

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM THE  
INNER HOUSE  
OF THE COURT OF SESSION

BETWEEN:

IA

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

-and-

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

Intervener

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CASE FOR

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

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**Introduction**

1. UNHCR has supervisory responsibility in respect of the 1951 Convention relating to the Status of Refugees<sup>1</sup> ("the 1951 Convention") and its 1967 Protocol.<sup>2</sup> Under the 1950 Statute of the Office of the High Commissioner (annexed to UN General Assembly Resolution 428(V) of 14 December 1950) ("UNHCR Statute")<sup>3</sup>, UNHCR has been entrusted with the responsibility for providing international protection to refugees, and together with governments, for seeking permanent solutions for their problems. As set out in the Statute (paragraph 8(a)), UNHCR fulfils its mandate by, *inter alia*, "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing

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<sup>1</sup> Convention relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html>

<sup>2</sup> Protocol relating to the Status of Refugees, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: <http://www.refworld.org/docid/3ae6b3ae4.html>

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

*amendments thereto.*<sup>4</sup> UNHCR's supervisory responsibility is also reflected in Article 35 of the 1951 Convention and Article II of the 1967 Protocol, obliging State Parties to cooperate with UNHCR in the exercise of its functions, including in particular, to facilitate UNHCR's duty of supervising the application of these instruments. The obligation to cooperate is also reflected in European Union law.<sup>5</sup> The supervisory responsibility is exercised in part by the issuing of interpretative guidelines, including (a) UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1979, reissued January 1992 and December 2011) ("*Handbook*") and (b) UNHCR's subsequent Guidelines on International Protection ("*Guidelines*").<sup>6</sup>

2. In United Kingdom law, UNHCR has a statutory right to intervene before the First Tier and Upper Tribunals (Immigration and Asylum Chamber).<sup>7</sup> Before the Supreme Court UNHCR seeks, in appropriate cases, permission to intervene to assist through submissions on issues related to its mandate with respect to refugee protection and the 1951 Convention. UNHCR is grateful in this case for the opportunity to attend the hearing and make oral submissions.

#### **I. Summary of UNHCR's submissions**

3. The issue in this appeal is the approach that decision-makers and UK tribunals should adopt when determining whether a person is a refugee for the purposes of the 1951 Convention and its 1967 Protocol in circumstances in which the person has previously been recognized as a refugee by UNHCR under its mandate following a refugee status determination ("RSD").
4. UNHCR submits, in summary, that:

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<sup>4</sup> Emphasis added.

<sup>5</sup> European Union law also demonstrates the commitment of its member states to cooperate with the High Commissioner in the implementation of the international refugee instruments, which extends to his supervisory role, for example: Declaration 17 on Art. 73k of the *Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts*, OJ 340/134 of 10 November 1997, available at: <http://www.refworld.org/docid/51c009ec4.html> ("*consultations shall be established with the United Nations High Commissioner for Refugees on matters relating to asylum policy*"); Recital 22 of *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, OJ L 337/10, 20 December 2011, pp 9-26 available at: <http://www.refworld.org/docid/4f197df02.html> ("*Consultations with the United Nations High Commissioner for Refugees may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention*"); Recital 25 of *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)* OJ L 180, June 2013 (the "2013 Directive") ("*the procedure in which an application for international protection is examined should normally provide an applicant at least with: 1...1 the opportunity to communicate with a representative of the United Nations High Commissioner for Refugees (UNHCR)*"); Art. 29 of the 2013 Directive ("*The role of UNHCR*", in particular "(c) to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for international protection at any stage of the procedure"), as well as Arts. 37(3) and 45(2)(a) of the 2013 Directive available at: <http://www.refworld.org/docid/51d29b224.html>.

<sup>6</sup> UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1952 Convention and the 1967 Protocol relating to the Status of Refugees*, December 2011, HCRAP/4/ENG/REV. 3, available at: <http://www.refworld.org/docid/4f33c8d92.html>.

