



Defending Human Rights & Due Process

A Policy Brief from Heartland Alliance's National Immigrant Justice Center

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Asylum Seekers Need Protection, Not Detention

When asylum seekers arrive at a U.S. airport or other port of entry and tell immigration officials they are afraid to return to their native countries, under current U.S. immigration policies they are arrested and detained, often for months, without an opportunity to ask for release. Thousands of arriving asylum seekers are subject to mandatory detention policies every year. The government's practice of jailing asylum seekers, even after they have been found to have credible asylum claims and to pose no threat to the community, stands in stark contrast to our nation's commitment to protecting the human rights of people fleeing persecution and seeking safety in the United States.

Department of Homeland Security (DHS) officials recently announced a series of reforms to transform the immigration detention system into one they say will be "truly civil" (see page 3). The National Immigrant Justice Center advocates for reforms that provide more humane treatment of asylum seekers. **DHS should adopt policies that presume release for asylum seekers who are found to have credible asylum claims. Asylum seekers whom DHS refuses to release should be able to have that decision reviewed.**

DHS Immigration and Customs Enforcement Assistant Secretary John Morton has already expressed a commitment to fixing these policies. In his Senate confirmation questionnaire he said, "I would welcome concrete recommendations from Congress, the [U.S. Commission for International Religious Freedom], the U.N. High Commissioner for Refugees (UNHCR), and the NGO community concerning how ICE could best identify and parole bona fide asylum applicants from custody."

Current U.S. asylum parole policies violate numerous international standards stating that asylum seekers should not be detained unless absolutely necessary (see page 3). The current system by which asylum seekers can request release is extremely difficult to navigate. Under current policies, asylum seekers must demonstrate it is in the "public interest" for them to be released. This requirement demands extensive documentation which is nearly impossible for most detained asylum seekers to come by, particularly if they do not have access to legal counsel. The National Immigrant Justice Center has filed numerous *habeas corpus* petitions on behalf of asylum seekers whose release would serve the public interest and uphold human rights. Even when an asylum seeker presents a worthy case, DHS officials rarely use their discretion to grant release.

DHS must reform its detention policies for asylum seekers to balance national security needs with U.S. human rights obligations and basic American standards of due process. ♦



Asylee Jean Pierre Kamwa speaks about his time in ICE detention in the documentary film *Restore Fairness*. Restorefairness.org

"Harsh asylum parole policies violate human rights. All arriving asylum seekers should be considered for release automatically within a reasonable timeframe, and should have access to the immigration courts for custody hearings, rather than be subjected to detention by default. Furthermore, DHS should develop a mechanism by which parole decisions are reviewed on a regular basis."

**- Mary Meg McCarthy
Executive Director
National Immigrant Justice Center**

U.S. Detains Afghan Man Who Helped the U.S. Military

Even after the Department of Homeland Security (DHS) released new asylum parole guidelines in 2007 requiring that detainees demonstrate that their detention is not in the public interest, the U.S. government repeatedly denied release requests for an Afghan asylum seeker represented by the National Immigrant Justice Center. He had been forced to flee the Taliban after assisting the U.S. military.

Unreasonable policies violate human rights

Ezatullah Oryakhil entered the Afghan military in 1993 as a soldier and later became a teacher in the General Staff College, a military school supported by the North Atlantic Treaty Organization (NATO) and the United States. In 2005, at the invitation of the U.S. military, Mr. Oryakhil came to the United States to participate in English language courses. Soon after Mr. Oryakhil returned to Afghanistan, Taliban soldiers began harassing his family and asking about his whereabouts. Heeding stories of other “disloyal” individuals who had been kidnapped by the Taliban, and concerned about the safety of his family, Mr. Oryakhil returned to the United States. When he arrived at Chicago’s O’Hare International Airport in September 2006 and asked for asylum, he was arrested by immigration agents and taken to a nearby county jail.

