



**Submission by the Office of the United Nations High Commissioner for Refugees
in *A.L. v. Russia* (Application no. 57426/16) before the European Court of Human Rights**

1. Introduction*

1.1 UNHCR has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek permanent solutions for refugees.¹ UNHCR is also responsible for supervising the application of international conventions for the protection of refugees.² UNHCR welcomes the opportunity to intervene in this case, as granted by the European Court of Human Rights ('the Court') in its letter of 12 June 2017.

1.2 In this submission, UNHCR draws the Court's attention to and re-affirms its *Position on Returns to South Sudan* (part 2). To assist the Court, UNHCR outlines below the domestic legislative framework and practice applicable to the treatment of asylum-seekers held in pre-removal detention in the Russian Federation (Part 3) and provides UNHCR's interpretation of the relevant principles of international refugee law and human rights law that govern access to fair and efficient asylum procedures (Part 4).

2. UNHCR's position on returns to South Sudan

2.1. In April 2015 UNHCR published its *Position on Returns to South Sudan – Update I*,³ which articulates the following conclusions on the international protection needs of persons fleeing South Sudan (para 8, footnotes omitted), as well as UNHCR's position on forcible returns to South Sudan (para. 9):

8. In conclusion, **the situation in South Sudan has continued to deteriorate since the outbreak of the current civil conflict in December 2013, with the security, rule of law and human rights situation in South Sudan remaining deeply compromised. In such a context, persons fleeing South Sudan are likely to meet the criteria for refugee status under the 1951 Refugee Convention**, or would otherwise meet the criteria contained in the refugee definition in Article 1(2) of the 1969 OAU Convention. Depending on the individual profile and circumstances of the case, exclusion considerations may need to be looked into. Furthermore, to preserve the civilian character of asylum, States need to assess the situation of arrivals carefully so as to identify armed elements and separate them from the civilian refugee population. [emphasis added]

9. The security, rule of law and human rights situation pertaining today in South Sudan also stands in the way of safe and dignified return for any person originating from South Sudan, whether or not the individual is found to be in need of international protection. Accordingly, UNHCR hereby reaffirms the February 2014 position, recommending States to suspend forcible returns of nationals or habitual residents of South Sudan to the country. The bar on forcible return serves as a minimum standard and needs to remain in place until such time as the security, rule of law and human rights situation in South Sudan has improved sufficiently to

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

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

² *Ibid.* para. 8(a).

³ UNHCR, *UNHCR Position on Returns to South Sudan - Update I*, 14 April 2015, <http://www.refworld.org/docid/552bc6794.html>.

permit a safe and dignified return of those determined not to be in need of international protection.

2.2. In light of the current circumstances in South Sudan, UNHCR confirms the continuing validity of the conclusions on the international protection needs of persons fleeing South Sudan set out in the April 2015 position, as is UNHCR's recommendation to all States to suspend forcible returns to South Sudan.⁴

3. The relevant legislative framework and practice in the Russian Federation

3.1. The legislative framework regarding the treatment of asylum-seekers in pre-removal detention

3.1.1. There is no specific legislation relating to the treatment of asylum-seekers in pre-removal detention in Russia. Neither the Law on Refugees⁵ and related Administrative Regulations⁶, nor the Administrative Code⁷ and the Code of Administrative Judiciary⁸ or any other legal act⁹ regulate the situation of asylum-seekers in pre-removal detention, including the obligations of the competent state bodies vis-à-vis asylum-seekers in detention.

3.1.2. Persons in readmission procedures and rejected asylum-seekers subject to administrative expulsion or deportation can be placed in pre-removal detention centers at the discretion of a court, as is the case for any other foreigner without legal status in Russia. According to Articles 3.10(5), 27.1(1) and 27.19(2) of the Administrative Code, for the purpose of executing the decision on administrative removal, a judge may order the foreign national's placement in a pre-removal detention facility. Under Article 31.9(1) of the Administrative Code, such decisions should be enforced within two years after it becomes final. No judicial or administrative review of pre-removal detention is foreseen by law. Thus, the person concerned has no legal remedy to challenge their detention.¹⁰

3.1.3. Pre-removal detention centers are under the authority of the Ministry of Interior in each region of Russia. UNHCR needs to seek official permission from the Ministry of Interior to visit persons of

⁴ UNHCR's Regional Updates on South Sudan are available at:

<http://data.unhcr.org/SouthSudan/documents.php?page=1&view=grid&Country%5B%5D=229&Org%5B%5D=78&Type%5B%5D=2>. Further information about the current situation in South Sudan can also be found on the South Sudan page of the UN Office of the High Commissioner for Human Rights (OHCHR): <http://www.ohchr.org/EN/Countries/AfricaRegion/Pages/SSIndex.aspx> and <http://www.ohchr.org/en/NewsEvents/Pages/NewsSearch.aspx?CID=SS>.

