

Proposed amendments to the Dutch Aliens Decree in relation to arranging the registration phase, the cancellation of the first hearing in the general asylum procedure and the implementation of several technical amendments

(in verband met het regelen van de aanmeldfase, het vervallen van het eerste gehoor in de algemene asielpprocedure en het doorvoeren van enkele technische aanpassingen)

UNHCR Observations

A. Introduction

1. The United Nations High Commissioner for Refugees (UNHCR) thanks the Ministry of Justice and Security for the opportunity to submit its observations on the proposal amending the Dutch Aliens Decree in relation to arranging the registration phase, the cancellation of the first hearing in the general asylum procedure and the implementation of several technical amendments (*‘in verband met het regelen van de aanmeldfase, het vervallen van het eerste gehoor in de algemene asielpprocedure en het doorvoeren van enkele technische aanpassingen’*).

2. UNHCR has a direct interest in law proposals related to asylum, as the agency entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, seek permanent solutions to the problems of refugees.¹ Paragraph 8 of UNHCR’s Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees,² whereas the 1951 Convention relating to the Status of Refugees (hereafter referred to as “1951 Convention”)³ and its 1967 Protocol⁴ oblige States to cooperate with UNHCR in the exercise of its mandate, in particular facilitating UNHCR’s duty of supervising the application of the provisions of the 1951 Convention and 1967 Protocol (Article 35 of the 1951 Convention and Article II of the 1967 Protocol). This has also been reflected in European Union law, including by way of reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the European Union⁵

3. Based on its supervisory responsibility, UNHCR herewith presents its main observations regarding the following proposed legislative amendments to the Dutch Aliens Decree:

The Explanatory Note to the proposed legislative amendments foresees a merger of the registration interview and the first interview, so that the reasons for flight can be identified during the registration phase. This amendment aims at increasing efficiencies and quality of decision making, which are objectives that UNHCR fully supports.⁶ However, UNHCR is concerned that procedural safeguards in

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

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

³ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series, No. 2545, vol. 189, available at: <http://www.unhcr.org/refworld/docid/3be01b964.html>. According to Article 35 (1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of the Convention”.

⁴ UN General Assembly, *Protocol Relating to the Status of Refugees*, UNTS No. 8791, Vol. 606, available at: <http://www.refworld.org/docid/3ae6b3ae4.html>, p. 267.

⁵ European Union, Consolidated version of the Treaty on the Functioning of the European Union, 26 October 2012, OJ L. 326/47-326/390; 26.10.2012, available at: <http://www.refworld.org/docid/52303e8d4.html>.

⁶ *Besluit van [...] tot wijziging van het Vreemdelingenbesluit 2000, in verband met het regelen van de aanmeldfase, het vervallen van het eerste gehoor in de algemene asielpprocedure en het doorvoeren van enkele technische aanpassingen*, Nota van Toelichting p.8, available at: https://www.internetconsultatie.nl/regelen_aanmeldfase.

place during the first interview in the current asylum procedure, such as access to information, legal assistance and the right to receive a transcript of the interview, are not fully guaranteed in the current amendments to the Aliens Decree.

The Explanatory Note further foresees a ministerial regulation formally regulating children in families being heard separately in the asylum procedure if there is reason to do so, as well as setting the minimum age at which children can be heard regarding their independent asylum claim and other procedural safeguards in the best interest of the child. Provisions can also be included in the ministerial regulation with regard to the way in which unaccompanied children are heard, such as the safeguards which must accompany these interviews.⁷ UNHCR would recommend that if children are interviewed about their overall reasons for applying for asylum upon arrival, they are provided sufficient time to prepare and reflect on rendering the account of their experiences to order to ensure a child-friendly interview in the best interests of the child.

i. Merging the registration interview and the first interview: The right to prepare the application, seek legal advice and obtain legal representation

4. According to the Explanatory Note, Article 108c sub 3 provides that asylum-seekers shall be notified in due time of the possibility to be assisted by a legal representative during the hearings and during the proceedings (partly at his own expense). Furthermore, Article 3.109 sub 4 clarifies that applicants will be provided with information on the asylum procedure only after the registration phase. Additionally, as the current amendments read, information on (free) legal assistance will not be provided during the amended registration phase rather information on the asylum procedure and legal representation will continue to be provided during the rest and recuperation period that follows the registration phase.⁸ This indicates that procedural safeguards currently in place for the first hearing will no longer be guaranteed in case the currently proposed amendments to the Aliens Decree are adopted.

