UNHCR's Comments on the Immigration, Residence and Protection Bill 2007

Introduction

1. UNHCR has a direct interest in the national legislation of signatory countries that regulates the application of the 1951 Convention, in line with a supervisory responsibility which the UN General Assembly has entrusted to UNHCR for providing international protection to refugees worldwide and for seeking permanent solutions for them[1]. UNHCR therefore takes this opportunity to provide comments on the Immigration, Residence and Protection Bill.

2. UNHCR is pleased to share its comments on this Bill, by virtue of which the asylum institution is proposed to be regulated in the context of a broader set of statutory provisions that generally rule on the arrival, presence in, and departure of foreigners in Ireland.

3. In order to facilitate the reading of UNHCR's suggestions, this document contains an outline of our general comments followed by more specific comments to each of the areas relating to UNHCR's Mandate, outlining the main concerns as well as reference to some specific sections of the Bill. Where possible and appropriate suggested alternative wording has been made.

General Comments

4. UNHCR takes note that the Bill *inter alia* is intended to transpose relevant EU Directives, including the Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (hereinafter referred to as the Qualifications Directive).

5. In this respect, UNHCR welcomes the introduction of a single procedure for determining refugee status as well as other forms of protection. Expectedly, a single procedure will increase administrative efficiency and, in principle, should be more cost-effective and speedier, as it is likely that similar fact-finding and consideration of protection needs for refugee status as well as for subsidiary protection will be undertaken by the same decision maker (*i.e.* the Minister for Justice, Equality and Law Reform). This will avoid duplication of labour.

6. It also takes note that the proposal foresees an all-inclusive single procedure where protection as well as non-protection grounds would be considered by the same protection status officer. UNHCR recommends and would welcome that subsidiary protection grounds be considered only if it is found that there is no nexus to 1951

[1] Statute of the Office of the United Nations High Commissioner for Refugees, United Nations General Assembly Resolution 428(V), 14 December 1950. Article 35 of the 1951 Convention relating to the Status of Refugees ("the 1951 Convention") contains a corresponding obligation for States Parties, which 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."*

Convention grounds. As well, humanitarian and other grounds should be considered only if the criteria for subsidiary protection cannot be met.

7. UNHCR would further welcome if explicit reference was made *inter alia* to the 1951 Convention in the legislation. This would be in line with the objective as outlined in the preamble of the Qualifications Directive to determine refugee status in line with the 1951 Convention.

8. The Qualification Directive specifies that the standards laid down in the Directive are minimum standards and by virtue of this national legislation can adopt more favourable standards (Article 3). UNHCR strongly encourages Ireland not to use the transposition process as an opportunity to lower standards in areas where it already meets or goes beyond minimum standards specified. It welcomes that the Bill has taken this approach in relation to certain aspects of provisions in the Directive. Specifically, UNHCR welcomes the rule of Section 38 (Protection Residence Permit), which offers the same rights as Convention Refugees to those granted protection on subsidiary grounds, including the right to a Travel Document and the right to Family Reunification as per Section 49 (Member of family of a holder of a protection residence permit).

9. UNHCR notes that the Bill introduces certain residence permits in relation to foreigners in the State such as the Temporary Protection Residence Permit and the Protection Residence Permit. To the extent this will assist in ensuring the protection and rights of the persons in need of international protection UNHCR finds such measures appropriate for immigration control purposes, however, UNHCR is concerned that the Bill appears to link the individual's needs for protection in the State with the conditions of the permit. While in UNHCR's view the issuance of a permit can be linked to the outcome of a protection decision, the reverse should not be the case and as such breach of conditions placed on the holder of the residence permit should not lead to *de facto* revocation of the protection status of the holder. (See for instance Section 59). In this respect, UNHCR would like to highlight the declaratory nature of refugee status. The 1951 Convention deals exhaustively with the issue of when a person ceases to be a refugee or can be excluded from refugee protection.

10. The comments to the Bill made below address issues of concern to UNHCR under the following themes:

- access to the territory for all protection applicants, which means allowing protection applicants to enter the State and temporarily stay in the country to make an asylum claim;
- interpretation and implementation in the State of the non-refoulement principle in accordance with International obligations and interpretations;
- access to a fair and efficient protection determination procedure, which means a procedure suited to enable a correct decision about an individual's refugee or other protection needs in accordance with International obligations and best practices and with due consideration to the individual needs of children and other vulnerable groups;
- full enjoyment of refugee rights in accordance with the 1951 Refugee Convention and its interpretation by ExCom including in relation to the use of detention, penalties for unlawful entry and non-discrimination;

- facilitation of integration and naturalization of refugees in accordance with Article 34 of the 1951 Refugee Convention, and
- special consideration for vulnerable individuals, including children.

