

Fatima Ulloa, twelve, left, and her sister, Natali Ulloa, ten, said they recently fled El Salvador, where they lived with their grandmother, to be reunited with their parents, who live in San Francisco. (John Coté/ San Francisco Chronicle/ Polaris)



UNDERSTANDING THE CRISIS IN OUR IMMIGRATION COURTS

Kathleen Guthrie Woods

//  ur immigration system is broken,” President Barack Obama stated in a November 2014 address, and local attorney advocates in the trenches of removal (formerly “deportation”) proceedings in San Francisco are seeing those broken pieces. Even before the president called for expedited dockets in July of last year, the courts were swamped with cases and resources had been severely depleted. According to a “Snapshot” report released by the National Association of Immigration Judges (NAIJ), as of October 31, 2014, the national backlog of pending cases was at 421,972. The eighteen immigration judges in San Francisco faced 26,690 pending cases. (These figures do not include criminal cases, which are handled separately.)

“We call immigration a ‘civil’ court matter,” says Van Der Hout, Brigagliano & Nightingale’s Marc Van Der Hout, “but it has all the repercussions of criminal court because people can be jailed and their lives are at stake.”

The respondents prioritized for deportation on these expedited dockets include unaccompanied children, adults with children who are detained, and adults with children who are released as an alternative to detention. “Most of these cases on the expedited dockets will relate to asylum and other forms of removal defense associated with situations in which people have suffered past persecution or have a credible fear of persecution,” says Robin Goldfaden, a senior attorney in immigrant justice at the Lawyers’ Committee for Civil Rights (LCCR). “Those people fleeing serious violence and threats on their lives are the ones who are supposed to be protected under international and U.S. laws. Because of the circumstances in their home countries, they cannot just get a visa and hop on a plane to flee—they have to do it by whatever means are available to them.”

But applying for and proving eligibility for relief (cancellation of removal, adjustment of status, asylum) is no small feat. In addition to facing language and cultural barriers, respondents are not provided a lawyer at any point in their removal proceedings so they must secure legal representa-

tion on their own, for a fee or pro bono. “According to the United Nations High Commissioner for Refugees,” says The Bar Association of San Francisco’s (BASF) Lawyer Referral and Information Service (LRIS) Director of Public Service Programs Carole Conn, of these cases “an estimated 60 percent involve children who might be eligible for humanitarian protection under international standards because of the violence in their home countries. But without a lawyer, the high commissioner estimates that, nine times out of ten, children will be deported for not being able to navigate their asylum claim—if they are able to figure out how to file one in the first place.”

The task facing immigration attorneys is to serve justice with a humanitarian response.

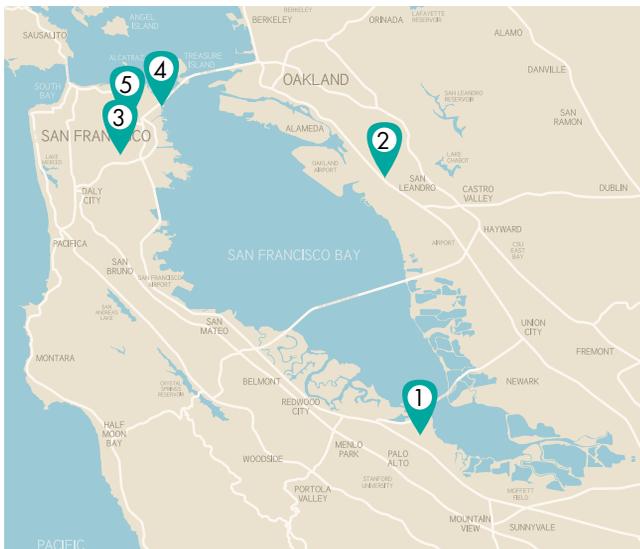
THE PROCESS . . . AND THE PITFALLS

Immigration law, which can intersect with family, dependency, and criminal law, is highly technical and confusing; only the Internal Revenue Code is more complex. “Between congressional action and presidential executive orders, changes to the immigration laws have made for a patchwork that requires creative, experienced lawyering to effectively represent clients,” says Conn. President Obama’s executive action expediting cases last summer was an example of how tremendous change happens quickly. To better understand the impact of the executive order, it helps to see the steps of the process, to see what happens when yet another acronym is added to the confusing alphabet soup that designates the interconnected agencies.

