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

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Stockholm, 29 July 2014

Notre/Our code: 101/RRNE/2014

Dear Mr Vuorio,

Re: **Comments by the United Nations High Commissioner for Refugees (UNHCR) Regional Representation for Northern Europe to the Finnish Ministry of the Interior on the draft Law Proposal of 26 May 2014, amending the Aliens Act of the Republic of Finland**

The UNHCR Regional Representation for Northern Europe is pleased to submit to the Ministry of Interior its comments on the draft Law Proposal amending the Aliens Act transposing parts of the recast Asylum Procedures Directive.

As always, UNHCR appreciates the constructive relationship between Finland and UNHCR, and we thank you for your consideration of this important matter.

We remain at your disposal for any clarifications required.

Yours sincerely,

Pia Prytz Phiri
Regional Representative

Jorma Vuorio
Director General
Ministry of the Interior
PO Box 26
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UNHCR

Observations by the United Nations High Commissioner for Refugees (UNHCR) Regional Representation for Northern Europe on the Draft Law Proposal of 26 May 2014 amending the Aliens Act for the transposition in Finland of the recast EU Directive on Asylum Procedures

I. Introduction

1. The UNHCR Regional Representation for Northern Europe (RRNE) is grateful to the Ministry of the Interior of Finland for the invitation to provide comments on the draft law proposal transposing the 'Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast)'[1] (hereafter 'recast APD'). UNHCR has participated in round table discussions during the drafting of the law amendments, and submitted initial observations in March 2014.

2. UNHCR has a direct interest in law proposals in the field of asylum, as the agency entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, seek permanent solutions to the problems of refugees[2]. According to its Statute, UNHCR fulfils its mandate *inter alia* by "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto[.]"[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 Relating to the Status of Refugees (hereafter '1951 Convention'). Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status ('UNHCR Handbook') and subsequent Guidelines on International Protection[4]. UNHCR's supervisory responsibility is reiterated in Article 35 of the 1951 Convention, and in Article II of the 1967 Protocol relating to the Status of Refugees[5].

3. UNHCR's supervisory responsibility has also been reflected in European Union law, including by way of a general reference to the 1951 Convention in Article

[1] European Union: Council of the European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, 29 June 2013, L 180/60, available at: http://www.refworld.org/docid/51d29b224.html.
[2] UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), available at: http://www.unhcr.org/cgibin/texis/vtx/refworld/rwmain?docid=3ae6b3628 ("UNHCR Statute").
[3] *Ibid.*, paragraph 8(a).
[4] UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, available at: http://www.refworld.org/docid/4f33c8d92.html.
[5] According to Article 35 (1) of the 1951 Convention, UNHCR has the "duty of supervising the application of the provisions of the 1951 Convention".

78(1) of the Treaty on the Functioning of the European Union ('TFEU')[6], as well as in Declaration 17 to the Treaty of Amsterdam, which provides that *"consultations shall be established with the United Nations High Commissioner for Refugees ... on matters relating to asylum policy"*[7]. Secondary EU legislation also emphasizes the role of UNHCR. For instance, Article 29 of the recast APD states that Member States shall allow UNHCR *"to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for international protection at any stage of the procedure"*.

II. Scope of the proposal

4. The aim of the draft law proposal amending the Aliens Act (301/2004) is to transpose the recast APD. The draft law proposal also contains amendments to the Aliens Act based on Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)[8] (Hereafter 'Dublin III Regulation'). However, the rules on detention in the recast Directives and Regulations are not being transposed in connection with this law proposal, but in connection with an earlier proposal on detention, which UNHCR commented on in April 2014, and which is projected to be submitted to the Parliament in the autumn of 2014.

5. Many of the changes introduced by the recast APD do not require Finland to amend its legislation. For example, Finland does not have a border procedure and corresponding provisions in the recast APD thus does not require transposition. Furthermore, some of the changes introduced by the recast APD will be transposed by amending the Asylum Regulation of the Finnish Immigration Service (hereafter 'Migri'). The most notable changes introduced through the current draft law proposal concern the interview with the applicant, vulnerable applicants, the concepts of safe countries, subsequent applications and requests for suspensive effect of appeals. Many of the proposed amendments reflect current practices in Finland, which now will be explicitly mentioned in the legislation. The binding time limits for the handling of applications will not be introduced in connection with this law proposal, but will wait for the outcome of the discussions on a possible transfer of the initial stages of the asylum procedure from the police and border guards to Migri.

III. Observations

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[6] European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, OJ C 115/47 of 9.05.2008, available at: http://www.unhcr.org/refworld/docid/4b17a07e2.html.

[7] European Union, *Declaration on Article 73k of the Treaty establishing the European Community*, OJ C 340/134 of 10.11.1997, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11997D/AFI/DCL/17: EN:HTML.

[8] European Union: Council of the European Union, *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, 29 June 2013, OJ L. 180/31-180/59; 29.6.2013, (EU)No 604/2013, available at: http://www.refworld.org/docid/51d298f04.html

6. In general, UNHCR welcomes initiatives aimed at bringing national legal frameworks in line with international and regional standards in the area of asylum and refugee protection, and would like to convey the following observations in relation to specific proposals in the draft law.

