



United Nations High Commissioner for Refugees (UNHCR)

Parliamentary Briefing (Guide to Official Comments issued July 2007¹)

CRIMINAL JUSTICE AND IMMIGRATION BILL

House of Lords Second Reading, Tuesday 22nd January 2008

Introduction

The UN Refugee Agency (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. UNHCR's role includes supervision of the application of ratifications to the 1951 Refugee Convention². UNHCR's interpretations of the 1951 Convention are generally considered an authoritative view to be taken into account by States when deciding on questions of refugee law.

UNHCR's comments on the Criminal Justice and Immigration Bill (Bill) are in regard to those aspects that impact upon refugee law, namely Part 12 'Special immigration status'.

UNHCR welcomes the provisions in clause 181 (5)(a) of the Bill in regard to the designation of 'special immigration status' which explicitly ward against a breach of the United Kingdom's obligations under the 1951 Refugee Convention³.

However, UNHCR is concerned that the criteria to define a 'foreign criminal' for the purposes of designating 'special immigration status' (clause 182) rely on previous UK legislation that undermines the international protection the 1951 Refugee Convention seeks to afford individuals with a well-founded fear of persecution⁴.

Specific Provisions of the Bill

Special immigration status – foreign criminal: Clauses 182 (2), (3), (5) and (6)

Relation to Section 72 NIAA 2002 interpretation of 1951 Convention Art. 33(2) 'expulsion'

Clauses 182 (2), (3), (5) and (6) of the Bill define a 'foreign criminal' for the purposes of designating someone with 'special immigration status' by reference to section 72 of the Nationality, Immigration and Asylum Act 2002 (NIAA). Under the Bill, a person with 'special immigration

¹ http://www.unhcr.org.uk/info/briefings/responding_to_policy/index.html Updated on 8 January 2008 to reflect structural changes to the Bill

² Article 35 of the 1951 Convention Relating to the Status of Refugees and 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)

³ "[T]he Secretary of State may not designate a person [with special immigration status] if the Secretary of State thinks that an effect of designation would breach – [...] the United Kingdom's obligations under the Refugee Convention." Clause 181 (5)(a)

⁴ The Nationality, Immigration and Asylum Act 2002 (NIAA), the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004 and Section 54 of the Immigration, Asylum and Nationality Act, 2006 (IAN). UNHCR's previous comments on this legislation are available upon request. Web links also indicated in respective footnotes below.

status' does not have leave to enter or remain in the UK (clause 183), with the Bill also providing for the extension of that status to family members (clause 181 (3)).

UNHCR's serious concerns over Section 72 NIAA⁵ and its secondary legislation, the Specification of Particularly Serious Crimes Order 2004⁶ (and by extension the reliance upon these in this Bill), stem from the particularly low threshold the previous legislation presents in order to exclude someone from the protection of *non-refoulement* (protection against return to a country where the individual has reason to fear persecution – a principle of customary international law embodied in the 1951 Refugee Convention (Art. 33)).

The 1951 Refugee Convention provides for exceptions to the principle of *non-refoulement* only in extraordinary cases, i.e. a refugee who constitutes a danger to the security of the country or who constitutes a danger to the community having been convicted by a final judgment of a particularly serious crime (Article 33 (2)).

Whilst UNHCR recognises that the term 'serious crime' may have different connotations in different legal systems, it is generally understood that a 'serious crime' is a capital or a very grave crime normally punished with long imprisonment (for example, murder, rape, arson and armed robbery), and therefore a 'particularly serious crime' must belong to the gravest category.

In contrast, the Nationality, Immigration and Asylum Act 2002 sets a conviction in the UK warranting two years imprisonment as indicative of a particularly serious crime which creates a presumption of a danger to the community (Section 72(2)) and extends this to comparable crimes and sentences committed overseas (Section 72(3)). The Specification of Particularly Serious Crimes Order 2004 (allowed under Section 72(4)) specifies crimes for which a conviction would be sufficient to raise such a presumption regardless of duration of the sentence. The list includes for example shoplifting⁷, graffiti⁸, and offences under the Road Traffic (Northern Ireland) Order 1995.

