

IN THE COURT OF SESSION
WRITTEN SUBMISSIONS FOR
THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES
IN THE APPLICATION FOR LEAVE TO APPEAL BY

I.A.

against a decision of the Asylum and Immigration Tribunal

I. Interest and status of the Office of the United Nations High Commissioner for Refugees

1. The Office of the United Nations High Commissioner for Refugees (“UNHCR”) has an interest in this application for leave to appeal.
2. The Statute of the Office of the United Nations High Commissioner for Refugees (“the UNHCR Statute”) was adopted by the United Nations General Assembly on 14 December 1950 as Annex to Resolution 428(V).
3. Paragraph 1 of the UNHCR Statute provides that UNHCR, acting under the authority of the General Assembly:

“... shall assume the functions of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities.”
4. Paragraph 8(a) of the UNHCR Statute states that UNHCR is to provide for the protection of refugees by, *inter alia*, promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.
5. UNHCR is responsible for the supervision of the 1951 Convention relating to the Status of Refugees (“the 1951 Convention”) and the 1967 Protocol relating to the Status of Refugees (“the 1967 Protocol”). Reference is made to the Preamble to the 1951 Convention. According to Article 35 of the 1951 Convention, the Contracting States undertake to co-operate with UNHCR in the exercise of its functions and to facilitate its duty of supervising the application of the provisions of the Convention. Article II of the 1967 Protocol makes similar provision.
6. UNHCR is entitled to intervene in proceedings before the First Tier and Upper Tribunals (Immigration and Asylum Chamber): Rules 2, 3 and 49 of the Asylum and Immigration Tribunal Procedure Rules 2005 as amended and Rule 9 of the Tribunal Procedure (Upper Tribunal) Rules 2008 as amended.
7. UNHCR submits that the United Kingdom decision maker, when determining whether a person is a refugee, must give considerable weight to, and seriously take into account, the fact that the person has been recognised as a refugee by UNHCR under its mandate – that he or she has “mandate refugee status” – when determining risk and assessing the credibility of his or her claim for asylum protection.
8. The present case is one in which the applicant was recognised as a refugee by UNHCR under its mandate.

9. UNHCR has intervened, with the leave of the Court of Appeal, in an appeal to that court from the decision of the Asylum and Immigration Tribunal in *MM (Status of recognised mandate refugees) Iran* [2009] UKAIT 00029. Permission to appeal in that matter was granted by Jackson LJ in *MM(Iran) v Secretary of State for the Home Department* [2010] EWCA Civ 294. That appeal raises issues similar to those in the present application for leave to appeal. In granting permission to appeal, Jackson LJ took into account that there was no authority which was directly in point on the issue of the effect in the United Kingdom of a decision by UNHCR overseas that an individual qualified for mandate refugee status.

II. The duties of UNHCR and exercise of the mandate

10. The competence of UNHCR extends, in terms of paragraph 6B of the UNHCR Statute to:

“Any other person who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence.”

11. UNHCR exercises its mandate where States have not acceded to the international refugee instruments or where domestic procedures have not been established or are not effective. In the exercise of its mandate UNHCR may be required to determine whether persons are refugees. It does so in order to protect refugees from *refoulement*, detention or other violations of their human rights and/or to facilitate a durable solution. The mandate may be exercised in a state which is a State Party, or one which is not.

12. It is the application of paragraph 6B of the UNHCR Statute which defines whether a person has mandate refugee status. The definition in paragraph 6B is not identical with the definition of refugee in Article 1A(2) of the 1951 Convention and 1967 Protocol, which reads as follows:

“the term “refugee” shall apply to any person who ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

13. The definition in the UNHCR Statute does not refer to membership of a particular social group. Also, unlike the definition in the 1951 Convention and the 1967 Protocol, it includes persons who **had** a well-founded fear of persecution.

14. When UNHCR determines refugee status under its mandate, it generally applies the criteria in the 1951 Convention and the 1967 Protocol. When a person meets the criteria in the UNHCR Statute, but not those in the 1951 Convention and the 1967 Protocol, UNHCR applies the definition in the UNHCR Statute. That would arise if a person **had** a well-founded fear of persecution.

15. UNHCR’s mandate has been extended to include refugees fleeing armed conflict and indiscriminate violence or public disorder. This is the result of successive General Assembly and ECOSOC resolutions and the adoption by UNHCR of the usage of a wider refugee definition, based on the definitions in regional instruments such as the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa and the 1984 Cartagena Declaration on Refugees. Reference is made to *Providing International Protection including through Complementary Forms of Protection*, EC/55/SC/CRP.16, 2 June 2005, paragraphs 9 and 26.

