



UNHCR

United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

UNHCR Regional Representation for Northern Europe provisional comments on the Draft Amendments to the Lithuanian Aliens Law (XIIP-2733)

I. Introduction

1. The UNHCR Regional Representation for Northern Europe (RRNE) appreciates the opportunity to present its provisional observations and recommendations relating to the Draft Law No **XIIP-2733** amending the Law on the Legal Status of Aliens (hereinafter – ‘Draft Amendments’). We understand that the Draft Amendments aim at introducing new requirements with regard to procedures for issuing and withdrawing residence permits as well as procedures for granting and withdrawing refugee status, subsidiary protection and temporary protection in cases involving an alleged threat to national security, public order and/or the community.
2. UNHCR has a direct interest in law proposals in the field of asylum, 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 refugees¹. 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 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 Relating to the Status of Refugees (‘1951 Refugee Convention’). Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status³ (‘UNHCR Handbook’) and subsequent Guidelines on International Protection⁴. This supervisory

¹ 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.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b3628> (“UNHCR Statute”).

² *Ibid.*, paragraph 8(a).

³ UN High Commissioner for Refugees (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/IP/4/ENG/REV. 3, available at:

<http://www.refworld.org/docid/4f33c8d92.html>.

⁴ UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 23 October 2012, HCR/GIP/12/01, available at: <http://www.refworld.org/docid/50348afc2.html>. Guidelines on International Protection No. 10: Claims to Refugee Status related to Military Service within the context of Article 1A (2) of

responsibility is reiterated in Article 35 of the 1951 Convention, and in Article II of the 1967 Protocol relating to the Status of Refugees.⁵

3. UNHCR's supervisory responsibility has also been reflected in European Union law, including by way of a general reference to the 1951 Convention in Article 78 (1) of the Treaty on the Functioning of the European Union, as well as in Declaration 17 to the Treaty of Amsterdam, which provides that "consultations shall be established with the United Nations High Commissioner for Refugees ... on matters relating to asylum policy". Secondary EU legislation also emphasizes the role of UNHCR. Hence, recital 22 of the recast Qualification Directive⁶ states that consultations with UNHCR "may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention".

II. Specific Observations

4. Article 1 of the Draft Amendments *inter alia* introduces new paragraphs 3 and 6 in Article 4 of the Aliens Law. The proposed paragraph 3 *inter alia* requires the Migration Department, i.e. the central asylum determining authority, upon the receipt of an application for asylum, to request the State Security Department, the Police Department and the State Border Guard Service to provide their conclusions as to whether the concerned person raises a threat to national security, public order or the community. The proposed provision further stipulates:

A residence permit in the Republic of Lithuania (refugee status, temporary or subsidiary protection) may be issued to a foreigner only if the State Security Department, the Police department [...] and the State Border Guard Service issue positive conclusions [with respect to the concerned foreigner].

5. Pursuant to the proposed paragraph 6 of Article 4, the Migration Department is required to take a decision within 14 days upon receipt of the conclusion adopted by the State Security Department, the Police Department and/or the State Border Guard Service, that a foreigner who has been granted asylum raises a threat to national security, public order or the community. The Migration Department is required to take the decision within 14 days provided the concerned foreigner has been given an opportunity to provide his/her views orally or in writing.

the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, 3 December 2013, HCR/GIP/13/10/Corr. 1, available at: <http://www.refworld.org/docid/529ee33b4.html>.

⁵ According to Article 35 (1) of the 1951 Convention, UNHCR has the "duty of supervising the application of the provisions of the 1951 Convention".

⁶ 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, available at: <http://www.refworld.org/docid/4f197df02.html>.

6. As far as exclusion from or revocation of refugee status is concerned, UNHCR, firstly, notes that the proposed provision essentially excludes from refugee status asylum applicants who allegedly raise a threat to national security, public order or the community. As regards references to a threat to national security or the community, the provisions partly follow Article 88 (1) (5) and Article 90 (1) (8) of the Aliens Law currently in force that provide, respectively, for exclusion from and revocation of refugee status where there are serious grounds to believe that the concerned person raises a threat to national security or has been recognised by an effective court judgement as guilty of the commissioning of a particularly serious crime and consequently presents a threat to the community.

