

UNHCR Observations on the Law Proposal amending the Assistant Police Officer Act and Other Acts (Measures related to the spread of virus SARS-Cov-2 that causes the disease COVID-19) 170 SE

I. Introduction

1. The UNHCR Representation for Northern Europe (hereafter “RNE”) submits to the Legal Committee of the *Riigikogu* its observations on the Draft Law proposing to amend the Assistant Police Officer Act and Other Acts (Measures related to the spread of virus SARS-Cov-2 that causes the disease COVID-19) (*Abipolitseiniku seaduse ja teiste seaduste muutmise seadus (COVID-19 haigust põhjustava viiruse SARS-Cov-2 levikuga seotud meetmed)*).
2. 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 UNHCR has a direct interest in law and policy proposals in the field of asylum. According to its Statute, UNHCR fulfils its mandate *inter alia* by “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto[.]”² UNHCR’s supervisory responsibility is reiterated in Article 35 of the 1951 Convention³ and in Article II of the 1967 Protocol relating to the Status of Refugees⁴ (hereafter collectively referred to as the “1951 Convention”).⁵
3. UNHCR’s supervisory responsibility is also formally recognized under 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 (TFEU)⁶, as well as in Declaration 17 to the Treaty of Amsterdam, which provides that “consultations shall be established with the United Nations High Commissioner for Refugees ... on matters relating to asylum policy”. Likewise, secondary EU legislation explicitly refers to UNHCR’s mandated responsibilities. For instance, Article 29 of the recast Asylum Procedures Directive⁷ states that Member States shall allow UNHCR “to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for international protection at any stage of the procedure”.
4. 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

¹ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V) (hereafter “UNHCR Statute”), available at: <http://www.refworld.org/docid/3ae6b3628.html>.

² *Ibid.*, para. 8(a).

³ 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>.

⁴ UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: <http://www.refworld.org/docid/3ae6b3ae4.html>.

⁵ According to Article 35 (1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of the 1951 Convention”.

⁶ European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 26 October 2012, OJ L. 326/47-326/390; 26.10.2012, available at: <http://www.refworld.org/docid/52303e8d4.html>.

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

Convention. Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (hereafter “UNHCR Handbook”) and subsequent Guidelines on International Protection.⁸ 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.

5. UNHCR became aware of the draft to amend AGIPA on 2 April when it was submitted to the *Riigikogu*. UNHCR remains at the disposal of the Estonian government and the Parliament for consultations on any future draft legislation pertaining to asylum or affecting persons of concern to UNHCR and to providing its support and expertise on matters under UNHCR’s mandate. The below observations are based on the latest version of the Draft Law as of first reading in the *Riigikogu*.

II. The Draft Law

6. UNHCR understands that the Estonian authorities have elaborated the present Draft Law to address the impact and consequences of the pandemic spread of the disease COVID-19. In the same time, the Draft Law aims to address concerns in times of any other potential emergency or emergency situation. As the Explanatory Note to the Draft Law provides, the aim of the proposal is to allow to quickly reorganise the resources of the Police and Border Guard Board in emergencies or emergency situations.
7. The Draft law includes, inter alia, two related amendments to the Act on Granting International Protection to Aliens (hereinafter “AGIPA”). In emergencies and emergency situations, the Draft law introduces a 10 days registration deadline for the application for international protection, whereas the deadline in regular circumstances is 3 days. Furthermore, according to the Explanatory Note, the Draft Law introduces the right for the courts to expedite decisions on detention in case of a large number of applicants by not requiring the judgments to include the descriptive and the reasoning parts, unless these are appealed. According to the Explanatory Note, the reasons for the latter is the anticipated rise in the number of asylum applications as foreigners who are obliged to leave Estonia because of the crisis would, according to the drafters, apply for asylum in order to delay expulsion.

