

**THE EXPEDITED REMOVAL STUDY**

**REPORT ON THE**

**SECOND YEAR OF IMPLEMENTATION**

**OF EXPEDITED REMOVAL**

**Center for Human Rights and International Justice**  
**University of California, Hastings College of the Law**

**Karen Musalo**  
**Director**

**Lauren Gibson**  
**Study Coordinator**

**J. Edward Taylor**  
**Research Consultant**

**May 1999**

Congress enacted expedited removal procedures to summarily return at ports of entry persons who do not have valid travel documents or who attempt entry through fraud or misrepresentation. The new procedures provide that persons indicating a fear of return or intent to apply for asylum are to be referred for a credible fear interview to determine whether their claims are groundless and abusive; if not, they are to be channeled into the normal process for full consideration of their claims to asylum and related protection. In enacting expedited removal, Congress hoped to deter the entry of fraudulent claimants to admission while ensuring that sincere asylum-seekers have the opportunity to access the full asylum process.

The Expedited Removal Study was initiated in May 1997 to conduct a comprehensive nationwide review of the expedited removal process implemented in April 1997, especially as such procedures apply to asylum-seekers. It was originally conceptualized as a two-year study of the implementation of expedited removal, but in light of the many unanswered questions regarding the process, it has been extended for a third year. The Study released its first annual report in May 1998. This is the Study's second annual report.

The Expedited Removal Study was designed to examine all components of the new procedure, and to provide solid statistical and qualitative information to policy makers and the public. The Study seeks to determine whether expedited removal, as implemented, meets the dual congressional objectives of preventing abuse of the process, while at the same time identifying and screening-in individuals who fear persecution. The Study's intended methodology included on-site observation at selected ports of entry in conjunction with review of Immigration and Naturalization Service (INS) data. However, the INS has not allowed access to data or on-site observation of the process. As a consequence, during its first and second years, the Study has concentrated on the collection and analysis of data obtained from domestic non-governmental organizations and attorneys. Additionally, in its second year, the Study obtained records of proceedings in expedited removal cases in which there was review by an immigration judge. These documents were produced by the Executive Office for Immigration Review pursuant to a Freedom of Information Act request.

The Expedited Removal Study is a project of the Center for Human Rights and International Justice at the University of California, Hastings College of the Law. It is funded by the Ford Foundation and the Joyce Mertz-Gilmore Foundation. Karen Musalo, the Center's Resident Scholar, is the Study's Director. Lauren Gibson, Research Fellow, is the Study Coordinator and J. Edward Taylor, Professor in the Department of Agricultural and Resource Economics at the University of California at Davis, is the Study's Research Consultant. The Study thanks Richard Boswell, Professor at the University of California, Hastings College of the Law, Lauren Cox-Pursley, Stephen Knight, Research Fellow, and all sources of the Study's data for their contributions. The Study also thanks and is grateful for the assistance of the Carnegie Endowment for International Peace in presenting this Report.

Expedited Removal Study  
Center for Human Rights and International Justice  
University of California, Hastings College of the Law  
200 McAllister Street  
San Francisco, California 94102

Karen Musalo  
(415) 565-4720, [musalok@uchastings.edu](mailto:musalok@uchastings.edu)

Lauren Gibson  
(415) 565-4696, [gibsonl@uchastings.edu](mailto:gibsonl@uchastings.edu)

J. Edward Taylor  
(530) 752-0213, [jetaylor@ucdavis.edu](mailto:jetaylor@ucdavis.edu)

Stephen Knight  
(415) 565-4791, [knights@uchastings.edu](mailto:knights@uchastings.edu)

Expedited Removal Study's website <<http://www.uchastings.edu/ers/>>

## TABLE OF CONTENTS

	Page
<b>EXECUTIVE SUMMARY</b> .....	1
Introduction .....	1
The Expedited Removal Study .....	1
Recent Developments in Law and Policy .....	2
Description and Analysis of the Study's Data .....	3
Current Occurrences and Trends which Raise Broader Legal or Policy Issues .....	5
Chinese Migrants Aboard the Chih Yung .....	6
Detention of Canadian-Bound Asylum-Seekers: Transnational Implications of Expedited Removal .....	6
Conclusion .....	7
<b>THE EXPEDITED REMOVAL STUDY: REPORT ON THE FIRST TWO YEARS OF IMPLEMENTATION</b> .....	8
Introduction .....	8
I. The Expedited Removal Process .....	10
II. The Expedited Removal Study: Background, Methodology, and Access to Data .....	12
III. Recent Developments in Law and Policy Relating to Expedited Removal .....	16
A. International Religious Freedom Act of 1998 .....	17
B. Lawsuits Challenging the Implementation of Expedited Removal .....	19
C. Mandatory Detention of Persons Placed in Expedited Removal .....	20
D. Canadian Change in Admission Procedure at Land Borders .....	22
IV. The Expedited Removal Study's Database .....	25
Introduction .....	25
A. Description, Uses and Properties of the Database .....	27
B. Summary of Cases in the Study's Database as of March 31, 1999 .....	29
C. Detailed Summary of Cases by Nationality, Port, and Socio-Demographic Characteristics .....	31
1. Countries of Nationality .....	31
2. Ports of Entry .....	31
3. Socio-Demographic Characteristics .....	32
D. Description and Analysis of INS's Basis of Inadmissibility .....	34
E. Arrival and Release from Detention .....	35
F. Description and Analysis of Grounds for Asylum .....	37
1. Grounds for Asylum Generally .....	37
By Gender .....	38
2. Grounds for Asylum by Port of Entry .....	39
3. Grounds for Asylum by Country .....	40

G.	Description and Analysis of the Adjudicatory Process	41
1.	Attorney Database	41
	Presence of Attorney or Consultant at the Credible Fear Interview	41
	By Nationality	41
	Decision at the Credible Fear Interview	42
	By Nationality	42
	Decision at Immigration Judge Review	42
	Merits Asylum Hearing	42
	By Gender	43
	By Nationality	43
2.	EOIR Database	43
	Presence of Attorney or Consultant at the Credible Fear Interview	43
	By Nationality	43
	Basis for Adverse Credible Fear Determination	43
	By Gender	44
	By Nationality	44
	Immigration Judge Review	45
	By Gender	45
	By Nationality	45
V.	Case Studies	45
A.	Case Studies from the Attorney Database	46
1.	Ecuadoran Asylum-Seeker #1	46
	Observations	48
	Summary Return of Asylum-Seekers Without any Process	48
	Detention	49
	Safe Third Country	49
2.	Asylum-Seeker from the Democratic Republic of the Congo	50
	Observations	55
	Interpretation	55
	Reliance on Material Outside of the Record	56
	The Appearance of Bias	57
	Consular Visit	57
	Effect of Expedited Removal on the Treatment of Asylum- Seekers in Asylum Proceedings	59
3.	Angolan Asylum-Seeker	59
	Observations	61
4.	Sri Lankan Asylum-Seeker #1	61
	Observations	63
	Credible Fear Determination	63
	Parole	63
	Bond Breach	64
	Application of Expedited Removal to Asylum-Seekers in Transit	65

---

5. Sri Lankan Asylum-Seeker #2	65
Observations	69
Secondary Inspection	69
Credible Fear Interview	69
Detention Conditions	70
Release	70
6. Sri-Lankan Asylum-Seeker #3	71
Observations	73
Detention	73
Parole	75
7. Russian Software Engineer with Facially Valid Visa	76
Observations	77
Determination of Inadmissibility	77
Interpretation	78
Failure to Receive Copies of Signed Papers	79
B. Case Studies from the EOIR Database	79
1. Asylum-Seeker from Montenegro	79
Observations	81
Credibility Determination	81
No Persecution	83
“Singled-Out” Requirement	83
2. Brazilian Asylum-Seeker	84
Observations	85
Lack of Nexus to a Protected Ground	85
Internal Relocation	86
Credible Fear Process	87
3. Ecuadoran Asylum-Seeker #2	89
Observations	91
Lack of Nexus to a Protected Ground	91
Internal Relocation	91
Government’s Willingness to Aid	92
Safe Third Country	92
4. Haitian Asylum-Seeker	92
Observations	94
5. Nigerian Asylum-Seeker	94
Observations	96
Credibility	96
Torture Convention	97
Vacation by Immigration Judge	97
6. Venezuelan Asylum-Seeker of Haitian Descent	98
Observations	99
No Persecution	99
Lack of Nexus	99

	7. Asylum-Seeker from the Republic of the Congo . . . . .	100
	Observations . . . . .	101
	Lack of Nexus . . . . .	101
VI.	Current Occurrences and Trends which Raise Broader Legal or Policy Issues .	102
	A. Asylum-Seekers on the Chih Yung . . . . .	102
	1. Background . . . . .	102
	Secondary Inspection . . . . .	103
	Credible Fear Interviews . . . . .	104
	Visits to Asylum Applicants at CCA . . . . .	107
	Master Calendar Hearings . . . . .	108
	Preparation of Asylum Claims and Motions to Change Venue . . . .	109
	Visit of Chinese Consulate . . . . .	110
	Release . . . . .	111
	Juveniles . . . . .	112
	2. Observations . . . . .	112
	UNHCR's Lack of Access to Secondary Inspection . . . . .	112
	Efforts of Asylum Office . . . . .	113
	Quality of Interpretation During Credible Fear Interviews . . . . .	113
	Confidentiality and Access to Detainees . . . . .	114
	Notice to Attorneys . . . . .	116
	Visit by the Chinese Consulate . . . . .	117
	Release . . . . .	119
	3. Conclusion . . . . .	120
	B. Detention of Canadian-Bound Asylum-Seekers: Transnational	
	Implications of Expedited Removal . . . . .	120
	1. Background . . . . .	120
	The Case of Charles Namakando . . . . .	123
	2. Observations . . . . .	125

## TABLES

Table 1:	Number of Cases in Attorney Year-1 Database, Largest Countries of Nationality . .	129
Table 2:	Number of Cases in Attorney Year-2 Database, Largest Countries of Nationality . .	130
Table 3:	Number of Cases in EOIR Database, Largest Countries of Nationality . . . . .	130
Table 4:	Largest 10 U.S. Ports of Entry in the Attorney Year-1 Database . . . . .	131
Table 5:	Largest 10 U.S. Ports of Entry In the Attorney Year-2 Database . . . . .	131
Table 6:	Ports of Entry in the EOIR Database . . . . .	132
Table 7:	Socio-Demographic Characteristics, Attorney Year-1 Database . . . . .	133
Table 8:	Socio-Demographic Characteristics, Attorney Year-2 Database . . . . .	134
Table 9:	Socio-Demographic Characteristics, EOIR Database . . . . .	135
Table 10:	Share of Females in EOIR and Attorney Databases, Largest Countries of Nationality . . . . .	136
Table 11:	INS Basis of Inadmissibility (Charge), Attorney Year-1 Database . . . . .	137

Table 12: INS Basis of Inadmissibility (Charge), Attorney Year-2 Database .....	137
Table 13: INS Basis of Inadmissibility (Charge), EOIR Database .....	137
Table 14: Country of Nationality and Charge, Largest Countries of Nationality, Attorney Year-1 Database .....	138
Table 15: Country of Nationality and Charge, Largest Countries of Nationality, Attorney Year-2 Database .....	139
Table 16: Nationality and Charge, Largest Countries of Nationality, EOIR Database .....	139
Table 17: Gender and Charge, Attorney Year-1 Database .....	140
Table 18: Gender and Charge, Attorney Year-2 Database .....	140
Table 19: Gender and Charge, EOIR Database .....	140
Table 20: Average Days of Detention, by U.S. Port of Entry, Attorney Year-1 Database ....	141
Table 21: Average Days of Detention, by U.S. Port of Entry, Attorney Year-2 Database ....	141
Table 22: Average Days of Detention, by Country of Nationality, Attorney Year-1 Database .....	142
Table 23: Average Days of Detention, by Country of Nationality, Attorney Year-2 Database .....	143
Table 24: Average Days of Detention, by Gender, Attorney Year-1 Database .....	143
Table 25: Average Days of Detention, by Gender, Attorney Year-2 Database .....	143
Table 26: Grounds for Asylum Claims, Attorney Year-1 Database .....	144
Table 27: Grounds for Asylum Claims, Attorney Year-2 Database .....	145
Table 28: Grounds for Asylum Claims, EOIR Database .....	146
Table 29: Grounds for Asylum Claims by Gender, Attorney Year-1 Database .....	147
Table 30: Grounds for Asylum Claims by Gender, Attorney Year-2 Database .....	147
Table 31: Grounds for Asylum Claims by Gender, EOIR Database .....	147
Table 32: Grounds for Asylum Claims by Port of Entry, Attorney Year-1 Database .....	148
Table 33: Grounds for Asylum Claims by Port of Entry, Attorney Year-2 Database .....	148
Table 34: Grounds for Asylum Claims by Port of Entry, EOIR Database .....	149
Table 35: Grounds for Asylum Claims, Country of Nationality, Attorney Year-1 Database .....	149
Table 36: Grounds for Asylum Claims, Country of Nationality, Attorney Year-2 Database .....	150
Table 37: Grounds for Asylum Claims, Country of Nationality, Largest Nationalities, EOIR Database .....	150
Table 38: Percentage of Cases with Attorney or Consultant Present at Credible Fear Interview, Largest Countries of Nationality, Attorney Year-1 Database .....	151
Table 39: Percentage of Cases with Attorney or Consultant Present at Credible Fear Interview, Largest Countries of Nationality, Attorney Year-2 Database .....	151
Table 40: Credible Fear (CF) Status, Attorney Year-1 Database .....	152
Table 41: Credible Fear (CF) Status, Attorney Year-2 Database .....	152
Table 42: CFI Decision by Country of Nationality, Largest Countries of Nationality, Attorney Year-1 Database .....	153
Table 43: Post-ER Outcome, Attorney Year-1 Database .....	154
Table 44: Post-ER Outcome, Attorney Year-2 Database .....	154

Table 45: Post-ER Outcome, by Gender, Attorney Year-1 Database (Percent) .....	155
Table 46: Post-ER Outcome, by Country of Nationality, Attorney Year-1 Database .....	155
Table 47: Percentage of Cases with Attorney or Consultant Present at Credible Fear Interview, by Country of Nationality, EOIR Database .....	156
Table 48: Basis for Denial in Credible Fear Interview, by Gender, EOIR Database .....	156
Table 49: Basis for Denial in Credible Fear Interview, by Country of Nationality, EOIR Database .....	157
Table 50: Immigration Judge Review Outcomes, EOIR Database .....	157
Table 51: Immigration Judge Review Outcomes, by Basis of Adverse Credible Fear Determination, EOIR Database .....	157
Table 52: Immigration Judge Vacation of Adverse Credible Fear Determination, by Gender, EOIR Database .....	158
Table 53: Immigration Judge Vacation of Adverse Credible Fear Determination, by Country of Nationality, EOIR Database .....	158

## ATTACHMENTS

1. Letter from Karen Musalo, Director, Expedited Removal Study, to the United States Department of Justice (June 1, 1998)
2. Partial samples of two of the four files produced by the INS in response to the Expedited Removal Study's Freedom of Information Act Request
3. National INS Statistics
4. Statistics on Persons Placed in Expedited Removal at San Francisco International Airport from October 1998 through February 1999, by Country
5. UNHCR, Expedited Removal Statistics: UNHCR Regional Office Washington DC 1 April 1997-24 March 1999
6. Letter from Karen Musalo, Director, Expedited Removal Study, to the Office of Information and Privacy (Dec. 14, 1998)
7. Sample Record of Proceedings
8. UNHCR, Guidelines on applicable Criteria and Standards relating to the Detention of Asylum-Seekers (Guidelines) (Feb. 10, 1999)
9. Letter from Karen Koning AbuZayd, Regional Representative, UNHCR, to Commissioner Doris Meissner, INS (Feb. 17, 1999)
10. Office of Field Operations, Memorandum: Detention Guidelines Effective October 9, 1998, *reprinted in 75 INTERPRETER RELEASES 1523* (Nov. 2, 1998)
11. Letters from Florida Immigrant Advocacy Center to the INS, and INS's Letters of Response
12. Letter from Deborah Greitzer, Staff Attorney, VIVE, to Mr. Edward McElroy, District Director, INS (Nov. 12, 1998) and Letter from Edward McElroy, District Director, INS, to Deborah Greitzer, Staff Attorney, VIVE (Dec. 2, 1998)
13. Letter from John J. LaFalce, Member of the House of Representatives, to Edward McElroy, District Director, INS (Dec. 14, 1998) and Letter from McElroy to Congressman LaFalce (Feb. 16, 1999)



---

**THE EXPEDITED REMOVAL STUDY: REPORT ON THE FIRST TWO  
YEARS OF IMPLEMENTATION**

**EXECUTIVE SUMMARY**

**Introduction**

The expedited removal laws were among the most controversial provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and constitute one of the most fundamental changes in immigration law and policy in many decades. The United States Congress enacted expedited removal procedures in 1996, and the procedures were first implemented on April 1, 1997.

Under these laws, if an immigration officer at a port of entry determines that a person is not in possession of valid and proper travel documents or is attempting entry through fraud or misrepresentation, the officer has the authority to rule that the person is inadmissible and to issue a removal order. This determination is not subject to review and bars such person from returning to the United States for five years. The immigration officer has discretion to permit persons to withdraw their applications for admission to the United States and thus avoid this bar on reentry.

Pursuant to the law, there are two groups of persons who receive additional process: persons who express an intent to apply for asylum or a fear of return to their country of citizenship or residence, and persons claiming United States citizenship, lawful permanent resident, refugee, or asylee status. Persons claiming a fear of return or an intent to apply for asylum are referred to a credible fear interview, in which it is determined if they will be allowed to present their claims through the regular process provided by law. They are further entitled to review of this determination by an immigration judge. Persons claiming lawful United States status are also entitled to review of their claims by an immigration judge.

