

United Nations High Commissioner for Refugees (UNHCR)

DRAFT (PARTIAL) IMMIGRATION AND CITIZENSHIP BILL

**Submission to the Home Affairs Select Committee in response to the Call for
Written Evidence of 22 July 2008**

October 2008

Executive Summary

UNHCR welcomes the Government's initiative to simplify and consolidate current UK legislation on immigration and asylum, and is encouraged by a number of proposals contained in the Bill such as the duty on immigration officials to promote and safeguard the welfare of children.

In undertaking an inquiry into Managing Migration, UNHCR urges the Select Committee to ensure that the principles of international refugee protection will remain a priority for the Government and that the new legislation will uphold the UK's tradition of providing sanctuary to those fleeing persecution.

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

1. **International Protection:** UNHCR believes that the duties and rights in the 1951 Refugee Convention and its 1967 Protocol should be fully reflected in primary legislation;
2. **Definition of a refugee:** the definition contained in the Draft Bill should be amended to reflect the 1951 Refugee Convention definition of a refugee;
3. **Strong safeguards for strong borders:** the Bill should ensure safe access to asylum procedures for persons seeking international protection, recognise the principle of *non-refoulement* and the UK's extra-territorial obligations in this respect;
4. **Citizenship:** the naturalisation requirements of active citizenship and language proficiency should not directly or indirectly impede refugees' access to a durable solution;
5. **Criminalisation of 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;
6. **Appeals:** proposals to remove out of country appeal rights and further extend the powers of the Secretary of State to amend or expand the list of safe countries of origin remain areas of concern to UNHCR.

I. Introduction

1. 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.
2. In view of the Office's supervisory role under its Statute and Article 35 of the 1951 Convention Relating to the Status of Refugees² ('1951 Refugee Convention'), UNHCR's interpretation of the provisions of the 1951 Refugee Convention and 1967 Protocol Relating to the Status of Refugees³ ('1967 Protocol') are generally considered an authoritative view which should be taken into account by States when deciding on questions of refugee law.
3. UNHCR welcomes the Home Affairs Select Committee's Call for Written Evidence of 22 July 2008 and takes this opportunity to comment on the Draft (Partial) Immigration and Citizenship Bill 2008 ('Draft Bill'). UNHCR has consistently provided comments to previous legislation and policy consultations, including the initial consultation on simplifying immigration law of August 2007⁴, and will build on these comments in this briefing.
4. UNHCR commends the UK Government for the initiative and commitment to consolidate and simplify UK immigration and asylum law. UNHCR trusts that when this legislation is enacted it will not erode the UK's time-honoured tradition of providing asylum to those who are in need of international protection in line with its international obligations and in particular under the 1951 Refugee Convention and its 1967 Protocol. UNHCR also welcomes the inclusion in section 189 of the Draft Bill, which places a duty on immigration officials specifically designated by the State to promote and safeguard the welfare of children in carrying out their duties (similar to the section 11 duty in the Children Act 2004).
5. In view of some of the issues of serious concern identified by UNHCR with the Draft Bill, UNHCR has obtained a joint legal opinion from Michael Fordham QC of Blackstone Chambers and Samantha Knights of Matrix Chambers ('Joint Opinion'), which is summarised under heading II below (and attached to this submission). Under heading III UNHCR will address further issues of concern within the framework of the parameters stipulated by the Committee in its Call for Written Evidence of 22 July 2008.

II. Core issues of concern to UNHCR set out in the Joint Opinion

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 Refugees, 28 July 1951. United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.unhcr.org/refworld/docid/3be01b964.html>

³ UN General Assembly, Protocol Relating to the Status of Refugees, 30 January 1967. United Nations, Treaty Series, vol. 606, p. 267, , available at: <http://www.unhcr.org/refworld/docid/3ae6b3ae4.html>

⁴ UNHCR's has previously supplied a 'Response to Home Office Border Agency consultation "The Path to Citizenship: Next Steps in Reforming the Immigration System"' as well as a response to the initial consultation 'Simplifying Immigration Law'. The views expressed by UNHCR in this submission reflect the views contained in the both sets of consultation comments, available at: http://www.unhcr.org.uk/info/briefings/responding_to_policy/documents/080516ResponsetoHomeOfficeBorderAgencyconsultationoncitizenship.pdf and http://www.unhcr.org.uk/info/briefings/responding_to_policy/documents/UNHCRresponsetoInitialSimplificationConsultation.pdf.

6. The Joint Opinion covers 5 core issues which UNHCR has identified in the Draft Bill and 'draft illustrative immigration rules on protection' ('Immigration Rules') published by the UK Government at the same time as the Draft Bill. UNHCR is of the opinion that these core issues should be adequately addressed in the Draft Bill and Immigration Rules if the UK Government's obligations under the 1951 Refugee Convention are to be fully adhered to.
7. 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.
8. The definition of a refugee in the Draft Bill must reflect the 1951 Refugee Convention, the 1967 Protocol and UNHCR's Handbook 1979⁵. 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 one⁶.
9. 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.
10. Although in section 38, the Draft Bill makes a direct reference to the 1951 Refugee Convention it goes on to include a subjective executive regarding element regarding whom the Secretary of State thinks the 1951 Refugee Convention should protect.
11. 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 manner⁷.

III. Comments on specific aspects of the Draft Bill

⁵ 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>

⁶ Ibid, paragraph 29.

