ELENA

European Legal Network on Asylum

RESEARCH PAPER ON NON-STATE AGENTS OF PERSECUTION

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ELENA RESEARCH PAPER ON NON-STATE AGENTS OF PERSECUTION

1. INTRODUCTION

This paper has been drafted to serve as background information for participants at the ELENA International Course on Refugee Law as a Response to Failure of State Protection. It is a reference paper only, which has been based on information provided by ELENA National Co-ordinators and with significant reference to the publications 'Who is a Refugee? A Comparative Case Law Study'[1] and Persecution by Third Parties – a research paper commissioned by the Research and Documentation Centre of the Ministry of Justice of The Netherlands[2]. Participants are urged to refer to both these publications for an in-depth overview of the issue of agents of persecution in refugee law. Further information has been obtained from the UNHCR web-site and "Judicial Interpretation of Refugeehood: a Critical Comparative Analysis with Special Reference to Contemporary British, French and German Jurisprudence" by Nicholas Sitaropoulos.

This paper examines the recognition given in international jurisprudence on asylum to the interpretation that persecution, under Article 1A of the 1951 Geneva Convention relating to the Status of Refugees, may relate to action, not only by the State but also by non-state agents or third parties.

Neither the 1951 Geneva Convention nor the *travaux préparatoires* are explicit with regard to the interpretation to be given with regard to the source of the persecution feared by a refugee. And it would appear that, despite the guidance of UNHCR, some European states have developed diverse interpretations with the result that in a few European countries what matters is who you fear may persecute you rather than what they may do.

This paper does not set out to analyse the case law; this will be one of the objectives of the course itself and this has been done elsewhere (see the publications mentioned above). It simply aims to set out the positions of UNHCR, the European Union, the European Court of Human Rights (in relation to Article 3 of the European Convention on Human Rights), and various leading academics. The paper also attempts to describe the position of selected European States although this may be subject to amendment as materials were compiled during 1997 and 1998.

2. UNHCR'S POSITION

UNHCR Handbook on Procedures and Criteria for Determining Refugee Status[3]

Paragraph 65 of the UNHCR Handbook states:

"Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular, but where sizeable fractions of the population do not respect the religious beliefs of their neighbours. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection."

Paragraph 98 is also of relevance for the purposes of this paper:

"Being *unable* to avail himself of such protection implies circumstances that are beyond the will of the person concerned. There may, for example, be a state of war, civil war or other grave disturbance, which prevents the country of nationality from extending protection or makes such protection ineffective. Protection by the country of nationality may also have been denied to the applicant. Such denial of protection may confirm or strengthen the applicant's fear of persecution, and may indeed be an element of persecution."

Paragraph 164 adds on the issue of war refugees:

"Persons compelled to leave their country of origin as a result of international or national armed conflicts are not normally considered refugees under the 1951 Convention or 1967 Protocol…"

UNHCR Overview of Protection Issues (1995)[4]

UNHCR elaborated its viewpoint on the issue in September 1995:

"According to Article 1A of the 1951 Convention the decisive criterion for refugee status is that an

individual having a well-founded fear of persecution is "unable or, owing to such fear, is unwilling to avail himself of the protection" of his country of origin. Thus the essential element for the extension of international protection is the absence of national protection against persecution, irrespective of whether this absence can be attributed to an affirmative intention to harm on the part of the state. A situation in which the state is incapable of providing national protection against persecution by non-government agents clearly renders the individual unable to avail himself of the protection of his country of origin. This is also the case, a fortiori, when non-recognised entities exercise de facto authority over a part of the national territory.

"It has been evidenced on several occasions that persecution, including threats to life, liberty and security of the person, is not perpetrated solely by agents of the state. Persecution that does not involve direct or indirect state complicity is still persecution. Thus, it is not inherent in the nature of persecution itself that it should emanate from the state or be imputable to it.

"There is nothing in the wording of Article 1A of the 1951 Convention to indicate that persons who fear persecution otherwise than by – or with the complicity of – state authorities should be excluded from refugee status. Article 1A of the 1951 Convention does not, in fact, address the questions of the authors of persecution when determining a claim to refugee status. Thus, the interpretation that only persecution perpetrated with the direct or indirect complicity of the state justifies a claim to refugee status would be adding a condition to the refugee definition which cannot be found in the wording of Article 1A itself.

"The general principles of interpretation, as codified in Article 31 of the Vienna Convention of the Law of Treaties, require a treaty to be interpreted in accordance with the ordinary meaning to be given to its terms in their context and in the light of the treaty's object and purpose. The ordinary meaning of the term "persecution" as explained above is that it embraces all persecutory acts irrespective of whether or not the complicity of the state is involved. Moreover, the object and purpose of the 1951 Convention is to ensure that individuals who have a well-founded fear of persecution on the grounds enumerated in the Convention be granted international protection as a substitute for the, lacking, national protection. Having regard to these considerations, a restrictive interpretation according to which individuals fleeing from threat of persecution by non-state agents would be excluded from refugee status would be clearly contrary to the object and purpose of the 1951 Convention.

"It is also appropriate to mention the Preamble to the 1951 Convention which stresses the importance of human rights in the refugee context. In view of this, it would be contrary to the object and purpose of the 1951 Convention to exclude from its scope persons exposed to the danger of persecution. Finally, there is no indication in the travaux preparatoires to the 1951 Convention that the authors of that instrument intended to impose a requirement that a well-founded fear of persecution must emanate from the government or those perceived to be acting in its interest. On the contrary, it is clear from the travaux preparatoires that the definition of a refugee in Article 1A was meant to be given an inclusive rather than a restrictive interpretation.

"Hence, the position of UNHCR … is that denial of refugee status to persons fleeing persecution by non-government agents, who have no link with the state and whose activities the state is unable to control, has no foundation in the 1951 Convention. Clearly, the letter, object and purpose of the Convention would be contravened and the system for the international protection of refugees would be rendered less effective if it were to be held that an asylum seeker should be denied protection unless a state could be held accountable for the violation of his/her fundamental rights by a non-governmental actor. It is thus essential that international protection is extended to such refugees

and that the principle of *non-refoulement* is fully respected."

An updated expanded UNHCR position is expected in autumn 1998.

3. POSITION OF THE EUROPEAN UNION (MEMBER STATES) AS REGARDS PERSECUTION BY NON-STATE AGENTS (THIRD PARTIES)

On 4 March 1996, the European Union Member States adopted a Joint Position on the harmonized application of the definition of the term 'refugee'.[5] Point 5.2. of this Position, which is not legally binding, states:

"Persecution by third parties will be considered to fall within the scope of the Geneva Convention where it is based on one of the grounds in Article 1A, is individual in nature and is encouraged or permitted by the authorities. Where the official authorities fail to act, such persecution should give rise to individual examination of each application for refugee status, in accordance with national judicial practice, in the light in particular of whether or not the failure to act was deliberate. The persons concerned may be eligible in any event for appropriate forms of protection under national law."

This position is clearly not in line with the position of UNHCR in that it excludes those cases where the state authorities are unable to provide protection or unintentionally fail to provide protection. In other words, it reaffirms the position taken by a small number of European Union States that persecution must be imputable, either directly or indirectly, to the State. It, thereby, opposes the view of refugee law as a response to the failure of national protection whilst at the same time endorsing the grant of subsidiary forms of protection.

Sweden publicly disagreed with this position. The above paragraph of the Joint Position was subject to a unilateral 'Statement' by the Swedish delegation:

"In relation to the question of origins of persecution, Sweden is of the opinion that persecution by third parties falls within the scope of the 1951 Geneva Convention where it is encouraged or permitted by the authorities. It may also fall within the scope of the Convention in other cases, when the authorities prove unable to offer protection".

UNHCR considered the Joint Position serious enough to warrant a press release 'UNHCR expresses reservation over E.U. asylum policy' of 27 November 1995. In this update, UNHCR stated, "UNHCR's main concern is that the E.U. Position will allow states to avoid recognizing as refugees people persecuted by 'non-state agents' – such as rebel groups or extremist organizations. This interpretation creates an anomalous situation in which someone targeted by the government in a civil conflict could gain asylum abroad, but not an equally innocent civilian persecuted by the opposition, as has been the case with many Algerians. If governmental authority collapses altogether – as happened recently in Somalia or Liberia – no one might qualify for refugee status."

On the issue of civil war and other internal or generalised armed conflicts, Point 6 of the E.U. Joint Position notes:

"Reference to a civil war or internal or generalised armed conflict and the dangers which it entails is not in itself sufficient to warrant the grant of refugee status. Fear of persecution must in all cases be based on one of the grounds in Article 1A and be individual in nature.

"In such situations, persecution may stem either from the legal authorities or third parties encouraged or tolerated by them, or from de facto authorities in control of part of the territory within which the State cannot afford its nationals protection."

4. RELEVANT CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

In this context, it is interesting to note the jurisprudence of the European Court of Human Rights on the issue of action by non-state agents in relation to Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950.

Article 3 provides that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 3 provides an absolute guarantee and States are bound to protect individuals within their jurisdiction even if the ill-treatment is likely to take place outside the Contracting State.[6] In the case of Soering v. the United Kingdom, the Court, in a unanimous judgement, held that it would be contrary to Article 3 for a Party to the Convention to return an individual to another State "where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country". This position, that expulsion by a Contracting State may give rise to an issue under Article 3, has subsequently become well established in the case law of the Court.[7]

However, what is interesting for the purposes of this paper is that liability under the Convention does not fall on the government of the country to which it is planned to expel the applicant. An applicant may not be expelled if s/he risks any form of ill-treatment contrary to Article 3, whether that ill-treatment is likely to be by state-agents, private groups e.g. insurgents or criminals or a lack of adequate medical facilities.[8] In other words, it is irrelevant whether the source of the action prohibited by Article 3 is a state authority or a non-state agent. This point is illustrated by the following cases, which have come before the Court.

4.1 *Ahmed v. Austria (71/1995/577/663), 17 December 1996*

Mr. Ahmed, a national of Somalia, arrived in Austria on 30 October 1990 and applied for asylum on 4 November 1990. He was recognised as a refugee under the 1951 Geneva Convention on 15 May 1992.

In August 1993, Mr. Ahmed was sentenced by the Graz Regional Court to two and a half years' imprisonment for attempted robbery. The Minister of the Interior then ordered the withdrawal of Mr. Ahmed's refugee status which was eventually upheld in November 1995.

In April 1995, the Graz Federal Refugee Office declared the proposed expulsion of Mr. Ahmed to be lawful on the ground that he constituted a danger to the community. As the Aliens Act only recognises state agents, the Graz Federal Police Authority decided that there were no grounds to believe that upon return to Somalia, the applicant would suffer treatment contrary to the Aliens Act. Somalia was ravaged with civil war following the overthrow of President Siyad Barre. On appeal, this decision was overturned as there was found to be a risk of persecution and the expulsion was stayed for a renewable period of one year.

