



UNHCR

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

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Notre/Our code: 267/ROBNC/2012

Votre/Your code:

Dear Ms. Annette Møller Hannibal,

Re: **Response to request for UNHCR's guidance on the application of the 'first country of asylum' and 'safe third country' concepts, particularly in respect of Tunisia**

With reference to correspondence concerning your client, Mr. Ferhan Husny Gergies, a stateless Kurd from Syria (udl.nr. 1-32-693.144), please find enclosed UNHCR's guidance on the application of the first country of asylum and/or safe third country concepts, particularly in relation to Tunisia in view of the specific circumstances in your client's case.

I hope you will find this guidance useful and invite you to contact us again if you have any further questions in this regard.

Yours sincerely,



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Senior Regional Legal Officer

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Response by the UNHCR Regional Office for the Baltic and Nordic Countries to request for guidance on the application of the ‘first country of asylum’ and ‘safe third country’ concepts, particularly in respect of Tunisia

1. According to its Statute, UNHCR fulfils its mandate *inter alia* by “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto[.]”¹ UNHCR’s supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention relating to the Status of Refugees (“1951 Convention”).² Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (“UNHCR Handbook”)³ and subsequent Guidelines on International Protection⁴. This supervisory responsibility is reiterated in Article 35 of the 1951 Convention and Article II of the 1967 Protocol relating to the Status of Refugees (“1967 Protocol”).⁵
2. UNHCR, in exercising its mandate and supervisory responsibility, provides information on a regular basis to decision-makers and courts of law in cases concerning the proper interpretation and application of provisions of the 1951 Convention and the 1967 Protocol. These responses are provided without prejudice to UNHCR’s position under the Convention on the Privileges and Immunities of the United Nations.
3. UNHCR’s expertise on asylum issues has also been acknowledged in the context of the European Union’s asylum *acquis* and beyond, including in the pronouncements of the European Court of Human Rights, which has highlighted the reliability and objectivity of UNHCR in this field.
4. In the present case, UNHCR notes that the decision of the Danish Immigration Service concluded that the applicant met the criteria for recognition as a Convention refugee under Article 7.1 of the Danish Aliens Act. However, in its decision, the Danish Immigration Service directed the applicant to take up residence in Tunisia in view of his marriage to a Tunisian national, with reference to Article 7.3 of the Aliens Act. It should be noted that the applicant himself has never resided in Tunisia. Article 7.3 of the

¹ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*,

14 December 1950, A/RES/428(V), available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b3628> (“UNHCR Statute”), paragraph 8(a).

² UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series No. 2545, vol. 189, p. 137, available at: <http://www.unhcr.org/refworld/docid/3be01b964.html>.

³ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1 January 1992, available at: <http://www.unhcr.org/refworld/docid/3ae6b3314.html>.

⁴ UNHCR issues “Guidelines on International Protection” pursuant to its mandate, as contained in the Statute of the Office of the United Nations High Commissioner for Refugees, in conjunction with Article 35 of the 1951 Convention. The Guidelines complement the UNHCR Handbook (see above footnote 2) and are intended to provide guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff.

⁵ According to Article 35 (1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of th[e 1951] Convention”.

Aliens Act stipulates that “a residence permit under subsections (1) and (2) can be refused if the alien has already obtained protection in another country, or if the alien has close ties with another country where the alien must be deemed to be able to obtain protection”.

5. In relation to the application of the concept of “first country of asylum”, UNHCR notes that the causes of secondary movements of refugees are manifold and include, among other things, a lack of durable solutions, limited capacity to host refugees and a failure to provide protection in some third countries. Any assessment of whether a third country constitutes a first country of asylum requires a careful and individualised case-by-case examination of the conditions in that country and the individual circumstances of the refugee. As a general rule, the concept of first country of asylum is only relevant where a refugee has sought and received protection. It should be noted that in the present case, the applicant has not yet sought or received asylum in Tunisia.
6. In order to apply the concept of first country of asylum, states must ensure that the designated first country of asylum will:
 - (i) re-admit the person,⁶ and
 - (ii) (ii) that the person can re-avail him/herself of protection in the designated country.⁷
7. Where UNHCR is engaged in refugee status determination under its mandate there is a presumption that the country should not be considered a “first country of asylum”.⁸ UNHCR often undertakes such functions because the state has no capacity to conduct refugee status determination or to provide protection. The return of persons in need of international protection to such countries should therefore not be envisaged. In Tunisia, UNHCR conducts refugee status determination under its mandate on behalf of the Tunisia Government in the absence of a functional national asylum system.
8. In relation to the application of the concept of “safe third country”, UNHCR notes that this in general presumes that the applicant could and should already

⁶ A precondition to the application of the first country of asylum concept in European Union law is that the designated first country of asylum will re-admit the applicant. See Article 26 of *Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, 2 January 2006, 2005/85/EC, available at: <http://www.unhcr.org/refworld/docid/4394203c4.html>.

⁷ For more information on the concept of first country of asylum, please refer to: UNHCR, *Summary Conclusions on the Concept of “Effective Protection” in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002)*, February 2003, available at: <http://www.unhcr.org/3e5f323d7.html>; UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/14, available at: <http://www.unhcr.org/refworld/docid/3b36f2fca.html>; UNHCR, *Global Consultations on International Protection/Regional Meetings: Conclusions (Regional Meeting in Budapest, 6-7 June 2001)*, 15 June 2001, EC/GC/01/14, available at: <http://www.unhcr.org/refworld/docid/3b36f29b1.html>; ExCom Conclusion No. 58 (XL) – 1989 - *Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection*, available at: <http://www.unhcr.org/3ae68c4380.html>, ExCom Conclusion No. 87 (L) – 1999, available at: <http://www.unhcr.org/3ae68c6ec.html>.

