Right to Counsel for Asylum Applicants

Romina Nemaci
Loyola University Chicago School of Law

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Nemac: Right to Counsel for Asylum Applicants

Right to Counsel for Asylum Applicants

Romina Nemac

Since the mid-1800s, the United States has had a long and winding road of immigration jurisprudence that places any immigrants seeking admission to the United States at the mercy of Congress and its decisions regarding when, how, and if someone will be admitted. Stretching as far back as the nineteenth century in *Nishimura Ekiu v. United States*, the Court has held “[i]t is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.”1 This fateful passage continues to be referenced by the Court to this date.2

Though the Court has addressed the concept that aliens, regardless of their immigration status in the United States, are protected by the Equal Protection clause of the Fourteenth Amendment,3 one has to wonder how far this protection goes. How do we prevent human rights abuses from occurring against some of our country’s most vulnerable populations, namely immigrants, both documented and undocumented, when detained immigrants are often viewed as outside the purview of constitutional rights afforded to those facing incarceration on criminal charges? Though an indigent person accused of a crime and facing incarceration is guaranteed the right to appointed counsel through the Sixth Amendment,4 an asylum detainee seeking asylum in the United States is not granted the same protections. Once asylum seekers are placed in active removal proceedings, only then are they guaranteed a right to counsel, albeit at their own expense.5 This leaves asylum seekers vulnerable during the

1 *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892).
2 See Dep’t of Homeland Sec. v. Tharaissigiam, No. 19-161, 2020 U.S. LEXIS 3375, at *1982 (June 25, 2020); see also Zadvydas v. Davis, 533 U.S. 678, 679 (2001) ("...for the Due Process Clause applies to all persons within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent.").
3 See *Plyler v. Doe*, 457 U.S. 202, 212 (1982) (holding that all immigrants, regardless of immigration status, are protected by the Equal Protection clause of the Fourteenth Amendment).
4 See *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (holding that absent knowing and intelligent waiver, under the Sixth and Fourteenth Amendments, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless they were represented by counsel at their trial).
most critical initial stage of their application: the “credible fear” interview, which occurs before they are subject to removal proceedings and guaranteed constitutional access to counsel. The lack of guaranteed access to counsel before and during such interviews leaves applicants vulnerable to missteps that arise from rapidly changing policy. In order to gain access to counsel, many applicants are automatically placed in removal proceedings and then are subject to the horrors of life under Immigration and Customs Enforcement (“ICE”) detention, from overcrowding and disease⁶ to mass hysterectomies performed on women provided too little information to consent to the procedure.⁷

Right to Counsel in Immigration Cases: The Existing Protections

The United States has recognized that in certain cases, namely where a non-citizen is in removal proceedings before an immigration judge, then the right to counsel attaches at the non-citizen’s expense.⁸ The Court of Appeals for the Third Circuit has held that despite the statutory right to counsel in removal proceedings, there is no Sixth Amendment right to counsel in those same proceedings.⁹

There is also an emphasis on the right to counsel “at their own expense”: the Court has held that because immigration proceedings are not adversarial adjudications under 5 U.S.C.A. § 554,¹⁰ the United States Government is not and cannot be responsible for the costs incurred during immigration proceed-

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⁸ See supra note 5.

⁹ See Ulpiano v. Ashcroft, 289 F.3d 226, 231 (3d Cir. 2002) (holding that during removal proceedings there is no Sixth Amendment right to counsel).

¹⁰ See 5 U.S.C. § 554 (defining what an “adversarial adjudication” is for purposes of the Equal Access to Justice Act (“EAJA”) which allows petitioners to recoup legal fees and costs at the government’s expense from cases that are adversarial adjudications).
ings under the Equal Access to Justice Act. This blocks avenues for immigrants through which they could receive assistance with private attorney’s fees, and requires those immigrants in deportation proceedings who possess the right to an attorney to either be lucky enough to find pro bono representation for the removal case, or pay thousands of dollars in attorney’s fees for a private immigration attorney.

The singular instance where a court narrowly held that there was a right to counsel inherent to those in removal proceedings outside of the statutory requirement was for those who are mentally unfit to stand trial. The plaintiff in Franco-Gonzalez v. Holder suffered from schizophrenia, and his doctors determined that he did not understand that his removal proceedings were ongoing, nor could he comprehend how to structure a sufficient defense due to his delusions. The court subsequently held that a mentally incompetent detainee must be represented by an “accredited representative” in cases where they are detained for removal proceedings because the detainee may be incapable of fully comprehending the realities of their detention and potential removal.

Currently, in the beginning stages of asylum applications when applicants are subject to a “credible fear” interview, the Department of Homeland Security Guidelines state that:

“The alien may consult with a person or persons of the alien’s choosing prior to the interview or any review thereof, and may present other evidence, if available. Such consultation shall be at no expense to the Government and shall not unreasonably delay the process. Any person or persons with whom the alien chooses to consult may be present at the interview and may be permitted, in the discretion of the asylum officer, to present a statement at the end of the interview. The asylum officer, in his or her discretion, may place reasonable limits on the number of persons who may be present at the interview and on the length of the statement.”

