

NEW ISSUES IN REFUGEE RESEARCH

Working Paper No. 52

Complementary or subsidiary protection? Offering an appropriate status without undermining refugee protection

Jens Vedsted-Hansen

Professor
University of Aarhus Law School
Denmark

E-mail: jvh@jura.au.dk

February 2002

These working papers are issued by the Evaluation and Policy Analysis Unit, and provide a means for UNHCR staff, consultants, interns and associates to publish the preliminary results of their research on refugee-related issues. The papers are written in a personal capacity and do not represent the official views of UNHCR. They are also available online under 'Publications' on the UNHCR website, <http://www.unhcr.org>

ISSN 1020-7473

Introduction¹

The way of describing the problem of *de facto* refugee protection in itself discloses paradoxes inherent in the problem: First, reference to *de facto* refugee protection in the context of the formal elaboration of a European Community legal instrument may seem somewhat self-contradictory. Second, as indicated in the title of this paper, it is an issue of dispute whether the form of protection under examination here should be referred to as complementary or subsidiary.

I would suggest, however, that both of these paradoxes can be helpful in guiding the discussion. The former because a Common European Asylum System presupposes *de jure* harmonization of the various responses to forced migration, and the latter because European human rights *acquis* provides ample basis for adopting such common legal standards. In doing so, we have to understand the risk of undermining the principal position in international refugee law which is, and still should be, held by the 1951 Refugee Convention.

This risk should probably also be taken into account when discussing whether the protection system for *de facto* refugees is most adequately characterized as complementary or subsidiary. In this paper I shall attempt to point out the risks of undermining the primacy of the Refugee Convention, and at the same time suggest various mechanisms or safeguards that may contribute to reducing the risk. Furthermore, I shall discuss some issues that have to be settled in preparing the future community instrument, in terms of delimiting the beneficiaries of subsidiary protection and deciding the standards of treatment accorded to such persons.

Respecting Convention refugee status as the principal form of protection

When preparing the Community legal instrument dealing with subsidiary protection, it is of crucial importance to maintain the distinction towards refugee status according to the 1951 Refugee Convention and to operationalize that distinction so as to respect the scope of application of the Convention – thus avoiding that this global instrument of refugee protection be relegated to a subsidiary protection mechanism. I therefore fully agree with the statement made by ECRE (European Council on Refugees and Exiles), that a discussion of complementary protection has to start from an analysis of why such a form of protection is needed at all.

In the context of a common European Union asylum law and policy, the necessity to uphold the primacy of the Refugee Convention follows from the wording and the structure of article 63 of the EC Treaty, as amended by the Treaty of Amsterdam. This

¹ Paper presented at the Seminar ‘International Protection within one Single Asylum Procedure’, 23-24 April 2001, Norrköping, Sweden.

provision makes it clear that measures on asylum must be in accordance with the Refugee Convention, and that other international protection measures consequently have to be placed in a secondary position. To be sure, this was recognized by the Tampere European Council in October 1999. In Conclusion No. 13, reaffirming the importance the Union and member states attach to absolute respect of the right to seek asylum, the Council agreed to work towards establishing a Common European Asylum System, based on the *full and inclusive application of the Refugee Convention*, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of *non-refoulement*. When discussing Conclusion No. 14, which is indeed a more operational part of the Tampere Conclusions on a Common European Asylum System and which specifically mentions measures on subsidiary forms of protection, we therefore have to take the principle statement on the Refugee Convention as our point of departure.

Emphasizing the primary role of the Refugee Convention is not only a matter of principle or of advocacy groups' concern for the risk of further reducing the position of the Convention. It is not difficult to find empirical evidence of such risk, both by way of comparison between EU member states, and by drawing on experience from concrete jurisdictions.

If we contrast the differences of interpretation of the Convention refugee definition between member states and the low recognition rates under the Refugee Convention, with the fact that a large number of unsuccessful refugee claimants are allowed to stay on upon refusal of their asylum application in many member states – including those with low Convention status recognition rates – there is quite conclusive circumstantial evidence that the various arrangements for permission to remain are inseparably linked to the restrictive application of the Refugee Convention.

As a concrete example, I allow myself to refer to Denmark, where it can reasonably be posited that the favourable legal status for *de facto* refugees, introduced by the 1983 Aliens Act, has in practice, to some extent, contributed to reducing the application of the Refugee Convention. Even while Denmark cannot be counted among the member states adhering to a particularly restrictive interpretation of the Convention refugee definition, there are in fact various types of asylum cases demonstrable of a certain predisposition to grant asylum with *de facto* status rather than recognizing refugee status in full application of the Convention.

How can it then be ensured that a legal instrument on subsidiary protection will have relatively closed doors towards ordinary refugee status according to the Convention? In keeping with the Tampere Conclusion quoted before, it is first and foremost a matter of taking the primary commitment to the full and inclusive application of the

Refugee Convention seriously. This is not only a question of the contents of the future Community instrument on minimum standards for the application of the Convention refugee definition, but also remains a challenge to the practical implementation of such an instrument.

