



Office of the United Nations High Commissioner for Refugees
Submission to the Supreme National Court of Justice

Writ of constitutional protection (Amparo en Revisión): 762/2019

Subject: Amicus Curiae*

General Registry
Second Chamber of the National Supreme Court of Justice
Present

1. The Office of the United Nations High Commissioner for Refugees ('UNHCR') has a direct interest in ensuring a proper and consistent interpretation of the 1951 Convention relating to the Status of Refugees ('1951 Convention')¹ in Mexico, as part of its supervisory responsibility,² and welcomes the opportunity to submit this *amicus curiae* in these proceedings in accordance with Thesis Number 2016906, issued by this Court.³ UNHCR makes this submission as *amicus curiae* in order to assist the Court in its interpretation and application of refugee law concepts in the context of applications for international protection.

Amicus Curiae

I. UNHCR's mandate, interest and expertise in this matter

2. UNHCR is a global humanitarian and non-political organisation. As a subsidiary organ of the United Nations, UNHCR has been entrusted by the United Nations General Assembly with the mandate to provide

* This submission does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognized principles of international law. UN General Assembly, *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, <http://www.refworld.org/docid/3ae6b3902.html>.

¹ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <https://www.refworld.org/docid/3be01b964.html>.

² UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, ('UNHCR Statute') 14 December 1950, A/RES/428(V), www.refworld.org/docid/3ae6b3628.html, para. 8(a).

³ Eighteenth Collegiate Court for Administrative Issues, *Amicus curiae; Normative Basis for the analysis and consideration of manifestations in such form in the Mexican Legal System*, Thesis Number 2016906, book number 54, May 2018, III, p. 2412.

international protection to refugees and, together with Governments, to seek solutions for refugees.⁴ Paragraph 8(a) of the 1950 Statute of the Office of the United Nations High Commissioner for Refugees ('Statute') and the Preamble of the 1951 Convention confer responsibility upon UNHCR to supervise the application of international conventions for the protection of refugees,⁵ including the 1951 Convention. This supervisory responsibility is reiterated in Article 35(1) of the 1951 Convention which obliges State Parties to cooperate with UNHCR in the exercise of its functions. Similar obligations for States are laid down in Article II (1) of the 1967 Protocol relating to the Status of Refugees.⁶

3. UNHCR provides information on a regular basis to decision-makers and courts of law concerning the proper interpretation and application of the provisions within the 1951 Convention and has a long history of acting as *amicus curiae* and/or as a third party intervener in many national and regional jurisdictions. The Office is often approached directly by courts or other interested parties to obtain UNHCR's '*unique and unrivalled expertise*'⁷ on particular legal issues. As the international body set up to monitor and implement the 1951 Convention, UNHCR has been granted intervener status in numerous jurisdictions all over the world, including the European Court of Human Rights, the Court of Justice of the European Union, the US Supreme Court, the Supreme Court of Norway, the Supreme Court of the United Kingdom (as well as the former House of Lords), the German Federal Constitutional Court and the Supreme Court of Canada among others.

4. UNHCR submits this amicus brief out of concern that Article 18 of the *Law on Refugees, Complementary Protection, and Political Asylum* ('*Refugee Law*')⁸ at issue in this case, significantly restricts access to asylum in a way that is at variance with two international legal protections: the right to seek asylum and the principle of *non-refoulement*. UNHCR has a strong interest in ensuring that Mexico's refugee law is consistent with its international treaty obligations, and respectfully offers its guidance on those obligations. Consistent with its approach in other cases, it does not address nor comment on the positions of the appellants, but is concerned solely with the interpretation and application of international refugee law.

II. International Standards on the Protection of Refugees and Asylum Seekers

A. The legislative framework and practice

⁴ UN General Assembly, *UNHCR Statute*, note 2 above, para. 1.

⁵ *Ibid.* Article 8(a) of 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'.

⁶ UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267: <https://www.refworld.org/docid/3ae6b3ae4.html>.

⁷ R (*on the application of EM (Eritrea)*) v. *Secretary of State for the Home Department*, [2014] UKSC 12, United Kingdom: Supreme Court, 19 February 2014, para.72, http://www.refworld.org/cases,UK_SC,5304d1354.html.

⁸ Mexico, *Law on Refugees, Complementary Protection and Political Asylum*, Official Journal of the Federation, January 27, 2011:

https://www.gob.mx/cms/uploads/attachment/file/211049/08_Ley_sobre_Refugiados_Proteccion_Complementaria_y_Asilo_Politico.pdf.

5. Mexico acceded to the 1951 Convention and the 1967 Protocol in 2000 and in January 2011, the *Refugee Law* was passed in order to bring Mexican law in line with the 1951 Convention.⁹ In August 2016, article 11 of the Political Constitution of the United Mexican States was amended to reflect the right of every person to seek and receive asylum in compliance with the 1951 Convention and article 22 (7) of the *American Convention on Human Rights* ('*American Convention*').¹⁰

6. Article 18 of the *Refugee Law* establishes that any individual who requests recognition as a refugee must do so within 30 business days of entry into Mexico.¹¹ Additionally, Article 19 of the *Regulation of the Law on Refugees and Complementary Protection*¹² establishes that requests filed beyond the 30 business day deadline can be admitted for review on an **“exceptional” basis** “when the alien *proves that because of causes beyond their will it was materially impossible to file* the request in timely fashion”.¹³ [emphasis added] If an applicant files a claim after the 30-day deadline, in order to analyze the asylum-seeker’s justification, the Mexican Commission for Refugees (COMAR) proceeds to inform the asylum-seeker that his/her claim has been filed after the deadline, and that a justification is required. The asylum-seeker has 5 days to present and *to prove* a justification beyond their control.

7. UNHCR is concerned that the current Article 18 of the *Refugee Law* and Article 19 of the *Regulation of the Law on Refugees and Complementary Protection* favor an arbitrary and discretionary application of the 30-day deadline exception, since there are no clear and uniform applicable standards or policies at national level. Moreover, due to this omission, scenarios can be identified in which COMAR does not take into consideration the merits and particularities of each case, but rather applies the deadline in a mechanical fashion. The National Commission for Human Rights has documented several cases in which i) applicants were not given an effective opportunity to present the reasons for the delay, and/or, ii) applicants were requested to provide the justification through a telephone interview and not through an in person hearing; and/or, iii) COMAR did not specify the criteria used or the reasons for denying the request for an extension.¹⁴

⁹ *Ibid.*

¹⁰ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969: <https://www.refworld.org/docid/3ae6b36510.html>.

¹¹ Article 18 of the *Refugee Law*: “The alien who requests recognition as a refugee must file her request in writing before the Ministry [of the Interior, via COMAR] within a 30 business day deadline computed starting from the following business day upon entry into the country or, if this is the case, from the following day in which it was materially possible to file the request according to the terms established in the Rulings [...]” [unofficial translation] note 8 above.

¹² *Regulation of the Law on Refugees and Complementary Protection*, February 2012, <https://www.acnur.org/fileadmin/Documentos/BDL/2012/8339.pdf>.

¹³ Article 19 of the *Regulation of the Law on Refugees and Complementary Protection*, “In order to comply with article 18 of the Law, the Coordination [COMAR] exceptionally will process requests filed beyond the considered deadline, when the alien proves that because of causes beyond their will it was materially impossible to file the request in timely fashion.” [unofficial translation]

¹⁴ National Commission for Human Rights, Recommendation N. 35/2017 on violations to human rights, legal certainty and legality, freedom of movement and the principle of the best interest of the child for a group persons who sought asylum, in the context of migration, Mexico City, 31 August 2017: https://www.cndh.org.mx/sites/all/doc/Recomendaciones/2017/Rec_2017_035.pdf.

8. The discretionary and arbitrary application of the exception is of concern to UNHCR when considered against the current context in Mexico, which has seen a very significant increase in asylum applications in recent years. This increase, compounded by the lack of financial resources assigned to COMAR, its absence in some key field locations, and increases in asylum applications continues to pose challenges for the efficiency and fairness of the asylum system. The practical challenges and obstacles to the effective operation of the asylum procedure were exacerbated by the earthquake affecting Mexico City on September 2017 which brought damage to COMAR's facilities. As a result, the central office temporarily closed, and activities were suspended.

9. Since 2014, asylum claims have increased in Mexico by 3,500%. From January to August 2019, claims have increased by 230% relative to the same period in 2018, totalling 48,254 persons (total figure for 2018 was 29,600). In 2018, 4,449 people were recognized as refugees, 1,470 received complementary protection and 1,325 were rejected. Substantive decisions were taken with respect of 7,244 claimants, with an overall recognition rate of 82%. The capacity of COMAR to process cases has increased recently, but COMAR still faces operational limitations that are being gradually addressed in order to reduce and eliminate the current backlog.

10. UNHCR recognizes and supports the need for efficient asylum procedures, which is in the interests both of applicants and Member States. However, Member States should not dispense with key procedural safeguards. Rules which serve to curtail significantly or prevent the exercise by applicants of their rights under international refugee law undermine the right to seek asylum and protection from *refoulement*.

B. Principles of international refugee and human rights law

i) The right to seek and enjoy asylum

11. The right to seek and enjoy asylum is a basic human right which derives from Article 14(1) of the *Universal Declaration of Human Rights*,¹⁵ and is supported in particular by the legal framework of the 1951 Convention and its 1967 Protocol. The right has also been recognized in the *American Convention* and other regional instruments such as the *Charter of Fundamental Rights of the European Union* (Art.18)¹⁶, and the *African Charter on Human and Peoples' Rights* (Art.12.3).¹⁷ Seeking asylum is not, therefore, an unlawful act.¹⁸

¹⁵ Article 14.1: Everyone has the right to seek and to enjoy in other countries asylum from persecution. 2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations. UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III): <https://www.refworld.org/docid/3ae6b3712c.html>.

¹⁶ Art.18: The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community. *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, <http://www.refworld.org/docid/3ae6b3b70.html>.

¹⁷ Art.12.3: Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions. OAU, *African Charter on Human and Peoples' Rights*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982): <http://www.refworld.org/docid/3ae6b3630.html>.

¹⁸ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guideline 1, para. 11: <http://www.unhcr.org/publications/legal/505b10ee9/unhcr->

12. Article 22 (7) of the *American Convention* states:

Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes.¹⁹

13. The right is further cemented in Article XXVII of the *American Declaration of the Rights and Duties of Man* ('*American Declaration*') which states:

Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements.

14. The Inter-American Court of Human Rights has previously recognized that both Article 22(7) of the *American Convention* and Article XXVII of the *American Declaration* have enshrined the subjective right of all persons to seek and receive asylum, thereby overcoming the historical understanding of this mechanism as a "mere State prerogative" under various inter-American conventions on asylum.²⁰

ii) *The principle of non-refoulement*

15. Central to the realization of the right to seek asylum is the obligation of States not to expel or return (*refouler*) a person to territories where his or her life or freedom would be threatened. The principle of *non-refoulement* constitutes the cornerstone of international refugee protection and is most prominently expressed in Article 33 of the 1951 Convention which states:

No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.

16. The protection against *refoulement* under Article 33(1) applies to any person who is a refugee under the terms of the 1951 Convention, that is, anyone who meets the requirements of the refugee definition contained in Article 1A(2) of the 1951 Convention and does not fall within the scope of one of its exclusion provisions. Given that a person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfills the criteria contained in the refugee definition, refugee status determination is declaratory in nature: a person does not become a refugee because of recognition but is recognized because he or she is a

[detention-guidelines.html](#). As António Guterres, the UN Secretary General and former UN High Commissioner for Refugees has stated: "[i]t is not a crime to cross a border to seek asylum": <http://www.unhcr.org/news/press/2015/9/55f9a70a6/unhcr-urges-europe-change-course-refugee-crisis.html>.

¹⁹ *American Convention on Human Rights*, note 10 above.

²⁰ *Advisory Opinion OC-21/14, "Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection"*, Inter-American Court of Human Rights (IACrTHR), 19 August 2014, para. 73: <https://www.refworld.org/cases,IACRTHR,54129c854.html>.

refugee.²¹ It follows that the principle of *non-refoulement* applies not only to recognized refugees, but also to those whose status has not yet been determined.²²

17. The Inter-American Court of Human Rights has stated that:

[i]n view of the declarative nature of the determination of refugee status, the protection provided by the principle of *non-refoulement* applies to all refugees, even if they have not yet been deemed refugees by authorities based on the requirements of the definition of Article 1 of the 1951 Convention and its 1967 Protocol or by domestic legislation.²³

18. This necessarily means that asylum-seekers may not be rejected without an adequate and individualized examination of their requests.²⁴

19. Within the framework of the 1951 Convention, the principle of *non-refoulement* constitutes an essential binding and non-derogable component of international refugee protection²⁵ and has been reaffirmed by the Executive Committee of the High Commissioner's Programme (ExCom) in numerous

²¹ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, April 2019, HCR/IP/4/ENG/REV. 4, para. 28: <https://www.refworld.org/docid/5cb474b27.html>. See also, *Note on International Protection*, 31 August 1993, A/AC.96/815, para. 11, <http://www.unhcr.org/refworld/docid/3ae68d5d10.html>; UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, January 2007, paras 26-31: <http://www.unhcr.org/refworld/docid/45f17a1a4.html>.

