



UNHCR Comments for the Parliament of the Republic of Albania on the Draft Law on Aliens

I. Introduction

The United Nations High Commissioner for Refugees (UNHCR) thanks the Albanian Parliament for the opportunity to submit its comments on the Draft Law (hereafter the Draft Law) No. [...] /2021 on Aliens.

UNHCR offers these comments as the agency entrusted by the United Nations General Assembly with the responsibility for providing international protection to refugees and other persons within its mandate, and for assisting governments in seeking permanent solutions to the problem of refugees.¹ As set forth in its Statute, UNHCR fulfils its international protection mandate by, inter alia, 'promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.'² UNHCR's supervisory responsibility under its Statute is reiterated in Article 35 of the 1951 Convention relating to the Status of Refugees (the 1951 Convention) according to which State parties undertake to 'co-operate with [UNHCR] [...] in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the Convention.'³

II. General observations

UNHCR welcomes the efforts made by Albania to bring the legislation on aliens in line with international human rights law, including asylum and statelessness standards, as well as EU law and EU fundamental rights.

The following comments and recommendations are proposed to the Albanian Parliament and its competent Parliamentary Commissions for the purposes of clarification and strengthening of certain key provisions of the draft law in line with international standards.

III. Recommendations related to key issues of the Draft Law

Definitions, Article 3 of the Draft Law

The term 'asylum-seeker(s)' is used in Articles 88 (ç), 101 (2) (dh) and 132 (11) of the Draft Law but is not defined as such in this Law. A definition of the person who has made an application for international protection, but whose application has not yet been finally decided on, is important as it contributes to determining the personal scope of the Draft Law.

¹ Statute of the Office of the United Nations High Commissioner for Refugees, UN General Assembly Resolution 428 (V), Annex, UN Doc. A/1775, Para. 1 (1950), available at: <https://www.refworld.org/docid/3ae6b3628.html>.

² Ibid. para. 8(a).

³ UN Treaty Series (UNTS) No. 2545, Vol. 189, p. 137.



Recommendation:

UNHCR recommends adding a definition of ‘asylum-seeker’ under **Article 3 of the Draft Law**. UNHCR recommends that the definition be aligned with the definition of ‘[asylum] applicant’ in Article 3 (8) of the Law No. 10/2021 on Asylum.⁴

Article 3 (2) of the Draft Law states that for the purposes of the present law, the term ‘stateless person’ shall apply to any person ‘who is not the national of any state’.

Article 1(1) of the 1954 Convention Relating to the Status of Stateless Persons (the 1954 Convention) sets out the definition of a stateless person.⁵ As indicated by UNHCR in its 2019 Comments to the Law No. 113/2020 on Citizenship,⁶ the 1954 Convention does not permit reservations to Article 1(1) and thus this definition is binding on all State Parties to the treaty. The 1954 Convention definition is referred to in Article 2 (dh) of the Law on Citizenship,⁷ by reference to the definition stipulated in Article 1 (1) of Law No. 9057/2003 on the Accession of the Republic of Albania to the [1954] Convention relating to the Status of Stateless Persons.

Recommendation:

UNHCR recommends that the definition of a stateless person in **Article 3 (2) of the Draft Law** includes all elements contained in Article 1(1) of the 1954 Convention to ensure the proper identification of a stateless person on the territory of Albania in accordance with international law, and the provision of the core protection that the 1954 Convention offers to stateless persons. UNHCR recommends that a similar reference to the definition as in Article 2 (dh) of the Law on Citizenship be made in this provision, ensuring that the Draft Law fully reflects this binding definition of a stateless person.

Article 3 (25) of the Draft Law provides a seemingly exhaustive list of ‘vulnerable persons’. Situations of vulnerability, however, are not fixed and will change over time with changing circumstances. Vulnerability is shaped by personal (internal) factors and environmental (external) factors, which can be multiple and intersect so as to entrench and exacerbate risks of harm.⁸

⁴ Article 3 (8) of the Law No. 10/2021 on Asylum in the Republic of Albania: “**Applicant**” means any foreign national or stateless person who has made an application for international protection in respect of which a final decision has not yet been taken’.