**The Expedited Removal Study**

The Expedited Removal Study is a study of the implementation of these procedures, especially as they apply to asylum-seekers. It was originally conceptualized as a two year study of the implementation of expedited removal, but in light of the many unanswered questions regarding the process, it has been extended for a third year. The Study released its first annual Report in May 1998. This is the Study's second annual Report.

Two years after its implementation, the public has been provided with little information on the manner in which expedited removal is being administered. The Immigration and Naturalization Service (INS) has continued to deny non-governmental organizations (NGOs) and the Study access to statistical data and planned observations of secondary inspections and credible fear interviews. The General Accounting Office's March 1998 report on expedited removal, which was mandated by Congress, while valuable, did not evaluate the quality or

accuracy of the decisions made during the process. However, Congress recently provided an additional opportunity for study of the expedited removal process under the International Religious Freedom Act of 1998. This congressionally mandated study, which by law is not limited to asylum-seekers whose fear is based on religion, must be completed by September 1, 2000. Unlike the General Accounting Office's (GAO) previous study, this Act allows for the possibility of outside experts to collaborate with the GAO in conducting the study.

The Expedited Removal Study has modified its research methodology in light of the INS's denial of on-site observation and relevant data associated with the process. In its first year, the Study collected and analyzed data from attorneys and NGOs that have provided representation or consultative advice to persons subject to the expedited removal process. In its second year, the Study has continued to focus on gathering data from these secondary sources. The Study now has information on more than 600 cases from attorneys and NGOs.

The Study has continued to seek primary data associated with the expedited removal process from the INS. Towards this end, the Study submitted a Freedom of Information Act request to the United States Department of Justice. The INS's response to this request has been largely non-responsive; the Study is pursuing various alternatives to obtain INS compliance with the requirements of the Freedom of Information Act. In contrast to the INS, the Executive Office for Immigration Review (EOIR) cooperated with the Study's request for data and thus far has produced over 150 records of proceeding (ROPs) in which there was immigration judge review of a credible fear determination or a claim of lawful United States status, 132 of which are reported on in the present Report. These records of proceedings constitute the most comprehensive primary data on the interpretation and application of the credible fear standard that the Study has obtained to date.

### **Recent Developments in Law and Policy**

In addition to its collection and analysis of data on individual cases, the Expedited Removal Study follows significant developments in law, policy, and practice that relate to expedited removal and their impact, if any, on other countries. This second year Report provides an overview of important developments, including the course of litigation challenging expedited removal, the development of United Nations High Commissioner for Refugees (UNHCR) guidelines and recommendations on detention of asylum-seekers, and changes to Canadian border procedures. The highlights of these developments are as follows:

- On August 20, 1998, in the second year of implementation of expedited removal, three lawsuits were dismissed that challenged the expedited removal process on behalf of asylum-seekers and applicants for admission with facially valid visas. These lawsuits were filed by a number of NGOs and immigration attorneys in March and May of 1997, and are currently on appeal to the United States Court of Appeals for the District of Columbia Circuit.

- On February 10, 1999, UNHCR released guidelines on the detention of asylum-seekers, which address the mandatory detention of asylum-seekers. The general principle set forth is that asylum-seekers should not be detained. When these guidelines were released, UNHCR, while commending the use of discretionary parole, expressed its concerns to the INS that asylum applicants arriving at ports of entry are detained while their cases are pending, even if eligible for parole, and that they remain in detention after they have been found to have a credible fear of persecution.
- In November 1998, a change in Canadian border procedures was adopted that is likely to affect the number of persons placed in expedited removal at the United States-Canada border. Prior to November 1998, persons who presented refugee claims at Canadian ports of entry at the border with the United States were required to wait in the United States during the initial processing of their Canadian claims. After the implementation of expedited removal, it was reported that a number of these persons were placed in expedited removal and detained while awaiting such processing. However, in November 1998, Canada announced that refugee claimants would no longer have to wait in the United States during the initial processing of their claims. Rather, Canadian refugee claimants can now enter and remain in Canada during all stages of the processing.

### **Description and Analysis of the Study's Data**

The Expedited Removal Study's database provides information on individuals who have been processed under the new expedited removal procedures since they were first implemented in April 1997. The Study has gathered this information from the EOIR and from attorneys and NGOs representing or providing consultation to these individuals.

The database contains both primary and secondary information. The data the Study has obtained from the EOIR is classified as "primary," and is referred to as the "EOIR database." These cases are currently limited to the first year of the implementation of expedited removal. The remainder of the Study's database, which was collected from attorneys and representatives of individuals subject to the expedited removal process, is classified as "secondary" information. These cases are referred to as the "Attorney database," and represent year one (April 1, 1997-March 31, 1998) and year two (April 1, 1998-March 31, 1999) of the implementation of expedited removal.

The database has two components, one quantitative and the other, qualitative. The quantitative component includes information on 79 variables related to these individuals and the expedited removal process as applied to them. This information includes socio-demographic characteristics, country of origin, port of entry, nature of asylum claims, and outcomes at the different stages of the expedited removal process. It also attempts to follow expedited removal cases through the entire adjudicatory process (regular removal hearings and ensuing appeals), in order to determine whether the process has an identifiable impact on subsequent adjudication of a case. The second, qualitative component of the database includes case studies in narrative form.

These case studies are based on records of proceedings from the EOIR and telephone interviews with attorneys and NGOs representing individuals in the expedited removal process.

As of March 31, 1999, the Study had information on 736 cases. These cases include 132 for which the Study had received records of proceedings from the EOIR. All of the EOIR cases produced thus far commenced in the first year of the implementation of expedited removal. Also included is information on 604 cases provided to the Study by NGOs and attorneys. One cannot generalize from the Study's database to the population of all persons subject to expedited removal because these cases do not constitute a random sample of all expedited removal cases (which as of February 1999 totalled 143,940) or of all cases referred to credible fear interviews (which the Study approximates to be around 5,300). Notwithstanding the limitation on the Study's database, its features raise questions about the implementation of expedited removal. The Study's analysis of its database shows the following:

- Males continue to predominate in the sample of persons not removed at secondary inspection but referred to credible fear interviews; there is a low percentage of females in this sample of persons not removed (32% in the Attorney Year One database, 33% in the EOIR database). In year two, the percentage of females decreased further, to 22%, in the Attorney database.
- In the Attorney database, there has been a slight decrease from year one to year two in the high socio-economic status of the individuals (as reflected by high education, urban origins, English fluency, and family contacts in the United States and Canada). The EOIR database reflects a somewhat lower average socio-economic status than that of individuals in the Attorney database.
- In the Attorney database, there was a marked decrease from year one to year two in the percentage of individuals placed in expedited removal because they possessed facially valid documents that were deemed invalid. In the Attorney and EOIR databases, women were twice or three times as likely as men to be charged with this ground of inadmissibility.
- In the Attorney database, there has been a decrease from year one to year two in average days of detention. Lengths of detention time vary by port of entry and by nationality. (Information on length of detention is not available in the EOIR database).
- In the Attorney database, an extremely high percentage of persons are found to have a credible fear of persecution at the credible fear interview. (All EOIR cases, by definition, have negative credible fear determinations at this stage, with IJ review requested.)
- In the EOIR database, the two most common bases for the asylum officer's (AO) adverse credible fear determination are that the applicant is not credible and that the applicant failed to establish a nexus to an enumerated statutory ground. To a lesser extent, the AOs

denied on the basis that the harm alleged did not constitute persecution and that the fear was not well-founded. Bases of denial varied by gender and nationality.

- Men were denied on the basis of credibility twice as often as women.
- Women were denied on the basis of nexus more than twice as often as men.
- Women were denied more often than men on the basis that the harm did not amount to persecution.

The other component of the Study's database, presented in fourteen case studies in narrative form, addresses qualitative aspects of the expedited removal process. Seven of the case studies are from the Study's Attorney database, and seven are from the EOIR database. The Study does not present these cases as being representative of each of these databases, the Study's database as a whole, nor all cases in which persons have been placed in expedited removal. Rather, these are cases that the Study has identified as illustrating important or problematic aspects of the expedited removal process.

The case studies raise a number of questions about expedited removal. Some of these questions address: the accuracy of determinations made during the expedited removal process; the adequacy of expedited proceedings when complex legal or factual determinations, such as nexus and country-wide persecution, are required; whether the quality of interpretation may impact credible fear determinations; the importance of immigration judge review; the breadth of secondary inspection; parole; conditions of detention; notification of and access permitted to consular officers regarding asylum-seekers in detention in the United States; and the interrelation of expedited removal laws and the refugee laws of other countries.

### **Current Occurrences and Trends which Raise Broader Legal or Policy Issues**

The Expedited Removal Study, in its first year, focused principally on the gathering of data on the application of expedited removal to individuals. In its second year, the Study continued gathering data on individual cases, but also identified instances in which the application of expedited removal to an individual or group of individuals illustrated broader legal or policy issues. This Report has selected two such instances for close examination. The first is the application of expedited removal to a group of Chinese migrants who arrived by boat in August 1998. The second is the transnational implications of the application of expedited removal to persons who transit through the United States intending to apply for refugee status in the country of their destination, particularly those bound for Canada. Many of the issues that arise in this discussion complement the discussion of related issues in the individual case studies.

*Chinese Migrants Aboard the Chih Yung*

The Study presents facts and analysis of the application of expedited removal to a group of Chinese migrants on a ship that was intercepted in international waters off the coast of Mexico and later brought to San Diego in August 1998. Although initial reports noted that few persons aboard the Chih Yung had claims to asylum, over ninety were ultimately referred to credible fear interviews. Two regional NGOs, Casa Cornelia Law Center and the San Diego Volunteer Lawyer Program, offered direct and indirect legal assistance to a number of these persons during the expedited removal process. They also offered some assistance in the beginning stages of removal proceedings, when applications for asylum were filed, and planned to represent a smaller percentage throughout the entirety of such proceedings.

The processing of the Chinese asylum-seekers from the Chih Yung presented a number of troubling problems which arose in the expedited removal process and post-expedited removal proceedings, some of which have arisen in other individual case studies presented in this Report. The problems noted include:

- The INS's failure to grant timely permission to observe secondary inspections to a UNHCR representative who arrived at the detention facility at which the majority of the Chinese nationals were being detained, after UNHCR was invited by INS's Acting Director of International Affairs to observe the asylum processing of such nationals;
- Pervasive errors in telephonic interpretation;
- Limitations on the role of the legal representatives of the Chinese, including difficulties in obtaining access to the detained Chinese nationals, obstructions of confidential attorney visits, violations of the attorney-client privilege, and a failure by INS and EOIR to send notice of material developments in the cases of such persons during regular removal proceedings; and
- A visit by Chinese consular officials to the detained Chinese nationals, about which some of their legal representatives were not given notice, and the denial of one legal representative's request to consult with his client prior to or be present during such visit.

*Detention of Canadian-Bound Asylum-Seekers: Transnational Implications of Expedited Removal*

The Study presents for discussion the transnational implications of the application of expedited removal to persons who transit through the United States en route to a third country in which they intend to apply for refugee status. In most cases, the application of expedited removal to these individuals deprives them of the opportunity to apply for refugee status in the country of their destination. The only exception is for persons who are paroled in the discretion of the INS, and are thus able to continue on to the country in which they intend to seek refugee

status. Those who are not paroled, and who remain in detention, have no other option than to apply for asylum in the United States in order to avoid removal to their country of citizenship or residence. Once they apply for and are granted asylum in the United States, these persons may be barred from refugee status in a third country. This raises humanitarian concerns, particularly in situations where individuals have family, friends, or cultural ties in that third country.

The story of Charles Namakando, presented in this Report, is illustrative of this phenomenon. Mr. Namakando was placed in expedited removal and detained upon arrival in the United States, although he was en route to Canada where his wife and two children live in lawful status. He had no option other than to apply for asylum in the United States in order to avoid removal to his country of citizenship. He was granted asylum and remains in the United States.

Recently, a number of Canadian and United States immigration and refugee advocates have increased their focus on the application of expedited removal to persons seeking refugee status in other countries, such as Mr. Namakando, who attempt to transit through the United States. This issue has been brought to the attention of the Canadian government, and a meeting is currently being scheduled between Canadian and United States NGO representatives and Citizenship and Immigration Canada, which is responsible for Canada's immigration program and for certain aspects of the Canadian refugee program.

Policy discussions on this issue recognize the necessity of balancing humanitarian considerations and the norms of international law with the protection of the interests of the United States. In the context described, the application of expedited removal may be seen as a *de facto* implementation of country of first asylum and safe third country principles. Laws based on these principles have previously been the subject of a draft agreement between the United States and Canada on which negotiations were halted and never completed.

### **Conclusion**

The INS's denial of access and data continues to insulate the expedited removal process from careful scrutiny and evaluation. Despite these limitations, the over-arching goal of the Expedited Removal Study, as reflected in this second year Report, is to evaluate this process. The Study collects and analyzes data, identifies trends, and raises questions, where warranted, about the implementation of expedited removal. This information is made available to the public through the Study's annual reports and website.

**THE EXPEDITED REMOVAL STUDY: REPORT ON THE FIRST TWO  
YEARS OF IMPLEMENTATION**

**Introduction**

The Expedited Removal Study is a nationwide, scholarly study of summary immigration procedures, called “expedited removal,” especially as they apply to asylum-seekers. The expedited removal laws were among the most controversial provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA)<sup>1</sup> and constitute one of the most fundamental changes in immigration law and policy in many decades. The United States Congress enacted expedited removal procedures in 1996, and the procedures were first implemented on April 1, 1997. The Study was initiated in May 1997.<sup>2</sup> This is the Study’s second annual Report.<sup>3</sup>

The Study seeks to provide important and useful information on the implementation of expedited removal. Two years after its enactment, the public has been provided with little information on the manner in which this process is being implemented. The Immigration and Naturalization Service (INS) has denied non-governmental organizations (NGOs) and the Study access to statistical data as well as to secondary inspections and credible fear interviews for observation purposes.<sup>4</sup> Although the United Nations High Commissioner for Refugees (UNHCR) was granted some access to primary data and on-site observations, such access was granted on the condition that UNHCR’s observations be kept confidential. The General Accounting Office’s (GAO) March 1998 report on expedited removal, which was mandated by Congress, while valuable, did not evaluate the quality or accuracy of the decisions made during

---

<sup>1</sup> Pub. L. No. 104-208, 110 Stat. 3009 (1996) (enacted as Division C of the Omnibus Appropriations Act of 1996).

<sup>2</sup> The Study was originally conceptualized as a two year study. In light of the many remaining unanswered questions about the process, it has been extended a third year.

<sup>3</sup> The Study’s first annual report was released in May 1998. See THE EXPEDITED REMOVAL STUDY, REPORT ON THE IMPLEMENTATION OF EXPEDITED REMOVAL (First Year Report) (May 1998). The First Year Report can be located on the Study’s website at <<http://www.uchastings.edu/ers>>.

<sup>4</sup> Studies of immigration procedures, which involved on-site observation, have been conducted in the past. For example, Janet Gilboy was allowed to observe secondary inspections and interview port officers, both at a major airport and a Mexico-United States land border. Janet A. Gilboy, *Deciding Who Gets In: Decisionmaking by Immigration Inspectors*, 25 LAW & SOC. REV. 571, 576-77 (1991) (Attachment 13 to First Year Report). Additionally, the INS provided the National Asylum Project with internal records of over 400 preliminary assessments of asylum claims. See NATIONAL ASYLUM STUDY PROJECT, AN INTERIM ASSESSMENT OF THE ASYLUM PROCESS OF THE IMMIGRATION AND NATURALIZATION SERVICE (Dec. 1992).



the process.<sup>5</sup> As discussed below, Congress recently provided an additional opportunity for study of expedited removal under the International Religious Freedom Act of 1998. The Act requires the Comptroller General to perform a second study of specified aspects of the expedited removal process by September 1, 2000.

The Expedited Removal Study's original planned methodology involved a comprehensive statistical analysis of sampled data and extensive on-site observations at ports of entry. Due to a denial of access to primary data and on-site observations by the INS, the Study's methodology was modified. In its first year, the Study focused principally on the collection of data from NGOs and attorneys that have provided representation or consultative advice to asylum-seekers subject to the expedited removal process. In its second year, the Study continues to collect data of this nature. To date, the Study has collected and analyzed information on 604 cases. Additionally, the Executive Office for Immigration Review (EOIR) has cooperated with a Freedom of Information Act request and produced copies of records of proceedings in expedited removal cases in which there is immigration judge review. Thus, the Study has been able to broaden the nature of its data to include this primary data from the EOIR; this second year report includes an analysis of the first 132 EOIR cases. The Study is currently challenging the INS's denial of access to primary data, as discussed below, in order to obtain more comprehensive data.

The majority of the data collected by the Study, obtained from attorneys, NGOs, and the EOIR, do not constitute a random sample. Nonetheless, the Study believes that its data, which includes detailed socio-demographic information on the individuals subject to expedited removal, as well as comprehensive information on each stage of the process, continue to raise important questions about the implementation of expedited removal. These questions can only be answered by access to primary data on and observation of the expedited removal process.

Part I of this Report provides a brief background on the statutory and regulatory provisions governing the expedited removal process. Part II briefly describes the background and methodology of the Study, and its continuing efforts to gain access to primary data. Part III describes recent changes in the law and policy relating to expedited removal. Part IV presents the Study's data and analysis of the data. Part V presents case studies, collected both from primary and secondary sources of data, on the experiences of persons subject to expedited removal. These case studies illustrate significant aspects of the process. Part VI addresses a number of significant legal and policy issues that have arisen during the application of expedited removal to: 1) Chinese nationals arriving by sea; and 2) asylum-seekers bound for Canada who transit through the United States.

---

<sup>5</sup> See *infra* Part III(A).

