

Comments by the United Nations High Commissioner for Refugees (UNHCR) Regional Representation for Northern Europe on the draft Law Proposal of 20 November 2013, 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 of Finland for the invitation to comment on the draft Law Proposal of 20 November 2013, amending the Finnish Aliens Act based on the recast Qualification Directive¹ of the European Union.
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 refugees². 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[.]”³ UNHCR’s supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention Relating to the Status of Refugees (hereafter ‘1951 Convention’). Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (‘UNHCR Handbook’) and subsequent Guidelines on International Protection⁴. This supervisory responsibility is reiterated in Article 35 of the 1951 Convention, and in Article II of the 1967 Protocol relating to the Status of Refugees⁵.
3. UNHCR’s supervisory responsibility has also been reflected in European Union law, including by way of a general reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the European Union (“TFEU”)⁶, as

¹ European Union: Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L 337; December 2011, pp 9-26, available at:

<http://www.refworld.org/docid/4f197df02.html>.

² 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”).

³ *Ibid.*, paragraph 8(a).

⁴ UN High Commissioner for Refugees (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 According to Article 35 (1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of the 1951 Convention”.

⁶ European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, OJ C 115/47 of 9.05.2008, available at:

well as in Declaration 17 to the Treaty of Amsterdam, which provides that “consultations shall be established with the United Nations High Commissioner for Refugees ... on matters relating to asylum policy”⁷. Secondary EU legislation also emphasizes the role of UNHCR. For instance, Recital 22 of the recast Qualification Directive states that consultations with UNHCR “may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention”.

II. Observations

4. UNHCR welcomes initiatives aimed at bringing national legal frameworks in line with international and regional standards in the area of asylum and refugee protection and notes that the draft Law Proposal seeks to transpose the recast Qualification Directive. UNHCR would like to convey the following observations on specific proposals for amendments to the Finnish Aliens Act.

Section 87 b. Reasons for Persecution

5. In determining whether an applicant can be considered a member of a “particular social group” for the purposes of the refugee definition, UNHCR welcomes the added requirement in Section 87 b for gender-related aspects to be “given due consideration”, combined with the deletion of the present statement that gender creates no presumption of membership of a group. This will strengthen the protection of women, girls and LGBTI-applicants in particular. UNHCR has no comments on the changes proposed to the Section which are purely related to the Finnish language.
6. Nevertheless, the Section should be further amended to clarify the scope of the term “particular social group”. Members of a particular social group may be subject to persecution for either real or ascribed characteristics: it is not necessary for attributed characteristics to be factual. For example, a man may be persecuted because of a perception that he is gay, due to the way he dresses, speaks and/or acts, which may not be in line with the cultural gender roles and norms, even though he identifies himself as heterosexual. The term should also be interpreted in a manner open to the diverse and changing nature of groups in various societies and to evolving international human rights norms.⁸ Two main schools of thought have emerged in international refugee law theory as to what constitutes a particular social group within the meaning of the 1951 Convention; these are reflected in the recast Qualification Directive. The “protected characteristics approach” is based on an immutable characteristic or a characteristic so fundamental to human dignity that a person should not be compelled to forsake it. The “social perception approach” is based on a common characteristic which creates a cognizable group that sets it apart from society at large. Based on the “social perception approach”, people may require protection

<http://www.unhcr.org/refworld/docid/4b17a07e2.html>.

⁷ European Union, *Declaration on Article 73k of the Treaty establishing the European Community*, OJ C 340/134 of 10.11.1997, available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11997D/AFI/DCL/17: EN:HTML>.

⁸ See also UNHCR, *Guidelines on International Protection: Membership of a Particular Social Group Within the Context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/02, para. 12, at:

<http://www.unhcr.org/refworld/docid/3d36f23f4.html>.

because they are perceived as having certain characteristics which unite the group, irrespective of whether they actually possess these or not. While the results under the two approaches may frequently converge, this is not always the case. The protected characteristics approach may be understood to identify a set of groups that constitute the core of the social perception analysis.⁹ In other words, the social perception analysis would likely result in the recognition of a wider range of groups than would reference to protected characteristics alone.¹⁰ For example, to be a lawyer may not be seen as a protected characteristics, but can be covered under the social perception approach, since they may be cognizable as a group in the society. To avoid any protection gaps, UNHCR has thus recommended that the recast Qualification Directive permit the alternative, rather than cumulative, application of the two concepts.¹¹

