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

UNHCR Observations on the Law Proposal "Prop. 16 L (2015–2016) Endringer i utlendingsloven (innstramninger)", Instructions "GI-12/2015, GI-13/2015 and 15/7814 – EST", Circular "RS 2015-013", and amendment to the "Immigration Regulation, §§ 17-18"

I. Introduction

1. The UNHCR Regional Representation for Northern Europe (RRNE) would hereby like to share its observations on the amendments to the Norwegian Immigration Act that entered into force on 20 November 2015.[1] In UNHCR's understanding, these amendments were introduced in light of the increasing number of asylum-seekers arriving to Norway via the Russian Federation, and a wish to more efficiently process and return applicants who have arrived from a "safe third country" or "first country of asylum".

2. UNHCR has a direct interest in law proposals in the field of asylum, 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.[2] Paragraph 8(a) of UNHCR' Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees,[3] whereas the 1951 Convention relating to the Status of Refugees and its 1967 Protocol relating to the Status of Refugees (hereafter collectively referred to as "1951 Convention" oblige States to cooperate with UNHCR in the exercise of its mandate, in particular facilitating UNHCR"s duty of supervising the application of the provisions of the 1951 Convention and 1967 Protocol (Art. 35 of the 1951 Convention and Article 11 of the 1967 Protocol).

3. Pursuant to this mandate, and in line with UNHCR's established practice of submitting comments on law proposals in Norway, UNHCR is herewith sharing its observations on relevant parts of the Law proposal Prop. 16 L (2015–2016) Endringer i utlendingsloven (innstramninger), even though they have already been adopted and entered into force. Furthermore, given the linkages between

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[1] Prop 16 L (2015–2016) *Endringer i utlendingsloven (innstramninger)*, 13.11 2015, available at: https://www.regjeringen.no/no/dokumenter/prop.-16-l-20152016/id2461221/?ch=1&q=; and Lov 20 november 2015 nr. 94 om endringer i utlendingsloven (innstramninger).

[2] UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), (thereafter "UNHCR Statute"), available at: http://www.refworld.-org/docid/3ue6b3628.html.

[3] Ibid., para 8(a). According to para 8(a) of the Statute, UNHCR is competent to supervise international conventions for the protection of refugees. The wording is open and flexible and does not restrict the scope of applicability of UNHCR's supervisory function to one or other specific international refugee convention. UNHCR is therefore competent qua its Statute to supervise all conventions relevant to refugee protection, see UNHCR, UNHCR's supervisory responsibility, October 2002, ISSn 1020-7473, available at http://www.refworld.-org/docid/4fe405ef2.html

Prop. 16 L (2015-2016) and instructions GI-13/2015[4] and 15/7814 – EST[5] issued by the Ministry of Justice and Public Security on 24 November 2015, circular RS 2015-013[6] issued by the Norwegian Directorate of Immigration (UDI), as well as the amendment to the Immigration Regulation § 17-18 of 8 December,[7] UNHCR's observations regarding the instructions', circular's and Regulation's alignment with international and European refugee protection standards have also been noted.

4. To the understanding of UNHCR, the amendments to the Immigration Act are to be evaluated after two years. UNHCR hopes that the Ministry of Justice and Public Security will find these observations useful for a reconsideration of certain provisions, even though they are submitted after the law amendments, Instructions and Circular already entered into force. For the future, UNHCR kindly requests the Norwegian government to share law proposals impacting on UNHCR's persons of concern prior to their adoption, in order to enable UNHCR to submit its comments in a timely manner.

II. General Observations

5. At the outset, UNHCR acknowledges that Norway has a legitimate interest in controlling the entry of foreigners at its border, and for taking measures to ensure that claims for international protection that are clearly abusive or manifestly unfounded can be processed in an accelerated manner. UNHCR also supports States' implementation of effective return policies for people who are found not to be in need of international protection. Individuals found not to have a valid protection claim and who cannot benefit from alternative legal ways to regularize their stay should indeed be assisted to return quickly to their home countries, in a manner which fully respects their human rights.

