

2013

Cayman Islands
Human Rights Commission

Report on Cuban Migrants

A review of Policy, Legislation, and Practice



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Summary of Complaint

The Human Rights Commission (“Commission”) received a complaint on 22 February 2011 from a member of the public indicating that in his opinion the Cayman Islands Government was breaching s.1 (Guarantee of Rights, Freedoms and Responsibilities) and s.3 (Torture and Inhuman Treatment) of Part One of the Cayman Islands Constitution Order – the Bill of Rights, Freedoms and Responsibilities.

The complainant alleged that; *“it is my view that the restrictions that the Cayman Islands Government has placed on residents of the Cayman Islands to not allow them to assist Cubans who land in Cayman with the basic necessities of life – food, water, medical aid, and fuel, before sending them off to sea is against international rules for Human Rights. I believe that if a complaint was made to the United Nations and the EU that Cayman would be severely criticised.*

Let us say that a group, including women and children, had to stop in Cayman in their boat due to bad weather. They obviously needed fuel, water, food and perhaps some medical aid. However, individual Caymanians wanted to offer such help, at their cost, but officials stopped them. The boat then left and all persons subsequently died from lack of water, food, and fuel. This then was reported to the international press, United Nations, and the EU. Cayman would be in serious trouble, in my view.

I urge you to investigate this with Government, reminding them that their policy, in that regard, greatly exposes the Cayman Islands. It especially looks bad (and would allow the international press to write a colourful negative report in it), as Cayman’s heritage is that of a seafaring nation and Cayman should therefore be much more sympathetic to persons in a boat exposed to the dangers of the open sea.

I appreciate that a small country such as Cayman must ensure that it is not attractive to huge numbers of persons wanting to come here and claim refugee status, but the Cubans coming here are usually on their way to, directly or indirectly, the U.S.A. This method of not offering humanitarian assistance is not necessary to discourage Cubans from trying to come to the Cayman Islands.”

The complaint further indicated that as a result of his complaint he would like *“for Government to allow private citizens to provide basic necessities of life – food, water, fuel and medical aid – to Cubans passing by Cayman by boat on their way to other destinations.”*

After reviewing the complaint the Human Rights Commission agreed to conduct an investigation into the matter and ultimately considered whether there is any justification under international law for the Cayman Islands Government's policy of preventing anyone within the Cayman Islands from assisting Cuban migrants who come ashore or are found within the territorial limits by providing them with the basic necessities of life.

Terms of Reference

Following discussion of the complaint, the Commission decided of its own motion to undertake a review of the following matters:

1. To conduct a review of the Memorandum of Understanding (“MOU”) between the governments of Cuba and the Cayman Islands dated 15 April 1999;
2. To ensure that the Commission has complete information about the procedures for screening irregular migrants after disembarkation and ensuring that legitimate asylum claims are brought forward and dealt with appropriately;
3. To conduct an inquiry into the scope of Section 109 of the Immigration Law (2011 Revision) and how it is applied in practice; and
4. To determine how the Marine Unit assesses and determines whether to bring ashore migrants found within the territorial waters of the Cayman Islands

In order to engage effectively in as comprehensive a review as possible a sub-committee was established and during the course of the inquiry, members of the sub-committee met with various government agencies. Those meetings took place on the following dates:

1. On 26th April 2012, members of the Sub-Committee met with the Chief Immigration Officer and Mr Gary Wong;
2. On 23 January 2013, representatives of the Commission met with the Honourable Deputy Governor and a representative of the Attorney General;
3. On 30 January 2013, representatives of the Commission met with the Chief Immigration Officer and the Director of Public Prosecutions
4. On 6 February 2013, representatives of the Commission met with the Commissioner of Police and Police Superintendent Kurt Walton.

While the Human Rights Commission examined the issues herein generally with regard to migrants originating from Cuba, it is noted that the Cayman Islands Government’s practices, processes, and procedures for handling irregular immigration apply to all migrants regardless of jurisdiction of origin.

Section 1

Background

1.1 Illegal Migration

Every country has the sovereign right to protect its borders and regulate entry by making it a criminal offence to enter the country without the legitimate means or documentation or at unauthorised points of entry. The Cayman Islands, like any other country, should not facilitate irregular migration, and there is an obligation to balance migrant control with ensuring fair and appropriate asylum processes. The Cayman Islands do not support or condone illegal migration. This intention is embodied in the Memorandum of Understanding (“MOU”) between the Cayman Islands Government and the Republic of Cuba accompanied by the Internal Guidelines of July 2008 and local Immigration laws.

