



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 Ministry of Justice’s proposal for amendments to the Criminal Code’s provision on Arrangement of Illegal Immigration

Introduction

1. UNHCR would like to express its appreciation to the Finnish Ministry of Justice for the possibility to provide comments on the proposal for amendments to the Criminal Code concerning arrangement of illegal immigration. The comments below are made from the perspective of UNHCR’s mandate to provide international protection to refugees and, together with Governments, seek durable solutions to their situation¹.
2. 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 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.³ UNHCR’s supervisory responsibility is reiterated in Article 35 of the 1951 Convention and Article II of the 1967 Protocol⁴.
3. Finland is a party to the 1951 Convention since 10 October 1968.

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., paragraph 8(a).

³ 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/IP/4/ENG/REV. 3, available at: <http://www.unhcr.org/refworld/docid/4f33c8d92.html>

⁴ 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”.

General remarks

4. The right to asylum has been recognized as a basic human right.⁵ In exercising this right, asylum-seekers are often forced to arrive at, and enter, state territory without prior authorization, such as entry visas. Hence, the situation of asylum-seekers differs fundamentally from that of ordinary migrants in that they may not be in a position to comply with legal formalities for entry. Persons compelled to leave their countries to seek international protection abroad are often unable to obtain the necessary documentation in advance of their flight, e.g. because of their fear of persecution from the national authorities responsible for issuing passports and/or the urgency of the departure.
5. A non-penalization clause for illegal entry or presence was included in Article 31 of the 1951 Convention in recognition of the difficulties asylum-seekers frequently have in complying with immigration, including entry, formalities. Article 31(1) stipulates that refugees “coming directly from a territory where their life or freedom was threatened in the sense of Article 1 [of the 1951 Convention]” shall not be penalized for their illegal entry or presence if they present themselves to the authorities without delay and show good cause for their illegal entry or stay.
6. As previously mentioned, asylum-seekers are frequently compelled to enter a territory illegally, using fraudulent documents and the services of human smugglers in order to exercise their right to seek asylum. Also, measures to combat smuggling in human beings, such as interception of vessels on the high seas, strengthening of border controls and sanctions for commercial carriers, or agreements on the return and readmission of smuggled migrants, may hamper the ability of individuals to exercise their right to seek asylum if such measures are not accompanied by appropriate protection safeguards. The Protocol against the Smuggling of Migrants by Land, Sea and Air (hereafter "Protocol against Smuggling")⁶, supplementing the United Nations Convention against Transnational Organized Crime⁷, to which the Ministry of Justice’s proposal makes extensive reference, recognizes this by explicitly excluding victims of human smuggling from criminal liability and by stipulating that such victims are instead entitled to protection and assistance. The Protocol against Smuggling is also clear in that it does not aim at penalizing

⁵ Article 14 of the Universal Declaration of Human Rights provides that “Everyone has the right to seek and to enjoy in other countries asylum from persecution” and Article 18 of the Charter of Fundamental Rights of the EU enshrines the right to asylum. The scope of this right is broad and incorporates not only the substantive provisions of the 1951 Convention but also the procedural and substantive standards contained in the Union’s asylum *acquis*. The protection it confers plainly goes beyond protection from *refoulement* and includes a right to apply for and be granted refugee or subsidiary protection status. There will thus be a breach of Article 18 not only where there is a real risk of *refoulement* but also in the event of (i) limited access to asylum procedures and to a fair and efficient examination of claims or to an effective remedy; (ii) treatment not in accordance with adequate reception and detention conditions and (iii) denial of asylum in the form of refugee status or subsidiary protection status, with attendant rights, when the criteria are met. See UNHCR, *N.S. v. Secretary of State for the Home Department in United Kingdom; M.E. and Others v. Refugee Application Commissioner and the Minister for Justice, Equality and Law Reform in Ireland - Written Observations of the United Nations High Commissioner for Refugees*, 1 February 2011, C-411/10 and C-493/10, available at: <http://www.unhcr.org/refworld/docid/4d493e822.html>.

