UNHCR Comments on law proposal RP 86/2008 rd transposing the Asylum Procedures Directive into Finnish law

I. Introduction

Finland is proposing amendments to the Finnish Aliens Act 301/2004 (hereinafter "Aliens Act") in line with Finland's obligation to transpose Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ L 326/13 of 13.12.2005; hereinafter "Asylum Procedures Directive").

UNHCR is entrusted by the United Nations General Assembly with the responsibility for providing international protection to refugees, and for seeking permanent solutions for the problem of refugees. 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", which includes supervision of national legislation, and proposed amendments thereto, of signatory countries regulating the application of the 1951 Convention relating to the Status of Refugees (hereinafter "1951 Convention"). UNHCR's supervisory responsibility under its Statute is reiterated in Article 35 of the 1951 Convention and Article II of the 1967 Protocol relating to the Status of Refugees. It has also been reflected in EC law, including in the Asylum Procedures Directive.[1] The Office therefore appreciates the opportunity to provide comments on the proposed Bill 86/2008 concerning the amendment of the Aliens Act.

UNHCR welcomes the aim of EU Member States to create a common European asylum system based on a full and inclusive application of the 1951 Convention. At the same time UNHCR would like to emphasize that the provisions of the Asylum Procedures Directive do not fully reflect the standards of the 1951 Convention and to reiterate that the Asylum Procedures Directive aims to set minimum standards only, which leave EU Member States free to retain or introduce higher standards of protection if they so choose. UNHCR would like to encourage Finland to consider introducing best standards of protection.

[1] Declaration 17 to the Treaty of Amsterdam (OJ L 304/12 of 30.9.2004) provides that "Consultations shall be established with the United Nations High Commissioner for Refugees … on matters relating to asylum policy". Article 21 the Asylum Procedures Directive, especially Article 21(c), obliges Member States to 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 asylum at any stage of the procedure."

II. General comments

UNHCR is pleased with the orientation of many of the provisions of the proposed amendments. UNHCR welcomes the fact that the proposed amendments are intended to codify certain aspects of the asylum procedure, which strengthens the position of the applicant, provides clarity for decision-makers and improves the control of decision-making. In view of the fact that the Asylum Procedures Directive defines common minimum standards for national asylum procedures, but permits Member States to retain or introduce higher standards in national law, UNHCR urges Member States to apply more favourable provisions where necessary to ensure compliance with international refugee and human rights law. Finally, UNHCR would like to recall that it is crucial for the protection of those in need of it that the legislation is interpreted in good faith by the decision-makers with the objective of strengthening, not undermining refugee protection.

III. Comments on the proposed amendments

Proposed § 95 a Aliens Act:

UNHCR notes that the proposed provision relates to Article 10.1 a (and Article 34.1) Asylum Procedures Directive. It is proposed that information about the asylum procedure and the applicants' rights and obligations is provided to the applicant in his/her mother tongue or in a language he/she is, on reasonable grounds, assumed to understand.

UNHCR would like to reiterate[2] that in the context of an asylum procedure, where so much depends on the testimony of an individual, effective communication with the asylum-seeker is essential. UNHCR considers it necessary to provide information to every asylum-seeker in a language which he or she *actually understands*. Assumptions that an asylum-seeker speaks or understands the official language of his or her country of origin may be incorrect. As a matter of principle, bearing in mind the need to prevent deliberate obstruction, every effort should be undertaken in this regard by the countries of asylum.

Proposed § 95 b Aliens Act:

UNHCR notes that the proposed provision relates to Article 19.1 Asylum Procedures Directive. UNHCR appreciates that certain safeguards are proposed to ensure that the withdrawal of an application for international protection is a reflected decision of the applicant (the applicant shall state the reason for withdrawing the application in the withdrawal-document, it shall be apparent that the decision is based on his/her own will in the absence of any pressure from the authorities, the recipient of the withdrawal shall ask the applicant how he/she would handle possibly being expelled from and prohibited to enter Finland). UNHCR recommends to make it a prerequisite in practice that the

[2] UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004), 10 February 2005, Comment on Article 9(1)(a).

applicant has a right and an opportunity to meet a lawyer before making the decision to withdraw the application, in order to ensure that the applicant is fully aware of the consequences of his/her decision. This is particularly relevant for applicants who are detained.

