

## Proposal for an Act on amendments to the International Protection Act

### UNHCR comments

#### 1. Introduction

1. On 24 June 2020, the Ministry of Interior of Slovenia published its proposal for an Act on amendments to the International Protection Act<sup>1</sup> (hereafter referred to as ‘draft amendments’) for public consultation with the deadline of 22 July 2020.<sup>2</sup> The explanatory notes of the draft amendments suggest that these were necessitated by an increase in the number of applications for international protection in Slovenia and abuses of the asylum procedure. The objective of the proposed amendments is to ensure fast and efficient asylum procedures; to provide sanctions for non-compliance with obligations in the asylum procedures and the rules of residing in accommodation centres, for violating public order, and for criminal offences, and to clarify the legal basis and enable the more effective implementation of certain concepts of the Act, such as pertaining to restriction of movement and subsequent applications, and also to introduce legislative solutions that motivate beneficiaries of international protection to integrate in Slovenian society.

2. UNHCR has a direct interest in law proposals related to asylum, as the agency entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, seek permanent solutions to the problems of refugees.<sup>3</sup> Paragraph 8 of UNHCR’s Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees,<sup>4</sup> whereas the 1951 Convention relating to the Status of Refugees (hereafter referred to as “1951 Convention”)<sup>5</sup> and its 1967 Protocol 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 and 1967 Protocol (Article 35 of the 1951 Convention and Article II of the 1967 Protocol). This has also been reflected in European Union law, including by way of a general reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the European Union.<sup>6</sup>

3. UNHCR takes note of the stated objective to ensure quick and efficient international protection procedures by remedying the deficiencies identified in the implementation of certain provisions of the Act in practice. UNHCR recognizes that rendering asylum procedures more efficient is an important objective, not only for States, but also for individuals concerned. Therefore, UNHCR in general supports the goal of fair and efficient processing and the use of accelerated procedures for manifestly unfounded and manifestly

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<sup>1</sup> Official Gazette of RS, No. 22/16 and subsequent amendments, available in Slovenian at:

<http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO5761>.

<sup>2</sup> The draft amendments are available in Slovenian at: <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO7103>.

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

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

<sup>5</sup> 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.”

<sup>6</sup> European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, OJ C 115/47 of 9.05.2008, available at: <http://www.unhcr.org/refworld/docid/4b17a07e2.html>.

well-founded claims. However, efficient asylum procedures must be operationalized in a way that ensures fairness, including access to an effective remedy, and adheres to the principle of *non-refoulement*.<sup>7</sup>

4. UNHCR also acknowledges the efforts for enhancing the integration process through the right to assistance with integration and the institutionalization of the use of individualized integration plans based on each person's needs and capacities. UNHCR notes in particular the possibility for extending financial and in-kind integration support for refugees struggling with their local integration process. While UNHCR recognizes the need to conditionalize integration support to reflect both rights and obligations of refugees, such conditions should not result in undue hardship for refugees or render the purpose of social assistance meaningless. Taking into consideration the challenges in many European countries to obtaining disaggregated data on refugee integration and thus being able to evaluate, adapt and inform integration programmes to further enhance integration prospects, the recording of data on the socio-economic integration of persons under international protection is carefully noticed.

5. At the same time, and based on its supervisory responsibility, UNHCR wishes to present the following select concerns regarding the draft amendment to the Government of Slovenia:

- The consideration of the absence of reasons why the applicant could not obtain identification documents in the country of origin for establishing the likelihood that the applicant has destroyed or dispossessed of documents in bad faith which may be taken into account in the decision to reject the claims of asylum-seekers as manifestly unfounded in an accelerated procedure. The proposed consideration does not take into account the specific situation of asylum-seekers and may be at variance with the exemption from the imposition of penalties for unauthorised entry or presence under Article 31 of the 1951 Convention.
- The proposed changes may also result in the restriction of movement or even detention of asylum-seekers due to unrealistic demands for documents issued in their countries of origin, and hence on grounds which may be at variance with international standards. Furthermore, detention in the context of the border procedure lacks the necessary safeguards for asylum-seeking children.
- Shortened time frames to lodge an appeal and the lack of automatic suspensive effect against decisions made in accelerated procedures do not provide adequate procedural safeguards in accordance with the right to an effective remedy.
- The proposed changes do not provide for essential safeguards for asylum-seekers whose age is contested by the authorities.