⁷ 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>

“Strong borders” (including modernising border powers and carriers’ liability and powers to cancel visas abroad) – Parts 1, 2 and 8

12. 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.
13. The proposals currently contained within the Draft Bill build on existing migration control measures including visa restrictions and the e-Borders programme without referring to core principles of refugee protection. Parts 1 and 2 of the Draft Bill extend existing powers, in particular those of ‘juxtaposed controls’ and Airline Liaison Officers operating overseas (see sections 14(3), 20(3), 25(1) and 25(2) as well as 25(2)(e) and 29(1) of the Draft Bill); powers which facilitate the UK to manage immigration controls in another country long before migrants and persons with international protection needs reach UK territory. In short, these immigration officials will be able to examine passengers and cancel previously granted immigration and transit permission. 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.
14. 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. Out-posted UK immigration officials should be provided with the necessary specific training and clear instructions on how to uphold the UK’s international obligations under the 1951 Refugee Convention, including responding to and examining asylum applications and handling the needs of separated children, victims of trafficking and other groups with specific needs.
15. UNHCR refers to the provisions of its position on interception measures⁸, which, *inter alia*, recommends that any such interception measures be guided by the following considerations

⁸ UNHCR, Executive Committee (‘ExCom’) Conclusion on Protection Safeguards in Interception Measures, 10 October 2003. No. 97 (LIV) – 2003, available at: <http://www.unhcr.org/refworld/docid/3f93b2894.html>.

The Executive Committee of the High Commissioner’s Programme (‘ExCom’) has its genesis in para. 4 of the Statute of the Office of the United Nations High Commissioner for Refugees, 1950. Under that provision, the UN Economic and Social Council of the General Assembly established an Advisory Committee on Refugees. In 1958 it became the Executive Committee of the High Commissioner’s Programme: ECOSOC Res 672 (XXV), 30.4.58. ExCom is currently composed of 70 States. Under its terms of reference, it *inter alia* advises the Commissioner at his or her request on the

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;...’

16. UNHCR has developed a ‘*Ten Point Plan of Action*’⁹ 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*.¹⁰
17. 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 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 authorities¹¹.
18. Part 8 of the Draft Bill concerns the extension of existing provisions for carriers’ liability - the application of civil penalties on carriers of irregular or undocumented passengers – and introduces the ‘Authority to carry’ scheme (see section 149 of the Draft Bill). UNHCR’s principle concern is that carriers’ liability by preventing departure from a country of persecution or a country where protection is not guaranteed (such as a country of transit for example) conflicts with the spirit of the 1951 Refugee Convention in that it might ultimately prevent access to a territory where a claim for asylum will be adequately determined. Furthermore, these provisions may result in the *refoulement* of persons in need of protection due to the indiscriminate activities of private actors.
19. Through carriers’ liability provisions in Part 8 of the Draft Bill, private carriers are obliged 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

exercise of UNHCR’s protection functions under the statute (GA Res 1166 (XII), 26.11.57). The Commissioner is required to abide by the Committee’s conclusions on international protection: GA Res 1673 (XVI), 18.12.61, para 1, GA Res 1783 (XVI), 7.12.62. Given the duty on States under Article 35 1951 Refugee Convention to co-operate with the office of the UNHCR in order to facilitate the exercise of its functions, in particular its overarching ‘duty of supervising the application’ of the CSR, the fact that ExCom conclusions bind the Commissioner is a strong pointer to their persuasive weight before a domestic court.

⁹ 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>

¹⁰ UNHCR, ExCom Conclusion on Non-*Refoulement*, 1977. No. 6 (XXVIII) - 1977, available at: <http://www.unhcr.org/excom/EXCOM/3ae68c43ac.html>

¹¹ 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'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*.

“Earning the right to stay” (including new requirements for citizenship and an automatic ban on returns with new powers to exclude criminals and immigration offenders) – Part 3

20. 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.
21. 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”.
22. UNHCR considers that, as a matter of best practice, the required period of residence in order to be eligible for naturalisation should not exceed 5 years for refugees. This is in order to restore an effective nationality to refugees and those with humanitarian protection and promote their full integration into society. Further, UNHCR believes that a cumulative period of the initial 5 years should include periods spent in the country whilst asylum applications are under consideration.
23. 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.
24. 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. 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.

25. 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 penalised¹². 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).
26. 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 UK¹³ 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 status¹⁴.

“Playing by the rules” (including the introduction of ‘bail bonds’ for those awaiting detention or expulsion, ‘immigration bail’ as an alternative to detention, revised sanctions for breaches of immigration law, and simplified appeals system) – Parts 4, 5 and 10

27. Part 4 of the Draft Bill seeks to combine administrative removal¹⁵ (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.
28. 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)¹⁶. Recognised refugees and those granted subsidiary protection may come under the ambit

¹² 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.

¹³ 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/>

¹⁴ USA, Canada, Sweden, Norway, Finland, New Zealand, Denmark, The Netherlands, France, Ireland, Brazil, Chile, Argentina, Iceland, Poland, Portugal, Paraguay and Uruguay.

¹⁵ 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.

¹⁶ 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>

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)¹⁷.

