

Additional Observations by the United Nations High Commissioner for Refugees (UNHCR) Regional Representation for Northern Europe on the revised draft Law Proposal of 15 June 2015 amending the Act on Granting International Protection to Aliens and other related laws

I. Introduction

1. The UNHCR Regional Representation for Northern Europe (UNHCR RRNE) is grateful to the Estonian Ministry of the Interior for the invitation to provide additional comments on the revised draft Law Proposal of 15 June 2015 amending the Act on Granting International Protection to Aliens and other related laws (*Välismaalasele rahvusvahelise kaitse andmise seaduse ja sellega seonduvalt teiste seaduste muutmise seaduse eelnõu, 15.06.2015*)(Law Proposal), transposing the recast Asylum Procedures Directive¹ (recast APD), recast Reception Conditions Directive² (recast RCD) and certain provisions of the Dublin III Regulation³. UNHCR recognizes that this invitation is extended in line with the Office's supervisory responsibility⁴ and the fruitful cooperation the UNHCR RRNE has enjoyed with the Government of Estonia and its institutions over the years.
2. UNHCR RRNE welcomes and support the efforts made by the Government of Estonia to revise its asylum system through the transposition of the second generation of the European Union asylum *acquis*. This is an opportunity to ensure that the Estonian Asylum System is fully consistent with its obligations under international law and, in particular, with the 1951 Convention relating to the Status of Refugees (1951 Refugee Convention). In UNHCR's view, the Law Proposal introduces many substantial changes and improvements to the Estonian Act on Granting International Protection to Aliens (AGIPA). Adoption of the Law Proposal will help Estonia to realize one of the main goals of the Common European Asylum System, namely to establish a procedure that frontloads all the

¹ European Union: Council of the European Union, *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)* (hereinafter - *recast Asylum Procedures Directive* or *recast APD*), 29 June 2013, L 180/60, 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)* (hereinafter - *recast Reception Conditions Directive* or *recast RCD*), 29 June 2013, L 180/96, available at: <http://www.refworld.org/docid/51d29db54.html>.

³ European Union: Council of the European Union, *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)* (hereinafter – *Dublin III*), 29 June 2013, OJ L 180/31-180/59; 29.6.2013, (EU)No 604/2013, available at: <http://www.refworld.org/docid/51d298f04.html>.

⁴ UNHCR's supervisory responsibility to monitor and support State Parties in their application of the 1951 Convention related to the Status of Refugees and related standards is set out in its Statute, Article 35 of the 1951 Convention and Article II of the 1967 Protocol relating to the Status of Refugees. 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 ('TFEU'), 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. For instance, Article 29 of the recast Asylum Procedures Directive states that Member States shall allow UNHCR "*to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for international protection at any stage of the procedure*".

necessary elements, “*putting the adequate resources into the quality of decision-making at first instance to make procedures fairer and more efficient*”.⁵

3. Bearing in mind the complexity of the international protection framework and the importance of ensuring Estonia’s adherence to its international and European legal obligations, UNHCR RRNE stands ready to provide further clarifications on the comments made below to the responsible Parliamentary Committee(s), which will be appointed to prepare the Law Proposal for the hearing in the Parliament (*Riigikogu*).

II. General Observations

4. During UNHCR’s review of the initial text of the Law Proposal,⁶ the UNHCR identified a number of provisions, which appeared to be not in line with international and/or EU refugee law and human rights standards. UNHCR notes with satisfaction that some of these concerns have been addressed in the revised text of the Law Proposal.
5. UNHCR welcomes, in particular, the proposals guaranteeing children seeking asylum the right to education (Article 1 (14) of the Law Proposal) and requiring the consideration of the best interest of the child in the asylum procedure (Article 1 (24) of the Law Proposal), as well as provisions aimed at establishing the legal basis for resettlement and relocation of refugees (Article 1 (17) of the Law Proposal) and incorporating criteria for assessing a risk of absconding (Article 1 (50) of the Law Proposal). UNHCR is also pleased with the introduction of provisions facilitating the acquisition of long-term residence permits by beneficiaries of international protection (Article 5 of the Law Proposal), namely that the time spent waiting for a decision on their application for international protection and the time spent living on the basis of a residence permit after granting international protection would count towards the five year period of legal residence required to obtain long-term resident status.
6. UNHCR would like to note that several important issues still require further elaboration. For example, some of the provisions in the recast APD are not explicitly reflected in the Law Proposal, including Article 4 (1) (single determining authority), Article 6 (2) (obligation to ensure an effective opportunity to lodge an asylum application), Article 8 (1) (duty to provide information where there are indications that an alien may wish to make an application); Article 8 (2) (NGO access to border crossing points and transit zones), Article 14 (the responsibility of the central determining authority to conduct the personal interview), Article 23 (2) (the right of a legal adviser or other counsellor to enter detention facilities and transit zones), Article 29 (1) (the right of UNHCR to have access to asylum-seekers and information on individual applications and decisions, as well as to present its views to any competent authority, including the courts), and Article 29 (2) (rights of organizations working on behalf of UNHCR).

⁵ European Union: European Commission, *Amended proposal for a Directive of the European Parliament and the Council on common procedures for granting and withdrawing international protection status (Recast)*, 1 June 2011, COM(2011) 319 final, p. 5, available at: <http://www.refworld.org/docid/4e3941c22.html>.

⁶ UNHCR, *Observations by the United Nations High Commissioner for Refugees (UNHCR) Regional Representation for Northern Europe on the Draft Law Proposal of 05 December 2014 amending the Act on Granting International Protection to Aliens*, January 2015, available at: http://www.unhcr-northerneurope.org/fileadmin/user_upload/Documents/PDF/Estonia/2015-EST-AGIPA-Law-Comments-January.pdf.

7. Since these guarantees are essential for ensuring asylum-seekers' access to and effective participation in the asylum procedure, UNHCR is of the view that the aforementioned provisions of the APD should be fully transposed into Estonian legislation, taking into account the obligations under international refugee and human rights law.
8. Furthermore, UNHCR recommends the draft law to be reviewed to ensure the systematic use of the same terminology throughout the Law Proposal.

III. Observations on Specific Proposals

➤ Grant of Asylum

9. It emerges from the preamble of the 1951 Refugee Convention, Executive Committee Conclusions on International Protection⁷ and the UN Declaration on the Territorial Asylum⁸ that the grant of asylum by a State is a peaceful and humanitarian act and that, as such, it cannot be regarded as unfriendly by any other State. UNHCR recommends including a reference to the nature of the institution of asylum in the Law Proposal, in order to contribute to a better understanding of the aim of the national asylum system, including among the general public, and the creation of a more favourable protection environment for asylum-seekers and refugees in Estonia.

Recommendation: UNHCR recommends introducing the following provision in the Law Proposal:

“The grant of asylum is a peaceful and humanitarian act, based on the international obligations of the Republic of Estonia, notably those emerging from the 1951 Refugee Convention, and the requirements of EU legislation.”

➤ Article 1 (2) of the Law Proposal: Definition of an “asylum-seeker”

10. UNHCR welcomes the change in Article 1 (2) of the Law Proposal that expands the definition of “application for international protection”, to include applications for both refugee status and subsidiary protection. However, UNHCR remains concerned about the wording used to define an “applicant for international protection”. According to the new provision, “an applicant for international protection is an alien **who has submitted** an application for international protection (*kes on esitanud rahvusvahelise kaitse taotluse*) in respect of which a final decision has not yet been taken”.⁹ [emphasis added]
11. In UNHCR’s view, the proposed definition is not fully compliant with Article 2(c) of the recast APD, which provides that an applicant is “a third-country national or stateless person **who has made** an application for international protection...”. Recital 27 of the recast APD further clarifies that applicants for international

⁷ See for example Executive Committee Conclusions Nos. 48 (XXXVIII), 94 (LIII), and 99, excerpts relating to the peaceful and humanitarian act of granting asylum available in the UN High Commissioner for Refugees (UNHCR), *Thematic Compilation of Executive Committee Conclusions*, June 2014, Seventh edition, available at: <http://www.refworld.org/docid/5538cfa34.html>.

⁸ UN General Assembly, Declaration on Territorial Asylum, 14 December 1967, A/RES/2312 (XXII), available at: <http://www.refworld.org/docid/3b00f05a2c.html>.

⁹ According to Article 2 (1) of the current AGIPA, an alien is a third-country national or a stateless person.

protection are third-country nationals and stateless persons **who have expressed their wish to apply for international protection.** [emphasis added] Therefore, the “making” of an asylum application involves only the act of expressing, in any way, and to any authority, one’s wish to obtain international protection.

12. Furthermore, Article 1 (2) read together with Article 14 (1) and 15 (1) of the AGIPA imply that an asylum-seeker shall first submit an asylum application using a form offered by the Police and Border Guard Board (PBGB). Hence, only the submission of a completed template of the asylum application marks the formal start of the asylum procedure in Estonia as well as the moment from which an individual is considered to be an applicant for international protection. Article 1 (18) of the Law Proposal further stipulates that the application has to be registered as soon as the person expressed his/her wish to apply for international protection.
13. Since according to the recast APD, it is the “making” of an asylum application that triggers specific entitlements and procedural rights¹⁰, in order to secure to asylum-seekers effective access to the asylum procedure and, where applicable, international protection, it is vital to clearly spell out the standards enshrined in the recast APD within Estonian legislation and the practice of the respective State institutions (*i.e.* the PBGB).

Recommendation: In order to ensure that a person is considered as an applicant for international protection from the moment s/he expresses his or her intention to seek asylum irrespective of the “lodging of the asylum application”, UNHCR recommends amending the wording of Article 1 (2) of the Law Proposal as follows:

“An applicant for international protection is an alien who has made an application for international protection in respect of which a final decision has not yet been taken”.

Considering that in addition to “making” an application, the recast APD foresees, at least, two more procedural steps, which enhance effective access to the asylum procedure: i) *Registration* (written record of the applicant’s statement of intention), and ii) *Lodging* (complete application allowing for the start of the examination), UNHCR also recommends to bring the current text of the Law Proposal in compliance with the terminology enshrined in the recast APD to clearly mark the distinction of various steps in the procedure.

➤ **Article 1(5) of the Law Proposal: The determining authority**

14. According to the Law Proposal, Article 3 of the AGIPA will be amended through a new section 4, which provides that “*the Police and Border Guard Board shall register and examine applications for international protection*”. The explanatory note to the Law Proposal explains that the proposed provision is based on Articles 2(f) and 4(1) of the recast APD, which require Member States to designate, for all procedures at first instance, a *single determining authority*.