Section 95. Lodging applications for international protection

7. Section 95 of the Aliens Act is entitled "Filing applications for international protection" and does not differentiate between 'making' and 'lodging' an application. Also, there are currently no time limits in the Aliens Act for registration of an application. Article 6 of the recast APD makes a distinction between making and lodging an application, and provides that Member States shall ensure that an application is registered no later than six working days after an application has been made to an authority other than the one(s) competent to register applications for international protection. Authorities that are likely to receive applications should, according to Article 6, inform applicants where and how an application can be lodged. Section 95 is now proposed to be amended to differentiate between lodging and making an application. According to the proposal, Migri, Reception Centres, Detention Units and Customs officials, with whom applicants cannot lodge their applications, must refer a person who has made an application (to one of their respective authorities) to the police or border guards for lodging of the application. The application must be registered within six working days (from the time the application was initially made to one of the other authorities). The six day time limit can be extended to 10 working days if there is a steep increase in applications. The proposal furthermore states that the police or border guards must register applications without delay. UNHCR recalls the requirement on Member States in Article 6(2) of the recast APD, to ensure that a person who has made an application for international protection has an effective opportunity to lodge it as soon as possible, and recommends that this overarching principle is reiterated in the preamble to the proposal in order to ensure that the procedure introduced in Section 95 works accordingly. UNHCR also notes that the preamble acknowledges that the authorities referred to in Section 95 should have adequate knowledge and their staff receive training corresponding to their tasks and responsibilities. UNHCR wishes to stress that this is a requirement in the directive and needs to be implemented effectively. UNHCR further recommends that Finland also introduces, into the Aliens Act the possibility for legal representatives to lodge applications on behalf of asylum-seekers who do not have to possibility to do so (e.g. people kept in criminal prison and unable for medical reasons), in line with Article 6 (4) of the recast APD.[9]

Section 96 a. Special procedural guarantees

[9] See UN High Commissioner for Refugees (UNHCR), *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009)554, 21 October 2009)*, August 2010, page 11 – 12, available at: http://www.refworld.org/docid/4c63ebd32.html

8. According to Article 2 (d) of the recast APD, *"an 'applicant in need of special procedural guarantees' means an applicant whose ability to benefit from the rights and comply with the obligations provided for in this Directive is limited due to individual circumstances"*. Article 24 of the recast APD introduces safeguards for applicants in need of special procedural guarantees through (i) systematic and individual assessment of each applicant within a reasonable period of time as of the making, and (ii) provision of adequate support to address the special needs identified (including needs that become apparent at a later stage). Based on these two articles, the draft law proposal introduces a new section to the Aliens Act, Section 96 a. Section 96 a provides special procedural guarantees for applicants with special needs, to ensure they receive the support needed to benefit from the rights and meet the obligations they have in the asylum procedure. If the support needed cannot be provided in connection with accelerated procedures, accelerated procedures will not, according to the proposed Section 96 a, be applied. Special needs can be identified in the course of the reception of asylum-seekers, and during the asylum procedure. The proposed Section 96 a contains a reference to Section 6 of the Act on Reception of Applicants for International Protection (746/2011) (hereafter 'Reception Act') and the provisions therein on vulnerable applicants. According to the preamble of the draft law proposal, there is no direct connection between the definition in Article 2 (d) of the recast APD of applicants in need of special procedural guarantees and that of vulnerable applicants in the Reception Act, though it states that the former are likely to be found amongst the latter. UNHCR notes in this respect that there are differences between procedural needs, on the one hand, due to the situation of certain applicants; and their material and reception requirements on the other. According to the recast Directive laying down standards for the reception of applicants of international protection (hereafter 'recast RCD'),[10] only vulnerable persons may be considered as having special reception needs; Article 21 of the recast RCD contains a non-exhaustive list of who may be considered a 'vulnerable person'. The scope of the obligation in the recast APD is, on the other hand, not limited to 'vulnerable persons'. Instead, the definition in Article 2 (d) [of applicants in need of special procedural guarantees] of the recast APD recognizes that certain applicants (e.g. survivors of sexual violence) may require more time and psychological support to overcome trauma and explain their experience during an interview. Hence, the definition [of applicants in need of special procedural guarantees] does not create a "new status category". A case by case assessment is necessary to establish whether, due to his/her personal condition or experiences, a person is in need of more time and/or relevant support to present the elements of his/her application. For instance, an older person is not automatically in need of special procedural guarantees because of his/her age. However, it is possible that because of conditions associated with the age of a particular applicant, s/he may require more time to articulate the elements of his/her claim. UNHCR further notes that "sexual orientation, gender identity, serious physical illness and mental illness disorder" can be grounds for inclusion of applicants in the category of applicants in need of special procedural guarantees.[11]

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[10] European Union: Council of the European Union, *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, 29 June 2013, L 180/96 , available at: http://www.refworld.org/docid/51d29db54.html

[11] UN High Commissioner for Refugees (UNHCR), *UNHCR comments on the European Commission's Amended Proposal for a Directive of the European Parliament and of the Council on common procedures*

