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

UNHCR Response to questions posed by the Judicial Affairs and Education Committee in relation to the draft law amending the Act on Foreigners No. 80/2016 (International Protection), 154th Legislative Session 2023-2024, Assembly Record 1084 – Issue 722, Government Bill

1. The refugee definitions in international and regional law

The 1951 Convention relating to the Status of Refugees and its 1967 Protocol defines a refugee as a person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of [their] nationality and is unable or, owing to such fear, is unwilling to avail [themself] of the protection of that country."[1]

Regional refugee law instruments in Africa and the Americas have broadened this definition by including people who are compelled to leave their country because of "external aggression, occupation, foreign domination, internal conflicts, massive violation of human rights or events seriously disturbing public order". These instruments are the 1969 OAU Convention[2] governing the specific aspects of refugee problems in Africa and the 1984 Cartagena Declaration on Refugees.[3]

Within the European Union, the Qualification Directive[4] (Directive 2011/95/EU) in addition to setting out the refugee definition as contained in the 1951 Convention, also contains a complementary international protection status: subsidiary protection. This is defined as protection given to a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to their country of origin, or in the case of a stateless person to their country of former habitual residence, would face a real risk of suffering serious harm, and is unable or, owing to such risk, unwilling to avail themselves of the protection of that country.

States are bound by the international and regional refugee law instruments that they are Party to. To become party to a treaty, a State must express, through a concrete act, its willingness to undertake the legal rights and obligations contained in the treaty – it must "consent to be bound" by the treaty.

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[1] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations Treaty Series, No. 2545, vol. 189 http://www.unhcr.org/refworld/docid/3be01b964.html.
[2] Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention")*, 1001 U.N.T.S. 45, 10 September 1969, https://www.refworld.org/legal/agreements/oau/1969/en/13572.
[3] Regional Refugee Instruments & Related, *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, -, 22 November 1984, https://www.refworld.org/legal/resolution/rri/1984/en/64184.
[4] 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)*, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU, 20 December 2011, https://www.refworld.org/legal/reglegislation/council/2011/en/84781.

States are also bound by customary international law, such as, the principle of non-refoulement, which is the cornerstone of international refugee law. The prohibition against refoulement precludes any State conduct which results in removing any person in any manner whatsoever to territories where he or she is at risk of persecution, torture, or other forms of serious or irreparable harm. As a customary rule of law, it is binding on all States, including those which have not yet become party to the 1951 Convention and/or its 1967 Protocol.

2. Asylum ceiling

With reference to the motive and necessity of the proposed legislation and that it is not realistic for Iceland to receive more than 4,000 asylum application per year in the coming year, UNHCR wishes to underline that providing international protection cannot be subject to a ceiling or cap on the number of asylum-seekers that can be admitted in a given time period. Admission of people in need of international protection is rather based on the protection needs of those who arrive and the universal right to seek asylum.

UNHCR also wishes to underline that, if such a ceiling on the number of asylum-seekers to be admitted was to lead to the denial of access to territory and to asylum procedures, it would be in violation of Iceland's obligations under the 1951 Convention as well as European refugee law. If the ceiling would be used as a trigger for a lowering of agreed standards, then it could undermine European solidarity, and lead to shifting rather than sharing of responsibility for asylum-seekers. It may also be inconsistent with the EU framework for determining responsibility among States for examination of a claim, and for offering equivalent levels of treatment as regards reception conditions.

3. Differentiation in rights depending on migration/protection status

UNHCR recommends that the same type and length of permits should be granted to both persons holding subsidiary protection status and those recognized as 1951 Convention refugees, to avoid discrimination and ensure equal treatment. According to international and European standards, a differentiated treatment according to immigration status is only permitted when the grounds therefore are objectively and reasonably justified. [5]

In UNHCR's experience, these two categories of beneficiaries of international protection have the same protection needs and face the same integration opportunities and challenges, as well as similar return prospects. In practice, beneficiaries of subsidiary protection are generally not able to return home earlier than refugees.[6]

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[5] Niedzwiecki v. Germany, European Court of Human Rights (ECtHR), 25 October 2005, http://www.refworld.org/docid/4406d6cc4.html; Okpisz v. Germany, ECtHR, 25 October 2005, http://www.unhcr.org/refworld/docid/4406d7ea4.html; Biao v. Denmark (Grand Chamber), ECtHR, 24 May 2016, http://www.refworld.org/cases,ECHR,574473374.html;
Hode and Abdi v. The United Kingdom, ECtHR, 6 November 2012, http://www.refworld.org/cases,ECHR,509b93792.html.

[6] See for instance, UNHCR, *Recommendations to Norway on strengthening refugee protection in Norway, Europe and globally,* November 2021, Recommendations to Norway on strengthening refugee protection – UNHCR Northern Europe; UNHCR recommendations to Sweden on strengthening refugee protection in Sweden, Europe and globally, September 2022, UNHCR recommendations to Sweden on strengthening refugee protection – UNHCR Northern Europe.

