



UNHCR

United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

**Submission by the Office of the United Nations High Commissioner for Refugees
to the Transport and Industrial Relations Committee
on the New Zealand Immigration Bill 2007**

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UNHCR supports the overarching objective of the New Zealand Immigration Bill 2007 to streamline and rationalize the law and procedures insofar as they relate to asylum-seekers, refugees and other persons of concern to UNHCR.

The Office's comments in this Submission are directed principally to areas that require further review and revision. Broadly, these concerns relate to:

- certain aspects of the refugee and protected status determination process;
- the collection and use of classified information and biometric information;
- the detention of claimants for refugee and 'protected person' status; and
- certain issues relating to the expulsion and exclusion of claimants to refugee and 'protected person' status.

Summary of Recommendations

UNHCR recommends:

1. that the operative provisions of the 1951 Convention relating to the Status of Refugees ('the 1951 Refugee Convention') be specifically incorporated, *in extenso*, into the Immigration Bill, as opposed to being referred to in ss.117 (1) and (2) and the Annex thereof (*Section II, paragraphs 6-7*);
2. that s. 119 be amended to the effect that a person shall be granted refugee status if she/he satisfies the criteria set out in the Refugee Convention, as opposed to may be so granted (*Section II, paragraph 8*);
3. that the cessation provision (s. 132) of the Bill be carefully reviewed to ensure the process to determine refugee status offers certainty and finality to recognized refugees. An 'open-ended' time period for cessation under Article 1C of the 1951 Refugee Convention can cause serious hardship to refugees and their families. It should not ordinarily be invoked when refugees have acquired, or are in the process of acquiring, permanent residence and/or citizenship in New Zealand. Any primary decision to cancel refugee status through cessation should be subject to a full and substantive right of appeal/review by the Tribunal (*Section II, paragraphs 9-12*);

4. that the cancellation provisions of s. 133 (involving revocation *ab initio*) be carefully reviewed to ensure the process to determine refugee status offers certainty and finality to recognized refugees. As presently drafted, the grounds of re-opening and cancelling an earlier status '*for any reason*' [s. 133(iii) and (iv)] are too broad and vague. In UNHCR's submission, the grounds for cancellation under s. 133(1) should be confined to serious misrepresentations or deliberate omissions by the refugee or protected person that were material to the original grant of the protected status (*Section II, paragraphs 13-16*);
5. the deletion, from the Bill, of s. 125 which allows a determination officer to decline to accept a claim on the basis that the person lodged, or could have lodged, a claim for recognition as a refugee or for protection in another country. The provision misunderstands and oversimplifies a complex area of international law concerning the reciprocity of states party to the 1951 Refugee Convention and the two human rights conventions in question. As drafted, s. 125 is too broad, vague and uncertain to allow objective and clear application. Moreover, it does not appear to provide any adequate review by an independent Tribunal. Viewed as a whole, the effect of s. 125 would be to heighten the risk of *refoulement* in individual cases which would, in turn, be at odds with New Zealand's commitments under Article 33(1) of the 1951 Refugee Convention (*Section II, paragraphs 17-25*);
6. a full revision of s. 122. As presently drafted, s. 122 (a) invokes principles that are uniquely part of international refugee law (Article 1A(2) of the 1951 Refugee Convention) that may not be readily transferable into the context of other 'protected persons' under human rights law. In addition, the statutory requirement that the risk faced by a 'protected person' be distinguished from the risk faced generally by 'other persons', and that such risk must prevail in every part of the country before 'protected status' can be granted, may not be consistent with both international refugee law or human rights law. If a person is able to show he/she is at risk of persecution or torture, in violation of any of the three conventions, then the fact that others might be equally at risk is irrelevant. (*Section II, paragraphs 26-30*);
7. that the experience and high quality of expertise of refugee status determination, currently located in the Refugee Status Appeals Authority, be preserved in the context of any appellate structures and procedures that are envisaged under the Bill (*Section III, paragraphs 31-33*);
8. the sections relating to the classification and use of such information be revisited as they may be unduly broad, vague and uncertain. In reviewing these provisions, UNHCR recommends that: (i) the starting principle must be to ensure the full and open disclosure of all prejudicial information to a claimant for refugee or protected status (ii) the classification and non-disclosure of relevant and prejudicial information, whilst clearly justified in specific and limited circumstances, should be employed exceptionally where disclosure would pose a threat to national security or would have serious consequences to civil society in New Zealand (including serious criminal conduct). UNHCR is concerned that criterion such as New Zealand's 'international reputation' [s. 30(1)] is too vague and uncertain. (*Section IV, paragraphs 34-42*);
9. inclusion of appropriate safeguards into the Bill to ensure that international standards of reception and treatment are maintained for asylum-seekers, including the non-punishment of refugee and protected person claimants for illegal entry in accordance with Article 31 of the