To be operational in this respect, I would suggest certain procedural safeguards, as well as additional clarification in connection with the legal instrument dealing with subsidiary protection that certain types of cases cannot come within the scope of that instrument and the status it establishes. More specifically, it might be stipulated that if a certain degree of risk of human rights violations of a certain severity has been established, the decision of the case can only be the granting of *de facto* refugee status - i.e. subsidiary protection - if the decision-making authority is able to provide concrete reasons for the non-applicability of the Refugee Convention, such as the lack of relevant reasons for the risk of persecution. This again raises the issue of procedural safeguards to which I shall discuss in the next sections.

Precisely the reason why the term subsidiary protection may seem acceptable and even preferable to the notion of complementary protection, necessitates prudence in order to avoid that the subsidiary solution becomes primary after all, to the detriment of the truly principal refugee protection instrument.

Delimitation towards temporary protection

The structure and wording of article 63 (2) (a) of the EC Treaty may, particularly in some EU language versions, raise doubts as to the relationship between minimum standards for *temporary protection* to displaced persons on the one hand, and minimum standards for persons who otherwise need international protection, i.e. subsidiary protection, on the other.

The formal issue has been settled in subsequent policy documents such as the 1998 Commission Communication 'Towards an Area of Freedom, Security and Justice', the 1998 Action Plan of the Council and the Commission, and the 1999 Commission Working Document 'Towards Common Standards on Asylum Procedures' – all making it clear that two separate measures have to be adopted on temporary protection and subsidiary forms of protection, respectively. Nonetheless, it may be relevant to address the issue of the distinction between temporary protection and subsidiary protection here, because terminology has a critical role in this policy area, and some substantive confusion might occur even under separate Community instruments dealing with the two different kinds of minimum standards.

As it appears from the Commission's May 2000 Proposal for a Directive on minimum standards for giving temporary protection, this legal mechanism will be reserved for events of *mass influx* of displaced persons. Here, the Commission made it clear that

the proposed mechanism is not a third form of protection, alongside refugee status on the basis of the Refugee Convention and subsidiary protection. Instead, temporary protection must be seen as a tool enabling the asylum system to operate smoothly and not collapse under a mass influx. This is the rationale behind the possibility, as proposed by the Commission, that processing individual asylum applications may be suspended for a certain period while temporary protection is being delivered on a collective basis.

On the contrary, subsidiary protection is a legal mechanism which presupposes that a decision has been made as to the individual protection needs, and not least that it has been definitively decided that the nature of such protection needs falls outside the scope of application of the Refugee Convention. Only under such circumstances does it make true sense to describe this form of protection as subsidiary, and only then is it possible for member states not to implement the Refugee Convention standards of treatment.

Criteria for the delimitation of beneficiaries of subsidiary protection

While I have already emphasized the need to keep the door closed towards Convention refugee status, the situation is somewhat different as regards the delimitation of subsidiary protection towards less well-founded claims for protection. Still alluding to the building metaphor, it could perhaps be said that subsidiary protection should have a partly open door downwards, i.e. to applications that are not based in already recognized human-rights related protection needs.

To some extent, the very idea of adopting minimum standards for persons who *otherwise* need international protection mandates a certain flexibility, allowing for the dynamic interpretation of the legal instrument so as to ensure that the definitional provisions be applied in accordance with the evolving application of the international human rights norms underlying the notion of need for protection. In other words, the personal scope of application of the subsidiary protection instrument must be framed in such a manner that will keep it in line with the present-day conditions guiding the development of prohibitions of *refoulement* under relevant human rights treaties, such as the European Convention on Human Rights and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The reference to this human rights framework of *non-refoulement* obligations may require some qualification. First, keeping the personal scope of subsidiary protection open does not imply wide-open doors for cases of a purely humanitarian or compassionate nature. Such cases must generally be considered to fall outside the scope application of the subsidiary protection instrument, partly for pragmatic reasons of member states' willingness to expand the scope of subsidiary protection, partly because some restraint in that respect can be assumed to be inherent in the wording of

Article 63 (2) (a) of the EC Treaty. The need for international protection as prerequisite for the Community competence to adopt the instrument, can most naturally be construed as implying some basis in international legal obligations mandating such protection.

Having thus excluded the purely compassionate grounds from the category of subsidiary protection, I would like to stress that the division-line may in some instances be unclear, just as it may be changing over time as a result of the evolving interpretation of *non-refoulement* obligations under human rights treaties.

On the contrary, it may be relevant to mention what is often seen as *practical reasons* for the non-deportability of persons having been denied recognition as refugees under the Refugee Convention. While it is evident that the unfeasibility of deportation due to merely logistical problems of transportation does not raise a problem of human rights protection (unless where the person is detained), it seems important to be aware of the fact that barriers to deportation due to the unwillingness of asylum seekers' state of nationality to issue travel documents may under some circumstances be indicative of the failure of that state to protect its citizens. Indeed, such failure might even warrant a reconsideration of the claim to Convention refugee status, and it should at least be clear that such reasons for non-deportability cannot *prima facie* be excluded from an instrument of subsidiary protection.

