

IN THE COURT OF SESSION
ANNEX TO WRITTEN SUBMISSIONS FOR
THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES
IN THE APPLICATION FOR LEAVE TO APPEAL BY

I.A.

against a decision of the Asylum and Immigration Tribunal

National law and practice regarding UNHCR mandate refugees who seek asylum in another country

1. This annex to UNHCR's written submissions in the application for leave to appeal by I.A. against a decision of the Asylum and Immigration Tribunal before the Inner House of the Court of Session 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. It shows that there is not a common approach among European Union (EU) States or more broadly in relation to the domestic effect of recognition of mandate status by UNHCR.
2. States adopt a variety of approaches. Nevertheless, the fact of recognition by UNHCR can generally be seen to carry considerable weight. Most clearly, legislation in Bulgaria and France stipulates that a refugee recognised under UNHCR's mandate is automatically to be recognised as a refugee.¹ In the Netherlands, the Aliens Circular² provides protection from removal to the country of origin for individuals whom UNHCR's representation in the Netherlands states are refugees.
3. In terms of national practice as opposed to legislation, quite a number of States transfer mandate refugees seeking asylum in their State to a third State where, for instance, the Dublin II Regulation³ or safe third country provisions apply. The fact of mandate recognition by UNHCR also serves as a mechanism for ensuring that such cases are not channelled through procedures for applications considered manifestly unfounded. In others, it is regularly used in the context of credibility assessment. States appear most often to assess cases differently from UNHCR where circumstances have changed in the

¹ See, *Law on Asylum and Refugees (as amended in 2007)* [Bulgaria], 16 May 2002, Article 10, at <http://www.unhcr.org/refworld/docid/47f1faca2.html> and *Code de l'entrée et du séjour des étrangers et du droit d'asile (as amended in 2005)* [France] 22 February 2005, Livre VII, at <http://www.unhcr.org/refworld/docid/47c6c36c5b9e.html> respectively.

² Article C2/2.13. See also the Aliens Act, at <http://www.legislationline.org/documents/id/4680>

³ Under Council Regulation (EC) No. [343/2003](http://www.unhcr.org/refworld/docid/3e5cfc24.html), 18 Feb. 2003, 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, at <http://www.unhcr.org/refworld/docid/3e5cfc24.html> (hereafter the 'Dublin II Regulation').

country of origin since UNHCR's original recognition of status or where concerns about credibility and/or exclusion arise. Generally, however, most countries grant UNHCR mandate refugees some form of subsidiary protection if they are not confirmed as refugees as such.

4. The paragraphs which follow provide information on national legislation and practice. They are organised by country and listed in alphabetical order.
5. In Albania, the Albanian Office for Refugees (at the Ministry of Interior), which is responsible for assessing asylum claims at first instance, in practice acknowledges that mandate recognition by UNHCR creates a rebuttable presumption of a need for international protection. In such cases, UNHCR is asked unofficially for advice or expert opinion on various aspects of asylum cases, as generally provided for in Article 20 (3) of the Law on Asylum (Nos. 8432 and 10060) which states that 'UNHCR may offer to the Office for Refugees and the National Commission for Refugees proposals of a general character as well as recommendations concerning specific cases or cases of mass influx'.
6. In Austria, an initial procedure determines whether a case is admissible, i.e. whether another 'Dublin' State is responsible for assessing the claim or whether the applicant is able to access protection in a safe third country. Since the requirements for what constitutes a safe third country are high in Austria, it is accepted that refugees recognised under UNHCR's mandate in Azerbaijan and Turkey (the most common countries of first asylum for mandate refugees seeking asylum in Austria) cannot be returned there. In assessing whether asylum-seekers admitted to the procedure qualify for some form of international protection, the authorities regularly approach UNHCR to verify the situation of persons claiming to be mandate refugees. If the applicant agrees and the authorities ask for verification of his/her mandate refugee status or the applicant or his/her lawyers asks, UNHCR will provide a brief summary of the procedure, the claim and UNHCR's mandate determination. UNHCR is not aware of any case where a mandate refugee has received a final expulsion order from Austria to his or her country of origin.
7. In Belgium, mandate refugees may likewise be subject to the Dublin II Regulation provisions. When mandate refugees seek asylum in Belgium, UNHCR is usually contacted to confirm the individual's mandate status, the information provided being used in the context of the credibility assessment. Such persons have in general been recognised as refugees, as long as their claim is deemed credible and there are no reasons to exclude them.
8. In Bulgaria, while the law is clear, national practice appears weak. Article 10 of the Law on Asylum and Refugees provides that 'refugee status shall also be provided to a foreigner staying on the territory of the Republic of Bulgaria, recognised as a refugee by the

