

## UNITED STATES OF AMERICA<sup>1</sup>

The United States has mandatory detention for arriving asylum seekers who come to the US without valid travel documents and are therefore subject to an “expedited removal” process. Asylum seekers are taken, often in handcuffs and shackles, to detention centers, jails and prisons. Those who are determined to have a “credible fear or persecution” are no longer subject to the expedited removal process and are technically eligible to apply for parole, but parole practices vary depending on the practices of local immigration authorities. Asylum seekers who apply for asylum after they have already entered the United States are not generally detained.

The expedited removal process itself is wrought with flaws. It entrusts the decision to deport an individual who arrives with false or invalid travel documents to an immigration inspections officer, instead of a trained immigration judge. While asylum seekers are not supposed to be deported unless they are first given a chance to prove to an INS asylum officer that they have a “credible fear of persecution,” mistakes have been made.<sup>2</sup> The press and human rights organizations have documented instances of mistaken expedited removal determinations and other abuses relating to the conduct of the expedited removal process.<sup>3</sup>

Shortly before the expedited removal provisions went into effect in April 1997, the US Immigration and Naturalization Service increased its detention space and opened two large detention facilities to house asylum seekers subject to the expedited removal/mandatory detention provisions. These two facilities, both run by private contractors, are the 200-bed facility near JFK International Airport in Queens, New York, which is run by Wackenhut Corrections Corporation, and the 300-bed facility near Newark International Airport in Elizabeth, New Jersey, which is run by Correction Corporation of America. Asylum seekers are also held in other facilities across the country, including in county and local jails.

While the expedited removal provisions of the 1996 immigration law require the detention of asylum seekers during the expedited removal process, they do not prohibit parole once asylum seekers have established a credible fear of persecution and are

---

<sup>1</sup> This information was prepared by Eleanor Acer of the Lawyers Committee for Human Rights. For additional information visit LCHR’s website at [www.lchr.org](http://www.lchr.org). Copies of various LCHR reports, including *Refugees Behind Bars*, a comprehensive 1999 Report on the asylum detention system, are available there.

<sup>2</sup> Eric Shmitt, *When Asylum Requests Are Overlooked*, N.Y. TIMES, Aug. 15, 2001, at A6; John Moreno Gonzalez, *Amityville Woman Seeks \$8million In JFK Mix-Up*, NEWSDAY, July 12, 2000.

<sup>3</sup> *Id.*; *The Expedited Removal Study, Report on the First Three Years of Implementation of Expedited Removal* (2000); Lawyers Committee for Human Rights, *Is This America? The Denial of Due Process to Asylum Seekers in the United States* (2000).

therefore no longer subject to expedited removal proceedings.<sup>4</sup> The authority to parole arriving asylum seekers however is entrusted to the detaining authority, the INS. If the INS denies parole, that decision cannot be appealed to an independent or judicial authority. While immigration judges can review INS custody and bond decisions with respect to various other categories of non-citizens,<sup>5</sup> immigration judges are precluded from reviewing issues relating to the detention of “arriving” aliens, a category which includes all arriving asylum seekers.<sup>6</sup>

At any time, the U.S. government data ins about 22,000 non-citizens in INS detention facilities and jails, and it has been estimated that several thousand of those detainees are asylum seekers.<sup>7</sup> Precise statistical information about asylum seekers, including the number of asylum seekers in detention, has long been difficult to obtain from the INS. For years, in fact, the INS has been unable to regularly provide statistical information relating to detained asylum seekers – even in the face of a federal statute requiring the INS to report these numbers to Congress.<sup>8</sup>

---

<sup>4</sup> INA § 235(b)(1)(B)(iii)(IV); INA § 212(d)(5)(A) (providing for parole “on a case-by-case basis for urgent humanitarian reasons or significant public benefit” for an alien applying for admission); 8 Code of Federal Regulations (C.F.R.) § 235.3(c); 8 C.F.R. § 212.5(a); Memorandum from Office of INS Deputy Commissioner, “Implementation of Expedited Removal,” March 31, 1997, reprinted in 74 *Interpreter Releases* (April 21, 1997) (“[o]nce an alien has established a credible fear of persecution or is otherwise referred (as provided by regulation) for a full removal proceeding under section 240, release of the alien may be considered under normal parole criteria”) (citing to 1997 INS Guidelines).

