



UNHCR

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

UNHCR

Regional Representation for Northern Europe

Ynglingagatan 14, 6th fl.
SE-113 47 Stockholm

Tel.: +46 8 457 4880

Fax: +46 8 457 4887

Email: swest@unhcr.org

12 February 2016

Notre/Our code: 015/RRNE/2016

Re.: UNHCR Observations on the proposed amendments to the Norwegian Immigration Act and Regulation: Høring - endringer i utlendingslovgivningen (innstramminger II)

The UNHCR Regional Representation for Northern Europe hereby presents its consolidated observations on the proposed amendments to the Norwegian Immigration Act and Regulation (Høring - endringer i utlendingslovgivningen (innstramminger II)).

We remain at your disposal for any clarifications required.

Yours sincerely,

Pia Prytz Phiri
Regional Representative

Ministry of Justice and Public Security
Postboks 8005 Dep
0030 Oslo
Norway



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**UNHCR Observations on the proposed amendments to the
Norwegian Immigration Act and Regulation:
*Høring – Endringer i utlendingslovgivningen (Innstramminger II)***

I. Introduction

1. The UNHCR Regional Representation for Northern Europe (hereafter “RRNE”) is grateful to the Ministry of Justice and Public Security of the Kingdom of Norway for the invitation to submit its observations on the law proposal dated 29 December 2015 to amend the Norwegian Immigration Act¹ and Immigration Regulation²: *Høring – Endringer i utlendingslovgivningen (Innstramminger II)* (reference 15/8555) (hereafter the “Proposal”).³
2. 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 refugees, UNHCR has a direct interest in law and policy proposals in the field of asylum. 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[.]” This supervisory responsibility is reiterated in the preamble as well as reflected in Article 35 of the 1951 Convention, and in Article II of the 1967 Protocol relating to the Status of Refugees (hereafter collectively referred to as the “1951 Convention”). UNHCR’s supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in the 1951 Convention,⁴ as well as by providing comments on legislative and policy proposals impacting on the protection and durable solutions for refugees.

¹ *Lov 15. mai 2008 nr. 35 om utlendingers adgang til riket og deres opphold her (utlendingsloven)*, unofficial translation available at: <https://www.regjeringen.no/en/dokumenter/immigration-act/id585772/5772/> (hereafter “Immigration Act”).

² *Forskrift 15. oktober 2009 nr. 1286 om utlendingers adgang til riket og deres opphold her (utlendingsforskriften)*, unofficial English translation, available at <https://www.regjeringen.no/globalassets/upload/fo/dokumenter/forskrifter/immigration-regulations.pdf>. (hereafter “Immigration Regulation”).

³ *Høringsnotat – Endringer i utlendingslovgivningen (Innstramminger II)*, available at: <https://www.regjeringen.no/no/dokumenter/horing--endringer-i-utlendingslovgivningen-innstramminger-ii/id2469054/> (hereafter the “Proposal”).

⁴ 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> (hereafter “UNHCR Handbook”).

II. General Observations

3. UNHCR notes that the Proposal aims at making it “less attractive” to seek asylum in Norway and to curb the number of asylum-seekers arriving in the country.⁵ To achieve this aim, the Norwegian Government proposes a number of restrictions, *inter alia*, concerning access to its territory through visa requirements for asylum-seekers, increased use of cessation and temporary residence permits, weakened procedural safeguards in admissibility procedures, and the introduction of restrictive requirements for family reunification.
4. UNHCR wishes to recall that the Vienna Convention on the Law of Treaties (hereafter “VCLT”)⁶ offers guidance concerning the interpretation of international treaties. Articles 26 and 31 are considered as part of customary international law and therefore binding on Norway although it is not a party to the VCLT.⁷ These provisions explicitly state that the obligations of a convention 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”. In this respect, UNHCR wishes to note that the language of the Proposal is in stark contrast to the Preamble of the 1951 Convention, which contains strong human rights language and recognizes the importance of burden sharing and international co-operation in finding a satisfactory solution to the humanitarian nature of the problem of refugees. UNHCR therefore finds it regrettable that the Government of Norway is proposing changes to its national legal framework which are contrary to the spirit, object and purpose of the 1951 Convention.
5. At the same time, UNHCR welcomes the explicit reference in the Proposal to the 1951 Convention and international human rights law as the legal boundaries within which the Immigration Act and Immigration Regulation can be amended.⁸ UNHCR, however, notes that the Proposal, when referring to UNHCR’s sources, emphasize their non-binding nature,⁹ and that they are not considered decisive for the drafting of the Proposal.¹⁰ It is also stated in the Proposal that UNHCR’s guidance goes beyond obligations according to public international law and refugee law.¹¹

⁵ The Government’s website containing the law proposal describes the law proposal as “Høring med forslag til en rekke tiltak for å stramme inn og gjøre det mindre attraktivt å søke asyl i Norge», see: <https://www.regjeringen.no/no/dokumenter/horing--endringer-i-utlendingslovgivningen-innstramninger-ii/id2469054/>.

⁶ 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> (hereafter the “VCLT”), Articles 31-33 and the specific obligation of “good faith” in Article 26.

⁷ Supreme Court, Norway, Rt. 2010 page 858, available at: <https://www.udiregelverk.no/Global/Images/Rettskilder/Hoyesterett%20f.om%2020090924/HR%202010%2001130%20A.pdf>.

⁸ Proposal, p. 15.

⁹ Proposal e.g. pp. 61, 65, 69.

¹⁰ Proposal, e.g. pp. 61, 65, 69.

¹¹ Proposal, p. 65.

6. In this respect, UNHCR wishes to underline UNHCR's unique identity, specific legal authority and independence in international law, including its supervisory role, as explained above in paragraph 2. It should also be emphasized that as a State Party to the 1951 Convention, Norway has a corresponding obligation to cooperate with UNHCR, in particular to facilitate UNHCR's duty of supervising the application of the provisions of the Convention.¹² The authority of UNHCR has consequently been referred to in the preparatory works to the Norwegian Immigration Act, and the obligation to cooperate with UNCHR in line with Article 35 of the 1951 Convention has been explicitly incorporated in the Immigration Act's paragraph 98.¹³
7. UNHCR further recalls that the 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*, developed at the request of the Executive Committee of the High Commissioner's Programme (hereafter "ExCom") - of which Norway is a member since its inception – are based on the views of UNHCR, State practice, ExCom Conclusions on international protection, academic literature and judicial decisions at the national, regional and international levels, accumulated over a period of more than 60 years. They are firmly based on international law and on the rules of treaty interpretation contained in the VCLT.¹⁴
8. While neither the ExCom Conclusions on international protection nor UNHCR's guidelines are binding on States, they contribute to the formulation of *opinio juris* by setting out standards of treatment of approaches to interpretation which illustrate States' sense of legal obligation towards asylum-seekers and refugees.¹⁵ Various jurisdictions have found UNHCR's Handbook and Guidelines a persuasive source of expertise which can aid the interpretation and application of the provisions of the 1951 Convention that are ambiguous or unclear, and which should be given due weight.¹⁶ The European Court of Human Rights ("ECtHR") has, for example, long recognised the obligation of Council of Europe Member States to take into account materials originating from objective and reliable sources, including UN agencies, in assessing risk under Article 3 of the European Convention on Human Rights,¹⁷ and has

¹² See also the Immigration Act § 98 which incorporates Article 35.

¹³ See e.g. Ot.prp. nr. 75 (2006–2007) Om lov om utlendingers adgang til riket og deres opphold her (utlendingsloven), p. 16, available at <https://www.regjeringen.no/contentassets/f0a671a54de9453a8409a3abc04ed4c8/no/pdfs/otp200620070075000dddpdfs.pdf>.

¹⁴ See, VCLT Articles 31-33 and the specific obligation of "good faith" in Article 26 (pacta sunt servanda).

¹⁵ Goodwin Gill/McAdam, *The Refugee in International Law*, Oxford University Press, 2007, p. 217.

¹⁶ See, McAdam, *Interpretation of the 1951 Convention*, in Zimmerman, *The 1951 Convention relating to the Status of Refugees, A Commentary*, (hereafter, "Zimmerman, A Commentary"), pp. 110-114, which contains numerous references to case law in various jurisdictions. See further UNHCR, *B010 v. Minister of Public Safety and Emergency Preparedness: Factum of the Intervener (UNHCR)*, 2 February 2015, footnotes 2-4, available at: <http://www.refworld.org/docid/54d09bb44.html>.

¹⁷ See UN High Commissioner for Refugees (UNHCR), *UNHCR public statement in relation to Zuheyra Freyeh Halaf v. the Bulgarian State Agency for Refugees pending before the Court of Justice of the European Union*, August 2012, C-528/11, para. 4.2.3, available at: <http://www.refworld.org/docid/5017fc202.html>, which refers to e.g., *Salah Sheekh v. the Netherlands*, Application No. 1948/04, ECtHR, 11 January 2007, at para. 136, available at: <http://www.unhcr.org/refworld/docid/45cb3dfd2.html>. The Council of Europe has also made reference to the importance of considering UNHCR information in (i) assessing the situation in the country of return in

regularly relied upon UNHCR guidelines, reports, statements and formal third party interventions in its jurisprudence.¹⁸ Thus, UNHCR's protection guidelines provide States with guidance on how to apply the existing standards in the area of international refugee protection in practice, and in line with States' international obligations.

9. UNHCR also observes that the Proposal seeks to introduce a number of changes whereby the status of individuals granted international protection in Norway will only be temporary and subject to regular review, and also that a number of rights normally associated with such protection will be delayed, such as the right to family reunification. UNHCR wishes to note that "the ultimate goal of international protection is to achieve durable solutions for refugees", as formulated in ExCom Conclusion No. 104 on location integration,¹⁹ which is not achieved by keeping refugees in a state of uncertainty for years on end. The 1951 Convention recognizes that refugee status ends under certain clearly defined conditions and that once an individual is determined to be a refugee, their status is maintained unless they fall within the terms of the cessation clauses or their status is cancelled or revoked.²⁰ Moreover, the 1951 Convention foresees a gradual attainment of rights,²¹ with the end of the continuum being naturalization in the country of asylum or the end of the refugee's protection needs and voluntary return, for example, as a result of fundamental and durable changes in the country of origin.
10. UNHCR further notes that the Proposal seems to imply that the 1951 Convention does not apply to asylum-seekers. In this respect, UNHCR recalls the declaratory nature of refugee status and that any person is a refugee within the framework of the 1951 Convention if s/he meets the criteria of the refugee definition in that instrument. This would necessarily occur prior to the time at

the context of forced returns (Council of Europe Committee of Ministers, *Twenty Guidelines on Forced Return*, 4 May 2005, available at: <http://www.unhcr.org/refworld/docid/42ef32984.html>) and (ii) providing UNHCR with access to asylum-seekers, to information about asylum applications, and permitting UNHCR to present its views regarding asylum applications in the context of accelerated asylum procedures (Council of Europe Committee of Ministers, *Guidelines on human rights protection in the context of accelerated asylum procedures*, 1 July 2009, available at: <http://www.unhcr.org/refworld/docid/4a857e692.html>).

- ¹⁸ See, for example, *Hirsi Jamaa and Others v. Italy*, note 15 above, at para. 203; *Sufi and Elmi v. the United Kingdom*, Applications Nos. 8319/07 and 11449/07, ECtHR, 28 June 2011, at paras. 231-234, and 245 et seq., available at: <http://www.unhcr.org/refworld/docid/4e09d29d2.html>; *M.S.S. v. Belgium and Greece*, Application No. 30696/09, ECtHR, 21 January 2011, at paras. 229, 255, 300-304 and 347-349, available at: <http://www.unhcr.org/refworld/docid/4d39bc7f2.html>.
- ¹⁹ UN High Commissioner for Refugees (UNHCR), *Conclusion on Local Integration*, 7 October 2005, No. 104 (LVI) - 2005, available at: <http://www.refworld.org/docid/4357a91b2.html> (hereafter "ExCom Conclusion on local integration No. 104").
- ²⁰ UNHCR, Handbook, para. 112, noting that 'the strict approach towards the determination of refugee status results from the need to provide refugees with the assurance that their status will not be subject to constant review in light of temporary changes ... in the situation prevailing in their country of origin', see also ExCom Conclusion No. 69 (XLIII), fourth preambular paragraph. UNHCR, *Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)*, 10 February 2003, HCR/GIP/03/03, para. 1, <http://www.refworld.org/docid/3e50de6b4.html>. UNHCR, *Note on the Cancellation of Refugee Status*, 22 November 2004, <http://www.refworld.org/docid/41a5dfd94.html>.
- ²¹ See e.g. the 1951 Convention, Article 34, and ExCom Conclusion on local integration No. 104. See also doctrine on "levels of attachment" e.g. in Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press, 2005, pp. 160-192.

which refugee status is formally determined.²² To give effect to their obligations in good faith under the 1951 Convention, States Parties are required to make independent inquiries as to the need for international protection as refugees of persons seeking asylum, i.e. asylum-seekers, and provide them access to a fair and efficient refugee status determination procedure.²³

11. The signal Norway's introduction of further restrictions sends to other countries in the world, including the major refugee hosting countries and European countries that need to strengthen their asylum and integration capacity in order to receive higher numbers of refugees, is worrisome and could fuel fear and xenophobia. These measures can also contribute to other States' introduction of similar restrictions that would reduce – rather than expand - the asylum space globally and put refugees in need of protection at life-threatening risks. In the context of the European refugee situation, UNHCR has repeatedly called on States to demonstrate the principles of international solidarity and responsibility sharing, set out in international instruments relating to refugees, and in Conclusions on International Protection adopted unanimously by UNHCR's Executive Committee, including Norway.²⁴ UNHCR has in the same context called for the creation of credible legal alternatives to dangerous irregular movements; such alternatives may include enhanced resettlement opportunities, humanitarian admission programmes, facilitate greater access to family reunion options, student and employment visas for refugees and other forms of legal admission to Europe.²⁵
12. UNHCR therefore appeals to the Government of Norway to reconsider its intention to further restrict the national asylum space and urges Norway to instead use its standing as a global advocate for human rights, democracy and solutions to focus on promoting and building a coordinated European response. This needs to be done through the implementation of fully-functional hotspots, an internal relocation scheme and the opening-up of more legal entry channels, including expanded resettlement and family reunification programmes, and through support to European countries in need to further develop the capacity of their asylum and integration systems. This would, in UNHCR's view, be a more effective, positive, and humanitarian way of reaching a sustainable solution to the unequal distribution of refugees in Europe, than by introducing restrictions that challenge the international protection regime that Norway has been a strong supporter of for decades.

