

UNHCR Observations on the proposal to amend the Finnish Aliens Act and related laws *(Hallituksen esitys eduskunnalle ulkomaalaislain muuttamisesta ja siihen liittyviksi laeiksi)*

I. Introduction

1. The United Nations High Commissioner for Refugees (“UNHCR”) Representation for the Nordic and Baltic Countries (“RNB”) appreciates the invitation to provide observations on the “Government’s proposal to the parliament to amend the Aliens Act and related laws” (*Hallituksen esitys eduskunnalle ulkomaalaislain muuttamisesta ja siihen liittyviksi laeiksi*) concerning the introduction of a border procedure in Finland - hereafter the “Proposal”.¹
2. UNHCR has a direct interest in law proposals related to asylum, as the agency entrusted by the United Nations (“UN”) 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 of UNHCR’s Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees,³ whereas the 1951 Convention relating to the Status of Refugees⁴ and its 1967 Protocol (hereafter collectively referred to as “1951 Convention”) oblige State Parties 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 (Article 35 of the 1951 Convention and Article II of the 1967 Protocol). This has also been reflected in European Union (“EU”) law, including by way of reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the EU. The UN General Assembly has also entrusted UNHCR with a global mandate to provide protection to stateless persons world-wide and for preventing and reducing statelessness.⁵

¹ The full presentation of the Proposal by the Ministry of the Interior, including explanatory notes and proposed legislative text (in Finnish), is available at Hallituksen esitys eduskunnalle laiksi ulkomaalaislain muuttamisesta ja siihen liittyviksi laeiksi, Hankenumero SM033:00/2023, <https://intermin.fi/hankkeet/hankesivu?tunnus=SM033:00/2023>.

² UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V) <https://www.refworld.org/docid/3ae6b3628.html> (“the Statute”).

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 the 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, UNHCR’s supervisory responsibility, October 2002 <http://www.refworld.org/docid/4fe405ef2.html>, pp. 7–8.

⁴ UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations Treaty Series, No. 2545, vol. 189 <http://www.unhcr.org/refworld/docid/3be01b964.html>. According to Article 35 (1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of the Convention”.

⁵ UN General Assembly Resolution A/RES/50/152, 9 February 1996 <http://www.unhcr.org/refworld/docid/3b00f31d24.html>, reiterated in subsequent resolutions, including A/RES/61/137 of 25 January 2007, <http://www.unhcr.org/refworld/docid/45fa902d2.html>, A/RES/62/124 of 24 January 2008 <http://www.unhcr.org/refworld/docid/47b2fa642.html>, and A/RES/63/148 of 27 January 2009 <http://www.unhcr.org/refworld/docid/4989619e2.html>.

3. UNHCR's supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention. Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and subsequent Guidelines on International Protection ("UNHCR Handbook").⁶ UNHCR also fulfils its supervisory responsibility by providing comments on legislative and policy proposals impacting on the protection and durable solutions for forcibly displaced and stateless people.
4. UNHCR recognizes that States have the legitimate right to control their borders, however, this must be done in a protection-sensitive manner and in accordance with international law. States must ensure that persons wishing to seek asylum are given access to asylum procedures and are always protected against refoulement, including in times of emergency.⁷ UNHCR also recognizes that rendering asylum procedures more efficient is a key objective, both for Member States and individual applicants. UNHCR therefore supports the goal of fair and efficient processing and supports the use of accelerated procedures for manifestly unfounded and manifestly well-founded claims provided that all due process guarantees are in place.⁸
5. UNHCR acknowledges the challenging context at the border, in which the Proposal is made and wishes to put forward its considerations to assist the authorities to ensure that Finland upholds its international legal obligations when seeking to introduce border procedures.

II. General observations

6. According to the Proposal, a border procedure will be introduced in Finland to allow for fast processing of certain applications for international protection at the external border. The stated purpose of the Proposal is to respond to the instrumentalization of migration and to prevent unauthorized further movement of asylum-seekers. Asylum-seekers channeled through the border procedure will be required to stay at the border, in transit areas, or their vicinity, for the duration of the procedure, to ensure that they cannot move freely in Finland or to other countries.⁹ According to the Proposal, while in the border procedure, the applicant is not considered to have entered the territory. The applicant would be granted access to the territory only if no decision at first instance has been taken within a period of four weeks.

