



**Opinion by the Office of the United Nations High Commissioner for Refugees
for the Petition of 21-Jinjeong-0274200 submitted to the
National Human Rights Commission of Korea**

Introduction

1. These observations are submitted by the Office of the United Nations High Commissioner for Refugees (“UNHCR”)¹ in relation to petition 21-Jinjeong-0274200 before the National Human Rights Commission of Korea (“NHRCK”).
2. As the subsidiary organ entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions,² UNHCR has a direct interest in this matter. According to its Statute, UNHCR fulfils its mandate *inter alia* by “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto[.]”³ This supervisory responsibility is reiterated in Article 35(1)⁴ of the 1951 Convention relating to the Status of Refugees (“1951 Convention”)⁵ and Article II of the 1967 Protocol relating to the Status of Refugees (“1967 Protocol”).⁶
3. UNHCR’s supervisory responsibility is exercised, among other ways, by the issuance of interpretive guidelines on the meaning of provisions and terms contained in international refugee

¹ These submissions do not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoys under applicable international legal instruments and recognized principles of international law: UN General Assembly, *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, available at: <https://www.refworld.org/docid/3ae6b3902.html>.

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

³ *Ibid.*, at para. 8(a).

⁴ According to Article 35(1) of the 1951 Convention, States undertake to co-operate with UNHCR and “shall facilitate its [UNHCR’s] duty of supervising the application of the provisions of the Convention”.

⁵ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series No. 2545, vol. 189, pp. 137, available at: <https://www.unhcr.org/3b66c2aa10.pdf>.

⁶ UN General Assembly, *Protocol Relating to the Status of Refugees*, 4 October 1967, United Nations Treaty Series No. 8791, vol. 606, pp. 267, available at: <http://www.unhcr.org/3b66c2aa10.pdf>.

instruments, in particular the 1951 Convention and the 1967 Protocol.⁷ UNHCR regularly provides information to decision-makers and courts of law concerning the proper interpretation and application of the provisions of the 1951 Convention and has a history of third-party interventions in many national and regional jurisdictions. The Office is often approached directly by courts or other interested parties to obtain UNHCR's expertise⁸ on particular legal issues.

4. UNHCR's expertise on the interpretation of international refugee law is reflected notably in UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees ("UNHCR Handbook") first issued upon the request of UNHCR Executive Committee ("ExCom"),⁹ but also in UNHCR Guidelines on International Protection, as envisaged in UNHCR *Agenda for Protection*, endorsed by the ExCom.¹⁰ Korean courts have found that UNHCR's guidance "must be respected in interpretation and application of the Convention", considering the obligation of Contracting States under Article 35 of the 1951 Convention as well as its preamble.¹¹ The UNHCR Handbook has been found by many other judicial authorities, including the Supreme Courts of Canada, the United Kingdom, and of the United States respectively to be a "highly relevant authority",¹² a "highly persuasive authority",¹³ providing "significant guidance",¹⁴ and "should be accorded considerable weight", in the light of the obligation of Member States under article 35 of the Convention to facilitate its duty of supervising the application of the provisions of the Convention".¹⁵

⁷ Such guidelines include the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* ("UNHCR Handbook") which was subsequently complemented by a number of *Guidelines on International Protection*: HCR/1P/4/ENG/REV. 4, April 2019, available at: <https://www.refworld.org/docid/5cb474b27.html>.

⁸ United Kingdom: Supreme Court, *R (on the application of EM (Eritrea)) v. Secretary of State for the Home Department*, [2014] UKSC 12, 19 February 2014, available at https://www.refworld.org/cases_UK_SC_5304d1354.html at para. 72.

⁹ The Executive Committee of the High Commissioner's Programme ("UNHCR's Executive Committee" or "ExCom") is an intergovernmental body currently comprised of 107 Member States of the United Nations and the Holy See. The Republic of Korea is an active member of ExCom. Chief among its duties, the ExCom advises UNHCR in the exercise of its protection mandate.

¹⁰ UNHCR, *Agenda for Protection: UN High Commissioner for Refugees*, Goal 1, para. 6: October 2003, Third edition, available at: <https://www.refworld.org/docid/4714a1bf2.html>

¹¹ See, for example, 2019Nu47119 (Seoul High Court, 27 Sep 2019); 2014Nu52093 (Seoul High Court, 28 Jan 2015); 2013KuHap13617 (Seoul Administrative Court, 10 Oct 2013).

¹² Canada: Supreme Court, *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593, 19 October 1995, available at: https://www.refworld.org/cases_CAN_SC_3ae6b68b4.html at paras. 46 and 119; Canada: Supreme Court, *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 30 June 1993, available at: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/1023/1/document.do> at pp. 713-714.

¹³ United Kingdom: House of Lords (Judicial Committee), *R v. Secretary of State for the Home Department, Ex parte Adan, Ex parte Aitseuger*, 19 December 2000, available at: https://www.refworld.org/cases_GBR_HL_3ae6b73b0.html.

