



UNHCR

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

Inquiry into the Immigration (Mass Arrivals) Amendment Bill

Foreign Affairs, Defence and Trade Committee

Submission by the Office of the United Nations High Commissioner for Refugees

27 April 2023

I. INTRODUCTION

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to provide this submission to the Foreign Affairs, Defence and Trade Committee, in respect of its inquiry into the Immigration (Mass Arrivals) Amendment Bill (the Bill), introduced into the New Zealand Parliament on 28 March 2023.
2. The Bill proposes to introduce amendments to the statutory framework governing the arrival of a ‘mass arrival group’ (defined as over 30 people entering New Zealand irregularly, on board one craft or more at the same time) initially inserted into the *Immigration Act 2009* (the Act) by the *Immigration Amendment Act 2013*. Reference is made to UNHCR’s earlier submission to the Transport and Industrial Relations Committee in respect of its inquiry into the Immigration Amendment Bill 2012, especially as it relates to the proposed detention of asylum-seekers arriving as part of a mass arrivals group, on which these comments build.¹

II. UNHCR’S AUTHORITY

3. UNHCR offers these comments as the agency entrusted by the United Nations General Assembly with the responsibility for providing international protection to refugees and other persons within its mandate, and for assisting governments in seeking permanent solutions for refugees.² As set forth in the *Statute of the Office of the United Nations High Commissioner for Refugees*, 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

¹ UN High Commissioner for Refugees (UNHCR), Submission to the Transport and Industrial Relations Committee for its inquiry into the Immigration Amendment Bill 2012, 8 June 2012, available at: <https://www.unhcr.org/au/media/submission-new-zealand-immigration-amendment-bill-2012>

² See *Statute of the Office of the United Nations High Commissioner for Refugees*, UN General Assembly Resolution 428(V), Annex, UN Doc. A/1775, para. 1 (Statute).

proposing amendments thereto'.³ UNHCR's supervisory responsibility under its Statute is reiterated in Article 35 of the *1951 Convention relating to the Status of Refugees*,⁴ according to which State Parties undertake to "co-operate with the Office of the United Nations High Commissioner for Refugees [...] in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the Convention." The same commitment is included in Article II of the *1967 Protocol relating to the Status of Refugees* (1967 Protocol).⁵

4. In accordance with UN General Assembly resolutions 3274 XXIX⁶ and 31/36,⁷ UNHCR has been designated, pursuant to Articles 11 and 20 of the *1961 Convention on the Reduction of Statelessness* (the 1961 Statelessness Convention),⁸ as the body to which a person claiming the benefits of this Convention may apply for the examination of his or her claim and for assistance in presenting it to the appropriate authorities. In resolutions adopted in 1994 and 1995, the UN General Assembly entrusted UNHCR with a global mandate for the identification, prevention and reduction of statelessness and for the international protection of stateless persons.⁹ UNHCR's statelessness mandate has continued to evolve as the UN General Assembly has endorsed the Conclusions of UNHCR's Executive Committee.¹⁰
5. New Zealand is a Contracting Party to the *1951 Convention relating to the Status of Refugees* and its 1967 Protocol (together, the Refugee Convention), as well as the *1961 Convention on the Reduction of Statelessness* (the 1961 Statelessness Convention).¹¹ Through accession to these instruments, New Zealand has assumed international legal obligations in relation to refugees, asylum-seekers and stateless persons in accordance with their provisions.

³ Statute, para. 8(a).

⁴ UN General Assembly, *Convention relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

⁵ UN General Assembly, *Protocol relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267.

⁶ UN General Assembly, *Question of the establishment, in accordance with the Convention on the Reduction of Statelessness, of a body to which persons claiming the benefit of the Convention may apply*, 10 December 1974, A/RES/3274 (XXIX).

⁷ UN General Assembly, *Question of the establishment, in accordance with the Convention on the Reduction of Statelessness, of a body to which persons claiming the benefit of the Convention may apply*, 30 November 1976, A/RES/31/36.

⁸ UN General Assembly, *Convention on the Reduction of Statelessness*, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175.

⁹ UN General Assembly resolutions A/RES/49/169 of 23 December 1994 and A/RES/50/152 of 21 December 1995. The latter endorses UNHCR's Executive Committee Conclusion No. 78 (XLVI), *Prevention and Reduction of Statelessness and the Protection of Stateless Persons*, 20 October 1995.

¹⁰ Executive Committee Conclusion No. 90 (LII), *Conclusion on International Protection*, 5 October 2001, para. (q); Executive Committee Conclusion No. 95 (LIV), *General Conclusion on International Protection*, 10 October 2003, para. (y); Executive Committee Conclusion No. 99 (LV), *General Conclusion on International Protection*, 8 October 2004, para. (aa); Executive Committee Conclusion No. 102 (LVI), *General Conclusion on International Protection*, 7 October 2005, para. (y); Executive Committee Conclusion No. 106 (LVII), *Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons*, 6 October 2006, paras. (f), (h), (i), (j) and (t); all of which are available in: [Conclusions on International Protection Adopted by the Executive Committee of the UNHCR Programme 1975 - 2017 \(Conclusion No. 1 - 114\)](#), October 2017.

¹¹ UN General Assembly, *Convention on the Reduction of Statelessness*, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175.

