

## UNHCR observations

### on legislative amendments related to exclusion from and revocation of refugee status and subsidiary protection status

#### A. Introduction

1. On 21 December 2018, Act CXXXIII of 2018 on amending certain acts relating to migration and related laws was promulgated in the National Gazette which introduced substantial changes to the scope of provisions governing exclusion from, and revocation of, refugee status and subsidiary protection status under Act LXXX of 2007 on Asylum (Asylum Act). According to the explanatory notes attached to the draft law,<sup>1</sup> the rationale of the amendments is to ensure that a proportionality assessment may be conducted when deciding on exclusion from international protection as required by the judgment of the Court of Justice of the European Union (CJEU) in the case of *Shajin Ahmed*.<sup>2</sup>

2. More specifically, the changes enacted pursuant to Act CXXXVIII of 2018 include the removal of the requirement that a crime be punishable under Hungarian law by five years or more from Sub-sections 8(2), 8(5), 11(3) and 15 ab) of the Asylum Act, and its replacement with additional criteria determining the kinds of criminal offences which may give rise to exclusion from, or revocation of, refugee status and subsidiary protection status pursuant to Sub-sections 8(5), 11(3) and 15 ab) of the Asylum Act. For the reasons set out in detail in this note, UNHCR welcomes the amendments to Sub-section 8(2) of the Asylum Act, but is concerned that the changes introduced in Sub-section 8(5), which also determine the scope of Sub-sections 11(3) and 15 ab) of the Asylum Act, may result in denial or ending of refugee status or subsidiary protection status in circumstances where this would be at variance with the relevant provisions of the 1951 Convention relating to the Status of Refugees (1951 Convention).<sup>3</sup>

3. UNHCR offers the observations below in its capacity as the agency entrusted by the United Nations General Assembly with the responsibility for providing international protection to refugees within its mandate, and for assisting governments in seeking permanent solutions to the problem of refugees. As set forth in its Statute, annexed to General Assembly resolution 428 (V) of 14 December 1950, UNHCR fulfills its international protection mandate by, inter alia, "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto."<sup>4</sup> States are obliged to cooperate with UNHCR in the exercise of its mandate as per Article 35(1) of the 1951 Convention and Article II of its 1967 Protocol relating to the Status of Refugees (1967 Protocol), in particular by facilitating UNHCR's supervision of the application of the provisions of the 1951 Convention and 1967 Protocol. UNHCR's supervisory responsibility has also been reflected in primary EU law, in particular by a reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the European Union (TFEU),<sup>5</sup> in Article 18 of the Charter of

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<sup>1</sup> Explanatory notes on Paragraphs 62-65 of Draft Law T/3366, adopted on 12 December 2018 and entered into force as Act CXXXIII of 2018 on 1 January 2019.

<sup>2</sup> CJEU, Case C-369/17, *Shajin Ahmed v Bevándorlási és Menekültügyi Hivatal*, ECLI:EU:C:2018:713, Judgment of the Court (Second Chamber) of 13 September, available at: <http://curia.europa.eu/juris/document/document.jsf?jsessionid=5669BA2771225054AC2C8217E29742ED?text=&docid=205671&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=7060706>.

<sup>3</sup> UN General Assembly, *Convention relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <https://www.refworld.org/docid/3be01b964.html>.

<sup>4</sup> UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, ('UNHCR Statute') 14 December 1950, A/RES/428(V), para. 8(a), available at: [www.refworld.org/docid/3ae6b3628.html](http://www.refworld.org/docid/3ae6b3628.html).

<sup>5</sup> European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, available at: [www.unhcr.org/refworld/docid/4b17a07e2.html](http://www.unhcr.org/refworld/docid/4b17a07e2.html).

