

Lausunto

28.06.2024

Asia: VN/26422/2023

Luonnos hallituksen esitykseksi ulkomaalaislain muuttamisesta (säilöönotto ja maahantulokielto)

Lausunnonantajan lausunto

Voitte kirjoittaa lausuntonne alla olevaan tekstikenttään

UNHCR Observations on the proposal to amend the Finnish Aliens Act

Hallituksen esitys eduskunnalle laiksi ulkomaalaislain muuttamisesta

I. Introduction

1. The United Nations High Commissioner for Refugees (“UNHCR”) Representation for the Nordic and Baltic Countries appreciates the invitation to provide observations on the “Government’s proposal to the parliament to amend the Aliens Act” (Hallituksen esitys eduskunnalle ulkomaalaislain muuttamisesta), tightening the provisions concerning detention and reforming the provisions on entry bans - hereafter the “Proposal”.^[1]

2. UNHCR has a direct interest in law proposals related to asylum, as the agency entrusted by the United Nations (“UN”) General Assembly with the mandate to provide international protection to refugees and, together with Governments, seek permanent solutions to the problems of refugees.^[2] Paragraph 8 of UNHCR’s Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees,^[3] whereas the 1951 Convention relating to the Status of Refugees^[4] and its 1967 Protocol (hereafter collectively referred to as “1951 Convention”) oblige State Parties to cooperate with UNHCR in the exercise of its mandate, in particular facilitating UNHCR’s duty of supervising the application of the provisions of the 1951 Convention (Article 35 of the 1951 Convention and Article II of the 1967 Protocol). This has also been reflected in European Union (“EU”) law, including by way of reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the EU. The UN General Assembly has also

entrusted UNHCR with a global mandate to provide protection to stateless persons world-wide and for preventing and reducing statelessness.[5]

3. UNHCR's supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention. Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and subsequent Guidelines on International Protection ("UNHCR Handbook").[6] UNHCR also fulfils its supervisory responsibility by providing comments on legislative and policy proposals impacting on the protection and durable solutions for forcibly displaced and stateless people.

II. General Observations

4. UNHCR notes that the overall aim of the Proposal is to enhance the removal of people staying irregularly in the country, to better protect public order, public security and national security and to enhance the preparedness for "new and unpredictable" situations. The Proposal seeks to extend the maximum period of detention of foreigners who are in the removal process, add new grounds for immigration-related detention and to reform the provisions on entry ban for third-country nationals. The Proposal is based on the Government Programme of June 2023.[7]

5. The Proposal furthermore seeks to tighten Finland's asylum policy through the implementation of parts of the recast EU Return Directive[8] and the EU Reception Conditions Directive,[9] not yet part of the Finnish legislation.[10] No reference is made to legislative acts that are part of the recently adopted EU Pact on Migration and Asylum.[11]

6. At the outset, UNHCR wishes to recall that the fundamental rights of liberty and security of person and freedom of movement are expressed in all the major international and regional human rights instruments and are essential components of legal systems built on the rule of law[12]. The Universal Declaration of Human Rights[13] (Articles 3 and 9), the European Convention on Human Rights[14] (Article 5) and the EU Charter of Fundamental Rights[15] (Article 6) all contain provisions in this regard. These rights apply in principle to all human beings, regardless of their immigration, refugee, asylum-seeker or other status.

7. UNHCR's Executive Committee ("ExCom") has addressed on a number of occasions the detention of asylum-seekers.[16] Consistent with international refugee and human rights law and standards, detention of asylum-seekers should be avoided and considered only as a measure of last resort. Seeking asylum is not an unlawful act and liberty should be the default position.[17] The burden is on the State to show that a restriction on freedom of movement is necessary, reasonable and proportionate in the individual case.[18] Detention is the most far-reaching restriction on freedom of movement and alternatives to detention should first be considered.[19]

8. UNHCR notes that several legislative changes are under way affecting forcibly displaced and stateless persons in Finland. UNHCR appreciates that the Proposal has included a section to try to identify and evaluate the general combined effects of these changes and agrees with the observation in the Proposal that the changes and their possible impact chains are difficult to assess.[20] UNHCR finds, however, that the Proposal lacks an evaluation of the cumulative impact of the proposed measures on the affected individuals, including asylum-seekers. UNHCR recommends that a further analysis is undertaken of the combined impact that these changes may have.

