



**UNHCR**

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

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15 February 2012

Amelia Wilson  
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Immigrant Rights Program  
American Friends Service Committee  
89 Market St. 6<sup>th</sup> Fl.  
Newark, NJ 07102

**Re: Advisory Opinion / AK / Ivory Coast  
ROW 514-12C25899**

Dear Ms. Wilson,

I am writing in response to your request for an advisory opinion letter from the Office of the United Nations High Commissioner for Refugees (UNHCR) on the relevant international standards relating to refugee protection for individuals with mental disabilities in the context of the claim of your client, AK. In preparing this letter, we reviewed the documents you provided us including your draft pre-trial memorandum, the best interest letter prepared by the court-appointed *Guardian Ad Litem*, and the psychiatric evaluation of AK prepared by Angela Fairweather, PhD.

From the psychiatric evaluation you provided, we understand that AK has been diagnosed with chronic psychiatric illness<sup>1</sup> and that he requires continuing and lifelong psychiatric treatment including daily anti-psychotic medication. We also understand that the Immigration Court has recognized his mental incapacity in that the court has appointed a *Guardian Ad Litem* (Guardian). You have stated that, based on your analysis of country conditions information, if returned to Ivory Coast, AK would face such treatment as being chained to trees or blocks of wood possibly for years at a time without reprieve or release; complete denial of shelter and medication; flogging; neglect; abandonment; and complete reliance on the charity of villagers for food and water, which could result in starvation. According to the best interest letter, the Guardian, after taking into account country conditions information about Ivory Coast, the psychiatric evaluation, and the interviews conducted with AK, determined that it is in the best interests of your client to be extended full asylum protection in the United States and continued access to treatment for his severe mental illness and that he not be returned to Ivory Coast. You have articulated the claim as a fear of persecution based on membership of a particular social group of individuals from

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<sup>1</sup> Included in the psychiatric evaluation is a reference to medical and psychiatric reports from the immigration detention facility in which AK is being held and to the fact that AK was diagnosed with schizophrenia by the facility's psychiatrist. UNHCR has not seen the medical records or diagnosis of the detention facility.

Ivory Coast with serious mental illness. We address below the relevant international standards relating to refugee protection for mentally disabled individuals.<sup>2</sup>

### **The Office of the United Nations High Commissioner for Refugees**

UNHCR has been charged by the United Nations General Assembly with responsibility for providing international protection to refugees and other persons within its mandate and for seeking permanent solutions to the problem of refugees by assisting governments and private organizations.<sup>3</sup> As set forth in its Statute, UNHCR fulfils its international protection mandate by, *inter alia*, "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto."<sup>4</sup> UNHCR's supervisory responsibility is mirrored in Article II of the 1967 Protocol relating to the Status of Refugees (1967 Protocol)<sup>5</sup>, to which the United States acceded in 1968. The Protocol incorporates the substantive provisions of the 1951 Convention relating to the Status of Refugees (1951 Convention).

The views of UNHCR are informed by 60 years of experience providing and supervising international refugee protection. Among its many functions, UNHCR provides guidance to States regarding the establishment and implementation of national procedures for refugee status determinations as well as on the interpretation and application of the refugee definition. UNHCR's interpretation of the provisions of the 1951 Convention and 1967 Protocol is, therefore, integral to the global regime for the protection of refugees.

### **International Standards Regarding Refugee Status Determinations**

The 1951 Convention and its 1967 Protocol articulate the internationally accepted definition of a refugee and the fundamental rights of refugees and enumerate the obligations of States to refugees and asylum-seekers. These instruments do not specifically address the particular concerns raised by asylum seekers with mental disabilities, but UNHCR has addressed these particular concerns in a number of its interpretative documents. Of foremost importance, the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (UNHCR Handbook), a volume that is widely recognized as an important source of interpretation of international refugee law, includes a section addressing the special issues that arise in making refugee status determinations of mentally disabled persons.<sup>6</sup> In

<sup>2</sup> The international medical community and accompanying legal framework utilize a number of different terms to describe a range of mental impairments including, among others, "mental illness", "mental disabilities", and "mental health disabilities." For purposes of this letter, we use these terms interchangeably.

<sup>3</sup> See Statute of UNHCR, UN Doc. A/RES/428(V), Annex, at paras. 1, 6 (1950).

<sup>4</sup> *Id.*, at para. 8(a).

