



UNHCR

United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

**UNHCR
Regional Representation for Northern Europe**

Ynglingagatan 14, 6th fl.
SE-113 47 Stockholm

Tel.: +46 8 457 4880
Fax: +46 8 457 4887
Email: swest@unhcr.org

11 March, 2014

Notre/Our code: 19/RRNE/2014

Votre/Your code:

Dear Mr. Thor Andre Bjerkhaug,

Re: **Response to request for UNHCR's guidance on the interpretation of Article 31 of the 1951 Convention Relating to the Status of Refugees**

With reference to correspondence concerning your client, Mr. Thierry Jean Jacques Ebongue Ndjankoum, DOB.24.12.1984, please find enclosed UNHCR's guidance on the interpretation of Article 31 of the 1951 Convention Relating to the Status of Refugees.

I hope you will find this guidance useful and invite you to contact us again if you have any further questions in this regard.

Yours sincerely,

Karolina Lindholm Billing
Senior Regional Legal Officer

Thor Andre Bjerkhaug
Brusletta 14
2016 Frogner
Norway



UNHCR

United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

Response by the UNHCR Regional Representation for Northern Europe to request for guidance on the interpretation of certain elements in Article 31 of the 1951 Convention Relating to the Status of Refugees

I. Introduction

1. This guidance is submitted by the UNHCR Regional Representation for Northern Europe (RRNE) in response to a request, by the legal representative in the case of Mr. Thierry Jean Jacques Ebongue Ndjankoum before The Supreme Court of Norway, for UNHCR's views on the interpretation and application of certain elements in Article 31 of the 1951 Convention Relating to the Status of Refugees ("1951 Refugee Convention")¹.
2. The case in question concerns a national from Cameroon who has been charged and sentenced for the use of forged documents to enter Norway illegally. The applicant has explained that he left Cameroon to Nigeria in 2012, claiming fear of persecution after being imprisoned for two months in Cameroon, due to his sexual orientation as a homosexual. The applicant did not feel safe in Nigeria and left for Russia where he was subjected to racism and was not able to apply for asylum. Due to this situation, he did not feel safe and left for Norway. The applicant was stopped in the passport control at Gardermoen Airport, with a forged Portuguese residence-card and his Cameroonian passport. The applicant was charged for the use of forged documents and illegal entry into Norway in a decision of 1 October 2013 by Øvre Romerike Tingrett, and sentenced to 60 days in prison. The decision was upheld by Eidsivating Lagmannsrett in a decision of 12 December 2013.
3. UNHCR has a direct interest in the matter at hand, as the agency entrusted by the United Nations General Assembly with a mandate to provide international protection to refugees and, together with Governments, seek permanent solutions to the problem of refugees². According to its Statute, UNHCR fulfills its mandate inter alia by "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto[.]"³ UNHCR's supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Refugee Convention. Such

¹ UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations Treaty Series No. 2545, vol. 189, p. 137, available at: <http://www.unhcr.org/refworld/docid/3be01b964.html>.

² 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.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b3628>

³ *Ibid.*, paragraph 8(a).

guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (“UNHCR Handbook”) and subsequent Guidelines on International Protection⁴. This supervisory responsibility is reiterated in Article 35 of the 1951 Refugee Convention and in Article II of the 1967 Protocol relating to the Status of Refugees (“1967 Protocol”)⁵.

4. UNHCR also provides information directly to decision-makers, legal representatives and judicial and quasi-judicial bodies on the interpretation and application of provisions in the 1951 Refugee Convention its 1967 Protocol, including in response to requests for interpretative guidance. Such information is provided without prejudice to UNHCR’s position under the Convention on the Privileges and Immunities of the United Nations.
5. UNHCR’s expertise on asylum issues has been acknowledged in the context of the European Union’s asylum *acquis*⁶ and beyond, including in pronouncements of the European Court of Human Rights, which has highlighted the reliability and objectivity of UNHCR in this field.

II. Issues addressed to UNHCR for interpretative guidance

6. The issues addressed by the legal representative to UNHCR concern the right to freedom of movement and the right to liberty and security of the person as reflected, *inter alia*, in Article 31(1) of the 1951 Convention, the personal scope of the protection provided for in Article 31(1), and the conditions of entitlement.

III. The right to free movement and the right to liberty and security of the person under international human rights law and international refugee law

⁴ UN High Commissioner for Refugees, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011, HCR/IP/4/ENG/REV. 3, available at: <http://www.refworld.org/docid/4f33c8d92.html>

⁵ According to Article 35 (1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of th[e 1951] Convention”.

