



THE DETENTION OF REFUGEES AND ASYLUM-SEEKERS BY REASON OF THEIR UNAUTHORISED ENTRY OR PRESENCE

Introduction

UNHCR was established as of 1 January 1951 by the General Assembly of the United Nations. According to its *Statute*, UNHCR has two principal functions: to provide international protection to refugees within its competence and to seek durable solutions for them in co-operation with governments. Article 8 of the UNHCR Statute calls on the High Commissioner to provide for the international protection of refugees, *inter alia*, by promoting the conclusion and ratification of relevant international conventions, promoting the admission of refugees to the territories of States, obtaining from Governments information concerning the number and conditions of refugees and the laws concerning them and facilitating the co-ordination of the efforts of private organizations concerned with the welfare of refugees.

A corresponding article in the *1951 Convention relating to the Status of Refugees*, Article 35, entitled *Co-operation of the national authorities with the United Nations*, states as follows:

“(1) The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees...in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provision of this Convention.

- (2) In order to enable the Office of the High Commissioner..., to make reports to the competent organs of the United Nations, the Contracting States undertake to provide them in the appropriate form with information and statistical data requested concerning:*
- a. The condition of refugees,*
 - b. The implementation of this Convention, and;*
 - c. Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.”*

Thus the Contracting States recognize the protection function entrusted to UNHCR and undertake to facilitate the performance of this function. UNHCR exercises its supervisory role in a number of ways, including by developing standards, interpreting standards and applying them

The undesirability of detention of asylum-seekers

The use of detention against refugees and asylum-seekers on account of their illegal entry or presence in the country of asylum is, in the view of the Office of the United Nations High Commissioner for Refugees (UNHCR), inherently undesirable. Freedom from arbitrary detention is a fundamental human right, and the use of detention is, in many instances, contrary to established norms and principles of international law. The right to seek and enjoy asylum is, equally, recognized as a basic human right. The act of illegal entry or presence on the territory of a State in order to seek asylum can therefore not be considered an offence or a crime.

Both the *International Covenant on Civil and Political Rights* (ICCPR, Article 9) and the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR, Article 5) provide that no one should be arbitrarily deprived of his or her liberty. Moreover, the *Convention on the Rights of the Child* provides for specific standards and safeguards for children, including the requirement that it only be used as a measure of last resort and for the shortest appropriate period of time (CRC, Article 37).

According to Article 14 of the *Universal Declaration of Human Rights*, the right to seek and enjoy asylum is recognised as a basic human right. In exercising this right, persons who have been forced to flee and who are in need of international protection may have no other choice but to resort to irregular means of entry into another state's territory.

Of key significance to the issue of detention of refugees and asylum-seekers is Article 31 of the *1951 Convention relating to the Status of Refugees*, which recognizes that there are good reasons justifying a refugee's unauthorized entry or presence in an asylum country. Persons who have to flee from persecution or violence in their country of origin will very often have serious difficulties in meeting visa prerequisites such as the possession of a valid national passport, monetary sums to cover the costs of their stay abroad and their return travel, or family ties in the country of their intended destination. Once in the country of asylum, fear of the authorities, language problems, lack of information and general insecurity may prevent a refugee from presenting himself or herself without delay to the authorities.

The Article explicitly provides that:

“the Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened...enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”

It should be stressed that although Article 31 refers to “refugees”, the effective implementation of this provision requires that it be applied to any person who claims to be in need of international protection, and therefore to asylum-seekers. Article 31 would be rendered meaningless if it were applied only after formal recognition occurs. Given that a person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfils the definitional criteria set out in the Convention, refugee status determination is declaratory in nature, meaning that a person does not become a refugee because of recognition, but is recognised because he or she is a refugee. Indeed the entire construct of refugee protection would be undermined if parties to the 1951 Convention could disavow any obligations towards those who express an intention to seek asylum. Consequently, an asylum-seeker is presumptively entitled to receive the provisional benefit of the “no penalties” provision in Article 31(1) until he/she is found not to be in need of international protection in a final decision following a fair procedure.

