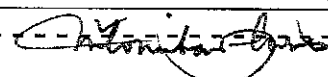


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G.R. No. 249387 – Rehman Sabir, *petitioner*, versus Department of Justice-Refugees and Stateless Persons Protection Unit (DOJ-RSPPU), *respondent*.

Promulgated:

August 2, 2022

X----------X

CONCURRING OPINION

CAGUIOA, J.:

The instant petition seeks to reverse the Court of Appeals' (CA) Decision<sup>1</sup> dated January 31, 2019 and Resolution<sup>2</sup> dated September 10, 2019 in CA-G.R. SP No. 153799. The CA affirmed the decisions<sup>3</sup> of respondent Department of Justice-Refugees and Stateless Persons Protection Unit (DOJ-RSPPU) (respondent) which denied the application of petitioner Rehman Sabir (petitioner), a Pakistani national, for recognition as a refugee under the 1951 United Nations (UN) Convention Relating to the Status of Refugees<sup>4</sup> (1951 Convention) and its 1967 Protocol Relating to the Status of Refugees<sup>5</sup> (1967 Protocol). The *ponencia* partly grants the petition by reversing the CA but remanding the case to respondent for further proceedings in accordance with the guidelines set in the *ponencia*.<sup>6</sup> In so doing, the *ponencia* recognizes in the main that respondent failed to actively discharge its shared and collaborative burden in assisting petitioner to elucidate his claim.<sup>7</sup> In particular, respondent failed to clarify the supposed inconsistency in petitioner's statements which may have been borne by the language barrier.<sup>8</sup>

The *ponencia* also observed that respondent's reliance on the United Kingdom's *Country Information and Guidance on Christians and Christian Converts in Pakistan*<sup>9</sup> (UK Country Guidance) and the *AK and SK (Christians: risk) Pakistan CG v. Secretary of State for the Home Department*<sup>10</sup> (*AK and SK (Christians: risk)*) case was improper.<sup>11</sup> On this

<sup>1</sup> *Rollo*, pp. 34-56. Penned by Associate Justice Amy C. Lazaro-Javier (now a Member of this Court) and concurred in by Associate Justices Remedios A. Salazar-Fernando and Marie Christine Azcarraga-Jacob.

<sup>2</sup> *Id.* at 58-60. Penned by Associate Justice Marie Christine Azcarraga-Jacob and concurred in by Associate Justices Remedios A. Salazar-Fernando and Maria Filomena D. Singh (now a Member of this Court).

<sup>3</sup> Decisions dated March 10, 2017 and May 25, 2017, *id.* at 101-107 and 115-119.

<sup>4</sup> Available at <<https://www.unhcr.org/4d934f5f9.pdf>>.

<sup>5</sup> Available at <<https://www.ohchr.org/sites/default/files/protocolrefugees.pdf>>.

<sup>6</sup> *Ponencia*, pp. 27-28.

<sup>7</sup> *Id.* at 27.

<sup>8</sup> *Id.* at 24.

<sup>9</sup> United Kingdom: Home Office, *Country Information and Guidance - Pakistan: Christians and Christian Converts*, February 2015, available at: <<https://www.refworld.org/docid/54e46a374.html>>.

<sup>10</sup> [2014] UKUT 00569 (IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), December 15, 2014, available at <[https://www.refworld.org/cases/GBR\\_UTIAC\\_549962d94.html](https://www.refworld.org/cases/GBR_UTIAC_549962d94.html)>.

<sup>11</sup> *Ponencia*, p. 25.



score, the *ponencia* expresses that reception of further evidence, conduct of additional interviews, in-depth study of country-of-origin information, and assessment of an applicant's averments to a greater extent should thus be encouraged from respondent.<sup>12</sup>

I agree with the above-stated disposition of the *ponencia*. Indeed, respondent is obliged to render a determination in applications for a refugee status that is consistent with the 1951 Convention, the *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*<sup>13</sup> (the Handbook) issued by the UN High Commissioner for Refugees (UNHCR) and the DOJ's own Department Circular No. 058<sup>14</sup> (DOJ-DC No. 058). The assailed decisions of respondent, however, as correctly held by the *ponencia*, fell short of what these instruments require from the examining authority. On this note, I write this separate Concurring Opinion for the sake of expounding on the obligations of a State party to these main international legal instruments, as well as other complementary international legal instruments, governing the determination of refugee status. In an attempt to give a holistic view of the entire proceedings, I also wish to add to the discussion the mechanisms in play when the application for a declaration of refugee status has been denied and the applicant has to consequently leave the country.

*The commitment of the Philippines  
under the 1951 Convention and its  
1967 Protocol*

As correctly observed by the *ponencia*, as early as 1940, Commonwealth Act No. 613<sup>15</sup> had authorized the President to allow "aliens who are refugees for religious, political, or racial reasons" to be admitted in the Philippines for humanitarian interests and when not opposed to the public interest.<sup>16</sup> The term "refugees," ostensibly, was not defined under the Act and was used rather loosely. The Act also provided of mere admission and not of recognition or determination of a status as a refugee.

