

United Nations High Commissioner for Refugees (UNHCR)

DRAFT (PARTIAL) IMMIGRATION AND CITIZENSHIP BILL

Submission to the Joint Committee on Human Rights

November 2008

Executive Summary

UNHCR has been charged by the United Nations General Assembly with the responsibility for providing international protection to refugees and other persons within its mandate and for seeking permanent solutions to the problem of refugees by assisting governments and private organizations¹.

UNHCR welcomes Government's initiative to simplify and consolidate current UK legislation on immigration and asylum but wishes to highlight a number of human rights issues raised by the Draft (Partial) Immigration Bill and Explanatory Notes. UNHCR urges the Joint Committee to ensure that the new legislation will uphold the UK's tradition of providing sanctuary to those fleeing persecution and is compatible with the UK's obligations under the 1951 Refugee Convention and the European Convention on Human Rights.

UNHCR particularly wishes to draw the Committee's attention to a number of areas of concern relating to the Draft Bill:

1. **Primacy of the 1951 Refugee Convention:** UNHCR believes that the duties and rights in the 1951 Refugee Convention and its 1967 Protocol should be fully reflected in primary legislation, including the definition of a refugee;
2. **Strong safeguards for strong borders:** the Bill should, recognise the principle of *non-refoulement* and the UK's extra-territorial obligations;
3. **A path to citizenship:** the naturalisation requirements of active citizenship and language proficiency should not directly or indirectly impede refugees' access to an effective nationality which UNHCR considers part of the durable solution; further to the UK's international obligations under the 1954 and 1961 Statelessness Conventions² appropriate

¹ Statute of the Office of the United Nations High Commissioner for Refugees, GA Res. 428(V), Annex, UN Doc. A/1775, paras 1, 6 (1950).

² UN General Assembly, Convention Relating to the Status of Stateless Persons, 28 September 1954. United Nations, Treaty Series, vol. 360, p. 117. Available at: <http://www.unhcr.org/refworld/docid/3ae6b3840.html>. UN General

national procedures should be in place to determine statelessness, whether de jure or de facto, and identify access to most relevant solutions which could include offering the opportunity to provide an effective nationality;

4. **Criminalisation of/ access to asylum:** there is an insistence in the Draft Bill on prosecuting individuals claiming asylum in the UK over assessing their international protection needs, whilst ‘immigration bail’ removes the presumption of liberty of those entering the UK.

I. Primacy of the 1951 Refugee Convention

1. There is no direct reference to the primacy of the 1951 Refugee Convention in the Draft Bill as is currently contained in section 2 of the Asylum and Immigration Appeals Act 1993. Instead, protection and reference to the 1951 Refugee Convention are confined to the draft Immigration Rules, which carries a number of risks. UNHCR is of the opinion that the duties and rights in the 1951 Refugee Convention should be fully reflected in primary legislation. Failing that, there should be an equivalent section 2 reference in the Draft Bill.
2. The definition of a refugee in the Draft Bill must reflect the 1951 Refugee Convention, the 1967 Protocol and UNHCR’s Handbook 1979³. Further, the definition is incorrect and should reflect the fact that recognition by the UK Government does not make someone a refugee but declares them to be one⁴.
3. Article 31 (1) of the 1951 Refugee Convention dealing with non-penalisation of refugees has not been accurately reflected in the Draft Bill, Part 11. The Draft Bill makes no mention of Article 31 (1) and adds qualifications which are not found in Article 31 (1). UNHCR believes that this issue could be addressed by having a direct reference to Article 31 (1) in the Draft Bill.
4. Finally, UNHCR is concerned that the Draft Bill appears to limit the UK’s obligations to persons present on UK territory. UNHCR’s view is that the 1951 Refugee Convention applies to state signatories in an extra territorial manner⁵.

II. Strong Safeguards for Strong Borders

Assembly, Convention on the Reduction of Statelessness, 30 August 1961. United Nations, Treaty Series, vol. 989, p. 175. Online. Available at: <http://www.unhcr.org/refworld/docid/3ae6b39620.html>

³ Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1, 1979 (Re-edited, January 1992), available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=3ae6b3314>

⁴ Ibid, paragraph 29.

