

UNHCR’s Comments on the Legislative Amendment Proposal to the Refugee Act of the Republic of Korea

I. Introduction

1. The United Nations High Commissioner for Refugees (“UNHCR”) Representation in the Republic of Korea (“RoK”) is grateful to the Legislative and Judiciary Committee (“Committee”) of the National Assembly of the Republic of Korea (“Korea”) for the opportunity to provide comments on the legislative amendment proposal to the Refugee Act of Korea (“Proposal”).¹
2. UNHCR has a direct interest in legislation in the field of 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.² Paragraph 8 of UNHCR’s Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees,³ whereas the 1951 Convention relating to the Status of Refugees⁴ and its 1967 Protocol relating to the Status of Refugees (hereafter collectively referred to as “1951 Convention”) oblige States 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). UNHCR’s supervisory function is also expressed in Article 29 of the Refugee Act, that provides for the Ministry of Justice’s cooperation and relationship with UNHCR.
3. UNHCR’s supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention. Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (“UNHCR Handbook”) and subsequent Guidelines on International

¹ Government of the Republic of Korea, Proposal to Partially Amend the Refugee Act, Proposal Number 13939, 17 Dec 2021, available at: https://likms.assembly.go.kr/bill/billDetail.do?billId=ARC_L2K1V1H2M1U7F0L9R4D2O4U1K6Q2X9. The comments are based on UNHCR’s unofficial English translation of the Proposal, attached here.

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

³ *Id.*, 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, *UNHCR’s supervisory responsibility*, October 2002, ISSN 1020-7473, pp. 7-8, available at: <https://www.refworld.org/docid/4fe405ef2.html>.

⁴ UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations Treaty Series, No. 2545, vol. 189, available at: <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”.

Protection.⁵ Korean courts have found that the guidance within the UNHCR Handbook “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, which notes that UNHCR is charged with the task of supervising the implementation of the 1951 Convention.⁶ The UNHCR Handbook has been found by many other judicial authorities, including the Supreme Courts of Canada, the United Kingdom, and the United States respectively to be a “highly relevant authority”,⁷ a “highly persuasive authority”,⁸ providing “significant guidance”,⁹ 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”.¹⁰ UNHCR’s Handbook and Guidelines have also been accepted as a valid source of interpretation under Article 31(3)(b) of the 1969 Vienna Convention on the Law of Treaties, in reflecting “subsequent practice in the application of the treaty”.¹¹

4. The following comments are based on international refugee protection standards set out in the 1951 Convention, Conclusions of the UNHCR Executive Committee (“Excom”), UNHCR Guidelines, and precedent setting decisions by higher courts. While neither the ExCom Conclusions on international protection nor UNHCR’s guidelines are *per se* binding on States, they contribute to the formulation of *opinio juris* by setting out standards of treatment or approaches to interpretation which illustrate States’ sense of legal obligation towards asylum-seekers and refugees.¹² As a member of the ExCom since 2000, the Republic of Korea has contributed to the development of the Conclusions on International Protection, adopted unanimously by the ExCom.
5. Additional reference is made to the previous comments submitted by UNHCR on the Comments on the 2009 Draft Bill on Refugee Status Determination and Treatment of Refugees and Others (2009)¹³ and the Draft Presidential Decree and Regulations to the

⁵ 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, available at: <https://www.refworld.org/docid/5cb474b27.html>.

⁶ See, for example, 2019Nu47119 (Seoul High Court, 27 Sep 2019); 2014Nu52093 (Seoul High Court, 28 Jan 2015); 2013KuHap13617 (Seoul Administrative Court, 10 Oct 2013).

⁷ *Chan v. Canada (M.E.I.)*, [1995] 3 S.C.R. 593, Canada: Supreme Court, 19 October 1995, www.refworld.org/cases.CAN_SC.3ae6b68b4.html at paras. 46 and 119; *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/1023/1/document.do> at pp. 713-714.

⁸ *R v. Secretary of State for the Home Department, Ex parte Adan*, United Kingdom: House of Lords (Judicial Committee), 19 December 2000, www.refworld.org/cases.GBR_HL.3ae6b73b0.html.

⁹ *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, United States Supreme Court, 9 March 1987, www.refworld.org/cases.USSCT.3ae6b68d10.html.

¹⁰ *Al-Sirri (FC) v Secretary of State for the Home Department*, [2012] UKSC 54, United Kingdom: Supreme Court, 21 November 2012, 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”. *R v. Secretary of State for the Home Department, Ex parte Robinson*, United Kingdom: Court of Appeal (England and Wales), 11 July 1997, www.refworld.org/cases.GBR_CA_CIV.3ae6b72c0.html at para. 11.

¹¹ *Pushpanathan v Canada (M.C.I.)*, [1998] 1 SCR 982 para. 54; *R v. Secretary of State for the Home Department, Ex parte Adan and Others*, *ibid.*, para. 71.

¹² Goodwin Gill/McAdam, *The Refugee in International Law*, Oxford University Press, 2007, p. 217.

¹³ UNHCR, *UNHCR’s Comments on the Republic of Korea 2009 Draft Bill on Refugee Status Determination and Treatment of Refugees and Others*, 15 June 2009, available at: <https://www.refworld.org/docid/4a8d58092.html>.

