



**UNHCR**

United Nations High Commissioner for Refugees  
Haut Commissariat des Nations Unies pour les réfugiés

**LEGAL AND PROTECTION POLICY  
RESEARCH SERIES**

**Cancellation of Refugee Status**

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**DEPARTMENT OF INTERNATIONAL PROTECTION**

**PPLA/2003/02**

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# EXECUTIVE SUMMARY

## I. INTRODUCTION

The issue of cancellation of refugee status arises where a person recognised as a refugee by a State under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol is subsequently found not to have been entitled to the benefit of international protection under these instruments. It may also affect persons who were determined to be refugees by the United Nations High Commissioner for Refugees (UNHCR) under its 1950 Statute. Cancellation means the invalidation of a positive refugee status determination which should not have been made in the first place. It has the effect of rendering refugee status null and void from the time of the original decision (*ab initio* or *ex tunc*).

In principle, individuals who were not eligible for international protection at the time they were determined to be refugees cannot claim to be prejudiced by cancellation of a status which ought not to have been recognised in the first place. Cancellation will normally be the appropriate measure where, at the time of the positive determination, the person concerned did not fulfil the eligibility criteria under the 1951 Convention, because s/he was not in need, or not deserving of international refugee protection. On the other hand, those who did have a well-founded fear of persecution and were rightly recognised as refugees must be protected from having their status invalidated in an arbitrary or discriminatory manner. Part I of this paper introduces the subject from an international protection perspective.

## II. CANCELLATION OF REFUGEE STATUS GRANTED BY A STATE UNDER THE 1951 CONVENTION

The 1951 Convention does not specifically address cancellation. General principles of law and national administrative procedure legislation determine the circumstances in which the invalidation of flawed refugee status determination is lawful. As a general rule, a faulty administrative act which does not confer rights upon an individual may be cancelled by the issuing authority at any time. By contrast, the cancellation of flawed administrative decisions which do confer such rights is subject to – often stringent – conditions.

Part II of this paper provides a comparative analysis of the law and practice of cancellation in a number of States. While there is some variation between common law and civil law countries, and even within those systems from one country to another, the general principles applicable to cancellation are similar.

For the invalidation of a positive refugee status determination to be justified, a ground for cancellation, as provided for under the relevant law, must exist. National legislation typically permits cancellation if one or more of the following grounds are established:

- substantial fraud by the applicant with regard to core aspects relating to his or her eligibility for protection;

- other misconduct affecting eligibility on the part of the applicant, such as, for example, threats or bribery;
- the applicability of an exclusion clause, with or without fraud on the part of the applicant;
- an error of law and/or fact by the determining authority, relating to inclusion or exclusion criteria.

Within each category, more detailed rules determine the conditions which need to be fulfilled for cancellation to be justified. An analysis of relevant legislation and jurisprudence is provided in Section A of this part of the paper.

The paper goes on to examine a number of other issues which are relevant for cancellation of refugee status under national administrative procedures. These include the circumstances and conditions in which final administrative decisions may be re-opened (Section B); evidentiary standards and requirements, including the question of standard and burden of proof (Section C); the distinction between mandatory and discretionary cancellation clauses (Section D); the safeguards and guarantees available to the individual in cancellation proceedings (Section E); and the consequences of a decision to cancel (Section F). Section G analyses the differences between cancellation and other forms of terminating refugee status, in particular, cessation and revocation. This section also briefly analyses the relation of cancellation and expulsion and exceptions to the principle of *non-refoulement* under Articles 32 and 33(2) of the 1951 Convention, respectively.

### **III. CANCELLATION OF REFUGEE STATUS DETERMINED BY UNHCR UNDER ITS STATUTE**

In principle, the same legal criteria apply for the cancellation of refugee status determinations by UNHCR as for recognition decisions of States. Cancellation will be justified only if the original determination was wrongly made. There must be a ground for the invalidation of the original determination, and cancellation must be based on evidence relating to facts which were relevant for the initial decision and specifically showing why the latter was erroneous. General principles of law, such as, for example, those of proportionality and procedural fairness, apply to UNHCR as well as States. There are, however, also significant legal and practical differences between UNHCR's mandate refugee status determinations and States' decisions to grant refugee status under the 1951 Convention. This in turn has a bearing on the way in which the same general principles of law operate for cancellation of determinations by UNHCR. Part III of this paper analyses these differences and considers some of the policy implications for UNHCR arising in the context of cancellation.



# CANCELLATION OF REFUGEE STATUS\*

## I. INTRODUCTION

1. The issue of cancellation arises where a person recognised as a refugee by a State under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol is subsequently found not to have been entitled to Convention refugee status at the time of the positive determination. In other words, the applicant was not eligible for protection as a refugee because the criteria of Article 1A(2) of the 1951 Convention<sup>1</sup> were not met, or because the applicant was not in need<sup>2</sup>, or not deserving<sup>3</sup>, of such protection. Cancellation may also affect a person who was determined to be a "mandate refugee" by the United Nations High Commissioner for Refugees (UNHCR) under the 1950 Statute of the Office of the UNHCR<sup>4</sup>.

2. As a general rule, once refugee status<sup>5</sup> has been determined, it remains in effect until it is ended because one of the cessation clauses of the 1951 Convention applies, or it is revoked on the basis of the exclusion provisions of Article 1F(a) or (c) of the 1951 Convention. Circumstances may come to light, however, which indicate that a person should

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\* Sibylle Kapferer: UNHCR Consultant. This research paper was commissioned by the Protection Policy and Legal Advice Section of UNHCR's Department of International Protection. It benefited from observations and comments of UNHCR staff at Headquarters and various Branch Offices, especially V. Türk, N. Karsenty, W. Englbrecht, F. Nicholson, S. Duff, E. Kikuchi, C. Mahr, A. Painter and J. Züfle. Except where a source is specifically cited, the views expressed in this paper are not necessarily shared by UNHCR.

<sup>1</sup> Under this provision and Article 1 of the 1967 Protocol, the term "refugee" shall apply to any person who "owing to a 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 nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

<sup>2</sup> Because they were already receiving protection from organs or agencies of the United Nations other than UNHCR (Article 1D of the 1951 Convention) or because they were recognised by the competent authorities of another country as having the rights and obligations attached to the possession of its nationality (Article 1E of the 1951 Convention).

<sup>3</sup> Because one of the exclusion clauses of Article 1F of the 1951 Convention would have been applicable on the grounds that there were serious reasons for considering that the applicant had committed (a) crimes against peace, war crimes or crimes against humanity, (b) a serious non-political crime, or (c) that they were guilty of acts contrary to the purposes and principles of the United Nations.

<sup>4</sup> The corresponding provisions of the Statute of UNHCR are paragraph 6 (inclusion criteria) and paragraphs 7(b-d). The Statute is annexed to Resolution 428 (V), adopted by the General Assembly on 14 December 1950.

<sup>5</sup> Depending on the country, this may be called "refugee status" or "asylum", or it may find its expression in the granting of a (permanent) residency visa or (indefinite) leave to remain.

never have been recognised in the first place<sup>6</sup>. While this may occur in any number of ways, the practice of States and UNHCR shows that cancellation considerations are often triggered in situations where an individual's refugee status comes under renewed scrutiny, for example, during subsequent procedures relating to residence permits or family reunification, or in the course of resettlement proceedings or criminal investigations<sup>7</sup>.

3. Cancellation of refugee status means a decision to invalidate a refugee status determination which should not have been granted in the first place. It applies to determinations that have become final, that is, they are no longer subject to appeal or review. In principle, cancellation has the effect of rendering refugee status null and void from the date of the initial determination (*ab initio* or *ex tunc*).

4. In national refugee legislation, jurisprudence, UNHCR policy documents and other writings, this is variously referred to as "cancellation", "revocation", "withdrawal", "termination", "annulment", "deprivation" or "vacation"<sup>8</sup>, while the term "cancellation" itself is sometimes used for decisions to end refugee protection with effect for the future (*ex nunc*).

5. Cancellation must, however, be distinguished from cessation, that is, loss of refugee status pursuant to Article 1C of the 1951 Convention because refugee protection is no longer necessary or justified on the basis of certain voluntary acts by the individual concerned or a fundamental change in the situation prevailing in the country of origin. Nor should cancellation be confused with revocation of refugee status in the application of the exclusion clauses of Article 1F(a) or (c) of the 1951 Convention to activities of a refugee after recognition. Cancellation also needs to be differentiated from expulsion under Article 32, or loss of protection against *refoulement* pursuant to Article 33(2) of the 1951 Convention. Neither of these provide for the loss of refugee status. In national law and practice, these distinctions are often blurred, which in turn may result in withholding refugee protection in ways that are not in keeping with the 1951 Convention<sup>9</sup>.

6. In principle, individuals who were not eligible for protection at the time they were recognised as refugees cannot claim to be prejudiced by cancellation of a status which ought not to have been granted to them in the first place. It is not the purpose of the 1951 Convention to extend refugee protection to persons who are not in need, or not deserving, thereof. In the interest of the integrity of the institution of asylum, it should be possible to rectify situations where refugee status was wrongly granted.

7. This does not mean, however, that it is open to a State to cancel refugee status whenever the initial determination is subsequently found to have been flawed. The conditions under which cancellation is lawful and appropriate must be identified and delimited very clearly. Those who were rightly recognised, because they did have a well-founded fear of persecution under the 1951 Convention, must be protected from cancellation of their refugee status in an arbitrary or discriminatory manner. There may also be circumstances in which refugee status, even if it was wrongly granted at the outset, gives rise to legitimate rights, interests or expectations and ought not to be cancelled.

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<sup>6</sup> UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (1992), at para. 117 (quoted in full in fn. 175 below).

<sup>7</sup> See below at paragraph 52.

<sup>8</sup> In French: "annulation" or "retrait" du statut de réfugié; in Spanish: "anulación" or "revocación".

<sup>9</sup> See below at paragraphs 120-126.

8. This paper analyses legal and practical aspects of cancellation, based on a survey of the law and practice in a wide range of countries in North America, Europe, Australasia and elsewhere, including both common law and civil law jurisdictions. It is not an exhaustive overview. Rather, countries were selected on the basis of the information that could be obtained, and with a view to the analysis of protection concerns and/or examples of "best practice" to be derived from State practice. Generally, information about cancellation cases, including statistical data, is not readily available<sup>10</sup>. Decisions by administrative authorities or courts are often not reported, and it appears that in many countries UNHCR is not necessarily informed systematically. On the basis of an analysis of applicable standards and principles of law and available jurisprudence, it is nevertheless possible to set out the legal parameters for cancellation within a protection context.

## II. CANCELLATION OF REFUGEE STATUS GRANTED BY A STATE UNDER THE 1951 CONVENTION

9. The 1951 Convention does not specifically address cancellation. This does not mean, however, that there is no basis in law for invalidating decisions to grant refugee status which should not have been issued.

10. Where refugee status is granted by a State on an individual basis, this is usually done through an administrative procedure. National refugee legislation in a number of countries contains specific provisions for the cancellation of refugee status, sometimes operating as *lex specialis* and precluding the application of general rules of administrative procedure, sometimes complemented by the latter. Depending on the legal regime in a given country, the invalidation of flawed administrative acts is permitted under general legal principles applicable to administrative decision-making or codes of administrative procedure<sup>11</sup>.

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<sup>10</sup> Statistics concerning cancellation decisions could be obtained only for a small number of countries: in Australia, between July 2000 and August 2002, a total of 14 Protection Visa and 2 Temporary Protection Visa were cancelled. Four cases concerned the cancellation of derivative Protection Visa. (information compiled by UNHCR). In Canada, the years 1997–2001 saw a total of 297 applications for vacation under s. 69.2(2) of the Immigration Act then in force, of which 245 were approved (in 1997: 39; in 1998: 34; in 1999: 88; in 2000: 58; in 2001: 26) and 52 rejected (in 1997: 4; in 1998: 5; in 1999: 13; in 2000: 26; in 2001: 4) (information provided by the Immigration and Refugee Board). In Germany, the refugee status of 344 persons was cancelled on the basis of s. 73(2) of the Asylum Procedure Act in the years 1998–2001 (in 1998: 97; in 1999: 97; in 2000: 88; in 2001: 62) (Statistics of the *Bundesamt für die Anerkennung ausländischer Flüchtlinge* (Federal Office for the Recognition of Foreign Refugees, hereinafter: Federal Office)). In the United States of America, the years 1999–2001 saw 148 cases where asylum granted by the asylum office of the Immigration and Naturalization Service (INS) was later terminated (48 in 1999; 54 in 2000; 46 in 2001). These figures do not include termination of asylum by Immigration Courts, nor do they refer to instances of termination of refugee status (information provided by the INS Asylum Office).

<sup>11</sup> Where the legal basis for refugee status is a decision by a court, or an administrative tribunal whose decisions are treated in law as those of a judicial authority, cancellation is also possible under certain circumstances. The threshold for overturning a judicial, or quasi-judicial status determination, even if it is found to have been wrong, is generally higher than for administrative decisions (see below at paragraphs 61–62).

11. As a general rule, a faulty administrative act which does not confer rights upon an individual may be cancelled by the issuing authority at any time. By contrast, the cancellation of flawed administrative decisions which do confer such rights is subject to – often stringent – conditions. While there is some variation in the details between common law and civil law systems and, even within those systems, from one country to another, the general principles applicable to cancellation are similar.

12. All administrative acts are deemed to have been rightly done (*omnia praesumuntur rite acta esse*). This basic presumption is, however, subject to rebuttal, and where it is found that an administrative decision was made wrongly, it may, under certain conditions, be invalidated<sup>12</sup>. In such cases, a conflict may arise between the general principles of legal certainty and protection of legitimate expectations (also sometimes referred to as "acquired rights")<sup>13</sup> and that of the legality of the administration<sup>14</sup>, which provides that a State's executive is bound by law and that unlawful situations ought to be rectified. Other general principles of law which apply to administrative procedures and come into play in cancellation cases are those of proportionality and procedural fairness.

13. A positive refugee status determination is declaratory: it does not create a right but states that the person concerned is a refugee within the definition of the 1951 Convention, and is therefore entitled to protection under this instrument<sup>15</sup>. Yet the recognition of a person as a refugee also forms the basis for the rights, entitlements and obligations listed in Articles 2–34 of the 1951 Convention. The above-mentioned general legal principles require that these, as well as any other relevant factors, be taken into consideration when determining whether cancellation of refugee status is lawful and appropriate. The authority may be precluded from revoking refugee status at a later stage, particularly where there was no wrongdoing on the part of the person concerned, and his or her reliance on, and trust in the validity of, the positive refugee status determination is worthy of protection.

#### **A. Grounds for Cancellation of Refugee Status**

14. Administrative acts may be faulty for a variety of reasons. Responsibility for the mistake may lie with the interested party or with the determining authority. Thus, a positive refugee status determination may be incorrect because an applicant who did not meet the

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<sup>12</sup> See Z.M. Nedjati and J.E. Trice, *English and Continental Systems of Administrative Law*, North-Holland Publishing Corp., Amsterdam, New York, Oxford (1978), at pp. 79–80.

<sup>13</sup> The notions of legal certainty and legitimate expectations are widely recognised in civil law countries. They have no counterpart in the legal tradition of the United Kingdom, but certain types of estoppel and the *ultra vires* doctrine are at least similar to these principles. The need to take into account legitimate expectations where a person's trust in the validity and continued effect of an administrative act is worthy of protection is particularly well-developed in Germany and Switzerland. See J. Schwarze, *European Administrative Law*, Sweet & Maxwell, London (1992), at pp. 869–870 and 901–906. See also below at paragraphs 56 and 65.

<sup>14</sup> This is the fundamental principle governing administrative measures in both the civil law and the common law traditions. In the latter, it derives from the inter-linkage of the principle of sovereignty of Parliament and the doctrine of *ultra vires*. See J. Schwarze, see above at fn. 13, at pp. 208–230.

<sup>15</sup> The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status notes that recognition of a person's refugee status does not "[...] make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee." (at para. 28). See also G.S. Goodwin-Gill, *The Refugee in International Law*, 2<sup>nd</sup> edition, Clarendon Press Oxford (1996), at p. 32, with further references.

eligibility criteria of the 1951 Convention misrepresented or concealed relevant information when presenting a claim. Alternatively, the determining authority may have wrongly granted refugee status as a result of an error of law and/or fact.

15. Cancellation proceedings essentially constitute a re-assessment of eligibility for refugee protection at the time of the original determination, with a view to reversing the positive decision if the applicant did not meet the inclusion criteria, or if one of the exclusion clauses would have applied. Thus, for cancellation to be justified, one or more of the following grounds must be present:

- substantial fraud on the part of the applicant with regard to core aspects relating to his or her eligibility for protection
- other misconduct affecting eligibility by the applicant, such as for example threats or bribery
- applicability of an exclusion clause, with or without fraud on the part of the applicant
- an error of law and/or fact by the determining authority, relating to inclusion or exclusion criteria

1. *Cancellation of refugee status because of fraud on the part of the applicant*

16. *Fraus omnia corrumpit* – fraud tarnishes everything. The notion that an administrative decision obtained through fraudulent means is vitiated by this very fact and may be cancelled is a general principle in both the common law and the civil law traditions. It is widely reflected in national legislation and jurisprudence<sup>16</sup> as well as UNHCR policy documents<sup>17</sup>.

