

CIHRC Case 8/06 The “Balseros” Case (Cuban Migrants Arriving by Sea)

Final Report of the Cayman Islands Human Rights Committee

Introductory Comment

1. The many and varied human rights questions raised by the migration of Cuban nationals have made this investigation a challenging and lengthy undertaking for the HRC. In the course of its research and deliberations, the HRC has been asked to consider the relative merits of the rights of Cuban nationals, who assert that their fundamental political freedoms are curtailed by the governing regime in Cuba; the rights of refugees fleeing from Cuba for numerous different reasons; the rights of states to protect their borders; the rights of individuals not to be exposed to, or placed at risk of, human trafficking; and essentially, the rights of all persons not to be subjected to acts of terrorism that could be facilitated by the unregulated migration of persons. In many cases these various human rights claims vie with one another, thereby further complicating the picture.
2. The wide-ranging and extra-territorial nature of these issues have also placed the HRC in a predicament in that no matter what the HRC recommends as the most appropriate course of action for human rights in the Cayman Islands, it will not resolve the underlying problems that give rise to illegal Cuban migration and many of the associated human rights concerns in the first place. The Cayman Islands is thus caught in a situation not entirely of its own making, largely due to its geographical position. For so long as there is a perceived benefit in leaving Cuba and in reaching the United States (at least amongst a significant sector of the Cuban population), it would appear that there is going to be illegal Cuban migration. Recognising this inherent limitation, the HRC has nonetheless focused on the actions of the Cayman Islands Government, as they impact on this wider problem.
3. That said; the actions of the Cuban government, such as they relate to any determination of whether an individual has a well-founded fear of persecution, are a relevant and important consideration of which the Cayman Islands Government must be fully cognizant when determining asylum applications and repatriating illegal Cuban migrants. The Cayman Islands Government, as this Final Report will make clear, is subject to a number of obligations arising out of both international maritime law and international human rights law, which if not complied with will result in a deterioration of the overall human rights situation. It therefore follows that whilst the Cayman Islands HRC possesses neither the mandate nor the resources to mount an investigation into the status of human rights in Cuba, it does have a legitimate interest in some aspects of this situation when monitoring the actions of the Cayman Islands Government.

The Issues

4. For the purposes of its investigation and this Final Report, the HRC was initially asked to address; or subsequently identified; a need to examine the following issues:
 - The policy of the Cayman Islands Government for encountering Cuban migrants arriving by boat, along with the practical application of this policy.
 - The policy of the Cayman Islands Government towards the processing of Cuban migrants, including repatriation, detention and asylum applications.
5. Both of these issues are largely regulated by a Memorandum of Understanding (MoU) between the respective Governments of the Cayman Islands and the Republic of Cuba and the Internal Guidelines adopted in the Cayman Islands to give effect to this MoU.

The Memorandum of Understanding

6. In 1999, the Government of the Cayman Islands entered into a MoU with the Government of the Republic of Cuba, which importantly established that Cuban migrants, who were not deemed to be refugees, as defined by the 1951 United Nations Convention relating to the Status of Refugees, could be repatriated to Cuba. This MoU has been supplemented by two sets of Internal Guidelines issued by the Cayman Islands Government, which were both designed to regulate the manner in which Cuban migrants are received, accommodated and repatriated.
7. The first set of guidelines was approved on 14th July 2004 and provided *inter alia*:
 - “It is the policy of the Cayman Islands government to lend humanitarian assistance to Cuban nationals who come into Cayman Islands waters or come ashore in their efforts to leave Cuba by sea and who seek assistance in continuing their journey. It is not intended, however, that the Cayman Islands should serve as an interim stop and particularly as a base for improving facilities and arrangements. Instead, Cuban nationals who arrive in the Cayman Islands with the declared intention of continuing on are expected to do so in a timely manner.”
 - “Cuban migrants who arrive in the Cayman Islands or in Cayman waters by craft, and who express no desire to remain in the Cayman Islands, will be free to continue their journey in such craft if they so wish.”

- Cuban migrants who arrive in the Cayman Islands without means of continuing their journey, will be repatriated to Cuba unless they are able to continue their journey on another craft of Cuban origin within forty-eight (48) hours of their arrival.”
- “Cuban migrants who arrive in the Cayman Islands by craft and who express a desire to continue on their journey may be afforded assistance in the following areas if they so request:
 - Food;
 - Water;
 - Fuel;
 - Clothing including raincoats;
 - Flashlights; and
 - Repair of their craft.”

New Internal Guidelines

8. These provisions were altered by new Internal Guidelines issued on 11 January 2005. As the Government Information Services press release of 12 January 2005 states:

“[M]igrants encountered in Cayman’s territorial waters or who come ashore any of the three Islands will be refused permission to land and will no longer be given assistance to enable them to continue their journey. Those able to depart immediately and wishing to do so will be allowed to leave. Otherwise they will be detained and repatriated to Cuba.”

9. Two explanations for this change in Cayman’s policy are identified in the new Internal Guidelines. The first reason cited is the “increased migration of Cuban nationals through the Cayman Islands.” The thrust of this explanation is that the Cayman Islands is unable to cope with a large scale migration of Cuban nationals; a claim which is supported by the experience of the last mass migration to Cayman, between 1993 and 1995, when over 2,000 Cuban migrants passed through Cayman waters and 1,100 landed in the Cayman Islands.
10. Since the mass arrivals in the 1990’s, the Immigration Department has confirmed to the HRC that there have been approximately 300 arrivals in boats from Cuba per year. Although it is too early to reasonably assess whether the new Internal Guidelines have provided an effective disincentive to illegal Cuban migrants, the HRC does accept the contention that if the Cayman Islands was to provide assistance to Cuban migrants, the number of migrants could indeed increase. Moreover, the HRC also accepts that there is the potential for this number to dramatically increase if the political situation



in Cuba were to become less stable. The Cayman Islands Government does therefore have a legitimate interest in protecting itself from large numbers of economic migrants and accordingly, may properly adopt appropriate policies to achieve this end. However, even measures designed to achieve legitimate objectives may be called into question if they excessively impinge upon human rights.

