



The American Civil Liberties Union

Written Statement
For a Hearing on

“The Refugee Protection Act of 2010”

Submitted to the Senate Judiciary Committee

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Introduction

The American Civil Liberties Union (ACLU) is a nonpartisan public interest organization dedicated to upholding our constitutional and other legal protections. The Immigrants' Rights Project (IRP) of the ACLU engages in a nationwide program of litigation, advocacy, and public education to enforce and protect the constitutional and civil rights of immigrants. On behalf of the ACLU's hundreds of thousands of members, activists, and 53 affiliates nationwide, we would like to thank Chairman Leahy, Ranking Member Sessions, and the Judiciary Committee for the opportunity to submit a statement for the record for this hearing on "The Refugee Protection Act of 2010."

In honoring the thirtieth anniversary of the Refugee Act of 1980, the Refugee Protection Act (RPA) would help the United States fulfill its long-standing commitment to fair adjudication of refugee and asylum claims and humane treatment of noncitizens. Currently, the Immigration and Nationality Act (INA) falls short of realizing these ideals in several key respects. The RPA would provide increased due process to refugee and asylum claimants, reduce erroneous denials of relief, and improve the quality of representation of noncitizens in the nation's immigration courts. It would also enact urgently needed reforms to the immigration detention system. The ACLU strongly supports the RPA's changes.

The RPA ends unintended bars to protection for victims of persecution who were coerced by terrorists

Current law and government policy block refugees and asylum applicants from relief, without regard to their past persecution, if the government applies its broad definition of "material support" of terrorism. This is true even if the applicant's "material support" was minimal and provided under extreme duress, such as coercion at gunpoint. The scope of the "material support" bar to relief sweeps in applicants who oppose terrorism and who were victims of terrorists themselves. While rigid interpretation of "material support" started under the prior presidential administration, it has continued in the last two years despite growing recognition of the problem and an accumulating backlog of cases. There has been a collective, interagency failure in the executive branch to address the matter and the RPA is necessary to fill a gaping breach in the United States' fair and individualized adjudication of refugee and asylum claims.

By implementing an understanding of "material support" that strains both the concept of culpability and common sense, the Department of Homeland Security (DHS) has denied refugee and asylum applicants fair and individualized hearings in matters of life-or-death importance. For example, Baskaran Balasundaram, a 27-year-old Sri Lankan farmer, was granted asylum by an immigration judge based on persecution during the Sri Lankan civil war by both Tamil separatists, known as Tigers, and government forces. He was captured at gunpoint by the Tigers and they made it clear that if he did not follow orders, he would be killed. The Tigers showed their captives the body of a person who had refused their instructions as an example of the consequences that ensue. After escaping the Tigers, Balasundaram was detained by government forces for the first of several brutal interrogations. Army personnel beat him, hung him upside

down, hit his back with barbed wire and put a bag doused with gasoline on his face until he could no longer breathe.

The immigration judge ruled that Balasundaram never “provided funds, transportation, a safe house, or anything else constituting ‘material support’ to the [Tigers],” but DHS appealed, arguing that he provided material support to the Tigers while in their captivity by following orders to prepare food for other detainees. He has been in immigration detention for 21 months. Asked what he would like to convey to the Judiciary Committee, Balasundaram said from his detention facility: “I would tell them, I won asylum from the judge. Why am I still here? I am no criminal. I told the truth. Why punish me for two years in jail? Some people don’t tell the truth. I could have said only what the Sri Lankan government did to me. Then maybe I would be released. I told them the truth, what the Sri Lankan government did and what the Tigers did. I am being punished for this. I’m happy to be alive. But besides that, I’m very sad and scared to be in this place. I haven’t spoken to my family in two years. This place is really bad. I am afraid I will never get out.”

A second pending case further illustrates the problem: 27-year-old Somali applicant Abdala Warsame Abdille, despite being otherwise fully eligible for asylum, was detained for 20 months and denied relief despite the persecution he suffered. Abdille was advised by the immigration judge to apply for a waiver from DHS, a cumbersome and lengthy process during which detention continues and family reunification is postponed. DHS continues to oppose asylum because, the government argues, Abdille provided “material support” to terrorists when a militia kidnapped him, killed his cousin in front of him, and forced him to stand in a road holding a gun on threat of death until he was able to escape. Abdille sends this message to the Committee: “I suffered a lot from Al-Shabaab, who kidnapped me, tortured me, killed my cousin right in front of me, and killed my people. I was the victim of this group, I have no sympathy for them, and I never want to see them again. That’s why I came to the U.S., so that I would escape them and would be able to live peacefully. I had nothing to do with them except that they were attacking me. I appeal to the Senate not to associate me with them.”

