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

Key observations and recommendations by the UNHCR Regional Representation for Northern Europe relating to the provisional comments on the Draft Amendments to the Lithuanian Aliens Law (No. 15-2286)

I. Introduction

1. The UNHCR Regional Representation for Northern Europe (RRNE) appreciates the opportunity to present its key observations and recommendations relating to the provisional comments on the Draft Law No 15-2286 amending the Law on the Legal Status of Aliens (hereinafter – 'Draft Amendments'). We understand that the Draft Amendments aim at transposing the recast Asylum Procedures Directive[1] (hereafter – 'APD') and the recast Reception Conditions Directive[2] (hereafter – 'RCD').

2. UNHCR has a direct interest in law proposals in the field of asylum, as the agency entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, seek permanent solutions to the problems of refugees[3]. 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[.]"[4] UNHCR's supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention Relating to the Status of Refugees (hereinafter - '1951 Refugee Convention'). Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (hereinafter - 'UNHCR Handbook') and subsequent Guidelines on International

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[1] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), 29 June 2013, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU, available at: http://www.refworld.org/docid/51d29b224.html

[2] European Union: Council of the European Union, Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), 29 June 2013, OJ L. 180/96 -105/32; 29.6.2013, 2013/33/EU, available at: http://www.refworld.org/docid/51d29db54.html

[3] UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V), available at: http://www.unhcr.org/cgibin/texis/vtx/refworld/rwmain?docid=3ae6b3628 ("UNHCR Statute").

[4] Ibid., paragraph 8(a).

Protection.[5] This supervisory responsibility is reiterated in Article 35 of the 1951 Convention, and in Article II of the 1967 Protocol relating to the Status of Refugees.[6]

3. UNHCR's supervisory responsibility has also been reflected in European Union law, including by way of a general reference to the 1951 Convention in Article 78 (1) of the Treaty on the Functioning of the European Union, as well as in Declaration 17 to the Treaty of Amsterdam, which provides that "consultations shall be established with the United Nations High Commissioner for Refugees ... on matters relating to asylum policy". Secondary EU legislation also emphasizes the role of UNHCR. Hence, recital 22 of the recast Qualification Directive states that consultations with UNHCR "may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention".

II. Specific Observations

4. The Draft Amendments do not contain any provisions relevant to the full transposition of Article 6 (2) APD which requires Member States to ensure '*that a person who has made an application for international protection has an effective opportunity to lodge it as soon as possible*'.

Since the act of lodging an application for asylum triggers specific entitlements and procedural rights of the applicant, it is vital for securing effective access to the asylum procedure and, where applicable, international protection, that the principle enshrined in Article 6 (2) APD is clearly spelled out in the Lithuanian Aliens Law.

UNHCR recommends introducing the following provision in the Aliens Law:

"A foreigner who expresses a request for asylum addressed to the authorities of the Republic of Lithuania shall be provided an effective opportunity to lodge his/her asylum application with the institutions referred to in Article 67 (1) of the Aliens Law as soon as possible".

5. Pursuant to the proposed wording of Article 5 (5) of the Aliens Law, asylum-seekers who are subject to the border procedure are entitled to remain at border crossing points and transit zones until the time limit for lodging an appeal has expired. They are also entitled to remain at the border crossing point until a court takes a decision on interim measures.

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[5] UN High Commissioner for Refugees (UNHCR), Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011, HCR/1P/4/ENG/REV. 3, available at: http://www.refworld.org/docid/4f33c8d92.html.

[6] According to Article 35 (1) of the 1951 Convention, UNHCR has the "duty of supervising the application of the provisions of the 1951 Convention".

Article 5 (6), however, specifies that asylum-seekers whose presence raises a threat to the national security or community shall be exempted from the scope of the above provision.

Moreover, pursuant to Article 47 (7) (b) APD, a court examining a request for an interim measure lodged by an asylum-seeker whose application is rejected or considered inadmissible in the context of the border procedure shall examine *'the negative decision of the determining authority in terms of fact and law'*. This crucial guarantee is omitted in the proposed amendments.

Regarding cases involving national security and public order considerations:

While the recast Asylum Procedures Directive provides Member States with a certain measure of flexibility when deciding whether appeals lodged in accordance with Article 47 should have automatic suspensive effect or rather provide for a system of interim measures, it does not allow for exceptions to the right to stay pending the request for an interim measure in cases involving national security and/or public order considerations. If adopted, the proposed Article 5 (6) would be in conflict with the Article 47 (5) (6) and (7) of the Directive. Moreover, the proposed provision would likewise be incompatible with Article 3 and 13 of the European Convention of Human Rights as interpreted by the European Court of Human Rights. In particular, the Court has made it clear that national security may not be relied on as a justification for denying suspensive effect. For example, as the Court stated in *M. and Others v. Bulgaria*:[7]

"... [The Court] observes that under Bulgarian law, whenever the executive chooses to mention national security as the grounds for a deportation order, appeals against such an order have no suspensive effect, even if an irreversible risk of death or ill-treatment in the receiving State is claimed ...

