



**Submission by the Office of the United Nations High Commissioner for Refugees
in the case of *Khasan Mohamad YASIEN v. Russia* (Application no. 3028/16) before the
European Court of Human Rights**

1. Introduction*

1.1 UNHCR has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions for refugees.¹ Moreover, UNHCR is responsible for supervising the application of international conventions for the protection of refugees.² UNHCR welcomes the opportunity to intervene in this case, as granted by the European Court of Human Rights ('the Court') in its letter of 3 May 2016.

1.2 In this submission, UNHCR addresses the domestic legislative framework and practice applicable to the treatment of asylum-seekers held in transit zones of airports in the Russian Federation (Part 2) and provides UNHCR's interpretation of the relevant principles of international refugee law and human rights law that govern these issues (Part 3) to assist the assessment of the Court.

2. The legislative framework and practice in the Russian Federation regarding the treatment of asylum-seekers held in airport transit zones.

2.1. The legislative framework regarding the treatment of asylum-seekers held in airport transit zones

2.1.1. The crossing of the border of the Russian Federation is regulated by two federal laws: "On Exit and Entry from/to the Russian Federation" N 114-FL dated 12 August 1996 (hereafter "The Law on Exit and Entry") and "On the State Border of the Russian Federation" N 4730-1 dated 1 April 1993 (hereafter "The Law on the State Border").

2.1.2. The Law on Exit and Entry provides that foreigners and stateless persons may enter Russia using valid identification documents and a visa, if arriving from a State that has a visa regime with Russia.³ Article 25(10) provides that "a foreigner or a stateless person who entered Russia violating the rules and/ or who does not have valid documents... is illegal in Russia and are liable in accordance with the legislation".⁴ Chapter 18 of the Administrative Code of the Russian Federation contains a number of articles penalizing violations of border regime and rules of stay.⁵ Articles 26 and 27 stipulate situations when entry may not be allowed (Article 26) or is strictly prohibited (Article 27). How-

* This submission does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognized principles of international law. UN General Assembly, *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, <http://www.refworld.org/docid/3ae6b3902.html>.

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

² *Ibid.* para. 8(a).

³ Article 24; Article 6(2) of the Law on Exit and Entry.

⁴ Unofficial translation.

⁵ Articles 18.1-18.8 of the Administrative Code of the RF No. 195_FL dated 30 December 2001

ever, the Law on Exit and Entry does not exempt the persons concerned from penalization for legal entry in case entry is for the purpose of seeking asylum.

2.1.3. The Law on the State Border is complementary to relevant provisions of the Law on Exit and Entry. Article 14 of the Law on the State Border governs the consequences relating to violations of the border regime. In particular, it provides that foreigners or stateless persons who do not have legal status in Russia, if there are no grounds to initiate criminal prosecution or administrative proceedings, are to be transferred to the State from which they arrived, unless they ask for political asylum.

2.1.4. Political asylum is one of the three types of protection granted in the Russian Federation together with refugee status and temporary asylum. However, it is a separate institution falling outside the scope of the Russian asylum legislation, in particular, the Federal Law “On Refugees” N 4528-1 dated 19 February 1993 (hereafter “the Law on Refugees”) and it is very rarely applied as it is granted by the President of the Russian Federation when it is in the state interest and/or for political purposes. Furthermore, only persons seeking political asylum are protected from criminal prosecution for illegal crossing of the border.⁶ This non-penalization clause does not exist in the Law on Refugees for persons who have applied for refugee status or temporary asylum. The Russian legislation does not incorporate article 31 of the 1951 Convention and refers only to political asylum as a pre-condition for non-penalization of asylum-seekers. According to the Administrative Code foreigners violating migration rules and rules of entry are to be fined with or without administrative expulsion. The expulsion component is up to the judge depending of circumstances of the individual case.

2.1.5. In accordance with Article 4 of the Law on Refugees, a foreigner who is crossing the Russian Federation border has to submit an application for asylum in writing to the border guard service at the border checkpoint. Article 4.2(3) and (4) provide that such asylum applications (irrespective of whether crossing of the border was legal or illegal) is to be handed over by the border guard service to the migration authorities within three days.

2.1.6. Regarding detention in the airport transit zones, Article 17 of the Law on State Border provides that “...duration and other conditions of temporary stay in the border regime zone can be determined.” There are no other laws or regulations that address the grounds, duration or procedural safeguards governing the situation of asylum-seekers at the border, including prolonged stays in the border areas and in transit zones. The Order N 451-OD dated 27 December 2010 approving the Rules “On the Regime at Border Checkpoints” also does not mention the duration and conditions of stay at border checkpoints. In fact, the legislation only sets the criteria to be fulfilled to be allowed to cross the border and such criteria do not include seeking asylum. If they are not fulfilled, a person remains under the responsibility of the air carrier⁷ until a person applies for asylum and consequently falls within the responsibility of the competent state body dealing with migration issues.

⁶ Article 322 of the Criminal Code of Russia concerns the illegal crossing of the state border of the Russian Federation and reads as follows:

1. The crossing of the State Border of the Russian Federation without valid documents for the right of entry into and exit from the Russian Federation or without a permit obtained in the procedure established by the legislation of the Russian Federation - shall be punishable with a fine in the amount of up to 200 thousand roubles, or in the amount of a wage/salary or any other income of the convicted person for a period of up to 18 months, or with compulsory labour for a term of up to two years, or with deprivation of liberty for the same term.
2. Illegal crossing of the State Border of the Russian Federation, committed by a group of persons by previous concert, or by an organized group, or with the use of violence or threats of its use, shall be punishable by deprivation of liberty for a term of up to five years. Note: The present Article shall not extend to cases of arrival in the Russian Federation in

Note: The present Article shall not extend to cases of arrival in the Russian Federation in breach of the rules for crossing the State Border of the Russian Federation by foreign nationals or stateless persons, for the use of the right to political asylum, in accordance with the Constitution of the Russian Federation, unless the actions of these persons contain a different corpus delicti.

⁷ In accordance with the 1944 Convention on International Civil Aviation, annex 9, chapter 5, para 5.9.1.

2.1.7. The migration authorities of the Russian Federation do not have offices or staff in the transit zone, so the latter is fully under the competence of the Border Guard Service (hereinafter the BGS) of the Federal Security Service. At the same time, the BGS does not make a decision to keep a person in the transit zone; it simply does not allow the person to cross the border and let the person inland.

2.1.8. The asylum procedure in the Russian Federation consists of seven stages.⁸ The Law on Refugees provides a set of rights for persons accepted to the procedure and prescribes that an asylum-seeker certificate should be issued after a preliminary assessment of the materials of the case, which is to be completed within five days. The migration service is obliged to issue an asylum-certificate within one day after that decision is made. The law also provides the right to have an interpreter and be informed about the asylum procedure and the rights and obligations of the asylum-seekers; medical care and employment; the right to be housed in the temporary accommodation centres run by the Federal Migration Service (FMS) of the Russian Federation (Article 6(4)-(6)). All the persons applying for asylum, including those applying at the border and in airport transit zones, and who are admitted to the procedure are entitled to all these rights and guarantees as per the Law on Refugees. However, asylum-seekers in transit zones are deprived of these rights given that the authorities consider that they have not entered the territory of the Russian Federation due to the gap of the border legislation which does not contain any provisions relating to asylum-seekers. As a result, asylum-seekers remain in a legal limbo and material destitution while stranded and detained in the transit zone even after having been issued an asylum-seeker certificate.

2.2. The practice⁹ regarding the treatment of asylum-seekers held in airport transit zones

2.2.1. In practice, asylum-seekers at the border, including in airport transit zones, face two significant challenges in terms of accessing the asylum procedure and in terms of detention. Firstly, asylum-seekers at the border are often denied the right to submit an asylum claim as the border guard service does not accept them. UNHCR and its partner organizations have observed and dealt with a number of cases when despite all efforts asylum applications are not accepted by the personnel of the Border Guard Service without providing any reasoning or by informing verbally that asylum-seekers in the transit zone are not allowed to apply for asylum. The numerous inquiries by UNHCR has failed to yield any constructive answers.

2.2.2. The lack of an office of the migration authorities and the complete lack of information in any form in the airports (information boards, posters, etc.) constitutes a significant limiting factor for persons trying to access the asylum procedures. Most of the time, it is UNHCR, after being contacted through its hotline or e-mail by asylum-seekers, that initiate efforts, on an *ad hoc* basis, to ensure that the right to seek asylum is observed, notably by informing the border authorities and the Ministry of Foreign Affairs that a person is seeking asylum and asking for relevant steps to be taken. However, contacting the migration authorities is not effective as the latter invoke the Law on Refugees arguing that unless a referral is made by the border authorities, the procedure cannot be initiated. The situation has worsened even further within the last two years as both UNHCR and lawyers representing asylum-seekers started to experience difficulties in gaining access to persons of concern in airport transit zones. Lately only international staff of UNHCR are allowed to enter the transit zone with no request to be made in advance. At the same time, even the presence of UNHCR does not help to ensure that steps are taken to initiate the processing of these asylum claims. None of the attempts by UNHCR to formalize its cooperation with the border authorities on these matters have yielded any results so far.

⁸ These include: 1) application for asylum; 2) preliminary assessment/ consideration of the application; 3) decision on documenting an applicant with an asylum-seeker certificate or refusal to examine the application on its merits; 4) issuance of an asylum-seeker certificate or the issuance of a decision refusing to consider the claim on its merits; 5) examination of the application on its merits; 6) decision on granting refugee status or a rejection decision; 7) issuance of a refugee certificate or issuance of a rejection decision.

⁹ Civic Assistance Committee, *Russia as a Country of Asylum - Report on the implementation of the 1951 Convention relating to the Status of Refugees by the Russian Federation*, 2015, Moscow, http://refugee.ru/wp-content/uploads/2016/06/doklad_ENG.pdf

2.2.3. Persons of concern who are admitted to the procedure and rejected at first instance have the right to appeal their rejection both to the FMS and/or court in accordance with Art. 10(2) of the Law on Refugees. However, asylum-seekers in airport transit zones cannot effectively exercise this right as they cannot participate in the court hearing and argue their case, if they wish to do so.

2.2.4. Secondly, the conditions of stay in the border facilities are particularly problematic not only prior to the formal submission of the asylum application but also once an application has been registered. In many respects, they are even worse than in detention. Unlike conditions of stay in detention centers and prisons of all types, the conditions of stay in airports are not regulated by any national legislation. Asylum-seekers stranded in transit zones are deprived of access to fresh air, privacy, food, access to medical and social care.

2.2.5. The situation of asylum-seekers at the transit zones of airports in the Russian Federation has not improved over the last several years and continues to raise concerns.¹⁰ Asylum-seekers have no choice but to stay without any reception conditions in the open area of the transit zone sleeping on the floor, without access to any hygienic facilities or medical care. Basic food and non-food items (such as bed linens, clothing, hygienic products) are provided by UNHCR on a weekly basis in an attempt to help meet the most immediate vital needs. The legislation does not place responsibility on any of the state bodies to ensure minimum conditions and basic care for asylum-seekers in the transit zones.

2.2.6. Importantly, this dire lack of any reception conditions may be prolonged for months and even years. In the absence of accelerated procedures or provisions allowing admission, asylum-seekers who applied at the border must await the outcome of the procedure in detention without any alternatives. In accordance with Article 7 para 1, part 2, the timeframe for consideration of asylum claims is three months with the possibility of an extension. On average, the whole asylum procedure including appeals may take 1-2 years.

2.2.7. Furthermore, in accordance with Article 24 of the Law on Exit and Entry, foreigners may enter the territory of Russia if they are in possession of visa and valid documents recognized as such by the Russian Federation. Article 10 further states that the only documents that can serve as an identification document for foreigners is a valid passport or other documents stipulated by relevant international treaties of the Russian Federation. If a person does not have valid documents to be allowed to cross the border and since asylum legislation does not mention seeking asylum as a criterion allowing an asylum-seeker to cross the border, there is no other legal option for the competent bodies, but to keep a person in the transit zone. Lastly, the national legislation does not provide for the possibility of appealing or judicially reviewing the situation of persons who remain stranded in the transit zone.

3. The relevant principles of international and European refugee and human rights law regarding the treatment of asylum-seekers in airport transit zones

3.1. International refugee law

3.1.1. The right to seek and enjoy asylum is supported by the legal framework including the 1951 Convention and its 1967 Protocol, to which the Russian Federation is a State party, and derives from Article 14(1) of the *Universal Declaration of Human Rights* 1948.¹¹ Seeking asylum is not, therefore, an unlawful act.¹²

¹⁰ See: European Court of Human Rights, *A.M. v. Russia*, Application no. 61427/15, 16 December 2015, <http://hudoc.echr.coe.int/eng?i=001-160015>; European Court of Human Rights, *M.B v. Russia*, Application no 61420/15, 16 December 2015, <http://hudoc.echr.coe.int/eng?i=001-160016>; *Z.A. v. Russia*, Application no 61411/15, 16 December 2015, <http://hudoc.echr.coe.int/eng?i=001-160017>.

¹¹UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), <http://www.refworld.org/docid/3ae6b3712c.html>.

¹² UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, (hereafter 'Guidelines on Detention') 2012, Guideline 1, para. 11, <http://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html>.

3.1.2. Furthermore, as elaborated upon below, Article 31 of the the 1951 Convention provides that asylum-seekers shall not be penalised for their illegal entry or stay.¹³ In exercising the right to seek asylum, asylum-seekers are often forced to arrive at, or enter, a territory without prior authorisation. The position of asylum-seekers may thus differ fundamentally from that of ordinary migrants in that they may not be in a position to comply with the legal formalities for entry. They may, for example, be unable to obtain the necessary documentation in advance of their flight because of their fear of persecution and/or the urgency of their departure.¹⁴ The drafters of the 1951 Convention were aware of such difficulties¹⁵ and the Executive Committee of the High Commissioner's Programme (hereafter "ExCom")¹⁶ itself recognised "the importance (...) to make the necessary distinction between the situation of refugees and asylum-seekers, and that of other aliens".¹⁷

3.1.3. These factors, as well as the fact that asylum-seekers have often experienced traumatic events, need to be taken into account in determining any restrictions on freedom of movement based on irregular entry or presence.¹⁸

3.1.4. In light of the above, the detention of asylum-seekers should be a measure of last resort, with liberty being the default position.¹⁹ This approach is also supported by ExCom which underlined that "(...) in view of the hardship which it involves, detention should normally be avoided".²⁰

3.1.5. Article 31 of the 1951 Convention specifically provides for the non-penalisation of refugees having entered or stayed irregularly if they present themselves without delay and show good cause for their illegal entry or stay. It further provides that restrictions on movement shall not be applied to such refugees other than those which are necessary and such restrictions shall only be applied until their status is regularised or they gain admission into another country.

3.1.6. The benefits provided under Article 31 are also applicable to asylum-seekers given the wording of these provisions applying to refugees physically in or lawfully in the territory of the concerned

¹³ Article 31 reads as follows:

1. 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.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

¹⁴ UNHCR, Guidelines on Detention, Guideline 1, para. 11.

¹⁵ UNHCR intervention before the European Court of Human Rights in the case of *Saadi v. United Kingdom*, 30 March 2007, Application No. 13229/03, para. 25, <http://www.refworld.org/docid/47c520722.html>

¹⁶ The Executive Committee of the High Commissioner's Programme was established in 1958 and functions as a subsidiary organ of the United Nations General Assembly. It has both executive and advisory functions; the latter includes issuing Conclusions on International Protection (referred to as "ExCom Conclusions"). ExCom Conclusions are adopted by consensus by the States which are Members of the Executive Committee and can therefore be considered as reflecting their understanding of legal standards regarding the protection of refugees. At present, 98 States are Members of the Executive Committee, including the Russian Federation which has been a member since October 1995.

¹⁷ ExCom Conclusion No 44, Detention of Refugees and Asylum-Seekers No. 44 (XXXVII) - 1986, para. (d), <http://www.unhcr.org/excom/exconc/3ae68c43c0/detention-refugees-asylum-seekers.html>

¹⁸ UNHCR, Guidelines on Detention, Guideline 1, para. 11.

¹⁹ UNHCR, Guidelines on Detention, Guideline 2, para. 14

²⁰ ExCom Conclusion No. 44 (XXXVII) (1986), para. (b), *supra*, note 14.

State as well as the declaratory nature of the refugee status determination.²¹ Regarding the material scope of Article 31, it is generally accepted that the term “penalties” referred to in this provision includes administrative detention in the immigration context.²²

3.1.7. Restrictions on movement of refugees and asylum-seekers, when necessary, reasonable and proportionate,²³ can only be justified by a limited number of grounds, namely public order, public health or national security.²⁴ More particularly, the notion of “public order” encompasses the following purposes:

- To prevent absconding and/or in cases of likelihood of non-cooperation;
- In connection with accelerated procedures for manifestly unfounded or clearly abusive claims;
- For initial identity and/or security verification;
- In order to record, within the context of a preliminary interview, the elements on which the application for international protection is based, which could not be obtained in the absence of detention.

3.1.8. The above grounds reflect the intention of the drafters of the 1951 Convention²⁵ as well as further guidance provided by ExCom²⁶ and are elaborated upon in UNHCR’s *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, (hereafter ‘Guidelines on Detention’) 2012,²⁷

The Guidelines on Detention reflect the state of international law on detention for immigration-related purposes of asylum-seekers and other persons seeking international protection. They also provide that irrespective of the justification initially invoked for the person’s detention, it should remain valid throughout the detention period and maximum limits on detention need to be established in law to protect the individual from arbitrary detention.²⁸ The Guidelines on Detention further provide that decisions to detain or to extend detention must be subject to minimum procedural safeguards.²⁹

3.1.9. These safeguards include:

- The right to be informed at the time of arrest or detention of the reasons for their detention, and their rights in connection with the order, including review procedures, in a language and in

²¹ Given that a person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfills the criteria contained in the refugee definition, refugee status determination is declaratory in nature. It follows that the prohibition of refoulement applies to all refugees, including those who have not formally been recognized as such, and to asylum-seekers whose status has not yet been determined. ExCom Conclusion No. 6 (XXVIII), 1977, para. (c); ExCom Conclusion No. 79 (XLVII), 1996, para. (j); ExCom Conclusion No. 81 (XLVII), 1997, para. (i), <http://www.unhcr.org/pages/49e6e6dd6.html>. See also, *Note on International Protection (submitted by the High Commissioner)*, A/AC.96/815, ExCom Reports, 31 August 1993, para. 11, <http://www.unhcr.org/refworld/docid/3ae68d5d10.html>.

²² UNHCR, Detention Guidelines, Guideline 4.1.4 para. 32. See also, UN Working Group on Arbitrary Detention, *Report to the Seventh Session of the Human Rights Council*, A/HRC/7/4/, 10 January 2008, which states: “criminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary [and therefore arbitrary] detention.” At para. 53, <http://www.unhcr.org/refworld/docid/502e0eb02.html>

²³ UNHCR, Guidelines on Detention, Guideline 4 para. 18.

²⁴ UNHCR, Guidelines on Detention, Guideline 4.1 para. 21

²⁵ UNHCR intervention before the European Court of Human Rights in the case of *Saadi v. United Kingdom*, 30 March 2007, Application No. 13229/03, para. 26, <http://www.refworld.org/docid/47c520722.html>

²⁶ ExCom Conclusion No 44, para. (b)

²⁷ UNHCR, Guidelines on Detention, Guideline 4.1

²⁸ UNHCR, Guidelines on Detention, Guideline 6

²⁹ UNHCR, Guidelines on Detention, Guideline 7 para. 47.

- terms which they understand;
- The right to be informed of the right to legal counsel. Lawyers need to have access to their client, to records held on their client, and be able to meet with their client in a secure, private setting;
 - The right to be brought promptly before a judicial or other independent authority to have the detention decision reviewed. This review should ideally be automatic. The reviewing body must be independent of the initial detaining authority, and possess the power to order release or to vary any conditions of release;
 - Following the initial review of detention, the right to benefit from a regular periodic review of the necessity for the continuation of detention before a court or an independent body, which the asylum-seeker and his/her representative would have the right to attend;
 - The right to challenge the lawfulness of detention before a court of law at any time. In this regard, the authorities need to establish that there is a legal basis for the detention in question, that the detention is justified according to the principles of necessity, reasonableness and proportionality, and that other, less intrusive means of achieving the same objectives have been considered in the individual case;
 - To contact and be contacted by UNHCR.

3.1.10. These safeguards also include access to a fair and efficient asylum procedure³⁰ in order to ensure that persons in need of international protection are properly identified. Access to asylum procedures must be realistic and effective, including that timeframes for lodging supporting materials are appropriate for someone in detention, and access to legal and linguistic assistance should be made available. It is also important that asylum-seekers in detention are provided with accurate legal information about the asylum process and their rights.³¹

3.1.11. Furthermore, in light of existing international and European human rights standards outlined below, detention conditions should be humane and dignified.³² In UNHCR's view, detention conditions that do not meet international standards may also infringe on other rights, in particular, the right for an asylum-seeker to submit and to argue an asylum claim in a fair and efficient asylum procedure. Material destitution may also undermine the ability of the person concerned to pursue and to substantiate his/her claim.³³

3.1.12. These safeguards are particularly important when asylum is requested at the border, including in international zones at airports, because of the particular vulnerability of asylum-seekers in this context.³⁴

3.1.2. International human rights law

3.1.2.1. Liberty of the person is a fundamental right proclaimed in the Universal Declaration of Human Rights (UDHR). Its importance is underpinned by the guarantee given in three specific provisions in the UDHR, namely Article 3 (right to life, liberty and security); Article 9 (right against arbitrary arrest, detention or exile); and Article 13 (right to freedom of movement and residence). These fundamental rights are also guaranteed in Articles 9 and 12 of the *International Covenant of Civil and*

³⁰ UNHCR, Guidelines on Detention, Guideline 7, para. 47(vi).

³¹ *Ibid.*

³² UNHCR, Guidelines on Detention, Guideline 8, para 48.

³³ UNHCR public statement before the Court of Justice of the European Union in the case of *Cimade and GISTI v. Ministry of the Interior*, 1 August 2011, C-179/11, para. 1.6., <http://www.refworld.org/docid/4e37b5902.html>

³⁴ UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, paras. 21-23, <http://www.refworld.org/docid/3b36f2fca.html>.

Political Rights (ICCPR).³⁵ In its General Comment No. 8 (1982) on Article 9, the Human Rights Council (HRC) made it clear that Article 9(1) “is applicable to all deprivations of liberty, whether in criminal cases or in others cases such as ... immigration control etc.”³⁶

3.1.2.2. The Human Rights Council considered the application of Article 9 in *A v. Australia* (1997).³⁷ The case concerned the prolonged detention of an asylum-seeker. The HRC held that:

“the notion of ‘arbitrariness’ must not be equated with ‘against the law’ but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context”.

3.1.2.3. The HRC, while agreeing that there was no basis for the claim that it is per se arbitrary to detain individuals requesting asylum, observed that, “the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of co-operation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal”.³⁸

3.2. The relevant ECHR standards

3.2.1. Before highlighting the various relevant standards relating to the protection from unlawful and arbitrary detention stemming from Article 5 ECHR, UNHCR recalls the general principles set by the ECtHR for interpreting such standards:

- “In harmony with other rules of international law of which it forms part”,³⁹ particularly where such other rules are found in human rights treaties (such as the 1951 Geneva Convention and the ICCPR);
- In a manner which ensures that rights are given a broad construction while limitations are nar-

³⁵ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, <http://www.refworld.org/docid/3ae6b3aa0.html>. Article 9(1) ICCPR, provides that “everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.” Article 12 ICCPR provides that “1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country”.

³⁶ UN Human Rights Committee (HRC), *CCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Persons)*, 30 June 1982, No. 8, para. 1, <http://www.refworld.org/docid/4538840110.html>.

³⁷ *UNHCR intervention before the European Court of Human Rights in the case of Saadi v. United Kingdom*, 30 March 2007, Application No. 13229/03, <http://www.refworld.org/docid/47c520722.html>.

³⁸ See: *C. v. Australia*, CCPR/C/76/D/900/1999, UN Human Rights Committee (HRC), 13 November 2002, <http://www.refworld.org/docid/3f588ef00.html>; *Samba Jalloh v. Netherlands*, CCPR/C/74/D/794/1998, UN Human Rights Committee (HRC), 15 April 2002, <http://www.refworld.org/docid/3f588ef3a.html>; *Omar Sharif Baban v. Australia*, CCPR/C/78/D/1014/2001, UN Human Rights Committee (HRC), 18 September 2003, <http://www.refworld.org/docid/404887ee3.html>; *Danyal Shafiq v. Australia*, CCPR/C/88/D/1324/2004, UN Human Rights Committee (HRC), 13 November 2006, <http://www.refworld.org/docid/47975af921.html>.

³⁹ *Al-Adsani v. The United Kingdom*, 35763/97, Council of Europe: European Court of Human Rights, 21 November 2001, para. 55, <http://www.refworld.org/docid/3fe6c7b54.html>; United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Article 31(3)(c), <http://www.refworld.org/docid/3ae6b3a10.html>; Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, Article 53, <http://www.refworld.org/docid/3ae6b3b04.html>.

- rowly construed;⁴⁰
- As a “living instrument ... in light of present day conditions” and in accordance with developments in international law so as to reflect the “increasing high standard being required in the area of the protection of human rights”;⁴¹
- In a manner that gives practical and effective protection to human rights.⁴²

3.2.2. The above standards in international refugee and human rights are broadly reflected in the relevant case law of the ECtHR relating to Article 5(1) ECHR as elaborated further below.

3.2.3. In *Amuur v. France*,⁴³ the Court recognised expressly that holding asylum-seekers in the transit zone of an airport is “acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations”⁴⁴, particularly the 1951 Convention and the ECHR, highlighting that “States’ legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by these conventions”.⁴⁵

3.2.4. The Court further held that such practice should not be prolonged excessively, as it may turn a mere restriction on liberty, into a deprivation of liberty.⁴⁶ In this respect, it found that the holding of an asylum-seeker for 20 days in the transit zone of a Paris airport was equivalent, in practice and in view of the restrictions suffered, to a deprivation of liberty and therefore falls within the scope of application of Article 5 ECHR.⁴⁷ In its reasoning, the Court recognised the need to take into account the specific situation of asylum-seekers who, “often fearing for their lives, have fled from their own country”,⁴⁸ and rejected the French authorities’ arguments that the applicants could have returned voluntarily to the country he transited through on his way from Somalia to France, namely Syria.⁴⁹ The Court went on to say:

“Above all, such confinement must not deprive the asylum-seeker of the right to gain effective access to the procedure for determining refugee status.”⁵⁰

3.2.5. In *Saadi v. United Kingdom*, the Court emphasized that “detention must be compatible with the

⁴⁰ *Winterwerp v. Netherlands* [1979] 2 EHRR 387, para. 37; *Kurt v. Turkey*, Appl. No. 15/1997/799/1002, Council of Europe: European Court of Human Rights, 25 May 1998, para. 122, <http://www.refworld.org/docid/49997ae512.html>.

⁴¹ *Selmouni v. France*, 25803/94, Council of Europe: European Court of Human Rights, 28 July 1999, para. 101, <http://www.refworld.org/docid/3ae6b70210.html>.

⁴² *Soering v. The United Kingdom*, 1/1989/161/217, Council of Europe: European Court of Human Rights, 7 July 1989, para. 87, <http://www.refworld.org/docid/3ae6b6fec.html>.

⁴³ *Amuur v. France*, 19776/92, Council of Europe: European Court of Human Rights, 25 June 1996, <http://www.refworld.org/docid/3ae6b76710.html>.

⁴⁴ *Ibid*, para. 43.

⁴⁵ *Ibid*.

⁴⁶ *Ibid*.

⁴⁷ *Ibid*, para. 49.

⁴⁸ *Ibid*, para.43.

⁴⁹ *Ibid*, para. 48.

⁵⁰ *Ibid*, para. 43; *Abdolkhani and Karimnia v. Turkey*, Appl. No. 30471/08, Council of Europe: European Court of Human Rights, 22 September 2009, <http://www.refworld.org/docid/4ab8a1a42.html>.

overall purpose of Article 5, which is to safeguard the right to liberty and ensure that no one should be dispossessed of his or her liberty in an arbitrary fashion.”⁵¹ The Court held that “to avoid being branded as arbitrary, [...] detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate [...] and the length of the detention should not exceed that reasonably required for the purpose pursued”.⁵²

3.2.6. Regarding alternatives to detention, the Court in *Yoh-Ekale Mwanje v. Belgium* ruled that, in certain compelling circumstances, the authorities’ failure to consider a less severe measure other than detention was in breach of Article 5(1) ECHR.⁵³ More particularly, the Court failed to see the connection between the prolongation of the pre-removal detention of a foreigner for seven additional weeks (instead of an alternative to detention) and the aim pursued by the respondent Government.⁵⁴

4. Conclusion

4.1. UNHCR considers that effecting or attempting to effect irregular entry for the purpose of seeking asylum should not be penalized and that the detention of the persons concerned, including at the border and in airport transit zones, should only be a measure of last resort. Furthermore, where it is applied, detention of asylum-seekers in these areas should be justified according to the principles of necessity, reasonableness and proportionality, and subject to a series of important procedural safeguards. All of which are currently missing in the context of persons held in airport transit zones in the Russian Federation.

UNHCR
1 June 2016

⁵¹ *Saadi v. The United Kingdom*, 13229/03, European Court of Human Rights, 11 July 2006, para. 66, <http://www.refworld.org/docid/44dc70a34.html>.

⁵² *Ibid*, para. 74.

⁵³ *Yoh-Ekale Mwanje v. Belgium*, 10486/10, European Court of Human Rights, 20 December 2011, paras. 123-125, <http://www.refworld.org/docid/520a18c64.html>.

⁵⁴ *Ibid*, para. 124.