Refugee Act (2013),¹⁴ as well as the Comments on the Legislative Amendment Proposal to the Refugee Act (2021) (“*2021 UNHCR Comments*”).¹⁵

6. The main objectives in amending the Refugee Act, according to the legislative purpose included within the Proposal, are to “assist recognized refugees, etc. for swift adoption to Korean society and stable living within Korea”, “strengthen humanitarian assistance to refugee status applicants”, and to introduce procedures within the Refugee Status Determination (“RSD”) system to “prevent abuse of the refugee status determination system as a tool to extend stay of sojourn.”
7. Noting the significance of the Refugee Act as the first comprehensive national refugee law in the region, UNHCR appreciates the efforts of Korea to further refine and improve its domestic refugee legislation and status determination procedures, as well as to expand access to rights for refugees, humanitarian status holders and refugee applicants. UNHCR also notes with appreciation the Korean government’s efforts in further refining the Proposal after its initial announcement in 2020, notably removing the proposed introduction of the concept of “manifestly unfounded claims” that was examined with concern by UNHCR in *2021 UNHCR Comments*.¹⁶
8. UNHCR’s aim in providing these comments is twofold. Firstly, UNHCR would like to assist Korea in ensuring that the amended Refugee Act is consistent with international standards related to refugee law. Secondly, UNHCR would like to offer its technical expertise in supporting the efforts undertaken by Korea to establish fair and efficient asylum procedures.
9. UNHCR’s comments are shared in two main parts. Part II provides comments of a general nature, including on some provisions which are not included in the Proposal, and Part III provides specific comments to individual provisions of the Proposal.
10. UNHCR seeks the National Assembly’s consideration of these comments and welcomes further cooperation regarding them and their implementations. UNHCR remains at the disposal of the authorities of Korea for a more extensive and detailed exchange on reforming the national asylum system.

II. General Comments

11. UNHCR appreciates the proposed measures to improve the fairness and efficiency of asylum procedures. In this regard, the following aspects should be considered:

¹⁴ UNHCR, *UNHCR’s Comments on the Draft Presidential Decree and Regulations to the Refugee Act of the Republic of Korea*, 26 March 2013, available at: <https://www.refworld.org/docid/54100f8f4.html>.

¹⁵ 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>. The contents of the Comments closely follow the *2021 UNHCR Comments*, reflecting the similarity of the two legislative proposals.

¹⁶ *Ibid.*, paras.29-32.

a) Access to the territory and to asylum procedures

Screening procedures at ports of entry should ensure that individuals seeking international protection are able to effectively exercise the right to seek and enjoy asylum and are protected against *refoulement*. Initial screening implemented at ports of entry, in particular at airports, should therefore be conducted by fully qualified officers with appropriate procedural safeguards (including the opportunity to contact UNHCR).¹⁷ With adequate safeguards, manifestly unfounded claims could be assessed in an accelerated procedure at ports of entry, while all other cases, including cases that can be admitted on humanitarian grounds, as well as child asylum-seekers and other particularly vulnerable asylum-seekers, including older people, person(s) with disabilities, the sick and traumatized should always be referred to the regular RSD procedures.¹⁸ Appropriate reception arrangements should become available for asylum-seekers pending decision at ports of entry. In this regard, UNHCR suggests the revision of Article 6 of the Refugee Act to ensure that screening modalities at ports of entry, including at airports, do not preclude the effective access to asylum procedures and respect the principle of *non-refoulement*.¹⁹

b) High quality individual decision-making and case processing modalities

Ensuring efficiency in decision-making while maintaining high quality RSD that results in fair individual decisions in accordance with procedural safeguards is not incompatible and has mutual benefits. Diversified case processing strategies²⁰ – such as simplified procedures for nationalities manifestly in need of protection – could be considered to safeguard quality and integrity, while promoting efficiency. Regular asylum procedures can also contribute to addressing security concerns by providing a means to exclude persons responsible for serious criminal acts, including acts of terrorism.²¹ 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, which includes the right to be heard in a

¹⁷ UNHCR, *UNHCR Comments on the European Commission's Proposal for an Asylum Procedures Regulation*, April 2019, COM (2016) 467, p. 36, available at: <https://www.refworld.org/docid/5cb597a27.html>; UNHCR, *Legal Considerations on State Responsibilities for Persons Seeking International Protection in Transit Areas or "International" Zones at Airports*, 17 January 2019, p. 4, available at: <https://www.refworld.org/docid/5c4730a44.html>. See also UNHCR, *UNHCR's Recommendations for the European Commission's Proposed Pact on Migration and Asylum*, January 2020, available at: <https://www.refworld.org/docid/5e3171364.html>.

¹⁸ This issue has also been recently raised by the National Human Rights Commission of Korea, *Opinion on the human rights protection of child asylum-seekers staying at the airport terminal for an extended period*, 21 April 2020, available at: <https://www.refworld.org/docid/5f8955f34.html>. See also UNHCR, *A guide to international refugee protection and building state asylum systems*, 2017, Handbook for Parliamentarians N° 27, p. 162, available at: <https://www.refworld.org/docid/5a9d57554.html>

¹⁹ UNHCR, *Legal Considerations on State Responsibilities for Persons Seeking International Protection in Transit Areas or "International" Zones at Airports*, *supra* note 17. UNHCR, *Note on the Principle of Non-Refoulement*, November 1997, available at: <https://www.refworld.org/docid/438c6d972.html>.

²⁰ 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>.

