

UNHCR Observations on the proposed amendments [Law proposal 16/2391] to Act No. 19 of 1997 (the National Insurance Act)¹ and Regulations, Act No. 41 of 26 June 1998 concerning Cash Benefit for Parents with Small Children² and the Law on supplementary benefit for persons who have only lived a short period in Norway³

[Høring 16/2391 om forslag til endringer i trygderegelverket i lys av asylsøkersituasjonen]

I. Introduction

1. The UNHCR Regional Representation for Northern Europe (hereafter “RRNE”) is grateful to the Ministry of Labour and Social Affairs and the Ministry of Children and Equality for the invitation to submit its observations on the law proposal 16/2391 amending social security legislation (hereafter the “Proposal”).
2. UNHCR has a direct interest in law proposals in the field of asylum and refugee integration as the agency entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with governments, to seek permanent solutions to the problems of refugees.⁴ 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 [.]”⁵ UNHCR’s supervisory responsibility is reiterated in Article 35 of the 1951 Convention and in Article II of the 1967 Protocol relating to the Status of Refugees (hereafter

¹ National Insurance Act (Lov om folketrygd) available at: <https://lovdata.no/dokument/NL/lov>.

² Cash benefit act (Lov om kontantstøtte til småbarnsforeldre) available at: <https://lovdata.no/dokument/NL/lov/1998-06-26-41>.

³ Law on supplementary benefit (Lov om supplerande stønad til personar med kort butid i Noreg): <https://lovdata.no/dokument/NL/lov/2005-04-29-21>.

⁴ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), available at: <http://www.refworld.org/docid/3ae6b3628.html> (“UNHCR Statute”).

⁵ *Ibid.*, para. 8(a).

collectively referred to as the “1951 Convention”).⁶ It 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 (hereafter “TFEU”).⁷

3. 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. Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and subsequent Guidelines on International Protection.⁸ UNHCR also fulfils its supervisory responsibility by providing comments on legislative and policy proposals impacting on the protection and durable solutions of its persons of concern.

II. The Proposal

4. The Proposal was made by the Ministry of Labour and Social Affairs and the Ministry of Children and Equality to follow up on the asylum agreement between several political parties and the recommendations made by the Parliament in its Prop. 1 S Appendix 1 (2015-2016).⁹ The Parliament underlined in its recommendations the need to (re)consider a number of issues related to social security rights of asylum-seekers and refugees, and to ensure that the benefits afforded by Norway to asylum-seekers and refugees are not at a level which makes Norway more economically attractive compared to other European countries. UNHCR understands that the amendments will apply *inter alia* to any person that have been granted a residence permit in Norway or who has acquired Norwegian citizenship, thus also refugees.
5. The primary purpose of the Proposal is to revise the existing welfare benefits and social security schemes and design a new welfare regime which can properly deal with/manage both the high number of asylum-seekers already in Norway, but also future situations where extraordinary numbers of asylum seekers are arriving in Norway. Although one of the stated objectives is to increase the refugees’ motivation to participate in the labour market, the Government also emphasises and estimates that the law changes will lead to savings of about 5,6 billion Norwegian kroner per year.
6. UNHCR understands that the proposed amendments intend to limit refugees’ access to core social security entitlements by revoking existing favorable law provisions exempting refugees from strict eligibility requirements, and introducing

⁶ According to Article 35 (1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of the 1951 Convention”.

⁷ European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, OJ C 115/47 of 9.05.2008, available at: <http://www.unhcr.org/refworld/docid/4b17a07e2.html>.

⁸ 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, available at: <http://www.refworld.org/docid/4f33c8d92.html>.

⁹ Prop. 1 S Appendix 1 (2015-2016), available at: <https://www.regjeringen.no/contentassets/ec5b195e093f4e3da6b87e6fd54dd0f1/no/pdfs/prp201520160001t01dddpdfs.pdf>.

stringent residency requirements in order for refugees to be eligible for such social entitlements. The Proposal seeks *inter alia* to introduce the following changes:

- i. revoke relevant provisions of the National Insurance Act on regular age pensions or disability pensions which apply to refugees and introduce a new pension scheme of means-tested benefits which will fall outside the national insurance system and introduce a five-year residency requirement before refugees are entitled/eligible to claim pension in Norway;
- ii. introduce a five-year residency requirement before refugees are eligible to receive cash benefits as parents with small children;
- iii. revoke relevant provisions on work assessment allowance¹⁰ and other related benefits.