7. Both provisions thereby tend to treat Article 33 (2) of the 1951 Convention (exceptions to the *non-refoulement* principle) as a basis for exclusion from or revocation of refugee status. In this respect, UNHCR - with reference to its previous comments to the Draft Law No XIIP – 1804⁷ - would like to reiterate that in the structure of the 1951 Convention, the exclusion clauses, set out in Article 1 F, and permissible exceptions to the principle of *non-refoulement*, set out in Article 33 (2), serve different purposes. The rationale of Article 1 F is to make clear that certain acts are so grave that they render their perpetrators undeserving of international protection, and to ensure that the refugee protection framework does not prevent serious criminals from facing justice. By contrast, Article 33 (2) defines the circumstances under which a refugee may be *refouled*, based on the fact that s/he is a danger to the national security of the asylum country or, **having been convicted by a final judgment of a particularly serious crime**, poses a danger to the community.⁸ Hence, while the 1951 Convention allows States Parties to return refugees falling within the scope of Article 33 (2) to their countries origin, this provision may not be used as a ground for exclusion from or revocation of refugee status. In this respect, it is indicative that Article 14 (4) and (5) of the recast Qualification Directive, which essentially mirrors the grounds in Article 33 (2) of the 1951 Convention, allows Member States *not to grant status to a refugee or revoke the status granted to a refugee*. It is UNHCR's understanding that these provisions refer to the asylum ("*status*") granted by the State rather than refugee status in the sense of Article 1A (2) of the 1951 Convention. This is, in particular, clear from Article 14 (6) of the recast Qualification Directive that requires Member States to ensure that persons to whom paragraphs 4 or 5 of Article 14 apply be entitled to the rights set out in Articles 3, 4, 16, 22, 31, 32 and 33

⁷ The United Nations High Commissioner for Refugees Initial Observations on the proposed Draft Law No XIIP - 1804 amending the Law on the Legal Status of Aliens in the Republic of Lithuania, Regional Representation for Northern Europe, 1 September 2014, para. 23, available at http://www.unhcr-northern-europe.org/fileadmin/user_upload/Documents/PDF/Lithuania/2014-Sep-Lit-observations-on-LTU-transposition-of-recast.pdf.

⁸ UN High Commissioner for Refugees (UNHCR), UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM(2009)551, 21 October 2009), 29 July 2010, page 14, available at: <http://www.refworld.org/docid/4c503db52.html>.

of the 1951 Convention (i.e. rights which do not require lawful residence) insofar as they are present in the Member State.

8. In a similar vein, public order considerations may never be used as a ground for exclusion from or revocation of refugee status. Instead, pursuant to Article 32 (1) and (3) of the 1951 Refugee Convention, when confronted with a threat to public order, States may expel the concerned refugee lawfully present on their territory, provided s/he has been given a reasonable period to seek legal admission into another country. The recast Qualification Directive follows the same approach. While Article 24 of the Directive allows Member States to refrain from issuing a residence permit to a beneficiary of refugee status where compelling reasons of public order so require, public order considerations do not appear either in Article 12 that lists *exclusion clauses* or Article 14 that deals with *revocation of, ending of or refusal to renew refugee status*. Hence, pursuant to international law and the EU asylum *acquis*, public order considerations may not be invoked as a ground for exclusion from or revocation of refugee status.
9. Furthermore, it appears from the proposed provisions that where the Police Department, the State Security Department or the State Border Guard Service conclude that the concerned person raises a threat to national security, public order and/or the community, the Migration Department (i.e. the determining asylum authority) has no choice but to reject the asylum application. This would place an immediate emphasis on the alleged threat to national security, public order or the community leaving no space for an examination of a vital issue of whether the concerned person if returned to his/her country of origin would face persecution or other form of serious harm such as torture, inhuman or degrading treatment or punishment.
10. Such an approach would be incompatible with international law. In particular, the case law of the European Court of Human Rights (ECtHR) clearly indicates that Article 13 of the European Convention of Human Rights (ECHR) does not permit a less rigorous scrutiny of an individual's claim that his or her removal would subject him or her to a risk of ill-treatment in cases involving national security or public order considerations. Hence, in *Chahal v. the United Kingdom*,⁹ the ECtHR held that the scrutiny of the claim must be carried out solely with reference to the question of the risk of ill-treatment upon removal, without regard to what the applicant may have done to warrant expulsion or to any perceived threat to the national security of the expelling State. According to the Court, the prohibition provided by Article 3 ECHR against ill-treatment is absolute, including in expulsion cases, meaning that "the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration."¹⁰
11. Moreover, with respect to the exclusion clauses set out in the recast Qualification Directive, the Court of Justice of the European Union (CJEU) clarified in joined cases *B*