²² UNHCR, Handbook, para. 28.

²³ UNHCR, *B010 v. Minister of Public Safety and Emergency Preparedness: Factum of the Intervener* (UNHCR), 2 February 2015, para. 13, <http://www.refworld.org/docid/54d09bb44.html>.

²⁴ See e.g., ExCom Conclusion Nos. 52 (on International solidarity and refugee protection), 77 (general conclusion), 85 (conclusion on international protection) and 90 (general conclusion), available at: <http://www.unhcr.org/pages/49e6e6dd6.html>.

²⁵ See e.g., UNHCR, *Syrian Refugees in Europe: What Europe Can Do to Ensure Protection and Solidarity*, 11 July 2014, available at: <http://www.refworld.org/docid/53b69f574.html>, p. 12, and UNHCR, *International Protection Considerations with regard to people fleeing the Syrian Arab Republic*, Update III, 27 October 2014, available at: <http://www.refworld.org/docid/544e446d4.html>, paras. 33–36; UNHCR, *International Protection Considerations with regard to people fleeing the Syrian Arab Republic*, Update IV, November 2015, para. 44, available at: <http://www.refworld.org/docid/5641ef894.html>.

III. Specific observations

Amendment to the Immigration Act paragraph 9 regarding visa free entry for asylum-seekers

13. Asylum-seekers are currently exempt from ordinary visa requirements under the Immigration Act, paragraph 9(1). However, the Proposal introduces a visa requirement for asylum-seekers arriving from a “first country of asylum” or “safe third country”, whose asylum application can therefore be declared inadmissible.²⁶ In UNHCR’s understanding of the Proposal, those who do not have a valid visa, will not be admitted to the territory. Their asylum applications will be processed through a border procedure determining the admissibility of their claim, pursuant to paragraph 32. UNHCR further understands that only asylum-seekers who come directly from a country in which they fear persecution will be granted access to the normal Norwegian asylum procedure and have their claims examined on the merits.²⁷
14. The Proposal notes that “entry is not punishable”, with reference to Article 31 of the 1951 Convention, but states that “as the visa freedom is restricted, it will become illegal to enter into Norway without a visa”.²⁸ In this respect, UNHCR recalls paragraph 106 (g) in the Immigration Act, according to which the fact that a foreigner’s application most likely will not to be admitted for an examination on the merits according to paragraph 32 (a) or (d), is a ground for detention. In UNHCR’s understanding, the proposed provision may thus lead to penalization of those arriving without a visa, either from a first country of asylum or from a country or area where the applicant has stayed without being persecuted.
15. The Proposal claims that the 1951 Convention does not hinder States from imposing visa requirements on asylum-seekers.²⁹ While under international law, States have the sovereign power to regulate the entry of foreigners, including by imposing visa requirements, this cannot hinder foreigners seeking asylum from persecution (Article 14 of the Universal Declaration of Human Rights) as implemented in part by the 1951 Convention. Numerous ExCom Conclusions refer to the need to admit refugees (including asylum-seekers, see paragraph 10 above) into the territories of States,³⁰ which includes no rejection

²⁶ Para. 32 of the Immigration Act regulates returns according to the “first country of asylum” and “safe third country” principles. Para. 32 (1) applies if (a) the applicant has been granted asylum or another form of protection in another country (first country of asylum), (b) it may be demanded that the applicant be accepted by another country participating in cooperation under the Dublin Agreement, (c) it may be demanded that the applicant be accepted by another Nordic state under the provisions of the Nordic Passport Control Agreement, or (d) the applicant has travelled to the realm after having stayed in a state or an area where the foreign national was not persecuted (safe third country).

²⁷ Proposal, pp. 18, 22.

²⁸ Proposal, p. 18.

²⁹ Proposal, p. 17.

³⁰ See references to relevant ExCom Conclusions in the chapter on Access to Asylum Procedures in the UN High Commissioner for Refugees (UNHCR), *A Thematic Compilation of Executive Committee Conclusions, 6th edition, June 2011*, June 2011, available at: <http://www.refworld.org/docid/4f50cfbb2.html>.

at frontiers, and allowing them access to fair and efficient procedures for determining status and protection needs. ExCom Conclusion No. 87 specifically mentions that “notions such as ‘safe country of origin’, ‘internal flight alternative’ and ‘safe third country’, should be appropriately applied so as not to result in improper denial of access to asylum procedures, or to violations of the principle of *non-refoulement*”.³¹

16. To give effect to their obligations in good faith under the 1951 Convention, States Parties to the Convention are required to make independent inquiries as to the need for international protection of persons seeking asylum, and provide them access to fair and efficient asylum or refugee status determination procedures. This may include an initial admissibility phase, including to assess a possible application of the safe third country concept.
17. Article 31 of the 1951 Convention is also relevant in this respect. It provides that States shall not penalize refugees for irregular entry or presence, provided the conditions set out in the article are met. Article 31(1) of the 1951 Convention recognises that refugees are often compelled to arrive at, or enter, a territory without appropriate documentation or prior authorisation. Already at the time of the drafting of Article 31, it was recognized that refugees (and asylum-seekers) whose departure from their country of origin is usually a flight, will rarely be in a position to comply with the requirements for legal entry (possession of a passport and visa) into the country of refuge.³² By requiring a refugee to obtain proper travel documentation before fleeing his or her country to seek asylum in another country, States overlook the very problems which give rise to the need for refugee protection and, in effect, deny the possibility of asylum to some refugees.
18. UNHCR is particularly concerned about this proposal on the introduction of visa requirements for asylum-seekers in view of the recently issued Instructions and Circulars and amendments to the Immigration Act and Regulation,³³ which introduced an expedited admissibility procedure with reduced criteria and safeguards in the application of the “safe third country” and “first country of asylum” concepts. UNHCR has, *inter alia*, expressed regret that the requirement that the applicant will have access to fair and efficient procedures for the determination of refugee status and/or other forms of international

³¹ UN High Commissioner for Refugees (UNHCR), *General Conclusion on International Protection*, 8 October 1999, No. 87 (L) - 1999, para (j), available at: <http://www.refworld.org/docid/3ae68c6ec.html>.

³² Secretary General’s Memorandum to the 1950 Ad Hoc Committee, February 1950.

³³ Prop. 16 L (2015–2016). Endringer i utlendingsloven (innstramninger), 13.11.2015, available at: [https://www.regjeringen.no/no/dokumenter/prop.-16-l-20152016/id2461221/?ch=1&q=](https://www.regjeringen.no/no/dokumenter/prop.-16-l-20152016/id2461221/?ch=1&q=;); and Lov 20. november 2015 nr. 94 om endringer i utlendingsloven (innstramninger); GI-13/2015 – Rask saksbehandling for asylsøkere som har hatt opphold i Russland, jf. utlendingsloven §§ 32 og 90, 24.11.2015, available at: <https://www.regjeringen.no/no/dokumenter/gi-132015--rask-saksbehandling-for-asylsokere-som-har-hatt-opphold-i-russland-jf.-utlendingsloven--32-og-90/id2468570/>; 15/7814 – EST. Instruks — Rutiner for rask håndtering av personer som ankommer over norsk- russisk landegrense (Storskog) uten gyldig visum eller annen gyldig innreisetilatelse til Norge, 24.11.2015, available at: https://www.regjeringen.no/contentassets/6262ec4896904942ba396c32ff68ee0f/instruks_pod.pdf; RS 2015-013 - Rundskriv om behandlingen av asylsøknader fra personer som har reist inn i Norge fra Russland (Storskog-porteføljen), 25.11.2015, available at: <https://www.udiregelverk.no/no/rettskilder/udi-rundskriv/rs-2015-013/>.

protection in the “safe third country” has been removed from the Immigration Act, despite it being one of the established criteria for applying the concept.³⁴

19. In light of the above taken together (as well as the allocation of responsibilities for the admission interviews to the police, which will be commented on below), UNHCR has serious concerns that the imposition of visa requirements for foreigners arriving in Norway from countries designated as “safe” may affect their right of access to a fair and efficient asylum procedure and, consequently, place such individuals at risk of *refoulement*, including chain-*refoulement*.

UNHCR Recommendations

- UNHCR recommends that Norway refrain from imposing visa requirements for people seeking asylum, in order to uphold the right of all asylum-seekers to access fair and efficient procedures for the determination of refugee status and/or other forms of international protection, and ensure protection against *refoulement*, including chain-*refoulement*.

Rejection of entry of persons arriving in Norway from a Nordic neighboring country

20. As UNHCR understands, the Proposal will introduce a new paragraph 32 (2) to the Immigration Act, which will create a legal basis to reject entry (*bortvise*) and not assess applications for asylum on their merits for persons arriving directly from a Nordic neighboring country, without a valid Schengen visa. According to the Proposal, this provision is introduced to ensure efficient control of arrivals from the neighboring countries, in particular Sweden³⁵ as it has received among the highest number of arrivals in Europe.³⁶ According to the Proposal, the Schengen and Dublin regulations³⁷ do not preclude bilateral

³⁴ The words «and where the foreign national’s application for protection will be examined» has been removed from the Immigration Act § 32 (1) (d). In this context, see ExCom Conclusion No. 85 which “Stresses that, as regards the return to a third country of an asylum-seeker whose claim has yet to be determined from the territory of the country where the claim has been submitted, including pursuant to bilateral or multilateral readmission agreements, it should be established that the third country will treat the asylum-seeker(s) in accordance with accepted international standards, will ensure effective protection against *refoulement*, and will provide the asylum-seeker(s) with the possibility to seek and enjoy asylum”.

³⁵ The measure is also proposed in response to the measures introduced by Sweden on 17 December 2015 concerning ID controls and carrier sanctions; see UNHCR, Comments by the United Nations High Commissioner for Refugees (UNHCR) Regional Representation for Northern Europe on the Law Proposal Prop. 2015/16:67 concerning particular measures in situation of serious threat to the public order or the internal security of the country (Särskilda åtgärder vid allvarlig fara för den allmänna ordningen eller den inre säkerheten i landet), [11 December 2015], available at: http://www.unhcr-northern-europe.org/fileadmin/user_upload/Documents/PDF/Sweden/Prop_2015-16_67_comments-UNHCR.pdf.

³⁶ Proposal, pp. 17-19.

³⁷ European Union: Council of the European Union, *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, 29 June 2013, OJ L. 180/31-180/59; 29.6.2013, (EU)No 604/2013, available at: <http://www.refworld.org/docid/51d298f04.html>. (hereafter "Dublin Regulation").

arrangements as long as they are not in contravention of these regulations. Paragraph 32 cannot be applied if there is a risk of *refoulement*.

21. In UNHCR's understanding, the Norwegian Government, in effect, intends to introduce an additional admissibility ground for asylum-seekers who try to enter Norway through a Nordic country, thus deviating from the mechanisms for determining the responsibility for an asylum application under the recast Dublin Regulation. UNHCR notes that the Proposal describes the Dublin Regulation as in practice not being in force in 2015, and as a system that has "broken down".³⁸ UNHCR, however, wishes to note that the Dublin Regulation continues to apply and is still in force, and thus recalls the importance of adhering to the Dublin system as the established manner for allocating responsibility within the Schengen area for the examination of applications for international protection.
22. Further, under the Dublin Regulation, Norway has an obligation to determine which State participating in the Dublin system is responsible for the examination of asylum applications of individuals arriving to its territory, including those arriving from neighboring Nordic States. It may well be that Norway is responsible for examining the asylum application even though the applicant has, for example, arrived via Sweden. Asylum-seekers may, *inter alia*, have a right to have their application processed in a particular state depending on where they have family relations.³⁹ UNHCR thus questions whether the proposal, which is to be implemented by the police at the border, will ensure that all rights accorded to asylum-seekers under the Dublin III Regulation, including the right to appeal (see paragraph 24 below), are ensured.
23. The Proposal highlights that the provision is to be utilized if the number of asylum-seekers arriving reaches a level which the Norwegian Immigration authorities are unable to handle.⁴⁰ As UNHCR understands, the Ministry will be given competence and discretion to decide when the situation reaches the level where the new provision is to be invoked. While not elaborated in the Proposal, in UNHCR's understanding, this measure would only be applied when there is a certain level of influx. UNHCR would in this regard like to express its concern that such an application of the 1951 Convention may be arbitrary and discriminatory, and thus in breach of Article 3 of the Convention.

UNHCR Recommendations

- UNHCR recommends Norway to not adopt the proposed measure as a way to shift the responsibility to other countries through which the asylum-seeker may have passed. In order to exercise their right to seek asylum, asylum-seekers need to have access to territory and for these procedures to be fair and efficient.

³⁸ Proposal, p. 27.

³⁹ Dublin III Articles 9, 10 and 11.

⁴⁰ Proposal, p. 31.

- UNHCR recommends Norway to adhere to the Dublin Regulation, and to fully apply the provisions concerning the rights of asylum-seekers.

Designation of the Police as the competent authority to reject applications which will not be assessed on the merits, and reject entry at the border of asylum-seekers coming through Nordic neighboring countries

24. According to the Proposal, the Ministry of Justice and Public Security will be given competence and discretion to delegate authority to the Police to reject applications which are not to be assessed on the merits under the Immigration Act paragraph 32 (2), when persons apply for asylum after crossing a border with a Nordic neighboring country.⁴¹ The Police will also be competent to issue decisions to reject entry (*bortvise*) at the border. The purpose of this amendment is to ensure effective handling of cases, where the asylum-seeker arrives from a Nordic neighboring country. To ensure this, the decisions to reject entry need not be issued as formal individual administrative decisions in writing, and there will thus be no right to appeal the decision.
25. UNHCR wishes to refer to its comments in October 2015,⁴² and reiterate its recommendation to have one competent determining authority with responsibility for all asylum proceedings, including interviewing applicants for international protection at the admissibility stage and in accelerated procedures, as well as for taking decisions on the granting or refusal of admissibility or international protection. UNHCR is of the strong view that all these tasks should be performed by a single central authority, in line with the guidance in UNHCR's ExCom Conclusion No. 8.⁴³

UNHCR Recommendations

- UNHCR strongly recommends that the central determining authority (i.e. UDI in Norway) be responsible for interviewing applicants for international protection and for taking decisions on their claim, including within admissibility and accelerated asylum procedures.

