Changes to the Act of Granting International Protection to an Alien

Introduction

The Estonian Parliament recently adopted *the Police and Border Guard Act*, the main goal of which is to amalgamate three currently existing governmental bodies: the Board of Border Guards, the Police and the Citizenship and Migration Board, into one Board as of 1 January 2010. We understand that the Estonian Government now is in the process of preparing a draft Law on the implementation of this act (hereinafter: the Draft Law). This legal document will amend a number of legal acts of Estonia including the *Act of Granting International Protection to an Alien (AGIPA*).

In line with the supervisory responsibility which the UN General Assembly has entrusted to the UNHCR for providing international protection to refugees worldwide and for seeking permanent solutions for them, UNHCR monitors the national legislation implementing the *1951 Convention relating to the Status of Refugees* (hereinafter the 1951 Convention) and provides its advice and recommendations in this regard.[1] To assist the Estonian Government in ensuring that its asylum legislation is in compliance with the 1951 Convention, as well as, the common asylum standards of the EU, the UNHCR would like to offer its comments on the proposed Law. These comments mainly strive to clarify UNHCR's views on certain aspects of the proposed law in relation to the implementation of the 1951 Convention. UNHCR would greatly appreciate the opportunity to continue the dialogue with the Estonian Government and to submit further comments on this important piece of legislation at later stages of the legislative process.

Competent authorities

UNHCR fully understands the need for structural changes on the part of the Government aiming to develop the organization of the Ministry's management and optimize its structure and functions. The Office cautions, however, that the result of such a re-organization should not lead to a lowering of protection standards or a limitation of the rights of asylum-seekers. The proposed amendment of Article 16 of the AGIPA (Article 98, section 10 of the Draft Law) removes the involvement of the Citizenship and Migration Board in asylum procedures at the border. The responsible authorities for the identification of asylum seekers may therefore include border authorities and policemen only.

Furthermore, UNHCR would like to refer you to *ExCom Conclusion No. 8* which recommends that "the competent official (e.g. immigration officer or border police officer) 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 me within the purview of the relevant international instruments. He/she should be required to act in accordance with the principle of *non-refoulement* and to refer such cases to a higher authority". It is further noted that "there should be a clearly identified authority – wherever possible a single central authority- with responsibility for examining requests for refugee status and taking a decision in the first instance".

UNHCR would recommend that this is clearly reflected in the Act and that border authorities only register the application for asylum and then refer the application to the determining authority for an examination of the merits of the case. It is further recommended that there be a designated competent

[1] Statute of the Office of the United Nations High Commissioner for Refugees, United Nations General Assembly Resolution 428(V), 14 December 1950. Article 35 of the 1951 Convention relating to the Status of Refugees contains a corresponding obligation for States Parties, which undertake to: '*co-operate with the Office of the United Nations High Commissioner for Refugees in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the Convention.*'

authority within the government, such as the current Citizenship and Migration Board, with officials designated to refugee status determination full time and that officials of an authority competent to take a decision in procedures related to asylum-seekers shall have the appropriate knowledge of standards applicable in the field of asylum and refugee law. This requirement is also reflected in Articles 12, 13 and 35 of the *Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*.

Principle of non-refoulement

Article 50(1) of the AGIPA mentions the existence of "prohibition" against *refoulement*, but does not require that such prohibition extends to asylum-seekers. UNHCR considers that the asylum applicant's safety should also be ensured under the country's legislation and practice and moreover shall not be just a formal obligation. Thus, UNHCR recommends to bring the AGIPA in compliance with Articles 27(1)(b)-(c) of the EU Procedures Directive and explicitly require that the "prohibition" in question be "respected in practice" with regard to "a person seeking asylum".

Introduction of safe third country concepts

The new wording of Article 16 of the AGIPA sets out that the applicant shall be denied access to the territory of Estonia and he or she shall be immediately returned back, if:

- another country can be considered the first country of asylum, i.e. asylum or other protection has been accorded to the applicant in another country, and such protection is still accessible to the applicant;

- there is a reason to consider the applicant's country of origin as a safe country of origin;

- the applicant has arrived in Estonia through a country which can be considered a safe third country.

In this respect, UNHCR would like to highlight the following elements for your consideration;

If protection status has been accorded in another country, UNHCR recommend recognition of that status in Estonia in accordance with *the European Agreement on Transfer of Responsibility for Refugees.*

In regard to safe countries of origin and safe third countries, the applicant for asylum should at all times be protected against *refoulement* and be treated in accordance with accepted international standards as outlined, *inter alia*, in the 1951 Convention – *i.e*. the country of origin or third country should be "safe" for the applicant. "Safety" should be ensured under the country's practice and not just under the formal obligations that it may have assumed. The question of whether an asylum-seeker can be sent to another country must be answered on an individual basis. Furthermore, the prohibition of *refoulement* extends to indirect *refoulement*. Thus, a person may not be returned to a country from where he/she may be sent to a country where he/she may face persecution or other serious harm (chain deportation).

