

EUROPEAN SERIES

Volume 1 – No 3 – 1995/09

An Overview of Protection Issues in Europe

**Legislative Trends and Positions
Taken by UNHCR**

United Nations High Commissioner for Refugees

Geneva
September 1995

Table of Contents

An Overview of Protection Issues in Europe – Legislative Trends and Positions Taken by UNHCR

Foreword

Chapter I Non-Arrival Policies

Introduction: the Issue

Section A Visa Requirements

Developments

UNHCR's Position

Section B Carrier Sanctions

Developments

UNHCR's Position

Chapter II Developments on Procedures

Introduction: the Issue

Section A Admissibility Phase / Access to the Procedure Criteria for dealing with Asylum Applications in the Admissibility Procedure

Developments

UNHCR's Position

1. First Asylum/Safe Third Country

Introduction: the Issue

The Use of First Asylum/Safe Third
Country Notions and Procedural Issues

Developments

UNHCR's Position

Procedural Issues

Developments

UNHCR's Position

Effective Protection

Developments

UNHCR's Position

2. The Dublin Convention/ Responsibility for Examining Asylum Requests

Introduction: the Issue

Developments

UNHCR's Position

Section B

Procedures on the Substance of the Claim in Accelerated Procedures

Criteria for dealing with Asylum Applications in Accelerated Procedures

Introduction: the Issue

1. Manifestly Unfounded or Abusive Applications

Developments

UNHCR's Position

Developments concerning the Definition of Manifestly Unfounded or Abusive Applications

Developments relating to Clearly Fraudulent Applications

Developments concerning Applications not related to Granting of Refugee Status

UNHCR's Position

2. Procedural Guarantees for Manifestly Unfounded Procedures

Developments

UNHCR's Position

Access to UNHCR and NGOs for Preliminary Counselling, to Legal Assistance, and Provision of Information

Developments

UNHCR's Position

Interpretation

Developments

UNHCR's Position

Interview by Qualified Staff

Developments

UNHCR's Position

Determination by a Competent Authority

Developments

UNHCR's Position

Appeal by Independent Authority

Developments

UNHCR's Position

Suspensive Effect of Appeal

Developments

UNHCR's Position

Groups with Special Needs

Developments

UNHCR's Position

3. Safe Country of Origin

Developments

UNHCR's Position

4. Serious Crimes

Developments

UNHCR's Position

5. Internal Flight/Relocation Alternative

Developments

UNHCR's Position

6. Time Limits and Undocumented Asylum-Seekers

Introduction: the Issue

Time limits

Developments

UNHCR's Position

Undocumented Asylum-Seekers

Developments

UNHCR's Position

Chapter III Developments on the Substance of Refugee Status Determination

Section A The Application/Interpretation of Article 1 of the 1951 Convention or Inclusion Clauses

Introduction: the Issue

1. Agents of Persecution

Developments

UNHCR's Position

2. Internal Flight/Relocation Alternative

Developments

UNHCR's Position

3. Civil War and Other Internal or Generalised Violence

Developments

UNHCR's Position

4. Gender-related Persecution/Membership of a Social Group

Developments

UNHCR's Position

Section B Exclusion and Cessation of Refugee Status
Introduction: the Issue

1. Exclusion

General Application

Developments

Membership of Groups that Commit Crimes/Advocate Violence

Developments

Serious Non-Political Crimes

Developments

UNHCR's Position

2. Cessation

The Distinction between Cessation, Exclusion, Safe Countries of Origin and
Article 33 Paragraph 2

Developments

Procedural Issues

Developments

The Content of Cessation Clauses

Developments

UNHCR's Position

Section C Legal Elements in Assessing a Claim to Refugee Status:
Evidence, Burden and Standard of Proof and the Link to Credibility
Introduction: the Issue

Evidentiary Issues

Developments

UNHCR's Position

The Standard of Proof

Developments

UNHCR's Position

Credibility

Developments

UNHCR's Position

Benefit of the Doubt

Developments

UNHCR's Position

Chapter IV *Non-Refoulement*
Introduction: the Issue

Developments

UNHCR's Position

Scope and Content of the *Non-Refoulement* Principle

Developments

UNHCR's Position

Safe Third Country and Indirect *Refoulement*

Developments

UNHCR's Position

Index

References

FOREWORD

The European Series vol. 1 no. 3 (1995) entitled “*an Overview of Protection Issues in Western Europe: Legislative Positions Taken by UNHCR*” was written to identify and examine some of the most important asylum issues currently being faced in Western Europe. It described the main legislative trends, which had evolved over the years, and outlined the position that UNHCR had taken on these issues. The booklet proved to be an invaluable reference tool for all those working with refugee protection issues, well beyond the scope of UNHCR staff, encompassing government officials, NGOs and scholars alike. Its concise and comprehensive coverage of UNHCR’s position, and its readability and timely analysis of trends in legislation and jurisprudence relating to refugee law are the principal reasons why it met such high demand.

Therefore, we were impressed to write this updated version to the 1995 edition. This revised booklet distinguishes itself from the previous version by being broader in scope on the legal issues. It covers a number of topics that are emerging for reasons including as a result of the development of more sophisticated asylum systems in Europe. In addition, since 1995, Central and Eastern European countries are gradually becoming asylum countries, and are therefore having to adopt legislation, and build institutional capacity to meet their obligations towards international refugee protection. For this reason, we have decided to expand the geographical scope of the booklet by including legislative developments and certain topics that are specific to these regions.

As in the 1995 version, this booklet reviews recent developments from two aspects: procedure and substance. Within the various chapters, each section deals with one particular issue, starting with the analysis of legislative provisions, and/or jurisprudence and administrative practice, which have been adopted since 1995, and which highlight interesting examples of a particular trend. The main objective is to present the Office’s views and positions, in particular when they are at variance with the legislative provisions, jurisprudence and administrative practice.

However, this booklet does not contain an exhaustive description of the legislation of each country, nor has it relied extensively on draft legislation.

There are, of course, other important asylum issues and trends affecting Europe, which we plan to address subsequently, including, *inter alia*, socio-economic rights for asylum-seekers and refugees, complementary/alternative forms of protection, and migration control mechanisms, which affect refugee protection.

We hope that this revised booklet will continue to serve two main purposes: first, as a reference and guide to UNHCR’s position on current refugee protection issues; and second, as a means to ensure and enhance consistency of approach by UNHCR and state actors.

Currently, many European countries are preparing new asylum and refugee legislation, and developing their jurisprudence and administrative practice. We hope that this booklet, which has been published in the European Series in order to secure the widest possible circulation, will serve as an appropriate reference material in this connection.

The task of producing this text was assigned to Mr. Michael Petersen at UNHCR Headquarters. He was assisted by a number of individuals. He was assisted by Ms. Deborah Elizondo, Ms. Christine Schreiner and Ms. Anne-Birgitte Krum Hansen of UNHCR. The bulk of the finalisation was entrusted to an external consultant, Dr. Colleen Thouez. The final version was reviewed by Mr. Jean-Francois Durieux, Mr. Volker Turk, Ms. Janice Marhsall, Mr. Walter Brill, Ms. Nathalie Karsenty and Ms. Shahrzad Tadjbakhshah at UNHCR Headquarters.

Anne Willem Bijleveld
Director
Bureau for Europe

Erika Feller
Director
**Department of International
Protection**

CHAPTER 1

Non-Arrival Policies

Introduction: the Issue

With unregulated migration on the rise in recent years, states have increasingly had recourse to measures aimed at preventing persons not possessing the documentation required for entry from reaching their respective territories. To the extent that such measures apply outside the territories of the states of destination they have been qualified as “non-arrival policies”.

One traditional such measure is the imposition of visa requirements on foreign nationals. Further to making increased use of visa requirements, states have recently taken a number of steps to enforce such requirements as well as those relating to the possession of other valid travel documentation. Measures to this effect include the imposition of sanctions on carriers. Air, and more recently other forms of transport carriers, are penalised for bringing persons who are without the required visa and/or without (or with insufficient) other travel documentation. More recent trends for enforcing immigration control measures have included the out-posting of immigration officers in countries of origin and intermediate countries, whose task includes assisting the local authorities and airlines in assessing the validity of visas and travel documents.

Such measures could prevent persons at risk of persecution and ill treatment from leaving their home countries, and for those who have already left, may, unless carefully crafted, result in depriving persons in need of international protection from access to such protection. Eventually, these measures may result in *refoulement*.

Section A Visa requirements

Developments

The most common example of non-arrival policies is the introduction of visa requirements. Currently, European countries impose visa requirements on nationals from most countries where people needing international protection generally originate. Moreover, states are increasingly enforcing visa requirements by having airline personnel verify upon departure that people concerned are in possession of valid visas. Carriers are sanctioned when they bring persons not possessing the necessary visas and/or other travel documentation.

Nevertheless, the negative effect of visa requirements on refugee protection has been mitigated in some European countries. For instance, some countries' legislation and practice allow for the issuance of so-called “humanitarian visas”. Humanitarian visas are issued in countries of origin to persons at risk of persecution or ill treatment, or in intermediate countries to persons who cannot find adequate protection there.

By contrast, the rigid application of visa requirements by other European countries to nationals of countries where serious human rights violations occur has led to outcomes that undermine international refugee protection.

UNHCR POSITION

While it is legitimate for states to control immigration, they also have a collective responsibility to extend international protection to refugees and asylum-seekers. When immigration control measures, exercised outside the territory of the state of destination, interfere with the ability of persons at risk of persecution to gain access to safety and obtain asylum in other countries, then states' actions are contrary to their international obligations towards refugees.

The imposition of visa requirements is a traditional and legitimate form of exercising immigration control. However, when combined with enforcement measures such as carrier sanctions (see below), visa requirements may be detrimental to international refugee protection. Indeed, the combination of visa requirements and carrier sanctions makes it practically impossible for persons originating from certain countries to enter a European state. Likewise, if applied inflexibly, i.e. not allowing for exceptions for people who may otherwise be deprived of international protection, visa requirements may infringe upon states' obligations to provide international protection to people in need of such protection.

Accordingly, it would be desirable for states not to impose visa restrictions on nationals of countries where considerable human rights violations occur. At least, states should allow for the possibility of exemptions from visas or for the issuance of visas for people who can show that if they were unable to leave their country of origin, they would be at risk of persecution or ill treatment. For persons who find themselves outside their country of origin, these possibilities should also exist. They should apply in cases where the inability to leave an intermediate country means such persons would be deprived of access to international protection or at risk of *refoulement*.

These requirements are even more important now in view of the 1992 Resolution on Manifestly Unfounded Applications for Asylum, adopted by Ministers responsible for immigration of the Member States of the European Community. This Resolution effectively considers claims lodged by applicants who have used false documents as manifestly unfounded.

Section B Carrier Sanctions

Developments

Over the last decade or so, European countries have gradually introduced a legal basis for air carrier sanctions to be imposed on transporters bringing in aliens without proper travel documentation and/or entry permits. Penalties often include the duty to return aliens who have been refused entry, and to assume liabilities for the costs associated with return. In many cases, the carrier is liable regardless of fault. The majority of European countries now have provisions dealing with air carrier liability.

European countries that penalise air carriers include: Austria, Belgium, Croatia, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, the Netherlands, Poland, Romania, the Russian Federation, the Slovak Republic, Slovenia, Ukraine and the United Kingdom.

Some states allow exemptions from liability where there has been no carrier negligence, such as France and Sweden, or where it is determined that the airline personnel has taken "reasonable precautions" to verify if the aliens were in possession of valid travel documents (as is the case in Belgium).

On the other hand, in some countries, proof of negligence is not necessary. For instance, the German Aliens Act stipulates that carriers are only allowed to transport aliens, including asylum-seekers, with proper documentation to Germany. Carriers are obliged to make the necessary controls. If a carrier infringes this provision, the Ministry of the Interior can issue an injunction order not to carry any persons without proper documentation to German territory. Injunction orders are issued for a specific time period. They can include a warning that a so-called coercive fine or compulsory charge ("*Zwangsgeld*") will be imposed if the carrier transports aliens to Germany contrary to the injunction order. The carrier may be fined a larger sum in the case of negligence and/or intentional act against an injunction order.

The imposition of fines on airline companies also exists at the international level. In 1988, Standards 3.34 and 3.36 of Annex 9 to the Chicago Convention on Civil Aviation was amended. Annex 9 provides for the obligation of carriers to return passengers to their points of departure if found inadmissible. However, the operators shall not be fined unless there is evidence to suggest that the carrier was negligent in taking precautions to see that the passenger has complied with the documentary requirements for entry into the receiving state. Standard 3.36 places the emphasis on the control of the possession of the required documents but not on its authenticity. These provisions are significant as they shift the burden on states to prove that the operators were negligent.

The Schengen Implementation Agreement adopted by European Community Member States in 1990, also provides for carrier sanctions. However, there is no *provisio* relating to negligence.

Increasingly, sanctions are imposed on transport vehicles other than airline carriers. The United Kingdom, for instance, has expanded carrier sanctions by introducing penalties on any 'vehicle, ship or aircraft' found to bring 'clandestine entrants' to the country.

UNHCR POSITION

Most states with carrier sanctions, including all European states, have ratified the 1951 Convention relating to the Status of Refugees. They are thereby obligated to ensure refugees a minimum standard of protection and respect for their rights. These include *non-refoulement*, or no return to persecution, which has been broadly understood to require protection both at the border and within state territory, irrespective of the formal act of status recognition (See UNHCR's Executive Committee (EXCOM) Conclusion No. 6 on *Non-Refoulement* (1977), paragraph c)).

UNHCR believes that careful harmonisation of standards of application, treatment and implementation such as accelerated procedures rather than the use of carrier sanctions is a better approach to addressing unfounded claims.

If states have recourse to carrier sanctions they should be implemented in a manner which is consistent with international human rights and refugee protection principles, notably Article 14 of the Universal Declaration of Human Rights. According to Article 14, "everyone has the right to seek and to enjoy in other countries asylum from persecution".

States should not sanction carriers unless they have knowingly brought into the state a person who does not possess a valid entry document, nor in the case of persons who have plausible claims for refugee status (or otherwise need

international protection). Thus, unless the carrier has shown negligence in checking documents, states should not apply sanctions. Nor should carriers be sanctioned in cases where: 1) an asylum claim is rejected on first asylum/safe third country grounds; 2) an asylum claim is not considered as manifestly unfounded; 3) the asylum-seeker is recognised as a refugee; or 4) s/he is granted stay on other humanitarian grounds. This shifts the onus of status determination on the state rather than the carrier. Transport companies should not be required to make such judgements since their personnel are neither qualified nor inclined to determine the validity of documentation, and/or to identify those with well-founded claims for refuge and asylum.

Chapter 2

Developments on Procedures

Introduction: the Issue

There has been growing confusion in states' practice between admissibility procedures and accelerated procedures (see below). The aim of admissibility procedures is to separate claims, which require consideration on the substance from those which do not. Claims, which would not involve an examination on the substance would, for example, include cases for which another state has agreed to consider the claim in substance. Admissibility procedures do not look into the substance of the claim. Accelerated procedures, on the other hand, deal with the substance of the claim. They do so in a simplified and expedient manner. In practice, however, some cases, which should have been evaluated in substance after admission to an accelerated procedure, have erroneously been considered under the decision on the admissibility of an asylum application. For instance, decisions on the abusive or manifestly unfounded character of a claim, which could possibly be considered within the accelerated procedure, are in some countries mistakenly being looked at during the admissibility stage.

Section A Admissibility Phase / Access to the Procedure Criteria for dealing with Asylum Applications in the Admissibility Procedure

Developments

Article 2 of the Resolution on Manifestly Unfounded Applications for Asylum adopted by the Immigration Ministers of the European Communities on 30 November and 1 December 1992 allows states to operate admissibility procedures under which applications may be rejected very quickly on objective grounds. The Resolution on a Harmonised Approach to Questions Concerning Host Third Countries also adopted by the Immigration Ministers of the European Union on 30 November and 1 December 1992 allows for identification of a host third country prior to the substantive examination of the claim. The Resolution on Minimum Guarantees for Asylum Procedures adopted by the EU Council of Ministers on 20 June 1995 allows states to apply, prior to the decision on admission, special procedures to asylum claims submitted at the border to establish whether or not the application for asylum is manifestly unfounded.

The three most prominent instances in which states refuse access to the determination procedure on formal grounds prior to an examination of the substance of the claim, are: 1) cases of undocumented asylum-seekers and asylum-seekers who are falling outside established time limits, 2) first asylum/safe third country cases, and 3) Dublin Convention cases. The European Commission's draft Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (draft Directive on minimum standards for asylum procedures) of 20 September 2000, provides minimum standards and binding procedural guidance in the instance that Member States would adopt common concepts and practices related to the asylum procedure. Its provisions include criteria

for dismissing applications as inadmissible, which are the same as numbers 2) and 3) enumerated above.

In some countries, the non-respect of time limits for filing asylum applications and the fact that an asylum-seeker is undocumented may result in the applicant being refused access to an examination of the substance of the claim in the determination procedure. (For further information, refer to Section B 6 on Time Limits and Undocumented Asylum-Seekers.)

In addition, as mentioned in Section A 1 on First Asylum/Safe Third Country, in a number of states, first asylum/safe third country cases are examined in admissibility procedures preceding a substantive examination of the claim.

Last, countries that are signatories of the Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities (the Dublin Convention) of 1990, may also transfer claims to the appropriate country without a substantive examination of the claim.

UNHCR POSITION

The Office recognises that – depending on the type and size of influx a state is being faced with - there may be a need to distinguish between asylum applications that require an examination based on the substance of the claim, and those that do not. While an application for asylum may be considered as inadmissible and, therefore, refused access to the substantive determination procedure on the grounds that an asylum-seeker has, or could have, found protection elsewhere, those which are being denied on the basis that the claim is “manifestly unfounded” or not in possession of valid travel or identity documents or applying outside time limits must have a consideration on the merits and therefore must have access to a procedure, albeit in some cases a truncated one. (Refer to Chapter II, Section B 6 relating to Time Limits and Undocumented Asylum-Seekers under Accelerated Procedures.)

It is in accordance with UNHCR’s position that Dublin cases and first asylum/safe third country cases may be refused access to the status determination procedure on formal grounds - provided the conditions mentioned in the Sub-section on the Dublin Convention are fulfilled. (See Chapter II, Section A 2 on the Dublin Convention.)

Because of his/her vulnerability, a separated child should not be refused access to the territory and his/her claim should always be considered under the normal refugee determination procedure.

1. First Asylum/Safe Third Country

Introduction: the Issue

The notions of first asylum/safe third country deny an asylum-seeker an analysis of the substance of his/her claim on procedural grounds in a particular state, on the basis that s/he already found or could have found protection in another country. While the two notions are often used interchangeably, there is an important

distinction: the first asylum country notion refers to situations where asylum-seekers have already found protection in another country as asylum-seekers or because they have received asylum in that country. The notion of “safe third country” should be used to cover instances where it is deemed that the applicant could and should have requested asylum in what is considered a “safe third country”.

The problems encountered in state practice include a too broad definition of the notions, allowing, for example, for sending asylum-seekers to intermediate countries where they may be at risk of *refoulement* because of inadequate procedural guarantees surrounding the asylum procedure or erroneous application of the criteria for eligibility of asylum. Another problem area related to the application of the notions with regard to countries, which have not consented to readmit the applicant. The result may be the creation of so-called “orbit situations”, in which no state considers itself responsible for the determination of an asylum claim, and which may eventually lead to *refoulement*. Moreover, in some countries, the procedural guarantees relating to the determination of whether these notions apply are inadequate, for example, by not allowing for an appeal with suspensive effect against negative decisions.

(a) The Use of the First Asylum/Safe Third Country Notions

Developments at the National Level

First Asylum Country

Whereas the extended use of the safe third country notion is a more recent development, many European countries have been applying the concept of first asylum country for a number of years. A few European states, however, still do not apply it.

Depending on the country in question, an asylum-seeker may be rejected on first asylum country grounds, for example, when, in another country, s/he has: applied for asylum; been granted asylum; been granted refugee status; or enjoys protection from persecution in another state.

Safe Third Country

According to the country in question, asylum applicants may be rejected on safe third country grounds, for example, if: the applicant did not arrive directly from his/her country of origin or the country in which s/he alleges persecution; s/he resided in a third country prior to seeking asylum in another country; s/he passed through a country party to the 1951 Convention; s/he did not risk persecution in the transit state; or s/he was protected from *refoulement* in the transit state.

Countries that do not apply the notion of safe third country are the Czech Republic and France. France discontinued the practice of dealing with safe third country cases in border procedures following a judgement of the Council of State in 1996. Further, following legislative reforms in May 1998, France abandoned the use of the safe third country concept for requests made in the territory (except with respect to Dublin cases).

Developments at the European Level

The Resolution on a Harmonised Approach to Questions concerning Host Third Countries, adopted by the Immigration Ministers of the EU in 1992, lays down four fundamental requirements for determining a safe third country. The first criterion stipulates that, in those third countries, the life or freedom of the asylum applicant must not be threatened, within the meaning of Article 33 of the 1951 Convention. The latter requirement is formulated in even broader terms in the Council of Europe Recommendation containing Guidelines on the Application of the Safe Third Country concept, which was adopted by the Committee of Ministers of the Council of Europe in 1997. The Recommendation refers to the need for the third country to observe "...international human rights standards as established in regional and universal instruments..." (One such standard is "...full implementation of the 1951 Convention".)

The second criterion stated in the Resolution is that the asylum applicant must not be exposed to torture or inhuman or degrading treatment in the third country.

The third criterion in the Resolution specifies that it must either be the case that the asylum applicant has already been granted protection in the third country or has had an opportunity, at the border or within the territory of the third country, to make contact with that country's authorities in order to seek their protection, before approaching the Member State in which s/he is applying for asylum, or that there is clear evidence of his/her admissibility to a third country. On the latter point, the Council of Europe Recommendation adds that there must be clear evidence of the admissibility of the asylum-seeker to a third country, and that the admissibility must be the result of the asylum-seeker's personal circumstances, including his/her prior relations with the third country.

And, the fourth criterion listed in the Resolution is that the asylum applicant must be afforded effective protection in the safe third country against *refoulement*, within the meaning of the 1951 Convention. The Council of Europe Recommendation also stipulates that the third country should provide the possibility to seek and enjoy asylum.

The draft Directive on minimum standards for asylum procedures outlines common standards for the application of certain concepts and practices, such as the safe third country concept. Where Member States wish to dismiss an application as inadmissible on the basis of the safe third country concept, they must abide by the common principles for designating a country as a safe third country as well as the common requirements for applying the concept in individual cases. (For further details on the draft Directive, see Section B on Accelerated Procedures.)

UNHCR POSITION

UNHCR has taken the view that it is legitimate, and may be useful, for states to establish parameters for the purpose of identifying the countries where it would appear reasonable for asylum-seekers to request asylum, and which states could reasonably be asked to assume responsibilities for the individuals concerned. UNHCR's Executive Committee has adopted two Conclusions on this issue: Conclusion No. 15 on Refugees without an Asylum Country, and Conclusion No. 58

on the Problem of Refugees and Asylum-seekers who move in an irregular manner from a country in which they have already found protection. Both of these Conclusions set out basic criteria for making such decisions. However, because of the extended scope given by some countries to the basic concepts, UNHCR is firmly of the view that the country of first asylum/safe third country notions cannot be considered principles of international refugee law. In other words, they are not binding but rather notions or concepts applied in state practice, which, as pointed out above, may in some circumstances be useful for the purpose of rationalising asylum systems. States must avoid returning asylum-seekers to countries through which they passed without the receiving state's agreement, both because of the risk of *refoulement* and orbit situations and because of the need for international solidarity and burden sharing.

(b) Procedural Issues

Developments

Channelling into Admissibility/Accelerated Procedures

According to the Resolution on Minimum Guarantees for Asylum Procedures, adopted by the EU Council of Ministers in 1995, an asylum-seeker may not be able to remain in the territory until a decision has been taken on appeal if the safe third country notion applies. Further, rather than a written communication explaining that the application has been rejected and its underlying reasons, this information may be transferred orally. According to the Resolution, upon request, the decision will be confirmed in writing. The third country authorities must, where necessary, be informed that the asylum application was not examined as to substance.

A number of countries, such as Bulgaria, Germany, Hungary and Lithuania (draft legislation), examine first asylum/safe third country cases in admissibility procedures, which do not involve an examination of the substance of the claim.

In other countries, such as Estonia, the Netherlands and Poland, safe third country cases may be considered as manifestly unfounded and accordingly channelled into the special accelerated procedures foreseen for such claims.

Channelling first asylum/safe third country cases into admissibility and accelerated procedures normally entails that fewer safeguards than in the normal procedures are provided. With respect to appeals, for instance, in Germany and Latvia (as regards applicants coming from countries included in their respective safe third country lists (see below)), applicants rejected on safe third country grounds cannot appeal against rejection. And, in some countries, such as Estonia and the United Kingdom, the possibility of appeal exists, but without suspensive effect.

According to the Council Resolution on Minimum Guarantees for Asylum Procedures, asylum applications made at the border, where the safe third country notion is applicable, may be decided by the authorities responsible for border controls without transferring the case to the body normally competent to decide on asylum claims. In Italy, whilst there is no manifestly unfounded procedure, certain types of applications such as first asylum/safe third country may be decided upon by the police. In Germany, decisions to return applicants applying at the border to

countries appearing on the German safe third country list are decided by the Border Police.

Safe Third Country Lists

Safe third country lists have been introduced as a mechanism for applying the notion of safe third country. Their usage reflects another recent trend. Countries on this list are presumed to be “safe”, and therefore asylum applicants arriving from these countries are usually returned there without any further assessment as to the safety of those countries either generally or for the individual concerned. There is normally no possibility of rebutting the presumption of safety at first instance. (There have been some exceptions, as in the case of Bulgaria, where there exists the possibility to appeal to the Minister of the Interior.)