Mr. Oryakhil’s asylum request was originally denied by an immigration judge who, despite finding that Mr. Oryakhil had proven he had a well-founded fear of future persecution based on political opinion and that he was likely to be persecuted if returned to Afghanistan, criticized Mr. Oryakhil’s failure to ask the Afghan military for protection. The National Immigrant Justice Center and a team of *pro bono* attorneys took Mr. Oryakhil’s case to the U.S. Seventh Circuit Court of Appeals, which disagreed: “To expect Oryakhil, after several years of teaching, to revert to a soldier’s lifestyle in a hostile, conflict-ridden region of Afghanistan—and to place his family in jeopardy by doing so—does not strike us as ‘reasonable.’”²

Betrayed by unjust policies and a broken court system

Even as Mr. Oryakhil’s case ran up against an overburdened immigration court system and drawn-out federal litigation, DHS refused to recognize that he qualified for release under its current parole guidelines. Not only did he pose no danger and was not a flight risk, but detaining a soldier who had been put in danger because of his assistance to American troops was clearly not in the public interest. The U.S. government denied Mr. Oryakhil his basic human right of liberty for more than two years until the Seventh Circuit ruled in his favor in 2008. Even then, the National Immigrant Justice Center had to advocate further to ensure his release. While it is essential that DHS revise current parole guidelines to better align with international human rights standards, the government also must ensure that they are implemented effectively. ♦



Afghan and U.S. soldiers in Kunar Province, Afghanistan in June 2009. The U.S. Army

Asylum seekers who flee to the United States have often already experienced brutal detention in their native countries.

A 2003 study by Physicians for Human Rights found that 67% of asylum seekers had been incarcerated as part of their persecution.¹

Individuals who have already suffered so much should not be subjected to further unnecessary detention.

Human Rights Standards for Detaining Asylum Seekers

International Covenant of Civil and Political Rights *Article 9(1)*

Prohibits the arbitrary detention of asylum seekers. Article 9(4) requires that anyone deprived of liberty by arrest or detention be “entitled” to proceedings before a court which will decide “without delay” on the lawfulness of the detention, and order release when detention is not lawful.

Universal Declaration of Human Rights *Articles 2 through 9*

Discourages arbitrary arrest and detention without some type of hearing, and states that detained individuals should have an opportunity to appeal an adverse decision.

United Nations High Commissioner for Refugees

Takes the position that “as a general principle asylum-seekers should not be detained.” Furthermore, if an adjudicator decides to detain an asylum seeker, the asylum seeker should have various procedural protections, including the right to periodic review before a judicial or administrative body and the right to request release.

Pathway to Reform Opens with New Administration

The Department of Homeland Security (DHS) has announced a series of initiatives intended to create a detention system more appropriate for civil immigration detainees.³ The National Immigrant Justice Center welcomes this commitment to making a “major overhaul” of its immigration detention system. However, more work is needed. As DHS develops its plan to build a fair and just detention system, there are a number of concrete steps, in addition to developing more humane parole guidelines for asylum seekers, that DHS Immigration and Customs Enforcement Assistant Secretary John Morton can take immediately to ensure human rights for immigrants in detention.

Alternatives to Detention According to a recent Migration Policy Institute report, DHS detained 378,582 individuals in 2008, a 60% increase from just four years ago. More than half of detainees did not have a criminal record. Noncriminal detainees were held on average for 65 days.⁴

The large-scale detention of noncriminal populations is a violation of human rights standards. Immigrant detainees are isolated from family support and legal counsel. DHS should identify and adopt coherent guidelines for alternatives to detention. The agency should partner with experienced community organizations to establish an alternatives to detention program. The program should include clear guidelines for local DHS officers to follow and should stress the importance of family unity and access to counsel.