The Court began by restating its case law that Contracting States had the right to control the entry, residence and expulsion of aliens and that there is no right to asylum in the European Convention on Human Rights or any of its Protocols. “However, the expulsion of an alien by a Contracting State might give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds had been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In such circumstances, Article 3 implied the obligation not to expel the person in question to that country”.

The Court held that “for as long as the applicant faces a real risk of being subjected in Somalia to treatment contrary to Article 3 of the Convention there would be a breach of that provision in the event of the decision to deport him there being implemented.” Importantly, it noted that this conclusion was not “invalidated by … the current lack of State authority in Somalia.”

4.2 *H.L.R. v. France (11/1996/630/813), 29 April 1997*

The case H. L. R. v. France involved a Colombian national who alleged that France’s expulsion of him back to Colombia would be in breach of Article 3. The applicant had been found guilty of smuggling a prohibited drug to France and was sentenced to imprisonment following which he was issued with a deportation order. He had, however, supplied information to the French police, which had enabled them to arrest another Colombian drug trafficker. The applicant argued that if returned to Colombia he would face reprisals from the drug cartels against which the Colombian authorities would not be able to protect him.

The case is important as the Court confirmed that a breach of Article 3 could arise where the receiving State was itself not specifically responsible for the danger existing in that State but where it was unable to afford adequate protection. The Court, therefore, acknowledged that Article 3 could apply where the danger emanates from persons or groups of persons who are not public officials (in this case drug cartels).

The Court stated, “owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection.”

4.3 *D. v. The United Kingdom (Case 146/1996/767/964), 2 May 1997*

In this judgement, the Court found that the U.K. would be in breach of Article 3 if it returned the applicant, who had been convicted of a drugs offence and was suffering from AIDS, to his country of origin (St.Kitts) which lacked the appropriate health care for his illness. The Court in its decision stated that it was not “prevented from scrutinising an applicant’s claim under Article 3 where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country ..”. In his concurring opinion, Judge Pettiti reaffirmed that “Article 3 is construed broadly ... because the Court considers that the principle of State responsibility, for the purposes of Article 1 and Article 3, may be extended to cases where the risk does not stem solely from the public authorities”.

5. SELECTED ACADEMIC ARGUMENT

5.1 Jean-Yves Carlier[9]

"Case law is consistent in considering that the agent of persecution is not necessarily a constituent part of the state; there can be indirect persecution. Case law, however, adopts differing positions when it comes to examining the extent of the responsibility of the state when the persecution is the act of a third party, private parties or entities. A restrictive view considers that it is necessary to prove that the state tolerates or encourages such persecution, at least by passive tolerance. A more expansive view holds that it is sufficient for the state to be unable to assure protection in a manner such that, in certain cases, the persecution can be of a very private level."[10]

"The applicant must have tried to secure the protection of the authorities of his or her country as long as such an attempt would appear reasonable under the circumstances. This expansive view is justified from the standpoint of the [protective] function of international refugee law, which consists in substituting international protection for that which is lacking from the state. In the case of civil war, the case law examines whether another organised authority has substituted that of the state and can be held responsible for the persecution, even if by a failure to protect. This view may lead to decisions denying refugee status in cases of absence of government or organised authority."

"In reality, the Geneva Convention definition makes no reference to the agent of persecution; it is enough that the victim of persecution cannot or no longer wishes to claim the protection of the authorities of the country of origin. It would therefore appear that, whoever the agent of persecution may be and whatever the situation of the authorities in the country of origin, it is sufficient, once the risk of persecution has been established, to conclude that no adequate national protection exists in order to substitute international protection. The role of the international community, through the action of the receiving state, is not – according to international refugee law – to condemn the country of origin, but to protect a refugee. It thus appears unjustified for American case law to examine the motivation of the foreign state in failing to protect with respect to the five causes set out in the Geneva Convention. Such motivation has more to do with the intent of the persecutor, whoever he or she may be, than with the failure on the part of the state that could have resulted from the simple inability to protect its nationals."[11]

5.2 Guy Goodwin-Gill[12]

According to Guy Goodwin-Gill, cases where governments are unable or unwilling to suppress persecution or when governments are co-operating with third parties, persecution within the meaning of the 1951 Geneva Convention can result "for it does not follow that the concept is limited to the actions of governments or their agents". Goodwin-Gill further states that "no necessary linkage between persecution and government authority is formally required" by the 1951 Convention.[13]

On the issue of agents of persecution and state responsibility, he adds, "The purpose is not to attribute responsibility, in the sense of state responsibility, for the persecution. If it were, then qualifying as a refugee would be conditional on the rules of attribution, and protection would be denied in cases where, for any reason, the actions of the persecutors were not such as to involve the responsibility of the State."

Concerning the question of the impact of an existing government on a claim for refugee status Goodwin-Gill states that "…there is no basis in the 1951 Convention, or in general international

law, for requiring the existence of effective, operating institutions of government as a pre-condition to a successful claim to refugee status".[14]

With regard to civil war situations, Goodwin-Gill notes that the fact "of having fled from civil war is not incompatible with a well-founded fear of persecution in the sense of the 1951 Convention. Too often, the existence of civil conflict is perceived by decision-makers as giving rise to situations of general insecurity that somehow exclude the possibility of persecution."

5.3 James Hathaway[15]

"The most obvious form of persecution is the abuse of human rights by organs of the state, such as the police or the military. This may take the form of either pursuance of a formally sanctioned persecutory scheme, or non-conforming behaviour by the official agents which is not subject to a timely and effective rectification by the state."

"Similarly, there is no meaningful protection when a government supports or condones privately inflicted violations of core human rights."

"Beyond these acts of commission carried out by entities with which the state is formally or implicitly linked, persecution may also consist of either the failure or the inability of a government effectively to protect the basic human rights of its populace. Specifically, there is a failure of protection where a government is *unwilling* to defend citizens against private harm, as well as in situations of objective *inability* to provide meaningful protection."

"Thus, the state which ignores or is unable to respond to legitimate expectations of protection fails to comply with its most basic duty, thereby raising the prospect of a need for surrogate protection. Intention to harm on the part of the state is irrelevant: whether as the result of commission, omission, or incapacity, it remains that people are denied access to basic guarantees of human dignity, and therefore merit protection through refugee law."

6. PRACTICE OF SELECTED EUROPEAN STATES WITH REGARD TO THE INTERPRETATION OF PERSECUTION BY NON-STATE AGENTS

6.1 Austria

The first instance decision on an asylum application in the normal determination procedure is taken by the Federal Asylum Office (*Bundesasylamt*). Prior to 1 January 1998, negative decisions could be appealed to the Ministry of the Interior (*Bundesministerium des Innern*). Since 1 January 1998, when the Federal Law Concerning the Granting of Asylum (1997 Asylum Act) entered into force, negative decisions may be appealed to the Federal Asylum Review Board. An appeal against the decision of the Ministry of the Interior and now the Federal Asylum Review Board could and may be made to the Federal Administrative Court (*Verwaltungsgerichtshof*).

In summary, the position of the Austrian authorities, with regards to the issue of the agent of persecution, is that the persecution should be imputable to the State in so far as the State is directly responsible for the persecution or it permitted or tolerated the persecution. The following cases are demonstrative.

Verwaltungsgerichtshof (VwGH), 11 March 1993, 93/18/0083.

Persecution must be attributable to state authorities. Private persecution without reference to the state does not guarantee protection by the Austrian State and the Geneva Convention.[16]

Verwaltungsgerichtshof (VwGH), 30 September 1993, 93/18/0256.

The case concerned a Liberian national who entered Austria, without travel documents, on 11 January 1993.

The Federal Administrative Court (*Verwaltungsgerichtshof*) noted that according to the Austrian Aliens Act (Paragraph 37, section 1 *FrG*) deportation of a foreigner is prohibited when there are valid grounds for believing that s/he is at risk of being subjected to inhuman treatment or punishment, or capital punishment. Furthermore, Paragraph 37, section 2 *FrG* prohibits deportation of a foreigner when there are grounds to believe that his/her life or freedom would be at risk on account of his/her race, religion, nationality, social group or political opinion.

The applicant claimed that he was entitled to remain in Austria due to the fact that he risked persecution by private agents in his country of origin, Liberia. As a consequence of the civil war in Liberia, there was no functioning state power and, therefore, there was no (state) protection for the applicant. The Court questioned whether threats emanating from private individuals or from hostile clans were grounds for a prohibition of deportation in the sense of Paragraph 37, section 1 *FrG*). The Court held that the harm referred to in Paragraph 37, section 1 *FrG* (inhuman treatment or punishment or the death penalty), against which foreigners should be protected, only falls within this Paragraph when it emanates from or is carried out with the consent of the State.

According to the case law of the Federal Administrative Court, persecution by private individuals or rebel groups does not qualify under this Paragraph.

Verwaltungsgerichtshof (VwGH) Zlen, 16 March 1994, 93/01/0249-6, 93/01/0286-6 DNr. 1502/0730 HP

Whether the actions carried out by Serbs against citizens of the Former Republic of Yugoslavia, from Bosnian and Muslim regions, "can be attributed to the State in the country of origin, and thus amount to persecution, depends on the capacity of this State to prevent these acts. Where the authority of the State is no longer effective in the regions concerned, these acts could then be assimilated to State measures".[17] In other words, the Court considered that persecution by a *de facto* power could be considered as 'persecution' for the purpose of refugee status.

Verwaltungsgerichtshof (VwGH), 9 May 1996, 95/20/0166.

The applicant, a Kurd of Turkish citizenship, entered Austria on 20 July 1992 and applied for asylum on 24 July 1992. On 13 August 1992, the Federal authorities rejected his application for asylum.

In the application, the applicant claimed that Kurds living in Turkey were disadvantaged in all aspects of life, and that the applicant had personally experienced such discrimination. After finishing school in June 1991, he was persuaded to become active for the PKK, and for a period of some months, he carried out actions in support of the PKK. This included putting up posters carrying the message "Long Live Kurdistan" (*Es lebe Kurdistan*). He was caught by the police on one occasion and detained for two days.

His activities on behalf of the PKK were known to the Turkish authorities and in mid-June 1992, he was detained for several days and questioned. He claimed that he was beaten and pressurised greatly. Even after his release, he was under constant surveillance by the Turkish police. After his release, the applicant decided that he no longer wanted to be active on behalf of the PKK. His contact person within the PKK explained that he had to continue to work for and be a member of the PKK otherwise he would be "finished off" (*man wurde ihn fertigmachen*).