For the longest time, there was no domestic law governing the determination of a refugee or stateless status of a person. This was so even with the accession by the Philippines to the 1951 Convention and its 1967 Protocol in July 1981. It was in the 1951 Convention when the term "refugee" was first defined or when the question on who qualifies as a refugee was first laid down in a global legal instrument, along with the kind of legal protection, other assistance and social rights a refugee is entitled to

<sup>12</sup> Id. at 27.

<sup>13</sup> Available at <<https://www.refworld.org/docid/5cb474b27.html>>.

<sup>14</sup> ESTABLISHING THE REFUGEE AND STATELESS STATUS DETERMINATION PROCEDURE, October 18, 2012, available at <<https://www.refworld.org/docid/5086932e2.html>> .

<sup>15</sup> AN ACT TO CONTROL AND REGULATE THE IMMIGRATION OF ALIENS INTO THE PHILIPPINES, otherwise known as "THE PHILIPPINE IMMIGRATION ACT OF 1940," August 26, 1940.

<sup>16</sup> Id., Sec. 47(b).



receive.<sup>17</sup> The 1951 Convention initially restricted its application to persons who became refugees due to events occurring in Europe before January 1, 1951 or after the aftermath of World War II. It was, in other words, limited in scope to persons fleeing events occurring before January 1, 1951 and within Europe. The 1967 Protocol removed these geographic and temporal limitations, thereby giving the 1951 Convention universal coverage.<sup>18</sup>

Notwithstanding the lack of a counterpart in our domestic laws, the Philippines remained obliged under its accession to honor the 1951 Convention and its 1967 Protocol as part of the laws of the land and which, henceforth, it should act upon to the extent already allowed under Philippine laws.<sup>19</sup> The 1951 Convention is notably grounded on Article 14<sup>20</sup> of the Universal Declaration of Human Rights 1948<sup>21</sup> to which the Philippines, as a member of the UN, had likewise bound itself.<sup>22</sup>

Significantly as well, as a sign of the country's commitment to the Convention, the DOJ issued DOJ-DC No. 058 entitled *Establishing the Refugee and Stateless Status Determination Procedure* on October 18, 2012. DOJ-DC No. 058 was issued precisely to strengthen the procedure to determine eligibility of protection for refugees and to establish a procedure to determine eligibility of protection for stateless persons consistent with the 1951 Convention, the 1967 Protocol, and the 1954 UN Convention Relating to the Status of Stateless Persons. It was also issued pursuant to the delegated power vested by the President to the DOJ through Letter of Implementation No. 47 dated August 18, 1976 over immigration matters, including the admission of aliens.

In 2022 through Executive Order (EO) No. 163 entitled *Institutionalizing Access to Protection Services for Refugees, Stateless Persons and Asylum Seekers*, the existing legal framework and mechanisms for the protection of refugees, stateless persons and asylum seekers in the country under DOJ-DC No. 058 were further strengthened and their need for protection, especially in times of public emergencies, addressed.<sup>23</sup>

It is likewise noteworthy that the term "refugee" was first defined in a domestic issuance through DOJ-DC No. 058 and later in EO No. 163, with both definitions being lifted almost verbatim from the 1951 Convention:

<sup>17</sup> See "The 1951 Convention relating to the Status of Refugees and its 1967 Protocol," available at <<https://www.unhcr.org/asia/about-us/background/4ec262df9/1951-convention-relating-status-refugees-its-1967-protocol.html>>.

<sup>18</sup> See "Convention and Protocol Relating to the Status of Refugees," available at <<https://www.unhcr.org/3b66c2aa10>>.

<sup>19</sup> See *Razon, Jr. v. Tagitis*, 621 Phil. 536 (2009).

<sup>20</sup> **Article 14**

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

<sup>21</sup> See "Convention and Protocol Relating to the Status of Refugees," supra note 18.

<sup>22</sup> See *Razon, Jr. v. Tagitis*, supra note 19.

<sup>23</sup> See EO No. 163, Sec. 1.



[DOJ-DC No. 058:]

SECTION 1. *Definition of Terms.* – x x x

x x x x

- d. “Refugee” is a person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of his or her former habitual residence”.

[EO No. 163:]

Section 2. *Definition of Terms.* x x x

x x x x

- f. *Refugee* shall mean a person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of his or her former habitual residence as a result of such events is unable, or owing to such fear, is unwilling to return to it.

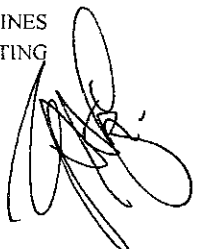
Thus, there should no longer be any room for doubt as to the Philippines’ commitment to honor its obligations as a State party under the 1951 Convention and its 1967 Protocol.

*On the criteria for the determination  
of refugee status*

I agree with the *ponencia* in holding that “the determination of refugee status will primarily require an evaluation of the applicant’s statements[, which, in turn,] must be contextualized based on the situation prevailing in his or her country of origin.”<sup>24</sup> The Handbook expressly provides this, owing to the element of a “well-founded fear of persecution” being, generally, the only motive recognized as compelling and understandable under the 1951 Convention for one to become a refugee.<sup>25</sup> I wish to emphasize that the operative word here is “primarily.” Since the definition speaks of fear, this necessarily involves a state of mind that is, therefore, *subjective*. The Handbook instructs that an evaluation of the subjective element is inseparable from an assessment of the personality of the applicant, since psychological reactions of different individuals may not

<sup>24</sup> *Ponencia*, p. 16. Italics omitted.