## I. The Expedited Removal Process<sup>6</sup>

In 1996, in the IIRAIRA, Congress enacted the expedited removal statute, which permits the summary return of certain persons seeking admission to the United States.<sup>7</sup> This law has been codified as section 235 of the Immigration and Nationality Act (INA). INA § 235(b)(1)(A)(I) provides that expedited removal applies to all “arriving aliens”<sup>8</sup> who are inadmissible for fraud or misrepresentation in seeking to procure a visa, other documentation, or admission to the United States (INA §§ 212(a)(6)(C)) or inadmissible for a lack of valid or suitable documentation (212(a)(7)). Expedited removal also applies to stowaways who express a fear of persecution or an intent to apply for asylum.<sup>9</sup> It does not apply to Cubans who arrive in the United States by plane<sup>10</sup> or to pre-April 1, 1997, parolees.<sup>11</sup> Under most circumstances, unaccompanied minors are also exempt from expedited removal.<sup>12</sup> The INA permits the Attorney General to apply expedited removal to persons who entered without inspection, but cannot establish that they have been physically present in the United States continuously for the two-year period immediately prior to the date of the determination of inadmissibility.<sup>13</sup> As of this writing, the Attorney General has declined to apply expedited removal to this category of persons.

Immigration officers of the INS conduct initial examinations of all arriving individuals at primary inspection, and route persons whose inadmissibility is in question to secondary inspection for further questioning. During secondary inspection, persons determined by an immigration officer to be subject to expedited removal may be ordered removed without further process. Under INA § 212(a)(9)(A)(I), the removal order becomes final upon a supervisor’s approval, and bars reentry to the United States for five years. INA § 235(a)(3) permits the

---

<sup>6</sup> For a detailed explanation of the expedited removal process, see Part I of the First Year Report, *supra* note 3.

<sup>7</sup> IIRAIRA § 302.

<sup>8</sup> An “arriving alien” is defined as one “who seeks admission to or transit through the United States . . . at a port of entry.” 8 C.F.R. § 1.1(q). “Arriving aliens” include persons interdicted in international or United States waters. INA § 235(a)(1).

<sup>9</sup> INA § 235(a)(2).

<sup>10</sup> 8 C.F.R. § 235.3(b)(1)(i).

<sup>11</sup> Office of Field Operations, INS Memorandum: Policy Concerning Pre-1997 Parolees (June 30, 1997), *reprinted in* 74 INTERPRETER RELEASES 1528 (Aug. 18, 1997). *See also* 8 C.F.R. § 1.1(q).

<sup>12</sup> Office of Programs, INS Memorandum: Unaccompanied Minors Subject to Expedited Removal (Aug. 21, 1997) (Attachment 1 to First Year Report, *supra* note 3).

<sup>13</sup> INA § 235(b)(1)(A)(iii).

withdrawal of an application for admission in the discretion of the Attorney General, in which case the applicant may depart without being subject to the five year bar on reentry.

Pursuant to the law, there are two groups of persons subject to expedited removal who are to be provided with additional procedural protections, rather than being immediately returned: 1) those who express a fear of persecution or an intention to apply for asylum; and 2) those who claim a right to reside in the United States based on citizenship, permanent resident, asylum or refugee status.<sup>14</sup> Persons claiming lawful status must have their claims verified by an immigration officer.<sup>15</sup> If the immigration officer is unable to verify a person's status, he or she will be referred to an immigration judge (IJ).<sup>16</sup> Those who express a fear of return or a desire to apply for asylum are referred to a "credible fear" interview to determine if they will be allowed to present their claims through the regular process provided by law to apply for asylum,<sup>17</sup> restriction on removal,<sup>18</sup> or protection under the Torture Convention.<sup>19</sup> A "credible fear of persecution" is established if "there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under Section 208."<sup>20</sup> If it is determined that a person does not have a credible fear of persecution, he or she may request *de novo* review by an IJ. The statute precludes any further administrative or any judicial review.<sup>21</sup>

Those persons who are found to have a credible fear of persecution will have their applications for asylum and related protections heard by an immigration judge in removal proceedings under INA § 240. Those who fail to establish a credible fear during the credible fear process or whose claims to lawful status are not verified by an inspector or immigration judge will be summarily removed from the United States.

---

<sup>14</sup> INA §§ 235(b)(1)(A)(ii), (b)(1)(C); 8 C.F.R. § 235.3(b)(5).

<sup>15</sup> 8 C.F.R. § 235.3(b)(5).

<sup>16</sup> *Id.*

<sup>17</sup> *See* INA § 208.

<sup>18</sup> *See* INA § 241(b)(3).

<sup>19</sup> *See* Pub. L. No. 105-277, § 242(a) (Oct. 19, 1998); 8 C.F.R. § 208 (interim regulations); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Feb. 4, 1985, 1465 U.N.T.S. 85, 23 I.L.M. 1027, *modified* 24 I.L.M. 535, G.A. Res. 39/46, U.N. GAOR, 39<sup>th</sup> Sess., Supp. No. 51 at 197, U.N. Doc. A/39/51 (1985).

<sup>20</sup> INA § 235(b)(1)(B)(v).

<sup>21</sup> INA § 235(b)(1)(C).

The statute provides for mandatory detention, until removal, of all persons subject to expedited removal proceedings.<sup>22</sup> A limited form of parole (release from detention) is available for individuals subject to expedited removal, in accordance with INA § 212(d)(5), if "the Attorney General determines, in the exercise of discretion, that parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective."<sup>23</sup> A person who establishes a credible fear of persecution is no longer subject to expedited removal proceedings, but rather to regular removal proceedings under INA § 240. Therefore, a person who establishes a credible fear of persecution may be eligible for parole "under normal parole criteria."<sup>24</sup>

## II. The Expedited Removal Study: Background, Methodology, and Access to Data<sup>25</sup>

The Expedited Removal Study — a program of the Center for Human Rights and International Justice at the University of California, Hastings College of the Law<sup>26</sup> — is a scholarly research project that seeks to collect and analyze data on the nationwide implementation of the new expedited removal procedures. The Study is directed by Karen Musalo, Resident Scholar of the Center. Professor J. Edward Taylor serves as Research Consultant. Lauren Gibson, Research Fellow, serves as Project Coordinator. The Study has a diverse Advisory Board composed of well-respected academic and policy leaders in the immigration field. Board members include two former INS General Counsels, a former congressional senior staff person, Richard Day (with former Senator Alan Simpson), and

---

<sup>22</sup> INA § 235(b)(1)(B)(iii)(IV); 8 C.F.R. § 235.3(b)(2)(iii). Prior to the credible fear interview, if there is insufficient detention space to detain an individual who arrived at a land port of entry, the individual may be required to wait in Canada or Mexico pending a final determination of her claim. However, those persons who make false claims to United States citizenship or false or unverified claims to lawful permanent resident, asylee, or refugee status, and persons whose fear of persecution is "related to" Canada or Mexico will be detained in the United States. Office of the Deputy Commissioner, INS Memorandum: Implementation of Expedited Removal (Mar. 31, 1997) (Attachment 3 to First Year Report, *supra* note 3); INS, INSPECTOR'S FIELD MANUAL 17-33 (Oct. 1998).

<sup>23</sup> 8 C.F.R. §§ 235.3(b)(2)(iii), (b)(4)(ii).

<sup>24</sup> Office of the Deputy Commissioner, *supra* note 22, at 3-4.

<sup>25</sup> For more detailed information on the background and original and evolving methodology of the Study, in addition to the INS's denial of access to primary data to the Study, see Part II of the First Year Report, *supra* note 3.

<sup>26</sup> The Study was originally located at Santa Clara University. In December 1998, the Study relocated to the University of California, Hastings College of the Law.

representatives of policy institutes and non-governmental organizations. UNHCR is also a member of the Study's Advisory Board, serving in observer status.<sup>27</sup>

The Study was designed to examine all components of expedited removal. These components include secondary inspection, credible fear interviews, and immigration judge reviews of credible fear determinations and claims to status as a United States citizen, legal permanent resident, refugee, or asylee. The goal of the Study is to provide solid statistical and qualitative information about expedited removal to policy makers and the public. The Study seeks to determine whether expedited removal, as implemented, meets the dual congressional objectives of preventing abuse of the process, while at the same time identifying and screening-in *bona fide* asylum-seekers.

The Study's methodology was originally intended to include primary data collection through on-site observation of expedited removal procedures at selected ports of entry, and a review of INS data. The data was to be evaluated through: (1) a purely statistical component; (2) a qualitative and quantitative analysis of the impact of variables on outcome, the quality of process, and the quality of decision-making; and (3) qualitative case studies.

In accord with its planned methodology, at its inception, the Study attempted to obtain the cooperation of the INS in obtaining access to relevant data, and permission to conduct on-site observation at selected ports of entry. The INS denied the majority of the Study's requests.<sup>28</sup> As a result of the denial of access, the Study modified its methodology, and focused principally on the gathering of data from secondary sources, including attorneys and NGOs who provide representation or consultation to persons placed in expedited removal proceedings.

The Study continues to seek primary data from the INS, which is necessary for a comprehensive evaluation of the expedited removal process. In an attempt to obtain the data which the INS has refused to voluntarily produce, the Study submitted a Freedom of Information Act (FOIA) request to the United States Department of Justice.<sup>29</sup> The following information was requested: all documents concerning individuals placed in expedited removal proceedings; all Forms I-275 (Withdrawal of Application for Admission/Consular Notification) executed on behalf of individuals believed to be inadmissible under INA § 235(b)(1); and all data reflecting statistics related to the implementation of expedited removal.<sup>30</sup>

---

<sup>27</sup> A list of the Study's Advisory Board members is contained in Attachment 11 to the First Year Report, *supra* note 3, and is available at the Study's website.

<sup>28</sup> See First Year Report, *supra* note 3, Part II(C).

<sup>29</sup> See Letter from Karen Musalo, Director, Expedited Removal Study, to the United States Department of Justice (June 1, 1998) (Attachment 1).

<sup>30</sup> *Id.* The documents requested concerning individuals placed in expedited removal included, but were not  
(continued...)

To date, the INS's response to the Study's FOIA request remains largely non-responsive. In response to the request for case files of individuals placed in expedited removal, the INS produced the files of four individuals. These few files were so heavily redacted that there was insufficient data for analysis.<sup>31</sup> In response to the Study's request for statistical data, the INS produced one substantial item: a table analyzing expedited removals in April 1997 by INS district and nationality.<sup>32</sup> This table had been prepared fourteen months prior to the FOIA request and did not contain up-to-date information. The other piece of statistical data produced contained the total number of expedited removals by month and INS region from October 1997 through April 1998.<sup>33</sup> Although not produced in response to the Study's FOIA request, the Study has obtained three other pieces of statistical information prepared by the INS: (1) the total numbers of expedited removals by port of entry, world region, and country of nationality from April through September 1997 and October 1997 through August 1998;<sup>34</sup> (2) the total numbers of expedited removals, by world regions and selected country breakdowns, in fiscal year 1998 and from October 1998 through February 1999;<sup>35</sup> and (3) the numbers of persons placed in expedited removal or referred to credible fear interviews at San Francisco International Airport from October 1998 through February 1999, by country.<sup>36</sup> In addition, UNHCR has provided statistical information regarding the numbers of persons placed in expedited removal who contacted

---

<sup>30</sup>(...continued)

limited to: Form I-867 (Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act); Form I-860 (Notice and Order of Expedited Removal); Form M-444 (Information about Credible Fear Interview); Form I-870 (Record of Determination / Credible Fear Work Sheet); Form I-862 (Notice to Appear); Form I-863 (Notice of Referral to Immigration Judge); and Form I-869 (Record of Negative Credible Fear Finding and Request for Review by Immigration Judge).

<sup>31</sup> Almost all information relevant to the persons' applications for admission, including the facts stated in support of their fear, was redacted; many pages appear almost wholly blank. Partial samples of two of the four files produced by the INS are contained in Attachment 2. When the EOIR produced the identical forms in response to the Study's FOIA, the redaction was limited to clearly identifying information, such as the name and file number of the individual.

<sup>32</sup> See Expedited Removals by District and Nationality: April 1997 (Attachment 3).

<sup>33</sup> See Selected Subcategories of Formal Removals: FY 1998 by Month (Attachment 3).

<sup>34</sup> See Expedited Removals FY97 (April-September) and FY98 (October-August) (Attachment 3).

<sup>35</sup> See Office of Policy and Planning, Expedited Removals FY 1998 and 1999 (Attachment 3). These statistics report that in fiscal year 1998, a total of 76,490 persons were placed in expedited removal, including 71,767 persons from Mexico, 1,506 persons from South America, 1,107 persons from Asia, 1,058 persons from the Caribbean, 792 persons from Central America, 446 persons from Africa, and 341 persons from Canada.

<sup>36</sup> See Attachment 4. This document was prepared by the San Francisco INS District pursuant to a request by the Lawyers' Committee for Civil Rights in San Francisco on March 5, 1999, for statistics on the number, languages, and nationalities of people being placed in expedited removal.

UNHCR: their nationality, gender, and age; the facilities in which they were detained; and the results of their cases by stage of the expedited removal process.<sup>37</sup>

On December 14, 1998, the Study appealed the INS's substantial failure to produce the data requested pursuant to its FOIA request;<sup>38</sup> that appeal is currently pending. The Study may seek federal court review of the INS's obligation to produce the requested data under the FOIA.

Unlike the INS, the EOIR was responsive to the Study's FOIA request and agreed to provide, on an ongoing basis, a redacted copy of the records of proceedings (ROPs) in every expedited removal case in which there has been immigration judge review. As noted above, the EOIR ROPs are not so heavily redacted that they do not provide valuable data. Rather, the EOIR ROPs provide the most comprehensive information the Study has obtained to date on secondary inspections and credible fear interviews by asylum officers. The EOIR has provided the Study with over 150 records of proceedings, 132 of which are discussed in this Report.<sup>39</sup> The majority of the ROPs received from the EOIR to date are from the following EOIR field offices: Elizabeth, New Jersey; Jamaica, New York; New York, New York; and Miami, Florida.

Each ROP consists of the Immigration Court's file on the matter, and contains notes from secondary inspection as well as the credible fear interview. The ROPs generally include most or all of the INS forms associated with the expedited removal process.<sup>40</sup> The following forms, which provide the most comprehensive information on secondary inspection and the credible fear process, are usually included in the ROP: Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act (Form I-867), Determination of Inadmissibility (Form I-860), Record of Determination / Credible Fear Work Sheet (I-870), and the Order of the Immigration Judge.<sup>41</sup> Form I-867 provides an account of the questioning at secondary inspection, in question and answer form. The names of the immigration officers performing the inspection and the name of the interpreter or interpretive service used are generally provided. Form I-870 provides information on the credible fear interview, including interpreter services, interview length, persons present at the interview, credibility findings, the basis for the asylum officer's decision,

---

<sup>37</sup> See UNHCR, Expedited Removal Statistics: UNHCR Regional Office Washington DC 1 April 1997-24 March 1999 (Attachment 5).

<sup>38</sup> See Letter from Karen Musalo, Director, Expedited Removal Study, to the Office of Information and Privacy (Dec. 14, 1998) (Attachment 6).

<sup>39</sup> The remainder of the EOIR cases and future cases will be discussed in the Study's third year report.

<sup>40</sup> A full sample ROP is contained in Attachment 7. See First Year Report, *supra* note 3, Part I and Attachments 2 and 5-9, for more information on and samples of INS forms associated with the expedited removal process.

<sup>41</sup> Forms I-867 and I-870 are contained in Attachments 2 and 6 to the First Year Report, *supra* note 3. A sample Order of the Immigration Judge is contained in Attachment 7 to this Report.

and bars to asylum, in addition to information on medical conditions, detention, and release. The form is generally accompanied by the asylum officer's notes on the information asked and provided during credible fear interviews. Generally, the notes are in question and answer form and the asylum officers summarize their findings and the bases for such findings in narrative form. The Order of the Immigration Judge indicates the disposition of the case on review by stating whether the credible fear determination by the asylum officer is affirmed or vacated. Unfortunately, this document does not provide a narrative discussion of the case or basis for the decision.

Throughout its second year, the Study has continued to collect and analyze information obtained from attorneys and NGOs providing representation to asylum-seekers. In the Study's First Year Report, data from these sources were presented on 280 individuals subject to expedited removal from 62 countries. In its second year, the Study reports data from these sources on 604 individuals from 80 countries. In addition, this Report provides data on 132 cases derived from the EOIR ROPs, in each of which there was immigration judge review of a credible fear determination or claim to lawful status in the United States.

The information collected from attorneys and NGOs does not constitute a random sample of all expedited removal cases (which as of February 1999 totalled approximately 144,000) or of all cases referred to credible fear interviews (which the Study approximates to be around 5,300).<sup>42</sup> Notwithstanding the limitation on the Study's database, the data collected continues to raise questions, similar to those raised in the First Year Report, regarding the impact of certain variables upon outcomes in the expedited removal process, such as whether women or people of low socioeconomic status are disadvantaged. Analysis of the Study's data indicates that socio-demographic characteristics such as age, education, gender, or country of origin may have an impact on who is screened-in and who is removed. The Study's initial analysis of the data obtained from the EOIR ROPs raises similar questions. These questions cannot be answered without access to INS data and procedures.

### **III. Recent Developments in Law and Policy Relating to Expedited Removal**

In addition to gathering and analyzing data on individuals placed in expedited removal (Section IV), the Study follows significant developments in law, policy, and practice that relate to expedited removal, and examines the impact the expedited removal process has, if any, on the

---

<sup>42</sup> The INS has not provided the Study with statistics on the number of credible fear referrals in the expedited removal process. The Study approximates the credible fear referrals at 5,300 on the basis of the following: 1) the INS has reported that as of February 1999, 1,056 persons who were referred to credible fear interviews were removed pursuant to expedited removal; 2) the INS has reported that 80% of all persons referred to credible fear interviews are approved; assumedly 20% are denied and removed subject to expedited removal; 3) the Study assumes that 1,056 represents the 20% of the credible fear referrals which were denied; 4) the Study assumes that the total number referred to credible fear interviews is approximately 5,300.



law, policy, and practice of other countries. In this section, the Study provides an overview of important developments, including (1) the passage of the International Religious Freedom Act of 1998, in which Congress provided for further study of the expedited removal process; (2) the dismissal and ensuing appeals of cases challenging the implementation of expedited removal as it applies to asylum-seekers and applicants for admission to the United States with facially valid visas that are deemed invalid; (3) UNHCR's release of guidelines and recommendations on the detention of asylum-seekers; and (4) a change in Canada's refugee claim process for refugees arriving from the United States at a land border which may prevent such persons from being placed in expedited removal in the United States.

