

**Comments by the United Nations High Commissioner for Refugees
(UNHCR) Regional Representation for Northern Europe on the draft
Law Proposal of 25 June 2014, amending the Act on Reception of
Applicants for International Protection and Sections 52 b and 52 c of
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 of Finland for the invitation to comment on the draft Law Proposal of 25 June 2014, amending the Finnish Act on Reception of Applicants for International Protection (hereafter ‘Reception Act’) and Section 52 b and 52 c of the Aliens Act. The amendments concern assistance to victims of trafficking.
2. The following comments are made in the context of UNHCR’s supervisory responsibility which is set out under its Statute, Article 35 of the 1951 Convention relating to the Status of Refugees, and Article II of its 1967 Protocol¹. UNHCR becomes involved with the issue of human trafficking where human trafficking impacts on persons of its concern. In particular, UNHCR has a responsibility to work to ensure that refugees, asylum-seekers, internally displaced persons (IDPs) and stateless persons do not fall victim to human trafficking. UNHCR also works to ensure that individuals who have been trafficked or are at risk of being trafficked and who have a well-founded fear of persecution or are otherwise in need of international protection, are protected against refoulement and their claims to international protection are examined by the competent authorities.²

II. Observations on proposed amendments

3. The amendments proposed concern the National Assistance System for Victims of Trafficking (hereafter ‘Assistance System’). The Assistance System refers customarily to the activities of the Joutseno Reception Centre for asylum seekers in regard to assisting victims of trafficking³. Neither the concept of the Assistance System nor the nature of its activities has so far been defined in the Reception Act. The Assistance System is a low-threshold system offering services and support for suspected victims of trafficking. Their need for support is assessed by a multidisciplinary team. UNHCR notes that, to a significant degree, the

¹ 1951 Convention and 1967 Protocol Relating to the Status of Refugees, available at:

<http://www.unhcr.org/3b66c2aa10.html>

² UN High Commissioner for Refugees (UNHCR), *Comments on the proposal for a Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims (COM(2010)95, 29 March 2010)*, June 2010, available at: <http://www.refworld.org/docid/4c0fa7092.html>

³ Group of Experts on Action Against Trafficking in Human Beings (GRETA): *Reply from Finland to the Questionnaire for the evaluation of the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Parties, 1st evaluation round*, Submitted on 31 January 2014, available at:

http://www.coe.int/t/dghl/monitoring/trafficking/Source/Public_R_Q/GRETA_2014_15_RQ_FIN_public_en.pdf

amendments give existing practices in Finland a legal basis. The amendments aim at strengthening the status of the Assistance System in the legislation to make the identification of victims and assisting them more predictable and transparent. The aim is also to give the system a clearer division of the tasks so that victims are protected and the human rights and equal treatment of victims are ensured within the system. The most significant amendments concern equal treatment, where Finnish nationals will not be excluded from the Assistance System. A recovery time for victims will also be introduced. More stringent rules on victim identification will further be introduced.

4. The draft law proposal aims at assessing the impact of the proposed law amendments on the equal treatment and gender equality. Men and women are often trafficked for different reasons. For this reason, when needed, the assistance delivered to victims has to be gender specific. UNHCR welcomes this. In *Prevent, Combat, Protect: Human Trafficking; Joint UN commentary on the EU Directive – A Human Rights-Based Approach*⁴ (hereafter “Joint UN Commentary”), Member States are encouraged to take into account the different impact trafficking and anti-trafficking responses may have on women, men, girls and boys, and to ensure that anti-trafficking responses are gender-sensitive, promote gender equality and are based on women’s empowerment. Member states are also encouraged to mention the gender-specific nature of trafficking in human beings, and thus the need for gender-sensitive provisions and to adopt a gender-specific and gender-sensitive approach.
5. The draft law proposal also aims at assessing the impact of the proposed law amendments on children. Children are more vulnerable than adults and therefore run a higher risk of becoming victims of trafficking. The draft law proposal aims at strengthening the cooperation between the Assistance System and both the police responsible for protection and child welfare authorities. In the joint UN commentary Member States are encouraged to ensure that all actions in relation to children are guided by the principles of protection and respect for children’s rights. The treatment of children should follow a determination of their best interest. Member States are encouraged to provide for a formal Best Interests Determination procedure for decisions having a long-term impact on a trafficked child’s future, such as the determination of a durable solution. UNHCR welcomes the assessment of the impact on children and the amendments that aim at strengthening the Assistance Systems capacity to assist child victims of trafficking, but notes with concern that there are no references in the draft law proposal to how the best interest of the child will be determined in the Finnish system.
6. UNHCR would like to convey the following observations on specific proposals for amendments to the Finnish Reception Act and Aliens Act.

