



International Detention Coalition

*Children in Immigration Detention
Position Paper*

Acknowledgments

The International Detention Coalition (IDC) would like to thank Melanie Teff of Refugees International and Professor Azadeh Dastyari of Monash University Law School for their research and writing which forms the basis of this position paper.

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Abbreviations

ACHR	American Convention on Human Rights
ACHPR	African Charter on Human and People's Rights
CRC	United Nations Convention on the Rights of the Child
CRSR	Convention Relating to the Status of Refugees
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
HRC	Human Rights Committee
HREOC	Human Rights and Equal Opportunities Commission (Australia)
ICCPR	International Covenant on Civil and Political Rights
INS	US Immigration and Naturalization Service
NGO	Non governmental organisation
ORR	US Office of Refugee Resettlement
UK	United Kingdom
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
US	United States
WGAD	Working Group on Arbitrary Detention

Introduction

The International Coalition on Detention of Refugees, Asylum Seekers and Migrants is a coalition of non-governmental organizations (NGOs) and individuals throughout the world providing legal, social and other services, conducting research, and doing advocacy and policy work on behalf of refugees, migrants, and asylum seekers. These groups have come together to share information and promote greater respect for the human rights of men, women and children subject to migration-related detention.

Since the detention of children is of particular concern to the coalition, we have chosen to issue a position paper on the issue. This paper analyzes the international legal framework on immigration in general and specifically as it relates to children, and examines its compatibility with the Convention on the Rights of the Child (CRC)¹ and other international norms. It considers alternatives to detention that are being, or could be, utilised by states, and concludes that immigration detention of children is only compatible with international law if certain criteria are met, particularly the criterion of use only as a measure of last resort. It argues that there are almost no circumstances in which alternatives are unavailable to states, and that therefore it cannot be classified as a measure of last resort, rendering it incompatible with international law, other than in rare exceptional cases.

Prior to drafting the position paper, the IDC conducted an informal survey of our members worldwide, seeking information on the detention of children in their countries. We received responses from members in 25 countries.² Only three of the surveyed countries – Spain, Ireland and Hungary – reported that their governments do not detain children. The Spanish government has piloted a program to transfer children arriving in the Canary Islands to different types of accommodation in regions throughout the Iberian Peninsula rather than detaining them in adult facilities on the islands. Hungarian legislation actually prohibits the detention of children and is believed to be the only law of its kind. However, it is feared that some older children – between the ages 16 and 18 judged to be adults – are detained in those countries. Age disputed cases, generally, remain a concern in all of the countries surveyed.³

The majority of members from the surveyed countries reported that there is no education for children in detention. Some members reported particularly disturbing conditions facing children in detention. Several reported that children are held in the same prison-like facilities as adults. In Cambodia, some ethnic Montagnard children from Vietnam have been held in detention sites for as long as two years. In Malaysia, children are

¹ Adopted 20 November 1989, entry into force 2 September 1990, 1577 UNTS 3.

² Australia, Austria, Belgium, Cambodia, Canada, Egypt, Finland, Germany, Hungary, Ireland, Israel, Ivory Coast, Japan, Lebanon, Malaysia, Malta, Mexico, New Zealand, Netherlands, Poland, South Africa, Spain, Thailand, UK, USA

³ For more on age disputes, see, The Immigration Law Practitioners' Association (ILPA) recently issued a report – When is a child not a child? Asylum age disputed and the process of age assessment (ILPA 2007). This report is available on the <http://www.ilpa.org.uk>.

detained with adults and sleep on cement floors with little bedding. Children there have been subject to corporal punishment – caning and slapping- for immigration offences. IDC members in Mexico reported that children (ages 13 to 18) there are also detained with adults under miserable conditions. Children prefer sleeping on the ground rather than using the threadbare, dirty mattresses. Many have contracted illnesses due to the unhygienic conditions. Very few countries make statistics on detained children available. The UK does provide quarterly statistics on asylum, which covers the number of children in detention. Statistics on detained children are also available in Australia. However, the numbers often do not reflect the reality.

Efforts to end the detention of children have been met with limited success. The following represent some examples of positive steps achieved as a result of advocacy and litigation. In June 2006, 140,000 signatures were presented to Members of Parliament in the Netherlands, urging them to ban detention of children. Following a petition drive by NGOs in Belgium in 2006, the government took a decision to research alternatives to detention for accompanied children. Groups in the United States have highlighted disturbing conditions faced by families and children in detention, forcing the government to open investigations into some facilities. After years of advocacy by Maltese NGOs, the government there finally adopted a policy in 2005 that children, whether accompanied or not, should not be detained. Nevertheless, at times children are still detained pending placement in appropriate facilities in Malta. In 2004, the High Court of Pretoria in South Africa found the detention of unaccompanied children to be unconstitutional. In a 2006 decision, the European Court of Human Rights found Belgium to be in violation of the European Convention on Human Rights in a case of a five year old unaccompanied girl who was held for a month in a detention center.

Australia provides one of the most dramatic examples of policy change. From 1992 to 2005, several thousand children were held in its closed immigration detention centres for periods averaging 15 months.⁴ At the height of this policy in the period 2000 – 2001, there were 1,923 children in immigration detention in Australia.⁵ In June 2005, the Australian government amended their migration legislation and policy with regard to children, and, as at March 2007, children are no longer held in closed detention centres in that country. Even though Australia's policy change may not have been primarily motivated by questions of international law, this paper examines recent jurisprudence of international bodies and courts on this issue to see if it could serve as an example of good practice. Certainly, the advocacy efforts of individuals and NGOs played a crucial role in bringing about these changes.

The IDC believes that children and their families should not be held in immigration detention facilities. If children are detained, it should only be as a matter of last resort and for the shortest period of time needed to conduct health and security checks. National security objectives, the desire for deterrence and the need to prevent asylum seekers from

⁴ HREOC, *A last resort? A summary guide to the national inquiry into children in immigration detention*, 2004, p.12.

⁵ HREOC, *A last resort? A summary guide to the national inquiry into children in immigration detention*, 2004, p. 8.

absconding never justifies the detention of children. Many of the alternative models discussed in this paper would, if implemented, allay any government concerns regarding security and provide for the best interests of children as required under international law. Such alternative models are inherently preferable to the detention of children in immigration detention facilities.

What is immigration detention?

The subject of this paper is the detention of non-citizen children⁶ for migration-related reasons. UNHCR defines detention as “confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory”.⁷

However, it is not always clear what amounts to a substantial curtailment of freedom of movement. For example, the policy change in Australia has resulted in the release of children from closed detention centres, but their transfer into community detention, with powers vested in a Minister to determine the conditions of restrictions of liberty in each case. The ECtHR has held that the difference between deprivation of and restriction upon liberty is merely one of degree and intensity and not one of nature or substance.⁸ UNHCR takes the view that there is a qualitative difference between detention and other restrictions on freedom of movement and that persons who are subject to limitations on domicile and residency are not generally considered to be in detention.⁹ According to UNHCR, “When considering whether an asylum seeker is in detention, the cumulative impact of the restrictions as well as the degree and intensity of each of them should also be assessed.”¹⁰

What is the current practice of states concerning children and immigration detention?

There is no uniformity of practice by states on immigration detention of children, but certain tendencies can be detected. These tendencies differ for two different groups of immigrant children – accompanied and unaccompanied children. “Unaccompanied children” are defined as children “who have been separated from both parents and other

⁶ A “child” is defined in Art. 1 CRC, see n1 supra, as every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.

⁷ UNHCR revised guidelines on applicable criteria and standards relating to the detention of asylum seekers, February 1999, UNHCR website: <http://www.unhcr.org/protect/PROTECTION/3bd036a74.pdf>, guideline 1.

⁸ *Guzzardi v Italy*, 6 November 1980, Series A no. 39, para.92.

⁹ UNHCR revised guidelines on applicable criteria and standards relating to the detention of asylum seekers, February 1999, UNHCR website: <http://www.unhcr.org/protect/PROTECTION/3bd036a74.pdf>, guideline 1.

¹⁰ UNHCR revised guidelines on applicable criteria and standards relating to the detention of asylum seekers, February 1999, UNHCR website: <http://www.unhcr.org/protect/PROTECTION/3bd036a74.pdf>, guideline 1.

relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.”¹¹

Accompanied children

With increased concerns being expressed by states about irregular immigration and an increased focus on national security since September 2001, there has been a significant increase in the worldwide use of immigration detention in general,¹² and children have not been exempted from this phenomenon. In fact, many states which previously tried to avoid the detention of children have changed their policies with regard to accompanied children.

