

UNHCR’s Comments on the Legislative Amendment Proposal to the Refugee Act of the Republic of Korea

I. Introduction

1. The United Nations High Commissioner for Refugees (“UNHCR”) Representation in the Republic of Korea (“RoK”) is grateful to the Government of the Republic of Korea for the opportunity to provide comments on the legislative amendment proposal to the Refugee Act of the Republic of Korea (“Proposal”).¹
2. UNHCR has a direct interest in law proposals in the field of asylum, as the agency entrusted by the UN General Assembly with the mandate to provide international protection to refugees and, together with Governments, seek permanent solutions to the problems of refugees.² Paragraph 8 of UNHCR’s Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees,³ whereas the 1951 Convention relating to the Status of Refugees⁴ 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 (Article 35 of the 1951 Convention and Article II of the 1967 Protocol).
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* (“UNHCR Handbook”) and subsequent Guidelines on International Protection.⁵ UNHCR also fulfils its supervisory responsibility by providing comments on legislative and policy proposals impacting on the protection and solutions of its persons of concern.

¹ The Korean Proposal is available at: <https://www.moleg.go.kr/lawinfo/makingInfo.mo?lawSeq=62041&lawCd=0&&lawType=TYPE5&mid=a10104010000>. The comments are based on UNHCR’s unofficial English translation of the Korean Proposal.

² 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”).

³ *Id.*, 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, *UNHCR’s supervisory responsibility*, October 2002, ISSN 1020-7473, pp. 7-8, available at: <https://www.refworld.org/docid/4fe405ef2.html>.

⁴ 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”.

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>.

4. The following comments are based on international refugee protection standards set out in the 1951 Convention, Conclusions of the UNHCR Executive Committee (ExCom), UNHCR guidelines, and precedent setting decisions by higher courts. While neither the ExCom Conclusions on international protection nor UNHCR's guidelines are binding on States, they contribute to the formulation of *opinio juris* by setting out standards of treatment of approaches to interpretation which illustrate States' sense of legal obligation towards asylum-seekers and refugees.⁶ As a member of the UNHCR ExCom since 2000, the Republic of Korea has contributed to the development of the Conclusions on International Protection, adopted unanimously by the ExCom.
5. Additional reference is made to the previous comments submitted by UNHCR on the Draft Presidential Decree and Regulations to the Refugee Act (2013)⁷, as well as the Comments on the 2009 Draft Bill on Refugee Status Determination and Treatment of Refugees and Others (2009)⁸.
6. According to the press release from the Ministry of Justice (MoJ) of 28 December 2020, the main objectives to achieve by amending the Refugee Act are to enhance expertise and fairness of the Refugee Status Determination (RSD) procedures, while ensuring efficiency to prevent abuse of the system, and to improve access to rights for recognized refugees, humanitarian status holders and refugee status applicants. Noting the significance of the Refugee Act as the first comprehensive national refugee law in the region, UNHCR appreciates the efforts of the Republic of Korea to further refine and improve its domestic refugee legislation and status determination procedures, as well as to expand access to rights for refugees, humanitarian status holders and asylum-seekers.
7. UNHCR's aim in providing these comments is twofold. Firstly, UNHCR would like to assist the Republic of Korea in ensuring that the amended Refugee Act is consistent with international standards related to refugee law. Secondly, UNHCR would like to offer its technical expertise in supporting the efforts undertaken by the Republic of Korea to establish fair and efficient asylum procedures.
8. UNHCR's comments are shared in two main parts. Part II provides comments of a general nature, including on some provision which are not included in the Proposal, and Part III provides specific comments to individual provisions of the Proposal.
9. UNHCR seeks the Republic of Korea's consideration of these comments and welcomes further cooperation regarding them and their implementations. UNHCR remains at the disposal of the authorities of the Republic of Korea for a more extensive and detailed exchange on reforming the national asylum system.

II. General Comments

⁶ Goodwin Gill/McAdam, *The Refugee in International Law*, Oxford University Press, 2007, p. 217.

⁷ UNHCR, *UNHCR's Comments on the Draft Presidential Decree and Regulations to the Refugee Act of the Republic of Korea*, 26 March 2013, available at: <https://www.refworld.org/docid/54100f8f4.html>.

⁸ UNHCR, *UNHCR's Comments on the Republic of Korea 2009 Draft Bill on Refugee Status Determination and Treatment of Refugees and Others*, 15 June 2009, available at: <https://www.refworld.org/docid/4a8d58092.html>.

10. UNHCR appreciates the proposed measures to improve the fairness and efficiency of asylum procedures. In this regard, the following aspects should be considered:

a) Access to the territory and to asylum procedures

Screening procedures at ports of entry should ensure that individuals seeking international protection are able to effectively exercise the right to seek and enjoy asylum and are protected against refoulement. Initial screening implemented at ports of entry, in particular at airports, should therefore be conducted by fully qualified officers with appropriate procedural safeguards (including the opportunity to contact UNHCR).⁹ With adequate safeguards, manifestly unfounded claims could be assessed in an accelerated procedure at ports of entry, while all other cases, including cases that can be admitted on humanitarian grounds, as well as child asylum-seekers and other particularly vulnerable refugee applicants, should be always referred to the regular RSD procedures.¹⁰ Appropriate reception arrangements should become available for asylum-seekers pending decision at ports of entry. In this regard, UNHCR suggests the revision of Article 6 of the Refugee Act to ensure that screening modalities at ports of entry, including at airports, do not preclude the effective access to asylum procedures and respect the principle of *non-refoulement*.¹¹

b) High quality individual decision-making and case processing modalities

Ensuring efficiency in decision-making while maintaining high quality RSD that results in fair individual decisions in accordance with procedural safeguards is not incompatible and has mutual benefits. Diversified case processing strategies¹² – such as simplified procedures for nationalities manifestly in need of protection – could be considered to safeguard the quality and integrity, while promoting efficiency. Regular asylum procedures can also contribute to addressing security concerns by providing a means to exclude persons responsible for serious criminal acts, including acts of terrorism.¹³ Applying frontloading, triaging and a mix of differentiated case processing modalities can help to prevent and address an RSD backlog whilst ensuring both efficiency and quality of RSD in accordance with procedural standards, which includes the right to be heard in a personal interview and the right to information in the language understood by the applicant, the right to legal aid and legal representation, and the right to an effective remedy, to name a few. Adequate resources are key to