¹⁴ United States: Supreme Court, *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421; 107 S. Ct. 1207; 94 L. Ed. 2d 434; 55 U.S.L.W. 4313, 9 March 1987, available at: https://www.refworld.org/cases_USSCT_3ae6b68d10.html.

¹⁵ United Kingdom: Supreme Court, *Al-Sirri (FC) (Appellant) v Secretary of State for the Home Department (Respondent) and DD (Afghanistan) (FC) (Appellant) v Secretary of State for the Home Department (Respondent)* [2012] UKSC 54, 21 November 2012, available at: https://www.refworld.org/cases_UK_SC_50b89fd62.html at para. 36. Similarly, the Handbook has been found "particularly helpful as a guide to what is the international understanding of the Convention obligations, as worked out in practice". United Kingdom: Court of Appeal (England and Wales), *R v. Secretary of State for the Home Department, Immigration Appeals Tribunal, Ex parte Anthonypillai Francis Robinson*, Case No:FC3 96/7394/D, 11 July 1997, available at: https://www.refworld.org/cases_GBR_CA_CIV_3ae6b72c0.html at para. 11.

5. The Petitioner is an asylum-seeker who made a subsequent refugee status application (“subsequent application”) to the Ministry of Justice (“MOJ”) after their first application was denied by MOJ and ultimately rejected by the Supreme Court on appeal. The competent regional Immigration Office (“IO”) which registered the re-application determined it to be a “subsequent application without change in circumstances,” and refused to extend the Petitioner’s existing visa. Instead, the regional IO issued a departure order against the Petitioner, the deadline of which needs to be deferred repeatedly until the refugee status determination (RSD) is completed and affords the applicant no work rights nor health care rights in the interim.
6. MOJ’s practice of denying visas to subsequent applications ‘without change in circumstances’ has been defended in court as necessary due to increases in the number of asylum applications that burden the limited resources of the government and underpinned by policy considerations of preventing ‘abuse of the RSD system’.¹⁶ Against this background, NHRCK requested UNHCR to comment on: the documentation and adequate treatment of applicants making subsequent applications; criteria and standards related to re-applications; addressing excessive workload and burden on RSD systems; and other related issues.
7. UNHCR submits this opinion to provide neutral and expert information in order to assist the NHRCK in its deliberations. In this opinion, UNHCR presents its recommendations on the importance of quality RSD decision making at first instance and access to an effective remedy. It also presents its recommendations on measures that can strengthen efficiency and adaptability of the asylum procedure, while maintaining fairness, quality and integrity, such as frontloading, triaging and usage of case processing modalities. It further provides UNHCR’s interpretation of necessary procedural safeguards and criteria for preliminary examination of subsequent applications. Finally, it presents its opinion on support and reception conditions of asylum-seekers undergoing preliminary examination of subsequent applications. UNHCR will only address issues of legal principle arising from these points and will not address or comment on the particular facts of the claim.

Case processing modalities that can help to prevent and address RSD backlogs, whilst ensuring efficiency and quality of RSD

8. UNHCR appreciates the engagement of the RoK authorities towards the enhancement of their national protection capacity, as pledged during the 2019 Global Refugee Forum.¹⁷ As the

¹⁶ *2020KuDan71041* (Seoul Administrative Court, 9 Jul 2021); *2020Nu10162* (Suwon High Court, 19 August 2020); *2019KuDan64429* (Seoul Administrative Court, 10 Sep 2020).

¹⁷ The GRF pledges made by the Republic of Korea includes the following: “As the first Asian country to enact a stand-alone refugee act in 2013, Korea has made continuous efforts to support the capacity building of its institutions and workforce for refugee status determination (RSD). To this end, the ROK government established a refugee division tasked with addressing refugee-related issues under the Ministry of Justice in 2013. Also, an independent refugee division dedicated to RSD was established under the Seoul

characteristics of quality asylum systems center around the principles of fairness, efficiency, adaptability, and integrity,¹⁸ efforts to improve one of those elements should be judiciously balanced to avoid any negative impact on the other elements. In particular, the efficiency of the asylum procedures should not compromise procedural fairness¹⁹ and fundamental human rights.

