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

Inquiry into the Migration Amendment Bill 2013

20 January 2014

I. INTRODUCTION

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee (Committee) in respect of its inquiry into the Migration Amendment Bill 2013 (Bill).

II. UNHCR'S STANDING TO COMMENT

2. Australia is a party to the *1951 Convention relating to the Status of Refugees* and its *1967 Protocol relating to the Status of Refugees* (together, the "1951 Convention").[1]

3. UNHCR makes this submission pursuant to its supervisory mandate established by article 35 of the 1951 Convention, article II of the 1967 Protocol and the *1950 Statute of the Office of the United Nations High Commissioner for Refugees*. UNHCR also has been given a mandate to contribute to the prevention and reduction of statelessness by the United Nations General Assembly in 1974 and 1976,[2] as well as through subsequent resolutions.

4. UNHCR's submission is limited to the amendments proposed to the *Migration Act 1958* (Act) which are set out in schedules 2 and 3 of the Bill.

III. AMENDMENTS PROPOSED IN SCHEDULE 2 OF THE BILL

5. Schedule 2 of the Bill proposes to clarify that s 48A of the Act prevents a non-citizen who has been refused, or had a protection visa cancelled, from making a further application for a protection visa while he or she is in Australia's migration zone. The statutory bar applies irrespective of whether or not the grounds or criteria for such a new application existed at the time of the earlier protection visa application.

6. The practical effect of the statutory bar is that a non-citizen who has previously had his or her protection visa cancelled or refused may not apply for a further protection visa, even if the complementary protection criteria under s 36(2)(aa) of the Act (which were only introduced into the Act on 24 March 2012) did not exist, and were in turn not considered, at the time of the initial application.

---

[1] The term '1951 Convention' is used to refer to the *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, [1954] ATS 5 (entered into force for Australia 22 April 1954) as applied in accordance with the *Protocol Relating to the Status of Refugees*, opened for signature on 31 January 1967, [1973] ATS 37 (entered into force for Australia 13 December 1973).

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

UNHCR's concerns in respect of the proposed statutory bar

7. UNHCR notes that Australia is a party to the *1966 International Covenant on Civil and Political Rights* (ICCPR),[3] the *1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT),[4] and the *1989 Convention on the Rights of the Child* (CRC).[5]

8. UNHCR defines "complementary" forms of protection as referring to legal mechanisms for protecting and according a status to a person in need of international protection who does not fulfil the refugee definition of the 1951 Convention.[6]

9. UNHCR is of the view that it is desirable that refugee status assessment procedures should have a legislative basis which includes consideration of complementary protection needs. UNHCR considers that a State's codification of its complementary protection obligations provides a clearer and more predictable framework within which assessments of certain international protection needs not covered by the 1951 Convention can be made.

10. UNHCR welcomed the introduction, in Australia on 24 March 2012, of a legislative basis to protect persons who may not qualify as refugees under the 1951 Convention, but who are nonetheless in need of international protection, based on *non-refoulement* obligations under international human rights instruments, notably the ICCPR and the CAT.

11. In this regard, UNHCR wishes to bring to the Committee's attention ExCom Conclusion No 103 (LVI) – 2005 on the Provision of International Protection Including Through Complementary Forms of Protection,[7] which underlines the importance of developing the international protection system in a way which avoids protection gaps, and enables all those in need of international protection to find and enjoy it.[8] The Conclusion also:

> '*Affirms* that relevant international treaty obligations, where applicable, prohibiting *refoulement* represent important protection tools to address the protection needs of persons who are outside their country of origin and who may be of concern to UNHCR but who may not fulfil the refugee definition under the 1951 Convention and/or its 1967 Protocol; and *calls upon* States to respect the fundamental principle of *non-refoulement*'[9]

12. UNHCR is concerned that the practical effect of the proposed statutory bar is to prevent further applications for protection visas in circumstances where the complementary protection criteria did not exist at the time when the earlier application was refused or cancelled.

---

[3] 1966 ICCPR, opened for signature 26 December 1966, 999 UNTS 171 (entered into force 23 March 1976), Articles 6 and 7.
[4] 1984 CAT, opened for signature 10 December 1984, 1465 UNTS 112 (entered into force 26 June 1987), Article 3.
[5] 1989 CRC, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), Article 6.
[6] See UN High Commissioner for Refugees (UNHCR), Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection, 7 October 2005, No. 103 (LVI) – 2005 which 'Encourages the use of complementary forms of protection for individuals in need of international protection who do not meet the refugee definition under the 1951 Convention or the 1967 Protocol'.
[7] UNHCR, Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection, 7 October 2005, No. 103 (LVI) – 2005.
[8] See UNHCR, Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection, 7 October 2005, No. 103 (LVI) – 2005, paragraph (s).
[9] See UNHCR, Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection, 7 October 2005, No. 103 (LVI) – 2005, paragraph (m).