Burden of proof and standard of proof and risk in the Immigration Act and Immigration Regulation

26. According to the Proposal, the burden and standard of proof have not been regulated in Norwegian law, but been developed by the Courts based on the preparatory works to the Aliens Act, in a less strict manner than foreseen and

⁴¹ Proposal, pp. 31-32.

⁴² UNHCR, UNHCR Observations on the proposed amendments to the Norwegian Immigration Act to allow for detention of asylum-seekers in the 48-hours accelerated procedure: Høyringsnotat om ny heimel for pågriping og fengsling i samband med 48-timarproseduren for openbert grunnlause asylsøknader, October 2015, available at http://www.unhcr-northern-europe.org/fileadmin/user_upload/Documents/PDF/Norway/UNHCR_Observations_on_Norwegian_Immigration_Act_48_Hour_Procedure.pdf.

⁴³ UNHCR, *Determination of Refugee Status*, 12 October 1977, No. 8 (XXVIII) - 1977, para. (e) (iii), available at: <http://www.refworld.org/docid/3ae68c6e4.html>.

as provided for by UNHCR's guidance.⁴⁴ As UNHCR reads the Proposal, the main purpose is to clarify and harmonize how the burden and standard of proof and risk should be applied by regulating this in the legislation.⁴⁵

27. As UNHCR understands the Proposal, *the burden of proof* in asylum claims will continue to be shared. The applicant is responsible for substantiating the claim, while the State has a duty to ensure that the case is as well investigated in line with international obligations and administrative law ("saken er tilstrekkelig opplyst i samsvar med folkerettslige regler og forvaltningsloven § 17"). When considering return to a State Party to the European Convention on Human Rights ("ECHR") and the EU recast Qualification Directive, there will, as a general rule, be a presumption that the person will not be in need of international protection.
28. In cases whereby the "safe third country" or "first country of asylum" concept is applied, the burden of proof, based on the presumption of safety, rests on the shoulders of the decision-maker, who needs to determine that the third country or first country of asylum is safe for the individual applicant. In UNHCR's view, the question of whether asylum-seekers can be sent to a third country for determination of their claim must be answered on an individual basis. If not, a risk of chain-*refoulement* arises. Also, the applicant concerned should be given an effective possibility to rebut a presumption of safety, including in the first instance,⁴⁶ even if on an accelerated basis. Otherwise an essential safeguard for asylum-seekers would be removed.
29. According to the Proposal, the general *standard of proof for establishing the facts* will be increased, but will continue to require less than preponderance of the evidence. The new standard of proof will be that facts are "sannsynlige" (plausible), instead of the current "noenlunde sannsynlig". According to the Proposal, UNCHR requires that an applicant's explanation must be "sannsynlig" (plausible), but this does not entail a requirement of preponderance of evidence.⁴⁷ UNHCR observes that a standard of proof for credibility findings is highly controversial. Accepting a fact as relevant and material for determining eligibility for protection (*inter alia* determining a well-founded fear of being persecuted for reasons of one or more of the Convention grounds) depends on the credibility of the fact, which in turn is determined by a range of indicators and not by a particular 'standard of proof'.⁴⁸ According to UNCHR's guidelines, credibility is established where the applicant has

⁴⁴ UNHCR, *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, available at: <http://www.refworld.org/docid/3ae6b3338.html>.

⁴⁵ Proposal, p. 33.

⁴⁶ Article 39(3) of the recast APD provides explicitly the obligation for States to offer to the applicant the opportunity to rebut the presumption of the safety of an European third country. See also UNHCR comments on the EC's amended proposal for a recast APD, pp. 29-30; as well as UNHCR comments on the EC's proposal for a recast APD, pp. 38-39.

⁴⁷ Proposal p. 37.

⁴⁸ UNHCR, *Summary of Deliberations on Credibility Assessment in Asylum Procedures, Expert Roundtable, 14-15 January 2015, Budapest, Hungary*, 5 May 2015, paras. 53 to 63, available at: <http://www.refworld.org/docid/554c9aba4.html>.

presented a claim which is coherent and plausible, not contradicting generally known facts, and therefore is, on balance, capable of being believed.⁴⁹

30. With regard to *sur place* activities and acts, the Proposal notes that the difficulties with documenting events in the country of origin are not at hand in the same way in Norway and that higher demands can therefore be placed on the asylum-seeker's credibility in this regard. The Government thus suggests that a statement concerning events that take place *sur place* needs to be "more probable than not" to be accepted, i.e. a higher standard of proof than with regard to other statements.⁵⁰ In regard to *sur place* claims, UNHCR first wishes to recall that a person is a refugee as soon as he or she fulfills the criteria in the definition in Article 1 A(2) of the 1951 Convention (see paragraph 10 above), and that a person may become a refugee after having left his or her country of origin because of circumstances arising in the country of origin during his/her absence or as a result of his/her own actions in the host country.⁵¹ The test nonetheless remains the same, i.e. whether or not the person has a well-founded fear of being persecuted for reasons of, including when it comes to assessing the credibility of material facts is determined by a range of indicators (as mentioned above) and not by a particular standard of proof.⁵²
31. UNHCR understands with regard to the *standard of proof for establishing identity*, that the Proposal foresees that the same standard as before will be maintained in applications for protection, i.e. that the applicant's identity must be "likely". Where the applicant has not documented his or her identity, a holistic assessment should be carried out. The Proposal notes that the obligation to clarify identity shall not compromise the need for protection.
32. UNHCR notes with concern that general experiences with applicants from countries with a larger number of cases of identity fraud may be taken into account.⁵³ In UNHCR's view, the assessment of credibility should be individual, and not based on general presumptions.⁵⁴ Decision-makers should be careful if they are considering dismissing documentary evidence on the basis of country of origin of a general nature. While widespread corruption and the availability of fraudulent documents may be characteristic of a particular country, this does not necessarily mean that documentation submitted by an applicant is forged or has been obtained through corruption.⁵⁵ In this regard, it

⁴⁹ UNHCR, *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, p. 3, available at: <http://www.refworld.org/docid/3ae6b3338.html>.

⁵⁰ European Council on Refugees and Exiles, *Comments from the European Council on Refugees and Exiles on the Commission Proposal to Recast the Qualification Directive*, 12 March 2010, page 15, available at: <http://www.refworld.org/docid/4b9e39e12.html>.

⁵¹ UNHCR, *Handbook*, paras. 94-96.

⁵² 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, available at: <http://www.refworld.org/docid/4c503db52.html>.

⁵³ Proposal, p. 41.

⁵⁴ UNHCR, *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, available at: <http://www.refworld.org/docid/3ae6b3338.html>, para. 11.

⁵⁵ UNHCR, *Beyond Proof, Credibility Assessment in EU Asylum Systems: Full Report*, May 2013, available at: <http://www.refworld.org/docid/519b1fb54.html> (hereafter "UNHCR, Beyond Proof"), p. 163.

should be noted that the European Court of Human Rights has found that a rejection of the documentary evidence submitted by the applicants in support of their applications without sufficient investigation was at odds with the requirement of close and rigorous scrutiny.⁵⁶

33. As UNHCR understands the Proposal, an applicant can be required to contact family members in the country of origin, but cannot be required to contact the Government of his or her country of origin if this would conflict with his or her need for protection. UNHCR appreciates that contacting the Government cannot be required, but cautions against requiring asylum-seekers to contact family members to send documents and other documentary evidence, as this could, in certain circumstances, put family members at risk of persecution.
34. The Proposal notes with regard to the *standard of risk* that the current practice should be retained, i.e. it is not required that it is more likely than not that there is a real risk that the applicant on return will be subjected to persecution or serious harm. As UNHCR understands the Proposal, the standard of risk will vary depending on the grounds for protection and the relevant circumstances.⁵⁷ The standard is higher in cases concerning subsidiary protection (returns against Article 3 of the ECHR) than in cases concerning persecution under the 1951 Convention. UNHCR notes that, according to the proposed Immigration Regulation paragraph 7-3 (4), the standard of risk is met when persecution is a “likely consequence” of return (Kravet til risiko ved retur anses oppfylt når forfølgelse [...] er en sannsynlig følge av utsendelse), and that the assessment shall be in compliance with international obligations.⁵⁸
35. UNHCR notes that it is well established that the standard of risk or well-foundedness of the fear of persecution does not need to be ‘conclusively beyond doubt’ or ‘more probably or likely than not’. To establish well-foundedness, persecution must be proved to be ‘reasonably possible’.⁵⁹

UNHCR Recommendations

- UNHCR notes that in cases where the “safe third country” or “first country of asylum” concept is applied, the burden of proof, based on the presumption of safety, rests on the decision-maker who needs to determine that the third country or first country of asylum is safe for the individual applicant.
- UNHCR recommends that credibility is established where the applicant has presented a claim which is coherent and plausible, not contradicting generally known facts, and therefore is, on balance, capable of being believed, and thus cautions against using a particular ‘standard of proof’; the same should apply in *sur place* claims.

⁵⁶ Singh and Others v. Belgium, no. 33210/11, ECtHR (Chamber judgment, final), 2 October 2012.

⁵⁷ Proposal p. 41.

⁵⁸ Proposal p. 43.

⁵⁹ See, UNHCR, *Letter from UNHCR to the Tokyo Bar Association Re request for inquiry in the case of S and the Government of Japan, Supreme Court 2012 No. 194 and 198*, 18 January 2013, available at: http://www.unhcr.or.jp/html/protect/pdf/UNHCR_Response_Letter_to_Tokyo_Bar_Association%20En.pdf

- UNHCR recommends that in establishing well-foundedness, persecution must be proved to be ‘reasonably possible’; the same should apply in *sur place* claims.
- UNHCR recommends that assessments of credibility are individual, and not based on general presumptions.
- UNHCR urges Norway to use caution if and when requiring refugees to contact family members to produce documentary evidence to substantiate their identity.

Introduction of subsidiary protection – restricting the term ‘refugee’ to persons covered by the 1951 Convention

36. According to the Proposal, the current system of recognizing both beneficiaries of international protection under the 1951 Convention and the ECHR Article 3 (subsidiary protection) as refugees will be repealed. Instead, persons who do not qualify for protection under the 1951 Convention, but cannot be returned without a violation of ECHR Article 3, will be granted subsidiary protection, regulated in a new paragraph 28 (a) of the Immigration Act. Aligning Norwegian legislation with the EU recast Qualification Directive⁶⁰, and having the possibility to accord a different level of rights associated with the protection status (for example, to travel documents, social welfare benefits and family reunification) are among the stated reasons for the amendment.⁶¹
37. While UNHCR welcomes States’ creation of a legal obligations to grant subsidiary protection to those at risk of serious harm for reasons and in circumstances not necessarily covered by the 1951 Convention, it is important that measures to provide subsidiary protection are implemented with the objective of strengthening, not undermining, the existing global refugee protection regime.⁶² This presupposes that individuals who fulfil its criteria are granted Convention refugee status, rather than being accorded subsidiary protection.⁶³ To this end, the refugee definition should be interpreted progressively and with the necessary flexibility to take changing forms of persecution into account.

⁶⁰ European Union: Council of the European Union, *Directive 2011/b 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>, (hereafter “EU recast Qualification Directive”).

⁶¹ By repealing the current Immigration Act § 28(1)(b), Norwegian legislation will be aligned with EU law. Article 28 (1)(b) is considered to mirror the EU recast Qualification Directive Article 15 letters a and b (with the exception of ‘execution’, which is not mentioned in the Norwegian law). Letter c has, however, been considered to be covered by the scope of the current § 28 (1)(b), which incorporates *inter alia* the ECHR Article 3, the ICCPR Article 7 and CAT Article 3.

⁶² UN High Commissioner for Refugees (UNHCR), *Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection*, 7 October 2005, No. 103 (LVI) - 2005, para (k), available at: <http://www.refworld.org/docid/43576e292.html>.

⁶³ *Ibid*, para (b).

38. UNHCR welcomes that the sequential approach will be introduced with the proposed amendment, and that the amendment acknowledges the primacy of the 1951 Convention. In the context of a sequential approach, UNHCR would like to note that many persons fleeing armed violence and conflict have a well-founded fear of being persecuted within the meaning of Article 1A(2) of the 1951 Convention. There is nothing in the text, context or object and purpose of the 1951 Convention which hinders its application to armed conflict or other situations of violence.⁶⁴ The 1951 Convention makes no distinction between refugees fleeing peacetime or wartime situations.⁶⁵ In fact, whole communities may suffer or be at risk of persecution.⁶⁶ Hence, there is no basis in the 1951 Convention for holding that in armed conflict or other situations of violence, an applicant needs to establish a risk of harm over and above that of others caught up in such situations (sometimes called a “differentiated risk”). Furthermore, there is nothing in the text of the 1951 Convention to suggest that a refugee has to be singled out for persecution.⁶⁷
39. The Proposal underlines that individuals currently granted subsidiary protection often have fled due to a fear of persecution by non-state actors, such as neighbors and family members, and should with the new provision not be granted Convention refugee protection in Norway.⁶⁸ UNHCR wishes to emphasize that there is no requirement under the 1951 Convention that the persecutor is a State actor and that there is scope within the refugee definition to recognize both State and non-State actors, for example in gender-related claims⁶⁹. As acknowledged by the Immigration Act paragraph 29(3)(c), harm

⁶⁴ See UN High Commissioner for Refugees (UNHCR), *Summary Conclusions on International Protection of Persons Fleeing Armed Conflict and Other Situations of Violence; Roundtable 13 and 14 September 2012, Cape Town, South Africa*, 20 December 2012, available at: <http://www.refworld.org/docid/50d32e5e2.html>.

⁶⁵ Forced Migration Review 47, Refugee by association, Blanche Tax, September 2014, available at: <http://www.fmreview.org/syria/tax>.

