



**Comments by the United Nations High Commissioner for Refugees
(UNHCR) Regional Representation for Northern Europe on the draft
Law Proposal of 15 April 2016 amending the Aliens Act of the
Republic of Finland**

I. Introduction

1. The UNHCR Regional Representation for Northern Europe (“RRNE”) is grateful to the Ministry of the Interior for the invitation to comment on the draft Law Proposal 32/2016 amending the Finnish Aliens Act (301/2004), (hereafter the “Proposal”). The Proposal seeks to introduce “directed residence” (“asumisvelvollisuus”) and “home curfew” (“lapsen asumisvelvollisuus”) as alternatives to detention.
2. UNHCR has a direct interest in law proposals in the field of asylum, 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 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 [...].”² This supervisory responsibility is reiterated in the preamble as well as reflected in Article 35 of the 1951 Convention,³ and in Article II of the 1967 Protocol relating to the Status of Refugees (hereafter collectively referred to as the “1951 Convention”). UNHCR’s supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in the 1951 Convention,⁴ as well as by providing comments on legislative and policy proposals impacting on the protection and durable solutions of its persons of concern.

II. General Observations

3. According to the Proposal, two new forms of alternatives to detention, i.e. directed residence (with reporting conditions), as well as home curfew for children⁵ will be

¹ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b3628> (“UNHCR Statute”).

² *Ibid.*, para. 8(a).

³ According to Article 35 (1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of the 1951 Convention”.

⁴ 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, HCR/1P/4/ENG/REV. 3, available at: <http://www.refworld.org/docid/4f33c8d92.html>.

⁵ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html> (“CRC”). A child is defined as “a human being below the age of 18 years”, Article 1 of the CRC.

introduced. UNHCR notes that the stated aim of the Proposal is to improve the efficiency of the asylum procedure and to ensure the removal from the country of rejected asylum-seekers. With the proposed control measures (“turvaamistoimet”), the Government also aims to improve the preparedness to administer bigger numbers of asylum-seekers. On the other hand, the Proposal seeks to promote the use of alternatives to detention through introducing directed residence and home curfew, and to limit the use of detention of children and persons with specific vulnerabilities.

4. UNHCR recalls that the rules on detention in Finland have changed frequently during the last few years. In 2015, detention of children was restricted but not totally banned, although a complete ban on detention of unaccompanied children was the goal of the previous Government.⁶ In 2014, when the Government’s proposal (172/2014) was presented to Parliament, the Ministry of the Interior was requested to prepare a study on alternatives to detention comprising an international comparison of practices and a consideration of ways to make detention of children redundant. According to the current Proposal, the situation in Finland has changed considerably since the study was completed, with the numbers of asylum-seekers soaring and a need to more effectively manage the asylum procedure and ensure the expulsion of rejected asylum-seekers.
5. During the last years, UNHCR has submitted several comments relating to detention to the Ministry of the Interior.⁷ In these comments, UNHCR has repeatedly recommended Finland to continue developing alternatives to detention and to completely ban the detention of children. UNHCR has also stressed the need to safeguard that the new control measures introduced are used as alternatives to detention and not as alternatives to open reception. The Proposal duly notes UNHCR’s recommendations to restrict the use of detention.
6. Although based on the study that sought to identify alternatives to detention and make detention of children redundant, UNHCR notes that the Proposal primarily aims at restricting the free movement of asylum-seekers rather than restricting the use of detention. As previously noted, UNHCR welcomes the use of alternatives to detention. However, as set out in the Guidelines on Detention, UNHCR would like to underline that liberty should be the default position and that “alternatives to detention should not be used as alternative forms of detention”, nor should they “become substitutes for normal open reception arrangements that do not involve restrictions on the freedom of movement of asylum-seekers”.⁸
7. Alternatives to detention imply conditions or restrictions to the freedom of movement or liberty of the individual, and thus need to be governed by the same human rights standards and safeguards as detention, including periodic review in individual cases by an independent body.⁹ The use of the proposed measures

⁶ According to the current legislation, unaccompanied children can be detained only if they are over the age of 15 and only after receiving an enforceable expulsion order.