⁹ UNHCR, *UNHCR Comments on the European Commission's Proposal for an Asylum Procedures Regulation*, April 2019, COM (2016) 467, p. 36, available at: <https://www.refworld.org/docid/5cb597a27.html>; UNHCR, *Legal Considerations on State Responsibilities for Persons Seeking International Protection in Transit Areas or "International" Zones at Airports*, 17 January 2019, p. 4, available at: <https://www.refworld.org/docid/5c4730a44.html>. See also UNHCR, *UNHCR's Recommendations for the European Commission's Proposed Pact on Migration and Asylum*, January 2020, available at: <https://www.refworld.org/docid/5e3171364.html>.

¹⁰ This issue has also been recently raised by the National Human Rights Commission of Korea, *Opinion on the human rights protection of child asylum-seekers staying at the airport terminal for an extended period*, 21 April 2020, available at: <https://www.refworld.org/docid/5f8955f34.html>.

¹¹ UNHCR, *Legal Considerations on State Responsibilities for Persons Seeking International Protection in Transit Areas or "International" Zones at Airports*, *supra* note 9. UNHCR, *Note on the Principle of Non-Refoulement*, November 1997, available at: <https://www.refworld.org/docid/438c6d972.html>.

¹² UNHCR, *Aide-Memoire & Glossary of case processing modalities, terms and concepts applicable to RSD under UNHCR's Mandate (The Glossary)*, 2020, available at: <https://www.refworld.org/docid/5a2657e44.html>.

¹³ UNHCR, *Refugee Status Determination*, 31 May 2016, EC/67/SC/CRP.12, p. 4, available at: <https://www.refworld.org/docid/57c83a724.html>.

guaranteeing that the process is not only efficient but that its quality, particularly as regards respect for procedural standards, is not compromised.¹⁴

11. Noting the RoK government's commitment to develop the national RSD capacity as pledged during the 2019 Global Refugee Forum (GRF),¹⁵ UNHCR welcomes continued engagement on how to enhance the quality of individual decisions-making and consider suitable case processing modalities, and stands ready to provide any necessary assistance to the MoJ in this regard, including continued consultations and systematic development to enhance the quality of decisions at first and second instance levels thereby improving the applicants' and public opinion's trust in the system.¹⁶ UNHCR further remains available to advise regarding guidelines on procedural and substantive issues in RSD decision-making, and to organize regular capacity development initiatives and trainings on different types of caseloads, thematic areas and applying different methodologies, though virtual and face-to-face workshops, as well as on-the-job trainings.
12. With reference to Article 3 of the Refugee Act which defines the prohibition of refoulement for "*Recognized refugees, humanitarian status holders and refugee status applicants*", UNHCR notes that the prohibition of refoulement under international refugee law applies to anyone who is a refugee, irrespective of whether or not they have been recognized as such (the recognition of a person as a refugee is declaratory in nature), which includes persons who have not expressly applied for refugee status. Likewise, the prohibition of refoulement under international human rights law applies to any persons, regardless of their status, where there are substantial grounds for believing that s/he would be at risk of irreparable harm upon return on account of torture, ill-treatment or other serious human rights violations.¹⁷ Therefore, UNHCR suggests the revision of this Article to include "*any person who meets the requirement of the refugee definition or for whom there are substantial grounds for believing that s/he would be at risk of irreparable harm upon return on account of torture, ill-treatment or other serious human rights violations.*"
13. UNHCR acknowledges that humanitarian status is a positive way of responding pragmatically to certain international protection needs for individuals who do not meet the refugee definition under the 1951 Convention. UNHCR calls upon the Republic of Korea to interpret the criteria for refugee status in the 1951 Convention in such a manner that all persons who fulfil these criteria are duly recognized as refugees and

¹⁴ UNHCR, *Refugee Status Determination Backlog Prevention and Reduction*, January 2018, PPLA/2018/03, available at: <https://www.refworld.org/docid/5b1a38374.html>. See also UNHCR, *UNHCR Discussion Paper Fair and Fast - Accelerated and Simplified Procedures in the European Union*, 25 July 2018, available at: <https://www.refworld.org/docid/5b589eef4.html>.

¹⁵ The GRF pledges made by the Republic of Korea includes the following: "As the first Asian country to enact a stand-alone refugee act in 2013, Korea has made continuous efforts to support the capacity building of its institutions and workforce for refugee status determination (RSD). To this end, the ROK government established a refugee division tasked with addressing refugee-related issues under the Ministry of Justice in 2013. Also, an independent refugee division dedicated to RSD was established under the Seoul Immigration Office in 2016. The ROK government has also made continuous efforts to increase its workforce to strengthen Korea's refugee protection capacity and relevant infrastructure. The number of RSD officers increased to 91 as of July 2019, a huge increase from 8 when the Refugee Act was enacted. The ROK government will continue to put effort into increasing its expertise on RSD by various means such as establishing a division dedicated to appeals." <https://globalcompactrefugees.org/channel/pledges-contributions>

¹⁶ See also UNHCR, *Refugee Status Determination Backlog Prevention and Reduction*, *supra* note 14.

