UNHCR

Comments by the United Nations High Commissioner for Refugees (UNHCR) Regional Representation for Northern Europe on the revised Law Proposal amending the Act on Granting International Protection to Aliens and other related laws (draft law 81 SE)

I. Introduction

1. In accordance with its supervisory responsibility to monitor and support State Parties in their application of the 1951 Convention related to the Status of Refugees, the UNHCR Regional Representation for Northern Europe (UNHCR RRNE) is pleased to provide to the Constitutional Committee of the Estonian Parliament (*Riigikogu*) the below comments on the revised Law Proposal (Law Proposal) amending the Act on Granting International Protection to Aliens (AGIPA) and other related laws (*Välismaalasele rahvusvahelise kaitse andmise seaduse ja sellega seonduvalt teiste seaduste muutmise seaduse eelnõu* 81 SE).
2. Last year, UNHCR submitted twice its comments on the Law Proposal in question and UNHCR is grateful to the Constitutional Committee of the Estonian Parliament and the Estonian Ministry of the Interior for their cooperation and willingness to address the issues highlighted in these submissions.
3. While noting positive changes and improvements in the revised Law Proposal, UNHCR considers that a number of crucial points and issues still require further elaboration. In UNHCR view, by addressing the issues, as identified below in the text, in a timely manner, the Estonian government will align the asylum system with international standards, ensure a proper transposition of the second generation of the EU asylum *acquis* into Estonian legislation, and create a conducive environment for transferring persons in need of international protection under the relocation and resettlement programs to Estonia.

II. Observations on Specific Proposals

➢ Definition of Resettlement and Relocation

4. UNHCR notes that Article 1(9) of the Law Proposal proposes a new Article 5[1], which provides definitions of "resettlement" and "relocation". In general, UNHCR welcomes the initiative to incorporate into the AGIPA these definitions. At the same time, the proposed wording of both definitions does not fully encompass several important elements as provided in the UNHCR Resettlement Handbook[1] and relevant EU Council decisions[2].
5. According to Section 1 of new Article 5[1], "*resettlement is reception by Estonia of a person who is granted international protection from a third country.*" According to the UNHCR Resettlement Handbook, UNHCR would like to note that resettlement involves the selection and transfer of refugees upon request of UNHCR from a State in which they have sought protection to a third State which has agreed to admit them – as refugees –

[1] UN High Commissioner for Refugees (UNHCR), UNHCR Resettlement Handbook, 2011, July 2011, available at: http://www.refworld.org/docid/4ecb973c2.html.

[2] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece; Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece.

with permanent residence status. Resettlement is a durable solution for refugees, i.e. one that ends the cycle of displacement by resolving their plight so that they can lead normal lives. The status thus provided, ensures protection against *refoulement* and provides a resettled refugee and his/her family or dependents with access to rights similar to those enjoyed by nationals. Resettlement also carries with it the opportunity to eventually become a naturalized citizen of the resettlement country3.

6. The nature of Resettlement as a Durable Solution is further confirmed in a number of Executive Committee (ExCom) Conclusions. For example ExCom Conclusion No. 99 from 2004 endorses the Multilateral Framework of Understanding on Resettlement, which underlines that Resettlement countries are to "work with refugees, as needed, to enhance their effective integration, with a view to progressively attaining the standards enjoyed by nationals" and "promote naturalization.[4] Also ExCom Conclusion No. 109 on protracted refugee situations reinforces the core of the UNHCR statute in searching for permanent solutions, and underlines the permanent nature of resettlement as a Durable Solution.[5] UNHCR is of the strong view that it remains of great importance to recognize the need to respect a basic degree of stability for refugees and the overarching objective of international protection, namely to find durable and permanent solutions for refugees.

7. It is therefore important to clarify in the AGIPA status and rights of resettled refugees, the process, but in particular the fact that it is a Durable Solution, eventually offering a pathway to citizenship. The integration of a definition, as in the UNHCR Resettlement Handbook, would lay a solid ground for a successful process of integration of resettled refugees. In the light of the fact that Estonia is in the process of establishing its national resettlement program, also bearing in mind the current climate of protracted conflicts and 'protection and asylum' fatigue in Europe, it is critical that Estonia would set a good example in granting durable solutions to resettled refugees and securing them permanent residence status.

   Recommendation: to amend Article 1(9) of the Law Proposal by modifying Section 1 of Article 5[1] of the AGIPA as follows: "Resettlement is the process of selection and transfer to Estonia upon request of the United Nations High Commissioner for Refugees of persons who have sought international protection in another country as refugees with permanent residence status and the right to naturalize."