<sup>5</sup> 8 C.F.R. § 3.19.

<sup>6</sup> 8 C.F.R. § 3.19 (h)(2)(i)(B).

<sup>7</sup> Dan Mallone, *851 Detained for Years in INS Centers – Many are Pursuing Asylum*, DALLAS MORNING NEWS, April 1, 2001; U.S. National Council of Churches, *People Fleeing From Persecution Held In Worse Than Prison Conditions In the U.S.* (Press Release, April 20, 2001), available at [www.nccusa.org/news/01news38.html](http://www.nccusa.org/news/01news38.html) (last accessed Sept. 16, 2002); Testimony of Bishop Thomas G. Wenski on behalf of National Conference of Catholic Bishops Committee on Migration, before The House Judiciary Subcommittee on Immigration and Claims, May 15, 2001 (on file with Lawyer’s Committee for Human Rights).

<sup>8</sup> FY 1999 Omnibus Consolidated and Emergency Supplemental Appropriations Act (Public Law 105-277), §§ 903-904; *Frederick N. Tulskey, Asylum Seekers Face Tougher U.S. Laws, Attitudes* (INS lacks precise data on detained asylum seekers; regarding failure to comply with statute requiring that INS report data: “An INS spokesman said that complying with the law would drain resources from other mandated responsibilities.”).

The costs of detention are tremendous. The INS detention and removal budget is now over \$1 billion. The INS reportedly spends an average of \$78 a day to detain a non-citizen. To detain an asylum seeker through his or her initial hearing before an immigration judge has been reported to cost, on the average, \$7259 for a single asylum seeker. This does not include the substantial expense of additional detention while any appeals are pending. It has been estimated that detaining asylum seekers costs taxpayers at least \$42.7 million per year.<sup>9</sup>

48,054 asylum seekers, not including dependents, applied for asylum during 2000; 18 percent were reopened applications.<sup>10</sup> In the first nine months of 2001, 47,584 asylum cases were reported.<sup>11</sup> The United States is a party to the 1967 Protocol Relating to the Status of Refugees.

Parole for asylum seekers, already restrictive in some areas of the U.S., seems to have become even more restrictive in the wake of September 11. Particularly troubling are reports of discriminatory parole practices. The press has documented cases in which asylum seekers from Arab or Muslim backgrounds, who would previously have been paroled prior to September 11, have been denied parole.

Additional charges of discriminatory parole practices have been leveled with respect to Haitian asylum seekers. In early December 2001, a boat bearing nearly 200 Haitian men, women and children arrived off the coast of Florida. In response, the INS has instituted a policy of denying parole to Haitian asylum seekers. A lawsuit filed in March 2002 alleges that the policy discriminates against Haitians based on their race and nationality and violates the U.S. Constitution's guarantees of due process and equal protection. The INS has admitted that this policy is designed to deter other Haitian asylum seekers from fleeing to the U.S.<sup>12</sup>

---

<sup>9</sup> Brent Walth, *Asylum Seekers Greeted with Jail*, THE OREGONIAN, Dec.10-15, 2001; Vera Institute of Justice, *Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program* 66 (Vol I, August 2000).

<sup>10</sup> U.S. COMMITTEE FOR REFUGEES, WORLD REFUGEE SURVEY 2001 at 12, *available at* <http://preview.refuges.org/world/worldmain.htm> (Immigration and Refugee Services of America 2001) [hereinafter USCR WORLD REFUGEE SURVEY 2001].

<sup>11</sup> United Nations High Commissioner for Refugees, *Asylum Applications Lodged in Europe, North America, Australia and New Zealand January-September 2001*, Table 1, *available at* [www.unhcr.ch/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=STATISTICS&id=3be27e964&page=statistics](http://www.unhcr.ch/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=STATISTICS&id=3be27e964&page=statistics) (last accessed Sept. 16, 2002).

