

Detention under scrutiny

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Seeking asylum is not an unlawful act, yet asylum seekers and refugees are increasingly detained and interned around the world, suffering not only deprivation of liberty but also other abuses of their human rights. UNHCR's new detention guidelines challenge governments to rethink their detention policies and to consider alternatives to detention in every case.

"It is a gross injustice to deprive of his liberty for significant periods of time a person who has committed no crime and does not intend to do so. No civilised country should willingly tolerate such injustices." Lord T Bingham, *The Rule of Law* (London: Allen Lane, 2010).

The widespread and increasing use of immigration detention has come under considerable scrutiny in recent years. As a means of controlling entry to the territory and, supposedly, as a form of deterrence, immigration detention is increasingly being questioned on practical and functional grounds, as well as on human rights/legal grounds. Politically, too, many countries are facing growing civil opposition to the practice of immigration detention.

It is clear that irregular migration can challenge the efficient functioning of asylum systems in many countries. States are increasingly confronted with the complex phenomenon of mixed population movements, including smuggling and trafficking in persons, and the multiple push and pull factors driving such movements. Being able to deport persons rapidly if they are found to have no grounds to stay is also a government objective. UNHCR has long held that the return of rejected asylum seekers is an important part of functioning asylum systems, and one which may be required in order to safeguard national and/or regional protection systems and to prevent onward movements.¹

Governments are also concerned about national security and criminal activities, which have in turn propagated an increasingly hostile and xenophobic climate in many countries. Xenophobia, racism and related intolerance are used in subtle and

overt ways by the media, politicians and other leading public figures to ignite fears of the 'other' in host communities; they pose some of the greatest threats to the global asylum system, and need to be combated.²

As governments have attempted to respond to these challenges, detention policies and practices have in some contexts been expanded; however, they have not always differentiated sufficiently between the special situation of persons in need of international protection and the broader category of irregular migrants. People are also at times detained in criminal facilities, including maximum security prisons, which do not cater for the particular needs of asylum seekers or other migrants and which, in effect, criminalise them. These are worrying trends, not least because the latest empirical research shows that not even the most stringent detention policies deter irregular migration or discourage persons from seeking asylum.³ In fact, recent research commissioned by UNHCR suggests that many asylum seekers are unaware of the detention policies of their destination countries, or indeed have little or no say about their journey or their final destination.⁴

The negative and at times severe physical and psychological consequences of detention are well-documented, yet appear to have had limited impact on the policy-making of some nations. A study by the Jesuit Refugee Service, for example, reveals that regardless of whether asylum seekers show symptoms of trauma at the start of their detention, within a few months they do show such symptoms. The research concludes that everyone is vulnerable in detention.⁵ The psychological effects of detention, especially prolonged detention, can

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also affect the ability of refugees to integrate into their host countries, and to become positive contributors to their new societies.

New detention guidelines

In October 2012, UNHCR launched its new Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012).⁶ The ten inter-related guidelines [see back cover] touch on different facets of the right to liberty and the prohibition against arbitrary detention for asylum seekers. Drawing upon international refugee and human rights law standards, they are intended to guide governments in their elaboration and implementation of asylum and migration policies which involve an element of detention, and help decision makers, including judges, in making assessments about the necessity to detain a particular individual.

UNHCR's Detention Guidelines outline the international legal framework that applies in different situations, and provide information

on alternatives to detention. The policies of many industrialised countries, for example, are out of step with the latest research. Evidence shows that alternatives to detention work in practice, whether in the form of reporting requirements, designated residence or supervision in the community, for example. Research indicates, too, that asylum seekers consistently comply with conditions of their release from detention in over 90% of cases.⁷

The same studies have shown that when asylum seekers are treated with dignity and humanity they demonstrate high levels of cooperation throughout the entire asylum process, including at the end of that process. There is even evidence which supports a correlation between going through an alternative to detention before having cases finally rejected and higher voluntary departure rates.⁸

UNHCR's Detention Guidelines emphasise that seeking asylum is not an unlawful act and, as such, even those who have entered or



An Afghan asylum seeker walks in the courtyard used for outdoor recreation time at Belawan Immigration Detention Centre, North Sumatra.

remained in a territory without authorisation are protected from penalisation, including in the form of detention or other restrictions on their movement. The Guidelines also draw upon the human right to liberty and the correlative prohibition against arbitrary detention, which apply to all people regardless of their immigration, asylum-seeker, refugee or other status. They explain the parameters of the right to liberty as it applies in the asylum context, and place particular prominence on the need for states to implement open and humane reception arrangements for asylum seekers, including alternatives to detention.

These new guidelines supersede UNHCR's 1999 guidelines, and include a special annex on alternatives to detention, an expanded section on special or vulnerable groups who – because of disability, age, gender, sexual orientation or gender identity – require special measures to be taken, and a recommendation calling for independent monitoring and inspection of places of detention. In support of the latter recommendation, UNHCR is working with the Association for the Prevention of Torture and the International Detention Coalition to publish a joint monitoring manual, to be released in late 2013. The Guidelines also specify minimum procedural safeguards plus humane and dignified conditions of detention.

The core of the message is that while detention is often a feature of asylum/migration systems, the detention of asylum seekers should in principle be avoided and used only in exceptional circumstances. Detention may only

be applied where it has been determined that it is necessary, reasonable and proportionate to the legitimate objective in the individual case, and alternatives to detention need to be considered in each case.

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See also Edwards A (forthcoming) 'Introductory Note to UNHCR's Guidelines on Detention and Alternatives to Detention', *International Journal of Refugee Law*.

See also Refworld's special page on detention: www.unhcr.org/refworld/detention.html

1. UNHCR, Protection Policy Paper 'The return of persons found not to be in need of international protection to their countries of origin: UNHCR's role', November 2010, para 3 www.refworld.org/docid/4cea23c62.html UNHCR, Protection Policy Paper 'Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing', November 2010, para 32. www.refworld.org/docid/4cd12d3a2.html
2. Edwards A 'Measures of First Resort 'Alternatives to Immigration Detention in Comparative Perspective'', 2011 *Equal Rights Review Special Feature on Detention and Discrimination*, 117-142 www.equalrightstrust.org/ertdocumentbank/ERR7_alice.pdf.
3. Edwards A *Back to Basics The Right to Liberty and Security of Person and "Alternatives to Detention" of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, UNHCR Legal and Protection Policy Research Series, PPLA/2011/01.Rev.1, April 2011 www.unhcr.org/refworld/docid/4dc935fd2.html International Detention Coalition, *There are Alternatives, A Handbook for Preventing Unnecessary Immigration Detention*, 2011, <http://idcoalition.org/cap/handbook/> UN, Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau, A/HRC/20/24, 2 April 2012 www.unhcr.org/refworld/docid/502e0bb62.html.
4. Costello C & Kaytaz E, *Building Empirical Research into Alternatives to Detention: Perceptions of Asylum-Seekers and Refugees in Toronto and Geneva*, UNHCR Legal and Protection Policy Research Series, June 2013 www.unhcr.org/51c1c5c9.html
5. Jesuit Refugee Service, Europe, *Becoming Vulnerable in Detention*, June 2011 www.unhcr.org/refworld/docid/4ec269f62.html
6. The Guidelines are available at: www.unhcr.org/refworld/docid/503489533b8.html
7. Edwards, endnote 3.
8. Edwards and IDC, endnote 3.

