

ՄԱԿ ՓԳՀ

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Dear Mr. Rshtuni,

The Representation of the United Nations High Commissioner for Refugees (UNHCR) in Armenia presents its compliments to the Criminal Court of Appeal of the Republic of Armenia. In the exercise of UNHCR's mandate to provide international protection to refugees and to supervise States' adherence to the 1951 Convention relating to the Status of Refugees (as elaborated below) and in line with international practice of providing advice to the judiciary on international refugee law issues (by way of *amicus curiae* briefs or otherwise), I am writing to draw your attention to the case of two Afghan asylum-seekers in detention, whose appeal case (ԱՎԴ1/0056/01/15 with charges under Article 329 of the Criminal Code of the Republic of Armenia) is currently pending with the Criminal Court of Appeal of the Republic of Armenia.¹

In particular, I wish to highlight Armenia's international legal obligations in respect of the principle of non-penalization under Article 31 of the 1951 Convention relating to the Status of Refugees (hereafter 'the 1951 Convention'), as well as the relevance of this Article to the above mentioned cases.

UNHCR's authority and expertise

As a subsidiary organ of the United Nations, UNHCR has been entrusted by the UN General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions to the problem of refugees. 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 [...]'² In pursuance of its supervisory responsibility, States parties are required, per Article 35(1) of the 1951 Convention, 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 ("1967 Protocol").

UNHCR's supervisory responsibility is also reflected in the national law of the Republic of Armenia. Article 44 of the *Law on Refugees and Asylum* provides that UNHCR "shall be granted full support and co-operation by all bodies responsible for asylum and refugees, in order to supervise the implementation of the Convention and its 1967 Protocol."³ UNHCR's supervisory responsibility is exercised in part by issuing interpretative guidelines as well as public positions, including in higher national and regional courts, on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention and 1967 Protocol.

¹ This letter 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. See, UN General Assembly, *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, <http://www.refworld.org/docid/3ae6b3902.html>.

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

³ *Armenia: Law No. HO-211-N of 2008 on Refugees and Asylum (2015)* [Armenia], 27 November 2008, <http://www.refworld.org/docid/4f1986412.html>.

The views in this letter are informed by more than 60 years of experience worldwide in supervising international refugee law instruments.

Background to the case

According to the information available to UNHCR, Mr. Sedigholla Alizade (YOB 1995) and Mr. Shoukad Aminze (YOB 1995) (hereafter referred to as ‘the applicants’) crossed the Turkish-Armenian border on 6 October 2015 where they were apprehended by Russian Federation border guards and subsequently handed over to Armenian authorities. Interview protocols show that they requested asylum with the National Security Service (NSS) on 8 October 2015 and the written request was formally lodged with the State Migration Service (SMS) of the Ministry of Territorial Administration on 13 October 2015. Their asylum claims were rejected by the SMS on 29 January 2016. The applicants’ appeals against the SMS decisions are currently pending with the Administrative Court of the Republic of Armenia. Since no final decision has been made on their asylum claims, the applicants continue to hold the legal status of asylum-seekers in Armenia.

On 6 October 2015, the day they crossed into Armenia and were apprehended at the border, the applicants were charged with the criminal offence of ‘illegal border crossing’ under Article 329(2) of the Criminal Code of Armenia and were placed in pre-trial detention. The detention continued despite their application for asylum on 8 October 2015. On 15 November 2016, the applicants were convicted by the Regional Criminal Court of Ararat and Vayots Dzor region and sentenced to three years’ imprisonment, which is the minimum sentence for committing this offence ‘as a group.’ The judgment did not address the applicants’ status as asylum-seekers or the principle of non-penalization for irregular entry under the 1951 Convention (further discussed below). On 15 December 2016, the applicants lodged an appeal of this conviction with the Criminal Court of Appeal. The applicants are currently serving their sentence in Armavir prison. They have been continuously in detention since 6 October 2015.