Bulgaria, Finland, Germany, Latvia and Slovakia are examples of countries that now have such lists. In the United Kingdom, under a provision of the 1999 Asylum Act due to enter into force in October 2000, all states party to the Dublin Convention, as well as Norway, Switzerland, Canada and the United States, will automatically be considered safe countries of asylum. Legislation in the Czech Republic also has provisions for the use of the concept of safe third country, but it does not have provisions for a safe third country list. In practice, however, the Czech Department of Asylum and Migration Policy has drafted such a list, which serves exclusively as an internal document.

The criteria for inclusion of countries in these lists vary widely. The German safe third country list, for example, includes only EU and a few neighbouring Central European countries. At the other end of the spectrum, Latvia’s interpretation of safe third country is considerably broader, designating all countries that have acceded to the 1951 Convention as safe third countries.

UNHCR POSITION

Regarding Channelling into Admissibility/Accelerated Procedures and Safe Third Country Lists

The analysis of whether an asylum-seeker can be sent to a first asylum/safe third country for determination of the claim, must be done on an individual basis. The underlying question is whether that country is safe for this asylum-seeker. It is not, therefore, a “generic” question which can be answered for any asylum-seeker in any circumstances.

The applicant should be given the possibility of rebutting any presumption that s/he has found or could have found protection. In order for that rebuttal to be effective, the applicant should have the possibility of obtaining an appeal surrounded by the same procedural safeguards as those recommended for procedures for manifestly unfounded claims, before rejection at the frontier or forcible removal from the territory. Indeed, the assessment of whether the first asylum/safe third country notions apply may be just as complex as the examination of the substance of the claim, and the consequences of an erroneous decision as serious as the return of a refugee to his/her country of origin where s/he risks persecution.

This is why the Office considers that no exceptions should be allowed to the principle that decisions should be made by the authority normally competent in asylum matters. In addition, the asylum-seeker should be permitted to remain in the territory until the first instance decision and the decision on the appeal (which s/he should have the opportunity to launch) have been made. Thus, UNHCR is of the view that appeals should have suspensive effect, whether or not they are Dublin cases. (See Section A 2 on the Dublin Convention and suspensive effect of appeals.)

Determination of whether there is a country of first asylum/safe third country does not entail an assessment of the substance of the asylum claim. It should be dealt with in admissibility procedures, and be conducted prior to the examination of the merits of the application, rather than in accelerated procedures for manifestly unfounded claims, during which the substance of the claim is examined.

Regarding Safe Third Country Lists

Whereas, for a number of reasons UNHCR would prefer that states do not use safe third country lists, the Office does not oppose the use of such lists, provided the procedural safeguards mentioned above are adhered to.

(c) Effective Protection

Developments

The main tenet underlying the Resolution on a Harmonised Approach to Questions concerning Host Third Countries and the Executive Committee (EXCOM) Conclusions Nos. 15 on Refugees without an Asylum Country (1979) and 58 on the Problem of Refugees and Asylum-Seekers who move in an Irregular Manner from a Country in which they had already found Protection (1989) mentioned above is that in order for a country to be considered as first asylum/safe third country it must offer the applicant effective protection.

The following are issues falling under the scope of effective protection: 1) the consent to re-admit, 2) protection against *refoulement*, 3) respect for human rights, and 4) treatment according to basic human standards.

Consent to Re-admit

The Council of the EU Resolution on Minimum Guarantees for Asylum Procedures contains the provision that host third country authorities must, where necessary, be informed that the asylum application was not examined in substance. However, the Resolution does not oblige EU States to obtain the prior consent of the safe third country to (re)admit the asylum-seeker and to examine the claim of refugee status. The Council of Europe Recommendation containing Guidelines on the Application of the Safe Third Country Concept would appear to contain such an obligation, in so far as it requires that the third country provide the possibility to seek and enjoy asylum.

Many European states' legislation allows for removal without obtaining the explicit prior consent of the first asylum/safe third country that the applicant will be (re)admitted to the territory and the asylum procedure and have his/her claim examined in substance. The United Kingdom immigration rules, for instance, contain

a provision such that the Secretary of State may remove an applicant to a third country without consulting with the authorities of the third country if s/he is satisfied that certain criteria have been met.

Polish legislation, on the contrary, requires that access to the refugee status determination procedure in the third country be secured. According to Spanish asylum legislation, the state responsible for examining the asylum-seeker's request must have explicitly acknowledged its responsibility to do so.

German legislation makes the issuing of an order to forcibly return the asylum-seeker to the safe third country subject to the feasibility of the return. However, this refers to physical considerations, and not to the prior consent of the third country.

Protection against Refoulement

The Resolution on a Harmonized Approach to Questions concerning Host Third Countries states that in sending back an applicant to a host third country, certain fundamental requirements must be met. For example, "the asylum applicant must be afforded effective protection in the host third country against *refoulement*, within the meaning of the 1951 Convention".

In some countries, protection is construed narrowly to include only protection against return to persecution. However, in a number of countries, such as Finland, France, Germany, Luxembourg, Poland, Slovenia, and Switzerland, legislation goes beyond the notion of persecution to include protection against torture, inhuman and degrading treatment.

The prohibition of return to a first asylum/safe third country from where there is a risk of *refoulement* is expressed in various manners in the legislation and practice of European states. In some countries, such as Italy, while the law protects against *refoulement*, in practice, decisions not to admit made at the border may occasionally result in immediate expulsion without proper and informed consideration of the possible risks involved for the applicant. Some countries' legislation requires only that the third country have signed the 1951 Convention and its 1967 Protocol. Other countries insist on effective implementation of the Convention and its Protocol. In line with the Council of Europe Recommendation - which refers to "full implementation" of the 1951 Convention - Germany and Poland are among the countries which require adherence to and implementation of the 1951 Convention and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

In Germany, while there is no possibility to rebut the application of the safe third country principle, the Federal Constitutional Court decided on its constitutionality, establishing the requirements that the legislator must provide information in order to define a third country as "safe". Essentially, the country must have procedures to determine whether the applicant risks being exposed to persecution in the sense of Article 33 of the 1951 Convention or ill treatment as defined in Article 3 of the ECHR. In the Polish Aliens Act, for a country to be considered as a safe third country, it must provide access to the refugee status determination procedure.

Respect for Human Rights

The Resolution on a Harmonized Approach to Questions concerning Host Third Countries provides that in the host country, the asylum applicant must not be threatened, within the meaning of Article 33 of the 1951 Convention; nor exposed to torture or inhuman or degrading treatment or punishment; and must be afforded effective protection against *refoulement*. The first asylum/safe third country notions in most European legislation prohibit the return to a country where the applicant would risk exposure to persecution or to torture and inhuman and degrading treatment or punishment.

In Spain, for instance, in cases of first asylum/safe third country, there must be no danger to the individual's life or liberty in the other state; s/he must not be exposed to torture or other inhuman or degrading forms of treatment there; and s/he must also be effectively protected against *refoulement*.

Treatment According to Basic Human Standards

Generally, whether a person will receive treatment according to basic human standards, such as adequate housing and subsistence levels, is not a consideration for not sending a person to a safe third country. An exception can be found in the Slovene Asylum Act, which speaks of the ability of a person to satisfy his/her basic subsistence needs. Slovene law elaborates on this point with regard to minors. In Germany, while the law is silent about the necessary living conditions in the country to which the individual is being sent, the alien must nevertheless be able to receive assistance to overcome difficulties caused by persecution (in addition to receiving protection against *refoulement* and meeting basic needs).

Mere Transit Situations

Under Article 7 of the Dublin Convention, in cases where the asylum-seeker is merely in transit at the airport, the country in question is not considered responsible for examining the application. The Resolution on Host Third Countries, however, does not explicitly exclude return to a country where the applicant has been in "mere transit".

Traditionally, states have considered the country where the individual made the asylum request responsible for examining that claim. However, if a person has closer "links" with a country other than the latter, then it is considered reasonable that s/he seek asylum in that country. Links are established based on elements such as family ties and stays in countries other than the country of origin.

According to Swiss legislation a minimum stay in another country of approximately 20 days is required for not considering that stay as mere transit. The 20 days constitute an approximate duration only, and may be shorter or longer depending on the circumstances of the case as specified in the Ordinance relating to the application of the Swiss Asylum Law. This interpretation was more recently confirmed in a second-instance decision rendered in March 2000 by the Swiss Appeals Board, thus overruling the Federal Office for Refugees' first instance decision, which was based on a strict interpretation of the 20-day criteria. Belgian legislation also states that the asylum-seeker should not have spent more than three months in one or more safe third countries for his/her claims to be examined in Belgium. Some countries' legislation is more vague. According to Bulgarian

legislation, a safe third country is a country where the applicant “has stayed, at his own will, for a period longer than the time normally indispensable for his coming to...Bulgaria.” According to Latvian legislation, an applicant’s “long-term stay” in the third country is not interpreted as mere transit.

Under Norwegian legislation, Norway retains responsibility for examining asylum requests if the applicant has family links in Norway despite the country of first asylum concept. In practice, Denmark follows the same principle.

Admissibility to Third Countries

In state practice, as in the Resolution on a Harmonised Approach to Questions concerning Host Third Countries, a country in which the applicant is admissible is considered a safe third country, regardless of whether the applicant has passed through that country. However, the Council of Europe Recommendation, while repeating the requirements of the Resolution, adds the caveat that the admissibility of the asylum-seeker should be “as a result of personal circumstances of the asylum-seeker, including his or her prior relations with the third country.”

In safe third country cases, British legislation provides for removal where the applicant has not arrived in the UK directly from the country in which s/he claims to fear persecution or there is clear evidence of admissibility to a third country. The notion of admissibility could be understood to mean that some form of authorisation or consent is required, although it can also apply to the situation where an applicant is being sent to a third country through which s/he did not travel but for which s/he may have a visa or some other form of permission to enter. The Dutch legislation indicates that a third country should admit an applicant who had resided there earlier. Similarly, Slovenia’s Asylum Law stipulates that entry should be guaranteed for applicants having resided in the third country.

UNHCR POSITION

A country can be considered a first asylum/safe third country if the asylum-seeker enjoys effective protection there. Where enjoying the benefit of such protection is conditional upon a positive decision on the asylum claim, the applicant should be given access to an eligibility determination procedure with adequate procedural safeguards. For a country to be considered to offer “effective protection”, it must be determined, in each individual case, that the conditions mentioned in the following are met. Whereas it is incumbent upon the authorities which maintain that the applicant could and should have requested protection in another country to establish that the conditions below are met, it is for the applicant who has found protection in a third country to show that that protection is not effective.

Regarding Consent to Re-admit

In the interests of avoiding *refoulement* and orbit situations and promoting international co-operation for the protection of refugees, the return of applicants who have found or who could have found protection in another country, should take place in accordance with arrangements agreed among the states concerned which determine responsibility for examining asylum requests (such as the Dublin Convention, Section A 2). Agreements providing for the return by states of persons

who have entered their territory from another contracting state in an unlawful manner (Readmission Agreements) should not be used for this purpose, unless they explicitly provide due regard for the special situation of the asylum-seeker.

In the absence of agreements determining responsibility for examining asylum requests, other safeguards must be applied. Such safeguards include: an explicit or at least implicit prior consent to readmit the applicant by the authorities of safe third and first asylum countries; substantive examination of the asylum claim; and effective protection as reliable means of ensuring *non-refoulement* and avoiding orbit situations. As an absolute minimum, the authorities of the third state should be explicitly informed that the asylum claim has not been examined based on its substance (as stated in the Resolution on Minimum Guarantees for Asylum Procedures). Informing the authorities of the third state would assist in avoiding that the asylum-seeker be sent on to yet another country – possibly the country of origin – on the assumption that s/he has been rejected upon a substantive assessment of his/her asylum claim.

Regarding Protection against Refoulement

The term “effective protection” should also be interpreted as involving, at a minimum, protection against return to situations of persecution, serious insecurity or other situations justifying the granting of asylum.

Regarding Respect for Human Rights

Moreover, to consider that a country offers “effective protection”, it must observe international human rights standards relevant to asylum as established in universal and regional instruments. This requirement includes compliance with the prohibition of torture, inhuman and degrading treatment or punishment. A country that detains asylum-seekers or subjects them to other forms of deprivation of liberty for unduly long periods of time, under unacceptable living conditions, or otherwise in violation of international rules relating to the deprivation of liberty of asylum-seekers and refugees, cannot be considered a country of first asylum/safe third country.

Regarding Treatment According to Basic Human Standards

Finally, “effective protection” should be understood to include treatment in accordance with basic human standards. Refugees must also be able to satisfy basic subsistence needs in the country of asylum, if necessary with assistance from the international community.

Regarding “Mere Transit”

Except where satisfactory arrangements have been made between states to ensure protection elsewhere, states should continue to be encouraged to accept asylum applications from asylum-seekers arriving at their borders, provided they have not significantly interrupted their journey or sought or received asylum in another country. Asylum-seekers should not be returned to a country where they have been in mere transit. According to the state in question, the period of time associated with the “mere transit” rule varies. Article 7 of the Dublin Convention provides that mere transit in an airport does not constitute entry into a country.

Underlying the “mere transit” rule are basic principles of international solidarity and burden sharing, and the notion that asylum should not be refused solely on the ground that it could be sought from another state. The decision to transfer to another state must follow a fair and reasonable assessment that the asylum-seeker has a connection or close links with that state.

Regarding Admissibility to Third Countries

Similar considerations apply to UNHCR’s position regarding sending a person to a country through which s/he has not passed on the way to the country where s/he is requesting asylum, on the grounds that s/he could find protection there and would be admissible. The position of the Office is that an asylum-seeker should not be sent onward to a third country; unless s/he is a national of that country; has permanent residence there; or has other relevant links.

2. The Dublin Convention/ Responsibility for Examining Asylum Requests¹

Introduction: the Issue

One serious problem as regards the application of the Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities (the Dublin Convention) has been that some states parties apply the 1951 Convention refugee definition and the country of first asylum/safe third country notions in a manner which could lead to a violation of the principle of *non-refoulement*. (See also Chapter III Section A relating to the Application/Interpretation of Article 1 of the 1951 Convention and Chapter II Section A 1 on First Asylum/Safe Third Country.) This effect of the application of the Dublin Convention is due in part to the fact that not all states parties apply adequate procedural safeguards to Dublin cases.

Other problems encountered in connection with the application of the Dublin Convention relate to the need to ensure that the principle of family unity is respected; that asylum-seekers receive proper counseling and material assistance pending determination of whether the Convention can be applied; and that the time period for responding to Dublin requests is curtailed.

In addition, there are other problematic issues that have emerged as a result of the application of the Dublin Convention that, because they do not raise protection concerns *per se* will not be expanded upon here, but that are also worth highlighting. First, there is an absence of common evidentiary standards and compatible procedures for Dublin cases between EU Member States, which in turn undermines the attempt to reduce the number of multiple or abusive claims. And second, contrary to promoting more equitable responsibility sharing amongst Member States, the application of the Dublin Convention in a disproportionate number of cases results in Member States with external borders becoming responsible for determining the asylum claim.

¹ For more information on the Dublin Convention, see Agnes Hurwitz, *The 1990 Dublin Convention: A Comprehensive Assessment*, International Journal of Refugee Law vol. 11 no. 4 (1999), p. 646-677

EU Member States have acknowledged the need for additional implementing guidelines in order to make the application of the system of allocation workable and efficient. The Committee established under Article 18 of the Dublin Convention has adopted a series of new guidelines focusing on a number of practical issues, such as time periods for re-applying for a request for transfer or re-admission. More recently, in a draft text (at time of publication), the European Commission has proposed radical changes to the Dublin Convention in anticipation of its conversion to an instrument under the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain Related Acts (the Amsterdam Treaty).

Developments

Though never adopted, the Council of Europe spent several years preparing a draft Agreement on the Responsibility for Examining Asylum Requests. A few years later, agreement was reached for regulating responsibility between the Member States of the European Union for examination of asylum claims with the conclusion of the Schengen Implementation Agreement², which entered into force in March 1995, and the adoption of the Dublin Convention. The Dublin Convention entered into force on 1 September 1997 for the twelve original signatories, on 1 October 1997 for Austria and Sweden, and on 1 January 1998 for Finland. It effectively replaced the similar arrangements contained in Chapter 7 of the Schengen Implementation Agreement.

In essence, the Dublin Convention and Schengen Implementation Agreement are based on the position that the state party that authorized entry is responsible for the examination of the claim. If no country has authorized entry, then the state party whose territory the individual first entered, albeit illegally, bears the responsibility for determining his/her claim. Other criteria for determining which state is responsible for determining the claim include the presence of a resident nuclear family member who has been recognized as a refugee.

The Dublin Convention has a double use: it prevents the lodging of simultaneous or consecutive asylum applications in Member States by setting out criteria to determine the responsible state, and puts an end to the phenomenon of "refugees in orbit", by obliging the responsible state to admit the applicant to its territory and examine the application for asylum. According to the Dublin Convention, there is only one Member State that is responsible for examining the application for asylum.

The Dublin Convention does not contain specific provisions for the registration and reception of applicants pending transfer. This may lead to complications in terms of assuring that applicants' needs are met during the period preceding their possible transfer. For example, in some countries, certain applicants awaiting a decision regarding the application of the Dublin Convention do not receive basic material assistance, including lodging. Since October 1998, for instance, such claimants in the Netherlands - and asylum-seekers who have lodged a repeat claim - do not benefit from reception facilities. Asylum-seekers who are returned to Greece under the provision of the Dublin Convention may face some difficulties in obtaining the necessary assistance from the government in terms of accommodation and in meeting their daily subsistence needs.

² Chapter 7 of the Agreement relates to the responsibility for examination of asylum claims.

Neither does the Dublin Convention provide for informing applicants of the procedure for transfer or of their rights. This, in turn, has created difficulties in terms of assuring that the asylum applicants' were aware of their rights. For example, there have been cases in the Netherlands where the asylum-seeker was informed that s/he would be transferred to the responsible state, but where in the meantime, the Dutch authorities have decided to examine the asylum claim themselves without informing the asylum-seeker of this decision.

From a procedural perspective, according to Article 11 of the Dublin Convention, "if a Member State with which an application for asylum has been lodged considers that another Member State is responsible for examining the application, it may, as quickly as possible and in any case within the six months following the date on which the application was lodged, call upon the other Member State to take charge of the application." The transfer of the applicant for asylum must take place within one month after approval from the other Member State. However, this period for determination or transfer of the claim is often exceeded. In the Netherlands, for instance, the District Court in *Zwolle* attempted to establish a mechanism by which the "relevant Dublin-time" would not exceed the six-months stipulated in the Convention. The term begins when it becomes known that the claim is going to be made until the decision is rendered, minus the period in which the claim is forwarded and accepted.³ However, in practice, once the immigration authorities take charge of an asylum application, the time frame for transfer of the claim is often prolonged.

The possibility for appeal in Dublin cases varies between Member States. In Ireland, for example, a specific remedy with suspensive effect is available against any decision based on the Dublin Convention. In Belgium, the decision on the determination of the state responsible is joined to an order of expulsion ("*ordre de quitter le territoire*"), and both decisions are contained in the same official document. No specific remedy is provided by the law against the decision on transfer, but the asylum applicant may still file a request for leave in "*extreme urgence*" of the decision of expulsion before the *Conseil d'Etat*, inasmuch as the asylum applicant can prove that the enforcement of the decision would give rise to serious and irreparable damage. In France and Germany, an appeal is possible in Dublin cases, but it does not have suspensive effect.

Article 3(5) of the Convention specifies that any Member State shall retain the right, pursuant to its national law, to send an asylum applicant to a third state. The determination of the existence of a safe third country normally takes place before the determination of the state responsible. Removal to a third country is allowed as long as the 1951 Convention is complied with i.e. the principle of *non-refoulement* is respected. However, in the absence of appropriate guarantees that receiving Dublin states will return applicants to first asylum/safe third countries which are indeed "safe", this provision may result in chain deportations and, ultimately, instances of *refoulement*.

Concerns over *non-refoulement* may also arise due to differences in the application of the refugee definition by EU states. On 7 March 2000, the European Court of Human Rights ruled against the transfer of a Sri Lankan asylum applicant who, according to the Dublin Convention, would have been returned by the United Kingdom to Germany based on Germany's narrow interpretation of "agents of persecution" (see Chapter III Section A 1).⁴ The Court ruled that the simple fact that the receiving state is a Dublin Member State (in case of indirect removal to an

³ *Ores. D.C. Zwolle, 24 June 1999, nr. AWB 99/2946*

⁴ *European Court of Human Rights, T.I vs. the United Kingdom, 7 March 2000, 43833/98*

intermediary country) does not absolve the expelling state from its responsibility under the European Convention on Human Rights and Fundamental Freedoms (ECHR). Further, the Court noted that the expelling state cannot rely solely on the arrangements made in the Dublin Convention because “the effectiveness of the Convention may be undermined in practice by different approaches adopted by Contracting States to the scope of the protection offered.” Rather, the expelling state (here, the UK) must comply with its obligations under Article 3 of the ECHR, namely to examine whether the applicant will risk ill treatment in his/her country of origin; and what the position of the applicant would be in the event that his/her application is rejected (here, in Germany).

In Austria, the Asylum Law provides that any decision on rejection of an application under the Dublin Convention shall be issued in conjunction with an expulsion order, which shall be concurrently deemed to constitute a statement of the admissibility of rejection, forcible return or deportation to a designated country. Thus, according to the law, an examination of whether the principle of *non-refoulement* must be applied does not need to be carried out in Dublin procedures. The issue of whether this provision is in violation of the Constitution is pending before the courts.

Article 4 of the Dublin Convention refers to family reunification, and contains a narrow interpretation of the family, which includes the nuclear family only. The Convention does not address the issue of family members applying for asylum in different Member States at the same time, nor does it cover cases where a family member resides in a Member State, but has not been recognised as a refugee.

In some countries, such as Belgium and the Netherlands, the restrictive definition of family has been circumvented by applying Article 9 (the “humanitarian clause”) or Article 3.4 (the “sovereignty clause” or “opt-out clause”). Both these derogatory clauses allow a Member State to examine an application for asylum even if such an examination is not its responsibility.

The humanitarian clause allows a Member State to examine an asylum application on the request of another Member State for humanitarian reasons or, due to family or cultural grounds, provided that the applicant so desires. The sovereignty clause allows Member States in which an application has been lodged to examine an asylum application on its own initiative, provided that the applicant agrees, even if such examination is not the Member State’s responsibility under the criteria defined by the Convention. Both these clauses may thus be used to maintain family groups and reunite families in a wider range of cases.

However, the authorities in some countries, such as the Netherlands, Germany and Belgium, have also applied the sovereignty clause where the asylum-seeker can be more easily and swiftly expelled at the end of the normal asylum procedure, or where the application is manifestly unfounded or abusive. It is assumed that lodging an asylum request constitutes the expression of the asylum-seeker’s consent. In Belgium, for instance, the Aliens Office automatically applies Article 3.4 to process claims by Romanian, Hungarian and Polish asylum-seekers.

UNHCR POSITION

UNHCR welcomed the entry into force of the Dublin Convention, insofar as it established a mechanism for allocation of responsibility for the examination of each individual asylum application, and it, in principle, ensured access to the asylum procedure inside the territory of the EU.

The Office believes that, where states are intent on using the first asylum/safe third country notions to determine admissibility of claims, it is desirable to handle such cases in the framework of arrangements such as the Dublin Convention, which envision the situation of asylum-seekers and contain adequate safeguards, rather than through the mechanism of Readmission Agreements. This is because Readmission Agreements do not normally contain provisions regarding the specific needs of asylum-seekers (for instance, they do not ensure that asylum-seekers are granted access to the asylum procedure in the receiving country). Such agreements should only be used as a basis for the automatic return of asylum-seekers to intermediate countries if containing clauses take this group's specific situation into consideration.

UNHCR appreciates that the Convention also contributes to reducing the number of orbit situations.

This being said, because of the problems associated with the application of the Dublin Convention, UNHCR has called for the conclusion of agreements that would meet the intended objectives of the Dublin Convention that have not been successfully addressed in practice.

Regarding Procedural Considerations

When applying the Dublin Convention asylum applicants must be provided, at all stages of the procedure, with adequate safeguards in line with those outlined for admissibility procedures and for accelerated procedures.

Specifically, asylum-seekers (and their legal counsel) should receive timely and sufficiently detailed information regarding Dublin procedures, including those related to the transfer of the applicant to another EU Member State. Asylum-seekers should also receive sufficient counselling on the Dublin procedures and the relevance of evidence required for the procedure to determine responsibility. In addition, decisions concerning the allocation of responsibility, including possible transfer, should be taken within the shortest possible time frame and should be issued in writing.

Moreover, the applicant should be offered an opportunity to introduce an appeal against the decision on a Member State's responsibility, in so far as s/he can forward further elements relevant to the application of the Dublin criteria and procedures in his/her particular case. Such an appeal should normally be decided upon by an independent and specialized judicial or administrative body. For an appeal to be effective, it should have suspensive effect, entailing that the applicant not be transferred until a final decision on the appeal has been made.

Regarding Treatment of Asylum-Seekers pending Decision on Application of the Dublin Convention

Member States should ensure that asylum-seekers awaiting a decision on responsibility for processing of their asylum request be provided with adequate reception facilities, receive basic assistance and normally will not be kept in detention. Asylum-seekers in this situation should be treated in the same manner as those admitted to the determination procedure.

Regarding Criteria for Applying the Dublin Convention

It is essential to ensure respect for the principle of family unity and to avoid that, in cases where several members of the same family seek asylum in the European Union, the application of the Dublin Convention results in two or more Member States being responsible for taking charge of the applicants. To this effect, it would be desirable to expand the notion of family as defined in Article 4 of the Convention to include, further to nuclear family, other family members who depend on the support of the family, such as family members who are living in the same household, but who do not belong to the nuclear family. This interpretation would be in accordance with paragraph 185 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status.

