CHAPTER 4: IMMIGRATION DETENTION

As stated above, the two main forms of administrative immigration detention and restriction of liberty are:

(i) The detention/restriction of liberty pending a decision on an asylum application;

(ii) The detention/restriction of liberty of those who are to be removed or deported.

The second category includes both rejected asylum seekers and migrants whose applications to remain have been refused but who have not left the country, and non-nationals who have been convicted of a criminal offence, have completed their sentences and are awaiting deportation. This category is particularly problematic, especially when the states concerned do not take into account the barriers to removing stateless persons, when formulating policy. In its most recent report, the UN Working Group on Arbitrary Detention has noted that in many countries, the detention of irregular migrants (including the stateless) is mandatory and automatic, and that:

Some national laws do not provide for detention to be ordered by a judge, or for judicial review of the detention order. Detainees often do not enjoy the right to challenge the legality of their detention. There is no maximum length of detention established by law, which leads to prolonged or, in the worst case, potentially indefinite detention in cases, for example, where the expulsion of a migrant cannot be carried out for legal or practical reasons.\(^{263}\)

While UNHCR guidelines explicitly state that statelessness should not lead to indefinite detention,\(^ {264}\) the practice in some countries researched by ERT

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\(^{264}\) See Guideline 9 of the UNHCR Guidelines.
does result in people being indefinitely detained or restricted in their liberty simply because they are stateless. The Working Group raised serious concern over the absence of legally established maximum lengths of detention in some countries, stating that:

[T]here are situations in which a removal order cannot be executed because, for example, the consular representation of the country of origin of the migrant does not cooperate or there is simply no means of transportation available to the home country. An example of a legal limitation for removal is the principle of non-refoulement. In such cases, where the obstacle to the removal of the detained migrants does not lie within their sphere of responsibility, the detainee should be released to avoid potentially indefinite detention from occurring, which would be arbitrary... The principle of proportionality requires that detention always has a legitimate aim, which would not exist if there were no longer a real and tangible prospect of removal.\textsuperscript{265}

\textsuperscript{265} See above, note 263.
Regarding the immigration detention of stateless persons, ERT’s research findings are grouped in three categories. Firstly, in order to identify the core challenges and trends pertaining to the immigration detention of stateless persons, ERT findings in the UK, USA and Australia are analysed. These three countries have detailed laws, policies and jurisprudence on immigration detention, but they have failed to address the specific challenge arising from statelessness. Secondly, we look at the situation in Kenya and Egypt – two countries with no clear policy pertaining to the stateless. Finally, as a case study of an acute problem of statelessness, immigration detention practices in Thailand, Malaysia and Bangladesh pertaining to the Rohingya are analysed. ERT’s research findings in all of these countries confirms the urgency with which the words of the UN High Commissioner for Human Rights that “[t]he great majority of immigrants, refugees and asylum seekers are not criminals and therefore should not be confined in detention centres like criminals,”266 must be heeded.

4.1 IMMIGRATION DETENTION OF STATELESS PERSONS IN THE UNITED STATES, THE UNITED KINGDOM, AND AUSTRALIA

The USA, UK and Australia are countries with complex and comprehensive immigration laws, regulations and policies. While the UK and Australia are parties to the 1954 and 1961 Statelessness Conventions, the USA is not. All three countries are legally dualist by nature, meaning that rights derived from an international treaty are only enforceable under national law if the treaty has been enacted into domestic legislation. Consequently, although the UK and Australia have ratified the Statelessness Conventions, since their parliaments have not legislated to incorporate them into domestic law, stateless persons cannot claim rights under these conventions in domestic courts.

Immigration law and policy in all three countries falls well short of affording satisfactory protection to the stateless. Of particular concern is the lack of any formal procedure for determining who is stateless, which could operate in parallel with – and complement - refugee status determination procedures. As a result, stateless persons who are in need of protection are often compelled to go through asylum procedures, because there is no procedure through which they can apply for recognition as a stateless person. This means that if they are refused asylum, the fact that they are stateless often remains unidentified, because officials have no clear duty to consider whether

266 See above, note 245.
they may be stateless and the persons concerned have no opportunity to seek protection as stateless persons. They may then be treated as other rejected asylum seekers and placed in immigration detention “pending removal”, on the assumption that – like other migrants - they have a country of nationality to which they can be removed.

Australia, the UK and USA all have detained stateless immigrants pending deportation, sometimes for indefinite periods. An additional factor is that these three countries, and most others, rely on the 1954 Convention’s definition of stateless persons as being *de jure* stateless, to the exclusion of the *de facto* stateless. This means that jurisprudence as well as statistics on statelessness relate to the *de jure* stateless and do not include the many others without an effective nationality who are also detained.

One of the primary concerns pertaining to all three countries is that there is a severe lack of **statistics and information** on stateless persons in immigration detention. This gap is indicative of general attitudes which do not consider statelessness to be a distinct issue.
In the UK, for example, there is little published information on the detention of stateless persons as a distinct group. The UK Border Agency (UKBA) has stated that in the breakdown of data by nationality, the stateless are categorised as “other or not known” and consequently there is no known disaggregated record of stateless persons and persons of disputed nationality in the UK.267 There are no separate records of the number of stateless persons detained or who have had their liberty restricted in any manner as they generally fall under the category of “other and not known”. The UKBA maintains no central statistics on cases where barriers to removal such as disputed nationality, non-cooperation by the country of origin, inadequate transport arrangements, the principle of non-refoulement, etc., have delayed removal by over six months.

The stark absence of accessible data on statelessness in Australia is reflected in the fact that Australia consistently registers “nil” under the category of stateless persons in the UNHCR annual report – Global Trends: Refugees, Asylum Seekers, Returnees, Internally Displaced and Stateless Persons.268

This section assesses the immigration detention regimes pertaining to the stateless in these countries through looking at the following key issues:

(i) Detention regimes.
(ii) Judicial responses.
(iii) Removing stateless detainees.
(iv) Restriction of liberty and release into destitution.

4.1.1 Detention Regimes

ERT research indicates a common trend over the past decade in these three countries towards a tightening of immigration detention regimes, to the detriment of the stateless. Although Australia has recently brought in changes to policy and practice which have ameliorated the likelihood of arbitrary detention, the risk of indefinite detention of stateless persons remains.269

267 See UK Border Agency response to ERT Questionnaire, 1 April 2009.


269 See Section 7.3 of Part Three below for a discussion on recent policy changes in Australia.
4.1.1.1 The United States

Over the past fifteen years, U.S. immigration policy has shifted towards increasing detention of irregular migrants and of persons pending removal and deportation. Perhaps most significantly, amendments to the Immigration and Nationality Act (INA) made detention mandatory for some non-citizens during removal proceedings. Other legal and policy developments also emphasised immigration enforcement, and the use of detention has increased as it has become an integral aspect of immigration regulation in the USA. In January 2009, the Associated Press (AP) took a “system snapshot” of immigration detention and found that there were exactly 32,000 individuals in immigration detention in the United States. The data indicated that 18,690 of those immigrants had no criminal conviction, and more than 400 of those with no criminal record had been detained for at least one year, while a dozen had been held for three years or more, and one man from China had been held for 5 years. Consequently, a system of immigration detention that housed 6,785 people in 1994 has nearly quintupled, and expanded into 260 facilities across the country, the majority of which are administered under contract with local governments or private companies.

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271 In 1996, with the passage of the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) – the much criticized “1996 amendments” – the detention of immigrants who are charged with being removable because they have been convicted of certain crimes became mandatory. See 8 U.S.C.A. § 1226(c); see also Demore v Kim, 538 U.S. 510 (2003).

272 Section 287(g) of the Immigration and Nationality Act (INA) provides that Immigration and Citizenship Enforcement (ICE) can effectively deputise local law enforcement agencies for the purpose of enforcing immigration laws, an arrangement which advocates argue has led to a variety of abuses, and an increase in immigration detention. See Justice Strategies, Local Democracy on ICE: Why State and Local Governments Have No Business in Federal Immigration Law Enforcement, February 2009, available at: http://www.justicestrategies.org/sites/default/files/JS-Democracy-On-Ice.pdf [accessed on 10 January 2010].


274 Ibid.

275 Ibid.
When a non-citizen is ordered removed from the United States, the Department of Homeland Security (DHS) is responsible to remove the person within a period of 90 days (the “removal period”). The Secretary of Homeland Security cannot release an alien who has been determined to be removable because of certain criminal or terrorist activity. Furthermore, a non-citizen may be detained beyond the removal period if he or she:

(i) was determined to be inadmissible to the U.S.;
(ii) was found deportable because of a violation of his or her status or condition of entry, commission of certain criminal offences, or certain security concerns; or
(iii) has been determined by the Secretary to be a risk to the community or unlikely to comply with the order of removal.

4.1.1.2 The United Kingdom

The UK is a party to the 1954 Convention and has obligations under it which require action by the state. Until 1980, the provisions of the 1954 Convention were reflected in Para 56 of the UK Immigration Rules, according to which, when a person was stateless, full account was to be taken of the provisions of the relevant international agreement to which the UK was party (i.e. the 1954 and 1961 Conventions). However these provisions were then removed from the Rules which today make no reference to statelessness.
UK immigration policy has also changed and tightened over the past few years, with the increased detention of irregular immigrants, including stateless persons who have no reasonable prospect of removal to another country. In 1998 the government rejected placing a limit on the maximum term of detention, but accepted a presumption in favour of temporary admission and release. The UK also decided against opting into the EU Return Directive, which imposes a maximum time limit of 18 months immigration detention. However, in September 2008, new Enforcement Instructions and Guidance replaced this by a presumption in favour of detention in the case of foreign national prisoners (FNP) with a view to protecting the public from harm and reducing the risk of absconding. FNPs are non-British citizens who may or may not be legally resident within the UK, who have been convicted of a crime and are recommended for deportation from the UK after having served their prison sentence. There is a strong public policy argument for the deportation of such individuals who have a criminal record and may be a threat to the safety of individuals in the future. Under the new policy, a FNP will normally be detained, provided detention is and continues to be lawful and there is a realistic prospect of removal within a reasonable time. Furthermore, the practical inability to return to a country of origin has no effect on the individual’s immigration status in the UK. A person with no valid leave to remain must be removed. This applies equally to stateless persons and other failed asylum seekers. Significantly, the UKBA regards disputed nationality, non-cooperation of the country of origin, lack of adequate transport, and the principle of non-refoulement only as barriers to removal, rather than as a basis to grant leave to enter or remain.

In a hard hitting report, the London Detainee Support Group has described the UK immigration detention regime as “ineffective”, “inefficient” and “opaque.” According to the group:


284 Ibid.


286 See above, note 267.

Detainees experience a lack of transparent evidence-based decision making at all stages ... Release is routinely refused by the UK Border Agency and the Asylum and Immigration Tribunal, based on what appear to be subjective assessments of risk of re-offending or absconding. Meanwhile, detainees are excluded from any meaningful dialogue with UKBA.288

Despite being a party to the 1954 Convention, the UK does not treat stateless persons differently from others in the determination of their claim.289 There is no separate status determination procedure in which statelessness can be considered, and the UKBA approach towards failed asylum seekers does not take into account the situation of stateless persons who have no realistic prospect of returning to their country of habitual residence – however much they may wish to do so.290

Significantly, the UK has not opted in to the EU Return Directive,291 which imposes a six month maximum immigration detention term, which can be extended by a further 12 months in extremely limited circumstances. In 2009, 225 people had been held in immigration detention for over a year in the UK. Forty five persons had been detained for over two years.292 The psychological impact of detention with no knowledge of when it will end is particularly damaging. According to Home Office statistics, 215 immigration detainees

288 Ibid.
289 See above, note 267.
290 The statutory framework for deportation of foreign national prisoners is contained in Section 3(5), 3(6) and 5 of the Immigration Act 1971; it provides for the deportation of non-citizens: "where it is determined that their conduct is not conducive to the public good; where a family member is or has been ordered to be deported; or where after the age of 17 the person is convicted of an offence punishable with imprisonment and on his conviction recommended for deportation by a competent court."
Para 2 of Schedule 3 to the 1971 Act details provisions for the detention of persons with respect to whom a recommendation of deportation has been made by court, pending the making of a deportation order and where a deportation order is in force against a person, pending his removal or departure from the UK.
291 The common EU immigration policy does not apply to Denmark which has decided to opt out of Title IV of the Treaty establishing the European Community. The UK and Ireland decide on their involvement on a case-by-case basis (i.e. there is a possibility of an "opt-in"). With regard to the Return Directive, the UK has decided not to opt in.
needed treatment for self-inflicted injuries in 2009, a 20% increase from the year before.\textsuperscript{293} Indefinite detention has also resulted in hunger strikes by immigration detainees demanding release. It is in this context that the former chief inspector of prisons has stated that there must be deadlines for immigration detention.\textsuperscript{294} However, the UKBA has demonstrated insensitivity to the particular challenge of statelessness. According to the UKBA’s strategic director for criminality and detention:

\textit{People in detention are there because both the UKBA and the courts deem them to have no legal right to be here. If detention is deemed necessary, we always aim to keep it to the minimum period possible. Detainees can voluntarily leave the UK at any point, and are free to apply for bail to an independent immigration judge}.\textsuperscript{295}

4.1.1.3 Australia

In Australia, the Migration Act allows for the removal or deportation from Australia of non-citizens whose presence in Australia is not permitted by the Act,\textsuperscript{296} and requires the mandatory detention of unlawful non-citizens.\textsuperscript{297} Introduced under the Keating Labour administration in 1992, the latter policy was announced as an explicitly deterrent measure: “[T]he Government is determined that a clear signal be sent that migration to Australia may not be achieved by simply arriving in this country and expecting to be allowed into the community”\textsuperscript{298}

One of the victims of this legislation told ERT:

\textit{When they put us in detention I was shocked. The officers were very tough and they scared us. We didn’t know where we were or what they would do to us. We were like sheep – they told us}

\textsuperscript{293} Ibid.
\textsuperscript{294} Ibid.
\textsuperscript{295} Ibid.
\textsuperscript{296} See Section 4 (4) of the Migration Act of Australia (1958).
\textsuperscript{297} Ibid., Sections 189, 196 and 198.
\textsuperscript{298} Cited in Amnesty International, The impact of indefinite detention: the case to change Australia’s mandatory detention regime, Amnesty International Australia Publications (2005) Sydney, p. 28, see also footnote 95 in that report.
go here, go there, go to your room, shut the door – and they didn’t explain anything to us. It was as if we weren’t humans, as if we weren’t even animals. We were treated like something disgusting ... The days were really dark for me, and the nights were even worse. I visualized rain and storms even when the day was clear. I really felt like I was slowly dying, day after day. I would wake up in the morning to die that day. Go to sleep to die. Wake up in the morning to die. I thought that my life had finished. I had become just like a corpse; no hope, no dreams. Others were trying to kill themselves in there. Days, weeks, and months passed.299

As the legislation currently stands,300 the reasonableness and proportionality of detention are not considerations that can be factored within a decision to detain on mainland Australia. If a person is reasonably suspected of being an unlawful non-citizen in the Australian “migration zone”, a migration officer must detain the person under section 189 (1) of the Migration Act.301

In late 2001, the Australian Parliament passed legislation that controversially “excised” vast tracts of Australian territory – including thousands of islands and coastal ports – from the Australian migration zone.302 Under the current legislation, a migration officer is authorised but not required to detain a person who is within, or seeking to enter, an “excised offshore place” and who it is reasonably suspected is an unlawful non-citizen (or would become an unlawful non-citizen upon entering the migration zone).303 Notwithstanding this technical distinction, it remains policy to detain all unauthorised arrivals held at excised places. Along with “excision”, the Australian Parliament also established a regime, dubbed the “Pacific Solution”, whereby all “unlaw-

299 ERT Interview with A. T., 12 July 2009, Sydney, Australia (ERT-SPD-AU-060). Initials have been changed to conceal the identity of the respondent.