⁵ Russian Federation: Federal Law No 4528-1 of 1993 on Refugees, 19 February 1993, <http://www.refworld.org/docid/527246344.html>.

⁶ Administrative Regulations on Provision of State Service on Consideration of Applications for Refugee status and Temporary Asylum in the Territory of the Russian Federation, 13 August of 2013 # 352.

⁷ The Administrative Code of the RF No 195-FL, 30 December 2001.

⁸ The Code of Administrative Judiciary of the RF No 21-FL, 08 March 2015.

⁹ Federal Law No. 115-FL: On the Legal Position of Foreign Citizens in the Russian Federation, 25 July 2002,

<http://www.refworld.org/docid/3ed72b274.html>; The Ruling of the Government of the Russian Federation No 310 On the Establishment of Requirements in Regard to Premises Handed over to the Subjects of the Russian Federation for Allocation of Special Facilities of the Federal Migration Service for Accommodation of Foreigners and Stateless Persons Subjected to Administrative Expulsion Outside the Territory of the Russian Federation or Deportation, 08 April 2013;

¹⁰ On 23 May 2017, the Constitutional Court of the Russian Federation in Ruling No 14-Π (the ruling is available in Russian at: <http://doc.ksrf.ru/decision/KSRFDDecision272574.pdf>) declared article 31.7 and 31.9 of the Administrative Code of the Russian Federation to be unconstitutional. The case concerned a stateless person detained in December 2015 following their penalization with a fine and an expulsion order in accordance with article 18.8 (3) of the Administrative Code for staying illegally in Russia. All attempts to release the Applicant from the detention center initiated by the individual himself and the Federal Bailiff Service were denied by the courts, which relied on article 31.7 and 31.9 of the Administrative Code (establishing a two-year term for implementation of any administrative penalty and no possibility of periodic court reviews over the term of detention). The Constitutional Court stated in its decision that detention for an undetermined period of time is not compliant with the guarantees provided for by the Constitution of the Russian Federation. The Court also made reference to the ECtHR position according to which the term of detention should not exceed the term necessary for achieving its objective. The Court stated that stateless persons awaiting expulsion find themselves in legal limbo not being able to enjoy effective judicial protection. The Court obliged Parliament to amend the Administrative Code and introduce norms that ensure judicial review over the terms of detention of stateless persons in pre-removal detention centers. The Court has also encouraged Parliament to oblige judges to establish precise terms of detention; introduce special migration status for stateless persons released from detention to enable the authorities to ensure control over the person before the term for the implementation of the expulsion decision expires. Before the legislative amendments are made, persons whose removal cannot be implemented, should be given the right to ask the court to review any further detention (three months after the expulsion decision was made). Although the ruling of the Court talks specifically about stateless persons, it is unclear whether the amendments to the legislation and judicial practice will also apply to others and will address all of the gaps related to arbitrary detention.

concern in detention.¹¹ Pre-removal centers are administrated by a specific department of the Ministry of Interior, separate from the General Administration for Migration Issues of the Ministry of Interior (hereafter Migration Department of the MoI), which deals with asylum-seekers and refugees. The lack of coordination between these departments and the bureaucratic processes¹² further complicates the processing of asylum cases in pre-removal detention centers.

3.2 Legislative framework regarding access to asylum procedures

3.2.1. The asylum procedure in the Russian Federation consists of seven stages.¹³ The *Law on Refugees* provides a set of rights for persons in the procedure and prescribes that an asylum-seeker certificate should be issued after a preliminary assessment of the materials of the case, which is to be completed within five days. The migration service is obliged to issue an asylum-certificate within one day after that decision is made. The asylum-seeker's certificate is an identification document confirming the right to benefit from the entitlements stipulated in the *Law on Refugees* such as the right to an interpreter; to be informed about the asylum procedure (including their rights and obligations); medical care; the right to work; and the right to be accommodated in temporary accommodation centres run by the government (Article 6(4)-(6)). All persons applying for asylum, including those applying while in detention, who are admitted to the procedure, are in principle entitled to all of these rights and guarantees.

3.2.2. Furthermore, while Article 10 of the *Law on Refugees* provides for procedural safeguards, including the right to appeal decisions regarding two forms of asylum, namely, refugee status and temporary asylum (humanitarian status),¹⁴ it does not extend protection from *refoulement* to asylum-seekers awaiting decisions (including on appeal) on temporary asylum.¹⁵ Therefore, the law does not provide for automatic suspensive effect under the temporary asylum procedures and limits it to asylum-seekers awaiting decisions (including on appeal) on refugee status only.

