UNHCR

Initial observations by the United Nations High Commissioner for Refugees (UNHCR) Regional Representation for the Baltic and Nordic Countries on Law Proposal No. 579/Lp11 amending the Asylum Law of the Republic of Latvia

I. Introduction

1. The UNHCR Regional Representation for the Baltic and Nordic Countries (RRBNC) has been informed that the Saeima of the Republic of Latvia is examining a Law Proposal (hereafter "Proposal") amending the Asylum Law of the Republic of Latvia (*Grozījumi Patvēruma likumā No. 579/Lp11*). The Proposal was initiated by the Government of the Republic of Latvia on 20 February 2013, by way of letter No. 90/TA-213 (2013), and is aimed at ensuring the transposition of provisions in several recast EU Directives in the field of asylum.

2. UNHCR has a direct interest in law proposals in the field of asylum, as the agency entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek permanent solutions to the problems of refugees[1]. 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[.]"[2] 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 Relating to the Status of Refugees (hereafter '1951 Convention'). Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status ('UNHCR Handbook')[3] and subsequent Guidelines on International Protection[4]. This supervisory responsibility is reiterated in Article 35 of the 1951 Convention, and in Article II of the 1967 Protocol relating to the Status of Refugees[5].

[1] 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.unhcr.org/cgibin/texis/vtx/refworld/rwmain?docid=3ae6b3628 ("UNHCR Statute").
[2] *Ibid*., paragraph 8(a).
[3] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, (hereinafter – *UNHCR Handbook*), 1 January 1992, available at: http://www.unhcr.org/refworld/docid/3ae6b3314.html.
[4] UNHCR issues "Guidelines on International Protection" pursuant to its mandate, as contained in the Statute of the Office of the United Nations High Commissioner for Refugees, in conjunction with Article 35 of the 1951 Convention. The Guidelines complement the UNHCR Handbook and are intended to provide guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff.
[5] According to Article 35 (1) of the 1951 Convention, UNHCR has the "duty of supervising the application of the provisions of the 1951 Convention".

3. UNHCR's supervisory responsibility has also been reflected in European Union law, including by way of a general reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the European Union ("TFEU")[6], as well as in Declaration 17 to the Treaty of Amsterdam, which provides that *"consultations shall be established with the United Nations High Commissioner for Refugees ... on matters relating to asylum policy"*[7]. Secondary EU legislation also emphasizes the role of UNHCR. For instance, Recital 22 of the recast Qualification Directive[8] states that consultations with UNHCR "may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention". The supervisory responsibility of UNHCR is specifically articulated in Article 21 of Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status ("Asylum Procedures Directive" or "APD")[9] and in Article 29 of the 'Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast)'[10] (hereafter "recast APD").

4. In line with its supervisory function, UNHCR has contributed to the development of the Common European Asylum System (CEAS) and monitored the application of its legislative instruments. For example, UNHCR has undertaken extensive research on the application of key provisions in the Asylum Procedures Directive in selected Member States[11] and provided comments[12] on the Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting

---

[6] European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, OJ C 115/47 of 9.05.2008, available at: http://www.unhcr.org/refworld/docid/4b17a07e2.html.

[7] European Union, *Declaration on Article 73k of the Treaty establishing the European Community*, OJ C 340/134 of 10.11.1997, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11997D/AFI/DCL/17: EN:HTML.

[8] European Union: Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L 337; December 2011, pp 9-26, available at: http://www.refworld.org/docid/4f197df02.html

[9] European Union: Council of the European Union, *Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, 2 January 2006, OJ L 326; 13 December 2005, pp. 13-34, ("Asylum Procedures Directive" or "APD"), available at: http://www.unhcr.org/refworld/docid/4394203c4.html. Article 21(c) of the APD obliges Member States to allow UNHCR "to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure."

[10] European Union: European Commission, *Amended Proposal for a Directive of the European Parliament and the Council on common procedures for granting and withdrawing international protection status* (Recast), 1 June 2011, COM(2011) 319 final, ("recast Asylum Procedures Directive" or "recast APD"). Available at: http://www.statewatch.org/news/2013/mar/eu-council-procedures-7695-13.pdf.

[11] UN High Commissioner for Refugees, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendations*, March 2010, at: http://www.unhcr.org/refworld/docid/4bab55752.html

[12] UN High Commissioner for Refugees, *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009)554, 21 October 2009)*, August 2010, ("UNHCR comments on the 2009 recast APD"), available at: http://www.unhcr.org/refworld/docid/4c63ebd32.html

and withdrawing international protection published in October 2009 ("2009 Recast") and comments[13] to the amended recast APD. UNHCR also provided comments[14] to the amended recast Reception Conditions Directive (hereafter "recast RCD")[15] in July 2012.

II. General observations

5. UNHCR welcomes initiatives aimed at bringing national legal frameworks in line with international and regional standards in the area of asylum and refugee protection, and recognizes the Latvian Government's obligation to transpose EU Directives within the prescribed two year period from their publication in the Official Journal of the EU[16]. UNHCR notes that the Proposal *inter alia* seeks to transpose the recast Qualifications Directive, which was approved on 20 December 2011 and thus needs to be transposed by December 2013.

6. On 24 April 2013, the LIBE (Libertés civiles) Committee of the European Parliament approved the text of the recast APD and of the Eurodac Regulation (orientation vote). Agreement on the text of the recast Dublin II Regulation and of the recast RCD was reached in autumn 2012. According to plans, the European Council should officially approve the 'asylum package' on 6 June 2013 and the European Parliament on 10-13 June 2013, during its plenary session in Strasbourg. Once the package is approved, the recast legislation will be published in the Official Journal of the EU. In due time thereafter, the European Commission will convene a contact point meeting that will seek to provide further clarification on the scope and meaning of the articles in the new EU legislation, to facilitate the transposition process. UNHCR will also issue annotated comments on the recast Directives to facilitate the transposition process, starting with a commentary on the recast Qualification Directive which is expected to be published by mid-2013.

7. In view of the fact that the final texts of the recast APD and recast RCD have not yet been finally approved by the plenary of the European Parliament, UNHCR strongly encourages Latvia to postpone the adoption of amendments to the national Asylum Law in areas covered by these recast Directives, until the transposition phase has started and further guidance on the scope and meaning of the articles been provided by the European Commission and UNHCR. Otherwise, there is a risk that further amendments will be required in the near future, in order to ensure full transposition of the EU legislation.

---

[13] UN High Commissioner for Refugees, *UNHCR comments on the European Commission's Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast) COM (2011) 319 final*, January 2012, ("UNHCR comments on the amended recast APD"), available at: http://www.unhcr.org/refworld/docid/4f3281762.html

[14] UN High Commissioner for Refugees, *UNHCR Comments on the European Commission's amended recast proposal for a Directive of the European Parliament and the Council laying down standards for the reception of asylum-seekers*, July 2012, (COM (2011) 320 final, 1 June 2011), available at: http://www.unhcr.org/refworld/docid/500560852.html

[15] European Commission, *Amended proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers* (Recast), 1 June 2011, COM(2011) 320 final ("*the recast Reception Conditions Directive" or "recast RCD"*), available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0320:FIN:EN:PDF.