6. Due to these concerns, UNHCR urges the Government of Slovenia to review the draft amendments to bring it into conformity with international refugee and human rights law as well as EU law. UNHCR stands ready to support Slovenia in this process.

## **2. Non-penalization for unlawful entry or presence**

7. Proposed indent 4 of section 52 of the IPA introduces a consideration for establishing that the asylum-seeker destroyed or dispossessed his or her identity documents in bad faith. If this is established, then the application for international protection shall be deemed manifestly unfounded in an accelerated procedure:<sup>8</sup> '[An application by an applicant which manifestly does not fulfil the conditions for international protection shall be deemed manifestly unfounded] where it is likely that, in bad faith, the applicant has destroyed or disposed of an identity or travel document that would have helped establish his or her identity

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<sup>7</sup> 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>.

<sup>8</sup> See proposed indent 5 of section 49(1) of the IPA.

or citizenship *especially if there are no reasons why the applicant could not obtain identification documents in the country of origin.*' [consideration in italic].

8. Claims made by individuals who clearly are not in need of international protection, or who make claims with an intent to deceive or mislead decision-makers, may be subject to expedited procedures.<sup>9</sup> However, false statements do not in themselves make the claim 'clearly fraudulent.'<sup>10</sup> In this regard, the mere fact of an applicant having misled the authorities by withholding information or documents does not mean that the criteria for international protection may not be met, nor would it obviate the need for international protection. While such cases can be examined in an expeditious manner, i.e. an accelerated examination procedure, they need to be approached with care to ensure they are abusive or without substance prior to declaring them manifestly unfounded. UNHCR's position is that only claims which are clearly abusive, clearly fraudulent or have no link to the 1951 Convention should be considered as 'manifestly unfounded.'<sup>11</sup>

9. Article 31(1) of the 1951 Convention prohibits the imposition of penalties on refugees who have come directly from territories where their life or freedom is threatened, present themselves without delay to authorities and show good cause<sup>12</sup> for their unauthorized entry or presence.<sup>13</sup> The material scope of Article 31(1) extends to the territory under a State's control, which includes borders. In exercising the right to seek asylum, asylum-seekers are often forced to arrive at, or enter, a territory without prior authorization. The effective implementation of Article 31(1) requires that it applies to any person seeking international protection. In consequence, a person seeking international protection is presumed to benefit from the prohibition to impose penalties as stipulated under Article 31(1) until found not to be in need of international protection following a fair procedure. 'Penalties' as referred to in this article is to be broadly understood, *including disadvantages in the asylum procedure as a consequence of irregular entry or presence*, particularly where procedural safeguards are not met.<sup>14</sup> In UNHCR's view, acceleration should not be used as a punitive measure in cases the applicant does not comply with obligations, but used solely as an efficiency tool ensuring expedient access to international protection for those in need of it, and quick negative decisions for those who are not.<sup>15</sup>

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<sup>9</sup> UNHCR Executive Committee, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, 20 October 1983, No. 30 (XXXIV) – 1983, available at: <http://www.refworld.org/docid/3ae68c6118.html>; '(d) Considered that national procedures for the determination of refugee status may usefully include special provision for dealing in an expeditious manner with applications which are considered to be so obviously without foundation as not to merit full examination at every level of the procedure.' See also 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>. See also Article 31(8) of the APD, in particular lit.(d).

<sup>10</sup> UNHCR, *Aide-Memoire & Glossary of case processing modalities, terms and concepts applicable to RSD under UNHCR's Mandate* ("The Glossary"), 2017, p. 19, available at: <http://www.refworld.org/docid/5a2657e44.html>; UNHCR, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum No. 30 (XXXIV) – 1983*, 20 October 1983, No. 30 (XXXIV) – 1983, ("UNHCR The Problem of Manifestly Unfounded Applications"), available at: <http://www.refworld.org/docid/3ae68c6118.html>; UNHCR, *UNHCR's Position on Manifestly Unfounded Applications for Asylum*, 1 December 1992, 3 European Series 2, ("UNHCR's Position on Manifestly Unfounded Applications"), p. 397, available at: <http://www.refworld.org/docid/3ae6b31d83.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>.

