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

UNHCR Preliminary Observations on the Draft Amendments to the Law of the Republic of Lithuania on the Legal Status of Aliens (Reg. No. 20-4883)

I. Introduction

1. The UNHCR Representation for Northern Europe (RNE) appreciates the opportunity to present its initial comments to the Draft Law Amending the Law of the Republic of Lithuania on the Legal Status of Aliens (hereinafter – 'Law 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[3] and in Article II of the 1967 Protocol relating to the Status of Refugees[4] (hereafter collectively referred to as the "1951 Convention").[5]

3. UNHCR's supervisory responsibility is also formally recognized under 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 (TFEU)[6], as well as in Declaration 17 to the Treaty of Amsterdam, which provides that *"consultations shall be established with the United Nations High Commissioner for Refugees … on matters relating to asylum policy"*. Likewise, secondary EU legislation explicitly refers to UNHCR's mandated responsibilities. For instance, Article 29 of the recast Asylum Procedures Directive[7] states that Member

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

[2] *Ibid.*, para. 8(a).

[3] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: http://www.refworld.org/docid/3be01b964.html.

[4] UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: http://www.refworld.org/docid/3ae6b3ae4.html.

[5] According to Article 35 (1) of the 1951 Convention, UNHCR has the "duty of supervising the application of the provisions of the 1951 Convention".

[6] European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 26 October 2012, OJ L. 326/47-326/390; 26.10.2012, available at: http://www.refworld.org/docid/52303e8d4.html.

[7] 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, (hereinafter – "recast Asylum Procedures Directive"), available at: http://www.refworld.org/docid/51d29b224.html.

States shall allow UNHCR *"to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for international protection at any stage of the procedure"*.

4. UNHCR's supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention. Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (hereafter "UNHCR Handbook") and subsequent Guidelines on International Protection.[8] UNHCR also fulfils its supervisory responsibility by providing comments on legislative and policy proposals impacting on the protection and durable solutions of its persons of concern.

II. General observations

5. UNHCR notes that the Law Proposal intends to introduce a number of major changes in the Lithuanian asylum system, including reductions of legal aid in the administrative and appeal procedures, as well as shortening time limits for lodging appeals in accelerated and border procedures and new restrictions on the freedom of movement. UNHCR understands that the background to the proposed measures, as outlined in the Explanatory Note,[9] is the phenomenon of secondary movements, a low recognition rate, and the length of appeal procedures.

6. UNHCR welcomes some of the proposed amendments, such as the explicit inclusion of the Refugee Reception Centre in the institutional structure of the asylum-seekers' reception system, the provision of free interpreter's services to ensure communication between asylum-seekers and legal aid lawyers, and the streamlining of asylum procedures in first instance. UNHCR likewise appreciates the declared aim of the Law Proposal i.e. to increase the overall efficiency of the asylum procedures. It is indeed in the interest of all parties that quality decisions are taken as soon as possible in an efficient and fair asylum procedure.[10] This shortens the time spent in the reception centres, which is good for the applicants, and also saves financial resources for the state.

7. However, speed should not be a goal in itself and any time limits must be applied without prejudice to an adequate and complete examination.[11] In this respect, UNHCR regrets that some of the amendments significantly restrict essential procedural safeguards, and, for this reason, may negatively impact on the fairness of the asylum procedure potentially leading to errors in the decision-making process. In this respect, UNHCR recalls that the recast Asylum Procedures Directive aims at ensuring "fair and efficient asylum procedures in the Member States",[12] and arrangements aimed at ensuring efficiency of decision

[8] UN High Commissioner for Refugees (UNHCR), Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, April 2019, HCR/1P/4/ENG/REV. 4, (hereinafter UNHCR Handbook) available at: https://www.refworld.org/docid/5cb474b27.html.

[9] *Aiškinamasis raštas dėl Lietuvos Respublikos įstatymo „Dėl užsieniečių teisinės padėties" Nr. IX-2206 pakeitimo įstatymo projekto*, available at https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/507fe4f1759411eaa38ed97835ec4df6?jfwid=-1d5z9ivmb7.

[10] UN High Commissioner for Refugees (UNHCR), *UNHCR Comments on the European Commission's Proposal for an Asylum Procedures Regulation*, April 2019, COM (2016) 467, p. 31, available at: https://www.refworld.org/docid/5cb597a27.html.

[11] *Ibid*. p. 31.

[12] Supra note 7, recast Asylum Procedures Directive, recital 4.

making, should not undermine the effectiveness of procedural safeguards asylum-seekers are entitled to pursuant to international standards and EU law.

8. In the following observations on specific amendments, UNHCR will focus its comments on the key modifications to the current procedural arrangements and safeguards, i.e. the border procedure; envisaged restrictions on legal aid; free interpretation services in appeal procedures; restrictions on the freedom of movement; the shortening of the applicable time-limits for lodging appeals against decision taken in accelerated and border procedures, and suspensive effect of appeals.