11. The new Internal Guidelines go on to identify the “reported incidents of violent methods used to commandeer vessels to transport Cuban migrants to the Cayman Islands” as a second explanation for the current policy of denying assistance to Cuban migrants in any onward journey. It follows that if the Cayman Islands Government was to facilitate Cuban migrants by assisting them in their onward journey, it could also be encouraging criminal activity ancillary to the illegal transit of Cuban migrants. This would clearly also amount to a legitimate concern for the Cayman Islands Government.
12. Furthermore, when this matter was referred to the HRC, it was also done so on the basis that the potential for exploiting the transit route between Cuba and the Cayman Islands could also result in human trafficking. If founded, this would place a human rights obligation on the Cayman Islands Government to take preventative action. Indeed, the new Internal Guidelines could be interpreted as precisely this kind of preventative action. The short time that it has recently taken some Cuban migrants to reach the United States from Honduras, having successfully navigated the treacherous sea journey to Honduras via the Cayman Islands, serves both to illustrate the feasibility of this claim and to underscore the seriousness of the resulting concern.
13. In a time of heightened sensitivity to terrorist threats, the HRC also accepts that all states have a responsibility to ensure that their jurisdiction is not used as a transit point for individuals engaged in terrorist activities. Whilst the HRC is not aware of any evidence that points to the Cayman Islands being used in this way, it does acknowledge that if the transit route between Cuba and the United States, via the Cayman Islands, Honduras and elsewhere in Central America became even more established, this could give rise to terrorist fears. This therefore provides a further justification for a policy that seeks to discourage Cuban migration via the Cayman Islands. That said; the HRC once again notes that even legitimate objectives are subject to human rights considerations and can be overridden if the negative impact on human rights is disproportionate to the action taken in pursuance of the legitimate objective.
14. Having noted the various arguments put forward in defence of the policies adopted by the Cayman Islands Government, as contained in the MoU and the Internal Guidelines, the HRC has repeatedly stated and maintains that these must be weighed against their impact on human rights of individuals. This Final Report will therefore attempt to identify these human rights concerns and undertake this balancing exercise in the context of each of the issues raised by the Case.

The Policy of the Cayman Islands Government for Encountering Cuban Migrants Arriving by Boat

15. The current policy of the Cayman Islands Government for encountering Cuban migrants arriving by boat has given rise to a number of human rights concerns. In no particular order, these include:
- The denial of any form of assistance to Cuban migrants arriving by boat places at risk the lives of all persons that continue their journey unaided.
 - The denial of any form of assistance to vulnerable persons, such as young children and pregnant women, particularly endangers the lives of these Cuban migrants who continue their journey.
 - The denial of medical assistance to persons in need of such assistance also endangers the lives of these Cuban migrants, in particular, who continue their journey.
 - The alleged practice of towing crafts beyond a point so that they are no longer swept ashore, this being the only impediment to the boat continuing its onward journey, if true, potentially renders the Cayman Islands authorities complicit in any subsequent loss of life that may befall the Cuban migrants who continue their journey.
 - The alleged ramming of a boat by the Cayman Islands authorities endangered the lives of those Cuban migrants on that vessel.
16. Appraising these concerns, the HRC began by considering the nature of the obligation owed to all persons encountered at sea. Aiding those in peril at sea is one of the oldest maritime obligations. This obligation is codified in a series of international conventions which form the basis of international maritime law and have long been recognised in the Cayman Islands, including:
- The United Nations Convention on the Law of the Sea (UNCLOS), which was extended to the Cayman Islands on the 25th July 1997;
 - The International Convention for the Safety of Life at Sea (SOLAS), which was extended to the Cayman Islands on the 9th May 1988 and its 1988 Protocol, which was subsequently extended to the Cayman Islands on the 30th January 2004;
 - The Convention on the High Seas, which was extended to the Cayman Islands on the 14th March 1960.



17. Particularly noteworthy amongst the various provisions contained in these international conventions is Article 98 of UNCLOS, which establishes in paragraph 2 that:

“Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.”

17. With Cayman Islands Government clearly cognizant of the dangers faced by Cuban migrants at sea, it would appear that the duty to render assistance in UNCLOS requires the establishment “an adequate and effective search and rescue service” in order to assist such persons.
18. Having identified the position of persons in need of assistance at sea, and performed any necessary rescue, thereby eliminating the immediate danger; the question then becomes what should the Cayman Islands authorities do next? Should the Cayman Islands Government provide Cuban migrants with any assistance required to safely continue their onward journey? Or, should the Cayman Islands Government bring ashore, by force if necessary, all persons who were in need of assistance and convey them to a place of safety; which unless they fall to be considered under the Refugee Convention, would most likely mean repatriation to Cuba.
20. The first option – providing assistance – would certainly go some way to ensuring that the lives of Cuban migrants are not put at such great risk. However, this by no means eliminates all of the risk. The reality of the situation is that the vessels used by Cuban migrants, even if repaired and made notionally seaworthy, are either makeshift or extremely old and are still at risk during what all are agreed is an extremely hazardous journey. Moreover, this option also enmeshes the Cayman Islands Government in the future of the Cuban migrants as they continue this journey. Thus, if a vessel, which has been patched-up with the assistance of the Cayman Islands Government was to then encounter difficulties, which in turn led to a loss of lives, it could be argued that the Caymanian authorities are implicated in, and in part responsible for, such an unfortunate outcome.
21. The second option – apprehension and then repatriation of all illegal migrants – is therefore preferable because it protects the lives of the Cuban migrants and ensures that the Cayman Islands Government has full control over the outcomes of the actions or decisions that it takes. Rather than be left at the mercy of the seas, if the Cayman Islands Government opts to bring Cuban migrants ashore, it then has complete control over their destiny.
22. The change in Caymanian policy, embodied in the second set of Internal Guidelines, is at least a partial recognition that the second option outlined here is preferable. By restricting the assistance that may be provided and making the onward

journey even less attractive, the new Internal Guidelines appear to make coming ashore the only real option, after which repatriation follows, unless the Refugee Convention is engaged.

