

UNHCR Observations on the proposed amendments to the Norwegian Immigration Act and Immigration Regulations

[Høring – tilknytningskrav for familieinnvandring]

I. INTRODUCTION

1. The UNHCR Regional Representation for Northern Europe (hereafter “RRNE”) is grateful to the Ministry of Justice and Public Security for the invitation to express its views on the law proposal of 3 February 2017, which seeks to amend Section 9-9 of the Immigration Regulations, cf. to Section 51 third and fourth paragraph [adopted by the Parliament in June 2016, but not yet entered into force]. The Proposal seeks to introduce a facultative provision (a so-called attachment requirement)¹ which will allow the immigration authorities to refuse applications for family reunification submitted by persons granted international protection in Norway when the person concerned is able to enjoy family life in a safe country where the family’s aggregate ties are stronger than those to Norway. The Ministry of Justice and Public Security describes the enforcement of the new rule on the attachment requirement in terms of ‘may’ clause which leaves it to the discretion of the Norwegian authorities whether to apply it or not.
2. As the agency entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, seek permanent solutions to the problems of refugees,² UNHCR has a direct interest in law and policy proposals in the field of asylum. According to its Statute, UNHCR fulfils its mandate *inter alia* by “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto [.]”³ UNHCR’s supervisory responsibility is reiterated in Article 35 of the 1951 Convention⁴ and in Article II of the 1967 Protocol relating to the Status of Refugees⁵ (hereafter collectively referred to as the “1951 Convention”).⁶
3. The following comments are based on international human rights and refugee protection standards set out on Conclusions on International Protection of the UNHCR Executive Committee (hereafter “ExCom”) and relevant UNHCR guidelines. While neither UNHCR ExCom Conclusions nor UNHCR guidelines are binding on States, they contribute to the formulation of *opinio juris* by setting out standards of treatment and approaches to interpretation which illustrate States’ sense of legal obligation towards asylum-seekers and

¹ Høring – tilknytningskrav for familieinnvandring, <https://www.regjeringen.no/no/dokumenter/horing--tilknytningskrav-for-familieinnvandring/id2537091/>

² UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V), available at: <http://www.refworld.org/docid/3ae6b3628.html> (hereafter “UNHCR Statute”).

³ *Ibid.*, para. 8(a).

⁴ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html>.

⁵ UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: <http://www.refworld.org/docid/3ae6b3ae4.html>.

⁶ According to Article 35 (1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of the 1951 Convention”.

refugees.⁷ As a member of the UNHCR ExCom since its inception in 1959 Norway has contributed extensively to the development of the Conclusions on International Protection, adopted unanimously by the ExCom.

II. THE PROPOSAL

4. The Proposal underlines that its purpose is to ensure a more sustainable asylum policy. Moreover, the Government acknowledges that the proposed change might reduce the outflow of asylum-seekers to Norway since they will most likely apply for family formation or reunification in other countries which have not introduced an attachment requirement. The Government also considers that the adoption of the provision will lead to reduced costs related to pensions and social benefits on the one hand, while leading to a decrease in state tax revenue on the other hand.
5. UNHCR further notes that the provision on the attachment requirement will apply to refugees who were granted a residence permit in Norway according to Section 28 (residence permit for foreign nationals in need of protection (asylum), Section 34 (Collective protection in a mass flight situation) or Section 35 third paragraph (resettlement refugees) of the Immigration Act.
6. Moreover, the provision does not contain any express exemptions from the attachment requirement for refugee children under the age of 18 years old although the Proposal does expressly recognize that refugee children's ties to the country of asylum are established much faster than in the case of adult refugees. The provision will not apply to refugees who have acquired permanent residence in Norway or Norwegian citizenship. However, the Government specifies in its Proposal that the attachment requirement may not be applied by the immigration authorities in situations where the family life could only be established and continued in a refugee camp.
7. The provision spells out that certain conditions/requirements must be fulfilled, in order for the immigration authorities to be able to apply the proposed optional provision concerning the attachment requirement in family reunification cases. The conditions laid out in Section 9-9 of the Immigration Regulations are worded as follows:

A residence permit for the purpose of family reunification may be refused according to Section 51 third paragraph of the Immigration Act when the applicant (refugee) has citizenship, formal residence permit or *similar status* in a *safe country* which respects refugees' and asylum-seekers' fundamental rights. The country must be accessible to the family through legal and safe entry. In the assessment of whether family reunification shall be denied, weight must be afforded to the family's (including accompanying children) aggregate ties to the country in question - acquired through length of stay, language, education, work, relatives, network etc.- and compare whether those ties are stronger than the family's ties to Norway.

8. The Ministry underlines in its Proposal that the essential precondition to refuse a family reunification application is that the country in question is safe for both the refugee and his/her family members and that the family will not be at risk of being subjected to persecution or treatment contrary to Article 3 of the ECHR there. The Ministry specifies

⁷ Goodwin Gill/McAdam, *The Refugee in International Law*, Oxford University Press, 2007, p. 217.

thereafter that the humanitarian situation in the designated country is not deemed relevant to the assessment of whether the country is to be considered safe.