11. UNHCR welcomes the many positive provisions in the Bill in meeting Ireland's obligations under each of the themes mentioned above, but is concerned, however, that certain provisions particularly in relation to ensuring access to the territory, interpretation of non-refoulement obligations, assessment of the claims, fall short of meeting international standards.

12. UNHCR notes that the mixing of asylum and protection issues together with general aliens provisions in one bill risks creating in some areas legal ambiguity in an already complex legal system for asylum. Failure to comply with an immigration condition should not bar access to the refugee determination procedure without fair procedures to give the applicant the opportunity to explain alleged non-compliance.

13. UNHCR notes that the preamble suggested in the scheme for the Bill has been omitted from the proposed Act. It is UNHCR's view that the absence of a preamble clearly specifying the objectives of the Act is likely to lead to difficulty in the implementation of different parts of the Act when the weighing of different objectives may be inevitable. In this respect UNHCR recommends that a section outlining the main objectives of the Bill is introduced and that this section clearly spells out those objectives as they relate to Ireland's protection responsibilities, the principle of family unity and best interest of the child, as found in numerous International instruments to which Ireland is party. Considering the longer term effects of immigration and asylum matters to be regulated in this Bill, reference to integration objectives may also serve a valuable purpose in guiding and clarifying expectations and rights for both decision makers and those benefiting from the permits foreseen in this Bill.

14. The comments below outline UNHCR's recommendations and concerns in six areas covered by the Bill.

Themed Comments

Comments in relation to access to the territory for all protection applicants, which means allowing protection applicants to enter the State and temporarily stay in the country to make an asylum claim

15. Access to the territory of the State and temporary stay to make a protection application is one of the key principles of refugee protection to ensure the State complies with the non-refoulement principle of Article 33 of the 1951 Refugee Convention. In the Bill this is ensured in Section 24(2), however without further clarification in other parts of the Bill or in the overall objectives for the interpretation of the Bill this principle may collide with other powers for Immigration Officers to deny leave to land or to remove a person from the State. In this respect, UNHCR recommends that specific references are made to Section 24(2) in those sections dealing with powers of Immigration Officers to refuse leave to enter or to remove a person from the State. This would include sections 21, 22, 23, 25 and Part 6.

16. UNHCR also retains its concerns made in previous comments in relation to carrier sanctions (Section 26) and the exception to Section 24 (2) in subsection (3).

17. In relation to procedures for initiating an application for protection, UNHCR notes that an application can be initiated at the border (Section 22) or by a foreign national already in the State; whether lawfully or unlawfully (Section 58). However, the procedures outlined in the two sections are not similar and lack in UNHCR's view clarity. Section 22 seems to replace the current Section 8(1) of the Refugee Act in which an Immigration Officer shall interview a foreign national at the border if s/he expresses a need for protection, an unwillingness to leave because of fear of persecution or a request not to be removed or returned to a country. During the interview, the Immigration Officer shall inform such a person of the possibility of making a protection application and interview the person for this purpose, as well as to establish some basic information, which is then forwarded to the Minister.

18. However, Section 22 reverses the sequence of events and fails to ensure that the State complies with its non-refoulement obligations in cases where a foreign national is unwilling to be returned due to protection related concerns but is unaware of his or her possibility for making a protection application. The formulation of Section 22 should in UNHCR's view be redrafted to create the necessary clarity in terms of rights, obligations and procedures applicable to persons seeking protection at the border of the State.

19. Section 58 deals with applications made in the State. In UNHCR's view this section has similar unclear and ambiguous formulations and seems to cover both situations where an applicant presents directly with the authority designated to make protection decisions and where an application is made to an Immigration Officer anywhere in the State. In UNHCR's view two distinct procedures may be more appropriate i.e. one for applications initiated with an Immigration Officer and one for applications initiated directly with the decision making body in the State, considering the nature of and powers of these two state authorities. In UNHCR's view Immigration Officers should only investigate applications in relation to establishing the very basic information about the person and forward the application to the authority designated to make decisions, more in line with the current Section 8 of the Refugee Act.

Comments in relation to interpretation and implementation in the State of the non-refoulement principle

20. UNHCR notes the definition of non-refoulement provided under Section 50 and would like to voice its serious concerns with its provisions.

21. *Refoulement* of a person to a risk of persecution or other serious harm is prohibited under international refugee law, international and regional human rights law as well as customary international law.

22. The principle of *non-refoulement* under international refugee law, as enshrined in Article 33 of the 1951 Convention relating to the Status of Refugees (hereafter: "1951 Convention"), is often referred to as the cornerstone of international refugee protection.

23. Article 33(1) provides: "No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would the threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion."

