

## ADVISORY OPINION BY UNHCR ON THE INTERPRETATION OF THE REFUGEE DEFINITION

### Basis for the submission of an advisory opinion and general considerations

1. The United Nations General Assembly has entrusted United Nations High Commissioner for Refugees (UNHCR) with the responsibility of providing international protection, under the auspices of the United Nations, to refugees within its mandate and of seeking permanent solutions to the problems of refugees. The Statute of the Office, annexed to General Assembly Resolution 428 (V) of 14 December 1950, specifies that the High Commissioner shall provide for the protection of refugees falling under the competence of the Office by, among others:

*"Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto..."<sup>1</sup>*

2. States have recognized and accepted this supervisory responsibility of the UNHCR in Article 35 of the 1951 Convention relating to the Status of Refugees (the 1951 Convention) to which Japan is a Party.

*"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."*

The submission of *amicus curiae* briefs, advice to lawyers and other similar interventions are part of the activities carried out by UNHCR in the exercise of its supervisory function.

3. Given its supervisory responsibilities, UNHCR considers it appropriate to respond to the request by the Tokyo Bar Association and place its own view before the Court.<sup>2</sup> UNHCR stands ready to provide any additional assistance to the Court for which it may be called upon. UNHCR will limit its submissions to issues of international law.
4. The present case raises important questions concerning the implementation of the 1951 Convention and involves the international protection function of the Office. The questions of law referred to the Court involve
  - (a) the meaning of the phrase “well-founded fear of persecution”
  - (b) the burden of proof
  - (c) the impact of illegal entry or stay on the claim for refugee status
  - (d) the legal impact of onward movements
5. The following submission is limited to issues of international law, and refrains from taking a position on the individual case. It is based on applicable international human rights and refugee law as evolved over the years. Particular reference is made to the Handbook on Procedures and Criteria for Determining Refugee Status (thereafter “the Handbook”) prepared by UNHCR in 1979 at the request of State Parties to assist them in applying the refugee definition contained in Article 1 of the 1951 Convention. The Handbook is recognised and applied by national authorities and courts as an authoritative source in interpreting the refugee definition and related procedural requirements.

**Query 1: How should the expression “well-founded fear of being persecuted” in Article 1A (2) of the 1951 Convention and Article 1 (2) of 1967 Protocol be interpreted?**

---

<sup>1</sup> Statute of the Office of the United Nations High Commissioner for Refugees, UNGA Res. 428(V), 14 December 1950, Annex, paragraph 8.

6. The phrase “well-founded fear of being persecuted” is the key phrase of the refugee definition<sup>3</sup>. It embraces two elements of the refugee definition: well-founded fear and persecution.
7. “Well-founded fear”: Departing from earlier methods of defining refugees by categories, the 1951 Convention introduced the general concept of “fear” to define who is a refugee. While fear is a subjective emotion, for the purpose of refugee status determination, it must be well-founded, that is, it must have an objective basis.<sup>4</sup> Thus, the term “well-founded fear” contains a subjective element, represented by the applicant’s state of mind to be assessed mainly by evaluating the applicants’ statements, and an objective element, which is to be assessed on the basis of the situation prevailing in his/her country of origin.
8. “Persecution”: The concept of persecution, as “originally intended” by the drafters of the 1951 Convention, was designed to allow for a sufficient degree of flexibility in order to provide protection to those who need it. The Handbook<sup>5</sup> notes the general understanding that persecution in any case comprises serious human rights violations. In addition, the Handbook also clarifies that discrimination amounts to persecution if it leads to consequences of a substantially prejudicial nature for the person concerned, including serious restrictions on his/her right to earn a livelihood, his/her right to practice a religion, or his/her access to normally available educational facilities.<sup>6</sup>

---

<sup>2</sup> See the request to UNHCR Regional Representation in Japan by the Tokyo Bar Association of 7 October 2004

<sup>3</sup> See Handbook on Procedures and Criteria for Determining Refugee Status, UNHCR, 1979, paragraph 37.

<sup>4</sup> See Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees, UNHCR, April 2001, paragraph 11.

<sup>5</sup> See paragraph 51 of the Handbook. Additional information can also be found in “Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees, UNHCR, April 2001, paragraph 16.

<sup>6</sup> See paragraph 54 of the Handbook.