7. There is some lack of certainty as to whether the cumulative approach is a correct interpretation of the text of the Qualification Directive given that the various language versions of the Directive appear to diverge in terms of whether the two tests are to be applied cumulatively or as alternatives. In terms of domestic transposition of the Qualification Directive, while some jurisdictions chose to state the two tests as alternatives in their legislation, like Ireland and Hungary, at least some jurisdictions within the EU have adopted the cumulative approach in implementing Art. 10(1)(d) into domestic law.¹²

Recommendation: UNHCR recommends amending Section 87 b to replace “and” with “or” between points 1 and 2 in Subsection 3. This will ensure that all refugees who fear persecution for reasons of their actual or perceived belonging to a particular social group qualify for international protection.

Section 88 d. Actors of National Protection

8. UNHCR notes that the proposed amendments to Section 88 d correspond to Article 7 of the recast Qualification Directive. The amendments stipulate that the protection must be effective and durable, specify who can provide such protection, and that actors of protection must be willing and able to enforce the rule of law. Reference is also made to “effective and durable” protection.

Recommendation: UNHCR welcomes the amendments and clarifications made to Section 88 d based on Article 7 of the recast Qualification Directive, which is intended to meet the standards of the 1951 Convention. In particular, UNHCR agrees that “willingness to protect” is not sufficient in the absence of the “ability to protect”.

⁹ Ibid, para 11.

¹⁰ UN High Commissioner for Refugees (UNHCR), *The 'Ground with the Least Clarity': A Comparative Study of Jurisprudential Developments relating to 'Membership of a Particular Social Group'*, August 2012, PPLA/2012/02, available at: <http://www.refworld.org/docid/4f7d94722.html>

¹¹ UN High Commissioner for Refugees (UNHCR), *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM(2009)551, 21 October 2009)*, 29 July 2010, p. 13 – 14, available at: <http://www.refworld.org/docid/4c503db52.html>.

¹² UN High Commissioner for Refugees (UNHCR), *The 'Ground with the Least Clarity': A Comparative Study of Jurisprudential Developments relating to 'Membership of a Particular Social Group'*, August 2012, PPLA/2012/02, p. 16 – 17.

9. In UNHCR's opinion, non-state actors in principle should not be considered as actors of protection. Parties and organizations, including international organizations, do not have the attributes of a State and do not have the same obligations under international law. In practice, this means that their ability to enforce the rule of law is limited, and thus their ability to render protection. Hence, an international body does not qualify as capable of providing protection. It is neither realistic nor practical to equate the protection generally provided by States with the exercise of a limited administrative authority and control over a territory by international organizations. Moreover, the Court of Justice of the European Union in *Abdulla*¹³ stresses the importance of access to protection.¹⁴

Recommendation: UNHCR recommends deletion of the reference to international organizations in Section 88 d.

Section 88 e. Opportunities to Receive Internal Protection

10. UNHCR welcomes the efforts to provide, through the proposed amendment to Section 88 e, greater clarity on the determination of when a part of a country may be considered a safe internal protection alternative, in line with the European Court of Human Rights judgment in *Salah Sheekh*¹⁵. However, UNHCR is concerned that the proposed amendment is not explicit in its wording as regards the period of time when the assessment of availability and accessibility of the internal protection alternative should take place. In UNHCR's view, an internal relocation or flight alternative must be safely and legally accessible for the individual concerned, at the time of the decision.¹⁶ A similar position is provided in Article 8(2) of the recast Qualification Directive, which requires that "*In examining whether an applicant has a well-founded fear of being persecuted or is at real risk of suffering serious harm, or has access to protection against persecution or serious harm in a part of the country of origin in accordance with paragraph 1, Member States shall **at the time of taking the decision** (emphasis added) on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant in accordance with Article 4. To that end,*

¹³ *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, C-175/08; C-176/08; C-178/08 & C-179/08, European Union: European Court of Justice, 2 March 2010, at:

<http://www.unhcr.org/refworld/docid/4b8e6ea22.html>. The Court found that "[t]he competent authorities of the Member State must verify, having regard to the refugee's individual situation, that the actor or actors of protection referred to in Article 7 (1) of Directive 2004/83 have taken reasonable steps to prevent the persecution, that they therefore operate, inter alia, an effective legal system for the detection, prosecution and punishment of acts constituting persecution and that the national concerned will have access to such protection if he ceases to have refugee status."