¹⁰ For example, the right to remain (Art. 9); material reception conditions subject to the rules and limitations in the recast RCD; obligation to assess special needs Art. 24 (1); obligation to cooperate with the authorities (Art. 13).

15. According to the present practice in Estonia, the asylum decision-making function/competence is divided between two structural units of the Police and Border Guard Board - the *Aliens Division* of the PBGB Migration Bureau of the Intelligence Management and Investigation Department and the border guard officials of the PBGB Territorial Prefectures. The Aliens Division includes staff of the earlier disbanded *International Protection Division* and its task is the examination, *inter alia*, of asylum applications lodged inside the territory, as well as the granting, extension and revocation of identification documents, residence and work permits for all aliens, including beneficiaries of international protection. The task of the Territorial Prefectures is to register asylum applications lodged in the border areas or at border-crossing points by persons who have no legal grounds for residence in Estonia, including persons who are transferred to Estonia on the basis of the EU Dublin III Regulation. The border guard officials of the Territorial Prefectures are also authorized to reject asylum applications lodged at the border. Such a decision-making competence of the border guard officials is in UNHCR's view not in compliance with the recast APD requirements, as it does not meet the criteria of a single determining authority.
16. The designated authority should furthermore have specialised staff to examine applications for international protection. Although some Estonian border guards have participated in trainings on how to conduct personal interviews and examine asylum applications, the majority still do not have sufficient competence to undertake legal analysis of asylum applications. The lack of comprehensive assessments of international protection needs at the border-crossing points puts persons in need of protection at risk of *refoulement* contrary to the 1951 Refugee Convention. Moreover, placing border guards in the role of decision-makers may undermine the perception of confidentiality and impartiality of the asylum process, which is crucial for creating the conditions conducive to the full disclosure of facts by applicants during the personal interview.

Recommendation: UNHCR recommends amending the proposed Article 1 (5) of the Law Proposal to ensure that the responsibility for examining and deciding on all asylum applications, and thus for assessing *non-refoulement* obligations on an individual basis, is accorded solely to the competent officials of the Aliens Division of the Migration Bureau of the PBGB Intelligence Management and Investigation Department.

➤ **Article 1 (13) of the Law Proposal: Rights of applicants for international protection**

17. UNHCR notes that Article 1 (13) of the Law Proposal amends, *inter alia*, Article 10 (2) of the AGIPA. The latter provides a set of rights, which shall be accorded to an applicant for international protection. According to the proposed new Item 1 of Article 10 (2), an applicant has the right “to receive as soon as possible, but not later than within 15 days from submission of an application for international protection or residence permit, information about his or her rights and obligations, including information about organisations providing legal aid or reception-related assistance, the asylum procedure as well as of consequences of not complying with their obligations. This information shall be provided both orally and in writing, and in a language that the applicant understands.”.
18. While silent on specific timeframes in relation to the provision of information, the APD states in Article 12 (1) (a) that the information (about the asylum procedure,

rights and obligations, consequences of not complying with obligations or of an explicit or implicit withdrawal of the application) “*shall be given in time to enable applicants to exercise the rights guaranteed in this Directive and to comply with the obligations described in Article 13.*” In this regard and taking into consideration Recitals 27-28 of the recast APD, UNHCR believes that this information shall be given as soon as a person makes an application (expresses his or her wish to apply for international protection) and no later than the *lodging* of the application. To ensure effectiveness of the safeguard provided in Article 12 (1) (a) of the recast APD, it is crucial that the information be given by competent officials, ideally those carrying out the *lodging* and the *registration* of an application.

19. UNHCR also advocates for a diversification of means of information, including leaflets in various languages besides the provision of verbal information to the applicant. Additionally, in order to ensure that information is effectively provided information on reception conditions should be provided to asylum-seekers in a manner which considers their individual circumstances including in particular their age and gender.¹¹
20. UNHCR would also like to point out that Article 5 (1) of the recast RCD requires Member States to inform applicants about the reception benefits and obligations within a reasonable time not exceeding 15 days *after they have lodged* [emphasis added] their application for international protection. In UNHCR’s view, there should be a distinction between the time-frame for information on the procedures, rights and obligations in the process of making, registering and lodging of the application and the information on benefits and obligations related to reception benefits and related obligations.

Recommendation: UNHCR recommends dividing the proposed new Item 1 of Article 10 (2) of the AGIPA into two provisions establishing separate time-frames for provision of information about asylum procedures under the recast APD and reception benefits and obligations under the recast RCD.

21. UNHCR further notes that the list of entitlements in the proposed new Article 10 (2) of the AGIPA does not include a number of very important rights guaranteed under the recast APD, including the right to remain in the territory until the determining authority has made a decision (Article 9 (1)); the right for a personal interview (Article 14 (1)); the right to arrange for a medical examination on own initiative (Article 18 (2)); the right to adequate support if the applicant is in need of special procedural or reception guarantees (Article 24 (3)) of the recast APD and Article 22 (1) of the recast RCD); the right to a representative, if an applicant is an unaccompanied minor (Article 25 (1) (a)); and the right to challenge the application of the safe third country concept (Article 38 (2) (c)).

Recommendation: UNHCR recommends amending the proposed new Article 10 (2) of the AGIPA with the additional set of rights as provided in Articles 9 (1), 14 (1), 18 (2), 24 (3), 25 (1) (a) and 38 (2) (c) of the recast APD and Article 22 (1) of the recast RCD.

¹¹ UN High Commissioner for Refugees (UNHCR), UNHCR Annotated Comments to 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), April 2015, page 11, (UNHCR Annotated Comments to the recast RCD), available at: <http://www.refworld.org/docid/5541d4f24.html>.

➤ **Article 1 (18) of the Law Proposal: Access to the asylum procedure**

22. UNHCR notes that Article 1 (18) of the Law Proposal introduces an obligation for the PBGB “to register an asylum application as soon as the person has expressed his/her wish to apply for international protection or at least within three working days starting from the **time of submission** of the asylum application. If a large number of applications for international protection prevent the respect of the above time limit, an application may be registered within ten working days after its submission”. [emphasis added]
23. As UNHCR has earlier explained, there is a discrepancy in the use of terminology between the current AGIPA and the recast APD. The latter distinguishes between three distinct procedural steps aiming at ensuring effective access to the asylum procedure (*making, registering and lodging* an application). According to Article 6 (1) of the recast APD, the *registration* (submission under the AGIPA) shall take place no later than three working days after the application is made. This obligation to register the applicant within a set time limit aims to secure the “*making*” of the application with a view to enhance effective access to the asylum procedure for persons seeking international protection in line with the case law of the Court of Justice of the European Union (CJEU).¹²

Recommendation: UNHCR recommends amending Article 1 (18) of the Law Proposal as follows:

“The application for international protection shall be registered no later than three working days after a person has expressed his/her wish to apply for international protection. If a large number of simultaneous applications for international protection makes it very difficult in practice to respect the above time limit, an application may be registered within ten working days after it is made”.

24. UNHCR would like to point out that prompt access to the asylum procedure is a paramount guarantee to ensure compliance with international law. UNHCR notes that Article 1 (5) of the Law Proposal provides that “the Police and Border Guard Board accepts and examines applications for international protection”. UNHCR further notes that neither the Law Proposal, nor the current AGIPA address situations when the application for international protection is made to a State authority, which is not competent under national law to register applications. This is, however, a mandatory requirement under the first indent of Article 6 (1) of the recast APD, which states that in case the application for international protection is made to authorities which are not competent under national law to register applications, Member States shall ensure that the registration takes place no later than six working days after the application is made.
25. Consequently, the Law Proposal foresees no additional requirements for the personnel of those authorities, which are likely to receive applications for international protection. Pursuant to second indent of Article 6 (1) of the recast APD, Member States should ensure that the personnel of such state institutions shall have the relevant information and receive the necessary level of training for informing applicants as to where and how applications for international protection may be lodged.

¹² See CJEU, case C-327/02, 16 November 2004, paras. 26–27, which requires that the Community Law shall guarantee “a procedural system which is easily accessible...”.

Recommendation: UNHCR recommends amending the Law Proposal with the following provisions:

- i) Stipulating a six days' time limit for the registration of applications for international protection made to authorities which are not competent under national law to register such applications;**
- ii) Establishing qualification requirements for the personnel of those Estonian State institutions, which are likely to receive applications for international protection.**

26. UNHCR notes that Article 14 (1) of the current AGIPA requires from individuals to *explicitly* express their wish to apply for international protection by submitting an application for international protection to the PBGB and this shall be done *immediately* after entering Estonia at a border-crossing point.
27. In UNHCR's view, neither the requirement of explicit expression of the wish to apply for asylum, nor the requirement to apply "immediately" is consistent with international refugee law or the EU legislation.
28. Although asylum-seekers (including persons who may have international protection needs but are intending to seek asylum elsewhere or at a later date, and those who have not yet had an effective opportunity to seek asylum) do not have an unfettered right to choose their country of asylum, **there is also no obligation** that they shall seek asylum at the first effective opportunity.¹³ Additionally, the fact that a person chooses not (or not immediately) to apply for asylum in a particular country does not mean that he or she is not a refugee to whom international obligations and UNHCR's mandate apply.¹⁴
29. The terminology used by the recast APD refers to submitting an application "as soon as possible" (see Article 6(2) and Article 10(1)) and puts the burden on the Member States to create the necessary conditions for the individual to be able to submit the application for international protection as soon as possible.
30. Neither the wish to apply for international protection needs to be expressed in any particular form, nor the word "asylum" shall be used expressly; the defining element is the expression of fear of what might happen upon return to the country of origin.¹⁵

¹³ UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, para 3(i), see *supra* footnote 9. See also UNHCR, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002)*, February 2003, <http://www.refworld.org/docid/3fe9981e4.html>, para. 11; and UNHCR Executive Committee ("ExCom") Conclusion No. 15 (XXX) – 1979, *Refugees without an Asylum Country*, <http://www.refworld.org/docid/3ae68c960.html>, paras (h)(iii) and (h)(iv).

¹⁴ This reflects the principle that recognised refugee status is declaratory rather than constitutive: "a person is a refugee within the meaning of the 1951 Convention as soon as s/he fulfils the criteria contained in the definition... S/he does not become a refugee because of recognition, but is recognized because s/he is a refugee." 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, para. 28, (UNHCR Handbook). Available at: <http://www.refworld.org/docid/4f33c8d92.html>.

¹⁵ See the *EU Commission Recommendation establishing a common "Practical Handbook for Border Guards (Schengen Handbook)" to be used by Member States' competent authorities when carrying out the border control of persons* (C (2006) 5186 final), para. 10.1, available at: <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015010%202006%20INIT>.

