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A VIEW FROM THE IMMIGRATION BENCH

*Noel Brennan**

The views expressed here are my own, and I write in my individual personal capacity and not as an official spokesperson for the U.S. Department of Justice. Nor do my views necessarily reflect the views of my colleagues on the New York court.

BACKGROUND

From the perspective of the immigration bench, the unmet legal needs of the immigrant poor are perpetually apparent, as is the importance of instituting concrete ways to begin to take on the herculean task of improving and increasing the availability of legal services for oft-forgotten immigrants.

In spring 2008, Judge Robert A. Katzmann¹ convened a working group, comprised of immigration practitioners from large and small firms, Legal Aid attorneys, distinguished members of the private bar, nonprofit legal service providers, an Assistant Chief Counsel from the New York Department of Homeland Security (DHS), law professors, clinical supervisors, and representatives from interested city, state, and federal agencies. The purposes of this “Katzmann study group” were to explore the problem of inadequate representation of the immigrant poor and to develop specific projects and strategies to overcome barriers to quality representation. In the meetings that ensued, Judge Katzmann, along with Judge Denny Chin,² inspired us all to do better and to do more. Each has given generously of his time. No question or invitation has been too small for them to take under consideration. Their inclusive problem-solving

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1. Judge Robert A. Katzmann sits on the U.S. Court of Appeals for the Second Circuit.

2. Judge Denny Chin is a district court judge in the U.S. District Court for the Southern District of New York. On October 6, 2009, President Obama nominated Judge Chin for a seat on the Second Circuit.

approach has resulted in a level of esprit that has captivated everyone involved.

Although the problem extends to travel agents who often advise immigrants to perjure themselves and attorney/notario fraud—matters that are addressed elsewhere in this issue—this account will focus on the promising developments underway in immigration courts in New York involving the cooperation of pro bono attorneys, service providers, immigration judges, and DHS to improve access to legal information and counseling and to increase representation of poor immigrants.³

THE IMMIGRATION COURTS IN MANHATTAN

Twenty-Six Federal Plaza is an extremely busy court. My twenty-four immigration judge (IJ) colleagues and I each have approximately 1000 cases on our respective dockets. Most of my cases involve people seeking asylum in the United States because of suffering inflicted on them for their political opinion, nationality, race, or religion. Two additional judges assigned to the Varick Street Detention Center have more than 900 open cases for detained immigrants.

Immigration law is complicated and labyrinthine. The immigrants who appear before me are predominantly non-English speaking, often from distinctly different cultures,⁴ and are often uneducated. They may be from totalitarian or corrupt regimes in which a government agent has been the persecutor, and from a culture where the common sense is that you can't trust government. Many are tentative when spoken to and even those represented by counsel convey the timidity and fear of someone in a completely unfamiliar setting. The stories of these same individuals often include dramatic acts of courage and heartbreaking details of suffering—often traumatic suffering—that can be relived in the telling. Such a respondent must rely completely on his attorney to guide him through the process and champion his claim. How the attorney performs can be fateful. If, for example, the attorney fails to create a complete record including submitting documents that are essential to the case, the immigrant may lose, no matter how authentic his claim for asylum may be or how dire the consequences of deportation. More specifically, the failure to produce corroborating witnesses or documents can render the applicant unable to

3. There is great value to a lawyer in engaging in immigration pro bono besides the poise gained and practical value of witness preparation and courtroom experience. A lawyer's ability to come to know and understand the situation of someone from a distinctly different background and culture challenges that lawyer to think differently. It challenges the imagination and intellect and makes us all better lawyers and judges. I am inspired each day by the energy and enthusiasm of pro bono attorneys, law students and their mentors, and the hardworking practitioners—both in the private sector and the government—who appear each day in my courtroom and do their job well.

