

FAHAMU

REFUGEE LEGAL AID NEWSLETTER

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WELCOME TO THE FAHAMU REFUGEE LEGAL AID NEWSLETTER

*a monthly forum for relevant news
and wider reflection on the
provision of refugee legal aid.*

| Africa | Asia | Middle East | Americas |
|--|---|--|--|
| <i>South Africa to resume deportation of Zimbabweans</i> • <i>Kenya fines, departs 89 Ethiopians</i> • <i>Refugees in DRC to get ID cards</i> | <i>Tibetan refugees detained in Nepal, handed over to China</i> • <i>Pakistan Christians killed outside courthouse</i> • <i>Australia to open new detention centre</i> • | <i>Iraqis deported from UK beaten as forced off plane</i> • <i>Egyptian court uses Geneva Convention to prevent refoulement</i> | <i>Almost 1500 Eritreans resettled to United States from Ethiopia</i> • <i>Former UNHCR deputy high commissioner calls for increased resettlement of Iraqis to USA</i> |

Local support for refugee rights in Thailand will be the goal of the new [Thailand Committee for Refugees](#), formerly the Thailand field office of the [United States Committee for Refugees and Immigrants](#). USCRI will continue its advocacy work in Thailand via a partnership with [Asylum Access](#).

The August 13 arrival of 492 Tamil asylum seekers by boat on Canada's west coast has brought increased public and government attention to the country's asylum system, including an article on why [human smuggling is essential to refugee protection](#) by [James Hathaway](#). While some citizens have [protested the detention](#) of the new arrivals, [others](#) have echoed the accusatory response of Canadian leaders. Prime Minister Stephen Harper [vowed to prevent](#) the arrival of further ships, and Immigration Minister Jason Kenney travelled to [France](#) and [Australia](#) for meetings to inform upcoming reforms to Canada's immigration system. Meanwhile, a couple from the Tamil boat have [given birth to a child](#) – by automatic right, Canadian.

More information has come to light about July's [violent forced repatriation](#) of refugees from Uganda's Nakivale refugee camp. A [report](#) published in Pambazuka News provides the names and gruesome causes of death of some of the individuals killed, burial details of some of the deceased, and partial lists of the separated families, children, and recognized refugees refouled to Rwanda. The forced repatriation is a violation of Uganda's obligations under the [African Charter on Human and Peoples' Rights](#).

Following wide criticism of Greece's asylum system – by [UNHCR](#) last month and the Council of Europe's Commissioner for Human Rights [earlier this year](#) – [Human Rights Watch](#) has [called for UNHCR](#) to take over refugee status determination from the Greek government. Further commentary on the situation can be found on the [free movement blog](#).

Thanks to quick efforts of [UNHCR](#) and [Lawyers for Human Rights](#), two Somali refugees were prevented from being refouled from Namibia through South Africa. The Pretoria High Court [granted an urgent interim order](#) interdicting the Department of Home Affairs, ACSA, and Analytical Risk Management (a private detention facility) from deporting, or in any way facilitating the removal of two refugees.

Bringing attention to the situation of African refugees in Cyprus, a [diabetic man from the Congo died](#) in Nicosia this month, unable to afford the regular meals necessary for his survival and barred from access to the country's welfare services. The event has prompted an [investigation](#) not from the Cypriot asylum system – the man had been awaiting protection for five years – but from the national labour ministry, which placed him in additional limbo while determining his welfare eligibility after policy changes, suspending his benefits in the meantime. *(Continued overleaf)*

The Fahamu Refugee Legal Aid Newsletter seeks your input, feedback and submissions for upcoming issues. Please email editors [Themba Lewis & Nora Danielson](#).

(News, continued) However larger problems with racial discrimination in Cyprus' asylum service have also come to light, long evident to Africans in Cyprus and to local anti-racism NGO [KISA](#), which has worked to counter it for the last twelve years.

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REQUESTS

Case law on non-refoulement?

Lakshan Dias urgently seeks the following: international case references or international customary law on non-refoulement, any United Nations or international case law references on the prevention of forced repatriation, or, more broadly, any information on UNHCR's obligation to prevent non-refoulement. Please email [Lakshan Dias](#) as soon as possible.