31. UNHCR would like to reiterate that, “the absence of an explicit and articulated request for asylum does not absolve the concerned state of its *non-refoulement* obligation.”¹⁶ Whether under the 1951 Refugee Convention, international human rights law, or customary international law, this principle is not conditional upon recognized refugee status or an express asylum application¹⁷. Rather, it is engaged “wherever there is conduct [for instance, during border checks, “pushbacks” or forced removals] exposing [an] individual to a risk of being subject to persecution or ill-treatment in another country.”¹⁸
32. The European Court of Human Rights (ECtHR) has ruled in a number of cases that Articles 1 and 3 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) require that where a Contracting State is aware, or ought to be aware, of a “real and immediate risk” of an individual being exposed to ill-treatment through being forcibly transferred by any person to another State, it has an obligation to take “within the scope of [its] powers, such preventive operational measures that, judged reasonably, might be expected to avoid that risk”.¹⁹
33. Similarly, the recast APD requires of Member States to carry out a mandatory check on possible *refoulement*. According to the last indent of Article 41 (1) of the recast APD, Member States may make an exception from the right to remain in the country “*only where the determining authority considers that a return decision will not lead to direct or indirect refoulement in violation of that Member State’s international and Union obligations*”.
34. In UNHCR’s view, it is therefore in the interests of Member States to ensure a correct identification and recognition of persons in need of protection within the meaning of Article 1 of the 1951 Refugee Convention or as persons eligible for subsidiary protection. Moreover, EU legislation calls for facilitated access to the asylum procedure by persons who has made an application for international protection. According to Article 6 (2) of the recast APD, Member States should ensure ‘*that a person who has made an application for international protection has an effective opportunity to lodge it as soon as possible*’. UNHCR considers that Article 14 (1) of the AGIPA needs to be harmonized with the requirements of Article 6 (2) of the recast APD as the current text of the Law Proposal contains no provisions relevant to the full transposition of this article.

Recommendation: UNHCR recommends introducing the following provision in the AGIPA:

¹⁶ UN High Commissioner for Refugees (UNHCR), *UNHCR intervention before the Court of Final Appeal of the Hong Kong Special Administrative Region in the case between C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents)*, 31 January 2013, Civil Appeals Nos. 18, 19 and 20 of 2011, para. 74, available at: <http://www.refworld.org/docid/510a74ce2.html>.

¹⁷ The independence of the *non-refoulement* principle from formal refugee status has been affirmed by ExCom in Conclusion No. 6 (XXVIII) – 1977 at para. (c), and Conclusion No. 82 (XLVIII) – 1997 at para. (d)(i). See also UNHCR, *Summary Conclusions: The Principle of Non-Refoulement*, June 2003, <http://www.refworld.org/docid/470a33b00.html>, para 3; and Lauterpacht and Bethlehem, ‘The Scope and Content of the Principle of Non-Refoulement: Opinion’ in UNHCR, *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, 2003, <http://www.refworld.org/docid/4bed15822.html>, especially pp. 115–119.

¹⁸ UNHCR, *Oral intervention before the European Court of Human Rights in the case of Hirsi and Others v. Italy*, 22 June 2011, Application no. 27765/09, <http://www.refworld.org/docid/4e0356d42.html>, p. 4.

¹⁹ ECtHR, *Savridin Dzhurayev v. Russia*, No. 71386/10, Judgment of 25 April 2013, paras. 177–185; *Nizomkhon Dzhurayev v. Russia*, no. 31890/11, Judgment of 03 October 2013, paras. 136–139; *Ermakov v. Russia*, no. 43165/10, Judgment of 07 November 2013, paras. 208–211; *Kasymakhunov v. Russia*, no. 29604/12, Judgment of 14 November 2013, paras. 134–141.

“An alien who expressed his/her wish to apply for international protection shall be provided an effective opportunity to lodge his/her application with the Police and Border Guard Board as soon as possible”.

35. UNHCR notes that the Law Proposal does not contain any provisions relevant to the full transposition of the Article 8 (1) of the recast APD, which requires Member States to ensure “*where there are indications that third-country nationals or stateless persons held in detention facilities or present at border crossing points, including transit zones, at external borders, may wish to make an application for international protection, Member States shall provide them with information on the possibility to do so. In those detention facilities and crossing points, Member States shall make arrangements for interpretation to the extent necessary to facilitate access to the asylum procedure.*”
36. In UNHCR’s view, information is essential to ensure effective access to the asylum procedures for people who may be in need of international protection and avoid breaches of the principle of *non-refoulement*.²⁰ Echoing to the recent study on fundamental rights at airports by the EU Fundamental Rights Agency,²¹ UNHCR wishes to highlight that the provision of information, where there is an indication that the person may be willing to seek asylum or may be in need of international protection, constitutes a precondition for an effective identification of persons in need of international protection. Similarly, the ECtHR has repeatedly reiterated in its case law the importance of guaranteeing anyone the right to obtain sufficient information to enable them to gain effective access to the relevant procedures and to substantiate their complaints.²²
37. The UNHCR Executive Committee in its Conclusion No. 8 recommends that “*The competent official, to whom the applicant addresses himself at the border or in the territory of a Contracting State, should have clear instructions for dealing with cases which might fall within the purview of the relevant international instruments. He or she is required to act in accordance with the principle of non-refoulement and to refer such cases to a higher authority.*” The Conclusion further recommends that “*the applicant should receive the necessary guidance as to the procedure to be followed.*”²³
38. Similarly, the right to receive information and counselling on the procedures to be followed is a precondition for persons to exercise the right to asylum, as enshrined in Article 18 of the EU Charter of Fundamental Rights and accordingly reflected in Article 8 of the recast APD. UNHCR wishes to stress that this is a requirement in the recast APD, which needs to be implemented effectively.

Recommendation: UNHCR recommends amending the Law Proposal with provisions modifying Articles 14 (2) and (3) of the AGIPA as follows:

²⁰ UN High Commissioner for Refugees (UNHCR), Determination of Refugee Status, 12 October 1977, No. 8 (XXVIII) - 1977, para. e (ii), available at: <http://www.refworld.org/docid/3ae68c6e4.html>; UN High Commissioner for Refugees (UNHCR), Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures), 31 May 2001, EC/GC/01/12, para. 24, at: <http://www.refworld.org/docid/3b36f2fca.html>.

²¹ EU Fundamental Rights Agency, *Fundamental rights at airports: border checks at five international airports in the European Union*, Luxembourg: Publications Office of the European Union, 2014, available at: http://fra.europa.eu/sites/default/files/fra-2014-third-country-nationals-airport-border-checks_en.pdf.

²² *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, para. 204, available at: <http://www.refworld.org/docid/4f4507942.html>.

²³ UNHCR Executive Committee, Determination of Refugee Status, No. 8 (XXVIII) (1977).

“If there are indications that an alien held in detention facilities or is present at border crossing points, including transit zones, or at external borders of Estonia may wish to make an application for international protection, the Police and Border Guard Board shall provide him or her with information on the possibility to do so.”

➤ **Article 1 (22) of the Law Proposal: Applicants with special needs**

39. UNHCR notes with satisfaction that Article 1 (22) of the Law Proposal incorporates an entirely new Article 15¹ into the AGIPA. The new article establishes an obligation for the PBGB and other relevant state institutions to identify applicants with special needs, including both applicants in need of special procedural guarantees and special reception needs.
40. UNHCR understands that the assessment under the new Article 15¹ of the AGIPA should be systematically conducted on an individual basis and not a group basis. This new provision acknowledges the special vulnerabilities of applicants with specific needs during the asylum procedure. While the proposed provisions constitute an important step forward for identification of applicants with specific needs, UNHCR cautions that the term “*as soon as possible after submission of application*” as provided in Article 15¹ (3) may not be applied in a way allowing for the early identification of person with specific needs wishing to make an asylum claim.
41. According to Article 2 (d) of the recast APD, an applicant in need of specific procedural guarantees is an applicant with limited ability to benefit from the rights and comply with the obligations provided for in the recast APD. In the absence of special procedural guarantees, the applicant would not have the possibility to have access to a fair procedure. In UNHCR’s view, it is thus crucial to initiate the assessment of special procedural needs at the earlier stage of the procedure. The UNHCR Executive Committee in its Conclusion No. 91 recalls that the special protection or assistance needs should be recorded at the *registration of the asylum application*.²⁴

Recommendation: UNHCR recommends amending Article 1 (22) of the Law Proposal to ensure that the identification of persons with specific needs shall start at the registration of an application for international protection.

➤ **Article 1 (24) of the Law Proposal: Child and Unaccompanied child**

42. UNHCR welcomes Article 1 (24) of the Law Proposal, which amends Article 17 of the AGIPA. This article outlines specific provisions for asylum proceedings involving both accompanied and unaccompanied children, including the appointment of a representative (guardian) for unaccompanied children seeking asylum. As mentioned previously, UNHCR is pleased with the initiative by the Estonian Government to introduce the principle of the best interests of the child at all stages of the asylum procedure and for all children irrespective of whether they are accompanied or not. This is in compliance with Article 3 (1) of the UN Convention on the Rights of the Child (CRC).²⁵

²⁴ UNHCR, ExCom Conclusion No 91 (LII) on Refugee Registration (2002), available at: <http://www.unhcr.org/3bd3e1d44.html>.

²⁵ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html>. Article 3 (1) of the CRC provides that “*In all actions concerning children, whether undertaken by public or private social welfare*

43. UNHCR notes that modified Article 17 (10) of the AGIPA provides that, as a representative (guardian) of a child, can be appointed either “*an individual or organization that are trustworthy or have necessary knowledge and skills to represent an unaccompanied child*”. UNHCR understands that new Article 15¹ (7) of the AGIPA establishes certain requirements for the qualification of State officials and employees who are supposed to deal with child asylum-seekers. However, to bring Estonian law into full compliance with the recast APD, UNHCR finds it necessary to introduce an additional safeguard, in line with Article 25 (1) of the recast APD, which requires that “*organisations or individuals whose interests conflict or could potentially conflict with those of the unaccompanied minor shall not be eligible to become representatives*”.
44. Furthermore, General Comment No. 6 of the Committee on the Rights of the Child requires guardians to have the necessary expertise and authority to take part in the asylum proceedings on behalf of an unaccompanied child, and to identify durable solutions.²⁶ If, in some areas, the guardian does not have the necessary expertise, supplementary measures, including the appointment of an adviser or legal representative, should be secured. A similar requirement is envisaged in Article 25 (1) of the recast APD, which provides that the guardians of unaccompanied children shall have the necessary expertise in the field of childcare as well as the ability to perform their duties in accordance with the principle of the best interests of the child. Also, Article 24 (4) of the recast RCD entails an obligation of Member States to train staff working with unaccompanied children²⁷.
45. Moreover, the Committee on the Rights of the Child requires that State parties have review mechanisms in place to monitor the quality of the guardians to ensure that the best interests of the child are being represented, and to prevent abuse.²⁸ UNHCR strongly supports these provisions, as children, due to their young age, dependency and immaturity, should enjoy specific procedural and evidentiary safeguards to ensure that fair refugee status determination decisions are reached with respect to their claims.²⁹

Recommendation: UNHCR recommends amending Article 1 (24) of the Law Proposal with a provision establishing additional requirements for the representatives (guardians) of children, including but not only, that they

institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”.

