



Observations by the Representative Office of the United Nations High Commissioner for Refugees in Kyrgyz Republic on the draft Law on Amendments to Certain Legal Acts of Kyrgyz Republic (“Deprivation of Nationality as a Measure of Counteraction to Terrorist Activities”)

Introduction

1. The Representative Office of the United Nations High Commissioner for Refugees in Kyrgyz Republic (UNHCR) has been informed that a group of members of the Parliament has prepared a draft Law on Amendments to Certain Legal Acts of Kyrgyz Republic (hereinafter "draft"). The draft was officially published on the web-page of the Parliament on 25 February 2016¹.

2. UNHCR offers these comments as the agency entrusted by the United Nations General Assembly with a global mandate to provide protection to stateless persons worldwide and for preventing and reducing statelessness.² The General Assembly has specifically requested UNHCR “to provide technical and advisory services pertaining to the preparation and implementation of nationality legislation to interested States”.³ It has also entrusted UNHCR with the specific role foreseen in article 11 of the 1961 Convention on the Reduction of Statelessness.⁴ Furthermore, UNHCR’s Executive Committee has requested UNHCR to provide technical advice with respect to nationality legislation and other relevant legislation with a view to ensuring adoption and implementation of safeguards, consistent with fundamental principles of international law, to prevent the occurrence of statelessness which results from arbitrary denial or deprivation of nationality.⁵ UNHCR thus has a direct interest in national legislation of countries impacting on the prevention or reduction of statelessness, including implementation of safeguards contained in international human rights treaties.

3. It is noted that UNHCR’s statelessness mandate comes into play in the context of loss or deprivation of nationality where statelessness is an issue of concern as

¹ Web-site of Jogorku Kenesh of Kyrgyz Republic (Parliament), Draft Law on Amendments to Certain Legal Acts of Kyrgyz Republic, http://www.kenesh.kg/RU/Articles/34554-Na_obshhestvennoe_obsuzhdenie_25_fevralya_2016_goda_vynositsya_proekt_Zakona_KR_O_vnese_nii_izmenenij_v_nekotorye_zakonodatelnye_akty_KR.aspx

² UN General Assembly Resolution A/RES/50/152, 9 February 1996, available at <http://www.unhcr.org/refworld/docid/3b00f31d24.html>. Reiterated in subsequent resolutions, *inter alia*, A/RES/61/137 of 25 January 2007, available at <http://www.unhcr.org/refworld/docid/45fa902d2.html>, A/RES/62/124 of 24 January 2008, available at <http://www.unhcr.org/refworld/docid/47b2fa642.html>, and A/RES/63/148 of 27 January 2009, available at <http://www.unhcr.org/refworld/docid/4989619e2.html>.

³ UN General Assembly Resolution A/RES/50/152, see above footnote 2, para. 15.

⁴ Article 11 of the 1961 Convention provides for the creation of a “body to which a person claiming the benefit of this Convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority.”

⁵ ExCom Conclusion 106, paras. (i) and (j), available at <http://www.refworld.org/docid/453497302.html>.

a consequence of the application of existing legislation or suggested measures, and not where the individual possesses another nationality.

4. UNHCR acknowledges and supports the government’s legitimate efforts to further strengthen the national security of the State. UNHCR is of the opinion that enhancement of security measures can be achieved in a manner, which is in line with international standards and best practices, by safeguarding national interests and providing better safety to the population at general while at the same time protecting rights of every citizen of the State.

Observations

5. The draft provides a number of measures aimed at containment, counteraction and punishment for acts related to commitment, incitement, assistance and support, praising or justification of terrorist and extremist acts (articles 1 and 2). These measures include increasing or establishing administrative and criminal responsibility for acts in question.

6. The draft introduces a new definition of terrorism (article 5) - “ideology of violence and practice of commitment of violent and (or) other criminal acts related to intimidation of population or breach of public security, as well as a call to commit such acts for the purpose of undermining of constitutional order or influencing decisions taken by bodies of State power, bodies of local self-government or international organizations.”

7. The draft provides in its article 7 for changes in article 26 “Loss of Citizenship” of the Law on Citizenship of 21 May 2007 by establishing additional grounds for loss of citizenship⁶.