²¹ UNHCR, *Refugee Status Determination*, 31 May 2016, EC/67/SC/CRP.12, p. 4, available at: <https://www.refworld.org/docid/57c83a724.html>.

personal interview and the right to information in the language understood by the refugee applicant, the right to legal aid and legal representation, and the right to an effective remedy, to name a few. Adequate resources are key to guaranteeing that the process is not only efficient but that its quality, particularly as regards respect for procedural standards, is not compromised.²²

12. Noting the RoK government's commitment to develop the national RSD capacity as pledged during the 2019 Global Refugee Forum (GRF),²³ UNHCR welcomes continued engagement on how to enhance the quality of individual decision-making and consider suitable case processing modalities, and stands ready to provide any necessary assistance to the RoK government in this regard, including continued consultations and systematic development to enhance the quality of decisions at first and second instance thereby improving the refugee applicants' and public's trust in the system.²⁴ UNHCR further remains available to advise regarding guidelines on procedural and substantive issues in RSD decision-making, and to organize regular capacity development initiatives and trainings on different types of caseloads, thematic areas and applying different methodologies, though virtual and face-to-face workshops, as well as on-the-job trainings.

13. With reference to Article 3 of the Refugee Act which defines the prohibition of *refoulement* for "*Recognized refugees, humanitarian status holders and refugee status applicants*", UNHCR notes that the prohibition of *refoulement* under international refugee law applies to anyone who is a refugee, irrespective of whether or not they have been recognized as such (the recognition of a person as a refugee is declaratory in nature), which includes persons who have not expressly applied for refugee status. Likewise, the prohibition of *refoulement* under international human rights law²⁵ applies to any persons, regardless of their status, where there are substantial grounds for believing that she or he would be at risk of irreparable harm upon return on account of

²² UNHCR, *Refugee Status Determination Backlog Prevention and Reduction*, January 2018, PPLA/2018/03, available at: <https://www.refworld.org/docid/5b1a38374.html>. See also 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>.

²³ 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 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>

²⁴ See also UNHCR, *Refugee Status Determination Backlog Prevention and Reduction*, *supra* note 22.

²⁵ Korea is a state party to several human rights instruments that explicitly provide for such obligations, including 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") and International Covenant on Civil and Political Rights ("ICCPR"). Prohibition of torture and arbitrary deprivation of life, which inherently includes prohibition of *refoulement* to risk thereof, is also part of customary international law, which has attained the rank of *jus cogens*.

torture, ill-treatment or other serious human rights violations.²⁶ Therefore, UNHCR suggests the revision of this Article to include “any person who meets the requirement of the refugee definition or for whom there are substantial grounds for believing that she or he would be at risk of irreparable harm upon return on account of torture, ill-treatment or other serious human rights violations.”

14. UNHCR acknowledges that humanitarian status is a positive way of responding pragmatically to certain international protection needs for individuals who do not meet the refugee definition under the 1951 Convention. UNHCR calls upon the Republic of Korea to interpret the criteria for refugee status in the 1951 Convention in such a manner that all persons who fulfil these criteria are duly recognized as refugees and protected under those instruments, rather than being accorded humanitarian status.²⁷ This is particularly relevant for refugee claims made in the context of armed conflict and violence.²⁸
15. UNHCR also encourages the Republic of Korea, in granting complementary forms of protection to those persons in need of it, to provide for the highest degree of stability and certainty by ensuring the human rights and fundamental freedom of such persons without discrimination, taking into account the relevant international instruments and giving due regard to the best interest of the child and family unity principles.²⁹ Further, as stated in Article 34 of the 1951 Convention, UNHCR recommends the Republic of Korea to consider the adoption of provisions to expedite access to naturalization for refugees.³⁰

III. Specific Comments³¹

16. In the following sections, UNHCR highlights specific comments on selected provisions of the proposal, that is, a) admissibility procedure, b) capacity development of RSD officers, c) implicit withdrawal, d) Refugee Committee, e) rights of recognized refugees, humanitarian status holders and refugee status applicants, f) procedural rights during the first instance RSD procedure, and g) punishments for submission of non-factual information.

²⁶ Executive Committee of the High Commissioner’s Programme (ExCom), ExCom Conclusion No. 6 (XXVIII), 1977, para. (c); ExCom Conclusion No. 79 (XLVII), 1996, para. (j); ExCom Conclusion No. 81 (XLVII), 1997, para. (i); UNHCR, *Note on the Principle of Non-Refoulement*, November 1997, *supra* note 19.

²⁷ Executive Committee of the High Commissioner’s Programme, *Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection No. 103 (LVI) - 2005*, 7 October 2005, No. 103 (LVI), available at: <https://www.refworld.org/docid/43576e292.html>.

²⁸ UNHCR, *Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions*, 2 December 2016, HCR/GIP/16/12, available at: <https://www.refworld.org/docid/583595ff4.html>.

²⁹ Executive Committee of the High Commissioner’s Programme, *Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection No. 103 (LVI) - 2005*, *supra* note 20. See also UNHCR, *Providing International Protection Including Through Complementary Forms of Protection*, 2 June 2005, EC/55/SC/CRP.16, p. 9, available at: <https://www.refworld.org/docid/47dfb49d.html>.

³⁰ See also UNHCR, *UNHCR's Comments on the Proposed Amendments to the Nationality Act and the Immigration Control Act of the Republic of Korea*, 29 October 2012, available at: <https://www.refworld.org/docid/509924e62.html>.

