Submission from the United Nations High Commissioner for Refugees (UNHCR) to the legal representative in case of XXX v State Migration Service of the Ministry of Territorial Administration of the Republic of Armenia

UNHCR's mandate and role

1. The Office of the United Nations High Commissioner for Refugees (hereafter “UNHCR”) has been entrusted by the United Nations General Assembly with a mandate to provide international protection to refugees and, together with Governments, seek permanent solutions to the problems of refugees.¹ According to its Statute, UNHCR fulfils its mandate inter alia by “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto[.]”² This supervisory responsibility is reiterated in Article 35 of the 1951 Convention and Article II of the 1967 Protocol relating to the Status of Refugees (hereafter collectively referred to as “1951 Convention”).³

2. UNHCR’s supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention. Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (hereinafter “Handbook”) and subsequent Guidelines on International Protection.⁴ UNHCR also provides information on a regular basis to decision-makers and courts of law concerning the proper interpretation and application of provisions of the 1951 Convention.

3. UNHCR has a direct interest in ensuring a proper and consistent interpretation of the 1951 Convention as part of its supervisory responsibility and thus, UNHCR welcomes the opportunity to provide this expert opinion in response to the request of the lawyer xxxxxxx representing asylum seeker xxx, to assist in the interpretation and application of refugee law concepts in the context of applications for international protection. In these submissions, UNHCR will address the following issues:

   (a) the meaning of the phrase “well-founded fear of persecution”;
   (b) the burden of proof, standard of proof, the benefit of the doubt and the use of COI;
   (c) the notion of prosecution, as distinct from persecution; and

² UNHCR Statute, para. 8(a).
(d) confidentiality and contact by authorities of an asylum country with [those of] the country of origin.

4. The following submission is limited to issues of international law, and refrains from taking a position on the applicant’s eligibility for international protection in this case. These submissions do not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoys under applicable international legal instruments and recognized principles of international law.5

A. Meaning of “well-founded fear of being persecuted” in Article 1A (2) of the 1951 Convention and Article 1 (2) of 1967 Protocol

5. The criteria for refugee status are set out in Article 1A(2) of the 1951 Convention and are to be interpreted in accordance with their ordinary meaning, and in light of the object and purpose of the 1951 Convention. The Preamble to the 1951 Convention contains clear and unequivocal references to international law and fundamental rights, and indicates that the intention of the drafters was to incorporate and secure the ‘widest possible exercise’ of human rights and fundamental freedoms in the application and interpretation of the Convention.

6. The Handbook identifies “well-founded fear of being persecuted” as the key phrase of the refugee definition.6 It incorporates two elements of the refugee definition: well-founded fear and persecution.

7. Since fear is subjective, determination of refugee status will therefore primarily require an evaluation of the applicant’s statements rather than a judgment on the situation prevailing in his or her country of origin.7 However, keeping in mind that fear is a subjective emotion, for the purpose of refugee status determination, it must be well-founded, that is, it must have an objective basis, i.e. the person’s frame of mind must be supported by evidence of an objective situation, including through comparing the statements with publicly available country of origin information, laws and practice in their implementation. Thus, the term “well-founded fear” contains a subjective element, corresponding to the applicant’s state of mind, to be assessed principally by evaluating the applicants’ statements, and an objective element, which is to be assessed on the basis of the situation prevailing in his/her country of origin.

8. Importantly, fear need not necessarily be based on the applicant’s personal experience: there is no need for him or her to be the victim of persecution; experiences of others belonging to the same group may well demonstrate that he or she will be persecuted. International refugee protection is preventive in its nature and the refugee definition, is forward-looking. As pointed out in the Handbook: “the applicant’s fear should be considered well-founded if [he or she] can establish, to a reasonable degree, that his or her continued stay in the country of origin has become intolerable to him or her, for

7 Ibid.
8 See Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees, UNHCR, April 2001, para. 11.
the reasons stated in the definition, or would for the same reasons be intolerable if he[or she] returned there”.

9. There is no universally accepted definition of persecution, however, drawing from Article 33 of the Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights will also always constitute persecution.

