

UNHCR Observations on the Draft Law 217 to Complement Section 28 of the Citizenship Act (Deprivation of Estonian Citizenship)

I. Introduction

1. The United Nations High Commissioner for Refugees (UNHCR) Representation for the Nordic and Baltic countries appreciates the opportunity to present its observations on the *Draft Law 217 to Complement Section 28 of the Citizenship Act*¹ (hereafter 'Law Proposal') addressing deprivation of Estonian citizenship².
2. UNHCR offers the following observations in its capacity as the Agency entrusted by the UN General Assembly with a global mandate to provide protection to stateless persons worldwide and for preventing and reducing statelessness.³ The General Assembly has specifically requested UNHCR "to provide technical and advisory services pertaining to the preparation and implementation of nationality legislation to interested States".⁴ It has also entrusted UNHCR with the specific role foreseen in Article 11 of the 1961 Convention on the Reduction of Statelessness.⁵
3. Furthermore, UNHCR's Executive Committee has requested UNHCR to provide technical advice with respect to nationality legislation and other relevant legislation with a view to ensuring adoption and implementation of safeguards, consistent with fundamental principles of international law, to prevent the occurrence of statelessness which results from arbitrary denial or deprivation of nationality.⁶
4. UNHCR thus has a direct interest in national legislation of countries impacting on the prevention or reduction of statelessness and protection of stateless persons, including implementation of safeguards contained in international human rights treaties.

II. The Law Proposal

5. The present Law Proposal introduces an additional subparagraph 1¹ to Section 28 of the Citizenship Act as follows:

"(1¹) A person may be deprived of Estonian citizenship by a decision of the Government of the Republic if he or she has committed a crime according to § 232, § 234², § 237-237³ or § 237⁵ of the Penal Code and for whom a conviction has entered into force." It also amends subsection (3) of the same section with a reference to the proposed (1¹), which excludes citizens by birth from the scope of the amendment.

¹ Riigikogu, *Draft Law 217 to Complement Section 28 of the Citizenship Act* (Kodakondsuse seaduse § 28 täiendamise seadus 217 SE), 18 June 2020, available at: <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/b77537a1-87d6-41a0-9d12-4d8d3285086c/Kodakondsuse%20seaduse%20§%2028%20täiendamise%20seadus>

² In the present comments, the terms 'nationality' and 'citizenship' are used interchangeably.

³ UN General Assembly, *Office of the United Nations High Commissioner for Refugees : resolution / adopted by the General Assembly*, 9 February 1996, A/RES/50/152, available at: <http://www.unhcr.org/refworld/docid/3b00f31d24.html>. Reiterated in subsequent resolutions, *inter alia*, UN General Assembly Resolution A/RES/61/137 of 25 January 2007, available at: available at: <https://www.refworld.org/docid/45fa902d2.html>, UN General Assembly Resolution A/RES/62/124 of 24 January 2008, available at: <https://www.refworld.org/docid/47b2fa642.html> and UN General Assembly Resolution A/RES/63/148 of 27 January 2009, available at: <https://www.refworld.org/docid/52fb51bb4.html>.

⁴ UN General Assembly Resolution A/RES/50/152, see above footnote 3, para. 15.

⁵ Article 11 of the 1961 Convention provides for the creation of a "body to which a person claiming the benefit of this Convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority."

⁶ Executive Committee of the High Commissioner's Programme, *Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons No. 106 (LVII) - 2006*, 6 October 2006, No. 106 (LVII), paras. (i) and (j), available at: <https://www.refworld.org/docid/453497302.html>.