²⁶ UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, para. 33, available at: <http://www.unhcr.org/refworld/docid/42dd174b4.html>.

²⁷ Article 24 (4) of the recast RCD reads: “*Those working with unaccompanied minors shall have had and shall continue to receive appropriate training concerning their needs, and shall be bound by the confidentiality rules provided for in national law, in relation to any information they obtain in the course of their work.*”

²⁸ CRC General Comment No. 6 (2005), para. 35. See also, UN Committee on the Rights of the Child, *General Comment No. 5 (2003) General Measures of Implementation*, 27 November 2003, CRC/GC/2003/5, available at: <http://www.refworld.org/docid/4538834f11.html>.

²⁹ UN High Commissioner for Refugees, *UNHCR comments on the European Commission’s Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast) COM (2011) 319 final*, January 2012, (“UNHCR comments on the amended recast APD”), para. 17, available at: <http://www.unhcr.org/refworld/docid/4f3281762.html>. See also UN High Commissioner for Refugees, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles I(A)2 and I(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08, para. 65, available at: <http://www.unhcr.org/refworld/docid/4b2f4f6d2.html>.

should have knowledge of the relevant provisions of the Estonian asylum legislation, as well as, receive training on basic concepts like “best interests of the child”, confidentiality, tracing, the refugee definition etc.

46. UNHCR is concerned that the Law Proposal requires unaccompanied children to seek State legal aid under the same conditions and requirements as foreseen for adult asylum-seekers. UNHCR understands that pursuant to Item 4 of Article 10 (2) of the AGIPA, any applicant for international protection has a right to seek free legal assistance in the amount and according to the procedures prescribed by the *State Legal Aid Act*.³⁰ This Act, however, does not guarantee State legal aid to all asylum-seeker and contains a number of grounds for rejecting applications for legal aid. Additionally, the process of applying for free legal assistance under the State Legal Aid Act does not take into consideration the specifics of the Estonian asylum procedure. UNHCR is thus concerned that the existing legal framework does not guarantee free legal aid to unaccompanied children seeking asylum, especially at the time of *making* and *registering* an application for international protection.
47. In this regard, UNHCR would like to note that many children may resist registration, may not be able to express themselves freely or be unwilling to self-identify accurately due to fear or lack of knowledge of the protection options. They may be under the influence of human smugglers or traffickers, may wish to abide by parental instructions or are under the influence of communities of asylum-seekers or irregular immigrants.³¹ At the same time, the decision to enter into immigration procedures, whether through lodging an application for international protection or other procedure, have considerable consequences for the child and his or her development opportunities.³²
48. The CRC General Comment No. 6 (2005)³³ provides that “in cases where children are involved in asylum procedures or administrative or judicial proceedings, they should, in addition to the appointment of a guardian, be provided with legal representation”.
49. Furthermore, pursuant to Article 12 (2) of the EU Anti-Trafficking Directive,³⁴ States should ensure that victims have access without delay to legal counseling and legal representation, including for claiming compensation. Legal counseling and representation should be free of charge if the victim does not have sufficient financial resources. An important element of the provision under Article 12 (2) is the requirement for States to grant access *without delay* to legal counseling [emphasis added]. For States where existing legislation requires means-testing to access free legal aid, the Anti-Trafficking Directive introduces a safeguard against undue delays: legal aid and legal counseling are to be granted without delay, including before a decision is reached regarding the financial means of the victim³⁵. Moreover, the legal assistance should be provided by qualified lawyers in a

³⁰ *Riigi õigusabi seadus*, RT I 2004, 56, 403.

³¹ UN High Commissioner for Refugees (UNHCR), *Safe and Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, October 2014, p. 25, available at: <http://www.refworld.org/docid/5423da264.html>.

³² *Ibid*, p. 41.

³³ CRC, *General Comment No. 6 (2005)*, para. 36.

³⁴ Council of the European Union, *Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA*, 15 April 2011, 2011/36/EU (Anti-Trafficking Directive), available at: <http://www.unhcr.org/refworld/docid/50ec1e172.html>.

³⁵ UN High Commissioner for Refugees (UNHCR), *Prevent. Combat. Protect: Human Trafficking*, November 2011, p. 66, available at: <http://www.unhcr.org/refworld/docid/4edcbf932.html>.

language that the victim understands. If necessary, this may require the services of a professional interpreter. In the context of trafficking related procedures, where so much depends on the testimony of an individual, effective communication with the victim, in a language he or she understands, is essential.

50. It is therefore necessary to ensure that the process of submission and registration of an application for international protection by children is accompanied by a higher level of procedural safeguards, which shall include, *inter alia*, access to free legal advice. In UNHCR's view, the right to legal assistance is an essential safeguard, especially in complex European asylum procedures. Even adult asylum-seekers are often unable to articulate coherently the elements relevant to an asylum claim without the assistance of a qualified counsellor, as they are not sufficiently familiar with the precise grounds for the recognition of refugee status and the legal system of a foreign country. Quality legal assistance and representation is, moreover, in the interest of States, as it can help ensure that international protection needs are identified accurately and early. Article 20 (2) of the recast APD foresees a possibility to provide free legal assistance and/or representation also in the procedures at first instance. In UNHCR's view, this possibility may be extended, in particular, to unaccompanied children and/or their guardians in order to ensure their effective access to the asylum procedure.

Recommendation: UNHCR recommends amending the Law Proposal with a provision ensuring that asylum-seeking children or their representatives (guardians) are entitled to free legal assistance and/or representation.

➤ **Article 1 (27) of the Law Proposal: Asylum interview**

51. UNHCR notes that Article 1 (27) of the Law Proposal will modify Article 18 (4) of the AGIPA as follows: *“In the review of an application for international protection, a personal interview shall be arranged, in which an applicant is to be provided an opportunity to present facts and give explanations concerning circumstances that may have essential importance in the review of his or her application for asylum, including the circumstances that may prevent the applicant's expulsion from the country.”*
52. UNHCR further notes that the proposed provision relates to Article 14 (1) of the recast APD, which provides: *“Before a decision is taken by the determining authority, the applicant shall be given the opportunity of a personal interview on his or her application for international protection with a person competent under national law to conduct such an interview. Personal interviews on the substance of the application for international protection shall be conducted by the personnel of the determining authority...”*
53. UNHCR understands that currently the interviewing of asylum-seekers is carried out by both the border guard officials of the PBGB Territorial Prefectures as well as officials of the Aliens Division of the PBGB Migration Bureau of the Intelligence Management and Investigation Department. In UNHCR's view, the latter constitutes the single determining authority in light of Article 4 (1) of the recast APD.
54. UNHCR is concerned that the proposed new wording of Article 18 (4) of the AGIPA does not fully transpose Article 14 (1) of the recast APD, which sets out the general principle, that it is the responsibility of the central determining authority, i.e. Aliens Division in the case of Estonia, to conduct the personal interview.

55. Also, while Article 34 (2) of the recast APD allows for another authority to conduct the personal interview on the admissibility of the application for international protection, UNHCR would like to stress that, due to the impact of the certification of a claim as inadmissible, only the determining authority, which has the necessary knowledge of the grounds for international protection, experience and access to updated country of origin information, should carry out the admissibility interview.³⁶ In line with the UNHCR's Executive Committee Conclusion No. 8 (XXXVIII) of 1977,³⁷ UNHCR is of the strong view that the responsibility for interviewing applicants for international protection at the admissibility stage as well as in accelerated or regular procedure, within the country or at its borders, should be performed only by a central determining authority, that is, the Aliens Division of the PBGB Migration Bureau of the Intelligence Management and Investigation Department.

Recommendation: UNHCR recommends amending Article 1 (27) of the Law Proposal as follows:

“In the review of an application for international protection, the applicant shall be given the opportunity to present facts and give explanations concerning circumstances that may have essential importance in the review of his or her application for asylum, including the circumstances that may prevent the applicant’s expulsion from the country, at a personal interview with the personnel of the Aliens Division of the Police and Border Guard Board, which is competent to conduct such an interview.”

➤ **Article 1 (35) of the Law Proposal: Unfounded application**

56. UNHCR welcomes that Article 1 (35) of the Law Proposal modifies the definition of “unfounded application”, which is provided in Article 20 (1) of the AGIPA, as follows: “If, on the basis of available information, it is clear that the applicant does not meet the criteria for granting international protection as provided in the recast Qualification Directive [...] (2011/95/EL), his or her applications shall be considered unfounded.” UNHCR further notes that the proposed new definition meets, in general, the requirements, which are enshrined in Article 32 (1) of the recast APD.

57. Article 32 (1) of the recast APD precludes the qualification of a claim as unfounded without an appropriate examination conducted by the determining authority to establish that the applicant does not qualify for international protection, whether for refugee status or subsidiary protection.³⁸ UNHCR emphasizes the importance of this principle when using accelerated procedures under any circumstances listed under Article 31 (8) and to reflect this in the Law Proposal.

Recommendation: UNHCR recommends amending the Law Proposal with a provision ensuring that all applications for international protection, which are channelled into the accelerated procedure, are to be examined by the

³⁶ UNHCR comments on the amended recast APD, para 13, see footnote 29.

³⁷ UNHCR, *Determination of Refugee Status*, 12 October 1977, No. 8 (XXVIII) - 1977, available at: <http://www.unhcr.org/refworld/docid/3ae68c6e4.html>.

³⁸ UN High Commissioner for Refugees (UNHCR), *UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004)*, (UNHCR Provisional Comments on the APD), 10 February 2005, p. 39, available at: <http://www.refworld.org/docid/42492b302.html>.

determining authority in accordance with the basic principles and guarantees as provided in Chapter II of the recast APD.

