human rights *first*

Statement of Human Rights First

United States Senate Committee on the Judiciary
"Improving Efficiency and Ensuring Justice in the Immigration Court System"

May 18, 2011

Introduction

Human Rights First applauds the Senate Judiciary Committee for holding a hearing on the immigration court system, focusing on improving efficiencies and ensuring justice. Since 1978, Human Rights First has worked to protect and promote fundamental human rights and to ensure protection of the rights of refugees. As part of this effort, we seek to ensure that refugees have access to asylum by advocating for fair asylum procedures, by pressing for U.S. compliance with international refugee and human rights law, and by helping individual refugees win asylum through our *pro bono* asylum legal representation program. Human Rights First and our volunteer lawyers have helped victims of political, religious, and other persecution from Burma, China, Colombia, Congo (DRC), Iraq, Zimbabwe, and many other countries gain asylum and protection from persecution in this country. Our asylum advocacy is informed by the experiences of our refugee clients and their *pro bono* lawyers.

The immigration court system within the Executive Office for Immigration Review (EOIR) is in a state of crisis and is not adequately serving the interests of the U.S. government or the applicants appearing before it. Through our partnership with law firms in New York, New Jersey, Washington DC, Virginia, Maryland and elsewhere, Human Rights First sees first-hand the hardship that court backlogs and extended processing times create for our asylum clients. For example, as of May 2011, judges in the Arlington and New York Immigration Courts are regularly scheduling asylum merits hearings on the non-detained docket for dates in late 2012 and, in some instances, as last as 2014. While they wait over one and a half years, and often longer, for their claims to be heard, many asylum seekers remain separated from their spouses and children, who may be in grave danger in their home countries.

Applications must be pending for at least six months prior to an asylum applicant being eligible for work authorization. For some asylum seekers, even if their cases have been pending for well over six months, they end up being barred entirely from obtaining work authorization throughout the duration of their asylum adjudication due to the arbitrary methods that immigration courts use to calculate the "asylum clock." Some asylum seekers with cases pending before the immigration courts, unable to work legally, are becoming destitute as

savings disappear and the hospitality of the friends or family members fade. They may face homelessness and be forced to live on the streets or find beds in unsafe homes or shelters in which abuse and exploitation are rampant. The longer a case is pending, the longer medical needs go unchecked or unattended to, with free medical services few and far between and often provided on a "lottery" basis and/or restricted to legal residents. During this time, experiencing the crushing reality of isolation and extreme poverty, many asylum seekers find themselves in an agonizing state of legal limbo, with their greatest fear frequently being that after such a long and difficult struggle, the United States will return them to a place where they face torture, arbitrary detention, or even death.

In this statement, Human Rights First offers three specific recommendations for actions Congress can take to support EOIR in efforts to improve the system: (i) provide appropriations to increase staffing and resources at EOIR to hire more immigration judge teams, including law clerks, so that caseloads are more manageable and judges have time to issue well-reasoned, written decisions; (ii) provide adequate appropriations to EOIR to expand the successful Legal Orientation Program (LOP), which provides detained respondents in removal proceedings with basic legal information and reduces court processing times by an average of 13 days, to all immigration detention facilities nationwide; and (iii) eliminate the one year asylum filing deadline that leads cases that could have otherwise been resolved by the Department of Homeland Security (DHS) to be referred to the immigration courts, causing further delays and preventing asylum cases from being adjudicated on their merits. These steps would help reduce the backlogs, improve efficiencies for detained cases, and allow for higher quality adjudications.[1]

i) Provide appropriations to increase staffing and resources at the Executive Office for Immigration Review (EOIR) to hire more immigration judge teams, including law clerks, so that caseloads are more manageable and judges have time to issue well-reasoned, written decisions.

The immigration court system within EOIR is comprised of 59 immigration courts and 268 immigration judges who, in FY 2010, received more than 392,961 matters, an increase of 12% since FY 2006.[2] Of these, 32,961 were asylum cases, which are often considered the most complex – factually and legally – of cases before the immigration courts and may carry life or death consequences for the applicant.[3]

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[1] To read Human Rights First's more comprehensive recommendations on improving the immigration courts see "Renewing the U.S. Commitment to Refugees: Recommendations for Reform on the 30th Anniversary of the Refugee Act," March 2010, available at http://humanrightsfirst.org/wp-content/uploads/pdf/30th-AnnRep-3-12-10.pdf; See also Human Rights First's recommendations for reform of the immigration courts, January 2006, available at http://www.humanrightsfirst.org/2006/07/31/wide-disparities-in-immigration-court-asylum-denials/.

[2] U.S. Department of Justice, Executive Office for Immigration Review, FY 2010 Statistical Yearbook, available at http://www.justice.gov/eoir/statspub/fy10syb.pdf.

[3] Id.