Proposed § 95 c Aliens Act:

UNHCR notes that the proposed provision relates to Article 20 Asylum Procedures Directive. It is proposed that the Finnish Immigration Service (Migri) decides that an application for international protection shall be annulled (*förfalla*), if the applicant has died or left, or is likely to have left, the country. This is particularly relevant in cases of transfers under the Dublin II Regulation.

UNHCR welcomes the proposed § 95 c (2) Aliens Act, according to which an asylum seeker, who reports to the authorities after Migri has decided that his/her application has ceased, shall be informed about his/her right to submit a new application and to have his/her application for international protection examined on the merits (the new application would not be a subsequent application in meaning of § 102 Aliens Act, as the initial application has not been decided upon on the merits).

Proposed § 97 a Aliens Act (Asylum interview):

UNHCR welcomes that it is proposed that the asylum interview shall be recorded, § 97 a (3) Aliens Act, as this enables the most accurate documentation of the interview and the information provided and also creates a more comfortable atmosphere for the asylum seeker than having the interviewer type the information during the interview.

UNHCR notes that the proposed § 97 a (4) Aliens Act relates to Article 14.1-3 Asylum Procedures Directive and welcomes that the protocol of the asylum interview shall be translated for the asylum seeker after the interview, that the applicant shall be informed about the possibility to make changes and additions and that the applicant's approval of the protocol should be requested. This way, the establishment of the grounds for the application can be ascertained, misunderstandings can be avoided and contradictions can be clarified. It is important that correcting misinterpretations and incorrect notes shall not be turned against the applicant. UNHCR further welcomes that the applicant shall receive a copy of the protocol immediately or as soon as possible after the interview.

UNHCR welcomes that the proposed § 97 a (5) Aliens Act allows for the presence of a legal representative during the asylum interview of minors.

Proposed § 97 b Aliens Act:

UNHCR notes that the proposed provision relates to Article 22 b (and Article 38.1 d) Asylum Procedures Directive. UNHCR appreciates that the motivation (at p. 59, Swedish version) states that the State's responsibility not to obtain information relating to asylum applications from the alleged actors of persecution comprises not only obtaining

information directly, but extends also to obtaining information indirectly. However, UNHCR would like to encourage Finland to spell this out in the provision itself.

Proposed § 98 (2) Aliens Act:

UNHCR notes that it is proposed to amend the existing § 98 (2) Aliens Act in order to achieve compliance with Article 8.2 b Asylum Procedures Directive, by adding the condition that up-to-date country of origin information shall be obtained from various sources, including UNHCR (motivation pp. 60-61, Swedish version). UNHCR would like to emphasize that country of origin information relied upon by the authorities as a basis for decisions should be similarly available to the asylum seeker and his/her legal representative, so that it can be challenged, and should further be subject to the scrutiny of reviewing bodies.

Proposed § 198 a Aliens Act:

UNHCR notes that the proposed provision regulates the annulment (*förfallande*) of appeals if the appellant has left the country or is likely to have left the country, as provided for in the proposed § 95 c (1) Aliens Act. It should be borne in mind that not all appeals do have automatic suspensive effect and that deportations of asylum seekers (as a consequence of negative decisions at the first instance level) while the appeal is pending occur. The proposed § 198 a Aliens Act should not lead to situation, in which appeals are annulled rather than decided upon, because the appellant has been deported. Instead, the appeal should be processed and, if the appeal is granted, the deported applicant should be issued a residence permit and return to Finland.