9. For this reason, UNHCR welcomes continued engagement with the authorities to enhance the quality of individual decisions-making in line with international standards and ensure due process (including the principle of non-discrimination, the right to be heard, to be provided with interpretation, the right to legal representation, the right to notice of decision). UNHCR stands ready to provide any necessary assistance for the development, and implementation of capacity development and/or quality assurance initiatives, as well as delivery of trainings on thematic areas (including country of origin information and its use), through workshops, on-the-job trainings and performance monitoring and evaluations. This is with a view to assisting the State's goal of enhancing institutional knowledge on RSD and qualifications of its RSD professionals, as well as achieving high quality, efficient decisions.
10. UNHCR acknowledges that the Republic of Korea has faced an unprecedented number of asylum applications in recent years, particularly prior to the COVID-19 pandemic outbreak. This has resulted in an increased backlog of Refugee Status Determination (RSD) applications. This is a concerning trend since delayed processing of RSD cases poses risks to asylum-seekers and could render RSD meaningless as a protection tool.²⁰
11. Faced with backlogs and/or increasing numbers of applications, State policies and practices are sometimes geared towards developing measures aimed at reducing the number of applications or arrival in the country rather than towards increasing, improving or streamlining processing capacity.²¹ Such actions may have some temporary success in reducing or containing an RSD backlog in a particular jurisdiction, but do not contribute to protection or responsibility sharing globally, and may risk violating the principle of *non-refoulement* and are at variance with the right to seek asylum.²² In the face of RSD backlogs, there may be a temptation to reduce procedural standards for the sake of efficiency,²³ which may result in the reduction of the quality of decision-making. However, lowering quality tends only to push the backlog further down the chain to

Immigration Office in 2016. The ROK government has also made continuous efforts to increase its workforce to strengthen Korea's refugee protection capacity and relevant infrastructure. The number of RSD officers increased to 91 as of July 2019, a huge increase from 8 when the Refugee Act was enacted. The ROK government will continue to put effort into increasing its expertise on RSD by various means such as establishing a division dedicated to appeals." <https://globalcompactrefugees.org/channel/pledges-contributions>

¹⁸ United Nations, *Global Compact on Refugees*, New York 2018, www.unhcr.org/5c658aed4.

¹⁹ UNHCR, *Observations on the European Commission Communication on 'A More Efficient Common European Asylum System: the Single Procedure as the Next Step'* (COM(2004)503 final; Annex SEC(2004)937, 15 July 2004), available at: www.refworld.org/pdfid/4156eee84.pdf.

²⁰ UNHCR, *Refugee Status Determination Backlog Prevention and Reduction*, PPLA/2018/03, January 2018, available at: <https://www.refworld.org/docid/5b1a38374.html> at p. 1.

²¹ *Ibid.*, at p. 2.

²² *Ibid.*

²³ *Ibid.*

appeal stages or result in subsequent applications, and further compounds the problem for first instance decision-making when many of those cases are sent back on remand.²⁴

12. As emphasized in *UNHCR's comment to the Legislative Amendment Proposal to the Refugee Act of the Republic of Korea*,²⁵ it is UNHCR's view that the two objectives of (1) ensuring efficiency in decision-making, while (2) maintaining high quality RSD that results in fair individual decisions in accordance with procedural safeguards are not incompatible. Diversified case processing strategies²⁶ could be considered to safeguard the quality and integrity of RSD, while promoting efficiency.
13. State asylum systems and UNHCR have tested and implemented various initiatives and measures with the objective of preventing and reducing RSD backlogs. A non-exhaustive list of measures and tools that can be utilized to prevent and reduce backlogs can be found in various UNHCR documents and guidance.²⁷ For the purpose of addressing the issues raised in the aforementioned petition, some selected concepts are highlighted here for consideration: frontloading, triaging, and usage of differentiated case processing modalities.
14. *Frontloading* refers to gathering more detailed information about the applicant and the reason(s) for flight at an early stage in the person's engagement with the asylum system, as well as capturing biometrics and obtaining documentation in support of the asylum claim. Such an approach can further allow for more effective triaging, differentiated case processing modalities and referrals to other services from the start of the asylum process. Frontloading can further reduce multiple and repeated interviews with an applicant.²⁸ Ineffective reception, registration, or first instance procedures may contribute to a higher number of multiple or repeat applications where return is not possible, and recognition becomes unlikely due to past exhaustion of a process.²⁹ Therefore, UNHCR and many States highlight the importance of front-loading investments in high-quality reception, registration, and first-instance decision-making.³⁰
15. *Triaging* refers to analyzing cases based on relevant, reliable and timely country of origin and specific profiles. Triaging typically starts upon registration of asylum applications and channelling them into different case processing modalities or 'tracks'.³¹ Cases can be triaged into different streams based on high and low recognition rates, as well as other case processing concepts (defined below) such as manifestly well-founded, manifestly unfounded and cases with

²⁴ *Ibid.*

²⁵ UNHCR, *UNHCR's Comments on the Legislative Amendment Proposal to the Refugee Act of the Republic of Korea*, 17 February 2021, available at: <https://www.refworld.org/docid/602cf8954.html>.

²⁶ UNHCR, *Aide-Memoire & Glossary of case processing modalities, terms and concepts applicable to RSD under UNHCR's Mandate (The Glossary)*, 2020, available at: <https://www.refworld.org/docid/5a2657e44.html> at pp. 18.

²⁷ *Ibid.* See also for example, *Refugee Status Determination Backlog Prevention and Reduction*, note 20 above.

