



UNHCR's comments on the Proposal for amendment of the Lithuanian Law on Legal Status of Aliens (Draft Law No. XIP-2360(2))

I. Introduction

UNHCR is entrusted by the United Nations General Assembly with the responsibility for providing international protection to refugees, and for seeking permanent solutions for the problem of refugees. According to its Statute, UNHCR fulfils its mandate, *inter alia*, by “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto”, which includes supervision of national legislation, and proposed amendments thereto, of signatory countries regulating the application of the 1951 Convention relating to the Status of Refugees (hereinafter – **1951 Convention**). UNHCR’s supervisory responsibility under its Statute is reiterated in Article 35 of the 1951 Convention and Article II of the 1967 Protocol relating to the Status of Refugees (hereinafter – **1967 Protocol**). The Office appreciates the opportunity to present these comments concerning the proposed changes to the Law on Legal Status of Aliens in Lithuania (hereinafter - **Draft Law**).

UNHCR understands that the present Draft Law shall amend the Law on Legal Status of Aliens from 29 April 2004 (No IX-2206) with provisions related *inter alia* to refugee status determination, treatment of vulnerable groups of asylum-seekers including identification of designated places for accommodation of minor asylum-seekers as well as application of detention with regard to certain categories of aliens.

II. General observations

UNHCR appreciates the initiative by the Government of Lithuania to introduce a number of legal standards and guarantees for separated or unaccompanied children as well as other categories of asylum-seekers with specific needs to the current Law on Legal Status of Aliens (No IX-2206). UNHCR also welcomes that the Draft Law provides definition of “vulnerable persons” (Article 2 (24)), stipulates a maximum period of deprivation of the right to liberty of a person (Article 120) and defines a place of initial accommodation of unaccompanied children seeking asylum in the Republic of Lithuania (Article 25). Furthermore, in accordance with the amended version of Article 25 of the Law on Legal Status of Aliens, unaccompanied minors shall be represented in the refugee status determination procedure by a guardian or a guardianship institution.

UNHCR notes that the Draft Law includes provisions providing for potential increased use of detention. UNHCR therefore recalls the overall commitment to refugee protection made by Lithuania as a party to the 1951 Convention and in this respect stresses the important to remain conscious of the protection needs of refugees and the respect for the principle of non-refoulement. The proposed Draft Law must therefore be implemented in full compliance with Lithuania's international obligations and the non-refoulement principle. Considering that European Union Directives in the area of asylum and refugee protection are minimum standards, UNHCR urges the Government of Lithuania to apply more favorable conditions where appropriate.

UNHCR would also like to use the present opportunity to draw the attention of the Government of Lithuania to the fact that the definition of "refugee" employed under the current Law on Legal Status of Aliens is not in line with 1951 Convention.

III. Specific comments

3.1. "Vulnerable persons"

UNHCR notes that the proposed definition of "vulnerable persons" (Article 2 (24) of the Draft Law) meets the requirements, which are prescribed in Article 17 of the EU Reception Directive¹. The latter stipulates that Member States shall take into account the specific situation of vulnerable persons such as:

- Minors/ unaccompanied minors;
- Disabled people;
- Elderly people;
- Pregnant women;
- Single parents with minor children;
- Persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

UNHCR has suggested that this list shall not be considered exhaustive and shall include also other groups with special needs requiring special treatment like victims of human trafficking and in some cases persons vulnerable on grounds of gender e.g. single women and girls, sexual minorities, single mothers with children, victims of sexual and gender based violence (SGBV)². Being outside their own social network, perhaps for the first time in their lives, may make women and (teenage) girls vulnerable, particularly if they are unaccompanied by family members. Single women and mothers may also face stigma from the community and

¹ Council Directive 2003/9/EC of 27 January 2003 *Laying Down Minimum Standards for the Reception of Asylum Seekers in Member States*, 6 February 2003, 2001/0091 (CNS), available online at: <http://www.unhcr.org/refworld/docid/3ddcfda14.html>