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<sup>16</sup> For example, in the United Kingdom: the House of Lords' judgments in *Lazarus Estates Ltd v. Beasley* [1956] 1 QB 702; *R. v. Secretary of State for the Home Department ex parte Hussain* [1978] 1 WLR 700; *R. v. Secretary of State for the Home Department ex parte Choudhary* (1978) 1 WLR 1177; *R. v. Secretary of State for the Home Department ex parte Zamir* (1980) AC 930; all referred to in W. Wade & C. Forsythe, *Administrative Law*, 8<sup>th</sup> edition, Clarendon Press, Oxford (2000), at p. 238. See also England and Wales Court of Appeal (Civil Division), *R. v. Secretary of State for the Home Department ex parte Jahangir* [1996] EWCA Civ 1182 (11<sup>th</sup> December 1996). In France, the *Conseil d'Etat* has held that the withdrawal of an act obtained by fraud is legally justified at any time. See R. Chapus, *Droit administratif général*, 13<sup>th</sup> edition, Montchrestien, Paris (1999), at pp. 972–974, with references to relevant jurisprudence. The *Conseil d'Etat* applied this principle to positive refugee status determinations by the *Office français pour les réfugiés et les apatrides* (French Office for the Protection of Refugees and Stateless Persons, OFPRA) in its decision of 26 February 1996, *Mercan*. See also F. Tiberghien, *La protection des réfugiés en France*, Economica, Paris (1988), at p. 115. In Austria: *Verwaltungsgerichtshof* (Administrative Court), decision of 25 April 1995 (94/20/0779), see R. Walter & H. Mayer, *Grundriss des österreichischen Verwaltungsverfahrensrechts*, 6<sup>th</sup> edition, Manz, Wien (1995), at pp. 253–254. In Germany: see H. Maurer, *Allgemeines Verwaltungsrecht*, 11<sup>th</sup> edition, C.H. Beck, München (1997), at pp. 274–282; see also P. Stelkens, H.J. Bonk, M. Sachs (eds.), *Verwaltungsverfahrensgesetz, Kommentar*, 5<sup>th</sup> edition, C.H. Beck, München (1998), at pp. 1386–1392. In Switzerland: see, for example, the decision of the *Asylrekurskommission* (Asylum Appeals Commission, ARK) of 17 March 1997, EMARK 1997/17, at pp. 145–147, with references to relevant jurisprudence of the *Bundesgericht* (Federal Court).

<sup>17</sup> UNHCR, Note on Loss of Refugee Status through Cancellation, 4 July 1989; UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (1992), para. 117.

17. In most of the countries examined for the purpose of this paper, where national refugee laws contain cancellation provisions, refugee status is liable to cancellation if it was obtained by fraud<sup>18</sup>. Sometimes, fraud is the only cancellation ground explicitly mentioned in refugee legislation<sup>19</sup>. Where there are no cancellation provisions in national refugee laws<sup>20</sup>, or where these do not refer to fraud<sup>21</sup>, general administrative law regularly permits the invalidation of administrative acts obtained by misrepresentation or concealment of material facts<sup>22</sup>. Cancellation of refugee status obtained through fraud is mandatory in some countries<sup>23</sup>, subject to discretion in others<sup>24</sup>.

18. Almost all the decisions which could be obtained for the purposes of this paper concern fraud. In Canada, the Minister of Citizenship and Immigration sought the cancellation of refugee status in cases where claims had been made under a false name<sup>25</sup>; using false identity documents<sup>26</sup>, an altered birth certificate<sup>27</sup>; false statements as to incidents of persecution by a guerrilla movement against the applicant's family members<sup>28</sup>; false statements as to circumstances and itinerary of flight<sup>29</sup>; concealment of status as citizen of a country where the applicant had no fear of persecution<sup>30</sup>; concealment of an earlier unsuccessful claim for asylum under a different name<sup>31</sup>. In France, such cases include a claim to persecution during a time when the applicant was found to have been in France<sup>32</sup>;

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<sup>18</sup> For example, in Bulgaria, Canada, Germany, Moldova, New Zealand, Romania, Spain, Switzerland, United Kingdom. In the refugee laws of Belarus, the Russian Federation, the Slovak Republic, South Africa, Spain, these clauses specifically (but not exclusively) refer to the use of false or forged documents.

<sup>19</sup> For example, in Canada, Germany, South Africa, Switzerland.

<sup>20</sup> For example, in Austria or France.

<sup>21</sup> For example, in the former Yugoslav Republic of Macedonia (hereinafter: FYROM).

<sup>22</sup> Austria: under s. 69(1)1. of the General Administrative Procedure Act; France: on the basis of general principles of law applicable to the cancellation of flawed administrative decisions; former Yugoslav Republic of Macedonia: in application of one of the "extraordinary remedies" provided for in Chapter 16 of the Administrative Procedure Law.

<sup>23</sup> Austria: s. 69 (1) 1. of the General Administrative Procedure Act; Germany: s. 73 (2) of the Asylum Act; Slovak Republic: s. 15(2)(a) of the Asylum Law, in force as of 1 January 2003; Switzerland: s. 63 (1)(a) of the Asylum Act. On the subject of mandatory cancellation clauses, see also below at paras. 94–99.

<sup>24</sup> Canada: s. 109 (1) of the Immigration and Refugee Protection Act 2001; France: decisions by the OFPRA, under general administrative law; New Zealand: ss. 129L and 129M of the Immigration Act 1987; Spain: s. 20(1)(a) of the Law No. 5/1984 of 26 March 1984; United Kingdom: ss. 10(1)(b) and 10(8) of the Immigration and Asylum Act 1999; United States of America: Immigration and Nationality Act (INA) § 207(c)(4) and § 208(c)(2), and 8 Code of Federal Regulations (CFR) § 208.24(a). On the subject of discretion, see also below at paras. 94–99.

<sup>25</sup> RefLex 27 (Case Note 16); RefLex 28 (Case Note 26); RefLex 102 (Case Note 13); RefLex 167 (Case Note 7).

<sup>26</sup> RefLex 114 (Case Note 18); *Adar v. Canada (Minister of Citizenship and Immigration)* IMM-3623-96, 26 May 1997.

<sup>27</sup> RefLex 89 (Case Note 8).

<sup>28</sup> RefLex 63 (Case Note 12).

<sup>29</sup> RefLex 20 (Case Note 2); RefLex 84 (Case Note 24); RefLex 88 (Case Note 24); RefLex 129 (Case Note 22); RefLex 129 (Case Note 24); RefLex 182 (Case Note 9).

<sup>30</sup> RefLex 30 (Case Note 4).

<sup>31</sup> RefLex 65 (Case Note 12).

<sup>32</sup> *Commission des recours des réfugiés* (Refugee Appeals Commission, CRR), 2 May 1988, 59.037, *Dogan Haydar*.

concealment of stay in a different country and expulsion because of drug-related offences<sup>33</sup>; false statements concerning imprisonment<sup>34</sup>; false identity documents<sup>35</sup>.

19. A case in New Zealand concerns cancellation after statements about the applicant's employment as a bodyguard for a human rights activist and politician assassinated by a guerrilla movement were found to have been false<sup>36</sup>. In Germany, the refugee status of more than 100 persons was cancelled between 1998 and 2000, after it was found that they were not of a particular religious faith. In other cases in Germany, cancellation followed the discovery of false statements concerning the applicants' identity and/or nationality, the circumstances of their flight, and, in one instance, false claims by the applicant as to his family relations with another refugee which led to the cancellation of his derivative status<sup>37</sup>.

20. State practice is consistent in requiring, for fraud as ground for cancellation, the presence of all three of the following elements:

- (i) objectively incorrect statements by the interested party;
- (ii) causality between these claims and the decision to grant refugee status by the authority;
- (iii) intention to mislead by the interested party.

a) Objectively incorrect statements

21. In the cases reviewed for the purposes of this study, this element of fraud appears to have presented little difficulty. The evidentiary requirements to be met by the authority which contends that statements made by the applicant are incorrect will be discussed below at paragraphs 71–93.

b) Causality

22. The requirement of causality means that an applicant's misrepresentations or concealment must relate to "relevant" or "material" facts, that is, elements upon which the authority relied in reaching the decision.

23. In Canada, the Federal Court quashed a cancellation decision by the Convention Refugee Determination Division (CRDD) and reinstated refugee status where the Minister had adduced evidence that the applicant had used three different names to obtain welfare assistance. The Federal Court made it clear that the Minister must show misrepresentation leading to the determination of refugee status, and that misrepresentations in other matters did not constitute misrepresentations for the purposes of obtaining Convention refugee status under the Immigration Act then in force<sup>38</sup>.

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<sup>33</sup> CRR, 29 April 1988, 60.757, *Karadeniz*.

<sup>34</sup> CRR, 17 November 1994, 239.456, *Yasik*; *Conseil d'Etat*, 5 December 1997, 159.707, *Ovet*.

<sup>35</sup> CRR, 13 November 1989, 75.599, *Taskin*.

<sup>36</sup> Refugee Status Appeals Authority (RSAA), Refugee Appeal No. 70708/97 and 70710/97, 17 November 1998.

<sup>37</sup> Information compiled by UNHCR.

<sup>38</sup> RefLex 60 (Case Note 21 containing the digest of the Federal Court's decision in *Olutu, Charles v. Minister for Citizenship and Immigration* (F.C.T.D., No. IMM-834-96), 31 December 1996).

24. In Austria, the *Verwaltungsgerichtshof* revoked a decision to cancel refugee status by the Minister of the Interior on the basis that the applicant had failed to disclose a stay in her country of origin which would have contradicted her claim to well-founded persecution there. The Court found that the Minister had granted refugee status without conducting further inquiries, after the initial rejection of the applicant's claim for asylum on appeal had been quashed by the Court on an error of procedure. The Minister could, therefore, not claim that the decision was based on the initial statements, correct or not, by the applicant<sup>39</sup>.

25. Two cases in France concerned decisions by the OFPRA to cancel refugee status on the basis of fraud after a recognised refugee had filed a second application for asylum under a different name. In *Tshibangu*, the *Conseil d'Etat* held that the *Commission des recours des réfugiés* (Refugee Appeals Commission, CRR) had erred in law when upholding the impugned cancellation decision solely on the basis of a second, fraudulent claim, without conducting any inquiries as to whether the initial claim had itself been tainted by fraud<sup>40</sup>. In *Erlor*, the CRR held that the inconsistencies and contradictions upon which the OFPRA had relied to cancel the initial status determination were not of themselves sufficient to establish that the original claim had been fraudulent<sup>41</sup>.

26. Recent decisions by German courts have also affirmed the requirement of causality. In a case in 1998, the *Verwaltungsgericht* (Administrative Court) in Ansbach held that the lack of reasons in the initial positive determination by the Federal Office made it impossible to discern on what grounds the applicant had been recognised; therefore, while a second asylum application made by the refugee under a different name had a significant impact on his credibility, the causal link required under s. 73(2) of the Asylum Procedure Act could not be established with the necessary certainty<sup>42</sup>. The Administrative Court in Wiesbaden also overturned a decision by the Federal Office to cancel refugee status after a second asylum application had been filed under a different name. In this case, the basis for the initial recognition was not the applicant's misrepresentations about his identity, but his continued political activities in Germany. The Court held that cancellation would be justified only if the applicant had made false statements about his political activities<sup>43</sup>.

### c. Intention to deceive

27. In principle, a person who, through deliberate misrepresentations or concealment, deceived the authorities with the aim of obtaining refugee status for which he or she did not qualify under the 1951 Convention has no claim to retain such status. The notion of "legitimate expectations" or "acquired rights" will not apply, as fraudulently obtained administrative decisions are generally held not to create any rights<sup>44</sup>. However, protection

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<sup>39</sup> Austria, *Verwaltungsgerichtshof*, decision of 25 April 1995 (94/20/0779).

<sup>40</sup> *Conseil d'Etat*, 12 December 1986, 57.214-57.789, *Tshibangu*. As noted by the *Commissaire du Gouvernement*, M. Bonichot, in his conclusions in this matter, fraud is never to be presumed but must be proven in each case ("*la fraude ne se présume pas*").

<sup>41</sup> CRR, 13 February 1992, 175.368, *Erlor*.

<sup>42</sup> *Verwaltungsgericht* Ansbach, decision of 24 March 1998 (AN 26 K 97.33371).

<sup>43</sup> *Verwaltungsgericht* Wiesbaden, decision of 9 December 1999 (5 E 30126/98.A (2)).

<sup>44</sup> Even so, cancellation must not result in disproportionate consequences for the person concerned nor does fraud by the applicant affect applicable human rights guarantees (see below at paragraph 115).



concerns arise where the elements of fraud are interpreted in a manner which may prejudice the individuals concerned. Often, this relates to the element of intention.

28. Where, during refugee status determination proceedings, applicants fail to mention facts which would take them outside the refugee definition of the 1951 Convention, it may be problematic to conclude that there was intention to deceive. UNHCR notes that, while

[...] the applicant has the duty to tell the truth, consideration should be given to the fact that, due to the applicant's traumatic experiences, he/she may not speak freely; or that due to time lapse or the intensity of past events, the applicant may not be able to remember all factual details or to recount them accurately or may confuse them; thus, he/she may be vague or inaccurate in providing detailed facts.<sup>45</sup>

Minor omissions or inaccuracies, insubstantial vagueness or incorrect statements should not be used as decisive factors to undermine an applicant's credibility, much less deemed sufficient to establish intention to deceive.

29. On other occasions, applicants do mention facts which might render them ineligible for refugee protection, but no further questions are asked nor any inquiries conducted. In such cases, it may be difficult to establish an intention to deceive. In the above-mentioned case in Austria, the *Verwaltungsgerichtshof* made it clear that if an authority fails to pursue, as part of its factual inquiries, avenues reasonably open to it without any particular difficulty, it may not then evaluate objectively incorrect claims by the interested party as "fraudulent claims" justifying a reopening of the procedure under s. 69(1)1 of the General Administrative Procedure Act<sup>46</sup>.

30. In some cases, refugee status is granted to all members of a group on a *prima facie* basis, or as the result of an accelerated procedure – sometimes without any formal hearing –, and applicants may not have been asked to provide information about their nationality, activities or any other individual circumstances of their case. Under such circumstances, unless it can be shown that the applicant intentionally misrepresented or concealed information relating to a determining criterion<sup>47</sup>, refugee status should not be cancelled on the basis of fraud.

31. Clauses in national legislation which provide that refugee status "shall be cancelled" if it was obtained through forged documents also raise protection concerns. In many

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<sup>45</sup> UNHCR, Note on Burden and Standard of Proof in Refugee Claims, 16 December 1998, at para. 9. See also UNHCR, Information Note on Article 1 of the 1951 Convention, 1 March 1995, at 10., where it is stated that while the applicant must furnish the relevant facts of his or her case, the very nature of circumstances which lead to flight from persecution is such that the requirement of evidence should not be too strictly applied.

<sup>46</sup> Austria, *Verwaltungsgerichtshof*, decision of 25 April 1995 (94/20/0779).

<sup>47</sup> As for example in a case in Canada: the applicants had been recognised in an expedited process, where their profile and statements made by them in their Personal Information Form suggested a likelihood that refugee status would be granted, as a result of which an order was made to grant refugee status without a formal hearing. Refugee status was cancelled when it was later discovered that they had concealed a lengthy stay in Germany which, if known at the time, would have rendered them ineligible for refugee protection. See *Annalingam v. Canada (Minister of Citizenship and Immigration)* 2002 FCA 281, 3 July 2002.

instances asylum-seekers may need to rely on false documents to flee persecution. Their use does not of itself render a claim fraudulent and should not be used to deny access to a refugee status determination procedure<sup>48</sup>, nor should it result in mandatory cancellation. Dealing with the question in 1995, the RSAA of New Zealand held that

"[...] it does not automatically follow from a determination that the grant of refugee status was not properly made (because it was procured by fraud, forgery, false or misleading representation, or concealment of relevant information) that the grant of refugee status must be cancelled. [...] [T]he phrase: "The Authority may cancel the grant of refugee status" clearly vests a discretion in the Authority."<sup>49</sup>

Provisions for cancellation on the basis of fraud in discretionary, rather than mandatory terms, are preferable and clearly the better practice, since they enable and indeed require the authorities to carry out a full assessment of the circumstances of each case, and to distinguish between false documents on which a refugee had to rely in order to flee persecution and others, which have been submitted intentionally, with the purpose of misleading the determining authority on essential aspects of a claim<sup>50</sup>.

32. The discovery of misrepresentations or concealment relating to part of the information presented by an asylum-seeker at the determination stage often undermines the credibility of the entire claim. The issue of credibility of an applicant's claim (i.e., whether it is coherent, plausible, and not contradicting generally known facts) must nevertheless be distinguished from fraud (i.e., intentional misrepresentation or concealment of material facts with the aim of procuring refugee status)<sup>51</sup>.

## 2. *Cancellation on the basis of other misconduct by the applicant*

33. An administrative act may regularly be invalidated *ab initio* if it was obtained through threats or bribery<sup>52</sup>. As with fraud, the applicant's conduct must have been material to the decision made. Depending on the legal regime in place, officials who accept bribes will be liable to disciplinary sanctions as well as prosecution under applicable criminal law.

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<sup>48</sup> See UNHCR, Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12, 31 May 2001, at paras. 34–37 and 50(1).

<sup>49</sup> RSAA, Refugee Appeal No. 522/92, 21 November 1995. A second reason given by the RSAA for avoiding mandatory cancellation in such cases relates to the question of whether cancellation proceedings should comprise an assessment of a well-founded fear of persecution at the time of cancellation. This is discussed below at paragraph 118.

<sup>50</sup> See also below at paragraphs 94–99.

<sup>51</sup> See also below at paragraphs. 85–86.

<sup>52</sup> For example, in Austria: s. 69(1)1.a of the General Administrative Procedure Act (referring to administrative acts obtained through falsification of a document, false testimony or any other criminal act); former Yugoslav Republic of Macedonia: s. 263(1)5 of the Administrative Procedure Act (coercion, extortion, blackmail, pressure or other unlawful activities); Germany: s. 48(2)1 of the Administrative Procedure Act (deception, threats or bribery); Switzerland: s. 66I(a) of the Federal Administrative Procedure Act (if the administrative act was influenced by a criminal offence or a misdemeanor).

