An Analysis of the Article 31(1) of the Refugee Convention: Non-Penalization

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Abstract

The article 31(1) of the 1951 Convention Relating to the Status of Refugees allows refugees illegally entering not to be penalized. Increasingly, many receiving countries although seems unable to manage their refugee determination systems effectively and efficaciously, the terms of article 31(1) of the 1951 Convention call for close examination and analysis. The paper reviews mainly the central issues arising from the Article 31(1) with particular reference to the scope of protection, the conditions of entitlement (‘coming directly’, ‘without delay’, ‘good cause’), and the precise nature of the immunity (penalties). States party to the Convention and the 1967 Protocol undertaking to accord certain standards of treatment to refugees and to guarantee to them certain rights will likely to be far from the object and purpose of the Convention.

Introduction

The Interpretation of Article 31(1) of the 1951 Convention Relating to the Status of Refugees which codifies a principle of immunity from penalties for refugees who directly come from a territory where their life or freedom is threatened and enter or are present in a country without authorization. Despite this provision, many States have rejected refugee for illegal entry under the terms of article 31(1) of the 1951 Convention giving reasons such as ‘coming directly’, ‘without delay’, ‘good cause’, and the precise nature of the immunity (penalties).

The Convention establishes a regime of rights and responsibilities for refugees. To impose penalties without regard to the merits of an individual’s claim to be a refugee will likely violate the obligation of the State and to protect the human rights of everyone within its territory. Nevertheless, demand for refugees to be recognized, due to the unauthorized arrival has increased and they have guaranteed lesser rights, contrary to the terms of article 31(1) of the 1951 Convention.

The origins of the text

The travaux préparatoires (preparatory work) affirm the ‘ordinary meaning’ of Article 31(1) of the 1951 Convention, as applying to refugees who enter or are present without authorization, whether they have come directly from their country of origin or from any country in which their life or freedom was threatened, provided they show good cause for such entry or presence. If the references mentioned in Article 31 of the 1951 Convention give ‘good cause’ and ‘come directly’, it may be ambiguous and these terms will intend to deny protection to refugees.

There contained no extensive discussion on the term ‘penalty’ within the preparatory work of the treaty. Penalties’ are interpreted only as criminal sanction according to the French

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term ‘sancrions pénales’. As a broader view, the term covers the object and purpose of the treaty taking into account other human rights treaties.

The Ad Hoc Committee

A proposal non-penalty to refugee is first included in the draft convention by the 1950 Ad Hoc Committee on Statelessness and Related Problems. The relevant part of what was then the draft Article 24 provided as follow:

The High Contracting Parties undertake not to impose penalties, on account of their illegal entry or residence, on refugees who enter or who are present in their territory without prior or legal authorization, and who present themselves without delay to the authorities and show good cause for their illegal entry.

The text was further refined during later meetings, emerging as the draft Article 26 which was the same as the text of the article 24. During this meeting, Australia called for a clarification of the term ‘penalties’ should be confined to judicial penalties only, no further clarification was provided.

The draft text was thus considered by the 1951 Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, which met in Geneva in July 1951.

Discussions at the 1951 Conference

Since Article 26 (Article 31 to be) ‘trespassed’ on the delicate ‘sovereign’ areas of admission and asylum, France was concerned during the 1951 Geneva Conference that it should not allow those who had already ‘found asylum . . . to move freely from one country to another with frontier formalities’.

Denmark cited the example of a Hungarian refugee living in Germany without actually being persecuted, feel obliged to seek refuge in another country’ and ‘a Polish refugee living in Czechoslovakia, whose life or freedom was threatened in that country and who proceeded to another. France suggested amendment (coming directly from their country of origin) be replaced by a reference to arrival from any territory in which the refugee’s life or freedom was threatened.

During the debate, the United Nations High Commissioner for Refugees, Dr Van Heuven Goedhart, expressed his concern about ‘necessary transit’ and the difficulties facing a refugee arriving in an ungenerous country. It would be unfortunate, if refugees in similar situations were penalized for not having proceeded directly to the final country of asylum.

The United Kingdom representative, Mr. Hoare, said that fleeing persecution was itself good cause for illegal entry, but there could be other good causes. The French suggested that their proposed amendment be changed so as to exclude refugees, ‘having been unable to fine even temporary asylum in a country other than the one in which . . . life or freedom would be threatened’.

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The French position is obvious in the comment of M. Rochefort which is "if refugees crossed the French frontier without being in danger, the French Government would be entitled to impose penalties and send them back to the frontier".\footnote{UN doc. A/CONF.2/SR.35, (M.Rochefort, France)}

Article 31 (1) of the 1951 Convention says:

The Contracting States shall not impose penalties, on account of their illegal entry or presence, 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.

Article 31(1) thus includes threats to life or freedom as possible reasons for illegal entry or presence; particularly avoids from such threats to the refugee from country of origin and considers that refugees may have other good causes other than persecution of the country of origin.

Over Views on the meaning of terms

The term 'penalties' is not defined in Article 31 and the question arises whether the term used in this context should only comprise criminal penalties, or whether it should also include administrative penalties. Some argued that the drafters seem to have had in mind measures such as prosecution, fine, and imprisonment. French view of the terms refers to 'sanctions pénales', and on case law.\footnote{R v. Secretary of State for the Home department, exparte Makoyi, English High Court (Queen's Bench Division), No.CO/2372/91, 21 Nov. 1991(unreported case).}

As mentioned above at the beginning, English version used the term 'penalties' as a wider interpretation which differs from French's one. According to their views, taking after article 31 and 32 of the Vienna Convention, the term should be adopted in respect of the objective and purpose of the treaty.