➤ **Article 1 (36) of the Law Proposal: Manifestly unfounded applications and accelerated examination**

58. UNHCR notes that Article 1 (36) of the Law Proposal incorporates two new articles in the AGIPA: Article 20¹ (*Manifestly unfounded applications*) and Article 20² (*Accelerated examination of application*).
59. The proposed new Article 20¹ (1) of the AGIPA defines as “manifestly unfounded” an application, which is based on claims and explanations irrelevant to circumstances provided in Article 20 (1) or if the application is clearly abusive and in which any of below nine circumstances is applicable:
- 1) *There is a reason to consider that the applicant is from a safe country of origin;*
 - 2) *In examination of his or her application, the applicant has intentionally presented false information, provided false statements, or intentionally withheld relevant information, which could be important for examination of his or her application for international protection, or intentionally presented false documents;*
 - 3) *It is likely that, in bad faith, the applicant has destroyed or disposed of a document or evidence that would have helped establish his or her identity or nationality;*
 - 4) *The applicant has made clearly false or obviously improbable representations which contradict sufficiently verified country of origin information, thus making his or her claim clearly unconvincing in relation to whether he or she qualifies as a beneficiary of international protection;*
 - 5) *The applicant has introduced a subsequent application which is subject to special examination procedure as provided in Article 24 (1);*
 - 6) *The applicant is making an application merely in order to avoid his or her obligation to leave;*
 - 7) *The applicant has entered or stayed in Estonia unlawfully and, without good reason, has either not presented himself or herself to the Police and Border Guard Board or not made an application for international protection as soon as possible;*
 - 8) *The applicant refuses to comply with an obligation to have his or her fingerprints taken.*
 - 9) *The applicant is a danger to the national security or public order, or the applicant has been forcibly expelled from Estonia for these reasons.*
60. At the outset, UNHCR notes that the proposed Article 20¹ (1) of the AGIPA does not incorporate the important guarantee set out in Article 32 (1) of the recast APD discussed in paragraph 57 above. In UNHCR’s view, in order to ensure a full transposition of Article 32 (1) of the recast APD, the wording of Article 20¹ (1) of the AGIPA shall clearly stipulate that an asylum claim may be rejected as manifestly unfounded **only after** an appropriate examination conducted by the determining authority which shall establish that the applicant qualifies neither for refugee status, nor for subsidiary protection under the recast Qualification Directive.

Recommendation: UNHCR recommends modifying the proposed Article 20¹ (1) to ensure that an application for international protection is to be considered manifestly unfounded only if it is established that an applicant does not meet the criteria for granting international protection and the application is not clearly related to the grounds for granting international protection”.

61. UNHCR further notes that the circumstances enumerated in new Article 20¹ (1) of the AGIPA correspond to Article 31 (8) of the recast APD, which stipulates grounds for channeling an application for international protection into an accelerated and/or border procedure. UNHCR would like to express its concern over the fact that the proposed wording of Article 20¹ (1) of the AGIPA provides that the grounds for channeling an application through the accelerated procedure are also the grounds on which an application can be rejected on its merits as manifestly unfounded.
62. UNHCR would like to recall that accelerated procedures are aimed at processing asylum applications at a significantly faster rate than in a normal asylum procedure. Accelerated procedures can either be classed as ‘inclusionary’ or ‘exclusionary’. The main objective of an ‘inclusionary’ accelerated procedure is to speedily grant an individual refugee status, for example in clearly well-founded cases, where compelling protection reasons are at hand and the acceleration allows for a swift positive decision on the asylum application.³⁹ In several EU Member States⁴⁰, an accelerated procedure is used for such cases. This may be a useful practice which helps reduce the burden on decision-making structures and releases resources to deal with more complex cases.
63. The main objective of an ‘exclusionary’ accelerated procedure is to speedily deal with applications which are obviously without foundation as not to merit a full examination at every level of the procedure. In line with the UNHCR Executive Committee Conclusion No. 30 (XXXIV) of 1983, only cases that are “clearly abusive” (i.e. clearly fraudulent), or “manifestly unfounded”, (i.e. not related to the grounds for granting international protection), should be considered for accelerated treatment.⁴¹ It should also be noted that decisions by the determining authority on applications for international protection – whether made in accelerated or regular procedures – require an ‘appropriate examination’ with the safeguards provided in Chapter II of the recast APD.
64. As explained in paragraph 57 above, pursuant to Article 32 (1) of the recast APD, an application for international protection channelled in the accelerated procedure may be rejected as unfounded if the determining authority concludes that the applicant does not meet the criteria to qualify for international protection in accordance with the recast Qualification Directive. It is therefore important to draw

³⁹ UN High Commissioner for Refugees, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, 20 October 1983, No. 30 (XXXIV) - 1983, Available at: <http://www.unhcr.org/refworld/docid/3ae68c6118.html>.

⁴⁰ This includes Greece (Article 8 (2) PD 90/2008 states that examination of an application may be prioritized when it may reasonably be considered to be well-founded), Italy (Article 28 of Legislative Decree No. 25/2008), Slovenia (according to Article 54 IPA, the competent authority may decide the application in the accelerated procedure “if the entire operative event has been established on the basis of facts and circumstances from the first to the eighth sub-paragraph of Article 23 of this Act inasmuch as they have been presented.” Notably, Article 54 IPA was never applied) and Spain (Article 25 (1) (a) of the New Asylum Law provides that the urgent RSD procedure will be applied to manifestly well-founded applications lodged in country only).

⁴¹ UNHCR, *The Problem of Manifestly Unfounded or Abusive Applications*, see footnote 39.

a line between the grounds for channelling applications for international protection into accelerated/ border procedures and grounds for rejecting applications on their merits.

Recommendation: UNHCR strongly recommends revising the wording in the proposed new Article 20¹ (1) of the AGIPA in order to bring it in line with Articles 31 (8) and 32 of the recast APD.

Taking into consideration the scope of the proposed Article 20¹ (1) of the AGIPA, UNHCR further recommends adding a provision stipulating that only the determining authority (Aliens Division of the PBGB Migration Bureau of the Intelligence Management and Investigation Department) may take a decision on whether to accelerate the examination of an asylum application.

65. According to Item 3 of the proposed new Article 20¹ (1) of the AGIPA, an application shall be considered as manifestly unfounded if an applicant, in bad faith, has destroyed or disposed of a document or evidence that would have helped establish his or her identity or nationality. UNHCR would like to reaffirm that a lack of documentation or use of forged documents does not, in itself, render a claim fraudulent, or warrant negative conclusions about the genuineness of the claim. Asylum-seekers are frequently compelled to flee by irregular means. They may, moreover, have destroyed or disposed of their identity or travel documents because they have been compelled to do so by smugglers who wish to reduce the risk of detection. This is recognized also by Article 31 (1) of the 1951 Refugee Convention, which explicitly exempts refugees from penalties for illegal entry or presence. UNHCR thus welcomes the proposed wording under Item 3 of Article Article 20¹ (1) since it requires a fraudulent intent on part of the asylum-seeker, in order to invoke this provision.⁴²
66. UNHCR notes that Item 4 of the proposed Article 20¹ (1) of the AGIPA foresees, as an important element triggering the qualification of an application as manifestly unfounded, that the applicant has made “*clearly false or obviously improbable representations which contradict sufficiently verified country-of-origin information...*”. In UNHCR’s view, making obviously improbable representations, which contradict sufficiently verified country of origin information, does not necessarily imply that an asylum claim is clearly abusive, fraudulent or unfounded.⁴³ In line with the UNHCR Handbook,⁴⁴ the duty to ascertain and evaluate all the relevant facts should be considered a shared duty between the applicant and the examiner. This also applies generally, including in cases where there are inconsistencies or contradictions, where an applicant’s story appears unlikely, or insufficiently substantiated. An attempt should be made to resolve inconsistencies and contradictions, although minor inconsistencies or contradictions on issues irrelevant to the substance of the claim should not affect the credibility of the applicant. In particular, trauma and mental illness, feelings of insecurity, or language problems may result in apparent contradictions or insufficient substantiation of claims. If the applicant has made a genuine effort to substantiate his or her claim and cooperate with the authorities in seeking to obtain available

⁴² UNHCR, Provisional Comments on the APD, p. 29. See footnote 38.

⁴³ UNHCR, Comments on the amended recast APD, p. 26. See footnote 29.

⁴⁴ UNHCR Handbook, para. 196. See footnote 14.

evidence, and if the examiner is consequently satisfied as to the applicant's general credibility, the applicant should be given the benefit of doubt.⁴⁵

Recommendation: UNHCR recommends that the criteria in the proposed new Article 20¹ (1) of the AGIPA, referring to “...or obviously improbable representations ...” be omitted.

67. According to Item 5 of the proposed new Article 20¹ (1) of the AGIPA, an application shall be considered as manifestly unfounded, if the applicant has introduced a subsequent application, which is subject to special examination procedures as provided in Article 24 (1) of the AGIPA. In UNHCR's view, as the assessment in Article 24 (1) concerns the merits of an application, only the determining authority can decide whether or not to channel such an application into an accelerated procedure. UNHCR considers that the current wording of Item 5 may seriously undermine the effective access of asylum-seekers to the asylum procedure seemingly due to the gap described in paragraph 57 above.
68. In addition, pursuant to Article 40 (2) of the recast APD, subsequent applications are to be channeled into a special preliminary examination in the context of the admissibility procedure. The aim of such a preliminary examination is to determine if new elements have arisen or have been presented by the applicant. Therefore, submission of a subsequent application cannot be automatically considered as an indication of the intention to abuse the asylum system and lead to an accelerated examination as a manifestly unfounded application.
69. UNHCR understands that the designated determining authority according to Article 4 (1) of the APD must also be responsible for the preliminary examination of subsequent applications mentioned in Article 40 (2) of the recast APD.

Recommendation: UNHCR recommends removing Item 5 from the proposed new Article 20¹ (1) of the AGIPA.

70. According to Item 7 of the proposed new Article 20¹ (1) of the AGIPA, an application shall be considered as manifestly unfounded, if the applicant has entered or stayed in Estonia unlawfully and, without good reason, has either not presented himself or herself to the PBGB or not made an application for international protection as soon as possible.
71. UNHCR is of the view that, particularly in a procedure, which may have reduced safeguards, grounds which are unrelated to the merits of the application should not be used for channeling a claim into the accelerated procedure. This includes grounds relating purely to non-compliance with procedural requirements, in cases where the applicant's circumstances may have made such non-compliance unavoidable, or where there could be a reasonable explanation for such non-compliance. This includes, among other things, failure to apply earlier.⁴⁶
72. In exercising their right to asylum,⁴⁷ asylum-seekers are often forced to arrive at, or enter, a State territory without prior authorization. The position of asylum-seekers

⁴⁵ UNHCR, Provisional Comments on the APD, p. 30. See footnote 38.

⁴⁶ UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendations*, March 2010, p. 57, available at: <http://www.unhcr.org/refworld/docid/4bab55752.html>.

