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Expedited Removal: A Refugee's Perspective¹

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Among the more controversial changes imposed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) (P.L. 104-208, 110 Stat. 3009) was the creation of a process called "expedited removal," which provides that people who seek admission to the United States without valid documents or with fraudulent documents may be sent away speedily, with extremely restricted opportunities for administrative and judicial review. The impetus for creation of the expedited removal process lay at least in part in the widespread idea that there were many applicants for admission to the United States who were permitted to stay for extended periods of time while pursuing what turned out to be meritless claims for asylum.² In theory, this mechanism should

¹I am indebted to Eleanor Acer, Director of the Pro Bono Asylum Project of the Lawyers Committee for Human Rights, New York, NY, and Mary McClenahan, attorney with the Catholic Legal Immigration Network, Newark, NJ, for sharing their observations and insights regarding the experiences of refugees with the expedited removal process.

²H.R. Rep. No. 104-879, Pt. 1, 107-108; U.S. GAO, 1998:16. Refugee advocates and others have argued that previous changes in the asylum application process (including elimination of eligibility for employment authorization upon application and cutting back on application backlogs) had already dramatically reduced the potential for fraud in the process. See also Lawyers Committee for Human Rights, 1998:3.

allow the Immigration and Naturalization Service (INS) to identify frivolous claims quickly, screening out applicants with such claims before undertaking lengthy proceedings. The significant changes imposed by the legislation included both a streamlining of the process of consideration of asylum claims and strict limitations on review of negative determinations.

The concept of expedited removal is appealing to those who see the delays and backlogs plaguing the immigration process as creating unwarranted opportunities for manipulation and exploitation by immigrants, particularly undocumented immigrants. For others, particularly those who advocate for the rights of refugees, the concept is fraught with danger. The proponents' goal of utmost efficiency in the refugee context is illusory because the INS has two distinct missions: 1) to provide protection to genuine refugees and 2) to screen out those with fraudulent claims. As in virtually any other endeavor, speed can come at the expense of accuracy. If undue speed in the process creates the opportunity for error, it may harm the agency's ability to carry out its mission to provide refuge to those who reasonably fear that, if sent home, they would face persecution on account of race, religion, nationality, membership in a particular social group, or political opinion (8 U.S.C. fl 1158(a)).

As soon as the expedited removal procedures were proposed, advocates for refugees expressed serious concerns that the speed of the process and the limitations on representation might result in foreclosing meritorious claims. (For comments summary on proposed regulations, see *Inspection and Expedited Removal of Aliens*, 62 Fed. Reg. 10312, 10318-10320; see also Schrag and Pistone, 1997.) Exacerbating those concerns was the absence of an opportunity for judicial review of the decision to order removal because it means that there is no ultimate chance to correct an error. And the consequences of erring on the side of ordering the removal of an applicant with a legitimate claim are grave: not just a five-year ban on reentering the country, but also the risk that such a person might face terrible harm upon return to his or her native country (Lawyers Committee for Human Rights, 1998:3-4).

After a year of experience with the law, it is possible that some preconceptions all around may have softened. The General Accounting Office (GAO) has reported that, in the first seven months of implementation, 79 percent of the approximately 1,100 aliens who had completed credible fear interviews were found to have a credible fear and referred for full hearings before an immigration judge (U.S. GAO, 1998:48). That statistic may suggest that there are not vast numbers of people seeking admission based on false claims of feared persecution. It may also suggest that asylum officers are complying with the mandate to interpret the credible fear standard more broadly than the well-founded fear standard. At the same time,

while some of the worries of refugee advocates have eased, some serious concerns remain. The voluntary organizations and lawyers who have assisted asylum applicants in the expedited removal process, and have interviewed others, continue to be concerned that the severe time limitations and restrictions on representation may be inhibiting the ability of genuine refugees to make their claims effectively.

To understand the flaws of this process, and to consider effective reforms, it is helpful to see it from the perspective of a refugee, beginning at arrival at a port of entry. Consider a hypothetical applicant for admission to the United States. She is an antigovernment activist in her home country and was recently detained and threatened by progovernment paramilitary forces in uniform. Fearing for her life, she managed to obtain a false passport and visa to enter the United States. She has never left her home country before, and she does not speak English.

If, at an initial inspection, an INS officer suspects that this applicant for admission to the United States has attempted to enter the United States without valid documents, the officer will refer her to what is called secondary inspection. During secondary inspection, another INS officer will question the new arrival further and review her documents, and the officer should give her the opportunity to express a fear of return to her country. The INS does not, however, inform her of this opportunity beforehand (62 Fed. Reg. 10312, 10318, March 1997; Lawyers Committee for Human Rights, 1998:10–11). In the meantime, the refugee may wait for many hours, probably without food and perhaps shackled to a bench in an airport holding room (Wheeler and McClenahan, 1997). She is not entitled to make a phone call or have any other access to family, friends, voluntary organizations, or lawyers (62 Fed. Reg. 10312, 10319; Lawyers Committee for Human Rights, 1998:12). In addition to physical exhaustion, this waiting period is likely to induce extreme distress, especially because the refugee will probably not yet understand the process or her rights. Anxiety and fatigue are likely to impede effective communication during the secondary inspection process.

