UNHCR Comments
on the Draft Law "Improvement of Migration Legislation, amendment of provisions of Laws 4636/2019 (A' 169), 4375/2016 (A' 51), 4251/2014 (A' 80) and other Provisions"

Introduction

UNHCR offers these comments as the Agency entrusted by the United Nations General Assembly with the responsibility for providing international protection to refugees and other persons within its mandate, and for assisting governments in seeking permanent solutions to the problem of refugees.[1] As set forth in its Statute, UNHCR fulfils its international protection mandate, *inter alia*, by *"promoting the conclusion and ratifications of international conventions for the protection of refugees, supervising their application and proposing amendments thereto*".[2] UNHCR's supervisory responsibility under its Statute is reiterated in the 1951 Geneva Refugee Convention[3] to which Greece is a Signatory. Article 35 of the 1951 Convention asks that State parties "*undertake to cooperate with the Office of the United Nations High Commissioner for Refugees […] in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the Convention"*. The same commitment is included in Article II of the 1967 Protocol.[4] UNHCR's supervisory responsibility is also reflected in European Union (EU) law.[5]

UNHCR notes that most of the provisions of the Draft Law "*Improvement of Migration Legislation, amendment of provisions of Laws 4636/2019 (A' 169), 4375/2016 (A' 51), 4251/2014 (A' 80) and other Provisions*" (hereafter "Draft Law") concern amendments to the recently adopted L. 4636/2019, in force as of 1 January 2020. UNHCR provided comments[6] on said Law to the (then competent) Ministry of Citizen Protection during the consultation period and presented its views to the competent Standing Parliamentary Committee of Public Administration, Public Order and Justice during the voting period. UNHCR further submitted a Memorandum to the latter Committee.[7] UNHCR's comments to L.4636/2019 as shared remain valid. Consequently, present comments on the proposed Articles 1 to 32 of the Draft Law should be read in conjunction with UNHCR's earlier comments to L. 4636/2019 (annexed for ease of reference).

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[1] See Statute of the Office of the United Nations High Commissioner for Refugees, UN General Assembly Resolution 428 (V), Annex, UN Doc. A/1775, Para. 1, available at: http://www.unhcr.org/refworld/docid/3ae6b3628.html ("Statute").
[2] Ibid. (8)(a).
[3] UNTS No 2445, Vol.189, p.137. Ratified by Greece by Legislative Decree 3989/19-26.9.1959 "for the ratification of the multilateral Convention relating to the Status of Refugees" (Official Gazette A' 201).
[4] UNTS No. 8791, Vol. 606, p. 267. Ratified by Greece by Reform Law 389 of 26.4/4.6.1968 "for the ratification of the Protocol of New York of 31.1.1967 relating to the Status of Refugees" (Official Gazette A' 125).
[5] See Article 29(1)(c) recast Asylum Procedures Directive (APD), 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)*, 29 June 2013, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU, available at: https://www.refworld.org/docid/51d29b224.html, as well as the references to the 1951 Convention in Article 78(1) TFEU, European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, OJ C 115/47 of 9.05.2008, available at: http://www.unhcr.org/refworld/docid/4b17a07e2.html, and Article 18 of the EU Charter, European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, available at: http://www.refworld.org/docid/3ae6b3b70.html
[6] UNHCR's comments on the Draft Law for International Protection "Provisions on the qualification and the status of third country nationals or stateless persons as beneficiaries of international protection, for a single status for refugees or persons eligible for subsidiary protection and for the content of protection granted, unification of provisions for the reception of applicants for international protection, the procedure for granting and revoking of the status for international protection, restructuring of judicial protection of asylum seekers and other provisions.", 21.10.2019.
[7] UNHCR Memorandum before the Permanent Committee of Public Administration, Public Order and Justice of the Hellenic Parliament submitted on 24 October 2019 in the context of deliberations for the Draft Law on "International Protection and other provisions".

