

UNHCR Recommendations concerning Asylum-related Cases in the Context of Judicial Reform in the Republic of Armenia

ADVOCACY PAPER

Introduction

UNHCR offers this paper 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 for refugees. As set forth in its Statute¹, 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." UNHCR's supervisory responsibility under its Statute is reiterated in Article 35 of the 1951 Convention relating to the Status of Refugees ("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". The same commitment is included in Article II of the 1967 Protocol relating to the Status of Refugees ("the 1967 Protocol").

Background

This document has been prepared to structure and facilitate advocacy efforts of UNHCR and its partners in the framework of the upcoming judicial reform in Armenia.

The Armenian court system is a three-tier system consisting of the First Instance Courts (Administrative Court and Courts of General Jurisdiction), Courts of Appeal (Second Instance Courts), and the Court of Cassation. The role of the Court of Cassation (Third Instance Court) is passive (only reviews points of law), and asylum appeals are exclusively heard by the lower two instances. International standards promoted by UNHCR only require one level of judicial review. Therefore, UNHCR is concerned with the many judicial layers that would render the system inefficient.

There are mainly two situations when asylum-seekers and refugees may approach local courts in Armenia concerning their asylum-related issues and thus exercising their right to due process or procedural fairness:

- 1) **Administrative judicial procedure:** The decisions of the Migration Service may be appealed before the Administrative Court within 60 days and the appeal has automatic suspensive effect. There is no exact timeframe for court review. The administrative judicial review is carried out based on the Law of the Republic of Armenia on Refugees and Asylum² and the Administrative Procedure Code. The Administrative Court reviews (i) negative decisions of the Migration Service on asylum applications, and (ii) decisions of the Migration Service to cancel, withdraw, cease, or revoke international protection status or asylum.

¹ Statute of the Office of the United Nations High Commissioner for Refugees, General Assembly Resolution 428 (V) of 14 December 1950, available at: <https://www.unhcr.org/protection/basic/3b66c39e1/statute-office-united-nations-high-commissioner-refugees.html>

² Armenia: Law No. HO-211-N of 2008 on Refugees and Asylum (2015) [Armenia], 27 November 2008, <http://www.refworld.org/docid/4f1986412.html>

- 2) **Judicial procedures in criminal courts** concerning (i) sentencing asylum-seekers to long-term imprisonment for irregular entry, and (ii) extradition request received from the country of origin. The judicial proceedings in these contexts are implemented based on *the Criminal and Criminal Procedure Codes of the Republic of Armenia*.

Brief overview of main gaps and shortcomings

Asylum cases under judicial review face a number of challenges in Armenia due to the absence of strict deadlines for processing of asylum appeals and the overall workload of the courts. As a result, the judicial review of a case before the first instance court takes around a year, while before the Appeals Court 'on average' cases are scheduled for hearing a year after the appeal was lodged. This is of particular concern when applicants are in pre-trial detention for irregular border crossing since by the time a final decision is delivered on the asylum case following all possible appeals, asylum-seekers may have spent a substantial period of time in detention.

Relevant, objective and up-to-date COI is crucial for the determination of refugee status and obstacles to return. Currently, there is no independent and proficient institution in Armenia to carry out COI research. The current available capacity within the Migration Service is not able to cover the needs and requirements of the court system and other relevant state authorities, who are responsible for expulsion and extradition proceedings and should effectively assess the possibility for return in accordance with international refugee and human rights law.

Administrative Judicial Procedure

The administrative court system is extremely overburdened and understaffed, and experiences a lack of financial resources. No timeframe is stipulated for processing asylum appeals by the court. As a result, the average processing time for asylum cases becomes 3 years.

Asylum-related appeals to the administrative courts are specific in terms of legal analysis, standard and burden of proof, require different approaches in the collection of facts, material and evidence assessment, and entail a research of relevant country of origin information (COI) in order to conduct a fair, effective and efficient consideration of each asylum application on its merit. Therefore, it would be cost and time efficient to consider a special procedure for the examination of asylum-related cases within the judicial system. Such approach has been taken by many countries (e.g. Austria, Belgium, Denmark, Finland, France, Sweden and the UK), and UNHCR would be available to share good practice in this regard.

Specialization of judges in refugee law constitutes good practice in light of the specificities of these types of cases. Two refugee courses have been developed by the Academy of Justice, and all judges should be encouraged to pass them. Systematic capacitation and specialization of judges in refugee law will contribute to an effective and timely consideration of asylum claims. The specialization of judges will also allow to speed up and ensure consistency in the decision-making process and jurisprudence.