16. UNHCR may recognise refugees on a group basis or individually. The need for a group-based determination arises from large-scale influxes where individual determination is impracticable and where there are often urgent protection and assistance needs which have to be met. Group determination and subsequent *prima facie* recognition is based on an evaluation of the objective situation in the country of origin which gave rise to the exodus. In some situations, it may be possible to take a *prima facie* group approach, if the entire group has been displaced under circumstances indicating that individual members of the group could be considered as refugees. As each member of the group is regarded *prima facie* as a refugee an in-depth detailed individual refugee status determination is not necessary; an interview to determine membership of the group, and where applicable the absence of exclusion grounds, would suffice. Where such individuals subsequently apply for asylum elsewhere, the case may need to be considered anew through an individual assessment, taking into account the objective circumstances giving rise to the displacement and up-to-date country of origin information.

III. The effect of a prior recognition of mandate refugee status on the determination of a person's claim for asylum

17. Recognition of mandate refugee status does not bind a State to recognise that person as a refugee. UNHCR submits that in determining the asylum claim of a person whose status as a refugee has been recognised by UNHCR, a decision maker in the United Kingdom must give the recognition considerable weight and take it seriously into account. He must take it into account when assessing the risk of persecution, and when assessing credibility.
18. The fact that a person has moved to another country since being granted mandate status does not mean that the status has been lost and should be left out of account. The definition of a refugee in terms of paragraph 6B of the UNHCR Statute is such that the status is dependent on a past or present fear of persecution. A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognised because he is a refugee: *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, January 1992, at paragraph 28. The recognition of refugee status is a declaratory act: Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted, Recital 14.
19. Recognition of refugee status in one State has extraterritorial effect in another. The UNHCR Executive Committee Conclusion on the "Extraterritorial Effect of the Determination of Refugee Status" (No 12 (XXIX) (1978)) states:

"The Executive Committee,

- (a) **Considered that one of the essential aspects of refugee status, as defined by the 1951 Convention and the 1967 Protocol, is its international character;**
- (b) Recognized the desirability for maintenance and continuity of refugee status once it has been determined by a Contracting State;
- (c) Noted that several provisions of the 1951 Convention enable a refugee residing in one Contracting State to exercise certain rights-as a refugee-in another Contracting State and that the exercise of such rights is not subject to a new determination of his refugee status;

(d) Noted that persons considered as refugees under Article 1 A (1) of the Convention maintain their refugee status unless they fall under a cessation or exclusion clause;

(e) Noted that refugees, holders of a Convention Travel Document issued by one Contracting State, are enabled to travel as refugees to other Contracting States;

(f) Considered that the very purpose of the 1951 Convention and the 1967 Protocol implies that refugee status determined by one Contracting State will be recognized also by the other Contracting States;

(g) Recognized, therefore, that refugee status as determined in one Contracting State should only be called into question by another Contracting State in exceptional cases when it appears that the person manifestly does not fulfil the requirements of the Convention, e.g. if facts become known indicating that the statements initially made were fraudulent or showing that the person concerned falls within the terms of a cessation or exclusion provision of the 1951 Convention;

20. Executive Committee Conclusion No 12 is consistent with the principle, mentioned in paragraph 18 above, that the recognition of refugee status is a declaratory act. As one of the essential aspects of refugee status is its international character, the recognition of mandate refugee status by UNHCR in one State should be given considerable weight and taken seriously into account by another State. This is bolstered by the fact that Resolution 428(V) requires States to cooperate with UNHCR. It is also supported by the fact that UNHCR decision-makers apply the definition in the 1951 Convention and its 1967 Protocol.

21. UNHCR's submission as to the weight to be accorded to recognition of mandate refugee status is consistent with:

- (i) the approach of the Immigration Appeal Tribunal ("IAT") as it then was in determining the asylum claim of a person previously recognised as a refugee by another State;
- (ii) the approach of the European Court of Human Rights to an earlier recognition of mandate refugee status;
- (iii) the approach of the Committee Against Torture to an earlier recognition by a State of refugee status; and
- (iv) law and practice in national jurisdictions.

(i) The approach of the IAT

22. The approach of the IAT to a person previously recognised as a refugee by another State can be found in *Babela v Secretary of State for the Home Department* [2002] UKIAT06124 and *Secretary of State for the Home Department v KK* [2005] UKIAT00054. The approach of the IAT is broadly consistent with the UNHCR Executive Committee Conclusion mentioned above.

In *Babela* the IAT applied the extraterritoriality principle, and found that refugee status determined in one contracting State should only be questioned by another contracting State where there is very good reason for doing so. Reference is made to paragraphs 28 to 30.