⁹ *Chahal v. The United Kingdom*, 70/1995/576/662, Council of Europe: European Court of Human Rights, 15 November 1996, available at: <http://www.refworld.org/docid/3ae6b69920.html>. See also *Saadi v. Italy*, Appl. No. 37201/06, Council of Europe: European Court of Human Rights, 28 February 2008, available at: <http://www.refworld.org/docid/47c6882e2.html>.

¹⁰ *Ibid.* para. 81

and *D* that the competent authority of the Member State concerned cannot apply them “until it has undertaken, for each individual case, an assessment of the specific facts within its knowledge, with a view to determining whether there are serious reasons for considering that the acts committed by the person in question, who otherwise satisfies the conditions for refugee status, are covered by one of those exclusion clauses”[emphasis added].¹¹ It, therefore, appears that even in exclusion cases involving acts such as serious non-political crimes or acts contrary to the purposes and principles of the United Nations, the EU asylum *acquis*, as interpreted by the CJEU, requires to assess, in the first place, whether the concerned person falls within the scope of inclusion clauses, i.e. whether s/he, if returned to his or her country of origin, would face a risk of persecution for reasons specified in the 1951 Convention. This approach corresponds to UNHCR’s Guidelines on the application of the exclusion clauses in Article 1F of the 1951 Refugee Convention, which *inter alia* provide that inclusion should generally be considered before exclusion, and that exclusion decisions should in principle be dealt with in the context of the regular asylum procedure and not in accelerated procedures.¹²

12. The CJEU has further underlined that an application of the exclusion clauses presupposes “a full investigation into all the circumstances of each individual case”¹³ and that the exclusion from refugee status is “conditional on an individual assessment of the specific facts.”¹⁴ This assessment is an integral part of the examination of an application for international protection, and therefore needs to be undertaken by a determining authority, i.e. an authority which pursuant to Article 2 (f) of the recast Asylum Procedures Directive¹⁵ must be responsible for **examining applications for international protection and competent to take decisions at first instance** in such cases.

13. Furthermore, pursuant to Article 10 (3) (a) of the recast Asylum Procedures Directive, each and every application for international protection, including cases involving national security and public order considerations, needs to be carried out individually, objectively and impartially. Also, Article 32 (1) taken in conjunction with Article 31 (2) of the Directive makes it clear that a decision to reject the application for international protection may only be taken where, **following a complete examination of the application**, “the determining authority has established that the applicant does not qualify

¹¹ *Bundesrepublik Deutschland v. B and D*, C-57/09 and C-101/09, European Union: Court of Justice of the European Union, 9 November 2010, para. 87, available at: <http://www.refworld.org/docid/4cda83852.html>

¹² UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, HCR/GIP/03/05, para. 31, available at: <http://www.refworld.org/docid/3f5857684.html>.

¹³ *Supra* note 11, para. 93

¹⁴ *Supra* note 11, para. 94

¹⁵ European Union: Council of the European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, 29 June 2013, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU, available at: <http://www.refworld.org/docid/51d29b224.html>

for international protection pursuant to [the recast Qualification Directive] [*emphasis added*].”

