

Introduction to Refugee Law
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The Law of Refugee Status

The law on the protection of those unable to return to their own State has proven to be controversial. In fact the principal law is quite clear cut: the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. This sets out a widely accepted, if narrow, definition of 'refugee'. Legally there are two problems: first, it is left to each State to decide for itself how it construes that definition, resulting in inconsistent application. Second, the narrowness of the definition means that there are many people who are outside their own country but for good reason fear to return, yet they are not considered to be refugees under the Convention. Because of this, a wider law of international protection has emerged in recent years, based on the notion that people who reasonably fear that they will be the victim of a serious breach of their basic human rights if forced to return to their home State may have an entitlement to international protection

General Reading

G Goodwin-Gill and J McAdam, *The Refugee in International Law* (3rd ed, Oxford University Press, 2007)

R Cholewiński, R Perruchoud and E MacDonald (eds), *International Migration Law. Developing Paradigms and Key Challenges* (TMC Asser Press, 2007)

E Feller, V Türk and F Nicholson (eds), *Refugee Protection in International Law* (Cambridge University Press, 2003)

R Perruchoud and K Tömölová (eds), *Compendium of International Migration Law Instruments* (TMC Asser Press, 2007)

Goodwin-Gill and McAdam, Ch.3

R Byrne, "Changing Paradigms in Refugee Law", in: Cholewiński *et al*, Ch.9

Who are refugees?

Situations that cause refugees:

- Internal political circumstances
- Natural disaster
- Armed conflict – international and non-international – population movements – forced deportation and internal displacement

Convention Relating to the Status of Refugees 1951

Art 1A(2) (as amended):

A "refugee" is anyone who, 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

In the case of a person whom has more than one nationality, the term ‘the country of his nationality’ shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.’

Article 31: *Refugees unlawfully in the country of refuge*

(1) The Contracting States shall not impose penalties, on account of their illegal entrance, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

(2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

Art 33(1): ‘No contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion.’

OAU Convention on the Specific Aspects of Refugee Problems in Africa 1969

- repeats first paragraph of above definition then adds:

Art I(2): ‘The term ‘refugee’ shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.’

Protocol Relating to the Status of Refugees 1967

Refugees Handbook:

<http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf>

UNHCR: Global Consultations and Convention Plus

Ruddock v Vadarlis [2001] FCA 1329

Para 126:

‘...whilst customary international law imposes an obligation upon a coastal state to provide **humanitarian assistance** to vessels in distress, international law imposes no obligation upon the coastal state to **resettle** those rescued in the coastal state’s territory. This accords with the principles of the Refugee Convention. By Art 33, a person who has established refugee status may not be expelled **to a territory where his life and freedom would be threatened for a Convention reason**. Again, there is no obligation on the coastal state to resettle in its own territory. Any extra-judicial

assessment of Executive policy in the present circumstances should be seen in this context.’ (emphasis in original)

Minister for Immigration and Multicultural Affairs v Khawar [2002] HCA 14
Secretary of State for the Home Department v K, Fornah v Secretary of State for the Home Department [2006] UKHL 46 (recent decision including detailed review of UK cases)

Questions

1. What are the limitations of the definition of ‘refugee’?
2. Who is excluded from the definition, yet may need international protection?
3. Why are people with more than one nationality required to be refugees in each country of their nationality, before they can get asylum?
4. How would you amend the definition of ‘refugee’?
5. Are women a particular social group in the sense of the Refugees Convention?
6. What are the main weaknesses of the Refugees Convention from the perspective of:
(a) asylum seekers?
(b) States?