The consensus of the international community on the inherent undesirability of detention of refugees and asylum-seekers is reflected in *Conclusion No. 44 (XXXVII)* adopted by the UNHCR Executive Committee in 1986. Drawing upon the Conclusions of its Executive Committee and the relevant provisions of international law, UNHCR has elaborated detailed Guidelines¹ setting out general principles and minimum standards of acceptable State practice relating to the detention of refugees and asylum-seekers. They are summarized below.

¹ UNHCR, February 1999, hereinafter UNHCR Guidelines on Detention.

General Principles

1. As a general rule, refugees and asylum-seekers should not be detained. Detention may exceptionally be resorted to for a minimal period, if it is clearly prescribed by a national law which is in conformity with general norms and principles of international human rights law and deemed necessary, in order:

- i. to verify identity;
- ii. to determine the elements on which the claim for refugee status or asylum is based;
- iii. to deal with cases where refugees or 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
- iv. to protect national security or public order.

The exception regarding verification of identity should be used only in cases in which identity may be undetermined or in dispute. In determining the elements of the claim, States should detain asylum-seekers only for the purposes of undertaking a preliminary interview and not for the entire period of the asylum claim. This exception should not be used to justify detention for the entire status determination procedure or for an unlimited period of time.

In cases in which asylum seekers arrive with false or no documents, detention is only permissible when there is an intention to mislead or a refusal to cooperate with the authorities. Asylum-seekers who arrive without documentation because they are unable to obtain any in their country of origin should not be detained solely for that reason.

The final exception concerns individuals for whom there is evidence that she or he has criminal antecedents and/or affiliations and is likely to pose a risk to public order or national security.

Detention of asylum-seekers may be considered to be arbitrary if it is not in accordance with the law, if the law itself allows for arbitrary practices, or is enforced in an arbitrary way: when it is random or capricious or not accompanied by fair and efficient procedures for its review. It may also be arbitrary if it is disproportionate, or indefinite².

Furthermore, detention may be in accordance with and authorised by the domestic legislation of a State, but that does not make it justified. It may be, therefore, arbitrary. According to the Human Rights Committee, in *Van Allphen vs. The Netherlands*³, arbitrariness is not to be equated with “*against the law*” but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. That is, the detention must be reasonable and necessary in all the circumstances. Reasonableness and necessity depend on the proportionality of the measure with its intended objective. This in turn implies that consideration must be given first to less invasive means of achieving the same ends. The detained person must have the right to challenge his/her detention before a court of law; detention that is not subject to effective judicial review is arbitrary.

² ExCom 15th Standing Committee, *Detention of Asylum-Seekers and Refugees: The Framework, the Problem and Recommended Practice*, 4 June 1999 (EC/49/SC/CRP.13), paragraph 10. See also *Amuur v. France*, judgment of 25 June 1996, Appl. No. 19776/92, where the European Court of Human Rights elaborated that in assessing the lawful basis of detention under Article 5, paragraph 1 of the ECHR, the quality of the domestic law which prescribes arrest or detention must be considered. Thus, in order to avoid all risk of arbitrariness, the national law must be sufficiently accessible and precise (para. 50).

³ HCR Case No. 305/1988.

2. Alternatives to the detention of an asylum-seeker until his or her refugee status is determined should be considered first in each individual case; such alternatives may include, for example, reporting obligations or guarantor requirements.
3. Asylum-seeking or refugee children under the age of 18 years should not be detained; if their detention cannot be avoided as a measure of last resort it should be for the shortest period of time.
4. As a general rule, the detention of pregnant women in their final months and of nursing mothers should be avoided.
5. Persons who have suffered torture or trauma, those with mental or physical disability and elderly asylum-seekers or refugees should not be detained without the certification of a qualified medical practitioner that detention will not adversely affect their health and well-being.

Minimum Procedural Guarantees for Detainees

- i. To receive, in a language and in terms they understand, prompt and full communication of any order of detention, together with the reasons for the order and their rights in connection with the order.
- ii. To be informed of the right to legal counsel, and where possible, to receive free legal assistance.
- iii. To have the decision subjected to an automatic review before a judicial or administrative body independent of the detaining authorities, followed by regular periodic reviews of the necessity for the continuation of detention.
- iv. To challenge at the review hearing, either personally or through a representative, the necessity of the deprivation of liberty and to rebut any findings made.
- v. To be able to pursue their application for asylum without any obstacle caused by their detention.