Articles 9 (the “humanitarian clause”) and 3.4 (the “sovereignty clause”) of the Dublin Convention should be applied in a generous manner and state practice regarding its application harmonized. In particular, these provisions should be applied so as to maintain family groups and reunite families in a wider range of cases. Such application and harmonization is especially required in cases where a family member is gravely ill, has a serious handicap, is elderly, is pregnant, has a new-born child, or in cases of minors who risk being separated from their family and left unattended. These clauses may also be invoked with the purpose of uniting couples, which have not concluded a legally valid marriage, yet live in a long-term relationship, or family members of persons who are in possession of a humanitarian, temporary or *de facto* status and therefore legally residing in a Member State.

With respect to the transfer to a Dublin state in accordance with the Convention and in order, in particular, to avoid possible incidents of *refoulement*, Member States must ensure that the receiving state:

- 1) applies fair asylum procedures and criteria for granting refugee status and asylum, in full conformity with the principles of international refugee law;
- 2) applies the country of first asylum/safe third country notions in conformity with international standards;
- 3) treats asylum applicants in accordance with accepted international standards.

And, where a Dublin case is transferred to a non-Member State “safe third country”, the sending state must ensure that the receiving state re-admits the asylum-seeker.

Section B Procedures on the Substance of the Claim in Accelerated Procedures Criteria for dealing with Asylum Applications in Accelerated Procedures

Introduction: the Issue

Since the early eighties, one response by western European states to the increase in the arrival of asylum-seekers has been the introduction of accelerated procedures. These procedures apply to asylum claims, which are deemed not to merit detailed examination at every level of the procedure. In such instances, an asylum-seeker’s claim may be refused access to the substantive determination procedure. Two main

criteria have been applied for channelling cases into such procedures: 1) that the asylum claim is manifestly unfounded or abusive (see Sub-Section 1); or 2) that the applicant comes from a safe country of origin (See Sub-Section 3). Some countries also channel into accelerated procedures claims made by applicants covered by the exclusion clauses of Article 1 F of the 1951 Convention, while others apply such procedures to applicants who have been deemed to have found a so-called internal flight/relocation alternative (See Sub-Section 5). And, finally, in some countries asylum-seekers who have applied outside time limits for submitting asylum applications or undocumented asylum-seekers may be considered as manifestly unfounded in accelerated procedures, while other countries consider such claims as inadmissible (See Sub-Section 6).

The draft Directive on minimum standards for asylum procedures contains provisions on when Member States may dismiss applications as manifestly unfounded. (See throughout this Section.)

1. Manifestly Unfounded or Abusive Applications

Introduction: the Issue

The main problem area in connection with accelerated procedures relates to the broad definition of the notion of manifestly unfounded claims, which is applied by some European countries. The result is that a number of claims, so complex that they deserve to be dealt with in the ordinary procedure, are channeled through accelerated procedures for manifestly unfounded claims. Moreover, some countries' accelerated procedures lack all the procedural safeguards necessary for guaranteeing protection against *refoulement*.

Developments

The same concern, which led Western European states to adopt accelerated procedures for manifestly unfounded claims led to the adoption of the Resolution on Manifestly Unfounded Claims by Immigration Ministers of the European Communities on 30 November and 1 December 1992. The Resolution defines a manifestly unfounded application, sets out procedural guarantees and provides for other categories of cases to be channelled into accelerated procedures. This Resolution, and two others, which were adopted at the same time, do not have a binding character.

Many Central and Eastern European states have been gradually introducing accelerated procedures for manifestly unfounded asylum applications in an effort to harmonise their asylum legislation and practice in line with EU countries. The Czech Republic, Hungary, Latvia, Slovakia and Slovenia are among the countries that have adopted such procedures. Some Central European countries, however, do not operate accelerated procedures at all. For example Romania's legislation does not provide for such a procedure, and Poland has not implemented such a procedure, although it is foreseen in its legislation.

A number of Council of Europe texts also contain recommendations of relevance to accelerated asylum procedures. Recommendation No. R (98) 13 on the Right of Rejected Asylum-Seekers to an Effective Remedy Against Decisions on Expulsion in

the context of Article 3 of the ECHR was adopted by the Committee of Ministers on 18 September 1998. The Recommendation defines the procedural guarantees derived from the right to an “effective remedy” before a national authority, contained in Article 3 of the ECHR. Article 3 applies to asylum-seekers whose requests for refugee status have been rejected and who are subject to expulsion to a country where they claim to be subjected to torture or inhuman or degrading treatment or punishment.

Another relevant Council of Europe text is Recommendation No. R (94) 5 on Guidelines to Inspire Practices of the Member States of the Council of Europe concerning the Arrival of Asylum-Seekers at European Airports, adopted by the Committee of Ministers of the Council of Europe on 21 June 1994. The Recommendation contains a number of guiding principles regarding specific arrangements, procedures and treatment that States should apply to asylum-seekers at airports.

UNHCR POSITION

UNHCR has long taken the position that, where necessary, national procedures for determination of refugee status may usefully deal with manifestly unfounded applications for refugee status or asylum in an accelerated procedure. This is provided that the definition of manifestly unfounded being applied conforms to internationally accepted criteria, and that the procedure includes safeguards regardless of whether the claim is presented at the border or within the territory.

Developments concerning the Definition of Manifestly Unfounded or Abusive Applications

The Resolution on Manifestly Unfounded Applications for Asylum defines a claim as manifestly unfounded where it raises no substantive issue under the 1951 Convention. This is because: 1) there is clearly no substance to the applicant’s claim to fear persecution in his/her own country; or 2) because the claim is based on deliberate deception or is an abuse of asylum procedures. Under the Resolution, a claim is to be considered as being without substance where the grounds for the application fall outside the scope of the 1951 Convention: where the application is based rather on reasons such as the search for employment or better living conditions. Furthermore, applicants manifestly lacking any credibility or whose claims are totally lacking in substance should, according to the Resolution, also fall within the manifestly unfounded procedure.

The Resolution on Manifestly Unfounded Applications for Asylum’s criteria mentioned above are to a large extent in conformity with those identified in Executive Committee (EXCOM) Conclusion No. 30 on the Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum (1983).

The European Commission’s draft Directive on minimum standards for asylum procedures states that while there is no obligation to apply an accelerated procedure to dismiss manifestly unfounded applications, Member States will have to abide by the common definitions and maximum time limits if they do so.

Legislation in a number of Member States of the European Union and of candidate States for EU membership in Central Europe have incorporated the definition adopted by the Resolution on Manifestly Unfounded Applications for Asylum. Some have included all examples of manifestly unfounded applications given in the Resolution. Other countries' legislation simply includes the Resolution definition of a manifestly unfounded claim.

Developments relating to Clearly Fraudulent Applications

Fraudulent or abusive claims are those where the applicant clearly does not need protection, and should be aware of this fact. It also includes claims, which involve deception or intent to mislead, and which generally denote bad faith on the part of the applicant.

The Resolution on Manifestly Unfounded Applications for Asylum lists examples of situations which could be considered clearly fraudulent: the applicant has used a false identity which s/he has maintained upon questioning; s/he has used false documents and insists on their authenticity; s/he has destroyed or disposed of documents in bad faith; s/he has made false representations; s/he has lodged multiple applications in one or more countries; s/he has had his/her application rejected in another country; s/he has applied for asylum with a view to forestalling an expulsion measure, or s/he has failed to comply with national rules relating to asylum.

According to the draft Directive on minimum standards for asylum procedures, a claim can be considered manifestly unfounded if the applicant has, without reasonable cause, submitted a fraudulent application with respect to his/her identity or nationality, or if the applicant has submitted a new application raising no new facts with respect to his/her particular circumstances or to the situation in his/her country of origin.

Belgium, France, Hungary, Portugal, the Netherlands, Slovenia, Switzerland and Spain are among those countries whose legislation has included fraud as a criterion for declaring a claim manifestly unfounded. Spanish asylum legislation, for example, provides that asylum applications based on information or allegations, which are openly false or implausible shall not be admitted to the regular refugee status determination procedures. Under the 1996 Asylum and Immigration Act, the United Kingdom extended the criteria for considering a claim as manifestly unfounded to cover, for example, cases where the application "is manifestly fraudulent, or any of the evidence adduced in its support is manifestly false". In Germany, asylum claims that are fraudulent in nature (such as making false statements regarding one's identity) can be rejected as "manifestly unfounded". However, fraud cannot serve as the sole basis for rejection of the claim. Under the Swiss asylum law, a claim may be considered as manifestly unfounded and rejected without further measures within 20 days after the initial hearing if the applicant is unable to demonstrate a credible claim to refugee status. Such decisions must nevertheless be summarily motivated.

The Netherlands is one of the few countries to include in its legislation the applicants' insistence as to the authenticity of his/her documents despite knowledge to the contrary (in addition to having produced false documents) as a criterion for fraud. In Ireland, the factor is whether or not the applicant had "reasonable cause" for

revealing that s/he was travelling under a false identity or was in the possession of false or forged identity documents.

In Belgium, the Commissioner General for Refugees and Stateless Persons has issued internal instructions regarding the interpretation of the notion of "fraud", which resemble the Resolution criteria. These criteria are, for example, the fact that an asylum-seeker deliberately makes false representations about his/her claim, either orally or in writing, after applying for asylum, or bases his/her application on a false identity or on forged or counterfeit documents which s/he has maintained are genuine when questioned about them.

Increasingly, a number of countries include in the definition of manifestly unfounded claims, applicants who fail to co-operate with the authorities in establishing their identity and the facts of their respective case. This is the case, for example in Austria, the Czech Republic, Slovakia and Switzerland.

In some countries such as Slovenia and the United Kingdom, the definition of manifestly unfounded includes applicants who have made an asylum claim after having received notice of expulsion. The United Kingdom and a few other countries also consider claims as manifestly unfounded where the cessation clauses would have been applied had the applicant been granted asylum.

Applicants who miss the time frame within which an asylum application may be lodged in a particular country, and/or who lack proper or sufficient travel documents or documents attesting to his/her personal identity, may have his/her claim channelled into accelerated procedures for manifestly unfounded claims. (See Chapter II Section B 6 on Time Limits and Undocumented Asylum-Seekers.)

iii) Developments concerning Applications not related to the Granting of Refugee Status

As stated above, the Resolution considers refugee or asylum claims to be without substance where the grounds of the application are outside the scope of the 1951 Convention; where the application is based on reasons such as the search for employment or better living conditions. Applicants lacking any credibility or whose claims are lacking in substance should, according to the Resolution, also fall within the manifestly unfounded procedure.

In the Directive on minimum standards for asylum procedures, Member States are able to dismiss applications as manifestly unfounded if in submitting and explaining his application, the applicant does not raise issues that justify international protection on the basis of the 1951 Convention or Article 3 of the ECHR.

Some countries, such as Belgium, Portugal, Slovenia and Spain have drawn very closely on the Resolution definition. They also provide for classification of claims as manifestly unfounded where the situation is not covered by the Convention criteria.

Some countries have adopted their own definitions. In the German Asylum Procedure Act, for instance, the definition of manifestly unfounded includes claims where based on the circumstances of the individual case, it is clear that the alien is staying on the territory for economic reasons, or in order to evade a general

emergency situation, or an armed conflict. Slovakia has adopted a definition of manifestly unfounded incorporating similar criteria.

In the Netherlands, a claim will be manifestly unfounded if, *inter alia*, it is based on circumstances which alone or in connection with other facts reasonably give rise to no suspicion that there are legal grounds for admission.

In Austria, a manifestly unfounded case includes one where “it clearly cannot be concluded from the asylum-seekers’ allegations that they are in danger of being persecuted in their country of origin”; “if the claimed risk is clearly not attributable to the reasons set forth in the 1951 Convention”; if “the asylum-seekers’ allegations concerning a situation of danger clearly do not correspond with reality”; if “the asylum-seekers, despite being so requested, do not co-operate in the establishment of the material facts of the case”; or if “owing to the general political circumstances, legal system and application of the law in the country of origin, there can generally be no well-founded fear of persecution for the reasons set forth in Article 1, section A (2), of the 1951 Convention on Refugees”.

Increasingly, the definition of manifestly unfounded being applied by these states is broadened, frequently beyond the scope of the definition contained in the Resolution on Manifestly Unfounded Applications for Asylum.

UNHCR POSITION

Regarding the Definition of Manifestly Unfounded or Abusive Applications

UNHCR is concerned that accelerated procedures be limited to the categories of claims specified in the above mentioned Executive Committee (EXCOM) Conclusion No. 30 on the Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum (1983) and that, regardless of whether the procedures are accelerated, claims should still continue to be examined on an individual basis. Extending the scope of accelerated procedures by, for example, broadening the definition of manifestly unfounded claims, risks failing to provide the full individualized consideration which asylum applications should enjoy and increases the possibility of erroneous decisions, with the serious consequences this could entail.

ii) Regarding Clearly Fraudulent Applications

Whereas the notion of “clearly fraudulent” could reasonably cover situations where the applicant deliberately attempts to deceive the authorities determining refugee status, the mere fact of having made false statements to the authorities does not necessarily exclude a well-founded fear of persecution and vitiate the need for asylum, thus making the claim “clearly fraudulent”. Only if the applicant makes what appear to be false allegations of a material or substantive nature relevant for the determination of his/her status could the claim be considered “clearly fraudulent”.

As to the use of forged or counterfeit documents, it is not the use of such documents that raises the presumption of an abusive application, but the applicant’s insistence that the documents are genuine. It should be borne in mind in this regard that asylum-seekers who have been compelled to use forged travel documents often understandably insist on their genuineness out of fear that that they may not be admitted into the country and their application examined. (See Section B 6 on Time Limits and Undocumented Asylum-Seekers.)

Concerning undocumented asylum-seekers, UNHCR has taken the position that only those cases where the lack of documents is linked to the asylum-seeker deliberately attempting to deceive the authorities may be deemed as manifestly unfounded. (For more details, see Section B 6 on Time Limits and Undocumented Asylum-Seekers.)

Applications suspected of being filed to forestall an expulsion order should only be considered as manifestly unfounded if the applicant has had ample opportunity to apply for asylum previously and has not given a valid explanation for the delay.

Where applicants have already had their claim for asylum rejected in another country upon examination of the substance of their claim, such applications could appropriately be considered in the procedure for manifestly unfounded applications. In such cases, rejection in a previous procedure raises a rebuttable presumption that there is no substance to the claim. However, this should only be the case where the examination on the substance was undertaken in conformity with UNHCR eligibility standards; the procedures comprise adequate procedural guarantees; and the applicant presents no new facts.

Regarding Applications not Related to 1951 Convention Grounds

Applications, which do not appear to be based on reasons related to the granting of asylum, may usefully be channelled into accelerated procedures where this is necessary to relieve overburdened asylum systems. Examples of such applications might, for instance, include situations where applicants invoke only economic deprivation, threats to security arising out of personal circumstances, which would not justify the granting of refugee status, or fear of prosecution for common crimes.

A claim should, however, not be considered as manifestly unfounded and, hence, channelled into accelerated procedures even if it does not fall under the 1951 Convention definition, if it is also evident that the applicant is in need of protection for other reasons and thus may qualify for the granting of asylum.

The same applies to cases where an assessment of credibility is necessary to establish the subjective element of the applicant's claim. Issues of credibility are often so complex that they will be more appropriately dealt with under the normal procedure.

2. Procedural Guarantees for Manifestly Unfounded Procedures

Developments

According to the Resolution on Manifestly Unfounded Applications for Asylum, such procedures need not include full examination of asylum claims at every level of the procedure. They should, however, provide for certain minimum procedural guarantees.

The Council of Europe Recommendation on Asylum-Seekers at Airports also outlines procedural guarantees, and it stipulates that the asylum-seeker shall be informed, orally or in writing, about the procedure to be followed and about his/her rights and obligations. The Recommendation also provides the right of asylum-seekers to the assistance of a qualified and impartial interpreter; to contact a legal

counsellor or a lawyer after the first interview; to ask to meet with among others, a representative of a religion, a lawyer and a representative of UNHCR, who should, to that effect, be given access to their place of accommodation. A representative of UNHCR should, moreover, be allowed to contact asylum-seekers at airports.

In state practice, most European states generally provide asylum-seekers with access to UNHCR and NGOs, although access is hampered in some countries and at some locations. Most countries provide legal representation, although it is not free of charge in most cases. Interpretation facilities exist in most countries, and in cases where interpretation is not provided, NGOs and other asylum-seekers often provide *ad hoc* interpretation. Only some European countries provide a personal interview in accelerated procedures. Such procedures are generally carried out by competent authorities, although this often depends on whether status determination takes place in the country or at the border points. Most European countries have an appeals mechanism within accelerated procedures that is independent from the first instance authority. And, some European countries also provide for suspensive effect of these appeals. Last, while a number of countries have legislation that deals specifically with groups with special needs such as women, separated children, the elderly, the disabled, torture victims and traumatised asylum-seekers, these safeguards are limited in scope and are undeveloped in some countries. (For more details, see below.)

UNHCR POSITION

As to the necessary safeguards to be included in procedures for manifestly unfounded claims, UNHCR has said that, in accordance with Executive Committee (EXCOM) Conclusion No. 30 on the Problem of Manifestly Unfounded or Abusive Applications for Refugee Status (1983), these guarantees should include: i) access to UNHCR and NGOs for counselling, legal assistance, and information provision ii) access to an interpreter, iii) the opportunity for a personal interview with a qualified official before any final decision is made, iv) determination by a competent authority at the appropriate level, fully qualified in asylum and refugee matters, v) appeal by an independent authority, vi) suspensive effect of appeal, and vii) special attention to vulnerable groups or groups with special needs.

These guarantees should also be applied to procedures at the border. Furthermore, these guarantees should normally be respected in procedures dealing with first asylum/safe third country cases. (See Section A 1 on First Asylum/Safe Third Country.) In addition, if at any time in the procedure, the authorities decide that the claim should not be in the manifestly unfounded procedure, then the claim should be transferred into the regular procedure.

- i) *Access to UNHCR and NGOs for Preliminary Counseling, to Legal Assistance, and Provision of Information*

Developments

According to the EU Resolution on Minimum Guarantees for Asylum Procedures, asylum-seekers must be given the opportunity at all stages of the procedure, to communicate with UNHCR or with other refugee organisations, which may be working on behalf of UNHCR in the Member State concerned, and vice versa. In addition, asylum-seekers may enter into contact with other refugee organisations

under the procedures laid down by the Member States. The Resolution also stipulates that the UNHCR representative must be given the opportunity to be informed of the course of the procedure, to learn about the decisions of the competent authorities and to submit his/her observations.

Generally, asylum-seekers in Europe have access to UNHCR and NGOs during the refugee status determination procedure. This is the case whether they are in detention during this period or not. In some countries, however, asylum-seekers who are detained are not provided with necessary information such as telephone numbers of UNHCR and or NGOs, or the means with which to contact legal counsellors, UNHCR, or NGOs. Furthermore, while most European countries provide preliminary counselling, in a number of countries, it is often border guards, who first come into contact with asylum-seekers. However, they are not always trained in asylum/refugee matters, or have only received basic training.

In some countries, UNHCR and NGOs have access only to some of the areas where asylum-seekers are detained. In Bulgaria, for instance, neither UNHCR nor the principal NGO has general access to border points. In the Russian Federation, while UNHCR was granted access to the airport transit zone (*Sheremetyevo II*) in 1997, access to the transit hotel where asylum-seekers are detained is not always guaranteed. Also, in other countries, UNHCR and NGO access is problematic. In the Czech Republic, UNHCR and NGOs have no official presence at the country's entry points and are therefore usually unable to contact or assist asylum-seekers as they enter the country.

According to the EU Resolution on Minimum Guarantees for Asylum Procedures, asylum-seekers, in accordance with the rules of the Member State concerned, may call in a legal adviser or other counsellor to assist him/her during the procedure.

In most European countries, asylum-seekers have the right to legal representation. However, in most cases, legal aid is not free of charge. Some exceptions to this include Belgium, France (for asylum-seekers at the border), the Netherlands, Slovenia, Switzerland (in some Cantons), and the UK, where legal aid can be free of charge. Free legal aid is more likely to be available if an asylum-seeker cannot afford his/her own lawyer. In cases where no legal aid is offered, NGOs often provide legal assistance.

In addition, the EU Resolution provides that asylum-seekers must be informed of the procedure to be followed, and of their rights and obligations during the procedure. This information must be provided in a language they understand. (See point iii) on Interpretation.)

Similarly, the draft Directive on minimum standards for asylum procedures stipulates that every applicant for asylum must be informed at decisive moments in the course of the procedure, in a language, which s/he understands, of his/her legal position in order to be able to consider possible next steps.

The quality of and access to information varies from country to country. In Denmark, Spain, Switzerland, and Finland, written information explaining the asylum process is made available to asylum-seekers. In other countries there are reports that provision of information is or has until recently been a problem, sometimes dependent on the goodwill of the border authorities. This is the case in Estonia,

France, Germany, Italy, and Norway. Sometimes, UNHCR Branch Offices have prepared informational leaflets on the asylum procedure, as was the case in Portugal and Spain. In other instances, NGOs perform this function.

In some countries, however, asylum-seekers who are detained (and/or whose applications have not yet been registered) receive little information concerning the progress of their asylum application. They are frequently unaware of why they are being detained; how they might have recourse to the appeals process; or when the detention period will end.

UNHCR POSITION

All applicants should receive preliminary counselling, legal assistance and be provided with relevant information in the appropriate language provided by NGOs, legal counsellors, the Government, UNHCR or some combination of these. Such support should include the possibility to be assisted in submitting a written statement.

Asylum-seekers should be allowed to contact NGOs, UNHCR and legal representatives. UNHCR should have access to asylum-seekers wherever they find themselves, and should have access to all asylum claims at all stages of the procedure.

ii) Interpretation

Developments

As stated above, the EU Resolution on Minimum Guarantees for Asylum Procedures stipulates that asylum-seekers be informed of the procedure to be followed and their rights and obligations during the procedure, in a language which they can understand. To this effect, they must be given the services of an interpreter, whenever necessary, for submitting their case to the authorities concerned.

Most European countries provide interpreters during all stages of the procedure. However, in many countries, such as the Czech Republic, Greece, Hungary, and Romania, there are often an insufficient number of interpreters, and or they are not versed in all required languages. Also, interpreters are not always available at all stages of the procedure. In Romania, for instance, interpreters are only available during the first stages of the procedure. Asylum-seekers face serious language obstacles, however, when they submit their applications and are notified of the written decisions.

In a number of countries, in cases where asylum-seekers are detained, and where no interpreter is available, other asylum-seekers often provide *ad hoc* interpretation. In some countries, such as Greece and Latvia, UNHCR and NGOs also assist with providing interpretation on an *ad hoc* basis.

Some countries do not provide interpretation facilities at certain detention centres where asylum-seekers are held. This is the case in certain instances in Estonia, Romania, the Russian Federation, and Slovenia. In the Russian Federation, safeguards such as the provision of interpreters and of information regarding the asylum procedure (see following sub-section) are not provided to asylum-seekers whose applications are not yet registered.

The EU Resolution also states that these services must be paid out of public funds, if the interpreter is called upon by the competent authorities.

UNHCR POSITION

Asylum-seekers must be given the services of an interpreter, whenever necessary, for submitting their case to the authorities concerned. These services must be paid out of public funds. For cases dealing with separated children, interpreters should be skilled and trained in communicating with children and in refugee children issues.

iii) Interview by Qualified Staff

Developments

According to the EU Resolution on Minimum Guarantees for Asylum Procedures, the asylum-seeker must be given the opportunity of a personal interview with an official qualified under national law, before a final decision is taken on the asylum application. This official need not necessarily be the person who is responsible for making the final decision.

While the legislation in many countries does not always explicitly provide for a personal interview, it is the practice of a number of countries (Belarus, Belgium, France, Germany, Norway and the United Kingdom) to conduct such an interview in order to allow the applicant to state his/her case.

UNHCR POSITION

Asylum-seekers should be given a full personal interview by a fully qualified official and, whenever possible, by an official of the authority competent to determine refugee status. In addition, for claims requiring special attention such as, for example, those involving allegations or torture, or gender-related persecution, interviewers should receive specialized training, and appropriate procedures and resources should be available for their identification and to deal with their special needs. Where interviews are required in the case of separated children, they should be carried out in a child-friendly manner (breaks, non-threatening atmosphere) by officers professionally qualified and specially trained in interviewing children. Children should always be accompanied at each interview by their legal representative and, where the child so desires, by their guardian or other significant adult (social worker, relative etc.). (See Sub-section vii) on Groups with Special Needs.)

iv) Determination by a Competent Authority

Developments

The Resolution on Minimum Guarantees for Asylum Procedures provides that decisions concerning an asylum application should be taken by an authority fully qualified in asylum and refugee matters. To this effect, states must have at their disposal specialised personnel with the necessary knowledge and experience in the field of asylum and refugee matters, who have an understanding of an applicant's particular situation. This personnel must have access to up-to-date information on

countries of origin and transit countries. They must have a right to ask advice, whenever necessary, from experts on particular issues.

The draft Directive on minimum standards for asylum procedures stipulates that decision-making authorities should have access to information on country of origin and be able to seek expert advice whenever necessary. Personnel should have received the requisite initial training; decision-making should follow certain investigative standards; decisions are to be taken individually, objectively and impartially, and full reasons should be stated for adverse decisions.

In some countries, such as Austria, France and Poland (draft legislation), the authority who decides in accelerated procedures is the same as the authority in the normal determination procedure. Some countries' authorities make eligibility decisions based exclusively on the 1951 Convention, whereas others refer to additional international instruments such as the ECHR. In Austria, the authority first decides whether the applicant is a refugee within the meaning of the 1951 Convention. If the result is negative, then the same authority decides whether the applicant may be sent back to his/her country of origin or whether s/he has to be protected against *refoulement* based on Article 33 of the 1951 Convention and Article 3 of the ECHR. (See Sub-section v) on Appeal by an Independent Authority.)