Case Study

Consider whether any of the following might be entitled to refugee status in terms of the Refugees Convention:

- Vladimir and Boris are citizens of the central European State of Slaka who have just spent two weeks in Berlin competing in an international event for disabled athletes. They have each performed very well and won several medals. Two days before the Slakan team is due to fly home, Vladimir and Boris leave their hotel and go to the local police station, where they request asylum. The basis for their claim is that they fear persecution in Slaka should they return. They claim that they have been attacked by police while demonstrating in Slaka in favour of equal rights for disabled people. They also say that, should they return to Slaka, they will be unable to live a reasonable life because of systemic discrimination against disabled people in the Slaka. They say that they are particularly prone to this because of their activism in a society devoted to lobbying for the rights and interests of disabled people. Are they entitled to asylum?
- A woman from China who has a three-year old daughter, who is six weeks pregnant and insists that, if she is forced to return to China, she will be forced to undergo an abortion.
- A family of Roma (two parents plus five children of school age) from the east European State of Belgravia (which is not a party to the European Convention on Human Rights) who argue that there is systematic discrimination against Roma in their country, including that their children are obliged to attend ‘special’ schools.
- A woman from Pakistan, who claims that she has been accused by her husband in Pakistan of having a sexual relationship with another man, and who says that she risks being imprisoned and subject to corporal punishment if returned to Pakistan.

Refugees in the European Union

While contemporary refugee law is based upon the 1951 Refugees Convention, within the European Union a quite separate regime has been developing since 2000, the so-called common European asylum System, based upon the Amsterdam Treaty. The effect of this is that nearly all EU States in principle operate a common system. Denmark has opted out of most of the measures adopted, while the UK and Ireland have generally participated while reserving the right to opt out of individual measures.

EU asylum law and policy is in large part a response to this development. It attempts to address the entry of non-EU citizens into the Union, in particular by the development of a dedicated regime for dealing with asylum seekers. It is crucial to appreciate the link between immigration and asylum. While not every migrant is a political or economic refugee, the increasing pressure of numbers from those wishing to migrate, coupled with increasingly restricted opportunities for legal migration into western Europe, has meant that more and more migrants have been resorting to alternative means of entry, such as irregular migration (people smuggling and trafficking) and the asylum channel, that is, claiming refugee status.

Normally, aliens (non-citizens) have no right of entry or residence in other States. Thus non-EU nationals have no right of entry or residence in EU States. Under international refugee law, however, anyone formally classed as a refugee is basically entitled to remain in the State where they are so recognised. The asylum channel therefore offers a way to circumvent the restrictions imposed by all States on the movement of aliens. A related problem is that, because of the perceived burden of looking after asylum seekers while their claims are evaluated, a process which might last several years, States would frequently look for reasons why asylum should more appropriately be sought elsewhere (thereby removing the burden).

Reading

S Peers, *EU Justice and Home Affairs Law* (2nd ed, Oxford University Press, 2006), especially Ch.6

The EU Asylum Regime

The Documentation referred to in this outline can be found on least one of the following websites:

- Justice and Home Affairs Directorate:
http://europa.eu.int/comm/justice_home/fsj/asylum/fsj_asylum_intro_en.htm
- European Council on Refugees and Exiles (ECRE)
<http://www.ecre.org>
- UN High Commissioner for Refugees (UNHCR)
<http://www.unhcr.org/cgi-bin/texis/vtx/home>

Reading – background and general policy

R Byrne (ed), *The Refugee Law Reader* (2004) – www.refugeelawreader.org – nearly everything you need, available on the web

European Commission, Communication – *Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum*, 22 November 2000 COM (2000) 755 final

ECRE, *Broken Promises – Forgotten Principles. An ECRE Evaluation of the Development of EU Minimum Standards for Refugee Protection, Tampere 1999-Brussels 2004* (September 2004)

European Commission, Communication – *Area of Freedom, Security and Justice: Assessment of the Tampere Programme and Future Orientations*, 2 June 2004 COM (2004) 401 final

Legal basis

The most important primary source materials are marked *.

