



Parliamentary Briefing to the Joint Committee on Statutory Instruments
Asylum (Designated States) Order 2010, Tuesday 9th February 2010

The Statute of Office of the United Nations High Commissioner for Refugees (UNHCR) entrusts the High Commissioner with the responsibility for providing international protection to refugees and for seeking permanent solutions to the problems of refugees.¹ Article 35 of the 1951 Convention relating to the Status of Refugees² requires that States co-operate with UNHCR in the exercise of its functions, and in particular facilitate its duty of supervising the application of the provisions of the Convention.

In view of the Office's supervisory role, UNHCR's interpretation of the provisions of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol³ ('1951 Convention') are generally considered authoritative.

Annex 2 of United Nations Security Council Resolution 1244 (SCR 1244) of 1999⁴ calls on UNHCR to supervise returns to Kosovo. UNHCR has endeavored since 1999 to contribute to creating conditions for sustainable return and has regularly issued assessments of the international protection needs of persons from Kosovo.

The proposed Order under consideration by the Joint Committee is also reflected in EU Asylum Procedure Directive which requires that *'the assessment of whether a country is a safe country of origin in accordance with this Article shall be based on a range of sources of information, including in particular information from other Member States, the UNHCR, the Council of Europe and other relevant international organisations.'*⁵

In its comments on the Asylum Procedures Directive,⁶ UNHCR indicated that it does not oppose use of the notion of 'safe country of origin' as a procedural device in limited circumstances. The serious infringements on the right to a fair process of refugee status determination resulting from the application of the concept of safe country of origin, should be fully justified by conditions in the country of origin concerned.

¹ Statute of the Office of the United Nations High Commissioner for Refugees, Annex to GA Res 428(V) (1950) (UN Doc. A/1775) paras [1] & [6]

² UN General Assembly, Convention Relating to the Status of Refugees (28 July 1951) 189 UNTS 137

³ UN General Assembly, Protocol Relating to the Status of Refugees (30 January 1967) 606 UNTS 267

⁴ UN Security Council, *Security Council Resolution 1244 (1999) [on the deployment of international civil and security presence in Kosovo]*, S/RES/1244, 10 June 1999, available at: <http://www.unhcr.org/refworld/docid/3b00f27216.html>.

⁵ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326/13

⁶ UNHCR Provisional Comments on the Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, February 2005: <http://www.unhcr.org/43661ea42.pdf>

UNHCR notes that each applicant should be given an effective opportunity to rebut the presumption of safety of the country of origin, in his or her individual circumstances, and have access to an effective remedy.

Annex II requires that on the basis of the legal situation, the application of the law and general political circumstances, it can be shown that there is generally and consistently no persecution [as defined in Article 9 of the Qualification Directive], no torture or inhuman or degrading treatment or punishment, and no threat by reason of indiscriminate violence in situations of international or internal armed conflict. Annex II contains a list of elements which must be considered in making this assessment, including the laws of the country and their application, as well as observance of human rights under the ECHR, and availability of effective remedies.⁷

UNHCR considers that at present, the EU criteria for a “safe country of origin” as set out in Annex II of the Asylum Procedures Directive are not met in the case of Kosovo. In this context it should also be noted that there continue to be persons originating from Kosovo who receive refugee or subsidiary protection status in countries of the European Union. UNHCR notes that while Kosovo’s Unilateral Declaration of Independence (UDI) has been recognised by the United Kingdom, the United Nations has not recognised Kosovo’s independence. These comments should therefore not be taken as diverging in any way from the position of the United Nations. In view of the fact that the status of Kosovo remains unresolved, that international forces continue to be present in Kosovo, and that human rights protections continue to be precarious at best, UNHCR would consider it premature to designate Kosovo as a ‘safe’ country or territory.

In November 2009 UNHCR published an updated assessment of the international protection needs of persons from Kosovo.⁸ Key elements of that assessment are provided in the attached summary.

⁷ Article 30(2) of the Asylum Procedures Directive sets out a lower threshold when a country has been designated as a ‘safe country of origin’ under pre-existing national law. In its comments on the Asylum Procedures Directive (proposed Articles 30A(1) and 30A(2) and (3), subsequently numbered as Articles 30(1) and 30(2) and (3)) UNHCR expressed its view that these criteria are insufficient to establish that a country is generally ‘safe’. See note 6 above.