³¹ In this section, relevant provisions of the amendment proposal are italicized, and newly inserted paragraphs are underlined for easy reference.

a) Admissibility procedure (Articles 5-2)

Article 5-2. (Decision of inadmissibility for refugee status determination regarding subsequent applications)

- (1) A person falling under any of the following, when making a subsequent application in accordance with Article 5, shall be subject to review of admissibility of the subsequent refugee application.
 1. A person who has been issued an inadmissibility decision for subsequent refugee status determination procedure pursuant to para. 4, subpara. 2.
 2. A person whose refugee status determination has been completed pursuant to the second sentence of Article 8(6).
 3. A person who has withdrawn his or her refugee application without receiving a decision pursuant to Article 18(1) and (2) and Article 19.
 4. A person who has received a non-recognition decision pursuant to Article 18(2) and Article 19.
 5. A person whose recognition decision was cancelled or withdrawn pursuant to Article 22(1) or (2).
 6. A person who is deemed to have withdrawn his or her refugee application or appeal pursuant to Article 22-2(1).
- (2) The Minister of Justice shall decide on the admissibility for subsequent refugee status determination procedure within 21 days of the submission of an application if the applicant, who falls under any of the subparagraphs of paragraph 1, has made a subsequent application pursuant to Article 5.
- (3) If the Minister of Justice does not reach a decision on the admissibility within the period provided in paragraph 2, assessment of refugee status determination shall be conducted pursuant to Article 8.
- (4) The Minister of Justice, when making a decision on the admissibility for subsequent refugee status determination procedure pursuant to paragraph 2, shall review whether there exist significant changes in circumstances which previously was the reason for the decisions, etc. of the subparagraphs of paragraph 1. The decision on the admissibility for subsequent refugee status determination procedure based on significant changes in circumstances shall follow the categorization in the following subparagraphs.
 1. Where there exist significant changes in circumstances: decision of admissibility for subsequent refugee status determination procedure
 2. Where there does not exist significant change in circumstances: decision of inadmissibility for subsequent refugee status determination procedure
- (5) The Minister of Justice shall conduct refugee status determination procedure pursuant to Article 8 for a person given decision of admissibility for subsequent refugee status determination procedure pursuant to para. 4, subpara. 1.
- (6) The Minister of Justice shall issue a Notice of Inadmissibility to Subsequent Refugee Status Determination, which states the reason for the decision, to a person

given decision of inadmissibility for subsequent refugee status determination procedure pursuant to para. 4, subpara. 2.

- (7) The Minister of Justice shall allow opportunity to vindicate significant changes in circumstances to a person undergoing admissibility review (hereinafter “person under admissibility review”), when reviewing whether there exists significant change in circumstances pursuant to para. 4.
- (8) The Minister of Justice, if necessary to review whether there exists significant change in circumstances pursuant to paragraph 4, may order a Refugee Status Determination officer or a Refugee Officer to take the following measures to the person under admissibility review.
 1. Order to submit data, including documents
 2. Order to appear
 3. Questions or interview

17. Article 5-2 of the Proposal stipulates grounds to screen out (make inadmissibility decision) for refugee status applicants making subsequent applications without significant changes in circumstances and/or whose previous refugee recognition decision was cancelled or withdrawn, or whose application for refugee status was deemed to have been withdrawn in the past.
18. There are many reasons why a refugee applicant may wish to submit further evidence or raise new issues following the examination of a previous application. Among other reasons, these may relate to a change in the situation in the country of origin; fear of persecution or serious harm based on activities engaged in, or convictions held, by the applicant since leaving the country of origin; a fear based on direct or indirect breach of the principle of confidentiality during or since the previous procedure; deficiencies or flaws in the previous procedure which may have prevented an adequate examination and assessment of relevant facts and evidence; trauma, shame, or other inhibitions that may have prevented full oral testimony by the applicant in the previous examination procedure; or further relevant evidence that may have been obtained by the applicant or arisen following the previous examination.³²
19. UNHCR, in principle, agrees that subsequent applications may be subjected to a preliminary examination of whether new elements have arisen or been presented which would warrant examination of the substance of the claim. Such an approach permits the quick identification of subsequent applications which do not meet these requirements. However, in UNHCR’s view, such a preliminary examination is justified only if the previous claim was considered fully on the merits.³³
20. According to UNHCR’s *RSD Procedural Standards*, as a general rule, applications for re-opening an RSD case should be made in writing and outline the reasons for the request, including any new or additional information submitted in support of the request. Applications for re-opening of a case file should not be rejected without some form of screening procedure. Decisions for re-opening of closed RSD files are made based on a

³² UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendations*, March 2010, pp. 72-73, available at: <https://www.refworld.org/docid/4bab55752.html>.

³³ *Id.*

screening of the application for re-opening and relevant information on the file, to assess whether the criteria for re-opening an RSD case are met. In the screening process, a personal interview may be undertaken.³⁴ For those duly notified, in addition to re-opening of closed RSD cases based on a significant change in the personal circumstances of the refugee applicant or the conditions in the applicant's country of nationality/habitual residence that may affect eligibility for refugee status including for *sur place* claims, re-opening can be justified also in case of: reliable and material new information indicating that the claim may have been improperly decided; serious reasons to believe that the claim was improperly decided; or that the grounds for eligibility for refugee status were not adequately examined or addressed.³⁵

21. Procedural safeguards are key in the case of the preliminary examination of subsequent applications. A personal interview is an essential part of an effective and fair asylum procedure as it provides the refugee applicant with an opportunity to explain and substantiate comprehensively and directly to the determining authority the reasons for the application and gives the authority the opportunity to establish, as far as possible, all relevant facts and to assess the credibility of the oral evidence.³⁶ As such, UNHCR has always strongly recommended that all applicants should, in principle, be granted the opportunity for a personal interview, both at the admissibility (as is the case here) and substantive stages, except in those cases in which the determining authority is able to take a positive decision on the claim to refugee status on the basis of evidence available, or the applicant is unfit or unable to attend an interview owing to enduring circumstances beyond his or her control, at which point the interview will need to be postponed.
22. In particular, in cases where an application is rejected on the basis of the concept of "explicit" or "implicit" withdrawal, and a further submission is therefore considered a "subsequent" application, a personal interview might not have taken place. In such cases, States should not use the option to omit the personal interview. Everyone has a right to an effective remedy, including in situations of subsequent applications. Refugee applicants whose claims have been withdrawn before the first instance or appeal decision was issued and who subsequently seek to apply for RSD should have their RSD case re-opened and referred to first instance or an appeal RSD procedure. 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.³⁷

b) Capacity development of RSD officers (Article 8-2)

Article 8-2 (Refugee Status Determination Officer)
(1) Refugee Status Determination Officer(s) and Refugee Officer(s)
responsible for interviews and factual investigations shall be designated in
Office, Branch or Center.