4. On any given day, I may hear cases from, for example, the People's Republic of China, Burma, Uzbekistan, Cote d'Ivoire, Republic of Congo, Haiti, Mauritania, or Zimbabwe.

rehabilitate problematic testimony. Even where testimony is deemed credible, under the REAL ID Act of 2005,⁵ where the IJ determines that the applicant should provide evidence that corroborates otherwise credible testimony, “such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain” it.⁶ And, assuredly, an applicant’s failure to make a complete record before the IJ may have the result that an issue is waived on appeal.

My actual workday as an immigration judge generally involves presiding over administrative hearings where I consider documents and evaluate testimony. Nearly every day I conduct multiple removal proceedings in which documentation that may be difficult to produce is essential and witness preparation is a necessity in order for the immigrant to succeed. Issues may arise related to the timely filing of an asylum application, how to consider the fact that an immigrant has briefly returned to the country of his persecution, or the development of a theory related to a protected social group. Some issues call for the testimony of an expert witness on, for example, political conditions in an immigrant’s country of origin or the long-term impact of physical harm on the applicant.

Although I am not a psychologist, I often observe immigrants in need of social support or other professional help that they are likely not receiving. For example, I may see a flat affect that suggests the possibility of deep depression. I have seen a woman from Kosovo break down in terror as she relived a rape. In another instance, a Chinese man sobbed uncontrollably as he recounted being detained by the cadres because he resisted the family-planning officials who came to forcibly take his wife, who was six months pregnant, for an abortion.

At Twenty-Six Federal Plaza nearly all immigrants are represented by counsel, while at the Varick Street Detention Center nearly all are unrepresented. The cases at both locations may involve complex legal and/or criminal issues that require competent representation. Even immigrants who have good lawyers can lose; those with no lawyer at all have to rely entirely on the judge for counsel. Attorneys for the DHS—the prosecutors—can be formidable opponents in these adversarial hearings. Effective representation involves careful review of documentation before submission into the record, thorough witness preparation, and the ability to guide the respondent through his story while addressing inconsistencies with his documents or prior statements, of which the DHS is likely to be aware. While legal issues may from time to time arise in a case—for example, the material support bar to relief⁷—it is more often the case that problems arise in a hearing because of the failure to produce documents or unexplained inconsistencies, which, in my view, could sometimes be avoided with some modicum of witness preparation.

5. Pub. L. No. 109-13, 119 Stat. 231 (codified in scattered sections of 8 U.S.C.).

6. 8 U.S.C. § 1158(b)(1)(B)(ii) (2006).

7. See *supra* note 6 and accompanying text.

The quality of representation before me varies widely. Many fine lawyers appear on behalf of the immigrants. But all too often the representation is mediocre. Some lawyers simply lack legal expertise. But there is also a kind of ennui that is widespread among lawyers who appear before me. Case theory is not developed. Necessary documents are not produced, nor are immigrants prepared to present reasonable explanations for why such documents are absent. Applicants and witnesses are often unprepared for the cross-examination by experienced DHS attorneys. At a master calendar hearing, issues may be identified that need to be addressed and documents singled out that the respondent can reasonably be expected to produce in a case. Capable, prepared, and effective counsel are on top of issues that require attention and will file supporting witness affidavits, corroborating documents, and/or memos of law on issues in dispute. It is not that I mind counsel choosing not to produce documentary evidence or certain witnesses to advance their client's claim. Rather, I've grown concerned that many attorneys are just not very interested in their work and therefore bring little professional vigor or focus to it.

Even more troubling are those situations in which, as is routinely the case at Varick Street Detention Center, immigrants appear before an IJ unrepresented. This means that the detainee must manage the acquisition of documents and identification of witnesses from behind bars. Furthermore, at the hearing, he must present his claim to the judge without a lawyer, all the while possibly confronting the trauma of past persecution and/or the prospect of being separated permanently from his family in the United States if his case does not go well. All of this puts substantial pressure on the judge to ensure that available relief is thoroughly explored and the record fully developed. However time-consuming, it is our duty to explain the law to pro se immigrants and to develop the record to ensure that any waiver of appeal or of a claim is knowing and intelligent. Given the dearth of representation in detained settings, without the IJ's assistance, many immigrants would be for all practical purposes foreclosed from making a case against removal.