Part 1: General comments

A. UNHCR welcomes the positive amendments to be introduced by the proposed Draft Law, bringing about important improvements of the legal framework. In UNHCR's view, the most important of these amendments include:

- Article 1 para. 3 extending the category of vulnerable groups to immediate family members, including parents, siblings, children and the spouse of those deceased in shipwrecks.
- Article 3 abolishing the provision of Article 48 para. 2 (4th indent) allowing for the possibility to extend administrative detention of children for 20 days.
- Article 8 para. 1 reducing the number of International Protection Applicant's Cards with different validity periods (depending on the applicable procedure) that can be issued by the authorities.
- Article 8 para. 2 allowing for the issuance and renewal of the International Protection Applicant's Card through electronic or other appropriate technological means, which may simplify and accelerate the registration and documentation procedures.
- Article 13 allowing for the alteration of personal data of beneficiaries of international protection in a simplified procedure similar to the procedure followed for applicants for international protection.
- Article 16 para. 2 by which persons belonging to vulnerable groups are exempted from accelerated asylum procedures.
- Article 22 allowing applicants residing outside the region of the Regional Asylum Office (RAO) which issued a decision, to submit an appeal to the nearest RAO and not mandatorily to the one that issued the decision. This provision can rectify challenges for the right to appeal that have arisen under the current legal framework, which does not provide for this possibility.
- Article 24 para. 1 which prioritizes appeals of applicants residing on the islands. This provision can greatly contribute to the acceleration of the needed decongestion of the islands.

B. Nevertheless, UNHCR regrets that a number of provisions in the Draft Law, including notably the majority of amendments relating to the asylum procedure, could further limit the exercise of rights by persons of concern to UNHCR, while other provisions may be at variance with international law standards and provisions of the EU law. These concern in particular:

(a) **Procedural safeguards at 1st instance,** including the provision of adequate interpretation services; the possibility to omit the personal interview if the applicant does not wish to be interviewed in the official language(s) of his/her country of origin; the appointment of a second service (RIS) as competent authority for the registration of asylum applications; the further treatment of implicitly withdrawn applications and the adding of new categories of applications considered manifestly unfounded; the amendment of the definition of the subsequent application.

(b) **The right to appeal and access to an effective remedy**, including the introduction of new means of notification of 1st instance decisions not guaranteeing effective notification to the applicant with ensuing implications for the exercise of the right to appeal; the access to free legal aid at the appeal stage; the respect of the right of the applicant to lawfully stay in country.

(c) **Protection from arbitrary detention of asylum applicants**, notably the establishment of the "Islands Closed Controlled Facilities".

Part II below provides specific comments on proposed amendments pertaining to these three areas.

C. The Draft Law proposes a number of amendments aimed at the acceleration of the procedures and the increase in productivity of the decision authorities. This concerns, in particular, the shortening of deadlines (for example, for the completion of the examination of absolutely prioritized cases (Article 16), for the examination and issuance of decisions at second instance, including for the applicants in

detention (Articles 23 para. 1 and 101)), as well as the increase of the number of cases to be mandatorily examined by the Independent Appeals Committees per month. UNHCR wishes to note that short deadlines and higher productivity targets are not *ipso facto* unreasonable or unfair. However, fairness concerns arise where needed modalities are not in place and adequate resources for case processing have not been allocated that would allow for processing within these deadlines and achieving high productivity targets without compromising on procedural safeguards.[8] In addition, the combination of very short deadlines with other impediments in procedural safeguards, might further compromise a fair process; for example, the provision of very short time-limits for the issuance of appeals decisions on applications of asylum-seekers in detention, in combination with further impediments to the access to legal assistance (see below Article 9 of the Draft Law) and the introduction of shorter deadlines regarding the submission of memoranda by the appellants and their legal representatives before the Appeals Committees (Article 26 of the Draft Law). This may compromise the right to an effective remedy as provided in Article 46 para. 4 APD (recast), according to which Member States *"shall provide for reasonable time limits and other necessary rules for the applicant to exercise his or her right to an effective remedy (…). The time limits shall not render such exercise impossible or excessively difficult."* **Based on the above, UNHCR would like to recommend that shortened deadlines and productivity targets in the Draft Law are reviewed so as to ensure that they are reasonable and realistic so that their eventual observation does not compromise the fairness of the process. UNHCR wishes to further offer its technical expertise to the Government of Greece on fast and fair procedures as laid out in its 2018 discussion paper *Fair and Fast - Accelerated and Simplified Procedures in the European Union*.[9]**

D. UNHCR would like to refer to its comments to Law 4636/2019 (annexed) in particular as regards the draft amendments of Article 16 on prioritization of applications[10] and of Article 17 on safe third countries[11].