The applicant felt threatened by both the PKK and the state authorities. He claimed he could not expect protection against persecution by the PKK, and further support to the PKK would result in persecution by the state authorities. Consequently, the applicant decided to flee. He also claimed that his illegal departure from Turkey would be further ground for persecution by the state authorities.

The applicant claimed that he had gone directly to Istanbul and that he had continued his journey the same day via Bulgaria, Yugoslavia and Hungary to Austria. However, he later added that he did not depart immediately following his release from detention, but that he had stayed for about three weeks with relatives in Sorgun. He had not been persecuted by the state authorities in Sorgun.

The *Bundesasylamt* (Federal Office) rejected the asylum application on the grounds that the applicant did not fear persecution in his country of origin, and also that he was safe against persecution in the states he travelled through to reach Austria.

The applicant appealed the decision, claiming that the first instance had made an incomplete establishment of the facts in the case.

The second instance ruled that on the facts given by the applicant, it could not be concluded that following his release from detention, he had a well-founded fear of persecution from the state. Concerning his fear of persecution by the PKK and the assertion that he would not receive any protection against this persecution, this was according to the second instance a solely subjective perception, which was not supported by facts or arguments.

The second instance ruled that the persecution the applicant feared by the PKK could not be the basis for refugee status, since the persecution did not emanate from nor was tolerated by the State.

The applicant appealed to the Federal Administrative Court which ruled that the judgement was flawed as procedural rules had not been heeded. It held that the second instance had not enquired into the crucial question of whether the authorities would have protected the applicant against persecution by the PKK.

Verwaltungsgerichtshof (VwGH) 14 November 1996, 95/18/1135.

The applicant, an Afghan citizen, claimed his life was threatened by the Mujahidin because he had assisted in the detention of a Mujahidin member. The Court held that persecution by a non-state agent is, according to the established case-law of the highest court, tantamount to persecution emanating from the state or approved by the state when the state is not in the position to prevent such persecution because of a lack of a functioning state power. There is no functioning state power in Afghanistan and the state is therefore not in a position to stop persecution emanat-

ing from the Mujahidin groups.

Verwaltungsgerichtshof (VwGH), 9 October 1997, 95/20/0679

The applicant, an Iraqi national, entered Austrian territory on 31 May 1994, and requested that the asylum granted to her husband (in January 1989) should be extended to her in accordance with Paragraph 4 *AsylG*.

The application was rejected by the asylum authorities on the grounds that the applicant only married her husband on 17 May 1992, after he entered Austria. On 6 February 1996, the appeal against this decision was rejected by the authorities as being unfounded.

After the administrative procedure was completed on the 28 and 29 March, the applicant re-applied for asylum, stating that she was not aware that her own grounds for flight would not be considered in an application based on Paragraph 4 *AsylG* 1991, and that she did, however, have her own reasons for fleeing from Iraq.

She stated that she had joined the PDK (Democratic Party of Kurdistan) in 1991. Her father was a member since 1983. On account of this membership he had been detained for two years from 1983. In 1991, the applicant had also joined the music group Barzani. She had earlier written and composed songs, amongst which, she composed a song (*Der Weg Barazani*) which, in 1993, was chosen by the Kurdish Parliament as the PDK anthem. At an event celebrating the founding of the Kurdish Parliament, she was honoured as the composer of the anthem, and this was broadcast on television. As a result, she became a public figure, and consequently had more opportunities to perform in public.

On 1 May 1994, fighting began between the rival Kurdish parties PDK and PUK. Kurdistan consists of the provinces Souleymania, Arbil and Dohuk. In the home town of the applicant, Souleymania, the PUK party was in power. On 8 March 1994, the party offices in her home town were surrounded by PUK members and the PDK members were apprehended. The applicants father was apprehended, and at first his whereabouts were unknown. On the same day, the PUK security forces searched the home of the applicant and she was brought to prison. She was questioned, beaten and humiliated (*gedemütigt*). She was also shown a video of her performing the PDK anthem.

Later it was revealed to the applicant that her father had managed to flee on the 8 May 1994, and that the PUK were also questioning her in an attempt to find out where he was. After two days she was released.

Her asylum application was rejected by the *Bundesasylamt* on the 6 April 1995. The *Bundesasylamt* gave a shortened version of the statement given by the applicant. In her appeal against the decision, the applicant complained that, due to drastic abridgements, the *Bundesasylamt* had given a totally distorted picture of the facts.

The appeal was rejected. The second instance held that the threat of harm by Kurdish parties gave no basis for recognition as a refugee. It held that the persecution must emanate from the state.

The applicant appealed to the Federal Administrative Court which reversed the judgement on procedural grounds.

The Federal Administrative Court stated that the second instance, as a consequence of its selectivity in the reproduction of the applicant's story, failed to notice that the applicant had stated that the PUK "was in power" in her home town. In the appeal, the applicant had argued that persecution by non-state agents should be ascribed to the state when it is not willing or in a position to protect its citizens against asylum relevant persecution carried out by private bodies. The Federal Administrative Court could not concur with the second instance since *inter alia*, without giving any reasoning and without investigating the power structures of the applicant's home-country, it could not establish that the alleged persecution did not emanate from the State.

Case No. 201.261/0-VII/19/98 Asylum Review Board

The Federal Asylum Review Board held that the appellant was, due to her KDP membership, exposed to the danger of significant infringements committed by the PUK. Further, an effective measure of protection by the state was not available, as the state was not willing to provide that protection (i.e. indirect state persecution).

6.2 Belgium

The first instance decision on asylum applications is taken by the General Commissioner for Refugees and Stateless Persons (CGRA). An appeal against a negative decision may by made to the *Commission Permanente de Recours des Réfugiés* (CPRR; Permanent Commission for Refugee Appeals) which is an administrative tribunal. Its decision may be further appealed, on legal grounds rather than on the merits, to the *Conseil d'Etat* (Council of State).

A number of decisions by the CPRR indicate that the agent of persecution does not need to be a state-agent. "Serious discriminatory or offending acts consciously tolerated by the authorities or against which the authorities are incapable to offer protection", constitute persecution under the Geneva Convention."[18]

Commission Permanente de Recours des Réfugiés, 8 November 1990, F015

The case concerned a Turkish asylum seeker who claimed that he had suffered persecution by third persons because of his religion. The tribunal ruled that "[a]cts of persecution by third persons qualify an applicant for asylum where the State knowingly tolerates these acts or where it cannot protect the applicant". See also, ***Commission Permanente de Recours des Réfugiés (1 ch.), 21 November 1991, F 035.***

Commission Permanente de Recours des Réfugiés, 1 October 1993, Marazoglou Sahim

In this case, regarding a Turkish citizen who was persecuted by private individuals because of his religion, the Commission followed precedent: "international protection may be granted to persons who are victims of persecution of private origin in their national State". The case law is based on UNHCR's doctrine, as it is expressed in the Handbook on Procedures and Criteria for Determining Refugee Status, paragraph 65. In the ruling, the Commission made reference to this paragraph and to the opinion of UNHCR's representative in Belgium.

The Council of State, deciding on the admissibility of an application, has confirmed this interpreta-

tion given by the CPRR that persecution by third parties need not only be tolerated or encouraged by the State but may also exist where the state authorities are incapable of offering effective protection. In the case of a Syrian applicant of Armenian origin, who was responsible for a fatal car accident and who feared reprisals at the hands of the victim's family, it was stated "for persecution emanating from private persons to amount to persecution according to the Geneva Convention, one has to establish, according to the criteria of UNHCR, that the action was tolerated by the authorities or that the authorities were incapable of offering effective protection.[19]

According to Jean-Yves Carlier, the "protection offered must not be absolute. The obligation to offer protection 'is not violated if the protection that is offered is not effective in every individual situation or if the efficiency of this protection differs depending on the region and the moment. The state cannot offer perfect protection without shortcomings to its citizens against acts of persecution by third persons (*Bundesverf assungsgericht*, 6 March 1990, 9C14.89, InfAusIR, 1990, 221).'"[20]

"Nevertheless, protection must be sufficient in relation to the activities undertaken by third parties."[21]

In a civil war situation, persecution by non-state agents may be accepted as a ground for refugee status.

Vaste Beroepscommissie voor vluchtlingen (Refugee Appeals Board, Dutch-speaking divisions), 2 ch., 3 September 1992, E no number

A Liberian national feared persecution because he belonged to the Mandigo tribe. He was granted refugee status by the Belgian authorities because "the effective power in the country remained with fighting parties and the interim government could not offer him effective protection.[22]

6.3 Denmark

Under the normal determination procedure, the first decision on an asylum application is taken by the Immigration Service with a right of appeal to the Refugee Appeals Board (*Flygtningenævnet*) which is an independent body.

Denmark was one of two European Union States (together with Sweden) that considered making an explicit reservation to Point 5.2 of the 1996 European Union Joint Position on the term 'refugee'.[23] Denmark initially stated during the drafting process that "persecution by third parties falls within the scope of the 1951 Geneva Convention where it is encouraged or permitted by the authorities. It may also fall within the scope of the Convention in other cases, when the authorities prove unable to offer protection". However, Denmark withdrew its reservation before the Position was adopted on the grounds that it did not consider a reservation necessary in order for it to continue its practice of including within the scope of the Convention, cases where the authorities prove unable to provide protection.

Danish case law supports this position. The following case law of the Refugee Appeals Board, which largely relates to persecution of Jewish persons by non-state agents, illustrates this:

Refugee Appeals Board, 13 March 1998

This case concerned a Jewish woman of Russian citizenship who claimed she had been subject to

persecution by non-state agents. The applicant had been working on the publication of a Jewish newspaper and had received threats, been assaulted and raped. Since it had not been possible for her to obtain protection from the Russian authorities, the Danish Refugee Appeals Board granted her asylum.[24]

This case is in line with earlier decisions by the Refugee Appeals Board:

Refugee Appeals Board (R.A.B.), 18 October 1991, No. 21-2827; R.A.B., 18 December 1991, No. 21-2574; R.A.B., 30 January 1992, No. 21-2546; R.A.B., 18 February 1993, No. 21-3861.

6.4 Finland[25]

Refugee status is determined by the Office for Aliens Affairs at the Ministry of the Interior (*Ulkomaalaiskeskus Sisäasiainministeriö*). Negative decisions (other than in cases determined manifestly unfounded or clearly unfounded) may be appealed to the Asylum Appeals Board (*Turvapaikkalautakunta*). This is an independent body acting with powers and responsibilities similar to those of a court, under the supervision of the Ministry of Justice.