Cancellation of Temporary Protection Status for Sierra Leoneans and Liberians in the US?

Claudena Skran, Associate Professor of Government at Lawrence University, is working on a project about the cancellation of Temporary Protection Status (TPS) for Sierra Leoneans and Liberians in the US, and their subsequent deportations by the US government back to West Africa and is looking to be in touch with anyone working on something similar. Please send replies to [her email](#).

Protection based on violation of the rights to work, to leave the country, to free movement, to free expression, or to elect leaders?

Asylum Access Ecuador is making the case to the Ecuadorian government to recognize that violations of economic, social and cultural rights and a wider range of civil and political rights can lead a need for international protection. As part of our advocacy, we would like to include examples of other countries or international tribunals that have found a need for protection based on violations of these rights. Specifically, we are interested in refugee cases based on the violation of the right to work, right to leave one's country or move freely within one's country, right to free expression, and right to elect one's leaders. If anybody has information (either cases or articles) related to this, please send them to [Daniel Berlin](#).

Mixed migration flows, undocumented migration, secondary movement or smuggling, trafficking and other transit networks in the the East and Horn of Africa, the Great Lakes region and Southern Africa?

On 6-7 September, UNHCR and IOM hosted a regional conference in Dar Es Salaam on Refugee Protection and International Migration: Mixed Movements and Irregular Migration from the East and Horn of Africa and Great Lakes Region to Southern Africa. As part of the conference follow-up, they are now trying to gain a better understanding of research currently being carried out in this area in order to better identify research gaps and target future study. UNHCR is therefore very keen to hear from all researchers or practitioners currently involved in projects focusing on any aspects of mixed migration flows, undocumented migration, secondary movement or smuggling, trafficking and other transit networks in the East and Horn of Africa, the Great Lakes region and Southern Africa. Please send a brief description of such a project, its expected time frame, and the contact details and affiliations of those involved to [Dr Katy Long](#).

Forced migration-related courses, conferences and events held outside the United Kingdom?

The [Forced Migration email list](#), which provides regular updates on major news, publications and events relating to forced migration, including relevant funding opportunities, job vacancies and new research projects, seeks a greater range posts regarding international events of interest. Details of on how to join or post to the Forced Migration Discussion List are available [online](#).

Is the United States a safe third country? A commentary on *Canadian Council for Refugees v. Her Majesty the Queen*

Contributed by law student Justin Patrou. This article was first posted on Birdsong's Law Blog, which includes full footnote references.

Both the US and Canada are signatories to the major pieces of international refugee law: 1951 Convention Relating to the Status of Refugees ('Convention'), the 1967 Protocol Relating to the Status of Refugees ('Protocol'), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('Convention Against Torture').

The US-Canada land border has been a concern to both countries as refugees routinely passed through the border to make an asylum claim in either or both countries. As a result, the two countries implemented the U.S.-Canada Smart Border Plan. Part of that plan was to implement the Safe Third Country Agreement ('STCA'), which addresses the procedure by which the two countries will process refugee claims in a more efficient manner. Under the United States Immigration and Nationality Act (§208(a)(2)(A) – the procedural tool that implemented the STCA – an applicant applying for asylum shall be denied the procedural process available to other refugee claimants if it is found that the applicant can be removed to another country, pursuant to a bilateral or multilateral agreement.

My interest in the agreement began with a case – *Canadian Council for Refugees v. H.M. The Queen* – handed down by a Canadian judge who determined that the United States was not a 'safe third country,' and as such, it would be illegal for Canada to turn away those who entered its land borders looking to make a refugee claim. The paragraphs that follow will address the three reasons by which the judge determined the US was not a 'safe third country' and the actions the US can take to ensure that this bilateral agreement does not meet a swift and unceremonious end. It will address each concern discussed and possible solutions for each problem.

The Safe Third Country Agreement: purpose and reasoning

The Safe Third Country Agreement was entered into by the US and Canada as part of the U.S.-Canada Smart Border Action Plan. The agreement was signed by the two parties on December 5, 2002, and became effective two years later on December 29, 2004. The STCA was created to help the two countries better manage asylum claims made by refugees under asylum laws.

