

## **Refugees, Asylum Seekers and the Department of Homeland Security: One Year Anniversary – No Time for Celebration**

### **Background: Setting the Context**

Last month marked the one-year anniversary of the March 2002 transfer of immigration functions from the former Immigration and Naturalization Service (INS) to the new Department of Homeland Security (DHS). The mission of the Department, as spelled out in the Homeland Security Act, is to prevent terrorist attacks in the United States, reduce the vulnerability of the United States to terrorism, and minimize damage from terrorist attacks. Although DHS is now the place where critical refugee protection decisions are made, its mission statement omits any language to ensure that the United States lives up to its obligations to refugees seeking asylum – obligations contained in both U.S. law and international treaty obligations.

Over a year ago, soon after the shift of these functions, Human Rights First (formerly the Lawyers Committee for Human Rights) issued a report entitled “Refugees, Asylum Seekers and the New Department of Homeland Security: Initial Concerns and Preliminary Recommendations.” That report outlined many concerns relating to asylum seekers and refugees – especially given DHS’ structure and functions. It offered specific recommendations for change, including the creation of high-level mechanisms within DHS to ensure the fair and appropriate treatment of refugees.

The following month, ninety nonprofit and faith-based organizations around the country wrote to Secretary Ridge to raise concerns about having immigration functions relating to asylum seekers divided into three separate DHS bureaus. The letter, which included a copy of the March report, recommended that a number of improvements be made within the Department to ensure that DHS policies and practices are consistent with U.S. and international law refugee protection obligations.

Human Rights First sees this one-year milestone as an opportunity to reflect on DHS’ policies and practices that impact on asylum seekers and refugees – to look at DHS’ achievements over the past year, as well as at where it has fallen short – and the consequences for asylum seekers and refugees. We conclude that while there have been some positive developments over the last year, the one-year anniversary does not provide much cause for celebration. The improvements recommended a year ago have not yet been established, and the lack of coordination within DHS on a range of refugee and asylum issues has become increasingly evident, particularly as the Department deals with issues that cut across various DHS bureaus. Put simply, DHS has considerable room for improvement.

*Some positive news:* There have been a number of positive developments relating to refugees and asylum seekers during the first year of DHS's operation. For instance,

- DHS decided in February 2004 to support the asylum claim of Rodi Alvarado in the *Matter of R-A* case. Following well-established law, DHS concluded that Ms. Alvarado, a survivor of severe domestic violence in Guatemala, is entitled to asylum.
- DHS decided to maintain the structure of the Asylum Office with its direct chain of command, and to create a similar professional refugee corps within the same bureau (the Bureau of Citizenship and Immigration Services) – although the new corps has not yet been funded or launched.

Other positive news included the issuance of long-overdue statistics on the detention of asylum seekers, and the release of 16-year-old orphan Malik Jarno after three years in detention and in the wake of a high-profile advocacy campaign on his behalf. Similarly, a Tibetan nun who had been detained by DHS for 6 months was released from a Virginia jail after a front page article about her detention ran in *The Washington Post*. DHS also issued guidance making clear that asylum seekers who have been ruled eligible for asylum by immigration judges should not generally continue to be detained.

There has also been a welcomed improvement in the pace of U.S. resettlement of refugees and a concerted effort to address the dramatic decline in the number of refugees resettled by the United States. Despite these improvements however it is anticipated that, at the current pace of resettlement, only about 35,000 refugees will be brought to safety in the United States this year and, at the most, refugee resettlement numbers may rise to the high 40,000's – still a far cry from the 70,000 target set by the President.

*A range of concerns:* While these developments are welcome, the delay in resolving some of these matters, as well as others, remains a matter of concern and appears to reflect a continuing tendency to treat asylum matters as items of low priority. Moreover, these success stories remain the exception, not the norm. And a number of DHS policies and practices warrant continuing concern – raising serious questions about the Department's commitment to protecting refugees. These include:

- Shifts in the detention practices of many DHS district offices, and the unnecessary detention of asylum seekers who meet criteria for release on parole.
- DHS continued to single out Haitian asylum seekers as part of a discriminatory detention policy and last year asked Attorney General Ashcroft to review a decision that allowed an 18-year-old Haitian asylum seeker to be released from detention on bond.
- The U.S. Coast Guard, now part of DHS, has returned Haitians fleeing that country by boat, including women and children, directly back to Haiti without providing basic safeguards sufficient to ensure that they are not being returned to face persecution.

