

## UNHCR Observations on the bill of law amending the Act on Foreigners, no. 80/2016

### *Frumvarp til laga um breytingu á lögum um útlendinga, nr. 80/2016 (alþjóðleg vernd)*

#### I. INTRODUCTION

1. The United Nations High Commissioner for Refugees (“UNHCR”) Representation for the Nordic and Baltic Countries (“RNB”) appreciates the invitation by the Parliament of Iceland to provide observations on the “Bill of Law amending the Act on Foreigners, no. 80/2016 (International Protection)” (Frumvarp til laga um breytingu á lögum um útlendinga, nr. 80/2016 (alþjóðleg vernd)) concerning a comprehensive reform of the Foreigners Act - hereafter the “Proposal”.<sup>1</sup>
2. UNHCR has a direct interest in law proposals related to asylum, as the agency entrusted by the UN General Assembly with the mandate to provide international protection to refugees and, together with Governments, seek permanent solutions to the problems of refugees.<sup>2</sup> Paragraph 8 of UNHCR’s Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees,<sup>3</sup> whereas the 1951 Convention relating to the Status of Refugees<sup>4</sup> and its 1967 Protocol (hereafter collectively referred to as “1951 Convention”) oblige State Parties to cooperate with UNHCR in the exercise of its mandate, in particular facilitating UNHCR’s duty of supervising the application of the provisions of the 1951 Convention (Article 35 of the 1951 Convention and Article II of the 1967 Protocol). This has also been reflected in European Union (“EU”) law, including by way of reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the EU. The UN General Assembly has also entrusted UNHCR with a global mandate to provide protection to stateless persons world-wide and for preventing and reducing statelessness.<sup>5</sup>

<sup>1</sup> Parliament of Iceland, Útlendingar (alþjóðleg vernd), <https://www.althingi.is/thingstorf/thingmalalistar-efrir-thingum/ferill/?ltg=153&mmr=382>.

<sup>2</sup> UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V) <https://www.refworld.org/docid/3ae6b3628.html> (“the Statute”).

<sup>3</sup> Ibid, para. 8(a). According to para. 8(a) of the Statute, UNHCR is competent to supervise international conventions for the protection of refugees. The wording is open and flexible and does not restrict the scope of applicability of the UNHCR’s supervisory function to one or other specific international refugee convention. UNHCR is therefore competent qua its Statute to supervise all conventions relevant to refugee protection, UNHCR’s supervisory responsibility, October 2002 <http://www.refworld.org/docid/4fe405ef2.html>, pp. 7–8.

<sup>4</sup> UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations Treaty Series, No. 2545, vol. 189 <http://www.unhcr.org/refworld/docid/3be01b964.html>. According to Article 35 (1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of the Convention”.

<sup>5</sup> UN General Assembly Resolution A/RES/50/152, 9 February 1996 <http://www.unhcr.org/refworld/docid/3b00f31d24.html>, reiterated in subsequent resolutions, including A/RES/61/137 of 25 January 2007, <http://www.unhcr.org/refworld/docid/45fa902d2.html>, A/RES/62/124 of 24 January 2008 <http://www.unhcr.org/refworld/docid/47b2fa642.html>, and A/RES/63/148 of 27 January 2009 <http://www.unhcr.org/refworld/docid/4989619e2.html>.

3. UNHCR's observations are structured as follows: Section II sets out observations on select aspects of the Proposal, that is, repeat applications (proposed new Article 35a), the concepts of first country of asylum and safe third country (proposed Article 36, paragraph 1), and family reunification (proposed Article 45, paragraph 2) of the Act on Foreigners and Section III sets out the conclusions.

## II. OBSERVATIONS

4. In light of the considerable increase in the number of asylum-seekers arriving in Iceland in 2022,<sup>6</sup> UNHCR notes with appreciation the comprehensive efforts made by the Icelandic Government to scale up the reception system to meet the needs of new arrivals and to uphold the fundamental right to seek and enjoy asylum in Iceland.
5. UNHCR also acknowledges the purpose of the reform of the Foreigners' Act to reflect recent developments and to clarify certain elements related to the provisions on international protection. One of the main aims of the Proposal is to "fight secondary movement" as the number of asylum applicants in Iceland who have previously either applied or been granted protection elsewhere, has increased.
6. UNHCR submitted observations on an earlier version of the draft proposal on 16 August 2019. The present observations complement and should be read in conjunction with the previous comments.<sup>7</sup>

### Repeat applications for international protection

7. According to the Proposal, there is a need to harmonize the Icelandic rules and procedures with regard to repeat (subsequent) applications for international protection with other European countries and to make them more efficient. Such applications will be dismissed unless the applicant is present in Iceland and new information is available in the case which leads to an *apparent increased probability* that the subsequent application will be approved.
8. In UNHCR's view, treating an application as a subsequent application is justified only if the previous claim was considered fully on the merits, involving all the appropriate procedural safeguards. There could be a number of valid reasons for an applicant to lodge a subsequent application which decision-makers must evaluate prior to dismissing the application. Such elements may include *inter alia* changes in the situation in the country of origin, deficiencies or flaws in the previous procedure preventing an adequate examination, trauma or other inhibitions preventing a full testimony by the applicant in the previous procedure or the applicant having obtained further evidence after the previous examination.

