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Refugee Status Determination under the Mandate of UNHCR: “Soft Enforcement” of the Supervisory Role of UNHCR in International Law

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Abstract

This article examines the recognition of refugee status determination, which was conducted by UNHCR, by states with a particular focus on the legal basis of UNHCR's supervisory role. Although the practices differ from state to state, most contain elements of “soft enforcement” where the issue of recognising refugee status conducted by UNHCR is discussed and is given weight. Refugee status determination is considered as the supervisory task of UNHCR. Consequently, Article 35 of the 1951 Convention is interpreted by the author, as it is the legal basis of UNHCR's supervisory responsibility and binds Contracting States to co-operate with UNHCR in particular to facilitate UNHCR's duties. Even though this is a binding obligation, the instruments, namely the UNHCR Statute and the UNHCR Handbook, for determining refugee status conducted by UNHCR merely have authoritative character. Therefore, the author evolves on the approach of a “soft enforcement” of these instruments and introduces a guidance tool, elaborated by UNHCR itself, in order to influence the decision-making process of Contracting States. Particularly those states are concerned, which are confronted with the issue of recognition of refugee status conducted by UNHCR.

Keywords: *refugee status determination; UNHCR; mandate refugees; recognition.*

Introduction

The United Nations High Commissioner for Refugees (UNHCR) registers a large number of asylum seekers worldwide and determines the ones, who are deemed to be considered as refugees. Originally this is the duty of the state where the persons concerned are residing. Nonetheless, UNHCR needs to conduct its own refugee status determination where countries are not Party of the 1951 Convention on the Status of Refugees (C1951)² or the 1967 Protocol relating to the Status of Refugees (P1967)³, where countries are Party to these instruments but an asylum determination procedure has not yet been established, or the national asylum determination process is inadequate, or where determinations are based on an erroneous interpretation of the 1951 Convention (UNHCR, 2005: 11).⁴ Many of these refugees recognized under the mandate of UNHCR continue to travel to

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² *Convention relating to the Status of Refugees*. Resolution 2198 (XXI) adopted by the United Nations General Assembly. (adopted 28 July 1951, entry into force 22 April 1954) 189 UNTS 150.

³ *Protocol relating to the Status of Refugees*. Resolution 2198 (XXI) adopted by the United Nations General Assembly. (adopted 31 January 1967, entry into force 4 October 1967) 606 UNTS 267.

⁴ In 2012 UNHCR conducted the RSD in 62 countries, 49 of those it had sole responsibility. UNHCR's decisions on refugee status had been accepted as the basis for the departure and recognition in receiving states of over 330.000 refugees from 2008 to 2012 to 24



third countries to seek protection. Thereof the issue of recognition of the refugee status determination (RSD) under the mandate of UNHCR by third states arises, as described in the subsequent case study. An Iranian national was recognized as a refugee under the mandate of UNHCR in Lebanon.⁵ The Iranian national travelled to Switzerland in order to seek protection. However, his asylum application was rejected by the Swiss authorities, although he was recognized as a refugee under the mandate of UNHCR. This case study depicts the core issue in practice which will be approached from a legal perspective in this paper.

Consequently, it needs to be questioned why are the Contracting Parties of the 1951 Convention and the 1967 Protocol continuously not bound to the previous RSD under the mandate of UNHCR? How do these third countries and the European Court of Human Rights (ECtHR) generally assess the recognition of refugees under the mandate of UNHCR? The introduced phenomenon will be elaborated subsequently, analyzing the legal basis, the supervisory role of UNHCR and selected state practices.

Scope and Definition

UNHCR recognizes refugees under its mandate as so-called *mandate refugees* according to the UNHCR Statute (Statute)⁶ in conjunction with the UNHCR Handbook (Handbook).⁷ The definition of “refugee” included in the Statute is not identical with Article 1 A para. 1 C1951.⁸ The Handbook defines that a person who meets the criteria of the Statute qualifies for the protection of the United Nations (UN) provided by the High Commissioner, regardless of whether or not he/she is in a country that is a party to the 1951 Convention or the 1967 Protocol or whether or not he/she has been recognized by his/her host country as a refugee under either of these instruments. Such refugees, being within the High Commissioner's mandate, are usually referred to as mandate refugees.⁹ Mandate refugees are protected from *refoulement* by UNHCR and are entitled to treatment in accordance with international humanitarian law and the relevant principles. However, this does not mean that they are entitled to the same rights as the *Convention refugees* or *prima facie* refugees. A mandate refugee may be a person whose application for recognition as a Convention refugee has already been rejected by a state (UNHCR, 1989: 12). Most frequently, refugees recognized by UNHCR are considered as mandate refugees, as the definition is broader compared to the 1951 Convention and as *prima facie* refugee status only applies in certain cases.¹⁰ Hence, this paper will focus on mandate refugees.

