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However, it is suggested that changes in law and social policy are most likely to be achieved where litigation is part of a broader campaign for change, alongside activism from civil society, human rights bodies, and refugees and migrants themselves.

Strategic Litigation to Vindicate the Rights of Refugees and Migrants: Pyrrhic Perils and Painstaking Progress

Cathryn Costello*

Introduction

This contribution considers strategic litigation taken to vindicate the rights of asylum-seekers, refugees and migrants. Strategic litigation refers to

> …a form of public interest litigation where a case is pursued on behalf of an applicant or group of applicants, with a view to achieving a law reform goal beyond the individual case. While legal ethics dictate that the clients' interests are paramount in litigation, strategic litigation seeks an additional social or political impact beyond the remedy sought by the individual.[55]

As non-citizens, refugees and migrants are usually un-enfranchised in the political communities to which they move or seek to move. As outsiders to the political process, they cannot rely on majoritarian political institutions to protect their rights. Their rights are also often obscured by the basic assumption that states have a wide discretion to control entry to their territory. This statist migration control assumption is often invoked to mask human rights violations, and to undermine the rule of law. In this context, it is tempting to look to human rights law as a secure source of protection for the rights of refugees and migrants. The basic human dignity and equality that underpins human rights law means that many forms of migration control are amenable to challenge if they violate human rights.

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However, human rights bodies and courts often defer to the right of states to control their borders.[56] So, while human rights law is important, it offers no panaceas for refugees and migrants. Moreover, litigation has inherent limits. Winning in court depends on who brings the cases, the persuasiveness of their arguments, and in turn the receptiveness of judges. Even if cases go the "right" way, there is no guarantee that rulings will be implemented in a fulsome way. They may be undermined politically in the implementation process. In some national systems, courts are subject to legislative override, so must tailor their rulings accordingly. In other contexts, such as where EU law is at issue, or where bills of rights provide for strong judicial review, courts may be in a stronger position. But irrespective of their formal constitutional position, courts depend on politics for the implementation of rulings.

Accordingly, strategic litigation comes with risks. Losing is always a risk, and the litigant herself gains nothing. Some losses also come as a political set-back. If a court upholds a rights-restrictive policy, that may be seen to confer legitimacy on it. Sometimes, wins may mask losses, as there is no guarantee that progressive rulings will be implemented in a manner that is faithful to their ethos. For organisations and individuals engaging in strategic litigation, all these potential risks ought to be carefully considered. There is now a rich social scientific literature on strategic litigation in the human rights field,[57] which those engaged in strategic litigation would do well to consult.

This contribution examines three different strategic litigation sagas, and distils some general observations from them. They concern three distinct issues – access to asylum, detention of asylum-seekers and the integrity of the asylum process. This short contribution cannot do justice to this potentially vast topic, and my selection does not claim to be comprehensive. I have selected some cases that broke important new legal ground. Success took great and long-standing efforts.

1. Courting Access to Asylum[58]

Considering access to asylum, it has been acknowledged for the past decades that there are few, if any, legal routes to asylum for refugees who seek protection in the Global North, particularly in

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EU Member States. While there may be some limited humanitarian admission programmes and formal resettlement for small numbers of refugees, in general, would-be asylum-seekers have to enter the EU illegally. Visas and carrier sanctions are just two of the many forms of extraterritorial border controls used by states in the Global North to stop refugees reaching their shores. Some of these border control practices are currently legal, others are not. But, in general, policies that prevent refugees from arriving allow states to avoid their responsibilities to refugees. Once refugees reach the territory of a state, in particular liberal-democratic states that respect the rule of law, at least their basic right to *non-refoulement* must be respected, requiring an examination of protection needs. However, if that arrival can be prevented, responsibility is avoided. Strategic litigation comes in as a way of asserting legal accountability over extraterritorial border control practices.

One of the main barriers to access to asylum is the lack of a specific visa for claiming asylum. Such a visa can easily be created, but states generally choose not to issue such visas.[59] If asylum-seekers do not have visas, then they cannot board regular flights and ferries due to carrier sanctions. It is difficult, but not impossible, to establish legal obligations on embassies to consider protection needs of those who apply for visas.[60] As well as visa processing, another common form of extraterritorial border control are juxtaposed border controls, when officials from a country of destination are posted to airports and ports in third countries. A further practice is maritime push-backs, in particular, in international waters and in the territorial waters of third countries.