²⁸ *Refugee Status Determination Backlog Prevention and Reduction*, note 20 above, at p. 10.

²⁹ *Ibid.*

³⁰ *Ibid.*, at p. 2.

³¹ 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> at p. 9; See also *Refugee Status Determination Backlog Prevention and Reduction*, note 20 above, at p. 5.

a ‘presumption of inclusion’ and addressed through simplified RSD and/or accelerated RSD modalities. Cases with variable recognition rates or which are otherwise more complex, will normally be directed to a regular RSD process. Certain types of cases can also be prioritized (or fast-tracked) based on individual specific needs and heightened protection risks.³² It is essential that clear, transparent yet sufficiently flexible criteria be established to manage the triaging, in order to avoid a large number of legal challenges, and an overloading of the accelerated/simplified procedures with complex cases, which would impair their effectiveness.³³

16. A *simplified RSD process* can, amongst others, include the development of RSD assessment forms with pre-populated legal analysis and/or pre-populated country of origin information (COI), or through interviews focusing only on core issues of the claim, such as area of origin, ethnicity or religion.
17. An *accelerated RSD process* refers to a procedure which involves a substantive and individualized examination/assessment of the refugee status claim, but an acceleration or shortening of all or some timelines in the RSD process. It is often applied in the same contexts as Simplified RSD but can be used in combination with most other types of RSD procedures. It is also frequently used for claims with specific needs or at heightened physical or legal protection needs. It should be noted that a case can be prioritized and accelerated at the same time.
18. A *regular RSD process* refers to an RSD procedure where the applicant’s claims are comprehensively examined on an individual basis by a trained decision-maker. It is best used for sensitive or complex cases, for example, cases that raise credibility or exclusion concerns, or where it is not appropriate to employ accelerated or simplified processing. Such cases will need to be challenged through regular procedures and with timelines set as per operational considerations.
19. As a general rule, the right to be heard requires that an applicant should have the opportunity to present their claim in person, and a refugee status claim should not be determined in the first instance on the basis of a paper review alone. Exceptionally, and where there is a high presumption of inclusion and a positive decision of the RSD application, a refugee claim may be recognized on the basis of information gathered at the registration stage or through additional information gathered in writing.³⁴
20. UNHCR would like to caution against the temptation to categorize certain cases from the onset as “manifestly unfounded”, i.e. “clearly not related to the criteria for refugee status” or which are

³² *Aide-Memoire & Glossary of case processing modalities, terms and concepts applicable to RSD under UNHCR's Mandate* (The Glossary), note 26 above.

³³ *Ibid.*, at p. 9.

³⁴ UNHCR, *RSD Procedural Standards Unit 4: Adjudication of Refugee Status Claims*, 26 August 2020, available at: <https://www.refworld.org/docid/5e87075d0.html> and *Aide-Memoire & Glossary of case processing modalities, terms and concepts applicable to RSD under UNHCR's Mandate* (The Glossary), note 26 above.

“clearly fraudulent or “abusive”³⁵, irrespective of whether it is a first or subsequent application. As mentioned in *UNHCR’s comment to the Legislative Amendment Proposal to the Refugee Act of the Republic of Korea*,³⁶ the concept of “manifestly unfounded” cases can indeed be a useful tool for case management in that, on the basis of indications a case presents that it is likely to be manifestly unfounded, it can be allocated to the appropriate case processing modality in order to improve efficiency. However, the concept should not be equated with claims submitted by applicants from a particular country or profile who may have, in the past or at present, low recognition rates nor should claims presenting such indications be processed with any lesser degree of procedural safeguards.³⁷ Further, the mere fact of having made false statements does not, however, mean that the criteria for refugee status may not be met, nor would it obviate the need for asylum. False statements do not in themselves make the claim “clearly fraudulent”.

21. UNHCR underlines that late or delayed submission of an asylum claim, including one which is made by applicants in need of extension of sojourn or facing fines or penalties for previous irregular entry or stay, or even following the issuance of a deportation or detention order, is not – as such – an abusive or fraudulent claim. Such applicants may have an asylum claim which requires a full merit review.
22. Lastly, RSD is time and resource intensive and requires a great deal of knowledge and skills. With increasing pressure and a growing backlog, turnover is common, and staff are more likely to be demotivated, contributing to reductions in productivity and quality of decision-making, which is likely to further increase the RSD backlog.³⁸ Many state systems have established benchmarks and targets to measure productivity. While this can be a useful way of assessing productivity, it would be imperative to also take into account operational factors and requirements that influence the processing capacity, including³⁹:
 - the number and rate of arrivals of new individuals
 - the availability of information on country of origin/ or former habitual residence relevant to the profiles of asylum-seekers within the caseload(s) in question, including their specific needs
 - level of complexity of claims, including potential exclusion considerations
 - triaging and case processing modalities in place for specific caseloads and profiles⁴⁰
 - the seniority and experience of the case workers/reviewers

³⁵ UNHCR, *ExCom Conclusion No 30 (XXXIV)*, ‘*The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*’, 1983.