Available at: <https://www.parlament.al/Files/Akte/20210203145606ligj%20nr%20%2010%20dt%20%201%202%202021.pdf>

⁵ Article 1(1) of the 1954 Convention sets out the definition of a stateless person as follows: ‘A person who is not considered as a national by any State under the operation of its law’. 1954 Convention relating to the Status of Stateless Persons, available at: https://www.unhcr.org/ibelong/wp-content/uploads/1954-Convention-relating-to-the-Status-of-Stateless-Persons_ENG.pdf

⁶ UNHCR, Comments on the Draft Law on Citizenship of Albania, Key Issues, Available at: <https://www.refworld.org/country,,,ALB,,5da06e0b7,0.html>

⁷ Albania: LAW No. 113/2020 ON CITIZENSHIP [Albania], 29 July 2020, available at: <https://www.refworld.org/docid/5fe1d01d4.html>

⁸ UNHCR-IDC Vulnerability Screening Tool - Identifying and addressing vulnerability: a tool for asylum and migration systems, available at: <https://www.unhcr.org/protection/detention/57fe30b14/unhcr-idc-vulnerability-screening-tool-identifying-addressing-vulnerability.html>



Recommendation:

UNHCR recommends that **Article 3 (25) of the Draft Law** is amended, making it a non-exhaustive list of categories of ‘vulnerable persons’ by adding the phrase ‘and other persons with specific needs’, thus making it conform to relevant international standards, which are also reflected in EU law.

Article 3 (46) of the Draft Law defines for the purposes of the present law the term ‘unaccompanied minors’. However, the definition leaves out ‘separated children’. The general comment No. 6 (2005) to the Convention on the Rights of the Child draws attention to the particularly vulnerable situation of unaccompanied and separated children who are outside their country of origin, and to the varied and numerous reasons for a child being unaccompanied or separated.⁹

Recommendation:

UNHCR recommends to use and define the term ‘unaccompanied or separated children’ as understood in the context of the Convention on the Rights of the Child (and its general comment No. 6 (2005))¹⁰, relevant EU Law and the UNHCR EXCOM Conclusion No. 107.¹¹

Residence permit on humanitarian grounds, Article 52 (1) (a) of the Draft Law

Article 52 (1) (a) of this Draft Law provides for the issuance of a temporary residence permit to an individual who has ‘filed a request with the asylum authorities to be recognized as a refugee’, i.e. to an asylum applicant who has lodged his or her application with the determining authority. However, such a residence document is not currently issued to a person who has made an application for international protection at the border with the national authority responsible for border and migration, but who has yet to lodge the application. Such a person remains undocumented, until he/she can register the asylum application.

Albania has generously in the past accepted the relocation of groups of persons on humanitarian grounds. It is possible that the status of these persons in Albania may not be one provided for elsewhere in this Draft Law and that their stay in the country for humanitarian grounds for longer periods may be necessary. The law could well provide the necessary flexibility to accommodate the situations of such groups of persons.

Recommendation:

UNHCR recommends amending this provision, adding persons who have made a claim for asylum at the border with the national authority responsible for border and migration issues (Border and Migration Police) to the categories of persons who should receive temporary residency documents.

⁹ General Comment No. 6 (2005) available at: <https://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf>

¹⁰ General Comment No. 6 (2005): “Unaccompanied children’ (also called unaccompanied minors) are children, as defined in article 1 of the Convention, who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so. [...] ‘Separated children’ are children, as defined in article 1 of the Convention, who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives’.

¹¹ Executive Committee of the High Commissioner’s Programme, Conclusion on Children at Risk No. 107 (LVIII) - 2007, 5 October 2007, No. 107 (LVIII), available at: <https://www.refworld.org/docid/471897232.html>



UNHCR

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

This will ensure the issuance of a temporary residence permit for asylum-seekers as soon as possible and their access to relevant services in the country.

Furthermore, UNHCR recommends including a provision under this article, allowing for specific groups of foreigners admitted to Albania for humanitarian reasons to be granted a temporary residence permit on humanitarian grounds, per decision of the council of ministers in which also specific conditions for their temporary residence will be established.

Determining statelessness status and issuance of document to a stateless person, Article 54 of the Draft Law

UNHCR welcomes the inclusion of this provision in the Draft Law as it establishes the legal basis for a statelessness determination procedure (SDP). Establishing a procedure or mechanism to identify stateless persons is an implicit obligation of the 1954 Convention relating to the Status of Stateless Persons. UNHCR notes that Article 54 (3) anticipates that further elements of an SDP will be laid down in a sub-legislative act (Instruction) to be adopted by the relevant ministry.¹²

UNHCR notes that Article 54 (2) excludes asylum-seekers, refugees, and beneficiaries of complementary forms of protection from the possibility to apply for stateless status. UNHCR would like to point out that a stateless person may also be a refugee or be entitled to a complementary form of protection. Therefore, when an applicant raises both a refugee and a statelessness claim, it is important that each claim is assessed and that both types of status can eventually be explicitly recognized. Alternatively, a beneficiary of international protection whose status ceases should be entitled to re-active his/her statelessness claim.