On juxtaposed controls, the case of *R v Immigration Officer at Prague Airport*[61] is illustrative. This case concerned a UK immigration control pre-clearance procedure at Prague airport. A policy was in place to refuse entry if UK immigration officers concluded that a would-be passenger was likely to claim asylum once she arrived in the UK. The Roma Rights NGO gathered data to demonstrate the racially discriminatory fashion in which the border controls in Prague Airport were being conducted, and brought a legal challenge in the UK courts. This case failed as a refugee case, but succeeded in establishing that equality guarantees had been violated. The United Nations High Commissioner for Refugees (UNHCR) had intervened in the case

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(the intervention was penned by Professor Guy S Goodwin-Gill of the University of Oxford), arguing that the controls were not a good faith application of the Refugee Convention,[62] but this argument was rejected.

On interdiction at sea and migrant push-backs, the leading case is *Hirsi Jamaa v Italy*.[63] The case concerned Italy's practice of interdicting and returning irregular migrants in international waters, and returning them to Italy, pursuant to an Italy-Libya agreement. The Italian authorities intercepted a boatful of migrants at sea in international waters, took them on board and brought them back to Libya. The European Court of Human Rights (ECtHR) held that, although Italy had been acting extraterritorially, its actions were nonetheless within its "jurisdiction", as it had exercised effective control over the persons in question. On the substance, it held that returning the applicants to Libya without examining their case exposed them to a risk of inhuman and degrading treatment, in violation of Art 3 of the European Convention on Human Rights (ECHR). Italy was also in violation of the prohibition of collective expulsions under Art 4 of Protocol 4. As a strategic case, *Hirsi* was challenging. The difficulties faced by the Italian lawyers were considerable. After all, the applicants had been returned to Libya, without ever having landed on Italian soil. The ECtHR had deemed a similar previous case inadmissible, as the lawyers could not demonstrate that they had proper authority to bring the case.[64]

These cases illustrate a gradual expansion of legal accountability over extraterritorial border control practices. *Hirsi* contrasts sharply with the US Supreme Court ruling in *Sale*, where push-backs were permitted.[65] The cases have established that some forms of extraterritorial acts will trigger the human rights obligations of the state in question, but many forms of cooperation still escape legal scrutiny. To illustrate, while European states would be held accountable for directly returning migrants to Libya, paying the Libyan authorities to prevent migrants leaving would not obviously involve an exercise of "jurisdiction" on the part of European States. This is not to suggest there is no way to establish state responsibility, but merely that other legal avenues must be sought other than via human rights courts.[66]

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2. Detaining Asylum Seekers[67]

In light of the access barriers sketched in the previous section, when asylum-seekers arrive in Europe, they tend to do so irregularly. This places them at risk of detention, in spite of the provisions of Art 31 of the Refugee Convention, under which refugees should generally not be penalised for their illegal entry.[68] Strategic litigation around detention of asylum-seekers, particularly in the UK, shows some of the pitfalls of losing significant cases early. When the UK introduced a fast-track detention process for some asylum-seekers, it was quickly challenged in the domestic courts. Unfortunately, Strasbourg upheld the detention practice in *Saadi v United Kingdom*.[69] Thereafter, the detention practices expanded greatly, so much more domestic litigation was required to demonstrate its illegality.

Prior to *Saadi v United Kingdom*,[70] the ECtHR had mainly considered pre-deportation detention under Art 5(1)(f) ECHR,[71] and not detention "to prevent unauthorised entry". Asylum-seekers cannot be deemed to be in "pre-deportation detention" until their legal status is determined. So the question was whether they could be treated as "unauthorised entrants". There were many interveners in the case, including the UNHCR, who argued for a very limited detention power. However, the ECtHR gave a ruling that established in principle a broad power to detain, and deemed administrative convenience an acceptable aim of detention. It also held that asylum-seekers were "unauthorised entrants" until the state decided otherwise. This power was not *carte blanche*, and a range of caveats was established to ensure the detention was not arbitrary, going to its duration, place and conditions. There was a powerful dissent, and the case was generally criticised for failing to vindicate the right to liberty.

