

14 May 2010

Ms Pia Oberoi
Office of the High Commissioner for Human Rights
Email: registry@ohchr.org



Dear Ms Oberoi

STUDY ON CHILDREN AND MIGRATION

The New Zealand Human Rights Commission appreciates the opportunity to provide information in relation to the OHCHR's study on protection of the rights of the child in the context of migration. Please find below, comments regarding recent challenges and achievements in New Zealand.

Legislation – Review of Immigration Act

A review of the Immigration Act was undertaken in 2006-07 and new legislation passed in 2009 which is to be implemented incrementally over the next 12 months.

The review involved a comprehensive consultation process, which led to some positive changes being made to the Immigration Bill. The Commission provided input and submissions at various stages of the review, as well as producing a discussion paper to assist NGOs to develop their own submissions.¹

Positive aspects of the new legislation are:

- greater consistency with the principle of non-refoulement and inclusion of specific reference to the UN Convention Against Torture and the International Covenant on Civil and Political Rights
- the definition of a child as a person under 18 years of age, in line with the UN Convention on the Rights of the Child – expanding the definition contained in the previous legislation which defined children as those under 17 years of age
- the requirement for children to be given the opportunity to express their views and for these to be taken into account in proceedings affecting them (s 377).

Some challenges that remain include:

- the lack of reference to the UN Convention on the Rights of the Child or recognition in the legislation of the best interests of the child as a primary consideration
- the lack of an explicit presumption against detaining children and young people

¹ These are available at: <http://www.hrc.co.nz/home/hrc/search/search.php?q=immigration>

- extension of the possible period of detention without warrant to up to 96 hours
- continuation of a proscription against the Human Rights Commission becoming involved in matters relating to immigration.

There have also been concerns that the changes will have the overall effect of making it more difficult for children who are not New Zealand citizens to be accepted as refugees or to be given rights of permanent residence in New Zealand.²

In addition, there has been a marked fall off in the number of people claiming asylum (spontaneous refugees) as a result of the interdiction process which allows airlines to prevent people considered to present a risk to New Zealand from boarding aircraft.

Right to identity

Changes to the Citizenship Act 1977 in 2006 provide that a child born in New Zealand will not be a New Zealand citizen unless one of the parents was a New Zealand citizen or permanent resident. Exceptions are made in the case of children who are found abandoned and children who would otherwise be stateless.

Access to education and other social services

The Commission continues to be concerned about discrimination against children in accessing education because of their immigration status.

Until the new Immigration Act comes into effect children who are unlawfully in New Zealand (either because their visas have expired or they have been refused refugee status) are only able to access primary and secondary school pending determination of their immigration status if they have a limited purpose permit (LPP). A LPP removes the right of appeal to the Removal Review Authority.

The new law goes some way to addressing this by ensuring that education providers do not commit an offence by allowing a child who is not entitled to study in New Zealand to undertake compulsory education.³ The Commission also understands that asylum seekers are likely to be granted permanent residency on receiving refugee status as a result of policy changes that will accompany the new legislation.

The law change represents progress towards removal of New Zealand's reservation to the UN Convention on the Rights of the Child that reserves the right to distinguish between persons according to the nature of their status in New Zealand. The government has indicated that access to housing and social

² Ludbrook, R, (2007), *Children's Law since 2004: A review of New Zealand's laws and draft legislation since 2004 and the impact of the Convention on the Rights of the Child*, available at: http://www.acya.org.nz/site_resources/library/Documents/Rpts_2009/CHILDREN_S_LAWS_SINCE_2004.pdf

³ Section 315(3) Immigration Act 2009

assistance requires further consideration before New Zealand is in a position to withdraw the reservation.⁴

Access to health services is an issue for many refugees and asylum seekers. Apart from difficulties that apply to the wider population (such as the length of waiting lists), refugees can experience difficulties with access to interpreters and appropriately trained health professionals. Asylum seekers who are released into the community before being formally recognised as refugees face an extra difficulty in this regard. While they have access to public health doctors, they cannot access specialist services such as dentists, mental health professionals or optometrists.⁵

There are also issues concerning access to ongoing support and trained professionals to deal with experiences unique to refugees, such as trauma resulting from torture, or anxiety at the length of time taken to process applications for refugee status or family reunification. In addition, existing services may be underutilised due to the lack of understanding of available services. Lack of access to interpreters may result in children being removed from school in order to provide interpretation for their parents.^{6 7}

The Children's Commissioner has noted that unaccompanied young people in the refugee population are one of the groups that face particular difficulties in accessing safe and suitable housing.⁸

Since 2004 the Government has taken a number of positive steps to enhance refugee resettlement support. Regional settlement strategies and action plans have been completed for Auckland (2006) and Wellington (2008). These strategies have been developed in partnership with central and local government, non-government organisations and other stakeholders with settlement-related interests including migrants, and refugees.

