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Stockholm, 28 February 2013

Notre/Our code: 067/ROBNC/2013

Dear Sir,

Re: The United Nations High Commissioner for Refugees additional comments on the proposed changes to draft law 354 SE amending the Act on Granting International Protection to Aliens

UNHCR has the honour to thank the Estonian Ministry of the Interior for the invitation to provide additional comments on a proposal to amend the Act on Granting International Protection to Aliens (*Välismaalasele rahvusvahelise kaitse andmise seaduse ja sellega seonduvalt teiste seaduste muutmise seadus, 354 SE I*). For your information, UNHCR will share a copy of its comments with Mr. Rait Maruste, the chairman of the Constitutional Committee of Estonian Parliament.

As always, UNHCR appreciates the constructive relationship between the Estonian Ministry of the Interior and UNHCR, and we thank you for your consideration of this important matter.

We remain at your disposal for any clarifications required.

Yours sincerely,



Pia Prytz Phiri

Regional Representative

Mr Ken-Marti Vaher
Minister of the Interior
Republic of Estonia

**The United Nations High Commissioner for Refugees
additional comments on the proposed changes to draft law 354 SE
amending the
Act on Granting International Protection to Aliens**

Introduction

UNHCR would like to thank the Estonian Ministry of the Interior for sharing its proposals revising the draft law 534SE (hereinafter – Proposals), which provide amendments to the Act on Granting International Protection to Aliens (AGIPA). UNHCR understands that the suggested changes are based, *inter alia*, on UNHCR observations to the initial text of the amendments which were submitted to the Estonian Ministry of the Interior on 11 February 2013. UNHCR also welcomes that the proposed changes take into consideration the commentaries provided by UNHCR at the meeting with the Constitutional Committee of Estonian Parliament on 19 February 2013.

The comments below provide position of UNHCR with regard to the proposals of the Estonian Ministry of the Interior to revise the initial list of grounds for detention and to introduce general legal principles and additional safeguards governing the detention of asylum-seekers in Estonia. The comments try to bring the draft law as much as possible in line with the compromise text of the amended recast Reception Conditions Directive¹ and the 2012 UNHCR Guidelines on Detention².

Grounds for detention

1. Pursuant to the Proposals, the wording of Article 36¹ (stipulating the grounds for detention of asylum-seekers) will be amended as follows:

“(1) An asylum-seeker can be detained on the basis of a ground prescribed by present law and in accordance with the principle of proportionality and in situations when

¹ European Commission, Amended proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers (Recast), 1 June 2011, COM(2011) 320 final (“the amended recast Reception Conditions Directive or amended recast RCD”), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0320:FIN:EN:PDF>.

² UN High Commissioner for Refugees, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (hereafter “UNHCR Guidelines on Detention”), 2012, available at: <http://www.unhcr.org/refworld/docid/50348953b8.html>.

application of surveillance measures, which are provided in present law, does not guarantee public order or national security or effectiveness of asylum procedure".

(2) In case of detention of an asylum-seeker, all circumstances shall be considered in each individual case and reasonable interests shall be measured.

(3) An asylum-seeker may be detained in the following cases:

- 1) for identification of personality or verification of identity;
- 2) for determination or verification of citizenship;
- 3) for checking the legal grounds for entry or residence in the country;
- 4) for establishing important circumstances relevant to the asylum proceedings;
- 5) ~~if there is good reason to believe that an asylum-seeker has committed a serious crime in a foreign state;~~
- 6) ~~an asylum-seeker has repeatedly or seriously violated the internal procedure rules of the accommodation centre for asylum-seekers or the official premises of the Police and Border Guard Board;~~
- 7) ~~an asylum-seeker fails to comply with the surveillance measures applied to him or her, or fails to perform other duties provided by law;~~
- 8) if there is a basis to believe that the conducting of asylum procedure will be ineffective with the use of the surveillance measures;
- 9) if there is a basis to believe that the applicant has lodged asylum application in order to suspend obligation to leave or avoid deportation;
- 10) detention of person is necessary in the interests of protection of national security or public order;
- 11) for transferring of an asylum-seeker in accordance with the Dublin II Regulation.

