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HUMAN RIGHTS FOUNDATION OF NEW ZEALAND
TUĀPAPA TIKA TANGATA O AOTEAROA

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1. This submission is on behalf of the Human Rights Foundation of Aotearoa New Zealand. It is a submission on the Immigration Amendment Bill 2012 (the Bill) to the Transport and Industrial Relations Select Committee.

2. The Human Rights Foundation is a non-governmental organisation, established in December 2001, to promote and defend human rights through research-based education and advocacy. We have made submissions on new laws with human rights implications. We also monitor compliance and implementation of New Zealand's international obligations in accordance with the requirements of the international conventions New Zealand has signed, and have prepared parallel reports for relevant United Nations treaty bodies to be considered alongside official reports.

3. The Human Rights Foundation has been supported in this submission by the Equal Justice Project. This Project is a student run pro-bono legal services organisation operating out of the University of Auckland Law School since 2005. The Human Rights team within the Equal Justice Project is dedicated to developing human rights discourse by contributing to government and non-governmental initiatives. The team endeavours to promote awareness of issues affecting fundamental human rights and to encourage student participation in debates surrounding these issues.

4. We appreciate this opportunity to present our views to the Committee and would like to speak to the Submission.

General Comments

New Zealand's Respected Human Rights Record

5. New Zealand takes pride in being a responsible and cooperative state agent in the global society. We strive to honour our obligations under international treaties. The enactment of this Bill will damage this reputation and potentially our bid for a non-permanent seat on the United Nation Security Council.[1]

Human Rights Concerns

6. The Bill raises several human rights concerns and has the potential to breach our obligations under the Convention Relating to the Status of Refugees 1951 (Refugee Convention) which New Zealand ratified in June 1960, the UNHCR Guidelines which are highly persuasive and the NZ Bill of Rights Act 1990 (NZBORA), as detailed below.

[1] Associated Press "US's 'Quite Admiring' of NZ's UN Security Council Bid" *Stuff.co.nz* (online ed, Auckland, 25/05/2012).

7. It is important not to overlook humanitarian considerations when enacting legislation concerning refugees and asylum seekers. Refugees and asylum seekers often are escaping from appalling conditions and face immense hardship both physical and mental in their journey to a safe country.

8. The Bill appears to be introduced in response to a number of generalisations and misconceptions concerning refugees and asylum seekers.

9. New Zealand's annual intake of refugees under the UNHCR Resettlement Programme is 750. Of the millions of refugees worldwide,[2] less than 1% will be resettled under the UNHCR quota program. The distinction between quota refugees and asylum seekers is pivotal to the understanding of New Zealand's obligations at international law; our commendable voluntary intake does not displace our obligation to fairly assess the status of each asylum-seeker, regardless of their method of arrival. Applying for protection onshore is not "queue jumping". It is the standard and correct procedure for seeking protection under the 1951 Refugee Convention.

10. The fact scenario on which the justification for the Bill appears to have been based is untenable: a fictional scenario of a boat carrying 500 asylum seekers, 62% of whose claim for refugee status would be declined. This analysis does not reflect the average inflow of asylum seekers arriving by boat in comparable jurisdictions. Approximately 300 asylum seekers file claims each year in New Zealand. Furthermore, a boat carrying asylum seekers has never reached New Zealand's shores and it seems highly unlikely that one would ever do so. This would suggest that the Bill responds in an alarmingly punitive manner to a problem which does not exist.

11. It is claimed that the proposed legislation would deter people smugglers. People smuggling is already a criminal offence under section 98C of the Crimes Act 1961. There is no evidence that the threat of detention is a deterrent in these circumstances. Furthermore, such a legislation which punitively targets genuine asylum seekers would be both unnecessary and unjust.

Specific Concerns

Warrant

12. There are a number of concerns over the proposed mass detention warrant. One of the expressed purposes of the mass detention warrant is risk management.[3] The concern is in regard to the criteria for judicial decision: it is specified that the judge must not issue a warrant unless he/she is satisfied that one or more of the circumstances of arrest applies to each member of the mass arrival group.[4] The judge is nevertheless required to individually assess the asylum seekers. It would appear this merely moves the bureaucratic burden from assessment for individual warrant to assessment of individuals in order to justify the issue of the group warrant. There may be limited practical effect in

[2] 15.4 million, see "Helpful Facts and Figures" Refugees International (2010) <www.refugeesinternational.org>
[3] Immigration Amendment Bill 2012 (16-1), cl 12 [The Bill].
[4] See Immigration Act 2009, s 316.

streamlining the system and utilising resources, but there is a lack of safeguards to ensure each individual is indeed judged on the merits of his/her own case.

