

## **UNHCR Observations on the adopted Rulebook on the Manner of Limitation of the Freedom of Movement of an Applicant for International Protection**

### **I. INTRODUCTION**

1. UNHCR offers these comments as the agency entrusted by the United Nations General Assembly with the responsibility to provide international protection to refugees and other persons within its mandate, and together with Governments, to seek permanent solutions to the problem of refugees, as outlined in Paragraph 1 of UNHCR's Statute<sup>1</sup>. 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." UNHCR's supervisory responsibility is reiterated in Article 35 of the 1951 Convention relating to the Status of Refugees<sup>2</sup> 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<sup>3</sup> (hereinafter collectively referred to as the "1951 Refugee Convention"). UNHCR also fulfills its supervisory responsibility by providing comments on legislative and policy proposals impacting on the protection and durable solutions of its persons of concern.
2. 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 Refugee Convention as well as by providing comments on legislative and policy proposals impacting on the protection and durable solutions of its persons of concern.
3. The following comments are based on international protection standards set out in the 1951 Convention, in international human rights law, on Conclusions on International Protection of the UNHCR Executive Committee (hereafter "ExCom"), and on UNHCR guidelines.

### **II. GENERAL OBSERVATIONS**

4. UNHCR welcomes the commitment of the Government to continue improving asylum legislation, to further align it with the international and regional standards, thus ensuring a full and inclusive application of the 1951 Convention. The adoption of the Rulebook on the Manner of Limitation of the Freedom of Movement of an Applicant for International Protection represents an important benchmark in completing the regulatory framework following the adoption of the new Law on International and Temporary Protection (LITP).
5. UNHCR would like to note the absence of consultations with our Office regarding the draft Rulebook, prior to its adoption, in conformity with Article 35 of the 1951 Convention which stipulates the

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<sup>1</sup> UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V), at: <http://www.unhcr.org/refworld/docid/3ae6b3628.html>

<sup>2</sup> 4 UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html>

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

obligation of the States parties to the Convention to provide information about any laws, regulations and decrees relating to refugees which are, or may be, in force. A consultative process between the Ministry of Internal Affairs and UNHCR would be helpful in ensuring that the Rulebook is in line with international refugee law and standards.

6. UNHCR would like to reiterate the points highlighted in its comments to the draft Law on International and Temporary Protection, notably its annotated comments on Articles 63 – 66 related to provisions about limitation of freedom of movement of asylum seekers.<sup>4</sup> The present observations reflect UNHCR’s position about the provisions of the Rulebook, in particular in view of the procedural guarantees it should provide for persons applying for international protection, against whom the measures for limitation of freedom of movement, or the measures depriving them of liberty, have been imposed, in line with national law, international<sup>5</sup> and regional standards<sup>6</sup>.

### III. SPECIFIC OBSERVATIONS

7. UNHCR would like to point out that the Rulebook does not define which **competent body within the Ministry of Interior** shall render the decision for limitation of freedom of movement and conduct an assessment of the necessity, reasonableness and proportionality of detention. The Rulebook only prescribes which organizational units are competent to submit a request for the limitation of freedom of movement (Article 2) and which organizational units prepare the decision (Articles 3 and 6) upon receiving the request. In order to avert the risk of imposing arbitrary detention, the Rulebook should provide for a body competent to decide on the request for limitation of freedom of movement and conduct individual assessments rather than merely “prepare” the decision. The Rulebook would benefit from further prescribing of the procedure and standards for rendering the decision .
8. UNHCR would like to refer to the absence of provisions in the Rulebook specifying the procedure for **informing asylum seekers** of the reasons (in fact and law) of their detention as well as **their right to appeal the decision**, which are provided in Article 66 (1) of the LITP, and which derive from international<sup>7</sup> and regional<sup>8</sup> instruments. Asylum seekers faced with the prospect of being detained, as well as during detention, should be informed in writing at the time of arrest or detention of the reasons for their detention, and their rights in connection with the order, including review procedures, in a language and in terms which they understand.<sup>9</sup> The Rulebook should further prescribe the procedure for informing asylum seekers of the reasons of detention, available legal remedies and avenues for their release.
9. UNHCR notes that neither the LITP nor the Rulebook provide for a **periodic review of detention** at the request of the concerned person and after a certain period of time. Following an initial review of

<sup>4</sup> UN High Commissioner for Refugees (UNHCR), UNHCR Annotated Comments on the 2018 Law on International and Temporary Protection of the former Yugoslav Republic of Macedonia, 31 January 2018, available at: <https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5b066b354>

<sup>5</sup> Article 9 of ICCPR, UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 and Article 5 of ECHR, Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

<sup>6</sup> Article 9 of the EU Reception Directive (recast), 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.

<sup>7</sup> Article 9 (2) of ICCPR and Article 9 (4) of ECHR.

<sup>8</sup> Article 9 (2) of Directive 2013/33/EU.