The RPA would make clear that the INA’s terrorist bar to refugee or asylee status was never intended to apply to cases like Balasundaram and Abdille, which wrongly transfer persecutors’ culpability to their victims. Individuals who encounter terrorists in this fashion are a particularly vulnerable group for reprisals if returned to their countries of origin; the stakes and danger could not be higher. The RPA would release from limbo hundreds of applicants who are now stuck in an inefficient waiver review process that leads to prolonged isolation from American society and to long-term detention of applicants who have undisputedly suffered persecution. The RPA would also repeal the INA’s un-American use of guilt-by-association to make spouses and children responsible for terrorist acts of their spouse or parent.

Aside from giving the same treatment to acts performed under duress as already exists in criminal law, the RPA remedies a catch-all provision in the INA that, in ad hoc fashion, adds countless loosely associated groups to the standing list of terrorist organizations designated by the U.S. government. Barring an applicant’s eligibility for asylum based on “material support” provided to any group of two or more people “whether organized or not” that has used armed force is contrary to the principle that each refugee and asylum applicant is entitled to a fair and

individualized hearing that takes account of all his or her circumstances. The government will retain complete authority to deny asylum based on national security or terrorist grounds, but this discretion will be implemented on a case-by-case basis by adjudicators when designated terrorist groups are not involved. Immigration judges will no longer be misguided by an unrealistic definition of informal terrorist groups that is impossible to apply consistently.

The RPA limits costly and inhumane detention of asylum seekers and establishes minimum detention standards

Instead of refuge, many seeking America's protection are greeted with prolonged detention in substandard conditions despite posing no risk of flight or danger to the community. The United Nations High Commissioner for Refugees has established that detention of asylum seekers should take place only in exceptional circumstances and urges states to employ alternatives to detention.¹ The RPA implements a DHS policy, announced in December 2009, to release asylum-seekers who have established a credible fear of persecution. It would also provide for alternatives to detention that ensure the presence of asylum applicants in immigration court while maximizing their supervised freedom to be with family members, receive medical treatment, and consult with legal representatives. Alternatives to detention are far less costly than incarceration, with alternatives costing \$14 per person per day as compared to more than \$100.²

According to medical experts, detention exacerbates the symptoms of trauma that travel with asylum-seekers. A leading study of 70 asylum seekers in immigration detention found high levels of psychological distress, which worsened during the course of detention.³ Baskaran Balasundaram, whose case is discussed above, has a legal permanent resident sponsor in New York and no allegations supporting his continued detention. Yet he has been incarcerated for 21 months at enormous personal cost, and at great taxpayer expense, without any prospect of government-approved release. More than 300,000 detainees are confined annually in the immigration detention system.⁴ As stated in an Immigration and Customs Enforcement report last year, when "[a]pproximately 1,400 non-criminal asylum seekers [were] detained daily," they "are dispersed to a number of locations, many of them an appreciable distance from the services and resources that they need."⁵

Detention facilities used by DHS have not withstood scrutiny for compliance with minimum conditions of care, including medical treatment. Prodded by an ACLU Freedom of Information Act lawsuit, the government revealed that more than 100 detainees have died in ICE

¹ See *UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers* (Feb. 1999), available at <http://www.unhcr.org/3bd036a74.pdf>

² Nina Bernstein, "Napolitano Outlines Ideas for Revamping Immigration Detention," *New York Times* (Oct. 6, 2009).

³ See Physicians for Human Rights and Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers* (June 2003), available at <http://physiciansforhumanrights.org/library/documents/reports/report-perstoprison-2003.pdf>

⁴ Dr. Dora Schriro, *Immigration Detention Overview and Recommendations*. (Oct. 6, 2009), 6, available at http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf

⁵ *Id.* at 27.

custody since October 2003.⁶ The RPA would establish binding standards to prevent recurrence of recent years' extensive rights violations in immigration detention facilities. One detainee, in whose case the government has acknowledged liability for medical negligence, testified before Congress prior to his premature death in 2008 at age 36 from the cancer that went untreated while he was in immigration detention. He advocated for legislation to repair the systemic problems that regularly lead to substandard medical care in immigration detention facilities, where more than a third of detainees have chronic medical conditions⁷: "Who knows how many tragic endings can be avoided if ICE will only remember that, regardless of why a person is in detention . . . they are still human and deserve basic, humane medical care."⁸