The text of the STCA was designed by the countries to ensure that the agreement complied with the text and the spirit of international law. The STCA acknowledges that both parties will safeguard every refugee claim, allowing them access to a fair and full status

determination in accordance with the protections of the Convention, the Protocol, and the Convention Against Torture.

The text of the STCA acknowledges that both the 'United States and Canada offer generous systems of refugee protection' and the STCA would uphold the protection afforded by the asylum procedures. The STCA was entered into in accordance with the advice of the United Nations High Commissioner for Refugees ('UNHCR') and its Executive Committee, that agreements among states may enhance the international protection of refugees by promoting the orderly handling of asylum applications by the responsible party and the principle of burden-sharing.'

The STCA addresses those refugee claimants who enter one of the two countries through a land border of the other country. Specifically, the STCA applies to any refugee claimant who tries to enter by train or through an airport if the claimant is being removed from the other country after being denied refugee status.

***Canadian Council for Refugees v. Her Majesty the Queen*: are those barred from making a claim really protected?**

The 2007 Canadian judicial opinion penned by Judge Phelan evaluated the validity of the STCA between the US and Canada, and concluded that the *US was not a safe third country*.

The opinion in *Canadian Council for Refugees v. Her Majesty the Queen* addresses a variety of legal issues that affect the validity of the STCA. The three most relevant and troubling issues that the Judge addressed in his opinion are:

1. the United States requires that an applicant applying for asylum file the application within one-year of arriving in the country, otherwise the applicant would be ineligible for asylum;
2. the United States does not have a policy which allows for there to be an exception to the exclusion of those individuals who involuntarily gave assistance to terrorists; and
3. the United States, unlike Canada and many other countries, does not allow individuals who have suffered from domestic violence to apply for refugee status.

It should be noted that the Canadian government, disappointed with the rulings of Judge Phelan, appealed his decision to the Canadian Federal Court of Appeal which overturned the decision. *Continued on page*

Pambazuka News

The Fahamu Refugee Legal Aid Newsletter is distributed in Pambazuka News, the authoritative pan-African electronic weekly newsletter and platform for social justice in Africa. With over 1000 contributors and an estimated 500,000 readers, Pambazuka News provides cutting edge commentary and in-depth analysis on politics and current affairs, development, human rights, refugees, gender issues and culture in Africa. Visit [online](#) or subscribe by [email](#).

ANNOUNCEMENTS

*The Independent Advisory Group on Country Information (IAGCI) is currently commissioning researchers to review the COI reports on Bangladesh, Eritrea, Iran, Occupied Palestinian Territories, and Sudan. The IAGCI advises the Independent Chief Inspector of the UK Border Agency on the quality of Country of Origin Information (COI) produced by the UKBA for use in asylum and other protection claims. The principle responsibility of the IAGCI is to review the content of all COI produced by the UKBA to help ensure that this is as accurate, balanced, impartial and up to date as possible. More information on the invitation to tender, and about the IAGCI in general, can be found on its website. Tenders must be received by **8th October**. Tenders and questions can be submitted by email to Dr Khalid Koser, Chair of the Independent Advisory Group on Country Information.*



***24th October** is the deadline for submissions to the first issue of the new Oxford Monitor of Forced Migration (OxMo), a biannual, student-edited publication. OxMo will provide critical analyses of forced migration issues, projects and policies in relation to international organizations and the work of NGOs and national governments; highlight innovative practices and developments geared towards countering forced migration predicaments; report best practices, examine local/grass roots developments, and foster a space for students, who themselves have been or are currently forcibly displaced, to present their perspectives on current situations. Students, recent graduates and those with first hand experience of forced migration – whether or not previously published or native English-speakers – are invited to submit articles of 1000-1500 words on policy, law, field experience or personal accounts of forced migration; academic articles up to 6000 words in length; or multimedia pieces. Submission details can be found on OxMo's website.*



*The 13th conference of the International Association for the Study of Forced Migration will be hosted by the Refugee Law Project, Kampala, Uganda in July 2011, with the theme 'Governing Migration.' Abstracts of 250 words, due by **31st October**, are sought from academics, graduate students, practitioners, policy makers, individuals working with forced migrants and forced migrants themselves for individual paper presentations or proposals to organize a panel on a particular theme or topic. Some financial assistance may be available to*

CASE NOTE**United Kingdom: the right to work during the asylum claim process**

by Tom Barratt

Few countries in the global south allow people seeking asylum the right to work during the refugee claim-making process, much less allowing recognized refugees the right to work. Here we see a decision by the United Kingdom Supreme Court which gives Somali refugees the right to seek employment, even on a second application for refugee status. This welcomed submission from UK-based lawyer Tom Barratt may provide legal advisers a basis for their advocacy in the global south and elsewhere.



