



Fair and efficient asylum procedures: a non-exhaustive overview of applicable international standards

This note describes the applicable international standards and best state practice in individual asylum procedures.¹ This is not an exhaustive overview and it is primarily intended to inform decision-makers and refugee advocates on principles relevant to the current asylum procedures in Japan. Topics selected in part II reflect issues relevant to Japan and examples of best practice.

I. International Legal Framework

The 1951 Convention and the 1967 Protocol relating to the Status of Refugees define those to whom international protection is to be conferred and establish key principles such as non-penalisation of entry and non-refoulement. However, they do not set out procedures for the determination of refugee status as such. Yet it is generally recognized that fair and efficient procedures are an essential element in the full and inclusive application of the 1951 Convention.²

In view of the nature of the risks involved and the grave consequences of an erroneous determination, it is essential that asylum-seekers be afforded full procedural safeguards and guarantees at all stages of the procedure. The necessity to provide fair and efficient refugee status determination procedures in the context of individual asylum systems stems from the right to seek and enjoy asylum, as guaranteed under Article 14 of the Universal Declaration of Human Rights, and the responsibilities derived from the 1951 Convention, international and regional human rights instruments, as well as relevant Executive Committee conclusions.³ The Programme of Action for the implementation of

¹ See, in particular, UNHCR Provisional Comments on the Amended Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004) on which political agreement was reached at the Justice and Home Affairs Council meeting of 19 November 2004.

² See UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)*, EC/GC/01/12, 31 May 2001, at paras. 4–5

³ See Executive Committee Conclusions No. 8 (XXVIII) – 1977 on Determination of Refugee Status; No. 15 (XXX) – 1979 on Refugees Without an Asylum Country; No. 30 (XXXIV) – 1983 on the Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum; No. 58 (XL) – 1989 on Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection. The importance of access to fair and efficient procedures has also been reaffirmed by the Executive Committee in its Conclusions No. 29 (XXXIV) – 1983; No.55 (XL) – 1989; No. 65 (XLII) – 1991; No. 68 (XLIII) – 1992; No. 71 (XLIV) – 1993; No. 74

the Agenda for Protection adopted by UNHCR's Executive Committee in 2002 also affirms that States are to grant access to asylum procedures and to ensure that their asylum systems provide for effective and fair decision-making.⁴

International refugee protection standards are reflected in individual asylum systems set up by States in accordance with their national judicial and administrative law standards. While different models have been put in place by States, certain core elements are necessary for decision-making in keeping with standards of fairness and due process.⁵

II. Issues of particular relevance to Japan

1. Access to asylum procedures

Under the 1951 Convention, a State's responsibility is engaged from the moment an asylum-seeker declares his/her intention to seek protection in that State against persecution to its authorities, be it at the border (airport or seaport) or within the territory. As has been underlined repeatedly by the General Assembly and UNHCR's Executive Committee, physical access of asylum-seekers to the territory of the State where they are seeking admission as refugees and, further, access to procedures where the validity of their refugee claim can be assessed are essential preconditions of international refugee protection. If an asylum application is filed at an airport or seaport, the same conditions as in-country applications must be met to ensure that persons in need of international refugee protection have access to fair and effective procedures. In particular, procedural guarantees for applicants, including access to information about the procedure and assistance of interpreters, should be available.

2. Decision-making authority

Given the fact that asylum applications raise issues which require specialized knowledge and expertise, best State practice provides for a clearly identified authority with responsibility for examining requests for refugee status and taking a decision in the first instance. Wherever possible, this should be a single central authority,⁶ which should also be responsible for making decisions on entry. Refugee status determination should be carried out by staff with specialized skills and knowledge of refugee and asylum matters, who are familiar with the use of interpreters and appropriate cross-cultural interviewing techniques. The central refugee authority should also include eligibility officials with training in the treatment of applications by women, children, or applicants who are victims of sexual abuse, torture or other traumatizing events.

(XLV) – 1994; No. 81 (XLVIII) – 1997; No. 82 (XLVIII) – 1997; No. 85 (XLIX) – 1998; No. 92 (LIII) – 2002

⁴ Goal 1, Objective 2, point 2, of the Programme of Action.