9. In view of the above, UNHCR notes that the preamble to the law proposal contains a number of requirements that the relevant authorities should fulfil when determining needs for special procedural guarantees. In this regard, UNHCR recommends that an individual, multi-disciplinary and systematic assessment should be conducted by qualified and competent personnel, in compliance with confidentiality principle, as soon as possible after the making of an application. Such an assessment could be conducted in a multi-stage process, starting with an initial, rapid assessment that could be completed at a later stage. UNHCR also recommends to explicitly state, in the preamble to the law proposal, that being an applicant in need of special procedural guarantees differs from being 'vulnerable' for the purpose of special reception needs, as highlighted in the paragraph above. UNHCR moreover recommends that monitoring mechanisms are put in place for verifying that adequate support is provided throughout the asylum procedure to address special needs identified. UNHCR notes the safeguard introduced in the preamble to the draft law proposal, that special needs identified at a later stage in the asylum procedure must be assessed and adequate support accordingly provided, but wishes to stress that this is an obligation according to Article 24 (4) of the recast APD.

Section 97. Asylum investigation

10. According to the draft law proposal, Section 97 of the Aliens Act should be amended based on Article 5 of the Dublin III Regulation, according to which the determining Member State shall conduct a personal interview with the applicant. Specifically, a requirement that the Police or border guards should orally find out information which is relevant to determine the Member State responsible for examining the application will be introduced in Section 97. This corresponds to the current practice in Finland. In order to further clarify the scope of this requirement, UNHCR recommends that the Aliens Act mentions that it is essential that the personal interview provides the applicant with an opportunity to raise, for example, circumstances which may preclude his/her transfer to a particular State on protection grounds; and/or clarify circumstances which help in identifying the responsible Member State.[12]

11. There are currently no provisions on admissibility interviews in the Finnish legislation. According to Article 34 of the recast APD, Member States shall conduct a personal interview on the admissibility of an application. The draft law proposal consequently introduces a new Subsection to Section 97, according to which the police or border guards will be responsible for conducting the personal interview on the admissibility of an application for international protection. According to the preamble of the draft law proposal, personnel

for granting and withdrawing international protection status (Recast) COM (2011) 319 final, January 2012, page 6, available at: http://www.refworld.org/docid/4f3281762.html

[12] UN High Commissioner for Refugees (UNHCR), *UNHCR comments on the European Commission's Proposal for a recast of the Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person ("Dublin II") (COM(2008) 820, 3 December 2008) and the European Commission's Proposal for a recast of the Regulation of the European Parliament and of the Council concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [the Dublin II Regulation] (COM(2008) 825, 3 December 2008)*, 18 March 2009, page 15, available at: http://www.refworld.org/docid/49c0ca922.html

conducting such admissibility interviews should, in advance, receive the necessary training.

12. Pursuant to Article 34 of the recast APD, Member States may indeed provide that personnel of authorities other than the determining authority can conduct personal interviews on admissibility, provided they receive the required basic training, in particular with respect to international human rights law, the European Union asylum acquis and interview techniques. UNHCR nonetheless recommends that all interviews, including those on admissibility, be conducted by the single and central determining authority, in line with the guidance contained in UNHCR's Executive Committee Conclusion No. 8 (XXXVIII) of 1977[13]. Thus, in UNHCR's comments to the 2009 recast APD, UNHCR welcomed the introduction in EU law of the principle that a single and competent determining authority should conduct the asylum interviews and examine all asylum applications, and reiterated its view that also admissibility interviews should be carried out by the determining authority[14]. An incorrect certification of a claim as inadmissible may have a dramatic impact on the life of an applicant. Furthermore, by having qualified staff from the central determining authority conduct also the admissibility interviews, the procedure is 'frontloaded' with quality and the likelihood of decisions being upheld upon appeal greater. UNHCR therefore recommends that the Subsection introduced to Section 97 in the draft law proposal be amended to provide that (also) admissibility interviews are conducted by the single and central determining authority, in line with the general principle reflected in Article 4 (1) of the recast APD on the designation of a single determining authority responsible for all first instance procedures and decisions.

13. Currently, Section 97 of the Aliens Act enables Migri to request the police to conduct asylum interviews if the number of applications has increased dramatically or, for special reasons, at other times as well. According to Article 14 of the recast APD, personal interviews on the substance of the application for international protection shall be conducted by the personnel of the determining authority. However, where simultaneous applications for international protection by a large number of third-country nationals or stateless persons make it impossible in practice for the determining authority to conduct timely interviews on the substance of each application, Member States may provide that the personnel of another authority be temporarily involved in conducting such interviews. In such cases, the personnel of that other authority shall receive in advance the relevant training. The third amendment to Section 97 in the draft law proposal restricts the possibilities for Migri to ask the police in Finland to conduct asylum interviews. This would be possible only temporarily and only if there is a sudden big increase in the number of applications for international protection, making it impossible in practice for the determining authority to conduct timely interviews on the substance of each application. Since the directive only applies to applications for international protection by third country nationals and stateless persons, the preamble of the draft law proposal notes that

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

[14] *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection)*, August 2010, Se footnote 9.

the police could still conduct the asylum interviews with applicants from within the EU. UNHCR would recommend that the competence for interviewing applicants from EUMS also lies with the determining authority. The preamble also lists the training needed for the police to be able to conduct asylum interviews. UNHCR welcomes the restriction introduced in Section 97, based on Article 14 in the recast APD, and finds this delegation of the task, including on the elements listed in Article 6 (4) (a) to (e) of the EASO Regulation[15]), that an appropriate definition of "large influx of third country nationals" is established.[16] UNHCR therefore recommends the inclusion of references to such training and a definition of "large influx" in the revised Section 97 and/or in the preamble to the law proposal. UNHCR welcomes that the preamble of the law proposal acknowledges that persons conducting personal interviews of applicants shall also have acquired general knowledge of problems which could adversely affect an applicant's ability to be interviewed, such as indications that the applicant may have been tortured in the past.