III. Specific observations

Border Procedure (Article 3 of the Law Proposal)

9. The proposed amendments to Article 5 (2) and (3) of the Law on the Legal Status of Aliens (hereinafter – 'Aliens Law') essentially provide that asylum-seekers who have applied for asylum at border crossing points or transit zones as well as those applying for asylum after being apprehended in the context of irregular border crossing are not considered to be on the territory of the Republic of Lithuania, until a decision to allow entry is taken by the Migration Department. This provision raises several issues related to access to the territory and the asylum procedures, including what is the legal status of a person that is not considered as being on the territory and whether there is a right to stay pending a decision, whether protection from refoulement is guaranteed and what procedural rights the person has.

10. In this respect, UNHCR, first, observes that neither the current Aliens Law nor the proposed amendments explicitly guarantee for asylum-seekers the right to remain at border crossing points and transit zones until the Migration Department takes a decision on their asylum application. Such a guarantee is only envisaged at the appeal stage of the border procedure (Article 5 (5) of the present Aliens Law and Article 5 (4) of the proposed amendments). The right to remain is also explicitly stipulated with regard to asylum-seekers admitted into the territory within the meaning of the proposed Article 22[1] of the Aliens Law. It, therefore, appears that the legal framework governing the border procedure lacks an explicit prohibition of removal from the Republic of Lithuania in the initial stage of the asylum procedure which, based on the current Aliens Law and the proposed amendments, may last for several weeks.

11. In relation to the above, UNHCR would like to recall that the obligation of States not to expel or return a person to territories where his or her life or freedom would be threatened (aka *the principle of non-refoulement*) is the cornerstone of international refugee law, most prominently expressed in Article 33 of the 1951 Convention. Article 33(1) **prohibits States from expelling or returning (*refouler*) a refugee in any manner whatsoever** to a territory where she or he would be exposed to such threats.[13]

[13] Given that a person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfils the criteria contained in the refugee definition, refugee status determination is declaratory in nature: a person does not become a refugee because of recognition but is recognized because he or she is a refugee. It follows that the principle of *non-refoulement* applies not only to recognized refugees, but

12. The principle of non-refoulement constitutes an essential binding and non-derogable component of international refugee protection[14] which has been restated in international[15] and regional human rights instruments.[16] The fundamental and non-derogable character of the principle of *non-refoulement* has also been reaffirmed by the Executive Committee of the High Commissioner's Programme ('ExCom') in numerous Conclusions since 1977.[17] It is a norm of customary international law[18] and is consequently binding for all States, whether or not they are parties to the 1951 Convention or its 1967 Protocol.

13. The prohibition of refoulement refers to a wide range of state conduct which may engage non-refoulement obligations. This is evident from the wording of the of Article 33(1) of the 1951 Convention, which refers to expulsion or return (*refoulement*) 'in any manner whatsoever'.[19] While the territorial scope of Article 33 (1) of the Convention is not explicitly defined in the 1951 Convention, UNHCR is of the view that the purpose, intent and meaning of *non-refoulement* obligations are unambiguous and that these obligations apply wherever a State exercises jurisdiction.[20] Jurisdiction can be based on *de jure*

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also to those whose status has not yet been determined. See UNHCR Handbook, para. 28, available at: https://www.refworld.org/docid/5cb474b27.html. See also, ExCom Conclusion, No. 6 (XXVIII) - 1977, para. (c); ExCom Conclusion, No. 79 (XLVII) - 1996, paras. (i)(j): UNHCR, *Conclusions on International Protection Adopted by the Executive Committee of the UNHCR Programme 1975 – 2017 (Conclusion No. 1 – 114)*, October 2017, available at: https://www.refworld.org/docid/5a2ead6b4.html.

[14] Article 42(1) of the 1951 Convention and Article VII(1) of the 1967 Protocol, list Article 33 as one of the provisions of the 1951 Convention to which no reservations are permitted. See also, UNHCR, *Declaration of States Parties to the 1951 Convention and or its 1967 Protocol relating to the Status of Refugees*, 16 January 2002, HCR/MMSP/2001/09, para. 4, available at: http://www.unhcr.org/refworld/docid/3d60f5557.html. Please note that exceptions to the principle of *non-refoulement* under the 1951 Convention are permitted only in the circumstances expressly provided for in Article 33(2), however these exceptions do not affect the host State's *non-refoulement* obligations under international human rights law, which permit no exceptions (e.g. exposure to a risk of torture or other irreparable harm).

[15] An explicit *refoulement* provision is contained in Article 3 of the *1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. *The International Covenant on Civil and Political Rights*, as interpreted by the Human Rights Committee also encompasses the obligation not to extradite, deport, expel or otherwise remove a person from a State's territory where there are substantial grounds for believing that there is a real risk of irreparable harm.

[16] In the Americas, the principle of *non-refoulement* is enshrined in Article 22(8) of the American Convention on Human Rights, whereas the jurisprudence of this Court has held that *non-refoulement* is an inherent obligation under Article 3 ECHR. See, for example, European Court of Human Rights ('ECtHR'), *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, 23 February 2012, para. 114: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-109231%22]}.

