

UNHCR Observations on the proposed amendments to the Norwegian Immigration Regulation of 18 January 2017 to reduce the income requirement in family reunification cases and introduce a requirement providing that an application for family reunification must be submitted within three months after the granting of the status [Invitasjon til høringsmøte og høring om endringer i utlendingsforskriften – underholdskravet i familieinnvandringsaker – senking av underholdskravet og endring av ettårsfrist for unntak for flyktninger]¹

I. INTRODUCTION

1. The UNHCR Regional Representation for Northern Europe (hereafter “RRNE”) is grateful to the Ministry of Justice and Public Security for the invitation to express its views on the law proposal dated 18 January 2017 to further amend the Norwegian Immigration Regulation.²
2. As the agency entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with governments, seek permanent solutions to the problems of refugees,³ UNHCR has a direct interest in law and policy proposals in the field of asylum. According to its Statute, UNHCR fulfils its mandate *inter alia* by “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto[.]”⁴ UNHCR’s supervisory responsibility is reiterated in Article 35 of the 1951 Convention⁵ and in Article II of the 1967 Protocol relating to the Status of Refugees⁶ (hereafter collectively referred to as the “1951 Convention”).⁷
3. UNHCR’s supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention. Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (hereafter “UNHCR Handbook”) and subsequent Guidelines on

¹ Law Proposal of 18 January 2016, available at: <https://www.regjeringen.no/no/dokumenter/invitasjon-til-horingsmote-og-horing-om-endringer-i-utlendingsforskriften--underholdskravet-i-familieinnvandringsaker--senking-av-underholdskravet-og-endring-av-ettarsfrist-for-unntak-for-flyktninger/id2527643/>.

² *Forskrift 15. oktober 2009 nr. 1286 om utlendingers adgang til riket og deres opphold her* (utlendingsforskriften), unofficial English translation, available at: <https://www.regjeringen.no/globalassets/upload/jd/dokumenter/forskrifter/immigration-regulations.pdf>. (hereafter “Immigration Regulation”).

³ UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V), available at: <http://www.refworld.org/docid/3ae6b3628.html> (hereafter “UNHCR Statute”).

⁴ *Ibid.*, para. 8(a).

⁵ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html>.

⁶ UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: <http://www.refworld.org/docid/3ae6b3ae4.html>.

⁷ According to Article 35 (1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of the 1951 Convention”.

International Protection.⁸ UNHCR also fulfils its supervisory responsibility by providing comments on legislative and policy proposals impacting on the protection and durable solutions of its persons of concern.

4. The following comments are based on international protection standards set out in the 1951 Convention, in international human rights law, on Conclusions on International Protection of the UNHCR Executive Committee (hereafter “ExCom”), and on UNHCR guidelines. While neither UNHCR ExCom Conclusions nor UNHCR guidelines are binding on States, they contribute to the formulation of *opinio juris* by setting out standards of treatment and approaches to interpretation which illustrate States’ sense of legal obligation towards asylum-seekers and refugees.⁹ As a member of the UNHCR ExCom since 1959, Norway has contributed extensively to the development of the Conclusions on International Protection, adopted unanimously by the ExCom.

II. THE PROPOSAL

5. UNHCR notes that the Norwegian Government proposes three measures in the area of family reunification.
6. Firstly, according to the Proposal, the income/subsistence requirement (that has to be fulfilled by the sponsor/family member in Norway) in family reunification cases will be reduced from NOK 305.000 to NOK 253.704. In UNHCR’s understanding, this change will apply to both refugees under Section 28(1) a and Section 28(1) b of the Norwegian Immigration Act.
7. Secondly, the Proposal seeks to introduce a requirement that an electronic application for family reunification must be submitted within three months after the granting of status in order to be exempt from the subsistence requirement. According to the current Norwegian Regulations, Section 10-8, paragraph 5,¹⁰ refugees are exempt from the general subsistence requirement if they apply for family reunification within one year from receiving status in Norway. With the proposed change, the period during which refugees are exempted would thus be reduced from one year to three months.
8. Thirdly, it is proposed to increase the administrative service fee for applications for family reunification, cf. Section 17-10 of the Norwegian Regulations [Fee for processing an application for a temporary or permanent residence permit or for renewal of a residence permit] from NOK 5 900 to NOK 8 000.
9. UNHCR welcomes the reduction in the income/subsistence requirement. However, UNHCR is concerned that the shortened exemption period and increase in

⁸ UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, available at: <http://www.refworld.org/docid/4f33c8d92.html>.

