

Comment,
PROSECUTORIAL DISCRETION IN
IMMIGRATION CASES

I. Introduction

Every year, thousands of children from Mexico and Central America leave their homes and climb aboard freight cars on northbound trains. Their destination: the United States. Their destiny: a game of immigration roulette. The 2010 Academy Award Nominee documentary film *Which Way Home* follows Kevin, Fito, Yurico, Jairo, Juan Carlos, Olga, and Freddy as they play this game, travelling from southern Mexico to the U.S. border on top of a train.¹ Ages 9-17, they are just a few of the thousands of unaccompanied children that attempt the journey to “El Norte” each year.

Some, like Fito, are detained before reaching the U.S. border and, if from Central America, are sent back to their home country. Some, like Jairo and Yurico, give up on their attempts at a better life in the United States and resign themselves to a low-paying job or life on the streets. Some fall prey to human traffickers, smugglers, and criminals, and are never to be heard from again. The “lucky ones” make it to the U.S. border, only to be apprehended there. They are fortunate because once at the U.S. border, unaccompanied juveniles may be eligible for different forms of immigration relief. However, the odds still weigh heavily against them.

Part II of this paper explores the challenges that unaccompanied children face when apprehended by immigration authorities. Lack of representation by attorneys and lack of guardian ad litem appointments results in tens of thousands of children who are never explained their rights and who never get the opportunity to plead for relief.

Part III explores the challenges immigrants face when apprehended as adults. For adult detainees, the options are equally limited. Some relief options focus on the circumstances of the immigrant himself, while other options focus on the immigrant’s family. The relief options focusing on the immigrant’s back-

¹ WHICH WAY HOME (HBO Documentary Films 2009).

ground, such as asylum and trafficking/victim visas are hard to prove. Often an immigrant's best chance for relief is cancellation of removal, under which the immigrant must prove his removal will result in exceptional and extremely unusual hardship to a U.S. Citizen or Lawful Permanent Resident (USC/LPR) family member. When the family member is a child, the immigrant again faces lack of standards and an arbitrary determination of what is sufficient hardship. Although the focus of Cancellation of Removal is supposed to be on the USC/LPR relative, no guardian ad litem or representative is appointed on the relative's behalf. Instead, the immigrant and his attorney must fill in the system's gaps with a hodgepodge of statistics that serve as proxy for a "best interests" determination.

Finally, Part IV will focus on a revived tool in the practitioner's arsenal – prosecutorial discretion. Available to adults and juveniles, prosecutorial discretion may provide immigrants with a new option for respite. Under this new tool, prosecutors in the Office of Immigration and Customs Enforcement opt to suspend proceedings against an immigrant. While the option provides no pathway to legal residence, it gives the immigrant a continued chance at survival and betterment in the United States.

II. Apprehended Children

The Department of Homeland Security (DHS) reports nearly 102,000 juveniles were apprehended by Customs and Border Patrol in FY 2006. Unfortunately, DHS does include in its Yearbook of Immigration Statistics data on apprehended minors. There are no ready statistics of how many apprehended children were traveling with a relative or how many were traveling alone. There are no statistics of how many children were turned back at the border or how many received further processing through the immigration system. Most of the apprehensions are made by Customs and Border Patrol at the U.S.-Mexico border, while the rest are made by Immigration and Customs Enforcement in the U.S. interior.²

² See Chad C. Haddal, U.S. Cong. Research Serv., RL33896, Unaccompanied Alien Children: Policies and Issues (2008).

What is known is that once the children are apprehended by either the Custom Border Patrol (CBP) or Immigration and Customs Enforcement (ICE), many are detained in inadequate facilities and receive no access to counsel or other social services while their cases are processed. For immigrants apprehended near the U.S. border, the first point of detention is usually the nearest Border Patrol station.

Border Patrol stations are not intended to serve as detention centers, and have inadequate holding facilities. After what should be a brief stay at the Border Patrol station, immigrants may be transferred to detention facilities. As abysmal as Border Patrol Stations are, ICE detention centers are not much better. Prior to 2003, detained immigrant children were placed in the same facilities across the U.S. as adult immigrants. These detention facilities were contracted prisons. Small cells, bars, poor bedding, and high security fences with razor wire surrounded children in some cases as young as five months.³

Two class action suits have been key in improving conditions for detained minors. In 1996, the Immigration and Naturalization Service (the predecessor agency to Immigration and Customs Enforcement, Customs and Border Patrol, and U.S. Citizenship and Immigration Services⁴) reached a settlement setting standards for the care of juveniles in detention in *Flores v. Ashcroft* (hereinafter the “*Flores settlement*”).⁵ Under the terms of the *Flores* settlement, INS (now CBP and ICE) is required to provide minors with a safe and sanitary environment with access to toilets, sinks, temperature control, and ventilation.⁶ Immigration of-

³ See *Amnesty International Statement Ahead of World Refugee Day Rally at T. Don Hutto Detention Facility*, HOUSTON CHRON., (June 22, 2007), at <http://www.chron.com/news/article/PRN-Amnesty-International-Statement-Ahead-of-1811993.php>.

⁴ USCIS is the agency primarily responsible for grant of immigration benefits. It is not responsible for immigration enforcement and removal.

