



UNHCR

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

Comments by the UNHCR Regional Representation for the Baltic and Nordic Countries on the Finnish Government's draft proposal on amendments to the Aliens Act

Introduction

1. UNHCR would like to express its appreciation to the Finnish Ministry of the Interior for the possibility to provide comments on the proposal for amendments to the Aliens Act based on the Schengen Borders Code¹ and the EU Return Directive². The amendments have consequences for persons of concern to UNHCR.
2. UNHCR has been entrusted by the United Nations General Assembly with a mandate to provide international protection to refugees and, together with Governments, to seek permanent solutions to the problems of refugees³. According to its Statute, UNHCR fulfils this mandate, *inter alia*, by “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto[.]”⁴ 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 relating to the Status of Refugees (“1951 Convention”) and its 1967 Protocol. Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and subsequent Guidelines on International Protection.⁵ UNHCR’s supervisory

¹ European Union: Council of the European Union, *Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)*, 15 March 2006, No. 562/2006, available at: <http://www.refworld.org/docid/47dfb0525.html>

² 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 returning illegally staying third-country nationals*, 16 December 2008, 2008/115/EC, available at: <http://www.refworld.org/docid/496c641098.html>

³ 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”).

⁴ *Ibid.*, paragraph 8(a).

⁵ UN High Commissioner for Refugees, *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.unhcr.org/refworld/docid/4f33c8d92.html>

responsibility is reiterated in Article 35 of the 1951 Convention and Article II of the 1967 Protocol⁶. Finland is a party to the 1951 Convention since 10 October 1968.

3. UNHCR's supervisory responsibility is reflected in European Union law, including pursuant to Article 78 (1) of the Treaty on the Functioning of the European Union, which stipulates that a common policy on asylum, subsidiary protection and temporary protection must be in accordance with the 1951 Convention. Its role is also reaffirmed 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 Consequently, UNHCR has a direct competence to advise Member States and EU institutions in relation to EU legislative proposals affecting persons of concern, and thus an interest in the transposition of EU regulations and directives impacting on the rights of persons of concern to UNHCR.

The proposed amendments

4. The term "*pääsyn epääminen*" (refusal of entry) is proposed to be introduced into the Finnish Aliens Act to fulfil the requirements of the Schengen Borders Code. The new legal term would be defined by way of a direct reference to the Schengen Borders Code and would be used alongside the hitherto used terms "*käännäyttäminen*" (refusal of entry) and "*karkottaminen*" (deportation). The articles in the Aliens Act concerning the opportunity to be heard, the overall consideration and the *non-refoulement* principle will be adjusted accordingly.
5. Additional amendments proposed to ensure the further implementation of the Return Directive include the following: return will be defined as encompassing both voluntary return and forced return; the detention ground "risk of absconding" will be defined in the legislation; the Ombudsman for minorities will be given the task to monitor returns; and the rights of national and international organizations to conduct visits to detention centres will be mentioned in the legislation.

UNHCR's observations

6. The principle of *non-refoulement* constitutes the cornerstone of international refugee protection. It is enshrined in Article 33 of the 1951 Convention, which is also binding on States Party to the 1967 Protocol⁸. The prohibition of *refoulement* to a danger of persecution under international refugee law is applicable to any form of forcible removal, including deportation, expulsion, extradition, informal transfer or "renditions", and non-admission at the border. This is evident from the wording of Article 33(1) of the 1951 Convention, which refers to expulsion or return

⁶ According to Article 35 (1) of the 1951 Convention, UNHCR has the "duty of supervising the application of the provisions of th[e 1951] Convention".

⁷ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities, 2 September 1997, *Declaration on Article 73k of the Treaty establishing the European Community* [OJ C 340, 10.11.1997] available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11997D/AFI/DCL/17:EN:HTML>.

⁸ Article I(1) of the 1967 Protocol provides that the States Party to the Protocol undertake to apply Articles 2–34 of the 1951 Convention.

