English translation of the French version as delivered

UNHCR's oral intervention at the European Court of Human Rights
Hearing of the case of *I.M. v. France*
Strasbourg, 17 May 2011

Mr. President, Distinguished Judges,

Introduction

The Office of the United Nations High Commissioner for Refugees (UNHCR) thanks the Court for authorising UNHCR to intervene as a third party in the present case, including in today's hearing. It is an honour for me, as a legal adviser within the Bureau for Europe, to represent UNHCR on this occasion.

The Statute of the Office was adopted 60 years ago by the United Nations General Assembly and it confers responsibility on UNHCR to supervise the application of international conventions for the protection of refugees. This supervisory responsibility extends to the 1951 Convention relating to the Status of refugees and its 1967 Protocol.

The present case is of particular interest to UNHCR. It concerns a type of accelerated asylum procedure, which affects the extent to which the respondent state complies with its obligations under the 1951 Convention, in particular the *non-refoulement* obligation. While this instrument does not specifically regulate the asylum procedure, the enjoyment of the rights it provides for requires that the States Parties establish fair and efficient asylum procedures, which allow them to identify the persons in need of international protection.

Indeed, UNHCR recognizes that accelerated asylum procedures may facilitate the examination of clearly abusive or manifestly unfounded claims.[1] This Court ruled that the mere fact of resorting to such procedures is not in itself contrary to the requirements of Article 13 of the European Convention of Human Rights (ECHR).[2]

However, UNHCR notes that many European States have established accelerated

[1] See Conclusion n° 30 of the Executive Committee of the UNHCR.
[2] ECtHR, *Sultani v. France*, 20 September 2007, para. 65.

asylum procedures based on an excessively wide interpretation of the concepts of clearly abusive or manifestly unfounded claims. In this regard, we underlined in our initial written observations that the mere fact of lodging an asylum application in administrative detention, including after the notification of an expulsion order, should not be sufficient *per se* to establish its unfounded or abusive character.

Moreover, UNHCR notes that the timeframes and guarantees in these procedures vary greatly across Europe. Furthermore, they are often insufficient to allow the applicant effectively to demonstrate his or her international protection need and to benefit from a close and rigorous scrutiny of his or her claim within a fair and efficient procedure. UNHCR documented some of these disparities and deficiencies in a study published in March 2010[3] mentioned in our updated written observations.

The two procedures at stake in the present case reflect, in several respects, these gaps. Indeed, notwithstanding a number of safeguards, the accelerated asylum procedure and the expulsion procedure do not always allow for a close and rigorous scrutiny of the protection need of persons claiming asylum in administrative detention, before they are deported. In other words, the available procedures do not guarantee that the principle of *non-refoulement* is effectively respected, notably, where there is a risk of violation of Article 3 ECHR.

Allow me, first, to outline the main concerns of UNHCR pertaining to the accelerated asylum procedure in administrative detention. I will then point out the insufficiencies of the remedy before the administrative judge within the expulsion procedure.

Mr President, Distinguished Judges, as to the accelerated asylum procedure in administrative detention in France:

Firstly, the conditions under which the applicant must lodge his or her claim with the Office français de protection des réfugiés et apatrides (OFPRA) impose particularly strict obligations on the applicant: the claim must be submitted in French within five

[3] UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Detailed Research on Key Asylum Procedures Directive Provisions*, March 2010, available at: http://www.unhcr.org/refworld/docid/4c63e52d2.html

days. However, the applicant does not have access to a translator paid by the authorities at this crucial stage of the preparation of the claim. In UNHCR's view, such conditions can undermine the ability of the applicant, in administrative detention, to argue the well-foundedness of his or her case. This is all the more so, given the specific vulnerability of the asylum-seeker that this Court recognized due to "everything he had been through during his migration and the traumatic experiences he was likely to have endured previously".[4]

Secondly, the time frame of 96 hours within which the OFPRA must examine the claim does not necessarily allow it to undertake close and rigorous scrutiny. This timeframe is fixed by the Code d'Entrée et de Séjour des Etrangers et du Droit d'Asile, which does not provide for any derogation. However, the OFPRA indicates in its 2010 report that the average time frame to deal with asylum claims lodged in administrative detention is 4 days, therefore suggesting that, in practice, it does derogate from the maximum 96-hour time frame. If this is the case, UNHCR questions on which legal basis such derogation is based and recalls that, according to this Court, the remedy required under Article 13 must be effective" in practice as well as in law.[5] Furthermore, according to UNHCR, it demonstrates that the 96 hour time frame is not viable. This is particularly the case with regard to complex asylum applications. In this regard, UNHCR underlines, once more, that the claims lodged in administrative detention are not necessarily abusive or manifestly unfounded. The OFPRA itself recognizes in its 2010 report that the increased number of first claims being dealt with under the accelerated asylum procedure weighs heavily on its adjudicating work.[6]

Thirdly, the remedy before the Cour nationale du droit d'asile (CNDA) cannot compensate for the deficiencies of the procedure before the OFPRA since it lacks suspensive effect. The applicant may therefore be deported before the CNDA delivers its judgment. In 2010, taking all the asylum procedures together, this specialised court annulled more than one negative decision of the OFPRA in five. In UNHCR's view, the premature deportation of the asylum seeker may therefore, in some cases, be at

[4] ECtHR, *M.S.S. v. Belgium and Greece*, 21 January 2011, para. 232.
[5] ECtHR, *Gebremedhin v. France*, 26 April 2007, para. 53.
[6] OFPRA, *Rapport Annuel 2010*, p. 15.

odds with the *non-refoulement* principle. Let us recall that, in the present case, the applicant could stay on the territory until the decision of the CNDA only due to the granting of interim measures by your Court.