The Legal Basis of the Refugee Status Determination under the Mandate of UNHCR

The issue of refugees and displaced persons was acknowledged by the General Assembly as a matter of international concern in 1946.¹¹ This awareness turned into the establishment of a

resettlement countries. *Judgement I.A. v. Secretary of State for Home Department (Respondent) (Scotland)*, [2014] UKSC 6, [2011] CSIH 28, (Supreme Court), para. 43.

⁵ UNHCR conducts the refugee status determination for non-Syrian asylum seekers. Retrieved from <https://www.unhcr.org/lb/refugees-and-asylum-seekers>.

⁶ *Statute of the Office of the United Nations High Commissioner for Refugees*. United Nations General Assembly Resolution 426 (v) of 14 December 1950.

⁷ UNHCR (2011) *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, Under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*. Geneva: UNHCR.

⁸ *ibid.*, para. 15.

⁹ *ibid.*, para. 16.

¹⁰ For further details on *prima facie* refugees see UN High Commissioner (2015). *Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status*. Geneva: UNHCR.

¹¹ General Assembly. (1946). *Refugees and Displaced Persons*. New York: UN GA, A/RES/62(I).



universal legal and constitutional framework on the protection of refugees, namely the 1951 Convention and its 1967 Protocol. It included the establishment of UNHCR as the international organization mandated to provide international protection to refugees according to Article 35 C1951 in conjunction with paragraph 1 and 8 of the Statute (Türk, 2002:1). UNHCR's international protection function essentially covers two distinctive features: its operational and supervisory function (Türk, 2002:3). Both functions are linked to each other. The concept of supervision will be analyzed in depth, as this function is the most significant for the RSD conducted by UNHCR.

The Concept of Supervision in International Law

In the past, states themselves were in charge of supervising international agreements. Due to the more complex international community and the increasing amount of multilateral agreements, international organizations took over this task (Schrijver, 1994: 275). The purpose of supervision by international organizations is to ensure compliance to instruments of international law. The essence of this concept is "to give effect, through appropriate limitation and international supervision of the international sovereignty of states, to the principle that the protection of the human personality and of its fundamental rights is the ultimate purpose of all law, national and international" (Lauterpacht, 1970: 47). Nonetheless, the supervisory role is considered more political and mostly lacks the characteristics of judicial supervision, such as objective rules and binding effects of decisions (Türk, 2002: 3).

UNHCR's supervisory work covers several areas, on the one hand, it focuses on public scrutiny of state practice, on the other hand on the supervision of violations by expert bodies and political organs (Kälin, 2003). Consequently, a distinction between supervision lead by UNHCR itself and monitoring carried out by other bodies and organs is necessary (Kälin, 2003).¹² The focus of this paper is in particular on the supervision carried out by UNHCR.

The Legal Basis of UNHCR's Supervisory Role

The legal basis for the supervisory role and, therefore, the authority of UNHCR's actions can be found in Article 35 C1951 in conjunction with para. 1 and 8 of the Statute. The binding Article 35 para. 1 C1951¹³ is nearly identical to Article II para. 1 P1967¹⁴, but the latter is referring to the provisions of the Protocol. Both provisions refer to the Preamble of C1951¹⁵, as they are linked to each other (Robinson, 1953: 167). Article 35 para. 1 C1951 and Article II para. 1 P1967 must be read in conjunction with para. 1 and 8 (a) and (d) of the Statute¹⁶. The Statute specifies the general supervisory function of UNHCR.

¹² Monitoring by other bodies includes the ICJ, or other judicial and quasi-judicial bodies, and certainly the individual itself bringing claims before courts.

¹³ "Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall, in particular, facilitate its duty of supervising the application of the provisions of this Convention." Article 35 para. 1 C1951.

¹⁴ "States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol." Article II para. 1 P1967.