For example, a report on family detention in the US states that “the recent increase in family detention represents a major shift in the US government’s treatment of families in immigration proceedings.”¹³ In the UK families with children were rarely detained, and then only for a few hours prior to removal. But in October 2001 new Immigration Service instructions were issued permitting the detention of families for longer periods than immediately prior to removal, which has resulted in families with children now being subject to the same immigration detention policy as single adults in the UK.¹⁴

Despite these trends, there are other countries that have prohibited immigration detention of all children, e.g. Hungary.

Unaccompanied children

There is a tendency for states to move away from the detention of unaccompanied children in closed immigration detention centres, eg. US, South Africa.

However, in many states that have policies that do not permit immigration detention of unaccompanied children, in practice children are detained because of disputes over their age. According to UK Home Office figures, in 2004 alone 2,345 cases in the UK gave rise to age disputes.¹⁵ Research indicates that around 50% of age-disputed individuals in the UK are in fact unaccompanied children.¹⁶ The scientific techniques currently available for age determination, such as dental examination and bone density tests are unable to identify age accurately. For this reason the UN CRC Committee has stated that

¹¹ CRC Committee, General Comment No. 6 on treatment of unaccompanied and separated children outside their country of origin, 1 September 2005, CEC/GC/2005/6, para.7.

¹² GS Goodwin-Gill, Article 31 of the 1951 CRSR: Non-penalization, detention and protection, October 2001, UNHCR website <http://www.unhcr.org/protect/PROTECTION/3bcfdf164.pdf>, pp.1-2.

¹³ M Brane and E Butera, Locking up family values: the detention of immigrant families, Women’s Commission for Refugee Women and Children and Lutheran Immigration and Refugee Service, February 2007, p.1.

¹⁴ H Crawley and T Lester, No Place for a Child, Children in UK immigration detention: impacts, alternatives and safeguards, Save the Children, 2005, p.5.

¹⁵ J Bhabha and M Crock, Seeking asylum alone: unaccompanied and separated children and refugee protection in Australia, the UK and the US, a comparative study (Sydney, Themis Press, 1997), p.33.

¹⁶ J Bhabha and M Crock, Seeking asylum alone: unaccompanied and separated children and refugee protection in Australia, the UK and the US, a comparative study (Sydney, Themis Press, 1997), p.33.

age assessments “should not only take into account the physical appearance of the individual, but also his or her psychological maturity.”¹⁷ The CRC Committee further stated that following an age assessment, “in the event of remaining uncertainty, (the assessment) should accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, she or he should be treated as such.”¹⁸ UNHCR takes this same position.¹⁹

Disappearances of unaccompanied children

A disturbingly high percentage of unaccompanied children go missing from the accommodation in which they are placed. For example, in Sweden in October 2003 a government report found that 103 children disappeared from State care during 2002 and 70% went missing before receiving the final decision on their asylum claim.²⁰ For some years there have been reports that around half of separated asylum seeking children in Belgium disappear before completion of the determination procedure.²¹ It is thought that a large number of these children have become victims of abductions and trafficking.²²

Evidence concerning the impacts of immigration detention on children

There is a growing body of evidence which demonstrates the negative impacts of immigration detention on children’s mental health. The health impacts of immigration detention are of course not confined to children, but children appear to be especially vulnerable to them.

Reports on the effects of immigration detention centres in Australia on children have found excess rates of suicide, suicide attempts and self-harm, suicide attempts by pre-pubertal children, and high rates of mental disorders and developmental problems, including severe attachment disorder for young children.²³ The Steel report documented

¹⁷ CRC Committee, General Comment No. 6 on treatment of unaccompanied and separated children outside their country of origin, 1 September 2005, CEC/GC/2005/6, para.7.

¹⁸ CRC Committee, General Comment No. 6 on treatment of unaccompanied and separated children outside their country of origin, 1 September 2005, CEC/GC/2005/6, para.7.

¹⁹ See UNHCR guidelines on policies and procedures in dealing with unaccompanied children seeking asylum, February 1997, *UNHCR website: <http://www.unhcr.org/publ/PUBL/3d4f91cf4.pdf>* para.5.11.

²⁰ O Field, Alternatives to detention of asylum seekers and refugees, UNHCR Legal and Protection Policy Series, POLAS/2006/03, April 2006, p.39, n158.

²¹ O Field, Alternatives to detention of asylum seekers and refugees, UNHCR Legal and Protection Policy Series, POLAS/2006/03, April 2006, p.39, n158.

²² O Field, Alternatives to detention of asylum seekers and refugees, UNHCR Legal and Protection Policy Series, POLAS/2006/03, April 2006, p.39, n158.

²³ M Dudley and B Blick, Appendix E to The heart of the nation’s existence – a review of reports on the treatment of children in Australian detention centres, ChilOut 2002; S Mares and J Jreidini, Psychiatric assessment of children and families in immigration detention – clinical, administrative and ethical issues, Australian and New Zealand Journal of Public Health 520 (2004); Human Rights and Equal Opportunity Commission, A Last Resort? National Enquiry into Children in Detention (HREOC, April 2004); Z Steel, S Momartin, C Bateman, A Hafshejani, D M Silove, N Everson, K Roy, M Dudley, L Newman, B Blick, S

extremely high rates of mental disorder suffered by children in Australian detention centres.²⁴ It also found that “there were marked differences between adults and children in the distress associated with various incidents.”²⁵ In particular, children were much more distressed by witnessing acts of self-harm than adults.²⁶

The closed immigration detention system in Australia involved prolonged periods of detention in remote detention centres, which had a particularly extreme impact on children’s mental health. But similar, if less extreme, impacts on children have been documented in other immigration detention settings. For example, in the UK, child protection forms in an immigration detention centre documented concerns about children’s failure to thrive, feeding and sleeping problems and depression.²⁷ There is also evidence of children suffering from skin complaints and persistent respiratory conditions in UK immigration detention centres.²⁸

States often argue that the impact of detention on accompanied children is less severe because of the presence of family members to care for them. However, there is evidence that detention can severely undermine the ability of parents to care for their children. For example, the report on family detention in the US found that the detention setting stripped parents of their role as arbiter and architect of the family unit²⁹ and that depression suffered by parents in detention affected their parenting ability.³⁰ This phenomenon also occurred with families in Australia.³¹

Other impacts on children of immigration detention concern the effects on their educational development. Further, as with adults, immigration detention can impact on a child’s access to legal assistance and their ability to prepare their asylum claim. Children

Mares, Psychiatric status of asylum seeker families held for a protracted period in a remote detention centre in Australia, *Australian and New Zealand Journal of Public Health* 534 (2004).

²⁴ Z Steel, *The politics of exclusion and denial: the mental health costs of Australia’s refugee policy*, May 2003, p.10.

²⁵ Z Steel, *The politics of exclusion and denial: the mental health costs of Australia’s refugee policy*, May 2003, p.8.

²⁶ Z Steel, *The politics of exclusion and denial: the mental health costs of Australia’s refugee policy*, May 2003, p.9.

²⁷ H Crawley and T Lester, *No Place for a Child, Children in UK immigration detention: impacts, alternatives and safeguards*, Save the Children, 2005, p.13.

²⁸ H Crawley and T Lester, *No Place for a Child, Children in UK immigration detention: impacts, alternatives and safeguards*, Save the Children, 2005, p.14.

²⁹ M Brane and E Butera, *Locking up family values: the detention of immigrant families*, Women’s Commission for Refugee Women and Children and Lutheran Immigration and Refugee Service, February 2007, p.2.

³⁰ M Brane and E Butera, *Locking up family values: the detention of immigrant families*, Women’s Commission for Refugee Women and Children and Lutheran Immigration and Refugee Service, February 2007, p.23.

³¹ HREOC, *A last resort? A summary guide to the national inquiry into children in immigration detention*, 2004, p.33.

may be so traumatised by detention that they choose “voluntary” return to their country of origin, in some cases to risks of the dangers they had fled.³²

The international legal framework on immigration detention

In order to examine the compatibility of the immigration detention of children with international law, it is necessary to first consider the legal framework concerning immigration detention in general. A number of human rights treaties, which are legally binding on states parties, contain guarantees that are relevant to the issue of immigration detention. Since the immigration detention population contains many asylum seekers and refugees, refugee law should be considered.

