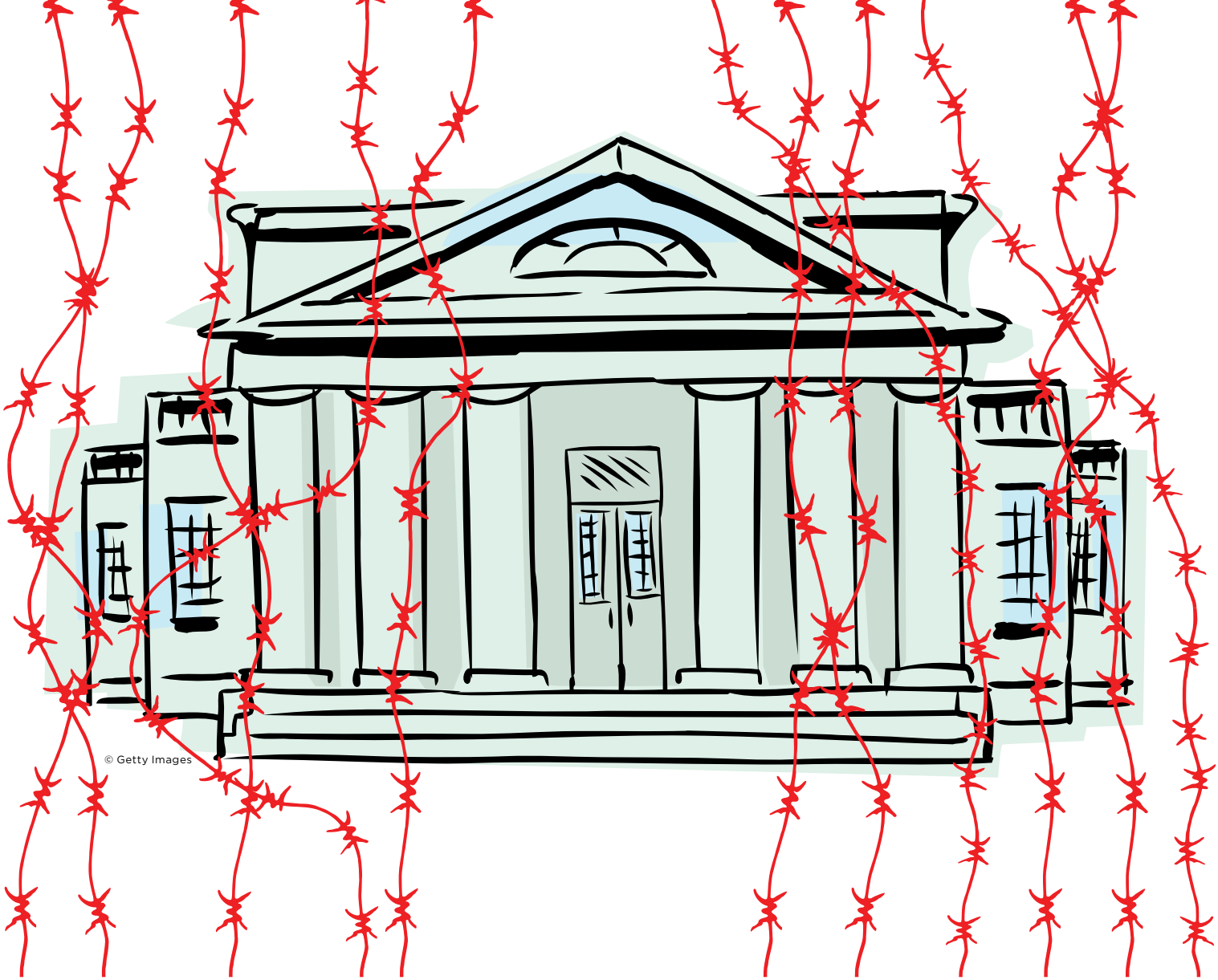

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Access to Counsel in Immigration Proceedings

Appointment of counsel for indigent and minor respondents draws support

By Matthew S. Mulqueen, *Litigation News* Associate Editor

Between July 2017 and June 2018, the U.S. government separated thousands of children from their families as part of a "zero-tolerance policy" of immigration enforcement. The practice stirred vigorous public debate over the extent to which arriving parents and children enjoy due process rights. In particular, reports of young children appearing unrepresented in immigration court focused attention on the availability of legal representation for respondents in removal proceedings. Unlike criminal defendants, who have a right to an attorney even when they cannot afford one, respondents in immigration court do not. Indigent respondents must instead rely on scarce pro bono law-

yers. Many find themselves without representation. ABA leaders have renewed calls for enhancements to due process in immigration proceedings, including the appointment of federally funded counsel for all indigent persons and unaccompanied minors in removal proceedings.