In the following years, the UK detained fast-track system expanded in terms of its capacity and application, and has become synonymous with the rejection of asylum claims, and harsh conditions. A small NGO, *Detention Action*, continued to challenge both the procedural implications of the detained fast-track, and its basis in law. It took three years of litigation, a dozen hearings, and two Court of Appeal rulings, but ultimately both the procedural fairness and the legal basis of the detained fast-track were found lacking.[72] The two Court of Appeal rulings went to the fairness and the legal basis of

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the detention. Immediately thereafter, it was feared that the ruling would be a pyrrhic victory, and that a new detained fast-track would be introduced on a clearer statutory footing, but it now appears that the practice will end.[73]

The application to Strasbourg in *Saadi v UK* should perhaps not have been made at the time it was. The detention in question was for a short period, and at that point in time, the UK Government's claims about the administrative utility of the detained fast-track seemed plausible (if not demonstrative of the necessity of the practice). By taking the Strasbourg case prematurely, the ECHR ruling gave wide leeway to detain asylum-seekers. It then fell to the domestic courts in the UK applying domestic administrative law principles to check the practice of detention on arrival, which expanded greatly in the intervening years.

3. Restoring the Integrity of the Asylum System

Canada's asylum system had long been commended for its high quality adjudication. However, the Conservative government of Stephen Harper had adopted many European-style policies to limit access to asylum, and "deter" asylum-seekers from certain countries.

A trio of cases represents a concerted effort to root out the restrictive practices, using the Canadian Charter and international refugee law to challenge the restrictive legislation. The cases concerned limitations on access to health-care for asylum-seekers (*Canadian Doctors for Refugee Care v Canada)*[74]; a system of "designated countries of origin" which limited the procedural rights of asylum-seekers from certain countries (*YZ and the Canadian Association of Refugee Lawyers v Minister for Citizenship and Immigration*)[75]; and a challenge to anti-smuggling laws which were alleged to be overbroad, in that they prohibited assistance by family members and humanitarian organisations to those who sought to enter Canada to seek refuge (*R v Appulonappa*).[76]

Space precludes a detailed examination of the cases, but suffice to note that the Canadian Charter's human rights and equality guarantees were interpreted to protect asylum-seekers from harsh and discriminatory treatment. On the smuggling prohibition, the Supreme Court of Canada held that the legislation was overbroad, and

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that it ought to be interpreted to permit a humanitarian exception. All of the cases were supported by public interest litigants, and in the *Canadian Doctors* case, the Canadian medical profession had staged industrial action to protest against the new laws. The Federal Court ruled that the government intentionally targeted poor and vulnerable refugees and refugee claimants "for the express purpose of inflicting predictable and preventable physical and psychological suffering on many of those seeking the protection of Canada".[77] Two of the cases were likely to be appealed, were it not for the change of government. The Liberal government of Justin Trudeau has not sought to appeal against these rights-protective rulings. In addition, his government is making good on an election promise to resettle 25,000 Syrian refugees.

Conclusion

Perhaps the selection of cases has been somewhat eclectic, but my aim was to illustrate some of the perils, as well as progressive potential, of strategic litigation on refugee rights. Some state practices are difficult to bring to the attention of courts. When states act extraterritorially, or in concert with other states, it takes great efforts to even gather the requisite evidence to bring cases to court. An NGO that specialises in strategic litigation[78] brought the *Roma Rights* case, while Professor Andrea Saccucci, renowned human rights law specialist practitioner and academic, represented *Hirsi et al*.[79] Without such institutional or professional support beyond the norm, such cases would never come to court. Most migrants and refugees excluded by extraterritorial practices would not have the resources or opportunity to challenge their exclusion. Few individual litigants would have the tenacity, strategic vision or resources to bring such cases to court. The cases made important clarifications of principle, but in practice, asylum-seekers still have few if any legal means to access asylum. There is much further work to be done on this front, both in political and legal *fora*.

Bringing the wrong case, and losing, has high costs, as *Saadi v UK* illustrates. By clarifying the scope of Art 5 ECHR prematurely, detention of asylum-seekers on arrival was normalised. It took a small, tenacious British NGO a decade more to demonstrate the legal shortcomings of the detained fast-track. But *Saadi v UK* remains the

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leading Strasbourg ruling, creating, in my view, far too great a leeway for detention.

My contribution concludes with the Canadian cases, as they represent strong rulings on equality and dignity for asylum-seekers. The Canadian courts have deemed unconstitutional the sorts of practices that have regrettably been normalised in Europe. The Canadian Charter has some particular features that may help explain the rulings, in particular its robust equality guarantee. But also noteworthy is the strong role of public interest litigants and interventions in the cases, and the civil society campaigns that supported the litigation. Strategic litigation does not take place in a vacuum, and the political winds were also blowing in a more refugee-friendly direction in the wake of the rulings.