⁶ The ‘Union’s asylum *acquis*’ refers to the accumulated legislation, legal acts, and court decisions which constitute the body of European Union asylum law. In this regard, see Recital 10 of Regulation 439/2010 of 19 May 2010 establishing the European Asylum Support Office, OJ L 132/11 of 29.05.2010; Recital 15 of Council Directive 2004/83/EC on minimum standards for the qualification and status of third-country nationals as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304/12 of 30.09.2004. See also the opinion of Advocate-General Sharpston in Case C-31/09, Nawras Bolbol v Bevándorlási és Állampolgársági Hivata, recognising the persuasive force of UNHCR’s statements, paragraph 16; and the references to quotations of UNHCR’s positions in the opinion of Advocate-General Mazák in Cases C-175/08, C-176/08, C-178/08 and C-179/08, Aydin Salahadin Abdulla and others v Bundesrepublik Deutschland, paragraph 20; Opinion of Advocate-General Poiares Maduro in Case C-465/07, Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie [2009] ECR I-921, which also recognises UNHCR’s expertise, paragraph 27.

⁷ September 1994. With regard to the **right to liberty and security of the person**, see, e.g.: Articles 3 and 9, UDHR; Article 9, ICCPR; Article 5(1), ECHR; Article 6, European Union, Charter of Fundamental Rights of the European Union, 7 December 2000, Official Journal of the European Communities, 18 December 2000 (2000/C 364/01) (hereinafter “Charter of Fundamental Rights of the EU”); Articles 1 and 25, Organization of American States, American Declaration of the Rights and Duties of Man, 2 May 1948, O.A.S. Res. XXX, 1948; Article 7(2), Organization of American States, American Convention on Human Rights, 22 November 1969; Article 6, ACHPR.

7. The fundamental right to liberty and security of the person, and the correlated right to freedom of movement, are reflected in all the major international and regional human rights instruments,⁷ as well as in international refugee law.⁸ Article 26 of the 1951 Convention provides for a general right of free movement for those refugees “lawfully in” the territory of the host State, subject only to necessary restrictions which may be imposed.⁹ This provision also applies to asylum-seekers.¹⁰

8. In addition to Article 26, the 1951 Convention contains a non-penalization clause, which provides that, even entry without authorization does not give the State an automatic power to detain under international refugee law. Article 31 (1) of the 1951 Convention provides that:

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 Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

9. A policy of prosecuting or otherwise penalising, including through the use of detention, illegal entrants, those present illegally, or those who use false documentation, without regard to the circumstances of flight in individual cases, and the refusal to consider the merits of an applicant’s asylum claim, amount to a breach of a State’s obligations in international law.¹¹

10. It is important to note that “a refugee, whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements of legal entry (possession of national passport and visa) into the country of refuge”¹². On account of

⁸ See, e.g. UNHCR, Global Consultations on International Protection/Third Track: Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems, 4 September 2001, EC/GC/01/17, available at: <http://www.unhcr.org/refworld/docid/3bfa81864.html>.

⁹ See Alice Edwards, Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants, April 2011, PPLA/2011/01.Rev.1, available at: <http://www.unhcr.org/refworld/docid/4dc935fd2.html>; Reinhard Marx, “Article 26 (Freedom of Movement)”, in Andreas Zimmerman (ed.), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (Oxford University Press 2011), at page 1147.

¹⁰ See, UNHCR, Reception of Asylum-Seekers, including Standards of Treatment, in the Context of Individual Asylum Systems, EC/GC/01/17, 4 September 2001, at para. 3. See also, *R. v. Uxbridge Magistrates Court, ex parte Adimi*, [1999] 4 All ER 520, 29 July, 1999, available at: <http://www.unhcr.org/refworld/docid/3ae6b6b41c.html> (hereinafter “Adimi”), at 527.