⁵ See Center for Human Rights, *Nationwide settlement regulating INS treatment of detained minors: Flores v. Ashcroft*, <http://centerforhumanrights.org/children/Document.2004-06-18.8124043749>.

⁶ See Women’s Refugee Commission, *Halfway Home: Unaccompanied Children in Immigration Custody* at 69 (Feb. 2009); see also *Flores Settlement*, *supra* note 5, at Exhibit 2, provision (c) processing.

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ficers must also provide drinking water, adequate food, medical care, and supervision.⁷

However, detention conditions have been slow to change. In 2007, the American Civil Liberties Union (ACLU) filed a class action lawsuit resulting in a landmark settlement to improve the T. Don Hutto detention center in Texas.⁸ Prior to the suit, children at Hutto were sometimes handcuffed, made to wear jumpsuits, and given only an hour of recreational time each day. Conditions were so deplorable that among the changes that ICE had to implement were to install privacy curtains around toilets, provide a full-time pediatrician, and supply toys and age-appropriate books.⁹ Although focused on conditions at Hutto, the suit brought to the attention of many human rights groups the saddening circumstances under which many immigrants are detained.

It is disturbing that violations continue after a history of lawsuits and settlements brought by civil and human rights organizations on behalf of immigrant detainees. In 2009, the Women's Refugee Commission visited Border Patrol detention stations, Immigration and Customs Enforcement contract detention centers, and facilities for Unaccompanied Alien Children and found that, unfortunately, current detention conditions for juveniles remain subpar. In its report *Halfway Home: Unaccompanied Children in Immigration Custody*, the Women's Refugee Commission found cases of girls being held in the same cells as adult males for several days.¹⁰ These conditions are in clear violation of the *Flores* settlement, which states that unaccompanied minors should be detained with unrelated adults for no more than 24 hours and should be transferred to the care of the Office of Refugee Resettlement within 72 hours of apprehension.¹¹

The report also uncovered terrible conditions in both Border Patrol stations and ICE detention centers. At the Border Patrol

⁷ *Id.*

⁸ American Civil Liberties Union, *Landmark Settlement Announced in Federal Lawsuit Challenging Conditions at Immigrant Detention Center in Texas* (Aug. 27, 2007), <http://www.aclu.org/immigrants-rights-prisoners-rights/landmark-settlement-announced-federal-lawsuit-challenging>.

⁹ *Id.*

¹⁰ See Women's Refugee Commission, *supra* note 6, at 9.

¹¹ *Id.* at 66; see also *Flores Settlement*, *supra* note 5, at Exhibit 2, provision (c) processing.

stations in El Paso and Ft. Brown (Brownsville) Texas, the Women's Refugee Commission found children slept on freezing floors and cement benches at worst and on plastic "boat beds" at best.¹² Where children were given blankets at all, the linens were ridden with bugs.¹³ There are not any shower facilities available, and the toilets in the detention cells were separated by a half-wall.¹⁴

There is not much to indicate that conditions will improve in detention, but there is a glimmer of hope for immigrant children who are successfully classified as Unaccompanied Alien Children (UAC). An "unaccompanied alien child" is a person under eighteen years of age who has no lawful legal status in the United States and for whom no parent or legal guardian is available to provide physical care and custody.¹⁵ While UAC is not an immigration status, classification as an unaccompanied alien child has its benefits.

First, children classified as UAC must be transferred to the care of the Office of Refugee Resettlement.¹⁶ As set forth in the Homeland Security Act of 2002, the Office of Refugee Resettlement (ORR) under the Department of Health and Human Services has responsibility for the care of unaccompanied children.¹⁷ ORR, which is also responsible for refugees, asylees, victims of human trafficking, victims of torture, and other such immigrants, created the Division of Children's Services/Unaccompanied Alien Children program in early 2003.¹⁸ Under the terms of the Act, unaccompanied alien children must be transferred to ORR facilities within 72 hours of apprehension.¹⁹

¹² See Women's Refugee Commission, *supra* note 6, at 10.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See 6 U.S.C. § 279(g) (2013) (Also known as the Homeland Security Act of 2002).

¹⁶ See *id.* § 279.

¹⁷ *Id.*

¹⁸ See U.S. Dept. of Health and Human Services, Office of Refugee Resettlement, *Unaccompanied Children's Services*, http://www.acf.hhs.gov/programs/orr/programs/unaccompanied_alien_children.htm (last visited May 29, 2012).

¹⁹ See Women's Refugee Commission, *supra* note 6, at 73; see also Flores Settlement, *supra* note 5, at Section X, provision 28A.

While this is still too long a period of time for immigration's most vulnerable victims, at least the Act provides for improved care. Many of the ORR centers are better suited for the care of immigrant minors. Décor is warm and welcoming, and the facilities offer educational programs and recreational spaces.²⁰ Several facilities provide medical care and mental health professionals. Because many of these children have suffered traumatic experiences as they traveled from their home countries to the United States, mental health services are in high demand.²¹

As the Women's Refugee Commission reports, ORR facilities still have a long way to go.²² But though not all ORR facilities have eliminated the prison-like feel, ORR is a significant step up from bug-ridden blankets and concrete floor beds. Unfortunately most children never even get the chance to obtain services as unaccompanied alien children; the detention facilities are as far as they get in the United States. Most children are removed back to their country of origin without much due process.

