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NOTE

from : UNHCR

to : Asylum Working Party

Subject : Common Standards on Asylum Procedures

Delegations will find attached reflections made by UNHCR on some of the issues raised in the Working Document prepared by the European Commission.

“Towards Common Standards on Asylum Procedures” :
Reflections by UNHCR on some of the issues raised in the Working Document
prepared by the European Commission

1. Introduction

1. UNHCR appreciates the intention of European Union States to begin reviewing the various harmonized texts on asylum procedures that have been adopted within the framework of their inter-governmental co-operation on asylum matters and under the Maastricht Treaty. The Amsterdam Treaty in particular provides an appropriate framework for such a review, as it allows for the use of binding Community instruments, such as Directives, or even Regulations, in the area of asylum

2. UNHCR welcomes the document "Towards Common Standards on Asylum Procedures", prepared by the European Commission. The paper is timely and offers a valuable analysis of the problems at stake in connection with procedures for determination of refugee status and granting of asylum. It contains a number of constructive proposals for solutions, which, if adopted, would contribute to enhancing the fairness of asylum procedures in Europe; this, in turn, is a key to the viability of the asylum system as a whole. UNHCR, particularly values the mention by the Commission that the document should serve as a basis for dialogue with the Office of the High Commissioner and non-governmental organizations.

3. UNHCR has some concerns about an approach to harmonization whereby exceptions to fundamental principles are tailored to accommodate lower standards found in the legislation and in the practice of some individual States. Indeed, this method of harmonization risks leading to the undesirable result of *de facto* harmonization at the level of the lowest common denominator, as States maintaining higher standards may feel obliged to revise them downwards with a view to becoming less attractive asylum countries.

4. The forthcoming review will, hopefully, also allow for developing more efficient and timely asylum procedures. UNHCR concurs with the need for quick and efficient procedures, provided that basic procedural safeguards are adhered to. While such efficiency can undoubtedly be obtained by streamlining those procedures, it will also require the allocation of adequate human and material resources for the purpose of determining eligibility for refugee status and asylum.

5. In the following, UNHCR discusses some of the most important procedural aspects of refugee status determination, and draws attention to the international standards which should be respected in any harmonization exercise. Rather than setting out generally standards to be adhered to by States, the document focuses on the concerns which the Office has expressed in the past about some aspects of the harmonized texts on asylum previously adopted by EU countries and which it would accordingly desire to see included in a revision of these texts.

2. Access to Procedures

6. Every refugee is, initially an asylum-seeker. Therefore, refugee protection demands that asylum-seekers be treated on the assumption that they may be refugees until their status has been determined. Except in situations of large-scale influx where individual determination of asylum claims may not be practical, all asylum-seekers should, in principle, have access to individual refugee status determination procedures.

7. Access to asylum procedures should not be denied on nationality grounds (safe country of origin) or on certain grounds directly connected with the substance of the refugee claim, such as those involved in the application of the exclusion clauses of Article 1F of the 1951 Convention and of the so-called "internal flight alternative" notion. Nor should such access be denied because of the asylum-seekers' failure to submit their asylum request within a certain time limit, or their non-fulfilment of other formal requirements.

8. Measures adopted for preventing illegal immigration and, generally, migration control measures need to be administered with sensitivity and flexibility, to ensure that persons in need of international protection are not hindered from reaching safety. Access to procedures should, furthermore, be granted regardless of whether the application is made within the territory or at the border.

3. Admissibility Procedures

9. An application for asylum may, nonetheless, be refused access to the substantive determination procedure:

- (i) if the applicant has already found protection in another country (a first country of asylum); and,
- (ii) if there is third country to which the applicant can be removed and in which he or she may seek and, if appropriate, obtain protection (a safe third country).

10. These circumstances may be assessed in admissibility procedures. The only purpose of such procedures is to determine whether the claim will or will not be considered in substance in the country in which it was submitted.

11. When determining admissibility, it must be ensured that the special protection needs of vulnerable groups are properly considered. This raises the question of proper training of border officials and others who deal with such cases.

4. Safe Third Country Concept

12. Various means have been developed in recent years for shifting asylum claims from the country in which the asylum-seeker has applied, to another country with which the claimant already has links and in which the claim can be determined. Some States have included in their refugee or asylum legislation provisions which establish the conditions under which an asylum-seeker may be returned to another country for examination of the claim, on the ground that he or she has (or could have) found protection there. UNHCR is concerned about the wide variations among European States of the application of the safe third country concept.

13. UNHCR considers that access to determination procedures should not be denied on the ground that the person might seek protection in a third country, without sufficient guarantees in each individual case that the asylum-seeker:

- (i) will be readmitted by the third country;
- (ii) will enjoy there effective protection against *refoulement*;
- (iii) will have the possibility to seek and enjoy asylum; and,
- (iv) will be treated in accordance with accepted international standards.