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<sup>6</sup> Directorate of Immigration, Statistics, available at: <https://island.is/en/o/directorate-of-immigration/statistics>, last accessed 3 November 2022.

<sup>7</sup> UNHCR, Observations on Law Proposal, 16 August 2019. These observations are enclosed in the present submission.

9. In principle, UNHCR agrees that subsequent applications may be subjected to a preliminary examination of whether new elements have arisen or been presented which would warrant an examination of the substance of the claim. Such an approach permits the quick identification of subsequent applications which do not meet these requirements. UNHCR is, however, concerned about the proposed heightened evidence threshold required for repeat applications. In UNHCR's view, a preliminary examination would not require assessing whether such elements "significantly increase the likelihood" of the applicant qualifying as a beneficiary of international protection. Whether an application qualifies for international protection requires an examination of the merits in a new procedure.<sup>8</sup>

### **Applicants with links to another country ("first country of asylum" or safe third country)**

10. The Proposal seeks to limit the possibility for a substantive examination of applications made by applicants who have "special ties" to another country, as long as the applicant does not fear persecution in that country. Applications made by individuals who have already obtained "effective international protection" in another country prior to coming to Iceland will also not be examined on the merits. The proposal does not define the criteria used to determine when a country is considered a "first country of asylum".
11. UNHCR recognizes that the onward movement of asylum-seekers and refugees may create challenges for Iceland and for the international protection system as a whole. In some cases, refugees and asylum-seekers move onward in order to seek international protection which is not in fact available in the place to which they have initially fled; or to access the means of survival, through humanitarian assistance or otherwise; to join family members from whom they are separated, or to secure durable solutions. In some cases, they may move onward with the aim of benefitting from economic opportunities or standards of treatment that are, or are perceived to be, higher.<sup>9</sup> However, if asylum-seekers refrain from seeking international protection in the State where they had an effective opportunity to do so, it results in administrative duplication, delays as well as additional demands on reception capacities and asylum systems in different countries.
12. The 2016 New York Declaration for Refugee and Migrants, therefore, observes that the ability of refugees to lodge asylum claims in the country of their choice may be regulated, subject to the safeguard that they will have access to, and enjoyment of, international protection elsewhere. Refugees may thus be returned or transferred to a State where they had found, could have found or, pursuant to a formal agreement, can find international

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<sup>8</sup> UNHCR, Comments on the European Commission's Proposal for an Asylum Procedures Regulation, April 2019, COM (2016) 467, available at: <https://www.refworld.org/docid/5cb597a27.html>, p. 37.

<sup>9</sup> UNHCR, Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-seekers, September 2019, available at: <https://www.refworld.org/docid/5d8a255d4.html>.

protection. Refugees do not have an unfettered right to choose their ‘asylum country’, but their intentions ought to be taken into account.<sup>10</sup>

*First country of asylum*

13. With respect to applicants who have already been granted international protection in another country upon arriving in Iceland, the so called “first country of asylum” concept generally applies. The international protection received in that first country needs to continue to be accessible and effective for the individual concerned. While the proposal does not define the criteria used for determining a “first country of asylum”, UNHCR has consistently maintained that an application of the first country of asylum concept requires an individual assessment of whether the refugee will be
- a. readmitted to the ‘first country of asylum’;
  - b. granted lawful stay there; and
  - c. accorded standards of treatment commensurate with the 1951 Convention and its 1967 Protocol and international human rights standards, including – but not limited to – protection from refoulement.<sup>11</sup>

Only where these criteria are met in the individual case, can the application be dismissed without an examination on the merits and the applicant returned to the first country of asylum.

*Third country of asylum*

14. With respect to applicants who have not yet obtained international protection in a third country but could have or can find protection in that State, the “safe third country concept” applies. Prior to transfer, it is important, keeping with relevant international law standards, individually to assess whether the third State will:
- a. (re)admit the person,
  - b. grant the person access to a fair and efficient procedure for determination of refugee status and other international protection needs,
  - c. permit the person to remain while a determination is made,
  - d. accord the person standards of treatment commensurate with the 1951 Convention and international human rights standards, including – but not limited to – protection from refoulement; and
  - e. where she or he is determined to be a refugee, s/he should be recognized as such and be granted lawful stay.
15. According to the Proposal, protection in the third country should be in compliance with the 1951 Convention, however, it is not required for the third country to be a signatory to the 1951 Convention. UNHCR has consistently maintained that being a “State party to the 1951

<sup>10</sup> UN General Assembly, New York Declaration for Refugees and Migrants: resolution / adopted by the General Assembly, 3 October 2016, A/RES/71/1, <https://www.refworld.org/docid/57ceb74a4.html>, para. 70.

