



Hua Zhen Chen, a victim of forced abortion, was detained for nearly two years.

### 3. An Inherently Unfair Process

The U.S. asylum detention system lacks the safeguards necessary to ensure due process and guard against unfair and arbitrary detention:

- The initial determination to detain an asylum seeker is a blanket one, not based on an individualized determination, but rather on whether a person possesses valid travel documents.
- Subsequent parole decisions are entrusted to the DHS, which is the detaining authority, rather than to an independent authority.
- The parole criteria applied by INS, now DHS, are set forth only in guidelines rather than in enforceable regulations.

#### **No Appeal to a Judge**

The Department of Homeland Security acts, in effect, as both judge and jailer with respect to parole decisions for asylum seekers. If parole is denied by DHS, the decision cannot be appealed to a judge – even an immigration judge. While immigration judges can review DHS custody decisions for other immigration detainees, they are precluded from reviewing the detention of so-called “arriving aliens,” a group that includes asylum seekers who arrive at airports and borders.<sup>10</sup> Federal courts have refused to review parole denials for asylum seekers, in some cases citing a lack of jurisdiction and in other cases emphasizing that they are obligated to defer to the judgment of immigration officials.<sup>11</sup>

Most European countries that detain asylum seekers provide for independent or judicial review of the decision to detain, as do Canada and South Africa. A survey

conducted by the Lawyers Committee identified at least 25 countries that provide some kind of independent review when they detain asylum seekers.<sup>12</sup> While the review procedures in some of these states are flawed, their laws at least make clear that asylum seekers are entitled to have their detention reviewed promptly by a judge or similar independent authority. For instance:<sup>13</sup>

- In Denmark, where about 50 percent of asylum seekers are detained at some point, review of detention by an independent City Court after three days is mandatory and can be appealed to the High Court.
- In Germany, where detention of asylum seekers is not mandatory, detention lasting more than 24 hours can be ordered only by local courts and can be appealed to district and regional civil courts within two weeks.
- In France, where an entering asylum seeker can be detained for a maximum of four days by border police, further detention is only allowed by order of an independent court, which may extend detention in eight day increments for a total of 20 days. The decisions of that court to extend detention can be appealed to the Court of Appeal.
- In Ireland, a detained asylum seeker is brought automatically before a judge who may decide that the individual should be released or, alternatively, that the individual may be detained for a 10-day period. Subsequent renewals of the 10-day period must be authorized by the court.
- In the United Kingdom, which detains more than 1,000 asylum seekers each year upon arrival and while awaiting deportation, decisions to detain asylum seekers can be reviewed by an independent authority through a request for a bail hearing, a process which is no longer automatic.

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## International Legal Standards

The International Covenant on Civil and Political Rights (ICCPR), to which the United States is a party, provides that: “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”<sup>14</sup> The U.N. Human Rights Committee has emphasized that the ICCPR “envisages that the legality of detention will be determined by a court so as to ensure a higher degree of objectivity and independence . . .”<sup>15</sup>

The detention guidelines issued by the United Nations High Commissioner for Refugees (UNHCR) call for procedural guarantees, including “automatic review before a judicial or administrative body independent of the detaining authorities,” when an asylum seeker is detained.<sup>16</sup>

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- In South Africa, if an asylum seeker is detained, any detention over 30 days is subject to automatic, independent judicial review under law. This review, however, does not take place in many instances.
- In Canada, if an asylum seeker is detained for 48 hours he or she must be brought before an independent administrative review board as soon as possible to determine whether the government can establish a need to continue the detention under criteria established by law.
- In Lithuania, police have authority to detain asylum seekers for identity purposes. About one hundred asylum seekers were in detention at the end of 2002.<sup>17</sup> Detention that exceeds 48 hours must be authorized by a court, which can allow detention in a registration center until a final decision is made in the asylum case. Every 30 days from then on the government must reapply for detention, and the court must respond to each application within 10 days.
- In Hungary, during the first five days of detention, a detained asylum seeker may request review from the local court. Such review focuses on whether the alien's policing authority correctly applied the law in ordering the detention.
- In Poland, a local court must make the decision to detain an asylum seeker beyond seven days. This decision may be appealed to the district court within seven days of the date of issuance of the decision.