13. Although UNHCR notes that the Minister has the powers to intervene and grant a protection visa under the Act, such powers are non-compellable and non-reviewable thus providing a discretionary rather than a legislative basis for the grant of complementary protection. UNHCR's view is that it is preferable to provide a legislative basis for ensuring that a person will not be returned to a place where he or she may suffer 'significant harm' on the basis of one of the grounds set out in s36(2A) of the Act to provide clarity and predictability. Furthermore, UNHCR is of the view that it is important to afford procedural fairness to the person concerned who is unable to appeal the Minister's decision.

IV. AMENDMENTS PROPOSED IN SCHEDULE 3 OF THE BILL

14. UNHCR has a number of concerns about the proposed amendments in Schedule 3 of the Bill about the compatibility of the Australian national legal framework with Australia's international obligations; the implications of the security assessment process in domestic law; and the practical impact of the legal framework and assessment process on the rights and well-being of refugees and asylum-seekers.

A. *Applicant assessed by ASIO to be direct or indirect risk to security ineligible for a protection visa*

15. Schedule 3 of the Bill proposes to amend the Act by requiring that applicants who apply for a permanent protection visas have not been assessed by the Australian Security Intelligence Organisation (ASIO) to be directly or indirectly a risk to security in accordance with s 4 of the ASIO Act.

16. UNHCR supports legitimate efforts by States to safeguard national security and is of the view that measures to address national security threats are not inherently incompatible with States' obligations under international refugee and human rights law. On the contrary, UNHCR considers that effective measures to safeguard national security together with the rights and obligations set out in the 1951 Convention are not conflicting, but are complementary.

17. In this regard, the 1951 Convention contains specific provisions which allow States to protect their right to safeguard national security, while at the same time protecting the rights of refugees who, unlike other categories of non-citizens, no longer enjoy the protection of their country of origin. Thus, in UNHCR's view, the 1951 Convention provides an appropriate legal framework through which legitimate security-related matters of concern to States may be considered by the country of asylum. The 1951 Convention does not provide a safe haven to terrorists or war criminals, and does not protect them from criminal prosecution. On the contrary, it renders the identification of persons engaged in terrorist activities or war crimes possible and necessary, foresees their exclusion from refugee status and does not shield them against either criminal prosecution or expulsion.[10]

18. Article 1F of the 1951 Convention sets out, exhaustively, the grounds on which an asylum-seeker may be excluded from international refugee protection due to an association with serious criminal activities. This should form part of an assessment for eligibility for refugee status. Indeed, it is arguable that should a security assessment uncover activities which

[10] UNHCR, *Addressing Security Concerns Without Undermining Refugee Protection - UNHCR's Perspective*, 29 November 2001, Rev.1 <http://www.unhcr.org/refworld/docid/3c0b880e0.html> at 22 March 2011, [3].

would exclude the individual from receiving protection under the 1951 Convention it would be desirable for such information to be considered as part of the refugee status determination process as well as in any removal or indeed prosecution proceedings.

19. In addition, article 33(2) of the 1951 Convention addresses the situation where a refugee constitutes a 'danger to the security of the country' or 'danger to the community of that country' and provides a very limited exception to the non-refoulement obligation. Article 32 requires that States must not expel a refugee except on grounds of national security or public order and 'shall only be in pursuance of a decision reached in accordance with due process of law.'

20. UNHCR understands that refugees in Australia who have received adverse security assessments have not been excluded from refugee protection by virtue of article 1F, nor have they been determined to fall within the category of refugees to whom article 33(2) or article 32 of the 1951 Convention applies, and expulsion is not being contemplated.

21. In UNHCR's view, the three articles in the 1951 Convention referred to above, properly applied, provide States with adequate "Convention-based" opportunities to assess the impact of legitimate national security consideration on the rights of refugees and asylum-seekers.

22. An adverse security assessment effectively prevents refugees from receiving the other main rights accorded to them in the 1951 Convention,[11] especially where they are detained in closed detention. UNHCR considers that, at a minimum, individuals who receive adverse security assessments should receive procedural fairness and an individualized risk assessment, on a periodic basis, to re-assess risk and explore options other than indefinite closed detention, depending on the nature of the security risk identified.