LAW OF KYRGYZ REPUBLIC “ON CITIZENSHIP OF KYRGYZ REPUBLIC”	
Current version	Proposed version
Article 26. Loss of citizenship of Kyrgyz Republic Citizenship of Kyrgyz Republic is lost: 1) as a result of enlisting to a military or intelligent service of a foreign state, with exception of cases foreseen by international treaties to which Kyrgyz	Article 26. Loss of citizenship of Kyrgyz Republic Citizenship of Kyrgyz Republic is lost: 1) as a result of enlisting to a military or intelligent service of a foreign state; of carrying out a training abroad aimed at acquiring skills and abilities related

⁶ As discussed below in paragraph 12, different terminology may be used for description of a process of withdrawal of nationality, which is not initiated by the individual. For the purposes of this paper, UNHCR uses terms “loss of citizenship” and “deprivation of citizenship” interchangeably, which is also the practice in Kyrgyz legislation (cf. Constitutional provision on deprivation of nationality, art.50, and provision of the Law on Citizenship on loss of nationality, art.26). While deprivation of nationality does not comprise loss of nationality voluntarily requested by the individual (renunciation), it comprises all other forms of loss of nationality, including those which occur automatically by operation of law and those which result from acts taken by administrative authorities (see Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General. Arbitrary deprivation of nationality: report of the Secretary-General, A/HRC/10/34, 26 January 2009, reply from UNHCR, p.49). See also UN Human Rights Council, *Human rights and arbitrary deprivation of nationality: report of the Secretary-General*, 14 December 2009, A/HRC/13/34, paragraph 24, available at: <http://www.refworld.org/docid/4b83a9cb2.html>

<p>Republic is a part of, currently in force in accordance with law, and cases foreseen by article 25 of this Law; 2) if citizenship of Kyrgyz Republic is acquired as a result of presenting of false information or fraudulent documents.</p>	<p>to commission of terrorist or extremist crime; or participation in armed conflicts or military operations on the territory of foreign State with exception of cases of performance of official duties related to peace-keeping and establishing security; 2) if citizenship of Kyrgyz Republic is acquired as a result of presenting of false information or fraudulent documents.</p>
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8. It is noted that the acts mentioned in the draft amendments to article 26 of Law on Citizenship are **not fully** covered by article 375 “Mercenary Activities” of the Criminal Code of Kyrgyz Republic⁷, which contains similar language and introduces criminal responsibilities of a mercenary for *participation in armed conflicts or military operations with the view of receiving a pecuniary reward or with the other interest and who is not a citizen of the state participating in an armed conflict of military operations, and who is not permanent resident on its territory, and who is not a person deployed there in his official capacity*. Article 375 of the Criminal Code establishes a criminal responsibility for only a **recruiter** for “*recruitment, providing training, preparation aimed at acquiring skills and abilities related to commission of terrorist or extremist crime*”. Therefore, article 375 of the Criminal Code does not establish a criminal responsibility for trainee until his actual commission of terrorist and extremist crimes. Whether it is possible to charge the trainee under other articles of the Criminal Code (citing for example article 27 “Preparation for a Crime”) is an open question mostly depending on individual situation of the case. It seems therefore that there might be situations when the individual in question will not be liable under the Criminal Code of Kyrgyz Republic but at the same time would be covered by the draft provision on deprivation of citizenship.

9. UNHCR notes that according to part 2 of article 50 of the Constitution of Kyrgyz Republic, no citizen can be deprived of his citizenship and the right to change his citizenship. On its face, article 26 of the Law on Citizenship (both current and proposed versions) is at variance with this Constitutional provision, as the latter provides for an unequivocal bar to any removal of citizenship without the will of the citizen. However, UNHCR is not in a position to determine the constitutionality of the

⁷ Article 326 “Mercenary Activities” of the Criminal Code of Kyrgyz Republic
(1) recruitment, providing training, preparation aimed at acquiring skills and abilities related to commission of terrorist or extremist crime, financing or other material subsistence of the mercenary, as well as his deployment to an armed conflict or military operations – is punishable by imprisonment for a term of 4 to 8 years.
(2) participation of a mercenary in an armed conflicts or military operations – is punishable by imprisonment for a term of 4 to 8 years;
(3) same acts committed:
1) by a group of persons in premeditated conspiracy;
2) by an organized criminal group;
3) by using official capacity;
4) in respect of underage person – is punishable by imprisonment for a term of 15 to 20 years or a life sentence with confiscation of property or without the same.
Note. A person is considered mercenary if he acts with the view of receiving a pecuniary reward or with the other interest and who is not a citizen of the state participating in an armed conflict of military operations, and who is not permanent resident on its territory, and who is not a person deployed there in his official capacity.

provisions of the Law on Citizenship as it falls within the domestic jurisdiction of the State.