#### A. International Religious Freedom Act of 1998

In March 1998, the GAO released its report on the first year of the implementation of expedited removal.<sup>43</sup> Although the GAO's Report provides useful information, its objectives and methodology were distinct from those of the Expedited Removal Study. The Study's objective is to conduct qualitative, as well as quantitative, analysis of expedited removal, including an evaluation of the accuracy of decision-making. The GAO did not undertake to evaluate the accuracy of decision-making in the expedited removal process, even though Congress intended for the GAO to do so.<sup>44</sup> In further contrast, while the original methodology of the Study intended to include substantial on-site observation, the GAO study entailed very limited on-site observation of the process.<sup>45</sup> On-site observation is critical to an objective assessment of the process, including an evaluation of agency compliance with controlling statutory and regulatory requirements. Instead, the GAO researchers relied largely upon INS's own records of compliance or non-compliance with formal requirements.<sup>46</sup>

---

<sup>43</sup> See GAO, *ILLEGAL ALIENS: CHANGES IN THE PROCESS OF DENYING ALIENS ENTRY INTO THE UNITED STATES* (Mar. 1998).

<sup>44</sup> Congress directed the GAO to study the following issues related to expedited removal:

- (A) the effectiveness of such procedures in deterring illegal entry,
- (B) the detention and adjudication resources saved as a result of such procedures,
- (C) the administrative and other costs expended to comply with the provision,
- (D) *the effectiveness of such procedures in processing asylum claims by undocumented aliens who assert a fear of persecution, including the accuracy of credible fear determinations,* and
- (E) the cooperation of other countries and air carriers in accepting and returning aliens removed under such procedures.

IIRAIRA, Appendix B (Requirement for Study and Report on Implementation of Removal Procedures) (emphasis added).

<sup>45</sup> The GAO research team observed a total of sixteen secondary inspections, nine credible fear interviews, and five immigration judge reviews. See GAO, *supra* note 43, at 21.

<sup>46</sup> For example, the GAO reviewed case files and examined the officers' notations as to whether they had asked the questions pursuant to Form I-867A regarding fear of persecution at secondary inspection. *Id.* at 7. See (continued...)

On October 27, 1998, Congress passed the International Religious Freedom Act of 1998, which provides the opportunity for additional study of the implementation of expedited removal.<sup>47</sup> The Act requires a second study to be performed and submitted to congressional committees by September 1, 2000, on whether, with respect to persons who may be eligible for asylum, immigration officers performing their duties under the expedited removal laws are engaging in any of the following conduct: (1) “[i]mproperly encouraging such aliens to withdraw their applications for admission;” (2) “[i]ncorrectly failing to refer such aliens for an interview by an asylum officer for a determination of whether they have a credible fear of persecution (within the meaning of section 235(b)(1)(B)(v) of such Act);” (3) “[i]ncorrectly removing such aliens to a country where they may be persecuted;” and (4) “[d]etaining such aliens improperly or in inappropriate conditions.”<sup>48</sup> This future study is not limited in scope to cases in which a fear of persecution is based on religion.

Additionally, this Act provides the opportunity for experts to coordinate with the Comptroller General in this second governmental study of expedited removal. It establishes the United States Commission on International Religious Freedom,<sup>49</sup> and gives the Commission the discretion to ask experts to cooperate with the Comptroller General in conducting the study.<sup>50</sup> Experts designated by the Commission may also submit a report, either independently or with the Comptroller General, to the following committees by September 1, 2000: the Committees on the Judiciary of the House of Representatives and the Senate, the Committee on International

---

<sup>46</sup>(...continued)

also First Year Report, *supra* note 3, Part II(D).

<sup>47</sup> See Pub. L. No. 105-292, 112 Stat. 2787 (1998). Congress described the purposes of this Act as follows:

An Act to express United States foreign policy with respect to, and to strengthen United States advocacy on behalf of, individuals persecuted in foreign countries on account of religion; to authorize United States actions in response to violations of religious freedom in foreign countries; to establish the Ambassador at Large for International Religious Freedom with the Department of State, a Commission on International Religious Freedom, and a Special Adviser on International Religious Freedom within the National Security Council; and for other purposes.

*Id.*

<sup>48</sup> International Religious Freedom Act § 605(a)(2).

<sup>49</sup> The Commission is to be composed of an Ambassador at Large, appointed by the President with the advice and consent of the Senate, and nine other members who are not being paid as officers or employees of the United States. *Id.* at §§ 101(b), 201(b).

<sup>50</sup> *Id.* at § 605(a)(2).

Relations of the House of Representatives, and the Committee on Foreign Relations of the Senate.<sup>51</sup>

### B. Lawsuits Challenging the Implementation of Expedited Removal

Under INA § 242(e)(3)(B), any action challenging the validity of the expedited removal process “must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure . . . is first implemented.” Pursuant to this provision, in March and May 1997, three lawsuits were brought to challenge the implementation of expedited removal on behalf of both asylum-seekers and other applicants for admission to the United States, including United States citizens, legal permanent residents, individuals with facially valid visas, and others for whom no entry documents are required.<sup>52</sup> In their complaints, the plaintiffs claimed that (1) the interim implementing regulations and other policies and procedures relating to expedited removal contravene the plain language and intent of IIRAIRA;<sup>53</sup> and (2) IIRAIRA, the interim implementing regulations and other policies and procedures violate various protections guaranteed by the United States Constitution and international law.<sup>54</sup> On August 20, 1998, Judge Emmet Sullivan granted the Government’s motion to dismiss these complaints. The

---

<sup>51</sup> *Id.* at §§ 605(b)(1), (2).

<sup>52</sup> On March 27, 1997, a complaint was filed by the Lawyers’ Committee for Civil Rights of the San Francisco Bay Area (LCCR) and the ACLU Immigrants’ Rights Project in *American Immigration Lawyers Association v. Reno*, No. 97-0597. This complaint challenges the implementation of expedited removal on behalf of asylum-seekers and others, and alleges improper promulgation of the implementing regulations to IIRAIRA (specifically, that the required notice and comment period had not been provided). *District Court Dismissed Expedited Removal Challenges*, 75 INTERPRETER RELEASES 1403, 1403 n.5 (Oct. 9, 1998). On May 30, 1997, the LCCR and the ACLU filed another complaint, *Liberians United for Peace and Democracy (LUPD)*, No. 97-1237, which challenges the implementation of expedited removal on behalf of asylum-seekers only. These cases were consolidated and are referred to as *LUPD*. Plaintiffs subsequently dismissed the claims in the first complaint which related to non-asylum-seekers. Another complaint, *Wood v. Reno*, No. 97-1229, was filed on behalf of the American Immigration Law Association (AILA), other organizations, and individuals. This lawsuit challenges the implementation of expedited removal as it affects applicants for admission to the United States other than asylum-seekers, including individuals with facially valid visas and individuals for whom no entry documents or visas are required. *Id.*

<sup>53</sup> The lawsuits challenged, *inter alia*, the following implementing regulations, policies, and procedures on the grounds that they violated IIRAIRA: (1) the ban on aliens’ communication with family, friends, and legal representatives during secondary inspection; (2) the failure to provide adequate translation at secondary inspection and credible fear determinations; (3) the failure to provide access to, and the participation of, counsel prior to and during the credible fear determination and any IJ review thereof; (4) the failure to provide adequate information on charges and procedures; and (5) the application of expedited removal procedures to persons with facially valid documents. *American Immigration Lawyers Association v. Reno*, 18 F. Supp. 2d 38, 53 (D.C. Cir. 1998).

<sup>54</sup> *District Court Dismissed Expedited Removal Challenges*, *supra* note 52, at 1404.

cases were consolidated on appeal to the Court of Appeals for the District of Columbia Circuit; arguments are currently scheduled for September 1999.<sup>55</sup>

### C. Mandatory Detention of Persons Placed in Expedited Removal

The expedited removal laws require the detention, until removal, of all persons subject to expedited removal proceedings. A limited form of parole (release from detention) is available for persons subject to expedited removal, in accordance with INA § 212(d)(5), if "the Attorney General determines, in the exercise of discretion, that parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective."<sup>56</sup> Persons who establish a credible fear of persecution are no longer subject to expedited removal proceedings, but rather to regular removal proceedings under INA § 240. Therefore, such persons may be eligible for parole "under normal parole criteria."<sup>57</sup>

The mandatory detention of asylum-seekers is a highly debated issue and a matter of humanitarian concern. Dennis McNamara, Director of UNHCR's International Protection Division, has stated that detention of asylum-seekers constitutes a breach of the 1951 Convention relating to the Status of Refugees.<sup>58</sup> Alternatively, a representative of INS Headquarters, Russ Bergeron, was reported as stating that "international law fully recognizes the right of a country to detain someone seeking entry when issues of their identity and credibility are in question."<sup>59</sup>

---

<sup>55</sup> *American Immigration Lawyers Association*, 18 F. Supp. 2d at 62. All claims of the individual plaintiffs, with the exception of two, were dismissed on the ground that under INA § 242(e)(3)(B), they failed to present their claims within sixty days of the implementation of IIRAIRA. *Id.* at 46-47. All organizational plaintiffs were dismissed on the grounds that they lacked standing except as to their First Amendment claims. *Id.* at 50, 52. As to their First Amendment claims, Judge Sullivan found that under *Ukrainian-American Bar Ass'n v. Baker*, 893 F.2d 1374 (D.C. Cir. 1990), "legal assistance organizations do not have a First Amendment right to government-provided access to aliens in removal proceedings," and therefore did not have the right of access to the secondary inspection process. *Id.* at 61-62. As to the remaining two individual plaintiffs, Judge Sullivan denied their substantive claims because he found that the implementing standards of IIRAIRA, as reasonable agency interpretations, were entitled to deference, and that the two individuals, who were coming to visit the United States on tourist visas, lacked sufficient ties to the United States to trigger scrutiny under the Due Process Clause. *Id.* at 52-57. Judge Sullivan's decision on the plaintiffs' First Amendment claims has not been appealed.

<sup>56</sup> 8 C.F.R. §§ 235.3(b)(2)(iii), (b)(4)(ii).

<sup>57</sup> Office of the Deputy Commissioner, *supra* note 22, at 3-4.

<sup>58</sup> *U.N. Official Criticizes the U.S. for Detaining Illegal Refugees*, MIAMI HERALD, Mar. 8, 1999.

<sup>59</sup> John M. Goshko, *INS Rejects U.N. Suggestion on Jailing Refugees*, WASH. POST, Feb. 23, 1999.

On February 10, 1999, UNHCR released guidelines on the detention of asylum-seekers.<sup>60</sup> The Guidelines provide that “[a]s a general principle, asylum-seekers should not be detained.”<sup>61</sup> UNHCR recognizes a few exceptions to this general principle,<sup>62</sup> but encourages alternatives to detention in all situations.<sup>63</sup> The Guidelines further provide that asylum-seekers who are minors should not be detained.<sup>64</sup> The Guidelines also recommend that asylum-seekers be given procedural guarantees,<sup>65</sup> and that they be detained under humane conditions.<sup>66</sup> Conditions of

---

<sup>60</sup> UNHCR, Guidelines on applicable Criteria and Standards relating to the Detention of Asylum-Seekers (Guidelines) (Feb. 10, 1999) (Attachment 8).

<sup>61</sup> *Id.* at Guideline 2. UNHCR notes that the fact that asylum-seekers “may not be in a position to comply with the legal formalities for entry” and the fact that asylum-seekers have often had traumatic experiences should be taken into account in determining any restrictions on their freedom of movement.

<sup>62</sup> The Guidelines provide that detention should only be resorted to where it is “*necessary*” to verify identity, to determine the elements of the claim of refugee status, to protect national security and public order, and in cases where asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities. *Id.* at Guideline 3 (emphasis in original). The Guidelines clarify that, absent the existence of other exceptional grounds, detention of asylum-seekers using fraudulent documents or no documents at all is only permissible where there is an “intention to mislead” or a refusal to cooperate with authorities. Furthermore, the Guidelines state that asylum-seekers who arrive without documentation because they are unable to obtain documentation in their country of origin should not be detained solely for that reason. *Id.*

<sup>63</sup> *Id.* at Guideline 4. Such alternatives include: monitoring, reporting requirements, residency requirements, provision of a guarantor/surety, release on bail, and collective accommodation centers where asylum-seekers are allowed to obtain permission to leave and return during stipulated times. The Guidelines further provide that in the cases of unaccompanied elderly persons, torture or trauma victims, and persons with mental or physical disability, active consideration of alternatives to detention should precede an order of detention. *Id.* at Guideline 7.

<sup>64</sup> *Id.* at Guideline 6. UNHCR adds that where possible, minors should be released into the care of family members who have already obtained residency in the asylum state.

<sup>65</sup> These procedural guarantees include: prompt and full communication of any order of detention and the basis for such detention in a language the asylum-seeker understands; notification of the right to counsel; automatic review of the detention determination before a judicial or administrative body independent of the detaining authorities and follow-up periodic reviews; the right to challenge, either personally or through a representative, the necessity of deprivation of liberty at the review hearing; and the right to contact and be contacted by UNHCR, and to communicate with UNHCR in private. *Id.* at Guideline 5.

<sup>66</sup> The Guidelines emphasize the following regarding detention conditions: asylum-seekers should undergo initial screening at the outset to identify trauma or torture victims; men, women, and children should be separated except that children should not be separated where part of a family group; separate detention facilities should be used, and where separate facilities are not available, asylum-seekers should be detained separately from convicted criminals; asylum-seekers should be able to make regular contact and receive visits from friends, relatives, religious, social, and legal counsel; appropriate medical and psychological counseling should be available; opportunities for continuing vocational or educational training and exercise of religion should be available; access to basic necessities should be available; and a complaints mechanism should be devised. *Id.* at Guideline 10.

detention involve yet another subject that has been a focus of debate and concern by policy-makers and has been widely reported on in the media.<sup>67</sup>

On February 17, 1999, in a letter to INS, UNHCR presented its Guidelines, reiterated its concerns regarding the detention of refugees and asylum-seekers, and encouraged the INS's "development and implementation of alternatives to detention whenever appropriate."<sup>68</sup> UNHCR noted concern over the fact that asylum applicants arriving at ports of entry are detained while their cases are pending, even though they are eligible for parole. It further expressed concern that "[m]any of these individuals remain in detention for months and even years, regardless of the fact that they have not been accused or convicted of any crime, that they have established that they have a credible basis for their asylum claim, and that they have a place to live while their cases are pending."<sup>69</sup> At the same time, UNHCR "applaud[ed]" INS's efforts to continue to use its discretion to parole individuals who seek asylum at ports of entry.<sup>70</sup>

#### **D. Canadian Change in Admission Procedure at Land Borders**

The Expedited Removal Study also seeks to examine the impact, if any, of expedited removal on the law, policy and practices of other countries. In this context, it has closely followed a recent change in procedure at the Canadian land border.<sup>71</sup>

---

<sup>67</sup> See *infra* Part V(A), Case Studies 1, 5, 6.

<sup>68</sup> Letter from Karen Koning AbuZayd, Regional Representative, UNHCR, to Commissioner Doris Meissner, INS (Feb. 17, 1999) (Attachment 9).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Also in this context, it has come to the attention of the Study that the Senate of Canada is considering a bill that proposes increased United States preclearance powers in Canadian airports. The United States has operated preclearance areas in Canada since 1974, in accord with the Agreement between the Government of Canada and the Government of the United States of America on Air Transport Preclearance, May 8, 1974, T.I.A.S. No. 7825. Under the preclearance process, United States federal inspection agencies inspect travelers and goods that are destined for the United States. Canadian sources report that air preclearance services at seven Canadian airports clear 8.5 million persons annually. Canada-U.S. Relations: Overview of the Legislation (visited Mar. 19, 1999) <<http://www.dfait-maeci.gc.ca/geo/usa/overview-e.htm>>.

The proposed bill gives United States preclearance officers in Canada many powers, including the following: refusal to preclear a traveler who does not satisfy to the officer that such person or his or her goods can be admitted to the United States in accordance with preclearance laws; frisk searches of persons the officer suspects on reasonable grounds to be carrying anything "that would afford evidence" of the making of a false or deceptive oral or written statement to a preclearance officer with respect to preclearance; and the temporary detention and delivery to Canadian officers of travelers reasonably believed to have made such a false or deceptive statement or to be carrying goods posing a danger. *Id.*; Bill S-22, 1st Sess., 36th Parliament, 46-47 Elizabeth II, 1997-98 (visited Mar. 19, 1999) <[http://www.parl.gc.ca/36/1/parlbus...overnment/S-22\\_1/190022bE.html](http://www.parl.gc.ca/36/1/parlbus...overnment/S-22_1/190022bE.html)>. The making of a false or  
(continued...)

