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## Detention of Asylum-seekers in the United States

by Barbara Cochrane Alexander\*

The 1951 United Nations Convention Relating to the Status of Refugees (1951 Convention) and the 1967 Protocol Relating to the Status of Refugees (1967 Protocol), as interpreted and codified in U.S. law, controls the fate of asylum-seekers entering the United States. The U.S. Immigration and Naturalization Service (INS) applies this law, specifically the 1980 Refugee Act and the Immigration and Nationality Act (INA), in the asylum determination process. The U.S. Congress passed the 1980 Refugee Act to better align U.S. refugee law with international standards. Since its passage, however, the detention of asylum-seekers has become an administratively and politically popular option in the asylum determination process even though asylum-seekers are not convicted criminals, but are persons who fled persecution in their home country. While in detention, many asylum-seekers endure inhumane or degrading treatment, such as inadequate access to medical care and overcrowding. As a result, the INS violates the asylum-seekers' rights to be free from detention and cruel, inhumane, or degrading treatment or punishment.

### Expedited Removal versus Non-Expedited Removal

With the passage of the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) in 1996 and the subsequent Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which amended certain IIRIRA provisions relating to immigration, the U.S. Congress enacted "expedited removal" provisions. These provisions allow individuals seeking asylum to enter the United States with invalid or fraudulent travel documents to be placed by the INS in expedited removal proceedings. Unless the individual indicates to the examining immigration officer a fear of persecution in the country to which the INS would return him or her or an intention to apply for asylum, the individual is removed from the United States immediately. This decision is not subject to administrative appeal to an immigration judge. If, however, the individual claims a fear of persecution or an intention to apply for asylum, an asylum officer will conduct a "credible fear" interview. The credible fear interview is a preliminary screening by an asylum offi-

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cer to determine whether the individual demonstrates a significant possibility of establishing eligibility for asylum. If the asylum officer determines there is no credible fear, then the asylum-seeker is removed, although he or she may request that an immigration judge review the credible fear determination. If the immigration judge determines there is credible fear, then the individual is placed in non-expedited removal proceedings. Under IIRIRA, the INS is required to detain the asylum-seeker throughout the entire administrative review process.

### INS Detention System

At any given time, approximately 125,000 individuals are in INS removal proceedings. This large number of individuals in removal proceedings strains the currently inadequate INS detention system. In 1992, the INS had fewer than 6,300 detention spaces. Through an approximately 250 percent increase in spending for the INS's detention and deportation division between 1992 and 1997, there are now approximately 15,000 detention spaces available for persons, including asylum-seekers, in removal and

expedited removal proceedings. According to an INS News Release dated July 12, 1999, however, the INS currently detains almost 17,500 individuals.

Because the system cannot detain all of the persons in expedited and non-expedited removal proceedings, the INS must release some individuals on bond or on their own recognizance, commonly referred to as parole, pending the INS's final determination of their cases. Parole is temporary and is not considered an admission into the United States. Asylum-seekers attempting to enter the United States without valid documents, which is a very common situation for those individuals who were forced to flee their homes quickly, are eligible for parole, but not until they pass the credible fear interview. Since IIRIRA does not specify a time limit for the credible fear determination, the INS can detain people for an undetermined length of time. As discussed in the previous section, once the asylum-seeker passes the credible fear interview he or she is placed into non-expedited removal proceedings where detention is not mandatory. If the asylum seeker passes the credible fear interview, however, parole pending an asylum decision is not guaranteed.

Despite INS guidelines that encourage parole as an option after the asylum-seeker passes the credible fear interview, human rights organizations, such as the Lawyer's Committee for Human Rights, report that INS implementation of these guidelines is ineffective and inconsistent. Bona fide asylum-seekers still are detained, and INS district directors, functioning independently of one another, continue to implement their own versions of INS parole policy. The de facto INS criteria for detaining an asylum-seeker appears to be available bed space; if it is available, the INS will hold the asylum-seeker until asylum is granted or denied. Because of this lack of uniformity, INS determinations as to who is paroled and who is detained are arbitrary.

Asylum-seekers detained by the INS find themselves in one of the following locations during the asylum process: INS Service Process Centers, facilities run by private corporations, U.S. Bureau of Prisons facilities, and local jails. No uniform standards exist for determining how people are placed and treated in the different detention facilities. For example, depending on where the asylum-seeker is detained, he or she may reasonably fear abuse by guards, inadequate access to legal resources, and exposure to criminals. In addition, some of the detention conditions include overcrowding, poor air quality and lighting, noise pollution, and insufficient bathroom facilities. Interviewed detainees also have complained about the quality and quantity of food, and a failure to meet religious and dietary needs. In some detention facilities, detainees who have money are able to purchase extra food from the facility's commissary, but at inflated prices. Furthermore, detainees are not allowed to receive outside packages. Some detainees report problems with theft of their personal property. They generally characterize medical care as poor. Human rights organizations, such as Amnesty International, Human Rights Watch, and the Lawyer's Committee for Human Rights, documented these conditions at INS detention facilities throughout the United States through extensive on-site visits and interviews conducted in 1998 and 1999.

The impact of these conditions on the psychological and physical health of asylum-seekers is particularly significant. Many asylum-seekers may already suffer from post-traumatic stress disorder as a result of the persecution suffered in their home countries, and the prison-like conditions exacerbate their suffering. In October 1998, the inhumane and abusive conditions that detained asylum-seekers encounter prompted a New Jersey federal district court, in *Hawa Abdi Jama v. INS*, to authorize asylum-seekers to sue the U.S. federal government for damages under the Alien

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Tort Claims Act. In deciding that asylum-seekers detained by the INS have the right to sue the U.S. government for the cruel, inhumane, and degrading treatment they suffer in INS detention, the court distinguished "detainees awaiting a hearing on their applications for political asylum" from "post-trial detainees," i.e. criminals. Moreover, the court agreed that the alleged treatment suffered by the plaintiff asylum-seekers in this case violated the international human right to be free from cruel, inhumane, or degrading treatment.