3. *Cancellation on the basis of an exclusion provision of the 1951 Convention*

34. National legislation in a number of countries provides explicitly for the cancellation of refugee status in circumstances where one of the exclusion clauses of the 1951 Convention would have applied at the time of the initial determination<sup>53</sup>. In other countries, cancellation is permitted under administrative law or applicable general principles of law, on the basis that the initial decision was erroneous, since the applicant was not eligible for protection under the 1951 Convention due to the existence of an exclusion ground at the time of the initial determination.

35. In a number of Canadian cases, concealment of the fact that applicants had been granted protection in another country, either as refugees<sup>54</sup> or as legally resident aliens<sup>55</sup>, was the basis for cancellation of refugee status because Article 1E of the 1951 Convention<sup>56</sup> would have applied. Also in Canada, refugee status was cancelled<sup>57</sup> because applicants had failed to provide information which, had it been before the original determining panel, would have led to the application of an exclusion clause of Article 1F of the 1951 Convention<sup>58</sup>.

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<sup>53</sup> For example, Austria: s. 14(1)4. of the Asylum Act (with reference to Article 1F of the 1951 Convention); former Yugoslav Republic of Macedonia: s. 47(3) of the Act on Movement and Residence of Aliens (reference to crimes against humanity and the international law, and acts contrary to the purposes and principles of the United Nations); Moldova: s. 35(b) of the Law on Refugee Status, in force as of 1 January 2003 (reference to acts within the scope of Article 1F of the 1951 Convention); Spain: s. 20(1)(b) of the Law No. 5/1984 (reference to Article 1F of the 1951 Convention).

<sup>54</sup> RefLex 20 (Case Note 3, asylum and permanent resident status in the USA); RefLex 22 (Case Note 29, refugee status in Belgium); RefLex 107 (Case Note 22, asylum in the USA).

<sup>55</sup> RefLex 28 (Case Note 37, permanent resident permit in Sweden); RefLex 30 (Case Note 3, resident alien status in the USA); RefLex 59 (Case Note 22, permanent resident with indefinite leave to remain in the United Kingdom); RefLex 129 (Case Note 11, resident alien status in the USA).

<sup>56</sup> Article 1E of the 1951 Convention: "This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country."

<sup>57</sup> RefLex 30 (Case Note 2, conviction for burglary with intent to commit sexual assault, with suspended ten-years' prison sentence); RefLex 36 (Case Note 32, digest of the Federal Court's decision in *Kahin, Guled Hussein v. Minister of Citizenship and Immigration* (F.C.T.D., No. IMM-2175-94), 15 March 1995; unspecified "criminal conviction" in the USA); RefLex 83 (Case Note 9, evidence obtained from Interpol concerning a conviction for fraud and the existence of an arrest warrant issued in China); *Thambipillai v. Canada (Minister of Citizenship and Immigration)* IMM-5279-98, 22 July 1999 (participation in torture while working for the Indian Peace Keeping Forces in Sri Lanka); *Aleman v. Canada (Minister of Citizenship and Immigration)* 2002 FCT 710, 25 June 2002 (new evidence related to participation in crimes against humanity as member of the El Salvadorean army).

<sup>58</sup> Article 1F of the 1951 Convention: "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

36. In such cases, decisions to cancel are usually based on the applicable exclusion ground rather than on fraud. It is not necessary, therefore, to establish that concealment of related facts by the applicant was intentional. What is required, however, is the presence of all the criteria of Article 1E or Article 1F of the 1951 Convention, as the case may be.

37. With regard to cancellation on the basis of Article 1F, in particular, this means that the authorities must not limit their examination to those elements which suggest that an exclusion clause would have applied. Only a full appreciation of all facts and circumstances related to each individual case will enable the authorities to determine whether an applicant is undeserving of protection under the 1951 Convention, and the inclusion aspects of a case should, in principle, be considered before exclusion<sup>59</sup>. Two decisions in Canada, where the Federal Court held that, since new evidence showed that Article 1F of the 1951 Convention would have applied to the applicants, the cancelling authority was not required to assess the remainder of the evidence, because it had no need to examine the inclusion aspects of the case before it, give rise to concern in this regard<sup>60</sup>.

38. Closely linked is the need to assess the potential consequences of exclusion and weigh them against the seriousness of the crimes committed<sup>61</sup>. This "balancing" requirement stems from the general principle of proportionality, and it must be carried out no matter whether the issue of exclusion arises at the initial eligibility stage or later, during cancellation proceedings.

39. "Balancing" in exclusion cases is different from the need to consider the potential impact of a decision to cancel refugee status in situations where the individual concerned has legitimate expectations or acquired rights on the basis of an erroneous refugee status determination. Normally, this will only apply where there has not been fraud on the part of the applicant. State practice suggests that where Article 1F of the 1951 Convention is found to be applicable as cancellation ground, the notion of legitimate interests carries little weight, and in fact, in the decisions obtained for this study, it was not considered at all.

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<sup>59</sup> See Summary Conclusions – Exclusion from Refugee Status, Lisbon Expert Roundtable, Global Consultations on International Protection, UN doc. EC/GC/01/2Track/1, 30 May 2001, at (15); see also G. Gilbert, "Current Issues in the Application of the Exclusion Clauses", in: E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, Cambridge (2003 forthcoming); M. Bliss, "Serious reasons for considering': Minimum standards of procedural fairness in the application of the Article 1F exclusion clauses", 12 *IJRL Special Supplementary Issue on Exclusion* (2000), at pp. 106–108.

<sup>60</sup> *Thambipillai v. Canada (Minister of Citizenship and Immigration)* IMM-5279-98, 22 July 1999; *Aleman v. Canada (Minister of Citizenship and Immigration)* 2002 FCT 710, 25 June 2002.

<sup>61</sup> See M. Bliss, above at fn. 59, at pp. 106–108. Most commentators support the view that balancing is required in cases involving exclusion under Article 1F(b). However, balancing in Article 1F(a) and (c) cases is sometimes considered unnecessary, given the serious nature of the acts covered by these provisions. State practice is uneven: common law countries, in particular, do not consider that balancing is required, including in cases involving Article 1F(b). See, for example: W. Kälin and J. Künzli, "Article 1F(b): Freedom fighters, terrorists and the notion of serious non-political crimes", 12 *IJRL Special Supplementary Issue on Exclusion* (2000), at pp. 71–74, with further references; G. Gilbert, "Current Issues in the Application of the Exclusion Clauses", above at fn. 59.

4. *Cancellation of refugee status because of a mistake on the part of the authority*

40. The recognition as a refugee of a person who does not meet the criteria of the 1951 Convention may result from an error on the part of the determining authority. The nature and seriousness of the mistake may justify cancellation of refugee status, including where the initial claim was presented in good faith, although it is in such situations that the legitimate interests, or acquired rights, of the person concerned may outweigh the public interest in rectifying a determination which was wrongly made in the first place.

41. None of the national refugee laws examined for the purpose of this paper contain specific provisions for cancellation on the basis of an error made by the authority. General administrative law therefore applies.

42. Depending on the nature of the flaw, and the legal system in place, faulty administrative acts may be considered non-existent, and therefore not binding on anyone and liable to be withdrawn at any time, or they may enter into legal effect but are subject to invalidation under certain conditions.

43. In common law, decisions made by an authority without any legal basis, or exceeding its jurisdiction<sup>62</sup>, are considered null and void on the basis of the doctrine of *ultra vires*<sup>63</sup>. Administrative authorities are also acting in a way that is unauthorised and therefore *ultra vires* if their decisions fail to meet the required standard of reasonableness<sup>64</sup>. The principle of natural justice demands that acts afflicted with certain serious procedural defects are also null and void<sup>65</sup>. However, even administrative decisions which are null and void enjoy a presumption of validity and must be obeyed unless they are invalidated by a court on judicial review<sup>66</sup> or, where it is authorised by statute to do so, by the determining administrative authority itself<sup>67</sup>.

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<sup>62</sup> For example, by making the decision in bad faith; or by making a decision it had no power to make; or by failing to take into account something which it was required to take into account; or, conversely, by basing its decision on some matter which it had no right to take into account.

<sup>63</sup> The UK House of Lords is of the view that any error of law made by a tribunal or administrative authority means that its decision is outside its jurisdiction and therefore liable to be quashed on judicial review. On the development of this line of jurisprudence, beginning with the House of Lords' decision in *Anisminic* of 1956, which was also followed by the Privy Council, the High Court of Australia and the Court of Appeal in New Zealand, see W. Wade & C. Forsythe, above at fn. 16, at pp. 256–274.

<sup>64</sup> In the United Kingdom, this is the case for administrative decisions which fail to meet the test of "Wednesbury reasonableness" – that is, if they are so unreasonable (or "absurd", "perverse", "irrational") that no reasonable authority could have taken them. This test is also applied, *inter alia*, in Australia and New Zealand. See W. Wade & C. Forsythe, above at fn. 16, at pp. 355–356. In Canada, administrative tribunals act outside their jurisdiction if they act in a "patently unreasonable" manner. See the Supreme Court's judgment in *Canada (Attorney General) v. Public Service Alliance of Canada* [1993] 1 S.C.R. The Federal Court held that this is the standard which applies to expert tribunals such as the CRDD. See *Adar v. Canada (Minister of Citizenship and Immigration)* IMM-3623-96, 26 May 1997. See also *Zobeto v. Canada (Minister of Citizenship and Immigration)* IMM-908-00, 2 November 2000.

<sup>65</sup> See J. Schwarze, above at fn. 13, at pp. 281–287.

<sup>66</sup> See W. Wade & C. Forsythe, above at fn. 16, at pp. 306–312. The question of whether administrative decisions made in breach of statutory requirements are void ("absolute invalidity"), or voidable ("relative invalidity"), and relevant jurisprudence of the UK House of Lords, the Privy Council, the Supreme Court of Canada and the New Zealand Court of Appeal, was addressed by the

44. In most civil law countries, specific provisions in administrative procedural law determine under what circumstances a determination is null and void. This is the case where an administrative act is defective to such an extent that it is regarded as non-existent and without legal effect. Although it is not binding, an appearance of validity is nevertheless created, which needs to be eliminated. Such acts may be cancelled at any time. Mistakes which render an administrative decision null and void must be particularly serious and manifest. Typically, they include "decisions" made by an authority which was not competent to issue them; decisions which would result in a breach of criminal law; orders which cannot physically be complied with; or "decisions" with certain serious formal defects (for example, lack of signature, or lack of prescribed form)<sup>68</sup>. In France, unwritten general principles of law determine under which circumstances an administrative act is so seriously flawed that it is null and void<sup>69</sup>.

45. Nullity, however, is usually an exception. In the majority of cases where civil law systems provide for the invalidation *ab initio* of administrative decisions, these are flawed on account of an error of law and/or fact which, while not rendering them null and void, nevertheless justifies cancellation. Such acts, though unlawful, are valid in the sense that they enter into effect and become binding. They may create rights and legitimate interests for individuals. Under certain, stringent conditions, they may be reopened and are subject to cancellation even if they have become final, that is, appeal or regular judicial review are no longer available.

46. The circumstances in which a flawed final administrative decision which confers rights or benefits upon an individual can be reopened are discussed below at paragraphs 53–70. Depending on the legal regime in place, this category may include administrative acts where the determining authority made an error of law (by basing itself on the wrong legal provisions or applying the law wrongly to the facts) or of fact (by relying on facts which were not established or not before it). The determining official may make a mistake in the exercise of discretion (for example, by relying on inadequate criteria or evaluating the facts before him or her in an unreasonable manner, or by failing to use discretion where it was conferred)<sup>70</sup>. Time limits may apply, and, once they have expired, cancellation is no longer

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High Court of Australia in *Minister for Immigration and Multicultural Affairs v. Bhardwaj* [2002] HCA 11 (14 March 2002), particularly at [101]–[107], as per Kirby J.

<sup>67</sup> See below at paragraphs 53–59.

<sup>68</sup> For example, in Austria: s. 68(4) of the General Administrative Procedure Act. Specific nullity provisions are also contained in various other laws, though not in the Asylum Act. Germany: s. 44 of the Administrative Procedure Law; Spain: s. 62 of the Law No. 30/1992 of 26 November 1992.

<sup>69</sup> The French *Conseil d'Etat* has made it clear that in those exceptional cases where an administrative act is non-existent, on account of it being afflicted with particularly serious and evident unlawfulness, it may be challenged on judicial review because of abuse of power, or reopened *ex officio*, at any time, and it cannot create any rights. See R. Chapus, above at fn. 13, at pp. 970–972, with references to the relevant jurisprudence of the *Conseil d'Etat*.

<sup>70</sup> Where the law vests discretion in an authority, the latter must exercise it lawfully and in keeping with the purposes for which it was conferred, within the limits of control by superior administrative authorities or courts. As a general rule, its decisions are held to the standard of reasonableness with reference to the evidence before it. In Canada, the Federal Court held that the applicable standard of review of decisions by the CRDD was that of "patent unreasonableness". (see *Adar v. Canada (Minister of Citizenship and Immigration)* IMM-3623-96, 26 May 1997). See also J. Schwarze, above at fn. 13, at pp. 281–287 and 261–268, respectively.

possible<sup>71</sup>.

47. In all cases of cancellation due to an error made by the authority, the principle of proportionality requires that the public interest of rectifying the mistake be weighed against the legitimate rights, interests or expectations of the individual concerned. Where refugee status has been wrongly granted as a result of a mistake made by the authority, all relevant facts must be taken into account, including, in particular, the person's length of stay in the country, the degree of social and economic integration as well as the potential consequences of cancellation. This was affirmed, for example, in a recent decision of the German *Bundesverwaltungsgericht* (Federal Administrative Court)<sup>72</sup>. Invalidation of refugee status must not result in disproportionate consequences for those affected. Therefore, and particularly where there was no wrongdoing on the part of the individual concerned, the authority may be precluded from cancelling its decision, even if it was wrongly made.

48. In its above-mentioned decision<sup>73</sup>, the German *Bundesverwaltungsgericht* held that refugee status could be cancelled on the basis of s. 48 of the Administrative Procedure Act, which regulates the invalidation of unlawful administrative acts, if according to a new legal or factual evaluation of the circumstances, refugee status should not have been granted at the time<sup>74</sup>. This provision has since been used in 36 cases in which refugees had their refugee status cancelled because the Federal Office's initial interpretation of the situation in the country of origin was considered to have been mistaken<sup>75</sup>.

49. Research conducted for this paper has not yielded any other instances in which refugee status was cancelled on the ground of an error of law and/or fact which was entirely attributable to the determining State authority. If they do occur, cases of this kind may simply not be reported, but it would appear that they are not very frequent. In countries with developed individual refugee status determination systems in place, erroneous first-instance decisions may be expected to be overturned on appeal or judicial review, and judicial

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<sup>71</sup> See below at paragraphs 68–70.

<sup>72</sup> *Bundesverwaltungsgericht*, decision of 19 September 2000 (9 C 12/00), which addressed, *inter alia*, the requirements for cancellation of refugee status under s. 73(2) of the Asylum Procedure Act and s. 48 of the Administrative Procedure Act, respectively. The Court clarified that the latter provision, which permits the cancellation of unlawful administrative decisions under certain circumstances, is applicable to refugee status determinations in cases which are not covered by s. 73(2) of the Asylum Procedure Act, thus ending a long-standing legal dispute, in which some had contended that the latter provision operated as *lex specialis*, precluding the application of general administrative law. Unlike s. 73(2) of the Asylum Procedure Act, which provides for compulsory cancellation if status was obtained through false statements or concealment of material facts and if the status could not be granted on the basis of other reasons (see below at paragraph 118), s. 48 of the Administrative Procedure Act requires the authority to exercise discretion and, therefore, take into consideration all circumstances of the individual case. See also below at paragraphs 94–99.

<sup>73</sup> See above at fn. 72.

<sup>74</sup> This decision put an end to the practice of the Federal Office whereby, during 1998 and 1999, the refugee status of several hundred Iraqi nationals recognised during the 1990s was revoked under s. 73(1) of the Asylum Procedure Act on the basis that an internal flight alternative was available in Northern Iraq. The *Bundesverwaltungsgericht* made it clear that s. 73(1) of the Asylum Procedure Act, essentially a cessation clause, applies only if there has been a significant change in the country of origin, and not in cases where the same circumstances are subsequently evaluated differently by the authorities. The Court held that such situations may give rise to cancellation under s. 48 of the Administrative Procedure Act.

<sup>75</sup> Information provided by UNHCR.

control over the legality of administrative acts is usually quite strict. Cases where a positive refugee status determination would be null and void because it was granted by an authority not competent to decide on asylum claims, or because it is beset by another serious defect which would render it a nullity, are perhaps even less likely to occur.

50. Yet faulty positive refugee status recognition decisions are by no means inconceivable, and the question of cancellation on the basis of an error made by the authorities may well arise. The determining authority may err in its legal qualification of the facts before it – for example, in wrongly concluding that the facts support the decision that there is a well-founded fear of persecution and/or a Convention ground, or in misinterpreting the requirements for the application of Article 1E or 1F of the 1951 Convention. The authority may also fail to establish the facts correctly – for example, because it does not conduct appropriate inquiries, or because information provided by the applicant which could have triggered the application of an exclusion clause at the eligibility stage are not followed up on. Or else, true facts may only become known after the decision is taken.

51. It makes no difference whether errors not attributable to the applicant occur in the context of situations in which refugee status is granted to all members of a group on a *prima facie* basis. As already noted earlier with regard to fraud, the existence of a cancellation ground must be established in each individual case. The notion of legitimate expectations or acquired rights and the principle of proportionality apply, and may preclude cancellation, in the same way as for refugee status granted as a result of an individual determination procedure.