6. Nonetheless, a number of safeguards need to be in place to ensure that individuals channelled through expedited admissibility procedures and/or accelerated procedures are not returned - directly or indirectly through a third country - to territories where their life or freedom would be threatened in contravention of the principle of *non-refoulement*. UNHCR appreciates that there shall be an assessment of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) Article 3 in each case, even if the application is rejected as inadmissible.

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[4] GI-13/2015 – *Rask saksbehandling for asylsøkere som har hatt opphold i Russland, jf. utlendingsloven §§ 32 og 90*, 24.11.2015, available at: https://www.regjeringen.no/no/dokumenter/gi-132015--rask-saksbehandling-for-asylsokere-som-har-hatt-opphold-i-russland-jf.-utlendingsloven--32-og-90/id2468570/.

[5] 15/7814 – EST *Instruks — Rutiner for rask håndtering av personer som ankommer over norsk- russisk landegrense (Storskog) uten gyldig visum eller annen gyldig innreisetilatelse til Norge*, 24.11.2015, available at: https://www.regjeringen.no/contentassets/6262cc4896904942ba396c321f68cc0f/instruks_pod.pdf

[6] RS 2015-013 - *Rundskriv om behandlingen av asylsøknader fra personer som har reist inn i Norge fra Russland (Storskog-porteføljen)*, 25.11.2015, available at: https://www.udiregelverk.no/no/rettskilder/udi-rundskriv/rs-2015-013/.

[7] *Forskrift om endring i forskrift om utlendingers adgang til riket og deres opphold her (utlendingsforskriften)*, 8.12.2015, available at: https://www.regjeringen.no/contentassets/8de19f7851a04c3681fa221cd126466d/utlendingsforskriften_17_18.pdf.

7. To the understanding of UNHCR, under the newly adopted measures, asylum-seekers will be kept in the border areas, and will, within a very short time-frame and without an examination of the merits of their applications, be returned to a third country (e.g. as specified in instruction GI-13/2015, the Russian Federation) where they may not have access to asylum procedures and to which they have only transited or have only a remote connection. If return can be carried out quicker to the country of origin, the case shall be assessed on the merits and the applicant returned to the country of origin rather than Russia.[8] UNHCR is concerned about the lack of adequate due process guarantees in this procedure, the application of the "safe third country" and "safe country of origin" concepts, and the expansion of the detention grounds in the Law.

III. Specific Observations

Accelerated procedures/expedited admissibility procedures and the application of the concepts of "safe third country" and "safe country of origin"

8. Applications from persons coming from a so-called "safe third country" or a "first country of asylum" may be channelled through admissibility procedures, within which specific procedural safeguards should be guaranteed. Even though Norway is not a member of the European Union and bound by the EU *acquis* on asylum, including the recast Asylum Procedures Directive, UNHCR would still like to recall that its Article 38 sets out the criteria for considering a non-EU Member State as a "safe third country". In UNHCR's view, the "safe third country" concept presumes that the responsibility for assessing the particular asylum application in substance is assumed by a third country and that the applicant is able to receive international protection in that country. A transfer of responsibility is only appropriate on the basis of an agreement which clearly outlines the respective responsibilities of the States involved, whereby (i) it is guaranteed that the case will be individually assessed as to the appropriateness of the transfer, subject to procedural safeguards prior to transfer; (ii) will be (re-)admitted to the proposed receiving State; (iii) will be protected against *refoulement*; (iv) will have access to fair and efficient procedures for the determination of refugee status and/or other forms of international protection; (v) will be treated in accordance with accepted international standards (for example, appropriate reception arrangements; access to health, education and basic services; safeguards against arbitrary detention; persons with specific needs are identified and assisted); and, (vi) if recognized as being in need of international protection, will be able to enjoy asylum and/or access a durable solution. Such pre-transfer assessments are particularly important for vulnerable groups, including unaccompanied and separated children whereby the best interests of the child must be a primary consideration.[9]

9. UNHCR notes that one of the aforementioned criteria for considering a country as a "safe third country" has been removed from the Aliens Act, based on the

[8] RS 2015-013 - *Rundskriv om behandlingen av asylsøknader fra personer som har reist inn i Norge fra Russland (Storskog-porteføljen)*, 25 11 2015, available at: https://www.udiregelverk.no/no/rettskilder/udi-rundskriv/rs-2015-013/, para. 3.