23. From a general humanitarian perspective, the problem with the new Internal Guidelines, however, is that there are still a number of Cuban migrants, particularly those in need of medical assistance in various forms, including the elderly, young children and pregnant women, who are able to opt to continue with a treacherous journey, but are obliged to do so without any assistance. If these persons require rescuing, the maritime conventions would provide a sustainable legal basis for apprehending such persons, potentially bringing them ashore and if necessary repatriating them. However, the issue that the HRC has then spent some considerable time debating is how this would work in practice if the Cuban migrants did not want to be rescued and instead were inclined to continue their journey in what may very well be unseaworthy vessels.
24. This dilemma would be eased to some extent if an additional maritime convention – the International Convention on Maritime Search and Rescue (SAR) – had been extended to the Cayman Islands. SAR deals more extensively with the precise detail of maritime search and rescue and establishes an obligation to “ensure that assistance be provided to any person in distress at sea ... regardless of the nationality or status of such a person or the circumstances in which that person is found.” SAR also clearly identifies that the term “rescue” not only encompasses the operation to retrieve persons in distress and to provide for their initial medical or other needs; but also extends to delivering them to a place of safety.
25. Furthermore, there are also relevant recent amendments to both UNCLOS and SAR, which only entered into force on 1st July 2006, neither of which have, to the HRC’s knowledge, been extended to the Cayman Islands. These amendments were adopted as a direct response to concern surrounding the treatment of persons rescued at sea; and in particular a number of incidents involving asylum seekers, refugees and stowaways, which threatened to negatively impact on the integrity of the global search and rescue system established under the auspices of the International Maritime Organisation. Of particular relevance here is a definition of persons in distress, which has now been added to chapter 2 of SAR.
26. Notwithstanding these advances, the HRC’s extensive research has not identified any definitive international resolution to the question of what to do with persons who may be in distress or in vessels that are not deemed to be seaworthy, but who do not wish to be rescued. Thus far, the advances noted above have essentially sought to ensure that persons, including refugees and potential asylum seekers, are rescued and that masters of ships, for example, provide the necessary assistance. It is evident therefore that the international maritime system is in a developmental phase and that it requires further refinements to effectively deal with precisely the issue that is now before the HRC. In addition to ratifying SAR itself, along with the amendments to various international maritime conventions that came into force in 2006, the HRC urges the Cayman Islands Government and, where appropriate because it has responsibility for international affairs, the United

Kingdom Government, to actively engage with the International Maritime Organisation to establish a resolution in international law for this particular issue.

27. Having accepted that the provision of assistance is not desirable; not least because it may facilitate infringements of other human rights; the HRC proceeded to investigate whether, in the absence of any clear direction from international maritime law, there was an alternative humanitarian basis for intervening to potentially save the lives of Cuban migrants, even if this assistance was not welcomed. Following further debate, the HRC concluded that there was a moral, if not legal, justification for humanitarian intervention, which at times should be exercised even if this went against the wishes of the Cuban migrants. The extent of the intervention thought permissible by the HRC would depend upon the position at which the vessel was encountered.

28. Where a vessel is encountered in territorial waters, as defined in the Port Authority Law (1999 Revision) as “that part of the sea adjacent to the Islands being within 12 miles of the coast at low tide,” there is also a domestic legal basis for intervention here, contained in section 14(2)(f) of the same Law, which provides that whoever:

“... navigates any vessel in such a manner as to cause damage or risk of damage to any person or property; ... is guilty of an offence ...”

29. The HRC therefore proposes the following refinements to the current policy:

- (i) Where the vessel is encountered outside Caymanian waters, the local authorities should only become involved if the vessel is in distress and the persons on board are desirous of being rescued. For the purposes of this policy, the definitions contained in the 6th edition of Hill’s “Maritime Law” are applicable. Hence: a vessel in “distress” is one that is “threatened by grave and imminent danger.”
- (ii) Where the vessel is encountered within Caymanian waters and is in distress (threatened by grave and imminent danger), the local authorities ought to rescue and bring ashore all persons on the vessel, even if persons are not desirous of any assistance and force is required.
- (iii) Where the vessel has landed in the Cayman Islands, the local authorities are then in a position to make an assessment of its seaworthiness. “Seaworthy” is defined in the 6th edition of Hill’s “Maritime Law” as the “fitness of a ship to withstand the expected hazards of the contemplated voyage with cargo.” If the local authorities are of the view that the ship is not seaworthy, all persons who travelled on this vessel would be deemed to have landed illegally and should then be processed in the manner outlined later in this Final Report.



If however, the vessel is thought to be seaworthy, it will be permitted to continue its journey, provided it does so immediately and without assistance, in the same way as the current policy envisages.

