



UNHCR

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

Observations by the United Nations High Commissioner for Refugees Regional Representation for Northern Europe on the draft Proposal to amend the Foreigner's Act in Iceland (*"Frumvarp til laga um útlendinga"*)

I. Introduction

1. The United Nations High Commissioner for Refugees ("UNHCR") Regional Representation for Northern Europe ("RRNE") is grateful to the Government of Iceland for the invitation to provide its observations on the proposal to amend the Foreigner's Act in Iceland: "*Frumvarp til laga um útlendinga*" ("the Proposal").
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, seek permanent solutions to the problems of refugees.¹ Paragraph 8 of UNHCR's Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees,² whereas the 1951 Convention relating to the Status of Refugees³ and its 1967 Protocol relating to the Status of Refugees (hereafter collectively referred to as "1951 Convention") oblige States to cooperate with UNHCR in the exercise of its mandate, in particular facilitating UNHCR's duty of supervising the application of the provisions of the 1951 Convention and 1967 Protocol (Article 35 of the 1951 Convention and Article II of the 1967 Protocol). It has also been reflected in European

¹ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), (hereafter "UNHCR Statute"), available at: <http://www.refworld.org/docid/3ae6b3628.html>.

² *Ibid.*, para 8(a). According to para. 8(a) of the Statute, UNHCR is competent to supervise international conventions for the protection of refugees. The wording is open and flexible and does not restrict the scope of applicability of the UNHCR's supervisory function to one or other specific international refugee convention. The UNHCR is therefore competent qua its Statute to supervise all conventions relevant to refugee protection, *UNHCR's supervisory responsibility*, October 2002, ISSN 1020-7473, available at: <http://www.refworld.org/docid/4fe405ef2.html>, pp. 7–8.

³ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series, No. 2545, vol. 189, available at: <http://www.unhcr.org/refworld/docid/3be01b964.html>. According to Article 35 (1) of the 1951 Convention, UNHCR has the "duty of supervising the application of the provisions of the Convention".

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”).⁴

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 and subsequent Guidelines on International Protection (“UNHCR Handbook”).⁵ 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.

II. Background and scope of UNHCR’s comments

4. UNHCR is grateful to the Icelandic Ministry of the Interior (“MOI”) for providing a partial translation of the Proposal, an effort essential for UNHCR’s ability to exercise its supervisory responsibility through input to the legislative Proposal at stake. UNHCR recognizes that it is a highly demanding and resource intensive task to translate such an extensive Proposal.
5. UNHCR’s observations below pertain to those parts of the Proposal which were translated and provided in English to UNHCR RRNE by the MOI. UNHCR observations do, therefore, only reflect the translated parts of the Proposal and not the entire Proposal. As the translation is unofficial and UNHCR is not fully clear about the meaning of some of the draft provisions, UNHCR has refrained from commenting on specific legal language and instead provided general observations. When articles in the Proposal refer to articles not included in the English translation, these were not commented upon. These written observations complement the earlier substantial oral comments that UNHCR RRNE provided in a meeting with the Ministry of the Interior in Reykjavik, in September 2015, as well as the initial recommendations shared in a meeting in February 2015 with the Parliamentary Committee tasked with revising the Foreigners Act.

III. General Observations

6. UNHCR welcomes and supports the efforts made by the Government of Iceland to harmonize the relevant Icelandic legislation to international and regional standards in the area of refugee protection, and on the protection of stateless persons. This is an opportunity to ensure that the Icelandic legal framework in these areas is fully consistent with the obligations under International Law and, in particular, with the

⁴ 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>.

⁵ 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, (hereafter UNHCR, Handbook”), available at: <http://www.refworld.org/docid/4f33c8d92.html>.

1951 Convention and the 1954 Convention on the Status of Stateless Persons. UNHCR particularly welcomes the fact that the Proposal seeks to address many of the recommendations contained in the mapping of Statelessness in Iceland, published in 2014,⁶ and in the ensuing National Action Plan, including the establishment of statelessness status determination procedures.⁷ While not a member of the European Union (“EU”) and consequently not bound by the Common European Asylum System (“CEAS”), Iceland seeks to coordinate asylum and migration issues with its neighbours and has in EU enlargement negotiations indicated that it generally applies the EU asylum *acquis*. The present comments, therefore, are *inter alia* informed by standards stemming from EU asylum law.

7. In times of increasing numbers of asylum-seeker in Europe and the need for greater solidarity and burden sharing among European states, UNHCR commends the inclusion of possibilities for the authorities to take charge of the responsibility for the determination of asylum applications with links to Iceland, as well as provisions on granting of permanent residence permits for recognized refugees. UNHCR also welcomes several provisions safeguarding the rights and well-being of children, victims of trafficking and other vulnerable groups. UNHCR further appreciates the proposed time-limits to ensure a timely processing and adjudication of asylum applications, thereby facilitating early integration and family reunification for individuals eligible for international protection.

IV. Comments on specific articles in the draft Proposal

Articles 6-8: The Appeals Board

8. UNHCR welcomes the establishment of an independent Refugee Appeals Board, functional since the beginning of 2015. UNHCR would also like to commend the references in the Proposal to ensure appropriate qualifications of the members of the Board on all issues covered by the Foreigners Act, i.e. international refugee protection and statelessness issues, and the explicit obligation of the Board to publish its decisions. To ensure the institutional independence of the Board, UNHCR recommends precluding from appointment as a member of the Board, officials from the Ministry of the Interior and officials working in the Directorate of Immigration, even where such officials have not have been previously involved in the case.
9. The right to an “effective remedy”, as, for instance, set out in the EU recast Asylum Procedures Directive (“recast APD”)⁸ not only includes the requirement of an effective remedy before a court or tribunal, but also imposes requirements for the

⁶ UNHCR, *Mapping Statelessness in Iceland*, December 2014, available at: <http://www.refworld.org/docid/54c775dd4.html>.

⁷ National Action Plan to End Statelessness in respect of Iceland, April 2015.

⁸ European Union: Council of the European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, 29 June 2013, OJ L 180/60 -180/95; 29.6.2013, 2013/32/EU, available at: <http://www.refworld.org/docid/51d29b224.html>. See Article 46.

scope of the review. It requires the reviewing body to conduct a full and *ex nunc* examination of both facts and points of law at least in appeals procedures before a court or tribunal of first instance. UNHCR would thus recommend inserting in the Proposal an explicit reference that the Appeals Board is competent to review *ex nunc* both facts and points of law.

10. The notion of an effective remedy, furthermore, entails the right to an automatic suspensive effect of the first instance decision, allowing the applicant to remain in the country until a final decision has been taken on the asylum application.⁹ UNHCR notes that the recast APD permits four exceptions to the right to an automatic suspensive effect, outlined in Article 46(6), where the suspensive effect is subject to a decision from a court or tribunal. UNHCR wishes to note its concern about the potential risk of *refoulement* where such derogations apply and to underline the importance of ensuring the safeguards enshrined in Articles 46 (5) (7) and (8) of the recast APD, including the requirement to allow the applicant to remain on Icelandic territory pending the Board's decision over the applicant's right to remain.¹⁰
11. UNHCR acknowledges the need to make the proceedings of the Board as efficient as possible, without jeopardizing the quality of the decisions. As UNHCR thus observed in the aforementioned meeting in September 2015, depending on the nature of the appeal, it is not required that all applicants be given the opportunity of a hearing at the appeal stage. However, the proposed provision that "proceedings shall normally be in writing" seems to overly restrict the right to be heard. Moreover, certain appeals may require a further examination of the merits of the asylum claim, which may best be done through an interview, for example, where the credibility of the applicant's statements is disputed. To fulfil the requirement of rigorous scrutiny established in international human rights law, it is moreover important to note that the Board should have a fact-finding competence and the submission of new facts or evidence should be permitted during the appeals process.¹¹
12. It is furthermore important to note that the right to be heard also applies to children in the appeals process, including both unaccompanied and accompanied children, in particular those making independent asylum claims. Judges and other officials serving on the Board therefore need to receive child-specific training, including on child-friendly interview techniques, just as case-workers and decision-makers serving at the Directorate of Immigration (Article 24 of the Proposal refers).
13. With regards to the authority of the Chair of the Board and in what circumstances s/he may rule alone on cases of concern, UNHCR observes that whether an appeal is heard by a single judge or a panel of judges may depend on the nature of the decision taken by the determining authority. While the aim of the Proposal is noted, that is, efficiency

⁹ Recast APD, Article 46(5).