23. The following propositions can be derived from the approach of the IAT in *Babela*:

- (i) The appropriate starting point in looking at the application should have been the fact that the applicant had refugee status.
- (ii) A great deal of weight should be put on the grant of that status.
- (iii) The refugee status previously recognised should not be questioned without a very good reason for doing so.
- (iv) Where there has been previous recognition of refugee status, the applicant has *prima facie* made out his entitlement to refugee status in the UK.

- (v) The *prima facie* case may be rebutted, and the onus is on the respondent to rebut it.
- (vi) To deal with the burden of proof in this way satisfies considerations as to whether or not a cessation clause applies, and the “very persuasive” UNHCR guidance that refugee status should not be lightly tampered with, but should only be reviewed or annulled on the most substantial and clear grounds.

24. The IAT rejected the respondent's argument that it would never be able to satisfy a burden of proof where he did not know the basis upon which the refugee status was granted initially. The IAT stated that there was nothing in the papers to suggest that the Appellant's claim to asylum was on any basis other than that upon which he had claimed it in the UK.

25. The IAT stated that it was not concerned with changes between 1994 when the appellant left his country of origin and the date of determination, but with changes between 1998 (when he had been granted asylum in South Africa) and the determination. It held that nothing in the objective material enabled the respondent to satisfy the burden of proof required to satisfy the IAT that the cessation clauses applied.

26. *Babela* was considered in *KK*. In *KK* the claimant had been granted refugee status by Zimbabwe under the OAU Convention. The IAT stated at paragraphs 17 to 20:

“17.Where the claimant can show, to a reasonable degree of likelihood, that there was a grant of asylum and that the grant of asylum was made on the same grounds as those which engage the Geneva Convention, the position is as follows.

18. The earlier grant of asylum is not binding, but it is the appropriate starting point for the consideration of the claim; the grant is a very significant matter. There should be some certainty and stability in the position of refugees. The Adjudicator must consider whether there are the most clear and substantial grounds for coming to a different conclusion. The Adjudicator must be satisfied that the decision was wrong. The language of *Babela* is that of the burden of proof: their status is *prima facie* made out but it can be rebutted; the burden of proof in so doing is on the Secretary of State. We do not think that that is entirely satisfactory as a way of expressing it and it leaves uncertain to what standard the burden has to be discharged and what he has to disprove. The same effect without some of the legal difficulties is established by the language which we have used.

19. But the important point is that it does not prevent the United Kingdom from challenging the basis of the grant in the first place. It does not require only that there be a significant change in circumstances since the grant was made. Clear and substantial grounds may show that the grant should never have been made by the authorities; it may be relevant to show that the authorities in the country in question lacked relevant information or did not apply the Geneva Convention in the same way. Exclusionary provisions may be relevant. The procedures adopted for examination of the claim may also be relevant. Considerations of international comity may be rather different as between EU member states and those with less honest administrations or effective legal systems.

20. Where however the Adjudicator is not satisfied that the foreign grant was wrongly made, if the Claimant is to fail in his claim in the United Kingdom because of a change of circumstances, this is equivalent to the application of a cessation provision and should be considered in a like manner.”

(ii) The approach of the European Court of Human Rights

27. The European Court of Human Rights, in determining whether an individual is entitled to protection under Article 3 ECHR has given “due weight” to UNHCR's recognition of that person's mandate refugee status.

28. In *Abdolkhani and Karimnia v Turkey*, Application No 30471/08, the applicants, originally from Iran, had been recognised as mandate refugees whilst in Iraq and had then entered Turkey. The Court, in determining whether the applicants' removal would expose them to treatment prohibited by Article 3, stated that the Court must give "due weight" to UNHCR's recognition of mandate status. Thereby, the Court considered that the UNHCR interviewed the applicants and so had "the opportunity to test the credibility of their fears and the veracity of their account" (paragraph 82). Also: *Jabari v Turkey* (Application No 40035/98), 11 July 2000, paragraph 41; *Dbouba v Turkey* (Application No 15916/09), 13 July 2010, paragraph 42; *MB and others v Turkey* (Application No 36009/08), 15 June 2010, paragraph 33; *Ahmadpour v Turkey* (Application No 12717/08), 15 June 2010, paragraphs 39 and 40.

(iii) The approach of the Committee Against Torture

29. In *Elif Pelit v Azerbaijan*, CAT/C/38/D/281/2005, the United Nations Committee Against Torture considered the complainant's claim that if forcibly removed to Turkey she would face torture contrary to Article 3 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. She was a Turkish national who had been given refugee status in Germany. The Committee held (paragraph 11) that her refugee status remained valid at the time of her deportation from Azerbaijan to Turkey, relying on the principle of extraterritorial effect as set out in UNHCR Executive Committee Conclusion No 12. It found that Azerbaijan had not shown why this principle was not respected in circumstances where the general situation of persons such as the complainant and her own circumstances raised real issues under Article 3. The Committee found that the way Azerbaijan had dealt with the complainant's case amounted to a breach of her rights under Article 3.