⁷ See, UNHCR Statement on provisions on detention in the Aliens Act and the Act on Treatment of Detained Aliens and on the Detention Unit of 17 January 2012; 2) UNHCR Comments on the draft amendment to the Aliens Act concerning the detention of children of 11 May 2012; 3) UNHCR Comments on the proposal to improve statistics on detention of 3 August 2012; 4) UNHCR Comments on the Finnish Government’s draft proposal on amendments to the Aliens Act and the Act on the Treatment of Detained Aliens and the Detention Unit of 2 December 2013; 5) UNHCR Comments on the Finnish Government’s draft proposal on amendments to the Aliens Act and the Act on the Treatment of Detained Aliens and the Detention Unit of 4 April 2014.

⁸ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at:

<http://www.refworld.org/docid/503489533b8.html> (“UNHCR, Guidelines on Detention”), para. 38.

⁹ UNHCR, Guidelines on Detention, paras. 12 and 37. These other rights could include: the right to privacy (Article 12 UN General Assembly, *Universal Declaration of Human Rights*, 10 December

should only be considered after an assessment of the necessity, reasonableness and proportionality of detention in each individual case. Individuals subjected to alternatives to detention need to have timely access to effective complaints mechanisms as well as remedies, as applicable.¹⁰ In designing alternatives to detention, it is important that States observe the principle of minimum intervention and pay close attention to the specific situation of particular vulnerable groups such as children, pregnant women, the elderly, or persons with disabilities or experiencing trauma.¹¹

8. UNHCR regrets that the Government's initial goal to introduce alternatives to detention seems to have shifted in focus through this Proposal which instead appears to introduce more restrictions to the freedom of movement of asylum-seekers, including for children. UNHCR will comment on the two main components of the Proposal, namely directed residence and home curfew as alternatives to detention, in the specific observations below.

III. Specific Observations

Section 118 a. Directed Residence

9. The Proposal introduces a new section to the Aliens Act containing a provision on directed residence, with the purported aim to guarantee the efficient management of the asylum-seekers in designated reception centres within the different stages of the asylum procedure, including return. According to this provision, an alien who has applied for international protection could be required to live in a designated reception centre and to register at the reception centre one to four times per day. As UNHCR understands it, directed residence will be added to the control measures, i.e. detention and alternatives to detention, contained in Chapter 7 of the Aliens Act. Such measures may be imposed on an asylum-

1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html> ("UDHR"); Article 17(1), UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.htm> ("ICCPR"); Article 16(1) CRC; Article 11, Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969, available at: <http://www.refworld.org/docid/3ae6b36510.html> ("ACHR"); Article 5 Inter-American Commission on Human Rights (IACRH), *American Declaration of the Rights and Duties of Man*, 2 May 1948, available at: <http://www.refworld.org/docid/3ae6b3710.html> ("ADRDM"); Article 8 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, available at: <http://www.refworld.org/docid/3ae6b3b04.html>, ("ECHR"); Article 7, European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, available at: <http://www.refworld.org/docid/3ae6b3b70.html> ("CFREU"), the right to family life (Articles 12 and 16(3), UDHR; Article 23(1), ICCPR; Article 10(1) UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html>, ("ICESCR"); Article 12(2) 1951 Convention and Recommendation B of the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, 25 July 1951, A/CONF.2/108/Rev.1, available at: <http://www.unhcr.org/refworld/docid/40a8a7394.html>; Article 18 Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <http://www.refworld.org/docid/3ae6b3630.html> ("ACHPR"); Article 17(1) ACHR; Article 6 ADRDM; Article 2 and 8 ECHR; Article 9 CFREU), the prohibition on inhuman or degrading treatment (Article 7 ICCPR; Article 1 UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <http://www.refworld.org/docid/3ae6b3a94.html> ("CAT")); Article 3 ECHR; Article 25 ADRDM; Article 4 CFREU; Article 5 ACHR; Article 5 ACHPR).

¹⁰ 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"), available at: <http://www.unhcr.org/refworld/docid/4e315b882.html>, paras. 6, 31.

¹¹ UNHCR and OHCHR, Global Roundtable Summary Conclusions, paras. 6, 21.

seeker if the grounds contained in Section 117 a, are met, i.e. to “establish the conditions for the right of the alien to enter or stay in the country”, or to “prepare or secure the execution of an expulsion order or otherwise to supervise that the alien returns”.