(4) An asylum-seeker can be detained for up to 48 hours without permission of the administrative court at the detention centre or premises of the Police and Border Guard Board.

(5) For detention longer than 48 hours the asylum-seeker can be detained only on the basis of permission of the administrative court.

~~(6) An asylum-seeker who has submitted an asylum claim during his or her stay at the detention centre, in a prison or house of detention, or in the course of execution of the expulsion procedure shall remain at the detention centre, in the prison or house of detention, respectively, until the termination of the asylum proceedings.~~

The grounds for detention which are prescribed by paragraph 3 of present article do not limit detention of a person on the basis of grounds prescribed by other laws.

(7) If it is not possible or substantially difficult to ensure detention of an asylum-seeker in the detention centre for the security, health or other reasons, the manager of the detention centre may decide to accommodate the detained asylum-seeker in the police jail or under surveillance outside the detention centre."

2. UNHCR welcomes the decision of the Estonian Ministry of the Interior to remove **Items 5, 6 and 7** from the list of grounds for detention provided in Article 36¹(3) AGIPA. Likewise UNHCR appreciates the proposal to amend the wording of **Article 36¹(6)**

AGIPA removing the provisions which stipulated an automatic or mandatory detention of asylum-seekers.

3. UNHCR further notes that **Item 3** of Article 36¹(3) AGIPA stipulates, as before, a possibility to detain an asylum-seeker “*for checking the legal grounds for entry or residence in the country*”. UNHCR notes that Article 31 of the 1951 Convention specifically provides for the non-penalization of refugees (and asylum-seekers) having entered or stayed irregularly if they present themselves without delay and show good cause for their illegal entry or stay³. It further provides that restrictions on movement shall not be applied to such refugees (or asylum-seekers) other than those which are necessary. Article 26 of the 1951 Convention further provides for the freedom of movement and choice of residence for refugees lawfully in the territory. Asylum-seekers are considered lawfully in the territory for the purposes of benefiting from this provision. In this regard, UNHCR would like to reiterate that the Estonian national legislation and practice must comply with the obligations under Article 31(1) and Article 26.

UNHCR therefore urges the deletion of Item 3 in Article 36¹(3) AGIPA.

4. UNHCR notes that **Item 4** of Article 36¹(3) AGIPA goes beyond the permissible grounds in the UNHCR Guidelines on Detention⁴ and could potentially allow for detention of significant numbers of asylum-seekers for long periods. Item 4 permitting detention “*for establishing important circumstances relevant to the asylum proceedings*” could be interpreted as covering the whole asylum procedure. The current wording of Item 4 provides no guarantees that detention on the basis of this ground will not be used for purposes of administrative convenience.

Taking into consideration the circumstances provided above, UNHCR suggests amending Item 4 of Article 36¹(3) AGIPA and stating the ground as follows:

“in order to record, within the context of a preliminary interview, the elements on which the application for asylum is based, which could not be obtained through other less coercive measures;”

5. UNHCR notes that newly proposed **Item 8** of Article 36¹(3) AGIPA (highlighted in yellow above) resembles the provisions of Article 8(3)(b) of the amended recast Reception Conditions Directive. The latter provides that an asylum-seeker can be detained “*in order to determine the elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding*”.

³ See the UNHCR *Guidelines on Detention*, para 11.

⁴ See Guideline 4.1 of the UNHCR *Guidelines on Detention*.

6. Also, UNHCR notes that the scope of Item 8 of Article 36¹(3) is covered by Item 10 of the same article (*detention of person is necessary in the interests of protection of national security or public order*). The protection of public order is one of three legitimate purposes which are generally in line with international law for restriction of freedom of movement and right to liberty of asylum-seekers. This purpose is supposed to be invoked in situations when there are strong grounds for believing that the specific asylum-seeker is likely to abscond or otherwise refuse to cooperate with authorities. Factors to balance in an overall assessment of the necessity to use such detention ground could include, for example, a past history of cooperation or non-cooperation, past compliance or non-compliance with conditions of release or bail, family or community links or other support networks in the country of asylum, the willingness or refusal to provide information about the basic elements of their claim, or whether the claim is considered manifestly unfounded or abusive⁵. Appropriate screening and assessment methods need to be in place in order to ensure that persons who are bona fide asylum-seekers are not wrongly detained in this way⁶.