¹¹ UNHCR, Global Consultations on International Protection: Summary Conclusions on Article 31 of the 1951 Convention relating to the Status of Refugees – Revised, 8-9 November 2001 (hereinafter “Global Consultations Summary Conclusions”), available at: <http://www.unhcr.org/3bf4ef474.html>, at paras. 5-7; See also, Guy Goodwin-Gill, “Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection”, in Erika Feller, Volker Turk and Frances Nicholson (eds.), *Refugee Protection in International Law*, UNHCR’s Global Consultations on International Protection (Cambridge University Press, 2003), available at: <http://www.unhcr.org/refworld/pdfid/470a33b10.pdf>, at page 219 (paras. 11-12).

the specific circumstances of the flight of persons in need of international protection, it is expected that refugees and asylum-seekers may arrive with false documents or insufficient documentation. Indeed, the Executive Committee of the Programme of UNHCR has noted that “it is recognised that circumstances may compel a refugee or asylum-seeker to have recourse to fraudulent documentation when leaving a country in which his physical safety or freedom are endangered.”¹³

IV. Personal Scope of Article 31(1) of the 1951 Convention

11. On the basis of the clear language contained in Article 31(1) of the 1951 Convention, the obligation not to impose penalties contained in the provision applies to refugees. Article 31(1) also applies to asylum-seekers, by virtue of the fact that recognition of refugee status does not make an individual a refugee, but only declares him/her to be one.¹⁴ The term asylum-seeker applies to those whose claims are being considered under an admissibility or pre-screening procedure as well as those who are being considered under refugee status determination procedures. It also includes those exercising their right to seek judicial and/or administrative review of their asylum request.¹⁵

V. The conditions for entitlement to the protections of Article 31(1) of the 1951 Convention – “coming directly”, “without delay” and “good cause”

12. Article 31 covers all persons claiming international protection who come “directly” from a territory where their life or freedom was threatened in the sense of Article 1 of the 1951 Convention. The term “coming directly” covers the situation of a person who enters the country in which asylum is sought directly from his/her country of origin, or from another country where his/her protection, safety and security could not be assured. The term “directly” must not be taken in the literal sense as refugees are not required to have come without pause from their country of origin. To ensure its legal effect in practice, Article 31 was also intended to apply, and has been interpreted to apply, to persons who have briefly transited other countries, who are unable to find

¹² Draft report of the Ad Hoc Committee on Statelessness and Related Problems, “proposed draft Convention Relating to the Status of Refugees”, UN doc. E/AC.32.L.38, 15 Feb. 1950, Annex I (draft Art.26); Annex II (comments, p.57).

¹³ Executive Committee Conclusion No. 58 (XL) – 1989, (i). See in the UN High Commissioner for Refugees, *Thematic Compilation of Executive Committee Conclusions*, June 2011, Sixth edition, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4f50cfbb2>

¹⁴ “Global Consultations Summary Conclusions”, para. 10 (g). This position was confirmed in *Adimi* (see footnote 10 above), at para. 16, where Simon Brown LJ concluded:

“That Article 31 extends not merely to those ultimately accorded refugee status but also to those claiming asylum in good faith (presumptive refugees) is not in doubt.” Upheld in *R. v. Asfaw* [2008] UKHL31, at para 62. See, also Guy Goodwin-Gill, “Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection”, in Erika Feller, Volker Turk and Frances Nicholson (eds.), *Refugee Protection in International Law, UNHCR’s Global Consultations on International Protection* (Cambridge University Press, 2003), at pp.185, 192; James C. Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press, 2005, at p.389.

¹⁵ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.refworld.org/docid/503489533b8.html>, para 9.

protection from persecution in the first country or countries to which they flee.¹⁶ No strict time limit can be applied to the concept “coming directly” and each case must be judged on its merits. The real question is whether effective protection is available for that individual in a particular country. The drafters only intended that immunity from penalty should not apply to refugees who had settled, temporarily or permanently, in another country in which effective protection is available. In all other cases, the term “directly” is interpreted widely.

13. With regard to the expression “*without delay*”, the promptness of presentation is a matter of fact and degree; it depends on the circumstances of the case, including the availability of advice.¹⁷ Given the special situation of asylum-seekers, in particular the effects of trauma, language problems, lack of information, previous experiences which often result in a suspicion of those in authority, feelings of insecurity, and the fact that these and other circumstances may vary enormously from one asylum-seeker to another, there is no time limit which can be mechanically applied or associated with the expression “without delay”.¹⁸
14. The term “without delay”, has furthermore been considered by the courts in two European Union Member States, to best be determined on a case by case basis. In the United Kingdom case of *R.v.Uxbridge Magistrates’ Court and Another, ex parte Adimi*,¹⁹ the court observed that “*the combined effect of visa requirements and carrier’s liability has made it well nigh impossible for refugees to travel to countries of refuge without false documents.*” The court held that the exemption from penal measures contained in Article 31 should apply as it was clear that the intended purpose of the provision “*was to provide immunity for genuine refugees whose quest for asylum reasonably involved them in breaching the law.*”
15. The court noted that the protections of Article 31(1) of the 1951 Convention applied both to refugees and asylum-seekers, and as much to those using false documents, as to those entering clandestinely. The court specifically rejected the government’s