The RPA would require regulations to establish binding standards for immigration detention facilities. It would limit the use of solitary confinement, shackling, and strip searches, and codify basic norms regarding access to legal representation – which is vital because all but 16% of detainees lack legal representation⁹ – recreation, translation, and religious services, as well as notice of transfers. These standards are all the more important because detention facilities to which detainees are frequently transferred are in remote areas that prevent detainees' communication with family and legal counsel. Pro bono counsel and legal services are much scarcer in these isolated locations.¹⁰ The RPA would also require DHS to file a charging document in the immigration court closest to a non-citizen's apprehension point. Currently immigration enforcement practice fails to follow this simple procedure and thereby transfers detainees to locations far from their homes, families, and attorneys.¹¹

By permitting the appointment of counsel in appropriate circumstances, the RPA would reinforce due process in the adjudication of immigration cases and improve the efficiency of adjudication

The RPA would authorize the Attorney General to appoint counsel for a noncitizen in removal proceedings where fair resolution or effective adjudication of the noncitizen's case would be assisted. The American Bar Association issued a report this year concluding that in immigration courts "[t]he lack of adequate representation diminishes the prospects of fair adjudication for the noncitizen, delays and raises the costs of proceedings, calls into question the fairness of a convoluted and complicated process, and exposes noncitizens to the risk of abuse and exploitation by 'immigration consultants' and 'notarios.'"¹² Moreover, asylum seekers who

⁶ Nina Bernstein, "Officials Hid Truth of Immigrant Deaths in Jail," New York Times (Jan. 10, 2010).

⁷ U.S. Immigration and Customs Enforcement, "DRO: Detainee Health Care." (May 7, 2008), available at <http://www.ice.gov/pi/news/factsheets/detaineehealthcare.htm>

⁸ Francisco Castañeda, Testimony to the House Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law (Oct. 4, 2007), available at <http://judiciary.house.gov/hearings/pdf/Castaneda071004.pdf>

⁹ American Bar Association Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*. (2010), 5-8, available at <http://new.abanet.org/immigration/pages/default.aspx>

¹⁰ Human Rights First, *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison*. (2009), 9-10, available at <http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-sum-doc.pdf>

¹¹ Human Rights Watch, *Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States*. (Dec. 2009), 17, available at <http://www.hrw.org/en/reports/2009/12/02/locked-far-away>

¹² *Reforming the Immigration System*, *supra*, at 5-8.

have legal representation are three times as likely to be granted asylum.¹³ In expedited removal cases the disparity is even more stark, as only 2% of unrepresented claimants were granted relief as opposed to 25% of represented claimants.¹⁴ Each asylum case that is fairly and accurately processed from the start obviates the need for and costs of appeals, helping a crushingly overburdened immigration court system which completes close to 300,000 cases per year with only 230 judges.¹⁵

The ABA report emphasizes that increasing legal representation of noncitizens “would ameliorate the legal errors associated with pro se litigants. Increased representation . . . would also lessen the burden on immigration courts and facilitate smoother processing of claims. . . . [P]ro se litigants can cause delays in the adjudication of their cases and, as a result, impose a substantial financial cost on the government. . . . [E]nhancing access to quality representation promises greater institutional legitimacy, smoother proceedings for courts, reduced costs to government associated with pro se litigants, and more just outcomes for noncitizens.”¹⁶ Fair process is both due to noncitizens and more efficient for the system as a whole. The RPA’s provision for appointment of counsel in appropriate cases would lead to benefits for all stakeholders in the immigration courts.

Conclusion

The ACLU applauds the Senate Judiciary Committee’s discussion of the Refugee Protection Act and urges prompt action to pass this legislation. The RPA would improve due process in refugee and asylum adjudication, by ensuring fair and individualized assessment of claims. It would also guard against civil rights violations and inhumane treatment for noncitizens in immigration detention facilities, which have been rife with substandard conditions. On the thirtieth anniversary of the Refugee Act, this successor legislation is a fine tribute to enduring American values.

¹³ *U.S. Detention of Asylum Seekers*, *supra*, at 8.

¹⁴ *Reforming the Immigration System*, *supra*, at 5-9.

¹⁵ *Id.* at 2-16.

¹⁶ *Id.* at 5-11.