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HUMAN RIGHTS WATCH

HRW.org

May 14, 2014

The Honorable Jeh Johnson
Secretary of Homeland Security
3801 Nebraska Avenue NW
Washington, D.C. 20528

Via electronic mail and USPS

RE: US Removal and Return Policies under International Law

Dear Secretary Johnson:

As you continue to review the Department of Homeland Security's policies on involuntary deportations ("removal policies") and voluntary return ("return policies"), we urge you to keep in mind the international human rights law obligations of the United States. The United States is a party to the International Covenant on Civil and Political Rights (ICCPR), which establishes key protections for the family unit and prohibits the use of arbitrary detention. Administrative reforms should contribute to bringing US removal and return policies and practices into compliance with international law.

The ICCPR states that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State" (art. 23(1)). It also provides that no one shall be subject to "arbitrary or unlawful interference" with one's family (art. 17 (1)). The Human Rights Committee, the international expert body that monitors compliance with the ICCPR, has explicitly stated that family unity imposes limits on states' power to deport.[1] Current DHS removal and return policies are failing to meet these obligations.

We suggest the following considerations to inform your review:

1. Give proper weight to family relationships, as well as other equities, in applying prosecutorial discretion, including in cases where the non-citizen in question has a criminal conviction.

The Immigration and Customs Enforcement (ICE) prosecutorial discretion policy outlined in part by the June 17, 2011 memo from Director John Morton

[1] In *Winata v. Australia*, the Human Rights Committee found a violation where Australia sought to deport two Indonesian nationals whose 13-year-old son, Barry, had been born in, and had become a citizen of, Australia. The committee rejected Australia's arguments that the petitioners were asserting a "claim[] to residence by unlawfully present aliens," noting that instead the petitioners merely asserted that "forcing them to leave would be arbitrarily interfering with their family life." Human Rights Committee, *Winata v. Australia*, Communication No. 930/2000, U.N. Doc. CCPR/C/72/D/930/2000 (2001).

does recognize the need to consider "the person's ties to the community, including family relationships."[2] However, this family consideration appears to be consistently trumped by ICE's civil immigration enforcement priorities. Those priorities state that persons convicted of crimes are highest priority for removal.[3] But as ICE's own 2012 numbers show, almost 50 percent of non-citizens deported with criminal convictions consist of people convicted of immigration crimes and traffic offenses. They include people who have been convicted of immigration crimes, such as illegal entry or reentry, often committed while trying to reunite with US citizen family members.[4] Another 21 percent were convicted of nonviolent drug offenses, with the most common drug offense being possession of marijuana.[5] At a time when the Obama administration is calling for significant changes to federal sentencing laws for drug trafficking crimes, tens of thousands are deported permanently each year away from their families and communities, often for much less serious offenses.

The Department should undertake a rigorous balancing test, weighing the family harm caused by a potential immigration enforcement action with the severity of the crime, the length of time the person has lived in the United States, rehabilitation, and other factors. The Department could also, while applying this balancing test, impose a "statute of limitations" that would limit consideration of crimes that occurred in the distant past, particularly with regard to lawful permanent residents, refugees, and non-citizens who would otherwise be eligible to gain lawful status through a family petition. As you know, changes to US immigration law under the Anti-Terrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Responsibility Act of 1996 essentially eliminated the ability of non-citizens to have a hearing in which such factors were given due consideration if they had a conviction from a broad range of offenses, including minor and old offenses. These amendments led to policies that violate several basic human rights, including the right to raise defenses to deportation, the right to family unity, proportionality, and the right to protection from return to persecution for refugees.[6] A prosecutorial discretion policy that gives immigrants with compelling equities an opportunity for relief from deportation would help to ameliorate these violations until more permanent legislative change can be enacted.

We urge a prosecutorial discretion policy giving proper weight to family protection apply across the Department's agencies, including Customs and Border Protection. The policy should consider family protection regardless of the time since an immigrant last entered the country, amending current priorities aimed at the deportation of "recent border crossers," which often sweep up those with strong ties in the US. It should also make immigrants with

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[2] US Immigration and Customs Enforcement, US Department of Homeland Security, Memorandum regarding "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens," June 17, 2011, http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf (accessed May 13, 2014).

