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Hon. Mary Gay Scanlon

By: E:Mail

Dear Rep: Scanlon:

Thank you for the opportunity to comment on the need for independent immigration courts to ensure fundamental fairness and comport with our international human rights responsibilities.

I am the retired executive director of a nonprofit organization that provided free or low cost immigration services at refugee resettlement to diverse populations in the Delaware Valley, Pennsylvania. I have been an immigration attorney for over 20 years. In my retirement, I do a considerable amount of pro bono representation, including deportation defense. I most recently visited Brownsville/Matamoros and interviewed 6 families/asylum seekers who are forced to remain in Mexico under the "Migrant Protection Protocols" and have their hearings heard in tent courts where Immigration Judges preside over video. I am appalled at the state of our immigration courts.

Our system of justice depends on decision-making based on the law, with a neutral arbiter, the Immigration Judge. Unfortunately, this is not the case with our immigration courts, especially under the current politicization of the law. Here are the issues I have observed:

1. Inherent Structural Conflict

Immigration Judges are part of the Department of Justice, in the Executive Branch. The attorneys who represent the Department of Homeland Security are also part of the Executive Branch. This sets up an inherent conflict of interest where one part of the executive apparatus is hearing a case, and another part is arguing the case. Under these circumstances there is tremendous pressure to defer to the Department of Homeland Security, rather than act as an independent decision maker. This conflict of interest is compounded during the federal appeal process. When a decision of the Board of Immigration Appeals is challenged by an immigrant in federal court, an attorney from the Department of Justice, Office of Immigration Litigation, handles the matter. At this point, then, an attorney from the Department of Justice is reviewing a decision from the Board of Immigration Appeals, another branch of the Department of Justice. Such a structure ensures a conflict of interest and undermines independent decision making.

2. Abolishing Precedential Decisions and Disrespect of Article 3 Courts

This structure has also resulted in a disrespect of our Article 3 Federal Courts. In the past two years, the Department of Justice has attempted to overrule prior Board of Immigration decisions, disregarding years of precedents and contrary decisions by our federal courts. The most recent example is *Matter of L-E-A*, which the Attorney General certified to himself, and then determined that families were rarely a social group. The decision is at odds with many circuit decisions that have found that families are indeed social groups.¹ Immigration Judges will feel bound by this decision unless there is contrary law in their circuit; it

¹ First Circuit— *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993) ("There can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family."); *Aldana-Ramos v. Holder*, 757 F.3d 9, 15 (1st Cir. 2014), as amended Aug. 8, 2014 ("It is well established in the law of this circuit that a nuclear family can constitute a particular social group. . . ."; "The law in this circuit and others is clear that family may be a particular social group simply by virtue of its kinship ties, without requiring anything more."). • Second

will result in costly additional federal litigation as well as inconsistent decisions in different circuits.

3. Restricting Immigration Judges Decision-Making and Ability to Control Dockets

Under new Department of Justice directives, Immigration Judges are not able to exercise discretion to continue, terminate, or administratively close cases when it is possible for immigrants to be granted lawful status or a visa by USCIS. For example, an immigrant victim of crime who has a pending U visa case, must wait years until the visa is available. Many are victims of horrendous crimes and are cooperating with the police. However, they now face removal before their U visa application can be adjudicated, despite the fact that these individuals bravely stepped forward to work with law enforcement. The lack of authority to continue, terminate or administratively close such cases, not only harms victims of interpersonal violence, but the entire community since it sends a message that cooperating with law enforcement will not protect you from removal. Other immigrants who were able to apply for a 601 Provisional waiver of unlawful presence while in the United States, and then return to their home country to apply for a visa and return to their families in a short amount of time, are denied this option because their cases are no longer administratively closed. That means in many cases, the immigrant must wait years in the home country, separated from their families, often to the great detriment of their spouses and especially their children. This has impacted many Pennsylvania families.

Case Example from Pennsylvania. A U.S. citizen filed a marriage petition for his wife, the mother of 3 children, who was in removal proceedings because an attorney, who was subsequently suspended from the practice of law, filed an asylum application for her. Because the Immigration Courts are no longer able to terminate or close cases, the couple was never able to move forward with filing of an I-601A “stateside waiver.” If the case was administratively closed, she could remain with her family, get approval of the waiver, return to her home country, and seek to return on an immigrant visa. Instead, this mother is forced to remain in immigration court for the duration of her “cancellation of removal” case, which entails a higher legal standard than the 601A Waiver. There is a good chance this family will be needlessly separated for years because of the Attorney General’s decision that Immigration Judges lack the authority to administratively close cases.