EOIR has been underfunded, understaffed and overwhelmed for several years. As recent studies – including the American Bar Association Commission on Immigration's 2010 report, "*Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency and Professionalism in the Adjudication of Removal Cases*" – have found, staffing shortages and inadequate resources at the immigration courts have contributed to massive backlogs, extended adjudication times, and insufficient time for judges to properly consider evidence and formulate well-reasoned opinions.[4] The Transactional Records Access Clearinghouse (TRAC) reported that the backlog of cases in December 2010 was 267,752 and the average time for a case pending in immigration courts as of February 2011 was 467 days, a 2.6% increase from September 2010 and a 44% increase from FY 2008.[5]

The caseloads of immigration judges are staggering. The American Bar Association reported that in 2008, each immigration judge completed an average of 1,243 proceedings and issued an average of 1,014 decisions. To keep pace with these numbers, each judge needed to issue an average of at least 19 decisions each week, or approximately four decisions per weekday. In most immigration courts, there is only one law clerk per every four immigration judges, leaving one law clerk to support an average of 4,972 cases per year. In some courts, the ratio of clerks to judges is even worse. Caseloads in comparable federal administrative courts, by contrast are much more manageable. In 2008, Veterans Law judges decided approximately 729 veteran benefits cases per judge (approximately 178 of which involved hearings) and in 2007 Social Security Administration administrative law judges decided approximately 544 cases per judge.[6]

A well-functioning immigration court system that has adequate resources to adjudicate cases in a thorough and timely manner and guarantees that individuals facing removal from the United States understand their rights, responsibilities and legal options is essential to allowing the United States to fairly and expeditiously adjudicate asylum claims and ensure that this country does not mistakenly return refugees – individuals who have a well-founded fear of persecution because of their race, religion, nationality, membership in a particular social group, or political opinion[7] – to countries where they face persecution. For this reason, Human Rights First urges Congress to provide EOIR with sufficient funding to hire additional immigration judge teams, including law clerks, so that case loads are more manageable, backlogs are contained, and processing times are more reasonable.

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[4] American Bar Association Commission on Immigration, "*Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency and Professionalism in the Adjudication of Removal Cases,"* at ES-28 (February 2010), available at http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/ReformingtheImmigrationSystemExecutiveSummary.authcheckdam.pdf. [Hereinafter ABA Report].

[5] *"Immigration Case Backlog Still Growing in FY 2011,"* Transactional Records Access Clearinghouse *(2010),* http://trac.syr.edu/immigration/reports/246/.

[6] ABA Report at ES-28.

[7] INA §101(a)(43).

ii) Provide adequate appropriations to EOIR to expand the successful Legal Orientation Program (LOP), which provides detained respondents in removal proceedings with basic legal information and reduces court processing times by an average of 13 days, to all immigration detention facilities nationwide.

The increase in EOIR's detained docket has exacerbated the stress of overwhelming caseloads for immigration judges as detained cases are prioritized and heard on an expedited basis. The number of immigrants going through the immigration detention system on an annual basis increased by over 83.5% between FY 2001 and 2009, growing from an annual population of 209,000 in FY 2001 to 383,524 in FY 2009.[8] The percentage of EOIR's detained cases has similarly increased, with 30% of individuals in proceedings held in detention in FY 2006 and 44% in FY 2010.[9] In real numbers, EOIR's detained docket has increased from 95,783 in FY 2006 to 125,580 in FY 2010.[10]

Detention substantially impedes an individual's ability to secure legal representation. The ABA Report found that less than half of immigrants in proceedings during the last several years had the benefit of representation but, for those in detention, only about 16% were represented.[11] With approximately 84% of detained immigrants appearing before the courts without legal representation, immigration judges are increasingly burdened by presiding over cases presented by individuals who are ill-informed and unprepared to make educated decisions about their cases. These factors make the court process less efficient and more prone to reaching improper conclusions.

In a September 2008 report, the Government Accountability Office found the likelihood of an asylum claim being granted by an immigration judge increased significantly for those who had legal representation.[12] The study, *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform*, found that represented clients win their cases at a rate that is about three times higher than the rate for unrepresented clients.[13] A 2005 report by the bi-partisan U.S. Commission on International Religious Freedom (USCIRF) similarly found that arriving asylum seekers with legal counsel were granted asylum at a rate of 90 percent more than those who did not have counsel.[14] In response to the USCIRF report, EOIR commented, "Non-

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[8] See Lutheran Immigration and Refugee Service, "Annual Detention Population, Fiscal Years 1994 – 2011," available at http://www.lirs.org/atf/cf/%7Ba9ddba5e-c6b5-4c63-89de-91d2f09a28ca%7D/CHARTANNUAL%20IMMIGRATIONDETENTIONPOPULATION100804.PDF.

[9] See supra note 1.

[10] See supra note 8.

[11] ABA Report at ES-7.

[12] U.S. Government Accountability Office, *U.S. Asylum System: Significant Variation Existed in Asylum Outcomes across Immigration Courts and Judges*, 30, GAO-08-940 (Sept. 2008), http://www.gao.gov/new.items/d08940.pdf.

[13] Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform (2009) at 45-46.

