Application no. 13229/03

IN THE GRAND CHAMBER OF THE EUROPEAN COURT OF HUMAN RIGHTS

SAADI v. UNITED KINGDOM

WRITTEN SUBMISSIONS ON BEHALF OF
THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

***Prepared by*:**

Raza Husain, Barrister
Matrix Chambers
London
acting pro bono

Instructed by
Baker & McKenzie LLP, Solicitors
London
acting pro bono

30 March 2007

I. INTRODUCTION

1. The Office of the United Nations High Commissioner for Refugees ("UNHCR") is grateful for the opportunity to make written submissions, limited to ten pages, as a third-party intervener.

2. UNHCR has been entrusted by the General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek permanent solutions to the problem of refugees[1]. The supervisory responsibility of UNHCR is formally recognised in Art. 35 of the 1951 Convention relating to the Status of Refugees and Art. II of its 1967 Protocol ("CSR"). International refugee law is part of the corpus of international human rights law, of which the European Convention on Human Rights ("ECHR") is an important regional component.

3. The views of UNHCR are informed by over 50 years of experience supervising international refugee instruments. UNHCR is represented in 116 countries. It provides *inter alia* guidance in connection with the establishment and implementation of national procedures for refugee status determinations.

4. UNHCR is concerned that the majority judgment of the Chamber, which (1) assimilates the position of asylum seekers to ordinary immigrants,[2] (2) considers that an asylum seeker effectively has no lawful or authorised status prior to the successful determination of the claim[3], and (3) rejects the application of a necessity test to the question of whether detention is arbitrary[4], permits States to detain asylum seekers on grounds of expediency in wide circumstances that are incompatible with general principles of international refugee and human rights law. It is, with respect, striking that the majority judgment of the Chamber makes no reference to such international legal principles.

5. Pursuant to the invitation by the President of the Grand Chamber, UNHCR's submissions address issues concerning the (1) admission, (2) legal status and (3) detention of asylum seekers in the host territory during the asylum procedure, with particular focus upon whether, and in what circumstances, such detention is compatible with international refugee and human rights law. In addressing these issues, and cognisant of the scope of its submissions as an intervener, UNHCR is mindful of the questions of principle upon which the parties have been requested to make submissions concerning the interpretation of Art. 5(1)(f) ECHR.

II. INTERPRETATIVE PRINCIPLES

6. Before developing its substantive submissions, UNHCR turns briefly to consider accepted principles which require that the ECHR (and indeed the CSR) is interpreted:

(1) "in harmony with other rules of international law of which it forms part"[5], particularly where such other rules are found in human rights treaties (such as the CSR and the International Covenant on Civil and Political Rights, "ICCPR") which States Parties to the ECHR have ratified and are therefore willing to accept[6];

(2) in a manner which ensures that rights are given a broad construction while limitations are narrowly construed[7];

(3) as a "living instrument … in light of present day conditions" and in accordance with developments in international law so as to reflect the "increasing high standard being required in the area of the protection of human rights"[8];

---

[1] Although not specifically mentioned in the *Statute of the Office of the United Nations High Commissioner for Refugees*, G.A. Res. 428(V), Annex, U.N. Doc. A/1775, para. 1 (1950), UNHCR's mandate for refugees also implies a competence for asylum-seekers. This understanding is accepted by States, and flows from the declaratory (rather than constitutive) nature of the grant of refugee status. See EXCOM Conclusion No. 22 (endorsed by the G.A. in Res .36/125).
[2] Chamber judgment, para 40, 44
[3] ibid., para 40
[4] ibid., para 44
[5] *Al-Adsani v United Kingdom* (2002) 34 EHRR 11 at para. 55; Vienna Convention on the Law of Treaties (May 23, 1969) Art. 31(3)(c); Art 53 ECHR. The fact that a specialised treaty spells out a specific obligation does not mean that an essentially similar obligation may not be contained in the analogous provision of the ECHR: *Soering v. United Kingdom* (1989) 11 EHRR 439 para 88.
[6] With the exception of Andorra and San Marino
[7] *Winterwerp v. Netherlands* (1979-80) 2 EHRR 387, para 37; *Kurt v. Turkey* (1998) 27 EHRR 373, para 122.
[8] *Selmouni v France* (2000) 29 EHRR 403 at para 101

(4) in a manner that gives practical and effective protection to human rights[9].

III. THE FUNDAMENTAL RIGHT TO SEEK ASYLUM, NON-REFOULEMENT AND ADMISSION TO PROCEDURES

7. The fundamental right, proclaimed by Art.14(1) Universal Declaration of Human Rights ("UDHR") of "everyone" "to seek and to enjoy in other countries asylum from persecution" corresponds with the obligation of States under the CSR not to *refoule* an asylum seeker and to admit to determination procedures. UNHCR observes that the UDHR is an expression of fundamental principles[10], albeit with increasing relevance to the content of general international law[11]. For the codification of those principles into concrete rights, reference may be made to its direct descendants, such as the CSR, ECHR, and ICCPR. Thus, as the EU Charter of Fundamental Rights and Freedoms 2000 proclaims by Art. 18, "the right to asylum shall be guaranteed with due respect for the rules of the (CSR)."