Fundamental Rights of the European Union,<sup>6</sup> as well as 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.’<sup>7</sup>

## **B. Observations on amendments in exclusion and revocation provisions in domestic law**

4. At the outset, UNHCR observes that international refugee law does not provide a cover for persons involved in serious criminality or otherwise posing a threat to the security of host countries. Specifically, the 1951 Convention provides for the exclusion of persons deemed undeserving of international protection as refugees because they are responsible for heinous acts and serious common crimes and ensures that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts. The 1951 Convention also permits the expulsion of, and the withdrawal of protection from refoulement from recognized refugees who pose a danger to the host state, including, for example, because of serious crimes they have committed there.<sup>8</sup>

### *(i) Exclusion from refugee status based on a serious non-political crime*

5. Pursuant to Sub-section 8(1) of the Asylum Act, ‘[a]ny alien to whom any of the exclusion clauses contained in Article 1D, E or F of the Geneva Convention apply shall not be recognized as a refugee.’ Act CXXXIII of 2018 introduced an amendment to Sub-section 8(2) of the Asylum Act, which sets out the criteria to be taken into consideration when considering whether a criminal offence may be considered a ‘serious non-political crime’ within the meaning of Article 1F(b) of the 1951 Convention,<sup>9</sup> and thus one of the grounds provided for in international refugee law. Prior to the amendments in 2018, Sub-section 8(2) included the criterion that the crime be ‘punishable under Hungarian law by five years of imprisonment or more’.<sup>10</sup>

6. The removal of this clause from Sub-section 8(2) of the Asylum Act by Act CXXXIII of 2018 follows the recent judgment of the CJEU in the case of *Shajin Ahmed*, which concerned exclusion from subsidiary protection status pursuant to Article 17 of the EU Qualification Directive,<sup>11</sup> but is equally applicable to exclusion from refugee status based on Article 12 of the Qualification Directive.<sup>12</sup>

7. In this decision, the CJEU held that a national provision that excludes individuals for having committed a serious crime on the sole basis of the length of the penalty provided for this crime is contrary to EU law. Instead, in order to assess the seriousness of the crime, the CJEU requires a full

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<sup>6</sup> European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, available at: [www.refworld.org/docid/3ae6b3b70.html](http://www.refworld.org/docid/3ae6b3b70.html).

<sup>7</sup> European Union, *Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts*, 10 November 1997, available at: [www.refworld.org/docid/51c009ec4.html](http://www.refworld.org/docid/51c009ec4.html).

<sup>8</sup> UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, HCR/GIP/03/05, paras. 2 and 4, available at: <https://www.refworld.org/docid/3f5857684.html>.

<sup>9</sup> Pursuant to Article 1F(b) of the 1951 Convention, ‘[t]he provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: ... (b) He [or she] has committed a serious non-political crime outside the country of refuge prior to his [or her] admission to that country as a refugee; ...’

<sup>10</sup> Sub-section 8(2) of the Asylum Act prior to the amendments read: ‘within the meaning of Article 1F(b) of the Geneva Convention, “serious non-political crime” shall mean any act where - taking into account all applicable circumstances, such as the objective of the offense, the motive, the mode of commission, the methods used or contemplated - the criminal elements of the offense outweigh the political aspects, and that is punishable under Hungarian law by five years of imprisonment or more.’

<sup>11</sup> 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: <https://www.refworld.org/docid/4f197df02.html>.

<sup>12</sup> See in this regard *Shajin Ahmed*, note 2 above, paras. 49 and 50.

investigation into all the circumstances of the individual case.<sup>13</sup> The CJEU based its decision on its earlier judgment in *B and D*,<sup>14</sup> where it held that any decision to exclude a person from refugee status pursuant to Article 12(2)(b) and (c) of the Qualification Directive must be preceded by a full investigation into all the circumstances of his/her individual case and cannot be taken automatically, and that such a requirement must be transposed to decisions to exclude a person from subsidiary protection.<sup>15</sup>

8. UNHCR welcomes the amendment in Article 8(2) of the Asylum Act, which allows for an individualized assessment of all relevant circumstances, in line with the 1951 Convention.

