



## **Summary of Recommendations Relating to the Comprehensive Review of the Immigration Courts and Board of Immigration Appeals**

On January 9, 2006, the Attorney General initiated a “comprehensive review” of the immigration courts and the Board of Immigration Appeals. By letter dated January 31, 2006, Human Rights First provided preliminary recommendations to the Department of Justice (DOJ) and urged that DOJ seek input not only from within the Department but also from the legal organizations, *pro bono* projects and law firms, refugee assistance organizations, law school clinics, and others who represent and assist asylum seekers and immigrants in the administrative adjudication process.

In the intervening months, Human Rights First has solicited input from a number of organizations, law school clinics, *pro bono* projects and *pro bono* attorneys who assist asylum seekers and other immigrants before the immigration courts and the Board.

The recommendations outlined below highlight reforms we believe are necessary to address some of the systemic problems that have undermined the effectiveness and fairness of proceedings before the immigration courts and the board.

### **Reverse Some Aspects of “Streamlining”**

In March 2002, the Board expanded its use of single-member affirmances without opinions (AWOs) to cases involving asylum, withholding of removal and relief under the Convention Against Torture. This expansion, which followed the Attorney General’s February 2002 announcement of upcoming changes to the Board, was made by the Board under existing streamlining authority – authority that had been included in regulations issued in October 1999.

Later in 2002, the Department of Justice issued new “streamlining” regulations. These regulatory changes also expanded the use of AWOs and brief orders – and made single-member decisions the rule, rather than the exception.

Prior to the changes made in 2002, the Board typically decided cases by three-member panels and granted about 25% of these appeals. But this rate dropped dramatically. A law firm working with Human Rights First analyzed about 1,400 asylum, withholding of removal, and Convention Against Torture cases decided by the Board in September 2002. In approximately 80% of these cases, a single Board member affirmed the decision of the immigration judge in a one-sentence opinion. Moreover, the

Board granted asylum, withholding of removal, or Convention Against Torture relief in less than 5% of these cases.<sup>1</sup>

In a February 2005 report, the bi-partisan U.S. Commission on International Religious Freedom (USCIRF) found a dramatic drop in granting asylum appeals – from about 24% to 2-4% in expedited removal cases – and concluded that “[s]tatistically, it is highly unlikely that any asylum-seeker denied by an immigration judge will find protection by appealing to the BIA.”<sup>2</sup> USCIRF specifically recommended that the Department of Justice revisit the practice of allowing summary affirmances in cases involving asylum, withholding and relief under the Convention Against Torture. The Commission explained that “[b]y making it significantly easier to affirm – rather than vacate – an immigration judge decision, the BIA may be inadvertently undermining its effectiveness as a quality assurance mechanism.”<sup>3</sup>

The streamlining changes have also increased the difficulty that federal courts face in reviewing immigration decisions. As Judge Jon O. Newman of the U.S. Court of Appeals for the Second Circuit noted, in testimony before the Senate Judiciary Committee, “[w]hen overburdened IJs decide their high volume of cases hurriedly with oral findings dictated into the record and then their decisions are affirmed in a one-word ruling, the courts of appeals often lack the reasoned explication that is to be expected of a properly functioning administrative process.”<sup>4</sup>

**Recommendation:** The “streamlining” changes that were implemented in 2002 (the expansion of the 1999 streamlining and the new 2002 regulations) should be abandoned. Instead:

- Three member panels should generally be used to review immigration appeals, including cases involving asylum, withholding of removal and relief under the Convention Against Torture;<sup>5</sup>
- In these cases, Board members should be required to issue decisions that explain the basis for the decision and address the arguments made by the parties; and
- The 90-day case completion goals should be revised so that the Board has sufficient time to address the merits of all cases, including those that involve complex or novel issues.

The use of three-member panels in more cases would also enable the Board to resolve more cases more efficiently. Under the 2002 streamlining changes, a single member cannot issue a decision reversing an immigration judge; if the member believes the decision to be incorrect, the case is typically remanded

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<sup>1</sup> These decisions, along with other information, were obtained by a pro bono law firm working with Human Rights First pursuant to a Freedom of Information Act request. See Lawyers Committee for Human Rights (now Human Rights First), *In Liberty's Shadow* (New York: Lawyers Committee for Human Rights, 2004), p. 26.

<sup>2</sup> United States Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal, Volume I: Findings and Recommendations* (Washington, DC: U.S. Commission on International Religious Freedom, February 2005), p. 7.

<sup>3</sup> *Ibid.*, p. 72.

<sup>4</sup> Immigration Litigation Reduction: Hearing Before the Senate Comm. on the Judiciary, 109<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (April 3, 2006) (statement of Hon. Jon O. Newman, United States Court of Appeals for the Second Circuit).

<sup>5</sup> The Department of Justice should also consider implementing the reforms proposed in Sections 702(g) and (i) of the Comprehensive Immigration Reform Act of 2006 (S. 2612, 109<sup>th</sup> Cong. § 702 (2006)).

back for additional hearings before the immigration judge. Not only does this process unfairly discouraged reversals, but it could also lead to remands (and additional hearings) in cases that would be more efficiently reversed at the Board level.