[17] See ExCom Conclusions No. 25 (XXXIII) 1982, (b); No. 29 (XXXIV) 1983, para. (c); No. 50 (XXXIX) 1988, para. (g); No. 52 (XXXIX) 1988, para. (5); No. 55 (XL) 1989, para. (d); No. 62 (XLI) 1990, para. (a) (iii); No. 65 (XLII) 1991, para. (c); No. 68 (XLIII) 1992, para. (f); No. 71 (XLIV) 1993, para. (g); No. 74 (XLV) 1994, para. (g); No. 77 (XLVI) 1995, para. (a); No. 81 (XLVIII) 1997, para. (h); No. 82 (XLVIII) 1997, para. (d)(i); No. 85 (XLIX) 1998, para. (q); No. 91 (LII) 2001, para. (a); No. 94 (LIII) 2002, para. (c)(i); No. 99 (LV) 2004, para. (1); No. 103 (LVI) 2005, para. (m); and No. 108 (LIX) 2008, para. (a).

[18] UN High Commissioner for Refugees (UNHCR), *UNHCR Note on the Principle of Non-Refoulement*, November 1997, available at: https://www.refworld.org/docid/438c6d972.html; and Cambridge University Press, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, June 2003, p. 140-163, available at: https://www.refworld.org/docid/470a33af0.html. See also, supra note 18, Concurring Opinion of Judge Pinto de Albuquerque in ECtHR in *Hirsi*. See further, Conclusion III(5): *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, 22 November 1984 available at: http://www.refworld.org/docid/3ae6b36ec.html. This principle has also been confirmed by the Inter-American Court of Human Rights in *Advisory Opinion OC-21/14*, "*Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*", 19 August 2014, para. 211, available at: https://www.refworld.org/cases,IACRTHR,54129c854.html and *Advisory Opinion OC-25/18*, 30 May 2018, para. 181, available at: https://www.refworld.org/cases,IACRTHR,5c87ec454.html.

[19] UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007 ('UNHCR Advisory Opinion'), para. 7, available at: https://www.refworld.org/docid/45f17a1a4.html.

[20] Idem, para. 24.

entitlement and/or *de facto* control.[21] Therefore, the principle of *non-refoulement* applies 'to the conduct of State officials or those acting on behalf of a State *wherever* [that conduct] *occurs*, whether [in, or] beyond the national territory of the State in question.'[22]

14. Given the declaratory nature of the refugee status determination, the principle of *non-refoulement* applies not only to recognized refugees, but also to those who have not had their status formally declared. [23] The principle of *non-refoulement* is of particular relevance to asylum-seekers. As such persons may be refugees, it is an established principle of international refugee law that they should not be returned or expelled pending a final determination of their status. This approach is supported by the jurisprudence of the European Court of Human Rights which more recently in a case in relation to Lithuania has reaffirmed that the principle of *non-refoulement* fully applies to asylum-seekers who are present at the border.[24]

15. Article 3 (1) in conjunction with Article 9 (1) of the recast Asylum Procedures Directive (recast APD) likewise extend the right to remain to all applicants who are requesting international protection at the border, in the territorial waters or in the transit zones of the Member States. Furthermore, Article 8 (1) read in conjunction with Recital 27 and 28 clearly point to the fact that from the moment a person expresses the wish to apply for asylum or there are indications that a person may wish to do so, he/she is considered an asylum applicant and entitled to the procedural guarantees and rights as provided in the recast APD.

16. In order to give effect to the above mentioned obligations under the international and European refugee and human rights law, it follows that the Law Proposal need to be adjusted to explicitly incorporate the right to remain for asylum-seekers who are present at border crossing points and transit zones from the moment he or she applies for asylum.

17. The national legislative framework of Lithuania allows for holding asylum-seekers at border crossing points and transit zones up to 28 days. The arrangement is frequently applied in practice. Throughout the entire period, the asylum-seekers concerned are not permitted to leave the place of their stay. In this respect, UNHCR recalls that prolonged confinement at the border amounts to detention,[25] as acknowledged in the ECtHR's jurisprudence.[26] Where detention is used for asylum-seekers at a border

[21] UNHCR, *UNHCR intervention before the European Court of Human Rights in the case of Hirsi and Others v. Italy*, March 2010, Application no. 27765/09 ('UNHCR *Hirsi* intervention'), para. 4.3.1: https://www.refworld.org/docid/4b97778d2.html. *'De jure* jurisdiction on the high seas derives from the flag state jurisdiction. *De facto* jurisdiction on the high seas is established when a state exercises effective control over persons.

[22] Supra note 20, the Scope and Content of *Non-Refoulement*, para. 67.

[23] Supra note 8, UNHCR *Handbook*, para. 28.

[24] See *inter alia M.A. and Others v. Lithuania (app no. 59793/17)*, ECLI:CE:ECHR:2018:1211JUD005979317, Council of Europe: European Court of Human Rights, 11 December 2018, available at: https://www.refworld.org/cases,ECHR,5c3497654.html.

[25] UN High Commissioner for Refugees (UNHCR), UNHCR Comments on the European Commission's Proposal for an Asylum Procedures Regulation, April 2019, COM (2016) 467, p. 36, available at: https://www.refworld.org/docid/5cb597a27.html.