10. In accordance with general principles of the law of evidence, the burden of proof lies on the person who makes the assertion, in the case of refugee claims, on the asylum-seeker. This burden is discharged by providing a truthful account of his/her background and personal experiences which have given rise to the fear of persecution. However, in view of the particularities of a refugee’s situation such that they may not be able to provide the relevant information or documentation or owing to their position of vulnerability, there is a duty shared between the applicant and the examiner 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.

11. The European Court of Human Rights (ECtHR) in a number of judgments has stressed that it is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that he or she would be exposed to a real risk of being subjected to treatment contrary to Article 3. However, it was for the national authorities to conduct a thorough and rigorous assessment in order to dispel any doubt regarding the risk of being subjected to such treatment or to dispel doubts as to the credibility of asserted facts.

12. Given that often asylum-seekers would have fled without their personal documents, they may not have documentary proof to support their statements. In fact, cases in which an applicant can provide evidence of all of his or her statements will be the exception rather than the rule. UNHCR’s position is that failure to produce documentary evidence to substantiate oral statements should not prevent the claim from being accepted if such statements are consistent with known facts and the general credibility of the applicant is good.

---

10 Handbook, para. 51
12 Ibid.
15 Note on Burden and Standard of Proof, para. 10.
13. The Handbook provides that:

“after the applicant has made a genuine effort to substantiate his[or her] story there may still be a lack of evidence for some of his[or her] statements... [I]t is hardly possible for a refugee to ‘prove’ every part of his[or her] case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt”.

14. Once the asylum-seeker fulfils his/her duty to provide all available information and statements at his/her disposal, especially if a satisfactory explanation for the lack of supporting evidence is given, his/her duty is considered to have been discharged and the duty to ascertain and evaluate the facts is then shared between the applicant and the adjudicator.16

15. The requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds him or herself. Allowance for such possible lack of evidence does not, however, mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the applicant.17 Untrue statements by themselves are not a reason for refusal of refugee status. There may be good reasons which explain the failure by the applicant to tell the truth.18 The untruthful elements may not be relevant or decisive as regards the applicant’s potential need for international protection. It is the examiner’s responsibility to evaluate such statements in the light of all the circumstances of the case, and determine whether or not an applicant is in need of international protection, based on all of the evidence seen in context.19

16. The case law of the ECtHR also indicates that the assessment of credibility should be based on the examination of the statements and the documents submitted in support of the claim.20 The Court reiterated that it is frequently necessary to give applicants the benefit of the doubt when it comes to assessing the credibility of their statements:

“The Court acknowledges that, owing to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the

16 See also, United Nations Committee against Torture decision of Iya v. Switzerland, CAT/C/39/D/299/2006, 16 November 2007, which states: ‘The State party has further questioned the authenticity of the evidence submitted by the complainant. At the same time, the complainant argues that national authorities did not thoroughly examine the evidence submitted by him or corroborate his declarations on the ground. The Committee observes that the complainant has provided a coherent version of the facts and the relevant evidence to corroborate these facts. Therefore, the Committee concludes that the State party's arguments to challenge the validity of this evidence and the complainant's declarations have not been sufficiently substantiated.’


19 Ibid., para.199. See also UK Supreme Court, MA (Somalia) v Secretary of State for the Home Department [2010] UKSC 49, 24 November 2010, para. 38: ‘Even if very large parts of his story have been disbelieved, it is still possible that the appellant has shown that he would be at risk on return. An appellant’s own evidence has to be considered in the round with other evidence and that can include unimpeachable evidence from expert reports or country guidance cases or other evidence about the general state of affairs in that country.’

documents submitted in support thereof.”

The Court indicated that the credibility of such statements should be questioned only where inconsistencies affect the core of the applicant’s story or when there are strong reasons to question the veracity of the applicant’s submissions, and the applicant does not provide a satisfactory explanation.

17. 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 and that an applicant’s life and/or integrity may be put at grave risk if international protection is wrongfully declined.

18. UNHCR suggests that when 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.

19. As established in national jurisprudence, it is crucial to objectively and in good faith assess the country of origin information (COI). The credibility of asserted material facts should be assessed in light of all the available relevant COI, and not just portions of that information. Relevant COI should be neither ignored nor misapplied. The credibility assessment would be flawed if it were carried out with reference solely to selected portions of the available evidence. It must be made with reference to the full picture emerging from the available evidence.

