



UNHCR

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

UNHCR

Regional Representation for Northern Europe

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Re: **UNHCR Observations on the proposed amendments to the Icelandic Act on Foreigners, titled *Frumvarp til laga um breytingu á lögum um útlendinga, nr. 96 15. maí 2002, með síðari breytingum (kærunefnd, fjölgun nefndarmanna)***

The UNHCR Regional Representation for Northern Europe hereby presents its observations on the law proposal referred to above.

We remain at your disposal for any clarifications required.

Yours sincerely,

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UNHCR Observations on the proposed amendments to the Icelandic Act on Foreigners:

Frumvarp til laga

um breytingu á lögum um útlendinga, nr. 96 15. maí 2002,
með síðari breytingum (kærunefnd,
fjölgun nefndarmanna)

I. Introduction

1. The UNHCR Regional Representation for Northern Europe (hereafter “RRNE”) hereby submits its observations on “Frumvarp til laga um breytingu á lögum um útlendinga, nr. 96 15. maí 2002, með síðari breytingum (kærunefnd, fjölgun nefndarmanna)” of March 2016, containing amendments to the Icelandic Act on Foreigners (hereafter “the Proposal”).
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,¹ 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[.]”.² UNHCR’s supervisory responsibility is reiterated in Article 35 of the 1951 Convention and in Article II of the 1967 Protocol relating to the Status of Refugees (hereafter collectively referred to as the “1951 Convention”).³ It has also been reflected in European Union law, including by way of a general reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the European Union (hereafter “TFEU”).⁴
3. 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,⁵ as well as by providing comments on legislative and policy proposals impacting on the protection and durable solutions of its persons of concern.

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

² *Ibid.*, para. 8(a).

³ According to Article 35 (1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of the 1951 Convention”.

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

⁵ 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>.

4. When drafting these comments, UNHCR has not had access to an official translation of the current Proposal. As the translation used is unofficial, and as UNHCR may not have a full understanding of the meaning of some of the draft provisions, UNHCR has refrained from commenting on specific legal language.
5. While not a member of the European Union ("EU") and consequently not bound by the Common European Asylum System ("CEAS"), Iceland seeks to coordinate asylum and migration issues with its EU neighbours and has in EU enlargement negotiations indicated that it generally applies the EU asylum *acquis*. The present comments, therefore, are *inter alia* informed by standards stemming from EU asylum law.

II. General Observations

6. UNHCR notes that the current Proposal contains a selection of changes already suggested in the comprehensive draft revision of the Icelandic Act on Foreigners (hereafter "the revision"), a revision which UNHCR contributed to through input to the work of the Cross-Party Parliamentary Committee and the Icelandic Ministry of the Interior during the autumn of 2015. UNHCR also provided written observations on the revision in November 2015 (hereafter "previous comments").⁶ UNHCR understands that the revision is currently pending submission to the Icelandic Parliament, and that the present Proposal contains certain parts of the revision that the Parliament wishes to prioritize for adoption, due to the increase in the number of asylum applications in Iceland.
7. UNHCR observes that the Proposal thus includes provisions to make the procedures at the Appeals Board faster and more efficient, as well as concerning criteria and procedures for applicants from a safe country of origin and manifestly unfounded applications. UNHCR acknowledges that Iceland has a legitimate interest in ensuring that claims for international protection that are clearly abusive or manifestly unfounded can be processed in an accelerated manner. Individuals found not to have a valid protection claim and who cannot benefit from alternative legal ways to regularize their stay should be assisted to return quickly to their home countries, in a manner which fully respects their human rights. Nonetheless, a number of safeguards need to be in place to ensure that individuals channelled through accelerated procedures are properly assessed and not returned to territories where their life or freedom would be threatened in contravention of the principle of *non-refoulement*. In this regard, UNHCR wishes to refer to its previous comments and the specific observations below.