Family unity

New Zealand's annual quota of refugees includes provision for a small number of refugees under the 'refugee family support' category.

⁴ Ministry of Youth Development, (2008), *Third and Fourth Consolidated Periodic Report to the United Nations Committee on the Rights of the Child*. Available at:

<http://www2.ohchr.org/english/bodies/crc/crcs56.htm>

⁵ Human Rights Commission (2004) *Human Rights in New Zealand Today*. Available at:

<http://www.hrc.co.nz/report/chapters/chapter12/asylum02.html#set>. The Commission is currently updating this report to reflect developments since 2004. While there has been considerable progress in some areas, as noted above, many of these issues remain.

⁶ New Zealand Immigration Service (2004), *Refugee Voices*, p364. Available at:

<http://www.immigration.govt.nz/migrant/general/generalinformation/research/Refugees/refugeevoices/>

⁷ Research carried out as part of the *Wellington Regional Action Plan for Refugee Health and Well-Being* includes assessments of refugee and migrant child and youth needs. See:

http://www.refugeeservices.org.nz/_data/assets/pdf_file/0011/209/Refugee-and-migrant-needs-Feb06.pdf

⁸ James, B, (2007), *Children and Young People's Housing Experiences: Issues and Scoping Paper*, Wellington: Centre for Housing Research Aotearoa New Zealand. At p6

<http://www.chranz.co.nz/pdfs/childrens-young-peoples-housing-experiences.pdf>

Family reunification policy narrowly defines “family” as including only immediate family of the principal applicant, which has been criticised as inconsistent with the UNHCR definition, and a longstanding issue of concern.⁹

Issues have been raised regarding the burdensome nature of the immigration process and significant time delays between refugees being resettled in New Zealand and their being reunified with their family. This contributes to the social and health issues that resettled refugees face requiring government and community support.

Detention of children

Immigration legislation and policy provides for the detention of asylum seekers in limited circumstances, where they are considered to pose a risk. While operational instructions¹⁰ include principles that emphasise compliance with UNCROC and require the best interests of the child to be the primary consideration, and detention of children a last resort, the Commission considered that the Immigration Act also should have included an explicit presumption against detention of children, and reference to UNCROC obligations.

The Mangere Accommodation Centre, described as an ‘open’ immigration facility, is designated as ‘approved premises’ for detention, and is generally used only for asylum claimants. Detention at the Centre is ‘administrative’ as opposed to ‘penal’. The Centre is also approved for the detention of unaccompanied minors between 14 and 17 years old. There is a separate one-block section for women and children. Minors are only detained with adults at the Centre if these adults are family members and it is in the best interests of the child. In practice, families are released with permits while their claims for asylum are processed. Unaccompanied minors are placed in the care of Child, Youth and Family.¹¹

Monitoring of places of detention

In 2007 New Zealand ratified the Optional Protocol to the Convention against Torture (OPCAT) and established National Preventive Mechanisms (NPMs) to give it effect. Four organisations have each been designated as NPMs to inspect and monitor specific categories of places of detention, and the Human Rights Commission has been appointed to a coordinating role as the designated Central National Preventive Mechanism.

The Ombudsmen have responsibility for monitoring immigration detention facilities, and in this role have visited the Mangere Accommodation Centre on at least two occasions.

The government states that it is not the practice of the Department of Labour to detain children, and the Ombudsmen have not encountered situations of children

⁹ Changersmakers Refugee Forum (2009), *Refugee Family Reunification in Wellington: A Discussion Document*

¹⁰ These can be viewed at: <http://www.immigration.govt.nz/opsmanual/i20141.htm>

¹¹ Ministry of Justice (2007) *Fifth Periodic Report to the United Nations Human Rights Committee*, CPR/C/NZL/2007

or young people being detained in immigration facilities to date. The Ombudsmen have requested notification should this occur at any stage.

Thank you again for the opportunity to provide these comments. Please do not hesitate to contact me should you require further information.

Yours sincerely,

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