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

UNHCR Observations on the New Version of the Draft Law on Granting Protection to Foreigners and Stateless Persons

General observations

In early 2020, UNHCR shared with the Ukrainian authorities a first set of comments on the Draft Law of Ukraine on Granting Protection to Foreigners and Stateless Persons (hereafter the Draft Law).[1] On 22 April 2020, UNHCR received from the State Migration Service (SMS) a new version of the Draft Law, in relation to which UNHCR is providing the below additional observations and comments.

The comments previously shared by UNHCR remain valid where the new version of the Draft Law received from the SMS does not incorporate the recommended changes to the provisions that were then reviewed. Improvements that had been introduced in the previous version of the Draft Law, with some of them highlighted by UNHCR in its comments,[2] have regrettably been removed from the new version of the Draft Law. While UNHCR noted that the previous version of the Draft Law was generally in line with international refugee law and standards, even though further improvements of some of the provisions were needed, this is not the case anymore with the new version of the Draft Law.

UNHCR would also like to reiterate one of the general observations made in its earlier comments to the Draft Law[3] concerning the provisions related to interpretation and integration measures, as well as to adaptation courses available to asylum-seekers, which will require an allocation of sufficient financial resources to be fully effective.

Specific observations

Detention of asylum-seekers

The new version of the Draft Law introduces in Article 6 amended grounds for the detention of asylum-seekers in Migrant Custody Centers. According to this new provision, all foreigners who crossed or attempted to cross irregularly the borders of Ukraine and then apply for asylum will be detained until the end of the asylum procedure. This will also be the case for those already present on the territory of Ukraine in violation of immigration rules and who will approach the SMS in order to apply for asylum

[1] UN High Commissioner for Refugees (UNHCR), *UNHCR Comments on the Draft Law of Ukraine on Granting Protection to Foreigners and Stateless Persons*, January 2020, available at: https://www.refworld.org/docid/5e60ec1c4.html
[2] Ibid, page 2
[3] Ibid, page 2

if they are not documented with a valid national passport. The detention period in these circumstances could amount to a substantial period if it also includes the appeal process (up to 18 months).

This provision is likely to affect most asylum-seekers present in Ukraine. Such systematic detention of asylum-seekers arriving irregularly in Ukraine would amount to a sanction whereas Article 31 of the 1951 Convention relating to the Status of Refugees (hereafter 'the 1951 Convention') provides that asylum-seekers shall not be penalized for their illegal entry or stay, provided they present themselves to the authorities without delay and show good cause for their illegal entry or presence. In its comments to the previous version of the Draft Law, UNHCR referred to its Guidelines on Detention[4] which spell out the specific circumstances in which immigration detention of asylum-seekers can be resorted to, as well as the safeguards which should apply. Article 6 of the new version of the Draft Law does not provide for any specific purpose of the detention measures, which therefore appears to constitute a penalty for illegal entry or stay in the country. Detention that is imposed in order to deter future asylum-seekers or to dissuade those who have lodged their claims from pursuing them, is inconsistent with international norms. Furthermore, immigration detention is not permitted to be used as a punitive measure or a disciplinary sanction for irregular entry or presence in the country. Apart from constituting a penalty under Article 31 of the 1951 Convention, it may also amount to collective punishment in violation of international human rights law.[5] UNHCR therefore recommends a revision of Article 6 of the Draft Law with a view to reduce the scope of this provision and establish explicit grounds and purposes for which asylum-seekers who arrived or are staying irregularly in Ukraine can be detained to make sure it remains an exception rather than common practice as required by international law.

Non penalization for irregular entry and stay

According to Article 5 of the new version of the Draft Law, asylum-seekers who have crossed the Ukrainian border irregularly, violated regulations on stay or have committed other immigration-related offenses,[6] will be exempted from administrative and criminal liability if they entered Ukraine directly coming from a territory where they were at risk of persecution in the sense of Article 1A of the 1951 Convention. To benefit from this exemption, they must apply for protection without delay and provide convincing written explanations in respect of their irregular entry or stay in Ukraine prior to their application for protection.

UNHCR welcomes the amended text of Article 5 of the revised Draft Law to ensure compliance with Article 31(1) of 1951 Convention. UNHCR would nevertheless like to remind that Article 31(1) of the 1951 Convention also protects asylum-seekers who have stayed for a period of time in, or merely transited through, other countries, where they have not or could not receive international protection,

[4] UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, available at: https://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html
[5] Ibid., page 19.
[6] Use of forged documents, etc.

i.e. be granted lawful stay and accorded standards of treatment commensurate with the 1951 Convention and international human rights treaties,[7] or otherwise where their protection, safety and security could not be or was no longer assured.[8] Such an interpretation of Article 5 of the revised Draft Law takes into consideration the geographical location of Ukraine, where most asylum-seekers arrive *via* third countries. Conversely, asylum-seekers who have found international protection or otherwise settled in a previous country where their protection, safety and security was assured, but who move on and enter or are present without authorization in their current host country, are not exempt from penalization because they have not come directly in the meaning of Article 31(1) of the 1951 Convention.