Crushing caseloads and limited judicial resources result in tremendous pressure on an IJ to ensure that the proceedings are fair and rational and that the record is properly developed despite inadequate or no representation. So much is at stake when someone is facing the return to a country where he or she was persecuted or, after having been in the United States nearly all of his or her life and known no other home, is facing separation from spouse and family—who, in turn, face the loss of their breadwinner.

Setting aside for a moment the aspiration of improving the overall quality of existing representation, there is an urgent need to increase the pool of pro bono attorneys for poor and, especially, detained immigrants who, for the most part, must litigate their claims without the help of lawyers. In my experience, pro bono attorneys take their work very seriously. Even if they are unfamiliar with the law, they make a point of learning what they need to know and working hard to develop a case theory, gather available

supporting documents, recruit experts, put in the time required to prepare a respondent to testify, and research background information on the country's conditions.

INITIATIVES UNDERWAY FOR UNDERSERVED IMMIGRANTS AT THE
IMMIGRATION COURTS IN MANHATTAN

While the government does not fund representation, it can foster practices that create a supportive climate for those who give their time and talent to help poor immigrants. The New York IJs have historically given their time generously to assist in training seminars sponsored by the City Bar, American Immigration Lawyers Association (AILA), the Federal Bar Counsel, and a variety of other organizations. Judges also routinely volunteer to have pro bono attorneys observe hearings, when appropriate, in their courtrooms. In particular, many of my colleagues have long supported the work of nonprofit service providers who serve the underrepresented immigrant poor. Assistant Chief Immigration Judge Sarah Burr, who spoke at the Fordham Levine Lecture Colloquium, is concerned about the general need to deliver more information to immigrants and the pressing matter of the lack of representation on detainees and its impact on the court's docket. She encourages IJs to speak and teach in ways that can improve representation and enhance pro bono efforts. Steve Lang, Pro Bono Coordinator for all the immigration courts and the Board of Immigration Appeals, recognizes the hard work undertaken in New York by the court and service providers and has applauded these efforts. Recently, in March 2008, the Office of the Chief Immigration Judge reinvigorated the Department of Justice's pro bono policy,⁸ which supports, encourages, and facilitates pro bono representation. The policy elevated awareness within and without the court of the need for pro bono lawyers and initiatives on behalf of poor, unrepresented immigrants. While individual judges determine their respective courtroom practices, the pro bono directive encourages flexibility and accommodation to attorney representatives providing pro bono services, for example, when setting hearing dates. Consistent with the pro bono directive, Immigration Judge Margaret (Peggy) McManus was named the pro bono liaison judge for New York to work with the court administrator and outside groups.

What follows is an overview of approaches in the Manhattan Immigration Courts designed to increase the access of poor immigrants to representation. One of the collaborations, the Immigration Representation Project (IRP), was a groundbreaking partnership begun more than ten years ago. Other more recent undertakings are an outgrowth of the collaborative work of those on the Katzmann study group. Since some of these efforts

8. See *EOIR Issues Guidelines for Facilitating Pro Bono Legal Services*, 85 INTERPRETER RELEASES 854, 854-57 (Mar. 17, 2008); Memorandum from David L. Neal, Chief Immigration Judge, Executive Office for Immigration Review, Dep't of Justice (Mar. 10, 2008), *reprinted in* 85 INTERPRETER RELEASES 889 app. II (2008).

are written about in detail elsewhere in this issue, my comments are brief. My intention is to describe the mix of approaches underway and to underscore that there is no single solution to this problem. While much remains to be done, each of these efforts is a step in the right direction.

