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

UNHCR Observations on the proposed legislative measure to repeal the sunset clause of the Act No. 1057 of 24 October 2019 (Act on the deprivation of nationality of foreign fighters)¹

[Høring over udkast til forslag til lov om ændring af lov om ændring af dansk indfødsret og udlændingeloven (Ophævelse af solnedgangsklausul)]

I. INTRODUCTION

1. The UNHCR Representation for the Nordic and Baltic Countries appreciates the opportunity to present its observations on the present legislative proposal (hereafter ‘the Proposal’) which seeks to repeal the sunset clause set out in Section 3, second paragraph of the Act No. 1057 of 24 October 2019.
2. UNHCR offers the following observations in its capacity as the Agency entrusted by the UN General Assembly with a global mandate to provide protection to stateless persons worldwide and for preventing and reducing statelessness.² The General Assembly has specifically requested UNHCR “to provide technical and advisory services pertaining to the preparation and implementation of nationality legislation to interested States”.³ It has also entrusted UNHCR with the specific role foreseen in article 11 of the 1961 Convention on the Reduction of Statelessness.⁴
3. Furthermore, UNHCR’s Executive Committee has requested UNHCR to provide technical advice with respect to nationality legislation and other relevant legislation with a view to ensuring adoption and implementation of safeguards, consistent with fundamental principles of international law, to prevent the occurrence of statelessness which results from arbitrary denial or deprivation of nationality.⁵ It further requested UNHCR to undertake

¹ Law Proposal to repeal the sunset clause of the Act No. 1057 of 24 October 2019 (Act on the deprivation of nationality of foreign, UN General Assembly Resolution A/RES/61/137 of 25 January 2007, available at: <https://www.https://hoeringsportalen.dk/Hearing/Details/64242>.

² UN General Assembly, *Office of the United Nations High Commissioner for Refugees : resolution / adopted by the General Assembly*, 9 February 1996, A/RES/50/152, available at: <http://www.unhcr.org/refworld/docid/3b00f31d24.html>. Reiterated in subsequent resolutions, *inter alia*, UN General Assembly Resolution A/RES/61/137 of 25 January 2007, available at: <https://www.refworld.org/docid/45fa902d2.html>, UN General Assembly Resolution A/RES/62/124 of 24 January 2008, available at: <https://www.refworld.org/docid/47b2fa642.html> and UN General Assembly Resolution A/RES/63/148 of 27 January 2009, available at: <https://www.refworld.org/docid/52fb51bb4.html>.

³ UN General Assembly Resolution A/RES/50/152, see above footnote 1, para. 15.

⁴ Article 11 of the 1961 Convention provides for the creation of a “body to which a person claiming the benefit of this Convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority.”

⁵ Executive Committee of the High Commissioner’s Programme, *Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons No. 106 (LVII) - 2006*, 6 October 2006, No. 106 (LVII), paras (i) and (j), available at: <https://www.refworld.org/docid/453497302.html>.



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“targeted activities to support the identification, prevention and reduction of statelessness and to further the protection of stateless persons”.⁶

4. UNHCR thus has a direct interest in the elaboration of or changes to national legislation of countries that may impact on the prevention or reduction of statelessness and protection of stateless persons, including on the implementation of safeguards contained in international human rights treaties, as well as those set out in the 1954 Convention relating to the Status of Stateless Persons⁷ (hereafter ‘1954 Convention’) and the 1961 Convention on the Reduction of Statelessness⁸ (hereafter ‘1961 Convention’).
5. The following observations are based on international standards set out in the 1954 and 1961 Conventions, relevant UNHCR guidelines, in particular the UNHCR Guidelines on Statelessness No. 5 regarding “Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness” (hereafter ‘Guidelines on Statelessness No. 5’).⁹

II. THE PROPOSAL

6. UNHCR notes that the present legislative Proposal seeks to repeal the sunset clause set out in Section 3, second paragraph of the Act No. 1057 of 24 October 2019. The sunset clause currently provides that the Act No. 1057 automatically ceases in its effect on 1 July 2021. In UNHCR’s understanding, the repealing of the sunset clause will render the provisions of the Act No. 1057 permanent. The adoption of Act No. 1057 amended the Danish Citizenship Act and Aliens Act and introduced a legal basis in domestic law to enable the Danish authorities to administratively deprive ‘foreign fighters’¹⁰ with dual nationality of their Danish nationality if they have displayed conduct seriously prejudicial to Denmark’s vital interests.
7. In the *explanatory notes* to the current Proposal, the Ministry of Immigration and Integration reiterates its views that the provisions of Act No. 1057, according to which it also applies

⁶ Ibidem, para. (a).

⁷ UN General Assembly, Convention Relating to the Status of Stateless Persons, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117, available at: <https://www.refworld.org/docid/3ae6b3840.html>.

