

Alþingi
Erindi nr. Þ 135/2800
komudagur 19.5.2008

UNHCR Comments on the proposed amendments on the Icelandic Act on Foreigners, Nr. 96 of 15 May 2002 (proposed in Parliament at the 135th legislature 2007-2008)

Introduction

Iceland is proposing amendments to the *Icelandic Act on Foreigners* (hereinafter “Foreigners Act”).

UNHCR is entrusted by the United Nations General Assembly with the responsibility for providing international protection to refugees, and for seeking permanent solutions for the problem of refugees. According to its Statute, annexed to *General Assembly Resolution 428 (V) of 14 December 1950*, 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”, which includes supervision of national legislation, and proposed amendments thereto, of signatory countries regulating the application of the *1951 Convention relating to the Status of Refugees* (hereinafter “1951 Convention”). UNHCR’s supervisory responsibility under its Statute is stipulated in Article 35 of the 1951 Convention and Article II of the *1967 Protocol relating to the Status of Refugees*. The Office therefore appreciates the opportunity to provide comments on the proposed Bill.

General Comments

UNHCR notes that the proposal relates to Iceland’s international obligations concerning the Schengen- and EEA-Agreements as well as domestic reasons. UNHCR would like to recall that Iceland’s international obligations include the 1951 Convention and that legislative amendments respectively have to be fully in line with the 1951 Convention.

Specific Comments

Section 10 lit. g of the proposal (Permit on humanitarian grounds):

UNHCR notes that it is proposed to move the part of the current Section 11 (2) *Foreigners Act* concerning the granting of a residence permit on humanitarian grounds to a new Section 12f *Foreigners Act*, while it is proposed to omit the second alternative of the current Section 11 (2) *Foreigners Act* concerning residence permits in Iceland on grounds of a foreigner’s particular relationship to Iceland. The proposal is therefore narrower than the current law, which gives reason to concern as in practice the development of a foreigner’s relationship to Iceland and his or her efforts to integrate into Icelandic society have previously supported decisions to grant humanitarian status.

UNHCR supports the inclusion of a legal obligation to grant subsidiary protection to those at risk of serious harm for reasons and in circumstances not necessarily covered by the refugee definition in the 1951 Convention. In this connection, it is important that

measures to provide subsidiary protection are implemented with the objective of strengthening, not undermining, the existing global refugee protection regime. This presupposes that individuals who fulfil the criteria of the 1951 Convention are granted Convention status, rather than being accorded subsidiary protection. To this end, the refugee definition should be interpreted progressively and with the necessary flexibility to take changing forms of persecution into account and subsidiary protection can only come into play after a decision on the non-applicability of refugee status.

UNHCR notes that neither the proposal (nor the motivation) defines what constitutes “urgent/substantial humanitarian grounds” on basis of which a Section 12f *Foreigners Act* permit can be granted. Rather it is stated in the motivation that a permit on such grounds is an “exemption permit” and that individual assessment is required in each case. The decision on whether to grant a permit on humanitarian grounds is, to a very large extent, a *discretionary* decision. To ensure predictability in the decision-making and guidance for the decision-makers, UNHCR would like to encourage Iceland, while maintaining a necessary degree of flexibility inherent in assessing humanitarian needs, to introduce criteria, upon fulfilment of which, a residence permit on humanitarian grounds shall be granted.

More often than not the protection needs of beneficiaries of subsidiary protection are as compelling and often as long in duration as those of refugees. Their entitlements should therefore be comparable to those of 1951 Convention refugees. For this reason, UNHCR recommends that persons granted a residence permit based on humanitarian grounds also receive an initial residence permit for three – respectively, in line with the proposed changes of Section 15 *Foreigners Act*, four – years, rather than one for one year which has to be renewed (as in the proposed Section 12f (2) *Foreigners Act*). In addition, UNHCR recommends that persons granted humanitarian status should receive equal treatment to 1951 Convention refugees with regard to work permits. Currently persons granted humanitarian status have to apply for a work permit that is limited to one employer while 1951 Convention refugees may apply for an unlimited work permit.