<sup>7</sup> Rules 2, 3 and 49 of the Asylum and Immigration Tribunal Procedure Rules 2005 (SI 2005/230) and Rule 9(5) and (6) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

- (1) The recognition of an individual as a refugee by UNHCR under its mandate does not bind a State to recognize the individual as a refugee. States have an independent responsibility under the 1951 Convention and 1967 Protocol to determine a person's refugee status.
  - (2) Having regard, however, to UNHCR's unique international mandate and authority, and its expertise and experience, the fact that UNHCR has recognised an individual as a refugee is relevant to RSD carried out by States. It should be the starting point of any exercise in the determination of whether the individual should be recognised as a refugee by the State. In considering the asylum claim of an applicant who has been recognised as a refugee by UNHCR, the State should give the recognition considerable weight and take it seriously into account.
  - (3) What that means in practice is this. A State decision-maker cannot disregard UNHCR's recognition of refugee status in evaluating the individual's claim unless there are cogent reasons for doing so. A State decision-maker may, after an examination of all the evidence available to him or her arrive at a decision regarding an applicant's eligibility for refugee status different from the UNHCR recognition where there are cogent reasons for doing so. Cogent reasons would include:
    - a. Where reliable information is available to the State decision-maker which supports a finding that the applicant does not meet the definition of a refugee in Article IA(2) of the 1951 Convention, for example where changes have occurred in the circumstances of the applicant or his or her country of origin which directly affect the assessment of the claim for refugee status. Other examples could include where previously unavailable or new information is now before the State decision-maker and which directly affects the assessment of the claim for refugee status. Information of this sort will often be information which post-dates UNHCR's decision.
    - b. Where reliable information is available to the State decision-maker which brings the applicant within the exclusion clauses in Article IF of the 1951 Convention.
    - c. Where reliable information is available to the decision-maker which, when considered in the light of all the available information, supports a finding that the applicant's statements on material elements of the claim are not credible.
5. This approach is based on a number of mutually supporting considerations, including UNHCR's international mandate and authority, its experience and expertise, and the need for consistency of approach in international protection of refugees. These points are developed below. The Inner House was correct to hold that the decisions of UNHCR in this field are to be

treated with great respect in the interest of legal diplomacy and comity, having regard to their source.<sup>8</sup>

## **II. UNHCR's mandate as relevant to the issue on appeal**

6. Paragraph 1 of the UNHCR Statute provides that:

*"The United Nations High Commissioner for Refugees, acting under the authority of the General Assembly, ... shall assume the functions of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees ..."*<sup>9</sup>

7. UNHCR's mandate encompasses individuals who meet the refugee criteria under the 1951 Convention. This mandate has been broadened through successive UN General Assembly and ECOSOC resolutions to a variety of other situations of forced displacement, resulting from conflict, indiscriminate violence or public disorder.<sup>10</sup> In light of this evolution, UNHCR's competence to provide international protection to refugees extends to individuals who are outside their country of origin or habitual residence and who are unable or unwilling to return there owing to serious threats to life, physical integrity or freedom resulting from generalised violence or events seriously disturbing public order.

8. UNHCR is responsible for the supervision of the 1951 Convention and the 1967 Protocol.<sup>11</sup> Further, according to Article 35 of the 1951 Convention, the Contracting States undertake to co-operate with UNHCR in the exercise of its functions and to facilitate its duty of supervising the application of the provisions of the Convention:

### ***"Co-operation of the National Authorities with the United Nations***

*1. The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention."*

9. Article II of the 1967 Protocol is in the same terms save that it refers expressly to the facilitation of the UNHCR's duty to supervise the application of the Protocol.

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<sup>8</sup> IA for leave to appeal [2011] CSH 28, paragraph 15.

<sup>9</sup> see footnote 3, above.