[9] http://www unhcrnortherneurope.org/fileadmin/user_upload/Documents/PDF/Denmark/UNHCR_comments_on_proposal_to_amend_the_Danish_Aliens_Act_November_2014 pdf

proposal in Prop. 16 L, namely, the removal of the requirement that the applicant will have access to fair and efficient procedures for the determination of refugee status and/or other forms of international protection in the "safe third country".[10]

10. The Instructions and circular further provide that applicants who have or have had different types of legal stay in the Russian Federation (e.g., refugee status, temporary asylum, a residence permit, a transit or multiple entry visa), can be returned to that country without being able to challenge in practice the safety of the "first country of asylum" or "safe third country".

11. In UNHCR's understanding, the new measures appear to have created a hybrid between the concepts of "safe third country" and the "safe country of origin", without applying all of the established criteria and procedural safeguards for the implementation of these concepts.

12. Concerning the application of the "safe third country" concept, UNHCR acknowledges that applications from asylum-seekers who could have requested asylum in a "safe third country" *en route* to the country where asylum is being requested may be rejected admissibility to the substantive examination procedure, provided the safeguards listed in para. 8 above are in place. Amongst the criteria listed is the presumption that the responsibility for assessing the particular asylum application in substance is assumed by a third country, and that the applicant is able to receive international protection in that country. UNHCR therefore regrets that the criteria, that the applicant has access to a fair and efficient asylum procedure, have been removed from the Immigration Act following the amendments introduced through Prop. 16 L. Consequently, an asylum-seeker who is rejected admissibility to the substantive examination procedure in Norway, and returned to a third country in which s/he will not have access to a fair and efficient asylum procedure, could be at risk of subsequent return to his or her country of origin without having had the merits of the claim examined by any country. The individual could thus be put at a risk of *refoulement*.

13. As regards the possibility to reject the admissibility of applicants who have received a protection status or permission to stay in a "first country of asylum", UNHCR would like to note that most of the criteria and safeguards outlined in para. 8 above are equally relevant when applying the "first country of asylum" concept. Importantly, the key ones are that the person should have been granted refugee status or subsidiary protection in that country and still be able to avail him/herself of effective protection in that country and thus be protected against *refoulement*. Hence, when considering the admissibility of an applicant who has, for example, temporary asylum in a third country it needs to be assessed whether the applicant is still able to avail him/herself of this status, and whether it offers effective protection and treatment in accordance with accepted international standards.

14. UNHCR also notes that the Instructions refer to a number of countries of origin which are considered as "respecting human rights at an acceptable level", and

[10] The words «and where the foreign national's application for protection will be examined» has been removed from the Immigration Act § 32 (1) (d)

that applications made by persons originating from these countries will often be regarded as manifestly unfounded. It is UNHCR's understanding that the Instructions allow for applicants from such "safe countries of origin" to be returned to the third country from which they entered Norway, from which they in turn could be sent back to their ("safe") country of origin.

15. UNHCR agrees that the "safe country of origin" concept may serve as a case management tool, for instance to assign applications to accelerated procedures. However, UNHCR observes that not all the countries on the list in the Instructions appear to have been designated as "safe countries of origin" for the purposes of other accelerated procedures in Norway.[11] UNHCR does not object to the designation of countries as safe countries of origin *per se*, provided that the decision has been preceded by a thorough assessment of the situation of that country, based on a range of sources of information including UNHCR. There must also be a mechanism in place to quickly remove the designation of a country as safe, if the country would cease to meet the criteria for a "safe country of origin". Such criteria include: relevant laws and regulations are in place and enforced providing protection against persecution and other forms of serious harm; international human rights standards are observed, including a system of effective remedies against violations of such rights; and the principle of *non-refoulement* is respected. Further, the "safe country of origin" concept cannot be applied automatically, but only after an individual examination of the application. Importantly, the presumption of safety must be rebuttable, both in law and in practice for the individual applicant.