Serious ramifications could also arise from providing assistance for irregular migration. The past Chief Immigration Officer Franz Manderson stated, on 2 April, 2007 in a press release by the Cayman Islands Government, “For example, terrorists could travel under the guise of illegal Cubans and, with our assistance, enter nearby countries and eventually enter the U.S.”¹ The aforementioned press release further reiterated that the Cayman Islands Government has a responsibility to do everything possible to prevent illegal migration, whether it is in relation to economic migrants, the smuggling of people, the threat of terrorism, or the sad story of human trafficking that affects many countries today.

1.2 What is a “Refugee”?

The perception by the public is that the Cayman Islands Government refuses to provide assistance, or allow the provision of assistance, to “Cuban Refugees”. This is a misunderstanding. The term “Refugee” has a very specific meaning. A person fleeing a developing country to look for a better life elsewhere is not automatically a “refugee” under international law. To be classified as a refugee, such a person must satisfy the requirements of the 1951 United Nations Convention on Refugees and its subsequent Protocol.

The 1951 Convention on Refugees describes a refugee as: "A person who is outside his/her country of nationality or habitual residence; has a well-founded fear of persecution because of his/ her race, religion, nationality, membership in a particular social group or political opinion; and is unable or unwilling to avail himself/ herself of the protection of that country, or to return there, for fear of persecution." This is a very specific definition and is different from someone who goes to a new country because living conditions or opportunities for jobs are not ideal in their own country. Such individuals have been termed “Economic Migrants”. In the light of the Cayman Islands' legitimate best interests to comply with international law and adhere strictly to such a definition of “refugee”, “economic migrants” are not to be classified as or assumed to be refugees.

¹ Cuban Migrant Policy. CIG Press Release. 2 April, 2007
http://www.gov.ky/portal/page?_pageid=1142,1940980&_dad=portal&_schema=PORTAL

1.3 The Memorandum of Understanding (“MOU”)

The MOU was signed on 15 April 1999 between the governments of the Republic of Cuba and the Cayman Islands. So far as the Commission is aware, it is the only MOU of its kind entered into by the Government of the Cayman Islands; while Cuba may not be the only country which is a source of irregular migration to, or through, the Cayman Islands, it is the most significant source of this type of migration by far. The MOU sets out a protocol for the return of all Cuban citizens who seek to migrate illegally to, or through, the Cayman Islands, including time frames for the reporting of any such arrivals to the Cuban government and the process for repatriation.

Following the meeting with the Chief Immigration Officer, Linda Evans, and Deputy Chief Immigration Officer Gary Wong on the 26th April 2012, the Commission received and reviewed the Immigration Detention Centre Operational Manual, a Cuban Migration Information Form required to be completed by migrants, a general statement on Migrant Arrival into the Cayman Islands, and the Asylum Policy and Procedure. Statistics on Cuban arrivals, repatriations and other departures from 2006 to 2012 were also provided. The Commission is satisfied that the asylum screening procedures have been adequately explained and documented by the Immigration Department in compliance with international human rights standards. It should be stressed that the Commission was not in a position to assess how the procedures have been, or are being, applied in practice and therefore cannot in this report comment on the adequacy of implementation of those procedures.

At the meeting with the Honourable Deputy Governor on 23 January 2013, the Commission agreed that it would look into the possibility of conducting an audit of the procedures for notifying irregular migrants about their rights, and for screening any claimants for asylum. The matter will be placed on the Commission’s agenda for follow up action.

The Honourable Deputy Governor was also advised at that meeting that work should be done to ensure that timelines set out in the MOU are complied with and to ensure that screening of asylum claimants takes place within a reasonable period of time in order to avoid the prospect that unreasonable delays which could lead to potential claims under the Bill of Rights, Freedoms and Responsibilities.

The Commission accepts that it would not be helpful or appropriate for the MOU to be amended to refer specifically to asylum screening procedures; it is implied that any claimant who succeeds in claiming asylum must by virtue of that fact be exempt from the obligation to repatriate irregular migrants. Furthermore, specific references to asylum, in particular when lists identifying illegal migrants are to be sent to the government of Cuba under the terms of the MOU may result in breaches of privacy for those seeking asylum and cause difficulty in conducting the asylum screening confidentially and comprehensively. The language of the MOU should, however, be more flexible so that it does not appear that repatriation is the default option.