4. Quotas and Rushed Decisions

Judges are now held to strict quotas which result in pressure for them to rush through cases. This is a major problem for individuals in detention. Cases are rushed through, which do not give the immigrant or their representative time to gather evidence and produce witnesses. Under the Trump administration, almost

Circuit—Vanegas-Ramirez v. Holder, 768 F.3d 226, 237 (2d Cir. 2014) (recognizing that noncitizen’s “membership in his family may, in fact, constitute a ‘social-group basis of persecution’ against him”) (citing Yumi v. Gonzales, 502 F.3d 150, 155 (2d Cir. 2007)). • Third Circuit—S.E.R.L. v. Att’y Gen. U.S., 894 F.3d 535, 556 (3d Cir. 2018) (“Kinship, marital status, and domestic relationships can each be a defining characteristic of a particular social group, but that does not mean that adding two or more of those characteristics together necessarily establishes a cognizable particular social group.”). 27 • Fourth Circuit—Crespin-Valladares v. Holder, 632 F.3d 117, 125 (4th Cir. 2011) (finding family to be a “prototypical” PSG); Hernandez-Avalos v. Lynch, 784 F.3d 944, 949 (4th Cir. 2015) (“[M]embership in a nuclear family qualifies as a protected ground for asylum purposes.”). • Sixth Circuit—Al-Ghorbani v. Holder, 585 F.3d 980, 995 (6th Cir. 2009) (“[A] family is a ‘particular social group’ if it is recognizable as a distinctive subgroup of society.”); Trujillo Diaz v. Sessions, 880 F.3d 244, 250 n.2 (6th Cir. 2018) (citing Al-Ghorbani). • Seventh Circuit—Ayele v. Holder, 564 F.3d 862, 869 (7th Cir. 2009) (“Our circuit recognizes a family as a cognizable social group under the INA. . . .”); Gonzalez Ruano v. Barr, 922 F.3d 346, 353 (7th Cir. 2019) (“We and other circuits have recognized that membership in a nuclear family can satisfy the social group requirement.”). • Eighth Circuit—Bernal-Rendon v. Gonzales, 419 F.3d 877, 881 (8th Cir. 2005) (“[P]etitioners correctly contend that a nuclear family can constitute a social group. . . .”); Aguinada-Lopez v. Lynch, 825 F.3d 407, 409 (8th Cir. 2016) (assuming petitioner’s proposed family-based PSGs were cognizable and citing to Bernal-Rendon). • Ninth Circuit—Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986) (finding immediate family to be a “prototypical” PSG); Rios v. Lynch, 807 F.3d 1123, 1128 (9th Cir. 2015) (finding family to be a “quintessential” PSG). (reprinted from: Practice Pointer, Matter of L-E-A-, Catholic Legal Immigration Services, available at <https://cliniclegal.org/resources/asylum-and-refugee-law/practice-pointer-matter-l-e>)

no asylum seekers are released from detention, even after they've shown a credible fear of persecution. Under past administrations, 80-90% of those who demonstrated a credible fear were released. As a result, immigrants and their attorneys are often forced to limit what they present, and important evidence can be overlooked. These are high stakes cases, treated as if a decision regarding someone's well-being or even their life, can be made in 2 or 3 hours.

Many asylum seekers, who do not understand the process, are simply quickly deported in absentia.

Case Example from Pennsylvania: I recently worked on an asylum case of an illiterate man from Guatemala who thought the Immigration Court had his address because he was wearing an ankle bracelet and he gave ICE his new address in the new state where he resided after release from detention. He even tried to call the court with the assistance of an attorney on the EOIR hotline, which provides case status and hearing dates. The hotline reported there was no information about his case. A few weeks later, he was picked up by ICE who informed him that he was deported in absentia from the court that initially had his case, and he was re-detained with his 10 year daughter in Berks Family Shelter.

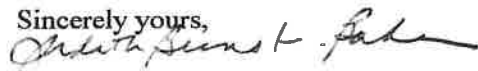
5. Human Rights Violations at the Border

The situation at the border is nothing short of "assembly line justice" and a travesty of international human rights. Although the "Migrant Protection Protocols" were created by the Department of Homeland Security, and not the Department of Justice, the Immigration Courts are acceding to the chaos and lack of due process created by the MPP program. I note that under MPP, individuals must show there is a "significant possibility" they will suffer persecution or torture in Mexico in order to pursue their case while in the United States. This legal standard is NOT the standard for asylum, which requires a well-founded fear of persecution that has been interpreted by the Supreme Court as a 10% chance of harm.

About 60,000 individuals are waiting in Mexico and can only come into the United States when their hearing is scheduled. Getting notice to applicants is chaotic. Mailing additional evidence for the case from Mexico to the courts is difficult, expensive, if not impossible to meet court imposed deadlines. It is estimated only 4% have attorneys.² The asylum seekers often don't speak English and do not know the first thing about how to put together an asylum application. As a result, individuals who face serious persecution may be returned home to great danger. I was personally at the border and interviewed a family whose son was targeted by gangs was deported by our government expeditiously and less than a year later, murdered in his family home by his persecutor, while his family was held hostage. Even worse, CBP and ICE officials are apprehending asylum seekers and sending them to new tent detention facilities in Donna Texas and near El Paso. These centers are shrouded in secrecy, and from what advocates gather, quickly interview the detainees, and deport most of them to the home country or Guatemala, if they passed through Guatemala, within 15 days. No lawyers, no judges, no process.

In sum, it is time to depoliticize our Immigration Court system and establish independent Article 1 courts that develop consistent precedents, adhere to the rule of law, and permit Judges to deliberate life and death matters in a neutral fashion.

Sincerely yours,


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² <https://www.buzzfeednews.com/article/adolfoflores/immigration-tent-courts-arent-allowing-full-public-access>