OFFICE OF THE UNITED NATIONS
HIGH COMMISSIONER FOR REFUGEES
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Note on Burden and Standard of Proof in Refugee Claims

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I. Introduction

1. The purpose of this Note is to set out basic considerations relating to the degree of proof necessary before a refugee claim should be accepted.

2. Procedures relating to the determination of refugee status are not specifically regulated in the international refugee instruments. There are no requirements as to whether such procedures must, by nature, be administrative or judicial, adversarial or inquisitorial. Whatever mechanism may be established for identifying a refugee, the final decision is ultimately made by the adjudicator based on an assessment of the claim put forward by the applicant in order to establish whether or not the individual has established a "well-founded fear of persecution".

2. In examining refugee claims, the particular situation of asylum-seekers should be kept in mind and consideration given to the fact that the ultimate objective of refugee status determination is humanitarian. On this basis, the determination of refugee status does not purport to identify refugees as a matter of certainty, but as a matter of likelihood. Nonetheless, not all levels of likelihood can be sufficient to give rise to refugee status. A key question is whether the degree of likelihood which has to be shown by the applicant to qualify for refugee status has been established.

3. The terms "burden of proof" and "standard of proof" are legal terms used in the context of the law of evidence in common law countries. In those common law countries which have sophisticated systems for adjudicating asylum claims, legal arguments may revolve around whether the applicant has met the requisite "standard" for showing that he/she is a refugee. While the question of the burden of proof is also a relevant consideration in countries with legal systems based on Roman law, the question of standard of proof is not discussed and does not arise in those countries in the same manner as in common law countries. The principle applicable in civil law systems is that of "liberté de la preuve" (freedom of proof), according to which the evidence produced to prove the facts alleged by the claimant, must create in the judge the "intime conviction" (deep conviction) that the allegations are truthful. Having said this, and while the common law terms are technical and with a particular relevance for certain countries, these evidenciary standards have been used more broadly in the

substantiation of refugee claims anywhere, including by UNHCR. Therefore the guidelines provided here should be treated as applicable generally to all refugee claims.

4. This Note examines issues relating to the burden and standard of proof applicable in normal refugee status determination procedures where the substance of the claim is examined. Issues relating to burden and standard of proof applicable in accelerated or expedited procedures are discussed elsewhere in a separate IOM-FOM.

II. Burden of Proof

5. Facts in support of refugee claims are established by adducing proof or evidence of the alleged facts. Evidence may be oral or documentary. The duty to produce evidence in order affirmatively to prove such alleged facts, is termed "burden of proof".

6. According to general legal principles of the law of evidence, the burden of proof lies on the person who makes the assertion. Thus, in refugee claims, it is the applicant who has the burden of establishing the veracity of his/her allegations and the accuracy of the facts on which the refugee claim is based. The burden of proof is discharged by the applicant rendering a truthful account of facts relevant to the claim so that, based on the facts, a proper decision may be reached. In view of the particularities of a refugee's situation, the adjudicator shares the duty to ascertain and evaluate all the relevant facts. This is achieved, to a large extent, by the adjudicator being familiar with the objective situation in the country of origin concerned, being aware of relevant matters of common knowledge, guiding the applicant in providing the relevant information and adequately verifying facts alleged which can be substantiated.

III. Standard of Proof – General Framework and Definitional Issues

7. In the context of the applicant's responsibility to prove facts in support of his/her claim, the term "standard of proof" means the threshold to be met by the applicant in persuading the adjudicator as to the truth of his/her factual assertions. Facts which need to the "proved" are those which concern the background and personal experiences of the applicant which purportedly have given rise to fear of persecution and the resultant unwillingness to avail himself/herself of the protection of the country of origin.

8. In common law countries, the law of evidence relating to criminal prosecutions requires cases to be proved "beyond reasonable doubt". In civil claims, the law does not require this high standard; rather the adjudicator has to decide the case on a "balance of probabilities". Similarly in refugee claims, there is no necessity for the adjudicator to have to be fully convinced of the truth of each and every factual assertion made by the applicant. The adjudicator needs to decide if, based on the evidence provided as well as the veracity of the applicant's statements, it is likely that the claim of that applicant is credible.

9. Obviously the applicant has the duty to tell the truth. In saying this though, consideration should also be given to the fact that, due to the applicant's traumatic experiences, he/she may not speak freely; or that due to time lapse or the intensity of past events, the applicant may not be able to remember all factual details or to recount them accurately or may confuse them; thus he/she may be vague or inaccurate in providing detailed facts. Inability to remember or provide all dates or minor details, as well as minor inconsistencies, insubstantial vagueness or incorrect statements which are not material may be taken into account in the final assessment on credibility, but should not be used as decisive factors.