¹⁰ *Ibid.*, Articles 46(5) (7) and (8).

¹¹ UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendations*, March 2010, available at: <http://www.refworld.org/docid/4bab55752.html>, pp. 90–91.

in times of scarce resources and high numbers of applicants from countries deemed by many EU countries as “safe”, UNHCR recommends to delineate more clearly the cases where the Chair of the Board can rule alone. UNHCR would recommend that if the case presents particular difficulties of a factual or legal nature or the legal matter is of fundamental significance, the case is not determined by the Chair alone, but with the full Board. UNHCR further observes that voting rules of the Board are missing.

Article 9: The Refugee Committee

14. UNHCR welcomes the reference to the important work of the Refugee Committee in the context of the selection and reception of quota refugees for resettlement in Iceland. UNHCR recommends inserting a specific reference to resettlement with regard to the role of the Committee. In addition, in light of the recent Icelandic decision to establish a specific refugee quota for the coming three years, UNHCR would like to encourage the inclusion in the law of a specific multi-year commitment as to how many refugees Iceland will receive through resettlement on a yearly basis, accompanied with a promulgated budget. A reference to selection missions and their execution could also be included, if not in the law itself, in the preparatory works.

Article 19: Passports

15. In respect of the requirement to possess a passport or recognized travel document when arriving to Iceland, UNHCR wishes to remind that on account of the specific circumstances of the flight of persons in need of international protection, it is expected that refugees and asylum-seekers may arrive with false documents or insufficient documentation. "A refugee, whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements of legal entry (possession of national passport and visa) into the country of refuge."¹² Indeed, the UNHCR Executive Committee has noted that "it is recognised that circumstances may compel a refugee or asylum-seeker to have recourse to fraudulent documentation when leaving a country in which his physical safety or freedom are endangered."¹³
16. In this respect, Article 13(1) of the Schengen Borders Code¹⁴ makes it clear that the requirement to refuse entry to the Schengen area with respect to persons who do not fulfil entry conditions, including the requirement to be in possession of a valid travel

¹² Draft report of the Ad Hoc Committee on Statelessness and Related Problems, "proposed draft Convention Relating to the Status of Refugees", UN doc. E/AC.32.L.38, 15 Feb. 1950, Annex I (draft Art.26); Annex II (comments, p.57)

¹³ Executive Committee Conclusion No. 58 (XL) - 1989, (i). See in the UNHCR, *A Thematic Compilation of Executive Committee Conclusions, 6th edition, June 2011*, June 2011, available at: <http://www.refworld.org/docid/4f50cfbb2.html>. See also, UNHCR, *Re: Your inquiry concerning Article 31 of the 1951 Convention Relating to the Status of Refugees*, 8 June 2012, 152/ROBNC/2012, available at: <http://swigea56.hcnet.ch/refworld/docid/5202450f4.html>.

¹⁴ European Union: Council of the European Union, *Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)*, 15 March 2006, OJ L. 105/1-105/32; 13.4.206, (EC) No 562/2006, available at: <http://www.refworld.org/docid/47fdfb0525.html>.

document, “shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection”, and recital 20 further specifies that the Code should be applied in accordance with relevant obligations as regards international protection and *non-refoulement*. While “different arrangements” and exemptions in “special cases” are foreseen by the wording of Article 19 of the Proposal, UNHCR recommends to make the exemption from the requirement of possessing a valid travel document explicit in the law for persons seeking asylum, or in other words, that Article 19 applies without prejudice to the right to seek asylum. See further UNHCR’s comments below on non-penalization in relation to the requirements under Article 31 of the 1951 Convention.

Article 22: Authorities and procedure

17. UNHCR welcomes that “administrative staff” working with applicants for international protection shall be specialized in the area of refugee status determination. In line with Article 4(3) and 10(c) of the recast APD, the personnel of the determining authority, including case workers and decision-makers, shall receive appropriate training relating to the interviewing and processing of applications for international protection. The Dublin III Regulation¹⁵ further provides that “staff of the competent authority who deal with requests concerning unaccompanied minors shall have received, and shall continue to receive, appropriate training concerning the specific needs of minors”.¹⁶
18. UNHCR would thus recommend to explicitly introduce in the law the obligation to provide appropriate training, including to ensure child-specific competence, for case-workers, decision-makers and other relevant staff of the Directorate of Immigration.

Article 23: Applications for international protection

19. UNHCR recommends reviewing the references to a “*foreign national* who has applied for international protection” in the article, to ensure that it does not – unintentionally – exclude stateless applicants, who are not nationals of any country, from its scope.
20. According to the Proposal, either the police or the Directorate of Immigration may receive an asylum application; in other words, an applicant may lodge his or her application with either of these two authorities. In UNHCR’s understanding, regardless of which authority receives the application, the police is responsible for the preliminary gathering of information including photographing and fingerprinting of the applicant, as per Article 26 of the Proposal. While according to Article 33 gr. of the Proposal, the Directorate of Immigration issues the registration certificate to

¹⁵ European Union: Council of the European Union, *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 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)*, 29 June 2013, OJ L 180/31-180/59; 29.6.2013, (EU)No 604/2013, available at: <http://www.refworld.org/docid/51d298f04.html>.

¹⁶ *Ibid.*, Article 6(3)(d).

asylum-seekers, UNHCR notes that it is not explicitly stipulated in the draft which authority is responsible for the registration of asylum applications.

21. UNHCR recommends combining the registration and lodging of an application into one single phase in order to facilitate prompt and effective access for applicants to relevant procedural rights and reception-related entitlements. In this regard, UNHCR wishes to refer to the timelines set out in Article 6(1) of the recast APD, which requires to complete the registration within three days after the application for asylum is made (that is, when the applicant has expressed his or her wish to apply for asylum) to the authority competent for registration. If the application is received by an authority which - while likely to receive applications - is not competent for the registration, the application shall be registered no later than within six working days after the application is made. In this respect, it is also important to underline that material reception conditions must be made available for asylum-seekers already at the moment of making asylum applications, i.e. expressing a wish to apply for international protection, as required by Article 17(1) the recast Reception Conditions Directive.¹⁷ Moreover, unaccompanied children should be referred without delay to the child protection authorities.¹⁸
22. UNHCR would thus recommend clarifying the respective roles of the police and the Directorate during these initial phases of the procedure, in line with the above. UNHCR would further like to recall that authorities which may receive applications at the border, such as the police, also need to receive the necessary level of training which is appropriate to their tasks and responsibilities, and instructions to inform applicants as to where and how applications for protection may be lodged¹⁹.
23. Further to the observation made above at paragraph 15, UNHCR notes that many asylum-seekers may, for valid reasons, lack identity documents upon arrival in Iceland. In order to be consistent with Article 31 of the 1951 Convention asylum-seekers must not be penalized for arriving in an irregular manner and/or without valid travel documents. UNHCR therefore suggests amending the wording of Article 23, paragraph 2, to exempt asylum-seekers and their family members from the absolute requirement to provide a passport or other travel document along with their asylum application. This would also help ensure consistency between Articles 23 and 31 in the Proposal, as Article 31 seeks to incorporate the requirements of Article 31 in the 1951 Convention (see comments further below in relation to Article 31 in the Proposal). In this respect, UNHCR also notes that Article 4 (1) and (2) of the recast

¹⁷ European Union: Council of the European Union, *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, 29 June 2013, OJ L 180/96 -105/32; 29.6.2013, 2013/33/EU, available at: <http://www.refworld.org/docid/51d29db54.html>.

