UNHCR
United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

UNHCR legal observations on the draft law *"Reform of deportation and return procedures of third country nationals, issues residence permits and procedures for granting international protection and other provisions within the competence of the Ministry of Migration and Asylum and the Ministry of Citizen Protection"*

«Αναμόρφωση διαδικασιών απελάσεων και επιστροφών πολιτών τρίτων χωρών, ζητήματα αδειών διαμονής και διαδικασιών χορήγησης διεθνούς προστασίας και άλλες διατάξεις αρμοδιότητας Υπουργείου Μετανάστευσης και Ασύλου και Υπουργείου Προστασίας του Πολίτη»

I. Introduction

1. These observations are submitted by the Representation of the United Nations High Commissioner for Refugees ("UNHCR") in Greece in relation to the Draft Law *"Reform of deportation and return procedures of third country nationals, issues of residence permits and procedures for granting international protection and other provisions within the competence of the Ministry of Migration and Asylum and the Ministry of Citizen Protection"* (hereafter "Draft Law").

2. UNHCR has a direct interest in law proposals in the field of 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.[1] Paragraph 8 of UNHCR's Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees,[2] whereas the 1951 Convention relating to the Status of Refugees[3] 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 and 1967 Protocol (Article 35 of the 1951 Convention and Article II of the 1967 Protocol).[4]

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 and subsequent Guidelines on

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1 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").

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

3 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".

4 UNHCR's supervisory responsibility has also been reflected in EU law, including by way of general reference to the 1951 Convention in Article 78 (1) of the Treaty on the Functioning of the EU.

International Protection ("UNHCR Handbook").[5] UNHCR also fulfils its supervisory responsibility by providing comments on legislative and policy proposals impacting on the protection and durable solutions of its persons of concern.

4. UNHCR notes that the provisions of the Draft Law include amendments to L. 3907/2011,[6] L. 4251/2014[7] and L. 4636/2019.[8] UNHCR had provided comments to the latter[9] and to Law 4686/2020, which amended L. 4636/2019, on April 2020[10] and presented its views to the competent Standing Parliamentary Committee of Public Administration, Public Order and Justice during the voting period. The above UNHCR's comments remain valid. Consequently, the present comments should be read in conjunction with UNHCR's earlier comments to L. 4636/2019 and L. 4686/2020, as relevant.

5. UNHCR welcomes the amendments introduced by the proposed Draft Law bringing improvements to the legal framework. In UNHCR's view, however, there are some amendments proposed by the Draft law that might seriously restrict rights of asylum seekers and refugees.

II. General considerations

6. The draft law foresees several positive amendments which will strengthen the legal framework, including i) safeguards for renewal of residence permits for persons granted subsidiary protection, who failed to comply with the deadline (article 15 para. 1), ii) increasing flexibility on documentary evidence required for the issuance of residence permits, notably accepting the "cohabitation agreement" for civil partnership (article 15 para. 4), iii) ensuring health coverage for unaccompanied minors pending the execution of a return decision and until they reach adulthood (article 17), iv) extending the validity of international protection applicant cards from 6 months to 1 year (article 19 para. 1).[11]

7. The proposed amendments which, in UNHCR's view, raise concern are i) the provisions regarding return/deportation procedures and voluntary return (article 1-7), ii) the amendments on the type of the Reception and Identification Service (RIS) facilities (article 26), iv) the introduction of an additional exclusion clause in line with article 14 of the Qualification Directive, v) the elimination of the possibility to grant an attestation of non-removal for humanitarian reasons to rejected asylum seekers who would be at risk of refoulement if forcibly returned (article 18), vi) the introduction of a fee to submit a subsequent application (article 21), vii) the introduction of a fine

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[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] Law 3907/2011 "Establishment of an Asylum Service and a First Reception Service, adaptation of the Greek legislation to the provisions of Directive 2008/115/EC 'with regard to the common rules and procedures in Member States for the return of illegally staying third-country nationals' and other provisions" (Official Gazette A' 7/26.1.2011).
[7] Law 4251/2014 "Immigration and Social Integration Code and other provisions" (Official Gazette A' 80/1.4.2014)
[8] Law 4636/2019 "On International Protection and other provisions" (Official Gazette A' 169/1.11.2011).
[9] UN High Commissioner for Refugees (UNHCR), UNHCR Comments on the Law on "International Protection and other Provisions" (Greece) , February 2020, available at: https://www.refworld.org/docid/5ee3590e4.html
[10] UN High Commissioner for Refugees (UNHCR), UNHCR Comments on the Draft Law "Improvement of Migration Legislation, amendment of provisions of Laws 4636/2019 (A' 169), 4375/2016 (A' 51), 4251/2014 (A' 80) and other Provisions" , 12 June 2020, available at: https://www.refworld.org/docid/5ee359cb4.html

for delays on the renewal of residence permit (article 15), and viii) the abolition of the Committee for the selection of the Administrative Director of the Appeals Authority (article 39 para.6) .