III. General Observations

7. UNHCR is concerned that the Government of Norway is proposing to introduce changes to a number of laws aimed at restricting the social security benefits of refugees. UNHCR considers that the proposed changes will, in practice, mean that refugees will be placed in a situation whereby their allowances during their first years in Norway will be substantially lowered compared to the social security benefits that they are eligible for today. In UNHCR's view, the Proposal will negatively impact upon refugee integration in Norway and risk further marginalizing refugees in the Norwegian society. As noted by Eide in the context of commenting on Article 24 of the 1951 Convention (see further below):

“Asylum-seekers, refugees and displaced persons do not have the same opportunities as others to achieve an adequate standard of living on the basis of their own efforts. They therefore require, to a larger extent than the ordinary public, direct provisions, until conditions are established in which they can obtain their own entitlements.”¹¹

8. UNHCR further considers it regrettable that the Government finds that there is a need to review the Norwegian welfare benefits and social security schemes due to the high number of arrivals in 2015, especially having in mind the very low number of arrivals between January-September 2016, when only 2,526 asylum-seekers applied for asylum in Norway. UNHCR also regrets that the stated background for the Proposal is to ensure that the benefits afforded by Norway to asylum-seekers and refugees are not at a level which makes Norway more economically attractive to asylum-seekers and refugees compared to other European countries. In UNHCR's view, the proposed legislative amendments will not only impact negatively on integration for refugees, the Proposal will also send a negative signal to other European countries, whom UNHCR also calls upon to preserve asylum

¹⁰ A work assessment allowance allows persons to have an income in periods during which you are ill or injured and need assistance from the Norwegian Labour and Welfare Administration (NAV) to return to work.

¹¹ A. Eide, The Right to an Adequate Standard of Living Including the Right to Food” in Economic, Social and Cultural Rights: A Textbook, pp. 133–148, quoted in E. Lester, 'Article 24', in A. Zimmerman (ed.), *Commentary of the 1951 Convention relating to the Status of Refugees*, Oxford University Press, 2011, p. 1049, at 19.

space consistent with obligations under international refugee and human rights law. UNHCR therefore appeals to the Government of Norway to reconsider its intention to restrict the national asylum space and to instead lead by example in upholding the European Union founding principles of human rights, democratic values and international solidarity.

IV. Norway's international obligations pertaining to social rights

9. Norway is bound by its obligations as a State party to the 1951 Convention and other relevant international human rights instruments protecting *inter alia* the rights of beneficiaries of international protection (hereafter referred to as “refugees”¹²). UNHCR wishes to recall that the Vienna Convention on the Law of Treaties¹³ (hereafter “VCLT”) offers guidance concerning the interpretation of international treaties. Articles 26 and 31 of the VCLT explicitly outline that the obligations under a treaty must be performed by the parties “in good faith” and “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.
10. In this regard, UNHCR would like to refer to the concept of “progressive realization” of social and economic rights,¹⁴ which is a key aspect of the obligations of States according to international human rights treaties. At the core of this concept is the obligation to take appropriate measures towards the full realization of economic, social and cultural rights to the maximum of States’ available resources. The UN Committee on Economic, Social and Cultural Rights has noted in its General Comment on the Right to Social Security that:

“If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant, in the context of the full use of the maximum available resources of the State party.”¹⁵

¹² The Proposal covers 1951 Convention refugees according to Section 28 1 (a) and others in need of international protection, such as persons at risk of ill-treatment contrary to Article 3 ECHR, in accordance with Section 28 1(b) of the Norwegian Immigration Act.

¹³ United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <http://www.refworld.org/docid/3ae6b3a10.html>.

¹⁴ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html>, Article 2.1.

¹⁵ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 19: The right to social security (Art. 9 of the Covenant)*, 4 February 2008, E/C.12/GC/19, available at: <http://www.refworld.org/docid/47b17b5b39c.html>, para. 42. See also, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23, available at: <http://www.refworld.org/docid/4538838e10.html>, which notes that “the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.” para. 9.