10. In principle, questions of nationality fall within the domestic jurisdiction of each State. Therefore, each State lays down the criteria for conferral and withdrawal of nationality in its own nationality laws. Provisions of the domestic laws recognized by other countries must be however consistent with international conventions, international custom, and the recognized principles of law applicable to questions of nationality.⁸ One such international instrument is the Universal Declaration of Human Rights, which includes in its Article 15(2) the principle of the prohibition of arbitrary deprivation of nationality. The avoidance of statelessness is a general principle of international law. While international law allows for the deprivation of nationality in certain circumstances, for it not to be arbitrary, it must be in conformity with domestic law and comply with specific procedural and substantive standards under international law, in particular the principle of proportionality.⁹

11. In assessing proportionality and the impact on the individual, consideration must be given to the strength of the link of the person with the State in question, including birth in the territory, length of residence, family ties, economic activity as well as linguistic and cultural integration. The time that has passed since the act in question is also relevant for the assessment as to whether the gravity of the act justifies deprivation of nationality. The longer the period elapsed since the conduct, the more serious the conduct required to justify deprivation of nationality. Some States therefore provide for a limitation period in respect to the time elapsed between commission of an act and its discovery by the authorities, and between the discovery and the issuance of the deprivation decision. Also relevant are the consequences of the deprivation of nationality for the person concerned and his/her family members, in particular loss of the right to reside in the country of which the person held nationality, as well as of the rights, which attach to residence¹⁰.

12. The 1961 Convention on the Reduction of Statelessness is the main international legal instrument to provide concrete safeguards to avoid statelessness in case of loss and deprivation of nationality. Kyrgyz Republic is not a party to this Convention. This notwithstanding, provisions of 1961 Convention are relevant in the present case as this instrument established international standards in this area. The 1961 Convention uses the expression “loss of nationality” to describe withdrawal of nationality which is automatic, by operation of law (“*ex lege*”). The term “deprivation” is used in the Convention to describe situations where the withdrawal is initiated by the authorities of the State. The overarching principle is that a State shall not deprive a person of its nationality if such deprivation would render him stateless¹¹. Loss and deprivation that result in statelessness will generally not meet the principle of proportionality because the impact on the individual usually far outweighs the interests

⁸ See UN High Commissioner for Refugees (UNHCR), *Nationality and Statelessness: Handbook for Parliamentarians* N° 22, July 2014, ISBN 078-92-9142-599-0 (IPU), available at: <http://www.refworld.org/docid/53d0a0974.html>, pages 8 and 34.

⁹ See for more details UN Human Rights Council, *Human rights and arbitrary deprivation of nationality: report of the Secretary-General*, 14 December 2009, A/HRC/13/34, paragraph 25, available at: <http://www.refworld.org/docid/4b83a9cb2.html>

¹⁰ See paragraphs 21-22, UN High Commissioner for Refugees (UNHCR), *Expert Meeting - Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality ("Tunis Conclusions")*, March 2014, available at: <http://www.refworld.org/docid/533a754b4.html>

¹¹ Article 8(1) of the 1961 Convention on the Reduction of Statelessness.

the State seeks to protect. The 1961 Convention sets out a narrow set of exceptions under which this would not be the case, striking a balance between the rights of individuals and the legitimate interests of States.¹² One of these exceptions relate to the case when the individual *has conducted himself in a manner seriously prejudicial to the vital interests of the State*¹³. Therefore, there *might be* circumstances in which deprivation of citizenship is possible under the international standards.

13. The ordinary meaning of the terms “seriously prejudicial” and “vital interests” indicate that the conduct covered by this exception must threaten the foundations and organization of the State whose nationality is at issue. The term “seriously prejudicial” requires that the individuals concerned have the capacity to impact negatively the State. Similarly, “vital interests” sets a considerably higher threshold than “national interests”. The exception does not cover criminal offences of a general nature. On the other hand, acts of treason, espionage and – depending on their interpretation in domestic law – “terrorist acts” may be considered to fall within the scope of this paragraph.¹⁴

14. Taking into account a number of complicated issues largely depending on individual circumstances of the case, 1961 Convention further stipulates in its article 8(4) that if the State exercises the power of deprivation of citizenship, then the law *shall provide for the person concerned the right to a fair hearing by a court or other independent body*. It is essential that the decisions of the body concerned be binding on the executive power. The person affected by deprivation of nationality has the right to have the decision issued in writing, including the reasons for the deprivation. Deprivation decisions are only to enter into effect at the moment all judicial remedies have been exhausted¹⁵.