III. Specific considerations

Safeguards on return procedures for persons who may be in need of international protection (article 1-7)

8. The proposed amendments reduce the available safeguards for persons pending execution of a return decision. UNHCR is concerned that persons who may be in need of international protection, in particular asylum seekers whose application has not been assessed in the merits, may be subject to return procedures without adequate safeguards.

9. In particular, the Draft Law (Article 1) provides for the application of the national L. 3386/2005[12] on deportations rather than L. 3907/2011[13] which transposes the EU Return Directive[14]. According to Article 2 para. 2(a) of the Return Directive *"Member States may decide not to apply this Directive to third-country nationals who: (a) are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorization or a right to stay in that Member State;"* Persons who have applied for asylum have obtained an authorization to stay in the Member State, therefore, they are not included in the above categories and cannot be excluded from the scope of application of the Return Directive.[15]

10. Consequently, **UNHCR recommends that the Return Directive and its safeguards, as transposed in the Greek legislation, including notably provision of free legal aid, is re-instated as applicable to the returns of asylum seekers with negative decisions.**

11. Additionally, the proposed amendment on the period for voluntary return (Article 13) renders the legal framework on returns more rigid, reducing the maximum time-limit for voluntary return from 30[16] to 25 days, as well as the possibility of extension of the time-limit from up to 1 year[17] to up to 120 days.

12. UNHCR advocates for return to be carried out in an orderly manner that is consistent with human rights standards and the dignity of the individuals concerned. This includes ensuring serious

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[12] Law 3386/2005 (OG A 212/23-8-2005) on the entry, residence and social integration of third-country nationals on Greek territory.
[13] Law 3907/2011 (OG A 7/26-1-2011) on the establishment of an Asylum Service and a First Reception Service, transposition into Greek legislation of the provisions of Directive 2008/115/EC "on common standards and procedures in Member States for returning illegally staying third-country nationals" and other provisions.
[14] European Union: Council of the European Union, *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*, 16 December 2008, OJ L. 348/98-348/107; 16.12.2008, 2008/115/EC, available at: https://www.refworld.org/docid/496c641098.html
[15] Rather, the Return Directive has a broad scope, see e.g. recent CJEU judgments in *Arib*, C-444/17, 19 March 2019, in particular paras. 47 and 50ff; and *B.Z.*, C-546/19, 3 June 2021.
[16] Article 22 para.1 L. 3907/2011.
[17] Amending article 22 para. 2 L. 3907/2011.

efforts have been made to effect return in the first instance on a voluntary basis, wherever possible and, for return of children, that the best interest of the child is a primary consideration.[18]

13. Therefore, **UNHCR recommends maintaining the current time limit of one year and to allow** the deciding authority to **exercise certain flexibility based on the particular circumstances of the individual case.**

RIS facilities. Detention and restriction of movement for asylum seekers (Article 26)

14. Should the draft law pass, the "Closed Controlled Facilities" are likely not to be limited to the islands, while no further details on the modalities of the operation and the status of residents in those facilities are provided. In addition, the proposed amendment abolishes the possibility of establishing mobile units and open facilities for persons pending execution of a return decision. A new type of "Closed Controlled Facilities" is introduced which *"are structured and have the competences of the Reception and Identification Centers and in which, in separate spaces, operate facilities for the temporary reception and detention of Art. 31 L. 3907/2011"*.

