

UNHCR's Comments on the Immigration, Residence and Protection Bill 2008

PART 1: Introduction

1. UNHCR has a direct interest in the national legislation of signatory countries that regulates the application of the *1951 Convention relating to the Status of Refugees* ("the 1951 Convention"). This follows from the 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 Irish Immigration, Residence and Protection Bill of January 2008.
2. UNHCR also considers it its statutory responsibility to foster a common understanding of the effective international protection in the European context, based on the full and inclusive application of the 1951 Convention and established principles of international refugee, human rights and humanitarian law.
3. UNHCR is pleased to share its comments on this Bill, by virtue of which the asylum institution proposed is regulated in the context of a broader set of statutory provisions that generally rule on the arrival, presence, and departure of foreigners in Ireland.
4. 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 alternative wording has been suggested.

PART 2: Comments to the Bill in General

Transposition

5. 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 Qualification Directive) and the Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee Status (hereinafter referred to as the Procedures Directive).

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.*"

6. UNHCR provided comments to both these directives² and to the Irish Immigration, Residence and Protection Bill published in 2007. This set of comments elaborate on our positions outlined in these documents and include references to a recent study on the implementation in selected EU countries of the Qualification Directive³ as well as to specific comments made to the interpretation of Article 15(c) of the said Directive in relation to a hearing before the ECJ.⁴

Single procedure

Firstly, UNHCR welcomes the introduction of a single procedure for determining refugee status as well as other forms of protection. Having a single procedure to look at refugee protection needs as well as other protection needs, formulated as subsidiary protection in the Bill, will allow for a more efficient process with less duplication of efforts. The process of establishing the facts on the basis of which a determination of refugee protection is taken is the same as that for subsidiary protection and will be done by the Minister for Justice, Equality and Law Reform. UNHCR's main concern in relation to a single procedure has been to ensure that it is designed in a way whereby the 1951 Convention criteria are examined first. If it is determined that the claimant is not a refugee, his or her need for subsidiary protection should then be assessed.

7. UNHCR is satisfied that the issue of the 1951 Convention's primacy is appropriately addressed in the Bill under Section 79(2) where the sequence of determination clearly outlines that the determination shall first conclude on whether the person should be given refugee protection, as well Section 62(2) states that an person who seeks any form of protection in the State shall be deemed to have sought protection in the State as a refugee.

8. As mentioned above, UNHCR welcomes Ireland establishing a single procedure for assessing both refugee protection needs and subsidiary protection needs. The Bill suggests that not only protection concerns will be assessed in the single procedure, but that other issues including *non-refoulement* obligations under general human rights instruments and other reasons for granting a person a permission to reside in the State are looked at in the same procedure (Section 74(1) (b) and Section 79(2)(c)). A decision under Section 79 that the person is not entitled to protection in the State and will not be permitted to remain in the State has the effect that the person is unlawfully in the State and can be removed. (See Section 68(4) stipulating when a protection application entry permission comes to an end, Section 4(1) stipulating that a person whose protection application entry permission is no longer valid is unlawfully in the State and Section 54(1) stipulating that a person unlawfully in the State can be removed).

9. This regime replaces the current sections of the Immigration Act of 1999 Section 3 relating to deportation orders and issues to be considered by the Minister before making a deportation order. With the proposed Bill it will no longer be possible to apply to the Minister for permission to stay in the State on humanitarian grounds

² UNHCR, "Summary of UNHCR's Provisional Observations on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status" and "UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 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", <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4249292c4>.

³ UNHCR, "Asylum in the European Union; A study of the implementation of the Qualification Directive", 2007, <http://www.unhcr.org/protect/PROTECTION/479df9532.pdf>.

⁴ See <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=479df7472>.

and persons who may have genuine grounds for requesting to stay in the State on grounds not related to protection concerns will have no avenue to make an application other than to instigate a protection application in compliance with Section 73(1). UNHCR is concerned that this will lead to protection applications being made for the sole purpose of getting stay in the country on non protection related grounds. Such practice may lead to overburdening of the asylum system, thereby canceling some of the advantages of the efficiencies that a single procedure anticipates. As well it could encourage the wrongful impression that the asylum system is being used in bad faith by applicants.

10. One example could be where a child, accompanying his refugee parents to Ireland, was granted leave to stay in the country on the basis of family reunification when his parents were granted refugee status. If his parents die his permission to stay, linked to his parents, is no longer valid. Under the current Section 3 of the 1999 Immigration Act he can apply to the Minister for permission to be granted leave to stay. With the proposed Bill he can only regularize his stay through a protection application irrespective of whether he himself has valid grounds for seeking protection. A similar dilemma may arise in relation to separated children coming to the State where it is not deemed appropriate to make an application for protection, but where it is nevertheless in the best interest of the child to remain in the State. (See our detailed comments below in relation to children).

Recommendation: In order to avoid compelling persons who have grounds to remain in the State on non-protection related grounds to instigate a protection application in compliance with Section 73(1) of the Bill, UNHCR suggests that an avenue be created, other than the single asylum procedure, to allow for persons unlawfully in the State to seek permission to remain.

11. Another adverse effect of not allowing a time between a person is lawfully in the State, for instance while pursuing his or her application for protection, and when a person is unlawfully in the State, for instance when the Protection Application Entry Permission expires or notice of a decision to refuse is given by the Tribunal, Section 68(4), is that persons have no official “grace period” to consider ending their stay in the State in an orderly manner and avail of the possibility of voluntary return. They would be subject to removal proceedings from the moment they receive a final negative decision.

Recommendation: UNHCR recommends that the final Act provides for an appropriate time for rejected protection applicants to consider other options such as voluntary return, and that the persons continue to be legally in the State during that time.

Minimum Standards contained in European Directives

12. The Qualification Directive and the Procedures Directive both specify that the standards laid down in these Directives are minimum standards and by virtue of this national legislation can adopt more favourable standards (Article 3 Qualification Directive and Article 5 Procedure Directive).

Recommendation: UNHCR 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.

13. In this regard, UNHCR welcomes that the Bill has taken a more favourable approach in relation to a number of aspects in the Directive. Specifically, UNHCR welcomes the rule of Section 97 (Protection Declarations and Permits), which offers the same rights to all protection applicants entitled to protection whether as refugees or persons eligible for subsidiary protection; including the right to a Travel Document, the entitlement to seek employment, apply for a long term residence permission and the right to family reunification as per Section 50 (Member of family of person in relation to whom protection declaration is in force).

14. However, in other respects UNHCR is concerned that the transposition of the Directives have led to lower standards than what is currently in force and in some instances to wording which contravenes Ireland's international obligations under the 1951 Convention. This is for instance the case in Section 61(1), giving the definition of a refugee, actors of persecution, protection against persecution, in Section 64, making new interpretations of acts of persecution and in Section 65, outlining the factors to be taken into account when assessing the reasons of persecution. UNHCR considers that while some of these sections reflect the Qualification Directive provisions and may give some valid guidance on the interpretation of the Convention refugee definition, they should in no way be considered to be conclusive or exhaustive. This will be analyzed in more details in the themed comments below.

15. Also considering the possibility of Member States to adopt more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, UNHCR would like to recommend a rewording of the definition used for granting a protection declaration based on Subsidiary Protection in Section 61(1) "serious harm" – subsection (c). The definition in Section 61 of serious harm part (c) follows the definition found in the Qualification Directive Article 15 and reads as follows "Serious harm means – serious and individual threat to a civilian's life or person by reason of indiscriminate violence in a situation of international or internal armed conflict".

16. UNHCR's comments to the Qualification Directive stated:

"In UNHCR's view however, the notion of an individual" threat should not lead to an additional threshold and higher burden of proof. Situations of generalized violence are characterized precisely by the indiscriminate and unpredictable nature of the risks civilians may face. At the same time, UNHCR agrees that such risks should be immediate and not merely be a remote possibility as, for example, when the conflict and the situation of generalized violence are located in a different part of the country concerned. Since a harmonized understanding regarding beneficiaries of temporary protection has been achieved, it would be consistent if individuals fleeing for similar reasons (but outside the context of a mass influx) were to be granted⁵ protection under this Directive. UNHCR further notes that the provision is restricted to cases where the threshold of an "internal or international armed conflict" is reached. Persons fleeing indiscriminate violence and gross human rights violations more generally would, however, similarly be in need of international protection. It hopes that States will recognize the need to grant protection broadly in transposing and applying this provision".

⁵ See Explanatory Memorandum on proposed Article 11(2)(c), Explanatory Memorandum presented by the European Commission (COM(2001)510 final, 12.9.2001), page 21.

17. Since these comments were made in April 2004, many EU States have transposed the Qualification Directive into national legislation and the problems highlighted in UNHCR's comments have proved to be a point of concern for a Common European Asylum System. UNHCR has elaborated on both the issue of the Individual threat and the notion of international and internal armed conflict in two recent documents; *i.e.* "Asylum in the European Union; A study of the implementation of the Qualification Directive"⁶ and a "Statement on Subsidiary Protection under the EC Qualification Directive for people threatened by indiscriminate violence" made to the ECJ in January of this year⁷

Recommendation: In view of the above, the bill should use a wording for the definition of serious harm in connection to victims of generalised violence/armed conflict, which avoids placing the strain on decision makers to determine if generalised violence indeed meets the threshold of an international and internal armed conflict and removing the reference to "individual threat" and the restriction of the provision to "civilians". UNHCR would recommend that this is taken into consideration in the discussion of this Bill and that the section 61 (1) (c), when defining "serious harm", is reworded as follows;

"Serious harm consists of:

c) serious and indiscriminate threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order."⁸

Public security, public health, public policy and public order "ordre public"

18. UNHCR notes the extensive references throughout the Bill to the notion of Public security, public health, public policy and public order "*ordre public*" without further specification of what this constitutes. The provisions cover a number of issues of concern to UNHCR, such as the making of exclusion orders to enter the State, revocation of certain permits and permissions including the Protection Permission, withholding of information relevant to the protection procedure and prioritisation of protection applications among other.

Recommendation: Exceptions to principles concerning access to the territory, access to procedures and conditions of stay for protection applicants should not be made with reference to the "*ordre public*" notion, which is not compatible with the framework and terminology of the 1951 Convention, which restricts exceptions to the *non-refoulement* principle, to the limitative scenarios defined in articles 32 and 33 (2) of the 1951 Convention..

PART 3: Comments to specific Themes of the Bill

19. UNHCR welcomes the many positive provisions in the Bill in meeting Ireland's obligations under each of the themes mentioned in this part, but is concerned, however, that certain provisions particularly in relation to ensuring access to the territory, use of detention and assessment of the claims, fall short of meeting international standards.

⁶ See <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain/docid=473050632>.

⁷ See <http://www.unhcr.org/protect/PROTECTION/479df9532.pdf>.

⁸ Reference is made to best practices within the EU, which can be found in the conclusions of the document *ibid note 7*.