*Amsterdam Treaty (entered into force 1 May 1999)

*Art. 63 - establishment of a Common Asylum System (CAS)

*TEU, Art.6: obligation to respect fundamental human rights

*EU Constitution 2004, Art III (158-169, esp. 167)

Relevant Protocols

No.4 (1997) - UK and Ireland: Visas and Asylum

No.29 (1997) - Asylum

**Presidency Conclusions*, Tampere Meeting, Oct. 1999, paras 10-27

http://europa.eu.int/council/off/conclu/oct99/oct99_en.htm

Two-stage process set out:

Para 14 (stage one): CAS to include

- Clear and workable determination of State responsible for examination of an asylum application
- Common standards for fair and effective asylum procedure
- Common minimum conditions of reception for asylum seekers
- Approximation of rules on recognition of entitlement to international protection and the content of the right

Stage one is complete.

Para 15 (stage two): CAS to include:

- Common asylum procedure
- Uniform status for those granted asylum, valid throughout EU

Main elements of the CAS

1. entitlement to international protection (refugee status or subsidiary protection)
2. procedures for granting and withdrawing refugee status
3. responsibility for consideration of applications for asylum
4. conditions for reception of asylum seekers

Related elements

1. entitlement to temporary protection
2. smuggling and trafficking of human beings

3. family reunification

Refugee status

*Convention Relating to the Status of Refugees 1951, Art. 1
Protocol Relating to the Status of Refugees 1967

1951 Convention, Article 1 Definition of the term "Refugee"

- see above

Article 33 Prohibition of expulsion or return ("refoulement")

Charter of Fundamental Rights of the European Union (2000), Arts 18-19
O.J. 2000/C 364/01

The CAS – Elements of the regime

(i) Entitlement to International Protection

R Piotrowicz and C van Eck, "Subsidiary Protection and Primary Rights", (2004) 53 *International and Comparative Law Quarterly* 91-122

H Lambert, "The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom and International Law", (2006) 55 *International and Comparative Law Quarterly* 161-192

Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

OJ L 304/12, 30.9.2004

European Commission, *Proposal for a Council Directive laying down minimum standards for the qualification and status of third country nationals and stateless persons as refugees... or as persons who otherwise need international protection* 12 September 2001 COM (2001) 510 (first version)

European Commission, *Proposal for a Council Directive laying down minimum standards for the qualification and status of third country nationals and stateless persons as refugees... or as persons who otherwise need international protection* 19 June 2003 10576/03, ASILE 40 (amended version)

Entered into force 20 October 2004:

http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_304/l_30420040930en00120023.pdf

Subsidiary Protection

Subsidiary, or complementary, protection describes the protection offered by many countries to those who are in a foreign country, do not qualify for refugee status but who are nevertheless at risk of serious breaches of their human rights in their own States if returned there.

Council Directive 2004/83/EC of 29 April 2004 (“Qualification Directive”) - on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection

- *Article 6 Persecution can be by*
 - *the State*
 - *parties or organizations controlling the State or a substantial part of its territory*
 - *non-state actors, where the State or those in control are unable or unwilling to provide protection against persecution or serious harm*

- *Article 15: Entitlement to subsidiary protection based on following threats:*
 - *Death penalty or execution*
 - *Torture or inhuman or degrading treatment or punishment in the country of origin*
 - *Serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of armed conflict*

(ii) Procedures for Granting and Withdrawing Refugee Status

**Council Directive 2005/85/EC of 1 December 2005 on minimum procedures in Member States for granting and withdrawing refugee status OJ L 326/13, 13.12.2005*

European Commission, *Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status* 18 June 2002 COM (2002) 326 final

UNHCR, *Aide Memoire: Directive on Minimum Standards on Procedures for Granting and Withdrawing Refugee Status*, 18 November 2003

Hailbronner, *Study on the Asylum Single Procedure (“One-Stop Shop”) Against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure* (2002), especially the Executive Summary. Available at: http://europa.eu.int/comm/justice_home/doc_centre/asylum/studies/docs/study_gesamtbericht_2002.pdf