In addition, UNHCR would like emphasize that supranational courts or judicial bodies, such as the European Court for Human Rights, regularly require an exhaustion of domestic remedies for a case to be admissible. The right to turn to such courts, which can be effective if a person's claim is admissible, must not be undermined by annulling a pending appeal due to the appellant's deportation.

UNHCR's supervisory role:

UNHCR's supervisory responsibility, outlined in the introduction of this document, is reiterated in Article 21 of the Asylum Procedures Directive. Article 21(c) obliges Member States to 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 asylum at any stage of the procedure." UNHCR appreciates that the proposal (at p. 34, Swedish version) states that "competent authorities" does not only refer to the decision-making body [i.e. Migri], but to all authorities such as the police, the border guard and courts. The proposal (at p. 34, Swedish version) continues: "I utlänningslagen finns inte någon separat bestämmelse där det särskilt föreskrivs att UNHCR ska ges de rättigheter som avses i artikel 21.1 i direktivet. Med tanke på genomförandet av direktivet torde det dock räcka att de

rättigheter som nämns i punkten uttryckligen inte förvägras UNHCR med stöd av den finska lagstiftningen."

UNHCR would like to encourage Finland to spell out the guarantees laid down in Article 21 Asylum Procedures Directive, which are reflected on p. 34 of the proposal (Swedish version), in the Finnish legislation, as the codification of legal guarantees provides clarity and is desirable in terms of the rule of law.

IV Comments on the existing system's compatibility with the Directive and international standards

In addition to above comments on the proposed amendments, UNHCR would like to further comment on certain aspects of the existing Finnish asylum legislation/procedure, many of which relate to the Asylum Procedures Directive.

Safe Country of Asylum

According to § 103 (1) Aliens Act, an application may be dismissed if the applicant has arrived from a safe country of asylum (defined in § 99 Aliens Act) where he or she enjoyed or could have enjoyed protection as referred to in § 87 Act (asylum) or § 88 Aliens Act (need for protection) and where he or she may be returned. According to § 99 Aliens Act, a State may be considered a safe country of asylum for the applicant if it is a signatory, without geographical reservations, to the *Convention relating to the Status of Refugees, the International Covenant on Civil and Political Rights* and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and adheres to them. The present proposal states (at p. 38, Swedish version) that the term "safe country of asylum" comprises both the concept "first country of asylum" (Article 26 Asylum Procedures Directive) and the concept "safe third country" (Article 27 Asylum Procedures Directive) and that the term "safe country of asylum" has rarely been applied in Finnish practice and not at all in recent years.

As the preamble to the 1951 Convention and a number of Executive Committee Conclusions highlight, refugee protection issues are international in scope and satisfactory solutions cannot be achieved without international cooperation. The primary responsibility to provide protection remains with the State where the claim is lodged. A transfer of responsibility should be envisaged only between States with comparable protection systems, on the basis of an agreement which clearly outlines their respective responsibilities, such as the Dublin II Regulation. By contrast, the designation of a "safe country of asylum", as defined in § 99 Aliens Act, rests on a unilateral decision by Finland to invoke the responsibility of a third State to examine an asylum claim.

UNHCR notes that none of the countries at the periphery of the European Union, which are not included in the Dublin II regime, could legitimately be considered safe. There is thus no room for an application of the concept of a "safe country of asylum" in practice. We note that the proposal states (at p. 38, Swedish version) that the concept "safe country of asylum" has rarely been applied in Finnish practice and not at all in recent years. In

light of this, the Committee may wish to consider abolishing the provision (in favour of multilateral agreements which ensure access to effective protection for asylum applicants).