Section 97 a. Asylum interview

14. According to the current wording of Section 97 a of the Aliens Act, a representative [guardian] shall be given an opportunity to attend the asylum interview of an unaccompanied minor. However, the practice in Finland is that both the guardian and legal counsel always participate in the asylum interview of an unaccompanied minor. According to the draft law proposal, Section 97(a) will be amended to state that the guardian or the legal counsel should be present during the interview of an unaccompanied minor. The proposed amendment is based on Article 25 of the recast APD and codifies the current practice, which UNHCR welcomes.

Section 97 b. Acquisition of information on individual cases relating to international protection

15. There is currently no reference to the acquisition of information about an applicant for international protection through medical examinations in Section 97 b of the Aliens Act. According to Article 18 of the recast APD, where the determining authority deems it relevant for the assessment of an application for international protection, Member States shall, subject to the applicant's consent, arrange for a medical examination of the applicant concerning signs that might indicate past persecution or serious harm. The draft law proposal consequently introduces a new subsection to Section 97 b to this end. According to the preamble of the draft law proposal, such a medical examination would be paid for from public funds, in accordance with the requirement in Article 18 (1) of the recast APD. UNHCR welcomes this amendment.

Section 99. Safe country of asylum

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[15] European Union, *Regulation No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office*, 19 May 2010, OJ L.132/11-132/28; 29.5.2010, (EU)No 439/2010, available at: http://www.refworld.org/docid/4c075a202.html

[16] *UNHCR comments on the European Commission's Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast)*, January 2012, page 14, See footnote 11.

16. Currently, Finnish legislation operates with a definition of "safe country of asylum", which subsumes both the "first country of asylum" and "safe third country" concepts. The recast APD, on the other hand, contains these concepts in separate provisions. Section 99 of the Aliens Act is consequently proposed to be amended to better correspond to the definition of "first country of asylum" in the recast APD. UNHCR welcomes the proposal to separate the "safe third country" and "first country of asylum" concepts in the Finnish Aliens Act. Concerning the first country of asylum concept, UNHCR welcomes the fact that the preamble to the draft law proposal states that already based on the current legislation in Finland, the applicant has the possibility to rebut the presumption of safety in cases where the first country of asylum concept is applied.[17] UNHCR also welcomes the inclusion of the criteria in Article 35 (a) of the recast APD that the applicant has received and can continue to receive protection in the first country of asylum. However, UNHCR notes that the criteria in Article 35 (b) have not been fully transposed in the draft law proposal, namely the requirement that the applicant be readmitted to the country of asylum has not been included in the amended section 99. Furthermore, UNHCR recommends that the wording "sufficient protection", which is proposed to be introduced in Section 99, Subsection 2 of the Aliens Act, be replaced with effective protection, as any protection in that country should be effective and available in practice.[18] This is, *inter alia*, demonstrated by the case law of the European Court of Human Rights according to which, a theoretical right to *non-refoulement* is not sufficient.[19] Further to the last paragraph of Article 35, UNHCR recommends that Member States take into account the criteria for safety under the "safe third country" under Article 38 (1) when applying the first country of asylum concept.[20]

Section 99 a. Safe third country

17. Further to the background described above, the draft law proposal also introduces the "safe third country" notion as a separate concept in the Aliens Act, which UNHCR welcomes. The "safe third country" concept will be defined in a new Section 99 a of the Aliens Act. UNHCR notes that the formulation in Section 99 a of the criteria to be applied when considering a safe third country is different from the formulation in Article 38 of the recast APD. However UNHCR assumes that the intended content is the same. Furthermore, the proposed definition contains a reference to "sufficient protection", similarly to the definition proposed in Section 99 of the Aliens Act in regard to the "first country of asylum" notion. UNHCR notes that the provisions on "safe third country" in the recast APD do not include any reference to "sufficient

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[17] *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection*, August 2010, page 29, See footnote 9.

[18] Ibid, page 33.

[19] See, *inter alia*, *Abdolkhani and Karimnia v. Turkey*, Appl. No. 30471/08, Council of Europe: European Court of Human Rights, 22 September 2009, para. 88, at: http://www.unhcr.org/refworld/docid/4ab8a1a42.html: "*The Court reiterates in this connection that the indirect removal of an alien to an intermediary country does not affect the responsibility of the expelling Contracting State to ensure that he or she is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention.*"

[20] Ibid.

protection", and recommends the deletion of the words "or otherwise sufficient protection".