## **B. Opening Cancellation Proceedings**

52. Information which casts doubt on a positive refugee status determination may come to light in any number of ways, ranging from pure coincidence to mandatory "re-examination provisions" in national refugee legislation. In practice, there are certain situations which are more likely than others to trigger cancellation considerations:

- Statements made by recognised refugees, or others, in the course of a subsequent procedure (for example, on application for permanent residence status or family reunification) may contradict those made at the determination stage, raising questions as to their veracity.
- The issue of fraud sometimes arises because a recognised refugee files a second application for refugee status under a different name and/or a different nationality, either in the country of refuge or elsewhere.
- Information which suggests that the exclusion clauses of Article 1F of the 1951 Convention would have applied to the initial determination often surfaces in the course of criminal investigations, including through international channels.
- Doubts about refugee status determinations by UNHCR are sometimes raised by States in the context of resettlement proceedings, or if a refugee recognised by UNHCR under its Statute later also applies for recognition by a State under the 1951 Convention.



## 1. Power to reopen administrative decisions

53. Power to reopen procedures, and to invalidate an administrative act, may lie with the issuing authority itself, either on its own motion (*ex officio* or *sua sponte*) or on the basis of an application for cancellation made to it, and sometimes both. Alternatively, the body with competence to cancel an unlawful administrative decision may be a higher-level organ within the same administrative authority, a supervisory authority or a court. Again, an application to open cancellation proceedings may, or may not, be required. However, once a positive refugee status determination has become final, it can be reopened with a view to cancellation only if there is evidence that indicates that the initial recognition of refugee status was flawed. Questions related to the kind and quality of evidence required are dealt with in more detail below at paragraphs 71–93.

54. In most countries reviewed for the purpose of this paper, the authorities may reopen their own final refugee status determinations under the circumstances provided for in applicable general administrative procedure law and/or refugee legislation. This normally applies to cases of fraud as well as other serious flaws which render the initial decision void, or voidable.

55. In common law systems, administrative authorities require explicit or implicit statutory authorisation to reopen their own final determinations. Refugee laws regularly do contain such provisions<sup>76</sup>. Such statutory powers are an exception to the principle usually referred to as *functus officio*, according to which an administrative authority's power to decide a matter within its jurisdiction is regarded as "spent" once the decision is made, with the effect that it may not reopen the procedure unless explicitly empowered to do so by statute<sup>77</sup>. Under common law, the discovery of new evidence is not of itself sufficient to empower an authority to reopen its own determinations. A statutory provision to that effect is required<sup>78</sup>.

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<sup>76</sup> For example, in Australia: ss. 109, 116, 501, 502 of the Migration Act; Canada: s. 109(1) of the Immigration and Refugee Protection Act; New Zealand: ss. 129L and 129M of the Immigration Act; United Kingdom: ss. 10(1)(b) and 10(8) of the Immigration and Asylum Act 1999; ss. 3(5) and 3(6) of the Immigration Act 1971; United States of America: INA § 207(c)(4); INA § 208(c)(2); 8 CFR § 3.2(a); 8 CFR § 3.23; 8 CFR § 208.24(f).

<sup>77</sup> A review of Australian, Canadian and UK jurisprudence on the issue of *functus officio* can be found in the decision by the RSAA in New Zealand, Refugee Appeal No. 71864/00 of 2 June 2000, which notes an established line of Canadian authority which allows only one exception to the rule, namely, where there has been a decision rendered contrary to the rules of natural justice (at [16]). The question of an authority's power to reopen its own final determinations was also dealt with by the High Court of Australia in *Minister for Immigration and Multicultural Affairs v. Bhardwaj* [2002] HCA 11 (14 March 2002), where it was termed "one of the most vexing puzzles in public law". Earlier, the Federal Court of Australia, dealing with "the unusual question whether the Refugee Review Tribunal can reopen or reconsider its substantive decision on its review of an RRT-reviewable decision after it has made and published its decision or whether, on the making of that decision, it is *functus officio*", held that the Tribunal did not have the power to reconsider or reopen its final decision (*Shantha Karunaratna Jayasinghe v. Minister for Immigration and Ethnic Affairs & Anor* [1997] 551FCA (25 June 1997). See also W. Wade & C. Forsythe, above at fn. 16, at pp. 253–238 and p. 916.

<sup>78</sup> See W. Wade & C. Forsythe, above at fn. 16, at pp. 235–236.

56. In civil law jurisdictions, the power to reopen final administrative decisions is usually specifically provided for in the relevant laws<sup>79</sup>, or, as in the case of France, determined by applicable general legal principles<sup>80</sup>. This may take the form of an exhaustive list of grounds for reopening a final administrative decision<sup>81</sup>, or a general authorisation to cancel an unlawful act in those exceptional situations in which the public interest in doing so outweighs that of the individual concerned in maintaining it<sup>82</sup>. The authorities regularly have power to reopen *ex officio* as well as on request. In some countries, in the presence of certain grounds – usually fraud or criminal conduct – the reopening of final decisions is mandatory<sup>83</sup>.

57. Generally, the power to reopen is an exception to the rule that an administrative decision, once it has become final, is valid and binding. In the context of immigration legislation, this was affirmed, for example, by the US Attorney General, who affirmed the view of the Board of Immigration Appeals (BIA) that its power to reopen proceedings *sua sponte* under 8 Code of Federal Regulations (CFR) § 3.2(a) is limited to exceptional circumstances and is "not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, when enforcing them might result in hardship"<sup>84</sup>.

58. In Germany, s. 73(2) of the Asylum Act requires the asylum authorities to reopen a case *ex officio*, but in practice, cancellation cases are normally initiated on request by the

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<sup>79</sup> For example, in Austria: ss. 68(4) and 69 of the General Administrative Procedure Act; Belarus: Chapter 6, para. 106 of Resolution No. 125, 26 September 2000, on Approval of the Guidelines on the Procedure of Refugee Status Determination in the Republic of Belarus, Ministry of Labour; Germany: s. 73(2) of the Asylum Procedure Act and ss. 44 and 48 of the Administrative Procedure Act; former Yugoslav Republic of Macedonia: the "extraordinary legal remedies" for the annulment, abolition or change of decisions contained in Chapter 16 of the Administrative Procedure Act; Slovak Republic: s. 15(1) of the Asylum Law, in force as of 1 January 2003; Spain: s. 20 of the Law No. 5/1984 and ss.102–106 of the Law No. 30/1992; Switzerland: s. 63(1)(a) of the Asylum Act and s. 66 of the Federal Administrative Procedure Act.

<sup>80</sup> The *Conseil d'Etat* has held that unlawful administrative acts may be cancelled by the issuing authority on grounds of want of jurisdiction; certain formal defects; abuse of power; or breach of the law – the so-called "*cas d'ouverture*", which would constitute grounds for cancellation on judicial review. See the decisions of 3 November 1922, *Dame Cachet*, and of 26 October 2001, *Monsieur Ternon*. See also R. Chapus, above at fn. 16, at pp. 975–1010. However, as noted below at paragraph 62, only decisions by the OFPRA can be reopened *ex officio*. Positive determinations by the CRR cannot be cancelled.

<sup>81</sup> As, for example, in Austria under s. 69 of the General Administrative Procedure Act, which permits reopening if the administrative act was obtained through criminal conduct, or otherwise fraudulently; or if new facts or evidence come to light which indicate that a different decision would have been reached, had they been known to the determining authority at the time.

<sup>82</sup> As, for example, in Germany: s. 48 of the Administrative Procedure Act provides that an unlawful administrative act which benefits an individual may not be cancelled if the interest of the person concerned in maintaining it is worthy of protection. This is not the case, however, if the act has been obtained through deception, threats or bribery; through statements which were incorrect or incomplete in essential respects; or if the person was aware of the unlawfulness of the act, or failed to be aware of it through gross negligence.

<sup>83</sup> On the question of mandatory vs. discretionary cancellation clauses, see below at paragraphs 94–99.

<sup>84</sup> Attorney General, *Jean*, 23 I & N Dec. 373 (A.G. 2002), 2 May 2002, with references to the BIA's decision in *J-J-*, 21 I & N Dec. 976 (BIA 1997), 31 July 1997. See also *G-D-*, 22 I & N Dec. 1132 (BIA 1999), 23 November 1999.

aliens' authorities<sup>85</sup>. In Canada, the opening of cancellation proceedings by the Refugee Protection Division depends on an application by the Minister<sup>86</sup>. New Zealand's Immigration Act provides for reopening *ex officio* by the Refugee Status Branch (RSB) in cancellation cases concerning refugee status recognised by the RSB, that is, in the first instance, whereas it must apply to the RSAA for cancellation, to be determined by the latter, if refugee status was recognised on appeal<sup>87</sup>.

59. In one case in Austria, cancellation was decided after a refugee had approached the authorities on his own initiative and informed them that his initial statements as well as documents presented at the original determination procedure had been false<sup>88</sup>. This case is somewhat unusual, however, in that the person concerned wanted to return to his country of origin and had requested a certificate from the Austrian authorities that his refugee status had lapsed. Under s. 14 (4) of the Austrian Asylum Act, however, refugee status can no longer cease after five years.

## 2. *Impediments to reopening administrative procedures*

60. Under certain circumstances, the reopening of administrative procedures may be precluded on the basis of *res judicata* or estoppel, or because of the time elapsed since the initial decision.

### a) Res judicata and estoppel

61. *Res judicata* means that a matter which has been the subject of a judicial determination cannot be opened again for a re-examination. It may pose an obstacle to cancellation in cases where refugee status was granted by a court, or an administrative body with quasi-judicial powers.

62. Thus for example, in Germany, where the Asylum Procedure Act provides for an appeal against first-instance rejection to the administrative court, the latter may impose a duty on the authorities to recognise a person's refugee status. In such cases, the authorities are precluded on the basis of *res judicata* from proceeding with cancellation under s. 73(2) of the Asylum Act or s. 48 of the Administrative Procedure Act<sup>89</sup>, and the refugee recognition could only be revoked under the strict conditions provided for in the Civil Procedure Code<sup>90</sup>. In France, decisions by the CRR are treated in law as those of a judicial

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<sup>85</sup> Information provided by UNHCR.

<sup>86</sup> s. 109(1) of the Immigration and Refugee Protection Act, in force since 28 June 2002. Under the previous legislation, the Immigration Act, the Minister needed to seek leave for application to vacate from the Chairperson of the Immigration and Refugee Board. Once leave was obtained, the Minister could make an application for vacation to the CRDD.

<sup>87</sup> ss. 129L and 129M of the Immigration Act. See also below at paragraphs 82–83.

<sup>88</sup> *Unabhängiger Bundesasylsenat* (Independent Federal Asylum Senate, UBAS), decision of 27 July 1999 (210.763/0-VIII/22/99).

<sup>89</sup> See *Bundesverwaltungsgericht*, decision of 24 November 1998 (9 C 53/97).

<sup>90</sup> ss. 580–591 of the Civil Procedure Code set forth strict conditions and requirements for reopening a court's decision by way of a so-called *Restitutionsklage*, including a time limit of one month from the moment the authority became aware of the ground for filing such an action. In practice, this is rarely used. UNHCR is aware of approximately 20 cases of this kind since 1998, some of them involving false passports. The effect of a successful *Restitutionsklage* would be an invalidation of the administrative court's decision recognising refugee status, and reinstatement of the original rejection

authority. They can be reversed only on review by the *Conseil d'Etat*, if one of the grounds for reopening (*cas d'ouverture*) apply. This would, however, require specific statutory provision for judicial review of decisions made by the CRR. French law does not contain such provision. As a consequence, a positive refugee status determination by the CRR, even if wrongly granted, is *res judicata* and cannot be cancelled<sup>91</sup>.

63. Most refugee status determinations are administrative acts. In administrative law, however, the principle of *res judicata* – or its equivalent which is sometimes referred to as "administrative finality" – plays a restricted role.

64. Under common law, *res judicata* can never be invoked if an administrative act was made by an authority acting outside its jurisdiction (*ultra vires*). It must also yield to the principle that statutory powers and duties cannot be fettered<sup>92</sup>. Moreover, *res judicata* applies only where an administrative decision can not, or no longer, be invalidated<sup>93</sup>. It would, therefore, be of relevance to cancellation cases only where an administrative refugee status determination has become final in spite of having been wrongly granted in the first place. This may be the case where the issuing authority does not have statutory power to reopen, or where it is precluded from exercising such power, for example, because a statutory time limit for reopening a decision which is flawed, but not *ultra vires*, has expired.

65. A related concept is that of estoppel. According to this principle of equity, anyone who, through a statement or representation of fact, causes another to act to their detriment in the belief that it is true, cannot later deny it as being incorrect<sup>94</sup>. Thus, an authority may be estopped from withdrawing an administrative act which is wrong because of a mistake made by it, if the interested party relied on its correctness and, as a result, acted to their detriment. The special category of "issue estoppel"<sup>95</sup> means that a final decision cannot be the subject of a renewed decision involving the same parties and the same matter. Again, the application of estoppel is subject to certain limits: it cannot be invoked so as to give an

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of the applicant's claim issued by the asylum authorities. In one recent case, the *Verwaltungsgericht* Ansbach (decision of 20 September 2000, AN 21 K 00.32183) cancelled a recognition decision by the Federal Office based on a decision by a court. The *Verwaltungsgericht* Ansbach relied on an analogous application of s. 826 of the Civil Code, which exceptionally permits the invalidation of a final judgment under civil procedural law, on the grounds that the court's decision had been obtained by the applicant through immoral means, and that it would be absolutely unacceptable to maintain the legal situation created by it.

<sup>91</sup> In French, this is referred to as the "*autorité de la chose jugée*". See the discussion of applicable legal principles in the Conclusions of the *Commissaire du Gouvernement*, respectively, in the *Conseil d'Etat* decisions of 12 December 1986, 57.214-57.789, *Tshibangu*; and 5 December 1997, 159.707, *Ovet* (with references to CRR, 26 November 1993, 163.630, *Vidrean* and CRR, 24 October 1997, 240.137, *Opoku*, both specifically on the issue of *res judicata*).

<sup>92</sup> See W. Wade and C. Forsythe, above at fn. 16, at pp. 249–254.

<sup>93</sup> *Ibid.*, at p. 250: "*Res judicata* does nothing to make the initial decision binding. [...] It is only because the decision is for some other reason binding that it may operate as *res judicata* in later proceedings raising the same issue between the same parties."

<sup>94</sup> W. Wade and C. Forsythe, above at fn. 16, at p. 242.

<sup>95</sup> Which, in turn, is one of the forms of "*res judicata* in its operation as estoppel", the other being "course of action estoppel"; see for example the decision of the Supreme Court of Canada in *Angle v. M.N.R.* [1975] 2 SCR 248, at [253]–[254], as per Mr Justice Dickson, quoted in *Adar v. Canada (Minister of Citizenship and Immigration)* IMM-3623-96, 26 May 1997.

authority powers which it does not in law possess<sup>96</sup>, nor can any kind of estoppel give a tribunal wider jurisdiction than it possesses<sup>97</sup>.

66. Two decisions of the Canadian Federal Court address the question of whether the concepts of *res judicata* and estoppel are applicable to cancellation proceedings. In *Adar v Canada*<sup>98</sup>, the Court held that the doctrine of *res judicata* was difficult to apply to the definition of a Convention refugee because a person's status as a Convention refugee was fluid. The fact that the CRDD had statutory power to reconsider refugee status meant that the requirements of "issue estoppel" (same parties, same issue, and final decision) were not met either: the status determination decision was not final. In *Zobeto v Canada*<sup>99</sup>, the Court found that the CRDD had not erred in deciding that neither "issue estoppel" nor the doctrine of *res judicata* were applicable: the former because the true facts were not before the Board at the initial determination hearing, and the vacation hearing was different from that hearing; the latter because it had found a vacation hearing to be different from a repeat claim<sup>100</sup>. In the United Kingdom, the House of Lords held that *res judicata* has no place in the field of administrative action on questions of immigration<sup>101</sup>.

67. In the civil law tradition, the legal validity of administrative acts is limited in similar ways. The equivalent of the common law notions of *res judicata* and estoppel can be found in provisions of general administrative law which typically preclude the re-examination of final administrative acts except in those special circumstances provided for by statute or applicable general principles of law<sup>102</sup>. The grounds which permit reopening under these conditions are deemed to "break through" the legal validity of final administrative acts which would otherwise stand in the way of a renewed examination of the matter.

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<sup>96</sup> W. Wade and C. Forsythe, above at fn. 16, at p. 243.

<sup>97</sup> *Ibid.*, at p. 244, where it is also noted that "estoppel has been allowed to operate against public authorities in minor matters of formality, where no question of *ultra vires* arises."

<sup>98</sup> *Adar v. Canada (Minister of Citizenship and Immigration)* IMM-3623-96, 26 May 1997 (In this case, the applicants submitted that the CRDD had erred by proceeding with the Minister's application as it was *res judicata*, as the Minister had already once brought a vacation application on the same basis, i.e. seized passports which contradicted the statements made by the applicants at the refugee determination hearing).

<sup>99</sup> *Zobeto v. Canada (Minister of Citizenship and Immigration)* IMM-908-00, 2 November 2000 (The applicant seeking judicial review by the Federal Court submitted that, on the basis of abuse of process, *res judicata* and issue estoppel, the CRDD should not have admitted evidence concerning false statements made by him in his Personal Information Form because that information had been available to the Minister at the time of the initial hearing.)

<sup>100</sup> On the question of *res judicata*, the decision in *Zobeto* would appear to be more appropriate: cancellation proceedings are indeed different from an initial determination procedure – their purpose is precisely to establish whether the initial decision was correctly made. If that is the case, the impugned decision is not subject to invalidation: it is valid and binding, and *res judicata* applies. For similar reasons, the Federal Court's reasoning with regard to estoppel also seems better founded in *Zobeto*. Administrative decisions become final when avenues for appeal or judicial review are exhausted. Statutory powers to reopen a determination on certain grounds do not affect its finality – i.e., the fact that they are no longer subject to appeal or review.