³⁶ *UNHCR’s Comments on the Legislative Amendment Proposal to the Refugee Act of the Republic of Korea*, note 25 above.

³⁷ *Aide-Memoire & Glossary of case processing modalities, terms and concepts applicable to RSD under UNHCR’s Mandate (The Glossary)*, note 26 above, at p. 20.

³⁸ *Refugee Status Determination Backlog Prevention and Reduction*, note 20 above, at p. 1; See also *UNHCR Discussion Paper Fair and Fast - Accelerated and Simplified Procedures in the European Union*, note 31 above.

³⁹ *Refugee Status Determination Backlog Prevention and Reduction*, note 20 above.

⁴⁰ Typically, the targets for cases channeled through simplified case processing can be higher per case workers compared to regular RSD, provided that necessary resources, such as tools (forms/templates) and trainings amongst others are in place.

- the availability, quality and efficiency of support procedures (i.e. reception, registration, file management and interpretation)
- additional activities and responsibilities beyond case processing staff normally undertake, such as coaching and training of new staff, engagement in protection related activities, involvement in notification of decisions, file management amongst others
- the context where RSD interviews and processing are taking place (e.g. office premises with support structures available as opposed to remote locations/ detention facilities/ remote processes).⁴¹

Standards and procedural safeguards for preliminary or admissibility examinations of subsequent applications

23. In UNHCR's view, the preliminary examination of a subsequent application is justified only if the previous claim was considered fully on the merits and in accordance with international standards. There are many reasons why an applicant may wish to lodge a subsequent application following the rejection of a previous application. The applicant may wish to submit further evidence or raise new issues that were absent in the examination of the previous application. For example, there may be changes in the situation in the country of origin; new-founded or increased fears of persecution or serious harm based on '*sur place*' activities or convictions held by the applicant since the first application; direct or indirect breaches of the principle of confidentiality during or since the previous procedure; trauma, shame, or other inhibitions may have prevented full testimony by the applicant; or further relevant evidence may have been obtained by the applicant or arisen after the previous examination.⁴²

24. Preliminary examination of a subsequent application must consider whether new elements or new evidence are presented that would warrant a re-examination of the substance of the claim. These include significant substantive changes to the asylum-seeker's individual situation and/or to the circumstances in the country of origin that may give rise to a *sur place* claim, and new evidence that relates to and supports the initial claim that warrants examination of the substance of the new claim or reopening the original claim.⁴³

25. Preliminary examination should extend both to points of fact and law, and the notion of new elements or findings should be interpreted in a protection-oriented manner, in line with the object

⁴¹ RSD Procedural Standards Unit 4: Adjudication of Refugee Status Claims, note 34 above.

⁴² UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendations*, March 2010, available at: <https://www.refworld.org/docid/4bab55752.html> at pp. 72-73.

⁴³ *Ibid.*, at p. 178. See also UNHCR, *Procedural Standards for Refugee Status Determination Under UNHCR's Mandate*, 26 August 2020, available at: <https://www.refworld.org/docid/5e870b254.html> at unit 9.

and purpose of the 1951 Convention.⁴⁴ Decision-makers must also consider that there may be valid reasons why an asylum-seeker did not disclose all the relevant facts in the initial claim, such as stigma associated with sexual violence, trauma, and/or misinformation.⁴⁵

26. Preliminary examination must have clearly established criteria and standards that are not arbitrary. Expiry of asylum-seeker's existing visa, lapse of time after entering the country of asylum, or impending deportation cannot by themselves constitute valid criterion for finding that there exist no new elements to warrant examination of the substance of the subsequent application.⁴⁶
27. With regard to asylum-seekers deemed to have withdrawn or abandoned their application, asylum applications should not be rejected merely because the asylum-seeker has failed to fulfil formal obligations, such as failure to appear before the authorities at a given time set by the authorities for an interview during the course of first-instance decision-making process.⁴⁷ A claim for refugee status may be explicitly or implicitly withdrawn for a variety of reasons not necessarily related to a lack of protection needs.⁴⁸ An asylum-seeker may fail to comply with procedural requirements due to circumstances beyond his or her control or there may be other reasonable explanations.⁴⁹ Such explanations may include, without limitation, lack of means of communication, misinformation, or language barriers and lack of interpretation/ translation.
28. Everyone has a right to be heard and the right to an effective remedy, including in situations of subsequent applications. Applicants whose claims have been withdrawn before the first instance or appeal decision was issued and who subsequently seek to follow-up on their application should have their RSD case re-opened and referred to the instance where their case was left. Also, in the case of applicants whose claims were rejected and had their RSD cases closed as a result of failing to file an appeal application, if it cannot be established that the applicant was duly notified of the negative decision and the relevant appeal deadline, the case should be re-opened for the purposes of examining the appeal.⁵⁰
29. Procedural safeguards are key, including in the case of the preliminary examination of subsequent applications. As mentioned above, as a general rule, the right to be heard is an essential part of an effective and fair asylum process, requiring that an applicant, in the context of subsequent applications, has the opportunity to present new elements. As such, UNHCR recommends that all applicants should, in principle, be granted the opportunity of a personal interview, including when

⁴⁴ UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Detailed Research on Key Asylum Procedures Directive Provisions*, available at: <https://www.refworld.org/docid/4c63e52d2.html>, at p. 407.