All in all, the cases I have described illustrate some of the potential and the pitfalls of strategic litigation on refugee and migrant rights. The costs of failure may be high, but in a context where human rights violations are normalised, legal challenges remain a powerful force.

Notes

1 This chapter is based on the proceedings of the third seminar, 'Immigration, Asylum and Legal Change', organised with the Immigrant Council of Ireland (ICI), which took place on 18 September 2015.

2 *Mallak v Minister for Justice, Equality and Law Reform* [2012] IESC 59, [2012] 3 IR 297 (SC).

3 [2012] IESC 59, [2012] 3 IR 297 (SC).

4 In *Meadows v Minister for Justice, Equality and Law Reform* [2010] 2 IR 701 (SC) [188], Hardiman J stated: "Judicial review of administrative action is a very significant part of the workload of the High Court and of this court on appeal. Asylum and immigration matters account in turn for a very significant portion of judicial review applications: between 2004 and December 2008 the percentage of judicial review matters represented by asylum and immigration cases varied from 47% the first year to 54% in the last, and in two years, 2006 and 2007, constituted almost 60% of the total judicial review workload (59% in each year). This seems to suggest, though no figures appear to be available, that a very high percentage of applications for asylum which are decided unfavourably to the applicant, and/or subsequent deportation orders, rapidly become the subject of judicial review applications". However, given the extraordinarily high rate of refusal (at one stage 99 percent of refugee applications were refused at first instance), as will be set out below, it might be thought that the rate of judicial review could in fact have been higher.

5 See, generally, Susan Kneebone (ed), *Refugees, Asylum Seekers and the Rule of Law*

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(Cambridge, Cambridge University Press 2009).

6 See, for example, Juliet Cohen, 'Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers' (2001) 13 *International Journal of Refugee Law* 293; Michael Kagan, 'Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determinations' (2003) 17 *Georgetown Immigration Law Journal* 367; Audrey Macklin, 'Truth or Consequences: Credibility Determinations in the Refugee Context' in International Association of Refugee Law Judges, *The Realities of Refugee Determination on the Eve of a New Millennium: The Role of the Judiciary–IARLJ 3rd Conference Ottawa, 14–16 October 1998* (International Association of Refugee Law Judges 1998); Jane Herlihy, 'Evidentiary Assessment and Psychological Difficulties' in Gregor Noll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Leiden, Martinus Nijhoff 2005) 123–40.

7 *Camara v Minister for Justice, Equality and Law Reform* (HC, 26 July 2000) (Kelly J).

8 *Nguejdo v Office of the Refugee Applications Commissioner* (HC, ex tempore, 23 July 2003) (White J).

9 *AMT v Refugee Appeals Tribunal* [2004] 2 IR 607 (HC).

10 *Carciu v Refugee Appeals Tribunal* [2003] IEHC 41.

11 *IR v Refugee Appeals Tribunal* [2009] IEHC 353.

12 *AAMO v Refugee Appeals Tribunal* [2014] IEHC 49.

13 See, for example, Aoife Drudy, 'Credibility assessments and victims of FGM: a re-evaluation of the refugee determination process' (2006) 14 ISLR 84; Samantha Arnold, 'The culture of credibility in the United Kingdom and Ireland and the sexual minority refugee' (2012) 30 *Irish Law Times* 55; Sue Conlan, Sharon Waters and Kajsa Berg, *Difficult to believe: the assessment of asylum claims in Ireland* (Dublin, Irish Refugee Council 2012); Carol Coulter, 'Call for review of up to 1000 rejected asylum applications', *The Irish Times*, 10 March 2008.

14 Office of the Refugee Applications Commissioner, 'Annual Report 2010' (2011) Appendix 3, Table 11.

15 Anthony Albertinelli, *Asylum applicants and first instance decisions on asylum applications in 2010* (Eurostat 2011).

16 Office of the Refugee Applications Commissioner (n 14).

17 Sue Conlan, Sharon Waters and Kajsa Berg, *Difficult to believe: the assessment of asylum claims in Ireland* (Dublin, Irish Refugee Council 2012) 1.

18 United Nations High Commissioner for Refugees (UNHCR), 'Irish Asylum Trends 2014' (6 May 2015).

19 *Nawaz v Minister for Justice* (HC, 29 July 2009) (Clark J).