¹⁵ "noting that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner." Preamble of the 1951 Convention.

¹⁶ UNHCR "shall assume the function of providing international protection" (para.1 of the Statute), "[promote] the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto" (para. 8 (a) of the Statute), and "[promote] the admission of refugees, not excluding those in the most destitute categories, to the territories of States" (para. 8 (d) of the Statute).

However, it must be highlighted that Article 35 C1951 is not limited to functions explicitly mentioned in an international instrument, according to Grahl-Madsen, “it is clear that it obliges the Contracting States to co-operate any and all of the functions of the High Commissioner’s office, irrespective of their legal basis” (Grahl-Madsen, 1997: Article 35 para. 5). This includes the supervisory role of UNHCR, which is not limited to a certain treaty (Grahl-Madsen, 1997: Article 35 para. 5). The broad understanding of Article 35 C1951 may, therefore, include obligations of Contracting States to recognize the mandate refugee status granted by the UNHCR. Before pursuing that approach, the meaning and object and purpose of Article 35 C1951 must be interpreted.

Interpretation of Article 35 of the 1951 Convention

From a historical approach it can be observed in Article 26 and 27 of the *travaux préparatoires* that the original draft only required states to “facilitate the work” of UNHCR and to “maintain constant relations with him” (UNHCR, 1990: 252), whereas the current obligations are much stronger.¹⁷ The present wording of Art 35 C1951 goes back to the proposal of the US, making the comment that the draft article should be revised to read as “[t]he Contracting States undertake to cooperate with the UN High Commissioner’s Office for Refugees, [...] in the function of supervising the application of the provisions of this Convention” (UNHCR, 1990: 254). The US representative added that the Committee had been hesitant to bind Contracting States to cooperate with UNHCR (UNHCR, 1990: 254). The Preamble already mentioned the supervision of the application of the Convention, which needed to be reflected in the articles of the 1951 Convention itself. The US proposal was adopted in Article 35 para. 1 C1951, which the Contracting Parties are bound to.

With regard to the object and purpose, the 1951 Convention aims its articles at obliging Contracting States to apply the 1951 Convention and its Protocol in order to provide protection to refugees and to “recognizing that the effective co-operation measure taken to deal with this problem will depend upon the co-operation of States with the High Commissioner”.¹⁸ It is the purpose of Article 35 C1951 to link the duty of the states to apply the rules with the UNHCR’s task to supervise the application of the 1951 Convention by imposing a treaty obligation on the State Parties themselves. This means, first, the Parties must respect UNHCR’s supervisory role, and its potentially arising power (Zieck 2011: 1492)¹⁹, and not hinder UNHCR accomplishing its task. Second, co-operating with UNHCR includes achieving an optimal implementation and *harmonized* application of the provisions of the 1951 Convention and its 1967 Protocol (Kälin, 2003). These duties have a highly evolutive and dynamic character since refugee circumstances change frequently.

From a systematic perspective, Article 35 para. 1 C1951 has to be examined in relation to Article 35 para. 2 C1951 and Article 36 C1951. Article 35 para. 2 C1951 contains reporting duties on State Parties to UNHCR “to make reports to the competent organs of the United Nations”. This particular organ is specified in para. 11 of the Statute, mentioning the annual reporting obligations of UNHCR to the “General Assembly through the Economic and Social Council”. This is significant as it evidences repeatedly the close conjunction between the 1951 Convention and the Statute as an essential amendment to the 1951 Convention. Pursuant to Article 36 C1951, the Contracting States

¹⁷ “and shall, in particular, facilitate” Article 35 C1951.

¹⁸ Preamble of the 1951 Convention.

¹⁹ UNHCR’s mandate has been expanding over time and its beneficiaries are nowadays known as “persons of concern to UNHCR”. Consequently, the obligations according to Article 35 C1951 oblige states to extend their cooperation to UNHCR, irrespective of the fact that their obligations pursuant to the 1951 Convention and its Protocol are predicated on a categorically smaller group of beneficiaries.