[26] See, for example, Amuur v. France, 17/1995/523/609, Council of Europe: European Court of Human Rights, 25 June 1996, available at: http://www.refworld.org/docid/3ae6b76710.html.

crossing point or in a transit zone, it should meet the requirements under Articles 8 to 11 of the recast Reception Conditions Directive.[27] This includes the requirements to introduce relevant detention grounds in national legislation and provide for speedy judicial review of detention. UNHCR, therefore, recommends transposing explicitly Article 8 (3) (c) of the recast Reception Conditions Directive and providing for requisite procedural guarantees, such as judicial review of detention at border crossing points and transit zones, in the Aliens Law.

18. UNHCR further notes that the Law Proposal provides for deleting Article 5 (8) of the Aliens Law which currently requires the State Border Guard Service (hereinafter – 'SBGS') in consultation with the Migration Department to allow entry and refer asylum-seekers to in-land reception arrangements in cases where appropriate reception conditions may not be ensured for asylum-seekers at border crossing points and transit zones. UNHCR regrets that it is intended to delete this essential safeguard which is currently instrumental in avoiding detention of children and other vulnerable asylum-seekers at the border.

19. UNHCR believes that given the character of border procedures they should not be applied to children. Detention, including at borders, is never in the best interests of the child, and should not even be used as a last resort. This concerns both unaccompanied and separated children, as well as children in families.[28] UNHCR and NGO monitoring activities at the external border of Lithuania likewise indicate that border crossing points and transit zones are not properly equipped for longer stays, in particular as far as vulnerable asylum-seekers are concerned. Insufficient space in accommodation premises, lack of warm meals, limited access to open air, and insufficient health care arrangements are those identified shortcomings which may require the transfer of asylum-seekers to the in-land reception facilities.[29] We, therefore, recommends providing for exempting children and other vulnerable asylum-seekers from the requirement to stay at border crossing points or transit zones in the context of the border procedure.

20. Furthermore, as indicated above, the Law Proposal appears to extend the border procedure to asylum-seekers who have been apprehended in the context of irregular border crossing. In this respect, UNHCR, first, note that the envisaged arrangement may be in conflict with Article 43 (1) of the recast Asylum Procedures Directive which links the application of the border procedure with the submission of the application for international protection at border crossing points and transit zones. Furthermore, since the stay at SBGS units in the context of the border procedure is not currently considered detention pursuant to the Aliens Law, UNHCR is concerned that the proposed amendments may expand resort to detention lacking requisite safeguards against unlawful or arbitrary detention. This includes the

[27] European Union: Council of the European Union, *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, 29 June 2013, OJ L. 180/96 -105/32; 29.6.2013, 2013/33/EU, available at: https://www.refworld.org/docid/51d29db54.html.

[28] UN High Commissioner for Refugees (UNHCR), *UNHCR Comments on the European Commission's Proposal for an Asylum Procedures Regulation*, April 2019, COM (2016) 467, p. 36, available at: https://www.refworld.org/docid/5cb597a27.html.

[29] See, for example, the Annual Report on Reception Conditions in Lithuania for 2019 (in Lithunaian), available at https://www.redcross.lt/leidiniai.

possibility of judicial review of detention. We, therefore, recommend refraining from introducing the proposed amendment.

UNHCR recommendations:

- Explicitly provide for the asylum-seekers' right to remain during the administrative stage of the procedure at the border.
- Specify that asylum-seekers present at border crossing points and transit zones enjoy the full range of rights guaranteed for asylum-seekers pursuant to the Aliens Law,
- Transpose explicitly Article 8 (3) (c) of the recast Reception Conditions Directive and provide for requisite procedural guarantee, such as judicial review, with respect to asylum-seekers who stay at border crossing points and transit zones in the context of the border procedure.
- Exempt children and other vulnerable asylum-seekers from the requirement to stay at a border crossing points or transit zones in the context of the border procedure.
- Refrain from applying the border procedure with respect to asylum-seekers apprehended in the context of irregular border crossing.

Legal aid in appeals procedures (Article 29 of the Law Proposal)

21. Pursuant to the proposed Article 71 (1) (4) of the Aliens Law, asylum-seekers would be entitled to legal aid in two sets of judicial proceedings only, i.e. (i) at the hearing before a district court when deciding whether to detain an asylum-seeker for a period extending 48 hours or apply an alternative to detention based on the submission of the SBGS, and (ii) procedures before an administrative court of first instance with regard to decisions taken on an application for asylum.

22. UNHCR notes that the envisaged legislative framework significantly reduces the scope of legal aid currently available for asylum-seekers in Lithuania. **As far the as the appeal stage of the asylum procedure is concerned,** the proposed amendments would deprive asylum-seekers of legal aid in procedures before the Supreme Administrative Court. This may lead in practice to the fact that decisions on asylum applications issued by the Migration Department would not be subjected to a judicial review by the Supreme Administrative Court, i.e. a higher judicial authority of Lithuania. Furthermore, lack of judicial review may lead to the deterioration of the quality of asylum determinations, open space for administrative errors, including risk of refoulement.

23. **As regards detention-related judicial proceedings**, the proposed legislative framework likewise excludes legal aid from appeal procedures before the Supreme Administrative Court (Article 117 of the Aliens Law) as well as procedures for a subsequent review of detention orders (Article 118 of the Aliens Law).