In the case *R (ZO (Somalia) et al v SSHD [2010] UKSC 36*, the UK Supreme Court has upheld the right of asylum claimant to apply for permission to work when their claim been under consideration for more than a year, even if *is* their second claim.

Background

In the United Kingdom, an asylum seeker who has been waiting for more than twelve months for a claim decision must have access to the labour market, provided that the delay is not his or her own fault.¹ This right, from European Union law, is subject to the conditions of the member state. The UK's conditions forbid self employment or engagement in a business or professional activities, and require that the asylum seeker apply for permission to work to the UK Secretary of State.² Under UK law, an initially unsuccessful asylum claimant may claim asylum again (a 'fresh claim'), provided that new evidence which creates a realistic prospect of success is submitted.³

The case

ZO and MM were Somali asylum claimants making fresh claims. Although their cases had exceeded twelve months, the Secretary of State withheld their permission to work on the basis that the right to work only exists for initial claims.

Arguments & judgement

The Secretary of State's argument was challenged and rejected in the Supreme Court on the basis that the right to labour market access exists for *all* asylum claims. This decision noted that

'an application for asylum' in the Reception Directive must be interpreted to include a subsequent application made after an original application has been determined and that the term 'asylum seeker' should be construed accordingly to include a person who makes such a subsequent application.⁴

The judgement continued its support of the fresh asylum claimant:

It is clear, therefore, that a person who has been in the United Kingdom for some time can apply for asylum and, on the interpretation that the appellant espouses, such a person would be entitled to the benefits of the Reception Directive whereas an applicant who has made an application immediately on arrival would lose those benefits forever after the first application has been determined.⁵

There is nothing unusual or untoward in the notion that one can be received into that system on more than one occasion.⁶

Thus the judgement not only clarifies the right of all asylum seekers to seek work after their cases have been in process for a year, it also points out that to judge otherwise might have the undesirable result that a person who waits some time after entering the UK before claiming asylum might be in a better position than one who claims straight away.

Countering the Secretary of State's argument that allowing all asylum seekers to apply for permission to work would encourage abuse of the system, the Supreme Court stated:

As a general principle, it is of course correct that difficulties in implementing legislation may provide a useful guide to the identification of the true purpose of an enactment but where, as here, the purpose of the Directive is unmistakably

clear, the fact that this may give rise to administrative difficulties cannot impel an interpretation which is inconsistent with that purpose.⁷

Thus the Court avoided the kind of speculation that the government appeared to be inviting.

Although strictly *obiter dictum*, it is an idea that would be well remembered elsewhere in the asylum system.

Implications

This decision affirms a positive interpretation of asylum seekers' right to work. The case has potential implications for other EU states bound by the Reception Directive. Particularly, it makes some useful assessment of arguments for treating less favourably those who have already made an unsuccessful claim. All of the purported rationales for such practice are dismissed, pointing, perhaps, to the more likely explanation that the government seeks to minimise claims wherever possible. While there may be sound concerns for good administration, the case implies that these might be qualified in two ways. First, certain rules will not permit an assessment of administration where they are sufficiently unequivocal about the rights conferred. Second, any concern for the effect on administration must be substantiated and not negligible.

On a more global scope, the arguments of the case could serve as guidance for legal aid providers arguing against administrative inconvenience elsewhere in the world.

Unfortunately, however, since the initial judgement of this case, the United Kingdom has announced that ["the only jobs for which asylum seekers kept waiting for twelve months or more will be able to apply are those on the shortage occupation list"](#) – a list which is [extremely limited](#).



¹Council Directive 2003/9/EC (The Reception Directive), article 11.

²Immigration Rules, rule 360.

