

UNHCR's Comments on the Proposed Amendments to the Nationality Act and the Immigration Control Act of the Republic of Korea

Summary

- The proposed amendments to the Nationality Act and the Immigration Control Act introduce permanent residency as a prerequisite for general naturalization of foreigners in the Republic of Korea. UNHCR is concerned that this requirement will prevent recognized refugees, humanitarian status holders, and stateless persons from being eligible to apply for naturalization, which is a key durable solution for persons in need of international protection. UNHCR recommends that recognized refugees, humanitarian status holders, and stateless persons be specifically included in the definition of persons eligible for permanent residency in Article 26(2) of the Immigration Control Act.
- Under Article 34 of the 1951 Convention and Article 32 of the 1954 Convention, States are encouraged to make every effort to expedite naturalization proceedings for refugees and stateless persons, respectively. UNHCR encourages the authorities of the Republic of Korea to favorably consider provisions on expediting the naturalization of refugees and stateless persons in order to facilitate the social integration into Korean society.
- The proposed amendments to Articles 26-2, 46 and 94 of the Immigration Control Act punish persons entering and/or staying in the Republic of Korea using illegal means by removal or severe penalties. UNHCR is concerned that the prohibitions and penalties may infringe the right to seek and enjoy asylum, which are not in conformity with the principle of immunity from penalties under Article 31 of the 1951 Convention. UNHCR recommends that a provision be included in the Immigration Control Act that exempts the institution or continuation of legal proceedings for illegal entry or stay against asylum-seekers who have applied for refugee status.

I. Introduction

1. UNHCR offers these comments as the agency entrusted by the United Nations General Assembly with the responsibility for providing international protection to refugees and other persons within its mandate, and for assisting governments in seeking permanent solutions to the problem of refugees.¹

¹ See Statute of the Office of the United Nations High Commissioner for Refugees, UN General Assembly Resolution 428(V), Annex, UN Doc. A/1775, para. 1, available at <http://www.unhcr.org/refworld/docid/3ae6b3628.html> ("Statute").

2. As set forth in its Statute, UNHCR fulfills its international protection mandate by, inter alia, “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.”² UNHCR’s supervisory responsibility under its Statute is reiterated in Article 35 of the *1951 Convention relating to the Status of Refugees* (hereinafter “the 1951 Convention”)³ according to which State parties undertake to “co-operate with the Office of the United Nations High Commissioner for Refugees [...] in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the Convention.” The same commitment is included in Article II of the *1967 Protocol relating to the Status of Refugees* (“the 1967 Protocol”).⁴

3. In addition, the UN General Assembly has entrusted UNHCR with a global mandate to provide protection to stateless persons worldwide and for preventing and reducing statelessness.⁵ It has specifically requested UNHCR “to provide technical and advisory services pertaining to the preparation and implementation of nationality legislation to interested States”.⁶ The General Assembly has also entrusted UNHCR with the specific role foreseen in Article 11 of the *1961 Convention on the Reduction of Statelessness* (hereinafter “the 1961 Convention”).⁷ 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.⁸ The Executive Committee also requests the Office “to provide technical advice to States Parties on the implementation of the *1954 Convention relating to the Status of Stateless Persons*” (hereinafter “the 1954 Convention”) so as to ensure consistent implementation of its provisions”.¹⁰

² *Ibid.*, para. 8(a).

³ UNTS No. 2545, Vol. 189, p. 137.

⁴ UNTS No. 8791, Vol. 606, p. 267.

⁵ UN General Assembly Resolution A/RES/50/152, 9 February 1996, available at: <http://www.unhcr.org/refworld/docid/3b00f31d24.html>. Reiterated in subsequent resolutions, *inter alia*, A/RES/61/137 of 25 January 2007, available at: <http://www.unhcr.org/refworld/docid/45fa902d2.html>, A/RES/62/124 of 24 January 2008, available at: <http://www.unhcr.org/refworld/docid/47b2fa642.html>, and A/RES/63/148 of 27 January 2009, available at: <http://www.unhcr.org/refworld/docid/4989619e2.html>.

⁶ UN General Assembly Resolution A/RES/50/152 9 February 1996, para. 16, available at <http://www.unhcr.org/refworld/docid/3b00f31d24.html>.

⁷ 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.”

⁸ UN High Commissioner for Refugees, *Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons*, 6 October 2006, No. 106 (LVII) - 2006, paras. (i) and (j), available at: <http://www.unhcr.org/refworld/docid/453497302.html>.