There are also gaps in the existing system of checks and balances in regard to the use of national security considerations in asylum-related cases. Judges are not always able to effectively review and scrutinize evidence provided by the National Security Service (NSS) to assess whether the stated reasons of national security carry significant weight. Neither rejected asylum-seekers and refugees nor their legal representatives have access to the NSS's classified information, which is an obstacle for an effective representation of their interests in court and, overall, has an adverse effect on the ability of the judicial system to conduct a full examination of all relevant aspects of cases raising potential security concerns.

Furthermore, *the Administrative Procedure Code* does not provide legal avenues for introducing third party, notably UNHCR opinions or positions to the courts in the form of *amicus curiae* interventions with regard to (i) the interpretation of the 1951 Convention relating to the Status of Refugees and the 1954 Convention relating to the Status of Stateless Persons; (ii) the interpretation of national legislation in a manner compatible with Armenia's international

obligations related to refugees and stateless persons; and (iii) analysis on conditions in the country of origin.

It is also important to guarantee free and qualified legal assistance and representation in asylum-related cases in law and practice. Although asylum-seekers and refugees are entitled to free legal aid through the Public Defender's Office, a shortage of public defenders, the lack of specialization in refugee law, and the absence of funds for interpretation raise concerns about the quality and efficiency of legal aid and representation in practice. At present, most asylum-related cases are represented by lawyers of the NGO Mission Armenia, which is funded by UNHCR.

UNHCR recommends to:

- Encourage the Migration Service to introduce a fair, effective and efficient panel appeal review to lift some burden from the administrative court by starting a feasibility study or a discussion around this idea. The panel will take the burden from the courts in terms of offering alternative review within the governmental structure;
- Introduce a special procedure for judicial review of asylum-related cases in the Administrative Procedure Code to provide for a full examination of both facts and points of law. This special procedure could reduce the general three-tier judicial review, for example;
- Promote specialization of judges in refugee law and support systematic and mandatory capacitation of judges and judges' assistants in refugee law through available courses of the Academy of Justice;
- Consider the establishment of an independent and professional research center on COI and ensure access to its services by all relevant state agencies dealing with asylum adjudication, extradition, expulsion and return (the Migration Service's COI Unit could be considered as a starting point with its experience and capacity);
- Ensure that national security considerations do not undermine refugee protection and establish an effective mechanism to provide judges, asylum-seekers and/or legal representatives with access to relevant information as required, in line with relevant international standards, to ensure fair and effective litigation in asylum-related cases;
- Introduce the possibility of an intervention of a neutral third party in legal proceedings in the court as a legal avenue for UNHCR and other actors to submit their opinions or positions;
- Guarantee free and qualified legal assistance and representation in asylum-related cases in law and practice.

Judicial procedures in criminal courts

1. Non-penalization for irregular entry

The criminal courts continue to authorize prolonged detention and sentence asylum-seekers to long-term imprisonment for irregular entry to Armenia. Such practice is, in many instances, contrary to established norms and principles of international refugee law and should be addressed in the framework of the judicial reform by way of amending the Criminal and Criminal Procedure Codes.

Article 31(1) of the *1951 Refugee Convention* recognizes that in exercising the right to seek asylum, refugees are often compelled to arrive, enter or stay in a territory without proper

authorization. An effective implementation of Article 31 of the 1951 Refugee Convention is the responsibility of all branches of the government – legislative, executive and judicial. It requires cooperation, coordination and communication between responsible institutions and actors, especially border control, prosecutorial and asylum authorities.

While both Article 329(3) of *the Criminal Code*³ and Article 28(1) of *the Law on Refugees and Asylum* reflect, albeit in slightly different terms, the non-penalization clause enshrined in international refugee law under Article 31 of the *1951 Refugee Convention*, this essential right is not always upheld in practice. There are still a number of asylum-seekers who are detained and face long imprisonment for irregular entry to Armenia. In some cases, the courts continue to interpret Article 329(3) of the Criminal Code as requiring a *prior intention* to seek asylum in Armenia, making it a necessary condition to benefit from the *non-penalization* exception for irregular entry. A requirement of a prior intention to seek protection in Armenia is not only absent from Article 31 of the *1951 Refugee Convention*, but it is also absent from Article 28 of the *Armenian Law on Refugees and Asylum* which replicates the non-penalization principle in national law. Read in light of these two provisions, it is clear that Article 329(3) may not be interpreted as requiring prior intent.

Thus, UNHCR advocates for the amendment of the *non-penalization principle* of Article 329(3) of the *Armenian Criminal Code* to bring it in line with the similar provision of Article 28 of the *Armenian Law on Refugees and Asylum* and thus safeguard the correct interpretation with regard to Article 31(1) of the *1951 Refugee Convention*.⁴

Furthermore, the same non-penalization provision should be considered under Article 325 of *the Criminal Code* to prevent criminal liability where asylum-seekers have to use insufficient, false or fraudulent documentation to enter Armenia⁵.