Refugee law

Article 31(1) of the CRSR³³ prohibits states parties from imposing “penalties on refugees who...enter or are present in their territory without authorization...” This prohibition exists because of the reality that most refugees need to cross borders clandestinely in order to access protection.³⁴ Although “penalty” is not defined, it is submitted that detention is a form of “penalty”.

Article 31(2) of the CRSR prohibits restrictions on the freedom of movement of refugees “other than those which are necessary” and only “until their status in the country is regularised or they obtain admission into another country.” Further, Article 26 requires states parties to accord to refugees “lawfully in its territory” the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances. The question arises as to whether a person who has only been granted temporary admission to a country pending determination of their asylum claim is “lawfully in its territory”. Many states argue that a person is not “lawfully in their territory” until they have been granted permanent entry, but it is submitted that, as argued by Hathaway, a refugee is lawfully present once formally admitted to the asylum state’s refugee status verification procedure, or otherwise expressly or impliedly authorised to remain at least temporarily in that state’s territory.³⁵

UNHCR’s detention guidelines³⁶ state that the detention of asylum seekers is inherently undesirable,³⁷ as a general principle asylum seekers should not be detained,³⁸ and

³² See Separated Children in Europe Programme Statement of Good Practice, Third Edition, Save the Children, 2004, p.31 for issues concerning returns of children.

³³ Adopted 28 July 1951, GA res. 429 (V) of 14 December 1950, entry into force 22 April 1954, 189 UNTS 137.

³⁴ J Hathaway, *The rights of refugees under international refugee law* (New York, Cambridge University Press, 2005), p.406.

³⁵ J Hathaway, *The rights of refugees under international refugee law* (New York, Cambridge University Press, 2005), p.414. For fuller argument on “lawful presence” see pp.173–186.

³⁶ UNHCR revised guidelines on applicable criteria and standards relating to the detention of asylum seekers, February 1999, UNHCR website: <http://www.unhcr.org/protect/PROTECTION/3bd036a74.pdf>, guideline 1.

detention should only take place after a full consideration of all possible alternatives.³⁹ UNHCR states that there should be a presumption against detention, but sets out exceptional grounds for detention. Having set out the limited situations in which detention may be permitted, the guidelines state that detention of asylum seekers for purposes other than those listed “is contrary to the norms of refugee law”.⁴⁰ Examples of purposes stated to be inconsistent with refugee law are detention as part of a policy to deter future asylum seekers, or to dissuade those who have commenced their claims from pursuing them.⁴¹

Human rights treaties

Article 9(1) of the ICCPR⁴² guarantees rights to liberty and security of the person, prohibits arbitrary arrest or detention, and provides that deprivation of liberty must be in accordance with such procedures as are established by law. Article 9(4) of the ICCPR provides procedural guarantees. The HRC has clarified that Articles 9(1) and 9(4) are applicable to all deprivations of liberty, including detention for immigration control.⁴³

Article 10(1) includes guarantees for persons deprived of their liberty that they “shall be treated with humanity and with respect for the inherent dignity of the human person,” and Article 7 prohibits torture or cruel, inhuman or degrading treatment or punishment.

Article 12(1) guarantees freedom of movement to everyone “lawfully within the territory of a state”.⁴⁴ Article 12(3) only permits restrictions to this right which are permitted by law, and are necessary to protect national security, public order, public health or morals or the rights and freedom of others. States sometimes argue national security grounds for immigration detention. These may be legitimate in individual cases, but the HRC has further stated that any measures restricting Article 12 rights “must conform to the

³⁷ UNHCR revised guidelines on applicable criteria and standards relating to the detention of asylum seekers, February 1999, UNHCR website: <http://www.unhcr.org/protect/PROTECTION/3bd036a74.pdf>, introduction, para.1.

³⁸ UNHCR revised guidelines on applicable criteria and standards relating to the detention of asylum seekers, February 1999, UNHCR website: <http://www.unhcr.org/protect/PROTECTION/3bd036a74.pdf>, guideline 2.

³⁹ UNHCR revised guidelines on applicable criteria and standards relating to the detention of asylum seekers, February 1999, UNHCR website: <http://www.unhcr.org/protect/PROTECTION/3bd036a74.pdf>, guideline 3.

⁴⁰ UNHCR revised guidelines on applicable criteria and standards relating to the detention of asylum seekers, February 1999, UNHCR website: <http://www.unhcr.org/protect/PROTECTION/3bd036a74.pdf>, guideline 3

⁴¹ UNHCR revised guidelines on applicable criteria and standards relating to the detention of asylum seekers, February 1999, UNHCR website: <http://www.unhcr.org/protect/PROTECTION/3bd036a74.pdf>, guideline 3.

⁴² Adopted 16 December 1966, entry into force 23 March 1976, 999 UNTS 171.

⁴³ HRC, General Comment No. 8 on right to liberty and security of persons, 30 June 1982, HRI/GEN/1/Rev.7, para.1.

⁴⁴ J Hathaway, *The rights of refugees under international refugee law* (New York, Cambridge University Press, 2005), pp. 173-186.

principle of proportionality.”⁴⁵ This principle requires that the reasons justifying interference with a right must be relevant and sufficient. States sometimes argue that freedom of movement needs to be limited in cases of mass influx of persons to protect public order, leading to the setting up of closed refugee camps, but other states, eg. Uganda, have managed to avoid such restrictions, which opens to question the necessity of such measures.

Regional human rights treaties contain analogous provisions to the ICCPR. The ACHR,⁴⁶ ACHPR,⁴⁷ and ECHR⁴⁸ guarantee the right to personal liberty and security⁴⁹ together with procedural guarantees for detainees.⁵⁰ They also prohibit torture or cruel, inhuman or degrading punishment or treatment.⁵¹

The ACHR and ACHPR provide protection from arbitrary arrest or imprisonment.⁵² The right to freedom of movement and residence is guaranteed by the ACHR,⁵³ ACHPR,⁵⁴ and the Fourth Protocol of the ECHR,⁵⁵ to persons lawfully in the territory.⁵⁶

The ECHR lists a number of exceptions to the general principle of non-deprivation of liberty, and included in this list are: “to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”⁵⁷ This permits some forms of immigration detention, but specifies the circumstances when such detention is permitted. Therefore, it is compatible with the ECHR to hold a person in immigration detention with a view to their deportation, but this detention would become incompatible with the ECHR as soon it becomes clear that the intended deportation will not in fact take place. In *Chahal v UK*⁵⁸ the ECtHR held that any such deprivation of liberty was justified under Article 5(1)(f) only for as long as deportation proceedings were in progress. If the proceedings were not prosecuted with due diligence, the detention would cease to be permissible under the provision. Detention for purely administrative purposes to speed up asylum processes would not appear to be a legitimate exception under ECHR Article 5(1)(f), but in the case of *Saadi v UK*,⁵⁹ in

⁴⁵ HRC, General Comment No. 27 on freedom of movement, 2 March 1999, CCPR/C/21/Rev.1/Add.9, para.14.

⁴⁶ Adopted 22 November 1969, entry into force 18 July 1978, OAS Treaty Series No.36.

⁴⁷ Adopted 27 June 1981, entry into force 21 October 1986, 1520 UNTS 363.

⁴⁸ Adopted 4 November 1950, entry into force 3 September 1953 (as amended, in force 1 November 1998), ETS No.5 (Protocol 11, ETS No.155).

⁴⁹ ACHR, Art.7(1), ACHPR, Art.6, ECHR, Art.5(1).

⁵⁰ ACHR, Art.7(6), ACHPR, Art.7, ECHR, Art.5(4).

⁵¹ ACHR, Art.5(2), ACHPR, Art.5, ECHR, Art.3.

⁵² ACHR, Art.7(3), ACHPR, Art.6.

⁵³ Art.22(1).

⁵⁴ Art.12(1).

⁵⁵ Art.2.

⁵⁶ J Hathaway, *The rights of refugees under international refugee law* (New York, Cambridge University Press, 2005), pp. 173-186.

⁵⁷ ECHR, Art.5(1)(f).

⁵⁸ (1996) 23 EHRR 413.

⁵⁹ 11 July 2006, Application no.13229/03.

which an asylum seeker was held for 7 days in a detention centre as part of a “fast track” procedure, the ECtHR held that this was not incompatible with Article 5(1)(f).⁶⁰

When is immigration detention considered to be “arbitrary”?