[16] http://www.europarl.europa.eu/oeil/popups/summary.do?id=1232265&t=e&l=en

8. Notwithstanding this general recommendation, initial observations on provisions in the Proposal which are not in line with international and/or EU standards are provided below. In general, the observations below are restricted to provisions contained in the Proposal and do not touch upon other provisions in the current Asylum Law which will eventually need to be amended and brought in line with the recast Directives as part of a comprehensive transposition process. For example, there will be a need to bring Section 10 (2) of the Asylum Law in line with Article 5(2) of the recast RCD, which provides that information on benefits and obligations relating to reception conditions shall be given *"in writing and […] in a language that the applicants understand or are reasonably supposed to understand. Where appropriate, this information may also be supplied orally*". Also, Article 11 of the recast RCD contains a requirement for regular monitoring of vulnerable persons in detention, which is not yet provided for in Latvian legislation.

III. Specific observations

A. Definition of family members

9. UNHCR notes that the proposed **Section 1(3)** of the Asylum Law relates to Article 2(j) of the recast Qualification Directive and encompasses an amendment of the current definition of 'family members', to include parents and guardians of an unmarried minor who is a beneficiary of international protection in Latvia. This proposal is in line with the right to family unity, as outlined in the UNHCR Handbook, which stipulates that dependents living in the same household normally should benefit from the principle of family unity[17].

10. While welcoming the proposed **Section 1(3)** in general, UNHCR recommends deleting the wording *"insofar as the family already existed in the country of origin"* from the Proposal as, in UNHCR's view, respect for family unity should not be conditional on the family having been established before flight from the country of origin. Families which have been formed during flight or in the country of asylum also need to have their right to family unity respected. This principle has been affirmed by the UNHCR Executive Committee in Conclusions No. 24 (XXXII) paragraph 5 and No. 88 (L) paragraph (b) (ii)[18].

Recommendation: UNHCR recommends deleting the phrase *"insofar as the family already existed in the country of origin"* from the proposed Section 1(3) to ensure that families formed during flight or in the country of asylum can also exercise their right to family unity.

[17] UNHCR, *Handbook*, *supra* footnote 3, para. 185. See also EXCOM, Conclusions Nos. 24 (XXXII) Family Reunification, 1981, para. 5, and 88 (L), 1999, para. (ii).
[18] All ExCom Conclusions are available by subject in UNHCR, *A Thematic Compilation of Executive Committee Conclusions*, 6th edition, June 2011, http://www.unhcr.org/refworld/docid/3dafdd344.html.

B. Detention

➢ *Grounds for detention*

11. UNHCR notes that the Proposal introduces two new grounds for detention of asylum-seekers. The proposed **Section 9 (1) (4)** of the Asylum Law foresees the detention of asylum-seekers "*if there is a justified reason to believe that the asylum-seeker has submitted the application in order to delay or frustrate the enforcement of a removal decision*". The proposed **Section 9 (1) (5)** prescribes an opportunity to detain in order "*to ensure the implementation of the decision mentioned in Section 12(4) of the Asylum Law"* (Dublin Regulation).

12. At the outset, UNHCR would like to remind that in view of the hardship which it entails, and consistent with international refugee and human rights law and standards, detention of asylum-seekers should normally be avoided and be a measure of last resort. As seeking asylum is not an unlawful act, any restrictions on liberty imposed on persons exercising this right need to be provided for in law, carefully circumscribed and subject to prompt review. Detention can only be applied where it pursues a legitimate purpose and has been determined to be both necessary and proportionate in each individual case[19].

13. Similarly to international human rights and refugee law, the prohibition against detaining asylum-seekers solely on the grounds that they have applied for asylum is also reflected in EU law, most notably in Article 18 of the Asylum Procedure Directive (APD)[20]. Furthermore, the recast RCD limit detention of asylum-seekers, in particular by reiterating the principle that Member States shall not hold a person in detention "*for the sole reason that he/she is an applicant for international protection (…)*"[21].

14. There are three situations in which detention of asylum-seekers might be justified under international law, namely[22]:

a) To protect public order:

- To prevent absconding and/or in cases of likelihood of non-cooperation;
- In connection with accelerated procedures for manifestly unfounded or clearly abusive claims;
- For initial identity and/or security verification;
- In order to record, within the context of a preliminary interview, the elements on which the application for international protection is based, which could not be obtained in the absence of detention.

---

[19] UN High Commissioner for Refugees, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (hereafter "*UNHCR Guidelines on Detention*"), 2012, page 2. Available at: http://www.unhcr.org/refworld/docid/503489533b8.html.

[20] Article 18 APD provides: "*Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum."* Further, Article 31(2) also provides that*: "Contracting States shall not apply to the movements of such refugees (including asylum-seekers) restrictions other than those which are necessary, and that any restrictions shall only be applied until such time as their status is regularized, or they obtain admission into another country*."

[21] Article 8(1) of the *recast Reception Conditions Directive*, see *supra* footnote 15.

[22] For more details regarding each of the purposes, please see UNHCR *Guidelines on Detention*, pages 17-19.

b) To protect public health;

c) To protect national security.

15. The European Convention on Human Rights (ECHR) explicitly limits the grounds of detention: sub-paragraphs (a) to (f) of Article 5(1) contain an exhaustive list of grounds upon which persons may be deprived of their liberty[23]. Article 5(1)(f) only permits the State to restrict the liberty of third-country nationals in an immigration context, either (i) to prevent an individual from effecting an unauthorized entry or (ii) with a view to deportation or extradition.

16. With regard to the detention ground provided under the proposed **Section 9 (1) (4)** of the Asylum Law, UNHCR notes that it seeks to incorporate the language of Article 8 (3) (d) of the recast RCD. The latter provides that an asylum-seeker may only be detained "*when he/she is detained subject to a return procedure under Directive 2008/115/EC in order to prepare the return and/or carry on the removal process and the Member State can substantiate on the basis of objective criteria, including that he/she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he/she makes the application for international protection merely in order to delay or frustrate the enforcement of the return decision*". UNHCR notes that the proposed wording of Section 9 (1) (4) lacks some of the safeguards prescribed by Article 8 (3) (d) of the recast RCD.

Recommendation: UNHCR recommends revising the proposed Section 9 (1) (4) of the Asylum Law in line with the wording of Article 8 (3) (d) of the recast RCD.

17. UNHCR notes that the proposed **Section 9 (1) (5)** of the Asylum Law prescribes a possibility to detain an asylum-seeker for the purpose of transferring him/her to another country under the Dublin II Regulation[24]. UNHCR understands that the proposed provision relates to Article 8(3)(f) of the recast RCD, which, in turns, cross references the Proposal for a recast of the Dublin II Regulation[25] (hereafter "recast Dublin II Regulation"). The recast Dublin II Regulation introduces several limitations on the use of detention in Dublin proceedings; specifically, Article 28(1) of the recast Dublin II Regulation prohibits the detention of an asylum-seeker for the sole reason that s/he has applied for international protection. Article 28(2) further states that *"When there is a significant risk of absconding, Member States may detain the person concerned in order to secure transfer procedures in accordance with this Regulation, on*

[23] See, e.g., *Saadi v. the United Kingdom*, para. 43; *Witold Litwa v. Poland*, ECtHR, App. No. 26629/95, at para. 49.