While in detention, the children lack access to any legal counsel or social services. For children held in detention centers, access to counsel is difficult because the detention facilities are often prisons and therefore are usually removed from populated areas.²³ For children in border patrol stations, representation is not even given as an option. Unaccompanied children, although more vulnerable than adult immigrants, have a right to counsel only if it is at no expense to the government.²⁴

Getting classified as an Unaccompanied Alien Minor is very difficult. Since children do not have representation, it is up to CBP and ICE officials determine whether the child is categorized as an Unaccompanied Alien Child. If ICE and CBP are solely responsible for classifying eligibility for relief, no one is advocating for the child. The result is that out of 102,000 children apprehended, only 7,000 are classified as unaccompanied alien children.

²⁰ *Id.* at 18.

²¹ *Id.* at 16.

²² See Women's Refugee Commission, *supra* note 6.

²³ See Detention Watch Network, Detention Map, <http://www.detentionwatchnetwork.org/dwnmap> (last visited May 29, 2012).

²⁴ See 6 U.S.C. § 279; Women's Refugee Commission, *supra* note 6, at 22.

Even for children classified as UAC, obtaining an advocate is unlikely. Although settlements like the one in *Flores* provide that detainees have access to legal orientation by immigrants' rights groups, no requirement exists that unaccompanied alien children have representation by counsel. Under the Homeland Security Act of 2002, which transferred custody of unaccompanied alien children to ORR, ORR is bound to develop a plan "to be submitted to Congress on how to ensure that qualified and independent legal counsel is timely appointed to represent the interests of each such child."²⁵ The statute does not specify a deadline for the plan to be submitted.²⁶

The only two attempts at setting guardian ad litem and counsel standards for unaccompanied alien children have died in Congress.²⁷ The Unaccompanied Alien Child Protection Act of 2005 and its 2007 reintroduction aspired that ORR should ensure that all unaccompanied alien children except those from Mexico have competent counsel to represent them in immigration proceedings or matters.²⁸ For children from Mexico, the Act still calls for a case-by-case determination that the unaccompanied child does not have a fear of persecution in his home country and that repatriation would not endanger the life and safety of the child.²⁹ The determination requires that the child is able to make an independent decision to withdraw his application for admission to the United States, but such a withdrawal can be made without anyone advocating on behalf of the child.

Unfortunately neither the 2005 nor the 2007 Unaccompanied Alien Child Protection Act made it out of committee. Of the dozen legislative attempts in the last five years to provide additional protection for unaccompanied immigrant children, most of the bills have died after introduction or in committee.³⁰ Three bills remain in Congress but in legislative limbo. The Refu-

²⁵ See 6 U.S.C. § 279(b)(1)(A) (2013).

²⁶ See *id.*

²⁷ See H.R. 1172, 109th Cong. 2005; S. 844; 110th Cong. 2007.

²⁸ See H.R. 1172, 109th Cong. 2005 at § 202(a)(1).

²⁹ See H.R. 1172, 109th Cong. 2005 at § 101(a)(2)(A).

³⁰ Unaccompanied Alien Children Protection Act of 2007, S. 844, 110th Cong. (2007); AgJOBS Act of 2007, S. 1639, 110th Cong. (2007); Place to Call Home Act, H.R. 3409, 110th Cong. (1st Sess. 2007); Trafficking Victims Protection Reauthorization Act of 2007, H.R. 3887, 110th Cong. (1st Sess. 2007); Trafficking Victims Protection Reauthorization Act of 2008, S. 3061, 110th Cong.

gee Protection Act has been reintroduced from its initial attempt in 2010 but has not yet been referred to committee.³¹ The Immigration Oversight and Fairness Act has been reintroduced twice, and was just recently referred to committee.³² The Child Trafficking Victims Protection Act is currently in committee.³³ Only one bill, the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), has been signed into law.

The TVPRA, which retained the established definition of an unaccompanied alien child, provides important protections for the children who manage to meet the classification. The Act provides that unaccompanied alien children are exempt from the one-year statutory deadline for filing an application for asylum.³⁴ Moreover, the Act provides that the U.S. Citizenship and Immigration Services Asylum Office has initial jurisdiction of the UAC's asylum claim.³⁵ This protection is important because USCIS is more apt to grant asylum than Immigration Court.

The Act also provides that petitions for Special Immigrant Juvenile Status should be adjudicated no later than 180 days after filing of the application.³⁶ Special Immigrant Juvenile Status (SIJS) is a humanitarian-based form of relief.³⁷ This special status was created by the Immigration Act of 1990 to protect out-of-status minors who are abused, abandoned, or neglected.³⁸ To obtain SIJS, an immigrant minor must be "declared dependent on a juvenile court located in the United States."³⁹ The proceedings begin with a proposed legal guardian or state agency filing a peti-

(2008); CIR ASAP Act of 2009, H.R. 4321, 111th Cong. (1st Sess. 2009); CIR Act of 2010, S. 3932, 111th Cong. (2009).

³¹ Introduced as S. 3113, 111th Cong. (2010), reintroduced as S. 1202, 112th Cong. (2011).