⁵ For more on the UK’s extra-territorial obligations see attached Legal Opinion. See also UNHCR ‘Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol’, 26 January 2007, available at: <http://www.unhcr.org/refworld/docid/45f17a1a4.html>. See also “The Scope and Content of the Principle of Non-Refoulement: Opinion”, Sir Elihu Lauterpacht and Daniel Bethlehem, 20 June 2001, in “Refugee Protection in International Law: ‘UNHCR’s Global Consultations on International Protection’”, edited by Erika Feller, Volker Türk and Frances Nicholson, Cambridge University Press, Cambridge (2003), available at: <http://www.unhcr.org/publ/41a1b51c6.html> and ‘UNHCR Note on Diplomatic Assurances and International Refugee Protection’, 10 August 2006, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=44dc81164&page=search>

5. As a signatory to the 1951 Refugee Convention and its 1967 Protocol the UK is obliged to identify persons with international protection needs within the phenomenon of mixed movements when undertaking migration control activities. In the management of migration and border control, States should ensure that safeguards are in place so that people who are seeking international protection can request asylum and be assured a fair treatment of their claims. Consequently, border control systems should incorporate measures which make it possible to identify people who are seeking protection. Within these flows, refugees and other people in search of international protection constitute a distinct category.
6. In UNHCR's view, the measures in the Draft Bill do not differentiate adequately between persons seeking international protection and other third-country nationals, and may therefore impede safe access to asylum procedures for persons seeking protection. The proposed new power to refuse permission must not prevent individuals from fleeing persecution or result directly or indirectly, in their *refoulement* or denial of access to the asylum procedure.
7. In UNHCR's understanding, the UK's protection responsibility under international refugee and human rights law, including respect for the principle of non-*refoulement*, is engaged wherever it asserts jurisdiction in relation to all persons within its territory or subject to its jurisdiction, including asylum-seekers and refugees. This responsibility also extends to the actions of out-posted UK immigration officials, as representatives of the UK Government acting on behalf of the UK or in the exercise of governmental authority. UK immigration officials operating overseas to prevent entry to the UK must be required and empowered to identify the protection needs of the people they intercept, allow access to asylum procedures for those seeking international protection, as well as to provide appropriate and differentiated solutions for all the profiles of people involved in mixed movements.
8. UNHCR recommends that any interception measures be guided by the following considerations in order to ensure the adequate treatment of asylum-seekers and refugees amongst those intercepted:

'...Interception measures should not result in asylum-seekers and refugees being denied access to international protection, or result in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where their life or freedom would be threatened on account of a Convention ground, or where the person has other grounds for protection based on international law. Intercepted persons found to be in need of international protection should have access to durable solutions;...'
9. UNHCR has developed a 'Ten Point Plan of Action'⁶ to assist States in finding practical solutions to the challenges of managing their external borders, while complying fully with their obligations under international refugee and human rights law. These practical protection safeguards are required to ensure that such measures are not applied in an indiscriminate or disproportionate manner and that they do not lead to direct or indirect *refoulement*.⁷
10. Where profiling mechanisms do not exist or cannot be applied, UK border control officials should be helped to identify asylum seekers and other persons with special needs through the

⁶ UNHCR, Refugee Protection and Mixed Migration: A 10-Point Plan of Action, January 2007. Rev.1, available at: <http://www.unhcr.org/refworld/docid/45b0c09b2.html>

⁷ UNHCR, ExCom Conclusion on Non-*Refoulement*, 1977. No. 6 (XXVIII) - 1977, available at: <http://www.unhcr.org/excom/EXCOM/3ae68c43ac.html>

elaboration of guidelines or standardised questionnaires, protection hotlines and/or the possibility to consult with UNHCR. They should receive clear instructions that all asylum seekers are to be referred to the responsible asylum authorities⁸.

11. Part 8 of the Draft Bill obliges private carriers to conduct immigration control activities, which may have the impact of seriously limiting the right to seek and enjoy asylum and may be incompatible with the humanitarian tenet on which the international regime for the protection of refugees is based. In UNHCR's view, when interception measures are conducted by private actors on behalf of the Government or in the exercise of governmental authority, the UK should ensure that asylum seekers and refugees have access to protection and respect for the principle of non-*refoulement*. In UNHCR's view, when interception measures are conducted by private actors on behalf of the Government, the UK still should ensure that asylum seekers have access to protection and respect for the principle of non-*refoulement*.

