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

UNHCR Comments on the Draft Amendments to the Law of the Republic of Armenia on Refugees and Asylum Specifying the Role and Procedural Standards of Engagement of the National Security Service in Asylum Procedures.

Introduction

The United Nations High Commissioner for Refugees (UNHCR) Representation in the Republic of Armenia is pleased to hereby provide its observations on the draft Law of the Republic of Armenia on Making Amendments and an Addition to the Law of the Republic of Armenia on Refugees and Asylum (hereafter "the Draft Amendments"), as posted on the Unified Website for Publication of Draft Legal Acts (e-draft.am) on 11 March 2020.

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."*[1] UNHCR's supervisory responsibility under its Statute is reiterated in Article 35 of the 1951 Convention relating to the Status of Refugees (hereafter "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"*.[2] A similar provision is included in Article II of the 1967 Protocol relating to the Status of Refugees.[3]

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.[4]

[1] See para 8(a) of the Statute of the Office of the High Commissioner for Refugees, as revised by General Assembly res. 58/153, 24 February 2004; available at: https://bit.ly/2p47kBm.
[2] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: https://www.refworld.org/docid/3be01b964.html.
[3] UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: https://www.refworld.org/docid/3ae6b3ae4.html.
[4] 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/.

General remarks

UNHCR notes that the main objective of the Draft Amendments is to expand the scope of engagement of the authorized body for national security issues (hereafter the "National Security Service") in asylum procedures, as well as to specify some procedural standards and timeframes for such engagement.

UNHCR shares the legitimate security concerns of States and reiterates its view that national security considerations and international protection of refugees are not mutually exclusive. UNHCR calls for an integrated response that focuses on addressing asylum and migration flows, thereby enabling States to identify those entering their territory and respond to protection, as well as security concerns in line with their obligations under international law.[5] The following recommendations are made with the aim of ensuring that security considerations are addressed in accordance with relevant aspects of international refugee protection standards and in a manner serving the objectives of fairness, effectiveness and efficiency of asylum procedures.

Specific observations

1. Competency to decide on an asylum claim

The Draft Amendments suggest modifying Article 34(4)(4) of the Law on Refugees and Asylum (hereafter "the Law")[6] as follows:

4. The Authorized Body [the Migration Service] shall [..]
(4) "apply to the authorized body for national security issues for provision of information on factual circumstances relevant for the application of the grounds for exclusion from refugee status, prescribed in Article 11, paragraph 1 of this Law, ***as well as for a conclusion on a possible danger posed by asylum-seekers to the national security of the Republic of Armenia, the availability of which shall be mandatory for deciding upon the issue of granting asylum****".*

According to the current wording of Article 34(4)(4), the need to seek a conclusion from the National Security Service as to whether an asylum-seeker could constitute a danger to national security applies only to those who entered Armenia irregularly. The proposed amendment to Article 34(4)(4) imposes this requirement for all asylum-seekers and not only for those who arrived irregularly. UNHCR notes that this requirement in and of itself does not raise concerns from international refugee law perspective.

The Draft Amendments further specify that availability of such conclusions in the file would be mandatory for proceeding with decision-making on the issue of granting

[5] UN High Commissioner for Refugees (UNHCR), *Addressing Security Concerns Without Undermining Refugee Protection - UNHCR's Perspective*, 17 December 2015, Rev.2, available at: https://www.refworld.org/docid/5672aed34.html

[6] 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:
The current version of Article 34(4):
4. the Authorized Body shall [..]
(4) ***"****apply to the Authorized Body for National Security Issues for an opinion on the potential danger to the national security of the Republic of Armenia posed by asylum seekers* ***who have entered the Republic of Armenia illegally****, as well as for provision of information on factual circumstances relevant for the application of exclusion grounds prescribed by part 1 of Article 11 of this Law".*

asylum. Thus, in line with procedural standards[7] and Article 34(4)(3) of the Law, the Draft Amendments reaffirms the exclusive competency of the asylum authority with regard to decision-making on asylum claims. The conclusions of the National Security Service are therefore to be considered and assessed as part of the evidence available to the asylum authority in the decision-making process, which should be assessed and weighed alongside all other available evidence.

