

URBAN
JUSTICE
CENTER



INTERNATIONAL REFUGEE ASSISTANCE PROJECT



May 4, 2016

The Honorable Jeh Johnson
Secretary of Homeland Security
245 Murray Lane, SW
Washington, DC 20528

The Honorable Alejandro Mayorkas
Deputy Secretary of Homeland Security
245 Murray Lane, SW
Washington, DC 20528

The Honorable León Rodríguez
Director, U.S. Citizenship and Immigration Services
20 Massachusetts Avenue, NW
Washington, DC 20529

Dear Secretary Johnson, Deputy Secretary Mayorkas and Director Rodríguez:

We request that the Department of Homeland Security (DHS) reverse its present policy banning counsel from overseas refugee interviews. We believe that permitting refugees overseas to appear with representation, at no cost to the government, is required under the applicable federal statute and regulation, would improve the fairness and efficiency of the process for refugee applicants and would better advance the objectives of the U.S. Refugee Admissions Program (USRAP).

Refugees have a right to counsel under U.S. statute and regulation

Refugee adjudications fall within the general class of immigration examinations in which applications are allowed to bring counsel. Refugees are entitled to representation by counsel at no expense to the government under the Immigration and Nationality Act's implementing

regulations at 8 C.F.R. § 292.5(b) and the Administrative Procedure Act (APA) at 5 U.S.C. §555(b), both allowing applicants to appear with counsel during government adjudications.

8 C.F.R. 292.5(b) states that applicants for admission to the United States have a right to counsel in examinations other than primary or secondary inspection. Primary or secondary inspections are examinations that occur at ports of entry, clearly distinct from overseas refugee adjudications. The refugee interview is an examination that falls within the applicants with the right to counsel because the interview is an adjudication with a government officer conducted under oath. In similar types of interviews with DHS, most notably affirmative asylum interviews, applicants are required to make an identical legal standard, and have the right to be represented by counsel, at no cost to the government.

The APA section 555(b) also indicates that refugee applicants for admission have the right to representation at no cost to the government. The provision applies to administrative proceedings, which are broadly defined as any agency action that results in an “order” or final disposition. Neither the INA nor any other legislation expressly supersedes the APA in refugee adjudications, so the APA’s procedural protections generally apply. Because refugee adjudications result in final orders, they are agency proceedings within the meaning of section 555(b) of the APA. As such, section 555(b) grants a right to counsel to refugee applicants for admission.

The policy of banning counsel from refugees in overseas interviews is currently memorialized only in a footnote in the DHS Adjudicator’s Field Manual (AFM). The chief reasoning provided in this footnote for the ban on the right to representation is “longstanding practice,” logic which glosses over the plain text of federal law, and ignores the fact that prior government practice was in fact to allow counsel in such interviews. Allowing access to counsel in refugee interviews would not require any change in the applicable law or regulations; it could be accomplished by simply changing the agency’s interpretation through an internal memorandum.

The former Immigration and Naturalization Service (INS) erred in its decision denying refugees the right to representation in their adjudications. In 1986, the former INS determined that 8 C.F.R. 292.5(b) gave refugees the right to be represented in their adjudications. In 1992, in the last weeks of the George H.W. Bush administration, the former INS overturned that in an agency memorandum. The 1992 memorandum is faulty in several ways.

First, it argues that refugees fall within the 8 C.F.R. 292.5 exception of applicants for admission who are not authorized to be represented by counsel. However, that exception applies only to primary and secondary inspections, which are examinations that take place at ports of entry into the United States. The plain text of the regulation *grants* the right to representation to applicants in all kinds of examinations other than primary or secondary inspections.

Second, the memorandum relies on *Ali v. INS*¹ to argue that 8 C.F.R. 292.5 is intended only to implement INA 292, which is specific to adversarial proceedings. *Ali* held that the former INS was not required to allow counsel in marriage-based adjustment interviews. However, according to DHS's own current policy guidance, DHS *is* required to allow representatives in adjustment interviews.² Further, since *Ali*, 8 C.F.R. 292.5 has been interpreted to provide a right to counsel in a range of examinations before DHS officers that are nonadversarial in nature, including adjustment interviews and affirmative asylum interviews. The 1986 *Ali* decision does not reflect law or current agency practice, and as a District Court decision, is not binding precedent.

Third, the 1992 memorandum argues that if refugees were provided with the right to counsel, then refugee adjudications would be adversarial. However, asylum-seekers in affirmative asylum proceedings, who must show that they meet the same substantive legal definition as refugees in overseas adjudications, have a right to counsel, and those proceedings are clearly not adversarial in nature. The mere presence of an attorney does not make a proceeding adversarial. As with the affirmative asylum process, U.S. law provides a role for attorneys in overseas refugee adjudications, and agency practice to the contrary is rooted in faulty legal reasoning.

Access to counsel improves the fairness of processing to refugees

Refugees applying for resettlement through USRAP must navigate a complicated administrative process, undergo numerous interviews with United Nations and U.S. officials, and submit extensive documentation. Most refugee applicants do not speak English and must rely on interpreters in their adjudications. Many applicants, including victims of torture, LGBTI refugees, survivors of gender-based violence, and applicants with mental health concerns, suffer from Post-Traumatic Stress Disorder as a result of persecution and as a result find the resettlement process particularly confusing and challenging. Children on their own, regardless of mental health issues, find both the process and the refugee interview particularly challenging and confusing. Even the most educated refugee applicants may not understand the resettlement process and may undergo refugee processing while they remain under threat.