³² Introduced as H.R. 7255, 110th Cong. (2nd Sess. 2008), reintroduced as H.R. 1215, 111th Cong., (2009), reintroduced as H.R. 933, 112th Cong. (2011).

³³ H.R. 2235, 112th Cong. (1st Sess. 2011).

³⁴ William Wilberforce Trafficking Victims Protection Reauthorization Act, H.R. 7311, § 235(d)(7)(A) (110th Cong. 2008).

³⁵ *Id.* § 235(d)(7)(B).

³⁶ *Id.* § 235(d)(2).

³⁷ A. Michelle Abarca, Deborah Lee, Kathleen Moccio, & Kristin Petri, *The ABCs of Representing Unaccompanied Children*, in IMMIGRATION PRACTICE POINTERS 590 (AILA ed., 2011-2012).

³⁸ Julie Rahbany, *Special Immigrant Juvenile Status*, in THE WAIVERS BOOK 305 (AILA, ed., 2011).

³⁹ 8 U.S.C. § 1101(a)(27)(J)(i) (2013).

tion on the child's behalf in state or juvenile court. The state/juvenile court must determine that "reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law," and that "it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence."⁴⁰ If granted SIJS, a child is eligible to obtain U.S. citizenship in five years.⁴¹

Regrettably, unaccompanied children still face an uphill battle. Poor treatment and lack of advocacy at every step of the way keep the children in the shadows and only leave them as more prominent prey for criminals. Regardless of what the winds of immigration reform bring, legislators should work expeditiously to protect the child victims of the system. ORR should be responsible for the care of all children apprehended, not just those identified as UAC. There should also be mandatory representation for any minor detained, and any determination regarding the child's status should be made with due process, not left up to CBP and ICE officials.

III. Apprehended Adults

The options change drastically when an immigrant who entered as a minor lives for years undetected in the United States and is placed in removal (deportation) proceedings as an adult. In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act set a uniform procedure for removing immigrants.⁴² The new removal procedures distinguish eligibility for relief, applicable burdens of proof, and other factors on whether the immigrant was admitted to the United States,⁴³ i.e., whether the immigrant lawfully entered the United States after inspection and authorization by an immigration officer.⁴⁴

⁴⁰ *Id.* § 1101(a)(27)(J)(i-ii) (2013).

⁴¹ Julie Rahbany, *Special Immigrant Juvenile Status*, in *THE WAIVERS BOOK* 306 (AILA, ed., 2011).

⁴² DANIEL M. KOWALSKI, *IMMIGRATION LAW AND PROCEDURE: DESK EDITION* § 16A.01[2] (2012).

⁴³ *Id.* at §16A.01[2].

⁴⁴ Immigration and Nationality Act (INA) § 101(a)(13).

Immigrants in removal proceedings may be eligible for several different forms of relief,⁴⁵ including but not limited to adjustment of status, voluntary departure, cancellation of removal, asylum, withholding of removal, and protection under the Convention Against Torture. If an immigrant requests one of these forms of relief and does not receive a favorable exercise of discretion, the result is an order of removal (deportation) and a bar to re-entry. Unfortunately, most options for relief from removal are very difficult to obtain and often simply unavailable to the immigrant.

Asylum, withholding of removal, and relief under the Convention Against Torture all depend on the circumstances of the immigrant. To qualify for asylum, an immigrant must establish a well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group.⁴⁶ The fear of persecution must be both subjective and objective.⁴⁷ The immigrant must genuinely fear persecution, and there must be an objective basis for the fear, such that a reasonable person would fear persecution.⁴⁸ A petition for asylum must be made within one year of the immigrant's entry to the United States, unless the immigrant can establish a justification for non-compliance.⁴⁹ The justification must be based in changed circumstances materially affecting the immigrant's eligibility for this category of relief, or extraordinary circumstances justifying the delay in filing the application.⁵⁰ In FY 2010, 2,771 immigrants in removal proceedings were granted asylum, for a grant rate of 35%.⁵¹

Withholding of removal carries a higher standard of proof than asylum. Here, the immigrant must show a clear probability of persecution rather than a just a well-founded fear.⁵² Moreo-

⁴⁵ IRA J. KURZBAN, *IMMIGRATION LAW SOURCEBOOK* 957 (11th ed. 2008).

⁴⁶ INA § 208.

⁴⁷ KOWALSKI, *supra* note 42, § 19.02.

⁴⁸ *Id.*; KURZBAN, *supra* note 45, at 466.

⁴⁹ KURZBAN, *supra* note 45, at 474.

⁵⁰ INA § 208(a)(2)(B).

⁵¹ Executive Office for Immigration Review, U.S. Department of Justice, FY 2010 Statistical Yearbook Figure 18, p. K2, available at <http://www.justice.gov/eoir/statspub/fy10syb.pdf>.