It is noted, however, that paragraph 2 of the MOU requires the Cayman Islands Government to provide a list of all irregular migrants within 7 days of their arrival. The Commission was informed that this timeframe is unrealistic, not least because it does not allow sufficient time for legitimate asylum claimants to be identified and dealt with

confidentially. The Honourable Deputy Governor informed the Commission that this timeframe will be re-considered.

Since meeting with the Human Rights Commission the Honourable Deputy Governor has had initial discussions with the Cuban Ambassador regarding guidance and assistance on the protocols required to amend the MOU in order to address the concerns detailed above. These discussions are on-going and the Honourable Deputy Governor has agreed to keep the Commission informed of any developments.

1.4 Options Given to Migrants

Any migrant who enters the territorial waters of the Cayman Islands will be subject to domestic laws, regulations and policies. The first point of contact for arrivals by sea will be with the Marine Unit, who will conduct an assessment in the manner summarised below (page 7). A migrant may either choose to continue on his or her journey or to come ashore. If the migrant chooses to continue on his or her journey, he or she must leave the territorial waters of the Cayman Islands within a reasonable time and accept that he or she will receive no assistance in any form from the Cayman Islands Government. If he or she chooses to come ashore, he or she must accept that he or she will be subject to the laws of the Cayman Islands and will be processed in accordance with those laws. These matters must be explained to the migrants when the options are presented.

There are circumstances in which the Cayman Islands Government may take action when it is absolutely necessary to avoid possible liability, regardless of the wishes of the migrants. These include²:

- a. Cuban migrants cannot opt to continue with their journey if weather conditions are unfavourable in the opinion of the Cayman Islands Meteorological Department. They will be taken ashore and processed;
- b. Where a vessel carrying Cuban migrants is threatened by grave and imminent danger every effort will be made to prevent the loss of life. Anyone rescued will be taken ashore and processed;
- c. When an assessment is made by the Marine Unit that a boat is not seaworthy; *“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.”* and/or
- d. If a vessel does not leave Cayman Islands territorial waters within a reasonable time after the migrants aboard elect to continue their journey, the relevant Cayman Islands authorities may seize their vessel and inform them that they have entered illegally into the Cayman Islands. They will be taken ashore and processed³.

If the migrant decides to come ashore, he or she will be provided with food and water accommodation, legal advice, medical care and any other necessary assistance and will be processed by the Immigration Department in accordance with Cayman Islands law. The applicable internal guidelines require that Immigration Officers explain the options to

² Cayman Islands Immigration Department. Cuban Migrants Internal Guidelines. July 2008.

the migrant in a language known to him/her, including the procedure for applying for asylum, immediately or as soon as possible after he or she is detained. All irregular migrants will be interviewed by an Immigration Officer who will determine whether a claim for asylum arises. Unless the migrant is found to qualify for refugee status under the 1951 convention, he or she will be repatriated to Cuba in accordance with the terms of the MOU.

Section 84 (12) of the Immigration Law (2012) Revision states: “*Where a person who has applied for or intends to apply for asylum is desirous of voluntarily leaving the Islands for a country in which he hopes to take up residence, the Chief Immigration Officer may render to him-*

- (a) Advice and other help in relation to his proposed journey; and*
- (b) Financial assistance to defray the cost of his travel and upkeep.”*

Thus if the person qualifies as a refugee under international law and has obtained permission from a third country to enter and be processed for asylum, he or she may be granted appropriate assistance from the CIO in accordance with section 84(12) of the Immigration Law.

The Cayman Islands are party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Article 3 of this convention states: “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”

The Cayman Islands Immigration Department must consider the implications of Article 3 as outlined above during the repatriation process.

A press article describing the 2007 visit to the Cayman Islands by Senior Protection Officer for the United Nations High Commissioner for Refugees (UNHCR) Grainne O’Hara, noted that “In general, she said, the treatment of the Cuban migrants currently housed at the facility meets international human rights standards.”³

1.5 Section 109 of the Immigration Law (2011 Revision)

Section 109 provides that: “*A person who, in contravention of this Law and whether for financial or material benefit or not, assists or facilitates the transportation, harbouring or movement into or out of the Islands, of an individual commits an offence and is liable on summary conviction to a fine of fifty thousand dollars and to imprisonment for seven years*”.