⁹ Goodwin Gill/McAdam, *The Refugee in International Law*, Oxford University Press, 2007, p. 217.

¹⁰ Requirement as to future income in a family immigration case under Chapter 6 of the Norwegian Immigration Act.

administrative fees will restrict the impact of such a provision and the rights of refugees applying for family reunification and will below provide detailed comments on these two aspects.

III. OBSERVATIONS

Right to family unity and family reunification in international law

10. Family unity is a fundamental and important human right contained in a number of international and regional instruments to which Norway is a State party. The right to family life and the protection of the family is, for example, enshrined in Article 23(1-3) of the International Covenant on Civil and Political Rights (hereafter “ICCPR”). Article 23(1) of ICCPR recognises that the family is the natural and fundamental group unit of society and is entitled to protection by the society and the State. Although the Human Rights Committee has acknowledged that the Covenant does not recognize the right of aliens to enter or reside in the territory of a State party, it has underlined that “in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.”¹¹
11. Pursuant to Article 3 of the Convention on the Rights of the Child (hereafter “CRC”), the best interests of the child shall be a primary consideration in all actions affecting children, and applies in all family reunification cases involving children, whether the child is in Norway, in the country of origin or in a third country. A child’s right to family life is specifically protected under Articles 9, 10 and 16 of the CRC, which, *inter alia*, provides that a family reunification application involving a child should be dealt with in a positive, humane and expeditious manner, and that the child has the right to maintain a regular and direct contact with both parents.
12. The UN Committee on the Rights of the Child has reminded State parties of their obligations in this respect, noting that “Whenever family reunification in the country of origin is not possible, irrespective of whether this is due to legal obstacles to return or whether the best-interests-based balancing test has decided against return, the obligations under article 9 and 10 of the Convention come into effect and should govern the host country’s decisions on family reunification therein.”¹² UNICEF has highlighted that all judicial and administrative processes concerning children need to be pursued as quickly as possible. Delay and uncertainty can be extremely prejudicial

¹¹ UN Human Rights Committee (HRC), CCPR General Comment No. 15: The Position of Aliens Under the Covenant, 11 April 1986, available at: <http://www.refworld.org/docid/45139acfc.html>.

¹² UN Committee on the Rights of the Child (CRC), General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6, available at: <http://www.refworld.org/docid/42dd174b4.html>.

to children's healthy development. From the child's perspective, any period of time is significantly longer in the life of a child than in that of an adult.¹³

13. While the text of the 1951 Convention¹⁴ is silent on the question on family reunification and family unity, the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons recommends that Member States "take the necessary measures for the protection of the refugee's family, especially with a view to (...) [e]nsuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country."¹⁵

14. UNHCR's ExCom has adopted a series of conclusions that reiterate the fundamental importance of family unity and reunification, and call for facilitated entry on the basis of liberal criteria for family members of persons recognized as being in need of international protection.¹⁶ ExCom has underlined the need for the unity of the refugee's family to be protected by measures which ensure respect for the principle of family unity, including, those to reunify family members separated as a result of refugee flight,¹⁷ and noted that it is desirable that countries of asylum ensure that the reunification of separated refugee families takes place with the least possible delay.¹⁸ Following separation caused by forced displacement such as from persecution and war, family reunification is often the only way to ensure respect for a refugee's right to family unity.¹⁹ In UNHCR's experience, the possibility of being reunited with one's family is also of vital importance to the integration process. Family members can reinforce the social support system of refugees and, in so doing, promote integration.²⁰

¹³ UNICEF, Implementation Handbook for the Convention on the Rights of the Child: Fully Revised Third Edition, September 2007, available at: http://www.unicef.org/publications/index_43110.html. See also, UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC /C/GC/14, para. 60, available at: <http://www.refworld.org/docid/51a84b5e4.html>.

¹⁴ UNHCR, The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis, 1990, available at: <http://www.refworld.org/docid/53e1dd114.html>.

¹⁵ UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, 25 July 1951, A/CONF.2/108/Rev.1, available at: <http://www.unhcr.org/refworld/docid/40a8a7394.html>.