E. In addition, UNHCR would like to comment on some institutional changes that the Draft Law introduces in particular Article 51 on the establishment of a registry of rapporteurs-assistants of asylum case workers and Article 54 on the abolition of the Legal Department of the Asylum Service (AS). **As regards the registry, UNHCR recommends that said provision is amended to provide for the mandatory training of new staff to be recruited in support of the AS case workers, in line with Article 4 para. 3 APD (recast). As regards the Legal Department of the Asylum Service, UNHCR would recommend for it to be maintained and a division of tasks is made between this Department and the Legal Department of the Ministry allowing for a maximum of flexibility and response preparedness at the disposal of the Asylum Service given the many complex legal challenges in the asylum procedures.**

In general, UNHCR is concerned that a number of the proposed draft amendments, commented in more detail below, in conjunction with UNHCR's earlier expressed concerns regarding Law 4636/2019, creates a legal framework for the examination of applications for international protection in Greece that reduces considerably the safeguards necessary for a fair asylum procedure.

Part II: Specific comments

A. Comments on provisions related to procedural safeguards at 1st instance

[8] UN High Commissioner for Refugees (UNHCR), UNHCR Discussion Paper Fair and Fast - Accelerated and Simplified Procedures in the European Union, 25 July 2018, available at: https://www.refworld.org/docid/5b589eef4.html.
[9] Ibid.
[10] UNHCR Comments to L. 4636/2019, Article 83 para. 7 to 9.
[11] UNHCR Comments to L. 4636/2019, Article 86 para. 2.

A.1. Provision of interpretation services to the applicants (Article 7)
The proposed amendment provides for interpretation in the official language of the country of origin of the applicant, where it is duly documented that the provision of interpretation is not possible in the language preferred by the applicant. In light of Article 15 para.3(c) of the APD (recast) which provides that "[*t]he communication shall take place in the language preferred by the applicant unless there is another language which he or she understands and in which he or she is able to communicate clearly*", **UNHCR recommends that the draft amendment is made subject to the condition that the interpretation in the official language of the applicant's country of origin is only resorted to if it is clearly demonstrated that the applicant understands and is able to communicate clearly in this language.**

A.2. Omission of personal interview (Article 11)
The proposed provision provides that a personal interview can be omitted if the applicant does not wish to be interviewed in the official language(s) of his/her country.

UNHCR considers a personal interview crucial as it provides the applicant with the opportunity to explain comprehensively and directly to the authorities the reasons for the application and provides the determining authority the opportunity to establish relevant facts and assess the credibility of the oral evidence. Omitting interviews can further raise concerns regarding the identification and exclusion considerations. It could also complicate any process of review, cancellation or cessation at a later stage, as a full record of the reasons of flight, which is relevant for these processes, may be absent. For these reasons, UNHCR does not favour the complete omission of the interview, except in very limited cases and only where the intention is to recognize claims. In such cases, the written application may be considered as having afforded the procedural standard of the applicant's 'right to be heard' and the interview is foregone.[12] Additionally, the draft provision is incompatible with Article 14(2) APD (recast) that provides for only two narrow cases in which a personal interview may be omitted. Those two cases do not include the refusal of the applicant to be interviewed in the official language of his/her country.

Based on the above, UNHCR recommends that the above draft amendment is not maintained, notably in relation to above comments pertaining to Article 7 of the Draft Law.

A.3. Competent authorities for the registration of applications for international protection (Article 5 para. 1)
The proposed amendment designates a new Service, the Reception and Identification Service (RIS), which, through its regional Services on the islands – the Reception and Identification Centres (RICs) – will have the authority to fully register asylum applications in parallel with the AS. According to the Explanatory Report to the Draft Law, the purpose of this amendment is a faster and more effective registration procedure.

