

Advisory Opinion by UNHCR

On the interpretation of certain articles of the 1951 Convention relating to the Status of Refugees to the Supreme Court of the Republic of Belarus

1. The United Nations High Commissioner for Refugees (UNHCR) is a UN agency, which is entrusted by the UN General Assembly with the function of providing international protection to refugees who fall under the competence of UNHCR and of seeking permanent solutions by assisting Governments and, subject to the approval of the Governments concerned, to private organizations¹. As specified in its statute, UNHCR executes this function *inter alia*, “by promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto².” UNHCR supervisory responsibility is mirrored in article 35 of the Convention relating to the Status of Refugees adopted 28 July 1951 (1951 Convention) and in article II of its Protocol relating to the Status of Refugees adopted 31 January 1967 (1967 Protocol), to which the Republic of Belarus acceded by the Law of the Republic of Belarus No. 10-Z of 4 May 2001.

2. UNHCR has more than 50 years of experience in the area of supervision of the application of international conventions for the protection of refugees. UNHCR is represented in 116 countries around the world. UNHCR assists in the elaboration and exercise of national procedures on the refugee status determination, and also carries out an independent refugee status determination in accordance with its mandate. UNHCR’s interpretation of the provisions of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees is an essential consultative source, which is to be taken in consideration by the national authorities while examining issues, related to refugee law, due to UNHCR’s supervision function in accordance with the provisions of UNHCR’s Statute, Article 35 of the 1951 Convention and Article II of the 1967 Protocol, as well as due to the duty of the governments to cooperate with UNHCR.

3. UNHCR considers it appropriate to respond to the request by Minsk City Bar related to interpretation of certain provisions of 1951 Convention related to cancellation, revocation, or cessation of refugee status, and place its own views before the Court. UNHCR will limit its

¹ Statute of the Office of the United Nations High Commissioner for Refugees, paragraph 1.

² Ibidem, paragraph 8(a).

submission to issues of international law. UNHCR stands ready to provide any additional assistance to the Court for which it may be called upon.

Applicability of the 1951 Convention in domestic law

4. In accordance with Article 8 of the Constitution of the Republic of Belarus, the Republic of Belarus shall recognize the supremacy of the universally acknowledged principles of international law and ensure that its laws comply with such principles. According to Section 2 of Article 1 of the Law on Refugees of the Republic of Belarus, if an international treaty to which the Republic of Belarus is party, establishes rules other than those envisaged by the present Law, the rules enshrined in the international treaty shall be applied.

5. Legal provisions contained in international treaties to which the Republic of Belarus is party and which have entered into force are part of the existing legislation on the territory of the Republic of Belarus. These provisions are subject to immediate application, except in cases when the international treaty states that the adoption (publication) of a domestic normative legal act is required for such provisions to be applied. The legal provisions then have the same force as the normative legal act by which the Republic of Belarus undertook its obligations as party to the treaty (Article 20 of the Law of the Republic of Belarus on Normative Legal Acts of the Republic of Belarus №361-Z of 10 January 2000).

Principle of *Non-refoulement*

6. As of 1 November 2007, the total number of States parties to the 1951 Convention or its 1967 Protocol reached 147. The most important right enshrined in the Convention is the right for protection against *refoulement* or expulsion of refugees to the territory of the country where they are in danger of persecution³. **Therefore, protection against *refoulement* is a duty of each Contracting State party to the 1951 Convention.** The number of ratifications confirms the universal acknowledgment of the present Convention. In practice it has already been recognized by many countries that the prohibition of forced return of refugees (hereinafter “the *non-refoulement* principle”) is **part of customary international law and a universally recognized principle of international law**⁴. It means that all states are obliged to abide by the

³ Paragraph 1 of Article 33 of the 1951 Convention: “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 ”

⁴ In 1954 27 States-parties of the UN Conference on the Status of Stateless persons expressed unanimously the resolution that the *non-refoulement* principle enshrined in the 1951 Convention is the expression of the generally recognized principle of inadmissibility of forced return. See Concluding

principle of non-refoulement of refugees even if they have not signed the 1951 Convention. All the more, it applies to the States parties to the Convention.