9. In the following observations on specific aspects of the Proposal, UNHCR will focus its comments on its most urgent concerns, that is, a) expanded grounds for detention, b) detention of children and c) deviation from procedural safeguards in certain situations.

III. Specific observations

a. Expanded grounds for detention

10. UNHCR observes that two new grounds for detention are proposed to be introduced in the Finnish Aliens Act, namely: a) where an individual is considered a danger to public order and public security and b) where an individual causes significant or repeated disturbance at a reception center.

Danger to public order and public security

11. Proposed Section 121, subsection 1, paragraph 6 introduces a new ground for detention where an asylum-seeker is considered to be a danger to public order or public security.[21] This will allow the authorities to use detention, for example, in situations where there are reasonable grounds to believe that an individual is a danger to society, but who cannot be detained on the ground of “jeopardizing national security”. The new detention ground could also be utilized in a situation of “instrumentalization”, where “the influencing State deliberately directs people, who are not in need protection and whose purpose is to cause a disturbance to public order or public security or national security, to Finland as asylum-seekers”. [22] According to the Proposal, the authorities must have the opportunity to maintain social peace and limit the freedom of movement of immigrants in cases of “deliberate, instrumentalized illegal immigration of third-country nationals into Finland”. [23]

12. UNHCR agrees that detention can be justified in certain situations to secure public order. However, such detention must not be arbitrary, can only be applied where it pursues a legitimate purpose and has been determined to be both necessary and proportionate in each individual case. The general principle of proportionality requires that a balance be struck between the importance of

respecting the rights to liberty and security of person and freedom of movement, and the public policy objectives of limiting or denying these rights. The authorities must not take any action exceeding that which is strictly necessary to achieve the pursued purpose in the individual case. The necessity and proportionality tests further require an assessment of whether there were less restrictive or coercive measures (that is, alternatives to detention) that could have been applied to the individual concerned and which would be effective in the individual case.[24]

13. UNHCR underscores that it has to be ensured that the purpose of the detention is indeed only to protect public order, and not, for example, to facilitate administrative expediency. In this context, UNHCR wishes to recall that, according to the UN Human Rights Committee,[25] administrative expediency is not a legitimate purpose for detaining people in light of the serious consequences it has for a human being.

14. Furthermore, UNHCR notes that “public security” is not a detention ground according to the EU Reception Conditions Directive. Article 8 (3) of the Directive sets out an exhaustive list of grounds under which an applicant of international protection may be detained. Public security as a ground for detention may only be found in the proposed recast Return Directive, which is not current EU law. UNHCR is concerned that by combining separate detention grounds from different pieces of legislation, the Proposal has not fully considered that these separate grounds were drafted to target distinct group of individuals in distinct circumstances. Introducing “public security” as a general detention ground in the Finnish Alien Act may therefore lead to the arbitrary detention of applicants of international protection.

15. With respect to the reference to instrumentalization in the context of detention, UNHCR recalls that detention can only be justified for a legitimate purpose. In the context of the detention of asylum-seekers, there are only three purposes for which detention may be necessary in an individual case, and which are generally in line with international law, namely public order, public health or national security. Moreover, detention laws must conform to the principle of legal certainty.[26]

Significant or repeated disturbance at a reception center

16. According to the Proposal, a second new ground for detention would be added through proposed Section 121, subsection 1, paragraph 8. According to the proposed provision, a foreigner staying in a reception center can be detained if they have caused “a significant or repeated disturbance to public order or are considered a danger to the safety of others and measures according to the Police Act have proven insufficient”.[27]