³⁴ UNHCR, *UNHCR RSD Procedural Standards Unit 9: Procedures for RSD Case Closure and Re-opening*, 26 August 2020, para. 9.2.2, available at: <https://www.refworld.org/docid/5e87076115.html>.

³⁵ *Id.*, at 7-8, para. 9.2.1.

³⁶ UNHCR, *UNHCR Discussion Paper Fair and Fast - Accelerated and Simplified Procedures in the European Union*, *supra* note 22, at 10.

³⁷ UNHCR, *supra* note 34, at 7-8, para. 9.2.1.

(2) The Minister of Justice shall conduct training to Refugee Status Determination Officers and Refugee Officers on the following:

1. Professional knowledge necessary for interviews and factual investigation of refugee applicants

2. Laws, policies, and procedures related to refugees

3. Status and rights of refugees stipulated in international human rights treaties acceded and ratified by the Republic of Korea

4. Other matters the Minister of Justice deems necessary for refugee related work

(3) Qualification, work, and training of Refugee Status Determination Officers and Refugee Officers shall be determined by the Presidential Decree.

23. UNHCR welcomes the expansion of areas to engage in capacity development initiatives and conduct trainings for national RSD officers on relevant theoretical and practical aspects of the RSD decision-making process. Training of RSD personnel is essential to enhance the knowledge of RSD as well as the analytical and critical skills of the RSD officers, leading to higher quality of decisions and increased efficiency, which will have a positive impact on preventing and addressing RSD backlogs. Newly recruited RSD officers should receive high quality and timely induction training, covering relevant areas of knowledge, skills and attitudes, including on-the-job training with supervision and feedback. Continuing professional development is critical with opportunities for advanced trainings on selected thematic areas, as well as targeted trainings in response to training needs identified through ongoing supervision of case processing.³⁸ UNHCR reiterates its readiness to provide technical support for the development and delivery of a systematic training programme in the implementation of the Proposal. Identification of selected areas for targeted training may be facilitated through a thorough examination of the RSD procedure through, *inter alia*, joint projects between the MoJ and the UNHCR such as quality assurance initiatives.

c) Implicit withdrawal (Article 22-2)

Article 22-2 Regarding as withdrawal of the application for refugee status, etc.

(1) Where a refugee applicant falls under any of the following subparagraphs, after he or she has applied for refugee status or appealed pursuant to Articles 5, 6 or 21, it shall be deemed that the applicant withdrew his or her refugee status application or appeal:

1. Where a person falls into one of the subparas. 1 to 4 of the Article 22(2).

2. Where a person has departed voluntarily from the Republic of Korea without a re-entry permit pursuant to Article 30(1) of the Immigration Act

3. Where a person has departed from the Republic of Korea and falls under subparas. 1 and 3 (limited to circumstances similar to subpara. 1), Article 37-2 of the Immigration Act

4. Where a person falls under subparas. 2 and 3 (limited to circumstances similar to subpara. 2), Article 37-2 of the Immigration Act.

(2) The Minister of Justice shall immediately notify the applicant in writing and orally matters related to para. 1, as determined by the Ministerial Decree, when an application for refugee status or appeal has been received pursuant to Articles 5, 6, or 21.

³⁸ UNHCR, *Refugee Status Determination Backlog Prevention and Reduction*, *supra* note 22, at 18.

24. Article 22-2 of the Proposal contains a series of grounds to regard an application withdrawn (“implicit withdrawal”), including where the refugee applicant has voluntarily departed from RoK without re-entry permit, failed to return to RoK within the permitted period, or falls in one of the grounds for cancellation of refugee status under Article 22 (2). This Article would act as one of the two provisions within the Refugee Act that allows for the authorities to regard a refugee applicant’s actions or inactions as implicit withdrawal of his or her application. The other provision that already exists in the Refugee Act, Article 8(6), allows the Minister of Justice to terminate refugee status determination procedure in case of the applicant’s three absences from RSD interviews, etc.
25. UNHCR is concerned that the broad use of the “implicit withdrawal” concept may lead to rejections of applications in cases in which refugee applicants do not actually intend to withdraw their application. This, in turn, may cause a great number of subsequent applications that would lead to admissibility review or merits review *de novo*, which would result in prolonged asylum procedures and deterioration of efficiency of the system. In general, UNHCR considers that an application can only be rejected where there has been a full examination of all relevant facts and circumstances, based on which the determining authority has established that the applicant is not a refugee and does not qualify for complementary protection.
26. UNHCR notes that there may be situations where the determining authority is not able to undertake a full examination and that applications for refugee status, despite having been made, are to be discontinued as stipulated in Article 22-2 of the Proposal and in the current Article 8(6) of the Refugee Act. Such situations may include refugee applicant’s good-faith failure to return to the territory of RoK within the permitted period, or good-faith failure to receive and respond to the summons or interview requests. In such situations, the process through which officers come to such conclusion that the circumstances of the applicant indeed fall within the scope of these two Articles needs to be clarified so that the decision is well informed based on evidence. UNHCR would recommend that in circumstances where the two Articles would apply, the authorities are required to give the applicant a prior written notice in the language she or he understands that the application will be regarded as withdrawn and thereby rejected (as abandoned) unless the applicant reports within a specified period. The applicant should be given the opportunity to report to the determining authority and to demonstrate that the reason for which the application was regarded as abandoned was beyond his/her control, in which case the examination shall be resumed.