<sup>10</sup> UNHCR, Providing International Protection Including Through Complementary Forms of Protection, 2 June 2005, EC/55/SC/CRP.16, available at: <http://www.refworld.org/docid/47fd49d.html>; UN General Assembly, *Note on International Protection*, 7 September 1994, A/AC.96/830, paras. 8, 10-11, 31-32, available at: <http://www.refworld.org/docid/3f0a935f2.html>.

<sup>11</sup> Paragraph 8(a) of the UNHCR Statute, quoted in paragraph 1, above (see also footnote 3, above).

10. In recognition of UNHCR's international responsibilities and functions, UNHCR is entitled to intervene in proceedings before the First Tier and Upper Tribunals.<sup>12</sup> This right to intervene assists UNHCR in performing its functions under the UNHCR's Statute. It also recognises the importance of consistency between the approach of the UK tribunals and international standards relating to the application of the 1951 Convention and other international instruments.

### **III. UNHCR RSD**

11. In order to be in a position to implement effectively their obligations under the 1951 Convention, including importantly the prohibition on *refoulement*, States must determine who is a refugee. The primary responsibility for conducting RSD lies with States because it is their responsibility to ensure that refugees are offered protection in accordance with their international obligations.
12. UNHCR exercises its supervisory role *inter alia* by monitoring both the procedures and the criteria applied by the States conducting RSD, and through interventions in those procedures on behalf of applicants, as and where appropriate.
13. In accordance with this mandate and in order to protect and assist refugees, UNHCR is obliged to determine and declare whether individuals or groups are of concern to the Office. In some contexts, this may require that UNHCR formally determine whether or not specific individuals or a wider group are refugees, even where a Government may have carried out a similar or different determination. UNHCR's mandate in this regard is neither restricted by international obligations assumed by a particular State, nor by the existence of national RSD procedures.
14. UNHCR conducts RSD itself in many different contexts, for example where States have not acceded to the international refugee instruments, or where domestic procedures have not been established or are not effective. UNHCR is compelled at times to conduct RSD, and to determine who should benefit from international protection. UNHCR is also legally entitled to and responsible for interceding directly on behalf of asylum-seekers and refugees who would otherwise not be represented legally on the international plane. It does so in order to protect refugees from *refoulement*, detention or other violations of their human rights and/or to facilitate a durable solution. Indeed, RSD under UNHCR's mandate is a core UNHCR protection function, whether carried out on an individual or group basis. The mandate may be exercised in a State which is a State Party, or one which is not.<sup>13</sup>
15. Certain core principles and standards are incorporated into the UNHCR RSD procedures in every UNHCR office to ensure that all asylum seekers, regardless of where they apply for RSD

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<sup>12</sup> See footnote 7, above.

<sup>13</sup> On the mandate of the High Commissioner for Refugees, see UNHCR, Note on the mandate of the High Commissioner for Refugees, October 2013, available at: <http://www.refworld.org/docid/5268c9474.html>.

by UNHCR benefit from consistent core standards. In order to ensure a harmonised and consistent approach, on 20 November 2003 UNHCR produced *Procedural Standards for Refugee Status Determination under UNHCR's Mandate ("Procedural Standards")*.<sup>14</sup> The *Procedural Standards* complement previously existing guidance on the procedural aspects of RSD, notably in the *Handbook*<sup>15</sup> and *Guidelines*<sup>16</sup>, as well as other relevant guidance, and establish fundamental principles and standards to enhance the quality, fairness and integrity of its mandate RSD procedures. It sets out specific guidance and uniform procedural standards for UNHCR RSD and is applicable to all UNHCR offices. *Procedural Standards* sets out standards in relation to issues such as confidentiality, file management, interpretation and complaints, as well as reception and registration of asylum-seekers, and adjudication of claims for refugee status at the various stages of the RSD procedure. The latter provisions relate to standards of case management, training and supervision of decision-makers, interviewing asylum-seekers, and review of RSD adjudications.