These reforms would not eliminate all streamlining. In fact the Board may continue to utilize various streamlining procedures implemented by the 1999 regulations, as they were in effect prior to 2002.

## **Promote Pro Bono Representation and Provision of Information for Pro Se Applicants**

A study conducted by the Georgetown University Institute for the Study of International Migration, which analyzed U.S. government statistics, showed that more than one out of three asylum seekers in immigration court lack legal representation. For detained asylum seekers, the situation is worse – more than twice as many detained asylum seekers lack representation when compared to non-detained asylum seekers in immigration proceedings.<sup>6</sup>

EOIR has created a pro bono office, supports legal orientation presentations, and launched a pro bono representation project at the Board. These are important initiatives. At the same time though, additional steps should be taken. While the vast majority of immigration judges are supportive of pro bono efforts,<sup>7</sup> some immigration judges regularly deny requests for adjournments that are necessary to provide representation by law school clinics or other pro bono providers, and some berate or insult pro bono volunteers or law students. These actions can dissuade law firms and law school clinics from engaging in pro bono representation before the immigration courts.

In its February 2005 report, USCIRF found that while asylum seekers who have been subject to expedited removal are granted relief 25% of the time when they are represented by an attorney, those who are unrepresented are granted relief only 2% of the time. USCIRF specifically recommended that the Department of Justice expand private-public partnerships to facilitate legal assistance and expand the Legal Orientation Program (LOP) system-wide. USCIRF noted that this program, administered by EOIR in partnership with NGOs, “has proven to be an effective and efficient model of facilitating representation for asylum seekers and other detainees ....”<sup>8</sup>

**Recommendations:** The Department of Justice and EOIR should take steps to promote pro bono representation and the provision of information to indigent *pro se* immigrants, including by:

- Providing guidance to immigration judges on the encouragement of pro bono representation. The February 1995 memorandum, issued by the Office of the Chief Immigration Judge, which

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<sup>6</sup> Asylum Representation, Summary Statistics, prepared by Dr. Andrew I. Schoenholtz, Director of Law and Policy Studies, Institute for the Study of International Migration, Georgetown University, May 2000.

<sup>7</sup> Many immigration judges participate in trainings for volunteer lawyers, acknowledge the contributions of the pro bono attorneys who appear before them, and grant the adjournments necessary to ensure that indigent immigrants can be represented by pro bono counsel.

<sup>8</sup> U.S. Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal*, p. 70.

addresses pro bono activities and the facilitation of pro bono representation, should be updated and re-issued.

- Ensuring that immigration judges grant the adjournments necessary to allow indigent immigrants to try to secure, and then be represented by, law school clinics, pro bono programs, pro bono attorneys and non-profit organizations. Without sufficient time, these organizations cannot identify cases appropriate for pro bono representation and recruit pro bono attorneys, and the pro bono attorneys cannot quickly get up to speed on the cases.
- Increasing the time available to secure pro bono representation at the Board.
- As recommended below, instituting pre-hearing conferences; and creating a process for confirming, one week prior to hearing, whether the hearing will actually proceed on the scheduled date. (Pro bono attorneys sometimes find out – only when they appear at a hearing and have arranged for witnesses to travel to the hearing, in some cases at considerable expense and difficulty – that the hearing will actually not proceed on that day due to the schedule of the ICE trial attorney or the immigration judge.)
- Instituting meaningful and regular local meetings between local pro bono providers and local liaison immigration judges, like the successful model initiated by the Arlington, Virginia immigration courts.
- Ensuring that staff at the immigration courts and the Board provide the kinds of information and respond to phone calls in a manner comparable to other professionally-operated courts in this country.
- Taking steps to expand and secure funding for legal orientation presentations system-wide.
- Ensuring that information and materials are available for *pro se* litigants before all immigration courts and the Board, and that hearings do not proceed until efforts have been made to allow the immigrant to attempt to secure pro bono representation, and if representation is not available, *pro se* information and a legal orientation presentation.
- Providing information on the right to appeal to the federal appeals court in Board notices rejecting appeals (while represented applicants will generally receive this information from their attorneys anyway, *pro se* applicants will not otherwise receive this information).
- Instructing immigration judges to allow non-local witnesses to testify by teleconference where appropriate, so *pro se* and other indigent asylum seekers who do not have the resources to pay for witnesses to travel to the hearing are not deprived of important evidence.
- Creating a working group, including pro bono providers and pro bono attorneys, to recommend specific improvements to address systemic issues and further facilitate pro bono representation.