¹⁸ In this respect, see 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, para. 12, and para 31 (i), available at <http://www.refworld.org/docid/42dd174b4.html>.

¹⁹ In this respect, see Article 6 (1) read in conjunction with recital 26 of the recast APD.

Qualification Directive²⁰ (“recast QD”) allows for requiring the applicant to submit as soon as possible the documentation regarding the identity and nationality that is *in his(her) disposal*, while Article 4 (5) of the recast QD further specifies that where aspects of the applicant’s statements are not supported by documentary or other evidence, those aspects shall not need confirmation when the credibility assessment criteria are met. This covers statements regarding the applicant’s identity and/or nationality.

24. As an understanding of what is being said is essential for a transparent administrative procedure, UNHCR recommends amending Article 23, paragraph 5, to provide information to the asylum-seekers (e.g. about the proceedings, rights and obligations) “in a language that the foreigner *actually understands*”. It should for example not be presumed that an asylum-seeker always will understand and speak the main language(s) of the country from where he or she originates.
25. In the context of provision of information, UNHCR further wishes to remind of children’s right to be provided with legal and procedural information in a language and manner they understand and would recommend to insert a specific obligation in the law to this effect.²¹

Article 24: Individual assessment of applications for international protection

Medical examination

26. UNHCR notes that the Icelandic law requires all aliens intending to legally reside in the country to undergo a medical examination, and acknowledges that there may be situations where there is a need for medical screening of applicants on public health grounds. UNHCR recommends that medical screening be accompanied with appropriate counselling in a language applicants can understand, to explain the reason for the medical screening in a gender and age appropriate manner, using the least invasive method. After care or treatment should be made available and counselling as needed.²²
27. UNHCR does not support compulsory or mandatory HIV testing of individuals including asylum-seekers and stateless persons, on public health grounds or for any other purpose. WHO and UNAIDS have asserted that there is no public health

²⁰ European Union: Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on 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 337/9-337/26; 20.12.2011, 2011/95/EU, available at: <http://www.refworld.org/docid/4f197df02.html>.

²¹ Recast APD, Article 25(4), UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08, paras. 8 and 70, available at: <http://www.refworld.org/docid/4b2f4f6d2.html>.

²² UNHCR, *UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, April 2015, available at: <http://www.refworld.org/docid/5541d4f24.html>, p. 35.

justification for mandatory HIV screening as it does not prevent the introduction or spread of HIV. Public health interests are best served by promoting voluntary counselling and testing in an environment where confidentiality and privacy are maintained.²³ As mandatory HIV testing is at variance with international human rights standards, UNHCR recommends any country which retains such provisions to review its legislation to prohibit mandatory HIV testing of persons of concern to UNHCR, including children.²⁴

Vulnerability assessment

28. UNHCR welcomes the provisions in the Proposal aimed at ensuring the identification of applicants with specific needs in a timely manner. With reference to the term “in a particularly vulnerable position”, in the view of UNHCR, the concept of applicants in need of special procedural guarantees in the recast APD is not limited to vulnerable persons and should therefore be interpreted to extend to a broader group of asylum-seekers. With regard to the enumeration of categories, the Government may wish to refer to Recital 29 of the recast APD, which in a non-exhaustive and inclusive manner lists a number of criteria, rather than categories of persons, that should be taken into account when identifying individual circumstances that may cause an applicant to require special procedural guarantees. These criteria include age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence. UNHCR also wishes to refer to the UNHCR, *The Heightened Risk Identification Tool* and the UN Office of the High Commissioner for Human Rights *Istanbul Protocol* which can serve as tools for the purposes of defining and identifying relevant individual circumstances.²⁵ In this respect, recital 31 of the recast APD explicitly refers to the *Istanbul Protocol* in connection with the national measures to be established for the purpose of the identification and documentation of symptoms and signs of torture or other serious acts of physical or psychological violence in the asylum procedure.
29. With regard to the time-frame for the identification and the reference to “as soon as possible” in the Proposal, UNHCR wishes to draw the Government’s attention to the UNHCR Executive Committee Conclusion No. 91, which states that special protection or assistance needs of asylum applicants should be recorded at the registration.²⁶ It is UNHCR’s understanding that whenever possible, at least the initial assessment to identify the need for special procedural guarantees should take place at

²³ UNHCR, *Note on HIV/AIDS and the Protection of Refugees, IDPs and Other Persons of Concern*, 5 April 2006, available at: <http://www.refworld.org/docid/4444f0884.html> page 3.

²⁴ UNHCR, Annotated Comments to the recast RCD, p. 36.

²⁵ See UNHCR, *The Heightened Risk Identification Tool*, June 2010, Second Edition, available at: <http://www.refworld.org/docid/4c46c6860.html>; UN Office of the High Commissioner for Human Rights (OHCHR), *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Istanbul Protocol")*, 2004, HR/P/PT/8/Rev.1, at: <http://www.refworld.org/docid/4638aca62.html>.

²⁶ UNHCR, *Conclusion on Registration of Refugees and Asylum-seekers*, 5 October 2001, No. 91 (LII) - 2001, available at: <http://www.refworld.org/docid/3bd3e1d44.html>.

the time of registration.²⁷ The needs assessment could also, as proposed above, be linked to the medical examination offered to asylum-seekers at the early stages of the asylum procedure. These initial efforts aimed at identifying special procedural needs should be supported by follow-up assessments, since certain consequences of trauma may become evident at a later stage of the asylum procedure.

30. Once the needs are assessed, the specific support and procedural needs should be communicated to the case workers and addressed in agreement with the applicant.²⁸ Thus in UNHCR's view, the aim of the assessment is dual: (1) to identify the specific needs of the applicant, and (2) to assess what will be the adequate support in order to allow the applicant to benefit from the rights and to comply with his/her obligations under this Directive.
31. UNHCR welcomes the reference to the application of the principle of the best interests of the child as a primary consideration and recommends adding that this principle should apply "in all actions" for consistency with Article 3 of the Convention of the Rights of the Child.²⁹ With regard to the right of the child to be heard, UNHCR wishes to note that it is important that unaccompanied as well as accompanied children arriving with their parents or other caretakers are entitled to make independent asylum claims and when considered as part of the parent's claim, to have their account assessed from the child's perspective. For the child to be able to exercise his or her right to be heard, free legal assistance and representation is an essential safeguard. Furthermore, where a child and the parents both have a claim in their own right, UNHCR Guidelines on International Protection No. 8 indicates that "it is preferable that each claim be assessed separately".³⁰
32. UNHCR notes that according to the Proposal an individual claiming to be a child may be considered an adult if it is obvious that he or she is not a child. The Position Paper on Age Assessment of the Separated Children in Europe Programme,³¹ endorsed by UNHCR and UNICEF, emphasizes that pending the result of an age assessment, the individual whose age is disputed should in principle be considered and treated as a child. In this context, UNHCR also wishes to remind of the EU Directive on Preventing and Combating Trafficking in Human Beings, which in Article 13(2)

²⁷ On the need to identify promptly asylum seekers who may have special protection or assistance needs see: UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate*, 20 November 2003, available at:

<http://www.refworld.org/docid/42d66dd84.html>, paras. 3.1.2 and 3.4.