¹⁷ Executive Committee of the High Commissioner's Programme (ExCom), ExCom Conclusion No. 6 (XXVIII), 1977, para. (c); ExCom Conclusion No. 79 (XLVII), 1996, para. (j); ExCom Conclusion No. 81 (XLVII), 1997, para. (i); UNHCR, *Note on the Principle of Non-Refoulement*, November 1997, *supra* note 11.

protected under those instruments, rather than being accorded humanitarian status.¹⁸ This is particularly relevant for refugee claims made in the context of armed conflict and violence.¹⁹ UNHCR also encourages the Republic of Korea, in granting complementary forms of protection to those persons in need of it, to provide for the highest degree of stability and certainty by ensuring the human rights and fundamental freedom of such persons without discrimination, taking into account the relevant international instruments and giving due regard to the best interest of the child and family unity principles.²⁰

14. UNHCR would also appreciate consideration of expanding the family reunification criteria stipulated in Article 37 of the Refugee Act to include family members of humanitarian status holders in addition to those of recognized refugees.²¹ In this regard, the Global Compact on Refugees (GCR) calls on States to put in place effective procedures and referral pathways to facilitate the family reunification of refugees, ensuring that beneficiaries of complementary protection also have access to family reunification and avoiding excessive legal requirements which go beyond what is necessary to preserve the right to family unity.²² Further, as stated in Article 34 of the 1951 Convention, UNHCR recommends the Republic of Korea to consider the adoption of provisions to expedite access to naturalization for refugees.²³

III. Specific Comments²⁴

15. In the following sections, UNHCR highlights specific comments on selected provisions of the proposal, that is, a) admissibility procedure, b) capacity development of RSD officers, c) procedural rights during the first instance RSD procedure, d) Refugee Committee, e) manifestly unfounded claims, f) implicit withdrawal, g) rights of recognized refugees, humanitarian status holders and refugee status applicants, and h) punishments for submission of non-factual information.

a) Admissibility procedure (Articles 5-2, 21 and Addenda Article 3)

Article 5-2. (Decision of inadmissibility for refugee status determination regarding subsequent applications)

¹⁸ Executive Committee of the High Commissioner's Programme, *Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection No. 103 (LVI) - 2005*, 7 October 2005, No. 103 (LVI), available at: <https://www.refworld.org/docid/43576e292.html>.

¹⁹ UNHCR, *Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions*, 2 December 2016, HCR/GIP/16/12, available at: <https://www.refworld.org/docid/583595ff4.html>.

²⁰ Executive Committee of the High Commissioner's Programme, *Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection No. 103 (LVI) - 2005*, *supra* note 20. See also UNHCR, *Providing International Protection Including Through Complementary Forms of Protection*, 2 June 2005, EC/55/SC/CRP.16, p. 9, available at: <https://www.refworld.org/docid/47fd49d.html>.

²¹ UNHCR, *UNHCR's Recommendations for the European Commission's Proposed Pact on Migration and Asylum*, *supra* note 9, at 5.

²² *Id.* UNHCR, *UNHCR observations on the proposed legislative amendments to the Swedish Aliens Act – Report by the Cross-party Committee of Inquiry on Migration [SOU 2020:54 – En långsiktigt hållbar migrationspolitik Betänkande av Kommittén om den framtida svenska migrationspolitiken]*, 7 December 2020, pp. 8–9, available at: <https://www.refworld.org/docid/5fe9c7074.html>.

²³ See also UNHCR, *UNHCR's Comments on the Proposed Amendments to the Nationality Act and the Immigration Control Act of the Republic of Korea*, 29 October 2012, available at: <https://www.refworld.org/docid/509924e62.html>.

²⁴ In this section, relevant provisions of the amendment proposal are italicized, and newly inserted paragraphs are underlined for easy reference.

(1) The Minister of Justice may issue a decision of inadmissibility for refugee status determination (hereinafter referred to as "inadmissibility decision") when a refugee applicant falls under any of the following:

1. When a person makes a subsequent application after being issued an inadmissibility decision or non-recognition decision in the past. However, a refugee applicant who can vindicate a significant change in circumstances is excluded.

2. When a person makes a subsequent application after his or her refugee recognition decision was cancelled or withdrawn in the past, or was deemed to have withdrawn his or her refugee application or appeal pursuant to Article 19-2. Provided, however, a refugee applicant who has vindicated a significant change of circumstances is not applicable.

(2) The Minister of Justice shall decide on the admissibility for refugee status determination procedure within 14 days of the submission of an application if the applicant falls under any of the subparagraphs of Article 5-2 (1), and if a decision of admissibility is not reached within this period, assessment of refugee status determination shall be conducted. However, in case of compelling circumstances, the period can be extended once up to seven days.

(3) The Minister of Justice may omit interview of the person who falls under any of the subparagraphs of Article 5-2 (1) and determine inadmissibility based on application form and other materials.

(4) The Minister of Justice when making an inadmissibility decision shall issue to the applicant or his/her representative a "Notice of Inadmissibility to Refugee Status Determination", which states the reasons for the decision.

Article 21 (Appeal)

(2) A person who has been issued an inadmissibility decision according to Article 5-2 or a decision of non-referral according to Article 6 (3) cannot submit an appeal against the decision.

Addenda Article 3 (Special provision to inadmissibility decision-making period)

Where a person who falls under one of the subparagraphs of Article 5-2 (1) submitted application for refugee status prior to implementation of the current law with pending decisions at the time of the implementation of the current law, an inadmissibility decision may be issued within 6 months from the date of the implementation of the current law regardless of the period stipulated in Article 5-2 (2).