... The Court reiterates that the notion of an effective remedy under Article 13 requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible. Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention ... As the prohibition provided by Article 3 against torture and inhuman or degrading treatment is of an absolute character, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration ... By choosing to rely on national security in a deportation order the authorities cannot do away with effective remedies ..." (paras.128-129).

The proposed Article 5 (6) needs to be supplemented as follows:

"*This paragraph shall not apply to asylum applicants* ".

[7] ECtHR, *M. and Others v. Bulgaria*, No. 41416/08, Judgment of 26 July 2011. See also, for example, ECtHR, *Auad v. Bulgaria*, No. 46390/10, Judgment of 11 October 2011, para. 121.

Regarding the scope of judicial review of requests for an internal measure:

Article 47 (7) (b) APD clearly sets the requirement of reviewing *'the negative decision of the determining authority in terms of fact and law'* as a precondition for operating the system of interim measures with respect to asylum-seekers whose applications are examined in the border procedure. Where this condition is not met, the Directive requires Member States to provide for automatic suspensive effect of appeals. Since the proposed amendments do not address the issue of judicial review in relation to requests for interim measures lodged by asylum applicants in the context of the border procedure, it is advisable to set out clear requirements for judicial review in such cases.

UNHCR recommends supplementing the proposed Article 139 (2) as follows:

"In the context of the examination of a request for an interim measure, the administrative court shall examine the decision of the Migration Department in terms of fact and law."

6. Pursuant to Article 68 (1) of the Aliens Law, information relating to the filing of applications for asylum and examination of the applications shall be classified in the manner prescribed by law, except in cases where (i) UNHCR requests access to the applicant's file, (ii) information is transferred to other Member States in the course of the Dublin procedures, (iii) the asylum applicant gives his/her written consent to declassify such information.

In practice, the requirement to classify information contained in the asylum files has led to the situation whereby only lawyers who have undergone a security check and received a permission to work with classified information are allowed access to the asylum files. Given the complexity of the procedure, many members of the Bar Association representing asylum-seekers are not allowed access to the asylum file of their client. Moreover, even asylum-seekers are formally not permitted to consult their asylum files unless they consent to declassify information contained there. These practices effectively prevent both asylum-seekers and their lawyers to benefit from the guarantees set out respectively in Article 17 (5) APD (asylum-seeker's and his/her representative's right to consult the report of a personal interview) and Article 23 (1) APD (legal counsellor's right to access the asylum file). With a view to ensuring equality of arms in the asylum procedure and at the same time preserving the confidentiality of asylum files, Article 68 (1) of the Aliens Law should be supplemented by extending the list of exceptions to asylum-seekers and their legal representatives.

UNHCR recommends supplementing Article 68 (1) of the Aliens Law as follows:

"This paragraph shall be without prejudice to the right of the asylum-seeker and his/her legal representative to enjoy access to information relating to the filing and examination of the application for asylum."

7. According to the proposed Article 76 (2) (9), an asylum application shall be channelled into an accelerated procedure, where an asylum-seeker fails:

(i) to comply with the obligation to provide all the available documents and a full truthful explanation of the motives for the asylum application, his/her personality as well as the circumstances of his/her entry and stay in the Republic of Lithuania, and/or
(ii) to cooperate with the officials and employees of the competent authorities.

The list of grounds for channelling an asylum application through an accelerated procedures contained in the APD is exhaustive. This is clear from the wording of Article 31 APD and recital 20. The latter stipulates that Member States should be able to accelerate the examination procedure "in well-defined circumstances". Since the proposed provision does not correspond to any of the grounds of accelerated procedures provided for in Article 31 (8) APD, it should be deleted.

UNHCR recommends deleting the proposed Article 76 (2) (9) of the Aliens Law.

8. The Draft Amendments provides for an inadmissibility ground that reads as follows:

"*An asylum application shall not be examined where an asylum-seeker has lodged a subsequent application merely in order to frustrate the execution of an expulsion decision*" (Article 77 (1) (3)).

The APD allows Member States to consider a subsequent asylum application inadmissible only where it has been established in the course of a preliminary procedure that it contains "*no new elements or findings relating to the examination of whether the applicant qualifies as a beneficiary of international protection*"(Art. 33 (2) (d)). The proposed inadmissibility ground is not in line with this requirement in the Directive and should, therefore, be deleted.

UNHCR recommends deleting the proposed Article 77 (1) (3) of the Aliens Law.

9. Pursuant to the proposed Article 79 (4), vulnerable persons may be accommodated in accommodation facilities run by Non-Governmental Organizations or may be allowed to stay with a close relative or representative by a decision of the Migration Department.

UNHCR strongly welcomes this development. However, UNHCR suggests (i) extending the benefits of this provision to family members of vulnerable persons; (ii) inserting a reference to other legal entities than NGOs that may be entitled to administer the reception facilities.