²⁸ See UNHCR, *Response to Vulnerability in Asylum: Project Report*, December 2013, Dr. Chrystalla Katsapaou, Recommendation No. 2, available at: <http://www.unhcr-centraleurope.org/pdf/what-we-do/caring-for-vulnerable-groups/response/response-to-vulnerability-in-asylum-project-report.html>.

²⁹ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html>.

³⁰ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08, para. 9, available at: <http://www.refworld.org/docid/4b2f4f6d2.html>.

³¹ Separated Children in Europe Programme, *Position Paper on Age Assessment in the Context of Separated Children in Europe*, 2012, p. 12, available at: <http://www.refworld.org/docid/4ff535f52.html> .

states that Member States shall ensure that, where the age of a person subject to trafficking in human beings is uncertain and there are reasons to believe that the person is a child, that person is presumed to be a child in order to receive immediate access to assistance, support and protection in accordance with Articles 14 and 15.³²

33. Furthermore, the Separated Children in Europe Programme's (SCEP) Statement of Good Practice recommends that age assessments should only be undertaken as a measure of last resort when there are grounds for serious doubt about the applicant's age and where other approaches have failed to establish the applicant's age. In this respect, UNHCR recalls that it is widely acknowledged by experts that age assessments are subject to a considerable margin of error. As stipulated in the UNHCR Executive Committee Conclusion on Children at Risk in 2007, the margin of appreciation inherent to all age-assessment methods needs to be applied in such a manner that, in case of uncertainty, the individual will be considered a child.³³ UNHCR recommends including the necessary safeguards that need to be in place for age assessments i.e. that applicants claiming to be children are provisionally treated as such, until an age determination has taken place, as well as the other safeguards set out in Article 25(5) of the recast APD.
34. UNHCR also welcomes the separation of the vulnerability and (security) risk assessment as two distinct elements of the procedure, as reflected in Articles 24 and 109 respectively of the Proposal.

Article 26: Investigation due to an application for international protection

35. Article 26 read in conjunction with Articles 109 and 110 *inter alia* provides for a possible search of an applicant, his/her storage and places of residence with reference to the provisions of the Code on Criminal Procedure. In this respect, UNHCR notes that while Article 13 (1) (d) of the recast APD indeed allows the competent authorities to "search the applicant and the items which he or she is carrying", the search of place of residence appear to have no connection with the purpose of the asylum procedure that is to establish whether the applicant fulfils the substantive criteria for granting international protection. UNHCR would further recommend that information resulting from the vulnerability assessment conducted by the Directorate as set forth in Article 24 is shared with the police only on a "need to know" basis and subject to rules of confidentiality.

Article 27: Interview with an applicant for international protection

³² See: European Union: Council of the European Union, *Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA*, 15 April 2011, OJ L 101/1-101/11; 15.4.2011, 2011/36/EU, available at: <http://www.refworld.org/docid/50ec1e172.html>; see further UNHCR, OHCHR, UNICEF, UNDOC, UN Women and ILO Joint Commentary on the EU Directive; UNHCR, *Prevent. Combat. Protect. Human Trafficking*, November 2011, available at: <http://www.refworld.org/docid/4edcbf932.html>.

³³ UN High Commissioner for Refugees (UNHCR), *Conclusion on Children at Risk*, 5 October 2007, No. 107 (LVIII) - 2007, para. (g)(ix), available at: <http://www.refworld.org/docid/471897232.html>.

36. UNHCR notes that pursuant to Article 27, an interpreter is to be provided at the asylum interview where necessary, and recommends making it explicit in the law that such services should be provided free of charge.³⁴ UNHCR further wishes to refer to Article 15 (3) of the recast APD, which states that Member States shall take appropriate steps to ensure that an asylum interview is conducted under conditions which allow applicants to present the grounds for their application in a comprehensive manner, *inter alia*, through selecting an interpreter who can ensure proper communication between the applicant and the person conducting the interview. UNHCR understands this provision as a requirement for the interpreter to be competent.³⁵ Given the essential role of the interpreter in ensuring a legally secure asylum decision, the competence and qualifications of the interpreter is key. UNHCR thus wishes to recommend introducing appropriate measures to ensure high quality interpretation services, for example, the provision of training on the specific role of the interpreter in the asylum context and the development of a code of conduct for interpreters. Article 15 (3)(b) of the recast APD furthermore requires, wherever possible, to provide for the interview with the applicant to be conducted by a person of the same sex if the applicant so requests, unless the determining authority has reason to believe that such a request is based on grounds which are not related to difficulties on the part of the applicant to present the grounds of his or her application in a comprehensive manner. In UNHCR's view, the same principle should apply with respect to interpreters, as this may facilitate disclosure of relevant information, especially in cases involving sexual and gender based violence claims.³⁶

Article 28: Accelerated procedures

37. Article 28 provides grounds for the use of accelerated procedures. In this respect, UNHCR, firstly, notes that the proposed provision allows to consider an application accepted for a substantial examination manifestly unfounded where the concerned applicant is a stateless person who "has previously had regular residence" in a safe country of origin (Article 28 (b)(1)). UNHCR would recommend that the phrase 'had regular residence' is replaced with 'where protection is available', and specific criteria for establishing whether protection is available for a stateless persons in another State is addressed in detail in Article 28. This recommendation stems from a concern that the phrase 'had regular residence' is not sufficient to ensure that the criteria for determining whether an individual has a realistic prospect of obtaining protection

³⁴ See, Article 12 (1) (b) of the recast APD.

³⁵ UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Detailed Research on Key Asylum Procedures Directive Provisions*, March 2010, available at: <http://www.refworld.org/docid/4c63e52d2.html>, see e.g. pp. 115–127.