III: A Path to Citizenship

12. In UNHCR's view securing legal residence is of utmost importance to the successful integration of refugees and other persons with international protection needs. Consideration should be given to facilitating naturalisation, especially as regards certain conditions for naturalisation which may prove too difficult for refugees to meet and in fact impair on refugees' access to a durable solution.
13. UNHCR is of the view that the proposed route to citizenship complicates, rather than simplifies, the immigration system by requiring migrants and refugees to pass through an additional stage of 'probationary citizenship'. There is a real risk that the complexity of the process and the fees involved will make the integration process longer and more expensive for refugees, contrary to Article 34 of the 1951 Refugee Convention which requires that States "expedite naturalization proceedings" and "reduce as far as possible the costs and charges of such proceedings".
14. UNHCR urges the UK Home Office to consider making exceptions for refugees who are unable to participate, or are limited in the manner in which they are able to participate in community activities. In this regard it should be borne in mind that refugees may have faced specific forms of persecution in the past and the association with community activities may have an unintended impact on their emotional and physical well being. Although this 'activity condition' is not mandatory, it appears to serve as a form of indirect penalty for not participating in the community activities. In the circumstances described above, in UNHCR's view, it would not be fair to expect the individuals concerned to spend three years as probationary citizens, increasing the total period of time before they become eligible for citizenship to eight years should they be unable, for reasons of their past persecution experience, to participate in community activities.
15. UNHCR is of the view that the language requirements imposed on refugees and their family members should be understood in the context of their flight. Refugees, unlike migrants, have not chosen to leave their country in freedom and are therefore particularly disadvantaged.

⁸ UNHCR's Response to the European Commission's Green Paper on the Future Common European Asylum System, September 2007, available at: <http://www.unhcr.org/refworld/docid/46e159f82.html>

UNHCR encourages the Government to ensure that refugees have access to Government funded English language classes given the fact that prior to their arrival in the UK, refugees, those with humanitarian protection and their families are likely to have had less access to English language training institutions and basic education facilities than regular migrants. Many will have fled from communities that have been torn apart by conflict; spent years in makeshift refugee camps; or lived in remote areas of the world where education facilities are minimal and access to specialized English language training as well as the internet is limited. Language classes should be further accessible to refugees taking into account the gender, age and diversity of the refugees to ensure that all refugees have equal access to assistance.

16. UNHCR is concerned that the provisions of the Draft Bill do not make it sufficiently clear that persons who come to the UK illegally and who are in need of international protection should not be penalised⁹. In light of this, UNHCR is concerned that as part of the requirements for naturalisation it is required that the applicant was not at any time in the qualifying period in the UK in breach of the immigration laws (section 33).
17. With regard to the resettlement of refugees to the UK under the Gateway Protection Programme, the majority of refugees who are resettled to the UK under the Gateway Protection Programme have been recognised as refugees by UNHCR for at least five years. They have often spent decades residing in refugee camps, and have been identified for resettlement because they are unable to integrate in their country of asylum, or return to their country of origin. Accordingly, the objective of resettlement is to provide these refugees with a durable and permanent solution. The grant of indefinite leave to remain upon arrival to the UK¹⁰ contributes significantly to the ability of refugees to begin to rebuild their lives in the UK (the first year of which is financed by the Government). UNHCR would like to draw attention to the fact that resettled refugees in all other resettlement countries receive indefinite leave to remain and not a temporary status¹¹.
18. UNHCR further would like to draw attention to the UK's international obligations under the 1954 Convention relating to the Status of Stateless Persons¹² and the 1961 Convention on the Reduction of Statelessness¹³. UNHCR is concerned that the provisions of these Conventions have not been transposed in national law. In the absence of a specific procedure to determine statelessness, the legal limbo in which the stateless person exists, remains unresolved. UNHCR therefore recommends that the UK will adopt a designated statelessness determination procedure with a view to identifying stateless persons, to facilitate the acquisition of a legal identity and to provide for a legal status, and where appropriate, to provide for a 1954 Convention Travel Document.

IV: Criminalisation of Asylum

⁹ Section 31 of the Immigration and Asylum Act 1999 represents UK legislators interpretation of what is required by Article 31 of the 1951 Refugee Convention. Please also refer to UNHCR comments in paragraphs 35 and 37 of this submission for more on UNHCR's concerns regarding Article 31 as well as the attached Legal Opinion.

¹⁰ This is currently the situation, see the Asylum Policy Instructions on the Gateway Protection Programme, available at: <http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/>

¹¹ USA, Canada, Sweden, Norway, Finland, New Zealand, Denmark, The Netherlands, France, Ireland, Brazil, Chile, Argentina, Iceland, Poland, Portugal, Paraguay and Uruguay.