24. The prohibition of return to a danger of persecution under international refugee law is applicable to expulsion as well as any other form of forcible removal, including deportation, extradition, informal transfer or "renditions". This is evident from the wording of Article 33(1) of the 1951 Convention, which refers to expulsion of return "in any manner whatsoever".

25. The principle of *non-refoulement* also applies to measures which amount to rejection or non-admittance at the frontier. The *travaux préparatoires* show that the drafters of the 1951 Convention clearly intended the *non-refoulement* provision to provide for protection against forcible removal to a risk of persecution, including through rejection at the border.

26. The principle of *non-refoulement* applies to any person who is a refugee under the terms of the 1951 Convention, that is, anyone who meets the inclusion criteria of Article 1A(2) of the 1951 Convention and does not come within the scope of one of its exclusion provisions. It applies irrespective of whether or not the refugee is lawfully in the country, and provides protection not only against return to the country of origin but also with regard to forcible removal to any other country where a person has reason to fear persecution related to one or more of the grounds set out in the 1951 Convention, or from where he or she risks being sent to his or her country of origin.

27. Given the declaratory nature of refugee status, the principle of *non-refoulement* also applies to those who meet the criteria of Article 1 of the 1951 Convention but have not had their status formally recognized, including, in particular, asylum-seekers. As such persons may be refugees, it is an established principle of international refugee law that they should not be returned or expelled pending a final determination of their status.

28. International refugee law permits the return of a refugee to a country where he or she would be at risk of persecution under certain, limited circumstances which are exhaustively provided for in Article 33(2) of the 1951 Convention.

29. UNHCR is concerned that the wording of Section 50 differs considerably from the wording of the 1951 Convention in a manner, which could lead to misunderstandings as to the scope of, and therefore result in, breaches of, the *non-refoulement* obligation under international refugee law. UNHCR therefore suggests that the wording of the 1951 Convention be relied upon.

30. UNHCR is concerned that the current formulation pursuant to Section 50 appears to indicate limitations to the principle of *non-refoulement,* which would not accord with international and regional human rights law. In this regard, it is noted that a number of different instruments contain explicit or implicit non-refoulement provisions. This is the case not only for the Convention against Torture – the only international instrument included in Section 50, but also the International Covenant on Civil and Political Rights, where both the right to life and the right to be free from torture and other cruel, inhuman or degrading treatment or punishment have been interpreted to include a right not to be refouled (reference is made to General Comment No. 31 of the Human Rights Committee), and, not least, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). There are no exceptions to these provisions, and they are not limited to acts by or at the instigation of a public official. Moreover, the principle of *non-refoulement* is evolving in human rights law, and the formulation chosen should not preclude relevant developments from being taken into account.

31. Further, while the principle of *non-refoulement* does not, as such, entail a right to asylum, it does mean that where States are not prepared to grant asylum to persons who have a well-founded fear of persecution, they must adopt a course that does not amount to a breach of the principle of *non-refoulement*. This could include, for example, removal to a safe third country or some other solution such as temporary protection or refuge. Reliance on the "safe third country" concept does not, however, take away the responsibility for *indirect refoulement*, that is, *refoulement* from the third country. Whether a third country is safe would need to be assessed in an individual examination and could not be determined in a general fashion. As a general rule, whenever a State engages in forcible removal to another State, it retains responsibility to ensure that the principle of *non-refoulement* is not breached. This obligation applies regardless of whether concerns were raised formally or not, or whether the person appeared to acquiesce in the removal or not.

32. Apart from these concerns about the definition of the non-refoulement obligation of the State in Section 50, a number of other Sections of the Bill also have an impact on the non-refoulement obligation and should be reviewed and redrafted to ensure that Ireland complies with its international obligations. These include: Section 36 (6) (b) in which a person in detention may leave the State if s/he withdraws his or her application for protection; Section 38 concerning Protection Residence Permits and related Sections 40, 42 and 43; Section 40 formulating exclusion clauses where our previous comments in relation to Section 44 on expulsion are still valid as well as previous comments made to Section 65 on withdrawal of an application, and Section 58 on breaches of conditions for a Temporary Protection Residence Permit.

33. In relation to expulsion, UNHCR recommends that a decision to make an expulsion order is taken without prejudicing the possibility to submit a new asylum application.

34. In relation to withdrawal UNHCR has raised strong concerns about linking the breach of Permit conditions to the possibility for an applicant to have his or her claim examined. In UNHCR's view, considering that the applicant may have a valid need for protection, there is a real risk of breach of the non-refoulement principle and UNHCR therefore recommends that a withdrawal should result in a discontinuation of the procedure only and the closing of the file. A reopening of the application should be possible without time limits.

35. The Bill also lacks some clarity in relation to the protection connected to the Long Term Residence Permit, where such a permit replaces a previously issued Protection Residence Permit after the initial 3 years. This is particularly relevant in relation to absence from the State, but also in relation to certain rights, such as right to family reunification.