1951 Refugee Convention (*Section V, paragraphs 43-49*);

10. incorporation of specific provisions into the Bill to ensure that refugee and protected person claimants are detained in non-correctional facilities, or otherwise segregated from persons detained for criminal reasons (whether on remand or convicted) (*Section V, paragraphs 50-54*);
11. a review of s. 153 of the Bill relating to deportation of refugees and protected persons. UNHCR recommends the incorporation of clearer legislative machinery for the application of the exceptions to the fundamental obligation of non-expulsion [Articles 32(1)] and *non-refoulement* [Article 33(2)] of the 1951 Refugee Convention. These Articles of the 1951 Refugee Convention should be incorporated explicitly into the Bill in a binding way rather than in the ‘short-hand’ way that is currently the case in s. 153(2) and s. 153(3). The Tribunal should also have full power to review both the facts and the applicable legal principles thereto (*Section VI, paragraphs 55-59*);
12. UNHCR recommends the application of a proportionality test to balance the seriousness of consequences of exclusion for the individual against the state’s interest in maintaining order and security in terms of the exhaustive criteria in Article 1F of the 1951 Refugee Convention (*Section VII, paragraphs 60-64*); and
13. that any introduction of biometric information should be accompanied by adequate and explicit safeguards with regard to privacy and confidentiality, especially in regard to the country of origin of the claimant (*Section VIII, paragraphs 65-68*).

I. Introduction

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) made a submission on the Review of the Immigration Act 1987 on 3 July 2006. UNHCR now welcomes the opportunity to provide comment on the New Zealand Immigration Bill 2007 (“the Bill”) which has been referred to the Committee for consideration.
2. UNHCR’s standing to comment is based on its Statute¹ and the 1951 Convention relating to the Status of Refugees (‘the 1951 Refugee Convention’). UNHCR also has a statutory function of providing international protection for stateless persons and has been given a specific and global mandate to contribute to the prevention and reduction of statelessness by the United Nations General Assembly in 1974 and 1976 as well as through subsequent resolutions.²
3. UNHCR will be addressing its comments only to how the Bill may affect asylum-seekers, refugees and stateless persons. The term “refugee” in this submission applies to all persons

¹ United Nations General Assembly, Resolution 428 (V), 14 December 1950: Statute of the Office of the United Nations High Commissioner for Refugees.

² United Nations General Assembly, Resolutions 3274 (XXIX) of 10 December 1974 and 31/36 of 30 November 1976.

recognized by New Zealand under the 1951 Refugee Convention and its 1967 Protocol, as well as to persons who have entered New Zealand through refugee resettlement programmes, irrespective of the visa they have been granted by New Zealand.

4. New Zealand has acceded to the 1951 Refugee Convention (on 30 June 1960) and its 1967 Protocol (on 6 August 1973). New Zealand has also ratified the *1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (“CAT”) (on 28 December 1978) and the *1966 International Covenant on Civil and Political Rights* (“ICCPR”) (on 28 December 1978).
5. UNHCR welcomes the Government of New Zealand’s accession to the *1961 Convention on the Reduction of Statelessness* on 20 September 2006.

II. Refugee and protected status determinations (Part 5)

Incorporation of Refugee Convention (Part 5, section 117)

6. Section 117 requires determination officers to act in a manner that is consistent with New Zealand’s obligations under the 1951 Refugee Convention which is set out in Schedule 1.
7. Although the 1951 Refugee Convention has been annexed to the Bill, UNHCR encourages the statutory incorporation of the 1951 Refugee Convention through a specific provision of the Bill. In this way the precise terms of the Refugee Convention are incorporated into New Zealand domestic law and practice. Given the centrality and binding nature of the 1951 Refugee Convention, it would be desirable for such an incorporation to be of the Convention in extenso.
8. UNHCR notes that even though a claimant might meet the definition of a ‘refugee’ under the Convention, a determination officer appears to have a discretion, in terms of the use of the words ‘may’ in s. 119, not to grant refugee status. If a person satisfies the relevant standard the appropriate status must be granted.

Recommendation 1: *UNHCR recommends that the operative provisions of the 1951 Refugee Convention be specifically incorporated, in extenso, into the Immigration Bill, as opposed to being referred to in the Annex thereof;*

Recommendation 2: *UNHCR recommends that s. 119 be amended to the effect that a person shall be granted refugee status if she/he satisfies the criteria set out in the 1951 Refugee Convention, as opposed to may be so granted.*

Cessation and cancellation of recognition (Part 5)

(a) Cessation (Part 5, section 132)

9. In accordance with s. 132, a determination officer may cease to recognize a refugee or protected person where Article 1C of the 1951 Refugee Convention applies, or where there are

no longer substantial grounds for believing the person deported would experience torture or arbitrary deprivation of life.