8. The fundamental principle of refugee protection is *non-refoulement*. A State is prohibited from returning, "in any manner whatsoever", asylum seekers who are subject to its jurisdiction[12] or who have reached its territory[13], to a place where life or freedom is threatened. While the principle of *non-refoulement* does not as such entail a right of individual to be granted asylum in a particular State[14], as a general rule[15], a State is required to admit the asylum seeker to fair and efficient asylum procedures[16] for the determination of the asylum claim. This is because an asylum seeker may be a refugee and therefore entitled to a plethora of rights provided for in the CSR quite apart from the prohibition on *refoulement*. Such rights constitute the minimum protection that is the essence of refugee status. In order for those rights to be implemented, in the context of the objects and purposes of the CSR, which include the preambular concern to "assure refugees the widest possible exercise of ... fundamental rights and freedoms", States, which have acceded to the CSR and are therefore bound to apply its provisions in good faith, have an obligation to admit asylum seekers to fair and efficient procedures.

9. This approach is supported by EU provisions which allocate responsibility for the determination of asylum claims across member States according to specified criteria[17]. The foundational premise of these provisions is that there exists a basic responsibility to determine a claim to refugee status by a member State: the question is always which state is fixed with that responsibility? Thus Council Regulation (EC) No. 343/2003 of 18.2.03, provides, by Art. 3, that "Member States shall examine the application of any third-country national who applies at the border or in their territory to any one of them for asylum."

---

[9] *Soering v. United Kingdom* (1989) 11 EHRR 439 at para 87

[10] See eg. *US Diplomatic and Consular Staff in Tehran* ICJ Reports, 1980, p.42, para 91. It is an instrument of "enormous" moral force: *R (ERRC) v. Prague Immigration Officer* [2005] 2 AC 1, p.46 G, para 46

[11] Although not intended at the time to contain legally binding obligations, provisions of the UDHR are now often cited as forming part of general international law: see Lillich, *Civil Rights*, in Meron (ed.) *Human Rights in International Law* (1984), pp.117-118

[12] See, by analogy, under the ICCPR, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004) ICJ Gen. List No. 131, 9 July 2004, para 109; HRC General Comment No. 31; contrast the aberrant decision in *Sale, Acting Comr, INS v. Haitian Centers Council Inc.* (1993) 509 US 155, criticised by the Inter-American Commission of Human Rights, Report No. 51/96, 13 March 1997, paras 156-158, 163, 171.

[13] *R (ERRC) v. Prague Immigration Officer* [2005] 2 AC 1, p.38C, para 26

[14] P. Weis, The Refugee Convention, 1951: The Travaux Préparatoires Analyzed with a Commentary by Dr. Paul Weis, Cambridge University Press, Cambridge (1995), at p. 342

[15] that is, where a safe third country cannot be identified, or in situation of mass influx: see ExCom Conclusion No. 22 (XXXII) (1981), *Protection of Asylum Seekers in Situations of Large-Scale Influx*; Council Directive 2001/55/EC, 20.7.01, OJ L 2001 212, p.12

[16] The CSR does not set out procedures for the determination of refugee status as such. Yet it is generally recognised that fair and efficient procedures are an essential element in the full and inclusive application of the CSR outside the context of mass influx situations. See EU Council Directive 2005/85/EC of 1 December 2005, Art. 8; UNHCR, Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12, 31 May 2001, paras. 4–5, ExCom Conclusion No. 81 (XLVIII) (1997) "*General"*, para. (h); ExCom Conclusion No. 82 (XLVIII) (1997), "*Safeguarding Asylum*", para. (d)(iii); ExCom Conclusion No. 85 (XLIX) (1998), "*International Protection*", para. (q); ExCom Conclusion No. 99 (LV) (2004), "*General Conclusion on International Protection*" , para. (l).

[17] See Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (the Dublin Convention) OJ C 254, 19.8.97, p.1; see now Council Regulation (EC) No. 343/2003 of 18.2.03 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national OJ L 50, 25.2.03, p.1

10. In a similar vein, the EU 'Qualification Directive'[18] provides by Art. 13 that Member States "*shall grant* refugee status" to qualifying third country nationals.

Conclusion on the duty to admit asylum seeker to procedures

In sum, UNHCR submits that there is an obligation on States not to *refoule* persons who have accessed the jurisdiction or territorial frontier, and who claim the fundamental right to seek and enjoy asylum. There is a further duty, except in relation to mass influx situations, to admit such persons to fair and efficient determination procedures, so that the minimum protection, provided by Arts. 3-31 CSR, which is the essence of refugee status, may be accessed.