11. The UNHCR Executive Committee (hereafter “ExCom”), of which Norway is a member, has also referred to the progressive realization of rights and affirmed “the particular importance of the legal dimension of integration, which entails the host State granting refugees a secure legal status and a progressively wider range of rights and entitlements that are broadly commensurate with those enjoyed by its citizens and, over time, the possibility of naturalizing”.¹⁶ In UNHCR’s view, the Proposal will facilitate a “retrogression” rather than a progressive realization of rights, as it intends to lower the standards of the current entitlements for refugees.
12. Relevant provisions in the 1951 Convention concerning social security for refugees are found in Article 23 (Public Relief) and Article 24 (Labour Legislation and Social Security). The interpretation and application of these complementary provisions must be consistent with the protective and rights-based object and purpose of the 1951 Convention. Article 23 provides that “The Contracting States shall accord to refugees lawfully staying in their territory the **same treatment** with respect to public relief and assistance as is accorded to their nationals” [emphasis added]. The Drafting Committee of the 1951 Convention noted in the *Travaux préparatoires* specifically with regard to this provision, that “refugees should not be required to meet any conditions of local residence or affiliation which may be required of nationals”.¹⁷ Both provisions use the language “shall accord”, which denotes an obligation that is mandatory in nature, rather than discretionary or recommendatory.¹⁸
13. Article 24(1)(b)(i) of the 1951 Convention provides that refugees lawfully staying in the territory of a State party shall be accorded the same treatment as its own nationals with regard to social security, including unemployment, old age and family responsibilities.¹⁹ This right may be limited in situations where part of the social benefit would ordinarily be paid by another country, for example, where the entitlement has been accrued in the country of origin or another third country; however, access to such benefits from the country of origin or a third country needs to be a reality, and not merely theoretical. It is more likely the case that refugees will not be in a position to make contact with their own countries in order to access such benefits and nor can they be required to do so given their particular circumstances as refugees (Article 6).²⁰

¹⁶ UNHCR, *Conclusion on Local Integration*, 7 October 2005, No. 104 (LVI) - 2005, available at: <http://www.refworld.org/docid/4357a91b2.html>.

¹⁷ UNHCR, *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis*, 1990, available at: <http://www.refworld.org/docid/53e1dd114.html>. The drafters of the 1951 Convention intended for Article 23 to fill gaps where social security provisions may be inadequate and for Articles 20, 23 and 24 combined, to form a comprehensive framework for welfare assistance for many refugees.

¹⁸ *Supra*, E. Lester, Article 23, *Commentary of the 1951 Convention relating to the Status of Refugees*, p. 1050, at 26.

¹⁹ See the UNHCR comments in relation to a previous, similar proposal, *UNHCR's Observations on the proposed amendments to the Danish law on social pension*, December 2010.

²⁰ Article 6 of the 1951 Convention provides that “For the purposes of this Convention, the term ‘in the same circumstances’ implies that any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, with the exception of requirements which by their nature a refugee is incapable of fulfilling.”

14. Article 24(1)(b)(ii) further provides that special arrangements may be prescribed for benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfill the contribution conditions prescribed for the award of a normal benefit. While this provision allows for very limited exceptions to the general rule that refugees shall enjoy the same treatment as nationals with respect to social security, “it does not absolve States of the responsibility of ensuring that special arrangements are made to cover those refugees whose situation cannot be adequately covered by the usual arrangements that are in place for nationals generally”²¹ and that those arrangements are in line with international human rights law (see further below). Refugees may under Article 24 receive less than a national in very specific circumstances and properly justified, however, this provision does not mean that States can deny pension and other social security benefits to refugees altogether.²² Safeguards against creating an underclass of older persons or other refugees would need to be taken.
15. Obligations under the 1951 Convention thus require the granting of pension and/or social security benefits in cases where refugees may not have had the opportunity to contribute to the relevant benefit schemes, *inter alia*, due to their short period of residence in the country of asylum or, for example, because of disability or age. This takes into consideration that, in many instances, refugees will be in an unfair and disadvantaged situation, as they generally cannot claim the pension and/or social security benefits towards which they may have contributed in their country of origin. As an exception to the general rule that refugees shall be accorded the same treatment as nationals in relation to social security (Article 24), the exceptions are to be applied only with proper justification, must not amount to discrimination in purpose or effect and cannot be applied as a penalty (Article 31(1)).
16. A similar right to that of Article 24(1) is set out in Article 9 of the International Covenant on Economic, Social and Cultural Rights (hereafter “ICESCR”),²³ which recognizes “the right of everyone to social security, including social insurance”. The rights of refugees to social security benefits are also enshrined in Articles 10, 11 and 12 of the ICESCR.
17. The principle of non-discrimination is enshrined in all major international and regional human rights treaties, including the ICESCR, and prohibits discrimination in the enjoyment of Convention rights, including on the basis of national and social origin. The UN Committee on Economic, Social and Cultural Rights has in its General Comment on the Right to Social Security stated that:

“The Covenant ... [p]rohibits any discrimination, whether in law or in fact, **whether direct or indirect**,²⁴ on the grounds of race, colour, sex, age,

²¹ *Supra*, E. Lester, Article 24, Commentary of the 1951 Convention relating to the Status of Refugees, p. 1073, at 44.

