

Comments from UNHCR

on the

Final Report by the Fourth Immigration Policy Advisory Committee on the Refugee Recognition System (Report of 24 December 2003)

I. Introduction and General Remarks

1. UNHCR welcomes the opportunity to submit its comments on the report by the Fourth Immigration Policy Advisory Committee (hereinafter, “the Committee”) on the reform of the appeal instance. The Committee issued its interim report on 1st November 2002 on which UNHCR also provided comments. Following the request of the Ministry of Justice to study ways of improving the appeal instance in refugee status determination procedures, the Committee reviewed relevant examples of State practice in Europe and other parts of the world. In UNHCR’s understanding, the Committee’s recommendations will be taken into consideration by the Ministry of Justice for the finalization of the draft law amending the Immigration Control and Refugee Recognition Act.
2. In its report, the Committee envisages the introduction of a third party advisory panel into the appeal process as a possible approach for improving the current lack of independence of the appeal instance. Under this proposal, the appeal instance would remain within the Ministry of Justice. Decisions on appeal would be taken by the Minister of Justice on the basis of the advisory panel’s recommendations. The review of the first instance negative decision would include, if deemed necessary by the panel, a hearing of the appellant’s claim with the assistance of a lawyer. The panel would be composed of three experts selected by the Minister of Justice. The selection criteria include requirements of integrity, competence, and overseas work experience.
3. UNHCR welcomes the fact that a third party advisory panel may be introduced in the appeal instance. This constitutes a positive development, which is intended to address concerns expressed by various quarters on the lack of independence of the appeal process and the need to improve the quality and the speed of the decisions. However, there may still be shortcomings in the proposed procedure, as the appeal may not provide a fair and satisfactory review.

Applicable international standards

4. International standards concerning the protection of refugees, adopted by the Executive Committee of UNHCR, the General Assembly or by regional organisations constitute guidelines or even “implementing tools” in application of international conventions, including the 1951 Convention relating to the Status of Refugees (hereinafter, “the 1951 Convention”). These standards do not have the same legal value as international treaties, but they are

nevertheless important tools in the appraisal of how to apply the 1951 Convention.

5. Based on international refugee law standards, asylum procedures, whether first or second instance, should therefore be governed by basic procedural standards and safeguards. As States have an obligation to protect individuals who fear persecution or other harm in their country of origin, it is a necessary corollary that the procedure, which determines *who* should benefit from international protection, has to be fair and efficient and needs to ensure that no one is wrongly rejected.
6. At appeal stage, the asylum procedure must ensure asylum-seekers' access to protection by enabling them to present the merits of their claim to an authority **independent from the first instance decision-making body**, and with the necessary training to take a substantial decision. The appeal instance should also provide a **full review**, that is, a review which includes matters of fact as well as of law.

II. Specific Comments and Recommendations

The following observations are based on the findings and recommendations by the Committee.

Decision-making authority

7. The Committee recommended that the decision on asylum lies with the Minister of Justice on the basis of the recommendations by the advisory panel. The Committee considered that if the panel had the power to decide on cases, this would affect the *consistency* of the decisions. The report also states that this would increase the length of the procedure. Lastly, the report points out that an independent decision-making body would, in practice, establish a new administrative structure, which, according to the Committee, is not in compliance with the current administrative reform in Japan.
8. This suggests that the Minister of Justice will remain the sole decision maker irrespective of the panel's recommendations. Further, it is unclear why an independent decision making body would be less speedy than the Minister of Justice since both the review and the hearing will not be done by the Minister of Justice. From UNHCR's perspective, it is essential that the body established to examine and decide on asylum claims ensures decision-making, which is independent, based only on human rights and other considerations relevant to asylum, and not influenced by other considerations such as immigration or foreign policy. Based on the Committee's recommendations, however, the proposed appeal instance will remain within the Ministry of Justice and the decision-making will not be independent from the first instance body, since all asylum decisions will be made by the Minister of Justice.
9. UNHCR understands that under the new scheme, the advisory panel is expected to bring a perspective that is different from the current immigration-oriented approach. While this is a positive development, it falls short, however, of establishing a fully independent appeal instance.