20 *Salman v Minister for Justice* [2011] IEHC 481.

21 [2012] 3 IR 297 (SC), [2013] 1 ILRM 73 (SC).

22 As provided by ss 15 and 16 of the Irish Nationality and Citizenship Act 1956 (as amended).

23 [2012] 3 IR 297 (SC), 312, [2013] 1 ILRM 73 (SC), 87.

24 [2012] 3 IR 297 (SC), 322, [2013] 1 ILRM 73 (SC), 95-96.

25 Catherine Cosgrave, *Living in Limbo – Migrants' Experiences of Applying for Naturalisation in Ireland* (Dublin, Immigrant Council of Ireland and NASC 2011).

26 *AP v Minister for Justice and Equality (No 2)* [2014] IEHC 241.

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27 Department of Justice and Equality, 'Minister Shatter introduces major changes to citizenship application processing regime' (16 June 2011).
28 Jamie Smyth, 'Government to bring in citizenship ceremony after successful pilot event' *The Irish Times*, 25 June 2011.
29 [2014] IEHC 241.
30 As noted by UNHCR, 'Conclusions of UNHCR Global Consultations on International Protection' (Expert Roundtable, Geneva, 8-9 November 2001), para 6, "maintaining and facilitating family unity helps to ensure the physical care, protection, emotional well-being and economic support of individual refugees and their communities. The protection that family members can give to one another multiplies the efforts of external actors. In host countries, family unity enhances refugee self-sufficiency, and lowers social and economic costs in the long term".
31 *POT v Minister for Justice, Equality and Law Reform* [2008] IEHC 361.
32 *RX v Minister for Justice* [2011] 1 ILRM 444 (HC).
33 *Hassan v Minister for Justice* [2013] IESC 8.
34 *Hamza v Minister for Justice* [2013] IESC 9.
35 *AMS v Minister for Justice (No 1)* [2012] IEHC 72.
36 *AMS v Minister for Justice (No 2)* [2014] IEHC 57, [2014] IESC 65.
37 *AAM v Minister for Justice* [2013] IEHC 68.
38 [2013] IEHC 68 [28].
39 See Colm Keena, 'Council of State to test validity of asylum Bill' *The Irish Times*, 29 December 2015 who noted "Mr Higgins's office has said it is concerned that sections 56 and 57 of the Bill, which are concerned with family reunification, might be in conflict with the Constitution".
40 Free Legal Advice Centre (FLAC), 'Direct Discrimination? An analysis of the scheme of Direct Provision in Ireland' (FLAC 2003) 8, which states "in November 1999, the Minister for Justice, Equality and Law Reform stated the government's intention to introduce Direct Provision as a matter of 'extreme urgency', commenting that the number of applications for asylum were 'spiralling out of control' and announcing the need for the burden to be spread throughout the country. The Minister also expressed concern that 'the welfare scheme must not act as a pull factor for non-genuine asylum seekers.' The United Kingdom was introducing Direct Provision in April 2000 and the Minister was of the view that if Ireland did not have a similar scheme up and running by that time, the country would be overwhelmed by the numbers of asylum applicants."
41 See, for example, FLAC, 'Direct Discrimination? An analysis of the scheme of Direct Provision in Ireland' (FLAC 2003); FLAC, *One Size Doesn't Fit All: A Legal Analysis of the Direct Provision and Dispersal Policy in Ireland Ten Years On* (Dublin, FLAC 2009); Irish Refugee Council, 'Direct Provision: Framing an Alternative Reception System for People Seeking International Protection' (Irish Refugee Council 2013).
42 For example, Liam Thornton, 'Upon the Limits of Rights Regimes: Reception Conditions of Asylum Seekers in the Republic of Ireland' (2007) 24(2) *Refuge* 86; Irish Human Rights and Equality Commission, 'Policy Statement on the System of Direct Provision in Ireland' (IHREC 2014); UN Human Rights Committee, 'Concluding Observations on the fourth periodic report on Ireland' (UNHRC 2014), which expressed concern about "delays in the processing of asylum claims and prolonged accommodation of asylum-seekers in direct provision centres which

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is not conducive to family life" and the lack of an accessible and independent complaints mechanism in direct provision centres, and Kitty Holland, 'Ireland challenged on children's rights record' *The Irish Times*, 14 January 2016 in respect of Ireland's most recent appearance before the UN Committee on the Rights of the Child, where one of the committee members noted "many child asylum seekers had spent "the whole of their childhoods" in direct provision centres".