10. The Proposal further outlines that a person subject to directed residence will not be able to arrange private accommodation for him or herself, because he or she will have to live in the reception centre to which he or she has been designated. Violations of the conditions of the directed residence could be followed by detention, when the requirements for detention are met. The reception centre should notify non-compliance with the directed residence requirement to the authority responsible for ordering it without delay.
11. UNHCR observes that directed residence with reporting obligations will seriously restrict asylum-seekers’ liberty and freedom of movement and should, as noted above, be subject to human rights standards.¹² Directed residence combined with registration up to four times per day appears closer to detention than liberty based on the scale of various forms of alternatives to detention described in the UNHCR Guidelines on Detention,¹³ and may thus amount to deprivation of liberty within the meaning of Article 5 of the European Convention on Human Rights (“ECHR”). According to the European Court of Human Rights (“ECtHR”), in order to determine whether someone has been deprived of his/her liberty, the starting point must be his/her concrete situation and account must be taken of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction on liberty is one of degree or intensity, and not of kind. The assessment will be case-specific; a deprivation of liberty might be established not by any one factor taken individually but by examining all elements cumulatively. UNHCR does not recommend the use of several forms of alternatives to detention together as this could place an arbitrary restriction on the freedom of movement of the individual in some cases and may for all practical purposes be identical to detention.
12. In view of the seriousness of the proposed measure, UNHCR considers that the same grounds for applying detention need to govern the use of directed residence as an alternative to detention. In UNHCR’s view, the same permissible grounds for applying detention apply to alternatives to detention, that is, to protect public order, to protect public health and to protect national security.¹⁴ UNHCR is thus concerned that the grounds for the use of directed residence contained in Section 117 are not sufficiently circumscribed, potentially applying to a large number of asylum-seekers and lacking in predictability.¹⁵ UNHCR reiterates that detention laws, including provisions on alternatives to detention, must conform to the principle of legal certainty, which requires that the law and its legal consequences be foreseeable and predictable.¹⁶ It furthermore needs to be ensured that the alternative to detention is for a legitimate purpose, and not, for

¹² UNHCR, Detention Guidelines, Guideline 4.3, para. 37, p. 22.

¹³ UNHCR, Detention Guidelines, p. 23.

¹⁴ UNHCR, Detention Guidelines, Guideline 4.1., paras. 21-30.

¹⁵ See e.g. *Amuur v. France*, 17/1995/523/609, Council of Europe: European Court of Human Rights, 25 June 1996, available at: <http://www.refworld.org/docid/3ae6b76710.html>, where the ECtHR maintained that the law ‘must be sufficiently accessible and precise in order to avoid all risk of arbitrariness.’ para. 50; *Medvedyev and Others v. France*, Application no. 3394/03, Council of Europe: European Court of Human Rights, 29 March 2010, available at: <http://www.refworld.org/docid/502d45dc2.html>, where the ECtHR held that the law must “allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in all circumstances, the consequences which a given action may entail.” para. 80.

¹⁶ UNHCR, Guidelines on Detention, para. 16.

example, to facilitate administrative expediency.¹⁷ Hence, because of the broad and general formulation of this ground, UNHCR sees a risk that directed residence could, rather than as an alternative to detention, be used as an alternative to open reception in order to manage asylum-seekers during the various stages of the asylum process.

13. In respect of the required procedural safeguards, UNHCR wishes to reiterate that the consideration of alternatives to detention needs to be part of an overall assessment of the necessity, reasonableness and proportionality of detention in each case, which ensures that detention is a measure of last rather than first resort. UNHCR welcomes that there will be an individual assessment and that a decision on directed residence can be appealed; a remedy is thus available.
14. UNHCR therefore recommends to review the Proposal with a view to ensuring that directed residence does not become an alternative to open reception. This can be done by introducing the same grounds and procedural safeguards requirements for directed residence as for detention in view of the fact that directed residence coupled with reporting obligations may amount to a deprivation of liberty.