30. If, as has been suggested, there are human rights concerns, including human trafficking, that render it necessary for the Cayman Islands Government to discourage the migration of Cubans by boat; then the existing policy, whilst an improvement on the previous one from this perspective, is by no means the most effective tack. The approach that the HRC has suggested, however, would make it more difficult for Cuban migrants to use the Cayman Islands as a stopover point and would thus also make this transit route far less amenable to and attractive for human trafficking purposes.
31. The HRC acknowledges that the current policy provides that “every effort must be made to prevent loss of life” should a vessel bearing Cuban migrants become disabled or in distress, but feels that the directions contained this Final Report would better balance the various competing human rights issues. The HRC does note, however, that these proposals could place a significant burden on the Caymanian authorities to ensure that they then process the Cuban migrants in a prompt and efficient fashion, which is compatible with international human rights law at all times. This issue will be addressed substantively below.
32. The current policy is also far from straightforward in its practical operation. For example, when, as has recently occurred, Cuban migrants arrived by boat in George Town in the middle of the day and were surrounded by cruise ship passengers being transferred to the shore, it was unclear how to practically deal with this situation. In this case, perhaps due to the proximity of sympathetic tourists, there appeared to be a greater inclination to provide assistance. It is also alleged that a similar predicament has often arisen in Cayman Brac, where the boats of Cuban migrants have been caught by the tide or the current and, this being the only impediment to the continuance of their journey, have been assisted in getting back out to sea. It is therefore hoped that the HRC’s proposals will provide clearer guidance to the local authorities as to how to proceed consistently in various situations.
33. In respect of the last of the human rights concerns that have been brought to the attention of the HRC and fall to be considered in this section of this Final Report, the HRC, in spite of inquiries, did not feel that it was in a position to make any finding of fact as to whether a boat containing Cuban migrants was rammed by the Caymanian authorities, as alleged. Rather than delay its Final Report into the multi-faceted situation of Cuban migrants any further, the HRC decided that it was more beneficial to publish its general findings and to reserve the right to revisit this particular issue separately should it find necessary in the future.
34. That said; the HRC does wish to note that it finds it difficult to envisage circumstances where there would be legitimate grounds for the ramming of boats containing Cuban migrants. Were this to occur and lives placed at risk, it is the view of

the HRC that legitimate human rights issues would arise. Even under the approach that the HRC is now proposing, where the local authorities might be required to confront a vessel within Caymanian waters contrary to the wishes of its occupants, the HRC cannot see any need for such drastic tactics.

The Policy of the Cayman Islands Government towards the Processing of Cuban Migrants, Including Repatriation, Detention and Asylum Applications

35. Having determined how best to meet and receive Cuban migrants who arrive by boat, the next stage of the process is to establish the most appropriate mechanism for handling such persons, whilst being sensitive to their human rights. In light of the fact that the approach suggested for the first issue will place a greater burden on what is already a stretched service; this is likely to prove challenging.
36. However, the Immigration Department did indicate that the majority of Cuban migrants, having been advised of Cayman's repatriation policy, still elect to land rather than continue with the onward journey. According to the information received, the Immigration Detention Centre currently receives approximately 300 persons per year and if all boats containing Cuban migrants that were deemed to be in distress or unseaworthy were processed in accordance with the policy suggested above, this would, based upon current trends, result in an increase, although not necessarily one of unmanageable proportions, over the year.
37. The HRC acknowledges that if the political situation in Cuba was to become more unstable, that there would be potential for a large increase in migration, but also notes that this threat pertains with the existing arrangements and that similar contingency plans would need to be in place for dealing with any such mass influx, irrespective of any existing policy on detention and intervention.
38. Whilst the short term effect of the change in policy proposed might result in the increase in persons detained suggested above, there is every possibility that once the new policy became more widely disseminated that the number of persons attempting to leave Cuba via a route that would take them in the vicinity of the Cayman Islands may well actually decline, thereby cutting the average number of persons needed to be detained in the Immigration Detention Centre in Grand Cayman.

Repatriation



39. Repatriation policies have been adopted to greater or lesser extents by most of the territories surrounding Cuba, including Bahamas, Honduras, Jamaica, Mexico and, provided that the Cuban migrants have not made it to dry land, the United States.
40. However, these must comply with the principle of *non-refoulement*, which is the basic tenet of the Convention relating to the Status of Refugees, established in 1951 and its 1967 Protocol. The Refugee Convention was extended to the Cayman Islands, via Jamaica, on the 25th October 1956.
41. Article 33 of the Refugee Convention provides, subject to the exception contained in paragraph 2, that:

“No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”
42. The principle of *non-refoulement* is also contained in the 1984 United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, which was extended to the Cayman Islands on the 8th December 1988.
43. Article 3 of the Torture Convention similarly provides that:

“No State Party shall expel, return (*refouler*), or extradite a person to another State where there shall be substantial grounds for believing that he would be in danger of being subjected to torture.”
44. The essence of these two provisions is that a Cuban migrant, detained in the Cayman Islands, may not be repatriated to Cuba if:
 - In the case of the Refugee Convention, the life or freedom of an individual would be threatened because of, perhaps most relevantly, a political opinion that they held; or
 - In the case of the Torture Convention, there are substantial grounds for believing that an individual is in danger of being subjected to torture.
45. In respect of the Torture Convention, torture is defined in Article 1 as:



“[A]ny act by which pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

46. One argument that the HRC has considered is that any repatriation to Cuba will, as a matter of course, breach this provision. This argument is premised on the human rights record of the Republic of Cuba, which by most independent international standards is regarded as poor.

47. Support for this perspective can be drawn from Article 3(2) of the Torture Convention, which provides that:

“For the purpose of determining whether there are ... grounds [for *refoulement*], the competent authorities shall take into account all relevant considerations including, where applicable, the existence on the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”

48. The argument therefore proceeds on the basis that the authorities in the Cayman Islands are under a duty to take into account the poor human rights record of the Cuban government (see Human Rights Watch, Country Report - Cuba, January 2007) when determining the legality, under international law, of any repatriation or *refoulement*. The HRC accepts that this is indeed an appropriate consideration. However, the HRC notes that this is not the only consideration anticipated by Article 3(2) of the Torture Convention.

49. In this context, it would also be pertinent to focus on the specific question of whether those who are to be repatriated are likely to be subjected to torture or other human rights abuses upon return as a result of departing Cuba illegally. Whilst the HRC cannot unequivocally state that the rights of repatriated Cubans are always fully respected, it was able to conclude that repatriated Cubans were not tortured as a matter of course upon return.