Moreover, it remains unclear whether asylum-seekers would be entitled to legal aid in procedures on extending detention periods before a district court.

24. UNHCR would like to underline that the right to legal aid is an essential component of the right to an effective remedy and fair trial under international law, and the right to effective judicial protection under EU Law. Pursuant to the respective case-law of the ECtHR and the CJEU, the grant of legal aid is governed by certain criteria, including the subject-matter of litigation and the importance of the issues at stake for the individual; the complexity of the applicable law and procedure; and the applicant's capacity to represent himself effectively.[30]

25. Asylum-seekers generally satisfy the above criteria notably because the issues which are at stake in asylum cases frequently involve fundamental human values such as the right to life, the right to liberty and the prohibition of torture or inhuman or degrading treatment or punishment; applicable law and procedure in the area of asylum in the EU is increasingly complex and sophisticated, and asylum-seekers typically lack knowledge of the language of national judicial procedures as well as knowledge of applicable legislation.

26. Given the importance of the legal issues often involved in cases of second or higher level appeals and complexity of the relevant appeal procedures, UNHCR recommends that access to free legal assistance and representation should be maintained in these cases. Where a national legal system allows the applicant to lodge a second or higher appeal, UNHCR considers that the applicant should have an effective opportunity to make use of such a right, including by enjoying free legal assistance and representation.[31]

27. It is true that Article 21 (2) of the recast Asylum Procedures Directive *inter alia* allows for granting legal assistance and representation only for appeals procedures before a court or tribunal of first instance. It needs to be underlined, however, that the directive, as an instrument of secondary legislation, must be applied in conformity with primary EU Law, notably Article 47 of the EU Charter of Fundamental Rights and the principle of effective judicial protection. In this respect, it is settled case-law of the CJEU that Member States must not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the European Union legal order or with the other general principles of European Union law.[32] As held by the CJEU in X, while there is no EU obligation to have, in asylum appeals procedures, a second level of jurisdiction, if Member States chose to have one, procedural rules governing access to the second level of appeal "must observe the principles of **equivalence** and **effectiveness**", as those rules implement EU law. According to the Court, these principles imply that relevant procedural rules "**must not be any less favorable than those governing**

[30] See *inter alia* judgments of the ECtHR in *Airey v. Ireland*, § 26; *McVicar v. the United Kingdom*, paras. 48 and 49; *P., C. and S. v. the United Kingdom* of 16 July 2002, para. 91, and *Steel and Morris v. the United Kingdom*, para 61, as well as the judgment of the CJEU in the case C-279/09, para. 61.

[31] UN High Commissioner for Refugees (UNHCR), *UNHCR Comments on the European Commission's Proposal for an Asylum Procedures Regulation*, April 2019, COM (2016) 467, p. 15, available at: https://www.refworld.org/docid/5cb597a27.html .

[32] See *inter alia* CJEU, joined cases of *N.S* and *ME*, C-411-10 and C-493-10, para.77

similar domestic actions (principle of equivalence) and **must not be framed in such a way as to render impossible in practice or excessively difficult the exercise of rights conferred by the legal order of the European Union (principle of effectiveness)".** [33] Moreover, as the CJEU further specified in *Gnandi*, "it is for the Member States to **ensure the full effectiveness** of an appeal against a decision rejecting an application for international protection, in accordance with the **principle of equality of arms [...].**"[34]

28. With this background, the proposed legislative framework appears to be problematic in several respects. First, the Aliens Law and the Law on Administrative Proceedings (lith. *Administracinių bylų teisenos įstatymas*) clearly entitle asylum-seekers to challenge decisions of the Vilnius Regional Administrative Court by lodging appeals with the Supreme Administrative Court. Pursuant to Article 9 and 134 (2) (6) of the Law on Administrative Proceedings, these appeals must be prepared in Lithuanian, and include *inter alia* a legal basis, i.e. references to applicable legal provisions and factual circumstances. It is clear that asylum-seekers deprived of legal aid would never be able to comply with these requirements and implement the right to appeal in practice. While some might hire a private lawyer, the majority would simply lack required financial resources and never be able to effectively lodge the appeal with the Supreme Administrative Court. The right granted to asylum-seekers pursuant to the Lithuanian legislation would only become illusory. It is difficult to see how **the principle of equality of arms,** as required by EU law, would then be ensured in the asylum appeal procedures in Lithuania.

29. Furthermore, UNHCR notes that the Law on the State Guaranteed Legal Aid of the Republic of Lithuania which governs the provision of legal aid in criminal and civil cases, as well as administrative cases outside the area of asylum, does not limit legal aid to the proceedings before a court of first instance. This situation may give rise to concerns in light of **the principle of equivalence** of EU Law, as elaborated above.

30. As regards detention procedures, in addition to the above considerations, the envisaged denial of legal aid may be in conflict with Article 9 (6) of the recast Reception Conditions Directive which requires Member States to ensure that applicants have access to free legal assistance and representation in cases of a judicial review of the detention order. The directive does not provide for a possibility to limit legal aid to certain levels of jurisdiction. It follows that the proposed provisions may be at variance with an instrument of secondary EU Law governing access to legal aid for asylum-seekers in detention cases.