<sup>25</sup> See HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS AND GUIDELINES ON INTERNATIONAL PROTECTION UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, par. 39. p. 19.



be the same in identical conditions.<sup>26</sup> The subjective character of fear of persecution requires an evaluation of the opinions and feelings of the person concerned. It is also in the light of such opinions and feelings that any actual or anticipated measures against him or her must necessarily be viewed.<sup>27</sup>

At the same time, in satisfying the subjective element of the "well-founded fear of persecution" criterion, an assessment of credibility is indispensable where the case is not sufficiently clear from the facts on record. It will be necessary to take into account the personal and family background of the applicant, his or her membership to a particular racial, religious, national, social or political group, his or her own interpretation of his or her situation, and his or her personal experiences. Simply put, everything that may serve to indicate that the predominant motive for the application is fear must be considered by the competent authorities who are called upon to determine the refugee status of the applicant.<sup>28</sup>

Since, however, the definition likewise qualifies the element of fear being well-founded, the frame of mind of the applicant is not the only consideration in the whole equation. There is also an *objective* element which must be satisfied. This element is nevertheless similarly anchored on an evaluation of the statements made by the applicant. While the Handbook assures that it is not a requirement to pass judgment on the conditions in the applicant's country of origin, the applicant's statements must still be viewed in the context of the relevant background situation; otherwise, the statements may be improperly rendered in the abstract.<sup>29</sup> Thus, knowledge of the conditions in the applicant's country of origin, though not absolutely indispensable, is an important element in assessing the applicant's credibility.

Correlatively, the Handbook acknowledges that an applicant may have been subjected to various measures not in themselves amounting to persecution (*e.g.*, discrimination in different forms), in some cases combined with other adverse factors (*e.g.*, general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect in the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on "cumulative grounds." It is not possible, nevertheless, to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status as this will necessarily depend on all the circumstances, including the particular geographical, historical and ethnological context.<sup>30</sup>

In all, the starting point in any application is the account or statement of the applicant. The success of his or her application hinges on the credibility and coherence of his or her own account, as adequately and strongly supported by the available evidence he or she has submitted. All of these, in

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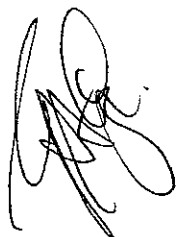
<sup>26</sup> *Id.*, par. 40, p. 19.

<sup>27</sup> *Id.*, par. 52, p. 21.

<sup>28</sup> *Id.*, pars. 41 and 42, p. 19.

<sup>29</sup> *Id.*, par. 42, pp. 19-20.

<sup>30</sup> *Id.*, par. 53, p. 21.



turn, are considered and weighed against the context of the situation in his or her country. Again, as the Handbook explains, “[i]n general, the applicant’s fear should be considered well-founded if he can establish, to a reasonable degree, that his [or her] continued stay in his [or her] country of origin has become intolerable to him [or her] for the reasons stated in the definition, or would for the same reasons be intolerable if he [or she] returned there.”<sup>31</sup> After all, the determination of refugee status is a process which takes place in two stages. First, it is necessary to ascertain the relevant facts of the case; and second, the definitions in the 1951 Convention and the 1967 Protocol have to be applied to the facts thus ascertained.<sup>32</sup> Surely, these so-called relevant facts cannot initially come from anywhere or anyone else but from the applicants themselves.

Here, respondent, in its assailed decisions, did not find the statements and evidence proffered by petitioner credible based on an alleged inconsistency between his statements. Specifically, it was highlighted by respondent that as regards the claim of “being forced to convert from being a Christian to Muslim,” petitioner during his interview stated that he was not forced but merely persuaded.<sup>33</sup> As a general principle, the national authorities, the DOJ in our case, are best placed to assess not just the facts but, more particularly, the credibility of asylum claimants since, apart from having the legal mandate to do so, it is they who have had an opportunity to see, hear and assess the demeanor of the individuals concerned.<sup>34</sup> Absent a clear showing of error of judgment or grave abuse of discretion on the part of the DOJ, the Court should refrain from substituting its own assessment of the facts.<sup>35</sup> Here, however, respondent’s decisions leave much to be desired. I agree that the perceived inconsistency in the statements of petitioner should not have sufficed as to entirely invalidate his claim. As succinctly summarized by the *ponencia*:

Here, records do not show that the DOJ-RSPPU attempted to clarify the supposed inconsistency in petitioner’s statements. Indeed, if the denial of an application would be hinged on the applicant’s choice of words, it behooves the State to ensure that the applicant deliberately and intelligently chose the words used.

However, when asked about his proficiency in speaking and understanding English, petitioner ticked the box “not easily” – within a range of “easily,” “not easily,” and “none” – in his Registration with the DOJ-RSPPU. Records do not show whether petitioner was provided with an interpreter despite his right to have one, if necessary, “at all stages of the refugee status determination and for the purposes of the preparation of the written application and for the interview.” The DOJ-RSPPU failed to consider that the change in petitioner’s statement, from “being persuaded”

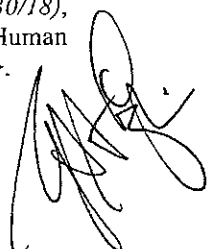
<sup>31</sup> Id., par. 42, p. 20.