<sup>101</sup> D. Foulkes, *Administrative Law*, 8<sup>th</sup> edition, Butterworths, London, Dublin, Edinburgh (1995), at p. 228 (with reference to the House of Lords' decision in *R. v. Immigration Appeals Tribunal ex parte Cheema* [1982] ImmAR 124).

<sup>102</sup> See above at paragraph 56.

## b) Time limits

68. Cancellation provisions in national refugee legislation do not usually stipulate a time limit for the invalidation of refugee status<sup>103</sup>, nor is there normally a time limit under general administrative law for the reopening of final decisions on the grounds of fraud or other misconduct, or if administrative acts are null and void<sup>104</sup>.

69. Statutory time limits affecting the grounds for reopening do normally apply where an administrative act is afflicted with less serious flaws. Thus, for example, in Spain, s. 103 (2) of the Law No. 30/1992 of 26 November 1992 imposes a four-year time limit on the cancellation of administrative acts which are unlawful, without being null and void. Under s. 69(3) of the Austrian General Administrative Procedure Act, there is a three-year time limit for the reopening *ex officio* by the authority that issued a final administrative act. Under s. 48(4) of the German Administrative Procedure Act, a one-year limit applies to the reopening of an unlawful administrative decision, beginning as soon as the authority takes notice of facts which would justify its cancellation<sup>105</sup>. In France, the authorities are entitled to cancel an unlawful administrative act which benefits an individual for a period of four months from the day on which it was decided<sup>106</sup>.

70. Even in the absence of statutory time limits, however, applicable general principles of law hold that the passing of time between the original refugee status recognition and the opening of cancellation proceedings must be taken into account when considering whether

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<sup>103</sup> See above at fns. 23 and 24.

<sup>104</sup> See, for example, in Austria: s. 68(4) of the General Administrative Procedure Act and s. 69(3), which, in combination with s. 69(1)1.a provides for an exception for cases of criminal conduct; Germany: s. 44 of the Administrative Procedure Act, and s. 48(4) in combination with s. 48(2), pursuant to which no time limit applies to the reopening of decisions obtained through deception, threats or bribery. In France, see the decisions by the *Conseil d'Etat* in *Dame Cachet* and *Monsieur Ternon*, which exempt cases of deliberate deception from the otherwise applicable four-month time limit for reopening *ex officio*.

<sup>105</sup> Two recent decisions by administrative courts address the one-year time limit in s. 48 of the Administrative Procedure Act in the wake of the decision by the *Bundesverwaltungsgericht* of 9 December 2000 (see above at fn. 72). The *Verwaltungsgericht* in Karlsruhe (A 12 K 10403/02, 17 September 2002) overturned a cancellation decision on the basis that the time limit had expired. The Court held that the one-year time limit for the cancellation of the status of Iraqi refugees on the basis that the initial determination failed to recognise the existence of an internal flight alternative in Northern Iraq began to run in early 1999, when the Federal Office was notified of the *Bundesverwaltungsgericht* decision of 8 December 1998, which held that such an alternative was available. The Karlsruhe Court also held that, in its view, this changed assessment of the situation did not mean that all positive decisions which benefited Iraqi refugees without taking into account an internal flight alternative could now be invalidated on the basis that they were unlawful *ab initio*. By contrast, in a decision concerning another Iraqi refugee, with respect to whom revocation proceedings under s. 73(1) of the Asylum Procedure Act had been changed into cancellation proceedings under s. 48 of the Administrative Procedure Act, the *Verwaltungsgericht* in Ansbach (AN 13 K 02.30394, 22 May 2002) held that this was precisely the case, and that the one-year time limit under the latter provision had begun to run at the end of the hearing as part of the revocation procedure.

<sup>106</sup> *Conseil d'Etat*, 26 October 2001, *Monsieur Ternon*, departing from the *Conseil d'Etat's* earlier jurisprudence in *Dame Cachet*, which had limited the reopening of unlawful decisions by the issuing authority to the period (normally two months from the date the decision was published or announced) during which an application for judicial review could be brought.

cancellation is appropriate. In Canada, the Federal Court and the CRDD have consistently held that a vacation application could not be denied on the basis of delay alone. In cases where the issue of delay was raised, however, the Minister's application for vacation was allowed only if the delay did not prejudice the person concerned and their ability to respond to the evidence presented by the minister to support the application for vacation<sup>107</sup>.

### C. Evidence for the Cancellation of Refugee Status

71. Questions related to evidence are of crucial importance in cancellation cases. The UNHCR Handbook refers to information which has

"[...] come to light that indicates that a person should never have been recognised as a refugee in the first place, e.g. if it subsequently appears that refugee status was obtained by a misrepresentation of material facts, or that the person concerned possesses another nationality, or that one of the exclusion clauses would have applied to him had all the relevant facts been known".<sup>108</sup>

The Handbook does not, however, specify what exactly this means in terms of the kind and quality of information needed to justify the reopening of a refugee's case and the cancellation of refugee status. General administrative law and cancellation-related jurisprudence permit a more precise appreciation of what is required.

72. A positive refugee status determination which has become final – that is, which is no longer subject to appeal or review – is liable to invalidation *ab initio* only if it is shown that the person concerned did not meet the eligibility criteria for international protection under the 1951 Convention and, therefore, was not a refugee at the time the determination was made. This is the case if there is a ground for cancellation, relating either to the inclusion aspects of the claim or the applicability of an exclusion clause.

73. In the (unlikely) case of a positive refugee status determination so seriously flawed that it is null and void, and therefore without legal effect, this requirement would not apply in the same way: such a decision would be liable to cancellation regardless of whether or not there was new evidence – in such cases the defect would need to have been particularly serious and manifest even at the time of the initial determination. Whether or not cancellation is appropriate in such cases would need to be decided on the basis of the principle of proportionality. The discussion in this section addresses evidentiary requirements with respect to grounds for ineligibility (and therefore cancellation) for refugee protection under the 1951 Convention in situations in which an erroneous refugee status recognition has nevertheless become valid.

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<sup>107</sup> For example, RefLex 104 (Case Note 9, several year delay, Article 1F(a) case); RefLex 136 (Case Note 12, vacation application commenced three years and five months after recognition); RefLex 139 (Case Note 17, cancellation five years after recognition), see also: *Coomaraswamy v. Canada (Minister of Citizenship and Immigration)* 2002 FCA 153, 26 April 2002 (five years' delay).

<sup>108</sup> UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (1992), at para. 117 (quoted in full in fn. 175 below).

1. *Evidence required to establish the existence of a ground for cancellation*

74. When determining whether an applicant meets the criteria of the refugee definition set forth in Article 1 of the 1951 Convention, adjudicators are free to evaluate and assess the information before them, within the limits of judicial control<sup>109</sup>. A mistake in the evaluation of the evidence related to the claim may give rise to cancellation. A positive determination of an applicant's eligibility for refugee protection made within the scope for evaluation provided for under the law cannot, however, be reversed simply on the basis of a subsequent change in the assessment of the same information that was before the authority at the time of the initial decision. For cancellation to be justified, there must be information which specifically shows that the determining authority erred in its original assessment of the case before it at the time.

75. Such information must establish the existence of a ground for cancellation at the time of the original assessment of the claim<sup>110</sup>. This should not be confused with information concerning a substantial change of circumstances, which may give rise to the application of a cessation clause, or activities by a refugee after recognition, which might lead to revocation on the basis of Article 1F(a) or (c) of the 1951 Convention, or justify expulsion or loss of protection against *refoulement*<sup>111</sup>.

76. For a specific cancellation ground to apply, all of its elements must be present. Thus, in cases of cancellation on the basis of fraud, it must be shown that the information presented by the applicant was objectively incorrect, related to material facts, and that there was intention to deceive (see above at paragraphs 21–32). Where an exclusion provision of the 1951 Convention is to be applied as a ground for cancellation, it must be demonstrated that all of its criteria were met at the time of the initial determination (see above at paragraph 37). If cancellation is considered on the basis of an error of law and/or fact on the part of the determining authority which constitutes a ground for reopening of a final refugee status determination under applicable national law, the existence of such an error must be established. The same applies to cancellation on the ground of misconduct by the applicant other than fraud, such as, for example, through threats or bribery.

77. In principle, any kind of information may be used as evidence. In all cases, evidence for the purpose of cancellation must be information that:

- (i) is related to material facts, that is, elements which were relied upon by the authority in reaching the decision; and
- (ii) could have supported a rejection of the claim for asylum, had they been before the determining authority at the time.

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<sup>109</sup> For example, in the United Kingdom, the courts may quash a decision taken by an administrative authority if it is "Wednesbury unreasonable" (see above at fn. 64) or otherwise *ultra vires*, or if the authority has wrongly interpreted the facts. In France, the *Conseil d'Etat* verifies that the facts have not been distorted ("*dénaturé*").

<sup>110</sup> Examples of jurisprudence which address this requirement in the case of fraud have been discussed above at paragraphs 23–26 and 29. It applies equally to other grounds on which cancellation may be based.

<sup>111</sup> See below at paragraphs 120–126.



78. An additional requirement may apply under applicable national law, according to which evidence for the purposes of cancellation must be information which was not before the original status determination authority. Such "new evidence" consists of elements which either did not exist or were not known to the authority at the time of the initial decision. The first category does not raise any difficulties: provided the evidentiary criteria set out in the previous paragraph are met, it will be open to the authority to use such new elements in cancellation proceedings. The situation is not so clear with regard to newly discovered evidence. In particular, the question arises whether an authority may be precluded from adducing as "new evidence" information that was not before the initial decision-maker, although it could have been obtained at the time. The issue was dealt with in a number of decisions reviewed for the purpose of this study.

79. In Austria, the *Verwaltungsgerichtshof* revoked a decision by the Minister to reopen a case, holding that an authority cannot cancel refugee status on the basis of information which it could have had before it but did not, because it had failed to conduct factual inquiries which would have been both feasible and reasonable, in breach of its duty to establish the correct facts of the case<sup>112</sup>. In Canada, the Federal Court held that it was open to the Minister to proceed with a vacation hearing on the basis of an intelligence report contradicting statements made by the applicant which predated the time of the initial determination but was secret and in non-releasable form then, since the Minister was unaware of the document at the time of the original hearing and was not a party at the hearing<sup>113</sup>. The Court's reasoning in this case, which concerned cancellation on the basis of Article 1F(a) of the 1951 Convention, suggests that the intelligence report would not have been admissible in the cancellation proceedings as evidence to show that the applicant made false statements at the initial determination hearing, had the Minister known of it at the time of the initial determination.

80. Thus, evidentiary requirements in place under national law for the invalidation of unlawful administrative acts may make it impossible for the authority to cancel a positive refugee status determination where its own earlier omissions preclude it from using evidence in cancellation proceedings. In principle, this would apply to all grounds for cancellation, including exclusion under Article 1F of the 1951 Convention, and even in situations where the applicant obtained refugee status through fraudulent means<sup>114</sup>.

## 2. *Burden and standard of proof*

81. As a general principle, the burden of proof lies on the person who makes an assertion. Thus, in cancellation proceedings, the onus to show that refugee status should be cancelled normally rests on the authority<sup>115</sup>. The burden of proof is reversed where the evidence is such that it creates a rebuttable presumption – in Canada, for example, this was

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<sup>112</sup> *Verwaltungsgerichtshof*, decision of 25 April 1995 (94/20/0779).

<sup>113</sup> *Thambipillai v. Canada (Minister of Citizenship and Immigration)* IMM-5279-98, 22 July 1999.

<sup>114</sup> This would not apply, for example, in Germany, where s. 48 of the Administrative Procedure Act entitles the authority to cancel its own determinations which are unlawful, including because of its own error, if the interest of the person concerned in maintaining the decision is not worthy of protection (see above at fn. 82).

<sup>115</sup> Cases where the person concerned alleges on their own initiative that a cancellation ground should apply are rare, although one such case recently occurred in Austria (see above at paragraph 59).

held to be the case where a valid passport showed that the applicant's nationality was different from what had been claimed during the determination procedure<sup>116</sup>, or where there was proof that refugee status had been granted to a person prior to the contested refugee status determination<sup>117</sup>.

82. Where the law requires an application for leave to apply for cancellation, or a request to the competent authority to open cancellation proceedings, it is usually necessary to substantiate an application for such leave with evidence. The threshold for this preliminary step of a cancellation procedure is not likely to be very high. Under the legislation in place in Canada until 28 June 2002, it was sufficient for the Minister of Citizenship and Immigration to satisfy the Chairperson of the Immigration and Refugee Board that evidence existed which, had it been known to the determining panel, could have resulted in a different determination<sup>118</sup>. In an earlier case, the Federal Court held that the minister had to establish a *prima facie* case to support an application for cancellation<sup>119</sup>.

83. In New Zealand, the RSAA held that the evidentiary threshold to be met for the RSB when applying to the RSAA for the opening of cancellation proceedings was that

"[...] the evidence in its position<sup>120</sup>, sensibly construed, could (not would) lead a reasonable decision-maker to the conclusion that the grant of refugee status may have been procured by fraud".<sup>121</sup>

The Terms of Reference then in force did not, however, impose a legal onus on the RSB to prove that there was fraud; once the threshold of the inquiry was crossed, the Authority had a duty to enquire whether the grant of refugee status was properly made<sup>122</sup>. In the USA, 8 CFR § 3.2(b)(1) provides that a motion to reconsider, by the Immigration and Naturalization

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<sup>116</sup> *Adar v. Canada (Minister of Citizenship and Immigration)* IMM-3623-96, 26 May 1997.

<sup>117</sup> RefLex 27 (Case Note 1).

<sup>118</sup> *Ofosu v. Canada (Minister of Citizenship and Immigration)* 2001 FCT 400, 27 April 2001. Under s. 69.2(2) of the Immigration Act then in force, the minister was required to seek leave from the Chairperson of the Immigration and Refugee Board to apply for cancellation of refugee status. Under the Immigration and Refugee Protection Act, in force since 28 June 2002, the Minister is no longer required to seek such leave but may apply for cancellation directly to the Refugee Protection Division.

<sup>119</sup> RefLex 43 (Case Note 24, digest of the Federal Court's decision *Canada (Minister of Citizenship and Immigration) v. Haji-Dodi*, IMM-2908-94, 29 March 1996. In this case, the Federal Court affirmed a CRDD decision to decline as unnecessary and a "fishing expedition" the minister's request to compel the applicant as a witness, allegedly to question him about Article 1E matters, where the minister had not previously presented any other evidence at the vacation hearing, and documentation filed was unsatisfactory.)

<sup>120</sup> This should probably read: "possession".

<sup>121</sup> RSAA, Refugee Appeals No. 70708/97 and 70710/97 of 17 November 1998; see also RSAA, Refugee Appeal No. 70553/97, 17 November 1998, where the threshold was found not to have been met. These decisions deal with the conditions for applications for cancellation by the RSB under Part I, para. 2(7), and Part II, para. 5(1)(d) of the Terms of Reference in force since 30 August 1993. The wording of the corresponding provisions of the Immigration Amendment Act 1999 (s. 129L(1)(f)(ii) and s. 129R(b)) is identical. No decisions could be obtained concerning cancellation grounds other than fraud, but the evidentiary threshold ought to be the same concerning the possible application of Articles 1D, 1E or 1F of the 1951 Convention.

<sup>122</sup> RSAA, Refugee Appeals Nos. 70708/97 and 70710/97 of 17 November 1998. See also below at paragraph 118.

Service (INS) or by the interested party, shall state the reasons for the motion by specifying the errors of fact or law in the prior BIA decision and shall be supported by pertinent authority. Under 8 CFR § 3.2(c), a motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material<sup>123</sup>.

84. Where the authority proceeds on the basis of its power to reopen administrative procedures *ex officio*, as is typically the case in civil law jurisdictions, the question does not arise as a preliminary matter, but lack of evidence to justify the reopening of a procedure will be subject to administrative and/or judicial control on appeal or judicial review of a cancellation decision<sup>124</sup>.

85. The standard of proof required for cancellation must at the very least be equivalent to what is required to determine refugee status. At the eligibility stage, the adjudicator must decide if, based on the evidence provided by the applicant as well as the latter's statements, it is likely that the claim of that applicant is credible. In other words, the applicant must have presented a claim which is coherent and plausible, not contradicting generally known facts, and therefore, on balance, capable of being believed<sup>125</sup>. The applicant must also show that his or her fear of persecution is well-founded, that is, reasonably possible<sup>126</sup>. Thus, cancellation may be justified only if the new evidence, had it been before the determining authority at the time, could have supported a negative finding with regard to the applicant's credibility and the well-foundedness of his or her fear of persecution for a Convention reason, or would have been sufficient to establish the existence of an exclusion ground under Article 1D, 1E or 1F of the 1951 Convention.

86. In many cases, recognition of refugee status ultimately hinges on the credibility of the information provided by applicants to support their claim of a well-founded fear of persecution. As noted above (at paragraph 74), cancellation can never be justified simply on the basis of a change of opinion on the part of the authority, which may subsequently come to assess the applicants' credibility in a different light. There must be evidence which shows that the initial determination was based on an error of fact and/or law.

87. In a decision in New Zealand, the RSAA held that it was unable to make a positive finding on the evidence before it that the appellant was a leader or even a member of a militant group and could therefore not conclude that the original grant of refugee status was obtained by fraud or false or misleading representation and thereby not properly made<sup>127</sup>. In one case in Germany, the *Verwaltungsgericht* in Osnabrück overturned a cancellation decision by the Federal Office because it could not decide, even with the assistance of an expert, whether the individuals concerned, who had been recognised as refugees on the basis

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<sup>123</sup> 8 CFR § 3.2 contains a number of requirements: thus, for example, a motion to reopen proceedings shall not be granted unless it appears to the BIA that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing.