50. This view is supported by the U.S. Department of State’s Country Report on Human Rights Practices in Cuba for 2006. This Report, while recognising that the Cuban Government’s human rights record “remained poor” and that it “continued to commit numerous, serious abuses”, including several worrying examples of torture and other cruel, inhuman or degrading treatments or punishments (which the HRC unequivocally condemns), also accepts that Cuban law “prohibits abusive treatment of detainees and prisoners” and that “physical torture was rare.”



51. Accordingly, it is not possible to sustain the view that all repatriations to Cuba inevitably breach the Torture Convention; nor can the Cayman Islands authorities be expected to accept without question that there are the “substantial grounds,” as required by the Torture Convention, for believing that those repatriated may be subjected to torture.
52. However, for so long as the human rights record of the Cuban Government remains poor, there will always be the danger that the human rights of any one of those persons repatriated may be infringed and the Cayman Islands Government must therefore remain vigilant and monitor the human rights situation in Cuba extremely closely to ensure that those repatriated are not victimised.
53. Every repatriation should therefore, as a matter of natural justice, be considered on case by case basis, taking into account the particular merits in each case. In addition, if the human rights situation in Cuba was to deteriorate further, it may become necessary to review the entire repatriation policy. With these guarantees in place and provided the local authorities are both sensitive to and vigilant in applying them, the standards required by the Torture Convention should be met.
54. Similar considerations should also be entertained in respect of the Refugee Convention. Here though the most pertinent concern is that persons repatriated lose their freedom as a result of a political opinion that they have expressed, either directly or indirectly as part of their attempt to leave Cuba. This gives rise to two questions:
- Are persons who are repatriated to Cuba routinely detained for excessive periods of time?
- And
- Have such persons actually been punished for a political opinion that they have expressed?
55. If, as the HRC understands, “illegal exit” from Cuba remains an offence, which is punishable by up to three years imprisonment in what have also been described by international human rights non-governmental organisations, as deplorable conditions (see Human Rights Watch, Country Report - Cuba, January 2007), there would be clear evidence that repatriated migrants are deprived of their liberty and freedom; and the first question posed would definitely be answered in the affirmative.
56. However, there is evidence to suggest that the Cuban authorities have, at least in most circumstances, tempered the effect of this provision. Rather than detain all persons who have attempted to flee the country for long periods of time, the general practice appears to be that Cuban nationals who are repatriated are interviewed and released within a short period of time.



57. This is evidenced in some of the Cuba's agreements with foreign governments, most notably the United States, in which the Cuban Government undertakes to protect to those persons who are repatriated. Whilst such a provision has not been included in the MoU between Cuba and the Cayman Islands (an omission that this Final Report will turn to again shortly), the HRC is of the view that this signals a change at least in the severity of the punishment handed out to those who illegally exit Cuba.
58. This position is, according to information received from the Immigration Department in the Cayman Islands, underscored by the fact that there are several examples of serial migrants only getting as far as the Cayman Islands and having to be repatriated to Cuba on more than one occasion. Moreover, where this has occurred, the individuals concerned do not appear to have reported that they were abused upon their previous repatriation to Cuba, nor cited any abuse as a reason for subsequently fleeing once again.
59. The HRC accepts that there may very well be examples of repatriated persons being detained and furthermore, the HRC also recognises that persons who have attempted to escape may also be singled out for less favourable treatment in terms of, for example employment and housing opportunities, and it criticises both of these outcomes; however, once again, this does not mean that in each individual case that repatriation will necessarily result in any excessive loss of freedom. In fact, the evidence appears to suggest that the opposite is at least now the general policy.
60. That said; the HRC believes that the Cayman Islands Government ought to insist on the inclusion of a guarantee, similar to that contained in the accord between the United States and Cuba signed in 1994, being included in a new MoU with the Cuban government. Such a guarantee, whilst still difficult to fully monitor in practice, would provide a more substantive basis for any repatriation policy and better reflect international human rights norms.
61. The second question of whether persons, if subjected to punishment, are being punished for a political opinion that they have expressed is also open to debate. If there is a reasonable belief that anybody repatriated to Cuba is going to be persecuted on the basis of their political persuasion and there is a "well-founded fear of being persecuted," then the Refugee Convention and the principle of *non-refoulement* requires that they should not be repatriated at all. If the asylum regulations, which will be considered below, are operating appropriately, the legitimate asylum seekers – the political activists and the like, who are being persecuted – should be identified and processed differently, thus leaving the economic migrants – those simply seeking a better life, usually in the United States – to be repatriated to Cuba.
62. Whilst the HRC would be concerned if economic migrants were being punished upon their return to Cuba; and for the avoidance of any doubt, the HRC would, of course, like to see the formal repeal of the Cuban "illegal exit" laws and greater freedom for Cuban nationals to travel abroad; the HRC is not convinced that a strict interpretation of international



refugee law could, in the absence of any recognisable ground of persecution, require the Cayman Islands to retain such persons or grant asylum.

63. This is a challenge for the international community as a whole and is beyond the capabilities of any individual nation, not least a small island jurisdiction such as the Cayman Islands. That said; the Cayman Islands ought to do all that it possibly can to mitigate against any potential limitation of human rights, which includes any punishment meted out simply for leaving one's own country, and as noted above, it would be an appropriate move to seek to regularise this in an updated MoU.



