

UNHCR Comments on the Draft Law of the Republic of Armenia on Making Additions and Amendments to the Law of the Republic of Armenia on Foreigners

Introduction

On 6 June 2019, the United Nations High Commissioner for Refugees (UNHCR) Representation in the Republic of Armenia learned that amendments to the Law of the Republic of Armenia on Foreigners (hereinafter the Law on Foreigners) had been endorsed by the Government of the Republic of Armenia and forwarded to the National Assembly of the Republic of Armenia. UNHCR did not have the opportunity to provide its expert advice during the previous stages of the drafting process of these amendments. However, UNHCR is pleased to submit the following comments at this point with a view to reinforce the asylum-related safeguards and principles of the proposed amendments, for consideration by all relevant governmental actors and for further discussions and consultations by the National Assembly.

UNHCR offers these comments as the Agency entrusted by the United Nations General Assembly with the responsibility for providing international protection to refugees and other persons within its mandate, and for assisting governments in seeking permanent solutions to the problem of refugees. As set forth in its Statute, UNHCR fulfils its international protection mandate by, *inter alia*, “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.” UNHCR’s supervisory responsibility under its Statute is reiterated in Article 35 of the 1951 Convention relating to the Status of Refugees (hereinafter the 1951 Refugee Convention) according to which State parties undertake to “*co-operate with the Office of the United Nations High Commissioner for Refugees [...] in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the Convention*”. A similar provision is included in Article II of the 1967 Protocol relating to the Status of Refugees.

Thus, UNHCR’s comments and availability for further consultations in the context of this legislative process are based on these international instruments. Moreover, the provisions of Article 81(1) of the Constitution of the Republic of Armenia (hereinafter the Constitution) require consideration for the practice of bodies operating on the basis of international human rights treaties, ratified by the Republic of Armenia, when interpreting the provisions concerning basic rights and freedoms enshrined in the Constitution. As described above, UNHCR has a very similar legal status as considered by Article 81(1) of the Constitution and as such is seeking to be treated analogously.¹

¹ Constitution of the Republic of Armenia - Article 81. Basic Rights and Freedoms and International Legal Practice: “1. The practice of bodies operating on the basis of international treaties on human rights, ratified by the Republic of Armenia, shall be taken into account when interpreting the provisions concerning basic rights and freedoms enshrined in the Constitution.”; available at: <https://www.president.am/en/constitution-2015/>.



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General remarks

UNHCR commends the continuous efforts of the Government of the Republic of Armenia aimed at enhancing the national migration and asylum systems and understands the importance of the proposed amendments on regulating the entry to and expulsion of foreigners from Armenia. UNHCR also welcomes the fact that some safeguards based on international refugee law have been considered during the drafting process of the proposed amendments to the Law on Foreigners. In that respect, UNHCR would like to share some observations aimed at further strengthening these safeguards for persons seeking international protection or having been found in need of international protection, and clarifying certain provisions in order to bring the Law on Foreigners closer in line with international standards.

Specific observations

1. The proposed amendments to Article 8, para 2 of the Law on Foreigners

The proposed amendment to para 2 of Article 8 of the Law on Foreigners provides the grounds for refusing to issue or revoking an entry visa, or otherwise prohibiting entry into the Republic of Armenia of a foreigner in the following manner:

“[...] 2. The issuance (extension of the term) of an entry visa to a foreigner shall be refused, the issued entry visa shall be revoked or entry into the Republic of Armenia shall be banned if he/she has been sentenced to imprisonment by a legally effective court decision for committing a crime in the Republic of Armenia.”

The public administration body authorized in the field of justice of the Republic of Armenia shall immediately inform the public administration body authorized in the field of police of the Republic of Armenia about the legal entry into force of a court decision by the Republic of Armenia concerning a foreigner’s conviction in order for an action on expulsion to be instituted pursuant to the procedure established by Article 31 of this Law.

A foreigner’s entry into the Republic of Armenia shall be banned if there is a legally effective court decision on expulsion due to the foreigner’s conviction for a crime unless three years have passed since the execution of the legally effective decision on expulsion in case of committal of a small or medium-grave crime, five years have passed in case of committal of a grave crime and eight years in case of committal of a particularly grave crime.

The provisions of this part [paragraph] do not extend to persons having close relatives (spouse, child, father, mother, sibling [sister, brother], grandmother, grandfather) legally residing in the Republic of Armenia.”

UNHCR takes note of the retention of the last paragraph of Article 8(2) of the Law on Foreigners providing for exceptions to the application of this provision for foreigners who have strong family links in Armenia in order to guarantee their right to respect for

private and family life.² UNHCR assumes that this provision will equally apply to asylum-seekers and recognized refugees who have close relatives legally residing in Armenia.