If Finland decides to retain the provision, UNHCR would like to emphasize that the following requirements should met when applying the "safe country of asylum" notion:

a) The applicant should be protected against *refoulement* and be treated in accordance with accepted international standards as outlined, *inter alia*, in the 1951 Convention – i.e. the third country should be "safe" for the applicant, which means that protection must in practice be accessible to the individual and effective. It is crucial that "safety" is ensured under the country's practice and not just under the formal obligations it may have assumed. UNHCR notes that this condition is reflected in § 99 Aliens Act ("…and adheres to them") and reiterates that the assessment of "safety" must focus on the country's practice.

UNHCR would like to emphasize that the protection in the third country should be available, i.e. accessible to the individual, and effective in practice. The Office recommends, therefore, using the term 'effective protection' in national legislation and suggests the elaboration of explicit benchmarks in line with the standards outlined in the 1951 Convention and the Lisbon Conclusions on 'effective protection'. Furthermore, the capacity of States to provide effective protection in practice should be taken into consideration, particularly if they are already hosting large refugee populations. Countries where UNHCR is engaged in refugee status determination under its mandate should, in principle, not be considered first countries of asylum. UNHCR often undertakes such functions because the State has neither the capacity to conduct status determination nor to provide effective protection. Generally, resettlement of persons recognized to be in need of international protection is required. The return to such countries of persons in need of international protection should therefore not be envisaged.

b) The applicant should have a genuine connection or close links with the third country. This link should be stronger than the link to the State in which asylum is requested, so that it is fair and reasonable that he or she be called upon first to request asylum there. The asylum-seeker should have transited through the State concerned, although mere transit alone or a simple entitlement to entry without actual presence would not, in UNHCR's view, constitute a connection or close link as transit is often the result of fortuitous circumstances and does not necessarily imply the existence of any meaningful link or connection. Examples of links which might reasonably be considered are family links, including extended family and possibly a broader community, previous stay such as visits or studies, as well as language and/or cultural links. Such links should be required in addition to transit through the country. The intentions of the asylum-seeker as regards the country in which he or she wishes to request asylum should, as far as possible, be taken into account. Such an approach would also be likely to have a positive impact on the integration of persons who are recognized to be in need of international protection.

UNHCR notes that the requirement of a meaningful link or connection is also contained in Article 27 (2) lit. a Asylum Procedures Directive and is concerned that this is not adequately reflected in Finnish legislation (the proposal at p. 39, Swedish version, states: "As the directive does not set up more specific requirements about the connection between the asylum seeker and the third country, the fact that the asylum seeker has come from a country as described in § 103 (1), Alt. 1, Aliens Act can be considered to meet the requirements of the directive."). UNHCR encourages Finland to provide for the requirement of a meaningful link or connection and makes reference to the examples of meaningful connections elaborated above.

c) The third country should expressly agree to admit the applicant to its territory and to consider the asylum claim substantively in a fair procedure. To that end, it is important for the returning State to provide clear information (in the language of the third State and one understood by the applicant) that the individual is an asylum-seeker and that his/her application has not been substantively examined (this is provided for in § 104 (2) Aliens Act, however not mentioning the language in which the document is issued). The third State should also provide access to a durable solution for those recognized to be in need of international protection.

d) The provision should permit for exceptions *inter alia* for separated children and other vulnerable persons.

e) In terms of procedural safeguards, the individual's own circumstances should be examined, so as to give the asylum seeker the opportunity to rebut a general presumption of safety. S/he could, for instance, demonstrate that on the facts of his/her case, the third State would apply more restrictive criteria in determining his/her status than the State where the application has been presented. In this connection, an appeal or review possibility with suspensive effect should be available (see Article 3 in connection with Article 13 of the European Human Rights Convention).

UNHCR observes that a number of practical problems resulting in the denial of protection may arise. For instance, an individual returned to a country deemed to be safe is denied access to the asylum procedure on the grounds that the deadline for submitting the application has lapsed. Elsewhere returned asylum-seekers are detained, pending deportation with no guaranteed access to legal aid or UNHCR. UNHCR furthermore notes that with the unilateral designation of safe third countries without due regard to objective criteria, asylum-seekers often feel compelled to conceal their identity and travel route, to destroy their documents and to pay increasing sums of money to smugglers.