29. 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*.
30. UNHCR has previously expressed its concerns to the UK Government regarding section 72 of the Nationality, Immigration and Asylum Act 2002 (as read with the NIAA Specification of Particularly Serious Crimes Order 2004) on its interpretation of the exception to the principle of *non-refoulement* in Article 33 (2) of the 1951 Convention¹⁸. The Article 33 (2) mechanism has always been considered a measure of last resort justified by the exceptional threat posed by the individual – a threat such that it can only be countered by removing the person from the country of asylum, including, if necessary, to the country of origin.¹⁹
31. Part 5 of the Draft Bill sets out the powers under which detention can be carried out on people liable to examination under the powers conferred in Part 2 of the Bill. It goes further by introducing a new concept of ‘immigration bail’ to replace temporary admission and temporary release as well as financial bonds for those granted ‘immigration bail’. Part 5 also appears to take away the presumption of liberty for those in respect of whom an expulsion order has or may be made (section 55) and further 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.
32. 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

¹⁷ See however, comments in paragraph 28 of the attached Legal Opinion.

¹⁸ See UNHCR Briefing On Nationality, Immigration And Asylum Bill, September 2002 available at: http://www.unhcr.org/uk/legal/positions/UNHCR%20Comments/comments_2002Bill.htm These concerns were again raised in relation to Section 72 of the Nationality Immigration and Asylum Act (NIAA) 2002 and the NIAA Specification of Particularly Serious Crimes Order) both of which set thresholds for an exception to the *non-refoulement* principle that are not in line with the letter and spirit of the 1951 Refugee Convention, and do not meet the criteria as set out in Article 33 (2) of the 1951 Refugee Convention.

¹⁹ Lauterpacht & Bethlehem, Sir Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement*, Opinion (2001), available at <http://www.unhcr.org/publ/PUBL/419c75ce4.pdf>

“The view has been expressed . . . that ‘the principle of non-refoulement of refugees is now widely recognized as a general principle of international law.’” and “the text of Article 33 (2) makes it clear that it is only convictions for crimes of a particularly serious nature that will come within the purview of the exception” (...) “the fundamental humanitarian character and primary importance of non-refoulement as a cardinal principle of refugee protection has also been repeatedly affirmed more generally in Conclusions of the Executive Committee over the past 25 years”.

- of freedom from arbitrary detention²⁰. 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 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.²¹ Use of the term ‘immigration bail’ implies that detention is the rule and not an exception.
33. UNHCR is also concerned that the Draft Bill as currently drafted erodes judicial oversight in detention decisions and the granting of bail.²² 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.²³ 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.
34. Part 7 consolidates the pre-existing immigration offences and adds a new offence of ‘obstructing, resisting or assaulting officials’.
35. 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 it²⁴.

²⁰ 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.

²¹ 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.

²² 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/Comments2005IANbilldetention.htm>.

²³ 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.

²⁴ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, paragraph 29, see footnote 5 above.

36. 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.²⁵ 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 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.²⁶
37. 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*²⁷.
38. Part 10²⁸ of the Draft Bill deals with appeals generally, appeal rights, grounds of appeal and the proposed structure for the Asylum and Immigration Tribunal²⁹. Section 164 will replace sections 82 and 83 of the Nationality, Immigration and Asylum Act 2002 but will also introduce some changes to the existing appeal rights. UNHCR welcomes the extension of the right to appeal against the cancellation³⁰ of refugee status, which UNHCR has previously advocated for³¹. However, the Draft Bill also takes away some appeal rights in certain instances such as clearly unfounded claims, except in those cases raising family life issues ('family life application'). Further, section 178 gives the

²⁵ 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>

²⁶ 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'.

²⁷ [2008] UKHL 31 [2008] 2 WLR 1178. See also attached Legal Opinion paragraphs 23-33.

²⁸ Part 10 has to be read together with Schedules 1 and 2 of the Draft Bill as well as the consultation on immigration appeals – "*Consultation: Immigration Appeals – fair decisions; faster justice*" published by the UKBA on 21 August 2008.

²⁹ To highlight some of the provisions: Section 164 provides for the immigration decisions against which an appeal may be brought and these are further elaborated in Sections s 165 to 173 explaining when and where an appeal may be brought. Section 174 provides for grounds upon which an appeal may be brought.

³⁰ UNHCR trusts that cancellation is used here generically to cover the following procedures; cancellation, cessation, revocation, exclusion and application of Article 33 (2).

³¹ See UNHCR comments to the transposition of Article 39 of Council Directive 2005/85/EC of 1 December 2005 laying down minimum standards on procedures in Member States for granting and withdrawing refugee status available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=42492b302&skip=0&query=procedures%20directive,%20article%2039>.