²² Grahl Madsen, *Commentary of the Refugee Convention 1951 (Articles 2-11, 13-37)*, October 1997, available at: <http://www.unhcr.org/refworld/docid/4785ee9d2.html>, Article 24, para. 8.

²³ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, available at: <http://www.refworld.org/docid/3ae6b36c0.html>, p. 3.

²⁴ Indirect discrimination refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of

language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation, and civil, political, social or other status, which has the intention **or effect of nullifying or impairing the equal enjoyment or exercise of the right to social security.**"²⁵ [emphasis added]

With regard to refugees and other vulnerable groups, the Committee has specifically stated that:

"Refugees, stateless persons and asylum-seekers, and other disadvantaged and marginalized individuals and groups, should enjoy equal treatment in access to non-contributory social security schemes, including reasonable access to health care and family support, consistent with international standards."²⁶

18. In respect of the adequacy of benefits, the Committee has noted that:

"Benefits, whether in cash or in kind, must be adequate in amount and duration in order that everyone may realize his or her rights to family protection and assistance, an adequate standard of living and adequate access to health care, as contained in articles 10, 11 and 12 of the Covenant. States parties must also pay full respect to the principle of human dignity contained in the preamble of the Covenant, and the principle of non-discrimination, so as to avoid any adverse effect on the levels of benefits and the form in which they are provided."²⁷

19. Furthermore, while acknowledging that Norway does not have obligations under EU's primary and secondary law, in particular the EU Asylum *acquis*, EU practice is instructive. The European Union Qualification Directive²⁸ provides in Article 29 that refugees have the right to "the necessary social assistance as provided to nationals". The provisions of the Qualification Directive are to be interpreted in light of Article 34 of the Charter of Fundamental Rights of the European Union²⁹ (which guarantees a right to social security and social assistance for everyone residing legally, including refugees, within the EU in order to combat social exclusion and

discrimination. For instance, requiring a birth registration certificate for school enrolment may discriminate against ethnic minorities or non-nationals who do not possess, or have been denied, such certificates. See UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, available at: <http://www.refworld.org/docid/4a60961f2.html>, para. 10 (b).

²⁵ Supra, General Comment No. 19: The right to social security (Art. 9 of the Covenant), para. 29.

²⁶ *Ibid.*, para. 38.

²⁷ *Ibid.*, para. 22.

²⁸ 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>.

²⁹ Charter of Fundamental Rights of the European Union, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=3ae6b3b70&skip=0&query=charter%20fundamental%20rights>

poverty and to secure a decent existence for all those who lack sufficient resources) and Article 21 (non-discrimination) of the same Charter.

20. In addition, Article 16 of the European Social Charter (hereafter “ESC”)³⁰ outlines that States undertake to promote the economic and social protection of family life by such means as social and family benefits, amongst other appropriate means, while Article 23 refers to States having agreed to design measures to enable the elderly to lead a decent life.³¹ The rights enumerated in the ESC extend to refugees, as does the European Convention on Social Security.³²
21. Moreover, the principle of non-discrimination is guaranteed in Article 14 (non-discrimination) of the European Convention on Human Rights (hereafter “ECHR”)³³ and Article 21 of the Charter of Fundamental Rights of the European Union. For instance, in a judgment from the European Court of Human Rights (hereafter “ECtHR”), *Thlimmenos v. Greece*, the Grand Chamber underlined that “the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention [the European Convention on Human Rights] is also violated when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.”³⁴
22. Although the ECHR does not contain any express provisions on the right to social security and social assistance, such rights fall within the scope of the ECHR. The ECtHR has discussed the right to social security and social assistance *inter alia* in the context of Article 1 of Protocol 1 (the right to property) taken in conjunction with Article 14, Article 8 (the right to respect for private life and family life) taken together with Article 14 and Article 3 (prohibition of torture) as further presented below.
23. To illustrate, the ECtHR concluded in *Wessels-Bergervoet v. the Netherlands*, no 34462/97³⁵ that the applicant's rights to a pension under the Dutch General Old Age Pensions Act could be regarded as “possession” within the meaning of Article 1 of Protocol No. 1 and that, consequently, Article 14 of the Convention was applicable. In *Willis v the United Kingdom* (2002)³⁶ the ECtHR held that the right to a widow's payment and a widowed mother's allowance – in so far as provided for in the applicable legislation – is a sufficiently pecuniary right to fall within the ambit of Article 1 of Protocol No. 1, while refusals to grant family allowances may result in violations of the right to respect for private life and family life (Article 8) and the non-