14. It follows that in the context of the current legislative framework in Lithuania, it is the Migration Department who is responsible for examining applications for asylum and taking decisions, and must, therefore, have powers to decide whether to approve or reject an asylum claim. While submissions by other bodies may inform the examination of asylum applications, such opinions may not predetermine the decision of the determining asylum authority. In UNHCR’s view, the proposed provision, if approved, would create tension with the requirements outlined above, since it essentially requires the determining asylum authority to follow the conclusions of the State Security Department, the Police Department, and the State Border Guard Service.
15. In this respect, it is also important to underline that while Article 4 (2) (b) of the first generation Asylum Procedures Directive¹⁶ allowed for an exception to the principle of a single determining authority by providing that another authority may be responsible for the purposes of “*taking a decision on the application in the light of national security provisions, provided the determining authority is consulted prior to this decision as to whether the applicant qualifies as a refugee [emphasis added]*”, this provision was deleted by the Council and the European Parliament in line with the proposal by the European Commission, and, consequently, the recast Asylum Procedures Directive does not provide for such an exception.

UNHCR Recommendation:

UNHCR recommends (i) deleting references to international protection statuses in the proposed Article 4 (3) of the Aliens Law; (ii) deleting the proposed Article 4 (6) of the Aliens Law.

16. Article 2 of the Draft Amendments introduces a new paragraph 5 in Article 26 of the Aliens Law, that stipulates that a foreigner’s application for a residence permit may not be processed and the procedure for issuing a residence permit must be discontinued where it has been established that a foreigner is suspected or accused in committing a crime in a foreign state.
17. In UNHCR’s view this provision may lead to serious obstacles for some refugees and beneficiaries of subsidiary protection to obtain residence permits in Lithuania. Pursuant to Article 9 (2) (c) and (e) of the recast Qualification Directive, *prosecution or punishment which is disproportionate or discriminatory* as well as *prosecution or*

¹⁶ European Union: Council of the European Union, *Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, 2 January 2006, OJ L 326; 13 December 2005, pp. 13-34, available at: <http://www.refworld.org/docid/4394203c4.html>

punishment for refusal to perform military service in a conflict, where performing military service would include a war crime, a crime against peace, a crime against humanity, a serious non-political crime or an act contrary to the purposes and principles of the United Nations are acts of persecution. Where other requirements of the refugee definition are fulfilled, Article 13 and Article 24 (1) of the Directive impose a duty on Member States to grant refugee status and issue a residence permit to the concerned person. Similar considerations apply with respect to a beneficiary of subsidiary protection who faces a risk of torture, inhuman or degrading treatment or punishment in relation to a pre-trial investigation or punishment in his/her country of origin. Article 24 (1) and (2) of the recast Qualification Directive allows Member States to refrain from issuing a residence permit to a person who has been granted refugee status or subsidiary protection status only where “compelling reasons of national security or public order” so require. The proposed wording may, therefore, lead to a situation whereby a person who has feared persecution in the form of a pre-trial investigation or criminal sanction which is either *disproportionate or discriminatory* would be denied a residence permit based on the fact that s/he is formally suspected or accused of committing a crime in his/her country of origin. Relevant examples would *inter alia* include cases of political activists prosecuted for political reasons. The same consideration applies to cases of refugees who fear prosecution or punishment in the country of origin because of their *refusal to perform military service in a conflict, where performing military service would inter alia require the commission of crimes against peace, such as aggression, war crimes or crimes against humanity*. In UNHCR’s view, the refusal to issue a residence permit in cases outlined above would not be compatible with the requirements of the recast Qualification Directive.

UNHCR Recommendation:

UNHCR recommends inserting the following line in the proposed Article 26 (5) of the Aliens Law:

“This provision shall not apply to a foreigner who has been granted refugee status or subsidiary protection in the Republic of Lithuania.”

UNHCR Regional Representation for Northern Europe

Stockholm, 26 May 2015

