

DISCUSSION PAPER

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Detention of Asylum Seekers

UNHCR's Regional Office in Canberra will publish a series of discussion papers on current issues affecting asylum-seekers and refugees. This first one is on the detention of asylum seekers. While the 1951 Convention relating to the Status of Refugees is silent on the issue of detention, UNHCR has developed guidelines for the detention of asylum-seekers and refugees. The increase in the use of detention by States to restrict the movement of asylum-seekers who enter a territory in search of asylum has been noted with considerable concern by UNHCR. In order to reflect on the detention of asylum-seekers and refugees, UNHCR invited Dr. Penelope Matthews, Senior Lecturer at the Faculty of Law, Australian National University, and Dr. Sev Ozdowski OAM, Human Rights Commissioner, to contribute their comments on this topic. Future publications of the UNHCR discussion papers will include topics such as temporary protection, family reunification, and people smuggling.

Human rights and immigration detention in Australia

By Dr Sev Ozdowski OAM

Although the Australian government and people have shown generosity towards asylum seekers who apply for protection offshore, those who have arrived on Australia's shores without visas ('unauthorised arrivals') in recent times have received less generous treatment.

The Human Rights and Equal Opportunity Commission has long been concerned about the government's treatment of unauthorised arrivals, in particular the mandatory detention regime. The Commission's statutory functions include the investigation and conciliation of complaints of human rights violations as outlined in international instruments attached to the *Human Rights and Equal Opportunity Commission Act 1986*. The Commission has the power to investigate violations of provisions of international human rights treaties. The two most important of these for immigration detainees are the *Convention on the Rights of the Child* (CROC) and the *International Covenant on Civil and Political Rights* (ICCPR). Based on these treaties, the Commission investigates individual complaints by refugees and asylum seekers in detention. It also makes more general inquiries into the operation of immigration detention centres.

Although the Commission only investigates human rights as defined under its Act, other instruments, such as the Refugee Convention, are noted by the Commission when applicable because they emphasise the standards and detail the meaning of the treaties on which the Commission relies. The UNHCR's Guidelines on applicable Criteria and Standards relating to the Detention of Asylum Seekers is a useful reference point because it emphasises many of the

key human rights principles in CROC and ICCPR.

In 1998 the Commission produced *Those who've come across the seas*, a report of its inquiry into the detention of unauthorised arrivals. Since then the Commission has continued to make inspections of the detention centres and to make recommendations to the government through the Minister for Immigration and Multicultural Affairs and to the Department of Immigration and Multicultural Affairs.

There have been two major areas of concern raised by the Commission on immigration detention in Australia, which are issues also raised in the UNHCR Guidelines.

The first relates to the inherent undesirability of immigration detention.

Under ICCPR article 9.1 everyone has the right to liberty and security of person and no one may be subjected to arbitrary arrest or detention. Under CROC article 37(b) no child is to be deprived of his or her liberty unlawfully or arbitrarily.

The meaning of 'arbitrary' is crucial in determining whether Australia's detention policy violates human rights obligations. The General Comments and jurisprudence of the Human Rights Committee are the main sources for interpretation of the ICCPR, although some dispute their authority. According to these sources, arbitrariness does not simply mean unlawful (General Comment No.16/1988); *Alphen v The Netherlands* (Communication No.305/1988).

Rather, arbitrariness is established when accepted principles of justice and fairness are violated.

To avoid being arbitrary, detention must be a proportionate means to achieve a legitimate aim. It must be reasonable in the circumstances. Even where initial detention is not arbitrary, it may become so during its course if it is without appropriate justification (*A v Australia* (Communication No.560/1993)).

Hence although mandatory detention per se may not be arbitrary, it must be a proportionate means to achieve a legitimate aim. As specified in the UNHCR Guidelines and the UNHCR EXCOM Conclusion No.44, the detention of asylum seekers may need to be used in certain instances. For example, detention may be necessary to verify identity.