Stateless status would then ensure continuity of protection in case the concerned person is still in need of international protection.

Recommendation:

UNHCR recommends not to prevent asylum-seekers and beneficiaries of international protection from applying for stateless status.

Permanent residence permit, Articles 87 (1) (dh) and 88 (c) of the Draft Law

Article 87 (1) (dh) of the Draft Law provides that persons who enjoy refugee status in Albania will be issued a permanent residence permit. However, beneficiaries of subsidiary protection status in Albania are explicitly excluded from this right according to Article 88 (c) of the Draft Law. UNHCR maintains that distinctions between beneficiaries of international protection (here between refugees and beneficiaries

¹² In 2014, UNHCR published its Handbook on Protection of Stateless Persons. This doctrinal tool is intended to help interpret and apply the 1954 Convention and to facilitate the identification and proper treatment of stateless persons. Part Two of the Handbook covers the modalities for creating SDPs that enable States to recognize and grant protection status to stateless persons. Part Three of the Handbook discusses the status of stateless persons under national law. UNHCR, Handbook on Protection of Stateless Persons, 30 June 2014, available at <https://www.unhcr.org/protection/statelessness/53b698ab9/handbook-protection-stateless-persons.html>. Furthermore, in 2020, UNHCR published the second edition of its Good Practices Paper on establishing SDPs. This paper complements the Handbook by presenting a brief overview of the key elements of SDPs and illustrating them with selected good State practices. UNHCR, Good Practices Paper on Establishing Statelessness Determination Procedures for the Protection of Stateless Persons, July 2020, available at <https://www.refworld.org/docid/5f203d0e4.html>. Available in Albanian upon request.

of subsidiary protection) are often neither necessary nor objectively justified. UNHCR considers that there is no reason to expect the protection needs of subsidiary protection beneficiaries to be of different nature or shorter duration than the need for protection as refugees.¹³

Recommendation:

Given the close linkages between refugee status and complementary (subsidiary) status¹⁴, and to avoid differentiation between the two statuses, UNHCR recommends aligning the grounds for granting a permanent residence permit accordingly. UNHCR recommends amending **Article 87 (1) (dh) of the Draft Law** extending the issuance of such permits to persons granted subsidiary protection.

Recommendation:

In accordance with the comment above regarding Article 87 (1) (dh), UNHCR recommends to delete the reference to persons granted complementary (subsidiary) protection in **Article 88 (c) of the Draft Law**, which currently excludes them from the right to obtain a permanent residence permit.

Expulsion of aliens, Articles 102 (1) (a), 104, 105 and 107 of the Draft Law

Article 102 (1) (a) regulates the circumstances under which an alien who entered illegally the territory of Albania can be expelled due to reports the he/she intends to move onward irregularly to a third country, whereas Article 104 covers situations where a person can be declared *persona non grata* for reasons that could be considered related to public order or national security.¹⁵

Article 107 indicates which categories of individuals cannot be subject to expulsion. It explicitly refers to, *inter alia*, persons who could face human rights violations upon return to the country of origin or another country and family members of a person recognized as a refugee. UNHCR welcomes the provisions of Article 107 of the Draft Law insofar as it recognizes the specific nature of persons who benefit from or need international protection.

However, paragraph 2 of Article 107 introduces an exception to the non-expulsion of these categories of persons when their stay represents a risk for public order and safety and threaten national security. UNHCR would like to recall that Article 32¹⁶ of the 1951 Convention permits the expulsion of a refugee

¹³ See UNHCR's Comments on the European Commission Proposal for an Asylum Procedure Regulation – COM (2016) 467, April 2019, available at: <https://www.refworld.org/pdfid/5cb597a27.pdf>.

¹⁴ Article 3 (19) of the Law No. 10/2021 on Asylum in the Republic of Albania

¹⁵ According to Article 104 of the Draft Law, an individual can be declared *persona non grata* if s/he i) has engaged in propaganda against the sovereignty of the Republic of Albania, its national security, constitutional order, and public order and safety; ii) is a member of terrorist organizations or supports and carries out actions encouraging anarchy against the rule of law; iii) is a threat to the country or to the relations of the Republic of Albania with other countries; iv) there are doubts that s/he will enter or stay in the territory to commit an offence or actions that pose a threat to the Republic of Albania; v) is involved in organized crime activities, trafficking in persons, drugs, and any other type of illegal trafficking, according to reports received by the relevant national security institutions.

¹⁶ Article 32 of the 1951 Convention stipulates:

"1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself,



lawfully residing in the country on grounds of national security or public order. Such a decision, however, is subject to strict procedural guarantees and conditions; there should be a due process of law, allowing the person to submit evidence and be represented, and, if the expulsion measure is confirmed, the person must be given appropriate time to seek legal admission into another country.