16. Article 5-2 of the Proposal stipulates grounds to screen out (or make inadmissibility decision) for refugee status applicants making subsequent applications without a major change in circumstances and/or whose previous refugee recognition decision was cancelled or withdrawn, or whose application for refugee status was deemed to have been withdrawn in the past.
17. There are many reasons why an applicant may wish to submit further evidence or raise new issues following the examination of a previous application. Among other things, these may relate to a change in the situation in the country of origin; fear of persecution or serious harm based on activities engaged in, or convictions held, by the applicant since leaving the country of origin; a fear based on direct or indirect breach of the principle of confidentiality during or since the previous procedure; deficiencies or flaws in the previous procedure which may have prevented an adequate examination and assessment of relevant facts and evidence; trauma, shame, or other inhibitions may have prevented full oral testimony by the applicant in the previous

examination procedure; or further relevant evidence may have been obtained by the applicant or arisen after the previous examination.²⁵

18. UNHCR, in principle, agrees that subsequent applications may be subjected to a preliminary examination of whether new elements have arisen or been presented which would warrant examination of the substance of the claim. Such an approach permits the quick identification of subsequent applications which do not meet these requirements. However, in UNHCR's view, such a preliminary examination is justified only if the previous claim was considered fully on the merits.²⁶
19. According to UNHCR's *RSD Procedural Standards*, as a general rule, applications for re-opening an RSD case should be made in writing and outline the reasons for the request, including any new or additional information submitted in support of the request. Applications for re-opening of a case file should not be rejected without some form of screening procedure. Decisions for re-opening of closed RSD files are made based on a screening of the application for re-opening and relevant information on the file, to assess whether the criteria for re-opening an RSD case are met. In the screening process, a personal interview may be undertaken.²⁷ For those duly notified, in addition to re-opening of closed RSD cases based on a significant change in the personal circumstances of the applicant or the conditions in the applicant's country of nationality/habitual residence that may affect eligibility for refugee status including for *sur place* claims, re-opening can be justified also in case of: reliable and material new information indicating that the claim may have been improperly decided; serious reason to believe that the claim was improperly decided; or that the grounds for eligibility for refugee status were not adequately examined or addressed.²⁸
20. Procedural safeguards are key in the case of the preliminary examination of subsequent applications. A personal interview is an essential part of an effective and fair asylum procedure as it provides the applicant with an opportunity to explain and substantiate comprehensively and directly to the determining authority the reasons for the application and gives the authority the opportunity to establish, as far as possible, all relevant facts and to assess the credibility of the oral evidence.²⁹ As such, UNHCR has always strongly recommended that all applicants should, in principle, be granted the opportunity for a personal interview, both at the admissibility (as is the case here) and substantive stages, except in those cases in which the determining authority is able to take a positive decision on the claim to refugee status on the basis of evidence available, or the applicant is unfit or unable to attend an interview owing to enduring circumstances beyond his or her control, at which point the interview will need to be postponed.
21. In particular, in cases where an application is rejected on the basis of the concept of "explicit" or "implicit" withdrawal, and a further submission is therefore considered a "subsequent" application, a personal interview might not have taken place. In such

²⁵ UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendations*, March 2010, pp. 72-73, available at: <https://www.refworld.org/docid/4bab55752.html>.

²⁶ *Id.*

²⁷ UNHCR, *UNHCR RSD Procedural Standards Unit 9: Procedures for RSD Case Closure and Re-opening*, 26 August 2020, para. 9.2.2, available at: <https://www.refworld.org/docid/5e87076115.html>.

²⁸ *Id.*, at 7-8, para. 9.2.1.

²⁹ UNHCR, *UNHCR Discussion Paper Fair and Fast - Accelerated and Simplified Procedures in the European Union*, *supra* note 14, at 10.

cases, States should not use the option to omit the personal interview. Everyone has a right to an effective remedy, including in situations of subsequent applications. Applicants whose claims have been withdrawn before the first instance or appeal decision was issued and who subsequently seek to apply for RSD should have their RSD case re-opened and referred to first instance or an appeal RSD procedure. Also in the case of applicants whose claims were rejected and had their RSD cases closed as a result of failing to file an appeal application, if it cannot be established that the applicant was duly notified of the negative decision and the relevant appeal deadline, the case should be re-opened for the purposes of examining the appeal.³⁰

22. Addenda Article 3 provides for a retroactive application of Article 5-2 which UNHCR recommends should be deleted because it is detrimental to pending applications, which is not in line with due process and procedural fairness.

b) Capacity development of RSD officers (Article 8 (4))

Article 8 (Refugee Status Determination)

(4) The Minister of Justice shall keep on staff at the Office, Branch or Center a refugee status determination officer(s) and Refugee Officer(s) (hereinafter referred to as an “RSD Officer”) responsible for interviews and factual investigations, and conduct trainings on expertise necessary for interviews and factual investigation of refugee applicants, procedures stipulated in the current law, related legislations, status and rights of refugees stipulated in international human rights treaties, etc. Matters concerning the qualifications and work performance of RSD Officers shall be determined by the Presidential Decree.

23. UNHCR welcomes the expansion of areas to engage in capacity development initiatives and conduct trainings for national RSD officers on relevant theoretical and practical aspects of the RSD decision-making process. Training of RSD personnel is essential to enhance the knowledge of RSD as well as the analytical and critical skills of the RSD officers, leading to higher quality of decisions and increased efficiency, which will have a positive impact on preventing and addressing RSD backlogs. Newly recruited RSD officers should receive high quality and timely induction training, covering relevant areas of knowledge, skills and attitudes, including on-the-job training with supervision and feedback. Continuing professional development is critical with opportunities for advanced trainings on selected thematic areas, as well as targeted trainings in response to training needs identified through ongoing supervision of case processing.³¹ UNHCR reiterates its readiness to provide technical support for the development and delivery of a systematic training programme in the implementation of the Proposal.

c) Procedural rights during the first instance RSD procedure (Articles 5 (1), 16, 18 (2) and 45-2)

Article 5 (Application for Refugee Status)

(1) Any person who intends to obtain refugee status as a foreigner within the Republic of Korea may apply for refugee status with the Minister of Justice. In such cases, the foreigner

³⁰ UNHCR, *supra* note 27, at 7-8, para. 9.2.1.