⁶⁶ UNHCR, Summary Conclusions on International Protection of Persons Fleeing Armed Conflict and Other Situations of Violence; Roundtable 13 and 14 September 2012, Cape Town, South Africa, 20 December 2012, para. 6, available at: <http://www.unhcr.org/refworld/docid/50d32e5e2.html>.

⁶⁷ UNHCR, Summary Conclusions on International Protection of Persons Fleeing Armed Conflict and Other Situations of Violence; Roundtable 13 and 14 September 2012, Cape Town, South Africa, 20 December 2012, para. 6, available at: <http://www.unhcr.org/refworld/docid/50d32e5e2.html>, para. 8; UNHCR Observations on the proposed amendments to the Danish Aliens Act: Lov om ændring af udlændingeloven (Midlertidig beskyttelsesstatus for visse udlændinge samt afvisning af realitetsbehandling af asylansøgninger, når ansøgeren har opnået beskyttelse i et andet EU-land mv.), [date], available at: http://www.unhcr-northerneurope.org/fileadmin/user_upload/Documents/PDF/Denmark/UNHCR_comments_on_proposal_to_amend_the_Danish_Aliens_Act_November_2014.pdf; see also UNHCR, International Protection Considerations with regard to people fleeing the Syrian Arab Republic, Update IV, November 2015, available at: <http://www.refworld.org/docid/5641ef894.html>, para. 36: UNHCR considers that most Syrians seeking international protection are likely to fulfil the requirements of the refugee definition contained in Article 1A(2) of the 1951 Convention, since they will have a well-founded fear of persecution linked to one of the Convention grounds. For many civilians who have fled Syria, the nexus to a 1951 Convention ground will lie in the direct or indirect, real or perceived association with one of the parties to the conflict. In order for an individual to meet the refugee criteria there is no requirement of having been individually targeted in the sense of having been “singled out” for persecution, or being at risk thereof.

⁶⁸ Proposal, p. 50.

⁶⁹ See UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/01, available at: <http://www.refworld.org/docid/3d36f1c64.html>, which in its para 21 explain “In cases where there is a risk

by non-State actors can also be considered persecution if those acts are knowingly tolerated by the authorities or if the authorities are unable or unwilling to offer effective protection.⁷⁰

40. As the purpose of the amendment is alignment with the EU recast Qualification Directive, UNHCR encourages Norway to also incorporate the protections of Article 15(c) of the Directive into the Immigration Act.
41. Although not discussed in the Proposal, UNHCR notes that the proposed Article 28 does not include the wording in the current Immigration Act paragraph 28(3), which ensures that “account shall be taken of whether the applicant is a child”.⁷¹ UNHCR urges Norway to retain the third paragraph, in line with the Convention on the Rights of the Child (“CRC”) Article 3, and that it also be applied to persons eligible for subsidiary protection (see further paragraphs 65-70 below concerning the recognition of children as Convention refugees or beneficiaries of subsidiary protection).
42. According to the Proposal, beneficiaries of subsidiary protection will no longer be considered refugees under Norwegian law and will, *inter alia*, not be exempt from income requirements for family reunification for one year (as Convention refugees have so far been), family members who themselves are not considered in need of protection will not be entitled to derivative protection status due to the principle of family unity in the Immigration Act paragraph 28 (1) (6) (*avledet flyktningsstatus*), and they will not be entitled to invoke particular provisions in the Norwegian social security legislation (*folketrygden*) granting refugees preferential treatment.⁷²
43. Residency permits on the basis of the new Article 28 (a) will, unlike residency permits granted to persons recognized as refugees, be subject to the same restrictions that can be applied to residency permits granted on the basis of humanitarian grounds, if necessary, for example, if the person’s identity is not sufficiently clear.
44. UNHCR acknowledges that States, including the Norwegian Government, are not obligated to accord the rights associated with 1951 Convention status to beneficiaries of subsidiary protection. However, UNHCR has repeatedly urged States to grant – to the extent possible - Convention refugees and beneficiaries of subsidiary/complementary protection the same rights, based on a recognition that they have the same protection needs. Access for subsidiary protection beneficiaries to similar rights as those of refugees is a significant element in facilitating their early participation and contribution to the host

of being persecuted at the hands of a non-State actor (e.g. husband, partner or other non-State actor) for reasons which are related to one of the Convention grounds, the causal link is established, whether or not the absence of State protection is Convention related.”

⁷⁰ *Ibid*, para. 19, and UNHCR, *Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/02, paras. 20-23, available at: <http://www.refworld.org/docid/3d36f23f4.html>.

⁷¹ Proposal, p. 52.

⁷² Proposal, p. 50.

community,⁷³ including through the labour market. The timely grant of secure legal status and residency rights are essential factors in the integration process.⁷⁴ In fact, providing an environment in which beneficiaries of international protection can attain self-reliance will help support the individual's achievement of any of the durable solutions, including voluntary repatriation should this become feasible.⁷⁵ As with Convention refugees, UNHCR is of the view that the status of a beneficiary of subsidiary protection should not in principle be subject to frequent review to the detriment of his/her sense of security, which international protection is intended to provide.⁷⁶

UNHCR Recommendations

- UNHCR recommends that beneficiaries of subsidiary protection generally be granted the same rights as Convention refugees.
- UNHCR recommends expanding the scope of subsidiary protection in the Norwegian Immigration Act to also encompass protection from the type of serious harm provided for by Article 15(c) of the EU recast Qualification Directive.
- UNHCR emphasizes the importance of a sequential approach to refugee status determination, and the primacy of the 1951 Convention, including in the determination of asylum claims from persons fleeing armed violence and conflict or persecution by non-state actors.
- UNHCR recommends that the period of validity of residence permits provided to beneficiaries of subsidiary protection be the same as that for 1951 Convention refugees. UNHCR moreover advises against frequent periodic reviews of individuals' international protection needs, as this is likely to undermine the individuals' sense of security, which is important for rehabilitation, and the ability to attain self-reliance; this in turn supports the attainment of any of the durable solutions including integration and voluntary repatriation.

Introduction of a new form of temporary protection

45. According to the Proposal, a temporary form of protection is to be introduced, which can be granted following a simplified procedure. The new temporary

⁷³ 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), para. 8, 29 July 2010, available at: <http://www.refworld.org/docid/4c503db52.html>.

⁷⁴ UNHCR Executive Committee, Conclusion No. 104, para (j). UNHCR Executive Committee calls on States with developed asylum systems to support refugee's ability to integrate "through the timely grant of a secure legal status and residency rights, and/or to facilitate naturalization", available at <http://www.unhcr.org/4357a91b2.html>.

⁷⁵ UNHCR, Handbook for Self-Reliance, August 2005, First edition, p. 7, available at: <http://www.refworld.org/docid/4a54bbf40.html>.

⁷⁶ UNHCR, Handbook para. 135,

permit will allow the immigration authorities to grant residence permits without assessing the merits of a protection claim, thus providing more time to assess the cases in detail later.⁷⁷

46. According to the Proposal, the King will have the competence to formulate regulations granting residency for up to two years, which are only to be issued when the processing of cases makes it necessary (*der hensynet til saksbehandlingen tilsier det*). UNHCR recommends that the criteria for when such permits can be issued be objectively described in law rather than leaving it at the discretion of the King. In its annotated comments to the EU Temporary Protection Directive, UNHCR has noted that “mass influx”, within the meaning of the Directive, cannot be defined in absolute terms, but should be defined in relation to the resources of the receiving country. The expression should be understood as referring to a significant number of arrivals in a country, over a short time period, of persons from the same home country who have been displaced under circumstances indicating that members of the group would qualify for international protection, and for whom, due to their numbers, individual refugee status determination is procedurally impractical.⁷⁸
47. Also, while accepting that the suspension of status determination procedures may be necessary in situations of mass influx, the UNHCR Executive Committee has affirmed that the implementation of temporary protection must not diminish the protection afforded to refugees under the 1951 Convention.⁷⁹ The EU Temporary Protection Directive also recognizes that temporary protection is not an alternative to refugee status under the 1951 Convention, but only a practical device aimed at meeting urgent protection needs during a mass influx situation until the individuals concerned have their asylum requests determined on a case-by case basis.⁸⁰
48. As UNHCR understands the Proposal, the granting of a permit will be at the discretion of the immigration authorities, and is only to be provided where the applicant’s identity is sufficiently clear. However, the permit is not to be granted where the application is considered manifestly unfounded, which means it will not apply to persons in admissibility procedures under the Immigration Act paragraph 32 or in accelerated procedures. UNHCR notes that the Proposal does not explain how the authorities will decide if a claim is manifestly unfounded if the claims have not been assessed on the merits. UNHCR further

⁷⁷ Proposal, p. 56.

⁷⁸ UN High Commissioner for Refugees (UNHCR), *UNHCR Annotated Comments on Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving Such Persons and Bearing the Consequences Thereof*, 19 May 2003, available at: <http://www.refworld.org/docid/3ecdeebc4.html> (hereafter “UNHCR annotated Comment on the EU Temporary Protection Directive”).

⁷⁹ See UN High Commissioner for Refugees (UNHCR), *General Conclusion on International Protection*, 7 October 1994, No. 74 (XLV) - 1994, available at: <http://www.refworld.org/docid/3ae68c6a4.html>, which “Notes that the beneficiaries of temporary protection may include both persons who qualify as refugees under the terms of the 1951 Convention and the 1967 Protocol and others who may not so qualify, and that in providing temporary protection States and UNHCR should not diminish the protection afforded to refugees under those instruments;”

⁸⁰ In UNHCR’s annotated Comment on the EU Temporary Protection Directive, UNHCR welcomes the explicit guarantee of access to asylum procedures by beneficiaries of temporary protection.

questions the reference to admissibility procedures, when manifestly unfounded claims should be examined (on the merits) in accelerated procedures.

49. While according to the Proposal, rights associated with the permit are to be determined in the future, the Ministry proposes that it should be associated with a right to work. In this respect, UNHCR has regularly appealed to States to provide beneficiaries of temporary protection the right to employment, since they may include a significant number of persons who would be recognised as refugees if their applications were processed individually.⁸¹ Early access to the labour market may help to diminish dependency on social assistance and also facilitate reintegration upon eventual return to the country of origin.
50. UNHCR further observes that individuals granted the temporary protection will not have the right to family reunification and permanent residency.⁸² In this respect, UNHCR wishes to refer to ExCom Conclusion No. 85, which calls on States to implement measures to facilitate family reunion of refugees in a positive and humanitarian spirit and without undue delay, and, where necessary, to consider developing the legal framework to give effect to a right to family unity for all refugees.⁸³ Such a policy should also be applied to beneficiaries of temporary protection on the understanding that many of them qualify as refugees.⁸⁴ UNHCR would like to note that the EU Temporary Protection Directive provides for the right to family reunification and, in this regard, makes explicit reference to the best interests of the child principle.⁸⁵
51. According to the Proposal, the granting of the permit will not be a formal individual administrative decision and thus cannot be appealed. While UNHCR acknowledges that the Government emphasizes that the new provision will not give grounds for rejecting an application for asylum,⁸⁶ UNHCR is of the view that asylum-seekers should have the right to appeal the decision, as refugee status is declaratory, and if an asylum-seeker fulfills the criteria in the refugee definition, s/he is entitled to the rights contained in the 1951 Convention.⁸⁷ As the new permit may restrict access to rights normally provided to refugees under Norwegian law and may be applied on a group basis, ordinary procedural safeguards should be in place to avoid discriminatory treatment and inconsistency with Article 3 of the 1951 Convention.

⁸¹ UNHCR annotated Comment on the EU Temporary Protection Directive.

⁸² Proposal, p. 56.

⁸³ UN High Commissioner for Refugees (UNHCR), *Conclusion on International Protection*, 9 October 1998, No. 85 (XLIX) - 1998, paras. (u) to (x), available at: <http://www.refworld.org/docid/3ae68c6e30.html>.

⁸⁴ UNHCR annotated Comment on the EU Temporary Protection Directive.

⁸⁵ See European Union: Council of the European Union, *Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof*, 7 August 2001, OJ L.212/12-212/23; 7.8.2001, 2001/55/EC, Article 15, available at: <http://www.refworld.org/docid/3ddcee2e4.html>.

⁸⁶ Proposal, p. 57.

⁸⁷ UNHCR Handbook, para. 28.

UNHCR Recommendations

- UNHCR welcomes the introduction of a temporary protection status in the Norwegian legislation, but stresses that the new permit should only be used as a provisional protection response in a situation of mass influx, aimed at meeting urgent protection needs until the individuals concerned have their asylum requests determined on a case-by case basis.
- UNHCR recommends that provisions on the temporary protection permit introduced in the Immigration Act include the right of beneficiaries of this permit to family reunification.
- UNHCR recommends Norway to review how the right to an effective remedy and procedural safeguards can be ensured in the context of applying temporary protection.

Increased use of cessation

52. The Proposal observes that the current practice is to grant refugees and beneficiaries of other forms of protection a temporary residency permit, as a general rule, for a period of one to three years.⁸⁸ These permits form the basis for an application for permanent residency. Unless there are grounds for cessation or revocation, residence permits of persons granted refugee status are as a general rule to be renewed.
53. According to the Proposal, the current situation warrants an increased use of cessation although it has thus far rarely been used. It is proposed that as a general rule, a residency permit will not be renewed if the basis for the first-time permit is no longer present.⁸⁹ The Proposal also refers to an earlier law proposal of 27 March 2015,⁹⁰ which proposed an increase from three to five years of temporary residency for eligibility for permanent residency (see further below at paragraphs 95-98).⁹¹ This change, together with an instruction that the immigration authorities to a greater extent should withdraw residence permits where the conditions are met, will allow for increased possibilities to control the influx.⁹²
54. Furthermore, on 14 January 2015, the Government issued an Instruction concerning the use of cessation in cases where a refugee has travelled to the

⁸⁸ Proposal, p. 54.

⁸⁹ Proposal, p. 54.

⁹⁰ Høring – endringer i utlendingsloven og utlendingsforskriften – hevet botidskrav for permanent oppholdstillatelse mv. – endringer i statsborgerloven, available at: <https://www.regjeringen.no/no/dokumenter/horing--endringer-i-utlendingsloven-og-utlendingsforskriften--hevet-botidskrav-for-permanent-oppholdstillatelse-mv.--endringer-i-statsborgerloven/id2403994/>.