mandate of the United Nations High Commissioner for Refugees'.⁴ When, however, four former members of the People's Mujaheddin Organisation of Iran (PMOI) with mandate refugee status sought asylum in Bulgaria in September 2008, they were deported to Greece under a readmission agreement despite UNHCR initiatives seeking to persuade the authorities to respect the individuals' mandate refugee status and to secure emergency resettlement for them.

9. In Canada, a leading case appears to be *Kim v. Canada (Minister of Citizenship and Immigration)*, concerning a Cambodian national who was recognised by UNHCR, though never declared a refugee in Canada, and who was resettled in Canada in 1984 at the age of 12. The judge found that the appellant was not protected from refoulement by his status as a mandate refugee:

[42] *The most persuasive part of Mr. Kim's argument, it seems to me, is the idea that once recognized by the UNHCR as a refugee, he should be recognized internationally as such, including by the Government of Canada. The UNHCR Statute definition that creates the concept of mandate refugees is nearly identical to the Refugee Convention definition. Although they are substantially similar, mandate refugees are not treated in the same way as Convention refugees under Canadian law and this is, arguably, not fair.*

[43] *I think the answer to this objection is that it is up to Parliament to define how certain categories of non-citizens will be dealt with in terms of a right of non-refoulement. Convention refugees must not be refouled because Canada has signed the Refugee Convention, and likewise, those in danger of torture cannot be refouled because of Canada's commitments under the Convention Against Torture. There is no such obligation with respect to mandate refugees. In any case, mandate refugees are only declared refugees for the purpose of allowing the UNHCR to provide help. Once the mandate refugee has been resettled, the UNHCR's mandate no longer applies to that person.⁵*

10. In France, the *Code de l'entrée et du séjour des étrangers et du droit d'asile* provides:

Anyone persecuted for their action in support of liberty is recognised as a refugee, as is anyone who falls within the mandate of the United Nations High Commissioner for Refugees as set out in Articles 6 and 7 of its Statute adopted by the General Assembly of the United Nations on 14 December 1950, or who fulfils the definition set out in Article 1 of the Geneva Convention of 28 July 1951 relating to the Status of Refugees. Their situation is regulated by the provisions of the abovementioned

⁴ *Law on Asylum and Refugees (as amended in 2007)* [Bulgaria], 16 May 2002, at <http://www.unhcr.org/refworld/docid/47f1faca2.html>.

⁵ *Kim v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 437 (CanLII), 1 April 2005, at <http://www.canlii.org/en/ca/fct/doc/2005/2005fc437/2005fc437.html>, paras. 42-43. To UNHCR's knowledge, the case did not proceed to the Federal Court of Appeal.

11. The applicability of this provision has been reaffirmed by the French *Commission des recours des réfugiés* (CRR, Refugee Appeals Commission) in its decision in *Mbingo Borongo*, Appeal No. 345064, of 5 June 2000.⁷ In this case, the CRR overturned a decision of the *Office français de protection des réfugiés et apatrides* (French Office for the Protection of Refugees and Stateless Persons, OFPRA) which had denied the applicant refugee status on the grounds that he was excluded under Article 1F(c). The CRR found that UNHCR had originally recognised the applicant in May 1998 in Brazzaville, that the Office had re-examined the applicant's case and found that he was not excluded under Article 1F(c) which referred to "acts contrary to the purposes and principles of the United Nations", and that OFPRA's decision should be overturned.
12. In Germany, there is no legal obligation under German law to transfer recognition as a refugee by UNHCR into recognition by the German authorities or to take mandate refugee status into account in the German asylum procedure. Recognition by UNHCR will not necessarily lead to the granting of international protection by the German authorities. It may nevertheless provide certain indications and may have procedural consequences. In one case, for instance, an applicant with mandate refugee status was admitted to the territory for the asylum procedure, since mandate recognition was taken as an indication that the case could not easily be solved and therefore that it could not be dealt with in the German airport procedure.
13. In Greece, legislation does not refer to mandate refugees who may seek asylum in Greece. In practice, however, UNHCR's mandate recognition is taken into account, at least for the purposes of credibility assessment, although they are not necessarily recognised as refugees. In November 2009, for instance, the Minister for Citizens Protection announced that 16 Iranian former members of the PMOI, recognised as refugees under UNHCR's mandate while in Iraq, would receive subsidiary protection. UNHCR had long advocated that their cases be examined on a priority basis as manifestly well-founded claims.
14. In Italy, where UNHCR participates by law in the asylum procedure, refugee status recognised by UNHCR under its mandate carries significant weight in practice in the