In UNHCR's view, it is critical to provide for asylum procedures that are both, fast and fair, noting in particular the necessity of avoiding processes conducive to long stay and ensuing overcrowding of reception facilities on the islands. Therefore, additional capacity for registering asylum applications is welcomed **provided that procedural safeguards remain in place, registration processes and tools used are harmonized and the designated "Competent Receiving Authorities" are fully coordinated amongst each other, including through the consistent use of a common data base (Alkyoni), to ensure a harmonized registration procedure and equal treatment of all asylum applicants.** Administrative guidance may be necessary in this regard to ensure a coherent and consistent registration approach. In particular, in assuming its new competency, RIS must ensure that all

[12] *Ibid*.

applicable procedural safeguards (Article 68 of L.4636/2019) and special duties (e.g. Article 67 on special procedural guarantees, Article 75 on age-assessment, Article 83 on prioritization of cases, including Dublin cases) are fully applied, in alignment with the practices of the AS.

Moreover, staff of the RICs registering applications for international protection, including all the grounds for which the applicant is seeking protection (according to Article 65 para.1 L. 4636/2019), **should be properly trained on these procedures,**[13] including on relevant Country of Origin information and registration in case of contested nationality etc. Adequate training of staff is imperative as, according to the provisions of L. 4636/2019 and the proposed amendments, the information collected during the full registration might serve as the sole basis on which an application is adjudicated and even, in some cases, rejected on the merits[14] (e.g. in case of an implicit withdrawal according to Article 81 of L. 4636/2019 where the applicant might not have the opportunity for a personal interview).

A.4. Consequences of applications deemed implicitly withdrawn and/or manifestly unfounded (Articles 14 and 18)

The draft amendments further add to the categories of applications that are considered as implicitly withdrawn and those considered as manifestly unfounded. This can have implications for those applications, notably regarding applicable procedural safeguards.

Positively, the proposed amendment in Article 14 improves the provision currently in force as it does no longer provide for an implicitly withdrawn application to be automatically rejected on the merits.[15] Rather, such an application should only be rejected if it is adequately examined based on the information available on file and assessed as unfounded. However, the provision does not address situations, in which an application is not assessed as unfounded or where the file does not provide for the necessary elements to make a determination as per Article 4 of the Qualification Directive, as no option to discontinue the examination of an application is provided for, despite Article 28 APD (recast). According to Article 28 APD (recast), in case of an implicit withdrawal, the determining authority takes a decision either to discontinue the examination or, provided that it considers the application to be unfounded on the basis of an adequate examination of its substance, to reject it.

Based on the above, UNHCR reiterates its recommendation to introduce the option to discontinue the examination of an application to the extent that this facilitates the closure of an application that is deemed not to be pursued by an applicant, without being obliged to take a decision on the merits.

Furthermore, the draft amendment in Article 18 para. 1 and 2 adds two more categories of applications for international protection to be considered as manifestly unfounded: a. applications by applicants who have "blatantly" violated their duty to cooperate, and b. where "it is clear from the circumstances of the particular case that [the applicant] remains in the country solely for economic reasons or in order to avoid a general situation of emergency."

UNHCR considers that manifestly unfounded applications include applications for refugee status 'clearly not related to the criteria for refugee status' and subsidiary forms of protection or which are 'clearly fraudulent or abusive'. The category of abusive or fraudulent claims involves those made by

[13] See also Article 6 para.1, 3rd indent of the APD (recast).
[14] See UNHCR Comments to L. 4636//2019, Article 81 and above comment on Article 11 on the possibility to omit the personal interview.
[15] See also UNHCR Comments to L.4636/2019, Article 81.

individuals who clearly do not need international protection.[16] UNHCR wishes to point out that a conclusion for a claim to be manifestly unfounded cannot be derived from general circumstances, but needs to be determined based on the elements brought forward by the applicant.

Therefore, UNHCR recommends to re-assess the two additional grounds to consider an application as unfounded in light of above outlined definition and ensure that only those applications are considered manifestly unfounded that are so obviously without foundation as not to merit full examination.[17]

A.5. Change of definition of subsequent application (Article 5 para. 2)

The proposed amendment defines a subsequent application as an application which is submitted "after a decision that cannot be challenged through the remedy provided in art. 108 of the Law". Article 108 provides for the possibility to submit an application for annulment of a decision by the Independent Appeals Committees (IAC) before the competent Administrative Courts. Nevertheless, according to Article 63 (a) a "final decision" is the decision of the Independent Appeals Committees or the decision of the Asylum Service that cannot be challenged through an appeal as the deadline has expired.