⁹¹ UNHCR Observations on the proposed amendments to the Norwegian Immigration Act, Immigration Regulation and Nationality Act: Hevet botid for permanent oppholdstillatelse mv., available from: <https://www.regjeringen.no/contentassets/a7935befc95d40c88e5d25e98db5f967/unhcr.pdf>.

⁹² Proposal, p. 55.

country of origin.⁹³ Although the Instruction is not part of the Proposal, UNHCR will take the opportunity to comment also on the Instruction.

55. As noted in the Instruction, travel to the country of origin represents abuse of the asylum system and should be deterred. As UNHCR understands the instruction, if it is more likely than not that a person has travelled to the country of origin, a case shall be opened for consideration. The general rule according to the Instruction is that if it is established that the refugee voluntarily has travelled to the country of origin, the residency permit (whether temporary or permanent) and refugee status shall be ceased. Exceptions can be made, for example, for a visit to a dying mother, a brief visit to conduct political activities that Norway supports, or a “go-and-see” visit to assess return possibilities. Longer visits and/or without a pressing humanitarian need are likely to not fall within the accepted exceptions.
56. According to the Instruction, if the foreigner, in spite of the return to the country of origin, has protection needs, his/her status should nevertheless cease and a new permit be issued. The burden of proving this rests on the refugee. The time period required for eligibility for permanent residency and citizenship will count from the time of the issuance of the new permit.
57. As a general note in respect of both the Proposal and the Instruction, UNHCR wishes to underline that so far, the cessation clauses have rarely been invoked, in recognition of the need to respect a basic degree of stability for refugees and the overarching objective of international protection, namely to find durable solutions for refugees in the form of integration in the country of asylum, resettlement to a third State, or voluntary repatriation to the country of origin, when this is possible in safety and dignity.
58. In respect of the Proposal, UNHCR wishes to reiterate that the timely grant of a secure legal status and residency rights are essential factors in the integration process.⁹⁴ UNHCR has observed that the duration of residence permits has a considerable impact on refugees’ ability to integrate, and that short-term residence permits can be detrimental to refugees’ security and stability.⁹⁵ In UNHCR’s view, in order to take into account the special position of refugees, permanent residence should be granted to them at the latest at the end of a three year residence period.⁹⁶
59. In UNHCR’s view, refugee status should not in principle be subject to frequent review, which would be to the detriment of the security which it is intended to provide.⁹⁷ Regular reviews with the objective of ending refugee status can create considerable uncertainty, making it difficult for a refugee to focus on the longer term future, and are thus not conducive to integration.

⁹³ GI-01/2016 Instruks om tolking av utlendingsloven §§ 37 og 63 når flyktingen har reist til hjemlandet i strid med forutsetningene for opphold i Norge, available from: <https://www.udiregelverk.no/PageFiles/11868/Instruks%2014.01.2016.pdf>.

⁹⁴ ExCom Conclusion on local integration No. 104, para (j).

⁹⁵ UNHCR, *Note on the Integration of Refugees in the European Union*, para. 18, May 2007, available at: <http://www.refworld.org/docid/463b24d52.html>.

⁹⁶ *Ibid.*, para. 20.

⁹⁷ UNHCR, Handbook, para. 135.

60. The 1951 Convention recognizes that refugee status ends under certain clearly defined conditions. This means that once an individual is determined to be a refugee, their status is maintained unless they fall within the terms of one of the cessation clauses contained in Article 1 C of the 1951 Convention or their status is cancelled or revoked. Refugee status may cease either through the actions of the refugee (Article 1 C (1) to (4)), such as by re-establishment in his or her country of origin, or through fundamental changes in the objective circumstances in the country of origin (Article 1 C (5) and (6)). The cessation clauses are exhaustively enumerated, that is, no additional grounds would justify a conclusion that international protection is no longer required. Therefore, in order to not renew the temporary permit on the ground that the individual's protection needs have ceased, the conditions in one or more of these clauses would need to be met.⁹⁸

61. With regard to the Instruction, UNHCR agrees with the Government of Norway that the institute of asylum should not be abused and that frequent or extensive travels to a country, in respect of which a person has been recognized as a refugee, can call into question the international protection needs of that individual. The Proposal does not specify which of the cessation clauses the Government intends to apply to refugees who travel to their countries of origin. UNHCR, however, wishes to draw attention to what the UNHCR Handbook states in relation to Article 1C(4) of the 1951 Convention, and the meaning of the term "voluntary reestablishment" in the country where persecution was feared. This is to be understood:

"as return to the country of nationality or former habitual residence with a view to permanently residing there. A temporary visit by a refugee to his former home country, not with a national passport but, for example, with a travel document issued by his country of residence, does not constitute "re-establishment" and will not involve loss of refugee status under the present clause."⁹⁹

62. While a refugee who has travelled to his or her country of origin may reasonably be expected to explain his/her conduct, States initiating cessation procedures against recognized refugees bear the burden of proving that the refugee is no longer in need of international protection. The benefit of the doubt must be given to the refugee, which is consistent with the restrictive interpretation appropriate to the application of the cessation clauses. Moreover, the cessation clauses "should not be transformed into a trap for the unwary or a penalty for risky or naive conduct." UNHCR's ExCom Conclusion No. 103 on complementary forms of protection further recommends that "where it is appropriate to consider the ending of complementary forms of protection, States adopt criteria which are objective and clearly and publicly enunciated; and notes that the doctrine and procedural standards developed in relation to the cessation clauses of Article 1C of the 1951 Convention may

⁹⁸ See also UNHCR Observations to the Proposed Amendments to the Danish Aliens Legislation, L87, paras 27-35, available at http://www.unhcr-northern-europe.org/fileadmin/user_upload/Documents/PDF/Denmark/UNHCR_Comments_on_Danish_Law_proposal_L87_January_2016.pdf.

⁹⁹ UNHCR, Handbook, para. 134.

offer helpful guidance in this regard”.¹⁰⁰ In terms of procedural rights, whether international protection status has ceased should always be determined in a procedure in which the person concerned has an opportunity to bring forward any considerations and reasons to refute the applicability of the cessation clauses..

UNHCR Recommendations

- UNHCR recommends that cessation not be used as a tool for undertaking frequent reviews of individual cases on the basis of fundamental changes in the country of origin, in recognition of the importance to preserve the refugee’s sense of stability as much as possible;
- UNHCR recommends that the interpretation and application of the grounds for cessation not be expanded beyond established practice and UNHCR’s guidance, both in regard to the cessation of Convention refugee status, as well as in relation to the cessation of subsidiary protection.
- UNHCR recommends that the burden of proof when assessing possible cessation of international protection is kept in line with the UNHCR Handbook and Guidelines. The burden of proof rests on the State.

Temporary permits for unaccompanied children

63. The Proposal observes that the current framework could provide incentives for parents and others to send children alone on long and dangerous journeys to Europe, as “anchor children”, and to increase the wealth of the family.¹⁰¹ The Government of Norway therefore proposes to introduce a new type of temporary residence permit for unaccompanied asylum-seeking children (UASC) who after a child sensitive assessment are found to be in need of protection. According to the Proposal, the children will be granted a temporary permit until the age of 18 years.¹⁰² UNHCR observes that the term child-sensitive (“barnsensitiv”) is not defined in the Proposal, and also notes that the general requirement in the Immigration Act paragraph 28 (3), that “account shall be taken of whether the applicant is a child” seems to have been proposed to be removed.

64. Although not explicit in the Proposal, as UNHCR understands, when the child turns 18 years, his/her protection needs will be assessed according to the standards applied to adults. If meeting the criteria, the child will be granted refugee status or subsidiary protection status according to paragraph 28 and 28(a). Eligibility for a residence permit on grounds of strong humanitarian considerations or a particular connection with Norway, according to paragraph

¹⁰⁰ UN High Commissioner for Refugees (UNHCR), *Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection*, 7 October 2005, No. 103 (LVI) - 2005, para (o), available at: <http://www.refworld.org/docid/43576e292.html>.

¹⁰¹ Proposal pp. 58-59.

¹⁰² Proposal, p. 59.

38, will also be assessed. If during the period of the temporary permit, new information comes to light that strengthens the protection needs of the child, the child could be recognized as a refugee and granted an ordinary permit. If a care-taker is traced in the country of origin, the permit could be “redone” or withdrawn. UASC who have no known care persons in their country of origin shall, as a general rule, be given a temporary permit according to paragraph 38. The temporary permit will give the child the right to go to school and to work for those children who reach sufficient age, but not to permanent residency or family reunification.

65. At the outset, UNHCR would like to stress that the refugee definition in the 1951 Convention should – in child asylum claims - be applied and interpreted in a child-sensitive manner, as set out in the UNHCR Guidelines on International Protection on Child Asylum Claims.¹⁰³ In UNHCR’s view, a child-sensitive understanding to children’s claims to asylum is necessary to ensure that children’s specific rights and protection needs are taken into account and that they are not discriminated against in the asylum procedure due to their young age and status as children.¹⁰⁴
66. In UNHCR’s view, a child-sensitive refugee status determination is guided by the general principles set out in the Convention on the Rights of the Child, including the principle of the best interests of the child. It involves a recognition of child-specific forms¹⁰⁵ and manifestations of persecution, i.e. that children may experience harm in a different way than adults. Child-sensitive asylum procedures thus require an adapted threshold for what harm constitutes persecution,¹⁰⁶ acknowledgement that children may be persecuted for reasons of a Convention ground,¹⁰⁷ and that child-specific procedural and evidentiary safeguards are in place.¹⁰⁸
67. Children recognized as refugees following a child-sensitive application of the Convention, should be granted full protection status and an ordinary permit. That children are recognized according to child-specific standards does not mean that they do not fully meet the criteria of the refugee definition, only that it has been applied in an age and child-sensitive manner. To afford children lesser protection than adults would in UNHCR’s view be at variance with the provisions on non-discrimination contained in both the 1951 Convention and the CRC. A non-discriminatory application of the 1951 Convention requires that children are placed on an equal footing with others concerning the enjoyment of the rights under the Convention.

¹⁰³ UNHCR, Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 22 December 2009, HCR/GIP/09/08, (hereafter “UNHCR Guidelines on Child Asylum Claims”), available at: <http://www.refworld.org/docid/4b2f4f6d2.html>.

¹⁰⁴ CRC art. 2, 1951 Convention, art. 3.

¹⁰⁵ This includes violations of child-specific rights, see UNHCR Guidelines on Child Asylum Claims, paras. 18-36. UNHCR’s Executive Committee has recognized that child-specific forms of persecution may include under-age recruitment, child trafficking and female genital mutilation.

¹⁰⁶ UNHCR, Guidelines on Child Asylum Claims, paras. 15-17.

¹⁰⁷ UNHCR, Guidelines on Child Asylum Claims, paras. 40-52.

¹⁰⁸ For an outline of these, please see UNHCR, Guidelines on Child Asylum Claims, paras. 65-77. See also, UNHCR, *The Heart of the Matter - Assessing Credibility when Children Apply for Asylum in the European Union*, December 2014, available at: <http://www.refworld.org/docid/55014f434.html>.

68. UNHCR further recalls that a child's protection needs or membership in a particular social group does not necessarily cease to exist merely because childhood ends. The consequences of having previously belonged to such a social group might not end, even if the key factor of that identity (that is, the applicant's young age) is no longer applicable. For instance, a past shared experience may be a characteristic that is unchangeable and historic and may support the identification of groups such as "former child soldiers"¹⁰⁹ or "trafficked children" for the purposes of a fear of future persecution.¹¹⁰
69. UNHCR acknowledges that some risks may be specific to the child due to his/her young age or status as a child, and that the risk may be reduced over time. However, UNHCR would not recommend granting such children temporary permits for an extended period of time. In UNHCR's view, this would be at variance with the best interests of the child principle and recommendations by the UN Committee on the Rights of the Child in its General Comment No. 6;¹¹¹ this purports that efforts to find durable solutions for UASC should be initiated and implemented without undue delay and, wherever possible, immediately upon the assessment of a child being unaccompanied or separated.
70. UNHCR wishes to reiterate that the earlier mentioned sequential approach should equally apply to the assessment of children's asylum claims, and that children's protection needs - just as adults' - should first be assessed under the 1951 Convention. If the child does not fulfil the criteria in the 1951 Convention, an assessment of eligibility for subsidiary protection should follow (see paragraph 41 above), only after which a permit on another ground should be considered. Given the far-reaching consequences for the child's development into adulthood of a decision to grant a humanitarian or temporary residence permit, such decisions should be based on a determination of the best interests of the child, which provides a reasoned weighing of all factors.¹¹²
71. UNHCR wishes to underline that children are entitled to a stable and secure legal status, which should not be subject to regular review.¹¹³ This is further supported by a number of rights in the CRC, which recognize children's right to development and the right of refugee children and children deprived of their family environment to special protection and assistance.¹¹⁴ Article 20 of the CRC specifically provides that "when considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing". Finding durable

¹⁰⁹ In *Lukwago v. Ashcroft*, Attorney General, 02-1812, U.S. Court of Appeals for the 3rd Circuit, 14 May 2003, <http://www.unhcr.org/refworld/docid/47a7078c3.html>.

¹¹⁰ UNHCR, Guidelines on Child Asylum Claims, para. 53. See also, RRT Case No. N02/42226, [2003] RRTA 615, Australia, RRT, 30 June 2003, <http://www.unhcr.org/refworld/docid/4b17c2b02.html>.

¹¹¹ 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, <http://www.refworld.org/docid/42dd174b4.html>, para. 79.

¹¹² UNHCR, *Safe and Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, October 2014, available at: <http://www.refworld.org/docid/5423da264.html>, pp. 43-44.

¹¹³ UNHCR Executive Committee, *Conclusion No. 104*, para. (j). See also observations above concerning cessation of refugee status.