Prior to November 1998, many Canadian ports of entry temporarily returned refugee claimants who arrived at the Canadian border to the United States to await the initial processing of their Canadian refugee status claims.<sup>72</sup> Pursuant to the procedures at these ports, refugee claimants who arrived at the Canadian border were required to present themselves on the Canadian side of the border to commence their Canadian refugee status claims. After submitting fingerprints and a photograph in Canada, they were asked to return to the United States with a form to complete, which was to be sent to a Canadian immigration office. These refugee claimants were required to wait in the United States until this form was approved, and then were permitted to enter Canada. Canadian NGOs informed the Study that these procedures were in effect for a significant number of years prior to 1998, and that although the procedures for processing refugee claimants at different ports of entry varied over the years, many, but not all, refugee claimants were temporarily returned to the United States to await initial processing of their claims.<sup>73</sup>

Following the changes in United States immigration law in 1996 under IIRAIRA, these claimants were at risk of being subjected to expedited removal and of being detained upon return to the United States.<sup>74</sup> A number of claimants were reported to have been detained or jailed in

---

<sup>71</sup>(...continued)

deceptive statement is an indictable offense under Canadian law. *Id.*

Under certain circumstances, the proposed law, if enacted, would appear to have a similar effect on admissions to the United States as expedited removal, except that it would bar entry from a foreign location, rather than a United States port of entry. Under the proposed bill, preclearance officers may refuse to preclear any person who makes a false or deceptive statement regarding their preclearance. Thus, persons who would be determined to be inadmissible on grounds that would subject them to placement in expedited removal (misrepresentation or fraud in seeking to procure admission to the United States under INA § 212(a)(6)(C)) if at the United States border, would likely be barred from entry to the United States prior to reaching the United States border.

The Citizenship and Immigration Section of the Canadian Bar Association, in its comments on the submission of this bill, stated that it could not endorse the bill for numerous legal and policy reasons, including the lack of safeguards and controls which afford travelers protection, and the wisdom of granting extensive powers of detention, search, seizure, forfeiture, and the use of force to preclearance officers. *See* Immigration Law Section of the Canadian Bar Association, Submission on Bill S-22, The Preclearance Act (on file with the Expedited Removal Study).

<sup>72</sup> Enforcement Branch, Citizenship and Immigration Canada, Memorandum: Temporary return of Refugee Claimants at Ports of Entry [Enforcement Branch Memo], at 1 (Nov. 30, 1998) (on file with the Expedited Removal Study).

<sup>73</sup> *See also* Brian Laghi and Lila Sarick, *Waiting Period Waived for Refugee Claimants*, GLOBE AND MAIL, Dec. 3, 1998.

<sup>74</sup> *Id.*

the United States after initiating their claims in Canada, and returning to the United States to await entry to Canada.<sup>75</sup>

After much lobbying by refugee groups, in November 1998, the Government of Canada changed its policy of temporarily “directing back” refugee claimants over the Canadian border to the United States while their claims are being processed.<sup>76</sup> In its memorandum announcing the change in policy, the Enforcement Branch of Citizenship and Immigration Canada (CIC) stated: “In order to ensure that all refugee claimants are allowed access to the refugee determination system, refugee claimants will not be temporarily sent back to the U.S. to await the initial processing of their claims.”<sup>77</sup>

Regarding its decision to change this policy, the Enforcement Branch noted that temporarily returning refugee claimants to the United States, without a guarantee that these claimants would be able to pursue their Canadian claims, “could be interpreted as an attempt by CIC to implement the safe-third-country provision of the legislation without first complying with statutory requirements.”<sup>78</sup> Huguette Shouldice, spokesperson for the CIC, commented:

Our concern was simply for us, that all people be allowed to come back. . . .

Because there was no guarantee, we looked at it and said no, we’re not going to take a chance, if there’s no absolute guarantee to be allowed on the date that we said they could come back.<sup>79</sup>

Upon arrival in Canada, refugee claimants are rarely detained. Immigration officers, however, may detain a refugee claimant who poses a risk to Canadian society or whom the

---

<sup>75</sup> Reverend John Long, Executive Director of VIVE La Casa, commented that fifty persons had been detained in the spring of 1998, and that all had been released, but that “in some cases it took tremendous effort to get them to Canada.” *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Enforcement Branch Memo, *supra* note 72, at 3-4.

<sup>78</sup> *Id.* at 1. Under the “safe third country” concept, refugees can be denied access to a substantial refugee status determination in a particular country, on the grounds that he or she has already found protection, or could reasonably be expected to find protection in another country. *See, e.g.*, DANISH REFUGEE COUNCIL, “SAFE THIRD COUNTRY”: POLICIES IN EUROPEAN COUNTRIES 1 (1997). Under the laws of certain countries, the safe third country principle may apply to persons who merely transited through another country. *Id.* at 164. *See also infra* Part VI(B), notes 245-49 and accompanying text.

The Canadian Council for Refugees had argued that directing claimants back to United States, where they risked being detained and being unable to pursue their claims in Canada, was equivalent to implementing safe third country principles without any of the safeguards contained in the draft agreement between the United States and Canada, on which negotiations were formally halted in February 1998. *See infra* Part VI(B), notes 243 and 249 and accompanying text.

<sup>79</sup> *See* Laghi and Sarick, *supra* note 73. Ms. Shouldice also noted that most of the problems had occurred in the Buffalo area.



officer has reason to believe will fail to appear for an immigration hearing.<sup>80</sup> Recently, INS officials visited Canada on a public relations visit aimed at improving relations between border officials of the two countries. The Canadian press reported that although the INS officials stated that they did not intend to tell Canada how to tighten its refugee process, they also stated that they were happy to “let the facts speak for themselves.”<sup>81</sup> They informed their Canadian counterparts that the number of asylum claims dropped from 100,000 to 25,000 a year since the United States enacted laws requiring the detention of asylum-seekers, except where it is believed that such claimants have a credible fear of persecution and will appear at their immigration hearings.<sup>82</sup> However, Lois Reimer, spokesperson for CIC, stated that Immigration Minister Lucienne Robillard rejected any recommendation to broaden the category of refugee claimants subject to possible detention in Canada.<sup>83</sup>

#### IV. The Expedited Removal Study's Database

##### Introduction

The Expedited Removal Study's database provides information on individuals who have been processed under the new expedited removal procedures since they were first implemented in April 1997. The Study has obtained this information from the EOIR and from attorneys and NGOs representing or providing consultation to these individuals. The information gathered addresses 79 variables in the database which are related to the individual (i.e., socio-demographic, nationality, etc.) and/or to the expedited removal process (i.e., port of entry, basis of inadmissibility, basis of credible fear determination, and length of detention).

The database in its entirety contains both primary and secondary information. The data the Study has collected from the EOIR is classified as “primary.” It is based on information in INS and EOIR documents which constitute the ROP,<sup>84</sup> and is referred to as the “EOIR database.” At this time, its cases are limited to the first year of the implementation of expedited removal. As the EOIR continues to produce cases, the database will include cases from subsequent years of the implementation of expedited removal. The EOIR cases do not constitute a random sample

---

<sup>80</sup> See Enforcement Branch Memo, *supra* note 72, at 4; Dianne Rinehart, *U.S. Officials Make Case for Tougher Immigration Policies*, VANCOUVER SUN, Feb. 23, 1999.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> The documents that constitute an ROP are described in Part II of this Report. For a sample ROP, see Attachment 7.

of all expedited removal cases because they originate from a limited number of ports,<sup>85</sup> and, by definition, represent cases in which there was an adverse credible fear determination and immigration judge review.

The remainder of the Study's database contains secondary information, which was not collected from a review of official data, but rather from attorneys and representatives of individuals subject to the expedited removal process. This compilation of data is referred to generally as the "Attorney database."<sup>86</sup> These secondary data, which constitute a majority of the Study's data (604 of 736 cases), are also not a random sample of all expedited removal cases, in that they are limited to those individuals who came into contact with an attorney or NGO at some point during the expedited removal process.

The majority of the persons in the Study's entire database are asylum-seekers who were not issued an expedited removal order at secondary inspection, but who were referred to a credible fear interview. However, the database also includes a small number of cases in which an arriving person claimed lawful status as a United States citizen, lawful permanent resident, asylee, or refugee, as well as a few persons removed after secondary inspection without receiving further process. There is insufficient data on these groups of persons to engage in either quantitative or qualitative analysis.

The cases in the Study's database do not constitute a random sample of those persons placed in expedited removal as a whole, or of all cases referred to credible fear interviews.<sup>87</sup> Thus, it is inappropriate to generalize from this database to the population of all persons placed in expedited removal, or to the sub-population of persons referred to a credible fear interview during secondary inspection. Despite its limitations, the Study's database constitutes the only such collection of information on actual individuals who have gone through the expedited removal process. The experiences and characteristics of these individuals raise questions about the implementation of the process which cannot be answered without access to INS data and procedures.

---

<sup>85</sup> The EOIR has produced cases by port of entry, and at the current juncture, the clear majority of the cases are from Miami, New York and New Jersey EOIR field offices.

<sup>86</sup> In the discussion which follows, "Attorney Year One database" and "year one" will be used to refer to cases that commenced during the first year of implementation of expedited removal (April 1, 1997-March 31, 1998). "Attorney Year Two database" or "year two" will be used to refer to cases that commenced during the second year of the implementation of expedited removal (April 1, 1998 -March 31, 1999).

<sup>87</sup> See *supra* note 42 and accompanying text.

### A. Description, Uses and Properties of the Database

The Study's database has two components, one quantitative and the other qualitative. The quantitative component includes information on 79 variables for each individual in the database, with additional information in comments, arranged in an EXCEL spreadsheet. This information addresses the background and socio-demographic characteristics of persons placed in expedited removal, in addition to details on each stage of the process and on detention.<sup>88</sup> The qualitative component includes case studies in narrative form. The case studies complement the quantitative data by providing overviews, in varying degrees of detail, of individuals' experiences at each stage of the expedited removal process. The case studies illustrate significant aspects of the expedited removal process and also raise issues regarding the accuracy of decision-making. Case studies are presented in Part V.

As noted above, the Study's database includes cases obtained from the EOIR, attorneys, and NGOs.<sup>89</sup> The Study attempted to obtain information on the maximum number of variables for both pools of cases. Details on a number of variables could not always be obtained.<sup>90</sup> Within the EOIR database, details on certain variables were not available as a result of redaction and inherent limits on information provided in the forms which constitute an ROP. It was often not possible to derive from the ROP background information on an individual (such as age or education level), information on various qualitative aspects of the procedure (including quality of interpretation), rationales of immigration judge review decisions, and information on duration of detention. Notwithstanding these limits, the data obtained from the EOIR ROPs are consistently the most comprehensive data on the interpretation and application of the credible fear standard which the Study has obtained to date. Each ROP includes the forms containing the questions and answers at secondary inspection and the credible fear interview, as well as the credible fear assessment, and the immigration judge's decision. Taken collectively, the ROPs provide substantial detail on the nature and adjudication of an applicant's asylum claim, as well as on the basis of inadmissibility. Detailed information on the components of the ROPs received in these cases is set forth in Part II of this Report, and a sample ROP is contained in Attachment 7.

As with the EOIR data, within the Attorney database, full information on all 79 variables was often not available. Information was collected from attorneys and NGOs mainly by

---

<sup>88</sup> A chart of the variables in the Study's database is contained in Attachment 26 to the First Year Report. The variables, in addition to background and socio-demographic information, seek information on: arrival, secondary inspection, detention, the nature of the asylum claim, credible fear interviews and results, immigration judge review and results, and post-expedited regular removal hearings. *See also* First Year Report, *supra* note 3, Part III(A).

<sup>89</sup> New attorney and NGO sources were added in the Study's second year, while some existing sources continued to provide information about cases.

<sup>90</sup> Throughout its analysis, the Study uses the maximum number of cases to calculate percentages and averages; the Study's tables indicate the number of cases used to estimate values for each variable presented.

telephone interview. The quantity of information each source could provide varied depending on the particular case and the extent of her involvement. Some attorneys did not have sufficient information to answer a question while others could not remember the particular details of a case. In some cases, documents were later provided which supplied information on additional variables.

For the reasons earlier noted, neither the EOIR or Attorney database constitute a random sample. Therefore, it is inappropriate to generalize<sup>91</sup> from the Study's database to the population of all individuals in expedited removal, or to the sub-population of those who were referred to a credible fear interview and/or for immigration review of their claims. Although the Study continues its efforts to obtain information on persons removed at secondary inspection, information on these persons in the database is minimal. Thus, the characteristics of individuals and case outcomes in the database may reflect those of: 1) persons placed in expedited removal; 2) the sub-population referred from secondary inspection to credible fear; 3) the sub-population of persons able to successfully seek representation at some point during this process (for cases in the Attorney database); or 4) the sub-population of persons found not to have a credible fear of persecution (for cases in the EOIR database).

Even with these limitations, the Study's database provides useful information regarding expedited removal. It is appropriate to examine the characteristics of the individuals in the database, explore how they correlate with expedited removal outcomes, and ask why, for individuals in the database, there appear to be differences in outcomes over time and for people with different socio-demographic characteristics. In addition, the database provides a baseline for comparison with information the Study hopes to gather through on-site observation and review of INS documents, once these become available.

The following sections present and discuss the information in the Study's database. A few points should be underscored regarding comparisons and analysis between the EOIR and Attorney databases, and between year one and year two of the Attorney database. At present, all EOIR ROPs are for the cases of individuals entering the United States during year one of the implementation of expedited removal. Thus, it is inappropriate to compare the characteristics and outcomes of the EOIR database to the Attorney Year Two database.

In contrast, a comparison between cases in the Attorney Year One and Year Two databases is appropriate. Differences in characteristics or outcomes between year one and year two cases may reflect changes in the ways in which expedited removal procedures are being implemented (including decisions made at secondary inspection, and credible fear determinations

---

<sup>91</sup> For more information on the properties and generalizability of the data, see Section III(C) of the First Year Report.

by asylum officers) or it may reflect a difference in the actual mix of cases.<sup>92</sup> For example, the incidence of positive credible fear determinations increased between year one and year two; in the Attorney Year Two database, nearly all individuals were approved at the credible fear determination stage. This could reflect a difference in the nature of the claims presented, or it could be a result of an increased “filtering out” of cases at secondary inspection, i.e., INS officers referring only the strongest cases for credible fear interviews.

### B. Summary of Cases in the Study's Database as of March 31, 1999

As of March 31, 1999, 736 cases had been entered into the Study's expedited removal database. Information on 604 cases was obtained from attorneys and NGOs (Attorney database) and information on 132 cases was distilled from EOIR ROPs. Although, as discussed above, one cannot generalize from this database to the population of all persons subject to expedited removal, the data indicate the following:

- **Gender:** In the Attorney Year One database, there was a low percentage of women (32%) in the sample of those not removed at secondary inspection, but referred to credible fear interviews. In the Attorney Year Two database, the percentage of women is even lower, at 22%. The EOIR database reflects a low percentage of women (33%).
- **Socio-economic status:** In the Attorney Year One database, there was a relatively high socio-economic status (reflected in high education, urban origins, English fluency, and family contacts in the United States and Canada) in the sample of those not removed at secondary inspection, but referred to credible fear interviews. There has been a slight decrease in certain of the indicators of high socio-economic status from year one to year two in the Attorney database. The socio-economic status of persons in the EOIR database is somewhat lower than that in the Attorney Year One database.

---

<sup>92</sup> Changes in characteristics or outcomes of cases in the database over time could be influenced by a number of factors, including: (1) differences in the characteristics of individuals entering the expedited removal process and seeking representation over time (for example, an escalation of human rights violations in a given country may increase that country's representation and change the mix of socio-demographic characteristics and possibly also outcomes in the expedited removal database); and (2) differences in attorney and NGO sources between the two years. The Study has attempted to keep close contact with year one attorney and NGO sources, in order to update cases and add new ones to the database. Nevertheless, in some cases this was not possible. Moreover, the year two cases include many cases obtained from attorneys first contacted in year two. Different attorney sources may represent different types of expedited removal cases, with a greater or smaller likelihood of a positive outcome.

This second factor should have less of an impact as the coverage of attorney sources in the expedited removal database increases. The number of attorney and NGO sources was 50 at the end of year one and is 94 at present. To some extent, differences in the characteristics of individuals entering the expedited removal process and seeking representation over time can be understood better by looking for evidence of changing mixes of nationality, gender, language, or other characteristics and exploring how these characteristics may correlate with expedited removal outcomes for individuals in the database.

- **Basis of Inadmissibility:** In the Attorney Year Two database, there has been a marked decrease in the percentage of individuals placed in expedited removal for facially valid documents deemed invalid (from 17% in year one to 2% in year two). In both years, women were twice as likely as men to be charged with possession of facially valid documents deemed invalid. In the EOIR database, 8% of persons were placed in expedited removal for possessing facially valid documents deemed invalid; women were almost three times as likely as men to be charged with possession of facially valid documents deemed invalid.
- **Detention:** There has been a decrease in average days of detention from year one (103 days) to year two (61 days) in the Attorney database. In year one there were differences in detention time by region; these differences persist into year two. Length of detention varies by country of nationality, with above-average duration of detention for African asylum-seekers.
- **Credible fear interview:** In the Attorney Year One database, there was a 94% approval rate at the credible fear interview stage. The approval rate in year two was 99.5%. By definition, the EOIR database is limited to cases in which there was a denial at the credible fear interview; i.e., it represents a 100% denial rate.
- **Basis of denial:** In the EOIR database, the two most common bases for denial by asylum officers are that the applicant is not credible (40%), and that the applicant failed to establish a nexus to an enumerated statutory ground (33%). Denials were less commonly based on a finding that the harm was not persecution (19%) or that the fear was not well-founded (6%).
  - Men were denied on the basis of credibility twice as often as women (48% of men, 23% of women).
  - Women were denied on the basis of nexus more than twice as often as men (53% of women, 24% of men).
  - Women were also denied more often than men on the basis that the harm did not constitute persecution (25% of women, 16% of men).
  - Nigerians were found to be not credible 100% of the time.

The foregoing represent characteristics and outcomes of actual cases that raise questions regarding the expedited removal process. Various explanations for these, and other trends identified in the database are discussed in the sections which follow.