<sup>11</sup> UNHCR, Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries, April 2018 <https://www.refworld.org/docid/5acb33ad4.html>, para. 3.

Convention and basic human rights instruments without any limitations is a critical indicator” of effective protection.<sup>12</sup> As such,

*“[a]ccess to human rights standards and standards of treatment commensurate with the 1951 Convention and its 1967 Protocol may only be effectively and durably guaranteed when the state is obliged to provide such access under international treaty law, has adopted national laws to implement the relevant treaties and can rely on actual practice indicating consistent compliance by the state with its international legal obligations.”<sup>13</sup>*

16. With respect to the proposed consideration that it be “natural and reasonable” for the applicant to stay in the third country,<sup>14</sup> UNHCR has consistently been advocating for a meaningful link or connection to exist that would make it reasonable and sustainable for a person to seek asylum in another State. Taking into account the duration and nature of any sojourn, and connections based on family or other close ties - including previously acquired rights in the State such as previous residence or long-term visits, and linguistic, cultural or other similar ties - increases the viability of the return or transfer from the viewpoint of both the individual and the third country. Such a link would further reduce the risk of irregular onward movement, prevents the creation of ‘orbit’ situations and advances international cooperation and responsibility sharing rather than shifting burden between States.<sup>15</sup>

### **Family reunification for beneficiaries of international protection**

17. UNHCR notes that the changes relating to family reunification set out in the Proposal are two-fold. Firstly, the Proposal seeks to remove the right to family reunification for resettled refugees under Article 70(4) of the Act on Foreigners. Secondly, individuals granted collective or derivative protection status would retain their right to family reunification while their family members would not be granted derivative protection status.

#### *Right to family reunification for resettled refugees*

18. With regard to resettled refugees, the Proposal outlines that there should be no need for family reunification following arrival in Iceland “since when choosing which groups and individuals are invited to the country, the United Nations Refugee Agency is consulted, and family unity is taken care of.”<sup>16</sup>

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<sup>12</sup> 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 <https://www.refworld.org/docid/3fe9981e4.html>, para. 15(e).

<sup>13</sup> UNHCR, Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries, para. 10.

<sup>14</sup> The Proposal, p. 28.

<sup>15</sup> UNHCR, Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-Seekers, September 2019 <https://www.refworld.org/docid/5d8a255d4.html>, para. 23.

<sup>16</sup> The Proposal, p. 33.

19. UNHCR emphasizes that family unity is an essential right of all beneficiaries of international protection, including resettled refugees. The right to family life is recognized in the Universal Declaration of Human Rights and several other international human rights instruments.<sup>17</sup> UNHCR’s Executive Committee (“ExCom”) has further highlighted the “fundamental importance” of family reunification, emphasizing the need for reunification to take place “with the least possible delay.” ExCom has also called on countries of asylum to “apply liberal criteria in identifying those family members who can be admitted with a view to promoting a comprehensive reunification of the family”.<sup>18</sup>
20. With regard to the proposal to remove the right to family reunification for resettled refugees with the assumption that family unity is “taken care of” during the time of resettlement, UNHCR wishes to underline that

*“[a]s a result of flight, families are often separated and dispersed. Sometimes families can be reunited in a country of asylum prior to resettlement, however, this is not always possible and cannot be guaranteed. Whereabouts of family members may be unknown, or they may be in different countries, with no legal possibility to travel between those two countries and be reunited. The right to family reunification in the resettlement country is therefore crucial to ensure family unity of resettled refugees.”<sup>19</sup>*

#### *Derivative status for family members of beneficiaries of international protection*

21. As UNHCR understands, the current version of draft Article 45(2) of the Act on Foreigners seeks to clarify what kind of status the family members of different protection status holders will be afforded. According to the Proposal, family members of refugees and stateless persons under Articles 37 and 39 of the Act on Foreigners would get the same status as the principal applicant, that is, international protection status. Family members of other protection beneficiaries, such as, for instance, those granted collective protection can still apply for family reunification but would not be granted international protection status themselves but rather a residence permit on family grounds. A residence permit on family grounds, under Articles 70-72 of the Act on Foreigners, would normally only be issued for a period of one year (with a maximum of two years to align the length with the permit of the

<sup>17</sup> Article 16(3), UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III): <https://www.refworld.org/docid/3ae6b3712c.html>.