⁶ UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, April 2019, HCR/1P/4/ENG/REV. 4 <https://www.refworld.org/docid/5cb474b27.html>.

⁷ UNHCR, Comments on the European Commission's Proposal for an Asylum Procedures Regulation, COM (2016) 467, April 2019, <https://www.refworld.org/legal/intlegcomments/unhcr/2019/en/122595>, p. 36.

⁸ Ibid, p. 5.

⁹ Proposal, pp. 4-5.

7. The border procedure will be established in accordance with the EU Asylum Procedures Directive (APD).¹⁰ The procedure would be used in all situations permitted by Article 31(8) and 43 of the APD, including in the event of large-scale arrivals, where an application for international protection has been made:

*“at the external border crossing point or in connection with an unauthorized crossing of the external border, and it could “be left unexamined under Section 103 or decided under expedited procedure under Section 104 of the Aliens Act”.*¹¹

8. UNHCR’s position is that any border procedure must be carried out in line with legal and procedural safeguards from the outset, and with full respect for the right to seek asylum and the principle of non-refoulement.¹² Border procedures must comply with the same due process requirements and safeguards under EU and international law as procedures that apply to applications lodged and examined at other locations.¹³ Despite the artificial construct of non-entry, State's legal obligations under international law remain unaltered. A State which is presented with an asylum request at its borders is required to provide admission at least on a temporary basis to examine the asylum claim, as the right to seek asylum would otherwise be rendered meaningless.¹⁴
9. UNHCR further notes that border procedures must be implemented in a protection-sensitive and child-sensitive manner and should not lead to *de facto* detention situations. In any case, detention must remain the exception.¹⁵ The Proposal contains references to the APD and the EU Reception Conditions Directive. In this respect, UNHCR wishes to note that fair and efficient procedures are only possible if implemented in a manner that provides for the special procedural and reception needs of vulnerable individuals.¹⁶
10. In the following sections, UNHCR’s observations on the Proposal are focused on screening and triaging, admissibility vs in-merits procedures, applicants with specific needs including children, and detention.

¹⁰ EU, 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), 29 June 2013, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU <https://www.refworld.org/docid/51d29b224.html>.

¹¹ Proposal, pp. 30-31.

¹² UNHCR, Recommendations for the Belgian and Hungarian Presidencies of the Council of the European Union (EU), 10 January 2024, <https://www.refworld.org/policy/polrec/unhcr/2024/en/147081>, p. 4.

¹³ UNHCR, Comments on the European Commission's Proposal for an Asylum Procedures Regulation, p. 36.

¹⁴ UNHCR, Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response, 16 March 2020, <https://www.refworld.org/docid/5e7132834.html>, p. 1.

¹⁵ UNHCR, Recommendations for the Belgian and Hungarian Presidencies, p. 8; UNHCR, Recommendations for the French and Czech Presidencies of the Council of the European Union, January 2022, <https://www.refworld.org/docid/61d71e864.html>, p. 8.

¹⁶ UNHCR, Recommendations for the Belgian and Hungarian Presidencies, p. 2.

III. Specific observations

a. Screening and Triaging

11. According to the Proposal, asylum applications made at the external border will be received and registered by the Finnish Border Guard. The Finnish Immigration Service (MIGRI) will be responsible for deciding whether an applicant should be channeled to the border or the regular asylum procedures. Applications that may be declared inadmissible (such as in the case of applicants coming from safe third countries) or processed in an accelerated manner (such as in the case of applicants presenting manifestly unfounded claims) will be directed to the border procedure (see further below at Section III b). Applicants falling outside the scope of the border procedure, such as manifestly well-founded applications, will be directed to the regular asylum procedures and to stay at regular reception centers.¹⁷
12. When receiving an asylum application, the Border Guard will enter data about the applicants in the “UMA automation system”.¹⁸ According to the Proposal, the technical features of this system allow for a simpler, more automated channeling of applications to certain queues and differentiated processing modalities.¹⁹ Where an automated referral to the border procedure is not possible based on the UMA system, MIGRI will determine what procedure should be used. UNHCR notes that the screening process appears considerably automated and may not be suitable for identifying vulnerable applicants and unaccompanied and separated children, for whom the border procedure would not be appropriate (see further below at Section III c).
13. UNHCR further notes that the responsibility sharing between the authorities concerned are not fully clarified in the Proposal. UNHCR would like to recall that:

*“The body responsible for examining and deciding on applications for refugee status in the first instance should be **a single, central specialized authority**. If an initial interview is made by a border official, there should be provision that an applicant is not rejected or denied admission **without reference to a central authority** [emphasis added].”²⁰*

Hence, in line with this standard, front-line authorities in charge of border and migration controls, such as border guards, are normally required to facilitate asylum-seekers’ access

¹⁷ Finnish Aliens Act, proposed Section 104(c).

¹⁸ Proposal, pp. 13-14. In the UMA system (electronic processing system for aliens affairs) information on the following is recorded: the applicant's personal data, language skills, the place of border crossing, the immediately notified basis for the asylum application and main aspects of the grounds for international protection, whether the applicant came as a Dublin return, travel and identity documents, family relationships, family members applying for international protection at the same time, travel route, possible visa and residence permits and residence permits in other States.

¹⁹ Proposal, p. 14.

²⁰ UNHCR, Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures), 31 May 2001, EC/GC/01/12, para. 50 (i), <http://www.refworld.org/docid/3b36f2fca.html>.

to the asylum procedure, by referring their cases to the central, specialized determining authority.

14. According to the APD, it must be ensured that the authority that carries out the screening has the appropriate knowledge or receive the necessary training to fulfil their obligations.²¹ In many national asylum systems, registration and initial identification of specific needs are undertaken by the police or border control officials. Establishing specialized, trained units to register, identify and assist asylum-seekers and others with risk profiles is a more advisable practice. Capacity development of such officials on key due procedural standards of the asylum process and international protection principles is imperative to ensure quality registration and fair treatment of individuals who wish to seek asylum. Such training activities can be undertaken with the support of civil society and other stakeholders with expertise.²²

b. Admissibility vs in-merits procedures

15. According to the Proposal, applications in the border procedures, pursuant to Section 103 of the Finnish Aliens Act, can either be declared inadmissible (“can be left undecided”)²³ or, according to Section 104(a), can be decided upon on the merits in an accelerated procedure.²⁴
16. UNHCR is of the view that in-merits assessments that examine the individual circumstances of an asylum application are generally preferred over admissibility procedures.²⁵ Admissibility procedures such as those related to the use of safe third country concepts, tend to create procedural inefficiencies, increase backlogs, add unnecessary layers and costs and shift the burden to non-EU countries, with potentially lesser asylum system capacity, resulting in an overall erosion of the international asylum system.²⁶ UNHCR would also like to note that one of the key differences between accelerated in-merits procedures and admissibility procedures as concerns returns is that in the former instance, returns would most exclusively be carried out to the country of origin rather than to a third country, to which admission could prove difficult, particularly if relations are strained.²⁷ Furthermore,

²¹ APD, Article 4(4).

²² UNHCR, Effective processing of asylum applications: Practical considerations and practices, March 2022, <https://www.refworld.org/docid/6241b39b4.html>, p. 8 and p. 22.

²³ Section 103 of the Aliens Act. An asylum application can be considered inadmissible when the applicant has arrived from a safe country of asylum or a safe third country, may be returned to another EU Member State responsible for an asylum claim pursuant to the Dublin Regulation, has received international protection in another EU Member State or has lodged a repeat application that does not meet conditions set out under Section 102 (3).

²⁴ Proposed Section 104(a) of the Aliens Act. Applications that may be decided upon on the merits in an accelerated manner include, for example, clearly abusive or manifestly unfounded applications, subsequent applications, and those made by applicants from a safe country of origin where he can be returned.