¹¹⁴ CRC Article 6, 20 22, and 27.

solutions for young children, that will allow them to integrate into communities, should be central in determining the best interests of children. Being allowed to remain under humanitarian or other forms of protection until reaching majority does not in itself constitute a solution for the unaccompanied or separated child and may be very detrimental for their development into adulthood. UNHCR finds the practice of allowing children to remain until they reach majority and then returning them particularly troubling. Unless individually tailored reintegration plans are in place, drawn up together with the child, the child's successful development into adulthood may be jeopardized.¹¹⁵

72. UNHCR moreover regrets that the proposed permit will not allow for family reunification. In some cases, reunification with parents or guardians traced in the country of origin or in a third country may be in the best interests of the child. In other cases however, such reunification will not be in the best interests of the child, for example if the child has international protection needs vis-à-vis that country and/or risks abuse or neglect from his or her parents (or other caregivers being considered).¹¹⁶ UNHCR recommends that unaccompanied minor children who cannot reunite with family members in their country of origin or in a third country be given the right to, as promptly as possible, seek family reunification in Norway with their parents or guardian, as well as with siblings.¹¹⁷ UNHCR also recommends, as part of the examination of the best interest of minor children, to consider and provide the possibility for refugee children to be reunited with other family members or guardians where their parents in direct ascending line cannot be traced. Children and adolescents are in particular need of a stable family environment to ensure the development of their personal and social skills. Recognizing that there may be tensions and dysfunctional family situations with the potential for abuse and neglect, it is important to ensure, in all cases, that the "best interest" of the child is promoted.¹¹⁸

UNHCR Recommendations

- UNHCR recommends including a reference directly in the Immigration Act, or in its preparatory works, to the sequential approach, as equally applicable to children's asylum claims, and to explicitly state that children's protection needs should first be assessed under the 1951 Convention. If the child does not fulfil the criteria in the 1951 Convention, a child-sensitive assessment of eligibility for subsidiary protection should follow, only after which a permit on another ground should be considered.

¹¹⁵ UNHCR, *Safe and Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, October 2014, available at: <http://www.refworld.org/docid/5423da264.html>, p. 49.

¹¹⁶ 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, para 81, available at: <http://www.refworld.org/docid/42dd174b4.html>.

¹¹⁷ UNHCR, Note on Family Reunification, July 1983, para. 5(a)(iii), available from: <http://www.refworld.org/pdfid/3bd3f0fa4.pdf>. CRC, Articles 9, 10 and 16.

¹¹⁸ UNHCR, *Protecting the Family: Challenges in Implementing Policy in the Resettlement Context*, June 2001, available at: <http://www.refworld.org/docid/4ae9aca12.html>, para. 22.

- UNHCR recommends that the refugee definition in the 1951 Convention should – in child asylum claims - be applied and interpreted in a child-sensitive manner, as set out in the UNHCR Guidelines on International Protection on Child Asylum Claims, and that children (including UASC) consequently recognized as refugees should be granted full protection status and an ordinary permit. Children qualifying for subsidiary protection should likewise be granted the same rights as adult beneficiaries of subsidiary protection, as well as child-specific rights under the CRC.
- UNHCR recommends that UASC who qualify for residence in Norway, as Convention refugees, beneficiaries of subsidiary protection or on other rights-based and/or humanitarian grounds, be granted a secure legal status which supports their right to development into adulthood. UNHCR therefore recommends that the proposal to grant UASC a temporary residence permit which will be reviewed upon turning 18 years be reconsidered.
- UNHCR also recommends that all UASC granted residence in Norway be afforded the right to family reunification, consistent with their rights according to the CRC, and according to which applications for family reunification should be dealt with in a positive, humane and expeditious manner.

Removal of the reasonableness criterion from the internal flight alternative (IFA) assessment

73. The Proposal removes the criterion of reasonableness when assessing an IFA under the Immigration Act paragraph 28 (5).¹¹⁹ According to the Proposal, assessing reasonableness is not required by international law and there have been doubts about how to apply the reasonableness criterion in practice. Removing the criterion will restrict the number of persons entitled to protection in Norway.¹²⁰
74. UNHCR wishes to refer to its Guidelines on International Protection on Internal Flight Alternative¹²¹ (hereafter "IFA"), which include a reasonableness criterion. UNHCR reiterates that the assessment of the reasonableness of an IFA is required for the IFA to be consistent with the 1951 Convention. In UNHCR's view, an IFA, including the reasonableness criterion, has a legal basis in the refugee definition. The approach taken to IFA by UNHCR in its Guidelines has been followed by the European Court of Human Rights,¹²² and both the relevance and reasonableness tests are reflected in Article 8 of the EU recast Qualification Directive.¹²³

¹¹⁹ Proposal, p. 60.

¹²⁰ Proposal, p. 64.

¹²¹ UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04, available at: <http://www.refworld.org/docid/3f2791a44.html>, (hereafter "UNHCR Guidelines on IFA").

¹²² *Salah Sheekh v. The Netherlands*, Application no. 1948/04, Council of Europe: European Court of Human Rights, 11 January 2007, available at: <http://www.refworld.org/docid/45cb3dfd2.html>

¹²³ EU recast Qualification Directive, Article 8.

75. UNHCR also refers to its *amicus curiae* of 4 August 2015 in the Supreme Court case of 18 December 2015 (HR-2015-2524-P),¹²⁴ which sets out what UNHCR considers the correct methodology for assessing the reasonableness criterion.¹²⁵ As UNHCR understands the decision of the Court, it does not, as the Proposal claims,¹²⁶ explicitly rule on whether or not an assessment of the reasonableness criterion is required by international law (or part of the refugee definition), as the majority opinion bases its arguments on domestic legal sources. The majority opinion concerning this issue was delivered by Justice Bergsjø, who, for the majority states clearly that he has not considered it necessary to assess this, but if such obligations do exist, this would indicate that the court has competence to rule on the matter.¹²⁷ Justice Bergsjø's majority opinion was that the Court does have competence to rule on the matter, and that it should exert caution when doing so.

UNHCR Recommendations

- UNHCR recommends that the reasonableness criterion not be removed from the Immigration Act, as an assessment of reasonableness is required for an IFA to be consistent with the 1951 Convention.

Restrictions concerning family reunification for refugees and beneficiaries of subsidiary protection

76. According to the Proposal, to increase the incentive for integration and to deter asylum-seekers from coming to Norway, an income requirement and a requirement of four years of work and/or education will be introduced for refugees to be eligible for family reunification.¹²⁸ In addition, the reference person¹²⁹ must not have received social welfare benefits in the past 12 months. As UNHCR understands, this will in effect mean that a minimum of four year residency will be required.

77. In UNHCR's understanding, the amendment will apply to both Convention refugees and beneficiaries of subsidiary protection. According to the Proposal, certain children will be exempted from the income requirement (see further below). Currently, refugees are exempt from the general income requirements if they apply within one year.¹³⁰ The Proposal also introduces a legal basis to

¹²⁴ Rt. 2015 page 1388, 18 December 2015, available at: <https://lovdata.no/dokument/HRSIV/avgjorelse/hr-2015-2524-p>

¹²⁵ UNHCR, *Amicus curiae submissions of the United Nations High Commissioner for Refugees (UNHCR) in case number 2015/203 (Staten v/Utlendingsnemnda (Regjeringsadvokaten) v. A (advokat Christian Hauge)) before the Supreme Court of Norway, concerning the internal flight or relocation alternative of Kabul, Afghanistan*, available at: http://www.unhcr-northerneurope.org/fileadmin/user_upload/Documents/PDF/Norway/2015_UNHCR_Amicus_curiae.pdf.

¹²⁶ Proposal, p. 63.

¹²⁷ HR-2015-2524-P, para. 216, available at: <https://lovdata.no/dokument/HRSIV/avgjorelse/hr-2015-2524-p>.

¹²⁸ Proposal, p. 73. Currently, the general income requirements are a past and future income of NOK 252 472, but the Ministry has proposed to increase this to NOK 305 200.

¹²⁹ In some jurisdictions, referred to as "the sponsor", meaning the person who has been granted international protection.

¹³⁰ Proposal, p. 67.

reject an application for family reunification if the reference person does not have permanent residence in Norway, and family reunification is possible in another country where the family as a whole has a stronger connection, e.g., where the family has residence in a safe third country.¹³¹

78. UNHCR notes with concern that the proposed restrictions on family reunification may in practice mean that many refugees in Norway may not be able to meet the requirements. Furthermore, when counting the time it will take to become eligible according to the new criteria plus the time for processing the family reunification application, families would have to wait at least five years for reunification, thus significantly prolonging the separation of families.
79. The Proposal states that there is no requirement to grant family reunification under the 1951 Convention. While the 1951 Convention is silent on the question on family reunification and family unity, the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons recommends that Member States “take the necessary measures for the protection of the refugee's family, especially with a view to (...) [e]nsuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country.”¹³²
80. UNHCR's Executive Committee has adopted a series of conclusions that reiterate the fundamental importance of family unity and reunification, and call for facilitated entry on the basis of liberal criteria for family members of persons recognized as being in need of international protection.¹³³ Specifically, the Executive Committee has underlined the need for the unity of the refugee's family to be protected by measures which ensure respect for the principle of family unity, including, those to reunify family members separated as a result of refugee flight,¹³⁴ and noted that it is desirable that countries of asylum ensure that the reunification of separated refugee families takes place with the least possible delay¹³⁵
81. Furthermore, family unity is a fundamental and important human right contained in a number of international and regional instruments to which Norway is a State party. These are the Universal Declaration of Human Rights, (Article 16(3)); the International Covenant on Civil and Political Rights, (Article 17); the International Covenant on Economic, Social and Cultural Rights,

¹³¹ Proposal, p. 67.

¹³² UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, 25 July 1951, A/CONF.2/108/Rev.1, available at: <http://www.unhcr.org/refworld/docid/40a8a7394.html>.

¹³³ See in particular, ExCom Conclusions on Family Reunion, No. 9 (XXVIII), 1997 and No. 24 (XXXII), 1981; ExCom Conclusion on Refugee Children and Adolescents, No. 84 (XLVIII), 1997; and ExCom Conclusion on the Protection of the Refugee's Family, No. 88 (L), 1999. ExCom Conclusions relating to family unity and reunification are compiled in the UN High Commissioner for Refugees (UNHCR), *A Thematic Compilation of Executive Committee Conclusions, 7th edition, June 2014*, June 2014, available at: <http://www.refworld.org/docid/5698c1224.html>.

¹³⁴ UN High Commissioner for Refugees (UNHCR), *Protection of the Refugee's Family*, 8 October 1999, No. 88 (L) - 1999, available at: <http://www.refworld.org/docid/3ae68c4340.html>.

¹³⁵ UN High Commissioner for Refugees (UNHCR), *Family Reunification*, 21 October 1981, No. 24 (XXXII) - 1981, available at: <http://www.unhcr.org/3ae68c43a4.html>.

(Article 10); the Convention on the Rights of the Child, (Article 16); as well as the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 8). Following separation caused by forced displacement such as from persecution and war, family reunification is often the only way to ensure respect for a refugee's right to family unity.¹³⁶

82. Even though Norway is not a Member of the European Union and is not bound by the EU Family Reunification Directive¹³⁷, UNHCR still wishes to note that Article 12(2) of that Directive provides that “Member States shall not require a refugee to have resided in their territory for a certain period of time, before having his/her family members join him/her”. In the case of other “sponsors” (including beneficiaries of subsidiary protection), Article 8 of the Directive provides that “Member States may require the sponsor to have stayed lawfully in their territory for a period not exceeding two years, before having his/her family members join him/her”. Nonetheless, in regard to beneficiaries of subsidiary protection, the European Commission “considers that the humanitarian protection needs of persons benefiting from subsidiary protection do not differ from those of refugees, and encourages Member States to adopt rules that grant similar rights to refugees and beneficiaries of temporary or subsidiary protection.”¹³⁸ By comparison, both Convention refugees as well as beneficiaries of subsidiary protection in Norway will – if the Proposal is adopted – be required to wait at least four years after being granted protection before they can initiate family reunification with their nuclear family members, including minor children remaining in countries of origin or first asylum.
83. UNHCR is concerned that the prolongation of access to family reunification procedures may be at variance with international and regional law, notably the 1951 Convention, the CRC and ECHR. The ECtHR has, regarding refugees, recalled that family unity is an essential right and a fundamental element in allowing persons who have fled persecution to resume a normal life and that refugees should benefit from a family reunification procedure which is more favourable than for other foreigners, due to their vulnerabilities. In this context the Court found it essential that the national authorities process the request for family reunification without undue delay.¹³⁹
84. The ECtHR has also made the point that due consideration should be given to cases where a parent has achieved settled status in a country and wants to be reunited with her child who, for the time being, finds himself in the country of origin.¹⁴⁰ The ECtHR has further noted that it may be unreasonable to force the

¹³⁶ UNHCR, Refugee Family Reunification. UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification of Third Country Nationals Living in the European Union (Directive 2003/86/EC), February 2012, p. 3, available at: <http://www.refworld.org/docid/4f55e1cf2.html>.

¹³⁷ European Union: Council of the European Union, *Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification*, 3 October 2003, OJ L. 251/12-251/18; 3.10.2003, 2003/86/EC, available at: <http://www.refworld.org/docid/3f8bb4a10.html>.

¹³⁸ Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification, Brussels, 3.4.2014, COM(2014) 210 final, para. 6.2, available at: http://ec.europa.eu/dgs/homeaffairs/e-library/documents/policies/immigration/familyreunification/docs/guidance_for_application_of_directive_on_the_right_to_family_reunification_en.pdf.

¹³⁹ *Tanda-Muzinga v. France* (no 2260/10) of 10 July 2014, para. 75.