In both the United States and Australia, the law provides for mandatory detention of asylum seekers who arrive without proper documents. In both countries the law currently fails to provide for meaningful individualized assessments of the need for detention by an independent or judicial authority.<sup>18</sup>

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### Liberian Pastor Denied Release

In April 2003, the DHS detained a pastor of a Pentecostal Church in Liberia when he arrived at a U.S. airport in search of refuge. The Pastor's visa was determined to be invalid by immigration inspectors because he had not left the country on time during a prior visit. The Pastor – a critic of the repressive government of President Charles Taylor and its recruitment of child soldiers – was handcuffed and shackled for transit to the immigration detention facility. He soon requested parole – submitting the valid passport he had used to travel to the United States and affidavits from religious clergy colleagues in West Virginia, Virginia, and Maryland, attesting to his identity and work in Liberia. The pastor also had family living in the United States. Even though he had submitted extensive proof of his identity and close religious ties in the United States, the DHS denied his parole request. The denial could not be appealed to an immigration judge. The pastor was detained for three and a half months and was only released in July 2003 after being granted asylum.<sup>19</sup>

## INS/DHS Release Criteria Not in Regulations

Over the years, the INS parole guidelines for asylum seekers, which were issued in a series of INS memoranda, have been applied inconsistently by local INS offices, with some local INS officials routinely failing to apply the guidelines.<sup>20</sup> The press, attorneys, human rights organizations, and refugee protection experts have reported extensively on inconsistencies and deficiencies in the administration of the asylum parole guidelines.<sup>21</sup> In June 1995, asylum seekers and others who were detained at an immigration detention facility in Elizabeth, New Jersey (known as the “Esmor” facility) rioted in response to abusive treatment by prison guards. This violent incident triggered a national examination of INS detention of asylum seekers.<sup>22</sup> The INS’ report on the riot revealed serious deficiencies in the implementation of the parole program at the facility.<sup>23</sup> The Lawyers Committee, which has addressed the failure to follow the parole guidelines in a series of reports, filed a formal petition to this effect to the INS in 1996. We requested that the INS issue formal regulations codifying its asylum parole guidelines. We continue to believe that this will help ensure that the guidelines are implemented properly and consistently.<sup>24</sup>

The problem of inconsistent application of parole criteria was so severe that, in December 2000, the INS issued a regulation confirming that the INS Commissioner could exercise authority over local INS parole determinations. The clarification was reportedly needed because some INS District Directors had maintained that INS headquarters did not have the authority to interfere in their parole determinations.<sup>25</sup>

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## Rwandan Family Denied Release

Three asylum seekers from Rwanda, a married couple and a relative, fled Rwanda after surviving direct threats on their lives because of their pro-democracy political affiliations. In search of refuge, the family came to the United States because they had family here.

Although they had traveled with valid passports and visas, the family was detained by the INS at the airport when they told officials that they had come to seek asylum – making their “non-immigrant” visas invalid in the eyes of immigration officers. The two men were taken to a large detention facility in one state and the young woman was moved to a prison for criminals in another state. At the prison, no one spoke her language. Prison authorities, without explanation, sheared off her long braided hair.

After passing their credible fear screening interviews, all three applied for parole, so they could live with their U.S. relatives while final resolution of their cases was pending. The young woman was released on parole by the immigration office. The two men, however, were both denied parole by immigration officials in the other state. Even though the two men had the same community ties and same proof of identity (their own valid passports), their parole applications were denied on different grounds. The INS found that one man did not have sufficient documentation of his identity – even though the INS’ own forensic experts authenticated his passport and visa. The other man was denied on the ground that he “had not established sufficient community ties” – even though both men and the woman were being sponsored by the same U.S. citizen relative, an individual who was well-respected in his community. The two men were finally released in January 2002 – after four months of detention – when they were granted asylum. The family is now reunited and living together in the United States.<sup>26</sup>

Despite the December 2000 regulation reaffirming the authority of the INS Commissioner over local INS parole determinations, the asylum parole guidelines themselves have not been codified into regulations – leaving local immigration officials free to ignore the guidelines. A survey conducted by the Lawyers Committee confirms that, even after this change, the guidelines are disregarded in many locations – leaving many asylum seekers in detention for long periods of time even though they meet the criteria for release. *Pro bono* attorneys in California, Illinois, Louisiana, Michigan, Minnesota, New Jersey, New York, Pennsylvania, and parts of Texas reported that the asylum seekers they represent are regularly denied parole from detention despite meeting the parole guidelines. In Florida, as discussed later in this report, Haitian asylum seekers arriving by boat are routinely denied parole under a special Haitian detention policy.