<sup>5</sup> 19 U.S.T. 6223 (1967), art. 2.

<sup>6</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, ¶¶ 206 – 212 (1979; reedited 1992; reissued 2011) available at: <http://www.unhcr.org/refworld/pdfid/4f33c8d92.pdf> [hereinafter *UNHCR Handbook*]. The *UNHCR Handbook* was prepared by UNHCR in 1979 at the request of Member States of the Executive Committee of the High Commissioner's Programme, which continues to include the United States, to provide guidance to governments in applying the terms of the Convention and Protocol. See *infra* note 7 for an explanation of the Executive Committee. The United States Supreme Court has determined that, although the *UNHCR Handbook* is not legally binding on United States officials, it nevertheless provides "significant guidance" in construing the Protocol and in giving content to the obligations established therein. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987); see also, *Matter of S-P-*, 21 I. & N. Dec. 486, 492 (BIA 1996)(noting that in adjudicating asylum cases the BIA must be mindful of "the fundamental humanitarian concerns of asylum law," and referencing the *UNHCR Handbook*).

addition, the UNHCR Executive Committee has issued several Conclusions concerning refugees with mental health and other disabilities.<sup>7</sup> Also relevant to the issues raised in this case is the United Nations Convention on the Rights of Persons with Disabilities, which enumerates the fundamental rights and freedoms of persons with disabilities, including mental illness.<sup>8</sup> These sources set forth guidance on the appropriate application and interpretation of the refugee definition in claims brought by mentally disabled persons as well as States' obligations to ensure their fundamental rights are protected.

### **Considerations for Assessing Asylum Claims Brought by Mentally Disabled Individuals**

The UNHCR Handbook underscores that in the context of refugee status determinations, an applicant for asylum “is normally in a particularly vulnerable situation. . . . in an alien environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country, often in a language not his own.”<sup>9</sup> Moreover, the UNHCR Handbook instructs that adjudicators “give the applicant the benefit of the doubt” in recognition of the difficulties many individuals will have in substantiating a request for protection.<sup>10</sup> These vulnerabilities are only enhanced for individuals with mental disabilities.<sup>11</sup>

In examining the claim of an asylum seeker with mental disabilities, the general principle that the particular situation of the individual applicant “should be kept in mind and consideration given to the fact that the ultimate objective of refugee status determination is humanitarian”<sup>12</sup> is particularly relevant. As the UNHCR Handbook makes clear, assessing asylum claims of mentally disabled refugees calls for “different techniques of examination”<sup>13</sup> that will take into account the impediments mental illness may cause in the ability of such individuals to present their protection claims. Specifically, it is necessary for adjudicators “to lighten the burden of proof normally incumbent on the applicant” and to seek information that cannot be easily secured from the applicant from other sources including any appointed guardian.<sup>14</sup> Similarly, it will often “not be possible to attach the same importance as is normally attached to the subjective element of ‘fear’, which may be less reliable, and it may be necessary to place greater emphasis on the objective situation.”<sup>15</sup>

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<sup>7</sup> UNHCR Executive Committee General Conclusion No. 108 on International Protection (LIX) (2008), available at: <http://www.unhcr.org/49086bfd2.html>; UNHCR Executive Committee Conclusion No. 110 on refugees with disabilities and other persons with disabilities protected and assisted by UNHCR (LXI) (2010) available at <http://www.unhcr.org/4cbeb1a99.html>. The Executive Committee is an intergovernmental body that advises UNHCR in the exercise of its protection mandate. It is currently comprised of 85 Member States of the United Nations, including the United States. It meets on a regular basis and issues Executive Committee Conclusions that call attention to key protection concerns and urge all States parties to the Convention or Protocol to undertake appropriate measures to address these concerns.

<sup>8</sup> UN General Assembly, Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106, Annex I, available at: <http://www.unhcr.org/refworld/docid/4680cd212.html> [hereinafter *UN Disabilities Convention*].

<sup>9</sup> *UNHCR Handbook*, ¶190.

<sup>10</sup> *Id.* ¶ 203; see also *id.* ¶ 196; UN High Commissioner for Refugees, *Note on Burden and Standard of Proof in Refugee Claims*, ¶12, 16 December 1998, available at: <http://www.unhcr.org/refworld/docid/3ae6b3338.html> [hereinafter *Note on Burden*].