¹⁴⁰ *Ebrahim and Ebrahim v. the Netherlands* of 18 March 2003.

parent to choose between giving up the position which she has acquired in the country of settlement or to renounce the mutual enjoyment by parent and child of each other's company, which constitutes a fundamental element of family life.¹⁴¹

85. The ECtHR has also concluded in several cases that since national authorities had not given due consideration to the applicants' specific circumstances, the family reunification procedure had not offered the requisite guarantees of flexibility, promptness and effectiveness to ensure compliance with their right to respect for their family life. For that reason, the State had not struck a fair balance between the applicants' interests on the one hand, and its own interest in controlling immigration on the other, in violation of Article 8.¹⁴² More generally, the ECtHR has concluded that preventing a temporary residence permit holder of five years from family reunification was in breach of Articles 8 and 14 of the ECHR.¹⁴³
86. Furthermore, the Court of Justice of the European Union (hereafter "CJEU") has held that the duration of residence in the EU Member States is only one of the factors that must be taken into account when considering an application for family reunification, and that a waiting period cannot be imposed without taking into account, in specific cases, all the relevant factors, while having due regard to the best interests of minor children.¹⁴⁴

Income requirement

87. UNHCR is concerned that income requirements for family reunification do not take into account the particular circumstances of persons who have had to flee persecution and/or serious human rights violations. While in principle advocating for the equal treatment with other third country nationals, the specific circumstances of refugees' flight and their vulnerability compared to other Third Country Nationals justifies a different treatment of those refugees and beneficiaries of subsidiary protection who may have suffered physical harm or traumatizing experiences, which may prevent them from meeting the income requirement. This is recognized in Article 34 of the 1951 Refugee Convention, which calls on Contracting States to facilitate the integration of refugees.

¹⁴¹ *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Judgment of 28 May 1985, Series A no. 94, § 68.

¹⁴² *Mugenzi v France* (Application No. 52701/09), *Tanda-Muzinga v France* (Application No. 2260/10), *Senigo Longue and Others v France* (Application No. 19113/09), see also European Court of Human Rights, "Family reunification procedure: need for flexibility, promptness and effectiveness." ECHR 211, Press release, 10.07.2014, available at: http://www.google.no/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CB0QFjAA&url=http%3A%2F%2Fhudoc.echr.coe.int%2Fwebsites%2Fcontent%2Fpdf%2F003-4817913-5875206&ei=gQZfVbLG8KtsgHd8oG4DA&usq=AFQjCNHZx5rQRNeOu0ieyaRVPLb-bvomUg&sig2=QeEySs-SXPB0ibmKjJs2bw&bvm=bv.93990622_d.bGg.

¹⁴³ *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>.

¹⁴⁴ Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification, Brussels, 3.4.2014, COM(2014) 210 final, p. 17.

88. Furthermore, restrictions on the right to employment applied during the asylum procedure and to beneficiaries of subsidiary protection place beneficiaries of international protection in a situation not comparable to other third-country nationals, and require them to have recourse to the social assistance system. The duty brought in by the 1951 Refugee Convention to grant refugees “treatment as favourable as possible” requires Member States to give due consideration to the non-application to beneficiaries of international protection of requirements otherwise applied to aliens.
89. Certain beneficiaries of international protection, due to their specific condition, may be in such a vulnerable situation that they may not be able to access family reunification if income requirements are applied without taking into account their particular circumstances. This could affect, *inter alia*, some victims of torture and trauma, persons with specific medical needs, or single heads of households.

Specific concerns regarding children

90. UNHCR notes that according to the Proposal, exemption from income requirements can be made because of particularly strong humanitarian considerations (Immigration Regulation paragraph 10-11). Exemption from the requirement of future income will be given if the reference person is a child under the age of 18 years.¹⁴⁵ In UNHCR’s view, however, it is unclear how many children will actually be able to benefit from this exemption in light of the proposal to introduce a temporary permit for UASC, which will not entitle the holders to family reunification. Exemptions will also be made for children under 15 years without a care-taker, who wish to reunite with their parents in Norway. UNHCR is not clear why the distinction has been made to not make the exemption applicable to all children i.e. to include also children between 15-17 years, as an age limit of 18 years would be consistent with Article 1 of the Convention on the Rights of the Child.
91. In the Proposal, the Government refers to Articles 3, 9 and 10 of the CRC, but concludes that the regulation of family reunification is at the State’s discretion. While UNHCR welcomes the reference to the CRC, UNHCR is concerned that the prolongation of the waiting period for eligibility for family reunification will have a detrimental impact on the well-being and safety of children remaining in countries of origin or first asylum, and be contrary to Norway’s obligation under Article 10 of the CRC to deal with applications for family reunification in a positive, humane and expeditious manner. As highlighted by UNICEF, all judicial and administrative processes concerning children need to be pursued as quickly as possible. Delay and uncertainty can be extremely prejudicial to children’s healthy development. From the child’s perspective, any period of time is significantly longer in the life of a child than in that of an adult.¹⁴⁶ UNHCR would also like to recall that according to Article 3 of the CRC, the best interests

¹⁴⁵ Proposal p. 73-75.

¹⁴⁶ UNICEF, Implementation Handbook for the Convention on the Rights of the Child: Fully Revised Third Edition, September 2007, available at: http://www.unicef.org/publications/index_43110.html. See also, UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC/C/GC/14, para. 60, available at: <http://www.refworld.org/docid/51a84b5e4.html>.

of the child shall be a primary consideration in all actions affecting children, and applies in all family reunification cases involving children, whether the child is in Norway, in the country of origin or in a third country.

92. UNHCR reiterates that children below the age of 18 are by UNHCR and in many other jurisdictions considered part of the nuclear family and eligible for family reunification.¹⁴⁷ Dependency may usually be assumed to exist when a person is under the age of 18 years, but continues if the individual (over the age of 18) in question remains within the family unit and retains economic, social and emotional bonds, or has special needs otherwise. UNHCR's Executive Committee has also called for facilitated entry on the basis of liberal criteria of family members of persons recognized to be in need of international protection.¹⁴⁸

The importance of family reunification for the integration process

93. The ability to reunify with one's family also supports the integration process, which States are requested to facilitate as far as possible, pursuant to Article 34 in the 1951 Convention. Separation of family members during forced displacement and flight can have devastating consequences on peoples' well-being, as well as on their ability to rehabilitate from traumatic experiences of persecution and war and inhibit their ability to learn a new language, search for a job and adapt to their country of asylum.¹⁴⁹ UNHCR's Executive Committee has emphasized that family reunification is an important element in the integration process, through ExCom Conclusion No. 104, which notes the role of family members in promoting the smoother and more rapid integration of refugee families given that they can reinforce the social support system of refugees.¹⁵⁰ Research consequently shows that, in most cases, family reunification is the first priority for refugees upon receiving status.¹⁵¹

Family reunification as a legal entry channel which prevents human smuggling

94. Finally, UNHCR regrets that the family reunification mechanism, as a legal entry channel, will be restricted and is concerned that this risks leading to more individuals, including women and children, having to resort to smugglers and risky journeys to Europe. Given the fact that most asylum-seekers are compelled to pay human smugglers large sums of money to reach Europe in order to exercise their right to seek asylum, many families are unable to travel together, and rely on legal family reunification procedures being available once a member of the family has been granted international protection.

¹⁴⁷ UNHCR, *Note on Family Reunification*, 18 July 1983, paras. 5 (b) and (c), available at: <http://www.refworld.org/docid/3bd3f0fa4.html>

¹⁴⁸ ExCom Conclusion on local integration No. 104.

¹⁴⁹ UNHCR, *A New Beginning: Refugee Integration in Sweden - It's about time!*, September 2013, available at: <http://www.refworld.org/docid/5295a60e4.html>.

¹⁵⁰ ExCom Conclusion on local integration No. 104, (n)(iv), which "reaffirms the importance of family unity and reunification as referred to in its Conclusions Nos. 9, 24, 84, and 88; and recognizes that family members can reinforce the social support system of refugees, and in so doing, promote the smoother and more rapid integration of refugee families".

¹⁵¹ UNHCR, *A New Beginning: Refugee Integration in Europe, September 2013*, <http://www.refworld.org/docid/522980604.html>.

UNHCR Recommendations

- UNHCR cautions that the proposed restrictions to family reunification may not be in compliance with the State's obligations under international and regional law, including the CRC and the ECHR, and run contrary to recommendations contained in UNHCR ExCom Conclusions. In addition, UNHCR cautions that such restrictions would act as an impediment to integration.
- UNHCR urges Norway to, in a pro-active manner, facilitate family reunification for all beneficiaries of international protection, including all children granted some form of protection, within the meaning of the CRC.
- UNHCR recommends that income requirements are not applied to beneficiaries of international protection for the purpose of family reunification; as a minimum, UNHCR recommends retaining the current exemption for refugees from income requirements for one year, and recommends that it be extended to beneficiaries of subsidiary protection.
- UNHCR recommends that the income requirements not be raised.

Increased requirements for permanent residency

95. UNHCR welcomes the intention to introduce measures that will support and facilitate integration of refugees. However, UNHCR considers that the increased requirements for permanent residency that the Norwegian Government proposes to introduce in paragraph 62 of the Immigration Act (see further below), will further undermine the ability of beneficiaries of international protection to integrate in Norway, and thus the Norwegian Government's expressed aim to improve the integration process.

96. In UNHCR's view, the Proposed measures are moreover contrary to the guidance provided in UNHCR's ExCom Conclusion No. 104 on local integration, which affirms "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".¹⁵² In UNHCR's view, the combined requirements of years of residency and language skills will be very difficult for many refugees and other beneficiaries of protection to meet. The temporary nature of their legal status and restrictions on the right to bring their family members also risk having a demotivating effect on integration. UNHCR considers that the proposed restrictions would lead to a "retrogression," rather than a progressive realization of rights.¹⁵³

¹⁵² ExCom Conclusion on local integration No. 104, para (l).

¹⁵³ UNHCR, UNHCR Observations to the proposed amendments to Danish Aliens legislation L87, para. 24.

Increased time of residency from three to five years

97. UNHCR refers to its comments of 21 May 2015¹⁵⁴ to the proposal of 27 March 2015 to introduce changes to the Immigration Act regarding, *inter alia*, increasing the residency time required for permanent residency and nationality to five years.¹⁵⁵ UNHCR wishes to reiterate its position regarding increasing the residency time i.e. that the timely grant of a secure legal status and residency rights are essential factors in the integration process.¹⁵⁶ UNHCR has observed that the duration of residence permits has a considerable impact on refugees' abilities to integrate, and that short-term residence permits can be detrimental to refugees' security and stability.¹⁵⁷
98. In order to take into account the special position of refugees, UNHCR recommends that permanent residence should be granted, at the latest, after a three year residence period,¹⁵⁸ and that this time-frame should also apply to beneficiaries of subsidiary protection statuses. While acknowledging that Norway is not bound by the EU *acquis* on asylum, UNHCR wishes to note that it has reiterated this recommendation in commentaries to the EU *acquis*, for example in relation to the three-year residence period established by the EU recast Qualification Directive.¹⁵⁹

Norwegian language and civic-orientation course

99. According to the Proposal, completion of a Norwegian civic orientation course (including a test) will become mandatory in order to qualify for permanent residency.¹⁶⁰ In this respect, UNHCR refers to its law comments to the law proposal of 27 March 2015 (see above)¹⁶¹ which also proposed a requirement of a completed civic orientation course before permanent residency can be granted. Further, while completion of a language course is already required, it is proposed that passing of a test of basic oral Norwegian (proficiency level A1) will become mandatory.

¹⁵⁴ UNHCR Observations on the proposed amendments to the Norwegian Immigration Act, Immigration Regulation and Nationality Act: Hevet botid for permanent oppholdstillatelse mv., available from: <https://www.regjeringen.no/contentassets/a7935befc95d40c88e5d25e98db5f967/unhcr.pdf>.

¹⁵⁵ Høring – endringer i utlendingsloven og utlendingsforskriften – hevet botidskrav for permanent oppholdstillatelse mv. – endringer i statsborgerloven, available at: <https://www.regjeringen.no/no/dokumenter/horing--endringer-i-utlendingsloven-og-utlendingsforskriften--hevet-botidskrav-for-permanent-oppholdstillatelse-mv.--endringer-i-statsborgerloven/id2403994/>.

¹⁵⁶ UNHCR Executive Committee, *Conclusion No. 104*, para. (j), UNHCR, *Thematic Compilation of Executive Committee Conclusions*, August 2009, 4th edition, available at: <http://www.refworld.org/docid/4a7c4b882.html>.

¹⁵⁷ UNHCR, *Note on the Integration of Refugees in the European Union*, para. 18, May 2007, available at: <http://www.refworld.org/docid/463b24d52.html>.

¹⁵⁸ *Ibid.*, para. 20.

¹⁵⁹ 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), available at: <http://www.unhcr.org/4c5037f99.pdf>.

¹⁶⁰ Proposal, pp. 77-79; 80-82.

¹⁶¹ UNHCR Observations on the proposed amendments to the Norwegian Immigration Act, Immigration Regulation and Nationality Act: Hevet botid for permanent oppholdstillatelse mv., available from: <https://www.regjeringen.no/contentassets/a7935befc95d40c88e5d25e98db5f967/unhcr.pdf>.

100. UNHCR welcomes the introduction of a mandatory civic orientation course and a basic oral language test as this may facilitate integration. UNHCR, however, urges Norway to apply these requirements flexibly as there may be individuals with specific learning needs. While not specific to refugees, the introduction of stringent language and civic orientation tests may penalize certain categories of refugees, in particular older or illiterate persons.¹⁶²
101. The Proposal proposes to make Norwegian language and civic orientation courses and tests mandatory also for persons between the age of 55 and 67. This age group currently has a right, but no obligation, to complete any classes.¹⁶³ UNHCR is positive to making such classes mandatory also for this age group, but generally urges Norway to apply flexibly the requirements of passing a test to be eligible for permanent residency.

Self-reliance

102. According to the Proposal,¹⁶⁴ a requirement of self-sufficiency for three years will be introduced, however the details for this are not set out. The competence to regulate this in detail is to be given to the Ministry of Justice and Public Security. The Proposal is not explicit on how these measures should be carried out in practice, and UNHCR therefore recommends that the detailed regulation be the subject of a public hearing before being regulated in either the Immigration Act or the Immigration Regulation. UNHCR, furthermore, urges Norway to introduce flexible exceptions if such a requirement is made mandatory.

UNHCR Recommendations

- UNHCR recommends Norway to refrain from increasing the number of years of residency required for permanent residency.
- UNHCR welcomes the introduction of a mandatory civic orientation course and a basic oral language test, but urges Norway to apply the requirements flexibly to refugees and other beneficiaries of international protection with specific needs.
- UNHCR recommends that the details of a requirement of self-reliance for three years to qualify for permanent residency be described in detail and be subject of a public hearing.