Section 10 lit. h of the proposal (Temporary permit):

UNHCR notes that it is proposed to move the current Section 11 (3) *Foreigners Act* to a new Section 12g *Foreigners Act*. UNHCR understands that according to the provision, a temporary permit to stay may be granted to a foreigner who has received a final rejection of his or her application for asylum, until the rejection is implemented (i.e. until the rejected asylum seeker is deported). UNHCR further notes that it is proposed that a temporary permit shall be granted for no longer than six months and that such permit cannot be the ground for a residence permit (which, according to Article 85 *Foreigners Regulation*, is a prerequisite to be entitled to work). UNHCR would like to encourage Iceland, considering that there are a number of countries which rejected asylum seekers cannot be deported to, that rejected asylum seekers should be granted the right to work until their deportation is carried out, to avoid a prolonged limbo situation.

In this connection, UNHCR would like to address the situation of asylum seekers with regard to their entitlement to work. According to Article 85 *Foreigners Regulation*, a residence permit is a prerequisite to be entitled to work. According to Article 46 (1) *Foreigners Regulation*, asylum seekers may be granted a provisional residence permit if: (a) the police have received a statement from the applicant; (b) the applicant's identity is not open to doubt, and; (c) there are no factors that may lead to the applicant's expulsion, or to a request that he will be taken back by another state. Therefore, in practice asylum seekers generally do not have access to the labour market (except they can somehow prove their identity). UNHCR strongly recommends that asylum seekers should be entitled to work and, in order to meet the requirements of Article 85 *Foreigners Regulation* to be entitled to a work permit, also be granted a residence permit while their application is processed, in order to foster their self-reliance and livelihood, as well as their integration into Icelandic society.

Section 11 of the proposal (Family reunification):

UNHCR notes that the proposed provision relates to Section 13 *Foreigners Act* and regulates the criteria for family reunification for persons granted a residence permit based on, *inter alia*, the proposed Section 12f *Foreigners Act* (humanitarian grounds). UNHCR notes with some concern that the proposed (financial) self-reliance criteria, corresponding to those of Section 11 (1) lit. a *Foreigners Act*, are putting a high threshold for family reunification. UNHCR would like to encourage Iceland to take a protection oriented approach in the application of this provision and thus not apply this provision in a way which would make the important principle of family unity only the privilege of financially self-reliant persons.

Moreover, as noted before, the protection needs of beneficiaries of subsidiary protection, which are among those granted a residence permit based on Section 12f *Foreigners Act*, are often as compelling and often as long in duration as those of 1951 Convention refugees. Their entitlements should therefore be comparable to those of 1951 Convention refugees. Supported by the principle, set forth in both the *Universal Declaration of Human Rights of 1948* and the *United Nations Covenant on Civil and Political Rights of 1966*, that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State," UNHCR promotes the unity of the family. Consequently, UNHCR strongly recommends that the family reunification criteria for persons granted a Section 12f *Foreigners Act* permit should be similar to the criteria for recognized refugees/quota refugees (whose family members are granted derivative refugee status according to Section 46 (3) *Foreigners Act* and for whom there are no self-reliance requirements) as they are in a comparable situation and in similar need of family support. To this end, the self-reliance criteria of the proposed provision should be changed/abolished accordingly or, as a minimum, a provision should be added allowing for a discretionary decision when the self-reliance criteria are not met, i.e. that the authorities can choose not to apply the criteria strictly in cases of persons granted a permit on humanitarian grounds.

