Refugee Background

Case Summaries

New South Wales:

***R v Botrus (No 6)* [2021] NSWSC 199** (Walton J)

Murder – aged 18 – refugee background

- Social disadvantage in early childhood years in war-torn Iraq and entry into Turkey and Australia as a refugee. The circumstances of experience were acute and "traumatic" although not causally connected to the offending: **at [90]-[91]**; ***Bugmy v The Queen* (2013) 249 CLR 571; *Perkins v R* [2018] NSWCCA 62; *R v Irwin* [2019] NSWCCA 133** cited.
- These factors go to reduce moral culpability and, to some extent, weight that might be attached to general and specific deterrence. Nonetheless, the Crown is correct that the early social disadvantage must not be taken in isolation from the largely positive experiences and support in his foundational years in Australia, particularly with respect to his supportive, loving family and close-knit community: **at [92].**

***Lelikan* (No 5) [2019] NSWSC 494** (McCallum J)

Member terrorism organisation – background taken into account to reduce moral culpability: Bugmy v The Queen (2013) 249 CLR 571

- Refugee status: **at [6]**. Several periods at refugee camp in Iraq: at **[12]**.
- Background taken into account to reduce moral culpability in accordance with principles in ***Bugmy v The Queen* [2013] HCA 37; 249 CLR 571**. Early experience of oppression, persecution and discrimination as a Kurd growing up in Turkey, personal experience of violence and torture, fleeing homeland for safety at tender age: **at [87]**.
- [Note: Crown sentence appeal (dismissed) ***R v Lelikan* [2019] NSWCCA 316; (2019) 101 NSWLR 490**].

***R v Mansaray* [2018] NSWCCA 64** (Hoeben CJ at CL; White JA and N Adams J agreeing)

Robbery in company – refugee background from Sierra Leone – relevance / causal link

- Refugee status; refugee camp: at **[32], [46]**. No evidence that offender's experience in Sierra Leone had any causal link to offending or otherwise adversely impacting on time in prison. Nevertheless, with those qualifications, the respondent had a strong subjective case: **at [63]** per Hoeben CJ at CL (N Adams J agreeing); ***Bugmy v The Queen* [2013] HCA 37; 249 CLR 571**.
- cf. Offender's experience as a refugee from Sierra Leone is not necessarily irrelevant because there is no evidence of a causal link between that experience and his offending: **at [72]** per White JA citing ***Perkins v R* [2018] NSWCCA 62 at [72]-[81]**.

***R v Qaumi* [2017] NSWSC 774** (Hamill J)

Manslaughter; Conspiracy murder; Solicit murder; Intent to murder - gangland violence - exposure to violence in Afghanistan – refugee background - Bugmy v The Queen (2013) 249 CLR 571

- Refugee background: **at [86]; [212].** Life of dislocation and trauma provides context in which offending to be evaluated. Involvement in crime and willingness to resort to violence, particularly gun violence, cannot be divorced from personal histories and exposure to violence in formative years: **at [73]**.
- Exposure to violence and dislocated family life caused psychiatric conditions; explains conduct and diminishes moral culpability to a degree: **at [83]**.
- Such history may mitigate sentence because "a background of that kind may compromise the person's capacity to mature and to learn from experience. It is a feature of the person's make-up and remains relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending": **at [124]-[125]; *Bugmy v The Queen* (2013) 249 CLR 571 at [37], [43].**
- "Social disadvantage ... frequently ... precedes the commission of crime." (***Bugmy* at [37]** citing Simpson J in *Kennedy v The Queen* [2010] NSWCCA 260 at [53].) The same is true of exposure to war, violence and dislocation. These matters, and their psychiatric impact, diminish culpability: **at [213]**.
- History and psychological impact may diminish general deterrence and impact on an assessment of moral culpability, but also heightens need for protection of the community: **at [208], [83], [98]; *R v Engert* (1995) 84 A Crim R 67**.