Safe Country of Origin

According to § 103 (2), Alt. 1, Aliens Act, the accelerated procedure may be applied if the applicant comes from a safe country of origin (defined in §100 Aliens Act) where he or she is not at risk of treatment as referred to in § 87 Act (asylum) or § 88 Aliens Act (need for protection) and where he or she may be returned. According to § 100 Aliens Act a State where the applicant is not at risk of persecution or serious violations of human

rights may be considered a safe country of origin for the applicant. When assessing a safe country of origin, particular account is taken of: (1) whether the State has a stable and democratic political system; (2) whether the State has an independent and impartial judicial system, and whether the administration of justice meets the requirements for a fair trial; and (3) whether the State has signed and adheres to the main international conventions on human rights, and whether serious violations of human rights have taken place in the State.

UNHCR has, in principle, no objection to the notion "safe country of origin" where it is used as a procedural tool to assign certain applications to accelerated procedures, if it is ensured that these procedures contain the normal safeguards. Likewise, UNHCR has no objection where the notion "safe country of origin" has an evidentiary function, for example giving rise to a presumption of non-validity of claims, however, the claimant should be given the possibility to rebut the presumption. For this rebuttal to be effective it should in turn be surrounded by normal procedural safeguards, including an effective remedy in the form of an independent review.

UNHCR appreciates the benchmarks entailed in § 100 Aliens Act as to when a country could be included in the list and emphasizes that the designation of a safe country of origin needs to take account not simply of international instruments ratified and relevant legislation enacted there, but also of the actual degree of respect for human rights and the rule of law of the country's record of not producing refugees, of its compliance with human rights instruments, and of its accessibility to independent national or international organizations for the purpose of verifying human rights issues. UNHCR would like to add that the decision to include countries in the safe country of origin list should only be based on verifiable current assessments of factual situations, such as country of origin information provided by UNHCR. It should not be possible to include a country where the potential for conflict is still considerable. UNHCR recommends that appropriate mechanisms provide for a regular review of such lists. Furthermore, any designation of such countries by law or regulation should be flexible enough to take account of changes, both gradual and sudden, in a given country.

As regards the possibility to designate a part of the country as safe, UNHCR notes that, in principle, a country cannot be considered "safe" if it is so only for part of its territory. Furthermore, UNHCR wishes to emphasize that the designation of a safe part of a country does not necessarily represent an internal flight or relocation alternative. The existence of a "safe" part of a country may be but one element in an examination of whether a particular asylum seeker has such an alternative. The complex questions which arise in the application of the internal flight alternative require a careful examination of the individual case and should not be dealt with in an accelerated procedure. In terms of transparency and procedural fairness, the list of safe countries of origin should be made publicly available.

Manifestly unfounded applications:

According to § 103 (2), Alt. 2, Aliens Act, the accelerated procedure may be applied if the application can be considered manifestly unfounded, which is defined in § 101 Aliens Act as following:

1) No grounds as mentioned in § 87(1) Aliens Act (asylum) or § 88(1) (need for protection) or other grounds that are related to non-refoulement have been presented, or if the claims presented are clearly implausible
2) The applicant obviously intends to abuse the asylum procedure:
a) by deliberately giving false, misleading or deficient information on matters that are essential to the decision on the application
b) by presenting forged documents without an acceptable reason
c) by impeding the establishment of the grounds for his or her application in another fraudulent manner; or
d) by filing an application after a procedure for removing him or her from the country has begun, to prolong his or her unfounded residence in the country; or
3) The applicant comes from a safe country of asylum or origin where he or she may be returned, if the authorities have, for weighty reasons, not been able to issue a decision within seven days (as laid down in § 104).