8. According to Section 2 of new Article 5[1], "*relocation is reception by Estonia of a person who is granted international protection from another EU Member State.*" UNHCR notes that the proposed definition is at variance with Article 3 of the EU Council Decision 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece. Pursuant to this Decision, relocation shall take place only in respect of ***applicants for international protection*** who belong to certain nationalities. UNHCR would like to remind that the measures provided for in the Council Decision 2015/1601 entail a temporary derogation from the rule set out in Article 13(1) of the Dublin III Regulation according to which Italy and Greece would otherwise have been responsible for the examination of an application for international protection based on the criteria set out in Chapter III of that Regulation. It is also a

[3] See UNHCR *Resettlement Handbook*, pages 3 and 28.

[4] UN High Commissioner for Refugees (UNHCR), *Multilateral Framework of Understandings on Resettlement*, 16 September 2004, FORUM/2004/6, available at: http://www.refworld.org/docid/41597d0a4.html.

[5] Conclusion on Protracted Refugee Situations, No. 109 (LXI) – 2009, ExCom Conclusions, 8 December 2009, paragraph d), available at; http://www.unhcr.org/4b332bca9.html.

temporary derogation from the procedural steps, including the time limits, laid down in Articles 21, 22 and 29 of that Regulation.

9. UNHCR therefore recommends to bring the proposed definition of relocation in the AGIPA in line with the EU Council Decision 2015/1601, which shall encompass applicants for international protection, but not persons who are granted international protection.

   Recommendation: to amend Article 1(9) of the Law Proposal by replacing the words "person who is granted international protection" with "applicants for international protection" in Section 2 of new Article 5^1.

10. UNHCR notes that Article 1(26) of the Law Proposal proposes to amend Article 15 of the AGIPA with additional Sections 1^1-1^5. According to new Section 1^5 of Article 15, "an alien who has submitted an application for international protection can be relocated or resettled to Estonia after being recognized as a beneficiary of international protection and granted a residence permit by Estonia". As was noted above, pursuant to the EU Council decisions, the process of relocation may involve only applicants who are in a clear need of international protection but not beneficiaries or persons who are already granted international protection.

11. Resettlement under the auspices of UNHCR, on the other hand, is only available to refugees who have a continued need for international protection. In many instances UNHCR conducts mandate status determination, however, if required resettlement countries may conduct an assessment of protection needs themselves upon submission by UNHCR of cases for resettlement. Hence, while UNHCR generally expect States to accept its assessment on the status of persons and their continued international protection needs (also in view of avoiding duplication of processes), the possibility for States to conduct their own assessment, when required, may remain in practice.

    Recommendation: to amend Article 1(26) of the Law Proposal by modifying Section 1^5 of Article 15 of the AGIPA as follows: "a refugee can be resettled to Estonia after being granted a residence permit by Estonia".

- **Safe country of origin**

12. According to Article 1(15) of the Law Proposal, Article 9 of the AGIPA will be amended through a new section 8, which provides that "*If a person (applicant) can safely and legally travel to a part of a country, s/he gains admittance to that part of the country and s/he can reasonably be expected to settle there, it is possible to designate this part of the country of origin as safe, following the requirements provided in sections 3-5 of the present article*". UNHCR notes that this issue was already addressed in the UNHCR commentary from January 2015.[6]

13. UNHCR would like to reiterate that the proposed modification is not in accordance with Article 37 of the recast Asylum Procedures Directive (APD)[7], which allows Member States to designate **only the entire country** of origin as safe, but not a part of it.

[6] Observations by the United Nations High Commissioner for Refugees (UNHCR) Regional Representation for Northern Europe on the Draft Law Proposal of 05 December 2014 amending the Act on Granting International Protection to Aliens, January 2015. Available at: http://www.unhcr-northerneurope.org/where-we-work/estonia/estonia/documents-reports/

[7] European Union: Council of the European Union, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection

14. UNHCR would like to also note that the proposed modification[8] incorporates the elements of two different legal concepts: the *safe country of origin* and the *internal flight or relocation alternative*. In UNHCR's view of, it is necessary to distinguish these two concepts in the national legislation. While the *safe country of origin* concept is to be applied as a procedural management tool for e.g. channeling asylum application into accelerated procedure[9], the concept of *internal flight or relocation alternative* is to be used in the context of examination of asylum application on its merits in the refugee status determination procedure[10].

Recommendation: To repeal Article 1(15) of the revised Law Proposal.