⁶ «Livre VII Le droit d'asile, Titre 1 Généralités, Chapitre 1 La qualité de réfugié (PA II alinéa 7 de l'article 2 de la loi n° 52-893 du 25 juillet 1952 relative au droit d'asile): Article L. 711-1 - La qualité de réfugié est reconnue à toute personne persécutée en raison de son action en faveur de la liberté ainsi qu'à toute personne sur laquelle le haut-commissariat des Nations unies pour les réfugiés exerce son mandat aux termes des articles 6 et 7 de son statut tel qu'adopté par l'Assemblée générale des Nations unies le 14 décembre 1950 ou qui répond aux définitions de l'article 1er de la convention de Genève du 28 juillet 1951 relative au statut des réfugiés. Ces personnes sont régies par les dispositions applicables aux réfugiés en vertu de la convention de Genève susmentionnée. »

⁷ *Commission des recours des réfugiés, Sections réunies, No. 345064, M. M., 5 June 2000, at <http://www.unhcr.org/refworld/docid/4a54bbc80.html>. (As of January 2008, the CRR was replaced by the *Cour nationale du droit d'asile*, (National Court of Asylum.)*

assessment of the claim. In most cases, the refugee status of mandate refugees seeking asylum in Italy is confirmed after an interview, although in some cases subsidiary protection is granted.

15. In Malta, adjudicators take mandate recognition by UNHCR into account when assessing the asylum claim.⁸ There are cases where asylum applicants granted mandate refugees status in African countries such as Libya had their asylum application rejected in Malta. In other cases, the appeal body has found that the fact that an asylum-seeker had already been recognised by UNHCR was a reason to reject the claim in Malta on the grounds that the individual had found protection elsewhere (even if mandate recognition did not in fact offer effective protection in that country).

16. In the Netherlands, Article C2/2.13 of the Aliens Circular provides:

On the basis of Article 35 of the Refugee Convention, The Netherlands works with UNHCR on the area of refugee policy. The obligation of Article 35 of the Convention does not entail a duty to follow UNHCR's standpoints. The Netherlands has its own authority concerning status determination and decisions to grant residence permits. If an alien has already been recognized as a refugee, an evaluation will take place to determine whether this recognition was on a group-based or individual basis and to what extent the situation in the country of origin has altered. Furthermore in a case where an individual declaration was given by UNHCR, individual testing will take place in which altered circumstances in the country of origin since the mandate certificate will be taken into account. In case UNHCR's representation in The Netherlands is of the opinion that the alien is a refugee on the grounds of his/her individual statement, he/she shall not be removed to the country of origin. This does not necessitate the granting of a residence permit to the alien. Removal to another country, for example on the basis of Article 30, under (a) or (d), Aliens Act or Article 31, second indent, under (h) or (i) Aliens Act will remain possible.⁹ (unofficial

⁸ The only reference in Maltese law to mandate refugee status is a transitory provision stating that holders of this status prior to the establishment of the Refugee Commission in Malta (i.e. before 2002) shall continue to be regarded as such, upon their request.

⁹ Article 30 of the Aliens Act (see <http://www.legislationline.org/documents/id/4680>) permits an application for a residence permit to be rejected if: 'a) another country which is party to the Convention on Refugees is responsible for processing the application by virtue of a treaty or a resolution of an international organisation binding on such country and the Netherlands; ... or (d) the alien will be transferred to a country of earlier residence on the grounds of a treaty obligation between the Netherlands and the other country concerned, which is a party to the Convention on Refugees, the Convention for the Protection of Human Rights and Fundamental Freedoms (Trb. 1951, 154) and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Trb. 1985, 69) or has otherwise undertaken to observe Article 33 of the Convention on Refugees, Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.' Article 31 permits an application for a residence permit to be rejected 'if the alien has not made a plausible case that his application is based on circumstances which, either in themselves or in connection with other facts, constitute a legal ground for the issue of the permit'. The second indent states that the 'screening of an application shall take account, among other things, of the fact that: ... (h) the alien has resided in a

translation)

