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Conducting RSD for resettlement: the need for procedural protections

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Procedural protections are vital in all aspects of refugee status determination (RSD). Shortcomings in operations conducting RSD for purposes of access to resettlement and complementary pathways call for greater clarity and transparency.

Resettlement and complementary pathways (such as community sponsorship, scholarships, humanitarian visas and family reunification¹) are important tools for refugee protection. They provide durable solutions, even though they benefit only a small number of refugees. For many refugees, access to UNHCR refugee status determination (RSD) and procedural integrity within that RSD are vital to access resettlement or complementary pathways.

In 2016, UNHCR published a Note on the strategic direction of UNHCR's activities under its mandate to determine refugee status. The Note acknowledged that historically "UNHCR has advocated for an individual [RSD] procedure to be conducted, wherever possible, following an in-depth examination of the individual circumstances of the applicant's case."² (UNHCR refers to this standard practice of determining refugee status on an individual basis as 'Regular RSD'.³) The Note announced a new strategy: that UNHCR would only conduct RSD on an individual basis if doing so would have a significant impact on the individual's access to protection. In particular, UNHCR would no longer strive to conduct Regular (individual) RSD where alternatives like group-based (*prima facie*) recognition could secure the same benefits.

UNHCR should champion access to complementary pathways for individuals who have group-based recognition. Further, UNHCR should also ensure that individuals who can only access refugee resettlement and/or complementary pathways if they have a positive RSD decision can actually access these pathways to protection. Lastly, where UNHCR does determine individuals' refugee status, it should ensure that it provides basic procedural safeguards.

Access to RSD for complementary pathways

Some complementary pathways require proof of refugee status with UNHCR. For example, Canada's 'Group of Five' private sponsorship scheme requires proof of formal recognition as a refugee by UNHCR or the country of asylum.⁴ In that situation, a sponsorship group can only sponsor individuals who have been awarded individualised recognition. If the individual only has group-based recognition, they cannot be sponsored under this scheme for resettlement in Canada. In countries where UNHCR does not generally conduct Regular RSD, it should ensure that individuals who could access a complementary pathway if recognised as refugees can do so. UNHCR should establish a process by which potential sponsors who wish to sponsor an individual with group-based recognition can request individualised RSD. It should also advocate with governments for individuals with group-based status to have access to complementary pathways.

Access to RSD for resettlement

UNHCR requires a positive RSD decision before it will refer an individual for resettlement.⁵ However, in many countries where UNHCR determines refugee status, Regular RSD is the exception – and group-based recognition the norm. In those situations, UNHCR simultaneously conducts RSD and assesses eligibility for resettlement in a process known as 'merged refugee status and resettlement determination' (RSD/RST). Thus, even where Regular RSD is not considered by UNHCR to be essential for refugee protection in a country of asylum, UNHCR will conduct individualised RSD

when a person's protection needs are deemed to warrant consideration for resettlement.

Procedural protections for RSD in merged proceedings

It is true that, in operations with merged RSD/RST proceedings, UNHCR has determined that Regular RSD is not essential to refugee protection. It is also true that resettlement, unlike refugee recognition, is not a right. However, this merged process is a prerequisite to accessing the durable solution of resettlement, and thus transparency and procedural safeguards are vital.

UNHCR's *Procedural Standards for RSD under UNHCR's Mandate* – first published in 2003 and revised in 2020 – set out core standards and best practices.⁶ The 2020 Procedural Standards state that the right to appeal a negative decision and the right to a legal representative do not apply in merged RSD/RST procedures because an asylum seeker “should not be rejected through merged” procedures. However, UNHCR should continue to bear in mind that safeguards such as transparent procedures and standards, notifying an applicant of the basis for a rejection, and giving the opportunity to respond are fundamental to ensuring the clarity and fairness of a process.

The 2020 Procedural Standards instruct UNHCR offices implementing merged RSD/RST procedures to adopt “appropriate procedural safeguards, including procedures for review...”. While the Standards go into great detail on appeal processes for Regular RSD, they do not outline what “procedures of review” mean in a merged RSD/RST proceeding, or whether this means review by a supervisor or an informal appeal for an applicant. In any case, the 2020 Standards do not require that an applicant be informed of the reason for the decision – and this diminishes the value of any review.

Further, the 2020 Procedural Standards also note that if an asylum seeker's claim is not appropriate for merged RSD/RST procedures, then that individual should be referred to Regular RSD.⁷ However, it is unclear whether this means that every person who is deprioritised through merged

procedures should be referred to Regular RSD or only some, or how UNHCR will decide which people to refer to Regular RSD.

The 2020 Standards allow that “wherever possible and in the interest of the integrity and fairness of procedures, UNHCR Offices may accommodate the participation of appointed legal representatives in the merged RSD-Resettlement process” but they do not require or recommend this. This stands in contrast to another section of the Standards, which notes that asylum seekers should have access to counsel in “any Interview in which UNHCR gathers information that is relevant to the determination of the Applicant's refugee status or the cancellation, revocation or cessation of his/her refugee status.”⁸ It is unclear why an RSD/RST interview is not included within that criteria.

Finally, UNHCR guidance on RSD/RST proceedings also states that there should be clear procedures and criteria, and requires UNHCR staff to consider the consequences for the individual before deprioritising them for resettlement. However, UNHCR has not published the criteria determining whom it will deprioritise or the protocols regarding how it makes these decisions. As such, it is unclear how UNHCR decides whom to recognise as refugees based on RSD/RST and who is deprioritised.

UNHCR needs to ensure that RSD serves as an effective protection tool and that there is integrity of process. Regular RSD may not be essential to accessing protection in some countries of asylum; however, RSD/RST is essential to accessing resettlement – and resettlement has an immense impact on an individual's access to protection. The current situation is ripe for arbitrary decision-making. UNHCR should provide basic procedural safeguards such as clear criteria and protocols, and access to counsel wherever possible, and ensure that individuals are informed of the grounds for denial and provided with an opportunity to respond. UNHCR must also undertake careful monitoring to ensure that its operations are implementing these vital safeguards.

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Procedural protections are vital to ensure trust in the system on the part of the individuals whose fates are being determined, to promote accurate decision-making, and to set a positive example to States in their asylum and immigration processes. UNHCR should ensure that its procedures for conducting RSD, including in merged RSD/RST, are transparent and safeguarded by basic procedural protections.

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