



United Nations High Commissioner for Refugees (UNHCR)

Simplifying Immigration Law

Comments to the Initial Consultation

Introduction

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."

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 welcomes the opportunity to comment on this initial consultation that seeks to simplify the immigration laws of the UK. Our primary focus will be on principles of refugee protection but we will also comment on immigration control issues in so far as they impact on the areas under our above-mentioned mandate.

In terms of UNHCR's response to this initial consultation exercise, we will answer the questions posed by highlighting several topics which we feel should be explored. These are as follows:

Simplification Principles (*Response to Q1*)

UNHCR welcomes the principles contained in this initial consultation paper that seek to maximise transparency, efficiency, clarity and predictability, use of plain English and the boosting of public confidence in the system of immigration control.

In addition to these principles UNHCR wishes to reiterate the need for a fair and transparent asylum system with a view to ensure that the simplification enhances the UK compliance to international protection obligations while safeguarding the institution of asylum. UNHCR requests that the following principles are adhered to and guide the simplification process:

- UNHCR notes that the Border and Immigration Agency (**BIA**) is founded on the following four objectives:

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)

- Strengthening borders, using tougher checks abroad so that only those with permission can travel to the UK, and ensuring that the UK knows who leaves so that they can take action against those who break the rules.
- Fast track asylum decisions, removal of those whose claims fail and integration of those who need protection.
- Ensuring and enforcing compliance with UK immigration laws, removing the most harmful people first and denying the privileges of Britain to those here illegally.
- Boosting Britain's economy by bringing the right skills here from around the world, and ensuring this country is easy to visit legally.

UNHCR also notes from these founding objectives that the only direct reference to refugee protection is to fast track asylum decision making, although also making reference to the removal of those whose claims fail and to integrate those found eligible for protection. UNHCR proposes that the Simplification Project should ensure that refugee protection does not become a secondary consideration to immigration control and that there is a clear place for an asylum system in which a refugee protection space is guaranteed. Provision of such space should enable the UK government to unravel mixed migration flows within the context of immigration control so as to adequately accommodate those with international protection needs.

- In accordance with the UNHCR Agenda for Protection², States are urged to grant access to asylum procedures and to ensure that their asylum systems provide for effective and fair decision-making, done promptly and with enforceable results, including as regards the return and readmission of those found not to be in need of international protection.
- In accordance with Executive Committee Conclusions (No. 82 (XLVIII) - 1997) (**ExCom Conclusion No. 82**) UNHCR reiterates, the need for full respect to be accorded to the institution of asylum in general, and considers it timely to draw attention to the following particular aspects:
 - I. the principle of non-refoulement, which prohibits expulsion and return of refugees in any manner whatsoever to the frontiers of territories where their lives or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion, whether or not they have been formally granted refugee status, or of persons in respect of whom there are substantial grounds for believing that they would be in danger of being subjected to torture, as set forth in the 1984 Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment;
 - II. access, consistent with the 1951 Convention and the 1967 Protocol, of asylum-seekers to fair and effective procedures for determining status and protection needs;
 - III. the need to admit refugees into the territories of States, which includes no rejection at frontiers without fair and effective procedures for determining status and protection needs.
- UNHCR would like the UK Government to afford asylum applicants the benefit of the doubt at all stages of the refugee status determination procedure in accordance with international protection principles.
- In addition to what is covered by ExCom Conclusion No. 82, UNHCR reiterates that access to legal aid and representation is also of fundamental importance³ and should be one of the guiding principles. The United Kingdom, as a member of UNHCR's Executive Committee, has repeatedly drawn attention to the importance of fair and effective asylum procedures⁴. UNHCR and the UK Government have both consistently emphasised the need for good

² UNHCR Agenda for Protection available at:

<http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3e637b194>

³ See UNHCR response to the DCA Consultation Paper: Asylum and Immigration Tribunal – the Legal Aid Arrangements for Onward Appeals December 2004

⁴ See ExCom Conclusion No. 82

quality decision-making⁵ and an appropriate appeal or review process to maintain procedural safeguards and due process. In UNHCR's view, the legal representative plays an important role in ensuring that these standards are maintained, that an asylum applicant is able to advocate his or her case effectively, and that proper access to and understanding of the procedures, their rights and obligations is achieved.