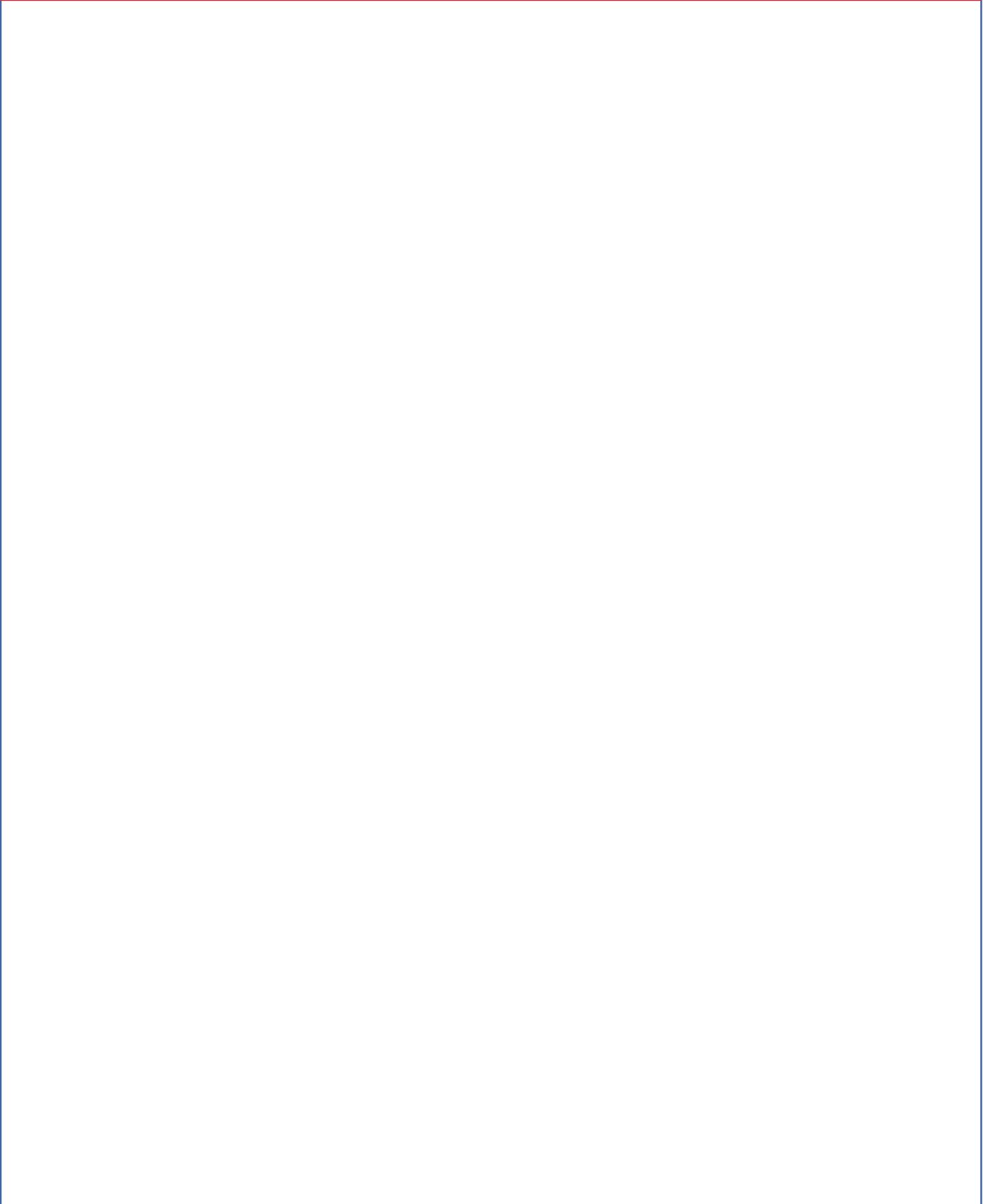
³Immigration Rules, rule 353.

