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

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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 10 November 2015, 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 law comments on the draft Law Proposal of 10 November 2015, amending the Aliens Act of the Republic of Finland.

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,

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Senior Regional Legal Officer

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UNHCR

Comments by the United Nations High Commissioner for Refugees (UNHCR) Regional Representation for Northern Europe on the draft Law Proposal of 10 November 2015, amending the Aliens Act of the Republic of Finland

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 comment on the draft Law Proposal of 10 November 2015, amending the Finnish Aliens Act (hereafter "the Proposal").

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.[1] 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[.]"[2] 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 (hereafter "UNHCR Handbook") and subsequent Guidelines on International Protection.[3] This 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.[4]

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 78(1) of the Treaty on the Functioning of the European Union (hereafter "TFEU"),[5] as well as in Declaration 17 to the Treaty of Amsterdam, which provides that *"consultations shall be established with the United Nations High*

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1 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").

2 *Ibid.*, para. 8(a).

3 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.

4 According to Article 35 (1) of the 1951 Convention, UNHCR has the "duty of supervising the application of the provisions of the 1951 Convention".

5 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.

Commissioner for Refugees ... on matters relating to asylum policy".[6] Secondary EU legislation also emphasizes the role of UNHCR. For instance, Recital 22 of the recast Qualification Directive (hereafter "recast QD"[7]) states that consultations with UNHCR "may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention".

II. The Proposal

4. The Proposal contains three proposed amendments to the Finnish Aliens Act.

5. Firstly, the protection category "humanitarian protection" contained in Section 88a of the Finnish Aliens Act is proposed to be abolished.[8] The stated aim of the Proposal is to make the concept of international protection in the Aliens Act conform with the legislation of the European Union, where international protection refers only to refugee status or subsidiary protection, as well as with the laws and regulations of the other Member States. Also, the current grounds for the granting of international protection contained in the Aliens Act already cover the protection grounds as required by international law, including both refugee status and subsidiary protection. Furthermore, the use of the provision on humanitarian protection has become more limited in light of international and national case law. The Finnish legislation would after this not appear more favorable than the legislation of the European Union.

6. Secondly, the notification procedure for decisions on international protection will be made more flexible and efficient. Decisions on international protection would in the future normally be notified through mail and only be served in person in situations where there are special grounds, such as a danger that the person receiving the negative decision will abscond.

7. Thirdly, an application for a residence permit would only be processed once the applicant has made the payment of the processing fees. UNHCR notes in this regard that all applications for international protection will be free from cost and welcomes that this amendment would therefore in practice not affect asylum-seekers.

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6 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.

7 European Union: Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU, available at: http://www.refworld.org/docid/4f197df02.html.

8 Section 88a defines humanitarian protection as follows: "An alien residing in Finland is issued with a residence permit on the basis of humanitarian protection, if there are no grounds under Section 87 or 88 for granting asylum or providing subsidiary protection, but he or she cannot return to his or her country of origin or country of former habitual residence as a result of an environmental catastrophe or a bad security situation which may be due to an international or internal armed conflict or a poor human rights situation.".

8. UNHCR will in the following therefore only comment on the first two proposed amendments, that is, on the abolition of humanitarian protection and on notifications of decisions on international protection.

III. Observations

Section 88 a. Humanitarian protection

9. UNHCR stated in its Law Comments of 30 April 2008 to the Law Proposal amending the Aliens Act transposing the first Qualification Directive (hereafter the "QD"[9]), that the concept and definition of protection as existing in the Finnish legislation prior to the transposition would meet with both UNHCR's recommendations and the requirement of transposing Article 15(c) of the QD.[10] Finland nevertheless opted to transpose Article 15 of the QD, mirroring its provisions on subsidiary protection. Also, humanitarian protection was introduced to the Aliens Act in Section 88a, as the Government considered that a simple implementation of the directive would have led to a lowering of the standard of international protection. At the time, it was thought that subsidiary protection could not be granted if there was no individual reason for the threat.