10. From the content of the report, it is unclear whether or not the advisory panel's opinions will be binding on the Ministry of Justice. In that regard, the Committee suggested (additional opinion) that the recommendations of the advisory panel should be made public, including where the Minister of Justice's decision differs from the recommendations. While this might constitute a way of influencing the Minister of Justice's decisions, it does not establish a collegial authority which would have the competence to interview the appellant, assess the claim and decide on the appeal.

UNHCR recommendations: Based on international standards and established State practice, UNHCR recommends that decisions on appeal should be taken by an independent authority other than the first instance decision-making body, that is, the Minister of Justice. Alternatively, taking into account the Committee's recommendations which set out an appeal body within the Ministry of Justice, UNHCR wishes to suggest a system whereby the review of the negative decisions would be done by a collegial body composed of two independent experts and one representative of the Ministry of Justice. Decisions would be made by a majority of the members of the collegial instance.

Selection of the members of the advisory panel

11. UNHCR would like to stress that the nature and competence of the determining authority is of great importance. As the human rights, including the right to life and freedom from torture, of individuals may be at stake, the responsibility for decision-making must be taken by an appropriate body and adequately qualified officials. In addition, the determining-authority must be a specialised body. The status and tenure of the decision-makers should afford the strongest possible guarantees of their competence and impartiality. If the experts are selected by the Minister of Justice, the guarantee of impartiality might be compromised.

UNHCR recommendation: In order to guarantee the impartiality of the members of the panel, UNHCR recommends that the experts should be designated by the Minister of Justice on the basis of a proposed list submitted by an authority or institution independent from the Ministry of Justice.

Role of UNHCR

12. The report refers to the possible participation in the panel of individuals who have worked with an international organization. UNHCR understands that this would not necessarily include UNHCR's current or former staff members.
13. Although the selected experts will be in charge of assessing refugee claims, the report seems to put on equal footing any international organization and UNHCR for the selection of an expert with the related work experience. As such, this does not take into consideration the specific mandate of UNHCR which was given the responsibility by the General Assembly, and therefore also by Japan, to provide protection to refugees worldwide. UNHCR's international protection function is unique in the international legal system in that it is not only based on General Assembly resolutions but also reflected in international treaty law (Article 35 of the 1951 Convention),¹ as well as UNHCR's role in national procedures and before courts. Moreover, Article 35 of the 1951 Convention is a provision that concretises the general obligations of UN member states to cooperate with the UN.

¹ The original mandate stems from the General Assembly in the form of resolution 428 (V) of 14 December 1950 to which the UNHCR Statute was annexed.

14. Therefore, in UNHCR's view, selecting experts among any international organizations would be inconsistent with Japan's commitment to international refugee law as this would ignore the specific responsibility of UNHCR to supervise the implementation of the 1951 Convention.²
15. As regards the participation of UNHCR in asylum decisions, UNHCR wishes to make the following observations:
- (i) **The main purpose of asylum procedures is to determine whether someone is in need of international protection, in accordance with the 1951 Convention. As a rule, this assessment should not be influenced by immigration-related considerations.**
 - (ii) **To exercise its international protection function vis-à-vis States, UNHCR relies on its Statute and the whole body of universal and regional refugee law and standards, complemented by relevant international human rights instruments, as well as relevant national legislation and key jurisprudence. This body of law and standards constitutes the international refugee protection regime at the core of which are the UNHCR Statute and the 1951 Convention/1967 Protocol. A certain legal authority has therefore been vested by States in this regime, including UNHCR's international protection function in the form of its supervisory role.**
 - (iii) **The values which constitute the fundamental assumptions that underlie this particular regime and define its very nature are: universality, impartiality and fundamental notions of humanity. This is particularly relevant to efforts by UNHCR to strengthen the international protection regime through its supervisory responsibility.**
 - (iv) **On a more practical note, should UNHCR play a role in the third advisory panel, it would be in a purely advisory capacity without decision-making power in accordance with the new scheme suggested by the Committee in its report. This would not, therefore, constitute an interference with decisions by the Government of Japan.**

