

Executive Summary of the UNHCR Comments on the Bill for partial amendments to the Immigration Control and Refugee Recognition Act (ICRRA) submitted to the 204th Diet session, 9 April 2021

- UNHCR participated as an observer in the Sub-Committee on Detention and Deportation (SCDD) under the 7th Immigration Policy Discussion Panel whose report formed the basis of the abovementioned Bill.
- UNHCR **acknowledges** the **challenges** the Immigration Services Agency (ISA) faces in relation to how to address the issues of abuse or misuse of the asylum system while ensuring to protect persons in need of international protection which are common around the world. UNHCR **commends ISA's continuous efforts** to address them.
- While several parts of the Bill are expected to strengthen the protection of asylum-seekers/refugees, there are however **a number of aspects** that raise **very serious concerns**.
- **UNHCR** stands ready to continue to support **ISA** and Japan in efforts to ensure a fair, transparent and effective asylum law and system that reflect international refugee law standards and help Japan to meet its international obligations.

1. UNHCR welcomes (parts of) the following proposed amendments:

- 1-1. Improvements on the rights of refugees:** The Bill abolishes the existing requirements for a recognized refugee to obtain legal status as a “long-term resident,” which are (i) filing applications within 6 months from arrivals in Japan and (ii) entering Japan “directly” from a territory where one would be persecuted under Article 61-2-2(1)(i)-(ii) of the current ICRRA. The automatic granting of legal status as a “long-term resident” extends to persons to be granted complementary protection as well (Article 61-2-2(1) of the Bill). The Amendment Bill extends the Convention travel document validity from 1 to 5 years (Article 61-2-15(3)). The Bill also facilitates the permanent residency for certain refugees by exempting them of certain requirements (Article 22(2)).
- 1-2. Stronger regulation on the treatment of detainees:** The Bill now regulates the treatment of detainees (which used to be governed by the Ministry of Justice Ordinance) and contains new provisions aimed at **improving detention conditions**, including the provision of support for intellectual, educational and recreational activities (for example Article 55-5), while **further improvements** including ensuring access to information/psychological counselling are desirable.
- 1-3. Strengthened rights of asylum-seekers granted Provisional Permission to Stay (PPS):** The **ability to acquire residency status** (Article 61-2-5) and **work permit** (Article 61-2-7(2)). PPS, however, was only granted to 3% (25/733) of those considered for it in 2019 – see 3-4 below on the proposed improvements.
- 1-4. Introduction of the concept of “complementary protection”** (Article 2(iii)2): UNHCR welcomes the adoption of the term “complementary protection,” which is the concept that conveys Japan’s **obligation** towards persons who do not fall within the refugee definition under the 1951 Convention relating to the Status

of Refugees (1951 Convention) but nevertheless need international **protection**. However, see also 3-2 below on UNHCR's concerns on its criteria.

1-5. Introduction of the right to apply for regularization (Special Permission to Stay) (Article 50):

Establishing migration/legalization channels likely helps address the issues of the abuse or misuse of the asylum procedure. However, see also 3-5 below.

2. UNHCR has serious concerns regarding the exceptional lifting of suspensive effect of asylum applications on deportation.

➤ **Summary: UNHCR understands that** Article 61-2-9(4)(i) and (ii) of the Bill proposes lifting of the suspensive effect of asylum applications on deportation, respectively for (i) **subsequent asylum applicants** (third time or more) who have not submitted “**material constituting reasonable grounds,**” and (ii) those who have been sentenced to **three years or more of imprisonment** without a stay of execution in Japan and those that are determined as being **suspected possibly** to be or become involved in or **facilitating** terrorism, or violent, subversive or other similar activities. What concerns UNHCR the most is that item (ii) is applicable to persons *applying for asylum for the first time pending the first RSD interview at the first instance*. Further, item (ii) covers a **broad range of activities**, and its applicability is determined through the examination within ISA.