²⁵ UNHCR, Recommendations for the Belgian and Hungarian Presidencies, p. 8.

²⁶ UNHCR, Practical considerations for fair and fast border procedures and solidarity in the EU, 15 October 2020, <https://www.refworld.org/docid/5f8838974.html> p. 2.

²⁷ UNHCR, Discussion Paper Fair and Fast - Accelerated and Simplified Procedures in the European Union, 25 July 2018, <https://www.refworld.org/policy/opguidance/unhcr/2018/en/121637>, p. 4.

for the safe third country concept to be effectively applied in the context of admissibility procedures, a meaningful link needs to exist between the applicant and the third country considered safe for them, which would make it reasonable and sustainable for the person to seek asylum there.²⁸

17. With regards to triaging, UNHCR recommends that following the vulnerability screening and registration, asylum cases are triaged depending on whether they are manifestly unfounded, complex and manifestly well-founded claims. It is indeed important that manifestly well-founded claims are timely identified, channeled out of the border procedure and prioritized for processing on the territory, possibly with the use of accelerated and/or simplified case processing modalities.²⁹ Manifestly unfounded claims could be decided on merits at the border in an accelerated manner.³⁰ The remaining category of more complex cases could be directed to regular asylum procedures. This would enhance the efficiency of the asylum system through quick determination on whether the applicant has the right to stay in Finland or is required to return.³¹

c. Specific needs

18. UNHCR strongly recommends frontloading of resources for early identification of individuals with specific needs and vulnerabilities to support referral to appropriate procedures and essential services.³² UNHCR thus welcomes that an individual assessment is to be carried out to evaluate the specific needs of an applicant and the appropriate proceeding. At this stage, family links in particular EU Member States should also be identified for eventual family reunion.³³ However, UNHCR notes that the Proposal lacks information regarding when and how the screening of vulnerable individuals will be carried out.³⁴
19. Regarding screening for identifying victims of trafficking, for instance, UNHCR recommends that screening should be undertaken on an individual basis in a confidential space and in an age- and gender-sensitive manner. Regarding screening with children, a children's desk manned by staff dedicated to assisting and supporting children (especially unaccompanied and separated children) at reception/screening centers is recognized good practice. This allows for more in-depth assessment and referral as soon as possible. Where

²⁸ UNHCR, Recommendations for the Belgian and Hungarian Presidencies, p. 9.

²⁹ Ibid, p. 8.

³⁰ UNHCR, Practical considerations for fair and fast border procedures, p. 4.

³¹ Ibid, p. 2; UNHCR, Recommendations for the European Commission's Proposed Pact on Migration and Asylum, p. 6.

³² UNHCR, Recommendations for the European Commission's Proposed Pact on Migration and Asylum, p. 7; UNHCR, Effective processing of asylum applications: Practical considerations and practices, p. 8.

³³ Ibid, p. 3.

³⁴ Proposal, p. 32 and p. 53. UNHCR emphasizes that the grounds that might indicate specific procedural needs such as age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders, and consequence of torture, rape or other serious forms of psychological, physical, sexual or gender-based violence, is not exhaustive and each case must be individually assessed. UNHCR, Comments on the European Commission's Proposal for an Asylum Procedures Regulation, p. 16.

possible, staff from child protection services (NGO, government, etc.) should be present to provide in-depth assessment of needs and vulnerabilities if required.³⁵

20. UNHCR welcomes the provision that individuals requiring special procedural safeguards (“erityisiä menettelyllisiä takeita”) are exempted from border procedures where their specific needs cannot appropriately be catered for in the border procedures.³⁶ In UNHCR’s view, the use of accelerated border procedures is not suitable for victims of trauma or trafficking and persons with mental disabilities. Other categories of vulnerable persons with specific needs may require additional support and services during the border procedure to ensure that they can effectively present their claim. If such support cannot be provided, applicants must be channeled to the regular procedure.³⁷ Should the conditions under which border procedures are implemented amount to detention, vulnerable persons should be exempted.³⁸ UNHCR thus welcomes the provision that if it becomes evident that the conditions for channeling an application through border procedure no longer are met, the procedure will be terminated.