Mr President, Distinguished Judges, I would like to underline now some of UNHCR's concerns regarding the possibility for the asylum seeker, in administrative detention, to challenge the expulsion order before the administrative judge.

Such remedy may, in some respects, appear to be effective in theory. However, UNHCR submits that it does not allow, in practice, for a close and rigorous scrutiny of the protection need of the persons concerned. As a matter of fact, this is confirmed in the present case: indeed, the CNDA granted refugee status to the applicant whereas the administrative judge had rejected his claim in the first place. The fact that the administrative tribunal only examines the claim under Article 3 ECHR is not sufficient to explain such a different assessment.

Firstly, the timeframe within which the applicant must exercise the remedy before the administrative tribunal is even shorter than in the accelerated asylum procedure in administrative detention - only 48 hours instead of five days for submitting a claim to the OFPRA. Moreover, while in theory the applicant is entitled to an interpreter, this right is difficult to exercise in practice. Indeed, the applicant must submit an express request to the president of the administrative tribunal. However, the applicant is not always informed about this possibility. Furthermore, the constraints highlighted previously are equally problematic at this stage. The applicant must, in particular, request an interpreter within a very short time frame. Finally, should he or she be assisted by an interpreter, the interpreter latter only intervenes during the hearing before the administrative tribunal. As for the submission to the OFPRA, the applicant is therefore not assisted by a translator during the written phase of the preparation of his or her remedy. However, during this phase, the applicant must articulate a story which is often traumatising in a language that he or she does not necessarily understand and within an excessively short period of time. In addition, the applicant faces material and procedural difficulties in terms of adducing evidence. This Court

recognized the specific situation of the asylum-seeker in this regard.[7] These difficulties are exacerbated by the fact the applicant is held in administrative detention; and UNHCR considers that the combination of these factors necessarily affects the capacity of the asylum-seeker to communicate his or her protection needs before the administrative judge.

Secondly, the administrative judge is not in a position to examine the claim as rigorously as possible within 72 hours, all the less when it is a first application which is often badly or not substantiated due to the constraints mentioned previously. This Court itself has expressed the difficulties it faces when dealing urgently with an interim measure request, where the Court considers that it does not examine the case in-depth.[8] The assessment, on the merits, that the administrative judge must conduct within 72 hours is therefore all the more difficult.

Thirdly and lastly, UNHCR notes that the remedy before the administrative tribunal does not have automatic suspensive effect everywhere on the French territory. Indeed, the derogatory rules applicable in Guyana and St Martin provide that the expulsion order can be implemented immediately.[9] UNHCR further submits that the suspensive effect of the administrative remedy provided by the general rules is not sufficient. In this regard, UNHCR shares the assessment of the Court in the *M.S.S.* ruling that "the requirement flowing from Article 13 that execution of the impugned measure be stayed cannot be considered cannot be considered as a subsidiary measure, that is, without regard being had to the requirements concerning the scope of the scrutiny".[10]

In terms of the scope of the scrutiny, the CNDA seems more suitable for examining the claim as rigorously as possible. As a matter of fact, the CNDA is a specialised court which rules collegially and conducts a full review of all the factual and legal aspects as they have been established on the date when the CNDA delivers its decision.

[7] ECtHR, *Said v. the Netherlands,* 5 July 2005, para. 49.
[8] ECtHR, *M.S.S. v. Belgium and Greece*, 21 January 2011, para. 355.
[9] See Article L 514-2 of the CESEDA and, on that point, the report of the Cour des Comptes of February 2011, p. 3.
[10] ECtHR, *M.S.S. v. Belgium and Greece*, 21 January 2011, para. 388.

Conclusion

Mr President, Distinguished Judges, in the light of the above and of its written observations submitted in the present case, UNHCR reaffirms that the accelerated asylum procedure in administrative detention does not meet all the requirements of a fair and efficient procedure and does not allow in particular for a close and rigorous scrutiny of the international protection need of the persons concerned. Moreover, the remedy before the administrative tribunal within the expulsion procedure does not guarantee such scrutiny.

In the present case, this Court filled a major gap in the national system, namely the absence of suspensive effect of the remedy before the CNDA, in granting interim measures in order to allow the applicant to remain on the territory until the end of the asylum procedure. However, UNHCR shares the views of this Court, which has recently underlined in a statement that it is primarily States' responsibility to provide at the national level for "remedies with suspensive effect which operate effectively and fairly, in accordance with the Court's case-law, and provide a proper and timely examination of the issue of risk".[11] More recently, the Declaration of the Izmir Conference reflects in substance this recommendation with reference to the subsidiarity principle.[12]

UNHCR hopes that this recommendation will be implemented in law and in practice in order to remedy, across Europe, the difficulties faced by many asylum-seekers whose claims, although they are often founded, are processed through unfair accelerated procedures.

Mr President, Distinguished Judges, I thank you for your attention.

[11] *Statement issued by the President of the European Court of Human Rights concerning Requests for Interim Measures*, p. 2,
http://www.echr.coe.int/NR/rdonlyres/B76DC4F5-5A09-472B-802C-07B4150BF36D/0/20110211_ART_39_Statement_EN.pdf

[12] *Declaration of the High Level Conference on the Future of the European Court of Human Rights organised within the framework of the Turkish Chairmanship of the Committee of Ministers of the Council of Europe*, 27 April 2011, p. 3,
http://www.coe.int/t/dghl/standardsetting/conferenceizmir/Declaration%20Izmir%20E.pdf