³¹ UNHCR, *Refugee Status Determination Backlog Prevention and Reduction*, *supra* note 14, at 18.

shall submit a written application for refugee status to the head of the local immigration office or foreigner-related office designated by the Minister of Justice.

Article 16 (Right to Access and Copy Relevant Materials)

(1) A refugee status applicant may request access to or a copy of his/her refugee interview record, recording of interview(s) produced during the RSD interview as per Article 8 (3) or relevant materials submitted by him/her.

(2) Recording of interview(s) produced during RSD interview(s) under Article 8 (3) can be accessed at a designated area upon the request of the refugee applicant.

Article 18 (Recognition of Refugee Status)

(2) If the Minister of Justice decides that the applicant is not a refugee, he/she shall issue to the applicant a "Notice of Non-Recognition of Refugee Status", which states the reasons for denial and issues regarding appeal.

Article 45-2 (Support for interpreting, etc)

(1) If a person who submits an application for refugee status as per Article 5 (1) or an application for appeal as per Article 21 (1), cannot fully express himself or herself in Korean, the Minister of Justice may provide translation and/or interpreting in the process of registering the application.

(2) If a person who is being issued a notification of decision of non-recognition of refugee status as per Article 18 (2) or a notification of rejection on appeal as prescribed by the Presidential Decree, cannot fully understand the contents of the notification, the Minister of Justice may provide translation and/or interpreting

(3) The Minister of Justice may delegate interpreting and/or translation support work as per paragraphs 1 and 2 to a private organization, if deemed necessary.

(4) Matters necessary for the delegation of work to private organizations, etc as per paragraph 3 shall be determined by the Presidential Decree.

24. UNHCR welcomes the provision of translation/interpreting in the process of registration at a designated immigration office, as stipulated in Article 45-2 of the Proposal. At the same time, UNHCR recommends that the provision of translation and interpreting during registration process should be mandatory, not discretionary, and that MoJ should ensure that translation and interpreting in RSD procedures are provided by trained and qualified translators/interpreters. Registration entails the recording of all relevant data regarding the applicants, the identification of persons with specific needs and the referral of persons for the necessary assistance.³² In terms of both efficiency and fairness, it is essential that there be an accurate and rigorous recording of relevant data and information from the outset to ensure the integrity of protection systems.³³
25. According to UNHCR's *RSD Procedural Standards*, all communications between an applicant and UNHCR must take place in a language that the applicant understands and in which s/he is able to communicate clearly. Applicants should have access to the services of trained and qualified interpreters at all stages of the RSD process, including during registration, first instance RSD, appeal, cancellation, revocation, cessation and re-opening procedures. Rejection letters should provide specific and detailed reasons for denial of refugee status claims and should be carried out in a language the Applicant understands.³⁴

³² UNHCR, *UNHCR Discussion Paper Fair and Fast - Accelerated and Simplified Procedures in the European Union*, supra note 14, at 14.

³³ *Id.*, at 6.

³⁴ UNHCR, *UNHCR RSD Procedural Standards Unit 2.5: Interpretation in UNHCR RSD Procedures*, 26 August 2020, para. 2.5.1, available at: <https://www.refworld.org/docid/5f3113ec4.html>.

d) Refugee Committee (Articles 25, 26, 27-2, and 27-3)

Article 25 (Establishment and Organization of the Refugee Committee)

(2) The Committee shall be comprised of not more than 50 members, including one Chairperson.

(3) The Committee shall have plenary meetings and sub-committees in order to efficiently manage tasks within the mandate of the Committee.

(4) A plenary meeting consists of all Committee members, and reviews the following:

- 1. Matters related with the management of the Committee and sub-committees*
- 2. Matters that a sub-committee decided to be managed directly by the Committee*
- 3. Other matters that the Chairperson acknowledged as necessary to be managed by the Committee*

(5) Sub-committees shall deliberate matters other than those stipulated in each subparagraph of paragraph 4.

(6) Other matters regarding the composition and management of sub-committees shall be regulated by the Presidential Decree.

(7) Matters deliberated by sub-committees are deemed to have been deliberated by the Committee.

Article 26 (Nomination of Committee Members)

(3) The term of office for members is three years. Members may serve consecutively once.

(4) If there is a vacancy in the Committee, the tenure of a newly appointed member shall be that of his or her predecessor's remaining term.

Article 27-2 (Opportunity to a Hearing, etc.)

(1) The Committee may ask a person who submitted an appeal (hereinafter referred to as "appeal applicant") or other concerned person(s) to appear before the Committee and make a statement, if necessary, and may hear an opinion from person(s) with experiences and knowledge on the issues under review.

(2) The Committee may ask an appeal applicant to submit documents, if needed. In such cases, the Committee may set a deadline to submit such documents.

(3) An appeal applicant may submit documents to the Committee in order to complement reasons of appeal application, if needed.

Article 27-3 (Appeal applicant's duty of cooperation)

(1) An appeal applicant shall cooperate with the Committee's request for appearance and/or request for documents, etc in good faith.

(2) If an appeal applicant does not respond to the request for appearance in accordance with Article 27-2 (1) without a legitimate reason, or does not submit requested documents within the deadline in accordance with subparagraph 2 of the same Article, the Committee may review the claim without the appeal applicant's statement or documents.

26. UNHCR welcomes the efforts to allocate sufficient personnel and resources to the Refugee Committee and to enhance due process by providing a ground for a hearing during an administrative appeal. Currently, most refugee status applications receive negative decision,³⁵ at the first instance as well as through the Refugee Committee. UNHCR reiterates its previous recommendation that the administrative review of first instance refugee status decisions should be made by an independent and impartial body, comprised of refugee status experts with the jurisdiction to review questions of fact and law.³⁶ In this context, UNHCR recommends that all members of the Refugee Committee are standing members, who receive support by trained research officers responsible for provision of accurate and up to date country of origin information from

³⁵ According to the Monthly Statistical Report of the Korea Immigration Service, the refugee recognition between January and December 2020 was 1.0%. Korea Immigration Service, Monthly Statistical Report, December 2020, available at: <https://www.immigration.go.kr/immigration/1569/subview.do>.