IV. THE LEGAL STATUS OF ASYLUM SEEKERS IN THE HOST COUNTRY

11. Where a State admits an asylum seeker to procedures, and the asylum seeker complies with national law, the asylum seeker's temporary entry into and presence on the territory cannot be considered as "unauthorised", still less is the asylum seeker, without more, seeking an unauthorised entry into the host State. This obtains even where the asylum seeker has used unlawful means to arrive at or enter the territory of the host State, but has not otherwise committed any breach of national immigration law.

Lawful presence under the CSR

12. The CSR envisages an incremental accrual of rights based on the deepening relationship of the refugee with the host State. The most basic rights (eg. Art. 33 on *non-refoulement*) are engaged even without territorial presence; an exercise of jurisdiction by the State over the asylum seeker suffices. On the host territory, the CSR envisages four types of legal status: presence; lawful presence; lawful stay and durable residence. Lawful presence is the intermediate stage between physical presence on the territory, and lawful stay there. An asylum seeker who is admitted at the frontier to national procedures by the State is (*ceteris paribus)* lawfully present in the territory, having been granted a (temporary) authorised entry. The contrary view, which sees lawful presence as predicated on a formal grant of refugee status or of a residence permit, wrongly conflates "lawful presence" with a right to future residence or "lawful stay".

13. Lawful presence was broadly conceived by the drafters[19] of the CSR to include refugees in the following situations:

a. Refugees whose admission is officially sanctioned for a fixed period of time, if only for a few hours[20];

b. More significantly for present purposes, presence is lawful in the case of "a person … not yet in possession of a residence permit but *who had applied for it and had the receipt for that application*. *Only those persons who had not applied, or whose applications had been refused, were in an irregular position.*"[21] (emphasis added) A refugee who travels without pre-authorisation to a state party, and is admitted to a process intended to assess suitability for admission to that or another state, was intended to "be considered … to have been regularly admitted."[22] In *O v. London Borough of Wandsworth* [2000] EWCA Civ 201, the national Court of Appeal accepted that those "who claim asylum at the port of entry

[18] Council Directive 2004/83/EC of 29.4.04 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, OJ L 304, 30.9.04, p.12

[19] The French representative described lawful presence as "a very wide term applicable to any refugee, whatever his origin or situation." Statement of Mr. Juvigny of France, UN Doc. E/AC .32/SR.42, 24..8.50, at Art. 23

[20] "The expression 'lawfully in the territory' included persons entering a territory even for a few hours, provided that they had been duly authorised to enter" : Statement of the US representative, Mr Henkin, UN Doc. E/AC .32/SR.41, 23.8.50, at Art. 10

[21] Statement of Mr. Rain of France, UN Doc. E/AC .32/SR.15, 27.1.50, at para 109

[22] Statement of Mr Henkin of the US, ibid., at para 94. See also Statement of the President of the Conference of Plenipotentiaries, Mr. Larsen of Denmark, UN Doc. A/CONF.2/SR.14, 10.7.51 at Art. 26, where no delegate challenged the accuracy of the President's understanding of "lawful presence" as including refugees subject to the various 'intermediary stages' which a country may establish between the arrival of a refugee and refugee status determination. See *Rajendran v. MIMA* (1998) 166 ALR 619 (Aus. FFC, 4.9.98), where the Australian Full Federal Court of Appeal held that an asylum seeker pending determination of status was "lawfully in" Australia by reason of his provisional admission under domestic ('bridging') regulations for the purposes of pursuing his claim. The South African Supreme Court of Appeal impliedly adopted the same approach in *MHA v. Watchenuka* (2004) 1 All SA 21 (SA SCA, 28.11.03), at para 36

and are granted temporary admission, or who claim asylum during an extant leave, are here lawfully." The national House of Lords held in *Szoma v. SSWP* [2005] UKHL 64 para 24, overturning previous House of Lords authority[23], that a person admitted to asylum procedures and granted temporary admission was "lawfully in" the UK.

c. Finally, in situations of mass influx, where asylum seekers are diverted to temporary protection regimes (but no decision taken on their refugee claims), presence is to be deemed lawful[24].

14. UNHCR accepts that the position is different if the request for asylum is used as a means for deceptive entry, evasion of regulated procedures governing admission to territory or an opportunity to gain *de facto* entry and then disappear in breach of restrictions on entry. All such cases would be examples of intended illegal entry, and where there are reasonable grounds to suspect such action, detention would be compatible with the first limb of Art. 5(1)(f) ECHR.

Lawful presence under other provisions

15. This approach to the CSR is supported by considerations of national law, by the ECHR (prior to the judgment of the Chamber), by provisions of EU law, and by the ICCPR.

16. The national case law of the UK recognises that an asylum seeker, even one without a passport, who presents himself at port is not thereby, without more, seeking to enter in violation of the UK's procedures or contrary to the law: see *R v. Naillie* [1993] AC 674, 680[25].

17. In 1986, in a case concerning the right to freedom of movement under Art. 2(1) of Protocol 4 ECHR, a right possessed by everyone "lawfully within the territory", the European Commission on Human Rights held that an asylum seeker admitted conditionally pending examination of his claim to part of the territory would *lose* his lawful status if he breached the conditions of his temporary admission.[26]

18. This view is underscored by the provisions of EU law, where asylum seekers have the right to remain in a Member State's territory pending the examination of their claim under the EU 'Procedures Directive', Art. 7.[27] The minority of the Chamber were live to this point (para 4).

