



Comments on the Draft 5th Immigration Control Basic Plan

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Reference is made to the above draft which was posted on MoJ's website on 26 June 2015 for public comments. UNHCR, which has been invited to participate in the Sub-Committee meetings throughout 2014, wishes to share its comments with the hope that those would be taken into consideration before the finalization of the draft document. It is suggested that this paper is read in conjunction with the paper "Points of Consideration related to global and domestic refugee and statelessness issues" that UNHCR Representation in Japan issued in July 2015.¹

Introduction

Global forced displacement has seen accelerated growth in 2014, reaching unprecedented levels. By end 2014, 59.5 million individuals were forcibly displaced worldwide as a result of conflict, generalized violence, or human rights violations. A record high of nearly 1.7 million individuals submitted applications for asylum in 2014, a 54 percent increase as compared to 2013.

Japan has also witnessed the highest record number of asylum applications in 2014. 5,000 individuals submitted asylum applications, which was an increase of almost 50 percent compared to 2013. While Japan has been receiving an increased number of asylum-seekers in recent years, the number is still relatively small, compared to other countries that are a State Party to the 1951 Convention relating to the Status of Refugees and/or its 1967 Protocol and have well-established RSD laws and procedures. However, there are now almost 10,000 asylum applications pending decision in Japan and the average length of the asylum process is more than three years, which is longer than in some European countries despite much higher numbers of applicants. As the country is currently facing an ever growing number of people seeking international protection, UNHCR believes that it is imperative for Japan to develop a more comprehensive, fair and efficient system to adequately manage the situation, invest into 'asylum-system building', and put in place a structure with necessary human, financial and other capacities.

In this regard, UNHCR wishes to refer to the deliberations of the Sub-Committee MoJ established in late 2013 to discuss asylum issues. As an observer to the Sub-Committee, UNHCR provided a number of recommendations and proposals and shared the practices of other countries Japan could learn from. UNHCR hopes that the recommendations by the Sub-Committee be swiftly and appropriately implemented.

¹ UNHCR "Points of Consideration related to global and domestic refugee and statelessness issues," July 2015, available at: http://www.unhcr.or.jp/html/ENG_New_Administration_Paper_July_2015_final.pdf

From UNHCR's point of view, it will be important for GoJ to consider the following measures in order to better deal with present day asylum challenges as a matter of priority:

- (1) The establishment of a comprehensive legal regime governing all asylum related matters,
- (2) The establishment of a centralized Government agency that consolidates asylum related tasks which are currently distributed among different ministries, and
- (3) The establishment of the required structures, resources and capacities that will allow the Government to more efficiently and fairly deal with the increasing number of applicants to determine who is in need of international protection and who not.

Concrete comments on the relevant paragraphs:

Re: Chapter 6.②*Stayers with fake status or Giso-Taizaisha* (page 23)

The reference to 'fake stayers' or Giso-Taizaisha and MoJ's wish to identify such persons and 'deal with them' give rise to a concern that genuine asylum-seekers / refugees may be labeled as such and be subject to immigration control measures. It should be recalled that in exercising the right to seek asylum, asylum-seekers are often forced to arrive at, or enter, a territory without prior authorisation. The position of asylum-seekers may thus differ fundamentally from that of ordinary migrants in that they may not be in a position to comply with the legal formalities for entry. They may, for example, be unable to obtain the necessary documentation in advance of their flight because of their fear of persecution and/or the urgency of their departure. These factors, as well as the fact that asylum-seekers have often experienced traumatic events, need to be taken into account in determining any restrictions on freedom of movement based on irregular entry or presence. The newly proposed immigration control measures should not put the asylum-seekers into further disadvantaged position and utmost care needs to be exercised as stipulated in Article 31 of the 1951 Convention.

④Proper treatment of detainees and expedited return of individuals (pages 24-25)

"The maintaining of proper environment for detainees will continue and the treatment of detainees will be improved further" (page 25)

"As to detainees who have not been returned for a prolonged period of time after the issuance of deportation order, effective measures for their return should be considered." (page 25)

Regarding the detention of asylum-seekers, UNHCR would like to recall the basic principles as follows:²

- It should be noted that every person has the right to seek asylum and enjoy in other countries asylum from persecution, serious human rights violations and other serious harm. Seeking asylum is not, therefore, an unlawful act. (Art. 14 of Universal Declaration of Human Rights and Art. 31 of 1951 Refugee Convention)
- Considering the physical and psychological effects associated with detention, and in accordance with international human rights laws and other international standards concerning the treatment of refugees, the detention of asylum-seekers should be normally avoided and be a measure of last resort.
- Consideration of availability, effectiveness and appropriateness of alternatives to detention in each individual case needs to be undertaken and the expansion of ATD programme should be given a priority.