² See for example, UNHCR Executive Committee Conclusions *on Refugee Protection and Sexual Violence*, 8 October 1993, No. 73 (XLIV) - 1993, available at: <http://www.unhcr.org/refworld/docid/3ae68c6810.html>

come under pressure to confirm with social and cultural norms. This vulnerability requires special attention and treatment. The problems faced by women and teenage girls could range from shortcomings in the actual asylum procedures to poor physical reception conditions. When a female asylum-seeker needs medical care, her cultural or social background may necessitate special attention, including the availability of a female doctor. Rights of refugee women are recognized in a number of international instruments³. Consistent with these standards, the recognition of female-specific problems in connection with the asylum procedure was spelt out in UNHCR Executive Committee Conclusions No. 64⁴ and 105⁵.

There is a need for adequate staff training on gender related issues in general, and gender vulnerabilities. Training should be combined with psychological, social or medical referrals in order to help victims of SGBV overcome their inhibitions in describing sexual violence they may have suffered.

Other useful guidance may be found in the UNHCR Handbook on the protection of refugee women and girls⁶ and the UNHCR Guidelines on Sexual and Gender Based Violence⁷.

UNHCR recommends to include “gender” as another indicator of vulnerability into the present text of the Law on Legal Status of Aliens.

Furthermore, UNHCR notes that the current Draft Law provides no guidance as regards the agencies or bodies, which shall be entitled to assess the vulnerability of applicants for asylum. Currently, Lithuania relies on self-identification for identification of vulnerable applicants. Special needs are identified only when and if an individual seeks specialized care. The process of identification of special needs often starts only if an asylum-seeker displays behavior or other signs which could indicate e.g. Post Traumatic Stress Disorder, without a pro-active mechanism to screen all asylum-seekers systematically for special needs. The lack of pro-active identification mechanisms leads to a risk that special needs may go undetected, and if not addressed, may become aggravated. As a consequence, individual evaluation takes place *de facto* when the reception centre officials or NGO partners are called upon to respond to an individual’s particular needs. Therefore, while the special needs of the asylum-seeker may be met, there is no systematic examination of the individual’s situation and the appropriate response.

In order to ensure clarity in the responsibility for identification and the necessary response and follow up, UNHCR would like to propose amending the current law by specifying

³ 1979 UN Convention on the Elimination of all Forms of Discrimination Against Women and the 1957 UN Convention on the Nationality of Married Women.

⁴ UNHCR Executive Committee Conclusions on *Refugee Women and International Protection*, 5 October 1990, No. 64 (XLI) - 1990, available at: <http://www.unhcr.org/refworld/docid/3ae68c441f.html>

⁵ UNHCR Executive Committee Conclusions on *Women and Girls at Risk*, 6 October 2006, No. 105 (LVII) - 2006, available at: <http://www.unhcr.org/refworld/docid/45339d922.html>

⁶ UN High Commissioner for Refugees, *UNHCR Handbook for the Protection of Women and Girls*, January 2008, available at: <http://www.unhcr.org/refworld/docid/47cfc2962.html>

⁷ See UN High Commissioner for Refugees, *Sexual and Gender-Based Violence Against Refugees, Returnees and Internally Displaced Persons. Guidelines for Prevention and Response*, May 2003, available at: <http://www.unhcr.org/refworld/docid/3edcd0661.html>

concrete and qualified bodies or state officials, who will be responsible for identification of persons with special needs, including carrying out the “individual evaluation” (Article 17 of the Reception Directive) of the situation of asylum-seekers with special needs, once they have been identified.

Early identification of vulnerability can ensure adequate reception and procedural responses. UNHCR has therefore recommended that needs of vulnerable individuals are identified and supported **already at the stage of referral to the reception centers**. It is the opinion of UNHCR that identification of vulnerabilities of asylum-seekers should preferably be done **as soon as possible** following arrival. Moreover, it should be also possible to identify and address special needs which may not be visible at first, **at any stage of the asylum procedure** as they become apparent.