(*refoulement*) “in any manner whatsoever”.⁹ The purpose, intent and meaning of Article 33(1) of the 1951 Convention are unambiguous and establish an obligation not to return a refugee or asylum-seeker to a country where he or she would be risk of persecution or other serious harm, which applies wherever a State exercises jurisdiction, including at the frontier, on the high seas or on the territory of another State.¹⁰

7. The *non-refoulement* provision in the Finnish Aliens Act is proposed to be amended to explicitly spell out all three forms of removal decisions (*pääsyn epääminen, käännyttäminen* and *karkottaminen*). UNHCR welcomes this clarification in the legal text, but notes that the *non-refoulement* principle is not only applicable when certain measures, provided for in legislation, are used. Instead, as mentioned above, it is a principle that seeks to protect refugees and asylum-seekers from being sent to a territory where he or she would be at risk of persecution or other serious harm, regardless of the measures used by a State exercising jurisdiction. UNHCR does not propose any changes to the proposed wording of the provision since the purpose of mentioning all three forms of removal decisions clearly reflects the understanding that the principle is applicable to any form of forced removal. UNHCR however suggests that the text containing the detailed justification for the amendment – which will become part of the *travaux préparatoires* of the legislation - could explain the general character of the *non-refoulement* principle in the terms set out above. This could prevent any misinterpretations in the application of the rule.
8. The factors to be considered when determining whether a risk of absconding exists will, according to the proposed amendments, be spelled out in detail in the legislation. Among the factors to be considered is if an alien has moved without informing the authorities or is he or she does not cooperate with the authorities to acquire travel documents. UNHCR notes that it will be important to ensure that the individuals concerned are clearly informed about the implications of a failure to cooperate, to enable them to make an informed decision about compliance.¹¹
9. Prior to the Return Directive, there was a lack of consistent and independent monitoring of returns by EU Member States in countries of origin. In the comments to the Return Directive, UNHCR recommended that the EU consider setting up effective monitoring mechanisms, in order to be able to assess the effectiveness of the safeguards it establishes.¹² UNHCR’s comments specifically refer to the Council of Europe’s Twenty Guidelines on Forced Return from 4 May 2005, which state that Member States should implement an effective system for monitoring forced returns. Suitable monitoring devices should also be considered where necessary. The forced return operation should be fully documented, in particular with respect to any

⁹ UN High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, para. 7, available at: <http://www.refworld.org/docid/45f17a1a4.html>

¹⁰ *Idem*, para 24,

¹¹ See UN High Commissioner for Refugees, *UNHCR Position on the Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals*, 16 June 2008, available at: <http://www.refworld.org/docid/4856322c2.html>

¹² UN High Commissioner for Refugees, *UNHCR Observations on the European Commission’s Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals (COM(2005) 391 final)*, 16 December 2005, available at: <http://www.refworld.org/docid/43a2a58f4.html>

- significant incidents that occur or any means of restraint used in the course of the operation. Special attention shall be given to the protection of medical data. If the returnee lodges a complaint against any alleged ill-treatment that took place during the operation, it should lead to an effective and independent investigation within a reasonable time.¹³
10. The task of monitoring the returns will, according to the proposal, be given to the Ombudsman for Minorities. UNHCR welcomes the inclusion of monitoring of returns in the Finnish legislation. The Ombudsman for minorities would have access to all relevant documents on return decisions and be able to choose which cases to monitor. The independent status of the Ombudsman for Minorities is an important feature and a strong argument for the choice. UNHCR, however, notes that the proposal does not contain any reference to the allocation of additional resources for the Ombudsman to fulfil this new task and recommends that this be considered to ensure that the law proposal can be implemented as intended.
 11. To ensure systems of immigration detention comply with international legal principles, it is important that immigration detention centres are open to scrutiny and monitoring by independent national and international institutions and bodies. In line with treaty obligations, and relevant international protection standards, access by UNHCR¹⁴ and other relevant international and regional bodies with mandates related to detention or inhumane treatment needs to be made possible. Access to civil society actors and NGOs for monitoring purposes should also be facilitated, as appropriate.¹⁵

Conclusion

UNHCR reiterates its sincere appreciation for the opportunity to provide comments on this legislative proposal. UNHCR welcomes the proposed law amendments, but recommends that the universal character of the *non-refoulement* principle be elaborated in the detailed justification, which will become part of the *travaux préparatoires* of the legislation.

UNHCR Regional Representation for the Baltic and Nordic Countries, Stockholm, 18 June 2013

¹³ Council of Europe: Committee of Ministers, *Twenty Guidelines on Forced Return*, 4 May 2005, available at: <http://www.refworld.org/docid/42ef32984.html>

¹⁴ Relevant treaty provisions include paragraph 8 of the UNHCR Statute in conjunction with States' obligations to cooperate with UNHCR in the exercise of its international protection mandate, found in Articles 35 and 36 of the 1951 Convention and Article 2 of the 1967 Protocol. See also explicit reference to UNHCR's monitoring role in Article 29(1)(a) of the recast Asylum Procedures Directive and Articles 10 and 11(1) of the recast Reception Conditions Directive.

¹⁵ UN High Commissioner for Refugees, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, para. 66, available at: <http://www.refworld.org/docid/503489533b8.html>