Detention

64. Under the MoU, Cuban migrants, who are unable to continue their journey, are detained in the Cayman Islands pending repatriation to Cuba. Unless exceptional circumstances apply, such persons are usually detained at the Immigration Detention Centre (IDC), adjacent to Fairbanks Prison.
65. Serious concerns had been expressed to the HRC in respect of the conditions at the IDC and the HRC was initially further concerned that, in the absence of public access to the IDC, the lack of transparency in the oversight of the facility could potentially shield any enquiry into the IDC's conditions. The HRC accepts that the privacy of all Cuban migrants ought to be respected, especially those fleeing persecution (as indicated by the current Internal Guidelines); although the HRC also notes that this can be achieved without undue or disproportionate restrictions to the facility itself.
66. Although not confirmed or denied by the Cayman Islands Government for the purposes of this investigation, the HRC understands that an independent professional committee has responsibility for inspecting the IDC's facilities and reporting on their status. Furthermore, the HRC also understands that the names of the persons on this oversight committee are not publicly available. Since there is apparently no direct public access to the IDC, this oversight function assumes an increased importance and whilst the HRC, as noted below, was able to visit the IDC and was of the opinion that the facilities did not give rise to any human rights concerns, it does not see any reason why the official oversight of this facility could not be more open and transparent. The HRC has sought clarification from the Immigration Department on the arrangements for overseeing the IDC and is awaiting a response.
67. When the HRC requested permission to visit the IDC on a particular date, this permission was granted the same day and three members of the HRC subsequently visited the facility on the afternoon of the 27th April 2007.
68. At the time of the visit, there were 47 Cuban migrants detained at the IDC. Four married couples were housed in separate married quarters and a further 39 others were detained in the large dormitory. Two additional Cuban migrants were, at that point in time, also being detained at the more secure Central Police Station following repeated escape attempts.
69. The Immigration Department personnel present confirmed that the IDC could only house a maximum of approximately 50 persons, which therefore meant that the facility was approaching capacity. There were several spare mattresses at the side of the main room, although there appeared to be little space for any additional bunk beds.
70. There were three showers and three toilets, in addition to two independent sinks, in the main section, which appeared to be used by all of the detainees. One bathroom was in the process of being repaired, following an escape attempt through its

ceiling. The detainees received toiletries, such as shampoo, soap, toilet rolls, feminine hygiene products and razors, as well as laundry and cleaning supplies. The supervisor of the facility maintains a controlled list of the residents' needs in this respect and is provided with vouchers to purchase such items as the residents require.

71. There is a washing machine, dryer and clotheslines, which detainees can use at any time when the compound is open – between 7.00am and 5.00pm – and a roof had been erected over the washing machine area to assist detainees. Several electric fans were also supplied in order to attempt to cool the facility.
72. There were also kitchen facilities available, where the detainees were able to cook breakfast for themselves with food provided and distributed to them each morning. These provisions included cereals, fresh milk, evaporated milk, eggs, fruit, bread, milo and juice, together with ice for the day. The storage cupboard and fridge containing these provisions appeared full and the HRC members considered it reasonable to assume therefore that adequate provision was being made for breakfast. All other main meals are provided by HMP Northward. In addition, detainees also receive snacks during the day and evening.
73. The supervisor of the IDC demonstrated considerable familiarity with the provisions, along with sensitivity towards the dietary preferences of the detainees. Special needs were accommodated if possible, including, the provision of soup and softer foods for one detainee who had had a tooth extracted the previous day.
74. Between 9.00am and 5.00am, detainees usually have access to a nurse, who is also fluent in Spanish. In the absence of the nurse during the visit by HRC members, the supervisor of the IDC was able to respond to a request for stronger painkillers and indicated that the nurse would address this request as soon as she returned.
75. There are two outdoor compounds where detainees can exercise. A roof has also been erected over a picnic bench in order to provide additional shelter in this area. Recreational activities consist of outdoor sports and ball games, cards, table football, television and a collection of videos.
76. The detainees appeared moderately satisfied with the conditions of their detention and the HRC members were of the view that the facilities were adequate and, importantly, did not breach international human rights standards. This view concurs with the findings of both the independent oversight committee and the UNHCR following their respective visits to the IDC. In respect of the UNHCR, it is understood that one of its Protection Officers last visited the IDC in 2006.
77. The HRC would like to express its gratitude to the Immigration Department for facilitating the visit; and in particular to the Senior Officer and Supervisor of the facility for assisting and answering questions during the visit.



78. Whilst the HRC does not therefore see any present human rights concern with the conditions of detention at the IDC, it did have one note of caution relating to the capacity of the IDC. With only three additional spaces potentially available at the IDC, there was little scope for any increase in the number of detainees. Although accommodation plans are no doubt in place for emergency situations, if the Cayman Islands was to accept the advice of the HRC contained in this Final Report, which could result in an increase in the number of detainees, at least in the short term, serious consideration needs to be given to increasing the facility or making another facility available. Failure to do so, which results in overcrowding could then give rise to human rights concerns.
79. One final potential area of concern in terms of detention was the length of detention. The MoU requires that the Cayman Islands notify the Republic of Cuba in no more than seven days of the illegal arrival of Cuban citizens from Cuban territory. In as short a time as possible thereafter, the Cayman Islands is then obliged to provide additional personal details of the illegal arrivees. The Cuban government is then supposed to reply within 20 days of the receipt of this information with its authorisation to accept the return if the Cuban citizens to be repatriated. Once agreement has been obtained, the Cayman Islands must then give a further seven days notice of the date for repatriation.
80. The length of time for repatriation and the consequent period to be spent in detention is therefore imprecise. Concerns have been expressed, even by Caymanian authorities, as to the efficiency of the repatriation process and it has been suggested that the Cuban authorities do not always respond as quickly as they perhaps ought to. Consequently, some Cuban detainees spend far longer in detention than it was originally anticipated by the MoU.
81. For the present time, with the periods of detention as the current level, the HRC does not believe that the time spent in the IDC awaiting repatriation gives rise to a human rights claim. However, were these periods to become too long and therefore excessive, an issue could arise in relation to Article 5 of the European Convention on Human Rights and Article 9 of the International Covenant on Civil and Political Rights, both of which have been extended to the Cayman Islands. What may constitute “excessive” will depend upon the facts of a particular case, although there is a wealth of human rights case law available to inform this assessments should it become necessary.
82. Article 5 of the European Convention on Human Rights and Article 9 of the International Covenant on Civil and Political Rights also establish that persons arrested or detained should be brought promptly before a judge or other officer authorised by law to exercise judicial power in order to determine the legality of any arrest or detention and if not, released. It is thus incumbent upon the Caymanian authorities to monitor the length of periods of detention and do whatever is possible to mitigate these should they become excessive. It follows that it is therefore not permissible to simply blame any delay on

the Cuban government, nor can the MoU cannot operate as a justification for failing to comply with human rights obligations.