16. The Instructions foresee the application of the concept not only to certain countries but also to particular places or cities within a country, for example to Kabul in Afghanistan or the Kurdistan region (KRG) in Iraq. In this respect, UNHCR wishes to clarify that an "internal flight alternative" (IFA) reflects a different concept. While, for example, Kabul has been considered a relevant and reasonable IFA in some cases, this conclusion has been reached as part of an assessment of the merits in the individual case, not as a general presumption that Kabul is safe for all nationals of Afghanistan.

17. In view of the above, UNHCR is concerned that an application of the "safe country of origin" concept, as envisaged through the Instructions, could put asylum-seekers at risk of *chain-refoulement* in violation of Article 33 of the 1951 Convention and Article 3 of the European Convention on Human Rights and Fundamental Freedoms (ECHR).

Procedural safeguards and roles and responsibilities in the procedures

18. As UNHCR understands the Instructions, the police will be the principal interviewer of applicants in the expedited admissibility procedure and the interview will take the form of an extended registration. UDI will remain

[11] See the list of countries in the 48 hours procedure, RS 2011-030 – *48-timersprosedyren*, 27.06.2011 (last modified 11.08.2014), available at:: https://www.udiregelverk.no/no/rettskilder/udi-rundskriv/rs-2011-030/, and the list of countries in the 3 week procedure, PN 2008-025 – *Landoversikt - 3u*, 27.04 2005 (last modified 09 10 2014), available at: https://www.udiregelverk.no/no/rettskilder/udi-praksisnotater/pn-2008-025/.

responsible for taking decisions, and will provide guidance to the police if further information or an additional interview is deemed necessary.

19. In light of the serious consequences that the certification of a claim as inadmissible may have for the applicant, UNHCR is of the view that the authority normally competent to determine refugee status (i.e. UDI in Norway) should also conduct the admissibility interview. This ensures that the interview is conducted by the determining authority that has the requisite competence, which can ensure that decisions are made on the basis of the best available information and evidence. For the same reason, UNHCR recommends that qualified staff from the central determining authority conducts the personal interviews in accelerated procedures. The general principle of having trained and qualified staff from the determining authority conduct all interviews - in accelerated and regular asylum procedures – is set out in the recast Asylum Procedures Directive (APD)[12], based on a recognition of the benefits of such a system. While Article 34 (2) of the recast APD allows for another authority to conduct the personal interview on the admissibility of the application for international protection, UNHCR would like to stress that, due to the impact of the certification of a claim as inadmissible, only the determining authority, which has the necessary knowledge of the grounds for international protection, experience and access to updated country of origin information, should carry out the admissibility interview.[13] In line with the UNHCR's Executive Committee Conclusion No. 8 (XXXVIII) of 1977[14], UNHCR is of the strong view that the responsibility for interviewing applicants for international protection at the admissibility stage as well as in accelerated or regular procedure, within the country or at its borders, should be performed only by a central determining authority, that is the UDI.

Time-limits and the right to information

20. UNHCR understands that applicants who arrive at the border must immediately ask for protection and that only limited information about the right to seek asylum is provided. According to the Instructions, asylum-seekers will be informed that as they lack a valid visa to enter Norway, they will be denied entry and stay ("ophold") in Norway.[15]

21. In this context, UNHCR would like to recall that applicants must be given adequate time to exercise their right to seek asylum, and be informed, in a language they understand, of the procedure to be followed and of their rights and obligations during the procedure.[16] While UNHCR understands the need to prevent abuse of the asylum procedure and to process asylum applications in an efficient manner, short time limits and limited information may result in potential

[12] 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) (hereinafter - recast Asylum Procedures Directive or recast APD), 29 June 2013, L 180/60, available at: http://www refworld.org/docid/51d29b224.html

[13] UN High Commissioner for Refugees, UNHCR Annotated Comments to 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) (hereinafter - recast Asylum Procedures Directive or recast APD), December 2014, para. 25

[14] UNHCR, Determination of Refugee Status, 12 October 1977, No 8 (XXVIII) - 1977, available at: http://www.unhcr.org/refworld/docid/3ae68c6e4.html.