<sup>11</sup> UNHCR, *UNHCR Comments on the European Commission's Proposal for an Asylum Procedures Regulation*, April 2019, COM (2016) 467, p. 30, available at: <https://www.refworld.org/docid/5cb597a27.html>.

<sup>12</sup> In reality, refugees often have few legal travel options, so it should generally be accepted that they have 'good cause' for illegal entry or presence. See Cathryn Costello (with Yulia Ioffe and Teresa Büchsel), *Article 31 of the 1951 Convention Relating to the Status of Refugees*, July 2017, PPLA/2017/01, pp. 30-31, available at: <http://www.refworld.org/docid/59ad55c24.html>. See also Newman J in United Kingdom: High Court (England and Wales), *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, [1999] EWHC Admin 765; [2001] Q.B. 667, 29 July 1999, para. 26, available at: [www.refworld.org/cases.GBR\\_HC\\_QB\\_3ae6b6b41c.html](http://www.refworld.org/cases.GBR_HC_QB_3ae6b6b41c.html): 'All counsel agree that this condition has only a limited role in the Article. It will be satisfied by a genuine refugee showing that he was reasonably travelling on false papers.'

<sup>13</sup> The term 'directly' is to be interpreted broadly and not in a literal temporal or geographical sense, meaning that refugees who have crossed through, stopped over or stayed in other countries en route may still be exempt from penalties. See UNHCR, *Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-Seekers*, para. 39, September 2019, available at: <https://www.refworld.org/docid/5d8a25d4.html>.

<sup>14</sup> For an analysis of the scope of Article 31 see: Cathryn Costello (with Yulia Ioffe and Teresa Büchsel), *Article 31 of the 1951 Convention Relating to the Status of Refugees*, July 2017, PPLA/2017/01, <http://www.refworld.org/docid/59ad55c24.html>.

<sup>15</sup> UNHCR, *UNHCR Comments on the European Commission's Proposal for an Asylum Procedures Regulation*, p. 34.

10. UNHCR further emphasizes that due to the circumstances in which they are sometimes forced to leave their home country, refugees are more likely than other foreigners to find themselves without identity documents. Moreover, while other foreigners can turn to the authorities of their country of origin for help in obtaining documents, refugees do not have this option.<sup>16</sup> Conversely, they are dependent on the authorities of their country of refuge in this regard. Thus, there are generally valid reasons why refugees were not able to obtain documentation in their countries of origin.

11. Thus, the use of an accelerated procedure for the consideration proposed in the draft amendments, without taking into account the specific situation of refugees, may be at variance with Slovenia's obligations under Article 31(1) of the 1951 Convention.<sup>17</sup>

12. Further, proposed section 89a of the IPA stipulates that – unless otherwise provided by another domestic law or a treaty binding on Slovenia – asylum-seekers are subject to the rules on sanctions and fines<sup>18</sup> provided under the Foreigners Act.<sup>19</sup> As described in the foregoing, Article 31 of the 1951 Convention is aimed at asserting the rights contained in the Convention through safeguarding access to asylum. UNHCR therefore recommends that Article 31 of the 1951 Convention be expressly referred to in the proposed new section to ensure that asylum-seekers are not penalized if the conditions under Article 31(1) are met.

### 3. Right to liberty and security and freedom of movement of asylum-seekers

13. Proposed paragraph 1 of section 84 of the IPA expands the grounds for restricting movement for the purpose of verifying the identity or citizenship of the asylum-seeker to include: the absence of a justifiable reason for the applicant to leave his or her country of origin without an identity document or the applicant having provided false information or falsified documents, or withheld important information or documents, or it is likely that the applicant deliberately destroyed or disposed of his or her documents. While section 84 of the IPA refers to 'restriction of movement,' UNHCR considers that measures regulated under this section may amount to detention, depending on their degree or intensity. In UNHCR's view, 'detention' refers to the deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities in a range of locations, including at land or sea borders, or in 'international zones at airports.'<sup>20</sup>

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<sup>16</sup> UNHCR, *Identity Documents for Refugees*, EC/SCP/33, 20 July 1984, available at: <https://www.unhcr.org/afr/excom/exconc/3ae68c4390/identity-documents-refugees.html>.

