



UNHCR

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

UNHCR Representation in Japan

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18 January 2013

Re: Request for inquiry in the case of **

Dear Mr. Fukutaka Hashimoto,

I wish to refer to your letter dated 13 December 2012, enquiring about UNHCR's position on several issues of law relevant to the case of ** (*appellant and petitioner for acceptance of final appeal*) and the Government of Japan (*appellee and opponent*), **, including the standard of proof in refugee status determination with, first, in respect of the well-foundedness of the fear of persecution, and, second, in respect of assessing the credibility; the treatment of asylum-seeking children; and the detention of asylum-seeking children on grounds of illegal entry or stay. Please find below reference to UNHCR's guidance on the issues you raised.

UNHCR, being a subsidiary organ of the United Nations, has been entrusted by the UN General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions to the problem of refugees.¹ Paragraph 8(a) of its Statute and the Preamble of the 1951 Convention relating to the Status of Refugees ("1951 Convention")² confer responsibility upon UNHCR to supervise the application of international conventions for the protection of refugees³, whereas Article 35(1) of the 1951 Convention obliges States Parties to cooperate with UNHCR in the exercise of its functions.⁴ Similar obligations for states are laid down in Article II(1) of the 1967 Protocol relating to the Status of Refugees ("1967 Protocol"). 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 Convention. Such guidance is included in the UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status ("UNHCR Handbook" and "UNHCR Guidelines")⁵ as well as other notes and guidance, including UNHCR's Note on Burden and Standard of Proof in Refugee Claims⁶, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention ("UNHCR Detention Guidelines")⁷, and Guidelines on

¹ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), <http://www.unhcr.org/refworld/docid/3b00f0715c.html>.

² UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, at: <http://www.unhcr.org/refworld/docid/3be01b964.html>.

³ According to Article 8(a) of the 1950 *Statute of the Office of the United Nations High Commissioner for Refugees* ("the Statute") "The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by: (a) Promoting the conclusion and ratification of international conventions for the protection of refugees, *supervising their application* and proposing amendments thereto;" [emphasis added].

⁴ "Article 35 – Cooperation of the national authorities with the United Nations"1. *The Contracting States undertake to cooperate with the Office of the United Nations High Commissioner for Refugees... in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.*"

⁵ UNHCR, *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*, (re-issued) December 2011, HCR/IP/4/ENG/REV. 3, available at: <http://www.unhcr.org/refworld/docid/4f33c8d92.html>.

⁶ UN High Commissioner for Refugees, *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, available at: <http://www.unhcr.org/refworld/docid/3ae6b3338.html>.

⁷ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.unhcr.org/refworld/docid/503489533b8.html>.

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.⁸ UNHCR prepared the Handbook in 1979 at the request of Member States of the Executive Committee of the High Commissioner's Programme ("Executive Committee") to provide guidance to governments in applying the terms of the 1951 Convention and 1967 Protocol. In 2002, UNHCR began issuing Guidelines, as envisaged under the 2002 UNHCR Agenda for Protection,⁹ which was endorsed by the Executive Committee¹⁰ and the UN General Assembly.¹¹ The Handbook and Guidelines are based on the accumulated views of UNHCR, State practice, Executive Committee Conclusions, academic literature and judicial decisions at national, regional and international levels, over a sixty-year period.¹² The Handbook and Guidelines are intended to provide legal interpretive guidance for governments, legal practitioners, and decision-makers, including the judiciary. They are not "binding" per se, they are nonetheless recognized and applied by national authorities and courts as an authoritative source in interpreting the refugee definition and related procedural requirements.¹³

On the question of **standard of proof in establishing the well-foundedness of the fear** of persecution, UNHCR's 1998 Note on burden and standard of proof in refugee claims sets out a number of key principles.¹⁴ In general, the determination of refugee status does not purport to identify refugees as a matter of certainty, but as a matter of likelihood.¹⁵ The phrase "well-founded fear of being persecuted" is the key phrase of the refugee definition. In this context, the term "fear" means that the person believes or anticipates that he/she will be subject to persecution. This is established very largely by what the person presents as his/her state of mind on departure. Normally, the statement of the applicant will be accepted as significant demonstration of the existence of the fear.¹⁶

Further, a substantial body of jurisprudence has developed on what standard of proof is to be applied in asylum claims to establish wellfoundedness. This jurisprudence largely supports the view that there is no requirement to prove well-foundedness conclusively beyond doubt, or even that persecution is more probable than not. To establish "well-foundedness", persecution must be proved to be **reasonably possible**.¹⁷

⁸ UN High Commissioner for Refugees, 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.unhcr.org/refworld/docid/4b2f4f6d2.html>

⁹ UNHCR, *Agenda for Protection [Global Consultations on International Protection/General]*, Goal 1, June 26, 2002, A/AC.96/965/Add.1, at 5, available at <http://www.unhcr.org/refworld/docid/3d4fd0266.html>.

¹⁰ UNHCR Executive Committee, *General Conclusion on International Protection*, Oct. 8, 2002, No. 92 (LIII) – 2002, available at <http://www.unhcr.org/refworld/docid/3dafdce27.html>.

¹¹ UN General Assembly, Office of the UNHCR, *Resolution Adopted by the General Assembly*, Feb. 6, 2003, A/RES/57/187, ¶ 6, available at <http://www.unhcr.org/refworld/docid/3f43553e4.html>.