The issue of agents of persecution has been dealt with mainly in cases concerning asylum seekers from Somalia. Asylum has only been granted twice. Most applicants have been granted a *de facto* refugee status that recognises the need for protection; however, this is outside the 1951 Geneva Convention. The 1951 Convention has not been carefully analysed on this issue, therefore there is no clear developed doctrine on agents of persecution except, implicitly, that such cases do not fall within the 1951 Geneva Convention according to the Finnish Asylum Appeals Board. The following case is illustrative:

Asylum Appeals Board, 13 December 1993

The Asylum Appeals Board ruled that IC, a man who had fled Lebanon to avoid violence from a clan hostile to his own claiming that the Lebanese authorities were not able to protect him, did not have a well-founded fear of persecution in Lebanon. Therefore, he was not granted asylum.

The Asylum Appeals Board acknowledged all facts and circumstances presented in the case and stated that there were strong reasons to believe that IC was in danger of being subjected to inhuman treatment in his home country. The Court further acknowledged that the applicant could, therefore, not safely return to Lebanon and therefore was in need of protection.

The Asylum Appeals Board instructed the Ministry of Interior to issue a residence permit based on the ground of a need for protection (*de facto* refugee status/A9) but did not recognise him as a refugee under the 1951 Geneva Convention.

6.5 France

Refugee status is determined in the first instance by the French Office for the Protection of Refugees and Stateless Persons (*Office français de protection des réfugiés et apatrides* (OFPRA)) which is an independent body under the supervision of the Ministry of Foreign Affairs. A negative decision by OFPRA may be appealed to the Appeals Board for Refugees (*Commission des recours des réfugiés* (CRR)). Occasionally, a negative decision by the CRR may be further appealed to the Council of State (*Conseil d'Etat*).

For a long time, the French authorities held that persecution by non-state agents of persecution could not be considered 'persecution' under the 1951 Geneva Convention. However, the Duman case marked a change in this approach. And in the Dankha case in 1983, the Council of State confirmed the legal reasoning of the Duman case by holding that there may be recognition of refugee status where the state or public authorities voluntarily tolerate or encourage persecution by third parties. However, refugee status will not be recognised where the state authorities are simply unable to offer protection.

Commission des recours des réfugiés (Appeals Board), 3 April 1979, Duman

An asylum seeker who alleged repeated and systematic ill-treatment organised by the population against inhabitants of Christian denomination, where this ill-treatment was tolerated by the government, was recognised as a refugee.[26]

Conseil d'Etat, 27 May 1983, 42.074, Dankha

The Council of State held that persecution does not automatically imply action by a public authority. Persecution that does not emanate from the public authorities can lead to recognition where "the facts are in fact voluntarily tolerated or encouraged by the public authorities, effectively making it impossible for the interested party to claim the protection of these authorities"[27].

As noted by Jean-Yves Carlier, "this issue directly concerns cases relating to Algerians who have been the victim of persecution by Islamic fundamentalists. The case law maintains the requirement for the indirect participation of the authority through its tolerance or encouragement, whilst trying to allow more flexibility on the point at which private acts are considered as being tolerated by the state."[28]

Subsequently, there has been an abundance of case law elaborating what might constitute 'voluntary tolerance' and 'encouragement' by the State. There is significant case law indicating that the actions of non-state agents opposed by the authorities cannot be considered tolerated.[29] Generally, the jurisprudence suggests that the applicant must have sought the protection of the authorities or show that the authorities were aware but they took no action.

In the case of ***Elkebir*** (22 July 1994, CRR), the applicant was an Algerian national who alleged persecution by Islamic groups on account of her professional work as a secretary. As a result of continuing violent aggression against her, she resigned from her work and fled Algeria. It was held that due to the fact that the local authorities were aware of the situation but did not take any action to intervene, this could be considered voluntary tolerance.

However, during 1997 jurisprudence has developed to provide that it is not necessary to seek the protection of the authorities, if this would clearly be in vain.

In the case of ***Lahmari***, the applicant was an Algerian national from Kabyle. Fearing further persecution from Muslim fundamentalists, he sought asylum in France. Whilst the applicant had not sought protection from the authorities in Algeria, the Appeals Board acknowledged that this was because any such request would have been made in vain. Accordingly, the Board found that the applicant had a well-founded fear of persecution. This decision recognises that failure by the applicant to avail him/herself of it should not *per se* be a ground for refusing refugee status.

The case of ***Bessafi*** involved a female Algerian national from Oran who worked as a Rai singer. She was repeatedly threatened by "unknown individuals" and as a result was forced to give up her job. In support of her asylum application before the French Appeals Board, the applicant argued that if she were returned to Algeria, the Algerian authorities would refuse to protect her on account of her profession and origins in Algeria. The Appeals Board agreed with the applicant's argument and granted her refugee status.

In the case of ***Namaoui***, from 9 December 1996, the Appeals Board likewise found that the police's refusal to afford protection to a female medical assistant, who had been persecuted by Muslim fundamentalists, on account of her "activité professionelle" constituted grounds for granting refugee status.

According to French jurisprudence, if the state is willing but unable to provide protection or appropriate protection, then there is no persecution within the meaning of the 1951 Geneva Convention.

Conseil d'Etat, 22 November 1996, case 167.195

M. Messara claimed that the Algerian government implicitly tolerated the actions of terrorist groups and was, in any case, incapable of providing protection. The Council of State rejected this position and insisted that the actions must be intentionally encouraged or tolerated.

The Council of State has followed the jurisprudence of the European Court of Human Rights with regard to the issue of the return of a person to his/her country of origin where s/he risks torture, inhuman or degrading treatement.

Conseil d'Etat, 1 December 1997, case 184053, Kechemir

The asylum application of Mr. Kechemir, an Algerian national, had been rejected by both OFPRA and the CRR on the grounds that the risk of persecution was not imputable to the state authorities. Mr. Kechemir was then issued a deportation order for his return to Algeria. In its decision to order the annulment of the instruction to return Mr. Kechemir to Algeria, the Council noted that article 27 bis amending the Ordonnance of 2 November 1945, provides that an alien may not be returned to a state where it can be established that there would be a risk to his life or liberty or where he would be exposed to treatment in violation of Article 3 of the European Convention of Human Rights. The Council held that this was the case regardless of whether the risk emanated from state authorities or persons or groups of persons unrelated to the public authorities as long as the state authorities were unable to provide appropriate protection.

If one looks at the line of reasoning in the Dankha case, it must be concluded that there can be no persecution if there is no government or de facto authority.[30] As a consequence, asylum applications from Somalis have been rejected. ***Commission des recours des réfugiés, 28 February 1995, case 270.619***

The Geneva Convention is seen as applicable in situations of civil war. But the mere existence of civil war is not sufficient for refugee status.[31]An asylum seeker from a civil war area was not considered to be persecuted since he could still "benefit from the protection of the authorities in his country of origin"[32]. ***Commission des recours des réfugiés , 7 September 1990, case 105.028.***

After the break up of Yugoslavia, a number of decisions were taken that granted refugee status to claimants who invoked fear of persecution by *de facto*/local authorities.

CRR 12-02-1993 case 216.617
CRR 122-02-1993 case 230.571
CRR 07-04-1993 case 125.617
CRR 06-09-1993 case 247.455

For further details of French jurisprudence relating to the issue of agents of persecution, reference should be made to the article 'Persecution by Non Public Agents' by Frédéric Tiberghien.

6.6 Germany

The Federal Office for the Recognition of Foreign Refugees *(Bundesamt für die Anerkennung ausländischer Flüchtlinge*) is the competent authority to determine refugee status. An appeal against a negative decision may be made to the Administrative Court (*Verwaltungsgericht*). A further appeal against a decision by the Administrative Court may be made to the Higher Administrative Court (*Oberverwaltungsgericht* or *Verwaltungsgerichtshof*). A final appeal may be made to the Federal Administrative Court (*Bundesverwaltungsgericht*).

If the asylum seeker believes that a violation of a provision of the Constitution may be reasonably alleged, the case may be appealed to the Federal Constitutional Court (*Bundesverfassungsgericht*).

An application for refugee status normally has two parts. One consists of the application for 'political asylum' according to Article 16a of the Constitution (*Grundgesetz*) which states that anybody persecuted on political grounds has the right of asylum. Both the Federal Constitutional Court and the Federal Administrative Court have developed a strictly applied objective concept of 'persecution'. The term 'political' is understood to refer to those State measures which are directed at the individual's political or religious beliefs or against other inalienable characteristics.

The other part of the application consists of a request for protection against *refoulement*. Paragraph 51, Section 1 of the Aliens Act (*Ausländergesetz* (AuslG)) states that an alien may not be expelled to a State in which his/her life or freedom is threatened on account of his/her race, religion, nationality, membership of a particular group or political opinion.

Both elements of an application are examined. Only where an applicant explicitly declines to lodge an application for recognition as a political persecutee under Article 16a of the Constitution will the decision be based solely on an application for protection against *refoulement.*

A positive decision on Article 16a of the Constitution is always accompanied by a positive decision on *non-refoulement*. If, on the other hand, the decision on Article 16a is negative, it is still possible to grant the status under Paragraph 51, Section 1 of the Aliens Act. If the decision on both above-mentioned elements (recognition as a victim of political persecution and protection against *refoulement*) is negative, the *Bundesamt* still has to determine whether there are other reasons, as set out in Article 53 of the Aliens Act, prohibiting the expulsion or deportation of the asylum seeker (e.g. the asylum seeker risks torture, the death penalty, or a violation of his/her rights under the European Convention on Human Rights, 1950).

German jurisprudence has established that persecution according to Article 16a of the Constitution and Paragraph 51, Section 1 of the Aliens Act must be directly or indirectly imputable to state organs. Persecution by third parties will only be indirectly imputable to the state if the state authorities encouraged, approved or tolerated the actions. If the State is unable to provide protection including when it attempts to do so, refugee status will be denied.

The Federal Administrative Court has held that there can be no persecution within the meaning of Article 16a of the Constitution or Paragraph 51, Section 1 of the Aliens Act where there is no state authority with control over the territory. No state authority can be considered to exist in the event of civil war. However, persecution by a *de facto* authority that is deemed to exercise state-like powers may result in the grant of refugee status.

Bundesverwaltungsgericht, 18 March 1986, 9 C 4.88.

According to the Federal Administrative Court acts of individuals can substitute for state violence and constitute persecution in the context of the law of refugee status when the state provokes individuals or groups to persecute or supports, approves or tolerates acts of that nature, and so denies the person affected the necessary protection because of lack of willingness or capability [to offer protection].[33]

Bundesverfassungsgericht, 10 July 1989, BverfGE 80, 315.