³⁰ European Social Charter, available at: <http://www.refworld.org/pdfid/3ae6b3678.pdf>.

³¹ Council of Europe, *European Social Charter (Revised)*, 3 May 1996, ETS 163, available at: <http://www.unhcr.org/refworld/docid/3ae6b3678.html>.

³² Appendix, 2; Council of Europe, *European Convention on Social Security*, 14 December 1972, ETS 78, available at: <http://www.unhcr.org/refworld/docid/3ae6b367c.html>, Art. 4.1.

³³ European Convention for the protection of Human Rights and Fundamental Freedoms, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=3ae6b3b04&skip=0&query=European%20convention%20on%20human%20rights>.

³⁴ *Thlimmenos c. Grèce*, Application no. 34369/97, Council of Europe: European Court of Human Rights, 6 April 2000, available at: <http://www.unhcr.org/refworld/docid/4a3a3af70.html>, para. 44.

³⁵ *Wessels-Bergervoet v. the Netherlands*, no 34462/97, 4 June 2002, available at: <http://hudoc.echr.coe.int/eng?i=001-60493>.

³⁶ *Willis v The United Kingdom*, Case Reports, no. 36042/97, 11 June 2002, available at: <http://hudoc.echr.coe.int/eng?i=001-60499>.

discrimination principle (Article 14). Moreover, in *Stec and others v. the United Kingdom*³⁷, the ECtHR held that if a State decides to enact legislation providing for the payment of right of a welfare benefit or pension - whether conditional or not on the prior payment of contributions - that legislation had to be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 and must be applied in a manner which is compliant with Article 14 of the Convention.

24. UNHCR thus regrets that the Proposal only to a very limited extent assesses whether the proposed amendments are consistent with Norway's human rights and refugee law obligations, including under the ECHR.

V. Specific observations

Pension benefits [regular age pensions and disability pensions]

25. The current legislation regulating old-age and disability pensions ensures that all refugees in Norway are eligible for a regular age pension or a disability pension from the date of being granted refugee status. Sections 12 (*uføretryg*), 19 (*alderspension*) and 20 (*garantipensjon*) of the Norwegian National Insurance Act contain express provisions which apply in cases concerning refugees with disabilities or refugees over the age of 67. In order to be entitled to a full basic age pension in Norway, one must have 40 years of insurance time (*trygdetid*) in the national insurance scheme in order to qualify for such pensions. However, refugees are exempted from the 40 years qualifying period. This means that all refugees in Norway are eligible at present for a regular age pension or disability pension, from the date of being granted refugee status if all other requirements are met according to the above-mentioned provisions. In addition, the current legislation also exempts refugees from the requirement of at least three consecutive years of membership or insurance period (*trygdetid*) before being entitled/eligible to claim pension in Norway.
26. Thus, the proposed amendments will limit refugees' access to core social security entitlements relating to regular age pensions or disability pensions by revoking relevant provisions of the National Insurance Act which apply to refugees and introducing a new pensions scheme under the law on supplementary benefits for persons who have only lived in Norway for a short period. The newly proposed changes introduce a scheme of means-tested benefits subject to annual consideration which would fall outside the National Insurance system, a scheme the Proposal does not elaborate on and that UNHCR is thus not in a position to comment on. In addition, it is proposed to introduce a five-year residency requirement before refugees are entitled/eligible to claim a pension in Norway.
27. In UNHCR's view, the Proposal to revoke the above-mentioned provisions of the National Insurance Act and to introduce a five-year residency requirement fails to take into consideration the special situation of refugees. Refugees who may have worked and would be entitled to pensions in their home countries will generally not be able to access such pensions after they have fled. In addition, the Proposal fails

³⁷ *Stec and Other v The United Kingdom*, Case reports, Nos. 65731/01 and 65900/01, Decision [GC] of 6 July 2005, available at: <http://hudoc.echr.coe.int/eng?i=001-73198>.

to address that some refugees may be stateless and therefore, as a matter of law, would be unable to secure such benefits from his or her country of former habitual residence. Not having access to the full old-age pension and other benefits in Norway will leave them in a very vulnerable situation with little means to integrate.