¹⁶² UNHCR, *Note on the Integration of Refugees in the European Union*, para. 43.

¹⁶³ Proposal, p. 83.

¹⁶⁴ Proposal, p. 82.

Expulsion of persons rejected due to a safe third country or first country of asylum

103. The Proposal introduces a legal basis in the Immigration Act paragraph 62 to expel persons whose application for asylum has been rejected admissibility pursuant to paragraph 32 of the Immigration Act, and who have not been granted a time-frame within which to leave the country (*utreisefrist*). According to the Proposal, the measure will result in fewer persons without a need for protection applying for asylum in Norway and will be in compliance with the EU Return Directive Article 11(1)(a).¹⁶⁵ Any expulsion decisions will be subject to a proportionality assessment. Unlike rejection of entry (*bortvisning*), an expulsion decision (*utvisning*) will allow for the imposition of a re-entry ban and registration in the Schengen Information System (SIS).
104. UNHCR strongly recommends including an explicit reference in the Immigration Act to the obligation to ensure that no return decision may be issued, and no removal carried out, if it would violate the principle of *non-refoulement*, as set out in Article 33 of the 1951 Convention and in relevant human rights instruments such as the ECHR (and incorporated into paragraph 73 of the Immigration Act).¹⁶⁶ The *non-refoulement* principle set out in Article 3 of the ECHR and Article 33 of the 1951 Convention are complementary and both need to be taken into account for the return decision to be in line with international law.
105. Furthermore, particular safeguards need to be in place for the return to third countries of asylum-seekers whose applications have not been determined on substance. In those cases, removal should be implemented only if access is assured to an asylum procedure in the third country and to effective protection in cases where it is needed. Specifically, where the proposed measures are applied to asylum-seekers being removed under a “safe third country” procedure or a “first country of asylum” concept, minimum safeguards should apply. This pertains, in particular, to assurances from the third country that the person will be admitted to a full and fair asylum procedure and have access to protection if required. Further, UNHCR recommends clarification of the definition of “return” to ensure that asylum-seekers whose claims have not been considered on their merits are not sent to countries in which they have never been and with which they have no connection.¹⁶⁷ Where persons are removed under “safe third country” or “first country of asylum” rules, the receiving State should be informed of the fact that the claim has not yet been

¹⁶⁵ European Union: Council of the European Union, Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, 16 December 2008, OJ L. 348/98-348/107; 16.12.2008, 2008/115/EC, available at: <http://www.refworld.org/docid/496c641098.html>.

¹⁶⁶ See UNHCR, UNHCR Observations on the European Commission's Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals (COM(2005) 391 final), 16 December 2005, available at: <http://www.refworld.org/docid/43a2a58f4.html>.

¹⁶⁷ Cf, Recital 44 and Article 38(2)(a) of the Asylum Procedures Directive (recast).

examined on its merits. UNHCR recommends the inclusion of a reference to this requirement.¹⁶⁸

106. Article 14 of the Universal Declaration of Human Rights affirms the right of every individual to seek and enjoy asylum from persecution. UNHCR reiterates that if the circumstances change in the individual's country of origin, or in the individual's profile or activities, resulting in a need for international protection, s/he must realistically be able to seek entry and can, according to Article 31 of the 1951 Convention, not be penalized for the illegal entry. A (re-)entry ban should, furthermore, not be issued for persons whose application for protection has been rejected on purely formal grounds.¹⁶⁹

107. In the *Z. Zh.* case (C-554/13), the CJEU found that States cannot automatically refuse to provide a deadline for voluntary return; decisions must be adopted on a case-by-case basis and properly take into account the fundamental rights of the person concerned.¹⁷⁰ Article 7(4) of the EU Return Directive provides that it is only in particular circumstances, such as where there is a risk to public policy,¹⁷¹ that Member States may grant a period shorter than seven days for voluntary departure or even refrain from granting such a period. To be able to rely on the derogation provided for in that provision on the ground that there is a risk to public policy, a Member State must be able to prove that the person concerned in fact constitutes such a risk.

108. Furthermore, by providing that the Member States are, in principle, required to grant a period for voluntary departure to illegally-staying third-country nationals, Article 7 of the EU Return Directive seeks, *inter alia*, to ensure that the fundamental rights of those third country nationals are observed in the implementation of a return decision taken under Article 6 of that Directive. In accordance with Article 79(2) TFEU, the objective of the EU Return Directive is, as is apparent from recitals 2 and 11 in the preamble thereto, to establish an effective removal and repatriation policy, based on common standards and common legal safeguards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity.

UNHCR Recommendations

- UNHCR strongly recommends including an explicit reference in the Immigration Act to the obligation to ensure that no return decision may be issued, and no removal carried out, if it would violate the principle of *non-refoulement*, as set out in Article 33 of the 1951 Convention and in relevant human rights instruments such as the ECHR.

¹⁶⁸ UN High Commissioner for Refugees (UNHCR), *UNHCR Observations on the European Commission's Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals (COM(2005) 391 final)*, 16 December 2005, available at: <http://www.refworld.org/docid/43a2a58f4.html>.

¹⁶⁹ *Ibid*, page 6.

¹⁷⁰ *Z. Zh. v Staatssecretaris voor Veiligheid en Justitie og Staatssecretaris voor Veiligheid en Justitie v I. O.*, 11. June 2015, paras. 69-70, available at: <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30dd76f41e6cf9b947899759d01f35a73863.e34KaxiLc3qMb40Rch0SaxuSaNv0?text=&docid=164962&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=229122>.

¹⁷¹ *Ibid*, para. 46.

- UNHCR recommends not issuing (re-)entry bans for persons whose application for protection has been rejected on purely formal grounds.

Reduced time-limit to appeal manifestly unfounded cases

109. The general rule in the Norwegian Public Administration Act¹⁷² of three weeks appeals time, apply in immigration cases unless more specific rules apply. The Proposal introduces a new provision (paragraph 94 a) in the Immigration Act, which create an exception for cases considered manifestly unfounded, whereby the deadline to appeal will be one week. The purpose is to expedite and make the processing of such cases more efficient. Cases considered manifestly unfounded will not normally be given suspensive effect, no time limit to leave the country (*utreisefrist*) will be given, and return can be effected immediately. According to the Proposal, applications rejected on the basis of the Immigration Act paragraph 32 will not be covered by this proposal, unless the application is assessed on the merits.
110. According to the Proposal, manifestly unfounded cases are not clearly defined in law, and applications from any nationality could, depending on the circumstances be processed as manifestly unfounded.¹⁷³ According to the Proposal, the assessment of whether a case is manifestly unfounded or not will be made by UDI. Examples provided are cases covered by the three week and 48-hours accelerated procedures, and where UDI considers it “obvious” that the person is not in need of protection, such as where the applicant is from a country that is normally considered a safe country of origin, where the applicant claims protection based on socio-economic problems in the country of origin or the application appears fabricated.¹⁷⁴ UNHCR considers that manifestly unfounded cases are to be defined as those which are clearly fraudulent or not related to the criteria for the granting of refugee status laid down in the 1951 Convention or to any other criteria justifying the granting of asylum.¹⁷⁵
111. As a general rule, UNHCR considers that the time-limit for appeals must be reasonable.¹⁷⁶ While short time-limits in first instance asylum proceedings aim to ensure an efficient and cost-effective examination of cases, the need to process asylum applications in a rapid and efficient manner cannot prevail over *non-refoulement* obligations.¹⁷⁷ Accelerated procedures that lack or limit the

¹⁷² Lov av 10. februar 1967 om behandlingsmåten i forvaltningsaker (forvaltningsloven).

¹⁷³ Proposal, pp. 89-90.

¹⁷⁴ Proposal, p. 92.

¹⁷⁵ UNHCR, The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum, 20 October 1983, No. 30 (XXXIV) - 1983, at: <http://www.unhcr.org/refworld/docid/3ae68c6118.html>.

¹⁷⁶ Cf. EU Asylum Procedures Directive (recast), recital 20.

¹⁷⁷ See also Parliamentary Assembly of the Council of Europe Resolution on accelerated asylum procedures, which states that Member States should ensure a balance between the need to process asylum applications in a rapid and efficient manner and the need to ensure there is no compromise over international obligations including under the Refugee Convention and the ECHR. Council of Europe: Parliamentary Assembly, Resolution 1471 (2005) on Accelerated Asylum Procedures in Council of Europe Member States, para. 8.1.17 October 2005, 1471 (2005), at: <http://www.unhcr.org/refworld/docid/43f349e04.html>.

procedural safeguards could, in some circumstances, limit or preclude an applicant from exercising his or her substantive right to seek asylum and receive international protection. Effective remedies against decisions taken in accelerated procedures must involve a rigorous scrutiny of whether the applicant's substantive rights have been respected.¹⁷⁸

112. UNHCR considers that the reduced time to file an appeal measure therefore should be viewed in light of the other restrictions on procedural safeguards that have recently been introduced, such as the lack of clear criteria for how safe countries of origin will be determined. In UNHCR's view, the expanded use of the "safe country of origin" concept foreseen by the Instruction adopted at the end of last year does not seem to be in line with established procedural standards in this area. In UNHCR's view, a decision to designate a country as safe should follow a thorough assessment of the situation of that country, based on a range of sources of information including UNHCR. There must also be a mechanism in place to quickly remove the designation of a country as safe, if the country would cease to meet the criteria for a "safe country of origin". Such criteria include: relevant laws and regulations are in place and enforced providing protection against persecution and other forms of serious harm; international human rights standards are observed, including a system of effective remedies against violations of such rights; and the principle of *non-refoulement* is respected. Further, the "safe country of origin" concept cannot be applied automatically, but only after an individual examination of the application. Importantly, the presumption of safety must be rebuttable, both in law and in practice for the individual applicant.
113. UNHCR considers that the combined effect of these measures could result in asylum-seekers not having access to an effective remedy to challenge a decision to reject their application as manifestly unfounded based on, for example, a consideration of their country of origin as "safe". Such individuals could thus be put at a risk of *refoulement*.

UNHCR Recommendations

- UNHCR recommends stipulating in the Immigration Act that manifestly unfounded claims are those which are clearly fraudulent or not related to the criteria for the granting of refugee status laid down in the 1951 Convention or to any other criteria justifying the granting of asylum.
- UNHCR recommends incorporating clear criteria for designating a country as a "safe country of origin" in the national legal framework, which are in line with the criteria referred to in paragraph 112 above.
- UNHCR recommends reviewing the Proposal with a view to ensuring that asylum-seekers channeled through the accelerated procedure for manifestly unfounded claims will have access to an effective remedy, with the required safeguards.

¹⁷⁸ UNHCR, UNHCR public statement in relation to *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration* pending before the Court of Justice of the European Union, 21 May 2010, para. 39, available at: <http://www.refworld.org/docid/4bf67fa12.html>.

No suspensive effect in admissibility procedures

114. According to the Proposal, in cases where return could entail *refoulement*, the general rule is that suspensive effect will be granted. The Proposal introduces a provision regulating that cases rejected under the Immigration Act, § 32 a (first country of asylum), c (acceptance by another Nordic state) and d (safe third country) can be effected immediately, that is, without suspensive effect. In exceptional circumstances, the decision may nevertheless not be implemented immediately. The stated purpose is the effective processing of cases. In UNHCR's view, suspensive effect should be automatic, including in admissibility and accelerated procedures.
115. Particularly in light of the reduced and, consequently, inadequate safeguards in the admissibility procedure (see concerns expressed above in paragraph 18), UNHCR is concerned that, despite the reference to suspensive effect being granted in cases where return could entail a risk of *refoulement*, there is a heightened risk of *refoulement*, including *chain-refoulement*, as a result of the combined effect of the various restrictive measures.

UNHCR Recommendations

- UNHCR recommends that suspensive effect of appeals be granted automatically in all asylum cases, including cases assessed within admissibility and accelerated procedures.

Biometrics are to be registered as a general rule in asylum cases

116. According to the Proposal, biometrics are to be registered as a general rule in immigration cases. Furthermore, there will be an increase in the time the material can be stored and a lowering of the age limit to record finger prints.
117. UNHCR wishes to remind that the sharing of personal information concerning asylum-seekers is guided by a number of principles as well as EU legislation.¹⁷⁹ Data sharing is normally regulated by national law and needs to

¹⁷⁹ See, for instance, European Union, *Directive 95/46/EC of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data*, 24 October 1995, available at: <http://www.refworld.org/docid/3ddcc1c74.html>; Convention for the protection of individuals with regard to automatic processing of personal data (CETS No. 108), 28.1.1981; Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding supervisory authorities and transborder data flows (CETS No. 181), Strasbourg, 8.11.2001; Amendments to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data approved by the Committee of Ministers, in Strasbourg, on 15 June 1999, available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/108.htm>; European Parliament legislative resolution of 12 March 2014 on the proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) (COM(2012)0011 – C7-0025/2012 – 2012/0011(COD)); available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0212+0+DOC+XML+V0//EN>.

have a legitimate basis and specific purpose. It should also be necessary and proportionate to a legitimate and specific purpose, and not exceed this. Generally, all personal data regarding persons of concern to UNHCR is considered as sensitive due to the particularly vulnerable position of asylum-seekers, and therefore requires handling in a confidential manner. Under no circumstances should data on persons of concern be shared with the country of origin. Data subjects further have the right to access, correction, deletion, and objection to their personal information. States are required to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the International Covenant on Civil and Political Rights.¹⁸⁰

UNHCR Recommendations

- UNHCR recommends that any measure involving the storing of biometric data from asylum-seekers and refugee be kept in line with applicable international and European standards, and that the recording of such material take into account the vulnerable situation of asylum-seekers, and in particular asylum-seeking children.

UNHCR Regional Representation for Northern Europe

Stockholm, 12 February 2016

¹⁸⁰ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html>. See also para. 10 of the General Comment No. 16 on Art 17 of the International Covenant of Civil and Political Rights (ICCPR), available at: http://ccprcentre.org/doc/ICCPR/General%20Comments/HRI.GEN.1.Rev.9%28Vol.I%29_%28GC16%29_en.pdf; UNHCR, *Policy on the Protection of Personal Data of Persons of Concern to UNHCR*, May 2015, available at: <http://www.refworld.org/docid/55643c1d4.html>.