

(Acts adopted pursuant to Title VI of the Treaty on European Union)

JOINT POSITION

of 4 March 1996

defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the definition of the term 'refugee' in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees

(96/196/JHA)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article K.3 (2) (a) thereof,

Whereas under Article K.1 of the Treaty, asylum policy is regarded as a matter of common interest;

Whereas the European Council, meeting in Strasbourg on 8 and 9 December 1990, set the objective of harmonizing Member States' asylum policies, which was further developed by the European Council in Maastricht on 9 and 10 December 1991 and in Brussels on 10 and 11 December 1993, and in the Commission communication on immigration and asylum policies of 23 February 1994;

Emphasizing, in keeping with the Member States' common humanitarian tradition, the importance of guaranteeing appropriate protection for refugees in accordance with the provisions of the Geneva Convention of 28 July 1951 relating to the Status of Refugees, as amended by the New York Protocol of 31 January 1967, hereafter referred to as the 'Geneva Convention';

Having established that the Handbook of the United Nations High Commissioner for Refugees (UNHCR) is a valuable aid to Member States in determining refugee status;

Whereas harmonized application of the criteria for determining refugee status is essential for the harmonization of asylum policies in the Member States,

HAS ADOPTED THIS JOINT POSITION:

- The guidelines set out below for the application of criteria for recognition and admission as a refugee are hereby approved.
- These guidelines shall be notified to the administrative bodies responsible for recognition of refugee status, which are hereby requested to take them as a basis,

without prejudice to Member States' caselaw on asylum matters and their relevant constitutional positions.

- This joint position is adopted within the limits of the constitutional powers of the Governments of the Member States; it shall not bind the legislative authorities or affect decisions of the judicial authorities of the Member States.
- The Council shall review the application of these guidelines once a year and, if appropriate, adapt them to developments in asylum applications.

1. Recognition as a refugee

Determination of the status of refugee is based on criteria according to which the competent national bodies decide to grant an asylum-seeker the protection provided for in the Geneva Convention. This document relates to implementation of the criteria as defined in Article 1 of that Convention. It in no way affects the conditions under which a Member State may, according to its domestic law, permit a person to remain in its territory if his safety or physical integrity would be endangered if he were to return to his country because of circumstances which are not covered by the Geneva Convention but which constitute a reason for not returning him to his country of origin.

2. Individual or collective determination of refugee status

Each application for asylum is examined on the basis of the facts and circumstances put forward in each individual case and taking account of the objective situation prevailing in the country of origin.

In practice it may be that a whole group of people are exposed to persecution. In such cases, too, applications will be examined individually, although in specific cases this examination may be limited to determining whether the individual belongs to the group in question.

3. Establishment of the evidence required for granting refugee status

The determining factor for granting refugee status in accordance with the Geneva Convention is the existence of a well-founded fear of persecution on grounds of race, religion, nationality, political opinions or membership of a particular social group. The question of whether fear of persecution is well-founded must be appreciated in the light of the circumstances of each case. It is for the asylum-seeker to submit the evidence needed to assess the veracity of the facts and circumstances put forward. It should be understood that once the credibility of the asylum-seeker's statements has been sufficiently established, it will not be necessary to seek detailed confirmation of the facts put forward and the asylum-seeker should, unless there are good reasons to the contrary, be given the benefit of the doubt.

The fact that an individual has already been subject to persecution or to direct threats of persecution is a serious indication of the risk of persecution, unless a radical change of conditions has taken place since then in his country of origin or in his relations with his country of origin.

The fact that an individual, prior to his departure from his country of origin, was not subject to persecution or directly threatened with persecution does not *per se* mean that he cannot in asylum proceedings claim a well-founded fear of persecution.

4. 'Persecution' within the meaning of Article 1A of the Geneva Convention

The term 'persecution' as it is used in this document is taken from Article 1A of the Geneva Convention.

The term is not defined in the Convention. Nor is a universally accepted definition to be found either in the conclusions of the UNHCR Executive Committee or in legal literature on the subject. The guidelines in this document do not constitute a definition.