***R v Jenbare* [2016] NSWSC 1317** (McCallum J)

Manslaughter by substantial impairment - survivor of torture as political prisoner; trauma in refugee camps - incarceration will be harsher due to mental state

- Capacity to control substantially impaired by severe, chronic post-traumatic stress disorder, depression and cognitive impairment, as a survivor of torture as a political prisoner in Ethiopia and trauma in refugee camps in Kenya and Somalia: **at [2], [26]**
- Extensive physical and mental disabilities as a result of background. Incarceration will be harsher due to mental state and ongoing physical pain and disability. It was in prison in Ethiopia that primary trauma of extended torture was sustained: **at [39]-[40]; [46]**.

***SS v R* [2016] NSWCCA 197** (Bathurst CJ; Schmidt and Wilson JJ agreeing)

BE commit AOABH; AOABH – applicant had adjusted well to life in Australia – Appeal dismissed

- Whilst applicant's tragic background in early childhood is a relevant factor (***Bugmy* (2013) 249 CLR 571**), the applicant had adjusted well to life in Australia. In those circumstances,

whilst recognising weight must be given to deprived background, the Court is not persuaded sentence manifestly excessive: **at [76]**. Appeal dismissed.

- Born in Sierra Leone; aged 6 witnessed father's murder; refugee camp in Guinea for 10 years; 2009 migrated to Australia and successfully adapted to Australian life.

Victoria:

***Schanker v The Queen* [2018] VSCA 95** (Tate JA, McLeish JA and Kidd AJA)

Large scale drug offences – background moderates sentence with limits; no specific evidentiary nexus between deprivation and offending

- Very aware of applicant's sad shocking background. It does moderate sentence but there are limits to its ameliorating influence. There was no specific evidentiary nexus established between this deprivation and the offending in question: **at [229].**
- Refugee; early life in Sierra Leone marked by extreme violence and trauma; refugee camp.

***Chol v R* [2016] VSCA 252; (2016) 262 A Crim R 455** (Maxwell P, Redlich and Weinberg JJA)

Intentionally cause serious injury - moderation of deterrence and denunciation to reflect great hardship of formative years; at same time increasing importance of community protection.

- Refugee. Parents and siblings killed in Sudan; refugee camp seven years; illiterate; alcohol and drug abuse: **at [35]-[36].**
- Disadvantaged background properly taken into account by sentencing judge: moderation of principles of deterrence and denunciation to reflect deprivation, disadvantage and very great hardship suffered during formative years: **at [35]-[36].**
- Background disadvantage as reducing moral culpability while at same time increasing importance of protecting community: **at [35]-[36]; *Bugmy v The Queen* (2013) 249 CLR 571 at [44]**.

***The Queen v Ajil* [2015] VSC 725** (Beale J)

Manslaughter – refugee, traumatic childhood - post-traumatic stress disorder - reduced moral culpability

- Refugee, fled Iraq, suffered severe physical and sexual abuse in refugee camp: **at [30]-[31]**.

- Post-traumatic stress disorder from childhood experiences (and other mental health conditions) meant impaired mental functioning contributed to offending, reducing moral culpability and jail will be harder due to mental difficulties: **at [31]**.

***DPP v Vo* [2008] VSC 49** (Bell J)

Manslaughter - Impact of child-refugee experiences taken into account - first offender

- Taken into account in favour of offender are main points from expert report: at [24] -
  - Delayed trauma reaction due to hardship and persecution of childhood refugee experiences.
  - Traumatic childhood refugee experience likely have led offender to perceive violence to be particularly threatening, acting as trigger to violent past memories and over-reaction.
  - Inability to control violent reaction to deceased's behaviour traced back to horrific experiences as a child-refugee.
  - Disrupted education, lack of fluency in English and strained childhood likely impacted on ability to cognitively manage effectively in threatening situations.
- Finding that offender will not behave in this manner again and represents no continuing threat to safety of the community: **at [29]**.

***R v Tran* (1998) 96 A Crim R 53** (Victorian Court of Appeal, 3.9.1997)

Fraud – refugee status – presenting evidence

- While refugee status may be a relevant consideration, the particular factors of mitigation should be identified (such as disadvantaged background or the substantial contribution to the community, or whatever else may be said in the prisoner's favour), rather than a simple referral to fact the accused was a refugee i.e. entered the country with a well-founded fear of persecution: per Callaway JA at 59-60.