

**In the Supreme Court of Norway**

Case number 2015/203

Staten v/Utlendingsnemnda (Regjeringsadvokaten)

v.

A, B, C, D

**Affidavit of JANICE LYN MARSHALL**

I, **JANICE LYN MARSHALL**, of Case Postale 2500, CH-1211 Genève 2 Dépôt, Suisse, MAKE OATH AND SAY as follows:

**Scope**

1. I am a Deputy Director in the Division of International Protection at the Office of the United Nations High Commissioner for Refugees ("**UNHCR**"). In this role, I supervise the Refugee Status Determination Section (RSD Section) within UNHCR headquarters in Geneva that is responsible for the production of country-specific policy guidance, as well as the section that is responsible for the production of the 'Guidelines on International Protection', namely, the Protection Policy and Legal Advice Section (PPLA).
2. Except where otherwise stated, the facts and matters set out in this affidavit are within my own personal knowledge and are true. Insofar as the facts were supplied by others, or are derived from documents, I have indicated their source, and they are true to the best of my knowledge and belief.
3. UNHCR takes this opportunity to recall the provisions of Article II, Section 2, as well as Article V, Section 18(a) of the Convention on the Privileges and Immunities of the United Nations, dated 13 February 1946, which is directly applicable to UNHCR, being an integral part of the United Nations. These provisions provide that the organisation shall enjoy immunity from every form of legal process and its "officials... shall be immune from legal process in respect of words spoken or written all acts performed by them in their official capacity". Pursuant to these provisions, any statement made by UNHCR or any of its officials shall not be interpreted as any expressed or implied waiver of UNHCR's or its officials' privileges and immunities.<sup>1</sup>
4. The purpose of this affidavit is to assist the Supreme Court in understanding the processes involved in UNHCR's production of policy guidance, including the Guidelines on International Protection as well as our country-specific policy guidance (in the form

---

<sup>1</sup> UN General Assembly, *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, <http://www.refworld.org/docid/3ae6b3902.html>.

of eligibility guidelines or protection considerations). This affidavit supports and is provided as supplementary to UNHCR's written contributions dated 3 August 2015 made as an *amicus curiae* in this case. UNHCR has a direct interest in ensuring a proper and consistent interpretation of the 1951 Convention as part of its supervisory responsibility and thus provides information on a regular basis to decision-makers and courts of law.

5. The strong value and authority of UNHCR Guidelines and submissions derives from three considerations: UNHCR's mandate responsibility to supervise the application of international instruments for the protection of refugees; the Office's widespread presence and network in the field; and its decades of experience in refugee protection, in particular in adjudicating refugee status under its mandate in a variety of circumstances. No other entity is as well placed to offer guidance on issues affecting, amongst others, refugees and asylum-seekers.

### **UNHCR Mandate and its Guidelines on International Protection**

6. UNHCR has been entrusted by the United Nations General Assembly with a mandate to provide international protection to refugees and, together with Governments, seek permanent solutions to the problem of refugees.<sup>2</sup> According to its Statute, UNHCR fulfils its mandate *inter alia* by "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto[.]"<sup>3</sup> This supervisory responsibility is reiterated in Article 35 of the 1951 Convention and Article II of the 1967 Protocol relating to the Status of Refugees (hereafter collectively referred to as "1951 Convention").<sup>4</sup>
7. UNHCR's supervisory responsibility is exercised in part by the issuance of interpretative guidelines and other positions on the meaning of provisions and terms contained in international instruments for the protection of refugees, in particular the 1951 Convention and its 1967 Protocol. Such guidelines include the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and complementary Guidelines on International Protection.<sup>5</sup>
8. The UNHCR Handbook was drafted at the request of the Member States of the Executive Committee of the High Commissioner's Programme, the Office's advisory

---

<sup>2</sup> UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950 A/RES/428(V) (hereafter "UNHCR Statute"), <http://www.refworld.org/docid/3ae6b3628.html>.

<sup>3</sup> UNHCR Statute, para. 8(a).

<sup>4</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series, No. 2545, vol. 189, <http://www.refworld.org/docid/3be01b964.html>. According to Article 35 (1) of the 1951 Convention, UNHCR has the "duty of supervising the application of the provisions of the Convention".