## C. Detailed Summary of Cases by Nationality, Port, and Socio-Demographic Characteristics

### 1. Countries of Nationality

Tables 1-3 summarize the countries of nationality of individuals represented in the Attorney and EOIR databases. In the Attorney Year One and Year Two databases (Tables 1 and 2), the largest countries of nationality are Sri Lanka (26% in year one, 28% in year two), Somalia (7% in both years), Haiti (5%, 11%), China (5%, 20%), Cuba (5% in both years), and Nigeria and Mexico (4% in both years). A comparison of the Attorney Year One and Year Two data reveals comparable percentages of cases from Sri Lanka (26% in year one, 28% in year two) and Somalia (7% in both years). There is a higher percentage of cases in year two from China (20%, versus 5% in year one) and from Haiti (11%, versus 5%), but similar percentages from Cuba, Nigeria, and Mexico (4 - 5%). The majority of the EOIR cases (Table 3) represent Haitians (36% of all EOIR cases), Chinese (9%) and Albanians (8%).

Numbers of cases by country of nationality may reflect differences in the human rights situations in countries, differences in the ability of asylum-seekers to leave their countries and seek asylum in the United States, or differences in the ability of individuals to seek representation or counsel (Attorney database) or request IJ review (EOIR database). The differences in nationality also reflect geographic characteristics of the EOIR and Attorney samples.

### 2. Ports of Entry

Tables 4-6 list the major ports of entry for the Attorney and EOIR databases. Eight of the ten major ports of entry remained the same between the Attorney Year One and Year Two databases (Tables 4 & 5). However, the rankings differ, reflecting in part the inclusion of many new cases from Southern California (particularly the San Diego area) in year two. More than half (56%) of all cases in the Attorney Year One database entered through either the New York/JFK,<sup>93</sup> Los Angeles, Miami, or Newark airports. The largest four ports represented in the Attorney Year Two database are San Diego (18%), Los Angeles (17%), Miami (15%), and San Ysidro (12%); jointly, they account for 62% of all cases. Changes in country of nationality mixes between the two years should be kept in mind when analyzing socio-demographic characteristics and expedited removal outcomes. Country of nationality is obviously correlated with socio-demographic characteristics, and it may be associated with expedited removal outcomes, as well.

Most EOIR cases in the database to date are from the Miami, New York and New Jersey EOIR field offices, and 80% entered through Miami, New York/JFK, or Newark airports (Table

---

<sup>93</sup> New York/JFK is used to indicate John F. Kennedy International Airport in New York.

6). Haitians are disproportionately represented in the Miami IJ reviews. The Attorney databases have a far more complete national representation than the EOIR database (Tables 4 and 5). They reflect the importance of the New York/JFK, Miami, and Newark ports of entry, which are among the 10 largest ports of entry in both years. However, they include a diversity of other ports of entry, as well, including Los Angeles and the U.S.-Mexico border ports of Brownsville, San Ysidro, San Francisco, San Diego, and San Juan, Puerto Rico.

### **3. Socio-Demographic Characteristics**

Tables 7 and 8 report socio-demographic characteristics of the individuals in the Attorney Year One and Year Two databases, and Table 9 summarizes socio-demographic characteristics of individuals in the EOIR sample.

The Attorney Year One and Year Two samples differ in important respects. The gender distribution, overwhelmingly male in year one, is skewed even more sharply in favor of males in year two (78% male, as compared to 68% in year one). Without INS's official statistics, it is impossible to know whether the low representation of women in the Study's database reflects that fewer women than men arrive at the United States and are placed in expedited removal proceedings, or that fewer women than men are referred to secondary inspection, reflecting disadvantage in the process.

Gender appears to be associated with nationality in the database (Table 10). Around 80 to 90% of all cases from Sri Lanka, China, Somalia, and Nigeria — four of the five largest countries of nationality in the combined database — are males. In a number of countries with fewer cases in the database — Pakistan, Sudan, Rwanda, Serbia — all entrants are male. By contrast, more than half of all cases in the database from Haiti (52%) and Guatemala (74%) are females.

Year one and year two entrants in the database are equally likely to speak fluent English (15 - 16%), but a smaller percentage of year two entrants are reported to speak at least some, limited English (21%, compared with 33% in year one). Individuals in both samples are predominantly of urban origin, but a much lower percentage are urban in year two (52%) than in year one (72%). This reflects the increase in representation from the San Diego and San Ysidro sectors, where only 16% of cases are of urban origin.

Average schooling is lower in the year two sample. The percentage of entrants with low schooling (6 years or fewer) is higher in year two (22%) than in year one (9%). At the other end of the schooling spectrum, the percentages in the two highest schooling categories are lower in year two (28% have more than 12 years of schooling, and 9% have more than 16 years) than in year one (39% and 18%, respectively). The percentage with intermediate schooling (7-12 years) is also lower in year two (45%, compared with 50%).



More than half (53%) of all individuals in the Attorney Year Two database had some family member living in the United States, higher than in the Attorney Year One database (43%). Both these percentages are considerably lower than the percentage of EOIR cases with family members already in the United States (81%).

The Study does not have sufficient data to ascertain the extent to which the predominance of men and the observed shifts related to socio-economic characteristics between the Attorney Year One and Year Two databases are representative of all credible fear referral cases. If they were representative, such trends in these important variables could reflect the manner in which expedited removal procedures are being implemented, or they could reflect differences in the composition of the population arriving at the United States and requesting admission. For example, if the predominance of men in the Study's database were characteristic of all cases referred for credible fear interviews, there could be several different explanations for the gender disparity: a) persecution in the countries represented in the Study's database could overwhelmingly be targeted at males; b) persecution may target males and females equally, but males may be more mobile and better able to leave their home countries; or c) males and females may be equally persecuted and able to leave their home countries, but males may be more successful at being referred to a credible fear interview and at making contact with an attorney or NGO. It is impossible to conclusively explain the lack of gender parity without access to INS statistics showing the gender mix of persons routed to secondary inspection, and subsequently referred to credible fear interviews.

Individuals in the EOIR database are slightly younger than individuals in the Attorney database — 26 years of age, compared with 28 years. Males also predominate in the EOIR database, constituting 67% of all cases.

A comparison of EOIR and Attorney Year One cases suggests that there may be differences in the characteristics of people who receive an adverse credible fear determination, and request IJ review (i.e., individuals in the EOIR database). Individuals in the EOIR database (Table 9) are more likely to be young and less likely to be of urban origin than those in the Attorney database. Like individuals in the Attorney Year One database, they are roughly two-thirds male. Individuals in the EOIR database tend to have less schooling, 79% with fewer than 12 years of formal schooling (compared with 59% in the Attorney Year One sample) and 12% with more than 16 years (compared with 18% in the Attorney Year One sample). English language ability is similar between the two groups, with a slightly lower percentage of individuals in the EOIR database speaking fluent English (11%, compared with 16% in the Attorney Year One data). Finally, individuals in the EOIR database are more likely to have family contacts already in the United States (81%, compared with 43% in the Attorney Year One sample).

#### **D. Description and Analysis of INS's Basis of Inadmissibility**

Tables 11 through 13 report the basis of inadmissibility upon which the INS relied in placing an individual in expedited removal. The tables report this as the “charge” at secondary inspection. A majority of the entrants in both the Attorney Year One (57%, Table 11) and Year Two (53%, Table 12) databases were placed in expedited removal proceedings because of false documents. A much higher percentage of individuals in the EOIR database (76%, Table 13) were charged with having false documents. Forty-two percent of individuals in the Attorney Year Two database were charged with having no documents, almost twice the percentage of individuals in the Attorney Year One database. The percentage of individuals in the EOIR database charged with having no documents was only 8%.

A number of people in both the EOIR and Attorney databases were placed in expedited removal for seeking admission with facially valid documents which were deemed invalid (e.g. persons with valid non-immigrant visas — visitor or student — who are deemed to have immigrant intent). In the Attorney Year One database, 17% of the individuals placed in expedited removal possessed facially valid documents deemed invalid; however, only 2% of the individuals in the Attorney Year Two database were placed in expedited removal proceedings for this reason. There appears to be a shift in the data away from “facially valid deemed invalid” to “false” documents as the reason for placing individuals in expedited removal proceedings. In the EOIR database, 8% of the individuals were placed in expedited removal because their facially valid documents were deemed to be invalid. A smaller percentage of individuals (3–4% in the Attorney databases, 7% in the EOIR database) were placed in expedited removal for possessing invalid documents (such as an expired visa).<sup>94</sup>

The basis of inadmissibility appears to vary by country of nationality and by gender (Tables 14 – 19). A majority of individuals from most countries in the three databases were placed in expedited removal proceedings for possessing false documents. In the Attorney Year One database (Table 14), “false documents” was the major charge for the two largest country groups — Sri Lankans (82%) and Somalians (65%). However, the third and fourth largest groups — Cubans and Mexicans — were charged primarily with having no documents (Cubans, 92%) or with facially valid documents deemed invalid (Mexicans, 44%). In the Attorney Year Two database (Table 15), 58% of Sri Lankans, 100% of Haitians, and 64% of Somalians were charged with having false documents, but individuals from China, the second largest country-of-origin group, were overwhelmingly charged with having no documents (95%).

In the EOIR database (Table 16), 87% of the individuals from Haiti, 91% from China, 73% from Albania, and 100% from Nigeria were charged with having false documents. Overall, the individuals most likely to be charged with having facially valid documents deemed invalid were from Albania, Haiti, or one of the countries of origin in the “other” category in the EOIR

---

<sup>94</sup> There was a small number of stowaways in the EOIR and Attorney Year One databases.

database. In the Attorney Year One database, 44% of the individuals from Mexico, 43% from China, and 20% from Iran (as well as 37% of individuals from countries in the “other” category) were charged with facially valid documents deemed invalid. In the Attorney Year Two database, 33% of the individuals from Russia, and 14% from Guatemala were placed in expedited removal for facially valid documents deemed invalid. In short, the “facially valid deemed invalid” charge was not frequently observed for the largest countries of nationality in the expedited removal database, but it did tend to be relatively more important for the countries accounting for fewer entrants.

In all three databases, there is a striking difference in the basis of inadmissibility between males and females (Tables 17-19). Overall, females are twice as likely as males to be placed in expedited removal for possessing facially valid documents deemed by the INS to be invalid. For example, this was the charge for 14% of the females in the EOIR database (Table 19), compared with only 5% of males. Females are also placed in expedited removal more often than males for possessing false documents. In contrast, males are considerably more likely than females to be placed in expedited removal for having no documents. (No female in the EOIR database was placed in expedited removal proceedings for having no documents.) In short, females are more likely than males to be placed in expedited removal for seeking admission with false documents or facially valid documents deemed invalid, while males are more likely than females to be placed in the process for having no documents at all.

#### **E. Arrival and Release from Detention**

The Study has attempted to obtain and analyze information on the duration of detention for those individuals in the expedited removal process who were found to have a credible fear of persecution. The Study has been able to calculate length of detention in cases where it had information on both the date of arrival to the United States and date of release from detention; length of detention was calculated to be the number of days between the two dates. There are a number of limitations on the Study's ability to provide comprehensive detention information. While information on detention within the Attorney database is available, it is somewhat incomplete. In many cases, the source attorneys were not able to provide information on the date of release from detention for individuals who had already been released. Furthermore, many individuals in the Study's database were still in detention as of the date the information was gathered; the Study was unable to calculate duration of detention without a release date. Because of this, actual lengths of detention are not available for all cases in the database. Where the Study did have adequate information, it calculated average length of detention by United States port of entry, by country of nationality, and by gender.

Overall, average length of detention for individuals with a positive credible fear determination was 103 days for the 134 cases on which the Study has information in the Attorney Year One database (Table 20). It was 61 days for the 50 cases on which the Study has detention release information in the Attorney Year Two database (Table 21). Detention information available in the Attorney database suggests a decrease in average lengths of

detention between the two years, but there is considerable variation in detention policies by port of entry, country of nationality, and gender.

For most countries of nationality, information on arrival and release from detention is available for only a small number of cases. Nevertheless, the range in detention across ports of entry is striking. For example, in the Attorney Year One data (Table 20), average detention ranges from 50 days or less for El Paso, San Francisco, St. Louis, and New Orleans to more than 100 days in Minneapolis, Los Angeles, New York/JFK, Champlain, and Boston, and more than 200 days in Houston, Portland, Philadelphia, and Chicago. In the Attorney Year Two database (Table 21), average detention ranges from fewer than 50 days in San Ysidro, Chicago, Houston, Miami, Detroit, and San Francisco, to more than 100 days in New York/JFK and Honolulu. Ports for which there are only one or two cases with detention information may appear to have unusually high or low average lengths of detention because detention is being calculated on such a small number of cases. An example is Chicago, which had two cases averaging 241 days of detention in year one and one case with only 37 days of detention in year two. However, taken together, Tables 20 and 21 reveal striking disparities in length of detention across ports of entry to the United States. Of the largest ports of entry, average detention appears to be longest for New York/JFK and shortest for Miami and San Francisco, with Los Angeles, Brownsville, Newark, and San Ysidro closer to the mean.

Length of detention also varies by country of nationality (Tables 22 and 23). Several African countries have average detention lengths well above the average in both the Attorney Year One and Year Two databases. The countries which have high durations of detention include the Democratic Republic of the Congo, Algeria, Nigeria, and Guinea. There are a number of possible explanations for the long duration of detention for Africans. One explanation is that Africans enter at ports of entry which have unusually high detention periods. A second explanation is that the individual Africans did not demonstrate the necessary criteria for discretionary parole. A third explanation is that the parole policy was applied in a manner which disfavored African asylum-seekers.

In an attempt to ascertain which of these explanations might have basis in fact, the Study considered the ports at which the majority of Africans sought admission. The major port of entry for Africans is New York/JFK (42% in year one, 22% in year two), where the average length of detention is high. However, this does not fully explain the lengthy detention of Africans, because they are detained longer than the average at that port of entry; their average detention in year one is 149 days,<sup>95</sup> as compared with 115 days for all cases entering through this port of entry. On the basis of the information the Study has compiled, it is not possible to speculate whether the long detention duration could be justified by the individual circumstances of the cases, or whether the parole policy was not applied in a uniform manner.

---

<sup>95</sup> This 149 day average detention applies to all Africans, with the exception of Somalians, who have a shorter average detention than nationals of all other countries in Africa in the Study's database.

The Study also looked at length of detention for the largest countries of nationality: Nigeria, Sri Lanka, Haiti, Cuba, China and Somalia. The length of detention appears to be longest for Nigeria and Sri Lanka and shortest for Haiti, Cuba, and China. Cases from Somalia have an average length of detention that is well above average in the Attorney Year One database (121 days, Table 22) but slightly below average in the Attorney Year Two database (53 days, Table 23).

In both of the Attorney databases, women have shorter average lengths of detention than men (Tables 24-25). The difference between the two is 22% in the Attorney Year One database (111 days for men, compared with 90 days for women) and 43% in the Attorney Year Two database (66 days, versus 46 days for women).

## **F. Description and Analysis of Grounds for Asylum**

Under international and domestic law, eligibility for asylum or restriction on removal (*non-refoulement*) requires a showing that the harm which is feared is “on account of” the individual’s race, religion, nationality, political opinion, or membership in a particular social group. The Study uses the terms “grounds for asylum” to represent the bases upon which fear of persecution or return to one’s country was claimed upon arrival in the United States.

It is important to keep in mind the following two factors when reading the analysis in this section. First, the Study’s information in this section regarding the grounds on which claims are based refers to cases in which such grounds were alleged by the applicant, were considered by an asylum officer, or could be inferred from the applicant’s statements. Second, many claims in the Study’s database involve multiple potential bases for asylum. Thus, when the Study states that a certain percentage of cases were based on political opinion, one cannot read this percentage to represent cases that were solely based on political opinion; they may be based on other grounds. This means that in the tables that follow, the percentages of claims based on different grounds may add up to more than 100%.

### **1. Grounds for Asylum Generally**

In the Attorney database, Tables 26 and 27 illustrate that political opinion and particular social group were the most frequent grounds on which claims were based. Claims based on political opinion accounted for 69% of year one cases and 47% of year two cases. Claims based on particular social group accounted for 63% of year one cases and 73% of year two cases. This indicates that in year two, claims were less frequently based on political opinion, while more claims were based on particular social group. Nationality was a ground on which claims were based in 20% of year one cases and 26% of year two cases. Race and religion were infrequent grounds for claims in both years one and two (under 10%). However, claims based on race were slightly more frequent in year two (3% to 6%), while claims based on religion were slightly less frequent (7% to 3%).

Tables 26 and 27 provide additional information of interest about the nature of these asylum claims. In year one, 13% of claims were gender-related, of which 52% were based on political opinion and 31% were based on particular social group. In year two, 30% of the claims were gender-related, of which 31% were based on political opinion and 60% were based on particular social group. It is interesting to note that a higher percentage of gender-related claims were based on particular social group in year two than in year one.

Furthermore, in the Attorney Year One database, 5% of claims were related to family planning, and no cases were related to sexual orientation. These percentages increased in year two, where 42% of the claims related to family planning, and 17% of the claims related to sexual orientation.

Table 28 illustrates that in the EOIR database, claims were based on political opinion in a majority of cases (63%). Particular social group was a basis for 12% of claims made. Thus, in the EOIR database, particular social group was a basis for significantly fewer claims than in the Attorney Year One database (69%). Religion and nationality served as the basis for claims in fewer than 5% of the cases in the EOIR database. Last, race served as the basis for no claims in the EOIR database, reflecting a slight difference when compared to the Attorney Year One database (3%). Only 2% of claims (3 cases) in the EOIR database were gender-related, of which two were based on political opinion, and one was based on particular social group. No EOIR cases in the database were related to sexual orientation, as in the Attorney Year One database.