[15] RS 2015-013 - *Rundskriv om behandlingen av asylsøknader fra personer som har reist inn i Norge fra Russland (Storskog-porteføljen)*, 25 11 2015, available at: https://www.udiregelverk.no/no/rettskilder/udi-rundskriv/rs-2015-013/, para. 4

[16] http://www.unhcr.org/4deccc639.pdf para 12

asylum-seekers being prevented from applying for asylum, and in flawed decisions, which will defeat the objective of an efficient and fair asylum procedure.

Right to legal representation

22. UNHCR understands that following the amendment to the Immigration Regulation § 17-18 of 8 December, asylum-seekers whose application has been rejected on the basis of having a first country of asylum (Immigration Act § 32(1)(a)) or a safe third country (Immigration Act § 32(1)(d)) will no longer have the right to free legal representation in the appeals procedure. The amendment will not apply to unaccompanied and separated children.[17] Applicants would therefore need to arrange for and pay for a lawyer themselves, which may be difficult given the time constraints and the remoteness of the location, coupled with language barriers and limited access to information. UNHCR is concerned that in practice, the lack of access to legal advice and representation could undermine the ability of applicants to articulate and present their claims for asylum. UNHCR therefore recommends that applicants are provided with legal aid.

Suspensive effect

23. According to the Circulars and Instructions, applicants rejected in expedited admissibility procedures must leave Norway immediately.[18] In UNHCR's understanding, there is no *suspensive effect* of decisions which are appealed. UNHCR recalls that to ensure an effective remedy and compliance with the principle of *non-refoulement*, appeals against decisions taken at first instance – either in admissibility, accelerated or in regular procedures - should, in principle, have automatic *suspensive effect* and allow the appellant to remain until a final decision has been taken on the application.

24. For a comprehensive overview of procedural safeguards in accelerated procedures, UNHCR would like to refer to the UNHCR Executive Committee Conclusion No. 30, The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum,[19] of 1983 and the UNHCR Statement on the right to an effective remedy in relation to accelerated asylum procedures, in the context of a preliminary ruling reference to the Court of Justice of the European Union in May 2010 (Case C-69/10).[20] This is the first preliminary ruling reference regarding the interpretation of the EU Asylum Procedures Directive (APD). The Court of Justice concluded that (Article 39 of Directive 2005/85/EC does not preclude national rules such as those established in the Grand Duchy of

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[17] Forskrift om endring i forskrift om utlendingers adgang til riket og deres opphold her (utlendingsforskriften), 8.12.2015, available at:https://www.regjeringen.no/contentassets/8dc19f7851a04c3681fa221ed126466d/utlendingsforskriften_17_18.pdf.

[18] RS 2015-013 - *Rundskriv om behandlingen av asylsøknader fra personer som har reist inn i Norge fra Russland (Storskog-porteføljen)*, 25.11.2015, available at: https://www.udiregelverk.no/no/rettskilder/udi-rundskriv/rs-2015-013/, para. 3

[19] UNHCR, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, 20 October 1983, No. 30 (XXXIV) - 1983, available at: http://www.refworld.org/docid/3ae68c6118.html.

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

Luxembourg by Article 20(5) of the Amended Law of 5 May 2006 on the right of asylum and complementary forms of protection, under which an applicant for asylum does not have an independent judicial remedy against the administrative authority's decision to rule on his application for international protection under the accelerated procedure, provided that the grounds for refusal which have already been assessed in that procedural decision can be effectively challenged before the court as part of the action that may, in any case, be brought against the final decision concluding the procedure dealing with the application for asylum.[21]

Detention of asylum-seekers during expedited admissibility procedures

25. Following the amendments to (Prop. 16 L (2015-2016)) the Immigration Act, asylum-seekers whose applications are likely ("mest sannsynlig") to not be examined on the merits due to the applicant having a first country of asylum or safe third country, can be detained. Individuals detained under § 106 (1)(g) can be kept in detention for seven days. The permissible places of detention of asylum-seekers are also expanded. Prop. 16 L (2015-2016) refers to the UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention,[22] which foresee the possibility of detention in connection with accelerated procedures for manifestly unfounded claims.