300 Proposed amendments are before the Australian Parliament at present.

301 Under section 189(2), an officer must similarly detain a person who is in Australia but outside the migration zone, where it appears that the person is seeking to enter into the migration zone and, if successful, would be classified as an unlawful non-citizen.

302 See the Migration Amendment (Excision from Migration Zone) Act 2001 (Cth); See also Migration Amendment (Excision from Migration Zone (Consequential Provisions)) Act 2001 (Cth) under which vast tracts of Australian territory were “excised” from the Australian migration zone - see http://www.abc.net.au/news/indepth/yir2001/politics9.htm

303 Migration Act 1958 section 189 (3) and (4).
ful non-citizens” entering an excised area were taken to a “declared country” (agreements were established with Nauru and Papua New Guinea) to have their asylum claims assessed, without provisions for legal assistance, or access to independent merits review or the Australian courts, and with a caveat that those found to be refugees would not be resettled in Australia. The human and financial toll of the “Pacific Solution” has been notoriously high and has attracted extensive criticism.304

In February 2008, a new administration moved to end the “Pacific Solution”, by closing the detention centre on Nauru and bringing the remaining detained refugees to Australia for resettlement.305 However, the policy of territorial excision - the bedrock of the “Pacific Solution” - has been retained, and all unauthorised boat arrivals continue to be taken to Australia’s remote Christmas Island for processing of their asylum claims under a non-statutory refugee status assessment system. Non-refugee stateless persons who arrive unauthorised by boat will only be able to have their claims of statelessness considered should the Minister chose to personally intervene in their case following a negative primary and merits refugee status assessment. A further Ministerial intervention would then be required, as with those assessed to be refugees, in order to allow the person to apply for a visa under the mainland system.

Section 196 of the Migration Act states that an unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is either removed from Australia voluntarily, deported, or granted a visa to reside lawfully in the community.306 The provision also states that where an unlawful non-citizen is so detained, he or she must not be released (except for the purposes of removal or deportation), even by court order, unless granted a visa.307 Indeed, the judicial review of most administrative decisions made


305 UN High Commissioner for Refugees, UNHCR welcomes close of Australia’s Pacific Solution, see above, note 303.

306 See Section 196 (1) of the Migration Act of Australia (1958).

307 Ibid., Section 196(3).
under the Act, including the decision to detain, is precluded by a wide ranging “super” privative clause,\(^{308}\) which was introduced in 2001 with the express intention of “reducing manipulation of Australia’s judicial system by unlawful non-citizens seeking to delay their departure”.\(^{309}\) Section 198 provides that an unlawful non-citizen must be removed “as soon as reasonably practicable”, where the unlawful non-citizen: has asked the Minister, in writing, to be so removed; has had a valid application for a substantive visa refused and finally determined; and has not made another visa application.

### 4.1.2 Judicial Responses

The judiciary in all three countries has scrutinised, critiqued and at times reversed these increasingly harsh policies with varying degrees of success.

#### 4.1.2.1 The United States

Courts in the United States have in two key decisions set important standards for the immigration detention of stateless persons. They are the cases of *Zadvydas v Davis*, and *Clark v Martinez*. Zadvydas, a *de jure* stateless person, was born to Lithuanian parents in a displaced persons camp in Germany in 1948, and immigrated to the USA with his family when he was eight years old, and acquired residency. As an adult, he was convicted for criminal activity and when released from prison on parole, he was detained by the INS pending deportation. However, as he is *de jure* stateless, no country accepted him and he remained in detention for many years until he challenged his detention in court. In 2001, in *Zadvydas v Davis*,\(^{310}\) the Supreme Court held that Section 1231(a)(6) of the United States Code authorises the Secretary to detain resident non-citizens beyond the removal period because of criminal convictions, only as long as “reasonably necessary” to remove them from the country.\(^{311}\) Specifically, the Court held that the two justifications for the detention at issue, preventing flight and protecting the community, were inadequate to justify prolonged and indefinite detention.\(^{312}\) The Court

\(^{308}\) *Ibid.*, Section 474.

\(^{309}\) Philip Ruddock (former Minister of Immigration of Australia) cited in McAdam, Jane and Garcia, Tristan, *Submission on Refugees and Asylum Seekers to the National Human Rights Consultation*, see above, note 303.


\(^{312}\) *Ibid.*, Para 690.
construed Section 1231(a)(6) to contain an implicit “reasonable time” limitation subject to federal judicial review, rather than to authorise indefinite detention.\textsuperscript{313} In so doing, the Court established a presumptively reasonable period of six months after the date of the final order of removal during which the government may detain an alien to effectuate removal.\textsuperscript{314}

The Court ruled that after this six-month period, a detained non-citizen can file a habeas petition in federal court, and if he or she can “provide good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing”.\textsuperscript{315} The Court also indicated that, “as the period of prior post-removal confinement grows, what counts as the “reasonably foreseeable future” conversely would have to shrink”.\textsuperscript{316} Accordingly, “once removal is no longer reasonably foreseeable, continued detention is no longer authorized”.\textsuperscript{317}

Just over three years later, the Supreme Court was forced to review the continued detention of inadmissible non citizens (as opposed to resident non-citizens) under Section 1231(a)(6) in the case of \textit{Clark v Martinez}.\textsuperscript{318}

In that case, Sergio Suarez Martinez and Daniel Benitez, two Cuban nationals who had arrived in the United States in 1980 as part of the Mariel boatlift and later been deemed excludable (or inadmissible) because of criminal convictions, challenged their detention beyond the removal period under Section 1231(a)(6).

The Supreme Court extended its holding in \textit{Zadvydas v Davis}, to non-resident non-citizens found inadmissible.\textsuperscript{319} It reasoned that the authority to detain each of those groups arose from the same statutory provision, i.e. Section 1231(a) (6), and because that provision did not distinguish between the two groups, the Court could not apply distinct interpretations of the same statute to one or the other.\textsuperscript{320}

\begin{itemize}
  \item \textsuperscript{313} \textit{Ibid.}, Para 682.
  \item \textsuperscript{314} \textit{Ibid.}, Para 699.
  \item \textsuperscript{315} \textit{Ibid.}, Para 701.
  \item \textsuperscript{316} \textit{Ibid.}
  \item \textsuperscript{317} \textit{Ibid.}, Para 699.
  \item \textsuperscript{318} \textit{Clark v Martinez}, 543 U.S. 371 (2005).
  \item \textsuperscript{319} \textit{Ibid.}, Paras 386-87.
  \item \textsuperscript{320} \textit{Ibid.}, Para 382.
\end{itemize}
The practical effect of these two decisions is to guarantee to all non-citizens detained pursuant to Section 1231(a) (6), the right to release after six months of being deemed removable if they can demonstrate that there is “no significant likelihood of removal in the reasonably foreseeable future”[^321]. This applies whether they are determined to be inadmissible upon arrival, deportable after gaining status, or determined by the Secretary to be a risk to the community or unlikely to comply with the order of removal.

### 4.1.2.2 The United Kingdom

In the UK, the legal validity of the 2008 policy which made a presumption in favour of detention was successfully challenged before the High Court in the celebrated case of *R (Abdi and Others) v the Secretary of State for the Home Department*.[^322] Justice Davis found that the published presumptive policy was not a legal option available to the State since it was in contravention of established authority on the interpretation of paragraph 2, Schedule 3 to the Immigration Act, 1971 – according to which there should not be a presumption in favour of further detention of FNPs upon completion of the sentence.[^323]

It emerged through the course of the litigation that this policy favouring detention which was published in September 2008, had in fact been applied and practiced by caseworkers with respect to FNPs since April 2006. There was no justification put forward for the failure to publish the new policy which ran counter to the prevailing and published policy towards detention and release.

The relevant policy documents have since been amended to reflect the ruling of the court. However, they continue to make a strong case for the detention of FNPs under certain circumstances. Justice Davis, in his subsequent judgment in *R (Abdi) v Secretary of State for the Home Department*[^324] found in favour of the altered policy, stating that it is not unlawful to guide a decision towards a particular outcome as long as there was a clear reference to a

[^321]: See above, note 310, Para 701.

[^322]: *R (Abdi and Others) v the Secretary of State for the Home Department* [2008] EWHC 3166 (Admin).


presumption in favour of release over detention. However, he warned against utilising the policy for purposes other than the removal of FNPs:

*It is to be borne in mind that immigration detention of foreign national prisoners is not to be used as a disguised form of preventive detention for the public safety. Nevertheless ... public safety remains a relevant factor in assessing the reasonableness of detention.*

4.1.2.3 Australia

Australian courts have been less willing and successful in affecting law and policy. However, high profile Australian cases in which the existing laws and policies were challenged catalysed a public debate and created the necessary momentum for these policies to be scrutinised and subjected to a reform process. Two landmark cases illustrate this:

*Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri*[^326]

The 2003 case of Mr. Akram Al Masri highlighted the issue of the indefinite detention of unlawful non-citizens where there is no reasonable prospect of removal or deportation to another country. The Full Federal Court decision in *Al Masri* was overturned by the High Court decision in *Al-Kateb*, considered below.

Mr. Al Masri was a stateless Palestinian asylum seeker, from a part of Gaza under the control of the Palestinian Authority. He arrived in Australia unlawfully, by boat in 2001. Shortly after his arrival he was transferred to the remote Woomera Immigration Detention Centre in South Australia. His claim for asylum was refused by the Department of Immigration and on appeal to the Refugee Review Tribunal (RRT).[^327] Mr. Al Masri elected not to challenge the RRT decision and instead requested that he be returned to Gaza.[^328]

[^325]: Ibid., Para 41.
[^326]: Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri [2003] FCAFC 70.
[^327]: Ibid., Para 4.
[^328]: Ibid., Para 5.
rangements were started for his return, but Israel, Egypt, Jordan and Syria refused to grant Mr. Al Masri an entry permit in order to facilitate his return to Gaza.329

At this point, Mr. Al Masri – as a Palestinian - could have been recognised as stateless, and not seen simply as a rejected asylum seeker; the cost of not having in place a statelessness determination procedure is therefore evident. With Mr. Al Masri facing the prospect of indefinite detention, the matter came before the Federal Court, which found that there was no power to continue to detain Mr. Al Masri in circumstances where there was no real likelihood or prospect of removing him from Australia in the reasonably foreseeable future. The finding was subsequently upheld on appeal to the Full Federal Court. Mr. Al Masri who had been released from detention with reporting requirements, was later removed from Australia and returned to Gaza in 2002.

In July 2008 Mr. Al Masri was shot dead at point blank range in Gaza. A departmental spokesperson was quoted in the Australian media stating that the welfare of a person removed from Australia was the “responsibility of the country to which he has been removed. Anybody who has applied for protection from Australia is not removed if we believe that person will be persecuted”.330

Al-Kateb v Godwin

In the Al-Kateb case of 2004, the High Court by a slim four-to-three majority, in what it conceded was a “tragic” outcome,331 held that an incontrovertibly stateless person who had no foreseeable prospect of removal to another country could lawfully be detained indefinitely, and potentially for life, at the will of the Executive.

Mr. Ahmed Al-Kateb was a stateless Palestinian who arrived in Australia without a passport or visa and was detained as an “unlawful non-citizen” pursuant to section 189 of the Migration Act. Following almost two years of immigration detention, Mr. Al-Kateb formally requested his removal “to Ku-

329 Ibid., Para 7.
wait, and if you cannot please send me to Gaza”:

Attempts by the authorities, and by Mr. Al-Kateb himself, to secure his removal to Kuwait, the Palestinian Territories, Egypt, Syria and several other countries all failed.

Following the Federal Court ruling in the case of Mr. Al Masri, Mr. Al-Kateb sought a declaration from the Federal Court that he was unlawfully detained and an order in the nature of habeas corpus directing his release from detention. Notwithstanding the prior Al Masri judgement, Mr. Al-Kateb’s application was unsuccessful.

Following the Full Federal Court Al Masri decision, Mr. Al-Kateb and several others in similar circumstances were released from detention. However, Al-Kateb was released without a bridging visa and into a state of probable destitution, being ineligible to work or to access any form of welfare. He was required to report to authorities daily and, under a system only recently abandoned, was some years later presented with a bill of $83,000 for expenses incurred in relation to his immigration detention.