d) Refugee Committee (Articles 25, 26, 27-2, and 27-3)

Article 25 (Establishment and Organization of the Refugee Committee)

(1) Refugee Committee shall be established within the Ministry of Justice to review the matters prescribed in following subparagraphs:

1. Matters on appeal pursuant to Article 21(1)

2. Matters related with the management of the Committee and sub-committees pursuant to Article 27-2(3)

3. Other matters that the Chairperson acknowledges as necessary to be managed by the Committee

(2) The Committee shall be comprised of not more than 50 members, including one Chairperson. Members who are not public officials of central administrative agencies (hereinafter “appointed members”) shall be majority.

Article 26 (Nomination of Committee Members)

(3) The term of office for members is three years. Members may serve consecutively once.

(4) If there is a vacancy in the Committee, the tenure of a newly appointed member shall be that of his or her predecessor’s remaining term.

Article 27-2 (Meeting of the Committee)

(1) Meeting of the Committee shall be held by the composition of Chairperson and Committee members designated by the Chairperson at each meeting, number of which shall be equal to or more than 8, and within 14, provided that the appointed members shall be majority of the total members.

(2) Meeting of the Committee shall be decided by attendance of majority of the composition, and vote of majority of attending members.

(3) The Committee may have sub-committees in order to efficiently manage its tasks pursuant to subpara. 1, Article 25(1).

(4) Matters deliberated by sub-committees and decided by entire agreement of its members are deemed to have been deliberated and decided by the Committee.

Article 28 (Opportunity to a Hearing, submission of data, etc.)

(1) The Committee (including sub-committees. All references within this Article to Committee shall be interpreted to include sub-committees) may have an appeal applicant or other concerned person(s) to appear before a meeting of the Committee and make a statement, if necessary for deliberation of appeal pursuant to subpara. , Article 25(1), and may hear an opinion from person(s) with experiences and knowledge on the issues under review.

(2) The Committee may demand an appeal applicant to submit data, if needed, within a deadline set by the Committee.

(3) An appeal applicant may submit documents to the Committee in order to complement reasons of appeal application, if needed.

(4) An appeal applicant shall conscientiously cooperate with the Committee’s request for appearance or request for data.

(5) If an appeal applicant does not respond to the request for appearance in accordance with the paragraph without a legitimate reason, or does not submit requested data within the deadline in accordance with paragraph 2, the Committee may review the application without the appeal applicant’s statement or documents.

(6) Matters necessary for composition, management, etc. for the Committee, other than matters prescribed by paragraphs 1 to 5, Articles 25 to 27, and Article 27-2 shall be prescribed by the Ministerial Decree.

27. UNHCR welcomes the efforts to allocate sufficient personnel and resources to the Refugee Committee and to enhance due process by providing a ground for a hearing during an administrative appeal. Currently, most refugee status applications receive

negative decision,³⁹ at the first instance as well as through the Refugee Committee. UNHCR reiterates its previous recommendation that the administrative review of first instance refugee status decisions should be made by an independent and impartial body, comprised of refugee status experts with the jurisdiction to review questions of fact and law.⁴⁰ In this context, UNHCR recommends that all members of the Refugee Committee are standing members, who receive support by trained research officers responsible for provision of accurate and up to date country of origin information from objective and reliable sources.⁴¹ Further, it is recommended that UNHCR's observer status is stipulated in the Refugee Act in respect of its supervisory mandate introduced above.

e) Access to rights for recognized refugees, humanitarian status holders and refugee status applicants (Articles 34 (3), 34-2, 39 (2), and 40 (2))

Article 34 (Social Integration Program, etc.)

(3) The Minister of Justice may provide necessary information and counseling to a recognized refugee in order to support his/her social integration, as prescribed by the Presidential Decree.

Article 34-2 (Support for Employment)

(1) The Minister of Justice may provide support for employment as prescribed by the Presidential Decree, if deemed necessary for a recognized refugee's stable living and prompt integration in the society.

(2) The Minister of Justice may request cooperation from the head of a municipal government in relation to the support for employment pursuant to paragraph 1.

(3) The Minister of Justice may delegate to a non-profit organization designated by the Minister of Justice tasks of support for employment pursuant to paragraph 1, as prescribed by the Presidential Decree.

Article 39 (Treatment of Humanitarian Status Holders)

(1) The Minister of Justice may provide permission to work to humanitarian status holders

(2) The Minister of Justice may provide support for employment to humanitarian status holders given permit pursuant to paragraph 1.

(3) Provisions of Article 34-2 shall apply mutatis mutandis to humanitarian status holders. In such cases, "recognized refugee" shall be considered to be "humanitarian status holder".

Article 40 (Support for Living Expenses, etc.)

(3) Notwithstanding paragraph 2, the Minister of Justice may permit a refugee status applicant to engage in wage-earning employment before six months has passed since the date on which the refugee application was made, if it is found that there is need to give extraordinary permission to engage in wage-earning employment for humanitarian circumstances, etc.