Access to documentation by asylum-seekers

In its comments to the previous version of the Draft Law, UNHCR commended the SMS for including a new provision (Article 1 § 1 (5)) attributing *ex lege* the status of an identity document to the asylum-seeker certificate and noted improvements in the area of social rights of asylum-seekers and of persons granted protection. UNHCR specifically observed that attributing the status of an identity document to the asylum-seeker certificate would facilitate access of asylum-seekers to social rights and employment, which depends on the presentation of an identity document.

However, as per Article 1 § 1 (6) of the new version of the Draft Law, the asylum-seeker certificate shall no longer have the status of a document certifying the identity of its holder. It shall only confirm the fact that a person has applied for protection, is lawfully staying on the territory of Ukraine and it can support access to the rights and services enumerated in Article 47 of the Draft Law and other Ukrainian specific laws.

UNHCR is concerned that this new version of the provision will create a distinction between asylum-seekers who are in possession of a national identity document, namely a valid national passport from their country of origin, and those who are not since, as according to Ukrainian legislation and practice,

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[7] UNHCR, *Summary Conclusions on Non-Penalization for Illegal Entry or Presence: Interpreting and Applying Article 31 of the 1951 Refugee Convention*, 15 March 2017, Roundtable, available at: https://www.refworld.org/docid/5b18f6740.html. Those Guidelines clarify the meaning, scope and legal effect of Article 31 of the 1951 Convention. See also G. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection*, Cambridge University Press, June 2003, available at: https://www.refworld.org/docid/470a33b10.html.

[8] *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, [1999] EWHC Admin 765; [2001] Q.B. 667, United Kingdom: High Court (England and Wales), 29 July 1999, para. 18, available at: https://www.refworld.org/cases,GBR_HC_QB,3ae6b6b41c.html. *Hassan v. Department of Labour*, CRI 2006-485-101, New Zealand: High Court, 4 April 2007, para. 39, available at: https://www.refworld.org/cases,NZL_HC,47a1d3e32.html. *BO1587, no. 09/02303*, the Netherlands: Supreme Court (*Hoge Raad der Nederlanden*), 24 May 2011, para. 2.4.3 and 2.5. The drafting history of the 1951 Convention indicates that the drafters intended Article 31(1) to provide a wide scope of exemption from penalization for irregular entry or presence, with the exception of those who had already found asylum in a previous country, see: G Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection*, June 2003, pp.189 and 191, available at: http://www.refworld.org/docid/470a33b10.html, referring to a statement made by the representative of France (M Colemar): UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Thirteenth Meeting*, 22 November 1951, A/CONF.2/SR.13, available at: https://www.refworld.org/docid/3ae68cdc8.html.

effective access to and the exercise of such rights and services, in particular access to the labour market, is only possible for persons in possession of such national identity documents.

While asylum-seekers have a duty to cooperate in establishing their identity and providing all available elements to that effect,[9] not all asylum-seekers are able to present a national identification document at the time of their application. The circumstances of flight may have prevented a person seeking international protection from using or carrying such documents. In UNHCR's experience with the registration of asylum-seekers in many parts of the world, asylum-seekers may have legitimate reasons for not being able to present a national identification document at the time of their application and no differentiated treatment should be made on this basis regarding access to asylum and related rights.

Therefore, and in accordance with Article 27 of the 1951 Convention which stipulates that identity papers should be issued to any refugee or asylum-seeker who does not possess a valid travel document,[10] UNHCR would recommend reverting to the previous version of the Draft Law attributing *ex lege* the status of an identity document to the asylum-seeker certificate.

This would ensure that there is no differentiated treatment in access to rights between asylum-seekers who have been able to produce national identification documents and those who have not been able to do so. UNHCR understands that one of the objectives of the change of this provision in the new version of the Draft Law is to ensure that asylum-seekers provide their identity documents upon registration. Since asylum-seekers cannot be required to provide national identity documents for the reasons outlined above, the SMS may want to consider other means of establishing the identity of asylum-seekers deprived of national documentation based on a proper counselling of applicants regarding their obligation to cooperate in establishing all facts related to their claim, including their identity.[11] Asylum-seekers should also be informed of the possible consequences in case of non-compliance with this obligation, particularly on the examination of their claim.