⁸ Available at: <http://www.unhcr.org/refworld/docid/4af842462.html>

ANNEX

Summary of key elements from UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Individuals from Kosovo, 9 November 2009*⁹

I. Human Rights Situation

It is reported that human rights remedies and protections in Kosovo are at the worst ineffective and at best inconsistent.¹⁰ While the authorities have made efforts to ensure respect for human rights, serious problems remain. Respect for minority rights continues to be the most significant human rights issue in Kosovo.¹¹ Restrictions on freedom of movement and exclusion from the political, social and economic realms affect many persons who live outside areas where they belong to the majority group.¹² The European Commission has highlighted the lack of capacity of the authorities fully to implement and harmonise human rights standards for the benefit of all inhabitants, including ethnic minorities.¹³

According to the Ombudsperson for Kosovo:

⁹ Available at: <http://www.unhcr.org/refworld/docid/4af842462.html>

¹⁰ Minority Rights Group International, *Filling the Vacuum: Ensuring Protection and Legal Remedies for Minorities in Kosovo*, 26 May 2009, available at: <http://www.unhcr.org/refworld/docid/4a1ce86f2.html>.

¹¹ According to the US Department of State, the most serious of these were:

“Deaths and injuries from unexploded ordnance or landmines; corruption and government interference in security forces and the judiciary; lengthy pre-trial detention and lack of judicial due process; cases of politically and ethnically motivated violence; societal antipathy against Serbs and the Serbian Orthodox Church; lack of progress in returning internally displaced persons to their homes; government corruption; violence and discrimination against women; trafficking in persons, particularly girls and women for sexual exploitation; societal violence, abuse, and discrimination against minority communities; societal discrimination against persons with disabilities; abuse and discrimination against homosexuals; and child labour in the informal sector.”

See: US Department of State, *2008 Country Reports on Human Rights Practices - Kosovo*, 25, February 2009, available at: <http://www.unhcr.org/refworld/docid/49a8f17bac.html>.

¹² See footnote 6.

¹³ According to the European Commission:

“As regards the promotion and enforcement of human rights, in December 2008, the government approved the strategy and the action plan on human rights for the period 2009-2011. However, the mechanisms to ensure their implementation are not yet in place. Some municipal human rights units are not operational, in particular in Kosovo Serb majority municipalities, which are reluctant to cooperate with the central authorities. The Ombudsman office has only limited oversight as regards Serbian parallel structures. The human rights units at the central level (e.g. Ministry of Justice, Ministry of Public Administration) mandated to implement the Ombudsman’s recommendations are not yet fully operational. Overall, there has been some progress in this area, notably the adoption of the human rights strategy and action plan. However, the institutional framework for the observance of international human rights norms in Kosovo needs to be significantly strengthened.”

European Commission, *Commission Staff Working Document: Kosovo Under UNSCR 1244/99 2009 Progress Report*, SEC(2009) 1340, 14 October 2009, available at: <http://www.unhcr.org/refworld/docid/4adc2a002.html>.

“While human rights violations are raised and may also be discussed in the media, the mechanisms in place still do not have the power to actually prevent or remedy human rights violations. At the same time, the majority of the population is not fully aware of their rights and thus often do not even complain, because they have become used to the situation as it is or believe that nobody can help them anyway. Under such circumstances, the actual protection of human rights depends more on fate and on the actual circumstances of each individual case than it normally should.”¹⁴

The UN Secretary General in his 30 September 2009 report on UNMIK to the Security Council, stated that:

“during the reporting period [1 June to 15 September 2009], there was a concern over the growing number of security-related incidents affecting minority communities that require appropriate follow-up and action by the Kosovo authorities.”¹⁵

The situation of Kosovo Roma remains problematic. The Council of Europe’s Committee of Experts on Roma and Travellers, citing the fragile security situation, urges that asylum claims lodged by Roma should be carefully considered.¹⁶ In September 2009, there were reports of Kosovo Albanians attacking and injuring several Kosovo Roma.¹⁷ In December 2009 the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, expressed concern at forced returns in particular of Roma people to Kosovo.¹⁸

II. Eligibility for International Protection

All claims by asylum-seekers from Kosovo should be considered on their individual merits according to fair and efficient refugee status determination procedures. UNHCR considers that groups set out in this section face a particular risk of persecution or serious harm in Kosovo, including through cumulative discriminatory acts. This listing is not to

¹⁴ Ombudsperson Institution in Kosovo, *Eighth Annual Report 2007-2008*, 21 July 2008, p. 36, available at: <http://www.ombudspersonkosovo.org/?cid=2,74>.

