

## I. Issue: Requirements for Government-Issued Travel Documents

### II. Reporting Organization(s): The Identity Project (PapersPlease.org)<sup>1</sup>

The Identity Project (IDP), <<http://www.PapersPlease.org>>, provides advice, assistance, publicity, and legal defense to those who find their rights infringed, or their legitimate activities curtailed, by demands for identification, and builds public awareness about the effects of ID requirements on fundamental rights. IDP is a program of the First Amendment Project, a nonprofit organization (NGO) based in Oakland, California, providing legal and educational resources dedicated to protecting and promoting rights protected by the First Amendment to the U.S. Constitution and corresponding provisions of international human rights treaties.

### III. Issue Summary

The U.S. has made "government-issued ID" a prerequisite for travel to, from, and within the U.S., but does not recognize any right of individuals to such ID. As a result, standardless, secret "discretionary" administrative decisions on whether or not to issue ID credentials determine who is able to travel or exercise other rights. Those who are without ID, including asylum-seekers, are denied their rights to travel (ICCPR Article 12), assembly (Article 21) and association (Article 22).

No U.S. law requires as a matter of right that an individual be issued an ID document, or restricts how long the government can take to issue an ID.

Since the U.S. Second and Third Periodic Reports to the UNHCR, the U.S. has placed new restrictions on the issuance of ID including the REAL-ID Act (requiring states to check "breeder documents", which many U.S. citizens do not have, before issuing state IDs), and a new "Biographical Questionnaire" for passport applicants, designed to be impossible to complete, which asks for, *inter alia*, the dates and locations of all of the applicant's mother's pre- and post-natal medical appointments, everyone who was in the room when the applicant was born, and all the addresses at which the applicant lived from birth until age 18.<sup>2</sup>

The Identity Project has received numerous reports and complaints from U.S. citizens who have been unable to obtain any government-issued ID, and as a result have been unable to travel within the U.S., to leave the U.S., and/or to return to the U.S. Many are caught in a Catch-22, unable to obtain government-issued ID without copies of "breeder documents" such as birth certificates, but unable to obtain copies of breeder documents without government-issued ID.

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1 Contact for this submission: Edward Hasbrouck, <[eh@papersplease.org](mailto:eh@papersplease.org)>, telephone +1-415-824-0214

2 The Identity Project, et al., "Comments on proposed form DS-5513" (April 24, 2011), <<http://papersplease.org/wp/wp-content/uploads/2011/04/idp-passport-ds-5513-comments.pdf>>; The Identity Project, "State Dept. admits passport form was illegal, but still wants it approved" (September 24, 2012), <<http://www.papersplease.org/wp/2012/09/24/state-dept-admits-passport-form-was-illegal-but-still-wants-it-approved/>>. The U.S. has not responded to a FOIA request for how many people have been required to complete this supplemental questionnaire, or the standards (if any) for who is required to complete it.

Since the U.S. Second and Third Periodic Reports, the U.S. has promulgated new regulations pursuant to which it is now unlawful for any U.S. citizen to attempt to enter or leave the U.S., by any means including by land, without a U.S. passport.<sup>3</sup>

Government-issued ID is required for all air travel to, from, or within the U.S.<sup>4</sup> and for entry to federal buildings. Courthouse doors are closed to those without ID.<sup>5</sup> The prohibition on air travel without ID is especially damaging to would-be asylum seekers. Often they are stateless and/or without documents, and unable to obtain ID from the government of the country from which they seek to flee. By forbidding airlines from transmitting lawful asylum seekers without ID, the U.S. prevents legitimate asylum seekers from reaching the U.S., and turns unqualified airline check-in staff into *de facto* asylum judges of first and last resort.

In response to our complaints that these ID requirements (and the permission requirements discussed in a separate issue submission to the UNHCR) violate U.S. obligations pursuant to the ICCPR, the U.S. has argued that (a) "travelers do not have a constitutional right to travel by a single mode or the most convenient form of travel," and (b) "Article 12 of the ICCPR does not apply to laws that are necessary to protect national security. Because the purpose of the Secure Flight program is to protect national security, Article 12 would not apply."<sup>6</sup>

With respect to (a), territories under U.S. jurisdiction include numerous island groups accessible only by air (or by those who can afford to own or charter private ocean-going yachts), including the Aleutian Islands, Hawaii, Puerto Rico, American Samoa, the U.S. Virgin Islands, Guam, and the Northern Marianas. Denial of air travel constitutes *de facto* denial of essentially all possibility of travel to or from these islands. And government requirements for ID to travel are not limited to any single mode of travel. In addition to air travel, ID is required for travel on Amtrak, the government-owned operator of the only national passenger rail system.<sup>7</sup> Transportation Security Administration (TSA) and U.S. Customs and Border Protection "Visible Intermodal Prevention and Response" (VIPR) teams claim the authority to demand and inspect ID credentials, and to deny transportation to those unable to produce them, in all transportation facilities and on all modes of transportation including trains, buses, and ferries.