For this to be most effective it is advisable to adopt specific policy instructions, guidelines, or any other form of operational guidance relating to the identification of asylum-seekers with special needs. Once identified, specialized medical personnel and institutions will be able to offer physically and mentally disabled persons, victims of sexual abuse and exploitation, victims of trauma and torture counseling and treatment as early as possible⁸.

UNHCR suggests that the legislative amendments are included setting out mechanisms of identifying, reporting and following up on the needs of vulnerable individuals already at the stage of referral to the reception centers.

It should be acknowledged that for a number of reasons, including shame or lack of trust, asylum-seekers may be hesitant to disclose certain experiences immediately. This may be the case, amongst others, of persons who have suffered torture, rape or other forms of psychological, physical or sexual violence. Special needs resulting from such experiences may therefore go undiscovered at an early stage of the process. Later disclosure of such experiences should not be held against asylum-seekers, nor inhibit their access to any special support measures or necessary treatment.

With this in mind, UNHCR suggests that the proposed mechanisms for persons with special needs shall provide for appropriate monitoring of their situation, regardless of when those needs are identified.

3.2. “Refugee definition”

The Draft Law sets out that “Refugee means an alien who has been granted the status of a refugee in the Republic of Lithuania in accordance with the procedure established by this Law”.

⁸ UN High Commissioner for Refugees, UNHCR Annotated Comments on Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers, July 2003, commentary to Article 20, available online at: <http://www.unhcr.org/refworld/docid/3f3770104.html>

UNHCR is concerned that the proposed in the Draft Law definition of “refugee” is not in line with the 1951 Convention and 1967 Protocol. A person is a refugee within the meaning of the 1951 Convention as soon as he/she fulfills the criteria contained in the definition. This would necessarily occur prior to the time at which his/her refugee status is formally determined by asylum authorities. Recognition of someone’s refugee status does not make him/her a refugee but declares him/her to be one. An individual may also already be granted refugee status when he/she arrives in Lithuania, even though he/she has not been granted refugee status under this legislation. The Draft Law could also specify that protection under the 1951 Convention is to be granted to all applicants who fulfill the Convention’s refugee definition.

UNHCR recommends that the full definition of a refugee, as set forth in Article 1(A)(2) of the 1951 Convention, be incorporated in Article 2 (22), including reference to stateless persons outside their country of habitual residence as also envisioned by Article (2)c of the EU Qualification Directive⁹.

3.3. “Unaccompanied minors”

The authors of the Draft Law use the term of “ unaccompanied minor”, which is not in line with the terminology of the UN Convention on the Rights of the Child (hereinafter - CRC). The Republic of Lithuania is a party to CRC as of 1992.

UNHCR would like, thus, to propose using the term “child” instead of “minor” in the text of the Draft Law.

UNHCR also recommends making use of both the terms “unaccompanied children” and “separated children”¹⁰ in the Draft Law, as there is a difference in terminology at the international level, and these two terms would cover both:

- 1) Children who have been separated from both parents and other relatives and are not cared for by an adult who, by law or custom, is responsible for doing so, and
- 2) Children who are separated from both their parents or their previous legal or customary guardian but who may be accompanied by other relatives or adults who may, however, not be able, suitable or willing to assume responsibility for the child’s care.

It is therefore advisable to amend accordingly Article 2(24) of the Draft Law.

⁹ Council Directive 2004/83/EC of 29 April 2004 *on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted*, 19 May 2004, 2004/83/EC, available at: <http://www.unhcr.org/refworld/docid/4157e75e4.html>

¹⁰ The UNHCR *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* from February 1997 may provide useful guidance for developing relevant national standards with regard to this vulnerable group of applicants, available at: <http://www.unhcr.org/refworld/docid/3ae6b3360.html>

In addition, UNHCR finds it necessary to clarify status, qualifications and role for guardians of separated or unaccompanied children in the current Draft Law. UNHCR welcomes that the appointment of a guardian for unaccompanied children is made mandatory according to Article 25 of the Draft Law. UNHCR notes, however, that the current content of Article 25 stipulates no prerequisites for appointment as a guardian of separated or unaccompanied child. In light of the decisive role the guardians play in ensuring the protection of children, it is very important to guarantee that these persons have the necessary expertise in the field of childcare.