UNHCR also welcomes the fact that, in line with its previous comments[8] on similar draft amendments to the Law dating back to 2018 which were eventually called back by the initiator, the Draft Amendments maintain a clear distinction between the exclusion clauses of Article 1F and the exception to the principle of non-refoulement under Article 33(2) of the 1951 Refugee Convention.

However, UNHCR notes the wording of the proposed amendment to Article 34(4)(4) of the Law which particularly refers to the availability of the conclusions of the National Security Service in the file as being mandatory for '*deciding upon the issue of granting asylum*'. While this wording does not imply that the asylum authority will be bound by the conclusions of the National Security Service, UNHCR would like to emphasize that under the provisions of the Law, national security considerations as such may only be relied upon in the context of assessment of possible applicability of the exception to the principle of non-refoulement envisaged under Article 33(2) of the 1951 Refugee Convention, as incorporated in the Law under the second paragraph of Article 9(1) as well as, indirectly, under Article 10(3). Thus, under the Law, national security considerations seem to have no bearing on the issue of granting asylum as such. Therefore, to avoid ambiguity, it would be important to adjust the wording of the proposed amendment to Article 34(4)(4) in line with the provisions of the Law.

UNHCR recommends replacing the wording '*for deciding upon the issue of granting asylum*' in the proposed amendment to Article 34(4)(4) with "*for examination of the asylum application"*.

2. Substantiation of conclusions on posing a threat to national security

As noted above, conclusions provided by the National Security Service may be relied upon in assessing the possible applicability of the exception to the principle of non-refoulement, as incorporated in the Law under the second paragraph of Article 9(1) as well as, indirectly, under Article 10(3).

These provisions reflect the respective clause of Article 33(2) of the 1951 Refugee Convention which particularly provides that the benefit of the principle of non-refoulement may not 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.

The below guidance concerning the interpretation and application of Article 33(2) of the 1951 Refugee Convention and deriving recommendations aim at ensuring that the information sharing between the National Security Service and the asylum authority is conducted in a manner which is in line with international standards and which would allow the asylum authority to properly weigh and use such information in the possible application of this exception to the principle of non-refoulement.

[7] See, for example, UN High Commissioner for Refugees (UNHCR), *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, para 48, available at: https://www.refworld.org/docid/3b36f2fca.html

[8] See UN High Commissioner for Refugees (UNHCR), *UNHCR comments on the Draft Law of the Republic of Armenia on Making Amendments and Supplements to the Law of the Republic of Armenia on Refugees and Asylum*, July 2018, available at: https://www.refworld.org/docid/5bd81b954.html.

Elements of the assessment of applicability of the 'danger to the security' exception to the principle of non-refoulement[9]

Nature of the danger

It is a general principle of law that exceptions to international human rights treaties must be interpreted restrictively.[10] Article 33(2) of the 1951 Refugee Convention *"constitutes an exception to the general principle embodied in paragraph 1 and has, like all exceptions, to be interpreted restrictively. Not every reason of national security may be invoked […]"*[11] Thus, while States clearly maintain a margin of discretion in applying the exceptions to Article 33(1) of the 1951 Refugee Convention, this margin of appreciation is not unlimited.[12]

The fundamental character of the prohibition of refoulement and the humanitarian character of the 1951 Refugee Convention more generally must be taken as establishing a high threshold for the operation of exceptions to the 1951 Refugee Convention. This is particularly so given the serious consequences of refoulement for the individual. The danger to the security of the country in contemplation in Article 33(2) of the 1951 Refugee Convention must therefore be taken to be a very serious danger rather than danger of some lesser order.[13] The security of the country is invoked against acts of a rather serious nature endangering directly or indirectly the constitution, government, the territorial integrity, the independence, or the external peace of the country concerned.[14] Article 33(2) of the 1951 Refugee Convention covers conduct such as attempts to overthrow the government of the host State through violence or otherwise illegal means, activities against another State which may result in reprisals against the host State, acts of terror and espionage, and the requirement of a danger to the security of the country can only mean that the refugee must pose a ***serious danger*** to the foundations or the very existence of the State, for his or her return to the country of persecution to be permissible.[15]

Standard of proof

The requisite standard of proof for applying the exceptions to the principle of non-refoulement is "*reasonable grounds for regarding as a danger"*. A finding of dangerousness can only be *"reasonable"* if it is adequately supported by reliable and credible evidence. The decision-making authority must specifically address the question of whether there is a present or future risk, and the conclusion on the matter must be supported by evidence.

