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ESSAYS ON
EXPANDING
ACCESS TO
JUSTICE**



Caught in the Web: Immigrant Children in Removal Proceedings

Claire R. Thomas and Lenni B. Benson¹

I. Introduction: Caught in the Web

The day of his hearing arrives. It is 8:30 a.m. He wears his best shirt and his jeans are clean and pressed. He grips the arms of the courtroom chair so hard that his knuckles are white. He is so small that his feet do not touch the floor. The Immigration Judge is speaking to him slowly and kindly, but he turns his small face up to look only at the court's Spanish-speaking interpreter. He does not understand English. The government prosecutor, an attorney for Immigration and Customs Enforcement (ICE), holds a document listing the charges against him; she is ready to proceed with his deportation case. He is eight years old.

In the United States, the individual state governments are primarily responsible for protecting children. Today, the basic normative principle governing domestic children's law is found in the legal standard known as the "best interests of the child." While this standard is not succinctly defined in the U.S. legal system,² scholars have noted that the "best interests of the child" generally "prioritizes the child's safety, permanency, and well-being."³ This flexible criterion guides agencies and judges through many critical legal decisions affecting the daily life of a child, such as guardianship, custody and visitation, economic support, abuse and neglect proceedings, and determinations relating to mental health and incarceration for juvenile infractions, while allowing the child to have a voice in the proceedings affecting his or her life.⁴

When the child is born abroad, but is now physically residing in the United States, the state's primary obligation to promote the child's welfare can also be woven into the complex web of federal immigration, education, and benefits law.⁵ Navigating through this intersecting web of competing or overlapping jurisdictions is extremely difficult even for the experienced *pro bono* attorney or professional social worker. The people least able to navigate these bureaucratic

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² The United Nations Convention on the Rights of the Child (CRC) clearly defines the standard of "best interests of the child." While the United States had an active role in drafting the CRC and signed the CRC on February 16, 1995, it has not yet ratified the Convention. The United States has, however, signed and ratified both optional protocols to the CRC. See Convention on the Rights of the Child, Sept. 2, 1990, 1577 U.N.T.S. 3; see also *Convention on the Rights of the Child*, UNITED NATIONS TREATY COLLECTION, <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&msgid=IV-11&chapter=4&lang=en>.

³ Bridgett A. Carr, *Incorporating a "Best Interests of the Child" Approach Into Immigration Law and Procedure*, 12 YALE H.R. & DEV. L. J. 120, 127 (2009).

⁴ *Id.* at 127.

⁵ Children born outside the territorial United States may have a claim to citizenship if one or both of their parents were U.S. citizens at the child's birth. The rules can be complex and have changed over time. Today the relevant statutory provision is found in Immigration and Nationality Act, 8 U.S.C. § 1401. This article is primarily focused on non-citizen children. As volunteers at the Immigration Court we have met young children who were born abroad to U.S. citizen fathers and who did not realize they had the ability to claim U.S. citizenship.

borders alone are children. Children who are caught up in the complexity and are unprotected are incredibly vulnerable. The confusion created by this web leaves non-citizen children without protection.

Sadly, in immigration law, the federal system has failed to provide free counsel to anyone, let alone children, who are often invisible and voiceless as a bureaucratic system operates around them.⁶ Data gathered through Freedom of Information Act requests indicates that between fiscal year 2005 and December of 2015, the government has initiated 169,684 juvenile cases in the Immigration Court, known as the Executive Office for Immigration Review (EOIR).⁷ The number of juveniles in the immigration removal system has steadily increased. In fiscal year 2005, approximately 8,910 juvenile cases began in Immigration Court.⁸ Ten years later, in fiscal year 2015, 28,819 juvenile cases were filed in Immigration Court. In 2014, the number of juvenile cases filed in Immigration Court was 56,167. And perhaps of greater importance is that juvenile cases have been a growing percentage of the overall EOIR workload. In fiscal year 2014, the cases initiated for juveniles represented 24% of the total of new cases filed.⁹

Only as the crisis widened and expanded did the Administration of President Barack Obama find limited funds through the Corporation for National and Community Service (CNCS) to assist with the dearth of legal counsel. In 2014, the CNCS created the Justice AmeriCorps program that funded less than 100 one-year attorney fellowship positions.¹⁰ The Justice AmeriCorps fellows can only represent unaccompanied children who are under the age of 16 at the time of entry to the United States. Fellows are expected to handle twenty-five to forty cases during their one-year fellowships; a challenging goal as many cases require more than one year to complete and most fellows are new attorneys with limited experience. The funding provides stipends of \$19,800 annually (a sum that is less than half of the public interest fellow salary in most major cities). Whether this program will be renewed or expanded beyond 2015 is unknown. Further,