“communicate to the Secretary-General of the UN the laws and regulations which they may adopt to ensure the applications” of the 1951 Convention. Whereas Article 35 C1951 provides for co-operation with UNHCR, Article 36 C1951 requires that the material to which it relates shall be submitted to the Secretary-General of the UN (Grahl-Madsen, 1997: Article 36 para. 2). Although the Secretary-General is nominally mentioned, in practice the states' communication is directed to the UNHCR (Türk, 2002:5). The UNHCR is the main body within the UN system responsible for refugee matters and a subsidiary organ of the UN General Assembly pursuant to Article 22 UN Charter (Türk, 2002:5). Ultimately, Zieck observes that since Article 35 C1951 is part of Chapter VI of the 1951 Convention, it is “clearly of ‘executory’ nature” (Zieck 2011: 1468), as it serves to secure the cooperation and ongoing liaison between State Parties and UNHCR and to connect the responsibilities of states according to the 1951 Convention and those of UNHCR (Zieck 2011: 1468).

Non-Member States of the 1951 Convention and the 1967 Protocol

The question arises whether states not party to the 1951 Convention and its Protocol are influenced by the supervisory role of the UNHCR. Certainly, these states are not bound to Article 35 C1951 and Article II P1967. Nonetheless, the duty for states to co-operate is reflected in the Resolution of the General Assembly prior to the Statute.²⁰ This duty has its legal basis in Article 56 UN Charter obliging Member States to cooperate with the UN (Kälin, 2003), including the UNHCR as one of the subsidiary organs of the General Assembly pursuant to Article 22 UN Charter. Not only the provisions in the UN Charter make the co-operation duties more tangible and consolidated for Non-Member States, but also the implementation of UNHCR's supervisory responsibility in regional agreements.²¹ The implementation in other conventions underpins the wide supervisory powers and the great extent of para. 1 and 8 of the Statute. The supervisory power even exists in relation to Member States of the UN or the aforementioned conventions regarding refugees, which are of concern to UNHCR, regardless of whether or not the host states are a party to any of UNHCR's instruments (Kälin, 2003).

Refugee Status Determination Conducted by UNHCR as a Supervisory Task

The UNHCR participates in various forms of determining refugee status. Most relevant to the research question is the conduct of its own RSD under the mandate of UNHCR (UNHCR, 2005: 9).²² The participation of UNHCR in the RSD derives from its supervisory role and from the obligations of Member States according to Article 35 C1951 to co-operate with the High Commissioner's Office (Goodwin-Gil, 1983: 205). Consequently, the conduct of the RSD under the mandate of the UNHCR is encompassed by UNHCR's supervisory role pursuant to Article 35 C1951.

²⁰ “Calling upon Governments to co-operate with the United Nations High Commissioner for Refugees in the performance of his functions” UNGA Res 319 A (IV) (3 December 1949) para. 2.

²¹ e.g. Article VIII of OAU (1969). *Convention Governing The Specific Aspects Of Refugee Problems In Africa* (adopted on 10 September 1969, entered into force on 20 June 1974) CAB/LEG/24.3 and Recommendation II (e) *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama* (adopted in 19 - 22 November 1984).

²² Only where countries are not Party of the 1951 Convention or the 1967 Protocol, where countries are Party of these instruments but an asylum determination procedure has not yet been established, or the national asylum determination process is inadequate, or where determinations are based on an erroneous interpretation of the 1951 Convention.

Conclusive Remarks on the Legal Basis of UNHCR's Supervisory Role

UNHCR's supervisory role has its legal basis in the binding 1951 Convention and provides for the power of UNHCR's action in the scope of its supervisory responsibility. As discussed above, UNHCR's supervisory role goes beyond its limitations, as it can even be applied in other regional conventions, as well as to Non-Contracting States of the 1951 Convention. UNHCR's mandate is a living instrument and evolves dynamically from Reports of the General Assembly. Still, there remains a gap between institutional responsibilities entrusted to UNHCR and the formal obligation accepted by signing the Convention. Therefore, the enforcement of the legal basis is of utmost importance to create tangible improvements for persons concerned and simultaneously to form the bridge between the responsibilities entrusted to UNHCR and the states' formal obligations.

