

## **UNHCR observations on the draft amendments to the Law on Refugees and Asylum and the Administrative Procedure Code of the Republic of Armenia<sup>1</sup>**

UNHCR offers these observations 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. As set forth in its Statute, UNHCR fulfils its international protection mandate by, *inter alia*, "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto".<sup>2</sup> UNHCR's supervisory responsibility under its Statute is reiterated in Article 35 of the 1951 Convention relating to the Status of Refugees (hereafter "the 1951 Refugee Convention") according to which State parties undertake to "co-operate with the Office of the United Nations High Commissioner for Refugees [...] in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the Convention".<sup>3</sup> A similar provision is included in Article II of the 1967 Protocol relating to the Status of Refugees.<sup>4</sup>

The below observations are largely drawn from those shared in 2018 in relation to the *Amendments to the Legislation of the Republic of Armenia on Extradition and Asylum*.<sup>5</sup>

### ***Provision of information and access to asylum procedures by persons in detention***

**The draft amendment to Article 47 of the Law on Refugees and Asylum, which introduces an obligation to inform a foreign citizen or a stateless person whose liberty is restricted about the right to apply for asylum,** should specify which state authority shall provide this information. As it stands, the draft provision does not seem to meet the requirement of Article 75 of the Constitution of Armenia to define organizational mechanisms and procedures necessary for an effective exercise of basic rights and freedoms that are regulated in law. Moreover, in view of the internationally recognized right to seek asylum and the need to respect the principle of non-refoulement at all times, UNHCR recommends that the draft amendment provides for the possibility to apply for asylum when the deadline for submission of an asylum claim was missed due to exceptional circumstances beyond the concerned person's control.

### ***Notification of asylum decisions***

**The overall objective of the proposed draft amendments is to reduce timeframes for examining asylum claims and appeal deadlines in certain contexts, namely when applicants are deprived of their liberty.** In light of this and with a view to ensuring effective and swift access to legal remedies, UNHCR would recommend that the draft amendment to Article 52 of the Law on Refugees and Asylum also foresees the possibility to notify first-instance decisions concerning applicants in detention to their lawyer and that applicants are provided with a copy of

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<sup>1</sup> Posted on the Unified Website for Publication of Legal Acts' Drafts on 10 August 2020.

<sup>2</sup> See para 8(a) of the *Statute of the Office of the High Commissioner for Refugees*, as revised by General Assembly res. 58/153, 24 February 2004; available at: <https://bit.ly/2p47kBrn>.

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

<sup>4</sup> UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: <https://www.refworld.org/docid/3ae6b3ae4.html>.

<sup>5</sup> UN High Commissioner for Refugees (UNHCR), *UNHCR comments on the Amendments to the Legislation of the Republic of Armenia on Extradition and Asylum*, June 2018, available at: <https://www.refworld.org/docid/5bd81c584.html>.

the decision in a language they understand or with the support of an interpreter in a language they understand to be able to access the content of the decision.<sup>6</sup>

### **Shortened deadlines and timeframes**

**Draft amendment to Article 57 of the Law on Refugees and Asylum and the proposed new Articles 222.14 § 1 and 222.15 § 1 and 4 of the Administrative Procedure Code provide for shortened timeframes for filing an appeal against a decision on an asylum claim** (10 days for appeals before the Administrative Court and Court of Appeals and 5 days for appeals before the Court of Cassation). UNHCR would like to point out that the proposed amendment to paragraph 1 of Article 57 of the Law on Refugees and Asylum refers to Article 52.1(1)(3), a provision which does not actually exist. Moreover, UNHCR would like to emphasise that the right to an effective remedy requires that an asylum-seeker is provided with sufficient time and facilities to exercise the right to appeal. Any shortened time limits must not render the exercise of this right practically impossible or excessively difficult, and should still allow applicants to undertake the required procedural steps to submit the appeal, taking into account that they may be unable to understand the language of the proceedings and/or documents. Applicants will also need time to understand the decision of the determining authority and any information provided on how to challenge that decision, secure legal assistance, request and/or be given access to their case file, consult a legal adviser, discuss the grounds for the appeal and draft the appeal. For all these reasons, both international and regional human rights law require sufficient time to lodge the appeal.<sup>7</sup> In particular, effective access to legal assistance is an essential safeguard in terms of effectiveness of a remedy against the risk of refoulement, as also underlined by the European Court of Human Rights.<sup>8</sup> UNHCR therefore considers that shortened timeframes for appeal may only be adequate if accompanied by stringent safeguards as regards access to legal aid. These are not available under the current applicable legal provisions.<sup>9</sup> Safeguards, which must be accessible both in law and practice, are extremely important in the context of Armenia considering the continuous serious challenges affecting access to State-funded legal aid for asylum-seekers resulting from deficiencies in the referral mechanism, lack of access to interpretation services when interacting with public defenders (State-funded legal aid providers in Armenia) and capacity constraints of public defenders.