16. In addition to the *Procedural Standards*, UNHCR offices are required to follow and implement other procedural standards as directed by the Office and contained in relevant guidance, for example in respect of special groups or issues, such as:

- UNHCR, *Note on Burden and Standard of Proof in Refugee Claims*, 1998<sup>17</sup>;
- UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 2002, Part III<sup>18</sup>;
- UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 2003, Part III<sup>19</sup>;
- UNHCR, *Guidelines on International Protection No. 6: Religion-based Refugee Claims within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 2004, Part III<sup>20</sup>;

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<sup>14</sup> UNHCR, *Procedural Standards for Refugee Status Determination Under UNHCR's Mandate*, 20 November 2003, available at: <http://www.refworld.org/docid/42d66dd84.html>.

<sup>15</sup> See footnote 6 above. Part two of the *Handbook* is entitled *Procedures for the Determination of Refugee Status*. It provides guidance as to the principles and methods to be applied in the establishment of matters of fact relevant to RSD.

<sup>16</sup> See footnote 6 above.

<sup>17</sup> UNHCR, *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, available at: <http://www.refworld.org/docid/3ae6b3338.html>.

<sup>18</sup> UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/01, available at: <http://www.refworld.org/docid/3d3611c64.html>.

<sup>19</sup> UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1952 Convention relating to the Status of Refugees*, 4 September 2003, HCR/GW/03/05, available at: <http://www.refworld.org/docid/M5857684.html>.

<sup>20</sup> UNHCR, *Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, 28 April 2004, HCR/GIP/04/06, available at: <http://www.refworld.org/docid/4090f9794.html>.

- UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1A(2) and 1F of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 2009, Part III<sup>21</sup>;
  - UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 2012, Part III<sup>22</sup>.
17. UNHCR also seeks to ensure high standards of quality and consistency in the substantive analysis of RSD by close adherence to the published guidance in the *Handbook* and *Guidelines*, as well as other relevant guidance. These provide guidance in interpreting the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention. They are intended to provide guidance to States as well as UNHCR offices, and are based on accumulated learning to be derived from jurisprudence from international, regional and national courts of law and other authoritative bodies, State practice, the views of UNHCR, Executive Committee Conclusions on International Protection, and academic writing. UNHCR also produces country-specific Guidelines on eligibility for international protection and other country of origin related information to assist decision-makers in assessing the international protection needs of asylum-seekers. These country-specific Guidelines are legal interpretations of the refugee criteria in respect of specific profiles on the basis of assessed social, political, economic, security, human rights and humanitarian conditions in the country or territory of origin concerned. This guidance is used by UNHCR when carrying out its own mandate RSD procedures.
18. Each UNHCR office is responsible for implementing UNHCR's procedural standards to ensure high quality of RSD decisions, supported by Headquarters, which also oversees consistency across UNHCR offices. Given the very diverse and, at times, challenging operational environments in which UNHCR carries out mandate RSD, the modalities of implementation may vary between offices, necessarily reflecting the size of the particular RSD operation, the staffing and other resources available in the UNHCR office, as well as the conditions of the particular country.
19. Guided by the *Procedural Standards*, the *Handbook* and *Guidelines*, country-specific Guidelines on eligibility as well as other relevant guidance, UNHCR undertakes a significant amount of RSD and associated protection activities. In 2012 UNHCR conducted RSD under its

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<sup>21</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, available at: <http://www.refworld.org/docid/4b2f4f6d2.html>.

<sup>22</sup> UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01, available at: <http://www.refworld.org/docid/50348afc2.html>.

mandate in 62 countries; in 49 countries UNHCR had sole responsibility for RSD whereas in 13 countries UNHCR conducted RSD jointly with, or parallel to, Governments. UNHCR registered 100,400 new individual applications in 2012. In many other countries UNHCR provided related technical or other support to Governments in the context of RSD. UNHCR's decisions on refugee status have been accepted as the basis for the departure and recognition in receiving States of over 330,000 refugees from 2008-2012 to 24 resettlement countries, approximating 60-85,000 departures per year.<sup>23</sup> This accumulated experience and expertise should be taken into account when considering the weight to be accorded to UNHCR RSD determinations in subsequent national RSD procedures, and the resettlement figures also show that States place considerable weight on UNHCR's determinations.