19. In 1986, its General Comment No. 15[28], the UN Human Rights Committee ("HRC") observed that while the ICCPR did not confer rights on aliens to enter or reside in the host territory, "in certain circumstances an alien may enjoy the protection of the Covenant *even in relation to entry* or residence, for example, when considerations of non-discrimination, *prohibition of inhuman treatment,* and respect for family life arise."(emphasis supplied). Thus, "consent for entry may be given subject to conditions relating, for example, to movement, residence and employment." In 1999, in its General Comment No. 27[29], the HRC noted that "The question whether an alien is 'lawfully' within the territory of a State is a matter governed by domestic

[23] *R v. SSHD ex p. Bugdaycay* (*Musisi)* [1987] AC 514

[24] See Kalin, *Temporary Protection in the EC: Refugee Law, Human Rights and the Temptations of Pragmatism* GYIL, 2001, V.44, p.221 "lawful presence" "refers to presence authorised by law which … may be of a temporary nature."

[25] "…if he presents himself to an immigration officer and asks for political asylum and does not produce a forged document or otherwise seek to deceive or deceive the immigration officer he is not a person entering or seeking to enter in breach of the immigration laws. He may not succeed in getting political asylum; even after temporary admission he may be refused leave. But he is not an illegal entrant for the purposes of the Act since he has not entered or sought to enter in breach of the immigration laws whether or not he has a passport."

[26] *Paramanathan v. Germany* (Application No. 12068/86) 51 DR 237, 240

[27] EU Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (which must be transposed into the national law of all Member States by 1 December 2007). Art. 7 provides that "Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until such time as the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III. This right to remain shall not constitute an entitlement to a residence permit". It is plain that appeals should also have suspensive effect, and given the irrevocable nature of the harm that may ensue pursuant to a wrongful removal, the Court's practice is to grant suspensive relief, which is binding on States Parties to the ECHR: see *Cruz-Varas v. Sweden* (1991) 14 EHRR 1*Mamatkulov v. Turkey* (2005) 41 EHRR 25. ExCom Conclusions No. 8 (XXVIII) (1977) and No. 30 (XXXIV) (1983), provide that the automatic application of suspensive effect can be waived only where it has been established that the request is manifestly unfounded or clearly abusive.

[28] UN Doc. A/41/40 (1986) "The position of aliens under the Covenant", 11.4.86, 27th Session, para 6

[29] CCPR/C/21/Rev.1/Add.9, "Freedom of movement", 2.11.99, para 4

law, which may subject the entry of the alien to the territory of the State to restrictions, provided they are in compliance with the State's international obligations."

20. In 1994, in *Celepi v. Sweden*[30], the HRC had concluded that the author of the complaint, who was subject to an extant expulsion order that had not been enforced, having previously been admitted to the territory, was nevertheless lawfully present within (part of) the territory for the purposes of Art. 12 ICCPR (guaranteeing the right of free movement to those lawfully within the territory). The European Commission on Human Rights had in 1989 reached a similar conclusion in *Aygun v. Sweden.*[31]

Conclusions on the legal status of asylum seekers during determination procedures

UNHCR submits that a person who claims asylum in accordance with national procedures is seeking admission to asylum procedures of the state pursuant to international refugee law, as transposed domestically. If admitted to those procedures, s/he is lawfully present (but not lawfully staying, or durably resident) there. The grant of temporary admission is precisely an authorisation by the state official to temporarily allow the individual to enter its territory consistent with the law. In such a situation, the asylum seeker is not seeking unauthorised entry, but rather, has been granted temporary but authorised entry, for the purpose of having the asylum claim examined (and where successful, being granted asylum, that is, lawful stay, in the scheme of the CSR).

V. DETENTION

21. Liberty of the person is a fundamental right proclaimed in the UDHR. Its importance is underpinned by the guarantee given in three specific provisions in the UDHR, namely Art. 3 (right to life, liberty and security); Art. 9 (right against arbitrary arrest, detention or exile); and Art. 13 (right to freedom of movement and residence). These fundamental rights are elaborated and guaranteed in Arts. 9 and 12 ICCPR.

22. Art. 9(1) ICCPR materially provides that "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention." In its General Comment No. 8 (1982) on Art. 9, the HRC made it plain that Art. 9(1) "is applicable to all deprivations of liberty, whether in criminal cases or in others cases such as … immigration control etc."