³⁶ See also (UNHCR), Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 23 October 2012, HCR/GIP/12/01, para 60 (vi), available at: <http://www.refworld.org/docid/50348afc2.html>, and (UNHCR), Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, 7 May 2002, HCR/GIP/02/01, para 39 (iii), available at: <http://www.refworld.org/docid/3d36f1c64.html>.

elsewhere are narrowly construed. In UNHCR's view, protection can only be considered available in another country when a stateless person a) is able to acquire or reacquire nationality through a simple, rapid, and non-discretionary procedure, which is a mere formality; or b) enjoys permanent residence status in a country of previous habitual residence to which immediate return is possible.³⁷

38. Secondly, pursuant to Article 28 (b)(2), a case accepted for a substantial examination is to be considered manifestly unfounded where "the foreigner may be sent to a state where he/she does not need to fear persecution or treatment which violates Art. 36". UNHCR notes that Article 36 *inter alia* addresses forms of other serious harm in the meaning of Article 15 of the recast Qualification Directive. Hence, while being broadly worded Article 28 (b)(2) essentially appears to allow for considering an application manifestly unfounded and channelling it into the accelerated procedure where the concerned person comes from either a safe third country or first country of asylum³⁸. In this respect, UNHCR notes that the safe third country and first country of asylum notions are employed in Article 35 of the Proposal as *inadmissibility grounds*. It is, therefore, unclear as to what is the purpose of the proposed Article 28 (b)(2). Moreover, it needs to be recalled that the rejection of an application as manifestly unfounded essentially means that the concerned applicant does not meet substantive criteria for granting international protection, while declaring such an application inadmissible implies that, in a third country, either the determination of whether the person is in need of international protection needs to be undertaken (the safe third country notion) or a secure international protection status is already available (the safe country of asylum notion). The recast APD is clearly based on this approach, since it allows for considering an application inadmissible where a country is considered either a first country of asylum or a safe third country for the applicant.³⁹ Importantly, Article 38 (3)(b) of the recast APD also requires the asylum authorities, when implementing a decision based on the safe third country notion, to provide the concerned person "with a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance". Based on the above, UNHCR recommends deleting Article 28 (b)(2). Furthermore, UNHCR also recommends referring to Article 24(3) of the recast APD, which prevents the application of accelerated procedures with respect to applicants with special needs such as victims of torture, rape or other serious forms of psychological, physical or sexual violence, where adequate support cannot be provided within the framework of the accelerated procedure.

Article 31: Non-penalization of illegal entry

39. UNHCR welcomes the inclusion of a ban on punishment for illegal entry of asylum-seekers and refugees in Iceland in Article 31 of the Proposal, but recommends clarifying, or deleting, the reference to a person who "was stateless or without the possibility of obtaining nationality", as this does not seem to be in line with the intent

³⁷ UNHCR Handbook on the Protection of Stateless Persons, 2014, para. 154

³⁸ The safe country of origin notion is reflected in Article 28 (b) (1) of the Proposal.

³⁹ Article 33 (2) (b) and (c) of the recast APD.

of Article 38 of the Proposal, which in turn refers to the 1954 Convention. One option could be to insert “the status of stateless person“, after the initial reference to an “applicant for international protection“.

40. Due to the importance of the subject, UNHCR also kindly recommends the Government to, into the *preparatory works* of the Foreigners’ Act, consider including the following interpretative guidance on the subject;

a) The right to free movement and the right to liberty and security of the person under international human rights law and international refugee law

The fundamental right to liberty and security of the person, and the correlated right to freedom of movement, are reflected in all the major international and regional human rights instruments,⁴⁰ as well as in international refugee law.⁴¹ Article 26 of the 1951 Convention provides for a general right of free movement for refugees “lawfully in” the territory of the host State, subject only to necessary restrictions which may be imposed.⁴² This provision also applies to asylum-seekers.⁴³

⁴⁰ With regard to the **right to freedom of movement**, see e.g.: Article 13, UN General Assembly, Universal Declaration of Human Rights 1948, 10 December 1948, 217 A (III) (hereinafter “UDHR”); Article 12, UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations Treaty Series, vol. 999, page 171 (hereinafter “ICCPR”); Article 5, UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations Treaty Series vol. 660, page 195 (hereinafter “ICERD”); Articles 1-4, Council of Europe, *Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto*, 16 September 1963, ETS 46; Article 12, Organization of African Unity, *African Charter on Human and Peoples’ Rights*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (hereinafter “ACHPR”); Article 13, Organization of African Unity, *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990); Articles 20-24, League of Arab States, *Arab Charter on Human Rights*, 15 September 1994. With regard to the **right to liberty and security of the person**, see, e.g.: Articles 3 and 9, UDHR; Article 9, ICCPR; Article 5(1), ECHR; Article 6, European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, Official Journal of the European Communities, 18 December 2000 (2000/C 364/01) (hereinafter “Charter of Fundamental Rights of the EU”); Articles 1 and 25, Organization of American States, *American Declaration of the Rights and Duties of Man*, 2 May 1948, O.A.S. Res. XXX, 1948; Article 7(2), Organization of American States, *American Convention on Human Rights*, 22 November 1969; Article 6, ACHPR.

⁴¹ See, e.g. UNHCR, *Global Consultations on International Protection/Third Track: Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems*, 4 September 2001, EC/GC/01/17, available at: <http://www.unhcr.org/refworld/docid/3bfa81864.html>.

⁴² See Alice Edwards, *Back to Basics: The Right to Liberty and Security of Person and ‘Alternatives to Detention’ of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, April 2011, PPLA/2011/01.Rev.1, available at: <http://www.unhcr.org/refworld/docid/4dc935fd2.html>; Reinhard Marx, “Article 26 (Freedom of Movement)”, in Andreas Zimmerman (ed.), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (Oxford University Press 2011), at page 1147.

⁴³ See, UNHCR, *Reception of Asylum-Seekers, including Standards of Treatment, in the Context of Individual Asylum Systems*, EC/GC/01/17, 4 September 2001, at para. 3. See also, *R. v. Uxbridge Magistrates Court, ex parte Adimi*, [1999] 4 All ER 520, 29 July, 1999, available at: <http://www.unhcr.org/refworld/docid/3ae6b6b41c.html> (hereinafter “Adimi”), at 527.

In addition to Article 26, the 1951 Convention contains a non-penalization clause, which provides that, even entry without authorization does not give the State an automatic power to detain under international refugee law. Article 31 (1) of the 1951 Convention provides that:

“The contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence”.

A policy of prosecuting or otherwise penalising, including through the use of detention, illegal entrants, those present illegally, or those who use false documentation, without regard to the circumstances of flight in individual cases, and the refusal to consider the merits of an applicant’s asylum claim, amount to a breach of a State’s obligations under international law.⁴⁴

b) Personal Scope of Article 31(1) of the 1951 Convention

On the basis of the clear language contained in Article 31(1) of the 1951 Convention, the obligation not to impose penalties contained in the provision applies to refugees. Article 31(1) also applies to asylum-seekers, by virtue of the fact that recognition of refugee status does not make an individual a refugee, but only declares him/her to be one.⁴⁵

c) The conditions for entitlement to the protections of Article 31(1) of the 1951 Convention – “coming directly”, “without delay” and “good cause”

Article 31 covers all persons claiming international protection who come “directly” from a territory where their life or freedom was threatened in the sense of Article 1 of the 1951 Convention. The term “coming directly” covers the situation of a person

⁴⁴ 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 (hereinafter “Global Consultations Summary Conclusions”), available at: <http://www.unhcr.org/3bf4ef474.html>, at paras. 5-7; Guy Goodwin-Gill, “Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection”, in Erika Feller, Volker Turk and Frances Nicholson (eds.), *Refugee Protection in International Law, UNHCR’s Global Consultations on International Protection* (Cambridge University Press, 2003), available at: <http://www.unhcr.org/refworld/pdfid/470a33b10.pdf>, at page 219 (paras. 11-12).