20. UNHCR may recognise refugees on a group ("*prima facie*") basis as well as through individual procedures. The need for a group-based determination arises from large-scale influxes where, for example, individual determination is impracticable and where there are often urgent protection and assistance needs which have to be met.
21. A *prima facie* approach is taken in circumstances where an entire group has been displaced in circumstances indicating that individual members of the group should be considered as refugees. As each member of the group is regarded *prima facie* as a refugee an in-depth detailed individual refugee status determination is not necessary and is often not feasible; an interview to determine membership of the group, and where applicable the absence of exclusion grounds, would suffice for UNHCR recognition. Where such individuals subsequently apply for asylum elsewhere, an individualised approach might be taken. In such circumstances it might be relevant for the decision-maker to know whether the RSD was conducted on a *prima facie* group approach. UNHCR endeavors to provide confirmation to State authorities as to whether the RSD was conducted on the basis of an individualised assessment or a *prima facie* group approach.

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

22. UNHCR's recognition of mandate refugee status does not bind a State to recognise that person as a refugee.
23. On the other hand, the fact that a person has moved to another country since being granted mandate status does not mean that the status has been lost and should be left out of account.
24. A person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfils the criteria contained in the definition. This necessarily occurs prior to the time at which his refugee status is formally determined. Recognition of refugee status does not make a person a

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<sup>23</sup> UNI-ICR, *Global Resettlement Statistical Report*, 2012, p. 4, available at: <http://www.unhcr.org/52693bd09.html>.



refugee but declares him or her to be one. He or she does not become a refugee because of recognition, but is recognised because he or she is a refugee.

25. The recognition of refugee status is therefore a declaratory act. This is recognised, for instance, in Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted, Recital 14, which states: "The recognition of refugee status is a declaratory act."<sup>24</sup>
26. Given that recognition of refugee status is a declaratory rather than a constitutive act, a prior refugee status determination by UNHCR must be an important starting point for any subsequent determination of refugee status by a State.
27. The foregoing considerations as well as more general considerations of international comity indicate that States should respect previous determinations of refugee status made by UNHCR (as well as other States, although this is not the issue in these proceedings) and accord them considerable weight. This is not in any sense inconsistent with the fact that States are responsible for reaching their own determinations of refugee status. On the contrary, it is the fact that they are free to reach their own conclusions which gives rise to the importance of respecting previous determinations made by UNHCR in order to maintain an effective and consistent system of international protection. To risk stating the obvious, differing refugee determinations in respect of the same individual are inconsistent with each other. It is undesirable that there should be different determinations in respect of the same individual, absent some change in circumstances or other cogent reason.
28. Cogent reasons would include:
  - 28.1. Where reliable information is available to the State decision-maker which supports a finding that the applicant does not meet the definition of a refugee in Article 1A(2) of the 1951 Convention, for example where changes have occurred in the circumstances of the applicant or his or her country of origin which directly affect the assessment of the claim for refugee status. Other examples could include where previously unavailable or new information is now before the State decision-maker and which directly affects the assessment of the claim for refugee status. Information of this sort will often be information which post-dates UNHCR's decision.
  - 28.2. Where reliable information is available to the State decision-maker which brings the applicant within the exclusion clauses in Article 1F.