23. The HRC considered Art. 9 in *A v. Australia*[32] (1997). The case concerned a prolonged detention of a Cambodian asylum claimant. The HRC held that (para 9.2) "the notion of 'arbitrariness' must not be equated with 'against the law' but be interpreted more broadly to include such elements as *inappropriateness* and injustice. Furthermore, *remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context."* The HRC, while agreeing that there was no basis for the claim that it is *per se* arbitrary to detain individuals requesting asylum, observed that, (para 9.4) "*the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of co-operation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal*."[33]

International refugee law

24. The starting point is Art. 31 CSR, which obligates States (1) not to impose penalties on refugees on account of their *illegal* entry or presence, provided they come directly from a territory where their life or freedom was threatened, report without delay to the authorities, and show good cause for their illegal entry; and (2) not to apply to the movements of *such* refugees restrictions other than those which are necessary, and only until their status in the country is regularized or they are admitted into another country[34]. UNHCR

[30] CCPR/C/51/D/456/1991, 26.7.94, para 9.2. See also *Karker v. France* (CCPR/C/70/D/833/1998)
[31] (Application no. 14102/88) 63 DR 195, 199 in the context of Art. 2(1) of Protocol 4 ECHR.
[32] CCPR/C/59/D/560/93
[33] This approach has been consistently applied in later cases: *C v. Australia* (CCPR/C/76/D/900/1999) (2002) (where the minimal impairment test was specifically endorsed); *Jalloh v. Netherlands* (CCPR/C/74/D/794/1998) (2002); *Baban v. Australia* (CCPR/C/78/D/1014/2001) (2003); *Shafique v. Australia* (CCPR/C/88/D/1324/2004) (2006)
[34] Art. 31 CSR (1) "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Art. 1, enter or are present in their territory

immediately observes that persons who claim asylum in compliance with national procedures without effecting an unlawful entry are lawfully present, and better placed than the class to which Art. 31 speaks.

25. The goal of Art. 31 is to provide an incentive for unauthorised entrants, with *bona fide* reasons for entering unlawfully, to regularise their status with the officials of the state: only refugees who come forward to the authorities and present claims in compliance with national law are entitled to the protection of the article. The drafters were aware that it is not always possible to abide by lawful entry procedures when fleeing persecution. Also, without protection against penalisation for unlawful entry, refugees may opt for an 'illegal existence' rather than make themselves known to the host state, with obvious disadvantages for both.[35]

26. Art. 31(2) permits the imposition of only *necessary* restrictions of liberty until status is regularised. In the original draft, a state was permitted to apply restrictions "as it may deem necessary"[36]. The move to an objective test ('are necessary') compels intensive scrutiny. The contemplation was that Art. 31(2) would enable states to investigate the identity of unlawfully present refugees[37], or the circumstances in which they had arrived[38], or to address special circumstances of mass influx and security concerns[39]. There was "general agreement" that "every state was fully entitled to investigate the case of each refugee who clandestinely crossed its frontier, and to ascertain whether he met the necessary entry requirements."[40] Art. 31(2) therefore authorises necessary restrictions on movement for the purposes of investigation of identity, the circumstances of arrival, the basic elements of the claim and security concerns.

27. In these circumstances, UNHCR considers that the better view is that status regularisation, for the purposes of Art. 31(2), occurs once the asylum seeker submits to and meets the host State's legal requirements to have his claim evaluated. This approach is also consonant with the object and purpose of the provision (to encourage the regularisation of unlawfully present refugees) and also its context (in light of Art. 26). Art. 26 provides for a (presumptive) and general right of free movement for those asylum seekers lawfully present in the host State, with only necessary restrictions permitted to be imposed by implication (see also Art. 12 ICCPR, Art. 2(1) Protocol 4 ECHR). Thus, once the domestic law formalities for access into determination procedures have been complied with, status is regularised if the other criteria in Art.31 are met, and Art. 26 governs the position.

28. This approach is also supported by the Conclusion of the Executive Committee of the High Commissioner's Programme[41] (ExCom), namely ExCom Conclusion No. 44 (XXXVII) (1986), the subject of express approval by the General Assembly[42]. ExCom Conclusion No. 44 (XXXVII) was in fact designed to provide guidance to States on when it can be said that it is necessary to restrict the freedom of movement of refugees pending "regularisation". The ExCom:

> "Expressed the opinion that in view of the hardship which it involves, detention should normally be avoided. *If necessary*, detention may be resorted to *only* on grounds prescribed by law (1) *to verify identity*; (2) to determine *the elements* on which the claim to refugee status or asylum is based; (3) to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or

---

without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. (2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country."

[35] UN Dept of Social Affair, "A Study of Statelessness" UN Doc. E/1112, 1.2.49 (United Nations, 'Statelessness'), at 20.

[36] Memorandum of the Secretary-General to the Ad Hoc Committee on Statelessness E/AC.32/2

[37] Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.35, 25.7.51, at 11

[38] Statement of Mr. Hoare of the UK, ibid., at 12

[39] Statement of the President of the Conference of Plenipotentiaries, Mr. Larsen of Denmark, UN Doc. A/CONF.2/SR.14, 10.7.51, at 16

[40] Statement of the President, Mr. Larsen of Denmark, ibid., at 13

[41] Pursuant to para 4 of the Statute, the UN Economic and Social Council of the GA established an Advisory Committee on Refugees. In 1958 it became the Executive Committee of the High Commissioner's Programme. It is currently composed of 70 States. Under its terms of reference, it *inter alia* advises the Commissioner at his or her request on the exercise of UNHCR's protection functions under the statute (GA Res 1166 (XII), 26.11.57). The Commissioner is required to abide by the Committee's conclusions on international protection: GA Res 1673 (XVI), 18.12.61, para 1, GA Res 1783 (XVI), 7.12.62.