“Enforcement” Elements of the Supervisory Role - Authoritative Character of UNHCR Statements

Currently, Article 35 C1951 and Article II P1967 consist of three main elements: the articles constitute the legal basis for the obligation of states to accept UNHCR's role of providing international protection to persons concerned to UNHCR, they respond to information requests by UNHCR, and they support the authoritative character of certain UNHCR statements (including the Handbook, the Statute, Guidelines and ExCom Conclusions (Bartciski, 2013: 71)²³) (Kälin, 2003). Of particular relevance is the authoritative character of the Handbook and the Statute, as they constitute the basis of the RSD under the mandate of UNHCR. Given the fact, that the RSD conducted by UNHCR according to the Statute in conjunction with the Handbook falls within the scope of UNHCR's supervisory responsibility, the question arises to which extent the Contracting States of the 1951 Convention and the 1967 Protocol are bound to these aforementioned specific UNHCR instruments. Neither the Statute nor the Handbook or other provisions of international law provide for a mechanism of enforcement that would press states to fulfill their obligations according to international refugee law instruments. They are considered non-binding instruments. Nevertheless, UNHCR approaches the term “enforcement” from a different angle. In UNHCR's understanding “enforcement” means in effect a wide range of intervention and advocacy activities covering the spectrum of displacement ranging from admission to regularization of stay and return, including the determination of refugee status (Türk, 2002: 11). The aim of these activities is to ensure the adherence of states to the agreed international instruments. Therefore, UNHCR seeks to influence state practice and advises authorities, courts and other bodies on the implementation and practical applications of the central provisions (Kälin, 2003).²⁴ Even though none of the provisions includes enforcement mechanisms, UNHCR's activities themselves form a type of “soft enforcement” (Kälin, 2003), as they have a comparatively high impact of their activities. “Soft enforcement” can be achieved due to the supervisory role of UNHCR and its high impact on promoting their tasks in coherence with their functions. Expanding on the idea of “soft enforcement”, this could form the required bridge between the recognition of refugees under the mandate of UNHCR and the recognition of this mandate refugee status by the Contracting Parties, as the UNHCR influences Contracting States to a great extent and thereby “softly enforces” the required recognition of the refugee status conducted by UNHCR according to its supervisory role.

²³ Executive Commission Conclusions were originally intended to advise the High Commissioner, however nowadays they aim at directly advising states on protection problems in their attempt to promote international standards.

²⁴ For further concrete activities of UNHCR, see Kälin, 2003: 11.



Comparison of State Practices

In order to know how the supervisory role of UNHCR has been implemented or even “softly enforced”, state practices must be compared and analyzed. In recent years domestic courts have invoked Article 35 C1951 when deciding about the relevance and character of the Handbook and on how to treat the mandate refugees recognized by UNHCR. This varies from court to court, therefore, the practices of France, Switzerland, the United Kingdom and the ECtHR were selected as they point out the different approaches of dealing with the recognition of mandate refugees and the underlying issue of how to classify the legal character of the Handbook, the Statute and the role of Article 35 C1951. As these states are – still – members of the European Union, the approach of the ECtHR will be introduced briefly, potentially providing for an overall approach for European countries.

France

The Code de l'entrée et du séjour des étrangers et du droit d'asile (CESEDEDA) provides in Article L. 711-1²⁵ that refugee status shall be granted if there is a previous recognition under the mandate of UNHCR. The applicability of the provision has been reaffirmed and one could say the supervisory role was "enforced" under the French law by the French Commission des recours des réfugiés (CRR, Refugee Appeal Commission) (UNHCR, 2013: 7). The decision of Mbingo Borongo²⁶ dealt with a national of the Democratic Republic of Congo who belonged to the Ngbandi ethnic group and was recognized as a refugee under the mandate of UNHCR in Brazzaville. However, the director of the Office Français de Protection des Réfugiés et Apatrides (OFPRA) relied on the provisions of Article 1 F (c) C1951, considering that there were serious reasons to believe that the person concerned had engaged in acts contrary to the purposes and principles of the United Nations excluding him from the benefits of the 1951 Convention.²⁷ The CRR overturned the decision of the OFPRA by referring to the recognition granted to the person concerned by UNHCR. The Office even re-examined the case and concluded that the person concerned was not excluded under Article 1 F(c) C1951. The latter must be applied, as Article L. 711-1 CESEDEDA states that refugees recognized under the mandate of UNHCR must be recognized under the French Asylum Act as refugees as well.