36. Non-refoulement should also be considered in relation to Section 66 with respect to burden of proof and other fair procedures related sections of the Bill, which can lead to breaches of the non-refoulement principle. It has been acknowledged that while a protection applicant has a duty to co-operate in establishing all the relevant facts concerning his or her claim, the applicant cannot be expected to be familiar with the legal standards of the refugee definition and the burden of proof for protection applications must therefore be shared between the applicant and the decision maker.

With reference to the above it is the State's responsibility to ensure that they do not breach the non-refoulement principle.

37. Furthermore, UNHCR is concerned with the extensive use made by the legislator of the notions of *security of the State, public security, public policy ("ordre public") or public health* also in key provisions dealing with asylum-seekers/refugees rights. Such notions risk broad interpretation and in some instances could limit refugee protection in a way that would be in breach of international standards (*e.g.* Section 38 and 40 in relation to renewal of residence permits, *inter alia* Section 71 dealing with exceptions to sharing of information as well as Section 96 concerning exclusion orders).

38. Finally, it should be mentioned that certain provisions in Section 26 concerning duties of carriers may serve as preventing persons with protection applications from ever reaching the State and our comments made to the draft scheme remain valid.

Comments in relation to access to a fair and efficient protection determination procedure

39. Procedural issues in relation to applications for refugee status are not dealt with directly in the 1951 Convention. However it has long been acknowledged by States parties to the Convention that fair and efficient procedures are an essential element in the full and inclusive application of the Convention. What constitutes a fair and efficient procedure has been subject to several ExCom conclusions and is further elaborated in EC/GC/01/12. Some of the concerns UNHCR has with the proposed Act are based on the findings found in this document.

40. It has thus been recognized that fair and efficient procedures are an essential element in the full and inclusive application of the Convention. They enable a State to identify those who should benefit from international protection under the Convention, and those who should not. States have acknowledged their importance by recognizing the need for all asylum-seekers to have access to them. Some of the core elements identified as necessary for fair and efficient decision-making in keeping with international refugee protection principles are also included in EC/GC/01/12.

41. Some of the issues raised, and for which UNHCR is concerned in relation to the Bill are: procedures and understanding of what constitute manifestly unfounded claims; use of safe third country and safe country of origin concepts; special procedures and penalties for persons with false documents; withdrawal of application; access to legal representation and interpretation, as well as well trained staff and the introduction of strict time limits and other requirements not directly related to a person's protection needs.

Time lines and formal requirements preventing or curtailing access to all aspects of the procedure

42. One fundamental safeguard is the recognition that an asylum-seeker's failure to submit a request within a certain time limit or the non-fulfilment of other formal requirements should not in itself lead to an asylum request being excluded from consideration, although under certain circumstances a late application can affect its credibility. The automatic and mechanical application of time limits for submitting applications has been found to be at variance with international protection principles.

43. The proposed Act introduces a number of time limits and other formal requirements, breaches of which bar the applicant from getting the protection claim assessed on its merits. Some of these time limits relate to the extension or discontinuation of residence permits, but Section 65 (2) excludes a person from having his or her claim heard if s/he fails to attend the scheduled interview and does not provide good reasons within 3 days. While other parts of this section also introduces time limits, these are operated only after a notice is issued and provide the person an opportunity to continue the process. It is recommended that in all situations where the authorities are required to consider the withdrawal of a protection application, the applicant is given notice and an opportunity to respond.

44. Other formal requirements may also prevent a protection application from having his or her claim heard. These relate to sections outlining when an application shall be considered withdrawn such as Section 65 with reference to Section 35 when a protection applicant changes address without informing the Minister. UNHCR would recommend that such time limits and other formal restrictions are reviewed and changes made to ensure that all applicants have access to the protection procedures and failure to comply with requirements allows for proper explanation and consideration.

45. This is further made relevant by the wording of Section 59 which has exchanged the "Protection decision to be made by the Minister" with a decision on whether or not a person shall be granted a protection residence permit. This reformulation is in UNHCR's view not purely semantic, but may lead to a conceptual change in how protection is viewed not as a basis for the grant of a protection residence permit, but as a condition for a protection residence permit.

46. The lack of clarity in the wording of Section 22, 23 and 58, all of which are related to how an application for protection is initiated, are also of concern and UNHCR would recommend redrafting of these sections to clearly reflect the rights and obligations of both applicants and immigration or authorities' officers, as well as the procedures to be followed. In particular, UNHCR takes note that the current Refugee Act Section 8(1), which places an obligation on the immigration officer to inform an individual of the right to make an application where protection issues arise, has been replaced by a much less proactive wording in the above mentioned sections. This may not only lead to breaches of the State's non-refoulement obligations, but may also prevent a person with protection needs from accessing the protection procedures.