These challenges have particularly aggravating effects on their access to an effective remedy by asylum-seekers in detention. Therefore, UNHCR considers that the proposed timeframe of 10 days (UNHCR understands that as per Article 51 of the Administrative Procedure Code, this would not include weekends and would thus give the applicant at least two weeks) to lodge an appeal would only be adequate if accompanied with the following explicit safeguards: (i) free legal representation is available for asylum-seekers at the stage of administrative proceedings<sup>10</sup> (this

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<sup>6</sup> UN High Commissioner for Refugees (UNHCR), *UNHCR Discussion Paper Fair and Fast - Accelerated and Simplified Procedures in the European Union*, 25 July 2018, page 12, available at: <https://www.refworld.org/docid/5b589eef4.html>.

<sup>7</sup> UN High Commissioner for Refugees (UNHCR), *UNHCR Comments on the European Commission's Proposal for an Asylum Procedures Regulation*, April 2019, COM (2016) 467, pages 18-19, available at: <https://www.refworld.org/docid/5cb597a27.html>.

<sup>8</sup> *Conka v. Belgium*, 51564/99, Council of Europe: European Court of Human Rights, 5 February 2002, para. 44, available at: [https://www.refworld.org/cases\\_ECHR\\_3e71fd4b4.html](https://www.refworld.org/cases_ECHR_3e71fd4b4.html); *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, para. 301, available at: [https://www.refworld.org/cases\\_ECHR\\_4d39bc7f2.html](https://www.refworld.org/cases_ECHR_4d39bc7f2.html).

<sup>9</sup> Article 41(3) of the Law on the Profession of Advocate provides for free legal representation in the pre-trial stage of criminal cases only, thus excluding administrative proceedings.

<sup>10</sup> See paras. 1 and 2 of Article 15 of the *Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU – COM (2016) 467*, available at: <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-467-EN-F1-1.PDF>.

would require an amendment to Article 41 of the Law on the Profession of Advocate defining the scope of free legal assistance and representation); (ii) an explicit requirement is introduced in the Law on Refugees and Asylum that the asylum authority shall, at the request of the applicant and as soon as possible after an application is made, request the appointment of a lawyer in administrative proceedings, thereby facilitating in practice the exercise of the right to free legal assistance and representation; (iii) in the case of an applicant in need of special procedural guarantees or an unaccompanied child, free legal assistance and representation shall be provided, regardless of whether or not the applicant has requested it;<sup>11</sup> (iv) a requirement that applicants are informed about their right to free legal assistance and representation, including in writing, in a language they understand at the time of notification of a negative decision, and that the asylum authority shall, as soon as possible, request the appointment of a lawyer, unless the applicant explicitly waives this right in writing; (v) where the applicant has requested free legal assistance and representation, the time limit for appeal shall run from the moment a lawyer is appointed;<sup>12</sup> (vi) the time limit shall not expire before the lawyer has had an effective opportunity to advise the applicant in lodging the appeal and the applicant has had an effective opportunity to act on that advice;<sup>13</sup> (vii) the respective court may extend/restore the time limit if required in light of the individual circumstances of an applicant.<sup>14</sup>

**The proposed Articles 222.14 and 222.15 of the Administrative Procedure Code aim at shortening the duration of the judicial review by setting out timeframes for the examination of asylum appeals** (one month for the Administrative Court, 15 days for the Court of Appeal and 5 days for the Court of Cassation). UNHCR considers that while efficient procedures are essential, timelines should be reasonable to ensure fairness and effectiveness. Overly short and inflexible timeframes for the examination of an appeal could result in a more cursory review of the relevant facts, thereby potentially undermining the quality and scope of the review and resulting in hastily-reasoned decisions, which run the risk of being incorrect, may trigger further appeals or repeat asylum applications burdening the system and may, in the worst case, lead to refoulement. In addition, short timelines will only work if appropriate modalities are in place, and adequate resources allocated to allow courts to comprehensively examine the individual circumstances of the particular case and obtain and review relevant evidence. Where this is not possible within the set time limits, they need to be extendable to ensure the effectiveness of the remedy.<sup>15</sup> While recognizing the importance of speedy remedies, the European Court of Human Rights equally considered that this should not be privileged over the effectiveness of procedural guarantees.<sup>16</sup> In light of the foregoing, the proposed shortened timeframes should be revisited and extendable to guarantee the right to an effective remedy in complex cases, especially considering the workload and lack of specialization on asylum of administrative law judges in Armenia.