⁴⁷ Article 18 of the Charter of Fundamental Rights of the EU enshrines the right to asylum. The scope of this right is broad and incorporates not only the substantive provisions of the 1951 Convention but also the

often thus differs fundamentally from that of ordinary migrants in that they may not be in a position to comply with the legal formalities for entry, not least because they may be unable to obtain the necessary documentation in advance of their flight, for example, because of their fear of persecution or the urgency of their departure.⁴⁸ The lack of documentation and the fact that many asylum-seekers have experienced traumatic events,⁴⁹ need to be taken into account when assessing the reason(s) for an asylum-seeker's delay in submitting his/her application. Furthermore, in UNHCR's experience, applicants may have various other valid reasons for a delay in submitting an asylum claim, such as illness, lack of information about the asylum procedure and ways to apply, or language barriers hampering the individual's understanding of available information, lack of trust in authorities, belief in and compliance with 'instructions' provided by smugglers etc.

73. As the reasons why applicants do not apply immediately can vary considerably from one individual to another, there is no fixed time limit which can be mechanically applied or associated with the expression "without delay" in Article 31 in the 1951 Convention.⁵⁰ The element "without delay" has been considered by courts in a number of European countries.⁵¹

74. Furthermore, even in cases when an applicant deliberately avoids submitting an application, for example, because he or she would prefer to seek asylum in another country where relatives or friends stay, the delay is not necessarily an indication of unfoundedness of the applicant's need for international protection. There is no obligation under international law for a person to seek international protection at the first effective opportunity. Likewise, the EU asylum legislation does not require applying for asylum "immediately upon arrival", and instead calls for facilitation of

procedural and substantive standards contained in the Union's asylum *acquis*. The protection it confers plainly goes beyond protection from *refoulement* and includes a right to apply for and be granted refugee or subsidiary protection status. There will thus be a breach of Article 18 not only where there is a real risk of *refoulement* but also in the event of (i) limited access to asylum procedures and to a fair and efficient examination of claims or to an effective remedy; (ii) treatment not in accordance with adequate reception and detention conditions and (iii) denial of asylum in the form of refugee status or subsidiary protection status, with attendant rights, when the criteria are met. See UNHCR, *N.S. v. Secretary of State for the Home Department in United Kingdom; M.E. and Others v. Refugee Application Commissioner and the Minister for Justice, Equality and Law Reform in Ireland - Written Observations of the United Nations High Commissioner for Refugees*, 1 February 2011, C-411/10 and C-493/10, available at: <http://www.unhcr.org/refworld/docid/4d493e822.html>.

⁴⁸ See UN Working Group on Arbitrary Detention, Report to the Seventh Session of the Human Rights Council, A/HRC/7/4/, 10 January 2008, at para. 53: "[C]riminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary [and therefore arbitrary] detention.", available at: <http://daccessddsny.un.org/doc/UNDOC/GEN/G08/100/91/PDF/G0810091.pdf?OpenElement>.

⁴⁹ As recognized by *M.S.S. v. Belgium and Greece*, at paras. 232–233.

⁵⁰ See, e.g., UNHCR, *Global Consultations on International Protection: Summary Conclusions on Article 31 of the 1951 Convention relating to the Status of Refugees* – Revised, 8–9 November 2001, available at: <http://www.unhcr.org/3bf4ef474.html>.

⁵¹ *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, [1999] EWHC Admin 765; [2001] Q.B. 667, United Kingdom: High Court (England and Wales), 29 July 1999, available at: <http://www.refworld.org/docid/3ae6b6b41c.html>; *Landgericht (Regional Superior Court), Muenster, Fed. Rep. Of Germany*, (Ref: 20 Dec. 1988, LG Muenster Ns 39 Js 688/86 (108/88)), concluding that there is no general time limit for determining what constitutes "without delay" and that the issue should be considered on a case-by-case basis; *Norwegian Supreme Court, case no. 2014/220, ref.: HR-2014-1323-A*, concluding that "[...] a refugee may be protected by Article 31 (1), even if he does not inform the authorities of his actions and need for protection until after he has been detained by the authorities. Even in these situations, a more concrete assessment is necessary". Available in English at: <http://www.domstol.no/en/Enkelt-domstol/-Norges-Hoyesterett/Summary-of-Recent-Supreme-Court-Decisions/Summary-of-Supreme-Court-Decision-2014/>.

access to the asylum procedure by persons who have made an application for international protection.⁵² Member States retain, however, a right to reduce material reception conditions when they can establish that the applicant, for no justifiable reason, has not lodged an application for international protection as soon as reasonably practicable after arrival in that Member State.⁵³ Therefore, while asylum-seekers and refugees do not have an unfettered right to choose the country of asylum, their intentions ought to be taken into account.⁵⁴ In addition, the family union criteria are central in the recast Dublin III Regulation.

75. Hence, while failure to apply promptly for asylum may be an element in the consideration of the credibility of a claim,⁵⁵ it should never be the sole reason for rejecting an application as manifestly unfounded.
76. The possibility of lodging an asylum claim at any time after arrival is also essential to enable individuals to be considered for international protection as refugees *sur place*. The automatic and mechanical application of time limits for submitting applications is not consistent with “the protection of the fundamental value embodied in Article 3” as interpreted in the case law of the ECtHR⁵⁶ and with international protection principles.⁵⁷

Recommendation: UNHCR recommends revising the wording of the proposed Article 20¹ (1), item 7, to bring it in line with Article 31 (8) (h) of the recast APD, as follows:

“the applicant entered the territory of Estonia unlawfully or prolonged his/her stay unlawfully and, without good reason, has either not presented himself/herself to the authorities and/or filed an application for asylum as soon as possible, given the circumstances of his/her entry”.

In addition, UNHCR would like to emphasize the importance of ensuring that this provision is not applied automatically without proper consideration of the reasons why an applicant did not file an application as soon as possible. A delay should not be assumed to imply a lack of need for international protection.

⁵² See Article 6 (2) of the recast APD.

⁵³ Article 20 (2) of the recast RCD.

⁵⁴ UNHCR, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002)*, February 2003, para. 11, available at: <http://www.refworld.org/docid/3fe9981e4.html>.

⁵⁵ A delay in applying for asylum should not be the sole ground for undermining the credibility of an applicant's statements. The decision-maker should in such cases enquire into the reasons for any apparent delay by offering the applicant the opportunity to explain it. See UNHCR, *Beyond Proof: Credibility Assessment in EU Asylum Systems*, May 2013, Section 2.6, pp. 43-45, at: <http://www.refworld.org/docid/519b1fb54.html>. See also UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, para. 20, at: <http://www.unhcr.org/refworld/docid/3b36f2fca.html>.

⁵⁶ *Jabari v. Turkey*, Appl. No. 40035/98, Council of Europe: European Court of Human Rights, 11 July 2000, para. 40, at: <http://www.unhcr.org/refworld/docid/3ae6b6dac.html>.

⁵⁷ UNHCR, *Refugees without an Asylum Country*, 16 October 1979, No. 15 (XXX) - 1979, para. (i), at: <http://www.unhcr.org/refworld/docid/3ae68c960.html>; Standing Committee of the UNHCR, *Note on International Protection*, EC/49/SC/CRP.12, 4 June 1999, para. 18, at: <http://www.unhcr.org/excom/EXCOM/3cc413316.pdf>.

77. According to Item 9 of the proposed new Article 20¹ (1) of the AGIPA, an application shall be considered as manifestly unfounded, if the applicant is a danger to the national security or public order, or the applicant has been forcibly expelled from Estonia for these reasons. As UNHCR noted above, accelerated procedures should be reserved for cases which are either manifestly unfounded or clearly abusive, or which are clearly well-founded, allowing a swift positive decision on the asylum application. Asylum claims, which require a detailed examination, including with regard to exclusion considerations,⁵⁸ should not, in UNHCR's view, be channelled through accelerated procedures. There are more effective and proportionate measures to deal with cases involving national security or public order. Given the severe consequences of a negative decision in cases of applications raising issues of national security, the Parliamentary Assembly of the Council of Europe⁵⁹ has recommended that these be exempted from accelerated procedures. UNHCR supports this recommendation.⁶⁰

Recommendation: UNHCR recommends deleting Item 9 of of the proposed Article 20¹ (1). UNHCR further recommends dealing with claims, which require a detailed examination with regard to exclusion, national security and/or public order, in the regular asylum procedure.

78. According to the proposed new Article 20² (2) of the AGIPA, it is possible to process applications lodged by unaccompanied children in the accelerated procedure if:

- 1) *S/he arrived from a safe country of origin or represents a threat to national security or public order;*
- 2) *S/he has intentionally presented false information... or documents, or s/he in bad faith, has destroyed or disposed of a document or evidence that would have helped establish his or her identity or nationality, under the condition that the children received an adequate support, including to consult with their legal representative, enabling them to exercise their rights and obligations during the asylum procedure);*
- 3) *S/he submitted a subsequent application, which is admissible.*
- 4) *S/he has arrived to Estonia through a safe third country.*

79. At the outset, UNHCR notes that the proposed new Article 20² (2) of the AGIPA raises difficult questions of principles and of interpretation, in particular relating to the exemption from accelerated and/or border procedures of unaccompanied or separated children seeking asylum. UNHCR considers that in many cases a normal procedure may prove fairer and more efficient.⁶¹

80. UNHCR further notes that this provision is based on exceptions as described in Items (a) – (d) of Article 25 (6) of the recast APD, which, in UNHCR's view, is

⁵⁸ See UN High Commissioner for Refugees, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, HCR/GIP/03/05, at: <http://www.unhcr.org/refworld/docid/3f5857684.html>.

⁵⁹ Council of Europe: Parliamentary Assembly, *Resolution 1471 (2005) on Accelerated Asylum Procedures in Council of Europe Member States*, 7 October 2005, 1471 (2005), para. 8.9, at: <http://www.unhcr.org/refworld/docid/43f349e04.html>.

⁶⁰ UNHCR, Provisional Comments on the APD, p. 32. See footnote 38.

⁶¹ UN High Commissioner for Refugees (UNHCR), *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, para. 24, at: <http://www.refworld.org/docid/3b36f2fca.html>.

extremely convoluted and difficult to comprehend from a child’s right perspective. In practice, this provision may seriously undermine children’s effective access to the safeguards laid down in Article 25 (1) to (5) of the recast APD. In this regard and taking into consideration that children may need more time to articulate and substantiate the reasons why they need international protection, UNHCR recommends all Member States not to transpose Items (a) – (d) of Article 25 (6) of the recast APD.