The scope of this provision was discussed during the meeting with the Director of Public Prosecution and the Chief Immigration Officer on 30 January 2013. The rationale behind this section is clearly to discourage assistance of illegal migration into the Cayman Islands, or through the Cayman Islands to another country. It is clear that it would be illegal to assist any person in entering the territorial waters of the Cayman Islands (within 12 miles from shore) and this kind of activity should and would be

³ Discussing Migrant Policies. CIG Press Release. 6 July, 2007
http://www.gov.ky/portal/page?_pageid=1142,2133526&_dad=portal&_schema=PORTAL

prosecuted. Members of the public should also report to the relevant authorities any irregular migrants seen within this radius or any activity that may involve irregular migration. It is clear that the section is aimed at preventing complicit dishonesty, i.e. human smuggling. It was noted at the meeting that no one has been prosecuted to date simply for providing food and water to someone who is or may be in peril at sea.

The Commission pointed out that members of the public should be educated about these obligations and the proper method for reporting illegal activity of this kind. There appears to be some lingering confusion about what section 109 means.

1.6 The role of the Marine Unit

The Commission met with the Commissioner of Police and Superintendent Kurt Walton of the RCIPS on 6 February 2013. The RCIPS representatives explained that the task of the Marine Unit is to protect life and that their primary duty is to ensure the safety of the inhabitants of any vessel encountered at sea within the 12 mile jurisdiction of the Cayman Islands.

The Unit will first assess the sea worthiness of the vessel, determine whether any persons on board require immediate medical treatment, take note of whether any minors are on board, and assess the prevailing weather conditions which are likely to impact on the journey. Under the Port Authority Regulations, the RCIPS is empowered to seize any vessel which is not seaworthy. Following their assessment, the officers will determine whether to prevent the onward passage of the vessel; this assessment is of necessity a judgment call, made on the spot, taking into account all of the factors set out above. There may not always be an immigration official present when this assessment is made and/or there may be language barriers which mean that information about asylum screening procedures cannot be given until the occupants of the vessel are brought ashore.

Section 2 Human Rights in Question

2.1 European Convention on Human Rights (“ECHR”)

At date of the original complaint Part One of the Cayman Islands Constitution Order, namely the Bill of Rights, Freedoms and Responsibilities (“BoRFR”) had not yet come into force. The Commission therefore considered Article 1 and Article 3 (Torture) of the “ECHR” in preparing its response to that complaint.

Article 1 of the ECHR states that “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”

2.2 Bill of Rights, Freedoms and Responsibilities (BoRFR)

S. 1 of the BoRFR – Guarantee of rights, freedoms, and responsibilities says

Whereas all peoples have the right of self-determination and by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development and may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit and international law;

1.—(1) This Bill of Rights, Freedoms and Responsibilities is a cornerstone of democracy in the Cayman Islands.

(2) This Part of the Constitution—

(a) recognises the distinct history, culture, Christian values and socio-economic Framework of the Cayman Islands and it affirms the rule of law and the democratic values of human dignity, equality and freedom;

(b) confirms or creates certain responsibilities of the government and corresponding rights of every person against the government; and

(c) does not affect, directly or indirectly, rights against anyone other than the government except as expressly stated.

(3) In this Part “government” shall include public officials (as defined in section 28) and the Legislature, but shall not include the courts (except in respect of sections 5, 7, 19 and 23 to 27 inclusive).

S. 3 of the BoRFR – Torture says

3. No person shall be subjected to torture or inhuman or degrading treatment or punishment.

2.3 Applicability

Any persons, including Cuban migrants, are considered to be within the Cayman Islands’ jurisdiction upon entering territorial waters, which according to the Port Authority Law

(1999 Revision) is “that part of the sea adjacent to the Islands being within 12 miles of the coast at low tide.”

The provisions of the ECHR and the BoRFR referred to above will apply to any person within those territorial limits. Section 5 of the BoRFR sets out the right to liberty and security: “Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country...”

Whether or not a person is lawfully detained under the Constitution, under section 3 of the BoRFR there is an absolute prohibition against torture.

Section 3

Conclusion

It is in the best interests of the Cayman Islands to adhere strictly to the definition of a refugee under international law. During Ms O'Hara's visit she stated "It is unreasonable for the Cayman Islands, like any other state, to facilitate irregular migration; there is an obligation to balance migrant control with asylum processes." Because the three Cayman Islands are on a direct migration route for Cuban refugees, there are various issues that have to be tackled within the context of fair policies.