¹⁴ UN High Commissioner for Refugees (UNHCR), *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted* (COM(2009)551, 21 October 2009), 29 July 2010, p. 5 – 6, available at: <http://www.refworld.org/docid/4c503db52.html>.

¹⁵ *Salah Sheekh v. The Netherlands*, 1948/04, Council of Europe: European Court of Human Rights, 11 January 2007, available at: <http://www.unhcr.org/refworld/docid/45cb3dfd2.html>.

¹⁶ UN High Commissioner for Refugees, *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted* (COM(2009)551, 21 October 2009), 29 July 2010, page 6, available at: <http://www.refworld.org/docid/4c503db52.html>.

Member States shall ensure that precise and up-to-date information is obtained from relevant sources, such as the United Nations High Commissioner for Refugees and the European Asylum Support Office". Attempted predictions regarding whether the obstacles will be temporary or permanent detract from requisite legal certainty in the application of this concept. If the proposed alternative is not accessible in a practical sense, an internal flight or relocation alternative does not exist and cannot be considered relevant¹⁷.

Recommendation: UNHCR recommends revising the proposed Section 88 e in order to bring it fully in line with Article 8(2) of the recast Qualification Directive, by explicitly making it clear that the authorities "...shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant...". If the reference to the time of the decision is seen as superfluous due to general provisions concerning the asylum process, this should be stated clearly in the *travaux préparatoires*.

Section 105 b. Tracing a parent or some other person responsible for the actual guardianship of an unaccompanied minor

11. UNHCR welcomes the suggested amendment in Section 105 b, strengthening the obligation of the Finnish authorities to conduct tracing. UNHCR also welcomes the extension of the tracing period to continue even after a decision on international protection is made. The UN Convention on the Rights of the Child contains, in its Article 22(2), an obligation on State Parties...to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family"¹⁸ Tracing is of particular importance in the case of unaccompanied minors for whom every effort should be made to trace parents and other relatives as soon as possible, where it is in their best interest.¹⁹

Recommendation: UNHCR welcomes the proposed amendment to Section 105 b, strengthening the obligation of Finnish authorities to conduct tracing and extending the period for tracing.

Section 107. Withdrawing Refugee Status and Subsidiary Protection Status

12. UNHCR welcomes the proposed addition to Section 107, providing grounds for continued international protection where compelling reasons based on past

¹⁷ UNHCR *Handbook*, para. 91 and UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04, para. 7 I a, available at: <http://www.unhcr.org/refworld/docid/3f2791a4.html>.

¹⁸ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations Treaty Series, vol. 1577, p. 3, Article 22(2), available at: <http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf>.

¹⁹ UN High Commissioner for Refugees (UNHCR), *Refugee Family Reunification. UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification of Third Country Nationals Living in the European Union (Directive 2003/86/EC)*, February 2012, p. 10, available at: <http://www.refworld.org/docid/4f55e1cf2.html>.

persecution exist, based on the 1951 Convention Article 1C(5) and (6).²⁰ In addition, as time elapses between the moment when an individual fled his or her country of origin in circumstances fulfilling the conditions of Article 1A of the 1951 Convention, and the decision of an asylum authority, UNHCR recommends that “compelling reasons based on past persecution” are taken into consideration not only when applying cessation to recognized refugees, but also when adjudicating an application for protection.

Recommendation: UNHCR supports the proposed addition to Section 107.

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²⁰ Article 1C (5) and (6) provides that “the 1951 Convention shall cease to apply to any person falling under the terms of Article 1 (A) if:

(5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; Provided that this paragraph shall not apply to a refugee falling under section A (1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

(6) Being a person who has no nationality he is, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence; Provided that this paragraph shall not apply to a refugee falling under section A (1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.”

UNHCR, *Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C (5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)*, 10 February 2003, HCR/GIP/03/03, at: <http://www.unhcr.org/refworld/docid/3e50de6b4.html>.