However, under current practice in Australia the detention of unauthorised arrivals is not exceptional or proportionate but the norm. Individual circumstances are not taken into account. The *Migration Act 1958* stipulates that all unlawful non-citizens must be detained (section 189) and kept in detention (section 196) until they are granted a visa or removed from the country. Bridging visas for unauthorised arrivals are limited to exceptional cases and are rarely given.

Prolonged detention pushes the test of reasonableness even further. In Australia, the length of time spent in detention has significantly reduced for recent arrivals. Nonetheless, most applicants remain in detention for months and some have remained in detention for over one year awaiting a final decision on their applications.

In addition to the test of arbitrariness, the detention of a child must be used only as a measure of last resort and for the shortest appropriate period of time (CROC article 37(b)). The UNHCR Guidelines also reflect this general principle for detention of children.

Unfortunately, although protection applications by unaccompanied minors are prioritised, most children are given similar treatment to adults. Despite the Minister's powers to issue bridging visas for children, very few children have been released from detention prior to the granting of a protection visa. The explanation for this lies in the fact that the Minister has no discretion to release the parents of the child. Hence a child released under these powers would be denied the protection of his or her parents, which may be against the best interests of the child and in breach of CROC. The Minister has recently announced some trials for the release of children from detention which may possibly see the beginning of an alternative detention regime. However, at present, not enough is being done to ensure that the detention of children is a last resort.

In *Those who've come across the seas*, the Commission has presented an alternative detention model which provides for open detention or community release of detainees after limited periods of secure detention.

The second concern of the Commission is that condi-

tions in detention must conform to international human rights standards.

In March 2000 the Commission produced Immigration Detention Guidelines to establish a benchmark against which the Commission and others may evaluate conditions and treatment in immigration detention. The Commission's Guidelines draw on relevant minimum standards, for example the *Standard Minimum Rules for the Treatment of Prisoners*, which detail what is required for humane detention consistent with respect for human dignity as required by the ICCPR and CROC. The Department of Immigration and Multicultural Affairs has its own Immigration Detention Standards that are scheduled to the contractual agreement between the Department and the detention service provider, Australasian Correctional Services. These Standards go some way to reflect minimum human rights standards but require revision in many respects.

Human rights instruments specify that conditions of detention for all persons deprived of their liberty must ensure humane treatment of detainees (ICCPR article 10.1; CROC article 37(c)). Each detainee under 18 years shall be treated in a manner which takes into account the needs of a person of his or her age (CROC article 37(c)). Authorities must avoid imposing cruel, inhuman or degrading treatment that would violate ICCPR article 7 and CROC article 37(a).

Immigration detention authorities should also recognise the rights of persons in immigration detention with special needs including unaccompanied elderly persons and minors, single women, torture and trauma victims and persons with a mental or physical disability (Principle 5(2), *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*). In particular, vulnerable detainees should be protected from abuse (CROC article 19).

A fundamental principle is that immigration detainees are not held pursuant to arrest or charge for any criminal offence. Therefore under international law their treatment should be as favourable as possible and in no way less favourable than that of prisoners (Rule 94, *Standard Minimum Rules for the Treatment of Prisoners*).

The Commission receives a number of immigration-related complaints, many of which relate to conditions in detention centres. In 1999-2000 the Commission received 61 immigration-related complaints (34% of the human rights-related complaints). Complainants allege a range of human rights violations including inhumane conditions or treatment in detention, being transferred to a state prison and ill-treatment when transferred to prison. Some of these complaints are declined for a variety of reasons. Yet many of the complaints echo concerns expressed by detainees during Commission visits or through other sources, including recent government reports. The Commission retains concerns relating to the provision of information and assistance to asylum seekers on arrival, contact with the outside world, trauma and mental health care, education and recreational activities for adults and children and behavioural management techniques, among others. The Commission is par-

ticularly concerned that the government exercise its duty of care for those detainees who, for whatever reason, remain in detention for prolonged periods of time.