III. General Considerations

8. From the outset, UNHCR wishes to recall that in matters concerning derogations from human rights in time of public emergency, the international and the European human rights legal framework clearly sets specific and strict requirements. These requirements include an official proclamation of a public emergency that “threatens the life of a nation”, that derogations should not be inconsistent with other international obligations and that derogations should be proportionally strictly required by the exigencies of the situation (i.e. other means less restrictive of the rights should be first considered), including in terms of duration, geographical coverage and material scope, that derogations must be applied in a non-discriminatory manner and that such derogations must be notified to the United Nations Secretary General and the Secretary General of the Council of Europe.⁹ Therefore, all the measures proposed in the Draft Law have to undergo a review as to whether they are in line with these requirements.

⁸ UN High Commissioner for Refugees (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>.

⁹ For more details see UN Human Rights Committee (HRC), *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, available at: <https://www.refworld.org/docid/453883fd1f.html> and European Court of Human Rights, *Guide on Article 15 of the European Convention on Human Rights, “Derogation in time of emergency”* updated on 31 December 2019, available at https://www.echr.coe.int/Documents/Guide_Art_15_ENG.pdf.

9. UNHCR notes the extraordinary nature of the challenge presented by the spread of the COVID-19 disease. States are entitled to take measures to ascertain and manage risks to public health. In all circumstances, such measures must be non-discriminatory as well as necessary, proportionate and reasonable to the aim of protecting public health.¹⁰ These measures can be undertaken in order to proceed with asylum processes and at the same time allow for flexible use of resources, including the use of technology, remote and simplified registration and automatic extension of residence permits. Furthermore, these measures can meet the necessary requirements to address issues pertaining to a public health emergency without undermining basic human rights, including the right to seek asylum.¹¹

IV. Specific observations

4.1 Extension of registration deadline

10. The Draft Law introduces an amendment to the second sentence of Article 14 (4¹) of AGIPA that would extend the deadline for registration of asylum applications to 10 days in case of emergency or an emergency situation.
11. UNHCR wishes to recall its comments to amendments to the AGIPA operated for transposition of the EU Asylum Acquis in 2015¹² whereby UNHCR emphasized the specific provisions of the recast APD in relation to the making, lodging and registering of an application for asylum and the content of these steps in the light of the APD provisions. As stated therein, according to Article 6(1) of the recast APD, the “registration” shall take place no later than three working days after the application is “made”. In other words, the “registration” shall start as soon as a person has expressed his/her wish to apply for international protection. UNHCR understands that the rationale behind the registration is to give more effectiveness to the “making”.
12. In its comments UNHCR stressed that the “registration” mentioned in Article 6 of the recast APD does not refer to the registration of fingerprints or other requested by the Eurodac Regulation¹³. If that was the case, the legislator would have made it clear by means of a cross reference. The registration mentioned above does not necessarily need to be a digital registration or a registration in a central national online database. In UNHCR’s view, the above implies that the registration of an asylum claim is not necessary to trigger the responsibility of the Member State vis-à-vis the applicant for international protection. This obligation to register the applicant in a set time limit aims to secure the “making” of the application with a view to enhance effective access to asylum procedure for persons seeking international protection. This

¹⁰ UN High Commissioner for Refugees (UNHCR), *Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response*, 16 March 2020, available at: <https://www.refworld.org/docid/5e7132834.html>.

¹¹ UN High Commissioner for Refugees (UNHCR), *THE COVID-19 CRISIS: KEY PROTECTION MESSAGES*, 31 March 2020, available at: <https://www.refworld.org/docid/5e84b9f64.html>.

¹² UN High Commissioner for Refugees (UNHCR), *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: <https://www.refworld.org/docid/58232f8f4.html> and UN High Commissioner for Refugees (UNHCR), *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*, August 2015, available at: <https://www.refworld.org/docid/582334eb4.html>.

¹³ European Union: Council of the European Union, *Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast)*, 29 June 2013, L 180/1, available at: <http://www.refworld.org/docid/51d296724.html>;

European Union: Council of the European Union, *Council Regulation (EC) No 2725/2000 of 11 December 2000 Concerning the Establishment of 'Eurodac' for the Comparison of Fingerprints for the Effective Application of the Dublin Convention*, 11 December 2000, OJ L 316; 15 December 2000, pp.1-10, available at: <http://www.refworld.org/docid/3f4e40434.html>

registration obligation seeks to give an effectiveness to the “making” since rights guaranteed by the EU Community Law requires “a procedural system which is easily accessible”¹⁴.