It has been recommended as good practice that guardians shall have knowledge about the relevant provisions of national legislation on aliens as well as trained on the basic concepts like “best interest of the child” of article 3 CRC, confidentiality, tracing, refugee definition and child related asylum claims etc. Special attention should be also paid to the risk of child trafficking, in particular in the case of separated and unaccompanied female asylum-seekers. Individuals whose interests could potentially be in conflict with those of the child’s should not be eligible for guardianship.

In addition, it is recommended that the appropriate authorities shall have a legal obligation to undertake regular assessments of the eligibility of guardians. In case, a conclusion to discontinue the functions of guardian is taken – such a decision shall be subject to an objective review process in accordance with the law.

UNHCR considers that the national legislation must safeguard the interests of asylum-seeking children and that the legal, social, health, psychological, material and educational needs of children shall be appropriately covered.

Keeping in mind developed good practice and standards, UNHCR recommends to amend the Draft Law accordingly and to lay down the additional safeguards and requirements for candidates for the position of guardians as described above.
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3.4. “Principle of best interests of the child”

When formulating the procedure for representation of unaccompanied children in asylum proceedings, consistent with Article 3 of the CRC, special attention should be paid to the best interests of the child throughout the asylum procedure, and adequate measures should be put in place to address the vulnerable situation of refugee children. UNHCR recommends that the Law explicitly uphold the principle of the best interests of the child throughout the asylum procedure in line with Article 15(6) of the EU Procedures Directive and Article 18(1) of the EU Reception Directive. To this effect, UNHCR recommends replacing the phrase “his/her rights and legal interests” with “his/her rights and best interests”. Similarly, as concerns the appointment of a “representative,” UNHCR urges that, as set forth in General Comment No. 6 (2005) (CRC/GC/2005/6 – 39th Session, 3 June 2005) by the Committee on Rights of the Child, Paragraph 7 requires the immediate appointment of a “guardian” upon identifying an unaccompanied or separated child, not only a “representative” in connection with an asylum application and irrespective of any request for asylum. Indeed, ideally, the

child should automatically have appointed both a “guardian” as well as “legal representative”. Further guidance for the treatment of separated children can be drawn from the “UNHCR Guidelines on Determining the Best Interests of the Child (May 2008)”.

UNHCR notes that the principle of *the child’s best interests* is not properly reflected in the proposed Draft Law, as it is only mentioned in provisions related to detention. UNHCR would therefore recommend incorporation of the principle of best interests of the child into the proposed Article 25 of the law. It may be also relevant to adopt an appropriate bylaw, which will ensure practical implementation of these provisions.

3.5. “Designated authority”

UNHCR notes that the Draft Law makes amendments to the relevant asylum authority by a proposal to remove the reference to the “Migration Department” from the text of the law (Articles 65-93).

UNHCR considers that there should be a clearly identified authority – wherever possible a single central authority- with responsibility for examining requests for refugee status and taking a decision in the first instance¹¹. Persons working with the determination of refugee status require certain specialized training *i.e.* on international refugee law, country of origin information research, interview techniques to ensure adequate and good quality adjudication.

In Lithuania, the Asylum Affairs Unit of the Migration Department has been the only institution to decide on asylum cases for the past 14 years and there is currently no other governmental body with appropriate expertise in Lithuania to replace it. UNHCR caution that a re-organization may lead to a lowering of standards in asylum adjudication and could lead to gaps in the protection framework unless significant investments are made. The absence of a single designated and competent authority for asylum and refugee matters may also lead to lowering of protection standards, if the duties and responsibilities of the different actors are not clearly set out, including in legislation. It is advisable that only a single central authority with dedicated, qualified and trained staff is responsible for the adjudication of asylum applications on the merits. It is recommended that other authorities than the determining authority only register the application for asylum and then refer the application to the determining authority for an examination into the merits.