As expressed in the UNHCR Guidelines, the issue of unauthorised arrivals is not a straightforward one. Providing a humane and effective system of receiving and assessing claims for protection is complicated by a range of pressures, including those political and economic. However, the Australian government has a responsibility to ensure that all people who come within its borders are treated with respect and in accordance with their human rights. ■

Dr Sev Ozdowski O.A.M began his five-year term as Human Rights Commissioner and one-year term as acting Disability Discrimination Commissioner on 8 December 2000. Dr Ozdowski's tireless work for the Polish community, including refugees, and his commitment to enhancing Australia-Poland relations was rewarded with an O.A.M in 1995 and with the Chevalier of the Order of Merit of the Republic of Poland in 2000.

The Human Rights Commissioner announced on 28 November 2001 a major National Inquiry into Children in Immigration Detention. The Human Rights and Equal Opportunity Commission Inquiry will be conducted over 2002. The Inquiry will consider public submissions and visit major detention centres and facilities. Public hearings will be conducted in States where there are detention centres. Dr Ozdowski hopes to report on the Inquiry to Federal Parliament by the end of 2002.

UNHCR Guidelines on the Detention of Asylum-Seekers

The following is a brief summary of UNHCR's Guidelines on applicable Criteria and Standards relating to the Detention of Asylum-Seekers. For a full copy of the Guidelines, contact the Regional Office in Canberra or visit the UNHCR website (www.unhcr.ch)

Guideline 1: Scope of the Guidelines.

The guidelines apply to all asylum-seekers in, or being considered for, detention or detention like situations.

Guideline 2: General Principle.

As a general principle asylum-seekers should not be detained. The position of asylum-seekers differs from that of ordinary immigrants in that they may not be in a position to comply with the legal formalities for entry. This, as well as the fact that asylum-seekers have often had traumatic experiences, should be taken into account.

Guideline 3: Exceptional Grounds for Detention.

In conformity with EXCOM Conclusion No. 44 (XXXVII) the detention of asylum-seekers may only be resorted to, if necessary: to verify identity; to determine the elements on which the claim for refugee status is based; in cases where asylum-seekers have destroyed their travel and /or identity documents or have used fraudulent documents in order to mislead the authorities; or to protect national security and public order.

Guideline 4: Alternatives to Detention.

Monitoring requirements; provision of a guarantor/ surety; release on bail; and open centres.

Guideline 5: Procedural Safeguards.

Asylum-seekers should be entitled to the following mini-

imum procedural guarantees: prompt and full communication of any order of detention, the reasons for it and their rights; to be informed of the right to legal counsel; to have the decision subjected to an automatic review; to contact and be contacted by the local UNHCR Office, available national refugee bodies or other agencies and an advocate.

Guideline 6: Detention of Persons under the Age of 18 years.

As a general rule, minors who are asylum-seekers should not be detained. During detention children have the right to an education, preferably outside the detention premises. Provision should also be made for recreation and play, which is essential to a child's mental development and to alleviate stress and trauma.

Guideline 7: Detention of Vulnerable Persons.

Active consideration of possible alternatives should precede any order to detain vulnerable asylum-seekers such as unaccompanied elderly persons, torture or trauma victims, or persons with mental or physical disability.

Guideline 8: Detention of Women.

Women and adolescent girls, especially those who arrive unaccompanied, are particularly at risk. Women asylum-seekers should receive the same access to legal and other services, and specific services in response to their special needs.

Guideline 9: Detention of Stateless Persons.

Stateless persons are entitled to benefit from the same standards of treatment as those in detention generally.

Guideline 10: Conditions of Detention.