While the above principles are respected, it is strongly proposed that the improvement of the detention conditions should also be considered as a matter of urgency.

Furthermore, considering that the number of cases which submit application for RSD after the deportation procedure has been initiated has been increasing, the following are proposed:

- The cases will be dealt with under the fair and efficient procedure and the measures to swiftly render decisions should be considered;
- A legislative framework and an effective system are put in place that fairly and transparently regulate the treatment of rejected asylum-seekers who are not entitled to domestic protection or other rights to remain. The basic principle governing the treatment of such persons includes that they be treated in a humane manner and in full respect for human rights and dignity;
- Counseling at the end of RSD process is provided (including addressing questions of return to the country of origin in safety and with dignity). Such a regulation also includes provisions for assisted voluntary return.
- An effective and transparent return monitoring system is put in place, where civil society organizations may be requested to play a role in monitoring that the return is carried out

² UNHCR, "Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-seekers and Alternatives to Detention" 2012, available at <http://www.refworld.org/docid/513dbe952.html>

in safety and dignity. In this regard, the effective usage of IOM's Assisted Voluntary Return and Reintegration (AVRR) programme may be considered.

Re: "7. Promoting proper and speedy protection of refugees" (pages 26-29)

1) Comparison with Sub-Committee recommendations

Under Chapter 7, the paper mentions A) In order to provide protection for refugees in a speedy manner without an exception, individuals who should be genuinely protected and those who are not in need of such protection will be distinguished and dealt in a proper and efficient manner in accordance with the content of each case; B) the efforts will be made to solve the problems the current system faces by further increasing the quality of examination. More in concrete terms, it provides a) the structure and basis of the RSD administration should be strengthened even more; b) the structure for compilation and analysis of basic materials re: asylum-seekers, COI as well as information on international affairs should be enhanced and strengthened.

On the contrary to the above, the recommendations of the Sub-Committee were composed of the following, i.e., I. Proper protection through clarification of those who should be protected; II. Fair and efficient RSD through clarification of procedures; III. Increasing transparency through clarification of eligibility criteria; IV. Enhancing specialization of individuals involved in RSD and other issues for further consideration.

Making a comparative analysis between the two documents, the draft 5th immigration control basic plan has omitted the following recommendations submitted by the Sub-Committee:

- I. - As for the claims with "new forms of persecution," consider providing protection based on proper interpretation of the 1951 Convention.
- II. - Review the refugee status application form; enhance the guidance given to asylum-seekers regarding the RSD system;

- Clarify special consideration for vulnerable individuals such as unaccompanied minors and persons with serious illness; allow experts to be present at interviews of such persons.
- III. - Efforts to clarify "normative elements," regarding eligibility considering practices and precedents in and outside Japan;

- Make reasons for rejection of refugee status more satisfactory and consider providing reasons for recognition;

- Make further efforts to make both recognized and rejected cases public.

- IV. - Increase the number of refugee inquirers and RECS in different locations;
- Review the decision-making process;
 - Share decisions, etc. made by RECs among RECs;
 - Establish a system of providing training for interpreters; introduce a system to evaluate performance of interpreters objectively.

It should be noted that all the above issues, which are considered imperative to further improve the current RSD system, have been omitted in the draft plan. We strongly hope that the above issues be clearly reflected in the revised (and final) plan.

UNHCR recognizes the need to review the issues highlighted by MoJ and develop solutions to address the specific and immediate issues the Ministry is currently facing. However, UNHCR believes that the points that have now been proposed for implementation are closely related to the overall fairness and efficiency of the current refugee status determination process and recommends a more holistic approach to ensure that the problems are appropriately resolved. Specifically, following issues need to be considered.

- a) 1951 Refugee Convention should be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose” (Art. 31 of Vienna Convention on the Law of Treaties)
- b) Criteria should be developed, taking into full consideration UNHCR’s guidelines and jurisprudence of other countries on this matter.

