



UNHCR

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

UNHCR
Regional Office for the Baltic
and Nordic Countries

Ynglingagatan 14, 6th fl.
SE-113 47 Stockholm

Tel.: +46 8 457 4880
Fax: +46 8 457 4887
Email: swest@unhcr.org

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Re: UNHCR's comments on the Ministry of the Interior's draft amendment to the Aliens Act (301/2004) concerning the detention of children

To: The Ministry of the Interior

The UNHCR Regional Office for the Baltic and Nordic Countries is pleased to submit its comments on the Ministry of the Interior's draft amendment to the Aliens Act (301/2004) concerning the detention of children to the Ministry of the Interior.

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,

Karolina Lindholm-Billing
Senior Protection Officer

**UNHCR's comments
on the Ministry of the Interior's draft amendment to the Aliens Act
(301/2004) concerning the detention of children**

UNHCR would like to thank the Finnish Ministry of the Interior for the opportunity to convey our observations on the draft amendment to the Aliens Act (301/2004) concerning the detention of children.

UNHCR has a direct interest in ensuring that asylum-seeking and refugee children are received and protected in line with relevant international and regional legal standards by virtue of our mandate, to provide international protection to refugees and, together with Governments, to seek permanent solutions to the problems of refugees¹. According to our 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[.]”² UNHCR’s supervisory responsibility is exercised in part by the issuance of interpretative guidance 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 guidance is contained in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (“UNHCR Handbook”)³ and in subsequent Guidelines on International Protection⁴. This supervisory responsibility is reiterated in Article 35 of the 1951 Convention, and in Article II of its 1967 Protocol.

Hence, pursuant to UNHCR's supervisory role, we would like to present the following observations and comments on the proposed amendment, as it relates to asylum-seeking and refugee children of concern to UNHCR.

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

² *Ibid.*, paragraph 8(a).

³ UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, 1 January 1992, available at: <http://www.unhcr.org/refworld/docid/3ae6b3314.html>.

⁴ UNHCR issues “Guidelines on International Protection” pursuant to its mandate, as contained in the Statute of the Office of the United Nations High Commissioner for Refugees, in conjunction with Article 35 of the 1951 Convention. The Guidelines complement the UNHCR Handbook and are intended to provide guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff.

General remarks

Article 31 in the 1951 Convention exempts refugees coming directly from a country of persecution from being penalized on account of their illegal entry or presence, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. The Article also provides that Contracting States shall not apply to the movements of such refugees, restrictions other than those which are necessary. This provision is complemented by UNHCR's Executive Committee Conclusion No. 44 (XXXVII) which stipulates that, in view of the hardship it involves, detention of asylum-seekers should normally be avoided.

UNHCR's Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers⁵ from 1999 (henceforth "UNHCR's Guidelines on detention") provide further guidance on the interpretation and application of Article 31 and ExCom Conclusion No. 44, and affirm that detention of asylum-seekers is inherently undesirable.

In regard to children, Article 37 of the Convention on the Rights of the Child, as interpreted by the Committee on the Rights of the Child in its General Comment No. 6 (2005)⁶, provides that unaccompanied or separated children should not, as a general rule, be detained. Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof. Where detention is exceptionally justified for other reasons, it shall be conducted in accordance with article 37 (b) of the Convention on the rights of the Child that requires detention to conform to the law of the relevant country and only to be used as a measure of last resort and for the shortest appropriate period of time⁷.

UNHCR's Guidelines on detention and the UNHCR Guidelines on Refugee Children⁸ also advise that children who are asylum-seekers should not be detained.

In the case of children accompanying their parents, all appropriate alternatives to detention should be considered. According to UNHCR's Guidelines on detention, children and their primary caregivers should not be detained unless this is the only means of maintaining family unity.

Proposal to ban detention of unaccompanied children

In view of the general remarks above, UNHCR welcomes the proposed ban on detention of unaccompanied children. Detention of children has not been commonplace in Finland and in general an increasing number of countries restrict the use of detention of children, in particular of unaccompanied children, noting their particular vulnerabilities. UNHCR is therefore very pleased that the proposed amendment encompasses all unaccompanied

⁵UN High Commissioner for Refugees, UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, 26 February 1999, available at:

<http://www.unhcr.org/refworld/docid/3c2b3f844.html>

⁶ UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6; available at: <http://www.unhcr.org/refworld/docid/42dd174b4.html>

⁷ Ibid, Paragraphs 61 and 63.

⁸UN High Commissioner for Refugees, *Refugee Children: Guidelines on Protection and Care*, 1994, available at: <http://www.unhcr.org/refworld/docid/3ae6b3470.html>

children, regardless of their immigration status. This proposal is in line with the opinion expressed by UNHCR at the hearing on 17 January 2012.

The draft amendment would still allow for the detention of children together with their caregivers. According to UNHCR's Guidelines on detention, children and their primary caregivers should not be detained unless this is the only means of maintaining family unity. UNHCR would, however, note that this is the minimum standard required. Nothing prevents Finland from choosing a total ban on the detention of children. In this regard UNHCR encourages Finland to stay vigilant to the development of jurisprudence from regional courts such as the European Court of Justice and the European Court of Human Rights on the question of detention of children.

Proposal to clarify rules on detention of children together with their caregivers

The draft amendment further introduces several requirements that need to be fulfilled before children accompanied by caregivers can be detained. Through this proposal, UNHCR is very pleased to note that the generally positive practice in Finland is now being laid down in law. The proposal that children shall not be detained in order to determine their identity is likely to limit the use of detention of children seeking asylum together with their caregiver, even though it will not completely prevent detention from being used. The need to ensure that detention is a necessary measure to maintain the connection between the child and his/her caregiver, in situations when detention of the caregiver is lawful, is in line with UNHCR's guidelines on detention and the principle of family unity.

UNHCR further welcomes the explicit reference to the best interests of the child in the provision concerning the need for a statement by a representative of the social welfare authority. UNHCR emphasizes the importance of ensuring that this provision is implemented in practice once adopted, through a procedure where the best interests of the child concerned are given primary consideration in reaching a decision on whether or not to detain. UNHCR would thus recommend that the proposed amendment makes reference to the need to put in place a mechanism for determining the best interests of the child in these situations.

Finally, UNHCR welcomes the proposed provision that children should not be detained in police jails and border guard detention facilities, which is in line with Article 37 of the Convention on the Rights of the Child, prohibiting the detention of children in prison-like conditions. Though this amendment, detention of children in police jails and border guard detention facilities due to the lack of space in the detention centre in Metsälä will be avoided.

UNHCR, Regional Office for the Baltic and Nordic Countries, Stockholm
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