<sup>17</sup> See also Articles 31(8)(d) and 32(2) of the Asylum Procedures Directive (APD), Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), 29 June 2013, OJ L. 180/60 - 180/95; 29.6.2013, 2013/32/EU, available at: <https://www.refworld.org/docid/51d29b224.html>.

<sup>18</sup> See section 46 of the draft law. Proposed section 89a of the IPA reads: 'Unless otherwise provided by another Act or a Treaty binding on the Republic of Slovenia, applicants for international protection are subject to the provisions of the Act governing entry into, residence in, and departure of foreigners from the Republic of Slovenia laying down the offences, fines and application of penal provisions.'

<sup>19</sup> See in particular sections 143, 144, and 145 of the Foreigners Act, Official Gazette of RS, No. 50/11 and subsequent amendments, available in Slovenian at: <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO5761>.

<sup>20</sup> Distinctions between deprivation of liberty (detention) and lesser restrictions on movement is one of 'degree or intensity and not one of nature or substance' (*Guzzardi v. Italy*, Application no. 7367/76, Council of Europe: European Court of Human Rights, 6 November 1980, para. 93, available at: [https://www.refworld.org/cases/ECHR\\_502d42952.html](https://www.refworld.org/cases/ECHR_502d42952.html)). See also UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, paras. 5-7, available at: <https://www.refworld.org/docid/503489533b8.html>. UNHCR also observed that holding applicants in a transit zone at the border severely restricts their freedom of movement and can qualify as detention. See UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of Ilias and Ahmed v. Hungary* (Application No. 47287/15) before the Grand Chamber of the European Court of Human Rights, 8 January 2018, available at: <https://www.refworld.org/docid/5dd6bb634.html>. See also Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, Judgment of 14 May 2020, para. 239, available at: <http://curia.europa.eu/juris/documents.jsf?num=C-924/19>.

14. The fundamental rights to liberty and security of the person and freedom of movement are set out in international and European human rights law.<sup>21</sup> Article 26 of the 1951 Convention provides for the freedom of movement and choice of residence for refugees lawfully in the territory. Asylum-seekers are considered lawfully in the territory for the purposes of benefiting from this provision.<sup>22</sup> Detention of asylum-seekers should be a measure of last resort, with liberty being the default position.<sup>23</sup> Restrictions on movement of refugees and asylum-seekers must be necessary, reasonable and proportionate.<sup>24</sup> Detention can only be justified on a limited number of grounds, notably public order, public health or national security.<sup>25</sup> Prior to recourse to detention, the availability, effectiveness and appropriateness of alternatives must be considered.<sup>26</sup>

15. Limited periods in detention may be permissible on public order grounds to carry out initial identity and security checks in cases where identity is undetermined or in dispute, or there are indications of security risks. Should asylum-seekers arrive without documentation because they are unable to obtain any in their country of origin it would need to be assessed whether the asylum-seeker has a plausible explanation for the absence or destruction/dispossession of documentation or the possession of false documentation, whether he or she had an intention to mislead the authorities, or whether he or she refuses to cooperate with the identity verification process. At the same time, mindful that asylum-seekers often have justifiable reasons for illegal entry or irregular movement, including travelling without identity documentation,<sup>27</sup> it is important to ensure that immigration provisions do not impose unrealistic demands regarding the documents asylum-seekers can reasonably be expected to produce. Also, in the absence of documentation, identity can be established through other information as well. The inability to produce documentation should not automatically be interpreted as an unwillingness to cooperate, or lead to an adverse security assessment. Asylum-seekers who arrive without documentation because they are unable to obtain any in their country of origin should not be detained solely for that reason.<sup>28</sup>

16. In light of the foregoing, UNHCR is concerned that asylum-seekers risk being unduly restricted in their movement or even detained due to unrealistic demands regarding the documents issued in their countries of origin, and hence on grounds which may be at variance with international standards.