(ii) Denial of refugee status based on a final conviction for a criminal offence

9. Sub-section 8 of the Asylum Act contains further grounds for exclusion from refugee status which go beyond those provided for in Article 1D, E or F of the 1951 Convention. Sub-section 8(4) of the Asylum Act stipulates that a person shall not be recognized as a refugee if his or her stay within the territory of Hungary poses a risk to national security,<sup>16</sup> while Sub-section 8(5) of the Asylum Act provides for the denial of recognition as a refugee of a person who has been convicted by a final court decision of certain criminal offences.<sup>17</sup> Act CXXXIII of 2018 amended Sub-section 8(5) by replacing the above-mentioned requirement of a minimum punishment of five years or more with new sub-sections which provide for exclusion from eligibility for refugee status if the person has been convicted by a final court decision for one of the following:

- a) imprisonment of five years or more for the intentional commission of a criminal offense,
- b) imprisonment for the commission of a criminal offense while being a repeat offender, a habitual recidivist or a repeat offender with a history of violence,
- c) imprisonment of three years or more for the commission of a criminal offense against life, physical integrity, health, personal liberty, sexual freedom, public peace, public security, or administrative procedures.<sup>7</sup>

*Lack of differentiation between exclusion from refugee status and exceptions from non-refoulement protection*

10. UNHCR observes that Sub-sections 8(4) and (5) in the Asylum Act provide for denial of refugee status on grounds not provided for under Article 1F, but rather under Article 33(2) of the 1951 Convention, which sets forth the exceptional circumstances in which a refugee may not invoke the prohibition of refoulement.<sup>18</sup> As UNHCR has consistently pointed out, Article 1F is to be distinguished from Article 33(2) of the 1951 Convention.<sup>19</sup> These are distinct provisions serving different purposes.

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<sup>13</sup> *Shajin Ahmed*, note 2 above, para. 50.

<sup>14</sup> CJEU, Cases C-57/09 and C-101/09, *Bundesrepublik Deutschland v B and D*, ECLI:EU:C:2010:661, Judgment of the Court (Grand Chamber) of 9 November 2010, paras. 91 and 93, available at: <https://www.refworld.org/cases.ECJ.4cda83852.html>.

<sup>15</sup> See in this regard *Shajin Ahmed*, note 2 above, para. 50.

<sup>16</sup> This provision was enacted by Section 21 of Act CXXVII of 2015, effective as of 1 August 2015.

<sup>17</sup> This provision was enacted by Section 59 of Act CXLIII of 2017, effective as of 1 January 2018.

<sup>18</sup> Pursuant to Article 33(2) of the 1951 Convention, '[t]he benefit of [Article 33(1) of the 1951 Convention] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.'

<sup>19</sup> UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, HCR/GIP/03/05, para. 4, available at: <https://www.refworld.org/docid/3f5857684.html>; UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, para. 10, available at: <https://www.refworld.org/docid/3f5857d24.html>; UNHCR, *UNHCR public statement in relation to cases Bundesrepublik*

11. Article 1F forms part of the refugee definition in the 1951 Convention, and exhaustively enumerates the grounds for exclusion from refugee status based on certain serious crimes or heinous acts committed by an applicant. Article 1F is aimed at preserving the integrity of the refugee protection regime, in line with its twofold rationale: firstly, certain acts are so grave that they render their perpetrators undeserving of international protection as refugees, and secondly, the refugee framework should not stand in the way of serious criminals facing justice.<sup>20</sup>

12. In contrast, Article 33(2) concerns protection of the national security or the community of the host country. Its application affects the treatment afforded to refugees, rather than their recognition as refugees under the 1951 Convention. Article 33(2) permits, under exceptional circumstances, the withdrawal of protection from refoulement of those recognized as refugees who are determined to pose a danger to the host country, or who, having been convicted by a final judgment of a particularly serious crime, constitute a danger to its community. The application of Article 33(2) has always been considered as a measure of last resort, taking precedence over and above criminal law sanctions and justified by the exceptional threat posed by the individual – a threat such that it can only be countered by removing the person from the country of asylum.<sup>21</sup>

13. Importantly, the application of Article 33(2) of the 1951 Convention does not result in the ending of the person's refugee status. The logic of the 1951 Convention is that individuals who commit 'serious non-political crimes' *within the country of refuge*, and thus *after admission*, do not fall within the scope of the exclusion clause under Article 1F(b) – their cases would be handled through rigorous domestic criminal law enforcement and/or the application of Article 32<sup>22</sup> and Article 33(2,) where necessary.<sup>23</sup> As such, a decision to exclude an applicant based on a finding that (s)he constitutes a risk to the security of the host country would be contrary to the object and purpose of Article 1F and the conceptual framework of the 1951 Convention.<sup>24</sup>