<sup>5</sup> UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, <http://www.unhcr.org/refworld/docid/4f33c8d92.html> (hereafter "UNHCR Handbook").

body comprising 87 States including Norway.<sup>6</sup> In addition to the Handbook, and in response to the varying legal interpretations of Article 1 of the 1951 Convention in national jurisdictions, UNHCR has continued to issue legal positions on specific questions of international refugee law. In this connection, UNHCR has published “Guidelines on International Protection” which arose from the Global Consultations on International Protection, organized by UNHCR in 2000–2 as part of the 50<sup>th</sup> anniversary of the 1951 Convention to address key questions relating to the interpretation and application of the 1951 Convention, where it was considered that greater clarity and global coherence of interpretation was needed. Pursuant to UNHCR’s Agenda for Protection, the blueprint for global action for refugee protection for the following decade, and endorsed by the United Nations General Assembly, UNHCR was requested to produce complementary guidelines to the Handbook.<sup>7</sup>

9. The Guidelines complement and update the Handbook and should be read in combination with it. The Guidelines are intended to provide legal interpretative guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff. They rely on general rules of treaty interpretation, guided by the Vienna Convention on the Law of Treaties, and are based on the accumulated views of UNHCR, State practice, Executive Committee Conclusions, judicial decisions at national and international levels and the views of leading jurists.<sup>8</sup>
10. The authority of UNHCR’s Handbook and Guidelines on International Protection have been widely recognized and cited in many national and regional courts. In the preparatory work to the Norwegian Immigration Act it was explicitly acknowledged that the Handbook and its status as a legal source is based on Article 35 of the 1951 Convention, which is in turn incorporated in the Immigration Act § 98.<sup>9</sup>
11. Of particular relevance to the case before the Court are UNHCR’s Guidelines on International Protection No. 4 on Internal Flight or Relocation Alternative (IFA)<sup>10</sup> and UNHCR’s Guidelines on International Protection No. 8 on Child Asylum Claims.<sup>11</sup>

---

<sup>6</sup> See Executive Committee Conclusion No. 8 (XXVII), 1977, Determination of Refugee Status, paragraph (g).

<sup>7</sup> UNHCR, Agenda for Protection, A/AC.96/965/Add.1, 26 June 2002, Goal 1(6), available at: <http://www.unhcr.org/cgi-bin/texis/vtx/home/opedocPDFViewer.html?docid=3d3e61b84&query=agenda%20for%20protection>; UNHCR Executive Committee, General Conclusion on International Protection, No. 92 (LIII) – 2002, 8 October 2002, available at: <http://www.unhcr.org/refworld/docid/3dafdce27.html>; UN General Assembly, Office of the United Nations High Commissioner for Refugees: Resolution adopted by the General Assembly, 6 February 2003, A/RES/57/187, para. 6, available at: <http://www.unhcr.org/refworld/docid/3f43553e4.html>.

<sup>8</sup> Volker Turk, ‘Summary of Introductory Remarks’, *International Journal of Refugee Law*, vol. 25, no 2, 2013, pp 394–398, Oxford University Press, paragraph 8

<sup>9</sup> Ot.prp. nr. 75 (2007-2008) p. 73, <https://www.regjeringen.no/no/dokumenter/otprp-nr-75-2006-2007-/id474152/>.

<sup>10</sup> UNHCR, *Guidelines on International Protection: the “Internal Flight or Relocation Alternative” within the context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, HCR/GIP/03/04, 23 July 2003, (hereafter “UNHCR Guidelines No. 4 on IFA”), <http://www.refworld.org/docid/3f2791a44.html>. The Guidelines resulted, *inter alia*, from a meeting of international legal experts which examined the subject in San Remo, Italy, in September 2001. For further information regarding their status see V. Türk, ‘Introductory Note to UNHCR Guidelines on International Protection’, *International Journal of Refugee Law*, vol. 15, no. 2, 2003, pp. 303–06. 1. The UNHCR

12. As stated above, the Protection Policy and Legal Advice Section (PPLA) produces the Guidelines on International Protection. They are informed by extensive research, including surveys and academic papers of, for example, State practice and national judicial opinions, and analysis, guided by the general rules of treaty interpretation and the Vienna Convention on the Law of Treaties. Some of these papers are published in UNHCR's Legal and Protection Policy Research Series.<sup>12</sup> Consultations throughout the drafting process are undertaken with many stakeholders including expert roundtables with the participation of diverse groups drawn from states, non-governmental organizations (NGOs), international organizations (IOs), academia, jurists, legal practitioners, and from all regions. Public consultation is now also available during the consultation and review phase via the UNHCR website.<sup>13</sup> The guidelines proceed through a rigorous internal review and vetting process at the senior management level of UNHCR and if necessary further revisions are made before publication.
  