²² Executive Committee of the High Commissioner's Programme (ExCom), was established in 1958 and functions as a subsidiary organ of the United Nations General Assembly. It has both executive and advisory functions; the latter includes issuing Conclusions on International Protection - referred to as "ExCom Conclusions". ExCom Conclusions are adopted by consensus by the States which are Members of the Executive Committee and can therefore be considered as reflecting their understanding of legal standards regarding the protection of refugees. At present, 101 States are Members of the Executive Committee, including Mexico which has been a member since 2001: <https://www.unhcr.org/excom/announce/40112e984/excom-membership-date-admission-members.html>. See ExCom Conclusion No. 6 (XXVIII) 1977, para. (c); ExCom Conclusion No. 79 (XLVII) 1996, ExCom Conclusion No. 81 (XLVII) 1997, para. (i); UNHCR, *Conclusions on International Protection Adopted by the Executive Committee of the UNHCR Programme 1975 - 2017 (Conclusion No. 1 - 114)*, October 2017: <https://www.refworld.org/docid/5a2ead6b4.html>.

²³ *Advisory Opinion OC-21/14*, IACrtHR, note 20 above, para. 210, and *UNHCR Handbook*, note 21 above, para. 28.

²⁴ *Ibid.* See IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System - at para 25. States must ensure that the person who requests asylum is able to access appropriate international protection by means of fair and efficient asylum proceedings. See also, *Case of the Pacheco Tineo Family v. Plurinational State of Bolivia*, Inter-American Court of Human Rights (IACrtHR), 25 November 2013, para.153: <https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=583ffe8a4>.

²⁵ Article 42(1) of the 1951 Convention and Article VII(1) of the 1967 Protocol, list Article 33 as one of the provisions of the 1951 Convention to which no reservations are permitted. See also, UNHCR, Declaration of States Parties to the 1951 Convention and or its 1967 Protocol relating to the Status of Refugees, 16 January 2002, HCR/MMSP/2001/09, para. 4: <http://www.unhcr.org/refworld/docid/3d60f5557.html>.

Conclusions since 1977.²⁶ It is a norm of customary international law²⁷ as recognized in the 1984 Cartagena Declaration on Refugees²⁸ which has been enshrined in the Mexican Refugee Law.

20. The Cartagena Declaration reiterates

the importance and meaning of the principle of non-refoulement (including the prohibition of rejection at the frontier) as a corner-stone of the inter-national protection of refugees. This principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*.²⁹

21. The fundamental and non-derogable character of the principle of *non-refoulement* has also been restated in international³⁰ and regional human rights instruments.³¹ The Inter-American Court of Human Rights has also affirmed that the principle of *non-refoulement* constitutes a norm of customary international

²⁶ See ExCom Conclusion No. 29 (XXXIV) 1983, para. (c); ExCom Conclusion No. 50 (XXXIX) 1988, para. (g); ExCom Conclusion No. 52 (XXXIX) 1988, para. (5); ExCom Conclusion No. 55 (XL) 1989, para. (d); ExCom Conclusion No. 62 (XLI) 1990, para (a) (iii); ExCom Conclusion No. 65 (XLII) 1991, para (c); ExCom Conclusion No. 68 (XLIII) 1992, para. (e); ExCom Conclusion 71 (XLIV) 1993, para. (g); ExCom Conclusion 74 (XLV) 1994, para. (g); ExCom Conclusion 77 (XLVI) 1995, para. (a); ExCom Conclusion 81 (XLVIII) 1997, para. (h); ExCom Conclusion 82 (XLVIII) 1997, para. (d)(i); ExCom Conclusion No. 85 (XLIX) 1998, para. (q); ExCom Conclusion No. 91 (LII) 2001, para. (a); ExCom Conclusion No. 94 (LIII) 2002, para. (c)(i); ExCom Conclusion No. 99 (LV) 2004, para. (1); ExCom Conclusion No. 103 (LVI) 2005, para. (m); and ExCom Conclusion No. 108 (LIX) 2008, para. (a).

²⁷ UNHCR, *Note on the Principle of Non-Refoulement*, November 1997, <http://www.unhcr.org/refworld/docid/438c6d972.html>; and UNHCR, *The Scope and Content of the Principle of Non-Refoulement*, 20 June 2001, paras. 193-253: <http://www.unhcr.org/refworld/docid/3b3702b15.html>. See also, Concurring Opinion of Judge Pinto de Albuquerque in European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, 23 February 2012, p. 67, <http://www.unhcr.org/refworld/docid/4f4507942.html>.

²⁸ Conclusion III(5): *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, 22 November 1984, <http://www.refworld.org/docid/3ae6b36ec.html>.

²⁹ This principle has also been confirmed by the Inter-American Court of Human Rights in *Advisory Opinion 21/14*, where the Court determined that the principle of *non-refoulement* constitutes the cornerstone of the international protection of refugees and asylum-seekers: note 20 above, para. 209.

³⁰ An explicit refoulement provision is contained in Article 3 of the *1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The International Covenant on Civil and Political Rights*, as interpreted by the Human Rights Committee also encompasses the obligation not to extradite, deport, expel or otherwise remove a person from a State's territory where there are substantial grounds for believing that there is a real risk of irreparable harm.

³¹ In the Americas, the principle of non-refoulement is enshrined in Article 22(8) of the American Convention on Human Rights, which provides that '*in no case may an alien be deported or returned to a country, regardless of whether or not it is country of origin, if in that country his right to life or personal freedom in in danger of being violated because of his race, nationality, religion, social status, or political opinions.*' The jurisprudence of the European Court of Human Rights has held that *non-refoulement* is an inherent obligation under Article 3 of the European Convention on Human Rights which states that '*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*' See for example, the Court's judgment in *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, 23 February 2012, para. 114, <http://www.refworld.org/docid/4f4507942.html>.

law³² and is, consequently, binding for all States, whether or not they are parties to the 1951 Convention or its 1967 Protocol.³³

22. Due to the serious consequences of expelling or returning a refugee or an asylum-seeker to a country where their fundamental human rights maybe at risk, the Inter-American Court of Human Rights has held:

States are bound not to return (“*refouler*”) or expel a person – asylum seeker or refugee – to a State where her or his life or liberty may be threatened as a result of persecution for specific reasons or due to generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order, nor to a third State from which she or he may later be returned to the State where she or he suffered this risk – a situation that has been called “indirect *refoulement*.”³⁴

23. Consequently, States have a duty to establish, prior to implementing any removal measure that persons under their jurisdiction are not at risk of such harm covered by the prohibition on *refoulement*.³⁵ If such a risk exists, the State is precluded from forcibly removing the persons concerned, and shall not deny their entry or admission, but shall ensure their protection from *refoulement*. States have a duty to inquire into the reasons an individual seeks protection and to keep the situation in the possible State of return under deliberative review, in order to conform to that obligation.³⁶

iii) The right to access a fair and efficient asylum procedure

24. While the 1951 Convention does not define specific rules governing asylum procedures *per se*, it is accepted that, as a general rule, in order to give effect to the obligations under the 1951 Convention, including the prohibition on *refoulement*, refugees need access to a fair and efficient procedure to enable their identification. ExCom has recalled “the importance of establishing and ensuring access consistent with the 1951 Convention and the 1967 Protocol for all asylum-seekers to fair and efficient procedures for the determination of refugee status in order to ensure that refugees and other persons eligible for protection under international or national law are identified and granted protection.”³⁷ Thus, “all asylum-seekers, in

³² *Advisory Opinion OC-25/18, requested by the Republic of Ecuador*, IACrTHR, 30 May 2018, para 181: <https://www.refworld.org/cases,IACRTHR,5c87ec454.html>; UNHCR, *Note on the Principle of Non-Refoulement*, November 1997, <http://www.unhcr.org/refworld/docid/438c6d972.html>; and UNHCR, *The Scope and Content of the Principle of Non-Refoulement*, 20 June 2001, paras. 193-253, <http://www.unhcr.org/refworld/docid/3b3702b15.html>, and UNHCR ExCom Conclusions No. 15(XXX) 1979, (b); 17 (XXXI) 1980 (b); 25 (XXXIII) 1982, (b); 68 (XLIII) 1992, (f); note 22 above.