The Study's database reflects an increase in the frequency of claims based on the grounds of particular social group from year one to year two in the Attorney database, and a significantly lower frequency of such grounds in the EOIR database. There is insufficient data to ascertain whether this characteristic (increased use of social group) is unique to the Study's Attorney database, or representative of all credible fear cases. If this characteristic were representative, it would raise some interesting questions. Although there are other, equally plausible explanations, the increase in usage of this ground in the Attorney database from year one to year two could be a result of the evolving social group jurisprudence. An alternative explanation could simply be that the year one attorney cases did not as frequently present facts which supported a claim based on particular social group as year two cases. As to the latter, a smaller percentage of cases in which particular social group was a basis for claims in the EOIR database could reflect perceived differences in controlling asylum jurisprudence by asylum officers, or again, that the facts of these cases simply did not support a social group claim. Without more detailed information, the Study is unable to explain these differences in the grounds for asylum.

### ***By Gender***

Tables 29 and 30 correlate gender with grounds for asylum in the Attorney database. Table 29 illustrates that in year one, with one exception, there were no differences greater than 6% between males and females regarding the grounds on which asylum claims were based. The exception was political opinion, where 73% of the claims of males were based on this ground, in

contrast to 58% of females (a 15% difference). Table 30 illustrates that in the Attorney Year Two database, there were larger differences in the percentages of grounds on which the claims of females and males were based than in year one. Thirty-three percent of females, as compared to 51% of males, had claims based on political opinion; 57% of females, as compared to 78% of males, had claims involving particular social group; 19% of females, as compared to 29% of males, had claims involving nationality; 5% of females, as compared to 2% of males, had claims involving religion; and 3% of females, as compared to 7% of males, had claims involving race. In short, males were more likely than females to have claims based on every ground except race. Basing asylum claims on multiple grounds was more common for males than females.

Table 31 correlates gender with grounds for asylum in the EOIR database. The largest difference between males and females was with regards to the particular social group ground, where 5% of females based their claim on this ground, as compared to 16% of males. The difference between males and females was less than 7% for the nationality, religion, and political opinion grounds. No claims in the EOIR database were based on race. Here, as in the two Attorney databases, the claims of men were more likely than women to be based upon multiple grounds; in fact there were no EOIR cases involving women with multiple grounds.

## **2. Grounds for Asylum by Port of Entry**

Tables 32 and 33 correlate the grounds for asylum by port of entry in the Attorney database. These tables illustrate that political opinion and particular social group are the predominant bases for feared persecution at the top ports of entry in the database. For example, for cases of individuals entering through Los Angeles in year one, 93% involved claims based on political opinion and 80% based on particular social group (as compared to 0% based on race, 4% based on religion, and 69% based on nationality). In year two, the percentages were 94% political opinion and 90% social group (as compared to 0% based on race, 3% based on religion, and 84% on nationality). Similarly, for cases of individuals entering through New York, in year one, 56% of cases involved claims based on political opinion, and 54% involved claims based on particular social group (as compared to 6% based on race, 8% on religion, and 2% based on nationality). In year two, the percentages were 83% and 67% respectively, with no cases being based on race, religion or nationality.

Notwithstanding the predominance of the political opinion and particular social group grounds at all ports of entry, there were notable differences in the grounds by ports of entry. For example, claims based on nationality were high at Los Angeles in both years (69% in year one and 84% in year two). However, claims based on nationality at the other top ports of entry were between 0 and 33% in both years one and two.<sup>96</sup> Also, there were no claims based on religion at Newark or San Ysidro in year one or two, while religion was asserted between 3% and 14% of

---

<sup>96</sup> The only exception is in year two, where at Honolulu, 100% of claims were asserted on the basis of nationality.

the time in cases at Los Angeles, San Francisco, and Brownsville in those same years. Last, while the majority of the most frequent ports in the Attorney Year One database did not involve claims of persecution based on race, in year two, 24% of claims of persons arriving at San Diego were based on race.

A comparison of year one to year two in the Attorney database shows a shift in the grounds on which claims were based at particular ports of entry. For example, claims premised on political opinion accounted for 46% of the cases where entry was through San Ysidro compared with 4% in year two. Also, particular social group was a basis for claims in 93% of cases where entry was through San Francisco in year one, compared with 56% in year two. There were smaller differences between the two years at a number of ports of entry; for example, of cases where entry was through Los Angeles, 4% involved claims based on religion in year one, while 3% of year two cases involved such claims. Similarly, of year one cases where entry was through Miami, 56% involved claims based on particular social group, compared with 50% in year two.

Table 34 presents information on grounds for asylum within the EOIR database. It shows that political opinion is the predominant basis for feared persecution at the most frequent ports of entry in the EOIR database. A comparison of the EOIR and Attorney Year One databases reveals a substantial difference at a number of ports between the EOIR and Attorney databases in the grounds for asylum on which claims were based. For example, persecution based on particular social group was claimed in 8% of the EOIR cases involving entry through Miami but in 56% of Attorney Year One database cases from Miami. Similarly, in the EOIR database, no claims of persecution were based on particular social group at Newark or San Ysidro, and only 16% were based on this ground at New York. However, in the Attorney Year One database, particular social group was a ground for 44% of cases entering through Newark, 58% of cases entering through San Ysidro and 54% entering through New York. Last, whereas 3% of EOIR cases where entrance was through Miami involved claims of persecution based on religion, 33% of Attorney Year One cases involved such claims.

### **3. Grounds for Asylum by Country**

Tables 35 and 36 correlate nationality with grounds for asylum in the Attorney database. Although political opinion and particular social group predominate for all nationalities, there were shifts between year one and year two as to the percentage of cases based on a particular ground within a nationality group. The only exception to this shift was Sri Lanka, which remained fairly constant. Examples of such shift include Nigeria and China. In year one, 20% of the claims of Chinese nationals were based on religion, 50% were based on political opinion, and 70% were based on particular social group. In year two, 22% of Chinese claims were based on race, 19% on nationality, 3% on political opinion, and 92% on particular social group. Also, in year one, 9% of Nigerian claims were based on religion, 90% were based on political opinion, and 20% were based on particular social group. In year two, 38% of Nigerian claims were based



on nationality, 13% were based on political opinion, and 50% were based on particular social group.

Table 37 relates grounds for asylum to nationality within the EOIR database. The table illustrates that an overwhelming majority of the claims for the largest nationalities in the database were premised on political opinion, in many cases to the exclusion of any other ground for asylum, unlike the near majority of cases in the Attorney database. For example, 100% of Nigerians had claims based solely on political opinion; 77% of Haitian claims were based on political opinion (with only 4% based on particular social group, and no claim on any other ground); 64% of Albanian cases were based on political opinion (with 9% based on particular social group, and no claim on any other ground).

## **G. Description and Analysis of the Adjudicatory Process**

The information which is available on the adjudicatory process is different in the Attorney than in the EOIR database. Cases in the Attorney database contain as much information on each stage of the expedited removal and post-expedited removal stages as the source of the information is able to provide. In contrast, the EOIR cases provide substantial information on the credible fear interview and ensuing determination, but nothing on post-expedited removal proceedings. The following section presents information drawn from the Attorney database, followed with that drawn from the EOIR.

### **1. Attorney Database**

#### ***Presence of Attorney or Consultant at the Credible Fear Interview***

Tables 38 and 39 show that 49% of persons placed in expedited removal in year one and 51% of persons in year two had attorneys or consultants present at the credible fear interview.

#### ***By Nationality***

Tables 38 and 39 also illustrate that in the Attorney database, the percentage of cases in year one and year two with attorneys or consultants present at the credible fear interview varied by nationality. For example, in year two, no Haitian had an attorney or consultant present at her credible fear interview, while 86% of Sri Lankans and 41% of the Chinese did have an attorney or consultant present.

As a comparison of the tables indicates, the percentage of cases in which persons had an attorney or consultant present at the credible fear interview varied for individual nationalities between years one and two. For example, in year one, 68% of Sri Lankans had attorneys or consultants present, as compared with 86% in year two. Also, in year one, there was an attorney or consultant present in 20% of the Somalian cases, as compared with 36% in year two.

Alternatively, some countries, such as Nigeria and Cuba, had differences of less than 10% between years one and two.

### ***Decision at the Credible Fear Interview***

Tables 40 and 41 report on credible fear determinations. The overwhelming number of cases in the Attorney database resulted in a positive credible fear determination (94% in year one and 99.5% in year two).

#### ***By Nationality***

Table 42 correlates nationality to the credible fear determination decision. In the Attorney Year One database, 100% of Somalians, Cubans, Nigerians, Iranians, and Sudanese received positive credible fear determinations. Nearly 100% of Sri Lankans (99%) also received positive credible fear determinations. In contrast, Haitians had a 13% rate of approval at the credible fear stage, the lowest percentage of all nationalities.

### ***Decision at Immigration Judge Review***

As most persons were determined to have a credible fear of persecution in years one and two in the Attorney database, there was immigration review in few cases. However, of the cases where there was review, 63% were vacated by an IJ in year one, and none were vacated in year two. The EOIR data, which provide information on a large number of IJ reviews, are a more sound basis for analyzing IJ review outcomes.

### ***Merits Asylum Hearing***

The Expedited Removal Study attempts to follow expedited removal cases through the entire adjudicatory process, in order to determine whether the process has an identifiable impact on subsequent adjudication of a case. Therefore, even though the merits asylum hearing is beyond the expedited removal process itself, the Study has collected and analyzed information on this stage of adjudication for cases in the Attorney database. Generally, information about the merits asylum hearing is not available for cases in the EOIR database.

The Study has information on approximately 80% of the year one expedited removal cases that proceeded to regular removal hearings in which asylum claims were presented. As reported in Table 43, of these cases, 58% have resulted in a grant of asylum, 13% have resulted in denials, and 10% have been terminated.

The Study has substantially less information on cases in the Attorney Year Two database (information on 25% as compared to 80% for year one), as 74% of the cases remain pending. This information is presented in Table 44, which shows that of the year two cases that reached a merits hearing, 67% were granted asylum, 9% were denied, and 13% were terminated.

---

*By Gender*

Table 45 correlates gender with outcome in post-expedited removal proceedings in the Attorney Year One database. Men and women who proceeded to regular removal hearings were denied asylum in 13% of cases. Fifty-two percent of women were granted asylum, as compared with 61% of men. Twenty percent of women's cases were terminated, compared to 6% of men's cases.

*By Nationality*

Table 46 presents the rate of approval by nationality in the Attorney Year One database. All Cubans (13 cases) were granted asylum, and no cases remain pending. Out of the Sri Lankan cases, 54% were granted asylum, 3% were denied, 25% were terminated,<sup>97</sup> and 9% remain pending. Out of the Nigerian cases, 56% received grants of asylum, 22% were denied, and 18% remain pending.

**2. EOIR Database*****Presence of Attorney or Consultant at the Credible Fear Interview***

Table 47 presents information on the percentage of persons in the EOIR database who had an attorney or consultant present at the credible fear interview. Thirty-six percent had an attorney or consultant present. The percentage of representation in the EOIR database is 14% points lower than that in the Attorney database (36% as compared to 50%).

*By Nationality*

Table 47 correlates representation at the credible fear interview to nationality. An attorney or consultant was present in 49% of Haitian cases, 18% of Albanian cases, and 36% of Chinese cases.

***Basis for Adverse Credible Fear Determination***

By definition, the EOIR database is composed of individuals who were found not to have a credible fear of persecution, and who requested IJ review. The Study divided the credible fear determination into elements corresponding to the applicant's burden of proof in order to analyze the basis for the adverse credible fear determination. Table 48 reports on the basis for adverse determinations. It illustrates that overall, the most frequent bases for such adverse credible fear

---

<sup>97</sup> Removal proceedings were terminated for several Sri Lankans in the Study's database who received a positive credible fear determination, were paroled, and departed for Canada. For more information, see Part V(A), Case Study 4 and Part VI(B) of this Report.

determinations were that the applicants were not credible (40%) or that there was no nexus between the past persecution or fear of persecution and a protected ground for asylum (33%). In 19% of the cases, asylum officers found that the harm alleged or feared was not persecution. In 6% of the cases, asylum officers found that the applicants did not have a well-founded fear of persecution.

### *By Gender*

In addition to reporting the basis of denial in the EOIR database as a whole, Table 48 reports the basis of denial by gender. Women are found to be more believable than men; men were found not credible in 48% of the cases, while women were found not credible 23% of the time. However, women fail in establishing nexus more than twice as often as men (no nexus in 53% of the cases involving women, compared with 24% involving men). The information in Table 48 suggests one other difference in the basis of denial by gender: the harm alleged is found not to be persecution in a greater percentage of the cases involving women than men (25% of the cases of women as compared with 16% of men).

There are a number of explanations for these gender-based differences in the basis of decisions. One explanation is that there are differences in the nature of the cases themselves. However, other possible explanations are that a failure to find nexus is due to continuing misunderstanding regarding the unique issues often raised by gender-related claims, which the INS has attempted to address in the form of guidance to asylum officers;<sup>98</sup> that cultural assumptions or other factors may explain the differing percentages between men and women on the basis of credibility; and that assumptions regarding the nature of the harm that women face may affect findings of a fear of persecution or past persecution.

### *By Nationality*

Table 49 correlates the basis of denial to nationality. Although the most frequent bases for denial for all nationalities were lack of credibility and nexus to a protected ground, there was variation among nationalities. For example, Nigerian, Pakistani, and Haitian cases were denied on the basis of a lack of credibility more than on any other basis (100%, 75% and 44% respectively). Forty-six percent of Albanian cases were denied on the ground that the harm alleged or suffered was not persecution, 36% were denied on the ground that there was no nexus to a protected ground for asylum, and 9% were denied because the applicant was found to be not credible. Among cases from Ghana and Mexico, the most frequent basis for denial was that there was no nexus to a protected ground for asylum (60% and 40% respectively).

---

<sup>98</sup> See Memorandum from Phyllis Coven, Office of International Affairs, INS, Considerations for Asylum Officers Adjudicating Asylum Claims From Women, *reprinted in* 72 INTERPRETER RELEASES 771 (June 5, 1995).

### *Immigration Judge Review*

Table 50 provides information on the results of immigration judge review. Immigration judges affirmed adverse credible fear determinations in the clear majority of cases (88%). Table 51 correlates IJ vacations of adverse credible fear determinations and the basis of the asylum officer's decision. Immigration judges affirmed the decision of asylum officers 100% of the time when the basis of the adverse credible fear determination was that the harm was not persecution or that the fear was not well-founded. They affirmed 93% of the decisions where the basis was that there was no nexus, and 77% of the decisions where the basis was that the applicant was not credible.

#### *By Gender*

Table 52 correlates IJ review with gender, and illustrates that adverse determinations were vacated slightly more often in the cases of males (14%) than in cases of females (12%).

#### *By Nationality*

Table 53 correlates IJ review with nationality, and illustrates that the percentages of cases in which adverse credible fear determinations were vacated varied significantly by nationality. The percentage of vacation for the top nationalities in the EOIR database is as follows: 9% of Haitian cases, 17% of Chinese cases, 9% of Albanian cases, 0% of Ghanaian cases (out of 5 cases), 0% of Mexican cases (out of 5 cases), and 40% of Nigerian cases (out of 5 cases).

## **V. Case Studies**

Section IV of this Report presents quantitative information regarding the individuals in the Study's database and the expedited removal process. This section of the Report presents fourteen case studies that address qualitative aspects of the expedited removal process, including the manner in which various stages of the process are conducted, the accuracy of decision-making during this process, the quality of interpretation, and the length and conditions of detention. Seven of these cases are from the Study's Attorney database, while the other seven are from the EOIR database.

The Study does not present these cases as representative of the EOIR and Attorney databases, the Study's database in its entirety, or of all cases in which persons have been placed in expedited removal. Rather, these are cases identified by the Study which illustrate important or problematic aspects of the expedited removal process.

The facts presented for these studies are based on the statements of the applicants, immigration officers, asylum officers, and immigration judges, as set forth in documents contained in the records of proceedings or as reported in interviews with attorneys and NGOs.

### *Immigration Judge Review*

Table 50 provides information on the results of immigration judge review. Immigration judges affirmed adverse credible fear determinations in the clear majority of cases (88%). Table 51 correlates IJ vacations of adverse credible fear determinations and the basis of the asylum officer's decision. Immigration judges affirmed the decision of asylum officers 100% of the time when the basis of the adverse credible fear determination was that the harm was not persecution or that the fear was not well-founded. They affirmed 93% of the decisions where the basis was that there was no nexus, and 77% of the decisions where the basis was that the applicant was not credible.

#### *By Gender*

Table 52 correlates IJ review with gender, and illustrates that adverse determinations were vacated slightly more often in the cases of males (14%) than in cases of females (12%).

#### *By Nationality*

Table 53 correlates IJ review with nationality, and illustrates that the percentages of cases in which adverse credible fear determinations were vacated varied significantly by nationality. The percentage of vacation for the top nationalities in the EOIR database is as follows: 9% of Haitian cases, 17% of Chinese cases, 9% of Albanian cases, 0% of Ghanaian cases (out of 5 cases), 0% of Mexican cases (out of 5 cases), and 40% of Nigerian cases (out of 5 cases).

## **V. Case Studies**

Section IV of this Report presents quantitative information regarding the individuals in the Study's database and the expedited removal process. This section of the Report presents fourteen case studies that address qualitative aspects of the expedited removal process, including the manner in which various stages of the process are conducted, the accuracy of decision-making during this process, the quality of interpretation, and the length and conditions of detention. Seven of these cases are from the Study's Attorney database, while the other seven are from the EOIR database.

The Study does not present these cases as representative of the EOIR and Attorney databases, the Study's database in its entirety, or of all cases in which persons have been placed in expedited removal. Rather, these are cases identified by the Study which illustrate important or problematic aspects of the expedited removal process.

The facts presented for these studies are based on the statements of the applicants, immigration officers, asylum officers, and immigration judges, as set forth in documents contained in the records of proceedings or as reported in interviews with attorneys and NGOs.

The Study does not make judgements about the veracity of these statements, but rather, attempts to present the facts which were presented during the expedited removal process and upon which determinations were made.