In principle, only state persecution or actions attributable to the state are considered as a valid basis for a claim for refugee status.[34] Political persecution in the sense of Article 16a of the Constitution presupposes that there is an effective State authority over the territory.

Bundesverwaltungsgericht, 12 June 1990, 9 C 37.89.

"Persecution actions performed by private persons entitle their victims to asylum when the State is responsible for the actions by inspiring, supporting or accepting passively such persecuting measures. This is not the case when the State grants protection on the whole with the help of the means at its disposal."[35]

Bundesverwaltungsgericht, 23 July 1991, 9 C 154.90.

The case concerned a Turkish citizen of Kurdish ethnic origin. Being of the Christian faith, he was at several times attacked by Muslims. The Court ruled that **"**[w]hen the provision of protection by the state against threat or infliction of harm by third party outreaches its forces, the state's responsibility cannot be involved".[36]

Bundesverwaltungsgericht, 18 January 1994 C 48.92. Affirmed by judgement by Bundesverwaltungsgericht, 22 March 1994, 9C 443.93.

Political persecution is in principle state persecution, but also actions carried out by organisations with power to exercise authority similar to that of the state is considered to be persecution if the state has not prevented the actions despite that it is in control of its territory.[37]

Bundesverwaltungsgericht, 1 July 1994, 9B 181.94.

The case concerned persecution carried out by the Sri Lankan army against the Tamil population

in the northern part of Sri Lanka.

The Higher Administrative Court had ruled that persecution by the army of the state on the orders of the head of the army are, when the government (tacitly) accepts the measures taken, to be interpreted as actions carried out by the state itself.

The purpose of the appeal to the Federal Administrative Court was to establish that the judgement by the Higher Administrative Court was in conflict with federal law on the ground that only such persecution arranged by the government or the President can be considered to constitute state persecution.

The appeal, though, was rejected as being unfounded. The Federal Administrative Court held that persecution, in a situation of civil war when the state does not have territorial sovereignty over parts of its territory but exists only as one of the fighting civil war factions; and where the state military carries out extermination measures against civilians, should be categorised as state persecution when the persecution is ordered or approved through a valid decision making process and chain of command within the State.

Bundesverwaltungsgericht, 6 August 1996, 9 C 172.95.

The applicants, a family of Muslim Bosnians from Bosnia-Herzegovina, applied for asylum in Germany on the basis of the civil war which had broken out in their country of origin. The Federal Office for the Recognition of Foreign Refugees *(Bundesamt für die Anerkennung ausländischer Flüchtlinge*) rejected the asylum application as being manifestly unfounded, and further stated that the criteria of Paragraph 51, Section 1 (protection against *refoulement*) of the Aliens Act were not fulfilled and that there were no obstacles to *refoulement* (Article 53 Aliens Act).

The applicant appealed to the Administrative Court (*Verwaltungsgericht*) which instructed the *Bundesamt* to revise its decision and determine that the criteria (Paragraph 51, Section 1 Aliens Act) for protection against *refoulement* were fulfilled.

The Higher Administrative Court (*Oberverwaltungsgericht*) rejected the appeal from the Federal Commissioner for Asylum Affairs *(Bundesbeauftragten für Asylangelegenheiten*). According to the Higher Administrative Court those parts of the territory which were occupied by the Serbs were considered to be, for the purposes of asylum law, under a state-like power. The group persecution which threatened the Muslims in that part of the territory occupied by Serbs, the lack of sufficient protection against this persecution, and the lack of an economically feasible internal flight alternative were grounds for protection against *refoulement*.

The Federal Commissioner for Asylum Affairs applied for judicial review of the judgement.

The Federal Administrative Court (*Bundesverwaltungsgericht*) was of the opinion that the application for judicial review was well founded. It states that the judgement of the Higher Administrative Court violates federal law. The asylum applicants had no basis for a claim for asylum (Article 16a of the Constitution) or for protection against *refoulement* (Paragraph 51, Section 1 Aliens Act) since they could claim the protection of their state of origin, Bosnia-Herzegovina. Therefore, it is of no importance here, if the persecution is “political” in the sense of the asylum law or if the asylum seekers were persecuted at the time when they left their country of origin.

Even if the measures taken by the Serbs against the Muslim population constituted group persecution at the time when the asylum seekers left, the applicants have not qualified for refugee status. The asylum law only provides protection against political persecution, and only in cases of lasting lack of protection.

Political persecution in the sense of the asylum law basically means persecution by the state. This includes persecution by a state-like power. A power is only state-like when it is organised in a state-like way, and is effective and stable. Effectiveness and stability requires some continuity and durability of the power.

When applying these criteria, one can conclude that the Bosnian Serbs in the territory of Bosnia-Herzegovina did not yet have a state-like power in June 1992. At the time of the decision by the Higher Administrative Court in May 1995, though, the Republic of Srpska had this state-like power and therefore also had the capability of carrying out political persecution in the sense of Article 16a in the *Grundgesetz* (German Constitution).

The lack of protection for a person is a requirement for an asylum application. A basis for an asylum claim does not, therefore, exist when the state, of which the applicant is a national, is capable and willing to protect against persecution by a state-like power on its territory. The applicants could receive the protection of the state of which they are nationals. As the Higher Administrative Court established, they are nationals of the existing state of Bosnia-Herzegovina. This state does not persecute the applicants and provides protection against persecution by the Republic of Srpska.

Bundesverwaltungsgericht, 15 April 1997, 9 C 15.96.

The applicant, a Somali citizen from the Darod/Marehan tribe, left Somalia in 1992 and applied for asylum in Germany. She had left Somalia because of the lack of peace after the overthrow of the Government in January 1991. Many members of her tribe, whose members previously formed the Government, had been persecuted. She was assaulted, beaten and injured because of her ethnic origin. Eight months before her departure, someone had attempted to rape her. During her last months in Somalia, she had been living in hiding with a Hawiye family in Mogadishu. When soldiers found out about this she fled. She claimed that if she returned to Somalia, she risked being raped or killed by robbers or by people belonging to the Hawiye tribe.

The *Bundesamt* rejected the asylum application and decided that there were no obstacles to deportation according the German Aliens Act (Paragraph 51, Section 1 and Article 53 AuslG).

The Administrative Court (*Verwaltungsgericht*) allowed part of the appeal, and ordered the *Bundesamt* to establish that the applicant fulfilled the requirements of the Aliens Act (Paragraph 51, Section 1: protection against *refoulement*), and rejected the rest of the appeal.

It reasoned that the only way into Somalia was through Mogadishu, which is controlled by the Hawiye clan. Because of her ethnic origin the applicant risked being killed or injured on her return. The Court noted that this is not a question of state persecution but rather measures by social groups in Somalia. It concluded that such persecution is recognised under the Aliens Act (Paragraph 51, Section 1 AuslG). Therefore, the requirements for protection against *refoulement* were fulfilled.

The Higher Administrative Court (*Verwaltungsgerichtshof*) changed the judgement of the Ad-

ministrative Court with regard to the part concerning Paragraph 51, Section 1 of the Aliens Act (AuslG) and dismissed the complaint as a whole. In its reasoning of the judgement the court stated that the norm in question requires political, and consequently state persecution. In cases where the state power has broken down due to war or other reasons, non-state actors could qualify as persecutors in the sense of the asylum law. The requirements on such a non-state actor is, in addition to possessing lasting organisational structures, that it has established what the German court calls "a regional peace order" (*regionale Friedensordnung*). This is what distinguishes asylum relevant persecutors from mere spheres of influence, headquarters or other structures of power that rebel- or clan-leaders have established. In Somalia, there was not, at the relevant time and cannot be foreseen in the near future, a local or regional power having enough power to be capable to pursue persecution relevant for establishing a basis for an asylum claim.

In the process of judicial review the applicant had argued that political persecution (Paragraph 51 Aliens Act) need not be carried out by the state. Instead, the criteria should relate to the targeted operations against a person and the lack of protection for that person. The applicant argued that the Higher Administrative Court had taken the requirements of state-like organisations too far, and undervalued the central criterion - persecution.

The Federal Administrative Court (*Bundesverwaltungsgericht*) was of the opinion that the request for judicial review was unfounded. The Higher Administrative Court was right in its opinion that political persecution must be carried out by the state or by state-like powers. According to the Higher Administrative Court there was in Somalia, at the time when the judgement was given, three "presidents" who were not in any position to control the whole territory, but strong enough to destroy any attempts to peacefully end the civil war (*instabiles Gleichgewicht*). Due to the lack of stability and effectiveness, none of the three powers could be classified as state-like.

Bundesverwaltungsgericht, 15 April 1997, 9 C 38.96.

The applicant, who was born in 1966, is a Somali national belonging to the Darod/Majeerten tribe. In March 1993, he arrived in Germany and applied for asylum. He claimed he had left Somalia because of the civil war. Many members of his family had been killed by the Hawiye, and he himself feared for his life. In April 1991, he had been detained for a two month period, during which he was beaten. Later in 1991, the rebels under general Aidid had brought the applicant and his family from Mogadishu to Jelib where they had stayed until July 1991. The applicant's uncle had been executed in Jelib. When returning to Mogadishu the applicant and his wife had been "humiliated" (*erniedrigt*), and his wife had been repeatedly raped.

The *Bundesamt* rejected the asylum application as manifestly unfounded. The applicant was issued a deportation order.

The applicant appealed to the Administrative Court (*Verwaltungsgericht*) which reversed the decision with regard to the deportation order since it was of the opinion that there were obstacles to *refoulement* (Article 53 Section 4 AuslG). The rest of the appeal was rejected. Since there was no state or state-like powers in Somalia, the applicant had no basis for claiming asylum. The requirements for deportation were not fulfilled though, because the applicant was at risk of being subjected to inhuman treatment (Article 3 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)) or even risked a violation of his right to life (Article 2 ECHR).

The Higher Administrative Court reversed the judgement, deciding that there was no obstacle to

deportation. According to the Higher Administrative Court, no state or state-like power capable of inhuman treatment in the sense of Article 3 ECHR had existed in Somalia since the outbreak of the civil war in 1991. Therefore the applicant had no basis for the claim that obstacles to *refoulement* existed.

The Federal Administrative Court (*Bundesverwaltungsgericht*) was of the opinion that the request for judicial review was unfounded.

The judgement by the Higher Administrative Court is in conformity with federal law in not granting the applicant protection against *refoulement* (AuslG and Article 3 ECHR). The Higher Administrative Court has correctly assumed that the requirements of the Aliens Act together with Article 3 ECHR are only to protect against *refoulement* when someone is at risk of being subjected to inhuman or degrading treatment or punishment by the state or a state-like organisation.