2) Introduction of the concept of “Complementary forms of protection”

It has been noted by the wording ‘... further consideration should be given to providing clarity as to who should be provided with residency permission under “evacuation opportunity”’ that MoJ is considering the introduction of a new concept under the term of “evacuation opportunity. Perhaps the most similar concept which exists may be the one called “temporary protection”. The latter, however, is intended as a specific provisional protection response to situations of mass influx providing immediate emergency protection from refoulement, without formally according refugee status, and therefore it should be clearly distinguished from other forms of international protection.

The introduction of the concept of ‘complementary forms of protection’ was discussed and considered by the Sub-Committee. Should MoJ still be contemplating the introduction of this concept, the following needs to be taken into consideration:

a) The new legal regime, which we believe will require changes to the current ICRRRA, will have its legal basis on the international human rights instruments, as the concept of complementary forms of protection:

- All persons who fulfil these criteria should be duly recognized and protected under those instruments, rather than being accorded a complementary form of protection and the measures to provide complementary protection should be implemented in a manner that strengthens, rather than undermines, the existing international refugee protection regime.
- All forms of international protection which are available in a national legal system (i.e., both applications for refugee status and for complementary forms of protection) need to be decided upon by the same authority in one single procedure with the same minimum guarantees.
- Criteria for granting complementary forms of protection are established in accordance with international standards.
- Complementary forms of protection are provided to those who do not qualify for refugee protection under refugee law instruments, in particular the 1951 Convention, but are in need of international protection because they are at risk of serious harm.
- Criteria are based on other relevant human rights instruments, such as CAT (Art.3), UNCRC (Art. 3, 9(1) and 37) and ICCPR (Art. 6 and 7).

b) where it is appropriate to consider the ending of complementary forms of protection, GoJ should adopt criteria which are objective and clearly and publicly enunciated; the doctrine and procedural standards developed in relation to the cessation clauses of Article 1C of the 1951 Convention may offer helpful guidance in this regard.

c) Those provided with complementary forms of protection should enjoy a formal legal status and should be granted the necessary civil, political, social and economic rights to ensure a high degree of stability and certainty and respect for other important principles, such as the fundamental principle of family unity to ensure speedy reunification of separated refugees and those provided with complementary forms of protection.

3) Introduction of admissibility procedures

a. Individuals who make claims based on reasons other than the ones specified in the 1951 Convention should be screened and clearly distinguished, and cases should be dealt within a simplified and expedited manner. (page 28)

Regarding admissibility procedures, they may be introduced to determine manifestly unfounded or clearly abusive claims. However, key procedural safeguards must be ensured and the quality of the examination procedure should not be dispensed – sacrificing thereof may result in flawed decisions which defeat the objective of a fair and efficient asylum procedure. Furthermore, the following needs to be taken into consideration. It is suggested that in developing such a procedure, UNHCR guidelines are fully taken into consideration.³

- The first step towards reducing the duration of the asylum procedure is to ensure the quality of the first instance procedure. It is imperative to invest resources in the first instance examination in order to produce reliable good quality first instance decisions. This would mean that the first instance examination procedure is implemented by sufficient numbers of trained specialist personnel, supported by qualified interpreters and good quality, up-to-date country of origin information, and the procedure encompasses all necessary procedural safeguards.
- Terms such as ‘clearly abusive’ or ‘manifestly unfounded’ should be clearly and exhaustively defined and interpreted restrictively.
- The manifestly unfounded or abusive character of an application should be established by the authority normally competent to determine refugee status.
- Applicants need to be given adequate time to exercise their rights to consult in an effective manner a legal adviser or other counselor, and/or to communicate with a refugee-assisting organization.
- Any admissibility procedure should be without prejudice to an adequate and complete examination of the claim, including personal interview, which is a crucial and basic guarantee of the asylum procedure.
- Applicants whose claims were rejected through admissibility procedure should have access to an effective remedy against a negative decision. This requires, among other things, a reasonable time limit in which to submit the appeal, as well as automatic suspensive effect.

³ UNHCR Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures), 31 May 2001, EC/GC/01/12, <http://www.refworld.org/docid/3b36f2fca.html>, Also, UNHCR’s position on accelerated procedure could be found in 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>.