43 For example, Barry Roche, 'Asylum seekers mount protest at Cork direct provision centre' *The Irish Times*, 15 September 2014; Eoin English, 'Asylum seekers' protest extends to fifth centre' *Irish Examiner*, 19 September 2014; Barry Roche, '160 asylum seekers protest at Waterford direct provision centre' *The Irish Times*, 8 October 2014.

44 *CA and TA (a minor) v Minister for Justice and Equality, the Minister for Social Protection, Attorney General and Ireland* [2014] IEHC 532.

45 The court declined to rule on the substantive human rights complaints on the basis that the applicants had sought to rely on a number of reports and statements such as: the Human Rights Committee, 'List of issues in relation to the fourth periodic report of Ireland' (OHCHR 2013); Irish Human Rights Commission, 'Submission to the UN CERD Committee on the Examination of Ireland's Combined Third and Fourth Periodic Reports' (IHRC 2010); Geoffrey Shannon, 'Fifth Report of the Special Rapporteur on Child Protection, A Report Submitted to the Oireachtas' (2011); Joint Committee on Justice, Defence and Women's Rights, 'Asylum Policy and Practice and Gender Issues: Discussion' (Houses of the Oireachtas Committee Debates, 7 July 2010); European Commission against Racism and Intolerance, 'ECRI Report on Ireland' (ECRI 2013); Council of Europe, Parliamentary Assembly, 'Refugees and the right to work' (Report of the Committee on Migration, Refugees and Displaced Persons – Rapporteur: Mr Christopher Chope) (Parliamentary Assembly of Council of Europe 2014), including a 'Resolution 1994 of the Parliamentary Assembly on Refugees and the right to work'; UN General Assembly, 'Report of the independent expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona, on her Mission to Ireland' (Seventeenth session, Human Rights Council 7 May 2011); FLAC, *One Size Doesn't Fit All: A Legal Analysis of the Direct Provision and Dispersal Policy in Ireland Ten Years On* (Dublin, FLAC 2009); Corona Joyce and Emma Quinn, *The Organisation of Reception Facilities for Asylum Seekers in Ireland* (Dublin, ESRI 2014). However, the court ruled that, because none of the authors of those reports had been called to give evidence in the case, it would be inappropriate to have regard to those reports.

46 Ronan McGreevy, 'Working group announced to examine direct provision' *The Irish Times*, 14 October 2014.

47 A letter by 123 academics to *The Irish Times* was highly critical of this limitation in the terms of reference and said that the process was thereby clearly a "cosmetic exercise" only: see letter to the editor on the working group on direct provision, *The Irish Times* (Dublin, 28 October 2014).

48 Working Group to Report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers, 'Final Report' (Working Group on the Protection Process 2015).

49 For example, Kitty Holland and Stephen Collins, 'Asylum seekers should get

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decision within 12 months' *The Irish Times*, 30 June 2015, which noted that "clear differences" had emerged between Minister for Justice and Equality Frances Fitzgerald TD, and the junior minister Aodhán Ó Ríordáin TD, at the launch of the McMahon report (hereinafter "McMahon report"); then Minister Ó Ríordáin spoke of a "moral obligation" in respect of implementation while Minister Fitzgerald said only that the report provided "food for thought".

50 'A Programme for a Partnership Government' (May 2016).

51 Kitty Holland, 'Government pledge on asylum reform report dropped' *The Irish Times*, 14 May 2016. Holland notes that "The draft programme for government included a pledge to 'implement the recommendations of the McMahon Report as swiftly as possible'. However, this passage has been removed in the adopted programme for partnership government agreed between Fine Gael and some Independents and published on Wednesday".

52 Mark Hilliard, 'Rights body urges action on direct provision reform' *The Irish Times*, 16 June 2016. While the government reported on 16 June 2016 that 91 recommendations from the McMahon report had been fully implemented, 49 partially implemented or in progress, while the remaining 33 required further consideration, the Irish Refugee Council has questioned the reality of improvements for those living within the system, stating "despite claims about implementation, a haze of vagueness prevails over this entire document". See Irish Refugee Council, 'Irish Refugee Council questions the real impact of the McMahon Report 12 months on' (30 June 2016).