31. Finally, UNHCR notes that the wording of the proposed Article 71 (1) (4) appears to exclude legal aid for the purpose of challenging administrative decisions on reception conditions. In this respect, Article 26 of the recast Reception Conditions Directive clearly entitles asylum-seekers to request and benefit from free legal assistance and representation with a view to lodging appeals against "decisions relating to the granting, withdrawal or reduction of benefits under this Directive" or "decisions [on residence and free movement] which affect applicants individually". Moreover, Article 45 (4) of the recast Asylum Procedures clearly guarantees legal aid to refugees and beneficiaries of subsidiary protection in appeals

[33] CJEU, *X*, Case C-175/17, paras 38 and 39.

[34] CJEU, *Sadikou Gnandi*, Case C-181/16, para. 61

procedures with regard to administrative decisions on withdrawing their international protection status. This guarantee is not provided for in the Aliens Law.

UNHCR recommendations:

- Maintain the provision of legal aid for appeals procedures before the Supreme Administrative Court against decisions issued by the Migration Department on asylum applications and decisions to detain an asylum-applicant;
- Maintain the provision of legal aid in judicial procedures on subsequent review of detention orders and judicial procedures on extending the detention periods;
- Extend legal aid to appeals against administrative decisions on decisions relating to the granting, withdrawal or reduction of reception benefits and decisions on residence and free movement;
- Introduce legal aid for appeal procedures relating to withdrawing refugee status and subsidiary protection.

Interpretation in appeals procedures (Article 29 of the Law Proposal)

32. In accordance with the proposed Article 71 (1) (6) of the Aliens Law, free interpreter's services would only be guaranteed for asylum-seekers in proceedings before a court of first instance. As a result, this essential procedural safeguard would not be any more available in proceedings before the Supreme Administrative Court.

33. First, as outlined above, Member States which choose to introduce or maintain a court of second instance in the asylum appeals procedures are under an obligation to ensure that relevant procedural rules conform to principles of effectiveness of EU Law and equality of arms. Free interpreter's services are a basic procedural guarantee aimed at enabling both the court and the parties to the procedures to communicate at the hearings. Without having appropriate interpretation arrangements in place, the Supreme Administrative Court would simply not be able to perform its tasks.

34. It is also worth noting that Article 12 (2) of the recast Asylum Procedures Directive requires Member States to ensure free services of an interpreter in appeals procedures, and Article 9 (4) of the Law on Administrative Proceedings of the Republic of Lithuania clearly guarantees the right to free interpreters' services for persons lacking knowledge of the Lithuanian language.

35. UNHCR, therefore, recommends refraining from introducing, in the Aliens Law, the proposed limitation on the use of interpreter's services in appeals procedures.

UNHCR recommendation:

- Provide for free interpreter's services throughout the appeals procedure.

Legal aid in administrative procedures (Article 47 of the Law Proposal)

36. The proposed amendments modify Article 82 (1) of the Aliens Law reducing the scope of legal aid *ratione personae* at the administrative stage of the asylum procedure (hereinafter – 'first instance asylum procedure'). Currently Article 82 (1) entitles any asylum-seeker to request the presence of a legal aid lawyer at an asylum interview. According to the proposed provision, the asylum-seeker would always have the right to a legal counsel during the asylum interview, but legal aid at asylum interviews would only be state-funded with respect to vulnerable asylum-seekers.

37. While UNHCR welcomes that vulnerable applicants would still have the right to legal aid free of charge at asylum interviews, we regret that Lithuania is introducing restrictions on free legal aid in first instance asylum-procedures. UNHCR considers that investing in the first instance procedure in line with the principle of "front loading", including through the provision of **quality legal aid early in the process**, has the potential to enhance the quality of decisions and reduce the number of appeals and repeat applications leading to a shorter overall duration of the procedure and reduced costs of reception conditions. "Frontloading" the asylum process may thus save resources for Member States and produce more efficient and fairer decisions for asylum-seekers.[35]

38. UNHCR agrees that the current legal aid system for asylum-seekers in Lithuania has certain shortcomings and may need to be modified and improved. The scope of legal aid, criteria for selecting service providers, remuneration rates, capacity building and quality assurance are among the issues which might inform the review process. We, however, believe that any major reform of this essential component of the national asylum system should be based on (i) a thorough evaluation of the current arrangements and practices and (ii) an impact assessment of the envisaged measures. UNHCR would be happy to collaborate with the Lithuanian authorities on such initiatives and contribute with its expertise and advice.

39. In view of the above, UNHCR recommends considering to refrain from reducing legal aid in first instance asylum procedures.

UNHCR recommendations:

- Maintain legal aid in first instance asylum procedures;

[35] UNHCR, Moving Further Toward a Common European Asylum System: UNHCR's statement on the EU asylum legislative package, June 2013, p. 2, available at: http://www.refworld.org/docid/51de61304.html.

- Consider initiating an evaluation of the current legal aid system for asylum-seekers with a view to developing possible options for its reorganization.

Periodic review of detention (Article 38 of the Law Proposal)

40. The proposed Article 114 (6) requires the SBGS to conduct regular review of detention orders by re-assessing relevant circumstances periodically, and at least every three month, and initiating subsequent judicial review procedures, where it is established that the applicable detention ground ceases to exist.