The Federal Administrative Court further states that it is not its task to stretch the limits of the Convention Parties' reception capacity and reception willingness through a creative interpretation of the Convention, and without regard to the protected sovereignty of the national legislator to freely decide about the composition of the population on its own territory and thereby also decide about the reception of refugees.

The Federal Administrative Court (*Bundesverwaltungsgericht*) maintains this position also after considering the judgement of the European Court of Human Rights in the case Ahmed v. Austria (17 December 1996 - 71/1995/577/663). An obstacle to deportation (Article 53 paragraph 4 AuslG in combination with Article 3 ECHR) requires that the foreigner is threatened by treatment which fulfils the same criteria of Article 3 ECHR as it would have to fulfil if the treatment took place in a State Party to the Convention. This is only the case when there is a considerable probability that the foreigner, throughout the whole country, risks inhuman or degrading punishment or treatment which emanates from the state. In exceptional cases, abuse by third parties may constitute such treatment, if the state can be held accountable because it supports, or approves the measures or because it does not provide protection although it was in the position to do so.

Bundesverwaltungsgericht, 4 November 1997, 9 C 34.94.

The applicant, an Afghan national, applied for asylum in Germany in January 1992. He claimed that he had been a member of the Afghan Communist Party since 1973 and that he had also been an officer in the air force. In 1990, he took part in a coup which failed. The applicant was detained, but managed to get out of prison and leave the country.

The *Bundesamt* rejected the application for asylum on the ground that the persecution that the applicant feared did not amount to political persecution, since no state or state-like organisation existed due to the civil war.

The Administrative Court (*Verwaltungsgericht*) ordered the *Bundesamt* to establish that an obstacle to *refoulement* (Article 53 Section 4 Aliens Act) existed, but rejected the rest of the appeal.

The Higher Administrative Court (*Verwaltungsgerichtshof*) further ordered that it should be established that the applicant had a right to asylum because of persecution by state-like powers and that the requirements for protection against *refoulement* (Paragraph 51, Section 1) were

fulfilled.

The case was appealed to the Federal Administrative Court on the ground that the Higher Administrative Court was wrong in establishing that state-like powers capable of carrying out persecution existed in parts of Afghanistan.

The Federal Administrative Court was of the opinion that the appeal was predominantly well-founded. The Court states that the applicant, if returned to Afghanistan, does not risk being persecuted by an existing state power, but the applicant does risk being persecuted or abused by state-like organisations which have developed in all regions of Afghanistan. The decisive factors are both the existence of state-like organised structures and an overall peaceful situation (*übergreifende Friedensordnung*).

6.7 Italy

The first instance authority in Italy is the *Commissione Centrale per il Riconoscimento dello Status di Rifugiato* (The Central Commission for the Eligibility of Refugee Status). This is an independent administrative body. Negative decisions by the Central Commission may be appealed to the *Tribunale Amministrativo Regionale* (Regional Administrative Tribunal). However, the appeal may only relate to the legality of the decision by the Central Commission and not to the merits of the application. As a consequence, a successful appeal to the Regional Administrative Tribunal results in a re-examination of the application by the Central Commission. The Regional Administrative Tribunal's decision may be further appealed to the *Consiglio di Stato* (Council of State).[38]

It is difficult to establish what the Italian approach to the issue of non-state agents of persecution is as there is no significant case law on the refugee definition. The decisions of the Central Commission are not public and it is possible to obtain individual decisions without the permission of the persons concerned. Furthermore, the reasoning of the Central Commission in its decisions is generic and does not relate to the individual facts of the specific case.

As the Regional Administrative Courts only decide on the legality of the decision by the Central Commission, an appeal on the merits would be considered ultra vires. However, the Regional Administrative Court has found on occasion that the Central Commission's decision has not been sufficiently well reasoned or evidenced.

There is some evidence to suggest that the Italian authorities interpret 'persecution' as action by state authorities or action tolerated by state authorities. As a consequence, asylum seekers fleeing civil war are rarely recognised as refugees. To succeed an asylum applicant must show that he/she is differentiated from other groups suffering from the civil war.

During the last few years (1995-1998), the number of Algerian asylum seekers in Italy has increased. The vast majority of applicants have not been recognised. Algerians who have been persecuted by non-state agents have not been recognised as the persecution did not emanate from the government authorities.[39] The following two cases illustrate this approach:

Regional Administrative Tribunal of Friuli-Venezia Giulia, case no. 740/96 (relating to application n. 532/95)

The appeal against the denial of refugee status by the Central Commission for Eligibility of

Refugee Status, is based upon, *inter alia*, the fact that the Central Commission did not take into account the risks faced by the applicant at the hands of Islamic groups.

The Tribunal nevertheless held that the 1951 Geneva Convention definition of a refugee requires the presence of persecution by the authorities of the State of the applicant. This part of the appeal was rejected on the grounds that the applicant had not claimed persecution by the state authorities in Algeria and, therefore, the first instance authority's decision was legally correct.

Council of State, 3976/94, 12 April 1994

The facts of the case are not re-produced in the decision by the Council of State. However, from the reasons given for the appeal, it can be deduced that the case involves an applicant of Algerian nationality who alleges persecution by the FIS and further alleges that the state authorities are unable to protect its citizens.

The Council of State held that the appeal was unfounded. The Council of State found that the applicant had not shown that s/he was at any greater risk of persecution than the rest of the population and therefore, his/her flight from the country was disproportionate. Furthermore, the persecution did not emanate from the Government which did provide protection to its citizens.

If there is no national government, or if the control of the national government is disputed, the asylum application is normally rejected. There is one known case, in which a Liberian applicant has been recognised as a refugee due to the instability in Liberia. [40] However, applications for asylum concerning countries in civil war are normally rejected unless the applicant can demonstrate that s/he was at greater risk than the rest of the population. Applicants may instead request a temporary residence permit on humanitarian grounds.[41]

6.8 Netherlands

Refugee status determination is the responsibility of the Ministry of Justice (formally the Secretary of State). An appeal against a negative decision may be made to the Ministry of Justice with a further right of appeal to one of five District Courts.

Dutch jurisprudence recognises persecution by non-state agents as persecution within the meaning of the 1951 Geneva Convention if the national authorities are unwilling or incapable of providing appropriate protection and if there is no internal flight alternative. Reference may be made to the following cases: ***ARRS 14 September 1981, AB 1981; HR 15 January 1993, RV 1993; Rb Den Haag, 19 August 1998, AWB 97/12038; Rb Den Haag, 14 January 1998, AWB 97/13806; Rb Zwolle 26 August 1997, AWB 97/1101***.

Recent jurisprudence also recognises persecution by non-state agents when there is no central government.

Rechtseenheidskamer, 27 August 1998, AWB 98/3068 en AWB 98/3072

On 27 August 1998, the District Court of The Hague (Rechtseenheidskamer, REK) took decisions in two cases concerning Somali asylum applicants. The central issue in the cases was whether persecution in the sense of article 1A (2) of the 1951 Geneva Convention and Article 15 (1) of the Dutch Aliens Law was possible in a situation where no central or de facto government

existed. The Co-ordinating Chamber of the Court decided in the affirmative. The Co-ordinating Chamber stated that its position was in line with the ordinary meaning given in the context and light of the object and purpose of the 1951 Geneva Convention. The Co-ordinating Chamber rejected the argument of the Council of State that other EU States, namely France and Germany, deny refugee status where no de facto government exists. Furthermore, it stated that the EU Joint Position is not legally binding and moreover there are some 130 other states party to the 1951 Geneva Convention.

6.9 Norway

Refugee status is determined by the Directorate for Immigration, UDI, (*Utlendingsdirektoriat*), on the basis of police reports. The UDI is a body of the Ministry of Local Government and Labour, but when concerned with the entry of aliens in Norway, it comes under the jurisdiction of the Ministry of Justice. All negative decisions may be appealed to the Ministry of Justice (*Kongelige Justis- og Politidepartementet*).

The Norwegian law does not elaborate on the issue of the agent of persecution, it simply refers to Article 1 A of the 1951 Geneva Convention.

Traditionally, the Norwegian government has not accepted persecution by non-state agents as a basis for refugee status. This is reflected in a number of decisions concerning asylum seekers from Algeria, Lebanon and Southern American countries. In all these cases, the asylum applications have been rejected on the grounds that there was no persecution by state-agents.

Nevertheless, the Norwegian authorities reviewed their policy concerning Convention refugee status in January 1998. This has resulted in new instructions which supposedly include persecution by non-state agents, where the state is unwilling or unable to provide protection, within the definition of a Convention refugee.

Ministry of Justice, 11 August 1994

The asylum applicant, a Peruvian woman, entered Norway on 22 June 1993. She claimed that she had collaborated with the guerrilla group Sendero Luminoso and as a result she was arrested by the military. After four days of questioning, beatings and rape she informed on the Sendero Luminoso and was subsequently released. Following her release, she feared that she would be killed by the Sendero Luminoso because she had informed the military. She claimed that a bomb, aimed at her, exploded outside her home in Lima.

The Directorate for Immigration (UDI) rejected the asylum application on the grounds that the requirements for refugee status (in the Aliens Act and 1951 Geneva Convention) were not fulfilled as the applicant was not subjected to persecution by the authorities in her home country. Considering the general situation in Peru, the UDI questioned whether the applicant was individually targeted or especially exposed. After considering all the circumstances of the case, the UDI was of the opinion that there was nothing to indicate that the applicant would risk being subjected to persecution on her return.

The applicant appealed to the Ministry of Justice, which rejected the asylum application on the grounds that the applicant did not fulfil the requirements for refugee status (Paragraph 16 Aliens Act). The Ministry questioned the credibility of the facts given by the applicant and did not find

that it was likely that the applicant would be persecuted if returned to Peru. However, if credibility had not been an issue, it is not clear what conclusion the Ministry would have reached.

6.10 Spain[42]

The Ministry of Interior is responsible for the determination of refugee status following the processing of the asylum application by the *Oficina de Asilo y Refugio* (Asylum and Refugee Office) and the Inter-Ministerial Commission on Asylum and Refugees). A negative decision may be appealed to the *Audiencia Nacional* (National High Court). There is a final right of Appeal to the Tribunal Supremo (Supreme Court).

The official position of the Spanish Asylum and Refugee Office on this issue is that it complies absolutely with both the UNHCR Handbook (Paragraph 65) and the 1996 EU Joint Position regarding Harmonised Application of the Definition of the Term "Refugee" in Article 1 of the 1951 Geneva Convention.