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<sup>21</sup> The fundamental rights to liberty and security of the person and freedom of movement are proclaimed in the Universal Declaration of Human Rights (UDHR), namely: Article 3 (right to life, liberty and security); Article 9 (right against arbitrary arrest, detention or exile); and Article 13 (right to freedom of movement and residence) as well as in all major international and regional human rights instruments, such as Articles 6, 9 and 12 of the International Covenant on Civil and Political Rights (ICCPR). Art. 9(1) ICCPR materially provides that ‘Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.’ In its General Comment No. 8 on Article 9, the Human Rights Committee (HRC) made it clear that Article 9(1) ‘is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as ... immigration control etc.’ See UN Human Rights Committee (HRC), CCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Persons), 30 June 1982, No. 8, para. 1, available at: <http://www.refworld.org/docid/4538840110.html>; see also Article 6 of the EU Charter of Fundamental Rights.

<sup>22</sup> UNHCR, “*Lawfully Staying*” – A Note on Interpretation, 1988, available at: <http://www.unhcr.org/refworld/pdfid/42ad93304.pdf>; UNHCR, *Global Consultations on International Protection/Third Track: Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems*, 4 September 2001, EC/GC/01/17, available at: <http://www.unhcr.org/refworld/docid/3bfa81864.html>.

<sup>23</sup> UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guideline 2, para. 14, available at: <https://www.refworld.org/docid/503489533b8.html>. This approach is also supported by ExCom which underlined that ‘(...) in view of the hardship which it involves, detention should normally be avoided.’ ExCom Conclusion No. 44 (XXXVII), 1986, para. (b), supra, note 40, available at: <http://www.unhcr.org/4aa764389.pdf>. See also UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of Ilias and Ahmed v. Hungary (Application No. 47287/15) before the Grand Chamber of the European Court of Human Rights*, 8 January 2018, para. 3.1.4 and following, available at: <https://www.refworld.org/docid/5dd6bb634.html>. See also Articles 8(2), (3)(a) and (4) and *FMS* (Joined cases C-924/19 PPU et C-925/19 PPU), paras. 250, 258, 259, 262, 264, and 266.

<sup>24</sup> UNHCR, *Guidelines on Detention*, Guideline 4, para. 18.

<sup>25</sup> UNHCR, *Guidelines on Detention*, Guideline 4.1, para. 21.

<sup>26</sup> UNHCR, *Guidelines on Detention*, Guideline 4.3, paras. 35-42.

<sup>27</sup> See also Paras. 9-10, above.

<sup>28</sup> UNHCR, *Guidelines on Detention*, paras. 24-25. Detention is used by some States as a penalty for unauthorized entry or presence. Article 31(2) of the 1951 Convention protects refugees who are exempted by Article 31(1) from penalties also from restrictions on their freedom of movement, other than those which are necessary, and then only until their status is regularized or they obtain admission into another country. See UNHCR, *Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-Seekers*, para. 41.

17. Additionally, the proposed paragraph 3 of section 84 of the IPA introduces a new ground for detention for purposes of conducting a border procedure.<sup>29</sup> In particular, the draft amendment does not protect children against detention in the context of border procedures as it does under regular circumstances.<sup>30</sup> In UNHCR's view, children should not be detained, including at borders, as it is never in their best interests.<sup>31</sup> Additionally, given the character of border procedures that may make the provision of full procedural safeguards practically difficult, border procedures should not be applied to children, including both unaccompanied and separated children, as well as children in families.<sup>32</sup> Consequently, detention of asylum seekers as foreseen in the context of the border procedure lacks the necessary safeguards for asylum-seeking children.

#### 4. Right to an effective remedy

18. Proposed paragraphs 1 and 2 of section 70 of the IPA reduce the time limit for lodging an appeal against a decision issued in an accelerated procedure – and against any other decision – from eight days to three days of its service.<sup>33</sup> Proposed paragraph 3 of section 70 IPA further removes the automatic suspensive effect of an appeal against a decision rendered in an accelerated procedure.<sup>34</sup> However, the applicant may request the reviewing court to order the suspension of the decision under challenge.<sup>35</sup>

19. UNHCR considers that asylum-seekers must be permitted to remain in the country pending a decision on the claim and be given a reasonable time to appeal the decision.<sup>36</sup> In respect of the principle of *non-refoulement*, the remedy must allow automatic suspensive effect except for very limited cases.<sup>37</sup> Even in exceptional situations, in UNHCR's view, the applicant must have the right and the effective opportunity to request a court or tribunal to grant suspensive effect. The modality chosen to examine an application for international protection should generally not negatively affect procedural safeguards, including the

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<sup>29</sup> Proposed paragraph 3 of section 84 of the IPA reads: 'In order to decide on the applicant's right to enter the territory in the procedure in accordance with Article 43 of this Act, the competent authority shall impose on the applicant the measure of having his or her movement restricted to the facility established at the border, airport, or port.' Section 18 of the draft law re-regulates border procedures.