41. UNHCR welcomes the introduction of the proposed arrangement aimed at ensuring regular periodic review of detention orders. This important procedural safeguard is instrumental in ensuring that detention complies with the principles of necessity and proportionality. We, however, consider that the proposed maximum 3 month period for conducting periodic reviews is too long, since district courts of Lithuania tend to initially authorise detention of asylum-seekers for a 3 month period. The proposed time limit would, therefore, have a limited added value.

42. In its Detention Guidelines, UNHCR refers to good practice which indicates that review of detention would take place every month.[36] We recommend applying this standard in Lithuania.

UNHCR recommendation:

- Provide for regular review of the detention order every month.

Alternatives to detention (Article 38 of the Law Proposal)

43. The Law Proposal adds point 5 to Article 115 (2) of the Aliens Law which lists alternatives to detention. The proposed provision reads as follows:

"[T]o accommodate a foreigner at the State Border Guard Service providing for a right to move within the territory belonging to a place of accommodation only" (*lith.* "apgyvendinti užsienietį Valstybės sienos apsaugos tarnyboje nustatant teisę judėti tik apgyvendinimo vietai priklausančioje teritorijoje").

In accordance with the proposed Article 115 (5), the measure would apply to asylum applicants, as well as the rejected asylum applicants who are the subject to the return procedures.

[36] UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, para. 47 (iv), available at: https://www.refworld.org/docid/503489533b8.html.

44. As UNHCR understands the proposal, the arrangements is intended to limit the freedom of movement of the persons concerned to specific areas belonging to SBGS units such as the territory of the Foreigners Registration Centre.

45. UNHCR supports the use of alternatives to detention. If properly designed and applied, these measures may ensure that detention of asylum-seekers is a measure of last, rather than first, resort.[37] However, as set out in the UNHCR Detention Guidelines, liberty should always be the default position and "**alternatives to detention should not be used as alternative forms of detention**", nor should they "become substitutes for normal open reception arrangements that do not involve restrictions on the freedom of movement of asylum-seekers."[38]

46. While the Law Proposal lacks details on the envisaged practical arrangements, the wording of the proposed provision tend to indicate that liberty and freedom of movement of the asylum-seekers concerned might seriously be restricted. UNHCR is concerned that the envisaged measure, if not equipped with requisite safeguards, might amount into deprivation of liberty, i.e. detention.

47. Pursuant to the UNHCR Detention Guidelines, ""detention" refers to the deprivation of liberty or confinement **in a closed place** which **an asylum-seeker is not permitted to leave at will,** including, though not limited to, prisons or purpose-built detention, **closed reception or holding centres or facilities"[39].** In a similar vein, Article 2 (h) of the recast Asylum Procedures Directive defines detention as "confinement of an applicant by a Member **State within a particular place**, where **the applicant is deprived of his or her freedom of movement.**"

48. According to the case-law of the ECtHR on Article 5 ECHR, in order to determine whether someone has been deprived of his/her liberty, the starting point must be his/her concrete situation and account must be taken of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction on liberty is one of degree or intensity, and not of nature or substance.[40]

49. It follows that the placement of an asylum-seeker in a reception centre may well amount into deprivation of liberty, even where the arrangement is formally titled "an alternative to detention". What matters is the intensity of applicable restrictions and whether the person concerned is permitted to leave the place at his/her will.

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[37] *Ibid., para* 35

[38] *Ibid., para 38*

[39] *Ibid., para.* 5

[40] See *inter alia Amuur v. France*, 17/1995/523/609, Council of Europe: European Court of Human Rights, 25 June 1996, para. 42, available at: https://www.refworld.org/cases,ECHR,3ae6b76710.html.

50. While Article 7 (1) of the recast Reception Conditions Directive provides for a possibility to limit the freedom of movement of asylum-seekers to "an area assigned to them by that Member State", the same provision also requires Member States to ensure that the assigned area **does not affect** "the unalienable sphere of **private life"** and "**allow sufficient scope for guaranteeing access to all benefits under this Directive"**. Furthermore, pursuant to Article 7 (5) of the Directive, Member States which opt for and apply this restriction must "provide for the possibility of granting applicants temporary permission to leave [...] the assigned area". In this respect, UNHCR notes that the notion of the "assigned area", as employed in Article 7 (1) of the recast Reception Conditions Directive, has always been understood as referring to a territorial (administrative) units of the state. This understanding is *inter alia* reflected in the European Commission Report on the application of the first generation Reception Conditions Directive, which provides examples of the application of Article 7 (1) by referring to practices of restricting the free movement of asylum seekers to "one district".[41] In any case, to comply with the requirements of Article 7 (1) and (5) of the recast Reception Conditions Directive, the envisaged measure must allow for accessing all the benefits provided for by the Directive, including access to health care institutions, social support and legal assistance services, schools, NGOs, and, where the required conditions are fulfilled, labor market. It is difficult to see how these opportunities could be ensured, if the asylum-seekers concerned would have the right "to move within the territory belonging to a place of accommodation only" (*lith.* "judėti tik apgyvendinimo vietai priklausančioje teritorijoje").