10. In principle, recognition as a refugee or protected person should offer finality and certainty to a refugee and/or protected person (as well as their families). Ordinarily, this would lead to some form of grant of long term legal status equivalent to permanent residence and to citizenship within a prescribed period.
11. Due to the fact that cessation results in the withdrawal of rights, and the serious consequences that may have, UNHCR considers that, at the very least, the evidentiary burden of proof should lie with the asylum state authorities to establish that the grounds for cessation have been clearly made out.³ Refugees must be assured that their status will not be subject to constant review in the light of temporary changes – not of a fundamental character – in the situation prevailing in their country of origin so the cessation clauses of the 1951 Refugee Convention should be applied restrictively. The legislation and procedures should require clear and compelling evidence which satisfies objectively identifiable criteria and demonstrates the existence of a settled and durable situation that is incompatible with a real chance of persecution arising from the circumstances that produced the original grant of protection.
12. Even though the 1951 Refugee Convention permits the ending of refugee status if the conditions for cessation under Article 1C are met, UNHCR is of the view that a refugee's status should, not in principle, be subject to frequent review to the detriment of his or her sense of security, which international protection is intended to provide, and that a refugee who, or whose family, has suffered under atrocious forms of persecution should not be expected to repatriate. The proviso to Article 1C of the 1951 Refugee Convention makes it clear that refugee status should be retained even where there have been improvements in the country of origin.

Recommendation 3: UNHCR recommends that the cessation provision (s. 132) of the Bill be carefully reviewed to ensure the process to determine refugee status offers certainty and finality to recognized refugees. An 'open-ended' time period for cessation under Article 1C of the 1951 Refugee Convention can cause serious hardship to refugees and their families. It should not ordinarily be invoked when refugees have acquired, or are in the process of acquiring, permanent residence and/or citizenship in New Zealand. Any primary decision to cancel refugee status through cessation should be subject to a full and substantive right of appeal/review by the Tribunal.

(b) Cancellation (involving revocation *ab initio*) (Part 5, section 133)

13. Section 133(1)(a)(i) establishes the statutory basis for cancellation of refugee or protected status acquired by fraud, forgery, false or misleading representation, or concealment of relevant information.

³ See Global Consultations Lisbon Expert Roundtable, "Summary Conclusions – Cessation of Refugee Status", 3-4 May 2001, paragraph 27: "If in the course of the asylum procedure there are fundamental changes in the country of origin, the asylum authorities should bear the burden of proof that such changes are indeed fundamental and durable. "

14. UNHCR accepts that cancellation is appropriate where there are serious reasons to consider that the original grant of refugee or protected person status may have been obtained through the means enumerated and considers this is properly reflected in s. 133(1)(a)(i) of the Bill.
15. Subsection (a)(iii) also provides for the cancellation of refugee or protected person status where matters dealt with in Articles 1D, 1E and 1F of the 1951 Refugee Convention, and ss. 122 or 127(2) of the Bill, may not have been considered 'for any reason'. UNHCR is concerned that the language of this provision 'for any reason' is too broad and vague.
16. In UNHCR's view, cancellation *ab initio* should only be employed where deliberate acts or omissions of concealment or misrepresentation have been made by the refugee or protected person claimant and there exists some element of material culpability or deception that led to the earlier grant of refugee status. The mere fact that a determination officer failed to make due inquiry or made a decision with which a subsequent determination officer disagrees, should not be sufficient to re-open in cancellation procedures a claim which has been finally determined. Finality and certainty in the recognition of refugee and protected person status should ordinarily take precedence over instigating cancellation proceedings in the absence of fraud or deception.

Recommendation 4: *UNHCR recommends that the cancellation provisions of s. 133 (involving revocation ab initio) be carefully reviewed to ensure the process to determine refugee status offers certainty and finality to recognized refugees. As presently drafted, the grounds of re-opening and cancelling an earlier status 'for any reason' [s. 133(1)(a)(iii) and (iv)] are too broad and vague. In UNHCR's submission, the grounds for cancellation under s. 133(1) should be confined to serious misrepresentations or deliberate omissions by the refugee or protected person that were material to the original grant of the protected status.*

'Safe Third Country' (Part 5, section 125)