7. Consequently, taking into account Article 33 of 1951 Convention, Article 8 of the Constitution of the Republic of Belarus, part 2 of Article 1 of the Law of the Republic of Belarus on Refugees, if the legislation of the Republic of Belarus contravenes the principle of *non-refoulement*, the stated legislation cannot be applied.

Restrictive interpretation of termination of refugee status

8. The term “refugee” is defined in the 1951 Convention. The Convention also contains the conditions under which the refugee status shall not be granted (Article 1, Paragraph D, E, F), as well as the conditions under which the cessation of the refugee status shall take place (Article 1, Paragraph C).

9. Under applicable legal principles and standards, a person who was recognized as a refugee by a State under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol may lose refugee status only if certain conditions are met. The following three categories need to be distinguished:

- **Cancellation**, which relates to a decision to invalidate a refugee status recognition which should not have been granted in the first place. Cancellation affects determinations that have become final, that is, they are no longer subject to appeal or review. It has the effect of rendering refugee status null and void from the date of the initial determination (*ab initio* or *ex tunc*).⁵
- **Revocation**, which is the withdrawal of refugee status in situations where a person engages in conduct which comes within the scope of Article 1F(a) or 1F(c) of the 1951 Convention after having been recognized as a refugee. This has effect for the future (*ex nunc*).

Document of the UN Conference on the Status of Stateless Persons: 360 UNTS 117. The universal character of this principle has constantly been emphasized in other instruments, including declarations, recommendations and resolutions, both on the universal international level and on regional levels. This principle is of primary importance according to leading Belarusian and foreign experts on refugee law. See, for example, L.V. Pavlova, *International Legal Refugee Status: Manual for university students/* Minsk: Tesey, 2006, see 20-23. G.C. Goodwin-Gill, *Status of Refugees in International Law/Translated from English – M. UNITY*, 1997, p. 167. The Court of Central District of Minsk city omitted this fundamental principle of international law among those named even though this principle is at the core of refugee protection (see p. 5 of the Statement of Motivation).

⁵ Handbook on Procedures and Criteria for Determining Refugee Status, UNHCR Geneva, 1979 (reedited 1992), paragraph 117

- **Cessation**, which concerns the ending of refugee status pursuant to Article 1C of the 1951 Convention because international protection is no longer necessary or justified on the basis of certain voluntary acts of the individual concerned or a fundamental change in the situation prevailing in the country of origin. Cessation has effect for the future (*ex nunc*).

10. These grounds for ending international refugee protection are distinct from expulsion under Article 32 and the loss of protection against *refoulement* pursuant to Article 33(2) of the 1951 Convention. Neither of these provide for the loss of refugee status of a person who, at the time of the initial determination, met the eligibility criteria of the 1951 Convention.

11. Article 35 paragraph 5 of the Law on Refugees of the Republic of Belarus allows for the loss of refugee status of a person who has left the territory of the Republic of Belarus and has not returned within a period of one year after the expiry of the validity of the person's travel document. Article 35 paragraph 5 introduces a provision under which refugee status ends on the basis of grounds that have not been foreseen in the 1951 Convention. Since such a ground for the cessation of the refugee status is not enshrined in the 1951 Convention, its application would constitute a violation of the Convention.

12. Once a person has been granted status as a refugee, this status must be maintained, unless the refugee comes within the terms of one of the cessation clauses or, alternatively, refugee status can be cancelled or revoked. The cessation clauses list the conditions under which a person who was granted refugee status is no longer in need of international protection because national protection, of either the State of origin or another State, has become effectively available (Article 1C of 1951 Convention). The grounds that have been identified in the 1951 Convention on the basis of which refugee status ceases are exhaustive. This means they should be interpreted restrictively, and no additional grounds can justify a conclusion that international protection is no longer required.⁶

⁶ Handbook on Procedures and Criteria for Determining Refugee Status, UNHCR Geneva, 1979 (reedited 1992), paragraph 116. The Court of the Central District of Minsk City (hereinafter "Court") in its decision of 6 June 2007 ruled that "*some grounds for exemptions from the definition of refugee are determined in the Convention. The reason for this wording to be envisaged is that Article 1 of the Convention does not provide a complete list of grounds for such exemptions; neither does it provide any direct reference to the final character of these exemptions*" (see p. 6 of the Statement of Motivation). Such an interpretation of Article 1 of 1951 Convention is not in accordance with its letter and spirit. The Court further indicates that among the addressees of the Article in question are also certain UN agencies and bodies, and concludes that only for them the list of exemptions is complete. However, only States are parties and are bound by the 1951 Convention. None of the UN agencies or bodies is a Contracting Party to the 1951 Convention.