Though this is merely a guideline and not a statutory measure, it does allow for already acquired representatives to be present at the interview and help their clients with the credible fear determination process as it is happening.

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12 Franco-Gonzalez v. Holder, 828 F.Supp.2d 1133, 1136 (9th Cir. 2011).
13 Id. at 1146.
14 See 8 CFR § 208.30(d)(4).
ICE Detention: the Realities

The realities of ICE detention, particularly now during the COVID-19 pandemic, are, to put it bluntly, disturbing. Because of the lack of proper social distancing in detention, those detained by ICE face a much higher risk for transmission and infection of the virus.\textsuperscript{15} By April 20, 2020, ICE confirmed that over 125 detainees were infected with COVID-19,\textsuperscript{16} a number which has undoubtedly risen as we have seen the number of cases rise correspondingly amongst the general population of the United States. Though ICE issued a memorandum on March 27, 2020 addressing the Center for Disease Control's ("CDC") interim guidance for managing the COVID-19 outbreak, this memorandum was considered by the court to be only a "best practices," not commands or even performance standards, with the further caveat that the 'CDC remains the authoritative source.'\textsuperscript{17} The 9th Circuit found that though "ICE appears to be engaging in at least some centralized monitoring of facility conditions, though Defendants do not submit evidence that they are enforcing IHSC or CDC guidelines at all ICE facilities," ICE is thereby leaving detained populations incredibly vulnerable to contracting COVID-19, and further spreading the disease among detained populations.\textsuperscript{18}

Even before the COVID-19 pandemic affected ICE detention facilities, the Office of the Inspector General ("OIG") found the conditions at ICE detention facilities to be concerning. In a 2019 report by the OIG, several ICE detention facilities were found to have "common problems" such as: "nooses in detainee cells, overly restrictive segregation, inadequate medical care, unreported security incidents, and significant food safety issues."\textsuperscript{19} The report found that: all four facilities visited had been feeding detainees expired food (such as spoiled meat and chicken);\textsuperscript{20} in three of the facilities the segregation practices violated legal standards and infringed on the rights of the detainees; in two facilities there were no recreation facilities outside of the detainees’ cells; and finally, one facility only allowed "no contact visits" despite the fact that it could readily accommodate in-person visitation.\textsuperscript{21}

\textsuperscript{15} See 8 CFR § 208.30(d)(4) at 5.
\textsuperscript{16} Id. at 6.
\textsuperscript{17} Id. at 7.
\textsuperscript{18} Id. at 9.
\textsuperscript{19} OFF. OF INSPECTOR GEN., OIG-19-47, CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT FOUR DETENTION FACILITIES (2019).
\textsuperscript{20} Id. at 4.
\textsuperscript{21} Id. at 3.
Regarding food standards, the OIG found at one ICE detention facility that "open packages of raw chicken leaked blood all over refrigeration units . . . ; lunch meat was slimy, foul-smelling and appeared to be spoiled; and moldy bread was stored in the refrigerator."22 This could lead to food poisoning or other food borne illnesses, negatively impacting the detained population at that facility. The food management at this facility was so atrocious that ICE and the facility leadership replaced the kitchen manager during the OIG inspection.23 At another facility "lunch meat and cheese were mixed and stored uncovered in large walk-in refrigerators; lunch meat was also unwrapped and unlabeled; chicken smelled foul and appeared to be spoiled; and food in the freezer was expired."24 Though spoiled meat was recorded at only two of the four detention centers inspected, there were issues with moldy and undated food at all four detention centers, indicating a wider problem of generally unhygienic food handling by ICE at detention centers.

Disciplinary segregation was also an issue at multiple facilities. The OIG found that two of the facilities inspected placed detainees in disciplinary segregation prematurely, before their case determined to require such disciplinary segregation.25 Three of the facilities placed detainees who were already in disciplinary segregation in restraints (typically handcuffs) when outside of their cells.26 One facility subjected detainees to strip searches upon entering segregation.27 In addition, two facilities did not provide detainees in segregation the required recreation time outside of their cell, or even time outside their cells at all.28

According to the OIG, ICE standards require all detainees to be allowed outdoor recreation time outside their living area in order to promote and improve detainees’ mental health and welfare.29 However, two of the facilities visited did not provide outdoor space; instead, recreation for detainees was located within their housing units or cells.30 The report cited the National Institute for Jail Operations, and stated that the loss or reduction of recreation-

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22 Id. at 4.
24 Id.
25 Id. at 5.
26 Id.
27 Id.
28 Id.
29 Id. at 7.
30 Id.
related amenities, specifically outdoor recreational amenities that provide access to fresh air and direct sunlight, may result in “increased idle time and a significantly lower quality of life.” The detainees at these two facilities expressed a desire to access the outdoors to be able to play soccer and enjoy the sunshine, but they were prohibited from doing so.