B. ***Clarification that RRT and AAT unable to review ASIO decisions***

23. Schedule 3 proposes to amend the Act by clarifying that the Refugee Review Tribunal (RRT) and the Administrative Appeals Tribunal (AAT) do not have the power to review a decision to cancel or refuse an application for a protection visa if the applicant has been assessed by ASIO to be directly or indirectly a risk to security within the meaning of s 4 of the ASIO Act.

24. UNHCR is concerned that the confidential nature of the procedure by which ASIO assesses a person to be a risk to security lacks transparency and does not provide a basis on which an affected person is able to assess and, if necessary, contest a negative assessment. In view of the very serious consequences flowing from such negative assessments, UNHCR believes that some adjustment to the procedures in such cases should be considered.

25. Section 36(b) of the ASIO Act provides that "Part IV – Security Assessments" (other than subsections 37(1), (3) and (4)) does not apply to or in relation to a person who is not an Australian citizen, the holder of a valid permanent visa, or a person who holds a special category visa.

26. This provision means that ASIO is not required to disclose to unlawful non-citizens or non-permanent visa holders, including refugees and asylum-seekers, the statement of grounds

[11] 1951 Convention, articles 3, 4, 13, 16(1), 18, 20, 22, 26, 27, 29, 31, 32, 33, and 34, respectively.

supporting an adverse security assessment.[12] Furthermore, the ASIO Act removes the right of "unlawful" non-citizens and non-permanent visa holders to apply to the Security Appeals Division of the AAT for a review of the assessment.[13] Notwithstanding, judicial review of the procedural, rather than substantive, matters relating to the ASIO Security Assessment remains possible by application to the Federal and/or High Court of Australia.[14]

27. Although the proposed amendment to the Act simply clarifies the position that the RRT and the AAT do not have the power to review a decision to cancel or refuse an application for a protection visa if the applicant has been assessed by ASIO to be directly or indirectly a risk to security, UNHCR notes its concern that a refugee who has received an adverse assessment has very limited legal avenues to contest a negative assessment and is not afforded procedural fairness or natural justice.

28. UNHCR supports the views of two former Inspector-Generals of Intelligence and Security (IGIS) who recommended amendment of the ASIO Act to provide the AAT with jurisdiction to review the adverse security assessments of visa applicants who had been recognized as refugees in Australia.[15] It is UNHCR's view that this amendment would significantly improve procedural fairness, with limited cost implications, for the small number of refugees who fall within this category. This is particularly concerning as an adverse security assessment, in practical effect, restricts the release of refugees from immigration detention in Australia.

29. UNHCR acknowledges that the use of classified information is a complex area of law where an appropriate balance between national security and international protection must be found. UNHCR understands that in matters of national security, the preservation of sources of information and methods of intelligence gathering may need to be protected from public scrutiny. Nevertheless, drawing from practical experience in other jurisdictions, UNHCR believes it is possible to have a process that protects the interests of the State but which also offers an affected individual access to a limited, perhaps redacted, summary of the evidence against him or her, and which would allow some meaningful opportunity to challenge the assessment in appropriately compelling cases.

30. UNHCR is of the view that an appropriate point of departure is that open disclosure of all prejudicial information should be encouraged and the use of classified information in determinations which affect refugee status or associated rights 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 Australia. However, even in such circumstances, the person affected by the classified information should be provided as much information as possible to ensure a fair determination process in accordance with procedural fairness and natural justice.

[12] *Australian Security Intelligence Organisation Act 1979* (Cth), s 37(2).
[13] Ibid s 38(1).
[14] ASIO, *ASIO's Security Assessment Function* (1 October 2010), 7.
[15] IGIS, *Annual Report 2006-2007* (2007), 12; IGIS, *Annual Report 1998-1999* (2000), [90].

V. CONCLUSION

31. In conclusion, UNHCR would like to note:

(i) UNHCR considers it desirable to have a legislative basis for the consideration of complementary protection as well as refugee claims and that individuals should not be denied the opportunity to apply for a protection visa on the basis that the complementary protection criterion did not exist at the time when an earlier application for protection was lodged, which would be the practical effect of the statutory bar proposed in Schedule 2 of the Bill;

(ii) While UNHCR acknowledges that security assessments are a necessary right and responsibility of the State, they should be designed to ensure procedural fairness, to the extent possible, and to allow for appropriate and individualized assessments in considering ramifications for the individual as well as the State of any adverse security assessments; and

(iii) It would be desirable for the AAT to have jurisdiction to review the adverse security assessments of visa applicants who had been recognized as refugees in Australia.

50. UNHCR stands ready to provide more information and to discuss these matters further.

UNHCR Regional Representation
Canberra, 20 January 2014