- Given the grave consequences of exclusion, exclusion decisions should be dealt within the context of the regular status determination procedure.
- Certain applications may be considered for exemption from preliminary screening, due to special needs of the applicant (e.g. victims of torture, survivors of SGBV, persons with disabilities).

4) Repeat applications

2. Repeat applications should be limited to cases where new situation has arisen after the initial application process or there are unavoidable reasons for not being able to present such a claim in the initial application. Taking situation of applicants into consideration, repeat applications should be dealt with in the same procedure as 1 above. (page 29)

UNHCR has shared its viewpoints and the practices of other countries on preliminary screening and repeat applications in the Sub-Committee. Among others, criteria and procedures for receiving and processing repeat applications by examining, inter alia, the following points.

Criteria:

A repeat application, i.e. a new application made by the same person after having received a final decision, is admissible when new elements or findings have arisen or been presented which may mean that the applicant has a well-founded fear of persecution. Such new elements or finding may relate to the general situation in the country of origin and therefore lead to a sur place claim, or may relate to the individual applicant who is, for example, able to present new credible facts or submit new evidence in support of his/her statements.

- A well-founded fear of persecution or a real risk of suffering serious harm may be based on events which have taken place in the country of origin since the examination of the previous application.
- A well-founded fear of persecution or a real risk of suffering serious harm may be based on activities which have been engaged in by the applicant or convictions held by the applicant since s/he left the country of origin.
- A well-founded fear of persecution or a real risk of suffering serious harm may arise if there has been a direct or indirect breach of the principle of confidentiality during or since the previous procedure, and the alleged actor of persecution or serious harm has been informed of the applicant's application for international protection in the Member State.

- Trauma, shame, or other inhibitions may have prevented full oral testimony by the applicant in the previous examination procedure, particularly in the case of survivors of torture, sexual violence and persecution on the grounds of sexuality.
- Further relevant evidence may have been obtained by the applicant or arisen after the previous examination.
- The previous examination may have been discontinued or terminated on grounds of withdrawal or abandonment without a complete examination of all the relevant elements.
- The previous application may have been submitted on behalf of a dependent who later wishes to submit an independent application in his/her own right.

Procedures:

- Repeat applications will be dealt with by the same determining authority in one single procedure as for refugee claims;
- Preliminary examination may be justified only if the previous application was considered in full on its merits;
- Minimum procedural safeguards and guarantees should be available as in the case of full refugee status determination procedure;
- A personal interview is conducted where the applicant is given an opportunity to present the new elements or findings which are claimed to justify a new procedure;
- Examination of a repeat application should not be automatically refused on the ground that the new elements or findings could have been raised in the previous procedure or on appeal; and,
- Applicants should be given the opportunity to clarify any apparent inconsistencies or contradictions which could lead to a refusal to examine a claim on its merits.
- Applicants should benefit from automatic suspensive effect

Reception conditions for those pursuing repeat applications:

- Pending a decision of the admissibility of the re-application and during the examination of an (admissible) reapplication the applicant should be entitled to support and reception conditions on a par with regular asylum seekers (i.e. from application to a final decision of the claim).

5) Restrictions on right to work

③ *As for allowing an access to labour market for those with residency status, which has become an incentive for abusive claims for the purpose of gaining employment in Japan, the current practice should be reviewed and a system that will decide whether or not to provide an access to labour market for the applicant, considering his or her individual circumstance separately, should be established under certain conditions. For example, cases that may fall under certain categories which are considered as not being in need of protection will not be provided with residency status that allows an access to labour market. (page 29)*

On page 27, the introduction of the restriction on right to work is explained as follows: “... individuals with residency status are allowed to work after 6 months from the date of submission of the RSD application without an exception, if they so wish. It is presumed that the system has been abused by foreigners with intention of working and resettling in Japan, as a result, the number of application has increased.”

In this regard, it is recalled that for example in Europe, “EU Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)” stipulates: 1. Member States shall ensure that applicants have access to the labour market no later than 9 months from the date when the application for international protection was lodged if a first instance decision by the competent authority has not been taken and the delay cannot be attributed to the applicant. While the legislations introduced in many European countries are in line with this provision, there are countries which provide work permit immediately upon application for RSD in the country (Sweden, Norway, Portugal etc.) In South Korea, under the Refugee Act, asylum-seekers are permitted to engage in wage-earning employment six months after the application was made. In the US and Canada, asylum-seekers whose application is pending are allowed to have access to labour market and in New Zealand, asylum-seekers are permitted to work after six months.