The HRC has considered the issue of arbitrariness and has defined it as not merely being against the law, but as including elements of “inappropriateness, injustice and lack of predictability” and of reasonableness and necessity in all the circumstances.⁶¹ In *A v Australia*,⁶² which concerned an adult asylum seeker who was held in various Australian closed detention centres for over four years, the HRC found that his detention was arbitrary within the meaning of Article 9(1) of the ICCPR.⁶³ The HRC found that it is not per se arbitrary to detain individuals requesting asylum.⁶⁴ But it held that detention could be considered arbitrary “if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence.”⁶⁵ The HRC held that whether a deprivation of liberty is considered to be reasonable and necessary will also depend on the proportionality of the measure with its intended objective.⁶⁶ The HRC stated that periodic review of detention is required so that the grounds justifying the detention can be assessed and that detention should not continue beyond the period for which the state can provide appropriate justification. Without factors specific to the individual, such as the likelihood of absconding and lack of cooperation, detention may be considered arbitrary, even if entry was illegal.⁶⁷ The HRC also found a violation of Article 9(4) of the ICCPR, because there was no access to a court which could order the detainee’s release if the detention was not lawful.⁶⁸

These findings were repeated in the case of *C v Australia*⁶⁹, where the HRC further held that the state had “not demonstrated that, in the light of the author’s particular circumstances, there were not less invasive means of achieving the same ends...”,⁷⁰ thus requiring that states consider the possibility of alternatives to detention in each individual case.

In summary, immigration detention is arbitrary if it is inappropriate, unjust or lacks predictability and if it is unreasonable or unnecessary in all the circumstances.

⁶⁰ This case was decided by a majority of 4 votes to 3. Oral arguments were held in May 2007 and a decision by the Grand Chamber is still pending.

⁶¹ *Van Alphen v The Netherlands*, Communication No.305/1988, UN Doc. CCPR/C/39/D/305/1988, decided 23 July 1990, para.5.8.

⁶² Communication No. 560/1993, UN Doc, CCPR/C/59/D/560/1993, decided 30 April 1997.

⁶³ Communication No. 560/1993, UN Doc, CCPR/C/59/D/560/1993, decided 30 April 1997, para. 9.4.

⁶⁴ Communication No. 560/1993, UN Doc, CCPR/C/59/D/560/1993, decided 30 April 1997, para.9.3.

⁶⁵ Communication No. 560/1993, UN Doc, CCPR/C/59/D/560/1993, decided 30 April 1997, para.9.2.

⁶⁶ Communication No. 560/1993, UN Doc, CCPR/C/59/D/560/1993, decided 30 April 1997, para 9.2.

⁶⁷ Communication No. 560/1993, UN Doc, CCPR/C/59/D/560/1993, decided 30 April 1997, para.9.4

⁶⁸ Communication No. 560/1993, UN Doc, CCPR/C/59/D/560/1993, decided 30 April 1997, para. 9.5.

⁶⁹ Communication No. 900/1999, UN Doc. CCPR/C/76/D/900/1999, decided 28 October 2002.

⁷⁰ Communication No. 900/1999, UN Doc. CCPR/C/76/D/900/1999, decided 28 October 2002, para.8.2.

Reasonableness and necessity will also depend on the proportionality of the measure with the intended objective. If “less invasive means of achieving the same ends” exist, the detention will be arbitrary.

Further legal protections for children

Human rights law recognises the special needs and vulnerabilities of children. All of the international and regional treaties relevant to immigration detention cited above apply equally to children as to adults, but there are some provisions of these treaties that relate specifically to children. Article 24(1) of the ICCPR provides that every child shall have “the right to such measures of protection as are required by his status as a minor...” Article 19 of the ACHR and Article 18(3) of the ACHPR include specific protections of the rights of children.

Convention on the Rights of the Child

Article 37(b) of the CRC requires that “no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.” Therefore, in order to be compatible with the CRC, all other possible options must have been considered before immigration detention is utilised.

Further relevant provisions in the CRC which provide extra protections beyond those provided in other human rights treaties are as follows: the child must be treated in a manner which takes into account the needs of persons of his/her age;⁷¹ the child’s best interests must be determined and must be a primary consideration;⁷² the child must be permitted to express his/her views which must be given due weight according to the child’s age and maturity;⁷³ unaccompanied children must be given special protection and assistance;⁷⁴ refugee and asylum-seeking children must be given appropriate protection and humanitarian assistance;⁷⁵ and appropriate measures must be taken to promote the recovery and reintegration of children who have suffered trauma.⁷⁶

The “best interests” requirement in Article 3 of the CRC does not require that the best interests of the child should be the only consideration (thus permitting states to take into account other considerations such as national security), but it does require that the child’s best interests must be determined and that they shall be a primary consideration. Therefore, prior to any decision being taken to detain a child, a best interests determination must be undertaken. When considering the situation of unaccompanied and separated children, the CRC Committee has stated that “a best interests determination

⁷¹ Art.37(c).

⁷² Art.3(1).

⁷³ Art.12.

⁷⁴ Art.20.

⁷⁵ Art.22.

⁷⁶ Art.39.

must be documented in preparation of any decision fundamentally impacting on the unaccompanied...child's life."⁷⁷

Article 2 provides protection against discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's family members. This is relevant in the context of immigration detention where children are usually detained as a result of the decisions taken by their family members.

The Article 12 requirement of assuring to the child who is capable of forming views the right to express those views freely in all matters affecting them demands that states take into account the evolving capacities of the child. There are some states which permit families to decide whether all of the family should be held in detention together or whether the family should be split during the period of detention, eg. Sweden and the Netherlands. This Article could require a state to consider the views of a mature child on this matter, not only the views of the parent(s). Article 9(1) further states that any decision to separate a child from his or her parents must be subject to judicial review.

The Article 39 requirement of appropriate measures to promote physical and psychological recovery and social integration of child victims of neglect, exploitation, abuse, torture, cruel, inhuman or degrading treatment or punishment, or armed conflicts states that "such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child." Given that many asylum-seeking, refugee and migrant children will have experienced the types of treatment set out in Article 39 in their countries of origin or during their flight from these countries and will need to recover from these experiences, it is incompatible with the CRC to place them in the environment of a detention centre, since this will not comply with the rehabilitative requirements of this Article. For example, the evidence presented to the Australian HREOC inquiry was clear that immigration detention centres were not an environment where children could recover from their past persecution and trauma⁷⁸ and a psychiatrist told the inquiry that "little can be done to help them whilst they remain in the detention situation".⁷⁹

The HREOC inquiry found that Australia's detention policy was "fundamentally inconsistent" with the CRC.

*CRC Committee general comments*⁸⁰

The CRC Committee has stated that "children should not, as a general rule, be deprived of liberty."⁸¹ They have further stated that "detention cannot be justified solely on the

⁷⁷ CRC Committee, General Comment No. 6 on treatment of unaccompanied and separated children outside their country of origin, 1 September 2005, CEC/GC/2005/6, para.19.

⁷⁸ HREOC, A last resort? A summary guide to the national inquiry into children in immigration detention, 2004, p.31.

⁷⁹ HREOC, A last resort? A summary guide to the national inquiry into children in immigration detention, 2004, p.35.

⁸⁰ Not binding, but authoritative.

basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof.”⁸² The CRC Committee says that unaccompanied children should be released from detention and placed in other forms of appropriate accommodation.⁸³ The CRC Committee points out that state obligations also apply with respect to children who come under the state’s jurisdiction while attempting to enter the country’s territory,⁸⁴ and that states should ensure that such children are not criminalised solely for reasons of illegal entry or presence in the country.⁸⁵

UNHCR guidelines and ExCom Conclusions

UNHCR has stated in numerous documents that children should not be held in immigration detention.⁸⁶ In its guidelines on detention, guideline 6 states that “minors who are asylum seekers should not be detained.”⁸⁷ With regard to unaccompanied children UNHCR states that where possible they should be released into the care of family members who already have residency within the asylum country. Where this is not possible, alternative care arrangements should be made by the competent child care authorities.⁸⁸ With regard to accompanied children, UNHCR states that all appropriate alternatives to detention should be considered, and that children and their primary caregivers should not be detained unless this is the only means of maintaining family unity.⁸⁹ If children are detained, UNHCR states that they must not be held under prison-like conditions.⁹⁰

⁸¹ CRC Committee, General Comment No. 6 on treatment of unaccompanied and separated children outside their country of origin, 1 September 2005, CEC/GC/2005/6, para.40.