⁵ In Europe, for example, EU Member States are bound by a number of instruments which have been adopted by the European Union. See in particular, Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers, OJ L 31, 6 February 2003; and Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 3 October 2003. See also footnote 1.

⁶ Executive Committee Conclusion No. 8 (XXVIII) – 1977, at para. (e)(iii).

3. Time limits

Formal requirements should not pose an obstacle to the exercise of the right to seek asylum. In particular, an applicant's failure to submit an asylum claim within a certain time-limit should not of itself lead to the claim being excluded from consideration. Legislation which does not impose time-limits for the submission of asylum applications, as is the case in Japan, is clearly best practice.

4. Single procedure (determination of complementary protection needs).

The circumstances that force people to flee their country are complex and often of a composite nature. Information obtained during an examination of a claim under the 1951 Convention could also be relevant for the examination of complementary/subsidiary protection needs. Such an approach should increase efficiency and reduce the costs of decision-making in asylum matters. Basic procedural guarantees should apply equally to any request for international protection. Therefore, it is advisable that all forms of international protection which are available in a national legal system be decided upon by the same competent authority in one single procedure with the same minimum guarantees. Thus, each case should be considered in its entirety with regard to both 1951 Convention grounds and complementary/subsidiary protection needs.⁷

5. Right to legal assistance and representation

Asylum-seekers are often unable to articulate the elements relevant to an asylum claim without the assistance of a qualified counselor because they are not familiar with the precise grounds for the recognition of refugee status and the legal system of a foreign country. Quality legal assistance and representation is, moreover, in the interest of States, as it can help to ensure that international protection needs are properly identified. The efficiency of first instance procedures is thereby improved. In UNHCR's view, the right to legal assistance and representation is an essential safeguard, especially in complex asylum procedures. It is also important to guarantee free legal assistance and representation in first instance procedures and against negative decisions.⁸ Adequate provision should additionally be made for asylum-seekers with special needs (unaccompanied children, victims of torture and other traumatic experiences) who generally require additional legal, as well as other, assistance. State practice usually recognizes the need for free legal assistance and/or representation in the event of a negative decision, in some cases under certain conditions.⁹

⁷ A number of countries apply the single asylum procedure. The Immigration Control and Refugee Recognition Act of Japan makes provision for special residency permit to the applicant whose request for refugee status was rejected. However, criteria for such alternative form of protection are not specified in the law.

⁸ In Japan, asylum-seekers do not have the right to be assisted by a legal counsel at the first instance interview. However, the presence of a legal counsel is possible on appeal. There is no state-sponsored free of charge legal assistance to asylum-seekers.

⁹ See Article 13 of the Amended Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status.

6. Appeals procedures: The right to an effective remedy

In most countries, applicants have the right to an effective remedy before an independent and impartial tribunal or body. Such an appeal instance has the jurisdiction to review questions both of fact and law. In practice, the combination of specialist expertise with quasi-judicial independence has proven particularly beneficial for the quality of decision-making.¹⁰

7. Report of personal interview

It is important that a written report is made of every personal interview, containing at least the essential information regarding the application, as presented by the applicant. Based on best state practice, the applicant has access to the report of the personal interview and his/her approval is sought on the contents of the report of the personal interview. Verifying the contents of the report of a personal interview is useful not only to avoid misunderstandings but also to facilitate the clarification of contradictions.¹¹

¹⁰ In most industrialized countries, the second-instance authority in the substantive asylum determination procedure is either an independent administrative tribunal or an administrative court, with at least one further possibility for judicial review. In Japan, there is a two-tier administrative procedure within the Immigration Bureau of the Ministry of Justice, which does not provide an opportunity for independent review, followed by two stages of judicial review. However, in the context of judicial review, the case is not considered “de novo” and thus does not provide a full review of questions of fact and law.

For examples of accepted standards, see Article 38 of the Amended Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status.

