



Immigration Update

by Amelia Wilson

Universal Representation Initiatives Gain Ground, Marking a Win for Detained Indigent Respondents

Deportation has been characterized by the U.S. Supreme

Court as a “particularly severe ‘penalty,’”¹ similar to banishment or exile, and often entails substantial physical, financial, or other harm.² Despite that, respondents in removal proceedings do not have the right to a court-appointed attorney. For detained and indigent individuals, the challenges associated with mounting a skilled and competent defense while pro se are particularly pronounced. Respondents are hobbled by language barriers, lack of commissary funds to make expensive phone calls to potential witnesses in the United States and abroad, lack of Internet access in detention facilities for conducting country-condition research, lack of legal training to understand complicated forms and regulations, and myriad other challenges that make self-representation nearly impossible.

Existing and emerging programs are responding to the pressing need for improved access to legal services for noncitizens facing deportation. A 2011 report published by the Study Group on Immigrant Representation convened by Hon. Robert A. Katzmann, chief judge of the U.S. Court of Appeals for the Second Circuit, found that 60 percent of New York’s detained immigrants did not have legal representation. Of those, only 3 percent won their cases in court.³ This number was in stark contrast to rates for detained, represented respondents—who won their cases 18 percent of the time. (Non-detained, represented respondents won relief 74 percent of the time.)

As a result of that groundbreaking study, a one-year “universal representation” pilot program was initiated in 2013 in New York City with funds from the city council and administered by the Vera Institute of Justice, a nonpartisan, nonprofit center for justice policy and practice. The Immigrant Family Unity Project (NYIFUP) sought to create the first-ever public defender model in immigration proceedings for indigent respondents who had their cases heard before the Varick Street Immigration Court in downtown New York City. The pilot had a cap of 150 cases accepted over the one-year period. In 2014, with significant additional financial backing from the New York City Council, NYIFUP expanded to cover each and every case heard

before the Varick Street court for New York City residents who could not afford an attorney and desired legal assistance in their defense.

While NYIFUP continues to serve respondents who were residents of NYC prior to detention, gaps remain nationwide throughout the 250 detention centers housing approximately 400,000 noncitizens. Good news continues to roll in, that said. In the fall of 2014, the Immigrant Rights Program of the American Friends Service Committee (AFSC) in Newark, New Jersey, received a generous grant from the David Tepper Charitable Foundation to launch a mirror universal representation model in New Jersey for indigent detained respondents facing deportation. AFSC’s program, called the Friends Representation Initiative of New Jersey (FRINJ), is the second such public defender model of its kind.

FRINJ’s objective—like that of NYIFUP—was to create a “merits-blind” model of representation for detainees who cannot afford attorneys and who are appearing pro se before the Elizabeth Immigration Court in Elizabeth, New Jersey. The Elizabeth Court was chosen because it is a smaller court servicing two detention centers (Delaney Hall and the Elizabeth Detention Center).

The grant also enabled AFSC to hire a staff attorney uniquely designated to expanding legal representation to indigent communities in Monmouth and Ocean counties. Those counties were selected because there was only one nonprofit immigration legal service provider in that area with limited capacity to take on complex cases. As a result, residents were required to travel for legal services.

FRINJ was formally launched in March 2015. Lawyers for the project accept cases for representation not based on the merits of the case but on income eligibility. All detainees who do not have an attorney, are unable to afford an attorney (assessed at 250 percent of the poverty line), and who consent to representation are eligible for free legal services. This represents a shift in common nonprofit models, which measure success by achieving legal status for a high

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because a defendant brought a motion under 12(b)(6) as opposed to under § 1404 or forum non conveniens.”¹⁷ The Third Circuit Court of Appeals has not yet taken a stance on this point, but its districts have employed different methods for applying forum-selection clauses. At least one district court has gone as far as characterizing a 12(b)(6) motion as one to transfer under section 1404(a), another has continued applying Rule 12(b)(6), and a third one took the conservative approach of applying both 12(b)(6) and the forum non conveniens doctrine.¹⁸

The upshot is that federal practitioners, especially those who litigate in the First and Third circuits, should take note of the continued vitality of using Rule 12(b)(6) motions to evaluate forum-selection clauses. Although the use of Rule 12(b)(6) motions creates unnecessary complications, perhaps the safest approach might be to move under section 1404(a) or forum non conveniens and, in the alternative, under 12(b)(6). ☉

Endnotes

¹Richard A. Posner, REFLECTIONS ON JUDGING 1-17 (2013).

²Edward S. Sledge, IV, Christopher S. Randolph, Jr., *Maneuvering to Terrain: Enforcement of Forum-Selection Clauses After Atlantic Marine*, 75 ALA. LAW. 228, 230 N. 18 (2014) (collecting circuit case law on this point).