⁸² CRC Committee, General Comment No. 6 on treatment of unaccompanied and separated children outside their country of origin, 1 September 2005, CEC/GC/2005/6, para.61.

⁸³ CRC Committee, General Comment No. 6 on treatment of unaccompanied and separated children outside their country of origin, 1 September 2005, CEC/GC/2005/6, para.61.

⁸⁴ CRC Committee, General Comment No. 6 on treatment of unaccompanied and separated children outside their country of origin, 1 September 2005, CEC/GC/2005/6, para.61.

⁸⁵ CRC Committee, General Comment No. 6 on treatment of unaccompanied and separated children outside their country of origin, 1 September 2005, CEC/GC/2005/6, para.62.

⁸⁶ Refugee children: guidelines on protection and care, 1994, UNHCR website: <http://www.unhcr.org/protect/PROTECTION/3b84c6c67.pdf> para.IV; UNHCR guidelines on policies and procedures in dealing with unaccompanied children seeking asylum, February 1997, *UNHCR website*: <http://www.unhcr.org/publ/PUBL/3d4f91cf4.pdf> para. 7.6.

⁸⁷ UNHCR revised guidelines on applicable criteria and standards relating to the detention of asylum seekers, February 1999, UNHCR website: <http://www.unhcr.org/protect/PROTECTION/3bd036a74.pdf>, guideline 6.

⁸⁸ UNHCR revised guidelines on applicable criteria and standards relating to the detention of asylum seekers, February 1999, UNHCR website: <http://www.unhcr.org/protect/PROTECTION/3bd036a74.pdf>, guideline 6.

⁸⁹ UNHCR revised guidelines on applicable criteria and standards relating to the detention of asylum seekers, February 1999, UNHCR website: <http://www.unhcr.org/protect/PROTECTION/3bd036a74.pdf>, guideline 6.

⁹⁰ Refugee children: guidelines on protection and care, 1994, para. IV, UNHCR website: <http://www.unhcr.org/protect/PROTECTION/3b84c6c67.pdf>; Refugee children guidelines, see n86 supra, chapter 1, para.IV; UNHCR guidelines on policies and procedures in dealing with unaccompanied children seeking asylum, February 1997, para 7.7, *UNHCR website*: <http://www.unhcr.org/publ/PUBL/3d4f91cf4.pdf>; UNHCR revised guidelines on applicable criteria and

The UNHCR Executive Committee has expressed deep concern about the number of asylum seekers in detention and believes that the hardship endured in detention should be avoided and thus detention should be limited to cases where it is absolutely necessary.⁹¹ It has called on states to remember their obligations under the CRC and to always act in the best interests of the child. Amongst other concerns such as physical and mental well-being, it is important for states to protect the child by preventing separation from their families.⁹²

The Executive Committee passed a further resolution relating to children at risk during its October 2007 meeting.⁹³ It recognized that detention can affect the physical and mental well-being of children and heighten their vulnerability. In light of that, it urges governments to refrain from detaining children, and to do so only as a last resort and for the shortest time period possible with the best interests of the child in mind.

UN rules and guidelines concerning juvenile justice

The UN rules for protection of juveniles deprived of their liberty (the Havana Rules),⁹⁴ which apply to children detained for any reason, are also relevant to children in immigration detention. Like the CRC, they state that imprisonment should be used as a last resort⁹⁵ and for the minimum necessary period⁹⁶ and should be limited to exceptional cases.⁹⁷ Other UN bodies of rules and guidelines concerning juvenile justice are also relevant for children in immigration detention, such as the UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)⁹⁸ and the CRC Committee's General Comment on children's rights in juvenile justice.⁹⁹

Recent jurisprudence concerning immigration detention of children

Unaccompanied children

In the case of *Mayeka and Mitunga v Belgium*¹⁰⁰ the ECtHR considered the legal issues raised by the detention of a 5 year old unaccompanied child held for two months in an adult detention centre. The ECtHR stated that it was in no doubt that detention in these conditions caused the child considerable distress and that the authorities who ordered her detention could not have failed to be aware of the serious psychological effects it would

standards relating to the detention of asylum seekers, February 1999, UNHCR website:

<http://www.unhcr.org/protect/PROTECTION/3bd036a74.pdf>, guideline 6.

⁹¹ UNHCR EXCOM *Detention of Refugees and Asylum seekers*, No. 44 (XXXVII) 1986

⁹² UNHCR EXCOM, *Refugee Children and Adolescents* No. 84 (XLVIII), 17 Oct. 1997. See also UNHCR EXCOM, *Refugee Children* Conclusion No. 47 (XXXVIII), 12 Oct. 1987 and UNHCR EXCOM, *Refugee Children*, No. 59 (XL), 13 Oct. 1989.

⁹³ UNHCR EXCOM *Children at Risk*, No. 107 (LVIII) 2007.

⁹⁴ Adopted by UN General Assembly resolution 45/113 of 14 December 1990.

⁹⁵ Adopted by UN General Assembly resolution 45/113 of 14 December 1990, para. 1.

⁹⁶ Adopted by UN General Assembly resolution 45/113 of 14 December 1990, para. 2.

⁹⁷ Adopted by UN General Assembly resolution 45/113 of 14 December 1990, para. 2.

⁹⁸ Adopted by General Assembly resolution 40/33 of 29 November 1985.

⁹⁹ General Comment No. 10, 9 February 2007, CRC/C/GC/10.

¹⁰⁰ 12 October 2006, Application No. 13178/03.

have on her.¹⁰¹ The Court held that her detention in such conditions “demonstrated a lack of humanity to such a degree that it amounted to inhuman treatment.”¹⁰² Thus they found a violation of Article 3 of the ECHR.

The ECtHR held that states’ interests in foiling attempts to circumvent immigration rules must not deprive foreign children, especially if unaccompanied, of the protection their status warrants.¹⁰³ The ECtHR pointed out that there was no risk that this child would seek to evade the supervision of the Belgian authorities and that therefore her detention in a closed centre for adults was unnecessary. They held that:

“other measures could have been taken that would have been more conducive to the higher interest of the child guaranteed by Article 3 of the CRC. These included her placement in a specialised centre or with foster parents.”¹⁰⁴

The measures taken were disproportionate and they therefore found a violation of the child’s right to private life under Article 8 of the ECHR.

With regard to the child’s Article 5 rights to liberty and security of the person, the ECtHR noted that she was detained:

“in a closed centre intended for illegal immigrants in the same conditions as adults; these conditions were consequently not adapted to the position of extreme vulnerability in which she found herself as a result of her position as an unaccompanied minor.”¹⁰⁵

The ECtHR found a violation of her rights under Article 5(1). The ECtHR referred to Articles 3, 10, 22 and 37 of the CRC as relevant international law.¹⁰⁶

This ECtHR case provides particularly strong judicial comment on the practice of detaining unaccompanied children. Other courts have also made decisions on this issue recently. For example, in the case of *Centre for Child Law and Isabelle Ellis v The Minister for Home Affairs and others* in 2004,¹⁰⁷ the High Court of South Africa ordered that all unaccompanied foreign children held in immigration detention in the Lindela Repatriation Centre be immediately removed from the centre and be placed “in an appropriate place of care or place of safety.”¹⁰⁸ The Court directed the authorities “to refrain from causing an unaccompanied foreign child to be admitted at Lindela, without such children first having been dealt with by the Children’s Court” in accordance with the

¹⁰¹ 12 October 2006, Application No. 13178/03, para. 58.

¹⁰² 12 October 2006, Application No. 13178/03, para. 58.

¹⁰³ 12 October 2006, Application No. 13178/03, para. 81.

¹⁰⁴ 12 October 2006, Application No. 13178/03, para. 83.

¹⁰⁵ 12 October 2006, Application No. 13178/03, para. 103.

¹⁰⁶ 12 October 2006, Application No. 13178/03, para.39.

¹⁰⁷ High Court of South Africa (Transvaal Provincial Division) Case no. 22866/2004, 8 September 2004.

¹⁰⁸ High Court of South Africa (Transvaal Provincial Division) Case no. 22866/2004, 8 September 2004, para.4.2.

South African Child Care Act.¹⁰⁹ Following this case children are no longer held in Lindela Repatriation Centre.