<sup>124</sup> See, for example, the decision by the Austrian *Verwaltungsgerichtshof* of 25 April 1995 (94/20/0779), where the decision by the Minister of the Interior to reopen was quashed on error of law (see above at paragraph 79).

<sup>125</sup> See UNHCR, Note on Burden and Standard of Proof in Refugee Claims, 16 December 1998, at paras. 7–11.

<sup>126</sup> *Ibid.*, at paras. 14–17.

<sup>127</sup> RSAA, Refugee Appeal No. 71136/98 of 22 December 1998.

that they belonged to a group subjected to persecution – ethnic Albanians from Kosovo – were indeed members of that group or assimilated ethnic Roma<sup>128</sup>.

### 3. *Remaining evidence: eligibility at the time of the initial determination*

88. Apart from elements to support, or rebut, the existence of a ground for cancellation, which may constitute new evidence, the decision as to whether or not the applicant was eligible for protection as a refugee at the time of the initial determination may be based only on such information as formed part of the initial procedure<sup>129</sup>. No further evidence in support of the original claim to eligibility for refugee protection may be presented. This follows from the nature and purpose of cancellation proceedings, which essentially constitute an assessment of whether or not the initial positive refugee status determination was made correctly.

89. Even if there is (new) evidence which deprives the initial determination of part of its basis, other elements may remain, however, to sustain it. This is most likely to occur where misrepresentations or concealment affect some, but not all, of the information provided by the applicant. The authority must decide whether, despite the existence of the (new) evidence, the applicant could have been found to be a refugee at the time. In Canada, the Federal Court has held in consistent jurisprudence that evidence in support of cancellation may be used only to identify those parts of the information originally provided by the applicant which are tainted by the new evidence – these must then be removed, so that the case may be re-assessed in light of the remaining elements. The authorities are not entitled to use the new information in order to re-assess the credibility of the remaining evidence<sup>130</sup>.

90. Some cancellation clauses in national refugee legislation explicitly require the authorities to conduct an assessment of any remaining evidence. For example, under s. 73(2) of the German Asylum Act, the authority must consider whether the applicant could have been recognised for other reasons. In Canada, both the old and the new refugee legislation provide(d) for the possibility of rejecting the minister's application for cancellation of refugee status on the basis that there was "other sufficient evidence" for a positive determination of the applicant's claim<sup>131</sup>. There are numerous decisions in which the Federal Court or the CRDD addressed the question of "sufficient other evidence", finding that the remaining untainted evidence did not support a positive determination, or that after removing the evidence tainted by misrepresentation there were no elements left which had not been affected<sup>132</sup>.

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<sup>128</sup> *Verwaltungsgericht Osnabrück*, decision of 25 August 1998, 5 A 715/96.

<sup>129</sup> See, for example, the decisions in *Coomaraswamy v. Canada (Minister of Citizenship and Immigration)* 2002 FCA 153, 26 April 2002, at [17]. See also *Canada (Minister of Citizenship and Immigration) v. Ekuban*, 2001 FCT 65, at [30], where the Federal Court held that both the authority and the person whose refugee status is challenged are entitled to present evidence that was not before the original determining body to support or rebut, respectively, the contention that refugee status should be cancelled.

<sup>130</sup> *Maheswaran v. Canada (Minister of Citizenship and Immigration)* [2000] 195 F.T.R. 254; *Coomaraswamy v. Canada (Minister of Citizenship and Immigration)* 2002 FCA 153, 26 April 2002, at [27].

<sup>131</sup> s. 69.3(5) of the Immigration Act, s. 109(2) of the Immigration and Refugee Protection Act.

<sup>132</sup> In one decision, the CRDD held that the applicants' misrepresentation or concealment on the part of the applicants had the effect of foreclosing further inquiries into the *bona fides* of their claims (RefLex 129 (Case Note 20), multiple identities and fraudulent identity documents found to lead to

91. In other Canadian cases, applications for vacation were dismissed and refugee status was maintained on the basis of "sufficient other evidence". One concerned a stateless Kurd born in Lebanon who had falsely claimed to have been born in Iraq to Kurdish parents. The CRDD found that there was enough evidence before the original panel to show discrimination of Kurds in Lebanon amounting to persecution on the basis of the applicant's ethnicity and affiliation with a Kurdish political party<sup>133</sup>. In another case, the CRDD dismissed the application for vacation brought by the minister after the wife of a recognised refugee had stated that her husband had never received any death threats from fundamentalist groups. The CRDD found his explanations as to why he had said nothing to his wife plausible, logical from a cultural viewpoint and fully justified<sup>134</sup>.

92. But even without an explicit statutory obligation to consider any "remaining evidence", the authority deciding on cancellation must examine whether, despite the existence of a ground for cancellation, the applicant could have been found to be a refugee by the initial decision-maker on the basis of the information before him or her at the time. A rejection of the original claim in situations where "remaining evidence" would suffice to support the finding that the applicant was in need, and deserving of, protection as a refugee would be at variance with the 1951 Convention.

93. The need to examine any "remaining evidence" is different from the question of whether or not the procedure should include an examination of eligibility for refugee protection at the time of the cancellation proceedings, which will be discussed below at paragraphs 117–119.

#### **D. Cancellation: Mandatory or Discretionary?**

94. Cancellation clauses in national refugee and general administrative legislation often provide for the exercise of discretion on the part of the authorities, with regard to initiating cancellation proceedings as well as the decision to cancel as such<sup>135</sup>.

95. This means that the authorities may decide, upon consideration of all relevant facts of a case, not to open cancellation proceedings despite the existence of new evidence, or to maintain refugee status, even if it ought not to have been granted in the first place. Whether or not this is the appropriate decision in a given situation depends on the circumstances. Elements such as the length of the person's stay in the country, their social and economic

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complete lack of credibility). In another case, the Federal Court found that the false information before it had prevented the original panel from thoroughly assessing whether an applicant fell within the exclusion provisions the 1951 Convention (*Aleman v. Canada (Minister of Citizenship and Immigration)* 2002 FCT 710, 25 June 2002, at [35]).

<sup>133</sup> RefLex 138 (Case Note 14).

<sup>134</sup> RefLex 128 (Case Note 10). By contrast, the statements made by the wife of another refugee when interviewed in the course of a permanent residence application to the effect that her husband had not had any difficulties with the authorities were taken as the basis to vacate his status (RefLex 128 (Case Note 15)).

<sup>135</sup> Among the countries reviewed for the purpose of this paper, cancellation is discretionary in Australia, Canada, New Zealand, United Kingdom and the United States of America. In others, cancellation is discretionary with regard to some cancellation grounds, mandatory in respect of others (usually fraud or criminal conduct). This is the case, for example, in Austria, Germany and the Slovak Republic.

situation and the degree of integration, their criminal record (or absence thereof), potential hardship which may be caused by a decision to cancel, must all be taken into account. In Germany, the *Bundesverwaltungsgericht* addressed the requirements for cancellation of refugee status under s. 48 of the Administrative Procedure Act, a provision which requires the authorities to exercise discretion, and held that every time the authority becomes aware that a decision is unlawful, it has a wide scope of discretion to determine whether it will initiate withdrawal proceedings, and that it must always ponder whether the effect of the withdrawal should be *ex nunc* or *ex tunc*<sup>136</sup>.

96. As noted above (at paragraph 46), the authorities must use their discretion lawfully, and in keeping with the purposes for which it was conferred. This includes the duty to exercise discretion when required. Thus, in Canada, the Federal Court held that the CRDD was not to allow an application for cancellation without first determining whether it ought, in the circumstances, to exercise the discretion conferred upon it by s. 69.3(5) of the Immigration Act<sup>137</sup>.

97. In some countries, once certain grounds – usually fraud – are established, cancellation is mandatory<sup>138</sup>. As noted above with regard to the use of false documents<sup>139</sup>, provisions for mandatory cancellation of refugee status should be avoided. From a protection perspective, cancellation clauses whereby the authorities are entitled, and required, to exercise discretion, and therefore have a duty to consider all relevant circumstances of a case, are clearly the better practice.

98. National legislation may also provide for a mandatory re-examination of positive refugee status determinations after a certain period of time<sup>140</sup>. A statutory obligation to

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<sup>136</sup> *Bundesverwaltungsgericht*, decision of 19 September 2000 (9 C 12/00). By contrast, if it is established that an applicant obtained refugee status through misrepresentation or concealment of material facts, and if there are no other grounds to recognise him or her, cancellation is mandatory under s. 73(2) of the Asylum Procedure Act.

<sup>137</sup> RefLex 40 (Case Note 47, digest of the Federal Court's decision in *Minister for Citizenship and Immigration v. Mahdi*, where the evidence before the original panel did not support the application of Article 1E of the 1951 Convention, due to a serious possibility that the United States of America would no longer recognise the applicant as a permanent resident); *Thambipillai v. Canada (Minister of Citizenship and Immigration)* IMM-5279-98, 22 July 1999, at [15]. In *Thambipillai* and in *Aleman v. Canada (Minister of Citizenship and Immigration)* 2002 FCT 710, 25 June 2002, both concerning cancellation on the basis of Article 1F of the 1951 Convention, the Federal Court found that the panel was not required to exercise its discretion under s. 69.3(5), as the exclusion clauses had taken the applicant outside the realm of the 1951 Convention and the panel did not need to consider the inclusion aspects of their claims. See also above at paragraph 37.

<sup>138</sup> For example, Austria: s. 69(1)1. of the General Administrative Procedure Act; Germany: s. 73(2) of the Asylum Act; former Yugoslav Republic of Macedonia: s. 47 of the Act on Movement and Residence of Aliens; Moldova: s. 35 of the Law on Refugee Status; Slovak Republic: s.15(2) of the Asylum Law, in force as of 1 January 2003; Switzerland: ss. 63(1) and (2) of the Asylum Act.

<sup>139</sup> See above at paragraph 31.

<sup>140</sup> This was planned in Germany, where new legislation scheduled to enter into force on 1 January 2003 was to introduce a mandatory examination, after three years, of all positive refugee status determinations, to establish whether the conditions for cancellation on the basis of incorrect information or concealment of essential facts are met and the person concerned could not be recognised on other grounds (s. 73(2a) of the Asylum Act, with reference to both s. 73(1) (concerning cessation) and s. 73(2) (concerning cancellation) of the same law). Under s. 26(3) of the new *Aufenthaltsgesetz* (Residence Act), refugees whose status was confirmed by the Federal Office

check after a certain time whether the initial decision was correct is not of itself contrary to legal principles applicable to cancellation. Whether it is appropriate, however, may be questioned. While they could not lower the legal threshold for the cancellation of refugee status, mandatory review provisions would nevertheless raise protection concerns, as they may increase the risk of a general perception of asylum-seekers and refugees as "bogus"<sup>141</sup>.

99. Moreover, practical constraints are likely to lead to a need for pre-selecting cancellation examinations on the basis of nationality or other criteria. Although it is difficult to argue that someone whose refugee status was wrongly granted in the first place, and should therefore be cancelled, would be prejudiced by the fact that others might escape scrutiny, it is particularly important to avoid a situation which might result in a less than objective evaluation of refugee status granted to persons belonging to a particular category. As the Commission of the European Union has noted, a re-examination of "closed files" of persons granted refugee status could be considered by Member States, but such a measure "should only be taken if there is a clear inducement for doing so, for instance based upon intelligence services information, identifying security risks. A review of cases based solely on the grounds of nationality, religion or political opinion is not considered appropriate"<sup>142</sup>. Similar considerations apply to initiatives aimed at reviewing applications for asylum to identify those applicants who may have links to international terrorist groups.

#### **E. Cancellation Procedure: Safeguards and Guarantees**

100. The rules of procedural fairness apply to all administrative proceedings<sup>143</sup>. As a guiding principle, the more important the rights and interests at stake, the stronger the person's claim to more exacting procedures and to a high level of accuracy and propriety in applying the standards<sup>144</sup>. In procedures which concern the recognition of refugee status, or its cancellation, the stakes are particularly high, as they determine the applicant's claim to protection against *refoulement* under the 1951 Convention. The obligation to provide access to fair and efficient procedures for the determination of refugee status flows from the right to seek asylum under Article 14 of the 1948 Universal Declaration of Human Rights and, for States Parties to the 1951 Convention and its 1967 Protocol, from their obligation to fulfil

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in the course of this mandatory examination were to be automatically issued a permanent residence permit. However, on 18 December 2002, the *Bundesverfassungsgericht* (Federal Constitutional Court) declared the new law to be void, on the grounds that it had not been adopted in accordance with the procedural requirements of the constitution (2 BvF 1/02, 18.12.2002).

<sup>141</sup> Such provisions would also have a negative impact on the ability of the individuals affected to resume their lives on a stable and secure basis.

<sup>142</sup> See the Commission's working document on the relationship between safeguarding internal security and complying with international protection obligations and instruments, COM(2001) 743 final, 5 December 2001, at p. 8.

<sup>143</sup> As noted by D.J. Galligan, *Due Process and Fair Procedures, A Study of Administrative Procedures*, Clarendon Press, Oxford (1996), at p. 316, "the duty to provide fair procedures comes into play whenever a person is affected by an administrative process". The general principle of procedural fairness is fundamental to any legal system. In common law systems, procedural fairness overlaps with and draws from the concepts of natural justice and due process, while in the civil law tradition, general principles of fairness have long been recognised as fundamental to both civil and criminal proceedings. See also M. Bliss, above at fn. 59, at pp. 93–94.

<sup>144</sup> See D.J. Galligan, above at fn. 143, at p. 250.

their treaty obligations in good faith<sup>145</sup>. The need to provide minimum standards of fairness has been repeatedly highlighted by UNHCR<sup>146</sup> as well as States<sup>147</sup>. The most important aspects with regard to cancellation are considered here.

101. First, cancellation may only be decided on an individual basis<sup>148</sup>. This also applies where the original status determination was made as part of an expedited process, during which the circumstances of the individual case may not have been fully examined, or where members of a particular group were recognised as refugees on a *prima facie* basis. The existence of grounds which would render cancellation lawful and appropriate, for example in cases where a person is later found not to have met the criteria on which a *prima facie* recognition was based, must be established for each individual case.

102. Procedural fairness requires that persons whose refugee status may be cancelled be informed of the nature of the proceedings and of the evidence in support of the proposed cancellation. They must also be given an opportunity to make submissions and to rebut any evidence suggesting that refugee status should not have been granted. The assistance of an interpreter must be provided if the proceedings are conducted in a language that the applicant does not understand. Access to counsel should be permitted.

103. There should always be a hearing as part of the cancellation procedure. A recognised refugee whose status may be withdrawn must be given full opportunity to enter into the substance of the case. Notice of the hearing must be given in time to allow for preparation.

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<sup>145</sup> See M. Bliss, above at fn. 59, at pp. 94–96, with reference to UNHCR, Note on International Protection, UN doc. A/AC.96/898, 3 July 1998, at para. 15, and applicable international and regional human rights instruments.

<sup>146</sup> See, for example, UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status (1992), at para. 192; UNHCR, Asylum Processes (Fair and Efficient Asylum Procedures), UN doc. EC/GC/01/12, 31 May 2001.

<sup>147</sup> See, in particular, Executive Committee, Conclusion No. 8 (XXVIII) 1977, on the determination of refugee status (UN doc. A/AC.96/549); see also Council of the European Union, Resolution on Minimum Guarantees for Asylum Procedures, 21 June 1995), and the European Commission's Amended Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, COM(2002) 326 final/2, 16 June 2002. The latter is the first EU asylum policy instrument which explicitly refers to cancellation (termed "annulment" under the proposed Directive).

<sup>148</sup> This is recognised, for example, in Article 10 of the amended proposal for a EU Council Directive on minimum procedures for granting and withdrawing refugee status. Article 37 provides that annulment of refugee status shall be examined under the regular procedure, which provides for an individual interview. However, Article 37(2) of the amended proposal provides that Member States may derogate from the procedural guarantees set out in Articles 9–12 when it is technically impossible for the competent authority to comply with the guarantees of those Articles (including the right to be informed, assistance of an interpreter, notification within reasonable time, and the right to a personal interview). In its comments concerning a similar provision in the original Proposal, the EU Commission had specified that these exceptions would apply when the person in question had voluntarily re-established himself in the country where persecution was feared (see EU Proposal for a Council Directive on minimum procedures in Member States for granting and withdrawing refugee status, COM(2000) 578 final/2, 2000/0238 (CNS) of 20 November 2000 and the amended proposal COM(2002) 326 final of 3 July 2002). In its analysis of the 2000 Proposal, the Immigration Law Practitioners' Association (ILPA) noted that this, as well as other safeguards referred to by the Commission in its comments (see above at ...), should be included explicitly in the Directive. See ILPA Analysis of January 2001, available at <http://www.statewatch.org/semidocfree/legobs1B1.html>.



104. The right to appeal or seek review of decisions whereby refugee status is cancelled is essential to fair procedures. As with rejection of a claim for refugee status, denial of a right to appeal where refugee status is cancelled after it is found to have been unduly granted in the first place would amount to a denial of a basic guarantee of procedural and substantive due process<sup>149</sup>. The appeal must also have suspensive effect: in other words, refugee status must be maintained until a cancellation decision becomes final.

105. In cancellation cases on the basis of an exclusion ground under Article 1F of the 1951 Convention, all exclusion-related procedural guarantees must be respected<sup>150</sup>.

106. In the countries reviewed here, detailed procedural rules and regulations are in place, and most of the procedural requirements listed above are provided for. For the purpose of this paper, it was not possible to conduct an in-depth examination of how these procedural guarantees and safeguards are implemented in cancellation cases.

107. A number of decisions obtained deal specifically with procedural questions in cancellation proceedings. In Canada, the Supreme Court held in *Baker v Canada*<sup>151</sup>, a decision which deals with the question of procedural fairness in immigration proceedings, that the fact that an administrative decision affects the rights, privileges or interests of an individual is sufficient to trigger the application of the duty of fairness. The Supreme Court further held that the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case. All of the circumstances must be considered in order to determine the content of the duty of procedural fairness. The Supreme Court's decision in *Baker v Canada* is referred to in a number of decisions by the Federal Court and the CRDD dealing with cancellation proceedings.