Conditions of detention for asylum-seekers should be humane with respect for the inherent dignity of the person. ■

Australia's detention policy assessed against UNHCR's Guidelines on Detention

By Dr Penelope Mathew, Senior Lecturer, Faculty of Law - Australian National University

UNHCR's Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers (February 1999) begin with the statement that the detention of asylum-seekers is inherently undesirable and, in many instances, contrary to international law. There follow a number of guidelines which spell out various matters, including:

- the general principle that asylum-seekers, particularly vulnerable asylum-seekers, should not be detained (Guideline 2);
- the exceptional circumstances when asylum-seekers may be detained (Guideline 3);
- the alternatives to detention (Guideline 4);
- the procedural guarantees that must be available to asylum seekers (Guideline 5);
- considerations applicable in the case of particularly vulnerable groups (Guidelines 6, 7 and 8); and
- the conditions of detention for asylum-seekers (Guideline 10).

These guidelines do not constitute binding law in and of themselves. However, they draw on the 1951 Convention Relating to the Status of Refugees (the "Refugee Convention"), the "soft law" represented by the conclusions of the Executive Committee which supervises the UNHCR programme ("EXCOM"), and general human rights treaties like the International Covenant on Civil and Political Rights. Yet Australia continues to maintain what is commonly acknowledged as the harshest detention scheme for asylum-seekers in the Western world.

The policy of mandatory detention for unauthorised asylum-seekers was introduced in 1992 as a response to a particular group of Cambodian asylum-seekers who had sought review of their cases by the Federal Court. Two days before a crucial hearing, legislation was introduced to ensure that these asylum-seekers remained in detention. The second reading speech indicated that Australia's aim was to send a strong message of deterrence to future unauthorised arrivals. Small changes have been implemented since the policy was first introduced. In particular, bridging visas are now available for certain vulnerable groups, namely the elderly, victims of torture, and children. However, bridging visas are rarely granted. In the case of children, for example, bridging visas are not available to their parents and the government recognises that children should not be separated from their parents.

The policy contradicts the UNHCR's guidelines on nearly every score. Contrary to Guideline 2, the general principle in Australian law is that asylum-seekers should be detained, not the reverse. There is no recognition of the fact that "the position of asylum-seekers differs fundamentally from that of ordinary immigrants in that they may not be in

a position to comply with the legal formalities for entry" (see Guideline 2). Indeed, the government has often invoked the idea of a "queue" that asylum-seekers should be required to join.

Apart from deterring so-called "queue-jumpers", the Australian government has claimed that detention is necessary to prevent asylum-seekers absconding into the community. Circumstances particular to the individual are not accounted for; alternatives to detention are not considered (see Guideline 4); and the reasons for detention are not those recognised by UNHCR. According to UNHCR, detention is permissible in order:

- to verify identity;
- to determine the elements on which the claim for refugee status or asylum is based;
- to deal with cases where asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or
- to protect national security and public order. (See Guideline 3, which reiterates the criteria established by EXCOM in Conclusion No. 44.)

Procedural guarantees in relation to detention (see Guideline 5) are almost non-existent. In particular, unauthorised arrivals are not informed automatically of their right to legal counsel. Frightened that asylum-seekers already in the refugee status determination process will "coach" new arrivals, the government seeks to keep new arrivals effectively incommunicado. There is also no effective judicial review of detention – a fact condemned by the Human Rights Committee in its decision in *A v Australia*.

In addition to detaining many children, which is contrary to Guideline 6, there is almost no recognition of the particular risks to women in detention centres (see Guideline 8). Finally, the conditions of detention (see Guideline 10) may not accord with the standard of humane treatment required by Article 10 of the International Covenant on Civil and Political Rights and various other soft-law standards relating to detention that have been adopted by the UN. For example, there have been worrying reports of child abuse and the use by immigration detention officers of numbers rather than names to identify asylum-seekers.

It is to be hoped that the recent release of a small group of women and children into the community is the first small step towards a sea change in Australian policy that will bring Australia into compliance with international law. If this trial is successful, the government may realise that its fear of "opening the floodgates" is unwarranted. More importantly, a change in policy will serve to recognise the fact that the way we treat asylum-seekers says more about Australians than it does about the asylum-seekers. ■