**Query 2: How much evidence may be required to establish a well-founded fear of being persecuted? What is the standard of proof?**

9. In accordance with general principles of the law of evidence, the burden of proof lies on the person who makes the assertion – in the case of refugee claims, on the asylum-seeker. This burden is discharged by providing a truthful account of his/her background and personal experiences which have given rise to the fear of persecution. However, because of the particularly vulnerable situation of asylum-seekers and refugees, the responsibility to ascertain and evaluate the evidence is shared also by the decision-maker.
10. In the context of a refuge claim, the expression “standard of proof” means the threshold to be met by the applicant in persuading the adjudicator as to the truth of his or her assertions. Based on the Handbook, the applicant’s fear should be considered well-founded if he/she *“can establish, to a reasonable degree, that his continued stay in his country has become intolerable...”*<sup>7</sup>
11. State practice confirms that the test for well-foundedness is less than “beyond a reasonable doubt” and also less than a “balance of probabilities”. Various national courts have decided that the fear is well-founded if there is a “reasonable possibility”, or “good reason” to fear persecution. This is well illustrated by the U.S Supreme Court in *INS v. Cardoza-Fonseca*:

*“There is simply no room in the United Nations definition for concluding that an applicant has a 10% chance of being shot, tortured, or otherwise persecuted, that she or he has no ‘well-founded fear’ of the event happening...so long as an objective situation is established by the evidence, it need not been shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility”.*<sup>8</sup>

---

<sup>7</sup> See paragraph 42 of the Handbook.

<sup>8</sup> See U.S. Supreme Court, *I.N.S. v. Cardoza-Fonseca*, 67 U.S. 407 (1987) at 453. See, also the Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae in support of the

**Query 3: Is the applicant required to demonstrate real, individualized and concrete circumstances to establish a well-founded fear of persecution?**

12. The refugee definition, in the sense of the 1951 Convention, is forward-looking. The wording “well-founded fear” does not require past persecution, although past persecution is a strong indication of the well-foundedness of continued fear. International refugee protection is preventive in its nature and therefore a person does not need to wait until she or he has been detected and persecuted before she or he can claim refugee status. As pointed out in paragraph 42 of the Handbook, *“the applicant’s fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in the country of origin has become intolerable to him, for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there”*.
13. As a further consequence there is no requirement of individual targeting. In order to be a refugee, it is sufficient if the applicant can demonstrate that persons in similar circumstances have been persecuted. Paragraphs 43 of the Handbook provide useful guidance in this regard:

*43. These considerations need not necessarily be based on the applicant’s own personal experience. What, for example, happened to his friends and relatives and other members of the same racial or social group may well show that his fear that sooner or later he also will become a victim of persecution is well-founded. The laws of the country of origin, and particularly the manner in which they are applied, will be relevant. The situation of each person must, however, be assessed on its own merits. In the case of a well-known personality, the possibility of persecution may be greater than*

---

Respondent” Cardoza Fonseca. Additional case law can be found in UNHCR’s Position “Note on Burden and Standard of Proof in Refugee Claims” of 16 December 1998.

*in the case of a person in obscurity. All these factors, e.g. a person's character, his background, his influence, his wealth or his outspokenness, may lead to the conclusion that his fear of persecution is "well-founded".*

**Query 4: Does illegal entry for the purpose of earning an income have a bearing on the assessment of the refugee claim? If illegal entry was facilitated through smuggling channels, is this factor taken into account in the assessment?**

14. States have acknowledged that refugees will frequently have justifiable reasons for illegal entry. Article 31 of the 1951 Convention provides for the exemption from penalties for refugees entering or present without authorization, provided they fulfil certain conditions. Such principle of exemption is confirmed in the national legislation and case law of a number of State parties to the 1951 Convention.<sup>9</sup>
15. The illegal character of the asylum-seeker's entry or stay in the country of asylum does normally not have any impact on the merits of his/her claim for refugee status. Purpose of the asylum procedure is to assess whether there is a reasonable possibility that the applicant will be subject to persecution upon return to his/her country of origin. The existence of a "well-founded fear of persecution" does not depend on the legal or illegal character of the applicant's entry or stay in the country of asylum, or whether entry was facilitated with the assistance of smugglers. However, denial of travel documents by the country of origin, forcing the asylum-seeker to travel illegally may, in some cases, be an indicator of a risk of persecution.

**Query 5: Consequences of secondary movements of asylum-seekers and refugees (i.e. stay in a third country prior to seeking asylum in another country, and alleged false statements by the applicant concerning his/her**

---

<sup>9</sup> An overview of state practice is contained in Guy Goodwin-Gill, "Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection", pp.

**conditions of stay in the third country; For further details, see attached query by the Tokyo Bar Association).**

16. As a rule, a refugee claim is assessed against the country of the applicant's nationality, or habitual residence if s/he is stateless. Therefore, the fact that the applicant has resided in, or transited through, a third country before seeking asylum in the country of destination is, in itself, irrelevant for the purpose of determining whether s/he has, or does not have, a well-founded fear of persecution in his or her own country.
17. With respect to the fact that the applicant would have made false statements regarding his or her situation in the third country, it is important to recall that the primary concern in determining a refugee claim is the objective risk of being persecuted, that is, the situation prevailing in the country of origin. Therefore, false statements would therefore not necessarily negate the reality of the risk faced by the applicant. While dishonesty in relation to the applicant's situation in the third country may be one factor affecting the credibility of the claim, it can not in itself lead to the rejection of the claim as such statements are not material to the substance of the refugee claim. Decision-makers need to make a distinction between matters that are directly relevant to the claim (the fear of being persecuted in the country of origin) and other aspects which are substantively irrelevant to qualification for refugee status.
18. The "third country element" may be relevant in the context of determining whether the refugee claim needs to be assessed, that is, whether the applicant may be returned to that third country without having his or her refugee claim determined in the country of destination. In this context, the case examples provided in the query by the Tokyo Bar Association subsume so-called "safe third country" or "first country of asylum" situations where individuals have