13. The core principle of refugee law, as enshrined in the 1951 Convention, is the need for refugees to be protected against *refoulement*. Ceasing or withdrawing refugee status based on other reasons than explicitly mentioned in the 1951 Convention will deny international protection to persons who continue to have a well-founded fear of persecution and hence put them at risks of *refoulement*.

Freedom of Movement

14. Article 28 of the 1951 Convention creates an obligation on the part of the Contracting State, subject to the conditions therein, to issue a travel document to a refugee lawfully staying in its territory. The Schedule to the 1951 Convention is applicable with respect to such travel documents. Paragraph 13 lays down a general rule that the holder of a travel document shall be entitled to return to the territory of the issuing State throughout the period that for which the travel document itself is valid.

15. As the Executive Committee of the United Nations High Commissioner for Refugees emphasized in its Conclusion No. 12 (XXIX) of 1978 Extraterritorial Effect of the Determined Refugee Status, one of the most important aspects of the refugee status defined in the 1951 Convention and the 1967 Protocol, is its international character. The Executive Committee recognized the desirability of maintenance and continuity of the refugee status once it has been determined by a Contracting State. The Executive Committee noted that several provisions of the 1951 Convention enable a refugee residing in one Contracting State to exercise certain rights as refugee in another Contracting State and that the exercise of such rights is not subject to a new determination of his refugee status. The Executive Committee 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.

16. While it shall be up to the discretion of the Contracting State to decide whether to deny re-entry in case a refugee returns after the expiry of the validity of the travel document, such denial can in no way be equated with or lead to the cessation of refugee status. The administrative event of the expiry of a travel document affects in no way the grounds on which a person has been granted refugee status and cannot be considered as an additional ground of an exhaustive list of cessation clauses. Therefore, contrary to the conclusions by the Court of Central District of Minsk City, the 1951 Convention does not provide for grounds for the State to deprive these persons of their refugee status for the sole reason

that their travel documents have expired⁷. Cessation of the applicant's refugee status deprives him of international protection and can entail forced repatriation, which would **violate the principle of *non-refoulement* and contravenes Article 8 of the Constitution of the Republic of Belarus.**

Interpretation of Article 2 and Article 6 of the 1951 Convention

17. The Civil Cases Chamber of Minsk City Court agreed with the reasons of the Court of the Central District of Minsk City. In addition, the Minsk City Court in its ruling of 30 August 2007 established that according to Article 6 of the 1951 Convention Relating to the Status of Refugees a refugee shall fulfill any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfill for the enjoyment of the right in question, if he were not a refugee, with the exception of requirements which by their nature a refugee is incapable of fulfilling. However, Minsk City Court made only partial citation of Article 6 of the Convention, omitting an important part. Article 6 has only interpretative nature, in order to clarify the meaning of term "**in the same circumstances**", that is used in various articles of the Convention⁸. This term is used in the Articles 13 (Movable and immovable property), 15 (Right of association), 17 (Wage-earning employment), 18 (Self-employment), 19 (Liberal professions), 21 (Housing), 22 (Public education) of the Convention. Correspondingly, Article 6 can be used only in relation to the abovementioned Articles and only with regard to the issues that are considered there. Article 6 does not directly impose any duties on refugee and on States parties of the Convention. The purpose of Article 6 is to clarify the fact that in many countries of the world for the enjoyment of the particular rights, a person shall satisfy certain criteria, for example related to age, education, experience, marital status, length of residence, etc. Refugees, to enjoy such rights would also need to conform to the general requirements.