It seems unlikely that acts such as providing food and/or water or any other humane assistance to Cuban migrants encountered at sea or after having recently come ashore could or should be prosecuted under the Immigration Law. However, this is simply the view of the Commission and does not constitute legal advice or a binding ruling on the matter. There is a clear prohibition against any act which would constitute aiding and abetting illegal entry into, or exit from, the Cayman Islands. This suggests that there is an obligation to report to the relevant authorities every incident occurring in circumstances that suggest that an illegal entry has occurred or is being attempted.

The Commission reiterates its view that there should be more public education undertaken about the scope of section 109 of the Immigration Law.

The Commission undertakes the following action points:

- to report to the Honourable Deputy Governor as to the feasibility of conducting an audit of the asylum screening procedures in practice; and
- to follow up with the Honourable Deputy Governor periodically to check the status of any updates to the MOU.

The Commission would like to thank the persons named in this report for their co-operation in providing documentation and meeting with members of the Sub-Committee. Their assistance has been invaluable.

**Section Four
Appendix**

4.1 Memorandum of Understanding between the Government of the Cayman Islands and the Government of the Republic of Cuba

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MEMORANDUM OF UNDERSTANDING

**BETWEEN THE GOVERNMENT
OF THE CAYMAN ISLANDS
AND THE GOVERNMENT
OF THE REPUBLIC OF CUBA**

SIGNED ON 15th DAY OF APRIL 1999

**BY: HIS EXCELLENCY MR JAMES M RYAN, MBE, JP
ON BEHALF OF THE CAYMAN ISLANDS GOVERNMENT**

AND

**DR JOSE PERAZA CHAPEAU
ON BEHALF OF THE OF GOVERNMENT OF THE REPUBLIC OF CUBA**

MEMORANDUM OF UNDERSTANDING
BETWEEN THE GOVERNMENT OF THE CAYMAN ISLANDS
AND THE GOVERNMENT OF THE REPUBLIC OF CUBA

Taking into account that, on various occasions, citizens of the Republic of Cuba have arrived directly and illegally in the territory of the Cayman Islands using various routes, but in particular by sea.

Considering the wish of the Government of the Cayman Islands and the Government of Cuba that these Cuban citizens be repatriated immediately to the Republic of Cuba.

The two Governments have reached the following understanding:

1. The Government of the Republic of Cuba shall accept the return of all Cuban citizens who left Cuban territory and illegally reached the territory of the Cayman Islands as from the entry into force of the present Memorandum of Understanding.
2. The Government of the Cayman Islands shall inform the Government of the Republic of Cuba, in no more than 7 days, of the illegal arrival of Cuban citizens from Cuban territory. This information shall consist of a list of the persons with their names, two surnames and alleged addresses.

This shall thereafter be completed, in as short a time as possible with details of sex, date of birth, their most recent address in Cuba to include street name, house number, flat number, municipality and province, as well as a photograph of each person and the place and date of their illegal arrival in the Cayman Islands.
3. In the interests of their security, the Cuban citizens repatriated to Cuba should be escorted by officials from the Government of the Cayman Islands.
4. The Government of the Republic of Cuba shall reply to the Government of the Cayman Islands, in no more than 20 days from the date of receipt of the information provided by the Government of the Cayman Islands, referred to in the above paragraph 2 item 2, its authorization to accept the return of the Cuban citizens to be repatriated.
5. Once the agreement from the Cuban Government has been obtained, the Government of the Cayman Islands shall inform the Cuban Government, at least 7 days notice, the date of repatriation to Cuba of the Cuban citizens, their names, as well as those of the officials of the Government of the Cayman Islands who shall accompany them.
6. The Government of the Cayman Islands shall repatriate those Cuban citizens who arrive illegally in the Cayman Islands and directly from Cuba and have been submitted to the procedures provided for in this Memorandum of Understanding and accepted by the Government of the Republic of Cuba. These citizens shall be repatriated by air via "José Martí" International Airport in Havana.

7. The Government of Cuba agrees not to charge arrival tax or any other tax related to the repatriation of these Cuban citizens.
8. The persons repatriated to the Republic of Cuba shall be able to bring with them only the belongings, which they had on their illegal arrival in the Cayman Islands directly from Cuba. They shall not be able to return with any money from other countries or other effects of any kind.
9. The Government of the Republic of Cuba shall facilitate the entry to Cuba of the officials from the Government of the Cayman Islands mentioned above in Article 3 of this Memorandum.
10. The present Memorandum of Understanding shall take effect from the date of signature.

Signed in the City of George Town this 15th day of April 1997
in two copies, one in English and one in Spanish, both texts having equal legal validity.

For the Government of
the Cayman Islands

For the Government of
the Republic of Cuba