Conditions during the secondary inspection, at which the refugee would first be told of her opportunity to express a fear of returning home, may add to the refugee's confusion and feeling of intimidation. The space for administering these inspections at Kennedy Airport in New York, to take one example, is a large room with a counter, behind which sits a row of officers conducting secondary inspections (Lawyers Committee for Human Rights, 1998:13). There is no separation of the applicants from each other and thus no guarantee of confidentiality. The alien is likely to have difficulty discussing distressing and possibly intimate events in public, surrounded by strangers. An airline or INS employee may serve as

interpreter, but if not one is present and available to translate, the translation may be done by an interpreter over a speaker-phone (62 Fed. Reg. 10312, 10319). This approach to interpretation (which involves reliance on nonprofessional interpreters as well as possibly erratic technology) has resulted in inaccurate translations in some cases (Lawyers Committee for Human Rights, 1998:15).

It is also important to note that this refugee, who has fled brutal treatment by uniformed officers in her own country, may have good reason to hesitate to be frank with any uniformed officer, even one of the United States government (see Shrag and Pistone, 1997:287). Although the inspectors are given explicit forms to follow in asking questions designed to elicit an alien's possible fear, they may not have undergone extensive training to identify those who may have legitimate claims but who hesitate to express their fears. Even the requirement of standardized interview forms is no guarantee that the necessary questions will be asked. According to a GAO review (U.S. GAO, 1998), the reports of inspectors at one port of entry failed to indicate that they had asked all three required questions relating to fear in as many as 18 percent of the inspections.³ Even worse, there are reports that on some occasions INS inspectors have used intimidating and abusive tactics during the examinations (Lawyers Committee for Human Rights, 1998:11–12). A genuine refugee who, by virtue of apprehension or confusion or both, hesitates to express her fear at this point in the process will likely receive an order of expedited removal and be returned to conditions of persecution.⁴ Of case files reviewed by the General Accounting Office, 95 percent of aliens at three major ports of entry (Los Angeles airport, Miami airport, and the Buffalo district) who were not referred for credible fear interviews were removed within two days of attempting entry to the United States; at Kennedy Airport in New York, the figure was 84 percent (U.S. GAO, 1998:44–45).

³An inspector is required to take a sworn statement from an alien in secondary inspection, which is to include, among other things, answers to certain required questions. The three questions relating to fear are as follows: Why did you leave your home country or country of last residence? Do you have any fear or concern about being returned to your home country or being removed from the United States? Would you be harmed if you are returned to your home country or country of last residence? (See U.S. GAO, 1998:32–33, Fig. IV-1.) The General Accounting Office (GAO) reviewed the case files on several hundred aliens who had tried to enter the United States between May 1, 1997, and July 31, 1997, and looked at whether the inspectors documented that they had asked the required questions; the GAO found that compliance with required procedures was not consistent (U.S. GAO, 1998:42–43).

⁴In certain limited circumstances, an inspector may not issue an expedited removal order, but may allow the alien to withdraw the application for admission, may process a waiver, may defer inspection, or may parole the alien into the United States. According to the GAO, the INS does not have data "readily available" on the number of aliens who were offered one of the four options (U.S. GAO, 1998:34–35).

If someone manages to express fear during the secondary inspection, the INS officer should refer her immediately for a "credible fear interview" by an asylum officer (8 C.F.R. fl 235.3(b)(4)). The INS policy is to schedule the credible fear interviews within 48 hours of referral (62 Fed. Reg. 10312, 10319). Such a short time (or even a day or two longer) is too brief to ensure access to assistance if needed. An alien in this position may not have the ability even to contact family or friends during this period. The barriers to access may seem trivial, but they may be important enough to prevent effective communication. In some cases, for example, the INS officers take address books away with baggage, and the alien can retrieve them only through a potentially lengthy request process. An alien may not have U.S. currency with which to purchase phone cards to pay for calls to family or friends (McClenahan, 1998; Wheeler and McClenahan, 1997). In some facilities, family and friends are permitted to visit only on weekends. If a person awaiting an interview was brought to a facility on a Monday or Tuesday, she may have no opportunity for a visit for consultation before the credible fear interview (Acer, 1998). Even if contact is made with family or friends who can put the detainee in touch with an attorney, she will not have much time to have meaningful consultation with an attorney.

Although the INS has permitted voluntary agencies into detention centers to conduct information sessions and individual meetings, there are other obstacles. In at least one facility, for example, the INS decided not to permit other detainees to accompany aliens at individual meetings for the purpose of translation and assistance (McClenahan, 1998; Acer, 1998). So a refugee may finally have access to someone who can help her understand her rights, but not be able to communicate effectively with that person. While there may be privacy concerns when an alien does not wish to have another detainee present, if the alien is willing to set those concerns aside, it may be the only way to provide information effectively.