3.3. The practice regarding the treatment of asylum-seekers in pre-removal detention

3.3.1. Despite the above, in practice, asylum-seekers in pre-removal detention are often deprived of these procedural guarantees and face numerous challenges. Firstly, administrators of detention centers are unwilling to accept applications and do not refer them to the Migration Department of the MoI for further consideration. Secondly, they are usually not issued with an asylum-seeker's certificate and consequently cannot enjoy any of the related rights and notably non-*refoulement* as well as access to interpreters and information regarding the asylum procedure. Lastly, legal representatives of the persons concerned experience difficulties and delays in accessing their clients in order to initiate the asylum procedure.

3.3.2. As a result, it sometimes leads to instances of *refoulement* since the removal procedures are initiated before the completion of the asylum determination and interim measures under Rule 39 of the Rules of the Court constitute the only effective remedy to prevent deportation. UNHCR is aware of several incidents of *refoulement*. In early 2015 two Syrian asylum-seekers were refouled from pre-

¹¹ Only the following entities may provide legal assistance to persons of concern in pre-removal detention centres: 1) Advocates (licensed lawyers); 2) the Ombudsman's representatives; 3) Public Observation Commissions (undertaking the review of the detention conditions).

¹² Pre-removal detention and Migration Service are managed by different departments of the MoI, thus, all aspects related to asylum-seekers require additional coordination. The execution of expulsion lies within the competence of the Bailiffs' Service and suspension of removal procedures also require additional coordination.

¹³ These include: 1) application for asylum; 2) preliminary assessment/consideration of the application; 3) decision on documenting an applicant with an asylum-seeker certificate or refusal to examine the application on its merits; 4) issuance of an asylum-seeker certificate or the issuance of a decision refusing to consider the claim on its merits; 5) examination of the application on its merits; 6) decision on granting refugee status or a rejection decision; 7) issuance of a refugee certificate or issuance of a rejection decision.

¹⁴ In accordance with Article 10(2) of the Law on Refugees, "decisions and actions ... of the authorities ... and officials associated with the implementation of this Federal Law may be appealed to a higher authority or the court." <http://www.refworld.org/docid/527246344.html>.

¹⁵ "A person applying for refugee status or granted refugee status, or who has lost the status of a refugee or is withdrawing refugee status cannot be returned against their will to the country of their nationality (sojourn), while the circumstances specified in subparagraph 1, Article 1 (1) hereof are ongoing in a given country". <http://www.refworld.org/docid/527246344.html>.

removal detention centres in Vladikavkaz, despite pending applications for asylum and UNHCR's interventions. UNHCR learned about these cases when both applicants were already in a pre-removal detention centre in Vladikavkaz, Republic of North Ossetia-Alania and awaiting expulsion for illegal stay. Fearing being returned to Syria, the applicants applied for asylum from detention. UNHCR submitted letters in support of their asylum claims to the Federal Migration Service¹⁶ (FMS) in November 2014. However, on 21 January 2015, UNHCR was informed that both applicants had been expelled to Syria before their applications for refugee status were duly considered. UNHCR expressed its concerns about the refoulement to the FMS in writing on the same day. In May 2015, the FMS replied to UNHCR in writing, stating that the applications for refugee status by the two Syrian asylum-seekers had been rejected on 27 January 2015 (i.e. at least six days after they were expelled) and that they had not applied for temporary asylum.¹⁷ Likewise, in early 2016, UNHCR became aware of deportations of two Nepalese citizens, whose applications for asylum were rejected and their expulsion was enforced. Although the UNHCR Representation in the Russian Federation sent a Note Verbale on these two cases, the Government denied that they had applied for asylum. Furthermore, on 5 and 6 October 2016, two Sudanese asylum-seekers from Darfur were expelled from pre-removal detention in Petrozavodsk, notwithstanding UNHCR's interventions¹⁸ and requests to be granted access to them and to ensure non-refoulement. In their official reply¹⁹ to UNHCR's interventions, the MoI answered that the nationals of Sudan had been expelled in accordance with the court's rulings.

3.3.3. The absence of legislation regulating detention of asylum-seekers, as highlighted above, further exacerbates their situation as they remain in a legal limbo without any procedural safeguards in relation to their deprivation of liberty. This includes lack of access to legal assistance and interpreters, difficulties in contacting UNHCR, absence of information on the rights and procedures applicable in detention, the impossibility of challenging the lawfulness of pre-removal detention and the absence of regular periodic reviews.

4. The relevant principles of international refugee and human rights law regarding access to a fair and efficient asylum procedure in detention

4.1.1. The right to seek and enjoy asylum is a basic human right which derives from Article 14(1) of the *Universal Declaration of Human Rights* 1948 and is supported by the legal framework of the 1951 Convention and its 1967 Protocol, to which the Russian Federation is a State party.²⁰ Seeking asylum is not, therefore, an unlawful act.²¹

Non-penalisation and safeguards against arbitrary and unlawful detention

4.1.2. In exercising the right to seek asylum, asylum-seekers are often forced to arrive at, or enter, a territory without prior authorisation which is precisely why Article 31 of the 1951 Convention provides that asylum-seekers shall not be penalised for their irregular entry or presence if they present

¹⁶ The Federal Migration Service of the Russian Federation (FMS) was dismantled by the Presidential Ruling of 05 April 2016 and its functions, including the management of the asylum issues, were handed over to the Ministry of Interior of the Russian Federation.