➢ **Provision of information to asylum-seekers**

15. UNHCR notes that Article 1(16) of the Law Proposal amends, *inter alia*, Article 10 (2) of the AGIPA. The latter provides a set of rights, which shall be accorded to an applicant for international protection. According to the proposed new Item 1 of Article 10(2) of the AGIPA, an applicant has the right "*to receive as soon as possible, but not later than within 15 days from submission of an application for international protection or residence permit, information about his or her rights and obligations, including information about organisations providing legal aid or reception-related assistance, the asylum procedure as well as of consequences of not complying with their obligations. This information shall be provided both orally and in writing, and in a language that the applicant understands.*".

16. This issue was addressed by UNHCR in its previous commentary.[11] UNHCR would like to note that pursuant to Recitals 27-28 and Article 12(1a) of the recast APD, information about the asylum procedure, rights and obligations, etc shall be given to individual asylum-seeker as soon as a person expresses his or her wish to apply for international protection. The current timeframe as suggested in Item 1 of Article 10(2) is thus not in line with the recast APD. Also, considering the plans of the Estonian Government to introduce an admissibility procedure at border-crossing points (see Articles 1(44) and 5 of the Law Proposal), the proposed timeframe (15 days) may potentially lead to lack of effective access to procedural rights for those asylum-seekers who will be denied the right to enter Estonia pursuant to new Section 3^1 of Article 11^1 of the Law on State

(recast), 29 June 2013, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU (recast APD), available at: http://www.refworld.org/docid/51d29b224.html.

[8] According to the explanatory note to the Law Proposal, the proposed modification of Article 9(7) of the AGIPA is based on Article 8 of the recast QD, which outlines criteria for application of the internal protection, also known as "*internal flight or relocation alternative*".

[9] See UN High Commissioner for Refugees (UNHCR), *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009)554, 21 October 2009)*, August 2010, page 35, available at: http://www.refworld.org/docid/4c63ebd32.html and UN High Commissioner for Refugees (UNHCR), *UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004)*, 10 February 2005, pages 40-41, available at: http://www.refworld.org/docid/42492b302.html.

[10] See UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04, available at: http://www.refworld.org/docid/3f2791a44.html.

[11] Additional Observations by the United Nations High Commissioner for Refugees (UNHCR) Regional Representation for Northern Europe on the revised draft Law Proposal of 15 June 2015 amending the Act on Granting International Protection to Aliens and other related laws, July 2015, see paras 19-22. Available at: http://www.unhcr-northerneurope.org/where-we-work/estonia/estonia/documents-reports/

Border (see the proposed new wording of this provision in Article 5 of the Law Proposal).

Recommendation: To amend Article 1(16) of the Law Proposal by:
- deleting the words "not later than within 15 days" in Item 1 of Article 10(2) of the AGIPA, as follows: "*to receive immediately after submission of application for international protection or residence permit information about the procedure to be followed and on their rights and obligations during the procedure and the possible consequences of not complying with their obligations and not cooperating with the authorities, the time-frame, the means at their disposal for fulfilling the obligation to submit the elements as referred to in Article 4 of Directive 2011/95/EU, as well as of the consequences of an explicit or implicit withdrawal of the application.*"

- adding new Item 11 to Article 10(2) of the AGIPA as follows: "*to receive within a reasonable time not exceeding 15 days after lodging of their application for international protection, information on any established benefits and of the obligations relating to reception conditions which they must comply with, as well as information on organisations or groups of persons that provide specific legal assistance and organisations that might be able to help or inform them concerning available reception conditions, including health care.*".

- **Definition of persecution**

17. UNHCR notes that Article 1(39) of the Law Proposal proposes amending Section 1 of Article 19 of the AGIPA, which provides criteria for establishing persecution and serious fear. According to new Item 1 of Article 19 (1) of the AGIPA, persecution shall be real or repetitive and shall violate human rights, except cases provided in Article 15(2) of the European Convention on Human Rights.

18. In UNHCR's view the current wording of new Section 1 of Article 19 is not in full accordance with Article 9(1a) of the recast Qualification Directive (QD)[12]. The latter provides that in order to be regarded as an act of persecution within the meaning of Article 1(A) of the Geneva Convention, an act must be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Recommendation: to amend Article 1(39) of the Law Proposal by amending Item 1 of Article 19(1) of the AGIPA and incorporating the language of Article 9 (1a) of the recast QD, as follows: "*1) be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms*".

