

**UNHCR**

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

**UNHCR****Regional Representation for Northern Europe**

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Dear Ms Päivärinne,

**Re: Comments by the UNHCR Regional Representation for Northern Europe on the Finnish Government's draft proposal on amendments to the Aliens Act and the Act on the Treatment of Detained Aliens and the Detention Unit**

The UNHCR Regional Representation for Northern Europe regrets not being able to participate in the round table discussion on 15 November 2013 at the Ministry of the Interior, but is pleased to submit its comments on the proposal for amendments to the Aliens Act concerning detention.

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

**Ms. Sirkku Päivärinne**  
**Director**  
**Ministry of the Interior**  
**PO Box 26**  
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## **Comments by the UNHCR Regional Representation for Northern Europe on the Finnish Government's draft proposal on amendments to the Aliens Act and the Act on the Treatment of Detained Aliens and the Detention Unit**

### **Introduction**

1. UNHCR would like to express its appreciation to the Finnish Ministry of the Interior for the invitation to the round table on the 15 November 2013. Unfortunately we were not able to attend. We would, however like to seize the opportunity to provide comments on the proposal for amendments to the Aliens Act and the Act on the Treatment of Detained Aliens and the Detention Unit. The amendments have consequences for persons of concern to UNHCR.
2. UNHCR has been entrusted by the United Nations General Assembly with a mandate to provide international protection to refugees and, together with Governments, to seek permanent solutions to the problems of refugees<sup>1</sup>. According to its Statute, UNHCR fulfils this 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[.]”<sup>2</sup> 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 (“1951 Convention”) and its 1967 Protocol. Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and subsequent Guidelines on International Protection.<sup>3</sup> UNHCR’s supervisory responsibility is reiterated in Article 35 of the

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<sup>1</sup> 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/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b3628> (“UNHCR Statute”).

<sup>2</sup> Ibid., paragraph 8(a).

<sup>3</sup> UN High Commissioner for Refugees, *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.unhcr.org/refworld/docid/4f33c8d92.html>

1951 Convention and Article II of the 1967 Protocol<sup>4</sup>. Finland is a party to the 1951 Convention since 10 October 1968.

3. UNHCR's supervisory responsibility is reflected in European Union law, including through Article 78 (1) of the Treaty on the Functioning of the European Union, which stipulates that a common policy on asylum, subsidiary protection and temporary protection must be in accordance with the 1951 Convention. Its role is also reaffirmed 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."<sup>5</sup> Consequently, UNHCR has a direct competence to advise Member States and EU institutions in relation to EU legislative proposals affecting persons of concern, and thus an interest in the transposition of EU regulations and directives impacting on the rights of persons of concern to UNHCR.

### **The proposed amendments**

4. The proposed amendments are based on amendments prepared in 2012, which, however, were never presented to the Parliament. The 2012 proposal contained a general ban on detention of unaccompanied minors. The current proposal has been amended to enable detention of unaccompanied minors in certain circumstances. Namely, detention of unaccompanied minors seeking international protection would be possible after a return decision has become enforceable. Detention would in these cases be in accordance with the Directive on common standards and procedures in Member States for returning illegally staying third-country nationals<sup>6</sup>. The proposal still contains a ban on detention of unaccompanied children as long as they do not have an enforceable return decision. The proposal is more restrictive on the use of detention than the Directive laying down standards for the reception of applicants for international protection (recast)<sup>7</sup> (recast Reception Conditions Directive). Article 11, paragraph 2 of the recast Reception Conditions Directive stipulates that minors shall be detained only as a measure of last resort, whereas the proposal proposes a ban on minors applying for international protection. The detention of unaccompanied minors who do not apply for international protection would be possible under certain circumstances. Detention of children in police premises would be banned.

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<sup>4</sup> According to Article 35 (1) of the 1951 Convention, UNHCR has the "duty of supervising the application of the provisions of th[e 1951] Convention".

<sup>5</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities, 2 September 1997, *Declaration on Article 73k of the Treaty establishing the European Community* [OJ C 340, 10.11.1997] available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11997D/AFI/DCL/17:EN:HTML>.