⁴⁵ UNHCR, *A guide to international refugee protection and building state asylum systems, 2017*, Handbook for Parliamentarians N° 27, 2017, available at: <https://www.refworld.org/docid/5a9d57554.html> at ch. 7.9.

⁴⁶ Please refer in this regard to para 23 of this submission.

⁴⁷ *A guide to international refugee protection and building state asylum systems, 2017*, note 45 above, at ch. 7.9.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ UNHCR's *Comments on the Legislative Amendment Proposal to the Refugee Act of the Republic of Korea*, note 25 above, at p.7, see also UNHCR, *UNHCR RSD Procedural Standards Unit 9: Procedures for RSD Case Closure and Re-opening*, 26 August 2020, available at: <https://www.refworld.org/docid/5e87076115.html>, para. 9.2.1.

conducting a preliminary examination in the context of a subsequent application and only dispense with conducting a personal interview when the determining authority is able to take a positive decision that new elements have been brought forward requiring a further assessment of the merits of the subsequent application, or the applicant is unfit or unable to attend an interview owing to circumstances beyond their control, at which point the interview will need to be postponed.⁵¹

30. UNHCR would like to emphasize that policy considerations, such as excessive case backlogs or migration control, cannot be legitimate grounds for restricting subsequent applications.

Reception standards and minimum living conditions for asylum-seekers undergoing RSD upon subsequent application

31. International human rights law complements the 1951 Convention in defining minimum reception standards for asylum-seekers.⁵² Most prominently, the Article 11 of the International Covenant on Economic, Social and Cultural Rights (“CESCR”) provides that “States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”. The Committee on Economic, Social and Cultural Rights, the treaty body with the competence to interpret obligations of States arising under the CESCR, has placed special emphasis on refugees, stateless persons and asylum-seekers, who should in principle enjoy equal treatment in access to non-contributory social security schemes, including reasonable access to health care and family support, consistent with international standards.⁵³

32. Other international human rights conventions and interpretations thereof by competent treaty bodies provide additional protection to particularly vulnerable groups of asylum-seekers. The Committee on the Elimination of all Forms of Discrimination Against Women have recommended that throughout the asylum procedure and during the integration process for women granted refugee status, State parties should ensure an adequate standard of living, including safe accommodation, sanitary and health facilities, food, clothing and necessary social services, in addition to sources of livelihood and employment opportunities.⁵⁴

⁵¹ UNHCR's *Comments on the Legislative Amendment Proposal to the Refugee Act of the Republic of Korea*, note 25 above, at p.7.

⁵² UNHCR, *Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems*, EC/GC/01/17, 4 Sep 2001, available at: <https://www.refworld.org/docid/3bfa81864.html> at para. 4.

⁵³ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 19: The right to social security*, 4 February 2008, available at: <https://www.refworld.org/docid/47b17b5b39c.html> at paras. 31 and 38.

⁵⁴ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, 5 November 2014, CEDAW/C/GC/32, available at: <https://www.refworld.org/docid/54620fb54.html>, at para. 48.

33. The Convention on the Rights of the Child specifically provide for States' obligations to ensure that child asylum-seekers receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the Convention on the Rights of the Child and in other international human rights or humanitarian instruments,⁵⁵ which include, *inter alia*, the right to social security,⁵⁶ the right to health⁵⁷ and the right to an adequate standard of living.⁵⁸ According to the Committee on the Rights of the Child, enjoyment of such rights, unless explicitly provided otherwise within the Convention, are guaranteed to all children within a State's jurisdiction, including asylum-seekers and refugees.⁵⁹
34. UNHCR's Executive Committee has emphasized that the various reception measures for asylum-seekers should respect human dignity and applicable international human rights law and standards.⁶⁰ Asylum-seekers' access to the appropriate governmental and non-governmental entities should be ensured so that their basic support needs, including food, clothing, accommodation, and medical care, as well as respect for their privacy, are met.⁶¹ A prerequisite for basic protection of asylum-seekers is issuance of documentation of their status, which may take the form of a temporary stay permit. Asylum-seekers whose applications cannot be decided without delay should be provided with provisional documentation sufficient to ensure that they are protected temporarily until a final decision has been taken by the competent authorities with regard to their application.⁶²
35. Moreover, it should be noted that *non-refoulement* obligations arise not only in situations of forced repatriations, but sometimes also may arise in repatriations that are seemingly voluntary but can be directly attributed to the lack of livelihood support by the country of reception. In this context, if asylum-seekers are left with no real option but to leave the country of reception, such departures are not in fact voluntary but constitute *de facto* enforced departure which may be at variance with the principle of *non-refoulement*. Such coercive measures include deprivation of means of support and reduction of essential services.⁶³

⁵⁵ UN General Assembly, *Convention on the Rights of the Child (CRC)*, 20 November 1989, United Nations Treaty Series vol. 1577, p. 3, available at: <https://www.refworld.org/docid/3ae6b38f0.html>, art. 22.

