

Observations by the United Nations High Commissioner for Refugees Regional Representation for Northern Europe:

Draft Law Proposal of 5 October 2018 amending the Alien's Act of Finland

I. Introduction

1. The United Nations High Commissioner for Refugees (hereafter “UNHCR”) Regional Representation for Northern Europe is grateful to the Finnish Ministry of the Interior for the invitation to express its views on the draft law proposal of 5 October 2018 amending the Alien's Act of Finland (hereafter “law proposal”).
2. 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 UNHCR has a direct interest in law and policy proposals in the field of asylum. 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 there to[.]”.² UNHCR's supervisory responsibility is reiterated in Article 35 of the 1951 Convention³ and in Article II of the 1967 Protocol relating to the Status of Refugees⁴ (hereafter collectively referred to as the “1951 Convention”).⁵ It 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”)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 Directive on common procedures for granting and withdrawing international protection (recast)⁸

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.refworld.org/docid/3ae6b3628.html>.

² *Ibid*, para. 8(a).

³ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html>.

⁴ UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: <http://www.refworld.org/docid/3ae6b3ae4.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”.

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, *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, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU, available at: <http://www.refworld.org/docid/51d29b224.html>.

(hereafter “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”.

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 (hereafter “UNHCR Handbook”) and subsequent Guidelines on International Protection.⁹ UNHCR also fulfils its supervisory responsibility by providing comments on legislative and policy proposals impacting on the protection and durable solutions of its persons of concern.

II. Scope of the Proposal

4. The law proposal consists of five proposed amendments to the Alien’s Act of Finland. Two amendments concern subsequent applications, one the right to work, one the seizure of travel documents. The fifth amendment concerns the minority of unaccompanied children who attains the age of majority during the course of asylum proceedings in respect of an application for family reunification.
5. The rules on subsequent applications are, according to the law proposal, to be aligned more closely with the recast APD concerning the conditions for examining subsequent applications. Finland has also not included in the Aliens Act all the legal exceptions from the right to stay within the territory following a subsequent application. These options are now suggested to be included into the Aliens Act. It is the intention that Finland’s legislation concerning subsequent applications would follow the conditions set out in the recast APD as closely as possible.
6. The further examination of a subsequent application would require the applicant to present new grounds or arguments that significantly increase the likelihood that the applicant would be considered to be in need of international protection. This change would align legislation with current practice. It is further required that the applicant, for reasons beyond his or her control, has been incapable of asserting the situations in support of their application during the examination of the previous application. The proposal also amends the provision concerning deportation orders in situations where the applicant has submitted a first or later subsequent application. The first subsequent application would not stop the enforcement of a final judgment on the deportation order if the purpose of the application is merely to prevent or delay the immediate implementation of this decision. The

⁹ 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. available at: <http://www.refworld.org/docid/4f33c8d92.html>.

second subsequent application would no longer stop the implementation of a deportation order, regardless of the procedure in which the previous application has been resolved.

7. The starting date for the right to work for a person seeking international protection is, according to the law proposal, to be clarified so that the right to work begins when the application is submitted and the applicant has stayed in the country, depending on their case, for either three or six months after the submission. The time limit is three months if the applicant, while seeking asylum, presents a valid travel document. Regarding the subsequent application, the same deadline would apply as during the first application. The right to work would end when the deportation order becomes enforceable. For a subsequent application a new waiting period of either three or six months will be applied, and the right to work would terminate depending on whether a new decision for deportation is taken or if the old decision is still seen to be valid. The right to work would also expire when the Finnish Immigration Service has taken a decision on the expiry of an application for international protection.
8. The law proposal introduces seizure of the passport or any other travel document of the applicant by authorities until the applicant has been granted a residence permit or leaves the country.¹⁰ The travel document could be seized by the police, border inspection authority or the Finnish Immigration Service. The travel document would normally be seized as soon as the application is filed. It could also be seized by the authorities later during the asylum or appeals procedure. The proposed seizure of travel documents would be part of the asylum procedure and would not be subject to a separate administrative decision. A certificate of the seizure would be provided to the applicant.
9. The law proposal would change the regulations on family reunification based on Case C-550/16 of the Court of Justice of the European Union (hereafter “CJEU”). In the case of unaccompanied minors who have been granted refugee status, an exception is proposed according to which an applicant who has applied for international protection as a child should be considered a minor even if the decision on a family reunification application is made after he or she has reached adulthood. An application for a residence permit on the basis of family ties should be made by the sponsor within three months of receiving refugee status.

III. Observations

10. A Directive is a legislative act that sets out a goal that all EU countries must achieve. However, it is up to Member States to devise the means to reach these goals and adopt measures to transpose directives into domestic law, thereby leaving Member States a margin of discretion. According to Article 5 of the recast APD, Member States may introduce or retain more favourable standards on procedures for granting and withdrawing international protection, insofar as those standards are compatible with this Directive. The recast APD sets common minimum standards for asylum procedures, with no obligation for Member States to transpose all provisions in full. The provisions in the recast APD now proposed to be transposed into Finnish legislation and thus introduced into the Finnish asylum procedure are minimum level provisions under the level of which the legislation may

¹⁰ At the moment the legislation only caters for temporary seizure of travel documents.

not go. Thus, UNHCR wishes to stress that there is no obligation for Finland to transpose the said provisions.