³³ *Ibid*, para. 211.

³⁴ *Advisory Opinion OC-21/14*, IACrTHR, note 20 above, para. 212.

³⁵ ExCom Conclusion No. 6 (XXVIII) 1977, para. (c); note 22 above.

³⁶ ECtHR, *M.S.S. v. Belgium and Greece*, Appl. no. 30696/09, 21 January 2011, para. 359, <http://www.refworld.org/docid/4d39bc7f2.html>. See also, Final Appeal Nos 18, 19 & 20 of 2011 (Civil) between C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents) and UNHCR (Intervener), Hong Kong: Court of Final Appeal, 25 March 2013, paras 56 and 64, <http://www.refworld.org/docid/515010a52.html>; UNHCR, Intervention before the Court of Final Appeal of the Hong Kong Special Administrative Region in the case between C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents), 31 January 2013, Civil Appeals Nos. 18, 19 & 20 of 2011, paras 74 and 75, <http://www.refworld.org/docid/510a74ce2.html>.

³⁷ See ExCom Conclusion No. 71 (XLIV) (1993), para (i); note 22 above.

whatever manner they arrive within the jurisdiction of a State, should have access to procedures to adjudicate their claim which are fair, non-discriminatory and appropriate to the nature of the claim.”³⁸

25. In *Case of Pacheco Tineo Family v. Bolivia*, the Inter American Court acknowledged the judgment of the European Court of Human Rights³⁹ where it defined the right to asylum as a fundamental freedom whose corollary is precisely the person’s right to apply for refugee status, which implies the right of applicants to a proper assessment of their application by the national authorities and of the risk they might face if returned to the country of origin.⁴⁰

iv) Timeframes must not constitute an automatic bar to the making an asylum claim

26. The 1951 Convention does not specify a timeframe during which a person can access the asylum procedure. Reflecting this, the laws of most Latin American States which do not specify timeframes.⁴¹ However, in Mexico, Article 18 of the Refugee Law imposes a 30 day deadline in which an asylum-seeker must file their claims.

27. UNHCR has long expressed its “concern that some States have introduced time limits for the filing of asylum requests, after which applications are not admitted to the asylum procedure. **The use of time limits as a bar for a person to apply for asylum is contrary to accepted asylum and refugee protection principles.**”⁴² [emphasis added] ExCom has affirmed that while time limits may well be set for certain specific administrative purposes, an asylum-seeker’s failure to submit the request within a certain time limit “should not lead to the asylum request being excluded from consideration.”⁴³

³⁸ UNHCR, *Global Consultations on International Protection: Asylum Processes - Fair and Efficient Asylum Procedures*, (‘UNHCR, Asylum Processes’), 31 May 2001, EC/GC/01/12, para 50: <https://www.refworld.org/docid/3b36f2fca.html>.

³⁹ *Gebremedhin [Gaberamadhien] v. France*, 25389/05, Council of Europe: European Court of Human Rights, 26 April 2007, para. 65: <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-80333%22%5D%7D>.

⁴⁰ *Case of Pacheco Tineo Family v. Bolivia*, note 24 above.

⁴¹ Save for Belize, Bolivia, Colombia, Ecuador, El Salvador, Peru and Dominican Republic which set timeframes ranging from 14 days to 90 days, see UNHCR good practices on legislation in the Americas: https://www.acnur.org/fileadmin/Documentos/Proteccion/Buenas_Practicas/9307.pdf?view=1 , Table 1 available at: https://acnur.org/fileadmin/Documentos/Proteccion/Buenas_Practicas/9220.pdf.

⁴² UNHCR, *Note on International Protection*, 4 June 1999, EC/40/SC/CRP.12, para. 18: <https://www.unhcr.org/afr/3cc413316.pdf>.

⁴³ ExCom Conclusions No.15 (XXX) 1979, para. (i); note 22 above. This is consistent with international human rights norms, which establish that all restrictions to a right must be exceptional, therefore, all restriction measures must be necessary and proportional to the attainment of a legitimate objective of a democratic society, in conformity with the purpose and objectives of human right treaties. IAC. *Caso Pueblo Indígena Xucuru y sus miembros vs. Brasil*, Preliminary Exceptions, Sentence 5 February 2018. Series C No. 346, Paragraph 125. In Mexico, the Supreme Court collects the criteria of the inter american system which indicates: “*In order for the measures imposed by the ordinary legislator with the purpose to restrict fundamental rights be valid, it must be proven the following requisites: a) be admissible within the constitutional sphere, this is, the ordinary legislator can only restrict or suspend the exercise of individual rights with the objectives within the provisions of the Magna Carta; b) be necessary to ensure and obtain the underlined of constitutional restriction, that is to say, is not enough to restrict in broader terms to obtain those objective but must be appropriate its realization, which means that the end the legislator seeks cannot be reasonably achieve by other means less restrictive than fundamental rights; and, c) must be proportional, which means, the legislation must respect a correspondence between the importance of the end sought by the law and the harmful effects that produces other rights and constitutional interests, understanding that the persecution of a constitutional objective*”

28. In UNHCR's view, "formal requirements should not pose an obstacle to the exercise of the right to seek asylum."⁴⁴ To this end, UNHCR recalls that a fundamental safeguard:

is the recognition that an asylum-seeker's failure to submit a request within a certain time limit or the non-fulfilment of other formal requirements should not in itself lead to an asylum request being excluded from consideration, although under certain circumstances a late application can affect its credibility. The automatic and mechanical application of time limits for submitting applications has been found to be at variance with international protection principles.⁴⁵

29. Indeed, the National Supreme Court of Justice in Mexico, recently analysed COMAR's application of the 30-day timeframe. The Court ruled in favor of two asylum-seekers who had their applications for processing outside of the 30-day timeframe refused. The Court emphasized that COMAR should consider the state of vulnerability of the applicants, and that the obligation to prove a justification beyond their control should not be so strict or rigorous as to require documentary evidence. The Court ruled that the 30-day timeframe should not automatically lead to the dismissal of the respective application.⁴⁶

30. In this context, the European Court of Human Rights in a case which considered the legality of a five-day deadline for registration of claims, has held as follows:

The Court is not persuaded that the authorities of the respondent State conducted any meaningful assessment of the applicant's claim, including its arguability. It would appear that the applicant's failure to comply with the five-day registration requirement under the Asylum Regulation 1994 denied her any scrutiny of the factual basis of her fears about being removed to Iran [...]. **In the Court's opinion, the automatic and mechanical application of such a short time-limit for submitting an asylum application must be considered at variance with the protection of the fundamental value embodied in Article 3 of the Convention.**⁴⁷ [emphasis added]

31. Similarly, the Court of Justice of the European Union stated in the context of a striking down a 15 day deadline for filing an application for subsidiary protection:

[T]aking account of the difficulties such applicants may face because of, inter alia, the difficult human and material situation in which they may find themselves, it must be held that a time limit, such as that at issue in the main proceedings, is particularly short and does not ensure, in practice, that all those applicants are afforded a genuine opportunity to submit an application for subsidiary protection and, where appropriate, to be granted

cannot be done at the expense of an unnecessary affectation or unreasonable to other goods and protected constitutional rights.[...] Likewise, the restrictions must be in accordance to the law, including international human rights norms [...]. See: Tesis Aislada num. 1a. LXVI/2008 Supreme Court of Justice, First Hall, 1 July 2008. Restricciones a los derechos fundamentales. Elementos que el juez constitucional debe tomar en cuenta para considerarlas válidas.

⁴⁴ UNHCR, *Fair and Efficient Asylum Procedures: A Non-Exhaustive Overview of Applicable International Standards*, ('UNHCR, *Fair and Efficient Asylum Procedures 2005*') 2 September 2005:

<https://www.refworld.org/docid/432ae9204.html>.

⁴⁵ UNHCR, *Asylum Processes*, note 38 above, para 20.

⁴⁶ Press release 163/2019, National Supreme Court of Justice, <http://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=5983>.

⁴⁷ *Jabari v. Turkey*, European Court of Human Rights, 10 July 2000, para. 40.

subsidiary protection status. Therefore, such a time limit cannot reasonably be justified for the purposes of ensuring the proper conduct of the procedure for examining an application for that status.⁴⁸

32. A national procedural rule must not render impossible in practice, or excessively difficult, the exercise of rights conferred by the 1951 Convention, the American Convention on Human Rights and the Mexican Constitution. Accordingly, it has been recognised by regional courts that national procedural rules must ensure, that persons applying for protection are actually in a position to avail themselves of the rights conferred on them.⁴⁹

33. In this regard, the Constitutional Court of Ecuador, striking down the fifteen day timeframe to apply for asylum under national law, noted that:

“In these circumstances, to threaten a person subjugated to the sentiment of uprooted suffering and recommencement in a foreign place, with the obligation to present an application for asylum in a short period of time and with the threat to lose the right if the person does not comply with the required time frame; inevitably worsens the difficult situation already caused by forced displacement.”⁵⁰

34. The automatic and mechanical implementation of a time limit to present an asylum application in reality has the effect of introducing an additional exclusion clause that is at variance with the 1951 Convention and can lead to situations of *refoulement*.⁵¹ “Formal time limits for submitting an asylum application may result in *refoulement* and are therefore inconsistent with international refugee law. Failure to apply for asylum promptly may be an element in the consideration of the credibility of a claim. However, it should never be the sole reason for rejecting an application.”⁵²

35. Lastly, it should be noted that in relation to the one year bar to asylum in the United States, UNHCR has urged the government to revoke the one year timeframe, particularly for asylum claims made by

⁴⁸ *Evelyn Danqua v Minister for Justice and Equality, Ireland, Attorney General*, C-429/15, European Union: Court of Justice of the European Union, 20 October 2016, para. 46: <https://www.refworld.org/cases.ECJ.580a36e84.html>.

⁴⁹ *Ibid.*, para. 39.

⁵⁰ Constitutional Court Sentence No. 002-14-SIN-CC. n/d. p. 48: http://portal.corteconstitucional.gob.ec/Raiz/2014/002-14-SIN-CC/REL_SENTENCIA_002-14-SIN-CC.pdf. As a result of the Court’s decision, asylum-seekers in Ecuador now have three months to make an application.

⁵¹ La mise en œuvre automatique et mécanique d’un délai pour déposer une demande d’asile a, en réalité, pour effet d’introduire une sorte de clause d’exclusion additionnelle, non conforme à la Convention de 1951, et peut aboutir à des situations de refoulement. De tels délais sont donc incompatibles avec le droit international des réfugiés. Le non-respect des délais peut néanmoins être pris en compte dans l’examen de la crédibilité de cette dernière. Cependant, ce ne doit pas être l’unique raison du rejet de la demande. L’expérience du HCR en la matière montre qu’il peut y avoir des raisons valables de ne pas déposer une demande dans les délais, comme, par exemple, la maladie, le traumatisme, le manque d’information sur la procédure à suivre pour déposer la demande, le besoin de rechercher des conseils juridiques ou des raisons liées aux spécificités culturelles du demandeur. UNHCR, *Observations écrites du HCR devant la Cour européenne des droits de l’homme dans l’affaire I. M. c. France*, September 2009, Requête no. 9152/09, page 9: <https://www.refworld.org/docid/4abb61992.html>.

⁵² UNHCR, *Provisional Comments on the 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)*, 10 February 2005: <https://www.refworld.org/docid/42492b302.html> - page 11:

children.⁵³ “Legislation which does not impose time-limits for the submission of asylum applications, [...] is clearly best practice.”⁵⁴ In countries as diverse as Japan, the EU and Canada, there is no deadline in which applications for international protection can be made. The EU does make a legal distinction between ‘making’ and ‘lodging’ an application. The ‘making’ of an application does not involve any formalities, but simply refers to a wish expressed by a third-country national or stateless person, who can be understood to seek international protection.⁵⁵ While the making of an application does not carry any time limit, the lodging of an application does. The EU Asylum Procedures Directive explicitly states that “Member States shall ensure that applications for international protection are neither rejected nor excluded from examination on the sole ground that they have not been made as soon as possible.”⁵⁶

iv) Exemptions to the deadline must be fair and flexible ensuring the right to access asylum

36. As stated above, the 1951 Convention does not establish a timeframe when a person can access the asylum procedure. It further does not enter therefore into considerations of what constitutes a reasonable timeframe. However, UNHCR has maintained where timeframes are envisaged in law it is important that the period not be so short as to undermine the impartiality and quality of the procedure.⁵⁷ When insufficient time is allocated during the asylum procedure to exercise the right to seek asylum, the effectiveness of the procedure is diminished or denied.⁵⁸ Likewise, excessively short and inflexible timeframes can have a negative effect on the fairness of a procedure and lead to incomplete or rash decisions, which generate risks of an incorrect decision and situations of *refoulement*.⁵⁹

37. The question of whether a timeframe is incompatible with international standards in a particular case is linked to whether the State has carried out a rigorous and individualized study of the applicant’s claim

⁵³ UNHCR, *Submission by UNHCR for the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review*, 2014, page 7-8: <https://www.refworld.org/docid/55474c1b4.html>. In 2010, the former United Nations High Commissioner for Refugees and the current Secretary General of the United Nations, António Guterres, describe the timeframe limit to present asylum applications in the United States as “divergent of international norms” and declared that “it makes more difficult for most asylum applicants to establish their need for protection.” See: António Guterres, *U.N. High Commissioner for Refugees, Closing Keynote cited in Human Rights First, “The Asylum Filing Deadline Denying Protection to the Persecuted and Undermining Governmental Efficiency”*, September 2010, at 11, n. 42, <https://www.humanrightsfirst.org/wpcontent/uploads/pdf/afd.pdf>.