⁵² INA § 241(b)(3).

ver, a grant of withholding of removal does not entitle the immigrant to petition for his family, and does not automatically lead to permanent resident status.⁵³ Finally, the immigrant can still be removed to a country other than the one where the immigrant would be persecuted.⁵⁴ In FY 2010, only 16% of withholding of removal applicants – 1,874 immigrants – were granted relief.⁵⁵ Under the Convention Against Torture, which provides that an immigrant may not be removed to a country “where there are substantial grounds for believing that he would be in danger or being subjected to torture,”⁵⁶ less than 400 people were granted relief in FY 2010.⁵⁷

Voluntary departure is a form of relief under which the immigrant is not allowed to stay in the United States. It may be the best and only option for the immigrant who has a pending visa application or may become an eligible immigrant in the future, but who currently is ineligible for another form of relief.⁵⁸ Under voluntary departure, an immigrant must leave the United States within the time specified by the immigration court – 120 days if the request is made prior to the conclusion of removal proceedings⁵⁹ or 60 days if the request is made at the conclusion of removal proceedings.⁶⁰ To be eligible for voluntary departure at the conclusion of removal proceedings, the immigrant must have been present in the United States for at least one year prior to service of notice to appear before the immigration court, must prove good moral character for the previous five years, and must demonstrate by clear and convincing evidence the financial resources to leave the United States within the specified time.⁶¹

⁵³ KOWALSKI, *supra* note 42, § 19.06.

⁵⁴ *Id.*

⁵⁵ Executive Office for Immigration Review, *supra* note 51, at Figure 19-A, p. K4.

⁵⁶ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Jun. 26, 1987, 1465 U.N.T.S. 85, *available at* <http://www2.ohchr.org/english/law/cat.htm>.

⁵⁷ Executive Office for Immigration Review, *supra* note 51, Table 9, p. M1.

⁵⁸ KOWALSKI, *supra* note 42, §17.04.

⁵⁹ INA § 240B(a)(2)(A).

⁶⁰ INA § 240B(b)(2).

⁶¹ KURZBAN, *supra* note 45, at 966.

Two additional forms of removal relief are distinguishable in that the immigrant obtains relief based on a determination of the circumstances of his immediate family. These two options are cancellation of removal and adjustment of status.

Adjustment of status is an administrative remedy by which an eligible immigrant can become a permanent resident. In removal proceedings, a detainee can request adjustment of status if he is the beneficiary of an approved petition for alien relative.⁶² To adjust status, an immigrant must have been “admitted” to the United States, must be admissible for permanent residence, and a visa number must be immediately available.

For persons in removal proceedings, this means that the immigrant is only eligible for this relief if his family member had the foresight and ability to file a relative petition on the immigrant’s behalf. However, not all relatives can file petitions. Regrettably, the family-based immigration system established half a century ago and still used today is wholly ineffective for non-nuclear families. Under INA, a U.S. citizen (USC) or Lawful Permanent Resident (LPR) can file a petition for only the most immediate family members. Citizens can file petitions on behalf of a spouse, fiancé, parent, sibling, or child.⁶³ Permanent Residents can only file petitions on behalf of a spouse, parent, or *unmarried* child.⁶⁴ In FY 2010, immigration courts granted less than 8,500 adjustment of status petitions, out of over 287,000 proceedings completed.⁶⁵

The most commonly requested relief is cancellation of removal. An out-of-status immigrant who has been in the United States for more than ten years and can prove good moral character may be eligible for cancellation of removal. To obtain cancellation of removal, the immigrant must also have a USC or LPR immediate relative. An immediate relative for purposes of cancellation of removal is a parent, spouse, or child. Siblings are not included in this standard. Again, immigration law fails to recog-

⁶² INA § 245, 8 U.S.C. § 1255 (2012); REPRESENTING CLIENTS IN IMMIGRATION COURT 131 (AILA, 2nd ed. 2010).

⁶³ INA § 203(a).

⁶⁴ *Id.*

⁶⁵ Executive Office for Immigration Review, *FY 2010 Statistical Year Book*, STATISTICAL YEAR BOOK, JAN. 2011, at M1, Table 9, <http://www.justice.gov/eoir/statspub/fy10syb.pdf>.

nize non-traditional family circumstances, such as an immigrant who is the primary caretaker for sibling(s).

Meeting the residency and good moral character requirements are easy tasks. The challenge is that the immigrant must show that the immediate relative would suffer “exceptional and extremely unusual hardship” should the former be removed. “Exceptional and extremely unusual hardship” is a tenuous standard to meet. The concept was introduced in 1940 in the Alien Registration Act.⁶⁶ That Act allowed an immigrant in deportation proceedings to suspend his deportation upon proof that removal would result in “serious economic detriment” to the immigrant’s USC/LPR spouse, parent, or child.⁶⁷ In 1952, the burden was raised to prove “exceptional and extremely unusual hardship,” which is defined as that which is “substantially beyond that which ordinarily would be expected to result from the alien’s deportation.”⁶⁸ Unfortunately, that is as much of a bright-line rule as the courts have established.

A determination of “exceptional and extremely unusual” hardship is heavily fact-specific.⁶⁹ Factors are considered in the aggregate, and usually no one factor is sufficient to sway the court. For immigration practitioners, the most practical advice is to carefully document any information that may demonstrate exceptional and extremely unusual hardship. Hardship proof generally falls into one of two categories: first, external information about the environment to which the immigrant and USC/LPR relative would be deported, and second, internal information about conditions specific to the USC/LPR relative.

The best hardship proof is that which is specific to the USC/LPR relative.