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<sup>24</sup> available at: <http://www.reiworld.org/docid/4157e75e4.html>

- 28.3. Where reliable information is available to the decision-maker which, when considered in the light of all the available information, supports a finding that the applicant's statements on material elements of the claim are not credible.
29. UNHCR as an organisation has particular experience and expertise in the assessment of refugee status, having regard to the matters set out in paragraphs 11-21, above.
30. The considerations referred to in the preceding paragraphs support the propositions advanced in paragraph 4.
- V. Relevance of an absence of information about the basis for UNHCR's determination**
31. The statement of issues asks whether it would be proper for a decision-maker to take into account as diminishing the importance of a UNHCR RSD that there is an absence of evidence as to how it was made.
32. However, the matters set out above (see paragraphs 11-21 above), explaining the procedures and standards governing UNHCR's mandate RSD operations, warrant a presumption that a UNHCR recognition was reached in accordance with its internal standards and in a robust and informed manner such that UNHCR's recognition must be given considerable weight.
33. The same position ought to apply in respect of an absence of information as to the facts relied upon in reaching the particular decision (rather than how that decision was made). Even where supporting documentation (such as the statement of claim or interview transcript) is not available to the State decision-maker, it ought to be presumed that the decision was taken in accordance with UNHCR's internal standards. The absence of information as to how UNHCR made the particular decision should not affect the approach to be adopted by a decision-maker. Whether or not such information is available, the decision-maker must examine the relevant information available in a given case. In either event, departing from the conclusion reached by UNHCR will be justifiable only if there is material before the decision-maker such as to provide cogent reasons for so doing.
34. For example, if other material before the decision-maker leads him/her to considerations that point cogently (see paragraph 28 above) against the conclusion arrived at by UNHCR, then the decision-maker is justified in departing from the latter conclusion. The absence of information as to how UNHCR made the particular decision, or the factual basis for that determination, does not change the approach a decision-maker would need to adopt or the criteria based on which he or she may reach a decision that is different from UNHCR. As noted by the Court of Session, notwithstanding the need to give UNHCR's decision considerable weight, if a decision-making

body finds itself unable, having regard to the material before it, to reach the same conclusion, it may reach a different one<sup>25</sup>.

35. UNHCR is not always able, nor can it be expected to, respond to every request for documentation and/or information on a particular decision. There are good reasons why UNHCR is not able to provide such information in an individual case, including the observance of confidentiality/data protection principles, capacity or resources, access and/or the security of staff, refugees and/or operations which may be compromised.
36. Although UNHCR is currently reviewing what documentation it can and should make available pursuant to requests from individuals, UNHCR's current Procedural Standards set out at paragraph 2.1.2 strict controls on disclosure of UNHCR documents or source reporting relied upon in making RSD. As to interview transcripts and notes the relevant rule provides:

*"As a general rule, UNHCR interview transcripts and notes should not be disclosed; however the interview transcript taken directly from Applicant's own statements may be read back to the Applicant during the interview."<sup>26</sup>*

37. Of course, some information about the particular basis for a decision might be apparent from documents that individuals possess or which are obtained by them from UNHCR (if available). That said, to give UNHCR's recognition diminished weight for those applicants who have not been able to obtain the supporting documentation or further particulars about how their specific decision was arrived at, compared with some who may have been able to obtain that information, would lead to unfairness and differential treatment. For reasons of consistency, and based on the above-mentioned general procedural rules and standards, it should be presumed that UNHCR recognition was reached in accordance with its own internal rules, and any departure from that decision would require cogent reasons.

## **VI. Treatment of UNHCR RSD in other fora**

38. The approach articulated above draws support from (a) the approach of the Court of Appeal and Immigration Appeals Tribunal (IAT) / First Tier Tribunal in England and Wales, and (b) the approach of the European Court of Human Rights. Law and Practice in other national jurisdictions is not uniform. In relation to the latter, a summary is provided at point (c) below, and Annex 1 provides a fuller account.

### **(a) The approach of courts in the UK**

39. The Court of Appeal has considered the approach to be taken by decision-makers and tribunals in determining whether a person given mandate refugee status by UNHCR is a refugee for the purposes of the 1951 Convention and 1967 Protocol. In *MM (Iran) v. Secretary of State for the*

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<sup>25</sup> see paragraph 15 of [2011] CSIH 28 (footnote 8, above).

<sup>26</sup> 26 see footnote 14, above.