17. UNHCR reiterates that asylum-seekers may only be detained based on the exhaustively listed grounds set out in the EU Reception Conditions Directive. While the Directive permits detention on

the ground of public order, UNHCR highlights that any additional ground of detention should meet the threshold of existing case law. The case law regarding detention on the ground of public order is well established. The EU Court of Justice has concluded that detention is “justified on the ground of a threat to national security or public order only if the applicant’s individual conduct represents a genuine, present and sufficiently serious threat, affecting a fundamental interest of society or the internal or external security of the Member State concerned”.^[28] In interpreting the concept of public order, reference is also made to recital 37 of the EU Qualification Directive, which provides an illustration of what may constitute a threat to national security or public order. According to that recital, “the notion of national security and public order ... covers cases in which a third-country national belongs to an association which supports international terrorism or supports such an association”.

18. UNHCR is concerned that the proposed new ground may lead to arbitrary detention, if no less coercive and intrusive means to resolve the situation are considered. The consideration of alternatives to detention is part of an overall assessment of the necessity, reasonableness and proportionality of detention. Such consideration ensures that detention of asylum-seekers is a measure of last, rather than first, resort. It must be shown that in light of the asylum-seeker’s particular circumstances, there were no less invasive or coercive means of achieving the same ends.^[29]

19. UNHCR further wishes to highlight that the “significant or repeated disturbance to public order” is not clearly defined within the Proposal, nor how the assessment would be conducted. Lack of clear guidelines for assessing such “disturbance” consequently poses a challenge in evaluating whether detention is necessary, reasonable in all the circumstances and proportionate to a legitimate purpose. UNHCR is concerned that lack of clear definition may lead to erroneous assessment, and inconsistent and arbitrary use of this proposed detention ground.

20. UNHCR recommends Finland to review the proposed new grounds to ensure that asylum-seekers may only be detained based the grounds exhaustively set out in the EU Reception Conditions Directive. UNHCR also recommends to clearly define “significant or repeated disturbance to public order” to avoid arbitrary and/or unlawful detention.

b. Detention of children

21. According to the Proposal, a new subsection would be added to Section 122 of the Aliens Act, setting out that a child detained together with a guardian should be released no later than three months after being detained. Detention can be extended for a maximum of three months in situations of delays in the implementation of the deportation decision, for instance, because the detainee does not cooperate in carrying out the return or the necessary return documents are not obtained from the third country. In order to prolong the detention, there has to be a reasonable possibility to implement the removal from the country. Previously, the Section did not stipulate a

maximum duration of detention for a child with a guardian, however, referred to the general rules regarding release from detention contained in Section 127.

22. UNHCR acknowledges that the Proposal seeks to improve existing law by providing a timeline for the release of children detained with their guardian. However, UNHCR's position is that children should not be detained^[30] for immigration related purposes, irrespective of their legal/migratory status or that of their parents, and detention is never in their best interests.^[31]

23. Children are among the most vulnerable groups of forcibly displaced persons and have specific rights and needs according to the UN Convention on the Rights of the Child as well as other international and regional instruments. The right to family life and family unity is enshrined in international human rights, humanitarian, and refugee law, and it applies to all individuals, including asylum-seekers and refugees, and throughout displacement, including at admission, in reception, where expulsion is threatened, and other stages. International law recognizes the family as the natural, fundamental group of society, and it ascribes to family units a right to protection by States.^[32] The UN Committee on the Rights of the Child has stated that the detention of a child because of their or their parent's migration status constitutes a child rights violation and always contravenes the principle of the best interest of the child.^[33]

24. UNHCR further wishes to highlight that all appropriate alternative care arrangements should be considered in the case of children, not least because of the well-documented deleterious effects of detention on children's well-being, including on their physical and mental development.^[34] Studies have indicated that detention of children can undermine their psychological and physical well-being and compromise their cognitive development.^[35] Furthermore, children held in detention are at risk of suffering depression and anxiety, and frequently exhibit symptoms consistent with post-traumatic stress disorder such as insomnia, nightmares and bedwetting.^[36] There is strong evidence that detention has a profound and negative impact on children's health and development, regardless of the conditions in which children are held, and even when detained for short periods of time or with their families. The risk of exposure to others forms of harm, including sexual and gender-based violence, are also significant in many detention contexts.