Proportionality

Being an exception to the general human rights principle, the proper interpretation and application of Article 33(2) of the 1951 Refugee Convention also requires an assessment of proportionality of a return measure, which means that: (1) there must

[9] See also ibid.
[10] ECtHR, *Klass v. Germany,* at para. 42 (1978); ECtHR, *Winterwerp v. The Netherlands,* at para. 37 (1979).
[11] Paul Weis, *The Refugee Convention, 1951*: *The Travaux préparatoires Anlyzed with Commentary by Dr. paul Weis,* at 342 (Cambridge University Press, 1995). See also Sir Elihu Lauterpacht and Daniel Bethlehem, *Cambridge University Press, The Scope and Content of the Principle of Non-Refoulement: Opinion,* June 2003, para. 159(iii), available at: http://www.refworld.org/docid/470a33af0.html.
[12] See, Lauterpacht and Bethehem, at paras. 167-68.
[13] See, Lauterpacht and Bethlehem, at para. 169.
[14] Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951: Article 2-11, 13-37,* at 236 (manuscript, 1963, published by UNHCR, 1997).
[15] Walter Kälin, *Das Prinzip des Non-refoulement,* Europäische Hochschulschriften Bd./Vol. 298, at 131 (Bern, Frankfurt am Main: Peter Lang, 1982) (unofficial translation from the German original).

be a rational connection between the removal of the refugee and the elimination of the danger; (2) refoulement must be the last possible resort to eliminate the danger; and (3) the danger to the country of refuge must outweigh the risk to the refugee upon refoulement. It is UNHCR's understanding that the need for such a balancing approach is also supported by the principle of proportionality explicitly enshrined under Article 78 of the Constitution of Armenia.[16]

In light of the above guidance, in order for the decision-making authority, *i.e.* the Migration Service of Armenia, to be able to assess applicability of the 'danger to the security' exception to the principle of non-refoulement as incorporated under the second paragraph of Article 9(1) and under Article 10(3) of the Law, it must possess information, to a reasonable degree, on the nature of the danger posed and the underlying factual circumstances.

Considering the current practice whereby the relevant conclusions of the National Security Service provided either to the Migration Service or courts of Armenia do not contain any information on the nature of the danger posed or underlying grounds, UNHCR considers it to be extremely important to address this gap through the current legislative initiative. UNHCR has observed that, in practice, concrete information as to why a person is to be considered as a threat to national security may have been expressly withheld by the National Security Service from the Migration Service and the Administrative Court of Armenia on the basis of Article 41 of the Law on Operative Investigative Activities. Such an approach can result in practical impossibility to invoke, in a manner consistent with international refugee law, the exception to the principle of non-refoulement or to effectively argue against application of such exception.[17] A conclusion indicating that a person represents a threat to the national security without any additonal explanation can generally serve as a trigger for a thorough examination as to the possible applicability of the exception to non-refoulement, but will not be sufficient as such to justify its application.

UNHCR recommends

- supplementing the Draft Amendments with a provision requiring substantiation of the conclusions of the National Security Service in terms of the nature of the danger posed and the underlying grounds.
- considering respective parallel amendments to other relevant legislative acts regulating disclosure of sensitive information if the existing regulations are assessed to be precluding such disclosure in the context of asylum procedures.

3. Procedural guarantees[18]

UNHCR recalls that the application of Article 33(2) of the 1951 Refugee Convention requires an individualized procedure which offers, as a minimum, the guarantees provided for in Article 32(2) and (3) of the 1951 Refugee Convention.

[16] According to Article 78 of the Constitution of Armenia, *"[t]he means chosen for restricting basic rights and freedoms must be suitable and necessary for achievement of the objective prescribed by the Constitution. The means chosen for restriction must be commensurate to the significance of the basic right or freedom being restricted."*, available at https://www.president.am/en/constitution-2015/.

[17] See further on this under section 2 on procedural guarantees.