However, it is generally agreed that, in order to constitute 'persecution' within the meaning of Article 1A, acts suffered or feared must:

- be sufficiently serious, by their nature or their repetition: they must either constitute a basic attack on human rights, for example, life,

freedom or physical integrity, or, in the light of all the facts of the case, manifestly preclude the person who has suffered them from continuing to live in his country of origin⁽¹⁾, and

- be based on one of the grounds mentioned in Article 1A: race, religion, nationality, membership of a particular social group or political opinions. Grounds of persecution may overlap and several will often be applicable to the same person. The fact that these grounds are genuine or simply attributed to the person concerned by the persecutor is immaterial.

Several types of persecution may occur together and the combination of events each of which, taken separately, does not constitute persecution may, depending on the circumstances, amount to actual persecution or be regarded as a serious ground for fear of persecution.

In the following guiding principles, the term 'persecution' is to be understood with reference to this section.

5. Origins of persecution

5.1. Persecution by the State

Persecution is generally the act of a State organ (central State or federal States, regional and local authorities) whatever its status in international law, or of parties or organizations controlling the State.

In addition to cases in which persecution takes the form of the use of brute force, it may also take the form of administrative and/or judicial measures which either have the appearance of legality and are misused for the purposes of persecution, or are carried out in breach of the law.

5.1.1. Legal, administrative and police measures

(a) General measures

The official authorities of a country are sometimes moved to take general measures to maintain public order, safeguard State security, preserve public health, etc. As

⁽¹⁾ This wording is without prejudice to point 8: 'whether the person concerned cannot find effective protection in another part of his own country...'.

required, such measures may include restrictions on the exercise of certain freedoms. They may also be accompanied by the use of force, but such restrictions or use of force do not in themselves constitute sufficient grounds for granting refugee status to the individuals against whom the measures are directed. However, if it emerges that such measures are being implemented in a discriminatory manner on one or more of the grounds mentioned in Article 1A of the Geneva Convention and may have sufficiently serious consequences, they may give rise to a well-founded fear of persecution on the part of individuals who are victims of their improper application. Such is the case, in particular, where general measures are used to camouflage individual measures taken against persons who, for the reasons mentioned in Article 1A, are likely to be threatened by their authorities.

(b) *Measures directed against certain categories*

Measures directed against one or more specific categories of the population may be legitimate in a society, even when they impose particular constraints or restrictions on certain freedoms.

However, they may be considered as justifying fears of persecution, in particular where the aim which they pursue has been condemned by the international community, or where they are manifestly disproportionate to the end sought, or where their implementation leads to serious abuses aimed at treating a certain group differently and less favourably than the population as a whole.

(c) *Individual measures*

Any administrative measure taken against an individual, leaving aside any consideration of general interest referred to above, on one of the grounds mentioned in Article 1A, which is sufficiently severe in the light of the criteria referred to in section 4 of this Joint Position, may be regarded as persecution, in particular where it is intentional, systematic and lasting.

It is important, therefore, to take account of all the circumstances surrounding the individual measure reported by the asylum-seeker, in order to assess whether his fears of persecution are well-founded.

In all the cases referred to above, consideration must be given to whether there is an effective remedy or remedies which would put an end to

the situation of abuse. As a general rule, persecution will be indicated by the fact that no redress exists or, if there are means of redress, that the individual or individuals concerned are deprived of the opportunity of having access to them or by the fact that the decisions of the competent authority are not impartial (see 5.1.2) or have no effect.

5.1.2. Prosecution

Whilst appearing to be lawful, prosecution or court sentences may amount to persecution where they include a discriminatory element and where they are sufficiently severe in the light of the criteria referred to in section 4 of this Joint Position. This is particularly true in the event of:

(a) *Discriminatory prosecution*

This concerns a situation in which the criminal law provision is applicable to all but where only certain persons are prosecuted on grounds of characteristics likely to lead to the award of refugee status. It is therefore the discriminatory element in the implementation of prosecution policy which is essential for recognizing a person as a refugee.

(b) *Discriminatory punishment*

Punishment or the threat thereof on the basis of a universally applicable criminal law provision will be discriminatory if persons who breach the law are punished but certain persons are subject to more severe punishment on account of characteristics likely to lead to the award of refugee status. The discriminatory element in the punishment imposed is essential. Persecution may be deemed to exist in the event of a disproportionate sentence, provided that there is a link with one of the grounds of persecution referred to in Article 1A.