Please note that should any differences of view over the facts relating to the circumstances of the applicants’ movements and their intentions arise, UNHCR takes no position on the factual circumstances underlying the case.

Application of the 1951 Convention in national law

By acceding to the 1951 Convention and its 1967 Protocol, Armenia is bound by both instruments and various laws of the Republic of Armenia give effect to these instruments. As part of its supervisory responsibility, UNHCR has a direct interest in ensuring a proper and consistent interpretation of the 1951 Convention including in the context of the present case on the interpretation and application of the *Law on Refugees and Asylum*, and the Criminal Code of the Republic of Armenia.

Article 31(1) of the 1951 Convention and its incorporation into Armenian national law

Article 31(1) of the 1951 Convention provides that the Contracting States:

“shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened..., enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.” [emphasis added]

Article 31(1) is reflected in Article 28(1) of the *Law on Refugees and Asylum* of the Republic of Armenia, which provides that asylum-seekers and refugees shall not bear criminal or administrative liability for illegal entry or stay in the Republic of Armenia.⁴ Further, under Article 329(3) of the Criminal Code, an exception to the charge of illegal border crossing is made in “cases when a foreign citizen or stateless person enters the Republic of Armenia to enjoy the right for asylum stipulated by the Constitution of the Republic of Armenia.”

Application of Article 31(1) to asylum-seekers

The object and purpose of Article 31(1) is to ensure non-penalization on account of illegal entry or illegal presence in recognition of the realities of a refugee’s flight.⁵ Refugees are rarely in a position to travel with genuine documentation when they seek asylum abroad and are frequently compelled to resort to irregular means of entry.⁶ Article 31(1) of the 1951 Convention applies to refugees and asylum-seekers alike. Asylum-seekers are explicitly included in the non-penalization provision of Article 28(1) of the *Law on Refugees and Asylum* of the Republic of Armenia. By virtue of the fact that the determination of refugee status is declaratory rather than constitutive in nature, a person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfils the criteria contained in the definition. This would ordinarily occur prior to the time at which his/her refugee status is formally determined.⁷

Accordingly, in order to give meaning to Article 31 of the 1951 Convention, it must apply not only to recognized refugees but also to asylum-seekers.⁸ Article 31 was specifically designed to protect the rights of individuals seeking asylum and who may be compelled to arrive at or enter the territory without prior authorization.⁹ It would be nonsensical for the provision therefore to be inapplicable to asylum-seekers. This approach is confirmed by international practice, with broad consensus reflected in UNHCR Executive Committee Conclusions.¹⁰ Finally, alongside a few other rights in the 1951 Convention, Article 31 is not linked to lawful stay or residence and thus necessarily applies to asylum-seekers.¹¹

UNHCR considers that the requirement for asylum-seekers to avail themselves “without delay” of the opportunity to contact the authorities to apply for asylum is met in cases where there are challenges and possible short delays related to the delays or processes at the border.

⁴ Armenia: Law No. HO-211-N of 2008 on Refugees and Asylum (2015) [Armenia], 27 November 2008, <http://www.refworld.org/docid/4f1986412.html>.

⁵ See Ad Hoc Committee on Statelessness and Related Problems, UN Doc. E/AC.32/2 Annex (1950), p. 46, referenced by Noll in Zimmerman (ed), p. 1249.

⁶ ‘Many applicants travel and enter EU Member States with false documents or by evading immigration controls as it would be difficult, if not impossible, for them to enter in a regular manner.’ UNHCR, *Beyond Proof, Credibility Assessment in EU Asylum Systems: Full Report*, May 2013, <http://www.refworld.org/docid/519b1fb54.html>, p. 213.

⁷ UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, para. 28; <http://www.unhcr.org/refworld/docid/3ae6b3314.html>; Executive Committee of the High Commissioner’s Programme (ExCom) Conclusion No. No. 6 (XXVIII) – 1977 on Non-Refoulement, para. c), <http://www.unhcr.org/excom/EXCOM/3ae68c43ac.html>.