Use of the 1951 Convention and determination procedures

47. Apart from these concerns with sections which may prevent an applicant from having his or her claim heard on the merits, certain sections involving the actual assessment of protection needs such as establishing of facts and legal definitions are also of concern. This includes sections introducing definitions, which on the whole limit the scope of the 1951 Convention, such as definitions of "Acts of Persecution" (61), "State Protection" (56 and 64), "Membership of a particular social group" (62) and the exclusion of nationals from EU Member States from having their case heard.

48. A concern for most States engaged in protection status determination is the issue of abusive claims or claims which are manifestly unfounded. Document EC/GC/01/12 refers to Conclusion No. 30 in this respect. This describes "clearly abusive" and "manifestly unfounded" applications as "those, which are clearly fraudulent or not related

to the criteria for the granting of refugee status laid down in the 1951 Convention … nor to any other criteria justifying the granting of asylum". In other words, applications which are not made in good faith by the applicant.

49. Whether a case is deemed "manifestly unfounded" or not will depend upon the degree of linkage between the stated reasons for departure and the refugee definition. One potential problem in applying this notion is that not all asylum-seekers have the capacity without assistance to articulate clearly and comprehensively why they left, and certainly not where there is an element of fear or distrust involved, or where other factors are at play, including the quality of the interpreters. There is also the issue of credibility: an asylum-seeker's description of events prompting flight may appear to relate to the refugee definition, but may still lack objective credibility, while falling short of being "fraudulent". In other words, an applicant may make an application in good faith, but still not meet the legal standards of the refugee definition or be believed on all aspects of his or her claim. Similarly, certain information not found relevant to the claim, may be withheld for reasons not relating to bad faith, but to reasons to do with more subtle human and psychological factors.

50. In UNHCR's view the legal framework regulating how to assess protection claims should make a clear distinction between the notion of claims which are clearly abusive and/or manifestly unfounded and those which may otherwise lack in credibility or not meet the standard of proof for a refugee claim of "well founded fear". While the former may merit some procedural consequences, the latter should not. Furthermore, such a framework should acknowledge that while an applicant has an obligation to co-operate, the burden of proof is shared and the process best suited to establish facts should be inquisitorial in nature. The current Bill does not clearly make such a distinction. UNHCR also finds that the formulations used in the Bill in relation to these notions are unclear and repetitious and may jeopardize the correct assessment of a person's protection needs. The sections referred to include: Section 60 (Assessment of facts and circumstances), 66 (Burden of Proof), 67(Credibility), 68 (Duty to co-operate), and 70 (Determination of an application) and their links to Section 65 (withdrawal of applications); 69 (prioritization of applications) and 71 (appeal procedures). Furthermore, UNHCR takes note that the Bill does not seem to include reference to the use of benefit of doubt, which was included both in the draft scheme and in the current Refugee Act.

51. In relation to the assessment of other protection needs, UNHCR is concerned that the definition of serious harm could result in a number of persons in need of international protection not being recognized. Therefore, UNHCR would like to strongly suggest that the definition be amended to include: "serious and indiscriminate threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order."

Comments in relation to full enjoyment of refugee rights in accordance with the 1951 Refugee Convention

52. As mentioned above, UNHCR takes note and welcomes that the Bill foresees the same standards of rights for all persons issued a Protection Residence Permit as outlined in Section 38. These rights include: the right to reside in the State, to travel, to enter into gainful employment, access education, health and social welfare benefits subject to the same terms and conditions as applies to Irish Nationals. UNHCR also

notes that these rights seem to cover obligations for the State laid down in Article 17 to 24 of the 1951 Convention related specifically to rights of refugees.

53. The areas of concern to UNHCR in relation to the Bill are the issues of non-discrimination as per Article 3 of the 1951 Convention and of penalties for unlawful entry and restriction of movement further to Article 31 of the 1951 Convention, including their interpretations through ExCom conclusions.

54. The Bill foresees the possibility for the Minister to introduce different treatment for different classes of applications. In Section 59 (10) for instance the Minister can introduce different procedures for the investigation of a protection application for different classes of applications. It is not clear what such procedures or classes may mean, but if based on race, religion or country of origin considerations, Article 3 of the 1951 Convention may apply.

55. In relation to imposing penalties for illegal entry into the State for protection applicants, the Bill is in UNHCR's view not sufficiently clear in its formulation as to ensure that the principle of Article 31(1) of the 1951 Convention is respected. This is *inter alia* relevant in relation to Section 5, 7, 21, 22 and 8. Section 5 deals with who is to be considered lawful and unlawful in the State but does not make any specific reference as to how to regard protection applications. A reference in Section 5(8) would indicate that protection applicants might be considered unlawfully in the State. Although it seems clear that a protection applicant will be given permission to enter the State and stay while the application is processed, a reading of the Bill does not provide a clear answer to whether a protection applicant can still be considered technically unlawful in the State. This is particularly relevant as no entitlements have been listed in relation to holders of a Temporary Protection Residence Permit and since Section 8 dealing with entitlements of persons considered unlawful in the State would not be entirely suitable for protection applicants a clarification on this would be welcome.