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

- i. access to the territory for all protection applicants, pending assessment of their asylum claims;
- ii. the implementation of the *non-refoulement* principle;
- iii. access to a fair and efficient protection determination procedure;
- iv. 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;
- v. facilitation of integration and naturalization of refugees in accordance with Article 34 of the 1951 Refugee Convention; including family reunification rights; and
- vi. treatment of specific groups of concern, including children and vulnerable applicants;
- vii. transitional issues

i. Access to the territory for all protection applicants

21. 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 covered in Section 23(9), 23(10) and Section 25(1) (b) which ensure that a foreign national indicating *inter alia* that s/he has or wishes to make and application for protection or is seeking protection against persecution or serious harm shall be given permission to enter the State. In such circumstances the powers of the Minister/ immigration officers of Section 24 to refuse a foreign national to enter do not apply. The exception is Section 25(1) (c) and Section 25(4) referring to Section 117 concerning persons who are under an exclusion order from the Minister based on public security, public policy or public order.

22. UNHCR finds that these sections represent an improvement since our comments to the previous Bill, but is, however, still concerned with the lack of access for persons with an exclusion order based on the *ordre public* or public order notion. Section 117 does not specify that *non-refoulement* considerations have been taken into account or that the person has to be present in the State for an exclusion order to be made, nor does it indicate which criteria shall be considered for a determination of a public order exclusion.

23. It must be kept in mind that keeping a person from accessing the territory and making an asylum application bars that person from having protection and *non-refoulement* issues considered.

Recommendation: In order for the State to comply fully with its *non-refoulement* obligations under the 1951 Convention and international human rights law all persons must have unhindered access to a procedure, which will consider all relevant aspects of the persons' claim including those pertaining to the enforcement of the exception to the *non-refoulement* obligation as set out in the 1951 Convention at Article 33(2).

Carrier sanctions

24. UNHCR notes that the Bill includes provisions for carrier sanctions such as Section 28(1) (c) which make it an offence for a carrier to have on board a person seeking to enter the State who does not have a valid travel document or visa if such is required.

25. UNHCR's position is that while carrier Sanctions may be a legitimate immigration tool, such measures may also interfere with the ability of persons at risk of persecution to gain access to safety. If States have recourse to carrier sanctions, they should be implemented in a manner, which is consistent with international human rights and refugee protection principles, notably Articles 31 (Refugees unlawfully in the country of refuge) and 33 (Prohibition of expulsion or return "*refoulement*") of the 1951 Convention. UNHCR's concern is that without making it a defence to assist persons at risk or persons in need of protection these legitimate measures to control irregular migration may prevent the assistance to persons in, for instance, need of rescue at sea.

Recommendation: Liability of carriers should not apply in respect of refugees and other persons with protection needs or rescue operations.
--

ii. The non-refoulement principle

26. UNHCR welcomes the significant changes to the definition of *refoulement* provided under Section 52 and the general prohibition against *refoulement* outlined in Section 53, but would however still like to voice its concerns with certain provisions.

27. *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 international customary law. 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") and is often referred to as the cornerstone of international refugee protection.

28. 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 be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion."

29. 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 or return "in any manner whatsoever".

30. While Section 53(1) of the Bill clearly prohibits a person from being removed from the State to a territory, if doing so would be *refoulement*, the exception in 53(2) for extradition orders may not be in line with the 1951 Convention. 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. The 1951 Convention permits *refoulement* only when there are reasonable grounds for regarding that a person otherwise determined to be a refugee is a danger to the security of the State or having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country. UNHCR therefore recommends that the Bill is modified to ensure that only these exceptions to *refoulement* of refugees are applied.

31. It is arguable that Section 53(2) also contravenes case law of the European Court of Human Rights (ECHR), in relation to extradition to a place where the person may face torture, inhumane or degrading treatment. This was dealt with in *Soering v. the UK*; the ECHR found that a person could not be extradited to a place where

substantial grounds have been shown for believing that the person concerned would face a real risk of inhumane or degrading treatment.

Recommendation: UNHCR proposes cancellation of Section 53 (2) from the Bill, unless Ireland can ensure that the Extradition Acts 1965 and 2001 as well as the European Arrest Warrant Act, 2003 referred to in 53 (2) contain themselves sufficient safeguards to prevent *refoulement*.

32. 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. The exception to Section 23(9) and (10) found in Section 117 may therefore also contravene Ireland's *non-refoulement* obligation as outlined above.

Recommendation: Ireland should clarify in the final Act that protection applicants shall not be excluded from the territory of the State unless there has been a prior assessment of their protection needs and there is no subsequent risk of *refoulement* further to the enforcement of an exclusion decision.

33. 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.

34. 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. UNHCR would have some concern with this in relation to persons applying for leave for judicial review of a Protection Review Tribunal decision (hereinafter the Tribunal) under Section 118 as well as for protection applicants where the application is deemed withdrawn without consideration of the application on its merits.

35. In relation to Section 118 it is relevant to look at the basis for a person to be legally staying in the State which for a protection applicant is the Protection Application Entry Permission Section 23(10). Section 4(1) provides that only persons with a valid permission are lawfully in the State and Section 4(4) further provides that once a person is unlawfully in the State the foreign national shall leave the State and may be removed. A Protection Application Entry Permission is according to Section 68(4) valid *inter alia* until the sending of notice of a decision to refuse protection status by the Tribunal. As such a person will be unlawfully in the State and may be removed before they have a possibility to make an application for leave to apply for judicial review in accordance with Section 118. This is irrespective of whether this would be in the interest of justice and of whether the person could be a refugee.

36. The risk of a breach to the State's *non-refoulement* obligation is further jeopardised by Section 118(9), which does not give suspensive effect of a removal for a person who has applied for leave to get judicial review. This is particularly relevant if the Minister also decides to exercise his discretion under Section 46(1) and issues a non-return exclusion order.

Recommendation: UNHCR suggests that Ireland should consider amending the Bill to ensure that rejected asylum seekers could be subject to removal measures only once they had an effective opportunity to apply for judicial review of a Protection Review Tribunal decision.

37. Furthermore, 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. In UNHCR's view this is particularly relevant in relation to Section 54 where a person might be removed to a third state irrespective of whether this state is a safe third country for that person.

Recommendation: Removals to third countries should be permissible only in cases where it can be excluded that a person would be subject to *refoulement* from the third country where s/he is removed.

38. Other parts of the Bill may also impact on the State's *non-refoulement* obligation. For instance in relation to Section 71(14) whereby a person in detention may leave the State if s/he withdraws his or her application for protection. The principle of *non-refoulement* in relation to torture, inhumane and degrading treatment is an in-alienable right and cannot be given up by an applicant. Accepting to withdraw the protection application and be removed from the State cannot relieve the State of its responsibility not to *refoule* a person to a situation of torture, inhumane or degrading treatment.

Recommendation: Section 71(14) is amended to include a reference to the judge's obligation to assess whether removal from the State would contravene the State's *non-refoulement* obligation.

iii. Access to the procedure

39. While Section 23(9) and 23(10) deal with access to the territory to make a protection application other sections deal with applications made in the State, withdrawal of an application or other provisions which may effectively bar an applicant from a hearing of his or her application on the merits.

Recommendation: Every asylum application should be examined in substance, to avoid a risk of *refoulement*. Explicit or implicit withdrawal should lead to

discontinuation of the procedure, not to rejection of the claim. Applicants should be granted the opportunity to resume or re-open the asylum procedure.

Lack of access for certain applicants

40. One of UNHCR's concerns in relation to access to the procedure is for EU nationals (Section 61). Section 61 excludes nationals of Member States from the refugee definition "without prejudice" to the "Protocol on Asylum for nationals of a Member State". The Bill's current formulation, therefore, lends itself to misinterpretations, as it seems to exclude EU nationals *a priori* from the refugee definition, whereas the "Protocol on Asylum" merely establishes a (rebuttable) presumption of such claims to be considered as "manifestly unfounded". UNHCR's recommendation in relation to EU nationals is that protection under the 1951 Convention should be granted to all persons who fulfil the Convention's refugee definition as the Convention does not have any geographical limitations.

Recommendation: Recognising the State's concern that cases of EU nationals have a greater likelihood for being manifestly unfounded, UNHCR would understand that a prioritised procedure could be applied to deal with such applications, but not that nationals from other EU countries have no access at all to be heard or to get protection in the State if so required. For conceptual clarity, the Bill should not refer to the "Protocol on Asylum" as an instrument to exclude persons from the refugee definition, but as interpretative guidance in determining the burden of proof of asylum seekers from EU countries.

Withdrawal and "deemed withdrawn"

41. Apart from the above where certain applicants are denied access to the procedure, other parts of the Bill may result in the application not being assessed on its merits but considered withdrawn. The consequences of an application being withdrawn or deemed withdrawn is that any investigation of the protection application shall be terminated and the report by either the Minister or the Tribunal shall include a determination that the applicant is not entitled to protection in the State and no appeal is possible (section 80(5)). Furthermore, the Protection Application Entry Permission is no longer valid as per Section 68 and thus the person is unlawfully in the State and is required to leave and may be removed – Section 4(1) and (4). Issues of *refoulement* in relation to such a removal can therefore not be considered and breaches to *non-refoulement* may occur.

42. The Bill provides for eight situations where an application can be deemed withdrawn without the applicant actually making a withdrawal him or herself.

1. Section 68 provides that a protection applicant can be required to either dwell in a proscribed place or report at regular intervals. Failure to comply results in the application deemed withdrawn. The conditions can only be imposed if the applicant has been notified in writing including about the consequences of failure to comply. The notice must where necessary and practicable be in a language the applicant understands.

2. Section 70 provides that the immigration officer shall issue a protection Applicant with a Protection Application Entry Permit. If it is not practical to do so the officer may require the applicant to remain in a place specified by the officer. Failure to comply results in the application without further notice being deemed withdrawn. The condition to remain in a specified place can only be imposed if the applicant has been notified in writing including about the consequences of failure to comply. The notice must where necessary and practicable be in a language the applicant understands.

3. Section 71(14) provides that a person can at any time during immigration related detention indicate a desire to leave the State and once confirmed before a judge of the District Court and after making a removal order the person's protection application shall be deemed withdrawn.

4. Section 80(2) provides that a person's protection application shall be deemed withdrawn if s/he fails to attend for interview with the Minister and has not given explanation found reasonable for the non-attendance within 3 working days.

5. Section 80(3) provides that a person's protection application shall be deemed withdrawn if the applicant does not confirm to the Minister, within 10 working days after the sending of notice that s/he wants to continue the application. The grounds for such a notice are; when it appears to the Minister that the applicant is failing to co-operate or the Minister is of the opinion that the applicant has a) left the State without consent, b) not informed the Minister of change of address, c) is not remaining in specified place or d) not reporting as required to the authorities.

6. Section 87(1) provides that a person's protection application shall be deemed withdrawn if s/he fails to attend for interview with the Tribunal and has not given an explanation found reasonable for the non-attendance within 3 working days.

7. Section 87(2) provides that a person's protection application shall be deemed withdrawn if the applicant does not confirm to the Tribunal, within 10 working days after the sending of notice that s/he wants to continue the application. The grounds for such a notice are; when it appears to the Minister that the applicant is failing to co-operate or the Minister is of the opinion that the applicant has a) left the State without consent, b) not informed the Minister of change of address, c) is not remaining in specified place or d) not reporting as required to the authorities.

8. Section 104(3) provides that a protection application for a person who has been transferred under what is generally know as the Dublin II Regulation shall be deemed withdrawn.