[24] Council Regulation (EC) No 343/2003 of 18 February 2003 *establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*, Official Journal ('OJ') L 050, 25/02/2003, available at: http://www.unhcr.org/refworld/docid/3e5cf1c24.html, ("*Dublin II Regulation"*).

[25] Position of the Council at first reading with a view to the adoption of a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) ("*recast Dublin II Regulation"*).

the basis of an individual assessment and only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively".

18. UNHCR is thus of the view that the proposed **Section 9 (1) (5)** of the Asylum Law leaves room for a too extensive application and could potentially lead to the systematic detention of every asylum-seeker who is subject to transfer under the Dublin Regulation. UNHCR thus recommends amending the wording the proposed Section 9 (1) (5) of the Asylum Law, to bring it in line with Article 28 of the recast Dublin II Regulation.

Recommendation: UNHCR recommends revising the proposed Section 9 (1) (5) of the Asylum Law to bring it in line with Article 8(3)(f) of the recast RCD, read in conjunction with Article 28(2) of the recast Dublin II Regulation, by introducing the criteria that detention (in the context at hand) may only be used in order to secure transfer procedures in accordance with the Dublin Regulation, when there is a significant risk of absconding on the basis of an individual assessment and only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively.

- ***Guarantees for detained asylum-seekers***

19. UNHCR welcomes the introduction of general principles governing the detention of asylum-seekers in the proposed **Section 9 (5[1])** of the Asylum Law. Respecting the right to seek asylum entails instituting open and humane reception arrangements for asylum-seekers, including safe, dignified and human rights-compatible treatment[26]. Accordingly, the conditions of detention should ensure humane treatment with respect for the inherent dignity of the person[27].

20. UNHCR would further recommend introducing exceptions to the use of detention, of children, nursing mothers and women in the later stages of pregnancy, survivors of torture or sexual violence as well as traumatized persons, in view of their special needs. In respect of children, Article 37 of the UN Convention of the Rights of the Child provides that no child shall be deprived of his or her liberty unlawfully or arbitrarily and that detention of a child shall be used only as a measure of last resort and for the shortest appropriate period of time.

[26] See, in particular, UN High Commissioner for Refugees (UNHCR), Executive Committee of the High Commissioner's Programme (ExCom), *Conclusion on Reception of Asylum-seekers in the Context of Individual Asylum Systems*, No. 93 (LIII) – 2002, available at: http://www.unhcr.org/refworld/docid/3dafdd344.html.

[27] See Universal Declaration of Human Rights (Article 10), Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 11), International Covenant on Civil and Political Rights (Article 10), International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Article 17), and CRC (article 37 (c)). See also: UN Human Rights Committee, General Comment No. 21: *Article 10 (Humane Treatment of Persons Deprived of Their Liberty)*, 10 April 1992, available at http://www.unhcr.org/refworld/docid/453883fb11.html, and UN General Assembly, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment: resolution / adopted by the General Assembly*, 9 December 1988, A/RES/43/173, available at http://www.unhcr.org/refworld/docid/3b00f219c.html.

- ***Use of disciplinary sanctions in respect of detained asylum-seekers***

21. The proposed **Section 9 (5[1]) (3)** of the Asylum Law introduces provisions governing the use of a disciplinary sanctions for detained asylum-seekers who violate the "Internal Procedures Regulations of the Accommodation Premises for Asylum-Seekers" (hereafter 'Internal Regulations'), or who may pose a threat to the safety of other persons staying in the accommodation premises, UNHCR notes that according to Principle 30 of the "Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment" (hereafter 'BPP'), conduct that constitute disciplinary offences during detention or imprisonment, the description and duration of disciplinary punishment that may be inflicted and the authorities competent to impose such punishment shall be specified by law or lawful regulations and duly published[28].

22. Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules (hereafter 'EPR') similarly stipulates that "National law shall determine: (a) the acts or omissions by prisoners that constitute disciplinary offences; (b) the procedures to be followed at disciplinary hearings; (c) the types and duration of punishment that may be imposed; (d) the authority competent to impose such punishment; and (e) access to and the authority of the appellate process"[29]. The UN Standard Minimum Rules for the Treatment of Prisoners (hereafter 'SMRTP')[30] also provide:

> 29. The following shall always be determined by the law or by the regulation of the competent administrative authority:
>
> (a) Conduct constituting a disciplinary offence;
> (b) The types and duration of punishment which may be inflicted;
> (c) The authority competent to impose such punishment.
>
> 30. (1) No prisoner shall be punished except in accordance with the terms of such law or regulation, and never twice for the same offence.

23. UNHCR would like to recall that freedom of movement and freedom from arbitrary detention is a fundamental human right. Detention of asylum-seekers should normally be avoided and be a measure of last resort. This is even more so in the case of detainees who are held in a regime of isolation (no contact with other detainees, limited or no contact with the outside world). Placing a human being in the specially equipped premises (solitary confinement) is a serious sanction which, if applied for an extended period of time and/or if repeated, can constitute inhuman or degrading treatment or even an act of torture[31].

---

[28] See *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (hereafter 'BPP'), adopted by the United Nations General Assembly Resolution No. 43/173 of 9 December 1988, Principle 30(1). Available at: http://www.un.org/documents/ga/res/43/a43r173.htm

[29] Council of Europe Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, Rule 57.2 (hereafter 'EPR'), available at: http://www.coe.int/t/dghl/standardsetting/prisons/Recommendations_en.asp

[30] UN Standard Minimum Rules for the Treatment of Prisoners, paras. 29 and 30(1), available at: http://www2.ohchr.org/english/law/treatmentprisoners.htm

[31] "Prolonged solitary confinement of the detained or imprisoned may amount to prohibited acts of torture", *General Comment No. 20/44 on Article 7 of the International Covenant on Civil and Political Rights,* available at: http://www2.ohchr.org/english/bodies/hrc/comments.htm

24. As a starting point, detainees who commit offences amounting to a violation of national criminal law should be prosecuted in accordance with that law.[32] If this is not the case, then the necessity and proportionality tests require an assessment of whether disciplinary sanctions are justified or if there are less restrictive or coercive measures that could be applied to the individual concerned and which would be effective in the individual case.[33] The principle of proportionality has been affirmed by the EPR, which provide that "Solitary confinement shall be imposed as a punishment only in exceptional cases and for a specified period of time, which shall be as short as possible".[34] Whenever possible, prison authorities shall use mechanisms of restoration and mediation to resolve disputes with and among prisoners[35].

25. In addition, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has established specific standards governing the use of disciplinary sanctions, and in particular solitary confinement, which need to be respected.[36] The CPT Standards stipulate that with regard to detainees undergoing solitary confinement, the administration may apply only those restrictions which are necessary for the safe and orderly confinement. Accordingly, during solitary confinement there should, for example, be no automatic withdrawal of rights to visits, telephone calls and correspondence or of access to resources normally available to detainees (such as reading materials). Equally, the regime should be flexible enough to permit relaxation of any restriction which is not necessary in individual cases[37].