⁶ In recent litigation in Southern California, the U.S. Department of Homeland Security (DHS) agreed to provide appointed counsel in cases where the respondent non-citizen was mentally incompetent. The Executive Office for Immigration Review (EOIR) which is part of the Department of Justice is in the process of developing more procedures to try to recruit and locate free counsel for the mentally incompetent. *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034 (C.D. Cal. 2010). See also Judge Robert A. Katzmann, U.S. Court of Appeals for the Second Circuit, The Orison S. Marden Lecture of the Ass'n of the Bar of the City of New York: The Legal Profession and the Unmet Needs of the Immigrant Poor (Feb. 28, 2007), available at http://webcache.googleusercontent.com/search?q=cache:v7_KcCfj_oAJ:www.aila.org/File/DownloadEmbeddedFile/40681+&cd=1&hl=en&ct=clnk&gl=us&client=safari. The EOIR does provide some funds for "know your rights presentations" provided by nonprofit legal services organizations. Organizations receiving these funds may not provide direct legal representation under the terms of the grants. AM. BAR. ASS'N, THE FUND FOR JUSTICE AND EDUCATION 2009-2010 ANNUAL REPORT, available at http://www.americanbar.org/content/dam/aba/images/fund_justice_education/fje_ar0910.pdf.

⁷ See *Juveniles—Immigration Court Deportation Proceedings*, TRAC IMMIGRATION, <http://trac.syr.edu/phptools/immigration/juvenile/> (last visited on Feb. 21, 2016) (data shared in a tool reported on juvenile cases before EOIR). The official statistical yearbook of the EOIR does not separate out cases classified as unaccompanied children or juveniles. Statistical Year Book, U.S. DEP'T OF JUST., <http://www.justice.gov/eoir/statistical-year-book> (last visited Feb. 21, 2016).

⁸ See *Juveniles*, *supra* note 7 (data shared in a tool reported on juvenile cases before EOIR).

⁹ The EOIR reported 225,896 new cases initiated in fiscal year 2014 and the TRAC data reported 56,097 new juvenile cases for that time period. The 2015 fiscal year data was not yet available at the time of this writing.

¹⁰ See *Justice AmeriCorps Legal Services for Unaccompanied Children*, CORP. FOR NAT'L AND COMMUNITY SERV., <http://www.nationalservice.gov/build-your-capacity/grants/funding-opportunities/2014/justice-ameri-corps-legal-services> (last visited Feb. 21, 2016). Safe Passage Project received a grant under this program and actively participates in the Justice AmeriCorps program. It is hoped that this program will help establish that providing free counsel to indigent children is cost effective and helps reduce the length of the immigration case, thereby reducing government costs in the administration of the cases as well.

the need for qualified, trained, and free counsel continues to grow.¹¹

Around the time that the Administration created Justice AmeriCorps, the Administration for Children and Families of the U.S. Department of Health and Human Services announced that they would appropriate some funds for full legal representation of children to those legal services organizations which had been providing some “Legal Orientation” programs inside the Office of Refugee Resettlement (ORR) detention facilities managed by this agency. The full figures are unclear, but the program found the funds to authorize legal assistance to approximately 6,000 children.¹²

Yet even as the Administration was responding by trying to mobilize limited legal resources for children, the number of immigrant youth arriving grew dramatically. By the summer of 2014, nearly 4,000 children a month arrived at the Southern Border of the United States from three main countries: Honduras, Guatemala, and El Salvador. The U.S. government began to describe the arrivals as a “surge” but also recognized the issue as a humanitarian crisis.¹³ The Department of Homeland Security (DHS), which is charged with enforcing the immigration laws, and the Department of Justice (DOJ), which contains the Immigration Courts with its Executive Office for Immigration Review (EOIR), entered into a memorandum of understanding that for all new child arrivals after May 1, 2014, the EOIR would schedule the removal (deportation) cases within twenty-one days of receipt of the charging document. This fast-tracked “priority docket” or “rocket docket” was created both in an effort to resolve the claims quickly to help those individuals who might qualify for protection and to respond to strong criticism within the U.S. Congress that the lengthy delays within the Immigration Court system created the impression in the children and mothers arriving that they would get “permisos” or work permits while their cases slowly worked through the court.¹⁴ In fact, few people qualify quickly for any type of work

¹¹ In July 2014, the American Civil Liberties Union (ACLU), in conjunction with the American Immigration Council, Northwest Immigrant Rights Project, Public Counsel, and K&L Gates LLP, filed suit in U.S. District Court in Seattle, Washington, on behalf of unrepresented immigrant children in removal proceedings. This class-action lawsuit, *J.E.F.M. v. Holder*, No. 2:14-cv-01026-TSZ, 2015 WL 9839679 (W.D. Wash. Apr. 13, 2015), is pending as of January, 2016. The plaintiffs’ request for an injunction was not granted and the case is proceeding with discovery and other pretrial motions. The District Court has refused class certification and the federal government also filed an interlocutory appeal to the Ninth Circuit Court of Appeals challenging the court’s subject matter jurisdiction. In August of 2015, the District Court dismissed several of the plaintiffs from the suit because they had managed to secure some immigration relief or hired counsel. The District Court scheduled a hearing on the merits of the children’s constitutional claims to appointed counsel on May 2, 2016.