Conditions of Detention

- i. In all circumstances, conditions of detention of refugees and asylum-seekers should be humane with full respect shown for the inherent dignity of the person; conditions of detention have to be prescribed by national law.
- ii. There should be, at the outset of detention, initial screening to identify any victims of torture or traumatized persons.
- iii. Asylum-seekers and refugees should not be detained in prisons; if there is no alternative, they should be accommodated separately from convicted criminals.
- iv. Female detainees should be accommodated separately from male detainees, unless they are close family relatives.
- v. Detainees should have the opportunity to make regular contact with, and receive visits in private from, friends, relatives, UNHCR and refugee-assisting NGOs.
- vi. They should receive appropriate medical treatment and psychological counselling where needed.
- vii. They should have the opportunity to conduct some form of physical exercise through daily indoor and outdoor recreational activities.
- viii. They should have the opportunity to continue further education or vocational training.
- ix. They should be able to exercise their religion and to receive a diet in keeping with their religion.
- x. They should have access to basic necessities of life, such as beds, shower facilities, toiletries, etc.

- xi. They should have access to complaints mechanism; the procedures that need to be followed in lodging complaints should be made available to detainees in a language they understand.

The detention of asylum-seekers in Malta

Every year a large number of asylum-seekers leave Libyan shores in an attempt to reach Europe. During this extremely perilous journey across the Mediterranean in unseaworthy vessels, many of these asylum-seekers encounter difficulties related to the boat's engine or to the rough weather conditions. In fact, the great majority of asylum-seekers arriving in Malta every year do not choose to breach Malta's immigration legislation, but are rescued at sea by the Malta Maritime Squadron. They are then brought to Malta where they are detained for entering Malta in an irregular manner.

UNHCR observes that a very large percentage of persons brought to Malta in this manner and subsequently seeking asylum are in fact recognised as being in need of international protection⁴. This means that these persons did not choose to leave their countries of origin, but were forced to escape due to either persecution or armed conflict.

UNHCR notes that the stipulated maximum detention duration of twelve months for asylum-seekers is excessive and unjustifiable.

On the basis of regular visits made by UNHCR to Malta's detention centres, UNHCR notes the general lack of the above-mentioned procedural safeguards by the Detention Service. Access to legal counsel is generally limited to visiting NGOs offering a voluntary service whilst little or no information is provided on access to other legal services. Asylum-seekers in Malta's detention centres also have limited private access to information, friends and relatives. There is no automatic and regular judicial review of detention and existing procedures under Maltese law are either not effectively accessible or ineffective due to delays and administrative obstacles.

Malta's detention policy is also at times applied to vulnerable persons, namely children, pregnant and lactating women, elderly persons, persons with disabilities and victims of torture/and trauma. The procedure for fast-track release of these vulnerable persons from detention often suffers from administrative hindrances, resulting in unnecessarily long detention and related negative consequences for the vulnerable persons. Whilst in detention, minors, including children, do not generally receive any kind of education and are only permitted minimal time for leisure activities in the open air. Female, male and minor asylum-seekers are not segregated, but accommodated in the same premises and with joint use of showers and toilets.

The medical service provided in detention is not sufficient to meet all the needs, often urgent, of the detained asylum-seekers. Health risks are also present due to the severe hygiene conditions and lack of ventilation. The Detention Service also makes extensive use of inappropriate cells for the confinement of asylum-seekers as a means of punishment, and use of violence and offensive language, including threats is common in the centres.

UNHCR is not aware of any analysis made by the Government of Malta to explore alternatives to the detention of asylum-seekers.

⁴ Between 1 January 2002 and 31 December 2006, the Office of the Refugee Commissioner recognized the international protection needs of 2,191 persons, *January-December 2006 Report of the Office of the Refugee Commissioner*, Office of the Refugee Commissioner (30th December, 2006)

Over the past several years, UNHCR has been in discussions on these issues with the Government of Malta, during which submissions in writing were also presented on different occasions. Discussions between UNHCR and the Government of Malta continue, in an attempt to reach a mutual understanding on the above-mentioned points.

**UNHCR Regional Representation in Rome,
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