<sup>32</sup> Id., par. 29, p. 17.

<sup>33</sup> *Ponencia*, p. 23.

<sup>34</sup> See *Case of A.S.N. and Others v. The Netherlands (Applications nos. 68377/17 and 530/18)*, ECLI:CE:ECHR:2020:0225JUD006837717, Council of Europe: European Court of Human Rights, February 25, 2020; available at <<https://www.refworld.org/cases.ECHR.5e625edf4.html>>.

<sup>35</sup> See id.



to “being forced” to convert to Islam and vice versa, may have been due to a language barrier, given his difficulty in speaking and understanding the English language. Not being proficient in English, petitioner may not have accurately portrayed the nuances of his situation in Pakistan.

To clarify petitioner’s allegations, the DOJ-RSPPU should have considered his original statement of “being persuaded” to convert to Islam together with the rest of his claims. Notably, he was constant in relaying his fear of religious persecution. As mentioned, in his Registration, petitioner already claimed that he is being forced to change his religion, and he would be killed if he does not convert to Islam. As also stated in the Handbook, even assuming that there are inconsistencies in petitioner’s account, a further interview may be conducted to clarify and resolve any contradictions in his statements.<sup>36</sup>

Precisely, it is often, if not always, difficult to establish the pertinent facts in cases such as the present one. There can be no gainsaying that an applicant who feels and believes having been persecuted and has left his or her home country out of fear for his or her life would have done so in haste. The Handbook thus instructs that often, an applicant may not be able to support his or her statements by documentary or other proof, and cases in which an applicant can provide evidence of all his or her statements will be the exception rather than the rule.<sup>37</sup> In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents.<sup>38</sup> It would be defeating of the humanitarian purpose behind the determination of refugee status to require an applicant to produce every piece of hard evidence to support his or her application. Hence, the examining authority, alongside the applicant, is expected and encouraged to assess all the relevant facts and to even use all the means at its disposal to produce the necessary evidence in support of the application.<sup>39</sup>

Moreover, in its endeavor to contextualize the case, respondent relied heavily on the 2014 case decided by the United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), *AK and SK (Christians: risk)*. Respondent concluded that in general, Christians in Pakistan are able to practice their faith, attend church, participate in religious activities and have their own schools and hospitals. Although Christians therein, as with other faiths, may be at risk of blasphemy allegations, this alone will not generally be enough to stake out a claim for international protection under the 1951 Convention, unless there is evidence that the charge is pursued. Evidence of a blasphemy charge being actively pursued by State actors may establish a real risk in the home area and an insufficiency of state protection.<sup>40</sup>

<sup>36</sup> *Ponencia*, p. 24. Citations omitted.

<sup>37</sup> HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS AND GUIDELINES ON INTERNATIONAL PROTECTION UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, par. 196, p. 43.

<sup>38</sup> *Id.*

<sup>39</sup> See *id.*

<sup>40</sup> *Rollo*, pp. 105-106.

Again, however, as correctly observed by the *ponencia*, the heavy reliance on the *AK and SK (Christians: risk)* case is misplaced. A comparison of the *AK and SK (Christians: risk)* case with the decisions of respondent even highlights the sheer paucity of a strong basis for the latter's conclusion. The *AK and SK (Christians: risk)* case made an exhaustive consideration of Pakistan's legal framework, the frequency of blasphemy allegations in the country, and the country information and reports from various reliable sources. It also utilized statements from other experts and witnesses. On the other hand, respondent's decisions evidently did not take this same path. Thus, there is likewise failure to adequately contextualize the case of petitioner in the relevant background situation prevailing in Pakistan.

Parenthetically, it is well to point out that the standard set by the 1951 Convention to establish a "well-founded fear of being the victim of persecution" is, in fact, moderate. This was highlighted in the US case, *INS v. Cardoza-Fonseca*<sup>41</sup> (*INS*).

In *INS*, the Supreme Court of the United States (SCOTUS) recounted that the Committee that drafted the provision containing the expression "well-founded fear of being the victim of persecution . . ." (Article 1 of the 1951 Convention) explained that the expression means "that a person has either been actually a victim of persecution or can show good reason why he fears persecution."<sup>42</sup> The SCOTUS then 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 or she will be persecuted in order to be classified as a refugee.<sup>43</sup> If it were indeed otherwise, that would be a more difficult burden to mount.

*INS* scrutinized the two criteria used in different types of reliefs under the Immigration and Nationality Act and the Refugee Act of 1980 granted to an alien who claims that he or she will be persecuted if deported. Section 243(h) of the Immigration and Nationality Act required the Attorney General to withhold deportation of an alien who demonstrates that his or her "life or freedom would be threatened" on account of one of the listed factors if he or she is deported. This was considered as a stricter requirement since an alien must demonstrate that "it is more likely than not that [he or she] would be subject to persecution" in the country to which he or she would be returned.<sup>44</sup>

On the other hand, Section 208(a) of the Refugee Act of 1980 authorized the Attorney General, in his or her discretion, to grant asylum to an alien who is unable or unwilling to return to his or her home country "because of persecution or a well[-]founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or

<sup>41</sup> 480 U.S. 421 (1987).