¹² The 1954 Convention relating to the Status of Stateless Persons, UNTS, No. 5158, Vol. 360, p.117

¹³ The 1961 Convention on the Reduction of Statelessness, UNTS 14458, vol. 989, p.175

19. Part 4 of the Draft Bill seeks to combine administrative removal¹⁴ (used in the majority of cases of failed asylum-seekers), automatic deportation and deportation (used in cases where the concerned individual's presence in the UK is considered not conducive to public good) into the single concept of 'expulsion'. Part 4 also takes away the requirement to give notice to the individual facing expulsion and consequently gives the affected individual no opportunity to make representations before the decision to expel is taken.
20. UNHCR remains concerned about the Draft Bill's insistence on prosecuting individuals in the UK over assessing their international protection needs. For example, the Draft Bill provides that persons sentenced to at least 12 months are liable to automatic expulsion because they become 'foreign criminals' (sections 37(2)(b) and 51 read together)¹⁵. Recognised refugees and those granted subsidiary protection may come under the ambit of 'foreign criminals' if they commit even minor offences and are sentenced to at least 12 months. Such persons are protected from removal from the UK if this would contravene the UK's obligations under the Refugee Convention while their application is being decided (according to section 38 (4) of the Bill)¹⁶.
21. Article 33 (2) of the 1951 Refugee Convention provides that no person shall be expelled to a country where they face persecution **unless**, "*there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country*". UNHCR believes that the obligation which the Draft Bill places on the Secretary of State, to make an expulsion order where an individual has been imprisoned for 12 months sets too low a threshold to justify an exception to the principle of *non-refoulement*.
22. In introducing the concept of 'immigration bail', Part 5 of the Draft Bill appears to take away the presumption of liberty for those in respect of whom an expulsion order has or may be made (section 55). Further, it weakens the judicial oversight on 'immigration bail' by limiting the power of the Tribunal to cancel bail conditions imposed by the Secretary of State and by requiring the Tribunal to seek the Secretary of State's consent before granting bail in cases where removal from the UK is imminent.
23. While UNHCR accepts that there may be exceptional situations under which States may detain individuals seeking international protection, it has always been UNHCR's view that the detention of asylum seekers is inherently undesirable, and that there must be a presumption against its use as such measures are contrary to the fundamental human right of freedom from arbitrary detention¹⁷. UNHCR is therefore concerned that the proposed use of the term 'immigration bail' in the Draft Bill is not appropriate where it is sought to apply to all individuals seeking international protection who are waiting for their applications to be

¹⁴ Prior to the changes to the Immigration Rules brought under HC321 in April 2008, administrative removal, did not bar removed individuals from returning to the UK. HC321 now imposes re-entry bans of varying lengths for any forced removals or voluntary departures after October 2008. For details on HC321 see <http://ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/statementsofchanges/>. See also UNHCR comments to Part 3 of the Draft Bill in this submission.

¹⁵ This regime currently exists in the UK Borders Act 2007 and is known as 'automatic deportation'. See UNHCR Briefing for the House of Lords, second reading, June 2007 on the UK Borders Bill available at: <http://www.unhcr.org.uk/legal/documents/UNHCRComments.June07.pdf>

¹⁶ See however, comments in paragraph 28 of the attached Legal Opinion.

¹⁷ As set out in 'UNHCR's Guidelines on applicable Criteria and Standards relating to the Detention of Asylum Seekers', February 1999. UNHCR also considers that there are certain categories of people who should not be detained, due to their particular vulnerability such as victims of torture, disputed minors, persons with a mental or physical disability, unaccompanied elderly persons, families with children, and other individuals with similarly vulnerable backgrounds and characteristics are also of concern to UNHCR in the context of detention.

decided. Individuals fleeing persecution have a right to ask the United Kingdom to offer them international protection, and it is UNHCR's position that the detention of such applicants should be resorted to only exceptionally and where such action would be proportionate to the objectives it is aiming to achieve.¹⁸ Use of the term 'immigration bail' implies that detention is the rule and not an exception.