¹⁶ ExCom Conclusions relating to family unity and reunification are compiled in the UNHCR, *A Thematic Compilation of Executive Committee Conclusions, 7th edition, June 2014*, June 2014, available at:

<http://www.refworld.org/docid/5698c1224.html>. See in particular, ExCom Conclusions on Family Reunion, No. 9 (XXVIII), 1997 and No. 24 (XXXII), 1981; ExCom Conclusion on Refugee Children and Adolescents, No. 84 (XLVIII), 1997; and ExCom Conclusion on the Protection of the Refugee's Family, No. 88 (L), 1999.

¹⁷ UNHCR, ExCom Conclusion, *Protection of the Refugee's Family*, 8 October 1999, No. 88 (L) - 1999.

¹⁸ UNHCR, ExCom Conclusion, *Family Reunification*, 21 October 1981, No. 24 (XXXII) – 1981.

¹⁹ UNHCR, Refugee Family Reunification. UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification of Third Country Nationals Living in the European Union (Directive 2003/86/EC), February 2012, p. 3, available at: <http://www.refworld.org/docid/4f55e1cf2.html>.

²⁰ UNHCR, ExCom Conclusion No. 104 (LVI), 2005, para. (n)(iv); see also UNHCR, *A New Beginning, Refugee Integration in Europe* 2013, <http://www.unhcr.org/protection/operations/52403d389/new-beginning-refugee-integration-europe.html>.

Right to family reunification and family life in European law

15. UNHCR notes with concern that the proposed restrictions to reduce the time limit for applying for family reunification in order to be exempted from the subsistence requirement and increase the administrative fee of processing family reunification raise serious questions under Article 8 (the right to respect for private life and family life) of the ECHR as they would impose unreasonable restrictions and effectively prevent the realization of family unity. Refugees and other persons in need of international protection may not be aware if their family members are still alive, or of their whereabouts if they were separated during flight. In addition, tracing of family members is a lengthy process which may exceed three months in many cases. Also, family members may be required to travel – sometimes across several countries – in order to reach an Embassy at which they can submit an application for family reunification.²¹
16. The European Court of Human Rights (ECtHR) has, regarding refugees, consistently ruled that family unity is an essential right and a fundamental element in allowing persons who have fled persecution to resume a normal life and that refugees should benefit from a family reunification procedure which is more favourable than for other foreigners, due to their vulnerabilities.²² In this context, the Court found it essential that the national authorities process the request for family reunification without undue delay once the applicant has lodged an application for family reunification.²³ It also found that preventing a temporary residence permit holder of five years from family reunification was in breach of Articles 8 and 14 of the ECHR,²⁴ since family unity is an essential right for refugees and family reunification was a fundamental element in enabling persons who had fled persecution to resume a normal life.
17. In several decisions, the ECtHR attached decisive or particular weight to the broad consensus at the international and European level concerning the need for refugees to benefit from a more favourable family reunification procedure than that foreseen for other foreigners. The Court underlined in particular that the refugees could not be held responsible for the family separation and made extensive reference to international legal sources.²⁵ The ECtHR's decision in *I.A.A. and Others* against the United

²¹ UNHCR, *Refugee Family Reunification. UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification of Third Country Nationals Living in the European Union (Directive 2003/86/EC)*, February 2012, available at: <http://www.refworld.org/docid/4f55e1cf2.html>.

²² See, for example, *Tanda-Muzinga c. France*, Requête no 2260/10, Council of Europe: European Court of Human Rights, 10 July 2014, available at: <http://www.refworld.org/docid/53be80094.html>.

²³ *Tanda-Muzinga c. France*, Requête no 2260/10, Council of Europe: European Court of Human Rights, 10 July 2014, available at: <http://www.refworld.org/cases,ECHR,53be80094.html>.

²⁴ *Hode and Abdi v. The United Kingdom*, (Application no. 22341/09), Council of Europe: European Court of Human Rights, 6 November 2012, available at: <http://www.refworld.org/docid/509b93792.html>.

²⁵ See Council of Ministers, <http://www.legislationline.org/documents/action/popup/id/8359>. Sources included e.g. the 1951 Convention, Response by the High Commissioner for Refugees to the Green Paper (February 2012), Preamble to Council Directive 2003/86/EC on the right to family reunification, European Commission Green Paper on the right to family reunification of third-country nationals living in the European Union; Recommendation no. R (99) 23 of the Committee of Ministers of the Council of Europe and Memorandum by the Council of Europe Commissioner for Human Rights (May 2008).