<sup>42</sup> *Id.* at 438.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 423. Emphasis and underscoring supplied.





political opinion.”<sup>45</sup> This criterion in Section 208(a) was based directly upon the language of the 1951 Convention and its 1967 Protocol, and was intended to be construed consistent with said instruments. Under this more benevolent criterion, the SCOTUS observed, one can certainly have a well-founded fear of an event happening even when there is less than a 50% chance of it taking place.<sup>46</sup> As such, “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.”<sup>47</sup>

Verily, to employ a stricter standard in the determination of refugee status would defeat the human rights underpinnings of the 1951 Convention and its 1967 Protocol.

Article 33(1) of the 1951 Convention, which prohibits *refoulement*, ostensibly refers to a threat to “life and freedom,” to wit:

1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.

Reading the above provision together with Article 1(A)(2),<sup>48</sup> one must conclude that human rights violations are a strong indication of persecution if they occur on grounds laid down in Article 1(A)(2) of the 1951 Convention. The development of the understanding of human rights norms can therefore impact on the interpretation of persecution.<sup>49</sup>

The Handbook echoes the foregoing observations as well. It provides that there is no universally accepted definition of “persecution,” and various attempts to formulate such a definition have been met with little success. Nonetheless, it may be inferred from Article 33 of the 1951 Convention that

<sup>45</sup> Id.

<sup>46</sup> Id. at 431.

<sup>47</sup> Id. at 440. Emphasis supplied.

<sup>48</sup> Article 1

**DEFINITION OF THE TERM “REFUGEE”**

A. For the purposes of the present Convention, the term “refugee” shall apply to any person who:

x x x x

(2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [or her] nationality and is unable or, owing to such fear, is unwilling to avail himself [or herself] of the protection of that country; or who, not having a nationality and being outside the country of his [or her] former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

In the case of a person who has more than one nationality, the term “the country of his [or her] nationality” shall mean each of the countries of which he [or she] is a national, and a person shall not be deemed to be lacking the protection of the country of his [or her] nationality if, without any valid reason based on well-founded fear, he [or she] has not availed himself [or herself] of the protection of one of the countries of which he [or she] is a national.

<sup>49</sup> Santhosh Persaud, “Protecting refugees and asylum seekers under the International Covenant on Civil and Political Rights,” available at <<https://www.unhcr.org/4552f0d82.pdf>>.

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 — for the same reasons — would also constitute persecution.<sup>50</sup>

*Available relief to an alien whose application has been denied with finality*

To further stress the human rights impetus behind these proceedings, it is well to point out that an alien, whose application for recognition of refugee status has been denied with finality, is not removed from the host country *ipso facto*.

Under DOJ-DC No. 058, where the application is denied with finality, the applicant shall be afforded sufficient time to leave the country unless he or she holds another immigration status or the Commissioner has authorized his or her continued stay.<sup>51</sup> The mere presumption therefore is that the applicant is henceforth removed or returned to his or her country of origin, which may not necessarily be the applicant's country of nationality, but that from which he or she came prior to entering the host country.

DOJ-DC No. 058 must be harmonized, however, with the principle of *non-refoulement*.

The principle of *non-refoulement*, as enshrined in the previously cited Article 33(1) of the 1951 Convention and which is also binding on States parties to the 1967 Protocol, constitutes the cornerstone of international refugee protection. **The principle applies not only to recognized refugees, but also to those who have not had their status formally declared.**<sup>52</sup> The principle does not entail or guarantee a right to an individual to be granted asylum in a particular State; it does mean, however, that **where States are not prepared to grant asylum to persons who are seeking international protection on their territory, they must adopt a course that does not result in their removal, directly or indirectly, to a place where their lives or freedom would be in danger on account of their race, religion, nationality, membership of a particular social group or political opinion.**<sup>53</sup>

Significantly, though, Article 33(1) does not extend the right to *non-refoulement* to everyone who meets the definition of "refugee." Rather, it

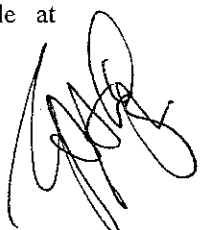
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<sup>50</sup> HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS AND GUIDELINES ON INTERNATIONAL PROTECTION UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, par. 51, p. 21.

<sup>51</sup> DOJ-DC No. 058, Sec. 14.

<sup>52</sup> See "Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol," available at <<https://www.unhcr.org/4d9486929.pdf>>.

<sup>53</sup> Id.



requires that an applicant satisfy two burdens: first, that he or she be a “refugee,” *i.e.*, prove at least a “well-founded fear of persecution;” and second, that the “refugee” show that his or her life or freedom “**would be threatened**” if deported.<sup>54</sup> To emphasize, as earlier discussed in *INS*, **this is a more exacting requirement** since an applicant has to demonstrate that “it is more likely than not that [he or she] would be subject to persecution” in the country to which he or she would be returned.<sup>55</sup>

Moreover, the principle of *non-refoulement* has also found entry and has been developed in international human rights law, such as the International Covenant on Civil and Political Rights (ICCPR), and has now become a norm of customary international law.<sup>56</sup> The threshold requirement, however, as with Article 33(1) of the 1951 Convention, also remains high.