5. In principle, UNHCR has no concerns with the proposed merger of the registration interview and the first interview, as UNHCR acknowledges that an accurate registration and identification phase is critical for an effective triaging of caseloads as a basis for channelling cases into the different processing tracks.⁹ However, the proposed acceleration/simplification of procedures should not be at the expense of fundamental procedural safeguards provided for under international and EU law from the outset of the asylum process, in particular:

- The right of the applicant to information on the nature of the procedure and on his/her rights and obligations, including applicable deadlines, and relevant remedies in a language that the applicant understands; and
- The right to prepare the application and seek legal advice and obtain legal representation.

6. UNHCR would like to emphasize that legal representation is an important factor in enabling fair and transparent asylum procedures and strengthening the quality of decision-making. Equally, the right to information about the procedure and the right to legal assistance are primordial and should be guaranteed at all stages of the process. The failure to provide applicants with adequate information, guidance and support will only complicate and delay the process and potentially lead to the lodging of unfounded subsequent applications.¹⁰

⁷ Supra note 6, p. 14.

⁸ Ibid., p. 2 and p. 19.

⁹ 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>, p.6.

¹⁰ Ibid.

7. In light of the above, UNHCR recommends inserting a specific provision on the responsibility of the asylum authorities to ensure access to information about the asylum procedure and the availability of legal assistance prior to the revised registration interview in the amendments to the Aliens Decree.

ii. The right to receive transcripts from interviews and the possibility for applicants to provide corrections to these transcripts where necessary

8. Article 3.108d paragraph 8 provides that the asylum-seeker shall receive a transcript of the registration interview and that the registration phase will end with the completion of the registration interview. It is, however, unclear to UNHCR whether there will be a possibility for the asylum-seeker to provide corrections and additions to the transcript as is currently possible after the first interview.

9. The right to receive transcripts from interviews and the possibility for applicants to provide corrections to these transcripts where necessary is a fundamental safeguard to ensure procedural fairness. UNHCR therefore recommends that in case the registration phase is amended as proposed, the right to receive a transcript and provide comments and additions is retained.¹¹

iii. Interviewing asylum-seeking children

10. Article 3.109a paragraph 5 provides that further rules can be set by ministerial regulation regarding the hearing of children in the asylum procedure. According to the Explanatory Note, this opportunity will be used to explicitly arrange for children in families to be heard separately in the asylum procedure if there is reason to do so. Furthermore, the minimum age at which children can be heard regarding their independent asylum claim can be set. Provisions can also be included in the ministerial regulation with regard to the way in which unaccompanied children shall be heard, such as the safeguards which must accompany these interviews.¹²

11. UNHCR fully supports explicit regulations which enable children to present their asylum claims independently of that of their parents and guarantee age-appropriate safeguards. UNHCR would like to emphasize that before children are interviewed, they are provided with child-sensitive and age-appropriate information on the procedures and their options, are given time to express their views and opinions, and receive legal advice and child-sensitive information in order to prepare for the procedure and reflect on rendering the account of their experiences during the interview. A child's own account of his/her experience is often essential for the identification of his/her individual protection requirements and, in many cases, the child will be the only source of this information. Ensuring that the child has the opportunity to express his/her views and needs requires the development and integration of safe and child-appropriate procedures and environments that generate trust at all stages of the asylum process.¹³ It is important that children be provided with all necessary information in a language and manner they understand about the possible existing options and the consequences arising from them.¹⁴

12. UNHCR would like to take this opportunity to highlight its findings, as part of an EU-funded research project conducted in 2018-2019 in the Netherlands, which resulted in the release of the report

¹¹ Supra note 10.

¹² Supra note 7, p. 14.

¹³ UNHCR, *Guidelines on International Protection No. 8 on Child Asylum Claims*, 2009 (hereafter "UNHCR, *Guidelines on Child Asylum Claims*") available at: <https://www.refworld.org/docid/4b2f4f6d2.html>, para. 70.

¹⁴ UN Committee on the Rights of the Child, General Comment No. 6 (2005) - *Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, CRC/GC/2005/6, Sep. 2005 (hereafter "CRC, General Comment No. 6"), available at: <http://www.unhcr.org/refworld/docid/42dd174b4.html>, para. 25; CRC, *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12 (hereafter "CRC, General Comment No.12") available at: <https://www.refworld.org/docid/4ae562c52.html>, paras. 123–124.

'In de eerste plaats een kind'.¹⁵ All children and young adults consulted indicated feeling overwhelmed and confused upon arrival in the Netherlands and during the registration process. Children meet and are interviewed by an array of stakeholders upon arrival where overlap of information exists. Additionally, children are led into an asylum procedure from the moment they arrive in the Netherlands. This results in children applying for asylum without understanding their situation, without time to adjust to their new surroundings and situation, without time to build the foundations of trust, and without feeling safe.