10. As regards supportive evidence, where there is corroborative evidence supporting the statements of the applicant, this would reinforce the veracity of the statements made. On the other hand, given the special situation of asylum seekers, they should not be required to produce all necessary evidence. In particular, it should be recognised that, often, asylum-seekers would have fled without their personal documents. Failure to produce documentary evidence to substantiate oral statements should, therefore, not prevent the claim from being accepted if such statements are consistent with known facts and the general credibility of the applicant is good.

11. In assessing the overall credibility of the applicant's claim, the adjudicator should take into account such factors as the reasonableness of the facts alleged, the overall consistency and coherence of the applicant's story, corroborative evidence adduced by the applicant in support of his/her statements, consistency with common knowledge or generally known facts, and the known situation in the country of origin. Credibility is established where the applicant has presented a claim which is coherent and plausible, not contradicting generally known facts, and therefore is, on balance, capable of being believed.

12. The term "benefit of the doubt" is used in the context of standard of proof relating to the factual assertions made by the applicant. Given that in refugee claims, there is no necessity for the applicant to prove all facts to such a standard that the adjudicator is fully convinced that all factual assertions are true, there would normally be an element of doubt in the mind of the adjudicator as regards the facts asserted by the applicant. Where the adjudicator considers that the applicant's story is on the whole coherent and plausible, any element of doubt should not prejudice the applicant's claim; that is, the applicant should be given the "benefit of the doubt".

IV. Standard of Proof in Establishing the Well-Foundedness of the Fear of Persecution

13. The phrase "well-founded fear of being persecuted" is the key phrase of the refugee definition. Although the expression "well-founded fear" contains two elements, one subjective (fear) and one objective (well-founded), both elements must be evaluated together.

14. In this context, the term "fear" means that the person believes or anticipates that he/she will be subject to that persecution. This is established very largely by what the person presents as his/her state of mind on departure. Normally, the statement of the applicant will be accepted as significant demonstration of the existence of the fear,

assuming there are no facts giving rise to serious credibility doubts on the point. The applicant must, in addition, demonstrate that the fear alleged is well-founded.

15. The drafting history of the Convention is instructive on this issue. One of the categories of "refugees" referred to in Annex I of the IRO Constitution, is that of persons who "expressed valid objections to returning" to their countries, "valid objection" being defined as "persecution, or fear, based on reasonable grounds of persecution". The IRO Manual declared that "reasonable grounds" were to be understood as meaning that the applicant has given "a plausible and coherent account of why he fears persecution". The Ad Hoc Committee on Statelessness and Related Problems adopted the expression "well-founded fear of persecution" rather than adhered to the wording of the IRO Constitution. In commenting on this phrase, in its Final Report the Ad Hoc Committee stated that "well-founded fear" means that a person can show "good reason" why he fears persecution.

Threshold

16. The Handbook states that an applicant's fear of persecution should be considered well-founded if he "can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable...".

17. A substantial body of jurisprudence has developed in common law countries on what standard of proof is to be applied in asylum claims to establish well-foundedness. This jurisprudence largely supports the view that there is no requirement to prove well-foundedness conclusively beyond doubt, or even that persecution is more probable than not. To establish "well-foundedness", persecution must be proved to be reasonably possible. Attached as an annex is an overview of some recent jurisprudence, by country.

Indicators for assessing well-foundedness of fear

18. While by nature, an evaluation of risk of persecution is forward-looking and therefore inherently somewhat speculative, such an evaluation should be made based on factual considerations which take into account the personal circumstances of the applicant as well as the elements relating to the situation in the country of origin.

19. The applicant's personal circumstances would include his/her background, experiences, personality and any other personal factors which could expose him/her to persecution. In particular, whether the applicant has previously suffered persecution or other forms of mistreatment and the experiences of relatives and friends of the applicant as well as those persons in the same situation as the applicant are relevant factors to be taken into account. Relevant elements concerning the situation in the country of origin would include general social and political conditions, the country's human rights situation and record; the country's legislation; the persecuting agent's policies or practices, in particular towards persons who are in similar situation as the applicant, etc. While past persecution or mistreatment would weigh heavily in favour of a positive assessment of risk of future persecution, its absence is not a decisive factor. By the same token, the fact of past persecution is not necessarily conclusive of the possibility of renewed persecution, particularly where there has been an important change in the conditions in the country of origin.

V. Conclusion

20. In so far as evidence is concerned, refugee claims are unlike criminal cases or civil claims. Subjective elements asserted are particularly hard to prove and a decision on credibility will not normally rest on “hard” facts. The adjudicator will often need to depend entirely on oral statements of the applicant and make an assessment in light of the objective situation in the country of origin.

21. As regards “well-foundedness” of the fear of persecution, while an assessment of this element is inherently speculative in nature, it is not pure conjecture, nor does it amount to drawing strict legal inferences. Deciding on the “likelihood” or “possibility” of an event happening lies somewhat in-between and must be justifiable based on valid grounds.