Under the International Covenant on Civil and Political Rights (ICCPR), whether the word 'penalty' in article 15(1) should be interpreted narrowly or widely, and whether it applies to different kinds of penalties, 'criminal' and 'administrative', must depend on other factors. In the case, the Human Rights Committee notes, regard must be had, inter alia, to its object and purpose.\footnote{Van Duzen v. Canada, Communication No. 50/1979, UN doc.CCPR/C/15/D/50/1979, 7 April 1982, para. 10.2.}

Nowak refers to the term 'criminal offence' in article 14 of the ICCPR. He argues that 'every sanction that has not only a preventive but also a retributive and / or deterrent character is . . . to be termed a penalty'.\footnote{M. Nowak, UN Covenant on civil and Political Rights- CCPR Commentary (Engel Verlag, Kehl am Rhein, Strasbourg, Arlington, 1993),p.278.}

In this context, the distinction between criminal and administrative sanctions becomes irrelevant. It is necessary to look beyond the notion of criminal sanction and examine whether the measure is reasonable and necessary, or arbitrary and discriminatory, or in breach of human rights law.

The meaning of 'illegal entry' would cover arriving or securing entry through the use of false or falsified documents, clandestine entry, and entry into State territory with the assistance of smugglers or traffickers. Illegal presence has included lawful arrival and remaining. Even
though the notion of ‘good cause’ is sufficient for being persecution, the validity of the reason should be considered.\textsuperscript{12}

With respect to the above approach, Article 31(1) of the Convention could be interpreted that the object and purpose of the protection under Article 31(1) of the 1951 Convention led to non-penalization on account of illegal entry or presence.

State Practice

In R. v. Uxbridge Magistrates’ Court and another, \textit{ex parte Adimi},\textsuperscript{13} the Divisional Court in the United Kingdom observed: ‘That article 31 extends not merely to those ultimately accorded refugee status but also to those claiming asylum in good faith is not in doubt. Nor is it disputed that article 31’s protection can apply equally to those using false documents as to those (characteristically the refugees of earlier times) who enter a country clandestinely.

The Regional Superior Court (\textit{Landesgericht}) in Münster, Federal Republic of Germany,\textsuperscript{14} found that an asylum seeker who entered illegally and who presented himself to the authorities one week after arrival after looking for advice on the asylum procedure was not to be penalized for illegal entry. The court observed that there is no general time limit for determining what constitutes ‘without delay’, which should be considered on a case-by-case basis.

The \textit{Oberlandesgericht Celle}\textsuperscript{15} and the \textit{Landesgericht Münster}, among others, found that refugees can claim exemption from penalties for illegal entry, even if they have passed through a third State on their way to Germany from the State of persecution. On 14 January 2000, the \textit{Oberste Landesgericht} of Bavaria held that Article 31 of the 1951 Convention does not apply where the asylum seeker has benefited from the help of a smuggler (\textit{Schleuser}).\textsuperscript{16} Such an interpretation finds no support, in the words of Article 31, or the \textit{travaux préparatoires} or in the practice of States. In addition to directly violating Article 31 of the 1951 Convention, this interpretation also contravenes the letter and the spirit of Article 5 of the Protocol against the Smuggling of Migrants by Land, Air and Sea.\textsuperscript{17}

In the case of \textit{Shimon Akram and Others}, the Court of First Instance (Criminal Cases) in Mytilini, Greece,\textsuperscript{18} found the defendants- Iraqi citizens of the Catholic faith-to be innocent of the crime of illegal entry. Referring to Article 31 of the 1951 Convention, among others, the Court concluded that refugee status precludes the imposition of penalties on asylum seekers for illegal entry.

The Swiss Federal Court\textsuperscript{19} confirms the above interpretations, and especially that ‘good cause’ is not about being at risk in a particular country, but much more about the illegally of entry. In particular, the Court held that Article 31(1) of the 1951 Convention applies even where an asylum seeker has had the opportunity to file an asylum claim at the border but did not do so because he or she was afraid of not being allowed entry. The case involved the illegal entry of an Afghan refugee into Switzerland from Italy with a false Singaporean passport.

\textsuperscript{13}(1999) Imm AR 560.
\textsuperscript{15}Decision of 13 Jan 1987 (1 Ss 545/86), NwZ 1987, 533 (ZeChRV) 48(1988),741.
\textsuperscript{17}Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the UN Convention Against Transnational Organized Crime, UN doc.A/55/383, Nov.2000.
\textsuperscript{18}\textit{Shimon Akram and Others}, No.585/1993, the Court of First Instance (Criminal Cases), in Mytilini, 1993
\textsuperscript{19}Federal Cassation Court, judgment of 17 March 1999, reported in Asyl 2/99, 21-3.
Owing to the above discussion, refugees are not required to have come ‘directly’ from their country of origin. The criterion of ‘good cause’ for illegal entry is clearly flexible enough to allow the elements of individual cases to be taken into account. ‘Without delay’ should be considered to depend on the circumstances such as the availability of advice and the situation of the transit.

Conclusion

States party to the 1951 Convention undertake to accord certain standards of treatment to refugees and to guarantee to them certain rights: non-discrimination (article 3), non-penalization (article 31), and non-refoulement (article 33) of the Convention etc. Accordingly, the preamble of the Convention mentioned to guarantee to refugees certain rights as much as possible. The object and purpose of the article 31(1) of the Convention is the avoidance of penalty to refugee for illegal entry. An over strict approach to defining this term, giving reasons such as ‘come directly’, ‘good cause’, ‘without delay’, precise meaning of ‘penalty’ will not be appropriate. Otherwise, the fundamental protection intended may be lost and there will be lack of the right of refugee at discretion. Therefore, the practice of States party to the Convention will be suitable, if they recognize the broader view of the term ‘penalties’ in favour of the object and purpose of the Convention.

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