Right to marry

The right to marry is proposed to be explicitly excluded for asylum-seekers (Article 47, § 1 (17)). This provision constitutes a restriction to the right to marry and to found a family as enshrined in Article 16(1) of the Universal Declaration of Human Rights and various human rights instruments to which Ukraine is a State party, for instance Article 23 of the International Covenant on Civil and Political Rights (ICCPR). In addition, Article 17(1) of the ICCPR protects individuals against arbitrary or

[9] 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, 2019, para. 195, available at:* https://www.unhcr.org/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html

[10] See the 1984 ExCom Conclusion no. 35, available at: https://www.refworld.org/docid/5a2ead6b4.html UNHCR paper on Identity Documents for Refugees, 20 July 1984, EC/SCP/33, available at: https://www.refworld.org/docid/3ae68cce4.html

[11] In that regard, it is not clear to UNHCR what is the objective and the outcome of the two new procedures introduced in the new version of the Draft Law for checking the identity of an asylum-seeker: the verification and the identification procedures (Article 1, § 1 (3 and 14)).

unlawful interference with their family life. Further, Article 10(1) of the International Covenant on Economic, Social and Cultural Rights stipulates that the widest possible protection and assistance shall be accorded to the family, "particularly for its establishment". Of relevance is also Article 5(d)(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination, to which Ukraine is a signatory, which prohibits discrimination based on race and nationality with regard to the right to marriage. The right to marry is also protected in Article 12 of the European Convention on Human Rights (ECHR), and is connected to Article 8 of the ECHR, which protects family life. Article 14 of the ECHR requires that persons in similar situations are treated equally, unless the differential treatment can be objectively and reasonably justified.

UNHCR notes that while it is legitimate to prevent fraudulent marriages for the mere purpose of regularization of stay, and the possible negative consequences of marriages entered into by persons whose identity cannot be verified, it is not justified to impose a general prohibition of marriage for asylum-seekers. Instead, the responsible authorities should identify means to prevent any negative or undesired consequences of asylum-seekers' marriages on a case-by-case basis and relevant evidence as per current practice in other States.

In light of this, UNHCR recommends removing this restriction from the new version of the Draft Law.

Procedural and other issues

The provision related to country of origin information (Article 1, § 1 (17)) has been substantially revised, i.e. removing the reference to possible sources of country of origin information that could be relied upon in the context of refugee status determination. The current revised article indicates that the list of country of origin information sources will be established by the competent authority. UNHCR would recommend to further add to that provision that such a list should include sources of country of origin information that can deliver precise, impartial, and up-to-date information, in order to support quality decision-making on applications for protection.

In relation to the definition of the safe third country concept (Article 1, § 1 (41)), the paragraph from the previous version of the Draft Law, which included the requirement for the Ukrainian authorities to obtain the agreement of the safe country to accept an asylum-seeker to whom the concept would be applied has been removed in the new version of the Draft Law. However, ensuring readmission of an individual to the safe third country is an important safeguard in applying the safe third country concept and required by international refugee law.[12] Without such an agreement by the concerned third country, persons to whom the concept is applied would either remain in limbo on the territory of Ukraine without having the possibility to have their asylum claim examined on the merits or find themselves unlawfully in the territory of the third country, possibly without access to the asylum procedure and exposed to the risk of *refoulement*. UNHCR therefore recommends reverting to the previous version of this provision.

[12] See UNHCR Legal Considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries, April 2018, para. 4, available at: https://www.refworld.org/docid/5acb33ad4.html

Other specific safeguards to ensure access to protection from pre-trial detention facilities (Article 10), where persons who were arrested in the context of extradition procedures are detained, were also removed in the latest version of the Draft Law. In its earlier comments, UNHCR noted its concern over the lack of detailed provisions regarding the initial notification of the right to apply for protection and how the application will be recorded in practice. UNHCR therefore recommended to include an obligation for the authorities to notify persons who might wish to seek international protection about their right to do so, in a language that they understand, and to provide information on the possibility to access legal counseling/assistance to prepare the application.

The new version of the Draft Law removes the notification obligation of the authorities responsible for extradition procedures, as well as the 30 days deadline within which a person in detention could apply for asylum. This lowers further the procedural safeguards applicable to persons in pre-trial detention in the context of an extradition procedure and could give rise to a risk of refoulement.

While the new version of the Draft Law still maintains the notification obligation of the authorities in charge of immigration detention, a similar obligation should be envisaged for the authorities responsible for extradition procedures in Ukraine.

Concerning the notification of a negative asylum decision, the new version of the Draft Law (Article 22 § 10) removes the obligation to provide to the applicant a copy of the recommendation based on which the decision was made. UNHCR considers that providing a motivated decision to the applicant is an essential component of a fair and efficient asylum process as it allows the applicant to understand the reasons for the decision, determine whether to lodge an appeal if it is negative and substantiate the appeal. UNHCR would therefore recommend reverting to the previous version of this provision or at least to specify that a negative decision should contain the motivation based on which the decision was reached.

Conclusion

UNHCR hopes that the State Migration Service and other relevant authorities of Ukraine will give due consideration to this additional set of comments. UNHCR remains available to provide further technical support and expertise, including with regard to the other provisions of the new version of the Draft Law, in order to ensure that this important legislative initiative leads to the adoption of a national asylum law that further improves the operation of the national asylum system and is fully in line with relevant international refugee law and standards.

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