14. The EU Qualification Directive also provides for an obligation to exclude persons from 'being a refugee' when the clauses set out in Article 12 apply. The Qualification Directive, in its Articles 12(2) and (3), restates the exclusion criteria of Article 1F of the 1951 Convention, but offers in addition a partial interpretation of two of the criteria. These additional elements should be construed in a way which is consistent with Article 1F of the 1951 Convention.<sup>25</sup> Furthermore, pursuant to Article 14(4) of the Qualification Directive, Member States may revoke, end or refuse to renew 'refugee status' where the person is considered to be a danger to the security of the Member State, or a danger to the community after having been convicted of a particularly serious crime. Article 14(5) lays down the possibility of not granting 'refugee status' in situations described in Article 14(4), where such a decision has not yet

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*Deutschland v. B and D pending before the Court of Justice of the European Union*, July 2009, p. 8, available at: <https://www.refworld.org/docid/4a5de2992.html>. See also UNHCR, *UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted* (OJ L 304/12 of 30.9.2004), 28 January 2005, pp. 30-31, available at: <https://www.refworld.org/docid/4200d8354.html>; UNHCR, *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), 29 July 2010, pp. 13-14, available at: <https://www.refworld.org/docid/4c503db52.html>. See also UNHCR, *UNHCR Comments on the European Commission Proposal for a Qualification Regulation – COM (2016) 466*, February 2018, pp. 22-23, available at: <https://www.refworld.org/docid/5a7835f24.html>.

<sup>20</sup> UNHCR, *Background Note on the Application of the Exclusion Clauses*, note 19 above, para. 3.

<sup>21</sup> UNHCR, *Background Note on the Application of the Exclusion Clauses*, note 19 above, para. 10.

<sup>22</sup> Pursuant to Article 32 of the 1951 Convention, '[t]he Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.' Under this provision, however, expulsion is permitted only to a country where the refugee would not be at risk of persecution. Article 32(2) and (3) sets out procedural requirements.

<sup>23</sup> UNHCR, *Background Note on the Application of the Exclusion Clauses*, note 19 above, para. 44.

<sup>24</sup> *UNHCR public statement in relation to cases Bundesrepublik Deutschland v. B and D pending before the Court of Justice of the European Union*, note 19 above, p. 8.

<sup>25</sup> UNHCR, *Guidelines on International Protection No. 5*, note 19 above.

been taken. Article 14(6) provides that persons who may be subject to Article 14(4) or (5) are nonetheless entitled to rights set out in or similar to those set out in Articles 3, 4, 16, 22, 31, 32 and 33 of the 1951 Convention. This provision clarifies that the application of Article 14(4) or (5) of the Qualification Directive does not mean the person no longer benefits from other rights as a refugee within the meaning of the 1951 Convention.

15. In its decision in the joined cases of C-391/16 *M v Ministerstvo vnitra*, C-77/17 and C-78/17 *X v Commissaire général aux réfugiés et aux apatrides* which concern the interpretation of Articles 14(4), (5) and (6) of the Qualification Directive and their conformity with the 1951 Convention,<sup>26</sup> the CJEU confirmed that the application of Articles 14(4) and (5) of the Qualification Directive do not lead to the result that the individual concerned is no longer a ‘refugee’ within the meaning of Article 2(d) of the Qualification Directive and Article 1A(2) of the 1951 Convention.<sup>27</sup> The CJEU further clarified that the terms ‘refugee status’ and ‘status granted to a refugee’ under Articles 14(4) and (5) refer only to the benefit of the rights provided for in Chapter VII of the Qualification Directive, which contains both rights equivalent to those set out in the 1951 Convention and other rights referred to in the Qualification Directive.<sup>28</sup> If a Member State relies on Articles 14(4) or (5) to revoke or refuse to grant ‘refugee status’ within the meaning of the Qualification Directive, the person nevertheless remains a refugee under international law and retains, as a minimum, those rights guaranteed by the 1951 Convention which do not require lawful stay in its territory,<sup>29</sup> without prejudice to other obligations under the Charter of Fundamental Rights of the European Union.<sup>30</sup> Consequently, if properly applied, Article 14(4), (5) and (6) of the Qualification Directive can result in outcomes that are consistent with the 1951 Convention.<sup>31</sup>

16. The explanatory notes attached to Act CXXVII of 2015, which introduced Sub-section 8(4) on 1 August 2015,<sup>32</sup> and to Act CXLIII of 2017 which introduced Sub-section 8(5) in its present form on 1 January 2018,<sup>33</sup> refer to the introduction of these provisions in the Asylum Act as a matter of transposition of Articles 14(4) and Article 14(5) of the Qualification Directive.