The Government successfully appealed to the High Court to overturn the Al Masri principle, requiring the release of Al-Kateb and others. As observed by Justice McHugh in his judgment:

[T]he justice or wisdom of the course taken by the Parliament is not examinable in this or any other domestic court. It is not for the courts, exercising federal jurisdiction, to determine whether the course taken by Parliament is unjust or contrary to basic human rights. The function of the courts in this context is simply to determine whether the law of the Parliament is within the powers conferred on it by the Constitution.
Indeed, Justice McHugh stated that it would be “heretical” to construe the Constitution in accordance with contemporary principles of international law, as this would interfere with Parliament’s capacity to legislate, and if it so wished, to override those principles.338

In *Al-Kateb*, the High Court majority found that the Migration Act authorised indefinite detention of unlawful non-citizens, even where there was no real prospect of removal, because the purpose of detention was deemed to be administrative rather than punitive.339 In a literal interpretation of the statute it was held that the relevant provisions were unambiguous, requiring, under the circumstances, that Mr. Al-Kateb be detained indefinitely. Justice McHugh stated that “the words of the three sections are too clear to read them as being subject to a purposive limitation or an intention not to affect fundamental rights”.340 Indefinite detention was held to be non-punitive as long as its purpose was to ensure the unlawful non-citizen’s availability for removal and prevent the unlawful non-citizen’s entry into the Australian community.341

Chief Justice Gleeson argued for the minority that “indefinite, and perhaps permanent administrative detention is not one to be dealt with by implication”342 He noted that it would be easier to find a legislative intention to allow indefinite detention if there was a discretion that allowed an officer or a court to consider factors personal to the detainee, such as whether or not the detainee posed a threat to the community if released, or was likely to abscond.343

Following the High Court decision, Mr. Al-Kateb was not re-detained, but instead left residing in the community without a bridging visa. Some months on, his status was regularised through the grant of a temporary Bridging Visa

342  *Ibid.*, Para 21. Chief Justice Gleeson also stated at Para 19 that “Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment”.
While rendering him a “lawful non-citizen”, the BVE carried stringent conditions – namely, a lack of entitlement to undertake paid or voluntary employment, or formal study, or to access mainstream welfare or subsidised health care. After several months, following concerted advocacy efforts, the conditions of his visa were amended, initially to allow him to study, and eventually to allow him to work.

Upon the High Court’s handing down of its judgment, Mr. Al-Kateb submitted a request for Ministerial intervention in his matter on compassionate grounds, under Section 417 of the Migration Act. In October 2007, over three years later, the then Minister of Immigration exercised his discretionary powers to grant Mr. Al Kateb a permanent visa. The visa carried a two-year assurance of support requirement, meaning that a guarantor needed to underwrite any welfare or health care benefits that Mr. Al Kateb might draw upon during that period. In early 2009, Mr. Al Kateb was granted Australian citizenship.

4.1.3 Removing Stateless Detainees

One of the biggest immigration detention challenges in all three countries is the fact that it is almost impossible to remove stateless detainees. This is a problem which is particularly acute regarding the de facto stateless – persons who would not be classified as stateless by the countries concerned, due to the definitional limitations discussed in Part One above, but whom no other country will admit. As also discussed in Part One, there can be many factors which result in non-removability and which contribute to de facto statelessness including the lack of consular protection, the principle of non-refoulement and the non-existence of transportation.

344 There are several classes of Bridging Visas, which are issued to make non-citizens who would otherwise be unlawful lawful in a range of circumstances, including pending: the processing of their application for a substantive visa; completion of litigation; or finalisation of their preparations to depart from Australia. The Bridging Visa E may be used for those who are unlawful and have been located by the department, and are: making arrangements to depart; applying for a substantive visa; seeking judicial review; seeking Ministerial intervention; in criminal detention; or seeking review of a decision to cancel a visa, except in cases where the visa was cancelled under sections 501, 501A or 501B of the Act. The holder must abide by any conditions placed on the visa (for example, reporting requirements). A security payment may be required. See http://www.immi.gov.au/allforms/pdf/1024i.pdf

345 Amnesty International Australia, Brief: Current s417 Applications of Stateless Persons (26 October 2006), Unpublished Brief, p. 2.

346 See above, note 336.

347 An eminent Australian citizen, Dr. Jocelyn Chey, acted as Mr. Al-Kateb’s guarantor.
Some practical examples can be found in a report by the London Detainee Support Group, which identified external barriers to removal. Persons from countries such as Zimbabwe, Somalia and Iraq cannot be removed for legal and practical reasons. Even though High Court rulings have meant that no returns have been made to Zimbabwe over the past few years, three Zimbabweans had been detained in the UK for over a year. Others face insurmountable obstacles in obtaining documents from the embassies of their countries (Iran, Algeria) to enable them to return. Still others are given deportation orders after many years of residence in the UK but can no longer prove their original nationality. All these people are nevertheless detained for future deportation that may never become possible. Release on bail or temporary admission is often denied on the ground that due to past criminal convictions, they are likely to re-offend or abscond.348

4.1.3.1 The United States

In the USA, following the Zadvydas decision, regulations were promulgated to govern the procedure by which the Department of Homeland Security (DHS) reviews the detention of non-citizens deemed removable (the Zadvydas regulations).349 According to these regulations, after 180 days of detention, a determination has to be made on whether detention can be continued on account of “special circumstances” beyond 180 days, even where removal is not foreseeable.350 After 180 days of detention, the authority over the custody determination transfers to the DHS Headquarters Post-Order Detention Unit (HQPDU) in Washington, D.C.351

However, this system does not work efficiently. According to a 2005 report by Catholic Legal Immigration Network, Inc. (CLINIC), “once detainees’ files are transferred to Headquarters for review, detainees have little to no access to information about their status, and lack opportunities for advocacy in favor of release”.352 The report concluded that detainees rarely receive notification of

348 See above, note 287, p. 2.
350 8 C.F.R. § 241.14. See the discussion in Section 7.2.1 of Part Three below.
HQPDU’s determination with regard to their removability and the only viable option for them to contest their continued detention is a petition for habeas corpus filed in federal court.353

Indeed, most advocates interviewed by ERT in the course of 2009 felt that the only way to secure the release of detainees after six months was to file a habeas petition, and that filing the petition alone would often result in release. In some jurisdictions, the Office of the Federal Public Defender (FPD) will aid immigrant detainees in filing petitions for habeas corpus after they have been detained beyond 180 days. This should be considered a best practice, inasmuch as advocates from those jurisdictions report that excessive and abusive periods of detention are much less common than in other jurisdictions.354

**Non-Cooperation**

The first issue HQPDU will consider at the 180-day review is whether a detainee has cooperated with his or her removal. As explained below, many believe that HQPDU abuses that discretion. On the one hand, there are those cases in which courts have upheld non-cooperation determinations because the removable non-citizen refused to take steps to secure travel documents, either by failing to fill out necessary forms or providing false information,355 or because the non-citizen physically resisted removal.356 On the other hand, there are cases in which the court has overturned non-cooperation determinations because removable non-citizens have clearly done everything that the DHS had required them to do to secure travel documents,357 where they initially resisted removal but then began to cooperate,358 or where they cooperated, but truthfully stated to a consular official that they intended to challenge the order of removal and did not want to return home.359

353  Ibid.
354  ERT interview with advocates at the ACLU of Southern California, April 2009, who indicated that the San Diego FPD filed *Zadvydas* habeas petitions. See also ERT interview with Bob Pauw, an immigration attorney in Seattle, Washington, April 2009.
355  See *Lema v I.N.S.*, 341 F.3d 853, 856 (9th Cir. 2003).
356  See *Gamado v Chertoff*, 2008 WL 2050842 (D.N.J.)
Between these two extremes, there is a vast grey area within which arbitrary non-cooperation determinations by the DHS reign. The 2005 CLINIC report highlights the following specific problems:

(i) the DHS’s “failure to provide and utilize clear criteria for non-cooperation”;  
(ii) evidence to suggest “that non-cooperation is used as a basis for continuing detention when there is no other reason to detain the individual, but [the DHS] is not ready to release”;  
(iii) accounts “that non-cooperation allegations could arise from [the DHS’s] ineffective mechanisms to keep track of the status of individual cases”; and  
(iv) indications that the DHS sometimes “conflates a detainee’s non-cooperation with its own inaction, or a lack of response from the detainee’s consulate”.360

Likelihood of Removal

The second issue that the DHS analyses is whether removal is reasonably likely in the foreseeable future. Attorneys interviewed by ERT indicated that the DHS will often release Cubans, Vietnamese, Cambodians, and Laotians when called on to determine the reasonable likelihood of removal, acknowledging that citizens of these countries will not receive travel documents. A lawyer of the National Immigration Forum explained that this is because:

(i) the United States does not maintain diplomatic relations with Cuba;  
(ii) the United States does not have a repatriation agreement with Laos;  
(iii) while the United States recently signed a repatriation agreement with Vietnam, it does not apply to Vietnamese citizens who arrived before 1995; and  
(iv) while the United States does have a repatriation agreement with Cambodia, the terms are very limited and removal to that country rarely occurs.361

Nationals of countries to which removal is difficult generally spend much more time in detention. For example, the DHS Office of the Inspector General (OIG) has reported that of 246 Chinese persons detained in March 2006, 156 (63%) were still detained in June 2006, and 32 of them had been in detention for more than 360 days. The Report also indicated that, as of June 2006,

360 See above, note 349, pp. 24-25.  
there were 428 total non-citizens with final orders of removal who had been in detention for more than one year.\textsuperscript{362}

\textit{Special Circumstances}

The third issue that the DHS considers is whether continued detention is justified by some “special circumstances”.\textsuperscript{363} The regulations define “special circumstances” as:

(i) non-citizens with “\textit{a highly contagious disease that is a threat to public safety}”;

(ii) non-citizens detained because of “\textit{serious adverse foreign policy consequences of release}”;

(iii) non-citizens that pose “\textit{security or terrorism concerns}”; and

(iv) non-citizens who are “\textit{specially dangerous}”.\textsuperscript{364}

\textit{Designation of a Country for Removal}

Notably, nowhere in \textit{Zadvydas v Davis} and its progeny is the issue of statelessness directly addressed. While Zadvydas himself was legally stateless, the central question addressed by the Supreme Court, and the question that is central to the \textit{Zadvydas} regulations themselves, is whether removal from the United States is reasonably foreseeable. Neither \textit{de jure} nor \textit{de facto} stateless persons have any guarantee that authorities will determine that their removal is not reasonably foreseeable. This is largely because the regulatory framework grants immigration authorities broad discretion in designating countries for removal.

U.S. policy provides guidance to immigration authorities on selecting countries to which non-citizens may be removed.\textsuperscript{365} The first part of that section provides the framework for the removal of arriving, inadmissible non-citizens, and indicates that such individuals should be removed to the country


\textsuperscript{363} 8 C.F.R. § 241.14.

\textsuperscript{364} 8 C.F.R. § 241.14(b), (c), (d), (f). The regulations further establish that immigration courts only have jurisdiction to review determinations with respect to the fourth category 8 C.F.R. § 241.14(a)(2).

\textsuperscript{365} 8 U.S.C.A. § 1231(b).
from which they arrived, unless they arrived from a bordering territory (for example, Mexico or Canada), in which case they should be removed to the country from which they arrived to the bordering territory. However, if travel to the latter country is not permitted, then the statute instructs immigration authorities to remove the non-citizen to his or her country of nationality, where he or she was born, has residence, or to any other country that will accept him or her.

The second part of the relevant section pertains to non-citizens determined to be deportable, i.e. those who have already entered the United States, and permits the non-citizen to designate his or her country of removal. However, it also outlines circumstances in which immigration authorities may disregard such designation, and in those cases, provides a long list of countries to which immigration authorities may attempt removal in the alternative. This list includes everything from the country from which the non-citizen entered the United States to “another country whose government will accept [him or her] into that country.”

The OIG in its report has indicated that immigration authorities generally accept that removal to countries like Cuba and Vietnam is impracticable and release the majority of nationals from those countries. The report also indicates that other countries may present challenges, either because of strained political relations with the United States, onerous requirements for attaining travel documents, or a variety of other reasons. These observations assume that travel documents are necessary for removal. However, on the same day that it decided Clark v Martinez, the U.S. Supreme Court held in Jama v Immigration and Customs Enforcement (a case concerning the removal of a Somali national) that a target country’s permission was not always necessary to remove a non-citizen who had been deemed removable.

370 Ibid.
371 See above, note 359.
4.1.3.2 The United Kingdom

English law previously accepted that where a stateless person had acquired habitual residence in a particular state there may be constraints on their expulsion. However, the law has since regressed and present jurisprudence is more deferential to the executive’s power to detain and deport. The most authoritative statement of principles underpinning detention under the Immigration Act is contained in the judgment of Justice Woolfe in *R v Governor of Durham Prisons, ex p. Hardial Singh.* The *Hardial Singh* principles were later summarised in the form of four propositions:

(i) the Secretary of State must intend to deport the person and can only use the power to detain for that purpose;
(ii) the deportee may only be detained for a period that is reasonable in all the circumstances;
(iii) if, before the expiry of the reasonable period it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period he should not seek to exercise the power of detention;
(iv) The Secretary of State should act with reasonable diligence to effect removal.

Under the *Hardial Singh* principles, a person may not lawfully be detained “pending removal” for longer than a reasonable period of time. Where it is evident that removal cannot be effected within a reasonable period, the detention becomes unlawful even if the reasonable period of detention has not expired.

According to the UK courts, there are a number of circumstances which may be relevant to the question of how long a person can be reasonably detained before his/her detention is deemed to be unlawful. Relevant factors include the length of the period of detention, the nature of the obstacles which stand in the path of the Secretary of State securing deportation, the diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles, the conditions in which the detained person is being kept, the effect of detention on the detainee and their family, the risk of re-offending and absconding if not detained, the danger to the public if released and the detainee’s willingness to accept voluntary repatriation.