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<sup>11</sup> UN High Commissioner for Refugees (UNHCR), *UNHCR Comments on the European Commission's Proposal for an Asylum Procedures Regulation*, April 2019, COM (2016) 467, pages 15-16, available at: <https://www.refworld.org/docid/5cb597a27.html>.

<sup>12</sup> See para. 6 of Article 53 of the *Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU* – COM (2016) 467, available at: <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-467-EN-F1-1.PDF>.

<sup>13</sup> UN High Commissioner for Refugees (UNHCR), *UNHCR Comments on the European Commission's Proposal for an Asylum Procedures Regulation*, April 2019, COM (2016) 467, page 19, available at: <https://www.refworld.org/docid/5cb597a27.html>.

<sup>14</sup> See *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, Case C-69/10, European Union: Court of Justice of the European Union, 28 July 2011, paras. 66-68, available at: <https://www.refworld.org/cases,E CJ,4e37bd2b2.html>.

<sup>15</sup> UN High Commissioner for Refugees (UNHCR), *UNHCR Statement on safe country concepts and the right to an effective remedy in admissibility procedures*, Issued in the context of the preliminary ruling reference to the Court of Justice of the European Union in the case of *LH v Bevándorlási és Menekültügyi Hivatal (C-564/18)*, September 2019, paras. 23-25, available at: <https://www.refworld.org/docid/5d7b842c4.html>.

<sup>16</sup> *I.M. c. France*, requête no 9152/09, Council of Europe: European Court of Human Rights, 2 February 2012, para 147, available at: <https://www.refworld.org/cases,ECHR,4f2932442.html>.

## ***Repeat asylum applications***

**The revised wording of Article 59 of the Law on Refugees and Asylum aims at replacing the concept of repeat application with that of “second application”.** UNHCR notes that the rewording may result in limiting the number of possible subsequent applications to only one in practice. Should that be the case, such a bar may lead to a breach of non-refoulement and human rights obligations<sup>17</sup> since there are many reasons why an applicant may wish to submit further evidence or raise new issues. Such reasons may arise at any point in time following the examination of the initial or a second application: (i) change in the situation in the country of origin; (ii) activities of the applicant in the country of asylum; (iii) breach of the principle of confidentiality; (iv) deficiencies or flaws in the previous procedure; (v) trauma, shame or other reasons having prevented full oral testimony at an earlier stage; (vi) change in the legislation, policy or case law of the country of asylum; (vii) obtaining of evidence not available previously. Therefore, to avoid any misinterpretation in practice, UNHCR suggests maintaining the notion of “repeat application”. Nevertheless, UNHCR wishes to underline that legitimate concerns for preventing any possible abuse of the asylum system may be addressed through the introduction of shortened timeframes for a preliminary examination of subsequent applications; making use of the possibility provided by Article 52.1(1)(2) of the Law on Refugees and Asylum to process repeat applications through an accelerated procedure; introducing a shortened timeframe for appeal; and derogating from the automatic suspensive effect of an appeal while maintaining the right and the effective opportunity to request the court to grant suspensive effect.<sup>18</sup>

UNHCR notes that paragraph 3(1) of the proposed Article 59 of the Law on Refugees and Asylum on repeat applications only refers to “new circumstances with respect to well-founded fear of being persecuted” as an admissibility ground for such applications. Unlike the current wording of Article 59(2)(1), this wording thus does not seem to cover situations falling under Article 6(1)(2) of the Law, namely generalized violence, massive human rights violations or other events disrupting public order. In keeping with non-refoulement obligations enshrined in international and European human rights treaties, UNHCR recommends to maintain the current wording of Article 59(2)(1), which covers both the strict and extended refugee definitions of Article 6(1) of the Law on Refugees and Asylum.

UNHCR hopes that a careful consideration will be given to its comments and recommendations. It remains available for further consultations and to provide technical support and expertise in order to ensure that this legislative initiative results in the adoption of amendments that further improve the operation of the national asylum system.

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**UNHCR, September 2020**

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<sup>17</sup> 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)*, pages 36-37, available at: <https://www.refworld.org/pdfid/4c63ebd32.pdf>.

<sup>18</sup> UN High Commissioner for Refugees (UNHCR), *UNHCR Comments on the European Commission’s Proposal for an Asylum Procedures Regulation, April 2019, COM (2016) 467*, pages 19-20, available at: <https://www.refworld.org/docid/5cb597a27.html>.