

Submission by the Office of the United Nations High Commissioner for Refugees
Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011
Senate Legal and Constitutional Affairs Committee
25 May 2011

I. INTRODUCTION

1. The Regional Representation of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee (“the Committee”) in its Inquiry into the Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011.

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* (“the 1951 Refugee Convention”).¹
3. UNHCR provides comment pursuant to its mandate in the Preamble and Article 35 of the 1951 Refugee Convention as well as the *1950 Statute of the Office of the United Nations High Commissioner for Refugees* (“the Statute”).

III. SCOPE OF THE SUBMISSION

4. UNHCR’s submission addresses issues in the Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011 insofar as they affect refugees, asylum-seekers and stateless persons, and focuses specifically on their consistency with relevant international law and standards.

IV. AUSTRALIA’S IMPLEMENTATION OF THE 1951 REFUGEE CONVENTION

5. Australia’s international refugee law obligations under the 1951 Refugee Convention are, for the most part, domestically enacted through the *Migration Act 1958* (Cth), which allows for the grant of a protection visa where the applicant is ‘a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.’²

¹ The term ‘1951 Refugee 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 *Migration Act 1958* (Cth), s 36(2)(a). Article 1A(2) of the 1951 Convention (as broadened by the 1967 Protocol) provides that the term “refugee” shall apply to any person who:

6. Schedule 1 of the Migration Regulations describes the particular classes of visas for which a non-citizen may apply, which includes Protection (Class XA) and Refugee and Humanitarian (Class XB) visas. Schedule 2 stipulates the provisions with respect to the grant of subclasses of visas, including the requirement that the applicant satisfies public interest criteria (PIC) 4001, 4002 and 4003/4003A.³

V. 1951 REFUGEE CONVENTION AND THE CHARACTER TEST

7. Section 501 of the Migration Act provides that the Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test, and may cancel a person's visa if the person does not satisfy the Minister that the person passes the character test or if the Minister reasonably suspects that the person does not pass the character test. The Act sets out a number of circumstances in which the person does not pass the character test on the basis, inter alia, of past, present and/or future criminal and/or general conduct or associations. These provisions are already quite broad in nature.
8. In practice, the application of the character test means that although a person may be determined to be a refugee under the 1951 Refugee Convention, he/she may not necessarily be granted a permanent protection visa if he or she fails the character test. Section 501 allows the Minister complete discretion in the refusal or cancellation of a visa, and is not subject to the requirements of natural justice.⁴
9. In UNHCR's view, the 1951 Refugee Convention provides the appropriate legal framework and parameters through which matters relating to a refugee's character should be considered by the country of asylum. Article 1F of the 1951 Refugee Convention sets out, exhaustively, the grounds on which an asylum-seeker may be excluded from international refugee protection due to the commission of a serious non-political crime or other serious discrediting conduct prior to his or her admission to the country of asylum.
10. For crimes committed after admission to the country of asylum, the 1951 Refugee Convention foresees that refugees who are assessed to be a danger to the security of the country, or who, having been convicted of a "particularly serious crime", constitute a danger to the community of that country can be subject to expulsion proceedings in

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The refugee definition additionally provides for the cessation of refugee status (article 1C) and exclusion from refugee status (articles 1D, E and F).

³ *Migration Regulations 1994* (Cth), Schedule 2, 866.225(a).

⁴ *Migration Act 1958* (Cth), s 501; *Migration Regulations 1994* (Cth) reg 1.03; *Migration Regulations 1994* (Cth) reg 200.226, 201.226, 202.227, 203.226, 204.226 and 866.225.

accordance with Article 32 and, in exceptional cases, to removal under Article 33(2). Neither action per se involves the loss of refugee status.