[18] See also UN High Commissioner for Refugees (UNHCR), *UNHCR comments on the Draft Law of the Republic of Armenia on Making Amendments and Supplements to the Law of the Republic of Armenia on Refugees and Asylum*, July 2018, available at: https://www.refworld.org/docid/5bd81b954.html; as well as UN High Commissioner for Refugees (UNHCR), *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*, 30 September 2019, available at: https://www.refworld.org/docid/5df891524.html.

UNHCR also notes the requirements of the Constitution and legislation of Armenia for proper administrative action and the right to be heard,[19] as well as the relevant jurisprudence of the Court of Cassation of Armenia.[20] Nevertheless, UNHCR has observed instances when the conclusions of the National Security Service, which contained no factual data or substantiation whatsoever, have been taken as a basis to withdraw asylum from a refugee pursuant to Article 10(3) of the Law.[21] In such cases, the refugees and their representatives/lawyers lacked any possibility to challenge the validity, correctness or relevance of the underlying information.

Having acknowledged the legitimate interest of States to address national security considerations, UNHCR has stressed on several occasions[22] the need to strike a fair balance between the interests of the State and the individual when it comes to disclosure of sensitive information. Where there are concerns that disclosure of information to the refugee may pose a threat to the security of the country of asylum or to individuals, a summary statement of the information which would not be injurious to national security or to the safety of persons shall be provided to the refugee to enable him/her to be reasonably informed of the circumstances giving rise to the issue of application of the exception to the principle of non-refoulement and to provide the person with a reasonable opportunity to be heard. The need to balance the State interests with the procedural safeguards for individuals in the context of national security considerations has also been highlighted by the European Court of Human Rights in its jurisprudence on numerous occasions.[23]

Several mechanisms have been introduced in State legislation and practice to address the issue of disclosure of sensitive information, including the system of *'special*

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[19] Ibid 4, Article 50 of the Constitution of Armenia; Article 38 of the Law on Fundamentals of Administrative Action and Administrative Proceedings.

[20] See, for example, decision of the Court of Cassation of the Republic of Armenia in the administrative case No. ԿԴ/0016/05/08.

[21] 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 10. Grounds for ceasing recognition of a refugee and grant of asylum

"*3. Asylum granted in the Republic of Armenia to a refugee shall be ceased, if, owing to well-founded reasons, he/she is regarded to be dangerous for the national security of the Republic of Armenia, or if he/she has been convicted of committing a serious or particularly serious crime."*

[22] See, for example, UN High Commissioner for Refugees (UNHCR), *Addressing Security Concerns Without Undermining Refugee Protection - UNHCR's Perspective*, 17 December 2015, Rev.2, para 28, available at: https://www.refworld.org/docid/5672aed34.html.

[23] See, for example, *Chahal vs. the UK*, *Application no. 22414/93*, para. 131 which states: 'The Court recognises that the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved (see, mutatis mutandis, the Fox, Campbell and Hartley v. the United Kingdom judgment of 30 August 1990, Series A no. 182, p. 17, para. 34, and the Murray v. the United Kingdom judgment of 28 October 1994, Series A no. 300-A, p. 27, para. 58). The Court attaches significance to the fact that, as the intervenors pointed out in connection with Article 13 (art. 13) (see paragraph 144 below), in Canada a more effective form of judicial control has been developed in cases of this type. This example illustrates that there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice; see also *Ljatifi v. the Former Yugoslav Republic of Macedonia, Application no.* 19017/16, para. 35 which states: '[…] even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that deportation measures affecting fundamental human rights be subject to some form of adversarial proceedings before an independent authority or a court competent to effectively scrutinise the reasons for them and review the relevant evidence, if need be with appropriate procedural limitations on the use of classified information. The individual must be able to challenge the executive's assertion that national security is at stake. While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority or court must be able to react in cases where the invocation of this concept has no reasonable basis in the facts or reveals an interpretation of "national security" that is unlawful or contrary to common sense and arbitrary […]'; see also *A. and Others v. the UK,* 19 February 2009, no. 3455/05, §204; *C.G. and Others v. Bulgaria*, 24 April 2008, no. 1365/07, §57.

advocates' in Canada and the UK which may serve as helpful examples of international practice to take into consideration.[24]

UNHCR recommends introducing relevant changes to the Draft Amendments and, if deemed necessary, other relevant legislative acts that would enable a refugee or his/her representative to be reasonably informed of the circumstances giving rise to the issue of application of an exception to the principle of non-refoulement, including through withdrawal or denial of protection under Article 10(3) or the second paragraph of Article 9(1) of the Law, and to provide him/her with a reasonable opportunity to be heard and provide counter-arguments.