Moreover, an asylum-seeker should be provided with a right to rebut these three presumptions within reasonable time to an impartial administrative or judicial authority. In addition, to ensure compliance with the principle of *non-refoulement*, appeals should have suspensive effect, and the right to stay should be extended until a final decision is reached because the threat to which refugees are exposed is serious and generally relates to fundamental rights such as life and liberty.

Thirdly, the asylum-seeker should have a genuine connection or close links with the third country. This link should be stronger than the link to the State in which asylum is requested, so that it is fair and reasonable that the applicant be called upon first to request asylum there. The person should have transited through the State concerned, although the mere transit alone would not, in UNHCR's view,

constitute a connection or close link. The intentions of the applicant as regards the country in which he or she wishes to request asylum should, as far as possible, be taken into account. The third country should expressly agree to admit the applicant to its territory and to consider the asylum claim substantively in a fair procedure. It should also provide access to a durable solution for those recognized to be in need of international protection.

Fourthly, the provision should permit for exceptions for unaccompanied or separated children and other vulnerable persons. The admissibility and accelerated procedures generally do not provide for sufficient flexibility and time to take the situation of separated/unaccompanied children into account. Border guards may often not be qualified to deal with children's asylum claims. In UNHCR's view, claims by separated or unaccompanied children should therefore be examined in the regular procedure, and entry should be granted to claims submitted at the border. Furthermore, the competent authority should endeavour to trace the child's family members as soon as possible.

Finally, UNHCR would like to reiterate also that the primary responsibility to provide protection lies with the State where an asylum application is lodged. Therefore, a transfer of responsibility should be envisaged only between States with comparable protection systems, on the basis of an agreement which clearly outlines their respective responsibilities, such as the Dublin II Regulation. By contrast, the designation of a "safe third country", as defined in the AGIPA, rests on a unilateral decision by Estonia to invoke the responsibility of a third State to examine an asylum claim. Application of this concept should be abandoned in favor of such multilateral agreements which ensure access to effective protection for asylum-seekers.[2]

Detention of asylum-seekers

Proposed Article 98 section 15 of the Draft Law suggests new wording of Article 32 of the AGIPA. According to the proposed article, the applicant for asylum can be detained for up to 48 hours in the initial reception centre. This detention period can be extended under certain circumstances (Section 3 of Article 32) and in consultation with the administrative judge. UNHCR is concerned that the proposed preconditions for detention are too excessive and far-reaching. For example, an asylum-seeker may be detained if "he or she has repeatedly or seriously violated internal regulations of the Reception Centre for Asylum-Seekers" or "if the applicant fails to comply with the surveillance measures applied with respect to him or her, or fails to perform other duties provided by law."

UNHCR would like to reaffirm the general principle that asylum-seekers should not be detained. UNHCR strongly recommends that the guidance provided by the Executive Committee in its *Conclusion No. 44 (XXXVII) of 1986* and *UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, of 1999, which outlines permissible exception be adopted. The exceptions include, if detention is necessary to verify identity; or to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order.

In the Office's view, the grounds for detention provided in Items 3 and 4 of Article 32(3) are not meeting the necessary criteria to restrict the fundamental freedom of movement of asylum-seekers and represent rather an administrative punishment which shall be imposed in accordance with national laws regulating liability for misdemeanor or criminal offences. UNHCR is of the opinion that these provisions should be removed from the text of the present law. Moreover, to be consistent and to ensure a common level of protection to all asylum-seekers, UNHCR recommends including into the text of this article, a provision stipulating unimpeded access to the asylum procedure, legal and social

[2] See *UNHCR's Provisional Observations on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, 22 March 2005.

assistance, interpretation facilities and information to detained asylum-seekers since the detention should not constitute an obstacle to asylum-seekers' possibilities to pursue their asylum application.

It is also noted with concern that the proposed wording of Article 32 of the AGIPA permits the detention of asylum-seekers for an indefinite period. In this regard, UNHCR would like to reiterate that detention should be applied only in exceptional cases for a minimum period with the possibility of speedy judicial review. Therefore, UNHCR suggests an inclusion in the law of a maximum period of detention of asylum-seeker, which shall be reasonable and respect the right to liberty and security of person as prescribed *inter alia* in Article 5 of the *European Convention on Human Rights and Fundamental Freedoms*.

UNHCR would also like to raise its concern that the proposed article does not provide exceptions for vulnerable groups such as children, survivors of torture or sexual violence or otherwise traumatized persons. In respect of detention of persons under the age of 18 years we would like to refer to the Article 37 of the *Convention on the Rights of the Child*, by which States Parties are required to ensure that the detention of minors be used only as a measure of last resort and for the shortest appropriate period of time. Unaccompanied minors should not, as a general rule, be detained, which is also confirmed by *UN Rules for the Protection of Juveniles Deprived of their Liberty*.

UNHCR hopes that the proposed suggestions and recommendations will contribute to the efforts of the Estonian Government to establish a progressive and efficient asylum system based on the full and inclusive application of the 1951 Convention and other relevant international and regional instruments.

UNHCR Regional Office for the Baltic and Nordic Countries
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