### The Impact of Detention on Legitimate Asylum Claims

The impact of detention conditions on the psychological and physical health of asylum-seekers, discussed in the previous section, can also impact the asylum claim itself. Inhumane and prison-like detention conditions can hinder an asylum-seeker's ability to discuss his or her claim by contributing to poor mental health. For example, a female asylum-seeker who has suffered some form of sexual torture in her country of origin and who does not receive proper medical care in the form of counseling and therapy, may encounter great difficulty in explaining the persecution she suffered. If the asylum-seeker is unable to testify about the persecution she or he suffered, an asylum officer or immigration judge may inaccurately conclude that the asylum-seeker is not credible and is therefore ineligible for asylum. In addition, asylum-seekers do not have the right to an attorney to assist them. If they are able to find an attorney who is willing to help them, it is difficult for the asylum seeker to meet and work with the attorney because of the isolated location of many detention facilities. The lawyer must also navigate through an elaborate bureaucracy in order to visit those in detention. Also, detained asylum-seekers are unable to assist in the preparation of evidence for their cases. Although INS-operated detention facilities may have legal libraries to which detainees have limited access, local jails do not.

### International Standards on the Rights of Asylum-seekers

The principles of freedom from arbitrary detention and inhumane, cruel, and degrading treatment are well founded in international law. The International Covenant on Civil and Political Rights (ICCPR), which the U.S. government ratified in 1992, prohibits arbitrary arrest, detention, or exile (Article 9), as well as cruel, inhumane, or degrading treatment or punishment (Article 7). The United Nations plays a key role in interpreting and explaining international standards and laws that relate to the rights of asylum-seekers. Recently, on December 18, 1998, the Working Group on Arbitrary Detention of the United Nations High Commissioner on Human Rights (Working Group) released its report on *Civil and Political Rights, including questions of Torture and Detention*. This report presents 14 criteria for determining whether a detention is arbitrary, and Article 76 of the report specifically states that the guarantees of freedom from arbitrary detention, including cruel, inhumane, and degrading treatment are to benefit refugees. Significantly, this report advocates requiring legislation that establishes a maximum time limit for detention, so that detention may not be for an unlimited period of time.

In addition to the Working Group's report, in February 1999, the UN High Commissioner for Refugees (UNHCR) issued an update of its *Guidelines on the Detention of Asylum-seekers* for use by all

signatories of the 1951 Convention and the 1967 Protocol. UNHCR's updated guidelines reaffirmed that a government's detention of asylum-seekers is undesirable and that a government should only resort to detention when no viable alternatives exist.

Currently, asylum-seekers in U.S. detention facilities have no protection against indefinite detention. INS regulations allow INS district directors to order an asylum-seeker detained until his or her asylum claim is granted or denied; the time that the asylum process takes can vary from case to case. As of June 1999, for example, some asylum-seekers detained at York County Jail in York, Pennsylvania were in detention for more than two years. The INS's failure to follow its own procedures on detaining asylum-seekers, its inability to accommodate those people in removal proceedings, and its lack of the means to ensure compliance with the law, result in arbitrary detention, thus violating Article 9 of the ICCPR.

In addition, the ICCPR prohibits cruel, inhumane, or degrading treatment or punishment (Article 7). The INS, however, vio-

lates this prohibition in its treatment of asylum-seekers, as demonstrated by the examples of detainees' complaints, discussed above. Although asylum-seekers may have attempted to enter the United States without adequate documents, they often are fleeing persecution in their home country, thus making the INS's detention and treatment of them particularly cruel and degrading. By subjecting asylum-seekers to prison-like conditions in detention facilities, the INS compounds the traumatic experiences asylum-seekers fled in their home countries. Furthermore,

confining asylum-seekers to prison exposes them to, and equates them with, criminals who often have committed violent crimes. This treatment is grossly disproportionate to the asylum-seekers actions.

### Conclusion

Although the United States implemented international refugee law through its domestic refugee legislation and, in 1968, signed the 1967 Protocol, the INS detention system does not abide by the primary goal of international refugee law: to protect persons seeking asylum. Asylum-seekers placed in the U.S. detention system are victims of INS officers who arbitrarily apply the law and expose the asylum-seekers to degrading treatment that violates the ICCPR and is contrary to UN guidelines. To remedy this situation, the INS must make the improvement of its detention system a priority by clearly establishing detention as a last resort and improving the treatment of asylum-seekers while in detention.

Furthermore, Congress must act to amend IIRIRA. On November 17, 1999, Senator Patrick Leahy (D-VT) introduced the Refugee Protection Act (S. 1940) in the United States Senate. S. 1940 would amend the INA, and specifically, the 1996 changes made by IIRIRA, including mandatory detention in expedited removal proceedings. In keeping with the purposes of S. 1940, to protect persons fleeing persecution, Section 3(f) of the bill provides that the Attorney General have the discretion to detain asylum-seekers, amending the current mandatory detention of asylum-seekers in expedited removal proceedings. The bill was read twice in the Senate and referred to the Committee on Judiciary, where it remains as of February 4, 2000. If passed, this bill could open the door for the continued improvement of the conditions faced by asylum-seekers in the United States. ☺

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Lawyers Committee for Human Rights