<sup>30</sup> See proposed sections 84(2) and (3) of the IPA. Moreover, EU law provides for additional safeguards for specific groups of applicants within the context of border procedures, including for persons with specific needs who are survivors of torture, rape or other serious forms of psychological, physical or sexual violence and unaccompanied children. See Articles 24(3) and 25(6)(b) of the APD.

<sup>31</sup> UNHCR, *UNHCR's position regarding the detention of refugee and migrant children in the migration context*, January 2017, para. 9, available at: <https://www.refworld.org/docid/5885c2434.html>; UNHCR, *Guidelines on Detention*, Guideline 9.2, UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of I.A. v. Hungary (Application No. 38297/17) before the European Court of Human Rights*, 22 January 2018, 38297/17, paras. 3.3.3, available at: <https://www.refworld.org/docid/5a9d68ae4.html>. See also Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, para. 10, available at: <https://www.refworld.org/docid/5a12942a2b.html>.

<sup>32</sup> UNHCR, *UNHCR Comments on the European Commission's Proposal for an Asylum Procedures Regulation*, p. 36.

<sup>33</sup> See section 32 of the draft law. Proposed paragraphs 1 and 2 of section 7 of the IPA read: '(1) An action may be brought against a decision of the competent authority before the Administrative Court within 15 days of its service. *An action against a decision issued in an accelerated procedure may be brought within three days of its service.*

(2) An action may be brought against any decision issued pursuant to this Act *within three days of its service.*'

<sup>34</sup> *Ibid.* See proposed paragraph 3 of section 70 of the IPA.

<sup>35</sup> Section 32 of the Administrative Dispute Act, Official Gazette of RS, No.105/06 and subsequent amendments, available in Slovenian at: <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO4732>.

<sup>36</sup> ExCom Conclusion No. 8 (XXVIII), 1977, para. (e)(i), <http://www.unhcr.org/excom/exconc/3ae68c6e4/determination-refugeestatus.html>. See also, ExCom Conclusion No. 81 (XLVIII), 1997, para. (h), <http://www.unhcr.org/excom/exconc/3ae68c690/general-conclusion-international-protection.html>; ExCom Conclusion No. 82 (XLVIII), 1997, para. (d)(ii) and (iii), <http://www.unhcr.org/excom/exconc/3ae68c958/safeguarding-asylum.html>; ExCom Conclusion No. 85 (XLIX), 1998, para. (q), <http://www.unhcr.org/excom/exconc/3ae68c6e30/conclusion-internationalprotection.html>. See also: UN General Assembly, *Recommended Principles and Guidelines on Human Rights at International Borders: Conference room paper*, 23 July 2014, A/69/CRP. 1, Guideline 7, para. 5, <http://www.refworld.org/docid/54b8f58b4.html>.

<sup>37</sup> States should only be able to derogate from the automatic suspensive effect of an appeal on an exceptional basis, when there is clearly abusive behavior on the part of the applicant, or where the 'unfoundedness' of a claim is manifest. See UNHCR, *UNHCR public statement in relation to Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration pending before the Court of Justice of the European Union*, 21 May 2010, available at: <http://www.refworld.org/docid/4bf67fa12.html>; see also ExCom conclusion No. 30 (XXXIV), 1983, <https://www.unhcr.org/excom/exconc/3ae68c6118/problem-manifestly-unfounded-abusive-applications-refugee-status-asylum.html>.

suspensive effect of appeal. Given the severe consequences of a wrong negative decision on applications examined through an accelerated or border procedure, these claims, with the possible exceptions, should be provided with full procedural safeguards to ensure full respect for the principle of *non-refoulement*, including by providing automatic suspensive effect of appeals.<sup>38</sup>

