

# Traversing the Immigration Court in Light of the New Executive Order

By Rebecca Robichaud

With the recent signing of the executive order on Border Security and Immigration Enforcement Improvements,<sup>1</sup> President Trump set the immigration legal community reeling. While implementing the order will take some time and further clarification, what is clear to all is that enforcement priorities have been broadened. With increased enforcement comes an increased burden on an already overly burdened immigration system, particularly the immigration courts. Because U.S. immigration law is both complex and dynamic, and because the entire system is overwhelmed, the latest executive order for increased enforcement will likely have unfortunate consequences. Attorneys with an interest in assisting immigrants who may become subject to the provisions of the new executive order may wish to consider exploring pro bono opportunities representing immigrants.

## Immigration legal basics

According to the Immigration and Nationality Act, a person who is not a citizen or national of the United States is defined as an alien.<sup>2</sup> Removal proceedings, which are held in immigration court, are for determining whether an alien is deportable or inadmissible.<sup>3</sup> Immigration courts operate under the umbrella of the Department of Justice and are run by the Executive Office for Immigration Review.<sup>4</sup>

Immigration proceedings are civil proceedings. An immigration judge presides over all proceedings, including removal

proceedings. While an immigration judge is required to “exercise their independent judgment and discretion,”<sup>5</sup> as the National Association of Immigration Judges noted, “both Immigration Judges and the DHS prosecutors who appear before them have the same client, the United States government.”<sup>6</sup> As part of the executive branch of government, immigration judges are arguably “government attorneys.” In fact, in March 2016, of the eight new immigration attorneys sworn in, seven previously served as prosecutors on immigration cases.<sup>7</sup>

In the courtroom, immigration judges have the authority to question the respondent and play an active role in the proceedings. “Immigration judges shall administer oaths, receive evidence, and *interrogate, examine, and cross-examine aliens and any witnesses.*”<sup>8</sup> This can be helpful for the immigrant-respondent who is unrepresented by counsel if the immigration judge is able to elicit testimony necessary to assist in making the respondent’s case. But it can just as easily be harmful to the immigrant-respondent who is unrepresented and has no one there to protect his or her interests in the face of both the immigration judge and the Immigration and Customs Enforcement attorney appointed to represent the United States government.

Practice before the immigration judges generally is governed by the *Immigration Court Practice Manual*, which took the place of local operating procedures as of July 1, 2008.<sup>9</sup> Rules of evidence do not apply in immigration court, with relevance and fundamental fairness being the only bars to inadmissibility under the rules of evidence.<sup>10</sup>

## The current dearth of immigration judges and the increasing case backlog

One of the many challenges in the current immigration justice system is the lack of judges for the ever-increasing number

of cases. In June 2016, the American Immigration Council reported on the increased funding for enforcement and the lack of resources for the immigration courts.<sup>11</sup> According to this report, in fiscal year 2014, each immigration judge handled an average of more than 1,400 matters per year. In contrast, federal judges average 566 cases per year (2011 statistics) and Social Security administrative law judges average 544 hearings per year (2007 statistics).<sup>12</sup> This staggering number of cases pending in the immigration courts typically means that a case may take years to resolve.

According to the TRAC immigration court backlog tool, the average wait in Detroit is currently 780 days.<sup>13</sup> That means there is typically over a two-year wait for an immigrant to obtain a hearing to determine if he or she will be able to remain in the United States or be deported. This delay often has life-altering consequences not only for the immigrant but also for family members, some of whom may be U.S. citizens.

The National Association of Immigration Judges wrote about the significant burden on immigration courts in 2013, noting, “Whether detained or not, the individuals served by the Immigration Courts deserve timely decisions, as the old adage is irrefutable: justice delayed *is* justice denied.”<sup>14</sup> The authors also predicted, “[W]ithout immediate far-reaching reform, the courts will be overwhelmed to the point of collapse.”<sup>15</sup>

## Challenges facing immigrants seeking legal representation

Although the consequences of an immigrant’s losing his or her case are monumental (deportation), it is often difficult for an immigrant to secure legal representation. According to a recent study, only 36 percent of immigrants in detention seeking counsel actually found counsel, as compared to 71 percent of nondetained immigrants.<sup>16</sup> There are numerous reasons (some of which

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overlap) why so many immigrants have trouble retaining counsel.

The physical location of a detained immigrant may be a complicating factor in the search for counsel. For example, if a respondent is in detention in Michigan, he or she may be held at the Calhoun County Jail in Battle Creek—two hours each way from Detroit and an hour each way from Lansing. This is an obvious disincentive for counsel in those cities to represent clients in detention.