III. Specific Observations

a. Increase in the number of Appeals Board members

8. UNHCR welcomes the suggested increase in the number of Appeals Board members from three to seven. UNHCR also welcomes the suggestion to make the Co-Chair (in addition to the Chair) of the Appeals Board a full time staff member. These measures may assist in reducing waiting times and backlogs and at the same time maintaining quality of decisions. In this context, UNHCR wishes to reiterate the following statements in its previous comments regarding the nomination of the members:

⁶ UNHCR, *Observations by the UNHCR Regional Representation for Northern Europe on the draft Proposal to amend the Foreigner's Act in Iceland ("Frumvarp til laga um útlendinga")*, November 2015, available at: <http://www.refworld.org/docid/56e17dc54.html>.

UNHCR would also like to commend the references in the Proposal to ensure appropriate qualifications of the members of the Board on all issues covered by the Foreigners Act, i.e. international refugee protection and statelessness issues, and the explicit obligation of the Board to publish its decisions. To ensure the institutional independence of the Board, UNHCR recommends precluding from appointment as a member of the Board, officials from the Ministry of the Interior and officials working in the Directorate of Immigration, even where such officials have not been previously involved in the case.⁷

b. Transfer of responsibilities from the Police to the Directorate of Immigration

9. UNHCR also welcomes the suggestion to transfer the responsibilities for the initial registration of claims from the Police to the Directorate of Immigration (hereafter "DI"). UNHCR recommends having one competent determining authority with responsibility for all asylum proceedings, including conducting personal interviews with 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 to ensure high quality procedures. 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 Executive Committee (ExCom) Conclusion No. 8.⁸

c. Powers of the Chairperson of the Appeals Board

10. UNHCR notes that the Proposal wishes to give the Chairperson of the Appeals Board the right to decide on his/her own on cases under certain circumstances. UNHCR understands from the unofficial translation used for these comments that this suggestion is similar to the suggestions presented in the revision. In this regard, UNHCR therefore wishes to reiterate its previous comments:

With regards to the authority of the Chair of the Board and in what circumstances s/he may rule alone on cases of concern, UNHCR observes that whether an appeal is heard by a single judge or a panel of judges may depend on the nature of the decision taken by the determining authority. UNHCR would recommend that if the case presents particular difficulties of a factual or legal nature or the legal matter is of fundamental significance, the case is not determined by the Chair alone, but with the full Board.⁹

UNHCR Recommendation:

- UNHCR recommends to, in the Act on Foreigners, clearly outline under which circumstances the Chairperson can decide on his/her own, and that these powers are used as restrictively as possible.

⁷ *Ibid.*, para. 8.

⁸ UNHCR, *Determination of Refugee Status*, 12 October 1977, No. 8 (XXVIII) - 1977, para. (e) (iii), available at: <http://www.refworld.org/docid/3ae68c6e4.html>. See also UNHCR, *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009)554, 21 October 2009)*, August 2010, section 5, pp. 9-11 available at: <http://www.refworld.org/docid/4c63ebd32.html>.

⁹ UNHCR, *Observations by the UNHCR Regional Representation for Northern Europe on the draft Proposal to amend the Foreigner's Act in Iceland ("Frumvarp til laga um útlendinga")*, November 2015, para. 13, available at: <http://www.refworld.org/docid/56e17dc54.html>.

d. Oral hearings at the Appeals Board

11. UNHCR notes that the Proposal suggests to restrict the number of oral hearings at the Appeals Board. It is suggested that the Board will invite applicants for oral interviews where it sees a need, instead of the applicant him/herself being able to request a hearing. UNHCR notes that the suggestion is similar to the one contained in the revision. In this regard, UNHCR wishes to reiterate its previous comments:

UNHCR acknowledges the need to make the proceedings of the Board as efficient as possible, without jeopardizing the quality of the decisions. As UNHCR thus observed in the aforementioned meeting in September 2015, depending on the nature of the appeal, it is not required that all applicants be given the opportunity of a hearing at the appeal stage. However, the proposed provision that “proceedings shall normally be in writing” seems to overly restrict the right to be heard. Moreover, certain appeals may require a further examination of the merits of the asylum claim, which may best be done through an interview, for example, where the credibility of the applicant’s statements is disputed.