⁵⁴ UNHCR, *Fair and Efficient Asylum Procedures 2005*: note 44 above.

⁵⁵ UNHCR, *Comments on the European Commission's Proposal for an Asylum Procedures Regulation*, April 2019, COM (2016) 467, page 25: <https://www.refworld.org/docid/5cb597a27.html>.

⁵⁶ Asylum Procedures Directive: 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): <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013L0032&from=en>.

⁵⁷ UNHCR Statement issued in the context of the preliminary ruling reference to the European Court of Justice in the case of *LH v. Bevándorlási és Menekültügyi Hivatal* (C-564/18), September 2019, para. 23: <https://www.refworld.org/docid/5d7b842c4.html>.

⁵⁸ *UNHCR public statement in relation to Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration pending before the Court of Justice of the European Union* (‘UNHCR Statement in Diouf’), 21 May 2010, para. 8: <https://www.refworld.org/docid/4bf67fa12.html>

⁵⁹ UNHCR, *Brief of Amicus Curiae United Nations High Commissioner for Refugees in East Bay Sanctuary Covenant et al v. Donald J. Trump*, 5 December 2018, Case No. 3:18-CV-06810-JST, page 14: <https://www.refworld.org/docid/5c459ac44.html>; *UNHCR Statement in the case of LH v. Bevándorlási és Menekültügyi Hivatal* (C-564/18), para. 25. note 57 above.

for asylum. The establishment of a timeframe cannot deny the applicant the right to thorough scrutiny of the facts that motivated their fear of return to their country.⁶⁰

38. The fact that a person does not present an asylum application within the allotted timeframe does not necessarily mean the application is baseless and cannot be conducive to its rejection for the same reason. UNHCR's experience shows that there may be valid reasons why an asylum application was not submitted on time, for example, illness, trauma, lack of access to information about the asylum procedure to follow, the need to seek legal advice or for reasons of cultural sensitivities.⁶¹

39. In the context of access to effective remedies, UNHCR has noted that there "are many reasons why facts relevant to the application for international protection may not be raised in the course of the first instance administrative procedure. In particular, in cases of persons with specific needs, such as children or victims of trafficking or sexual and/or gender-based violence, applicants might not be able or willing to share all relevant information at first instance, in particular information related to traumatising experiences. Further, applicants may be reluctant to talk about intimate matters, such as their sexual orientation and/or gender identity, in particular when their sexual orientation or gender identity is stigmatised in their country of origin."⁶² In many cases, applicants will need time, an environment of trust, and concrete psychological support to overcome trauma and talk about their experience."⁶³ All of these reasons are equally applicable to the making of an asylum application.

v) ***Consideration for any time limit is conditioned to the asylum applicant's opportunity to effectively present its application***

40. UNHCR considers that, in cases where national legislation contemplates a timeframe to present an asylum application, this can only begin when an applicant has the effective opportunity to do so.⁶⁴ In

⁶⁰ The European Court for Human Rights has consistently held that governments are required to suspend deportation proceedings pending an "independent and rigorous scrutiny" of applicant's claims: See *Jabari v. Turquía*, App. No 40035/98, 11 July 2000, para. 40; *Čonka v. Belgium*, Application No. 51564/99, ECtHR, 5 February 2002, para. 79; *Baysakov and others v. Ukraine*, ECtHR 18 February 2010, Appl. No. 54131/08; *Bahaddar v. the Netherlands*, ECtHR 19 February 1998, Appl. No. 25894/94. Likewise, the Court of Justice of the European Union has also reaffirmed on several occasions the need for vigilant and careful examinations of asylum applications to avoid instances of *refoulement*: see: *Abdulla* [GC], Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, 2 March 2010, requiring that the risk assessment "must, in all cases, be carried out with vigilance and care." (para. 90) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62008CJ0175&from=EN>. See also *Y, Z* [GC], *Joined Cases C 71/11 and C 99/11*, 5 September 2012, para. 77 ('vigilance and care [...] based solely on a specific evaluation of the facts and circumstances'); *X, Y, Z, Joined Cases C 199/12 to C 201/12*, 7 November 2013, para. 73 ('vigilance and care [...] based solely on a specific evaluation of the facts and circumstances'); *B and D* [GC], *Joined Cases C 57/09 and C 101/09*, para. 93 ('full investigation into all the circumstances of each individual case').

⁶¹ UNHCR, *Observations écrites du HCR devant la Cour européenne des droits de l'homme dans l'affaire I. M. c. France*, note 51 above, page 9.

⁶² 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, para. 59: <http://www.refworld.org/docid/50348afc2.html>.

⁶³ *UNHCR Comments on the European Commission's Proposal for an Asylum Procedures Regulation*, April 2019, COM (2016) 467, page 17: <https://www.refworld.org/docid/5cb597a27.html>.

⁶⁴ *Ibid.* page 26.

practice, an “effective opportunity” refers not only to the State interviewing the applicant but also taking into account the difficult and vulnerable situation in which applicants find themselves.⁶⁵

41. In UNHCR’s view, “when requesting asylum, applicants must be given adequate time to exercise their rights, including, inter alia, the right to be informed, in a language which they understand, of the procedure to be followed, of their rights and obligations during the procedure, the possible consequences of not complying with their obligations and not cooperating with the authorities, the right to receive the services of an interpreter, to consult in an effective manner a legal adviser or other counsellor, to communicate with a refugee-assisting organization, to be given the opportunity of a personal interview and/or to lodge an appeal.”⁶⁶

42. Other difficulties applicants may face which may justify the late submission of their asylum application, are situations where “it may be difficult, if not impossible, for the person concerned to supply evidence within a short time, especially if such evidence must be obtained from the country from which he or she claims to have fled. The lack of direct documentary evidence thus cannot be decisive per se.”⁶⁷