18. In addition UNHCR notes that the rules contained in Article 38 (2) of the recast APD have not been transposed in the draft law proposal. These include a rule requiring a connection between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country. UNHCR recommends that all of the rules set out in Article 38(2) be transposed into the Finnish legislation.

Section 101. Manifestly unfounded applications

19. According to the current wording of Section 101 of the Aliens Act, an application may be rejected as manifestly unfounded if: 1) no asylum or protection grounds or other grounds that are related to *non-refoulement* have been presented, or if the claims presented are clearly implausible; 2) the applicant obviously intends to abuse the asylum procedure: a) by deliberately giving false, misleading or deficient information on matters that are essential to the decision on the application; b) by presenting forged documents without an acceptable reason; c) by impeding the establishment of the grounds for his or her application in another fraudulent manner; or d) by filing an application after a procedure for removing him or her from the country has begun, to prolong his or her unfounded residence in the country; or 3) the applicant comes from a safe country of asylum or origin where he or she may be returned, and Migri has, for weighty reasons, not been able to issue a decision on the application within seven days. According to the draft law proposal, the criteria in point (3) regarding applicants from safe countries of asylum will be omitted from the accelerated procedure and be included as an admissibility criteria in the asylum procedure. Moreover, the list of cases that can be determined manifestly unfounded will, according to the draft law proposal, be shortened by omitting those that are not found in Article 31 (8) of the recast APD. "Impeding the establishment of the grounds for his or her application in another fraudulent manner" will thus be omitted from section 101. UNHCR welcomes this amendment.

20. UNHCR recalls in Executive Committee Conclusions No. 30 (XXXIV)[21] of 1983 that only "clearly abusive" (i.e. clearly fraudulent) or "manifestly unfounded" (i.e. unrelated to the criteria for the granting of international protection) applications can be channeled into an accelerated procedure. National procedures for the determination of international protection needs may include special provisions for dealing expeditiously with applications which are considered to be so obviously without foundation as not to merit a full examination at every level of the procedures limited to clearly abusive or manifestly unfounded claims. Making obviously improbable representations contradicting sufficiently verified country of origin information does not necessarily imply that his/her claim is clearly abusive, fraudulent or

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

unfounded.[22] UNHCR points out that, in line with the UNHCR Handbook (paragraph 196), the duty to ascertain and evaluate all the relevant facts should be considered a joint responsibility of the applicant and the examiner. This also applies generally, including in cases where there are inconsistencies or contradictions, where an applicant's story appears unlikely, or insufficiently substantiated. An attempt should be made to resolve inconsistencies and contradictions, although minor inconsistencies or contradictions on issues irrelevant to the substance of the claim should not affect the credibility of the applicant. In particular, trauma and mental illness, feelings of insecurity, or language problems may result in apparent contradictions or insufficient substantiation of claims. If the applicant has made a genuine effort to substantiate his or her claim and cooperate with the authorities in seeking to obtain available evidence, and if the examiner is consequently satisfied as to the applicant's general credibility, the applicant should be given the benefit of doubt.[23] UNHCR would thus recommend that the criteria in Section 101 point (1) of the Aliens Act, referring to *"...if the claims presented are clearly implausible..."* be omitted.

21. UNHCR welcomes the proposed amendment to Section 101 in the draft law proposal where the words *"An application may be rejected as manifestly unfounded ..."* will be replaced with *"An application may be considered as manifestly unfounded ..."*. This corresponds to the concerns raised by UNHCR during the round table discussions since the designation of an application as manifestly unfounded and the grounds for rejection of a claim are two separate stages in the asylum procedure. The combined reading of Article 32 (1) with Article 32 (2) of the recast APD will ensure that an application is only rejected when the applicant is determined to neither qualify for refugee status nor for subsidiary protection under the QD.

Section 102. Subsequent applications

22. According to the current wording of Section 102 of the Aliens Act, *"[a] subsequent application means an application for international protection filed by an alien after his or her previous application was rejected by the Finnish Immigration Service or an administrative court while he or she still resides in the country, or if he or she has left the country for a short time after his or her application was rejected"*. According to Article 2(q) of the recast APD, *"[a] 'subsequent application' means a further application for international protection made after a final decision has been taken on a previous application, including cases where the applicant has explicitly withdrawn his or her application and cases where the determining authority has rejected an application following its implicit withdrawal in accordance with Article 28(1)"*. Pursuant to the draft law proposal, the Aliens Act will be amended so that the definition of a subsequent application will no longer refer to an application made after a negative decision, but to an application made after a final decision that

[22] See *UNHCR comments on the European Commission's Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast)*, January 2012, page 26, See footnote 11.

[23] UN High Commissioner for Refugees (UNHCR), *UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004)*, 10 February 2005, page 30, available at: http://www.refworld.org/docid/42492b302.html

has gained legal force. This amendment will, according to the preamble to the draft law proposal, not change the practice in Finland.