¹² U.S. DEP’T OF HEALTH AND HUMAN SERV., OFFICE OF REFUGEE RESETTLEMENT (ORR), LEGAL RESOURCE GUIDE—LEGAL SERVICE PROVIDER LIST FOR UAC, REV. (February 9, 2015) available at https://www.acf.hhs.gov/sites/default/files/orr/lrg_5_legal_service_provider_list_for_uac_in_orr_care_e02_09_15.pdf. The provision of legal counsel funded by ORR is discussed by David Rogers, *Under 16 and Ordered Deported- with No Lawyer*, POLITICO (Nov. 18, 2015), <http://www.politico.com/story/2015/11/under-16-and-ordered-deported-with-no-lawyer-215944#ixzz3yBkMrTOM>.

¹³ Barack Obama, President of the U.S., Remarks by the President on Border Security and Immigration Reform (June 30, 2014), available at <https://www.whitehouse.gov/the-press-office/2014/06/30/remarks-president-border-security-and-immigration-reform>.

¹⁴ Testimony given to House Subcommittee hearings in July 2014. See *Oversight of U.S. Citizenship and Immigration Services: Hearing Before H.R. Comm. on the Judiciary*, 113th Cong. 9-23 (2014) (statement of The Honorable Leon Rodriguez, Director, U.S. Citizenship and Immigration Services), available at http://judiciary.house.gov/_cache/files/e7d4d5f8-2139-4c56-8419-56962569569a/113-99-88919.pdf. Congressman Goodlatte sent a letter to President Obama demanding an explanation of why the administration said most of the children would be sent back and cited the authors’ letter to the *New York Times* that many of the children would in fact qualify for relief. Lenni B. Benson & Claire R. Thomas, *Lawyers for Immigrant Youths, To the Editor*, N.Y. TIMES, May 27, 2014, <http://www.nytimes.com/2014/05/28/opinion/lawyers-for-immigrant-youths.html?partner=rssnyt&emc=rss&r=0>. See also Letter from Bob Goodlatte, Virginia Congressman, Committee On The Judiciary Chair, to Barack Obama, President of the United States (June 24, 2014), available at http://judiciary.house.gov/_cache/files/c0ad486f-e935-4ba0-9dfc-f1d4acc781c0/062414bgualettertoobama.pdf.

authorization and children are not generally authorized to work in the United States until they are over the age of sixteen.¹⁵

The government also began a comprehensive public relations campaign in Central America to deter children from coming to the United States and in a very unusual move created an overseas refugee processing program called the Central American Minors (CAM) program.¹⁶ This limited program does allow minor children of parents living *with status* in the United States to file an application to be considered for refugee admissions or if the child (again acting alone and without representation) could not convince the interviewer that she or he had a bona fide refugee claim to be considered for permission to travel and enter the United States under humanitarian parole. The program was announced in 2014 and by the end of the fiscal year, no child had successfully completed the process. In the late fall of 2015, approximately 90 children were admitted to the United States.¹⁷ Further, the Administration coordinated actions with the government of Mexico to try to increase apprehensions of children in Mexico in order to reduce the migration of Central American children to the United States.¹⁸

At first these efforts appeared to reduce the number of children arriving at the southern border of the United States. Still in 2015, over 33,000 children arrived. In the last two months of 2015, the numbers of children arriving at the southern border of the United States increased to over 5,000 per month, the highest rate of apprehensions of unaccompanied children in the history of the record-keeping.¹⁹ Many are calling the people fleeing El Salvador, Honduras and Guatemala, “The Other Refugee Crisis” and comparing the flight of Central Americans with the unprecedented number of people fleeing Syria and Afghanistan.²⁰

The purpose of this essay is to demonstrate the need for adequate and free legal counsel for non-citizen children who are caught in this web of bureaucratic borders. Although immigration statutes guarantee the right to counsel, there is no counsel provided at government expense.²¹ Given children’s limited knowledge of the law and of potential avenues for immigration relief, inability to contract and hire legal counsel, and “greater potential for being victims of trafficking and other forms of abuse and neglect or abandonment,” children are in particular

¹⁵ In our experience reviewing notes and talking with volunteers who have interviewed over 1,000 young people at the New York Immigration Court, no child or adult has told us they expected a permit to stay and most express surprise when we explain the child may qualify for legal protection and status within the United States.

¹⁶ *In-Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (Central American Minors – CAM)*, U.S. CITIZENSHIP IMMIGR. SERV., <http://www.uscis.gov/CAM> (last viewed Feb. 21, 2016).

¹⁷ Michael D. Shear, *Red Tape Slows U.S. Help for Children Fleeing Central America*, N.Y. TIMES, Nov. 11, 2015, <http://www.nytimes.com/2015/11/06/us/politics/red-tape-slows-us-help-for-children-fleeing-central-america.html>.

¹⁸ Adam Isacson, Maureen Meyer & Gabriela Morales, *Mexico’s Other Border: Security, Migration, and the Humanitarian Crisis at the Line with Central America*, WOLA: ADVOC. OF HUM. RTS. IN THE AM. (June 17, 2014), http://www.wola.org/publications/mexicos_other_border#usaid.

¹⁹ *United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016*, U.S. CUSTOMS AND BORDER PROTECTION, <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016> (last viewed Mar. 18, 2016); see also Julia Preston, *U.S. to Open Shelters for New Surge of Youths Crossing the Southwest Border*, N.Y. TIMES, (Dec. 7, 2015), <http://www.nytimes.com/2015/12/08/us/us-to-open-shelters-for-new-surge-of-youths-crossing-southwest-border.html>.