⁹ U.N.T.S. No. 5158, Vol. 360, p.117

¹⁰ UN High Commissioner for Refugees, *Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons*, 6 October 2006, No. 106 (LVII) - 2006, para. (x),

4. The Republic of Korea acceded to the *1951 Convention relating to the Status of Refugees* and the *1967 Protocol* on 3 December 1992, and the *1954 Convention relating to the Status of Stateless Persons* on 22 August 1962. Pursuant to Article 6 of the Constitution of the Republic of Korea, these treaties are considered to be part of the domestic law of the Republic of Korea and are the primary source for regulating the rights and obligations of refugees and stateless persons in the Republic of Korea.¹¹
5. UNHCR is pleased to take this opportunity to provide comments on the proposed amendments to the Nationality Act and the Immigration Control Act. These comments relate specifically to the proposed amendment to introduce permanent residency¹² as a prerequisite for general naturalization, and to the proposed amendment to penalize illegal entry and/or presence.¹³
6. UNHCR's primary aims in providing these comments are twofold. Firstly, UNHCR would like to assist the Republic of Korea in meeting its international obligations with regard to refugee protection and the protection of stateless persons. Secondly, UNHCR would like to offer its expertise to the ongoing efforts of aligning the Republic of Korea's domestic legislation with international standards.
7. UNHCR remains at the full disposal of the authorities of the Republic of Korea for a more comprehensive exchange in the future in relation to these proposed amendments.

II. Adoption of Permanent Residency as a Prerequisite to General Naturalization¹⁴

8. The proposed amendments to the Nationality Act and the Immigration Control Act introduce permanent residency as a prerequisite for general naturalization of foreigners in the Republic of Korea. The proposed amendments to Article 5(1)(1) of the Nationality Act specify that persons wishing to apply for general naturalization should have had permanent residence in the Republic of Korea for three years or more.

available at: <http://www.unhcr.org/refworld/docid/453497302.html>; see also para. (i).

¹¹ Article 6 of the Constitution of the Republic of Korea stipulates that: (1) Treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea. (2) The status of aliens shall be guaranteed as prescribed by international law and treaties.

¹² As a term indicating permanent residence status or right to stay as a permanent resident, 'permanent residency' is used throughout the comments unless otherwise provided for in national legislation.

¹³ Comments are based on an unofficial translation of relevant provisions of the Nationality Act and the Immigration Control Act. The unofficial translation is annexed to these comments.

¹⁴ According to the proposed amendment to Article 6 of the Nationality Act on simple naturalization, foreigners wishing to apply for simple naturalization must sustain permanent residency for two years or longer. However, the impact on simple naturalization of the new permanent residency requirement is not included in the current discussion because recognized refugees are not eligible to apply for simple naturalization under the existing Article 6 of the Nationality Act.

Article 5 of the Nationality Act (Requirements for General Naturalization)¹⁵

(1) A foreigner shall meet each of the following requirements in order to obtain permission for naturalization, except where prescribed by Article 6 or 7:

1. he/she is to **sustain a domicile** in the Republic of Korea for at least five consecutive years **and maintains permanent residency for recent 3 years or more pursuant to Article 10(1) of the Immigration Control Act**; (emphasis added)

2. he/she is to be an adult under the Civil Act of the Republic of Korea;

3. his/her conduct is to be orderly;

4. he/she is to be able to support himself/herself, relying on his/her own assets, ability or family he/she lives with; and

5. he/she is to have basic knowledge as a national of the Republic of Korea, such as Korean language skills and understanding of Korean customs.

(2) The period “to sustain a domicile in the Republic of Korea” in Article 5(1) is the period he/she registered as a foreigner and legitimately stayed in the Republic of Korea pursuant to Article 31 of the Immigration Control Act, and the criteria to determine the period shall be stipulated by Ordinance of the Ministry of Justice.

9. The proposed new Article 26 of the Immigration Control Act defines those persons considered to be a permanent resident.

Article 26 of the Immigration Control Act (Eligibility and Scope of Permanent Residency)

(1) A permanent resident’s activities shall not be limited pursuant to Article 10(1).

(2) A permanent resident shall be a person who falls under any of the followings as prescribed by the Presidential Decree:

1. A spouse of a national of the Republic of Korea or permanent resident, and his/her minor children;

2. An overseas Korean with foreign nationality under Article 2(2) of the Act on the Immigration and Legal Status of Overseas Koreans;

3. A person who has excellent ability in a specific field or has greatly contributed to the Republic of Korea; or

4. A person who is deemed necessary to receive permanent residency by the Minister of Justice, in consideration of the national interests of the Republic of Korea, such as investors, professionals, etc. (emphasis added)

(...)