At the credible fear interview, the asylum officer is to ask questions to determine whether there is a "significant possibility . . . that the alien could establish eligibility for asylum. . ." (8 U.S.C. § 1225(b)(1)(B)(v)). This standard is thus by definition more liberal than that applied in the ultimate decision on eligibility for asylum. The applicant has had very little time (perhaps less than 48 hours) to prepare for the interview. Accordingly, the interviewers should not seek inordinate amounts of detail. In some cases, however, asylum officers have subjected aliens to extensive, repetitive questioning, lasting longer than a typical asylum interview (Lawyers Committee for Human Rights, 1998:15). An applicant could easily become confused or seem unprepared for this level of examination. In other cases, there are reports of inadequate translation during credible fear interviews (Lawyers Committee for Human Rights, 1998:16).

Both of these situations create the possibility of confusion, with the attendant risk that the officer will misunderstand someone with a genuine claim and make an erroneous decision based on that misunderstanding. Another problem occurs even if there is a finding of credible fear. If inadequate translation or repetitive, confusing questions lead the asylum officer to record inaccuracies in the refugee's story, those inaccuracies become part of the record of the proceeding, and may be perceived as inconsistencies (leading to unwarranted credibility issues) at the next stage of review (Lawyers Committee for Human Rights, 1998:16).

Following the credible fear interview, notwithstanding the legislative and regulatory mandate for expedition, it is reported that the time to make the credible fear determination is in some cases several weeks (McClenahan, 1998). To the extent that this happens frequently, it would call into question the underlying rationale for the expedited removal process and support the argument for greater flexibility in timing of other steps in the process. If the asylum officer determines that the alien does not have a credible fear of persecution, the officer will issue an order of expedited removal (if the alien is not a stowaway). An alien who is ordered removed by the Asylum Officer may ask for review of the decision by an immigration judge.

The statute mandates that review by an immigration judge, if requested by the applicant, be done within seven days (INA § 235(b)(2)(B)(iii)(III); 8 U.S.C. § 1225 (b)(2)(B)(iii)(III)). Again, this is an inordinately short period of time to prepare what might be a complex case. Even if the alien is able to locate and consult with an attorney, the attorney may have difficulty providing effective representation. When attorneys visit detainees in the detention centers, they wait anywhere from one to three hours at some facilities before they can even meet with their clients (McClenahan, 1998). While this may seem like a small or at least not insurmountable barrier, it is certainly a strong disincentive to busy attorneys to provide representation, and it limits the amount of assistance that can be provided even by those who are eager to help.

During the immigration judge review, an alien is not entitled to representation by an attorney. The Office of the Chief Immigration Judge of the Executive Office for Immigration Review has instructed immigration judges that, in their discretion in an individual case, they may allow people with whom the alien has consulted to be present during the review (U.S. Department of Justice, 1997). "However, nothing in the statute, regulations or this OPPM [operating policy and procedure memorandum] entitles an attorney to make an opening statement, call and question witnesses, cross examine, object to written evidence, or make a closing argument" (n. 10). According to reports, immigration judges differ fairly wide-

ly in what they permit attorneys to do (Lawyers Committee for Human Rights, 1998:18). Some allow an attorney to do a direct examination of a client, while others permit no examination or statements. It is difficult to see the logic in allowing this level of inconsistency. It is equally difficult to understand the logic in forbidding an attorney from playing an active role in the proceedings. An attorney's representation would obviously assist the applicant in making her case, but can also help the immigration judge by clarifying issues. The potential improvement in the quality of decision-making would outweigh the negligible delay in the process. Such assistance is crucial since, for most claimed refugees, if the decision is negative this is the last step in the process. If the immigration judge agrees with the decision by the asylum officer, "the case shall be returned to the Service [INS] for removal of the alien" (8 C.F.R. § 208.30(f)(i)). The statute does not provide for additional review of a negative decision; that aspect of the law is subject to challenge.

The expedited removal process is flawed in design and implementation. To the extent that the law is written to foreclose lawyers from providing effective representation of those claiming to be refugees, and to prohibit judicial review of negative determinations, Congress should amend it. Even if the law is not revised to eliminate or substantially revise the process, there are still a number of reforms that the Department of Justice could and should implement. The INS could make it easier for applicants to have access to information and assistance as well as accurate translations throughout the process. Both the INS and the Executive Office for Immigration Review should create mechanisms to insure greater consistency and to eliminate the possibility of abuse in the procedures of inspectors, asylum officers and immigration judges. Finally, there should be greater flexibility in the time frames, especially to permit representation by counsel. Without such reforms, an alien who has experienced trauma, or has little sophistication or understanding of American immigration law, many never have the chance to assert her case effectively. If she has a genuine claim, that result benefits no one.

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