UNHCR is involved in the airport procedures in some countries such as Austria, Spain and Switzerland. In Austria, asylum applicants arriving via the airport may only be dismissed as being manifestly unfounded or by reason of existing protection in a safe third country with the consent of UNHCR. UNHCR's consent is not required, however, in cases where rejection takes place because another state is responsible under a treaty for examining the asylum application. In Switzerland, in cases where entry is not authorised and the applicant cannot be sent back to a third country, the applicant can only be sent back to his/her country of origin or provenance if the Federal Office for Refugees and UNHCR jointly agree that there is no manifest risk of persecution for the applicant. Furthermore, the Swiss Appeals Board frequently consults UNHCR regarding the "reasonableness" of return of applicants to third countries.

UNHCR POSITION

The manifestly unfounded or abusive character of an application should be established by the authority normally competent to determine refugee status. This authority should undertake a thorough investigation and evaluation of the case.

That authority should examine not only the applicant's eligibility under the 1951 Refugee Convention, but also as regards the European Human Rights Convention, including, in particular, its Articles 3 and 8, and other international treaty obligations, for example, the UN Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) and the International Covenant on Civil and Political Rights.

The decision on eligibility under the 1951 Convention and whether the applicant is covered by Article 3 of the ECHR should be undertaken by the same body in a single procedure.

v) *Appeal by an Independent Authority*

Developments

According to the Resolution on Minimum Guarantees for Asylum Procedures, the starting point is that there should be an appeal possibility against a negative eligibility decision. Such an appeal should normally have suspensive effect on the implementation of the deportation order. (See Sub-Section vi) on Suspensive Effect of Appeal.)

The draft Directive on minimum standards for asylum procedure stipulates that asylum applicants must have the right to appeal against a decision in first instance, irrespective of the nature of the decision. The draft also outlines a three-tier system, consisting of an authority determining refugee status, an authority to hear administrative or judicial appeals and an Appellate Court.

However, in manifestly unfounded procedures, the Resolution on Minimum Guarantees for Asylum Procedures allows for excluding the possibility of an appeal against a negative decision altogether, if instead an independent body distinct from the examining body has already confirmed the decision.

Most European countries have an appeals mechanism within accelerated procedures. In Austria, for example, applicants in the accelerated procedure have the right to lodge an appeal. The (independent) authority at the second instance then has to pronounce its decision within ten working days. If necessary, the time limit may be extended to a maximum of 20 working days. However, in practice, this time limit is rarely met, and accelerated procedures generally last several months (up to one year).

In Spain, applicants rejected at border points can invoke an administrative review to the Ministry of the Interior within a period of 24 hours from the date the decision was rendered. The Ministry of the Interior must decide on the review, and the applicant must be notified within a two-day period. Should the review confirm the first negative decision, the applicant is entitled to lodge a judicial appeal to the National High Court.

In Luxembourg, asylum-seekers whose claims are determined to be manifestly unfounded by the Minister of Justice at the first instance, may request an appeal of the decision (*annulation*) before the Administrative Tribunal (*Conseil d'Etat*).

Finally, other countries, such as Finland, do not provide for a formal appeal for manifestly unfounded decisions. In Finland, manifestly unfounded cases are channelled automatically by the Directorate of Immigration to the County Administrative Court for final decision. (See Section B 3 on Safe Country of Origin.)

UNHCR POSITION

The asylum-seeker must be provided an adequate opportunity to rebut the presumption that the claim is not well-founded. Moreover, an unsuccessful applicant

should be able to appeal a negative decision. This appeal possibility can be more simplified than that available in the case of rejected applications that are not considered manifestly unfounded or abusive. For example, time limits for lodging the appeal may be shortened, the appeal procedure prioritised or the number of members of a panel hearing the appeal reduced. The appeal authority should be able to gain a personal impression of the applicant.

Furthermore, there is a principle of general application of administrative law in a number of European states such that at a minimum, one level of appeal will be carried out by an independent authority. UNHCR considers that in order to be meaningful, the appeal should be by an authority different from and independent of the one making the initial decision.

vi) *Suspensive Effect of Appeal*

Developments

According to the Resolution on Minimum Guarantees for Asylum Procedures, an appeal/review possibility against a negative eligibility decision should have suspensive effect on the implementation of the deportation order. Again, however, even under normal asylum procedures, states are authorized, if their national legislation so permits, to derogate from these principles. In such instances, the Resolution stipulates that there should exist a possibility of applying on a case-by-case basis to the appeal body for leave to remain pending the outcome of the appeal procedure.

In manifestly unfounded procedures, the Resolution allows for entirely excluding the possibility of giving an appeal suspensive effect.

The Council of Europe Recommendation on the Right of Rejected Asylum-Seekers to an Effective Remedy in the Context of Article 3 of the ECHR stipulates that such a remedy before a national authority is considered effective only when the execution of the expulsion order is suspended until the decision of that authority is taken. This Recommendation is of particular relevance to countries where issues relating to the 1951 Refugee Convention and Article 3 of the ECHR are dealt with in a single procedure.

Whilst neither the Resolution on Manifestly Unfounded Applications for Asylum nor the Resolution on Minimum Guarantees for Asylum Procedures impose an unconditional obligation on EU Member States to provide for an appeal of manifestly unfounded decisions with suspensive effect, certain countries, including Austria, Belgium, Bulgaria, Czech Republic, Greece, Hungary, Ireland, Portugal, and Slovenia do. Greece and Hungary apply an almost identical procedure to manifestly unfounded and other claims, the only difference being the time limits for submitting the appeal and taking the decision.

Even though the time limits for filing appeals in these countries are rather short (in the United Kingdom the time limit is 48 hours), these appeals do have suspensive effect.

However, some states, such as the Russian Federation, do not provide the possibility of giving an appeal suspensive effect in cases being dealt with in manifestly unfounded procedures.

In Central European countries that employ accelerated procedures, most provide for suspensive effect of appeals. In Hungary, suspensive effect of appeals in airport procedures was introduced on 1 September 1999. However, amendments to Slovakia's Aliens Law provide that appeals against expulsion of illegal entrants and overstayers not have suspensive effect.

In certain other jurisdictions, the suspensive effect is not automatic and remains at the discretion of the authorities. In Switzerland, applicants whose cases are deemed manifestly unfounded by the first instance authorities, and a decision has been taken to immediately return them, have 24 hours to appeal against the withdrawal of suspensive effect. In Germany, the asylum-seeker can apply for an injunction suspending deportation at the local Administrative Court. In the Netherlands, the applicant may request the courts to grant suspensive effect of appeals unless the rejection is combined with measures implying further limitation of movement. In Denmark, suspensive effect can only be waived upon concurrence by the Danish Refugee Council.

In Spain, a judicial appeal against a rejection at the border may be lodged to the National High Court (after review and rejection by the Ministry of the Interior (see Sub-Section v) Appeal by an Independent Authority)). The appeal does not have suspensive effect unless the applicant requests so to the National High Court, and this Court deems it appropriate to suspend deportation. Alternatively, the deportation order will be suspended if UNHCR issued a positive opinion concerning the case in question during the administrative review. In such cases, the competent authorities will authorise the applicant's immediate entry into Spain to lodge his/her appeal to the Court.

UNHCR POSITION

The appeal should have suspensive effect allowing the applicant to remain in the country pending the review of his/her case. Exceptions to the principle of suspensive effect of appeals may be possible in instances where UNHCR has been given a formal role in the procedure to provide its opinion on whether a case should be channelled into an accelerated procedure, provided that opinion is mandatory for the decision of the national authority.

An exception to the principle of suspensive effect would be acceptable in cases where an NGO, which has an agreement with UNHCR, can veto the channelling into accelerated procedures.

vii) *Groups with Special Needs*

Developments

Women

In some countries, female asylum-seekers receive specialised treatment during the refugee status determination procedure. According to the EU Council Resolution on

Minimum Guarantees for Asylum Procedures, “Member States must endeavour to involve skilled female employees and female interpreters in the asylum procedure where necessary, particularly where female asylum-seekers find it difficult to present the grounds for their application in a comprehensive manner owing to the experiences they have undergone or to their cultural origin.”

Executive Committee (EXCOM) Conclusion No. 64 on Refugee Women and International Protection (1990) recommends providing “skilled female interviewers in procedures for the determination of refugee status and ensure appropriate access by women asylum-seekers to such procedures, even when accompanied by male family members.”

In some European countries, women have the right to file independent applications and be interviewed by female staff and interpreters during the status determination procedure. In Slovenia, for example, the Asylum Law stipulates that female asylum applicants shall be entitled, upon request, to have a female person to conduct the asylum procedure or to provide interpretation. In the Netherlands, female asylum-seekers are also interviewed separately from their male relatives.

In line with the EU Council Resolution, Executive Committee (EXCOM) Conclusion No. 64 on Refugee Women and International Protection (1990) also recommends providing “the representation of appropriately trained female staff across all levels of all organisations and entities, which work in refugee programmes and ensure direct access of refugee women to such staff.”

Separated Children

General safeguards for separated children in European countries are outlined in the EU Council Resolution on Minimum Guarantees for Asylum Procedures, and the EU Council Resolution on Unaccompanied Minors who are Nationals of Third Countries of 26 June 1997.

In accordance with the EU Council Resolution on Minimum Guarantees for Asylum Procedures, many European countries’ legislation provides for the appointment of a guardian for separated children. In practice, however, only a few countries appoint guardians systematically, while most countries appoint them on an *ad hoc* basis. In Spain, separated children are assigned a legal representative to act *in loco parentis* and to represent the minor in status determination procedures. In Hungary, for minors under the age of 18 without legal representation, the Hungarian Office for Refugee and Migration Affairs (ORMA) provides a temporary guardian for the determination period, and a permanent guardian is appointed by the municipality of the child protection authority for all other aspects of private life (schooling, health, etc.). Similarly, in Latvia, separated children are allocated an impartial representative by the Refugee Appeals Council. Allocation of a legal representative to separated children is also provided in Poland, Slovakia and Slovenia among other countries.

The age at which minors are considered “minor” and thus entitled to “special” benefits varies from country to country. It is generally 18 years of age. In the draft amendment of the Refugee Law in the Slovak Republic, for instance, the age limit of a minor is being changed from under 15 to under 18 years in cases where a legal representative or guardian is required to act on a minor’s behalf in the refugee status determination procedure. In some countries, however, the age limit is lower. For example, separated children between the ages of 14 and 18 years have their claims

processed under the same procedure as adults in Romania, and between the ages of 15 and 17 years in Denmark.

Special Groups

There are few provisions or specialised assistance programmes in place in European countries to ensure special care, accommodation or other assistance for vulnerable applicants such as the elderly and disabled, torture victims and traumatised asylum-seekers.

UNHCR POSITION

UNHCR's experience, and that of some states, with status determination involving certain groups or those with certain types of experience, has revealed that status determination can pose particular problems and require particular procedural adjustments, in order for certain applicants to be provided with a full and fair hearing. Groups, which have been so far been identified include:

- (i) victims of sexual violence, especially if they are women from some cultural backgrounds;
- (ii) torture victims generally;
- (iii) psychologically disturbed persons;
- (iv) separated children (under 18 as provided for in the Convention on the Rights of the Child)

UNHCR and states have developed guidelines with respect to dealing with these groups. Reference may be made to the various published guidelines for more detail.⁵ In general, important procedural considerations which should be highlighted in any procedure dealing with such groups include:

- (i) creating an interview atmosphere in which the claimant can feel comfortable enough to divulge the information needed to determine the claim (including, for instance, where necessary for claims by certain women, the provision of female interpreters and interviewers; or in the case of young children, the provision of specially qualified and trained interviewers, or providing for the presence of a trusted adult);
- (ii) training decision-makers and interviewers to be culturally and gender sensitive, in order to both pose questions in a way that is likely to elicit a response, and to truly hear and understand what is being said by the interviewee;
- (iii) being prepared to obtain evidence from medical or other specialist sources, or to infer facts from a myriad of sources of evidence, where those facts cannot,

⁵ See the *UNHCR Handbook*, paragraphs 206 - 219; *Guidelines on the Protection of Refugee Women*, UNHCR, 1991; *Guidelines: Women Refugee Claimants Fearing Gender Related Persecution*; *UNHCR Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum*, 1997; Sandy Ruxton *Separated Children Seeking Asylum in Europe: a Programme for Action*, UNHCR and Save the Children, 2000.

because of the special nature of the claimant, be obtained in a more conventional way;

- (iv) women asylum-seekers should have independent access to asylum procedures, even when accompanied by male family members;
- (v) an adult or institution should be appointed to represent separated children seeking asylum who do not have capacity under national law, and should be allowed to accompany them during interviews;
- (vi) because of special needs of minors in accelerated procedures generally, but in procedures conducted at ports and airports in particular, are unlikely to be met, separated children should not be subject to such procedures;
- (vii) specific identification procedures should be established for separated children in countries where they do not already exist, with the purposes of finding out whether the child is separated from parents or previous primary caregiver or not, and of determining whether the child is an asylum-seeker or not;
- (viii) procedures for separated children should be immediate and should include: registration and documentation; an age assessment procedure that is humane and reliant on psychological maturity in addition to physical test; tracing of parents or families in the shortest delay; and appointment of a guardian to assist and protect the child;
- (ix) for separated children's claims, particular regard should be given to circumstances such as the child's stage of development, his/her possibly limited knowledge of conditions in the country of origin, and their significance to the legal concept of refugee status, as well as his/her special vulnerability;
- (x) it should further be borne in mind that certain policies and practices constituting gross violations of specific rights of the child (such as recruitment of children for regular or irregular armies, their subjection to forced labour, the trafficking of children for prostitution and sexual exploitation and the practice of female genital mutilation) may, under certain circumstances, lead to situations that fall within the scope of the Refugee Convention.

(See Chapter III Section C for additional information on Groups with Special Needs and Burden of Proof.)

3. Safe Country of Origin

Developments

In recent years, a number of European countries have introduced into their legislation the possibility of channeling claims from applicants originating in countries considered as safe into accelerated procedures. Such countries are listed on so-called "safe country of origin" lists. In instances where the safety of countries figuring on such lists represents a presumption only, against which a rebuttal surrounded by adequate safeguards is possible, this practice does not give rise to concern. However, it may give rise to concern in cases where applicants coming from countries that figure on such lists are automatically barred access to the asylum procedure, or have their

cases channeled into accelerated procedures that are not surrounded by adequate procedural guarantees.

Application of the safe country of origin concept may result in: 1) automatic rejection of asylum/refugee claims lodged by nationals of countries not considered to be “refugee producing”; or 2) application of a rebuttable presumption against the validity of the claim.

Applying *de facto* safe country criteria in procedures is not a new practice. Eligibility officers often resort to a safe country concept, based on their general knowledge of conditions in countries of origin when assessing the well-foundedness of the fear.

On 30 November and 1 December 1992, the EC Immigration Ministers adopted their Conclusion on Countries in which there is Generally no Serious Risk of Persecution. According to the Conclusion, a safe country of origin is one “where it can be clearly shown, in an objective and verifiable way, normally not to generate refugees or where it can be shown, in an objective and verifiable way that circumstances which might in the past have justified recourse to the 1951 Convention have ceased to exist”. Member States may choose to use such an assessment in channelling cases into accelerated procedures. They should, according to the Conclusion, consider the individual cases of all applicants from such countries and any specific indications presented by the applicant which might outweigh a general presumption of safety (or no persecution). Elements such as previous refugee recognition rates, observance of human rights, the existence of democratic institutions and stability are taken into account.

According to the draft Directive on minimum standards for asylum procedures, if an applicant is from a safe country of origin, his/her claim may be considered manifestly unfounded.

In recent years, a number of western European countries have transformed the *de facto* safe country of origin practice into law. Several Central and Eastern European countries, such as Estonia, Latvia and Ukraine, also have provisions in their refugee legislation concerning safe countries of origin.

Some legislation provides for certain countries to be included on safe country lists by executive action only, as is the case in Finland and Switzerland, or by both legislative and executive action, as in the case of Germany.

Removing a country from the lists is usually possible by executive action only. This is the case, for example, in countries such as Finland, Germany, the Slovak Republic and Switzerland. In some countries, such as Ukraine, there seems to be no review mechanisms to adapt to changed circumstances in countries of origin, nor are there consultations with UNHCR on the nature and consequences of such changes when they occur.

The criteria used to assess whether a country is safe differ from country to country. In Germany, a country is placed on the safe country list if the legal situation, the application of the law and the general political circumstances justify the assumption that neither political persecution, nor inhumane or degrading punishment or treatment takes place there. In Switzerland, the asylum law provides that the

Federal Council can determine which countries, on the basis of their findings, should be considered as safe from persecution. In the Nordic countries, those countries, which have acceded to the 1951 Convention without geographical limitation, and are members of the Council of Europe can be considered safe. The latter is also a criterion applied in Latvia. In Estonia, however, neither the Refugee Act nor any by-laws stipulate which criteria should be applied when determining whether a country can be considered safe or not.

In the above-mentioned countries that have introduced such safe country lists, the safety of the country represents a presumption only, which is subject to rebuttal by the applicant.

In Finland, if an asylum-seeker is rejected in a first instance decision of the Directorate of Immigration (DOI), then the applicant can appeal the decision to the Helsinki Administrative Court. In manifestly unfounded cases, the court only receives and reviews the paper copy of the decision (without hearing from the applicant), and either approves or sends the claim back for further review. There is an Ombudsman for Aliens, but his/her role is limited due to the large number of decisions that s/he must review each year. In practice, the Ombudsman has rarely disagreed with the decisions of the DOI.

In most countries, the safe country of origin notion is employed to determine admissibility to the territory, and to channel claims into accelerated procedures as manifestly unfounded. In 1996, the Government of the United Kingdom introduced a list of designated safe countries of origin, known as the "White List". Any person coming from one of the safe countries of origin on this list could be removed without an in depth examination of his/her asylum claim. The White List was, however, abolished in 1998. In Germany, Luxembourg and Portugal applicants originating from safe countries are automatically channelled into the accelerated procedure. In Germany, there is an appeal against a finding of manifestly unfoundedness. Such an appeal will only have suspensive effect, however, if there are serious doubts as to the legality of the administrative act against which the complaint has been filed. Similarly, applicants in Switzerland may appeal, but not with an automatic suspensive effect.

In France, the safe country of origin notion is used as a common sense guideline rather than as a strict legal criterion. However, in 1998, France introduced a legislative amendment to its Asylum Law of 1952, allowing the *Prefet* to deny a temporary residence permit to asylum-seekers of a nationality for which the cessation clause of 1C(5) of the 1951 Convention applies. The *Prefet's* decision, however, does not preclude OFPRA making a substantive examination of the asylum claim.

In certain countries, such as Hungary, the safe country of origin notion is also being employed in the ordinary refugee status determination procedure.

The Protocol on Asylum for Nationals of EU Member States, which is part of the Amsterdam Treaty, provides that only under exceptional circumstances should EU Member States entertain asylum applications from nationals of other EU Member States. If they decide to do so, in spite of these circumstances being fulfilled, they should presume such applications to be manifestly unfounded. In this regard, the Declaration made by Belgium on the Protocol is noteworthy. Belgium declared indeed that " in accordance with its obligations under the 1951 Convention and the

1967 New York Protocol, it shall, ... carry out an individual examination of any asylum request made by a national of another Member State.”

UNHCR POSITION

UNHCR believes that the use of the notion of safe country of origin as an automatic bar to access to asylum procedures is contrary to the necessary individual determination of refugee status under the 1951 Convention, which includes assessment of the subjective element of fear of persecution. It is impossible to exclude, as a matter of law, the possibility that an individual could have a well-founded fear of persecution in any particular country however great its commitment to human rights and the rule of law.

However, that would not be the case in principle where: 1) the notion of safe country of origin is used as a procedural tool to assign certain applications to accelerated procedures; or 2) where its use has an evidentiary function, for example giving rise to a presumption of non-validity of claims.

The decision to include countries in the safe country of origin list should only be based on verifiable current assessments of factual situations. Countries where there is more than an insignificant risk of persecution or other threats to life and freedom should not be considered “safe”. Therefore, countries where there is a civil war/strife should be excluded from such lists.

In determining whether a country is “safe”, states should take into account the following factors: its respect for human rights and the rule of law; its record of not producing refugees; its ratification and compliance with human rights instruments; and its accessibility to independent national or international organisations for the purpose of verifying and supervising respect for human rights.

Where the notion is used as a procedural tool for assigning claims to accelerated procedures made by persons coming from countries enumerated on the list of safe countries of origin, it should be ensured that these procedures are accompanied by appropriate safeguards. The safeguards should be similar to those required for manifestly unfounded procedures. (See Section 2 on Procedural Guarantees for Manifestly Unfounded Procedures.) If the fact that a country figures on the list gives rise to a presumption of non-validity of claims made by nationals of that country, the claimant should be given the possibility to rebut the presumption. For this rebuttal to be effective, it should include an appeal or review possibility with suspensive effect.

UNHCR expressed serious reservations about the adoption of a Protocol to the Amsterdam Treaty providing for the possibility to limit the ability of EU citizens to apply for asylum in other EU Member States. The Office took the position that access for asylum-seekers – without discrimination as to country of origin – to fair and efficient asylum procedures – is a basic pre-requisite of international refugee protection. The Office also expressed concern that this type of restriction threatened the universality of the international refugee protection regime and might be adopted in other regions, where human rights protection might be less well developed than in Europe.

4. Serious Crimes

Developments

The Resolution on Manifestly Unfounded Applications for Asylum states that its provisions are without prejudice to national provisions allowing asylum claims to be placed into accelerated procedures if it is established that the applicant has committed a serious offence in the Member States, if a case manifestly falls within Article 1F of the Convention, or for reasons of public security.

As a result, some countries such as the Czech Republic, France, Germany, Latvia, Luxembourg (draft legislation) and Portugal have included crimes and or threats to national security as reasons for channelling asylum claims into accelerated procedures. Lithuania, while not having an accelerated procedure presently, has provisions for an accelerated procedure in its draft Refugee Law, according to which threats to national security and public order will comprise grounds for channelling claims into this procedure.

UNHCR POSITION

UNHCR has taken the view that the application of Article 1 F of the 1951 Convention requires a very careful examination of the application for refugee status and of the grounds for exclusion from international protection.

Moreover, it has been broadly accepted that exclusion clauses, which are exceptions to the rule, are, as a matter of treaty interpretation, subject to restrictive interpretation. UNHCR has constantly advocated that states balance the need for international protection with the seriousness of the crime or misconduct. This normally entails a need to examine the claim substantively and on its merits, after, or at least together with, consideration of the merits of the claim under the inclusion clauses. (For more information on UNHCR's Position regarding Article 1F, see Chapter III Section A.) This approach, however, is not possible in an accelerated procedure and therefore such cases ought not be so considered.

5. Internal Flight/Relocation Alternative

Developments

The notion of internal flight/relocation alternative is increasingly used in order to reject asylum-seekers on the grounds that they could have sought or can safely find refuge in another area of their country of origin, rather than leaving and seeking asylum abroad. The Resolution on Manifestly Unfounded Applications regards the possibility of finding an internal flight/relocation alternative as a ground for considering the application as manifestly unfounded. A number of European countries are applying the concept of internal flight/relocation alternative. (See Chapter III A 2 on same subject.)

UNHCR POSITION

Applications where the internal flight/relocation alternative is relevant raise a number of complex questions. There is as yet no international consensus on the exact parameters of this notion, which in UNHCR's view is no more than one element in determining the well-foundedness of fear in certain cases where it arises. An in-depth examination will always be required to establish whether the persecution faced by an individual applicant is clearly limited to a specific area, and whether moving elsewhere can overcome the well-foundedness of the individual's fear. For this reason, it is inappropriate to consider such applications in the accelerated procedures.

6. Time Limits and Undocumented Asylum-Seekers

Introduction: the Issue

Increasingly, asylum-seekers' claims are adversely affected on the grounds that they have missed the time frame within which an asylum application has to be lodged in a particular country, and/or because the applicant lacks proper or sufficient travel documents or documents attesting to his/her personal identity.

In some countries, an asylum-seeker in this situation may have his/her claim considered as inadmissible and hence, barred from the refugee status determination procedure. In other countries, such individuals' claims will be deemed as manifestly unfounded, and consequently examined in accelerated procedures. And, in some countries, such circumstances will negatively affect the credibility of an asylum applicant.

Time Limits

Developments

In Admissibility Procedures

The legislation of the large majority of European states does not provide for time limits for filing asylum applications. In a number of Central and Eastern European states, which do apply time limits, they are being removed or extended. In Slovakia, for example, a draft amendment of the Refugee Law provides for the removal of time limits for access to refugee status determination procedures. Similarly, in Poland, following a decision by the Supreme Administrative Court (see below), the new Refugee Law will not include time limits. In Hungary, previous legislation included a 72-hour time limit, but the current Asylum Act does not specify any time limit within which in-country applications must be submitted. And, in Romania, though the current law contains a 10-day time limit for filing an asylum application, a draft revision of the new law currently under consideration requires that an application be lodged "as soon as possible".

In Western European countries, for the few that have adopted this practice, falling outside the time limits established does not automatically result in the claim being barred from examination on the substance. For example, in Spain, where it is foreseen that an asylum application must be submitted within one month after the asylum-seeker's arrival, the application presented after this period will be inadmitted into the regular refugee status determination procedure. However, the authorities, following UNHCR's recommendations on a case-by-case basis, generally do not

consider applications falling outside the time limits as a sufficient criterion for inadmissibility. In the Netherlands, asylum-seekers who do not possess valid documents for entry, may be declared inadmissible, unless they request for asylum without delay (in practice within 48 hours). Yet the Dutch Court of Standardisation ruled in December 1994 that this provision must follow a motivated assessment as to whether there is reasonably no doubt that persecution does not exist.

In countries where time limits are applied, they vary depending on whether the asylum application was lodged at the border, or within the country. Also, different time limits may be imposed for asylum-seekers who arrive legally versus those who arrive illegally. For instance, in the Russian Federation, asylum-seekers who have entered the country legally may submit their application to one of the Federal Migration Services (FMS) at any time. Asylum-seekers arriving illegally, however, must lodge their application with the border guards at a border point, with a territorial branch of the Federal Ministry of Internal Affairs or with the FMS within 24 hours of crossing the border.