13. In other words the content of the registration of an asylum application as stipulated by the recast APD does not have to be as detailed and comprehensive as it is today and respectively may require less time and resources to complete.
14. In relation to the proposed derogation, UNHCR also notes that such a possibility is not foreseen in the recast APD. The derogation that is permitted refers to mass influx of asylum seekers that overwhelms the capacity of the national authorities. Thus this raises questions regarding the compliance of the proposed provision with EU law.
15. Furthermore, there are several measures Estonia could take to tackle a potential backlog during a health emergency and still maintain a fast registration process. These include measures such as simplifying the registration process by only asking for essential data in conjunction with identification of any special needs, introducing written or electronic submission of registration requests, which can be supplemented by remote interviewing via video or teleconferencing, which can include facial recognition as well as capturing the image of the applicant for further reference. Issuance of documentation can also be fully automatized, through email or online services.
16. **UNHCR thus recommend that instead of extending the deadline for registration, alternative measures as suggested above are considered in case of an emergency situation.**

4.2 Simplification of content requirements of court detention judgments

17. The second substantive change to AGIPA is to allow for courts to make judgments without providing descriptive and reasoning parts of the judgment, only to do so at the first opportunity when a decision is appealed.
18. UNHCR notes that this provision is not limited to times of emergency or emergency situation, but simply when there are a large number of detention applications, and was initially a part of the draft law incorporating amendments for cases of mass influx, which are under consideration in the Constitutional Committee of the Parliament and to which UNHCR has provided its comments.¹⁵
19. In this context, it should be noted that expert guidance by the World Health Organization (WHO)¹⁶, the International Committee of the Red Cross (ICRC)¹⁷, the Council of Europe (CoE)¹⁸ and the Inter-Agency Standing Committee (IASC)¹⁹ emphasize that people in detention, including asylum-seekers in immigration detention or other closed facilities, are at particular risk of a COVID-19 infection. Therefore, increased

¹⁴ Case C-327/02 – the Court of Justice of the European Union, 16 November 2004, paras 26-27:

¹⁵ Estonia: Riigikogu, *Väljasõidukohustuse ja sissesõidukeelu seaduse ja välismaalasele rahvusvahelise kaitse andmise seaduse muutmise seadus (massilise sisserände tõkestamine)* 110 SE.

¹⁶ WHO Regional Office for Europe, *Preparedness, prevention and control of COVID-19 in prisons and other places of detention, Interim guidance*, 15 March 2020, available at: http://www.euro.who.int/_data/assets/pdf_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf?ua=1.

¹⁷ ICRC, *COVID-19: Protection prison population from infectious coronavirus disease*, 11 March 2020, available at: <https://www.icrc.org/en/document/protecting-prison-populations-infectious-disease>.

¹⁸ Council of Europe, *Committee on the Prevention of Torture (CPT), Statement of principles related to the treatment of persons deprived of their liberty*, 20 March 2020, available at: <https://www.coe.int/en/web/cpt/-/covid-19-council-of-europe-anti-torture-committee-issues-statement-of-principles-relating-to-the-treatment-of-persons-deprived-of-their-liberty->.

¹⁹ IASC *Interim Guidance on COVID-19: Focus on Persons Deprived of their Liberty*, available at: <https://interagencystandingcommittee.org/system/files/2020-03/IASC%20Interim%20Guidance%20on%20COVID-19%20-%20Focus%20on%20Persons%20Deprived%20of%20Their%20Liberty.pdf>.

detention of asylum seekers might contribute, rather than stem, the spread of the virus. Thus, many European countries identified alternative measures to detention and have decided not to place additional people, including new arrivals, in closed facilities.

20. **UNHCR recommends that this proposal undergoes a Parliamentary scrutiny in respect of compliance with international law as well as relevant guidance in times of a pandemic.**

UNHCR Representation for Northern Europe

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