51. In view of the seriousness of the proposed measure, UNHCR recommends to review the envisaged arrangements with a view to ensuring that the directed residence at an SBGS unit would not become an alternative form of detention. This can be done by introducing additional safeguards aimed at ensuring respect for necessity and proportionality requirements and providing the possibility to leave the place temporarily.

UNHCR recommendations:

- Provide that the envisaged measure may only be applied where it is established that less restrictive measures, as listed in Article 115 (2) of the Aliens Law, may not be effectively applied in the individual case.
- Provide for the possibility for the asylum-seekers concerned to leave the place temporarily.

Time-limits for lodging appeals (Article 50 of the Law Proposal)

52. The proposed Article 138 (2) of the Aliens Law requires asylum-seekers to lodge appeals against negative substantive decisions taken following an accelerated procedure and decisions to consider an application

[41] Report from the Commission to the Council and to the European Parliament on the application of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, COM/2007/0745 final, pra. 3.4.1., available at https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=celex:52007DC0745.

inadmissible with an administrative court **within 7 days.** The provision would also apply to decisions taken in the border procedure pursuant to the proposed Article 5 (3) of the Aliens Law. UNHCR notes that the current time-limit for these categories of cases is 14 days. The amendment, therefore, reduces significantly the applicable time limit for exercising the right to an effective remedy in accelerated, admissibility and border procedures.

53. UNHCR emphasizes that the asylum-seeker must have sufficient time and facilities to exercise the right of appeal. **Adequate time limits** for lodging appeals are required **to render a remedy effective**. Asylum-seekers who typically lack knowledge of the language of the national judicial proceedings need time to understand the decision; secure legal assistance; consult a legal adviser and discuss the grounds for the appeal; and draft the appeal.[42] In this respect, Article 46 (5) of the recast Asylum Procedures Directive makes it clear that time limits for the applicants to exercise the right to an effective remedy **must not render such exercise impossible or excessively difficult**. This provision reflects a general principle of EU Law.
54. Having regard to applicable arrangements within the Lithuanian asylum system, UNHCR is concerned that the proposed time limit is indeed too short, hence making the exercise of the remedy excessively difficult in practice. This is because the asylum-seekers should, first, apply for legal aid, the Migration Department then has to prepare and send a legal service order to a legal aid provider (law firm), and the assigned lawyer has to (i) access and study the asylum file, (ii) discuss the case with the asylum-seeker, (iii) collect required additional evidence, (iv) draft the appeal, (v) get asylum-seeker's approval and collect his/her signature, and (vi) lodge the appeal with an administrative court. Since Lithuanian legislation does not provide for automatic suspensive effect of appeals in accelerated and border procedures, the lawyer must also prepare and submit a request for an interim measure to prevent imminent expulsion. For applicants who are present at remote border crossing points within the framework of the border procedure these tasks may become simply impossible to accomplish. UNHCR, therefore, recommend refraining from shortening the current time limit.

UNHCR recommendation:

- Refrain from introducing the 7 day time-limit for lodging appeals against decisions taken in admissibility, accelerated and border procedures.

Suspensive effect of appeals (Article 50 of the Law Proposal)

55. Article 139 (1) of the Aliens Law currently in force does not provide for automatic suspensive effect of appeals with respect do decisions taken in accelerated and border procedures. In such cases, an administrative court may apply an interim measures allowing the applicant to remain pending the

[42] UN High Commissioner for Refugees (UNHCR), *UNHCR Comments on the European Commission's Proposal for an Asylum Procedures Regulation*, April 2019, COM (2016) 467, p. 19, available at: https://www.refworld.org/docid/5cb597a27.html.

outcome of the remedy upon his or her request. The proposed Article 139 (2) of the Aliens Law sets out a time limit of 2 days for taking a decision on the interim measure by the court in such cases.

56. This is a UNHCR position that given the severe consequences of a wrong negative decision on applications examined through an accelerated or border procedure, these claims, with the possible exceptions of "clearly abusive" or "manifestly unfounded", applications should be provided with full procedural safeguards to ensure full respect for the principle of *non-refoulement*, including by providing automatic suspensive effect of appeals.[43]
57. UNHCR nevertheless understands that Lithuania intends to maintain the current arrangement, based on Article 46 (6) of the recast Asylum Procedures Directive, whereby a court has the power to apply an interim measure preventing removal in accelerated and border procedures (*ad hoc* suspensive effect). Given the irreversible and potentially lifethreatening consequences of an erroneous first instance decision, it is critical that court scrutinizes rigorously any request for suspensive effect.[44] To that end, Article 46 (7) (b) of the recast Asylum Procedures Directive which deals with *ad hoc* suspensive effect arrangements in the border procedures requires Member States to ensure that the "court [...] examines the negative decision of the determining authority in terms of fact and law". UNHCR notes that this essential safeguard is missing in national legislation implementing the recast Asylum Procedures Directive in Lithuania.

UNHCR recommendation:
• Provide that the court, when examining a request for an interim measures, reviews the negative decision of the determining authority in terms of fact and law.

UNHCR Representation for Northern Europe, April 2020

[43] *Ibid.*, p. 21

[44] *Ibid.* p. 20