13. By way of example, UNHCR Guidelines No. 4 on IFA were produced after the San Remo Expert Roundtable which was organised by UNHCR and the International Institute of Humanitarian Law in September 2001. The discussion was informed by a background paper prepared by James C. Hathaway and Michelle Foster, University of Michigan, entitled "Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination". Roundtable participants were provided with written contributions on the background paper including from Hon. Justice Baragwanath, High Court of New Zealand; Hugh Massey, United Kingdom; Marc Vincent, Norwegian Refugee Council; Reinhard Marx, Practitioner, Germany; and the Medical Foundation for the Care of Victims of Torture. Participants included 33 experts from 23 countries.<sup>14</sup> Summary conclusions of the general views expressed at the roundtable, reviewed by participants, also informed the drafting and review processes of the guidelines.<sup>15</sup>

## Country Specific Policy Guidance

---

Guidelines on International Protection are issued in the context of the Agenda for Protection, which was endorsed by the Executive Committee in October 2002 at the end of UNHCR's 2000–2002 Global Consultations on International Protection. As noted on the cover page of the Guidelines, they "are intended to provide interpretative legal guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determination in the field".

<sup>11</sup> UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08, <http://www.refworld.org/docid/4b2f4f6d2.html> (hereafter "UNHCR Guidelines NO. 8 on Child Asylum Claims").

<sup>12</sup> <http://www.unhcr.org/pages/4a16b17a6.html>

<sup>13</sup> Available at: <http://www.unhcr.org/544f59896.html>.

<sup>14</sup> *Summary Conclusions: Internal Protection/Relocation/Flight Alternative*, June 2003, <http://www.refworld.org/docid/470a33b84.html>.

<sup>15</sup> *Ibid.*

14. Also relevant to the case at bar are UNHCR's Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan.<sup>16</sup> One of UNHCR's primary tasks is to administer, participate in or monitor States' refugee status determination (RSD) processes worldwide. Performance of this important function has both (i) required UNHCR to develop and maintain the highest quality of Country of Origin (COI) collection and analysis, and (ii) incrementally added to UNHCR's institutional memory and breadth of experience. In other States, UNHCR is entrusted to adjudicate definitively individuals' claims for refugee status. In 2014 UNHCR conducted over 94,000 first instance RSD decisions in more than 60 States and territories.
15. UNHCR produces and makes available to States its country-specific policy guidance as a means of furthering its mandate responsibility of assisting States in their interpretation and application of international refugee law. Informed by UNHCR's wide field presence and significant RSD experience, UNHCR seeks to assist domestic decision-makers by providing guidance on eligibility for international protection for applicants originating from particular countries of origin, based on its collection and analysis of relevant, accurate and up-to-date COI. UNHCR notes that its country-specific policy guidance is also used by organs of the United Nations, intergovernmental organizations (IGOs), NGOs and other institutions of global, regional, national and local government, including judicial and quasi-judicial bodies.

### **Contributions from Regional Bureaux and Field Offices: Local Knowledge**

16. UNHCR works in 125 countries, with staff based in a mixture of 109 regional and branch offices, and 341 sub and field offices. UNHCR staff working in these offices possess longstanding experience and knowledge of the country and operations in which they work, and acquire considerable knowledge of the circumstances pertaining to the asylum-seekers and refugees with whom they work.
17. Information is gathered from a variety of Field Offices, in particular those in countries which host asylum-seekers and refugees from the country about which the country-specific policy guidance is prepared. Field Offices are overseen by Regional Hubs or Representations, as well as by Regional Bureaux and the various Divisions in UNHCR's Headquarters in Geneva.

### **Production of Country-Specific Policy Guidance**

18. Recognition of the need for new country-specific policy guidance can be prompted by a variety of 'triggers', which include but are not limited to Regional Bureaux or Field Offices communicating the need for new guidance in respect of a particular country,

---

<sup>16</sup> UNHCR, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, 6 August 2013, HCR/EG/AFG/13/01, p. 76, <http://www.refworld.org/docid/51ffdc34.html>.

often owing to a lack of or conflicting available COI. In other cases, States may themselves identify evidential or legal issues, the resolution of which would be assisted by the provision of new UNHCR country-specific policy guidance.

19. There is no set formula for the production of country-specific policy guidance and different countries and circumstances may call for slightly different approaches.
20. The process of drafting and approving country-specific policy guidance is a lengthy and laborious one, involving all layers within the organization including a senior level review conducted by the Deputy Directors and, finally, the Director of the Division of International Protection and the relevant Regional Bureau. The process includes a rigorous assessment of country conditions against the criteria for eligibility for international protection. It includes an assessment of risk levels that is consistent with UNHCR's approach in other countries.