15. UNHCR notes that decisions amounting to a deprivation of asylum seekers' freedom of movement amounting to detention should be a measure of last resort.[19] In UNHCR's view, detention of asylum-seekers should not be used by default or mandatorily for all arrivals, but rather remain the exception. Minimal periods in detention are permissible at the outset to carry out initial identity and security checks in cases where identity is undetermined or disputed, or there are indications of security risks. It is also permissible for a limited initial period for the purpose of recording, within the context of a preliminary interview, the elements of their claim to international protection to facilitate effective triaging. For cases triaged as manifestly unfounded, detention beyond this period may be legitimate for up to four weeks from the lodging of the asylum claim with the applicable safeguards as established by the EU Court of Justice and the European Court of Human Rights. Where detention is applied for a legitimate purpose, it needs to be provided for by law, based on an individual decision, be strictly necessary and proportional, timebound and regularly reviewed. Detention should never apply to minors. Alternatives to detention, e.g. temporary movement restrictions, are generally preferable and possible in border procedures as per current practice in several EU+ MS.[20] Detention can therefore not be applied automatically.[21]

16. **UNHCR recommends that the draft law foresees that, asylum-seekers are only detained as a measure of last resort. Where, exceptionally, and only for legitimate reasons, asylum-seekers**

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[18] UN High Commissioner for Refugees (UNHCR), Protection Policy Paper: The return of persons found not to be in need of international protection to their countries of origin: UNHCR's role, November 2010, available at: https://www.refworld.org/docid/4cea23c62.html

[19] 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, available at: https://www.refworld.org/docid/503489533b8.html CJEU, *F.M.S*, Joined Cases C-924/19 PPU and C-925/19 PPU, 14 May 2020, in particular para. 258, and CJEU, *Commission v. Hungary*, C-808/18, 17 December 2020, para. 147, where the CJEU holds that detention measures cannot be justified without the authorities having 'previously determined, on a case-by-case basis, whether they are proportionate to the aims pursued, such a determination requiring them to ensure, in particular, that detention is used only as a last resort'.

[20] UN High Commissioner for Refugees (UNHCR), *Practical considerations for fair and fast border procedures and solidarity in the European Union*, 15 October 2020, available at: https://www.refworld.org/docid/5f8838974.html

[21] CJEU, *Commission v. Hungary*, C-808/18, 17 December 2020, para. 199.

are deprived of their liberty, the amendment should clarify the conditions and safeguards envisaged. Eventually, UNHCR considers that it must be further clarified which of the areas will operate as closed or as controlled facilities, which group of population will be accommodated in each – and how their entry/exit from certain areas will be regulated.

Application of exclusion clauses

17. The amendment (Article 14) includes the possibility not to grant refugee status in the situations provided for in Article 14(4) of the Qualification Directive, namely when the applicant is considered to constitute a danger to the national security of the country or a danger to the community of this country.

18. **UNHCR considers[22] that this provision risks departing substantively from the framework of the 1951 Convention by adding exclusion grounds which are not foreseen in international refugee law.** Under the 1951 Convention, the exclusion clauses (Article 1F) and the exceptions to the principle of non-refoulement (Article 33(2)) serve different purposes. The rationale of Article 1F, which exhaustively enumerates the grounds for exclusion based on criminal conduct of the applicant, is twofold. First, certain acts are so grave that they render their perpetrators undeserving of international protection. Secondly, the refugee protection framework should not stand in the way of prosecution of criminals. By contrast, Article 33(2) deals with the treatment of refugees and defines the circumstances under which they may exceptionally lose their entitlement to protection against refoulement under international refugee law. The provision aims at protecting the safety of the country of refuge or of the community. Its application hinges on the assessment that the refugee in question is a danger to the national security of the country or, having been convicted by a final judgment of a particularly serious crime, poses a danger to the community. Article 33(2) was not, however, conceived as a ground for terminating refugee status. Unless the person has engaged in conduct which justifies exclusion based on Article 1F(a) or (c) of the 1951 Convention, s/he remains a refugee in the sense of Article 1 of the 1951 Convention. Assimilating the exceptions to the non-refoulement principle permitted under Article 33(2) to the exclusion clauses of Article 1F would therefore be incompatible with the 1951 Convention. Moreover, it may lead to an incorrect interpretation of both provisions of the 1951 Convention.[23] In addition, it may have serious negative effects outside the European Union, were it might be replicated and used as a basis for the cancellation or revocation of refugee status in regions with less stringent human rights and rule of law safeguards in place.