UNHCR's understanding is that the proposed amendment to Article 8(2) of the Law on Foreigners lowers the nature of the crimes that can affect a foreigner's entry or stay in the Republic of Armenia. According to the amendment, "*crimes*", and not anymore "*grave or particularly grave crimes*" - as per the previous formulation of this provision - can lead to the denial of entry or lead to the discontinuation of the stay of foreigners in Armenia. Such changes fall within the sovereign right of the Republic of Armenia as far as foreigners are concerned that are not covered by the specific legal regime for the entry, stay and expulsion of asylum-seekers and refugees. The latter, even if not coming under the purview of the last paragraph of draft Article 8(2), are protected by the principle of non-*refoulement* and its exceptions, referred to in Article 9 of the Law on Refugees and Asylum.³ It would therefore be important that the draft provisions of the Law on Foreigners refer explicitly to Article 9 of the Law of the Republic of Armenia on Refugees and Asylum (the Law on Refugees and Asylum)⁴ as the absence of such a reference could lead to misunderstandings and a practice that might be at variance with the principle of non-*refoulement* as enshrined in Article 9(1) and (2) of the Law on Refugees and Asylum in transposition of Article 33 of the 1951 Refugee Convention, as well as with provisions in international human rights law providing for protection against *refoulement*, namely Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The same concern applies to Article 8(1) of the Law on Foreigners, which is not being amended, as it contains a list of grounds for prohibiting entry into Armenia without making any reference to the specific regime of entry, stay and expulsion of asylum-seekers, refugees and others who benefit from the provisions of Article 9 of the Law on Refugees and Asylum.

² Article 16 of the Universal Declaration of Human Rights; Article 23 of the International Covenant on Civil and Political Rights; Article 10 of the Convention on the Rights of the Child; Article 44 of the Convention on the Protection of the Rights of Migrant Workers and Members of their Families; and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

³ Armenia: Law No. HO-211-N of 2008 on Refugees and Asylum (2015) [Armenia], 27 November 2008, available at: <https://www.refworld.org/docid/4f1986412.html>.

Article 9. Non-*refoulement*

1. According to this Law and international law, the principle of non-*refoulement* is not returning a refugee in any manner whatsoever to the frontiers of territories where his/her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, political opinion or generalised violence, foreign aggression, internal conflicts, massive violations of human rights, or other serious events disrupting public order.
The present provision does not apply to a refugee whom there are reasonable grounds for regarding as a danger to the security of the Republic of Armenia or who— having been convicted by a final judgment of a particularly serious crime— constitutes a danger to the community.
2. An asylum seeker may not be expelled from the territory of the Republic of Armenia prior to the making of a final decision on the asylum claim submitted by him/her pursuant to Article 47 of this Law.
3. A foreign national or stateless person may not be expelled, returned or extradited to another country where there is a danger, as per well-founded reasons, that he/she would be subjected to cruel and inhuman or degrading treatment or punishment, including torture.

⁴ Armenia: Law No. HO-211-N of 2008 on Refugees and Asylum (2015) [Armenia], 27 November 2008, available at: <https://www.refworld.org/docid/4f1986412.html>.



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UNHCR recommends to add a new paragraph to Article 8 of the Law on Foreigners as follows:

“Part 1 and 2 of this Article shall not apply to asylum-seekers, refugees, and other persons who come under the purview of the provisions of Article 9 of the Law of the Republic of Armenia on Refugees and Asylum.”

2. The proposed amendments to Article 30 of the Law on Foreigners

UNHCR does not have any comments on the proposed amendment to Article 30 (b) of the Law on Foreigners that:

“A foreigner shall be obliged to voluntarily leave the territory of the Republic of Armenia, if:

*[..](b) [instead of: the entry visa has been revoked on the grounds referred to...] **there are grounds** referred to in Article 8(1), (2), and (3) of this Law.”*

However, UNHCR would like to draw attention to the absence of a timeframe for voluntary departure of a foreigner who, in case of non-compliance with voluntary departure, will be subject to expulsion.

Insofar as the issue of voluntary departure may also be relevant for refugees whose asylum status has been withdrawn (cancelled, ceased or revoked), as well as in the context of voluntary return of rejected asylum-seekers, UNHCR would like to recommend the introduction of a reasonable timeframe for voluntary departure to facilitate the implementation of this provision and avoid questions as to when an expulsion procedure as stipulated by Article 31 of the Law on Foreigners can/shall be initiated.