Asylum

83. Having established that the repatriation policy must be compatible with the principle of *non-refoulement*, the final subject for consideration in this Final Report is that of asylum. In this context, it is somewhat surprising that since the last mass migration of Cuban nationals that culminated in 1995, no Cuban nationals arriving by boat have been granted refugee status. This is even more noteworthy in light of the fact that specific asylum provisions have subsequently been incorporated into the immigration laws of the Cayman Islands.
84. One explanation for this situation, in which the HRC sees some degree of merit, is that virtually all of the illegal migrants who leave Cuba are economic migrants who would ideally like to reach the United States. As such, when the Cuban migrants are first interviewed in the Cayman Islands, they still have the United States firmly in mind as their destination of choice and are thus not necessarily inclined to claim asylum. If this claim is not made at the initial interview stage, it becomes harder to substantiate the legitimacy of any claim by an individual that they are likely to face persecution if repatriated; the asylum claim is thus prejudiced; and the likelihood of ultimate success diminished, if not rendered non-existent.
85. When initially met by immigration officials, all Cuban migrants are advised, including in Spanish, of the policy contained in the MoU. Cuban migrants are therefore, at least in principle, aware that they will be repatriated should they elect to come ashore in the Cayman Islands. Whilst information on the repatriation policy is provided, the migrants are not informed of any asylum provisions. This latter information is not required under the Refugee Convention; and whilst it might enable those that are the subject of persecution to make a more informed decision in terms of where to apply for asylum; and to make it at the first port of call, as opposed to holding out hope of somehow getting to the United States and making the application there; the reason for withholding this information is understandable: the presumption (embodied in the construction of the Refugee Convention) is that if an individual has been subjected to or genuinely believes that they are in real danger of being persecuted, they will articulate this as soon as is reasonably practicable.
86. Instead, the Immigration Department has indicated that most Cuban migrants, in response to initial questioning in the Cayman Islands, simply respond that they are “looking for a better life” or that they would like to “go to the United States.” This then places them firmly in the category of economic migrants and with little chance of substantiating any claim that they have in fact been persecuted, which they might make at a later date.



87. But what about those persons who could potentially apply for and indeed obtain asylum? How can these persons be best identified? The reality of Cuban migration and the preoccupation with the United States means that the current approach to asylum in the Cayman Islands stacks the odds against identifying these persons and whilst this does not breach any individual Article in the Refugee Convention, it does not sit well with the spirit of the Convention.
88. The Cayman Islands ought therefore to investigate ways in which it can improve this system. To this end, the HRC endorses the recommendations of the UNHCR, who when they visited the Cayman Islands were prepared to provide the immigration authorities with types of questions, which will enable the authorities to dig deeper into the migrant's story in order to more easily draw the distinction between economic migrants and political refugees. The HRC notes that some immigration officials have received training from the UNHCR, but any additional advice should be welcomed, received positively and utilised.
89. The HRC would like to see whatever measures are reasonably feasible to ensure that the interview process is as consistent and fair as it possibly can be and moreover, that it is perceived as such. To this end, the HRC recommends consideration of the following suggestions:
- (i) Inviting the interviewee to share their story, rather than respond to a series of closed questions;
 - (ii) The adoption of standard questions for follow-up; and
 - (iii) The recording of all interviews on video.

Once again, the HRC accepts and appreciates that some steps have been taken which largely ensure that the current interview process is compatible with the Refugee Convention, although the HRC also feels that it is important to build upon these and introduce additional guarantees if at all possible.

90. Since this initial interview therefore particular significance (a fact which is borne out by the absence of successful Cuban asylum grantees in the Cayman Islands since the mass migration during the 1990's), one suggestion was that legal representation ought to be provided at this stage. Largely because of the financial ramifications, the Refugee Convention does not require legal representation at the initial or subsequent interviews. However, if this first interview is to be treated so definitively, consideration ought perhaps to be given to ensuring that there is at least a person available to reaffirm the practical effect of the repatriation policy and to advise on the best course of action at that stage.



91. If legal representation is either inappropriate or impractical (and the HRC does accept that it could potentially lead to unmeritorious asylum applications and significant financial demands), the HRC would advocate for any feasible alternative provisions that would guarantee the integrity of the interview process. Ideally, these should be available locally, in order to provide immediate support and not to add any additional delay to the process. However, in the absence of, for example, sufficient numbers of local support groups whose members might sit in on interviews, the HRC would, once again, support the UNHCR recommendation that copies of all interviews with detainees be sent to the UNHCR, so that it can offer advice if needed.
92. The HRC also believes that the integrity of the asylum process in the Cayman Islands could be further improved by an amendment to the Immigration Law, which changed the initial arbiter of asylum claims and made this process, not only more transparent, but also more impartial. Currently, the responsibility for initially determining asylum claims falls on the Chief Immigration Officer. With the greatest respect, in light of the significant, often life-threatening, ramifications of such decisions, it is somewhat surprising that this decision remains the preserve of a government employee, particularly where more routine immigration decisions, such as the grant of work permits are by contrast, assigned to an independent statutory board.
93. As per Article 14 of the International Covenant on Civil and Political Rights and Article 6 of the European Convention on Human Rights, everyone is entitled to a fair hearing in respect of any determination of their rights. If the Chief Immigration Officer is acting in a capacity where rights are determined, as recognised by either of these international human rights treaties then a concern could indeed arise. Whilst this is by no means clear, this conclusion may in fact be supported in light of the current process.
94. The HRC, however, has not formed any final conclusion on this point; because it is of the view that irrespective of whether or not the Covenant on Civil and Political Rights or the European Convention on Human Rights has indeed been breached, it would still be appropriate for an independent statutory board or an independent asylum adjudicator to be established to deal with asylum applications. Such an advance would not only be in line with the spirit of the Refugee Convention but would also mirror the UNHCR's Model Law.
95. These various recommendations in this section should assist in the identification of legitimate asylum seekers. However, once identified as having a *prima facie* case for asylum, the HRC is of the view that, pending any final determination of this claim, such persons ought not to be detained at the IDC alongside the detainees who are awaiting repatriation. The HRC therefore agrees with the UNHCR that unless asylum seekers have committed a crime (other than entering the jurisdiction unlawfully), they ought not to be detained. The current Immigration Law does provide for more favourable treatment to be given to persons deemed to be asylum seekers vis-à-vis economic migrants, although this does not extend