6. As outlined in the Explanatory Note⁷, the Law Proposal amends the existing Citizenship Act with a subsection that gives the Government of the Republic discretionary powers to deprive naturalised citizens of Estonian citizenship in case they have been convicted by a final court decision of the following crimes in the Penal Code: treason; intelligence activities against the Republic of Estonia and support thereof; acts of terrorism; membership in a terrorist organisation; preparation of and incitement to acts of terrorism; financing and support of acts of terrorism and activities directed at it; travel for terrorist purposes.
7. According to the Explanatory Note, persons who are considered threats to Estonian national security do not “deserve” Estonian citizenship and thus the protection of the Republic of Estonia. Noting that terrorist groups threaten the national security of Estonia and other countries, the note further states that: “[t]he participation in or support of the activities of such groups is such extreme anti-state behaviour and in clear contradiction with the constitutional values of the Republic of Estonia that as a consequence of such action it is justified to consider deprivation of Estonian citizenship even if the result is statelessness.” The Explanatory Note further states that: “[t]he aim of the law is not to punish someone for the second time, by granting citizenship a duty of loyalty has been created between the individual and the state, and by committing an anti-state crime, the person has significantly harmed the interests of the state and thus violated the duty of loyalty.”

III. General observations

8. UNHCR appreciates the critical importance of national security considerations and acknowledges the threat acts related to terrorism may pose to the national security of a country. In this context, UNHCR underlines that deprivation of nationality is permissible under international law if it is not arbitrary and does not lead to statelessness.
9. UNHCR wishes to recall that the right to nationality, protection against arbitrary deprivation of nationality as well as principles related to prevention of statelessness are firmly embedded in the existing international legal framework. There is a strong international consensus that the right to a nationality, which is reflected in numerous widely ratified international treaties,⁸ and, relatedly, the prohibition of arbitrary deprivation of nationality are fundamental principles of international law. The fundamental nature of the right to a nationality and the prohibition of arbitrary deprivation of nationality was also recalled and reaffirmed in several General Assembly Resolutions, Human Rights Council Resolutions, UNHCR Executive Committees Conclusions and General Comments by UN treaty monitoring bodies. The strong international consensus on the right to a nationality is further evidenced by a series of regional treaties and instruments containing references to it, as well as regional declarations that highlight the importance of the right to a nationality and ending statelessness.⁹
10. The fact that statelessness has significant adverse impacts on the individual and that it should be avoided to the greatest extent possible¹⁰ has been recognised in the two main international instruments, the 1954

⁷ Riigikogu, *Explanatory Note to the Draft Law 217 to Complement Section 28 of the Citizenship Act* (Kodakondsuse seaduse § 28 täiendamise seaduse 217 SE seletuskiri), 18 June 2020, available at: <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/b77537a1-87d6-41a0-9d12-4d8d3285086c/Kodakondsuse%20seaduse%20%20%2028%20täiendamise%20seadus>

⁸ International Covenant on Civil and Political Rights, Article 24(3); Convention on the Rights of the Child, Article 7(1); Convention on the Elimination of Discrimination against Women, Article 9(1) and 9(2); Convention on the Elimination of Racial Discrimination, article 5; Convention on the Rights of Persons with Disabilities, Article 18; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 29.

⁹ UN High Commissioner for Refugees, (UNHCR), Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness, May 2020, HCR/GS/20/05, para 84-90, available at: <https://www.refworld.org/docid/5ec5640c4.html>.

¹⁰ Convention on the Status of Stateless Persons, 360 UNTS 117, (1954 Convention), Preamble: The need to avoid adverse impacts of statelessness upon individuals is reflected in the preamble of the 1954 Convention, in which it is clear that parties took account of the fact that “the United Nations ha[d], on various occasions, manifested its profound concern for stateless persons and endeavoured to

Convention relating to the Status of Stateless Persons (1954 Convention)¹¹ and the 1961 Convention on the Reduction of Statelessness (1961 Convention)¹². The duty to avoid statelessness has become “a fundamental principle of international law”¹³ and has been acknowledged as an obligation of customary international law.¹⁴ According to the UN Secretary General’s Guidance Note on the UN and Statelessness, the avoidance of statelessness exists “as a corollary to” the right to nationality itself and “States must make every effort to avoid statelessness through legislative, administrative and other measures”.¹⁵