Article 2 (q) APD (recast) provides that a "subsequent application" means a further application for international protection made after a final decision has been taken on a previous application. Article 2 (e) of the Directive Provides that a "final decision is a decision on whether the third- country national or stateless person be granted refugee or subsidiary protection status […] which is no longer subject to a remedy within the framework of Chapter V of this Directive […]". In the Greek context, the remedy "within the framework of Chapter V", corresponds to the procedures before the Independent Appeals Committees[18], which are by law the appeal body in the Greek legal order according the Chapter V.

Making the submission of a subsequent application contingent upon an annulment of a decision by the IAC by judicial recourse may forfeit the purpose subsequent applications can fulfil, i.e. the introduction of new elements, which, if known earlier, had potentially led to a different decision. The judicial recourse for annulment against a decision by the Independent Appeals Committees is a review of an administrative act on the points of law, and not on the merits, and is part of the national judicial procedures guaranteeing the judicial overview of all administrative acts. A subsequent application seeks to serve a different purpose as outlined above.

In view of the above, UNHCR recommends to maintain the provision as currently in force without amendment. Instead, the introduction of a system for faster examination of subsequent applications could serve the purpose of curbing the abusive use of subsequent applications.

B. Comments on provisions related to the right to appeal and effective remedy

B.1.New means of notification of first instance decisions (Article 15)

According to the draft amendment, decisions on applications for international protection can be notified by mail or email or through the use of an "electronic application" managed by the Asylum

[16] UN High Commissioner for Refugees (UNHCR), UNHCR Discussion Paper Fair and Fast - Accelerated and Simplified Procedures in the European Union, 25 July 2018, available at: https://www.refworld.org/docid/5b589eef4.html.

[17] UNHCR Executive Committee, The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum, 20 October 1983, No. 30 (XXXIV) – 1983, http://www.refworld.org/docid/3ae68c6118.html spec.: '(d) Considered that national procedures for the determination of refugee status may usefully include special provision for dealing in an expeditious manner with applications which are considered to be so obviously without foundation as not to merit full examination at every level of the procedure.'

[18] Chapter Z' L. 4636/2019 entitled "Procedures on Second Instance", including Articles 92 et seq. by which Article 46 of the Asylum Procedures Directive is transposed into the Greek legislation.

Service and to which applicant has access through an account that he/she maintains. Such notification should be accompanied by a document explaining in a language the applicant can reasonably understood and in simple and accessible way the contents of the document served, the consequences for the applicant and the actions that may be taken. Alternatively, an electronic link to the website of the Ministry of Migration and Asylum may be provided, when such information is provided there. Moreover, paragraph 2 of Article 15 provides that when the applicant is detained or is under Reception and Identification procedures, decisions are notified to the Head of the detention facility or the Head of the Reception and Identification Centre (RIC), who has the obligation of onward notification. Most concerning is the provision according to which a notification is deemed completed after 3 days from its reception by the Head of detention facility or of the RIC, irrespective of whether they have indeed uploaded the information on dates and times on a board or not, if the applicants have been adequately informed on the process etc.

This may raise concerns that the above means do not constitute an "appropriate" notification as required by Recital 25 of the APD (recast) and do not ensure that the applicant acquires knowledge of decisions that concern him/her. Taking into consideration the current living conditions particularly in the RICs and the prevailing challenges in regulating and managing this environment, including to ensure a reliable, timely and consistent notification pathway, UNHCR is of the view that the proposed amendment disproportionally shifts the burden on applicants. In the possible event of delay, it further affects their timely knowledge of the decisions affecting them and reasons for those, and, consequently, their capacity to exercise their rights, in particular, their right to appeal, the effectiveness of which EU Member States must ensure (Articles 46(1) APD (recast) and 47 EU Charter of Fundamental Rights).[19]

Moreover, the provision allowing information on a decision to be given through access to an internet site which will include "all this information" is vague and, unless specified, it risks to be at variance with the requirements of APD (recast), should the respective information contained online not address the set forth requirements. According to Article 19(1) APD, the applicant, on request, has to be provided with information in order to clarify the reasons of a negative decision and how to challenge it, which may require to also provide information tailored to the individual case. Article 11 (2) 2nd indent APD (recast) only permits not to provide information on how to challenge a decision if the applicant has been provided with such information at an earlier stage either in writing or by electronic means accessible to the applicant.