[3] US Immigration and Customs Enforcement, US Department of Homeland Security, Memorandum regarding "Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens," March 2, 2011, http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf (accessed May 13, 2014).

[4] Human Rights Watch, *Turning Migrants into Criminals: The Harmful Impact of US Border Prosecutions*, May 2013, http://www.hrw.org/reports/2013/05/22/turning-migrants-criminals-0. Data from the US Sentencing Commission shows a clear and marked shift of prosecuting a great proportion of non-citizens with minor or no criminal history for felony reentry. Data on family ties is more limited, but judges and attorneys across the border reported a significant percentage of defendants had US citizen immediate family.

[5] US Department of Homeland Security, "Immigration Enforcement Actions: 2012," December 2013, http://www.dhs.gov/publication/immigration-enforcement-actions-2012 (accessed May 11, 2014); Transactional Records Access Clearinghouse, "Secure Communities and ICE Deportation: A Failed Program?" April 8, 2014, http://trac.syr.edu/immigration/reports/349/ (accessed May 11, 2014).

[6] Human Rights Watch, *Forced Apart*, July 2007, http://www.hrw.org/node/10856/section/8, Chapter VI: US Deportation Policy Violates Human Rights.

strong family ties in this country ineligible for expedited removal by Immigration and Customs Enforcement or Customs and Border Protection, regardless of prior criminal history.

2. Support the goals of the Deferred Action for Childhood Arrivals program by protecting immediate relatives

Beyond improving its prosecutorial discretion policies, the Department could take an additional important step to protect families. The Obama administration has recognized the damage caused by lack of action on immigration reform by establishing the Deferred Action for Childhood Arrivals (DACA) program, which defers immigration enforcement action for people brought at a young age to the United States. This program recognizes that the status quo harms young people unnecessarily and provides necessary relief: a recognized, temporary immigration status until reform legislation is passed. The Department should expand this program to immediate relatives of DACA recipients. As the administration recognizes the harms caused by dedicating immigration enforcement resources to young people, it should recognize the similar harms of seeking to remove their parents. It is counterintuitive to protect a child or young person who has lived several years in the country but leave their parent at risk of removal—it would be using one policy of the government to undermine another. We therefore strongly encourage the Department to seek expansion of the DACA program to immediate relatives.

3. Provide relief from the visa backlog

The Department should consider the vast number of people living in the United States without status who would be likely to qualify under a family visa but are currently ineligible due to a backlog in available family visas. Many of the nearly 17 million people in the United States who are living in families with at least one unauthorized immigrant family member have valid applications for legal status filed by their US citizen or permanent resident family members. However, low numerical limits for family visas and processing inefficiencies have led to a massive backlog. An adult son or daughter from Mexico, for example, may wait almost 20 years after a petition is filed by a US citizen parent. This backlog creates tremendous pressure throughout the immigration system, leading to increased illegal immigration and visa overstays.

The immigration reform bill passed by the Senate earlier this year attempted to address this visa backlog by providing methods to eliminate the backlog over 10 years. The administration should consider the harms to families caused by this backlog, and offer deferred action to adults living without status in the US who, but for the backlogs, would be eligible to adjust their status on the basis of a family relationship. Bureaucratic delays should not be a justification for interference with family unity.

