September 2010

New regulations for the treatment of asylum seekers in Israel August 2010

General:

The main additions to the new regulations are geared towards allowing the MOI to reject asylum applications without conducting the full RSD process.[1] The new regulations include strict time-tables with procedural requirements that most asylum seekers in Israel, who are unrepresented, illiterate and often unaware of procedural requirements, will not be able to meet.[2] Such failure will result in the summary rejection of their applications. The regulations maintain the structure of the NSGB,[3] despite its inability to provide an efficient solution to the growing numbers of applications (a situation that led the NSGB to make over 98% of its decisions by e-mail correspondence). There is no right of appeal, although it is possible to ask for a re-hearing of the case if there was a change of circumstances or new evidence were discovered.[4] The procedure does not provide for any procedural rights for the claimant, such as the right to be represented by a legal representative,[5] the right to receive the transcripts from the RSD interviews, the right to be informed of evidence which may adversely affect his claim and to answer them; the right to receive full and detailed reasoning of the rejection of the claim; etc. Another gap in the procedure has to do with the lack of any regulations regarding subsidiary protection such as temporary protection and protection from *refoulement* under Article 3 of the Convention against Torture.
The chapter concerning UNHCR's future involvement in the asylum system seems to be the only positive aspect of the new regulations, although specific issues should be further clarified.[6]

1 Those include rejection at the registration phase (article 2(b)(1)) or summary rejection following a "basic interview" (Article 4) or rejection by a short procedure (Article 6(a)).

2 Those include: Submission of an application within a year after their arrival in Israel (Article 1b(1)); Failure to report at the interview date (Article 5b); Failure to submit asylum forms at the designated date (Article 5c(2); Submission of an appeal after two weeks or submission of an appeal which does not specify a change of circumstances since the submission of the initial application (Article 9b).

3 All members of the NSGB, excluding the chair-person, are civil servants. There is no clause that ensures their independence or their obligation to adjudicate applications according the 1951 Convention. Article 7 of the old regulations, which cited UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status as a guiding resource which will assist the NSGB, is not mentioned in the draft regulations. The chairperson, who is the only member who is not a civil-servant, is easily replaced (Article 7c).

4 A request for a re-hearing will not be heard by an independent adjudicator but rather another team at the RSD Unit (article 9c).

5 Following a High-Court petition submitted by the Refugee Rights Clinic, the MOI announced a six month "pilot" during which lawyers would be allowed to passively attend their clients' RSD interviews. We were told (orally) that the right to a passive presence of a lawyer would be inserted to the regulations. As far as we know, the MOI will not allow a non-lawyer representative to attend an RSD interview.

6 For example: Does Article 13a exclude UNHCRs ability to perform Mandate RSD in the future in cases that were erroneously decided by the Israeli system (for example by refusing to recognize gays as a particular social group)? What does the requirement of coordination with the MOI prior to meeting with detained asylum seekers (Article 13c) entail?

Discriminatory lack of protection is inherent in the new procedure as well

The exclusion of "enemy nationals"(Article 10):

Article 10 is similar in its phrasing to the former Article 6, which reads:

> The State of Israel reserves the right, not to absorb into Israel, or to grant a permit to enable the stay in Israel, of subjects of enemy or hostile states - as determined from time to time by the relevant authorities, and for as long as such states possess that status. The issue of the release of such persons on bail will be examined on a case-by-case basis, in accordance with the prevailing circumstances, and security considerations.
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> Israel appreciates UNHCR'S position, according to which UNHCR will make every effort to find a country of resettlement for such refugees, pending a comprehensive political settlement in the region.

Article 6 has been the source of much controversy in the past.[7] Its adverse impact became clear in 2005, with the arrival of growing numbers of Sudanese asylum seekers. The Sudanese asylum seekers were placed in indefinite detention due to the fact that they were "enemy" nationals. UNHCR was unable to resettle them and they languished in prison (often for periods of 12-18 months) before legal petitions paved the way for their conditional release. Those asylum seekers are still in Israel today, many of them in a state of legal limbo. They do not undergo the RSD process, they are not being resettled[8] and they do not receive basic rights.[9] Despite a pragmatic relaxation of the detention policy vis-à-vis Sudanese asylum seekers (see below) they are still considered by the Israeli Government to be enemy nationals who are, therefore, barred from being granted asylum in Israel.[10] In the past, Israel has used UNHCR acquiescence to this article, and UNHCR's willingness to resettle enemy nationals as proof to its legality under the Convention.