²⁰ Clara Long, *The Other Refugee Crisis, from Central America to the U.S.*, THE PROGRESSIVE (Sept. 18, 2015), <http://www.progressive.org/news/2015/09/188320/other-refugee-crisis-central-america-us>; see also *The Brian Lehrer Show: The Other Refugee Crisis*, WNYC (Nov. 6, 2015) (with Lenni B. Benson), available at <http://www.wnyc.org/story/other-refugee-crisis/>.

²¹ 8 U.S.C. § 1362. See also 8 U.S.C. § 1229a(b)(4)(A).

need of appointed counsel in the immigration context.²² Creating a stable, funded, legal defense system will benefit the overall system not only for helping these desperate children but also for systemic efficiencies and reforms that are possible when the court system operates with effective and prepared counsel.²³

II. Miguel: Navigating Alone

Miguel is eight years old.²⁴ He is from El Salvador. His mother left him when he was a baby—he does not have a relationship with her. His father traveled to the United States a few years ago to work to support Miguel and his uncles. Miguel came to the United States on buses with a teenage cousin across Mexico after his uncles were killed by gang members who threatened to murder their entire family. U.S. Customs and Border Protection (CBP) apprehended Miguel at the southern border of the United States. He was taken to a juvenile detention center run by the federal Office of Refugee Resettlement (ORR) and a representative of the federal government interviewed him and learned that his father is living in New York City. They contacted Miguel's father. After several weeks, they released Miguel to his father, who was designated his "ORR Sponsor," and handed them a packet of papers explaining that Miguel is in removal proceedings and will receive a letter that tells him when he must appear at Immigration Court in Manhattan. These papers explain that if Miguel does not attend, the Department of Homeland Security can order him deported.

The day of Miguel's hearing arrives. He and his father traveled to downtown Manhattan at 8:30 a.m. Miguel is in the courtroom. He wears his best shirt and his jeans are clean and pressed. He tightly grips the arms of the courtroom chair. He is so small that his feet do not touch the floor. The Immigration Judge is speaking to him slowly and kindly but Miguel turns his small face up to look only at the court's Spanish-speaking interpreter. The judge is asking, "Are you here alone today?" Miguel responds, "No, I am here with my father." "Where is your father?" the Judge asks. Miguel pauses. He looks at the judge. He turns his head to the left and looks at the government prosecutor from Immigration and Customs Enforcement (ICE). He turns to the interpreter. Slowly he says, "I don't know. He is outside?" Miguel's father has no papers. He is undocumented and afraid, like so many immigrants, to come inside the courtroom.

This scene is repeated with small variations every day at the New York Immigration Court. The Immigration Judges see many unrepresented people in the courts and now, a growing percentage of people facing deportation alone are children.

²² Letter from Lenni B. Benson, Comm. on Immigration and Nationality Law Chair, to the Senate Judiciary Committee (Apr. 24, 2014) (regarding Position Paper on the "Right to Counsel"), *available at* <http://www2.nycbar.org/pdf/report/uploads/20072470-SupportofRighttoCounselbill.pdf>.

²³ See DR. JOHN D. MONTGOMERY, COST OF COUNSEL IN IMMIGRATION: ECONOMIC ANALYSIS OF PROPOSAL PROVIDING PUBLIC COUNSEL TO INDIGENT PERSONS SUBJECT TO IMMIGRATION REMOVAL PROCEEDINGS (2014) (commissioned by the New York City Bar Association), *available at* <http://bit.ly/1EUrONw>.

²⁴ Miguel's case is discussed in testimony Claire Thomas provided at a New York City Council hearing on February 25, 2014. Testimony of Claire R. Thomas Before New York City Council, Safe Passage Project (Feb. 25, 2014), *available at* <http://www.safeassageproject.org/claire-r-thomas-testifies-before-new-york-city-council/>.

III. Entering Immigration Court Alone

At Miguel's hearing, he will be asked if he would like to retain counsel. He will be given a list of organizations in New York that provide free services and will hopefully have the opportunity to meet with one of the non-profit organizations for a consultation.²⁵ Although he is likely to be granted a continuance to try to secure *pro bono* counsel or to allow his father to hire an immigration attorney, at the second or possibly third appearance before the immigration judge he will have to plead to the allegations that the CBP wrote in the charging document that initially placed him into removal proceedings. CBP likely charged Miguel with being an arriving alien who lacked documentation to enter the United States and who seeks to immigrate. When a person is charged as an "arriving alien," the burden is on that person, referred to as the "respondent," to prove his ability to enter the United States.²⁶ In the vast majority of immigration cases the respondent, especially a child, admits the allegations and the immigration judge finds that he is removable. The case then progresses to determining whether the respondent can qualify for any relief from removal.