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375 *R(I) v Home Secretary* [2002] EWCA Civ.888.
Omran is a stateless Palestinian. He was born and spent his early childhood in Gaza; after his mother died when he was approximately five years old, he moved to Lebanon, but was not registered as a refugee as his family were considered to be "displaced". Omran found work as a taxi driver in Lebanon. He was detained and tortured by Syrian forces after one of his passengers had photographed buildings in a high security area. He managed to escape and fled the country for Germany, where he applied for asylum. He spent two and a half years in Germany, but got frustrated with the delays in determining his asylum application and illegally entered the UK.

Omran was refused asylum in the UK. He was subsequently sentenced to four and a half years imprisonment for assault and inflicting bodily injury. He claims that he was poorly represented by his lawyer who met him only once, and that the interpreter used a dialect he did not fully understand. Omran served three years of his sentence in Risley prison, Warrington. He then gave his consent to be deported as he was told he would be released from prison if he did so. However, he was kept in prison for a further 90 days, during which he was attacked by four prisoners. His neck was slashed with a razor and his jaw and cheek bone were broken – injuries which required three surgical operations. After this attack, Omran sued for compensation but did not receive any.

Omran then spent 33 months in detention in Campsfield House, near Oxford. Omran wants to be sent back to Gaza where his
sister lives. However, this has not been possible. Several applications to be released on bail were refused as the Home Office has stated that there are “anomalies” in his documentation. The Home Office did not believe he was from Gaza, and believed he would abscond. Ironically, in the first few months when he was in Campsfield House, there was a fire and breakout. Omran had the opportunity to escape, but chose not to.

Omran was finally released on bail in December 2009. He is challenging the legality of his detention through judicial review.

Risk of Re-Offending/Absconding

Lord Justice Dyson in *R (M) v Secretary of State for the Home Department* concluded that the combined risk of absconding and re-offending may justify allowing the Secretary of State a substantially longer time within which to arrange for removal. The greater the risks, the longer the period for which detention may be reasonable – but there comes a time when whatever the magnitude of the risks, the period of detention can no longer be said to be reasonable.

Justice Toulson in *A v Secretary of State for the Home Department* held that the risk of re-offending was a relevant factor when assessing the reasonableness of detention and that the strength of this factor would depend on the magnitude of risk. Since the purpose of deportation was to remove from the UK a person whose presence was not conducive to the public good due to a propensity to commit serious offences, protection of the public is the purpose of the deportation order and must be a relevant consideration when detaining that person pending his removal.

In assessing the reasonableness of the length of detention in *Abdi*, it was accepted that while detention of foreign national prisoners must not be used

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377 *R (M) v Secretary of State for the Home Department* [2008] EWCA Civ. 307 at [14].
378 *R (A) v Secretary of State for the Home Department* [2007] EWCA Civ 804, Para 55.
as a disguised form of preventive detention for the protection of the public, public safety remains a valid concern when assessing the reasonableness of detention.\textsuperscript{379}

\textit{Length of Detention}

In the case of \textit{Wang}, Justice Mitting found that the claimant had been detained for 30 months, a very long period, which is at the outer limit of the period of detention which can be justified on \textit{Hardial Singh} principles except in the case of someone who has in the past committed very serious offences and who may go on to commit further such offences or who poses a risk to national security.\textsuperscript{380} Justice Mitting concluded that the applicant should be released from detention despite the significant risk of absconding and committing further low level crimes while at liberty. Even if on the facts the claimant had refused to cooperate with the authorities in obtaining travel documents, the decision to release him would remain unchanged.\textsuperscript{381}

\textit{Failure to Cooperate}

Refusal to cooperate can be a relevant factor while assessing the reasonableness of detention and may also influence the court’s decision regarding the likelihood of imminent removal. There is a significant amount of debate surrounding the determination as to what constitutes non-cooperation. Certainly, non-citizens who do not want to be removed may sabotage efforts to acquire travel documents, or even physically resist removal; however, as with the USA, the government has a fair amount of discretion to decide what constitutes cooperation with removal. For example, in \textit{Abdi}, the claimant refused to cooperate with attempts to return him to Somalia by signing a disclaimer which would have served as evidence that he left the UK voluntarily and permitted the Secretary of State to order his deportation despite the human rights situation in Somalia. The government’s stand was that Mr. Abdi had himself prolonged his detention by refusing to sign the disclaimer.\textsuperscript{382}

\textsuperscript{379} \textit{R (Abdi) v Secretary of State for the Home Department} [2009] EWHC 1324 (Admin), Para 40.


\textsuperscript{381} \textit{Ibid.}, Para 35.

\textsuperscript{382} \textit{UN Working Group on Arbitrary Detention}, \textit{Opinion No.45/2006 (UK) Concerning Mr. Mustafa Abdi}, 9\textsuperscript{th} November 2006, Para 15.
Unravelling Anomaly

Prospect of Removal

Under the *Hardial Singh* principles, even if the length of detention is found to be reasonable, a person may still be released if circumstances indicate that it will not be possible to deport such person within a reasonable period of time.

In *Abdi*, for example, the court found that the detention of Mr. Abdi must come to an end, because there was no realistic prospect of his removal within a reasonable time. It noted the ECHR practice of granting interim relief to all applicants who were to be removed to Mogadishu. Despite a risk of re-offending and absconding, the court found that given the length of time the claimant had already spent in detention and the fact that there was no likelihood of his imminent removal to Somalia, Mr. Abdi should be released from detention.

In the case of *MM* a young Somali national who had lived legally in the UK since he was a child and was given a deportation order following a short prison sentence, the High Court ordered his release after a period of almost two years detention on account of the impossibility of return.\(^{383}\)

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**The Iraqi Asylum Flight of 2009**\(^{384}\)

The UK Border Agency (UKBA) has gone to extreme measures to enforce removals. A recent example is the so called Iraqi Asylum Flight of 15 October 2009, which was the first instance in over five years to take Iraqis forcibly back to Baghdad. In what has been described as an example of the UKBA’s “cavalier attitude to the law”, 44 Iraqis were taken from immigration detention and forced onto a charter flight to Baghdad on 15 October 2009.

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\(^{383}\) *MM (Somalia) v Secretary of State for the Home Department* [2009] EWCH 2353 Admin.

The final destination of the flight was kept secret from those being removed and the full list of deportees was only made available to Iraqi officials on 12 October, three days before removal. Upon landing in Baghdad, Iraqi authorities accepted only 10 of the deportees and returned the other 34 back to the UK, on the basis that they could not be responsible for their safety.

After being returned, the Iraqis were once again detained. A High Court decision related to one of the returned detainees - Soran Ahmed, a 22-year-old Kurd from Kirkuk. Ahmed had been in immigration detention for 21 months following the refusal of his asylum application. He had not been removed because the K urdish Regional Government would not accept him, and it was too dangerous to return him to Baghdad. Consequently, the High Court held that since there was no likelihood of him being sent back even in the medium term, it would be unlawful to continue to detain him.

**Non-Cooperation by the Country of Nationality**

Release may also be affected by non-cooperation by the country of nationality where, for example, a country refuses/fails to identify or readmit their national. Iran and Algeria in particular have failed to cooperate in identifying and issuing travel documentation for their nationals – rendering their nationals particularly vulnerable to indefinite administrative detention. In *A and Others*[^385] the detention of three Algerians was found unlawful in the absence of a reasonable prospect of their removal to Algeria – due mainly to the refusal by Algerian authorities to issue travel documents to the detainees despite their cooperation with the removal process by providing their biographical data and relevant details to their Embassy.

The above discussion of the development of the law shows that despite judicial restriction of the executive’s authority to indefinitely detain persons pending removal, such detention continues, mostly unhampered until successfully challenged before the courts.

[^385]: *A and Others v Secretary of State for the Home Department* [2008] EWHC 142 Admin.
4.1.3.3 Australia

Unlike the UK and the USA, in Australia it is mandatory that all non-citizens whose presence in Australia is unlawful are detained until they are removed from Australia voluntarily, deported, or granted a visa to reside lawfully in the community.\textsuperscript{386} What this means is that no factor can provide justification for the release of immigration detainees unless they are removed from Australia or granted a visa to remain.

Consequently, factors such as the length of detention, the likelihood of removal, cooperation, and the reasonableness of detention, which are important in the U.S. and UK contexts, play no role in the determination of whether a detainee should be released from immigration detention in Australia. Australian Courts have held that even when removal is impossible, detention must continue. The court ruling in the case of \textit{Al-Kateb} discussed above stands as testament to this reality.\textsuperscript{387}

This inhumane system which does not take into account the realities of statelessness is a recipe for indefinite detention. Persons in the unfortunate situation of being immigration detainees with no third country to be removed to depend very much on the discretion of ministers to grant them bridging visas – which often (as in the case of \textit{Al-Kateb}) only happens after a lengthy period of detention and a draining legal battle.

4.1.4 Restriction of Liberty and Release into Destitution

Equally problematic is the continued restriction of liberty and likely destitution of those released.

In each of the above UK cases, the court imposed conditions on release which included residing at a fixed address, electronic tagging, reporting requirements, etc.\textsuperscript{388} The UKBA sees such restrictions of liberty as a means

\textsuperscript{386} See Sections 189, 196 and 198 of the Australian Migration Act of 1958. These provisions have been discussed in Section 4.1.1.3 above.

\textsuperscript{387} See Section 4.1.2.3 above.

of conferring a degree of freedom on a person who would otherwise be detained.\textsuperscript{389}

It has been argued that “the government has ... been practising a deliberate policy of destitution of this highly vulnerable group”.\textsuperscript{390} No distinction is made between stateless persons who have applied for asylum and been refused and other rejected asylum seekers who have effective nationalities. All are expected to leave the country within 21 days (with the exception of families with children who continue to receive financial support and accommodation). Single adults and childless couples have their housing and other support cut off at this point. There is limited access to free non-emergency secondary healthcare.\textsuperscript{391} There are very limited circumstances in which either group of refused asylum seekers may receive low-level support and accommodation.\textsuperscript{392}

But the absence of a formal statelessness determination or regularisation procedure, combined with the near impossibility of removing such persons to any other country, leaves them particularly vulnerable to indefinite destitution.\textsuperscript{393}

Australia has also imposed a regime of release into destitution, as evidenced by the following testimony:

\begin{quote}
Our release from detention was done in such a hard way. They drove us out of the detention centre at night. They stopped on a dark street in Port Augusta – away from the shopping centre. They told us to get out of the car. They put our bags at the side of the road. They didn’t say goodbye. And then they were gone. We didn’t have money and we didn’t have phone num-
\end{quote}

\begin{footnotes}
389  See above, note 267.

390  Joint Committee on Human Rights, Treatment of Asylum Seekers, 10\textsuperscript{th} Report of Session 2006-7, 30/03/07, Para 120.


392  See Section 4, Immigration and Asylum Act, 1999; and The Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005 S.I. 2005 No.930.

393  See above, note 391, p. 1; See also The Asylum Support Appeals Project, Unreasonably Destitute, June 2008, above, note 391.

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bers. We didn’t know how to use the phones. We didn’t have anything. Our English ability was not strong. We didn’t even know how to ask for the police station. ... I found that I was very scared walking amongst people. After being like a cat in a cage for years, suddenly being put in amongst everything was very stressful. I saw people’s different moods towards us. It felt like they were all looking at us. The feelings from detention were still with me.\textsuperscript{394}

Recently, however, as discussed in Part Three below, the Australian policy has begun to change in a positive direction.

4.2 IMMIGRATION DETENTION OF STATELESS PERSONS IN KENYA AND EGYPT

The UK, USA and Australia have complex, detailed and comprehensive immigration laws, which do not satisfactorily take into consideration their human rights obligations to the stateless. The situation in Kenya and Egypt is very different: both countries have porous borders and deal with irregular immigrants in an \textit{ad hoc}, reactive manner. There is no clear, consistently implemented policy pertaining to detention pending removal. Consequently, there is an even larger element of uncertainty in how a particular person would be handled by the authorities.

4.2.1 Kenya

In Kenya stateless persons may be detained on grounds of irregular residence and/or lack of identity documents. Those who were once married to Kenyans and may have divorced before they applied for naturalisation are equally susceptible to detention. The Ministry of Immigration is responsible for the administration and management of persons who are considered non-Kenyans.

Detention generally happens in cases where immigration or police officers identify persons during raids as aliens without personal documents.\textsuperscript{395}

\textsuperscript{394} See above, note 299.

\textsuperscript{395} Kenya Anti-corruption Commission, \textit{Examination report on systems, policies, procedures and practices at the Ministry of Immigration and Registration of Persons}, April 2006, p. 31.
These persons are commonly charged with unlawful presence in Kenya.\footnote{Under Section 13(2) of the Immigration Act of Kenya.} They may be sentenced to between one month and twelve months in prison and/or a fine of up to 3,000 Kenyan shillings [approximately 37 US Dollars]. Additionally, deportation orders are also made against them.

As with the USA, UK and Australia, stateless individuals are often detained for prolonged periods, solely because they cannot be returned to their country of nationality or habitual residence. In the absence of a national legal framework to deal with stateless detainees, they often remain in detention indefinitely. Information on where detainees are held (including international zones at border points and administrative detention facilities) is difficult to come by. Reliable data on the number of detainees and reasons for detention disaggregated by gender and age is not available.

The Kenyan justice system, similarly to those of Australia, the UK and the USA, can be intimidating and difficult to access for vulnerable persons. Those who do not understand a local language are particularly predisposed to administrative delays. The slowness of immigration officers to contact the country of origin or residence and the non-cooperation of such countries are added impediments. The non-existence of legal aid for immigration detainees in Kenya is a further, often insurmountable obstacle in the paths of the stateless in immigration detention.

According to Human Rights Watch, between December 2006 and March 2007, “Kenyan security forces arrested at least 150 individuals from some 18 different nationalities at the Liboi and Kiunga border crossing points with Somalia”.\footnote{Human Rights Watch, People fleeing Somalia war secretly detained, March 2007.} The Kenyan authorities transferred these individuals to Nairobi where they were detained in prisons and other detention facilities for periods that exceed the fourteen day period permitted for pre-trial detention under Kenyan law. The Kenyan police denied many of the detainees access to family, legal counsel, diplomatic representatives, and human rights groups, including the parastatal Kenyan National Human Rights Commission.