13. Further, in enabling blanket group processing the warrant may become the means for arbitrary detention.[5] Lawful detention may be arbitrary if it exhibits elements of inappropriateness, injustice or lack of predictability or proportionality.[6] Extending the maximum detention period because individual warrants do not allow sufficient time for robust risk assessment[7] leads to inappropriate treatment of the individual under the guise of facilitating better assessment for group arrival. Moreover, the fact that fewer warrants are estimated to be needed for detention of those people who arrive as part of a mass group is no justification for allowing extended detention of the whole group.[8] For an individual, the maximum initial detention period can still be extended from 28 days to six months; regardless of the reasons, that is a disproportionate means of achieving the stated legislative objective of better efficiency and more robust risk assessment. Simply adding the individual assessment time together and applying the sum to the group is a fallacious assessment and an unjust and disproportionate limitation to an individual's liberty.

Detention

14. Human rights law establishes the right to liberty and protection from arbitrary detention.[9] "Arbitrariness" encompasses more than mere "unlawfulness"; detention must be employed without discrimination and only in proportion to the objectives behind the detention.[10] Thus, the necessity for detention must be demonstrated in each individual case. The conditions set out in clause 12, section 317A (a) of the Bill are ambiguous to the extent of having no practical meaning. These conditions are not in line with the exceptional grounds on which the presumption against detention established by the UNHCR Guidelines on Detention could be overturned.[11] Furthermore, those Guidelines hold that even once a legitimate ground for detention has been established, it must be employed only after all alternatives have been exhausted and for the shortest time possible. Under the Bill, the possibility of a detention period of up to 6 months with an extension of 28 days is potentially in breach of these guidelines. The Bill allows for mandatory blanket detention which is both blind to the merits of each individual's case and discriminatory in its application only to those under the definition of "mass arrival

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[5] New Zealand Bill of Rights Act 1990 s 22.
[6] *Manga v Attorney-General* [2000] 2 NZLR 65, 72; see also *Zaoui v Attorney-General* [2005] 1 NZLR 577, 615 (CA).
[7] "Regulatory Impact Statement" Department of Labour <www.dol.govt.nz>, at 6.
[8] Specifically demonstrated by the impact assessment in regards to "Mandatory Detention for an Initial Period up to Six Months", at 7.
[9] International Covenant on Civil and Political Rights (opened for signature 16 December 1966, entered into force 23 March 1976), arts 9(1), 13, 14 [ICCPR].
[10] ICCPR, arts 2, 9.1 and 26; Refugee Convention, arts 3, 31; United Nations Convention on the Rights of the Child, arts 2, 22 and 37(b); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* GA Res 43/173, A/Res/43/173 (1988), principles 2, 3 and 5(1); *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* GA Res 45/113, A/Res/45/113 (1990), para 4; "UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers" UNHCR (26 February 1999) <www.unhcr.org>, [2]–[5].
[11] UNHCR Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers, Guideline 3 ("Guidelines").

group" in section 9A.[12] New Zealand's obligations apply irrespective of the asylum seeker's mode of transport. To place individuals in detention on the basis of membership of a particular group would constitute a fundamental breach of human rights. Such blanket processing also raises significant concerns of due process.

15. The use of detention for the purpose of deterring future asylum seekers is in violation of principles of international protection.[13] There is no empirical evidence that detention deters irregular migration or discourages persons from seeking asylum.[14] International studies have found that the principal aim of asylum seekers is to reach a place of safety and that they generally have a very limited understanding of the migration policies of destination countries. Those who are aware before arrival of the prospect of detention tend to view it as an unavoidable part of the journey.[15] The majority of refugees who experienced detention did not pass on a message of deterrence to those overseas. Often the relief of escaping persecution and reaching a place of safety overrode the trauma and sense of rejection.[16] More relevant factors influencing choice of destination country included historical links between countries, reunification with family and friends and the reputation of countries as tolerant and safe. Those supporting the Immigration Amendment Bill have made it clear that one of its key purposes is to make New Zealand a "less desirable target" and appear less of a "soft touch". The evidence overwhelmingly suggests that such a policy will not effectuate its articulated purpose.