11. Clearly, refugees must conform to the ordinary laws and regulations of the country of asylum as set out in article 2 of the 1951 Refugee Convention and if they commit crimes are liable to criminal prosecution and the appropriate penalties imposed pursuant to such prosecution in the country of asylum in the same way as any other person.
12. In UNHCR's view, involvement in criminal activities in the country of asylum which does not lead to loss of refugee status or to expulsion, should not per se restrict the entitlement to rights guaranteed to refugees by the 1951 Refugee Convention, or impose additional punishment to that faced by other persons in the same situation.
13. UNHCR is of the view that the granting of rights and obligations associated with international legal status should be grounded in law and not be subject to the sole discretion of the Government.
14. UNHCR notes the existence of the Bridging (Removal Pending) Visa, which enables the release from immigration detention of recognized refugees who have had a substantive visa application refused, but who are nevertheless acknowledged to be in need of international protection. However, it remains concerned that this visa class does not provide access to the full range of rights under the Convention, nor respect the principle of family unity, which was unanimously recommended in the Final Act of the United Nations Conference which adopted the 1951 Refugee Convention⁵ and which has been affirmed in a number of UNHCR Executive Committee Conclusions.⁶ UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status further specifies that the '*principle of the unity of the family does not only operate when all family members become refugees at the same time. It applies equally to cases where a family unit has been temporarily disrupted through the flight of one or more of its members.*'⁷
15. UNHCR is of the view that where a refugee has committed a crime and has been punished for the crime, he or she should be entitled to the benefits and rights established by the 1951 Refugee Convention, and that family reunion should not be denied in such a case. If refugees are punished for the crime and then, additionally, denied basic rights and entitlements under the Convention, then the refugee is effectively being penalized twice for the same offence. Given the serious consequences for a refugee on a Bridging (Removal Pending) Visa, issues of proportionality and punishment arise.

⁵ Recommendation B, Final Act of the 1951 United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, United Nations Treaty Series, vol. 189, p. 37.

⁶ No. 9 (XXVIII), paras. (a)-(c); No. 15 (XXX), para. (e); No. 24 (XXXII); No. 84 (XLVIII), para. b; No. 85 (XLIX), paras. (k), (u), (v), (w) and (x); and No. 88 (L).

⁷ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Geneva, January 1992, Chapter VI, para. 186.

VI. STRENGTHENING THE CHARACTER TEST

16. Item 4 of the Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011 will insert 501(6)(aa) and (ab) to provide that, in addition to the existing grounds, a person (automatically) does not pass the character test if the asylum-seeker has been convicted of any offence that was committed relating to their immigration detention; or has escaped from immigration detention.
17. While the amendments do not affect the Minister's discretion, they do broaden the circumstances under which the person automatically does not satisfy the character test and would then become subject to that discretion.
18. It is UNHCR's longstanding position that the detention of asylum-seekers is inherently undesirable and that alternatives to detention should be explored wherever possible. It has long been recognized that prolonged detention, particularly in isolated locations, can have severe and detrimental effects on the health and psycho-social wellbeing of those affected, many of whom have already suffered from torture or trauma before arriving in Australia.
19. While not condoning the use of violence or criminal activities in Australia's immigration detention facilities, UNHCR is of the view that these additional criminal charges are not only unnecessary, since the Minister already has wide-ranging discretion with regard to the granting of visas, but may be considered unreasonably punitive. While offences relating to immigration detention, or escape from immigration detention, may not be acceptable, there may be extenuating circumstances which should be taken into account within the Minister's discretion.
20. Put simply, the fact that a refugee may, out of impatience or frustration caused by his/her predicament in detention, lead to a criminal offence, does not of itself go to the core issue of that person's character and suitability for a permanent protection visa. Conversely, the combined effect of conviction for a relatively minor offence, coupled with the serious consequences of loss of 1951 Refugee Convention and other rights, might well be disproportionate and punitive to the person affected. The consequences of failing a character test may be extremely serious for such individuals, as they potentially involve indefinite detention or denial of family unity. Furthermore, there is no opportunity to have the merit of such a decision reviewed or for the applicant to be accorded natural justice.
21. It is UNHCR's view that the further broadening of grounds, which may lead to a failure of the character test, may have a disproportionately harsh impact upon refugees and asylum-seekers (who comprise the majority of persons held in immigration detention) and unduly affect vulnerable persons.

VII. CONCLUSION

22. UNHCR is concerned that the application of the character test means that a person may be assessed to be a refugee but may be unreasonably restricted from enjoying the rights guaranteed to refugees by the 1951 Refugee Convention on the one hand, or from enjoying the rights guaranteed to other persons under Australian law, including natural justice and other procedural safeguards in relation to decisions affecting a person's liberty on the other.
23. In UNHCR's view the further broadening of grounds of the character test is unnecessary and may have a disproportionately harsh impact upon refugees and asylum-seekers who have been detained for prolonged periods, and who are particularly vulnerable.

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