



Defending Human Rights & Due Process

“We understand the Board’s staggering workload. But the Department of Justice cannot be permitted to defeat judicial review by refusing to staff the Immigration Court and the Board of Immigration Appeals with enough judicial officers to provide reasoned decisions.”

- U.S. Court of Appeals for the Seventh Circuit,
Mekhael v. Mukasey, 509 F.3d 326 (7th Cir. 2007)

Courts of Injustice

Immigration Court System Needs Vital Fixes to Protect Human Rights

As the Department of Homeland Security (DHS) expands immigration enforcement programs that sweep up and detain thousands of people, the U.S. government has failed to provide the necessary resources to ensure due process in the courts that will ultimately decide immigrants’ fates. DHS ordered more than 213,000 people to appear in immigration court in FY 2008, a 36 percent increase since 2007.¹ As a result of this influx and lack of funding for the immigration court system, thousands of men, women, and children are denied a fair and meaningful day in court, a basic human right and a founding principle of the American justice system.

A fair hearing is crucial in the immigration system, where the outcome of a single administrative court hearing may mean death or permanent exile for a person or family if they are forced to return to their native country. Federal courts have harshly criticized the lack of due process that plagues U.S. immigration courts and the Board of Immigration Appeals. One court stated that “the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice.”²

Among the more than 8,000 immigrants, refugees, asylum seekers, unaccompanied immigrant children, and human trafficking victims to whom Heartland Alliance’s National Immigrant Justice Center (NIJC) provides legal services every year, hundreds have encountered due process violations within the immigration courts. The dozens of these cases which have escalated to the federal courts have triggered persistent criticism from those courts, including the U.S. Court of Appeals for the Seventh Circuit. This policy brief offers recommendations for reforms that are necessary to promote due process and human rights, as well as efficiency and professionalism, in the immigration court system. ♦



An NIJC client reunites with her children and granddaughter after being granted lawful permanent resident status in 2009. An immigration judge had previously ordered her removed when she appeared in court without a lawyer and explained she was not competent to represent herself. (Read her story on page 2.)

The Seventh Circuit on the Immigration Court System

Excerpts from recent decisions from the U.S. Court of Appeals for the Seventh Circuit

“[T]he record as a whole—the tone of the IJ’s cross-examination of Castilho de Oliveira and his expert witness, the frequent interruptions, the inappropriate questions and comments, and the IJ’s ultimate failure to engage with the evidence in the record while resting his decision on speculation and irrelevancies—leaves the impression that the IJ entered the hearing with his mind already made up.”

- *Castilho de Oliveira v. Holder*, (7th Cir. 2009)

“The errors that have compelled us to reverse in these cases despite the deferential standard of judicial review of agency action are not subtle. Asylum seekers should not bear the entire burden of adjudicative inadequacy at the administrative level.”

- *Guchshenkov v. Ashcroft* and *Dimitrov v. Ashcroft*, 366 F.3d 554 (7th Cir. 2004)

“Indeed, at times, the record may be read plausibly as indicating a certain hostility to Ms. Rodriguez... the IJ’s questioning clearly assumes the role of counsel for the Government. It goes beyond clarification or simply filling in the interstices of Ms. Rodriguez’ testimony and becomes de facto cross-examination of the witness.”

- *Rodriguez Galicia v. Gonzales*, 422 F.3d 529 (7th Cir. 2005)

“The elementary principles of administrative law, the rules of logic, and common sense seem to have eluded the Board in this as in other cases.”

- *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000)

“We are appalled that the IJ would rest his decision on the absurd proposition that Bosede could evade imprisonment, mistreatment, and possibly death by approaching his jailers and trying to buy his way out. ... We have said before and underscore here that whether an alien might succeed in escaping persecution or torture through bribery is an irrational and altogether improper consideration in deciding a claim for asylum or other relief.”

- *Bosede v. Mukasey*, 512 F.3d 946 (7th Cir. 2008)

“We do not lightly reverse the BIA’s decision, given the deferential standard of review applicable in a petition for review. But the IJ’s opinion, which the BIA echoed, is riddled with systematic and obvious errors. Tadesse did not receive a fair hearing, and she is entitled to a new one. We urge the Board on remand to reassign the case to a different immigration judge.”

- *Tadesse v. Gonzales*, 492 F.3d 905 (7th Cir. 2007)

“The determination that Tunis is unlikely to be subjected to government-condoned torture if she is returned to her village cannot stand, given the errors committed by the immigration judge and left uncorrected by the Board of Immigration Appeals. ...the immigration judge’s opinion is not reasoned, and its defects were not repaired by the Board’s perfunctory discussion of the torture issue in its opinion affirming the immigration judge.”