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<sup>26</sup> CJEU, Joined Cases of C-391/16 *M v Ministerstvo vnitra*, C-77/17 and C-78/17 *X v Commissaire général aux réfugiés et aux apatrides*, ECLI:EU:C:2019:403, Judgment of the Court (Grand Chamber) of 14 May 2019, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=214042&pageIndex=0&doclang=EN&mode=req&dir=&oc=first&part=1&cid=681759>.

<sup>27</sup> *M v Ministerstvo vnitra and X v Commissaire général aux réfugiés et aux apatrides*, note 26 above, paras. 97 and 98: ‘Article 14(4) and (5) of Directive 2011/95 cannot be interpreted as meaning that, in the context of the system introduced by that directive, the effect of the revocation of refugee status or the refusal to grant that status is that the third-country national or the stateless person concerned who satisfies the conditions set out in Article 2(d) of that directive, read in conjunction with the provisions of Chapter III thereof, is no longer a refugee for the purposes of Article 2(d) of that directive and Article 1(A) of the Geneva Convention.’

<sup>28</sup> *M v Ministerstvo vnitra and X v Commissaire général aux réfugiés et aux apatrides*, note 26 above, paras. 90-92.

<sup>29</sup> Such as the rights set out in Articles 3, 4, 13, 16, 20, 22, 25, 27, 29, 31, 32 and 33 of the 1951 Convention. See *M v Ministerstvo vnitra and X v Commissaire général aux réfugiés et aux apatrides*, note 26 above, paras. 101-108: ‘It must therefore be held that Member States, when implementing Article 14(4) or (5) of that directive, are, in principle, required to grant refugees who are present in their respective territories only the rights expressly referred to in Article 14(6) of that directive and the rights set out in the Geneva Convention that are guaranteed for any refugee who is present in the territory of a Contracting State and do not require a lawful stay.’

<sup>30</sup> *M v Ministerstvo vnitra and X v Commissaire général aux réfugiés et aux apatrides*, note 26 above, para. 109.

<sup>31</sup> UNHCR, *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)*, note 19 above, p. 14. See also the Opinion of Advocate General Melchior Wathelet in the Joined Cases of C-391/16 *M v Ministerstvo vnitra*, C-77/17 and C-78/17 *X v Commissaire général aux réfugiés et aux apatrides*, 21 June 2018, para. 72, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=203230&pageIndex=0&doclang=HU&mode=req&dir=&oc=first&part=1&cid=991198>.

<sup>32</sup> Explanatory notes on Paragraph 21 of Draft Law T/5416, adopted on 6 June 2015 and entered into force as Act CXXVII of 2015 on 1 August 2015.

<sup>33</sup> Explanatory notes on Paragraph 59 of Draft Law T/17565, adopted on 5 November 2017 and entered into force as Act CXLIII of 2017 on 1 January 2018.



17. In light of the foregoing, UNHCR is concerned that Sub-sections 8(4) and 8(5) of the Asylum Act, both before and after the amendments to the latter provision introduced through Act CXXXIII of 2018, do not accurately reflect the differentiation between exclusion from refugee status pursuant to Article 1F of the 1951 Convention and Article 12(2) of the Qualification Directive, on the one hand, and the exceptions from non-refoulement protection as contained in Article 33(2) of the 1951 Convention and reflected in Articles 14(4)-(6) of the Qualification Directive, on the other.