⁶ UN General Assembly, *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, available at: <http://www.unhcr.org/refworld/docid/479dee062.html>

⁷ UN General Assembly, *United Nations Convention against Transnational Organized Crime : resolution / adopted by the General Assembly*, 8 January 2001, A/RES/55/25, available at: <http://www.unhcr.org/refworld/docid/3b00f55b0.html>

individuals or organizations which assist such persons for purely humanitarian, non-exploitative, reasons, through its reference in Article 6(1) to “criminal offences...when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit”. The saving clause in Article 19 of the Protocol explicitly provides that nothing in the Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and its 1967 Protocol and the principle of non-refoulement. In its Summary Position on the Protocol against Smuggling, UNHCR emphasizes the need to reconcile legitimate measures to combat the smuggling of migrants and the trafficking of persons with States’ obligations under international refugee and human rights law, as set out, *inter alia*, in the saving clause in Article 19 of the Protocol against Smuggling.⁸

Scope of the Proposal

7. The Ministry of Justice proposes that the provision in Chapter 17, Section 8 of the Criminal Code on ‘arrangement of illegal immigration’ shall be amended. Specifically, the proposal introduces a penalty for bringing a foreigner to Finland whose travel document, visa, residence permit or any other, with travel document comparable document that is required for entry, has been obtained by giving false or misleading information relevant for the issuance of the document. Giving such documents to a foreigner or arranging the travel to Finland of a foreigner using such documents will also be subject to penalties. Attempts will also be punishable.
8. The Ministry also proposes amendments to Criminal Code provision Chapter 17, Section 7 of the Criminal Code on ‘border offence’. These proposed amendments do not however increase the scope of criminal liability and as stated in the proposal. Paragraph 2 of the provision still contains the savings clause based on Article 31 of the 1951 Convention, stating that a foreigner who seeks asylum or applies for a residence permit as a refugee in Finland shall not be sentenced for a border offence.
9. The potential criminalization, covered by the proposal, was unclear until the Supreme Court adopted its decision 2010:6, which somewhat clarified the situation by stating that arranging the entry of foreigners whose travel documents have been obtained by giving false information is not punishable as ‘arrangement of illegal immigration’. The need to amend the Criminal Code based on the Protocol against Smuggling was assessed in connection with the preparation of amendments to the Criminal Code in 2004. At that time, the current provision on ‘arrangement of illegal immigration’ was found to be in line with the requirements of the Protocol against Smuggling. The international comparison in the proposal on provisions concerning ‘arrangement of illegal immigration’ does not show any clear European standard on the criminal liability of arrangers of illegal entry.

⁸ See further UN High Commissioner for Refugees, *UNHCR Summary Position on the Protocol Against the Smuggling of Migrants by Land, Sea and Air and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention Against Transnational Organized Crime*, 11 December 2000, available at: <http://www.unhcr.org/refworld/docid/3ae6b3428.html>

10. Today, giving false information, for example concerning the reason for the journey, to Finnish authorities, can lead to criminal liability according to Chapter 16, Section 8 of the Criminal Code on 'providing false documents to a public authority'. This concerns also cases where the reasons for the journey have been stated falsely when applying for visa. If the false information is based on a falsified document it is regarded as 'forgery' according to Chapter 33 of the Criminal Code. Also traveling to Finland on false documents is regarded as 'forgery'. These criminal liabilities usually concern only the one who travels to Finland. According to the proposal, it is difficult to get proof on criminal complicity when someone has for example given someone advice to provide false information.
11. According to the proposal one of the main objectives of the proposed criminalization is to combat organized crime, as an obligation following the Protocol against Smuggling. However, the proposal also allows for the criminalization of an individual who facilitates the entry of a foreigner to Finland through the use of a document obtained through false or misleading information but without any intention to benefit economically from the action. This could be applicable in situations when someone submits an invitation to a foreigner in order for this person to obtain a visa. The proposal gives the example of a Finnish citizen who is planning to get married to a foreign national and invites friends of his or her spouse and falsely presents them in a letter or application as relatives of the future spouse. Even if there is no financial or material gain the action is criminalized. Intent is needed to trigger criminal liability. Knowledge about false information given by someone else is enough for criminal liability. Even knowledge of the probability of false information will trigger criminal liability according to Finnish jurisprudence on intent through probability.
12. The proposal acknowledges the right to apply for international protection according to the 1951 Convention and clarifies that it is not intended to impede the possibility for persons who flee their countries for protection related reasons to seek international protection. The proposal refers to the Protocol against Smuggling, which, as recalled above, does not aim at penalizing persons who facilitate illegal entry for purely humanitarian reasons. According to the proposal, the saving clause in Chapter 17, Section 8, Paragraph 2 of the Criminal Code could be applied in these circumstances. According to this saving clause, an act which, when taking into account in particular the motives of the person committing it and the circumstances pertaining to the safety of the foreigner in his or her home country or country of permanent residence, and when assessed as a whole, is to be deemed committed under vindicating circumstances, does not constitute arrangement of illegal immigration.