Equal treatment

7. The draft law proposal aims at clarifying the uncertainty existing in Finland as to whether assistance can be granted also to persons who have legal residence in Finland. According to the proposal the rules will be applicable to all victims of

⁴ UN High Commissioner for Refugees (UNHCR), *Prevent. Combat. Protect: Human Trafficking*, November 2011, available at: <http://www.refworld.org/docid/4edcbf932.html>

trafficking regardless of their nationality or immigration status. The rules will therefore be applicable also to Finnish citizens if they fall victim to trafficking. In the Joint UN Commentary Member States are encouraged to ensure the respect for the principle of non-discrimination anchored in EU and international law. Member States may also wish to reaffirm the contribution of their anti-trafficking legislative and other measures to the elimination of all forms of discrimination on grounds of sex, gender, ethnicity, immigration or other status, including through women empowerment, and ensure that these are implemented in a way that will not affect victims negatively. UNHCR thus welcomes this amendment strengthening the equal treatment of victims of trafficking in Finland.

Recovery period

8. The Finnish Aliens Act currently has rules on a reflection period for victims of trafficking granted by the police. The draft law proposal introduces a recovery period granted by the Assistance System to victims who do not wish to cooperate with the police. The Assistance System will be obliged to report to the police about a victim in the Assistance System when the recovery period has come to an end. A victim staying legally in Finland can be granted a recovery period of 30 days that can be extended with a maximum 60 days to a maximum of 90 days. According to the Joint UN Commentary⁵, Member States are encouraged to include in their national legislation a period of reflection and recovery of a minimum of 90 days for all victims of trafficking. For child victims, such decisions should reflect consideration of their best interests. In its Toolkit to Combat Trafficking in Persons, UNODC has compiled national legislation on the reflection period, existing guidelines, and discussions in various fora.⁶ As for empirical evidence, it suggests that a minimum period of 90 days is required for the cognitive functioning and emotional strength of a trafficked person to increase to a level at which they are able to make well-considered decisions about their safety and cooperation with the authorities against the traffickers, as well as to offer detailed evidence about past events.⁷ The EU Experts Group on Trafficking also recommended that access to a reflection delay of no less than three months be granted.⁸ UNHCR welcomes the introduction of a recovery period granted by the Assistance System. UNHCR however notes that the minimum time period suggested is 30 days and the maximum 90 days. In UNHCR's view, the recovery time should be minimum 90 days and UNHCR recommends Finland to amend the draft law proposal accordingly. UNHCR further notes that the recovery period is reserved for victims who are staying legally in Finland. UNHCR recommends Finland to adopt a human rights-based approach also on this issue. A human rights-based

⁵ Idem

⁶ UNODC, *Toolkit to Combat Trafficking in Persons*, Second Edition, May 2010, Tool 7.1, pages 326-334, available at http://www.unodc.org/documents/human-trafficking/HT_Toolkit08_English.pdf

⁷ Zimmerman, Cathy, c.s., *Stolen Smiles. The physical and psychological health consequences of women and adolescents trafficked into Europe*, the London School of Hygiene and Tropical Medicine, 2006, page 3, available at <http://genderviolence.lshtm.ac.uk/files/Stolen-Smiles-Trafficking-and-Health-2006.pdf>

⁸ Experts Group on Trafficking in Human Beings, *Report of the Experts Group on Trafficking in Human Beings*, European Commission, DGA Justice, Freedom and Security, 2004, paras 3 & 5, available at http://ec.europa.eu/anti-trafficking/download.action?nodeId=977ca985-90c5-4520-baa5-57a914aa4ddc&fileName=Report+22+Dec_en.pdf

approach guarantees that anti-trafficking responses do not undermine or otherwise negatively impact on the human rights of trafficked persons or other groups affected by trafficking or anti-trafficking responses, or discriminate against women, migrants, refugees or other groups in a vulnerable situation.⁹ With reference to the human rights-based approach, UNHCR recommends that the recovery period is made accessible for *all* victims of trafficking, not only those whose stay in Finland is legal.