(4) Notwithstanding paragraph 2, the Minister of Justice may waive all or part of the requirements under paragraph 2(3) if deemed suitable for the national interests of the Republic of Korea in consideration of the foreigner’s ability or contributions to the Republic of Korea.

¹⁵ Throughout this document the proposed amendments to the legislation are noted in italics.

(5) The criteria and procedures granting permanent residency permission shall be prescribed by the Ordinance of the Ministry of Justice.

10. UNHCR notes that recognized refugees and humanitarian status holders are not included in the list of persons deemed to be permanent residents in Article 26(2) of the Immigration Control Act. Although Article 26(4) of the Immigration Control Act provides that the Minister of Justice may waive all or part of the requirements in Article 26(2)(3) if deemed suitable for national interests, this is merely a discretionary power and does not guarantee that recognized refugees and humanitarian status holders can benefit from the exercise of such power.
11. UNHCR is of the opinion that Article 26(2) of the Immigration Control Act should specifically include recognized refugees and humanitarian status holders as persons eligible to apply for permanent residency. The Office proposes that the Ordinance of the Ministry of Justice should provide the grounds for granting permanent residency either immediately, or at the latest, following expiry of the initial legal status, in order to allow recognized refugees to achieve self-reliance and successful social integration in the Republic of Korea.
12. UNHCR would like to draw the attention of the authorities of the Republic of Korea to the fact that Article 34 of the 1951 Convention calls on States to facilitate the assimilation and naturalization of refugees as far as possible:

The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.
13. Article 34 of the 1951 Convention implies that State Parties should make good faith efforts to assist refugees to meet the requirements for naturalization.¹⁶
14. In addition, UNHCR's Executive Committee has recognized that integration into their host societies is the principal durable solution for refugees in the industrialized world and has "call[ed] on States to facilitate, as appropriate, the integration of refugees, including, as far as possible, through facilitating their naturalization."¹⁷
15. Most advanced asylum countries adopt the policy of granting permanent residency to refugees recognized in the country. In Canada, under Section 12(3) of the Immigration and Refugee Protection Act, refugees recognized in Canada and their family members may apply to Citizenship and Immigration Canada (CIC) for

¹⁶ UN High Commissioner for Refugees, *Note on the Integration of Refugees in the European Union*, May 2007, para. 42, available at: <http://www.unhcr.org/refworld/docid/463b24d52.html>.

¹⁷ UN High Commissioner for Refugees, *Conclusion on Local Integration*, 7 October 2005, No. 104 (LVI) - 2005, available at: <http://www.unhcr.org/refworld/docid/4357a91b2.html>.

‘permanent residence’.¹⁸ Once granted permanent residence in Canada, recognized refugees and the dependents have the right to receive most social benefits that Canadian citizens receive, including health care coverage; to live, work or study anywhere in Canada; and to apply for Canadian citizenship.¹⁹

16. In Australia, under Section 36(2)(a) of the Migration Act 1958, recognized refugees are granted a protection visa, which is considered ‘permanent residence’.²⁰ Recognized refugees who are granted a protection visa are able to live and work in Australia as a permanent resident.²¹ Similarly, in the Netherlands, under Section 110(7) of the Alien Act 2000, admission as a refugee is deemed to be a residence permit for an indefinite period.²²
17. Naturalization concludes the legal dimension of the integration process, as it leads to cessation of refugee status in accordance with Article 1C(3) of the 1951 Convention.²³ It can also signify the end of the socio-cultural integration process for refugees seeking to acquire the receiving country’s citizenship as an expression of and acknowledgement of full membership and belonging in the country.²⁴
18. Concerning the status of humanitarian status holders, there are compelling reasons to align the rights of persons granted humanitarian status with the rights of refugees. The protection needs of humanitarian status holders are often of equal duration to those of refugees. In this context, the Executive Committee has encouraged States “to provide for the highest degree of stability and certainty by ensuring the human rights and fundamental freedoms of [persons being accorded a complementary form of protection] without discrimination, taking into account the relevant international instruments and giving due regard to the best interests of the child and family unity

¹⁸ Section 12(3) of the Immigration and Refugee Protection Act, last amended on 15 August 2012, available at: <http://laws-lois.justice.gc.ca/PDF/I-2.5.pdf>. See also <http://www.cic.gc.ca/english/newcomers/about-pr.asp>; Penny Becklumb, Parliamentary Information and Research Service, Library of Parliament, 16 September 2008, p. 14, available at: <http://www.parl.gc.ca/Content/LOP/researchpublications/bp185-e.htm>. Unlike resettled refugees who arrive in Canada as permanent residents, refugees who applied for refugee status in Canada (either at a port of entry or a CIC office) must apply for and be granted permanent residence after receiving a positive decision on their refugee claim from the Immigration and Refugee Board.