17. Section 125(2)(a)(i) provides that the determination officer may decline to accept a claim on the basis that the person lodged or could have lodged a claim for recognition as a refugee or for protection in another country.
18. This provision appears to be based on the concept of 'safe third country' (also known as 'safe country of asylum' or 'effective protection elsewhere') that has been employed by a number of other countries in other regions. It does not, however, constitute a principle of refugee protection. At best, it can be seen as a device used by states party to the 1951 Refugee Convention to determine which of them has the primary responsibility to provide refugee status determination and a durable solution for a recognised refugee.
19. In UNHCR's experience, such arrangements can work within a multilateral, legal framework, such as that of the European Union, where clear reciprocal obligations are imposed on states and which define which state has responsibility to accept and determine a claim for refugee status. However, UNHCR is particularly concerned where states introduce such arrangements in the absence of clear, binding and reciprocal undertakings and guarantees being in place.
20. In the context of Australia and New Zealand, most asylum-seekers come to the region through countries which are neither signatory to the 1951 Refugee Convention and do not have even

the most basic capacity to provide protection and durable solutions to refugees. In this geopolitical context, any application of s. 125 that results in the rejection of a claimant at the border must be treated with considerable caution. As presently drafted, s. 125 is couched in vague and uncertain language that gives no clear guidance as to how decision-makers are to apply a section that is central to New Zealand's obligations under the 1951 Refugee Convention.

21. UNHCR is also concerned that s. 125 serves as a procedural bar to the substantive consideration of the merits of a claim in New Zealand. New Zealand has no bilateral or multilateral agreements (comparable to the Dublin Convention and Dublin II Regulation in the European Union) which govern inter-states responsibility.
22. It should be noted in this context that the mere presence of an office of the United Nations High Commissioner for Refugees in another country does not equate to 'effective protection'. Although mandate refugee status could be conceivably construed as 'protection' in which s. 125 is framed, protection is afforded by states and not by international organizations. Further, the mere fact that a state is signatory to the 1951 Refugee Convention will not ensure 'effective protection', as restricted access to asylum-seekers, limited resources and limited commitments of contracting states may raise concerns about the quality of refugee protection and reception standards of treatment available.
23. In UNHCR's view, s. 125 introduces a procedural bar that may not be appropriate to the geopolitical context of this region and which should not be a substitute for substantive assessment of a refugee or protected person's claims in New Zealand.
24. It is also unclear whether a negative decision made by a determination officer under s. 125 attracts a right of appeal to the Tribunal. Although s. 176(1)(a) allows the right of appeal to an independent Tribunal, it is unclear whether s.125(3)(a) and (b) fall within that appellate jurisdiction. If this provision is retained in the Bill, a right of appeal should be preserved due to the grave consequences of an erroneous determination at first instance.

Recommendation 5: *UNHCR recommends the deletion, from the Bill, of s. 125 which allows a determination officer to decline to accept a claim on the basis that the person lodged or could have lodged a claim for recognition as a refugee or for protection in another country. The provision misunderstands and oversimplifies a complex area of international law concerning the reciprocity of States Parties to the 1951 Refugee Convention and the two human rights conventions in question. As drafted, s. 125 is too broad, vague and uncertain to allow objective and clear application. Moreover, it does not appear to provide any adequate review by an independent Tribunal. Viewed as a whole, the effect of s. 125 would heighten the risk of refoulement in individual cases which would, in turn, be at odds with New Zealand's commitments under Article 33(1) of the 1951 Refugee Convention.*

Complementary Protection (Part 5, section 122)

25. Sections 120 and 121 establish a statutory basis to recognize protected persons under the CAT and the ICCPR but s. 122 establishes additional requirements for recognition as a protected person by requiring the risk of torture, arbitrary deprivation of life, or cruel treatment faced by

a 'protected person' be distinguished from the risk faced generally by 'other persons', and that such risk must prevail in every part of the country before 'protected status' can be granted.

26. UNHCR welcomes the codification of New Zealand's international obligations under CAT and ICCPR to provide complementary protection to persons who do not satisfy the strict and sometimes narrower definition of a refugee contained in the 1951 Refugee Convention.
27. UNHCR supports any provision that would allow protection for "persons fleeing the indiscriminate effects of violence and the accompanying disorder in a conflict situation, with no specific element of persecution, which might not fall under a strict interpretation of the 1951 Convention refugee definition, but may still require international protection..."⁴
28. In this context, UNHCR notes that if a person is able to show he/she is at real risk of persecution, torture, or cruel treatment (as defined in s. 121 of the Bill), in violation of any of the three conventions, then the fact that others might be equally at risk is an irrelevant consideration and New Zealand's convention responsibilities to protect that individual would be engaged.
29. As drafted, the Bill unduly restricts the application of 'complementary' protection to any person who individually faces protection concerns under CAT and ICCPR in every part of the country. In UNHCR's view, s. 122(b) tries to abstracts from the refugee protection context, the notion that an individual must show she/he can avoid harm in every part of the country of origin before New Zealand's convention responsibilities are engaged. This requirement – sometimes referred to as the 'internal flight alternative' or, as in New Zealand, the 'internal protection alternative' - is a very complex legal and factual issue that has not been adequately captured by the language of s. 122(b).
30. UNHCR is of the opinion that the requirement that the risk of human rights violations exists in every part of the country extends well beyond the jurisprudence which the Refugee Status Appeals Authority (RSAA) has in the refugee context. A more appropriate test might be whether a claimant can reasonably and effectively find protection from serious harm in other parts of the country.⁵ UNHCR considers it preferable for a proper analysis and assessment of international human rights to evolve through the jurisprudence of the Tribunal rather than through specific legislative provision of s. 122(b).