An undocumented immigrant is apprehended at the border by U.S. Customs and Border Protection (CBP) and detained by U.S. Immigration and Customs Enforcement (ICE). Removal proceedings begin when the Department of Homeland Security (DHS) serves the immigrant with a notice to appear (NTA) and files a charging document with one of the Executive Office for Immigration Review’s (EOIR) immigration courts.

STEP UP HELP OUT

In addition to funding or donations, local organizations need people — attorneys and interpreters. Many offer workshops, intensive trainings, and mentoring. Visit their websites for more information about the services they provide and opportunities for involvement.



- 1 Community Legal Services in East Palo Alto: www.clsepa.org
- 2 Centro Legal de la Raza: centrolegal.org
- 3 Immigration Center for Women and Children: icwclaw.org
- 4 Lawyers' Committee for Civil Rights: www.lccr.com
- 5 Legal Services for Children: www.lsc-sf.org

The court proceedings begin with a first hearing, the “master calendar.” Later in the process, the respondents may argue against the removal charges on their own at a merits hearing; in between, respondents will be encouraged to seek legal representation and the judge may grant a continuance—with possible subsequent continuances—to allow the respondent to find an attorney.

Ultimately respondents will be called upon to offer a defense, with or without legal assistance. The respondent’s case—and those of the respondent’s children, which may be adjudicated in separate cases—may include testimony and the submission of documents verifying residence, employment and tax records, and local family ties. The respondent may need to build his or her case by providing as much material evidence as possible, including witness declarations, detailed descriptions about adverse conditions in his or her home country, medical documents, and any other factual evidence that will support an argument for relief from removal. The legal remedies may include asylum, Special Immigrant Juvenile Status, Victims of Trafficking and Violence Protection Act (T and U visas), Violence Against Women Act, and deferred action for childhood arrivals. Each involves a complicated application process.

“As soon as an attorney comes into the picture, it opens so many doors to respondents that were previously shut,” says solo immigration attorney Jacqueline Brown Scott. “If they don’t have representation, women and children are being deported by the hundreds,” she says, referring to the unfortunate impact of the expedited dockets proceedings.

“We’re doing too many, too fast,” say Susan Bowyer, deputy director of the Immigration Center for Women and Children (ICWC). “The ‘rocket docket’ is a vastly inhumane process.”

The hundreds of cases these attorneys see locally are a small percentage of what is happening nationally. Of the more than 11.3 million undocumented immigrants living in the United States, 438,000 were deported in 2013.

THE IMPACT ON NONPROFIT ORGANIZATIONS

“We first heard the term *surge* in February 2012 when there was an increase in kids arriving,” says Bowyer. “In July 2014, there were two dockets in the morning, two in the afternoon,” she says. “Now there are maybe eighty individual respondents a day, five days a week.” The consequence is that nonprofit organizations are overwhelmed and must turn away cases. “We’re four staff attorneys and we have a huge volume of cases and people who need help,” says Ilyce Shugall, directing attorney of the immigration program for Community Legal Services in East Palo Alto. “It’s difficult to make decisions to prioritize which cases we can take.”

Lack of basic administrative support can be critical. A concern frequently brought up at hearings is respondents’ inability to simply get through to the nonprofits. “Keep trying,” is often the only advice judges can offer respondents who say they’ve called multiple times and left messages. The hard, cold reason in many cases is there’s no one available to answer the phones. “We get three hundred phone calls a day from surge cases,” says Eleni Wolfe-Roubatis, who is Centro Legal de la Raza’s (Centro Legal) immigration program director, “but we don’t have a full-time receptionist.” Staff members need to devote their limited time and resources to serving clients, so even if they could afford a full-time receptionist to field calls from potential clients, no one has the time to return calls and answer questions.