⁴⁵ UNHCR, *UNHCR’s Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 26 February 1999 (hereinafter “UNHCR Revised Detention Guidelines”), available at: <http://www.unhcr.org/refworld/docid/3c2b3f844.html>, at para. 3 and “Global Consultations Summary Conclusions”, para. 10 (g). This position was confirmed in *Adimi* (see footnote 17 above), at para. 16, where Simon Brown LJ concluded: “That Article 31 extends not merely to those ultimately accorded refugee status but also to those claiming asylum in good faith (presumptive refugees) is not in doubt.” Upheld in *R. v. Asfaw* [2008] UKHL31, at para 26. See, also Guy Goodwin-Gill, “Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection”, in Erika Feller, Volker Turk and Frances Nicholson (eds.), *Refugee Protection in International Law, UNHCR’s Global Consultations on International Protection* (Cambridge University Press, 2003), at pp.185, 192; James C. Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press, 2005, at p.389.

who enters the country in which asylum is sought directly from his/her country of origin, or from another country where his/her protection, safety and security could not be assured. The term “directly” must not be taken in the literal sense as refugees are not required to have come without pause from their country of origin. To ensure its legal effect in practice, Article 31 was also intended to apply, and has been interpreted to apply, to persons who have briefly transited other countries, who are unable to find protection from persecution in the first country or countries to which they flee.⁴⁶

With regard to the expression “*without delay*”, the promptness of presentation is a matter of fact and degree; it depends on the circumstances of the case, including the availability of advice.⁴⁷ No time limit which can be mechanically applied or associated with the expression “without delay”.⁴⁸

The expression “show good cause for their illegal entry or presence” requires a consideration of the circumstances under which the asylum-seeker fled. “Illegal entry” would, *inter alia*, include arriving or securing entry through the use of false or falsified documents, the use of other methods of deception or clandestine entry, including entry into State territory with the assistance of smugglers or traffickers. “Illegal presence” would, for example, cover remaining after the elapse of a short, permitted period of stay. Having a well-founded fear of persecution is recognized in itself as ‘good cause’ for illegal entry. To “come directly” from such country via another country or countries in which s/he is at risk or in which generally no protection is available, is also accepted as “good cause” for illegal entry. There may, in addition, be other factual circumstances which constitute “good cause”.⁴⁹ As noted above, it is also recognised that circumstances may compel a refugee or asylum-seeker to have recourse to fraudulent documentation when leaving a country in which his physical safety or freedom are endangered.⁵⁰

⁴⁶ Global Consultations Summary Conclusions (at footnote 18 above), at para. 10(c). See, also, *Adimi* (at footnote 17 above), at para. 18, where Simon Brown LJ concluded that: “I am persuaded by the applicants’ [...] submission, drawing as it does on the travaux préparatoires, various Conclusions adopted by UNHCR’s executive committee (ExCom), and the writings of well-respected academics and commentators (most notably Professor Guy Goodwin-Gill, Atle Grahl-Madsen, Professor James Hathaway and Dr Paul Weis), that some element of choice is indeed open to refugees as to where they may properly claim asylum. I conclude that any merely short term stopover en route to such intended sanctuary cannot forfeit the protection of the Article, and that the main touchstones by which exclusion from protection should be judged are the length of stay in the intermediate country, the reasons for delaying there (even a substantial delay in an unsafe third country would be reasonable were the time spent trying to acquire the means of travelling on), and whether or not the refugee sought or found there protection *de jure* or *de facto* from the persecution they were fleeing.”

⁴⁷ Global Consultations Summary Conclusions (at footnote 18 above), at para. 10(f).

⁴⁸ See, e.g., UNHCR Revised Detention Guidelines (at footnote 21 above), at para. 4; 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>.

⁴⁹ For example, the non-penalization clause of Article 31(1) was found to be applicable even where an asylum-seeker has had an opportunity to file an asylum claim at the border entry point but did not do so because he or she had apprehensions of not being allowed entry. Swiss Federal Cassation Court, judgment of 17 March 1999, reported in *Asyl* 2/99, 21-3.

⁵⁰ Executive Committee Conclusion No. 58, lit. (i).

Article 32: Legal status of asylum-seekers

41. Article 32 provides that “a child who applies for asylum shall be ensured access to compulsory education or similar education within the public school system or at the child’s residence”. While essentially supporting the proposed provision, UNHCR notes that access to school for children should be granted as soon as possible following the lodging of the application for asylum in order to avoid further interruptions in education, unless the best interests of the child would suggest otherwise.⁵¹ UNHCR, therefore, recommends specifying in the Proposal that the possibility to access the public school system shall be ensured *as soon as practicably possible*.
42. UNHCR recommends adding a reference to applicants for the status of stateless persons, as envisaged through Article 38 of the Proposal, to make it clear that they are also entitled to the rights prescribed in Article 32, while awaiting the outcome of the determination.⁵²

Article 34: Execution of decisions etc.

43. Pursuant to Article 34, a decision to deport an applicant for international protection may not be executed before a final administrative decision has been made “unless very significant reasons would provide for it.” In this respect, UNHCR wishes to underline that the right to remain on the territory throughout the administrative phase of the asylum procedure and a system of *suspensive* effect of appeals are indispensable safeguards aimed at preventing *refoulement* of refugees and other persons in need of international protection in situations whereby a final decision on the merits of their asylum claims have not yet been taken. These safeguards, which are also provided for by the recast APD, need to be clearly spelled out in the proposal. In this respect, the phrase “unless very significant reasons would provide for it” appear to leave a large margin of uncertainty potentially leading to possible removals of asylum-seekers from the territory of Iceland even before the asylum authority decides on the merits of the claim. Such practices would not be in compliance with international law. UNHCR thus recommends deleting the phrase “unless very significant reasons would provide for it”.

⁵¹ UN High Commissioner for Refugees (UNHCR), UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), April 2015, page 37, available at: <http://www.refworld.org/docid/5541d4f24.html>.

⁵² See UN High Commissioner for Refugees (UNHCR), *Handbook on Protection of Stateless Persons*, 30 June 2014, paras. 144-146, available at: <http://www.refworld.org/docid/53b676aa4.html>.

44. In regard to the protection of stateless persons against expulsion, UNHCR recommends ensuring that Article 34, and related provisions in the Proposal, incorporate the safeguards set out in Article 31 of the 1954 Convention relating to the Status of Stateless Persons.⁵³

Article 35: Decision on the merits etc.

45. Article 35 essentially lays down grounds for considering an application for asylum inadmissible. These *inter alia* include situations whereby “the applicant has been granted international protection or other protection in another state.” The provision appears to be based on the notion of first country of asylum. In this respect, UNHCR underlines that the protection should be effective and available in practice.⁵⁴ This is, *inter alia*, demonstrated by case law from the European Court of Human Rights, according to which the theoretical right to *non-refoulement* is not sufficient.⁵⁵ UNHCR recommends, therefore, using the term ‘effective protection’ and suggests the elaboration of explicit benchmarks in line with the standards outlined in the 1951 Convention and the Lisbon Conclusions on ‘effective protection’.⁵⁶ Furthermore, countries where UNHCR is engaged in refugee status determination under its mandate should, in principle, not be considered first countries of asylum. UNHCR often undertakes such functions because the State has neither the capacity to conduct status determination nor to provide effective protection. Generally, resettlement of persons recognized to be in need of international protection is required. The return to such countries of persons in need of international protection should therefore not be envisaged.⁵⁷ UNHCR moreover recommends that applicants for international protection should have – at substantial level - the possibility to rebut the presumption of safety.
46. UNHCR also notes that the provision proposed under letter (b) that appear to refer to the safe third country notion employs the phrase “having stayed in a state or area”, thus apparently allowing for the application of the concept with respect to certain territories. In UNHCR’s view, only states may offer effective protection in the meaning referred to above, and, therefore, “areas” may hardly be considered a

⁵³ *Ibid.*, para. 134.

⁵⁴ UN High Commissioner for Refugees (UNHCR), *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, para. 26, available at: <http://www.refworld.org/docid/4c63ebd32.html>.