In Ukraine, in-country applicants who entered legally must respect a three-day time limit, whereas those who entered illegally must request asylum within the first 24 hours after their entry into the country. The latter rule also applies in Belarus.

In Poland, asylum applications must be lodged while crossing the border, and immediately after having crossed the frontier in cases of illegal entry. Those asylum-seekers who fail to do so due to a justified fear of life or health should lodge their applications within 14 days after crossing the border. “*Sur place*” refugees must lodge their applications within 14 days from the time they receive information on the existence of circumstances justifying the granting of refugee status. As mentioned above, in a decision by the Supreme Administrative Court in August 1999, however, the application of time limits of any form was negated as a criterion for rejecting asylum-seekers.

In some cases, access to the asylum procedure is denied for overstayers. In Slovakia, for instance, the Refugee Law stipulates that an asylum-seeker may apply for refugee status within the period of permitted stay. In February 1998, the Constitutional Court confirmed that non-compliance with this provision may lead to denial of access to the asylum procedure.

In Accelerated Procedures

According to the draft Directive on minimum standards for asylum procedures, Member States will be able to dismiss applications as manifestly unfounded if an application is made at the last stage of a procedure to deport the person and could have been made earlier.

A number of European countries, particularly in Central and Eastern Europe, place asylum applications that have been made after the expiration of a time limit into accelerated procedures.

In some countries, illegal entry combined with the expiry of time limits may result in the asylum-seeker’s claim being examined in accelerated procedures. In the case of Latvia, for instance, although the Asylum Law does not include any specific time limit within which an in-country application should be submitted, applicants who have resided illegally in the country for more than 72 hours are generally dealt with under accelerated procedures.

In the Slovak Republic, there is a 24-hour time limit for applying for asylum. However, there exist two contradictory Ministerial Decrees on this issue. One provides that access to the determination procedure is denied for those without adequate explanation for the delay in submitting their application. The other stipulates that such cases should be dealt with in the accelerated procedure. In practice, increasingly, applicants who submit their claim after the 24-hour time limit are likely to be admitted to the determination procedure. And, while Slovak legislation provides for an accelerated procedure to be applied in a variety of situations, in practice applicants are virtually always admitted into the regular and not the accelerated procedure.

Most countries that channel applicants applying after the expiration of time limits into accelerated procedures allow for the possibility of appeal against a negative decision. In Austria, for example, if an application is dealt with in the accelerated procedure, the applicant has the right to lodge an appeal against a negative decision within ten days.

Affecting Credibility

While most European countries do not apply any time limit for filing an asylum application, in practice, some countries, such as Norway and Sweden, apply a strict credibility interpretation viewing any delay in filing an asylum application as undermining the overall credibility of the asylum-seeker's claim.

UNHCR POSITION

Regarding Admissibility and Accelerated Procedures

Asylum-seekers should, in principle, apply for asylum without delay. However, in no instance should the application of time limits bar access to the asylum procedure. The reasoning behind this position is that to do so may lead to a violation of the fundamental principle of *non-refoulement*. The UNHCR Executive Committee (EXCOM) affirmed in its Conclusion No. 15 on Refugees without an Asylum Country (1979): "while asylum-seekers may be required to submit their asylum request within a certain time limit, failure to do so, or the non-fulfilment of other formal requirements, should not lead to an asylum request being excluded from consideration".

A time limit may be set in order to define the notion of "without delay" contained in Article 31, paragraph 1 of the 1951 Convention. However, in line with the criteria set out in Articles 31 and 33 of the Convention, neither illegal entry nor the failure to report to the competent authorities within a given time limit can be considered formal grounds to exclude a person from refugee status. The obligation of a state party to the 1951 Convention to observe the *non-refoulement* principle of Article 33 exists independently from an alien's compliance or non-compliance with formal requirements, even if the alien entered the country illegally.

In countries where time limits are used, UNHCR recommends that they be applied in a flexible manner. A flexible approach would include examining applications on their substance; and requesting explanations for late applications. If explanations are found to be invalid, the findings may negatively affect the credibility of the claimant. It should be noted that asylum-seekers may be unaware of or unable to comply with the proposed time limits for a variety of legitimate reasons, including

lack of information, health problems, language barriers and difficulties encountered in gathering documentary evidence. In such instances, they should be supported with information, documentation and counselling.

In so far as rejections on purely procedural grounds lead to automatic deportation of the individuals concerned to their countries of origin, they may also constitute a violation of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Establishing time limits for filing asylum applications from the moment an asylum-seeker enters the country of asylum, would bar access to the procedure to “*sur place*” refugees whose claims arise from subsequent events or circumstances in their country of origin during their absence. Thus, if time limits are applied to such refugees, they should come into effect from the moment the applicant receives information as regards the events or circumstances, which justify the claim for refugee status.

Finally, rejection for expiry of a time limit would be less serious in cases where the claimant originated from a safe third country and was consequently returned to a safe third country, rather than to the country of origin. Nevertheless, as stated, the passage of time does not alter the fundamental obligation of *non-refoulement*.

Regarding Credibility

While, as mentioned above, expiry of time limits should not bar access to the refugee status determination procedure nor automatically channel an asylum claim into accelerated procedures, such circumstances could, in certain contexts and if not adequately explained, make an asylum claim less credible.

Undocumented Asylum-Seekers

Developments

In recent years, European states have adopted a panoply of measures aimed at preventing and combating illegal migration. Such measures have included specific provisions relating to asylum-seekers who are undocumented or possess false or falsified documents.

In a number of European countries, lack of documentation has no implication for the processing and outcome of asylum claims. In Slovenia, for instance, the new Asylum Law of 1999 stipulates that asylum-seekers shall be granted entry regardless of whether they are in possession of documentation or not. In other countries, however, undocumented asylum-seekers' claims are referred to admissibility procedures or accelerated procedures for manifestly unfounded claims.

In Admissibility Procedures

Under current Swiss legislation, applications from asylum-seekers who do not present travel documents or other documents proving their identity within 48 hours, will receive a decision referred to as “*non-entrée en matière*”. However, the decision will not be issued if the applicant is able to give “excusable” reasons for the lack of documents, or if there are signs of persecution that are not manifestly unfounded.

Suspensive effect during the appeal is not automatic, but the applicant may request it within a 24-hour deadline.

In the Netherlands, claims by asylum-seekers who do not possess travel documents and who are unable to prove that the lack of documents is not attributable to them, may be declared inadmissible.

In some countries such as Belgium, France, Germany, Spain and Switzerland, asylum-seekers arriving at airports and ports without documents enter a pre-admission/screening procedure prior to a decision being made on granting access to the territory. In Hungary, the airport procedure has been introduced with a view to deny improperly documented asylum-seekers arriving from a safe third country or a safe country of origin immediate access to "Hungarian territory". The procedure does not differ from the normal procedure with the exception that the first interview should take place immediately and not within five days from the submission of the application.

In Accelerated Procedures

According to the Resolution on Manifestly Unfounded Applications for Asylum, adopted by the Immigration Ministers of the European Communities on 30 November and 1 December 1992, EU Member States may consider including under the accelerated procedures "all applications which are clearly based on deliberate deceit or are an abuse of asylum procedures". There are a number of instances in which deliberate deceit or abuse may be suspected. For instance, cases where the applicant bases his/her application on a false identity or on forged documents which s/he has maintained as genuine when questioned about them. Also, in cases where s/he has, in bad faith, destroyed, damaged or disposed of any passport, other document or ticket relevant to his/her claim in order to establish a false identity for the purpose of his/her asylum application, or to make the consideration of his/her application more difficult. Nevertheless, these factors cannot in themselves outweigh a well-founded fear of persecution under Article 1 of the 1951 Convention.

Criteria for channelling claims through the accelerated procedures applied by states vary from those in the Resolution on Manifestly Unfounded Application for Asylum to other criteria whose scope goes beyond this instrument. For example, in the United Kingdom, for port entrants, failure to produce a passport, or production of an invalid passport, without a reasonable explanation, will result in the claim being considered as manifestly unfounded.

According to the draft Directive on minimum standards for asylum procedures also contains provisions on accelerated procedures, Member States are able to dismiss applications as manifestly unfounded if the applicant has produced no identity or travel document and has not provided the determining authority with sufficient or sufficiently convincing information to determine his identity or nationality, and there are serious reasons for considering that the applicant has in bad faith destroyed or disposed of an identity or travel document that would help determine his identity or nationality.

Affecting Credibility

A number of countries in Europe, while not channelling their claims through admissibility or accelerated procedures, may consider that an asylum-seeker's lack

of documentation or deliberate destruction of his/her passport and tickets relevant to his/her claim without reasonable explanation, constitutes an element which negatively affects his/her credibility.

Undocumented Asylum-Seekers and Detention

An increasing number of European states, such as Belgium, the Czech Republic, Denmark, Estonia, Lithuania, Poland, and the Russian Federation detain undocumented asylum-seekers or those unable to prove their identity. In some cases as in Estonia, Finland, Lithuania and Sweden, national legislation does not specify the maximum duration of detention.

In most countries, detention does not affect access to the asylum procedure. However, in Lithuania, for instance, the practice of detention and criminal charges (for illegal entry or use of forged documents) results in a suspension of the examination of the asylum-seeker's application.

UNHCR POSITION

Regarding Admissibility and Accelerated Procedures

It is important to bear in mind that asylum-seekers may have valid reasons for being undocumented or being in possession of forged documents. The use of false documents and/or illegal entry may in some cases be unavoidable and necessary methods of flight. Indeed, in many cases persons fleeing from persecution will have arrived with the barest necessities, and frequently without personal documents. The 1951 Convention thus prohibits punishment for illegal entry.

While acknowledging that there is an increasing number of asylum-seekers arriving undocumented or with forged documents and that states have a legitimate interest in adopting measures aimed at preventing illegal migration, these facts must be reconciled with the right of individuals to seek asylum and with states' obligation not to *refouler* refugees.

The fact of not possessing identity and/or travel documents, or of possessing improper, insufficient or false documents, does not in and of itself constitute a reason for considering an asylum claim as abusive or fraudulent and, therefore, as manifestly unfounded. Nor does the mere fact of having made false representation, concealing or destroying documentation, constitute a reason for considering a claim as manifestly unfounded. Only in situations where the asylum-seeker deliberately attempts to deceive the authorities as to his/her identity or to the substance of his/her claim should the case be deemed as manifestly unfounded. If considering the nature of his/her situation, the applicant has provided credible and plausible account for the lack or state of documents, the application would not amount to a clear abuse of the asylum procedure, and should be admitted into the regular procedure. In any event, cases of undocumented asylum-seekers should always be examined in procedures involving an examination of the substance of the claim and, therefore, cannot be considered in admissibility procedures, where such an examination is not undertaken.

Regarding Credibility

While undocumented asylum-seekers should not be barred access to the refugee status determination procedure nor automatically channeled into accelerated procedures, depending on the explanations provided and the other circumstances, such circumstances could make an asylum claim less credible.

Regarding Detention

As with any other asylum-seekers, undocumented asylum applicants should not be detained unless absolutely necessary and in accordance with the law. If detention cannot be avoided, its duration must be kept to a minimum in order to verify identity in cases where refugees or asylum-seekers have destroyed their documents or have used fraudulent documents to mislead authorities in the country of asylum.

Chapter 3

Developments on the Substance of Refugee Status Determination

Section A The Application/Interpretation of Article 1 of the 1951 Convention or Inclusion Clauses

Introduction: the Issue

A number of European countries have in recent years sought to narrow the ambit of application of the 1951 Convention by means of adopting restrictive interpretations of the refugee definition and of introducing additional qualifying criteria. Two examples of this trend are particularly noteworthy: the restrictive application of the concept of agents of persecution, and the misuse of the notion of internal flight/relocation alternative. This practice has limited the possibilities for persons fleeing persecution arising in a civil war context of being recognised refugee status.

1. Agents of Persecution

Developments

According to the Joint Position on the Harmonised Application of the Term “Refugee” in Article 1 of the 1951 Convention adopted by the Council of the European Union in 1996, persecution by third parties is considered to fall within the scope of the 1951 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, the text provides that each case is to be examined in the light of national jurisprudence in order to determine, in particular, whether government inaction was deliberate.

The majority of European states accept asylum claims from persons risking persecution by non-state agents, and which their state is unwilling or unable to prevent. Thus, the “absence of protection” based on the state’s inability or unwillingness to provide protection is generally considered when determining refugee status. For example, the new Czech Refugee Law explicitly acknowledges that persecution by non-state agents may provide the basis for a refugee claim. (The Czech High Court, however, tends not to recognise persecution where there is no functioning state.)

In the Netherlands, in 1998, in the Hague District Court, decided that protection under the 1951 Convention cannot be withheld simply because there is no central or *de facto* authority in a country. (This position is a reversal from a 1995 Council of State decision, which held that there could be no persecution within the meaning of the 1951 Convention where there were no authorities (for example, in Somalia)). The Court also decided that it is unnecessary to take into consideration the different ways the Member States apply the concept of persecution by third parties where another Member State is responsible for examination of the asylum claim under the Dublin Convention, unless the applicant has exhausted all available judicial remedies in the responsible Member State, including those provided for under the ECHR.

Prior to the revisions of the Aliens Act in 1996, the Swedish authorities granted asylum in cases of persecution by non-state agents, except in cases where there was an absence of government. Reforms to the Aliens Act, however, have meant that cases of persecution by non-state agents may lead to asylum "...irrespective of whether persecution is at the hands of the authorities of the country or these cannot be expected to offer protection against persecution by private individuals", including where there is no state authority exercising power.

In Spain, persecution emanating from non-state agents is generally considered as a basis for refugee status by the Spanish Office of Asylum and Refuge in cases where the state authorities tolerate or promote acts of persecution by non-state agents. However, refugee status will be denied if the state authorities are willing to provide protection to victims of persecution by non-state agents. In such cases, the Spanish authorities tend to grant subsidiary forms of protection (humanitarian status) instead of refugee status.

On the other hand, some countries only grant refugee status in cases of persecution by state agents. In Germany, for instance, only persecution by or attributable to the state or quasi-state agents is considered relevant for the granting of asylum. Persecution by non-state actors for which the state is unable to provide protection (because it does not control parts or the whole of the territory) is not taken into account.

This position was confirmed by the Federal Administrative Court in April 1997 in a decision concerning a Somali asylum-seeker. Furthermore, the Court addressed the criteria for defining "state-like" agents. It outlined that an organization can only be considered as a 'quasi-state' agent if it is based on an organized, effective and stable exercise of power over a specific territory.⁶ The Court denied the existence of political structures in Somalia, which could be considered as state-like or 'quasi-state' like. It therefore found that no agents of persecution capable of persecution as interpreted by German case law existed in Somalia. In November 1997, the Federal Administrative Court also denied the existence of state-like agents of persecution in Afghanistan. For the time being, this remains the most authoritative interpretation of the refugee definition in Germany for persons fleeing persecution by non-state agents.

Similarly, according to jurisprudence of the French Refugee Appeals Commission, persecution must emanate from the authorities of the country of origin of the applicant, or at least have been encouraged by or tolerated by those authorities. The mere incapacity of the authorities to provide protection, or a situation of anarchy does not lead to recognition of refugee status.

This jurisprudence led to denial of refugee status to Somali asylum-seekers who, because of their clan membership, fear persecution by members of rival clans. However, because the clans did not exercise sufficient power over the territory, they did not qualify as "state-like" entities. This practice changed following the recognition of the *de facto* authorities in Somaliland, and asylum-seekers from this region are now recognised as refugees.

However, in cases where the claimant has sought protection from the state authorities against persecution by non-state actors without any response, or where seeking protection from the state authorities would be in vain, the French Refugee

⁶To meet the criterion of "effectiveness" the Court required that a certain degree of continuity of the organisation exist.

Appeals Commission has granted refugee status. Furthermore, the French Asylum Law of 1998 introduced the notion of “territorial asylum”. According to the *travaux préparatoires*, this notion was created essentially to provide an alternative form of protection to victims of persecution by non-state agents, who do not qualify for protection under the 1951 Convention nor for “constitutional asylum”.

In Switzerland, persecution by non-state agents will not lead to refugee status unless the state authorities tolerate or promote the acts perpetrated by the non-state agent. If the state is willing to provide protection but unable to, refugee status will only be granted if the agent of persecution exercises an effective, stable and durable quasi state authority. This is considered to be the case in Afghanistan, but not in Algeria or Somalia.

In Hungary, the concept of persecution by non-state agents has appeared in a couple of court-decisions, used partially to support rejection decisions. In Latvia and Lithuania, non-state actors are very rarely recognised as agents of persecution. Lithuanian jurisprudence has proved to be particularly restrictive with respect to certain nationalities, such as Somalis, Iraqi Kurds, and Indian Sikhs.

In the past, asylum-seekers claiming persecution by non-state agents have received refugee status in Poland. However, in November 1999, the Supreme Administrative Court dismissed the appeal of a rejected Somali asylum-seeker referring to the lack of individualised persecution by state agents or existing *de facto quasi* state organs.

UNHCR POSITION

On several occasions, it has been evidenced 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.

With respect to the wording of Article 1A of the 1951 Convention, there is nothing to indicate that only persons subject to persecution by the state, or which is instigated or tolerated by the state, may benefit from refugee status. That provision does not in fact address the question of authors of persecution. It stipulates that any person who is outside of his/her country of origin (the country of nationality or of habitual residence) owing to well-founded fear of being persecuted for Convention reasons, falls within the scope of the Convention’s “inclusion clauses”. Thus, the person is entitled to recognition of refugee status unless s/he also falls within the scope of an “exclusion clause”.

Hence, conditions described above are met when a person is outside of his/her country of origin because his/her life, liberty or security is threatened there by non-state agents, as a result of his/her race, religion, nationality, membership of a particular social group or political opinion, and that the state authorities are unable to provide him/her with an effective level of protection.

The interpretation that only persecution perpetrated, instigated or tolerated by the state may provide grounds for a refugee claim is, thus, not supported by the letter of Article 1A of the 1951 Convention. In fact, it effectively adds a new requirement to the refugee definition.

Further, a narrow interpretation of the 1951 Convention with respect to agents of persecution would contradict the requirement of interpreting treaties in accordance with their ordinary meaning, and in light of their objective and purpose.

As codified in Article 31 of the Vienna Convention on the Law of Treaties, “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its 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 complicity of the state is involved.

Moreover, the Preamble to the 1951 Convention stresses the importance of human rights in the refugee context. By prohibiting the *refoulement* of persons at risk of persecution, the Convention contributes to the prevention of human rights violations to which refugees would be exposed if expelled to their country of origin. For the Convention to be interpreted in conformity with its object and purpose, all perpetrators of serious breaches of international human rights norms must be considered, whether they are agents of the state or not.

In addition, there is no indication in the *travaux préparatoires* to the 1951 Convention that the authors of the Convention intended to impose a requirement that well-founded fear of persecution must emanate from the government or those perceived to be acting in its interest. On the contrary, based on the *travaux préparatoires*, the definition of a refugee in Article 1A was intended to be interpreted inclusively rather than in a restrictive manner.

Under certain circumstances, for example, where the situation is characterised by civil war, anarchy or breakdown of law and order in whole or parts of the territory, the authorities may have hardly any control over the agents of persecution. The need for protection that individuals may require against the serious violation of their human rights in such context is, nonetheless, consistent with the terms of the 1951 Convention definition. Moreover, the fact that a large number of persons or groups of persons share the same risk of persecution on account of one of the Convention grounds does not make the threat of persecution less relevant nor does it prevent the granting of refugee status under the terms of the 1951 Convention.

The notion of agents of persecution includes any non-governmental groups such as a guerrilla organisation, death squads, paramilitary groups, as well as any non-recognised entity exercising *de facto* authority over parts of the national territory.

The issue of the relevance of persecution by non-state agents often arises in connection with claims submitted by women who have become victim of gender-based violence perpetrated by agents other than the official authorities. In fact, gender-based persecution is frequently committed by non-state agents in situations where the authorities are either unwilling or unable to provide effective protection. In such cases, recognition of refugee status under the 1951 Convention is justified, provided that the other requirements of the Convention definition are met.

In sum, the position of UNHCR - as also expressed in Paragraph 65 of the *Handbook on Procedures and Criteria for Determining Refugee Status* - is that denial of refugee status to persons fleeing persecution by non-state agents whose activities the state is unable 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 undermined 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 be extended to such refugees and that the principle of *non-refoulement* be fully respected.

2. Internal Flight/Relocation Alternative

Developments

An internal flight/relocation alternative presupposes that the territory in question offers the asylum-seeker reasonable protection against persecution. This should include freedom from “disabilities or dangers” there, which, by virtue of their intensity or seriousness are equivalent to politically motivated persecution. This position has been reiterated in several decisions of the German Federal Constitutional Court concerning for example, Afghan nationals. The German Federal Constitutional Court has further defined “disabilities and dangers” to include civil war violence and deprivation of religious practice (or “minimum religious existence”). The German Federal Constitutional Court decided in a case involving a Sri Lankan national of Tamil origin, that a person who is only affected by persecution within a particular region of the country will qualify for asylum if his/her situation is rendered untenable throughout the territory of the state.

In the UK, cases from certain countries, such as Sri Lanka and India (Sikhs), are frequently rejected on the premise that the applicants could have fled from persecution to safety within another region of the country of origin even though the agent of persecution is the state.

In Spain, in the case of civil war, where there are areas under the *de facto* control of non-state agents, the Spanish authorities have occasionally applied the internal flight/relocation alternative concept. However, these cases may qualify under subsidiary/complimentary forms of protection.

In Austria, the Higher Administrative Court issued a judgement in April 2000 in which it states that in applying the concept of internal flight/relocation alternative, the authorities are obliged to examine whether the person in question, in fact has the possibility to access the designated area of the internal flight/relocation alternative.

In France, the notion of internal flight/relocation alternative is not applied. In the case of Bosnian refugees, the *Commission des Recours* (CRR) has declared that the question of whether the individual could have sought protection in another part of Bosnia is irrelevant. A similar position has been taken with regards to refugees from Kosovo.

UNHCR POSITION

The so-called internal flight/relocation alternative- the idea that refugees should first try to find a place within the country of origin where they would be safe, before seeking asylum outside the country- rests on understandings which are basically at odds with fundamental refugee protection principles. These principles include the right to leave one's own country and the right to seek asylum (including the prohibition of imposing penalties for illegal entry, the prohibition of expulsion, and the entitlement to protection against return to a situation of danger). UNHCR thus

believes that the notion does not amount to a "principle" of refugee law. Rather, it represents an element to be considered, in appropriate cases, during the refugee status determination procedure.

In cases where relocation is an issue, it must be judged whether the risk of persecution in one part of the country can be successfully avoided by living in another part of the country. If it can, and if such relocation is both possible and reasonable for the individual, then this consideration has direct bearing on the well-foundedness of fear. In the event that there is a part of the country where it is both safe and reasonable for the asylum-seeker to live, the well-founded fear criterion may not be fulfilled.

UNHCR's approach to analysing cases of this nature is described in paragraph 91 of the *Handbook on Procedures and Criteria for the Determining Refugee Status*:

"The fear of being persecuted need not always extend to the whole territory of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all circumstances it would not have been reasonable to expect him to do so".

As this paragraph indicates, in order for internal relocation to be relevant, the asylum-seeker must, in some localised part of his/her country of nationality, experience a serious problem, or risk serious harm on Convention grounds. Further, there must be other places within the country where that fear of persecution is non-existent. This analysis will be based on a factual evaluation, which must take place during assessment of the entirety of the claim. It therefore cannot be considered an element, which precludes analysis of the substance of the claim; rather, it forms part of that analysis.

Furthermore, life must actually be safe for the person in question in the alternative location. An effective internal relocation alternative can only exist when the conditions in the area correspond to the minimum standards deriving from the 1951 Convention and other major human rights instruments. Above all, an internal relocation alternative must be accessible in safety and durable in character. The possibility to find safety in the country should normally have existed at the time of flight and must continue to be available when the eligibility decision is taken and the return to the country of origin is implemented. Evidence must be available to indicate that the risk giving rise to the asylum-seeker's fear of persecution does not extend to that part of the country.

The safety available in the context of internal relocation alternative primarily relates to physical security. However, other aspects must also be taken into consideration. Protection must be meaningful. A person should not be excluded from refugee status merely because s/he could have sought refuge in another part of the same country, if under all the circumstances, it is unreasonable to expect him/her to do so. In addition to security aspects, this would require that basic civil, political and socio-economic rights are respected. It must, in short, be demonstrated that, in all the circumstances, it would be reasonable for this asylum-seeker to seek safety in that location in order to overcome his/her well-founded fear of persecution. Thus, the analysis must be undertaken on an individual basis, and taking the individual context into consideration.

Questions of an economic nature, such as access to suitable employment, are not centrally relevant to the availability of protection, but, in the case of an inability to survive elsewhere in the country, this will provide a compelling reason to grant international protection.

Another consideration in assessing the "reasonableness" of an internal flight/relocation alternative includes an evaluation of the subjective circumstances surrounding the alleged persecution, such as the depth and quality of the fear itself. In some situations, the experience may be so severe and the subjective fear so great that the applicant, quite understandably, is unwilling to avail him/herself of the protection of his/her country regardless of the absence of real danger elsewhere in the country. This must remain an important consideration, and in many cases will constitute a persuasive factor in the overall claim.

The underlying assumption justifying the application of the internal relocation notion is that the state authorities are willing to protect the rights of the individual concerned, but are, in certain areas of the country, being prevented from doing so or are otherwise unable to assure such protection in certain areas of the country. Therefore, the notion should not, in principle, be applied in situations where the person is fleeing persecution from state authorities, even if the same authorities may refrain from persecution in other parts of the country. This assertion deserves a caveat, however, in the sense that the presumption that state agents are able to act throughout the territory under the state's nominal control is a refutable one. It may be open to the status determination authority to find, on appropriate evidence that the state is not in control of its entire territory. In such cases, it may be possible to conclude that internal relocation would be a safe and reasonable alternative, providing all other elements are fulfilled.