In an effort to help as many people as possible, organizations have gotten more creative, adding clinics and workshops that address topics such as changing venues, meeting deadlines, and how to apply for asylum. Partners have also stepped up to fill the gaps. BASF’s LRIS, which has operated the Attorney of the Day (AOD) program in the San Francisco Immigration Court for more than twenty-five years, has expanded its administrative support to coordinate pro bono counsel to appear at master calendar court dates on the expedited dockets. Firms such as Kecker

& Van Nest have generously provided space for nonprofit attorneys to meet and paralegal support to BASF for data entry of AOD intake and copies of materials. Sometimes the needs are basic, but crucial. “If there are a thousand more cases,” says Wolfe-Roubatis, “we’ll need a thousand more copies” of the materials that are provided to respondents in court.

IMPACT ON THE COURTS

Meanwhile, the courts themselves are struggling. “We are resource-starved to the point of being anorectic,” says Judge Dana Marks, NAIJ’s president. “In 2013,” Marks reports, “\$18 billion was spent on immigration law enforcement and only 1.7 percent of that went to the courts.” In addition to working with outdated equipment (a hardware failure in April 2014 took the docketing system offline for five weeks) and understaffed offices, the increase in surge dockets has created other problems.

The NAIJ reports significant burnout. Nationwide there are approximately 225 sitting judges in field offices, a number the organization feels should be doubled to handle the caseload. “Immigration judges spend thirty-six hours a week on the bench,” says Marks, “which leaves four hours a week to do the administrative work, to read dockets and prepare, to keep up with the Ninth Circuit.” According to a 2009 NAIJ survey, “immigration judges reported stress and burnout at higher levels than prison wardens or doctors at busy hospitals.”

As the pressures continue to build, one recommendation that has support from judges, attorneys, and nonprofit organizations is to follow New York City’s lead and provide universal representation in immigration court, like criminal court (*Gideon v. Wainwright*, 1963), for removal defense proceedings. The court system functions much better when attorneys participate, and benefits include reduced costs related to more efficient proceedings, shorter detentions, and fewer continuances and appeals.

For now, though, it’s “Hurry up and wait,” says Judge Marks. As of October 31, 2014, according to the NAIJ, a

case was pending on the docket until decision an average of 569 days; in San Francisco, the average is 590 days. In mid-November, after filings, hearings were set for August of 2017.

BASF'S ATTORNEY OF THE DAY PROGRAM

There are two bits of good news. One: waves of immigrants have landed on our shores before, and much of the groundwork for how best to mobilize aid to immigrants today is in place. Two: dedicated lawyers and organizations, including BASF's LRIS, have been actively engaged in finding solutions for decades.

In 1974, fresh out of law school, Bill Hing and two other attorneys composed the Bay Area Legal Aid's immigration unit. "Every morning we interviewed those arrested the night before, represented them for bail hearings, and often ended up representing them," says Hing, who is now a professor of immigration law at University of San Francisco Law School (USF). In the early 1980s, in response to sweeps of Mexican immigrants and an influx of refugees from the civil wars in Nicaragua, Guatemala, and El Salvador, the International Institute of the Bay Area hired two attorneys.

"The bar coordinated nonprofits and lawyer groups that were doing pro bono work," says Van Der Hout, and many of the organizations on the forefront today amped up their involvement, such as the LCCR, which was founded in 1968. The volunteer attorneys were referred to as *amicus curiae*, or "friend of the court," someone who is not a party to a case, but who assists the respondents in court, the predecessor of the Attorney of the Day program.

Today an active band of experienced, private immigration attorneys volunteer for the custody and noncustody calendars at the immigration court and assist respondents at the master calendar hearings. BASF's Constance Tang schedules AODs for regular calendars, and Adina Hemley-Bronstein, an immigration paralegal, assists as

LRIS's immigration surge case coordinator, scheduling AODs for the expedited dockets.