<sup>6</sup> European Union: Council of the European Union, *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*, 16 December 2008, 2008/115/EC, available at: <http://www.refworld.org/docid/496c641098.html>

<sup>7</sup> 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>

5. In the invitation to the round table that took place on 15 November 2013, participants were asked to comment on the question of differing treatment and rights depending on whether the detainee would be placed in a detention centre or in a police facility and which communication tools could be banned in detention.

### UNHCR's observations

6. During the last years, UNHCR has delivered the following comments relating to detention to the Ministry of the Interior: 1) Statement on provisions on detention in the Aliens Act and the Act on Treatment of Detained Aliens and on the Detention Centre of 17 January 2012; 2) Comments on the draft amendment to the Aliens Act concerning the detention of children of 11 May 2012; 3) Comments on the proposal to improve statistics on detention of 3 August 2012. Reference is made to these previous comments. Since the issuance of these comments, however, UNHCR has in the autumn of 2012 issued Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention<sup>8</sup>.
7. Children<sup>9</sup> should in principle not be detained at all. The United Nations Convention on the Rights of the Child<sup>10</sup> (CRC) provides specific international legal obligations in relation to children and sets out a number of guiding principles regarding the protection of children, which are relevant to the context at hand: The best interests of the child shall be a primary consideration in all actions affecting children, including asylum-seeking and refugee children (Article 3 in conjunction with Article 22, CRC). Each child has a fundamental right to life, survival and development to the maximum extent possible (Article 6, CRC). Children have the right to family unity (*inter alia*, Articles 5, 8 and 16, CRC) and the right not to be separated from their parents against their will (Article 9, CRC). Article 20(1) of the CRC establishes that a child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State. Article 22 of the CRC requires that States Parties take appropriate measures to ensure that children who are seeking refugee status or who are recognised refugees, whether accompanied or not, receive appropriate protection and assistance. Article 37 of the CRC requires States Parties to ensure that the detention of children be used only as a measure of last resort and for the shortest appropriate period of time. Where separation of a child or children from their parents is unavoidable in the context of detention, both parents and child are entitled to essential information from the State on the

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<sup>8</sup> UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.refworld.org/docid/50348953b8.html>

<sup>9</sup> A child is defined as "a human being below the age of 18 years", Article 1, United Nations Convention on the Rights of the Child (CRC), 1990.

<sup>10</sup> UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html>

whereabouts of the other unless such information would be detrimental to the child (Article 9(4), CRC).<sup>11</sup>

8. Overall an ethic of care – and not enforcement – needs to govern interactions with asylum-seeking children, including children in families, with the best interests of the child a primary consideration. The extreme vulnerability of a child takes precedence over the status of an “illegal alien”.<sup>12</sup> States should “utilize, within the framework of the respective child protection systems, appropriate procedures for the determination of the child’s best interests, which facilitate adequate child participation without discrimination, where the views of the child are given due weight in accordance with age and maturity, where decision makers with relevant areas of expertise are involved, and where there is a balancing of all relevant factors in order to assess the best option.”<sup>13</sup>
9. All appropriate alternative care arrangements should be considered in the case of children accompanying their parents, not least because of the well-documented deleterious effects of detention on children’s well-being, including on their physical and mental development. The detention of children with their parents or primary caregivers needs to balance, inter alia, the right to family and private life of the family as a whole, the appropriateness of the detention facilities for children,<sup>14</sup> and the best interests of the child.<sup>15</sup>
10. As a general rule, unaccompanied or separated children should not be detained. Detention cannot be justified based solely on the fact that the child is unaccompanied or separated, or on the basis of his or her migration or residence status.<sup>16</sup> A primary objective must be the best interests of the child.<sup>17</sup>

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<sup>11</sup> UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, para. 51.

<sup>12</sup> *Muskhadzhiyeva and others v. Belgium* (2010), ECtHR, App. No. 41442/07, available at: <http://www.unhcr.org/refworld/docid/4bd55f202.html>, in which it was held inter alia that detaining children in transit facilities designed for adults not only amounted to inhuman or degrading treatment in contravention of Article 3 of the ECHR, it also rendered their detention unlawful.

