



United Nations High Commissioner for Refugees (UNHCR)

CRIMINAL JUSTICE AND IMMIGRATION BILL

Briefing for the House of Commons at Second Reading

July 2007

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. 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."

2. The views of UNHCR are informed by over 50 years of experience supervising international refugee instruments. UNHCR is represented in 116 countries. 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. UNHCR therefore welcomes the opportunity to comment on Part 11 of the Criminal Justice and Immigration Bill.

¹ 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)

General comments:

3. UNHCR's primary focus will be on clause 116 of the Bill which provides the criteria that the UK Government will use to designate individuals for special immigration status.² UNHCR's concern is related to the criteria proposed for the designation of special immigration status, in particular where it concerns individuals whose asylum claim is assessed against Article 1F and refugees where it is considered that Article 33 (2) applies.

4. UNHCR welcomes in this regard that clause 115 (5)(a) provides that "the Secretary of State may not designate a person if the Secretary of State thinks that an effect of designation would breach – [...] the United Kingdom's obligations under the Refugee Convention". Pursuant to Clause 116, Section 72 of 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) are to be used as basis for determining persons to be designated. However, UNHCR concerns stem precisely from the way in which Articles 1F and 33(2) of the 1951 Convention have been interpreted in the UK.

5. UNHCR thus takes this opportunity to reiterate concerns that have been expressed previously in respect of aspects the legislation which form the basis for designation under this Bill. UNHCR has expressed its serious concerns that both Section 72 NIAA and the Order set thresholds for an exception to the *non-refoulement* principle that are not in accordance with the letter and spirit of the 1951 Convention, and do not meet the criteria as set out in Article 33(2) of the 1951 Convention. UNHCR has also expressed serious concerns about the way in which Section 54 IAN was intended to interpret Article 1F(c)³.

Specific Provisions of the Bill

Clauses 116 (2), (3), (5) and (6)

6. The above referred clauses of the Bill define a foreign criminal and therefore a person who can be designated for special immigration status by reference to section 72 of the NIAA 2002 and to the Serious Crimes Order 2004. Section 72(2) 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, 72(3) extends this to comparable crimes and sentences committed overseas and 72(4) allows the Secretary of State to specify crimes in the form of an order (the NIAA Specification of Particularly Serious Crimes Order) for which a conviction would be sufficient to raise such a presumption regardless of duration of the sentence. UNHCR reiterates its concerns

² UNHCR asks that it be noted that the lack of comments on the other provisions of Part 11 of the Bill does not mean that UNHCR endorses these provisions. Rather UNHCR has chosen to focus its comments on issues most relevant to its mandate.

³ UNHCR is happy to share its previous comments with MPs if requested

that section 72 NIAA and the Order include a wide range of offences that seem incompatible with the definition of “particularly serious” and present a particularly low threshold for an exception to the principle of *refoulement* to apply. The Order includes for example shoplifting (s1 (1) Theft Act 1968, Schedule 2), graffiti (s.1(1) Criminal Damage Act 1971, Schedule 2), and offences under the Road Traffic (Northern Ireland) Order 1995 [68] (Schedule 5). UNHCR is concerned that this list represents an inappropriate interpretation of Article 33(2) of the 1951 Convention.

7. The 1951 Convention provides for exceptions to *refoulement* only in extraordinary cases (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). If it is generally understood that a “serious crime” is a capital or a very grave crime normally punished with long imprisonment, it follows that a “particularly serious crime”, must belong to the gravest category. Article 33(2) therefore applies to refugees who become an extremely serious threat to the country of asylum due to the severity of crimes perpetrated by them in the country of asylum. It aims to protect the safety of the country of refuge and hinges on the assessment that the refugee in question poses a major actual or future threat. For this reason the Article 33(2) mechanism has always been considered as a measure of last resort, taking precedence over and above the application of criminal sanctions and 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.

8. In determining whether a “danger to the security of the country” has been made out, a decision-maker applying article 33(2) should be required to assess whether the danger to the security constitutes both a sufficiently serious danger and whether this is specific to the country of refuge, as well as whether the *refoulement* of the refugee is a proportional response to this danger.

9. No definition of serious danger is provided, but the *travaux préparatoires* indicate that the drafters were concerned only with significant threats to national security. The types of concerns considered are captured in the following statement by the United Kingdom representative:

Among the great mass of refugees it was inevitable that some persons should be tempted to engage in activities on behalf of a foreign power against the country of their asylum, and it would be unreasonable to expect the latter not to safeguard itself against such a contingency.

