



UNHCR

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

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Re: Review of the power to proscribe organizations as terrorist organizations

Dear Ms Swieringa,

The Parliamentary Joint Committee on Intelligence and Security (PJCIS) has invited comments on the operation, effectiveness and implications of the power to make regulations proscribing organizations as terrorist organizations.

The Office of the United Nations High Commissioner for Refugees welcomes the opportunity to make a submission to the Committee, insofar as the power impacts on Australia's international obligations with regard to asylum-seekers and refugees.

Please do not hesitate to contact me should you require further information or clarification on any of the matters raised in the enclosed submission.

My best regards,

Richard Towle
Regional Representative



REVIEW OF THE POWER TO PROSCRIBE ORGANIZATIONS AS TERRORIST ORGANIZATIONS

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

A INTRODUCTION

1. The Parliamentary Joint Committee on Intelligence and Security (PJCIS) has invited comments on the operation, effectiveness and implications of specific provisions of the Criminal Code that empower the Governor-General on the advice of the Attorney-General to make regulations proscribing organizations as terrorist organizations.
2. The Office of the United Nations High Commissioner for Refugees (“UNHCR”) welcomes the opportunity to comment on the power to proscribe organizations as terrorist organizations insofar as it impacts on Australia’s international obligations with regard to asylum-seekers and refugees.
3. Australia has assumed a responsibility to protect refugees through its accession to the 1951 Convention. Insofar as refugees are asylum-seekers prior to their being recognized as refugees, such responsibility also extends to asylum-seekers.
4. UNHCR’s standing to comment is based on its Statute¹ and the 1951 Convention relating to the Status of Refugees. The latter enjoins Contracting States to cooperate with UNHCR in its duty of supervising the application of the provisions of the Convention (Article 35). UNHCR is regularly requested to comment on national legislation regarding refugees and related issues by Contracting States to the Convention.
5. UNHCR supports all reasonable efforts by States, whether multilateral or national, to combat international terrorism. The Office recognizes that States must take robust steps to combat terrorism and agrees there must be no avenue for those supporting or committing terrorist acts to avoid lawful prosecution, or to carry out

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

further attacks. Such steps must nevertheless be taken in full respect for the rule of law, human rights including fundamental principles of refugee protection and asylum, to be found principally in the 1951 Convention.

6. At the outset, UNHCR would like to emphasize that, contrary to some popular misconceptions, international refugee instruments do not provide any opportunity for terrorists to find a haven from lawful criminal prosecution. On the contrary, the 1951 Convention contains specific and clear provisions that exclude from refugee protection anyone who there are serious grounds for believing may have committed serious crimes, war crimes or crimes against humanity (Article 1F).

B COMMENTS ON THE REVIEW

Exclusion from refugee status

7. International refugee instruments do not provide a safe haven for terrorists, nor protect them from lawful criminal prosecution. On the contrary, as stated above, Article 1F of the 1951 Refugee Convention contains specific and clear provisions to exclude from refugee protection anyone who has committed particularly serious crimes. Such 'excluded persons' cannot acquire 'refugee' status and are unable to secure any of the protection afforded by the Convention, particularly the non-removal/expulsion (*non-refoulement*) provisions of Article 33 (1).
8. In this context, UNHCR is of the view that an Australian list of proscribed terrorist organizations may adversely affect asylum-seekers and refugees by having the unintended consequence of creating a non-rebuttable presumption that would deny asylum to refugees in need of international protection.
9. To take one example,² a criterion for the grant of a Protection Visa is that an asylum-seeker must not be assessed by the Australian Security Intelligence Organization (ASIO) to be "directly or indirectly a risk to security".³ Adverse security assessments might be based upon an individual's perceived involvement with a proscribed terrorist organization; however the basis for such a determination may not be disclosed⁴ and therefore can not be rebutted by a person otherwise found to be in need of international protection.

² See also PIC 4001 ("character test" as defined in s.501(6) of the *Migration Act 1958*) and 4003 (associated with the proliferation of weapons of mass destruction) Schedule 4 of the Migration Regulations 1994.