23. UNHCR re-affirms the position that subsequent applications can be subjected to a preliminary examination, to determine whether new elements have arisen which would warrant an examination of the substance of the claim. However, UNHCR recalls that such preliminary examination is justified only if the previous claim was considered fully on the merit. Consequently, UNHCR considers it inappropriate to treat claims as subsequent applications if they are submitted following a rejection based on an explicit withdrawal of an earlier claim. In such cases, UNHCR instead encourages national legislation to provide for the resumption or re-opening of the asylum procedure. In this connection, and more specifically in the context of implicitly withdrawn claims, UNHCR notes with satisfaction the introduction of an obligation in Article 28 (1) of the recast APD that implicitly withdrawn claims can be rejected only after an adequate analysis of their merits in line with Article 4 of the Qualification Directive. In this framework, UNHCR observes that only implicitly withdrawn claims rejected after an adequate analysis of the substance can be considered as subsequent applications and channeled (along with other subsequent applications defined by Article 2 (q) of the recast APD) into preliminary examination to establish if new element or finding have arisen. UNHCR reiterates its position[24] that an explicitly withdrawn claim should be considered as a subsequent application – and in this case subject to an inadmissibility procedure – only if is rejected after an analysis on its merits; or if the obligation to inform the applicant of the consequences of withdrawal are properly applied under Article 12 (1) (a) of the recast APD.

Section 103. Dismissing applications

24. According to the current wording of Section 103 of the Aliens Act, cases can be dismissed only if they are so-called Dublin cases or the applicant has come through a 'safe country of asylum' (including both 'first country of asylum' and 'safe third country'). Article 33 of the recast APD also list subsequent applications as applications that can be found inadmissible. The draft law proposal introduces an amendment to Section 103, which entails that subsequent applications where no new elements or findings have arisen are moved from the list of applications processed in the accelerated procedures to the list of applications that shall be considered inadmissible. Considering that a preliminary examination is still required to verify if new elements or findings have arisen before certifying a subsequent application as inadmissible, UNHCR can support this amendment based on the recast APD.[25] However, as noted in paragraph 12 above, UNHCR strongly recommends that all admissibility interviews be conducted by the single and central determining authority in Finland, i.e. Migri. UNHCR also wants to underline the 2(d)-leg of Recital 32 of the recast APD stipulating that: *"(...) The complexity of gender-related claims should be properly taken into account in procedures based on the concept of*

[24] *UNHCR comments on the European Commission's Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast)*, January 2012, page 28, See footnote 11.
[25] Ibid.

safe-third country, the concept of safe country of origin or the notion of subsequent applications."

Section 104. Using accelerated procedures

25. The use of accelerated procedure for applicants from "safe countries of origin" and "safe countries of asylum" will, according to the draft law proposal, be discontinued and this concept will instead be applied as admissibility criteria. According to the amended Section 104 of the Aliens Act, the accelerated procedure will only be used for manifestly unfounded applications, as defined in Section 101 (see above paragraphs 19 – 21). The draft law proposal provides that the application of an unaccompanied minor can be processed in the accelerated procedure only if the applicant comes from a safe country of origin, with reference to Article 25 (6) in the recast APD. In UNHCR's view, some of the requirements in Article 25 (6) may not be consistent with EU law. The provision in Article 25 (6) is extremely convoluted, of difficult comprehension from a child's right perspective as it may seriously undermine in practice unaccompanied minors effective access to the safeguards laid down in Article 25 (1) to (5). In light of the above and considering that in many cases a simplified, single procedure may prove fairer and more efficient, UNHCR recommends Finland not to transpose the opportunity to apply article 31(8) to unaccompanied minors, but to exempt unaccompanied minors from accelerated procedures in all cases.

26. Based on Article 31 (9) first indent of the recast APD, a time limit of 5 months is introduced in the draft law proposal for the accelerated procedure, meaning that Migri has to make a decision within 5 months from the moment the application is lodged. UNHCR welcomes the time limit of 5 months and strongly supports the range of safeguards established by the recast APD for claims that are channeled into accelerated procedures, including the possibility to exceed the time limit where necessary in order to ensure an adequate and complete examination of the claim. These are essential to ensure that claims in accelerated procedures are examined fairly and correct decisions are made.[26] Such time limits must be reasonable and allow the applicant to prepare for the interview, to contact and consult a legal adviser, to gather and submit additional evidence and to disclose traumatic experiences. At the same time, time limits should be reasonable so as to allow the determining authority to conduct a gender-appropriate interview, to gather and assess the evidence as well as to examine the claim and draft the decision.[27] UNHCR therefore recommends that a possibility to exceed the 5 month time limit provided for in the draft law proposal be introduced where necessary in order to ensure an adequate and complete examination of the application.

Section 198 b. Request to suspend enforcement

[26] Ibid. page 26 – 27.