4. Short-term residence permits and mandatory review of protection needs

UNHCR has long advocated for refugees and beneficiaries of subsidiary protection to be entitled to a secure and stable protection status, which should not be subject to regular review.[7] Regular, mandatory status reviews may not only be detrimental to the mental health and well-being of refugees and beneficiaries of subsidiary protection but could also create an unnecessary burden on the asylum authorities and increased costs for the State. In many cases, it is unlikely that protection status will end, as the protection needs are not typically of a short duration. Many situations of forced displacement worldwide are regrettably of a protracted nature and go on for many years, even decades.[8]

UNHCR observes that mandatory regular review of the protection needs of refugees and beneficiaries of international protection has been introduced in recent years in some of the Nordic countries. However, policy and practice are far from uniform. Of the many cases initiated every year in countries where such review is undertaken, in practice most protection holders are granted a new residence permit and few end up with a loss of their protection status. Appeals and overturn rates tend to be high and processing times lengthy.

With respect to Denmark, the UN Committee Against Torture recently expressed concern that protection status is subject to a regular mandatory review upon the expiration of residence permits, noting the detrimental effect that this may have on the mental health of refugees, including many victims of torture. The Committee recommended that Denmark "ensure that reviews of asylum status are only undertaken on the basis of new information indicating a fundamental, stable, and durable change in the conditions in the country of origin, and that protection in the country of origin is effective and available".[9] The recent report by Save the Children Denmark "Young people in uncertainty - the importance of temporary residence for children and young people with a refugee background in Denmark" sheds light on how temporary residence permits affect the mental health of children and young people between the ages of 13-17. The report also illustrates how they experience the temporariness that affects their everyday lives and future opportunities.[10]

With respect to Norway, a review of the protection needs of refugees has in recent years become mandatory prior to possible conversion of the temporary residence permit into permanent residency.[11] Every year, hundreds of new revocation cases are initiated, while,

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7 UNHCR, Note on the Integration of Refugees in the European Union, May 2007, http://www.unhcr.org/463b462c4.pdf, para. 18; UNHCR, Comments on the European Commission Proposal for a Qualification Regulation – COM (2016) 466, February 2018, https://www.refworld.org/legal/intlegcomments/unhcr/2018/en/120341, p. 27

[8] Global Trends | UNHCR.

[9] UN Committee Against Torture, Concluding observations on the eighth periodic report of Denmark, December 2023, CAT/C/DNK/CO/8, https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsn8r9LWINRbKCgMhZhC1U4D8EiB64MGOLyHv8loN7p26712bbvn%2BKE5kQwvKYKNdAvqZu6NRr9rPPfymKy4xT5MeQP8QVag4pjnZ8dWvtfR0.

[10] Save the Children Denmark, Young people in uncertainty – the importance of temporary residence for children and young people with a refugee background in Denmark, March 2024, https://taggodtimod.redbarnet.dk/wp-content/uploads/2024/03/Ung-i-usikkerhed-rapport-Red-Barnet.pdf.

[11] CMI Report, Number 5, by Jessica Schultz, The temporary turn in Norwegian asylum law and practice, September 2022, https://www.cmi.no/publications/8445-the-temporary-turn-in-norwegian-asylum-law-and-practice. See also, NOAS, Tilbakekall – Ungdom fra Afghanistan som risikerer å miste oppholdstillatelse eller statsborgerskap, 2023, https://www.noas.no/wp-content/uploads/2023/10/Tilbakekall.-Ungdom-fra-Afghanistan.pdf.

in reality most are granted a new residence permit and few end up with a revocation decision. Processing times for revocation cases are five or more years and procedural safeguards are not adequately applied.[12] Some refugees have had their protection terminated even in situations when the change only applied to part of their home country.

UNHCR acknowledges the possibility of using the "ceased circumstances" cessation clauses of the 1951 Convention in situations where due to a fundamental and durable change of circumstances in their home country refugees no longer require international protection. However, cessation provisions should be used cautiously and restrictively with the necessary legal standards and procedural safeguards in place. Refugees and other beneficiaries of international protection should not be compelled to return to a still volatile situation in their country.[13]

5. The concepts of First Country of Asylum and Safe Third Country

With respect to the concepts of 'First Country of Asylum' or 'Safe Third Country', UNHCR wishes to refer to its previous observations on draft laws to amend the Foreigners Act in this respect.[14]

UNHCR does not object to the removal of Article 36(2) but recommends aligning the remaining part of Article 36 with the UNHCR and EU criteria for these concepts, including the requirement that the applicant has a connection or meaningful link to the third country. With respect to the recently adopted EU Pact and the new Asylum Procedures Regulation, UNHCR welcomes the optional nature of the safe third country and the retention of the connection requirement.