108. On the issue of procedural rights at the hearing, the Federal Court of Canada held that grant of leave to bring an application for cancellation under s. 69.2(2) of the Immigration Act then in force triggered a full application hearing and all of the procedural guarantees associated with it, including the opportunity for the applicant to present full legal submissions at the hearing and, at the end of the hearing the opportunity to seek leave to bring an application for judicial review of a negative decision, should it arise<sup>152</sup>. In another decision, the Federal Court held that the applicant, who objected to the CRDD's use of declarations introduced as evidence by the minister, was under no obligation to provide rebuttal evidence prior to the hearing but was free to seek cross-examination of the declarants at the hearing<sup>153</sup>.

109. Some Canadian decisions also concern the requirement for the authorities to notify the person concerned of their intention to initiate cancellation proceedings. The CRDD

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<sup>149</sup> See UNHCR, Note on International Protection, UN doc. A/AC.96/777, 9 September 1991, at para. 20.

<sup>150</sup> See the study on Exclusion from Protection by the Lawyers Committee for Human Rights, the findings of which are contained in 12 *IJRL Special Supplementary Issue on Exclusion* (2000), and, particularly with regard to procedural fairness: M. Bliss, above at fn. 59, at pp. 92–132.

<sup>151</sup> *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R., 4 November 1999.

<sup>152</sup> *Ofosu v. Canada (Minister of Citizenship and Immigration)* 2001 FCT 400, 27 April 2001.

<sup>153</sup> RefLex 43 (Case Note 24, digest of *Minister of Citizenship and Immigration v. Haji-Dodi*, 15 May 1996. In the event, the claimant had not requested such cross-examination at the hearing and the CRDD was found not to have been obliged to obtain cross-examination before deciding upon the admission and weight of the evidence.)

dismissed an application for cancellation by the Minister where the latter had not made satisfactory efforts to give notice to a refugee who was in Norway<sup>154</sup>. By contrast, in other cases where the Minister was unable to notify the interested persons but had made reasonable efforts to locate them, the application was allowed and refugee status cancelled *in absentia*<sup>155</sup>. In Austria, the *Verwaltungsgerichtshof* also held that the Minister had a duty to inform the applicant that he intended to revoke refugee status and give him an opportunity to show that the grounds for deprivation of status did not apply<sup>156</sup>.

110. In Germany, however, most cancellation cases are reportedly decided without a hearing, although s. 28 of the Administrative Procedure Act provides for the possibility of submitting a written statement within one month, starting with the official notification by the asylum authorities of the intention to open cancellation proceedings<sup>157</sup>.

## F. Decision to Cancel – Consequences of Cancellation

111. Cancellation invalidates a faulty refugee status determination, with effect *ab initio*. The original recognition of refugee status is deemed never to have been made: the person was not a refugee at the time of the original status determination<sup>158</sup>.

112. In principle, loss of refugee status means that those affected are subject to the legal provisions governing the presence of aliens in the country in question<sup>159</sup>. In some cases, their presence in the country continues to be legal on the basis of a permit authorising residence or stay. Cancellation of refugee status does not necessarily mean loss of such other status. In Germany, for example, the person concerned generally remains in possession of their residence permit, which may only be withdrawn by the aliens authorities in a separate procedure, having regard to all circumstances of the individual case<sup>160</sup>. As part of cancellation proceedings, the Federal Office is competent to decide whether or not the individual concerned is eligible for protection against deportation under the Aliens Act<sup>161</sup>. In

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<sup>154</sup> RefLex 122 (Case Note 14); RefLex 134 (Case Note 20).

<sup>155</sup> RefLex 107 (Case Note 22); RefLex 133 (Case Note 28).

<sup>156</sup> Austria: *Verwaltungsgerichtshof*, decision of 6 March 1996 (95/20/0133).

<sup>157</sup> The notification letter briefly refers to the reasons for reconsideration of refugee status. In practice, the possibility of a written submission is not often used, and very few applicants ask to be heard in person (information provided by UNHCR).

<sup>158</sup> In Canada, the Federal Court expressly recognised that the CRDD's power to vacate refugee status under s. 69.2(2) of the Immigration Act then in force included its jurisdiction to determine, where the evidence was not sufficient to maintain a finding of refugee status, that the applicant was not a Convention refugee at the time of the initial decision (*Bayat v. Canada (Minister for Citizenship and Immigration)* [1999] 4 FC 343).

<sup>159</sup> G.S. Goodwin-Gill, above at fn. 15, at p. 371, notes that refugees whose status ceases, and who then become subject to the ordinary law governing the residence of foreign nationals, are entitled to the same standards of treatment, including the right not to be arbitrarily expelled, which includes, *inter alia*, that "the foreign national's 'legitimate expectations' be taken into account, including such 'acquired rights' as may derive from long residence and establishment, business, marriage, and local integration".

<sup>160</sup> ss. 43–48 of the Aliens Act apply.

<sup>161</sup> This was confirmed by the *Bundesverwaltungsgericht* in its decision of 20 April 1999 (9 C 30.98). S. 51(1) of the Aliens Act provides for protection against deportation to a country where a person's life or physical integrity would be at risk on account of his or her race, religion, nationality, membership of a particular social group or political opinion. Under s. 53 of the Aliens Act, an alien is protected from deportation if (1) he or she would face an individual danger of being tortured upon

Austria, the authority which decides to cancel refugee status on the grounds of Article 1F of the 1951 Convention is also required to state whether there are legal obstacles to the forcible return or deportation of the person concerned to his or her country of origin<sup>162</sup>. If such legal obstacles exist, he or she will be granted protection against *refoulement* under s. 8 of the Asylum Act and issued a temporary residence permit according to s. 15 of the Asylum Act. The refugee law of Belarus provides for protection against *non-refoulement* including for persons who have been deprived of refugee status<sup>163</sup>.

113. Elsewhere, persons whose refugee status is cancelled are immediately liable to removal. Thus, for example, in the United Kingdom, an alien whose leave to enter or remain was cancelled on the basis of fraud is liable to removal as an illegal immigrant<sup>164</sup>. Depending on the country, possibilities to seek a stay of removal may, or may not, apply. Under the Canadian refugee legislation in force since June 2002, such claims may be made under the procedure termed "pre-removal risk assessment"<sup>165</sup>.

114. It is of course open to States to grant legal status on humanitarian or other grounds to a person whose refugee status has been cancelled. In Spain, this possibility is explicitly mentioned as part of the cancellation clauses in national refugee law<sup>166</sup>. Moreover, it is worth noting that national legislation usually provides for the possibility of granting compensation to individuals affected by the cancellation of an administrative decision. Under certain conditions – particularly where an individual's interest in maintaining an administrative decision is worthy of protection – States may be under an obligation to provide adequate compensation<sup>167</sup>.

115. Whether or not a person is recognised as a refugee under the 1951 Convention, he or she is protected against *refoulement* under international human rights instruments. Pursuant to Article 3 of the UN Convention Against Torture, it is not permitted to expel, return or extradite a person to another country if this would expose them to a risk of torture. In such cases, the principle of *non-refoulement* is absolute and non-derogable. It applies irrespective of the conduct of the individual concerned and is not forfeited where an individual engaged in excludable activities, or obtained refugee status through fraudulent means<sup>168</sup>.

116. Cancellation of refugee status regularly results in the cancellation, as a consequence, of derivative refugee status, particularly that of family members. In such cases, however, it

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return; (2) he or she would be prosecuted for having committed a crime which is sanctioned with the death penalty; (4) if the deportation is contrary to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms or (6) if the applicant would face a serious and individual threat to his/her life, physical integrity or freedom.

<sup>162</sup> s. 14(3) of the Asylum Act.

<sup>163</sup> s. 15(1) of the Law on the Introduction of Alterations and Amendments to the Law of the Republic of Belarus on Refugees 1999.

<sup>164</sup> Under ss. 10(1)(b) and 10(8) of the Immigration and Asylum Act 1999.

<sup>165</sup> ss. 112–115 of the Immigration and Refugee Protection Act.

<sup>166</sup> See s. 20(2) of the Law No. 5/1984 of 26 March 1984.

<sup>167</sup> For example, in Germany: s. 48(3) of the Administrative Procedure Act.

<sup>168</sup> Article 7 of the 1966 International Covenant on Civil and Political Rights, Article 3 of the 1950 European Convention on Human Rights and Article 5 of the 1969 American Convention on Human Rights also protect individuals against *refoulement* where they would face a risk of torture in the receiving country. See E. Lauterpacht & D. Bethlehem, "The scope and content of the principle of *non-refoulement*", in: E. Feller, V. Türk and F. Nicholson, above at fn. 59. See paras. 125-126 below for discussion of expulsion and exceptions to the principle of *non-refoulement*.

is generally accepted that those concerned must be given an opportunity to show that they should be recognised as refugees in their own right.

117. In most of the countries reviewed for the purpose of this paper, cancellation proceedings do not include a determination of whether the person concerned is a refugee at the time of cancellation. In Canada, the Federal Court has explicitly rejected the cancelling authority's power to make such a determination. It has consistently held that a person is not entitled to an examination of evidence relating to their need for refugee protection at the time of the vacation proceedings. Such evidence is not admissible. Rather, if the person concerned has a well-founded fear of persecution at the time of cancellation, he or she must present a fresh claim for refugee protection<sup>169</sup>.

118. By contrast, under s. 73(2) of the German Asylum Procedure Act, the authorities must examine whether a person who obtained recognition as refugee through misrepresentations or concealment of material facts has a current well-founded fear of persecution on other grounds<sup>170</sup>. In New Zealand, cancellation proceedings also include an assessment of the existence of a well-founded fear of persecution at the time of cancellation. Once the initial threshold is crossed, the RSAA considers itself to be

"[...] under a duty to enquire whether the grant of refugee status was properly made. In making that assessment, it will need to take into account all the relevant evidence, whether or not it was in existence or available at the time of the original appeal hearing. Changed circumstances in the country of origin will also be a mandatory consideration. All this is no more than a consequence of the settled principle that the relevant date for the assessment of refugee status is the date of determination".<sup>171</sup>

In an earlier decision, the RSAA had held that

"[...] notwithstanding the fraud, forgery, false or misleading representation or concealment of relevant information, the individual may nevertheless possess (on the true facts) a well-founded fear of persecution for a Convention reason and therefore be entitled to retain the grant of refugee status".<sup>172</sup>

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<sup>169</sup> *Ray v. Canada (Minister of Citizenship and Immigration)* IMM-2818-99, 9 June 2000. According to this decision, an entitlement to a new hearing would be "inconsistent with the scheme of the [Immigration] Act. A failed claimant who told the truth is not entitled to another hearing. Clearly the scheme of the Act is not to give more rights to a party who has misrepresented material facts". [14]. This decision was cited subsequently by the Federal Court as "closing the door on the right to a fresh hearing, *Annalingam v. Canada (Minister of Citizenship and Immigration)* 2002 FCA 281, 3 July 2002, at [12]. See also *Coomaraswamy v. Canada (Minister of Citizenship and Immigration)* 2002 FCA 153, 26 April 2002, at [15]: "Any possible doubt about the interpretation of subsection 69.3(5) is resolved by asking what legislative purpose would be served by affording to claimants who succeed in deceiving the Board an opportunity to submit additional evidence in an attempt to prove *de novo* at the vacation hearing that their claims were genuine. No such opportunity is available to either truthful or deceptive claimants whose claims for refugee status are dismissed."

<sup>170</sup> This was affirmed, for example, by the *Verwaltungsgericht* Wiesbaden, decision of 9 December 1999, 5 E 30126/98.A(2).

<sup>171</sup> RSAA, Refugee Appeals Nos. 70708/97 and 70710/97 of 17 November 1998, with reference to RSAA, Refugee Appeal No. 70366/96 of 22 September 1997.

<sup>172</sup> RSAA, Refugee Appeal No. 522/92, 21 November 1995.

119. Cancellation of refugee status does not preclude a subsequent claim for recognition as refugee under the 1951 Convention, if its eligibility criteria are met.

### **G. Cancellation vs. Cessation, Revocation, Expulsion and Exceptions to the Principle of *non-refoulement***

120. Although the 1951 Convention does not contain cancellation provisions, cancellation of refugee status which should not have been granted in the first place is in keeping with its object and purpose, if the legal criteria and requirements applicable to the invalidation of flawed administrative or judicial decisions are met. As noted above<sup>173</sup>, cancellation must be distinguished from the ending of refugee protection with effect for the future (*ex nunc*), which is provided for under the 1951 Convention only in two sets of circumstances:

- (i) where one of its cessation clauses applies, or
- (ii) where a refugee engages in conduct which brings him or her within the scope of Article 1F(a) or (c).

The Convention does not, however, envisage the revocation of refugee status where a recognised refugee falls within the scope of Article 32 or 33(2), which set out the conditions, respectively, in which the expulsion of a refugee, or even his or her return to the country of origin, may be permitted, provided there are appropriate safeguards in place.

#### *1. Cessation and revocation*

121. The 1951 Convention permits the ending of refugee status if the conditions for cessation under Article 1C (1-6)<sup>174</sup> are met, either on the basis of certain voluntary acts of the individual concerned, or because of a significant change in the circumstances in the country of origin. This is not the same as cancellation: cessation applies where the basis on which refugee status was granted no longer exists and protection is therefore no longer

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<sup>173</sup> See above at paragraph 5.

<sup>174</sup> Article 1C of the 1951 Convention: "This Convention shall cease to apply to any person falling under the terms of section A if:

- (1) He has voluntarily re-availed himself of the protection of the country of his nationality; or
- (2) Having lost his nationality, he has voluntarily re-acquired it; or
- (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
- (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution;
- (5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under Section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

- (6) Being a person who has no nationality he is, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;

Provided that this paragraph shall not apply to a refugee falling under section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence."

necessary or justified. The validity of the original positive refugee status determination is not contested, and the effect of cessation is only for the future (*ex nunc*)<sup>175</sup>.

122. The cessation clauses of Article 1C are an exhaustive list of grounds on the basis of which refugee status may be terminated because it is no longer needed or justified. The only other circumstances in which refugee status may be ended *ex nunc*, in keeping with the 1951 Convention, is its revocation where the exclusion clauses of Article 1F(a) or (c) apply to the conduct of a refugee. This, too, is different from cancellation: excludable acts committed by a person subsequent to the granting of refugee status do not affect his or her eligibility for refugee protection at the time of the initial determination. They cannot, therefore, constitute a ground for invalidating refugee status *ab initio*.

123. A number of countries provide for the revocation of refugee status if a refugee engages in conduct which comes within the scope of one of the exclusion clauses of Article 1F of the 1951 Convention<sup>176</sup>. In the case of Article 1F(b), which provides for exclusion in cases where there are "serious reasons for considering that a person has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee", revocation of refugee status for such acts, when committed after recognition, plainly contradicts the 1951 Convention. This was confirmed, for example, by the US Board of Immigration Appeals, which held that an applicant's conviction for burglary in the United States of America after having been admitted as a refugee does not provide a basis for terminating his refugee status under § 207 of the Immigration and Nationality Act<sup>177</sup>. In France, the decision *Rajkumar* of the *Conseil d'Etat* also made it clear that crimes committed on the territory of the host State could not justify denial of refugee status on the basis of Article 1F(b)<sup>178</sup>.

124. The remaining two exclusion clauses of Article 1F are not explicitly limited to acts committed before refugee status was granted or outside the host country. Article 1F(a) applies to crimes against peace, war crimes and crimes against humanity, and Article 1F(c) to acts contrary to the purposes and principles of the United Nations, regardless of when or where they are committed. These provisions may, therefore, form the basis for revocation of refugee status, if all the criteria for their application are met<sup>179</sup>.

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<sup>175</sup> The difference between the two concepts is addressed in para. 117 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (1992): "Article 1C does not deal with the cancellation of refugee status. Circumstances may, however, come to light that indicate that a person should never have been recognised as a refugee in the first place; e.g., if it subsequently appears that refugee status was obtained by a misrepresentation of material facts, or that the person concerned possesses another nationality, or that one of the exclusion clauses would have applied to him had all the relevant facts been known. In such cases, the decision by which he was determined to be a refugee will normally be cancelled."

<sup>176</sup> For example, Austria: s. 14 (1) 4 of the Asylum Act; former Yugoslav Republic of Macedonia: s. 47(1) of the Act on Movement and Residence of Aliens 1992 (covering acts falling within the scope of Article 1F(a) and (c) of the 1951 Convention); Moldova: s. 35(b) of the Law of Refugee Status, in force as of 1 January 2003; Slovak Republic: s.15(2)(h) of the Asylum Law, in force as of 1 January 2003; Spain: s. 20(1)(b) of the Law No. 5/1984 of 26 March 1984.

<sup>177</sup> *García-Alzugaray*, 19 I & N Dec. 407 (BIA 1986), 25 August 1986.

<sup>178</sup> *Conseil d'Etat*, 28 September 1998, *Rajkumar*.

<sup>179</sup> It should be noted that Article 1F(c), which is vague both with regard to the acts covered and its personal scope, should be applied very restrictively. Concerns may arise, in particular, where States propose to rely widely on Article 1F(c). See G. Gilbert, above at fn. 59.

## 2. *Expulsion and exceptions to the principle of non-refoulement*

125. Refugee protection which was validly granted can be lawfully ended only under the conditions enumerated in the cessation clauses of Article 1C, or on the basis of Article 1F(a) or (c) of the 1951 Convention. Yet in a number of countries, national legislation enables the authorities to order the withdrawal of refugee status in ways which are not provided for in the 1951 Convention. Sometimes referred to as "cancellation", the effect of such decisions is generally to terminate refugee protection *ex nunc*, thus expanding the grounds for cessation or revocation of refugee status beyond those foreseen in Article 1C and Article 1F(a) and (c) of the 1951 Convention. In many instances, this applies to situations which, under the 1951 Convention, should rather be dealt with pursuant to its provisions on expulsion or on exceptions to the principle of *non-refoulement*, neither of which foresees the loss of refugee status<sup>180</sup>.