¹⁵ As of the 30 June 2009 deadline, however, 317 of the 325 Kosovo Serb police officers returned to work. United Nations Security Council, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, S/2009/497, 30 September 2009, available at: <http://www.unhcr.org/refworld/docid/4acb51cdd.html>.

¹⁶ Council of Europe, Committee of Experts on Roma and Travellers, *Updated Opinion of MG-S-ROM on the Return of Roma to Kosovo and South Eastern Europe*, MG-S-ROM (2009)3, 6 May 2009, available at: <http://www.coe.int/T/DG3/Romatravellers/documentation/mgsrom/Abridged%20Report%2027th%20meeting.pdf>

¹⁷ See Human Rights Watch, *Kosovo: Investigate Attacks on Roma*, 7 September 2009, available at: <http://www.unhcr.org/refworld/docid/4aae3ed81a.html>; and Amnesty International, *Kosovo: Investigate Attacks on Roma*, 7 September 2009, available at: <http://www.unhcr.org/refworld/docid/4ac06ef9c.html>.

¹⁸ Comments available at: http://www.coe.int/t/commissioner/News/2009/091202Kosovo_en.asp

be construed as exhaustive and is based on information available to UNHCR at the time of writing.

Main Groups at Risk

1. Serbs and Albanians in Minority Situations, and Roma

Kosovo Serbs and Kosovo Albanians inhabiting areas where they are in the minority, and Kosovo Roma inhabiting any part of Kosovo, continue to face serious restrictions to their freedom of movement and the exercise of fundamental human rights, including serious societal and sometimes administrative discrimination that would limit in particular their ability to exercise their political, social and economic rights. Furthermore, there are reports of threats and physical violence perpetrated against these communities.¹⁹

The Ashkali and Egyptian minorities, due to their racial and ethnic characteristics, may be confused with Kosovo Roma. Similarly to the Kosovo Roma, the Ashkali and Egyptian minorities often lack identity papers and are therefore placed in difficult circumstances with regard to access to social services, health care and education.²⁰ Asylum applications of members from these communities should be assessed carefully in order to evaluate whether there is a need for international protection, based on a risk of persecution grounded on actual or perceived race or nationality.²¹

2. Persons in Ethnically Mixed-Marriages and Persons of Mixed Ethnicity

People in mixed marriages and children of mixed parentage may face discrimination amounting to persecution, based on their actual or perceived race or nationality.²² Unlike other minority groups, mixed families and persons of mixed origin may be excluded from all communities – including potentially their own extended families and communities in places of origin – and unable to rely on the relative security of their ethnic enclaves. Asylum applications of persons in mixed marriages or persons of mixed ethnicity should be assessed carefully in order to evaluate whether there is a need for international protection due to cumulative discrimination or other measures amounting to persecution, including for the reason that they do not speak the language of the majority community.²³

3. Persons Perceived to Have Been Associated with the Serbian Authorities After 1990

¹⁹ See Footnote 18.

²⁰ UNICEF, *Ethnic minority communities struggle to break a cycle of poverty in Kosovo*, 29 June 2009, available at: http://www.unicef.org/girlseducation/index_50107.html?q=printme.

²¹ See Art. 10(1) of the Qualification Directive.

²² *Ibid.*

²³ For example, where there is a visible difference in skin colour and the Roma partner speaks no or accented Albanian, a mixed marriage or relationship may put both parties at risk. See: *KX (Mixed Marriages - Roma-Albanian - Januzi Applied) Serbia and Montenegro (Kosovo) v. Secretary of State for the Home Department*, CG [2006] UKAIT 00072, UK Asylum and Immigration Tribunal, 20 September 2006, available at: <http://www.unhcr.org/refworld/docid/467f862b2.html>; *SI (Mixed Serb/Roma Parentage) Kosovo v. Secretary of State for the Home Department*, CG [2009] UKAIT 00011, UK Asylum and Immigration Tribunal, 16 March 2009, available at: <http://www.unhcr.org/refworld/docid/49c782aa2.html>.