25. UNHCR thus recommends refraining from detaining children with guardians for immigration related purposes.

c. Procedural safeguards

Deviation based on exceptional situations

26. Proposed new Section 123 b introduces a possibility to deviate from the provisions on the place of detention and court proceedings of a detained foreigner in exceptional situations. Such situations could, for example, arise if an exceptionally large number of foreigners were to be returned, or as a result of large-scale immigration unexpectedly causing a large burden on detention units or the personnel of an administrative or judicial authority. District courts would be allowed a two-day processing time in matters concerning the detention of unaccompanied children and a seven-day processing time concerning all other detention cases, as opposed to the existing one and four days respectively. In exceptional circumstances, a detained foreigner could be placed in a detention facility of the police or the Border Guard or in another place instead of the detention unit. The proposed amendment would also allow for deviating from the obligation to provide separate accommodation facilities for detained families.

27. UNHCR is concerned about the proposed possibility to deviate from the provisions on procedural safeguards in certain situations. Every asylum-seeker should have the right to be brought promptly before a judicial or other independent authority to have his/her detention decision reviewed. This review should ideally be automatic and take place in the first instance within 24-48 hours of the initial decision to hold the asylum-seeker.[37] As UNHCR understands the Proposal, the law does not specify that the proposed deviation from the procedural safeguards would only apply to foreigners waiting for removal and is concerned that asylum-seekers and refugees might be affected by these measures. This proposed amendment is based on Article 18 of the EU Return Directive, which specifically regulates detention for the purpose of removal.

28. The conditions of detention must meet international standards, including with regards to vulnerable groups such as children. Article 10 of the EU Reception Conditions Directive sets out that the detention of asylum-seekers shall take place, as a rule, in specialized detention facilities. The use of prisons, jails, and facilities designed or operated as prisons or jails, should be avoided.[38] Also, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has repeatedly[39] concluded that prisons and police stations are not suitable places in which to detain someone who is neither suspected nor convicted of a criminal offence. Consequently, the period of time spent by immigration detainees in such establishments should be kept to the absolute minimum. The European Court of Human Rights has reached similar conclusions in its case law.[40]

29. Furthermore, Article 11 (4) of the EU Reception Conditions Directive requires Member States to provide detained families separate accommodation that guarantee adequate privacy. The only exception to this general rule is where an asylum-seeker is detained at a border-crossing point or in a transit zone.[41] As noted above, however, the detention of families with children for immigration related purposes will never be in line with the best interests of the child. Children should never be criminalized or subject to punitive measures because of their parents' migration status. Alternatives to detention should be explored, preferably through family-based alternative care options or other suitable alternative care arrangements as determined by the competent childcare authorities.[42]

30. UNHCR recommends adjusting the Proposal to remain within the conditions and guarantees regarding detention of forcibly displaced persons set in the Reception Conditions Directive even in exceptional situations.

Ex officio periodic reviews

31. The Proposal suggests that Section 128 subsection 2 be amended to make it an obligation for the district courts to ex officio re-examine the detention decision on a periodical basis, at least once every three months without action required from the detainee.

32. UNHCR welcomes the proposed introduction of ex officio periodic reviews of detention orders, which do not require the action of the forcibly displaced person in detention. Forcibly displaced persons and their representative should have the right to attend such review. Good practice indicates that following the initial judicial decision to detain, subsequent reviews are to take place every seven days until the one-month mark and thereafter every month until the maximum limit is reached.[43]

33. Building on the positive steps taken, UNHCR would welcome adjusting proposed Section 128 of the Proposal to require reviews every seven days until the one-month mark and thereafter every month until the maximum limit is reached.