UNHCR thus recommends amending Item 8 of Article 36¹(3) AGIPA as follows:

“if there is a basis to believe that the conducting of asylum procedure will be ineffective with the use of the surveillance measures, in particular when there is a risk of absconding;”

7. UNHCR notes that **Item 9** of Article 36¹(3) AGIPA relates to paragraph (d) of Article 8(3) of the amended recast RCD. The proposed provision allows detention of an asylum-seeker in situations when “*there is a basis to believe that the applicant has lodged asylum application in order to suspend obligation to leave or avoid deportation*”. In UNHCR’s opinion, it is in the interest of all parties to ensure efficient, as well as fair, procedures for the determination of international protection needs within a reasonable time. Article 18 of the EU Charter of Fundamental Rights⁷ enshrines a positive obligation for Member States to provide international protection. Recognizing the substantive character of a decision that an application for refugee status is manifestly unfounded or abusive and the grave consequences of an erroneous determination for the applicant⁸, UNHCR considers it important to ensure the appropriate procedural guarantees which would provide for the person an effective opportunity to lodge an asylum application. Moreover, the manifestly

⁵ See, UNHCR ExCom, Conclusion on Detention of Refugees and Asylum-Seekers, No. 44 (XXXVII) – 1986, para. (b), available at: <http://www.unhcr.org/refworld/docid/3ae68c43c0.html>.

⁶ International Detention Coalition (IDC), *There are Alternatives*, 2011, Introducing the Community Assessment and Placement Model, available at: <http://idcoalition.org/cap/handbook>.

⁷ European Union, Charter of Fundamental Rights of the European Union, 7 December 2000, Official Journal of the European Communities, 18 December 2000 (OJ C 364/01), available at: <http://www.unhcr.org/refworld/docid/3ae6b3b70.html>.

⁸ UN High Commissioner for Refugees, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, 20 October 1983, No. 30 (XXXIV) – 1983, available at: <http://www.unhcr.org/refworld/docid/3ae68c6118.html>.

unfounded or abusive character of an application should be established by the authority normally competent to determine refugee status⁹. State authorities shall substantiate the “bad faith” on the part of the applicant by referring to the objective criteria, including that he/she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he/she makes the application for international protection merely in order to delay or frustrate the enforcement of return decision.

UNHCR thus recommends amending Item 8 of Article 36¹(3) AGIPA as follows:

“when an asylum-seeker is already detained in order to prepare the return and/ or carry on the removal process and there are substantial grounds to believe that he or she has lodged asylum application merely in order to suspend obligation to leave or avoid deportation;”

8. UNHCR notes that **Item 11** of Article 36¹(3) AGIPA prescribes a possibility to detain an asylum-seeker for transferring to another country under the framework of the Dublin II Regulation¹⁰.

9. UNHCR further understands that the proposed provision relates to paragraph (f) of Article 8(3) of the amended recast RCD, as negotiated and agreed by the co-Legislators which, in turns, cross refers to the European Commission’s Proposal for a recast of the Dublin II Regulation¹¹. The later proposes certain limitations on the use of detention in the Dublin proceedings. Article 27(1) of the recast Dublin II Regulation prohibits detaining an applicant for the sole reason that s/he has applied for international protection. It further states that an asylum-seeker could be detained only *when there is a significant risk of absconding, on the basis of an individual assessment and only in so far as detention is proportional, if other less coercive alternative measures cannot be applied effectively.*

10. In UNHCR’s view, the present wording of Item 9 of Article 36¹(1) AGIPA is open for too broad interpretation which may potentially lead to a systematic detention of every asylum-seeker who is subject to transfer under Dublin II Regulation.

⁹ *Ibid*, at para (e) (ii).

¹⁰ Council Regulation (EC) No 343/2003 of 18 February 2003 *establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*, Official Journal (“OJ”) L 050, 25/02/2003, p. 1-10, available at: <http://www.unhcr.org/refworld/docid/3e5cflc24.html>. (“Dublin II Regulation”).