³⁶ UNHCR, *UNHCR's Comments on the Republic of Korea 2009 Draft Bill on Refugee Status Determination and Treatment of Refugees and Others*, *supra* note 8, at 22.

objective and reliable sources.³⁷ The Refugee Act or its Presidential Decree, in addition, needs to provide the required quorum for a plenary meeting of the Refugee Committee, in order to avoid delays caused by the increased number of Refugee Committee members. Further, it is recommended that UNHCR's observer status is stipulated in the Refugee Act in respect of its supervisory mandate introduced above.

27. With regard to the appeal applicant's duty to cooperate in Article 27-3 of the Proposal, in both first instance and appeal stages, given the special situation of asylum-seekers, they should not be required to produce all necessary evidence. In particular, it should be recognized that, often, asylum-seekers would have fled without their personal documents. Failure to produce documentary evidence to substantiate oral statements should, therefore, not prevent the claim from being accepted if such statements are consistent with known facts and the general credibility of the applicant is good.³⁸ An applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.³⁹
28. It should be noted that an appeal applicant should not be expected to present/retrieve documentation from his/her country of origin that may put him/her or his/her family members at risk. Refugees and asylum-seekers may be exposed to serious risk of harm if their personal data or other information regarding them is brought to the attention of authorities or non-State actors in their country of origin. As such, legal aid providers and other actors involved in providing services and assistance to refugee status applicants should not be required to share any personal data or other information by which individual refugee status applicants, or their family members, could be identified.⁴⁰

e) Manifestly unfounded claims (Articles 18-2, 21 (8) and 44-2)

Article 18-2 (Decision of non-recognition of refugee status against manifestly unfounded applications)

(1) The Minister of Justice shall issue a non-recognition decision specifying that it is a "manifestly unfounded application" in case the applicant is clearly not a refugee under this Act for reasons such as applying for the sole purposes of extension of sojourn, conflicts between private individuals, or economic reasons.

(2) Article 18 (2) – (6) shall apply mutatis mutandis to methods of notification regarding the issuance of non-recognition decision notice etc. per paragraph 1.

³⁷ *Id.*, at 25.

³⁸ UNHCR, *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, para. 10, available at: <https://www.refworld.org/docid/3ae6b3338.html>.

³⁹ 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*, *supra* note 5, at 42.

⁴⁰ UNHCR, *UNHCR RSD Procedural Standards Unit 2.1: Confidentiality and Data Protection in UNHCR RSD Procedures*, 26 August 2020, available at: <https://www.refworld.org/docid/5f3112624.html>.

Article 21 (Appeal)

(8) Notwithstanding paragraph 7, the Minister of Justice shall decide on an appeal against the denial of refugee status as per Article 18-2 within two months from the date when the written Application for Appeal is received. However, if the decision concerning the appeal fails to be issued during this period due to unavoidable circumstances, the Minister of Justice may extend the period not exceeding two months.

Article 44-2 (Period for Litigation)

(1) A complaint shall be filed at the court within 30 days of learning the decision made as per Article 18-2, or within 30 days upon learning about the decision on appeal application made in pursuant to Article 21 regarding a decision made as per Article 18-2 (if submitted for administrative adjudication, 30 days since s/he received the delivery of a written verdict).

(2) Regarding the litigation in paragraph 1 above, a complaint shall not be filed after 90 days following the issuance of the decision, or if submitted and appeal against the decision as per Article 18-2, 90 days since the decision on appeal application was made. However, this shall be exempted provided that there is a legitimate reason for it.

(3) Period stipulated in paragraph 1 shall be invariable.

29. The Proposal contains a non-exhaustive list of mandatory grounds to reject an application as “manifestly unfounded” and to limit the review period of an appeal by the Refugee Committee as well as the period to submit a complaint at the court against such decisions. UNHCR notes that applications that are clearly not related to the criteria for refugee status or which are clearly fraudulent or abusive may be rejected as manifestly unfounded. However, UNHCR is concerned that the criteria for determining a claim “manifestly unfounded” in the Proposal are too broad and not in line with UNHCR’s position or the views of the Executive Committee.⁴¹ It is UNHCR’s position that only claims which are clearly abusive, clearly fraudulent or have no link to the Refugee Convention should be considered as “manifestly unfounded”. Applicants in need of extension of sojourn or economic activities might nonetheless have an asylum claim which requires a full merit review.
30. Further, asylum claims based on conflicts between private individuals does not justify automatic denial of application but rather require thorough analysis of one’s claim with emphasis of effective remedy and protection in the country of origin based on reliable Country of Origin Information (CoI). It is well established that non-State actors can be agents of persecution. In the case of persecution that does not emanate from the State, it has to be evidenced that the State was either unwilling or unable to provide protection.⁴² The question is whether the risk giving rise to the fear is sufficiently mitigated by available and effective national protection from that feared harm. Where such an assessment is necessary, it requires a judicious balancing of a number of factors both general and specific, including the general state of law, order and justice in the country, and its effectiveness, including the resources available and the ability and willingness to use them properly and effectively to protect residents.⁴³ The ability of a State to protect must be seen to comprehend not only the existence of

⁴¹ Executive Committee of the High Commissioner’s Programme, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum No. 30 (XXXIV) - 1983*, 20 October 1983, No. 30 (XXXIV), available at: <https://www.refworld.org/docid/3ae68c6118.html>; UNHCR, *Aide-Memoire & Glossary of case processing modalities, terms and concepts applicable to RSD under UNHCR’s Mandate (The Glossary)*, supra note 12, at 19-20; UNHCR, *UNHCR Comments on the European Commission’s Proposal for an Asylum Procedures Regulation*, supra note 9, at 30.