14. The analysis of whether the asylum-seeker can be sent to a third country for determination of the claim, must be done on an individualised basis. For UNHCR the question is whether that country is "safe" for this asylum-seeker, and is not a "generic" question which can be answered for any asylum-seeker in any circumstances (i.e. on the basis of a "safe third country list"). A country may be "safe" for asylum-seekers of a certain origin and "unsafe" for others of a different origin; even among asylum-seekers of the same origin, a country may be "safe" for someone and "unsafe" for somebody else, depending on the individual's background and profile.

15. UNHCR recognises the usefulness of agreements among States to provide for the adoption of common criteria to determine which State shall be responsible for considering an application for asylum. One agreement of this kind is the Dublin Convention. However, return has increasingly been carried out over recent years on the basis of classical bilateral readmission agreements. As such agreements do not contain guarantees regarding the protection of the asylum-seeker, particularly against *refoulement*, UNHCR considers that they should not be used for this purpose.

16. UNHCR further objects to the removal of asylum-seekers to third countries with which they have not established any meaningful links. Mere "transit countries" should, therefore, not be considered as potential third countries to which asylum-seekers could be returned for the purpose of filing their application.

5. The Dublin Convention

17. UNHCR believes that it is important that the applicant will be provided, at all stages of the procedure, with timely and sufficiently detailed information regarding the application of the Dublin provisions, including those which may result in transfer of the applicant to another Member State.

18. In addition, harmonization of the application of article 9 of the Dublin Convention is highly necessary and desirable. UNHCR suggests that Member States adopt guidelines on family reasons for the application of Article 9, at least in cases where a family member is gravely ill, has a serious handicap, is elderly, is pregnant, has a new-born child, or in case of minors who risk being separated and left unattended.

19. UNHCR would also welcome the adoption of a commitment by which Member States undertake to ensure that asylum-seekers who are waiting for a decision on responsibility for processing of their asylum request, be provided with adequate reception facilities and receive basic assistance, and will not normally be kept in detention.

6. The Normal Asylum Procedure

20. It has been suggested that it would be desirable to streamline the normal asylum procedure - as opposed to accelerated procedures - by instituting a single procedure for determining applications for protection. Indeed, a single procedure is likely to be more economical than a situation in which applicants rejected for refugee status can subsequently initiate another procedure - or two or more additional procedures - for an alternative status. Moreover, the risk of persons in need of protection being unable to receive it, because of the complexity of a system of parallel procedures, could be minimized if the same decision-maker would simultaneously consider the claim from the 1951 Convention angle and from that of subsidiary protection available. A number of EU Member States already have such a single procedure, while others do not. This proposal therefore deserves further consideration.

21. Some States (in Western Europe, in particular), have complex, multi-layered systems which allow for multiple appeal levels. UNHCR believes that a streamlining of such systems would be possible, and that, generally, two levels of appeal including the necessary safeguards, may well be adequate to meet the requirements of fairness. The first appeal level may involve considerations of fact and law and the second (perhaps on a "with leave" basis) questions of law only.

22. Reducing the number of appeals, however, does not enhance the procedure *per se*, if existing limitations in the first instance procedure are not addressed. Such limitations may relate to the quality of interviews, the skills and expertise of decision-makers and the availability and proper use of country-of-origin information.

23. One important procedural safeguard which the Office believes to be essential is consideration of the appeal by an authority different from, and independent of, the one making the initial decision. Reference is made, in this connection, to the relevant EXCOM Conclusions and Council of Europe Recommendations, particularly Recommendation No R (98) 13 of the Committee of Ministers of the Council of Europe to Member States on the Right of Rejected Asylum-seekers to an Effective Remedy against Decisions on Expulsion in the Context of Article 3 of the European Convention on Human Rights.

7. Accelerated Procedures

24. UNHCR has agreed that national procedures for the determination of refugee status may usefully include special provisions for dealing in an expeditious manner with applications which are considered to be so obviously without foundation as not to merit full examination at every level of the procedure. Executive Committee Conclusion No. 30 of 1988 defines these claims as either (i) clearly abusive or fraudulent or (ii) not related to the criteria for refugee status. However, given the potentially grave consequences of wrongly so deciding against an applicant, UNHCR has counselled that such accelerated procedures must nevertheless be accompanied by appropriate procedural safeguards. These include that:

- (i) the applicant be given a complete personal interview by a fully qualified official, whenever possible, by an official of the authority competent to determine refugee status;

- (ii) the manifestly unfounded or abusive character of an application be established in an individual procedure, conducted by the authority normally competent to determine refugee status;
- (iii) the asylum-seeker be provided an adequate opportunity to rebut the presumption that the claim is not well-founded;
- (iv) an unsuccessful applicant be enabled to have a negative decision reviewed before rejection at the frontier or forcible removal from the territory. This review possibility can be more simplified than that available in the case of rejected applications which are not considered manifestly unfounded or abusive. Even a simplified review should, however, be undertaken by an authority different from and independent of the initial decision maker.