¹¹ *Proposal for a Regulation of the European Parliament and of the Council 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)*, COM(2008) 820 final, 3 December 2008, p 1, paragraph 2, available at: <http://www.unhcr.org/refworld/docid/493e8e3a2.html> (hereinafter - *recast Dublin II Regulation*).

UNHCR suggests amending the wording of Item 9 as follows:

“for transferring of an asylum-seeker in accordance with the Dublin II Regulation where there is significant risk of absconding, on the basis of an individual assessment and when detention is proportional and no other less coercive alternative measures can be applied effectively;”

Vulnerable applicants

11. UNHCR notes that the Ministry of the Interior proposed new paragraph 3 in Article 36⁴ AGIPA, as follows:

„(3) In case of detention of children, persons with disabilities, elderly, pregnant, single parents with minor children, also persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, the special needs of such persons shall be taken into consideration. There should be ensured regular monitoring of detention of such persons“.

12. At the outset, UNHCR would like to remind that the recent case law of the European Court on Human Rights (ECtHR) on the undesirability of detention of children (in families) has repeatedly found that detention of children, including with their parent(s) may amount to inhuman and degrading treatment (see for instance, *Popov v. France*; Application nos. 39472/07 and 39474/07, J 19 January 2012 and *Kanagaratnam and others v. Belgium*, Application no. 15297/09, 13 December 2011). In *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*,¹² the ECtHR held that the detention of a five year old child amounted to a breach of Article 3 of the ECHR and also took into account Articles 3, 10, 22 and 37 of the CRC. In particular it held that *“other measures could have been taken that would have been more conducive to the best interests of the child guaranteed by Article 3 of the Convention on the Rights of the Child. These included her placement in a specialised centre or with foster parents”*.

13. UNHCR is of the opinion that children seeking asylum should not be kept in detention. This is particularly important in the case of unaccompanied children. States which, regrettably and contrary to the preceding recommendation, may keep children seeking asylum in detention, should, in any event, observe Article 37 of the Convention of the Rights of the Child, according to which detention shall be used only as a measure of last resort and for the shortest appropriate period of time¹³.

¹² *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 13178/03, Council of Europe: European Court of Human Rights, 12 October 2006, available at: <http://www.unhcr.org/refworld/docid/45d5cef72.html>

¹³ UNHCR, Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, Feb 1997, paras. 7.6 and 7.7, available at: <http://www.unhcr.org/refworld/docid/3ae6b3360.html>. See also paras. 61 and 62 of General Comment No.6 (2005) of the Committee on the Rights of the Child, thirty-ninth session, 17 May – 3 June 2005, *Treatment of Unaccompanied and separated children outside*

14. UNHCR also supports the proposal of the European Commission in the text of the amended recast Reception Conditions Directive¹⁴, which provides that vulnerable persons¹⁵ shall in principle not be detained.

UNHCR thus recommends amending Article 36¹ AGIPA with provisions as follows:

“In all cases, vulnerable persons, as described in Article 36⁴(3) AGIPA, shall not be detained unless it is established following an individual examination of their situation by a qualified and independent professional that their health, including their mental health, and well-being, will not significantly deteriorate as a result of the detention.”

15. UNHCR notes that Article 36⁴ (3) AGIPA establishes a requirement of regular monitoring of vulnerable persons in detention. UNHCR welcomes this proposal of the Ministry of the Interior. UNHCR agrees that introduction of such safeguard may help to ensure that pressing medical and other needs can be identified, addressed and mitigated in a timely and professional fashion. UNHCR welcomes also initiative of the Ministry of the Interior to authorize the Estonian Red Cross to carry out regular monitoring visits to the detention centre and provide the reports on the quarter basis.

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February 2013

their country of origin, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/438/05/PDF/G0543805.pdf?OpenElement>.

¹⁴ See Article 11(1) of the amended recast Reception Conditions Directive.

¹⁵ According to Article 21(1) of the amended recast Reception Conditions Directive, Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of trafficking, persons with serious illnesses, persons with mental disorders, and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation, in the national legislation implementing this Directive.