³*Silva v. Encyclopedia Britannica Inc.*, 239 F.3d 385, 387 (1st Cir. 2001); *Salovaara v. Jackson Nat. Life Ins. Co.*, 246 F.3d 289, 298 (3d Cir. 2001).

⁴134 S. Ct. 568 (2013).

⁵*Id.* at 580 (internal quotation marks omitted).

⁶*Id.* at 577.

⁷*Id.* at 579.

⁸*Id.* at 580.

⁹*Id.*

¹⁰*Id.* at 580 n. 4.

¹¹*Id.*

¹²*Argueta v. Banco Mexicano*, 87 F.3d 320, 324 (9th Cir. 1996).

¹³*See, e.g., Rivera v. Centro Medico de Turabo Inc.*, 575 F.3d 10, 15 (1st Cir. 2009) (so holding in the forum-selection clause context).

¹⁴*Silva*, 239 F.3d at 388.

¹⁵*See, e.g., Sucampo Pharm. Inc. v. Astellas Pharma Inc.*, 471 F.3d 544, 549 (4th Cir. 2006) (“Allowing this strategy could result in a waste of judicial resources and allow defendants to ‘test the waters’ of the plaintiff’s chosen forum, before invoking their rights under the forum-selection clause.”).

¹⁶*See Martinez v. Bloomberg LP*, 740 F.3d 211, 216 (2d Cir. 2014) (noting that *Atlantic Marine* “held that generally ‘the appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of forum non conveniens,’ rather than Rule 12(b).” (quoting *Atlantic Marine*, 134 S.Ct. at 580)) *see also Pappas v. Kerzner Int’l Bahamas Ltd.*, 585 F. App’x 962, 964 (11th Cir. 2014).

¹⁷*Claudio-De Leon v. Sistema Universitario Ana G. Mendez*, 775 F.3d 41, 46 n. 3 (1st Cir. 2014).

¹⁸*Lieberman v. Carnival Cruise Lines*, No. CIV. A. 13-4716 JLL, 2014 WL 3906066, at *1 (D.N.J. Aug. 7, 2014); *Wolfe v. TBG Ltd.*, No. 13-3315, 2014 WL 325637, at **1-2 (E.D. Pa. Jan. 28, 2014); *Mark IV Transp. & Logistics Inc. v. Nat’l Indep. Contractor Ass’n*, No. 2:13-02614 WJM, 2014 WL 69890, at **2-5 (D.N.J. Jan. 9, 2014).

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percentage of clients. With a universal representation model, success is gauged by increasing the number of individuals with counsel, which also leads to an increase in grant rates given data that shows higher approval rates for detainees who have representation.

At the same time, detainees who are not eligible to remain in the United States will receive accurate information about their cases, support in the steps they need to take to prepare to leave the United States, and representation before the Immigration Court and U.S. Immigration and Customs Enforcement (ICE). In this way, they will spend shorter periods of time in detention and will better understand their options.

Like NYIFUP, FRINJ is currently in pilot format and will be limited in scope, with a plan to grow with additional funding and possibly partnering with other organizations. Prior to the pilot, AFSC represented approximately 60 detained clients (15 clients per year) before the detained court in Elizabeth, with a similar number before the detained court in Newark. In 2015, AFSC expects to represent at least 200 immigrants before the Elizabeth Immigration Court. These cases include clients with short hearings to accept deportation orders or voluntary departure as well as clients with longer, more intensive cases who are seeking relief including asylum, cancellation of removal, and so on.

These innovative new programs may represent the future of immigration defense before detained courts nationwide. They not only ensure fairness for those they affect by providing free, high-quality legal representation and in many cases preventing deportation,

but they also expose the staggering financial incentives in providing counsel. It costs the U.S. government roughly \$164 a day to detain noncitizens.⁴ Where parents and spouses of U.S. citizens are deported, those who remain struggle financially and often rely on public benefits for basic needs to be met, and the emotional impact on families and their communities is felt for years after the deportation.

NYIFUP and FRINJ will certainly serve as models for the rest of the country to follow. Providing counsel to indigent detained respondents not only makes financial sense for the government but is the fair and equitable thing to do. Universal representation is critical to protecting the rights of uniquely vulnerable populations and promotes the integrity of the immigration system. ☉

Endnotes

¹*Padilla v. Kentucky*, 559 U.S. 356, 365 (2010).

²*Id.* at 373 (citing *Delgado v. Carmichael*, 332 U.S. 388, 390-91 (1947)).

³Steering Committee of the New York Immigrant Representation Study Report, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357, 393 (2011) (available at www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf).

⁴Detention Watch Network, *About the U.S. Detention and Deportation System* (available at www.detentionwatchnetwork.org/resources).