To fulfil the requirement of rigorous scrutiny established in international human rights law, it is moreover important to note that the Board should have a fact-finding competence and the submission of new facts or evidence should be permitted during the appeals process.¹⁰ It is furthermore important to note that the right to be heard also applies to children in the appeals process, including both unaccompanied and accompanied children, in particular those making independent asylum claims.¹¹

12. With regards to the right to request an oral hearing, UNHCR submits that a protection applicant should be given the possibility to request an oral hearing on appeal, in particular where facts or credibility are at issue. An appeal authority should have the power to conduct an oral hearing either upon the applicant’s request or acting on its own discretion. The absence of either of these safeguards may give rise to an interference with standards of due process or procedural fairness and with the right to an effective remedy. The blanket or automatic denial of an oral hearing on appeal – for example because the person originates from a “safe country of origin” – resulting in the appeal authority being unable to evaluate all the evidence and take its own decision, would run counter to a fair and efficient asylum procedure, the good administration of justice and the right to an effective remedy.
13. In addition, and while acknowledging that Iceland is not an EU member, UNHCR notes that the right to be heard is guaranteed by both Articles 41 and 47 of the Charter of Fundamental Rights of the European Union (CFREU)¹². The same right is also

¹⁰ See also the recent ECtHR judgment; *F.G. v. Sweden*, Application no. 43611/11, Council of Europe: European Court of Human Rights, 23 March 2016, para 156 and conclusions in particular, available at: <http://www.refworld.org/docid/56fd485a4.html>. The court held the Swedish authorities (both first and second instance) responsible for failing to conduct a full *ex nunc* assessment of the risk of persecution due to the applicant’s *sur place* conversion to Christianity, despite the applicant choosing not to present this fact as an explicit basis for his asylum application.

¹¹ UNHCR, *Observations by the UNHCR Regional Representation for Northern Europe on the draft Proposal to amend the Foreigner's Act in Iceland ("Frumvarp til laga um útlendinga")*, November 2015, para. 11, available at: <http://www.refworld.org/docid/56e17dc54.html>.

¹² European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, available at: <http://www.refworld.org/docid/3ae6b3b70.html>.

enshrined in Article 6(1) of the European Convention for the Protection of Human Rights and Freedoms (ECHR)¹³, to which Iceland is a State party.

UNHCR Recommendation:

- UNHCR recommends to, in the Act on Foreigners, retain the right of the applicant to request an oral hearing and clearly outline under which circumstances an oral hearing is not required. Possible specific needs of an individual applicant should always be given due consideration.

e. Suspensive effect

14. UNHCR notes that the Proposal suggests to give the Chairperson the right to decide that no suspensive effect is to be granted in cases where the applicant comes from a “safe country of origin” or where the application is considered “manifestly unfounded”. UNHCR understands that also this suggestion is part of the Government’s wish to accelerate procedures for certain cases. With regard to the right to suspensive effect, UNHCR stated as follows in its previous comments:¹⁴

The notion of an effective remedy, furthermore, entails the right to an automatic suspensive effect of the first instance decision, allowing the applicant to remain in the country until a final decision has been taken on the asylum application. UNHCR notes that the recast APD [EU Asylum Procedures Directive¹⁵] permits four exceptions to the right to an automatic suspensive effect, outlined in Article 46(6), where the suspensive effect is subject to a decision from a court or tribunal. UNHCR wishes to note its concern about the potential risk of *refoulement* where such derogations apply and to underline the importance of ensuring the safeguards enshrined in Articles 46 (5) (7) and (8) of the recast APD, including the requirement to allow the applicant to remain on Icelandic territory pending the Board’s decision over the applicant’s right to remain.

UNHCR Recommendations:

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

f. The concept of “safe country of origin”

15. UNHCR notes that Article 6 of the Proposal aims at defining under which circumstances a country of origin is to be considered as safe. The Proposal mentions several factors

¹³ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.html>.