REMOVAL PROCEEDINGS IN A (HIGHLY SUMMARIZED) NUTSHELL

Individuals suspected of entering the United States illegally typically face removal proceedings. Most removal proceedings begin with an arrest, either by a local police department that coordinates with U.S. Immigration and Customs Enforcement (ICE) (an agency within the Department of Homeland Security (DHS)) or U.S. Customs and Border Protection (CPB) (a separate DHS agency). Once in ICE custody, ICE determines whether to detain and institute removal proceedings against the individual.

Removal proceedings usually occur in immigration courts, which are part of the Executive Office for Immigration Review (EOIR), an office within the Department of Justice. In every immigration case, DHS is represented by an attorney from ICE's Office of the Principal Legal Advisor, a division of DHS's Office of the General Counsel. EOIR's immigration judges preside over formal, quasi-judicial hearings, rendering decisions on deportation, exclusion, removal, rescission, and bond. Because the EOIR is part of the Department of Justice—not an Article I court—immigration judges serve at the pleasure of the attorney general.

One defense to removal may be qualification for asylum based on a credible fear of persecution in the respondent's home country because of race, religion, nationality, political opinion, or membership in a particular social group. During removal proceedings, a respondent may be detained in DHS custody, released with conditions, or released without conditions. If the court determines removal is appropriate, the individual will return to his or her country of origin via voluntary departure or involuntary deportation by ICE.

RIGHT TO GOVERNMENT-FUNDED COUNSEL FOR INDIGENT RESPONDENTS

Section 292 of the Immigration and Nationality Act (INA) has long afforded respondents in removal proceedings the "privilege" of representation by counsel at their own expense. However, debate over the right to counsel has more frequently centered on a different question: whether indigent respondents in removal proceedings have the right to *government-funded* representation.

Data suggest this debate has broad implications, particularly for children. Unaccompanied minors were unrepresented by an attorney in approximately three out of four cases originating in 2017, according to a University of Syracuse report. As of September 30, 2018, approximately 66 percent of the total 537,152 juveniles in removal proceedings were unrepresented, according to the same data.

Respondents who cannot afford attorneys continue to rely primarily on pro bono representation, and the debate over whether to provide counsel to indigent respondents in immigration proceedings—regardless of whether the Constitution requires it—continues.

The Sixth Amendment guarantees "the assistance of counsel" to defendants in federal *criminal* proceedings, which case law has interpreted to include the appointment of counsel for defendants who cannot afford to hire their own. This right applies to defendants facing any charge resulting in a sentence of actual or suspended imprisonment. However, removal proceedings are classified as civil rather than criminal matters. Accordingly, although the right has been held to apply in some civil contexts, courts have held that immigrants in removal proceedings do not have a right to government-funded counsel under the Sixth Amendment.

Less settled, however, is the question of whether the Fifth Amendment's general guarantee of due process provides a basis for the appointment of counsel during removal proceedings. Some circuit courts have stated that due process may require the appointment of counsel on a case-by-case basis for aliens who are incapable of representing themselves due to age, ignorance, or mental capacity.

With regard to children in particular, courts have been sympathetic but have thus far declined to determine that immigrant children, as a class, have a due process right to appointed counsel. In *J.E.F.M. v. Holder* (2015), a district court denied a motion to dismiss in a class action seeking a ruling that juveniles in removal proceedings have a constitutional right to counsel at government expense. In 2016, the U.S. Court of Appeals for the Ninth Circuit reversed the district court on jurisdictional grounds. The appellate court declined to opine on the merits of the plaintiffs' claims, but two circuit judges specially concurred, stating in part that whether or not appointed counsel would someday be found to be a constitutional right, the other branches of government should act: "To give meaning to 'Equal Justice Under Law,' the tag line engraved on the U.S. Supreme Court building, to ensure the fair and effective administration of our immigration system, and to protect the interests of children who must struggle through that system, the problem demands action now."