³ Public Interest Criterion 4002, Schedule 4 of the Migration Regulations 1994.

⁴ Division 2 of Part IV *Australian Security Intelligence Organisation Act 1979*; see also Sundberg J in *Parkin v O'Sullivan* [2006] FCA 1413 at [28] – [32] "This sub-section permits the Attorney-General to certify either that the withholding of a notice to the subject of the assessment is "essential to the security of the nation" or that disclosure to any person of the statement of grounds that is otherwise to be provided with the security assessment would be prejudicial to the interests of security. If the Attorney-General makes the former certification, then there is no requirement on the agency to provide the security assessment to its subject. If the Attorney-General makes the latter certification, the assessment given to the subject "shall not contain any matter to which the certificate applies."

10. The consequences flowing from such an adverse security assessment are particularly serious for asylum-seekers and refugees alike. Such persons, having fled their country of nationality (or country of former habitual residence) for fear of persecution are in a particularly vulnerable position as they no longer have recourse to the protection of their country of nationality (or country of former habitual residence).
11. Accordingly, UNHCR is concerned that an Australian list proscribing certain organizations to be terrorist organizations could lead to:
- (i) summary rejection at borders (which may amount to *refoulement*)
 - (ii) restrictions on the movements of asylum-seekers;
 - (iii) sharing of data with countries of origin;
 - (iv) exclusion from refugee status;
 - (v) cancellation of refugee status;
 - (vi) expulsion, including to country of origin;
 - (vii) extradition for what may amount to persecution reasons;
 - (viii) a reduction in resettlement of vulnerable refugees; and,
 - (ix) vilification of refugees and asylum-seekers on the basis of particular races or religions.
12. UNHCR encourages States to use the exclusion clauses of Article 1F of the Convention as the appropriate means of determining whether an asylum-seeker who is suspected of being associated with a terrorist organization, should be denied international refugee protection. This is consistent with international refugee law and with Security Council resolutions which call on States not to provide refuge to terrorists,⁵ but which also call for appropriate measures with regard to asylum-seekers which must conform to international standards of human rights.⁶
13. In view of the seriousness of the issues and the consequences of an incorrect decision, the application of any exclusion clause should continue to be individually assessed, based on available evidence, and conform to basic standards of fairness and justice.
14. It is essential that procedures which may lead to the applicability of an exclusion clause offer adequate legal safeguards⁷ and that the exclusion clauses are applied

⁵ In particular SCR 1373 (2001) and SCR 1624 (2005); see also *UNHCR Note on the Impact of Security Council Resolution 1624 (2005) on the Application of Exclusion Under Article 1F of the 1951 Convention relating to the Status of Refugees* of 9 December 2005

<http://www.unhcr.org/home/RSDLEGAL/440ff6944.pdf>.

⁶ For further information see United Nations Commission on Human Rights, *Promotion and Protection of Human Rights: Report of Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, 28 December 2005 (E/CN.4/2006/98).

⁷ UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, issued on 4 September 2003

<<http://www.unhcr.org/home/RSDLEGAL/3f5857d24.pdf>> and also *UNHCR Observations on the*

in a manner consistent with the object and purpose of the 1951 Convention.⁸ Such safeguards considered necessary include:

- individual consideration of each case;
- opportunity for the applicant to consider and comment on the evidence on the basis of which exclusion may be made;
- provision of legal assistance;
- availability of a competent interpreter, where necessary;
- reasons for exclusion to be given in writing;
- right to appeal an exclusion decision to an independent body; and
- no removal of the individual concerned until exhaustion of all legal remedies against decision to exclude⁹.