When the relative in question is a minor, important hardship factors include: the age of the USC/LPR relative, how long the USC/LPR relative has been present in the United States, whether the USC/LPR relative has any ties to the removal country, and whether the USC/LPR relative speaks the language of

⁶⁶ 8 U.S.C. §§ 451-460 (1940).

⁶⁷ Alien Registration Act of 1940, Pub. L. No. 76-670, 54 Stat. 672.

⁶⁸ *Ramirez-Perez v. Ashcroft*, 336 F.3d 1001, 1006 (9th Cir. 2003).

⁶⁹ Curtis Pierce, *The Benefits of “Hardship”: Historical Analysis and Current Standards for Avoiding Removal*, in AILA HANDBOOK ON WAIVERS AND RELIEF FROM REMOVAL 19 (AILA ed., 1999).

the removal country.⁷⁰ One very influential factor in a hardship determination is the health of the USC/LPR relative. As immigration practitioners say tongue-in-cheek, “the worse the health of the USC/LPR relative, the better the possibility of cancellation of removal.”

Proof of exceptional and extremely unusual hardship comes from health or development problems afflicting the USC/LPR relative. To obtain a favorable exercise of discretion, the health/development problems must be proven and documented. Practitioners are wise to obtain physician’s reports and other documentation substantiating any physical/mental health treatments a USC/LPR is receiving in the United States and would be unable to receive in the removal country.

If there is insufficient specific hardship proof, practitioners can look to external information such as data regarding conditions of crime, unemployment, poverty, and other factors in the removal country. While courts have consistently held that factors such as a lower standard of living or high crime rates in the removal country are insufficient to meet the hardship standard, information particularized to the immigrant’s home city and state may be especially helpful, although not determinative.⁷¹

In making best interest of the child determinations, family courts look to factors of the environment in which the child will be living pursuant to the court’s decision.⁷² Immigration practitioners, then, are urged to do the same. Data regarding nutrition, education, healthcare, sanitation, and other social factors can sufficiently sway a court into a favorable outcome.

Many detainees falsely believe that considerations regarding their infant children are irrelevant in a determination of exceptional and extremely unusual hardship. However, a child’s young age can itself be a factor favoring cancellation of removal. For example, if the USC/LPR child will be removed to a country with a high incidence of malnutrition, it may be in the child’s best interest to remain in the United States (with the immigrant parent). According to reports by UNICEF, only 3% of U.S. children

⁷⁰ Ramirez-Perez, 336 F.3d at 1006.

⁷¹ *Id.*

⁷² See 750 ILL. COMP. STAT. 5/602 (2012); MICH. COMP. LAWS § 722.23 (2013).

under age five suffer chronic malnutrition (stunting).⁷³ In contrast, stunting affects an alarming 54% of children in Guatemala, 29% of children in Honduras, 19% of children in El Salvador, and 16% of children in Mexico.⁷⁴ Thus, a child removed to Guatemala is 39 times more likely to suffer chronic malnutrition. In 2010, 2,292 persons were removed (deported) to Guatemala, and the Department of Homeland Security estimates that there are 23,068 persons in the U.S. that are removable to that country.⁷⁵ A child removed to Mexico is six times more likely to suffer chronic malnutrition.

Another possible metric to demonstrate hardship to an LPR or USC child is lack of access to sanitation and clean water sources in the country to which the immigrant (and the child) would be removed. The World Health Organization (WHO) reports that while more than 2 billion people have gained access to drinking water in the last 20 years, 780 million still lack improved water resources;⁷⁶ while 1.8 billion gained access to improved sanitation, 2.5 billion persons are still without sanitary facilities.⁷⁷

As the WHO explains, huge disparities still exist between world regions, developed versus “least developed” nations, and urban versus rural settings.⁷⁸ In the Dominican Republic, 25% of the rural population remains without access to adequate sanitation facilities.⁷⁹ In Southern and Southeastern Asia, less than 30% of the population has access to piped water supplies; in Sub-Saharan African, this number is only 16%.⁸⁰ Immigrants from these regions, while fewer than 2% of annual deportees,⁸¹ can at

⁷³ UNICEF, *The State of the World's Children 2012 Table 2: Nutrition*, UNICEF, http://www.unicef.org/rightsite/sowc/pdfs/statistics/SOWC_Spec_Ed_CRC_TABLE%202.%20NUTRITION_EN_111309.pdf (last visited July 13, 2013).

⁷⁴ *Id.*

⁷⁵ Office of Immigration Statistics, *2010 Yearbook of Immigration Statistics*, DEPARTMENT OF HOMELAND SECURITY 92 (Aug. 2011), http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/ois_yb_2010.pdf.

⁷⁶ UNICEF and World Health Org., *Progress on Drinking Water and Sanitation: 2012 Update*, http://whqlibdoc.who.int/publications/2012/9789280646320_eng_full_text.pdf (last visited July 13, 2013).

⁷⁷ *Id.*

⁷⁸ *Id.* at 4.

⁷⁹ *Id.* at 42.

⁸⁰ *Id.* at 8.

⁸¹ *2010 Yearbook of Immigration Statistics*, *supra* note 75, at 97.

least use statistics like those provided by the WHO to improve their chances for a favorable result.