⁵⁵ See, *inter alia*, *Abdolkhani and Karimnia v. Turkey*, Appl. No. 30471/08, Council of Europe: European Court of Human Rights, 22 September 2009, para. 88, at: <http://www.unhcr.org/refworld/docid/4ab8a1a42.html>: “The Court reiterates in this connection that the indirect removal of an alien to an intermediary country does not affect the responsibility of the expelling Contracting State to ensure that he or she is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention.”

⁵⁶ UN High Commissioner for Refugees (UNHCR), *UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status* (Council Document 14203/04, Asile 64, of 9 November 2004), 10 February 2005, pages 34 and 35, available at: <http://www.refworld.org/docid/42492b302.html>.

⁵⁷ *Ibid.* page 35.

protective alternative. Furthermore, UNHCR notes that while the provision specifies that in that state or an area the applicant “was not at risk of being subjected to persecution and did not have reason to fear to be returned to his country of origin without his application for international protection having been adequately examined”, this does not cover all the safeguards to be put in place with a view to ensuring that the third country is indeed safe for the applicant. In this respect, UNHCR recommends relying on the criteria set out in Article 38 (1) of the recast APD that *inter alia* includes the possibility “to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention”. Finally, UNHCR wishes to underline that any return of an individual to a third country should be accompanied by an in-depth assessment of the circumstances and conditions prevailing there, and to what extent the location is legally and practically accessible to the individual. If the case is not assessed in Iceland on merits, it should be investigated whether the person has a factual opportunity to have his/her case properly assessed on merits in the country of return. That assessment inevitably needs to be forward looking and, therefore, the past tense employed in the proposed safe third country clause does not appear to be appropriate. UNHCR recommends revising Article 35 based on the comments discussed above.

Article 36: Sur Place claims

47. In UNHCR’s view, the “sur place” analysis does not require an assessment of whether the asylum-seeker has created the situation giving rise to persecution or serious harm by his or her own decision. Rather, as in every case, what is required is that the elements of the refugee definition are in fact fulfilled. The person who is objectively at risk in his or her country of origin is entitled to protection notwithstanding his or her motivations, intentions, conduct or other surrounding circumstances.⁵⁸

Internal Flight Alternative (IFA)

With regard to the Internal Flight Alternative referred to in paragraph four of the article, UNHCR recommends that any such approach should be assessed in accordance with the UNHCR Guidelines on International Protection on IFA⁵⁹ and proper relevance and reasonableness tests should be conducted in the context.

Best Interest of the Child

UNHCR welcomes the direct reference in the proposal to the importance of Best Interests Assessments (BIA), and that any decision “shall state what effect that consultation (BIA) had on the case and reasons given for any deviations from the

⁵⁸ UN High Commissioner for Refugees (UNHCR), *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, available at: <http://www.refworld.org/docid/4c503db52.html>, page 16.

⁵⁹ UN High Commissioner for Refugees (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.refworld.org/docid/3f2791a44.html> .

assessment”. UNHCR suggests considering adjusting the provision regarding best interests of the child by adding that the best interests must be a primary consideration in cases concerning children, rather than merely stating that the best interests guide assessments.

Articles 37, 75 and 76: Defining acts of persecution

48. In the context of aiming at defining acts of persecution, UNHCR would like to stress that persecution may not only exist in the context of concrete acts of persecution, but also where there is an absence of or failure to provide protection. This point is of particular relevance to gender-based claims where serious discriminatory or other offensive acts committed by individuals or the local population can also be considered as persecution, if such acts are knowingly tolerated by the authorities, or if the authorities refuse, or are unable, to offer effective protection.⁶⁰ UNHCR further suggests indicating that not only unlawful discrimination but also arbitrary discrimination and discrimination amounting to an intolerable predicament for the applicant may constitute persecution. UNHCR also recommends refraining from using the words “basic human rights” in the Proposal since depending on the context and circumstances of the case, all categories of rights may need to be considered when establishing whether the harm the applicant faces in the country of origin amounts to persecution. Moreover, UNHCR notes that when listing actors of persecution, the Proposal refers to “other parties which do not exercise the power of a state”. In this respect, UNHCR recommends adhering to the language of Article 6 (c) the recast Qualification Directive that employs the notion of non-state actors. That notion appears to be more flexible and capable of accommodating various sources of harm (persecution) such as violent husbands, neighbours or other individuals acting in their private capacity.

Article 38: Status of stateless persons

49. UNHCR welcomes the introduction of this provision, stating that “a stateless person who is in Iceland but is not a refugee according to Article 36 and who is not excluded from the status of statelessness according to Article 40, has an independent right to international protection on the ground of his status as stateless, upon application”, and the reference to the 1954 Convention Relating to the Status of Stateless Persons. While UNHCR acknowledges the reference to the need for a Regulation containing rules for the examination of applications for statelessness, UNHCR nevertheless recommends at least including the definition of a stateless person, pursuant to Article 1(1) of the 1954 Convention, into the Foreigners Act.

⁶⁰ UN High Commissioner for Refugees (UNHCR), *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, available at: <http://www.refworld.org/docid/4c503db52.html>.

Article 39: Exclusion from obtaining status as a refugee

50. UNHCR would recommend not differentiating between beneficiaries of international protection when it comes to exclusion from the relevant status, as referred to in point c. of the article. UNHCR sees no reason why beneficiaries of international protection according to article 36 paragraph 2 should enjoy a weaker protection from exclusion from status (“*reasonable* grounds to expect s/he is a threat to national security”) than refugees fulfilling the criteria in the 1951 Convention definition. The recast QD makes no such distinction, as illustrated by Article 17 of that Directive.

Article 40: Exclusion from obtaining status as a stateless person

51. The wording of the exclusion clauses in Article 40 of the Proposal is not fully in line with Article 1(2) of the 1954 Convention relating to the Status of Stateless Persons. UNHCR thus recommends aligning the wording to that in the 1954 Convention.

Articles 41 and 113: *Non-refoulement*

52. For sake of clarity, UNHCR recommends that the language in this article be based on Article 33 of the 1951 Convention, which reads as follows:

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

This provision constitutes the cornerstone of the international refugee protection regime, and the 1951 Convention, to which no reservations are permitted. It is also an obligation under the 1967 Protocol by virtue of Article I(1) of that instrument. Unlike some provisions of the Convention, its application is not dependent on the lawful residence of a refugee in the territory of a Contracting State. As to the words "*where his life or freedom would be threatened*", it appears from the *travaux préparatoires* that they were not intended to lay down a stricter criterion than the words "*well-founded fear of persecution*" figuring in the definition of the term "*refugee*" in Article 1 A (2). The different wording was introduced for another reason, namely to make it clear that the principle of *non-refoulement* applies not only in respect of the country of origin but to any country where a person has reason to fear persecution.⁶¹

Furthermore, UNHCR understands that Article 113 provides for alternatives to detention. In this respect, we would like to draw attention to the UNHCR *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*

⁶¹ UN High Commissioner for Refugees (UNHCR), *UNHCR Note on the Principle of Non-Refoulement*, November 1997, available at: <http://www.refworld.org/docid/438c6d972.html>.