(iv) Law and practice in national jurisdictions

30. There is not a common approach among EU States or more broadly in relation to the domestic effect of recognition of mandate status by UNHCR. The Annex to this submission sets out applicable national legislation where this exists, as well as decisions and practice in national jurisdictions regarding the situation of persons previously recognised under UNHCR's mandate who seek asylum in another country.

31. States adopt a variety of approaches. Nevertheless, the fact of recognition by UNHCR can generally be seen to carry considerable weight. The situation is clearest in France and Bulgaria, where legislation stipulates that a refugee recognised under UNHCR's mandate is automatically to be recognised as a refugee. Similarly, in the Netherlands, the Aliens Circular provides protection from removal to the country of origin for individuals whom UNHCR's representation in the Netherlands states are refugees.

32. In terms of national practice as opposed to legislation, a number of States transfer mandate refugees seeking asylum in their State to a third State where, for instance, the Dublin II Regulation or safe third country provisions apply. The fact of mandate recognition by UNHCR also serves as a mechanism for ensuring that such cases are not channelled through procedures for applications considered manifestly unfounded. In others, it is regularly used in the context of credibility assessment. States appear most often to assess cases differently from UNHCR where circumstances have changed in the country of origin since UNHCR's original recognition of status or where concerns about credibility and/or exclusion arise. Generally, however, most countries grant UNHCR mandate refugees some form of subsidiary protection if they are not confirmed as refugees as such.

IV. Assessing the credibility of a person with mandate refugee status

33. In assessing the credibility of a person claiming asylum who has previously been recognised as a mandate refugee, a UK decision-maker must give due weight to that prior recognition. As the

European Court of Human Rights has recognised (see paragraph 28 above), UNHCR will have interviewed the applicant and assessed the credibility of his fears and the veracity of his account.

34. In conducting a refugee status determination, UNHCR staff interview persons seeking asylum. In doing so they adhere to the *Procedural Standards for Refugee Status Determination under UNHCR's Mandate*. Once staff have conducted the interview the claim is assessed in the light of the evidence submitted by the applicant, relevant country of origin information, and the relevant criteria. Attention is given to any special characteristics of the applicant, such as age, mental and physical health, and the possible effects of trauma. UNHCR staff use a standard Refugee Status Determination Assessment Form. Credibility by UNHCR is assessed with reference to the internal consistency and level of detail of the applicant's accounts; the consistency of the applicant's statements with other evidence submitted; the consistency of the applicant's statements with country of origin information; and any failure to submit available evidence and whether there is a reasonable explanation for any such failure.
35. Once a Refugee Status Determination assessment has been drafted, it is submitted to a Reviewing Officer who reviews the recommendation contained in the assessment report and who is responsible for issuing a decision.
36. The fact that UNHCR, an organisation that has particular experience in the assessment of refugee status, has assessed the claim as credible suggests that it is credible.
37. Consequently, a State decision-maker must not make a finding as to the person's credibility and only then consider the effect of the recognition of mandate refugee status. The decision-maker must not reach a view on credibility without taking as the starting point that recognition, and then use adverse credibility findings as a means to reject the recognition of mandate refugee status.
38. The correct approach is broadly analogous to that which a decision-maker should employ in a case where he requires to consider medical evidence. It is not appropriate to use adverse findings of credibility with regard to a claimant as a means to reject supportive medical evidence: see, *mutatis mutandis*, *Virjon B v Special Adjudicator* [2002] EWHC 1469 (Admin), at paragraph 21; *Diaby v Secretary of State for the Home Department* [2005] EWCA Civ 651, at paragraphs 6 and 34.
39. The approach outlined above is consistent with the approach described by Sedley LJ in *Karanakaran v Secretary of State for the Home Department* [2000] 3 All ER 449:

“decision-makers, on classic principles of public law, are required to take everything material into account. Their sources of information will frequently go well beyond the testimony of the applicant and include in-country reports, expert testimony and – sometimes – specialised knowledge of their own (which must of course be disclosed). No probabilistic cut-off operates here; everything capable of having a bearing has to be given the weight, great or little, due to it.”
40. When assessing credibility, UNHCR submits that a determination of mandate refugee status is an important source of information, to be taken into account by the UK decision-maker.

V. Summary and conclusion

41. For the foregoing reasons, UNHCR submits that in determining whether a person is refugee for the purposes of the 1951 Convention and/or 1967 Protocol, the UK decision-maker must give considerable weight to, and seriously take into account, the fact that that person has been recognised previously by UNHCR under its mandate as a refugee when determining risk and assessing the credibility of his or her claim for asylum protection.

Ailsa Carmichael QC

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