European Commission, *Communication to the Council and the European Parliament, A More efficient Common European Asylum System: The Single Procedure as the Next Step*, 15.07.2004, COM (2004) 503 final

Commission Communication, *A More Efficient Common European Asylum System: The Single Procedure as the Next Step*, 15 July 2004, COM (2004) 503 final

ECRE, *Comments of the ECRE on the Communication... on “A More Efficient Common European Asylum System: The Single Procedure as the Next Step”*, September 2004

(iii) Responsibility for Consideration of Applications for Asylum

UN High Commissioner for Refugees, *Implementation of the Dublin Convention: Some UNHCR Observations* (May 1998) (deals with the original Dublin Convention)

European Commission, *Evaluation of the Dublin Convention*. 13 June 2001 SEC (2001) 756

**Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (Dublin II)*

(iv) Conditions for Reception of Asylum Seekers

UNHCR, *Reception Standards for Asylum Seekers in the European Union* (1 July 2000)

**Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers*, OJ L 31/18, 6.2.2003

(v) Entitlement to Temporary Protection

**Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (Temporary Protection Directive)*, OJ L 212/12, 7.8.2001

Fitzpatrick, "Temporary Protection of Refugees: Elements of a Formalised Regime", (2000) 94 *American Journal of International Law* 279-306

(vi) Family Reunification

European Commission, *Amended proposal for a Council Directive on the right to family reunification* 2 May 2002 COM (2002) 225 final

**Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification*

(vii) The current position and future developments

European Commission, *Communication on the common asylum policy and the Agenda for protection*, 26 March 2003 COM (2003) 152 final

UNHCR, *UNHCR's Three-Pronged Proposal* (Revised version), December 2003

European Commission, *Communication – Towards more accessible, equitable and managed asylum systems*, 3 June 2003, COM (2003) 315

European Commission, *Communication: Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations*, 2 June 2004, COM (2004) 401 final

ECRE, *Comments of the ECRE on Future Orientations for an Area of Freedom, Security and Justice*, September 2004

The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, in: Council of the EU, 22 October 2004, 13302/2/04 REV 2

European Commission, *Proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals*, 01.09.2005, COM (2005)391 final

Questions

1. What is the difference between entitlement to subsidiary protection and entitlement to refugee status?
2. What is the relationship between temporary protection and subsidiary protection?
3. What do you think are the best and worst features of the EU's common asylum system?

Case Study

1. David is a citizen of Grenada. He entered Germany illegally in 2003. He is HIV positive and has developed AIDS. His life expectancy is about two years. He has been convicted of several petty crimes in Germany and a court has ordered his deportation to Grenada. David has come to see you for legal advice. He tells you that Grenada is a very poor country. He says he has no friends or relatives there. If he is forced to return he will be destitute because he has no money and the social welfare available is totally inadequate to meet his extensive health problems. He will probably die a slow and painful death. Your research into conditions in Grenada indicates that David's claim is essentially true.

What legal measures might you use to help him?

2. Pedro is a citizen of Colombia, currently resident in Frankfurt-Oder, where he is studying law. He has been convicted by a German court of possession of cannabis. His visa is due to expire soon, because he has passed the *Erste Staatsexamination* with fantastic results. He is afraid to return to Colombia because he was involved with a drug cartel there, from which he stole \$100,000 to fund his law studies (and his need for cannabis), because the cartel has offered a reward of \$25,000 for his murder.

Is there any legal basis for him to remain in Germany?

4. Britney is nine years old. She is a citizen of Slaka but lives in Prenzlauerberg with her parents, both Slakan citizens, where she goes to school. Her parents run a small business in Berlin. Her parents have been convicted of tax evasion and the court has ordered their expulsion from Germany. Their lawyer is arguing that they should not be deported from Germany because this would breach Britney's right to education, as the education system in Slaka is not as good as Germany's; and that they are therefore entitled to subsidiary protection from Germany.

Do you agree?