d. Children

21. The Proposal provides that children arriving with their families as well as unaccompanied children according to certain criteria may be directed to the border procedure.³⁹ Special attention should be paid to the well-being and best interests of the child, and the border procedure should not apply if it is found to be against the child’s best interests following an individual assessment.⁴⁰
22. Children are among the most vulnerable groups of asylum-seekers and have specific rights and needs according to the UN Convention on the Rights of the Child as well as other international and regional instruments. UNHCR thus appreciates that an individual assessment will be made as to the child’s specific needs and whether border procedures are appropriate. It is important to recall the wide range of procedural safeguards that apply to children in asylum procedures.⁴¹

³⁵ UNHCR, 10 Point Plan of Action, Refugee Protection and Mixed Migration, 2016 Update, <http://www.unhcr.org/publications/manuals/5846d0207/10-point-plan-action-2016-update-chapter-5-mechanisms-screening-referral.html>, Chapter 5.

³⁶ Finnish Reception Act, Article 6.

³⁷ UNHCR, Comments on the European Commission’s Proposal for an Asylum Procedures Regulation, p. 16.

³⁸ UNHCR, Recommendations for the Belgian and Hungarian Presidencies, p. 9.

³⁹ See Proposal p. 39-40 cf. APD, Article 25(6)(a)(i-iii). Such children may include unaccompanied children who originate from a safe country of origin or safe third country, make a repeat application considered inadmissible, are considered a danger to national security or public order, or have misled authorities by presenting false documents or deliberately destroyed documents that would clarify the child’s identity.

⁴⁰ Proposal, p. 40 and p. 62.

⁴¹ UNHCR, Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, HCR/GIP/09/08, 22 December 2009, <https://www.refworld.org/policy/legalguidance/unhcr/2009/en/71246>, see Procedural standards in paras. 65-77.

23. In UNHCR's view, border procedures should not be applied to unaccompanied and separated children, including in cases raising security or public order concerns.⁴² Children have specific rights and needs that may not be met under this Proposal. Especially unaccompanied children have specific procedural needs that cannot be appropriately met in such a context, such as to a guardian, legal representative, tracing and family reunification.⁴³ While UNHCR appreciates that the Proposal notes that their "procedural needs, rights and well-being" should be ensured,⁴⁴ border procedures will likely make the provision of full procedural safeguards difficult. UNHCR therefore strongly recommends that all unaccompanied and separated children be exempted from the border procedure. Furthermore, UNHCR would like to reiterate that should conditions under which border procedures are implemented amount to detention, children and families with children should be exempted.

e. Remote hearing

24. The Proposal introduces a new paragraph to Section 97 of the Aliens Act, enabling asylum interviews in the border procedure to be conducted via video conference without requiring the applicant's consent for a remote interview. This aims to ensure that applicants can stay in the reception center without needing to be physically present at the interview premises of MIGRI.

25. In this regard, UNHCR would like to draw attention to its *Key Procedural Considerations on the Remote Participation of Asylum-Seekers in the Refugee Status Determination Interview*⁴⁵ in which several safeguards are set out to ensure the integrity and quality of proceedings as a whole. UNHCR recognizes that the use of remote interview modality can contribute to the efficiency of asylum procedures, however, preference should be given to an in-person interview whenever possible, as the interview and applicant's ability to express him- or herself remains key to ensuring procedural fairness. If a remote interview is considered, its appropriateness needs to be assessed individually before the interview, including seeking the views of the applicant regarding remote modality. Interviews via video conference or telephone may not be suitable or appropriate for all applicants, for example where specific needs such as those related to age, sight or hearing impairment, mental health, trauma or other factors preventing effective participation in the interview.⁴⁶

26. According to the Proposal, applicants in the border procedure will have the same right to legal aid and interpretation as other asylum-seekers. With reference to the right to legal assistance, UNHCR would like to underline that even if specific provisions aimed at

⁴² UNHCR, Recommendations to the Belgian and Hungarian Presidencies, p. 9.