*Home Department* [2010] EWCA Civ 1457 the Claimant, an Iranian, was recognised as a refugee by UNHCR in Turkey. He subsequently travelled to the United Kingdom where he sought asylum. UNHCR was given permission to intervene in the case by the Court.

40. In its judgment, the Court of Appeal accepted UNHCR's position that although a prior recognition by it of mandate refugee status is not binding on the Secretary of State or the tribunal, in determining the asylum claim of a person previously given refugee status by UNHCR the decision maker must give UNHCR's prior recognition considerable weight. At paragraph 27, the Court of Appeal provided:

*"27....In reality, a decision by the UNHCR as to refugee status will, given the UNHCR's particular expertise and responsibilities under the Refugee Convention, be given considerable weight by the Secretary of State and the tribunal unless in any particular case the decision taker concludes that there are cogent reasons not to do so on the facts of that individual case. It would be just as unrealistic to contend that a decision by the UNHCR as to refugee status must always be given considerable weight regardless of any indications to the contrary as it would be to contend that it should be given less than considerable weight for no good reason."*

41. The approach of the IAT in cases involving a person previously recognised as a refugee by another State can be found in *Babela v. Secretary of State for the Home Department* [2002] UKIAT06124 and *Secretary of State for the Home Department v. K.K.* [2005] UKIAT00054.
42. In *Babela* the IAT applied the extraterritoriality principle, and found that refugee status determined in one contracting State should only be questioned by another contracting State where there is very good reason for doing so. Reference is made to paragraphs 28 to 30 of that decision.
43. The following propositions can be derived from the approach of the TAT in *Babela*:
- (i) The appropriate starting point in looking at the application should have been the fact that the applicant had refugee status.
  - (ii) A great deal of weight should be put on the grant of that status.
  - (iii) The refugee status previously recognised should not be questioned without a very good reason for doing so.
  - (iv) Where there has been previous recognition of refugee status, the applicant has *prima facie* made out his entitlement to refugee status in the UK.
  - (v) The *prima facie* case may be rebutted, and the onus is on the respondent to rebut it.

- (vi) To deal with the burden of proof in this way satisfies considerations as to whether or not a cessation clause applies, and the "very persuasive" UNHCR guidance that refugee status should not be lightly tampered with, but should only be reviewed or annulled on the most substantial and clear grounds.
44. The IAT rejected the respondent's argument that it would never be able to satisfy a burden of proof where he did not know the basis upon which the refugee status was granted initially. The IAT stated that there was nothing in the papers to suggest that the Appellant's claim to asylum was on any basis other than that upon which he had claimed it in the UK.
45. The IAT stated that it was not concerned with changes between 1994 when the appellant left his country of origin and the date of determination, but with changes between 1998 (when he had been granted asylum in South Africa) and the determination. It held that nothing in the objective material enabled the respondent to satisfy the burden of proof required to satisfy the IAT that the cessation clauses applied.
46. *Babela* was considered in *KK*. In *KK* the claimant had been granted refugee status by Zimbabwe under the Organization of African Unity (now African Union) Convention governing Specific Aspects of Refugee Problems in Africa. The IAT stated at paragraphs 17 to 20:

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

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

*19. But the important point is that it does not prevent the United Kingdom from challenging the basis of the grant in the first place. It does not require only that there be a significant change in circumstances since the grant was*

*made. Clear and substantial grounds may show that the grant should never have been made by the authorities; it may be relevant to show that the authorities in the country in question lacked relevant information or did not apply the Geneva Convention in the same way. Exclusionary provisions may be relevant. The procedures adopted for examination of the claim may also be relevant. Considerations of international comity may be rather different as between ELI member states and those with less honest administrations or effective legal systems.*

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

**(b) The approach of the European Court of Human Rights**

47. The European Court of Human Rights, in determining whether an individual is entitled to protection under Article 3 ECHR, has given "due weight" to UNHCR's recognition of that person's mandate refugee status, even though the Court is not engaged in determining refugee status.