17. The Immigration and Naturalisation Directorate (IND) in the Netherlands regularly asks UNHCR to verify mandate recognitions from all over the world. Where a mandate refugee has come from a third country, the IND will generally reject the application and return the individual to that country on safe third country grounds, as long as there is no risk of him or her being returned to the country of origin.¹⁰ Where he or she falls within the terms of the Dublin II Regulation, this is applied. Otherwise, however, mandate refugees usually receive some form of status in the Netherlands. UNHCR is, for instance, aware of more than eight individuals from Iran (including two siblings whose father was active in the Kurdish Democratic Party of Iran), who had been recognised as refugees by UNHCR, who later claimed asylum in the Netherlands, and were granted either refugee status or a residence permit in 2009 and 2010.

18. In Poland, when a mandate refugee seeks asylum, the national authorities determining international protection needs usually take this fact into account. While there is no specific provision in Polish law regarding mandate refugees,¹¹ Articles 7 and 77 of the Code of Administrative Proceedings require the relevant administrative body to take into account all the circumstances of the case, including legal opinions and documents. Failure to do so or interpreting them in an inappropriate way would violate the relevant provisions of the Code and result in the appellate instance quashing the asylum decision. Thus, a failure of the relevant asylum body to take into account a UNHCR decision recognising mandate refugee status can be seen to violate the relevant provisions of the Code of Administrative Proceedings.

19. In Romania, in two cases of mandate refugees seeking asylum known to UNHCR, their recognition by UNHCR was not taken into account at the administrative level. One of the cases has now gone to a second appeal after a first appeal to the court in Galati failed to take into account a UNHCR document submitted by the appellant's lawyer and confirming that the individual was a mandate refugee.

20. In a Russian decision of 22 November 1999, in the case of *Muhammad Sadiq Zarguna v. Rostov RMS*, the Pervomaiski District Court of the Rostov-on-Don region referred to UNHCR Executive Committee Conclusion No. 12 (1978) on the extraterritorial effect of the

third country that is a party to the Convention on Refugees and one of the conventions referred to in section 30 (d) and the alien has not made a plausible case that such country does not fulfil its treaty obligations with regard to him; (i) the alien will be admitted to a country of earlier residence until he has found lasting protection elsewhere'.

¹⁰ UNHCR has, for instance, successfully argued that returning mandate refugees to Turkey is not an option.

¹¹ The situation of mandate refugees is not specifically mentioned in the law, but Article 39.6 of the Law on granting protection to aliens on the territory of the Republic of Poland of 13 June 2003 states: 'Opinions, documents and materials issued by a representative of the United Nations High Commissioner for Refugees shall be attached to files of the case.' This provision allows UNHCR, *inter alia*, to present documents confirming that an applicant was granted a refugee status.

determination of refugee status to decide that, because the applicant had been recognised as a mandate refugee by UNHCR in Uzbekistan, the Russian authorities must recognise his refugee status as well. The court noted that “once they accede to the 1951 Geneva Convention and the 1967 Protocol, States thereby agree for UNHCR to be a priority agent for providing international legal protection to refugees, with its decisions on refugee status in principle being binding on all States”.¹²

21. In Switzerland, UNHCR is regularly asked to provide information regarding the situation of persons seeking asylum who are UNHCR mandate refugees. This information is then mainly used in the context of credibility assessment. In some cases, mandate refugees who seek asylum in Swiss embassies abroad (as provided for under Swiss law) find their claim refused on the ground that they would be protected by UNHCR in the country where UNHCR's status determination took place and that there is therefore no need for Switzerland to grant an entry permit. While the Federal Administrative Court has recognised a number of mandate refugees on appeal, at least three cases concerning mandate refugees are known currently to be before this court.
22. Thus, while legislation and practice is not uniform among EU and other States, UNHCR's submission that mandate status should be given considerable weight and should be taken seriously into account by the UK decision-maker in the determination of an asylum claim is clearly consistent with the approach of a number of other States.

UNHCR Brussels, October 2010

¹² UNHCR, *Analysis of the Courts Practice in the Russian Federation as Pertaining to Refugee Status Determination*, June 2002, at <http://www.unhcr.org/refworld/docid/40b4a3a34.html>, p. 18.

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