The absence of a guardian ad litem can be a double-edged sword in petitions for cancellation of removal. While a hardship determination is not bound by statutory guidelines, the open standards and free reign of the Immigration Court lead to cases that are similar in facts but obtain radically different results.⁸²

IV. Prosecutorial Discretions

The number of out-of-status or un-admitted immigrants (“illegal aliens” to anti-immigrant organizations) remains hard to pinpoint. The Pew Hispanic Center estimates the unauthorized immigration population in the United States at about 11.2 million persons as of March 2010.⁸³ Of that number, the Department of Homeland Security has identified half a million deportable persons in the United States.⁸⁴ According to John Morton, Director of ICE, the ICE only has sufficient resources to remove 4% of these deportable persons.⁸⁵ Therefore, to best effect goals of national security and border safety, and to maximize use of enforcement resources, ICE Director Morton issued a memorandum in June 2011 expanding the use of prosecutorial discretion.⁸⁶

Prosecutorial discretion is a decision by ICE officials to “not assert the full scope of the enforcement authority available to the agency in a given case.”⁸⁷ Prosecutorial discretion is an inherent

⁸² Compare *In re Andazola-Rivas*, 23 I. & N. Dec. 319 (BIA 2002), with *In re Monreal-Aguinaga*, 23 I. & N. Dec. 56 (BIA 2001); *In re Recinas*, 23 I. & N. Dec. 467 (BIA 2002).

⁸³ Jeffrey Passel & D’Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010*, PEW RESEARCH HISPANIC CENTER (Feb. 1, 2011), <http://www.pewhispanic.org/2011/02/01/unauthorized-immigrant-population-brnational-and-state-trends-2010/>

⁸⁴ *2010 Yearbook of Immigration Statistics*, *supra* note 75, at 93.

⁸⁵ Andrea Montavon-McKillip, *Prosecutorial Discretion and Your Client*, AILA VOICE, Mar./Apr. 2012, at 14.

⁸⁶ Memorandum from John Morton on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens to Field Office Directors, Special Agents in Charge, and Chief Counsel (June 17, 2011), available at <http://www.aila.org/content/default.aspx?bc=1016—6715—8412—38207—35942>.

⁸⁷ *Id.*

agency authority. In immigration, it exists neither in the statute nor regulations. Rather, prosecutorial discretion has long been recognized as a part of administrative law. As the Supreme Court stated in *Heckler v. Chaney*, “a decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”⁸⁸ In removal (deportation) cases, an ICE attorney can favorably exercise prosecutorial discretion by administratively closing a removal case or agreeing to a continuance when the immigrant becomes eligible for relief at a later date.⁸⁹ Other ways to exercise prosecutorial discretion are also available, but these are the most significant.

For Jesus Gerardo Noriega, prosecutorial discretion provided relief from removal when he had no other options.⁹⁰ Under the Immigration and Nationality Act’s stop-time rule, an immigrant’s period of continuous presence in the United States is stopped as of the date the immigrant receives his notice to appear before the immigration court.⁹¹ Jesus was detained just twelve days before he completed the ten years of continuous presence requisite for cancellation of removal.⁹² Ineligible for cancellation of removal, asylum, or other forms of relief, Jesus’ choices were down to requesting voluntary departure or face an order of removal.

If granted a voluntary departure, Jesus would have sixty days to leave the United States – after first proving by clear and convincing evidence that he has the financial resources to leave.⁹³ If Jesus failed to depart and were discovered by ICE, Jesus would be removed from the United States and be ineligible for any form of immigration relief for ten years after departure.⁹⁴ He

⁸⁸ *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

⁸⁹ Mary Kennedy, *Prosecutorial Discretion: How to Advocate for Your Client*, LEGAL ACTION CENTER (June 24, 2011), <http://www.legalactioncenter.org/sites/default/files/ProsecutorialDiscretion-11-30-10.pdf>.

⁹⁰ Julia Preston, *In Deportation Policy Test, 1 in 6 Offered Reprieve*, N.Y. TIMES (Jan. 19, 2012), http://www.nytimes.com/2012/01/20/us/in-test-of-deportation-policy-1-in-6-offered-reprieve.html?_r=2&pagewanted=1.

⁹¹ KURZBAN, *supra* note 45, at 974.

⁹² Preston, *supra* note 90.

⁹³ KURZBAN, *supra* note 45, at 968.

⁹⁴ *Id.* at 971.

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would have to stay in Mexico, away from his mother, father, and three brothers all that time.

But Jesus was brought to the United States when he was just nine years old.⁹⁵ His parents are Lawful Permanent Residents and his three siblings are U.S. citizens.⁹⁶ Jesus' own application for lawful status is in the system, but is part of a years-long backlog.⁹⁷ A high school graduate with no criminal record, Jesus wants to study automotive engineering. He speaks more English than Spanish.⁹⁸ Now, he is detained by police and transferred to ICE detention. And what was the incident leading to Jesus' deportation proceedings? Driving with a burnt-out license plate light as he was headed to the store to buy milk.⁹⁹

Jesus was a poster candidate for prosecutorial discretion. Although he was already an adult when placed in removal proceedings, he was a child when he came to the United States, having likely immigrated by the decision of his parents. Under Morton's June 2011 memo, there are nineteen positive factors for a favorable exercise of prosecutorial discretion, and eight additional special factors that prompt special consideration and demonstrate the immigrant is (not) a "high priority" prosecution for ICE.