### **The Assessment Methodology**

21. Underlying each of the stages of the production of the country-specific policy guidance production process, outlined above, is UNHCR's assessment methodology. The methodology is comprised of three major considerations: (i) criteria to be applied to the process of collecting information; (ii) the determination of information's reliability; and, (iii) the assessment of policy and risk thresholds. I will briefly describe each of these in turn.

#### *Process of Collecting Useful Data*

22. Information is collected from a variety of different sources, including external sources which make information available in the public domain, as well as from UNHCR Field Offices and Regional Bureaux. Information is also obtained from persons whose applications for international protection are determined by UNHCR.
23. All information gathered remains clearly associated with the source from which it comes, so that the subsequent determination of reliability and assessment of policy and risk thresholds can be undertaken in a fully informed manner. The information collection stage involves an assessment of the relevance of the information. To be considered for inclusion in UNHCR's country-specific policy guidance, the information must be relevant with respect to subject matter and time.
24. It is essential that information is collected from a balance of sources. To ensure this, UNHCR requires the 'triangulation' of sources for any one piece of information. This involves guaranteeing that information from one type of source is corroborated by information from different kinds of sources, with the hope of at least partially negating the effects of bias or inaccuracy. For example, representations from States

on their own State practices must be assessed in the light of independent reports of such practices' effects in the State in question. Through this process, UNHCR seeks to obtain information from, for example, each of the following categories of source independent from UNHCR: (i) UN/IGOs; (ii) NGOs; (iii) Governments; and (iv) news or media organizations. Quite apart from other filters, such as the determination of reliability, information that is not triangulated will not be included as the basis of a factual statement in the country-specific policy guidance.

25. This means that all factual statements made in country-specific policy guidance (whether a footnote reference appears or not) are assessed to be reliable and are corroborated. It also means that the association of a factual statement in country-specific policy guidance with a public source by a footnote reference does not mean that this reference is the only basis for that statement; in many cases it will represent a form of corroboration for the statement.

#### *Determination of Reliability*

26. Both the source and reporting of the information are subjected to intense scrutiny to ensure that UNHCR can be confident in the reliability and veracity of the information. By way of example, the following determinants of source reliability are examined:
  - a. **Subject Matter Competence:** The institutional or personal experience of the source in dealing with the subject matter at hand. For example, an NGO source may have a presumed competence for monitoring matters falling within its mandate, but not for reporting on unrelated matters.
  - b. **Objectivity:** The extent of freedom from bias or agenda of the source and its reports, as determined by a study of the source itself and, to a lesser extent, informed by the tone of the report being assessed.
  - c. **Reputation:** The extent to which the source has been assessed to be reliable or unreliable in the past.
  - d. **Observational Capacity and Proximity:** This requires an assessment of the source's ability to accurately report the information being assessed, based on its operational resources (for example, staffing levels, conflicting workload, access to direct sources of information) and its geographical proximity to the events or other information being reported.
  - e. **Source Methodology:** The care and method relied upon by a source to gather and record data, conduct research, complete analysis and publish reports will impact significantly on the reliability of the subject information.

#### *Assessment of Policy and Risk Thresholds*

- e. **Source Methodology:** The care and method relied upon by a source to gather and record data, conduct research, complete analysis and publish reports will impact significantly on the reliability of the subject information.


*Assessment of Policy and Risk Thresholds*

27. Information collected, determined to be reliable and being considered for inclusion in country-specific policy guidance is subjected to repeated analysis in light of UNHCR's policy and risk thresholds. In assessing risk levels, UNHCR is guided by its institutional memory of producing country-specific policy guidance and adjudicating on refugee status claims in many countries. By ensuring that a common approach is followed and that the standard of proof and risk levels are uniformly applied, UNHCR seeks to ensure that eligibility guidelines and other country-specific policy guidance report findings in a manner consistent and compatible with international legal instruments and useful to States' administrative and judicial decision-makers.

**Conclusions**

28. For the reasons set out in this statement, I commend the Guidelines on International Protection as well as UNHCR's country-specific policy guidance to the Court, and hope that the Court considers the document useful in its deliberations in the present case. I hope that this background evidence may be informative to the Court also in other cases.

Sworn to be true in Geneva, Switzerland on this 26<sup>th</sup> day of October, 2015



Janice Lyn Marshall

Deputy Director,  
Division of International Protection, UNHCR