UNHCR has long taken the position[3] that national procedures for determination of refugee status may usefully provide for dealing in an accelerated procedure with manifestly unfounded applications for refugee status or asylum. EXCOM Conclusion 30 (XXXIV), 1983, describes "clearly abusive" and "manifestly unfounded" applications as "those which are clearly fraudulent or not related to the criteria for the granting of refugee status laid down in the 1951 … Convention … nor to any other criteria justifying the granting of asylum", i.e. claims "which are so obviously without foundation as not to merit full examination at every level".

UNHCR has stated that the notion of "clearly fraudulent" could reasonably cover situations where the applicant deliberately attempts to deceive the authorities determining refugee status. The mere fact of having made false statements to the authorities does not, however, necessarily exclude a well-founded fear of persecution and vitiate the need for asylum, thus making the claim "clearly fraudulent". Only if the applicant makes what appear to be false allegations of a material or substantive nature relevant for the determination of his or her status could the claim be considered "clearly fraudulent".

As to the use of forged or counterfeit documents, it is not the use of such documents which raises the presumption of an abusive application, but the applicant's insistence that the documents are genuine. It should be borne in mind in this regard that asylum-seekers who have been compelled to use forged travel documents will often insist on their

[3] UN High Commissioner for Refugees, *UNHCR's Position on Manifestly Unfounded Applications for Asylum*, 1 December 1992. 3 European Series 2, p. 397. Online. UNHCR Refworld, available at: http://www.unhcr.org/refworld/docid/3ae6b31d83.html [accessed 13 October 2008]

genuineness until the time they are admitted into the country and their application examined.

Applications suspected of being filed to forestall an expulsion order should only be considered as manifestly unfounded if the applicant has had ample opportunity to apply for asylum previously and has not given a valid explanation for the delay.

Where applicants have already had their claim for asylum rejected in another country upon examination of the substance of their claim, UNHCR agrees that such applications could appropriately be considered in the procedure for manifestly unfounded applications. However, this should only be the case where the examination on the substance is in conformity with UNHCR eligibility standards (of which practice in many EU Member States currently falls short), and the procedures comprise adequate procedural guarantees. In such cases, rejection in a previous procedure raises a rebuttable presumption that there is no substance to the claim.

As concerns applications not related to the granting of refugee status, UNHCR has on a number of occasions stressed that a claim should not be rejected as manifestly unfounded even if it does not fall under the 1951 Convention definition, if it is also evident that the applicant is in need of protection for other reasons and thus may qualify for the granting of asylum. When an assessment of credibility is necessary to establish the subjective element of the applicant's claim the situation is different. Issues of credibility are so complex that they may be more appropriately dealt with under the normal procedure. It should also be borne in mind that not all asylum-seekers have the capacity without assistance to articulate clearly and comprehensively why they left, and certainly not where there is an element of fear or distrust involved, or where other factors are at play, including the quality of the interpreters.

Necessary procedural safeguards include that:

- the applicant should be given a full personal interview by a fully qualified official and, whenever possible, by an official of the authority competent to determine refugee status;
- the manifestly unfounded or abusive character of an application should be established by the authority normally competent to determine refugee status;
- an unsuccessful applicant should be able to have a review of a negative decision. This review possibility can be more simplified than that available in the case of rejected applications which are not considered manifestly unfounded or abusive. UNHCR considers that in order to be meaningful, the review should be by an authority different from and, if possible, independent of the one making the initial decision. The appeal should have suspensive effect allowing the applicant to remain in the country pending the review of his or her case;
- UNHCR should have the possibility of access to all claims at all stages of the procedure.

UNHCR notes with concern that in the Finnish legislation several reasons for a claim to be considered manifestly unfounded refer to credibility, such as "clearly implausible", "abusing asylum procedure", “deliberately gives false, misleading or deficient information on essential matters", "another fraudulent manner". UNHCR would like to emphasize that the credibility assessment is an issue that is too complex to be made in the accelerated procedure and encourages Finland to revise its legislation on manifestly unfounded applications in line with the above comments.