26. The CPT has established a few more principles governing the imposition of solitary confinement to detainees. Firstly, in deciding whether to impose solitary confinement, appropriate care must be taken to ensure that irrelevant matters are not taken into account. Authorities should monitor the use of all forms of solitary confinement to ensure that they are not used disproportionately, without an objective and reasonable justification, against a particular detainee or particular groups of detainees. Secondly, a full record should be maintained of all decisions to impose solitary confinement and of all reviews of decisions. These records should evidence all the factors which have been taken into account and the information on which they were based. There should also be a record of the detainee's input or refusal to contribute to the decision-making process. Further, full records should be kept of all interactions with staff while the detainee is in solitary confinement, including attempts by staff to engage with the detainee and the detainee's response[38].

---

[32] See for example EPR, Rule 55, which stipulate "*An alleged criminal act committed in a prison shall be investigated in the same way as it would be in free society and shall be dealt with in accordance with national law*".

[33] UNHCR *Guidelines on Detention*, Guideline 4.2 (§34), see *supra* footnote 21.

[34] EPR, Rule 60.5.

[35] EPR Rules 56.1 and 56.2.

[36] The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) Standards, CPT/Inf/E (2002) 1 - Rev. 2011, available at: http://www.cpt.coe.int/en/docsstandards.htm

[37] CPT Standards, para 55(d).

[38] *Ibid*, para 55(c) and 55(e).

Recommendation: UNHCR recommends adding the necessity, proportionality and non-discrimination requirements and safeguards underpinning the use of disciplinary sanctions to the proposed Section 9 (5[1]) (3) of the Asylum Law. UNHCR moreover recommends including a specification of the types of conduct which can lead to disciplinary sanctions, as well as a maximum duration of stay in the specially equipped premises.

- ***Alternatives to detention of asylum-seekers***

27. In general, UNHCR welcomes the proposed **Section 9 (9) and Section 9 (10)** of the Asylum Law, which introduces alternatives to the detention of asylum-seekers.

28. Consideration of alternatives to detention – ranging from reporting requirements to structured community supervision and/or case management programmes – should be part of the overall assessment of the necessity, reasonableness and proportionality of detention. Such consideration ensures that detention of asylum-seekers is a measure of last, rather than first, resort. It must be shown that in light of the asylum-seeker's particular circumstances, there were not less invasive or coercive means of achieving the same ends[39]. Thus, consideration of the availability, effectiveness and appropriateness of alternatives to detention in each individual case needs to be undertaken[40].

29. Appropriate screening or assessment tools can guide decision-makers in this regard, and should also take into account the special circumstances or needs of particular categories of asylum-seekers (like children, victims of trauma or torture, women, victims of trafficking or asylum-seekers with disabilities etc)[41]. Factors to guide such decisions can include the stage of the asylum process, the intended final destination, family and/or community ties, past behavior of compliance and character, and risk of absconding or articulation of a willingness and understanding of the need to comply. Also, as stated above in paragraph 20, UNHCR recommends the introduction of exceptions to detention of children, nursing mothers and women in the later stages of pregnancy, survivors of torture or sexual violence, and traumatized persons, in view of their special needs.

30. In UNHCR's view, the current Section 9 of the Asylum Law, even when applied in conjunction with the proposed amendments, still lacks several important safeguards intended to protect individuals from arbitrary detention. Specifically,

[39] *C v. Australia*, HRC, Comm. No. 900/1999, para. 8.2, available at: http://www.unhcr.org/refworld/docid/3f588ef00.html.

[40] See, for example, *Sahin v. Canada*, (Minister of Citizenship and Immigration) [1995] 1 FC 214 available at: http://www.unhcr.org/refworld/docid/3ae6b6e610.html. See, also, WGAD, Opinion No. 45/2006, UN Doc. A/HRC/7/4/Add.1, 16 January 2008, para. 25, available at: http://www2.ohchr.org/english/bodies/hrcouncil/7session/reports.htm and WGAD, Legal Opinion on the Situation regarding Immigrants and Asylum-seekers, UN Doc. E/CN.4/1999/63, para. 69: "*Possibility for the alien to benefit from alternatives to administrative custody.*" available at: http://ap.ohchr.org/documents/alldocs.aspx?doc_id=1520 and WGAD, Report to the Thirteenth Session of the Human Rights Council, A/HRC/13/30, 15 January 2010, para. 65, available at: http://www.unhcr.org/refworld/docid/502e0fa62.html.

[41] For more details, see Guideline 9 of the *UNHCR Guidelines on Detention*, pages 33-39.

the Section does not provide for an assessment by a law-implementing authority or a court of the reasonability "in all the circumstances", and of the proportionality of the detention "to a legitimate purpose"[42]. Article 8(2) of the recast RCD limits detention of asylum-seekers by introducing a necessity test.

31. Also, the application of alternatives to detention shall be based on the principles of necessity and proportionality rather than considerations of humanitarian nature, as suggested in the proposed Section 9 (9) of the Asylum Law. Like detention, alternatives to detention equally need to be governed by laws and regulations in order to avoid the arbitrary imposition of restrictions on liberty or freedom of movement. The principle of legal certainty calls for proper regulation of these alternatives. Legal regulations ought to specify and explain the various alternatives available, the criteria governing their use, as well as the authority(ies) responsible for their implementation and enforcement[43].

Recommendation: UNHCR recommends revising Section 9 of the Asylum Law in order to bring it in line with international and EU standards, including Article 8(2) of the recast RCD, by introducing the following new provision:

"*The detention of asylum-seekers is inherently undesirable and shall be used only as a last resort when it proves necessary on the basis of an individual assessment of each case and if other less coercive alternative measures cannot be applied effectively. Alternatives to detention shall be considered prior to consideration of detention. In addition, detention shall be for as short a period as possible and shall only be maintained for as long as legitimate grounds are applicable.*"

UNHCR would further recommend introducing a provision which exempts asylum-seekers with specific needs, such as children, nursing mothers and women in the later stages of pregnancy, survivors of torture or sexual violence as well as traumatized persons from detention. In particular, detention of children should as a rule be avoided.

C. Right to legal aid of asylum-seekers detained during the accelerated procedure at the border

32. UNHCR notes that the proposed **Section 10(3¹)** of the Asylum Law relates to Article 9(5) of the recast RCD. UNHCR welcomes this proposal, which provides asylum-seekers, who have been detained during the implementation of accelerated procedures at the border, with the right to request free legal assistance and representation. However, UNHCR is concerned about the short timeframe (1 day) provided for detained asylum-seekers to request legal assistance. Furthermore, the Proposal does not clarify the procedure for

[42] *Van Alphen v. The Netherlands*, HRC, Comm. No. 305/1988, 23 July 1990, para. 5.8, available at: http://www.ohchr.org/Documents/Publications/SDecisionsVol3en.pdf. Also, *A v. Australia*, HRC, Comm. No. 560/1993, 3 April 1997, available at: http://www.unhcr.org/refworld/docid/3ae6b71a0.html, paras. 9.2-9.4 (on proportionality). See also *UNHCR Guidelines on Detention.* Guidelines Nos. 4.1 and 4.2.
[43] *UNHCR Guidelines on Detention*, para 36.

requesting legal assistance (orally and/or in writing) and the duty of the governmental officials (border guards) to inform asylum-seekers about their right to seek free legal assistance. UNHCR notes that Article 19(1) of the recast APD[44] sets out the obligation of Member States to provide applicants for international protection – upon request – with legal and procedural information including, at least, "*information on the procedure in the light of the applicant's particular circumstances and explanations of reasons in fact and in law in the event of a negative decision"*.