IV. Possible Forms of Relief from Removal for Immigrant Youth

A. Asylum and/or Withholding of Removal

In Miguel's case, he may have at least two avenues of relief from removal, the first of which is asylum and/or withholding of removal based on the persecution and trauma he suffered in El Salvador and/or fears of suffering should he be forced to return. Because Miguel was apprehended by CBP without a parent or guardian and before he turned eighteen, he is classified as an Unaccompanied Alien Child (UAC).²⁷ He is therefore entitled to file his application for asylum with the Asylum Office of the U.S. Citizenship and Immigration Services (USCIS), as opposed to having his asylum case heard in the first instance by an immigration judge. Nevertheless, whether an asylum claim is made by a child or an adult, the applicant must show that: 1) he meets the statutory definition of a "refugee;"²⁸ 2) he is not subject to any statutory bars from asylum; and 3) he merits a grant of asylum in the adjudicator's discretion. A child meeting these three criteria may be granted asylum under Section 208 of the Immigration and Nationality Act.

B. Special Immigration Juvenile Status: Bifurcated State and Federal Protection

In the alternative, as a second avenue of immigration relief, Miguel may also be eligible for Special Immigrant Juvenile Status (SIJS).²⁹ This is an unusual immigration protection that does not originate out of international treaties. Congress created the SIJS category to help homeless

²⁵ The list of free providers is available on the EOIR website. Many of the listed organizations will not accept cases of people in detention and are oversubscribed so that it is very possible that none of the organizations will accept representation of a child who called. Please visit <http://www.justice.gov/eoir/new-york-city-immigration-court> for a list of providers and more information.

²⁶ 8 U.S.C.A. § 1229b; 8 C.F.R. § 1001.1 (current through May 21, 2015); 8 C.F.R. § 1.2 (current through May 21, 2015). 8 C.F.R. § 1.2 defines "arriving alien" as a non-citizen who has not yet been inspected and admitted at a port of entry.

²⁷ See Memorandum from Ted Kim, Acting Chief of Asylum Division, to All Asylum Office Staff, on Updated Procedures For Determination Of Initial Jurisdiction Over Asylum Applications Filed By Unaccompanied Alien Children to All Asylum Office Staff (May 28, 2013), available at <https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Minor%20Children%20Applying%20for%20Asylum%20By%20Themselves/determ-juris-asylum-app-file-unaccompanied-alien-children.pdf>.

²⁸ See 8 U.S.C. § 1101(a)(42)(A).

²⁹ 8 U.S.C. § 1101(a)(27)(J). A person who qualifies for special immigrant juvenile is granted lawful permanent resident status.

non-citizen youth in state foster care programs. State social work agencies testified in Congress about the problem with children who, due to a lack of immigration status, found themselves unemployable, exploited, and possibly homeless when they “aged-out” of state foster care upon their eighteenth birthdays. In 2008, Congress revised the SIJS statute to expand the qualifying criteria to allow children who are not in foster care to be eligible for SIJS.³⁰ This status, which leads to lawful permanent residence and potentially to citizenship, is available to immigrant youth who can demonstrate that they meet the following criteria:

1. The child is under 21;
2. The child is unmarried;
3. The child is “dependent” on a juvenile or family court within the United States, or a court “has legally committed to, or placed [the child] under the custody of, an agency or department of a State or an individual or entity appointed by a State or juvenile court located in the United States”;³¹
4. A state juvenile court has made a finding that the reunification with one or both of the child’s parents “is not viable due to abuse, neglect, abandonment, or a similar basis found under State Law”;³² and
5. In judicial or administrative proceedings “it has been determined...that it would not be in the [child’s] best interest to be returned to the alien’s or parent’s previous country of nationality or country of last habitual residence”[.]³³

If Miguel could find a way to access the state court responsible for matters concerning juveniles, such as the Family Court, he could seek these “special findings” and then file a petition with the USCIS qualifying him for a visa in this SIJS category. But how will he do this?

Unlike the immigration proceeding, where the young person was placed into the administrative court proceeding, the child has no direct way to access the family court. As we explained above, if the family court has jurisdiction over a child to make custody, guardianship, or other placement decisions such as foster care or juvenile delinquency, the child could seek the special immigrant juvenile findings that would later enable the child to seek permanent residence and a termination of the removal proceedings initiated by DHS. But how does the child access the family court? In most states, an adult or a state or local agency must initiate a proceeding and the child is the “subject” of the proceeding. For example, a parent might bring an action to gain custody over a child and would name the child’s other parent as a respondent. Custody proceedings meet the immigration law requirement that the child is “dependent on the family court.”³⁴

³⁰ 8 U.S.C. §§ 1101(a)(27)(j), 1232; see William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. Law 110-457, 122 Stat. 5044 (2009).

³¹ 8 U.S.C. § 1101(a)(27)(i).

³² *Id.* Unfortunately the current agency regulations do not reflect the statutory changes and must be used with care. See 8 C.F.R. § 204.11. For example, this regulation refers to a requirement of foster care or abandonment by both parents; that requirement has been superseded. As of this writing in December 2015, the new agency regulations have not been issued although they have been drafted. Notes based on public presentation by USCIS to New York County Bar Association (Nov. 18, 2013) (notes on file with authors).

³³ 8 U.S.C. § 1101(a)(27)(J)(ii). This best interest finding is usually made in the state family court as part of the special immigrant juvenile status findings. See, e.g., New York Family Court General Form 42 (GF-42) (sample court order with all of the reference elements for the special immigrant juvenile findings), available at *Family Court Forms*, NYCOURTS.GOV, <https://www.nycourts.gov/forms/familycourt/general.shtml>.