1. Subsequent applications

11. The law proposal introduces an amendment providing that a further examination of the application may be decided only where the applicant concerned was, through no fault of his/her own, incapable of asserting the situations in the previous procedure, or by exercising his/her right to an effective remedy. UNHCR is concerned that the implementation of such a procedural bar as enabled by Article 40 (4) of the Recast APD may lead to a potential breach of Finland's *non-refoulement* and human rights obligations. Authorities should not automatically refuse to examine a subsequent application on the ground that the new elements or findings could have been raised in the previous procedure or on appeal.¹¹ Consequently, UNHCR recommends omitting the second sentence in the proposed Section 102, Paragraph 3 from the proposal.
12. In particular, with regard to what "no fault of his or her own" entails, the preamble to the law proposal mentions changes occurring in the applicants country of origin, changes in the applicants personal situation, and new information the applicant has received – including information the applicant could not assert earlier or information that the applicant was not aware could influence the assessment of the need for international protection. UNHCR wishes to draw attention to the fact that there are many reasons why facts relevant to the application for international protection may not be raised in the course of the previous procedure. UNHCR calls, in particular, for due consideration to be paid to the situation of applicants with specific vulnerabilities, such as LGBT, child asylum-seekers, and victims of trafficking, whose inability to assert their claim initially should be recognized as a valid reason for assessing a subsequent application.
13. LGBTI individuals' capacity to present their claims fully and without fear can be impacted detrimentally by discrimination, hatred and violence in all its forms. Some may be deeply affected by feelings of shame, internalized homophobia and trauma, and their capacity to present their case may be greatly diminished as a consequence. Where the applicant is in the process of coming to terms with his or her identity or fears openly expressing his or her sexual orientation and gender identity, he or she may be reluctant to identify the true extent of the persecution suffered or feared. Some LGBTI applicants may, for instance, change their claims during the process by initially stating that their sexual orientation is imputed to them or making a claim on a ground unrelated to their sexual orientation or gender identity, to eventually expressing that they are LGBTI. Adverse judgements should not generally be drawn from someone not having declared their sexual orientation or gender identity at the screening phase or in the early stages of the interview.¹²

¹¹ 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, pages 36 - 37, available at: <http://www.refworld.org/docid/4c63ebd32.html>.

¹² UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01, available at: <http://www.refworld.org/docid/50348afc2.html>.

14. As with dependent adult asylum-seekers, a child asylum-seeker may not be able to substantiate his/her claim initially. He or she may only later develop sufficient maturity and confidence to report on his/her experiences. It is therefore important that appropriate safeguards ensure that the examination of subsequent asylum applications of child dependants, and/or separated child asylum-seekers, take such constraints into account.¹³
15. Victims who have escaped from their traffickers could be in fear of revealing the real extent of the persecution they have suffered. Some may be traumatized and in need of expert medical and/or psycho-social assistance, as well as expert counselling. Women, in particular, may feel ashamed of what has happened to them or may suffer from trauma caused by sexual abuse and violence, as well as by the circumstances surrounding their escape from their traffickers. In such situations, the fear of their traffickers will be very real. Additionally, they may fear rejection and/or reprisals by their family and/or community which should be taken into account when considering their claims.¹⁴
16. In many cases, applicants will need time, an environment of trust, and concrete psychological support to overcome trauma and talk about their experience. Certain elements of the claim may therefore become evident only at a later stage, and sometimes possibly only at the stage of a subsequent application. The opportunity to present elements which are relevant for the applicant's claim should therefore not be precluded in a subsequent application. In addition, UNHCR notes that the recast APR proposal requires the determining authority to carry out an "adequate and complete examination".¹⁵ Not allowing certain information or remedies in subsequent applications may be at variance with procedural fairness and may have serious negative consequences, including a violation of the principle of *non-refoulement*.

2. Exceptions from the right to remain in case of subsequent applications

17. UNHCR notes that Finland according to the law proposal intends to transpose Article 41 (1) of the recast APD, which contains derogations to the general principle of the right to remain for subsequent applications that are found not to contain new elements and that are lodged only in order to frustrate the imminent removal provided that the determining authority is satisfied that the removal will not result in direct or indirect *refoulement* of the applicant. UNHCR wishes to stress that when a Member State wants to make an exception to the right of the applicant to remain in situations of subsequent applications, 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

¹³ 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, pages 11 – 12, available at: <http://www.refworld.org/docid/4c63ebd32.html>.

¹⁴ UNHCR, *Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked*, 7 April 2006, HCR/GIP/06/07, pages 16 – 17, available at: <http://www.refworld.org/docid/443679fa4.html>.