48. In *Abdolkhani and Karimnia v. Turkey*, Application No. 30471/08, 22 September 2009, the applicants, originally from Iran, had been recognised as mandate refugees whilst in Iraq and had then entered Turkey. The Court, in determining whether the applicants' removal would expose them to treatment prohibited by Article 3, stated that:

*"82. The Court must also give due weight to the UNHCR's conclusions regarding the applicants' claims, before making its own assessment of the risk which the applicants would face if they were to be removed to Iran .... In this connection, the Court observes that, unlike the Turkish authorities, the UNHCR interviewed the applicants and had the opportunity to test the credibility of their fears and the veracity of their account of circumstances in their country of origin. Following these interviews, it found that the applicants risked being subjected to an arbitrary deprivation of life, detention and ill-treatment in their country of origin (see paragraphs 8 and 9 above)."*

49. Other cases have taken an analogous approach.<sup>27</sup>

**(c) Law and practice in other national jurisdictions**

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<sup>27</sup> *Jabari v Turkey* (Application No 40035/98), 11 July 2000, paragraph 41; *Dbouba v Turkey* (Application No 15916/09), 13 July 2010, paragraph 42; *MB and others v Turkey* (Application No 36009/08), 15 June 2010, paragraph 33; *Ahmadpour v Turkey* (Application No 12717/08), 15 June 2010, paragraphs 39 and 40; *Abdulkhakov v. Russia* (Application No. 14743/11), 2 October 2012, see paragraph 147.

50. There is not a common approach among EU States or more broadly in relation to the domestic effect of recognition of mandate status by UNHCR. Annex 1 to this submission sets out applicable national legislation where this exists, as well as decisions and practice in national jurisdictions regarding the situation of persons previously recognised under UNHCR's mandate who seek asylum in another country.
51. States adopt a variety of approaches. Nevertheless, the fact of recognition by UNHCR can generally be seen to carry considerable weight.
52. The situation is clearest in France and Bulgaria, where legislation stipulates that a refugee recognised under UNHCR's mandate is automatically to be recognised as a refugee. In the Netherlands, the Aliens Circular provides protection from removal to the country of origin for individuals whom UNHCR's representation in the Netherlands states are refugees.
53. States regularly rely on UNHCR's refugee determinations in the context of credibility assessment. States also appear most often to assess cases differently from UNHCR where circumstances have changed in the country of origin since UNHCR's original recognition of status or where concerns about credibility and/or exclusion arise or where the State has access to additional information.
54. Generally, however, several countries grant UNHCR mandate refugees some form of subsidiary protection if they are not confirmed as refugees as such.

**VII. The material disclosed by UNHCR in connection with this case**

55. UNHCR notes that the appellant seeks permission to adduce in this appeal interview and assessment forms relative to UNHCR's RSD in relation to the appellant in 2003. UNHCR offers no submission as to whether such permission ought to be given.
56. It is however important to note that the disclosure of material in this case goes beyond that which would normally be made by UNHCR. It should not be regarded as setting a precedent or indicating that similar material would be produced in another case. UNHCR reviewed the question of disclosure in the course of preparations for this appeal, and decided to disclose the interview and assessment forms to the appellant, the respondent, and the Court if the appellant wished that to be done. For the reasons touched on in paragraph 35, requests for disclosure are treated with particular care having regard to the security of the individual, the security of UNHCR staff and the humanitarian and non-political character of the work of UNHCR: *Procedural Standards*, paragraph 2.1.2. Interview transcripts and notes are not normally disclosed.

57. UNHCR's decision in the present case took place before the publication of the *Procedural Standards*<sup>28</sup> and thus the documents disclosed should not be taken as representative of the way in which decisions would be taken and recorded today.

**IX. Summary and conclusion**

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



**AILSA CARMICHAEL QC**

**TOM HICKMAN**

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<sup>28</sup> see footnote 14, above.