¹⁹ <http://www.cic.gc.ca/english/newcomers/about-pr.asp>.

²⁰ Section 36(2)(a) of the Migration Act 1958, available at:

<http://www.comlaw.gov.au/Details/C2012C00676>.

²¹ <http://www.immi.gov.au/visas/humanitarian/onshore/866/>.

²² Section 110(7) of the Alien Act 2000, available at: *Aliens Act 2000 (Complete revision of the Aliens Act)* [Netherlands], 1998-1999; 26 732, 1 April 2001, available at: <http://www.unhcr.org/refworld/docid/3b5fd9491.html>.

²³ UN High Commissioner for Refugees, *Note on the Integration of Refugees in the European Union*, May 2007, para. 40, available at: <http://www.unhcr.org/refworld/docid/463b24d52.html>.

²⁴ UN High Commissioner for Refugees, *UNHCR Note on Refugee Integration in Central Europe*, April 2009, p. 11, available at: <http://www.unhcr.org/refworld/docid/4bfe70d72.html>.

principles.”²⁵ They should be eligible for permanent residency with defined rights and obligations and the status should last for as long as protection is required.²⁶

19. Moreover, under Article 34 of the 1951 Convention, States are encouraged to make every effort to expedite naturalization proceedings for refugees.²⁷ UNHCR encourages the authorities of the Republic of Korea to favorably consider provisions on expediting the naturalization of refugees in order to facilitate the social integration of refugees into Korean society.
20. UNHCR notes that stateless persons²⁸ are not included in the list of persons deemed to be permanent residents in Article 26(2) of the Immigration Control Act. UNHCR is of the opinion that Article 26(2) of the Immigration Control Act should specifically include stateless persons as persons eligible to apply for permanent residency. The Office further proposes that the Ordinance of the Ministry of Justice should provide the grounds for granting permanent residency either immediately, or at the latest, following expiry of the initial legal status, in order to allow non-refugee stateless persons to naturalize and thereby realize their right to a nationality, as articulated in Article 15 of the Universal Declaration of Human Rights.

²⁵ UN High Commissioner for Refugees, *Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection*, 7 October 2005, No. 103 (LVI) - 2005, available at: <http://www.unhcr.org/refworld/docid/43576e292.html>.

²⁶ UN High Commissioner for Refugees, *Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime*, 9 June 2000, EC/50/SC/CRP.18, para. 14, available at: <http://www.unhcr.org/refworld/docid/47fdfb491a.html>.

²⁷ According to information available to UNHCR, 3 out of 299 recognized refugees in the Republic of Korea have been naturalized via the general naturalization process as at September 2012. In comparison, according to a 2005 study based on the 2001 census in Canada, which was jointly conducted by CIC and Statistics Canada, “refugees who arrived between 1991 and 1995 recorded a citizenship take-up rate of 85% and those who landed in 1996 or 1997 had a take-up rate of 59% by 2001”. UN High Commissioner for Refugees, *Research Summary on Resettled Refugee Integration in Canada*, 2 May 2011, p. 25, available at: <http://www.unhcr.org/refworld/docid/4e4b77842.html>.

²⁸ There is currently no procedure in domestic law for the identification of non-refugee stateless persons despite the fact that the Republic of Korea is a party to the 1954 Convention. The research on Relationships between the Korean Domestic Law and the two Stateless Conventions, commissioned by UNHCR and conducted by Professor Hong Yup Choi in 2009, as well as the 2010 MOJ Survey on the Status of Recognized Refugees, Asylum-seekers, and Humanitarian Status Holders in the Republic of Korea recommended that the Government adopt procedures to determine statelessness. Also, UNHCR Guidelines note that “it is implicit in the 1954 Convention that States must identify stateless persons within their jurisdictions so as to provide them appropriate treatment to comply with their Convention commitments”. (UN High Commissioner for Refugees, *Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person*, 5 April 2012, HCR/GS/12/02, para. 1, available at: <http://www.unhcr.org/refworld/docid/4f7dafb52.html>.) A number of States have established statelessness determination procedures including, France, Hungary, Latvia, and Spain. At UNHCR’s December 2011 Ministerial-Meeting convened to commemorate the 60th and 50th anniversaries of the 1951 Convention and the 1961 Convention, ten States pledged to establish Statelessness Determination Procedures (SDPs) or take measures to establish SDPs, including: Australia, Belgium, Brazil, Costa Rica, Georgia, Moldova, Peru, Philippines, Uruguay, and the United States of America. UNHCR recommends that the Republic of Korea considers establishing a Statelessness Determination Procedure to ensure that non-refugee stateless persons are identified in the migratory context.

