



United Nations High Commissioner for Refugees (UNHCR)

UK BORDERS BILL

Briefing for the House of Lords at Second Reading

June 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.

3. UNHCR welcomes the opportunity to comment on the UK Borders Bill. Our primary focus will be on clauses 5 and 7 (2) on biometric registration, clause 16 with regard to conditional leave to enter or remain, and clause 31 (2) concerning automatic deportation.

4. While UNHCR supports biometric registration with a view to enhancing the protection situation for refugees and asylum seekers, in its view, the scope and the procedural aspects of this provision need further clarification. UNHCR is, however, seriously concerned about the effects of non compliance as laid down in clause 7 (2). In UNHCR's view, the failure to fulfil formal requirements does not in itself exclude a well-founded

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)

fear of persecution or fear from generalized or indiscriminate violence. UNHCR therefore calls for specific protection safeguards in the process which would give due attention to the specific situation of refugees and asylum seekers in order to ensure that non compliance does not lead to an erosion of the protection otherwise provided by the 1951 Refugee convention and other international treaties.

5. Clause 16 allows for reporting and residency requirements. UNHCR notes that this clause does not make any exception for or take into consideration the special protection and care duties for children. UNHCR believes that decisions to accommodate children and to establish reporting obligations should be taken with the best interests of the child as a primary consideration. UNHCR would like to encourage legislators to examine alternative arrangements for children to ensure that required contact management will be conducted in a child friendly manner and within the overall normative framework of the Convention on the Rights of the Child and the 1951 Refugee Convention.

6. While UNHCR welcomes the inclusion of exceptions to the application of the automatic deportation clause, UNHCR is concerned about the possible impact of clause 31 in that it may lead to the erosion of protection principles, specifically the principle of non refoulement, of the 1951 Convention. Article 33 (2) of the Convention provides for an exemption to refugee protection for those individuals who constitute a serious danger to the country or the community. The current proposal provides for imprisonment of at least 12 months to lead to automatic deportation in the current proposal. In UNHCR's view, such a proposal risks a violation of the letter and spirit of the 1951 Convention, as the threshold provided for in the Convention may not be met.

Specific Provisions of the Bill

1. Biometric Registration (clause 5- 7 (2))

Clause 5 of the Bill creates a requirement for all people subject to immigration control to register for BIDs. Persons subject to immigration control include people of concern to UNHCR such as asylum-seekers, refugees and those granted complementary forms of protection in the UK including children.

UNHCR supports efforts to enhance registration techniques where these are undertaken with a view to improving the protection of refugees and asylum seekers. Executive Committee Conclusion 91 of 2001² on the registration of refugees and asylum seekers advises that the registration process should abide by fundamental principles of confidentiality, amongst others. UNHCR suggests that legislators clarify the scope of clause 5, the procedural aspects of the provision and compliance with general principles of confidentiality governing asylum procedures. If asylum seeking children are to be subjected to any type of biometric testing, it is strongly recommended that the decision to pursue the testing will be made in the best interests of the child³.

² EXCOM/91 (LII) 2001 Conclusion on Registration of Refugees and asylum seekers para b (i) the registration should abide by the fundamental principles of confidentiality” para (d) “Also encourages States and UNHCR to introduce new techniques and tools to enhance the identification and documentation of refugees and asylum seekers, including biometric features,

³ Separated Children in Europe Programme, Position Paper on the Use of Biometric data, October 2006.

Clause 7(2) provides a power to the Secretary of State to make regulations to penalise those who do not comply with the requirement to register for BIDs. The regulations made under this power, will enable the Secretary of State, inter alia, to:

- require or permit an application or claim in connection with immigration to be disregarded or refused
- require or permit the cancellation or variation of leave to enter or remain in the United Kingdom

In this respect, UNHCR would like to draw attention to the possible consequences of non-compliance. UNHCR is concerned that the provision to penalise those who do not comply with the requirement to register for BIDs might impair refugees' effective access to asylum or complementary protection status determination procedures and/or allow for the taking away of international protection where granted if the specific circumstances of refugees and asylum seekers, who are not complying with the regulations, are not taken into consideration. In UNHCR's view, the failure to fulfil formal requirements does not in itself exclude a well-founded fear of persecution or fear from generalized or indiscriminate violence. Therefore, UNHCR would like to encourage the inclusion of protection safe guards in the system to ensure negative consequences of non-compliance for reasons related to the specific circumstances of refugees or asylum seekers will not affect their access to effective international protection.

In UNHCR's experience, non-compliance with the obligation, for example, to have fingerprints taken does not necessarily give an indication of the substance of the claim. There may be a variety of reasons why asylum-seekers may refuse to have their fingerprints taken. Refugees and asylum seekers might encounter obstacles to meet the biometric registration requirements for reasons of cultural sensitivity (especially for women), alleged association with criminal proceedings and/or the administrative costs related to the biometric documents and believes that measures should be put in place to ensure that those obstacles can be met without the fear of losing international protection. When determining an asylum claim, such a refusal may be taken into account as one element amongst others, when assessing the credibility of the claim, but it should not in and of itself lead to a refusal of recognition.