25. Some States have considered in accelerated procedures issues which in UNHCR's view should rather be examined in the normal procedure. Such issues include:

- (i) the application of the exclusion clauses in article 1F of the 1951 Convention. Application of these clauses requires a very careful examination of the claim for refugee status and of grounds for exclusion from international protection. Moreover, it has been broadly accepted that exclusion clauses are subject to restrictive interpretation. UNHCR has advocated constantly that States balance the need for international protection with the seriousness of the crime or misconduct;
- (ii) the determination of the credibility of the asylum-seeker's claim or evidence. The Office believes that issues of credibility are so complex that they may more appropriately be dealt with under the normal asylum procedure;

- (iii) the determination of whether the well-founded fear of persecution experienced by an applicant is clearly limited to a specific area in the country of origin and may be overcome by relocating within the country of origin (the so-called "internal flight alternative"). Applications raising the issue of the "internal flight alternative" involve a number of complex questions, and no international consensus exists as to its precise relevance for the determination of refugee status. In most instances, it will require an in-depth examination to establish whether the persecution faced by the applicant is clearly limited to a specific area and that effective protection is available in other parts of the country. For this reason, it is not appropriate to consider such applications in the same manner as manifestly unfounded applications.

26. UNHCR is concerned that accelerated procedures be limited to the categories of claims specified in the above mentioned EXCOM Conclusion No 30 and that, regardless of the accelerated nature of the procedures, the individual nature of the procedure be maintained. Extending the scope of accelerated procedures, for example by broadening the definition of manifestly unfounded claims, risks failing to provide the full individualized consideration which asylum applications should enjoy and increases the possibility of erroneous decisions, with the serious consequences that this could entail. For instance, in some States, asylum-seekers arriving without adequate documentation to prove their identity or establish their travel route are sometimes considered under the "manifestly unfounded" rubric. UNHCR disagrees with this use of the accelerated procedures. Indeed, some asylum-seekers may have no other choice to avoid persecution and ill-treatment than to leave without or with forged or counterfeit documents.

10. Other Procedural Considerations

A. Groups with special protection needs

30. UNHCR's experience, and that of some States, with status determination involving certain groups or those with certain types of experience, has revealed that status determination can pose particular needs and require particular procedural adjustments, in order for certain applicants to be provided with a full and fair hearing. Groups which have been so far identified include:

- (i) torture victims;
- (ii) victims of sexual violence;
- (iii) women, under certain circumstances;
- (iv) unaccompanied children;
- (v) psychologically disturbed persons;

31. UNHCR has developed guidelines with respect to dealing with these groups which States may find useful to consult when undertaking their review.

B. Cessation of refugee status

32. UNHCR is concerned that cessation of refugee status be considered on an individual basis, as is the case for the recognition of such status. This is particularly important with respect to application of the "changed circumstances" clause. As a matter of procedure, the applicant should be provided with the opportunity to show that subjectively, for him or her, the change in circumstances in the country of nationality or origin does not remove the source of well-founded fear, and therefore that he or she, as an individual, should continue to enjoy refugee status.

8. Right of Appeal

27. UNHCR has always advocated that the asylum-seeker must be allowed to stay in the country until the appeal is finally decided, in order to avoid inadvertent refoulement. This suspensive effect of an appeal may not, however, be required in the case where an asylum-seeker's claim is not being examined in substance in that State, but will be elsewhere considered (for instance where he or she is transferred to another State which undertakes to hear and decide the claim in full, as provided in the Dublin Convention). The Office believes that the principle of suspensive effect of appeals against negative decisions on asylum should apply regardless of whether such decisions are taken in normal or accelerated procedures. In case it does not apply, it should be ensured that the first instance procedure contains particularly well developed procedural guarantees. Reference is made, in this connection, to the relevant EXCOM Conclusions and Council of Europe Recommendations, including, in particular, the above mentioned Recommendation on the Right to Effective Remedy of Rejected Asylum-seekers, adopted by the Committee of Ministers of the Council of Europe.

9. Safe Country of Origin Concept

28. The determining factor for UNHCR is that the concept of Safe Country of Origin must not be used as an automatic bar to access to asylum procedures. If applied in this manner, the notion is contrary to the requisite individual determination of refugee status under the 1951 Convention, which includes assessment of the subjective element of fear of persecution. It is impossible to exclude, as a matter of law, the possibility that an individual could have a well-founded fear of persecution in any particular country, however great its attachment to human rights and the rule of law.

29. The Office has no objection in principle, however, to the use of the notion of safe country of origin as a procedural tool to assign certain applications to accelerated procedures, or where its use has an evidentiary function, for example giving rise to a presumption of non-validity of claims. As such claims involve determination of the substance of the claim, they should not be dealt with in admissibility procedures.

C. Time limits on decision-making

33. UNHCR finds the imposition on the competent authority of compulsory time limits for making decisions on asylum claims to be problematic, because of the risk of compromising procedural guarantees. Nevertheless, the Office believes that indicative administrative guidelines to this effect may contribute to ensuring that asylum claims are handled in an expeditious manner. UNHCR therefore sees no objection to imposing deadlines on the possibility for applying the safe third country concept or for conducting accelerated procedures.

UNHCR

Geneva, 4 May 1999