³⁴ SAFE PASSAGE PROJECT, SPECIAL IMMIGRANT JUVENILE STATUS: A STEP-BY-STEP GUIDE FOR SAFE PASSAGE PROJECT VOLUNTEER ATTORNEYS 19-21, available at <http://www.safepassageproject.org/wp-content/uploads/2013/02/SIJS-Manual-11.24.2014-CT-FINAL-AMENDED.pdf>.

V. Further Appearances in Immigration Court

In a few months, Miguel will have another hearing at the New York Immigration Court (EOIR). If Miguel has not secured *pro bono* assistance or private counsel, he will again have to appear *pro se* before an immigration judge. Miguel and his father might be unaware that there is immigration relief available to Miguel and even if they are aware, they may not know how to initiate either form of relief: asylum or special immigrant juvenile status. The immigration judge may be able to give some generalized directions about applying for asylum, but he or she is not qualified to explain the procedures for initiating a petition in a state family court. EOIR personnel are aware of these problems and in some cities, the immigration court has created special juvenile dockets and invited non-profits to participate as “Friends of the Court.” In this capacity, non-profit organizations attempt to screen the children arriving for their removal hearings and to quickly advise them about how and where they might pursue immigration remedies. The attorneys acting as “Friend of the Court” are not making formal appearances as attorneys in these children’s cases and as such, their role is limited to assisting the child to seek a continuance.³⁵

The availability of such special juvenile dockets is not guaranteed. In New York, there are currently five special dockets and those were not adequate to handle the increasing workload of juvenile cases. In the summer of 2014, the EOIR created special priority dockets for recently arriving children.³⁶ Until the creation of the new priority dockets for juveniles who arrived after May 1, 2014, children were sometimes scheduled on any immigration judge’s docket and sometimes children arrived at the immigration court when no special volunteers or advocates are present. Further, the non-profit organizations covering the juvenile dockets are not able to directly represent all of the children in removal. A typical master calendar hearing day will have sixty to seventy cases before a single immigration judge. While many of the non-profits work valiantly to try to either directly represent or find *pro bono* counsel for all of the children, the need far exceeds existing resources.³⁷

After the creation of the priority dockets for recent arrivals of adults with children and unaccompanied children in the summer of 2014, many nonprofit organizations scrambled to

³⁵ Normally an attorney cannot speak on behalf of a person unless he or she has filed a Notice of Appearance (Form EOIR – 28) and is registered with the Immigration Court. 8 C.F.R. § 1292.1. The Friend of the Court is an informal process currently conducted under local *ad hoc* rules but it may expand to a more formal process as the EOIR anticipates receiving an ever-growing number of children on its dockets. Friends of the Court can assist the child to seek a change of venue if he or she is going to reside in another district. Counsel for ICE usually cooperates with the Friend of the Court process in the interest of streamlining the court procedure. See 42 C.F.R. § 430.76(c); Memorandum from Brian M. O’Leary, Chief Immigration Judge of the U.S. Dep’t of Justice, to All Immigration Judges, on Friend of the Court Guidance (Sept. 10, 2014), available at <http://www.americanbar.org/content/dam/aba/administrative/immigration/UACFriendCtOct2014.authcheckdam.pdf>.

³⁶ *Department of Justice Announces New Priorities to Address Surge of Migrants Crossing into the U.S.*, U.S. DEP’T OF JUST. (July 9, 2014), <http://www.justice.gov/opa/pr/departments-justice-announces-new-priorities-address-surge-migrants-crossing-us>. This program also created priority dockets for Adults with Children who were admitted into the United States. The vast majority of women with very young children were detained or released with ankle monitors to ensure they returned to Immigration Court. Because the children are traveling with a parent or legal guardian, their cases are consolidated with the adult. Many of these people are also unrepresented.

³⁷ In New York, the following non-profit organizations provide some coverage of the juvenile dockets: The Door, The Legal Aid Society, the New York Chapter of the American Immigration Lawyers Association, Catholic Charities, Make The Road New York and Human Rights First, and Kids in Need of Defense (KIND). The Safe Passage Project at New York Law School was responsible for one docket a month and brings volunteer attorneys, law students and volunteer interpreters to the Immigration Court. In August of 2014 Safe Passage Project expanded to begin covering the docket once a week and currently covers three Fridays a month. The authors are both engaged in the work of Safe Passage Project. For more information, please see the Safe Passage Project website at www.safepassageproject.org.

try to expand the resources at the court.³⁸ In some cities, law school clinics mobilized to provide information tables. In California, the state legislature responded with unprecedented funds to support counsel for unrepresented children.³⁹ The City Councils of both San Francisco and New York City gave new funding to groups trying to meet the need. Private foundations also stepped forward in partnership with public funds to try to help the immigrant youth facing removal.⁴⁰

The immigration judges request that the ORR sponsor⁴¹ or a parent is present with the child at the hearing. The median age of the children in Immigration Court is approximately fourteen years old, but even infants have been placed in removal hearings. The immigration judges usually make an inquiry about where the child is living and whether he is attending school.⁴² If the young person is working and not attending school, the judges usually encourage the child to find a general educational development (GED) or other educational program, including English as a second language (ESL) programs.⁴³ At times, children explain to the immigration judge that they have had difficulty enrolling in the public schools for a variety of reasons, including not having a legal guardian residing in the school district; the school district is asking for records from abroad; or the child and his or her sponsor are unable to overcome the bureaucratic barriers some school districts raise.