⁴² UNHCR, *Agents of Persecution - UNHCR Position*, 14 March 1995, para. 6, available at: <https://www.refworld.org/docid/3ae6b31da3.html>.

⁴³ UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, April 2001, para. 15, available at: <https://www.refworld.org/docid/3b20a3914.html>.

an effective legislation and procedural framework but the capacity and the will to effectively implement that framework.⁴⁴

31. The concept of “manifestly unfounded” can be a useful tool for case management in that on the basis of indications a case presents that it is likely to be manifestly unfounded it can be allocated to the appropriate case processing modality in order to improve efficiency. However, **the concept should not be equated with claims that simply have low recognition rates nor should claims presenting such indications be processed with any lesser degree of procedural safeguards.**⁴⁵ UNHCR recognizes the substantive character of a decision that an application for refugee status is manifestly unfounded or abusive, the grave consequences of an erroneous determination for the applicant and the resulting need for such a decision to be accompanied by appropriate procedural guarantees.⁴⁶
32. Imposing time limit on the administrative review period as well as the period to submit a complaint to a court for manifestly unfounded claims can significantly hinder one’s procedural right to an effective remedy. Recognizing the serious consequences for the applicant of an erroneous determination, the decision to consider an application as manifestly unfounded should be undertaken ensuring appropriate procedural safeguards. The decision should not be taken solely based on the application form but should include an RSD interview by a qualified official.⁴⁷

f) Implicit withdrawal (Article 19-2)

Article 19-2 Regarding as withdrawal of the application for refugee status
Where a refugee applicant falls under any of the following, it is deemed that the applicant withdrew his or her refugee status application or appeal:

1. Where a person who applied for refugee status or submitted an appeal voluntarily departed from the Republic of Korea without a re-entry permit as per Article 30 (1) of the Immigration Act, or does not re-enter within the permitted period after departure with a re-entry permit.
2. Where a person who applied for refugee status or submitted an appeal departed from the Republic of Korea expressing his or her intention to leave the Republic of Korea.
3. Where a person falls into one of the Articles 22 (2) (1) to (4).

33. Article 19-2 of the Proposal contains a series of grounds to regard an application withdrawn (“implicit withdrawal”) where the applicants appears to have departed from RoK or falls in one of the grounds for cancellation of refugee status under Article 22 (2).
34. UNHCR is concerned that the broad use of “implicit withdrawal” concept may lead to large-scale rejections of applications in cases in which applicants do not actually intend to withdraw their application. This, in turn, may cause a great number of subsequent applications, thereby prolonging procedures in breach of the principle of

⁴⁴ *Molnar v. Canada (Minister of Citizenship and Immigration)*, [2003] 2 F.C. 339; [2002] F.C.J. No. 1425; 2002 FCT 1081, Canada: Federal Court, 16 October 2002, para. 33, available at: https://www.refworld.org/cases,CAN_FC.4039f1a64.html; *Elcock v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. 1438, at para.15.

⁴⁵ UNHCR, *Aide-Memoire & Glossary of case processing modalities, terms and concepts applicable to RSD under UNHCR's Mandate (The Glossary)*, supra note 12, at 20.

⁴⁶ Executive Committee of the High Commissioner’s Programme, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum No. 30 (XXXIV) - 1983*, supra note 41, para. (e).

⁴⁷ *Id.*

“frontloading” asylum procedures. In general, UNHCR considers that an application can only be rejected where there has been a full examination of all relevant facts and circumstances, based on which the determining authority has established that the applicant is not a refugee and does not qualify for complementary protection.

35. UNHCR notes that there may be situations where the determining authority is not able to undertake a full examination and that applications for refugee status, despite having been made, are to be discontinued as stipulated in Article 19-2 of the Proposal and in the current Article 8 (6) of the Refugee Act. In such situations, the process through which officers come to such conclusion that the circumstances of the applicant indeed fall within the scope of these two Articles needs to be clarified so that the decision is well informed based on evidence. UNHCR would recommend that the authorities are required to give the applicant written notice in the language s/he understands that the application will be regarded as withdrawn and thereby rejected (as abandoned), unless the applicant reports within a specified period. The applicant should be given the opportunity to report to the determining authority and to demonstrate that the reason for which the application was regarded as abandoned was beyond his/her control, in which case the examination shall be resumed.

g) Access to rights for recognized refugees, humanitarian status holders and refugee status applicants (Articles 34 (3), 34-2, 39 (2), and 40 (2))

Article 34 (Social Integration Program, etc.)

(3) The Minister of Justice may provide necessary information and counseling to a recognized refugee in order to support his/her social integration, as prescribed by the Presidential Decree.

Article 34-2 (Support for Employment)

(1) The Minister of Justice may provide support for employment as prescribed by the Presidential Decree, if deemed necessary for a recognized refugee's stable living and prompt integration in the society.

(2) The Minister of Justice may request cooperation from the head of a municipal government or delegate to the head of a non-profit organization designated by the Minister of Justice in relation to the tasks prescribed in paragraph 1.

Article 39 (Treatment of Humanitarian Status Holders)

(2) Provisions of Article 34-2 shall apply mutatis mutandis to humanitarian status holders.

Article 40 (Support for Living Expenses, etc.)

(2) As determined by the Presidential Decree, the Minister of Justice may permit a refugee status applicant to engage in wage-earning employment six months after the date on which the refugee application was received. However, if there is a considerable probability that a refugee status applicant does not fall into one of the subparagraphs in Article 5-2 (1) or Article 18- (1), and special necessity is recognized, (the Minister) may permit a refugee applicant to engage in wage-earning employment prior to the abovementioned period.