19. UNHCR also notes that Article 19 of the AGIPA does not fully transpose another important standard which is envisaged by Article 9 of the recast QD. In accordance with Section 3 of Article 9 of the recast QD, there must be a connection between the reasons

[12] European Union: *Council of the European Union, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU, available at: http://www.refworld.org/docid/4f197df02.html.

for persecution and the acts of persecution, as qualified in Section 1 of Article 9 of the recast QD, or the absence of protection against such acts.

Recommendation: to amend Article 1(39) of the Law Proposal by incorporating a new Section 2^1 in Article 19 of the AGIPA, as follows:

"(2^1) There should be a connection between the reasons for persecution as provided in Article 4(1) of the present law and the acts of persecution as qualified in Items 1-6 of Section 2 of the present article or the absence of protection against such acts.".

- **Manifestly unfounded application and grounds for accelerated examination of application**

20. UNHCR notes that Article 1(43) of the revised Law Proposal incorporates two new articles in the AGIPA: Article 20^1 (*Manifestly unfounded applications*) and Article 20^2 (*Accelerated examination of application*).

21. Section 1 of Article 20^1 of the AGIPA provides a definition of a "manifestly unfounded application". The issue of the definition of a "manifestly unfounded application" was addressed by UNHCR in its previous commentaries and discussed at the meeting of the Constitutional Committee of the *Riigikogu* in November 2015.

22. UNHCR welcomes the positive adjustments made as a result of these deliberations, however UNHCR is concerned that the current wording of Section 1 of Article 20^1 of the AGIPA still provides a possibility to treat an application for international protection as manifestly unfounded without examination of its merits. In UNHCR's view, the provision in question is not compliant with Article 32(2) of the recast APD. The Article 32(2) requires that an application for international protection can be considered as manifestly unfounded **only after** an appropriate examination conducted by the determining authority which shall establish that the applicant qualifies neither for refugee status, nor for subsidiary protection.

Recommendation: Taking into consideration the proposed modification of Article 20 of the AGIPA (see for details Article 1(42) of the revised Law Proposal), which provides a definition of an "unfounded application" (*põhjendamatu taotlus*), UNHCR recommends amending Article 1(43) of the revised Law Proposal by modifying the proposed new Section 1 of Article 20^1 of the AGIPA, as follows:

"An "unfounded" application shall be considered as a manifestly unfounded application, if one of the below circumstances is applicable: ".

23. UNHCR further notes that the Item 4 of Article 20^2 of the AGIPA enables a decision-making authority to channel an inadmissible application for international protection made by an unaccompanied child into the accelerated procedure. UNHCR would like to remind that while inadmissible applications are not supposed to be examined on its merits, the purpose and scope of the accelerated procedure is to examine on its merits, albeit in an expeditious manner, the applications which are obviously without foundation.

Recommendation: to modify Article 1(43) of the Law Proposal by deleting new Item 4 of Section 3 of Article 20^2 of the AGIPA.

- **Inadmissible procedure**

24. UNHCR notes that Article 1(44) of the revised Law Proposal aims to harmonize Article 21 of the AGIPA with the corresponding Article 33 of the recast APD, which provides

grounds for leaving applications without examination on the merits whether the applicant qualifies for international protection (inadmissible applications). UNHCR recommends to bring the new Article 21 of the AGIPA in line with Article 43(2) of the recast APD by introducing a reasonable time frame for examination of an application for international protection in the admissibility procedure.

Recommendation: to amend Article 1(44) of the revised Law Proposal by incorporating a reasonable time frame for processing applications in the admissibility procedure in Article 21 of the AGIPA.

- **Withdrawal or abandonment of application**

25. Article 1(46) of the revised Law Proposal introduces, *inter alia*, a revised version of Article 23 of the AGIPA, which regulates the procedures in case of withdrawal or abandonment of an application for international protection. According to the modified Article 23 (3) of the AGIPA, "*the PBGB shall reject the application in accordance with Article 4 of the recast QD, if an applicant has implicitly withdrawn or abandoned his or her application.*".

26. UNHCR notes that the proposed provision reflects, to some extent, the requirements of Article 28(1) of the recast APD. However, the current wording of Article 23(3) does not transpose an important provision enshrined in Article 28(1) providing that the determining authority can reject an application which is considered implicitly withdrawn or abandoned *only after an adequate examination of its merits*. The implementation of the modified Article 23(3) of the AGIPA in its current wording may lead to situations, where a person who is in clear need of international protection may be rejected in the admissibility procedure at the border and returned to his or her country of origin. For example, an application of a Syrian, who absconds from the reception centre in Vao, would be considered as rejected on the merits pursuant to the proposed amendment. Should this applicant be returned to Estonia under the Dublin III Regulation, the Police and Border Guard Board would have to process his or her application as a 'subsequent application'. Accordingly, unless new circumstances or facts are provided, such an application would be rejected without examination on the merits in the admissibility procedure in line with new Articles 21(4) and 24(3) of the AGIPA and Article $11^1(3^1)$ of the State Border Act.