- Secretary of State the power to amend the list of countries to which the non-suspensive appeal regime applies (manifestly unfounded claims) by reference to such factors as gender, language, race, religion, nationality, membership of a particular social group or political opinion. This list, however, is not exhaustive and may be extended by reference to ‘any other attribute or circumstance that the Secretary of State thinks appropriate’.
39. It is UNHCR’s view that a well-functioning appeals system is integral to fair and efficient refugee status determination procedures³². The right to an effective remedy is enshrined in international human rights law instruments: the International Covenant on Civil and Political Rights (Article 2, Paragraph 3) and Article 13 of the European Convention of Human Rights. The European Court of Human Rights has applied Article 13 to mean that an appeal mechanism for refugee status determinations is necessary where there is danger of refoulement.³³ Article 13 of the ICCPR mandates that a review procedure should be allowed before an alien can be expelled from the territory³⁴.
40. Given the potentially serious consequences of an erroneous determination at first instance, the suspensive effect of asylum appeals is a critical safeguard to ensure respect for the principle of non-refoulement of asylum seekers. If an applicant asylum seeker is deprived of an appeal right or not permitted to await the outcome of an appeal against a negative decision at the first instance in the UK, the remedy against the decision is ineffective. This is because such a state of affairs undermines the realisation of the very remedy sought by the appeal, in that the asylum seeker is appealing against a decision which in terms of the law, requires removal from the UK. UNHCR considers that the principle of *non-refoulement* is so fundamental to protecting the life and basic freedoms of an individual that it would be severely undermined if the authorities were enabled to remove a person without conducting a thorough review and assessing the reason being advanced for such a stand with full procedural guarantees. Exceptions to this fundamental principle should only be permitted in precisely defined cases, where there is clearly abusive behaviour on the part of an applicant, or where the unfoundedness of a claim is manifest³⁵.
41. UNHCR regrets that for applications which are rejected at first instance and certified as manifestly unfounded, appeals do not have suspensive effect in the UK. Such cases do not have an in-country right of appeal and can only appeal the decision to refuse the asylum application after return to their countries. In UNHCR’s view this provision greatly increases the risk of instances of *refoulement*, especially since the only way to challenge the decision to certify is through judicial review.

³² The Global Consultations paper of 31 May 2001 on Asylum Processes (Fair and Efficient Asylum Procedures) states at para. 41: “Procedures in place in most States recognize that standards of due process require an appeal or review mechanism to ensure the fair functioning of asylum procedures...”

³³ See European Court of Human Rights cases of *H v. France* (33087/07), *Gebremedhin v. France* (25389/05) 26 April 2007, *Čonka v. Belgium* (51564/99) 5 February 2002, *Jabari v Turkey* (40055/98) 11 July 2000, available at: <http://www.echr.coe.int/ECHR/FR/Header/Case-Law/Hudoc/Hudoc+database/>

³⁴ Article 13 states: “an alien lawfully in territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and have his case reviewed by, and be presented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.”

³⁵ UNHCR Ex Com Conclusion No. 30 (XXXIV) - 1983 on the Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=3ae68c6118>.

42. Although UNHCR welcomes any measures aimed at improving the appellate system and recognises that States may have recourse to accelerated procedures in determining asylum applications, the more accelerated a procedure is; the higher the risk that an erroneous decision will be taken, the consequences of which could include a return to the country of persecution for the applicant. Such decisions should, therefore, always be accompanied by the appropriate procedural guarantees, including a possibility of appeal within the UK. In particular, UNHCR would recall its Executive Committee, in Conclusion No. 30, of which the UK is a member, stated in 1983 that:

"[A]n unsuccessful applicant should be enabled to have a negative decision reviewed before rejection at the frontier or forcible removal from the territory. Where arrangements for such a review do not exist, governments should give favourable consideration to their establishment."³⁶

43. UNHCR is seriously concerned by the proposal contained in sections 165(2)(b), 166 (2)(b) and 177 (2) of the Draft Bill to take away out-of-country appeal rights in refugee protection or subsidiary protection (human rights) cases which are certified by the Secretary of State as “*clearly unfounded*”. The only exception to this is where the human rights application raises family life issues. UNHCR has in the past expressed concern over the shortcomings of the provision of out-of-country appeals in accelerated procedures and is concerned that even that nominal appeal facility is now being taken away³⁷. Completely abolishing appeal rights in certain cases would infringe on Article 39 of the European Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status³⁸. If no general suspensive effect is required, at least access to protective measures by the judiciary must be guaranteed (Art. 39 (3) (b)).
44. UNHCR is further concerned that section 178 of the Draft Bill extends further the already wide powers of the Secretary of State to amend or expand the list of countries in Schedule 2 (deemed to be safe countries of origin). Specific factors describing a person such as those listed in section 178 (3) (“gender, language, race, religion, nationality membership of a particular social or other group, political opinion of any other attribute the Secretary of State thinks appropriate”) are inherent to an individual and part of an individualized refugee status determination procedure, and do not lend themselves to a generalized assessment on which to base a country designation. The proposed amendment of the list by reference to description of a person on the basis of is contrary to the Asylum Procedures Directive, which allows for factors such as “the legal situation, the application of the law and the general political circumstances” and not individual factors describing a person.
45. In UNHCR’s view, the ‘safe country of origin’ concept should be applied narrowly and may only be resorted to as a procedural tool for prioritised or accelerated treatment of

³⁶ Ibid.

³⁷ See UNHCR’s comments on the Nationality Immigration and Asylum Bill, 2002, available at: http://www.unhcr.org.uk/legal/positions/UNHCR%20Comments/comments_2002Bill.htm. In its comments to the 2002 Bill, UNHCR had indicated its difficulty with envisaging how it would be possible to properly launch an appeal against a refusal of an asylum claim from outside the UK, especially if the failed applicant were returned to his or her country of origin. Access to legal advice would be more problematic since it would be necessary to find a legal representative with experience of UK asylum law and practice. UNHCR urged the UK to ensure that safeguards in the clearly unfounded category of cases must include an appeal within the territory of the UK, and should not be made subject to exceptions in view of the potentially grave consequences for the applicant.

³⁸ 2005/85/EC, Asylum (Procedures) Regulations 2007 and HC 82.

claims in carefully circumscribed situations. UNHCR does not oppose the notion of ‘safe country of origin’ where it is used as a procedural tool for prioritized or accelerated treatment, in carefully circumscribed situations. However, it is critical that each case be examined fully and individually on its merits. Each applicant should be given an effective opportunity to rebut the presumption of safety of the country of origin, in his or her individual circumstances and to access an effective remedy in the form of an independent review.