Additionally, the proposed amendment in para.2 is referring only to the "abstract of the operative part and the accompanying explanatory document" being notified to applicants in detention or in RICs, and not the full text of the decision. This could be at variance with the provision of Article 11 para. 2 of the APD (recast), which provides that *"where an application is rejected with regard to refugee status and/or subsidiary protection status, the reasons in fact and in law are stated in the decision."*

Based on the above, UNHCR recommends that the provision is amended in order to ensure appropriate notification of asylum decisions and proper information so as to guarantee the effective exercise of rights, particularly the right to appeal a negative decision. The presumption, applicable in RICs and detention centres, of the notification having taken place 3 days after the reception by the respective Head, should not be maintained. Should the modalities of mail or e-mail notification be maintained, they should be accompanied with procedural safeguards such as, for example, that the notification is considered completed only if a. applicants and/or their lawyers have agreed to notification through electronic means (email etc.), b. a written reply to the e-mail or a proof that

[19] See also the judgments of the Court of Justice of the European Union in *Torubarov* (C-556/17), paras. 51, 55; *LH* (C-564/18), paras. 61, 65; and *PG* (C-406/18), paras. 26, 28.

the applicant has downloaded/viewed the decision in the electronic application is required to confirm receipt and c. if a proof of reception of a registered mail is received by the competent authorities.

B.2.Access to legal aid at the appeal stage as a procedural safeguard (Articles 9 and 25)
In UNHCR's view, the right to legal assistance and representation is an essential safeguard, especially in complex European asylum procedures. Asylum-seekers are often unable to articulate cogently the elements relevant to an asylum claim without the assistance of a qualified counsellor because they are not familiar with the precise grounds for the recognition of refugee status and the legal system of a foreign country.[20] Access to legal aid thus serves the protection of the rights of applicants in asylum procedures, including at appeal stage.

According to the proposed draft amendments, free legal aid is provided only if the appeal is deemed as having a tangible prospect of success. Moreover, the application for the provision of free legal assistance has to be submitted within two days from the notification of the first instance decision, while the current legislation provides for 10, 5 and 3 days before the hearing of the appeal, respectively, in the regular procedure, in the accelerated procedure and for applicants in RICs, while for border procedures it is submitted simultaneously with the appeal.

Although, depending on its application, the above draft provision may be in line with Article 20 para. 3 of the APD (recast), it is UNHCR's view that a "merits test", as the above, risks making an essential procedural safeguard dependent on a "pre-screening" of the case. UNHCR's 2010 APD study highlighted that in some Member States, merits tests were applied in ways that could lead to arbitrary restriction of access to legal assistance on appeal.[21] This would then be at variance with Article 20 para. 3 APD (recast), which explicitly affirms in the 3d indent that *"(…) Member States shall ensure that legal assistance and representation is not arbitrarily restricted and that the applicant0s effective access to justice is not hindered."* Furthermore, a purpose of free legal aid at appeal stage (a mandatory service to be provided by the State according to APD) is to highlight those aspects of a case that were not adequately addressed in the first instance examination. Therefore, the provision of legal aid cannot be made dependent on the examination of the first instance file. In UNHCR's view, exceptions to the provision of free legal aid should only be made where the applicant has adequate financial means.[22]

Additionally, the very short deadline of two days from the notification of the 1st instance decision in all procedures, for the submission of applications for free legal aid, could undermine the exercise of this right.

Based on the above, UNHCR recommends that the draft amendment in Articles 9 is not maintained.

B.3. Right of the applicant to lawfully stay in the country (Article 28)
With the proposed amendment the applicant is considered as legally staying in the country until the issuance of the appeal decision and not until its notification, as it is provided for by the currently applicable legislation.