36. UNHCR welcomes the inclusion of provisions to improve access to rights for recognized refugees, humanitarian status holders and refugee status applicants. UNHCR recommends revising the relevant provisions as mandatory rather than discretionary, in order to ensure full respect of the intention of the provisions in practice and prevent potential confusions in their implementation. Additionally, UNHCR proposes that the rights provided for in the Refugee Act and its Presidential Decree for the above-mentioned groups are set out in a transparent manner and possibly with reference to relevant frameworks where these rights are reflected.

h) Punishment for submission of non-factual information (Article 47)

Article 47 (Punishments)

(2) A person who facilitates or solicits unlawful application for refugee status by using unlawful methods such as submission of false or fabricated documents and/or submission of documents including non-factual information shall be subject to imprisonment not exceeding two years or fines not exceeding twenty million Korean Won.

(3) A person who conducted the actions stipulated in paragraph 2 above for profit shall be subject to imprisonment not exceeding five years or fines not exceeding fifty million Korean Won.

37. Article 47 (2) of the current Refugee Act and the new Articles 47 (2) and 47 (3) of the Proposal stipulate grounds to punish refugee status applicants for the use of false or forged documents and/or the submission of non-factual information during the RSD procedures. UNHCR notes that where this provision applies to the refugee status applicant such punishment is not in accordance with Article 31 (1) of the 1951 Convention when the applicant meets the criteria for non-penalization for irregular entry/presence stipulated therein.⁴⁸ Article 31(1) provides that: “The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.” In many instances, asylum-seekers are obliged to rely on false identity papers to flee persecution. Each asylum application must therefore be considered on the basis of the specific circumstances of each individual case, including the circumstances and conditions of entry into the territory and the reasons why an asylum seeker has resorted to the use false or forged documents.⁴⁹ The grounds expressed in Article 47 (2) can create the risk of detention in the context of asylum procedures and result, contrary to Article 31 (1) of the 1951 Convention, in the penalization of asylum-seekers, who enter the country in an irregular manner.⁵⁰ In UNHCR’s view, it is important to recognize the specific legal situation of asylum-seekers, who are claiming the fundamental human right to asylum, which entitles them to safeguards additional to those of other aliens, who enter or are

⁴⁸ See UNHCR, *Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalization, Detention and Protection [Global Consultations on International Protection/Second Track]*, 1 October 2001, available at: <https://www.refworld.org/docid/3bf9123d4.html>.

⁴⁹ UNHCR, *UNHCR's Position on Manifestly Unfounded Applications for Asylum*, 1 December 1992, 3 European Series 2, p. 397, available at: <https://www.refworld.org/docid/3ae6b31d83.html>. See, for instance, in the context of cancellation of refugee status, “The use of forged documents does not of itself render a claim fraudulent and should never automatically result in the cancellation of refugee status, provided the true identity and nationality of the person is known and has formed the basis of the recognition decision. In addition, it should be noted that cancellation does not serve as a “punishment” for incorrect statements.” UNHCR, *Note on the Cancellation of Refugee Status*, 22 November 2004, available at: <https://www.refworld.org/docid/41a5dfd94.html>.

⁵⁰ According to the IPU Handbook for Parliamentarians No. 27, a Guide to International Refugee Protection and Building State Asylum Systems, jointly published by the Inter-Parliamentary Union (IPU) and UNHCR, parliamentarians are encouraged to: ensure that legislation states clearly that penalties shall not be imposed on refugees on account of their illegal entry or presence, when they come directly from a territory where their life of freedom was threatened, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. They are further encouraged to advocate for the inclusion in criminal legislation of provisions that bar the institution or continuation of legal proceedings for irregular entry or stay against individuals who have applied for asylum, until the final outcome of the asylum claim, referring to relevant immigration/asylum law provisions to ensure consistency. UNHCR, *A guide to international refugee protection and building state asylum systems*, 2017, Handbook for Parliamentarians N° 27, p. 95, available at: <https://www.refworld.org/docid/5a9d57554.html>

otherwise present in the country in an irregular manner.⁵¹ UNHCR therefore urges the deletion of this provision.

Conclusion

- The Proposal includes several welcoming elements that have the potential to improve due process during administrative RSD procedures and access to rights for recognized refugees, humanitarian status holders and refugee status applicants.
- However, the impact of these improvements may remain limited if access to fair and efficient asylum procedures is infringed by creating inadmissibility procedures and stipulating rejection grounds based on a broad interpretation of ‘manifestly unfounded’ applications.
- In UNHCR’s view, the best way forward for fair and efficient asylum procedures is to ensure good quality decision-making, appropriate resource allocation and a case management system at all stages of the process, including with regards to staffing, case processing modalities and training.
- UNHCR, in principle, agrees that subsequent applications may be subjected to a preliminary examination of whether new elements have arisen or been presented which would warrant examination of the substance of the claim. However, such a preliminary examination is justified only if the previous claim was considered fully on the merits. In order to guarantee procedural safeguards, a personal interview is an essential part of the procedure.
- UNHCR is concerned that the criteria for determining a claim “manifestly unfounded” in the Proposal are too broad. It is UNHCR’s position that only claims which are clearly abusive, clearly fraudulent or have no link to the 1951 Convention should be considered as “manifestly unfounded”. The concept should not be equated with claims that simply have low recognition rates nor should claims presenting such indications be processed with any lesser degree of procedural safeguards.
- The broad use of “implicit withdrawal” concept may lead to large-scale rejections of applications in cases in which applicants do not actually intend to withdraw their application. In general, UNHCR considers that an application can only be rejected where there has been a full examination of all relevant facts and circumstances.
- Refugee status applicants should not be penalized for submitting false or forged documents or false information during the RSD procedures. Imposition of penalties in this regard is not in accordance with Article 31 (1) of the 1951 Convention.

**UNHCR Representation in the Republic of Korea
Seoul, 17 February 2021**

⁵¹ UNHCR, *UNHCR Comments on the European Commission’s amended recast proposal for a Directive of the European Parliament and the Council laying down standards for the reception of asylum-seekers*, June 2011, p. 8, available at: <https://www.unhcr.org/513da1cc9.pdf>.