In court and prior to the master calendar hearing, respondents (and their guardians, if they're minors) benefit from Know Your Rights (KYR) presentations. Representatives from nonprofit organizations provide these orientations that give an overview of the process, and packets are available that include a list of documents respondents will need, information about Office of Refugee Resettlement benefits they may be eligible for (job training, interpreters, medical and housing assistance services), and a list of approved organizations that may be able to represent them.

Following the KYR presentation, respondents who have not already secured counsel meet with the AOD. Initially, two experienced immigration attorneys were calendared each weekday, but LRIS had to quickly expand the program to eight AODs almost every day to handle the expedited dockets. "You show up and the docket is whatever it is. Some days it's triage," says Victoria Argumedo of Argumedo Garzon Law Group, whose partner, Marco Garzon, also serves as an AOD. She speaks with respondents as a group to make sure they have their charging documents and hearing notices, and to get them started filling out their personal contact information on BASF's AOD intake form. Then she meets individually with each one and helps respondents fill out the rest of the intake form, which includes information on entry, exit, family immigration history, and primary language; why they came to the United States; and why they don't want to return to their countries of origin.

The AOD appears alongside the respondent at the master calendar, but AOD is not a self-referral program; AODs may, however, make recommendations on agency referrals. At subsequent appearances, "reset hearings," the respondent will be asked what he or she has done to find a lawyer. With luck and perseverance, the respondent will secure representation. The judges are accommodating, but usually by the third appearance, an attorney for the government will present the charges and the respondent will be asked to enter a plea. With or without an attorney, the

respondent must be prepared to present a massive amount of documented evidence in his or her defense.

Since the creation of the expedited dockets, the AOD panel has grown this past year to include many of the dedicated staff attorneys from immigration nonprofits and law schools. Under the direction of Lisa Weissman-Ward and Jayashri Srikantiah, students in Stanford's Immigrants' Rights Clinic perform all AOD tasks. "It combines learning along with the ability to contribute to and engage in public service," says Weissman-Ward. "Students experience how to triage a case, engage with the immigration court and Homeland Security, and meet critical needs." As needed, BASF also provides interpreters, many of whom have been vetted by Hing's USF program. "The kids trapped in this crisis have brought people together in coalition, and that's a good thing," says Conn.

MOVING FORWARD

Applying right to counsel afforded under *Gideon* seems the obvious remedy, and the Northern California Collaborative for Immigrant Justice, in which BASF participates under its AOD program, continues to evaluate the needs, lay the groundwork for a pilot program, and create a strategy for funding the program.

As always, funding is a pressing need. The San Francisco Board of Supervisors unanimously approved an unprecedented appropriation of more than \$2 million in September to support pro bono representation of children and families in expedited proceedings. Meanwhile, private funds have been contributed to the cause, including a \$60,000 grant from Kecker & Van Nest last fall. "Every refugee facing deportation, child or adult, should have a lawyer," says Kecker Partner Dan Purcell. "We hope to do even more in 2015 to make that goal a reality, and we would love to see other Bay Area law firms step up and match or even exceed our contributions. This humanitarian crisis isn't going away, and our community has more resources to give to keep these children and families safe."



JOIN BASF'S LRIS AND AOD PROGRAMS

Visit www.sfbar.org/lawyerreferrals/att-join.aspx for general information on how to join a panel and to download an application for the Immigration and Naturalization Law Panel or pro bono Attorney of the Day Immigration and Naturalization Law Panel.

For more information, especially if you would like to take a case pro bono but need training and mentoring, call LRIS Supervisor Antonio Hernandez at 415-477-2374 or email him at ahernandez@sfbar.org.

"I believe we must challenge the system," says Shugall, a sentiment her fellow advocates share. "There are disappointments and losses," says Brown Scott, "but you're still making a difference in someone's life; you're giving them a voice."

It's that kind of passion that has driven this work for decades, and there's more to be done, for immigration law continues to be complex, involving adversarial proceedings with high stakes. "For some detainees, mistakes have been made. This is why we have due process," says Goldfaden. "We should recognize immigrants' humanity and their rights. We should care about getting it right."

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