As a result, the resettlement process may exacerbate symptoms of trauma, lead to incorrect adverse decisions, or create misunderstandings with applicants who do not understand the process or who cannot relate their narrative coherently. Because refugee applicants are extremely vulnerable, and because of the high stakes involved in these decisions, refugees should have the right to be represented in their adjudications.

¹ 661 F. Supp. 1234, 1247 (D. Mass. 1986).

² Adjudicator's Field Manual Section 12.1 revised May 23, 2012 at note 2. See also USCIS, "The Role of Private Attorneys and Other Representatives; Revisions to Adjudicator's Field Manual (AFM) Chapters 12 and 15; AFM Update AD11-42," https://www.uscis.gov/sites/default/files/USCIS/Outreach/Feedback%20Opportunities/Interim%20Guidance%20for%20Comment/Role_of_Private_Attorneys_PM_Approved_122111.pdf ("Because . . . USCIS offices are generally very busy with a high volume of applicants appearing for adjustment . . . it is essential that adequate office space be provided . . . the officer and applicant, attorney or other representative and family members should be provided.").

Access to counsel improves the efficiency of the U.S. Refugee Admissions Program

Presence of a legal advocate at interviews can also aid the U.S. government interviewer and make the adjudication more efficient by bridging linguistic, cultural, and psychological gaps between applicants for resettlement and USCIS Refugee Affairs Officers. In the context of U.S.-based asylum seekers, who must meet an identical legal and evidentiary burden, studies have shown that the presence of counsel improves the efficiency of adjudications.

The presence of counsel can increase efficiency because a lawyer can explain the application process to the applicant; help an applicant identify, gather, and organize her evidence and important documents; prepare an applicant for her interview; and help clarify unclear statements made by the applicant during the interview. Correct adjudications in the first instance reduce the number of claims forced to go through the administrative review process; USCIS reports that its staff spends hundreds of hours adjudicating requests for reconsideration from refugees who were rejected in the first instance.

After Congress acted to allow counsel in one category of refugee adjudications and Special Immigrant Visa interviews,³ the International Refugee Assistance Project began representing clients in those adjudications. In several interviews, the attorney was able to clarify an unclear point or to encourage the applicant to provide evidence to support the claim, avoiding unnecessary denials or holds in those cases and giving applicants a fair chance to navigate the admissions process successfully. Adjudications are more efficient when applicants are prepared for and represented by competent counsel.

Access to counsel advances the objectives of the U.S. Refugee Admissions Program

Permitting refugees to have counsel present at their Department of Homeland Security interviews would better serve the objectives of the U.S. Refugee Admissions Program. By allowing counsel, adjudicators can clarify misunderstandings and avoid lengthy and time-consuming appeals. Counsel in overseas interviews are an asset to *both* the interviewer and interviewee.

There is no legislative, regulatory, or practical reason to prohibit an applicant to the refugee admissions process from being represented in their adjudication at no expense to the U.S. government. Rather, applicable regulations provide that DHS allow the presence of counsel in this context. An internal memorandum is the only change needed to bring the refugee admissions process into compliance with the plain language of longstanding statute and regulation. Accordingly, we respectfully request that DHS reverse the current ban on access to counsel for refugees seeking resettlement in the United States.

Sincerely,

³ National Defense Authorization Act for Fiscal Year 2014, Section 1219.

National/International Organizations

American Civil Liberties Union
American Federation of Teachers
American Immigration Council
Asylum Access
Center for Community Change
Center for Gender & Refugee Studies
Center for Human Rights & Constitutional Law
Columban Center for Advocacy and Outreach
Community Refugee & Immigration Services
Egyptian Foundation for Refugee Rights
Fair Immigration Reform Movement (FIRM)
HIAS
Human Rights First
Immigrant Justice Corps
International Refugee Assistance Project (IRAP) at the Urban Justice Center
Justice, Peace and Reconciliation Commission, Priests of the Sacred Heart, US Province
Kids in Need of Defense (KIND)
Latin America Working Group
League of United Latin American Citizens
Little Sisters of the Assumption U.S. Territory
Lutheran Immigration and Refugee Service
Migration and Refugee Services of the U.S. Conference of Catholic Bishops
NAFSA: Association of International Educators
National Council of Jewish Women
National Immigrant Justice Center
National Immigration Law Center
National Justice for Our Neighbors
National Korean American Service and Education Consortium
Polaris
Refugee Solidarity Network
Safe Passage Project
Save the Children
Sisters of Mercy of the Americas, Institute Justice Team
Southern Poverty Law Center
Syrian American Council
The Advocates for Human Rights
U.S. Committee for Refugees and Immigrants
Unitarian Universalist Service Committee

Local Organizations:

Adrienne Oleck LLC

Asian Americans Advancing Justice-Los Angeles

Atlas: DIY

Center for the Human Rights of Children, Loyola University Chicago

Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA)

Cornell Asylum and Convention Against Torture Appellate Clinic

DC-MD Justice for Our Neighbors

Illinois Coalition for Immigrant and Refugee Rights

Lawyers' Committee for Civil Rights of the San Francisco Bay Area

Michigan Immigrant Rights Center

North Georgia Immigrant Justice

Pangea Legal Services

Pennsylvania Council of Churches

Tulsa Immigrant Resource Network

University of Connecticut Asylum and Human Rights Clinic

University of Houston Law Center Immigration Clinic

USC International Human Rights Clinic