[27] See inter alia UN High Commissioner for Refugees (UNHCR), *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendations*, March 2010, para. 2.7, available at: http://www.refworld.org/docid/4bab55752.html

27. According to the current wording of the Aliens Act, in cancelled cases, Dublin cases and subsequent applications with no new grounds, a decision can be enforced directly after service of the decision on the applicant. If the application is rejected in an accelerated procedure based on the applicant coming from a safe country of origin, safe country of asylum or the application has been found manifestly unfounded, the decision may be enforced at the earliest on the eighth day from service of the decision on the applicant, even if an appeal is lodged. All these decisions can be appealed and a request to suspend enforcement be made to the court. Even if the time limit for filing an appeal is 30 days in practice, the appeal has to be made very urgently and in the first mentioned cases, practically immediately. According to Article 27 (3) (c) of the Dublin III Regulation, the applicant must be given the opportunity to request within a reasonable period of time a court or tribunal to suspend the implementation of the transfer decision pending the outcome of his or her appeal or review. The draft law proposal introduces a new section, Section 198 b, with provisions giving applicants 7 days to request a suspension of the enforcement of the decision. The time limit of 7 days is, according to the preamble of the draft law proposal, based on the current procedure in accelerated procedures. Since the Dublin III Regulation has been in force since 1 January 2014 Finland has, according to the preamble of the draft law proposal, in practice already granted 7 days to file a request for suspension of the implementation in Dublin cases.

28. UNHCR supports the introduction of time frames which enable an applicant to demonstrate why, in the circumstances of his/her particular case, removal prior to an appeal decision may prejudice his/her legal rights. This reflects the jurisprudence of the European Court of Human Rights and the European Court of Justice (Hereafter 'CJEU').[28] Short time limits for lodging an appeal may render a remedy ineffective in practice[29]. The CJEU has held that: "detailed procedural rules governing actions for safeguarding an individual's rights under Community law [...] must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)". The appeals procedure must include sufficient procedural safeguards, including sufficient time to lodge the appeal.[30] Article 46 (6) of the recast APD foresees that court or tribunal shall have the power to rule whether the applicant may remain on the territory of the Member State, pending the outcome of the appeal. In line with Article 4 (4), the time limit to request the

[28] *UNHCR comments on the European Commission's Proposal for a recast of the Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person ("Dublin II") and the European Commission's Proposal for a recast of the Regulation of the European Parliament and of the Council concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [the Dublin II Regulation]*, 18 March 2009, See footnote 12

[29] *Unibet*, C-432-05, European Union: European Court of Justice, 13 March 2007, para. 43, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0432:EN:HTML.

[30] UN Human Rights Committee (HRC), *Consideration of reports submitted by States parties under article 40 of the Covenant : International Covenant on Civil and Political Rights : concluding observations of the Human Rights Committee : France*, 31 July 2008, CCPR/C/FRA/CO/4, available at: http://www.unhcr.org/refworld/docid/48c50ebe2.html, para. 20, in which concerns were raised by the Human Rights Committee regarding a 48-hour time limit for lodging an appeal. In *Alzery v. Sweden*, the complainant had no real time to appeal the decision to deport him; he was expelled only hours after the decision to expel him was taken, HRC: *Alzery v. Sweden*, 10 November 2006, No.1416/2005, para. 3.10.

court or tribunal to grant permission to remain pending the outcome of the remedy must be reasonable. With regard to the reasonable time limits, UNHCR would like to recall the judgment of the CJEU in Samba Diouf.[31] At paragraph 67, the Court stated that "a 15-day time limit for bringing an action does not seem, generally, to be insufficient in practical terms to prepare and bring an effective action and appears reasonable and proportionate in relation to the rights and interests involved." The proposed 7-day time limit can thus be seen as short and UNHCR recommends its extension to 15 days, in line with the EUCJ case-law mentioned above.

Section 199. Deciding petitionary matters relating to enforcement

29. Currently there are no time limits to be observed by the appeals instance, the Helsinki Administrative Court, when an asylum applicant has filed a request for suspension of implementation of a decision. According to Article 27 (3) (c) of the Dublin III Regulation, any decision on whether to suspend the implementation of a transfer decision shall be taken within a reasonable period of time. In Section 199 of the Aliens Act, the draft law proposal introduces a new Subsection 4, with a time limit of 7 days for the Helsinki Administrative Court to make a decision on a request to suspend enforcement. UNHCR welcomes this proposed amendment.

Section 201. Enforcing decisions on refusal of entry

30. The lack of suspensive effect of appeal, as explained in the observations to Section 198 b, has for a long time been one of UNHCR's main concerns with the Finnish asylum procedure. According to Article 46 (8) of the recast APD, Member States shall allow applicants to remain in the territory pending the outcome of the procedure on whether or not the applicant may remain on the territory. According to Article 27 (3) (c) of the Dublin III Regulation, *"Member States shall ensure that an effective remedy is in place by suspending the transfer until the decision on the first suspension request is taken"*. Based on these provisions, a right to stay in the country, until a decision on the request to suspend the enforcement has been made, is in the draft law proposal introduced in Section 201 of the Aliens Act. UNHCR welcomes this amendment. Member States should only be able to derogate from the automatic suspensive effect of an appeal on an exceptional basis, when a decision has been made that the claim is "clearly abusive" (i.e., clearly fraudulent) or "manifestly unfounded". Additional exceptions could apply with respect to preliminary examinations in the case of subsequent applications, and where there is a formal arrangement between states on responsibility-sharing. In such situations, in accordance with international law, the appellant nevertheless must have the right, and the effective opportunity to request a court or tribunal to grant suspensive effect. The principle of suspensive effect should otherwise be observed in all cases, regardless of whether a negative decision is taken in an admissibility procedure instituted for the application of the "safe third country" concept or in a substantive procedure.[32]