The actual practice would appear to be somewhat different with regard to the UNHCR position. Asylum seekers who claim persecution by a non-state agent may obtain exceptional leave to remain under section 17 (2) of the Spanish Asylum Act, as amended in 1994. This is sometimes complemented with a specific reference to the '*non-refoulement*' clause (under section 17(3)).

The Spanish authorities do grant asylum when it is clear that the national authorities are unwilling to protect the claimant from a non-state agent.

Case law is scarce and somewhat erratic. The Council of State (the Government's highest consultative body, which made reports on individual cases before the 1994 amendment to the Asylum Act) declared that "when a Government maintains an organised and systematic repression of terrorist groups, the threats or attacks made by those groups cannot be the ground for political asylum protection, although unavoidable outrages may happen" (Report 1411/1991, 28 November 1991). This report referred to a Peruvian asylum seeker, and the *Audiencia Nacional* (National High Court) expressed a similar opinion in several subsequent rulings of 15 March, 3 and 7 June, and 19 July 1996).

However, there are other rulings with a completely different approach, for example:

Audiencia Nacional, 18 March 1997

Also regarding a Peruvian asylum seeker who claimed persecution from "Shining Path" group. The Court stated that "there is enough evidence to understand that the appellant reasonably fears that he is or may be persecuted by reason of his membership of a certain family and his work as a teacher".

Audiencia Nacional, 25 November 1997

This concerned an Algerian journalist from an anti-radical newspaper who was also a founding member of the "Hizb el Haq" political party and a candidate running for the 1991 election. He alleged persecution by radical Islamic groups. Implicitly, the Court considered that he would not obtain effective protection from the authorities and accepted that there was enough evidence to justify recognition of refugee status.

Audiencia Nacional, 10 February 1998

The fact that an asylum claim is not based on any of the grounds which qualify for refugee status is one of the circumstances which may lead to its inadmissibility to the procedure [Section 5 (6) b of the Asylum Act]. In the case of a Peruvian asylum seeker who invoked persecution from "revolutionary groups", the Audiencia Nacional ruled that the concurrence of this circumstance could not be appreciated, and therefore the claim had to be duly studied under the ordinary determination procedure.

The Court decided, to the contrary, that persecution from a non-state agent (revolutionary groups) may lead to recognition of refugee status according to the 1951 Geneva Convention.

Where the authority of the national government is disputed or simply does not exist, one can quote a ruling by the ***Audiencia Nacional of 23 June 1994*** on an asylum application submitted by a Bosnian inter-ethnic couple from Sarajevo of Serb/Croatian origin. The *Audiencia Nacional* describes the situation in Bosnia-Herzegovina at that time as the result of "a genocide action pursued by one of the belligerent parties, but counteracted with the same methods and equal hardship by the others". The Court accepted that "it is true - as the Administration says - that the mere fact of a civil war situation is not enough for refugee status recognition; but this principle cannot reasonably be maintained in such cases when it is possible to establish the practice of continuous persecution - frequently amounting to open extermination - of specific human groups for reasons included in the 1951 Geneva Convention, going much further than the bare military objective of conquering a portion of territory". The Court expressly rejected the possibility that the couple could have settled either in Serbia or in Croatia, due to its inter-ethnic character.

6.11 Sweden

The first instance decision-making body for applications for refugee status is the *Statens Invandraverk* (SIV) (National Immigration Board). A negative decision may be appealed to the Aliens Appeal Board.

Sweden made an explicit reservation to Point 5.2 of the 1996 European Union Joint Position on the term 'refugee'.[43] The Swedish delegation stated that "persecution by third parties falls within the scope of the 1951 Geneva Convention where it is encouraged or permitted by the authorities. It may also fall within the scope of the Convention in other cases, when the authorities prove unable to offer protection".

Sweden has implemented this position in its own national legislation. Chapter 3, section 2 of the Aliens Act states that "the term refugee as used in this Act refers to an alien who is outside the country of his nationality, owing to a well founded fear of being persecuted for reasons of race, nationality, membership of a particular social group, or religious or political opinion, and who is unable or, owing to such fear, is unwilling to avail himself of the protection of that country. This applies irrespective of whether persecution emanates from the authorities of the country or these cannot be expected to offer protection against persecution by individuals."

Asylum-seekers fleeing civil-war situations can be granted a new form of subsidiary protection or temporary protection.[44] Chapter 3, section 3 A.A. provides a subsidiary form of protection or b-status for those in need of protection. This includes those who cannot return to their country of origin on account of external or internal armed conflict.

6.12 Switzerland

The Swiss Confederation exercises its powers to determine refugee status through the *Bundesamt für Flüchtlinge/Office Fédéral des Réfugiés* (Federal Office for Refugees). The Federal Office undertakes the substantive examination of, and decides in the first instance on, the asylum application. An appeal against a negative decision may be made to the *Schweizerische Asylrekurskommission/Commission Suisse de recours en matière d'asile* (Swiss Asylum Appeals Commission). Its decision is final.

Swiss jurisprudence has established that persecution must be imputable to state organs. Either the state must be directly responsible for the persecution or indirectly in that it encouraged, tolerated, or indicated an unwillingness to provide protection against persecution by a third party. The simple inability of the state to provide protection will result in a denial of refugee status. If there is no state or *de facto* authority exercising state-like powers, there can be no claim to refugee status. There may be a claim to refugee status where persecution emanates from a *de facto* authority exercising state-like powers over the territory and its population.

Swiss Asylum Appeals Commission (CRA), 7 December 1992, JICRA, 1993, no.9.

"The attitude of the state authorities is taken into account as an objective element in gauging their desire and ability to offer protection to persecuted people. Intervention by the Turkish state authorities was lacking in the case of religious persecution of syro-orthodox Christians by third parties. This has been considered to be indirect state persecution."[45]

Swiss Asylum Appeals Commission (CRA), 24 January 1994 N 242106

"In general, a civil war does not give entitlement to refugee status because the persecution is not targeted and the misfortune concerns the whole population of a country. A Liberian national, referring to the civil war and to the conditions in general in his country, was not recognised."[46]

Swiss Asylum Appeals Commission, 10 January 1995, EMARK 1995/2

The applicant, a Muslim from Bosnia-Herzegovina, applied for asylum in Switzerland on 7 September 1993. He claims that, in 1992, he volunteered to the HVO (*Kroatischen Verteidigungsrat*) to fight the Serbs. When the conflict between Croats and Muslims arose in the applicant's home country, the HVO started to detain its Muslim soldiers. The applicant claims that, on 10 May 1993, he was picked up by several HVO soldiers at his home. He and 33 fellow Muslim HVO soldiers were held in two separate camps. On 10 June 1993, he was released. The applicant claims that they were held under inhuman conditions, and he was beaten with rifle butts several times. They were also forced to build field fortifications on especially dangerous front-lines. He had to sleep on the floor and received insufficient food, and as a result of this treatment he lost eleven kilograms of weight and developed tuberculosis.

On 29 April 1994, the Federal Office for Refugees rejected the asylum application on the ground that the facts of the application were irrelevant for asylum purposes. A deportation order was issued. However, the unreasonableness of an execution of the deportation order was established and the applicant was temporarily admitted in Switzerland.

The applicant appealed to the Swiss Asylum Appeals Commission, which overruled the decision by the Federal Office for Refugees and instructed it to grant the applicant asylum in Switzerland. The Commission reasoned that the applicant had credibly demonstrated that Muslim soldiers had been placed in internment camps. The applicant was obviously detained because of his religion. It stated that, generally, persecution by the state might result in the grant of refugee status. Whilst persecution by a third party would not normally be deemed relevant for asylum purposes, unless the state could be held accountable. The state could be held accountable if it encouraged, supported, approved or passively accepted the situation, although it was in the position to grant protection an thereby demonstrated its lack of willingness to protect.

When concerned with indirect state-persecution, one has to address the issue of what happens when the state is unable to protect. Two scenarios can be distinguished:

Persecution by private individuals in a state that is unable to protect is not relevant for asylum purposes.

Persecution by private bodies, which, without being the recognised state-power, *de facto* are in power of parts of the territory qualifies as state-like persecution and is relevant for asylum purposes.

To qualify as state-like, a power needs a certain continuity, stability and effectiveness. The stability could, for example, be measured by the degree of autonomy towards the outside world. In summary, it can be established that persecution by private bodies which have a continuous and effective power over specific parts of the territory and over the civilian population living there, qualify as a state-like power. If the other asylum-requirements are fulfilled, asylum may then be granted.

The Swiss Asylum Appeals Commission ruled in favour of the appeal and instructed the lower instance to grant the applicant asylum in Switzerland.

Swiss Asylum Appeals Commission, 6 June 1995, EMARK 1996/28[47]

The applicants, an Algerian couple, arrived in Switzerland on 1 September 1994, and applied for asylum on 3 October 1994. They claimed that the wife had received a letter with threats from Islamic fundamentalists wanting to stop her from taking up her work as a teacher. They had been too frightened to go to the police. In August 1994, posters, saying that all teachers taking up their profession would be killed, was put up in their village. The applicants claimed that in some other villages, where schools opened, teachers had been killed. This was a decisive factor in their decision to seek asylum. Furthermore, the local chairman, his representative and the parish clerk had recently been killed in their home village.

The husband claimed he feared violence at his work (he was employed by the post and had been robbed twice), but stated that he left Algeria primarily to save the life of his wife.

The Federal Office for Refugees rejected the asylum application, on the grounds that the threats did not emanate from the state but from a private body and that the state was trying to fight this organisation. Therefore, the threats were not relevant for asylum purposes, regardless of whether the state was successful in fighting the organisation that carried out the threats. A deportation order was issued.

The applicants appealed to the Swiss Asylum Appeals Commission and requested that they be granted asylum, or that it, in any case, establish that they should not be forced to return.

The Commission stated that persecution which is not attributable to the State is not relevant for asylum. Only when a State indicates that it is not intending to protect its citizens, is this persecution relevant for Geneva Convention refugee status. The Algerian authorities cannot be considered unable to protect. Still, it is evident that it cannot always protect its citizens from fundamentalists. Relevant in this matter, though, is that no state can succeed in guaranteeing its citizens absolute safety. It can be established, though, that the fundamentalist groups, have no effective or continuous power over any parts of the Algerian state territory. Therefore, the threats emanating from them are not relevant for asylum purposes.

The Commission rejected the appeal in the part requesting refugee status but, on the other hand, approved the part regarding non-execution of the deportation order.