[14] U.S. Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal* (February 2005), available at http://www.uscirf.gov/index.php?option=com_content&task=view&id=1892.

represented cases are more difficult to conduct. They require far more effort on the part of the judge."[15]

While not a substitute for legal representation, EOIR's highly effective Legal Orientation Program (LOP) – managed through a contract with the Vera Institute for Justice, which subcontracts with local non-profit legal service providers – has succeeded in providing basic legal information to some of the 84% of detained immigrants who are unrepresented. LOP offers basic legal information to immigrant detainees so that they can understand their legal options. When possible, LOP connects individuals with possible claims for relief – including asylum seekers – to pro bono resources but given the rural location of many detention facilities and the overall lack of pro bono (or even low bono) legal services, attorneys are often unavailable or unable to take detained cases.

LOP has received widespread bi-partisan praise from members of Congress, NGOs, government officials, immigration judges and others for promoting the efficiency and effectiveness of immigration court proceedings and for reducing court time by an average of 13 days.[16] Despite its success, LOP is available in only 27 of more than 250 detention facilities nationwide. Given that few programs offer as many benefits as LOP, Human Rights First recommends Congress appropriate funding sufficient to expand LOP to all detention facilities holding immigrants in removal proceedings.

iii) Eliminate the one year asylum filing deadline that leads cases that could have otherwise been resolved by the Department of Homeland Security (DHS) to be referred to the immigration courts causing further delays and preventing asylum cases from being adjudicated on their merits.

The one year asylum filing deadline contained in §208(a) of the Immigration and Nationality Act (INA) pushes the cases of credible refugees into the overburdened immigration courts, thereby diverting limited time and resources that could be more efficiently allocated to assessing the actual merits of asylum applications.[17] A September 2010 report by Human Rights First found that the one year asylum filing deadline not only bars refugees who face religious, political and other forms of persecution from receiving asylum in the United States, it leads thousands of asylum cases that could have been resolved by DHS to be referred to the immigration courts.[18]

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[15] Charles H. Kuck, Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices 8 (Dec. 2004), *available at* http://www.uscirf.gov/images/stories/pdf/asylum_seekers/legalAssist.pdf.

[16] For more information about the Vera Legal orientation Program, *see* Legal Orientation Program, Vera Institute of Justice, http://www.vera.org/project/legal-orientation-program.

[17] The deadline bars an applicant from asylum if she cannot demonstrate by "clear and convincing evidence" that her application was filed within one year of her arrival in the United States, absent a finding of "changed" or "extraordinary" circumstances that would excuse her delayed filing. Examples of changed and extraordinary circumstances can be found at 8 C.F.R. § 208.4(a)(4) – (5).

[18] Human Rights First, "The Asylum Filing Deadline: Denying Protection to the Persecuted and Undermining Governmental Efficiency," September 2010, available at http://www.humanrightsfirst.org/wp-content/uploads/pdf/afd.pdf.

For example, a Congolese nurse and human rights advocate, who escaped torture with the help of Congolese nuns, filed her application for asylum affirmatively with the DHS Asylum Office but, based on the filing deadline, her case was denied and referred to the immigration court because she could not prove the date she entered the United States. After three years of litigation, an immigration judge finally granted her "withholding of removal," which requires a higher burden of proof but does not provide the permanent protection of asylum.[19] There are thousands of cases, just like this, clogging immigration judges dockets that should – and could, but for the one year deadline – be resolved by DHS in the first instance.

According to DHS Statistics, between 1998 – when the filing deadline went into effect as a bar to asylum – and 2010, more than 53,400 applicants have had their requests for asylum denied, rejected or delayed because of the filing deadline.[20] Many of these cases are referred to the immigration courts for further adjudication and are piled on top of the court's growing backlog of cases. A recent independent, academic analysis of DHS data concluded that during this time period it is likely that, if not for the filing deadline, more than 15,000 asylum applications – representing more than 21,000 refugees – would have been granted asylum by DHS without the need for further litigation in the immigration courts.[21] Given staffing shortages, fiscal challenges and the enormous backlogs immigration judges are facing, Congress should commit to making targeted fixes – such as by eliminating the one year asylum filing deadline – to prevent cases from being referred into the immigration courts that could have been resolved by DHS in the first instance, thus alleviating some of the burden on the courts and improving efficiencies in the process overall.

Conclusion

The solutions to the complex and myriad problems in the immigration courts are multi-faceted, requiring an infusion of targeted resources, a series of legislative changes, improved interagency coordination between the Departments of Homeland Security and Justice, and better training, oversight and quality assurance measures of immigration judges and U.S. Immigration Customs Enforcement trial attorneys and agents. Nevertheless, the above recommendations are concrete actions Congress can take now to support EOIR in efforts to reduce the backlogs, improve the efficiencies for detained cases, and allow for higher quality adjudications of asylum applications.

[19] Id at 11.
[20] Id at 1.
[21] Philip G. Schrag, Andrew I. Schoenholtz, Jaya Ramji-Nogales, and James P. Dombach, "Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum," William and Mary Law Review, December 2010, *available at* http://wmlawreview.org/files/Schrag.pdf.