11. While not all States are party to the two Statelessness Conventions, all States have obligations concerning loss and deprivation of nationality pursuant to the prohibition of arbitrary deprivation of nationality.¹⁶ In order not to be arbitrary, deprivation of nationality must be prescribed by law and comply with specific procedural and substantive standards of international human rights law, in particular for such a step to be the least intrusive means of achieving a legitimate purpose, proportional to the legitimate purpose pursued and follow due process.¹⁷ In this respect, the notion of arbitrariness applies to all State action, legislative, administrative and judicial.
12. Likewise, all States have obligations concerning avoidance of statelessness. Where deprivation of nationality leads to statelessness, the impact on the individual is particularly severe. International law therefore strictly limits the circumstances in which loss or deprivation of nationality leading to statelessness is permissible¹⁸ or can be recognized as serving a legitimate purpose.¹⁹
13. UNHCR bases the specific observations on the Law Proposal below on the above mentioned applicable provisions and general principles of international law²⁰ as well as on UNHCR’s Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness (UNHCR Guidelines No. 5).²¹ The guidance contained in Part III of these Guidelines is also

assure stateless persons the widest possible exercise of...fundamental rights and freedoms.” See also UN Ad Hoc Committee on Refugees and Stateless Persons, *A Study of Statelessness*, United Nations, 1 August 1949, E/1112; E/1112/Add.1, <https://www.refworld.org/docid/3ae68c2d0.html>. This study shows that statelessness was a matter of significant international concern even before the drafting of the 1954 Convention.

¹¹ UN General Assembly, *Convention Relating to the Status of Stateless Persons*, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117, available at: <https://www.refworld.org/docid/3ae6b3840.html>.

¹² UN General Assembly, *Convention on the Reduction of Statelessness*, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175, available at: <https://www.refworld.org/docid/3ae6b39620.html>.

¹³ UN Human Rights Council, *Human rights and arbitrary deprivation of nationality: Report of the Secretary-General*, A/HRC/25/28 (2013), p.3.

¹⁴ The Explanatory Report to the European Convention on Nationality, which codifies this principle in Article 4(b), refers to the obligation of avoidance of statelessness as a part of customary international law. See ECN, ETS No. 166, 1997, para. 33: <https://rm.coe.int/16800ccde7>.

¹⁵ UN Secretary-General (UNSG), *Guidance Note of the Secretary General: The United Nations and Statelessness*, November 2018, available at: <https://www.refworld.org/docid/5c580e507.html>, p. 4.

¹⁶ See A/HRC/13/34, para. 25 available at: https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/13/34; *Karashev and Family v. Finland*, 31414/96, Council of Europe: European Court of Human Rights, 12 January 1999, available at:

<https://www.refworld.org/cases,ECHR,45d076a92.html>; Court of Justice of the European Union, Case No. C-135/08, *Rottmann v. Freistaat Bayern*, 2 March 2010, available at: <https://www.refworld.org/cases,ECJ,4be130552.html>. On the notion of “arbitrary” under international law, for instance in the context of deprivation of liberty, see A/HRC/22/44, para. 61.

¹⁷ *Idem*.

¹⁸ The 1961 Convention Article 8 (2) b and European Convention on Nationality Article 7 1 (b) provide for an exception that deprivation of citizenship may be permitted if it was obtained “by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant”

¹⁹ The 1961 Convention Article 7, paras. 4 and 5; Article 8, paras. 2 and 3 contains a limitative set of exceptions to these rules, recognizing a narrow set of circumstances in which loss or deprivation of nationality leading to statelessness may serve a legitimate purpose.

²⁰ Cf UN High Commissioner for Refugees (UNHCR), *Mapping Statelessness in Estonia*, 2016, available at:

<https://www.refworld.org/docid/5a338b5c4.html>, page 20: The Estonian Supreme Court, as well as legal scholars, have interpreted Article 3 (1) of the Estonian Constitution to automatically adopt the rules of customary international law into Estonian law. For a detailed discussion of the relationship between customary international law and the Estonian legal system, see Hannes Vallikivi, *Domestic Applicability of Customary International Law*, *Juridica International* VII/2002.

²¹ See supra note 9.

relevant to States, like Estonia, who are not party to the 1961 Convention insofar as it concerns international law and good practices generally.