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to a definitive statement in favour of releasing asylum seekers, pending resolution of their case. Undoubtedly, this will give rise to practical difficulties and will also incur cost. However, the HRC believes that this is the most appropriate approach to ensure fullest compliance with the Refugee Convention.



Conclusions

96. In conclusion, the HRC finds that:

- (i) The rights of Cuban migrants should be fully respected in accordance with international and domestic law.
- (ii) The Cayman Islands Government does have a legitimate interest in protecting itself from large numbers of economic migrants.
- (iii) Policies adopted to prevent illegal activities, including, in particular, human trafficking, which may potentially impinge upon other human rights, are appropriate; provided the policies are a proportionate response to the threat identified.
- (iv) Assisting Cuban migrants in any onward journey is not a viable option for the Cayman Islands Government.
- (v) The policy of the Cayman Islands Government for encountering Cuban migrants arriving by boat should be amended to provide that:
 - Where the vessel is encountered outside Caymanian waters, the local authorities should only become involved if the vessel is in distress and the persons on board are desirous of being rescued. For the purposes of this policy, the definitions contained in the 6th edition of Hill's "Maritime Law" are applicable. Hence: a vessel in "distress" is one that is "threatened by grave and imminent danger."
 - Where the vessel is encountered within Caymanian waters and is in distress (threatened by grave and imminent danger), the local authorities ought to rescue and bring ashore all persons on the vessel, even if persons are not desirous of any assistance and force is required.
 - Where the vessel has landed in the Cayman Islands, the local authorities are then in a position to make an assessment of its seaworthiness. "Seaworthy" is defined in the 6th edition of Hill's "Maritime Law" as the "fitness of a ship to withstand the expected hazards of the contemplated voyage with cargo." If the local authorities are of the view that the ship is not seaworthy, all persons who travelled on this vessel would be deemed to have landed illegally and should then be processed in the manner outlined later in this Final Report. If however, the vessel is thought to be seaworthy, it will be permitted to continue its journey, provided it does so immediately and without assistance, in the same way as the current policy envisages.



- (vi) The International Convention on Maritime Search and Rescue should be extended to the Cayman Islands.
- (vii) The Cayman Islands Government should, in conjunction with the United Kingdom Government, engage with the International Maritime Organisation in an effort to seek an international legal remedy to the problem of refugees travelling in unseaworthy vessels, who may be in distress, but who may not, for whatever reason, wish to be assisted and taken to the first available place of safety.
- (viii) Repatriation of illegal Cuban migrants does not automatically give rise to a breach of international human rights law.
- (ix) If a policy of repatriation is maintained; it is, however, incumbent upon the Cayman Islands Government to continually monitor the human rights situation in Cuba generally, and the treatment of those repatriated in particular, in order to ensure that future repatriations do not breach international human rights law.
- (x) Repatriation should therefore be considered on an on-going case by case basis.
- (xi) The Cayman Islands Government should, in conjunction with the United Kingdom Government, urge the Cuban Government to formally repeal its illegal exit laws.
- (xii) The Memorandum of Understanding between the Governments of Cuba and the Cayman Islands ought to be amended to protect the rights of Cuban nationals repatriated to Cuba.
- (xiii) The facilities at the Immigration Detention Centre are adequate for existing requirements.
- (xiv) Any additional provision for detaining Cuban migrants should be of an equivalent standard.
- (xv) The management of the Immigration Detention Centre appeared to be both attentive and informed.
- (xvi) The oversight of the Immigration Detention Centre should be as open and transparent as possible.
- (xvii) Periods of detention for Cuban nationals awaiting repatriation do not currently breach any international human rights.



- (xviii) Periods of detention for Cuban nationals awaiting repatriation should, however, be continually monitored to ensure that these are kept to a minimum.
- (xix) If periods of detention for Cuban nationals awaiting repatriation do increase, a human rights issue could then arise.
- (xx) The rights of asylum seekers should be fully respected in accordance with international law.
- (xxi) The assistance of the UNHCR should continue to be sought to ensure that the questioning of asylum seekers enables the immigration authorities to effectively distinguish between economic migrants and political refugees.
- (xxii) The interview process for asylum seekers should be as consistent and fair as is possible and would benefit from the following suggestions:
 - Inviting the interviewee to share their story, rather than respond to a series of closed questions;
 - The adoption of standard questions for follow-up; and
 - The recording of all interviews on video.
- (xxiii) The interview process for asylum seekers would also benefit from the presence of an independent third party; although if this is not feasible, all interviews should be recorded and made available to the UNHCR.
- (xxiv) The establishment of an independent statutory board or an independent asylum adjudicator to deal with asylum applications.
- (xxv) Once an applicant has been identified as having a *prima facie* claim for asylum, such persons should not be detained unless they have committed a crime other than entering the jurisdiction illegally.

97. It is the intention of the HRC that this report is read as a complete document. Further, the HRC hopes that those desirous of quoting from its contents or attempting to summarise it will not do so without making sure they fully place any comments or quotations in their context. To do otherwise may create an entirely misleading impression.