To illustrate, the ICCPR imposes upon State parties the duty of *non-refoulement* that is different from their duty to provide asylum or refugee protection to an alien. Whereas the former prevents a state from removing a person to a situation of danger, the latter describes the act of a state protecting a person by granting her or him refuge on its territory.<sup>57</sup> **If a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person’s rights under the ICCPR will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.**<sup>58</sup>

In *J.I. v. Sweden*<sup>59</sup> (*J.I.*), the applicant, a Christian, was denied asylum in Sweden. Thereafter, before his scheduled deportation to Afghanistan, the applicant sought the views of the UNHCR, claiming impediments to the enforcement of his expulsion. Specifically, he claimed that his deportation would amount to a violation by the State Party of Articles 6,<sup>60</sup> 7<sup>61</sup> and 18<sup>62</sup> of

<sup>54</sup> *INS v. Cardoza-Fonseca*, supra note 41, at 440-441. Emphasis and italics supplied.

<sup>55</sup> See *id.* at 423. Underscoring supplied.

<sup>56</sup> Santhosh Persaud, “*Protecting refugees and asylum seekers under the International Covenant on Civil and Political Rights*,” supra note 49.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*, citing *Kindler v. Canada*, Communication No. 470/1991, § 6.2.

<sup>59</sup> UN Human Rights Committee (HRC), May 22, 2020, available at <<https://www.refworld.org/cases/HRC.Sede13ff4.html>>.

<sup>60</sup> Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his [or her] life.

x x x x

<sup>61</sup> Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his [or her] free consent to medical or scientific experimentation.

<sup>62</sup> Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his [or her] choice, and freedom, either individually or in community with others and in public or private, to manifest his [or her] religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his [or her] freedom to have or to adopt a religion or belief of his [or her] choice.

the ICCPR, because there was a real and substantiated risk of irreparable harm, even death, due to severe persecution of Christians in Afghanistan. In considering the merits of the communication of the applicant, the UNHCR recalled its General Comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties under the ICCPR not to extradite, deport, expel or otherwise remove a person from their territory when there are substantial grounds for believing that there is a real risk of irreparable harm such as that contemplated by Articles 6 and 7 of the ICCPR.<sup>63</sup> The perceived risk may either be in the country to which removal is to be effected or in any country to which the person may subsequently be removed.<sup>64</sup>

The UNHCR also indicated that the risk must be personal and that there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists. Thus, all relevant facts and circumstances must be considered, including the general human rights situation in the author's country of origin. The UNHCR also significantly recalled that it is generally for the organs of States parties to examine the facts and evidence of the case in question in order to determine whether such a risk exists, unless it can be established that the assessment was clearly arbitrary or amounted to a manifest error or denial of justice.<sup>65</sup>

Furthermore, it bears emphasis that the UNHCR noted in *J.I.* that even when the State party's authorities found that the reported conversion or conviction of an applicant to a certain faith is not sincere, they should nevertheless proceed to assess whether, in the circumstances of the case, the asylum seeker's behavior and activities in connection with his or her conversion or conviction, could have serious adverse consequences in the country of origin so as to put him or her at risk of irreparable harm, as contemplated under Articles 6 and 7 of the ICCPR.<sup>66</sup>

Similarly, in *Case of A.S.N. and Others v. The Netherlands*<sup>67</sup> (*A.S.N.*), the Council of Europe: European Court of Human Rights was called upon to decide on the rights of aliens whose applications for asylum were denied, but who invoked Article 34<sup>68</sup> of the Convention for the Protection of Human

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

<sup>63</sup> *J.I. v. Sweden*, supra note 59.

<sup>64</sup> General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 1326 May 2004, available at <<https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkGld%2FPPrICAqhKb7yhsjYoiCfMKoIRv2FVaVzRkMjTnjRO%2Bfud3cPVrcM9YR0iW6Txaxgp3f9kUFpWog%2FhW%2FTpKi2tPhZsbEJw%2FGeZRASjdFuuJQRnbJEaUhby3lWiQP12mlLFDDe6ZSwMMvmQGVHA%3D%3D>>.

<sup>65</sup> *J.I. v. Sweden*, supra note 59.

<sup>66</sup> *Id.*

<sup>67</sup> Supra note 34.