III. CONSIDERATION OF THE PROPOSED LEGISLATION

6. Of primary concern to UNHCR is the amendments contained in Part 2 of the Bill which enable a member of a mass arrival group to be detained until an application for a mass arrival warrant has been determined. While proposed new section 317AB requires an application for a mass arrival warrant to be determined 'as soon as is reasonably practicable' and within 7 days, the District Court Judge can adjourn the proceeding if satisfied that it is not reasonably practicable to determine the application within 7 days, provided the determination is made within 28 days. Currently, an application for a mass arrival warrant authorising detention must be decided within 96 hours (4 days).
7. The Regulatory Impact Assessment notes that the current provisions in the Act for seeking a warrant of commitment provide inadequate time for a Court to meet natural justice and human rights protections under the *Bill of Rights Act 1990* such as the right to seek legal representation and the right to a fair hearing. While welcoming the government's commitment to upholding human rights and the rule of law and acknowledging their stated need for capacity to effectively manage security screening and health assessments, UNHCR notes with concern that the effect of the proposed amendments is to extend in law the duration for which asylum-seekers (excluding unaccompanied minors) arriving as part of a mass arrival group can be detained in custody without warrant (including in prisons).
8. UNHCR reiterates its longstanding position that the detention of asylum-seekers is inherently undesirable. This is even more so in the case of vulnerable groups such as women, children, older asylum-seekers, asylum-seekers with disabilities, and those with special medical or psychological needs. Refugees are frequently victims of torture or trauma and a detention environment for them – even for limited periods – can be harmful. It should be recalled that freedom from arbitrary detention is a fundamental human right and the detention of asylum-seekers beyond what is demonstrably necessary and proportionate is, contrary to international law.
9. UNHCR's *Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* state that the detention of asylum-seekers should be a measure of last resort, with liberty being the default position.¹² Mandatory or automatic detention (in law or practice) is arbitrary as it is not based on an examination of the necessity of the detention in the individual case. To guard against arbitrariness, any detention needs to be necessary in the individual case, reasonable in all the circumstances and proportionate to a legitimate purpose.
10. The purposes for which, exceptionally, the detention of asylum-seekers may be permissible, if prescribed by national law, include where necessary to protect public order, to protect public health, and to protect national security. All decisions to detain an asylum-seeker must be based on a detailed and individualized assessment, and in consideration of alternatives to detention. In other words, it must be shown that considering the asylum-seeker's particular circumstances, there were not less invasive or coercive means of achieving the same ends.

¹² UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, para 14, available at: <https://www.refworld.org/docid/503489533b8.html>.

11. UNHCR welcomes the clear indication in the Bill's Explanatory note stating "any detention must be for the least possible time and in the least restrictive facility that is commensurate with achieving the lawful purposes for which people are detained. Choices available to immigration officers will include granting entry permission and a visa, offering accommodation in a low or no security facility, or releasing into the community on conditions (such as reporting conditions) or without conditions".¹³
12. At the same time, whilst it is acknowledged that the government has implemented alternatives to detention and that reform efforts continue to address some of the concerns raised in the independent review of INZ processes and procedures relating to the detention of asylum-seekers (the 2022 Casey Review),¹⁴ to examine *inter alia* the appropriateness of using police and corrections facilities to detain asylum-seekers, it is regrettable that the recommended statutory reforms to Part 9 of the Act are yet to be made.
13. Though the mass arrivals regime was expressly outside the scope of the 2022 Casey Review, the recommended reforms to Part 9 of the Act for asylum-seekers *not* arriving as part of a mass arrival group relevantly included *reducing* the time period before which the person must be brought before the Court for their detention to be reviewed from 96 hours to (preferred) 24 hours, but in any event a maximum of 48 hours; and recognising that detention of a refugee claimant is only justified as an exceptional measure of last resort, when it is determined on an assessment of the individual's circumstances to be necessary, reasonable and proportionate to a legitimate purpose, and observing the principles of minimum interference.

IV. CONCLUSION

15. UNHCR recognizes, as acknowledged by the government, that the arrival of several hundred asylum-seekers in New Zealand over a short period of time would present operational and management challenges for the government. In the specific circumstances of such an arrival, special contingency plans would be useful to ensure that such persons are disembarked and received in a non-discriminatory way that is safe, humane and human rights-based whilst, at the same time, addressing New Zealand's legitimate concerns. Contingency planning for a large arrival need not automatically involve a regime of detention. In UNHCR's experience, some less intrusive reception arrangements might serve as perfectly adequate to protect New Zealand's interests but also allow more humane and appropriate treatment of asylum-seekers and refugees.
16. UNHCR urges reconsideration of the measures contained in the Bill as they relate to the increased permissible period of detention without warrant for asylum-seekers arriving as part of a mass arrival group.

¹³ Explanatory note, Immigration (Mass Arrivals) Amendment Bill, available at:

https://www.legislation.govt.nz/bill/government/2023/0214/latest/LMS797386.html?search=ts_act%40bill%40regulation%40deemedreg_mass+arrivals_resel_25_a&p=1.

¹⁴ Victoria Casey KC, Report to Deputy Chief Executive (Immigration) of the Ministry of Business, Innovation and Employment: Restriction of Movement of Asylum Claimants, 23 March 2023, available at:

<https://www.mbie.govt.nz/dmsdocument/20130-report-to-deputy-chief-executive-immigration-of-the-ministry-of-business-innovation-and-employment-restriction-of-movement-of-asylum-claimants>.