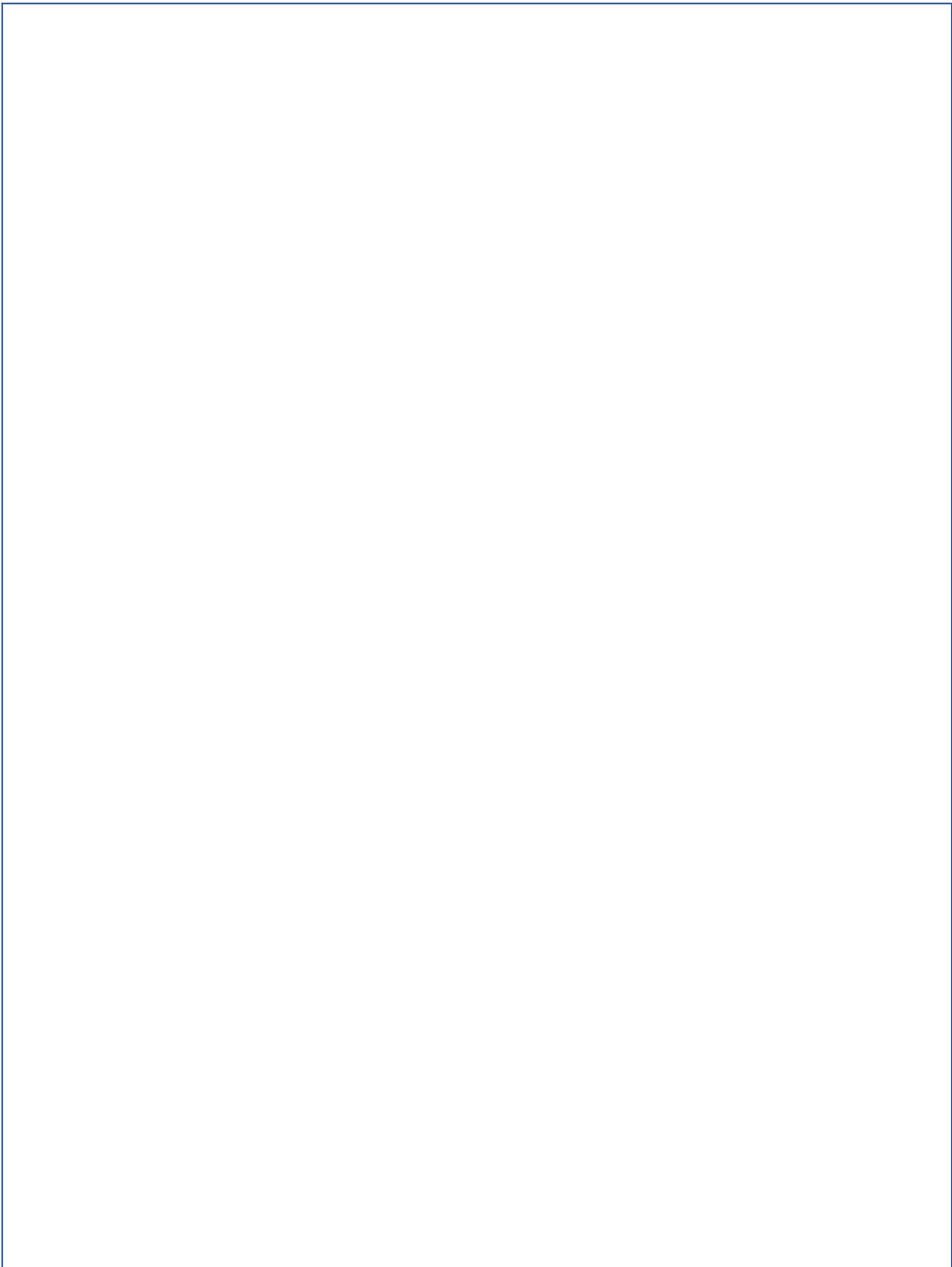
⁴*R (ZO (Somalia) et al v SSHD [2010] UKSC 36*, paragraph 31.

⁵*Ibid.*

⁶*Ibid.*, paragraph 32.

⁷*Ibid.*, paragraph 44.





| NEWS & INFORMATION LINKS |
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| southern refugee legal aid network website & email list |
| forced migration current awareness blog |
| country of origin information for rwanda |
| rsdwatch : information on unhcr's refugee decisions |
| kanere: kakuma refugee free press |
| un palestinian rights division's ngo action news |
| refugees international regional and issue-based e-updates |
| international detention coalition news and resources |
| euromediterranean migration and asylum blog |
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