¹⁶ Global Consultations Summary Conclusions (at footnote 11 above), at para. 10(c). See, also, *Adimi* (at footnote 10 above), at para. 18, where Simon Brown LJ concluded that: “I am persuaded by the applicants’ [...] submission, drawing as it does on the travaux préparatoires, various Conclusions adopted by UNHCR’s executive committee (ExCom), and the writings of well-respected academics and commentators (most notably Professor Guy Goodwin-Gill, Atle Grahl-Madsen, Professor James Hathaway and Dr Paul Weis), that some element of choice is indeed open to refugees as to where they may properly claim asylum. I conclude that any merely short term stopover en route to such intended sanctuary cannot forfeit the protection of the Article, and that the main touchstones by which exclusion from protection should be judged are the length of stay in the intermediate country, the reasons for delaying there (even a substantial delay in an unsafe third country would be reasonable were the time spent trying to acquire the means of travelling on), and whether or not the refugee sought or found there protection *de jure* or *de facto* from the persecution they were fleeing.”

¹⁷ Global Consultations Summary Conclusions (at footnote 11 above), at para. 10(f).

¹⁸ For the same reasons, a strict time limit to lodge an application for asylum may result in refolement and should thus not be applied. See UNHCR Comments on Article 7(1) of the Asylum Procedures Directive, ECHR Judgment in *Jabari v Turkey*, at para 40, and ExCom Conclusion N. 15 (XXX) lit. i.” The term “without delay” is to be interpreted on a case-by-case basis; Global Consultations Summary Conclusions (at footnote 11 above), at para 7.

¹⁹ See footnote 10 above.

argument that an asylum-seeker was obliged to claim asylum immediately upon arrival, holding that it was sufficient that the claimant had intended to claim asylum within a short time of arrival. Similarly, the Regional Superior Court (Landesgericht) in Münster, Federal Republic of Germany, found that an asylum-seeker who entered illegally and who presented himself to the authorities one week after arrival looking for advice on the asylum procedure was not to be penalised for illegal entry.²⁰

16. The expression “show good cause for their illegal entry or presence” requires a consideration of the circumstances under which the asylum-seeker fled. “Illegal entry” would, *inter alia*, include arriving or securing entry through the use of false or falsified documents, the use of other methods of deception or clandestine entry, including entry into State territory with the assistance of smugglers or traffickers. “Illegal presence” would, for example, cover remaining after the elapse of a short, permitted period of stay. Having a well-founded fear of persecution is recognized in itself as ‘good cause’ for illegal entry. To “come directly” from such country via another country or countries in which s/he is at risk or in which generally no protection is available, is also accepted as “good cause” for illegal entry. There may, in addition, be other factual circumstances which constitute “good cause”.²¹ As noted above, it is also recognised that circumstances may compel a refugee or asylum-seeker to have recourse to fraudulent documentation when leaving a country in which his physical safety or freedom are endangered.²²
17. To ensure the full and inclusive application of Article 31, it is imperative that clear legislative or administrative action is undertaken to ensure that no penalties are in fact imposed for cases falling within Article 31(1). Where a State “leaves compliance with international obligations within the realm of executive discretion, a policy and practice inconsistent with those obligations involves the international responsibility of the State. The policy of prosecuting or otherwise penalising illegal entrants, those present illegally, or those who use false documentation, without regard to the circumstances of flight in individual cases, and the refusal to consider the merits of an applicant’s claim, amount to a breach of a State’s obligations in international law.”²³

UNHCR Regional Representation for Northern Europe
Stockholm, 3 March 2014

²⁰ Nos. 39 Js 688/86, LG Munster, 20 Dec. 1988. An appeal by the public prosecutor was rejected on 3 May 1989 by the Appeals Court (Oberlandesgericht) in Hamm.

²¹ For example, the non-penalization clause of Article 31(1) was found to be applicable even where an asylum-seeker has had an opportunity to file an asylum claim at the border entry point but did not do so because he or she had apprehensions of not being allowed entry. Swiss Federal Cassation Court, judgment of 17 March 1999, reported in *Asyl* 2/99, 21-3.

²² Executive Committee Conclusion No. 58, lit. (i).

²³ Guy Goodwin-Gill, “Article 31 of the 1951 Convention Relating to the Status of Refugees: non penalization, detention, and protection”, in Erika Feller, Volker Turk and Frances Nicholson (eds.), at p. 219.