The presence of internally displaced persons (IDPs) in one part of the country is not in itself conclusive evidence that an asylum-seeker who has fled the country could, instead, have chosen to relocate and join the group of internally displaced. Those displaced may be fleeing violence and its consequences, and may not be fleeing persecution. In such cases, the presence of IDPs will have little relevance to the situation of asylum-seekers and refugees whose claims are based on a fear of persecution. Even where persecution is at issue, displacement may not have resolved the situation of those displaced by it, and the threat of persecution may persevere. Moreover, the standard and quality of life of IDPs may be insufficient to support a finding that living in an area would be a reasonable alternative to flight.

3. Civil War and Other Internal or Generalised Violence

Developments

During the 1990's, the international community witnessed numerous refugee flows as a result of civil war situations. Nevertheless, many states, including in Europe, maintain the view that persons fleeing civil war or other internal or generalised armed conflict are ineligible for refugee status.

The EU Joint Position on the Harmonised Application of the Term "Refugee" in Article 1 of the 1951 Convention, however, recognises, in principle, that persecution within the meaning of Article 1A of the 1951 Convention may also occur in situations of civil war and other internal generalised armed conflicts. The text states that in such situations "persecution may stem either from the legal authority 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 national protection". The Joint Position further provides that, in principle, the use of armed force does not constitute persecution where it is in accordance with international rules and internationally recognised practice. However, it becomes persecution where, for instance, an authority is established over a particular area and its attacks on opponents or on the population fulfil the criteria of persecution within the meaning of the 1951 Convention.

In Germany, persons fleeing civil war or armed conflict are excluded from refugee status and the application of other provisions providing legal protection.

The Italian Central Commission and the appeal courts in Italy have often taken the view that the "individual nature of persecution" excludes situations where a generalised pattern of persecution can be evidenced (i.e. civil war/conflict). Rejected cases, which cannot, or should not be returned to their country of origin (i.e. civil war victims) may receive humanitarian "sojourn" permits.

According to the Swedish Aliens Act, an alien who has left the country of his/her nationality due to an external or internal armed conflict may be considered "in need of protection", but does not, in principle, qualify for refugee status.

In 1998, the House of Lords determined that asylum-seekers originating from countries in civil war have to show fear of persecution based on a Convention reason "over and above the ordinary risks of clan warfare" in order to be recognised as refugees in the UK.⁷

Persons fleeing situations of civil war and other internal or generalised armed conflicts are generally ineligible for refugee status under the 1951 Convention in Latvia and Lithuania, unless they can show that they would risk individual persecution.

In the Slovak Republic, "*de facto* refugee status" has been granted by Governmental Decree for purposes of "temporary protection" against the consequences of war in the country of origin, as in the cases of Bosnia and Kosovo. However, a claim for refugee status (as opposed to *de facto* refugee status) whether on Convention grounds or for humanitarian reasons, may be considered manifestly unfounded if it is clear that the applicant "wants only to flee from a general state of emergency or a war conflict in his/her country of origin...".

In Swiss jurisprudence, the absence of state authority means that there would be no state to which persecution can be attributed, neither directly nor indirectly. Unless a quasi-state authority has replaced the original state authority, asylum-seekers from countries where state power has collapsed will not be recognised as refugees. However, the new Swiss Asylum Law now explicitly provides that temporary protection may be granted collectively to persons fleeing generalised violence including civil war.

UNHCR POSITION

Many of today's refugees are fleeing war and armed conflict. While it is accepted that persons who are exclusively fleeing indiscriminate violence arising in the context of

⁷ *Secretary of State for the Home Department v. Hassan Hussein Adan (1999), Imm.AR 338*

war or conflict are not covered by the 1951 Convention, it is also recognised that such persons are in need of protection. It is for this reason that they have been placed under UNHCR's mandate.

It is also widely recognised that war and violence may be used as instruments of persecution. Indeed, persecutors may use war and violence to repress or eliminate specific groups, who are targeted based on their ethnicity or other affiliations. Such victims of targeted violence qualify as refugees under the 1951 Convention. The fact that their persecution takes place in the context of a war situation in no way disentitles them to refugee protection under the 1951 Convention.

UNHCR welcomes that the EU Joint Position does not *per se* exclude protection according to the 1951 Convention in situations of civil war and other internal or generalised conflict. However, the above-mentioned concerns relating to "agents of persecution" are applicable here as well. In order to qualify for refugee status, an applicant subject to persecution by non-state agents must show that the persecution stems from "*de facto* authorities in control of the territory". UNHCR disagrees with this limitation of the concept of international protection. The Office maintains that there is nothing in the wording of Article 1A of the 1951 Convention to indicate that only persons subject to persecution by *de facto* authorities may benefit from refugee status.

The distinction made between "*de facto* authorities in control of the territory" and actors that are not or perceived not to be in control of the territory is difficult to make. This is particularly true given the high standards for establishing that "*de facto* authorities (are in) control of the territory". Recent examples of the French and German jurisprudence (see above) with regard to Somalia and Afghanistan illustrate this dilemma.

4. Gender-related Persecution/Membership of a Particular Social Group

Developments

The term "gender-related persecution" is commonly used in international refugee law, but it denotes a varied set of possible claims. For example, such claims have typically encompassed acts of sexual violence, family violence, coerced family planning, female genital mutilation, punishment for transgression of social mores and homosexuality. These claims may be quite different from each other in that they mix forms of persecution with persecution reasons. What is common amongst them, however, is the fact that gender is the relevant factor in the determination of the claims.

Persecution based on "gender" may be distinguished from persecution based on "sex". Gender refers to the relationship between women and men based on socially defined roles that are assigned to one sex or another, while sex is a biological category. Persecution is not necessarily or only caused by the victim's sex, but by the perpetrator's ideology. Gender-related persecution may occur when persons deviate from their attributed gender.

Over the past 15 years, there has been an increased recognition of the need to interpret the notion of persecution in a manner that is sensitive to gender issues. A number of countries, most notably Australia, Canada and the United States have introduced guidelines for the assessment of asylum requests involving gender-related persecution in line with Executive Committee (EXCOM) (General)

Conclusions No. 87 (1999). In this document, the Executive Committee encourages states, UNHCR and other concerned actors to promote wider acceptance, and inclusion in their protection criteria of the notion that persecution may be gender-related or effected through sexual violence.

In 1984, the European Parliament called on states to grant refugee status to “women in certain countries who face harsh or inhuman treatment because they are considered to have transgressed the social mores of the society in which they live”. According to the European Parliament, women who have been treated in this manner “can be considered as belonging to a ‘particular social group’” and should therefore be granted asylum under the 1951 Convention. There is also a growing awareness that men who transgress the norms of society – homosexuals in certain countries being the obvious example – may also be persecuted on the grounds of membership of a particular social group. However, this Convention reason (out of the five grounds for persecution enumerated in the Convention) continues to be the least commonly applied in European asylum procedures.

In March 1999, the House of Lords handed down the clearest decision in the United Kingdom so far by determining that women may be defined as a particular social group under the 1951 Convention. Women can constitute a social group as ‘a particular social group’ comprises a group of persons who share a common, immutable characteristic that is either beyond the power of a person to change or so integral to the individual’s identity that it ought not to be required to be altered. Article 1(A) 2 does not require that a particular social group should possess a component of cohesiveness.⁸

In January 1998, the Norwegian Ministry of Justice presented its new guidelines for refugee status determination, including having persecution based on gender or sexual orientation falling under the application of the 1951 Convention. The Irish Refugee Act of 1996 states that membership of a particular social group includes, *inter alia*, membership of a group of persons whose defining characteristic is their belonging to the female or male sex or having a particular sexual orientation. And, that a person’s freedom shall be regarded as threatened “if s/he is likely to be subject to serious assault including that of a sexual nature.” However, despite these developments in Norway and Ireland, only very few gender-related persecution cases have resulted in the granting of refugee status throughout Europe.

In the Russian Federation, though there are no general guidelines regarding gender-based persecution, there have been some positive court judgements among the first and second instance courts pointing in the direction of recognising single, Afghan professional women, educated in the former Soviet Union, as being a special group facing persecution if returned to their home country.

The Swedish authorities, however, have repeatedly stated their unwillingness to consider “gender”⁹ as falling under a particular social group. The Aliens Act, as amended by the Parliament in December 1996, includes a special “in need of protection” category for those with a well-founded fear of persecution on account of gender or homosexuality. The explanation attached to the amendment and contained in the legislative proposal specifically excludes either category from the scope of “membership of a particular social group” under Article 1A of the 1951 Convention.

⁸ *Shahana Islam v. Secretary of State* (1992), 2 *Imm.AR* 283

⁹ The Swedish text actually uses the term “*kön*”, which is the equivalent to “sex” (rather than “*genus*” which is the equivalent of “gender”).

Until very recently, gender-related persecution was not considered as falling under “membership of a particular social group” in French jurisprudence either. However, the *Commission des Recours* (CRR) has begun to apply this criterion to trans-sexuals and homosexuals who are considered to constitute a particular social group. The French definition of the notion appears to allow for granting of asylum in diverse situations. The CRR generally defines a particular social group by making reference to the form of persecution to which the members have been (or risk being) subjected.

In Germany, applicants who fear persecution based on gender are not generally regarded as members of a social group, though a few lower courts have in some individual decisions granted refugee status to members of sub-groups like single women from Afghanistan. Some lower courts recently also made reference to gender as an innate characteristic against which an individual must not be discriminated. This reasoning, however, has been linked to Convention grounds other than membership in a social group, such as political opinion and religion.

In some countries, while gender-related persecution or ill-treatment does not lead to the granting of refugee status, it may qualify applicants for complimentary forms of protection. In Spain, for example, gender-related persecution, such as sexual violence, rape, forced sterilization and female genital mutilation, is taken into account when the asylum claim is examined, and often forms the basis for at least the granting of residence permits on humanitarian grounds.

Beyond a more gender-sensitive interpretation of the refugee definition, some states are introducing more gender-sensitive refugee status determination procedures. For example, in the Netherlands, new asylum procedures require that women asylum-seekers be interviewed separately from their male relatives. (See also Chapter II, Section B 2 vii) on Groups with Special Needs.)

UNHCR POSITION

Regarding Gender-related Persecution

Persecution related to a person’s gender or sexuality is not explicitly mentioned in the 1951 Convention. However, in UNHCR’s view, the refugee definition must be interpreted in a gender-sensitive way. In the same way that country of origin information, in general, is of paramount importance for adjudication of refugee claims, the socially defined roles in a particular culture also have to be understood to ensure proper refugee protection. In its conclusions of October 1999, the Executive Committee encourages states, UNHCR and other concerned actors to promote wider acceptance, and inclusion in their protection criteria of the notion that persecution may be gender-related or effected through sexual violence.

Gender-based persecution can be said to assume six principal forms. The first can be described as harsh or inhuman treatment for the transgression of social norms. A woman who transgresses the norms of her society may do so out of choice and as a result of deeply held convictions. But such transgression may also take place in circumstances over which the woman has no control. A rape victim who is threatened with prosecution and punishment for adultery would constitute such a case.

Second, persecution can take the form of sexual violence. Although women are particularly exposed to this form of persecution, both male and female children,

as well as male prisoners can be terrorized in this way. In Bosnia, for example, sexual violence was used as a systematic weapon of war intended to intimidate and punish certain sections of the society and to provoke their flight.

A third form of gender-related persecution is that of female genital mutilation or excision. Genital mutilation is a practice that few females seek to resist or flee, largely, perhaps, because it usually involves pre-puberty girls. Obviously, the question of persecution does not arise in situations where women embrace or even tolerate a particular practice. But in situations where it is imposed on a woman against her will and where the authorities are unable or unwilling to provide that person with protection, then female genital mutilation could provide the basis for a claim to refugee status.

Fourth, on the issue of birth control, UNHCR has taken the view that national family planning policies cannot be regarded as inherently persecutory. When such policies are implemented in a non-discriminatory manner, when they are promoted on the basis of common well-fare, and when respect for human rights is maintained, they can be considered as legitimate state practice. However, as recognized in the Programme of Action from the 1994 Cairo Population Conference, all couples and individuals have a basic right “to make decisions concerning reproduction free of discrimination, coercion and violence”. The existence of family planning policies must therefore be distinguished from the methods used to implement them. Compliance may be sought by persuasion, through methods such as education publicity campaigns and economic incentives. But where coercive and intrusive methods are used, including forced abortions and involuntary sterilization, a woman or man might legitimately claim to have a fear of persecution.

The punishment and mistreatment of people on the basis of their homosexuality has come to be regarded as a fifth form of gender-related persecution as it pertains to the roles which men and women are expected to play in society. Indeed, UNHCR has long held the view that a well-founded fear of persecution due to homosexuality can be a basis for recognition of refugee status.

A sixth area of gender-related persecution is that of domestic violence, although it has formed the basis for successful asylum requests in only a small number of countries. Domestic violence becomes an asylum issue primarily in situations where the abuse attains a certain level of severity, and where the authorities are unable or unwilling to provide any protection to the person or people concerned.

Regarding Membership of a Particular Social Group

A “particular social group” normally comprises persons who display common characteristics, i.e. similar background, habits or social status, shared attitudes and value systems, intrinsic to the nature of the persons concerned, which go to their identity and who, as a result thereof, share a common destiny. Homosexuals are manifestly a “particular social group” in the meaning of the 1951 Convention, as a person’s sexual orientation is a fundamental and arguably unchangeable part of his/her identity. The group in question must be both distinct as an entity within the broader society, and definable in terms of non-arbitrary characteristics shared by its members. Further, the notion is applicable only when the social group in question exists independently of persecution. In order to determine whether persecution is the sole distinguishing factor, it is necessary to examine the state’s broader policies, legislative provisions, factual circumstances and how people similarly situated are treated by law and society. In this context, external factors beyond a group’s

internally unifying characteristics are also relevant in associating persons as a social group. Thus, for example, “women who behave at odds with the prevailing social or cultural mores” can also constitute a particular social group.

An asylum applicant will, generally, need to establish not only the existence of a persecuted social group, but also that the persecution may be specifically directed towards the applicant as a member of such a group. Mere membership of a particular social group will not, normally, be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be sufficient ground to fear persecution.

There is no requirement of voluntary association in the sense that members of the group must have met or have other close association. Rather the issue of “voluntary association” may be interpreted in the context of a determination of whether by leaving the group; the claimant can eliminate the risk of persecution. It is in this context that “voluntary association” could be protected if it becomes a question of abdicating human dignity and fundamental human rights.

B. Exclusion and Cessation of Refugee Status

Introduction: the Issue

One main problem area as regards states’ legislation and jurisprudence concerning exclusion from and cessation of refugee status relates to the confusion in the legislation of a number of states between exclusion and cessation clauses. Other necessary distinctions, which have not always been appropriately made by states, are between cessation of refugee status based on the “ceased circumstances” clause and the safe country of origin notion and between exclusion or cessation and exceptions to the principle of *non-refoulement* allowed for by Article 33, paragraph 2, of the 1951 Convention.

1. Exclusion

General Application

Developments

While most European countries have incorporated the exclusion clauses of the 1951 Convention into their asylum legislation, some have adopted exclusion provisions that are not foreseen by the 1951 Convention. A number of European countries allow for exclusion of asylum-seekers who pose a threat to the security or public order. Thus, for example, the Hungarian Asylum Law stipulates that a person whose stay or activity in Hungary violates the interest of national security shall not be recognised as a refugee.

Further, some states apply the exclusion clauses before considering whether the applicant qualifies for inclusion under Article 1A of the 1951 Convention. For instance, in November 1997, the Dutch Government announced that it is not necessary to verify whether a person meets the refugee definition in order to invoke the exclusion clause, thus a person can be rejected “directly” on the basis of Article 1F of the 1951 Convention. The Dutch courts have endorsed this view. The French-speaking chamber of the *Commission Permanente de Recours de Refugies*, the

appeal instance at the substantive stage of the asylum procedure in Belgium, adopted the same view point. The Flemish-speaking Chamber, however, continues to determine inclusion before evaluating exclusion aspects. According to the Spanish Asylum Law, admission to the refugee status determination procedure can be denied if the applicant is considered to fall under Article 1F and 33 paragraph 2 of the 1951 Convention, which entails that the application of Article 1F is examined before inclusion is determined. (In Spain, however, no case has been declared inadmissible on the basis of the exclusion clause.) A number of other countries' legislation also allows for applying the exclusion clauses in accelerated procedures, and admissibility procedures. (See Chapter II, Section B 1 on Accelerated Procedures.)

Membership of Groups that Commit Crimes/Advocate Violence

Developments

According to the Latvian Refugee Law, "refugee status shall not be granted if the applicant belongs to a terrorist or other criminal organisation". A similar rejection ground can be found in the Romanian Asylum Law, which provides that "refugee status cannot be granted to a foreigner who presents, through his/her behaviour or membership to a particular organisation or grouping, a threat to Romania's national safety or public order". (This also constitutes a ground for withdrawal of refugee status.)

In 1998, the Swedish authorities granted refugee status to a Sri Lankan asylum-seeker, member of the LTTE, in a decision which signals a major change from Sweden's earlier stance with regard to exclusion. Prior to the decision, the Swedish authorities would exclude persons from refugee status on the basis of membership in armed groups, or simply for being related to such members. In this case, the Government decided that exclusion must be interpreted carefully, with consideration given to all aspects of an individual case. Thus, according to Swedish case law, mere membership of an armed group cannot exclude an asylum-seeker from eligibility for refugee status.

Although not in principle applying the 1951 Convention exclusion clauses, the German Federal Administrative Court went in the opposite direction exactly a year later when ruling that members of terrorist organisations may be excluded from the constitutional right of asylum and from protection against *non-refoulement*.

Serious Non-Political Crimes

Developments

Serious Crimes

A typical example of an exclusion provision which goes beyond the notion of "serious crime" as contained in Article 1F b) of the 1951 Convention is the Romanian Refugee Law, which excludes from refugee status "a person who committed, intentionally, in Romania an offence for which the law provides a punishment of more than three years of imprisonment, or has committed a serious common law offence outside Romania".

Outside the Country of Refuge

For example, the Bulgarian, Slovak, and Romanian asylum laws allow for the exclusion from refugee status to asylum-seekers who have committed particularly serious crimes on their respective territories. Before 1998, asylum-seekers and refugees who had committed common crimes on French territory could also be excluded from refugee status. However, this policy has been abandoned in recent French jurisprudence.

UNHCR POSITION

Regarding General Application

Article 1F of the 1951 Convention states that provisions of that Convention "shall not apply to any person with respect to whom there are serious reasons for considering that s/he has:

- a) committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- b) committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- c) been guilty of acts contrary to the purposes and principles of the United Nations."

The logic of the exclusion clauses contained in Article 1F of the 1951 Convention is that certain acts are so grave as to render the perpetrators undeserving of international protection as refugees. Thus, their primary purposes are to deprive such protection to the perpetrators of heinous acts and serious common crimes; and to safeguard the receiving country from criminals who present a danger to the country's security. These underlying purposes must be borne in mind in interpreting the applicability of the exclusion clauses.

States retain the sovereign right to grant another status than refugee status and conditions of residence to those who have been excluded. Moreover, the individual may still be protected against *refoulement* by the application of other international instruments. These include Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, or in the European context, the principle of *non-refoulement*, which according to the jurisprudence of the European Commission and Court on Human Rights is contained in Article 3 of the European Convention on Human Rights. Protocol No. 6 of the European Convention on Human Rights also deters the return of individuals to a country where s/he may fear the death penalty.

As with any exceptions to provisions of human rights law, the exclusion clauses need to be interpreted restrictively. For this reason and because of the serious potential consequences of exclusion for the applicant, the exclusion clauses should be used with utmost caution, representing, in effect, the most extreme sanction provided for by the relevant international refugee instruments.

The grounds for exclusion are enumerated exhaustively in Article 1F of the 1951 Convention. Accordingly, when drafting provisions relating to asylum in their national legislation, states are advised to follow the letter of the corresponding provisions of Article 1F of the 1951 Convention. National legislation that makes use of exclusion clauses that are broader than those of the 1951 Convention effectively represents making a reservation to Article 1 of that instrument, which according to Article 42 of the Convention is not permitted.

When applying the exclusion clauses, states must thus be cautious not to apply notions such as national security as grounds for applying the exclusion clauses. The primary purposes of the exclusion clauses are to deprive of international protection the perpetrators of heinous acts and serious common crimes; and to protect the community of a receiving country from the danger of admitting a refugee who has committed a serious common crime. They also seek to render due justice to a refugee who has committed a common crime of a less serious nature or has committed a political offence. With respect to the refugees lawfully staying in the country of asylum, Article 32 specifically addresses the national security concerns of the receiving state party.

The logic behind the prevention of the application of national security concerns as grounds for exclusion is based on the rationale that refugees - who do not fall under the category of persons undeserving of protection as per Article 1(F) of the Convention - are deemed to be in need of international protection in one form or another, regardless of the perceived national security risk to one state party. After all, a national security risk to one state party may not necessarily be a risk in another. This contrasts with the reasoning behind the exclusion clauses of Article 1(F), which follows that while the persons at issue may be in need of international protection, they are deemed to have forfeited their right to such protection as a result of their own inhumane behaviour prior to arriving in the territory of the state party.

Even after a state party decides to expel the refugee under Article 32 of the 1951 Convention, it would still maintain his/her refugee status, whereas not recognising him/her as a refugee through an incorrect application of the exclusion clauses will label the refugee as a "non-refugee". While it can be argued that an incorrect non-recognition of refugee status by a state party would not negate the fact that the individual is still a refugee, the consequences of such an act are particularly significant in the European context. In Europe, there might be an extra-territorial effect placed by other state parties to a negative determination of refugee status by another European state. If, instead of the exclusion clauses, Article 32 is used to expel a refugee, s/he would still retain his/her status as a refugee; could benefit from the safeguards stipulated in the Article; and would thereby have the possibility of receiving protection from another state.

In principle, the applicability of exclusion clauses should be considered only after it has been decided that an asylum-seeker qualifies as a refugee under the 1951 Convention. This is mainly because cases of exclusion are often inherently complex, requiring the weighing of the nature of the crime and the applicant's role in it, against the gravity of the persecution feared (often referred to as the "proportionality test"). This can only be undertaken by officials fully familiar with the case and the nature of the persecution feared by the applicant.

The exclusion clauses should, therefore, not be used to determine the admissibility of an application for refugee status because a preliminary or automatic exclusion would result in depriving individuals of an assessment of their claim for refugee status.

States applying the exclusion clauses must have "serious reasons for considering that the applicant has committed any of the crimes or acts described in those clauses. It is implicit that those grounds must be well-founded, even though there is no requirement that the applicant be formally charged or convicted.

Regarding Membership of Groups that Commit Crimes/Advocate Violence

Membership *per se* of an organisation that advocates or practices violence is not necessarily decisive or sufficient to exclude a person from refugee status. The fact of membership does not, in itself, amount to participation or complicity. It must be considered whether the applicant had close or direct responsibility for, or was actively associated with, the crimes specified under the exclusion clauses.

UNHCR has consistently emphasised that an applicant should not be excluded if s/he is able to give a plausible explanation that s/he did not commit, and was not directly or closely associated with the commission of any crime specified under Article 1F of the 1951 Convention.

Notwithstanding the above, the purposes, activities and methods of some groups or terrorist organisations are of a particularly violent and notorious nature. Where membership of such groups is voluntary, the fact of membership may be impossible to dissociate from the commission of terrorist crimes. Membership may, in such cases, amount to the personal and knowing participation, or acquiescence amounting to complicity, in the crimes in question. However, care should always be taken to consider defences to exclusion, notably factors such as duress, self-defence, or to the fact that "unauthorised" acts may also be carried out in the name of the group.

Regarding Serious Non-Political Crimes

Article 1F (b) provides for exclusion of persons who have committed a "serious non-political crime outside the country of refuge prior to being admitted to that country as a refugee. The issues for determination here are: i) what constitutes a serious crime, whether the crime in question is of a non-political nature; and ii) the meaning of the phrase "outside the country of refuge prior to his admission".

Serious Crimes

The UNHCR Statute excludes a person whom there are serious reasons for considering that s/he has committed a crime covered by the provisions of treaties of extradition. Similar language was not retained for the 1951 Convention, which describes the nature of the crime with greater precision. It must meet the "serious, non-political crime" criterion.

The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* specifies that a "serious" crime refers to a capital crime or a very grave punishable act. Examples would include homicide, rape, arson and armed robbery. Certain other offences could also be deemed to be serious if they are accompanied by the use of deadly weapons, serious injury to persons, evidence of habitual criminal conduct and other similar factors. It is evident that the drafters of the 1951 Convention did not intend to exclude individuals simply for committing non-capital crimes on non-grave punishable acts. The seriousness of the crime can be deduced from several factors, including the nature of the act, the extent of its effects, and the motive of the perpetrator. The overriding consideration should be the aim of withholding protection only from persons who clearly do not deserve any protection on account of their criminal acts. Crimes such as petty theft, or the possession of soft drugs should not be the grounds for exclusion under Article 1F(b), because they do not reach a high enough threshold to be regarded as serious.

Article 1F (b) should be seen in parallel with Article 33 paragraph 2, which permits the return of a refugee if there are reasonable grounds for regarding him as a danger to the security of the country of asylum or who, having been convicted by a

final judgement of a particularly serious crime, constitutes a danger to the community of that country.

The primary question in determinations under Article 1F(b) is whether the criminal character of the refugee outweighs his/her need for international protection or character as a *bona fide* refugee. As stated in the *Handbook*, it is important to strike a judicious balance between the nature of the crime in question, and the likely persecution feared by the applicant. Thus, if the applicant has reason to fear severe persecution, a crime must be very serious in order to exclude the applicant.