(c) *Breach of a criminal law provision on account of the grounds of persecution*

Intentional breach of a criminal law provision — whether applicable universally or to certain categories of persons — on account of the grounds of persecution must be clearly the result of pronouncements or participation in certain activities in the country of origin or be the objective consequence of characteristics of the asylum-seeker liable to

lead to the grant of refugee status. The deciding factors are the nature of the punishment, the severity of the punishment in relation to the offence committed, the legal system and the human rights situation in the country of origin. Consideration should be given to whether the intentional breach of the criminal law provision can be deemed unavoidable in the light of the individual circumstances of the person involved and the situation in the country of origin.

5.2. *Persecution by third parties*

Persecution by third parties will be considered to fall within the scope of the Geneva Convention where it is based on one of the grounds in Article 1A of that Convention, is individual in nature and is encouraged or permitted by the authorities. Where the official authorities fail to act, such persecution should give rise to individual examination of each application for refugee status, in accordance with national judicial practice, in the light in particular of whether or not the failure to act was deliberate. The persons concerned may be eligible in any event for appropriate forms of protection under national law.

6. **Civil war and other internal or generalized armed conflicts**

Reference to a civil war or internal or generalized armed conflict and the dangers which it entails is not in itself sufficient to warrant the grant of refugee status. Fear of persecution must in all cases be based on one of the grounds in Article 1A of the Geneva Convention and be individual in nature.

In such situations, persecution may stem either from the legal authorities or third parties encouraged or tolerated by them, or from *de facto* authorities in control of part of the territory within which the State cannot afford its nationals protection.

In principle, use of the armed forces does not constitute persecution where it is in accordance with international rules of war and internationally recognized practice; however, it becomes persecution where, for instance, authority is established over a particular area and its attacks on opponents or on the population fulfil the criteria in section 4.

In other cases, other forms of protection may be provided under national legislation.

7. **Grounds of persecution**

7.1. *Race*

The concept of race should be understood in the broad sense and include membership of different ethnic groups. As a general rule, persecution should be deemed to be founded on racial grounds where the persecutor regards the victim of his persecution as belonging to a racial group other than his own, by reason of a real or supposed difference, and this forms the grounds for his action.

7.2. *Religion*

The concept of religion may be understood in the broad sense and include theistic, non-theistic and atheistic beliefs.

Persecution on religious grounds may take various forms, such as a total ban on worship and religious instruction, or severe discriminatory measures against persons belonging to a particular religious group. For persecution to occur, the interference and impairment suffered must be sufficiently severe in the light of the criteria referred to in section 4 of this Joint Position. This may apply where, over and above measures essential to maintain public order, the State also prohibits or penalizes religious activity even in private life.

Persecution on religious grounds may also occur where such interference targets a person who does not wish to profess any religion, refuses to take up a particular religion or does not wish to comply with all or part of the rites and customs relating to a religion.

7.3. *Nationality*

This should not be confined exclusively to the idea of citizenship but should also include membership of a group determined by its cultural or linguistic identity or its relationship with the population of another State.

7.4. *Political opinions*

Holding political opinions different from those of the government is not in itself a sufficient ground for securing refugee status; the applicant must show that:

- the authorities know about his political opinions or attribute them to him,
- those opinions are not tolerated by the authorities,
- given the situation in his country he would be likely to be persecuted for holding such opinions.

7.5. *Social group*

A specific social group normally comprises persons from the same background, with the same customs or the same social status, etc.

Fear of persecution cited under this heading may frequently overlap with fear of persecution on other grounds, for example race, religion or nationality.

Membership of a social group may simply be attributed to the victimized person or group by the persecutor.

In some cases, the social group may not have existed previously but may be determined by the common characteristics of the victimized persons because the persecutor sees them as an obstacle to achieving his aims.

8. **Relocation within the country of origin**

Where it appears that persecution is clearly confined to a specific part of a country's territory, it may be necessary, in order to check that the condition laid down in Article 1A of the Geneva Convention has been fulfilled, namely that the person concerned 'is unable or, owing to such fear (of persecution), is unwilling to avail himself of the protection of that country', to ascertain whether the person concerned cannot find effective protection in another part of his own country, to which he may reasonably be expected to move.

9. **Refugee *sur place***

The fear of persecution need not necessarily have existed at the time of an asylum-seeker's departure from his country of origin. An individual who had no reason to fear persecution on leaving his country of origin may subsequently become a refugee *sur place*. A well-founded fear of persecution may be based on the fact that the situation in his country of origin has changed since his departure, with serious consequences for him, or on his own actions.

