

Observations by the United Nations High Commissioner for Refugees (UNHCR) on the proposed ‘Amendments to the Dutch Aliens Decree 2000 due to developments in implementation and policy’

I. Introduction

1. UNHCR welcomes the opportunity to present its observations on the draft ‘*Amendments to the Dutch Aliens Decree 2000 due to developments in implementation and policy*’.¹
2. UNHCR offers these observations in its capacity as the Agency entrusted by the United Nations General Assembly with the responsibility of providing international protection to refugees and other persons within its mandate and of assisting governments in seeking permanent solutions to the problems of refugees.² Paragraph 8 of UNHCR’s Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees,³ whereas the 1951 Convention relating to the Status of Refugees (hereafter referred to as ‘the 1951 Convention’)⁴ and its 1967 Protocol relating to the Status of Refugees (“the 1967 Protocol”)⁵ oblige States to cooperate with UNHCR in the exercise of its mandate, in particular facilitating UNHCR’s duty of supervising the application of the provisions of the 1951 Convention and 1967 Protocol (Article 35 of the 1951 Convention and Article II of the 1967 Protocol). This has also been reflected in European Union law, including by way of reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the European Union.⁶

¹ ‘Besluit tot wijziging van het Besluit inburgering 2021, het Besluit uitvoering Wet arbeid vreemdelingen 2022 en het Vreemdelingenbesluit 2000 in verband met de afschaffing van de verblijfsground voor vermogende vreemdelingen en andere aanpassingen die voortvloeien uit ontwikkelingen in de uitvoeringspraktijk en jurisprudentie alsmede van herstel van onduidelijkheden van de implementatie van EU-richtlijnen’, <https://www.internetconsultatie.nl/vreemdelingenbesluit/b1>.

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.refworld.org/docid/3ae6b3628.html>.

³ Ibid, para. 8(a). According to para. 8(a) of the Statute, UNHCR is competent to supervise international conventions for the protection of refugees. The wording is open and flexible and does not restrict the scope of applicability of UNHCR’s supervisory function to one or other specific international refugee conventions. UNHCR is therefore competent qua its Statute to supervise all conventions relevant to refugee protection, UNHCR’s supervisory responsibility, October 2002, available at: <http://www.refworld.org/docid/4fe405ef2.html>, pp. 7–8.

⁴ UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations Treaty Series, No. 2545, vol. 189, available at: <http://www.unhcr.org/refworld/docid/3be01b964.html> <https://www.refworld.org/docid/3be01b964.html>. According to Article 35 (1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of the Convention”.

⁵ UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: <https://www.refworld.org/docid/3ae6b3ae4.html>.

⁶ European Union, Consolidated version of the Treaty on the Functioning of the European Union, 26 October 2012, OJ L. 326/47-326/390; 26.10.2012, available at: <http://www.refworld.org/docid/52303e8d4.html>.

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. Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and subsequent Guidelines on International Protection ("UNHCR Handbook")⁷. UNHCR also fulfils its supervisory responsibility by providing comments on legislative and policy proposals impacting on the protection and durable solutions of its persons of concern.
4. UNHCR's comments will only address the introduction of a new Article 5.8 to the Aliens Decree 2000 (section K in the draft amendments), concerning the detention of unaccompanied or separated children.

II. Comments relating to Article 5.8

5. One of the amendments proposed is the introduction of Article 5.8 in the Aliens Decree 2000, which aims to clarify current regulations on the detention of unaccompanied or separated children and to introduce a legal basis for a later introduction of additional norms and rules on the detention of unaccompanied or separated children.⁸ The proposed new Article provides that unaccompanied or separated children can only be detained in exceptional circumstances and in locations specific for this purpose.⁹
6. Article 37 (b) of the Convention of the Rights of the Child¹⁰ states that no child shall be deprived of his or her liberty unlawfully or arbitrarily. The provisions on detention of children as a "measure of last resort" in this Article may apply to children in conflict with the law but are not applicable to immigration proceedings and therefore cannot be used to justify immigration detention of children.¹¹

⁷ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, April 2019, HCR/1P/4/ENG/REV. 4, available at: <https://www.refworld.org/docid/5cb474b27.html>.