22. It is pertinent to note the following guidance offered by the Handbook: “Since the examiner’s conclusion on the facts of the case and his personal impression of the applicant will lead to a decision that affects human lives, he must apply the criteria in a spirit of justice and understanding”.

ANNEX: Overview of some recent jurisprudence

United States:

In the case of INS v. Stevic the Supreme Court made a clear distinction between the standard applicable in withholding of deportation proceedings and asylum proceedings. The Court held that in order to qualify for withholding of deportation, an alien must demonstrate that "it is more likely than not that the alien would be subject to persecution" in the country to which he would be returned; that is, the applicant has to show "clear probability of persecution". In contrast, with regard to the standard applicable in asylum proceedings, it pointed out that a moderate interpretation of the "well-founded fear" standard would indicate "that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility".

This distinction was re-emphasised by the Supreme Court in the later case of INS v. Cardoza-Fonseca. In that case, the Supreme Court, by referring to the legislative history of the 1980 Refugee Act, as well as the plain language of the Act, stressed that the terms "refugee" and "well-founded fear" were made an "integral part" of asylum procedures and that to show a "well-founded fear of persecution" an alien "need not prove that it is more likely than not that he or she will be persecuted in his or home country". Justice Stevens stated that "one can certainly have a well -founded fear of an event happening when there is less than a 50% chance of the occurrence taking place". On the basis that it was Congress' intention to define "refugee" in the 1980 Refugee Act to be in conformity with the 1967 Protocol, the Court examined the drafting history of the 1951 Convention and concluded that the "standard, as it has been consistently understood by those who drafted it, as well as those drafting the documents that adopted it, certainly does not require an alien to show that it is more likely than not that he will be persecuted in order to be classified as a 'refugee'." The Court then reaffirmed the standard stipulated in the Stevic case, that of "a reasonable possibility".

United Kingdom:

In providing guidance on the standard of proof applicable in cases which involve analysing the likelihood of a future event occurring, the House of Lords rejected the use of the "balance of probabilities" test ("more likely than not")which is applicable in civil cases. In Fernandez v. Government of Singapore, which is a case relating to the 1967 United Kingdom Fugitive Offenders Act, Lord Diplock stated that "there is no general rule of English law that when a court is required, either by statute or at common law to take account of what may happen in the future and to base legal consequences on the likelihood of its happening, it must ignore any possibility of something happening merely because the odds on its happening are fractionally less than evens". The Court took into account the relative gravity of the consequences of the Court's expectations proving wrong either one way or the other, and concluded that it was not necessary to show that it was more likely than not that the individual

would be detained or restricted if returned; a lesser degree of likelihood sufficed, such as a “reasonable chance”, “substantial grounds for thinking” or ‘a serious possibility”.

In the case of R. v Secretary of State for the Home Department ex parte Sivakumaran, etc. the House of Lords took into consideration the gravity of the consequences of an erroneous judgement and called for a test less stringent than the “more likely than not” standard. It ruled that the fear is well-founded if there is reasonable degree of likelihood that the person will be persecuted for one of the reasons mentioned in the Convention if returned to his country.

Australia:

In the case of Chan Yee Kin v. The Minister for Immigration and Ethnic Affairs, the Australia High Court endorsed the standard stipulated in the cases of Ex Parte Sivakumaran and INS v. Cardoza-Fonseca, but preferred to equate it to the term “real chance”. Mason C.J. said, “When the Convention makes provision for the recognition of the refugee status of a person who is, owing to a well-founded fear of being persecuted for a Convention reason, unwilling to return to the country of his nationality, the Convention necessarily contemplates that there is a real chance that the applicant will suffer some serious punishment or penalty or some significant detriment or disadvantage if he returns.” Dawson C.J. stated that “for the sake of uniformity”, he preferred a test which “requires there to be a real chance of persecution before fear of persecution can be well -founded”. He explained this to mean something “more than plausible” since “an applicant may have a plausible belief which may be demonstrated, upon facts unknown to him, to have no foundation”, at the same time, there need not be “certainty” or “even probability that (a fear) will be realised”. Similarly, McHugh J. said, “Obviously, a far-fetched possibility of persecution must be excluded. But if there is a real chance that the applicant will be persecuted, his or her fear should be characterised as ‘well-founded’ for the purpose of the Convention and Protocol”.

Canada:

In Canada, the Court of Appeal, in the case of Joseph Adjei v. Minister of Employment and Immigration, rejected the “more likely than not” test stating “It was common ground that the objective test is not so stringent as to require a probability of persecution..”. MacGuigan J. adopted a “reasonable chance” standard which was equated with “good grounds for fearing persecution” and “a reasonable possibility” of persecution. This reasoning was followed in the later case of Salibian v. Canada in which the Federal Court of Appeal stated that “the fear felt is that of a reasonable possibility that the applicant will be persecuted if he returns to his country of origin”.