<sup>12</sup> Editorial, *Justice Denied, Again for Haitian Asylum Seekers*, MIAMI HERALD, Mar. 18, 2002; Jody Benjamin, *INS Admits New Get-Tough Policy on Haitians Aimed at Preventing Exodus*, SOUTH FLORIDA SUN-SENTINEL, Mar. 20, 2002; Alfonso Chardy, *INS Clamps Down on Haitian Asylum Seekers*, MIAMI HERALD, March 20, 2002.

With respect to the over 1100 non-citizens detained in the wave of arrests following September 11, the press and human right organizations have documented a range of disturbing abuses including lengthy detentions without charges, denial of access to counsel, the conduct of secret hearings and abusive treatment.<sup>13</sup> These detainees are overwhelmingly non-citizen men of Arab or Muslim background who are being held or have already been deported based on immigration violations. While the vast majority of these individuals are not asylum seekers, a few refugees have been caught up in this wave of detentions.<sup>14</sup>

Following September 11, a series of measures have been taken by the U.S. government that have deprived non-citizens of their rights. An overview of these measures is contained in a September 2002 report issued by the Lawyers Committee for Human Rights, entitled "A Year of Loss." The report is available on the Lawyers Committee's website at [www.lchr.org](http://www.lchr.org). Among the measures that will most affect detained asylum seekers are (1) the planned transfer of the immigration service, including its detention functions, to a new Department of Homeland Security and the gutting of the immigration appeals process, and (2) the changes to the administrative appellate process which have rendered that process meaningless in many cases, leading some asylum seekers little choice but to remain detained for longer periods while they appeal their cases to the federal courts of appeals.

*Is there independent review of the detention decision?* No.

There is no independent review of INS decisions to detain arriving asylum seekers. As noted above, if the INS denies parole to an arriving asylum seeker, that decision cannot be appealed to an independent or judicial authority. While immigration judges can review INS custody and bond decisions with respect to various other categories of non-citizens,<sup>15</sup> immigration judges are precluded from reviewing issues relating to the detention of "arriving" aliens, a category which includes all arriving asylum seekers.<sup>16</sup> The U.S. government and some federal courts have taken the position that parole denials cannot be challenged in federal court as a result of changes made by a 1996 immigration law. Even prior to 1996, very few asylum seekers challenged their parole denials by filing

---

<sup>13</sup> Amnesty International, AMNESTY INTERNATIONAL'S CONCERNS REGARDING POST SEPTEMBER 11 DETENTIONS IN THE USA (AI Index: AMR 51/044/2002, March 2002); Jim Edwards, *Attorneys Face Hidden Hurdles*, NEW JERSEY LAW JOURNAL (Dec. 3, 2001).

<sup>14</sup> Jody A. Benjamin, *Iraqi Refugees Cleared by FBI Could Still Face Deportation*, SOUTH FLORIDA SUN-SENTINEL, Dec. 12, 2001.

<sup>15</sup> 8 C.F.R. § 3.19.

<sup>16</sup> 8 C.F.R. § 3.19 (h)(2)(i)(B).

habeas petitions in federal courts, because (1) it takes months or longer to receive a decision from a federal court rendering the effort meaningless from a practical standpoint in most cases, (2) most asylum seekers cannot afford to pay for counsel to take on federal court litigation, and (3) federal courts would generally defer to INS decisions unless the INS had failed to give a reason for the parole denial in the particular case.

*Are there limits on the period of detention?* No.

There is no limit on the length of time that an asylum seeker may be detained while her claim is pending. In fact, human rights organizations and news reports have documented cases of asylum seekers who have been detained for three or four years, and one recent news report uncovered that several hundred asylum seekers have been detained for more than one year.<sup>17</sup> In researching the U.S. immigration detention system, *The Dallas Morning News* obtained statistics revealing that over 851 non-citizens in detention had been detained for over three years, and that 361 of these detainees were asylum seekers or other detainees who had not been convicted of any crime.<sup>18</sup> *The San Jose Mercury News*, in the course of conducting interviews for its award-winning series on asylum in the U.S., profiled or gathered information relating to about 56 asylum seekers who were detained for over one year before being granted asylum.<sup>19</sup>