¹⁴ UNHCR, *Observations by the UNHCR Regional Representation for Northern Europe on the draft Proposal to amend the Foreigner's Act in Iceland ("Frumvarp til laga um útlendinga")*, November 2015, para. 10, available at: <http://www.refworld.org/docid/56e17dc54.html>. See also Article 13 of the ECHR and Article 47 of the CFREU regarding the fundamental right to an effective remedy.

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

to be taken into consideration when making this assessment such as a stable regime abiding by the rule of law, economic status and nature of internal state administration of the State, fulfilling the so-called Copenhagen criteria for EU accession and being a party to major international human rights treaties. Finally, also the experience of other State parties to the Schengen agreement can be taken into account when assessing the “safe country of origin” concept.

16. Firstly, UNHCR wishes to refer to ExCom Conclusion No. 87, which notes that “notions such as ‘safe country of origin’, ‘internal flight alternative’ and ‘safe third country’, should be appropriately applied in order not to result in improper denial of access to asylum procedures, or to violations of the principle of *non-refoulement*”.¹⁶ To give effect to their obligations in good faith under the 1951 Convention, State parties to the Convention are required to make independent inquiries as to the need for international protection of persons seeking asylum, and provide them with unhindered access to fair and efficient asylum or refugee status determination procedures.
17. In addition, 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.¹⁷ 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.

UNHCR Recommendation:

- UNHCR recommends that the assessment of whether a country can be presumed to be a “safe country of origin”, should follow a thorough assessment of the situation in that country, based on criteria referred to above and UNHCR guidance.

g. Humanitarian considerations

18. UNHCR notes that in the introductory summary, the Proposal refers to a change in the policy on residence permits granted on humanitarian grounds, however, this change is not specified in the proposed articles. Presuming that such changes will be introduced in the legislation and while not being aware of the details, UNHCR would like to emphasize the importance of applying the sequential approach to the assessment of applications for international protection. The sequential approach, acknowledged in the EU Qualification Directive¹⁸ and in the UNHCR ExCom conclusion on complementary

¹⁶ UNHCR, *General Conclusion on International Protection*, 8 October 1999, No. 87 (L) - 1999, para. (j), available at: <http://www.refworld.org/docid/3ae68c6ec.html>.

¹⁷ See also the APD, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), Article 37, available at: <http://www.refworld.org/pdfid/51d29b224.pdf>

¹⁸ European Union: Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L 337/9-337/26; 20.12.2011, 2011/95/EU, available at: <http://www.refworld.org/docid/4f197df02.html>.

forms of protection,¹⁹ recognizes the primacy of the 1951 Convention and requires that it is first determined who qualifies as a refugee in accordance with the 1951 Convention before assessing subsidiary protection. It is both a sequential as well as a hierarchical (in terms of rights) relationship.

19. The Icelandic asylum authorities (DI and the Appeals Board) thus have a responsibility to first undertake a thorough assessment of an asylum-seeker's eligibility for refugee status and thereafter, of his/her eligibility for "subsidiary protection" prior to assessing whether the applicant should be granted a right to remain based on humanitarian grounds. This is important in order to ensure there is no protection gap for persons in need of international protection.²⁰

UNHCR Recommendation:

- UNHCR recommends that the Government of Iceland reflect the sequential approach in the relevant legislation to ensure there is no protection gap for persons in need of international protection.

UNHCR Concluding Recommendation

- UNHCR recommends the Government of Iceland to ensure that all proposed measures to accelerate the asylum procedure provide for fundamental procedural safeguards for the individual asylum-seeker, as recommended above and in UNHCR's previous comments on the "revision", submitted to the Government in November 2015.

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Stockholm, 1 April 2016

¹⁹ UN High Commissioner for Refugees (UNHCR), *Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime*, 9 June 2000, EC/50/SC/CRP.18, available at: <http://www.refworld.org/docid/47dfb491a.html>

²⁰ 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, see e.g. para. 36, available at: <http://www.refworld.org/docid/50d32e5e2.html>. See also UNHCR, *Using the 1951 Convention Relating to the Status of Refugees to protect people fleeing armed conflict and other situations of violence: key legal challenges*, 20 October 2014, available at: <http://www.refworld.org/docid/545b43884.html>.