## **Increase Resources for the Board and the Immigration Courts**

Without adequate staffing and resources, the immigration courts and the Board cannot conduct proceedings in a fair and effective manner. Judge John M. Walker, the Chief Judge of the U.S. Court of Appeals for the Second Circuit, recently testified to “a severe lack of resources and manpower at the Immigration Judge and BIA levels in the Department of Justice.” In testimony before the Senate Judiciary Committee, Judge Walker noted that a single immigration judge “has to dispose of 1,400 cases a year, or nearly twenty-seven cases a week, or more than five each business day, simply to stay abreast of his docket” and that each board member “must dispose of nearly 4000 cases a year – or about 80 a week – a virtually impossible task.”<sup>9</sup>

Judge Walker strongly supported a substantial increase in the number of immigration judges and Board members, as have other federal judges. Judge Jon O. Newman concluded, in his Senate testimony, that “[a] full complement of BIA members, sufficient to provide three-member panels for all appeals, would enable the BIA to resume its place as a professional administrative agency, comparable to the other agencies of the federal government.”

The U.S. Commission on International Religious Freedom recommended that EOIR reinstate funding for immigration judge training, including training conferences.

***Recommendation:*** The Department of Justice should take steps to ensure that EOIR is provided with significant additional funding for both training and personnel. While we are not in a position to advance recommendations for specific numbers of board members, immigration judges or staff, it is clear that significant increases are necessary. If the Department of Justice does not provide for sufficient additional resources, it will need to reduce case completion goals at the Board and the immigration courts. In hiring Board members and immigration judges, DOJ should make a concerted effort to search for and hire highly qualified lawyers with immigration expertise from a diverse range of backgrounds, including those who have represented immigrants and those who are academic experts as well as those who have served within the Department of Homeland Security.

## **Increase Training and Implement Effective Quality Assurance**

***Training Recommendation:*** Immigration judges and Board Members should be required to attend regular trainings, and the annual immigration court training conference should be re-funded. Trainings should include presentations by independent academic and other experts, including experts on refugee law, international human rights, and issues affecting women, children, survivors of torture and other populations. Regular trainings should cover issues such as conditions in certain countries, cultural sensitivity, relevant circuit law and adherence to it, new laws and legal developments, and the proper use of interpreters.

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<sup>9</sup> Immigration Litigation Reduction: Hearing Before the Senate Comm. on the Judiciary, 109<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (April 3, 2006) (statement of Hon. John M. Walker, Jr., Chief Judge, United States Court of Appeals for the Second Circuit). See also Letter from Hon. Richard A. Posner to Hon. Richard J. Durbin (March 15, 2006).

**Quality Assurance Recommendation:** EOIR should improve quality assurance mechanisms, as recommended by USCIRF. DOJ and EOIR should institute random, unannounced visits of representatives of DOJ and the Office of the Chief Immigration Judge to observe and document the conduct of immigration and asylum hearings. EOIR should regularly survey immigration lawyers, pro bono organizations, and immigrants themselves to identify needed improvements.

## **Create Effective Oversight Mechanisms**

**Recommendation:** EOIR should devise an effective and meaningful process for investigating complaints about individual immigration judges, as well as a code of judicial conduct for immigration judges. A proposed code of conduct for immigration judges is in the process of being developed as a joint project of UC Hastings's Center for Gender and Refugee Studies and its Immigration Clinic, and should be examined and considered by EOIR.

## **Ensure Compliance with Obligations to Refugees**

**Recommendation:** The immigration courts and the Board should conduct specialized trainings and take other steps to ensure compliance with the 1951 Refugee Convention and its Protocol. Trainings should cover complex and developing issues in refugee law (like the filing deadline, the “material support” issue and other bars to asylum), appropriate application of “corroboration” requirements, and the interviewing of survivors of torture and trauma. The Attorney General and the Secretary of the Department of Homeland Security should make clear, not only to immigration judges, Board Members and asylum officers, but also to ICE trial attorneys and attorneys at the DOJ’s Office of Immigration Litigation (OIL), that it is part of their responsibility to ensure that refugees are not deported in violation of the Refugee Convention and U.S. law. In addition, the practice of some judges of “offering” withholding of removal in return for not having to conduct a full asylum hearing, or not having to hear several hours of testimony, should be abandoned. (This recommendation stems from concern that in some cases, refugees have been asked to negotiate away their chance to receive asylum simply to save an immigration judge’s time.)

## **Improve Conduct of Immigration Court Proceedings**

**Recommendation:** There are a number of reforms that would help to improve the conduct of immigration court proceedings, including:

- Limiting “off the record” discussions.
- Advancing the appropriate use of prosecutorial discretion.
- Creating safeguards for the handling of cases of those who are unrepresented, detained, or disabled.

- Requiring immigration court interpreters to meet federal court certification standards. Inaccurate interpretation can lead immigration judges to mistakenly conclude that an asylum seeker is not credible or does not otherwise satisfy the requirements for asylum. The current quality of interpretation is sometimes deficient. Improved interpretation will ensure that more cases are properly resolved at an earlier stage, and that justice is served.
- Prohibiting the practice of teleconferenced hearings, in which confidential communications between the detained respondent and his representative are impossible.
- Promoting the use of pre-hearing conferences to narrow the issues, facilitate stipulations, and identify evidence that should be produced and witnesses whose testimony will be permitted either in person or telephonically.