14. As a general comment and considering that Estonia is only one of three European Union Member States (alongside Cyprus and Poland) that is not part of either to the 1954 and 1961 Conventions, UNHCR reiterates its long-standing recommendation that Estonia accedes to both.

IV. Specific observations

Legal certainty and procedural safeguards

15. UNHCR would like to recall that the existing national legal framework in Estonia does not contain any provisions defining a stateless person²² nor does it contain provisions as to the criteria relevant to establishing whether a person is stateless.²³ The lack of a statutory definition of a “stateless person” means there is no common understanding and consistent application of the concept in Estonian law, which is relevant in the context of this Law Proposal as, in its current form, this may create new cases of statelessness. Therefore, it is recommended to insert in the text of the law the internationally recognized definition of a stateless person.²⁴
16. In Estonia, multiple citizenship is not legally allowed for naturalised citizens apart from very limited circumstances²⁵, thus deprivation of citizenship under the Section 28 of the Citizenship Act with the latter exceptions will result in statelessness. The current wording of the of the Citizenship Act does not contain safeguards against statelessness in the context of deprivation of nationality. In order to reflect the principle of avoidance of statelessness recognised in customary international law, it is recommended to amend the Citizenship Act and bring it in line with those obligations.
17. UNHCR further notes that general procedural safeguards such as necessity and proportionality assessment and three-stage judicial review are provided for by administrative procedure laws in relation to any administrative act. The Explanatory Note to the Law Proposal includes a reflection on the proportionality and personal impact, including references to the relevant case-law of the European Court of Human Rights regarding prohibition of non-refoulement. The Explanatory Note further suggests that these standards are to be used when assessing the proportionality of the deprivation of citizenship.
18. For deprivation of nationality to be proportionate, measures leading to the withdrawal of nationality should “serve a legitimate purpose that is consistent with ... the objectives of international human rights law” and be the least intrusive means necessary to achieve the aim pursued by the State.²⁶ Therefore, the consequences of any withdrawal of nationality must be carefully weighed against the aim pursued and the gravity of the behaviour or offence for which the withdrawal of nationality is prescribed. Given the severe

²² UN High Commissioner for Refugees (UNHCR), *Mapping Statelessness in Estonia*, 2016, page 20, available at: <https://www.refworld.org/docid/5a338b5c4.html>.

²³ *Idem*, page 73.

²⁴ The customary international law defines a stateless person as a “person who is not considered as a national by any State under the operation of its law”. See page 49 of the International Law Commission, *Articles on Diplomatic Protection with commentaries*, 2006, at: <http://www.refworld.org/docid/525e7929d.html>.

²⁵ See Section 3 of the Citizenship Act.

²⁶ See e.g., *Rottmann v Freistaat Bayern*, Case C-135/08, [2010] ECR I-01449, <https://www.refworld.org/cases/ECJ/4be130552.html>, para. 56; Human Rights Council, *Human rights and arbitrary deprivation of nationality: Report of the Secretary-General*, 19 December 2013, A/HRC/13/34, para. 25; and Human Rights Council, *Human rights and arbitrary deprivation of nationality: Report of the Secretary-General*, 19 December 2013, A/HRC/25/28, para. 4.

consequences of statelessness, withdrawal of nationality that results in statelessness would only be possible to justify as proportionate under very limited and narrow circumstances.²⁷