It is impossible to know how many asylum seekers are paroled or denied parole from detention – and the average period of detention they suffer – because of the failure of the INS (now the DHS) to provide accurate, regular statistical information to the public about the detention of asylum seekers. In 1999, frustrated by the failure of immigration officials to produce such information, Congress passed a law requiring the INS to provide statistical information about the detention of asylum seekers to Congress on an annual basis, and to the public whenever requested. But immigration authorities have persistently failed to comply with this law.<sup>27</sup> In February 2003 the Lawyers Committee filed a formal request under the Freedom of Information Act for information relating to the detention and parole of asylum seekers (including the information that is required to be provided to Congress). The Department of Homeland Security has still not provided this information to us.

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### U.S. Committee on Religious Freedom Addresses Parole Variations

On May 17, 1999, the Secretary of State's Advisory Committee on Religious Freedom submitted its final report and addressed the detention of asylum seekers and concerns about the variation in release policies among INS districts. The Committee on Religious Freedom concluded that: "The unnecessary detention of already traumatized victims of religious persecution, as well as other types of persecution, should be examined with the goal of providing release. . . . Serious concerns have been raised over the length of time these traumatized individuals are spending in detention facilities, the conditions they are being kept in, the types of detention facility that are being used and the variation in policies from district to district."<sup>28</sup>

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## No Limit on Length of Detention

Neither U.S. laws nor regulations set a limit on the length of time an asylum seeker may be detained while his or her asylum proceedings are pending. In fact, human rights organizations and news reports have documented cases of asylum seekers who have been detained for three, four, and even five years.<sup>29</sup> In researching the U.S. immigration detention system, the *Dallas Morning News* obtained statistics revealing that 361 asylum seekers and other detainees who had not been convicted of any crime had been detained for over three years.<sup>30</sup>

In June 2001, the U.S. Supreme Court ruled that the indefinite detention of non-citizens who had been admitted to the United States and were later ordered deported would raise serious concerns under the U.S. Constitution. In *Zadvydas v. Davis*, the Court decided that the law at issue contained an implicit reasonable time requirement, which the Court determined to generally be a period of six months.<sup>31</sup> The Court's decision involved immigrants already present in the United States rather than those detained upon their arrival at U.S. airports or borders. The U.S. government has taken the position that the ruling in this case does not apply to these "arriving aliens," a category which includes arriving asylum seekers.<sup>32</sup>

## Viktor Odnovyun and Oleksiy Galushka Detained for Four Years

Viktor Odnovyun and Oleksiy Galushka have been detained for nearly four years at a county jail in Pennsylvania and at the Wackenhut facility in Queens, New York. The two arrived in the United States in March 1999, seeking asylum from Ukraine where they were persecuted by security forces because of their work with non-governmental organizations. They were detained when they arrived at a U.S. airport. Although they were traveling on their own Ukrainian passports, they lacked visas to enter the U.S. In September 1999, an immigration judge granted them withholding of removal but denied them asylum because he believed they had the right to live in Argentina. After a series of appeals, the INS agreed to release the two men in connection with a federal court settlement agreement.



Oleksiy Galushka (left) and Viktor Odnovyun (right).

After over three years in INS detention, Odnovyun and Galushka were released. They settled in Pennsylvania because they had built up extensive community ties while detained at the York, Pennsylvania jail. Galushka volunteered at York Hospital, while Odnovyun volunteered at the local Orthodox Church and the International Friendship House, a home for released asylum seekers. After they received their work authorizations, Odnovyun was able to start sending money home for the medical care of his teenage son, who has been battling cancer in the Ukraine.

On June 17, 2003, they drove from Pennsylvania to New York to attend an immigration court hearing, expecting to return to their home and jobs. Both men had additional job offers pending: Galushka from the hospital where he had volunteered, and Odnovyun from a medical supply firm. The Immigration Judge found that they could be tortured if returned to their home country and granted both men withholding of removal under the U.N. Convention Against Torture. But the DHS trial attorney announced that she would appeal the judge's decision and directed that both men be re-detained immediately.

Their *pro bono* attorneys filed a new parole application – supported by 28 letters of support from their employers, friends, and fellow parishioners in Pennsylvania. The DHS denied the parole application in late September 2003 in a letter that referred to the two men collectively as “she,” stating that that DHS “cannot be assured that she will appear for immigration hearings or other matters as required.” The letter did not address the fact that Odnovyun and Galushka, when previously released on parole, had appeared for all immigration hearings.

Both Odnovyun and Galushka participated in a hunger-strike at the Queens detention facility in late October 2003. They began eating again on November 1 after losing about 20 pounds each.<sup>33</sup>