¹⁷ UNHCR letter to the FMS Department in the Republic of North Ossetia-Alania No RUSMO/MS/0569 dated 13 November 2014 in support of applicants' asylum applications and advocating for non-refoulement. UNHCR letter to the Head of the FMS of Russia cc: the Head of the FMS Department for the Republic of North Ossetia-Alania and the MFA No RUSMO/MS/0014 dated 21 January 2015 expressing concern over risk of refoulement of the two Syrian asylum-seekers while their applications for refugee status were under consideration and urging to undertake measures to guarantee non-refoulement and right to seek asylum; UNHCR letter to the FMS Department for the Republic of North Ossetia-Alania requesting information on the decision taken on asylum application submitted by concerned Syrian nationals No RUSMO/MS/0143 dated 30 March 2015; Letter from the FMS Department for the Republic of North Ossetia-Alania No 1/8/2175 dated 14 May 2015 informing that the two concerned Syrians were rejected in granting refugee status on 27 January 2015, had not applied for temporary asylum and left the territory of the Russian Federation under the judicial rulings

¹⁸ UNHCR Letters to MOI and MFA No RUSMO/0398 and No RUSMO/MS/299 dated 05 October 2016, requesting urgent measures to prevent refoulement and repeatedly requesting access to the applicants by UNHCR in order to seek a solution to their cases.

¹⁹ MOI Letter No 20/14180 dated 24 October 2016.

²⁰ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), <http://www.refworld.org/docid/3ae6b3712c.html>.

²¹ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, (hereafter 'Guidelines on Detention') 2012, Guideline 1, para. 11, <http://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html>.

themselves without delay and show good cause for their irregular entry or stay.²² The position of asylum-seekers “may thus differ fundamentally from that of ordinary migrants in that they may not be in a position to comply with the legal formalities for entry”.²³ The drafters of the 1951 Convention were aware of such difficulties and the Executive Committee of the High Commissioner’s Programme (hereafter “ExCom”)²⁴ itself recognised “the importance (...) to make the necessary distinction between the situation of refugees and asylum-seekers, and that of other aliens”.²⁵

4.1.3. Article 31(2) further provides that restrictions on movement shall not be applied to such refugees other than those which are necessary²⁶ and such restrictions shall only be applied until their status is regularised or they gain admission into another country.

4.1.4. Given the declaratory nature of the refugee status determination, Article 31 is applicable to all refugees, including those who have not formally been recognized as such, and to asylum-seekers whose status has not yet been determined.²⁷ Regarding the material scope of Article 31, it is generally accepted that the term “penalties” referred to in this provision covers administrative detention in the immigration context.²⁸

4.1.5. UNHCR’s *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (hereafter ‘Guidelines on Detention’)²⁹ reflect the state of international law on detention for immigration-related purposes of asylum-seekers and other persons seeking international protection. They provide that irrespective of the justification initially invoked for the person’s detention, it should remain valid throughout the detention period and maximum limits on detention need to be established in law to protect the individual from arbitrary detention.³⁰ The Guidelines on Detention further provide that decisions to detain or to extend detention must be subject to minimum procedural safeguards.³¹

²² Article 31 reads as follows:

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

²³ UNHCR, Guidelines on Detention, Guideline 1.

²⁴ The Executive Committee of the High Commissioner’s Programme was established in 1958 and functions as a subsidiary organ of the United Nations General Assembly. It has both executive and advisory functions; the latter includes issuing Conclusions on International Protection (referred to as “ExCom Conclusions”). ExCom Conclusions are adopted by consensus by the States which are Members of the Executive Committee and can therefore be considered as reflecting their understanding of legal standards regarding the protection of refugees. At present, 98 States are Members of the Executive Committee, including the Russian Federation which has been a member since October 1995.

²⁵ ExCom Conclusion No 44, Detention of Refugees and Asylum-Seekers No. 44 (XXXVII) - 1986, para. (d), <http://www.unhcr.org/excom/exconc/3ae68c43c0/detention-refugees-asylum-seekers.html>

²⁶ Restrictions on movement of refugees and asylum-seekers, when necessary, reasonable and proportionate, can only be justified by a limited number of grounds, namely public order, public health or national security. More particularly, the notion of “public order” encompasses the following purposes: to prevent absconding and/or in cases of likelihood of non-cooperation; in connection with accelerated procedures for manifestly unfounded or clearly abusive claims; for initial identity and/or security verification; and in order to record, within the context of a preliminary interview, the elements on which the application for international protection is based, which could not be obtained in the absence of detention. UNHCR, Guidelines on Detention, Guideline 4, paras 18 and 21.

