

September 2013

## Establishing arbitrariness

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States have international obligations to ensure that all deprivations of an individual's liberty are consistent with international human rights law. The majority of provisions in the international human rights law instruments that deal with such deprivations of liberty contain the term 'arbitrary', yet there is no clear definition of what this entails. Arbitrariness is defined differently by different supervisory bodies in different cases, and in different contexts; understanding it requires awareness of the different factors affecting how individual deprivations of liberty are examined and understood.

An important factor is the dominance of discourses around national security and notions of territorial sovereignty. The right of states to control entry into their territories has consistently been made explicit by the European Court of Human Rights (ECtHR), emphasising that as long as the detention is considered to serve a legitimate public interest it cannot be considered as arbitrary. The apparent counter-

balances to this are the concepts of proportionality and necessity, and the UN Human Rights Committee suggests that these two concepts remain central in situations of deprivation of liberty. It is not enough that a detention serves a political purpose; if it fails the tests of proportionality and necessity it cannot be justifiable and is therefore 'arbitrary'. Indeed, some argue that in cases concerning asylum seekers there is no legal justification for detention unless in exceptional circumstances such as a threat to national security or public order. Nevertheless, states continue to detain migrants without regard to proportionality and necessity. Closely linked to the ideas of proportionality and necessity, the notions of fairness, justice and predictability are also central to understanding arbitrariness, and must be kept in mind in any examination of whether a particular detention is or is not arbitrary.

In the context of deportation proceedings, according to the ECtHR, detention can only be justified for as long as proceedings are in progress, and "if such proceedings are not prosecuted with due diligence, the detention will cease to be permissible".<sup>1</sup> Irrespective of state claims to the contrary, detention of those awaiting deportation must be both proportionate and necessary; that the detainee in question is subject to removal is not sufficient justification.



Family locked in holding cell, Tucson, Arizona, in the US.

Finally there must always be consideration of the individual circumstances of any particular case. It is crucial that a 'one size fits all' approach be avoided. It should not be enough that a state is acting in pursuit of a broader policy of immigration control or that generalised notions of national security are being invoked; the proportionality and necessity of each and every instance of detention should be scrutinised.

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1. Chahal v. the United Kingdom [GC], Application No. 22414/93, ECtHR, Judgment of 15 November 1996, Reports 1996-V, para. 112.