Free legal aid in the criminal proceeding is guaranteed by Article 41 of *the Law on Attorneyship of the Republic of Armenia*.⁶ However, in practice, due to the overall workload and the absence of funds for interpretation, public defenders are not always able to meet with detainees, including asylum-seekers and refugees, prior to the first court hearing and throughout the judicial review as required. Such situation hinders access to effective and timely legal counselling and affects the quality of preparations and participation in court hearings and timely collection of evidence.

UNHCR recommends to:

- Amend Articles 325 and 329 (3) of the Criminal Code to guarantee an interpretation of the *non-penalization* provision in accordance with Article 31(1) of the 1951 Refugee Convention;
- Ensure access to qualified legal aid at all stages of the judicial review.

2. Extradition and Asylum

There are some gaps and shortcomings in *the Criminal* and *Criminal Procedure Codes* concerning extradition, which create difficulties in practice and risk breaching the principle of *non-refoulement*, as provided for in Article 33(1) of *the 1951 Refugee Convention* and under

³ *Criminal Code of the Republic of Armenia*, 18 April 2003, non-official translation available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=527766599> and amendments of 21 June 2014: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5bc456984>

⁴ *UNHCR comments on the Draft New Criminal Code of the Republic of Armenia with particular reference to the wording of Article 329(3) of the existing Criminal Code*, July 2016, (“UNHCR Comments Draft New Criminal Code”), <http://www.refworld.org/docid/5a69a3304.html>

⁵ *Ibid*

⁶ National Legislative Bodies / National Authorities, *Armenia: Law on Attorneyship*, 14 December 2004, available at: <https://www.refworld.org/docid/5ac374627.html>

international human rights law, notably Article 3 of the European Convention of Human Rights, which absolutely prohibits return in case the person will be subjected to torture, inhuman or degrading treatment or punishment.⁷

The extradition legislation needs to include explicit provisions requiring relevant state authorities (National Security Service, including border guards, Prosecutor General's Office, Ministry of Justice and Police) to effectively refer any asylum request submitted in the context of proceedings related to extradition to the Migration Service without delay.

It is also crucial to guarantee in the extradition legislation that in case of a pending asylum procedure there is an automatic suspension of any extradition order until the final decision on the asylum claim has been reached.

In sharing information with the requesting State in the context of extradition proceedings, relevant authorities should take into account legitimate confidentiality and privacy interests of asylum-seekers and refugees, as well as potential protection risks for persons associated with them (for example their family members remaining in the country of origin) in accordance with the individual right to protection of personal data. In this regard, no information about their asylum request, asylum claim and asylum procedure should be provided to the country of origin.

It is important to ensure effective, efficient and qualified legal assistance and representation at all stages of the extradition procedure, and free legal aid should be provided in case the asylum-seekers and refugees in extradition detention cannot afford it.

In addition, assistance of a competent interpreter should be provided at all stages of the extradition procedure to facilitate the effective and efficient collection of information about the applicant, his asylum claim and obstacles to return.

Furthermore, if there are substantial grounds for believing that a person in the extradition procedure will face a real risk of treatment contrary to Article 3 of the European Convention of Human Rights (i.e. torture, inhuman and degrading treatment and/or punishment), a legal analysis of the law and practice in the country of origin, including a rigorous scrutiny of its diplomatic assurances, should be carried out by the relevant authorities (in cases where the wanted person is an asylum-seeker, this determination would need to be made by the asylum authority).⁸

UNHCR recommends to:

- Consider a comprehensive revision of Chapters 54 and 54¹ of the Criminal Procedure Code and of Article 16 of the Criminal Code of the Republic of Armenia to guarantee proper safeguards in accordance with refugee protection international standards, and include an explicit reference to the Law on Refugees and Asylum in case a person in the extradition procedure asks for asylum in Armenia.

Conclusion

As previous capacity development of both Administrative and Criminal Law judges in the field of refugee law has clearly had a positive impact, continue these efforts focusing on challenges/gaps identified, relying increasingly on already trained judges in the system for such activities, showcasing good quality judgments, further complementing the curriculum of the Academy of

⁷ 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>

⁸ UN High Commissioner for Refugees (UNHCR), *Guidance Note on Extradition and International Refugee Protection*, April 2008, available at: <http://www.refworld.org/docid/481ec7d92.html>

Justice with more advanced courses on refugee law, as well as on an ad hoc basis, including in cooperation with the Council of Europe institutions and other stakeholders.

In the framework of the upcoming judicial reform, UNHCR would like to take this opportunity to raise issues relevant to fair, effective and efficient judicial review in asylum-related cases to ensure that the specific situation and protection regime for asylum-seekers and refugees is also included in the reform process. It is also important to consider that the reform requires an allocation of state resources and close cooperation and coordination among relevant state agencies and international organizations. In this regard, UNHCR is at the government's disposal for discussions and committed to provide any required expertise and support.

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