Recommendation: While UNHCR recognises that the above provisions are mainly aimed at ending procedures for persons who may not be genuinely pursuing their application, UNHCR would recommend stronger procedural safeguards for some of these categories. UNHCR would also like to make a strong point for changing the Bill so a withdrawal results in a discontinuation of the procedure only and the closing of the file, but not in a decision that the applicant is not entitled to protection. A reopening of the application should be possible without time limits upon application. Considering a withdrawn application as a determination that the person is not entitled to protection, when the merits of the claim have not been assessed, would be inconsistent with principles of natural justice and risk breaching the *non-refoulement* principle.

43. The Bill only provides for further consideration of withdrawn applications in relation to Section 89 whereby the Minister can consent to a person whose application was deemed withdrawn to make a further protection application. There is nothing in this section obliging the Minister to allow such further application and removal proceedings cannot be challenged in any way if the challenge is based on information that was available to the applicant but not to the Minister or the Tribunal at the time of the decision to reject Section 118(11).

44. What this could mean in practical terms is that for instance a child who was trafficked into the State and made an application and who was subsequently removed from the proscribed place referred to in Section 68 by the person(s) who organised the trafficking, breaching Section 68(6). The minor would then be likely not to attend his or her oral hearing as regulated in Section 80(2) and is also unlikely to be able to give reasons within the 3 day period. This child's application would be deemed withdrawn and considered not entitled to protection, be unlawfully in the State and could be removed. The only redress would be to make a further application to the Minister under Section 89. Pending this decision, the removal can go ahead and the child cannot challenge the removal. Section 89(3) makes reference to Section 118(11) whereby a removal cannot be challenged on the basis of the existence of information that was or could reasonably have been available to the person but was not available to the Minister. In the example the child would have the information, but the Minister would not at the time of making the decision to withdraw *i.e.* reject.

45. Similarly, an applicant who makes an application in the State but subsequently leaves for another EU Member State, let say, because s/he has relatives there, may find that the other Member State refuses to process his or her asylum application referring to the Dublin II Regulation, whereby Ireland is responsible for processing the application. Even if Ireland accepts to take back the applicant s/he would be in breach of Section 80(3) and the case would be deemed withdrawn. This could also apply to an applicant who went to visit Enniskillen for the day not knowing that s/he had left the country. It is not clear from Section 89 that the Minister would be required to consider a further application and that the applicant would have access to having his or her case assessed on its merits.

Recommendation: UNHCR would therefore recommend that Section 89 makes a clear exception in the case of transfers back to Ireland under the Dublin II Regulation and includes a provision for notification of UNHCR where the Minister decides not to allow for a further application.

iv. Fair and efficient protection determination procedure

Refugee definition – inclusion

46. Apart from our concerns in relation to provisions, 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, also raise issues of concern to UNHCR. This includes sections introducing definitions, which, on the whole, limit the scope of the 1951 Convention, such as definitions of "Acts of Persecution" (61) and "State Protection" (56 and 64).

47. The refugee definition of the Bill is found in Section 61 (1). This definition has three limitations in relation to the definition in the 1951 Convention. Firstly, Section 61 limits the scope of the Convention definition to persons who are not national of an EU Member State. Secondly, the definition in Section 61(1) refers to Section 61(2) which elaborates on what should be considered as protection against persecution and thirdly the section broadens the scope for actors of protection and thereby limits situations where a person can seek international protection in the State.

Recommendation: UNHCR would suggest that the limitation in Section 61(1) to non-EU nationals be removed. The 1951 Convention does not have any geographical limitations and an exclusion of EU nationals would also not be inline with Article 3 of the 1951 Convention, which sets out that a state shall apply the provisions of the Convention to refugees without discrimination as to race, religion or

country of origin, and Article 42 which does not permit reservations in relation to Article 1 and 3 of the Convention. (See also our comments above in relation to access to the procedure).

48. The second potential limitation to the scope of the 1951 Convention springs from the outline in Section 61(2) of when protection should be considered generally provided. The 1951 Convention does not have a definition of what protection against persecution means, but invites states to make an investigation of each case on the merits.⁹ Section 61(2) specifies that protection should be considered generally provided when agents of protection have taken *reasonable steps* to provide protection. This assessment of reasonable steps is irrespective of whether the protection is effective, accessible and adequate.

Recommendation: In UNHCR's view the assessment to be made is whether the applicant's fear of persecution continues to be well- founded, regardless of the steps taken to prevent persecution or serious harm. UNHCR recommends that the section is amended to reflect this.

49. The third limitation is in relation to agents of protection. Section 61(2) outlines the agents of protection to include, "states, parties or organizations, including international organization, controlling a state or a substantial part of the territory of a state". This section raises a question regarding the extent to which non-State entities can provide protection.

Recommendation: In UNHCR's view, refugee status should not be denied on the basis of an assumption that the threatened individual could be protected by parties or organizations, including international organizations, if that assumption cannot be challenged or assailed. It would, in UNHCR's view, be inappropriate to equate national protection provided by States with the exercise of a certain administrative authority and control over territory by international organizations on a transitional or temporary basis. Under international law, international organizations do not have the attributes of a State. In practice, this generally has meant that their ability to enforce the rule of law is limited. UNHCR recommends that only reference to state protection is kept.

50. There are three other parts of the Bill, which *de facto* lead to limitations of the scope of the 1951 Convention in relation to determining who falls within the refugee definition and for which UNHCR has some concerns. One is Section 63(1)(e) referring to possibility of asserting citizenship, the other is Section 63 (2) and (3) in relation to past persecution and the third is Section 64(1) defining acts of persecution.

51. Section 63(1)(e) outlines that the Minister in his/her decision shall have regard to whether an applicant could reasonably be expected to avail him or herself of protection of another country where he or she could assert citizenship. The factor outlined in this section should not form part of the refugee status determination assessment. There is no obligation on the part of an applicant under international law to avail him- or herself of the protection of another country where s/he could "assert" nationality. The issue was explicitly discussed by the drafters of the Convention. It is regulated in Article 1A(2) (last sentence), which deals with applicants of dual

⁹ Section 61(2) is worded on the basis of the Qualification Directive and combines the wording of two paragraphs in the Qualification Directive Article 7 on who can be considered actors of protection.

nationality, and in Article 1E of the 1951 Convention. There is no margin beyond the limits of these provisions. For Article 1E to apply, a person otherwise included in the refugee definition would need to fulfill the requirement of having taken residence in the country and having been recognized by the competent authorities in that country “as having the rights and obligations which are attached to the possession of the nationality of that country”.

Recommendation: Section 63(1)(e), establishing a duty for protection applicants to avail themselves of the protection of another country where they “could assert citizenship” should not be part of the final Act if full compatibility with Article 1 of the 1951 Convention is to be ensured.

52. Section 63 (2) and (3) specifies that past persecution or serious harm is a serious indication of the applicant’s well founded fear of future persecution. UNHCR has advocated that when the assessment concludes that serious harm will not be repeated, compelling reasons arising out of previous persecution may still warrant the granting of refugee status. The basis for this position is based on the exception to the “ceased circumstances” cessation clauses in Articles 1C(5) and 1C(6) of the 1951 Convention relating to “compelling reasons arising out of previous persecution”. UNHCR believes that this proviso should be interpreted to extend beyond the actual wording of the provision and to apply to the initial determination of refugee status according to Article 1A(2) of the Convention. The humanitarian reasoning behind this position is recognition that the level of atrocious acts experienced by a person can in itself be of such extraordinary nature that a forward looking assessment in relation to the need for protection is unnecessary.

53. The consequence of the current wording in the Bill is that where a protection applicant is seeking protection in the State because of *particularly atrocious forms of persecution* this person is not granted protection if there is no basis for considering that the persecution will be repeated in the future. While this is unlikely to affect a large number of applicants it is however a well established humanitarian principle; well grounded in State practice. The Bill does include the possibility for considering compelling reasons arising out of previous persecution, but in relation to Section 67 and Section 99 (3) where it is stated that the Minister shall not revoke a protection declaration on the basis of cessation when compelling reasons of previous persecution arises. As mentioned above UNHCR recommends that the assessment also benefits persons when they are seeking protection.

Recommendation: UNHCR would recommend that the possibility of granting protection to persons who have compelling reasons arising out of previous persecution is included in Section 63.

54. Section 64 defines acts of persecution. It is formulated on the basis of the Qualification Directive Article 9 and as such UNHCR would have similar concerns with Section 64 as were made in our comments to Article 9 of the Qualification Directive. However, of further importance and of grave concern is the formulation of Section 64(1)(b), which deviates from Article 9(2) and in UNHCR’s view leads to a serious limitation of the 1951 Convention refugee definition by defining persecution as follows “Acts are not acts of persecution for the purposes of this Part unless they are [...], and there is a connection between the reasons for persecution, as construed under section 65, and the acts of persecution as construed under this section”. This wording makes “for reasons of” part of the persecution definition, when in the 1951 Convention there are two separate elements *i.e.* “persecution” and “for reasons of”.

55. Article 9 of the Qualification Directive also has a reference to the reasons for persecution (Article 9), but is formulated without limiting the definition of persecution and tying the reasons into the definition of persecution. Article 9 (2) is formulated as follows. "In accordance with Article 2(c), [the refugee definition] there must be a connection between the reasons mentioned in Article 10 [also known as the grounds for persecution] and acts of persecution as qualified in paragraph 1". In other words the Qualification Directive makes the appropriate reference that for persecution to be relevant for *refugee status* it must be "for reasons of" one of the grounds in the definition. It does not limit the understanding of persecution itself. In other words, while all the elements of the definition must tie together, the presence or absence of a Convention ground does not alter the character of the acts of harm.

56. The consequence of the suggested wording in the Bill is that the legal analysis of protection claims in relation to each of the elements to consider for refugee status *i.e.* that the harm feared is persecution, that it is well founded and that it is for one of the reasons, will be further complicated, difficult to use and open to challenge.

Recommendation: UNHCR recommends that the reference to the reasons of persecution is left out of Section 64, as it is already found in the refugee definition, or as a minimum that the wording of the Qualification Directive Article 9(2) is relied upon.

Sur place claims

57. A person who was not a refugee when s/he left his country, but who becomes a refugee at a later date, is called a refugee *sur place*. A person becomes a refugee *sur place* due to circumstances arising in his or her country of origin during his/her absence or may become a refugee *sur place* as a result of his/her own actions. UNHCR welcomes that the Bill recognizes the possibility of a refugee claim *sur place* in Section 63 (4) and (5). UNHCR also welcomes that the Bill has not included Article 5(3) of the Qualification Directive in relation to *sur place* claims. Instead the Bill has limited the considerations of whether "a person engaged in activities for the sole or main purpose of creating the necessary conditions for applying for protection" to an assessment of facts and circumstances in relation to a claim - Section 63(1) (d).

Recommendation: The ultimate issue to be considered with regard to *sur place claims* is whether the applicant has come to the attention of the authorities in his or her home country and would be at risk of persecution.