On a visit to a Nairobi detention facility in May 2009, ERT found four stateless individuals who had been in prolonged detention because they could not obtain travel documents to their home countries. One had been in detention for over five years while another had been in detention for over three. The
other two had been in custody for two years. Despite the fact that two of the detainees had been identified by an April 2006 government report (Kenya Anti-corruption Commission) as being stateless, nothing had been done about their situation three years later. The following is the story of one of these persons:

**Pheneas Chapatula, Failing Health in Indefinite Immigration Detention**

I was born in Somalia in 1968 to the Chewa community, in a village called Djiboula very close to Mogadishu. I have a wife in Somalia and three brothers. In January 2007, I decided to come to Kenya to look for my elder brother who had left Somalia to live in Kenya. I entered Kenya through Wajir but was unable to trace my brother. Within a week of being in Kenya, I was arrested. I had no papers as I had lost my identity card in Somalia. After arrest I was taken to court but did not have a lawyer. I was sentenced to six months in prison for illegal presence in Kenya, after which I was to be deported.

After serving the prison sentence, I was transferred to the Nairobi Industrial Area Prison in April 2007. Since being transferred, no efforts have been made to deport me. I have only been visited once by a person who I think was an immigration officer.

I share a prison cell with eight others. They are all Kenyan remand prisoners awaiting trial. I am not allowed out of the cell, and not allowed to exercise. They give me different food, worse than what the others get. I am not given meat when the other prisoners are.

The prison officers say that Mr. Chapatula suffers from mental health problems, which he himself is unaware of. ERT asked him what he knew about his mental health status. Mr. Chapatula stated that although he had been told that

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he had mental health problems the doctor only gave him tablets for a common cold. He has not been seen by a psychiatrist to-date, despite requesting to be seen by one. During the interview with ERT, Mr. Chapatula appeared to be in great anguish. He was rational and articulate, but very sad and subdued, and said that he had had no news from his wife or other family since he came to Kenya. He wanted to go back to Somalia, but due to his lack of identity papers and the indifference of the authorities, he had remained in immigration detention for more than two years.

4.2.2 Egypt

As a Party to the 1951 Refugee Convention and its 1967 Protocol, and the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention), Egypt has accepted an obligation to protect refugees and asylum seekers who are on its territory and to respect the principle of non-refoulement. Furthermore, unlike the other countries discussed above, Egypt has a monist legal system, meaning that enabling national legislation is not necessary to enforce international treaties ratified by the state.

Article 53 of the Constitution stipulates that Egypt shall grant “the right of political asylum to every foreigner persecuted for defending the people’s interest, human rights, peace or justice. The extradition of political refugees shall be prohibited”. Despite this clear legal framework, Egypt has not established national determination procedures to recognise refugees. Egypt is not a Party to either of the Statelessness Conventions, and Egyptian law and policy do not recognise or cater to the unique challenges of statelessness. Instead, stateless persons without documentation are considered to be illegal immigrants.

Refugee status determination in Egypt is currently carried out by the UNHCR Regional Office in Cairo. ERT was unable to establish whether any statelessness determination system existed in the UNHCR Cairo office. Those whose


400 Constitution of the Arab Republic of Egypt, Article 53.

401 Recently the UNHCR has been receiving requests to assess claims and establish whether an asylum seeker is a refugee or not before his/her release takes place. In case of recognition as a refugee the person is then freed and protected against deportation. In case of a negative response, the Egyptian authorities put the failed asylum seeker in contact with their embassy in order to facilitate their repatriation.
claims to refugee status are refused by UNHCR do not receive a full explanation of the reasons for rejection, and they must appeal within one month of receiving the decision. If the appeal is rejected or if the appeal submission is not filed within one month, the UNHCR considers the applicant to be a closed file, meaning that the applicant is no longer under the protection of the UNHCR and can be deported to his country of origin. Without UNHCR protection and without a country of effective nationality, some rejected asylum seekers find themselves stateless.

Similarly, asylum seekers who never registered with the UNHCR are not considered to be persons of concern to the UNHCR and are also vulnerable to deportation. This rule of registration even applies to persons who are recognised as refugees by UNHCR offices in other countries.

If arrested in a raid or convicted of a crime, recognised refugees and registered asylum seekers are usually released by the Egyptian authorities upon the fulfilment of their sentence and are protected against *refoulement*. However, unregistered asylum seekers and stateless persons (including those who did not have the opportunity to register due to being arrested at the border), have little chance of being assisted by the UNHCR as the Egyptian authorities do not allow the UNHCR to access them in detention. Often, when unregistered asylum seekers and stateless persons are arrested at the border for illegal entry they are tried by military tribunals under the authority of Egypt’s Emergency Law. After they have completed their sentences, unregistered asylum seekers are, without any respect for their asylum request, put in contact with their home embassies in order to facilitate their deportation. Consequently, stateless persons face the almost certain prospect of indefinite detention if arrested on Egyptian soil.

Statistics of stateless persons in Egypt are hard to come by, and often contradictory. It is estimated that there are 70,000 Palestinians in Egypt of whom the majority are stateless. The latest statistics of the UNHCR indicate that as of 2007, there were 74 non-Palestinian stateless persons living in Egypt. ERT has been told that a large number of stateless persons are currently being detained in Egyptian prisons, but they are not registered with the UNHCR, and are therefore not included in the statistics.

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402 Border areas are under the control of military justice. Cf. Art. 20 of Martial Law No. 25 for year 1966.

Asylum seekers and stateless persons are often subjected to criminal and administrative detention in Egypt on account of illegal entry into the country or because they have remained in the country without regular residence permits. The punishment for illegal entry into Egypt is a maximum prison sentence of six months and a fine of 200 to 1000 Egyptian pounds [approximately 35 to 175 USD]. Additionally, the illegal immigrant may also be deported.\textsuperscript{404} According to Human Rights Watch, the police have arrested hundreds of migrants in the past two years alone, of which the majority have been arrested at border points.\textsuperscript{405}

All immigration detainees are held in regular prisons which also hold Egyptian criminals. However, generally, foreign prisoners are not held in the same cells with Egyptian citizens. They are commonly held together after their arrest in police stations, and kept in a different block within detention centres.

After completing their prison sentence, migrants, unregistered asylum seekers and stateless persons are held in administrative detention pending deportation. Detainees generally have the right to challenge the legality of their detention by:

(i) Petitioning the investigative judge prior to referring the case to the trial court;
(ii) Petitioning the trial court after referral;
(iii) Filing an appeal after conviction when such an appeal is allowed.

There is a process similar to the writ of habeas corpus that allows unlimited access to the courts to challenge the legality of detention.\textsuperscript{406}

\textsuperscript{404} See Article 41 of the Foreigners Law, Decree Law No. 89/1960. In general, the sentence given by the court to a foreigner arrested and tried for illegal entry – violation of Articles 2 and 3 of the Foreigners Law – is one year imprisonment and a 1000 Egyptian Pound fine according to Article 41 of the law.

\textsuperscript{405} Human Rights Watch, \textit{Sinai Perils}, November 12, 2008.

A De Facto Stateless Cameroonian’s Story of Detention in Egypt

I came to Egypt in order to seek asylum through the UNHCR. I reached the border on January 6th, 2007. I was stopped by the Egyptian Immigration authorities because I didn’t have a passport. They searched me and collected everything from me. I was taken to a cell where I remained for 14 days, and then I was brought to a court, and I tried to tell them my life story, but they could not understand me because I could not speak Arabic, and they could not understand French. I was not given an interpreter.

I was sentenced to one year in prison with a fine of 1000 Egyptian pounds [approximately 175 U.S. dollars]. I was taken to prison on February 16th 2007. Life was very hard in prison. My hands and feet were handcuffed, and my skin began to rub off and I was bleeding. I went through periods without being fed.

I faced many problems because I am a Christian; I was assaulted by the other prisoners and the prison guards; I was forbidden to use the communal bathroom; I was treated as being impure because when they asked me to pray with them, I refused. They cut the cross that I was wearing around my neck and they poured water on my Bible. There were about 25 people held in the same room as me, and I was the only Christian.

I tried to complain to a guard, and I was slapped and called a pagan. My wrists and feet were handcuffed and they began to peel and bleed. I was then put into a dark room for four days. I had to drink my own urine in there because I was so thirsty, and I was not given any water. I was no longer lucid by the end of my solitary confinement. The general conditions were not good. There was no bathroom in the cell which contained 25 people, and we were fed one meal a day. I was in the same cell with criminals who had been sentenced to death, and they would hide razors in their teeth.

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407  ERT Interview with E.G., June 2009, Detention Centre, Greater Cairo, Egypt (ERT-SPD-EG-008). The detainee was kidnapped as a child and raised in Cameroon, and has suffered very bad abuse in that country.
4.3 IMMIGRATION DETENTION OF STATELESS ROHINGYA IN BANGLADESH, MALAYSIA AND THAILAND

The Rohingya are one of the most vulnerable and abused stateless communities in the world. Legally they have been stripped of their nationality since 1982 and victimised by a host of discriminatory laws, policies and practices in their home country of Myanmar. As a result, hundreds of thousands of Rohingya have fled the country in search of a more stable, economically viable and less discriminatory future.

Under Myanmar law, the Rohingya are forbidden to leave the country (or even their village) without receiving permission to do so. However, in practice, it is easier for a Rohingya to cross the frontier to Bangladesh clandestinely than it is to obtain a pass and make the short internal journey to Sittwe – the capital of the Rakhine state which is home to the Rohingya. Those caught making the journey to or from Bangladesh, however, face jail sentences under charges of illegal entry or exit. Consequently, the Rohingya who do leave Myanmar

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At the end of my sentence, I was made to serve another 3 months because I could not pay the fine. My three months were completed on April 6, 2008.

I was then sent to another prison where I remain today. I was visited by someone from the Cameroon Consulate, and he asked me if I had any family who could afford to buy me a plane ticket back to Cameroon. I told him that prison is better than returning to Cameroon and Chad. I am still being detained because I have no country to be deported to.

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408 The main legislation regulating entry and exit of persons into Myanmar is the Burma Immigration (Emergency Provisions) Act, 1947 (Act XXXI of 1947) which was amended in 1990 by the Law Amending the Myanmar Immigration (Emergency Provisions) Act, 1947, or The State Law and Order Restoration Council Law No. 2/90. According to Section 13 (1) of the Burma Immigration Act, citizens need to possess a valid passport and an exit stamp or exit permit in the form of border pass in order to re-enter the country legally. In practice, provisions of Section 13(1) of the Immigration Act are rarely applied on Myanmarese citizens and the prosecution of citizens is usually politically motivated, such as in the case of political activists or rejected asylum seekers.
leave forever and their fate is in the hands of the states they travel to, often in life-threatening, hazardous sea voyages on ill-equipped boats.

The mass exodus of Rohingya (and other minority communities) from Myanmar has created considerable immigration problems for the authorities of neighbouring Bangladesh and Thailand, as well as the economically more prosperous Malaysia. Many first generation Rohingya immigrants should be recognised as refugees, due to the level of persecution suffered in Myanmar. Second, third and even fourth generation Rohingya born into irregular immigrant families, and not legally integrated into the societies they are born into, remain *de jure* stateless. This reality demonstrates the overlap between the protection needs of refugees and non-refugee stateless persons, and is one of the main reasons for ERT’s focus on the Rohingya problem.


410 However, apart from some in Bangladesh and Malaysia, most Rohingya are not recognised as refugees.
Typically, Rohingya escaping Myanmar would illegally cross the border into Bangladesh, from where they would take a boat journey to Thailand and then cross over into Malaysia.\textsuperscript{411} At each stage along this journey the Rohingya suffer exclusion, discrimination and abuse, and risk detention, trafficking and informal deportation. ERT in its field research followed this journey – focussing on Rohingya communities in Bangladesh, Thailand and Malaysia – and revealed the cyclical nature of the Rohingya flight, which has not received adequate attention from the international community.

4.3.1 First Port of Call: Bangladesh

Bangladesh is the first port of call for many Rohingya who try to escape persecution in Myanmar and hope to reach the economically less impoverished shores of Thailand and Malaysia. Bangladesh is not party to the two Statelessness Conventions. It has not ratified the 1951 Refugee Convention and its 1967 Protocol and has not enacted any domestic legislation protecting refugees or stateless persons. The Constitution of Bangladesh guarantees legal protection to Bangladeshi citizens as well as “every other person for the time being within Bangladesh”\textsuperscript{412}

Bangladesh has been burdened by two mass refugee exoduses of about 250,000 Rohingya refugees (about one third of the total Rohingya population in North Arakan) in 1978 and 1991-92. Each was followed by repatriation, often under coercion, despite the fact that the human rights situation in Myanmar had not shown any improvement. Consequently, many repatriated Rohingya have since fled again to Bangladesh but have no access to the official refugee camps and UNHCR protection.

At present, some 28,000 \textit{prima facie} Rohingya refugees who first arrived in the 1991-92 mass exodus remain in Bangladesh in the two “official” refugee camps of Nayapara and Kutupalong in the Cox’s Bazar district of South-East Bangladesh. They benefit from limited protection and humanitarian assistance from the UNHCR and from some international and national NGOs. A further Rohingya population estimated at approximately 200,000 have settled outside the two official refugee camps. Most have fled to Bangladesh independently of the mass exodus, many after 1992, and have been denied access to the camps; some have fled from the camps to escape forced repatriation. ERT research indicates that perhaps as many as 50% of these unregistered

\textsuperscript{411} See Annex B for a Rohingya Migration Map (courtesy of the Arakan Project).
\textsuperscript{412} See Article 31 of the 1972 Constitution of Bangladesh.
Rohingya were once camp refugees who had been forcibly repatriated to Myanmar and fled back to Bangladesh. Today, they are found in two unofficial sites or dispersed in villages throughout Cox’s Bazar District and to a lesser extent in the Chittagong Hill Tracts. In 2002, local authorities in Teknaf, the southernmost point of Bangladesh in Cox’s Bazar District, evicted without warning the Rohingya persons living there. This led to the spontaneous establishment of the unofficial “Teknaf makeshift camp” which was relocated to a new site in Leda [also in Cox’s Bazar] in mid-2008 and currently houses about 10,000 Rohingya. In early 2008, insecurity related to voter registration and fear of eviction prompted the Rohingya from around Cox’s Bazar District to gather beside the Kutupalong refugee camp. Today, the unofficial “Kutupalong makeshift camp” continues to grow and houses an estimated 30,000 Rohingya. New arrivals continue to trickle into Bangladesh on a regular basis.