Even though there is no a particular international standard establishing or defining what is a reasonable timeframe in this context, based on existing good practice, it would be useful to define a timeframe between 30 to 90 days.

It is also advisable to provide for the extension of the timeframe for voluntary return in case of arising challenges with obtaining a travel document, unexpected illness of the foreigner or her/his family members, to allow for the completion of the school year for families with children and other valid causes or circumstances beyond the foreigner's control.

UNHCR recommends introducing a reasonable timeframe for voluntary departure coupled with the possibility for an extension in case of a valid cause and circumstances beyond the control of the concerned foreigner.

3. The proposed amendments to Article 36 of the Law on Foreigners

The draft amendment to Article 36 of *the Law on Foreigners* introduces a new para 2.3, which reads as follows:

“[...]2.3. Where a foreigner files an asylum claim with the authorized body pursuant to the established procedure, the decision on expulsion taken on the grounds envisaged by Article 8, para 2 of this Law shall be executed after a final decision on rejecting his/her claim has been made, including the appeal procedure in court.”

UNHCR welcomes this important safeguard for persons applying for asylum. Based on the principle of *non-refoulement* of the 1951 Refugee Convention and in accordance with the jurisprudence of the European Court of Human Rights (ECtHR)⁵, it is crucial to specify and guarantee in law and in practice that in case a foreigner applies for refugee status, the expulsion decision is automatically suspended.

UNHCR recommends that this provision be extended to situations where a foreigner applies for asylum after his/her residency on other grounds is cancelled for reasons enumerated in Article 21 of the Law on Foreigners⁶ and is likely to face forcible return as per the provisions of Article 30 [read in conjunction with Article 31] of the Law on Foreigners.

In addition, Article 36 should clarify that in case the asylum procedure ends with a recognition of the individual as a refugee, expulsion orders that have been adopted prior or during the asylum process will automatically lose their validity. Instead, if the person is recognized as a refugee, but prior or during the asylum procedure, the authorities established circumstances falling within the scope of the exceptions to the principle of *non-refoulement* of Articles 32⁷ and 33⁸ of the 1951 Refugee Convention, transposed in Article 9(1) of the Law on Refugees and Asylum, the decision to expel him/her can only be taken following a distinct assessment in accordance with the specific grounds for expulsion, safeguards and guarantees laid out in the aforementioned provisions.⁹

⁵ *Jabari v. Turkey*, Appl. No. 40035/98, Council of Europe: European Court of Human Rights, 11 July 2000, para 50, available at: https://www.refworld.org/cases_ECHR_3ae6b6dac.html; *Gebremedhin [Gaberamadhien] c. France*, 25389/05, Council of Europe: European Court of Human Rights, 26 April 2007, para 66, available at: https://www.refworld.org/cases_ECHR_46441fa02.html.

⁶ Law on Foreigners of the Republic of Armenia – Article 21 provides:

“Grounds for repealing a decision on granting a residence status, for refusing to extend a residence status, consequences of depriving of residence status, and appealing against deprivation of residence status”.

⁷ Article 32 of the 1951 Refugee Convention provides:

“1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.”

⁸ Article 33 of the 1951 Refugee Convention provides:

“1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.

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

⁹ E. Lauterpacht and D. Bethlehem, “The scope and content of the principle of *non-refoulement*: Opinion”, in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, Cambridge University Press, Cambridge (2003), paras 158-159, available at <http://www.unhcr.org/refworld/docid/470a33af0.html> (hereinafter: “E. Lauterpacht and D. Bethlehem”).



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UNHCR recommends amending draft para 2.3 of Article 36 of the Law on Foreigners as follows:

“[.]2.3. Where a foreigner files an asylum claim with the authorized body pursuant to the established procedure, the decision on expulsion shall be automatically suspended and only be executed after a final negative decision on her/his asylum application has been made, including in an appeal procedure before the court. In case of a resulting recognition as a refugee, previously issued expulsion orders shall automatically lose their validity.”

4. Additional UNHCR recommendations on possible amendments to the Law on Foreigners

UNHCR wishes to propose two more recommendations focusing particularly on important safeguards in expulsion proceedings which derive from its experience of monitoring the application of the relevant domestic provisions in practice:

- **Availability of free-of-charge quality interpretation services, as well as legal aid and representation**

UNHCR considers it crucial to introduce an explicit provision in the Law on Foreigners, which guarantees the right to free and qualified legal aid and representation, as well as interpretation at all stages of the expulsion procedure. In accordance with the ECtHR case law, the lack of interpretation and legal assistance undermines the effectiveness of a remedy against the risk of *refoulement*.¹⁰ These services represent important procedural safeguards to ensure effective access to justice and should be available both in law and in practice.