81. As also discussed above, UNHCR notes that Article 25 (6) of the recast APD requires Member States to consider the best interests of the child when implementing this Directive. Furthermore, Article 24 (3) of the recast APD requires Member States to ensure that, where applicants have been identified as applicants in need of special procedural guarantees, they should be provided with adequate support in order to allow them to benefit from the rights and comply with the obligations of the Directive throughout the duration of the asylum procedure. Based on the aforementioned provisions, UNHCR recommends exempting applicants who are in need of special procedural guarantees, including unaccompanied children, from being channeled into an accelerated procedure.

Recommendation: To ensure fair and efficient procedures, UNHCR recommends exempting applicants who are in need of special procedural guarantees, including unaccompanied children, from accelerated procedures in all cases. In this regard, UNHCR recommends removing the proposed new Article 20² (2) of the AGIPA from the Law Proposal.

82. More specifically, in relation to Item 1 of the proposed new Article 20² (2) of the AGIPA, UNHCR would like to reiterate its position that applications for international protection, which require a detailed examination, including with regard to exclusion considerations, should not be channelled through the accelerated procedure. There are more effective and proportionate measures to deal with cases involving national security or public order.

Recommendation: UNHCR recommends revising Item 1 of proposed Article 20² (2) to ensure that applications which require a detailed examination with regard to exclusion, national security and/or public order, are to be processed in the regular asylum procedure.

83. In relation to Items 2-3 of the proposed new Article 20² (2) of the AGIPA, UNHCR would like to note that its current wording may seriously undermine the effective access of unaccompanied children to the asylum procedure and relevant safeguards as provided in Articles 24 and 25 of the recast APD. While noting that Article 24 (3) of the recast APD does not define the content of the adequate support that should be provided to applicants in need of special procedural guarantees, including unaccompanied children, Recital 29 nevertheless indicates that “sufficient time” could be, *inter alia*, a form of support provided to applicants identified as having special needs. Reference to sufficient time is understood in such a way that time is an important element to create the necessary conditions for presenting effectively the elements needed to substantiate the application for international protection. UNHCR understands that it should be interpreted in a way that the persons in need

of special procedural guarantees, including unaccompanied children, cannot be channelled into accelerated procedures, especially at the border.⁶²

Recommendation: UNHCR recommends removing Items 2 and 3 of the proposed Article 20² (2) of the AGIPA.

84. UNHCR notes that Item 4 of Article 20² (2) of the AGIPA foresees channeling into the accelerated procedure applications which were submitted by applicants who have arrived to Estonia through a safe third country. UNHCR further notes that pursuant to Articles 31 (8) and 33 (2) (c) of the recast APD, this type of applications for international protection is not supposed to be processed through the accelerated procedure but in the *admissibility procedure* as such applications do not require consideration on the merits. UNHCR would like to reiterate that the aim of the *admissibility procedure* is to separate claims, which require consideration on the substance from those which do not. The purpose and scope of the *accelerated procedure* is to deal in an expeditious manner with applications which are obviously without foundation (see further above, at paragraphs 62–63).
85. UNHCR would also like to reemphasize that Article 31 (8) of the recast APD limits the possibility to accelerate an application to ten exhaustive grounds and specifies clearly that the basic principles and guarantees of Chapter II must be respected also in accelerated procedures. The proposed provision goes beyond the permissive grounds for accelerated examination prescribed under Article 31 (8) of the recast APD.

Recommendation: UNHCR recommends removing Item 4 of the proposed Article 20² (2) of the AGIPA.

- **Article 1 (37) of the Law Proposal: Leaving an application without examination on the merits (admissibility procedure)**
86. UNHCR notes that Article 1 (37) of the Law Proposal aims to harmonize Article 21 of the AGIPA with the corresponding Article 33 of the recast APD, which provides grounds for leaving applications without examination on the merits whether the applicant qualifies for international protection (inadmissible applications). UNHCR is pleased that the proposed grounds are, in general, in compliance with Article 33 of the recast APD.
- **Article 1 (38) of the Law Proposal: Withdrawal or abandonment of application**
87. Article 1 (38) of the Law Proposal introduces, *inter alia*, a revised version of Article 23 of the AGIPA, which regulates the procedures in case of withdrawal or abandonment of an application for international protection. According to the modified Article 23 (3) of the AGIPA, “*the PBGB shall reject the application if an applicant has implicitly withdrawn or abandoned his or her application.*”. UNHCR notes that the proposed provision reflects, to some extent, the requirements of Article 28 (1) of the recast APD. UNHCR further notes, however, that the current wording of Article 23 (3) does not transpose an important guarantee enshrined in recast Article 28 (1) providing that the determining authority can reject an

⁶² UN High Commissioner for Refugees (UNHCR), *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Detailed Research on Key Asylum Procedures Directive Provisions*, March 2010, p. 265, available at: <http://www.refworld.org/docid/4c63e52d2.html>.

application which is considered implicitly withdrawn or abandoned *only after an adequate examination of its merits*.

Recommendation: UNHCR recommends revising the wording of Article 23 (3) of the AGIPA as follows:

“If an applicant has implicitly withdrawn or abandoned his or her application, the Aliens Division of the PBGB Migration Bureau of the Intelligence Management and Investigation Department shall take a decision either to discontinue the examination or reject an application if it considers the application to be unfounded on the basis of an adequate examination of its substance in line with Article 4 of the recast Qualification Directive.”

➤ **Article 1 (42) of the Law Proposal: Appeal**

88. Article 1 (42) of the Law Proposal introduces a new Article 25,¹ which aims to regulate the appeal procedures with respect to decisions taken under the AGIPA. According to proposed Article 25¹ (1) of the AGIPA, *a decision to reject an application for international protection or to revoke an international protection status may be appealed in the administrative court within ten days starting from the day of delivery*. UNHCR is concerned that the proposed time frame for appeal may adversely affect applicants’ access to effective legal remedy with regard to decisions rejecting applications on the merits since the majority of asylum-seekers do not speak the Estonian language, are unfamiliar with the national legal system, and may not have effective access to free and good quality legal aid. It should be emphasized that, in contrast, legal residents of Estonia benefit from a 30-day period for appeals in administrative procedures.⁶³ According to Article 46 (4) of the recast APD, the applicant must have reasonable time and facilities in order to undertake all the steps required to exercise the right of appeal.⁶⁴
89. UNHCR notes that proposed Article 25¹ (6) of the AGIPA requires ensuring the rights provided in Article 10 (2) of the AGIPA, to applicants rejected in the border procedure. UNHCR is seriously concerned that Article 10 (2) of the AGIPA does not provide for interpretation, legal assistance and at least one week to prepare the request for an interim measure suspending deportation pending the outcome of the appeal, as required by Article 46 (7) (a) of the recast APD. UNHCR understands that Article 10 (2) of the AGIPA entitles asylum-seekers “to receive legal assistance in accordance with the State Legal Aid Act”. In this regard, UNHCR would like to reiterate (see paragraph 46 above) that presently the State Legal Aid Act does not guarantee free legal assistance to every asylum-seeker. Also, this law is not tailored to meet the specifics of Estonian asylum procedures, especially if they are conducted at the border. As a result, the current wording of Article 25¹ (6) of the AGIPA significantly limits the access to effective remedy for applicants who are rejected in the border procedure. UNHCR recalls that the right to an effective remedy, in cases where entitlements guaranteed by EU law are affected, is a

⁶³ See Article 46 of the 2012 Estonian Code of Administrative Court Procedure, available at: <https://www.riigiteataja.ee/en/eli/ee/527012014001/consolide>.

⁶⁴ In this regard, the case law of the CJEU provides that the time limits must be sufficient in practical terms to enable the applicant to prepare and bring an effective action. See judgement of 28 July 2011 in Case C—69/10, *Brahim Samba Diouf v. Ministre du Travail, de l’Emploi et de l’Immigration*.

fundamental right under the EU Charter. It is also one of the general principles of EU law⁶⁵ and of the CJEU case law.⁶⁶

Recommendations: UNHCR recommends the Government of Estonia to consider an extension of the time-frame for appealing decisions rejecting applications for international protection in the regular procedure.

Additionally, UNHCR recommends revising the wording of Article 25¹ (6) of the AGIPA, to ensure its compliance with procedural safeguards (interpretation and mandatory free legal aid) provided in Article 46 (7) of the recast APD.

➤ **Article 1 (49) of the Law Proposal: Detention in Dublin cases**

90. UNHCR notes that Article 1 (49) of the Law Proposal suggests amending Item 7 of Article 36¹ (2) of the AGIPA, which stipulates the ground for detention in case of transferring of an asylum-seeker in accordance with the Dublin III Regulation. The proposed new wording of Item 7 provides that an asylum-seeker may be detained “*for transferring under the Dublin III Regulation in case there is a risk of absconding.*”.

91. UNHCR notes that the “risk of absconding” is provided as one of the legitimate reasons for detaining a person in connection with a transfer under the recast Dublin III Regulation. Article 28 (2) of the Regulation provides: “[w]hen there is a significant risk of absconding, Member States may detain the person concerned in order to secure transfer procedures in accordance with this Regulation (...)”. The same provision requires that the assessment of the risk of absconding has to be carried out on an individual basis. Detention will be permissible only if less coercive alternatives cannot be applied effectively.

92. In UNHCR’s view, the proposed amendment to Article 36¹ (2) of the AGIPA is not in full compliance with Article 28 (2) of the Dublin III regulation, which requires that an applicant can only be detained to secure a transfer under Dublin when there is a “**significant** risk of absconding”. Article 2(n) of the Dublin III Regulation further defines a significant risk of absconding as “the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that an applicant or a third-country national or a stateless person who is subject to a transfer procedure may abscond.”

Recommendation: UNHCR recommends amending Article 1 (49) of the Law Proposal as follows:

“7) For securing a transfer under Dublin III Regulation when there is a significant risk of absconding.”

➤ **Article 1 (50) of the Law Proposal: Criteria for assessing a risk of absconding**

93. According to Article 1 (50) of the Law Proposal, it is suggested to amend Article 36¹ of the AGIPA with a new section 2¹ as follows:

⁶⁵ UNHCR comments on the amended recast APD, p. 32. See footnote 29.

⁶⁶ See *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, Case C-69/10, European Union: European Court of Justice, 28 July 2011, para. 49; *Arcor AG & Co. KG*, Case C-55/06, European Union: European Court of Justice, 24 April 2008, para. 174.

“There is a risk of absconding... if an applicant has left without authorization his or her place of residence or another EU Member States as well as in cases when one of the circumstances enumerated in Article 6.8 of the Obligation to Leave and Prohibition on Entry Act is applicable.”

