

UNHCR Observations on the proposed amendments to the Norwegian Immigration Act

[Høringsbrev – evaluering og videreføring av midlertidige endringer utlendingsloven vedtatt på bakgrunn av Prop. 16 L (2015–2016)]

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 11 January 2017, which, based on an evaluation of *Restrictions package II* adopted in May 2016, seeks to make the provisions permanent (hereafter the “Proposal”¹).
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. UNHCR regrets that the Ministry of Justice and Public Security proposes to make all provisions of *Restrictions package II* permanent, and wishes in this respect to refer to its earlier comments of 12 February 2016,⁷ where UNHCR recommended Norway to refrain from introducing restrictive provisions in the Norwegian Immigration Act and Regulations.
4. The Proposal further seeks to make permanent the authority of the Ministry of Justice and Public Security to instruct the Appeals Board on the interpretation of the law and exercise of discretion in all matters falling with the Board’s competence, introduced in November 2015.⁸ When submitting its comments in February 2016, UNHCR did not express concerns

¹ Law Proposal, 11 January 2017, available at: <https://www.regjeringen.no/no/dokumenter/evaluering-og-videreforing-av-midlertidige-endringer-i-utlendingsloven-vedtatt-pa-bakgrunn-av-prop.-16-l-2015-2016/id2526794/>.

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”.

⁷ UNHCR, UNHCR Observations on the proposed amendments to the Norwegian Immigration Act and Regulation: Høring – Endringer i utlendingslovgivningen (Innstramninger II), 12 February 2016, available at: <http://www.refworld.org/docid/56c1c6714.html>.

⁸ Lov nr. 94/2015. Please note that the power of instruction does not encompass an authority to instruct in individual cases.

on this matter, however, UNHCR is of the view that this power of instruction may raise doubts concerning the independence of the Appeals Board and risks creating an impression of bias. UNHCR considers that given the fundamental rights at stake in asylum cases, a high level of procedural protection is required, including a second instance which offers both judicial impartiality and independence.

5. In UNHCR's view, it is essential that the appeal is considered by an authority, court or tribunal, *separate or different from and independent of the authority which made the initial decision*.⁹ This view is supported by the jurisprudence of the European Court of Human Rights (hereafter "ECtHR"), according to which the national authority/body must have a court-like character in terms of independence and competence even if it may not be considered as a court *per se*.¹⁰ The Court has further underlined that the national authority does not necessarily have to be a judicial authority if it presents guarantees of independence and impartiality. In *Silver and others v. UK*, the ECtHR underlined that where the national authority both issues directives and adjudicates, it could not be considered to have a sufficiently independent standpoint to satisfy the requirements of Article 13 of the European Convention on Human Rights (hereafter "ECHR").¹¹
6. Moreover, the Supreme Court of Norway has found that the Appeals Board is to be regarded as a court according to the ECHR and satisfies the requirement of an effective right of review by a national authority.¹² It should however, be noted that at the time of the ruling, the Ministry of Justice and Public Security did not have the power to instruct the Appeals Board, and it is not clear to UNHCR whether the ruling of the Supreme Court has been considered for the purposes of the Proposal. UNHCR would further recommend an assessment of the Proposal's consistency with Section 77 of the Immigration Act which refers to the independence of the Appeals Board.¹³
7. UNHCR further takes note of the review and findings of the Special Courts Committee ("Særdomstolsutvalget"), which recommends to maintain the second instance in asylum and immigration cases in its current form.¹⁴ However, UNHCR considers that there remains a need to expressly and carefully assess to which extent the power of instruction interferes with the independence of the Appeals Board.

⁹ UNHCR, *UNHCR public statement in relation to Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, 21 May 2010, available at: <http://www.refworld.org/docid/4bf67fa12.html>, para. 32.

¹⁰ *Klass and Others v. Germany*, Application no. 5029/71, Council of Europe: European Court of Human Rights, 6 September 1978, available at: <http://hudoc.echr.coe.int/eng?i=001-57510>, para. 64; *Silver and Others v. the United Kingdom*, Application nos. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75, Council of Europe: European Court of Human Rights, 25 March 1983, available at: <http://hudoc.echr.coe.int/eng?i=001-57577>.

¹¹ 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>.

¹² *A, B, C, D v. UNE*, Norway: Supreme Court, 21 December 2012, available at: <http://www.domstol.no/en/Enkelt-domstol-Norges-Hoyesterett/Summary-of-Recent-Supreme-Court-Decisions/Summary-2012/>.

¹³ Norwegian Immigration Act, Section 77: The Immigration Appeals Board: "As an independent body the Immigration Appeals Board shall decide the cases assigned to it in section 76, first and third paragraphs."

¹⁴ The Special Courts Committee was assigned in May 2015 to review whether the administrative complaint mechanisms in Norway, including the Appeals Board, are in need of reform. See further, NOU 2017: 8, Publisert under: Regjeringen Solberg, Utgiver: Justis- og beredskapsdepartementet, Særdomstoler på nye områder?, available at: <https://www.regjeringen.no/no/dokumenter/nou-2017-8/id2542284/>.

8. In view of the above, UNHCR advises the Government of Norway to continue to monitor the situation carefully to ensure that Norway continues to provide an effective remedy and a truly independent second instance for persons in asylum proceedings. To conclude, UNHCR recommends the Government of Norway to
- refrain from making the provisions of the Restrictions package II permanent;
 - conduct an in-depth review of how the power of instruction has affected the independence of the Appeals Board, in order to ensure the right to an effective remedy.

UNHCR Regional Representation for Northern Europe
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