⁸ *Ibid*, at p. 282.

have requested asylum if he/she passed through a safe country en route to the country where asylum is being requested. As with the “first country of asylum” concept, any assessment of whether a third country constitutes a “safe third country” requires an individualized assessment that the third country is “safe” in the case of each asylum-seeker, thus ensuring respect for international protection principles and in particular that of *non-refoulement*. This would include an examination of the individual’s own circumstances so as to give the asylum seeker the opportunity to rebut a general presumption of safety.

9. UNHCR has set forth the following general principles to be taken into consideration when assessing whether a country constitutes a “safe third country”:
 - (i) The applicant should be protected against *refoulement* and be treated in accordance with accepted international standards as outlined, *inter alia*, in the 1951 Convention – i.e. the third country should be ‘safe’ for the applicant. ‘Safety’ should be ensured under the country’s practice and not just under the formal obligations that it may have assumed.
 - (ii) The applicant should have a genuine connection or close links with the third country. This link should be stronger than the link to the State in which asylum is requested, so that it is fair and reasonable that he or she be called upon first to request asylum there. The asylum-seeker should have transited through the State concerned, although mere transit alone would not, in UNHCR’s view, constitute a connection or close link. The intentions of the asylum-seeker as regards the country in which he or she wishes to request asylum should, as far as possible, be taken into account. Such an approach would also be likely to have a positive impact on the integration of persons who are recognized to be in need of international protection.
 - (iii) The third country should expressly agree to admit the applicant to its territory and to consider the asylum claim substantively in a fair procedure. It should also provide access to a durable solution for those recognized to be in need of international protection.
 - (iv) The provision should permit for exceptions *inter alia* for separated children and other vulnerable persons.”⁹

10. In regard to the third principle above, containing a requirement to ensure that the third country will re-admit the applicant and consider his/her asylum claim substantively in a fair procedure, UNHCR notes that entry and stay of foreigners in Tunisia is regulated by *Loi n° 1968-0007 du 8 mars 1968, relative a la condition des étrangers en Tunisie* (“1968 Law”).¹⁰ All foreigners seeking entry

⁹ UNHCR, *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, available at: <http://www.unhcr.org/refworld/docid/42492b302.html>, at pp. 35-36.

¹⁰ Available at : <http://www.jurisitetunisie.com/tunisie/codes/etranger/etranger1000.htm> See also, *Decret N° 1968-198 du 22 juin 1968, réglementant les conditions d'entrée et de séjour des étrangers en Tunisie (amandé 1992)* [Tunisia], 28 June 1968, available at: <http://www.unhcr.org/refworld/docid/3ae6b51c14.html>

into Tunisia must present a valid passport or a travel document authorizing return and re-admission to the country of issuance. Article 1 of the 1968 Law and the *Loi sur la nationalité en Tunisie*¹¹ defines foreigners as those not holding Tunisian nationality, either because they hold a foreign nationality or because they do not have a nationality. Foreigners also require a Tunisian entry visa, unless there is a bilateral agreement exempting the nationals of the relevant country from the entry visa requirement. It should be noted that Syrian nationals require a visa to enter Tunisia. Hence, in the absence of valid travel documents and a valid entry visa, a foreigner - even if married to a Tunisian national - would not meet the requirements for entry into Tunisia.

11. Furthermore, when considering whether Tunisia may constitute a safe third country for any applicant, States must assess whether the individual would have access to protection in Tunisia, including protection from refoulement and whether he/she would be treated in accordance with accepted international standards as outlined, *inter alia*, in the 1951 Convention. In this regard, UNHCR notes that although Tunisia is party to the 1951 Refugee Convention, it has yet to adopt national asylum legislation and develop a system for the determination of refugee status. Tunisia is thus one of the countries in the world where UNHCR conducts refugee status determination under its mandate. The return of persons in need of international protection to such countries should not be envisaged.
12. In the absence of a national law on asylum, a number of refugees and asylum-seekers in Tunisia do not have appropriate documentation regularizing their presence in Tunisia. Marriage to a Tunisian spouse does not facilitate the issuance residency documents or granting of nationality. As such, a number of refugees and asylum-seekers in Tunisia do not have appropriate legal documentation regularizing their presence in Tunisia.
13. In conclusion, UNHCR recalls the general principle that the application of the concepts of first country of asylum and of safe third country requires a careful and individualised assessment of the applicability of the criteria set out above, through a case-by-case examination of the conditions in the third country and of the individual circumstances of the refugee or asylum-seeker, taking into account ethnic, political, religious, and other relevant considerations, including the age and gender of the applicant, and any requirements for ongoing special medical treatment or psychological support (i.e. victims of torture, post-traumatic stress disorder, survivors of sexual and gender-based violence, persons with serious disabilities, etc.).

**UNHCR Regional Office for the Baltic and Nordic Countries
Stockholm, 17 December 2012**

¹¹ *Loi sur la nationalité en Tunisie* [Tunisia], 12 March 1968, available at: <http://www.unhcr.org/refworld/docid/3ae6b4d128.html>