- *Tunis v. Gonzales*, 447 F.3d 547 (7th Cir.2006)

A life on the line: When getting a fair hearing is a matter of luck



Maleah (left) with NIJC Attorney Hena Mansori

When Maleah* appeared alone before an immigration judge and explained that she suffered from depression and anxiety, sometimes heard voices, and had memory problems, the judge ordered her to be deported. It wasn’t until attorneys at Heartland Alliance’s National Immigrant Justice

Center (NIJC) took on Maleah’s case that the immigration court considered her mental health and other circumstances that made her eligible to remain in the United States.

Maleah, a 50-year-old native of the Philippines and mother of three children, has lived in the United States as a lawful permanent resident since 1990. In October 2008, she was detained by U.S. Immigration and Customs Enforcement (ICE) following two minor convictions. She had suffered

depression for years and had been under regular care of a doctor, but that care ended once she was in ICE custody. Suffering from severe depression exacerbated by her detention, and unable to understand the full nature of the proceedings against her, Maleah appeared at her immigration hearing without a lawyer. The judge did not tell Maleah that she had the right to seek free legal assistance from a legal aid organization before he ordered her removal.

A few days after the hearing, Maleah met attorneys from the National Immigrant Justice Center during a “know your rights” presentation. By the time the attorneys agreed to represent Maleah a few days later, she had already been transferred from Chicago to El Paso, Texas, and was about to be deported. The attorneys convinced a judge to stop the deportation and allow Maleah to reopen her case. Over the next six months, the attorneys helped Maleah gather the evidence she needed to demonstrate she was eligible to remain in the United States. In August 2009, the court reinstated Maleah’s permanent resident status and she was released from detention. On the day of her release, she met her infant granddaughter for the first time. ♦

*Name has been changed

Recommendations for immigration court reform

Ensure access to counsel

People who consult with immigration legal experts are better able to understand the types of documentation they need to corroborate an application for relief, making their time in court more productive and reducing the number of unnecessary court hearings. Studies have shown stark disparities in success rates between represented and unrepresented individuals in immigration proceedings.³ But in 2006, the Department of Justice (DOJ) Executive Office for Immigration Review reported that only 48 percent of people appearing before an immigration judge had legal representation.⁴ The DOJ should fund non-governmental organizations (NGOs) to expand their direct representation of vulnerable immigrants and allow immigration judges to appoint NGO-based legal counsel for detained individuals who are unable to adequately defend themselves and cannot afford an attorney. The National Immigrant Justice Center and other NGOs filed a petition for rulemaking with the DOJ in 2009 requesting that it promulgate rules to authorize immigration judges to appoint counsel.⁵

Increase staffing

Although Department of Homeland Security (DHS) enforcement has significantly increased the number of cases filed with the immigration courts, the Department of Justice (DOJ) has not hired additional immigration judges or court clerks to meet the influx. On average, one clerk is assigned to four immigration judges, and in 2008 judges heard more than 1,200 cases each.⁶ As a result, the average waiting time for cases to move through the court is more than 14 months.⁷ Insufficient resources also result in errors in judges' decision-making. The DOJ should hire more immigration judges and court clerks.

Hold judges accountable

When the Board of Immigration Appeals (BIA) finds error and remands cases, it currently remands to the same judge who erred initially. When a judge's decision has been reversed, the BIA should ensure fair adjudication of the case by remanding it to a different judge, a common practice in other courts.

Respect judges' independence

Immigration judges lack authority over their own courtrooms, creating unfairness and inefficiencies in the immigration court system. For example, judges may hold lawyers for immigrants in contempt of court, but have no similar power over DHS prosecutors. Judges also must wait

for prosecutors to take some procedural steps to complete a case, but have no authority to order them to act.⁸ Finally, DHS prosecutors have effective "veto power" over several types of court decisions.⁹ Immigration judges should be allowed the same control over their courtrooms as judges in other courts, including the power to command that certain actions be performed within a time frame set by the court, rather than by agency bureaucracy.

Adopt an electronic filing system

The immigration court system still relies exclusively on paper filings, resulting in delays and lost files. Electronic filing of briefs would increase the efficiency of the system, reduce potential filing errors by court clerks, and permit parties to review files without requiring the assistance of court staff. Currently, immigration hearings are recorded using 1980s-era tape recording equipment. To obtain transcripts, immigrants and their attorneys must wait for the cassette tapes to be transported from the court to the transcribers. Many cassette tapes are inaudible or accidentally erased. Electronic case management would avoid these problems.

Assign DHS prosecutors to handle cases from start to finish

Unlike federal prosecutors in the criminal justice system, DHS does not assign one attorney to a particular case. This makes it impossible for immigrants' counsel to properly prepare their defense and for both parties' attorneys to hold pretrial discussions. This practice also harms the prosecutorial interests of the government, since the DHS attorneys have little time to become familiar with the facts of their cases. DHS should assign one attorney for the duration of each case.