Expulsion, including to the country of origin

15. UNHCR is concerned that States may be inclined to expel groups or individuals based on religious, ethnic or national origin or political affiliation, on the mere assumption that they may be involved in terrorism.
16. International law - in particular article 33(2) of the 1951 Refugee Convention – does not prohibit the expulsion of recognized refugees, provided it is established that the person constitutes a danger to the security or the community of the country of refuge. As this danger should outweigh the danger of return to persecution, such expulsion decisions must be reached in accordance with due process of law which substantiates the security threat and allows the individual to provide any evidence which might counter the allegations.
17. While exclusion from refugee status is motivated by the severity of crimes committed in the past and protects the institution of asylum from abuse, expulsion aims to protect the country of refuge and hinges on the appreciation of a present or future threat. The threshold for returning refugees to their country of origin – as an exception to the *non-refoulement* principle – should be particularly stringent.¹⁰

European Commission Proposal for a Council Framework Decision on combating terrorism, of November 2001 <<http://www.unhcr.org/home/RSDLEGAL/3c6a63824.pdf>>

⁸ The incorporation of a proportionality test when considering exclusion and its consequences provides a useful analytical tool to ensure that the exclusion clauses are applied in a manner consistent with the overriding humanitarian object and purpose of the 1951 Convention. In UNHCR's view, consideration of proportionality is an important safeguard in the application of Article 1F. For further information please see *UNHCR Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (HIR/GIP/03/05) of 4 September 2003 <<http://www.unhcr.org/home/RSDLEGAL/3f5857d24.pdf>>

⁹ Though the majority of these safeguards are available to persons having their claims assessed in Australia, those having their claims assessed 'offshore' are not afforded the same rights, namely the provision of reasons in writing, independent review etc. See also Department of Immigration and Citizenship Onshore Protection Interim Procedures Advice No. 16 (September 2002)

¹⁰ *Addressing Security Concerns without Undermining Refugee Protection: UNHCR's perspective of November 2001* <<http://www.unhcr.org/home/RSDLEGAL/3c0b880e0.pdf>>

C CONCLUSION

18. UNHCR is concerned that security safeguards such as the power to establish lists of proscribed terrorist organizations and the effect of linking individuals to such organizations may – if not exercised with proper regard for due process and refugee protection principles, notably those relating to exclusion and expulsion – have adverse implications for refugees and asylum-seekers, including potentially in the following areas:
- admission and access to refugee status determination;
 - exclusion procedures;
 - treatment of asylum-seekers (notably with regard to detention and standards of due process);
 - withdrawal of refugee status;
 - deportation;
 - extradition; and,
 - resettlement.
19. Bona fide asylum-seekers may be victimized as a result of the consequences of the exercise of the power to proscribe certain organizations as terrorist organizations and refugee protection principles eroded. In reviewing the operation, effectiveness and implications of this power, UNHCR believes refugee protection principles must be taken into account. Above all, any exclusion from international refugee protection requires an individual assessment and a determination on the basis of reliable information.

ANNEX A

Art.1A DEFINITION OF THE TERM “REFUGEE”

For the purposes of the present Convention, the term “refugee” shall apply to any person who:

- (2) ...owing to wellfounded 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...

Art.1F The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

Art.32 EXPULSION

The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Art.33 PROHIBITION OF EXPULSION OR RETURN (“REFOULEMENT”)

No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

ANNEX B

MIGRATION REGULATIONS 1994 - SCHEDULE 4

Part 1 Public interest criteria

4001 Either:

(a) the applicant satisfies the Minister that the applicant passes the character test; or

(b) the Minister is satisfied, after appropriate inquiries, that there is nothing to indicate that the applicant would fail to satisfy the Minister that the person passes the character test; or

(c) the Minister has decided not to refuse to grant a visa to the applicant despite reasonably suspecting that the applicant does not pass the character test; or

(d) the Minister has decided not to refuse to grant a visa to the applicant despite not being satisfied that the applicant passes the character test.

4002 The applicant is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security, within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*.

4003 The applicant is not determined by the Foreign Minister, or a person authorised by the Foreign Minister, to be a person whose presence in Australia:

(a) is, or would be, contrary to Australia's foreign policy interests; or

(b) may be directly or indirectly associated with the proliferation of weapons of mass destruction.