In a similar decision in 2012, the Cour National du Droit d'Asile (CNDA) declared the aforementioned decision of 5 June 2000 as “jurisprudence constante de la Cour [...] que l'Office [OFPRA] est lié aux les décisions du HCR de placement sous mandat strict” and stresses further that the decisions taken by UNHCR are binding for the French authorities.²⁸

²⁵ “La qualité de réfugié est reconnue à toute personne persécutée en raison de son action en faveur de la liberté ainsi *qu'à toute personne sur laquelle le Haut-Commissariat des Nations unies pour les réfugiés exerce son mandat aux termes des articles 6 et 7 de son statut tel qu'adopté par l'Assemblée générale des Nations unies le 14 décembre 1950* ou qui répond aux définitions de l'article 1er de la convention de Genève du 28 juillet 1951 relative au statut des réfugiés.” Article L. 711-1 CESEDEDA.

²⁶ Commission des Recours des Réfugiés, Mbingo Borongo, (05 June 2000), Appeal No. 345064. Retrieved from http://www.refworld.org/cases,FRA_CRR,4a54bbe80.html [accessed 5 November 2018].

²⁷ *ibid.*

²⁸ Cour Nationale du Droit d'Asile (9 March 2012), Décision No. 11022879. Retrieved from http://www.refworld.org/cases,FRA_CNDA,52569b604.html [accessed 5 November 2018].

In France, due to the implementation of Article L. 711-1 CESDEDA, UNHCR's supervisory role even goes beyond "soft enforcement". The authoritative character of the Statute and the Handbook evolves into a binding character for the cases Article L. 711-1 CESDEDA subjects.²⁹

Switzerland

Comparatively, Switzerland follows a very restrictive approach concerning the conduct with mandate refugees. In Switzerland the recognition as a mandate refugee is not considered binding for Contracting States of the 1951 Convention, however, it has a strong indicative effect.³⁰ The RSD under the mandate of UNHCR is based on the Statute, which provides in Article 6 A(2)(E) that refugees are excluded from the responsibility of UNHCR if the circumstances leading to refugee recognition have ceased to apply.³¹ The Swiss Federal Administrative Court concludes that even in the case of prior recognition by UNHCR of an asylum seeker as a mandate refugee, the situation at the time of the assessment by the Swiss asylum authorities is decisive for granting refugee status.³² In July 2011, the judges stated that independent of the recognition as a mandate refugee by UNHCR, it should be examined whether there is a justified fear of persecution in a specific case in the event of a return home.³³ There is a clear jurisprudence of the Swiss Federal Administrative Court that UNHCR's recognition as a mandate refugee merely has an indicative effect. This, compared to the French practices, demonstrates the other side of the coin. Where there is no binding character or traditional enforcement mechanisms, states can "enforce extremely softly" the obligations according to Article 35 C1951 and Article II P1967 as an indicative effect.

United Kingdom

In the case of the United Kingdom, the development of the British jurisdiction concerning the UNHCR's supervisory role pursuant to Article 35 C1951 is of particular relevance. The Court started with a restrictive approach regarding UNHCR's role and progressed to implementing "soft enforcement" elements of the supervisory role of UNHCR. Starting in 1994, the British Court began changing its attitude of awarding the legal instruments a "considerable weight".³⁴ In the judgment of 19 December 2000, Lord Steyn emphasized that "UNHCR plays a critical role in the application of the Refugee Convention" referring to para. 8 of the Statute and the duty of co-operation according to Article 35 C1951 and further stressed "that the Handbook, although not binding on states, has high persuasive authority, and much relied on by domestic courts and tribunals".³⁵ This latter

²⁹ Bulgaria chose a very similar approach, Article 10 of the Law of Asylum and Refugees states the following: "Refugee status shall also be granted to an alien who is within the territory of the Republic of Bulgaria and has been recognized as a refugee under the mandate of the United Nations High Commissioner for Refugees". Refugee Status is granted automatically to those who had been recognized as mandate refugees.

³⁰ Bundesverwaltungsgericht, Judgment of 21 November 2013, E-2631/2013, 5.2.2.

³¹ Bundesverwaltungsgericht, Judgment of 21 November 2013, E-2631/2013, 4.1.

³² Bundesverwaltungsgericht, Judgment of 21 November 2013, E-2631/2013, 5.2.2.

³³ Bundesverwaltungsgericht, Judgment of 8 July 2011, D-6618/2009, 3.1.