21. Article 32 of the 1954 Convention calls on States to facilitate the assimilation and naturalization of stateless persons as far as possible:

The Contracting States shall as far as possible facilitate the assimilation and naturalization of stateless persons. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

22. In addition, UNHCR would like to draw to the attention of the authorities of the Republic of Korea that a number of other States Parties to the 1954 Convention provide for facilitated naturalization for stateless persons by providing for shorter qualifying periods for naturalization. They include: Belgium, Bulgaria, Denmark, Estonia, Finland, Germany, Greece, Hungary, Italy, the Netherlands, Norway, Slovenia, Sweden and Switzerland.

23. UNHCR therefore encourages the authorities of the Republic of Korea to favorably consider provisions that would allow non-refugee stateless persons to naturalize. Furthermore, UNHCR notes that other reforms to ROK nationality law may be recommended in the future to supplement that help prevent statelessness, in particular, to ensure that children who are born on the territory and who would otherwise be stateless, acquire a nationality either at birth or on application.

III. Penalization of Illegal Entry and/or Presence

24. The proposed amendments in Article 26-2 of the Immigration Control Act prohibit persons entering and/or staying in the Republic of Korea using illegal means. The proposed amendments to Articles 46 and 94 of the Immigration Control Act provide that persons violating the prohibition in Article 26-2 will be punished by removal or severe penalties, including imprisonment up to 3 years.

Article 26-2 (Prohibition of Submitting False Documents, etc)
*No one shall conduct activities falling under any of the following subparagraph related with **visa or visa issuance certificate, entry permission, landing permission, residence related permissions, re-entry permission, alien registration, for the purpose of entering or staying in the Republic of Korea:***

1. *an act of making a forged document and reporting false fact;*
2. *an act of falsely applying by making use of a forged document, reporting false fact, or other illegal means; or* (emphasis added)
3. *an act of assisting or advising above acts.*

Article 46 (Persons to be removed)

(1) The Head of Office, Branch Office or Immigration Detention Center **may deport** those falling under any of the following subparagraph from the Republic of Korea, pursuant to the procedures prescribed in this Chapter. (...)

10-2. A person who has violated the provisions of Article 26-2. (emphasis added)

Article 94. Penal Provisions

Any person who falls under any of the following subparagraphs **shall be punished by penal servitude or imprisonment not exceeding 3 years, or by a fine not exceeding 20 million Korean Won.** (...)

17-2. A person who violated the conditions under the provision of Article 26-2. (emphasis added)

25. The right to seek and enjoy asylum is contained in Article 14 of the Universal Declaration of Human Rights. In order to exercise this fundamental human right, asylum-seekers must be granted access to the territory and have access to fair and efficient eligibility procedures.

26. Asylum-seekers may face circumstances that compel them to have recourse to illegal means in order to escape an immediate risk of persecution in their home country. The drafters of the 1951 Convention acknowledged, for instance, that, “[a] refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry (possession of national passport and visa) into the country of refuge.”²⁹ Furthermore, UNHCR’s Executive Committee Conclusion No. 58 (XL) has affirmed that “circumstances may compel a refugee or asylum seeker to have recourse to fraudulent documentation when leaving a country in which his physical safety or freedom are endangered.”³⁰

27. Accordingly the principle of immunity for refugees from penalties for illegal entry and presence was introduced in the legally binding obligation in Article 31 of the 1951 Convention. Article 31(1) of the 1951 Convention stipulates:

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 I, 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.

28. “Illegal entry” refers, *inter alia*, to the arrival or securing of entry through the use of false or falsified documents, the use of other methods of deception or clandestine entry, including entry into State territory with the assistance of smugglers and

²⁹ Draft Report of the *Ad hoc* Committee on Statelessness and Related Problems. Proposed Draft Convention relating to the Status of Refugees: UN doc. E/AC.32.L.38, 15 February 1950, Annex I (draft Article 26); Annex II (comments. p. 57). UN High Commissioner for Refugees, *Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalization, Detention and Protection [Global Consultations on International Protection/Second Track]*, 1 October 2001, para. 15, available at: <http://www.unhcr.org/refworld/docid/3bf9123d4.html>.