26. While UNHCR agrees that detention can be justified to secure public order in certain situations, such detention must not be arbitrary, and can only be applied where it pursues a legitimate purpose and has been determined to be both necessary and proportionate in each individual case. UNHCR notes that deterrence is one of the stated purposes of the amendments, and thus questions whether the new legal basis for detention fulfils the requirement of legitimate purpose, and how the assessment of necessity, when pursuing this purpose is to be carried out in practice. According to UNHCR's Detention Guidelines, detention policies aimed at deterrence are generally unlawful under international human rights law as they are not based on an individual assessment as to the necessity to detain.[23] The basic tenets are, that seeking asylum should not be seen as an unlawful act, and that detention is an exceptional measure that should be used as a measure of last resort. UNHCR's Observations of 16 October 2015 on the proposed amendments to the Norwegian Immigration Act of 3 July 2015, provide more detailed recommendations concerning the standards and safeguards pertaining to the detention of asylum-seekers being processed in accelerated procedures.[24]

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[21] CJEU - C-69/10 / Judgmenthttp://curia.europa.eu/juris/document/document.jsf?text=&docid=108325&pageIndex=0&doclang=EN&mode=doc&dir=&occ=first&part=1&cid=5536

[22] UNHCR, *Guidelines on the Applicability Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012 (hereafter "Detention Guidelines") available at: http://www.refworld.org/docid/503348953b8.html.

[23] Detention Guidelines, para. 3 [*Ibid*]

[24] UNHCR, *UNHCR Observations on the proposed amendments to the Norwegian Immigration Act to allow for detention of asylum-seekers in the 48- hours accelerated procedure: Høyringsnotat om ny heimel for pågriping og fengsling i samband med 48-timarprosedyren for openbert grunnlause asylsøknader*, 16.10.2015, available at: https://www.regjeringen.no/contentassets/b1f31b9c8db7471481da24bf6ddb7f21/unhcr.pdf.

27. In view of the aforementioned standards and principles, UNHCR is concerned that the amendments will allow for an asylum-seeker to be detained merely due to alikelihood that his or her application for asylum could be declared inadmissible for having a first country of asylum or having arrived via a "safe third country". In this regard, it needs to be ensured that the purpose of the detention is indeed to protect public order, and not, for example, to facilitate administrative expediency, that is, to ensure a swift return of applicants whose claims have been declared inadmissible. In this context, UNHCR wishes to recall that, according to the UN Human Rights Committee, administrative expediency is not a legitimate purpose for detaining people in light of the serious consequences it has for a human being.[25]

28. Despite the concerns expressed above, UNHCR welcomes the fact that unaccompanied children and families with children will not be covered by the new provision and that there will be an assessment of necessity of the detention in each individual case.

29. Regarding the introduction of new detention facilities, the UNHCR Detention Guidelines note that asylum-seekers can only lawfully be detained in places officially recognized as places of detention, and that detention in police cells is not appropriate.[26]

30. In summary, UNHCR would caution against a continuation of the introduced expedited admissibility procedures and accelerated procedures in the present manner. Such rapid procedures without proper safeguards present a high risk of erroneous decisions and of persons being returned to situations where their life and freedom could be in danger. In UNHCR's view, the application of the safe third country concept should explicitly provide for return to be effected only if the individual will be readmitted to the country, will be able to access fair asylum procedures and, if recognized, will be able to enjoy effective protection there.

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[25] See UN Human Rights Committee (HRC), *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986, available at: http://www.refworld.org/docid/45139acfc.html
[26] Detention Guidelines, para. 48(i) [*Ibid.*]