[42] Resolution 41/124 of the GA (4.12.86) para "welcomed" the conclusion (41st Session), Suppl no 53, p.181

have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or (4) to protect national security or public order;" (emphasis and numeration added).

The ExCom further

"(d) *Stressed* the importance for national legislation and/or administrative practice to make the necessary distinction between the situation of refugees and asylum-seekers, and that of other aliens;"

29. To give effect to ExCom Conclusion 44 (XXXVII), UNHCR published guidelines in 1995, which it revised and reissued on 10 February 1999[43]. UNHCR made plain that detention of asylum seekers was "inherently undesirable". Guideline 3 provides that detention,

"may exceptionally be resorted to for the reasons set out below … as long as this is … in conformity with general norms and principles of international human rights law (including Art. 9 ICCPR) … Where there are monitoring mechanisms which can be employed as viable alternatives to detention, (such as reporting obligations or guarantor requirements) … these should be applied **first** unless there is evidence to suggest that such an alternative will not be effective in the individual case. *Detention should therefore only take place after a full consideration of all possible alternatives, or when monitoring mechanisms have been demonstrated not to have achieved the lawful and legitimate purpose.*" (italicised emphasis added)

30. In particular the guidelines explain ExCom Conclusion 44 (XXXVII) in the following manner:

"…detention of asylum-seekers may only be resorted to, if **necessary: (i) to verify identity.** This relates to those cases where identity may be undetermined or in dispute. **(ii) to determine the elements on which the claim for refugee status or asylum is based.** This statement means that the asylum-seeker may be detained exclusively for the purposes of a preliminary interview to identify the basis of the asylum claim. This would involve obtaining essential facts from the asylum-seeker as to why asylum is being sought and *would not extend to a determination of the merits or otherwise of the claim. This exception to the general principle cannot be used to justify detention for the entire status determination procedure*, or for an unlimited period of time. **(iii) in cases where asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State, in which they intend to claim asylum.** What must be established is the absence of good faith on the part of the applicant to comply with the verification of identity process. … Asylum-seekers who arrive without documentation because they are unable to obtain any in their country of origin should not be detained solely for that reason...." (italicised emphasis added)

31. As the above indicates, UNHCR recognises that the process of examining those who are seeking asylum may involve necessary and incidental interference with liberty, so that it is legitimate to impose *restrictions* on liberty for the purposes of examination of a claim. The Court also recognised as much in *Amuur v. France*[44]. However, where detention is resorted to for permitted purposes *but* on a fact-insensitive blanket basis, or where detention is effected purely for reasons of expediency or administrative convenience, then it fails the necessity test required under international refugee as well as human rights law.

32. Thus, the UN Working Group on Arbitrary Detention[45], in its report following its visit to the UK, recommended that the UK Government should "ensure that detention of asylum seekers is resorted to only for reasons recognised as legitimate under international standards and only when other measures will not suffice;" (para 26), "Alternative and non-custodial measures, such as reporting requirements, should *always* be considered before resorting to detention."; (para 33); "The detaining authorities must assess a compelling need to detain that is based on the personal history of each asylum seeker." (para 34).

---

[43] UNHCR Revised Guidelines On Applicable Criteria And Standards Relating To The Detention Of Asylum Seekers, February 1999 ("UNHCR Guidelines"). They were endorsed in 2002 by the Special Rapporteur on Human Rights, Ms. Gabriela Rodriguez Pizarro, para 15, fn.4, E/CN.4/2003/85, 30.12.02

[44] See *Amuur v. France* (1996) 22 EHRR 533 at para 43: a deprivation of liberty "… *is acceptable only in order to enable States to prevent unlawful immigration* while complying with their international obligations, particularly under the (CSR) and the (ECHR). *States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions* must not deprive asylum-seekers of the protection afforded by these conventions." (emphasis supplied)

[45] E/CN.4/1999/63/Add.3, 18/12/99

Summary of the international refugee and human rights law position

The detention of asylum seekers may only be undertaken as an exceptional measure of last resort. Fundamental standards of human rights law require that detention should not be arbitrary, and must therefore be necessary and proportionate. International refugee law complements this position, and stipulates the permitted purposes for which detention may effected as a necessary exceptional measure.

Article 5 ECHR

33. Despite the settled principles of international law which regard detention as an exceptional measure of last resort, the Chamber judgment permits recourse to detention of asylum seekers as a normal measure of first resort. UNHCR now turns to consider the position under Art. 5 ECHR.

"Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases **…"**

34. The guarantee of the right to liberty and security in Art. 5 applies to "(e)veryone" within jurisdiction, irrespective of nationality or immigration status, and "no one" shall be deprived of the right to liberty save in prescribed cases. Those prescribed exceptions must be narrowly construed. Even in 1950, it was plain that the well-established right of states in public international law to control the conditions of entry and stay of aliens was subject to this provision. Moreover, in stipulating the exclusive purpose for which detention may be effected, the first limb of Art. 5, confers (on a proper reading), if anything, *greater* protection of the right to liberty, than international human rights and refugee law. This is entirely in keeping with the ECHR's status as a leading regional component of the corpus of international human rights law.

"… prevent his effecting an authorised entry …"

35. The language of Art. 5(1)(f) indicates that it is directed to two situations: the position on entry, and that on removal. The language also indicates that the article applies two different tests for a lawful detention to those two situations.

36. The justification for detention under the first limb is narrow: it is acceptable only to *prevent* an individual's effecting an unauthorised entry. The use of the term 'prevent' in Art. 5(1)(f) points to a requirement of a causal connection between the detention and the unauthorised entry. In UNHCR's submission, that necessary causal connection will be broken if an asylum seeker is not *seeking* unauthorised entry, because detention cannot prevent that which is not being sought. A remote connection between detention and the aim of "prevent(ing) unlawful immigration" or to "circumvent immigration restrictions" (as the Court put it in *Amuur*, para 43), is not permissible having regard to the importance of the right at stake, and the narrow construction to be given to exceptions.

37. By contrast, where the second limb of Art. 5(1)(f) is engaged, no causal connection is required between the detention and the deportation; the article does not require, for example, detention in order to facilitate deportation. Moreover, those subject to deportation or extradition will have committed breaches of the national law (unlike those seeking access to asylum procedures, pursuant to a fundamental right, where there is no reason to believe they will abscond or misbehave). These differences help to explain the decision in *Chahal v United Kingdom (*1997) 23 EHRR 413[46].

necessity

38. In other contexts, the Court has implied into Art. 5 a test of necessity which, again, is absent from the language in Art. 5(1)(f). In *Litwa v Poland* (Application no. 26629/95, Judgment 4 April 2000) the Court was concerned with the detention of an alcoholic, under Art. 5(1)(e), which, like Art. 5(1)(f), contains no analogue of the language of necessity in Art. 5(1)(c). The detention of the applicant for six and a half hours in a sobering up centre was held to constitute a breach of Art. 5. The Court expressed itself as follows at para 78:

[46] At paragraph 112: "Art. 5(1)(f) does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing; *in this respect* Art. 5(1)(f) provides a different level of protection from Art. 5(1)(c)" (emphasis supplied); see also *Bozano v France* (1986) 9 EHRR 297 para 60; *Conka v. Belgium* (Application no. 51564/99, Judgment 5 February 2002), para 38.

> "The Court re-iterates that a necessary element of the 'lawfulness' of the detention within the meaning of Art. 5(1)(e) is the absence of arbitrariness. *The detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered* and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is executed in conformity with national law but it must also be necessary in the circumstances." (emphasis supplied)[47]

39. Similarly, in *Vasileva v. Denmark* (2003) 40 EHRR 27, the Court held (para 36) that a "balance must be drawn between the importance in a democratic society of securing the immediate fulfillment of the obligation in question, and the importance of the right to liberty", and in *McVeigh, O'Neill and Evans v. UK* (1981) 21 DR at 42, the Commission implied a necessity test, despite the fact that the express terms of Art. 5(1)(b) contain no reference to such a balance nor to necessity.

40. UNHCR submits that alternatives should be considered before recourse is taken to detention measures. If the primary objective of a detention regime is to promote speedy decision making, the question arises whether this objective, and the availability of the asylum-seeker for the speedy conduct of the procedure, cannot be achieved by a less intrusive measure, short of detention; for example by an obligation to reside in a reception facility and to report every day at a given time in order to inform the applicant of, to summon him or her to scheduled interviews, or to serve decisions.

41. UNHCR's submissions are consistent with the Committee of Ministers Recommendation (Rec (2003)5) to member states on measures of detention of asylum seekers. The recommendation addresses those within the first limb of Art. 5(1)(f): it "does not concern measures of detention of asylum seekers on criminal charges or rejected asylum seekers detained pending their removal from the host country." (para 2) The recommendation relevantly provides as follows:

> "3. The aim of detention is not to punish asylum seekers. Measures of detention may be resorted to only in the following situations: (a) when their identity, including nationality, has in case of doubt to be verified, in particular when asylum seekers have destroyed their travel or identity documents or used fraudulent documents in order to mislead the authorities of the host state; (b) when elements on which the asylum claim is based have to be determined which, *in the absence of detention*, could not be obtained; (c) when a decision needs to be taken on their right to enter the territory of the state concerned; or (d) when protection of national security and public order so requires.
>
> 4. Measures of detention of asylum seekers should be applied only after a careful examination of their necessity in each individual case. Those measures should be specific, temporary and non-arbitrary and should be applied for the shortest possible time. Such measures are to be implemented as prescribed by law and in conformity with standards established by the relevant international instruments and by the case law of the European Court of Human Rights … 6. Alternative and non-custodial measures, feasible in the individual case, should be considered before resorting to measures of detention …. 20. As a rule, minors should not be detained unless as a measure of last resort and for the shortest possible time." (emphasis supplied)

