

"Lawfully Staying" -
A Note on Interpretation

1. Lawful presence or stay as a pre-requisite for the enjoyment of specific rights recurs in a number of the provisions of the 1951 Convention relating to the Status of Refugees. The purpose of this Note is to suggest an interpretation of the requirement "lawful stay", based on a common understanding of the words and the drafting history of the Convention, taking foremost into account the purposes of the Convention and the best interests of the refugees.

A. Provisions of the Convention

2. A number of articles of the Convention make some form of presence, or residence, in territory a factor in the enjoyment of the respective rights with which they deal. Formulations of the degree of presence vary. The main formulations require refugees to be:

- within territory (Articles 4 and 27);
- resident in territory (Article 25);
- in a state in which they have habitual residence (Article 16);
- lawfully staying (Articles 17, 19, 21, 24 and 28);
- lawfully in territory (Articles 18, 26 and 32).

3. Two other provisions envisage more generally that residence or stay will condition enjoyment of rights. These are:

- Article 6, which on its face prescribes that, where enjoyment of rights by a refugee is specifically equated in some way in the Convention to enjoyment of rights by other aliens, enjoyment by the refugee is subject to virtually the same conditions "including requirements as to length and conditions of sojourn or residence" which the alien would have to fulfil;
- Article 31 which sets out terms on the basis of which refugees will not be penalized for "illegal entry or presence".

4. There is no one article in the Convention specifying in detail the terms and conditions of admission. The Convention makes no provision for a right to asylum in any particular country.

B. Meaning of "lawful stay"

(i) On the basis of the travaux

5. Discussion of the term "lawfully staying" by the Ad Hoc Committee on Statelessness and Related Problems and at the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons gives some insight into, albeit not conclusive guidance on, the intended meaning of the word "stay".

6. The travaux make clear that the words "lawfully staying" are a translation of the French term "résident régulièrement". The text prepared by the First Session of the Ad Hoc Committee which examined the Draft Refugee Convention employed the terms "résident régulièrement" and "lawfully resident".¹ At the Second Session of the Ad Hoc Committee it was felt that there might be a discrepancy between the two terms since the literal English equivalent of the French term "résident régulièrement" had a more restrictive application.² At the Conference of Plenipotentiaries which adopted the Convention it was decided that the French term "résident régulièrement" could best be rendered in English by the term "lawfully staying".³ The meaning to be given to the French term "résident régulièrement" is apparent from the discussions at the Second Session of the Ad Hoc Committee. The Representative of France pointed out that the use of the term was the result of a concession by the French delegation.

1 UN Doc. 1618, p. 22

2 E/AC.32/SR.42, pp. et seq.

3 A/CONF.2/102, p. 2

"The term previously used was "résidence habituelle" which implied some considerable length of residence. The term "résidence régulière" was far less restrictive in meaning. In France, the word "résident" was understood to mean not only a privileged resident or ordinary resident but also a temporary resident. The word "résident" which had those three meanings did not include certain cases very difficult to define, such as those of refugees who might be in a certain territory for a very short period. But such cases would not, in fact, raise any problems since an examination of the various articles in which the words "résident régulièrement" appeared would show that they all implied a settling down and consequently a certain length of residence. ... Consequently, ... the only concrete cases that could arise were cases implying some degree of residence, if only temporary residence; and temporary residence would be covered by the present wording as far as France was concerned,"⁴ The term "résident régulièrement" clearly meant more than mere presence in the country and did not include refugees merely passing through a country⁵ A musician staying in a country for one or two nights in order to give concerts is probably not covered by this term.⁶

7. On the basis of the above it is reasonable to conclude that "stay" embraces both permanent and temporary residence, but not the situation of refugees in transit or temporarily visiting a country for special reasons and for a specific period⁷.