94. UNHCR notes that Article 6.8 of the Obligation to Leave and Prohibition on Entry Act (OLPEA) defines the risk of absconding if any of the below 8 circumstances is applicable:

1) the alien has not left Estonia or a Member State of the Schengen convention after the term has passed for voluntary compliance with the obligation to leave imposed by the order to leave;

2) the alien has submitted false information or falsified documents upon application for the legal basis for the stay in Estonia or the extension thereof, the Estonian citizenship, international protection or identity document;

3) there is a reasoned doubt in the identity or citizenship of the alien;

4) the alien has repeatedly committed intentional criminal offences or has committed a criminal offence for which he or she has been sentenced to imprisonment;

5) the alien has not complied with the surveillance measures applied with regard to him or her to ensure compliance with the precept to leave;

6) the alien has notified the Police and Border Guard Board or the Estonian Internal Security Service of his or her non-compliance with the obligation to leave;

7) the alien has entered into Estonia during the period of validity of the prohibition on entry applied with regard to him or her;

8) the alien has been detained due to the crossing of the external border of Estonia illegally and he or she has not obtained the permit or right to stay in Estonia.

95. UNHCR would like to stress that where there are strong grounds for believing that a specific asylum-seeker is likely to abscond or otherwise to refuse to cooperate with the authorities, detention may be necessary in an individual case.⁶⁷ Factors to balance in an overall assessment of the necessity of such detention could include, for example, a past history of cooperation or non-cooperation, past compliance or non-compliance with conditions of release or bail, family or community links or other support networks in the country of asylum, the willingness or refusal to provide information about the basic elements of the claim, or whether the claim is considered manifestly unfounded or abusive.⁶⁸ Appropriate screening and assessment methods need to be in place in order to ensure that persons who are *bona fide* asylum-seekers are not wrongly detained in this way.⁶⁹ The national law of the Member State should therefore provide for objective criteria, enabling decision-makers to determine if the person is indeed at risk of absconding. The absence of the criteria for determining a risk of absconding with respect to Dublin

⁶⁷ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guideline 4.1, para. 22. Available at: <http://www.refworld.org/docid/503489533b8.html>.

⁶⁸ UNHCR ExCom, *Conclusion on Detention of Refugees and Asylum-Seekers*, No. 44 (XXXVII) –1986, para. (b), available at: <http://www.unhcr.org/refworld/docid/3ae68c43c0.html>.

⁶⁹ International Detention Coalition (IDC), *There are Alternatives*, 2011, Introducing the Community Assessment and Placement Model, available at: <http://idcoalition.org/cap/handbook>.

detention in the national legislation may lead to arbitrary deprivation of liberty, and to recognizing such detention as unlawful.⁷⁰

96. UNHCR is concerned that some of the criteria for assessing the risk of absconding as provided in Article 6.8 of the OLPEA are too general and do not take into consideration the individual aspects of each applicant as well as the specific status and safeguards accorded to asylum-seekers and refugees by international law. For example, the criteria expressed in Item 8 of Article 6.8 of the OLPEA, may, depending on its implementation and application, create a risk of widespread detention in the context of border procedures and result, contrary to Article 31 (1) of the 1951 Refugee Convention, in the penalization of asylum-seekers, who enter Estonia in an irregular manner. In UNHCR's view, it is important for Estonian national legislation and administrative practice to recognize the specific legal situation of asylum-seekers, who are claiming the fundamental human right to seek asylum,⁷¹ which entitles them to safeguards additional to those of other aliens, who enter or are otherwise present in Estonia in an irregular manner.
97. Likewise, the submission of false identification documents, or doubts concerning the identity or citizenship of the applicant (Items 2 and 3 of Article 6.8 of the OLPEA), may lead to automatic detention of almost every asylum-seeker in Estonia. UNHCR acknowledges that minimal periods in detention may be permissible to carry out initial identity and security checks in cases where identity is undetermined or in dispute or there are indications of security risks.⁷² However, the examination of nationality can be a complex and lengthy process, especially for stateless applicants, and thus special safeguards will need to be put in place to prevent arbitrary detention, including prolonged or indefinite detention.⁷³ Detention must last only as long as reasonable efforts are being made to establish identity or to carry out the security checks, and within strict time limits established in law.⁷⁴ It also remains questionable whether the criteria expressed in Items 2 and 3 provide sufficient reasons to believe that an applicant may abscond.
98. UNHCR considers that by lodging an application for asylum an individual obtains a new legal status, which is governed by another legal regime under which administrative or immigration detention ceases to be justified unless there is a legitimate purpose. In this regard, UNHCR would like to recall Recital 9 in the Preamble to the Return Directive,⁷⁵ which states that “[i]n accordance with ... Directive 2005/85 (APD) ... a third-country national who has applied for asylum in a Member State **should not be regarded as staying illegally** on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force’. In accordance with Article 7 (1) and (3) of the recast RCD, asylum-seekers may move freely within the territory of the host Member State or within an area assigned to them by that

⁷⁰ See the German Federal High Court (Bundesgerichtshof) Judgment of 26 June 2014, V ZB 31/14, *Beschluss vom 26. Juni 2014 in der Überstellungshaftsache, V ZB 31/14, Germany: Bundesgerichtshof, 26 June 2014*, available at: <http://www.refworld.org/docid/53d63a444.html>.

⁷¹ Article 18 EU Charter, see footnote 25 above, and UN General Assembly, Article 14 *Universal Declaration of Human Rights*.

⁷² UNHCR Detention Guidelines, Guideline 4.1.1, paras. 24 and 25.

⁷³ UNHCR Detention Guidelines, Guideline 4.1.1, para. 26.

⁷⁴ UNHCR Annotated Comments to the recast RCD, p. 19.

⁷⁵ European Union: Council 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>.

Member State, except when it proves necessary, for example for legal reasons or reasons of public order, to confine an applicant to a particular place.

Recommendation: UNHCR recommends revising the wording of Article 1 (50) of the Law Proposal to ensure that the proposed criteria for assessing the risk of absconding correspond to the legal status of applicants for international protection. UNHCR further recommends revoking a reference to Article 6.8 of the OLPEA and enumerating the criteria for assessing the risk of absconding directly in the text of the AGIPA instead.

➤ **Article 3 of the Law Proposal: Permission to enter**

99. According to Article 3 of the Law Proposal, it is suggested to modify Article 11¹ (3¹) of the State Borders Act⁷⁶ as follows:

“A third-country national who lacks legal basis or valid travel document for entering Estonia and who wish to apply for international protection in Estonia shall be permitted to enter Estonia after submission of the application for international protection to the Police and Border Guard Board, except if circumstances mentioned in Item 1 of Article 20¹ (1) or Items 1-3 of Article 21 (1) of the AGIPA are applicable.”.

100. UNHCR understands that the aim of the proposed amendment is to deny the permission to enter the territory of Estonia to those applicants who:

- Have arrived from a *safe country of origin* (Item 1 of Article 20¹ (1) of the AGIPA);
- Were *granted asylum either by another EU Member State* or so called *first country of asylum* (Items 1-2 of Article 21 (1) of the AGIPA);
- Have arrived through a *safe third country* (Item 3 of Article 21 (1) of the AGIPA).

101. UNHCR notes that Article 43 of the recast APD permits Member States to have procedures at border or transit zones to decide on (i) the admissibility of an application, pursuant to Article 33 of the recast APD, or (ii) the substance of an application in an accelerated procedure pursuant to Article 31 (8) of the recast APD.⁷⁷ Article 43 (2) of the recast APD states that in case a decision cannot be made within four weeks, the applicant should be granted access to the territory for further processing. Given that in practice such decisions are supposed to be awaited in transit zones or at borders where the issue of deprivation of liberty arises, UNHCR urges Member States to apply the safeguards in Article 9 (3) of the recast RCD, requiring a speedy judicial review where an applicant is detained based on Article 8 (3)(b), (3)(c) or (3)(d), observing a maximum period of four weeks. Considering the requirements of Article 36²(1) of the AGIPA,⁷⁸ the PBGB shall seek the authorization of the administrative court in case of deprivation of liberty for the mentioned above purposes for periods longer than 48 hours.

102. In UNHCR’s view, the proposed wording of the amendment to Article 11¹ (3¹) of the State Borders Act extends the list of exceptions from the right to remain

⁷⁶ *Riigipiiri seadus*, RT I 1994, 54, 902.

⁷⁷ Accelerated procedures for manifestly unfounded or abusive applications, including those which aim to frustrate the removal process.

⁷⁸ This provision stipulates that applicants for international protection can be detained without the permission of an administrative court for up to 48 hours.

in the territory and thus permitting exemptions from the principle of *non-refoulement*. According to Article 3 (1) of the recast APD, this Directive, and accordingly all its procedural guarantees, applies to all applications for international protection, including those made at the border, in territorial waters or in the transit zones. These guarantees include, *inter alia*, the right to remain in the territory of a Member State “*until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III.*”⁷⁹ In line with the principle of *non-refoulement*, the right of applicants to stay in the territory is extended until a final decision is reached on their applications.

103.The only permissible exceptions to the right to remain in the territory are prescribed in Article 9 (2) of the recast APD, which encompass situations where “*a person makes a subsequent application referred to in Article 41 or where they will surrender or extradite, as appropriate, a person either to another Member State pursuant to obligations in accordance with a European arrest warrant or otherwise, or to a third country or to international criminal courts or tribunals.*”

104.Importantly, even the making of another subsequent application does not exempt a State from the duty to carry out a mandatory check on possible *refoulement*. According to the last indent of Article 41 (1) recast APD, Member States may make an exception from the right to remain in the country “*only where the determining authority considers that a return decision will not lead to direct or indirect refoulement in violation of that Member State’s international and Union obligations*”. Moreover, pursuant to Article 46 (8) of the recast APD, Member States shall allow the applicant to remain in the territory pending the outcome of the procedure to rule whether or not the applicant may remain on the territory. Such a procedure can be invoked, *inter alia*, in situations when a subsequent application was considered inadmissible under Article 33 (2) (d) recast APD and the applicant wants to prepare and submit to the court the arguments in favor of granting him/her the right to remain on the territory, as prescribed by Article 46 (7) recast APD.

105.It is therefore necessary to ensure in the law that any applicant for international protection is treated in accordance with the basic principles and guarantees as provided in Chapter II of the recast APD, including the right to remain in the territory until the final decision on their application is made, or until the court will decide on whether or not the applicant may remain on the territory.

Recommendation: UNHCR recommends revisiting the wording of Article 3 of the Law Proposal, to bring it in line with international and EU law. UNHCR recommends deleting the words “except if circumstances mentioned in Item 1 of Article 20¹ (1) or Items 1-3 of Article 21 (1) of the AGIPA are applicable, to ensure that any applicant for international protection is treated in accordance with the basic principles and guarantees as provided in Chapter II of the recast APD, including the right to remain in the territory.

⁷⁹ Article 9 (1) of the recast APD.