9. According to the explanatory note of the draft law proposal the rules on the recovery period is supposed to be interpreted so that it does not preclude the application of the Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)¹⁰ (Hereafter ‘Dublin III Regulation’). According to the explanatory note, this is especially important in cases where the victim has an application for international protection pending in another State applying the Dublin III Regulation, but the victim has not applied for international protection in Finland. UNHCR understands that an indication of being a victim of trafficking is one of the criteria that Finnish authorities take into consideration when assessing whether Finland should apply the discretionary clause of the Dublin III Regulation and examine the application even if not obliged to do so. It would be beneficial for the future application if this was also reflected in the explanatory note, possibly including statistics on how often this possibility has been used. UNHCR wishes to stress that the Dublin system is predicated on the assumption that the asylum laws and practices of the participating States utilize common standards and produce comparable results. In reality, asylum legislation and practice still vary widely from country to country, and as a result, asylum-seekers receive different treatment from one Dublin State to another. A transfer under the Dublin system may therefore lead to diminished prospects of protection.¹¹ Third country national victims of trafficking may find themselves trafficked from one Member State to another. As such, the Member State where these persons manage to escape to or where the authorities rescue them may not be the first point of entry into the European Union. If the victim seeks asylum in the former State, under the Dublin system, this person is likely to be sent back to the latter State. An assessment of the personal circumstances is therefore necessary before the “Dublin” return is effected to ensure that guarantees of non-repetition are indeed in place. The ECtHR ruling in the case of *M.S.S. v Belgium and Greece*¹² on “Dublin” returns to Greece addresses the treatment of asylum-seekers by Greece and further clarifies State obligations under Article 3 ECHR in this context. It

⁹ UN High Commissioner for Refugees (UNHCR), *Prevent. Combat. Protect: Human Trafficking*, November 2011, page 26, see footnote 4.

¹⁰ European Union: Council of the European Union, *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, 29 June 2013, OJ L. 180/31-180/59; 29.6.2013, (EU)No 604/2013, available at: <http://www.refworld.org/docid/51d298f04.html>

¹¹ UN High Commissioner for Refugees (UNHCR), *UNHCR's Response to the European Commission's Green Paper on the Future Common European Asylum System*, September 2007, available at: <http://www.refworld.org/docid/46e159f82.html>

¹² ECtHR, *M.S.S. v Belgium and Greece*, Application No. 30696/0, 21 January 2011.

can also be argued that the Court's ruling carries consequences for the treatment of (potential) victims of trafficking subject to "Dublin" returns, in particular the obligation to assess the risk they may face on return. In the Joint UN Commentary Member States are encouraged to include a provision on the safe return of victims of trafficking, in line with international and regional safeguards, and including the establishment of pre-return risk assessments.¹³ This is also applicable to "Dublin" returns.

Identification of victims

10. The Finnish Assistance System has a low threshold admitting persons who have been preliminarily identified as victims of trafficking. Not only authorities, but practically any legal entity might suggest that the Assistance System admits a preliminarily identified victim to the Assistance System. Even victims themselves may do so. The Joint UN Commentary Member States recommends adopting a "low-threshold approach" to the identification of victims, which should be clearly defined in national law. As the identification of victims by the criminal justice system may be a lengthy and difficult process, a human rights-based approach would encourage States to overcome the multiple challenges of victim identification through procedures that foster the referral of persons for whom there are reasonable grounds to believe that they have been trafficked to specialized services as soon as indicators or a suspicion of trafficking are noted. The Joint UN Commentary further notes that, irrespective of official and judicial identification procedures, service providers and other first responders may activate a request for immediate support in the presence of a reasonable suspicion that a person may have been trafficked. This ensures that access to basic support and assistance can be provided to individuals who are thought to have been trafficked. This "low-threshold approach" is a step towards addressing the assistance and protection needs of exploited persons, without prejudice to the criminal justice system process, in cases where trafficking cannot be proven by the criminal justice system.¹⁴ UNHCR thus welcomes the human rights- and victim based approach applied by Finland in making the Assistance System available to preliminarily identified victims of trafficking with a low threshold.
11. A new provision concerning the formal identification of victims is introduced in the draft law amendment. UNHCR welcomes this amendment since there has been a lack of clarity in Finland as to which authority is the one to formally declare the identification of a victim of trafficking. The identification is meant to be a formal recognition of the victim. UNHCR understands the formal identification as an affirmation of the victim enabling the stay in the Assistance System until the victim no longer has a need for assistance and support. According to the law proposal, the police or a prosecutor will formally identify a victim when a criminal investigation of a trafficking crime starts and the person concerned is a victim of the crime. There is no requirement of cooperation with the police for this formal identification to take place. The Finnish Immigration Service (hereafter Migri) will formally identify a victim when the victim is granted a residence permit as a victim of trafficking according to Section 52 a of

¹³ UN High Commissioner for Refugees (UNHCR), *Prevent. Combat. Protect: Human Trafficking*, November 2011, p. 61 – 62, see footnote 4.