Refugee definition – exclusion

58. Articles 1 D, E and F of the 1951 Convention exhaustively list the situations where, regardless of whether a person falls within the refugee definition, the person may nevertheless be excluded from refugee protection, either because the person is receiving protection or assistance from a UN Agency other than UNHCR, or because he[she] is not in need or not deserving international protection. In the Bill, exclusion to refugee status is dealt with in Section 66, but other parts of the Bill are also introducing standards of *de facto* exclusion. Such as Section 61 where EU nationals are barred from having their case heard. Since Articles 1 D, E and F are exhaustive; any broadening of the conceptual framework and scope of the exclusion provisions would be a contravention of the 1951 Convention. Although these provisions are subject to interpretation, they can not be however supplemented by additional criteria in the absence of an agreement by State Parties. UNHCR is concerned that the Bill suggests alterations to all three of the exclusion clauses of the 1951 Convention.

59. Section 66(1)(a) and Section 66(6) covers the situation outlined in Article 1 D of the 1951 Convention, which particularly refers to persons falling within the protection and assistance mandate of UNRWA for Palestinian refugees. The objective of Article 1D of the 1951 Convention is to avoid overlapping competencies between UNRWA and UNHCR, but also, in conjunction with UNHCR's Statute, ensures the continuity of protection and assistance of Palestinian refugees as necessary. The fact that a Palestinian falls within paragraph 2 of Article 1D (automatic inclusion) does not necessarily mean that s/he cannot be returned to UNRWA's area of operations. Reasons not to return may be a danger of persecution or other serious protection related problems or his/her inability to return, for example, because the authorities of the country concerned refuse readmission.¹⁰

60. Section 66(6) does not replicate paragraph 2 of Article 1D, the automatic inclusion, but simply makes an exception to the exclusion of persons getting UNRWA assistance and protection.

Recommendation: UNHCR recommends that the line “these persons shall *ipso facto* be entitled to the benefits of refugees recognised under this Act” is added to Section 66(6) in line with the 1951 Convention.

61. Section 66(1) (b) refers to the exclusion clause of Article 1E of the 1951 Convention excluding a person “who is recognised by the competent authorities of the country in which s/he has taken residence as having the right and obligations which are attached to the possession of the nationality of that country”. The rationale for this exclusion is that such persons would not be in need of international protection as they already have the rights and obligations which are attached to the possession of the nationality of that country. UNHCR is concerned that Section 66(1) (b) extends the scope of this exclusion clause by adding to the definition persons who have “rights and obligations equivalent to those”.

62. A similar formulation is found in the Qualification Directive Article 12(1) (b) for which UNHCR had the following comments “It should be noted that Article 1E applies only to cases where the person is *currently* recognized by the country concerned as having these “rights and obligations”. If the country granted such rights in the past but is no longer willing to do so, Article 1E does not apply. Similarly, Article 1E does not apply to the claims of individuals for whom the potential for such enjoyment of right exists, but who have never resided in that country”.

Recommendation: The final Act should ensure that language employed in Section 66 (1) (b) be consistent with the language of Art. 1E of the 1951 Convention.¹¹

63. Section 66(2) reflects Article 1F of the 1951 Convention outlining the three situations where a person can be excluded from refugee protection because of acts

¹⁰ For further information, UNHCR recommends that States consult UNHCR's “Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees” of October 2002, when interpreting this provision. See <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3da192be4>.

¹¹ See UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 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 (OJ L 304/12 of 30.9.2004), 28 January 2005, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4200d8354>.

committed that render him [her] not deserving of such protection. Due to the serious implication of such exclusion, Article 1F must be interpreted restrictively. Section 66(2) (b) however seem to broaden the scope of exclusion in relation to a person “who has committed a serious non-political crime outside the State” by conditioning the commission of such act to be “prior to the grant of a protection declaration”.

64. The phrase “prior to the grant of a protection declaration” is not in line with the wording of Article 1F(b) of the 1951 Convention, which limits the exclusion of such persons to those who have committed the said act prior to the “admission to the country as a refugee”. The temporal limitation established in the 1951 Convention cannot be interpreted as referring to the time preceding the recognition of refugee status, or “the granting of a protection declaration” as stated in Section 66(2) of the Bill. UNHCR is concerned by such formulation, as it would imply that any serious non-political crime committed before formal recognition as a refugee would lead automatically to the application of Article 1F(b) . Given that the recognition of refugee status is declaratory, not constitutive, “admission” in this context includes mere physical presence in the country of refuge. Such an interpretation is based on the rationale that serious crimes committed in the country of refuge after admission are considered in the context of Articles 32 and 33(2) of the 1951 Convention, rather than in the context of the exclusion clauses.

Recommendation: UNHCR recommends reformulating Section 66(2) (b) to read “has committed a serious non-political crime outside the State prior to the admission to the State as a refugee”.

65. Section 66(2) (c) also broadens the scope of the exclusion clause found in Article 1F(c) by adding specific parts of the United Nations Charter to consider when assessing whether a person is guilty of acts contrary to the purposes and principles of the United Nations. UNHCR has the following observation in relation to the interpretation of Article 1F(c) and would suggest that this reference to Article 1 and 2 of the United Nations Charter is deleted.

66. It is UNHCR’s understanding that only those criminal acts which are contrary to the purposes and principles of the United Nations in a fundamental manner may trigger the application of Article 1F(c). The purposes and principles are set out in Articles 1 and 2 of the United Nations Charter and relate to international peace and security, and peaceful relations between States. However, the broad and general terms of Articles 1 and 2 of the Charter of the United Nations, which set out its purposes and principles, offer little guidance as to the criminal acts which could exclude a person from refugee status through the application of Article 1F(c) of the 1951 Convention. Whether or not a particular crime comes within the scope of Article 1F(c) will also depend on its impact and gravity on the international plane. Therefore Article 1F(c) should be interpreted restrictively in light of the gravity of the consequences of exclusion from refugee protection.

Recommendation: UNHCR recommends that changes be made to Section 66 of the Bill to bring the wording in line with the 1951 Convention and the formulation “as set out in the Preamble 20 and Articles 1 and 2 of the Charter of the United Nations” be deleted from Section 66(2) (c) of the Bill.

Exclusion from Subsidiary Protection

67. Exclusion from subsidiary protection is dealt with in Section 66(3) and (4). These sections contain five grounds for which a person who otherwise fulfils the requirements for subsidiary protection contained in the definition (Section 61) may

nevertheless be excluded from the protection offered under the Act. In other words these persons are persons for whom substantial grounds have been demonstrated that they will face a real risk of suffering serious harm, such as torture, execution or the threats to life flowing from an international or internal armed conflict, but will nevertheless not be given a protection-permission in the State.

68. The five grounds for exclusion are;
1. if the person has committed a crime against peace, a war crime, or a crime against humanity;
 2. if the person has committed a serious crime;
 3. if the person has been guilty of acts contrary to the purposes and principles of the United Nations;
 4. if the person constitutes a danger to the community or to the security of the State
 5. if the person prior to the admission to the State, committed one or more crimes not consisting of a "serious crime" as mentioned above, which would be punishable by imprisonment had it or they been committed in the State and if in the opinion of the Minister or the Tribunal the person left the country of origin in order to avoid sanctions resulting from that or those crimes.

69. Keeping in mind the serious consequences of excluding a person who is in need of protection, UNHCR argues that, as with any exception to human rights guarantees, the exclusion clauses must always be interpreted restrictively and used with great caution. The rationale for the exclusion clauses in the 1951 Convention is twofold. Firstly, certain acts are so grave that they render their perpetrators undeserving of international protection as refugees. Secondly, the refugee framework should not stand in the way of serious criminals facing justice. Given the close linkages between refugee status and subsidiary forms of protection, in so far as they cover persons under UNHCR's mandate for persons in need of protection, UNHCR considers that the exclusion clauses in relation to subsidiary protection should be similar to those for refugees.

70. UNHCR is therefore concerned with the broad wording of these exclusion clauses in the Bill, in relation to subsidiary protection. In particular UNHCR is concerned with Section 66(3)(b) which excludes a person from subsidiary protection if he or she "has committed a serious crime". The provision does not specify where and when the serious crime has been committed; neither requires the qualification that the crime has to be non-political. Similarly UNHCR is concerned with Section 66(4). Under this section, a person may be excluded from subsidiary protection if "prior to his or her admission to the State, s/he committed one or more crimes not consisting of a "serious crime" as mentioned above, which would be punishable by imprisonment had it or they been committed in the State, and if in the opinion of the Minister or the Tribunal the person left the country of origin in order to avoid sanctions resulting from that or those crimes".UNHCR recommends that this exclusion clause be taken out of the final Act and would also like to mention that the State's obligations under international human rights law with regard to *non-refoulement* continue to apply in such cases.

<p>Recommendation: The wording of Section 66 (3) should mirror the one in place for refugees and be in line with the 1951 Convention. Section 66(4) should be deleted. If Section 66(4) is kept in its current formulation, UNHCR considers that it should be understood to refer to crimes punishable in Ireland by imprisonment only.</p>
--

Procedure

71. It has 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. The key purpose of the refugee status determination procedure is to determine whether a person seeking refugee protection is a person who falls within the scope of the 1951 Convention and therefore is entitled to the protection and rights in this Convention. Similarly, the purpose of the second part of the single procedure is to determine whether a person seeking protection falls within the scope of subsidiary protection as set out in the Qualification Directive and therefore be entitled to the protection and rights outlined in the Directive and transposed in the national legislation.

72. 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/01/12.¹² Some of the concerns UNHCR has with the proposed Act are based on the findings found in this document.

73. The issues, in the Bill, of concern to UNHCR in relation to a fair and efficient procedure for establishing protection relates to a number of different sections and falls in three main areas: firstly, provisions which deals with establishing the facts of the claim, standards and burden of proof; secondly, provisions, which deal with the specific aspects of the procedure such as appeal procedures, interpretation and information; and, thirdly, provisions, which concern issues of natural justice and equality of arms in legal procedures, such as access to information on the case, impartiality and transparency of procedures.

Provisions, which deals with establishing the facts of the claim, standards and burden of proof

74. According to general legal principles of the law of evidence, the burden of proof lies on the person who makes the assertion. Thus, in refugee claims, it is the applicant who has the burden of establishing the veracity of his/her allegations and the accuracy of the facts on which the refugee claim is based. The burden of proof is discharged by the applicant rendering a truthful account of facts relevant to the claim so that, based on the facts; a proper decision may be reached. In view of the particularities of a refugee's situation the adjudicator shares the duty to ascertain and evaluate all the relevant facts.

75. Section 75 of the Bill sets out that the principle in relation to the burden of proof is that the applicant shall establish that s/he is entitled to protection, but specifies that the Minister and the Tribunal shall cooperate with the applicant in assessing the relevant elements of the protection application. Section 75 also refers to Section 63(8) which gives guidance on how the applicant can lift this burden where no documents in support of his or her statement are available. There is one important exception to Section 75 in Section 62(3).

76. Section 62(3) increases the burden of proof for three categories of applicants by introducing a presumption that persons falling in these groups are not in need of protection. This presumption concerns persons who have residence rights in a

¹² See <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain/opendocpdf.pdf?docid=3b36f2fca>.

country designated as a safe country of origin set out in Section 102, persons who have lodged a prior application for protection in another state party to the Geneva Convention and persons who have protection status in a country outside the EU and has not left or fear return based on prosecution or serious harm. In other words for persons falling in these categories it is not enough to rendering a truthful account of facts relevant to the claim so that, based on the facts, a proper decision may be reached, they have to provide additional evidence to show that they have reasonable grounds for asking for protection.