⁴³ UNHCR, Guidelines on Child Asylum Claims, paras. 68, 69 and 73.

⁴⁴ Proposal, p. 40.

⁴⁵ UNHCR, Key Procedural Considerations on the Remote Participation of Asylum-Seekers in the Refugee Status Determination Interview, 15 May 2020, <https://www.refworld.org/policy/legalguidance/unhcr/2020/en/123213>.

⁴⁶ UNHCR, Remote Interviewing: Practical Considerations for States in Europe, 9 June 2020, <https://www.refworld.org/policy/polrec/unhcr/2020/en/112992>.

ensuring it remotely are put in place, concerns remain about the effective possibility to exercise this right in practice, for example, due to the need for the applicant to establish a relationship of trust with the legal representative and ensuring the right to confidentiality.

f. Detention and alternatives to detention

27. According to the Proposal, the applicant's legal stay during the border procedure would be restricted to the border, transit zone, or designated reception center. As described in the Proposal, barriers, such as, fences and gates, will secure the applicant's stay within the reception center. Residents would be able to move freely within the confines of the reception center area, including outdoor areas. Food, clothing and other services would be provided within the premises.
28. Permission will be needed from the reception center's director to temporarily leave the center, which will only be granted due to compelling personal reasons, such as serious illness or funeral of a close relative. Children would have the right to leave the center in certain situations such as to go to school, in case schooling is not provided within the center. Applicants would have the right to appeal the decision to the Administrative Court. While an asylum-seeker would not be prevented from leaving the reception center by force, this may result in his/her detention for the duration of the border procedure.
29. According to UNHCR's guidelines, detention refers to the deprivation of liberty or confinement in a closed place, which an asylum-seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centers or facilities.⁴⁷ In determining the distinction between a restriction on liberty of movement and deprivation of liberty in the context of confinement of foreigners in airport transit zones and reception centers for the identification and registration of migrants, the European Court of Human Rights (ECtHR) has taken the following factors into consideration: "i) the applicants' individual situation and their choices, ii) the applicable legal regime of the respective country and its purpose, iii) the relevant duration, especially in the light of the purpose and the procedural protection enjoyed by applicants, and iv) the nature and degree of the actual restrictions imposed on or experienced by the applicants".⁴⁸
30. Based on the description in the Proposal of the reception arrangements in the context of border procedures, UNHCR considers, for the purpose of these comments, that they may amount to *de facto* detention. In UNHCR's view, detention of asylum-seekers should not

⁴⁷ UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012, <https://www.refworld.org/policy/legalguidance/unhcr/2012/en/87776>, p. 9.

⁴⁸ See e.g., CASE OF ILIAS AND AHMED v. HUNGARY (Application no. 47287/15) (Grand Chamber), ECLI:CE:ECHR:2019:1121JUD004728715, Council of Europe: European Court of Human Rights, 21 November 2019, <https://www.refworld.org/jurisprudence/caselaw/echr/2019/en/89813>, para. 217.

be used by default or be mandatory for all arrivals, but rather remain the exception.⁴⁹ Should the conditions under which border procedures are implemented amount to detention, vulnerable persons should be exempted.⁵⁰ The ECtHR has found that where an asylum-seekers' detention occurs *de facto*, that is, as a matter of practical arrangement, the detention is unlawful where the authorities “did not issue a formal decision with reasons for the detention, including an individual assessment and consideration of any alternative measures that would have been less coercive than detention”.⁵¹ Where detention is applied for a legitimate purpose, it needs to be provided for by law, based on an individual decision, strictly necessary and proportional, timebound and regularly reviewed.⁵²