*Expansion of the scope for exclusion from and revocation of refugee status*

18. UNHCR notes that Sub-sections 8(4) or (5) of the Asylum Act provide for the denial of recognition as a refugee to a person who otherwise meets the refugee definition as set out in Article XIV(4) of Hungary's Fundamental Law.<sup>34</sup> Thus, the application of Sub-sections 8(4) and (5) of the Asylum Act has the effect of excluding a person from 'refugee status' within the meaning of Article 1A(2) of the 1951 Convention and Article 2(d) of the Qualification Directive. As such, these provisions expand the grounds for exclusion from refugee status beyond those provided for in Article 1F of the 1951 Convention and Article 12(2) of the Qualification Directive.

19. As regards Sub-section 8(4) of the Asylum Act, UNHCR notes that cases involving a person who constitutes a danger to the security of the country need to be assessed in light of Article 32 or 33(2) of the 1951 Convention, while the relevant provisions in the Qualification Directive are Articles 14(4)(a), 14(5) and, where applicable, Article 21(1).<sup>35</sup>

20. In relation to Sub-section 8(5) of the Asylum Act, UNHCR notes that persons, who have been convicted by a final court judgment of criminal offenses, may fall within the scope of Article 1F of the 1951 Convention if the criminal offence meets the definition of a war crime, a crime against humanity or a crime against peace – in these circumstances, the person concerned may be excluded, or have his or her refugee status revoked – pursuant to Article 1F(a) of the 1951 Convention. Similarly, if the criminal offense constitutes an 'act contrary to the purposes and principles of the United Nations', exclusion from or revocation of refugee status based on Article 1F(c) of the 1951 Convention may be applicable. UNHCR recalls that Article 1F(a) and (c) of the 1951 Convention are applicable without limitation as to the place or time of their commission.

21. Article 1F(b) of the 1951 Convention, however, specifies that the crime in question must have been committed 'outside the country of refuge prior to admission to that country as a refugee.' Given that the recognition of refugee status is a declaratory act,<sup>36</sup> the expression 'admission as a refugee' in Article 1F (b) should be understood as the mere physical presence of the asylum-seeker in the host country. The exclusion clause contained in this provision should therefore only cover 'serious non-political crimes' committed outside the host country.<sup>37</sup> UNHCR further notes that in determining the seriousness

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<sup>34</sup> Section 6(1) of the Asylum Act provides: 'Hungary shall recognise as refugee a foreigner who complies with the requirements stipulated by Article XIV(4) of the Fundamental Law.' Article XIV(4) of the Fundamental Law provides: 'Hungary shall, upon request, grant asylum to non-Hungarian nationals who are persecuted in their country or in the country of their habitual residence for reasons of race, nationality, the membership of a particular social group, religious or political beliefs, or have a well-founded reason to fear direct persecution if they do not receive protection from their country of origin, nor from any other country. A non-Hungarian national shall not be entitled to asylum if he or she arrived in the territory of Hungary through any country where he or she was not persecuted or directly threatened with persecution.' See also UNHCR, *UNHCR Observations on the Legislative Amendments Adopted in Hungary in June and July 2018*, 6 November 2018, available at: <https://www.refworld.org/docid/5c6bd18a7.html>.

<sup>35</sup> See also *B and D*, note 14 above, para. 101.

<sup>36</sup> See also Recital 21 of the Qualification Directive.

<sup>37</sup> UNHCR, *Background Note on the Application of the Exclusion Clauses*, note 19 above, paras. 44-45. It is noted, in this context, that Article 12(2)(b) of the Qualification Directive provides that the term 'prior to admission as a refugee' means the time of issuing a residence permit based on the granting of refugee status. In this regard, see UNHCR, *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards*

of the crime under Article 1F(b) of the 1951 Convention, international rather than local standards are relevant, and factors to be taken into account include the nature of the act, the actual harm inflicted, the form of procedure used to prosecute the crime, the nature of the penalty, and whether most jurisdictions would consider it a serious crime. While certain crimes, such as murder, rape and armed robbery would undoubtedly qualify as serious offence, other offences could also be deemed serious if they are accompanied by the use of deadly weapons, involve serious injury to persons, or there is evidence of serious habitual criminal conduct and other similar factors. On the other hand, crimes such as petty theft or the possession for personal use of illicit narcotic substances would not meet the seriousness threshold of Article 1F(b) even if committed repeatedly.<sup>38</sup> In all cases, an individualized assessment is required to determine whether a criminal offense constitutes a serious non-political crime within the meaning of this exclusion ground.<sup>39</sup> UNHCR recalls, in this context, that the CJEU has reaffirmed the requirement for a full assessment of the individual circumstances in the case of *B and D*<sup>40</sup> and in the case of *Shajin Ahmed*.<sup>41</sup>