UNHCR's observations

13. UNHCR shares the concerns raised by many states that criminal and organized smuggling of migrants, on a large scale, may lead to the misuse of national asylum or immigration procedures. However, given an increasing number of obstacles to access safety, asylum-seekers are often compelled to resort to smugglers. UNHCR has emphasized the need to reconcile measures to combat the smuggling of migrants with existing obligations under international refugee law. In its Summary Position on the Protocol against Smuggling, UNHCR expressed appreciation for the adoption of provisions for the protection of smuggled migrants, such as the obligations of State

Parties to take appropriate measures to afford smuggled migrants protection against violence and to take into account the specific needs of women and children. UNHCR further noted that the Protocol against Smuggling is clear in that it does not aim at punishing persons for the mere fact of having been smuggled or at penalizing organizations which assist such persons for purely humanitarian reasons. UNHCR expressed hope that State Parties will respect the international legal framework set out by the Protocol against Smuggling through the adoption of similar safeguards in all bilateral or regional agreements or operational arrangements implementing or enhancing the provisions of the Protocol against Smuggling.⁹

14. Even if increasing the scope of criminalization in the provision on arrangement of illegal immigration does not directly target the foreigner arriving to Finland, as all measures combatting the smuggling of migrants, it could impact on the ability of persons in need of international protection to seek asylum in Finland.
15. Even if there are saving clauses attached to the provisions on ‘border offence’ and ‘arrangement of illegal immigration’, there are none in respect of the provisions concerning the provision of ‘providing false documents to a public authority’ or ‘forgery’. There is no information in the proposal on how these provisions are used today in cases where someone has applied for visa to Finland without disclosing the intent to seek asylum and then asks for asylum in Finland. Is this person charged with providing false documents to a public authority? This question is relevant since the proposal clearly states that giving false information of the reasons for the journey leads to criminal liability under the ‘providing false documents to a public authority’ provision and there is no saving clause in the provision. In UNHCR’s view, while a future asylum-seeker might be able to obtain a visa on other justified grounds, to enable him/her to enter legally, his/her right to seek asylum without being penalized for this act must be respected in line with international and regional refugee and human rights law standards and EU *acquis* on asylum.
16. In UNHCR’s experience, the principle in Article 31 of the 1951 Convention on non-penalization for illegal entry or stay is applied very restrictively in Finland. UNHCR has filed a judicial intervention in a case where an asylum-seeker, who was eventually granted asylum (Convention status), was convicted of forgery for having presented a forged passport at the Finnish border; the non-penalization principle was not applied since the asylum-seeker had waited one day before applying for asylum. This strict interpretation raises concerns about how the non-penalization principle in Article 31 of the 1951 Convention is applied in cases where false documents are presented to a public authority, and how the explicit saving clauses are applied. UNHCR has concerns about the provisions in chapter 33 and their interpretation being in line with article 31 of the 1951 Convention.
17. The new proposed criminalization could in principle lead to a situation where a person can become criminally liable for helping an asylum-seeker obtain a visa to Finland by submitting an invitation while the intent to seek asylum is withheld. The application of the saving clause is here an option, but the proposal only states that it

⁹ UN High Commissioner for Refugees, *UNHCR Summary Position on the Protocol Against the Smuggling of Migrants by Land, Sea and Air and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention Against Transnational Organized Crime*, 11 December 2000, available at: <http://www.unhcr.org/refworld/docid/3ae6b3428.html>

could be applied, there is no guarantee that this will happen, especially when taking into consideration the strict application in Finland of the non-penalization principle in Article 31 of the 1951 Convention. There is no clarity in the proposal on how the saving clause will be used in these cases.

18. Convicting someone of ‘arrangement of illegal immigration’ in situations described in paragraph 17 of course depends of the intent and thus the knowledge of the person submitting an invitation. Since Finland has jurisprudence on intent through probability, concerns arise if the mere existence of a probability of a certain level that the one traveling to Finland will ask for asylum is enough to trigger criminal liability for the one submitting the invitation. There is no clear answer to this in the proposal.
19. Lastly, UNHCR wishes to point out that there are situations when individuals are compelled to seek asylum while already abroad due to, for example, sudden changes in the situation in their country of origin. Such persons may qualify as refugees *sur place*. Refugees *sur place* may have entered their country of asylum on a visa issued e.g. for family visit or study reasons, before their need to seek asylum arose.

Conclusion

20. UNHCR appreciates the commitment shown by the Ministry of Justice in the proposal not to impede the possibilities of persons fleeing persecution, conflict or war to apply for international protection. Based on UNHCR’s knowledge of the strict interpretation in Finland of the non-penalization principle in Article 31 of the 1951 Convention the proposal however raises concerns about the effect the law amendment may have on asylum-seekers arriving in Finland.
21. UNHCR invites the Ministry of Justice to keep into consideration the concerns raised above and to provide guidance accordingly. This measure would contribute to the expressed goal of the Ministry not to impede the possibilities of persons fleeing persecution, conflict or war to apply for international protection in Finland.

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