[20] 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), 10 February 2005, page 18, available at: http://www.unhcr.org/refworld/docid/42492b302.html
[21] UNHCR APD Study, note 23 above. See also Devon law Centre, Asylum Appellate Project – Final Report, March 2010.
[22] UNHCR: Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, footnote 20 above, p. 19.

UNHCR is concerned that such amendment would allow for the removal of a person from the territory before a second instance decision is notified to him/her. The parallel notification of a negative appeal decision is also undermining the right to judicial protection as provided in Articles 108 *et seq.* of the Law, as persons whose claims are rejected will not be able to submit an application for annulment or an application for suspension in practice, which could ultimately lead to a violation of the principle of *non-refoulement*. The deprivation of legal stay before a notification of a negative decision has further premature negative repercussions on the enjoyment of the rights of asylum seekers from which they are to be excluded only following the notification of negative decision (e.g. the right to shelter and cash assistance).

Therefore, UNHCR recommends that the above draft amendment not be maintained.

C. Comments related to protection from arbitrary detention of asylum applicants

C.1. Establishment of « Island Closed Controlled Facilities" (Article 33 para. 3)

Through the proposed amendment, the Draft Law would introduce the establishment of Island Closed Controlled Facilities as regional Reception and Identification Service facilities, notably for asylum seekers and persons in return procedures. However, the proposed provision does not specify further relevant information, such as the reasons for placing asylum seekers in such facilities, the possibility of and procedures for entry and exit, general conditions, the maximum period of stay and whether and under which conditions legal representatives, UNHCR, NGOs as well as other actors involved in providing assistance to asylum seekers will be granted access. Furthermore, information is amiss with regard to the general operation of such facilities. It is only provided that RICs, Closed Temporary Reception Facilities, Pre-removal Detention Centres, and separate areas for the accommodation of vulnerable persons may operate in distinct areas of such facilities. While for persons in return procedures, Article 15 of the Return Directive[23] needs to be considered by EU Member States, UNHCR notes that asylum-seekers have a different status and decisions amounting to a deprivation of their freedom of movement/detention should be a measure of last resort.[24] On the other hand, certain time-bound limitations on freedom of movement to manage the identification, screening and referral of cases, and for the purpose of accelerated procedures for manifestly unfounded cases, can be permissible if necessary and proportional, and subject to judicial review. This position is supported by Article 8 of the Reception Conditions Directive[25], which states in para. 1 the principle that a person shall not be held in detention for the sole reason that he or she is an applicant for international protection. Only as ultima ratio, where necessary based on an individual assessment and if other less coercive alternative measures cannot be applied effectively (para. 2), detention may be resorted to only for the limited reasons as set forth in para. 3 and which need to be laid down in national law.

UNHCR notes that regardless of the legal definition of the aforementioned facilities, the envisaged deprivation of liberty may amount to detention depending on the particular circumstances to be

[23] 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, OJ L. 348/98-348/107; 16.12.2008, 2008/115/EC, available at: https://www.refworld.org/docid/496c641098.html

[24] 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, available at: https://www.refworld.org/docid/503489533b8.html

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

applied.[26] In this respect, the ECtHR undertakes an autonomous assessment whether or not there has been a deprivation of liberty,[27] taking into account of criteria such as the type, duration, effects and manner of implementation of the measure in question.[28]

UNHCR recommends that the amendment ensures that, as a rule, asylum-seekers shall not be detained, also as required by Article 8 RCD. Where, exceptionally and as ultima ratio, and only for legitimate reasons, asylum-seekers are deprived of their liberty, the amendment should clarify the conditions of stay in such facilities and the respective operation of the envisaged facilities. Regarding persons under return procedures, regards must be given to Article 15 of the Return Directive. Furthermore, the introduction of Closed Controlled Facilities under the Reception and Identification Service, might not be in accordance with the purpose of the Service as described in Article 8 of L. 4375/2016. Eventually, UNHCR considers that it must be further clarified which of the areas will operate as closed or as controlled facilities, which group of population will be accommodated in each – and how their entry/exit from certain areas will be regulated.

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[26] UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012
[27] See ECtHR Guide on Article 5 of the European Convention on Human Rights, Right to liberty and security, Updated on 31 December 2019, p. 8 , para. I (B) (4), with case law cited.
[28] *Ibid,* para. I (B) (5)