UNHCR would therefore recommend introducing a provision in the text of the Draft Law ensuring that officials of the “designated authority” competent to take a decision in procedures related to asylum-seekers shall have the appropriate knowledge of standards applicable in the field of asylum and refugee law as required in Articles 12, 13 and 35 of the *Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status* (EU Procedures Directive).

¹¹ See UNHCR Executive Committee Conclusions *on Determination of Refugee Status*, 12 October 1977, No. 8 (XXVIII) - 1977, available at: <http://www.unhcr.org/refworld/docid/3ae68c6e4.html>

3.6. “Detention of asylum-seekers”

UNHCR notes the proposed amendment to Article 119 (para 1, item 2) of the Law on Legal Status of Aliens does not stipulate anymore an exemption from being detained prior to Migration Department decision to grant temporary territorial asylum. In UNHCR’s opinion, practical implementation of such a provision may lead to detention of every asylum-seeker irrespective of the type and stage of the asylum procedure he or she is in.

Currently all asylum-seekers are exempted by law from detention, which is in line with international refugee law and human rights standards¹².

UNHCR would like to reaffirm the general principle that asylum-seekers should not be detained¹³. International law confirms that seeking asylum is not an unlawful act and, therefore, that one cannot be detained for the sole reason of being an asylum-seeker. In addition, there are specific international legal guarantees against penalization for illegal entry or stay, which would include penalties in the form of detention¹⁴.

Detention must therefore be used only as a last resort and only according to a justified purpose, proportional to its intended objective, and not related to the status of being an asylum-seeker. Likewise, for *de jure* as well as *de facto* stateless persons, their lack of legal status or documentation means that they risk being held indefinitely, which is unlawful under international law. Statelessness cannot be a bar to release, and using the lack of any nationality as an automatic ground for detention would run afoul of non-discrimination principles.

Therefore, UNHCR would like to recommend the Government of Lithuania to avoid the adoption of restrictions to the existing provision on detention of asylum-seekers.

3.7. “Alternatives to detention”

International human rights law and standards require that less intrusive measures be considered first before more restrictive measures, such as detention are applied. Both the current Law on the Legal Status of Aliens and the Draft Law do not foresee that alternatives to detention should be considered first and that detention should only be resorted to if less coercive means have failed. Possibility to consider both detention and alternatives to detention at the same time without considering priority of the alternatives gives the opportunity to the judiciary to decide on both options without considering less intrusive measures first. Not only international standards but also Council Directive 2008/115/EC on

¹² Article 9 (1) of the International Covenant on Civil and Political Rights; Article 16(4) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 6 of the Charter of Fundamental Rights of the European Union.

¹³ Further guidance on the issue of detention of asylum-seeker may be found in the UNHCR Executive Committee Conclusion No. 44 (XXXVII) of 1986 and UNHCR's *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, of 1999.

¹⁴ Articles 26 and 31(1) of the 1951 Convention relating to the Status of Refugees.

Common standards and procedures in Member States for returning illegally staying third-country nationals mentions the possibility of the use of detention only *if less coercive measures failed, for as short period of time and only as long as removal arrangements are in progress and executed with due diligence*¹⁵. Detention is justified only to prepare for the return of failed asylum seekers or to carry out the removal process and if the application of less coercive measures would not be sufficient.

UNHCR would like to recommend introducing a requirement to consider alternatives to detention prior to consideration of detention in the proposed version of Articles 119 or 121 of the law.

UNHCR hopes that the challenges identified by UNHCR and recommendations shared will contribute to the efforts of the Lithuanian authorities to establish a progressive and efficient asylum system based on the full and inclusive application of the 1951 Convention and other relevant international and regional instruments.

These comments mainly strive to clarify UNHCR's views on certain aspects of the proposed Law in relation to implementation of the 1951 Convention and other human rights instruments. UNHCR would greatly appreciate the opportunity to continue the dialog with Lithuanian Parliament and to submit further comments on this important legislation during the discussion in the Parliament Committees.

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¹⁵ See Article 15 of the European Union, Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 *on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals*, 16 December 2008, 2008/115/EC, available at: <http://www.unhcr.org/refworld/docid/496c641098.html>