⁸ UN General Assembly, Convention on the Reduction of Statelessness, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175, available at: <http://www.refworld.org/docid/3ae6b39620.html>.

⁹ UN High Commissioner for Refugees (UNHCR), Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness, May 2020, available at: <https://www.refworld.org/docid/5ec5640c4.html>.

¹⁰ The Preamble of the Additional Protocol to the CoE Convention on the Prevention of Terrorism defines foreign fighters as “persons travelling abroad for the purpose of committing, contributing to or participating in terrorist offences, or the providing or receiving of training for terrorism in the territory of another State”; see also definition provided by Geneva Academy of International Humanitarian Law and Human Rights, Academy Briefing No. 7—Foreign Fighters under International Law (Geneva, 2014), p. 6.



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to persons who may not be holding a second nationality at the time of the administrative decision to remove the Danish citizenship, but can acquire one merely through registration with the national authorities, are in conformity with the 1961 Convention.¹¹ In support, the Ministry of Immigration and Integration points to UNHCR's Guidelines on Statelessness No. 4 on Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness (hereafter 'Guidelines on Statelessness No. 4'), in particular paragraphs 24-26.¹² Accordingly, the Ministry puts forward that the Proposal does not raise any issues under the 1954 and 1961 Conventions.

III. UNHCR's OBSERVATIONS

8. UNHCR welcomes the legislator's intention to continue applying the provisions of Law No. 1057 in full accordance with the 1961 Convention without rendering individuals, who fall within the scope of the law, stateless.¹³
9. UNHCR appreciates the critical importance of national security considerations and acknowledges the threat foreign fighters may pose to the national security of a country. In this context, UNHCR underlines that deprivation of nationality is possible under international law provided that does not lead to statelessness¹⁴.
10. UNHCR also wishes to acknowledge that the adoption of the Law No. 1057 to be extended by the current law Proposal preceded the publication of UNHCR's Guidelines on Statelessness No. 5.¹⁵ Therefore, UNHCR would like to draw the legislator's attention to the new Guidelines on Statelessness No. 5, which provide detailed legal guidance on the issue of deprivation of nationality, including with regard to States' obligations to provide fair and effective procedural safeguards. The present observations are primarily based on this guidance.

¹¹ See Explanatory Notes to Bill no. L 38 (L 38 Forslag til lov om ændring af lov om dansk indfødsret og udlændingeloven.), available at: <https://www.ft.dk/samling/20191/lovforslag/138/index.htm>.

¹² UN High Commissioner for Refugees (UNHCR), *Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness*, 21 December 2012, HCR/GS/12/04, available at: <https://www.refworld.org/docid/50d460c72.html>.

¹³ See Explanatory Notes to Bill no. L 38 (L 38 Forslag til lov om ændring af lov om dansk indfødsret og udlændingeloven.), page 3, available at: <https://www.ft.dk/samling/20191/lovforslag/138/index.htm>.

¹⁴ UNHCR notes that several of the Contracting Parties referred to in the explanatory notes of the current Proposal had retained their right to deprive a person of its nationality by ways of declaring at the time of ratification that they retain the right to deprive a person of its nationality as permitted by Article 8(3)(a). Moreover, at the time of ratification, the domestic law of several of the States mentioned in the Proposal for comparative purposes already provided for deprivation of nationality on the basis of conduct seriously prejudicial to the vital interests of the state.

¹⁵ UN High Commissioner for Refugees (UNHCR), *Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness*, May 2020, HCR/GS/20/05, available at: <https://www.refworld.org/docid/5ec5640c4.html>.



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11. The text of the current Proposal acknowledges that it may prove difficult to obtain evidence of whether a person considered to pose a threat to Denmark's vital interests possesses another nationality,¹⁶ while remaining silent on how the possession of such other nationality will be determined in order to ensure that the application of the law does not create future cases of statelessness.
12. In the explanatory notes to the current Proposal, the Ministry of Immigration and Integration submits that the provisions of the 1961 Convention can be broadly construed to encompass an interpretation allowing for the deprivation of Danish nationality if the person concerned may acquire another nationality by merely registering with the other country's authorities. The Ministry of Immigration and Integration has previously noted that such interpretation is supported by UNHCR's Guidelines on Statelessness No. 4, in particular paragraphs 24-26.¹⁷ In this regard, UNHCR would respectfully draw attention to the fact that the reference to paragraphs 24-26 in UNHCR's Guidelines on Statelessness No. 4 is of limited relevance to the legal issues arising in the context of citizenship deprivation of foreign fighters regulated by the current Proposal as the paragraphs referred to specifically deal with the acquisition of nationality for children under Articles 1-4 of the 1961 Convention,¹⁸ ensuring that children who would otherwise be stateless are able to acquire the nationality of their State of birth either automatically, by operation of law or upon application.
13. In UNHCR's view, laws which permit individuals to be deprived of a nationality if they are considered to be eligible for or entitled to another nationality, which they have not yet acquired, are problematic as there is a high risk that these individuals may be left stateless should such attempts fail. Accordingly, the proposed test of an individual's assumed predictive ability, at the time of deprivation, to acquire another nationality by mere registration, raises concerns.
14. According to paragraph 82 of UNHCR's Guidelines on Statelessness No. 5, if a Contracting State seeks to deprive an individual of his/her nationality in line with Article 8 of the 1961 Convention, it must conduct an assessment of whether it would render that individual stateless at the moment that the deprivation of nationality would occur. It is statelessness upon withdrawal of nationality and not the question of an individual's potential eligibility for another nationality that is salient for the purposes of preventing statelessness. The