Interpretation is essential for the accurate collection and establishment of facts and evidence by the authorities. Any person who is subject to expulsion proceedings has the right to be clearly and timely informed about the reasons for the expulsion, adduce evidence in an effective manner, and make submissions against the expulsion in a language s/he understands.¹¹

The free legal assistance and representation should be available whenever a person does not have sufficient means to pay for such services. The legal assistance should be qualified and accessible.¹²

¹⁰ *I.M. c. France*, requête no 9152/09, Council of Europe: European Court of Human Rights, 2 February 2012, para 145, available at: https://www.refworld.org/cases_ECHR_4f2932442.html; *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, para 301 and 304, available at: https://www.refworld.org/cases_ECHR_4d39bc7f2.html; *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, para 201-204, available at: https://www.refworld.org/cases_ECHR_4f4507942.html.

¹¹ *Ibid* 13; Council of Europe, *Twenty Guidelines on Forced Return*, September 2005, *Guideline 4.1*, available at: https://www.coe.int/t/dg3/migration/archives/Source/MalagaRegConf/20_Guidelines_Forced_Return_en.pdf.

¹² Council of Europe, *Twenty Guidelines on Forced Return*, September 2005, *Guideline 5.2*, available at: https://www.coe.int/t/dg3/migration/archives/Source/MalagaRegConf/20_Guidelines_Forced_Return_en.pdf.



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UNHCR recommends incorporating a new paragraph in Article 32 of the Law on Foreigners to guarantee the provision of free interpretation, as well as legal assistance and representation at all stages of the expulsion procedure.

- **Burden of proof in expulsion procedures**

Article 32(1) of the Law on Foreigners requires that a foreigner who is to be expelled shall provide evidence indicating the existence of a threat of persecution or a real danger of torture or cruel, inhuman or degrading treatment or a risk of being convicted to the death penalty. The burden of proof rests therefore exclusively upon the concerned foreigner.

According to general legal principles of the law of evidence, the burden of proof indeed lies on the person who makes the assertion. However, a person with international protection needs may often not be able to support his/her statements with documentary or other proof, and can also not be expected to approach the authorities of her/his country of origin to obtain relevant documents as is reflected as a general principle in Article 25 of the 1951 Refugee Convention. In view of the particularities of this situation, the adjudicator shares the duty to ascertain and evaluate all relevant facts and should use all means at her/his disposal to produce the necessary evidence in support of the decision. This is achieved, to a large extent, by familiarizing her/himself with the objective situation in the relevant country of origin, guiding the person subject to expulsion proceedings in providing the relevant information and adequately verifying alleged facts, which can be substantiated. However, such independent research may not always be successful and there may also be statements that are not susceptible to proof. In such cases, if the individual's account appears credible, s/he should, unless there are good reasons to the contrary, be given the benefit of the doubt.¹³

In case of recognized refugees, it is important to take the decision on expulsion in consultation and collaboration with the authorized body for asylum (currently, the Migration Service of the Ministry of Territorial Administration, Infrastructure and Developments of the Republic of Armenia), which is responsible for determining refugee status in accordance with the Law on Refugees and Asylum. Importantly, an asylum recognition decision by the Migration Service cannot be put into question as such during an expulsion procedure.

UNHCR would also like to recall ECtHR case law whereby in cases related to Article 2 and 3 of the ECHR, States have a duty to carry out an assessment of the risk of their own motion when information on a life-threatening situation is freely ascertainable from a wide number of sources or when the State authorities are aware

¹³ UN High Commissioner for Refugees (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, para 195-205, available at: <https://www.refworld.org/docid/5cb474b27.html>; UN High Commissioner for Refugees (UNHCR), *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, available at: <https://www.refworld.org/docid/3ae6b3338.html>.



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of facts that could expose a specific individual to a risk of ill-treatment under the aforementioned provisions.¹⁴ In those circumstances, the burden of proof is shared.

UNHCR recommends reflecting the principle of shared burden of proof in Article 32(1) of the Law on Foreigners related to expulsion and the necessary assessment of the risk of mistreatment or other harm in case of forcible return.

UNHCR, 30 September 2019

¹⁴ *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, para 131-133, available at: <https://www.refworld.org/cases,ECHR,4f4507942.html>; *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, para 366, available at: <https://www.refworld.org/cases,ECHR,4d39bc7f2.html>; and *F.G. v. Sweden*, Application no. 43611/11, Council of Europe: European Court of Human Rights, 23 March 2016, para 125-127, available at: <https://www.refworld.org/cases,ECHR,56fd485a4.html>.