Recommendation 6: *UNHCR recommends a full revision of s. 122. As presently drafted, s. 122 (a) invokes unique principles of refugee law (Article 1A(2) of the 1951 Refugee Convention) that may not be readily transferable into the context of other 'protected persons'. In addition, the statutory requirement that the risk faced by a 'protected person' be distinguished from the risk faced generally by 'other persons', and that such risk must prevail in every part of the country before 'protected status' can be granted, may not be consistent with either international refugee law or human rights law.*

⁴ Executive Committee of the High Commissioner's Programme, Standing Committee Eighteenth Meeting, "Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime" (EC/50/SC/CRP. 18) 9 June 2000 at [10].

⁵ See UNHCR's *Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*.

III. Immigration and Protection Tribunal (Part 7, section 193)

31. Section 193 establishes an Immigration and Protection Tribunal *inter alia* to determine appeals against decisions in relation to recognition as a refugee or protected person and to make decision in relation to recognition as a refugee or protected at first instance, where the decision involves classified information.
32. UNHCR generally supports the objective of streamlining and rationalizing the multiplicity of appellate and review bodies dealing with immigration issues. In UNHCR's experience in other countries, it is sensible for a single body to gather the relevant facts which form the basis of decisions to grant 'protection' status to a claimant, in a single procedure.⁶
33. UNHCR believes that any amalgamation process in New Zealand should ensure that the high level of experience and expertise currently located in the RSAA is not diluted. This body is widely regarded as one of the most credible refugee review tribunals in any domestic system in the world and one which has contributed significantly to the development of sound refugee status determination practice and jurisprudence internationally. Its decisions are cited as authoritative in many other domestic processes. For these reasons, the high degree of specialization required to make fair and accurate determinations on a claimant's protection needs - and New Zealand's concomitant responsibilities under the 1951 Refugee Convention, CAT and the ICCPR – should be reflected and protected within any amalgamated tribunal. In addition, the independence and autonomy of decision-makers in the field should be insulated from any risk of pressure or distraction that might occur if the functions are merged with other discretionary-based decisions within the Tribunal.

Recommendation 7: *UNHCR recommends that the experience and high quality of expertise of refugee status determination, currently located in the Refugee Status Appeals Authority, be preserved in the context of any appellate structures and procedures that are envisaged under the Bill.*

IV. Classified information

Definition of classified information and its use in decision making (sections 5, 30 and 137)

34. A number of provisions in the Bill introduce powers to use classified information in the refugee status determination process and as a basis to detain asylum-seekers. Section 5 defines 'classified information' as information that the chief executive of the relevant agency certifies cannot be disclosed. In accordance with s. 30, classified information may be used in decision-

⁶ Global Consultations on International Protection, Asylum Processes (Fair and Efficient Asylum Procedures), 2nd Meeting, 31 May 2001, (EC/GC/01/12). See also Executive Committee Conclusion No. 103 (LVI) at (q) which encourages States to consider whether it may be appropriate to establish a comprehensive procedure before a central expert authority making a single decision which allows the assessment of refugee status followed by other international protection needs, as a means of assessing all international protection needs without undermining refugee protection and while recognizing the need for a flexible approach to the procedures applied.

making, including where the decision concerns refugee or protected person status, if the Minister determines that the information relates to matters of security, criminal conduct or matters that may have a significant impact on New Zealand's international reputation. Under s. 137(1), where classified information may be involved in determining a refugee or protected person claim, or cancellation of recognition, the determination must be made by the Tribunal.