Judicial Review

16. The Bill removes the rights of those asylum seekers arriving as a group to apply for more than one oral review before the Immigration and Protection Tribunal. It also stipulates that judicial review proceedings can only be filed by leave of the High Court. This is phrased as a "streamlining" of the review process but it will have the effect of obstructing access to justice which is guaranteed to everyone in New Zealand under section 27 of NZBORA. Under s 5, limitations on the rights under the BORA must be demonstrably justifiable in a free and democratic society. The Ministry of Justice cited minor limits on the right to judicial review in the Employment Act 2000 and the Tax Administration Act 1994 as evidence that such limitations would be fair.[17] However, in the present situation the review relates to an order for detention. The right to liberty is given paramount importance under international law and should be considered in a separate light. It is

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[12] The Bill, cl 5.
[13] Guidelines, above n 10.
[14] "There are Alternatives: a Handbook for Preventing Unnecessary Immigration Detention" International Detention Coalition (2011) <http://idcoalition.org/cap>
[15] R Black and others "Routes to Illegal Residence: A Case Study of Immigration Detainees in the United Kingdom. Geoforum" (2006) 37 Geoforum 552; S Haug "Migration Networks and Migration Decision-Making" (2008) 34. Journal of Ethnic and Migration Studies, 585; T Havinga and A Bocker "Country of Asylum by Choice or by Chance: Asylum-Seekers in Belgium, the Netherlands and the UK (1999) 25 Journal of Ethnic and Migration Studies 43; Rosyln Richardson "Sending a Strong Message? The Refugees Reception of Australia's Immigration Deterrence Policies" (PhD Thesis, Charles Sturt University, 2008); E Thielemann "Does Policy Matter? On Governments' Attempts to Control Unwanted Migration." The Center for Comparative Immigration Studies (12 January 2004) <http://escholarship.org/uc/item/5jt5v2sw>.
[16] Richardson "Sending a Strong Message?"
[17] Melanie Webb "Immigration (Mass Arrivals) Amendment Bill" Ministry of Justice (2 May 2012) <www.justice.govt.nz>, at 4 and 5.

probable that New Zealand courts would declare that this restriction is unjustifiably contrary to the NZBORA.

Suspension of Refugee Claims

17. The Bill empowers the making of regulations to suspend the processing of refugee and protection claims. This is an alarmingly far-reaching provision. New Zealand should sustain its international reputation as a champion of democratic principles by encouraging predictability in the refugee application process. Such predictability is a key element of the rule of law. This concern is also recognised at international law: under Article 13 of the Refugee Convention, New Zealand is required to make every effort to expedite refugee status claims.

Family Reunification

18. The proposed policy allows only limited family reunification for those claiming refugee status as a result of "mass arrival". This differential treatment in regards to those who arrived in mass, despite their recognised status as refugees, is against the individual's right to be free from arbitrary or unlawful interference with his/her family life.[18] The consequential narrowing of family reunification to immediate family (spouse and offspring), excluding parents of adult refugees and adult siblings, fails to acknowledge the existence of alternative family structures to the Western nuclear family. Considering that this limitation applies only to refugees who arrived "in mass", the difference lies essentially in the form and method of arrival. This suggests that there is a strong argument to be made that the Bill is an arbitrary limitation on Convention rights, one that is prohibited by the ICCPR.

19. The differential treatment also contravenes New Zealand's obligation under Article 31 of the Refugee Convention[19] (included under Schedule 1 of the Immigration Act 2009), which prohibits penalties to be imposed on account of illegal entry or presence. The inability to bring extended family members, as allowed for their peers arriving individually or in small groups, essentially serves as a penalty for a method of arrival.

Conclusion

20. For all these reasons we submit that the Bill is unnecessary and potentially in breach of New Zealand's international human rights obligations. We strongly believe that it should be withdrawn.

[18] ICCPR, arts 17 and 23.
[19] Refugee Convention, Art. 31