IV. Concluding remarks

34. Based on the above observations, UNHCR invites Finland to consider the following amendments to the Proposal in order to ensure full compliance with its international legal obligations:

- a. To undertake further analysis of the combined impact that the proposed legislative changes have on forcibly displaced persons.
- b. To review the proposed new grounds for detention to ensure that asylum-seekers may only be detained according to the grounds exhaustively set out in the EU Reception Conditions Directive;
- c. To clearly define “significant or repeated disturbance to public order”;
- d. To refrain from detaining children with guardians for immigration related purposes;
- e. To adjust the frequency of the periodic review of detention decisions and require reviews every seven days until the one-month mark and thereafter every month until the maximum limit is reached;

f. To ensure the procedural guarantees and conditions for detention set out in the EU Reception Conditions Directive at all times for forcibly displaced persons.

UNHCR Representation for Nordic and Baltic Countries

June 2024

- [1.] The full presentation of the Proposal by the Ministry of the Interior, including explanatory notes and proposed legislative text (in Finnish), is available at Hanke säilöönottoa ja maahantulokieltoa koskeva sääntely, Hankenumero SM043:00/2023, <https://intermin.fi/hankkeet/hankesivu?tunnus=SM043:00/2023>.
- [2.] UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V) <https://www.refworld.org/docid/3ae6b3628.html> (“the Statute”).
- [3.] Ibid, para. 8(a). According to para. 8(a) of the Statute, UNHCR is competent to supervise international conventions for the protection of refugees. The wording is open and flexible and does not restrict the scope of applicability of the UNHCR’s supervisory function to one or other specific international refugee convention. UNHCR is therefore competent qua its Statute to supervise all conventions relevant to refugee protection, UNHCR’s supervisory responsibility, October 2002 <http://www.refworld.org/docid/4fe405ef2.html>, pp. 7–8.
- [4.] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations Treaty Series, No. 2545, vol. 189 <http://www.unhcr.org/refworld/docid/3be01b964.html>. According to Article 35 (1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of the Convention”.
- [5.] UN General Assembly Resolution A/RES/50/152, 9 February 1996 <http://www.unhcr.org/refworld/docid/3b00f31d24.html>, reiterated in subsequent resolutions, including A/RES/61/137 of 25 January 2007, <http://www.unhcr.org/refworld/docid/45fa902d2.html>, A/RES/62/124 of 24 January 2008 <http://www.unhcr.org/refworld/docid/47b2fa642.html>, and A/RES/63/148 of 27 January 2009 <http://www.unhcr.org/refworld/docid/4989619e2.html>.
- [6.] UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, April 2019, HCR/1P/4/ENG/REV. 4, <https://www.refworld.org/docid/5cb474b27.html>.
- [7.] Finnish Government, “A strong and committed Finland – the Government’s vision” Programme of Prime Minister Petteri Orpo’s Government, 2023:60, 20 June 2023, <https://urn.fi/URN:ISBN:978-952-383-818-5>.
- [8.] Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), COM(2018) 634 final 2018/0329(COD) European Commission, 12 September 2018, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0634>.