42. In his report on his visit to the UK, the Council of Europe Commissioner for Human Rights expressed similar views[48]. He noted that,

> "I would like to raise a number of points regarding these proceedings. The first concerns the frequent resort to detention for asylum seekers at the very outset of proceedings. Whilst detention is not automatic in such proceedings, there would appear to be a strong presumption in its favour; mooted plans to increase the asylum detention estate in precisely this area suggest that this is the direction in which the UK is headed[49]. The UK authorities have indicated to me that the UK courts have approved detention for the

[47] The decision in *Litwa* was followed in *Varbanov v Bulgaria* (5 October 2000), para 46.
[48] CommDH(2005)6, 8 June 2005, para 65.
[49] In fact, in a subsequent case, the national Court of Appeal appeared to contemplate that the judgment of the House of Lords in *Saadi* meant that Art. 5(1)(f) permitted the detention of all those claiming asylum (if that were considered desirable by the state), but that the discipline imposed by Art. 5 was that "(i)n selecting some, but not others, for detention the Secretary of State must not act in an arbitrary fashion." *Nadarajah v. SSHD* [2003] EWCA Civ 1768, [2004] INLR 139, para 53. In another subsequent case, the High

sole purpose of processing asylum applications. I do not exclude the possibility of detention being appropriate in certain circumstances, but I do not believe that this would be an appropriate rule. Open processing centres providing on-site accommodation and proceedings, are, I believe, a more appropriate solution for the vast majority of applicants whose requests are capable of being determined rapidly."

Conclusions on Art. 5(1)(f) ECHR

Properly construed, the first limb of Art. 5(1)(f) confers robust protection against detention for asylum seekers. It stipulates a purpose, the effecting of an unauthorised entry, which detention must prevent. A temporary entry granted to permit the exercise of the fundamental right to seek asylum is authorised by international and domestic law. It is not permissible to detain refugees because they are seeking recognition of their status. Asylum seekers must be distinguished from general classes of illegal entrants or those facing deportation. In order to detain an asylum seeker under Article 5(1)(f), there must be something more than the absence of a decision on the claim. Moreover, detention under the first limb of Art. 5(1)(f) must be necessary, in the sense that less intrusive measures will not suffice, and proportionate to the aim pursued. Mere expediency or administrative convenience is not sufficient.

VI. CONCLUSIONS

43. UNHCR submits that:

(1) Where an individual seeks asylum and submits an asylum claim in accordance with national procedures of a country in which s/he has arrived, s/he is exercising the fundamental right to seek asylum, and the State has a general duty, first not to *refoule* the individual, and secondly, to grant admission to refugee status determination procedures;

(2) Once an asylum seeker is permitted to remain pending the processing of the claim, and there is no evidence of a breach or intended breach of national law, temporary entry is authorised, and the individual is lawfully present. Authorised entry ought not to be distinguished from that which is lawful, and ought not to be equated to the grant of leave to enter in national law.

(3) Refugee law and human rights law require that the detention of an asylum seeker must be necessary, in the sense that measures less intrusive of liberty in the individual case would not suffice, and must be proportionate to the legitimate aim pursued. Proportionality is not limited to considerations of the duration of detention. It follows that the detention of asylum seekers is an exceptional measure of last resort, inherently undesirable and should be avoided. Detention is also a grave interference with the fundamental right to liberty that cannot be justified on grounds of expediency or administrative convenience. Detention should not be normalised or permitted to be a measure of first resort.

(4) In the first limb of Art. 5(1)(f) ECHR, the legitimate aim is not open-ended but is rather supplied by the article itself: detention may only be resorted to where there is a causal connection with the specific purpose of preventing unauthorised entry. If what is being sought is an authorised entry, detention cannot prevent an unauthorised one, because there would there be no rational connection between the measure and the aim sought to be achieved. Thus if a person is detained during the consideration of the claim, but then released on temporary admission after refusal, this would be powerful evidence to suggest that there was no rational connection between the detention and the prevention of unauthorised entry.

(5) A strict necessity test is required, at least in the first limb of Art. 5(1)(f), consonant with the value placed by the ECHR, international refugee and human rights law, and indeed national law, on the right to liberty, which extends to "everyone." This means that if there are less intrusive alternatives to detention capable of achieving the relevant aim, they should be adopted.

30 March 2007

Court held that *Saadi* decisively informed the conclusion that detention, in conditions very different from – and considerably harsher than - the "relaxed regime" of Oakington did not need to be justified as necessary by the Secretary of State, even where the detention of a claimant separated him from his common law wife and their infant child, so that Art. 8 (in addition to Art. 5) was in play: *R (Kpandang) v. SSHD* [2004] EWHC (Admin) 2130, paras 58-60.