<sup>18</sup> ExCom Conclusions No. 9 (XXVIII) on Family Reunion, 1977; No. 24 (XXXII) on Family Reunification, 1981; No. 84 (XLVIII) on Refugee Children and Adolescents, 1997; No. 88 (L), 1999 on the Protection of the Refugee’s Family; No. 104 (LVI), 2005 on Local Integration; and No. 107 (LVIII), 2007 on Children at Risk. See UNHCR, Conclusions on International Protection Adopted by the Executive Committee of the UNHCR Programme 1975 – 2017 (Conclusion No. 1 – 114), October 2017, HCR/IP/3/Eng/REV. 2017, <https://www.refworld.org/docid/5a2ead6b4.html>. See also, UNHCR, Statement on family reunification for beneficiaries of international protection Issued in the context of the preliminary ruling reference to the Court of Justice of the European Union in the case of CR, GF, TY v. Landeshauptmann von Wien (C-560/20), 22 June 2021, <https://www.refworld.org/docid/60d20abe4.html>, para 3.1.2.

<sup>19</sup> UNHCR comments (No. 7), section 5.

principal applicant), compared to a four-year residence permit issued to beneficiaries of international protection.

22. While there is no explicit provision on family reunification in the 1951 Convention, the Final Act of the UN Conference of Plenipotentiaries recommended Governments to take the necessary measures for the protection of the refugee's family, especially with a view to ensuring that "the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country."<sup>20</sup> Hence, if the head of a family meets the criteria of the definition, his/her dependents should normally be granted refugee status according to the principle of family unity.<sup>21</sup> The principle of the unity of the family does not only operate where all family members become refugees at the same time. It applies equally to cases where a family unit has been temporarily disrupted through the flight of one or more of its members.

23. The UNHCR Procedural Standards (primarily intended for UNHCR's own operations where the organization carries out refugee status determination) notes as follows:

*"as a general rule, family members/dependants of a recognized refugee who meet the eligibility criteria for refugee status under UNHCR's mandate should be recognized as refugees in their own right, even if they have applied for refugee status as part of a family rather than on an individual basis. In this regard, it is important to note that accompanying family members/dependants will often have the same international protection needs as the recognized refugee due to similarities in profile, personal circumstances and the conditions in the country of origin.*

24. The UNHCR procedural standards further provides that:

*"Individuals who are granted derivative refugee status enjoy the same rights and entitlements as other recognized refugees, and should retain this status notwithstanding the subsequent dissolution of the family through separation, divorce or death, or the fact that a child reaches the age of majority"<sup>22</sup>*

25. According to the Procedural Standards, there are some categories of persons not eligible for derivative status:

*"As a general rule, a person cannot acquire derivative refugee status solely on the basis of a family/dependency relationship with a person who has derivative refugee status. For instance, the spouse of a person who has derivative refugee status will not be able to be*

<sup>20</sup> Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 25 July 1951, A/CONF.2/108/Rev.1, [www.refworld.org/docid/40a8a7394.html](http://www.refworld.org/docid/40a8a7394.html).

<sup>21</sup> UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, April 2019, HCR/1P/4/ENG/REV. 4, <https://www.refworld.org/docid/5cb474b27.html>, para. 184.

<sup>22</sup> UNHCR, Procedural Standards for Refugee Status Determination Under UNHCR's Mandate, 26 August 2020 <https://www.refworld.org/docid/5e870b254.html>, Chapter 5.2.

*granted derivative refugee status as a result of the marriage unless he or she forms a direct dependency relationship with the Refugee Status Applicant. It must be noted, however, that a derivative refugee status holder may himself or herself become eligible for refugee status in his or her own right as a result of his or her own actions or changes in the country of origin since departure (sur place claims).”<sup>23</sup>*

### III. CONCLUSIONS

26. Based on the above, UNHCR invites Iceland to consider potential amendments to the Proposal in order to:

- a. Ensure that an application is only considered a subsequent application where the initial application was considered **fully on the merits**;
- b. Clearly outline in law the relevant assessment that needs to be carried out when applying the concepts of first country of asylum” and “third country of asylum” respectively, in line with the criteria set out above;
- c. Refrain from returning or transferring an applicant to a country that is not a **State party to the 1951 Convention and/or its 1967 Protocol** and basic human rights instruments;
- d. Remove the requirement of “**significantly increased likelihood** for qualifying for international protection” when assessing repeat applications in proposed Article 35(a);
- e. Maintain the right to family reunification for **resettled refugees**;
- f. Recognize **family members/dependants of a holder of international protection status as beneficiaries of international protection in their own right**, including when the principal applicant is a beneficiary of collective temporary protection.

UNHCR Representation for Nordic and Baltic Countries

22 November 2022

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<sup>23</sup> Ibid.