10. In accordance with the proposed Article 81 (3), where an asylum application is channelled into an accelerated procedure, a decision on the merits of the claim shall be taken within 7 working days (i.e. 9 days from the lodging of the application).

Short time limits may make it excessively difficult, if not impossible, for the applicant to substantiate his/her claim. They also reduce the capacity of the determining authority to conduct a thorough and complete examination of the asylum applications. While it may be difficult to come up with a specific time limit for completing accelerated procedures, 7 working days may impose a significant pressure on the determining authority, in particular if

confronted with bigger numbers of asylum applications. Moreover, the proposal seems to indicate that the Ministry of the Interior has refrained from transposing the second line of paragraph 9 of Article 31 APD which allows Member States to exceed time limits applicable with respect to accelerated procedures *"where necessary in order to ensure an adequate and complete examination of the application for international protection"*.

UNHCR recommends considering the possibility of providing a longer time limit for the completion of an accelerated procedure (e.g. 14 days).

The Aliens Law should also provide for a possibility to either exceed the time limit or re-channel the application into the regular procedure, where necessary in order to ensure an adequate and complete examination of the asylum application.

11. Pursuant to the proposed Article 82 (2) (1), a personal interview may be omitted where a decision to grant asylum may be taken based on documents and evidence obtained by / available to the Migration Department.

The provision aims at transposing an optional clause set out in Article 14 (2) APD. Yet, while the Directive provision allows for omitting a personal interview where the determining authority is able, on the basis of evidence available, to take a positive decision with regard to refugee status, the proposed provision of the Aliens Law refers to "a decision to grant asylum". Since pursuant to Article 2 (23) of the Aliens Law, the term "asylum" encompasses both the refugee status and the subsidiary protection status, the proposed Article 82 (2) (1) has a broader scope as regards the possibility to omit a personal interview, and, therefore, is not compatible with the Directive.

UNHCR recommends replacing the words "a decision to grant asylum" with "a decision to grant refugee status" in the proposed Article 82 (2) (1).

12. The proposed Article 82-1 (1) of the Aliens Law stipulates as follows:

> "*Where it is established in the course of the examination of the application that the results of a medical examination may confirm or deny the applicant's statements, the Migration Department* ***may*** *arrange for a medical examination [emphasis added].*"

The provision is intended to transpose Article 18 (1) APD. Yet, in the Directive, Article 18 (1) is a "shall" provision, hence imposing a clear obligation on the determining authority to arrange for a medical examination where it is relevant for the assessment of an application for international protection, while the proposed amendment is worded as an optional clause. It should, therefore, be adjusted. It is also important to underline that the European Court of Human Rights made it clear that authorities in charge of the examination of asylum applications have a duty to ascertain all relevant facts, particularly in circumstances where there is a strong indication that an applicant's injuries may have been caused by torture, including by obtaining an expert medical opinion[8].

UNHCR recommends replacing the word "may" with "shall" in the proposed Article 82-1 (1).

[8] *R.C. v. Sweden*, Application no. 41827/07, Council of Europe: European Court of Human Rights, 9 March 2010, para. 53, available at: http://www.refworld.org/docid/4b98e11f2.html

13. The proposal provides for a revised list of detention grounds. In particular, it stipulates that where a foreigner, who is detained subject to a return procedure, lodges an asylum application, s/he may be further detained where there are serious grounds to consider that s/he is making the asylum application merely in order to delay or frustrate the enforcement of the return decision (Article 113 (4) (3)).

To a large extent the proposed provision follows the requirements of Article 8 (3) (d) of the RCD. Yet, Article 8 (3) (d) RCD implies an obligation for the competent authorities to consider, before resorting to detention, whether the asylum applicant "already had the opportunity to access the asylum procedure". This requirement is omitted in the proposed provisions.

UNHCR recommends supplementing -the proposed Article 113 (4) (3) as follows: "When establishing whether there are serious grounds to consider that the foreigner has made the asylum application merely in order to delay or frustrate the enforcement of the return decision, it shall be assessed whether s/he already had the opportunity to access the asylum procedure".

14. UNHCR also notes that some of the provisions of the recast Asylum Procedures Directive are not explicitly reflected in the proposed amendments. This is notably the case with Article 8 (2) (NGO access to border crossing points and transit zones), Article 10 (2) (respect of the primacy of refugee status when examining the application), Article 23 (2) (the right of a legal adviser or other counsellor to enter detention facilities and transit zones) and Article 24 (3) (exemption of victims of torture, rape or other serious forms of psychological, physical or sexual violence and other applicants with special procedural needs from the accelerated and border procedures). Since these guarantees are essential for ensuring asylum-seekers' access to and effective participation in the asylum procedure, the aforementioned provisions of the APD should be fully transposed into Lithuanian legislation.

UNHCR Regional Representation for Northern Europe

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