20. The adjudicator needs to assess the credibility of the applicant’s statements, to determine whether and which of the Applicant’s statements and other evidence can be accepted, which shall be rejected and which remain unclear. Only following this process – credibility assessment – based on the material facts and accepted evidence, analysis of the well-founded fear of persecution shall be carried out.

21. 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

---

22 F.H. v. Sweden, no. 32621/06 (Judgment), European Court of Human Rights (ECHR), 20 January 2009, para. 95.
23 M. v. Sweden, no. 22556/05 (Final Decision), ECHR, 6 September 2007, para. 60: “Taking these circumstances into account, the Court finds that the applicant has failed to provide a satisfactory explanation for the irregularities and inconsistencies in his story and cannot but endorse the Government’s observations as to the applicant’s general credibility.”
25 Note on Burden and Standard of Proof, para. 11.
degree of likelihood which has to be shown by the applicant to qualify for refugee status has been established.  

22. In the context of a refuge claim, the expression “standard of proof” means the threshold to be met by the applicant in persuading the adjudicator as to the truth of his or her assertions. Based on the Handbook, the applicant’s fear should be considered well-founded if he/she “can establish, to a reasonable degree (emphasis added), that his[her] continued stay in his[her] country has become intolerable...”

23. State practice confirms that the test for well-foundedness is less than “beyond a reasonable doubt” and also less than a “balance of probabilities”. 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.

24. Various national courts have decided that the fear is well-founded if there is a “reasonable possibility”, or “good reason” to fear persecution. This is well illustrated by the U.S. Supreme Court in INS v. Cardoza-Fonseca:

“There is simply no room in the United Nations definition for concluding that an applicant has a 10% chance of being shot, tortured, or otherwise persecuted, that she or he has no ‘well-founded fear’ of the event happening...so long as an objective situation is established by the evidence, it need not been shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility.”

C. The concepts of prosecution and persecution

25. As stated in the Handbook, persecution must be distinguished from punishment for a common law offence. Persons fleeing from prosecution or punishment for such an offence are not normally refugees. It should be recalled that a refugee is a victim – or potential victim – of injustice, not a fugitive from justice.

26. In distinguishing the ordinary prosecution of offences from persecution, it is necessary to take into account and analyse at least some of the following factors:

• whether the law is in conformity with human rights standards or is inherently persecutory (for example where it prohibits legitimate religious belief or activity);

---

28 Note on Burden and Standard of Proof, para. 2.
30 Note on Burden and Standard of Proof, para.8.
32 Additional case law can be found in UN High Commissioner for Refugees (UNHCR), Note on Burden and Standard of Proof in Refugee Claims, 16 December 1998, available at: http://www.refworld.org/docid/3ae6b3338.html

• whether implementation of the law is carried out in a manner which amounts to persecution based on a Convention reason. Elements to be considered in this regard include:

• whether persons charged under the law are denied due process of law for a Convention reason;

• whether prosecution is discriminatory (for example where only members of certain ethnic groups are prosecuted);

• whether punishment is meted out on a discriminatory basis, (for example, the usual penalty is a six month prison term but those judged to hold a certain political opinion are routinely sentenced to a 1 year imprisonment);

• whether punishment under the law amounts to persecution (for example where the punishment amounts to cruel, inhuman or degrading treatment).33

27. At times the person may be persecuted based not necessarily on his or her actual, but imputed political opinion. Hence, when determining whether prosecution is a form of persecution regard shall be made to the personality of the applicant, his/her (imputed) political opinion, the motive behind the act, the nature of the act committed, the nature of the prosecution and its motives; finally, also, the nature of the law on which the prosecution is based.34

D. Confidentiality and contact with the country of origin

28. International human rights law guarantees everyone the right to privacy and protects individuals from arbitrary or unlawful interference.35 Effective measures need to be taken to ensure that information concerning a person’s private life does not reach the hands of third parties that might use such information for purposes incompatible with international human rights law; sharing of information with an external party should not jeopardize the safety of the individual concerned or lead to the violation of his or her human rights.