⁵⁶ *Ibid.*, Art. 26.

⁵⁷ *Ibid.*, Art. 24.

⁵⁸ *Ibid.*, Art. 27(1).

⁵⁹ UN Committee on the Rights of the Child (CRC), *General Comment No. 6: Treatment of unaccompanied and separated children outside their country of origin*, CRC/GC/2005/6, 1 September 2005, available at: <https://www.refworld.org/docid/42dd174b4.html> at para. 12.

⁶⁰ UNHCR, *Executive Committee Conclusion No. 93 - 2002: Conclusion on reception of asylum-seekers in the context of individual asylum systems No. 93 (LIII)* 2002, 8 October 2002, available at: <https://www.unhcr.org/3dafdd344.html>.

⁶¹ *Ibid.*

⁶² UNHCR, *Discussion Paper on Recommended Reception Standards for Asylum-Seekers in the Context of the Harmonisation of Refugee and Asylum Policies of the European Union*, June 2000, available at: <https://www.refworld.org/docid/3ae6b3378.html>. See also, Identity Documents for Refugees, *ExCom Conclusion No. 35 (XXXV) (1984)*, <https://www.unhcr.org/excom/exconc/3ae68c4390/identity-documents-refugees.html>.

⁶³ J. Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press, 2014, pp. 318-319, pp. 464-465; *UNHCR Handbook on Voluntary Repatriation: Internal Protection*, 1996, available at: <https://www.unhcr.org/publications/legal/3bfe68d32/handbook-voluntary-repatriation-international-protection.html> at ch. 4.1.

36. Domestic courts and regional human rights bodies have repeatedly reinforced the duty of States to ensure minimum standards of living of all persons, including asylum-seekers, within their jurisdictions. For example, the German Constitutional Court has found that the inadequate cash benefits for asylum-seekers were incompatible with the fundamental right to a minimum level of existence as emerging from the right to human dignity.⁶⁴ It has ruled that this right should be guaranteed to non-nationals residing in Germany, and that the government should not in principle differentiate among recipients of basic social benefits in accordance to their residence status; the legislature must always be guided by the concrete needs to secure a person's existence.⁶⁵
37. The Seoul Administrative Court of the Republic of Korea has found that “[in light of the absence of other livelihood support by the government] complete denial of employment for asylum-seekers amounts to entrusting their survival to the good-will of non-governmental organizations or charity organizations for refugees, which goes against a civilized nation's constitutional principles to protect people's dignity and to ensure their right to survival.”⁶⁶
38. The European Court of Human Rights have recently ruled that the French government's refusal to provide material and financial assistance to asylum-seekers, forcing them to sleep in the street, is in violation of the Article 3 of the European Convention on Human Rights, which provides an absolute prohibition of torture and inhuman and degrading treatment.⁶⁷ In reaching this conclusion, the Court took note of the particular vulnerability of the asylum-seekers and their complete dependence on the government of the country of asylum. According to the Court, migratory policy considerations cannot exonerate the States from their obligations on prohibition of torture and inhuman and degrading treatment.⁶⁸
39. Regarding asylum-seekers who file subsequent applications, the UK Supreme Court has ruled that minimum standards of living should be extended to them, as they also have the right to be ensured “standards that are no more than the minimum to permit [them] to live with some measure of dignity.”⁶⁹ The policy objective of discouraging unmeritorious subsequent applications should not be achieved by denying all subsequent applicants minimum standards of living; rather, “[t]he problem of undeserving cases should be counteracted by identifying and

⁶⁴ Germany: Constitutional Court, *Case No. 1 BvL 10/10*, 18 July 2012, available at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/07/ls20120718_1bvl001010en.html at paras. 1 and C.I.1

⁶⁵ *Ibid.*, at para. C.I.1.dd.

⁶⁶ 2013 *KuHap13617* (Seoul Administrative Court, 10 Oct 2013).

⁶⁷ Council of Europe: European Court of Human Rights, *N.H. and others v France*, Application No. 28820/13, 75547/13 and 13114/15, 2 October 2020, available at: <http://hudoc.echr.coe.int/eng?i=001-203295>.