43. There are many circumstances where a person is not able to make or present an asylum application for legitimate reasons.⁶⁸ As stated above, there may be traumas or other factors related to the vulnerabilities of the person that justify why an asylum application was submitted late.⁶⁹ Likewise, the applicant may have been in possession of a visa or residence permit where they became a refugee “sur place”.⁷⁰

vi) Timelines must not exclude ‘Sur Place’ Refugees

44. The risk of refoulement as a result of time limits which lead to rejection of applications for asylum without adequate scrutiny, is especially problematic for individuals with *sur place* claims. A person who was not a refugee when he or she left their country, but who becomes a refugee at a later date due to changes in circumstances in their countries of origin, is called a refugee ‘sur place’.⁷¹ The application of the 1951 Convention is not limited to actions or persecution that took place prior to flight. In fact, the wording of the 1951 Convention suggests the exact opposite: that it can and does apply to all persons who are ‘outside the country of nationality’.⁷² This interpretation is further confirmed by the wording and content of Article 1C(4). That provision, governing the cessation of refugee status, acknowledges that a fear of persecution may arise after a person left his or her country, where it states that the 1951 Convention ceases to apply to a person who has ‘voluntarily re-established himself [or herself] in the country which he [or she] left *or outside which he [or she] remained owing to fear of persecution*’. [emphasis added] By explicitly referring

⁶⁵ *Ibid.*

⁶⁶ UNHCR Statement in Diouf, note 58 above, para. 12.

⁶⁷ *J.K. and Others v. Sweden*, Application no. 59166/12: European Court of Human Rights, 23 August 2016, para. 92: <https://www.refworld.org/cases,ECHR,57bc18e34.html>.

⁶⁸ UNHCR, *Observations écrites du HCR devant la Cour européenne des droits de l’homme dans l’affaire I. M. c. France*, note 51 above, pages 7-8.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*, para 4.2.

⁷¹ UNHCR *Handbook*, note 21 above, para 94.

⁷² *Ibid.* ‘The requirement that a person must be outside his country to be a refugee does not mean that he must necessarily have left that country illegally, or even that he must have left it on account of well-founded fear.’

to a country where the person has ‘remained’, it is clear that one’s fear of persecution is not dependent on, and need not have arisen prior to, leaving or fleeing their country.⁷³

45. The handling of *sur place* claims is further addressed in UNHCR’s *Handbook on Procedures and Criteria for Determining Refugee Status* (‘UNHCR Handbook’). The UNHCR Handbook is internationally recognized as an important source of interpretation of international refugee law, and although not legally binding, it nevertheless provides ‘significant guidance’ in construing the 1951 Convention and in giving content to the obligations established therein.⁷⁴ According to the Handbook, a person may become a refugee *sur place* in two distinctive sets of circumstances: as a result of events occurring in the home country since the applicant’s departure,⁷⁵ and/or, as a result of the applicant’s activities, acts, or behaviour in the country of asylum.⁷⁶

46. For all of the above reasons, it is necessary to proceed with a thorough evaluation of the application and the individual circumstances that surrounds it, even if a person files a claim beyond a deadline established by national law.⁷⁷ In fact, given the absolute nature of the protection against torture, degrading or inhuman treatment and its relation with the principle of *non refoulement*,⁷⁸ conditioning the evaluation of an asylum application to an administrative deadline, is prohibited, as it could lead to *refoulement* at variance with the 1951 Convention.

⁷³ A. Zimmermann and C. Mahler, ‘Article 1A, para. 2, Definition of the term ‘Refugee’, in *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, ed. by A. Zimmermann, p. 325, para. 132.

⁷⁴ See *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, <http://www.refworld.org/cases,USSCT,3ae6b68d10.html>. The Supreme Court of Canada has also stated that the UNHCR *Handbook* is a ‘highly relevant authority’: *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593, 19 October 1995, http://www.refworld.org/cases,CAN_SC,3ae6b68b4.html at para. 46. In fact, many high courts internationally have endorsed UNHCR’s views as persuasive authority in interpreting the 1951 Convention, its 1967 Protocol, and related international law. See *Ward v. Canada (Minister of Employment & Immigration)*, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993, http://www.refworld.org/cases,CAN_SC,3ae6b673c.html, *R v. Secretary of State for the Home Department (SSHD), Ex parte Adan and Others*, United Kingdom: Court of Appeal (England and Wales), 23 July 1999, http://www.refworld.org/cases,GBR_CA_CIV,3ae6b6ad14.html, *Al-Sirri (FC) (Appellant) v Secretary of State for the Home Department (Respondent) and DD (Afghanistan) (FC) (Appellant) v Secretary of State for the Home Department (Respondent)*, [2012] UKSC 54, United Kingdom: Supreme Court, 21 November 2012, http://www.refworld.org/cases,UK_SC,50b89fd62.html, para. 36.

⁷⁵ UNHCR *Handbook*, paragraph 95: ‘A person becomes a refugee “*sur place*” due to circumstances arising in his country of origin during his absence. Diplomats and other officials serving abroad, prisoners of war, students, migrant workers and others have applied for refugee status during their residence abroad and have been recognized as refugees.’

⁷⁶ UNHCR *Handbook*, paragraph 96: A person may become a refugee “*sur place*” as a result of his own actions, such as associating with refugees already recognized, or expressing his political views in his country of residence. Whether such actions are sufficient to justify a well-founded fear of persecution must be determined by a careful examination of the circumstances. Regard should be had in particular to whether such actions may have come to the notice of the authorities of the person’s country of origin and how they are likely to be viewed by those authorities.

⁷⁷ *Idem*.

⁷⁸ *Saadi v. Italy*, Appl. No. 37201/06: European Court of Human Rights, 28 February 2008, para. 137: <https://www.refworld.org/cases,ECHR,47c6882e2.html>; *Observations écrites du HCR devant la Cour européenne des droits de l’homme dans l’affaire I.M. c. France*, note 51 above.

vii) ***Basic Procedural Guarantees to be respected in Refugee Status Determination Procedures***

47. In *Case of Pacheco Tineo Family v. Bolivia*, the Inter American Court held that: “under the American Convention all proceedings involving the determination of Rights should be granted due process. While States have the right to have different procedures for evaluating applications that are ‘manifestly unfounded’, such power cannot render minimum due process guarantees meaningless.”⁷⁹

48. In UNHCR’s view, the rights contained in Articles 8 and 25 of the American Convention, when read together with Articles 22.7 and 22.8 give rise to a series of obligations in the context of refugee status determination proceedings. First, an asylum-seeker has the right to be heard, with due process guarantees and within a reasonable time, by a competent, independent and impartial tribunal or authority, previously established by law. The term “tribunal” should be understood to apply to administrative as well as judicial authorities. Under Article 25, the asylum-seeker has a right to an effective judicial remedy for protection against acts which violate his or her fundamental rights. The right to be heard requires that the asylum-seeker be allowed the opportunity to lodge an asylum claim before the competent authority.⁸⁰

49. Protection from persecution implies that asylum-seekers and refugees should be granted access to refugee status determination procedures for the proper assessment of their claims, in accordance with certain standards and safeguards. Building upon the basic procedural guarantees to be respected in refugee status determination procedures, Executive Committee and UNHCR recommend the following:⁸¹