- [9.] 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), OJ L 180/96 -105/32; 29.6.2013, 2013/33/EU, 29 June 2013, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0033>.
- [10.] Proposal, p. 1.
- [11.] European Parliament, European Parliament legislative resolution of 10 April 2024 on the proposal for a regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] (COM(2020)0610 – C9-0309/2020 – 2020/0279(COD)), 10 April 2024, https://www.europarl.europa.eu/doceo/document/TA-9-2024-0179_EN.html
- [12.] UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012, <http://www.refworld.org/docid/503489533b8.html> (“UNHCR, Guidelines on Detention”) p. 13.
- [13.] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), <http://www.refworld.org/docid/3ae6b3712c.html>.
- [14.] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, <http://www.refworld.org/docid/3ae6b3b04.html>.
- [15.] European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, <http://www.refworld.org/docid/3ae6b3b70.html>.
- [16.] UNHCR ExCom, Conclusion on Detention of Refugees and Asylum-Seekers, No. 44 (XXXVII) – 1986, para. (b), <http://www.unhcr.org/refworld/docid/3ae68c43c0.html>. See also in particular, UNHCR ExCom, Nos. 55 (XL) – 1989, para (g); 85 (XLIX) –1998, paras. (cc), (dd) and (ee); and 89 (LI) – 2000, third paragraph, <http://www.unhcr.org/3d4ab3ff2.html>.
- [17.] UNHCR, Guidelines on Detention, p. 13.
- [18.] UN Human Rights Committee (HRC), General comment no. 35, Article 9 (Liberty and security of person), CCPR/C/GC/35, 16 December 2014, <https://www.refworld.org/legal/general/hrc/2014/en/104763>, paras. 15 and 18.
- [19.] *Guzzardi v. Italy*, Application no. 7367/76, Council of Europe: European Court of Human Rights, 6 November 1980, paras. 92-93, www.refworld.org/cases,ECHR,502d42952.html. *Medvedyev and Others v. France*, Application no. 3394/03, Council of Europe: European Court of Human Rights, 29 March 2010, para. 73, www.refworld.org/cases,ECHR,502d45dc2.html. See also *De Tommaso v Italy*, Application no. 43395/09, Council of Europe: European Court of Human Rights, 23 February 2017, <https://hudoc.echr.coe.int/eng?i=001-171804>, para. 80, considering that “[t]he difference between deprivation and restriction of liberty is one of degree or intensity, and not one of nature or substance”.
- [20.] Proposal, p. 39.
- [21.] The Proposal does not explicitly define public order and security. The language is directly derived from the Reception Directive where Article 8 (3) e provides for the possibility of detention where the protection of national security or public order so requires. The Proposal does, however

detail relevant case law, where “the concept of "public order" requires, according to the ruling practice of the EUJ, that it is not only a disturbance of social order, which all violations of the law imply, but also a real, immediate and sufficiently serious threat affecting the fundamental interest of society”. Furthermore, the Proposal states the “it appears from the case law of the EU that the term "public security" includes the internal security of a member state and its external security, and that therefore a threat to the operation of state bodies or its basic public services or the survival of the population, the danger of serious disruption of foreign relations or the peaceful coexistence of nations, or war- the threat to legitimate interests may affect public security”. Proposal, p. 60.

[22.] Proposal, p. 59.

[23.] Proposal, p. 59.

[24.] UNHCR, Guidelines on Detention, p. 21. UNHCR Bureau for Europe, UNHCR Annotated Comments to 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), April 2015, <https://www.refworld.org/legal/intlegcomments/unhcr/2015/en/104806>, p. 31.

[25.] UN Human Rights Committee (HRC), CCPR General Comment No. 15: The Position of Aliens Under the Covenant, 11 April 1986, <http://www.refworld.org/docid/45139acfc.html>.

[26.] See further, UNHCR, Guidelines on Detention, paras. 16 and 21.

[27.] EU Reception Conditions Directive, Article 8.

[28.] CJEU - C-601/15 PPU, J. N. v Staatssecretaris van Veiligheid en Justitie, 15.02.2016, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62015CP0601>.

[29.] UNHCR, Guidelines on Detention, Guideline 4.3, para. 35.

[30.] UNHCR, Guidelines on Detention, para. 51. No other qualifications should be added to the baseline position of non-detention of children for immigration related purposes. References to the application of Art.37(b), “exceptional circumstances / measure of last resort”, are not appropriate for cases of detention of any child for immigration related purposes. It is understood from the commentaries of the CRC (see below), that while Art. 37 (b) may apply in other contexts (such as in cases of children in conflict with the law – see CRC/C/GC/10 from 2007), its application to detention in the immigration context would be in conflict with the principle of best interests of the child.

[31.] UNHCR, UNHCR's position regarding the detention of refugee and migrant children in the migration context, January 2017, <https://www.refworld.org/policy/legalguidance/unhcr/2017/en/115250>.