Jesus met one of the eight special consideration factors – an individual present in the United States since childhood. Of the nineteen positive factors, Jesus met several. He arrived in the United States when he was a minor,¹⁰⁰ is a high school graduate,¹⁰¹ has no criminal history,¹⁰² had not previously been in trouble with immigration authorities,¹⁰³ has U.S. Citizen and Lawful Permanent Resident immediate family members,¹⁰⁴ and

⁹⁵ Preston, *supra* note 90.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Sara Castellanos, *Broken Light, Broken Dream: Illegal Immigrants in Aurora*, AURORA SENTINEL, (May 25, 2011), http://www.aurorasentinel.com/email_push/news/article_52b8e5da-8711-11e0-b9ed-001cc4c002e0.html.

¹⁰⁰ Memorandum from John Morton, *supra* note 86, factor 3.

¹⁰¹ *Id.* at actor 4.

¹⁰² *Id.* at actor 6.

¹⁰³ *Id.* at factor 7.

¹⁰⁴ *Id.* at factor 12.

has a pending immigration petition making relief likely in his removal case.¹⁰⁵

It is still too soon to see what, if any, will be the long-term impact of this agency directive on prosecutorial discretion. On August 2011, the Department of Homeland Security announced a review of all cases pending in the immigration courts.¹⁰⁶ According to the announcement, each case would be reviewed according to the factors of Morton's June 2011 memorandum. Cases eligible for a favorable exercise of prosecutorial discretion would be administratively closed. Syracuse University's TRAC Immigration Project reports only a net increase of sixty-nine closures nationwide as a result of the heightened emphasis on prosecutorial discretion.¹⁰⁷

Moreover, since Prosecutorial Discretion is an initiative by memorandum, different ICE offices may have different procedures for applying prosecutorial discretion. In some regions, exercise of prosecutorial discretion may depend on whether the immigrant is represented by counsel during removal proceedings. In Kansas City, for example, cases may be reviewed for administrative closure on ICE's own initiative if the immigrant is appearing pro se. However, when the immigrant has retained counsel, it is up to counsel to evaluate his client's case and make an affirmative request for prosecutorial discretion.

Practitioners are cautioned to remember that all immigration relief is discretionary. Immigrants have no right to a favorable exercise of prosecutorial discretion or any other form of relief.¹⁰⁸ ICE officials now exercise broad discretion in deciding whether to prosecute immigrants for removal, but as in Part I, the decision remains in the hands of an agency whose mission is to prevent unauthorized immigration into the United States.¹⁰⁹ A practitioner's task is to tell his client's story as completely and compassionately as possible, and hope for the best.

¹⁰⁵ *Id.* at factor 17.

¹⁰⁶ Immigration Update: Maximizing Public Safety and Better Focusing Resources, The White House Blog (Aug. 18, 2011), <http://www.whitehouse.gov/blog/2011/08/18/immigration-update-maximizing-public-safety-and-better-focusing-resources>.

¹⁰⁷ TRAC Immigration, ICE Review of All Pending Immigration Court Cases, available at <http://trac.syr.edu/immigration/reports/272/>.

¹⁰⁸ Memorandum from John Morton, *supra* note 86.

¹⁰⁹ *Id.*

APPENDIX A: Positive Factors for Prosecutorial Discretion¹¹⁰

1. the agency's civil immigration enforcement priorities;
2. the person's length of presence in the United States;
3. the circumstances of the person's arrival in the United States and the manner of his entry, particularly if the alien came to the United States as a young child;
4. the person's pursuit of education in the United States, with particular consideration given to those who have graduated from a U.S. high school or have successfully pursued or are pursuing a college or advanced degrees at a legitimate institution of higher education in the United States;
5. whether the person, or the person's immediate relative has served in the U.S. military, reserves, or national guard, with particular consideration given to those who served in combat;
6. the person's criminal history, including arrests, prior convictions, or outstanding arrest warrants;
7. the person's immigration history, including any prior removal, outstanding order of removal, prior denial of status, or evidence of fraud;
8. whether the person poses a national security or public safety concern;
9. the person's ties and contributions to the community, including family relationships;
10. the person's ties to the home country and condition in the country;
11. the person's age, with particular consideration given to minors and the elderly;
12. whether the person has a U.S. citizen or permanent resident spouse, child, or parent;
13. whether the person is the primary caretaker of a person with a mental or physical disability, minor, or seriously ill relative;
14. whether the person or the person's spouse is pregnant or nursing;
15. whether the person or the person's spouse suffers from severe mental or physical illness;
16. whether the person's nationality renders removal unlikely;

¹¹⁰ Memorandum from John Morron, *supra* note 86.

17. whether the person is likely to be granted temporary or permanent status or other relief from removal, including as a relative of a U.S. citizen or permanent resident;
18. whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, or a victim of domestic violence, human trafficking, or other crime; and
19. whether the person is currently cooperating or has cooperated with federal, state or local law enforcement authorities, such as ICE, the U.S. Attorneys or Department of Justice, the Department of Labor, or National Labor Relations Board, among others.

Catalina Velarde