- DHS refers some asylum seekers who arrive on false documents for criminal prosecution despite the recognition under both national and international law that refugees should not be penalized for resorting to false documents to flee from harm.
- DHS has expanded its use of immigration detention in first in Connecticut, and now in Denver and Atlanta, leading to the detention of asylum seekers who had voluntarily come forward to immigration authorities if they are denied relief by immigration judges -- even if they are appealing their decisions.

Other issues that warrant further investigation include:

- The sharp decline in the rate of granting asylum. Prior to September 11 and the transfer of asylum functions to DHS, asylum officers granted asylum to about 43 percent of asylum seekers, but in fiscal year 2002 that rate dropped to 36 percent and in fiscal year 2003 the rate dropped further to about 29 percent.
- The decline in the number of individuals referred by immigration inspectors at U.S. borders and airports for “credible fear” asylum screening interviews. In fiscal year 2002, immigration inspectors referred 10,000 people for asylum screening interviews, but they only referred 6000 people for asylum screening in fiscal year 2003.

In each case, investigation is necessary to determine the reasons for these changes and to ascertain whether these changes reflect a failure to follow applicable U.S. asylum legal standards, a belief that it is permissible to disregard applicable standards in the new security environment, or a decision to de-emphasize protection of refugees in favor of increased attention to immigration enforcement – or if instead there are alternate explanations.

DHS has, for example, acknowledged that “because of the heightened security level and more extensive primary inspection, the INS had fewer staffing resources to devote to the more complex and time-consuming expedited removal process.”<sup>1</sup> And a January 2004 Human Rights First report, *In Liberty’s Shadow: U.S. Detention of Asylum Seekers in the Era of Homeland Security*, revealed significant shifts in policies and practices relating to the detention of asylum seekers, including increased denial of parole from detention in many offices – even to asylum seekers who meet the government’s parole criteria.

### **Recommendations for Change**

To begin to address the above, and other problems at DHS that affect refugees and asylum seekers, Human Rights First recommends that the following measures be adopted:

- **Refugee Protection Director.** DHS should begin by establishing a new Director of Refugee Protection who reports directly to the Secretary of Homeland Security. The Director of Refugee Protection should have the authority to convene meetings among the

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<sup>1</sup> Department of Homeland Security, *2002 Yearbook of Immigration Statistics*

different bureaus and entities within DHS, to speak for the Department on refugee protection issues, to quickly intercede in operational matters that impact on asylum seekers, and to issue recommendations to the Secretary and other senior DHS officials designed to ensure that the Department treats asylum seekers in a manner consistent 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.

- **Immigration Judge Review of Detention.** DHS should work with the Department of Justice to afford asylum seekers the chance to have their detention reviewed by an immigration judge – like other immigration detainees. The right to be able to challenge a decision to detain before a judge or other independent authority is central to both U.S. and international conceptions of procedural fairness.
- **Codify Parole Criteria.** DHS should issue regulations shifting the official parole criteria for asylum seekers from guidelines into formal regulations.
- **Legal Structure.** DHS should devise a structure to ensure that the two immigration enforcement bureaus and other parts of the Department accurately and consistently apply legal standards relating to asylum and refugee issues, and that the legal guidance of DHS attorneys on these matters is followed throughout the Department. Individual attorneys within the enforcement bureaus should report directly to, and be supervised by, asylum law experts in the Bureau of Citizenship and Immigration Services when they are handling asylum cases.
- **Oversight of Asylum Inspections.** DHS should ensure adequate oversight of immigration inspections by senior officials within its bureaus, including through a reinvigorated high-level working group on expedited removal and expanded training of inspectors by the asylum division.
- **Oversight of Asylum Detention.** 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 DHS bureaus other than ICE (the Bureau of Immigration and Customs Enforcement). A working group on asylum detention issues should be created that would include officials from the Secretary’s Office, General Counsel’s office, and the relevant DHS bureaus.
- **Fair Policies and Non-discrimination.** DHS should ensure that its policies, including its detention and interdiction policies, do not discriminate against asylum seekers on the grounds of race, religion, national origin, or any other immutable characteristic.
- **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.

- **Fund Refugee Corps.** DHS should take additional steps to ensure that funding is obtained to create and maintain a professional refugee corps within the Bureau of Citizenship and Immigration Services. Congress should also take steps to ensure that funds are appropriated for this new corps.
- **Fix Refugee Resettlement.** DHS should devote adequate resources and priority to resettlement processing in order to improve the drastically reduced pace of refugee resettlement.