<sup>68</sup> ARTICLE 34

Individual applications

Rights and Fundamental Freedoms,<sup>69</sup> and alleged that their removal from the Netherlands to Afghanistan would violate their right to life under Article 2<sup>70</sup> of the said Convention and would expose them to a real risk of ill-treatment contrary to Article 3<sup>71</sup> thereof. Notably, the Deputy Minister of the Ministry of Security and Justice of Netherlands decided on both the rights of the applicants under the 1951 Convention and the Convention for the Protection of Human Rights and Fundamental Freedoms in this wise:

x x x **The Deputy Minister concluded that as the applicants' account had been found to lack credibility, they had failed to make a plausible case for believing that they feared persecution within the meaning of the 1951 Convention Relating to the Status of Refugees ("the 1951 Convention").** In assessing the risk of treatment contrary to Article 3 of the Convention, he considered that, as the general security situation in Kabul **did not amount to one of a most extreme case of general violence**, there could not be said to be a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return to that city. It was further concluded that, although the applicants did belong to a minority group which had been designated as vulnerable in the asylum policy in force (see paragraphs 58-60 and 62 below), they had failed to make plausible their fear of treatment contrary to Article 3 of the Convention by submitting "specific individual characteristics" (*specifieke individuele kenmerken*) within the meaning of that policy, nor had it transpired that human rights violations had occurred in their "immediate circle" (*naaste omgeving*).<sup>72</sup> (Emphasis supplied)

The Court in *A.S.N.* also affirmed that the ill-treatment which an applicant alleges he or she will face if returned to his or her country of origin must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms. In addition, and to the extent that the applicants therein should be understood as claiming that the humanitarian conditions to which they would be exposed if removed to Afghanistan would be incompatible with Article 3, the Court held that humanitarian conditions in a

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The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

<sup>69</sup> A treaty among members of the Council of Europe. Available at <[https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf)>.

<sup>70</sup> **SECTION I**  
**RIGHTS AND FREEDOMS**  
**ARTICLE 2**  
**Right to life**

1. Everyone's right to life shall be protected by law. No one shall be deprived of his [or her] life intentionally save in the execution of a sentence of a court following his [or her] conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;  
(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;  
(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

<sup>71</sup> **ARTICLE 3**  
**Prohibition of torture**

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

<sup>72</sup> *A.S.N. and Others v. The Netherlands*, supra note 34, at 5.

country of return could give rise to a breach of that provision only in a very exceptional case where the humanitarian grounds against removal are “**compelling**.”<sup>73</sup>

The foregoing discussion illustrates that different reliefs may be accorded an alien who has sought refuge in another country owing to a well-founded fear of persecution. Apart from an application for refugee status determination, an applicant is also entitled for protection under the principle of *non-refoulement* when his or her personal circumstances are determined to warrant the application of said principle. A denial of an application for refugee status determination should not be a hindrance to obtain other forms of reliefs grounded on other binding international legal instruments that would ultimately halt his or her deportation, albeit requiring a more stringent standard or threshold than that provided in Article 1 of the 1951 Convention.

It must be stressed at this juncture that while Article 33(2)<sup>74</sup> of the 1951 Convention provides for exceptions to the principle of *non-refoulement*, these do not affect the host State’s *non-refoulement* obligations under international human rights law, which permit no exceptions.<sup>75</sup> Within the framework of the 1951 Convention and its 1967 Protocol, the principle of *non-refoulement* constitutes an essential and non-derogable component of international refugee protection.<sup>76</sup> The central importance of the obligation not to return a refugee to a risk of persecution is reflected in Article 42(1)<sup>77</sup> of the 1951 Convention and Article 7(1)<sup>78</sup> of the 1967 Protocol, which list Article 33 as one of the provisions of the 1951 Convention to which reservations are not permitted.<sup>79</sup>

Torture, cruel, inhuman or degrading treatment can never be justified on the basis of a balance to be found between society’s interest and the

<sup>73</sup> Id. at 41. Emphasis supplied.

<sup>74</sup> **Article 33**

**PROHIBITION OF EXPULSION OR RETURN (“REFOULEMENT”)**

x x x x

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he [or she] is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

<sup>75</sup> See “*Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*,” supra note 52.

<sup>76</sup> Id.

<sup>77</sup> **Article 42**

**RESERVATIONS**

1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16(1), 33, 36-46 inclusive.

<sup>78</sup> **Article 7. Reservations and declarations**

1. At the time of accession, any State may make reservations in respect of article IV of the present Protocol and in respect of the application in accordance with article I of the present Protocol of any provisions of the Convention other than those contained in articles 1, 3, 4, 16(1) and 33 thereof, provided that in the case of a State Party to the Convention reservations made under this article shall not extend to refugees in respect of whom the Convention applies.

<sup>79</sup> See “*Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*,” supra note 52.

individual's rights under Article 7 of the ICCPR.<sup>80</sup> No person, without any exception, even those suspected of presenting a danger to national security or the safety of any person, and even during a state of emergency, may be deported to a country where he or she runs the risk of being subjected to torture or cruel, inhuman or degrading treatment.<sup>81</sup>

Thus, when an applicant who has been rejected claims, for instance, that he or she was persecuted and would be persecuted upon return to his or her home country, the Philippines, through respondent, is duty-bound to establish, prior to implementing any removal measure, that said applicant would not be exposed to a danger of serious human rights violations. If such a risk exists, the Philippines is precluded from forcibly removing the person.<sup>82</sup>