19. Against this background, **UNHCR recommends that persons who are in need of international protection but may be considered a danger to the security of the country or the community** should be dealt with in the light of Article 21 of Law 4636/2019 and thus pursuant to the **criteria set out in Article 33(2) of the 1951 Convention.**

Attestation for non-removal on humanitarian grounds (*non-refoulement*)

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[22] See UNHCR Comments on the European Commission Proposal for a Qualification Regulation – COM (2016) 466, https://www.refworld.org/docid/5a7835f24.html

[23] Among other things, there is a risk that decisions on whether a person poses a danger to the security or community of a Member State may be taken in proceedings where the concerned persons are not entitled to see all the evidence against them or to respond effectively, which increases the possibility of incorrect application of these provisions. That these concerns are justified has been confirmed by a 2007 review of national implementing legislation and State practice, see . *UNHCR, Asylum in the European Union, A study on the implementation of the Qualification Directive,* November 2007, available at: http://www.refworld.org/docid/473050632.html.

20. **The Draft Law (Article 18) abolishes the possibility** for the competent authorities to provide an **attestation of non-removal (*"for humanitarian reasons"*),** following rejection decisions at first and second instance, in cases where return would breach the principle of non-refoulement or would be in violation of Article 3 of the European Convention for Human Rights or of the Convention Against Torture or of Article 7 of the International Covenant for Civil and Political Rights or of Articles 31 and 33 of the 1951 Convention.

21. UNHCR notes that the above provision concerns in essence the granting of a suspension of removal of persons that have been found not to be in need of international protection, but for whom other reasons would impose their non-removal, as a possible removal would constitute a violation of the above provisions of international law.

22. In UNHCR's view the above provision constitutes an important guarantee to ensure respect of the above human rights instruments, prohibiting removal in certain cases. In addition, the asylum decision authorities, competent to decide on claims for international protection, are best placed to assess the circumstances of such cases as these are normally linked to the claims for international protection. **Therefore, UNHCR recommends that the possibility** for the competent authorities to provide an **attestation of non-removal (*"for humanitarian reasons"*)** is maintained.

Introduction of a fee for the submission of a subsequent application

23. The draft law (Article 21) proposes the introduction of a fee of 50 euros for the submission of a subsequent application for asylum. According to this provision the amount may be revised through a Joint Ministerial Decision.

24. While understanding the need to tackle potential abuse of the asylum system, which may be to the detriment of the fairness and efficiency of the system, UNHCR notes that access to asylum should be unhindered and effective[24]. It is noted that the proposed fee for the submission of a subsequent application may create impediments to access an in-merits examination for asylum seekers, who following an admissibility procedure were not readmitted. Thus, **UNHCR generally cautions against the imposition of administrative fees** for asylum applications.

Residence permits for beneficiaries of international protection

25. The proposed Draft Law (Article 15) introduces a fine amounting to EUR 150 in the event of unjustifiably overdue applications for the renewal of residence permits. UNHCR is concerned that the proposed administrative sanction and the amount of the fine risk to create disproportional consequences to beneficiaries of international protection and seriously compromise the enjoyment of rights attached to the holding of a valid residence permit.

26. **Therefore, UNHCR recommends that the proposed amendment is not maintained.** In case this provision is finally maintained, UNHCR recommends that it is narrowly applied with due

[24] UN High Commissioner for Refugees (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 For a recent confirmation of this fundamental principle, see CJEU, VL, C-36/20 PPU, 25 June 2020, para. 63, where the Court states that the APD's purpose is 'to guarantee effective access, namely access that is **as straightforward as possible**, to the procedure for granting international protection' (emphasis added).

consideration for extremely vulnerable cases and that, **if a fine is to be imposed, it should be commensurate to the financial situation of the beneficiary of international protection as proven by his/her income statement**, ranging from a symbolic amount for those with no or low income and reaching the amount of 150 euros for those with high income.

Appeals Authority – abolition of the three-member Committee

27. According to the proposed amendment (Article 39 para. 6) the provision on the establishment of the three-member Committee for the selection and recommendation of three candidates for the position of the Administrative Director of the Appeals Authority, is abolished. Therefore, the Administrative Director of the Appeals Authority will be appointed by the Minister of Migration and Asylum, without any selection procedure.

28. UNHCR considers that the legislative framework in force enhances the independence of the Appeals Authority and the status of the Administrative Director and guarantees access to effective remedy. **Therefore, UNHCR recommends that the current procedure is maintained.**

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UNHCR Greece