³⁰ UN High Commissioner for Refugees, *Conclusions Adopted by the Executive Committee on the International Protection of Refugees*, December 2009, 1975 – 2009 (Conclusion No. 1 – 109), No. 58 (XL), para. (i), available at: <http://www.unhcr.org/refworld/docid/4b28bf1f2.html>.

traffickers, while “illegal presence” may include remaining after a valid residency permit has expired.³¹

29. Immunity from penalties applies to asylum-seekers and refugees who have briefly transited other countries, who are unable to find protection from persecution in the first country, or who have good cause for not applying in such country, and only exclude persons who had settled in another country.³² The wording of the provision refers to “refugees”, but is generally considered also to refer to persons seeking asylum as being “presumptive” refugees.
30. The principle is confirmed in the national legislation of many States party to the 1951 Convention. In a study conducted by UNHCR covering 31 European countries,³³ 61 per cent (19 out of 31 countries) of the participating States had a legislative provision exempting refugees and asylum-seekers from penalties for illegal entry or presence. 35 per cent of the States reviewed indicated that they suspend proceedings if the individual applies for asylum, and that 13 per cent suspend penalties but not proceedings.³⁴
31. Other advanced asylum countries also have national legislation exempting refugees and asylum-seekers from penalties for illegal entry and/or presence. In the United States of America, Title 8 of the Code of Federal Regulations, Part 270 on Penalties for Document Fraud, Section 270.2 Enforcement Procedures, stipulates:

The [Immigration and Naturalization] Service shall not issue a Notice of Intent to Fine for acts of document fraud committed by an alien pursuant to direct departure from a country in which the alien has a well-founded fear of persecution or from which there is a significant danger that the alien would be returned to a country in which the alien would have a well-founded fear of persecution, provided that the alien has presented himself or herself without delay to an INS officer and shown good cause for his or her illegal entry or presence.³⁵

32. UNHCR requests that the principle of immunity from penalties under Article 31 of the 1951 Convention be respected in the national legislation of the Republic of Korea.

³¹ UN High Commissioner for Refugees, *Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalization, Detention and Protection [Global Consultations on International Protection/Second Track]*, 1 October 2001, para. 34, available at: <http://www.unhcr.org/refworld/docid/3bf9123d4.html>.

³² *Ibid.*, para. 103.

³³ The UNHCR study looked at practices in thirty-one countries: Armenia, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, France, Former Yugoslav Republic of Macedonia, Georgia, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Moldova, the Netherlands, Norway, Poland, Romania, Russian Federation, Slovak Republic, Slovenia, Spain, Switzerland, Turkey, Ukraine, and the United Kingdom. *Ibid.*, para. 53.

³⁴ *Ibid.*, para. 57.

³⁵ 8 Code of Federal Regulations (CFR), part 270, Penalties for Document Fraud, section 270.2, Enforcement procedures, 8 U.S.C. 1101, 1103, and 1324c., available at: <http://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-11261/0-0-0-28344/0-0-0-28360.html>.

To ensure the full and inclusive application of Article 31, legislative or administrative measures should be taken. UNHCR therefore recommends that a provision be included in the Immigration Control Act that exempts the institution or continuation of legal proceedings for illegal entry or stay against asylum-seekers who have applied for refugee status until the final outcome of the asylum claim is made.

Recommendations

UNHCR wishes to make the following recommendations to the authorities of the Republic of Korea:

- That recognized refugees, humanitarian status holders, stateless persons, and their dependent family members be explicitly included in the Immigration Control Act Article 26(2) definition of persons eligible for permanent residency.
- That the Ordinance of the Ministry of Justice provide that recognized refugees, stateless persons, and their dependent family members be granted permanent residency either immediately after the decision to recognize their status, or at the latest, following expiry of the initial legal status.
- That recognized refugees, stateless persons, and their dependent family members be included in the definition of persons eligible for simple or special naturalization found in Articles 6 and 7 of the Nationality Act.
- That a provision be included in Articles 26-2, 46 and 94 of the Immigration Control Act that exempts the institution or continuation of legal proceedings for illegal entry or stay against asylum-seekers who have applied for refugee status.

UNHCR Representation in the Republic of Korea
Seoul, 29 October 2012