CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

THE CRISIS OF UNREPRESENTED INDIVIDUALS IN REMOVAL PROCEEDINGS

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by
Cyrus D. Mehta*

A noncitizen who is placed in removal proceedings has a right to a lawyer at his or her own expense, but unlike a criminal proceeding, there is no constitutional right to counsel. Securing representation in immigration proceedings cannot be at the expense of the government. As a result, many poor immigrants in removal proceedings are unable to afford hire a lawyer. If a person is criminally charged, he or she must be given counsel, regardless of the ability to pay for one. This is not so in removal proceedings despite the fact that the consequences of deportation from the country may be more drastic than a criminal sentence P which most of the times results in permanent banishment from the United States and from loved ones.

Even if an immigrant in removal proceedings can pay for a lawyer, it is difficult to find one since Immigration and Customs Enforcement (ICE), the enforcement arm of Department of Homeland Security, can incarcerate this individual in remote detention centers such as in Oakdale, LA, even if this person was initially arrested in New York. Moreover, while many lawyers undertake pro bono representation, this in itself may not be enough to cover the entire population of people in removal proceedings.

A recent New Jersey Law Journal editorial is spot on in advocating that it is necessary for Congress to step in to create a corps of competent lawyers to represent individuals in removal proceedings, http://blackstonetoday.blogspot.com/2009/09/deportation-without-representation-nj.html. About 300,000 people face removal proceedings each year before

200 immigration judges. According to the Executive Office for Immigration Review, only 40% of them were represented in 2008. The plight of detained persons facing removal is far worse. Only 1 in 10 had representation. In a great democratic nation like the United States, people deserve competent counsel so that they can effectively assert their rights. Removal proceedings are bewilderingly complex, and it is impossible for the unrepresented respondent to effectively navigate the process and identify legal grounds to remain in the United States. The odds of winning relief in removal are greatly improved when such a person is represented by a competent lawyer.

On February 28, 2007, Judge Katzmann in the Court of Appeals of the Second Circuit challenged lawyers at a New York City Bar annual lecture, both within and outside the immigration bar, to find ways to increase representation to the immigrant poor through pro bono services, to advance access to justice as well as the administration and operation of our immigration laws. His speech, http://www.probonoinst.org/wire/emy078.pdf, inspired an interdisciplinary group of lawyers, bar groups, non-profit organizations, other judges and law firms to conduct an in-depth exploration of this problem. The group is known as the Katzmann Study Group, which meets frequently in the JudgeXs chambers at 7.30 am! A New York Times article describing Judge KatzmannXs extraordinary efforts is worth reading, http://www.nytimes.com/2009/03/13/nyregion/13immigration.html.

One project, known at the Varick Street Detention Representation Project, started in December 2008 in which pro bonoattorneys from large multi-practice law firms, after being trained by Legal Aid, the City Bar Justice Center (where a dedicated Fragomen Fellow coordinates the project), and the American Immigration Lawyers Association-NY Chapter, consult with detained immigrants about whether they can obtain relief from removal. AILA lawyers serve as mentors to the volunteers and assist them in spotting the issues and avenues for relief. The screenings are held each week. The next stage is to encourage firms to take on representation, either on a limited basis or more fully on the merits in deserving cases.

It is hoped that the Varick Street model is replicated across the country, and that more lawyers from a non-immigration law background take up the representation of indigent persons in removal proceedings on a pro bono basis. These volunteer lawyers can be paired up with expert immigration lawyers from AILA, so that the volunteer lawyers are also ably guided through

the labyrinthine process. It would be far more effective to leverage the resources of large law firms in increasing the representation of persons in removal proceedings. AILA lawyers, who are often sole practitioners and already providing low bono services, can provide their expertise to the large law firms working on these cases.

Even if pro bono representation is stepped up, it may not be enough. All immigrants in removal proceedings, especially in remote detention centers in rural areas, faraway from where attorneys practice, may not be covered by these laudable efforts. The program may be further stepped up through corporate funding, and this is happening for minors in removal proceedings through KIND (Kids In Need of Defense), which is supported in part by Microsoft and the Angelina Jolie Foundation. Ultimately, though, as the NJ Law Journal Editorial suggests, Congress will need to step in to fund a corps of competent lawyers, so that every individual in removal will have counsel.

The vulnerability of those in removal proceedings was eloquently described by Judge Katzmann in *Aris v Mukasey,* 517 F.3d 595 (2d Cir. 2008):

> The importance of quality representation is especially acute to immigrants, a vulnerable population who come to this country searching for a better life, and who often arrive unfamiliar with our language and culture, in economic deprivation and in fear. In immigration matters, so much is at stake P the right to remain in this country, to reunite a family, or to work.

But providing counsel to every immigrant in removal proceeding is not just some warm and fuzzy charitable gesture. The Board of Immigration Appeals in *Matter of Lozada*, 19 I&N Dec. 637. recognized that there was a Fifth Amendment right to a fair hearing, and this right would be undermined if an immigrant received ineffective assistance from counsel. Several Courts of Appeal have upheld this right, *See e.g. Aris v. Mukasey*, *supra*. Attorney General Holder also reaffirmed this right recently. If there is a Fifth Amendment right to competent representation, and a fair hearing, it can be logically extended to all immigrants in removal proceedings. It makes little sense to give this right only to people who hired a lawyer but received ineffective assistance and not for people who were unable to seek a lawyer in the first place and not able to adequately present a good defense.

***Cyrus D. Mehta, a graduate of Cambridge University and Columbia Law School, is the Managing Member of Cyrus D. Mehta & Associates, PLLC in New York City. The firm represents corporations and individuals from around the world in a variety of areas such as business and employment immigration, family immigration, consular matters, naturalization, federal court litigation and asylum. Mr. Mehta has received an AV rating from Martindale-Hubbell and is listed in Chambers USA, International WhoXs Who of Corporate Immigration Lawyers, Best Lawyers and New York Super Lawyers. Mr. Mehta is the Chair of AILAXs National Pro Bono Committee and is also the Co-Chair of the AILA-NY Chapter Pro Bono Committee. He is a former Chairman of the Board of Trustees of the American Immigration Law Foundation (2004-2006). He was also the Secretary and member of the Executive Committee (2003-2007) and the Chair of the Committee on Immigration and Nationality Law (2000-2003) of the New York City Bar. He is a frequent speaker and writer on various immigration-related issues, and is also an Adjunct Associate Professor of Law at Brooklyn Law School where he teaches a course entitled TImmigration and Work.У All opinions expressed herein are the personal views of Cyrus D. Mehta and do not represent those of the organizations he has been part of in the past and presently.**