¹¹ See, for example, Article 12 of the Amended Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status: “ 1. Member States shall ensure that a written report is made of every personal interview, containing at least the essential information regarding the application, as presented by the applicant, in terms of Article 4(2) of Council Directive 2004/83/EC.
2. Member States shall ensure that applicants have timely access to the report of the personal interview. Where access is only granted after the decision of the determining authority, Member States shall ensure that access is possible as soon as necessary for allowing an appeal to be prepared and lodged in due time.
3. Member states may request the applicant's approval on the contents of the report of the personal interview. Where an applicant refuses to approve the contents of the report, the reasons for this refusal shall be entered into the applicant's file. The refusal of an applicant to approve the contents of the report of the personal interview shall not prevent the determining authority from taking a decision on his/her application.”

In Japan, the interview report (questions and answers) is read aloud to the applicant who signs it at the end of the interview. However, the interview report is not shared in writing with the applicant or his/her counsel, except for judicial review purposes, that is, only when the administrative phase of the procedure is completed and the appeal rejected. Best state practice shows that the applicant and/or his legal representative have access to the record of the interview for the purpose of appeal (for example, Ireland, Austria, Germany, The Netherlands, Australia, and New Zealand).

8. Country of origin information relied upon by the determining authority

It is generally recognized that country of origin information should be obtained from various sources, such as information from UNHCR as to the general situation prevailing in the countries of origin of applicants.¹² UNHCR would like to draw attention to its country of origin and legal databases known as 'REFWORLD', as well as to other reliable sources available on internet, including Member States, NGOs and specialized sites such as www.ecoi.net. In UNHCR's view, information used as a basis for decisions should be similarly available to the asylum-seeker and his or her legal adviser/counselor, and should further be subject to the scrutiny of reviewing bodies.¹³ This principle of "equality of arms" is reflected in best State practice.¹⁴

9. Access by the applicant to reasons for rejection and other information on file

Best State practice ensures that the reasons for not granting refugee status

¹² See Article 7 (2) of the of the Amended Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status: "2. *Member States shall ensure that decisions by the determining authority on applications for asylum are taken after an appropriate examination. To that end, Member States shall ensure that (a) applications are examined and decisions are taken individually, objectively and impartially; (b) precise and up-to-date information is obtained from various sources, such as information from the United Nations High Commissioner for Refugees (UNHCR), as to the general situation prevailing in the countries of origin of applicants for asylum and, where necessary, in countries through which they have transited, and that such information is made available to the personnel responsible for examining applications and taking decisions;*"

¹³ In Japan, the country of origin information which is relied upon by the determining authority is not shared with the applicant or his/her counsel.

¹⁴ For example, in Australia, Austria, Belgium, Denmark, Germany, Ireland, the Netherlands, and New Zealand, country of origin information which is relied upon to make a decision, is generally shared with the applicant and/or his legal representative, for appeal purposes. In Denmark and Germany, this includes internal reports.

are, in fact and in law, stated in the decision.¹⁵ Such information needs to be shared with the applicant as soon as necessary for allowing an appeal to be prepared and lodged in due time. In UNHCR's view, it is important that decisions are properly substantiated so that the applicant could appeal meaningfully from such negative decision. Furthermore, it is generally recognized that the legal counsel who assists or represents an applicant for asylum also needs to know the reasons for rejection of the applicant's claim.¹⁶ Should information and its sources be withheld, it should be only done under clearly defined conditions, where disclosure of sources would seriously jeopardize national security or the security of the organizations or persons providing information.¹⁷

9. Confidentiality principle in relation to asylum applicants

Best State practice guarantees that for the purpose of examining individual cases, States shall do not disclose the information regarding individual applications for asylum, or the fact that an application has been made, to the alleged actor(s) of persecution of the applicant for asylum, or obtain any information from the alleged actor(s) of persecution in a manner that would result in such actor(s) being directly informed of the fact that an application has been made by the applicant in question.¹⁸