4 E/AC.32/SR.42

5 Ibid., pp. 15-20

6 Ibid., p. 17

7 See also Commentary on the 1951 Convention by Nehemiah Robinson, p. 111

8. As to when a stay is "lawful", the travaux have little to say. It seems that "lawfully staying" as a term replaced the words "lawfully in the country" earlier agreed, at least in relation to Article 15 in the Ad Hoc Committee⁸. Robinson points out that "lawfully in the country" was understood to refer to "refugees either lawfully admitted or whose illegal entry was legalized but not to refugees who, although legally admitted or legalized, have overstayed the period for which they were admitted or were authorized to stay or who have violated any other condition attached to their admission or stay". In other words, the "lawfulness" of the stay was to be judged against national rules and regulations governing such a stay.

(ii) On the face of the words

9. According to one view⁹, for many national representatives involved in the drafting of the Convention, national regulations concerning entry and residence were foremost to mind. Presence would be lawful when regulations concerning possession of passports or other travel documents had been complied with and entry did not contravene any ban such as an expulsion order. Ingredients of lawful entry would variously include proper documentation, observance of frontier control formalities, compliance with prescribed periods of stay or, at a minimum, presence where formalities had been officially dispensed with.

10. It is possible to argue a further refinement of the term¹⁰ by differentiating "lawful" from "legal", as does Black's Law Dictionary. "Legal" is taken to imply conformity with the general provisions of the law while "lawful" is said to correspond with that which is "authorized,

⁸ See Robinson's Commentary, p. 110-111, and Doc. E/1618 re Art. 10

⁹ See Grahl Madsen, "The Status of Refugees in International Law", Vol. II, p. 34 ff.

¹⁰ See memorandum 87/0044 of 8/1/87 from Bonn

sanctioned or at any rate not forbidden by the law". While it is debatable whether the drafters of the Convention would have had in mind these legal niceties of domestic jurisprudence, this should not detract from the quite feasible proposition that express permission is not the only ingredient of lawfulness. (This argument is developed below).

(iii) In the context of the Convention

11. The articles of the Convention which tie rights to some form of presence vary, as noted earlier, in the nature of residence they require. The phraseology seems to differ intentionally, depending on the degree to which the rights in question carry with them financial or social responsibilities or multilateral implications for the granting State. The exercise of those rights which could be said to attach to more durable settlement and involve for the State tangible commitments in the afore-mentioned three areas (e.g. rights relating to housing, social security, wage-earning employment, professional practice or issue of travel documents) are those which require "lawful stay". In other words, there does seem to have been a conscious attempt by the drafters to match the character of the various rights in question to the degree of residence required. This would support the conclusion that "lawful stay" means a permitted, regularized stay of some duration.

12. Such a conclusion is consistent also with the equation in the Convention, particularly by means of Articles 6 and 7, of the rights of refugees, other than the most elemental, with those of aliens. The Convention by and large leaves to the domestic law of a country, by legislating for aliens, to set the scope of the rights of refugees. As aliens rights depend to a large extent on residence requirements, it is reasonable to assume that the drafters of the Convention kept in mind, throughout, the need for a link between permitted residence and enjoyment of rights by refugees¹¹.

¹¹ See, generally, Robinson's Commentary on the Convention, pp. 82-89

C. Unauthorized stay and lawful stay

(i) The crux of the problem

13. There are a variety of practical refugee situations in which the lawfulness of the presence or stay has been an issue affecting the exercise of rights. These commonly have been the result of the practice in some countries of "tolerating" the stay, even for prolonged periods, of certain individuals or groups without at the same time regularizing status (through appropriate procedures and documentation) in a way entitling the persons in question to benefit fully from the terms of the Convention. In practice, what has been granted in such cases has been a stay of deportation rather than any rights to durable residence.

14. This situation has in part arisen because the Convention is virtually silent on admission - except for the protection against refoulement - and because there is no duty to grant permanent asylum. States have been able to take the position that there can be no expectation as of right that the stay of a refugee will be regularized. Where stay is not regularized, States have then been able to argue, based on a strict interpretation of the words, that this does not constitute "lawful stay" and accordingly the rights in the Convention for the enjoyment of which lawful stay is a pre-requisite do not attach to the persons affected.

15. The result will often be that the refugee, unable to secure entry to another State and denied regularized local settlement, yet benefiting from non-refoulement, falls into limbo.