---

186-254, in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, 2003 Cambridge University Press.

travelled through countries where, it is felt, the person “should have requested” protection or “actually received” protection.<sup>10</sup>

19. That being said, it is important to stress that under international refugee law, the State presented with an asylum request at its borders or on its territory has and retains the immediate and primary refugee protection responsibilities relating to admission, at least on a temporary basis, and the provision of basic reception conditions. This includes providing access to a fair and efficient asylum procedure. Consistent with the object and purpose of the 1951 Convention and its underlying regime, these responsibilities are elaborated upon in more detail in a number of Conclusions of the Executive Committee (EXCOM), including EXCOM 22 (1981), para 2, EXCOM 82 (1997), para d, iii and EXCOM 85 (1998), para q.
20. While the transfer of responsibilities for handling refugee status claims to another country is not precluded under international refugee law, situations of “refugees in orbit” must be avoided. Therefore, there are limitations on such transfer of responsibilities. Consistent with the growing body of acknowledged international practice, a transfer of responsibility to another country must be based on an international agreement which frequently requires the existence of a link between the applicant and the third country, such as previous stay on the territory of the third country, previous issuance of an entry visa or close family links.
21. In the absence of international agreements assigning responsibilities for status determination, international refugee law sets strict requirements to the application of the first country of asylum or the “safe third country” concepts. As is clear from relevant Conclusions of the Executive Committee, which would apply by analogy, no asylum-seeker should be sent to a third country for determination of the claim without sufficient guarantees in each individual case that: i) the person will be admitted to that country; ii) will enjoy there

---

<sup>10</sup> The longer, the more meaningful and the more secure the person’s stay in the third country, the more likely it is that the country will be described as a “first country of asylum” rather than a “safe third country.” The difference is one of degree (except that a first country of asylum might have greater responsibility to other countries, in a given case).



effective protection, in particular against *refoulement*; iii) will have the possibility to seek and enjoy asylum; and iv) will be treated in accordance with accepted international standards. This was also confirmed, *inter alia*, at the expert roundtable on effective protection held in Lisbon in December 2002 in the context of the Global Consultations on International Protection.<sup>11</sup>

22. In addition, the determination as to whether an asylum-seeker may be returned to a third country where she or he would enjoy “effective protection” revolves around what treatment that person will receive in the relevant third country *now*, not what happened in the past. Past events might well shed light on what will happen upon return, but they should not be regarded as conclusive.
23. Lastly, the application of any "safe third country concept" clearly hinges on such a third country accepting the responsibilities for an individual asylum-seeker or refugee. In this context, the explicit consent of a third country to readmit the person as an asylum-seeker or refugee is essential.<sup>12</sup>

### **Conclusion**

24. UNHCR hopes that the above observations will assist the further deliberations on these issues and stands ready to provide additional information.

## **United Nations High Commissioner for Refugees**

**22 December 2004**

---

<sup>11</sup> See, Lisbon Expert Roundtable, 9 and 10 December 2002, *organised by the United Nations High Commissioner for Refugees and the Migration Policy Institute hosted by the Luso-American Foundation for Development*: “Summary Conclusions on the Concept of “Effective Protection” in the Context of Secondary Movements of Refugees and Asylum-Seekers”

<sup>12</sup> See, also, paragraph. 15 (d) of the Summary Conclusions of the Lisbon Expert roundtable.

**ADVISORY OPINION BY UNHCR ON THE INTERPRETATION OF THE  
REFUGEE DEFINITION**

**Enclosure:**

1. UNHCR's Position "Note on Burden and Standard of Proof in Refugee Claims", 16 December 1998.
2. UNHCR Paper on Article 1 of the 1951 Convention, April 2001.
3. Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae in support of the Respondent" Supreme Court of the United States, *I.N.S. v. Luz Marina Cardoza-Fonseca*, October 1986.
4. Conclusions of the Executive Committee of UNHCR No.22 (1981), No.82 (1997), and No.85 (1998).
5. "Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers" (Lisbon Expert Roundtable, 9 and 10 December 2002, organised by the United Nations High Commissioner for Refugees and the Migration Policy Institute hosted by the Luso-American Foundation for Development).