*and Alternatives to Detention*⁶². Pursuant to the Guidelines, the consideration of alternatives to detention is part of an overall assessment of the necessity, reasonableness and proportionality of detention that ensures that detention of asylum-seekers is a measure of last, rather than, first, resort. Moreover, when considering whether an asylum-seeker may be detained, it must always be shown that in light of his/her particular circumstances, there were not less invasive or coercive means of achieving the same ends. Thus, the consideration of the availability, effectiveness and appropriateness of alternatives to detention in each individual case needs to be undertaken before resorting to detention⁶³. This requirement is now clearly spelled out in the recast Reception Conditions Directive, which allows for resorting to detention only “if other less coercive alternative measures cannot be applied effectively”⁶⁴. UNHCR recommends clearly stipulating this principle in the proposal.

UNHCR also recommends reviewing Article 113 (e) of the Proposal, as it is of concern that an individual could be given a reporting duty or even forced to stay in a particular place, solely due to having been granted a residency permit based on *non-refoulement*.

Article 44: Legal effects of international protection

53. UNHCR wishes to commend the initiative to accord all beneficiaries of international protection permanent residence permits. However, the article needs to not only refer to the “legal status of a refugee”, but also to the legal status of a stateless person, as envisaged through Article 38 in the Proposal.

Article 45: Travel documents for refugees

54. In UNHCR’s view, draft Article 45 appears to be in compliance with Article 28(1) of the 1951 Convention, in that it – as a starting point – requires the State to issue a Convention Travel Document to a lawfully staying refugee. Further, in so far as the exceptions are for compelling reasons of national security or public order as stipulated in Article 28(1) of the 1951 Convention there is no issue of compliance with international law. As such, it appears that the exceptions are not problematic, apart from the ones mentioned under (c) and (e). UNHCR finds the exception under (c) peculiar as an individual falling within the scope of the clauses in Article 1 F of the 1951 Convention would have led to exclusion, or would lead to cancellation or revocation of refugee status.
55. The exception under (e) is problematic, in so far as this will affect a wide number of individuals. If their claim to refugee status is determined to be credible, then they need

⁶² UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.refworld.org/docid/503489533b8.html>.

⁶³ *Ibid*, para 35

⁶⁴ Article 8(2) of the recast Reception Conditions Directive.

to be given the benefit of the doubt regarding their identity, and be able to benefit from the provisions of the 1951 Convention.

56. As previously noted (see the comments above in regard to Article 31), there may be beneficiaries of international protection who do not possess passports, and UNHCR would thus recommend inserting a clarification to the third paragraph of the article stating that “an application for a travel document for refugees or passport for foreign nationals must be accompanied by a passport or other travel documents, *if* possessed by the applicant”.
57. UNHCR moreover wishes to clarify that the issuance of a travel document should be regulated separately from the issuance of an identity paper under Article 27 of the 1951 Convention.
58. Furthermore, UNHCR notes that there is no corresponding Article referring to travel documents for stateless persons, pursuant to Article 28 of the 1954 Convention, and thus recommends introducing a provision to this effect.

Article 47: Revocation of asylum

59. UNHCR notes that there may be some confusion as to the legal concepts of cessation, cancellation and revocation. Cessation (which is what seems to be referred to under Article 47 of the proposal) refers to the ending of refugee status pursuant to Article 1C of the 1951 Convention because international refugee protection is no longer necessary or justified. Cancellation means a decision to invalidate the recognition of refugee status, where it is subsequently established that the individual should never have been recognized, including in cases where he or she should have been excluded from international refugee protection. Revocation refers to the withdrawal of refugee status in situations where a person properly determined to be a refugee engages in excludable conduct which comes within the scope of Article 1F (a) or (c) of the 1951 Convention after recognition.

Guidance with regards to cessation, and in particular with regards to the “ceased circumstances’ clauses (points e. and f. in the current article) can be found in the UNHCR guidelines on the subject.⁶⁵ Factors to especially consider are the possible fundamental character and the enduring nature of change and to what extent a restoration of protection has in fact taken place in the country of origin.

Any cessation, cancellation or revocation of asylum should also be accompanied by adequate legal safeguards for the individual concerned.

Article 77: Provisional temporary residence permit

⁶⁵ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the “Ceased Circumstances” Clauses)*, 10 February 2003, HCR/GIP/03/03, available at: <http://www.refworld.org/docid/3e50de6b4.html>.

60. While UNHCR welcomes this provision, reaffirming the fundamental principle that asylum-seekers have the right to remain in the territory until a final decision has been taken on his/her application for asylum, it is recommended to clarify the wording of Article 77, to ensure that it is clear that this principle should apply to all asylum-seekers and not be a discretionary right.

It is likewise important that persons having their status as stateless persons determined under article 38 in the Proposal have the right to remain in the territory, pending the outcome of the procedure.⁶⁶

Article 108: Seizure

61. UNHCR recommends cautiously using terminology such as giving the right to the police to seize “anything else” aimed at aiding the establishment of identity. Seizure should always be a last resort and the need for such should always be assessed on a case by case basis.

Article 114: Capture and detention

62. Detention in the migration context is neither prohibited under international law per se, nor is the right to liberty of a person absolute. However, international law provides substantive safeguards against unlawful as well as arbitrary detention. UNHCR would therefore like to underline that detention must never be arbitrary, and that any decision to detain must be based on an assessment of the individual’s particular circumstances. UNHCR therefore welcomes the reference in paragraph two to alternatives to detention. In the context of the detention of asylum-seekers, there are three purposes for which detention may be necessary in an individual case, and which are generally in line with international law, namely *public order, public health or national security*.⁶⁷

Furthermore, a detention decision is to be brought promptly before a judicial or other independent authority to have the detention decision reviewed. This review should ideally be automatic, and take place in the first instance within 24-48 hours of the initial decision to hold the asylum-seeker. The reviewing body must be independent of the initial detaining authority, and possess the power to order release or to vary any conditions of release.⁶⁸

Following the initial review of detention, regular periodic reviews of the necessity for the continuation of detention before a court or an independent body must be in place,

⁶⁶ UN High Commissioner for Refugees (UNHCR), *Handbook on Protection of Stateless Persons*, 30 June 2014, paras. 144-146, available at: <http://www.refworld.org/docid/53b676aa4.html>.

⁶⁷ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.refworld.org/docid/503489533b8.html>, page 16.

⁶⁸ *Ibid*, page 27.

which the asylum-seeker and his/her representative would have the right to attend. Good practice indicates that following an initial judicial confirmation of the right to detain, review would take place every seven days until the one month mark, and thereafter every month until the maximum period set by law is reached.⁶⁹

As a general rule, unaccompanied or separated children should not be detained. Detention cannot be justified based solely on the fact that the child is unaccompanied or separated, or on the basis of his or her migration or residence status. Where possible they should be released into the care of family members who already have residency within the asylum country. Where this is not possible, alternative care arrangements, such as foster placement or residential homes, should be made by the competent child care authorities, ensuring that the child receives appropriate supervision.⁷⁰

All appropriate alternative care arrangements should also be considered in the case of children accompanying their parents, not least because of the well-documented deleterious effects of detention on children's well-being, including on their physical and mental development. The detention of children with their parents or primary caregivers needs to balance, *inter alia*, the right to family and private life of the family as a whole, the appropriateness of the detention facilities for children, and the best interests of the child.⁷¹

Article 115: Criminal provisions

63. UNHCR acknowledges the legislator's efforts to combat crime through this article. However, in regard to (h) on the possession of forged travel documents, UNHCR recommends ensuring that this provision does not contradict the non-penalization principle set out in Article 31 of the Proposal, in line with Article 31 in the 1951 Convention.

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⁶⁹ *Ibid.*

⁷⁰ *Ibid*, pages 34-36.

⁷¹ *Ibid*, pages 35-36.