The facilities were also found to have substandard health conditions for the showers and toilets provided to detainees. Photographs exposed mold and mildew growing along the shower walls, as well as toilets stuffed with garbage and filled with brown water, effectively making them unusable. At one facility, the report found that “mold permeated all walls in the bathroom area, including ceilings, vents, mirrors, and shower stalls.” The report concluded that such environmental conditions presented health risks that could lead to serious health issues for detainees, “including allergic reactions and persistent illnesses.” In addition to the mold and mildew, the report found that the detention centers did not adequately provide personal hygiene items to detainees: many detainees were issued clothing in 3x or 4x sizes, far too big for them to comfortably wear; detainees at one facility “receive[d] a bag with one bar of soap, one stick of deodorant, one toothbrush, a small tube of toothpaste, and a comb,” upon entry, and in order to replenish any items used, detainees were instructed to purchase those items from the facility’s commissary, something the report notes is directly against ICE detention policy.

Recently, it came to the public’s attention that an ICE facility in Georgia conducted unnecessary hysterectomies on women in ICE custody. Women were forced to undergo medical procedures, often unsure why the procedure was being administered, and several women have come forward stating they did not provide consent for the hysterectomies conducted on them. One woman stated she “was given three different explanations of what it would be,

31 Id.
33 Id. at 9.
34 Id. at 8.
35 Id.
36 Id. at 9.
37 Id. at 10.
38 Id.
39 See Treisman supra note 7.
ranging from having her womb removed entirely to instead having a small amount of tissue scraped away. 41 Though there is now a nationwide push to investigate what happened at this detention center, women have already suffered the anticipated risks of unchecked ICE discretion over what happens in their detention centers.

ICE detention, particularly now during COVID-19, poses significant risks for those taken into ICE custody and detained while seeking asylum. The act of claiming asylum is not an illegal one; anyone may present themselves at a port of entry and claim asylum as per the INA. 42 Then why is it we treat those who do seek asylum as criminals, placing them in detention with substandard care? These individuals face a higher risk due to their custodial status, yet they are not categorically entitled to representation.

The Impact of Representation on Asylum Seekers

When organizations like the Refugee and Immigrant Center for Education and Legal Services (“RAICES”) provide counsel to clients before their processes begin with a credible fear interview, they take advantage of the DHS provision that allows people to bring someone in with them to their interview, 43 be it detained or non-detained clients. Manoj Govindaiah, the Director of Policy and Government Affairs at RACIES, once said, “The role of the lawyer in a non-adversarial interview is relatively limited— it’s rare that you would object to a line of questioning because the line of questioning is usually coming from an adjudicator, the immigration judge.” When asked to describe how having counsel in a credible or reasonable fear interview affects the client, he remarked that “The role that we typically play in the interview is we prepare a closing argument about why our client qualifies for credible or reasonable fear, and making sure that the officer has accurately summarized our client’s testimony.” Elaborating on that, Mr. Govindaiah stressed the importance of the lawyer’s ability to monitor the officer’s account of the client’s testimony regarding their real or credible fear. “We monitor the testimony so that when the officer creates that summary it is accurate.” Counselors are also able to suggest lines of questioning that they believe should have been administered that an officer may have bypassed. When asked if, from his experience, having counsel makes a definite impact on one’s chances in a credible or reasonable fear interview Mr. Govindaiah responded, “oh for sure, without a doubt in my mind.”

41 Id.
42 See 8 USC § 1158.
43 See supra note 14.
If one looks farther along in the process, for instance when someone is ready to have their interview or merits hearing, the impact of a counselor at the credible fear interview can be easily seen. Lee VanderLinden is a staff attorney for the National Immigrant Justice Center’s LGBT Immigrant Rights Initiative; he works with clients, both detained and non-detained, later on in the process. When asked about their opinion on how counsel impacts a person’s ability to apply for asylum their response was similar to that of Mr. Govindaiah’s: “Asylum law is so complicated! How do you formulate a PSG? That is in itself gymnastics at times. And so for some who is not a lawyer, who doesn’t have a legal education, who English may not be their first language, how can you as an individual formulate [your] particular social group so that it is a recognizable social group under Seventh Circuit case law? That is hard to do with a legal education, so expecting that from a pro-se individual is ridiculous.”

Conclusion

The right to counsel is a fundamental one, and yet, one’s ability to access that right is based on external forces outside of their control. An asylum seeker at the United States border is no less deserving of this right than the United States citizen who receives such protection merely by virtue of being a citizen. Asylum seekers placed in detention are subjected to horrible conditions, sub-standard care, lack access to the outside world, and rely heavily on the counsel they may obtain only after they are placed in detention and are subject to expedited removal proceedings. However, people should not have to be in detention and expedited removal proceedings in order to have access to counsel to help them with what has now become a defensive asylum application. Asylum seekers should have a right to counsel regardless of whether they are placed into expedited removal proceedings, particularly if this protocol is changed by the incoming administration, or any future administration. Asylum law is intricate and often difficult to understand, and the added stress of being held in a detention centers does not make navigating the pathway to citizenship any easier. The support that counsel provides asylum seekers is invaluable and should unquestionably be accessible to those who need it.