In June 2001, the U.S. Supreme Court ruled that the detention of aliens who have received final orders of removal for a period beyond what is reasonably necessary to deport them was contrary to law. The Court, construing a particular statute, held six months to be a presumptively reasonable period. This decision involved immigrants already present in the United States and did not reach a decision on the case of aliens detained on arrival at a U.S. airport or border. The overwhelming majority of asylum seekers detained in the United States are detained upon arrival in the country. The U.S. government has taken the position that the ruling in this case does not apply to arriving aliens, which would include arriving asylum seekers.

---

<sup>17</sup> Lawyers Committee for Human Rights, *Refugees Behind Bars*, *supra* note 1, at 6-7 (Somali asylum seeker detained for 4 years before being granted asylum); Michael Clancy, *Nigerian Finally Wins Asylum After Long Fight*, THE HERALD NEWS, July 20, 2001 (Nigerian refugee granted asylum after 3 years and 4 months in detention); Dan Malone, *Man Locked Up for Four Years But Convicted of Nothing*, THE DALLAS MORNING NEWS, April 1, 2001 (Sri Lankan Asylum seeker detained for four years); Chris Hedges, *Immigrant Detained for 3 and 1/2 years Emerges from Labyrinth*, N.Y. TIMES, Nov. 6, 2000 (Congolese refugee granted asylum after 3 and ½ years in jails and detention facilities); Walth, *Asylum Seekers Greeted With Jail*, *supra* note 9 (Liberian asylum seeker detained for 6 years, Chinese asylum seeker detained over 2 years, Sri Lankan asylum seeker detained for 4 years).

<sup>18</sup> Mallone, *851 Detained for Years in INS Centers*, *supra* note 7.

<sup>19</sup> Tulskey, *Asylum Seekers Face Tougher US Laws*, *supra* note 8.

*Is there periodic review of detention?* No.

There is no periodic review of decisions to detain asylum seekers. For so-called indefinite detainees, *i.e.* an immigration detainee who has received a final order of removal (including a rejected asylum seeker) but has not been deported after three months, or six months if there has been an extension, a custody review will take place within 30 days, and once a year thereafter.

*Is there access to government-funded legal aid?* No.

There is no provision of federal funds for legal representation of asylum seekers.

*Alternatives to detention:* Despite several successful pilots, nationwide alternatives to detention have not been implemented.

The US immigration authorities contracted with the Vera Institute of Justice to conduct a pilot program to test a supervised release program which was called the “Appearance Assistance Program.” The Vera Institute’s report, issued in August 2000, reported a 93% appearance rate for asylum seekers who were screened and released through the Vera program, and a 55% cost savings. Despite this successful model, no national supervised release program has been established. In addition, the Catholic Legal Immigration Network and the Lutheran Immigration and Refugee Services have reported high appearance rates for asylum seekers released through projects that they have coordinated.

*Vulnerable groups:* Children who arrive without valid entry documents at U.S. borders and airports are subject to detention in the U.S. Advocacy groups have criticized the U.S.’s practices with respect to detaining children, including the procedures (which include dental and wrist examinations) by which the U.S. determines that teenagers are classified as adults and held in adult detention facilities and jails. About 5000 children have been reported to be in INS custody; many are held in juvenile jails and shelters.<sup>20</sup> Children have also been detained in adult jails and detention facilities when the INS has mistakenly concluded that they are adults based on dental examinations – a procedure that has been widely criticized by medical experts and is no longer relied upon even by the U.S. State Department.<sup>21</sup>

---

<sup>20</sup> *Id.*; Eliza Amon, *Access Denied, Children in INS Custody Have No Right to a Lawyer*, THE NATIONAL LAW JOURNAL, April 12, 2001.

<sup>21</sup> Alan Elsner, *New York Dentists Can Settle Fate of Migrants*, REUTERS, Jan 11, 2002; Chris Hedges, *Crucial INS Gatekeeper: The Airport Dentist*, N.Y. TIMES, July 22, 2001.