⁸ UNHCR, UNHCR public statement before the Court of Justice of the European Union in the case of *Cimade and GISTI v. Ministry of the Interior*, 1 August 2011, C-179/11, para. 2.2; <http://www.refworld.org/docid/4e37b5902.html>.

⁹ As Professor Goodwin-Gill has stated: “[a]lthough expressed in terms of the ‘refugee’, this provision would be devoid of all effect unless it also extended, at least over a certain time, to asylum seekers...”. *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection*, June 2003, <http://www.refworld.org/docid/470a33b10.html> in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (edited by Erika Feller, Volker Türk and Frances Nicholson, Cambridge University Press, 2003).

¹⁰ See for example: UN High Commissioner for Refugees (UNHCR), *Protection of Asylum-Seekers in Situations of Large-Scale Influx No. 22 (XXXII) - 1981*, 21 October 1981, No. 22 (XXXII) - 1981, <http://www.refworld.org/docid/3ae68c6e10.html>; and UN High Commissioner for Refugees (UNHCR), *Conclusion on Protection Safeguards in Interception Measures No. 97 (LIV) - 2003*, 10 October 2003, No. 97 (LIV) - 2003, <http://www.refworld.org/docid/3f93b2894.html>.

¹¹ UNHCR, Reception of Asylum-Seekers, including Standards of Treatment, in the Context of Individual Asylum Systems, Global Consultations on International Protection, EC/GC/01/17, 4 September 2001, para. 3, <http://www.unhcr.org/3b95d6244.html>.

UNHCR is of the view that “the expression ‘coming directly’ covers the situation of a person who enters the country in which asylum is sought directly from his/her country of origin, or from another country where his/her protection, safety and security could not be assured.”¹² The term “directly” must not be interpreted in the literal – temporal or geographical – sense as refugees are not required to have come without pause or stops and without crossing other countries from their country of origin.¹³ Further, no strict time limit can be applied to the concept “coming directly”. When assessing whether transit through or previous stay in another country is consistent with “coming directly”, the intention of the refugee to reach a particular country of refuge, for instances, for family reunification purposes, is also a relevant factor to be taken into account.¹⁴ The phrase “coming directly” covers the situation of a refugee who enters the country in which asylum is sought from another country where his/her protection, safety and security could not be assured.¹⁵ The phrase does not cover situations where the refugee has found protection, or has settled – temporarily or permanently – in another country.¹⁶ Further, “coming directly” does also not cover situations whereby the refugee has halted his or her flight in a country where protection could have been available for to him or her, but delayed unduly his or her efforts to use that opportunity to seek protection.¹⁷

The use of detention

UNHCR reiterates that the detention of asylum-seekers on account of their illegal entry or presence in the country of asylum should be avoided, and used only as a measure of last resort.¹⁸ Detention

¹² UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, 26 February 1999, <http://www.refworld.org/docid/3c2b3f844.html>, para 4.

¹³ *Summary Conclusions: Article 31*, para. 10(b), “Refugees are not required to have come directly from territories where their life or freedom was threatened”; and UNHCR Executive Committee Conclusion No. 15 (XXX) (Refugees without and Asylum Country) (1979), para. (h)(iii), “The intentions of the asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account”. See also, 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, <http://www.refworld.org/docid/3fe9981e4.html>, para. 11, “There is no obligation under international law for a person to seek international protection at the first effective opportunity. On the other hand, asylum seekers and refugees do not have an unfettered right to choose the country that will determine their asylum claim in substance and provide asylum. Their intentions, however, ought to be taken into account.”; and Guy S. Goodwin-Gill, “Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection”, in *Refugee Protection in International Law 2003*, pp. 217–218. Newman J in *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, para. 69, “The Convention is a living instrument, changing and developing with the times so as to be relevant and to afford meaningful protection to refugees in the conditions in which they currently seek asylum. Apart from the current necessity to use false documents another current reality and advance, occurring since 1951, is the development of a really accessible and worldwide network of air travel. As a result there is a choice of refuge beyond the first safe territory by land or sea”.