³⁴ In July 1999 the Royal Courts of Justice introduced Article 35 C1951 with the following words: "Having regard to Article 35(1) of the Convention, it seems to me that such Guidelines should be accorded considerable weight". *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, [1999] EWHC Admin 765; [2001] Q.B. 667 (United Kingdom: High Court), para. 20.

³⁵ *R v. Secretary of State for the Home Department, Ex parte Adan / R v. Secretary of State for the Home Department, ex parte Aitseguer*, [2001] 1 All E.R. 593; [2001] 2 W.L.R. 143, Lord Steyn.



decision reflects the idea of a “soft enforcement” of UNHCR's legal instruments, as the Handbook is awarded high impact and even “persuasive authority”.³⁶

More recently, the British Supreme Court had to deal with the particular question of the recognition of mandate refugees under domestic law.³⁷ In the judgment, IJ Agnew dealt with the argument that “the grant of refugee status by the UNHCR should be followed by the grant of asylum in the United Kingdom unless there were 'the most clear and substantial grounds' for departing from that decision”,³⁸ but in the end opted for a much more restrictive interpretation stressing that “the granting of refugee status to the appellant should be regarded as a starting point, it is not necessarily a very strong one”³⁹. However, the decision of IJ Agnew was challenged in the Court of Session emphasizing that he had failed to give any weight to the decision of UNHCR to grant refugee status. That circumstance “should have loomed large in the consideration of the appellant's case”.⁴⁰

These arguments were ultimately rejected by the Extra Division. Nevertheless, UNHCR submitted a statement emphasizing that although the recognition of an individual as a refugee by UNHCR is not binding⁴¹, due to its expertise and experience the RSD carried out by UNHCR should give the recognition considerable weight⁴², and concluded that “[a] state decision-maker cannot disregard UNHCR's recognition of refugee status in evaluating the individual's claim unless there are cogent reasons for doing so”⁴³ and concluded by listing possible cogent reasons.⁴⁴

³⁶ The selected jurisdiction does not particularly focus on the Handbook, the Statute and Guidelines concerning the RSD under the mandate of the UNHCR, rather approaches the legal instruments in general terms which can then be applied to the Statute and the Handbook.

³⁷ An Iranian national, member of a Kurdish family, was recognized twice as a refugee under the mandate of UNHCR in 1998 in Iraq and in 2003 in Turkey. In 2006, the appellant traveled to the United Kingdom where his refugee status was refused by the Secretary of State on 27 September 2007. *Judgement I.A. v. Secretary of State for Home Department (Respondent) (Scotland)*, [2014] UKSC 6, [2011] CSIH 28, (Supreme Court).

³⁸ *Judgement I.A. v. Secretary of State for Home Department (Respondent) (Scotland)*, [2014] UKSC 6, [2011] CSIH 28, (Supreme Court), para. 21.

³⁹ *Secretary of State for the Home Department v. KK (Recognition Elsewhere as Refugee) Democratic Republic of Congo*, [2005] UKIAT 00054, (United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority).

⁴⁰ *ibid.*, para. 22.

⁴¹ “The recognition of an individual as a refugee by UNHCR under its mandate does not bind a State to recognize the individual as a refugee. States have an independent responsibility under the 1951 Convention and 1967 Protocol to determine a person's refugee status.”, *IA – and – Appellant and Secretary of State for Home Department (Respondent) – and – United Nations High Commissioner For Refugees (Intervener)*, [2012] UKSC2012/0157, 4012112-v2LONDOCS, para. 4.

⁴² “Having regard, however, to UNHCR's unique international mandate and authority, and its expertise and experience, the fact that UNHCR has recognised an individual as a refugee is relevant to the RSD carried out by States. It should be the starting point of any exercise in the determination of whether the individual should be recognised as a refugee by the State. In considering the asylum claim of an applicant who has been recognised as a refugee by UNHCR, the State should give the recognition considerable weight and take it seriously into account.” *ibid.*

⁴³ “What that means in practice is this. A State decision-maker cannot disregard UNHCR's recognition of refugee status in evaluating the individual's claim unless there are cogent reasons for doing so. A State decision-maker may, after an examination of all the evidence available to him or her arrive at a decision regarding an applicant's eligibility for refugee status different from the UNHCR recognition where there are cogent reasons for doing so.” *ibid.*