A. *The IRP at Twenty-Six Federal Plaza*

Created in 1995, the IRP involves the cooperative effort of a number of service providers and the New York Immigration Court at Twenty-Six Federal Plaza, which provides an interview room.⁹ Four days each month, nonlawyer representatives from one of four participating organizations—the Legal Aid Society, Human Rights First, Hebrew Immigrant Aid Society, and Catholic Charities Community Services of the Archdiocese of New York—interview immigrants in the “Pro Bono” room on the twelfth floor of Twenty-Six Federal Plaza. The process involves meeting with immigrants, who typically have cases pending at Twenty-Six Federal Plaza, and completing a questionnaire. This interview is usually followed up by a more in-depth interview at one of the participating organizations or the City Bar Justice Center. The cases are distributed to the various organizations, with the Legal Aid Society handling cases involving individuals with criminal convictions and sometimes partnering with law firm pro bono attorneys. Asylum cases are referred to Human Rights First and the law firm pro bono attorneys they mentor. Catholic Charities also takes some of the cases, working with law students or handling the cases in-house. Elsewhere in these proceedings, the Report of the Subcommittee on Enhancing Mechanisms for Service Delivery provides a comprehensive discussion of the IRP.

Each week at master calendar hearings, my colleagues and I routinely refer unrepresented immigrants to the IRP for screening. When immigrants succeed in obtaining pro bono representation through an IRP referral or some other avenue, we are generally assured that specific forms of relief are adequately explored and, where applicable, claims for relief sought and corroborating evidence produced. While together the IJs have a total of sixteen master calendar days per month, limited resources only permit the IRP to be open four days per month. A number of ideas to improve the IRP are discussed in the Enhancing Mechanisms for Service Delivery subcommittee report. Ideally, the IRP would expand to eight or, better yet, sixteen days per month. Also, resources permitting, the addition of group legal orientations or “Know Your Rights” presentations at Twenty-Six Federal Plaza would be an efficient way to provide an overview of the immigration court process, the possibility of relief from removal, and ways to expedite the process for the hundreds of immigrants who come to Twenty-Six Federal Plaza daily.

9. The New York court administrators, Star Pacitto (at Twenty-Six Federal Plaza) and Tom Bonita (Varick Street) are the steady hands behind the scenes who do much to facilitate the smooth day-to-day operation of the pro bono programs at New York courts.

B. *One-on-One “Know Your Rights” Program for Detainees at Varick Street Detention Center*

This new program, begun in fall 2008, involves collaboration among the City Bar Justice Center, the New York Chapter of the American Immigration Lawyers Association, and the Legal Aid Society, who train pro bono attorneys from law firms to provide one-on-one consultations with detainees at Varick Street on Thursday mornings. These consultations provide for in-depth discussion about the court processes and specific forms of relief from removal. Interpreters may be needed and these, too, are provided by law firm and provider participants. The Benjamin N. Cardozo School of Law Immigration Justice Clinic and the Brooklyn Law School Immigration Law and Safe Harbor Projects have begun participating in the project. DHS detention supervisory personnel cooperate in providing meeting rooms for the detainees and the volunteers and in making it possible for the detainees to meet with the volunteer attorneys at the designated time. The effort is expanding as new firms are recruited to assist in consultations.

Let it be said that one-on-one consultations are a vast improvement over generalized presentations that are sometimes offered as part of an orientation to newly detained respondents. Let it also be said that even these generalized presentations are a lot better than no help at all. However, even one-on-one consultations have limitations. For someone from another culture, another legal system, who does not speak English well, if at all, and who may have little education, the help offered here, precious though it may be, needs reinforcement. Indeed, I have seen experienced attorneys—and judges—struggle with aspects of the law. The one-on-one consultation is, for sure, of great value in a situation in which there is otherwise no help, but its existence must not be allowed to obscure the larger predicament of detained respondents or allay our qualms in this regard. At present, in many cases, the burden of closing the vast gap remains on the IJs who must serve both as counselor and judge.