4. Address Arbitrary Detention

In addition to protecting families, we urge you to address your Department's excessive and unnecessary detention policies. Article 9 of the ICCPR states that "[n]o one shall be subjected to arbitrary arrest or detention." Arbitrariness pervades US immigration detention policy. Two of the most prominent examples of this arbitrariness are the mandatory detention provisions under US law and the immigration "detention bed" mandate. We urge your reforms to ease the excessive use of immigration detention.

a. Develop alternatives to mandatory detention

Since at least 1996, ICE has enjoyed relatively unchecked powers to place non-citizens into detention. Mandatory detention laws require tens of thousands of immigrants to be detained each year without individualized consideration of whether they are a threat to public safety or a flight risk. These laws include detaining non-citizens who have committed crimes but have already served their sentences, nonviolent offenders, lawful permanent residents, and individuals who committed offenses decades ago. ICE also detains many people even after court rulings in their favor; people granted refugee status who fail to provide proper paperwork; and people for whom detention conditions can be particularly harsh, such as individuals with disabilities and unaccompanied minors. Not only are ICE's detention powers broad, they are sometimes without temporal limit. Immigrants may be placed in custody for months or years with no fixed or clear end to their detention.

The United Nations Working Group on Arbitrary Detention recognizes "the sovereign right of states to regulate migration" and yet cautions: "immigration detention should gradually be abolished.... If there has to be administrative detention, the principle of proportionality requires it to be a last resort."[7] This means that immigration detention should only be used in those cases in which legitimate government interests cannot be fulfilled through any other means. While the United States has a legitimate interest in detaining some non-citizens to guarantee their appearance at hearings and to ensure the deportation of those judged to be removable, the power of immigration authorities to detain people is currently too broad, leading to unnecessary and unfair detention. We urge you to embrace reforms that move away from this broad detention regime, including ensuring a prompt bond hearing for every non-citizen who is detained, including non-citizens who fall under mandatory detention provisions. We also urge you to strictly implement and consider expanding ICE's 2012 policy directive against detainee transfers, since such transfers may prolong the amount of time immigrants are detained, and can slow down legal proceedings and interfere with basic due process rights.

In accordance with the human rights requirement that detention should be used as a last resort, you should require your agents to apply the least restrictive form of detention, including alternative forms of custody such as electronic monitoring, for all potential detainees. At a minimum, your department should formulate an administrative policy that would extend the right to a bond hearing for all detained immigrants, now judicially recognized in the 9th circuit,[8] to immigrants across the country.

b. Clarify the scope of the immigration "detention bed" mandate

Current congressional appropriations language requires that funding be made available to ICE to "maintain a level of not less than 34,000 detention beds."[9] We agree with your interpretation of this language that it requires the capacity for

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[7] UN Human Rights Council, "Report of the Working Group on Arbitrary Detention," A/HRC/13/30, January 18, 2010.
[8] *Rodriguez v. Robbins*, 715 F. 3d 1127 (9th Cir. 2013).
[9] House Resolution (HR) 933, Consolidated and Further Continuing Appropriations Act, 2013.

34,000 detainees but not that the beds be filled at all times. Quotas distort considerations about the best use of resources to address public safety and security threats. Your announced reforms should formalize the position that legislative language that mandates that an average of 34,000 people be detained daily by ICE is arbitrary and unfair and does not comply with the US commitment to not subject people to arbitrary detention.

In conclusion, we appreciate that you are not undertaking this review process lightly, and that you are endeavoring to implement an immigration enforcement policy that better addresses the country's priorities focusing on threats to national security, border security, and public safety.[10] We strongly urge you to not delay these reforms. Human rights obligations are not negated if one branch of government is unable to reach a resolution as to how to comply with them. If the legislative and judicial branches have failed to reach a resolution, the executive branch has the responsibility to take all the necessary steps bring the United States into compliance with its international legal obligations. As Congress as a body has failed to address the flaws in the US immigration system for over a decade, it is incumbent on the executive to use its available powers to establish immigration enforcement policies that respect family unity, due process, and other internationally recognized human rights within the United States.

We hope to be able to discuss these recommendations with you soon. Thank you for your attention to these recommendations.

Sincerely,

Antonio M. Ginatta
Advocacy Director, US Program

[10] Ted Hesson and Jordan Fabian, "A Ray of Hope for a More Humane Deportation Policy?" Fusion, May 7, 2014, (accessed May 13, 2014), http://fusion.net/justice/story/obamas-team-mulls-deportation-policy-pitch-661711.