1. The competent official, to whom the applicant addresses himself at the border or in the territory of a Contracting State, should have clear instructions for dealing with cases which might fall within the purview of the relevant international instruments. He or she is required to act in accordance with the principle of *non-refoulement* and to refer such cases to a higher authority.⁸²
2. The applicant should receive the necessary guidance as to the procedure to be followed⁸³, in a language and manner they understand (for example, in an oral manner in the case of illiterate persons). This obligation is not limited only to offering information and guidance to those individuals who manifest their fear of return, but entails an obligation of proactive identification of potential asylum seekers who may not be aware of their right to seek asylum or may be somehow incapable of adequately stating their international protection needs.
3. Given the particular vulnerabilities of asylum-seekers, the application should be examined within the framework of specially established procedures, by a clearly identified authority⁸⁴, and by

⁷⁹ Unofficial translation, original text in Spanish: “[...] la Comisión considera que bajo la Convención Americana todo trámite de determinación de derechos debe contar con un debido proceso. Si bien los Estados tienen la facultad de disponer distintos procedimientos para evaluar solicitudes que sean “manifestamente infundadas”, tal facultad no puede vaciar de contenido las garantías mínimas del debido proceso”. See Comisión Interamericana de Derechos Humanos (CIDH) <http://www.oas.org/es/cidh/decisiones/corte/12.474Fondoesp.doc>,

⁸⁰ *UNHCR’s Expert Witness Testimony before the Inter-American Court of Human Rights, Hearing in the case of Pacheco Tineo vs. Bolivia*, 19 March 2013, Case 12.474, para 37: <https://www.refworld.org/docid/516e58704.html>.

⁸¹ *Ibid.* para 39.

⁸² ExCom Conclusion No. 8 (XXVIII) 1997, para (e) (i); note 22 above.

⁸³ *Ibid.* para (e) (ii).

⁸⁴ *Ibid.*, para. (e)(iii).

qualified personnel having the necessary knowledge and experience, and an understanding of an applicant's particular difficulties and needs.⁸⁵

4. The asylum procedure needs at all stages to respect data protection and confidentiality principles. No information on the asylum application to be shared with the country of origin.⁸⁶
5. The applicant should be given the necessary facilities, including the services of a competent interpreter, as well as access to legal advice and representation,⁸⁷ for submitting his or her claim to the authorities concerned. Where free legal aid is available, asylum-seekers should have access to it in case of need.⁸⁸ Applicants should also be given the opportunity, of which they should be duly informed, to contact a representative of UNHCR.⁸⁹
6. The applicant to be given access to the report of the personal interview and his/her approval is sought on the contents of the report of the personal interview in order to avoid misunderstandings and to clarify contradictions⁹⁰. Subsequent interviews may be necessary to clarify any apparent inconsistencies and to resolve any contradictions in a further interview, and to find an explanation for any misrepresentation or concealment of material facts.⁹¹
7. While the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner⁹². The applicant needs to present his or her claim as fully as possible and with evidence supporting his or her claim and as available.⁹³ Because of the particular situation of asylum-seekers and the nature of their flight, further inquiries and information is likely to be needed by the examiner.⁹⁴
8. The reasons for not granting refugee status, in fact and in law, should be stated in the decision. Such information needs to be shared with the applicant in writing as soon as necessary for allowing an appeal to be prepared and lodged in due time.⁹⁵
9. If the applicant is not recognized, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial.⁹⁶

III. Conclusion

50. UNHCR appreciates that States have operational demands to manage their asylum systems efficiently and are within their rights to manage access to asylum through the imposition of procedural requirements

⁸⁵ UNHCR *Handbook*, note 21 above, para. 190.

⁸⁶ UNHCR, *Asylum Processes*, note 38 above, para. (50)(m).

⁸⁷ UNHCR, *Fair and Efficient Asylum Procedures 2005*, note 44 above, p. 3.

⁸⁸ UNHCR, *Asylum Processes*, note 38 above, para. 50 (g).

⁸⁹ ExCom Conclusion No. 8 (XXVIII), 1977, para (e) (iv); note 22 above.

⁹⁰ UNHCR, *Fair and Efficient Asylum Procedures 2005*, note 44 above, p. 4.

⁹¹ *Ibid.*, para 199.

⁹² *Ibid.*, para 196.

⁹³ UNHCR *Handbook*, note 21 above, para. 205(b)(i).

⁹⁴ *Ibid.*, note 21 above, paras. 196-7.

⁹⁵ UNHCR, *Fair and Efficient Asylum Procedures 2005*, note 44 above, pages 5-6.

⁹⁶ Under Article 25 of the American Convention on Human Rights, the asylum-seeker has a right to an effective judicial remedy for protection against acts which violate his or her fundamental rights. See also, ExCom Conclusion, No. 8 (XXVIII), 1977, para (e) (vi); note 22 above.

and accelerated procedures.⁹⁷ However, States may not use procedural requirements to deny protection to entire categories of persons who may satisfy the refugee definition.

51. UNHCR has serious concerns about the imposition of a rigid deadline to apply for asylum, and the discretionary and non-consistent application of the exemptions. Allowing access to the territory and informing potential asylum-seekers in a timely fashion of their right to seek asylum are key to ensuring access to international protection.⁹⁸ Access to fair and efficient refugee determination procedures, including the elimination of procedural obstacles, are required to ensure compliance with international refugee law.⁹⁹ Given the significance of the decisions to be made and the complexities of the procedures, it is imperative that the asylum procedures are applied in a flexible and reasonable manner.

52. The 30-day deadline and discretionary application of the exemption imposes too high a threshold. Coupled together they effectively establish a bar to access and eschews fair and efficient procedures to determine the refugee claims of persons who are unable to meet the deadline for a variety of reasons. It ignores the realities of refugee flight, which makes it impossible for some refugees to make a claim within 30 days of arrival in the country. It is thus at odds with the State's obligation to protect the right of access to asylum and to provide a fair and efficient individualized process consistent with the standards set forth in international law. Moreover, it is likely to result in the *refoulement* of refugees, a result that is impermissible under international law.

IV. Petitions

In light of the above, the General Registry of the National Supreme Court of Justice is requested the following:

FIRST. To consider this *amicus curiae* as presented by the Office of the United Nations High Commissioner for Refugees.

SECOND. To take into consideration the arguments presented in this *amicus curiae* for the resolution of the writ of constitutional protection (Amparo en Revisión) 762/2019.

Mexico City, 13 December 2019.

Respectfully,

Mark Manly,

Representative of the Office of the United Nations High Commissioner for Refugees in Mexico.

⁹⁷ UNHCR, *Asylum Processes*, note 38 above, p. 2.

⁹⁸ UNHCR, *Note on the Principle of Non-Refoulement*; note 27 above.

⁹⁹ UNHCR, *Fair and Efficient Asylum Procedures 2005*, note 44 above; *Note on International Protection*, 1999, note 42 above; and EXCOM Conclusion No. 15 (XXX) 1979; note 22 above.