Persons suspected of having collaborated with the Serbian authorities after the abolition of Kosovo's autonomous status in 1989 may face discrimination and ill-treatment in Kosovo which may amount to persecution based on actual or perceived political opinion. While in some cases they may find protection from the authorities, a lack of trust in the judiciary and the failure of the administration to ensure that the "rule of law" protects individuals have been cited as major problems, and recourse to law enforcement is frequently unsuccessful.

4. Victims of Trafficking

Human trafficking for sexual and other forms of exploitation continues to be a serious problem in Kosovo, affecting women and children in particular.²⁴ Victims of trafficking, and in particular women and children, may be in need of international protection, particularly since they may not be able to rely on effective state protection. They may fear ill-treatment upon return to Kosovo by their traffickers or related elements. Their families may be threatened as well. In addition, victims may face ostracism, discrimination or punishment by their family and/or the local community or other forms of ill-treatment upon return.²⁵

5. Victims of Domestic Violence

While prohibited by law, domestic violence affects women and children in Kosovo and remains a serious problem throughout all communities. According to Kosovo police statistics, 1,077 cases of domestic violence were recorded in 2007. Moreover, reports claim that most cases are not reported to the competent authorities, in part because the authorities are unable and/or unwilling to provide protection.²⁶ As a result, cases of domestic violence are not investigated, and official data is believed to underestimate the scale of the problem. Rape and other forms of sexual and gender-based violence are underreported due to the cultural stigma attached to survivors and their families, and the fact that survivors may not be able to rely on effective state protection.²⁷

²⁴ US Department of State, *Trafficking in Persons Report 2009 - Kosovo*, 16 June 2009, available at: <http://www.unhcr.org/refworld/docid/4a4214ad28.html>; See also Human Rights Watch, *A Human Rights Agenda for New Kosovo*, No. 1, February 2008, available at: <http://www.hrw.org/en/reports/2008/02/14/human-rights-agenda-new-kosovo>.

²⁵ Qualification Directive, Article 9(2), which states that acts of persecution can inter alia take the form of "(a) acts of physical or mental violence, including acts of sexual violence" and "(f) acts of a gender-specific or child-specific nature." Article 9(3) further provides that 'gender related aspects might be considered' in relation to a particular social group.

²⁶ According to a Human Rights Watch report:

“...little is done by the state to protect the victims of domestic violence. In the absence of adequate public funding, support to victims of domestic violence and the provision of safe houses depend upon Kosovo's already stretched women's human rights groups. Most regions and many municipalities lack safe houses. Public awareness of domestic violence remains low.”

Human Rights Watch, *A Human Rights Agenda for New Kosovo*, No. 1, February 2008, p. 3, available at: <http://www.hrw.org/en/reports/2008/02/14/human-rights-agenda-new-kosovo>

²⁷ Los Angeles Times, *Kosovo's women suffer*, 10 March 2008, <http://articles.latimes.com/2008/mar/10/world/fg-women10>.

6. Persons Whose Claims are based on Sexual Orientation

The Constitution of Kosovo prohibits discrimination based on sexual orientation.²⁸ However, according to reports, there have been a number of cases of discrimination against homosexuals in Kosovo. Victims have been unwilling, in many cases, to present their cases publicly out of fear of further discrimination. Others reportedly make great efforts to hide their sexual orientation in order to avoid being identified as a homosexual. Establishments catering to homosexual clientele, including restaurants, have been targeted once this affiliation has been made public.²⁹

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²⁸ Constitution of the Republic of Kosovo, 15 June 2008, available at: <http://www.unhcr.org/refworld/docid/4ae969d32.html>.

²⁹ Institute for War and Peace Reporting, *Gay Kosovars flirt with danger*, 30 May 2003, available at: http://www.iwpr.net/?apc_state=henfbc157142&m=t. See also Metro Weekly, Safe haven: Gay man from Kosovo granted political asylum in the US, 17 May 2007. See also Gaykosova available at: <http://www.gaykosova.org/index.html>.