27. Consequently, by rejecting an application without examining it on the merits, Estonia will be potentially in breach of Article 33 of the 1951 Convention enshrining the principle of *non-refoulement*.

Recommendation: to amend Article 1(46) of the revised Law Proposal by amending the wording of Article 23(3) of the AGIPA as follows:

"If an applicant has implicitly withdrawn or abandoned his or her application, the Police and Border Guard Board shall take a decision either to discontinue the examination or reject an application if it considers the application to be unfounded on the basis of an adequate examination of its substance in line with Article 4 of the recast Qualification Directive.".

- **Detention in Dublin cases**

28. UNHCR notes that Article 1(58) of the revised Law Proposal suggests amending Item 7 of Article 36^1 (2) of the AGIPA, which stipulates the ground for detention in case of

a transfer of an asylum-seeker in accordance with the Dublin III Regulation. The proposed new wording of Item 7 provides that an asylum-seeker may be detained *"for transferring under the Dublin III Regulation in case if there is a risk of absconding.*".

29. In UNHCR's view, the proposed amendment to Article 36[1] (2) of the AGIPA is not in full compliance with Article 28(2) of the Dublin III regulation, which requires that an applicant can only be detained to secure a transfer under Dublin when there is a "***significant*** risk of absconding", which must be evaluated in each individual case.

Recommendation: to modify Article 1(58) of the revised Law Proposal by amending the word "significant" into Item 7 of Article 36[1](2) of the AGIPA, as follows:

"7) to secure a transfer under the Dublin III Regulation when there is a significant risk of absconding."

- **Criteria for assessing a risk of absconding**

30. According to Article 1(59) of the revised Law Proposal, it is suggested to amend Article 36[1] of the AGIPA with a new section 2[1] as follows:

"There is a risk of absconding... if an applicant has left without authorization his or her place of residence in another EU Member States or in cases when one of the circumstances enumerated in Article 6.8 of the Obligation to Leave and Prohibition on Entry Act is applicable."

31. UNHCR notes that the issue of inapplicability of some grounds for assessing the risk of absconding as provided in the Obligation to Leave and Prohibition on Entry Act (OLPEA) with regard to persons who are in need of international protection has been thoroughly addressed in the UNHCR previous commentary from July 2015.

32. UNHCR would like to reiterate that some of the criteria for assessing the risk of absconding as provided in Article 6.8 of the OLPEA are too general and do not take into consideration the individual aspects of each applicant as well as the specific status and safeguards accorded to asylum-seekers and refugees by international law, including, *inter alia,* Article 31 of the 1951 Refugee Convention[13]. By lodging an application for international protection, an individual obtains a new legal status, which is governed by another legal regime under which administrative or immigration detention ceases to be justified unless there is a legitimate purpose.

Recommendation: to amend the wording of Article 1(59) of the revised Law Proposal by introducing a separate list, which is specifically tailored for the situation of applicants for international protection, with criteria for assessing the risk of absconding in Section 2[1]of Article 36[1] of the AGIPA.

- **Permission to enter**

33. According to Article 5 of the revised Law Proposal, it is suggested to modify Article 11[1] (3[1]) of the State Borders Act[14] as follows:

[13] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: http://www.refworld.org/docid/3be01b964.html

[14] *Riigipiiri seadus*, RT I 1994, 54, 902.

"A third-country national who lacks legal basis or valid travel document for entering Estonia and who wish to apply for international protection in Estonia shall be permitted to enter Estonia after submission of the application for international protection to the Police and Border Guard Board, except if circumstances mentioned in Item 1 of Article 20¹ (1) or Items 1-3 of Article 21 (1) of the AGIPA are applicable.".

34. UNHCR notes that the aim of the proposed amendment is to deny the permission to enter the territory of Estonia to those applicants whose applications are ***manifestly unfounded*** pursuant to the safe country of origin concept (Item 1 of Article 20¹(1) of the AGIPA or whose applications are ***inadmissible*** pursuant to the first country of asylum/ safe third country concepts (Items 1-3 of Article 21(1) of the AGIPA). This implies that such applicants will have to remain at a border-crossing point or transit zone pending examination of their applications in the accelerated or admissibility procedure by the PBGB.