22. Amended Sub-section 8(5) of the Asylum Act does not provide for such assessment. Instead, under the terms of the three Sub-sections introduced through Act CXXXIII of 2018, it introduces the mandatory exclusion of persons even if the crimes of which they have been convicted may not fall within the scope of Article 1F(b) of the 1951 Convention or Article 12(2)(b) of the Qualification Directive.

- a) Sub-section 8(5)(a) leaves no room for an assessment of the fairness of a criminal conviction, including in cases where this conviction may have taken place in the person's country of origin and may well constitute a form of persecution.<sup>42</sup>
- b) Similarly, Sub-section 8(5)(b) does not specify the nature of the offence and could thus be applied in cases of repeat offenders without reference to the nature of the act committed and the harm inflicted, including where the person concerned has not committed crimes that are sufficiently serious to justify exclusion from international protection.<sup>43</sup>
- c) Lastly, Sub-section 8(5)(c) provides for mandatory exclusion in cases of crimes which appear to have been selected from the Special Part of Act C of 2012 on the Criminal Code in cases of a conviction of three years or more. The explanatory notes attached to Act CXXXIII of 2018 do not elaborate on the reasons or justifications for applying a stricter condition for exclusion from refugee status for the commission of such crimes as compared to Sub-section 8(5)(a), nor on the criteria for selecting the crimes listed in Sub-section 8(5)(c). UNHCR notes with concern that the latter provision encompasses criminal offenses related to administrative proceedings under the Criminal Code, which include the crimes of unauthorized crossing and vandalization of the border fence,<sup>44</sup> and which would not, given their nature, amount to 'serious non-political crimes' within the meaning of Article 1F(b) of the 1951 Convention.

23. The amended criteria for exclusion from refugee status pursuant to Sub-section 8(5) of the Asylum Act, also apply to the revocation of refugee status pursuant to Sub-section 11(3) of the Asylum Act.

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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), 29 July 2010, note 19 above, p. 12.

<sup>38</sup> See UNHCR, *Background Note on the Application of the Exclusion Clauses*, note 19 above, paras. 38-40.

<sup>39</sup> See UNHCR, *Background Note on the Application of the Exclusion Clauses*, note 19 above, paras. 41-43.

<sup>40</sup> See *B and D*, note 14 above, para. 87. See also, by analogy, CJEU, Case C-573/14, *Commissaire général aux réfugiés et aux apatrides v. Mostafa Lounani*, ECLI:EU:C:2017:71, Judgment of the Court (Grand Chamber) of 31 January 2017, para. 72, available at [https://www.refworld.org/cases\\_ECJ\\_5898a77f4.html](https://www.refworld.org/cases_ECJ_5898a77f4.html).

<sup>41</sup> See *Shajin Ahmed*, note 2 above, para. 49. See also *B and D*, note 14 above, paras. 91 and 93.

<sup>42</sup> See UNHCR, *Background Note on the Application of the Exclusion Clauses*, note 19 above, para. 108.

<sup>43</sup> See UNHCR, *Background Note on the Application of the Exclusion Clauses*, note 19 above, paras. 38-40.

<sup>44</sup> Sections 352/A and 352/B of Act C of 2012 on the Criminal Code.

With regard to this provision, Act CXXXIII of 2018 removed the minimum requirement of five-year punishment under Hungarian law as the criterion determining the criminal offence in cases involving a final conviction as the basis for the revocation of refugee status, and replaced it with a reference to Sub-section 8(5), thus rendering the above-mentioned Sub-sections 8(5)(a), (b) and (c) of the Asylum Act also applicable as grounds for ending ('revoking') refugee status of a person to whom refugee status had already been granted. In this regard, UNHCR notes that under international refugee law, criminal conduct after recognition as a refugee may give rise to the ending of refugee status ('revocation', in UNHCR's terminology) only in circumstances which fall within the scope of Article 1F(a) or (c) of the 1951 Convention.<sup>45</sup>