⁴⁴ “Cogent reasons would include:

a. Where reliable information is available to the state decision-maker which supports a finding that the applicant does not meet the definition of a refugee in article 1A(2) of the 1951 Convention, for example where changes have occurred in the circumstances of the applicant or his or her country of origin which directly affect the assessment of the claim for refugee status. Other examples could include where previously unavailable or new information is now before the state decision-maker and which directly affects the assessment of the claim for refugee status. Information of this sort will often be information which post-dates UNHCR's decision.

b. Where reliable information is available to the state decision-maker which brings the applicant within the exclusion clauses in article 1F of the 1951 Convention.

c. Where reliable information is available to the decision-maker which, when considered in the light of all the available information, supports a finding that the applicant's statements on material elements of the claim are not credible.” *ibid.*

The latter decision exemplifies which arguments can be further developed. There continues to be an ongoing discussion within the jurisdiction with potential for more elements of “soft enforcement”, which were pointed out by UNHCR itself. In this case UNHCR took an unequivocal stand and presented a new guidance tool which can navigate other states, as all Contracting States are confronted with the same issue.

European Court of Human Rights

The case *Jabari v Turkey* dealt with the deportation order of a UNHCR mandate refugee.⁴⁵ The person concerned fled from Iran to Turkey where she was registered as a UNHCR mandate refugee based on her well-founded fear of persecution on return to Iran. It was therefore the task of UNHCR to interview the person on the flight and assess the asylum application, particularly “the credibility of her fears and the veracity of her account”.⁴⁶ The complaint was successful before the ECtHR after it had been dismissed by the Ankara Administrative Court. The Court stated that it must *give due weight* to UNHCR's conclusion on the applicant's claim when making its own assessment of the risk the applicant would face in Iran. In this case, the Court agreed with the information provided and the decision taken by UNHCR.⁴⁷ According to Article 46 para. 1 of the European Convention of Human Rights (ECHR) the judgements of the Court are binding. Therefore, the Member States must at least *give due weight* to the decision of UNHCR.

Concluding Remarks

Refugee status determination is built upon the supervisory function of UNHCR. Article 35 C1951 and Article II P1967 oblige the Contracting Parties to co-operate with any supervisory function of UNHCR, “irrespective of their legal basis” (Grahl-Madsen, 1997: Article 35 para. 5). Although it is tempting to follow up on Grahl-Madsen's approach, the Handbook and the Statute cannot be considered binding to Contracting States. Hence, it cannot be argued that Contracting States are obliged to recognize mandate refugees, as the obligation, pursuant to Article 35 C1951, exists irrespective of the legal basis. The Handbook and the Statute continue to play an important role as they formalize UNHCR's supervisory role with specific tasks, such as the RSD under the mandate of UNHCR. This concept, however, leads to a gap between institutional responsibilities entrusted to UNHCR and the formal obligation accepted by signing the 1951 Convention. To presume, that this can be solved with the “good will” and “good faith” of Contracting States with full intention to fulfill their treaty responsibilities to the best of their capability (Simeon, 2013: 338), will not be sufficient. In order to mind the gap, the “soft enforcement” of UNHCR's instruments could function as a bridge between the obligations according to Article 35 C1951 and the supervisory responsibility of UNHCR. Elements of “soft enforcement” can already be found in state practice and in the judgment of the ECtHR. The latter may serve as a minimum standard giving due weight to UNHCR's decision. Particularly effective is the “enforcement” in France, where the broader definition of the Handbook in conjunction with the Statute is implemented in Article L. 711-1 CESDEDA, whereas in Switzerland UNHCR's previous recognition has very limited effects. The Judgement *I.A. v. Secretary of State for Home Department* of 2011 came up with a major improvement, as UNHCR submitted a clear guideline on this issue. States cannot disregard UNHCR's recognition unless there are cogent reasons for doing so, to which the state decision-maker must provide evidence. This submission could be regarded as a tool of “soft enforcement”

⁴⁵ *Case of Jabari v Turkey* App no. 40035/98 (ECtHR, 11 July 2000).

⁴⁶ *Ibid.*, para. 41.

⁴⁷ *Ibid.*



of UNHCR's supervisory role in the specific function of the RSD, which could not only guide the UK, but also every other state which is confronted with this issue, and could lead to a greater impact of the recognition conducted by UNHCR and finally to a step towards a harmonization of refugee status determination.

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