According to the *Handbook*, the fact that an applicant convicted of a serious non-political crime has already served his/her sentence or has been granted a pardon or has benefited from an amnesty should be taken into account when evaluating when the applicant's criminal character still predominates.

For exclusion, the serious crime must also be non-political, which implies that other motives - such as personal reasons or gain - predominate. Increasingly, extradition treaties specify that certain crimes, notably acts of terrorism, are those regarded as non-political for the purpose of applying extradition treaties, although such treaties typically also contain protective clauses in respect of refugees. Hence, for example, the European Convention on Extradition (1957) provides that "extradition shall not be granted if the offence in respect of which it is requested is regarded by the requested Party as a political offence or as an offence connected with a political offence". For the purpose of applying the exclusion clauses of the refugee definition, UNHCR opposes the use of lists of certain crimes considered as particularly serious. In UNHCR's view, the nature of the crime should be assessed in each case, taking all factors into account.

Outside the Country of Refuge

The application of Article 1F(b) should be clearly differentiated with that of Article 33 paragraph 2. As the *Handbook* points out in paragraph 153, only a crime committed by the applicant prior to formal recognition as a refugee, "outside the country of refuge", is a ground for exclusion under Article 1F of the Convention. The country in question would normally be the country of origin, although it also could be another country. However, it can never be the country where the applicant seeks recognition as a refugee.

Persons who, after formal recognition as a refugee, commit a particularly serious crime within the country of refuge, are subject to that country's criminal law process, and to Article 33 paragraph 2 of the Convention, which permits a refugee's return or expulsion under particular circumstances.

It should be noted that there is also a difference in the standard of proof used for the application of Articles 1F(b) and 33 paragraph 2. While Article 1F(b) requires "serious reasons for considering" the commission of a "serious non-political crime", Article 33 paragraph 2 requires both that the refugee be "convicted by a final judgement" of a "particularly serious crime" and "constitutes a danger to the community of that country." Regardless of the fact that there is no requirement that the applicant be formally charged or convicted for the application of 1F(b), it is implicit that those grounds must be well-founded.

UNHCR does not agree with the interpretation of Article 1F(b) according to which an applicant who committed a serious non-political crime in the country of asylum, but before formal recognition as a refugee, would be excluded. It would not be correct to use the phrase "prior to admission...as a refugee" to refer to the period

in the country prior to recognition as a refugee, as the recognition of refugee status is declarative and not constitutive. "Admission" may therefore include mere physical presence in the country.

2. Cessation

- i) *The Distinction between Cessation, Exclusion, Safe Countries and Article 33 Paragraph 2*

Developments

Some of the European asylum legislation contains cessation clauses that exceed the scope of Article 1C of the 1951 Convention. For instance, in 1999, the Dutch authorities adopted a stricter interpretation of the cessation clauses than UNHCR is suggesting. The new Dutch Asylum Law foresees that refugee status may cease if "the applicant constitutes a threat to national security, or has been sentenced by a final judgement for a crime that is punishable by imprisonment of three years or more". Further, the Luxembourg Asylum Law provides that "refugee status can be withdrawn in cases which fall under one of the cessation or exclusion clauses in Article 1C and 1F" respectively of the 1951 Convention. Similarly, the Austrian Asylum Law allows for cessation of refugee status if the exclusion clause in Article, 1F or Article 33, paragraph 2, of the 1951 Convention applies. In 1998, France introduced a legislative amendment to its Asylum Law of 1952, allowing the *Prefet* to deny a temporary residence permit to asylum-seekers of a nationality with regard to which the cessation clause foreseen at 1C(5) of the 1951 Convention has been applied. The Hungarian Asylum Law stipulates that refugee status shall be withdrawn if "the conduct of the refugee violates national security interests and this presumption has been found well-founded in a procedure according to Article 32 paragraph 2", while the Estonian, Belarussian and Ukrainian Refugee Laws state that an alien shall be deprived of his refugee status if s/he presents a threat to national security and public order in the respective countries.

Procedural Issues

Developments

In Italy, the procedure for determining cessation of refugee status is the same as the initial refugee status determination procedure, i.e. a personal hearing takes place before the Central Eligibility Commission. Similarly, in the Czech Republic, proceedings on granting as well as withdrawal of asylum shall be within the competence of the Ministry, and are, generally, governed by provisions of the Administrative Code. A proceeding on withdrawal of asylum commences on the basis of an initiative of the Ministry or on the basis of a proposal made by the beneficiary of asylum.

The Content of Cessation Clauses

Developments

The Cessation Clause relating to the Act of the Refugee

The Austrian Asylum Law stipulates that refugee status shall cease if "the centre of the refugee's life is in another country", while the Dutch Asylum Law foresees cessation of refugee status if "the applicant has moved his residence outside of the Netherlands". The Hungarian Asylum Law allows for refugee status to be withdrawn if

“the refugee has been sentenced to 5 years imprisonment for having intentionally committed a particularly serious crime”. Similarly, the Estonian and Slovak Refugee Laws provide that refugee status should be withdrawn if the recognised refugee has committed a serious crime for which s/he was sentenced accordingly. The Slovak Law, however, also requires that the serious crime in question be intentional in character, while, Estonian legislation states that cessation on this ground may be invoked only if the recognised refugee’s continued presence in Estonia poses a threat to the security or public order of the country.

The Romanian Asylum Law provides that “refugee status may be withdrawn if a foreigner presents, through his behaviour or membership to a particular organisation or grouping, a threat to Romania’s national safety or public order. From the Ukrainian Asylum Law it follows that “a person may be deprived of his/her refugee status if s/he “has been sentenced to imprisonment by the order of an Ukrainian court”. In the Russian Federation, “a person shall be deprived of his/her refugee status if s/he has been convicted by an effective court decision for a crime committed in the territory of the Russian Federation”.

The Ceased Circumstances Cessation Clauses

Most countries allow for cessation if the conditions in Article 1C of the 1951 Convention are fulfilled. Cessation of refugee status in Germany is, however, sometimes based solely on a changed eligibility practice, even if the situation in the country of origin may not have changed significantly.

UNHCR POSITION

Regarding the Distinction between Cessation, Exclusion, Safe Countries of Origin and Article 33 Paragraph 2

In UNHCR’s view, cessation of refugee status applies when the refugee, having secured or being able to secure national protection, either of the country of origin or of another country, no longer needs international protection. This linkage of international protection to the duration for which it is needed distinguishes the cessation clauses from the exclusion clauses in Article 1F of the 1951 Convention, which address situations in which the refugee does not deserve the benefits of international refugee protection.

Further, cessation of refugee status based on the "ceased circumstances" cessation clause should also be distinguished from the notion of safe country of origin. While there are common and overlapping factors in the consideration of both situations, these two notions operate at different ends of the refugee protection spectrum and are conceptually different. A declaration of cessation under the "ceased circumstances" clause involves an assessment of the specific conditions during a certain time period which led to the granting of refugee status to a particular refugee or group of refugees and does not address the issue of whether other persons from that country might have refugee related reasons for leaving. Likewise, a proper designation of a country as a "safe country of origin" does not, by that fact alone, operate as a declaration of cessation of refugees from that country. Such a designation may, however, in turn warrant reviewing the application of the cessation clause.

The application of cessation of refugee status to cases falling under Article 33, paragraph 2, of the 1951 Convention would constitute a reservation, which according to Article 42 of the Convention, is not allowed.

Further, it should be noted that persons falling under Article 33, paragraph 2, do not lose their refugee status. Consequently, such persons would, if accepted by a third country, still have to be considered as refugees.

Regarding Procedural Issues

The cessation clauses are exhaustive. This means that a refugee's status is maintained until one of the cessation clauses can be invoked. In any case, refugees should not be subjected to constant or regular review of their refugee status.

Where application of the cessation clause would result in termination of residential rights, or in deportation of the refugee, procedures should be established which would allow the refugee the opportunity to challenge the authorities' decision to invoke the cessation clause. In (EXCOM) Conclusion No. 69 on Cessation of Status (1992) the Executive Committee recognised that in some cases where the "ceased circumstances" cessation clause is applicable, there may be compelling reasons to support the continuation of refugee status for certain individuals. In this context, the Executive Committee endorsed a "careful approach", calling for "clearly established procedures" in the application of this cessation clause.

A decision by the host state to apply the "ceased circumstances" cessation clause must operate as a rebuttable presumption only and the individual must be given the possibility of having his or her case considered on its own merits.

UNHCR plays a role, as stipulated in Executive Committee (EXCOM) Conclusion No. 69 on Cessation of Status (1992), in assisting host states determine whether conditions in the country of origin have changed sufficiently to warrant the application of the "ceased circumstances" clause. The Conclusion also notes that "any declaration by the High Commissioner that the competence accorded to her by the Statute of her Office with regard to certain refugees shall cease to apply may be useful to states in connection with the application of the cessation clauses as well as the 1951 Convention". Since 1975, UNHCR has declared cessation in respect of fifteen national groups of refugees based on fundamental changes in the country of origin.

Regarding the Content of Cessation Clauses

The cessation clauses can be divided into two broad categories. The first category comprises the four clauses which relate to change in personal circumstances of the refugee, brought about by his own act, and which results in the acquisition of national protection so that international protection is no longer necessary. The second category comprises the clauses which relate to the change in the objective circumstances in connection with which the refugee has been recognised, so that international protection is no longer justified (the "ceased circumstances" cessation clause).

The Cessation Clauses relating to the Act of the Refugee

These cessation clauses, contained in Article 1 C of the 1951 Convention, concern the refugee acting to reacquire the national protection of the country of origin, or to acquire the national protection of another country. They apply to a refugee if s/he has "voluntarily" re-availed him/herself of the protection of his/her country of nationality"; or has "voluntarily" re-acquired a nationality which s/he previously lost; or has

acquired the nationality of another country, and enjoys the protection of that country; or has “voluntarily” returned to the country of origin.

For cessation due to reacquisition of the national protection of the country of origin to be applicable, the refugee must have acted voluntarily to obtain the protection of the country of origin and must actually have obtained such protection. Where a refugee contacts the diplomatic mission of his or her country of origin on the instruction of the authorities in the country of asylum, or where such contact is occasional and incidental - such as for the purpose of certification of academic documents, or for the purpose of obtaining copies of birth, marital, and other records - this will not give rise to the application of the cessation clause.

In the situation of a refugee who avails himself of the protection of the country of his nationality, where the refugee has lost his or her nationality and acts to reacquire it, the reacquisition must be both voluntary and effective in order for the cessation clause to be applicable. The reacquisition of nationality *de jure* alone is insufficient to invoke the cessation clause. It must be accompanied by the actual restoration of relations between the individual and the country of nationality, that is, the effective protection of the country of nationality must be available to the refugee, who willingly re-avails him/herself of it.

It should be noted that if the refugee is compelled to act by circumstances beyond his or her control, such as at the instructions of the authorities of the country of asylum or in order to avert illegalities in regard to his or her stay there, such an act should not be considered as voluntary.

For the refugee to be considered as having acquired the national protection of another country s/he must not only have acquired a new nationality, but this nationality must carry with it the effective protection of the country concerned. This means that the refugee must secure and be able to exercise all the rights and benefits entailed by possession of the nationality of the country.

This situation should be distinguished from that of a refugee being excluded from refugee status on the basis that he or she is recognised by the competent authorities of the country of asylum as having the rights and obligations which attached to the possession of the nationality of that country. While the underlying rationale for both situations is the same, that is, that there is no need of international protection, the latter situation operates to exclude a refugee from the benefits of international protection and is a factor for consideration during the refugee status determination process.

A return to one's country of origin must, under the terms of the Convention, have been undertaken voluntarily and the refugee must also have “re-established” himself or herself in the country of origin. A temporary visit to the country of origin will not necessarily trigger the cessation clause. Where, however, a refugee visits the country of origin frequently and avails himself or herself of the benefits and facilities in the country normally enjoyed by citizens of the country, the cessation clause may be invoked.

The Ceased Circumstances Cessation Clause

This cessation clause, contained in Article 1 C (5) of the 1951 Convention, applies to a person if:

"He can no longer, because of the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality".

UNHCR has taken the view - confirmed by Executive Committee Conclusion No. 69 and shared by a majority of jurists- that for this clause to be applicable, there must have been a change in the refugee's country of origin which is fundamental, durable and effective. Fundamental changes are considered as effective only if they remove the basis of the fear of persecution.

A change in government or in the political organisation of the state remains the most typical situation in which this cessation clause has been applied. Depending on the grounds for flight, significant reforms altering the basic legal or social structure of the state may also amount to a fundamental change, as may democratic elections, declarations of amnesties, repeal of repressive laws and dismantling of former security services.

Large-scale spontaneous repatriation of refugees does not in itself constitute a fundamental change within the meaning of this cessation clause. Such changes may be an indicator of changes that are occurring or have occurred in the country of origin, but where the return of refugees would be likely to generate fresh tension in the country of origin, this in itself could signal the absence of effective, fundamental change. Similarly, in situations where one type of civil war has been replaced by another, the cessation clause cannot be invoked despite a major political change.

The fundamental changes must also be stable and durable. UNHCR generally recommends that all developments which would appear to evidence significant and profound changes be given time to consolidate before any decision on cessation is made. It has been advocated that a period of twelve to eighteen months elapse after the occurrence of profound changes before such a decision is made. It is UNHCR's recommendation that this period be regarded as a minimum for assessment purposes. In general changes that take place peacefully under a constitutional, democratic process with respect for human rights, permits an assessment of durable change within a relatively shorter period. Where the changes take place in a violent environment, the period for assessing their durability will be longer.

The ceased circumstances cessation clause contains a provision which allows a refugee to invoke "compelling reasons arising out of previous persecution for refusing to re-avail himself or herself of the protection of the country of origin". The reference in the provision indicates that the exception applies to "statutory refugees". At the time when the 1951 Convention was elaborated these formed the majority of refugees. The exception, however, reflects a more general humanitarian principle, which could also be applied to refugees other than statutory refugees. This provision is intended to cover cases where refugees and family members have suffered atrocious forms of persecution. The rationale behind the exception, as stipulated in the *Handbook*, is that even though there may have been a change of regime in his or her country, this may not always produce a complete change in the attitude of the population, nor, in the view of his or her past experiences, in the mind of the refugee.

Particular problems arise regarding application of the "ceased circumstances clause" to refugees from civil conflict. The key question is whether the refugee could avail himself or herself of the national protection of the country of origin. National protection must be effective. National protection means more than mere physical security or safety. It would need to include also the presence of a functioning

governing authority, the existence of basic structures of administration and the existence of adequate structures to enable residents to exercise their right to a basic livelihood. Even if changes in part of the country of origin can be considered as fundamental, they must be given a sufficient period of time, and perhaps longer than the twelve to eighteen months mentioned above before an evaluation is made of their stability and durability.

Section C Legal Elements in Assessing a Claim to Refugee Status: Evidence, Burden and Standard of Proof and the Link to Credibility

Introduction: the Issue

As procedures relating to the determination of refugee status are not specifically regulated in the international refugee instruments, there are no requirements as to whether such procedures must, by nature, be administrative or judicial, adversarial or inquisitorial. Whatever mechanism may be established for identifying a refugee, the final decision is ultimately made by the adjudicator based on an assessment of the claim put forward by the applicant in order to establish whether the individual has a “well-founded fear of persecution”.

Particularly in common law countries, the terms “burden of proof” and “standard of proof” represent legal terminology used in the law of evidence in order to determine who has the obligation to adduce evidence in support of the claim, and what would be the required standard for discharging that obligation.

Despite the fact that these terms have technical meanings and are of particular relevance in certain countries, these evidentiary standards have nevertheless been widely used in the substantiation of refugee claims, including in the practice of UNHCR. It should be noted, however, that applying the concepts of burden and standard of proof may vary according to the different aspects of the refugee procedure being undertaken. For example, the standard of proof for excluding someone from refugee status or the degree of proof required to determine that an individual has a refugee claim differ. In the following, the focus is solely on the inclusion aspects of refugee status determination procedures.

1. Evidentiary Issues (Burden of Proof – Assessing the Evidence)

Developments

According to the Resolution on Minimum Guarantees for Asylum Procedures adopted by the EU Council of Ministers in 1995, when examining an application for asylum the competent authority must *ex officio* take into consideration and seek to establish all relevant facts. They must give the applicant the opportunity to present a substantial description of the circumstances of the case, and to prove them. For his/her part, the applicant must present all the facts and circumstances known to him/her and give access to all the available evidence. Furthermore, the Resolution explicitly states that recognition of refugee status is not dependent on the production of formal evidence. This suggests that the burden of proof should be shared between the authorities and the claimant, and that the claimant, notwithstanding his/her inability to prove all

elements of the asylum claim, should be given the benefit of the doubt, provided s/he is co-operative and his/her explanation is credible and coherent.

The applicant is thus clearly not required to prove every fact alleged in a refugee claim. This position is reflected in a number of important decisions made in separate national jurisdictions. For example, the Swiss Appeals Commission, in reviewing a rejected case, decided that an applicant's failure to produce documents upon request did not justify a finding that he had violated his duty to co-operate in supplying evidence to substantiate his claim. It was held that Swiss Asylum Law does not require every alleged fact to be proved. (See also developments in Swiss legislation in Chapter II Section B 6 on Time limits and Undocumented Asylum-Seekers.) In 1989, the Netherlands' Council of State annulled a rejection that was partly based on the applicant's failure to produce the original, rather than a copy, of a judgement whereby he had been imprisoned for a political offence.

The US Board of Immigration Appeals has held that the burden of proof may be discharged when no concrete evidence can be produced, but the applicant can provide a coherent and plausible account as to the type of persecution feared and the reasons for the fear. The testimony should, nevertheless, be credible, consistent and sufficiently detailed. If, however, the applicant's statements appear to run counter to generally known facts or are in contradiction with the situation known to be prevailing in the country of origin, more evidence will be required to substantiate them. This will also be the case with claims that are seemingly without foundation or unrelated to the refugee criteria.

In Spain, however, in 1998, the Supreme Court while "acknowledging the difficulties that a person fleeing persecution would have to face if obliged to obtain proof of his/her persecution,..." ruled that "...the mere declaration by the asylum-seeker could not be considered to have evidential value, (and) a minimum proof leading to the possibility of existence of the alleged facts would have to be provided". The Spanish authorities have used this decision to reject asylum applications by interpreting "minimum proof" as requiring high standards and documentary evidence. This position is also reflected in a 1999 decision of the National High Court, in which it is argued that a mere declaration does not have evidentiary value, highlighting the debate over what could be considered "enough substantiating proof".

According to the Lithuanian Civil Procedures Code, the applicant needs to meet the same burden of proof as in civil cases (for example, all statements must be supported by documentation). The Slovene authorities tend to place the main focus on the itinerary of the asylum-seeker rather than on the claim. In Romania, refugee status is granted only occasionally solely on the basis of a plausible and coherent statement. Rather, emphasis is placed on the asylum-seeker's ability to provide documents that would substantiate the claim.

UNHCR POSITION

Regarding Burden of Proof

It is a general legal principle that the burden of proof of an allegation lies with the person submitting the claim. A refugee claimant must therefore make efforts to establish the truthfulness of his/her allegations and the accuracy of the facts on which the refugee claim is based. In addition to the general duty to tell the truth and

co-operate with the decision-making authority, the refugee applicant should be provided with a reasonable opportunity to present evidence to support his/her claim.

In view of the particular nature of the refugee situation, the decision-maker must also share the duty to ascertain and evaluate all the relevant facts. Indeed, in some cases, it may be for the examinee to use all the means at his/her disposal to produce the necessary evidence in support of the application. Reference to relevant country of origin and human rights information by the decision-making authority will assist in assessing the objective situation in an applicant's home country. In recent years, UNHCR as well as a number of states have made significant advances in compiling and disseminating country of origin information. Relying on such information in refugee status determination decisions should be seen as a necessary undertaking by the decision-making authority towards satisfying the shared responsibility of the burden of proof.

The UNHCR *Handbook* (paragraph 197) has acknowledged that evidentiary requirements should not be applied too strictly "in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds him or herself." Although the burden of proof is discharged by the applicant through providing evidence, in the end, the evidence may only be an applicant's testimony. Other evidence such as documents or the testimony of witnesses who can support the applicant's claim to refugee status, or who may have expertise on relevant country conditions, should also be permitted during the determination procedure. Overall, the applicant should be permitted a reasonable opportunity to present evidence in support of the claim to refugee status, as well as to clarify any aspects of the claim which the decision-maker considers not to be credible.

In light of research and other information which may be available to the decision-making authority, in the interests of fairness and in order to fully assess the veracity of a claim, an applicant should normally be permitted to know which documentary or other evidence the decision-maker is relying upon to decide on the claim. The increasing use of internal reports prepared by national authorities may prejudice an applicant who is unable to obtain disclosure of crucial information, which s/he could refute by adducing evidence to explain or support an alternative point of view.

Regarding Assessing Evidence and the Link to Credibility

Given the potential seriousness of an erroneous negative decision and because objective evidence will frequently be unavailable or inaccessible, assessing whether the applicant has proved a 'well founded fear' should be approached flexibly, particularly where:

- the fear which is the subject of an asylum claim relates to developments occurring after the refugee left his/her country (*sur place* refugee) or a future possibility and therefore is not capable of being demonstrated in the present;
- the circumstances of sudden and often clandestine flight and travel make it difficult or impossible to provide documentary evidence;
- the existence of fear and/or trauma following persecution and flight results in gaps or inconsistencies in testimony;

- as refugees cannot return to their country of origin, enormous difficulties and costs are associated with obtaining original documentary evidence.

The above elements are reflected in the Resolution on Minimum Guarantees for Asylum Procedures which provides that when examining an application for asylum the competent authority must *ex officio* take into consideration and seek to establish all relevant facts and give the applicant the opportunity to present a substantial description of the circumstances of the case and to prove them. As noted above, in order to discharge the burden of proof the applicant must present all the relevant facts and circumstances of his/her case and must make sincere attempts to make accessible all the available evidence. Furthermore, the Resolution on Minimum Guarantees explicitly states that recognition of refugee status is not dependent on the production of formal evidence. This suggests that even in the case of undocumented claims where the evidence is solely based on an applicant's testimony, notwithstanding the inability to prove all the elements of the asylum claim, if an applicant's allegations are coherent, plausible and consistent and thereby credible, it may be proper to grant refugee status.

In assessing the evidence presented by an applicant, which is of key importance in making an assessment on the applicant's credibility, the decision-maker must assess *all* of the evidence, both oral and documentary. Furthermore, the evidence must be assessed together, and not just in parts in isolation from the rest of the evidence. However, the decision-maker would be correct to place greater weight on evidence that is directly relevant to the issue being addressed, as some evidence may be more material to the case than other aspects of the evidence.

Even if there are inconsistencies or exaggerations in the evidence presented, the decision-maker must go on to assess the evidence which is found to be credible to determine if it supports the claim to refugee status in its totality. The rejection of some of the evidence, or even all of the applicant's testimony, on account of lack of credibility does not necessarily lead to rejection of the refugee claim. The claim must still be assessed on the basis of the information that was found to be truthful, including documentary evidence relevant to the applicant's situation and evidence regarding persons similarly situated.

Other considerations may come into play in assessing the evidence of children or of persons suffering from mental or emotional disorders. In the case of children, to ensure that the best interests of the child are taken into account, a designated representative should be appointed to help the child through the determination procedure. (See Chapter II Section B 2 vii) on Groups with Special Needs.) Factors to consider in assessing the evidence of children include: a child's age at the time of the events; the time that has elapsed since the events; level of education; ability to understand and relate the events; understanding of the need to tell the truth; capacity to recall the events; capacity to communicate intelligibly or in a form capable of being rendered intelligible. It should be further recalled that a refugee applicant who is a child might have difficulty recounting the events that led him/her to flee his/her country. Often the child's parents will not have shared distressing events with the applicant with the intention of protecting their child. As a result the child's testimony may appear vague and uninformed about key events which are relevant to the claim of persecution. It is therefore essential when assessing the credibility of a child applicant, that the child's sources of knowledge and his/her maturity and intelligence

must be assessed. The seriousness of the persecution alleged must be considered and whether past events have traumatised the child and hindered his/her ability to recount details must also be taken into account.

Persons who have suffered trauma or are suffering from mental or emotional disorders also require special care. The UNHCR *Handbook* (paragraph 210) has suggested that in such cases, whenever possible, the examiner should obtain expert medical advice. The *Handbook* further suggests that a medical report should provide information on the nature and degree of mental illness and should assess the applicant's ability to fulfil the requirements normally expected of an applicant in presenting his/her case. In any event, it will be necessary to "lighten the burden of proof normally incumbent upon the applicant, and information that cannot easily be obtained from the applicant may have to be sought elsewhere, for example from friends, relatives and other persons closely acquainted with the applicant ... it may also be necessary to draw certain conclusions from the surrounding circumstances."

2. The Standard of Proof

In the context of the applicant's responsibility to prove facts in support of his/her claim, the term 'standard of proof' means the threshold to be met by the applicant in persuading the decision-maker as to the truth of his/her factual assertions.

Developments

In an UK House of Lords case, it was established that the appropriate test to determine whether an applicant's fear was well-founded was if there is a reasonable degree of likelihood of persecution that the person will be persecuted for a Convention reason if returned to his/her country. The applied 'test' was intended to be a lesser standard than the civil standard of balance of probabilities.¹⁰

In Germany the Federal Constitutional Court has ruled in a number of cases that there should be a "considerable likelihood" that the applicant would be exposed to persecution on return. However, according to the Court, "considerable likelihood" of persecution exists even if the chances of persecution actually occurring are less than 50%. The important element is rather whether there are sufficient objective elements that would make a reasonable thinking person fear persecution.