20. UNHCR emphasizes that asylum-seekers must have sufficient time and facilities to exercise the right of appeal. Adequate time limits for lodging appeals are required to render a remedy effective, as asylum-seekers will need time to understand the decision of the determining authority and any information provided on how to challenge the decision; secure legal assistance; request and/or be given access to his/her case file; consult a legal adviser and discuss the grounds for the appeal; draft the appeal; and, where there is no automatic suspensive effect, to apply for an interim measure to prevent imminent expulsion. UNHCR recommends a time frame of two months to lodge an appeal against a decision rejection an application under a regular procedure and one month within an accelerated procedure.<sup>39</sup>

21. According to relevant international and regional standards and related case law, in order to be effective, an appeal based on an arguable claim of a risk of treatment contrary to Article 3 of the European Convention on Human Rights, must have automatic suspensive effect.<sup>40</sup> The Court of Justice of the European Union (CJEU) also stated in relation to a return decision and a possible removal decision, the protection inherent in the right to an effective remedy and in the principle of *non-refoulement* must be guaranteed by according an applicant for international protection the right to an effective remedy with automatic suspensive effect at least before one judicial body.<sup>41</sup> Further, based on the jurisprudence of the CJEU, the period prescribed to lodge an appeal must be sufficient in practical terms to enable the applicant to prepare and bring an effective action.<sup>42</sup>

22. Against this background, UNHCR considers that the shortened time frames to lodge an appeal and the lack of automatic suspensive against all decisions made within accelerated procedures, instead of on an exceptional basis, do not provide adequate procedural safeguards in accordance with the right to an effective remedy.

## 5. Safeguards related to asylum-seeking children

23. Proposed paragraphs 1, 2, 4 and 5 of section 17 of the IPA provide for the possibility to conduct an age assessment procedure as soon as the asylum-seeker expresses his or her intention to apply for asylum and therefore before a legal representative is appointed to the asylum-seeker.

<sup>38</sup> See in particular UNHCR, *UNHCR Comments on the European Commission's Proposal for an Asylum Procedures Regulation*, pp. 19-21.

<sup>39</sup> UNHCR, *UNHCR Comments on the European Commission's Proposal for an Asylum Procedures Regulation*, pp. 17-19. See also UNHCR, *UNHCR Discussion Paper Fair and Fast - Accelerated and Simplified Procedures in the European Union*, 25 July 2018, p. 10, available at: <https://www.refworld.org/docid/5b589eef4.html>.

<sup>40</sup> *Conka v. Belgium*, Application no. 51564/99, Council of Europe: European Court of Human Rights, 5 February 2002, paras. 83-85, available at: [http://www.refworld.org/cases/ECHR\\_3e71fd4.html](http://www.refworld.org/cases/ECHR_3e71fd4.html); *Gebremedhin [Gäberamadhién] v. France*, Application no. 25389/05, Council of Europe: European Court of Human Rights, 26 April 2007, para. 66, available at: [http://www.refworld.org/cases/ECHR\\_46441fa02.html](http://www.refworld.org/cases/ECHR_46441fa02.html); *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, para. 293., available at: [http://www.refworld.org/cases/ECHR\\_4d39bc7f2.html](http://www.refworld.org/cases/ECHR_4d39bc7f2.html). See also UNHCR, *Statement on the right to an effective remedy in relation to accelerated asylum procedures, issued in the context of the preliminary ruling reference to the Court of Justice of the European Union from the Luxembourg Administrative Tribunal regarding the interpretation of Art. 39, Asylum Procedures Directive (APD); and Articles 6 and 13 ECHR*, para. 24, available at: <http://www.refworld.org/pdfid/4bf67fa12.pdf>.

<sup>41</sup> *Gnandi v. État belge*, C-181/16, 19 June 2018, para 54, available at: <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C.T.F&num=C-181/16>. See also *X v. Belastingdienst/Toeslagen*, C-175-17, 26 September 2018, paras. 32-33, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=206119&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=102651>; *X and Y v. Staatssecretaris van Veiligheid en Justitie*, C-180-17, 26 September 2018, paras. 28-29, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=206115&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=102823>.