This unregistered population is particularly vulnerable as it does not benefit from any protection. They have no legal status in Bangladesh and are labelled as illegal migrants. They are at risk of eviction, arrest and detention, and recently of deportation to Myanmar. No mechanism exists in Bangladesh for the unregistered, including new arrivals, to access UNHCR protection. Over the last two years, Bangladesh has increasingly implemented a new policy of “informal deportation” or “push-backs”. Arrests of new arrivals and roundups in villages followed by informal deportations across the Myanmarese border have significantly increased since 2009.

4.3.1.1 Immigration Detention

When compared with the size of the unregistered Rohingya population in Bangladesh, the level of arrest, detention and/or deportation is relatively low, indicating that Bangladesh has developed a degree of tolerance towards the Rohingya. However, the legal system of Bangladesh is weakened by inefficiency, politicisation, corruption and poor enforcement, thus undermining accountability in the administration of justice, in particular at the level of lower courts and the police.413

According to Amnesty International, “for many decades the rule of law in Bangladesh has been subverted by political interference, weak institutions and disregard for human rights. The powerful and the privileged have been able to act with impunity, with no fear of being called to account. Abuse of power was the norm, marked by a growing nexus between political violence and organized crime. The poorest people have been often the most vulnerable to abuse and least able to find redress.” Amnesty International, One year on: human rights in Bangladesh under the state of emergency, 10 January 2008, available at: http://www.amnesty.org/en/for-media/press-releases/one-year-human-rights-bangladesh-under-state-emergency-20080110 [accessed on 5 May 2010].
Being amongst the poorest in Bangladesh and also being undocumented, foreign and stateless, the Rohingya have disproportionately suffered the consequences. Arrests of Rohingya are generally made by the police or occasionally by the border security forces (BDR). From time to time, the police launch crackdowns against irregular Rohingya migrants. These sporadic raids often appear to be politically motivated, usually occurring at times of elections or during local outbursts of anti-Rohingya sentiment. The Teknaf and Ukhia Sub-districts in Cox’s Bazar, where there is a particularly high degree of hostility towards the Rohingya, are the main areas targeted by the police.

The most significant problem of immigration detention for the Rohingya is that of “released prisoners” (RPs) - those who continue to be detained after serving immigration related sentences, due to difficulties related to their deportation. RPs have completed their sentence and are then kept in detention pending deportation. Because the Myanmarese authorities refuse to readmit these prisoners, they remain incarcerated indefinitely, and some have died in custody. The Bangladesh Prisons Department does not have a specific budget for RPs and their presence among pre-trial detainees and convicts constitutes an additional burden to the penal system:

*In jail every prisoner feels sympathy for the “released prisoners” because they are the worst victims of the system. A prisoner usually has a country and, whenever he gets bail or completes his sentence, he can return to his family but “released prisoners” cannot return home although their sentence has been served long ago.*

A former Rohingya prisoner released in June 2009 and interviewed by ERT spoke about one of his jail mates, a Rohingya fisherman from Sittwe who was arrested in Bangladesh on 31 May 1992. His boat was caught in a storm and drifted into Bangladeshi waters. He was charged under Section 25B of the 1974 Special Powers Act (smuggling). After four years in pre-trial detention he was sentenced to four years and six months imprisonment, of which his four years of pre-trial detention were deducted. Thirteen years later, he is still among the RPs in Cox’s Bazar jail.

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414  ERT interview with a former Rohingya detainee, 14 June 2009, Cox’s Bazar, Bangladesh (ERT-SPD-BD-042).

415  ERT interview with a former Rohingya detainee, 23 June 2009, Cox’s Bazar, Bangladesh (ERT-SPD-BD-045).
4.3.1.2 The Impact of Public Interest Litigation

In 2001 Ain-O-Shalish Kendra (ASK), a Bangladeshi human rights and legal aid NGO, initiated a public interest litigation case on behalf of foreigners kept in administrative detention as “released prisoners”, on the grounds that detention beyond the full term of their sentence was unconstitutional, and also violated Rules 78 and 570 of the Jail Code providing for the release of prisoners who had completed their sentences. In its judgment, the Supreme Court of Bangladesh directed the Ministry of Home Affairs to:

(i) make contact with the respective embassies of the detainees’ countries of origin with a view to expedite their repatriation;
(ii) facilitate access to the detainees for ASK and the International Organisation for Migration; and
(iii) take steps for providing shelter to those prisoners if their repatriation could not be arranged. 416

According to a list prepared on 14 May 2007 by the Bangladesh Prisons Department, on 10 July 2001, 720 RPs were detained in Bangladesh, including 430 from Myanmar. By 14 May 2007, possibly as a result of this litigation, their numbers had decreased to 245, of whom 117 were from Myanmar, and 80 were Rohingya. Some of these RPs had been “released” as early as 1996, but remained in prison for over a decade due to their non-removability. The Cox’s Bazar jail housed 79 of the 80 Rohingya RPs. The Rohingya have been systemically excluded from the occasional exchanges of prisoners between Bangladesh and Myanmar. But in April 2009, for the first time, the Myanmar authorities accepted 43 Rohingya (39 of them listed in 2007) among 64 deported “released prisoners”. Consequently, of the 80 Rohingya detained in 2007, 41 remained in detention at the end of 2009. Collectively, they have been detained for 285 years beyond their prison terms.

4.3.1.3 Detention Conditions

Bangladesh does not have separate prison facilities for immigration detainees. The Rohingya are held in medium-security jails with criminal prisoners. Pre-trial and convicted inmates are generally mixed together and juveniles are held alongside adults, even though the law forbids this. 417

416 ERT interview with civil society actors, May 2009, Dhaka.
417 Notes from ERT meeting with humanitarian organisations operating in Bangladesh, May 2009.
Bangladeshi prisons are very over-crowded in general. All Rohingya interviewed by ERT had been held in Cox’s Bazar jail. Conditions in the old Cox’s Bazar jail were particularly harsh but a new jail was constructed in the outskirts of Cox’s Bazar town with some improved facilities including fans, lights and televisions in the prison wards. However, the new Cox’s Bazar jail already suffers from acute overcrowding. The jail has a capacity of 440 prisoners but housed 2,868 prisoners as of 1 June 2009. On 31 July 2008, there were 339 Rohingya detainees in Cox’s Bazar, of whom 79 were RPs incarcerated beyond the term of their sentence. The following statement by a Rohingya interviewed by ERT captures the dire situation in the jail:

_I faced many problems during the first 3 months when I was detained in Ward No. 1, the most overcrowded ward in the jail with a total of 165 to 170 prisoners. It was difficult to sleep during the night as it was so overcrowded that one had to bribe the jail warden and the prisoners’ leader (usually a convicted prisoner) in order to secure a space to lie down. Other prisoners had to spend the entire night sitting. We were packed like sardines. This is the ward for the new arrivals where prisoners suffer the most in Cox’s Bazar jail._

One Rohingya “released prisoner” who had spent more than 13 years in jail and had been initially detained in the old prison of Cox’s Bazar, recalled:

_The old jail of Cox’s Bazar could be compared to hell. The food was also terrible. In the morning we received one half-baked chapatti with a bit of molasses, in the afternoon two half-baked chapattis again with one cup of dhal and in the evening, a small amount of rice with a bit of vegetables. Every three evenings, they gave us a small piece of fish or beef. There was no plate and no glass for all prisoners. Only influential prisoners received these. Ordinary prisoners like me had to clean a spot on the cement floor to put bread or rice on._

In Cox’s Bazar jail, the provision of water is also reported as a serious problem. Furthermore, medical items are often in short supply. Deaths of Rohingya

_418_ ERT interview with a former Rohingya detainee, 11 June 2009, Cox’s Bazar, Bangladesh (ERT-SPD-BD-043).

_419_ ERT interview with a former Rohingya detainee, 17 June 2009, Cox’s Bazar, Bangladesh (ERT-SPD-BD-041).
prisoners in custody are not uncommon and are most often health-related. This is not surprising in view of the unhygienic environment, overcrowding, lack of mobility and poor medical care. A deported “released prisoner” who had spent more than 13 years in several jails recalled:

During my years in jail, about 15 prisoners died in custody, both Bangladeshis and Burmese. I witnessed a total of five released prisoners dying - two in Comilla jail and three in Cox’s Bazar jail. All of them died of disease, no one was beaten to death.  

A 60-year-old Rohingya’s Account of Ill-treatment and Extortion

I was first sent to the “newcomers’ ward” where new detainees are always put in order to be sold by the prisoners’ leader to another ward for a fixed amount of money which would be extorted from the new prisoner. This ward is like an auction place. The prisoners’ leader collects personal details from each new detainee, gauges how much money can be extorted from his family and then fixes the selling price for the other ward leaders. These ward leaders then buy prisoners from him and later collect the same amount from the purchased prisoner by beating him. I had to stay for two days in this ward. Then, I was sent to Ward No. 12 and the ward leader who had “bought me” told me that I had to pay him 5,000 Taka. I replied: “How can I get this money? I am just a refugee.”

That night, we, about 20 newcomers, were put in the “pile”. “Pile” is jail jargon. It means a small corner of the ward where a maximum of 7 or 8 people can lie down. The ward leader compels 20 or more prisoners to go into that corner. They are packed like sardines. Then the ward leader and his assistants (all of them prisoners) press and push prisoners on all sides so that they get hurt. They also kick, punch and jump on the body of the lying prisoners until

\[\text{\footnotesize 420} \quad \text{Ibid.} \]

\[\text{\footnotesize 421} \quad \text{See above, note 415.} \]
they agree to pay. When the prisoner can no longer tolerate this and starts crying, the ward leader says: “Can you pay us now? How much? When?” The prisoner then mentions an amount and promises to pay as soon as his relatives come to visit him. Once the prisoner promises, the ward leader allows him to go and sleep in a wider area of the same ward.

I had to remain in the “pile”. The next day, the ward leader again asked me whether I was ready to pay but I again said no. The ward leader then slapped me and transferred me to another ward, Ward No. 4, where older prisoners were kept.

Former prisoners also reported that drug use was widespread, gambling was encouraged by prison staff and that non-consensual homosexual activity was prevalent among inmates. Corruption, extortion and violence are prevalent as well. Detainees stated that they were subject to beatings by prison wardens but most custodial violence takes place between inmates. Every ward is under the control of a prison gang. They bully and assault inmates in order to extort protection money from their families. In particular, newcomers are targeted for ill-treatment and extortion.

4.3.1.4 “Push-backs” from Bangladesh

In December 2007, 110 new Rohingya arrivals were “pushed back” – forcibly returned - by Bangladesh to Myanmar. This trend continued and increased in 2008, and about 300 were deported without any formality. Most were either new arrivals or boat people crossing into Bangladesh with the intention of travelling on to Thailand and Malaysia. In 2009, the number dramatically shot up, and included unregistered Rohingya who had been living in Bangladesh for several years. In 2009, approximately 1,500 Rohingya were arrested and pushed back to Myanmar.

Arrests usually take place on the road or at checkpoints near the border area. But over the first two weeks of October 2009, the police, aided by locals, began rounding up Rohingya from their houses in the Bandarban District.
The repatriated Rohingya are at risk of prosecution in Myanmar for illegal exit and entry.\textsuperscript{422} To date, Rohingya returnees have not been re-arrested in Myanmar, but most have been unable to reinstate their names in their family lists and are thus illegally staying in their villages. At least one has fled to Bangladesh again.\textsuperscript{423}

One group of 14 Rohingya, including women, children and babies, all settled in Bangladesh for several years, were rounded up and pushed back at the BDR border outpost of Chakdala in Naikongchari on 16 July 2009. Forced back into Myanmar, they encountered a paramilitary border administration force (NaSaKa) patrol and nine of them were arrested, while the rest escaped. After being detained in the NaSaKa camp of Kha Moung Seik in North Maungdaw, three women and two men were produced to the Buthidaung court in Myanmar and, on 20 August 2009, they were sentenced to five years imprisonment. The children and babies were taken away from their mothers and handed over to grandparents in their village of origin.

One of the Rohingya men who managed to escape arrest along with his son recounted his ordeal. His wife is currently held in Buthidaung jail in Myanmar and his two other children have been handed over to his wife’s parents.

\textit{On 15 July 2009, we were arrested by the BDR. They took us to a house where there were three other Rohingya families. In the late afternoon, an Army pickup arrived and took us all to the BDR camp in Naikongchari. BDR then handcuffed the men, not the women and children. Altogether there were 14 of us, eight adults and six children. There was a newly married couple who had recently fled from Myanmar, one couple with a two-year-old baby, one family with two children and my family of five.}

\textit{On the morning of 16 July, the BDR took our individual pictures as well as a group picture of each family. After lunch, they ordered us to get on the same pickup. The men were handcuffed again. It was raining heavily and the pickup drove to the BDR border outpost of Chakdala. We had to get off and}

\textsuperscript{422} Section 13(1) of the 1947 Burma Immigration (Emergency Provisions) Act provides for sentence of up to 5 years imprisonment.

\textsuperscript{423} See above, note 419.
started walking accompanied by seven BDR men. It was still raining and we walked for about 45 minutes along a hilly path in the dense jungle.

Then the BDR men ordered us to keep walking in the same direction and said: “Within a few minutes, you will be in your country. Don’t try to come back to Bangladesh. If you do, we will shoot you.” The BDR men stood there watching us as we continued to walk.

After a few minutes we found a temporary shed made of leaves. Our children were wet and shivering so we decided to stop there. When the rain stopped, it was almost dark. The family with one child decided to remain in the shed and said they would follow us later. The newly-married couple, the other couple with two daughters and my family started walking again. My eldest son was on my shoulder, my 3-year-old daughter on the shoulder of the newly-married man and my wife carried our nine month old baby son. The other couple with their two daughters carried their own children.