<sup>9</sup> See, further WGAD, Report to the Fifty–sixth session of the Commission on Human Rights, E/CN.4/2000/4, 28 December 1999, Annex II, Deliberation No. 5 available at: <http://www.unhcr.org/refworld/pdfid/3b00f25a6.pdf>

detention, regular periodic reviews of the necessity for the continuation of detention before a court or an independent body must be in place, which the asylum seeker and his/her representative would have the right to attend. A good practice example is the EU Directive 2013/33<sup>10</sup>, which provides that a decision to detain should be reviewed by a judicial authority at reasonable intervals of time, ex officio and/or at the request of the applicant concerned, in particular whenever it is of a prolonged duration, relevant circumstances arise or new information becomes available, which may affect the lawfulness of detention. The absence of a regular periodic review of the necessity of a continuation of detention, which could be ensured, for example, if the Rulebook provided for an obligation of the Sector for Asylum to refer a case to judicial review, in precisely defined timeframes, could render detention arbitrary<sup>11</sup>.

10. UNHCR expresses concern over the absence of further provisions in the Rulebook outlining specific **alternatives to detention** and prescribing the procedure for **individual assessment of less coercive alternative measures** that could be applied effectively in individual cases. Such consideration ensures that detention of asylum seekers is a measure of last, rather than first, resort. It must be shown that in light of the asylum seeker's particular circumstances, there were no *less invasive means of achieving the same ends*<sup>12</sup>. Thus, consideration of the *availability, effectiveness and appropriateness of alternatives to detention*<sup>13</sup> in each individual case needs to be undertaken. This is especially concerning in relation to the **lack of individual assessment of detention of vulnerable categories, especially children** as prescribed in Article 66 (2) of the LITP. An absence of screening and a procedure for determining vulnerability and risk factors, may result in a detention decision that amounts to arbitrary and therefore unlawful detention.
11. UNHCR notes that for the purpose of ensuring legal certainty, and ensuring detention is only imposed as a **measure of last resort**, the authorities should clearly set forth alternatives to detention, available and provided for in national legislation such as, for example, the deposition or surrender of documents, reporting conditions, directed residence, provision of a guarantor/surety and release on bail, community supervision or alternative care arrangements. Good practice examples on various forms of alternatives to detention are available in UNHCR's Detention Guidelines<sup>14</sup>.
12. Further, UNHCR would like to emphasize that it is **never in the best interest of the child to be detained**, not even as a last resort. The possibility of detaining children as a measure of last resort, which may apply in other contexts such as juvenile criminal justice, is not applicable in immigration proceedings<sup>15</sup>. UNHCR would therefore urge the Government to consider amending the Rulebook, to

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<sup>10</sup> Article 9 (5) of Directive 2013/33/EU.

<sup>11</sup> UNHCR Detention Guideline 7, para. 47, indent iv available at: <http://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html>

<sup>12</sup> C. v. Australia, CCPR/C/76/D/900/1999, UN Human Rights Committee (HRC), 13 November 2002, available at: <https://www.refworld.org/cases,HRC,3f588ef00.html> [accessed 20 February 2019]

<sup>13</sup> See for example, Sahin v. Canada [sv 1,214] [sv 75,1] [sv 19], 1995], Canada: Federal Court, 19 October 1994, available at: [https://www.refworld.org/cases,CAN\\_FC,3ae6b6e610.html](https://www.refworld.org/cases,CAN_FC,3ae6b6e610.html) [accessed 20 February 2019]. See, also, WGAD, Opinion No. 45/2006, UN Doc. A/HRC/7/4/Add.1, 16 January 2008, para. 25, available at: <http://www2.ohchr.org/english/bodies/hrcouncil/7session/reports.html> and WGAD, Legal Opinion on the Situation regarding Immigrants and Asylum seekers, UN Doc. E/CN.4/1999/63, para. 69: "Possibility for the alien to benefit from alternatives to administrative custody." available at: [http://ap.ohchr.org/documents/alldocs.aspx?doc\\_id=1520](http://ap.ohchr.org/documents/alldocs.aspx?doc_id=1520) and WGAD, Report to the Thirteenth Session of the Human Rights Council, A/HRC/13/30, 15 January 2010, para. 65, available at: <http://www.unhcr.org/refworld/docid/502e0fa62.html>.

<sup>14</sup> UNHCR Detention Guidelines. Para 38 - 42.

<sup>15</sup> UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families

ensure that when a measure of limitation of freedom of movement is considered for children, only alternatives to detention, subject to the tests of necessity, reasonableness and proportionality in the individual case, should be applied to them.

13. UNHCR would like to express concern that the **Rulebook does not provide for automatic release from detention**, upon expiration of the timeframe defined in the initial decision on detention, in the absence of a request for extension. The Rulebook instead introduces additional steps of communication between the concerned organizational units of the Ministry of Internal Affairs (Article 4 (3)), which may lead to an extension of the measure beyond the timeframe defined in the initial decision, without legal grounds. In line with the exceptional nature of detention as prescribed in Article 63 (1) of the LITP and international instruments, UNHCR suggests that in cases when the competent unit does not request for an extension of the deprivation of liberty, it should be presumed that the reasons for the detention are no longer in effect and the asylum seeker should be released. In that line, good practices are provided in the EU Directive 2013/33<sup>16</sup>, which prescribes that delays in administrative procedures that cannot be attributed to the applicant shall not justify a continuation of detention.

## **UNHCR Representation in North Macedonia**

**9 April, 2019**

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and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, available at: <https://www.refworld.org/docid/5a12942a2b.html> [accessed 19 February 2019].

<sup>16</sup> Article 9 (1) of Directive 2013/33/EU