10. UNHCR recognises that the term “serious crime” may have different connotations in different legal systems. In UNHCR’s understanding, the gravity of the crimes should be judged against international standards, not simply by its categorisation in the host State or the nature of the

penalty. Crimes such as petty theft or the possession for personal use of illicit narcotic substances would not meet the threshold of seriousness. Examples of a “serious crime”, *inter alia*, include murder, rape, arson and armed robbery. Certain other offences could be considered serious if they are accompanied by the use of deadly weapons, involve serious injury to persons, or there is evidence of serious habitual criminal conduct. Factors to be considered include the nature of the act, the actual harm inflicted, the form of procedure used to prosecute the crime, and whether most jurisdictions would consider the act in question as a serious crime. The qualification “particularly serious” indicates that only crimes of a particularly serious nature should be considered egregious enough to warrant an exception to the *non-refoulement* principle.

11. Conviction of a particularly serious crime in and of itself is not sufficient. The person concerned must, in view of this crime, also present a danger to the community. In UNHCR's opinion, the second provision of Article 33(2) should not be applied solely by reason of the existence of a past crime but on an assessment of the present or future danger posed by the wrong-doer. It is therefore not the acts the refugee has committed, which warrant his expulsion, but that these acts may serve as an indication of his future behaviour and thus indirectly justify his expulsion to the country of persecution.

12. The burden of proof is on the State to prove that one or several convictions are symptomatic of the criminal, incorrigible nature of the person and that he is likely to do it again. As Article 33(2) is concerned with the present and future more than with the past, it seems that the authorities ought to give a refugee fair warning and a chance to mend his ways, before expulsion to a country of persecution is seriously considered.

13. UNHCR therefore remains concerned that reliance on the interpretation of Article 33(2) as envisaged in section 72 of NIAA 2002 and the Serious Crimes Order 2004 as a basis for designation of persons for special immigration status undermines the protection afforded under the 1951 Convention.

Clause 116(4)

14. This provision defines a foreign criminal by reference to Article 1F of the Refugee Convention 1951. In its comments during the passage of the section 54 of the Immigration, Asylum and Nationality Act, 2006, UNHCR expressed concerns as to the way in which section 54 was intended to interpret Article 1F(c), particularly insofar as it would apply to acts of terrorism. It was and remains UNHCR's concern that section 54 may result in an overly broad application of Article 1F (c) with the result that certain persons, who do not fall within the scope of the exclusion clauses, are denied the benefit of international protection. 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. It thus remains UNHCR's position that Article 1F (c) must be read narrowly.

15. UNHCR reiterates below its guidance which is intended to ensure the correct application of Article 1F. 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."

Their primary purpose is to deprive those guilty of heinous acts, and serious common crimes, of international refugee protection and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts.⁴ Articles 1F(a) and 1F(c) are concerned with crimes whenever and wherever they are committed. By contrast, the scope of Article 1F(b) is explicitly limited to crimes committed outside the country of refuge prior to admission to that country as a refugee.

16. Given the grave consequences of exclusion, it is essential that rigorous procedural safeguards are built into the exclusion determination procedure. Exclusion decisions should in principle be dealt with in the context of the regular refugee status determination procedure and not in either admissibility or accelerated procedures, so that a full factual and legal assessment of the case can be made. The exceptional nature of Article 1F suggests that inclusion should generally be considered before exclusion, but there is no rigid formula. Exclusion may exceptionally be considered without particular reference to inclusion issues (i) where there is an indictment by an international criminal tribunal; (ii) in cases where there is apparent and readily available evidence pointing strongly towards the applicant's involvement in particularly serious crimes, notably in prominent Article 1F(c) cases, and (iii) at the appeal stage in cases where exclusion is the question at issue.

17. In order to satisfy the standard of proof under Article 1F, clear and credible evidence is required. It is not necessary for an applicant to have been convicted of the criminal offence, nor

⁴ Where information comes to light that Article 1F would have been applicable to a refugee at the time of recognition this may lead to the cancellation of refugee status. The refugee status of those who engage in conduct falling within the scope of Article 1F(a) or 1F(c) subsequent to recognition may be subject to revocation.

does the criminal standard of proof need to be met. Confessions and testimony of witnesses, for example, may suffice if they are reliable. Lack of cooperation by the applicant does not in itself establish guilt for the excludable act in the absence of clear and convincing evidence. Consideration of exclusion may, however, be irrelevant if non-cooperation means that the basics of an asylum claim cannot be established.

18. UNHCR is concerned that exclusion from protection of the Refugee Convention should not be equated with conviction for the excludable acts. The lower standard of proof in deciding Article 1F cases should be contrasted with 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:

19. UNHCR thanks the House of Commons for the opportunity to comment on the Criminal Justice Bill. It recognizes that Section 54 (IAN) and 72 (NIAA) are not subject to amendment at this time. It nonetheless hopes that its serious concerns relating to the interpretation of Article 33(2) and Article 1(F) of the 1951 Convention will be taken into consideration when the House debates the Bill, in particular Clause 116.

UNHCR
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