35. UNHCR further notes that according to new Section 4 of Article 20² of the AGIPA (as proposed by Article 1(43) of the revised Law Proposal), the duration of the accelerated procedure in Estonia is supposed to be within 30 days. Neither the current AGIPA, nor the revised Law Proposal provide a time frame for the admissibility procedure (see para 24 above).

36. In UNHCR' view, the Estonian border-crossing points or transit zones are not sufficiently equipped and suitable for accommodation of applicants for international protection for a period longer than 48 hours. As a result, there is a serious risk that applicants who will be channeled into the accelerated or admissibility procedures, will face treatment incompatible with Article 3 of the ECHR[15].

37. Likewise, UNHCR would like to remind that Articles 9(1) of the recast APD guarantees to applicants for international protection the right to remain during asylum proceedings until the PBGB takes a decision on their asylum application. Moreover, pursuant to Article 46(8) of the recast APD, Member States shall allow the applicant to remain in the territory pending the outcome of the procedure to rule whether or not the applicant may remain on the territory. Such a procedure can be invoked, *inter alia*, in situations when following an application considered inadmissible, the applicant wants to prepare and submit to the court arguments in favor of granting him/her the right to remain on the territory, as prescribed by Article 46(7a) recast APD. It is, therefore, possible that the time for processing of applications channeled into the accelerated or admissibility procedures will take much longer than 48 hours.

38. In UNHCR's view, the proposed amendment to Article 11¹(3¹) of the State Borders Act extends the list of exceptions from the right to remain in the territory and thus permits inadmissible exemptions from the principle of *non-refoulement*.[16] It is therefore necessary to ensure in the law that any applicant for international protection is treated in accordance with the basic principles and guarantees as provided in Chapter II of the recast APD, including the right to remain in the territory until the final decision on their application is made, or until the court will decide on whether or not the applicant may remain on the territory.

Recommendation: to amend the wording of Article 5 of the revised Law Proposal by deleting the words "*except if circumstances mentioned in Item 1 of Article 20¹ (1)*

[15] Council of Europe, http://www.echr.coe.int/Documents/Convention_ENG.pdf.

[16] See for more details the UNHCR Additional Observations on the revised draft Law Proposal of 15 June 2015, supra footnote 11, paras 99-105.

***or Items 1-3 of Article 21 (1) of the AGIPA are applicable"* in Article 11[1] (3[1]) of the State Borders Act.**

➢ **Extension of detention of asylum-seekers**

39. Article 1(60) of the revised Law Proposal foresees an automatic determination of the detention period (4 months) in cases when the relevant state authorities seek extension of detention of an applicant for international protection. UNHCR understands that currently, the detention period is extended for 2 months at a time.

40. The fundamental rights of liberty and security of person are expressed in all the major international and regional human rights instruments, and are essential components of legal systems built on the rule of law.[17] The basic tenets are, that seeking asylum should not be seen as an unlawful act, and that detention is an exceptional measure that should be used as a measure of last resort. The authorities must not take any action exceeding that which is strictly necessary to achieve the pursued purpose in the individual case. The necessity and proportionality tests further require an assessment of whether there were less restrictive or coercive measures (that is, alternatives to detention) that could have been applied to the individual concerned and which would be effective in the individual case[18]". Mandatory or automatic detention is arbitrary as it is not based on an examination of the necessity of the detention in the individual case[19].

41. In view of the aforementioned standards and principles, UNHCR is concerned about the risks of a high degree of arbitrariness with regards to extension of detention of applicants for international protection. It needs to be ensured that the purpose of extension of detention is indeed only to protect public order, and not, for example, to facilitate administrative expediency. UNHCR is thus of the view that following an initial judicial confirmation of the right to detain, review would take place every seven days until the one month mark and thereafter every month until the maximum period set by law is reached.[20]

42. UNHCR is thus concerned that the proposed amendment will create a conducive environment for deviating from the requirement to apply the necessity and proportionality tests while determining the period of extension of detention. There is also a risk that decisions on extension of detention may be taken in haste, in particular if Estonian administrative courts will face situations of mass influx of asylum cases or other significant increase of work-load. The automatic extension of detention for 4 months, without proper assessing the individual circumstances, would be consequently arbitrary and incompatible with international law.

Recommendation: to modify Article 1(60) of the revised Law Proposal by amending Section 5 of Article 36[2] as follows:

"The administrative court may extend the period of detention if there are grounds as provided in Section 2 of Article 36[1] of the current law, the detention is still necessary and proportional, and there are no other less coercive measures (alternatives to detention) that could have been applied to the applicant concerned. The new period

---

[17] UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, (UNHCR Detention Guidelines), available at: http://www.refworld.org/docid/503489533b8.html, page 13.