Greater clarity may soon arrive, at least for respondents in the Ninth Circuit. In September, the appellate court ordered a rehearing en banc in *C.J.L.G. v. Sessions*, an appeal from an order of the Board of Immigration Appeals affirming an immigration judge's denial of an unrepresented minor's claims for asylum and withholding of removal. In the original panel opinion, the court admitted that the minor, who had fled violence in Honduras at the age of 13, was "a sympathetic petitioner." But, "proceed[ing] cautiously" given "the peculiar and restricted role of the judiciary in reviewing matters of immigration policy," the court declined to find that the Due Process Clause implied a right to court-appointed counsel at government expense. Oral argument is set for December 2018.

To date, the Supreme Court has not weighed in on whether due process requires the appointment of government-funded counsel for any class of respondents in removal proceedings. Nor has Congress acted to provide a legislative solution. In the meantime, respondents who cannot afford attorneys continue to rely primarily on pro bono representation, and the debate over whether to provide counsel to indigent respondents in immigration proceedings—regardless of whether the Constitution requires it—continues.

THE IMPACT OF COUNSEL IN IMMIGRATION PROCEEDINGS

Whether a respondent is represented by counsel can have a significant impact on the outcome of immigration proceedings. In 2016, the American Immigration Council published a report on access to representation that analyzed data from over 1.2 million removal cases decided between 2007 and 2012. The report concluded that only 37 percent of respondents secured legal representation, with significant variances in representation rates depending on the geographic location of the court and the immigrant's nationality.

Represented immigrants were more likely to apply for relief from detention and deportation. Respondents with counsel were also more likely to obtain the immigration relief they sought. Detained immigrants with representation were more than twice as likely as unrepresented immigrants to obtain relief if they sought it. Non-detained immigrants with representation were nearly five times more likely than their unrepresented counterparts to obtain relief if they sought it.

The report noted that ability to pay was one obstacle to obtaining representation and that the availability of pro bono representation was insufficient to meet the needs of the respondent population. Although nonprofit organizations, law firm pro bono programs, and law school clinics are known for providing pro bono representation to immigrant populations, the report found that only 2 percent of immigrants facing removal secured such representation.

AN ESPECIALLY PRONOUNCED PROBLEM FOR MINORS

Representation in immigration proceedings is a particularly critical issue when the respondent is a minor, says Martín Gauto, Los Angeles, CA, member of the ABA Section of Litigation's Children's Rights Litigation Committee. When children are separated from parents, "they are very quickly on their own legal track where they may be expected to go to immigration court, come up with a claim for potential relief from deportation, all while separated from their parents and potentially without access to counsel, raising very serious due process and human rights concerns," notes Gauto.

The issue of legal representation for children has come into sharp focus in the last two years. In March 2017, then-secretary of the Department of Homeland Security (DHS) John Kelly stated that the department was considering separating children from their parents at the border as a means of deterring families from migrating to the country.

> "I saw a baby one time as a respondent in an immigration court. Someone just walked up and held the baby and the judge went through a hearing with the baby in someone's arms. It is almost unbelievable that our country does this."

Because entry into the United States without inspection is a federal misdemeanor—in addition to a civil violation of the INA—the government has the discretion, but is not mandated, to charge unauthorized immigrants with a crime and to place them into custody to await trial. When a parent is criminally charged, the government's policy is to transfer accompanying children to the custody of the Office of Refugee Resettlement, which then places the children with relatives, in juvenile detention centers, or in foster care. In contrast, when a parent is charged only with a civil violation, children typically remain with their parents. Prior to mid-2017, the government did not have a blanket policy to prosecute parents and, accordingly, separate them from their children.

From July 2017 to October 2017, the Trump administration implemented a zero-tolerance "pilot program." During that period, federal prosecutors began to criminally charge any adult who crossed the border unlawfully between New Mexico and West Texas. On April 8, 2018, the attorney general announced the expansion of the "zero-tolerance policy" nationwide. In total, the government separated thousands of children from family members between July 2017 and June 2018, when, after public pressure, President Trump signed an executive order ending the policy of separating children from their parents.

