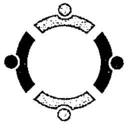 human rights *first*

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November 15, 2007

Julie Myers
Assistant Secretary
Immigration and Customs Enforcement
Department of Homeland Security
425 I St. N.W.
Washington, D.C. 20536

Re: New ICE Directive on Parole of Asylum Seekers

Dear Assistant Secretary Myers:

We are writing to express our serious concerns about the directive ICE issued on November 6 with respect to the detention and parole of asylum seekers. Rather than codifying the existing parole guidance into regulation, or even re-issuing the existing guidance in an updated form, ICE has rescinded the prior parole guidelines and actually changed the underlying parole policy for asylum seekers. We are concerned that this significant change in U.S. detention policies for asylum seekers will lead more refugees to be detained for even longer in this country.

Among other changes, the new directive:

- Rescinds guidance providing that parole should be considered for those who satisfy certain criteria (identity established, community ties/no flight risk, and no danger to the public) and replaces it with a directive that signals that parole should be available in "limited circumstances;"

- Alters the underlying criteria for parole, setting up an additional level of assessment that appears to be aimed at further limiting parole for asylum seekers who have satisfied criteria relating to their identity and lack of risk; and

- Departs from prior guidelines which directed local detention officials to make a parole determination for each asylum seeker who has completed the "credible fear" screening standard.

This fundamental shift in the underlying parole policy and criteria runs contrary to the recommendations made by Human Rights First, a coalition of faith-based and other refugee advocacy organizations and the bi-partisan U.S. Commission on International Religious Freedom.

As you know, Human Rights First has urged ICE to take steps to improve the parole process for asylum seekers. We called for the existing parole criteria for asylum seekers[1] to be codified into formal regulations so that asylum seekers who satisfy the parole criteria – establishing identity, community ties/no flight risk and no danger to the community – can be released from detention on parole. We have also recommended that immigration courts be given the authority to conduct custody determinations for these asylum seekers, as they do for other immigration detainees.

The bi-partisan U.S. Commission on International Religious Freedom issued a 500-page report in February 2005, which concluded that asylum seekers are detained in jails and jail-like facilities that are inappropriate for them and that these detention conditions create a serious risk of psychological harm. The Commission found that "the formal release criteria are not being consistently applied" and that "variations in parole rates from ICE facilities across the country are associated with factors other than the established parole criteria." The Commission specifically recommended that ICE promulgate regulations to more consistently implement the parole criteria included in the December 1997 parole guidance.

Two years and nine months later, DHS has still not provided its response to the Commission's recommendations and findings. Instead ICE has issued a directive that appears aimed at increasing the detention of asylum seekers. More specifically, the directive:

- Rescinds the 1997 and 1998 parole guidance that had provided that parole "should be" considered, and even favored, for asylum seekers who satisfied the criteria (establishing identity, community ties, no risk).[2]

- Rescinds 2004 guidance that made clear that parole of asylum seekers who are ruled eligible for relief by an immigration judge should generally be favored, though detention could be continued under particular circumstances.

- Relegates the prior parole criteria (establishing identity, community ties, no risk) to a "threshold assessment" and allows release for these asylum seekers only if they fall into a few other narrow categories (such as pregnant women, service as a witnesses, medical condition, etc) - or can make an additional showing that their parole is in the "public interest." Prior guidance was based on the premise that the parole of an asylum seeker who can establish identity, community ties, and lack of risk, was generally in the public interest.

- Makes it difficult for an immigration detention officer to conclude that an asylum seeker satisfies the "public interest" test by failing to define the term and requiring that an immigration officer must "draft a full written justification for supervisory review" if he/she believes parole is warranted in the public interest – without including a corresponding requirement when parole is denied.

This parole directive marks a significant shift in U.S. detention policies for asylum seekers – a shift that puts U.S. detention policies and practice even further out of line with this country's commitment to refugees under the 1951 Refugee Convention, its Protocol and other human rights standards. Not only is parole entrusted to local officials without review even by an independent immigration judge, but the new directive allows local immigration detention officers to deny parole to an asylum seeker even when the asylum seeker has establish his identity, shown he has community ties and does not present a flight risk, and does not present a risk to the community.

Given the degree of discretion afforded local officials and the lack of a definition of "public interest," we are concerned that the new parole directive, will ironically, leave local officers free to simply ignore the guidance as they have in the past. Parole decisions may, as a result, continue to turn not on the individual merits of a parole request but simply on the availability of detention "bed space" or the individual views of local officers.

We are also concerned about the failure of the directive to require local ICE officers to review the need for continued detention for each asylum seeker who has completed the "credible fear" screening process. The 1997 parole guidance had instructed local officials to review the case of each asylum seeker after a credible fear determination. Such a requirement (if followed) would help to make sure that ICE is not detaining asylum seekers who could and should be released, not incurring unnecessary detention costs, and not prejudicing asylum seekers who cannot afford legal representation.

We urge ICE to immediately rescind and revise this directive to make its application of the parole criteria consistent with the prior parole guidance. The directive should also reinstate the prior approach of generally favoring parole in cases where the parole criteria are met and assessing each asylum seeker's case for parole eligibility after the individual has completed the credible fear process. ICE should further clarify that parole is indeed generally in the public interest when an asylum seeker has met the relevant criteria (identity established, community ties, and no risks). More broadly, we reiterate our prior recommendations that those criteria be codified and that immigration judges be allowed to review custody determinations for arriving asylum seekers, as they do for other detained immigrants.

We will submit additional comments after we have further reviewed the new directive. For now though, we note with disappointment the lack of any internal headquarters review process for parole denials. We are pleased to see some requirements relating to documentation and statistics, but note that documentation and statistics should be required not only regarding "parole requests" but also regarding the detention and parole of all detained asylum seekers.

Over the years we have represented or assisted hundreds of refugees who have been detained in U.S. immigration jails for months or years before being granted asylum in this country. Many have gone on to become citizens and legal residents. These refugees fled from persecution and torture in places like Burma, Colombia, China, Congo (DRC), Guinea, Liberia, Rwanda and the Darfur region of Sudan. Many of them were shocked to find themselves detained for months or years in the United States when they arrived in search of refuge from persecution – and equally shocked at the lack of a fair and independent process for assessing the need for their continued detention. Unfortunately, this new directive will likely leave more refugees detained for even longer.

We look forward to raising additional concerns directly with ICE and request a specific meeting to discuss this directive in greater detail.

Sincerely,

Eleanor Acer
Director
Refugee Protection Program

cc:
Dan Sutherland
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[1] Memorandum from Michael A. Pearson, Immigration and Naturalization Service (INS) Executive Associate Commissioner for Field Operations, to Regional Directors, District Directors, and Asylum Office Directors, "Expedited Removal: Additional Policy Guidelines," December 30, 1997 (parole "is a viable option and should be considered" for asylum seekers "who meet the credible fear standard, can establish identity and community ties, and are not subject to any possible bars to asylum involving violence or misconduct.") In October 1998, the INS again explained in written guidance that "[a]lthough parole is discretionary in all cases where it is available, it is INS policy to favor release of aliens found to have credible fear of persecution, provided that they do not pose a risk of flight or danger to the community." Memorandum from Michael A. Pearson, INS Executive Associate Commissioner, Office of Field Operations, to Regional Directors, "Detention Guidelines Effective October 9, 1998," October 7, 1998.
[2] *See* memoranda cited in note 1 above.