126. Pursuant to Article 32 of the 1951 Convention<sup>181</sup>, a State may exceptionally be justified in expelling a refugee on grounds of national security or public order, but refugee

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<sup>180</sup> For example: Australia: ss. 116(1), 500A and 501 of the Migration Act (all providing for cancellation of protection visa, *inter alia*, on security grounds) and, in particular, s. 502(1) of the Migration Act (specifically providing for cancellation of protection visa on the grounds of Article 32 or 33(2) of the 1951 Convention); Austria: s. 14 (1)5 of the Asylum Act ("deprivation of refugee status" if a refugee constitutes a danger to the security of the Republic or has been convicted by a court of a particularly serious crime); Belarus: s. 14(2)b. of the Law on the Introduction of Alterations and Amendments to the Law of the Republic of Belarus on Refugees 1999 ("deprivation" of refugee status if an alien presents a threat to national security, public order, and the health of the people); former Yugoslav Republic of Macedonia: s. 47(2) and (3) of the Act on Movement and Residence of Aliens (loss of refugee status "due to reasons regarding protection of security and defence of the Republic of Macedonia"); Moldova: s. 35(b) of the Law on Refugee Status, in force as of 1 January 2003 (cancellation if, after being granted refugee status, the alien is a threat to national security and/or public, given his behaviour or membership of a particular organisation or group); Russian Federation: s. 9(2)(1) of the Federal Law on Amendments and Additions to the Law of the Russian Federation "On Refugees" (deprivation of refugee status if a person has been convicted by an effective court sentence for a crime committed in the territory of the Russian Federation); Spain: s. 20(1)(b) of the Law No. 5/1984 of 26 March 1984 (revocation of refugee status where Article 33(2) of the 1951 Convention is applicable); United Kingdom: directions for removal under ss. 3(5) and 3(6) of the Immigration Act 1971, and under s. 22(2)(i) of the Anti-Terrorism, Crime and Security Act 2001, which have the effect of curtailing indefinite leave to remain; United States of America: termination of asylum pursuant to INA § 208(b)(2)(ii) (the alien, having been convicted of a particularly serious crime, constitutes a danger to the security of the USA); (iv) (reasonable grounds for regarding an alien as a danger to the security of the USA) and (v) (certain terrorism-related grounds). A number of other countries have referred to the possibility of revoking refugee status in circumstances which may come within the scope of Article 33(2) of the 1951 Convention in their reports to the committee established pursuant to Security Council resolution 1373 (2001) of 28 September 2001 (the so-called "Counter-Terrorism Committee"), including Brazil, Croatia, the Czech Republic, Ireland, Jordan, Latvia, Sudan, Ukraine and Uruguay. See the reports available at <http://www.un.org/Docs/sc/committees/1373>.

<sup>181</sup> Article 32 – Expulsion:

"1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for

status remains intact, as does the principle of *non-refoulement*. The latter may cease to apply only under the strict conditions set forth in Article 33(2)<sup>182</sup>, but even then, the 1951 Convention does not provide for either cessation or cancellation of refugee status. In France, this was recognised by the *Conseil d'Etat* in its decision *Pham*, which ended the practice whereby the French authorities had applied Article 33(2) of the 1951 Convention as the basis for withdrawing refugee status from refugees who had committed a crime on French territory<sup>183</sup>.

### III. CANCELLATION OF REFUGEE STATUS DETERMINED BY UNHCR UNDER ITS STATUTE

127. The issue of cancellation also arises where a person was determined to be a "mandate refugee" by UNHCR under its Statute and information later comes to light that indicates that he or she did not qualify for such status in the first place. In practice, this has been the case, for example, when doubts about a mandate refugee recognition were raised by a State in the context of resettlement proceedings<sup>184</sup>. UNHCR has also been faced with cancellation issues in some cases where mandate refugees later applied to a State for recognition as Convention refugees and were found to be excludable or, on one occasion, because the country of origin issued an extradition request concerning a person recognised as mandate refugee<sup>185</sup>. Other typical situations in which cancellation issues may come to the fore are similar to those found in State practice, including, for example, statements by family members which contradict with the representations made earlier by an applicant.

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the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary."

<sup>182</sup> Article 33. - Prohibition of expulsion or return ("*refoulement*"):

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

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 is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."

See paragraph 115 above for discussion of *non-refoulement* as protected by international human rights and refugee law.

<sup>183</sup> *Conseil d'Etat*, 21 May 1997.

<sup>184</sup> G.S. Goodwin-Gill, above at fn. 15, at p. 34, states: "Occasionally, access to national refugee resettlement programmes may be conditional upon certification by the UNHCR in the country of first admission that the individuals in question fall within the mandate of the High Commissioner." He also notes that "UNHCR's determination operates as a filter in such cases, although the final decisions on both status and acceptance are increasingly taken by governments themselves." *Ibid.*, at fn.14

<sup>185</sup> It is worth noting that such an extradition request may trigger cancellation considerations, but it should not of itself be regarded as sufficient to establish the existence of a cancellation ground. In the case in question, it was subsequently established that the applicant was under investigation by the International Criminal Tribunal for Rwanda, though no indictment had been issued.



128. The UNHCR Statute does not contain cancellation provisions<sup>186</sup>. Thus, as with cancellation of refugee status granted under the 1951 Convention, the conditions in which a decision to invalidate mandate refugee status *ab initio* is lawful and appropriate must be derived from general legal standards.

129. In principle, the legal criteria and requirements for the cancellation of mandate refugee status are the same as those which apply to States' determinations under the 1951 Convention: for cancellation to be justified, a ground for the invalidation of the original decision must exist. That is, the initial determination must have been wrongly made. The error in granting mandate refugee status to a person who did not meet the eligibility criteria of the Statute may be attributable to fraudulent conduct on the part of the applicant, or to UNHCR. There must be evidence relating to facts which were relevant for the original determination, and specifically showing why the latter was erroneous. Like States, UNHCR is bound the principle of proportionality as well as by the responsibility to provide fair and efficient procedures, both for the determination of refugee status and, where necessary, for its cancellation.

130. There are, however, also significant legal and practical differences between UNHCR's mandate refugee status determinations and States' decisions to grant refugee status under the 1951 Convention.

131. Firstly, the legal effect of determination of refugee status by UNHCR is not the same as that of a State. A recognition by a State that a person is a refugee under the 1951 Convention is not only binding on the authorities of the country concerned but also extraterritorially, at the very least with respect to other States parties to the 1951 Convention<sup>187</sup>. Mandate refugee recognition by UNHCR does not necessarily have the same effect<sup>188</sup>. On the basis of UNHCR's supervisory role under the Statute, in conjunction with

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<sup>186</sup> The UNHCR Statute does provide for cessation of mandate refugee status under paragraph 6 A (ii), and revocation of such status is also permitted on the basis of paragraph 7(d), which contains exclusion provisions essentially covering the same situations as Article 1F of the 1951 Convention. See G.S. Goodwin-Gill, above at fn. 15, at pp. 95–114.

<sup>187</sup> See Executive Committee, Conclusion No. 12 (XXIX) – 1978 on the Extraterritorial Effect of the Determination of Refugee Status. In para. (g), it is recognised that "refugee status as determined in one Contracting State should only be called into question by another Contracting State in exceptional cases when it appears that the person manifestly does not fulfil the requirements of the Convention, e.g. if facts become known indicating that the statements initially made were fraudulent or showing that the person concerned falls within the terms of a cessation or exclusion provision of the 1951 Convention." See also UNHCR, Note on the Extraterritorial Effect of the Determination of Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, EC/SCP/9, 24 August 1978.

<sup>188</sup> In some countries, determinations of refugee status by UNHCR are accepted as binding by national authorities. In France, s. 2 of the Law No. 1952-893 of 25 July 1952, the OFPRA recognises the refugee status of any person with regard to whom UNHCR has exercised its mandate pursuant to Articles 6 and 7 of its Statute. Under s. 51(2) of the German Aliens Act, mandate refugee status recognition by UNHCR has a binding effect on German authorities, if UNHCR conducts refugee status determination on behalf of a State (for example, on the basis of a Memorandum of Understanding or other agreement), or if the host country has endorsed an individual decision by UNHCR by means of issuing a Convention Travel Document or grant of other rights enshrined in the 1951 Convention.

Article 35 of the 1951 Convention<sup>189</sup>, its determinations of status have a certain validity. As a minimum, States which disagree with UNHCR's decisions would need to provide a reasoned justification for doing so<sup>190</sup>.

132. Nor is mandate refugee determination by UNHCR equivalent to refugee status recognition by a State with regard to the rights and entitlements that flow from it. If a State recognises that an applicant meets the criteria of the refugee definition in Article 1 of the 1951 Convention, this determination could also form the basis for an actionable claim to the rights and entitlements of refugees pursuant to Articles 2–34 of the 1951 Convention, depending on national asylum legislation in place<sup>191</sup>. As seen above, there are circumstances in which legitimate expectations arising from a State's refugee recognition under the 1951 Convention will stand in the way of cancellation: under certain conditions, States are bound to assume responsibility for their own erroneous decisions<sup>192</sup>.

133. By contrast, UNHCR's status determination decisions cannot normally be invoked as the basis for an individual claim to certain benefits or specific protection measures vis-à-vis any particular State, nor does the notion of legitimate expectations operate in the same way as for administrative acts by States. Under its Statute and subsequent General Assembly resolutions in conjunction with the 1951 Convention, UNHCR has a responsibility to provide international protection to persons within its mandate. They, in turn, are entitled to expect that UNHCR will exercise its protection functions to the best of its ability, and through the means at its disposal, as appropriate. These may range from formal or informal representations with relevant authorities to resettlement in another country, depending on the protection needs of the individual concerned and the agreement between UNHCR and the State where UNHCR carries out refugee determination<sup>193</sup>.

134. But where an erroneous mandate refugee determination will not be accepted by States because the legal criteria for cancellation are met, UNHCR cannot actually provide protection to the person concerned. It does not have a territory on which it may offer sanctuary to refugees, nor can it issue residence permits or humanitarian status. Arguments of legitimate interests or acquired rights of the individual concerned will not normally apply, nor is UNHCR bound in the same way as States by evidentiary rules which, under certain conditions, preclude States from cancelling their own erroneous decisions<sup>194</sup>. Moreover, maintaining mandate refugee status where it patently should not have been granted would have negative repercussions on UNHCR's credibility vis-à-vis States as well as refugees,

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<sup>189</sup> See V. Türk, "UNHCR's supervisory responsibility", 14.1 *Revue québécoise de droit international* (2001), at pp. 135–158.

<sup>190</sup> As noted by G.S. Goodwin-Gill, above at fn. 15, at p. 370, "[...] the very definition of refugees [...] incorporates areas of appreciation, so that in practice UNHCR's position on individuals and groups may be challenged. Nevertheless, UNHCR's opinions must be considered by objecting States in good faith and a refusal to accept its determinations requires substantial justification." See also fn. 170, where it is noted that: "UNHCR's decisions on refugee status, although possessing an international character, do not have the same binding character as, say 'housekeeping' or technical resolutions of international organizations, which may directly create obligations for member States."

<sup>191</sup> The 1951 Convention does not prescribe any particular way in which States are to give effect to the rights and entitlements of refugees.

<sup>192</sup> See, in particular, above at paragraphs 56 and 65.

<sup>193</sup> See V. Türk, above at fn. 189, at pp. 148–149.

<sup>194</sup> See above at paragraphs 78–79.

and, as a consequence, risk undermining the integrity of its international protection function. In such situations, UNHCR is left with little option but to cancel.

135. Where recognition was obtained through fraudulent means by an applicant who did not meet the inclusion criteria of the Statute, UNHCR does not have protection obligations arising from the original determination, and its cancellation does not raise protection concerns<sup>195</sup>. The same applies where a person recognised under the Statute is found, after full consideration of inclusion and exclusion aspects as well as an assessment of the consequences of exclusion in the light of proportionality, not to be deserving of refugee protection, irrespective of whether or not there was any wrongdoing on the part of the applicant.

136. Yet from an international protection point of view, erroneous positive status determinations by UNHCR may also be cancelled in practically all cases where responsibility for the mistake lies entirely with the Office itself, including in situations where a UNHCR adjudicator simply made the wrong decision in cases where the applicant presented the claim in good faith, but without meeting the eligibility criteria of the Statute.

137. However, if fewer legal impediments apply to the cancellation of a refugee status determination by UNHCR than to the invalidation of a refugee recognition issued by a State, this should not lead to the conclusion that cancellation of mandate refugee status may be resorted to lightly, nor does it mean that there are no legal considerations for UNHCR to take into account in the context of cancellation.

138. Under general principles of law, UNHCR has a duty of care with respect to persons whose lives are affected by its decisions, even if it turns out that it does not have international protection obligations towards them under its mandate. UNHCR's decisions to cancel mandate refugee status may have a very serious impact on the lives of the individuals concerned. As noted above, however, UNHCR has very limited possibilities to limit any damage which may result from cancellation – for the individual concerned, who may well have presented his or her claim in good faith, but also for its own credibility and, in the longer term, its overall capacity of fulfilling its international protection mandate. As a consequence, it would clearly not be appropriate for UNHCR to rely on cancellation as an easy way out whenever the initial status determination is found wanting and resettlement or other permanent solutions would prove impossible as a result.

139. The duty to provide fair and efficient refugee status determination procedures flows from UNHCR's responsibility under international law to ensure the protection of those in need. It is also based on the obligation, which applies to UNHCR as well as States, to proceed in accordance with the principle of procedural fairness whenever its decisions have an impact on the rights, interests and expectations of individuals.

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<sup>195</sup> Such obligations could, however, result from a current well-founded fear of persecution. The same considerations as apply to fraud are relevant in cases where the applicant would have obtained mandate refugee status through other unlawful means, for example, threats or bribery. Under UNHCR's staff rules, acceptance of a bribe by a UNHCR official would constitute misconduct, which would give rise to disciplinary investigations and, if established, disciplinary sanctions. See UNHCR, *Disciplinary Proceedings and Measures*, 30 May 2002.

#### IV. CONCLUDING REMARKS

140. From the point of view of international refugee protection, the issue of cancellation must be considered in light of two principal considerations: on the one hand, those who were determined to be refugees despite the fact that they did not meet the eligibility criteria of the 1951 Convention or the Statute of UNHCR cannot, in principle, claim to be prejudiced by the loss of a status which should not have been granted in the first place. Under these conditions, cancellation will normally be the appropriate measure. On the other hand, those who did have a well-founded fear of persecution and were therefore rightly recognised as refugees must be protected from having their status invalidated in an arbitrary manner. In all cases, the principles of procedural fairness and proportionality must be respected, so as to prevent situations in which cancellation would deprive individuals in need of protection of essential guarantees and expose them to the risk of *refoulement*.

141. General principles of law determine under which conditions the cancellation of refugee status is lawful. They also provide safeguards for the protection of the rights and legitimate interests of those affected, and are widely reflected in municipal administrative law, both in the common law and in the civil law tradition. As a consequence, stringent criteria and requirements usually apply for the cancellation of unlawful administrative acts which confer benefits upon an individual. The reopening and invalidation of final decisions by administrative authorities is subject to judicial control, and in many countries, there is a long-standing tradition whereby the courts hold administrative decision-makers to high standards of legality. It is also widely accepted that States assume the consequences of erroneous decisions which are entirely attributable to their own authorities, without any wrongdoing on the part of the individuals who benefit as a result.

142. Thus, cancellation of refugee status is not something that State authorities can resort to casually. Instead, they must show, on the basis of adequate evidence, that there are grounds for cancellation provided for by law, and cancellation proceedings must conform to the standards and requirements of procedural fairness. This paper refers to numerous examples of State practice in line with these principles and standards.

143. But there are also matters of concern. As a review of the law and practice with regard to cancellation shows, judicial control alone is not always sufficient to ensure compliance with international standards for the protection of refugees. Administrative authorities may have very wide-ranging powers to invalidate their own decisions. In a number of countries, refugee status may be withdrawn not only where it was wrongly granted in the first place, but also in conditions in which loss of status is not provided for under the 1951 Convention, and in particular, as a result of activities by refugees after they have been recognised, which are not covered by the exclusion clauses of Article 1F(a) or (c). This is an area at the margins of a discussion of cancellation, as circumstances which do not affect the applicant's eligibility at the time of the initial positive determination can never warrant its invalidation *ab initio*. It is nonetheless of concern, as it does broaden the grounds for the withdrawal of refugee protection and may result in breaches of the principle of *non-refoulement*.

144. In recent times, there appears to be a growing interest in cancellation, linked to some extent to an increased awareness and concern for the application of the exclusion provisions of the 1951 Convention among States, particularly in the context of current anti-terrorism efforts. UNHCR has recommended that States apply the exclusion clauses "rigorously,

albeit appropriately"<sup>196</sup>; and it has also warned of any unwarranted linkages between refugees and terrorists<sup>197</sup>. This applies equally to considerations concerning the cancellation of refugee status. Where States proceed with a review of asylum applications or status determinations, this should be closely monitored by UNHCR. Neither administrative orders nor mandatory provisions in national legislation can lower the standards and criteria for cancellation, which must be met in each individual case.

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<sup>196</sup> UNHCR, Addressing Security Concerns Without Undermining Refugee Protection - UNHCR's perspective, 29 November 2001, at para. 12.

<sup>197</sup> Ibid., at para. 26; see also UNHCR, Ten refugee protection concerns in the aftermath of September 11, 14 February 2001, at 10.