Training issues

16. The report suggests that experts who have worked overseas would be an advantage, as they would be able to provide background information on the situation in a specific country. It is indeed of the utmost importance that the determining authority is well informed of the situation in the country of origin. This includes that the authority has access to accurate and up-to-date legal and factual background information against which the decision maker may

² The UNHCR's supervisory responsibility is a specific emanation of the UNHCR's international protection function that is directly linked to ensuring a principled application of existing treaty obligations. The rationale behind this role is that supervision by an international organisation is indispensable for a functioning, predictable and credible framework of international co-operation and to ensure the proper functioning of such a system. In the context of refugee protection, it is important to ensure the resolution of refugee problems and harmonisation of international refugee law on the basis of objective evaluations and judgements.

assess the strength of an asylum claim. Sources for information include a wide range of actors such as government sources, UNHCR, NGOs and academic institutions. However, it should be emphasised that information should not be limited to the *general* situation prevailing in the countries of origin and transit but also include *case specific* information relevant to the application.

17. It is therefore important to ensure that the competent authorities are properly trained to deal with asylum applications. In UNHCR's view, the officials responsible for examining and making decisions on asylum requests at *all* stages of the procedures should have the expertise and knowledge especially required for the performance of their tasks, including expertise in international refugee and human rights law. The report, however, does not contain information on the training of the reviewing authority.

UNHCR recommendation: As regards the appropriate knowledge of the panel, UNHCR recommends that the members of the panel should be trained on a regular basis on interviewing skills, working with interpreters and international refugee law, as well as other relevant areas of law, such as human rights and humanitarian law.

Rejection of claims at first instance and at appeal stage

18. A negative decision can only be appealed properly if the asylum seeker is informed of the considerations that have led to that decision. If the asylum-seeker does not have this information, s/he is faced with an impossible task: the rebuttal of unknown presumptions. In UNHCR's view, the Committee's report does not contain sufficient information or guidance on the conditions to appeal a negative decision.

UNHCR recommendation: If an application is rejected in first instance, as well as on appeal, the reasons for the decision in fact and in law need to be clearly stated.

Scope of the review

19. UNHCR noted that the report referred to the possibility to seek judicial review which provides a re-examination of factual and legal matters, including new evidence. The report concluded "in order to quickly process the appeal procedure, it is advisable to limit the scope of the review to the elements of the first instance decision". Based on one dissenting opinion, however, it was stated that the new procedure should not set lower standards than those currently in place.
20. In UNHCR's view, judicial review may well be part of the refugee status determination process if it provides for a full examination of factual and legal matters, and if it is clear that the principle of *non-refoulement* applies until a decision by the court has become final and enforceable. That said, procedural fairness requirements must be considered in a broader sense. In practice, judicial review proceedings often take a long time, as courts are under considerable time pressure. Therefore, courts may not always conduct a full review of asylum appeals, even though they are entitled to do so by law. Meanwhile, rejected applicants are not granted with any form of legal status. Judicial review is also costly and few asylum seekers can afford it.

UNHCR recommendation: Notwithstanding the possibility to seek judicial review, the asylum procedure should provide a review of all relevant circumstances of the claim, including the well-founded fear of persecution at the time of the appeal decision. This is important, as it will enable the appellant to submit new elements

that were not submitted to the first instance authority. It is also necessary given the delays between the first instance decision and the re-examination at appeal stage.

Personal interview

21. UNHCR is concerned by the restrictions contained in the report which recommends that “it is not necessary at all times to have an oral hearing at the appeal procedure” in case the applicant is not requiring it or where “the conclusion is manifest”. This lowers the current standards and undermines the procedural guarantee that every applicant is entitled to a personal interview.
22. It is important that the competent authority conducts a personal interview with *all* applicants for asylum, without allowing discretion to give the opportunity or not to the particular asylum-seeker to have a personal interview. If the panel interviewing applicants found that the interview is not possible for reasons such as, for instance, physical or mental incapability, the competent authority must ensure that the asylum claim can be fully presented through other means, such as legal representation.