29. The right to privacy and its confidentiality requirements are especially important for an asylum-seeker, whose claim inherently supposes a fear of persecution by the authorities of the country of origin and whose situation can be jeopardized if protection of information is not ensured. It would be against the spirit of the 1951 Convention to share personal data or any other information relating to asylum-seekers with the authorities of the country of origin until a final rejection of the asylum claim.


34 Ibid., para.86.

30. Bearing these concerns in mind, the State that receives and assesses an asylum request must refrain from sharing any information with the authorities of the country of origin and indeed from informing the authorities in the country of origin that a national has presented an asylum claim. This applies regardless of whether the country of origin is considered by the authorities of asylum as a “safe country of origin”, or whether the asylum claim is considered to be based on economic motives. Likewise, the authorities of the country of asylum may not weigh the risks involved in sharing of confidential information with the country of origin, and conclude that it will not result in human rights violations. Such contacts may expose the asylum seeker or his family members who remained in the country of origin to risk of persecution.

31. Article 25 of the Convention, which concerns administrative assistance, also reflects the fact that a refugee cannot rely on the national protection of his or her country of origin. It is also intended to prevent a refugee from being exposed to persecution through contact with the authorities of his or her country of origin and to prevent family members and/or associates who still remain in the country of origin being placed at risk.

32. As discussed during the Global Consultations on International Protection, “the asylum procedure should at all stages respect the confidentiality of all aspects of an asylum claim, including the fact that the asylum-seeker has made such a request” and highlighted that “no information on the asylum application should be shared with the country of origin.”36

33. The authorities must therefore seek in advance the written consent of asylum-seekers to check their personal data in the country of origin. In cases where an asylum-seeker believes that compelling evidence in his or her favor is obtainable from the country of origin, and that this evidence may be obtained only by disclosing certain of his or her personal data, he or she may occasionally request the authorities of the country of asylum for help in obtaining such evidence.

34. Confidentiality requirements apply throughout the asylum procedure, including judicial review. If research is conducted on an individual case to verify a fact or a document, the written consent of the individual has to be sought in advance, unless, exceptionally, a legitimate overriding security interest is at stake.37 Furthermore, the fact that judicial review before the courts is public does not amount to an automatic waiver of confidentiality.

35. There may also be questions as to whether the confidentiality requirements continue to apply in situations where an asylum-seeker has voluntarily disclosed his or her identity and the fact that s/he has sought asylum through statements to the media. In UNHCR’s view, while there might be a possibility that such information has come to the knowledge of the country of origin, this may not be interpreted as an explicit waiver of confidentiality. The country of asylum remains bound by the principle of confidentiality and personal data on the individual asylum claim must not be disclosed to the country of origin.


37 The disclosure of certain confidential information to the country of origin without the consent of the applicant may be justified in limited, exceptional circumstances, such as combating terrorism. These principles are reflected in a series of UNHCR documents, such as, UN High Commissioner for Refugees (UNHCR), Addressing Security Concerns Without Undermining Refugee Protection - UNHCR's Perspective, 17 December 2015, Rev.2, available at: http://www.refworld.org/docid/5672aed34.html and the “Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, 4 September 2003”, http://www.refworld.org/docid/3f5857d24.html.
36. **If information is disclosed this may lead to a situation where the asylum-seeker may become a refugee *sur place* and family members or associates of the asylum seeker may be endangered.**

37. If the authorities responsible for assessing an asylum claim, whether administrative or judicial, deem it necessary to collect information from the country of origin, such requests must be couched in the most general and anonymous terms, and should never include names or data by which the asylum-seeker or his or her family could be identified in the country of origin. Such authorities however must not communicate with entities in the country of origin of the claimant (whether governmental or non-governmental) to verify or authenticate declarations or documents provided by the asylum-seeker.

38. In case of a suspicion that an asylum-seeker has used forged documents to support his or her application, a credibility assessment and confirmation of the authenticity of submitted evidence may be obtained through various means without affecting the basic procedural safeguards with respect to confidentiality.

**Conclusion**

UNHCR hopes that the above observations will assist the further deliberations on these issues and stands ready to provide additional information.

**United Nations High Commissioner for Refugees**

2 December 2016