<sup>11</sup> The *UNHCR Handbook* uses the phrase “mentally disturbed persons,” a term reflective of the time in which the *UNHCR Handbook* was first written, but also refers specifically to “mental illness” in ¶ 208.

<sup>12</sup> *Note on Burden*, ¶2.

<sup>13</sup> *UNHCR Handbook*, ¶207.

<sup>14</sup> *UNHCR Handbook*, ¶210.

<sup>15</sup> *UNHCR Handbook*, ¶211.

In cases where the asylum seeker is mentally ill, an adjudicator “will, as a rule, have to be more searching” and “us[e] whatever outside sources of information may be available.”<sup>16</sup> In particular, adjudicators should, whenever possible, obtain an expert medical report that provides an assessment of “the nature and degree of mental illness” and the ability of the individual to present the basis of her or his protection claim.<sup>17</sup> In applying the refugee definition, UNHCR recognizes that treatment which may not be persecutory for certain individuals may be so for disabled persons.

An application of the refugee definition that is sensitive to individuals with mental disabilities in accordance with the principles discussed above would also be consistent with the United Nations Convention on the Rights of Persons with Disabilities (UN Disabilities Convention). The UN Disabilities Convention defines persons with disabilities as “those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”<sup>18</sup> The Convention recognizes the responsibility of States in providing protection to persons with disabilities, emphasizing that: “State parties shall take, in accordance with international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including armed conflict, humanitarian emergencies and the occurrence of natural disasters.”<sup>19</sup> Among the rights guaranteed to persons with disabilities are equal protection before the law;<sup>20</sup> access to justice;<sup>21</sup> freedom from torture or cruel, inhuman or degrading treatment or punishment;<sup>22</sup> and the right to health.<sup>23</sup> While the US has signed but not ratified the UN Disabilities Convention, it has recognized the need to make special accommodations for persons in the United States with disabilities including mental disabilities, through its enactment of the 1990 Americans with Disabilities Act.<sup>24</sup>

### Conclusion

In considering whether a determination of eligibility for asylum submitted by an individual with severe mental illness has embraced the standards and principles discussed above, UNHCR would consider a number of factors. First, UNHCR would employ a more “searching” type of investigation than usual, taking into prime consideration any expert psychiatric evaluation, any best interest determination submitted by a guardian, country conditions information, as well as any other available outside sources; apply a lower burden of proof; and emphasize the objective situation over the subjective element of fear. Second, UNHCR would apply the refugee definition in a manner sensitive to individuals with disabilities and their unique vulnerabilities and give the benefit of the doubt to the expression of fear. UNHCR would recognize that treatment which may not be rise to the level of persecution for some individuals, such as the denial of food or medical assistance,

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<sup>16</sup> *UNHCR Handbook*, ¶212.

<sup>17</sup> *UNHCR Handbook*, ¶208.

<sup>18</sup> UN General Assembly, Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106, Annex I, Article 1, available at: <http://www.unhcr.org/refworld/docid/4680cd212.html> [hereinafter *UN Disabilities Convention*].

<sup>19</sup> *UN Disabilities Convention*, Article 11.

<sup>20</sup> *Id.*, Article 12.

<sup>21</sup> *Id.*, Article 13.

<sup>22</sup> *Id.*, Article 15.

<sup>23</sup> *Id.*, Article 25.

<sup>24</sup> 42 USC § 12102 (“The term “disability” means, with respect to an individual (A) a physical or mental impairment that substantially limits one or more major life activities of such individual . . .”).

may have such a serious impact on mentally disabled persons so as to constitute persecution. Finally, UNHCR would consider whether a particular legal remedy was effective in safeguarding the health and well-being of an asylum seeker with mental disabilities, including the availability of medical and psychiatric care. Insofar as an asylum adjudication did not take into account these factors, UNHCR would likely find that assessment to be inconsistent with the governing standards and responsibilities for making such a determination.

In UNHCR's view, an individual who is unable to articulate his fear as a result of a professionally diagnosed serious mental illness, but whose Guardian is able to articulate such a fear, and who fled a country where credible country conditions information indicates there is widespread and potentially severe maltreatment of the mentally ill, would warrant the full range of protection available under international obligations and national law. We hope that this analysis is useful to you and the United States authorities considering your client's claim. Please do not hesitate to contact our office if we can be of any further assistance.

Cordially yours,

s/

Pamela Goldberg  
Senior Protection Officer