UNHCR recommendation: Include a provision in the draft law that guarantees that every applicant is entitled to a personal interview.

Access to legal assistance

23. The report states that the appellants have a right to have their legal adviser or counsellors present during the appeal interview. UNHCR welcomes this recommendation which endorses the current practice. While these safeguards are welcome, it would be preferable to the right to legal assistance be recognised not only at appeal stage but also at first instance. Furthermore, legal assistance should be provided free of charge if the applicant has not adequate means to pay for it himself or herself.

UNHCR recommendation: Include a provision in the draft law that recognizes the right to legal assistance, free of charge for needy asylum-seekers, both at first instance and appeal stage.

III. Additional observations

Refugee status and “humanitarian status”

24. The purpose of the Committee’s recommendations is to provide guidance on the appeal procedure for granting refugee status in the sense of the 1951 Convention. Under the current procedure, however, the Adjudication Division of the Ministry of Justice decides both on appeals against negative asylum decisions, and requests for “humanitarian status”. This humanitarian status may therefore be granted in the context of the deportation procedure to persons who, according to the Ministry of Justice, do not fall under the scope of the 1951 Convention. In UNHCR’s view, however, such persons may nevertheless be in need of international protection even if they do not meet the definition of Article 1(A) of the 1951 Convention.
25. In UNHCR’s opinion, the same minimum guarantees should be applied in all procedures leading to the grant of whatever form of international protection is available in the national legal system concerned. As the circumstances that force people to flee their country are complex and often of a composite nature, the identification of international protection needs should not, therefore, be

made in a compartmentalized fashion by de facto allowing different procedural rules to apply. Each case should be examined in its entirety, ideally by the same authority, and this can be best achieved if the claim is considered in a single procedure. UNHCR also believes that a single asylum procedure will help to increase efficiency and reduce the costs of decision-making in asylum matters.

26. As the examination of a claim under the 1951 Convention allows for information to be obtained which could usefully be considered as relevant also for the examination of the “humanitarian status” category (as currently applied in Japan), the reform of the Immigration Control and Refugee Recognition Act could therefore provide an opportunity to introduce a single asylum procedure. Such a procedure would serve to increase considerably the efficiency of the asylum system to identify persons in need of international protection.

IV. Summary of UNHCR’s recommendations

- **The body responsible for deciding on asylum claims must be an independent and specialized authority.**
- **Alternatively, taking into account the Committee’s recommendations which set out an appeal body within the Ministry of Justice, the review of the negative decisions should be done by a collegial body composed of two independent experts and one representative of the Ministry of Justice. Decisions would be made by a majority of the members of the collegial appeal body.**
- **In first instance, as well as on appeal, the reasons for the decision in fact and in law need to be clearly stated.**
- **In order to guarantee the impartiality of the members of the panel, the experts should be designated by the Minister of Justice on the basis of a proposed list submitted by an authority or institution independent from the Ministry of Justice.**
- **UNHCR, as a United Nations Agency mandated by the General Assembly to protect refugees worldwide, should be able to provide input to the advisory panel, or to participate in the panel.**
- **Members of the panel should be trained on a regular basis on interviewing skills, working with interpreters and on including international refugee law, as well as other relevant areas of law, such as human rights and humanitarian law.**
- **The asylum procedure should provide a review of all relevant circumstances of the claim, including the well-founded fear of persecution at the time of the appeal decision.**
- **Every applicant should be entitled to a personal interview, both at first instance and at appeal stage.**
- **The right to legal assistance, free of charge for needy asylum- seekers, both at first instance and appeal stage, should be explicitly recognized.**

- **The same minimum guarantees should be applied in all procedures leading to the grant of whatever form of protection is available in Japan. Each case should be examined in its entirety, ideally by the same authority, through a single asylum procedure.**

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