28. As noted above, Article 9 of the ICESCR applies to *all* older persons, including refugees, and requires State parties to pay special attention to this group, including ensuring that they enjoy equal treatment in access to non-contributory pension schemes. It prohibits any discrimination in the law, whether direct or indirect, on the basis of a person's national or social origin, and which has the effect of impairing the right to social security, including old-age pension.

29. The UN Committee on Economic, Social and Cultural Rights has in its General Comment No. 19 on the Right to Social Security specified that:

“States Parties should, within the limits of available resources, provide non-contributory old-age benefits, social services and other assistance for all older persons who, when reaching the retirement age prescribed in national legislation, have not completed a qualifying period of contributions or are not otherwise entitled to an old-age insurance-based pension or other social security benefit or assistance, and have no other source of income.”³⁸

30. The Proposal underlines that its primary purpose is to revise the existing welfare benefits and social security schemes and design a new welfare regime which can properly deal with both the high number of asylum-seekers already in Norway and future situations in which extraordinary numbers of asylum seekers might be arriving in Norway. UNHCR is of the view that the stated purpose of the Proposal raises questions of whether the legislature could be said to act in the public interest and whether such measures are proportional under Article 1 of Protocol No. 1 of the ECHR. In *Koufaki and Adedy v. Greece*³⁹ the ECtHR acknowledged that the notion of “public interest” is extensive and that the margin of appreciation available to the legislature in implementing social and economic policies is wide when deciding to enact laws to balance State economy. Although the Court did not find a violation of Article 1 of Protocol No. 1 of the ECHR, it appears to have attached significant weight to the fact that the legislature’s aim had been to remedy the country’s acute budgetary crisis and consolidate the State’s finances on a lasting basis. It was in this particular context of severe economic crisis that the ECtHR considered that the impugned measures had not imposed an excessive burden on the applicants and were found to be proportional.⁴⁰

31. UNHCR considers that the Proposal will have a major negative impact on refugees’ rights to social benefits as they will, for example, also not be eligible for a regular disability pension if they become injured or disabled during their first five years of residency in Norway. In UNHCR’s understanding, refugees will only qualify for supplementary benefits which are in principle afforded to persons who have never held employment. UNHCR underlines in this respect that migrant workers will

³⁸ *Supra*, General Comment No. 19: The right to social security (Art. 9 of the Covenant), para. 15.

³⁹ *Koufaki and Adedy*, nos 57665/12 and 57657/12 v Greece, 31 August 2013, available at: <http://hudoc.echr.coe.int/eng?i=001-120092>.

⁴⁰ See paras. 41-47, *Koufaki and Adedy v Greece*.

remain eligible for a disability pension according to the National Insurance Act, while refugees will no longer qualify for this social entitlement despite the fact that they could be said to be in an analogous situation to, for example, migrant workers. The Proposal fails therefore to assess whether the newly proposed provisions may be contrary to Article 14 of the ECHR taken in conjunction with Article 8. For instance, the ECtHR recalled in *Hode and Abdi v the United Kingdom*⁴¹ that immigration status also conferred by law, rather than being inherent to the individual, does not preclude it from amounting to “other status” for the purposes of Article 14. The Court added moreover that refugee status amounts to “other status”, as unlike immigration status refugee status does not entail an element of choice.

32. UNHCR is very concerned that the Proposal seeks to revoke the exemption from the 40-years qualifying period for refugees, particularly bearing in mind that the legislation will apply retroactively, thus profoundly affecting the rights and legitimate expectations of refugees. Reference is made to the letter of the Ministry of Justice and Public Security of 3 December 2015 to the Ministry of Labour and Social Affairs, where the Ministry noted that the Proposal would apply retroactively *inter alia* to refugees who are Norwegian citizens and have been living in Norway for 20 years or more, and refugees who have very short time left until retirement. UNHCR emphasises that curtailing the existing pension schemes with retroactive effect may amount to a violation of the right to property under the ECHR as such measures may place refugees at risk of having insufficient means to support themselves. Such interference may in UNHCR’s view impose an excessive burden on refugees and interfere with the right to the peaceful enjoyment of possessions for the purposes of the first sentence of the first paragraph of Article 1 of Protocol No. 1 of the ECHR.