19. In order to determine the very high threshold for deprivation of nationality taking into account the gravity of the consequence for the individual if rendered stateless and to ensure consistency of the law amendments with the internationally recognized principle to prevent statelessness, UNHCR would like to offer, as a matter of good practice, relevant guidance in line with the standards set out in the 1961 Convention. According to Article 8(3)(a)(i) and (ii) of the 1961 Convention, rendering services to another State and “conduct seriously prejudicial to the vital interests of the State” may qualify as “behavior inconsistent with the duty of loyalty of the State” allowing for deprivation of nationality.²⁸ However, in line with UNHCR’s Guidelines on Statelessness No. 5, individuals must have conducted themselves with the intention of acting inconsistently with their duty of loyalty to the State in order to meet the threshold of the two exceptional grounds. Without clear evidence that an individual intended to act inconsistently with their duty of loyalty to the Contracting State, the State must not deprive an individual of nationality on either of the two grounds.²⁹
20. Furthermore, the ordinary meaning of the terms “seriously prejudicial” and “vital interests” indicate that the conduct covered by this narrow exception must threaten the very foundation and organization of the State whose nationality is at stake. The term “seriously prejudicial” requires that the individual in question has the capacity to negatively impact the State. The conduct meeting the threshold of deprivation of nationality under Article 8(3)(a)(ii) must not be incidental to the harm caused but rather fundamentally related to it. Conduct that involves remote support that does not materially affect whether or not the harm in question would occur cannot be considered “seriously prejudicial.”
21. The term “vital interests” is to be interpreted as imposing a higher threshold than offences against “national interests”.³⁰ The essential function of the State is to safeguard its integrity and external security and protect its constitutional foundations. Only acts which are seriously prejudicial to that function and other vital interests warrant deprivation of nationality under Article 8(3)(a)(ii).³¹ Deprivation of nationality of an individual who commits such acts should only be used where protecting a Contracting State’s vital interests cannot be achieved through other less intrusive means.
22. Acts related to “terrorist activities” indicated in the Law proposal may fall under the grounds provided in Article 8(3)(a)(i), (ii).³² However, it is important to note that laws that permit deprivation of nationality on the grounds of terrorism should be publicly available and be precise enough to enable individuals to understand the scope of impermissible conduct. States should regularly review domestic legislation on counterterrorism to ensure compliance with developments in international law. Legislation on membership or affiliation with terrorist groups or armed non-State actors amounting to conduct which could result in deprivation of nationality should clearly define “membership” and the thresholds for conduct which would trigger legal

²⁷ See supra note 9, para 95.

²⁸ It is important to note that availability of these exceptions are conditioned by existence of a legislation providing for these grounds at the time of ratification of the 1961 Convention and that a specific declaration in that regard is made without prejudice to the objective and purpose of the 1961 Convention.

²⁹ See supra note 9.

³⁰ The term “national security” is used in the wording of Articles 1(2)(c) and 4(2)(c) of the 1961 Convention.

³¹ United Nations Conference on the Elimination or Reduction of Future Statelessness, Summary Records, 21st Plenary Meeting, 11 October 1961, A/CONF.9/SR.21, p. 13: The *travaux préparatoires* indicate that the wording of Article 8(3)(a)(ii) is intended to exclude criminal offences of a general nature.

³² According to UN General Assembly Resolution 60/288 of 2006 preambular para. 7, terrorist activities are aimed, inter alia, at “the destruction of human rights, fundamental freedoms and democracy, threatening territorial integrity, security of States and destabilizing legitimately constituted Governments.”

proceedings on deprivation of nationality. Mere membership in a terrorist group or the fact of receiving training from a terrorist group generally does not constitute a terrorist act.³³

23. States have important duties “to ensure that action is taken so that violations and abuses are prevented and/or not repeated, to promptly, thoroughly, independently and impartially investigate allegations of such violations and abuses, to punish perpetrators and to ensure an adequate remedy and redress are provided to victims. In line with these duties and the general principle that States’ nationality decisions are to be given deference insofar as they are consistent with international law, a State should carefully consider the impact of its decision to deprive individuals of nationality on its obligations concerning the maintenance of international peace and security”.³⁴
24. In light of the above, it is recommended that the deprivation grounds in the Section 28 including the ones added by the Law Proposal are construed as exceptions to the general prohibition of deprivation of nationality leading to statelessness. In addition, the crimes included in the Law Proposal leading to deprivation of nationality may require scrutiny to ensure that these indeed are meeting the high threshold of behaviour “seriously prejudicial to the vital interests of the state”.