Section 122 a. Home Curfew

15. According to the proposed provision on home curfew, an unaccompanied child, between the ages of 15 and 17, who has been rejected in the asylum procedure in final instance and has received an enforceable expulsion order, could be ordered to stay at a specific reception centre and not leave the area of the centre. Home curfew would further include registering at the reception centre from one to four times per day. The Director of the reception centre could give the child permission to temporarily leave the area of the reception centre for personal reasons. The Proposal argues that a child upon whom a home curfew is imposed would still have the possibility to move more freely in the reception centre compared to placement in detention in a detention unit.
16. The Proposal notes that, like detention, home curfew constitutes deprivation of liberty as defined in Section 7 of the Constitution of Finland, and therefore requires the application of the procedures concerning ordering detention and district court hearings. Further, the Proposal states that both the general requirements for ordering interim measures and the special requirements for placement in detention should always be met when ordering a home curfew. Hence, as UNHCR understands, in addition to the criteria in Section 117 a of the Aliens Act, the conditions in Section 121 concerning conditions for detention and Section 122 concerning detention of children also need to be fulfilled. UNHCR notes that the imposition of home curfew is subject to the same legal safeguards as detention. UNHCR welcomes this as home curfew as set out in the Proposal, constitutes a serious restriction of liberty. Further, UNHCR wishes to draw attention to the relevant provisions of the EU Returns Directive, which provides that a third-country national, who is to be returned, can only be kept in detention if less coercive measures would be insufficient and in particular only when there is a risk of absconding or the third-country national concerned avoids or hampers the preparation of return or the removal process.¹⁸ The Directive also provides

¹⁷ The UN Human Rights Committee has found that administrative expediency is not a legitimate purpose for restricting people's liberty in light of the serious consequences it has for a human being, see *van Alphen v. the Netherlands* (Communication No. 305/1988), CCPR/C/39/D/305/1988, UN Human Rights Committee (HRC), 23 July 1990, available at: <http://www.refworld.org/docid/525414304.html>.

¹⁸ European Union: Council of the European Union, *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for*

that any “detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.”

17. Whereas UNHCR welcomes that one of the stated aims of the Proposal is to restrict the detention of children, the Proposal does not foresee a complete ban on the detention of children. According to the Proposal, there is still a need for the possibility to detain children as a last resort. UNHCR wishes to reiterate its strong view that children should - in principle - not be detained at all.¹⁹ Detention cannot be justified based solely on the basis of his or her migration or residence status.²⁰ A primary objective must be the best interests of the child.²¹ Article 22 of the United Nations Convention on the Rights of the Child (“CRC”) requires that States Parties take appropriate measures to ensure that children who are seeking refugee status or who are recognized refugees, whether accompanied or not, receive appropriate protection and assistance. In UNHCR’s view, this can be accomplished in reception centres, with or without home curfew, but not in detention.²² As noted by the UN Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment:

“Within the context of administrative immigration enforcement, it is now clear that the deprivation of liberty of children based on their or their parents’ migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children. The deprivation of liberty of children based exclusively on immigration-related reasons exceeds the requirement of necessity because the measure is not absolutely essential to ensure the appearance of children at immigration proceedings or to implement a deportation order. ... Therefore, States should, expeditiously and completely, cease the detention of children, with or without their parents, on the basis of their immigration status. States should make clear in their legislation, policies and practices that the principle of the best interests of the child takes priority over migration policy and Convention on the Rights of the Child.”²³

18. As the Proposal seeks to introduce a real alternative to detention for unaccompanied children, there is, in UNHCR’s view, no longer a need for Finland to continue detention of such children. Furthermore, UNHCR recommends Finland to introduce a general ban of detention of all children.

¹⁸ *returning illegally staying third-country nationals*, 16 December 2008, OJ L 348/98-348/107; 16.12.2008, 2008/115/EC, available at: <http://www.refworld.org/docid/496c641098.html>, (“Returns Directive”), Article 15.

¹⁹ UNHCR, Guidelines on Detention, para. 51.

²⁰ *Popov v. France*, (2012), ECtHR, App. No. 39472/07 and 39474/07, available at: <http://www.unhcr.org/refworld/docid/4f1990b22.html>.

²¹ UNHCR, Guidelines on Detention, para. 54.

²² For good practice examples please see, UNHCR, Options Paper 1: Options for governments on care arrangements and alternatives to detention for children and families, 2015, available at: <http://www.refworld.org/docid/5523e8d94.html>.

²³ UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 5 March 2015, A/HRC/28/68, available at: <http://www.refworld.org/docid/550824454.html>, para. 80.

Summary of UNHCR recommendations:

UNHCR recommends

- a review of the grounds and procedural safeguards for directed residence with a view to ensuring that directed residence becomes an alternative to detention, not an alternative to open reception;
- to abstain from the use of two alternatives to detention together, i.e. directed residence coupled with reporting obligations, and instead use one or the other to fulfil the stated purpose of the Proposal;
- an introduction of a general ban of detention of children.

**UNHCR Regional Representation for Northern Europe
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