Kingdom,²⁶ clearly indicates that the principles established in previous jurisprudence (such as the judgments mentioned above in paragraph 16) regarding States' positive obligations to facilitate family reunification and to lay down the most favourable rules for refugees and their families are still valid and instructive. The ECtHR has also made the point that due consideration should be given to cases where a parent has achieved settled status in a country and wants to be reunited with her or his child who, for the time being, finds himself in the country of origin.²⁷

18. Although the ECtHR has not had any cases before it under Article 8 of the ECHR pertaining to timeframes for lodging an application for family reunification, the Court has concluded in several cases that since national authorities had not given due consideration to the applicants' *specific circumstances*, the family reunification procedure had not offered the requisite guarantees of *flexibility, promptness and effectiveness* to ensure compliance with their right to respect for their family life. For that reason, the State had not struck a fair balance between the applicants' interests on the one hand, and its own interest in controlling immigration on the other, in violation of Article 8 of the ECHR.²⁸ In particular, where children are involved, their best interests must be taken into account.²⁹
19. Furthermore, while acknowledging that Norway does not have obligations under EU's primary and secondary law, EU law and jurisprudence are instructive. In addition, UNHCR finds relevant to refer to relevant jurisprudence from the Court of Justice of the European Union (hereafter "CJEU") –binding on all Member States- where the Court clarifies under which conditions Member States may restrict third country nationals' rights, in particular the right to family reunification.
20. It is worth noting, for instance, that the CJEU has held that Member States must not use their margin of discretion under the EU Family Reunification Directive³⁰ in a way that "would undermine the objective of the Directive, which is to promote family

²⁶ *I.A.A. and others v. the United Kingdom*, (application no. 25960/13), inadmissibility decision, 31 March 2016, available at: <http://hudoc.echr.coe.int/eng?i=001-161986>, para. 43.

²⁷ *Ebrahim and Ebrahim v. the Netherlands*, Application no. 59186/00, Council of Europe: European Court of Human Rights, 18 March 2003, available at: http://www.refworld.org/cases_ECHR_583ff5dc4.html

²⁸ *Jeunesse v. the Netherlands*, Application no. 12738/10, Council of Europe: European Court of Human Rights, 3 October 2014, available at: http://www.refworld.org/cases_ECHR_584a96604.html, para 107 and 121. *Mugenzi c. France*, Requête no 52701/09, Council of Europe: European Court of Human Rights, 10 July 2014, available at: <http://www.refworld.org/docid/53be81784.html>; *Tanda-Muzinga c. France*, Requête no 2260/10, Council of Europe: European Court of Human Rights, 10 July 2014, available at: <http://www.refworld.org/docid/53be80094.html>; *Senigo Longue et autres c. France*, Requête no 19113/09, Council of Europe: European Court of Human Rights, 10 July 2014, available at: <http://www.refworld.org/docid/53be7dc94.html>. See also European Court of Human Rights, "Family reunification procedure: need for flexibility, promptness and effectiveness." ECHR 211, Press release, 10.07.2014, available at: <http://hudoc.echr.coe.int/webservices/content/pdf/003-4817913-5875206?TID=lvwyqpbzdr>

²⁹ *Jeunesse v. the Netherlands*, *ibid.*, para 109.

³⁰ European Union: Council of the European Union, Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification, 3 October 2003, OJ L. 251/12-251/18; 3.10.2003, 2003/86/EC, available at: <http://www.refworld.org/docid/3f8bb4a10.html>.

reunification, and the effectiveness thereof.”³¹ Most recently, the CJEU reaffirmed that Article 7(1)(c) of the Family Reunification Directive cannot be applied in such a manner that its application would disregard the fundamental rights set out in, *inter alia*, Article 7 of the Charter of Fundamental Rights of the European Union,³² which corresponds to Article 8 of the ECHR.