While some detained clients may have a “right” to be released on bond, this right may be hollow in practice. Immigrants who may be eligible for release can request a bond hearing before an immigration judge. The judge will determine whether bond will be given based on factors including length of residence in the U.S., family ties in the U.S., immigration record, and criminal record. Even if bond is granted, however, often immigrants cannot afford to pay the bond that is set. Lack of funds also complicates the quest for legal representation. An immigrant in detention is not able to work to raise funds to pay attorney fees and is often forced to rely on family or friends to raise the money.

Logistical problems can further complicate the representation of detained clients. Detention facilities may bar mobile phones and laptops, and there is often not a private room to meet with clients. In addition, frequently the client does not speak English fluently. This can necessitate the use of interpreters, which adds expense and logistical complexities to coordinating travel to the detention facility.

Additionally, detained persons are generally on a “rocket docket,” meaning their cases are heard more quickly than others. This can be challenging, as it can be difficult to meet with the client, prepare required paperwork, and gather evidence in time for the hearing.

## Challenges in asylum hearings

One form of relief available to eligible immigrants is asylum. The immigration court also presides over asylum hearings, and the evidentiary standards in these hearings constitute one of the biggest challenges counsel may face. To be eligible for asylum, an immigrant must be physically present in the U.S. and meet the definition of refugee.<sup>17</sup> A

refugee is defined in the Immigration and Nationality Act as:

any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>18</sup>

Part of the burden on the immigrant in an asylum proceeding is providing corroborating evidence of refugee status, and “[w]here the trier of fact 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 the evidence.”<sup>19</sup> As one might guess, the issue of “reasonably obtain” can be contentious when immigrants come from countries with a variety of recordkeeping systems. For example, some immigrants may never have been issued a birth certificate, or an adoption may be an informal (undocumented) process—issues that arise frequently in immigration court.

Even when there is documentary evidence from another country, there is the challenge of authenticating the document. Authentication is covered by regulations at 8 CFR 287.6 and 1287.6 and requires knowing whether the document comes from a signatory or nonsignatory country to the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents.

## Making a difference: pro bono work in immigration court

Even with its challenges, practicing in immigration court can be a wonderful experience. Representing a client in an asylum hearing can be highly rewarding as you learn more about a country and culture, get to know your client on a personal level, and realize your work has life-changing consequences for this person and his or her family.

For attorneys interested in providing pro bono immigration services, a number of

Michigan nonprofits have panels that will screen cases to assign to pro bono attorneys and provide mentors for those cases. Given the intricacy of immigration law—which many say is second only to tax law in complexity—it is highly advisable to seek a mentor when beginning practice in immigration court. ■

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## ENDNOTES

- Executive Order No. 2017-4.
- 8 USC 1101(a)(3).
- 8 USC 1229a(a)(1).
- 8 USC 1101(b)(4).
- 8 CFR 1003.10(b).
- National Association of Immigration Judges, *The State of Our Courts: A View from the Inside* (April 2013), p 4 <[http://naij-usa.org/wp-content/uploads/2014/06/NAIJ-The-State-of-Our-Courts\\_4-13-131.pdf](http://naij-usa.org/wp-content/uploads/2014/06/NAIJ-The-State-of-Our-Courts_4-13-131.pdf)>. All websites cited in this article were accessed February 22, 2017.
- Department of Justice Executive Office of Immigration Review, *Eoir Swears in Eight Immigration Judges*, (March 14, 2016) <<https://www.justice.gov/eoir/pr/eoir-swears-eight-immigration-judges>>.
- 8 CFR 1003.10(b) (emphasis added).
- US Department of Justice Executive Office of Immigration Review, *Immigration Court Practice Manual* (December 2016) <[https://www.justice.gov/sites/default/files/pages/attachments/2016/12/02/practice\\_manual.pdf](https://www.justice.gov/sites/default/files/pages/attachments/2016/12/02/practice_manual.pdf)>.
- See *Espinosa v INS*, 45 F3d 308, 310 (CA 9, 1995).
- American Immigration Council, *Empty Benches: Underfunding of Immigration Courts Undermines Justice* (June 17, 2016) <<https://www.americanimmigrationcouncil.org/research/empty-benches-underfunding-immigration-courts-undermines-justice>>.
- Id.*
- TRAC Immigration, *Immigration Court Backlog Tool* <[http://trac.syr.edu/phptools/immigration/court\\_backlog/](http://trac.syr.edu/phptools/immigration/court_backlog/)>.
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- Id.*
- Eagly & Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U Pa L Rev 1, 34 (2015).
- 8 USC 1158(b)(1).
- 8 USC 1101(a)(42).
- 8 USC 1158(b)(1)(B)(ii).