¹⁴ *Idem*, p. 33 – 34.

the Aliens Act. If Migri grants refugee or subsidiary protection status or other forms of residence permit than the one based on section 52 a to the victim the formal identification will, according to the draft law proposal, be done by the police. A third possibility is that the Assistance System formally identifies the victim. This situation may occur when there is no ongoing criminal investigation and the victim has applied for international protection in Finland or when the criminal investigation concludes that the victim is indeed a victim, but no charges will be raised against anyone. UNHCR welcomes that the law proposal envisages three ways of formally identifying victims of trafficking. Especially the right given to the Assistance System to formally identify a victim which is a flexible way of ensuring that persons who really are victims can stay in the Assistance System. UNHCR however notes that there is no explication in the explanatory note as to why the formal identification by Migri is restricted to residence permits granted to victims of trafficking but is excluding refugees and subsidiary protection holders, when such status could be derived from the fact that the refugee is a victim of trafficking.

Tracing

12. As one of the amendments aimed at strengthening the position of a child victim of trafficking, the draft law proposal introduces family tracing for a child victim of trafficking. The aim is to establish contact between the child and his parents or person having the custody of the child, if this is seen as being in the best interest of the child. Tracing can give additional information about the child's background and details concerning the victimization of the child. The explanatory note stresses, that the tracing can in some cases be against the interest of the child, and can even lead to re-victimization if the relatives are the culprits from the beginning. The Joint UN commentary stresses that caution is needed where such tracing may be contrary to the best interests of the child (for example, when family members are involved in the exploitation or in cases involving abuse or neglect) or if it would otherwise jeopardize the child's rights or endanger their family. In UNHCR's view it is hence important that the determination of the best interest of the child be done before starting the tracing. UNHCR welcomes the caution in the explanatory note that tracing may be against the best interest of the child, but recommends that the instances mentioned in the explanatory note where this might be the case should not be interpreted as an exhaustive list. Also abuse and neglect, jeopardizing the child's rights and endangering the family are reasons for considering tracing as not being in the best interest of the child.

III. Additional observations

Trafficking as persecution

13. The explanatory note of the draft law proposal duly notes that becoming a victim of trafficking may constitute ground to grant refugee status. It further states that in granting refugee status the risk assessment is forward looking, and that having become a victim of trafficking earlier, does not in itself constitute a reason to grant refugee status. In this respect UNHCR wants to stress that inherent in the trafficking experience are such forms of severe exploitation as abduction, incarceration, rape, sexual enslavement, enforced prostitution, forced labor,

removal of organs, physical beatings, starvation, the deprivation of medical treatment. Such acts constitute serious violations of human rights which will generally amount to persecution. In cases where the trafficking experience of the asylum applicant is determined to be a one-off past experience, which is not likely to be repeated, it may still be appropriate to recognize the individual concerned as a refugee if there are compelling reasons arising out of past persecution, provided the other interrelated elements of the refugee definition are fulfilled. This would include situations where the persecution suffered during the trafficking experience, even if past, was particularly atrocious and the individual is experiencing ongoing traumatic psychological effects which would render return to the country of origin intolerable. In other words, the impact on the individual of the past persecution continues. The nature of the harm previously suffered will also impact on the opinions, feelings and psychological make-up of the asylum applicant and thus influence the assessment of whether any future harm or predicament feared would amount to persecution in the particular case.¹⁵ UNHCR thus recommends that the compelling reasons arising out of past persecution is reflected in the explanatory note of the law proposal.

Summary:

UNHCR notes with concern that there are no references in the draft law proposal to how the best interest of the child is or will be determined in the Finnish Assistance System for trafficking victims.

UNHCR recommends that the recovery time should be minimum 90 days.

UNHCR recommends that the recovery period should be accessible for all victims of trafficking, not only those whose stay in Finland is legal.

UNHCR recommends Finland to include a provision on the safe return of victims of trafficking, in line with international and regional safeguards, and including the establishment of pre-return risk assessments in relation to Dublin returns.

UNHCR recommends that the instances mentioned in the explanatory note where tracing is not in the best interest of the child should not be interpreted as an exhaustive list.

UNHCR recommends that the compelling reasons arising out of past persecution be reflected in the explanatory note of the law proposal when discussing granting refugee status to victims of trafficking.

UNHCR Regional Representation for Northern Europe
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¹⁵ UN High Commissioner for Refugees (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, paragraphs 15 – 16, available at: <http://www.refworld.org/docid/443679fa4.html>