Return (*refoulement*) coming under the purview of Article 33¹⁷ of the 1951 Convention can take place irrespective of whether the person is lawfully in the territory and can take place to a country where the person would be at risk of persecution, under the exceptional circumstances explicitly provided for in Article 33 (2).

The exception to non-expulsion foreseen in Article 107 (2) do not include the guarantees of Article 32 and 33 of the 1951 Convention. Moreover, UNHCR further notes that Article 105 (3) of the Draft Law stipulates that detailed reasons for declaring an alien *persona non grata* will not be provided to the concerned person, notably when related to national security, defence, and public order. As indicated above, Article 32 (2) explicitly provides that expulsion should take place in accordance with due process during which the refugee is able to submit evidence. While international human rights law does not explicitly prohibit procedural adjustments in relation to classified information, principles of judicial fairness require counterbalancing measures to ensure that a decision to proceed with an expulsion on these grounds is nevertheless properly reviewed. This has been particularly pointed out by the European Court of Human Rights in its relevant caselaw.

Recommendation:

With a view to ensure coherence of **Article 107 of the Draft Law** with the domestic legislation applicable to asylum-seekers and refugees, UNHCR recommends including in the Draft Law a direct reference to the relevant articles of the Law on Asylum, or to the procedural guarantees of Article 32 and 33 of the 1951 Convention.

Recommendation:

UNHCR recommends a review of the implications of **Article 105 (3) of the Draft Law** in light of the principle of judicial fairness and of the relevant caselaw of the European Court of Human Rights related to the use of classified information in the context of procedures applicable to foreigners.¹⁸

and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. *The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.*"

¹⁷ Article 33 of the 1951 Convention stipulates:

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

2. The benefit of [Article 33(1)] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

¹⁸ The guide published by the European Court of Human Rights, *Guide to Article 1 of Protocol No. 7 - Procedural safeguards relating to expulsion of aliens*, could serve as a relevant reference. Available at: https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_7_ENG.pdf

Detention of unaccompanied minors, Article 119 of the Draft Law

Article 119 (1)-(3) of the Draft Law authorizes the detention of unaccompanied minors on certain conditions.

UNHCR's perspective on the detention of children in the immigration context has been developed in the 2012 Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (Detention Guidelines).¹⁹ UNHCR's position, in accordance with international standards, is that children should not be detained for immigration related purposes, irrespective of their legal or migratory status or that of their parents, and detention is never in their best interests.

As affirmed by the Convention on the Rights of the Child, the best interest of the child shall be a primary consideration in all the measures affecting the children, including asylum seeking and refugee children.²⁰ A best interests' assessment procedure should be conducted, which may be in the context of the national child protection system, where applicable. The principles of minimal intervention and the best interest of the child should govern any measures taken by the relevant authorities.

Unaccompanied or separated children should not be detained; instead, appropriate care arrangements remain the best measure, as liberty and freedom of movement of children should be always the preferred solution. Detention cannot be justified based solely on the fact that the child is unaccompanied or separated, or based on his or her migration or residence status, or lack thereof. Alternatives to detention should be explored, preferably through family-based alternative care options or other suitable alternative care arrangements as determined by the competent childcare authorities.

Recommendation:

UNHCR recommends that **Article 119 of the Draft Law** be amended accordingly. UNHCR recommends that a provision prohibiting the detention of children and instead providing for appropriate care arrangements and alternatives to detention be introduced in the text.

Article 119 (4) of the Draft Law provides for an age assessment of a detained unaccompanied minor. The age assessment methodology foreseen through DNA testing. Article 119 (4) further provides that in case of doubt about the child's age, the foreigner is presumed to be a child.

UNHCR²¹ would like to reiterate that most experts agree that age assessment is not a determination of chronological age but an estimated guess. Scientific methods currently available, including medical

¹⁹ Available at: <http://www.refworld.org/docid/503489533b8.html>. For UNHCR's position, see also 'UNHCR's position regarding the detention of refugee and migrant children in the migration context', January 2017, available at <https://www.refworld.org/docid/5885c2434.html>. See also UNHCR's Comments on the Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) – COM (2016) 465, August 2017, available at: <https://www.refworld.org/pdfid/59a6d6094.pdf>.

²⁰ Article 3, paragraph 1, of the Convention on the Rights of the Child.