[18] *Ibid*, page 21.

[19] See, for example, *A v. Australia*, HRC, Comm. No. 560/1993, 3 April 1997, paras. 9.2-9.4 (on proportionality), available at: http://www.unhcr.org/refworld/docid/3ae6b71a0.html.

[20] *UNHCR Detention Guidelines*, page 27.

of detention shall be determined by the administrative court depending on the detention ground invoked by the Police and Border Guard Board or Security Police."

➢ **Revocation/ repeal of refugee status**

43. UNHCR notes that Article 1(64) of the revised Law Proposal aims to amend the ground for revocation (*kehtetuks tunnistamine*) of refugee status as provided in Item 2 of Section 3 of Article 49 of the AGIPA. The proposed amendment sets out that "*the refugee status may be revoked by the Police and Border Guard Board, if a judgment of conviction of the first degree criminal offence has entered into force with regard to an alien*". Pursuant to Section 2 of Article 4 of the Estonian Penal Code[21], a criminal offence is of first degree when the maximum punishment prescribed for it in the Penal Code for a natural person is imprisonment for five or more years or life imprisonment.

44. UNHCR further notes that unlike the AGIPA, the official English translation of the Administrative Procedure Act[22] operates with the term 'repeal' instead of 'revocation' when it discusses the issues related to invalidation (*kehtetuks tunnistamine*) of administrative acts both proactively (*edasiulatuvalt or ex nunc*) and retroactively (*tagasiulatuvalt* or *ex tunc*)[23]. Pursuant to Item 1 of Section 2 of Article 66 of the Administrative Procedure Act, an administrative act ***which is lawful at the moment of issue*** may be proactively repealed/ revoked to the detriment of a person if this is permitted by law. [emphasis added]

45. UNHCR concludes that Article 1(64) of the revised Law Proposal seeks to establish a ground for terminating a lawfully granted refugee protection with effect for the future (*ex nunc*) in line with Item 1 of Section 2 of Article 66 of the Administrative Procedure Act.

46. In this regard, UNHCR would like to note that under the 1951 Refugee Convention the termination of refugee status with effect for the future (*ex nunc*) is possible only in two sets of circumstances[24]:

    (i) Where one of its cessation clauses applies (Article 1C), and

    (ii) Where a refugee engages in conduct which brings him or her within the scope of Article 1F(a) or (c).

47. The 1951 Refugee Convention does not, thus, envisage the revocation of refugee status where a recognised refugee is convicted of a criminal offence committed in the country of asylum. Refugee protection which was validly granted can be lawfully terminated only under the conditions enumerated in the cessation clauses of Article 1C, or on the basis of Article 1F(a) or (c) of the 1951 Refugee Convention.

Recommendation: to modify Article 1(64) of the revised Law Proposal as follows: *"to revoke Item 2 of Section 3 of Article 49 of the AGIPA.*

➢ **Principle of Non-refoulement**

---

[21] Karistusseadustik (RT I 2001, 61, 364).

[22] Haldusmenetluse seadus (RT I 2001, 58, 354).

[23] See Division 4 (*Amendment and Repeal of Administrative Act*) of the Administrative Procedure Act, including Section 1 of Article 65.

[24] UN High Commissioner for Refugees (UNHCR), Cancellation of Refugee Status, March 2003, PPLA/2003/02, paras 5 and120, available at: http://www.refworld.org/docid/3f4de8a74.html.

48. UNHCR notes that Article 1(66) of the revised Law Proposal aims to modify Item 2 of Section 2 of Article 50 of the AGIPA, which stipulates exceptions from the principle of non-refoulement. According to the proposed amendment, the Police and Border Guard Board may expel or return an alien to a state where his or her life or freedom would be threatened on account of race, nationality or religion or membership of a particular social group or political opinions, "*if a judgment of conviction of the first degree criminal offence has entered into force with regard to him or her.*"

49. At the outset, UNHCR would like to point out that pursuant to Article 32 of the 1951 Refugee Convention, a State may exceptionally be justified in expelling a refugee on grounds of national security or public order, but **refugee status remains intact**, as does the principle of *non-refoulement*. The latter may cease to apply only under the strict conditions set forth in Article 33(2), but even then, the 1951 Refugee Convention does not provide for either cessation or cancellation (*ex tunc* invalidation) of refugee status. In France, this was recognised by the Conseil d'Etat in its decision *Pham*, which ended the practice whereby the French authorities had applied Article 33(2) of the 1951 Convention as the basis for withdrawing refugee status from refugees who had committed a crime on French territory.[25]

Recommendation: to modify Article 1(66) of the revised Law Proposal by:
- suggesting to replace the word "alien" with the word "refugee" in the entire Section 2 of Article 50 of the AGIPA;
- by amending Item 2 of Section 2 of Article 50 as follows: "a refugee constitutes a danger to the community of Estonia as a result of being convicted by a final judgment of a particularly serious crime.