77. While UNHCR does not object in principle to the use of the notion of “safe” country of origin as a procedural tool to assign these applications to accelerated procedures, UNHCR has explicitly recommended that the use of this as a procedural tool does not increase the burden of proof for the asylum-seeker and that it remains essential to assess each individual case fully on its merits. Similarly the burden of proof should not be higher for an applicant simply because s/he has lodged a prior protection application in another state party to the Geneva Convention or has been recognized as a refugee under the Geneva Convention by a non EU State. In the former case UNHCR is concerned that the State can refuse an applicant protection status in the State without regards to whether that person can return and be readmitted to a fair and efficient protection procedure in the state where the prior application was lodged.

Recommendation: All three categories of applicants mentioned in Section 62(3) should be considered on the merits of their claim like other applicants.

78. While UNHCR is overall satisfied with the standards on Burden of Proof in Section 75 and 63(8) UNHCR is concerned about Section 63(8)(d) which provides that a statement made by an applicant shall *require additional proof* if the applicant cannot show that s/he applied for protection at the earliest possible time.

Recommendation: UNHCR points out that a late submission by the applicant should not increase the burden of proof for the applicant.

79. Another important aspect of fair procedures is the assessment of credibility of an applicant. It is generally acknowledged that due to the specific circumstances of protection applications not all statements can be supported by documentary evidence. As mentioned above the applicant must make genuine efforts to substantiate his or her claim and when the applicant’s statements are found coherent and plausible and not contrary to generally known facts the benefit of doubt is applied where other evidence than the applicant statements is lacking.

80. Issues of establishing and assessing the facts and credibility of a protection applicant in the State is dealt with in Section 63 on assessment of facts, Section 76 concerning credibility and Section 77 regarding the duty to cooperate as well as Section 108(6) specifically concerning the duty to cooperate in relation to biometrics information.

Recommendation: UNHCR recognizes the legitimate concern of the State to ascertain whether a claim for protection is made in good faith or whether it is made in bad faith to mislead and circumvent immigration control measures. However in assessing a persons’ credibility UNHCR recommends an approach whereby an individual assessment of all the relevant and personal circumstances are factored in to the determination.

81. As mentioned above the duty to ascertain and evaluate all the relevant facts should be considered a joint responsibility. This also applies generally, including in cases where there are inconsistencies or contradictions, where an applicant's story appears unlikely, or insufficiently substantiated. An attempt should be made to resolve inconsistencies and contradictions, although minor inconsistencies or contradictions on issues irrelevant to the substance of the claim should not affect the credibility of the applicant. The fact that an applicant's claim is 'unlikely' does not necessarily mean that it is not true. In UNHCR's experience, claimants with seemingly unlikely histories may, nonetheless, be confirmed as refugees. As regards insufficiencies in submissions, there may be limits to what the asylum-seeker is able to submit. Persons in need of international protection may arrive with the barest necessities and frequently without any documents. In such situations, examiners should use all the means at their disposal to search for the necessary evidence in support of the application. Similarly, it should be kept in mind that certain information not found relevant to the claim by the applicant may be withheld for reasons not relating to bad faith, but to reasons to do with more subtle human and psychological factors. This is for instance often the case in relation to information regarding the travel to the State where the applicant may fear reprisals from smugglers if certain information is provided.

Recommendation: UNHCR suggests introducing the following wording in the final Act in Section 63 and Section 76 "In the application of this section due regard shall be had to the specific situation of the individual and vulnerable persons such as persons under the age of 18 years (whether or not unaccompanied), disabled persons, elderly persons and persons who have been subjected to torture, rape or other forms of psychological, physical or sexual violence".

82. Most importantly, each case should be determined individually, on its merits. In particular, decision makers should take into account that trauma and mental illness, feelings of insecurity, or language problems may result in apparent contradictions or insufficient substantiation of claims. If the applicant has made a genuine effort to substantiate his or her claim and cooperate with the authorities in seeking to obtain available evidence, and if the examiner is consequently satisfied as to the applicant's general credibility, the applicant should be given the benefit of doubt.

Recommendation: UNHCR recommends that a specific reference to the principle of the benefit of doubt is made in the final Act.

Provisions, which deal with the specific aspects of the procedure.

83. In relation to provisions dealing with specific aspects of the procedure UNHCR has observations in relation to provisions concerning information and interpretation provided for the applicant and in relation to different procedures for different categories of applicants.

84. It is a well established principle of fair procedures that a person is informed in a language which s/he understands. Section 73(4), Section 73(17) and Section 85(5) all deal with the issue of interpretation in relation to the protection determination procedure using the following wordings: "An interview shall, where necessary and practicable, be conducted with the assistance of an interpreter". The Minister shall give or cause to be given to the applicant a statement in writing specifying, where practicable in a language that the applicant understands" and "An oral hearing shall, where necessary and practicable, be conducted with the assistance of an interpreter

who is able to ensure appropriate communication between the person being interviewed and the interviewer”.

Recommendation: UNHCR welcomes that Section 85(5) places emphasis on ensuring appropriate communication and would recommend that a similar formulation is used in relation to Section 73(4). UNHCR also recommend that the word “where practicable” be removed, as failure to provide the information in a language that the applicant understands undermines the purpose of the provision. UNHCR has similar concern in relation to Section 23(9) regarding information provided by the immigration officer about the protection application procedure, Section 68(9) regarding permission conditions and requirements, Section 70(7) concerning permit conditions and requirements and would make the same recommendation for these cases.

85. UNHCR welcomes the provisions in the Bill specifying that a protection applicant shall be given information about the procedure and the right to consult a solicitor and communicate with the High Commissioner. Such information shall be provided by the Immigration Officer in accordance with Section 23(9) and by the Minister in accordance with Section 73(17). UNHCR is however concerned that a reading of Section 73(17) seems to outline that information by the Minister in the form of a written statement shall be given only *after* receipt of a protection application, even though Section 73(14) outlines some requirements for the form of such an application, which occur prior to the statement with the information.

Recommendation: UNHCR recommends that a protection applicant is given all the relevant information necessary in a language that s/he understands *before* s/he makes the protection application.

86. UNHCR takes note that the Bill provides for three different appeals procedures depending on the outcome of the determination made by the Minister pursuant to Section 79. Section 84(1) and (2) provide that an applicant found not to be in need of protection can appeal within 15 working days and can request an oral hearing. If however, the Minister made any findings in relation to Section 79(3) in connection with the rejection of the protection application then Section 81(7) provides that the applicant can appeal within 10 working days and cannot request an oral hearing.

87. The findings under 79(3) relates in UNHCR’s view to two distinctly different types of findings. The first type of findings relate to the basis of the claim and the statements made by the applicant, both of which may indicate that there is a minimal basis for a protection need. UNHCR has in principle no concerns with an accelerated procedure for this type of cases.

88. The second type of findings are however not related to the merits of the claim but to more procedural issues such as; compliance with permission requirements, failure to provide documents in support of a claim or time of submission of the application and concepts such as “safe country of origin” and “safe third country” notions. UNHCR would not consider the factors, such as the fact that a person has lodged an application in a country outside the EU who is party to the 1951 Convention, in themselves an indication of any particular lack of merits of the protection claim.

Recommendation: UNHCR would recommend that only the first type of findings, i.e. those relating to the substance of the claim, be included in Section 81(7) procedures.

89. The third type of procedures is outlined in Section 82(1) and covers the same situations as found in Section 81(7), but when the Minister in addition has proscribed different procedures for the investigation of the class of applications in accordance with Section 74(19). In such cases, Section 82(2) provides a 4 working day deadline for submission of an appeal and no possibility to request an oral hearing.

Recommendation: In UNHCR's view a 4 working day time limit may not be sufficient to ensure a fair hearing.

90. In relation to special procedures UNHCR has some concern with Section 89 regarding further protection applications. Section 89(2) provides that the Minister makes a preliminary examination to consider admissibility of a further application. UNCHR agrees in principle that further applications can be subjected to a preliminary examination (an admissibility procedure in this case the Minister's discretion) to examine whether new elements have arisen which would warrant examination of the substance of the claim. Such an approach would permit the quick identification of further applications which do not meet these requirements. However, in UNHCR's view, such a preliminary examination is justified only if the previous claim was considered fully on the merits.

Recommendation: UNHCR recommends not to treat claims as further applications, if they are submitted following a 'rejection' based on explicit or implicit withdrawal of an earlier claim, which is the included in Section 89(1)(a) and (c).

Provisions, which concern issues of natural justice and equality of arms in legal procedures.

91. Natural justice and equality of arms are well established principles of fairness in legal and administrative procedures. Relevant considerations include having a claim heard by an impartial body, that both parties have equal access to information on the case and to relevant law, rules and regulations as well as the principle of non-discrimination form part of this concept. UNHCR's concerns in relation to the Bill are threefold; firstly, in relation to the impartiality of the procedures, secondly, in relation to equal access to information on the file and to rules and procedures and thirdly other provisions which in UNHCR's view may infringe on the fairness of the procedure.

92. UNHCR takes note of and welcomes the mentioning in Section 91(3) that the Tribunal shall be inquisitorial in nature and independent in the performance of its functions. However, UNHCR would also like to see a reference that the Tribunal shall be impartial, and is concerned that its impartiality and independence could be affected by the fact that part time members can be appointed by the Minister, as stipulated in Section 92(4). This concern also related to Section 96 whereby the Minister can direct the Tribunal to prioritise certain applications. While there may be legitimate reasons of efficiency for introducing this; the criteria outlined in Section 96(2) seem to be a mix of objective criteria and criteria relating to the Minister's findings under Section 79.

Recommendation: UNHCR recommends introducing a clear reference in the final Act that the Tribunal shall be impartial and UNHCR considers that prioritization of

applications should only be possible when based on objective criteria such as country of origin, family relationship, age of the applicant etc.

93. UNHCR welcomes the possibility for the Chairperson of the Tribunal in Section 93(7) to make provisions for training programmes for members of the Tribunal. The Procedures Directive Article 8 stipulates that “the personnel examining applications and taking decisions have the knowledge with respect to relevant standards applicable in the field of asylum and refugee law”. Considering that Section 92(2) does not require that members of the Tribunal have experience in protection matters UNHCR would suggest that the Bill includes provisions to ensure compliance with Article 8 of the Procedures Directive.

Recommendation: Section 93 (6) or (7) are amended to ensure that the Chairman can call on members to attend, not only meetings, but training events arranged for the Tribunal members.

94. In relation to equality of arms, UNHCR notes the possibility for the Minister in Section 74(18) to prescribe different procedures for the investigation of different classes of applications. UNHCR is concerned that Section 74(18) contains no indication of the criteria to be used to identify the different classes and no reference to how this is to be communicated to the relevant parties. This section is found to be too generally worded considering the potential consequences of its application. UNHCR is also concerned that Section 81(4) and Section 86(2)(a) allow the Minister to withhold information regarding the file from the applicant and the Tribunal based on “*ordre public*” considerations. While it is well appreciated that certain sources of information may not be disclosed, the actual information, if relied upon for the determination of a protection application, should be disclosed as part of fair procedures. Similarly, UNHCR would be concerned that Section 93(3) gives the chairman of the Tribunal the possibility of issuing guidelines on practical application and operation of the provisions, without these guidelines be made public or shared with the High Commissioner. A final point in relation to the equality of arms relates to Section 95 concerning access to previous decisions. UNHCR finds that the procedures to access previous Tribunal decision lacks clarity and transparency and considers that decisions should be made available with the least restrictions possible ensuring client confidentiality.