Subsequent applications

According to § 103 (2), Alt. 3, Aliens Act, the accelerated procedure may be applied if the applicant has filed a subsequent application which contains no new grounds for staying the country. According to § 102 Aliens Act, a subsequent application means an application for international protection filed by an alien after his or her previous application was rejected by the Finnish Immigration Service or an administrative court while he or she still resides in the country, or if he or she has left the country for a short time after his or her application was rejected. A decision on a subsequent application may be issued without an asylum interview, § 102 (3) Aliens Act.

UNHCR recommends to provide for exceptions from this provision if the first application has been “rejected” on formal grounds without an examination on the merits. Claimants should be permitted to reopen the first asylum procedure in cases where an initial “rejection” was based on the “safe country of asylum” concept or arrangements such as the Dublin II Regulation, if it subsequently emerges that Finland is nonetheless responsible for determining the claim on the merits. UNHCR welcomes that this is proposed for withdrawals (proposed § 95c Aliens Act).

Furthermore, UNHCR would like to emphasize that the requirement of “new grounds” should be applied in a protection oriented manner, in line with the object and purpose of the 1951 Convention, and take into account, *inter alia*, trauma and culture-, gender- or age-related sensitivities, which may not have been considered sufficiently earlier. Facts supporting the essence of a claim, which could contribute to a revision of an earlier decision, should generally be considered as new elements. Gross procedural errors should also lead to a reopening of the procedure. If a new element appears to reinforce an earlier claim and could consequently result in a positive revision of the decision, the claim should not be considered in an accelerated procedure.

Enforcement/effective remedy (suspensive effect of appeals):

Decisions in cases where the applicant arrived from a safe country of asylum or origin or the application is considered manifestly unfounded, are enforceable eight days after notification of the decision, of which five days have to be working days, § 201 (3) Aliens Act. The applicant may appeal to the Helsinki Administrative Court within 30 days from the notification. Under the accelerated procedure, appeals do not have automatic suspensive effect. However, if a petition is filed to the court to suspend the expulsion, the court has to make an interim decision within eight days. Decisions under the Dublin II

Regulation and cases of subsequent applications can be enforced directly after service of the decision, § 201 (2) Aliens Act, unless otherwise ordered by an administrative court.

UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* provides in its paragraph 192 (vii) that an "(…) applicant should be permitted to remain in the country pending a decision on his initial request by the competent authority (…) unless it has been established by that authority that his request is clearly abusive. He should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending."

UNHCR would like to emphasize that the existence of an effective appeal procedure forms an integral part of a fair and efficient asylum system and that quite a number of refugees in Europe are recognized only during the appeal process. In that respect, the suspensive effect of an asylum appeal can serve as a critical safeguard, given the potentially serious consequences of an erroneous decision (at the first instance level). To enable the suspensive effect of an appeal is often essential to ensure respect for the principle of *non-refoulement*. If an applicant is not permitted to await the outcome of an appeal against a negative decision at first instance in the territory of the country in which he seeks asylum, the remedy against a decision, in practice, will be most of the time ineffective.

Exceptions to this fundamental principle should only be permitted in precisely defined cases, where there is clearly abusive behaviour on the part of an applicant, or where the unfoundedness of a claim is manifest. Here, the automatic application of suspensive effect (as defined in Executive Committee Conclusion No. 30 (XXXIV) of 1983) could be lifted. Additional exceptions could apply with respect to preliminary examinations in the case of subsequent applications, and where there is a formal arrangement between States on responsibility-sharing with respect to the determination of asylum claims. However, even in these cases, there should be some form of review by a court or other independent body.

The assessment and possible denial of suspensive effect in an individual case should take into account the possibility of a positive outcome of the appeal. Such a review could be simplified and fast, provided both facts and law are considered. In order to be meaningful, the applicant should always be permitted to stay until this review is completed and a decision taken. UNHCR considers that review prior to removal should be required explicitly.