➢ **Extension of residence permits to beneficiaries of international protection**

50. UNHCR notes that Article 1(83) of the revised Law Proposal suggests introducing a new Section 4[6] in Article 75 of the AGIPA. The proposed amendment provides that a failure by a beneficiary of international protection to attend Estonian language training or adaptation courses, as well as to use the services of a support person shall be taken into consideration while deciding on extension of a residence permit or granting of a new residence permit to a beneficiary of international protection.

51. UNHCR further notes that similarly to what is already provided in Article 38 of the AGIPA, the proposed Article 1(62) of the revised Law Proposal suggests granting to the persons who will be relocated or resettled to Estonia a 1-year residence permit if s/he is accorded a subsidiary protection status, and a 3-year residence permit - in case of being recognized as a refugee.

52. UNHCR would like to point out that the timely grant of a secure legal status and residency rights are essential factors in the integration process.[26] UNHCR has observed that the duration of residence permits has a considerable impact on refugees' abilities to integrate, and that short-term residence permits can be detrimental to refugees' sense of security and stability.[27] In order to take into account the special position of refugees, UNHCR recommends that permanent residence should be granted, at the latest, after a

[25] Conseil d'Etat, 21 May 1997.
[26] UNHCR Executive Committee, *Conclusion No. 104*, para. (j), UNHCR, *Thematic Compilation of Executive Committee Conclusions*, August 2009, 4th edition, available at: http://www.refworld.org/docid/4a7c4b882.html.
[27] UNHCR, *Note on the Integration of Refugees in the European Union*, para. 18, May 2007, available at: http://www.refworld.org/docid/463b24d52.html.

three year residence period,[28] and that this time-frame should also apply to beneficiaries of subsidiary protection statuses. UNHCR wishes to note that it has reiterated this recommendation in commentaries to the EU *acquis,* for example in relation to the three-year residence period established by the EU Qualification Directive.[29]

53. In UNHCR's view, the combined requirements of five years of residency, language skills and employment[30] may be very difficult for many refugees and other beneficiaries of protection to meet in order to apply for a long-term residence permit under the Aliens Act of Estonia. The temporary nature of their legal status and the proposed restrictions on extension or granting residence permits - risk having a demotivating effect on integration. Needless to say that the one-year duration of the residence permit granted to beneficiaries of subsidiary protection will be a serious obstacle for their possibilities to integrate, including finding employment and housing.

54. Finally, UNHCR would like to remind that the refugee status may end only under certain clearly defined conditions, which are provided in the 1951 Refugee Convention. This means that once an individual is determined to be a refugee, their status is maintained unless they fall within the terms of one of the cessation clauses contained in Article 1C of the 1951 Refugee Convention or their status is cancelled or revoked. Refugee status may cease either through the actions of the refugee (Article 1 C (1) to (4)), such as by re-establishment in his or her country of origin, or through fundamental changes in the objective circumstances in the country of origin (Article 1 C (5) and (6)). The cessation clauses are exhaustively enumerated, that is, no additional grounds would justify a conclusion that international protection is no longer required. It will therefore be inconsistent with the 1951 Refugee Convention to condition the legal status (grant or extension of residence permits) of beneficiaries of international protection with their ability to fulfil certain duties such as participation in the adaptation course or use of support persons.

Recommendations:
- To amend Article 1(83) of the revised Law Proposal by deleting new Section 4[6] in Article 75 of the AGIPA;
- To amend Article 1(62) of the revised Law Proposal by modifying Section 1 of Article 38 and Item 2 of Section 3 of Article 38 of the AGIPA as follows: "A long-term residence permit shall be issued to a refugee".

UNHCR Regional Representation for Northern Europe

March 2016

[28] *Ibid.*, para. 20.
[29] UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM(2009)551, 21 October 2009), available at: http://www.unhcr.org/4c5037f99.pdf.
[30] See Article 232 of the Aliens Act (*välismaalaste seadus*), which stipulates requirements for applying for a long-term residence permit.