With respect to (b), the U.S. erroneously equates, "is claimed by the State Party to be *intended* to protect national security" with, "is genuinely *necessary* to protect national security", ignoring the

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3 The Identity Project, "Today we're all prisoners in the USA" (June 1, 2009), <<http://www.papersplease.org/wp/2009/06/01/today-were-all-prisoners-in-the-usa/>>. Exceptions to the passport requirement are permitted only on the basis of standardless "discretionary" case-by-case administrative waivers.

4 Although the U.S. claims to have "procedures" to allow air travel without ID, those who have attempted to document these procedures have been arrested and prevented from traveling by air, even when they held valid tickets. See *State of New Mexico v. Phillip Mocek*, as discussed at <<http://www.papersplease.org/wp/mocek/>>. Mr. Mocek was acquitted of criminal charges, but was prevented from traveling by air.

5 *Foti v. McHugh*, Case No. 05-16079, Ninth Circuit Court of Appeals, unpublished memorandum opinion, August 28, 2007; The Identity Project, "Ninth Circuit dismisses ID to enter courthouse case" (September 7, 2007), <<http://papersplease.org/wp/2007/09/07/ninth-circuit-dismisses-id-to-enter-courthouse-case/>>.

6 Secure Flight Program, Final Rule, 73 Federal Register 64026-64027 (October 28, 2008).

7 Amtrak, "Passenger Identification", available at <<http://www.amtrak.com/passenger-identification>>.

discussion of "necessary" in the UNHRC's General Comment No. 27. The U.S. has not conducted any public judicial or administrative fact-finding concerning the effectiveness of these measures, or whether less restrictive alternatives would be equally or more effective.

Without the ability to travel within and between U.S. territories, and to leave and return to the U.S., assembly (ICCPR Article 21) and association (Article 22) with other U.S. subjects and with people in other countries are impossible.

#### **IV. U.S. Government Report**

The U.S. Fourth Periodic Report does not mention ID requirements for travel, despite complaints including formal complaints filed with the U.S. government that these requirements violate U.S. obligations pursuant to the ICCPR.

Paragraph 251 of the U.S. Fourth Periodic Report claims that, "governmental actions affecting travel are subject to ... heightened judicial review".

#### **V. Legal Framework**

ICCPR Article 12: "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.... Everyone shall be free to leave any country, including his own....

No one shall be arbitrarily deprived of the right to enter his own country."

ICCPR Article 21: "The right of peaceful assembly shall be recognized."

ICCPR Article 22: "Everyone shall have the right to freedom of association with others."

General Comment No. 27: Freedom of movement (Art. 12): "It is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures ... must be appropriate to achieve their protective function; [and] they must be the least intrusive instrument amongst those which might achieve the desired result.... States should ensure that any proceedings relating to the exercise or restriction of these rights are expeditious and that reasons for the application of restrictive measures are provided.... The application of restrictions in any individual case must be based on clear legal grounds and meet the test of necessity.... [O]bstacles making it more difficult to leave the country... include, inter alia, ... the requirement to apply for special forms through which the proper application documents for the issuance of a passport can be obtained; the need for supportive statements from ... family members; [and] unreasonable delays in the issuance of travel documents".

#### **VI. Recommended Questions**

(1) Does the U.S. recognize a right to leave the U.S.? To travel within the U.S.? A right of U.S. citizens to return to the U.S.? How are those rights embodied in U.S. law, and what ID or other

conditions can be placed on them by U.S. law?

(2) Are U.S. citizens entitled as a matter of right to any government-issued ID?

(3) What, if any, means are available to a U.S. citizen, resident, or lawful visitor to obtain judicial review of denial or delay in issuance of government-issued ID, or of prohibitions or restrictions on travel without ID?

(4) What, if any, means are available for judicial review of whether U.S. federal, state, or local requirements for government-issued ID as prerequisite for travel are "necessary" for any of the purposes specified in Article 12 of the ICCPR?

(5) What, if any, means are available for an asylum seeker fleeing persecution in another country to travel to the U.S. without government-issued ID?

## **VII. Suggested Recommendations**

(1) The U.S. should withdraw all ID requirements for travel or movement to, from, or within the U.S. except those that are necessary for purposes permitted by Article 12 of the ICCPR, as discussed in General Comment No. 27.

(2) Denial or delay of issuance of government ID should be subject to judicial review according to the criteria for measures which restrict the exercise of rights guaranteed by the ICCPR including freedom of movement (Article 12), the right of assembly (Article 21), and freedom of association (Article 22).