Specific Problems (*Response to Q2*)

UNHCR identifies below a non-exhaustive list of some of the current specific problems which could benefit from the Simplification Project:

- In addition to the recommendation made in its Fourth Quality Initiative report⁶ on gender-sensitive interviewing, UNHCR suggests that the Simplification Project should address the issue of gender and age sensitive status determination procedures.
- UNHCR suggests that through the Simplification Project the UK Government unreservedly incorporate the Convention on the Rights of the Child. Pursuant to General Comment No. 6 (2005)⁷ the UK Government should have due regard to the particularly vulnerable situation of unaccompanied and separated children; ensuring that such children are able to access and enjoy their rights; and, to provide guidance on the protection, care and proper treatment of unaccompanied and separated children based on the entire legal framework provided by, with particular reference to the principles of non-discrimination, the best interests of the child and the right of the child to express his or her views freely.
- A two-pronged approach comprising mainstreaming of age, gender and diversity into all relevant programmes, policies and operations, and targeted action, to ensure that these profiles of asylum applicants enjoy protection on an enhanced basis commensurate to their specific needs.
- UNHCR also suggests that the Simplification Project addresses the issue of detention of asylum-seekers and pays particular attention to clarifying as well as simplifying the following issues:
 - I. The introduction of a time limit on the use of detention.
 - II. The introduction of an automatic, independent review of detention after 7 and 35 days of detention, using public-funding where necessary to provide legal representation.
 - III. An end to the detention of children, the mentally ill, those with serious medical conditions and those who have been tortured.
 - IV. Greater transparency about the use of detention - more detailed statistics and better information provided to individual detainees about the reasons for their detention and the legal process in the language which the detainee can understand.
 - V. Presumption in favour of temporary release or temporary admission.
 - VI. At every stage where detention is reviewed (internally by the Immigration Service, or externally by an Adjudicator) full written reasons should be given for the decision that continued detention is necessary and compliant with Articles 2, 3 and 8. Instructions to the Immigration Service and Guidance Notes to Adjudicators should be amended to make clear the need to clearly justify continued detention.
- Executive Committee Conclusions No. 91 (LII) - 2001 (Conclusion on Registration of Refugees and Asylum-Seekers) (**Excom Conclusion No. 91**) acknowledges the

⁵ It is as a result of this consensus that the UK Government and UNHCR set up the Quality Initiative Project in 2003 which aims to raise the quality of refugee determination process in the UK through systematic monitoring and through provision of advice on procedure and the application of the refugee criteria.

⁶ See Quality Initiative Project Fourth Report to the Minister January 2007 available at:

<http://www.ind.homeoffice.gov.uk/6353/aboutus/unhfourthreport.pdf>

⁷ Committee on the Rights of the Child – General Comment No 6 (2005) available at:

[http://www.unhchr.ch/tbs/doc.nsf/c12563e7005d936d4125611e00445ea9/532769d21fcd8302c1257020002b65d9/\\$FILE/G0543805.pdf](http://www.unhchr.ch/tbs/doc.nsf/c12563e7005d936d4125611e00445ea9/532769d21fcd8302c1257020002b65d9/$FILE/G0543805.pdf)

importance to the international community, particularly States, UNHCR and other relevant organizations, of sharing statistical data. Excom Conclusion No. 91 also encourages States “to introduce new techniques and tools to enhance the identification and documentation of refugees and asylum-seekers”... “and to share these with a view towards developing a more standardized worldwide registration system”. UNHCR urges the UK government to implement a reporting and statistical data collection tool that provides transparent statistics for a range of breakdowns including *inter alia* the following areas: gender; age; family size; areas of origin; profile of claim; ethnicity; religion; and statelessness.

UNHCR notes that at paragraph 3.1 the consultation paper also makes reference to matters that the simplification project is seeking to minimise such as the need for further legislation, reliance on concessions outside the normal rules, the need for decision-makers to exercise discretion, inconsistencies between different parts of the system, duplication and gaps within different systems.

