

UNHCR's Comments on the Proposed Amendment of the Enforcement Decree of the Refugee Act of the Republic of Korea

Part 1: Introduction

1. UNHCR wishes to commend the Republic of Korea for its continued efforts to improve the domestic asylum system, which is mainly implemented through the Refugee Act and its Enforcement Decree and Regulations.
2. UNHCR offers these comments as the agency entrusted by the United Nations General Assembly with the mandate for providing international protection and seeking permanent solutions for refugees and other persons of concern.¹ As set forth in its Statute, UNHCR fulfils its international protection mandate by, inter alia, “[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 under its Statute is reiterated in Article 35 of the 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention)³ and Article II of the 1967 Protocol Relating to the Status of Refugees (1967 Protocol) according to which State parties undertake to “co-operate with the Office of the United Nations High Commissioner for Refugees [...] in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the Convention”.⁴
3. The submission is also in line with Article 29 of the Refugee Act on Exchange and Cooperation with UNHCR, which promotes cooperation between the Ministry of Justice and UNHCR for the implementation of and compliance with the 1951 Refugee Convention and the 1967 Protocol.⁵
4. UNHCR's aim in providing these comments is twofold. Firstly, UNHCR would like to offer its expertise to the ongoing efforts to align the Republic of Korea's domestic legislation with the 1951 Refugee Convention, 1967 Protocol and other international standards. Secondly, UNHCR would like to contribute to the enhancement of both the quality and efficiency of the national asylum systems, notably by providing guidance on relevant procedural safeguards.

¹ See Statute of the Office of the United Nations High Commissioner for Refugees, UN General Assembly Resolution 428(V), Annex, UN Doc. A/1775, paragraph 1, available at <http://www.unhcr.org/refworld/docid/3ae6b3628.html> (“Statute”).

² Statute of the Office of the United Nations High Commissioner for Refugees, UN General Assembly Resolution 428(V), Annex, UN Doc. A/1775, paragraph 8(a), available at <http://www.unhcr.org/refworld/docid/3ae6b3628.html>.

³ UNTS No. 2545, Vol. 189, page 137. It is suggested to add a reference either in the text or in a footnote to the domestic legislation by which the country concerned ratified or acceded to the Convention and/or the Protocol.

⁴ UNTS No. 8791, Vol. 606, page 267.

⁵ Article 29 of the Refugee Act of the Republic of Korea, English version available at: <http://www.law.go.kr/LSW/eng/engLsSc.do?menuId=2§ion=lawNm&query=refugee+act+&x=0&y=0#liBgcolor8>

5. It should be noted that the below comments are based on the unofficial translation of the amendment proposal to the Enforcement Decree of the Refugee Act of the Republic of Korea (hereinafter, 'Enforcement Decree').
6. UNHCR's comments in Part 2 provides the rational for the procedural considerations recommended in Part 3. *UNHCR seeks* the Republic of Korea's consideration of the below guidance and welcomes further cooperation and discussion in this regard.
7. UNHCR remains at the full disposal of the authorities of the Republic of Korea (RoK) for a more extensive and detailed exchange on the amendment of the relevant laws and regulations, and on improving the national asylum system.

Part 2: Rational

8. The amendment proposal to the Enforcement Decree aims at establishing the legal basis for holding Refugee Committee meetings in the form of remote video conferences to run the Refugee Committee more efficiently and supplement any shortcomings in operation of the current system.
9. UNHCR generally welcomes the proposal which is of immediate relevance in the context of the COVID-19 pandemic, or in case of an emergency situation, to facilitate a timely protection response. UNHCR appreciates RoK government's efforts in ensuring procedures in place which enable efficient case processing and reduce or prevent the accumulation of pending cases. However, considering the confidential nature of all communications, personal data or information obtained from or about asylum seekers, UNHCR notes potential concerns in the implementation of the proposed amendment in keeping with the Refugee Status Determination (RSD) core principles, and recommends for remote video conference in the RSD context to be considered on the condition that the technology used ensures data security and the confidentiality of all information.⁶
10. Further, UNHCR notes the implementation of the proposed amendment involves the possibility for remote RSD interviewing of asylum-seekers. This will require particular caution, since it may influence the procedural rights of asylum-seekers in the process of administrative appeal.
11. UNHCR notes that domestic laws and regulations stipulate:

⁶ UN High Commissioner for Refugees (UNHCR), *Procedural Standards for Refugee Status Determination Under UNHCR's Mandate*, 26 August 2020, p15 and para. 2.1. available at: <https://www.refworld.org/docid/5e870b254.html>
Nota Bene: while UNHCR RSD Procedural Standards under UNHCR's mandate does not set mandatory procedural standards for national asylum procedures, in situations where UNHCR acts in an advisory role, UNHCR may make recommendations based on principles and standards set out in the 2020 RSD Procedural Standards, which are based on international standards and human rights practices, with a view to enhancing standards of due process or assisting in the development of national asylum procedures and processes.