Improve BIA efficiency & professionalism

The BIA is currently the last level of review for most immigration cases. Composed of only 15 members and about 140 staff attorneys,¹⁰ it decided more than 38,000 cases in 2008.¹¹ These decisions are often brief and inconsistent, and have been reversed at rates over 40 percent in some federal circuit courts.¹² The strain of reviewing large numbers of decisions prevents BIA members from focusing on important or difficult legal issues, causing them to make mistakes even in precedential decisions. The BIA should implement a law clerk system, hold oral arguments in published cases, solicit *amicus* briefs to ensure full exposition of the relevant issues, and make non-precedential decisions available publicly in redacted form. ♦

TAKE ACTION

Tell Attorney General Holder to restore due process to the immigration courts

U.S. Attorney General Eric Holder has the power to make critical reforms to the immigration court system and ensure that immigrants have a fair day in court.

One of the greatest barriers to a fair day in court for immigrants is lack of access to counsel. People facing deportation from the United States are not provided court-appointed counsel, even though studies have shown stark disparities in success rates between represented and unrepresented individuals in immigration proceedings.

Ask Attorney General Holder to take two important steps to expand access to counsel for immigrants:

1. Allow immigration judges to appoint counsel for immigrants who cannot afford to hire an attorney and who would be denied a fair day in court if they did not have an attorney to help them prepare their case.
2. Expand the Department of Justice's Legal Orientation Program to allow non-governmental organizations to provide representation of indigent immigrants facing deportation.

Visit www.immigrantjustice.org/action/holder_counsel or call the Attorney General Public Comment Line at 202-353-1555 to ask Attorney General Holder for critical reforms to restore human rights to the immigration court system.

Sources:

1. American Bar Association Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, February 2010, ES-19.
2. *Benslimane v. Gonzales*, 430 F.3d 828 (7th Cir. 2005).
3. Donald Kerwin, "Revisiting the Need for Appointed Counsel," *Insight*, Migration Policy Institute, No. 4, April 2005, 6.
4. United States Department of Justice, Executive Office for Immigration Review, *FY 2006 Statistical Year Book*, G1 (2007).
5. "Petition for Rulemaking to Promulgate Regulations Governing Appointment of Counsel for Immigrants in Removal Proceedings," submitted June 29, 2009. www.immigrantjustice.org/news/litigation/petition-aptcounsel.html
6. American Bar Association, ES-28.
7. Transactional Records Access Clearinghouse, *Case Backlogs in Immigration Courts Expand, Resulting Wait Times Grow*, Syracuse University, June 2009, Figure 1.
8. For example, judges must await "background checks" before granting relief, but cannot order the government to perform those checks. See, 8 C.F.R. §§ 1003.1(d)(6)(ii)(A); 1003.47(h). In re M-D-, 24 I&N Dec. 138 (BIA 2007).
9. For example, while immigration court regulations permit judges to terminate removal cases in humanitarian situations to permit naturalization, the BIA has held that immigration judges cannot use this provision without the agreement of DHS. *Matter of Hidalgo*, 24 I. & N. Dec. 103 (BIA 2007).
10. Chicago Appleseed Fund for Justice, *Assembly Line Injustice: Blueprint to Reform America's Immigration Courts*, May 2009, 34.
11. Executive Office for Immigration Review, *FY 2008 Statistical Yearbook*, Department of Justice, March 2009, S1.
12. *Benslimane v. Gonzales*, 430 F.3d 828 (7th Cir. 2005).

Recent Reports and Recommendations on Immigration Court Reform

American Bar Association Commission on Immigration

Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases, February 2010

http://www.abanet.org/media/nosearch/immigration_reform_executive_summary_012510.pdf

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Case Backlogs in Immigration Courts Expand, Resulting Wait Times Grow, June 2009

<http://trac.syr.edu/immigration/reports/208/>

Immigration Courts: Still A Troubled Institution, June 2009

<http://trac.syr.edu/immigration/reports/210/>

Latest Data from Immigration Courts Show Decline in Asylum Disparity, June 2009

<http://trac.syr.edu/immigration/reports/209/>

Chicago Appleseed Fund for Justice

Assembly Line Injustice: Blueprint to Reform America's Immigration Courts, May 2009

http://www.chicagoappleseed.org/programs/immigration_court_reform



Heartland Alliance's National Immigrant Justice Center (NIJC) provides direct legal services to and advocates for immigrants, refugees, and asylum seekers through policy reform, impact litigation, and public education. NIJC gratefully acknowledges the U.S. Human Rights Fund for its support of this publication and the DHS-NGO Enforcement Working Group. The Working Group, co-chaired by the Chicago Bar Foundation, facilitates advocacy and communication between the Department of Homeland Security (DHS) and human rights organizations, the organized bar, legal aid providers, and immigrant rights groups. The Working Group advocates for full protection of internationally recognized human rights, constitutional and statutory due process rights, and humane treatment of noncitizens. The National Immigrant Justice Center is solely responsible for the content of this document.

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