In the US a class action lawsuit challenging the constitutionality of policies and practices governing the detention of unaccompanied children resulted in the 1997 Flores v Reno settlement agreement.¹¹⁰ It provides that detaining authorities must release children without unnecessary delay (and it lists the parties to whom children may be released) unless their detention is required to secure the child's appearance in court or to ensure their safety or the safety of others. The 2002 Homeland Security Act moved responsibility for unaccompanied immigrant children from the INS to the ORR, a federal agency within the Department of Health and Human Services. Unlike the INS, the ORR has a social service mandate. Prior to this transfer, many such children were held in secure facilities for youth with criminal offences. Now the predominant detention model in the US for unaccompanied children involves single purpose "children's shelters".¹¹¹ Field considers these shelters to be places of "soft detention" rather than alternatives to detention.¹¹²

Accompanied children

The HRC has considered three recent communications concerning immigration detention of children in Australia.

In the cases of Mr. Baban and his young son who were detained for nearly two years¹¹³ and D and E and their young children who were detained for over three years,¹¹⁴ following its jurisprudence in A v Australia¹¹⁵ the HRC found violations of Article 9 of the ICCPR in respect of the adults and the children.¹¹⁶ In both cases the HRC held that the reasons for detention advanced by Australia failed to justify the continued detention, in the individual circumstances of each case, and that detention should not continue beyond the period for which there is appropriate justification, causing hardship for the children.¹¹⁷

In both cases the HRC held that Australia had not demonstrated that there were not "less invasive means of achieving the same ends, that is to say, compliance with the state

¹⁰⁹ High Court of South Africa (Transvaal Provincial Division) Case no. 22866/2004, 8 September 2004, para. 7.

¹¹⁰ Flores v Reno, 507 US 292 (1993).

¹¹¹ J Bhabha and M Crock, Seeking asylum alone: unaccompanied and separated children and refugee protection in Australia, the UK and the US, a comparative study (Sydney, Themis Press, 1997), p. 92.

¹¹² O Field, Alternatives to detention of asylum seekers and refugees, UNHCR Legal and Protection Policy Series, POLAS/2006/03, April 2006, p.227.

¹¹³ Communication No. 1014/2001, UN Doc. CCPR/C/78/D/1014/2001, decided 6 August 2003.

¹¹⁴ Communication No. 1050/2002, UN Doc. CCPR/C/87/D/1050/2002, decided 11 July 2006.

¹¹⁵ Communication No. 560/1993, UN Doc, CCPR/C/59/D/560/1993, decided 30 April 1997.

¹¹⁶ Communication No. 1014/2001, UN Doc. CCPR/C/78/D/1014/2001, decided 6 August 2003, para. 8; . Communication No. 1050/2002, UN Doc. CCPR/C/87/D/1050/2002, decided 11 July 2006, para. 8.

¹¹⁷ Baben, Communication No. 1014/2001, UN Doc. CCPR/C/78/D/1014/2001, decided 6 August 2003, para. 7.2; D and E, Communication No. 1050/2002, UN Doc. CCPR/C/87/D/1050/2002, decided 11 July 2006, para. 7.2.

party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions."¹¹⁸

In both cases the complainants also argued that there had been a breach of Article 24 of the ICCPR with regard to the measures of protection required by the children's status as minors. The HRC held these claims to be inadmissible, noting the state's argument that in the absence of other family in Australia, the best interests of the children were best served by being held with their parent(s), and the state's explanation of the efforts they claimed to have undertaken to provide children in detention with appropriate educational, recreational and other programmes.¹¹⁹

The HRC's jurisprudence was further developed in the communication of the Bakhtiyari family, who were detained with their five children.¹²⁰ The children spent 2 years 8 months in detention, until the Australian High Court ordered their release to foster care, following concerns about the mental health of two of the children (concerning incidents of self-harm, including stitching their lips together, slashing their arms, and refusing to eat). The HRC held that the continuation of immigration detention for Mrs. Bakhtiyari and her children was arbitrary and found violations of Article 9(1) and 9(4) of the ICCPR, on almost identical findings to those in the Baban and D and E cases.¹²¹

The HRC again stated that less intrusive measures than detention could have achieved the state's aims.¹²² But in this case the HRC also found a violation of Article 24 of the ICCPR. The HRC held that:

“the principle that in all decisions affecting a child, its best interests shall be a primary consideration, forms an integral part of every child's right to such measures of protection as required by his or her status as a minor...as required by Article 24(1).”¹²³

The HRC held that the measures taken by Australia had not been guided by the best interests of the children, and thus revealed a violation of Article 24(1). The Committee are therefore interpreting Article 24(1) of the ICCPR in the light of Article 3 of the CRC.

Despite these decisions of the HRC, in the case of *Re Woolley* in 2004, the Australian High Court dismissed appeals by four children held in immigration detention for nearly

¹¹⁸ Baben, Communication No. 1014/2001, UN Doc. CCPR/C/78/D/1014/2001, decided 6 August 2003, para. 7.2; D and E, Communication No. 1050/2002, UN Doc. CCPR/C/87/D/1050/2002, decided 11 July 2006, para. 7.2.

¹¹⁹ Baben, Communication No. 1014/2001, UN Doc. CCPR/C/78/D/1014/2001, decided 6 August 2003, para.6.8; D and E, Communication No. 1050/2002, UN Doc. CCPR/C/87/D/1050/2002, decided 11 July 2006, para. 6.4.

¹²⁰ Communication No. 1069/2002, UN Doc. CCPR/C/79/D/1069/2002, decided 29 October 2003.

¹²¹ Communication No. 1069/2002, UN Doc. CCPR/C/79/D/1069/2002, decided 29 October 2003, para.9.3.

¹²² Communication No. 1069/2002, UN Doc. CCPR/C/79/D/1069/2002, decided 29 October 2003, para.9.3.

¹²³ Communication No. 1069/2002, UN Doc. CCPR/C/79/D/1069/2002, decided 29 October 2003, para.9.7.

three years, holding that it was not unlawful or unconstitutional to detain children in immigration detention, stating that there were no exceptions to the law for children.¹²⁴ There is no requirement under Australian law that opinions issued by the HRC have any binding effect and Australia has not incorporated the CRC into domestic law.¹²⁵

The policy change in Australia

WGAD conducted a visit to Australia in 2002 and their resulting report was strongly critical of the immigration detention system that was in place, particularly with regard to children.¹²⁶ The WGAD report concluded by making the prescient comment that “one could reasonably assume that if public opinion were fully and specifically informed about the conditions to which human beings are being subjected in Australia and the negative consequences for the image of a democratic country, public opinion would change.”¹²⁷ It appears that this is in fact what did take place. The change of policy followed extensive media exposure of the mental health of children in detention and a subsequent change in public opinion.

The Australian government may have taken the position that criticism by such bodies as the CRC Committee, WGAD and the HRC were irrelevant, but these criticisms did enable NGOs to raise these issues more forcefully with the media, eventually impacting upon Australian public opinion. By December 2003 there were no unaccompanied children remaining in Australian closed detention centres.¹²⁸ The Migration Amendment (Detention Arrangements) Act 2005 came into force in July 2005, amending the Migration Act 1958. It states that a minor shall only be detained as a measure of last resort. The explanatory memorandum to the Bill states that detention of children should take place in the community.¹²⁹ Accompanied children were then moved into community detention with their mothers.

Alternatives to immigration detention

The UN Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules) set out the principles relating to non-custodial sentencing.¹³⁰ Although drawn up with regard to criminal sentencing they are analogous to alternatives available in the immigration detention context. The Tokyo Rules state that non-custodial measures should be used in accordance with the principle of minimum intervention.¹³¹ *Inter alia*, they require that the

¹²⁴ Re Woolley: ex parte applicants M276/2003 by their next friend GS (2004) HCA49.

¹²⁵ But in the case of Minister for Immigration and Ethnic Affairs v Teoh, (1995) 183 CLR 273, the Australian High Court held that the ratification of the CRC did create a legitimate expectation that administrative decision-makers would act in conformity with it.

¹²⁶ E/CN.4/2003/8/Add.2, 24 October 2002.

¹²⁷ E/CN.4/2003/8/Add.2, 24 October 2002.

¹²⁸ HREOC, A last resort? A summary guide to the national inquiry into children in immigration detention, 2004, pp. 54-55.

¹²⁹ Migration Amendment (Detention Arrangements) Bill 2005 explanatory memorandum.