10. As UNHCR noted at the time of the transposition, since the QD defined common minimum standards for national asylum procedures, but permitted Member States to introduce higher standards in national law, UNHCR urged Member States to apply more favorable provisions where necessary to ensure compliance in practice with international refugee and human rights law. There is no requirement of EU-wide uniformity with regard to the transposition of the EU Directives which provide for minimum standards only.[11] A Member State fulfils its obligation as long as the minimum standards are met, which includes legislation above the minimum standards. In UNHCR´s view, there is thus no obligation for Finland to amend the legislation not to differ from the regulations and provisions of the European Union, as the current legislation meets the minimum standards and Finland's obligations are met. The fact that the QD has been replaced by the recast QD does not change this fact.

11. UNHCR recalls that Section 88a refers to protection needs as a result of "an environmental catastrophe or a bad security situation which may be due to an international or internal armed conflict or a poor human rights situation." At the time of the introduction of the provision, UNHCR welcomed that it allowed for humanitarian protection in case of an environmental catastrophe, which is caused by man or a natural catastrophe and as a result of which the environment has to great extent become unsuitable for living or harmful for health. UNHCR regrets that this protection category will now be omitted from the legislation, even if the Proposal states that persons fleeing an environmental catastrophe

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[9] European Union: Council of the European Union, *Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted*, 30 September 2004, OJ L. 304/12-304/23; 30.9.2004, 2004/83/EC, available at: http://www.refworld.org/docid/4157e75e4.html.

[10] Comments on RP 166/2007vp.

[11] *Ibid.*, p. 8.

could receive either temporary protection or be granted residence permit on individual humanitarian grounds.

12. UNHCR further observes that individuals fleeing violence as a result of conflict and/or human rights violations may fall within the scope of the refugee definition contained in the 1951 Convention or the provisions on subsidiary protection, if properly interpreted and applied. As UNHCR understands the Proposal, whether abolishing the provision on humanitarian protection will lead to protection gaps will depend on how the provisions on refugee and subsidiary protection in Finnish law will be interpreted and applied. UNHCR regrets that the Proposal does not fully explain and analyse the background for the proposed change and whether it intends for any other protection ground to be abolished or merely that the protection grounds contained in Section 88a will be subsumed under the other provisions.

13. UNHCR wishes to reiterate that in its view, the 1951 Convention is the primary instrument for the protection of refugees, including those fleeing armed conflict and other situations of violence. Nothing in the text, context or object and purpose of the 1951 Convention hinders its application to armed conflict or other situations of violence.[12] There is nothing in the text of the 1951 Convention to suggest that a refugee has to be singled out for persecution, either generally or over and above other persons at risk of being persecuted. A person may have a well-founded fear of persecution that is shared by many others. Also, there is no basis in the 1951 Convention for holding that in armed conflict or other situations of violence, an applicant needs to establish a risk of harm over and above that of others caught up in such situations (sometimes called a "differentiated risk").[13]

14. The Proposal notes that the scope for applying the provision of humanitarian protection has become more limited in light of international and national case law, which have found that an individual threat is no longer required for the granting of subsidiary protection.[14] The Proposal refers to one decision of the Finnish Supreme Administrative Court (KHO 2010:84)[15] and the case *Elgafaji v. Staatssecretaris van Justitie*[16] from the Court of Justice of the European Union.

15. As noted in its public statement in relation to the *Elgafaji* case in 2008, to avoid protection gaps and to enable all those in need of international protection to find and enjoy it, UNHCR has long advocated for the creation of a specific basis in European Community law for the protection of persons falling under UNHCR's

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[12] UNHCR, *Summary Conclusions on International Protection of Persons Fleeing Armed Conflict and Other Situations of Violence; Roundtable 13 and 14 September 2012, Cape Town, South Africa*, 20 December 2012, available at: http://www.refworld.org/docid/50d32e5e2.html, para. 6.

[13] *Ibid.*, para. 9.

[14] Whereas 654 persons were granted humanitarian protection in 2010, in 2014 the same figure was 4 persons, but 20 as of 31 October in 2015, see Finnish Immigration Service, www.migri.fi.