²⁷ “A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.” See UNHCR, Handbook para. 28, <http://www.unhcr.org/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html>.

²⁸ UNHCR, Guidelines on Detention, Guideline 4.1.4 para. 32. See also, UN Working Group on Arbitrary Detention, *Report to the Seventh Session of the Human Rights Council, A/HRC/7/4*, 10 January 2008, which states: “criminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary [and therefore arbitrary] detention.” At para. 53, <http://www.unhcr.org/refworld/docid/502e0eb02.html>.

²⁹ UNHCR, Guidelines on Detention, Guideline 4.1

³⁰ UNHCR, Guidelines on Detention, Guideline 6

³¹ UNHCR, Guidelines on Detention, Guideline 7 para. 47.

4.1.6. These safeguards include:

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

4.1.7. The detention of asylum-seekers should therefore be a measure of last resort, with liberty being the default position.³² This principle is also supported by ExCom which underlines that “(...) in view of the hardship which it involves, detention should normally be avoided.”³³

4.2 Access to a fair and efficient asylum procedure including in the context of detention

4.2.1 The safeguards noted above include access to a fair and efficient asylum procedure³⁴ in order to ensure that persons in need of international protection are properly identified. This is of paramount importance to give effect to the obligations under the 1951 Convention, including primarily the prohibition on *refoulement* and to ensure respect for Article 3 of the ECHR. However, neither the 1951 Convention (nor the 1967 Protocol), nor the ECHR explicitly regulate the question of procedures for the determination of international protection. It is, therefore, left to each Contracting State to establish appropriate determination procedures, having regard to its particular constitutional and administrative structure,³⁵ the good administration of justice and accepted due process/procedural safeguards.

4.2.2. Regardless of the procedures chosen by States, ExCom has recommended that they should satisfy the following basic requirements:

- (i) The competent official (e.g. immigration officer or border police officer) to whom the applicant addresses himself at the border or in the territory of a Contracting State, should have clear instructions for dealing with cases which might me [sic] within the purview of the relevant international instruments. He should be required to act in accordance with the principle of non-refoulement and to refer such cases to a higher authority;
- (ii) The applicant should receive the necessary guidance as to the procedure to be followed;
- (iii) There should be a clearly identified authority – wherever possible a single central authority – with responsibility for examining requests for refugee status and taking a decision in the first instance;

³² UNHCR, Guidelines on Detention, Guideline 2, para. 14.

³³ ExCom Conclusion No. 44 (XXXVII) (1986), para. (b), *supra*, note 25.

³⁴ UNHCR, Guidelines on Detention, Guideline 7, para. 47(vi).

³⁵ UNHCR Handbook, para. 189; <http://www.unhcr.org/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html>.

- (iv) The applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned. Applicants should also be given the opportunity, of which they should be duly informed, to contact a representative of UNHCR;
- (v) If the applicant is recognized as a refugee, he should be informed accordingly and issued with documentation certifying his refugee status;
- (vi) If the applicant is not recognized, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing stem;
- (vii) The applicant should be permitted to remain in the country pending a decision on his initial request by the competent authority referred to in paragraph (iii) above, unless it has been established by that authority that his request is clearly abusive. He should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending.”³⁶

4.2.3. Establishing fair and efficient procedures³⁷ enable States to identify those who should benefit from international protection and those who should not.³⁸ An applicant for protection is normally in a particularly vulnerable situation,³⁹ and thus, the application should be examined within the framework of specially established procedures, carried out by qualified personnel possessing the necessary knowledge and experience, and an understanding of an applicant’s particular difficulties and needs.⁴⁰

4.2.4. In determining an application for international protection, decision-makers need to have regard to all the relevant circumstances of the case. They need to have a full picture of the asylum-seeker’s personality, background and personal experiences, as well as up-to-date knowledge of all the relevant objective circumstances in the country of origin.⁴¹ Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner.⁴²

4.3. *International human rights law*

4.3.1. Liberty of the person is a fundamental right proclaimed in the *Universal Declaration of Human Rights* (UDHR). Its importance is underpinned by the guarantee given in three specific provisions in the UDHR, namely Article 3 (right to life, liberty and security); Article 9 (right against arbitrary arrest, detention or exile); and Article 13 (right to freedom of movement and residence). These fundamental rights are also guaranteed in Articles 9 and 12 of the International Covenant on Civil and Political Rights (ICCPR).⁴³ In its General Comment No. 8 (1982) on Article 9, the Human Rights

³⁶ ExCom Conclusion, *Determination of Refugee Status* No. 8 (XXVIII) - 1977, 12 October 1977, No. 8 (XXVIII) – 1977; <http://www.refworld.org/docid/3ae68c6e4.html>. See also, ExCom Conclusion No. 71 (XLIV) (1993), para i, which reiterated the “importance of establishing and ensuring access consistent with the 1951 Convention and the 1967 Protocol for all asylum-seekers to fair and efficient procedures for the determination of refugee status in order to ensure that refugees and other persons eligible for protection under international or national law are identified and granted protection.”; <http://www.refworld.org/docid/3ae68c6814.html>.

