

**Submission of the United Nations High Commissioner for Refugees
on
Migration Legislation Amendment (Identification and Authentication)
Bill 2003**

In accordance with its supervisory responsibilities and Article 35 of the 1951 Convention relating to the Status of Refugees, the Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to provide its written observations and comments on the above-mentioned legislation, insofar as it impacts on asylum seekers, refugees and stateless persons.

COMMENTS

UNHCR appreciates that drafters of the proposed legislation tried to strike a proper balance between the government's objective of identifying the non-citizens and on the other the rights of individuals to be examined. This balance can be found within almost every section of the proposed legislation.

In June 2001, the Department of Immigration and Multicultural Affairs¹ shared with UNHCR for comment a policy document called "Combating Identity Fraud: Developing New Powers in the Migration Act." This policy document was intended to serve as the basis for a legislative amendment. We understand that this legislation is the outcome of that policy document.

In UNHCR's comments on the policy documents, we stated that UNHCR recognises the legitimate interest of governments to combat identity fraud. However, UNHCR had some concerns with the approach in the document, and therefore recommended additional safeguards to prevent adverse consequences to concerned asylum seekers, refugees and stateless persons.

UNHCR appreciates that the draft Bill has addressed the majority of our concerns and incorporated most of our recommendations.

UNHCR has some additional observations which it believes the Committee may wish to take into consideration, based on current thinking in UNHCR on these issues.

In particular, UNHCR would like to draw to the attention of the Committee the following considerations:

1. The proposed legislation could provide additional safeguards to seek to prevent any adverse physical or psychological effects on the individuals concerned. Asylum seekers may possibly be recognised as refugees. Refugees in many cases, suffer from trauma because of the persecution that they have experienced in their

¹ Now the Department of Immigration and Multicultural and Indigenous Affairs

country of origin, or due to the circumstances of their flight. Requiring them to undergo biometric tests may aggravate their already precarious psychological or mental state. It would therefore be useful for the proposed legislation to include adequate safeguards to prevent such adverse effects, notably through the provision of professional care and counselling, both prior to, and after, the testing.

2. The proposed legislation does not refer to the scientific reliability of each of the biometric tests. We do understand that the reliability of each test may vary, thus resulting in different legal implications, e.g., in regard to evidentiary weight. UNHCR considers it important that the proposed legislation be clearer on that matter. Where results prove to be inconclusive, UNHCR considers the right of the individual to have another test should be guaranteed. The proposed legislation could also provide criteria for drawing conclusions when there is a conflict between documentary or other evidence and the results of the tests.
3. The proposed legislation does not consider the socio-cultural implications of the tests, which may give rise to significant problems. For instance, if the purpose of the test is to identify the individual to prove his paternity relations with another person, there is no safeguard in place for any possible disruption of the family unit, if the result of the tests disproves paternity of children.
4. The proposed legislation does not provide for an oversight mechanism on the collection, storage, use and destruction of the data. UNHCR considers such a provision important, in view of its implications in regard to the principle of confidentiality that should govern all aspects of biometric testing.
5. The proposed legislation only prescribes the destruction of identifying information². In UNHCR's view, all biometric materials should be destroyed immediately after having served the exclusive purpose for which they were administered.
6. In regard to the principles of privacy and confidentiality, UNHCR considers that the proposed legislation should specify that when information on biometric testing of certain individuals is to be shared with another country (notably in the context of ascertaining whether a person had sought protection in another country), such information-sharing should be the subject of specific agreements. These agreements should include, *inter alia*, restrictions on the parties that would be privy to this information, and prohibitions on the dissemination of this information to any party that is not specifically included in the agreement. It should also be clearly stated that this information should not be shared, under any circumstances, with the authorities of the country of origin of the individual concerned or of the foreign country in respect of which the application or claim is made.

The proposed legislation provides for a broad scope of discretion on the part of responsible officers. UNHCR believes additional safeguards should be specified. In the refugee context this is particularly relevant in view of draft section 336 F subsection 5. Responsible officers should be able properly to establish, "that the country or body to which the disclosure is made will not disclose the identifying

² Paragraph 336K (4)

information to a foreign country in respect of which the application or claim is made, or a body of such a country."

To address this challenge, UNHCR recommends the establishment of training for responsible officers on the new legislation. Such training should include sessions on safeguards, risks and a sensitization of needs to protect information related to asylum-seekers, refugees and other persons of concern to UNHCR. While such training may not have to be explicitly mentioned in the law, reference may be made in the explanatory memorandum introducing the draft legislation. It may be appropriate for UNHCR to play a role in such training efforts, as well as in the drafting of implementing regulations.

Further, UNHCR considers section 336 F subsection 5, relating to the disclosure of identifying information with countries of origin or "to foreign country in respect of which the application or claim is made," should be reconsidered, in view of the possibility of risk to the failed asylum seeker. While in many cases and with regard to many countries this may not be problematic, there can be situations in which the sharing of such information, in particular if this will lead to disclosure that the person had applied for asylum in Australia, may lead to risks of persecution. Request for asylum abroad may be punishable and may lead to persecution (based on real or imputed political opinion documented by the request). Even where an asylum seeker has his/her claims rejected, such an asylum seeker has a legitimate and human rights-backed interest that no data would be shared with the country of origin. Prevention of such information sharing would also be in the interest of the Australian authorities, in order to prevent the creation of sur place cases or possible breach of the principle of refoulement.

Therefore, UNHCR suggests that an amendment of draft section 336 F subsection 5, could read:

(5) However, if:

(a) the person to whom the identifying information relates has requested or agreed to return to the foreign country in respect of which the application or claim is made; or

(b) the person is an applicant for a protection visa, and the application has been refused and finally determined; or

(c) the person is an offshore entry person:

(i) who makes a claim for protection under the Refugees Convention as amended by the Refugees Protocol; and

(ii) who, following assessment of his or her claim, is found not to be a person to whom Australia owes obligations under the Refugees Convention as amended by the Refugees Protocol;

then:

(d) subsection (3) does not apply to a disclosure to that country 20 or to a body of that country; and 21

(e) subsection (4) does not apply to a disclosure to a body or 22 country that may disclose the identifying information to that 23

foreign country or to a body of that country.
if such disclosure would not entail any risks [of human rights violation] for the person concerned."

The formulation in [...] has been proposed, to clarify that info exchange for legitimate criminal prosecution would not be prohibited, while on the other hand Australian authorities should not contribute in any manner to any human rights violation by the country of origin. The use of the term "risk of persecution" would be too narrow

7. Finally, UNHCR would recommend that the legislation stipulate that the administration of the tests should only be undertaken by professionals, who are trained not only on its scientific/technical aspects, but also on related issues, such as legal concerns, civil rights and liberties, record handling and keeping, etc. The Office would also propose that the legislation should specify that the costs of the testing be borne by the Government of Australia.