On the one hand, if the eventual removal or return of a rejected applicant will not be violative of the principle of non-refoulement, then the process should proceed. This is a logical consequence for persons who are found not in need of international protection.<sup>83</sup> It is recognized that the home country has the obligation to receive back their own nationals, while the host country has the concomitant right to expel aliens while respecting obligations under international refugee and human rights law.<sup>84</sup> To be sure, while an asylum or refugee claim is being processed, the applicant is inside the refugee protection system. After the final rejection of the claim, he or she passes over into the system of migration control, a prerogative flowing from state sovereignty that manages the inflow, presence and outflow of non-citizens on state territory.<sup>85</sup>

The removal should be, as a rule, voluntary. This is pursuant to Section 13 of DOJ-DC No. 058 which expressly provides that where the application is denied with finality, the applicant shall be afforded sufficient time to leave the country, unless he or she holds another immigration status or the Commissioner has authorized his or her continued stay. Voluntary compliance with the order to leave is also the ideal.<sup>86</sup> In our jurisdiction, the rejected applicant may very well be extended the opportunity to avail of the Bureau of Immigration's Assisted Voluntary Return Program provided for under its Rules of Procedure and specifically under its Immigration Memorandum Circular No. SBM-2015-011.

<sup>80</sup> See Santhosh Persaud, "Protecting refugees and asylum seekers under the International Covenant on Civil and Political Rights," *supra* note 49, at 8.

<sup>81</sup> *Id.* at 8-9.

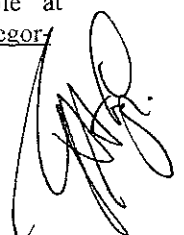
<sup>82</sup> See "Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol," *supra* note 52.

<sup>83</sup> See Background Paper No. 1, Legal and practical aspects of the return of persons not in need of international protection, available at <<https://www.unhcr.org/4d948b2c9.pdf>>.

<sup>84</sup> See UN High Commissioner for Refugees (UNHCR), "The removal of failed asylum seekers: international norms and procedures," December 1, 2007, ISSN 1020-7473, available at <<https://www.refworld.org/docid/4c2472eb0.html>>.

<sup>85</sup> Gregor Noll, "Rejected asylum seekers: the problem of return," May 1999, available at <<https://www.unhcr.org/research/working/3ac6a0cd0/rejected-asylum-seekers-problem-return-gregor-noll.html>>.

<sup>86</sup> See *id.* at 9.

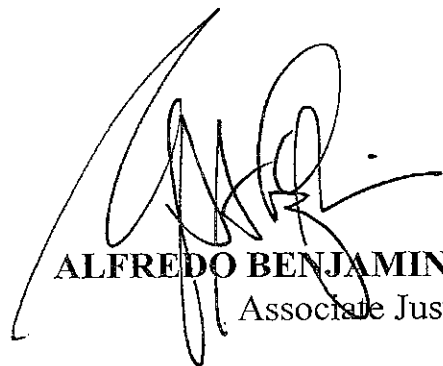


Should a voluntary removal prove infeasible, the government, through appropriate channels or agencies, is not precluded from resorting to the involuntary removal of petitioner. This is also a reserved right of a State, involving force as a last resort, if other measures to secure voluntary return fail.<sup>87</sup> The lack of any mechanism for such under DOJ-DC No. 058 should be of no moment for the denial of an application for a refugee status, as mentioned above, converts the matter into one of migration control.

As well, it is a recognized concern that the overstaying of persons rightly identified as not in need of international protection may pose many problems to States. The UNHCR is also concerned that the non-removal of such persons may negatively affect the integrity and credibility of asylum systems,<sup>88</sup> as is the lack of their *prompt* return.<sup>89</sup> The investment of time, financial resources and effort into the operation of complex determination procedures is only justifiable if States actually enforce negative decisions.<sup>90</sup> Moreover, failure to do so could represent a “pull factor,” because those with no substantive claim to protection would use asylum procedures as a way of entering the country.<sup>91</sup>

All told, the matter of determination of refugee status entails considerations of the State’s compliance with its international humanitarian obligations and traditions on one hand, and its duty and authority to uphold its state sovereignty and to protect its borders on the other.<sup>92</sup> It certainly cannot be disputed, however, that between these interests, the protection and respect for human rights always take primacy. A determination of refugee status proceeding that gives a lackadaisical treatment to these core values should not be countenanced.

In view of the foregoing, I concur with the *ponencia* in partially granting the petition and remanding the case to respondent for further proceedings in accordance with the guidelines stated in the *ponencia*.



**ALFREDO BENJAMIN S. CAGUIOA**  
Associate Justice

<sup>87</sup> See UN High Commissioner for Refugees (UNHCR), “*The removal of failed asylum seekers: international norms and procedures*,” supra note 84, at 6.

<sup>88</sup> Background Paper No. 1, Legal and practical aspects of the return of persons not in need of international protection, supra note 83.

<sup>89</sup> UN High Commissioner for Refugees (UNHCR), “*The removal of failed asylum seekers: international norms and procedures*,” supra note 84, at 9.

<sup>90</sup> Gregor Noll, “*Rejected asylum seekers: the problem of return*,” supra note 85, at 4.

<sup>91</sup> Id.

<sup>92</sup> See Laura Thompson, “*Protection of Migrants’ Rights and State Sovereignty*,” September 2013, available at <<https://www.un.org/en/chronicle/article/protection-migrants-rights-and-state-sovereignty>>.