³⁷ UNHCR uses the phrase “fair and efficient” procedures to reflect procedures that conform to accepted due process/procedural safeguards as well as standards of efficiency. It is noted that efficiency however should not undermine the rights of applicants to be able to present their claim to refugee status, while also acknowledging that efficiency can lead to the overall good administration of justice. See UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)* (“UNHCR Asylum Processes”), 31 May 2001, EC/GC/01/12, <http://www.refworld.org/docid/3b36f2fca.html>, para. 5.

³⁸ *Ibid.*

³⁹ “The Court attaches considerable importance to the applicant’s status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection (see, *mutatis mutandis*, *Oršuš and Others v. Croatia* [GC], no. 15766/03, § 147, ECHR 2010-...). European Court of Human Rights, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, 21 January 2011, para. 251.

⁴⁰ UNHCR Handbook, para. 190.

⁴¹ UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, April 2001, <http://www.refworld.org/docid/3b20a3914.html>, para. 8.

⁴² UNHCR Handbook, para. 196. See also, *J.K. and Others v. Sweden*, Application no. 59166/12, Council of Europe: European Court of Human Rights, 23 August 2016; <http://www.refworld.org/cases.ECHR.57bc18e34.html> at para 96.

⁴³ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, <http://www.refworld.org/docid/3ae6b3aa0.html>.

Article 9(1) ICCPR, provides that “everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.”

Committee (HRC) made it clear that Article 9(1) “is applicable to all deprivations of liberty, whether in criminal cases or in others cases such as ... immigration control etc.”⁴⁴

4.3.2. The HRC considered the application of Article 9 in *A v. Australia* (1997).⁴⁵ The case concerned the prolonged detention of an asylum-seeker. The HRC held that:

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

4.3.3. The HRC, while agreeing that there was no basis for the claim that it is *per se* arbitrary to detain individuals requesting asylum, observed that, “the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of co-operation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal”.⁴⁶

4.4. The relevant ECHR standards

4.4.1. The Court has set out a number of general principles which require that the ECHR be interpreted:

- 1) “[i]n harmony with other rules of international law of which it forms part”,⁴⁷ particularly where such other rules are found in human rights treaties (such as the 1951 Geneva Convention and the ICCPR);
- 2) in a manner which ensures that rights are given a broad construction while limitations are narrowly construed;⁴⁸
- 3) as a “living instrument ... in light of present day conditions” and in accordance with developments in international law so as to reflect the “increasing high standard being required in the area of the protection of human rights”,⁴⁹ and
- 4) in a manner that gives practical and effective protection to human rights.⁵⁰

Article 12 ICCPR provides that:

“1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

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

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

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

⁴⁴ UN Human Rights Committee (HRC), *CCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Persons)*, 30 June 1982, No. 8, para. 1, <http://www.refworld.org/docid/4538840110.html>.

⁴⁵ *A v. Australia*, U.N. Doc. CCPR/C/59/D/560/1993 (1997), HRC, at para. 9.2; <http://hrlibrary.umn.edu/undocs/html/560-1993.html>. See also, UNHCR intervention before the European Court of Human Rights in the case of Saadi v. United Kingdom, 30 March 2007, Application No. 13229/03, <http://www.refworld.org/docid/47c520722.html>.

⁴⁶ *A v. Australia*, U.N. Doc. CCPR/C/59/D/560/1993 (1997), at para. 9.4. See also: *C. v. Australia*, CCPR/C/76/D/900/1999, HRC, 13 November 2002, <http://www.refworld.org/docid/3f588ef00.html>; *Samba Jalloh v. Netherlands*, CCPR/C/74/D/794/1998, HRC, 15 April 2002, <http://www.refworld.org/docid/3f588ef3a.html>; *Omar Sharif Baban v. Australia*, CCPR/C/78/D/1014/2001, HRC, 18 September 2003, <http://www.refworld.org/docid/404887ee3.html>; *Danyal Shafiq v. Australia*, CCPR/C/88/D/1324/2004, HRC, 13 November 2006, <http://www.refworld.org/docid/47975af921.html>.