53 *NHV v Minister for Justice and Equality* [2016] 1 ILRM 453 (CA).

54 *NHV v Minister for Justice and Equality* [2016] IESCDET 51.

55 Andrea Coomber, 'Strategically litigating equality – reflections on a changing jurisprudence' (2012) 15 *European Anti-Discrimination Law Review* 11.

56 For an exploration of this theme, see generally, Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford, Oxford University Press 2016).

57 For a sample, Austin Sarat and Stuart A Scheingold, *Cause Lawyers and Social Movements* (Stanford, Stanford University Press 2006); Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago, Chicago University Press 1991); Charles R Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (Chicago, University of Chicago Press 1998).

58 See further, Cathryn Costello, 'Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored' (2012) *Human Rights Law Review* 287.

59 European Parliament, 'MEPs want EU embassies and consulates to grant asylum seekers humanitarian visas' (16 March 2016).

60 Kate Ogg, 'Protection Closer to Home? A Legal Case for Claiming Asylum at Embassies and Consulates' (2014) 33 *Refugee Survey Quarterly* 81.

61 *R v Immigration Officer at Prague Airport (Roma Rights)* [2004] UKHL 55.

62 *UNHCR intervention before the House of Lords in the case of European Roma Rights Centre and Others v Immigration Officer at Prague Airport, Secretary of State for the Home Department* (28 September 2004) <www.refworld.org/docid/41c1aa654.html> accessed 9 August 2016.

63 *Hirsi Jamaa v Italy* (2012) 55 EHRR 21.

64 *Hussun and Others v Italy* App Nos 10171/ 05, 10601/ 05, 11593/ 05 and 17165/

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05 (ECtHR, 19 January 2010).

65 See Harold Hongju Koh, 'YSL Sale Symposium: Sale's Legacies' (Opinio Juris, 17 March 2014) <http://opiniojuris.org/2014/03/17/yls-sale-symposium-sales-legacies/> accessed 9 August 2016.

66 For a comprehensive survey, see James C Hathaway and Thomas Gammeltoft-Hansen, 'Non-refoulement in a world of cooperative deterrence' (2014) University of Michigan Law & Economics Working Papers, Paper 106/2014 <http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1216&context=law_econ_current> accessed 23 August 2016.

67 Cathryn Costello, 'Immigration Detention: The Grounds Beneath our Feet' (2015) 68(1) *Current Legal Problems* 143.

68 For extensive commentary, see Gregor Noll, 'Article 31 (Refugees Unlawfully in the Country of Refuge)' in Andreas Zimmermann, Jonas Dörschner and Felix Machts (eds), *The 1951 Convention Relating to the Status of the Refugees and its 1967 Protocol: A Commentary* (Oxford, Oxford University Press 2011) 1243; Guy S Goodwin-Gil, *Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection* (Cambridge, Cambridge University Press 2003).

69 *Saadi v UK* (2008) 47 EHRR 17. See also, Helen O'Nions, 'No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience' (2008) 10 EJML 149.

70 *Ibid.*

71 Article 5 of the European Convention on Human Rights states:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

72 *R (Detention Action) v Secretary of State for the Home Department* [2014] EWCA Civ 1634; *The Lord Chancellor v Detention Action* [2015] EWCA Civ 840.

73 Jerome Phelps, 'The Fast Track is dead' (Open Democracy, 20 May 2016).

74 *Canadian Doctors for Refugee Care v Canada* 2014 FC 651.

75 *YZ and the Canadian Association of Refugee Lawyers v Minister for Citizenship and Immigration* 2015 FC 892. I provided an expert affidavit in the litigation, some of the contents of which are reflected in this contribution. See further, Catheryn Costello 'Safe Country? Says Who?' (2016) IJRL (forthcoming).

76 *R v Appulonappa* 2015 SCC 59, [2015] 3 SCR 754.

77 2014 FC 651 [587].

78 See further, the account of its Director, Adam Weiss, 'What is Strategic Litigation?' (ERRC, 1 June 2015) <www.errc.org/blog/what-is-strategic-litigation/62> accessed 9 August 2016.

79 Readers are recommended to watch his oral arguments in that case: Andrea Saccucci, 'Corte europea dei diritti dell'uomo–Hirsi e altri c. Italia–Strasburgo 5 luglio 2011' (2011) <www.youtube.com/watch?v=p2HgMXR52nI> accessed 9 August 2016.