56. Section 7 specifies that all foreign nationals shall possess sufficient identity documents and that not possessing this shall constitute an offence (7(4)). Likewise Section 21 stipulates that all foreign nationals shall enter the State through an approved port and that failing to do so constitutes an offence and Section 22 stipulates that a person shall present to an immigration officer immediately at the border and that not doing so is an offence. The definition of what it means to present is related to having certain documentations, which may not be appropriate to expect from protection applicants. There are no clear exceptions for protection applicants in line with the principles of Article 31 of the 1951 Convention. UNHCR is concerned that persons seeking protection in the State, either not possessing the mentioned documents or presenting directly with the status determining authority, may be considered to have breached these sections and be charged with an offence. This may be done irrespective of the principle of Article 31 and without regard to the fact that information about the procedures, duties and obligations, as well as access to legal representation, will only be available after they have made an application for protection.

57. Finally, UNHCR would like to raise concern with the suggested and potential extensive use of detention of protection applicants under *inter alia* Section 36 and 52 and in certain cases leaves it to an immigration policy statement to outline the classes of persons to whom detention provisions will apply. In the view of UNHCR, detention should be in line with Article 31 of the 1951 Convention, the relevant Conclusions of

UNHCR's Executive Committee, e.g. the Executive Committee Conclusion No. 44 (XXXVII) of 1986, as well as international and regional human rights law. Consistent with international and regional human rights law, detention of asylum-seekers is exceptional and should only be resorted to where provided for by law and where necessary to achieve a legitimate purpose; proportionate to the objectives to be achieved; and applied in a nondiscriminatory manner for a minimal period. The necessity of detention should be established in each individual case, following consideration of alternative options, such as reporting requirements. No single heading in the Bill deals with detention. UNHCR suggests that States provide for an exhaustive enumeration of the grounds for detention of asylum-seekers in national legislation.

58. Furthermore, UNHCR recommends that the requirements developed by the ECHR for the lawfulness of a detention order be incorporated into national law. Apart from prompt and regular detention reviewing and access to judicial review, these requirements include: unimpeded access to the asylum procedure, legal and social assistance, interpretation facilities and information. Additionally, implementing legislation should explicitly clarify that such provisions apply also to asylum-seekers whose claims were found to be inadmissible because another State was considered to be responsible for determining the claim, pursuant to arrangements on the transfer of responsibilities, such as the Dublin II Regulation, or in application of the 'safe third country' concept. The international and regional provisions on detention outlined above would also apply.

59. UNHCR welcomes the explicit exceptions to detention of children in Section 36 (4) and would recommend similar explicit exceptions to detention measures in relation to survivors of torture or sexual violence and traumatized persons.

60. Considering the above, UNHCR is particularly concerned with the power to detain outlined in Section 24 (7) reference (6), where an immigration officer can detain a protection applicant if it is not practical to issue a Temporary Protection Residence Permit. Keeping in mind the overriding human rights principles involved, a failure by the State to implement its own administrative legislation should not lead to the infringement on the right to liberty for persons seeking protection.

61. UNHCR also notes that a large number of both procedural and substantive aspects of the Bill will remain subject to the Minister's discretion, including through specifications introduced by way of *Ministerial statements and orders* including *Immigration Policy Statements* as outlined in Section 9 and 10 and including areas such as refusal to give permission to enter (Section 25) and right to marriage (Section 94), both of which could influence protection applicants. UNHCR suggests that to the extent possible, substantive provisions relating to asylum be set out in law.

Comments in relation to facilitation of integration and naturalization of refugees in accordance with Article 34 of the 1951 Refugee Convention

62. UNHCR has recently published a Note on the Integration of Refugees in the European Union as part of the discussions initiated by the German EU Presidency. This note stresses that the 1951 Convention places considerable emphasis on the integration of refugees. The 1951 Convention enumerates social and economic rights designed to assist integration, and in its Article 34 calls on States to facilitate the "assimilation and naturalization" of refugees. UNHCR's Executive Committee has recognized that integration into their host societies is the principal durable solution for refugees in the

industrialized world. The note also highlights some existing gaps in the integration of refugees in the European Union (EU), and formulates a number of policy recommendations in order to strengthen policy and practice in this area. The comments made to the Bill under this heading are based on some of the recommendations made in this note.