¹² Page 1 (Foreword), UNHCR, *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*, (re-issued) December 2011, HCR/1P/4/ENG/REV. 3, available at: <http://www.unhcr.org/refworld/docid/4f33c8d92.html>.

¹³ For example, Netherlands: *Osman Egal v. State Secretary for Justice*, AWB 98/3068 VRWET, Netherlands, The Hague District Court, 2 July 1998, available at: <http://www.unhcr.org/refworld/docid/3ae6b73718.html>. New Zealand: *Refugee Appeal No. 1/92 Re SA*, New Zealand: Refugee Status Appeals Authority, 30 April 1992, available at: <http://www.unhcr.org/refworld/docid/3ae6b73d8.html>. United Kingdom: *Horvath v. Secretary of State for the Home Department*, United Kingdom: House of Lords (Judicial Committee), 6 July 2000, available at: <http://www.unhcr.org/refworld/docid/3ae6b6e04.html>. *R v. Secretary of State for the Home Department, Ex parte Adan, Ex parte Aitseguer*, United Kingdom: House of Lords (Judicial Committee), 19 December 2000, available at: <http://www.unhcr.org/refworld/docid/3ae6b73b0.html>. United States of America: *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421; 107 S. Ct. 1207; 94 L. Ed. 2d 434; 55 U.S.L.W. 4313, United States Supreme Court, 9 March 1987, available at: <http://www.unhcr.org/refworld/docid/3ae6b68d10.html>.

¹⁴ UN High Commissioner for Refugees, *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, available at: <http://www.unhcr.org/refworld/docid/3ae6b3338.html>.

¹⁵ *Ibid.*, para. 2.

¹⁶ *Ibid.*, paras. 13 and 14.

¹⁷ *Ibid.*, para. 17. Also, UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*,

As for indicators for assessing well-foundedness of fear UNHCR has considered the following:

‘18. While by nature, an evaluation of risk of persecution is forward-looking and therefore inherently somewhat speculative, such an evaluation should be made based on factual considerations which take into account the personal circumstances of the applicant as well as the elements relating to the situation in the country of origin.

19. The applicant’s personal circumstances would include his/her background, experiences, personality and any other personal factors which could expose him/her to persecution. In particular, whether the applicant has previously suffered persecution or other forms of mistreatment and the experiences of relatives and friends of the applicant as well as those persons in the same situation as the applicant are relevant factors to be taken into account. Relevant elements concerning the situation in the country of origin would include general social and political conditions, the country’s human rights situation and record; the country’s legislation; the persecuting agent’s policies or practices, in particular towards persons who are in similar situation as the applicant, etc. While past persecution or mistreatment would weigh heavily in favour of a positive assessment of risk of future persecution, its absence is not a decisive factor. By the same token, the fact of past persecution is not necessarily conclusive of the possibility of renewed persecution, particularly where there has been an important change in the conditions in the country of origin.’¹⁸

On **assessing the credibility** of the applicant’s statements UNHCR considers that credibility is established where the applicant has presented a claim which is coherent and plausible, not contradicting generally known facts.¹⁹ Further, where there is an element of doubt in the mind of the adjudicator as regards the facts asserted by the applicant that should not prejudice the applicant’s claim; that is, the applicant should be given the “benefit of the doubt”.²⁰

As for the **treatment of asylum-seeking children** UNHCR’s submissions to the Inter-American Court of Human Rights in the framework of request for an Advisory Opinion on Migrant Children presented by MERCOSUR of February 2012 explains the general principles for the protection of asylum-seeking and refugee children (section 2) as well as guidance for early identification of children and their needs (section 3), appropriate and child-sensitive asylum procedures (section 4), and child appropriate reception standards (section 5).²¹

Finally, on the **detention of asylum-seekers** for their illegal entry or stay, including the detention of asylum-seeking children reference can be made to the 2012 UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention.²² Guideline 9.2 specifically refers to the detention of children.

April 2001, para. 10, available at: <http://www.unhcr.org/refworld/docid/3b20a3914.html>; UNHCR, Advisory Opinion by UNHCR on the Interpretation of the Refugee Definition, 23 December 2004, paras. 10 and 11 available at: <http://www.unhcr.org/refworld/docid/4551c0374.html>; and UNHCR, *In the High Court of Appeal, On Appeal From the Seoul Administrative Court. Between Messaoud Bennacer (Appellant) and Minister of Justice (Respondent): Written Submission on Behalf of the United Nations High Commissioner for Refugees*, paras. 17 and 18, 31 May 2005, available at: <http://swigea56.hcrnet.ch/refworld/docid/42da722f4.html>.

¹⁸ UN High Commissioner for Refugees, *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, available at: <http://www.unhcr.org/refworld/docid/3ae6b3338.html>.

¹⁹ *Ibid.*, para. 11.

²⁰ *Ibid.*, para. 12.

²¹ UN High Commissioner for Refugees, *UNHCR Submissions to the Inter-American Court of Human Rights in the framework of request for an Advisory Opinion on Migrant Children presented by MERCOSUR*, 17 February 2012, available at: <http://www.unhcr.org/refworld/docid/4f4c959f2.html>.

²² UN High Commissioner for Refugees, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.unhcr.org/refworld/docid/503489533b8.html>.

We hope that the guidance provided herewith clarifies the issues you have raised. UNHCR remains at your disposal for any further questions that may arise on the abovementioned matters.

Yours sincerely,
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Mr. Fukutaka Hashimoto
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