⁷ In the opinion of the Court of the Central District of Minsk City, prohibition to enter the country can be considered as a more severe sanction than the one envisaged by the Law on Refugees. However, undoubtedly, deprivation of the right of entry is a less severe measure than withdrawal of refugee status.

⁸ **TRANSLATION NOTE: Art. 6 is officially translated into Russian with the change of order of words. Below is the text of footnote 7 as appears in Russian text of the Position, and the reverse translation from official text in Russian to English. See also footnote 9.**

Статья 6 - Выражение "при тех же обстоятельствах"

В настоящей Конвенции выражение "при тех же обстоятельствах" означает, что беженец должен удовлетворять любым требованиям (включая требования, касающиеся срока и условий пребывания или проживания в стране), которым данное частное лицо должно было бы удовлетворять для пользования соответствующим правом, если бы оно не было беженцем, за исключением требований, которым, в силу их характера, беженец не в состоянии удовлетворить.

Article 6 The term "in the same circumstances":

In this Convention the term "in the same circumstances" means that a refugee shall fulfil any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the corresponding right, if he were not a refugee, with the exception of requirements which by their nature a refugee is incapable of fulfilling.

However, there are some requirements that refugees are unable to fulfill because of their specific situation. For example, refugees can not produce a certification of nationality, or any other document issued by the State from where the refugee came. The objective of Article 6 therefore is to **ease the stance of a refugee** in situations described above⁹. In our opinion, the Civil Cases Chamber of Minsk City Court arbitrarily interpreted the provisions of Article 6 of the Convention¹⁰.

18. The Court of the Central District of Minsk City stated that the determination of the character of legal sanctions is the exclusive authority of the State party. The Minsk City Court established that in accordance with Article 2 of the Convention, every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order. The 1951 Convention provides for the strict conditions for exclusion from refugee status (Article 1F). This is limited to perpetrators of certain exceptionally grave acts. The rationale for these exclusion clauses is that those guilty of war crimes, crimes against humanity and serious common crimes are not deserving of international refugee protection. The high threshold and necessary restrictive interpretation of the exclusion clauses indicates a clear notion that refugee status cannot be taken away lightly. Hence, the Article 2 can not be interpreted as signifying that a refugee who does not respect national laws and regulations can be sanctioned with the loss of refuge status. It is necessary to note that a State party has the right to determine the character of legal sanctions **only within the framework** of the international obligations of this State.

Conclusions

19. It follows therefore that the provisions of Paragraph 5 of Article 35 of the Law on Refugees of the Republic of Belarus contravene the

⁹ Atle Grahl-Madsen. Commentary on the Refugee Convention 1951. Articles 2-11, 13-37. Geneva, UNHCR, 1997, p.22-23.

¹⁰ It is also possible to note that during translation of Art. 6 from English to Russian, the order of words was changed. This does not change the meaning of the Article but it was probably a cause of misinterpretation. The literal unofficial translation of Art. 6: **TRANSLATION NOTE: here appears the literal translation of authentic Convention text from English to Russian, word by word.**

Буквальный неофициальный перевод ст.6:

“Для целей настоящей Конвенции выражение “при тех же обстоятельствах” подразумевает, что любые требования (включая требования, касающиеся срока и условий пребывания или проживания в стране), которым должно было бы удовлетворять данное частное лицо для пользования соответствующим правом, если бы оно не было беженцем, должны быть удовлетворены беженцем, за исключением требований, которым, в силу их характера, беженец не в состоянии удовлетворить.”

Constitution of the Republic of Belarus, the 1951 Convention and should not be applied.

20. In case the court practice of the application of Paragraph 5 of Article 35 of the Law on Refugees of the Republic of Belarus arises, genuine refugees can be subject to the expulsion to the country of persecution, in violation of the universally recognized principle of the *non-refoulement* of refugees.

UNHCR hopes that this advisory opinion can assist the Supreme Court of the Republic of Belarus in determining which grounds are admissible under the 1951 Convention to cease, cancel or otherwise withdraw refugee status and stands ready to provide any further clarification that may be necessary.

UNHCR
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