III. OBSERVATIONS

Right to family unity and family reunification in international law

9. UNHCR notes that the Ministry of Justice and Public Security proposes to introduce further restrictions to the right to family reunification, and wishes in this respect to refer to its earlier comments of 13 February 2017⁸.
10. While the 1951 Convention⁹ is silent on the question on family reunification and family unity, the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons recommends that Member States “take the necessary measures for the protection of the refugee's family, especially with a view to (...) [e]nsuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country.”¹⁰
11. Family unity is a fundamental and important human right contained in a number of international and regional instruments to which Norway is a State party. These are the Universal Declaration of Human Rights (UDHR),¹¹ (Article 16(3)); the International Covenant on Civil and Political Rights (ICCPR),¹² (Article 17); the International Covenant on Economic, Social and Cultural Rights (ESCR),¹³ (Article 10); the Convention on the Rights of the Child (CRC),¹⁴ (Article 16); as well as the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter ECHR)¹⁵ (Article 8) (see further below at paragraphs 15-17).
12. Furthermore, UNHCR's ExCom has adopted a series of conclusions that reiterate the fundamental importance of family unity and reunification, and call for facilitated entry on the basis of liberal criteria for family members of persons recognized as being in need of

⁸ UNHCR Observations on the proposed amendments to the Norwegian Immigration Regulation of 18 January 2017 to reduce the income requirement in family reunification cases and introduce a requirement providing that an application for family reunification must be submitted within three months after the granting of the status [Invitasjon til høringsmøte og høring om endringer i utlendingsforskriften – underholdskravet i familieinnvandringsaker – senking av underholdskravet og endring av ettårsfrist for unntak for flyktninger], 13 February 2017, available at: <http://www.refworld.org/docid/58a2f8684.html>

⁹ UNHCR, The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis, 1990, available at: <http://www.refworld.org/docid/53e1dd114.html>.

¹⁰ UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, 25 July 1951, A/CONF.2/108/Rev.1, available at: <http://www.unhcr.org/refworld/docid/40a8a7394.html>.

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

¹² UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html>.

¹³ UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html>.

¹⁴ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html>.

¹⁵ 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, available at: <http://www.refworld.org/docid/3ae6b3b04.html>.

international protection.¹⁶ Specifically, the ExCom has underlined the need for the unity of the refugee's family to be protected by measures which ensure respect for the principle of family unity, including, those to reunify family members separated as a result of refugee flight,¹⁷ and noted that it is desirable that countries of asylum ensure that the reunification of separated refugee families takes place with the least possible delay.¹⁸ Following separation caused by forced displacement such as from persecution and war, family reunification in *the country of refuge* is the only way to ensure respect for a refugee's right to family unity.¹⁹

13. UNHCR has consistently advocated that the unity of the refugee's family must be protected and that states must adopt specific measures enabling family reunification for beneficiaries of international protection, in particular having regard that such measures facilitate and advance the integration and naturalization processes of refugees. UNHCR emphasizes in this regard that resettlement is widely recognised as a durable solution rather than a temporary one, and consists of a process through which persons are recognized as refugees, selected and transferred to a third State which has agreed to admit them as refugees with a right to acquire permanent residence status. A number of ExCom Conclusions have underlined that resettlement countries are to enhance the effective integration of refugees, and the permanent nature of resettlement as a durable solution.
14. This shared understanding of the durable character of resettlement has been the basis for cooperation regarding resettlement between UNHCR and the core resettlement States, including Norway. UNHCR expects that these refugees, who were welcomed into the Norwegian society under a scheme that intends to offer protection and a durable solution to persons in need, will be able to remain permanently in Norway while allowing them to be reunited with their family members. In light of Norway's long-standing resettlement programme and its status as a core resettlement country, it is critical that Norway continues to set a strong example in granting truly durable solutions to resettled refugees, including a right to family reunification rather than referring them to exercise family life elsewhere. In UNHCR's view, the introduction of an attachment requirement in family reunification cases concerning refugees will constitute a serious obstacle to integration which further limits possibilities for refugees to attain a durable solution in Norway.
15. More generally, the ECtHR has established that family unity is an essential right for refugees and that family reunification was a fundamental element in enabling persons who had fled persecution to resume a normal life.²⁰ In several decisions, the ECtHR attached decisive or particular weight to the broad consensus at the international and European level concerning the need for refugees to benefit from a more favourable family reunification procedure than that foreseen for other foreigners. The Court underlined in particular that the refugees could not be held responsible for the family separation and

¹⁶ ExCom Conclusions relating to family unity and reunification are compiled in the UNHCR, *A Thematic Compilation of Executive Committee Conclusions, 7th edition, June 2014*, June 2014, available at: <http://www.refworld.org/docid/5698c1224.html>. See in particular, ExCom Conclusions on Family Reunion, No. 9 (XXVIII), 1997 and No. 24 (XXXII), 1981; ExCom Conclusion on Refugee Children and Adolescents, No. 84 (XLVIII), 1997; and ExCom Conclusion on the Protection of the Refugee's Family, No. 88 (L), 1999.