UNHCR is in particularly concerned about the situation for asylum seeking children. The process for children should be enshrined with specific protection safe guards, not only should the decision to proceed with biometric registration be subject to the consideration of their best interest, other procedural safeguards and guarantees are essential to the pursuit of such an operation. UNHCR recommends therefore that the purpose of the registration is clearly explained to the child, that the confidentiality of the information is guaranteed, and a legal representative or the legal guardian of the child is present during this process in order to safeguard the best interest of the child.

2. Conditional Leave to enter/remain – Clause 16

UNHCR understands that clause 16 of the Bill is designed to facilitate contact management with those individuals who are granted limited leave to remain. It is further understood that this clause is sufficiently broad to cover foreign national prisoners, suspected terrorists and those unable to be granted temporary admission as well as

unaccompanied asylum seeking children. Conditions placed on the individuals falling within the scope of the provision will have a restriction on their freedom of movement in respect of residency and reporting requirements.

As with biometric requirements, in UNHCR's view, the failure to fulfil formal requirements does not in itself exclude a well-founded fear of persecution or fear from generalized or indiscriminate violence, and should thus not lead, in and of itself, to a denial of status.

UNHCR is particularly concerned about the possible impact of this clause on the well being of asylum seeking children and believes that children should not be subject to reporting obligations or residency requirements without a proper assessment of their best interest, the specific circumstances of the child and their individual protection needs. The institution of reporting and residency requirements, without due consideration to age, may lead to an unnecessary infringement of the duty to ensure the psychosocial and physical well being of the child.

UNHCR proposes that children should not be subjected to a reporting obligation and/ or residency requirements like adults and encourages the legislators to explore other, more child friendly methods to facilitate the contact management with due regard to international legal standards laid down in the CRC and other international instruments.

3. Automatic deportation – Clause 31(2)

UNHCR notes that this provision seeks to confer further powers upon the Secretary of State to facilitate automatic deportation. UNHCR notes and welcomes the inclusion of exceptions to the application of the automatic deportation provisions in clause 32 of the Bill insofar as they would apply to people of concern to UNHCR.

We are concerned that clause 31(2), which provides that imprisonment of at least 12 months will result in automatic deportation, further erodes the principle of non-refoulement under which no government should expel a person to a country where they face persecution.

The principle of *non-refoulement* is enshrined not only in the 1951 Refugee Convention, but also in international human rights law, and is generally recognised as a norm of customary international law. An exemption to this is provided by Article 33(2) of the 1951 Convention, which provides that: “the benefit of the [*non-refoulement*] provision may not [...] be claimed by a refugee whom 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.”

However, in UNHCR's view, both Section 72 of the Nationality Immigration and Asylum Act 2002⁴ and the NIAA Specification of Particularly Serious Crimes Order set thresholds for an exception to the *non-refoulement* principle that are not in line with the letter and

⁴ In 2002 UNHCR submitted its view that Section 72 NIAA may be inconsistent with the letter and the spirit of the 1951 Convention.

spirit of the 1951 Convention, and do not meet the criteria as set out in Article 33(2) of the 1951 Convention.

The UK Borders Bill seeks to impose an even shorter term of imprisonment into the criteria and UNHCR is therefore concerned that, in conjunction with section 72 of the NIAA Act 2002, this further diminishes the protection for refugees and provides an extremely restrictive interpretation of Article 33(2) of the Convention.

Article 33(2) of the 1951 Refugee Convention applies to refugees whom there are reasonable grounds for regarding as a danger to the security of the country of asylum, or who having been convicted of a particularly serious crime constitute a danger to the community of that country. It aims to protect the security 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.

The qualification in the Convention that the crime be “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. However, conviction of a particularly serious crime in and of itself should not be sufficient to warrant automatic deportation. The person concerned must, in view of this crime, also present a danger to the community.

In UNHCR's opinion, the exemption to the non-refoulement provision 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 that 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.

The burden of proof is on the State to prove that convictions are symptomatic of the criminal, incorrigible nature of the person and that he is likely to reoffend. As a result 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.

Article 31(2) of the UK Borders Bill fails to make allowances for this, providing as it does for automatic deportation for all those imprisoned for longer than 12 months.

Conclusion:

UNHCR welcomes the acceptance of the continued primacy of the 1951 Refugee Convention in UK legislation. UNHCR trusts that its comments will be of assistance in helping ensure that the UK continues to strive for the highest protection standards.

**OFFICE OF THE REPRESENTATIVE FOR THE UNITED KINGDOM
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