After a short while, we lost the path and started walking through the jungle. It was soon completely dark but we kept walking one behind the other. I was the last in the line, my wife was just ahead of me and the two other couples were in front. Suddenly we heard whispering in Burmese and we saw a torch light. Since I was at the end of the line, I managed to hide in the bushes with my son and put my hand over his mouth to keep him quiet. Four NaSaKa men surrounded our group. I did not understand what they were saying but the newly married couple did. Quietly I moved deeper into the bushes. Four torches searched around but the rain helped me as the NaSaKa men did not bother to search further. Then they took away my wife, my two children and the other two families. My son tried to cry but I kept my hand over his mouth.

I cannot remember how long I waited there. Then I started walking in the opposite direction and continued for a long time. I was exhausted by the time I saw an empty house. It
must have been a maktab because there were many mats on the floor. I realised that I was in Bangladesh again and near a village.\textsuperscript{424}

4.3.1.5 Crackdown on Rohingya in Bangladesh

In January 2010, Bangladeshi authorities began an unprecedented crackdown on the unregistered Rohingya in Bangladesh. More than 500 Rohingya were arrested in January alone, up to 240 of whom have been charged and sentenced to prison terms for immigration offences, whilst the rest have been pushed back across the border to Myanmar.

This crackdown has been accompanied by growing anti-Rohingya sentiment amongst the public, a development which can have particularly harsh repercussions on the Rohingya community in Bangladesh. Fearing arrest and deportation, over 5,000 unregistered Rohingya in Bangladesh fled their homes in January 2010, and flocked to the Kutupalong makeshift camp in Ukhia, swelling the population of the camp to over 30,000. The residents of the camp do not receive any assistance or welfare, and are unable to work, because they risk arrest if they leave the camp in search of employment.\textsuperscript{425}

4.3.2 Rohingya Boat People in Thailand

The most common route taken by Rohingya to Malaysia is by boat from Bangladesh via Thailand, from where they travel overland to Malaysia. Smuggling and recruiting networks in North Arakan in Myanmar and Bangladesh reportedly offer two “packages” to Rohingya who wish to travel to Malaysia. The first option is sea passage to the shores of southern Thailand for less than US$300. The second includes transport beyond Thailand to Malaysia for between $700 and $1,000. Most Rohingya who undertake this journey are men between 18 and 40 years of age. However,

\textsuperscript{424} ERT interview with a Rohingya deported from Bangladesh, 25 July 2009, Cox’s Bazar, Bangladesh (ERT-SPD-BD-048).

children as young as eight years old have also been known to make the journey.426

The Rohingya begin their journey in North Arakan, travel through Bangladesh where they are joined by more Rohingya and some Bangladeshis, continue by boat to Thailand and then go overland to Malaysia. The sea leg of the journey lasts approximately one week. While the majority of boats depart from Bangladesh, some stop en route at Maungdaw in Myanmar to pick up more travellers, while a few begin their journey in Sittwe, Myanmar.

Many of the boats are in poor condition. Food, water and fuel are in short supply. The boat drivers are sometimes inexperienced, resulting in some boats getting lost at sea, others capsizing and still others drifting into national waters and being taken into custody by the coast guards of Myanmar, the Andaman Islands (India) and even Sri Lanka. Many boat people have disappeared at sea.

ERT research found that most of the boats which reach Thailand are intercepted at sea or apprehended when they land. The boat people are transferred to immigration detention (mostly in Ranong Detention Centre, Thailand, but also in Phangnga), sentenced to five to seven days of detention under the Thai Immigration Act, and informally deported to brokers across the Thai-Myanmar border. Brokers take over the detainees at this stage, and transport those who can pay a substantial fee from Myanmar to Malaysia via Thailand. Those who cannot afford the fee are beaten and sold as bonded labour to Thai fishing boats and plantations. At one point, the Thai authorities attempted to deport Rohingya formally into the hands of Myanmar’s immigration authorities, but they were sent back into Thailand the following day. The number of people making this hazardous voyage has increased over the years. It is estimated that approximately 3,000 persons made the journey in the sailing season of 2006-07. The following year, there were approximately 6,000 departures.

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A Young Rohingya’s Account of His Boat Journey

I embarked on the boat with my friend four days after Qurbani Eid (13 December 2008). The smuggler took us to Moheshkhali Island [near Cox’s Bazar] and we embarked from the main jetty. It was a cargo boat used to carry salt. It had two engines of 22 HP, one old and one new. We were 83 passengers onboard. I knew the exact number because the food and water was limited and rationed. The youngest passenger was 12 and the oldest around 60. The majority were young and newcomers from Maungdaw. There were only four or five Bangladeshis.

The sea journey lasted 12 days because the driver lost the way. There were 2 sacks of rice and 2 drums of water on board, but we ran out of food and water on the 10th day. We went hungry for the last 2 days. We met Burmese fishermen near Tenasserim Division. They did not provide us with any food but they gave us some fuel and showed us the direction to Thailand.

4.3.2.1 Push-Backs from Thailand

Thai authorities perceive the Rohingya as a threat to national security. On 28 March 2008 the Thai Prime Minister announced that Thailand was exploring the option of detaining Rohingya boat people on a deserted island: “To stop the influx, we have to keep them in a tough place. Those who are about to follow will have to know life here will be difficult in order that they won’t sneak in”.428 This statement was followed by a change in policy. Responsibility for dealing with the boat people was transferred from Thai Immigration to the Internal Security Operation Command of the Thai Military (ISOC) in December 2008. Boat people were detained on a remote island and then “pushed back” into the high seas. Between the end of November and mid-December 2008, six boats were intercepted and their passengers were detained on Sai Daeng Island by the ISOC. They reported being subject to beatings and torture on the island.

427 ERT Interview with a Rohingya boat person, June 2009, undisclosed location (ERT-SPD-ML-053A).

An Account of Detention on Sai Daeng Island

They put us all on a big Navy boat. The boat sailed to a hilly island [Koh Sai Daeng]. The island was deserted but we saw barbed wire as well as many shoes and clothes lying around in a clearing in the jungle. These things undoubtedly belonged to our own people and we suddenly wondered whether they would kill all of us. The island was quite small. It took just a couple of hours to cross its length. There were Thai soldiers all the time – 10 to 12 soldiers remained for two or three days and then the group was replaced by another group. They wore army uniform and had automatic guns and pistols. We were detained on that island for 15 days.

Several boats arrived during these two weeks. Every time a new boat was brought in to this island, the Army called us and ordered us to hide in the jungle so that people could not see us. In the end, there were about 575 boat people. The Thai soldiers beat us. We did not know why, perhaps to frighten us. They also dismantled the engines of all the boats that arrived.

The first push-backs occurred on 18 or 19 December 2008, when the military forcibly put 412 people from the six intercepted boats onto an engineless barge which had little food and water; then towed the barge out into the high seas for two days and two nights, and left them to drift. During this forced expulsion, one Rohingya child was reportedly thrown overboard. Between then and 19 January 2009, two further push-backs occurred. A total of over 1,100 boat people were cast to sea as a result. They drifted in different directions towards the Andaman Islands of India and Sabang Island and Idi Rayeuk of Indonesia, where the survivors were rescued. Over 300 people died.430

See above, note 427.

429 See above, note 427.

One of the survivors of the second push-back from Sai Daeng Island, in which 580 persons were forced onto four boats which had been tied together and had their engines removed, related his experience to ERT:

_One night two large Thai boats and four small ferry boats arrived. They tied four of our own boats to the large boat and put tyres between them. We had to board our own boats again. The Thais said they would carry us up to Malaysian waters. Then, at 2 a.m., the large Thai vessel started towing our four boats. They had put in each of the four boats two sacks of rice, two drums of water and one carton of biscuits._

_In the morning we realised that we had been taken to the high seas. They towed us for the entire day and the next night until about 10 a.m. on the following morning. Then they suddenly went full throttle, cut the tow ropes and disappeared into sea. At that moment, we knew that their promise to take us to Malaysian waters was false and we started crying. We found some plastic sheets, a wooden pole and ropes in the boat. We used the wooden pole as a mast and made a sail from the plastic sheets._

_On my boat, there were about 90 people. Soon we lost the other three boats. Most people cried but three of us remained strong. We steered the boat to sail towards the east. The wind was blowing from north to south. We drifted like this for four days and hit a storm on the fifth day._

On 5 January 2009, the boat referred to in the above testimony with 81 people on board was rescued by a fishing trawler and brought back to Thailand. The boat people were re-arrested and re-sent to Sai Daeng Island and pushed back again, with over one hundred others in the third round of push-backs on 19 January.

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431 See above, note 427.
4.3.2.2 The Aftermath

The survivors, rescued by the Indian and Indonesian authorities, were further detained.

**Indonesia** allowed the International Organisation for Migration (IOM) and UNHCR to interview 193 Rohingya and Bangladeshi boat people detained in a military base in Sabang Island (northern Aceh), and 198 boat people detained in a government compound in Idi Rayeuk (eastern Aceh). In December 2009, all rescued Rohingya boat people were released and issued UNHCR refugee certificates. They were accommodated in the local community and supported by IOM. At the time of writing most have already moved on and crossed over into Malaysia.

**India** has deported the Bangladeshi boat people rescued in the Andaman Islands, while 224 Rohingya remain in detention, with no access to them for the UNHCR. Thirty-eight of the Rohingya detainees requested the Indian authorities to deport them to Myanmar but were informed that Myanmar refused to re-admit them. The detainees are housed in an open jail in Port Blair.432

**Myanmar** repeated in the media that the Rohingya are not an ethnic group from Myanmar:433 It began the construction of a border fence on the Myanmar-Bangladesh border to prevent human smuggling and trafficking. But it also renewed an agreement with the UNHCR and allowed the expansion of some humanitarian programmes in north Arakan state.

**Bangladesh** increasingly prevented Rohingya access to its territory and arrested, detained or deported Rohingya. ERT field researchers have been informed that more than 3,000 Rohingya were “pushed back” to Myanmar between January 2009 and 31 January 2010.

**Thailand**’s actions were criticised by the international community as grave violations of human rights. Amnesty International stated that:

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432 This information was obtained by ERT researchers who made contact with the detainees in India and Indonesia.

the Rohingya’s situation has reached a critical stage over the last two months. The Thai government must stop forcibly expelling Rohingyas and provide them with immediate humanitarian assistance and cease any plans to proceed with more expulsions.434

4.3.2.3 Detention in Thailand

Thailand stopped its practice of “push backs” after January 2009. But on 26 January 2009, one more boat with 79 passengers was intercepted by the Thai Navy. Twenty-nine of the boat people claimed to be Bangladeshi, whilst fifty were confirmed as Rohingya. All of the people on board had been severely beaten by the Myanmarese Navy and were badly injured. They were not “pushed back” to sea, but taken to Ranong where medical care was provided, and several were transferred to Ranong hospital. The group, which included 12 children, was sentenced under the Immigration Act to five days imprisonment and fined. Since they could not pay the fine, they were jailed in Ranong prison for 30 days and then transferred to the Ranong Immigration Detention Centre. Thailand allowed the UNHCR to make an assessment of the situation, but not to screen the Rohingya detainees individually. Detainees reported to ERT that they were kept in cells so overcrowded they could not move, that they could not see daylight, and that their health seriously deteriorated. Two young Rohingya died. On 1 July 2009, 18-year-old Abdul Salam died of heart failure. On 13 August 2009, Hammah Tulah, 15, also died.

On 26 August 2009, four UN Special Rapporteurs and the Chairman of the UN Working Group on Arbitrary Detention sent a joint urgent appeal to the Thai Government regarding the plight of these Rohingya detainees.435 The urgent appeal, referring to the two deaths, stated that “in both cases, the rapid deterioration of their health may be due to the inadequacy and inefficiency of healthcare being provided to them during their detention period and particularly during the hours preceding their deaths.”436

434 Amnesty International, Myanmar minority group in peril, 2 February 2009.

435 The appeal was sent by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, together with the Chairperson of the Working Group on Arbitrary Detention, the Special Rapporteur on the human rights of migrants, the Special Rapporteur on extrajudicial, summary or arbitrary executions, and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

Following these two deaths in custody, the authorities decided to transfer the remaining 77 detainees to the Bangkok Immigration Detention Centre on 19 August 2009. Though better than Ranong, the Bangkok detention centre was extremely overcrowded. The detainees were housed in two cells – 66 persons in a large 40 x 12 foot room, and ten in a smaller 12 x 12 foot room. The emotional impact of their entire ordeal has been extremely strong. Many of the detainees were badly affected by the death of their two young fellow inmates. Some mentioned to ERT that they wanted to commit suicide. They were very anxious as to what will happen to them, how long they may remain in detention and whether they would ultimately be deported to Myanmar.

In February 2010, 28 of the Bangladeshi detainees were deported to Bangladesh. The 48 Rohingya and one Bangladeshi still remain in detention, one year after their ordeal of being pushed back to sea. It is unclear whether they will be released, and if so, when.  

4.3.3 Malaysia, a Final Destination

Like most other countries in the region, Malaysia too has ratified relatively few international human rights treaties. It has not ratified the Refugee or Statelessness Conventions, the ICCPR, ICESCR, CAT or CERD. The CRC and the CEDAW have been ratified, but with significant reservations.

Having entered Malaysia illegally, the vast majority of Rohingya are irregular immigrants. There is also a younger generation of Rohingya who were born in Malaysia and whose parents are irregular migrants. They are stateless. The Rohingya community in Malaysia can be categorised as follows:

(i) 16,662 Rohingya had registered with the UNHCR as of 2 December 2009.

(ii) An estimated minimum of 5,000 unregistered Rohingya also live in Malaysia. This estimate includes those who arrived after January 2006 when the UNHCR suspended the registration of Rohingya.