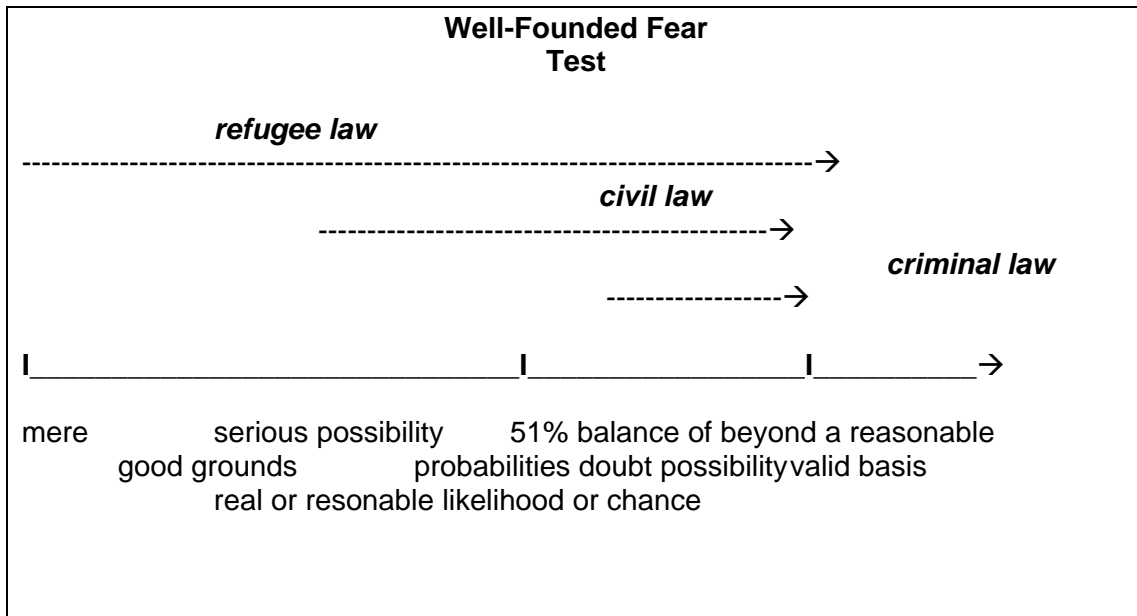
The Nordic countries, with the exception of Denmark, place a relatively high standard of proof on the applicant. This has traditionally been the case, for example, in Sweden. Refugee criteria and the evidentiary burden an applicant must satisfy are interpreted in a very restrictive way, and the applied standard of proof resembles more of what in the common law would amount to a standard higher than the 'balance of probabilities', but just below the criminal standard of 'beyond a reasonable doubt'. This high standard of proof may account for the relatively low recognition rate under the 1951 Convention in the Nordic context. Despite the low recognition rate for refugee status resulting from this practice, the Nordic countries have a generous grant of complementary protection.

Notwithstanding the above examples, in common law countries the law of evidence relating to criminal prosecutions requires cases to be proved 'beyond a

¹⁰ *Ex Parte Sivakumaran (1998)*, 1 All ER 193

reasonable doubt'. In civil cases, the law does not require such a high standard; rather the decision-maker has to decide the case on a 'balance of probabilities'.

The following illustration portrays these different approaches:



UNHCR POSITION

Facts which need to be 'proved' are those which concern the background and personal experiences of the applicant which purportedly give rise to fear of persecution and the unwillingness to avail him or herself of the protection of the country of origin. In this sense, there must be a well-founded fear of persecution that has caused the applicant to flee his/her country of origin or residence. The applicant's fear must be genuine and this is assessed in the light of his/her personal situation and background.

A fear must be well-founded, but this does not mean there must have been actual persecution. The *travaux préparatoires* to the 1951 Convention show that according to the drafting group's explanatory note on the refugee definition, the applicant must prove that s/he has either actually been a victim of persecution, or that s/he can show good reason why s/he fears persecution. It is generally accepted that the 1951 Convention does not require a causal relationship between persecution and flight. Thus, if the reasons to fear persecution have occurred after the applicant had already left the country (eg. in case of a change of regime), the granting of refugee status due to those "post flight reasons" is nevertheless justified.

In refugee claims, there is no necessity for the decision-maker to have to be fully convinced of the truth of each and every factual assertion made by the applicant. The decision-maker needs to decide if, based on the evidence provided as well as the veracity of the applicant's statements, there is a 'reasonable likelihood' that the claimant has a well-founded fear of persecution. If the asylum-seeker satisfies this

test, s/he should be considered a refugee even if s/he is unable to prove his/her case in full.

The more generous 'standard of proof' as developed in some common law countries is the correct approach. The flexibility which the decision-maker must take into account in assessing evidence on a refugee application, as well as the concern that placing too high an evidentiary burden on refugee applicants is inconsistent with the humanitarian nature of refugee law, supports the view that the standard of proof is satisfied if an applicant has demonstrated that his fear is a reasonable one.

3. Credibility

Credibility is a key factor in establishing validity of the claim. The overall credibility of an applicant's claim is usually assessed by examining a number of factors including: the reasonableness of the facts alleged; the overall consistency and coherence of the applicant's story; corroborative evidence adduced by the applicant in support of his/her statements; consistency with common knowledge or generally known facts; and the known situation in the country of origin. The applicant's demeanour is also of relevance.

Developments

There are a number of factors that in the practice of states tend to place credibility in doubt. However, these may be capable of rational explanation and should be assessed in each individual case in the broader context of refugee status determination. Factors reducing credibility include that:

- the applicant has withheld information, personal history data or submitted new information in a second interview;
- the applicant is unwilling to supply information;
- the behaviour of the applicant is inappropriate;
- deliberate destruction by the applicant of his passport or other documentation;
- professed inability to name the transit countries through which the applicant has travelled.

A number of national authorities are particularly strict when assessing an applicant's credibility, as even inconsistencies which are not central or material to the basis of the refugee claim may be considered as fundamental grounds for rejection. Thus, for example, the Nordic authorities generally place great emphasis on an applicant's travel route when considering credibility, although inconsistencies concerning a person's travel route may be offered in order to protect the identity of the individuals who assisted the applicant in reaching the asylum country. Nonetheless, a number of states place a strong focus on factors such as travel route, possession of travel or other identity documents, and delays before applying for asylum. In practice these elements appear to have a strong impact on the perceived credibility of the asylum-seeker.

UNHCR POSITION

The approach by states described above under developments may be inappropriate in the refugee context, as a more balanced analysis may be achieved by focussing on real contradictions or discrepancies that are of a significant or serious nature. Inconsistency, misrepresentation or concealment of certain facts should not lead to a rejection of the claim where these are not material to the claim. Where an applicant is found to be lying and the mistruth is material to the claim, then it is necessary for the decision-maker to take this into account in light of the entire body of evidence to be assessed. To be deemed to undermine an applicant's credibility, the contradictions or inconsistencies should relate to the fundamental or critical aspects of the claim. Rejecting a claim based solely on the non-credibility of marginal issues (for example, delay in applying for refugee status), without evaluating the credibility of the evidence concerning the substance of the claim is therefore not a desirable practice.

On the other hand, just as an applicant may be able to show on cumulative grounds that s/he has a well-founded fear of persecution, a series of discrepancies and contradictions taken individually which have appeared insignificant, taken together and considered in context may support a finding of lack of credibility.

A further element that must be acknowledged in assessing credibility is the behaviour of victims of torture or trauma. In a number of decisions taken by the UN Committee against Torture in cases of rejected refugee applicants, the Committee has noted that torture survivors may be unable to provide exact details about elements of their refugee claims. Moreover, the memory of individuals who are under stress or have suffered harm or are fearful of expressing themselves to a person in authority can play a crucial role in an applicant's inability to provide testimony, which is consistent and coherent. In such cases, more reliance on objective facts, which may be available and an appropriate exercise of the principle of the benefit of the doubt may be warranted.

In assessing the overall credibility of the applicant's claim, the adjudicator should take into account such factors as the reasonableness of the facts alleged, the consistency and coherence of the applicant's story, corroborative evidence adduced by the applicant in support of his/her statements, and consistency with common knowledge or generally known facts.

4. Benefit of the Doubt

Developments

Given that in refugee claims there is no necessity for the applicant to prove all facts to such a standard that the adjudicator is fully convinced that all factual assertions are true, there would normally be an element of doubt in the mind of the adjudicator as regards the facts asserted by the applicant. In this situation, and provided a certain threshold is met, the applicants should be given the benefit of that doubt.

The application of the benefit of the doubt has been widely adopted in national determination procedures and as part of UNHCR's practice in the field. However, many countries in Europe fail to apply the 'benefit of the doubt' in practice.

UNHCR POSITION

As mentioned above, it is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to

support his/her statements by documentary or other proof, and cases in which an applicant can provide evidence of all his/her statements will be the exception rather than the rule. Even independent research may not always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant satisfies the standard of proof as set out above and the credibility test, s/he should be given the benefit of the doubt.

(For more details on UNHCR's position, reference is made to the UNHCR Handbook, in particular paragraphs 196, 203 and 204)

Chapter 4

NON-REFOULEMENT

Introduction: the Issue

The principle of *non-refoulement*, often referred to as the cornerstone of refugee protection, represents a safeguard against forcible returns to persecution or other danger.

While the principle of *non-refoulement* is rarely infringed as far as recognised refugees are concerned, problems have increasingly emerged as regards to the protection from *refoulement* of asylum-seekers. These problems have been exacerbated by the growing number of immigration control measures throughout Europe, which may be difficult to reconcile with existing international refugee protection norms and principles. In addition, problematic issues have also arisen in connection with the application of the first asylum/safe third country principle. Indeed, if the application of these notions is not surrounded by the appropriate safeguards, the result may be *indirect refoulement* of *bona fide* refugees.

Developments

In International law

The principle of *non-refoulement* has been expressed in different forms in several international refugee and human rights instruments, most notably in Article 33, paragraph 1, of the 1951 Convention.

The *non-refoulement* principle contained in the 1951 Convention now has a parallel, although not identical equivalent in universal and regional human rights law. Article 3 of the UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) explicitly states: "No state party shall expel, return ("*refouler*") or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subject to torture..."

Though the European Convention for the Protection of Human Rights and Fundamental freedoms (ECHR) includes no explicit provision addressing the question of *refoulement*, Article 3 of the ECHR, which reads "No one shall be subject to torture or to inhuman or degrading treatment or punishment" has been interpreted by the European Court and Commission on Human Rights in a way that may prohibit *refoulement*.

The principle of *non-refoulement*, as codified in the 1951 Refugee Convention is, however, not guaranteed without limitation. As Article 33, paragraph 2, of the 1951 Convention, referring to its paragraph 1 states: "The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which s/he is, or who, having been convicted by a final judgement of a particular serious crime, constitutes a danger to the community of that country".

The principle of *non-refoulement* due to the risk of torture or inhuman, degrading treatment or punishment as based in Article 3 of the CAT and developed

on the basis of Article 3 of the ECHR do not contain limitations equivalent to Article 33, paragraph 2, of the 1951 Convention.

In National Law

The principle of *non-refoulement*, in its different scopes, has been included in the asylum or aliens legislation of a number of countries. With regard to its core content, as internationally codified in Article 33 of the 1951 Convention, examples for explicit transformation can be found *inter alia* in Aliens Acts of Austria, Finland, Germany, Hungary, Poland and Slovenia. Explicit transformation of the *refoulement* prohibition resulting from Article 3 of the ECHR can also be found in the legislation of these same countries.

In Polish and Slovene legislation, the principle specifically includes persons covered by Article 3 of the ECHR and the CAT. In the case of Slovenia, however, the provision is worded in a way that the exception under Article 33, paragraph 2, of the 1951 Convention would also apply to Article 3 of the ECHR.

Greece and Spain are among other countries, where national legislation protects asylum-seekers from *refoulement*. In Spain, the Asylum Law establishes that no foreigner can be rejected at the border or expelled if s/he has lodged an asylum application until a decision on the application has been taken.

National legislation in other countries often only reflects the principle of *non-refoulement* in the scope of Art 33 of the 1951 Convention.

Examples of limited protection against *refoulement* provided under national legislation can be found in, for instance, the Cypriot Refugee Act or in the Ukrainian Law on Refugees, which provide protection from *refoulement* merely for recognised refugees. The Belarussian Refugee Law protects persons who intend to or have submitted a request for refugee status in Belarus, on condition, however, that their asylum application has been registered, i.e. has passed the pre-registration phase of the two step asylum-procedure. Further, under the Law on Refugees, asylum-seekers whose applications are pending with the Ukrainian authorities, or have been excluded from the Ukrainian status determination procedure on safe third country grounds, or refugees recognised by third countries are not explicitly protected from *non-refoulement*. The Lithuanian Aliens Law stipulates that “the deportation of an alien shall be postponed provided that there may be a real threat to his life or health in the country to which he is being deported, or where he may be subject to persecution for his political convictions or any other reason”.

Probably the most comprehensive, but also most complicated set of rules covering the different aspects of the principle of *non-refoulement* can be found in a provision of the German Aliens Act, which incorporates Article 33, paragraph 1, of the 1951 Convention into the national legislation, and reflects Article 33, paragraph 2, of the 1951 Convention. Another provision of the Aliens Act, which takes into account the ECHR jurisdiction, the CAT obligations and national jurisprudence, ensures that a broader scope of the *non-refoulement* principle is applied.

As the principle of *non-refoulement* is considered a rule of customary international law (see UNHCR position below), constitutional provisions stipulating that generally recognised principles of international law must be observed are also relevant for ensuring full adherence to this principle.

Some countries, such as the Netherlands, apply exclusion clauses based on the exceptions to the principle of *non-refoulement*, provided for in Article 33, paragraph 2, of the 1951 Convention. (Chapter III, Section B 1 on Exclusion.)

Whereas the principle of *non-refoulement* is rarely violated in Europe where recognised refugees are concerned, asylum-seekers face growing risks of *refoulement*, especially at airports or other points of entry. Pre-screening and admissibility procedures combined with an extensive application of the concepts of first asylum country and safe country of origin without the necessary procedural safeguards, have increased the risk of *refoulement* for asylum-seekers. (See Chapter II, Section A 1 on First Asylum/Safe Third Country and Section 3 on Safe Country of Origin.) This is particularly true for asylum-seekers following non-admission or rejection at the border.

The legal fiction of “international zones”, that is considering transit areas at airports and at other points of entry as being outside the territory and the normal jurisdiction of a state, further increases the risk of *refoulement*, by reducing access to legal remedies.

As described in Chapter I on “Non-Arrival Policies”, measures taken by states to further their legitimate interest in controlling irregular migration may be at variance with the ability of refugees to find protection. Border control measures, such as gate checks and checks aboard aeroplanes in combination with visa requirements, may, if adequate regard is not given to the special situation of asylum-seekers, hinder their access to status determination procedures. A number of states also employ interception methods in the form of interdicting vessels suspected of carrying irregular migrants or asylum-seekers, either within territorial waters or on the high seas. In most cases, the aim after interception is return without delay of all irregular passengers to their country of origin.

A common phenomenon in Western European countries, such measures may, however, lead to *refoulement* and more particularly indirect *refoulement* (described below).

There is also greater risk of *refoulement* of asylum-seekers in situations where insufficient interpretation facilities, lack of access of asylum-seekers to legal aid, legal representation, preliminary information regarding asylum procedures, and appeals procedures exist. (See Chapter II, Section B 2 on Procedural Guarantees.)

Some countries have enacted legislation, which effectively counters indirect *refoulement*. As stated above, French legislation explicitly prevents against indirect *refoulement*. In a decision of 14 May 1996, the German Constitutional Court reiterated the view that the principle of *non-refoulement* prohibits not only direct return to a country of persecution, but also return to other countries where the risk of *refoulement* exists. The Court therefore confirmed that the responsibility of the state under Article 33 of the 1951 Convention can include indirect *refoulement* via an alleged “safe third country”. The Finnish Aliens Act, by combining different scopes of the *non-refoulement* principle, also protects against indirect *refoulement*. It stipulates: “No one may be returned to an area where s/he may be subjected to inhuman treatment or persecution”.

UNHCR POSITION

The principle of *non-refoulement* is a corollary to fundamental human rights principles, which include the right to seek and to enjoy asylum in other countries from persecution as initially set forth in Article 14 of the Universal Declaration of Human Rights. This principle reflects the concern and commitment of the international community to ensure that those in need of protection receive the enjoyment of fundamental human rights, including the right to life, to freedom from torture or cruel, inhuman or degrading treatment or punishment, and to liberty and security of person. The obligation for state parties to the 1951 Convention to respect the principle of *non-refoulement* is contained in Article 33 of the 1951 Convention.

Furthermore, as the principle of *non-refoulement* is considered a rule of customary international law, it is equally binding for states which have not acceded to the 1951 Convention or which have adopted a geographical limitation to that instrument. The character of the principle emanates from its widespread acceptance; the recognition of its fundamental character; and its incorporation into treaties to which numerous states in different areas of the world are parties. It has also been accepted into the practice of states, and its fundamental nature has not been seriously questioned.

The Scope and Content of the Principle of *Non-Refoulement*

Article 33, paragraph 1, of 1951 Convention stipulates that “No Contracting state shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”. The principle has been further reaffirmed and defined by states through Conclusions adopted by the UNHCR Executive Committee (EXCOM).

Refoulement relates to any state action whereby a refugee is directly or indirectly forced to return or is sent to a country where s/he has reason to fear persecution including threats to life and freedom. The principle of *non-refoulement* should be given due regard in the wording and application of extradition treaties and relevant national legislation.

Exceptions to the Principle of Non-Refoulement mentioned in Article 33, paragraph 2

It is essential to clearly differentiate between the application of Article 1F(b) of the 1951 Convention with that of Article 33, paragraph 2, of the 1951 Convention. Article 1F(b) can only be invoked for a crime committed or presumed to have been committed by an applicant “outside the country of refuge prior to his/her admission to that country as a refugee”. Further, Article 1F(b) should not apply to an applicant who committed a serious non-political crime in the country of asylum, but before formal recognition as a refugee. Refugees who, after former recognition as a refugee, commit a particularly serious crime with the country of refuge are subject to that country’s criminal law process, and to Article 33, paragraph 2, of the Convention. (See Chapter III, Section B 1 on Exclusion.)

Incorporation of the Principle of Non-Refoulement into National Law

Ensuring the respect for the principle of *non-refoulement*, including as reflected in human rights instruments, requires the incorporation of the full scope of the principle

into countries' national legislation. Indeed, clear reference to the principle in national legal acts secures its observance by the different state actors. Such reference should also clarify which authorities are charged with *non-refoulement* related decisions. Preferably, such decisions should be made by the central authority responsible for determining eligibility for refugee status and asylum. In case other bodies are responsible for these decisions, they should be obliged to request the opinion of the latter, prior to rendering their decision.

Applicability outside the National Territory/Non-Rejection at the Border

As stated in Executive Committee (EXCOM) Conclusion No. 6 on *Non-Refoulement*, (1977) the principle applies both at the border and within the territory of a state to persons who may be subjected to persecution if returned to their country of origin, irrespective of whether or not they have been formally recognised as refugees.

By its clear language, Article 33, paragraph 1, requires states to respect the principle of *non-refoulement* at all times, within, outside and at the border of their national territory. Therefore, returning refugees who have not yet crossed the borders of a state to persecution amounts to a violation of the principle of *non-refoulement*. The principle also requires non-rejection at the border of persons whose life and freedom would otherwise be in danger. This has been further reaffirmed by states in Executive Committee (EXCOM) Conclusion No. 22 on Protection of Asylum-Seekers in Situations of Large-scale Influx (1981), which states that, "In all cases the fundamental principle of *non-refoulement* including non-rejection at the frontier must be scrupulously observed".

It should be noted that in circumstances where access to asylum procedures constitutes the only means of avoiding *refoulement*, denial of such access may constitute a breach of the principle of *non-refoulement*. This would be the case, for example, when admission to the territory is directly linked to and dependent on access to asylum procedures.

Asylum-seekers

The rationale behind the broad application of the principle of *non-refoulement* to also include asylum-seekers is described in the 1993 Note on International Protection prepared by UNHCR: "Respect for the principle requires that asylum-seekers, that is, persons who claim to be refugees, be protected against return to a place where their life or freedom might be threatened until their status as refugees has been reliably ascertained. Every refugee is, initially, an asylum-seeker; therefore, to protect refugees, asylum-seekers must be treated on the assumption that they may be refugees until their status has been determined. Otherwise, the principle of *non-refoulement* would not provide effective protection for refugees, because applicants might be rejected at borders or otherwise returned to persecution on the grounds that their claim has not been established."

Interception

The various methods of interception should not obstruct the ability of asylum-seekers and refugees to benefit from international protection. The direct removal of a refugee or an asylum-seeker to a country where s/he fears persecution is not the only manifestation of *refoulement*. The removal of a refugee from one country to a third country, which will subsequently send the refugee onward to the place of feared

persecution constitutes indirect *refoulement* (see below), for which several countries may bear joint responsibility.

Given the practice of states to intercept persons at great distance from their own territory, the international refugee protection regime would be rendered ineffective if states' agents abroad were free to act at variance with obligations under international refugee law and human rights law.

When intercepted asylum-seekers and refugees have moved from a country other than their country of origin, their return to countries of first asylum can be envisaged whenever the refugees will be protected there against *refoulement*; will be permitted to remain there and treated in accordance with recognised basic human standards until a durable solution has been found. (See Chapter II, Section A 1 on First Asylum/Safe Third Country.)

Safe Third Country Principle and Indirect *Refoulement*

As previously stated, an automatic application of first asylum/safe third country principles without necessary safeguards may lead to orbit situations. Alternatively, it may result in the return of asylum-seekers to countries where protection against *non-refoulement* is not ensured, or to countries which may refuse entry, and which may *refoules* such persons to the country where they fear persecution. Such cases are referred to as indirect *refoulement* or "chain *refoulement*".

UNHCR POSITION

Regarding Indirect Refoulement

The principle of *non-refoulement* also covers protection against indirect *refoulement*. Respect for this principle therefore also requires that an asylum-seeker or a refugee not be returned to a country from where he or she may further be sent to a place where his or her life or freedom is in danger. A state that sends an asylum-seeker or a refugee to a place from which s/he may be sent onward to face persecution, acts in breach of the principle of *non-refoulement*.

Notwithstanding the need for procedural safeguards when applying the safe third country principle (see Chapter II, Section B 2 on Procedural Guarantees), it must be emphasised that denial of refugee status in the application of the safe third country principle does in no way waive the state's obligation to observe the principle of *non-refoulement*. Therefore, if return to the third country is not possible (anymore), for whatever reason, or if safety previously enjoyed in a third country has ceased, a decision on the applicability of the principle of *non-refoulement* must be made by the authorities of the state in which the (rejected) asylum-seeker finds him/herself. If the *non-refoulement* principle applies (based on a broad or narrow interpretation), and if the person thus in need of protection has no alternative where s/he can enjoy protection, protection should be offered.

INDEX

Accelerated procedures
Admissibility procedures
Admissibility to third countries
Agents of persecution
Amsterdam Treaty
Appeal
Applications not related to the granting of refugee status
Benefit of the Doubt
Burden of Proof
Carrier sanctions
Ceased circumstances (cessation clause)
Cessation
Civil War
Clearly fraudulent applications
Compelling reasons arising out of previous persecution
Credibility
Detention
Dublin Convention
Economic migrants
Effective protection
Evidence
Exclusion
External aggression
False statements
Family re-unification
Family unity

First asylum country

Gender-related persecution

Groups with special needs

Human rights

Illegal entry

Inclusion clauses

Indirect *refoulement*

Information provision

Internal flight (relocation) alternative

Interview

Membership of a particular social group

National security, threat to

Non-political crimes
Non-refoulement

Prosecution

Public order, threat to

Re-acquisition of nationality

Re-admission Agreements

Re-availment of national protection

Re-establishment in home country

Safe country of origin

Safe third country

Separated children

Serious crimes

Schengen Implementation Agreement

Standard of proof

Stateless persons

Sur place refugees

Suspensive effect of appeal

Time limit for applying for asylum

Unaccompanied minors

Undocumented asylum-seekers

Visa requirements

Well-founded fear of persecution

REFERENCES

International Treaties

Convention relating to the Status of Refugees (1951)

Protocol relating to the Status of Refugees (1967)

Universal Declaration of Human Rights (1948)

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)

International Covenant on Civil and Political Rights (1966)

Convention on the Elimination of All Forms of Discrimination against Women (1979)

Convention on the Rights of the Child (1989)

UNHCR Documentation

Conclusions on the International Protection of Refugees, adopted by the Executive Committee of the UNHCR Programme (EXCOM) (1975-1999)

Guidelines on the Protection of Refugee Women, UNHCR (1991)

UNHCR Position on Resolution on a Harmonised Approach to Questions concerning Host Third Countries (1995)

Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (1979)

Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum (1997)

EU Texts

European Convention for the protection of Human Rights and Fundamental Freedoms (1950)

European Convention on Extradition (1957)

Resolution on Manifestly Unfounded Applications for Asylum (1992)

Resolution on a Harmonised Approach to Questions concerning Host Third Countries (1992)

Council of Europe Recommendation on Guidelines to Inspire Practices of the Member States of the Council of Europe concerning the Arrival of Asylum-Seekers at European Airports (1994)

Resolution on Minimum Guarantees for Asylum Procedures (1995)

Joint Position on the Harmonised Application of the Definition of the Term “Refugee” in Article 1 of the 1951 Convention of 28 July 1951 relating to the Status of Refugees (1996)

Resolution on Unaccompanied Minors (1997)

Council of Europe Recommendation containing the Guidelines for the Application of the “Safe Third Country” Concept (1997)

Council of Europe Conclusions concerning the Practical Implementation of the Dublin Convention (1997)

Council of Europe Recommendation on the Right of Rejected Asylum-Seekers to an Effective Remedy against Decisions on Expulsion in the context of Article 3 of the ECHR (1998)

European Commission’s draft Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (2000)

Other Resources

Agnes Hurwitz, *The 1990 Dublin Convention: A Comprehensive Assessment*, *International Journal of Refugee Law* vol. 11 no. 4 (1999), p. 646-677

Sandy Ruxton *Separated Children Seeking Asylum in Europe: a Programme for Action*, UNHCR and Save the Children (2000)