Detainee Transfers DHS frequently transfers immigrants between detention facilities. While most detained immigrants find it difficult to access legal counsel, transfers strain attorney-client relationships, especially if the immigrant is transferred to a different jurisdiction. Due to the large number of transfers, DHS employees and contractors do not update the DHS database in a timely manner, leading to additional confusion. DHS should issue a transfer guidance, minimizing transfers of detainees, especially when the detainee is represented by counsel.

Medical Grievances A number of recent reports have highlighted the lack of access to medical care for immigrants held in civil detention. Health care is a basic human right. DHS should take immediate steps to ensure that immigrants can access appropriate medical providers. DHS should issue guidelines stating that individuals with serious medical or mental health issues are presumptively eligible for parole.

Immigration Enforcement DHS must improve the conditions under which immigrants are detained. However, the continuing rapid increase in immigration-related arrests across the United States will undermine even the best-laid plans to improve detention conditions. DHS’s detention reform initiatives are already being outpaced by federal and local programs that encourage local police officers to enforce federal law and sweep up individuals who are neither criminals nor threats to our communities. DHS must re-evaluate an immigration system that unjustly criminalizes immigrants and denies their important contributions to our society. ♦

Detention Reform Legislation Calls for the Protection of Human Rights

Several members of Congress have stepped forward to help restore basic human rights and due process to the U.S. immigration system. The National Immigrant Justice Center advocates for the inclusion of these provisions in any comprehensive immigration reform bill.

The Protect Citizens from Unlawful Detention Act (S. 1549) includes provisions to ensure that detainees understand their legal rights, allows for judicial review of the detention of U.S. citizens and vulnerable individuals during immigration enforcement actions, and requires reporting and oversight of enforcement practices and their harmful impact on U.S. citizens.

The Strong Safe Treatment, Avoiding Needless Deaths, and Abuse Reduction in the Detention System (Strong STANDARDS) Act (S. 1550) would create enforceable regulations governing critical basic standards of treatment for detainees. The required basic standards would include adequate medical and mental health care, access to legal information

and counsel, access to family and religious visitors, and a limitation on the use of solitary confinement and strip searches.

The Secure and Safe Detention and Asylum Act (S. 1594) would require improved detention conditions, including special standards for families and for victims of persecution and torture. This bill would also establish quality assurance measures to ensure that asylum seekers with a credible fear of persecution are not returned to their countries without a review of their cases.

The Immigration Oversight and Fairness Act (H.R. 1215) would, among other provisions, require DHS to use secure alternatives to detention for those immigrants who pose no threat to our communities and are not flight risks. This bill would increase protections for unaccompanied immigrant children who are in the custody of the federal government.

Read more about this legislation at <http://www.immigrantjustice.org/detentionlegislation>

TAKE ACTION TO RESTORE FAIRNESS:

Watch a New Documentary about Detention and Tell Congress to Restore Human Rights to the U.S. Immigration System



Restore Fairness is a powerful video that calls upon the U.S. government to bring back due process to the immigration system. The video, produced by Breakthrough in partnership with the National Immigrant Justice Center and 25 other leading organizations, features interviews with members of Congress, immigration judges, civil society leaders, and ordinary families affected by harsh immigration laws. Watch *Restore Fairness* and tell Congress to fix the broken immigration system at www.immigrantjustice.org/restorefairness.

Photos: The sister of an immigrant grandmother who died in detention testifies before Congress in *Restore Fairness*. Restorefairness.org

Sources:

1. Physicians for Human Rights, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers*, at p. 50 (2003), available at <http://www.physiciansforhumanrights.org/library/documents/reports/report-perstopprison-2003.pdf>.report-persprison.html
2. 528 F.3d 993 (7th Cir. 2008)
3. Read more about the DHS detention reform initiatives and timeline at http://www.dhs.gov/xlibrary/assets/press_ice_detention_reform_fact_sheet.pdf.
4. Kerwin, Donald and Serena Yi-Ying Lin, 2009. *Immigrant Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities?* Washington, DC: Migration Policy Institute.



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