63. As mentioned above, UNHCR welcomes the approach taken by Ireland to give all persons granted protection in the State the same rights and also welcomes that integration of protection applicants is included in national integration strategies, such as the *Integration: a two-way process* and the National Action Plan against Racism.

64. The concerns of UNHCR with the Bill in relation to integration are around three main areas. Entitlements for protection applicants, Part 5 regulating issues around the length and renewal of residence permits and Section 49 concerning family members of protection applicants, including the absence of sections dealing with the procedures for applying for family reunification.

65. In relation to entitlements for protection applicants it is worth mentioning that reception conditions can impact on the well being of protection applicants and in the longer term their successful assimilation and integration into society or their ability to return and reintegrate in case of an unsuccessful application. This includes the time spent in the asylum process, the access to community activities, employment or vocational skills acquired during the process and special care arrangements for separated children and victims and survivors of torture. UNHCR recommends that Ireland consider these in relation to the Bill and can refer to best practices developing in relation to the implementation of the Reception Directive.

66. In relation to residence rights, UNHCR welcomes that all persons granted protection will be given a three year Protection Residence Permit and can subsequently apply for a long term residence permit as per Section 38 (2) (b). However, Section 38 refers to Section 34 (2) conditions for being given such a long term permit and these conditions include: that the person has been in the country lawfully for at least 5 out of the last 6 years; speaks sufficient level of English or Irish and has shown that he or she has made reasonable efforts to integrate as well as being of good character. It is specifically mentioned that the period spent as an asylum-seeker shall not be considered when calculating the 5 years. This seems to indicate that, despite Section 38, persons holding a Protection Residence Permit will have to have at least one subsequent extension before they can apply for long-term residency. UNHCR would recommend that permanent residence should be granted to persons holding a protection residence permit at the latest at the end of the three-year residence period. UNHCR is also concerned with residency rights of refugees being linked to language or integration obligations in general, especially without clearly defined standards in this regard and appropriate integration schemes in place to facilitate refugees fulfill such standards.

67. Finally, UNHCR has some comments in relation to Section 49 concerning family rights in the country as well as to the lack of clear specifications of how to initiate a family reunification procedure. UNHCR suggests that it is understood that an investigation under 49(4)(a) which requires that the Minister is satisfied that the person is a family member, shall benefit from the benefit of the doubt in accordance with the proposed Head 49 (4).

68. In relation to Section 49, UNHCR welcomes that the Bill gives the same entitlements to a family member as to the holder of the Protection Residence Permit. In relation to the definition of family member, UNHCR encourages the use of a definition of the term "family member" which includes close relatives and unmarried children who lived together as a family unit and who are wholly or mainly dependent on the applicant. This is in line with the right to family unity, as outlined in the UNHCR *Handbook* which stipulates that other dependants living in the same household normally should benefit from the principle of family unity. Furthermore, in UNHCR's view, respect for family unity should not be made conditional on whether the family was established before flight from the country of origin. Families, which have been founded during flight or upon arrival in the Asylum State also need to be taken into account. With reference to the UNHCR Executive Committee Conclusion No. 24 (XXXII) paragraph 5 and No. 88 (L) paragraph (b)(ii), UNHCR recommends the application of liberal criteria in identifying those family members who can be admitted, with a view to promoting the unity of the family.

69. While welcoming that the Bill seems to include family established en route to the State as long as established before the protection application is made, UNHCR notes that the Bill does not include partnerships in accordance with the law of the country of origin or marriage which took place in the State. UNHCR recommends that both such categories of family members are included in Section 49.

70. UNHCR takes note that no specific mention has been made in the Bill in relation to procedures for initiating a family reunification process. UNHCR therefore presumes that it is foreseen that family reunification will continue to be initiated through the visa application process. Considering the current difficulties with this process, UNHCR recommends the following procedural changes: a specific application, other than a visa application, to apply for family reunification; special consideration in relation to issuance of travel documents facilitating the travel to the State for family members who may not be able to obtain a national passport and the possibility to appeal or have a review of a decision not to grant family reunification.

71. Considering the current backlog of family reunification cases pending and the resources required, UNHCR suggests that family members in as much as they are present in Ireland should be granted derivative status. In UNHCR's view, members of the same family should be given the same status as the principal applicant (derivative status). The principle of family unity derives from the Final Act of the 1951 United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons and from human rights law. Most EU Member States provide for a derivative status for family members of refugees. This is also, in UNHCR's experience, generally the most practical way to proceed. However, there are situations where this principle of derivative status is not to be followed, *i.e.* where family members wish to apply for asylum in their own right, or where the grant of derivative status would be incompatible with their personal status, e.g. because they are nationals of the host country, or because their nationality entitles them to a better standard.