¹⁵ See Article 8 of the Amended Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status: *1. Member States shall ensure that decisions on applications for asylum are given in writing. 2. Member States shall also ensure that, where an application is rejected, the reasons in fact and in law are stated in the decision [emphasis added] and information on how to challenge a negative decision is given in writing. Member States need not state the reasons for not granting the refugee status in the decision where the applicant is granted a status, which offers the same rights and benefits under national and Community law as the refugee status by virtue of Council Directive 2004/83/EC. In these cases, Member States shall ensure that the reasons for not granting the refugee status are stated in the applicant's file, and that the applicant has, upon request, access to his/her file."*

For example, in Austria, Belgium, Germany, Ireland and the Netherlands interview reports and all relevant documentation used in refugee status determination are shared with the applicant and counsel. In Australia and New Zealand, written, substantiated reasons for decision are provided at both the primary and review levels. In Japan, the applicant receives a notification of the rejection of his/her claim with a succinct statement on the reasons for rejection. Additional information on the reasons for rejection are not available at the first and second instance stages of the procedure. Information describing some aspects of the reasoning behind the decision becomes available in the context of civil court proceedings.

¹⁶ See Article 14 *ibid*.

¹⁷ See footnote 14 above.

¹⁸ For an example on specific regulations on confidentiality requirements, see United States (Department of Homeland Security) Confidentiality Regulations available at <http://uscis.gov/graphics/lawsregs/8cfr.htm>; See also Article 22 of the Amended Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status: "*For the purpose of examining individual cases, Member States shall not: (a) directly disclose the information regarding individual applications for asylum, or the fact that an application has been made, to the alleged actor(s) of persecution of the applicant for asylum.(b) obtain any information from the alleged actor(s) of persecution in a manner that would result in such*

10. Guarantees for separated and unaccompanied children

Separated and unaccompanied children require special procedural safeguards, including the application of the principle of the “best interest of the child” throughout the whole asylum procedure in accordance with the 1989 Convention on the Rights of the Child.¹⁹

11. The role of UNHCR

Best State practice guarantees access by UNHCR to asylum-seekers and information on asylum applications in order to present its views, in the exercise of the Office’s supervisory responsibilities under its Statute and Article 35 of the 1951 Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure. Information on the applicant’s file is usually shared with UNHCR²⁰ and States normally take UNHCR’s position into account when determining refugee status. Depending on the system in place, UNHCR offers its advice and expertise at the admission stage (e.g. airports), in the first instance or appeal stage. UNHCR’s contribution to the national refugee status determination procedures can take various forms. For example, participate as an observer in hearings and providing views on individual cases (Canada, Spain, Germany), review decisions (Austria, New Zealand, Switzerland), provide advisory opinions (Belgium, United States), designate an expert to act as a judge in the appeal body (France), have a review right in negative decisions

actor(s) being directly informed of the fact that an application has been made by the applicant in question, and would jeopardise the physical integrity of the applicant and his/her dependants, or the liberty and security of his/her family members still living in the country of origin.”

For information on applicable standards, see, for example, “Advisory Opinion on the Rules of Confidentiality regarding Asylum Information”, UNHCR Tokyo, 31 March 2005, http://www.unhcr.org/jp/protect/doc_e.html (Japanese version) <http://www.unhcr.org> (English version).

¹⁹ Further guidance on the treatment of separated children can be drawn from “UNHCR Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum”, February 1997, Save the Children and UNHCR: Separated children in Europe Programme ‘Statement of Good Practice’, Third edition, 2004; and ‘2004 Inter-agency Guiding Principles on Unaccompanied and Separated Children’. For additional information on accepted standards, see Article 15 of the Amended Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status.

²⁰ See, for example, Article 21 of the of the Amended Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status: “1. Member States shall allow the UNHCR:(a) to have access to applicants for asylum, including those in detention and in airport or port transit zones;(b) to have access to information on individual applications for asylum, on the course of the procedure and on the decisions taken, provided that the applicant for asylum agrees thereto; (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 asylum at any stage of the procedure.
2. Paragraph 1 shall also apply to an organisation which is working in the territory of the Member State on behalf of the UNHCR pursuant to an agreement with that Member State.”

(Switzerland, Netherlands) or conduct a joint monitoring project to improve the quality of decision-making (United Kingdom).

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