35. The use of classified information in international refugee law is a complex area of law where an appropriate balance between national security and international protection must be found. From UNHCR's perspective, the open disclosure of all prejudicial information should be encouraged and the use of classified information in refugee and protected person status determinations should only be maintained on an exceptional basis where, for example, disclosure would pose a threat to national security, serious criminal conduct or would have serious consequences to civil society in New Zealand. The person affected by the classified information should be provided as much information as possible to ensure a fair and transparent determination process in accordance with natural justice.
36. UNHCR is concerned that the definition of classified information contained in s. 5 empowers any agency of the New Zealand Government to declare information to be classified. This represents a significant broadening in scope from the current Immigration Act 1987 which only applies to the New Zealand Security Intelligence Service.
37. With regard to s. 30, while understanding the importance for national security in maintaining confidentiality of sources, UNHCR is concerned that a broad and relatively ill-defined concept of New Zealand's 'international reputation' be the basis for restricting natural justice in refugee claims – where access to and quality of supporting evidence is problematic. In light of the consequences of an erroneous determination based on classified information, UNHCR is concerned that information may be classified on the basis it may have a significant impact on New Zealand's 'international reputation'. The Bill does not attempt to define the circumstances or elements necessary to place New Zealand's international reputation at risk within any set of objective or defined criteria.

Special Advocate (Part 7, sections 235-239)

38. Under s. 235, the role of the special advocate is to represent the interests of an appellant (against the New Zealand Government) in any proceedings involving classified information. A special advocate, after having accessed the classified information, may only communicate with the appellant or affected person (or representative) with the approval of the Tribunal or court. However, under s. 235(2) decisions by the Tribunal involving classified information are not subject to judicial review as the special advocate may not commence their own proceedings.
39. UNHCR has earlier accepted the "role for a security-cleared 'special counsel' who could have access to the information and represent the person...", provided the role is clearly elaborated, and able to overcome many of the natural justice concerns over the use of classified information.⁷

⁷ UNHCR, Submission on the Review of the Immigration Act 1987, 3 July 2006.

40. Nevertheless, UNHCR has concerns that there is a lack of independent review in relation to proceedings involving the use of classified information. Although the proceedings before the Tribunal are inquisitorial rather than adversarial (s. 194), the appellant or affected person may be materially disadvantaged should the Tribunal or court decide, under s. 238(7), to consult the Chief Executive of the relevant agency of the Government.
41. Further, UNHCR questions whether, pursuant to s. 239, special advocates should be exempt from claims of misconduct or unsatisfactory conduct under the *Lawyers and Conveyancers Act 2006*, so long as they are acting in accordance with the principal Act.
42. UNHCR favours a restrictive approach to the use of classified information which avoids the use of unduly vague language. In UNHCR's view, the current language of the Bill may shift the balance too much in favour of classification of information and away from adequate and transparent disclosure for the purpose of the refugee status determination.

Recommendation 8: *UNHCR notes that the sections relating to the classification and use of information are unduly broad, vague and uncertain. In reviewing these provisions, UNHCR recommends that: (i) the starting principle must be to ensure the full and open disclosure of all prejudicial information to a claimant for refugee or protected status (ii) the classification and non-disclosure of relevant and prejudicial information, whilst clearly justified in specific and limited circumstances, should be employed exceptionally where disclosure would pose a threat to national security or would have serious consequences to civil society in New Zealand (including serious criminal conduct). UNHCR is concerned that criterion such as New Zealand's 'international reputation' [s. 30(1)] is too vague and uncertain.*

V. Detention (Part 9)

Liability to arrest and detention (Part 9, sections 272-279)

43. The Bill establishes a tiered detention and monitoring regime. Under s. 272, persons refused entry permission, who are (or are suspected to be) liable for deportation, or who are suspected to constitute a threat risk to security, are "liable to arrest and detention".
44. Persons recognized as protected persons or refugees (or claimants for such status) are not, under s. 153, liable to deportation unless removal is consistent with Articles 32(1) or 33(2) of the 1951 Refugee Convention. However, as the Bill is presently drafted, refugee and protected person claimants unlawfully in New Zealand remain liable to deportation and subject to arrest and detention under ss. 272, 273 and 279, potentially for an indeterminate period of time.
45. Under s. 275, the Bill provides that persons unlawfully in New Zealand may be arrested and detained without warrant for a period not exceeding 96 hours, or up to 28 days upon the issuance of a warrant of commitment, in order to *inter alia* ascertain the identity someone suspected to be liable for deportation but who fails to supply satisfactory evidence of his identity. UNHCR is concerned that s. 279 precludes a judge from ordering the person's release where their identity is unknown, "unless there are exceptional circumstances". UNHCR notes

that while classified information may be used to justify continued detention, under s. 288 a judge must confirm the accuracy of the information in any subsequent review of the detention.