(ii) Implicit lawfulness

16. It would seem from the earlier analysis that lawfulness is normally to be judged against existing national regulations. If this were, however, to be the final answer in all cases, where a State chooses not to regularize status, the person concerned will, as indicated above, be severely prejudiced in the exercise of rights for which lawful stay is a pre-requisite. This clearly was not the intention of the drafters.

Grahl Madsen argues convincingly that while lawfulness must normally be explicit, there comes a point when it can become implicit in a situation. He suggests: "A refugee's presence may, on the face of it, be 'illegal' according to some set of rules yet legal within a wider frame of reference".¹² Many of the provisions of the Convention are "based on the appreciation of the special status of refugees as aliens incapable of gaining admission to any other country ...". After a time the humanitarian considerations underlying the Convention must be held to override other considerations "of a more traditional legal nature".¹³

17. In other words unauthorized stay can constitute "lawful" stay depending on the circumstances. To adopt this approach however requires acceptance in the first instance of the more liberal interpretation of "lawful", mentioned earlier, which equates "lawful" with that which is not prohibited. Such an interpretation is in line with the object and purposes of the 1951 Convention.

18. Article 31 of the Vienna Convention on the Law of Treaties sets out, as a fundamental principle of treaty interpretation, that:

"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

This follows up the pacta sunt servanda principle in Article 26 that:

"Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

12 Grahl Madsen "The Status of Refugees in International Law", Vol. II, p. 350

13 Ibid. p.442-3

The principles of "good faith" and "pacta sunt servanda" are declared in the Preamble to the Convention to have been "universally recognized".

19. The 1951 Convention was negotiated in the context of a need to respond to the protection requirements of a particularly vulnerable group of people: refugees unable to return to their own countries and requiring international protection and a durable solution to their problems. The object and purpose of the Convention are clear from the Preamble, in which the High Contracting Parties considered inter alia:

"that the Charter of the United Nations and the Universal Declaration on Human Rights ... have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination",

and "that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms".

In short the purpose of the 1951 Convention was to assure refugees the widest possible exercise of their rights.

20. The provisions of the Convention must be interpreted against its context, objects and purposes which serve as general guidelines structuring the exercise of State discretion in receiving refugees and according them the rights set out in the Convention. An interpretation or an exercise of powers which, although on its face legitimate, in fact frustrates the object and purpose of the Convention, could amount to a breach of international obligations under the Convention.

21. Thus where a person enters a country illegally, but is allowed to stay because of personal circumstances sufficiently precarious to bring into play the non-refoulement obligation, it would be consistent with the intent of the framers of the 1951 Convention to regard that person as lawfully staying for the purposes of the Convention.

22. This approach would also seem to accord with the view of the Conference of Plenipotentiaries which adopted the 1951 Convention. Among the recommendations adopted unanimously by that Conference was Recommendation D -

"Considering that many persons still leave their country of origin for reasons of persecution and are entitled to special protection on account of their position,

Recommends that governments continue to receive refugees in their territories and that they act in concert in a true spirit of international co-operation in order that these refugees may find asylum and the possibility of resettlement".

D. Conclusions

23. The following conclusions may be drawn:

- The term "lawfully staying" has no generally recognized interpretation although it describes a presence integral to the enjoyment of fundamental rights;
- On the basis of the travaux and other provisions of the Convention it is reasonable to conclude that "stay" means something less than durable residence, although clearly more than a transit stop, while "lawful" normally is to be assessed against prevailing national laws and regulations;
- A judgment as to lawfulness should nevertheless take into account all the prevailing circumstances, including the fact that the stay in question is known and not prohibited, i.e. tolerated, because of the precarious circumstances of the person;
- Implying lawfulness in such circumstances is legitimate and necessary if a State is to implement its international obligations under the Convention;

- UNHCR should, in any case, adopt this position. It is consistent with the Office's role in developing doctrine, it is arguable on its face and it is necessary to strengthen the protection of refugee rights.

E. Postscript

24. Even in the event that States insist on the strictest interpretation of "lawfully staying", they might be reminded of the sentiment expressed by the Conference of Plenipotentiaries at the time of the adoption of the 1951 Convention, as set out in Recommendation E -

"The Conference

Expresses the hope that the Convention relating to the Status of Refugees will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention the treatment for which it provides".