Whatever the delimitation of the beneficiaries of subsidiary protection be, the viability of the future Community instrument depends crucially on its uniform application by EU member states, in order to avoid successful legal challenges to the operation of the Dublin Convention and its successor instrument under Article 63 (1) (a) of the EC Treaty. This presupposes not only a certain level of detail in the definitional provisions of the instrument on subsidiary protection, but also the full adherence by all EU member states to the evolving interpretation of the human rights norms underlying the definition of beneficiaries in that protection instrument.

Duration and treatment under an appropriate status

The issue of an appropriate status raises key questions concerning the standards of treatment for those persons being granted subsidiary protection, as well as the duration of such protection. As regards the latter, it can be assumed that international law leaves a rather wide discretion for States, in so far as they respect the various prohibitions of *refoulement*. The very purpose of harmonization at the EU level, however, clearly necessitates that the question concerning duration of protection be dealt with in the future instrument, in order to prevent secondary movements to those member states which might otherwise offer more favourable conditions of residence.

In this connection, it is hard to see any reason why the subsidiary protection instrument should provide longer duration of protection, or more facilitated access to permanent residence, than what may be the case for recognized Convention refugees, considering the cessation clauses in Article 1 C of the Refugee Convention. On the contrary, it is arguable that subsidiary protection can be brought to an end under more flexible criteria than asylum for Convention refugees, because human rights prohibitions of *refoulement* may often cease to apply without the relatively demanding conditions of fundamental change in the country of origin that are inherent in Article 1 C of the Refugee Convention.

Last, but certainly not least important, we have to address the question of the substantive standards of treatment that are to be accorded to the beneficiaries of subsidiary protection. On the one hand, organizations such as ECRE and ILPA have proposed a level of rights equivalent to the rights granted to persons recognized as Convention refugees, arguing that there are no legal or logical reasons to grant subsidiary protection beneficiaries fewer or lesser rights.

Similarly, the United Nations High Commissioner for Refugees has supported the view that the standards of treatment under subsidiary protection should be assimilated as much as possible to those applicable to Convention refugees, because the level of rights and benefits should be based on their needs rather than on the grounds on which they have been granted protection. As the other extreme, it might appear tempting to adopt vague standards, leaving wide discretion to member states to decide on the entitlements of beneficiaries according to national standards. I believe that this issue confronts us with a genuine dilemma which deserves further examination.

Even while assuming that only persons genuinely falling outside the Refugee Convention definition will be granted subsidiary protection, and thus not entitled to the standards laid down in the Refugee Convention, international law clearly does not leave States too much freedom of action in this respect. Apart from a few rather specific entitlements under the Refugee Convention, most of its civil and social-economic rights are similarly protected in general human rights law, such as the European Convention on Human Rights and the UN Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights. In addition to these general human rights there may be prohibitions of discrimination impacting the standards of treatment for beneficiaries of subsidiary protection.

By contrast, it might perhaps be worthwhile counting on certain differences of treatment between Convention refugees and those granted subsidiary protection, albeit not too significant differentiation. My reason for mentioning this is the assumption that, if *de facto* refugees are accorded exactly the same rights as Convention refugees, the recognition of Convention refugee status may seem less relevant in the sense that it does not make much immediate difference in everyday life. This may weaken the attention paid by decision-makers, to the detriment of both

individuals that may inappropriately be refused recognition of Convention refugee status, and of the Refugee Convention itself. The risk inherent in differentiated treatment is, of course, that lower standards under subsidiary protection may operate as an indirect incentive for States to prefer that form of protection, also to the detriment of the Refugee Convention as the principal international protection instrument.

Procedural safeguards in a single procedure

As mentioned earlier, I strongly believe that procedural safeguards are needed in order to reduce the risk of undermining the position of the Refugee Convention as the indirect result of an overly inclusive application of subsidiary protection. While several procedural safeguards may be relevant to this end, special attention must be drawn to the obligation to give *reasons for negative decisions*, as stipulated by Article 7 (d) of the Commission's Proposal for a Directive on minimum standards on procedures for granting and withdrawing refugee status. The decision to refuse recognition of Convention status, and granting subsidiary protection instead, must be considered such negative decisions.

If a single procedure is established in order to examine simultaneously the Convention refugee status as well as the grant of subsidiary protection, then it will be of similarly critical importance that persons receiving the latter form of decision are entitled to a *separate appeal* claiming Convention refugee status (cf. Article 32 of the proposed directive). Still, however, a single procedure may involve the risk of downgrading the recognition of Convention refugee status, as recognized in the Commission Communication (p. 8). Hence, establishing a single procedure, with its evident inherent advantages, also enhances the need to uphold and safeguard the principal role of recognition of Convention refugee status.