Swiss Asylum Appeals Commission (CRA) 29 June 1995

"Because there has to be indirect state responsibility to apply the Convention refugee definition, someone from a country without a central/local/de facto government cannot be a refugee". According to the Commission, the consequence is that persecution in the sense of the Geneva Convention does not exist in Somalia. [48]

Swiss Asylum Appeals Commission, 11 March 1996, I/N 250 200

"Persecution has to be imputable to state organs. The persecution does not have to emanate from the organs directly but can also emanate from them indirectly. This indirect persecution can be persecution by non-state organs. Persecution in the sense of the Geneva Convention can occur when state the encourages, tolerates or indicates that they are not willing to provide protection against persecution".[49]

Swiss Asylum Appeals Commission, 5 February 1997, EMARK 1997/6

The applicant, an Afghan citizen, applied for asylum in Switzerland on 25 September 1992. The Federal Office for Refugees rejected the claim on 11 May 1994. It was of the opinion that the situation in Afghanistan consisted of a total division of state-power between different factions and a total lack of state or state-like institutions.

The applicant appealed to the Asylum Appeals Commission which stated that two situations can be distinguished when a state is unable to offer protection (typically in a civil war situation). The persecution in question is irrelevant for asylum purposes if private parties are responsible. If, on the other hand, private bodies which, without being the recognised state-power, are *de facto* in power of parts of the territory, the persecution qualifies as state-like and is relevant for asylum purposes.

As a next step the Commission looked at whether the Taliban authority could be considered to be a state-like power. It concluded that because of the length of time, as well as the stability and effectiveness of their rule, the Talibans had state-like powers over the civilian population and that persecution by the Talibans qualified as quasi-state persecution. The Swiss Asylum Appeals Commission ruled in favour of the appellant and instructed the Federal Office for Refugees to grant the applicant asylum in Switzerland.

Swiss Asylum Appeals Commission, 28 May 1997, EMARK 1997/14

The Swiss Asylum Appeals Commission held that Serbian forces exercised de facto authority in Srebrenica in July 1995 and therefore the persecution of Muslims could be considered to fall within the definition of a refugee according to the 1951 Convention. See also **EMARK 1996/6, EMARK 1996/16** and **EMARK 1995/2.**

6.13 United Kingdom

The first decision on an asylum application is taken by the Home Office. An appeal may be made to the Immigration Appellate authority where cases are heard by a Special Adjudicator. Both the asylum seeker and the Home Office may request leave to appeal against the decision of the Special Adjudicator to the Immigration Appeal Tribunal (IAT). If leave is granted and the IAT rejects the appeal, an application for leave to appeal to the Court of Appeal may be made on a question of law. If the IAT does not grant leave to appeal, the applicant may apply for judicial review at the High Court. The decision of the Court of Appeal may be further appealed to the House of Lords.

United Kingdom jurisprudence states that the asylum applicant is required to show that persecution by non-state agents is knowingly tolerated by the authorities or that the authorities refuse or are unable to offer effective protection.[50]

In principle the Convention applies to persons fleeing civil war. However, the ability of persons fleeing a civil war to make a Convention claim in practice will be dependent on whether they are able to show distinctive persecution, over and above the ordinary risks of warfare.

R v. Secretary of State for the Home Department ex parte S. Jeyakumaran, 28 June 1985, QBD CO/290/84

The applicant, a Tamil and citizen of Sri Lanka, arrived in the United Kingdom on 9 October 1983 and applied for asylum.

The applicant claimed that as a result of racial riots in Colombo, during which he and his father had been beaten up, he and his parents were forced to leave their home for a refugee camp and later another village in northern Sri Lanka. He claimed that the Tamil minority was harassed by Sinhalese soldiers within the armed forces and consequently he went into hiding. His home in Colombo was looted, badly damaged and sprayed with anti-Tamil slogans. His neighbours had warned him to stay away for fear of injury.

The Home Office had concluded that insofar as violence had been directed against the Tamil minority in Sri Lanka, this had not been directed against the applicant or any member of his family in particular. Furthermore, the most recent violence was more in the nature of a conflict between factions than persecution of individuals.

The High Court rejected the notion that the applicant had to be personally singled out as an individual rather than as a Tamil. The Court further rejected the implication that violence to individuals flowing from a conflict between factions cannot amount to persecution and cited paragraph 65 of the UNHCR Handbook on procedures and criteria for determining refugee status.

“The government need not to be the agent of persecution, rather persecution by a faction of the

population which is tolerated by the government or persecution which the government is unable to prevent supports a claim for refugee status."[51]

Immigration Appeals Tribunal, February 1996, Yousfi-case, unpublished

"The real question is not whether the State authorities are doing the best they can in all the circumstances, but whether viewed objectively the domestic protection offered by or available from the State to the Appellant is or is not reasonably likely to prevent persecution".

R. v. Secretary of State for the Home Department ex. parte Adan, House of Lords, 2 April 1998

Hassan Hussein Adan, a Somali national, fled from Somalia in June 1988 owing to a well-founded fear of persecution at the hands of the then government. On 15 October 1990, he arrived in the United Kingdom with his wife and two children. He was not accorded refugee status but he and his family were granted exceptional leave to remain on humanitarian grounds.

His appeal for refugee status was contested on the grounds that he no longer had a fear of persecution, as there had been a change of government in Somalia. President Barre had fallen from power. This was upheld by the House of Lords which required the existence of a present fear.

Mr. Adan further argued that due to the political situation in Northern Somalia where local clans were engaged in civil war, if returned to Somalia his life would be in danger owing to his membership of one of the warring clans. He claimed that this amounted to persecution for a Convention reason of which he had a current well-founded fear. The House of Lords posed the following question:

"Can a state of civil war whose incidents are widespread clan and sub-clan based killing and torture give rise to well-founded fear of persecution" even where the applicant "is at no greater risk of such adverse treatment than others who are at risk in the civil war for reasons of their clan and sub-clan membership?"

The Special Adjudicator had held that "the agents of persecution in the case of this appellant are not the authorities of the country but the members of the armed groups or militias of other clans or alliances." Accordingly she held that Mr. Adan was entitled to refugee status.

The Immigration Appeal Tribunal disagreed. It stated "we find that there is no evidence that the respondent would suffer persecution on account of his membership of the Habrawal sub-clan of the Issaq clan, from members of the armed groups of other clans or sub-clans, and we find that, while we accept that inter-clan fighting continues, that fighting and the disturbances are indiscriminate and that individuals from all sections of society are at risk of being caught up therein, and that the situation is no worse for members of the Isaaq clan and the Habrawal sub-clan than for the general population and the members of any other clan or sub-clan."

The Court of Appeal reversed the decision of the Immigration Appeal Tribunal.

The House of Lords held that where a state of civil war exists, it is not enough for an asylum seeker to show that he would be at risk if he were returned to his country. He must be able to show a differential impact. In other words, he must be able to show fear of persecution for Convention reasons over and above the ordinary risks of clan warfare.

[1] Jean-Yves Carlier, Dirk Vanheule, Klaus Hullmann and Carlos Peña Galiano (Eds.), Kluwer Law International, 1997

[2] Ben Vermeulen, Thomas Spijkerboer, Karin Zwaan, Roel Fernhout (researchers), University of Nijmegen, Centre for Migration Law, May 1998

[3] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, 1979

[4] An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR, European Series, September 1995

[5] Joint Position defined by the Council of the European Union on the basis of article K.3 of the Treaty on European Union on the Harmonised Application of the Definition of the Term "Refugee" in Article 1 of the 1951 Geneva Convention relating to the Status of Refugees

[6] For further details, see Prohibition of Refoulement: The Meaning of Article 3 of the European Convention on Human Rights by Clare Ovey, Lawyer at the European Court of Human Rights, in the ELENA report from the International Course on the European Human Rights Convention in relation to Asylum, May 1997

[7] Cruz Varas and Others v. Sweden, (46/1990/237/307), 20 March 1991; Vilvarajah and Others v. United Kingdom, (45/1990/236/302-306), 30 October 1991; Chahal v. United Kingdom, (70/1995/576/662), 15 November 1996

[8] Ibid

[9] Who is a Refugee? A Comparative Case Law Study, Jean-Yves Carlier, Dirk Vanheule, Klaus Hullmann, & Carlos Peña Galiano (Eds.), Kluwer Law International, 1997

[10] Ibid. at p.705

[11] Ibid at p.706

[12] Guy S. Goodwin-Gill. The Refugee in International Law, second edition, 1996

[13] Goodwin-Gill pp. 71

[14] Goodwin-Gill pp. 73

[15] The Law of Refugee Status, James Hathaway, Butterworths, 1991

[16] Carlier a. o. p. 44

[17] Web-site: http://www.unhcr.org/refworld/refworld/legal/refcas.htm

[18] Carlier a. o. p. 93

[19] Carlier a. p. 114 (French language version), paragraph 76b referring to C.E., 6 November 1996, n.62.976. Rev. dr. étr., 1996, p.759

[20] V.B.C. (2 ch.), 2 September 1993, W1014 (Lebanon) cited in Carlier a. p.95

[21] C.P.R. (1 ch.), 21 November 1991, FO35. See Carlier a. p. 96 for further details

[22] Carlier a. o. p. 96

[23] See above at section 3

[24] Information from ELENA Co-ordinator

[25] Information from ELENA Co-ordinator

[26] Carlier a. o. p. 401

[27] Carlier a. o. p. 401

[28] Carlier at p. 402

[29] Frédéric Tiberghien, 'Persecution by Non Public Agents' in Refugee and Asylum Law: Assessing the Scope for Judicial Protection; International Association of Refugee Law Judges, January 1997 at p.105

[30] Nijmegen report p. 47

[31] Nijmegen report p. 48

[32] Nijmegen report p. 48

[33] Sitaropoulos pp. 425

[34] Carlier a. o. pp. 269

[35] Web-site: http://www.unhcr.org/refworld/refworld/legal/refcas.htm

[36] Web-site: http://www.unhcr.org/refworld/refworld/legal/refcas.htm

[37] Sitaropoulos p. 423

[38] For further information on the Italian refugee determination procedure and laws see 'Legal and Social Conditions for Asylum Seekers and Refugees in Western European Countries, Fabrice Liebaut and Jane Hughes, Danish Refugee Council, January 1997

[39] Information from ELENA Co-ordinator

[40] Information from ELENA Co-ordinator

[41] Information from ELENA Co-ordinator

[42] Information from ELENA Co-ordinator

[43] See above at section 3

[44] Nijmegen report p. 66

[45] Nijmegen report p. 69

[46] Nijmegen report p. 70

[47] Information from ELENA Co-ordinator

[48] Nijmegen report p. 70

[49] Nijmegen report p. 68 also Swiss Commission of Asylum Appeals, 29 June 1995/25

[50] R. v. Secretary of State for the Home Department ex. parte Choudhury, Court of Appeal (Civil Division), 19 September 1991

[51] Web-site: http://www.unhcr.org/refworld/refworld/legal/refcas.htm