437  Bangkok Post, Fate of 48 Rohingya Unclear, 19 February 2010.


439  UNHCR Malaysia, Active Caseload Breakdown, 2 December 2009.
4.3.3.1 Detention Practices

The Rohingya in Malaysia are trapped in a repeated cycle of arrest, detention and deportation. Irregular migrants - men, women and children, are arrested and taken into custody by the police or moved directly into immigration detention camps. They can legally be held for up to 14 days before being produced before a magistrate. In court, they seldom have legal representation. Many are convicted of immigration offences, which they serve in prison before being detained further in immigration detention centres pending deportation. In rare cases, Rohingya and other irregular migrants are deported directly from immigration camps without being produced before a magistrate.

Until recently, even registered refugees were detained, sentenced and deported. However, in a recent positive development, any UNHCR-registered refugees who are arrested and charged are now released and the charges withdrawn.

Crackdowns on illegal immigrants dramatically increased after 2002. However, since mid 2009, there has been a shift in policy and crackdowns are less frequent. Some raids specifically target refugees and organisations which work on their behalf.Raids are generally conducted either by the police, Immigration Department, or more frequently as a joint RELA-Immigration operation. They do not differentiate between refugees, stateless persons and illegal migrants and generally disregard any UNHCR refugee documentation when making arrests.

4.3.3.2 Deportation

Administrative immigration detention in Malaysia is an interim measure which operates until detainees can be deported across the border. Most deportations are informal “push-backs” in which detainees are removed over the Malay-Thai border and into the hands of human traffickers and smugglers. Some, however, are formal handovers to Thai Immigration officials. As far as the ERT is aware, there are no deportations of Rohingya directly to Myanmar.

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440 RELA is the Malay acronym for Ikatan RELawan Rakyat - a People’s Volunteer Corps.
Deportation into the Hands of Human Traffickers

Once under the control of traffickers, the former detainees face two options:

(i) To raise money to bribe officials to facilitate their illegal journey back into Malaysia; or
(ii) To be forced into bonded labour on fishing trawlers and plantations.

Deportees reported to ERT that they were counted at handover and some witnessed an exchange of money between the traffickers and Malaysian immigration officials. The transaction allegedly costs 200 to 300 Ringgit (approximately 62 to 93 U.S. dollars) per head. The traffickers then take the former detainees to makeshift jungle camps or plantations on the Thai side of the border, where they are held under guard, sleeping in makeshift shelters, exposed to mosquitoes and other insects. Subsequently, the traffickers facilitate their contact with relatives and friends in Malaysia via mobile phone, in order to arrange for the payment of a ransom ranging between 1,600 and 2,500 Ringgit (500 - 780 U.S. dollars) as the price of their release and safe return to their homes in Malaysia. If they cannot pay within a short period of time, the deportees are first beaten and if this does not work, are then sold to labour traffickers. In many instances, a first instalment of the full amount is to be paid into a bank account in Malaysia and the rest handed over in cash when the deportee is sent home.

The abuse and violence meted out by traffickers has a devastating impact. A 21-year-old Rohingya from Buthidaung was among the 108 Rohingya boat people who sailed directly to Malaysia and were arrested near Penang on 4 March 2007. He was subsequently detained in Juru immigration depot and deported to Sungai Golok. He told ERT:

Every month, some of us were deported to Golok at the Thai border from Juru detention camp. I was deported to Golok with 28 other detainees. We were handcuffed in the immigration bus. It started from Penang at 5.00 p.m. and reached Golok in the early morning. The immigration counted us and handed us over to agents. These agents took us to their jungle camp on the Thai side of the border. There were many makeshift tents: a space open on all sides with plastic sheeting for a roof. The agents had walkie-talkies, mobile phones and guns. Twenty guards working for them were also present. They demanded 1,650 Ringgit [approximately 515 U.S. dollars] to
release me. We could use a mobile phone and call whoever we wanted. I rang my village people in Malaysia and begged them to rescue me from there. They gathered money for me. But those who failed to pay the ransom within six days were beaten by the agents’ men. In total, there were 45 deportees detained there. I stayed about five days in the agents’ camp. We got released, except for 15 of us. I don’t know what happened to them. These agents have contacts with Thai fishing trawlers. If detainees cannot secure the money, they are sold to work on boats.441

Return Journey from the Thai Border

When deportees manage to raise money to pay their ransom, the traffickers arrange the return journey to Malaysia. This journey can be hazardous. The deportees are transferred from agent to agent over the various legs of the journey, often using different means of transport at each stage. It usually includes a journey by truck, a long walk or run through thick jungle, followed sometimes by a motorbike ride, and a journey squashed in the boot of a car or almost frozen in a refrigerated meat trailer. There are instances when these vehicles are stopped at checkpoints and the deportees are re-arrested, detained and deported again. A 53-year-old Rohingya described his journey back to his home in Kuala Lumpur after buying his freedom from the border traffickers:

On the fourth night at the camp, a truck arrived and they had a list of the names of all those who had paid the ransom. At about 5.00 p.m., 47 of us – six Rohingya and the rest Chin [an ethnic group of Myanmar who also face acute discrimination; most Chin are Christian] – were put on the truck and we were covered with a plastic sheet. They transported us for about 20 miles and then ordered us to get down and run across the border into Malaysia. We ran for about three hours in the jungle, led by the agents’ guide.

They took us to an oil-palm plantation close to a road and ordered us to lie down. The agents had mobile phones. Cars

441 ERT interview with a former Rohingya detainee, 9 May 2009, Butterworth, Penang State, Malaysia (ERT-SPD-ML-059).
started arriving. They pushed eight people into each car. Each car carried a driver and an agent in the front seat, four people in the back seat and four people in the boot. I had to go into the boot; when I could not squeeze into it, the agent kicked me on my back to push me in. The car drove for about one hour to Pasir Mas [in the State of Kelatan]. I could not breathe as my nose was pressed against the roof of the boot. I heard that some people had died in car boots. Moreover, the road was bumpy and there were sparks caused by the friction of the car and the concrete surface of the road. I still do not know how I managed to survive this.

In Pasir Mas, a big lorry, carrying frozen beef, was waiting in the dark. All 47 people were put into that lorry and they locked the backdoor. We were hidden behind chunks of beef. The driver started the air cooler and it was freezing cold. There were checkpoints on the road and the police opened the backdoor of the lorry but they could only see beef. I spent six hours inside that lorry – from 8.00 p.m. to 2.00 a.m. Then we were brought to a place where six other cars were waiting. They again transferred eight people into each car. This time I was lucky and was put on the backseat. Three cars went to Penang and three went to Kuala Lumpur. I had to change car in Selayang [in the Klang Valley in the outskirts of Kuala Lumpur] and the agent asked me where I wanted to go. I gave him my address and at 6.00 a.m. I was dropped at my house in Kuala Lumpur.\footnote{ERT-SPD-ML-053}

\textit{Trafficking into Labour Bondage}

Men and boys who are unable to pay the traffickers are sold to other brokers in Thailand as bonded labour to work on fishing boats and in plantations. Women have reportedly been sold to brothels or into domestic servitude. The trafficked deportees who are sold to fishing trawlers are forced to work in slave-like conditions with little or no sleep, casting and mending nets and sorting fish. These long-haul fishing trawlers are on the high seas for periods of up to two years, without coming back to shore. They are serviced by supply

\footnote{ERT interview with a former Rohingya detainee, 3 May 2009, Kuala Lumpur, Malaysia (ERT-SPD-ML-053).}
boats which provide fuel, food and new crews, and collect the catch on a regular basis. The Thai ports of Pattani and Songkhla in Southern Thailand are reportedly the main hubs for recruitment in southern Thailand, where trafficking gangs on the border sell persons from Myanmar including Rohingya deported from Malaysia. Jumping ship is often the only way to escape, but there is a risk of falling back into the hands of traffickers.443

A 48-year-old Rohingya from Sittwe who was trafficked onto a Thai fishing trawler in 2008 recounted his experience to ERT:

The brokers took us into a jungle where four Rohingya men, whose relatives could pay them, were separated from our group. The rest of us were kept there until the next day without food. The next day two large pickup trucks took us to the fish harbour of Pattani – about a three hour drive. We were 26 Rohingya. Some Mon people from Myanmar acting as agents for the Thais bought us. They told us that we had been sold for six months. Twenty of us went to one fishing company and six to another. I was among the group of six and we were brought to a fishing trawler, which stayed in the port for two days. We were watched by armed guards and could not escape.

Our main work was to cast out and pull in nets from the sea. There were 35 crew onboard – mostly Thai plus eight people from Myanmar: six Rohingya and two Rakhine who had also been sold. We had to work days and nights when the catch was good. I could not sleep for seven days during the first trip. When there was less fish we could sleep a bit. We were given two yaba tablets [methamphetamine] every day, sometimes even four, so we did not feel tired or hungry. The first trip lasted 13 days. We anchored for one day in the Pattani harbour where we had to load and unload the trawler. It was impossible to escape.

Then our trawler sailed to the high seas. After 15 days, another vessel arrived to collect the catch and bring food and other necessities for the crew. Our trawler did not return to

shore. Every 15 days, the supply boat came and left. Nobody was beaten on my trawler but I heard that some people were beaten on other boats.

After 45 days I fell sick. I could no longer eat or drink. The captain watched me for 15 days. He ordered me to work but gradually I lost all my energy. One day the captain hit my head with his torchlight. I told him that I was sick. He checked with the cook who confirmed that I had been unable to eat any food for the last two days. The captain then realised I was being genuine and he became kind to me. I think he did not want to let me die. When the supply boat next arrived, he gave me the option of returning to port. I agreed instantly. I was returned to shore in Songkhla after two months at sea. I heard that some sick crew members on other boats were simply thrown overboard or shot dead. I was lucky. I was sent back to Pattani where the fishing company handed me back to the Mon broker.

This time, I told the broker that I had a friend in Penang. He called him and demanded 1,300 Ringgit [406 U.S. dollars] to release me and to deliver me to Penang. The man then carried me from Pattani to Golok and handed me over to the traffickers at the border who sent me to Penang.444

4.3.3.3 Positive Developments

It must be noted, however, that some recent and positive developments have taken place:

(i) The deportation of irregular immigrants including the Rohingya into the hands of traffickers at the Thai border is reported to have stopped, and the UNHCR has not received a single confirmed report of deportation since July 2009. However, this drop in deportations has led to severe overcrowding in detention centres which must be addressed as a matter of grave urgency.

(ii) After the publication of the U.S. Department of State 2009 Annual Report on Trafficking in Persons, in which Malaysia is ranked very poorly, the Malay-
sian police made nine arrests, including five immigration officials, for their alleged involvement with a trafficking syndicate which sells Rohingya into forced labour.

(iii) Since March 2009, the Malaysian government has requested the UNHCR to screen Myanmar nationals, including Rohingya detained in immigration camps, in order to verify or determine their status. However, while this development has rendered those detained in immigration camps more accessible, the UNHCR continues to have at best an *ad hoc* access to Malaysian prisons.

While it is premature to read a lasting shift in Malaysian policy, it is hoped that the Malaysian government will build on these developments to establish a more progressive, rights-respecting immigration regime.

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Chapter 4 has reviewed practices of immigration detention in Australia, Bangladesh, Egypt, Kenya, Malaysia, Myanmar, Thailand, the UK and USA. These countries were grouped into three types, based on both geographic and thematic closeness of the specific issues and challenges faced. Firstly, we looked at the well developed immigration detention regimes of the United States, the United Kingdom and Australia. Both Australia and the UK have ratified the 1954 Convention, but none of the three countries have recognised the statelessness challenge in their immigration policies. Analysis of the three countries shows that their law, policy and jurisprudence has been mainly conservative, but there have been occasional progressive leaps, particularly at the courts. The U.S. cases of Zadvydas and Martinez, which established the principle that non-citizens in detention pending removal have a right to challenge their detention if deportation has not been possible for six months, are a strong example in this regard.

Kenya and Egypt – two countries with large, porous borders – face significant irregular immigration related problems.
Many who enter these countries irregularly have ineffective nationality. Neither Kenya nor Egypt have developed clear policies and practices pertaining to immigration detention, which consequently occurs in a haphazard manner with immigration detainees often being held in regular prisons. The failure of these governments to recognise statelessness as a significant issue has resulted in many individuals being detained indefinitely.

The Rohingya crisis has created immigration problems for most neighbouring countries in the region including Malaysia, Thailand and Bangladesh. None of these countries have ratified the 1954 Convention or the 1951 Refugee Convention. Some stateless Rohingya in Bangladesh and Malaysia are recognised as refugees, but the vast majority lead a life of irregularity and uncertainty. Raids, push-backs, deportations, arbitrary arrest and detention as well as human trafficking and smuggling are common problems in all three countries.

Key Findings:

1. ERT research found a clear connection between immigration detention and statelessness. This has not been fully understood, either by national immigration regimes or by NGOs and lawyers working on behalf of the rights of detainees. The stateless (de jure and de facto) often form a significant percentage of immigration detainees because in many instances they do not have documentation and they cannot be removed. Immigration detention regimes which are not sensitive to statelessness are likely to discriminate against the stateless by failing to recognise their special status.

2. Mandatory immigration detention (particularly for Foreign National Prisoners), and policies which carry a presumption in favour of detention, often lengthy, are becoming increasingly attractive to policy makers.
3. There have however been some positive steps, through jurisprudence and progressive policies, which have drawn from international human rights standards relating to detention and created stronger safeguards for immigration detainees.

4. No states looked at by ERT maintain comprehensive statistics on the stateless, or record those who have no legal nationality or no effective nationality. Nor do they record the reasons why detained individuals cannot be removed in such a way that statelessness as an underlying element can be identified.

5. Very few countries have statelessness determination procedures in place, with the result that individuals who cannot be removed because they have no right to enter another country are detained under immigration laws “pending removal”, although removal is practically impossible.

6. Particularly in the UK, stateless detainees who are released from detention, continue to face restrictions on their liberty (through electronic tagging for example) and are often pushed into destitution in breach of their social and economic rights. This is because they are not allowed to work after release, nor are they entitled to social welfare benefits.

7. The inaction and indifference of state authorities both in the country of detention and in the country of nationality or habitual residence of stateless detainees is often a major factor contributing to non-removability, and consequent indefinite detention. There have been such cases in all countries researched, but this is particularly true of Kenya and Egypt.