UNHCR wishes to provide the following broad comments:

Reducing Reliance on Concessions and the Use of Discretion (*Response to Q3*)

While UNHCR is sensitive to the UK government’s concerns regarding the use of concessions and discretion in mainstream immigration matters, UNHCR considers that the use of concessions and discretions in refugee protection and welfare issues may be unavoidable, given that the issues under consideration are not all capable of being codified. UNHCR refers to the following principles contained in UNHCR’s Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, 1992 (**UNHCR Handbook**) at paragraphs:

- *203. After the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements. As explained above (paragraph 196), it is hardly possible for a refugee to “prove” every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt.*
- *204. The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant’s general credibility. The applicant’s statements must be coherent and plausible, and must not run counter to generally known facts.*

UNHCR notes that use of concessions and discretions are also relevant and necessary in matters of family reunification⁸ for example and would urge for their continued reasonable use to maximise international protection of refugees and persons in need of international protection.

Three Tier Structure (*Response to Q4*)

Subject to what we say regarding possible models for simplification below, UNHCR appreciates that it is within the discretion of the UK Government to determine the structure of its primary legislation, immigration rules and operational guidance. UNHCR would however, remind the UK Government that whatever structure it decides to adopt should be one that enables the UK Government to discharge its duties and obligations stipulated in ExCom No. 8 (XXVIII) Determination of Refugee Status.

Possible Models for Simplification (*Response to Q5*)

With respect to alternative models UNHCR recommends, for practical reasons, a single legislative instrument bringing together all refugee protection provisions currently set out in various pieces of legislation. To this end, UNHCR stands ready to work with the UK Government in providing examples of refugee legislation, which have been successfully adopted in various Member States.

⁸ The Principle of Family Unity is explained in Chapter VI of the UNHCR Handbook

UNHCR, however understands that further legislation may be unavoidable and would therefore urge the UK to create space for refugee protection and welfare issues within the broader legislative framework so as to provide for areas such as reception conditions being adequate for those with special protection needs and the accreditation schemes as foreseen by the BIA.

Nationality Law (Response to Q6)

UNHCR has no particular views as to where the Nationality legislation falls within the ambit of the Simplification Project, provided that the substance of the laws is conducive to facilitating the assimilation and naturalization of refugees.

UNHCR reminds the UK Government of its obligations under Article 34 of the 1951 Refugee Convention to “...as far as possible facilitate the assimilation and naturalization of refugees” as well as “...make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.” In this respect UNHCR is concerned that the settlement and naturalization tests may hinder the integration of refugees, in particular those with specific vulnerabilities arising from their past experiences.

Distinctions (Response to Q7)

UNHCR urges the UK Government, as it focuses on consolidating the various work and study routes into the UK, to continue to make provision for refugees and people receiving complimentary protection in accordance with chapters II, III, IV & V of the 1951 Convention.

Other Comments (Response to Q8)

UNHCR also suggests that the Simplification Project considers the following issues where in UNHCR’s experience the UK policy and practise appears to be at variance with international standards of refugee protection:

- Exclusion;
- Cessation of refugee status;
- Cancellation of refugee status;
- Revocation of refugee status;
- Article 31 of the 1951 Convention (as interpreted by section 31 of the Immigration and Asylum Act 1999); and
- Article 33 (2) (as interpreted by section 72 of the Nationality, Immigration and Asylum 2002).

Conclusion

UNHCR hopes that these comments will assist the UK government in its efforts to simplify the Immigration and Asylum system. UNHCR welcomes the acceptance in the UK of the continued primacy of the 1951 Refugee Convention as well as the affirmation of all the other fundamental laws provided for through international human rights instruments such as the 1945 UN Charter⁹ and the 1948 Declaration of Human Rights¹⁰, which include the right to seek asylum. UNHCR trusts that its comments will be of assistance in helping ensure that the UK continues to strive for the highest protection standards.

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⁹ 1945 UN Charter available at - <http://www.unhchr.ch/html/menu3/b/ch-cont.htm>

¹⁰ 1948 Universal Declaration of Human Rights available at - <http://www.unhchr.ch/udhr/>