28. UNHCR welcomes the inclusion of provisions to improve access to rights for recognized refugees, humanitarian status holders and refugee status applicants. UNHCR recommends revising the relevant provisions as mandatory rather than discretionary, in order to ensure full respect of the intention of the provisions in practice and prevent potential confusions in their implementation. Additionally, UNHCR proposes that the rights provided for in the Refugee Act and its Presidential Decree for the above-

³⁹ According to the Monthly Statistical Report of the Korea Immigration Service, the refugee recognition between January and December 2021 was 3.0%. Korea Immigration Service, Monthly Statistical Report, December 2021, available at: <https://www.immigration.go.kr/immigration/1569/subview.do>.

⁴⁰ UNHCR, *UNHCR's Comments on the Republic of Korea 2009 Draft Bill on Refugee Status Determination and Treatment of Refugees and Others*, supra note 13, at 22.

⁴¹ *Ibid*, at 25.

mentioned groups are set out in a transparent manner and possibly with reference to relevant frameworks where these rights are reflected.

29. UNHCR also notes that the subpara. 4, Article 2 of the Proposal excludes asylum seekers undergoing admissibility procedures from the scope of refugee status applicant, which would lead to deprivation of their access to rights and treatment, including permission to engage in wage-earning employment. UNHCR emphasizes reception conditions should not be reduced or withdrawn as a result of lodging a subsequent application, and the States should at a minimum ensure a dignified standard of living for all asylum-seekers, including when admissibility of subsequent applications is being reviewed.⁴²

f) Procedural rights during the first instance RSD procedure (Article 45-2)

Article 45-2 (Support for interpreting, etc)

(1) The Minister of Justice may provide interpretation (including translation for subpara. 1 and 5) when receiving applications or issuing decisions pursuant to following subparagraphs, when a person of following subparagraphs cannot express himself or herself in Korean or cannot understand contents in Korean.

1. A person applying for refugee status pursuant to Article 5(1) and 6(1)

2. A person receiving decision of inadmissibility for subsequent refugee status determination procedure pursuant to Article 5-2(4), subpara. 2.

3. A person receiving decision of non-referral to refugee status determination procedure pursuant to Article 6(3).

4. A person receiving decision of non-recognition of refugee status pursuant to Article 18(2) and Article 19.

5. A person making an appeal pursuant to Article 21(1)

6. A person receiving a decision of rejection on appeal to the decision of non-recognition of refugee status pursuant to Article 21(6)

7. Other persons for whom the Minister of Justice deems to be in need of interpretation.

(2) The Minister of Justice may delegate interpretation and/or translation support work of paragraph 1 to a legal entity, organization, etc. that possesses personnel and qualifications necessary for the work, if deemed necessary, as determined by the Presidential Decree.

30. UNHCR welcomes the provision of translation/interpretation for refugee applicants and refugees, including during their submission of refugee application and registration thereof, as stipulated in Article 45-2 of the Proposal. At the same time, UNHCR is concerned that the discretionary nature of the provision may leave some asylum-seekers without translation/interpretation.⁴³ As such, UNHCR recommends that the provision of translation and interpretation during registration process should be mandatory, not discretionary, and that MoJ should ensure that translation and interpreting in RSD procedures are provided by trained and qualified translators/interpreters. Registration entails the recording of all relevant data regarding the applicants, the identification of persons with specific needs and the referral of persons for the necessary assistance.⁴⁴ In

⁴² 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.

⁴³ In this regard, UNHCR notes that the MoJ states its intention to “exclude, from translation support, refugee applications that do not fall under one of the persecution grounds under the 1951 Refugee Convention or the Refugee Act” within its Statement on Reasons for not Providing a Budget Estimate attached to the Proposal, without elaborating on how some applications will be screened for denial of support.

⁴⁴ UNHCR, *UNHCR Discussion Paper Fair and Fast - Accelerated and Simplified Procedures in the European Union*, supra note 22, at 14.

terms of both efficiency and fairness, it is essential that there be an accurate and rigorous recording of relevant data and information from the outset to ensure the integrity of protection systems,⁴⁵ which would be facilitated by appropriate translation/interpretation.

31. According to UNHCR's *RSD Procedural Standards*, all communications between a refugee applicant and UNHCR must take place in a language that the applicant understands and in which he or she is able to communicate clearly. Applicants should have access to the services of trained and qualified interpreters at all stages of the RSD process, including during registration, first instance RSD, appeal, cancellation, revocation, cessation and re-opening procedures. Rejection letters should provide specific and detailed reasons for denial of refugee status claims and should be carried out in a language the applicant understands.⁴⁶

g) Punishment for submission of non-factual information (Article 47)

Article 47 (Punishments)

(2) A person who facilitates or solicits unlawful application of the following subparagraphs by using unlawful methods such as submission of false or fabricated documents or other data or documents or other data that include non-factual information shall be subject to imprisonment not exceeding two years or fines not exceeding twenty million Korean Won.

1. A refugee status application pursuant to Article 5

2. An appeal pursuant to Article 21

3. An administrative appeal or litigation against decisions of the following items

a. a decision of inadmissibility of subsequent refugee status determination procedure pursuant to subpara. 2, Article 5-2(4).

b. a decision not to refer to refugee status determination procedure pursuant to Article 6(3).

c. A decision of non-recognition of refugee status pursuant to Article 18(2) and 19.

(3) A person who conducted the actions stipulated in paragraph 2 above for profit shall be subject to imprisonment not exceeding five years or fines not exceeding fifty million Korean Won.