➤ **UNHCR recommendations:**

<**Fundamental recommendations**>

- (i) **The UNHCR's position on lifting of automatic suspensive effect** while pending the final asylum decisions is that it is **undesirable** as it **increases the possibility of refoulement**. UNHCR thus considers that *insertion of the exceptions i.e. Article 61-2-9(4)(i)(ii) is undesirable*.
- (ii) Rather than devoting limited resources to legislate and implement any exceptions to the currently-automatic suspensive effect, it is necessary and effective to invest resources instead in further efforts to ensure a fair and efficient RSD system, including by **fully implementing the Recommendations of the Sub-Committee on the RSD System** in December 2014. UNHCR considers that those measures are also crucial to **fundamentally address** the issues of abuse and misuse of the RSD system. UNHCR appreciates the GoJ's continuous efforts, including those for strengthening its Country of Origin Information (COI) and training schemes, and stands ready to continue to support it.
- (iii) **If** exceptions were still to be made, they must be limited to truly exceptional cases, and **procedural safeguards** must remain in place for such cases, including, specifically, an **effective** remedy enabling the individuals concerned to appeal against the **decisions to lift the suspensive effect** (or decisions that lead to such consequences) and the right to apply for the suspension of deportation pending appeal decisions.
- (iv) Further, Section IV.1(4) [2] of the SCDD Recommendation also states “(...) care should be taken to

ensure that third party check on the appropriateness of administrative decisions, with a view to guaranteeing due process.” Such a mechanism to ensure both quality and efficiency of the RSD will be effective. *Moreover, if it were decided to introduce any exceptions to the suspensive effect, it is important that their implementation is also subject to the third-party check.*

<On persons with criminal record/profile including first-time applicants>

- (v) *Suspensive effect **must not be lifted for first-time applicants during first instance examination and appeal instances** for the sole reason that they have a certain criminal record or that they may possibly be or become involved in terrorism or violent or subversive activities.* While UNHCR shares the Government’s legitimate concerns over national security, **security and refugee protection are compatible** if the 1951 Convention are properly applied (non-inclusion under Article 1A (2), exclusion from recognition as refugees for those for whom there are serious reasons for considering that they have committed certain serious crimes under Article 1F or exceptions to non-refoulement under Article 33 (2)). A refugee who has committed a serious crime in the country of asylum is certainly subject to due process of law of that country.
- (vi) Exceptions to the principle of non-refoulement under Article 33(2) of the 1951 Convention where a refugee is considered to be **a danger to the security of the country of asylum** or (after **having been convicted** by final judgment of a **particularly serious crime**), to the community of that country are, however, intended to **apply to a person who has been recognized as a refugee**. Further, **deportation** through the application of Article 33(2) **must be the last possible way to eliminate or alleviate the danger** and **its application must be proportionate** which means that deportation is permitted only when **the future danger** posed by the refugee concerned **to the country/community outweighs the risk** faced by the refugee concerned upon return. The **right to have his/her eligibility for refugee status fully assessed against the refugee definition** under the 1951 Convention, including through a **personal RSD interview** and appeal examination must first of all be secured.
- (vii) UNHCR thus **proposes that Article 61-2-9(4)(ii) referring to persons with criminal record/profile be deleted from the exception clauses concerning the suspensive effect**. Instead, persons who pose security concerns should be assessed fully but **expeditiously** by qualified RSD officers with necessary expertise, which UNHCR is ready to assist the GoJ with.

<On subsequent (three times or more) applicants without “material constituting reasonable grounds for protection”>

- (viii) UNHCR’s position is that the **lifting of the automatic suspensive effect** pending the final decisions is **undesirable** as stated above in (i). However, adopting an accelerated procedure or **admissibility examination** for subsequent applications to decide whether there are elements to justify re-examination of the merits of their claims itself might be a useful efficiency measure. This is however on the conditions including that such subsequent applications have been submitted after having been **properly** examined

on their merits and finally rejected, and that the criteria for such admissibility examination are appropriately established/applied, with procedural safeguards including an effective remedy guaranteed.