⁸ See Explanatory Note to the draft Decision (*Nota van toelichting*), available at: <https://www.internetconsultatie.nl/vreemdelingenbesluit/b1>, page 15.

⁹ *Ibid.*

¹⁰ Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, available at <https://www.refworld.org/docid/3ae6b38f0.html>.

¹¹ UNHCR, IOM and UNICEF, *Safety and dignity for refugee and migrant children: Recommendations for alternatives to detention and appropriate care arrangements in Europe*, available at: <https://www.unhcr.org/62c3f1464>, page 6; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, available at: www.refworld.org/docid/5a12942a2b.html.

7. UNHCR's position is that children should not be detained solely on the basis of their migratory or residence status or that of their parents.¹² Detention is never in a child's best interest, as clearly articulated by the Committee on the Rights of the Child, the European Court of Human Rights, as well as other relevant human rights courts and authorities.¹³ Studies have indicated that detention of children can undermine their psychological and physical well-being and compromise their cognitive development.¹⁴ Furthermore, children held in detention are at risk of suffering depression and anxiety, and frequently exhibit symptoms consistent with post-traumatic stress disorder.¹⁵ There is strong evidence that detention has a profound and negative impact on children's health and development regardless of the conditions in which children are held, and even when detained for short periods of time or with their families.¹⁶
8. In light of the above, UNHCR recommends to the government of the Netherlands to ensure that children (both children in families and unaccompanied or separated children) are not held in detention for immigration related purposes and to ensure draft legislation and practice is in accordance with the Convention on the Rights of the Child and reflects the best interests of the child. This would be in line with the recommendation issued to the Kingdom of the Netherlands by the Committee on the Rights of the Child to "[p]rohibit and prevent the separation of asylum-seeking and migrant children from their parents and the detention and/or deportation of children across all constituent countries, including Aruba and Curaçao, on the basis of their or their parents' migration status".¹⁷
9. UNHCR further recommends to the government of the Netherlands to employ viable and constructive alternatives to detention from a child protection perspective and in line with the best interests of the child, including alternatives that are being used in the European and

¹² UNHCR, *UNHCR's position regarding the detention of refugee and migrant children in the migration context*, January 2017, available at: <https://www.refworld.org/docid/5885c2434.html>, page 2.

¹³ UNHCR, IOM and UNICEF, *Safety and dignity for refugee and migrant children: Recommendations for alternatives to detention and appropriate care arrangements in Europe*, available at: <https://www.unhcr.org/62c3f1464>, page 6; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, available at: www.refworld.org/docid/5a12942a2b.html; European Court of Human Rights, *Factsheet: Unaccompanied migrant minors in detention (2020)*, available at: www.echr.coe.int/Documents/FS_Unaccompanied_migrant_minors_detention_ENG.pdf; and Inter-Agency Working Group (IAWG), *Ending Child Immigration Detention*, available at: https://endchilddetention.org/wp-content/uploads/2016/09/IAWG_Advocacy-Brochure_Aug-2016_FINAL-web.pdf.

¹⁴ UNHCR, *UNHCR's position regarding the detention of refugee and migrant children in the migration context*, January 2017, available at: <https://www.refworld.org/docid/5885c2434.html>, page 2.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ UN Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of the Kingdom of the Netherlands*, CRC/C/NLD/CO/5-6, 9 March 2022, available at <https://www.ohchr.org/en/documents/concluding-observations/crcnldco5-6-concluding-observations-combined-fifth-and-sixth>, page 12.



Dutch context such as supervision and case management and foster- and family-based care. UNHCR remains available to engage with the government in a constructive dialogue on such alternatives to detention.

10. UNHCR remains available to discuss these observations with the Government of the Netherlands

UNHCR,
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