¹³⁰ Adopted by General Assembly resolution 45/110 of 14 December 1990.

¹³¹ Tokyo Rules, para.2.6.

dignity of the person subject to non-custodial measures shall be protected at all times¹³² and that his/her right to privacy, and the right to privacy of their family shall be respected.¹³³

The appropriateness of different alternatives to detention will depend on the individual's stage in the immigration/asylum process. Accompanied children tend to be detained with their parents in order to maintain family unity, and on the basis of the risk of their parent(s) absconding. UNCHR commissioned a study on alternatives to detention of asylum seekers and refugees by Field,¹³⁴ who found that the rate at which asylum seekers abscond, prior to a final rejection of their claim and/or the real prospect of removal from the territory, is low, particularly in destination states.¹³⁵ For example, a statistical survey of 76 countries relating to the first quarter of 2003, showed that only 20% (5,600 of 27,700) of all asylum applications were closed for non-substantive reasons.¹³⁶ A UK study¹³⁷ of bailed asylum detainees showed that 90% complied with their bail conditions and a US study showed that 84% did so.¹³⁸ Field therefore concluded that restrictive alternatives involving close supervision or monitoring, for the purpose of ensuring compliance with asylum procedures, are seldom, if ever, required in destination states where most asylum seekers wish to remain.¹³⁹ She proposes that destination states should be able to implement effective alternatives to detention, including unconditional release or admission to the community with only the minor duties to report addresses and appear for appointments."¹⁴⁰

Field found that absconding rates are higher in transit states. She cites several examples of reception policies and programmes which successfully reduced this rate, without recourse to detention, eg. provision of state accommodation and support in some southern European countries.¹⁴¹

With regard to unaccompanied asylum-seeking children, Field found that early detailed interviewing at the border, legal support, guardianship and specialised group homes run

¹³² Tokyo Rules, para.9.

¹³³ Tokyo Rules, para.3.11.

¹³⁴ O Field, Alternatives to detention of asylum seekers and refugees, UNHCR Legal and Protection Policy Series, POLAS/2006/03, April 2006, p.39, n158.

¹³⁵ O Field, Alternatives to detention of asylum seekers and refugees, UNHCR Legal and Protection Policy Series, POLAS/2006/03, April 2006, p. iv.

¹³⁶ Trends in RSD in 76 countries (first quarter 2003), UNHCR statistics, 4 July 2003.

¹³⁷ I Bruegel and E Natamba, Maintaining contact: what happens after detained asylum seekers get bail?, Social Science Research Paper No.16, London South Bank University, 2003.

¹³⁸ Vera Institute of Justice Appearance Assistance Program, in O Field, Alternatives to detention of asylum seekers and refugees, UNHCR Legal and Protection Policy Series, POLAS/2006/03, April 2006, p.231.

¹³⁹ O Field, Alternatives to detention of asylum seekers and refugees, UNHCR Legal and Protection Policy Series, POLAS/2006/03, April 2006, p.231.

¹⁴⁰ O Field, Alternatives to detention of asylum seekers and refugees, UNHCR Legal and Protection Policy Series, POLAS/2006/03, April 2006, p.25.

¹⁴¹ O Field, Alternatives to detention of asylum seekers and refugees, UNHCR Legal and Protection Policy Series, POLAS/2006/03, April 2006, p.iv.

by NGOs successfully reduced the rate at which they disappeared from several European countries.¹⁴²

Absconding rates are inevitably higher once a claim has been rejected or a person is likely to be removed from the territory. However, in the UK study¹⁴³ 15% of those tracked were bailed awaiting removal, and of these 80% complied with bail restrictions and were successfully removed. This demonstrates that even at the stage when removal directions have been issued alternatives to detention are available in many cases.

Field lists 12 alternatives to detention currently being used in the 34 countries surveyed, from less intrusive measures such as the obligation to register one's place of residence or surrender of passport and/or other documents, to much more intrusive measures such as electronic monitoring.¹⁴⁴ Other alternatives cited are accommodation-based alternatives (which may range from alternative forms of detention to minimal registration requirements), reporting requirements, bail and sureties, and community release programmes involving supervision and support by NGOs.

Field argues that it is important that the necessity and proportionality of alternatives is considered at each stage. She states that "there is a real risk of certain alternatives, such as electronic tagging, being misapplied to asylum seekers who would not and should not otherwise be detained, thereby becoming an unnecessary restriction on their freedom of movement and other rights."¹⁴⁵

Models of Alternatives to Detention

Swedish model

Many non-government organizations have urged other nations to follow the example of Sweden in their detention policies. Sweden's current detention policies are a result of changes made to counteract growing problems in detention centres (such as riots and mass hunger strikes). Some of these changes included the removal of private contractors and police from detention centres, and also ensuring that all staff were trained to show appropriate cultural sensitivity towards the detainees, so that essentially, centres would be run less like prisons.¹⁴⁶ The Swedish model of immigration detention does not use detention as a deterrent, but merely as a means to establish the identity and health of the person, and also to see if they pose a security risk.¹⁴⁷ The longest period a person may be detained for is two months, excluding any extensions. Detainees are also each given a

¹⁴² O Field, Alternatives to detention of asylum seekers and refugees, UNHCR Legal and Protection Policy Series, POLAS/2006/03, April 2006, p.v.

¹⁴³ I Bruegel and E Natamba, Maintaining contact: what happens after detained asylum seekers get bail?, Social Science Research Paper No.16, London South Bank University, 2003.

¹⁴⁴ O Field, Alternatives to detention of asylum seekers and refugees, UNHCR Legal and Protection Policy Series, POLAS/2006/03, April 2006, pp. 22-23.

¹⁴⁵ O Field, Alternatives to detention of asylum seekers and refugees, UNHCR Legal and Protection Policy Series, POLAS/2006/03, April 2006, p. iv.

¹⁴⁶<http://www.safecom.org.au/sweden.htm>

¹⁴⁷ http://www.humanrights.gov.au/human_rights/children_detention/submissions/jas.html#27

case worker whose role it is to make them aware of their rights, the length of time they are allowed to be held in detention, and to make sure they are given access to a lawyer. They all have a chance to appeal their detention under Swedish law.

One of the most important aspects of the Swedish model is that no child (under the age of 18) may be held in detention for more than three days, or in extreme circumstances, six days. After this, they will generally be released with their family into accommodation at a refugee centre, where they will report daily to the Department. However, in situations where it is ambiguous whether a threat to national security exists, or where a person's identity cannot be ascertained, the family is notified that the father is to be held in detention, while the mother and children are released into group homes and allowed to visit him or her during the day.¹⁴⁸ The Immigration Department assures the family that their case is of the utmost priority, and they are regularly informed of the status of their case. In situations where there is only a child and a father, and there may be strong reasons to not release the father, the child is released into a group home for unaccompanied children, and has regular access to their father.

Justice for Asylum Seekers Alliance Model (Australia)

The Justice for Asylum Seekers Alliance (JAS) is an Australian-based alliance comprised of many individual organizations.¹⁴⁹ JAS proposes a detailed alternative to current methods of detention around the world that would result in the release of children from immigration detention. JAS recommends a system of risk assessment, whereby asylum seekers will have thorough security, health and identity checks upon arrival. These assessments would also evaluate the risk of absconding. Asylum seekers will be placed in varying forms of housing depending on these assessments and the level of security needed for them. The lowest risk (generally suitable for children) would be in the form of community-based accommodation. Where medium levels of security are required for refugees, hostel accommodation will be given. Finally, only those people who are seen as a potential security risk will be put into full detention. This tiered level of accommodation for asylum seekers is a more humane method than many current techniques adopted by countries, helping to avoid the psychological damage that prolonged periods of detention may cause children. Furthermore, it also serves to significantly reduce financial cost.

Each asylum seeker, or family of asylum seekers, will also be assigned a case worker (either from the government or welfare agencies) who will help them understand the refugee determination process, support those who have been traumatised, help with adjustment, and generally prepare them for the possible outcomes.