¹⁴ *Summary Conclusions: Article 31*, para. 10(d).

¹⁵ “The term ‘coming directly’ refers, of course, to persons who have come directly from their country of origin or a country where their life or freedom was threatened, but also the persons who have been in an intermediary country for a short time without having received asylum there”, P. Weis, *The Refugee Convention, 1951* (1995), p. 302; Simon Brown LJ, in *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, para. 65, “If I am right in saying that refugees are ordinarily entitled to choose where to claim asylum, and that a short term stopover en route in a country where the traveller’s status is in no way regularised, will not break the requisite directness of flight, then it must follow that these applicants would have been entitled to the benefit of Article 31”; Lord Hope in *R v. Asfaw*, para. 56, “The single most important point that emerges from a consideration of the travaux préparatoires is that there was universal acceptance that the mere fact that refugees stopped while in transit ought not deprive them of the benefit of the article.”; *R v. Jaddi [2012] EWCA Crim 2565*, para. 16, “That was an observation to the effect that in order to give effect to the Convention it is necessary not to punish those who are merely in transit in a third country, or in Mrs Asfaw’s case, in this country. A person who is genuinely in transit does not, on the authority of *Asfaw*, lose the protection of the Convention and thus of section 31”; *R v. Mateta & Others (2013) EWCA Crim 1372 (UK court of appeal)*, para 17, “Given the accused does not lose the protection of Article 31 and s. 31 [of the 1999 UK Asylum Act] if he is genuinely in transit from a country where his life or freedom was threatened en route to another country wherein he intended to make an asylum application, depending on the facts of the case if he fails to present himself to the authorities in the United Kingdom ‘without delay’ during a short stopover in this country when travelling through to the nation where he proposed to claim asylum, the defence may remain extant”.

¹⁶ See *Summary Conclusions: Article 31*, para. 10(c).

¹⁷ The assessment of what this means -in each individual situation- must take into consideration the criteria previously referred to: the intention of the person seeking protection, the time elapsed and the availability of protection.

¹⁸ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, para. 14, <http://www.refworld.org/docid/503489533b8.html>.

must be in accordance with and authorized by law and be based on an assessment of the individual's particular circumstances.¹⁹ Detention is an exceptional measure and can only be justified for a legitimate purpose to protect public order, public health or national security. As such, minimal periods in detention may be permissible to verify identity, to determine the elements on which the claim to refugee status or asylum is based, to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum, or to protect national security or public order.²⁰

Detention for the sole reason that a person is seeking asylum is not lawful under international law. Illegal entry or stay of asylum-seekers does not give the State an automatic power to detain or to otherwise restrict freedom of movement. Furthermore, detention is not permitted as a punitive, for example, criminal, measure or a disciplinary sanction for irregular entry or presence in the country.²¹ "Apart from constituting a penalty under Article 31 of the 1951 Convention, it may also amount to collective punishment in violation of international human rights law."²²

We trust that our observations will be of assistance to the Court and all of the concerned parties and we stand ready to provide further support to you and the Court on these important aspects of international refugee law.

Yours sincerely,

Christoph Bierwirth

Representative

¹⁹ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, paras. 15 to 20, <http://www.refworld.org/docid/503489533b8.html>.

²⁰ ExCom, *Detention of Refugees and Asylum-Seekers*, 13 October 1986. No. 44 (XXXVII) – 1986,

<http://www.unhcr.org/refworld/docid/3ae68c43c0.html>. UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, paras. 22 to 30, <http://www.refworld.org/docid/503489533b8.html>

²¹ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, para. 32, <http://www.refworld.org/docid/503489533b8.html>.

²² *Ibid.*