6. Introduction of a statutory waiting period for Family Reunification

Family reunification mechanisms are essential for separated refugee families to be able to reunite. It is also vital for refugees to be able to enjoy the essential and fundamental right to family life. The right to family life is contained in a number of international and regional instruments to which Iceland is a State party.[15]

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[12] In 2022, for instance, UDI revoked 842 residence permits out of 1,846 revocation cases initiated. Of the 842, 488 (58%) were eventually granted residence permits on other grounds. https://www.udi.no/globalassets/om-udi/arsrapport-udi-2022.pdf, p. 35.

[13] Department of International Protection (DIP), *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)*, HCR/GIP/03/03, UNHCR, 10 February 2003, https://www.refworld.org/policy/legalguidance/unhcr/2003/en/14489.

[14] UNHCR, *UNHCR Observations on the bill of law amending the Act on Foreigners, no. 80/2016 (International Protection)*, 22 November 2022, https://www.refworld.org/legal/natlegcomments/unhcr/2022/en/124206; UNHCR, *UNHCR Observations on the bill of law amending the Act on Foreigners, no. 80-2016 (International Protection and Returns Directive)*, 16 August 2019, https://www.refworld.org/legal/natlegcomments/unhcr/2019/en/124212.

[15] 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 (Article 10) and the Convention on the Rights of the Child (Article 16). While the 1951 Convention does not explicitly discuss 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."

When refugees are separated from family members as a consequence of their flight, a prolonged separation can have devastating consequences on the wellbeing of the refugees and their families. The negative consequences impact on the refugees' ability to integrate in their country of asylum, become active contributors to the society, and rebuild their lives. The restoration of the family unit can help to ease the sense of loss often experienced by persons in need of international protection who have had to abandon their countries of origin, communities and previous ways of life. Family reunion is an important factor in reducing mental health issues among refugees. Research shows that there is a direct link between family reunification, mental health and successful integration. Therefore, finding and reuniting with family members is often one of the most pressing concerns of refugees.

Further, greater use of family reunification channels allows more people to travel legally, thus contributing to better management of movements and reducing reliance on smugglers, while at the same time providing legal pathways to protection and avoiding the need for dangerous journeys.

It is with this in mind that UNHCR advocates for family reunification mechanisms which are swift and efficient in order to bring families together as early as possible. In recognition of the devastating consequences of long-term separation of refugee families, UNHCR's ExCom, of which Iceland is a member, has underlined that "every effort should be made to ensure the reunification of separated refugee families", and that reunification "takes place with the least possible delay."[16]

UNHCR notes that the draft Proposal aims to introduce a statutory two-year waiting period before an application for family reunification can be made by family members of beneficiaries of subsidiary protection. UNHCR is concerned that the reunification process even without a statutory waiting period of two years can be very lengthy and result in close family members having to live apart for many years with severe consequences for their wellbeing and integration. Furthermore, UNHCR has consistently held that there is no reason to distinguish between refugees and subsidiary protection beneficiaries with respect to the enjoyment of the fundamental right to family life. Under Article 8 of the European Convention on Human Rights and Fundamental Freedoms ("ECHR"),[17] everyone has the right to respect for their private and family life, irrespective of the type of residence provided. The principle of non-discrimination further requires that similarly situated individuals should enjoy the same rights and receive similar treatment. UNHCR therefore sees no utility in introducing a two-year waiting period for beneficiaries of subsidiary protection to apply for family reunification.

The Proposal makes reference to the introduction of a similar rule in Denmark, which became the subject of a case before the European Court of Human Rights. The Court found in its ruling in July 2021 that the 'three-year rule' failed to allow for an individualised assessment of the interest of family unity in the light of applicant's concrete situation beyond the 'very limited exceptions' provided for in the Danish Aliens Act. The Court also

[16] UNHCR ExCom Conclusion, Family Reunification No. 24 (XXXII) - 1981, 21 October 1981, paras 1-2, https://www.refworld.org/docid/3ae68c43a4.html.

[17] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, ETS 5, 4 November 1950, https://www.refworld.org/legal/agreements/coe/1950/en/18688 Art. 8.

highlighted the need to safeguard flexibility, speed and efficiency in the family reunification process. The waiting period of three years, although temporary, was by any standard a long time to be separated from one's family, when the family member left behind remained in a country characterised by arbitrary violent attacks and ill-treatment of civilians. Moreover, the actual separation period would inevitably be even longer than the waiting period. UNHCR made a submission to the Court in the case, expressing concerns that Danish legislation and practice is at variance with both international and European human rights law, as it undermines the fundamental right to family life for persons in need of international protection and excludes certain groups in a disproportionate and discriminatory fashion, contrary to what is required by the ECHR.[18]

UNHCR Representation for the Nordic and Baltic Countries
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[18] UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of M.A. v. Denmark (Application no. 6697/18) before the European Court of Human Rights*, 21 January 2019, https://www.refworld.org/jurisprudence/amicus/unhcr/2019/en/121700.