⁶⁸ *Ibid.*; Council of Europe: European Court of Human Rights, *M.S.S. v. Belgium and Greece*. Application No. 30696/09, 21 January 2011, available at: <http://hudoc.echr.coe.int/fre?i=002-628> at para. 223; Council of Europe, European Court of Human Rights, *Khlaifia and Others v Italy*, Application No. 16483/12, 15 December 2016, available at: <http://hudoc.echr.coe.int/eng?i=001-170054> at para. 184.

⁶⁹ United Kingdom: Supreme Court, *R (on the application of ZO (Somalia) and others) (Respondents) v Secretary of State for the Home Department (Appellant)* [2010] UKSC 36, 28 July 2010, available at <https://www.supremecourt.uk/cases/docs/uksc-2009-0151-judgment.pdf> at para. 31.

disposing promptly of those which have no merit and ensuring that those applicants who are genuine are not deprived of the minimum conditions.”⁷⁰

40. Indeed, while the States may have flexibility in implementing reception arrangements,⁷¹ any arrangements that fail to ensure physical subsistence levels violate the requirements of international law.⁷² In UNHCR’s view, reception conditions should not be reduced or withdrawn as a result of lodging a subsequent application, and States should at a minimum ensure a dignified standard of living for all asylum-seekers. At a minimum, reception conditions should not be withdrawn or reduced until the decision on admissibility of subsequent applications is made,⁷³ provided that the admissibility procedures are properly implemented with procedural safeguards outlined above, and that inadmissibility of first instance or subsequent applications is not determined solely by any arbitrary criterion,⁷⁴ as discussed above.

41. UNHCR would also like to note that providing asylum-seekers with access to the labour market to sustain themselves is often conducive to ensuring minimum standards of living. Reception arrangements can be mutually beneficial where they are premised on the understanding that many asylum-seekers can attain a certain degree of self-reliance, if provided with the requisite opportunities.⁷⁵ Not allowing asylum-seekers - many of whom are talented and skilled professionals - to work is not beneficial to the market economy of the country of asylum.⁷⁶ Not only will the need for assistance be diminished if the asylum-seeker is permitted to engage in employment, but dignity and self-respect of asylum-seekers will be enhanced.⁷⁷

Conclusion

42. In summary, UNHCR submits that:

⁷⁰ *Ibid.*, at para. 49.

⁷¹ *Executive Committee Conclusion No. 93 - 2002: Conclusion on reception of asylum-seekers in the context of individual asylum systems No. 93 (LIII) 2002*, note 60 above.

⁷² UNHCR, *UNHCR Public Statement in relation to the case 1 BvL 10/10 before the Federal Constitutional Court of Germany - Stellungnahme an das Bundesverfassungsgericht im Verfahren 1 BvL 10/10*, December 2010, available at: <https://www.refworld.org/docid/4d08ef5d2.html> at p. 3.

⁷³ 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, available at: <https://www.refworld.org/docid/5541d4f24.html> at p. 49.

⁷⁴ UNHCR, *UNHCR Comments on the Draft 5th Immigration Control Basic Plan*, 24 July 2015, available at: https://www.unhcr.org/jp/wp-content/uploads/sites/34/protect/Final_UNHCR_Comments_ENG.pdf.

⁷⁵ *Executive Committee Conclusion No. 93 - 2002: Conclusion on reception of asylum-seekers in the context of individual asylum systems No. 93 (LIII) 2002*, note 60 above.

⁷⁶ UNHCR, *European Union: reception conditions directive*, 26 April 2002, available at: <https://www.unhcr.org/news/briefing/2002/4/3cc93c32a/european-union-reception-conditions-directive.html>.

⁷⁷ UNHCR, *UNHCR Guidelines on International Legal Standards Relating to Decent Work for Refugees*, July 2021, available at: <https://www.refworld.org/docid/60e5cfd74.html> at para. 48; *Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems*, note 52 above, at para. 13. It should also be noted that case studies suggest that access to labour market for a reasonable period may actually facilitate reintegration into the country of origin by making it possible for the asylum-seeker to return home with a degree of financial independence or even some acquired work skills. *Ibid.*

- Efforts to improve the fairness, efficiency, adaptability, or integrity of national asylum systems should be cautiously balanced so that, for example, the efficiency of the procedures in place does not compromise the fairness and integrity of the system.
- Applying frontloading, triaging and a mix of differentiated case processing modalities can help to prevent and address an RSD backlog whilst ensuring both efficiency and quality of RSD in accordance with procedural standards.
- Any preliminary or admissibility examination of subsequent applications, insofar as it may be a useful tool to enhance RSD efficiency, must take into consideration various reasons and circumstances that may give rise to subsequent applications. Such preliminary examination must include necessary procedural safeguards. It must also have clearly established criteria and standards that are not arbitrary.
- During examination of subsequent applications, asylum-seekers should be issued documentation and ensured minimum standards of living, including through access to the labour market to sustain themselves.

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