The European Parliamentary Assembly reported that “the cost to the State will clearly be less if asylum-seekers and refugees are employed rather than dependent on State support. Employment also contributes to a more cohesive society by encouraging and improving contacts between refugees, asylum-seekers and the local community.”⁴ It is not an over-statement that access to gainful employment to become self-sufficient is important for any asylum-seekers from the viewpoint of human dignity.

6) Categorization

⁴ Text adopted by European Parliamentary Assembly on 11 April 2014 (18th Sitting).
<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20893&lang=en>

Furthermore, “cases that may fall under certain categories which are considered as not being in need of protection” gives the impression that simplified procedure may be contemplated by screening cases by pre-fixed categories. It should be stressed that such categorization carries a huge risk of preventing genuine refugees from accessing proper assessment of their cases, given that each individual claim differs from one another.

7) Restrictions on access to asylum

④ As for abusive cases (including repeat applications), further consideration should be given to limiting right to apply for refugee status and establishing exceptions to the suspensive effect (for deportation) during asylum application, both from legal and operational aspects. The a/m three points and their effectiveness will also be taken into consideration [when introducing such measures]. (page 29)

The proposals above such as ‘limiting right to apply for refugee status itself’ and ‘establishing exceptions to the suspensive effect (for deportation) during asylum application, were not put on the table during the Sub-Committee meetings. The right to seek asylum is one of the most fundamental human rights recognized in Art.14 of Universal Declaration of Human Rights, and ‘limiting right to apply for refugee status itself’, gives rise to a grave concern. It should be pointed out that denial of access to territory and access to refugee status determination, as well as limiting the suspensive effect would indeed be considered as violation of Art. 33 of the 1951 Convention (non-refoulement principle).

UNHCR’s role

Paragraph 8 of UNHCR’s Statute, as well as the Preamble of the 1951 Convention relating to the Status of Refugees, confers responsibility on UNHCR for supervising the application of international refugee instruments, most notably the 1951 Convention and its 1967 Protocol. In turn, pursuant to Article 35 of the 1951 Convention and Article II of the 1967 Protocol, States signatory are required to cooperate with UNHCR and to provide the High Commissioner with relevant information so that the office is in a position to successfully carry out its duty of supervising the application of the 1951 Convention.

UNHCR’s supervisory responsibility is exercised in part by the issuance of guidelines on the interpretation and application of provisions and terms contained in international refugee instruments, in particular the 1951 Convention. Likewise, UNHCR’s role in relation to refugee status determination is normally recognized and stipulated in the national legislations in many countries. Access by UNHCR to asylum seekers and information on refugee status determination applications for UNHCR to present its views to the competent authorities regarding individual applications for refugee status at all stages of the procedure is thus a core feature of developed asylum systems around the world. As part of this, where UNHCR is a part of or observer to

national RSD procedures, information on the applicant's file is usually shared with UNHCR and States take UNHCR's position into account when determining refugee status. UNHCR also regularly participates as an observer in hearings and providing views on individual cases; reviews decisions, provides advisory opinions, designates an expert to act as a judge in the appeal body, has a review right in negative decisions, or intervenes – as a third party – on issues of law before administrative, judicial and quasi-judicial appeal bodies. Furthermore, UNHCR is engaged with a significant number of countries world-wide in so called 'Quality initiatives'. They are undertaken in a spirit of working collaboratively with the authorities concerned with a view to strengthening the fairness and efficiency of refugee status determination decision-making process so that states are better able to uphold their obligations under the 1951 Convention and its 1967 Protocol.

As discussed in the Sub-Committee meetings, UNHCR is ready to support the endeavors of MoJ in developing a fairer and more efficient RSD procedure. In particular, and as recommended by the Sub-Committee, it is crucial that cooperation between MoJ and UNHCR will be enhanced in the following three areas:

- 1) Compilation and analysis of Country of origin information
- 2) Case reviews
- 3) Capacity building of IB staff as well as Refugee Examination Counsellors

UNHCR stands ready to provide its support and guidance and work closely with MoJ and other relevant ministries and actors, as per standards international practice, with a view to developing structures and processes which ensure excellence in RSD processing and the highest quality standards related to the treatment of persons in need of international protection.

UNHCR Representation in Japan

24 July 2015