Child benefits: introduction of residency requirements regarding child benefits (kontantstøtte)

33. The current child benefits legislation in Norway does not include any residency requirement in order for refugees to be eligible for child benefits as “parents with small children”. The Government proposes to revoke this exemption and introduce a five-year residency requirement before being eligible to receive cash benefits as parents with small children. By virtue of their recent arrival in Norway, refugee parents and their children will not be able to comply with the five-year residency requirement. Many refugee children would thus, during the first five years, receive only part of the benefits to which Norwegian children are entitled and this would not be in line with Article 6 of the 1951 Convention.
34. The Convention on the Rights of the Child (“CRC”)⁴² applies to all children without discrimination (Article 2, CRC). The UN Committee on the Convention on the Rights of the Child has clarified that the principle of non-discrimination

⁴¹ *Hode and Abdi v. The United Kingdom*, (Application no. 22341/09), Council of Europe: European Court of Human Rights, 6 November 2012, available at: <http://www.refworld.org/docid/509b93792.html>.

⁴² UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html>.

“prohibits any discrimination on the basis of the status of a child as being unaccompanied or separated, or as being a refugee, asylum-seeker or migrant. This principle, when properly understood, does not prevent, but may indeed call for, differentiation on the basis of different protection needs such as those deriving from age and/or gender.”⁴³

35. The principle of the best interests of the child enshrined in Article 3 of the CRC is also relevant in this context. The principle provides that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”
36. Further, the CRC specifically notes that State parties shall take appropriate measures to protect and assist refugee children so that they may enjoy the applicable rights set out in the CRC and other instruments that Norway is a party to (Article 22). The Committee on the Rights of the Child has explicitly noted in respect of integration of separated or unaccompanied children that they “should have the same access to rights (including to education, training, employment and health care) as enjoyed by national children. In ensuring that these rights are fully enjoyed by the unaccompanied or separated child, the host country may need to pay special attention to the extra measures required to address the child’s vulnerable status, including, for example, through extra language training.”⁴⁴ UNHCR considers that refugee children in families should also have the same access to these rights.
37. Article 26 of the CRC further recognizes the right of every child to benefit from social security, including social assistance. State parties should also ensure (to the extent possible) the child’s survival and development, and provides for the right of the child to an adequate standard of living, including the mental, spiritual, moral and social aspects of his or her development. While, according to Article 27 of the CRC, parents have the primary responsibility for the child’s development, State parties are to take appropriate measures to assist parents in this task and in case of need, are required to provide material assistance, especially with respect to such basic needs as housing, food and clothing.
38. As any action involving children, including refugee children, should be taken in line with the principle of the best interests of the child (Article 3, CRC), UNHCR is deeply concerned that under the proposed amendments, refugee children during the first crucial years in Norway will receive a reduced child allowance. This may have serious consequences for the care of refugee children and does not acknowledge their special position as refugees and as children (Article 22, CRC). UNHCR is further concerned that the amendments, if adopted, will lead to a different treatment of refugee children compared to other categories of children in Norway and that this would be inconsistent with Norway’s commitments according to international refugee and human rights law.

⁴³ UN Committee on the Rights of the Child (CRC), *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, available at: <http://www.refworld.org/docid/42dd174b4.html>, para. 18.

⁴⁴ *Supra*, General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, para. 90.

39. Furthermore, the Proposal fails to assess whether the newly proposed provisions may be contrary to Article 14 (non-discrimination) of the ECHR in conjunction with Article 8 (the right to respect for private life and family life) of the ECHR. For instance, the European Court of Human Rights concluded in *Fawsie v. Greece*⁴⁵ and *Saidoun v. Greece*⁴⁶ that refusal to pay family allowance to refugee mothers which are payable under Greek law to “mothers of large families”, amounts to discriminatory denial contrary to Article 14 of the ECHR in conjunction with Article 8 of the ECHR, due to discrimination on grounds of nationality.
40. In its recent case-law, the Court has reiterated that a State’s refusal to grant family allowances may result in violations of the right to respect for private life and family life (Article 8) and the non-discrimination principle (Article 14).⁴⁷ The Court’s principal task was to examine whether the difference in treatment was based on objective and reasonable grounds.
41. Moreover, in *Aldegue Tomas v. Spain*⁴⁸, the Court clarified that although Article 8 of the ECHR does not guarantee, as such, a right to benefit from a specific social security scheme or a right to be granted a survivor’s pension, the notion of “family life” in Article 8 of the Convention does not only include dimensions of a purely social, moral or cultural nature but also encompass material interests such as pensions and child allowances, as previously established in *Merger and Cros v. France*⁴⁹.
42. In light of the jurisprudence presented above, UNHCR considers that introducing a five-year residency requirement before refugee parents may become eligible to receive child benefits as parents with small children may constitute discriminatory denial contrary to Article 14 in conjunction with Article 8 of the ECHR due to discrimination on grounds of status and/or nationality, as such difference in treatment could not be said to be based on objective and reasonable grounds.