15. Citizenship not only provides people with a sense of identity, it entitles individuals to the protection of a State and to many civil and political rights. Deprivation of citizenship constitutes withdrawal of a ‘right to have rights’. It is the axiom that certain rights guaranteed to all citizens can **only be restricted or deprived by a court act**. In Kyrgyz Republic these rights include *inter alia* freedom from arbitrary detention (according to article 24 (3) of Constitution, *no one can be arrested, detained or imprisoned without court decision on the grounds and according to procedures established by law*), right of privacy of correspondence, telephone and other communications, mail, telegraph, electronic and other messages (article 29(2) of Constitution), seizure of property against will of owner (part 2 of article 12 of Constitution). Even more so, it can be relevant for deprivation of citizenship.

16. Current Kyrgyz legislation does not provide for a detailed procedure related to implementation of article 26 of Law on Citizenship. UNHCR notes that according to article 28 of Law on Citizenship, the President takes decisions on issues related to *admission* to citizenship, *restoration* of citizenship, *renunciation* of citizenship and *loss* of citizenship of Kyrgyz Republic. According to article 64(7) of the Constitution of Kyrgyz Republic, the President takes decisions on issues related to *admission* to citizenship and *renunciation* of citizenship of Kyrgyz Republic. It is noted that these provisions are not identical.

¹² See UNHCR, *Tunis Conclusions*, paragraph 23.

¹³ Article 8(3)(a)(ii) of the 1961 Convention on the Reduction of Statelessness.

¹⁴ See UNHCR, *Tunis Conclusions*, paragraph 68.

¹⁵ See UNHCR, *Tunis Conclusions*, paragraph 26.

17. According to articles 29 and 30 of the Law on Citizenship, State bodies responsible for registration of population (currently, State Registration Service under the Government of Kyrgyz Republic, SRS) and for foreign relations (Ministry for Foreign Affairs, MFA) register loss of citizenship of persons residing in Kyrgyzstan (SRS) or abroad (MFA) correspondingly. Law on Citizenship does not have other provisions related to loss of citizenship. No detailed procedure is foreseen in the implementation of by-laws either (Regulations on procedures relating to issues of citizenship of Kyrgyz Republic, approved by Decree of the President of Kyrgyz Republic of 10 August 2013 No.174).

18. UNHCR notes that the language of the draft allows various interpretations. Such terms as “*armed conflict*”, “*skills and abilities related to commission of terrorist or extremist crime*”, are not defined in the legislation. UNHCR further notes that similar provisions in the Criminal Code are subject to interpretation by courts within criminal proceedings, which provide to the defendant necessary rights and safeguards enabling him to defend his position before a sentence is passed. In case of deprivation of citizenship, a citizen in question would not have these guarantees, and the decision would be taken by the executive order of the President. This order can be appealed in civil court but the standards of proof in criminal and civil courts are different.

19. Given the serious criminal nature of many of the acts, which would give rise to deprivation of nationality, UNHCR underlines that where criminal conduct is alleged, it is strongly advisable that deprivation of nationality only occurs following a two-step process, logically beginning with a finding of guilt by a criminal court. A decision by the competent authority (preferably a court) on deprivation of nationality would follow¹⁶.

Recommendations

20. UNHCR proposes to assess the constitutionality of the proposed amendments to the Law on Citizenship.

21. UNHCR urges to refer the decision-making authority on cases of loss/deprivation of nationality to the court in order to ensure the fairness of the process.

22. UNHCR proposes to amend the draft by providing definitions of all terms referred to in the provisions on loss/deprivation of nationality and not currently defined in the legislation.

23. UNHCR proposes to consider removing from the draft those grounds for loss/deprivation of citizenship, which are not covered in the Criminal Code as punishable offences.

24. UNHCR advises to provide in the Law on Citizenship that loss/deprivation of nationality only occur following a two-step process, beginning with a finding of guilt by a criminal court.

¹⁶ See UNHCR, *Tunis Conclusions*, paragraph 27.

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