33. UNHCR would also like to emphasize that the right to legal assistance and representation is an essential safeguard, in particularly in situations of detention. Free legal assistance should be available as soon as possible after detention to help the detainee understand his/her rights. Communication between legal counsel and the asylum-seeker must be subject to lawyer-client confidentiality principles. Lawyers need to have access to their client, to records held on their client, and be able to meet with their client in a secure, private setting[45].

Recommendation: UNHCR recommends revising the proposed Section 10(3[1]) of the Asylum Law, by extending the timeframe for seeking legal assistance and by specifying the procedure for requesting free legal assistance and the obligation of the responsible authorities for informing asylum-seekers about their right to request free legal assistance.

D. Admissibility and accelerated procedures

- ***The competence for interviewing of asylum-seekers and examining of asylum applications***

34. Pursuant to the proposed **Sections 12[1] and 19[1]** of the Asylum Law, authorized representatives of the Latvian State Border Guard shall take decisions on the refusal to grant refugee status or subsidiary protection to asylum-seekers who are being channelled through the accelerated procedure at the border in accordance with Section 19 (1) of the Asylum Law.

35. In regard to the responsibility for interviewing applicants for international protection at the admissibility stage and in accelerated procedures, within the country or at borders, as well as for taking decisions on the granting or refusal of admissibility or international protection, UNHCR is of the strong view that all these tasks should be performed by a single central authority, in line with the guidance in UNHCR's Executive Committee Conclusion No. 8 (XXXVIII) of 1977[46]. Hence, in UNHCR's comments to the 2009 recast APD, UNHCR welcomed the introduction in EU law of the principle that a single and competent determining authority should conduct the asylum interviews and

[44] See *supra* footnote 10.
[45] *UNHCR Guidelines on Detention, Guideline 7*, page 27.
[46] UNHCR, *Determination of Refugee Status*, 12 October 1977, No. 8 (XXVIII) - 1977, letter e (iii), available at: http://www.unhcr.org/refworld/docid/3ae68c6e4.html.

examine all asylum applications, and reiterated its view that also admissibility interviews should be carried out by the determining authority[47].

36. UNHCR is thus pleased to note that Article 14 of the recast APD provides the general rule that interviews on the substance of the application for international protection shall be conducted by the personnel of the determining authority, which would encompass interviews conducted within accelerated procedures in the country or at the border as these should always assess the substance of an application. In regard to admissibility interviews, however, Article 34(2) of the recast APD contains an exception to the general rule, which allows Member States to provide that the personnel of other authorities than the determining authority, such as the Border Guard, conducts the personal interview on the admissibility of the application for international protection. Nonetheless, Article 32(2) further provides that in such cases, Member States shall ensure that the personnel of those authorities who conduct the interview receive in advance the necessary basic training in particular with respect to international human rights law, the EU asylum acquis and interview techniques.

37. As noted above, the general rule in the recast APD is that decisions on admissibility and on the substance of asylum applications channeled in accelerated or regular procedures shall be taken by the central determining authority. According to Article 4(2)(b) of the recast APD, Member States may provide that an authority other than the "determining authority" is responsible for (i) processing cases pursuant to the Dublin Regulation, and (ii) granting or refusing permission to enter in the framework of border procedures, subject to the conditions and as set out in Article 43 of the recast APD and on the basis of the *reasoned opinion of the determining authority* (emphasis added). Article 43(1) of the recast APD allows for the determination at border-crossing points or in transit zones of the *admissibility of an application* (pursuant to Article 33 of the recast APD) and/or the *substance of an application in the accelerated procedure* (pursuant to Article 31(6) of the recast APD). Article 34 of the recast APD further provides that decisions on admissibility shall be taken by the determining authority.

38. UNHCR is aware that currently in Latvia, the competence to examine asylum applications in the accelerated and regular procedure lies with the OCMA. This governmental institution constitutes the central determining authority in the Latvian context and has as such been provided with the human and technical resources, including training, to perform this responsibility. Hence, while 'an authority other than the determining authority', such as the State Border Guard, may be authorized to process cases pursuant to the Dublin Regulation and make decisions on the granting or refusing permission to *enter* (emphasis added) under the recast APD, such decision can only be made on the basis of the determining authority's decision (or 'reasoned opinion') on admissibility (pursuant to Article 34) or on acceptance or rejection of a claim examined in the accelerated procedure (pursuant to Article 31(6) and 32 APD). All decisions requiring a determination of the applicability of the grounds for admissibility as well as decisions on the refusal or acceptance of applications channeled in the accelerated procedure, must thus be made by the central determining authority (i.e. the OCMA in Latvia).

[47] *UNHCR comments on 2009 recast APD*, see *supra* footnote 12.

39. Furthermore, if Latvia wishes to continue to authorize officials of the State Border Guard to conduct the personal interview on the admissibility of the application for international protection - on the basis of which the determining authority shall decide on admissibility – UNHCR recalls the requirement to ensure that those officials receive in advance the necessary basic training in particular with respect to international human rights law, the EU asylum acquis and interview techniques, pursuant to Article 34(2) of the recast APD[48].

Recommendation: UNHCR strongly recommends revising the proposed Sections 12[1] and 19[1], to bring the text in line with international and EU standards. Specifically, UNHCR recommends incorporating the wording of relevant Articles in the recast APD, which provide that decisions on admissibility and on the eligibility for international protection status pursuant to the EU Qualification Directive, whether taken in accelerated or in regular procedures, shall be made by the central determining authority.

In order to ensure compliance with the recast APD, UNHCR also recommends stipulating that interviews on the substance of the application for international protection shall be conducted by the personnel of the determining authority. If personnel from an authority other than the determining authority have been authorized to conduct admissibility interviews, then they must receive in advance the necessary basic training in particular with respect to international human rights law, the EU asylum acquis and interview techniques,

- ***Grounds for channelling an application through admissibility or accelerated procedures versus grounds for rejecting an asylum application in the accelerated procedure***

40. At the outset, UNHCR would like to express its concern over the fact that the current wording of **Section 19(1)** of the Asylum Law provides that the grounds for channeling an application through the accelerated procedure are also the grounds on which an application can be rejected on its merits.

41. UNHCR would like to recall that accelerated procedures are aimed at processing asylum applications at a significantly faster rate than in a normal asylum procedure. Accelerated procedures can either be classed as 'inclusionary' or 'exclusionary'. The main objective of an 'inclusionary' accelerated procedure is to speedily grant an individual refugee status, for example in clearly well-founded cases, where compelling protection reasons are at hand and the acceleration allows for a swift positive decision on the asylum application[49]. In several EU Member States[50], an accelerated procedure is used for such cases.