4. Timeframes for provision of conclusions on posing a threat to national security

The Draft Amendments propose to establish, under Article 35(1)(1) of the Law, a two-month and seven-day timeframe (regular and accelerated procedures respectively) for the National Security Service to provide its national security conclusions in relation to an asylum-seeker. UNHCR commends the initiative of introducing these timeframes as this contributes to preserving the efficiency of the procedures. However, bearing in mind the overall timeframes of the asylum procedures of three months and 10 days (for regular and accelerated procedures respectively) established under Articles 45(3) and 52.1(5) of the Law, UNHCR is concerned that the asylum authority may not be in a position to effectively conclude the proceedings within one month and three days respectively in case the conclusions by the National Security Service are received at the end of the set deadline. The conclusions provided by the National Security Service may require further interviews with asylum-seekers as well as country of origin information research before proceeding with decision-making, which will most likely require extension of the timeframe of the proceedings and thus, undermine their efficiency. Therefore, the Draft Amendments should aim at providing for the shortest possible and reasonable timeframes for providing the conclusions on national security, considering the overall timeframes and operational needs of the asylum procedures. A possibility to extend the timeframes may also be envisaged, in case there are exceptional circumstances beyond the control of the National Security Service.

Furthermore, in light of the suggested revision of Article 34(4)(4) of the Law requiring availability of the conclusion of the National Security Service in order to proceed with decision-making on an asylum claim, the Draft Amendments should provide for the possibility to proceed with decision-making in the absence of a conclusion from the National Security Service if such conclusion is not provided within the set deadlines. It is important to note that nothing would prevent information relevant to the possible application of an exception to the principle of non-refoulement to be provided after the deadline set out in (amended) Article 34(4)(4) of the Law, should the National Security Service obtain the relevant information at a later stage or take more time than provided for in the Law to submit its conclusion. Moreover, Article 35(1)(3) of the Law expressly sets out the authority of the National Security Service to provide information on the

[24] The role of the Special Advocate has developed in proceedings before a wide variety of forums, both statutory and non-statutory in origin, where a party, with the permission of the forum, seeks to rely upon 'closed' evidence. Closed evidence may raise issues concerning national security. Individuals and their legal representatives are excluded from hearings where closed evidence is used. Special Advocates perform an important role by representing the interests of the excluded party in those hearings and subjecting the sensitive material to scrutiny, thereby promoting the fairness of the proceedings; see, for example, UK Parliament, Select Committee on Constitutional Affairs, Seventh Report, *The Special Advocate system as operated under SIAC*, available at https://publications.parliament.uk/pa/cm200405/cmselect/cmconst/323/32307.htm.

existence of grounds for non-application of the principle of non-refoulement upon its own initiative.

In addition, for the sake of efficiency of asylum procedures, a deadline for all types of National Security Service interventions would be recommended such as in cases of assistance with establishing the identity of an asylum-seeker or verifying factual circumstances or providing information relevant for possible applicability of the exclusion clauses.

UNHCR recommends

- shortening the suggested timeframes for provision of conclusions by the National Security Service to one month and three days (regular and accelerated procedures respectively), with a flexibility to apply an extended timeframe of two months and five days respectively in case of circumstances beyond the control of the National Security Service.
- establishing similar timeframes for other interventions by the National Security Service upon the request of the asylum authority as per Article 35(1) and (2) of the Law.
- setting out the consequences of non-provision by the National Security Service of a conclusion on posing a threat to national security within the established timeframes, *i.e.* that the asylum authority may proceed with decision-making.

Conclusion

UNHCR would appreciate a consultative process in the finalization of these legislative proposals and remains available for further discussions as well as for provision of further expertise and support as required.

UNHCR, 7 May 2020