24. UNHCR is also concerned that the Draft Bill as currently drafted erodes judicial oversight in detention decisions and the granting of bail.¹⁹ In order to ensure that the detention of those seeking international protection is in conformity with international standards and that no individual is subjected to arbitrary detention, UNHCR believes that the detention of each individual held should be submitted to automatic judicial oversight.²⁰ In this respect, UNHCR recommends the re-introduction of automatic bail hearings, as was the position with Part III of the Asylum and Immigration Act 1999, into the Draft Bill, or for the adoption of similar legislative provisions to ensure that a bail hearing is automatically triggered in relation to any individual seeking international protection, once a specified reasonable and proportionate period of time is passed in detention. UNHCR further recommends that affirmative measures be put in place to facilitate bail applications by detained asylum seekers as well as the provisions of quality legal advice and representation.
25. Part 7 consolidates the pre-existing immigration offences and adds a new offence of 'obstructing, resisting or assaulting officials'. UNHCR's main concern with this part of the Bill is that it makes it an offence for asylum seekers to knowingly enter the UK without a valid travel document, contrary to the UK's obligations under Article 31 (1) of the 1951 Convention. The right to seek asylum is recognized in the Universal Declaration of Human Rights (Article 14). Further, individuals become refugees by fulfilling the definition of a refugee under the 1951 Refugee Convention and State recognition simply declares refugee status but does not create it²¹.
26. The criminalisation of asylum seekers in UK legislation has been the subject of UNHCR comments on a number of occasions in the recent past, including to this Committee.²² Refugees are often forced to flee their own country in fear of their lives. In such desperate circumstances individuals may need to resort to desperate measures merely to survive. It is well-established that the need to escape persecution frequently compels refugees to resort to irregular means of entry into host countries - including reliance on facilitators and/or the use

¹⁸ In conformity with UNHCR ExCom Conclusion No. 44 (XXXXVII) - 1986 (available at: <http://www.unhcr.org/refworld/docid/3ae68c43c0.html>), the detention of asylum-seekers may be resorted to if no alternatives are available, and for the minimum period of time necessary to:

- 1) Verify Identity;
- 2) To determine the elements on which the claim for refugee status or asylum is based;
- 3) In cases where asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State, in which they intend to claim asylum;
- 4) To protect national security and public order.

See also UNHCR's submission to the European Court of Human Rights in the case of *Saadi v. United Kingdom* (13229/03) 29 January 2008.

¹⁹ This point has been made in UNHCR's Comments on the 2005 Immigration and Nationality Bill, October 2005 available at: <http://www.unhcr.org.uk/legal/positions/UNHCR%20Comments/Comments2005!ANbilldetention.htm>.

²⁰ UNHCR has stated in ExCom Conclusion No. 44 (see footnote 21 above), that detention measures taken in respect of asylum seekers should be subject to judicial or administrative review.

²¹ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, paragraph 29, see footnote 5 above.

²² UNHCR has previously expressed its concern to this Committee, in December 2004, with regard to the implementation of legislation criminalizing asylum seekers for illegal entry or presence, see UNHCR's submission to the Home Affairs Committee Enquiry into the Policy and Practice of Immigration Control Examination of the entry clearance (visa) system, the granting or refusing of further leave in the UK and the enforcement of immigration control. See also, Asylum and Immigration (Treatment of Claimants, etc.) Bill Lords 2nd reading, UNHCR briefing March 2004 and UNHCR Comments on the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, Clause 2 Draft Guidance of June 2004 available at: <http://www.unhcr.org.uk/legal/position.html>

of false documentation. Article 31 is specifically aimed at protecting persons in this situation from prosecution for the measures that they were forced to use to reach safety.²³

27. UNHCR is also not satisfied that the defence for entering the UK without a passport (section 104 (3) is sufficient to ensure compliance with Article 31 (1) of the 1951 Refugee Convention. UNHCR is of the opinion that the question of whether an excuse is 'reasonable' (and whether non-compliance with the instructions of a facilitator was 'unreasonable') is inherently subjective and requires a careful assessment of the individual circumstances and special situation of asylum seekers. Very often persons who are of special interest to a government find it difficult, if not impossible to either apply for a passport or to leave their country of nationality in a regular manner. Hence, the use of forged or irregular documents and departure by irregular means (including reliance on a facilitator) are common methods used by persons in need of international protection to arrive in a country of asylum. These issues were explored in UNHCR's third party intervention in the recent case of *R v Asfaw*²⁴.

**UNHCR
November 2008**

²³ Please also see paragraphs 23-33 of the attached Legal Opinion. Article 31(1) of the 1951 Refugee Convention provides that:

'Contracting States shall not impose penalties on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.'

²⁴ [2008] UKHL 31 [2008] 2 WLR 1178. See also attached Legal Opinion paragraphs 23-33.