- a. “The Refugee Committee, established under Article 25, may perform factual investigations directly or via refugee research officers pursuant to Article 27⁷.” (Article 21 (4) of the Refugee Act⁸)
 - b. “The Committee may, if deemed necessary, require the presentation of a refugee status applicant or other relevant individuals in a meeting for statements, or may seek opinions from a person with sufficient experiences and knowledge in matters concerning the case presented.” (Article 10 (2) of the Enforcement Decree of the Refugee Act⁹)
12. UNHCR also notes that paragraph 7.4.2 of the UNHCR 2020 RSD Procedural Standards¹⁰ emphasizes, “As a general rule, Applicants should be given the opportunity to present their appeal in person”.¹¹ It further provide details of the circumstances within which an appeal interview must be conducted.¹²
13. In light of the above, UNHCR wishes to provide guidance and relevant procedural considerations for the remote participation of asylum-seekers, interpreters, legal representatives and third parties (such as guardian or support persons), in the RSD interviews.

Part 3: Key procedural considerations

14. In the UNHCR Key procedural considerations on the Remote Participation of Asylum-Seekers in the Refugee Status Determination Interview¹³, UNHCR recommends that

⁷ Art27(2) of the Refugee Act stipulates: “A refugee research officer, by order of the Chairperson, shall investigate appeals and undertake other work of the Committee.”

⁸ *Republic of Korea: Law No. 11298 of 2012, Refugee Act* [Republic of Korea], 1 July 2013, available at: <https://www.refworld.org/docid/4fd5cd5a2.html>

⁹ National Legislative Bodies / National Authorities, *Republic of Korea: Enforcement Decree of the Refugee Act and Enforcement Rule of the Refugee Act*, 1 July 2013, available at: <https://www.refworld.org/docid/5507fa5c4.html>

¹⁰ UN High Commissioner for Refugees (UNHCR), *Procedural Standards for Refugee Status Determination Under UNHCR's Mandate*, 26 August 2020, para. 7.4.2. available at: <https://www.refworld.org/docid/5e870b254.html>

¹¹ *Ibid.*

¹² *Ibid.* „ The negative RSD decision was based on credibility findings that were not adequately addressed during the RSD Interview and supported in the RSD Assessment;

„ Information that was relevant to the determination of the claim was presented by the Applicant but was not adequately considered in the RSD Interview and the RSD Assessment;

„ New information regarding the personal circumstances of the Applicant or a change in the situation in the country of origin that is relevant to the assessment of the refugee status claim is raised in the appeal application or otherwise becomes available. The Appeal Interview should be conducted to assess the reliability of the information; or

„ The Appeal Application Form and/or the RSD Interview record and RSD Assessment, or other relevant information, indicate a breach of procedural fairness, which could have affected the ability of the Applicant to establish his or her claim, including but not limited to: Inadequate interpretation; Concerns regarding the real or perceived conduct or profile (ethnic, religious, gender etc.) of the Eligibility Officer or Interpreter Lack of, or limited, opportunity for the Applicant to present relevant information; Lack of, or limited, opportunity for the Applicant to respond to credibility concerns; Failure to inform the Applicant regarding exclusion concerns and/or lack of, or limited, opportunity for the Applicant to respond to exclusion concerns; Concerns regarding the real or perceived conditions of the RSD interview having affected the confidentiality of the RSD procedure; or Inappropriate questioning.

¹³ UN High Commissioner for Refugees (UNHCR), *Key Procedural Considerations on the Remote Participation of Asylum-Seekers in the Refugee Status Determination Interview*, 15 May 2020, available at: <https://www.refworld.org/docid/5ebe73794.html>

in-person interview is the general rule. However, **as an exceptional measure**, in situations where an individual RSD interview cannot be conducted in person for reasons of safety and security of asylum-seeker and/or personnel, availability of resources, significant costs and/or other obstacles relating to travel or access to the asylum-seeker or public health imperatives, the interview may be conducted remotely, through telephone or videoconference to facilitate an efficient and expeditious assessment of refugee status claims.¹⁴ However UNHCR considers that such arrangements should be used with particular caution given the challenges and limitations associated with them.¹⁵ Therefore, UNHCR recommends for a thorough assessment of the feasibility of conducting the interview remotely, including from a security and integrity of process perspective as well as the technical perspective and its potential impact on the RSD process¹⁶, to be undertaken prior to conducting remote RSD interviewing.