SEPARATED FAMILIES FILE SUIT OVER ZERO-TOLERANCE POLICY

Several parents separated from their children filed suit. In one of those cases, *Ms. L. v. ICE*, the U.S. District Court for the Southern District of California preliminarily enjoined the zero-tolerance policy and mandated the reunification of a class of separated families. The court found the plaintiffs were likely to establish a violation of the right to family integrity implicit in due process. Specifically, the court determined that the government's policy, as implemented, was likely to be a highly destabilizing, traumatic experience with long-term consequences on child well-being, safety, and development.

On October 9, 2018, the *Ms. L.* court preliminarily approved a settlement. The settlement, if finally approved, would require the government to reassess the asylum claims of families included in the lawsuits. Such a reassessment would allow parents "the chance to present their claim objectively without all the stress and trauma of having their children ripped away from them, and now perhaps with legal representation," observes Gauto.

THE ABA EXPRESSES CONCERN OVER SEPARATED FAMILIES' ACCESS TO JUSTICE

The ABA weighed in on the issue of legal representation for children following the nationwide expansion of the zero-tolerance policy. On June 12, 2018, then-President Hilarie Bass, Miami, FL, sent a letter to the attorney general and the secretary of the DHS expressing opposition on behalf of the ABA. The letter noted that "[c]hildren proceeding in court alone often will not be competent to present their claims for relief or have access to vital evidence held by their parents." The letter also acknowledged "that the number of families arriving at the southern border in recent years has created challenges for the government" and "recognize[d] that these are challenging issues and that immigration involving children is, in general, a complicated matter with no easy solutions."

"The ABA Board of Governors has been involved in issues relating to immigration for quite some time," notes Bass, explaining why the ABA opposed the policy. In April 2018, Bass testified before the U.S. Senate Committee on the Judiciary regarding the ABA's recommendation to create an Article I court to replace the current immigration adjudi-

cation system (among other reasons, to solidify the impartiality of immigration judges) and to discuss the critical importance of access to counsel and legal information for respondents in immigration proceedings.

Supporting access to legal representation remains a key issue for Bass. "How can we have five-year-old children walking into immigration court being asked to articulate asylum claims? How can anybody suggest that that is reflective of the concept of due process that we afford to people in our country, whether they are U.S. citizens or people seeking asylum?" she stresses.

"I cannot tell you how many times I have seen a little kid sitting by himself or herself at the respondent's table in immigration court without an attorney sitting next to them. It is the saddest thing that you will ever witness. I saw a baby one time as a respondent in an immigration court. Someone just walked up and held the baby and the judge went through a hearing with the baby in someone's arms," Gauto adds. "It is almost unbelievable that our country does this."

SUPPORTING ACCESS TO JUSTICE

The ABA continues to support the appointment of counsel at federal government expense to represent all indigent persons and unaccompanied minors in removal proceedings. "Providing legal representation for children at government expense is something that we should advocate for, is the right thing to do, and is something I have been urging as an immigration lawyer for about 12 years," says Gauto. In addition to supporting the appointment of counsel at the federal government's expense, the ABA has urged state, local, territorial, and tribal governments to provide legal counsel to all indigent persons in removal proceedings in their jurisdictions.

At least one local government has acted in accordance with the recommendation. In 2014, the New York City Council funded a program that provides free legal counsel to almost all detained indigent immigrants facing removal at one immigration court in Manhattan. Prior to the program, only 4 percent of unrepresented, detained cases in that court resulted in successful outcomes for the respondent. With counsel, approximately 48 percent of respondents will resolve their proceedings successfully, according to a 2017 evaluation of the program.

Opponents of paid legal representation for respondents in immigration proceedings believe that taxpayers should not fund initiatives that make it harder to deport those who are removable. On the other hand, a 2014 study by NERA Economic Consulting found that the fiscal savings expected from such a program could exceed its costs.

Unless and until Congress follows through on suggestions like the ABA's policy proposal, indigent immigrants and children will continue to rely on the generosity of attorneys providing legal services pro bono. Attorneys who are interested in this issue, or who wish to learn more about serving in a pro bono capacity, can find information and resources on the ABA's Immigration & Family Separation Resources pages.