In any event the asylum-related characteristics of the individual should be such that the authorities in the country of origin know or could come to know of them before the individual's fear of persecution can be justified.

9.1. *Fear arising from a new situation in the country of origin after departure*

Political changes in the country of origin may justify fear of persecution, but only if the asylum-seeker can demonstrate that as a result of those changes he would personally have grounds to fear persecution if he returned.

9.2. *Fear on account of activities outside the country of origin*

Refugee status may be granted if the activities which gave rise to the asylum-seeker's fear of persecution constitute the expression and continuation of convictions which he had held in his country of origin or can objectively be regarded as the consequence of the asylum-related characteristics of the individual. However, such continuity must not be a requirement where the person concerned was not yet able to establish convictions because of age.

On the other hand, if it is clear that he expresses his convictions mainly for the purpose of creating the necessary conditions for being admitted as a refugee, his activities cannot in principle furnish grounds for admission as a refugee; this does not prejudice his right not to be returned to a country where his life, physical integrity or freedom would be in danger.

10. **Conscientious objection, absence without leave and desertion**

The fear of punishment for conscientious objection, absence without leave or desertion is investigated on an individual basis. It should in itself be insufficient to justify recognition of refugee status. The penalty must be assessed in particular in accordance with the principles set out in point 5.

In cases of absence without leave or desertion, the person concerned must be accorded refugee status if the conditions under which military duties are performed themselves constitute persecution.

Similarly, refugee status may be granted, in the light of all the other requirements of the definition, in cases of punishment of conscientious objection or deliberate absence without leave and

desertion on grounds of conscience if the performance of his military duties were to have the effect of leading the person concerned to participate in acts falling under the exclusion clauses in Article 1F of the Geneva Convention.

11. Cessation of refugee status (Article 1C)

Whether or not refugee status may be withdrawn on the basis of Article 1C of the Geneva Convention is always investigated on an individual basis.

The Member States should make every effort, by exchanging information, to harmonize their practice with regard to the application of the cessation clauses of Article 1C wherever possible.

The circumstances in which the cessation clause in Article 1C may be applied should be of a fundamental nature and should be determined in an objective and verifiable manner. Information provided by the Centre for Information, Discussion and Exchange on Asylum (Cirea) and the UNHCR may be of considerable relevance here.

12. Article 1D of the Geneva Convention

Any person who deliberately removes himself from the protection and assistance referred to in Article 1D of the Geneva Convention is no longer automatically covered by that Convention. In such cases, refugee status is in principle to be determined in accordance with Article 1A.

13. Article 1F of the Geneva Convention

The clauses in Article 1F of the Geneva Convention are designed to exclude from protection under that Convention persons who cannot enjoy international protection because of the seriousness of the crimes which they have committed.

This may also be applied where the acts become known after the grant of refugee status (see point 11).

In view of the serious consequences of such a decision for the asylum-seeker, Article 1F must be used with care and after thorough consideration, and in accordance with the procedures laid down in national law.

13.1. Article 1F (a)

The crimes referred to in Article 1F (a) are those defined in international instruments to which the Member States have acceded, and in resolutions adopted by the United Nations or other international or regional organizations to the extent that they have been accepted by the Member States.

13.2. Article 1F (b)

The severity of the expected persecution is to be weighed against the nature of the criminal offence of which the person concerned is suspected.

Particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes. This applies both to the participants in the crime and to its instigators.

13.3. Article 1F (c)

The purposes and principles referred to in Article 1F (c) are in the first instance those laid down in the Charter of the United Nations, which determines the obligations of the States party to it in their mutual relations, particularly for the purpose of maintaining peace, and with regard to human rights and fundamental freedoms.

Article 1F (c) applies to cases in which those principles have been breached and is directed notably at persons in senior positions in the State who, by virtue of their responsibilities, have ordered or lent their authority to action at variance with those purposes and principles as well as at persons who, as members of the security forces, have been prompted to assume personal responsibility for the performance of such action.

In order to determine whether an action may be deemed contrary to the purposes and principles of the United Nations, Member States should take account of the conventions and resolutions adopted in this connection under the auspices of the United Nations.

Done at Brussels, 4 March 1996.

For the Council
The President
P. BARATTA