Social support/benefits to family members of refugees [social support to spouses, social benefits to single parents, work assessment allowance, compensatory support to improve work ability and the ability to function in day to day life]

43. The proposed amendments seek to remove from the National Insurance Act all provisions concerning payment of social support/benefits to family members of refugees such as social support to spouses, social benefits to single parents and compensating support to improve work ability and the ability to function in day to day life. This change will result in refugees being treated the same way as persons

⁴⁵ ECtHR, *Fawsie v. Greece*, No. 40080/70, Judgment of 28 October 2010, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=4d0797932&skip=0&query=Fawsie%20v.%20Greece>.

⁴⁶ *Saidoun v. Greece*, No. 40083/07, Judgment of 28 October 2010, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=4d0796c52&skip=0&query=saidoun>.

⁴⁷ *Okitaloshima Okonda Osungu and Others v. France*, nos. 76860/11 and 51354/13, 1 October 2015, available at: <http://hudoc.echr.coe.int/eng?i=001-157628>.

⁴⁸ *Aldegue v. Spain*, no 35214/09, 14 June 2016, available at: <http://hudoc.echr.coe.int/eng?i=001-67906>

⁴⁹ *Merger and Cros v France*, no. 68864/01, 22 December 2000, available at: <http://hudoc.echr.coe.int/eng?i=001-67906>.

who were granted residence permit on humanitarian grounds and Norwegian citizens returning to Norway after a long period of stay abroad. While the proposed amendments would bring the calculation of social benefits for refugees in line with the rules for calculation of benefits for Norwegian citizens and immigrants who have lived abroad for extensive periods of time, they fail to take into account the specific circumstances of refugees.

44. UNHCR would like to recall that refugees arriving in Norway have frequently been forced to abruptly leave their home countries, and have often had their possessions destroyed or taken away. Upon arrival in Norway, they will thus have to start rebuilding their lives, often without any financial means and lacking local networks and knowledge, including of Norwegian language. While the newly proposed measures are also intended for Norwegian citizens who have lived abroad outside the European Union, the law proposal will primarily affect refugees and others with a foreign background. UNHCR is thus concerned that the proposed changes seek to introduce a significantly lower system of social support benefits which will be detrimental for refugees. As noted above, conditions which refugees are incapable of fulfilling and which are discriminatory in their impact would be inconsistent with the 1951 Convention (Article 6) and international human rights law.

V. CONCLUSIONS AND RECOMMENDATIONS

45. To conclude, UNHCR considers that the Proposal falls short of the requirements of the 1951 Convention as they do not sufficiently take into account the specific situation of refugees and because they lead to unequal treatment and enjoyment of the right to social security. The combined object and purpose of Articles 23 and 24 of the 1951 Convention, as well as relevant human rights obligations, establish a specific standard of treatment with regard to pensions, child allowances and social security benefits. In case this standard is not met, serious human rights concerns may arise. The general principle that refugees shall enjoy social security rights on par with nationals and other categories of persons, such as migrant workers, should be upheld and reinforced.
46. In line with international obligations, UNHCR recommends Norway to
- retain the current provisions of the relevant laws regulating pension, child care and all other social benefits of refugees, in order for refugees to receive adequate and sufficient social assistance while acknowledging the special position of refugees vis-à-vis other categories of persons, including non-nationals;
 - refrain from introducing qualifying residency requirements for refugees in order to be eligible to receive social benefits such as child benefits, social benefits to single parents and compensating support to improve work ability and the ability to function in the day to day life, as such legislative measures may result in discriminatory treatment contrary to the 1951 Convention and international human rights law.

UNHCR Regional Representation for Northern Europe

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