31. According to the UN Task Force on Children Deprived of Liberty, detention of children in the migration context is a child rights violation, which is never in their best interests.⁵³ UNHCR appreciates that children will be able to leave the reception center or group home if necessary. However, in UNHCR's view, unaccompanied and separated children should not be in the border procedure to begin with. Furthermore, where the reception arrangements amount to detention, children should not be in the border procedures at all.⁵⁴
32. According to the Proposal, the maximum duration of the border procedure is 77 days, not counting the registration phase.⁵⁵ Article 43(2) of the APD provides that “When a decision has not been taken within four weeks, the applicant shall be granted entry to the territory of the Member State.” The Court of Justice of the EU has clarified that this provision must be “interpreted as not authorising the detention of an applicant for international protection in a transit zone for a period of more than four weeks”.
33. In UNHCR's view, minimal periods in detention are permissible at the outset of the border procedure to carry out initial identity and security checks. It is also permissible for a limited initial period for the purpose of recording, within the context of a preliminary interview, the elements of their claim to international protection to facilitate effective triaging as a basis for channeling cases into the different processing streams. For manifestly unfounded cases, detention beyond this period may be legitimate for up to four weeks from the lodging of the asylum claim with the applicable safeguards as established by the EU Court of Justice and the ECtHR.⁵⁶ UNHCR thus recommends that where detention is necessary and

⁴⁹ Court of Justice of the European Union, *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, Joined Cases C-924/19 PPU and C-925/19 PPU, 2020.

⁵⁰ UNHCR, Recommendations to the Belgian and Hungarian Presidencies, p. 9.

⁵¹ *R.R. and others v Hungary* (application no. 36037/17), Council of Europe: European Court of Human Rights, 2 March 2021, <https://www.refworld.org/jurisprudence/caselaw/echr/2021/en/123982>, para. 90.

⁵² UNHCR, Practical considerations for fair and fast border procedures, p. 2. See also UNHCR, Recommendations for the French and Czech Presidencies, p. 9; UNHCR, Recommendations for the European Commission's Proposed Pact on Migration and Asylum, p. 10.

⁵³ UN Task Force on Children Deprived of Liberty, End Immigration Detention of Children, Inter-Agency, February 2024, <https://www.refworld.org/policy/themreport/ia/2024/en/147364>, p. 5.

⁵⁴ UNHCR, Recommendations to the Belgian and Hungarian Presidencies, p. 9.

⁵⁵ Proposal, p. 32.

⁵⁶ UNHCR, Practical considerations for fair and fast border procedures, p. 2.

proportionate in the context of border procedures, and no alternatives are available, its maximum duration is clearly stipulated and limited to the shortest possible period.⁵⁷

34. It is also proposed that an applicant would remain detained after a negative decision for the duration of return proceedings. Authorities would be given a four-week period to implement the return. UNHCR recognizes that accelerated procedures to swiftly identify persons not in need of international protection will help to build trust in the integrity of the asylum system when coupled with a functioning return system.⁵⁸ During return proceedings, any use of detention can only be applied where it pursues a legitimate purpose and has been determined to be necessary, reasonable, and proportionate in each individual case. The use of alternatives to detention in advance of return operations should be considered first.⁵⁹

IV. Concluding remarks

35. Based on the above observations, UNHCR invites Finland to consider potential amendments to the Proposal in order to:

- a. Ensure that the screening and triaging of asylum applications presented at the border is carried out by a single, central specialized authority that has sufficient knowledge and training;
- b. Refrain from applying border procedures to unaccompanied and separated children and victims of trauma or trafficking and persons with mental disabilities;
- c. Put in place measures to identify applicants in need of specific procedural guarantees as early as possible and throughout the procedure;
- d. Ensure the timely identification of manifestly well-founded claims for accelerated and/or simplified processing outside of the border procedures, and as appropriate with prioritization;
- e. Favor in-merits procedures over admissibility procedures such as those based on the safe third country concept;
- f. Ensure that the detention of asylum-seekers remains the exception, and where detention grounds apply instead consider alternatives to detention, including temporary lawful movement restrictions, as the preferred option;
- g. Fully adhere to international legal obligations which remain applicable despite the artificial construct of considering applicants as not having entered the territory while in border procedures.

⁵⁷ R.R. and others v Hungary (application no. 36037/17), para. 88.

⁵⁸ UNHCR, Recommendations for the European Commission's Proposed Pact on Migration and Asylum, p. 10.

⁵⁹ Ibid.

**UNHCR Representation for Nordic and Baltic Countries
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