15. Below are key criteria for procedural safeguards, when conducting remote RSD interviews noted in the UNHCR Key Procedural Considerations on the Remote Participation of Asylum-Seekers in the Refugee Status Determination Interview and UNHCR Procedural Standards for Refugee Status Determination¹⁷:

- a. The technology used should permit clear, reliable and uninterrupted audio and video transmission, to be appropriate.
- b. The technology used should permit confidential and secure communication, free from background noise and interruptions; due consideration should be given to data protection during the interview but also when it comes to the storage of the interviews recording if any.
- c. The asylum-seeker should participate from a location arranged by the competent authorities in order to ensure that the RSD interview is conducted in a safe, confidential and suitable environment. The identity of the asylum-seeker must be verified at the beginning of the interview and appropriate explanations provided to them in this regard.
- d. The Applicant should be informed of the conditions under which the RSD interview/interpretation is conducted¹⁸, and should receive an explanation of the confidentiality of the arrangement. The Applicant should be given the

¹⁴ UN High Commissioner for Refugees (UNHCR), *Key Procedural Considerations on the Remote Participation of Asylum-Seekers in the Refugee Status Determination Interview*, 15 May 2020, available at:

<https://www.refworld.org/docid/5ebe73794.html> and see also UN High Commissioner for Refugees (UNHCR), *Procedural Standards for Refugee Status Determination Under UNHCR's Mandate*, 26 August 2020, para. 2.5.5. and para. 4.3.2, available at: <https://www.refworld.org/docid/5e870b254.html>

¹⁵ For more information in this regard please refer to UN High Commissioner for Refugees (UNHCR), *Key Procedural Considerations on the Remote Participation of Asylum-Seekers in the Refugee Status Determination Interview*, 15 May 2020, available at: <https://www.refworld.org/docid/5ebe73794.html>

¹⁶ Ibid.

¹⁷ Spelled out in UN High Commissioner for Refugees (UNHCR), *Key Procedural Considerations on the Remote Participation of Asylum-Seekers in the Refugee Status Determination Interview*, 15 May 2020, available at:

<https://www.refworld.org/docid/5ebe73794.html> and UN High Commissioner for Refugees (UNHCR), *Procedural Standards for Refugee Status Determination Under UNHCR's Mandate*, 26 August 2020, para. 2.5.5. available at: <https://www.refworld.org/docid/5e870b254.html>

¹⁸ This includes explanations regarding the use and storage of electronic records.

opportunity to ask any questions or express any concerns regarding the remote interviewing arrangements. If serious concerns are raised, an assessment of the appropriateness of proceeding with the interview should be made and endorsed by a senior staff.

- e. Particular caution should be given to building rapport with the applicant as it facilitates obtention of a full account from the applicant. The applicant's account should also be regularly summarized, and their understanding confirmed. The possible impact of the arrangement on the willingness and ability of the asylum-seeker to provide a full account should be considered when assessing credibility.
- f. The interviewer must also be vigilant to ensure that the quality of the audio and/or video transmission is adequate throughout the interview, for the applicant as well as the interpreter. The interview must be adjourned in case of technical problems until these issues are resolved.
- g. Observations regarding the interviewing conditions should always be recorded in the transcript.
- h. As applicable, RSD interviews conducted remotely should be audio or video recorded in addition to written transcripts being maintained.¹⁹ Wherever possible, it is recommended that the interview is simultaneously audio/video recorded in both the applicant's location and in the interviewer's location in order to ensure the integrity and quality of the recording. Recording and transcripts may upon request be accessed by the Applicant and their legal representatives.
- i. The asylum-seeker should be informed of the modalities and given the opportunity to submit original/any additional documentary evidence within a reasonable timeframe following the conclusion of the RSD interview.
- j. Measures should be in place to facilitate the participation²⁰ of legal representatives who contribute to the efficiency, fairness, transparency and expediency of the RSD process.²¹ The Applicant's legal representative may request, with the Applicant's consent, a postponement of the Interview for legitimate reasons.²²
- k. The participation of other authorized third parties should also be facilitated, e.g. support persons, legal or customary caretakers, guardians of child asylum seekers, or support persons for asylum seekers with mental health conditions, intellectual disabilities, speech or hearing impairment. Their identity should be verified, their role explained, as well as their duty to preserve confidentiality. All statements or submissions made should be kept on record.

¹⁹ In this regard please refer to UN High Commissioner for Refugees (UNHCR), *Procedural Standards for Refugee Status Determination* para 2.5.5. *Under UNHCR's Mandate*, 26 August 2020, para. 4.3.12. available at: <https://www.refworld.org/docid/5e870b254.html>

²⁰ preferably in the same location with the applicant

²¹ See in this regard UN High Commissioner for Refugees (UNHCR), *Procedural Standards for Refugee Status Determination Under UNHCR's Mandate*, 26 August 2020, para. 2.7.1. available at: <https://www.refworld.org/docid/5e870b254.html>

²² See in this regard UN High Commissioner for Refugees (UNHCR), *Procedural Standards for Refugee Status Determination Under UNHCR's Mandate*, 26 August 2020, para. 2.7.4. available at: <https://www.refworld.org/docid/5e870b254.html>

1. Careful consideration should be given prior to conducting an RSD interview via video conference for applicants who have specific needs or vulnerabilities, in particular children, persons with hearing or visual impairment or mental health issues, or who are suffering the effects of trauma or torture, as this type of arrangement may not be appropriate given the applicant's profile or circumstances.
16. In submitting these comments, UNHCR wishes that the proposed amendment of the Enforcement Decree enhances due process and procedural rights of asylum-seekers, ensures timely protection of persons in need, and contributes to the establishment of a more solid national asylum system.

UNHCR Representation in the Republic of Korea
Seoul, September 2020