¹⁷ UNHCR, ExCom Conclusion, *Protection of the Refugee's Family*, 8 October 1999, No. 88 (L) - 1999.

¹⁸ UNHCR, ExCom Conclusion, *Family Reunification*, 21 October 1981, No. 24 (XXXII) – 1981.

¹⁹ UNHCR, Refugee Family Reunification. UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification of Third Country Nationals Living in the European Union (Directive 2003/86/EC), February 2012, p. 3, available at: <http://www.refworld.org/docid/4f55e1cf2.html>.

²⁰ *Hode and Abdi v. The United Kingdom*, (Application no. 22341/09), Council of Europe: European Court of Human Rights, 6 November 2012, available at: <http://www.refworld.org/docid/509b93792.html>; see also *Mugenzi c. France*, Requête no 52701/09, Council of Europe: European Court of Human Rights, 10 July 2014, available at: <http://www.refworld.org/cases,ECHR,53be81784.html>

made extensive reference to international legal sources.²¹ To illustrate, the ECtHR specifically held in *Bah v. the United Kingdom*²² that the fact that immigration status is a status conferred by law, rather than one which is inherent to the individual, does not preclude it from amounting to an “other status” for the purposes of Article 14. The Court suggested in its decision that the argument in favour of refugee status amounting to “other status” is clearly stronger, as unlike immigration status refugee status does not entail an element of choice.

16. UNHCR would also like to draw attention to ECtHR’s jurisprudence in *Biao v. Denmark*²³ where the Court had to assess whether Denmark’s attachment requirement was contrary to Article 14 (non-discrimination) taken in conjunction with Article 8 (the right to respect for private life and family life) of the ECHR. The Court found that the rule “had the indirect discriminatory effect of favouring Danish nationals of Danish ethnic origin, and placing at a disadvantage or having a disproportionately prejudicial effect on persons who acquired Danish nationality later in life and who were of ethnic origins other than Danish [...]”
17. Furthermore, the ECtHR also noted that Denmark’s justification for introducing an attachment requirement rule was, “to a large extent, based on rather speculative arguments while underlying in light of previous case-law that general biased assumptions or prevailing social prejudice in a particular country did not provide sufficient justification for a difference in treatment on the ground of sex for example.” UNHCR considers that the same reasoning could apply *mutatis mutandis* to the Proposal at hand which stated purpose is to reduce the influx of asylum-seekers and the costs related to pensions and social benefits.
18. Concerning the “safe country” condition that must be met prior to consider refusing an application for family reunification, UNHCR limits itself to point out that strict substantive criteria and procedural safeguards apply when assessing whether a country is to be considered safe.²⁴ In addition, the principle of legal certainty which UNHCR perceives of paramount importance, requires that rules of law are certain and foreseeable. UNHCR underlines in this regard that the wording ‘*similar status*’ might be viewed as problematic from the view point of legal certainty and predictability.

IV. CONCLUDING RECOMMENDATIONS

1. In light of the arguments presented above and previous observations of 13 February 2017²⁵, UNHCR considers that the Government’s proposals to introduce and apply an

²¹ See Council of Ministers, <http://www.legislationline.org/documents/action/popup/id/8359>. Sources included e.g. the 1951 Convention, Response by the High Commissioner for Refugees to the Green Paper (February 2012), Preamble to Council Directive 2003/86/EC on the right to family reunification, European Commission Green Paper on the right to family reunification of third-country nationals living in the European Union; Recommendation no. R (99) 23 of the Committee of Ministers of the Council of Europe and Memorandum by the Council of Europe Commissioner for Human Rights (May 2008).

²² *Bah v. United Kingdom*, Application no. 56328/07, Council of Europe: European Court of Human Rights, 27 September 2011, available at: http://www.refworld.org/cases_ECHR_4ee0fad32.html

²³ *Biao v. Denmark (Grand Chamber)*, Application no. 38590/10, Council of Europe: European Court of Human Rights, 24 May 2016, available at: http://www.refworld.org/cases_ECHR_574473374.html

²⁴ UN High Commissioner for Refugees (UNHCR), Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept, 23 March 2016, available at: <http://www.refworld.org/docid/56f3ee3f4.html>

²⁵ Ibid footnote 8

attachment requirement in family reunification cases concerning refugees must comply with international and regional law standards, notably the ECHR.

2. UNHCR recommends that the Government of Norway refrains from further restricting the existent family reunification legislation. UNHCR underlines that the proposed legal provision –although optional- must take into account the specific circumstances of refugees and ensure compliance with the principle of non-discrimination enshrined in the 1951 Convention and international human rights law.

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