Recommendations: Reword Section 74(18) to indicate criteria identifying the different classes of applications and respective communications to the relevant parties; clarify in Section 81(4) and Section 86 (2) that information relied upon for the determination of a protection application should be disclosed to the parties; clarify in the final Act that Guidelines to be issued by the chairman of the Tribunal should either be made public or at least be shared with the High Commissioner; review Section 95 to ensure that previous Tribunal decisions be made available in a clear and transparent procedure.

95. In relation to other provisions which may infringe on the fair procedure standards, UNHCR has concerns in relation to Section 90 which provides that the Minister or the Tribunal can require that an applicant attends a medical practitioner nominated by the Minister if during the investigation an issue of the applicant’s physical or psychological health arises. UNHCR would like to comment that non-compliance with a requirement to see a medical practitioner does not necessarily give an indication of the substance of the claim. There may be a variety of reasons, including cultural sensitivities, why asylum-seekers may refuse to see a medical

practitioner for certain physical and psychological issues. This is even more so if this is not a medical practitioner of the applicants own choice. While such a refusal may be taken into account as one element amongst others when assessing the credibility of the claim UNHCR does not support that such examination can be made a requirement.

96. The Bill does not specify the purpose of the examination other than when an issue of an applicant's physical or psychological health arises. The United Nations Istanbul Protocol of 2001 deals with best medical practices in relation to issue of torture and outlines some of the principles common to all codes of health-care ethics. Such principles include informed consent to medical examination and confidentiality. Paragraph 63 specifies "In cases where examination is not primarily for the purposes of providing therapeutic care, great caution is required in ensuring that the patients knows and agrees to this and that it is in no way contrary to the individual's best interest". Even further safeguards are included should the examination be used for evidential purposes.

Recommendation: That Section 90 is amended to remove the possibility for the Minister and the Tribunal to require an examination on such general basis.

97. UNHCR also has some concern with Section 106 in relation to the sharing of information by information holders if so requested. This is of particular concern where the Health Service Executive is the information holder, but is also the guardian of a separated child. The role of a guardian must be build on trust and confidentiality, which would be jeopardized if the Health Service Executive representative can be required to give information to the Minister or other information holders.

Recommendation: Section 106 should contain a clarification as to the information sharing duties of information holders that are acting as guardians of separated children.

98. UNHCR has concerns in relation to issues of natural justice and Section 73 (13). This section stipulates that a protection application made by a foreign national shall be considered to have been made on behalf of all his or her dependants who are under the age of 18 years. It further specifies: "whether present in the State at the time of the making of the application or born or arriving in the State subsequently". UNHCR supports the inclusion of all dependants of an applicant whether under or above the age of 18 and has advocated for a full investigation of the protection needs of all family members arriving in the State as well as for granting derivative protection status to such family members. However, UNHCR has concern with the inclusion in Section 73 (13) of dependants who are not in the State or are not yet born.

99. UNHCR considers that it would not be possible for the Minister or the Tribunal to assess the well founded fear of persecution or risk of serious harm for persons who are not in the State. Families often get separated during conflict or when some of its members are persecuted and have to flee. An application in the State by such family members cannot cover events of persecution or serious harm suffered by family members after the applicant left. It follows from natural justice that applications made by family members arriving at a later date are assessed on the basis of the merits of their claim. UNHCR also considers that Article 8 (2) (a) of the Procedures Directive requires that the person is in the State for "applications to be examined and decisions taken individually, objectively and impartially;"

Recommendation: The last paragraph, as quoted above, of Section 73(13) is deleted.

100. Finally UNHCR is concerned with the lack of suspensive effect of Judicial Review procedures for persons who are challenging a transfer under the Dublin II Regulation or to a country designated as a Safe Third Country (Section 118(9)). If an applicant is not permitted to await the outcome of a judicial review proceeding in the territory of the Member State, the remedy against a decision is ineffective.

Recommendation: The principle of suspensive effect should in UNHCR's view be observed in all cases, regardless of whether a negative decision is taken in an admissibility procedure instituted for the application of the 'safe third country' concept or in a substantive procedure.

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

101. As mentioned above the main purpose of the refugee status procedure is to determine who are refugees and therefore benefits from the provisions of the 1951 Convention, or as the case may be who is entitled to subsidiary protection and therefore benefits from the provisions in the Bill in relation to this protection status. UNHCR's concerns with the Bill in relation to the ensuring that refugees fully enjoy the rights in accordance with the 1951 Convention fall in five main parts: firstly, in relation to provisions regulating the issuance, revocation and renewal of the protection declaration and permission; secondly, in relation to the use of detention; thirdly, in relation to the rights of refugees; fourthly in relation to non-discrimination; and, finally in relation to penalties for illegal entry or presents in the State.

Issuance, Cessation, Revocation, Cancellation of a Refugee Declaration/Permission

Recommendation: In UNHCR's view, once a determination has been made by the Minister under Section 79(2) or the Tribunal under Section 88(2) that a person is a refugee or as the case may be is entitled to subsidiary protection in the State, further issues relating to the protection status, the granting of a protection declaration and the issuance of a protection permission should only be considered in relation to cessation, revocation or cancellation as outlined below.

102. *Cessation* refers to the ending of refugee status pursuant to Article 1C of the 1951 Convention because international refugee protection is no longer necessary or justified. *Cancellation* means a decision to invalidate a refugee status recognition, which is appropriate where it is subsequently established that the individual should never have been recognized, including in cases where he or she should have been excluded from international refugee protection. *Revocation* refers to the withdrawal of refugee status in situations where a person properly determined to be a refugee engages in conduct which comes within the scope of Article 1F(a) or (c) of the 1951 Convention after recognition. UNHCR requests states to differentiate between these concepts and their legal requirements in the implementing legislation.

103. In the Bill, Section 97(1) stipulates that the Minister shall grant a person who is found to be entitled to protection in the State as a refugee or a person eligible for subsidiary protection with a protection declaration. Section 97(3)(d) outlines that a person who has a valid protection declaration shall be given a three year protection permission. Section 98 further elaborates that when the Minister grants a protection permission the Minister shall issue a protection permit. UNHCR is concerned where

the Bill introduces exceptions to this regime or provisions which *de facto* limits the scope of the refugee status.

104. Such concern is relevant in relation to Section 97(7) which is an exception to Section 97(1). Section 97(7) outlines that the Minister may refuse to grant a protection declaration where the applicant is a danger to the security of the State or the applicant having been convicted of a particularly serious crime by final judgment; whether in the State or not, constitutes a danger to the community of the State.

105. This exception runs the risk of introducing substantive modifications to the exclusion clauses of the 1951 Convention, by adding the provision of Article 33(2) of the 1951 Convention (exceptions to the *non-refoulement* principle) as a basis for not granting a person otherwise found to be a refugee, a refugee declaration. Under the Convention, the exclusion clauses and the exception to the *non-refoulement* principle serve different purposes. The rationale of Article 1F which exhaustively enumerates the grounds for exclusion based on the conduct of the applicant is twofold. Firstly, certain acts are so grave that they render their perpetrators undeserving of international protection. Secondly, the refugee framework should not stand in the way of serious criminals facing justice. By contrast, Article 33(2) deals with the treatment of refugees and defines the circumstances under which they could nonetheless be refouled. It aims at protecting the safety of the country of refuge or of the community. The provision hinges on the assessment that the refugee in question is a danger to the national security of the country or, having been convicted by a final judgement of a particularly serious crime, poses a danger to the community. Article 33(2) was not, however, conceived as a ground for terminating refugee status.

Recommendation: Assimilating the exceptions to the *non-refoulement* principle permitted under Article 33(2) to the exclusion clauses of Article 1 F would be incompatible with the 1951 Convention. UNHCR recommends that the wording in the Bill, notably with regard to Section 97 (7), is brought inline with the 1951 Convention.

106. As mentioned above, once a protection declaration has been made the person shall be granted a protection-permission and on the basis of this a protection permit is issued (Section 98). The protection permission can be renewed after three years as outlined in Section 101, if the application is made 21 days before the expiry of the permission in the form of a valid application. The permission shall be renewed unless compelling reasons of public security, public policy or public order "*ordre public*" otherwise require. UNHCR has the same concern with this provision in relation to the potential of not renewing a protection declaration, as expressed above, *i.e.* that this provision risks introducing a *de facto* modification to the exclusion framework of the 1951 Convention. This is further compounded by the lack of clarity in relation to what can be considered "*ordre public*" requirements. While UNHCR acknowledges that it is not the protection declaration which is in question in relation to Section 101, it is worth recalling that the lack of a valid permission to be in the State means that the person is unlawfully in the State and can be detained and removed (Section 4). In other words the lack of complying with the 21 day rule can lead to a refugee being unlawfully in the State and be removed irrespective of his or her continued protection need.

Recommendation: Clarify unambiguously that the mere non-compliance with the 21 day rule of Section 101 shall not lead to the removal of a protected person from the State. UNHCR considers that the "*ordre public*" notion is not sufficiently clear to base on it any measures covered by articles 32 and 32 (2) of the 1951 Convention, hence reference to it should be avoided in this context.

107. Section 99 and 100 deal with revocation, as defined in the Bill, of a protection declaration. The term revocation in the Bill is used to cover the three situations outlined above *i.e.* cessation, revocation and cancellation. Section 99 stipulates that the Minister shall revoke where the person should have been or is excluded from protection under Section 66. This formulation seems to cover both issues of *revocation*, as defined above, *i.e.* withdrawal of refugee status in situations where a person properly determined to be a refugee engages in conduct which comes within the scope of Section 66 on exclusion; and *cancellation i.e.* where a person should never have been recognized, including in cases where he or she should have been excluded from international refugee protection.

108. Apart from UNHCR's concern with Section 66 outlined above, UNHCR would like to add that the language "is excluded from protection under Section 66" is understood to refer to a situation where refugee status can be ended or revoked because a refugee has committed a crime within the scope of Article 1F(a) and 1F(c) of the 1951 Convention after recognition (Section 66 (2) (a) and (c)). *Revocation*, as defined above, on the basis of Article 1F(a) or 1F(c) is permitted, as neither of these clauses contain a geographical or temporal limitation. For crimes other than those falling within the scope of Article 1F(a) or 1F(c), criminal prosecution would be foreseen, rather than revocation of refugee status. As noted above, Article 1F(b) (Section 66(2) (b)) specifies that the serious, non-political crimes must have been committed outside the country of refuge prior to admission. The logic of the Convention is that the type of crimes covered by Article 1F(b) committed after admission would be handled through rigorous domestic criminal law enforcement, as well as the application of Articles 32 and 33(2) of the 1951 Convention, where necessary. Neither Article 1F(b) nor Article 32 or 33(2) provides for the loss of refugee status of a person who, at the time of the initial determination, met the eligibility criteria of the 1951 Convention. On the other hand Section 99 may lead to *cancellation* based on Article 1F(b) if the person should never have been recognized because of acts falling within Article 1F(b).