If the child is represented, the attorney can often help the child find a school and will help the child document school attendance. Further, the child's attorney may be able to guide the child to plead to the allegations in the Notice to Appear, the charging document in immigration court, and to identify the forms of relief the child will be seeking. In those cases, if the child is in school, the immigration judge is usually willing to waive the appearance of the child at further immigration hearings as long as counsel attends in order to avoid further school absences and stress for the

³⁸ Kirk Semple, *Advocates Scramble As New York Accelerates Child Deportation Cases*, N.Y. TIMES, June 5, 2014, <http://www.nytimes.com/2014/08/05/nyregion/advocates-scramble-as-new-york-accelerates-child-deportation-cases.html>.

³⁹ 2014 Cal. Legis. Serv. Ch. 685 (S.B. 873), available at http://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB873. See Patrick McGreevy & Phil Willon, *Gov. Brown Signs Bills Aiding Immigrant Children, Troubled Students*, L.A. TIMES, Sept. 27, 2014, <http://www.latimes.com/local/politics/la-me-pol-brown-bills-20140928-story.html#page=1>.

⁴⁰ For more information, see <https://www.robinhood.org/news/nyc-council-speaker-melissa-mark-viverito-robin-hood-foundation-and-new-york-community-trust>. The New York City funding provides support for approximately 880 children who are residents of the City and covers the costs of screening for the other children who reside in other parts of New York. Approximately fifty percent of the children reside in Long Island. The Long Island Health and Welfare Council and the New York Secretary of State's Office for New Americans provided some limited funding to help support access to counsel for Long Island children. The need outstrips the resources of these grants. Safe Passage Project receives calls weekly from youth who have been unable to afford private counsel and have been turned away from other nonprofits due to lack of capacity.

⁴¹ The "ORR Sponsor" is the adult to whom the child is released from federal custody.

⁴² In 1982 the Supreme Court ruled in *Plyler v. Doe* that children have the right to attend public school regardless of their immigration status. *Plyler v. Doe*, 457 U.S. 202, 230 (1982). Nevertheless, many local school districts are neither prepared nor welcoming of recent immigrant children. *NYCLU Survey: NY School Districts Illegally Denying Education to Immigrant Children*, N.Y. CIV. LIBERTIES UNION (Oct. 30, 2014), <http://www.nyclu.org/news/nyclu-survey-ny-school-districts-illegally-denying-education-immigrant-children>.

⁴³ Children in removal proceedings do not automatically receive work authorization so any work may be in violation of both federal immigration laws and state labor laws that protect children depending on the nature and duration of the work. We have many times heard the children explain to the court that they have to work to support themselves and to "pay rent." Interview notes on file with authors. For children who later qualify for asylum or SIJS, the unauthorized work is not a barrier to their eligibility for adjustment of status. 8 U.S.C. § 1255(c)(2). Children who file for asylum and are over the age of eighteen may seek a work authorization document once the child's application has been pending more than 180 days at the Asylum Office or EOIR. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, THE 180-DAY ASYLUM EAD CLOCK NOTICE, available at https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Asylum_Clock_Joint_Notice.pdf.

child.⁴⁴ The child's attorney usually knows to request either a long continuance or an adjournment as the other applications for relief move forward. And in many cases, if the child is successful at the Asylum Office or in securing the family court Special Findings Order necessary to seek Special Immigrant Juvenile Status, the attorney may be able to terminate removal proceedings in immigration court. Further adjudications for the child's lawful permanent residence status, which are interview-based and non-adversarial by design, would then take place before the benefits agency of DHS, the U.S. Citizenship and Immigration Services (USCIS).⁴⁵ But what if the child is *pro se*?

VI. The Difference Representation Makes

To put it simply, if a child is detained and unrepresented, or if a child is released but unrepresented, it is extremely unlikely that he will be able to successfully navigate the many agency and court jurisdictions. One study of case outcomes posited that when a child is represented he has more than an 80% chance of successfully ending the removal hearing and obtaining some form of status. On the contrary, an unrepresented child is ordered removed (deported) 90% of the time.⁴⁶ In November of 2015, the web magazine *Politico* published an analysis of the cases involving juveniles and found that out of the sample of 7,600 cases reviewed, 2,800 children were ordered removed after a single hearing when they were not represented by counsel.⁴⁷ If these children had access to counsel it is very likely that they would have taken the steps necessary to pursue available legal remedies. But almost all of these remedies are found in adjudicatory bodies *outside* of the EOIR. In other words, just going to Immigration Court with or without counsel doesn't help the child. If the child is going to obtain asylum or other relief, he or she must navigate the complex jurisdictional barriers and successfully complete adjudications in other tribunals.