Applying the sufficient resource requirement to refugees where the application is not made within three months of the recognition of the sponsor in Norway

21. UNHCR is concerned that applying a subsistence/income requirement for family reunification, where the application for family reunification is not submitted within three months after the granting of the status, as suggested in the Proposal, does not take sufficiently account of the specific situation of refugees and other persons in need of international protection, or the special circumstances that have led to the separation of their families. The Proposal may create serious impediments to family reunification for them. During the negotiations of the EU Family Reunification Directive was introduced, UNHCR called on Member States not to apply time limits to the more favourable conditions granted to refugees.³³
22. Refugees may also face difficulties in providing the documentation required for submission of an application for family reunification, as documents may have been lost or destroyed during flight, and family members are unable to approach the authorities of their country of origin for documents due to risks of persecution. In this respect, UNHCR refers to the European Commission guidance on the application of the Family Reunification Directive, which recommends that “if Member States opt to apply this provision, the Commission considers that they should take into account objective practical obstacles the applicant faces as one of the factors when assessing an individual application.”³⁴

Administrative service fee for family reunification applications

23. Turning to the proposal to increase the administrative service fee charged for applications for family reunification, UNHCR would like to draw attention to ECtHR’s

³¹ *Chakroun v. Minister van Buitenlandse Zaken*, C-578/08, European Union: Court of Justice of the European Union, 4 March 2010, available at: <http://www.refworld.org/cases> para. 43.

³² *Mimoun Kachab v. Subdelegación del Gobierno en Álava*, preliminary ruling of 21 April 2016, available at: http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=176803&occ=first&dir=&cid=132198.

³³ UNHCR, *Refugee Family Reunification. UNHCR’s Response to the European Commission Green Paper on the Right to Family Reunification of Third Country Nationals Living in the European Union (Directive 2003/86/EC)*, February 2012, available at: <http://www.refworld.org/docid/4f55e1cf2.html>.

³⁴ *Ibid.*

unanimous judgment in *G.R. v. the Netherlands*.³⁵ Relying on Article 8 of the ECHR, the applicant complained that the financial threshold imposed by the authorities prevented him from seeking a residence permit for the purpose of residing with his wife and children. The ECtHR had to determine whether the procedure to reunify with the family was in fact “available in practice”, given the financial threshold of EUR 830 which the applicant (beneficiary of international protection) found insuperable. In the circumstances of the present case, in particular the disproportion between the administrative charge in issue and the actual income of the applicant’s family, the Court found a violation of Article 13 (the right to an effective remedy) of the ECHR. It is important to note that the relevant Dutch provisions – unlike the proposed measures at hand – do provide for exemptions from the statutory administrative charges of EUR 830.

24. The CJEU has also stressed in its judgment *European Commission v Kingdom of the Netherlands*,³⁶ where it interpreted relevant provisions of Directive 2003/109/EC concerning the status of third country nationals,³⁷ that Member States are prevented from imposing charges/administrative fees which are disproportionate. The CJEU concluded *inter alia* that the administrative charge/fee (EUR 830) imposed by the Netherlands on family members of third-country nationals (long-term residents) when applying for residence permits was excessive and disproportionate and liable to create an obstacle to the exercise of the rights conferred by the Family Reunification Directive. The Court concluded that the Netherlands had failed to fulfil its obligations under that Directive.

IV. CONCLUDING RECOMMENDATIONS

25. UNHCR concludes that the proposed restrictions may leave vulnerable refugee families in a prolonged state of uncertainty and separated from one another over long periods of time, while impeding the successful and rapid integration of refugees in their host societies.
26. In light of the arguments presented above, UNHCR considers that the Government’s proposal to considerably reduce the timeframe for lodging an application for family reunification in order to be exempted from the subsistence requirement and increase the administrative fee for processing such applications, may be at variance with international and regional human rights law, notably the ECHR and the CRC, in particular due to the fact that the proposed measures do not provide for specific

³⁵ Application no. 22251/07, Council of Europe: European Court of Human Rights, 10 January 2012, available at: <http://www.refworld.org/cases,ECHR,4f193eac2.html>.

³⁶ *European Commission v Kingdom of the Netherlands*, C-508/10, 26 April 2012, available at: <http://curia.europa.eu/juris/liste.jsf?num=C-508/10>.

³⁷ European Union: Council of the European Union, Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals Who are Long-Term Residents, 23 January 2004, OJ L. 16-44; 23. 1. 2004, 2003/109/EC, available at: <http://www.refworld.org/docid/4156e6bd4.html>.

exemptions. UNHCR underlines that such limitations appear disproportionate and unreasonable, and disregard the specific circumstances of refugees.

27. UNHCR thus recommends that the Government of Norway refrain from further restricting the existent family reunification legislation and exempt refugees from the need to fulfil the qualifying conditions that apply (or may apply) to ordinary aliens.

UNHCR Regional Representation for Northern Europe
13 February 2017