[15] *Supreme Administrative Court Decision of 30 December 2010*, KHO:2010:84, Finland: Supreme Administrative Court, 30 December 2010, available at: http://www.refworld.org/docid/4ea028162.html

[16] *Elgafaji v. Staatssecretaris van Justitie*, C-465/07, European Union: Court of Justice of the European Union, 17 February 2009, available at: http://www.refworld.org/docid/499aaee52.html.

mandate, but outside the scope of the 1951 Convention refugee definition.[17] In the statement, UNHCR expressed the view that the subsidiary protection regime created by the QD should be informed - but not limited - by international and regional human rights law. Subsidiary protection should only be resorted to after full use has been made out of the 1951 Convention. It should not be resorted to where the threat is targeted at an individual and he or she would qualify for refugee status.[18]

16. UNHCR notes that Recital 26 and the term "individual" in Article 15(c) of the QD might prove difficult to interpret, in light of the objective of addressing protection needs arising in the context of "indiscriminate" violence. UNHCR has therefore called on Member States not to adopt a minimalist interpretation of the Directive's provisions on subsidiary protection.[19] UNHCR considers that the added value of Article 15(c) is its ability to provide protection from serious risks which are situational, rather than individually targeted.[20] Article 15(c) was formulated explicitly to address threats stemming from indiscriminate violence, which by definition may affect everyone in a given situation.[21]

17. In UNHCR's view, the notion of an "individual" threat should not lead to an additional threshold and higher burden of proof. Situations of generalized violence are characterized precisely by the indiscriminate and unpredictable nature of the risks civilians may face.[22] The notion of "individual" threat should, in UNHCR's view, serve to remove from the scope of the provision persons for whom the alleged risk is merely a remote possibility, for example because the violence is limited to a specific region, or because the risk they face is below the relevant "real risk" threshold.

18. International protection needs arising from indiscriminate violence are not limited to situations of declared war or internationally recognized conflicts. It is therefore important that the requirements for an "internal armed conflict" in Article 15(c) are not set too high.[23] Persons fleeing indiscriminate violence and gross human rights violations more generally would, however, similarly be in need of international protection.[24]

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[17] UNHCR, *UNHCR public statement in relation to Elgafaji v. Staatssecretaris van Justitie before the Court of Justice of the European Union*, January 2008, available at: http://www.refworld.org/docid/479df7472.html, p. 4.

[18] *Ibid.*, p. 5.

[19] UNHCR, *UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted (OJ L 304/12 of 30.9.2004)*, 28 January 2005, available at: http://www.refworld.org/docid/4200d8354.html. See also, UNHCR, *UNHCR public statement in relation to Elgafaji v. Staatssecretaris van Justitie before the Court of Justice of the European Union*, January 2008, p. 5.

[20] *Ibid.*, UNHCR Statement, p. 6

[21] *Ibid.*

[22] UNHCR, *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM(2009)551, 21 October 2009)*, 29 July 2010, available at: http://www.refworld.org/docid/4c503db52.html, pp. 16–17.

[23] *Ibid.*

[24] UNHCR, *UNHCR Annotated Comments*, fn. 19, p. 33.

19. In light of the above, UNHCR recommends that Finland, if omitting the humanitarian protection category from the legislation, ensures that individuals fleeing conflict and violence and the other categories contained in Section 88a (1) do not fall outside of the scope of international protection granted in Finland. UNHCR also recommends the preamble of the Proposal to elaborate further how the legislative change would impact international protection granted in Finland.

Section 205. Notification of decision

20. According to the preamble of the Proposal, the changes in the notification of decisions will not alter the obligation to interpret or translate decisions as defined in Section 203 of the Aliens Act. According to Subsection 5 of this Section, 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.

21. 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. Assumptions that an applicant speaks or understands the official language of his or her country of origin may be incorrect. UNHCR therefore recommends that Finland amends the current wording of Section 203 to ensure, that the persons concerned are notified of decisions in a language they *actually* understand. The fact that the notification procedure is proposed to be simplified underlines the need to ensure that everyone actually understands the decisions that they are notified about.

Summary of UNHCR's views and recommendations

In UNHCR's view, there is no obligation for Finland to amend the legislation not to differ from the regulations and provisions of the European Union.

UNHCR recommends to elaborate further, in the preamble of the Proposal, how the legislative change would impact international protection granted in Finland.

To avoid protection gaps, UNHCR recommends that Finland, if omitting the humanitarian protection category from the legislation, ensures that individuals fleeing conflict and violence and the other categories contained in Section 88a (1) do not fall outside of the scope of international protection granted in Finland.

UNHCR regrets that the provision allowing for humanitarian protection in case of an environmental catastrophe will be omitted from the legislation as a protection category.

UNHCR 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.

UNHCR Regional Representation for Northern Europe
November 2015