Pause for a moment. Do you feel you understand the legal path a child like eight-year-old Miguel must take? The choices he must make? To obtain SIJS, Miguel's father must first initiate proceedings in state court, likely to obtain an order of custody or guardianship over Miguel.⁴⁸ Then, Miguel must make a motion for the state court judge to make certain "special findings" enabling him to petition USCIS for SIJS. At the same time, Miguel would need to appear for his scheduled hearings in Immigration Court and could terminate his removal proceedings after USCIS has either accepted or approved his petition for SIJS. Finally, Miguel would file for adjustment of status before USCIS. Would you feel prepared and competent to prepare petitions, fee waiver requests and applications in so many different types of courts and agencies? Do you

⁴⁴ OFFICE OF THE CHIEF IMMIGRATION JUDGE, U.S. DEP'T OF JUSTICE EXEC. OFFICE OF IMMIGRATION REVIEW, IMMIGRATION OFFICE PRACTICE MANUAL (2009), available at http://www.justice.gov/eoir/pages/attachments/2015/02/02/practice_manual_review.pdf.

⁴⁵ In some regions of the country, advocates prefer to complete the SIJS case before the immigration judge, if possible, because of delays before USCIS. See KIDS IN NEED OF DEFENSE, MANUAL FOR PRO BONO ATTORNEYS, CH. 4, SPECIAL IMMIGRANT JUVENILE STATUS 22, available at <https://supportkind.org/wp-content/uploads/2015/04/Chapter-4-Special-Immigrant-Juvenile-Status-SIJS.pdf>.

⁴⁶ *Representation for Unaccompanied Children in Immigration Court*, TRAC IMMIGRATION, <http://trac.syr.edu/immigration/reports/371/> (last visited Feb. 21, 2016). Safe Passage Project has found that very few children are ultimately unsuccessful if they have counsel. We have found that the majority of children who have been ordered removed are those children who lose contact with counsel or cases in which the child never appeared in the Immigration Court and the child may have had no opportunity to be informed about his or her eligibility for relief.

⁴⁷ See Rogers, *supra* note 12. The article explains that the journalist received a 175-page Excel spreadsheet with children's ages and outcomes in the cases. *Id.* The cases were filed between mid-July 2014 and August 31, 2015. *Id.*

⁴⁸ In New York a child cannot initiate a proceeding in family court until he or she is fourteen. N.Y. SURR. CT. PROC. ACT § 1703. State law varies and that adds to the confusion and complexity.

understand that this one application involves two different court systems and the participation of two different branches of the Department of Homeland Security?

For children who have been persecuted or who have a well-founded fear of persecution on account of one of the protected grounds,⁴⁹ asylum law offers the possibility of immediate protection from removal from the United States and creates basic eligibility for many social welfare benefits. For non-citizen children who are accompanied in the United States by a parent who is seeking asylum, the children will usually appear as derivative beneficiaries on their parent's asylum application. In the alternative, non-citizen children are able to apply for asylum individually, whether they are unaccompanied or accompanied by a parent or guardian in the United States.

Immigration law does not provide free counsel for children, even children seeking asylum. Although Congress has taken steps to make the asylum process less adversarial for unaccompanied minors under eighteen years of age, the complexities of the application process, the burden of document production, and the sophisticated legal advocacy needed to establish the *prima facie* case mean that asylum protection may be more of a dream than a reality for many children.

In order to prioritize the growing number of children's claims, the U.S. government announced that adult claims would be delayed while the claims of children and recently arriving adults with small children would be processed first. This policy of prioritized adjudication is openly designed in part to deter false or weak asylum claims and is also utilized in the hope that it will deter future entrants seeking asylum.⁵⁰ With this change in asylum priorities, coupled with the prioritization in the Immigration Courts, the adjudication of children's claims has truly become the tail that wagged the dog. Whether in immigration detention or operating outside of it, unaccompanied or with their parents or guardians, children cannot be expected to navigate the complex web of immigration law without competent legal counsel.

We are committed to helping children who are in removal proceedings. New York Law School houses our *pro bono* clinic called The Safe Passage Project. The authors teach a course that prepares law students to stand with children in the courtroom and to assist them in securing a continuance until they can find *pro bono* counsel. We then train and mentor the counsel. Our Project has grown rapidly from 50 cases in 2006 to over 550 in 2015. The need outstrips our ability to find *pro bono* counsel to fill the gap. If we are serious about our commitment to justice and our obligations under both child welfare and international refugee protection, our government must do more to ensure that every child is represented. We cannot stand by and leave them lost in the web and vulnerable to deportation. •

⁴⁹ To be eligible for asylum, a person must show that: (1) she meets the statutory definition of a "refugee," as found in 8 U.S.C. § 1101(a)(42)(A)(2); (2) she is not subject to any statutory bars from asylum as found in 8 U.S.C. § 1101(a)(42) (defining refugees to exclude "any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion"); and (3) she merits a grant of asylum in the adjudicator's discretion as found in 8 C.F.R. § 208.13(b)(1)(i). A person meeting these three criteria may be granted asylum under 8 U.S.C. § 1158.

⁵⁰ David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. Pa. L. Rev. 1247, 1290–91 (1990). Professor Martin helped design the current Asylum Adjudication System, and the value of efficient processing of cases to avoid people using the asylum system for delay or to obtain work authorization is articulated in this seminal article.