⁴⁷ *Al-Adsani v. The United Kingdom*, 35763/97, European Court of Human Rights, 21 November 2001, para. 55, <http://www.refworld.org/cases,ECHR,3fe6c7b54.html>; United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Article 31(3)(c), <http://www.refworld.org/docid/3ae6b3a10.html>; Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, Article 53, <http://www.refworld.org/docid/3ae6b3b04.html>.

⁴⁸ *Winterwerp v. Netherlands*, 6301/73 [1979] ECHR 4 (24 October 1979), para. 37; <http://www.bailii.org/eu/cases/ECHR/1979/4.html>; *Kurt v. Turkey*, Appl. No. 15/1997/799/1002, European Court of Human Rights, 25 May 1998, para. 122; <http://www.refworld.org/cases,ECHR,49997ae512.html>.

⁴⁹ *Selmouni v. France*, 25803/94, European Court of Human Rights, 28 July 1999, para. 101, <http://www.refworld.org/docid/3ae6b70210.html>.

⁵⁰ *Soering v. The United Kingdom*, 1/1989/161/217, European Court of Human Rights, 7 July 1989, para. 87, <http://www.refworld.org/cases,ECHR,3ae6b6fec.html>.

4.4.2. In *Amuur v. France*,⁵¹ the Court recognised expressly that detention of asylum-seekers is “acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations,”⁵² particularly the 1951 Convention and the ECHR, highlighting that “States’ legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by these conventions.”⁵³ The Court further highlighted the need to take into account the specific situation of asylum-seekers who, “often fearing for their lives, have fled from their own country”,⁵⁴ and went on to say:

“[a]bove all, such confinement must not deprive the asylum-seeker of the right to gain effective access to the procedure for determining refugee status.”⁵⁵

4.4.3. In *Saadi v. United Kingdom*, the Court emphasized that “detention must be compatible with the overall purpose of Article 5, which is to safeguard the right to liberty and ensure that no one should be dispossessed of his or her liberty in an arbitrary fashion.”⁵⁶ The Court held that “to avoid being branded as arbitrary, [...] detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate [...] and the length of the detention should not exceed that reasonably required for the purpose pursued”.⁵⁷

4.4.4. The Court further held that combined with Article 13 ECHR, the prohibition of *refoulement* under Article 3 includes the obligation of the returning state to provide effective guarantees to protect the applicant against *refoulement*, be it direct or indirect, to the country from which he or she has fled.⁵⁸

4.4.5. *Non-refoulement* is a cardinal protection principle, most prominently expressed in Article 33 of the 1951 Convention and recognized as a norm of customary international law.⁵⁹ Thus, UNHCR submits that under Articles 31 to 33 of the 1951 Convention an asylum-seeker cannot be deported or otherwise removed until his/her application for refugee status has been definitively determined. This principle was stated clearly by this Court in the case of *R.U. v. Greece*:

“[I]l ressort du droit international et national, à savoir les articles 31-33 de la Convention de Genève relative au statut des réfugiés [...] que l’expulsion d’une personne ayant soumis une demande d’asile n’est pas permise jusqu’au traitement définitif de ladite demande.”⁶⁰

⁵¹ *Amuur v. France*, 19776/92, European Court of Human Rights, 25 June 1996, <http://www.refworld.org/docid/3ae6b76710.html>.

⁵² *Ibid*, para. 43.

⁵³ *Ibid*.

⁵⁴ *Ibid*, para.43.

⁵⁵ *Ibid*, para. 43; *Abdolkhani and Karimnia v. Turkey*, Appl. No. 30471/08, European Court of Human Rights, 22 September 2009, <http://www.refworld.org/docid/4ab8a1a42.html>.

⁵⁶ *Saadi v. The United Kingdom*, 13229/03, European Court of Human Rights, 11 July 2006, para. 66, <http://www.refworld.org/docid/44dc70a34.html>.

⁵⁷ *Ibid*, para. 74.

⁵⁸ *M.S.S. v. Belgium and Greece*, Application No. 30696/09, European Court of Human Rights, 21 January 2011, para. 286, <http://www.refworld.org/docid/4d39bc7f2.html>.

⁵⁹ Article 33(1) prohibits states from expelling or returning a refugee in any manner whatsoever, to a territory where s/he would be at risk of threats to life or freedom. This prohibition applies to all refugees, including asylum-seekers whose status has not yet been determined. Moreover, the jurisprudence of this Court, has held that *non-refoulement* is an inherent obligation under Article 3 of the ECHR in cases where there is a real risk of exposure to torture, inhuman or degrading treatment or punishment, including, in particular, the Court’s judgment in *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, European Court of Human Rights, 23 February 2012, para. 114; http://www.refworld.org/cases_ECHR_4f4507942.html. See also, the Concurring Opinion of Judge Pinto de Albuquerque in *Hirsi* para. 42. Also, *UNHCR Note on the Principle of Non-Refoulement*, November 1997; <http://www.refworld.org/docid/438c6d972.html>; UNHCR, *Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees*, 16 January 2002, HCR/MMSP/2001/09, at para. 4, <http://www.refworld.org/docid/3d60f5557.html>; and UNHCR, *The Scope and Content of the Principle of Non-Refoulement (Opinion)* [Global Consultations on International Protection/Second Track], 20 June 2001, paras 193-253, <http://www.refworld.org/docid/3b3702b15.html>.

