



7. Recommendations

The United States should bring its laws and practices relating to the detention of asylum seekers into line with international standards and U.S. traditions of fairness. Asylum seekers should not be subject to automatic or mandatory detention, and should only be detained in those cases where detention is found to be necessary. The need for detention should be determined in a hearing before a judge or similar independent authority.

Thorough reform of the U.S. detention system for asylum seekers will take a combination of legislative, regulatory and administrative actions – as well as a change in the training of DHS staff who are entrusted with assessing the need to detain individual asylum seekers.

We have outlined below a series of significant changes that need to be made in order to improve U.S. detention practices. As a practical first step, Human Rights First (the new name of the Lawyers Committee for Human Rights) urges that the Department of Homeland Security make three changes that would help ensure the basic fairness of the asylum detention system:

- (1) First, create a new high-level refugee protection position in the Office of Secretary Tom Ridge.**
- (2) Second, give asylum seekers the chance to have their detention reviewed by an immigration judge, like other immigration detainees.**
- (3) Third, put the official parole criteria for asylum seekers into formal regulations.**

These three changes, on their own, will not magically transform the U.S. asylum detention system, but they will inject much-needed safeguards to help ensure that asylum seekers are treated fairly. Our comprehensive recommendations are detailed below.

Review by an Immigration Judge. Central to international and U.S. notions of fairness is the right to be able to challenge the decision to detain before a judge or other independent authority. Providing asylum seekers with the chance to have their detention in the United States reviewed by an independent judge will require action by both the Administration and by the U.S. Congress.

- **The Department of Homeland Security** should work with the Department of Justice to ensure that arriving asylum seekers, like other immigration detainees, have the chance to have their custody reviewed in a hearing before an immigration judge. DHS and DOJ should implement regulations establishing the right of asylum applicants to have parole decisions reviewed by an immigration judge.
- **The U.S. Congress** should enact legislation to ensure that immigration judges are independent of the Department of Justice, and instead part of a truly independent court system. This legislation should also provide for the right of asylum applicants to seek review of parole decisions by immigration judges, if this change has not been made by federal regulations.

High-Level DHS Position. The Department of Homeland Security should create a senior position within the Office of the DHS Secretary, called Director of Refugee Protection. This person should be charged with ensuring that DHS meets its refugee protection obligations under U.S. and international law.

- The Director of Refugee Protection should report directly to the Secretary of Homeland Security and his or her chief of staff. The Director of Refugee Protection should have the authority to convene meetings among the different bureaus and issue recommendations to the Secretary and other senior DHS officials designed to ensure that the Department acts consistently with requirements of national and international law.
- This position should be filled by an experienced refugee protection expert with both a strong background in asylum law and refugee law, and an understanding of how the different DHS bureaus can work together to fulfill these legal obligations.

Other Safeguards within DHS. The Department of Homeland Security should also create these additional safeguards:

- **Asylum and Refugee Legal Standards.** DHS should devise a structure to ensure that the two immigration enforcement bureaus and other components of DHS

accurately and consistently apply the legal standards relating to asylum and refugee issues, and that the legal guidance of DHS (CIS) attorneys on these matters is followed throughout DHS. Individual ICE attorneys should report directly to, and be supervised by, asylum legal experts in CIS when they are handling asylum cases.

- **Expedited Removal and Inspections.** DHS should ensure adequate oversight of immigration inspections by senior officials within both CBP and CIS, including through a reinvigorated high-level working group on expedited removal and expanded training of inspectors by the asylum division.
- **Additional Detention Oversight Mechanisms.** DHS should also ensure that asylum specialists with legal and operational expertise in asylum matters have oversight regarding the detention of asylum seekers, even if they are located in other DHS bureaus, such as CIS. A working group on asylum detention issues should be created that would include officials from the DHS Secretary's Office, DHS General Counsel's office, ICE, CBP and CIS, modeled on the expedited removal working group, as well as quality assurance and appeals mechanisms.

Codify INS/DHS Parole Guidelines in Formal Regulations. The INS/DHS asylum parole guidelines should be codified into formal regulations so that asylum seekers who meet the parole criteria – criteria which include posing no danger to the community, community ties, establishing identity, and satisfying the “credible fear” standard – can be released from detention on parole. These regulations should also specify that:

- A quality assurance procedure and an internal DHS appeals process should be implemented to ensure the fairness and accuracy of parole determinations.
- An asylum seeker's identity may be established through various kinds of evidence including the submission of identity documentation or sworn statements from individuals who can attest to the asylum seeker's identity.
- Asylum seekers who are determined by immigration judges to be entitled to asylum or “withholding of removal” and present no risk to the community should be released.

Non-discrimination. Detention policies should not discriminate against asylum seekers on the grounds of race, religion, national origin, or any other immutable characteristic. The basic principle of non-discrimination is central to international refugee and human rights law, as well as U.S. law.

Improve Detention Conditions. Asylum seekers should not be co-mingled with criminals or held in remote county and local jails. The Department of Homeland Security should issue regulations codifying detention standards that will ensure this fundamental principle,

along with other important protections, is strictly observed. All asylum seekers should be provided with appropriate medical care, including professional counseling for survivors of torture, rape or gender-based persecution. All detention facilities that house women seeking asylum should be staffed with female officers and female health care staff.

Children. DHS should ensure that asylum seekers under the age of 18 years are not detained by DHS but are in fact promptly transferred into the care of the Office of Refugee Resettlement. Congress should enact legislation to ensure that children are provided with *pro bono* representation and guardians. Senator Dianne Feinstein (D-CA) has introduced S 1129 The Unaccompanied Alien Child Protection Act of 2003 (S1129) and Representative Zoe Lofgren (D-CA) introduced a House version of the same bill, H.R. 3361, to address concerns relating to the detention of children that were not included in the Homeland Security Act.

Alternatives to Detention. When refugees seek asylum protection, the presumption should be that they not generally be detained. In cases where it is determined that some degree of supervision is needed, DHS should consider alternatives to detention, including supervised release, and for women with children, release to facilities operated by non-profit agencies. Alternatives might also include use of refugee accommodation centers, group homes, supervised release programs, release to a guarantor, or release on bond.

Release Detention Statistics. The Department of Homeland Security should publicly release accurate and current statistics regarding the number of asylum seekers in detention, the length of detention for asylum seekers, and rate of release of asylum seekers in compliance with US law.