Unequal treatment of naturalised citizens

25. UNHCR further notes that the Law Proposal may raise concerns with respect to non-discrimination, considering that the Law Proposal provides for the possibility to deprive citizenship from naturalized Estonian citizens only. Deprivation of nationality on racial, ethnic, religious or political grounds, regardless of whether or not it would result in statelessness is prohibited.³⁵ In addition, given that many naturalized citizens are likely to be from ethnic minority groups, States should exercise caution with respect to laws and practices which make naturalized citizens more vulnerable to withdrawal of nationality than citizens by birth.³⁶ Considering that the Law Proposal targets specifically naturalized persons, who may lose the right to reside and respectively rights attached to residence, it is therefore important to ensure that there are no less intrusive alternatives to achieve the relevant aim before withdrawal of nationality occurs.³⁷ Even where a person may be able to (re-)acquire another nationality, attention must be paid to effects on the right to reside in the State and the rights attached to residence.
26. UNHCR considers that any inequality of treatment between nationals by birth and naturalized citizens should, as a matter of good practice, be minimized. For example, a naturalized citizen should not be subject to a different set of rules on withdrawal of nationality to a national who acquired nationality by birth after a limited and defined period (e.g. one year) from the date of their acquisition of nationality by naturalization.

Treatment of children

27. UNHCR wishes to note that among individuals considered to be a threat to the national security of Estonia and who were convicted of treason or a terrorist offense there may be children (under the age of 18) who are protected under the 1989 Convention on the Rights of the Child (CRC), to which Estonia is a State Party, in particular Article 3 (best interests of the child as primary consideration); Article 7 (children’s right to a nationality especially in case the child would otherwise be stateless); and Article 8 on children’s right to preserve their identity, including nationality. Consequently, Contracting States are required to treat all

³³ See supra note 9, para 65-66.

³⁴ Human Rights Council, Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism, 19 December 2014, A/HRC/28/28, para. 40.

³⁵ See supra note 9, para. 76-79.

³⁶ Idem. para. 112.

³⁷ Idem, para 95.

persons under the age of 18 in accordance with their rights as children and so States must protect the rights of the child and the best interests of the child must be a primary consideration in all proceedings affecting the nationality of children, their parents and other family members. Rendering a child stateless in this regard can never be in the best interest of a child.³⁸

28. For the reason outlined above, States must take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members. In the same spirit as the CRC, Article 6 of the 1961 Convention on the Reduction of Statelessness provides that deprivation of nationality should not extend to a person's spouse or child and shall be conditional upon their possession of another nationality. As noted above, the Law Proposal may benefit from safeguards protecting against statelessness the family members who acquired Estonian citizenship based on marriage with and/birth to a person who would be subject to deprivation of citizenship under the Law Proposal.

In the light of the aforementioned, UNHCR recommends revisiting the Law Proposal and consider the below recommendations.

UNHCR recommendations:

- Consider accession to the 1954 UN Convention Relating to the Status of Stateless Persons and to the 1961 UN Convention on the Reduction of Statelessness.
- Consider introducing the definition of “stateless persons” in the text of the Citizenship Act, as well as introducing provisions in the relevant legislation with respect to criteria and procedure for determining whether a person is stateless.
- Introduce a provision in the Citizenship Act prohibiting deprivation of nationality leading to statelessness.
- Review the existing and proposed grounds for deprivation of nationality as a result of commission of a crime to ensure the internal consistency of the Section 28 as well as to ensure a very high threshold being applied due to the severe consequences on the individual. Any deprivation must fully respect the internationally recognized prohibition of arbitrary deprivation of nationality, being the least intrusive means of achieving a legitimate purpose and being prescribed by law.
- Remove inequality of treatment between naturalised citizens and citizens by birth by limiting the possibility for withdrawal of nationality for naturalised citizens only in a limited and defined period (e.g. one year) from the date of their acquisition of nationality by naturalization.
- Consider introducing safeguards in the Section 28 of the Citizenship law to prevent statelessness, in particular regarding children, as well as children and family members of a person who was deprived of Estonian citizenship and bring the current provisions of the Section 28 in line with international obligations, including under the Convention on the Rights of the Child.

UNHCR Representation for the Nordic and Baltic Countries, 16 October 2020

³⁸ See UNICEF, Implementation Handbook for the Convention on the Rights of the Child (section on article 7), 2007, available at: <https://resourcecentre.savethechildren.net/library/implementation-handbook-convention-rights-child>.