72. Finally, we would like to note that refugees require a secure status to be able to achieve self-reliance and to integrate more easily into the society of the host country, including into the labor market. UNHCR therefore suggests that they be granted permanent residency either immediately or, at the latest, following expiry of the initial permit. Similar rights to long-term residence should also be accorded to family members.

73. Specific consideration in relation to family reunification for separated children has been mentioned below in part VI.

Children issues and concerns in relation to other vulnerable persons

74. The 1951 Convention does not make any special provisions for protection of refugee children, who therefore have the same rights as adult refugees, however special considerations for children are outlined in the Convention on the Rights of the Child and good practices in relation to treatment of Separated Children seeking asylum have been developed in various documents, including through the Separated Children in Europe Program (SCEP).

75. UNHCR would like to welcome some of the special considerations for children outlined in the Bill including the exception to detention Section 36 (4), the notification of the HSE specified *inter alia* in Section 23 (4) and 36 (4) (c), 53 (3), the consideration of age in assessment of facts Section 60 (1) (c) and the special procedures for obtaining biometric information for persons below 14 years of age.

76. Similarly, UNHCR would like to welcome the mentioning of special considerations in relation to vulnerable persons such as children and victims of torture in Section 38 (4) in relation to giving rights to a person issued with a Protection Residence Permit.

77. However, UNHCR remains concerned with a number of sections of the Bill, which in our view do not comply with best practices as regards unaccompanied or separated children. These practices are built around the following principles: 1) That the best interest of the child is a primary consideration 2) The child should not be refused entry or returned at the point of entry, or be subjected to detailed interviews by immigration authorities at the point of entry 3) As soon as a separated child is identified, a suitably qualified guardian or adviser should be appointed to assist him/her at all stages 4) Interviews should be carried out by specially trained personnel and 5) Separated children should not be detained for immigration reasons.

78. In relation to implementing the best interest of the child, UNHCR takes note that this is mentioned in Section 58 (4) (c) (ii), but with the lack of an introduction section (or a preamble) outlining the overall objectives of the Bill, it is not clear that this principle is guiding all parts of the Bill. It also seems that the Bill lacks child appropriate alternatives for persons under the age of 18 years where it may not be in the child's best interest to make a protection application.

79. Concerning the entry to the State and interview at the border by Immigration Officers, Section 21, 22, 23 and 58 could be amended to take into consideration that a child should not be refused entry or returned at the point of entry, or be subjected to detailed interviews by immigration authorities at the point of entry. It would also be of particular importance that in case of doubt around the age of the person this doubt will be in favor of the child and only if the person is without reasonable doubt above 18 years s/he is treated as an adult. This would imply changes to Section 23 (7), 36 (4) (b) and 53 (2).

80. Point three above raises two important issues: firstly, who should be identified as a separated child, and secondly, that such a child should be appointed a suitable

guardian or adviser. UNHCR has specific concerns in relation to the definition of children identified as separated children and for whom contact with the HSE is established.

81. Section 23(1) defines such children as “a foreign national under the age of 18 years who has arrived at a frontier of the State (if) (*a*) s/he is not accompanied by a person of or over that age who is taking responsibility for the foreign national, the officer shall, as soon as practicable, notify the Health Service Executive of that fact, (*b*) is accompanied by such a person, the officer may require that person to verify that he or she is taking that responsibility”. UNHCR would recommend that the definition in line with SCEP best practices is adopted in which “Separated children are persons under 18 years of age who are outside their country of origin and separated from both parents, or their legal/customary primary caregiver.”

82. The Section 23 (1) definition does not have sufficient safeguards to ensure that children are not trafficked into the country or that they get the care, registration and assistance required for their full protection as a person. Furthermore UNHCR recommends the appointment of a guardian *ad litem* who can get legal advice on whether or not it is appropriate to make an application for protection on behalf of the child and assist the child in all aspects of the process.

83. The appointment of a guardian other than a HSE social worker seems particularly relevant also in light of the introduction of Section 92, which places an obligation on information holders to share information they may have about a foreign nationals with the Minister.

84. As mentioned above UNHCR, welcomes the specific exception to detention of persons below 18 years in Section 52, but finds the formulation of Section 53 unclear in relation to the detention of persons below the age of 18 years in relation to removal from the State.

85. In relation to family reunification Section 49 (4) (b) (ii) UNHCR has some concern with the limitations to this section, which do not take into consideration that a separated child seeking protection may have lost his or her parents but be emotionally dependent on other family members such as siblings or customary primary caregivers.

86. Finally, the Bill has no reference to child specific forms of persecution as envisaged for instance in the Qualification Directive preamble and Article 4.

87. In relation to other groups of vulnerable persons applying for protection, including victims of torture, UNHCR would welcome considerations in relation to all aspects of the Bill.

UNHCR Dublin
July 2007