[48] *UNHCR Comments on 2011 recast APD*, page 8. See *supra* footnote 13.
[49] UN High Commissioner for Refugees, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, 20 October 1983, No. 30 (XXXIV) - 1983, Available at: http://www.unhcr.org/refworld/docid/3ae68c6118.html,
[50] This includes Greece (Article 8 (2) PD 90/2008 states that examination of an application may be prioritized when it may reasonably be considered to be well-founded), Italy (Article 28 of Legislative Decree No. 25/2008), Slovenia (according to Article 54 IPA, the competent authority may decide the application in the accelerated procedure *"if the entire operative event has been established on the basis of*

This may be a useful practice which helps reduce the burden on decision-making structures and releases resources to deal with more complex cases. The main objective of an 'exclusionary' accelerated procedure is to speedily deal with applications which are obviously without foundation as not to merit a full examination at every level of the procedure. In line with UNHCR Executive Committee Conclusion No. 30 (XXXIV) of 1983, only cases that are "clearly abusive" (i.e. clearly fraudulent), or "manifestly unfounded", (i.e. not related to the grounds for granting international protection), should be considered for accelerated treatment[51]. It should also be noted that decisions by the determining authority on applications for international protection – whether made in accelerated or regular procedures – require an 'appropriate examination' with the safeguards provided in Chapter II of the recast APD.

42. Pursuant to Article 32 of the recast APD, the *ground for rejecting* (emphasis added) an application channelled in the accelerated procedure as unfounded is the determining authority's determination that the applicant does not qualify for international protection status pursuant to the recast Qualification Directive.

Recommendation: UNHCR strongly recommends revising the wording in Section 19 (1) of the Asylum Law in order to bring it in line with Articles 31(6) and 32 of the recast APD, to make it clear that the grounds provided in Section 19 are merely grounds for channelling an application through the accelerated procedure, and not grounds on which an application can be rejected.

Taking into consideration the scope of the proposed Sections 12[1] and 19[1] of the Asylum Law, UNHCR further recommends adding a provision stipulating that only the determining authority (OCMA) may take a decision on whether to prioritize and/or accelerate the examination of an asylum application.

- ***Grounds for channeling asylum applications into the accelerated procedure***

43. UNHCR notes that the Proposal introduces five new grounds in **Section 19 (1)** of the Asylum Law for channelling an application into the accelerated procedure, and revises the wording of the ground in item 3. Based on the Proposal, the new Section 19 (1) would read as follows:

facts and circumstances from the first to the eighth sub-paragraph of Article 23 of this Act inasmuch as they have been presented." Notably, Article 54 IPA was never applied) and Spain (Article 25 (1) (a) of the New Asylum Law provides that the urgent RSD procedure will be applied to manifestly well-founded applications lodged in country only).

[51] UN High Commissioner for Refugees, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, 20 October 1983, No. 30 (XXXIV) - 1983, at: http://www.unhcr.org/refworld/docid/3ae68c6118.html

Section 19. Examination of Applications Under the Accelerated Procedure

(1) An official authorised by the head of the Office shall examine an application under accelerated procedure and take a decision regarding the refusal to grant refugee or alternative status if at least one of the following conditions exist:

1) an asylum-seeker is from a safe country of origin;

2) an asylum-seeker has entered the Republic of Latvia, crossing a country which is not a Member State and is regarded as a safe third country in relation to the asylum seeker;

3) an asylum-seeker has deceived the institutions involved in the asylum proceedings, by providing false information or documents, or by not submitting appropriate information or documents in relation with identity or nationality, which might negatively impact the decision mentioned in Section 12 of this Law;

4) an asylum-seeker, without justified reason, has not submitted an application earlier, although he or she had such opportunity, including in order to delay or prevent his or her return from the Republic of Latvia; or

5) an asylum-seeker poses a threat to national security or public order and safety.

6) an asylum-seeker has not submitted information so as to make it possible to establish his/her identity or nationality, or there is a possibility that s/he has maliciously destroyed or discarded personal identification or travel document which could have helped to detect asylum seeker's identity or nationality;

7) an asylum-seeker has submitted inconsistent, contradictory, incredible or insufficient information which raises an assumption that his/her claim in relation with his/her persecution in light of Section 20 of this Law or in relation with threats of serious harm in light of Section 23 of this Law is unconvincing;

8) an asylum-seeker has illegally entered the Republic of Latvia or illegally prolonged his/her stay in the country and without any serious grounds has not submitted the application earlier;

9) an asylum-seeker refuses to fulfil his/her duty to give his/her fingerprints in accordance with Section 11(1)(1) of this Law;

10) an asylum-seeker has been removed from the Republic of Latvia because of a threat to national security or public order and safety, and in accordance with the provisions of the Immigration Law he or she has been included in the list of those foreigners for whom entry in the Republic of Latvia is prohibited.

44. UNHCR would like to recall that the purpose of accelerated procedures is to deal in an expeditious manner with applications which are obviously without foundation as not to merit a full examination at every level of the procedure. As stated above in paragraph 41, only cases that are "clearly abusive" (i.e. clearly fraudulent), or "manifestly unfounded", (i.e. not related to the grounds for granting international protection), should be considered for accelerated treatment.[52] Compelling protection reasons may also be a basis for processing a claim on a priority basis through an accelerated procedure, for example in cases which are clearly well-founded, allowing a swift positive decision on the asylum application[53].

[52] UNHCR, *The Problem of Manifestly Unfounded or Abusive Applications*, see *supra* footnote 55.
[53] *Ibid*., para. 8.1.3.

45. Article 31(6) of the recast APD enumerates the grounds for examining an asylum application in an accelerated procedure, and thus, together with ExCom Conclusion No. 30 on '*The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum'* and UNHCR's observations on the recast APD, provides the basis for UNHCR's comments below on relevant items in Section 19 (1) in the Latvian Asylum Law, as amended by the Proposal.

46. The proposed **Section 19 (1) (6)** of the Asylum Law, incorporates the content of Article 31(6)(d) of the recast APD as well as another ground, which is not permissible under international and EU law; namely the first part of the proposed Section 19 (1) (6) of the Asylum Law provides that *"an asylum-seeker who has not submitted information so as to make it possible to establish his/her identity or nationality"* shall be channelled through the accelerated procedure.

47. The mere fact of not having submitted documentary proof of one's identity should not be automatically interpreted as an unwillingness to cooperate and/or intention to mislead the authorities, and used as a ground for referral of an asylum application to the accelerated procedure. In UNHCR`s view, the lack of documentation does not, in itself, render a claim fraudulent, or warrant negative conclusions about the genuineness of the claim. For example, some asylum-seekers come from countries or areas were the population has not been provided with identity documents; others may lack authentic identify documents because these have been confiscated by the smugglers who arranged for their journey to the country of asylum. Moreover, determination of nationality or citizenship of an individual is a complicated assessment and as far as it relates to stateless asylum-seekers, it should be undertaken in a proper procedure[54].