<sup>13</sup> UNHCR ExCom Conclusion No. 107 (LVIII) – 2007, on *Children at Risk*, para. G (i), available at: <http://www.unhcr.org/refworld/docid/471897232.html>. 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*, 22 December 2009, HCR/GIP/09/08 (UNHCR Guidelines on International Protection on Child Asylum Claims), available at: <http://www.unhcr.org/refworld/docid/4b2f4f6d2.html>.

See, also, International Detention Coalition, *Captured Childhood: Introducing a New Model to Ensure the Rights and Liberty of Refugee, Asylum-Seeking and Irregular Migrant Children Affected by Immigration Detention*, 2012,

<http://idcoalition.org/wp-content/uploads/2012/03/Captured-Childhood-FINAL-June-2012.pdf>;

IDC, *Child Sensitive Community Assessment and Placement Model*, available at:

<http://idcoalition.org/ccap-5step-model/>.

<sup>14</sup> *Popov v. France*, (2012), ECtHR, App. No. 39472/07 and 39474/07, available at:

<http://www.unhcr.org/refworld/docid/4f1990b22.html>.

<sup>15</sup> UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, para. 53.

<sup>16</sup> *Popov v. France*, (2012), ECtHR, App. No. 39472/07 and 39474/07.

<sup>17</sup> UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, para. 54



11. Ensuring accurate age assessments of asylum-seeking children is a specific challenge in many circumstances, which requires the use of appropriate assessment methods that respect human rights standards.<sup>18</sup> Inadequate age assessments can lead to the arbitrary detention of children.<sup>19</sup> It can also lead to the housing of adults with children. Age- and gender-appropriate accommodation needs to be made available.<sup>20</sup>
12. Children who are detained benefit from the same minimum procedural guarantees as adults, but these should be tailored to their particular needs. An independent and qualified guardian as well as a legal adviser should be appointed for unaccompanied or separated children. An adult who is familiar with the child's language and culture may also alleviate the stress and trauma of being alone in unfamiliar surroundings. During detention, children have a right to education which should optimally take place outside the detention premises in order to facilitate the continuation of their education upon release. Provision should be made for their recreation and play, including with other children, which is essential to a child's mental development and will alleviate stress and trauma.<sup>21</sup>
13. All efforts, including prioritisation of asylum processing, should be made to allow for the immediate release of children from detention and their placement in other forms of appropriate accommodation.<sup>22</sup>
14. Detention can only lawfully be in places officially recognized as places of detention. Detention in police cells is not appropriate. UNHCR thus welcomes the proposed ban on detention of children in police premises. Asylum-seekers in detention should be able to make regular contact (including through telephone or internet, where possible) and receive visits from relatives, friends, as well as religious, international and/or non-governmental organisations, if they so desire. Access to and by UNHCR must be assured. Facilities should be made available to enable such visits. Such visits should normally take place in private unless there are compelling reasons relevant to safety and security to warrant otherwise.<sup>23</sup>

<sup>18</sup> UNHCR and the Office of the High Commissioner for Human Rights (OHCHR), *Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons: Summary Conclusions*, May 2011 (Global Roundtable Summary Conclusions), para 7, available at: <http://www.unhcr.org/refworld/docid/4e315b882.html>.

UNHCR *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, February 1997, available at: <http://www.unhcr.org/refworld/docid/3ae6b3360.html>.

UNHCR *Guidelines on International Protection on Child Asylum Claims*, above note 13.

<sup>19</sup> UNHCR, *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum*, *ibid*

<sup>20</sup> UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, para. 55.

<sup>21</sup> *Ibid*, para 56.

<sup>22</sup> See CRC General Comment No. 6: *Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, para. 61, available at: <http://www.unhcr.org/refworld/docid/42dd174b4.html>.

<sup>23</sup> UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, para. 48.

## **Conclusion**

15. UNHCR expresses its sincere appreciation for the opportunity to provide comments on this legislative proposal at this early stage. UNHCR welcomes the proposed law amendments restricting the detention of children, but reiterates that, in principle, children should not be detained at all.

**UNHCR Regional Representation for Northern Europe,  
Stockholm, 2 December 2013**