¹⁵ Article 31(2) recast APD.

Rights.¹⁶ UNHCR further notes that the preamble of the law proposal stresses that it must be satisfied that the return decision will not lead to *refoulement*. However, neither the proposed law amendment nor the preamble contains a reference to the determining authority. For the law proposal to be in line with the Directive and the case law of the European Court on Human Rights, the law must clearly state that the determining authority must be involved in applying exceptions from the right to remain in case of subsequent applications.

3. Access to labour market

18. In UNHCR's view, early access to the labour market fosters integration and increases the ability of the person concerned to self-sustain as well as to cope and constructively engage with asylum and/or migration processes.¹⁷ It promotes the social inclusion and self-reliance of asylum-seekers, and avoids the loss of existing skills and dependency. For the host State, it brings increased tax revenues and savings in accommodation and other support and reduces illegal working.¹⁸
19. Whereas UNHCR appreciates the need to prevent fraudulent asylum applications, including subsequent applications made purely to benefit from the right to work which the law proposal refers to, UNHCR wishes to point out that measures envisaged, must be proportional to the aim of the amendment. According to the preamble of the law proposal, 234 applicants were granted residence permits in Finland during the six first months of 2018 after filing a subsequent application. This shows that subsequent applications are often based on valid claims for international protection. With this in mind, UNHCR recommends that *bona fide* subsequent applications be omitted from the introduction of a waiting period for access to labour market.

4. Seizure of travel documents

20. UNHCR sees the seizure of travel documents as an alternative to detention.¹⁹ Asylum-seekers may be required to deposit or surrender identity and/or travel documentation (such as passports). In such cases, however, individuals need to be issued with substitute documentation that authorises their stay in the territory and/or release into the community.²⁰ According to the law proposal, an attestation of the seizure would be issued to the applicant. UNHCR welcomes that an attestation will be issued and recommends, that the attestation specifies that it suffices as proof of legal stay on the territory.

¹⁶ See *AC and others v. Spain*, para 94, available (in French) at:

[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"itemid":\["001-142467"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{).

¹⁷ UN High Commissioner for Refugees (UNHCR), *Options Paper 2: Options for governments on open reception and alternatives to detention*, 2015, page 6, available at: <http://www.refworld.org/docid/5523e9024.html>.

¹⁸ UNHCR, *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, page 38, available at: <http://www.refworld.org/docid/5541d4f24.html>.

¹⁹ See UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Annex A, page 41, available at: <http://www.refworld.org/docid/503489533b8.html>.

²⁰ Article 27, 1951 Convention. 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 24, available at: <http://www.unhcr.org/refworld/docid/4e315b882.html>.

5. Minority of unaccompanied children in family reunification

21. When refugees are separated from family members as a consequence of their flight, a prolonged separation can have devastating consequences on the wellbeing of the refugees and their families. The negative consequences impact on the refugees' ability to integrate in their country of asylum, become active contributors to the host society, and rebuild their lives. Finding and being reunited with family members is often one of the most pressing concerns for asylum-seekers and refugees. Family reunification in the country of asylum is often the only way to ensure that the right to family life and family unity of refugees is respected.²¹
22. In this regard, UNHCR has welcomed the judgment of the CJEU of 12 April 2018 in the case of *A, S v. Staatssecretaris van Veiligheid en Justitie* (C-550/16, 26 October 2017), in which the Court has ruled that a third-country national or stateless person who attains the age of majority during the course of asylum proceedings but who was a minor at the moment of his or her entry into the territory of a Member State and of the introduction of his or her asylum application must be considered as a minor in respect of an application for family reunification. Through its ruling, the CJEU has affirmed the importance of the principle of family unity as a means to protect family life, has recognised the special situation of refugees and unaccompanied minors in that regard and affirmed the declaratory nature of refugee recognition, consistent with the provisions of the Family Reunification Directive. UNHCR thus welcomes Finland's the proposed amendments, which would ensure conformity of its legislation with the aforementioned CJEU ruling.

IV. Concluding recommendations

23. In light of the above analysis, UNHCR recommends that:
- the second sentence in proposed Section 102, Paragraph 3 be omitted;
 - the inability of applicants with specific vulnerabilities, such as LGBTI and child asylum-seekers, as well as victims of trafficking, to assert their claim initially be recognized as a valid reason for examining a subsequent application;
 - it be clearly stated, that the determining authority will be responsible for exceptions from the right to remain in case of subsequent applications;
 - the waiting period for access to labour market be omitted in cases of *bona fide* subsequent applications;

²¹ UNHCR, *Summary Conclusions on the Right to Family Life and Family Unity in the Context of Family Reunification of Refugees and Other Persons In Need Of International Protection*, 4 December 2017, Expert Roundtable, para 1, available at: <http://www.refworld.org/docid/5b18f5774.html>.

- attestations issued when travel documents are seized specify that they suffice as proof of legal stay on the territory.

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