Recommendation: UNHCR recommends deleting the first part of Section 19 (1) (6) of the Asylum Law, which refers to *"an asylum-seeker who has not submitted information so as to make it possible to establish his/her identity or nationality"*, in order to bring it in line with Article 31(6) of the recast APD, and rephrase item 6 as follows: *"it is likely that, in bad faith, the applicant has destroyed or disposed of an identity or travel document that would have helped establish his/her identity or nationality".*

48. The proposed **Section 19 (1) (7)** of the Asylum Law appears to be in line with Article 31(6)(e) of the recast APD and UNHCR's position. However, as UNHCR only has an unofficial English translation of the Proposal at its disposal, the Office recommends reviewing the proposed text to ensure it corresponds with the wording of Article 31(6)(e) of the recast APD.

[54] UNHCR and the Office of the High Commissioner for Human Rights (OHCHR), *Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons: Summary Conclusions*, May 2011 (Global Roundtable Summary Conclusions), para 6, available at: http://www.unhcr.org/refworld/docid/4e315b882.html. See also, UNHCR, *Guidelines on Statelessness No.2: Procedures for Determining Whether an Individual is a Stateless Person*, 5 April 2012, HCR/GS/12/02, available at: http://www.unhcr.org/refworld/docid/4f7dafb52.html.

Recommendation: UNHCR recommends reviewing the wording of the proposed Section 19 (1) (7), to ensure it corresponds to the following wording of Article 31(6) of the recast APD:

"the applicant has made clearly inconsistent and contradictory, clearly false or obviously improbable representations which contradict sufficiently verified country-of-origin information, thus making his/her claim clearly unconvincing in relation to whether he/she qualifies as a refugee or a person eligible for subsidiary protection by virtue of the EU Qualification Directive"

49. The proposed **Section 19 (1) (8)** resembles, but is not identical to Article 31(6)(f1) of the recast APD, which provides that an application may be examined in an accelerated procedure if *"the applicant entered the territory of the Member State unlawfully or prolonged his/her stay unlawfully and, without good reason, has either not presented himself/herself to the authorities and/or filed an application for asylum as soon as possible, given the circumstances of his/her entry".*

50. In principle, UNHCR is of the view that, particularly in a procedure which may have reduced safeguards, grounds which are unrelated to the merits of the application should not be included in the list of criteria for examining a claim in an accelerated procedure. This includes grounds relating purely to non-compliance with procedural requirements, in cases where the applicant's circumstances may have made such non-compliance unavoidable, or where there could be a reasonable explanation for such non-compliance. This includes, among other things, failure to apply earlier[55].

51. In exercising their right to asylum[56], asylum-seekers are often forced to arrive at, or enter, state territory without prior authorization. The position of asylum-seekers often thus differs fundamentally from that of ordinary migrants in that they may not be in a position to comply with the legal formalities for entry, not least because they may be unable to obtain the necessary documentation in advance of their flight, e.g., because of their fear of persecution or the urgency of their departure[57]. This element, as well as the fact that many asylum-seekers

[55] UN High Commissioner for Refugees, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendations*, March 2010, page 57. Available at: http://www.unhcr.org/refworld/docid/4bab55752.html

[56] Article 18 of the Charter of Fundamental Rights of the EU enshrines the right to asylum. The scope of this right is broad and incorporates not only the substantive provisions of the 1951 Convention but also the procedural and substantive standards contained in the Union's asylum *acquis*. The protection it confers plainly goes beyond protection from *refoulement* and includes a right to apply for and be granted refugee or subsidiary protection status. There will thus be a breach of Article 18 not only where there is a real risk of *refoulement* but also in the event of (i) limited access to asylum procedures and to a fair and efficient examination of claims or to an effective remedy; (ii) treatment not in accordance with adequate reception and detention conditions and (iii) denial of asylum in the form of refugee status or subsidiary protection status, with attendant rights, when the criteria are met. See UNHCR, *N.S. v. Secretary of State for the Home Department in United Kingdom; M.E. and Others v. Refugee Application Commissioner and the Minister for Justice, Equality and Law Reform in Ireland - Written Observations of the United Nations High Commissioner for Refugees*, 1 February 2011, C-411/10 and C-493/10, available at: http://www.unhcr.org/refworld/docid/4d493e822.html.

[57] See UN Working Group on Arbitrary Detention, Report to the Seventh Session of the Human Rights Council, A/HRC/7/4/, 10 January 2008, at para. 53: *"[C]riminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary [and*

have experienced traumatic events[58], needs to be taken into account when assessing the reason(s) for an asylum-seeker's delay in submitting his/her application. In UNHCR's experience, applicants may have various valid reasons for a delay in submitting an asylum claim, such as illness, lack of information about the asylum procedure and ways to apply, or language barriers hampering the individual's understanding of available information, lack of trust in authorities, belief in and compliance with 'instructions' provided by smugglers etc. As the reasons why applicants do not apply immediately can vary considerably from one individual to another, there is no fixed time limit which can be mechanically applied or associated with the expression "without delay" in Article 31 in the 1951 Convention.[59]

52. Furthermore, even in cases when an applicant deliberately avoids submitting an application, for example, because he or she would prefer to seek asylum in another country where relatives or friends stay, the delay is not necessarily an indication of unfoundedness of the applicant's need for international protection. There is no obligation under international law for a person to seek international protection at the first effective opportunity. On the other hand, asylum-seekers and refugees do not have an unfettered right to choose the country that will determine their asylum claim in substance and provide asylum. Their intentions, however, ought to be taken into account.[60] In addition, the family union criteria are central in the recast Dublin II Regulation.

53. Hence, while failure to apply promptly for asylum may be an element in the consideration of the credibility of a claim,[61] it should never be the sole reason for rejecting an application.

54. The possibility of lodging an asylum claim at any time after arrival is also essential to enable individuals to be considered for international protection, as refugees *sur place*. The automatic and mechanical application of time limits for submitting applications is not consistent with "the protection of the fundamental value embodied in Article 3" as interpreted in the case law of the ECtHR[62] and with international protection principles.[63]

---

therefore arbitrary] detention." Available at: http://daccessddsny.un.org/doc/UNDOC/GEN/G08/100/91/PDF/G0810091.pdf?OpenElement.

[58] As recognized by *M.S.S. v. Belgium and Greece*, at paras. 232-233.

[59] See, e.g., UNHCR, *Global Consultations on International Protection: Summary Conclusions on Article 31 of the 1951 Convention relating to the Status of Refugees* – Revised, 8-9 November 2001, available at: http://www.unhcr.org/3bf4ef474.html.

[60] UN High Commissioner for Refugees, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002)*, February 2003, para. 11, available at: http://www.refworld.org/docid/3fe9981e4.html

[61] UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, para. 20, at: http://www.unhcr.org/refworld/docid/3b36f2fca.html

[62] *Jabari v. Turkey*, Appl. No. 40035/98, Council of Europe: European Court of Human Rights, 11 July 2000, para. 40, at: http://www.unhcr.org/refworld/docid/3ae6b6dac.html

[63] UNHCR, *Refugees without an Asylum Country*, 16 October 1979, No. 15 (XXX) - 1979, para. (i), at: http://www.unhcr.org/refworld/docid/3ae68c960.html; Standing Committee of the UNHCR, *Note on International Protection*, EC/49/SC/CRP.12, 4 June 1999, para. 18, at: http://www.unhcr.org/excom/EXCOM/3cc413316.pdf.