Article 10 violates Israel's international obligations under the 1951 Refugee Convention and other international instruments, retaining it will perpetuate the discriminatory lack of protection of many genuine refugees who currently reside in Israel.[11]

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7 For an analysis of the article and Israel's policy regarding Sudanese nationals, see: Kagan M. "Destructive Ambiguity: Enemy Nationals and the Legal Enabling of Ethnic Conflict in the Middle East." 38 *Columbia Human Rights Law Review* (2007), p. 263.

8 As far as we know, Israel objects to any resettlement plan for Sudanese asylum seekers since this may create a pull factor.

9 Despite the Israeli government's occasional declaration that the Sudanese receive "temporary protection," their actual status is that of deferred deportation. They are given "conditional release visas" (under Article 2(a)(5) to the Entry to Israel Law) which carry no rights, aside from a permit to be in Israel. Recently the government decided to enforce the prohibition on their employment as of September 1, 2010.

10 In a submission to the Merkaz Administrative Court, filed on March 23, 2010, the Interior Ministry argues that Sudanese nationals, just like Syrian and Iranian nationals, are presumed to be a security risk (Article 10, AD 31808-03-10, Supplementary submission on behalf of the State); That Sudanese nationals do not receive "group protection" or refugee status, since they do not meet the 1951 Convention's definition (ibid, Article 4); The State emphasized that Sudanese asylum seekers were never recognized in Israel as refugees, mainly for security reasons (article 21).

11 Among the people who are currently denied protection in Israel based on their nationality are Palestinians. Israel does not admit Palestinian applicants to its asylum system. The exclusion of Palestinians is done via the 2003 Citizenship and Entry to Israel Law (Interim Order) 2003 and a misinterpretation of Article 1D to the 1951 Convention, according to which every Palestinian is automatically excluded from the scope of the Convention. Although this policy was not yet decided by an Israeli Court, we believe both arguments must fail: Despite the Citizenship and Entry to Israel Law, Israel permits Palestinians in under circumstances to reside in Israel (a notable example being individuals whose

Impermissible derogation of article 1A(2): The Convention's basic definition of who is a refugee cannot be derogated,[12] just as a member state may not decide to exclude from its protection all people with red-hair, it may not unilaterally exempt itself (or in the words of Article 10: "reserve the right") from providing protection under the Convention to people of specific nationality or nationalities. With this article, Israel is effectively adding for itself a new exclusion clause to the Convention's refugee definition, which is expressly prohibited.

Forbidden discrimination under Article 3 of the 1951 Convention and under the Convention on the Elimination of All Forms of Racial Discrimination: Article 3 to the 1951 Convention prohibits discrimination based on the refugee's country of origin. Israel may not exempt itself from the applicability of Article 3.[13] Another prohibition on discrimination is found in the Convention on the Elimination of All Forms of Racial Discrimination (CERD) which prohibits distinctions made on the basis of national or ethnic origin.[14] The CERD does not apply to distinctions between citizens and non-citizens, nor to provisions "concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality".[15]

The prohibition to apply exceptional measure on refugees based on their country of origin: Although Israel entered a reservation to Article 8 of the 1951 Convention, it is bound by Article 44 of the 1949 Fourth Geneva Convention relating to the Protection of Civilian Persons in Time of War, which encapsulates a similar principle.[16] The article reads:

> In applying the measures of control mentioned in the present Convention, the Detaining Power shall not treat as enemy aliens exclusively on the basis of their nationality de jure of an enemy State, refugees who do not, in fact, enjoy the protection of any government.