46. In addition, Part 10 of the Bill provides that every person who, in support of any application or request for a visa or entry permission, makes any statement, or provides any information, evidence or submission knowingly that it is false, or produces or surrenders or completes any document or supplies and information, commits an offence.
47. Although s 305(b) removes liability where persons who produce or surrender false documents have “reasonable excuse”, the Bill does not indicate whether the claimant’s assertion of a well-founded fear of persecution for a Convention reason may constitute such a ‘reasonable excuse’.
48. In UNHCR’s view the detention of asylum-seekers is inherently undesirable and should only be resorted to, if necessary, to (i) verify identity; (ii) to determine the elements on which the claim for refugee status or asylum is based; (iii) 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; or (iv) to protect national security and public order. If asylum-seekers are detained, they should have access to adequate and regular procedural review.⁸ Article 31 of the 1951 Refugee Convention exempts refugees from punishment on account of their illegal stay or presence in the host country, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
49. In UNHCR’s view, a “general policy and/or practice of prosecuting users of false travel documentation without regard to the circumstances of individual cases, and without allowing an opportunity for any claim for refugee status or asylum to be considered by the responsible central authority before prosecution, may amount to a breach of Article 31 of the 1951 Convention”.⁹

Recommendation 9: UNHCR recommends the inclusion of appropriate safeguards into the Bill to ensure that international standards of reception and treatment are maintained for asylum-seekers, including the non-punishment of successful refugee and protected person claimants for illegal entry, in accordance with Article 31 of the 1951 Refugee Convention.

Alternatives to arrest and detention (section 277)

50. UNHCR welcomes the capacity of immigration officers, under s. 277, to agree to residence and reporting requirements with a person liable to arrest and detention.
51. UNHCR generally encourages Contracting States to employ viable alternatives to detention, such as reporting obligations or guarantor requirements, and recommends that they be

⁸ See UNHCR *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, (February 1999).

⁹ UNHCR “Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalization, Detention and Protection”, Global Consultations on International Protection/Second Track (2001).

employed unless there is evidence to suggest that such an alternative will not be effective in the individual case.

52. However, UNHCR is concerned with the absolute discretionary nature of that power to offer or agree to residence and reporting requirements, which may be varied through consensus, or terminated at the officer's absolute discretion.
53. UNHCR does not support the practice of using police or correctional facilities to detain asylum-seekers. Where asylum-seekers are detained only because of their illegal entry or presence in the country of asylum, UNHCR's 1998 Executive Committee "*Conclusion on International Protection*" states that their detention with others who have been detained as common criminals "is undesirable and must be avoided whenever possible."¹⁰
54. A person who is detained under s. 275 or a warrant of commitment, may be detained, if the person is if under 18 years, at any residence or premises approved by the chief executive of the department responsible for the administration of the *Children, Young Persons and Their Families Act 1989* or premises agreed to by the guardian/parents; and, in any other case, any premises approved by the chief executive under s. 293, or at a police station.

Recommendation 10: UNHCR recommends the incorporation of specific provisions into the Bill to ensure that refugee and protected person claimants are detained in non-correctional facilities, or otherwise segregated from persons detained for criminal reasons (whether on remand or convicted).

VI. Expulsion (Part 6, section 153)

55. The Bill contemplates the expulsion of refugees under s. 153 while codifying the exceptions to the prohibition on *refoulement* contained in Article 33(2) of the 1951 Refugee Convention and the right of expulsion (but not involving *refoulement*) under Article 32(1) to (3).
56. The return of a person to the frontiers where he/she fears persecution is a serious step which should only be taken where the grounds stipulated in the 1951 Refugee Convention are clearly met. In UNHCR's view, the grounds for the expulsion of refugees lawfully in the territory are exhaustively limited under Articles 32 and 33(2) of the 1951 Refugee Convention. The expulsion of refugees on health grounds, including being affected by HIV/AIDS, is not supported by the 1951 Refugee Convention as grounds for expulsion, and may amount to *refoulement* of a refugee or asylum-seeker.
57. UNHCR supports s.179, which provides for persons liable for deportation the right to appeal to the Tribunal in order to determine whether the factual circumstances which have given rise to the deportation liability did or did not exist. However, UNHCR has concerns that the Bill does not contain clear legislative guidance on how the exceptions to the fundamental obligation of *non-refoulement* will be applied, nor provision as to how liability for deportation under s. 153 is to be determined by the Tribunal.

¹⁰ UNHCR ExCom No. 85 (XLIX) 1998.

58. Given the significant consequences for expulsion and/or *refoulement*, the Tribunal should also have power to review not only the factual circumstances of the determining officer's decision to deport but also the applicable international legal principles and doctrine that pertain to those facts.
59. UNHCR further supports ss. 184 and 180(1)(c) requiring the Tribunal to consider, respectively, in the case of refugee or protected persons liable for deportation under s. 150 (convicted of a criminal offence), whether deportation is prohibited under s. 153 and then to determine any humanitarian appeal brought by the person; or in the case of refugee or protected persons liable for deportation under s. 151 (recognition obtained by fraud), whether the person is *currently* a refugee or protected person, and then determine any humanitarian appeal brought by the person.