RESOURCES

- ABA's Family Separation Resources, available at http://bit.ly/LN442-family.
- ABA's Immigration Resources, available at http://bit.ly/LN442-immigration.
- American Immigration Council, *Access to Counsel in Immigration Court* (2016), available at http://bit.ly/LN442-AIC.
- Litigation Documents & Resources Related to Trump Policy on Family Separations, available at http://bit.ly/LN442-policy.
- ABA Working Group on Unaccompanied Minor Immigrants, available at http://bit.ly/LN442-UM.
- Olga Byrne & Elise Miller, *The Flow of Unaccompanied Children Through the Immigration System: A Resource for Practitioners, Policy Makers, and Researchers* (Vera Institute on Justice, Center for Immigration and Justice Mar. 2012).
- ABA Letter Regarding Family Separation, available at http://bit.ly/LN442-ABAletter.
- Statement of Hilarie Bass, President of the American Bar Association Before the Subcommittee on Border Security and Immigration, Committee on the Judiciary, U.S. Senate, "Strengthening and Reforming America's Immigration Court System" (Apr. 18, 2018).
- University of Syracuse, *Children: Amid a Growing Court Backlog Many Still Unrepresented* (Sept. 28, 2017).
- INA § 240(b)(4)(A).
- 6 C.F.R. § 15.30 (prohibiting discrimination by DHS).
- 28 C.F.R. § 39.130 (prohibiting discrimination by the Department of Justice).
- *Aguilera-Enriquez v. Immigration & Naturalization Serv.*, 516 F.2d 565, 568 (6th Cir. 1975).
- *Alabama v. Shelton*, 535 U.S. 654, 674 (2002).
- *C.J.L.G. v. Sessions*, 880 F.3d 1122, 1136 (9th Cir.), *reh'g en banc granted*, 904 F.3d 642 (9th Cir. 2018).
- *Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005).
- *Escobar Ruiz v. INS*, 787 F.2d 1294, 1297 (9th Cir. 1986), *opinion withdrawn sub nom. Rolando Escobar Ruiz v. INS*, 818 F.2d 712 (9th Cir. 1987), *and on reh'g*, 838 F.2d 1020 (9th Cir. 1988).
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- *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984).
- *J.E.F.M. v. Holder*, 107 F. Supp. 3d 1119 (W.D. Wash. 2015), *aff'd in part, rev'd in part sub nom. J.E.F.M. v. Lynch*, 837 F.3d 1026 (9th Cir. 2016).
- *Johnson v. Zerbst*, 304 U.S. 458 (1938).
- *Leslie v. Attorney Gen.*, 611 F.3d 171, 181 (3d Cir. 2010).
- *Mathews v. Eldridge*, 424 U.S. 319 (1976).
- *Ms. L.; et al. v. U.S. ICE; et al.*, 18cv0428 (S.D. Cal. June 26, 2018) (order granting plaintiffs' motion for classwide preliminary injunction).
- *Ms. L.; et al. v. U.S. ICE; et al.*, 18cv428 DMS MDD (S.D. Cal. Nov. 8, 2018) (joint status report).
- *Romero v. INS*, 399 F.3d 109 (2d Cir. 2005).
- Kate M. Manuel, Cong. Research Serv., *Aliens' Right to Counsel in Removal Proceedings: In Brief* (Mar. 17, 2016).
- Lucas Guttentag & Ahilan Arulanantham, "Extending the Promise of Gideon: Immigration, Deportation, and the Right to Counsel," ABA Human Rights Mag. (May 2013).
- John D. Montgomery, NERA Econ. Consulting, *Cost of Counsel in Immigration: Economic Analysis of Proposal Providing Public Counsel to Indigent Persons Subject to Immigration Removal Proceedings* (May 28, 2014).
- Jennifer Stave et al., Vera Inst. of Justice, *Evaluation of the New York Immigrant Family Unity Project: Assessing the Impact of Legal Representation on Family and Community Unity* (Nov. 2017).
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- Ingrid V. Eagly & Steven Shafer, "A National Study of Access to Counsel in Immigration Court," *U. of Penn. L. Rev.* (Dec. 2015).