*(iii) Exclusion from eligibility for subsidiary protection*

24. Given the close linkages between refugee status and subsidiary forms of protection, in so far as they cover persons under UNHCR's mandate, similar concerns as those expressed with regard to exclusion from eligibility for, and revocation of, refugee status under the Asylum Act apply also for exclusion from and revocation of subsidiary protection pursuant to Sub-sections 15 ab) and 18(2)g, respectively. The amendments introduced through Act CXXXIII of 2018 resulted in the removal of the minimum requirement of five-year punishment under Hungarian law as basis for the application of exclusion or revocation, and its replacement with a reference to Sub-section 8(5) of the Asylum Act, and thus the same criteria as set forth in Sub-sections 8(5)(a), (b) and (c).

**C. Conclusion**

25. UNHCR welcomes the removal of the provisions under Sub-sections 8(2), 8(5), 11(3), 15 ab) and 18(2)g of the Asylum Act that mandate the exclusion from and revocation of international protection solely based on the length of penalty provided for a specific crime under domestic law. However, UNHCR considers that the aforementioned legislative amendments introduce provisions on exclusion from, and revocation of, refugee status and subsidiary protection which are at variance with both the 1951 Convention and the Qualification Directive.

26. UNHCR wishes to point out an inconsistency in the law as amended through Act CXXXIII of 2018, as the removal of the problematic provisions related to mandatory exclusion based on the length of the penalty provided by law is rendered ineffective by Sub-section 8(5) which reintroduces mandatory exclusion clauses without the possibility for domestic authorities and courts to assess the seriousness of the crime and an applicant's individual circumstances. In UNHCR's assessment, this is contrary to the criteria for exclusion from refugee status provided for in the 1951 Convention<sup>46</sup> and contradicts the ruling of the CJEU that 'any decision to exclude a person from refugee status [and subsidiary protection status] must be preceded by a full investigation into all the circumstances of his individual case and cannot be taken automatically.'<sup>47</sup>

27. UNHCR also notes that the amendments pursuant to Act CXXXIII of 2018 introduce an additional inconsistency in the legislation, as amended Sub-section 8(5) contradicts amended Sub-section 8(2), since the latter allows for an interpretation of the meaning of 'serious non-political crime' in line with Article 1F(b) of the 1951 Convention, whereas the former provides for mandatory exclusion in circumstances in which denial of refugee status would be at variance with the 1951 Convention.

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<sup>45</sup> UNHCR, *Background Note on the Application of the Exclusion Clauses*, note 19 above, para. 17. Note that the term 'revocation' is not expressly provided for in the 1951 Convention. UNHCR uses it to refer to the application of the exclusion grounds provided for in Article 1F(a) or (c) of the 1951 Convention to a refugee whose conduct brings him or her within the scope of these provisions after recognition.

<sup>46</sup> See e.g. UNHCR, *Background Note on the Application of the Exclusion Clauses*, and other references in note 19 above.

<sup>47</sup> *Shajin Ahmed*, note 2 above, paras. 49 and 50, with reference to *B and D*, note 14 above, paras. 91 and 93.



28. UNHCR recommends that Hungary revise its existing legislation pertaining to exclusion from and revocation of international protection to bring it in line with international refugee law standards and the provisions of the Qualification Directive. In particular, UNHCR recommends that Sub-sections 8(4), 8(5), and 11(3) be amended so as to replicate the wording of Article 14(4) and Article 14(5) of the Qualification Directive. Amendments should also include Article 14(6) of the Qualification Directive in the Asylum Act, as recommended in UNHCR's comments on the European Commission Proposal for a Qualification Regulation, in order to ensure that persons to whom Sub-section 8(4) or (5) is applied continue to benefit from the status of refugee and retain all the rights guaranteed by the 1951 Convention without prejudice to any other rights and entitlements which remain in place under the Charter of Fundamental Rights of the European Union and/or the Qualification Directive.<sup>48</sup>

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**December 2020**

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<sup>48</sup> UNHCR, *UNHCR Comments on the European Commission Proposal for a Qualification Regulation – COM (2016) 466*, February 2018, note 19 above, p. 23.