- (ix) *If the lifting of automatic suspensive effect is still to be introduced, UNHCR recommends that Article 61-2-9(4)(i) provides for a **reasonable time limit** for the submission of the “material constituting reasonable grounds” for protection and for a period of time until the ISA is to determine whether the submitted materials constitute “reasonable grounds” for protection, along with the provision that **any determination to lift the suspensive effect or not may only be made following the passage of the above periods of time.***
- (x) To ensure an effective remedy in (iii) above, an ISA’s decision that the “material constituting reasonable grounds” for protection has **not** been submitted (and thus the exception to the suspensive effect is to be applied) should be **considered to constitute an administrative disposition, which should be explicitly informed to the individual concerned and be subject to an administrative appeal** under the Administrative Complaint Review Act during which the asylum-seeker concerned is guaranteed the possibility to apply for suspensive effect.
- (xi) *If asylum-seekers’ right to administrative appeal is not made available by law, it is crucial that their access to judicial review is ensured. Specifically, UNHCR recommends **that Article 52-8 (Plan on Deportation) be modified to add ISA’s obligation to inform the individual concerned about the non-grant of suspensive effect, as well as its plan such as the timing of deportation.** Further, it is recommended to establish within ICRRRA the provision that **deportation would not be executed during the period allowed for the person to prepare for and file a litigation** if he or she wishes to pursue it (to cancel the rejection of refugee status or complementary protection, or the deportation order on the grounds of such refugee claim) under the Administrative Case Litigation Act. While not within the scope of the ICRRRA amendments, it is also important that consideration be given to the amendment to the Comprehensive Legal Support Act, which currently excludes persons without legal status from its beneficiaries, and that measures be taken to **facilitate access to legal representation.***

3. UNHCR has concerns on the following and recommends:

3-1. Imposition of penalties for (i) not leaving despite a deportation order and (ii) not applying for a passport etc. (Article 55-2(1) and Article 72(viii), Article 52(12) and Article 72(vi)): Criminalization of irregular migration always exceeds the legitimate interests of States according to the UN Working Group on Arbitrary Detention. UNHCR recommends that, at least, **all asylum-seekers and stateless persons be explicitly exempted** from the newly proposed **orders and penalties** (imprisonment with work for not more than 1 year and/or a fine).

3-2. Criteria for “complementary protection”: The proposed wording does not reflect that used under international and regional refugee/human rights law. It is thus desirable that the wording be modified to

ensure the fulfillment of **all of the GoJ's non-refoulement obligations under international human rights law**, including CAT and ICCPR.

- 3-3. Need to establish the maximum period of detention and to secure prompt and periodic review of decisions to (continue to) detain by an independent judicial body:** Although the Bill does not cover these aspects, to introduce them in accordance with recommendations from UN human rights mechanisms.
- 3-4. “Monitoring measures” and the need to further utilize existing ATDs:** It is desirable that measures be taken to secure the means of livelihood of the persons concerned, including by providing **State-funded assistance if the right to work** is not granted. It is appropriate to address the issue of abscondment by proper case-management and other measures rather than the imposition of imprisonment and/or a fine; The **imposition of** reporting requirements and administrative fine for non-compliance on “monitors” is hoped to be reconsidered, as has been pointed out by legal professionals and civil society organizations that it may lead to possible conflict of interest/difficulties in nurturing trustful relationship and could hinder successful implementation of the system; In addition, it is hoped that PPS be granted to a wider range of individuals, including by abolishing some of its criteria (such as having applied for RSD within six months of landing and not having been issued with a deportation order), and that landing permission for temporary refuge be granted in a more flexible manner.
- 3.5. Special Permission to Stay (regularization measure):** As an organization mandated by UN General Assembly to address statelessness around the world, UNHCR recommends GoJ to consider establishing a statelessness determination procedure so that stateless persons would be protected with residency status granted. Especially in the absence of such a procedure, GoJ may wish to consider extending the right to apply for SPS to persons who have already been issued with a deportation order. UNHCR further would recommend **statelessness** be included as **elements for positive consideration**.