Recommendation 11: *UNHCR recommends a review of s. 153 of the Bill relating to deportation of refugees and protected persons. UNHCR recommends the incorporation of clearer legislative machinery for the application of the exceptions to the fundamental obligation of non-expulsion [Article 32(1)] and non-refoulement [Article 33(2)] of the 1951 Refugee Convention. These articles of the 1951 Refugee Convention should be incorporated explicitly into the Bill in a binding way rather than in the 'short-hand' way that is currently the case in s. 153(2) and s. 153(3). The Tribunal should also have full power to review both the facts and the applicable international legal principles thereto.*

VII. Exclusion (Part 2, sections 9-11)

60. Section 9(1) prevents the grant of a visa, entry permission or visa waiver to an individual who has been convicted of an offence for which the person has been sentenced to imprisonment for a period greater than five years, or period greater than 12 months in the preceding ten years, or has been 'removed, excluded or deported' from another country. Further, s. 10(a) and (b) exclude any person where the Minister has a reasonable belief they are likely to commit an offence punishable by imprisonment.
61. UNHCR notes that the Bill provides the Minister with the competency to exclude from entry permission any person who the Minister has reason to believe is likely to commit an offence in New Zealand that is punishable by imprisonment, or who is a risk to public order or the public interest.
62. In UNHCR's view, Article 1F of the 1951 Refugee Convention exhaustively sets out the grounds on which an asylum-seeker may be excluded from international refugee protection. These grounds should be applied restrictively. The grounds necessarily involve individual responsibility in relation to serious criminal acts or crimes, and UNHCR encourages the application of a proportionality test in light of the potential consequences of exclusion. Health and character are not grounds for exclusion contemplated within the framework of Article 1F and are not susceptible to considerations of individual responsibility or of proportionality.
63. Section 119 provides that a person 'may' be recognized as a refugee if the person is a refugee within the meaning of the 1951 Refugee Convention. UNHCR is of the view that a person

satisfying the refugee definition in the Convention ‘shall’ be recognised as a refugee, rather than ‘may’ as presently drafted.

64. UNHCR has concerns that the ‘non-eligibility’ categories of persons may exclude refugee and protected persons claimants from entry permission into New Zealand based on character grounds that are beyond those contemplated in the 1951 Refugee Convention. In light of the potential consequences of exclusion, UNHCR encourages the application of a proportionality test where the serious consequences for an excluded refugee claimant are balanced against the state’s interest in maintaining order and security. Exclusion from the grant of entry permission may, *a fortiori*, amount to a breach of the principle of *non-refoulement*; especially where the character grounds for exclusion from entry permission may also form the basis upon which a claim for protection may be founded.

Recommendation 12: *UNHCR recommends the application of a proportionality test to balance the seriousness of consequences of exclusion for the individual against the state’s interest in maintaining order and security in terms of the exhaustive criteria in Article 1F of the Refugee Convention.*

VIII. Biometric Information (Part 2, section 29, and Part 5, section 138)

65. The Bill provides that all visa/entry permit applicants must submit to the collection of basic biometric information (fingerprint, photograph and iris scan data). Under s. 138(1)(e), a determination officer may require a refugee or protected person claimant to allow the collection of biometric data within the process of status determination.
66. However, s. 29 of the Bill does not contain any restrictions on the use of this information, merely stipulating that biometric information may be used to establish a record of a person’s identify, verify a person’s identity, or assist with decision making under the Act.
67. Although recognizing the legitimate interest of governments in combating identity fraud, UNHCR believes the collection and use of biometric information must be accompanied by safeguards to prevent undue adverse consequences to concerned asylum-seekers, refugees and stateless persons.
68. UNHCR recognizes that the Bill requires confidentiality as to the identity of any claimant or refugee or protected person, and particulars of his or her case must be maintained by all persons at all times, unless disclosure would not, *inter alia*, endanger the safety of the claimant or any other person. Notwithstanding these restrictions, UNHCR has concerns with the lack of safeguards to protect the safety of persons when the information is used for purposes outside New Zealand, in particular the authorities of the country of origin of the claimant concerned or of the foreign country in respect of which the application or claim is made.

Recommendation 13: *UNHCR recommends that any introduction of biometric information should be accompanied by adequate and explicit safeguards with regard to privacy and confidentiality, especially in regard to the country of origin of the claimant.*

IX. Conclusion

69. UNHCR welcomes the broad consultation process that is taking place with key stakeholders and appreciates the opportunity to comment in further detail on the New Zealand Immigration Bill 2007 prior to the implementation of any introduced changes. This is an important piece of legislation for a country renowned internationally for its high standards of refugee protection. The Bill raises important and sometimes contentious issues that need to be given full and measured reflection in the consultation process.

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20 November 2007