⁶⁰ *R.U. v. Greece*, Application No. 2237/08, European Court of Human Rights, 7 June 2011, http://www.refworld.org/cases_ECHR_4f3368952.html, at para. 94 [UNHCR Translation: “[I]t emerges from international and national law, notably Articles 31-33 of the Geneva Convention Relating to the Status of Refugees [...] that the expulsion of a person who has submitted an application for asylum is not permitted until a final determination on the asylum application.”].

4.4.6. Of particular relevance in the present case, the Court held that the effective remedy under Article 13 ECHR must be available in law and in practice⁶¹ and must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent state.⁶² Furthermore, effectiveness involves requirements of “quality, rapidity and suspensivity”.⁶³ Article 13 also requires “independent and rigorous scrutiny” of any complaint made by a person in such a situation, where “there exist substantial grounds for fearing a real risk of treatment contrary to Article 3” and secondly, “the possibility of suspending the implementation of the measure impugned.”⁶⁴ In this regard, the Court recognized that the haste with which a removal is carried out might render the available remedies ineffective in practice and therefore inaccessible.⁶⁵ Furthermore, while the guarantees under Article 13 are only applicable to persons with an arguable claim pursuant to one of the other relevant rights in the ECHR, the Court held that the person concerned should have an effective opportunity to make such a claim, notably in terms of material conditions, access to information,⁶⁶ legal assistance and interpretation.⁶⁷ The Court also recognized that the absence of these safeguards undermines the quality of the submission and consequently the quality of the examination by the authorities.⁶⁸

5. Conclusion

5.1. International and European law precludes the deportation or otherwise removal of asylum-seekers until such time as there has been a final decision on their claims determining that they are not in need of international protection. In such circumstances, detention for the purpose of expulsion or removal is unlawful as it cannot be justified according to the principles of necessity, reasonableness and proportionality. Furthermore, detention must be subject to important legal standards and procedural safeguards which are currently lacking in the Russian Federation.

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The Court made a similar finding in *S.D. v. Greece*, European Court of Human Rights, App. No. 53541/07, 11 June 2009, <http://www.unhcr.org/refworld/docid/4a37735f2.html>, at para. 62, without making specific reference to the provisions of the 1951 Convention. See also UNHCR, Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Alaa Al-Tayyar Abdelhakim v. Hungary (Application No. 13058/11), 30 March 2012, <http://www.refworld.org/pdfid/4f75d5212.pdf>; UNHCR, Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Said v. Hungary (Application No. 13457/11), <http://www.refworld.org/pdfid/4f75d5212.pdf>.

⁶¹ European Court of Human Rights, *I.M. v. France*, Application No. 9152/09, 2 February 2012, para. 130, <http://www.refworld.org/docid/4f2932442.html>.

⁶² European Court of Human Rights, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, 21 January 2011, para. 290.

⁶³ European Court of Human Rights, *I.M. v. France*, Application No. 9152/09, 2 February 2012, para. 132, <http://www.refworld.org/docid/4f2932442.html>.

⁶⁴ European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, 23 February 2012, para. 198, <http://www.unhcr.org/refworld/docid/4f4507942.html>. European Court of Human Rights, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, 21 January 2011, para. 293, <http://www.refworld.org/docid/4d39bc7f2.html>.

⁶⁵ European Court of Human Rights, *De Souza Ribeiro v. France*, Application No. 22689/07, 13 December 2012, para. 95, <http://www.refworld.org/docid/511cf0a22.html>.

⁶⁶ In its *Hirsi* judgment, the Court reiterated “the importance of guaranteeing anyone subject to a removal measure, the consequences of which are potentially irreversible, the right to obtain sufficient information to enable them to gain effective access to the relevant procedures and to substantiate their complaints.” European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, 23 February 2012, para. 204, <http://www.unhcr.org/refworld/docid/4f4507942.html>. See also European Court of Human Rights, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, 21 January 2011, para. 304, <http://www.refworld.org/docid/4d39bc7f2.html>.

⁶⁷ European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, 23 February 2012, para. 202, <http://www.unhcr.org/refworld/docid/4f4507942.html>.

⁶⁸ European Court of Human Rights, *I.M. v. France*, Application No. 9152/09, 2 February 2012, para. 155, <http://www.refworld.org/docid/4f2932442.html>.