Recommendation: Ensure that the wording of Sections 99 and 66 makes clear distinction between revocation/cancellation of refugee status on the one hand, whereby a person loses his/her refugee status, and expulsion measures against recognized refugees in line with Articles 32 or 33(2) of the 1951 Convention on the other, and which should not entail loss of refugee status (but may lead to refugees convicted of serious non-political crimes committed after admission being expelled). UNHCR would recommend appropriate changes to bring the provisions inline with the 1951 Convention.

109. Section 99 also stipulates that the Minister shall revoke when the person ceased to be a refugee or a person eligible for subsidiary protection. The grounds for cessation are outlined in Section 67. The 1951 Convention Article 1C outlines the situations where the protection of the Convention ceases to apply to a person. UNHCR is satisfied that the provisions in Section 67 are in line with the 1951 Convention.

110. Finally, Section 99 (1)(c) also stipulates that the Minister shall revoke where misrepresentation or omission of facts, including the use of false documents, by the person was decisive for the granting of protection. This provision would be a case of cancellation to which UNHCR has the following observation: Misrepresentations or omission of facts, including the use of false documents, can only serve as a basis for cancelling refugee status if this amount to objectively incorrect statements by the

applicant which relate to material or relevant facts (that is, elements which were clearly instrumental to the recognition) and if there was an intention on the part of the applicant to mislead the decision maker. The use of forged documents should also be assessed in light of the circumstances of the case: in many instances, asylum-seekers need to rely on false papers to flee persecution. The use of false documents does not of itself render a claim fraudulent and should not automatically result in the cancellation of refugee status, provided the person revealed his/her true identity and nationality and it has formed the basis of the recognition decision. The fact that refugees may sometimes be forced to make use of forged documents is also recognized by Article 31(1) of the 1951 Convention which exempts refugees (under specific conditions) from penalization on account of illegal entry into or stay in the country in which they apply for asylum.

111. While Section 99(1) above outlined the situations where the Minister shall revoke a declaration, Section 99(2) gives the Minister the possibility of revoking a declaration on the same grounds as outlined in Section 97(7) concerning security of the State and conviction of a particularly serious crime. UNHCR has similar concerns with this provision as made to Section 97(7) above.(cf. paragraph 101)

Recommendation: Reformulate Section 99 (2) to bring it in line with the 1951 Convention, notably its distinction between exclusion clauses on the one hand and exceptions from the *non-refoulement* principle on the other (cf. comments under paragraph 101.)

Detention

112. UNHCR would like to raise concern with the suggested use of detention for protection applicants. 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. UNHCR recommends that 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 non-discriminatory 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.

113. The Bill provides for detention relevant to protection applications in four situations;

1. by Immigration Officers of all foreign nationals at the frontier for investigation purposes (Section 23);
2. by Immigration Officers of protection applicants if it is not practical to issue a Protection Application Entry Permit (Section 70(2));
3. (Section 71 (1) (a)) by Immigration Officers or Garda Síochána of protection applicants suspected of:
 - a. posing a threat to public security or public order in the State;
 - b. has committed a serious non-political crime outside the State;
 - c. has not made reasonable efforts to establish his or her true identity;
 - d. intends to avoid removal from the State in the even of a transfer under the Dublin II Regulation;
 - e. intends to leave the State and unlawfully enter another State;
 - f. has without reasonable cause destroyed his or her identity or travel documents or is or has been in possession of forged, altered or substituted identity documents;

- g. if the application is made by a person who was unlawfully in the State and made the application for delaying the removal – other than those who made an application at the border;
 - h. Those who are making a further application at the time of removal because they are unlawfully in the country.
4. Section 4(6) a foreign national in the State for securing removal.

114. UNHCR would have concerns with Section 70(2), part of Section 71(1)(f) and parts of Section 4(6) as well as some of the provisions in relation to place of detention, length of detention and other procedural safeguards. In relation to Section 70(2) UNHCR would be concerned that a lack of capacity to deal with administrative requirements placed on the Immigration Officers to issue a Protection Application Entry Permit can lead to the detention of the applicant for an unspecified period *i.e.* “as soon as practicable”.

Recommendation: UNHCR recommends that the provision of 70 (2) is left out of the final Act as it would allow for detention of unspecified length for the sole reason of lack of administrative capacity.

115. In relation to Section 71(1) (f) UNHCR is concerned that the provision for detention of persons who “is or has been in possession of forged, altered or substituted identity documents” goes beyond the scope of Article 31(1) of the 1951 Convention. While it may be legitimate for an immigration officer to detain a person in order to verify identity where the person is lacking documents or is in possession of forged, altered or substituted identity documents, the mere fact that a person is or was in possession of such documents does not seem to warrant legitimate grounds for detention.

Recommendation: Adjust the wording of Section 71 (1) (f) so it is in line with Article 31 of the 1951 Convention to reflect that a protection applicant is not to be detained for the mere possession of a forged, altered or substituted document.

116. Section 4(4) of the Bill sets out that a person unlawfully in the State shall leave the State and may be removed from the State. Section 4(6) further provides that a foreign national may be arrested, or arrested and detained, for the purpose of securing his or her removal. There are a number of situations where a protection applicant can become unlawful in the State but which nevertheless may not warrant or necessitate detention. This includes where a protection applicant is found not to be in need of protection or where an application is considered withdrawn.

Recommendation: UNHCR recommends that the Bill includes a sub-section specifically calling on an assessment of whether it is necessary and proportionate to detain in relation to Section 4(6).

117. In relation to the provisions on detention, UNHCR is also concerned with some of the safeguards of these provisions such as: the right to be informed in a language the applicant understands; (see comments above) and, time limitations for the detention and judicial review.¹³ Section 55 relates to detention in relation to

¹³ Article 5(2) of the European Convention of Human Rights: “Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charges against him”.

removal of foreign nationals. As shown above protection applicants may for various reasons be detained pending removal and thus Section 55 will apply.

Recommendation: UNHCR is concerned that detention under Section 55 is not under detention review before a judge and that a person can be detained without access to the court for up to 8 weeks pending removal. Protection applicants who are unlawful in the State as their protection application has been rejected or their claim is deemed to have been withdrawn shouldn't be measures as severe as detention without having been given adequate notice periods (see comments above).

118. While Section 55 deals with detention in relation to removal of a person unlawfully in the State, Section 70 and Section 71 permits the detention of a protection applicant in other circumstances. Section 70 allows for the detention of a protection applicant until a protection application entry permit can be issued. There are no time limitations for this detention which shall lawfully persist until a permit can be issued, which shall happen "as soon as practicable". There is no detention review before a judge of this detention which is authorized by information to the member in charge of the Garda Station or the Governor or the Immigration Officer in Charge. Similarly, Section 71 provides that a person detained under this provision shall be brought before a judge "as soon as practicable" (Section 71(3)) and that the person shall be informed of the cause for the detention "as soon as practicable" (Section 71(16)).

Recommendation: UNHCR recommends that more specific time limitations with regard to the duration of detention are introduced to Sections 70 and 71 of the final Act.

Penalties for unlawful entry and presence in the State

119. Article 31(1) of the 1951 Convention provides that: the State shall not impose penalties on refugees, on account of their illegal entry or presence, when coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in the territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

120. The Bill contains a number of provisions where unlawful entry and presence in the State is made an offence, without providing for specific exceptions in line with Article 31 of the 1951 Convention. This concerns Section 4(3) making it an offence to be unlawfully in the State, Section 19(2) making it an offence to enter through an unauthorized port, Section and 22(4) making it an offence not to be in possession of valid travel document when landing in the State.

Recommendation: UNHCR recommends that special exceptions are made to provisions where unlawful entry and presence in the State is made an offence, in line with Article 31 of the 1951 Convention.

Rights for refugees and persons with subsidiary protection

121. As mentioned above, UNHCR takes note and welcomes that the Bill foresees the same standards of rights for all persons issued a protection declaration, whether they are refugees or entitled to subsidiary protection, as outlined in Section 97. These rights include; the right to reside in the State, to travel, to seek and enter into employment, access education, medical care and social welfare benefits subject to the same terms and conditions as applies to Irish Nationals.

122. UNHCR notes however that the rights outlined in Section 97 are different from the rights outlined in the current Refugee Act 1996 Section 3 and do not specify the right to freedom of religion, rights to access the courts and rights to form and be a member of an association.

Recommendation: While rights such as the right to freedom of religion, rights to access the courts and rights to form and be a member of an association may be covered under applicable human rights legislation in the State, UNHCR would recommend that specific reference is made in the Bill to such rights, as they also form part of the 1951 Convention.

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

123. UNHCR published, in 2007, 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.

124. 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.

125. The concerns of UNHCR with the Bill in relation to integration are around two main areas; 1) length of a protection permission and renewal issues of such a permission; including the requirements of integration and language skill for long term residence permits and 2) issues concerning family members of protection applicants, including the absence of sections dealing with the procedures for applying for family reunification.

Protection Permission

126. In relation to residence rights, UNHCR welcomes that all persons granted protection will be given a three year Protection Permission (Section 97(3)(d)) and can subsequently apply for a Long Term Residence Permission as per Section 97(4) referring to Section 36.

127. Section 36 sets out the conditions for being given such a long term permission 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, and has during his or her presence in the State, been supporting himself or herself and any dependants without recourse to such publicly funded services as are prescribed, as well as being of good character.

128. It is specifically mentioned that the period spent as an asylum-seeker shall not be considered when calculating the 5 years (Section 36(5)(b)). This seems to indicate that a person holding a Protection Permission will have to have at least one subsequent extension before they can apply for long-term residency.

Recommendation: Permanent residence should be granted to persons holding a Protection Permission at the latest at the end of the initial three-year residence period.

129. UNHCR is also concerned with long term resident permission for 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. In particular UNHCR is concerned with the additional requirement made in Section 36(4)(c) (iv) of the applicant not to have had recourse to publicly funded services as are prescribed.

130. With regard to the latter 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 support themselves and their depends, not to mention their ability to return and reintegrate in case of an unsuccessful application. In particular, the length of 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 may impact the subsequent integration.

Recommendation: UNHCR would recommend Section 36(4)(c)(iv) be deleted and issues of reception conditions to be taken into consideration in relation to overall policies on integration.

Family

131. The right for a protection applicant to apply for his or her family to join him or her in the State is regulated in Section 50 of the Bill. UNHCR has some comments in relation to Section 50 concerning: family rights in the country; the definition of family; as well as to the lack of clear specifications of how to initiate a family reunification procedure.

Recommendation: UNHCR suggests that it is understood that an investigation under 50(4) which requires that the Minister is satisfied that the person is a family member, shall look at all relevant information and not rely solely on documentary evidence which may be difficult to obtain considering the particular circumstances of protection applicants

132. In relation to Section 50, UNHCR welcomes that the Bill gives the same entitlements to a family member as to the holder of the protection declaration. 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. Also families, which have

been founded during flight or upon arrival in the Asylum State, need to be taken into account.

Recommendation: 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.

133. 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. Recent practices in the State has been to allow family reunification for children of a person with a protection status in the State without allowing the spouse or “the other parent of these children” to accompany them, because the couple was not formally married or their married is not considered valid in the State. Such practices would not be in line with the principle of family unity.