<sup>42</sup> *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, C-69/10, Judgment of the Court (Second Chamber) of 28 July 2011, EU:C:2011:524, paras. 66-68, available at: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-69/10>.

24. States have a duty to identify children, including in cases where they are separated or unaccompanied, as soon as their presence in the country becomes known to the authorities to ensure their effective access to the rights set out in the Convention on the Rights of the Child<sup>43</sup> and the 1951 Convention.<sup>44</sup> UNHCR acknowledges that it can be difficult to establish the accurate age of asylum-seeking children. However, no method can determine age definitively; age assessment is not a determination of chronological age but an estimated guess.<sup>45</sup>

25. When age assessment procedures are implemented, UNHCR recommends important principles and safeguards that States should take into account.<sup>46</sup> UNHCR highlights that age assessment should not be carried out immediately following arrival to allow time for the child to build trust and properly recollect information which can be used when establishing their age. Age assessment procedures should also not take place without the consent of the child or their guardian, and before information on the procedure and legal consequences is provided in a child-friendly manner and language which children understand. Refusal to undergo age assessment should not have any adverse impact on the asylum eligibility assessment. The asylum-seeker should also be considered a child throughout the age assessment procedures and be provided with an effective remedy.<sup>47</sup>

26. States should also appoint guardians as soon as possible after identification to accompany unaccompanied children through asylum and other processes, including any age assessment procedures, to ensure that the child is properly represented, that his/her views are expressed, and that any decisions taken are in his/her best interests.<sup>48</sup>

27. UNHCR is concerned that the proposed amendments do not provide for essential safeguards for asylum-seekers whose age is contested by the authorities.

## **UNHCR**

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<sup>43</sup> UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <https://www.refworld.org/docid/3ae6b38f0.html>.

<sup>44</sup> UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08, available at <http://www.refworld.org/docid/4b2f4f6d2.html>; Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, 16 November 2017, CMW/C/GC/3-CRC/C/GC/22, available at: <https://www.refworld.org/docid/5a1293a24.html>; CRC, General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6, available at: <https://www.refworld.org/docid/42dd174b4.html>.

<sup>45</sup> UNHCR, *Submission by UNHCR in the case of M.S. v. Slovakia and Ukraine (Appl. No 17189/11) before the European Court of Human Rights*, 1 June 2016, Application No 17189/11, paras 4.3.3, available at <https://www.refworld.org/docid/574fe6144.html>.

<sup>46</sup> ExCom, *Conclusion on Children at Risk No. 107 (LVIII) - 2007*, 5 October 2007, No. 107 (LVIII), available at: <https://www.refworld.org/docid/471897232.html>; UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08, available at: <https://www.refworld.org/docid/4b2f4f6d2.html>; UNHCR, *Submission by UNHCR in the case of M.S. v. Slovakia and Ukraine (Appl. No 17189/11) before the European Court of Human Rights*, 1 June 2016, Application No 17189/11, para 4.3.3, available at <https://www.refworld.org/docid/574fe6144.html>; UNHCR, *UNHCR observations on the use of age assessments in the identification of separated or unaccompanied children seeking asylum*, 1 June 2015, available at: <https://www.refworld.org/docid/55759d2d4.html>; UNHCR, *The Way Forward to Strengthened Policies and Practices for Unaccompanied and Separated Children in Europe*, July 2017, available at: <https://www.refworld.org/docid/59633afc4.html>.

<sup>47</sup> UNHCR, *Submission by UNHCR in the case of M.S. v. Slovakia and Ukraine (Appl. No 17189/11) before the European Court of Human Rights*, 1 June 2016, Application No 17189/11, para. 4.3.3 ix., available at <https://www.refworld.org/docid/574fe6144.html>.

<sup>48</sup> UNHCR, *Guidelines on Assessing and Determining the Best Interests of the Child*, November 2018, p. 105, available at: <https://www.refworld.org/docid/5c18d7254.html>; UN General Assembly, *Guidelines for the Alternative Care of Children*: resolution / adopted by the General Assembly, 24 February 2010, A/RES/64/142, para. 145, available at: <https://www.refworld.org/docid/4c3acd162.html>.