[32.] UN General Assembly, Universal Declaration of Human Rights, 217 A (III), 10 December 1948, <https://www.refworld.org/legal/resolution/unga/1948/en/11563>, art. 16(3); UN General Assembly, International Covenant on Civil and Political Rights, United Nations, Treaty Series, vol. 999, p. 171, 16 December 1966, <https://www.refworld.org/legal/agreements/unga/1966/en/17703>, art. 23(1); UN General Assembly, International Covenant on Economic, Social and Cultural Rights, United Nations, Treaty Series, vol. 993, page 3, 16 December 1966, <https://www.refworld.org/legal/agreements/unga/1966/en/33423>, art. 10(1). See also U.N. G.A., UN General Assembly, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, A/RES/59/262, UN General Assembly, 3 March 2005,

<https://www.refworld.org/legal/resolution/unga/2005/en/11841>, art. 44; UN Commission on Human Rights (46th sess. : 1990 : Geneva), Convention on the Rights of the Child., E/CN.4/RES/1990/74, UN Commission on Human Rights, 7 March 1990, <https://www.refworld.org/legal/resolution/unchr/1990/en/47325>, art. 3; U.N. G.A., UN General Assembly, Convention on the Rights of Persons with Disabilities, A/RES/61/106, Annex I, 13 December 2006, <https://www.refworld.org/legal/agreements/unga/2006/en/90142>, Annex I; UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 19: The right to social security (Art. 9 of the Covenant), E/C.12/GC/19, 4 February 2008, <https://www.refworld.org/legal/general/cescr/2008/en/41968>; Kate Jastram and Kathleen Newland, Family Unity and Refugee Protection, Cambridge University Press, June 2003, <https://www.refworld.org/reference/research/cup/2003/en/49731>. Related rights, such as the right not to be subject to arbitrary or unlawful interference with family (among other matters), are also protected in several of those instruments. See ICCPR, art. 17(1); CRC, art. 16; CMW, art. 14.

[33.] UN Committee on the Rights of the Child (CRC), Committee on the Rights of the Child, Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration, 28 September 2012, <https://www.refworld.org/reference/themreport/crc/2012/en/95889>

[34.] UNHCR, Guidelines on Detention, p. 35.

[35.] Human Rights Watch has documented, over more than 10 years in Europe and beyond, serious violations of children's rights arising from immigration detention of children; highlighting that children may be arbitrarily detained, held in cells with unrelated adults, and subjected to brutal treatment by police, guards and other authorities and are often held in poor conditions that fall far short of international standards governing appropriate settings for children deprived of their liberty, <https://www.hrw.org/topic/childrens-rights/refugees-and-migrants>.

[36.] For more information on the negatives effects of detention on children, <http://endchilddetention.org/impact/> and also <http://www.fmreview.org/detention/farmer.html>.

[37.] UNHCR, Options Paper 2: Options for governments on open reception and alternatives to detention (first published 2015, revised version 2020), 2020, <https://www.refworld.org/policy/strategy/unhcr/2020/en/104606>, p. 3.

[38.] UNHCR, Guidelines on Detention, Guideline 8, para. 48.

[39.] The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Factsheet, March 2017, CPT/Inf(2017)3, <https://rm.coe.int/16806fbf12>.

[40.] European Court of Human Rights has found a violation of Article 3 of the ECHR on account of the detention of refugees for three months in the basement of police headquarters. *Abdolkhani and Karimnia v. Turkey (No.2)*, (2010), ECtHR App. No.50213/08, <http://www.unhcr.org/refworld/docid/4c5149cf2.html>; *Saadi v the United Kingdom*, Application no. 13229/03, Council of Europe: European Court of Human Rights, 29 January 2008, para. 74, <http://www.unhcr.org/refworld/docid/47a074302.html>.

[41.] See Article 11(6) of the recast Reception Conditions Directive.

[42.] UNHCR's position regarding the detention of refugee and migrant children in the migration context, page 1, *supra* fn. 33.

[43.] UNHCR, Guidelines on Detention, Guideline No 7, para. 47(iii) and (iv).

Leino Maiju
UNHCR Representation for Northern Europe