²¹ For UNHCR's position, see UNHCR's Comments on the European Commission Proposal for an Asylum Procedure Regulation – COM (2016) 467, April 2019, available at: <https://www.refworld.org/pdfid/5cb597a27.pdf>. See also EASO, Practical Guide on age assessment, Second Edition, 2018, available at: <https://www.refworld.org/pdfid/5aafb42c0.pdf>. Relevant standards and safeguards can also be found in the Separated Children in Europe Programme's Position Paper on Age Assessment in the Context of Separated Children in Europe, 2012, available at: <https://www.refworld.org/pdfid/4ff535f52.pdf>.



examinations based on dental or wrist bone x-rays or visual inspection of physical development - DNA testing is not among them - can only estimate age. Therefore, there will always be a margin of error. This margin 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. UNHCR welcomes that this provision of the Draft Law deals with cases of uncertainty, providing the safeguard that when age is uncertain, benefit of the doubt shall be applied.

In UNHCR's view, a holistic assessment of capacity, vulnerability, and needs that reflect the actual situation of the young persons is preferred to reliance on age assessment procedures aimed at estimating chronological age. Any medical examination to determine a child's age must be a measure of last resort where reasonable doubts have arisen as to the child's age and a psychosocial assessment has not provided clarity. Age assessments should not be used as a matter of routine. This is particularly the case where the age assessment relies on medical examinations involving invasive techniques.

It is essential that the child is fully informed of the possibility that his or her age may be determined by a medical examination in a language that the child understands. Furthermore, a child's refusal to undergo a medical examination should not create the presumption that he or she is not a child, as there may be various legitimate reasons why the child refuses to undergo a medical examination to assess his or her age. Neither should a refusal to undergo a medical examination be considered indicative of whether or not the person is in need of international protection.

Lastly, unaccompanied or separated children should have the right to appeal a decision determining their age based on a medical examination or other methods.

Recommendation:

UNHCR recommends that the above considerations be taken into account, if not in the Draft Law itself, in a sub-legislative act, which is currently not foreseen in draft Article 146 (on Bylaws). UNHCR recommends that if a sub-legislative act is opted for, a reference to such an act in relation to **Article 119 (4) of the Draft Law** be added in **Article 146**.

Rights of aliens in detention, Article 121 of the Draft Law

Article 121 is part of Section V of the Draft Law, which regulates the detention of foreigners who are subject to an expulsion order. This article does not include the possibility for a foreigner placed in detention to apply for asylum. Also, insofar as detention of asylum-seekers is authorized by the 2021 Law on Asylum (Articles 45-47 spelling out the grounds for detention), Section V of the Draft Law is also relevant where expulsion orders are issued to asylum-seekers. However, Article 121 does not provide for asylum-seekers and refugees who are detained the opportunity to contact or be contacted by UNHCR.

Recommendation:

UNHCR recommends that **Article 121 of the Draft Law** provides that persons in detention must be given access to asylum procedures, and that detention should not constitute an obstacle to an asylum-seeker's possibility to pursue his or her asylum application. Furthermore, UNHCR recommends that this provision



UNHCR

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

spells out the rights of detainees to contact and be contacted by UNHCR or its designated partner NGO.²² Effective access to other bodies, including the ombudsman office, should also be possible, in accordance with the respective mandates.

IV. Conclusion

UNHCR hopes that the Parliament of Albania will give due consideration to these comments and remains available to provide additional observations, as well as the necessary technical support and expertise. UNHCR would like to further indicate that it stands ready to extend its cooperation to the Ministries listed in Article 146 and tasked with the preparation of the necessary bylaws and implementing guidelines, as they concern asylum-seekers, refugees and stateless persons.²³ UNHCR believes that these common efforts will ensure that this important legislative initiative leads to the adoption of a national aliens law that further improves the operation of the national legal framework affecting asylum-seekers, refugees and persons at risk of statelessness and is fully in line with relevant international and EU law.

**UNHCR Albania,
March 2021**

²² UNHCR has responsibility to supervise the implementation of international instruments for the protection of refugees, laid down explicitly in paragraph 8(a) of the 1950 Statute, in Articles 35 of the 1951 Convention relating to the Status of Refugees. In exercising these supervisory responsibilities, including in places of detention, States are expected to cooperate with the High Commissioner. UNHCR is to be given prompt and unhindered access to asylum-seekers, refugees and stateless persons and to supervise their well-being, wherever they are, including when they are detained. See Executive Committee Conclusion Nos. 44(XXXVII) – 1986 – Detention of Refugees and Asylum-Seekers, para. (g). Available at: <https://www.unhcr.org/4aa764389.pdf>

²³ UNHCR would like to point out that the Ministry of Health and Social Protection should also be referred to in Article 146 (2), in light of its role and responsibilities with regard to persons with specific needs, including children and in particular unaccompanied and separated children.