13. UNHCR would like to note that before the start of the procedure, children will need time to build trusting relationships with their guardian and other professional staff and to feel safe and secure.¹⁶ Children may also require more time for their interview or require several interviews and additional breaks during interviews. It is also important to recall when interviewing children that they do not have the same communication skills and may not be able to articulate their refugee status claims in the same way as adults. A child may be too young or lack the level of maturity to evaluate what information is relevant or to recall and recount what they have witnessed or experienced. Children are different from adults in terms of access to memory, vocabulary, concrete/abstract thinking, suggestibility and risk-taking. As such, it is important that interviewing techniques are adapted to ensure they are child-friendly and age and gender-appropriate.¹⁷ Interviewing officers and interpreters must be attentive to the specific needs and vulnerabilities of children to be able to adapt the manner in which the interview is conducted to the child's age, level of emotional and mental development and maturity, but also gender, disability, culture, education and socio-economic background and other relevant factors.^{18,19}

14. UNHCR recommends that when a ministerial regulation is designed for the interviewing of (unaccompanied) children, that all necessary safeguards are guaranteed to ensure a child-sensitive approach throughout the procedure, such as:

- a. Sufficient time to build trust in order to enable child applicants to give a full and truthful account of their experiences during the interview;²⁰

¹⁵ UNHCR, *In de eerste plaats een kind*, 2019, available at: <https://www.unhcr.org/nl/wp-content/uploads/UNHCR-Children-First-2019-screen-1.pdf>.

¹⁶ UNHCR, *Guidelines on Child Asylum Claims*, para. 66.

¹⁷ UNHCR, *RSD Procedural Standards* (Unit 2.8: Children in UNHCR RSD Procedures, Unit 4.3.8 Interviewing child applicants), available at: <https://www.unhcr.org/4317223c9.pdf>, p.77.

¹⁸ *Ibid.*, p. 87.

¹⁹ UNHCR Procedural Standards (Supra note 17, p.75, 154) suggests the following standards be taken into account when considering whether an interview would be in the best interests of a child:

- a. Whether the child has made an asylum application in their own right or whether they have applied for derivative status;
- b. Where the applicant is unaccompanied or separated child;
- c. The child's age;
- d. The child's level of psychological and mental development and maturity;
- e. The child's capacity to understand the asylum process and procedures and the rights and obligations it entails (and thus their capacity to consent);
- f. Whether information about the child applicant's profile and experiences in country of origin must be gathered from them in order to determine the claim;
- g. Relevant information already available from other sources, such as country of origin information, family members, caregivers, etc.
- h. Any specific needs or vulnerabilities the child applicant may have, including but not limited to physical and mental health issues and disabilities;
- i. The length of time since the child applicant left the country of origin (this may affect the ability to recall and recount events/experiences in the country of origin) and their age at the time of departure;
- j. The child's views and preferences.

²⁰ UNHCR, *The Heart of the Matter - Assessing Credibility when Children Apply for Asylum in the European Union*, December 2014, available at: <https://www.refworld.org/docid/55014f434.html>, p. 64.

- b. Sufficient time to prepare the interview²¹ in order to enable interviewers to take into account the needs of the child;²² and
- c. Sufficient time for children to receive child-sensitive and age-appropriate information²³ and seek advice from relevant, essential actors (guardian, lawyer, etc.).²⁴

15. UNHCR would welcome an opportunity to discuss the above observations and recommendations in relation to the legislative amendments to the Aliens Decree, in a dialogue with the Ministry of Justice and Security and other relevant stakeholders, as appropriate. In particular on the implementation of child-sensitive and age-appropriate asylum procedures in line with its Guidelines on Child Asylum Claims and recommendations from UNHCR research ‘*In de eerste plaats een kind*’²⁵.

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18 November 2020

²¹ Ibid., p. 107.

²² UNHCR, *Guidelines on Child Asylum Claims*, para. 71. See also: UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, Geneva, 1997 (hereafter “UNHCR, *Guidelines on Unaccompanied Children Seeking Asylum*”) available at: <http://www.unhcr.org/refworld/docid/3ae6b3360.html>, p. 10.

²³ CRC, *General Comment No. 6*, para. 25; CRC, *General comment No. 12*, paras. 123–124.

²⁴ UNHCR, *Guidelines on Child Asylum Claims*, para. 69. See also: Executive Committee of the High Commissioner’s Programme, *Conclusion on Children at Risk No. 107* (LVIII) - 2007, 5 October 2007, No. 107 (LVIII), available at: <https://www.refworld.org/docid/471897232.html>, para. (g)(viii). For further details, see CRC, *General Comment No. 6*, paras. 33–38, 69, and, UNHCR, *Guidelines on Unaccompanied Children Seeking Asylum*, p. 2 and paras. 4.2, 5.7, 8.3, 8.5.

²⁵ Supra note 15.