Section 13 of the proposal (Permanent residence permit):

UNHCR notes that the proposed provision relates to Section 15 *Foreigners Act*. UNHCR is concerned that it is proposed to introduce stricter requirements to be fulfilled by the applicant in order to obtain a permanent residence permit, notably by changing the requirement of the duration of previous residence in Iceland from currently three to now four years and by introducing a new Section 15 (1) lit. c *Foreigners Act* on financial self-reliance requirements that have to be fulfilled and a new Section 15 (1) lit. e *Foreigners Act* regulating that there must not be an unfinished case in which the foreigner is suspected or accused of a criminal conduct. In that connection, UNHCR would like to recommend that the duration of the initial residence permit for refugees (regulated in Section 51 (3) *Foreigners Act*) – as well as for persons granted humanitarian status (regulated in the proposed Section 12f *Foreigners Act*) – should accordingly be changed from three to four years, so that a permanent residence permit can be obtained following the expiry of the initial permit.

UNHCR welcomes the proposed subsection regulating that a child born after the parent's arrival in Iceland can be granted a residence permit on the condition that the parent has a residence permit in Iceland.

Section 18 of the proposal (Restrictions to freedom of movement):

UNHCR notes that this proposal relates to Section 29 *Foreigners Act* and that it is suggested that asylum seekers can be asked to report to the police daily or be arrested if they decline to identify themselves or act in a manner that implies that they may be dangerous (examples are given in the motivation of the proposal). UNHCR notes with concern that it is further suggested to abolish a maximum length of time of detention and recommends that the current provision on a maximum length of twelve weeks detention should be retained.

The detention of asylum seekers unless if there are valid grounds which could apply to any person, is, in the view of UNHCR inherently undesirable.¹ There should be a presumption against detention. Detention may be exceptionally resorted to, in conformity with *EXCOM Conclusion No. 44 (XXXVII) – 1986*, if necessary, to:

- (1) verify identity;
- (2) determine the elements on which the claim to refugee status or asylum is based;
- (3) deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum;
- (4) protect national security or public order.

¹ See further UN High Commissioner for Refugees, *UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 26 February 1999. Online: UNHCR Refworld, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3c2b3f844> [accessed 16 May 2008].

With regard to the latter, UNHCR would like to bring to the attention of the Committee that situations in which it is necessary to protect national security or public order imply a high threshold to be applied. UNHCR would therefore like to encourage Iceland to introduce criteria/examples as to when a foreigner “may be dangerous” in terms of the proposed Section 18 *Foreigners Act*. Due to the lack of definition of the terms “dangerous”, “public order” and “national security”, combined with the possibility to detain a person for a prolonged time, it is desirable to establish more defined criteria, to avoid a potentially inconsistent or even arbitrary or discriminatory application of this section. Reference is also made to Article 26 of the 1951 Convention, which applies to both refugees and asylum seekers and grants freedom of movement subject only to regulations applicable to aliens generally in the same circumstances.

UNHCR would further like to refer to Article 31 of the 1951 Convention, according to which penalties (restrictions of movement and detention can amount to such) shall not be imposed on refugees and asylum seekers who entered or are present in the territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

Finally, UNHCR urges States to explore alternatives to detention, which may include: monitoring requirements, provision of a guarantor/surety, release on bail, open centres. Detention should always be the last resort.

Section 31 of the proposal:

UNHCR welcomes the proposal to introduce a new paragraph to Section 46 *Foreigners Act* to the effect that the Minister of Justice may issue rules on how to handle matters in asylum cases, in line with UNHCR’s previous recommendation.

Section 51 Foreigners Act:

While not addressed in the proposed amendment, UNHCR would like to draw the attention to Section 51 *Foreigners Act*. Section 51 *Foreigners Act* states that the Immigration Office grants quota refugees an unlimited residence permit, but it does not mention asylum seekers who are granted refugee status. However, in practice, asylum seekers that have been granted refugee status since the *Foreigners Act* came into force were granted this permit, although it is not stated in the *Foreigners Act*. UNHCR recommends that Iceland amends Section 51 *Foreigners Act* to the effect that it clearly states that asylum seekers who are granted refugee status should receive the same permit as quota refugees.