Bearing in mind, these considerations, the principle of suspensive effect of appeals should be the rule and therefore be observed in the other cases (safe exceptions provided for above). From this and recalling the recommendation (UNHCR Handbook) that an applicant should be permitted to remain in the country while an appeal is pending except the claim is clearly abusive.

Oral hearing at the appeal stage:

UNHCR would like emphasize that, as a general rule, asylum seekers should be given the opportunity to present their appeal in person. In particular, an oral hearing at the appeals stage should be granted in the following circumstances:

- The negative first instance decision was based on credibility finding that were not adequately addressed during the Refugee Status Determination (RSD) interview and supported in the RSD assessment;
- Evidence that was relevant to the determination of the claim was presented by the applicant but was not adequately considered in the RSD interview and the RSD assessment.
- New evidence is raised in the appeal application that is relevant to the determination of the refugee claim. The appeal interview should be granted to assess the reliability of the evidence.
- The appeal and/or the RSD interview transcript and RSD assessment, or other reliable evidence, indicate that a breach of procedural fairness is likely to have occurred, which could have limited the ability of the applicant to establish his/her claim, including:
    - Inadequate interpretation
    - The applicant's discomfort regarding the conduct or profile (ethnic, religious, gender etc.) of the RSD officer (case-worker) or interpreter
    - Denial of the opportunity to present relevant evidence
    - Real or perceived concerns regarding the confidentiality of the RSD procedure
    - Inappropriate questioning.

UNHCR encourages Finland to introduce legislation which explicitly provides for oral hearings at the appeals level to be conducted in the situations listed above.

Prioritization of claims of unaccompanied or separated children

As a general rule, claims of unaccompanied or separated children should be prioritized. UNHCR notes that § 6 (3) Aliens Act states that matters concerning minors should be processed with urgency and welcomes Migri's recent achievements with regard to processing times (in 2007, the average processing time for an asylum application in general was 206 days and 228 days for applications of unaccompanied minors; in 2008, the average processing time in general was 127 days and 115 days for applications of unaccompanied minors).

Detention:

According to § 121 (1) Aliens Act, an alien may be held in detention if:

> *1) taking account of the alien's personal and other circumstances, there are reasonable grounds to believe that the alien will prevent or considerably hinder*

the issue of a decision concerning him or her or the enforcement of a decision on removing him or her from the country by hiding or in some other way;

2) holding an alien in detention is necessary for establishing his or her identity; or

3) taking account of the alien's personal and other circumstances, there are reasonable grounds to believe that he or she will commit an offence in Finland.

(2) Holding an alien in detention on grounds that his or her identity is unclear requires that the alien gave unreliable information when the matter was processed or refused to give the required information, or that it otherwise appears that his or her identity cannot be considered established.

The detention of asylum seekers unless if there are valid grounds which could apply to any person, is, in the view of UNHCR inherently undesirable.[4] There should be a presumption against detention. Detention may be exceptionally resorted to, in conformity with *EXCOM Conclusion No. 44 (XXXVII) – 1986*, if necessary, to:

(1) verify identity;
(2) determine the elements on which the claim to refugee status or asylum is based;
(3) deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum;
(4) protect national security or public order.

UNHCR would further like to refer to Article 31 of the 1951 Convention, according to which penalties (restrictions of movement and detention can amount to such) shall not be imposed on refugees and asylum seekers who entered or are present in the territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

Finally, UNHCR urges States to explore alternatives to detention, which may include: monitoring requirements, provision of a guarantor/surety, release on bail, open centres. Detention should always be the last resort.

UNHCR ROBNC
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[4] See further UN High Commissioner for Refugees, *UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 26 February 1999. Online: UNHCR Refworld, available at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3c2b3f844 [accessed 16 May 2008].