Recommendation: In line with the principle of family unity, the final Act should ensure that all immediate family members are permitted to enter and reside when they formed a family unit before or during flight and that partnerships in accordance with the law of the country of origin or marriage which took place in the State are included in Section 50.

134. 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.

Recommendation: Considering the current difficulties with the visa application 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. Specific exceptions to parts of the visa sections if applicable to family reunification and the possibility to appeal or have a review of a decision not to grant family reunification.

135. UNHCR's position is that 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.

Recommendation: 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 or another residence permission.

136. 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.

Recommendation: UNHCR suggests that refugees 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.

137. Specific consideration in relation to family reunification for separated children has been mentioned below.

vii. Other groups

Children

138. 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).

139. UNHCR would like to welcome some of the special considerations for children outlined in the Bill including: the general exception to detention before removal Section 58; exception to detention under Section 71(1) as stipulated in Section 71(7); the notification of the Health Service Executive specified *inter alia* in Section 24(1), 58(3), 71(9), 73(6) and (8), 74(8) and 85(8); exceptions to the liability of removal for a person below the age of 18 Section 60(2); potential for internally prioritized procedures Section 93(4)(d) and 96(2)(d); possibility for exceptions to proscribed fees for persons below 18 Section 126(3)(b); and, provisions for information specifically in relation to unaccompanied minors in the Register for protection applications Section 38(4).

140. 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 49(6) and Section 97(6) in relation to issuance of travel documents, family reunification and protection declaration rights.

141. 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.

Recommendation: With regard to children, the Bill should observe the following best-practice 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.

142. UNHCR notes that there is no section providing for the best interest of the child to be considered in relation to all aspects of the Bill. Best interest considerations are only provided for in relation to the decision by the Health Service Executive to make a protection application Section 73(10) and in relation to where a foreign

national is a minor and is accompanied by an adult applicant other than the minor's parent, the Tribunal or the Minister, where it considers that the accompanying adult is not acting in the best interests of the minor, shall so inform the Health Service Executive (Section 74(8) and 85(8)).

Recommendation: UNHCR recommends that a standard provision be included in the Bill referring to the best interest of the child determination to be made in all decisions related to a separated child.

143. UNHCR considers that Section 23(9), (10) and Section 24 provide sufficient safeguards to ensure that separated children have access to the territory either by making an application for protection at the border or by the notification of the Health Service Executive and the taking into care under the Child Care Acts 1991 and 2007.

144. 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 Health Service Executive is established.

145. Section 24(1) does not specifically define separated children, but states that "Where it appears to an immigration officer that a foreign national under the age of 18 years who has arrived at a frontier of the State (a) 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".

Recommendation: The definition in line with SCEP best practices should be 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." This definition would also be closer to the definition of an unaccompanied minor in the Procedure Directive.

146. The Section 24 (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.

Recommendation: Consider including in Section 24 (1) more specific safeguards against trafficking of children and that appropriate protection and facilities are available

147. Under the proposed Bill the Health Service Executive makes the determination whether a protection application should be made and in doing so must consider whether this is in the best interest of the child (Section 73(10)).

Recommendation: 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. The appointment of a guardian other than a Health Service Executive social worker seems particularly relevant also in light of the introduction of Section 106, which places an obligation on information holders to share information they may have about a foreign nationals with the Minister.

148. Of particular concern to UNHCR is the lack of child appropriate alternatives to the protection application and that it would seem that a child for whom a protection application is not made has no legal basis for remaining in the State and can therefore be removed without consideration of whether this is in the best interest of the child. Even if a removal is not carried out this child will be unlawfully in the country and Section 6 restrictions apply. The child will for instance not be able to attend school if above 16 years of age. The child could therefore be residing (unlawfully) in the State for two years without any possibility of improving him or herself or engage in meaningful activities if provided by a Minister of the Government, a local authority or the Health Service Executive, except for attending school if below 16 years.

Recommendation: Consider inclusion of a child appropriate alternative to the protection application to avoid removal of children on whose behalf such application has not been made, in case removal is not in the best interest of such children.

149. UNHCR welcomes the provision in Section 74(10)(b) and 85(6)(a) whereby the Minister and the Tribunal can dispense of an oral hearing of an applicant under 18 years of age if such a hearing would not be useful for advancing the investigation or the appeal. UNHCR would however recommend that such a decision be based also on the best interest of the child considerations and with due regard to the right of the child to be heard in relation to all decisions affecting him or her.

Recommendation: UNHCR would like to recommend that the Bill specifically provide that interviews of a minor is carried out by a person with the necessary knowledge of the special needs of children, as mentioned in the Procedures Directive.

150. UNHCR welcomes that the Bill makes exception to detention under Section 55 and 71 with regard to person under 18 years. (Section 58(1) and Section 71(7)). UNHCR is however concerned that where there is doubt about the age of the person the benefit of the doubt is not given to the child, consequently children may be *de facto* detained. UNHCR is also concerned about the exception to Section 58(1) where a child has failed to comply with immigration control conditions of Section 56(1) and Section 58(4) to remain in a designated place. This is particularly problematic as detention for immigration purposes is in the same location as detention of persons for criminal offences.

Recommendation: UNHCR suggests the final Act to clarify that the benefit of the doubt in age determination should always be given to the child, so that *de facto* detention of minors can be avoided.

151. In relation to family reunification Section 50 (4) (1) (b) 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.

Recommendation: That the final Act include under Section 50 (4) (1) (b) reference to other adults who by custom or law are responsible for the child as well as the child's siblings.

152. UNHCR notes that the Bill does not include any provisions in relation to age assessment of applicants where their age is disputed. UNHCR and Save the Children published the Separated Children in Europe Programme (SCEP) Statement of Good Practices where age-assessment was addressed as set out below;

Age-assessment includes physical, developmental, psychological and cultural factors. If an age assessment is thought to be necessary, independent professionals with appropriate expertise and familiarity with the child's ethnic/cultural background should carry it out. Examinations should never be forced or culturally inappropriate. Particular care should be taken to ensure they are gender- appropriate. In cases of doubt there should be a presumption that someone claiming to be less than 18 years of age will provisionally be treated as such. It is important to note that age assessment is not an exact science and a considerable margin of error is called for. In making an age determination separated children should be given the benefit of the doubt.

Recommendation: The final Act should include a provision on age-assessment in line with the above principles.

153. Finally, UNHCR welcomes the inclusion in Section 64(2)(f) of a reference to child specific forms of persecution.

Vulnerable groups

154. 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. For instance UNHCR notes that reference is made to special considerations in relation to vulnerable persons such as children and victims of torture in Section 49(6) and Section 97(6) in relation to issuance of travel documents, family reunification and protection declaration rights, but that no specific reference is made to consideration of the impact of trauma on the ability to establish facts and give details about his or her claim without contradictions.

Recommendation: UNHCR would suggest that specific reference is made to consideration of the impact of trauma on a protection applicant's ability to establish facts and give details about his or her claim without contradictions.

155. UNHCR has welcomed the explicit exceptions to detention of children in the Bill and would recommend similar explicit exceptions to detention measures in relation to survivors of torture or sexual violence and traumatized persons.

156. UNHCR welcomes the inclusion of Section 124 giving victims of trafficking 45 days legal stay for recovery and reflection, and the further possibility of getting a temporary residence permit for 6 months. UNHCR considers however that additional safeguards for the victims of trafficking should be included in the Bill.

Recommendation: In particular UNHCR suggests that a provision is included in Section 124 to ensure that individuals who have been trafficked and who fear being subjected to persecution upon a return to their country of origin, or individuals who fear being trafficked are informed of the possibility to make a protection application and to this effect are afforded access to legal advice.

vii. Transitional Issues

157. In relation to transitional provisions UNHCR is concerned that all persons present in the State and in need of International Protection, either for refugee status or subsidiary protection status have access to a procedure allowing for a fair assessment of the merits of the protection application. In this respect, UNHCR welcomes Section 136(3) specifying that a refugee applicant shall not be unlawfully in the State where his or her application has been refused further to the 1996 Refugee Act; as such practice would prevent the applicant for having his or her needs for subsidiary protection assessed before removal.

158. UNHCR has raised general concern about the access to a fair procedure where a case is deemed withdrawn (see below for more details). As a decision to deem a case withdrawn leads to a negative decision in relation to the refugee status, such cases can currently only be assessed on their merits if the Minister decides to allow a further application under Section 17(7) of the 1996 Refuge Act. Section 136(6) of the Bill stipulates that an application made under Section 17(7) where the Minister has not yet made a decision shall be considered to have been made under Section 89 of the Bill. UNHCR would be concerned with this procedure in as much as the person is not notified of this change and invited to submit information in relation to the points outlined in Section 89(2), as a similar provision was not included in Section 17(7).

Recommendation: That the final Act includes in Section 136(6) a notification to the applicant specifying that a submission with the information to be considered by the Minister as outlined in Section 89(2) can be made, if the Minister is not granting the further application.

159. UNHCR notes that Section 136(7) states that an application for family members to join the protection applicant made pursuant to Section 18 of the Refugee Act shall, where the Minister has not yet made a final decision be considered as an application made pursuant to Section 50 of the Bill. While UNHCR has no concern with this procedure in principle, we have some general concerns in relation to the procedure in Section 50 as well as the change in the conditions applicable to family members outlined in Section 18 of the Refugee Act and Section 97(3) of the Bill. (See our comments below in the themed comments section).

160. UNHCR would have concerns in relation to two groups of persons who are present in the State and may be in need of International Protection defined as subsidiary protection in the Bill and who may not have access to a procedure allowing for a fair assessment of the merits of their protection needs. The first group comprise persons who had a negative decision for refugee status and had already made a submission under Section 3 of the 1999 Immigration Act, but had not yet had a decision in this regard before the coming into force of S.I. 518 Eligibility for Protection introducing subsidiary protection in Ireland as of 10th October 2006. Persons in this group may be in need of international protection as they have a real risk of serious harm in their country of origin but may not have access to have their plea heard on its merits. The other group are those who have made an application to the Minister in accordance with S.I. 518 Eligibility for Protection, but have not yet had a decision in relation to their request for subsidiary protection.

Recommendation: Make transitional provisions to ensure that persons with such pending applications have access to an interview similar to that foreseen in the Bill and specifying whether the applications will be processed under the provisions of the Bill or the S.I. 518 Eligibility for Protection.

161. UNHCR welcomes Section 136(9) and (10) outlining that an application made before the Act comes into operation, but where an interview has not yet taken place then this Act (the Bill) shall apply and the applicant is given an opportunity to modify or supplement the application to include issues pertaining to subsidiary protection. UNHCR is however concerned that without ensuring the assistance of legal aid the applicant may not be able to take advantage of such an opportunity and according to Section 136(11) the interview shall then be disposed of on the basis of the initial submission. In this respect UNHCR would like to mention that the adjudicator shares the duty to ascertain and evaluate all the relevant facts in relation to the refugee claim as well as for the claim for subsidiary protection and has the responsibility to ensure that the State complies with its *non-refoulement* obligation.

<p>Recommendation: The Minister should consider issues of subsidiary protection if relevant irrespective of whether the application has availed of the possibility in Section 10 to modify or supplement an application.</p>

UNHCR Dublin
March 2008