46. UNHCR hopes that its concerns with the Draft Bill will be given due attention in order to ensure the United Kingdom’s full adherence to its international and legal obligations under the 1951 Refugee Convention. UNHCR wishes to thank the Home Affairs Select Committee for seeking its views and remains available to provide further clarifications and comment, in order to inform the legislative process as may be necessary.

UNHCR
October 2008

Annexe I

RE: THE HOME AFFAIRS SELECT COMMITTEE AND THE DRAFT IMMIGRATION AND CITIZENSHIP BILL

JOINT OPINION

INTRODUCTION

1. The United Nations High Commissioner for Refugees (UNHCR) has asked for our Joint Opinion on the position in law on five of the issues regarding refugee protection, which arise from the draft Immigration and Citizenship Bill and illustrative Immigration Rules published on 14 July 2008 by the United Kingdom's Home Office. This Joint Opinion is not intended to be exhaustive of all the issues relating to refugee protection, still less issues relating to human rights or other immigration matters, arising from the draft Bill.
2. The duties which the United Kingdom owes to refugees, and the rights to which they are entitled, are set out in the Refugee Convention. The Convention falls to be interpreted by the Courts on the language which it contains and as a matter of law, being given its autonomous meaning and with recognition that it is a living instrument. It must be given a purposive construction consistent with its humanitarian aims: see *R v Asfaw* [2008] UKHL 31 [2008] 2 WLR 1178 at [11] (Lord Bingham).
3. A 'protection gap' would arise if the United Kingdom's domestic legal provisions fall short of what the Convention, properly interpreted, would require. Only by securing that the terms of the Convention itself govern the State's obligations and the refugee's rights, can it be ensured that the United Kingdom has not put itself in breach of the Convention. Were it the intention to legislate so as to fall short of the obligations

under the Convention, creating such protection gaps, this aim would surely need to be explicitly articulated and justified. We can see no good reason why the United Kingdom would wish to (or could justify) legislating to create protection gaps. It must, moreover, be a fundamental role of pre-legislative scrutiny, to ensure that protection gaps (and breaches of international law) are not the consequence of legislative reform which is being promoted. This is the context in which the five issues arise.

4. Throughout the analysis of the Bill from a refugee law perspective, the following straightforward questions arise: (1) does the Bill invariably allow the provisions of the Refugee Convention itself, properly interpreted by the Courts, to be the determinative ‘driver’ of the rights and obligations which arise in relation to refugees?; (2) if not, then what legitimate articulated reason is there said to be for this and the breaches of international law which stand to follow where protection gaps appear?
5. For ease of reference, this Joint Opinion is divided into two sections: first dealing with the broader issues relating to the primacy of the Convention itself, and the definition of a refugee, and secondly dealing with comments on specific sections of the draft Bill.

SECTION A

(1) Convention Primacy and Immigration Rules

6. There is a problem in the draft legislation which arises from the combination of two things: (1) seeking to achieve certain aspects of substantive protection of refugees in immigration rules; and (2) failing to legislate for the primacy of the Convention itself over those rules.

7. The primacy of the Refugee Convention is the fundamental cornerstone of the international protection regime for refugees. The Convention as the international treaty governing this area is the driving force in law in refugee protection afforded by States to individuals and the rights enjoyed by them. It both (a) imposes a key duty not to remove refugees in breach of the Convention; and also (b) requires that other rights and protections be recognised in the case of refugees.

8. The most obvious way in which Parliament could fully secure the Convention's primacy would be to incorporate or domesticate the Convention. That step has not yet fully been taken in the United Kingdom: see *R v Asfaw* [2008] UKHL 31 [2008] 2 WLR 1178 at [29] (Lord Bingham). Proper domestication would not be difficult to achieve. For a helpful parallel in human rights law, see the Human Rights Act 1998 which scheduled Convention rights from the European Convention on Human Rights. That Act has allowed the proper interpretation of those provisions of the ECHR, itself a living instrument, to be applicable in domestic law. It avoids protection gaps and secures against breaches of international law. Here, the draft Bill, intended to simplify immigration and asylum legislation, has been framed in a way which is a missed opportunity and a failure to take an important step forwards.

9. Other countries have domesticated the protections of the Refugee Convention directly: see e.g. South Africa's Refugees Act 1998 (Opening paragraph and Preamble: "*To give effect within the Republic of South Africa to the relevant international legal instruments, principles and standards relating to refugees... Whereas the Republic of South Africa has acceded to the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees....*"); Canada's Immigration and Refugee Protection Act 2002, s. 95(1) (referring directly to the Refugee Convention in conferring protection); New Zealand's Immigration Amendment Act 1999, ss. 129C and D (referring directly to the Refugee Convention for determining status); Spain's Law 5/1984 of 26 March 1984 on the Right to Asylum and Refugee status, amended by the law 9/1994, Article 3.1 (asylum is granted to persons meeting the criteria of the 1951 Geneva Convention and its 1967

Protocol); The Netherlands' Aliens Act 2000 of 23 November 2000, Article 29 (1) (a) (providing for asylum on the basis of the refugee definition of the Refugee Convention); and New Zealand's Immigration Amendment Act 1999, s. 129X(1) (directly incorporating Articles 32(1) and 33(2) of the Convention).

10. In fact, the draft Bill as framed takes a damaging and inexplicable backwards step. This can be seen by comparing the position in existing domestic law. Under the current legislation, whether an individual is recognised as a refugee for the purpose of non-removal and certain other rights is the subject of: (a) the application by the Secretary of State of immigration rules regarding asylum claims; and (b) the consideration of refugee-status appeals by the Asylum and Immigration Tribunal and the appellate courts: see *Saad v Secretary of State for the Home Department* [2001] EWCA Civ 2008 [2002] Imm AR 471. Importantly, however, there is a rule in current primary legislation which ensures that the Immigration Rules (however framed) will yield to the provisions of the Convention itself, properly interpreted. That is because section 2 of the Asylum and Immigration Appeals Act 1993 provides: “*Nothing in the immigration rules (within the meaning of the 1971 Act) shall lay down any practice which would be contrary to the Convention.*” The current Immigration Rules themselves reinforce the Convention's primacy (by paragraph 328): “*All asylum applications will be determined by the Secretary of State in accordance with the Geneva Convention*”.

11. Section 2 of the 1993 Act is important in avoiding protection gaps, and securing that the United Kingdom does not breach its international law obligations, in relation to refugee status. These examples will suffice:

11.1 *Haddad v Secretary of State for the Home Department*, IAT [2000] I.N.L.R. 117. In this case an Algerian asylum seeker had his application rejected as a result of missing his asylum interview and a failure to disclose all material information. This was a breach of the Immigration Rules para. 340. He successfully appealed on the basis that the Secretary

of State had not complied with the Convention which demanded an investigation of the merits of the claim. It was held that section 2 of the 1993 Act required compliance with the Convention. This decision was ‘starred’ by the appeals tribunal and is binding on all tribunals. It is classic case where the Immigration Rules would have meant a protection gap which resort to the Convention itself (via section 2) prevented.

11.2 *Bekim Haradini v Secretary of State for the Home Department* [2005] EWCA Civ 1642. The applicant’s appeal failed on its facts. However, a claim which succeeded was that the policy of the British government during 2000-2001 vis-à-vis Albanians from Serbia applying for asylum contradicted the Refugee Convention (Article 3: Non-discrimination) and was therefore illegal as a result of section 2 of the 1993 Act. The Court of Appeal agreed.

11.3 *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55 [2005] 2 AC 1. In that case, the House of Lords considered the compatibility of pre-clearance controls at Prague airport with the Convention. In that context, it was recognised (Lord Bingham at [7]) that: “*Plainly the Rules cannot provide for asylum applications to be handled less favourably to the applicant than the Convention requires.*”

12. In this way, although the Refugee Convention has not been expressly incorporated into UK law, the effect of the legislative references and the content of the Rules have led the courts to say, in certain contexts, that the Convention has to all intents and purposes been operating as part of domestic law: see *R v Secretary of State for the Home Department, ex p Singh* The Times, 8 June, 1987, Div Ct; *R v Secretary of State for the Home Department, ex p Sivakumaran* [1988] AC 958, 990 and cited in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55 [2005] 2 AC 1 at [6]-[9] (Lord Bingham) and [40]-[41] (Lord Steyn).

13. The primacy of the Refugee Convention is recognised by the Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. The Directive, implemented in the United Kingdom by the Refugee or Person in Need of International Protection (Qualification) Regulations 2006, is part of a raft of measures aimed at establishing a common policy on asylum for Member States. The Directive states that this is to be based on “*the full and inclusive application*” of the Refugee Convention (Preamble (2)). It further acknowledges the Refugee Convention as the “*cornerstone of the international legal regime for the protection of refugees*” (Preamble (3)). It is seen to set out minimum and non-exhaustive criteria, so that protection gaps are avoided and the Convention itself remains the source of the state’s obligations: see *K and Fornah v Secretary of State for the Home Department* [2006] UKHL 46 [2007] 1 AC 412 at [10], [16] (Lord Bingham).

14. The dangers of confining protection and reference to the Refugee Convention to the Immigration Rules alone, as is envisaged by the draft Bill, rather than having a direct incorporation or a statutory primacy rule (as in section 2 of the 1993 Act), arise from four points:

14.1 If the Rules are out of step with the Refugee Convention, the United Kingdom will be in breach of its international law obligations in circumstances where decision makers owe a duty to the individual.

14.2 As a living instrument, the Refugee Convention is subject to ongoing scrutiny and interpretation. Fixing rights in the Rules without reference to the Refugee Convention will ossify such interpretation if there is no overriding duty to secure compatibility.

14.3 The problems are compounded by the fact that the Immigration Rules are not actively debated in same manner as primary legislation: see *Huang v*

Secretary of State for the Home Department [2007] UKHL 11 [2007] 2 AC 167 at [17] (Lord Bingham). Moreover, they are subject to the negative resolution procedure and there is scant legislative oversight of instruments passed in this way: see *R (Stellato) v Secretary of State for the Home Department* [2007] UKHL 5 [2007] 2 AC 70 at [12] (Lord Bingham).

14.4 The Immigration Rules have been called rules of practice (see e.g. *Pearson v Immigration Appeal Tribunal* [1978] Imm AR 212) and do not carry the force of primary statute. See also MacDonald's *Immigration Law and Practice* (7th ed.) paras. 1.33-1.35.

15. It is impossible to see what good reason there is for repealing the direct reference currently contained in section 2 of the 1993 Act. Indeed, there is considerable force in the view that it is high time that the duties and rights in the Refugee Convention be fully and straightforwardly reflected in domesticating primary legislation. But failing that at the very least there should be an equivalent section 2 reference in primary legislation.

(2) Clause 205(3) and “Refugee”

16. The definition of a refugee in clause 205(3) of the draft Bill raises two concerns. First, there is the reference to having been “*recognised*”. If it is intended to mean ‘recognised by the Secretary of State for the Home Department’ this is nonsensical. Recognition by a State does not create a refugee; it merely acknowledges the existing objective fact. In other words a refugee is a refugee regardless of a State’s recognition: see *UNHCR Handbook* (1979) para 28, and *Khaboka v Secretary of State for the Home Department* [1993] Imm AR 484 at 487, CA (per Nolan LJ). The much better approach is that which is taken elsewhere in the Bill at clause 193(9) namely: “*In this section, ‘refugee’ has the same meaning as it has for the purposes of the*

Refugee Convention". This is simple, allows direct reference to the Convention, and avoids any protection gap.

17. Secondly, a point arises from the use of the word "*would*". It is important that there is a right to a refugee status determination and status appeal. A refugee must be entitled to recognition and consequential rights, whether or not expulsion is in practice being threatened. This is the point which arose in *Saad v Secretary of State for the Home Department* [2001] EWCA Civ 2008 [2002] Imm AR 471, where the statutory wording (section 8(1)-(4) of the 1993 Act) was treated as involving a hypothetical removal. Any new legislation must ensure that the position as regards a challenge to the Secretary of State's decision not to grant status should be capable of challenge regardless of whether or not expulsion is threatened. The draft legislation concerning appeal rights has not yet been published. However, it is essential that the Bill protects the position as confirmed by the Court of Appeal in *Saad* at [56]-[58], [68]-[69], [72] (Lord Phillips MR).

(3) Clause 205(6) and extra-territoriality

18. Clause 205(6) of the draft Bill appears to be an attempt to limit the United Kingdom's obligations to refugees who are physically present in the territory of the United Kingdom. We note that the same restriction appears to be being used in the Bill for the obligations arising under the EC Qualification Directive and the European Convention on Human Rights.

19. This approach illustrates the problem with the failure to reflect the terms of the Convention itself. The question whether rights and obligations can arise even though the individual is not physically present in the UK territory raises questions of law, for determination on the proper interpretation of the international instrument itself (as a living instrument), and in order to avoid protection gaps and UK breaches of international law obligations.

20. Once again, the principled position is not to restrict the scope of the Convention by means of the introduction of rigid domestic qualifications not found in the provisions of the Convention itself. Either the Convention applies extra-territorially in a particular situation, or it does not. This being the case, the domestic legislation should not be concerned to cut down on that application creating protections gaps and breaches of international law. The Convention itself will provide the answer.
21. There is ample law illustrating the sorts of issues which arise. There is the well-known decision of the United States Supreme Court in *Sale v Haitian Centers Council* 113 S Ct 2549 (1993), concerning the interception and return of Haitian asylum seekers to Haiti by US coastguards without any determination of their claims. Then there is the decision of the House of Lords in the *European Roma Rights Centre* case, concerning pre-clearance controls at Prague. In that case, Lord Bingham at [21] expressly distinguished *Sale* where asylum seekers were outside the country of origin, from the situation in *Roma Rights* where pre-entry controls were carried out in the country of origin. There is also a raft of analogous cases in the Strasbourg judgments under the ECHR. All of which is no doubt precisely why Canada's domestic law is expressly non-rigid, and allows for extra-territorial application of the Refugee Convention: see Immigration and Refugee Protection Act 2001 s. 99(1) ("a claim for refugee protection may be made in or outside Canada").³⁹
22. Domestic legislation should not be framed to foreclose on such questions, depriving refugees of protection to which they may be entitled. There is no good reason for doing so, in circumstances where the United Kingdom accepts its legal obligations under the Refugee Convention. A proper and principled approach to those obligations involves mirroring the Convention by reference to it and its own terms; not the

³⁹ 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 (published 26 January 2007) which reference a number of detailed arguments in support of the extra-territoriality of the Convention including (1) construction of the terms in accordance with 1969 Vienna Convention norms, (2) state practice, (3) analogy to other international law instruments.

introduction of restrictive formulae which rigidly constrain and pre-empt the answer which the Convention would yield on its own proper interpretation.

SECTION B

(1) Article 31(1) and non-penalisation of refugees

23. There is a continuing problem in the draft Bill, which arises from the way in which statutory defences to penalties fail directly to match Article 31(1).
24. Article 31(1) of the Refugee Convention contains important rights not to be penalised. Its basis is the recognition that the circumstances compelling flight may lead refugees to seek entry to States without possessing proper documentation. It acknowledges the reality of the plight of refugees who increasingly face stringent legal and practical barriers to legitimate forms of entry into States.
25. Article 31(1) was considered in *R v Asfaw* [2008] UKHL 31 [2008] 2 WLR 1178. The House of Lords held that the Article 31 statutory defence available in relation to a list of criminal offences (section 31 of the Immigration and Asylum Act 1999) left a protection gap because other offences could still be charged which would attract Article 31 protection but no section 31 defence: *Asfaw* at [28] (Lord Bingham).
26. The mismatch is also illustrated by the grotesque case of *R v Makuwa* [2006] EWCA Crim 175 [2006] 1 WLR 2755, where a mother who had arrived with her children at Heathrow could invoke the statutory defence in respect of her own illegal entry, but could still be (and was) imprisoned for bringing her children with her. That was a classic case of a protection gap.
27. The unsatisfactory statutory mismatch in *Asfaw* had to be resolved by invoking the common law principle of abuse of process, so as to achieve the protection set out in Article 31: see [31]-[34] (Lord Bingham). Unfortunately, the draft Bill takes the same

type of approach as led to the problems in *Asfaw*. Thus, the draft Bill replicates the approach of existing domestic legislation by listing a specified number of offences relevant to Article 31(1) but which cannot be taken as comprehensive.

28. Moreover, unlike the present section 31(8) of the Immigration and Asylum Act 1999, which refers to the Refugee Convention and to Article 31(1) in particular, the draft Bill in clause 193 makes no reference at all to Article 31. Thus the new legislation is a backwards step in protection terms.

29. There can be no good reason why the United Kingdom in its aim at simplification and consolidation of existing legislation does not simply make direct reference to Article 31(1). This would allow a refugee to rely on the protection of Article 31(1) on its own terms and leave it to be decided as a matter of interpretation of the Refugee Convention itself, as opposed to domestic legislation, what was covered. In this respect, the Bill could simply state: “*it is a defence for a person to show that a conviction would be incompatible with Article 31(1) of the Refugee Convention*”. This has the advantage of being simple, and avoiding the need to invoke ‘abuse of process’ arguments as was necessary in *Asfaw*.

30. Then there are the respects in which the Bill introduces express qualifications which are not found in the text of Article 31(1). In particular:

30.1 Clause 193(3)(c) of the draft Bill adds an additional requirement, namely that the individual made a protection application “*as soon as reasonably practicable after arriving in the UK*”.

30.2 Clause 193(4) refers to subsection (3) as applying in a case where the individual stopped in another country “*only if R shows that R could not reasonably have expected to be given protection under the Refugee Convention in that other country*”.

30.3 Clause 193(5) prevents reliance on the defence in subsection (3) “*in relation to an offence committed by the refugee after making the application*”.

31. Qualifications such as these present challenging problems of compatible interpretation which it was not necessary to decide in *Asfaw*. The point is straightforward. Either such qualifications are present in Article 31(1) of the Convention itself, or they are not. If they are not, the domestic legislation is creating protection gap problems and risks placing the United Kingdom in breach of international law. If they are, they will be applied from a proper interpretation of Article 31(1) itself. Either way, the terms of the Convention itself should be the driver, not restrictive domestic rules.

32. There is also the concern that the draft Bill does not even work on its own terms. For example, clause 97 of the draft Bill (as is the case for a number of other offences stipulated in Part VI) specifies the ingredients of the offence of entering the UK without immigration permission and 97(5) refers specifically to clause 193 for a defence to this offence. However, by contrast clause 104 which specifies the offence of ‘Entering the UK without a passport etc.’ does not make a reference to clause 193 at all. There can be no good reason for this. It merely creates a greater protection gap for the individual.

33. As explained above, the simplest and most effective approach is to have a direct reference to Article 31(1) in primary legislation. This will afford an individual proper protection within the meaning of the Refugee Convention, safeguard against protection gaps, and will preclude additional restrictions on Article 31(1) protection. If the intention is to reflect Article 31(1), that can and should be done straightforwardly, not by means of (a) partial lists, and (b) additional qualifications, each of which threatens to produce protection gaps and to prevent the provisions of the Convention itself, properly interpreted, from governing the position as to penalisation of refugees.

(2) Clause 38, Articles 32-33 and Executive Subjectivity

34. Clause 38(4) of the draft Bill makes direct reference to the Refugee Convention. This is commendable and amply illustrates a point we have been emphasising throughout this Joint Opinion: the importance and ready availability of legislative drafting which allows the provisions of the Refugee Convention themselves, by their own terms properly interpreted, to drive the relevant obligations and protections which arise. There is no reason why direct reference should not be found elsewhere; and every reason why it should be.

35. In relation to Article 33(2), we note that this approach is taken in New Zealand: see Immigration Amendment Act 1999, s.129X(1) which provides “*No person who has been recognised as a refugee in New Zealand or is a refugee status claimant may be removed or deported from New Zealand under this Act, unless the provisions of Article 32.1 or Article 33.2 of the Refugee Convention allow the removal or deportation*”. That approach straightforwardly refers to the content of the Convention as to both Article 32(1) and 33(2).

36. That aside, clause 38(1) of the draft Bill is nevertheless drafted in a way which raises concerns in these respects:

36.1 The Convention protection here is qualified by the phrase “*if the Secretary of State thinks*”. This phrase risks introducing a subjective executive element of whom the Secretary of State thinks the Convention should protect, rather than objective factual questions under the Convention itself. It would be better removed.

36.2 In any event, it is essential that the legislation makes clear that the AIT and any other Court considering a case must be able to decide objectively for themselves issues as to whether the protection afforded by the Refugee

Convention applies. That must include the status determination in respect of an individual, whether or not in practice facing removal: see below. The draft (partial) Bill does not extend to the appellate legislative framework, but confirmation is needed that these imperatives will be secured.

- 36.3 Clause 38(6) allows the Secretary of State by order to amend clause 38. This is difficult to understand. Certainly, in so far as protection is conferred by the Refugee Convention, there should be no room for amendment which could introduce a protection gap.

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