¹⁴⁸ <http://www.safecom.org.au/sweden.htm>

¹⁴⁹ http://www.humanrights.gov.au/human_rights/children_detention/submissions/jas.html

Lutheran Immigration and Refugee Service (US)

The Lutheran Immigration and Refugee Service (LIRS) has proposed a similar process to JAS.¹⁵⁰ In the United States, asylum seekers technically have the legal right to parole from detention (release from detention), but in many cases there is no one to sponsor them for release, so they remain in detention.¹⁵¹ Previously, the US conducted a 3 year test program, funding a non-governmental organization (NGO) to supervise the release of asylum seekers, with positive results (93% appeared at all necessary hearings).¹⁵² Based on this and various other successful pilot programs run by NGOs, the LIRS proposes that the government work in conjunction with private, non-profit agencies to screen asylum seekers and determine which ones would be appropriate for release from detention. This screening would analyze the threat they pose to the community, their risk of absconding and any other relevant factors. If they are released, the non profit agency uses their links in the community to assist participants in getting access to necessary services (such as job placements and health checks), and also to help integrate them into the community (for example by helping them make contacts in their ethnic/religious communities). They will also inform the asylum seekers about their legal rights and obligations, when they need to attend a hearing.

LIRS also recommends that the government grant work authorization for those released. This has the dual effect of allowing them to support themselves rather than being dependent on the government, and also giving them the opportunity to contribute to the community instead of being inactive. The notable advantages of this program rely on the role that the NGO's play in assisting the asylum seekers. Firstly, LIRS believes that refugees are more likely to trust representatives who do not work for the government. More importantly, non-profit agencies have the resources and knowledge to help people get access to important services such as health, education, and employment. This has been a vital part in the success of all pilot programs run in the past.¹⁵³ Another benefit of using this model is financial. LIRS has calculated that the cost of using this alternative up to an asylum seeker's hearing is about US \$2626 (including the cost of detention prior to screening, and any necessary re-detention); comparatively, the cost of detention until a hearing is about US \$7259. This is a difference of more than \$4500 per person.¹⁵⁴

Australian Model

In 2006, the Australia Prime Minister announced that by 28 July all children should be released from immigration detention.¹⁵⁵ As a result, s 4AA of the Australian *Migration Act* 1958 now affirms that as a matter of principle, children shall only be held in

150 <http://www.lirs.org/DonateServe/advocate/Detention/DetentionProposal.htm>

151 Ibid.

152 Ibid.

153 <http://www.lirs.org/DonateServe/advocate/Detention/DetentionProposal.htm>

154 <http://www.lirs.org/DonateServe/advocate/Detention/DetentionProposal.htm>

155 See Mary Crock, Ben Saul and Azadeh Dastyari, *Future Seekers II: Refugees and Irregular Migration in Australia* (Federation Press, 2006) at 164 -165.

immigration detention as a matter of last resort. The principle relates to holding children in traditional detention rather than under the community release schemes and does not apply to children detained in the offshore processing centers of Nauru or Papua New Guinea.

Under the changes, a community sector organization, contracted by the Australian government provides care and residential accommodation to children and their families. The Minister for Immigration can stipulate different conditions for each family, such as reporting requirements. However, in general detainees may go about their daily activities, such as shopping or attending school, without the accompaniment of a guard. The pre-existing detention centers and residential housing centers will continue to be used: the first for individuals; the second for families taken into custody for breaching residential housing orders or for whom removal is imminent.

Save the Children (UK)

Save the Children, a UK organization, endorses the above approaches, asking for a scale of supervision based on case-by-case assessments of individual asylum seekers and their unique situation.¹⁵⁶ It wishes to restrict the time limit on the detention of children to an absolute maximum of seven days, and also “take steps to significantly reduce the transfer of children between detention facilities.”¹⁵⁷ If countries are not prepared to put time limits on the period that children may be detained, Save the Children suggests that at the very least, there should be a process for reviewing all cases where children are detained.¹⁵⁸ They also ask for case-by-case assessments to establish whether, in cases of children, it would be better for a child to be detained with their family, or be separated, saying that the family themselves should be part of making that decision. Save the Children believes that no families with children should be detained without a full review of their case.

Conclusions

States continue to detain accompanied children, arguing that this is necessary in order to maintain family unity, despite the fact that in nearly all cases alternatives to detention are available for families that would meet the state’s objectives of compliance with migration controls. Immigration detention may be proportional to the intended measure (and therefore in compliance with international law) if there are risks to national security, which may justify a brief initial period of detention to verify identity, but will not justify further detention other than in exceptional cases. Alternatively it may be proportional if there is a high risk of absconding once deportation is in process, but only if alternatives to detention will not minimise this risk and only whilst deportation is being pursued with due diligence and only for a reasonable period of time.

156 http://www.savethechildren.org.uk/scuk_cache/scuk/cache/cmsattach/2412_no_place_for_a_child_exec_summ.pdf

157 http://www.savethechildren.org.uk/scuk_cache/scuk/cache/cmsattach/2412_no_place_for_a_child_exec_summ.pdf

158 *ibid*

The trend towards detaining accompanied children as opposed to unaccompanied children is not consistent with the most commonly expressed justifications for immigration detention, given their relatively high rate of disappearances. In contrast there is no evidence that children living with their families disappear if permitted to reside in the community, thereby rendering their detention disproportionate. The survey on alternatives to detention concluded that “the flight risk of families with young children in destination states appears to be inherently low...”¹⁵⁹ In fact, it is often the presence of children in families that makes it easier for states to locate families because they are more likely to access services for their children, particularly educational and health services.¹⁶⁰

There is increasing judicial recognition and acceptance by states of the incompatibility of detention of unaccompanied children with international law. However there is a need for safe alternatives to detention for unaccompanied children to counter the risks of abductions and trafficking. The Field report identified a number of safeguards outside of detention that provide protection to unaccompanied children.

In its recent jurisprudence the ECtHR has recognised that immigration detention of children can have such serious psychological effects that it can amount to inhuman treatment and an interference with children’s rights to liberty and security and to respect for their private life. The *Mayeka and Mitunga v Belgium* case should have important implications for states that are still holding unaccompanied children in immigration detention. It may have wider implications for the immigration detention of children, whether accompanied or not, since the ECtHR referred to the fact that this child was unaccompanied as an aggravating factor, but the case was not decided specifically on the basis of her unaccompanied status. However, it is of course a case involving a particularly young child, and the ECtHR may not have been so willing to find violations of Article 3 in the case of an older child. That remains to be seen, but the door is left open for cases concerning children on whom detention will have serious psychological effects. Given the evidence available concerning the psychological impact of detention on children, this case may be applicable to many other children’s situations.

In the *Bayan, Bakhtiyari, and D and E* communications against Australia the HRC has found that immigration detention of children can amount to an interference with their rights to liberty and security, and (in the *Bakhtiyari* case) that it can violate their rights to such measures of protection as are required by their status as a minor. Both the ECtHR and the HRC referred to provisions of the CRC when making their decisions.

The *Bakhtiyari* case involved children who had suffered particularly extreme effects as a result of detention, but the HRC’s reasoning for finding a violation of Article 24 of the ICCPR, that “the children have suffered demonstrable, documented and on-going adverse

¹⁵⁹ O Field, *Alternatives to detention of asylum seekers and refugees*, UNHCR Legal and Protection Policy Series, POLAS/2006/03, April 2006, p. 40.

¹⁶⁰ H Crawley and T Lester, *No Place for a Child, Children in UK immigration detention: impacts, alternatives and safeguards*, Save the Children, 2005, p. 25.

effects of detention...in circumstances where that detention was arbitrary”¹⁶¹ are also applicable to many other cases of children in immigration detention.

In all of the cases analysed in this paper the judgments referred to the fact that alternatives to detention were available and should have been used. The ECtHR in the *Mayeka and Mitunga* case proposed placement in a specialised centre or with foster parents. The HRC in the *Baban, Bakhtiyari, and D and E* cases proposed the imposition of reporting obligations, sureties or other conditions. As set out above there are many alternatives to detention that states could make available for unaccompanied children and for families, and therefore detention cannot be seen as “a measure of last resort”, as required by art. 37 of the CRC. It could only be a measure of last resort in exceptional circumstances, such as a situation where a child was with only one parent and that parent was deemed to be a national security risk and separating the child from the parent was not considered to be in the child’s best interests. Outside of such exceptional circumstances, alternative restrictions on liberty are always available, as opposed to deprivation of liberty. Any restrictions on liberty of children for migration-related reasons must be necessary and proportionate and the least restrictive form possible must be used in order to be compatible with international human rights law.

¹⁶¹ Communication No. 1069/2002, UN Doc. CCPR/C/79/D/1069/2002, decided 29 October 2003, para. 9.7.

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