UNHCR recognises that Section 72 NIAA and the Order are not subject to amendment at this time, but nonetheless wishes to reiterate its serious concerns due to the Bill's reliance on legislation that presents a particularly low threshold for permitting the return of an asylum seeker or recognised refugee and/or their family members to a situation where they fear persecution based on a wide range of offences that seem incompatible with the definition of 'particularly serious crime'.

Special immigration status – foreign criminal: Clause 182(4)

Interpretation of 1951 Refugee Convention Art.1F 'exclusion' in UK legislation, e.g. IAN 2006
Clause 182(4) defines a foreign criminal by reference to Article 1F of the 1951 Refugee Convention (criteria by which an individual may be excluded from the protection of refugee status). The primary purpose of Article 1F may be summarised as depriving those guilty of heinous acts and serious common crimes of international refugee protection⁹.

⁵ http://www.unhcr.org.uk/legal/positions/UNHCR%20Comments/comments_2002_clause20.htm

⁶ <http://www.unhcr.org.uk/legal/positions/UNHCR%20Comments/SeriousCrimesOrder2004.htm>

⁷ s1 (1) Theft Act 1968, Schedule 2

⁸ s.1(1) Criminal Damage Act 1971, Schedule 2

⁹ Article 1F of the 1951 Convention states that the provision of the Convention "shall not apply to any person with respect to whom there are serious reasons for considering that

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he has committed a serious non-political crime outside the country of refuge prior to this admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

UNHCR is concerned about the way in which Article 1F has been interpreted in previous UK legislation, for example Section 54 of the Immigration, Asylum and Nationality Act 2006 (IAN)¹⁰ seeks to further define Article 1F(c) (persons 'guilty of acts contrary to the purposes and principles of the United Nations') by expanding the text to encompass 'acts of committing, preparing or instigating terrorism (whether or not the acts amount to an actual or inchoate offence)' as well as acts of 'encouraging or inducing others' to do the same.

It is UNHCR's opinion that Section 54 may result in an overly broad application of the principle of exclusion for a number of reasons including the absence of a universally accepted legal definition of terrorism at the international level, and Article 1F (c) envisaging acts of such a nature as to impinge on the international plane in terms of their gravity, international impact and implications for international peace and security.

While a State has the prerogative to define terrorist acts more broadly to encompass acts which may not have an international dimension, not all acts so defined as "terrorist" would fall under Article 1F (c). It has been long-standing practice of many States party to the 1951 Convention to maintain a restrictive interpretation and application of Article 1F (c), especially given its vague nature and potentially grave consequences. It is UNHCR's position that Article 1F (c) must be read narrowly.

Furthermore, UNHCR is concerned that exclusion from protection of the 1951 Refugee Convention should not be equated with conviction for the excludable acts, due to the contrast between the lower standard of proof in deciding Article 1F cases ('clear and credible' evidence is required, but no conviction is necessary), *vis-à-vis* the 'beyond reasonable doubt' standard for criminal convictions in the UK. Bearing this in mind, UNHCR questions whether it is appropriate to designate persons excluded under Article 1F as 'foreign criminals'.

Conclusion:

UNHCR recognizes that Section 72 (NIAA) is not subject to amendment at this time. Nonetheless, due to the reliance of the Criminal Justice and Immigration Bill on this previous legislation, UNHCR hopes that its serious concerns relating to the aforementioned legislation's interpretation of the 1951 Refugee Convention (more specifically Article 32(2) 'expulsion') will be taken into consideration when the House debates the Bill, particularly Clause 182 'foreign criminal'. In a similar manner, UNHCR would ask that its concerns regards the UK's interpretation of Article 1F (c) of the 1951 Convention ('exclusion') also been borne in mind.

About UNHCR:

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 organizations¹¹. As set forth in its Statute, UNHCR fulfils its international protection mandate by, *inter alia*, "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto."

The views of UNHCR are informed by over 50 years of experience supervising international refugee instruments. UNHCR provides guidance in connection with the establishment and implementation of national procedures for refugee status determination and also conducts such determinations under its mandate. In view of the Office's supervisory role under its Statute and Article 35 of the 1951 Convention, UNHCR's interpretation of the provisions of the 1951 Refugee Convention and 1967 Protocol are generally considered an authoritative view which should be taken into account by States when deciding on questions of refugee law.

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¹⁰ <http://www.unhcr.org.uk/info/briefings/IAN2005.html>

¹¹ See 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)