¹⁶ See Explanatory Notes to Bill no. L 38 (L 38 Forslag til lov om ændring af lov om dansk indfødsret og udlændingeloven.), paragraph 3, page 13, available at: <https://www.ft.dk/samling/20191/lovforslag/138/index.htm>.

¹⁷ UN High Commissioner for Refugees (UNHCR), *Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness*, 21 December 2012, HCR/GS/12/04, available at: <https://www.refworld.org/docid/50d460c72.html>.

¹⁸ According to the Ministry, the UNHCR Guidelines are said to leave room for interpreting the Convention in a manner that if an individual has the right to another citizenship through mere registration in another country - without discretion by the authorities, the individual cannot claim the protection of the Convention against "being deprived to statelessness".



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relevant question is whether a person *currently* possesses and has proof of another nationality.¹⁹

15. Furthermore, UNHCR recommends in its Guidelines on Statelessness No. 5 that an assessment of whether a person holds a second nationality and has proof thereof, takes place at the time of the Contracting State's decision to deprive that person of his/her nationality.²⁰ In line with UNHCR's Handbook on the Protection of Stateless Persons, an assessment of a person's statelessness is neither a historic nor a predictive exercise. Therefore, if an individual is partway through a process for acquiring nationality, but those procedures are yet to be completed, s/he cannot be considered as a national for the purposes of Article 1(1) of the 1954 Convention.²¹
16. In line with paragraphs 80-82 of the Guidelines on Statelessness No. 5 and in order to prevent future cases of statelessness, as per the legislator's intention, UNHCR recommends that the Proposal includes explicit safeguards to ensure that any deprivation of nationality does not result in statelessness, by providing for the inclusion of a comprehensive assessment of whether the person actually is holding another nationality at the time of the State's decision to deprive that person of his/her nationality.
17. Regarding access to fair and effective procedural safeguards, UNHCR considers that the Proposal may benefit from greater consideration of the due process requirements outlined in paragraphs 97-108 of UNHCR's Guidelines on Statelessness No. 5.²² In all situations where deprivation of nationality can potentially result in statelessness, the due process guarantees should include the provision of a fair hearing.²³
18. According to paragraph 73 of UNHCR's Guidelines on Statelessness No. 5 on the issues of access to and timing of a fair hearing, while the text of Article 8(4) of the 1961 Convention does not specify the timing and thus leaves room for interpretation on this point, as a matter of good practice, the hearing should take place before the deprivation of nationality occurs and the individual should retain the nationality in question until relevant legal proceedings have been concluded.²⁴ Furthermore, in UNHCR's view, any deprivation of nationality for terrorist activities shall be decided or reviewed by a criminal court, with full respect for all

¹⁹ Guidelines on Statelessness No. 5, paragraphs 80-82.

²⁰ Guidelines on Statelessness No. 5, paras 80-82.

²¹ UNCHR Handbook on Protection of Stateless Persons 2014, para 50.

²² Guidelines on Statelessness No. 5, paras 97-108.

²³ Guidelines on Statelessness No. 5, para 100.

²⁴ Guidelines on Statelessness No. 5, para 73.



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procedural safeguards of criminal law hence ensuring that the procedure is in line with basic and essential elements of the rule of law.²⁵

19. UNHCR would like to highlight in particular that where a State seeks to deprive a person of his/her nationality in absentia, the concerned person is unlikely to have practical or effective access to a fair hearing. Therefore, deprivation of nationality in absentia should be avoided for that reason. In UNHCR's view, procedural safeguards and fundamental guarantees must be afforded in all cases of withdrawal of nationality, including in circumstances where the individual concerned is served with an electronic administrative decision solely through online digital communication and has limited or no access to judiciary electronic-filing systems to initiate an appeal as foreseen in the present Proposal.

UNHCR Representation for the Nordic and Baltic Countries,

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²⁵ Venice Commission of the Council of Europe, The Rule of Law Checklist, available at: https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf.