

***Amicus curiae* of the United Nations High Commissioner for Refugees (UNHCR) on the interpretation and application of Article 25, Article 27 and Article 28 of the 1951 Convention Relating to the Status of Refugees**

I. UNHCR's mandate and role

1. The Office of the United Nations High Commissioner for Refugees (hereafter "UNHCR") has been entrusted by the United Nations General Assembly with a mandate to provide international protection to refugees and, together with Governments, seek permanent solutions for refugees.¹ 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[.]"² This supervisory responsibility is reiterated in Article 35 of the 1951 Convention and Article II of the 1967 Protocol relating to the Status of Refugees (hereafter collectively referred to as "1951 Convention").³
2. UNHCR's supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention.⁴ UNHCR also provides information on a regular basis to decision-makers and courts of law concerning the proper interpretation and application of the provisions within the 1951 Convention.
3. According to Section 15-8 of the "*Tvisteloven*" - the Norwegian Dispute Act⁵ - written submissions may be made in court proceedings by "organisations and associations within the purpose and normal scope of the organisation" in order to shed light on matters of public interest. UNHCR has a direct interest in ensuring a proper and consistent interpretation of the 1951 Convention as part of its supervisory responsibility, including in the context of the present case, which concerns the right to travel documents and identity documents under the 1951 Convention. UNHCR submits this *amicus curiae* in order to assist the Borgarting Court of Appeal. The Supreme Court of Norway has previously accepted UNHCR's written submissions.⁶ Copies of this *amicus curiae* were sent to the parties to the present case on 22 December 2016.
4. This *amicus curiae* 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.⁷

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

² UNHCR Statute, para. 8(a).

³ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, <http://www.refworld.org/docid/3be01b964.html>. According to Article 35 (1) of the 1951 Convention, UNHCR has the "duty of supervising the application of the provisions of the Convention".

⁴ Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and complementary Guidelines on International Protection: UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, <http://www.unhcr.org/refworld/docid/4f33c8d92.html> (hereafter "UNHCR Handbook").

⁵ *Lov 17. juni 2005 nr. 90 om mekling og rettergang i sivile tvister (Tvisteloven)*, unofficial English translation, <http://app.uio.no/ub/ujur/oversatte-lover/data/lov-20050617-090-eng.pdf>.

⁶ *HR-2015-02524-P*, Case no. 2015/203, Norway: Supreme Court, 18 December 2015, <http://www.refworld.org/docid/56cc6e2c4.html>, at para. 35.

⁷ UN General Assembly, *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, <http://www.refworld.org/docid/3ae6b3902.html>.

II. Questions addressed in this submission

5. In the present *amicus curiae*, UNHCR will address three questions that relate to the obligations of Contracting States to issue identity and travel documents to refugees:
 - 1) What obligations do Contracting States have to provide administrative assistance, pursuant to Article 25 of the 1951 Convention, if a refugee does not have recourse to the authorities of a foreign country?;
 - 2) What obligations do Contracting States have to issue 'identity papers' to a refugee who does not possess a valid travel document, pursuant to Article 27 of the 1951 Convention?; and
 - 3) What obligations do Contracting States have to issue travel documents pursuant to Article 28 of the 1951 Convention, and under what circumstances can an application be rejected?
6. UNHCR will only seek to address issues of legal principle arising from these questions and will not address or comment on the particular facts of the present case or positions taken by the parties.
7. Bearing in mind the interaction between the 1951 Convention and international human rights law, UNHCR will make specific reference to relevant provisions of human rights law. Moreover, UNHCR will make reference to EU's primary and secondary law and the jurisprudence of the Court of Justice of the European Union (hereafter "CJEU") in so far the European legal framework may provide useful guidance on the interpretation of Articles 27 and 28 of the 1951 Convention.

The Vienna Convention on the Law of Treaties

8. The starting point for determining the obligations in Articles 25, 27 and 28 of the 1951 Convention is the *Vienna Convention on the Law of Treaties*⁸ (hereafter "Vienna Convention"), which confirms that a treaty shall be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in the context and in the light of its object and purpose."⁹
9. The Vienna Convention permits recourse to supplementary means of interpretation, including the *travaux préparatoires*, only where the meaning of the treaty language is "ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable."¹⁰ If the meaning of the treaty is clear from its text when viewed in the "light of its context, object and purpose", recourse to supplementary means, such as the *travaux préparatoires*, is unnecessary.¹¹
10. In relation to the 1951 Convention, this means interpretation by reference to the object and purpose of extending the protection of the international community to refugees, and assuring to "refugees the widest possible exercise of fundamental rights and freedoms."¹²

⁸ United Nations, *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, 12 March 1986, <http://www.refworld.org/docid/3ae6b3924.html> (hereafter "Vienna Convention").

⁹ Vienna Convention, Article 31(1).

¹⁰ Vienna Convention, Article 32.

¹¹ *Ibid.*

¹² 1951 Convention, Preamble, paras. 1-3.

11. UNHCR further recalls that “it is a fundamental principle of international law that international law prevails over domestic law.”¹³ It is also a fundamental rule of international law that every treaty in force is binding upon the Contracting States and must be performed in good faith (the principle of *pacta sunt servanda*).¹⁴ In addition, a Contracting State is bound to make modifications to its national legislation as may be necessary to ensure the fulfilment of its international obligations.¹⁵ The duty of a Contracting State to ensure that its domestic law is in conformity with its international obligations is beyond question. A Contracting State may not invoke provisions of its domestic legislation as justification for a failure to perform a treaty obligation.¹⁶ In implementing the treaty, the Contracting State must attain the international standard of reasonable efficacy and efficient implementation of the treaty provisions concerned.¹⁷

Refugee Status Determination Procedures in Norway

12. The Refugee Status Determination (hereafter “RSD”) process in Norway is governed by the “*Utlendingsloven*” – the Norwegian Immigration Act of 2008 - and the “*Utlendingsforskriften*” – the Norwegian Immigration Regulations. According to Section 3 of the Norwegian Immigration Act, “the Act shall be applied in accordance with the international rules by which Norway is bound, when these are intended to strengthen the position of a foreign national.”¹⁸
13. Applications for international protection may be made at airports; seaports; the border; or, in-country at a police station. Applications at these locations are sent to the National Police Immigration Service in Oslo for registration. Norwegian Police will inform the applicant about his or her rights and duties, the asylum process and his or her obligation to cooperate with the Norwegian immigration authorities during the procedure.¹⁹
14. The Norwegian Directorate of Immigration (hereafter “UDI”) conducts a short arrival interview regarding the reasons for seeking international protection and schedules the RSD interview. After having considered all the information pertinent to an application, a UDI caseworker presents a proposal for the RSD to a senior caseworker. If accepted, both caseworkers sign the decision and

¹³ *Opinion: The 1951 Convention relating to the Status of Refugees and the Obligations of States under Articles 25, 27 and 28, with particular reference to refugees without identity or travel documents*, by Prof. Guy S. Goodwin-Gill for UNHCR, May 2000, <http://www.refworld.org/docid/51af00184.html>, at para. 11, citing International Court of Justice, *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, [1988] ICJ Reports 12, 31-2, para. 47.

¹⁴ Brownlie, I., 1969 Vienna Convention on the Law of Treaties, Article 26; *Principles of Public International Law*, Oxford: Clarendon Press, 5th ed., 1998, 620, quoted in *Opinion: The 1951 Convention relating to the Status of Refugees and the Obligations of States under Articles 25, 27 and 28, with particular reference to refugees without identity or travel documents*, by Prof. Guy S. Goodwin-Gill for UNHCR, May 2000, <http://www.refworld.org/docid/51af00184.html>, at para. 20.

¹⁵ Permanent Court of International Justice, *Exchange of Greek and Turkish Populations*, (1925) PCIJ, Ser. B, No. 10, 20., cited in *Opinion* by Prof. Guy S. Goodwin-Gill for UNHCR, May 2000, <http://www.refworld.org/docid/51af00184.html>, para. 21.

¹⁶ Article 27, Vienna Convention.

¹⁷ *Opinion: The 1951 Convention relating to the Status of Refugees and the Obligations of States under Articles 25, 27 and 28, with particular reference to refugees without identity or travel documents*, by Prof. Guy S. Goodwin-Gill for UNHCR, May 2000, <http://www.refworld.org/docid/51af00184.html>, para. 14.

¹⁸ Intergovernmental Consultations on Migration, *Asylum and Refugees, Asylum Procedures: Report on Policies and Practices in IGC Participating States 2015*, September 2015, p. 312, section 2.1, http://www.igc-publications.ch/upload/Asylum_Procedures_Report_2015.pdf.

¹⁹ *Ibid.*, at p. 313, section 5.1.

the applicant is informed of the outcome. Decisions are always given in writing and negative decisions are reasoned.

15. According to Section 28a of the Norwegian Immigration Act, refugee status is granted if the following conditions are met:
 - The cause of persecution is connected to one of the grounds set out in Article 1A(2) of the 1951 Convention;
 - The persecution is of an individual nature;
 - Fear of persecution is the reason the applicant does not wish to return to his or her country of origin.²⁰
16. The RSD process includes verification of asylum-seekers' documentation by an expert body, "*Nasjonalt ID-senter*" – the Norwegian Identity and Documentation Centre (hereafter "the Norwegian ID Centre"). The Norwegian ID Centre authenticates travel and identity documents, and develops tools and methods that can be employed when an applicant's identity is undocumented.²¹

Undocumented refugees in Norway

17. A significant number of asylum-seekers in Norway cannot provide documentation that substantiates their identity. Between 2007 and 2011, over 94 per cent of applicants for international protection in Norway could not present identity documents to the authorities.²²
18. This situation is acknowledged by the UNHCR Handbook, which states that "in most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents."²³ This may be due to a range of factors, including:
 - a) Those who flee persecution may not be able to safely travel with their identity documents when leaving their country of origin;
 - b) The journey from the country of origin may result in the loss or damage of identity documents;
 - c) Administrative structures in the country of origin may preclude the refugee from obtaining any identity documents at all; and
 - d) The authorities responsible for issuing identity documents may not do so for all their citizens.

III. What obligations do Contracting States have to provide administrative assistance, pursuant to Article 25 of the 1951 Convention?

19. Article 25 of the 1951 Convention provides as follows:

²⁰ *Ibid.*, p. 319, section 6.1.1, "gender based persecution, and persecution due to sexual orientation are also grounds for asylum."

²¹ Nasjonalt ID-senter, <https://www.nidsenter.no/en/About-NID/>. See also, Intergovernmental Consultations on Migration, *Asylum and Refugees, Asylum Procedures: Report on Policies and Practices in IGC Participating States 2015*, September 2015, which states: "The main objective of the Norwegian ID Centre is to strengthen the work of the immigration authorities and the Police in establishing the identity of foreign nationals entering, applying for residence in, or residing in Norway." http://www.igc-publications.ch/upload/Asylum_Procedures_Report_2015.pdf at p. 322, section 6.7.5.

²² European Migration Network (EMN), *Establishing Identity for International Protection: Challenges and Practices*, February 2013, <http://www.refworld.org/docid/51b893e74.html>, at p. 6.

²³ UNHCR Handbook, <http://www.refworld.org/docid/4f33c8d92.html>, para. 196.

- 1) When the exercise of a right by a refugee would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the Contracting States in whose territory he is residing shall arrange that such assistance be afforded to him by their own authorities or by an international authority.
 - 2) The authority or authorities mentioned in para. 1 shall deliver or cause to be delivered under their supervision to refugees such documents or certifications as would normally be delivered to aliens by or through their national authorities.
 - 3) Documents or certifications so delivered shall stand in the stead of the official instruments delivered to aliens by or through their national authorities, and shall be given credence in the absence of proof to the contrary.
 - 4) Subject to such exceptional treatment as may be granted to indigent persons, fees may be charged for the services mentioned herein, but such fees shall be moderate and commensurate with those charged to nationals for similar services.
 - 5) The provisions of this Article shall be without prejudice to Articles 27 and 28.
20. Hence, Article 25 of the 1951 Convention obliges Contracting States to provide assistance normally afforded by national authorities, including the issuance of documents or certifications which are to stand in the stead of official instruments and are to be given credence in the absence of proof to the contrary.
21. Moreover, Article 25(5) confirms that it is without prejudice to Articles 27 and 28, which deal with identity documents and travel documents, respectively. In fact, these Articles may need to be read together (for example, Article 25 with Article 27 and Article 25 with Article 28), as part of a single system of protection of the refugee's entitlement to identity and documentation, as the issuance of identity documents under Article 27 or 28 may be contingent on the issuance of the necessary antecedent documents under Article 25, relating, for example, to births, deaths and marriages.²⁴

IV. What obligations do Contracting States have to issue an identity document, pursuant to Article 27 of the 1951 Convention, if an application for a travel document is rejected?

22. The purpose of Article 27 of the 1951 Convention²⁵ is to safeguard the interests of refugees, and not to stigmatize them in any way²⁶ and document the refugee status of the person concerned. According to the *travaux préparatoires* on Article 27, the identity card primarily constitutes permission to

²⁴ *Opinion: The 1951 Convention relating to the Status of Refugees and the Obligations of States under Articles 25, 27 and 28, with particular reference to refugees without identity or travel documents*, by Prof. Guy S. Goodwin-Gill for UNHCR, May 2000, <http://www.refworld.org/docid/51af00184.html>, at para. 37. See also, UN Human Rights Committee (HRC), *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, 2 November 1999, CCPR/C/21/Rev.1/Add.9, <http://www.refworld.org/docid/45139c394.html>.

²⁵ Article 27 provides that "The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document."

²⁶ UNHCR, *Convention relating to the Status of Stateless Persons. Its History and Interpretation*, 1997, <http://www.refworld.org/docid/4785f03d2.html>, at Article 27, para. 2.

reside in the reception country.²⁷ Its real purpose is to ensure the practical exercise of this right where such right already exists.

23. As stated earlier, due to the circumstances in which refugees are sometimes forced to leave their country of origin, they are perhaps more likely than others to find themselves without identity documents. Refugees commonly do not have the option to seek administrative assistance from their country of origin and are therefore dependent upon the authorities of their country of asylum for assistance.²⁸
24. Under the early generation of refugee treaties, refugees were issued a single identity document – originally known as a “Nansen passport”²⁹ and later simply referred to as a “travel document” – which served both to facilitate international travel by refugees, and also to identify its holder as a refugee authorised to reside in the asylum country. According to the *travaux préparatoires*, the drafters of the 1951 Convention elected to provide themselves with some discretion to refuse to issue refugees with international travel documents on national security or public order grounds, as well as to standardise the format of those documents. A separate draft article was therefore proposed to stipulate the duty to provide refugees with a more general form of identification, essentially for use within the receiving country.³⁰ The formula which became Article 27 was adopted by the *Ad Hoc Committee* without comment.³¹
25. The scope of the beneficiary class for Article 27, which was alluded to during the drafting debates, resulting in a confirmation that the duty to issue identity papers:

*could not be refused to anyone, whatever his status or the legality of his presence in a given territory...[T]he identity papers...were not a legal document, but merely a temporary certificate of identity, in no way prejudging the future position of refugee, or even his actual status as a refugee.*³²
26. The representative of the *International Refugee Organization to the Conference of Plenipotentiaries* said that this provision was necessary because a person without papers was “a pariah subject to arrest for that reason alone”. The representative of France stated that under Article 27 a refugee whose presence was irregular would at least be given a provisional document “which he could produce if [...] he was stopped in the street”.³³

²⁷ Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.15, Jan. 27, 1950, at 13, quoted in James Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press, 2005, at p. 620.

²⁸ UNHCR, *Identity Documents for Refugees*, 20 July 1984, EC/SCP/33, <http://www.refworld.org/docid/3ae68cce4.html>, para. 3.

²⁹ In honour of the first United Nations High Commissioner for Refugees.

³⁰ Goodwin-Gill, G., McAdam, J., *The Refugee in International Law*, Third edition, Oxford University Press, 2007, pp. 515-516.

³¹ UN Ad Hoc Committee on Refugees and Stateless Persons, Ad Hoc Committee on Refugees and Stateless Persons, Second Session: Summary Record of the Forty-First Meeting Held at the Palais des Nations, Geneva, on Wednesday, 23 August 1950, at 2.30 p.m., 28 September 1950, E/AC.32/SR.41, <http://www.refworld.org/docid/3ae68c1c4.html>, at Article 22 Identity Papers.

³² UN Ad Hoc Committee on Refugees and Stateless Persons, Ad Hoc Committee on Refugees and Stateless Persons, Second Session: Summary Record of the Forty-Second Meeting Held at the Palais des Nations, Geneva, on Thursday, 24 August 1950 at 2.30 p.m., 28 September 1950, E/AC.32/SR.42, <http://www.refworld.org/docid/3ae68c190.html>, Statement of Mr. Juvigny of France, at Article 23 Travel documents, emphasis added.

³³ UNHCR, *Identity Documents for Refugees*, 20 July 1984, EC/SCP/33, <http://www.refworld.org/docid/3ae68cce4.html>, para. 7.

27. The obligation of Contracting States to issue identity documents to refugees who do not possess valid travel documents is subject to no exceptions, and “the *travaux préparatoires* make it clear that every refugee was intended to benefit from this provision.”³⁴

V. What obligations do Contracting States have to issue a travel document, pursuant to Article 28 of the 1951 Convention, and under what circumstances can an application for a travel document be rejected?

28. As is the case with Article 27, Article 28 of the 1951 Convention³⁵ employs the imperative verb “shall” which imposes a mandatory obligation on Contracting States to issue documents for the purpose of travel to refugees lawfully staying in their territory, unless one of the lawful exceptions applies.³⁶ These documents are referred to as Convention Travel Documents (hereafter “CTDs”).

29. The object and purpose of Article 28 is to facilitate the international freedom of movement of refugees.³⁷ The interpretation of this obligation is also influenced by other human rights obligations, as the refusal to issue a travel document interferes with the right to freely leave a country.

a. Right to travel document under international and European human rights law

30. The right to freedom of movement is guaranteed *inter alia* in Article 12(3) of the *International Covenant on Civil and Political Rights* (hereafter “ICCPR”)³⁸. The UN Human Rights Committee, in its General Comment 27, on Article 12 (Freedom of Movement) of the ICCPR, clarified that Article 12(2), which embodies the right to leave any country, must be interpreted to include a right to obtain necessary travel documents:

“In order to enable the individual to enjoy the rights guaranteed by article 12, para. 2, obligations are imposed both on the State of residence and on the State of nationality. Since international travel

³⁴ *Opinion: The 1951 Convention relating to the Status of Refugees and the Obligations of States under Articles 25, 27 and 28, with particular reference to refugees without identity or travel documents*, by Prof. Guy S. Goodwin-Gill for UNHCR, May 2000, para. 42, <http://www.refworld.org/docid/51af00184.html>.

³⁵ Article 28 provides that:
1) The Contracting States *shall issue* to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, *unless compelling reasons of national security or public order otherwise require*, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence. [Emphasis added];
2) Travel documents issued to refugees under previous international agreements by parties thereto shall be recognized and treated by the Contracting States in the same way as if they had been issued pursuant to this article.

³⁶ UNHCR, *Note on Travel Documents for Refugees*, 30 August 1978, EC/SCP/10, para. 16, <http://www.refworld.org/docid/3ae68cce14.html>.

³⁷ UNHCR, *Note on Convention Travel Documents issued pursuant to the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and/or the 1954 Convention relating to the Status of Stateless Persons*, January 2010, para. 3, http://unhcr.org/ua/img/uploads/docs/CTDsNote.Rev2_1_1_1.pdf.

³⁸ 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>.

usually requires appropriate documents, in particular a passport, the right to leave a country must include the right to obtain the necessary travel documents. The issuing of passports is normally incumbent on the State of nationality of the individual. The refusal by a State to issue a passport or prolong its validity for a national residing abroad may deprive this person of the right to leave the country of residence and to travel elsewhere. It is no justification for the State to claim that its national would be able to return to its territory without a passport.”³⁹

31. Moreover, refusal by a State to issue a passport must be in compliance with Article 2(2) and 2(3) of Protocol No. 4 to the *European Convention for the Protection of Human Rights and Fundamental Freedoms*⁴⁰ (hereafter “ECHR”) which guarantees the right to freedom of movement. The European Court of Human Rights (hereafter “ECtHR”) found in *Napijalo v. Croatia*, “that the right of freedom of movement as guaranteed by paras 1 and 2 of Article 2 of Protocol No. 4 is intended to secure to *any person* a right to liberty of movement within a territory and to leave that territory, which implies a right to leave for such country of the person’s choice to which he may be admitted”.⁴¹
32. The ECtHR in *Napijalo v. Croatia* further establishes that any measure liable to infringe or to restrict the exercise of the right must satisfy the requirement “necessary in a democratic society” in pursuit of a “legitimate aim”. Accordingly, and in light of its previous judgments in *M. v. Germany*⁴² and *Baumann v. France*, the ECtHR considered that a State measure which dispossesses an individual of an identity document such as, for example, a passport, undoubtedly amounts to an interference with the exercise of liberty of movement.⁴³ The ECtHR supported its finding by making reference to the UN Human Rights Committee, General Comment 27 (see above at paragraph 30).⁴⁴
33. Furthermore, the ECtHR found in *Nada v. Switzerland*⁴⁵ that Switzerland’s decision to apply a comprehensive ban on travel against the applicant had breached his right to respect for family life and private life (Article 8) and to an effective remedy (Article 13) as such interference prevented him from leaving the area where he was residing in order to seek and receive medical treatment.

³⁹ UN Human Rights Committee (HRC), *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, 2 November 1999, CCPR/C/21/Rev.1/Add.9, at para. 9, <http://www.refworld.org/docid/45139c394.html> (hereafter “CCPR, General Comment No 27”).

⁴⁰ Council of Europe, *Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto*, 16 September 1963, ETS 46, <http://www.refworld.org/docid/3ae6b3780.html>; see also Jens Vedsted-Hansen in Andreas Zimmerman, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol - A commentary*, Oxford University Press, 2011 (hereafter “Zimmerman, A commentary”), p. 1207.

⁴¹ *Napijalo v. Croatia*, 66485/01, European Court of Human Rights, 13 November 2003, <http://www.refworld.org/docid/402b56e34.html> at para. 68. The Court goes on to state: ‘see, mutatis mutandis, *Peltonen v. Finland*, Commission decision of 20 February 1995, Decisions and Reports (DR) 80-A, p. 43, § 31 [Application no. 19583/92, [Baumann v. France, judgment of 22 May 2001, Reports of Judgments and Decisions 2001-V, p. 217, § 61 \[Application no. 33592/96, <http://hudoc.echr.coe.int/eng?i=001-59470>\].’](http://hudoc.echr.coe.int/eng#{)

⁴² *M. v. Germany*, Application no. 19359/04, 17 December 2009, <http://hudoc.echr.coe.int/eng?i=001-96389>.

⁴³ *Napijalo v. Croatia*, 66485/01, European Court of Human Rights, 13 November 2003, <http://www.refworld.org/docid/402b56e34.html> at para. 69.

⁴⁴ *CCPR General Comment No. 27*.

⁴⁵ *Nada v. Switzerland*, Application 10593/08, 12 September 2012, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113118>.

34. However, in *Bartik v. Russia*,⁴⁶ the ECtHR concluded that the authorities' restrictions on the applicant's travel abroad to tend to his ailing father and refusal to issue a travel document had not interfered with his right to respect for private life and family life. This conclusion was exclusively based on the fact that the applicant's elderly parents did not belong to his core family and they had not been shown to have been dependent members of his family. In cases where the family members do belong to the applicant's core family and are considered dependent, restrictions on the right to freedom of movement, such as refusal to issue a passport, may breach Article 8 of the ECHR. These decisions clearly illustrate that the right to leave a country is not only embodied through Article 2 of Protocol No. 4, but also constitutes a central element in the exercise of other human rights, such as the right to respect for private and family life (Article 8 ECHR), which the contracting parties to the ECHR have undertaken to respect.
35. In light of the above, UNHCR submits that travel documents are an essential means for the exercise of the fundamental human right to freedom of movement. Restrictions on the freedom of movement of refugees, such as refusal of exit and refusal to issue travel documents, may disproportionately interfere not only with their right to freedom of movement guaranteed by Article 12 of the ICCPR and Article 2 of Protocol no. 4 of the ECHR, but also with the right to respect for family life and private life provided under Article 8 of the ECHR.

b. Circumstances in which Convention Travel Documents are required to be issued

36. Article 28, paragraph 1, requires Contracting States to issue CTDs to refugees lawfully in their territory. CTDs may also be issued to refugees in the territory who are not lawfully staying, whether their presence in the country is illegal or purely temporary.⁴⁷ Article 28 provides that the Contracting States are obliged to give "sympathetic consideration" to any application by a refugee for travel documents *unless compelling reasons of national security or public order otherwise require*. As a general rule, a Contracting State must issue a refugee with a CTD and not with any other document such as a foreign resident's passport.⁴⁸
37. The CTD is required to be issued "for the purpose of travel". The mandatory wording of this provision implies that a Contracting State may not refuse to issue a CTD to a refugee if, for example, it regards the proposed travel as inappropriate. The *travaux préparatoires* to this provision indicate that a refugee is not required to "justify" the proposed travel in order to receive a CTD to which he or she is entitled "for travel purposes".⁴⁹

c. Circumstances in which the issue of a Convention Travel Document may be refused

38. The lawful exception to the requirement that Contracting States issue a CTD to refugees lawfully staying in their territory is to be found in the words "unless compelling reasons of national security or public order otherwise require". In this context, the terms "compelling reasons", "national security" and "public

⁴⁶ *Bartik v Russia*, Application no. 55565/00, 21 December 2006, <http://hudoc.echr.coe.int/eng?i=001-78792>.

⁴⁷ UNHCR, *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis*, 1990, p.195, <http://www.refworld.org/docid/53e1dd114.html>.

⁴⁸ *Ibid.*, p. 194.

⁴⁹ UNHCR, Opinion : The 1951 Convention relating to the Status of Refugees and the Obligations of States under Articles 25, 27 and 28, with particular reference to refugees without identity or travel documents, May 2000, <http://www.refworld.org/docid/51af00184.html>, at 46, p. 13.

order” should be interpreted and applied restrictively, and only concern grave and exceptional circumstances.⁵⁰

39. The *travaux préparatoires* regarding Article 28, stressed that the word “compelling” was to be understood as a restriction upon the words “reasons of national security or public order”. Thus, not any grounds of national security or public order may be invoked but only *compelling* grounds.⁵¹ The exception must be interpreted narrowly, and not every case which would ordinarily fall under the latter concept would therefore justify a refusal of a travel document, but only reasons of a very serious character.⁵² Refusal of a CTD is only justified if the journey or journeys outside the country give rise to fear of endangering national security or public order, for example, if a refugee is suspected of using the journey outside the country for action connected with intelligence or contrary to the customs or currency regulations.⁵³
40. Furthermore, while acknowledging that Norway does not have obligations under EU’s primary and secondary law, in particular the EU Asylum acquis, EU legislation and jurisprudence sheds light on the way in which Article 28 has been construed and implemented by other State parties. Directive 2011/95/EU (recast) of the European Parliament and of the Council of 13 December 2011 (hereafter “Qualification Directive”)⁵⁴ [on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted] provides in Article 25 (travel document) that

“1. Member States shall issue to beneficiaries of refugee status travel documents, in the form set out in the Schedule to the Geneva Convention, for the purpose of travel outside their territory unless compelling reasons of national security or public order otherwise require.

2. Member States shall issue to beneficiaries of subsidiary protection status who are unable to obtain a national passport, documents which enable them to travel outside their territory, unless compelling reasons of national security or public order otherwise require.”

41. Article 25 of the Qualification Directive incorporates the same grounds for refusal as Article 28 of the 1951 Refugee Convention. It is also crucial to bear in mind that the provisions of the Qualification Directive are to be interpreted in light of Article 1 (the right to human dignity), Article 7 (the right to respect for private and family life) and Article 45 (the right to freedom of movement and of

⁵⁰ UNHCR, *Guide for Issuing Machine Readable Convention Travel Documents for Refugees and Stateless Persons*, jointly published by UNHCR and the ICAO, October 2013, para. 28, <http://www.refworld.org/docid/52b166a34.html>.

⁵¹ UNHCR, *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis*, 1990, p.194, <http://www.refworld.org/docid/53e1dd114.html>

⁵² UNHCR, *Note on Travel Documents for Refugees*, 30 August 1978, EC/SCP/10, <http://www.refworld.org/docid/3ae68cce14.html>, para. 16; see also Jens Vedsted-Hansen in Zimmerman, *A commentary*, p. 1206.

⁵³ UNHCR, *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis*, 1990, p.193, <http://www.refworld.org/docid/53e1dd114.html>.

⁵⁴ European Union: Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU, <http://www.refworld.org/docid/4f197df02.html>.

residence) of the Charter of Fundamental Rights of the European Union.⁵⁵ In this respect UNHCR underlines that the provisions of the Charter have the same “meaning and scope” to their *corresponding* ECHR rights according to Article 52(3) of the Charter.⁵⁶

42. The concept of “compelling grounds” has not been clarified by the CJEU in the context of Article 25. However, the Court has addressed the issue in the context of Article 24(1) of the Qualification Directive (headed “residence permits”) and clarified in *C-373/13, H. T. v Land Baden-Württemberg*⁵⁷ that the concept of ‘compelling reasons of national security or public order’ must be understood and interpreted in light of its previous case-law on the meaning of the concepts of “public security” and “public order” in Article 27 and 28 of the Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States Directive (hereafter “Citizenship Directive”)⁵⁸.
43. The CJEU has established in its settled case-law under the Citizenship Directive that “public security” pertains to the internal and external security of the Member State which may be affected by, inter alia: a threat to the functioning of the institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, a risk to military interests or organized drug-related crimes. Furthermore, in case *C-145/09 Tsakouridis*⁵⁹ the Court concluded that trafficking in narcotics as part of an organised group could reach a level of intensity that might directly threaten the calm and physical security of the population as a whole or a large part of it. The Court has also held, in that context, that the concept of “imperative grounds of public security” contained in Article 28(3) presupposes not only the existence of a threat to public security, but also that such a threat is of a particularly high degree of seriousness, as is reflected by the use of the words ‘imperative reasons’. Regarding the concept of “public order” contained in Directive 2004/38, in particular in Articles 27 and 28 thereof, the Court held that the concept “presupposes the existence of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, in addition to the perturbation of the social order which any infringement of the law involves”, cf. para 40 in *Byankov, C-249/11*.⁶⁰

⁵⁵ European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, <http://www.refworld.org/docid/3ae6b3b70.html>.

⁵⁶ Article 52(3) of the Charter: ‘In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.’

⁵⁷ *H. T. v Land Baden-Württemberg*, C-373/13, Court of Justice of the European Union, 24 June 2015, <http://www.refworld.org/docid/558bb4a04.html>.

⁵⁸ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, <http://data.europa.eu/eli/dir/2004/38/oj>.

⁵⁹ *Land of Baden-Württemberg v Panagiotis Tsakouridis*, C-145/09, European Union: Court of Justice of the European Union, 23 November 2010, <http://curia.europa.eu/juris/documents.jsf?num=C-145/09>.

⁶⁰ *Hristo Byankov v Glaven sekretar na Ministerstvo na vatreshnite raboti*, C 249/11, European Union: Court of Justice of the European Union, 4 October 2012, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-249/11>.

44. In *P.I. v Oberbürgermeisterin der Stadt Remscheid*, (case C-348/09)⁶¹ the CJEU interpreted the concept of “imperative grounds of public security”, cf. Article 28(3) and established that the concept covers a range of criminal offences referred to in Article 83(1) of the Treaty on the Functioning of the European Union (hereafter “TFEU”),⁶² namely offences amounting to “a particularly serious threat to one of the fundamental interests of society, which might pose a direct threat to the calm and physical security of the population” i.e. terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.
45. In light of its previous jurisprudence under Directive 2004/38, the CJEU concluded in *H.T. v Land Baden-Württemberg* that support provided by a refugee to a terrorist organisation falls within the scope of Article 24(1) in Directive 2004/83⁶³ thus justifying the revocation of the residence permit of a refugee. However, before revoking the refugee’s residence permit, the national authorities were obliged to undertake an individual assessment of the specific elements of the case i.e. considering the actions of the terrorist organisation, the involvement of the person concerned and the principle of proportionality.⁶⁴ The finding of the CJEU in *H.T. v Land Baden-Württemberg* supports UNHCR’s interpretation that only offences such as those enlisted in Article 83(1) of the TFEU may justify a State’s refusal to issue a CTD to a refugee and respect the principle of proportionality.
46. Although the judgment focuses on the concept of “compelling reasons of national security or public order” in Article 24(1) of the Qualification Directive, one must bear in mind that the residence permit of Article 24 is of the same nature as the travel document of Article 25 of the Qualification Directive i.e. it documents and provides for the administration of a pre-existing entitlement. Moreover, the exception in both provisions is worded in identical terms i.e. *compelling reasons of national security or public order*. This leads to the conclusion that the CJEU’s interpretation of article 24(1) in *H.T. v Land Baden-Württemberg* may also apply to Article 25 (travel document) of the Qualification Directive and implicitly cast light on the interpretation of Article 28 of the 1951 Convention.
47. UNHCR recalls that Section 64 of the Norwegian Immigration Act⁶⁵ incorporates Article 28 of the 1951 Convention and provides that refugees, upon application, shall be granted a CTD for travel outside Norway, provided no relevant reasons prohibit it. Moreover, as stated earlier, Section 3 of the Act requires its provisions to be applied in accordance with international provisions by which Norway is bound when these are intended to strengthen the position

⁶¹ *P.I. v Oberbürgermeisterin der Stadt Remscheid*, C-348/09, European Union: Court of Justice of the European Union, 22 May 2012, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-348/09>.

⁶² European Union, Consolidated version of the Treaty on the Functioning of the European Union, 26 October 2012, OJ L 326/47-326/390; 26.10.2012, <http://www.refworld.org/docid/52303e8d4.html>.

⁶³ European Union: Council of the European Union, Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, 30 September 2004, OJ L. 304/12-304/23; 30.9.2004, 2004/83/EC, <http://www.refworld.org/docid/4157e75e4.html>.

⁶⁴ See paras. 86-92 of *H. T. v Land Baden-Württemberg*, C-373/13, European Union: Court of Justice of the European Union, 24 June 2015, <http://www.refworld.org/docid/558bb4a04.html>.

⁶⁵ *Lov 15. mai 2008 nr. 35 om utlendingers adgang til riket og deres opphold her* (utlendingsloven), unofficial English translation, <https://www.regjeringen.no/en/dokumenter/immigration-act/id585772/>.

of the individual.⁶⁶ However, the Norwegian Immigration Regulations⁶⁷ provides for exceptions to Section 3 of the Immigration Act, according to which “travel documents ... may be refused where there is doubt about the foreign national’s identity.”⁶⁸

48. Recalling that international law takes precedence over national law, as noted above in para. 11, UNHCR submits that the exceptions in the Norwegian Immigration Regulations are inconsistent with international refugee and international human rights law. Further support for this view is found in the jurisprudence of the CJEU.

D. *Verifying the identity of a refugee*

49. There are various means to establish an applicant’s identity. For national passport applications, countries often require documentary evidence in order to establish identity and citizenship, for example, birth certificates. However, special procedures that take into account the particular legal and factual situation of refugees and stateless persons are needed for CTD applications. For instance, refugees and stateless persons may not be in possession of a birth certificate because they never obtained one, or because it was lost or left behind in the country of origin. Moreover, competent authorities must never contact the authorities of a refugee’s country of origin, including embassies and consulates, in order to obtain missing documentation or verify identity.⁶⁹
50. The 1951 Convention requires the receiving country to provide administrative assistance to refugees and stateless persons in such situations. Where documentary evidence is missing or weak, authorities may rely on the information obtained during status determination procedures and/or use additional mechanisms, for example, collection of biometrics, verification of “social footprint”, guarantor, references and interviews. It is for such reasons that it can be useful for one Government authority to have the combined responsibility for conducting status determination and determining CTD entitlement.⁷⁰
51. Here as well, EU asylum legislation may help inform the interpretation of the 1951 Convention. Article 4(5) of Directive 2011/95/EU provides that the identity of an asylum applicant should be taken at face-value if certain requirements are met, for example, the applicant having made a genuine effort to substantiate their application.

Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant’s statements are not supported by documentary or other evidence, those aspects *shall not need confirmation* when the following conditions are met:

⁶⁶ Original text in Norwegian: “Loven skal anvendes i samsvar med internasjonale regler som Norge er bundet av når disse har til formål å styrke individets stilling.”

⁶⁷ Forskrift 15. oktober 2009 nr. 1286 om utlendingers adgang til riket og deres opphold her (utlendingsforskriften), unofficial English translation, <https://www.regjeringen.no/globalassets/upload/id/dokumenter/forskrifter/immigration-regulations.pdf>.

⁶⁸ Original text in Norwegian: “Reisebevis etter lovens § 64 første ledd kan nektes utstedt når det er tvil om utlendingens identitet.”

⁶⁹ UNHCR, *Guide for Issuing Machine Readable Convention Travel Documents for Refugees and Stateless Persons*, jointly published by UNHCR and the ICAO, October 2013, para.26, <http://www.refworld.org/docid/52b166a34.html>.

⁷⁰ *Ibid.*

- a. the applicant has made a genuine effort to substantiate his application;
 - b. all relevant elements at the applicant's disposal have been submitted, and *a satisfactory explanation has been given regarding any lack of other relevant elements*;
 - c. the applicant's statements are found to be *coherent and plausible* and *do not run counter* to available specific and general information relevant to the applicant's case;
 - d. the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and
 - e. the general credibility of the applicant has been established.⁷¹
52. The refugees in the present case have each been granted refugee status by Norway. The UDI has found each of their statements to be coherent and plausible and that this in turn has informed the general credibility of the claim for international protection, resulting in the grant of refugee status. Norway should therefore issue identity and travel documents as any documentary or other evidence verifying identity does not need confirmation.

VI. Conclusions

a. Response to Question 1

53. Contracting States are obliged under international law, in particular the Refugee Convention and relevant international and regional human rights instruments, to issue a CTD to any refugee in their territory who does not possess a valid travel document.

b. Response to Question 2

54. Contracting States are obliged to issue CTDs to refugees who are lawfully staying in their territory, as long as "compelling reasons of national security and public order" do not require otherwise. The exceptions are to be interpreted in a restrictive manner.

c. Response to Question 3

55. The duty to issue identity papers in accordance with Article 27 is not subject to any exceptions. If the Contracting State declines to issue CTDs referring to the exceptions in Article 28, the state nonetheless remains obliged to issue identity papers in accordance with Article 27.

United Nations High Commissioner for Refugees

22 December 2016

⁷¹ Emphasis added.