Recommendation: UNHCR recommends revising the wording of the proposed Article 19(1), item 8, to bring it in line with Article 31(6)(f1) of the recast APD, as follows:

"the applicant entered the territory of the Member State unlawfully or prolonged his/her stay unlawfully and, without good reason, has either not presented himself/herself to the authorities and/or filed an application for asylum as soon as possible, given the circumstances of his/her entry".

In addition, UNHCR would like to emphasize the importance of ensuring that this provision is not applied automatically without proper consideration of the reasons why an applicant did not file an application as soon as possible, which should not be assumed to imply a lack of need for international protection.

55. The proposed **Section 19 (1) (10)**, as well **as Section 19 (1) (5)** in the existing Asylum Law allow for the accelerated examination of claims from asylum-seekers who *"poses a threat to national security or public order and safety*" (item 5), or who have *"been removed from the Republic of Latvia because of a threat to national security or public order and safety, and in accordance with the provisions of the Immigration Law he or she has been included in the list of those foreigners for whom entry in the Republic of Latvia is prohibited."* (item 10).

56. These two provisions, together, resemble the ground for accelerated processing contained in Article 31(6)(g) of the recast APD, which stipulates *"the applicant may for serious reasons be considered a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security or public order under national law"*.

57. UNHCR would like to recall that accelerated procedures should be reserved for cases which are either manifestly unfounded or clearly abusive, or which are clearly well-founded, allowing a swift positive decision on the asylum application. Asylum claims which require detailed examination, including with regard to exclusion[64] considerations, should not, in UNHCR's view, be channelled through accelerated procedures. There are more effective and proportionate measures to deal with cases involving national security or public order. Given the severe consequences of a negative decision in cases of applications raising issues of national security, the Parliamentary Assembly of the Council of Europe[65] has recommended that these be exempted from accelerated procedures. UNHCR supports this recommendation. This ground should therefore not be invoked to accelerate such claims[66].

[64] See UN High Commissioner for Refugees, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, HCR/GIP/03/05, at: http://www.unhcr.org/refworld/docid/3f5857684.html

[65] Council of Europe: Parliamentary Assembly, *Resolution 1471 (2005) on Accelerated Asylum Procedures in Council of Europe Member States*, 7 October 2005, 1471 (2005), para 8.9, at: http://www.unhcr.org/refworld/docid/43f349e04.html

[66] UN High Commissioner for Refugees, *UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing*

Recommendation: UNHCR recommends deleting current Section 19 (1) (5) and the proposed Section 19 (1) (10) in the Asylum Law, and dealing with claims with which require a detailed examination with regard to exclusion, national security and/or public order, in the regular asylum procedure.

- ***Guarantees for vulnerable applicants in the accelerated procedure***

58. UNHCR notes that Section 19 (1) of the Asylum Law does not explicitly exempt claims from separated and unaccompanied children from examination in the accelerated procedure, and would thus recommend including a provision to this effect. In UNHCR's view, asylum claims submitted by separated or unaccompanied children should always be examined in a regular procedure that provides for sufficient procedural guarantees, including those set out in Article 25 of the recast APD.

Recommendation: UNHCR recommends adding a provision to Section 19 of the Asylum Law, which exempts unaccompanied or separated children from processing in the accelerated procedure.

E. Providers of national protection

59. UNHCR notes that the proposed **Section 26 (1) (2)** of the Asylum Law corresponds to Article 7(1)(b) of the recast Qualification Directive and that **Section 26 (2)** of the Asylum Law appears to correspond to Article 7(2) of the same Directive, which provides certain safeguards in the consideration of non-State actors as providers of protection.

60. In UNHCR`s opinion, non-state actors in principle should not be considered as actors of protection. Parties and organizations, including international organizations, do not have the attributes of a state and do not have the same obligations under international law. In practice, this means that their ability to enforce the rule of law is limited, and thus their ability to render protection would not qualify an international body as capable of providing protection. It is neither realistic nor practical to equate the protection generally provided by states with the exercise of a limited administrative authority and control over a territory by international organizations. Moreover, the CJEU in *Abdulla* stresses the importance of access to protection[67].

Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004), 10 February 2005, page 32, available at: http://www.refworld.org/docid/42492b302.html.

[67] See *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, C-175/08; C-176/08; C-178/08 & C-179/08, European Union: European Court of Justice, 2 March 2010, at: http://www.unhcr.org/refworld/docid/4b8e6ea22.html. The Court found that "[t]he competent authorities of the Member State must verify, having regard to the refugee's individual situation, that the actor or actors of protection referred to in Article 7 (1) of Directive 2004/83 have taken reasonable steps to prevent the persecution, that they therefore operate, inter alia, an effective legal system for the detection, prosecution and punishment of acts constituting persecution and that the national concerned will have access to such protection if he ceases to have refugee status."

Recommendation: UNHCR recommend deleting the proposed Section 26 (1) (2) of the Asylum Law, and consequently also Section 26 (2).

If Latvia nonetheless decides to retain such a provision in its national Asylum Law, then UNHCR recommends ensuring that it is harmonized with Articles 7(1)(b) and 7(2) of the recast Qualification Directive.

F. Internal flight or relocation alternative

61. UNHCR welcomes the efforts to provide, through the proposed **Section 29** in the Asylum Law, greater clarity on the determination of when a part of a country may be considered a safe internal protection alternative. However, UNHCR is concerned that the proposed provision remains silent as regards the period of time when the assessment of availability and accessibility of the internal protection alternative should take place. In UNHCR`s view, an internal relocation or flight alternative must be safely and legally accessible for the individual concerned, at the time of the decision[68]. A similar position is provided in Article 8(2) of the recast Qualification Directive, which requires that "…*Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant*…". Attempted predictions regarding whether the obstacles will be temporary or permanent detract from requisite legal certainty in the application of this concept. If the proposed alternative is not accessible in a practical sense, an internal flight or relocation alternative does not exist and cannot be considered reasonable[69].

Recommendation: UNHCR recommends revising the proposed Section 29 of the Asylum Law in order to bring it fully in line with Article 8 of the recast Qualification Directive, which, *inter alia*, provides that *"In examining whether an applicant has a well-founded fear of being persecuted or is at real risk of suffering serious harm, or has access to protection against persecution or serious harm in a part of the country of origin in accordance with paragraph 1, Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant in accordance with Article 4. To that end, Member States shall ensure that precise and up-to-date information is obtained from relevant sources, such as the United Nations High Commissioner for Refugees and the European Asylum Support Office".*

UNHCR Regional Representation for the Baltic and Nordic Countries
May 2013

[68] UN High Commissioner for Refugees, *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM(2009)551, 21 October 2009)*, 29 July 2010, page 6, available at: http://www.refworld.org/docid/4c503db52.html.

[69] UNHCR *Handbook*, para. 91 and UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04, available at: http://www.unhcr.org/refworld/docid/3f2791a44.html.