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[31] See *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, Case C-69/10, European Union: Court of Justice of the European Union, 28 July 2011, available at: http://www.refworld.org/docid/4e37bd2b2.html

[32] *Provisional Comments on the Proposal for a Council Directive on Minimum Standards on*

31. In reference to UNHCR's recommendation to Section 198 b in paragraph 28, that the time frame be prolonged from the suggested 7 days to 15 days for filing an application to suspend enforcement, the time limit in Section 201, Subsection 2 of 8 days should be prolonged to 16 days. As UNHCR reads the law proposal, the reference in Section 201, Paragraph 3 to Section 103, Subparagraph 1, enabling enforcement of the decision if suspension is not granted after request, concerns only safe countries of asylum, not safe third countries. The fact that application of the safe third country concept is not included in the exception from the automatic suspensive effect of appeal fulfills the requirement mentioned in the paragraph above, which UNHCR welcomes. For the sake of legal clarity UNHCR however recommends, that this fact be elaborated in the preamble of the law proposal to prevent any uncertainty on how the provision should be interpreted.

32. The second amendment to Section 201 of the Aliens Act introduced by the draft law proposal concerns the introduction of an exception from the right to remain in the territory when a person has lodged a second subsequent application without new elements or has lodged a first subsequent application without new elements, merely in order to delay or frustrate the enforcement of a decision which would result in his or her removal within three days. The proposal is based on Article 41 (1) (a) of the recast APD, which gives Member States the possibility to derogate from the right to remain in the territory if the subsequent application is made merely in order to delay or frustrate the enforcement of a decision. Specifically Article 41 (1) (b) gives Member States the possibility to derogate from the suspensive effect of the first instance procedure in case of subsequent applications for the "third time"[33]. UNHCR wishes to stress, that when a Member State wants to make an exception to the right of the applicant to remain in the territory in these situations the determining authority must be satisfied that the return decision will not lead to direct or indirect *refoulement*. This is in line with the case law of the European Court on Human Rights[34].

Other issues

33. According to Section 203, Subsection 5 of the Aliens Act, asylum-seekers have the right to be notified of a decision in their mother tongue or in a language which, on reasonable grounds, they can be expected to understand. According to Article 12 (f) of the recast APD, they shall be informed of the result of the decision by the determining authority in a language that they understand or are reasonably supposed to understand. According to the preamble of the draft law proposal there is thus no need to change the national legislation. UNHCR however considers that "in a language that the applicant is reasonably supposed to understand" should have been amended to "in a language the applicant understands" in the recast APD. As assumptions that an applicant speaks or understands the official language of his or her country of origin may be

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Procedures in Member States for Granting and Withdrawing Refugee Status, 10 February 2005, page 52, See footnote 23.

[33] I.e. after an applicant has already lodged a subsequent application which has been declared inadmissible or rejected, and after the inadmissibility or rejection has been confirmed in appeal.

[34] See AC and others v. Spain, para 94, available (in French) at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"itemid":["001-142467"]}

incorrect, and UNHCR therefore recommends that Finland amend the current wording of Section 203 to ensure, that the persons concerned are notified of decisions in a language they actually understand.

34. According to the preamble of the law proposal the Asylum Regulation of Migri will be amended to accommodate the requirement in Article 15 of the recast APD that same-sex interpreters shall be provided upon request. UNHCR welcomes this. The preamble also states that the Asylum Regulation will be amended to accommodate the requirement in Article 15 that the person who conducts the interview on the substance of an application for international protection does not wear a military or law enforcement uniform. UNHCR wishes to point out that although the requirement in the recast APD only concerns interviews on the substance of the applications, in UNHCR's view this should be applied to all interviews conducted in the asylum procedure including admissibility interviews. UNHCR thus recommends that Finland extends the ban on uniforms to all interviews. This is especially important in Finland since the police or border guards conduct an interview with all asylum-seekers and are in the draft law proposal suggested to be the ones conducting the admissibility interview.

35. The amendment to Article 11 (2) of the recast APD does not, according to the draft law proposal, require amendments to the Finnish legislation, since the omitted provision was never in use in Finland. UNHCR however wishes to point out that the article requires that the reasons for a rejection are stated both in fact and in law. According to the findings of UNHCR's APD study[35], the relevant legislation in Finland[36] does not explicitly require that the reasons be stated in fact and in law, but instead more generally requires that reasons be stated. For the sake of legal certainty, UNHCR recommends that the current good practice in Finland regarding stating the reasons for rejections in both fact and law should be backed up with a clear obligation under national law.

UNHCR Regional Representation for Northern Europe
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[35] UN High Commissioner for Refugees (UNHCR), *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Detailed Research on Key Asylum Procedures Directive Provisions*, March 2010, page 13, available at: http://www.refworld.org/docid/4c63e52d2.html

[36] Section 44 (3) of the Act on Administrative Conduct 434/2004 requires that a written decision includes information about *"the motivations for the decision and individualised information about what the individuals are entitled or obliged, or how the matter has otherwise been decided ..."* but this generic guiding norm does not explicitly distinguish between reasons in law and fact.