Contradicting the highly individualized nature of the Refugee Convention: Article 10's sweeping ban on "subjects of enemy or hostile states"[17] contradicts the highly individualized nature of the 1951 Refugee Convention. Article 9 permits taking provisional measures which a state considers to be essential to the national security in time of war, *in case of a particular person*, but only pending the determination that he is in fact a refugee and that the continuance of such measures *in his case* are in the interest of national security. Similarly, article 33(2) to the 1951 Convention which restrict the application of the non-refoulement principle applies to "*a refugee* who there are *reasonable grounds* for regarding as a danger to the security of the country in which he is." Contrary to those

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stay was approved by the Threatened Persons Committee). Article 1D obviously does not permit a sweeping ban of all Palestinians based on their nationality (See UNHCR's own Revised Statement on Article 1D of the 1951 Convention, (October 2009), see also a recent judgment of the European Union's Court of Justice: Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal, C-31/09 (17 June 2010).

12 Article 42(1) to the Convention.

13 Id

14 CERD, Article 1 para. 1.

15 Id. Article 1 para 3 (emphasis added).

16 As Kagan points out in his article, this is particularly ironic since Israel sponsored the inclusion of article 44 in the Geneva Convention following the experience of the Jews who fled the Nazi regime during WW2 (Kagan ft. note 7, id. P. 281, 309).

17 We wish to draw your attention to the explicitly vague terms used in the article. The drafters do not detail which are the "enemy" or "hostile" countries and explicitly reserve the right of the "the relevant authorities" to determine "from time to time" the list of countries concerned. Attempts made in the past to receive the list of those countries failed.

articles, Article 10 to the new regulations excludes groups of refugees, without even adjudicating their status, simply based on their nationality.

The 1951 Convention contains internal checks and balances which balance the right to asylum with security-based state interests

The necessary balance between the right of refugees to receive protection, on the one hand; and the receiving states' interest to security and public order, on the other hand, is dealt with by the 1951 Convention. In addition to Articles 9 and 33(2), mentioned above, articles 1F(b) and Article 32 ("The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order") are examples of mechanisms *within* the 1951 Convention, which ensure protection of asylum state interests. Allowing a member state to add further qualifications (such as Israel's Article 10 to the draft regulations) would destroy the fine balance struck by the Convention.

Israel's own policy defeats its argument that it is unable to grant enemy nationals status in Israel

Despite the fact that Israel argued to UNHCR for many years that its laws prohibit accepting enemy nationals, several hundred Darfuris were granted temporary residency in Israel in 2008 (and continue to receive this status today). In a speech given in the Knesset in September 2007, Former Prime-Minister Ehud Olmert announced that Israel would provide a safe haven for 500 Darfurians who are the "only genuine refugees present in Israel." The criteria for granting temporary residency remain vague.[18] Moreover, Israel has long backtracked from its initial detention policy which justified the indefinite detention of every Sudanese national due to a "presumption of dangerousness." Sudanese nationals are currently released from detention as a matter of routine, once their identity has been determined to be Sudanese. Upon their release they are not subjected, as in the past, to restrictions of their freedom of movement. However, as mentioned above, the State still refuses to grant them any status or asylum, arguing that as enemy nationals they are presumed to be a security risk.

Conclusion

Israel currently hosts thousands of Sudanese nationals who are illegally excluded from its asylum system. They are not considered for resettlement from Israel; even if some would be able to repatriate at an unknown future date, others will remain in the legal limbo in which they have been trapped for the past five years. The second paragraph of Article 10 is therefore an empty promise, which in no way remedies the exclusion of the asylum seekers from the Israeli system.

In its original form, Section 6 may have appeared to be a small pragmatic compromise that facilitated the establishment of an asylum system in Israel. Time has shown that this was not the case. As a legal matter, this exclusion drives at the heart of the ironclad guarantee of non-refoulement in refugee law, and accepting Israel's position establishes a dangerous precedent that other states may also follow by carving out their own illegal exceptions from protection obligations. As a practical matter, the exception is no longer workable. It is impractical to suppose that all so-called "enemy" refugees who reach Israel can be resettled. More to the point, experience has shown that this is literally an exception that swallows the rule, since the nationalities of asylum seekers most likely to reach Israel are often those most easily labeled hostile by the Israeli government.

18 It seems that the status was granted to those Darfurians who were present in Israel at the time the decision was made. There was n

On the threshold of a new phase, in which Israel establishes its own state-owned asylum system, it is vital that the new system be based on sound legal principles. While the State has legitimate security interests, the security-based exceptions to non-refoulement and to the Refugee Convention generally require individualized grounds.

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