Unfortunately, at the New York State Correctional Facilities in Fishkill, Ulster, and Bedford Hills, where immigrants are often detained by DHS, there is no systematic pro bono effort, one-on-one or otherwise, which means that immigrants appear without a lawyer in every proceeding. As discussed above, this remains not only a serious problem for detained immigrants but for the system as a whole. These facilities are outside the metropolitan area, which makes it harder for respondents to secure pro bono representation. They are not so far away, however, as to be beyond the purview of lawyer-rich Manhattan, much less the larger metropolitan area. One idea that comes to mind is establishing a dedicated law school clinic targeting these three facilities. Some providers have recently proposed another idea, on which as a judge I cannot comment, for the Justice Department to develop regulations for those individual situations where appointed counsel is absolutely necessary if, for example, mental competence is at issue for a detainee.

C. *Representation at Bond Hearings at Varick Street*

At Varick Street, bond hearings are held early in a case before charges are filed. Since December 2008, students from the New York University School of Law Immigrant Rights Clinic have provided limited representation in bond hearings. The fledgling program is expanding to include pro bono attorneys. Previously, it had been difficult to recruit pro bono attorneys because immigrants are often moved to another venue before a hearing on the merits. Now, however, even though detainees may be transferred after a consultation with Legal Aid or pro bono counsel after their bond hearing (assuming that bond is denied), this transfer does not impose any impractical burdens on volunteer law firms. The transfer issue is discussed at length in the Reports of the Subcommittee on Enhancing Mechanisms for Service Delivery elsewhere in this issue. In addition, stakeholders have met to discuss operational concerns and potential solutions, a practice that should continue since it facilitates communication and coordination of resources among stakeholders.

D. *Unaccompanied Minor Initiative*

In 2004, in response to the increasing number of children being placed in proceedings, a special calendar was established at Twenty-Six Federal Plaza for unaccompanied immigrant children. Immigration Judges Patricia Rohan, Douglas Schoppert, and Gabriel Videla, and our court administrator, Star Pacitto, shepherded this effort in cooperation with several law firms, New York AILA, and DHS. The judges preside over dedicated calendars to ensure the proper balance between child-sensitive procedures and the appropriate courtroom setting for hearings. The response from the pro bono provider community has been strong, and their efforts on behalf of the children are greatly appreciated.

E. *Training*

My colleagues and I are grateful to AILA, Catholic Charities, the City Bar Justice Center, the Federal Bar Council Public Service Committee, Human Rights First, the Legal Aid Society, the excellent New York law school clinics, and the too-many-to-name law firms who have partnered with service providers to produce numerous excellent collaborative training programs for New York immigration practitioners and pro bono lawyers. The training programs generally emphasize essential litigation skills—developing a case theory, witness preparation, how to ask questions to develop testimony, the consideration of the use of an expert—and the choices a litigator should consider in putting his case together. A mentoring component complements classroom training. Volunteer attorneys are also encouraged and invited to observe master calendar and merits hearings at Twenty-Six Federal Plaza. We judges will continue to speak about, help plan, and support these efforts.

Finally, perhaps regulators can explore requiring attorneys who fall below standards of professional conduct to receive mandatory training as an element of any sanction imposed, since most of these lawyers return to practice before the Immigration Courts. Elsewhere in this issue, the Report of the Subcommittee on Addressing Inadequate Representation discusses the role of training in sanctioning poorly performing attorneys.

CONCLUSION

Most pro bono work is satisfying to volunteer attorneys, but few pro bono efforts can generate the deep satisfaction of securing asylum for someone who has suffered cruel treatment at the hands of a despotic government. In the New York Immigration Courts, we have a multitude of these opportunities awaiting pro bono counsel as avenues are put in place for them to step up and help a poor immigrant in the name of justice.

Though significant steps have been taken, so much remains to be done on so many different levels of the system to carve out new avenues for pro bono opportunities and to ensure the effective representation of all immigrants in removal proceedings. Each initiative described above is a work in progress and wholly dependent upon the dedication, commitment, and continued cooperation of all involved.

Notes & Observations