32. Article 47, subpara. 2 of the current Refugee Act and the paragraphs 2 and 3 of the Articles 47 of the Proposal stipulate grounds to punish refugee status applicants for the use of false or forged documents and/or the submission of non-factual information during the RSD procedures. UNHCR notes that where this provision applies to the refugee status applicant, such punishment is not in accordance with Article 31 (1) of the 1951 Convention when the applicant meets the criteria for non-penalization for irregular entry/presence stipulated therein.⁴⁷ Article 31(1) provides that: "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence." In many instances, asylum-seekers are obliged to rely on false identity papers to flee persecution. Each asylum application must therefore be considered on the basis of the specific circumstances of each individual case, including the circumstances and conditions of entry into the territory and the reasons why an

⁴⁵ *Ibid*, at 6.

⁴⁶ UNHCR, *UNHCR RSD Procedural Standards Unit 2.5: Interpretation in UNHCR RSD Procedures*, 26 August 2020, para. 2.5.1, available at: <https://www.refworld.org/docid/5f3113ec4.html>.

⁴⁷ See UNHCR, *Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalization, Detention and Protection [Global Consultations on International Protection/Second Track]*, 1 October 2001, available at: <https://www.refworld.org/docid/3bf9123d4.html>.

asylum-seeker has resorted to the use false or forged documents.⁴⁸ The grounds expressed in Article 47 (2) can create the risk of detention in the context of asylum procedures and result, contrary to Article 31 (1) of the 1951 Convention, in the penalization of asylum-seekers, who enter the country in an irregular manner.⁴⁹ In UNHCR's view, it is important to recognize the specific legal situation of asylum-seekers, who are claiming the fundamental human right to asylum, which entitles them to safeguards additional to those of other aliens, who enter or are otherwise present in the country in an irregular manner.⁵⁰ UNHCR therefore urges the deletion of this provision.

Conclusion

- The Proposal includes several welcoming elements that have the potential to improve due process during administrative RSD procedures and access to rights for recognized refugees, humanitarian status holders and refugee status applicants.
- However, the impact of these improvements may remain limited if access to fair and efficient asylum procedures is infringed by creating inadmissibility procedures.
- In UNHCR's view, the best way forward for fair and efficient asylum procedures is to ensure good quality decision-making, appropriate resource allocation and a case management system at all stages of the process, including with regards to staffing, case processing modalities and training.
- UNHCR, in principle, agrees that subsequent applications may be subjected to a preliminary examination of whether new elements have arisen or been presented which would warrant examination of the substance of the claim. However, such a preliminary examination is justified only if the previous claim was considered fully on the merits. In order to guarantee procedural safeguards, a personal interview is an essential part of the procedure.

⁴⁸ UNHCR, *UNHCR's Position on Manifestly Unfounded Applications for Asylum*, 1 December 1992, 3 European Series 2, p. 397, available at: <https://www.refworld.org/docid/3ae6b31d83.html>. See, for instance, in the context of cancellation of refugee status, "The use of forged documents does not of itself render a claim fraudulent and should never automatically result in the cancellation of refugee status, provided the true identity and nationality of the person is known and has formed the basis of the recognition decision. In addition, it should be noted that cancellation does not serve as a "punishment" for incorrect statements." UNHCR, *Note on the Cancellation of Refugee Status*, 22 November 2004, available at: <https://www.refworld.org/docid/41a5dfd94.html>. Also see UNHCR, *UNHCR Handbook*, paras. 198-199, that explain that an asylum-seeker's apprehension towards any authority may hinder his ability to speak freely and to give a full and accurate account of his case, and that "untrue statements by themselves are not a reason for refusal of refugee status and it is the examiner's responsibility to evaluate such statements in the light of all the circumstances of the case."

⁴⁹ According to the IPU Handbook for Parliamentarians No. 27, a Guide to International Refugee Protection and Building State Asylum Systems, jointly published by the Inter-Parliamentary Union (IPU) and UNHCR, parliamentarians are encouraged to: ensure that legislation states clearly that penalties shall not be imposed on refugees on account of their illegal entry or presence, when they come directly from a territory where their life of freedom was threatened, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. They are further encouraged to advocate for the inclusion in criminal legislation of provisions that bar the institution or continuation of legal proceedings for irregular entry or stay against individuals who have applied for asylum, until the final outcome of the asylum claim, referring to relevant immigration/asylum law provisions to ensure consistency. UNHCR, *A guide to international refugee protection and building state asylum systems*, 2017, Handbook for Parliamentarians N° 27, p. 95, available at: <https://www.refworld.org/docid/5a9d57554.html>

⁵⁰ UNHCR, *UNHCR Comments on the European Commission's amended recast proposal for a Directive of the European Parliament and the Council laying down standards for the reception of asylum-seekers*, June 2011, p. 8, available at: <https://www.unhcr.org/513da1cc9.pdf>.

- The broad use of “implicit withdrawal” concept may lead to rejections of applications in cases in which refugee applicants do not actually intend to withdraw their application. In general, UNHCR considers that an application can only be rejected where there has been a full examination of all relevant facts and circumstances.
- UNHCR welcomes the inclusion of provisions to improve access to rights for recognized refugees, humanitarian status holders and refugee status applicants. However, UNHCR would recommend that their access to rights, including right to health and work, are fully ensured by revising the relevant provisions as mandatory rather than discretionary. Asylum-seekers undergoing admissibility procedures should also be ensured of their right to work.
- Refugee status applicants should not be penalized for submitting false or forged documents or false information during the RSD procedures. Imposition of penalties in this regard is not in accordance with Article 31 (1) of the 1951 Convention.

UNHCR Representation in the Republic of Korea
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