The Study did not evaluate the accuracy of the ultimate credible fear decision in these case studies. Because of the denial of access by the INS, the Study lacked crucial data, such as that which could be provided by on-site observation. For cases from the Attorney database, for example, the information available to the Study is limited to that provided by each attorney and varies in individual cases. For EOIR cases, each ROP includes the asylum officer's notes and the IJ's order.<sup>99</sup> It is not clear that an asylum officer's notes of the credible fear interview are verbatim.<sup>100</sup> Furthermore, the immigration judge's order only indicates the disposition of the case on review, but does not provide a basis for the decision. The Study was not provided with a transcript of the immigration judge proceeding, or the tape itself, which would have included the applicant's testimony, as well as statements by the immigration judge as to the rationale for the decision.

#### **A. Case Studies from the Attorney Database<sup>101</sup>**

##### **1. Ecuadoran Asylum-Seeker #1**

Mr. A, an Ecuadoran businessman, went into hiding after giving information to the police about a major crime in Ecuador. On July 1, 1995, gold and jewelry worth twenty billion sucres (five million U.S. dollars) was stolen from an office of the *Instituto Ecuatoriano de Seguro* (IESS), Ecuador's Social Security department. The press dubbed the huge theft "*El Robo del Siglo*" ("The Theft of the Century"), and a large reward was offered in return for information leading to the discovery of the perpetrators. One of Mr. A's friends, Mr. Z, had some contacts in the town where the theft had taken place, and they obtained information about the perpetrators of the crime. Mr. A, Mr. Z and two other friends (Mr. X and Mr. Y) promptly went to the National Police and the IESS to report what they had learned.

About a month later, the four men began to receive anonymous threats over the phone and by mail. Mr. A received three such phone calls. He was told that he would be killed because he had given information about the theft to the police.

---

<sup>99</sup> For a full description of the contents of each ROP, see *supra* notes 40-41 and accompanying text. A full sample ROP is contained in Attachment 7.

<sup>100</sup> See *infra* Part V(B), Case Study 2, note 165.

<sup>101</sup> Individuals are referred to by letter for the purposes of identification in this Report; the letters are unrelated to the actual names of the individuals.

In March 1996, acting on the information provided by Mr. A and his friends, the police arrested a number of suspects and charged them with participation in the theft. The suspects included a police officer and a well-known gang leader (who was later released). Two other police officers were implicated but never indicted. Following the arrests, Mr. X was attacked by unknown assailants, stabbed repeatedly with a machete, and left for dead. He was found and taken to the hospital. Upon Mr. X's recovery, he fled Ecuador and went to Colombia; Mr. A has not heard from him again.

After this incident, Mr. A and his other friends went into hiding. Mr. Z eventually left for Belgium to seek asylum. Mr. A and Mr. Y hid in the home of a relative, Mr. W. They soon began to receive threatening notes and phone calls. They were afraid to report to the police because police officers were involved in the theft. After a few months, Mr. A and Mr. Y hid in another home located in a remote area. Members of Mr. W's family were targeted for helping the two men; one woman was attacked by three men while bringing food to the men in hiding. After that attack, Mr. A, Mr. Y and Mr. W sought assistance from the *Comision Ecumenica de Derechos Humanos* (CEDHU), a human rights organization. They were advised to leave Ecuador. The CEDHU obtained visas for the three men and made arrangements for them to travel to England to seek asylum.

Mr. A and his two friends left Ecuador in mid-1997 with legitimate travel documents and British tourist visas. Although their destination was London, their flight had a stopover in Miami, Florida. Their flight from Quito had been delayed, and they missed the connecting flight. While the three men waited in the lounge for the next plane, Mr. A and Mr. W were summoned over the intercom to an immigration office where they were questioned about their travel plans. Mr. A explained that he and Mr. W were on their way to London to apply for asylum. An immigration officer told Mr. A that he did not believe that Mr. A had an asylum case and accused Mr. A of lying. The officer inspected the two Ecuadorans' documents. While Mr. A and Mr. W were being questioned, their plane departed. Mr. Y, who had not been summoned, left on that flight. He has applied for asylum in the United Kingdom, and his case is under review.

Eventually, Mr. A and Mr. W were told that they would be allowed to continue on to London. There were no other flights scheduled that day, so Mr. A and his friend slept in chairs at the airport, under surveillance. The next morning they were escorted aboard a flight to London.

In London, Mr. A and Mr. W were met by British immigration officials and they requested asylum. A British immigration officer examined their passports. Both passports had been stamped TWOV (Transit Without Visa)<sup>102</sup> by the INS in the United States. The

---

<sup>102</sup> The Transit Without Visa (TWOV) program provides for a waiver of visa requirements for people in transit through the United States. See INA § 212(d)(4)(c); 8 C.F.R. § 214.2(c)(1). Persons at a port of entry are eligible if (a) they are admissible under the immigration laws; (b) they have confirmed reservations to another country; and (c) they will continue their journey on the same connecting line within eight hours of their arrival or on



immigration officer explained that new laws in England prevented Mr. A and Mr. W from applying for asylum because the TWOV stamp indicated that they had made an entry in another country where they should have sought asylum. The two men were told that they would be sent back to the United States where they could apply for asylum. They were each given a document, *Notification to Third Country Authority*, which stated that the bearer had applied for asylum in the United Kingdom and his claim had “been refused without substantive consideration because there is a safe third country” to which he could be sent. They were told to present the document upon arrival and were assured that they would not be deported from the United States.

That same day, Mr. A and Mr. W were escorted onto a flight bound for John F. Kennedy International Airport in New York. When they arrived, they were taken directly to an immigration office at the airport. Mr. A told an immigration officer that he wanted to apply for asylum because he was in danger in Ecuador. He showed the officer the British immigration document regarding their applications for asylum, but he was told: “We have a different policy here.” Mr. A was concerned and upset at the possibility of being returned to Ecuador. He said that he wished to apply for asylum in the United States, as the British officials had told him he would be able to do so, but he was simply ordered to sit down. The two men were not allowed to make a telephone call. An immigration officer informed Mr. A and Mr. W that they were to be returned to Ecuador the next day.

The two men spent the night under guard at a nearby hotel; Mr. A was given no food, was not allowed to bathe and was handcuffed to a table next to the bed for the entire night. The next morning Mr. A and Mr. W were escorted aboard a flight to Ecuador. During a stopover in Miami, Mr. A explained his situation to some Spanish-speakers; they gave him money and he placed a call to CEDHU in Ecuador. That organization was able to make calls on their behalf to UNHCR in the United States, but was unable to prevent their return to Ecuador. Based on what they had been told in New York, the two men did not seek asylum while in Miami because they believed they were not eligible. They were returned to Ecuador. After his return, Mr. A fled once again. According to the latest information received by the Study, Mr. A has pursued a refugee status claim in a European country.<sup>103</sup>

### ***Observations***

#### *Summary Return of Asylum-Seekers Without any Process*

Upon arrival at Kennedy Airport in New York, Mr. A and Mr. W were escorted to an immigration office. It is unclear whether the ensuing contact with immigration officers amounted to secondary inspection, but it appears to have constituted at least its functional

---

<sup>102</sup>(...continued)  
the first available transport.

<sup>103</sup> The country is known to the Study but omitted due to concerns over confidentiality.

equivalent. Yet, despite making express requests to apply for asylum, Mr. A and Mr. W were not referred to credible fear interviews. They were ordered removed and the INS arranged for their flight back to Ecuador.

As Mr. A and Mr. W did not have valid entry documents to enter the United States, and expressed an intent to apply for admission to the United States (i.e., via their request for asylum), the two men should have been subject to expedited removal with its provisions for referral to a credible fear interview upon the expression of fear or an intent to apply for asylum in the United States. The failure to refer to a credible fear interview appears to be a violation of INA § 235. This case raises a serious question regarding compliance with expedited removal laws which provide for a credible fear determination process under circumstances such as these. Mr. A and Mr. W were returned to Ecuador without any substantive consideration of their claims, even though they expressed a fear of return to Ecuador and an intent to apply for asylum.

When contacted by Mr. A's attorney, an INS official confirmed that the two men had been interviewed by the INS at Kennedy Airport, but he denied that they had expressed a fear of returning to Ecuador. The INS, however, has no record of the case because the two men were never formally inspected. According to Mr. A and Mr. W, they expressed their fear of returning to Ecuador, and their desire to apply for political asylum to the INS officials at Kennedy Airport. The Study has confirmed that they sought asylum while in London, and that they telephoned CEDHU in Ecuador from Miami about their fear of being returned.

### *Detention*

This case raises humanitarian concerns about the procedures for the detention of asylum-seekers, and other persons placed in expedited removal who are awaiting removal from the United States. When Mr. A and Mr. W arrived at Kennedy Airport, they were prohibited from making a phone call. Had they been able to contact CEDHU before leaving New York, that organization might have been able to contact NGOs in the New York area that could have assisted the two asylum-seekers, and requested that the INS or other government officials refer Mr. A and Mr. W to a credible fear interview. The conditions under which Mr. A and Mr. W were held prior to return to Ecuador were poor; they were taken from the airport to a hotel where they were handcuffed to the bed throughout the night. Mr. A was not given food nor permitted to bathe.

### *Safe Third Country*

The asylum claims of Mr. A and Mr. W were refused in the United Kingdom "without substantive consideration" on the ground that there was a safe third country, the United States, to

which they could be returned.<sup>104</sup> They were given a document, *Notification to Third Country Authority*, which stated that they had applied for asylum in the United Kingdom and had been refused “on the grounds that there is a host third country to which the applicant can be returned.” They were told to present the document upon their arrival in New York and were assured that they would not be deported from the United States.

The United Kingdom acted on the assumption that in the United States Mr. A and Mr. W would be provided an opportunity to apply for protection, and that they would not be returned to Ecuador without some process. In this case, it appears that the assumption made by the United Kingdom was incorrect. Upon their arrival in the United States, the two men were promptly returned to Ecuador without any substantive process. This case emphasizes the need that countries, such as the United Kingdom, and international NGOs have in the availability of comprehensive data regarding the implementation of expedited removal and its impact on asylum-seekers. The Study has become aware of the fact that a number of refugee and immigration advocates in other countries intend to challenge the presumption that the United States is a safe third country, in large part based on the United States’ enactment of expedited removal procedures.

## 2. Asylum-Seeker from the Democratic Republic of the Congo

Mr. B is a twenty-five year old Hutu from the Democratic Republic of the Congo (D.R. Congo), formerly known as Zaire. He fled his country and arrived in the United States on May 21, 1997, as a stowaway on a ship. He did not have any identification or travel documents in his

---

<sup>104</sup> Although there may be slight differences among countries, the “safe third country” concept generally provides that an asylum applicant may be sent to a country in which her life or freedom would not be threatened on account of a protected ground, in which she would not be subjected to torture, and in which she would have access to a full and fair process for determining refugee status. *See generally* GUY GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 333-44 (1996). *See also infra* Part VI(B).

In the United Kingdom, a person who has made a claim for asylum may be removed to a country where his or her life is not threatened on account of a protected ground and such country will not send the person to another country in which his or her life would be so threatened. *See* DANISH REFUGEE COUNCIL, “SAFE THIRD COUNTRY:” *POLICIES IN EUROPEAN COUNTRIES* 162-63 (1997). Furthermore, the claim of an asylum applicant can be refused without substantive consideration if the applicant has not arrived directly from a country in which he or she fears persecution and such person had an opportunity to seek protection in the third country. *Id.* at 163. The United Kingdom applies these laws to people in transit. *Id.* at 164.

It is unclear that a person who has transited through a country has necessarily “found protection.” UNHCR has stated that asylum-seekers who move in an irregular manner from a country where they have already found protection, may be returned to that country if they are protected against *refoulement*, if they are permitted to remain, and if they are treated in accordance with recognized basic human standards. Conclusion 58 (XL) of the Executive Committee of UNHCR (1989). UNHCR has further stated that the intentions of any asylum-seeker should be taken into account when identifying the country responsible for processing a refugee claim, and that asylum should not be refused solely because it could be sought from another country, unless such person has close links or connections with that country such that it would be fair and reasonable to expect him or her to request asylum there. Conclusion 15 (XXX) of the Executive Committee of UNHCR (1979).

possession. Mr. B's father had been an active member of the Union of Democracy and Social Progress (UDPS), a democratic opposition party. His father was beaten to death at the family home on October 7, 1996, by a group of seven armed soldiers, after they found literature and posters promoting the UDPS in his father's possession. The men also severely beat Mr. B, and took him to a prison camp. Mr. B and the other prisoners, some of whom were Hutu and had opposition party affiliations, were beaten several times a day and deprived of food, water and medical treatment. Two men died from the beatings.

After eleven days, Mr. B escaped into the surrounding bush while getting water. Mr. B fled to Zambia, where he remained for approximately two months before fleeing to Namibia for about one month. From there he went to South Africa where he was arrested and imprisoned for approximately seven weeks. He believes he was imprisoned because he did not have any identity documents, as he was not charged with any crime. He was released from prison when the uncle of a man he met in South Africa paid a small fine on his behalf. About a month later, Mr. B stowed away aboard a ship docked in the Cape Town harbor, not knowing for where it was bound. He was discovered by crew members after four days at sea and was sexually abused and threatened by them. When the crew members took Mr. B to the captain of the ship, the captain threatened to have him thrown overboard. He had to plead for his life.

On May 21, 1997, after three weeks at sea, the ship arrived in Philadelphia. Mr. B was turned over to the INS and questioned by an immigration officer in English, despite the fact that he could not understand or communicate well in English. Although he was determined to be inadmissible to the United States because he had arrived as a stowaway, he was referred to a credible fear interview because he expressed a fear of being returned to his home country.<sup>105</sup> Mr. B was detained at the Elizabeth Detention Facility in Elizabeth, New Jersey, which is operated by the Corrections Corporation of America (CCA) under contract with the INS.

Mr. B's credible fear interview was conducted at the Elizabeth Detention Facility on May 27, 1997. The interview was conducted in English with no interpreter, despite Mr. B's extremely limited ability to speak or understand English. The Asylum Officer (AO) wrote that English was Mr. B's "language of fluency" on the Record of Determination/Credible Fear Work Sheet (INS Form I-870), when in fact, Mr. B is fluent only in Swahili. Mr. B did not have an attorney or legal consultant present. The AO asked Mr. B a few questions about his background, family, and reason for coming to the United States. The AO concluded that Mr. B did not have a credible fear of persecution. This determination was based largely, according to the AO's summary of the interview ("Interview Comment"), on the fact that Mr. B did not speak French.

Mr. B signed a form requesting review by an IJ of the negative credible fear determination, although he did not know what a negative credible fear determination was or why he was being sent before a judge. Mr. B appeared before an IJ for his credible fear review on

---

<sup>105</sup> See INA § 235(a)(2).

June 16, 1997. It was conducted in English and Mr. B was not offered an interpreter at any point during the review. He was not represented by an attorney. The IJ affirmed the negative credible fear determination of the AO and his case was returned to the INS for removal. Mr. B remained in detention at the Elizabeth Detention Facility.

In the course of its efforts to remove Mr. B, in July 1997 the INS invited an official from the Congolese Consulate to meet with Mr. B at the Elizabeth Detention Facility. The official questioned Mr. B in Swahili about his origins, political activities, experiences in the prison camp, and reasons for coming to the United States. Mr. B told the official the names of his parents and where he was from, but refused to answer other questions because he believed that he was going to be returned to D.R. Congo and that conveying such information to a representative of the Congolese government would only subject him to further danger of torture and death upon being returned to his country.

On October 16, 1997, the INS took Mr. B to Kennedy International Airport in New York to be removed. He was shackled at the ankles, waist, and wrists and forcibly placed on a plane. On the plane, Mr. B screamed and cried, stating that he was terrified of being returned to D.R. Congo because he believed that he would be killed. He begged the officials not to return him. The pilot came out of the cockpit and ordered that Mr. B be removed from the plane. Mr. B was returned to the Elizabeth Detention Facility.

On December 30, 1997, the INS issued a memorandum establishing a policy authorizing the re-interview of applicants previously found not to have a credible fear of persecution by an AO before or after the review of a negative decision by an IJ.<sup>106</sup> Sometime in January 1998, the INS determined that Mr. B should be re-interviewed pursuant to this policy.<sup>107</sup>

Mr. B's second credible fear interview was conducted on January 30, 1998, by a different AO. Mr. B had been in detention for more than eight months. The second interview was again conducted in English. A legal intern from the Catholic Legal Immigration Network was present on Mr. B's behalf. Unlike the AO who conducted Mr. B's May 1997 credible fear interview, the second AO asked numerous questions, including follow-up questions, about past abuse suffered by Mr. B and his political activities. She also asked him about the circumstances of his life in D.R. Congo. From these questions she elicited, among other details, the reasons why Mr. B spoke some English but no French — the fact on which the first AO's negative credible fear determination largely rested. Mr. B stated that while he never attended school in D.R. Congo, between the ages of eleven and fifteen he had lived and traveled with his mother in Zambia,

---

<sup>106</sup> Office of Field Operations, INS Memorandum on Expedited Removal: Additional Policy Guidance (Dec. 30, 1997) (Attachment 27 to First Year Report).

<sup>107</sup> Mr. B was not yet represented at this point; therefore, it is unclear who initiated the re-interview process on his behalf.

where the colonial language is English, and he was taught some English by a friend of his mother's.

The AO determined that Mr. B had a credible fear of persecution. She found that he suffered past persecution on account of his Hutu ethnicity and his and his father's UDPS activities, and that he had a well-founded fear of future persecution by the government of Laurent Kabila. The AO cited excerpts from several sources in support of these findings, including the *Christian Science Monitor*, *The New York Times*, and a report from Human Rights Watch. The AO rejected the first AO's conclusion that Mr. B was not credible because he did not speak French. She further concluded that his Congolese nationality should not be in dispute since the INS was prepared to deport him to D.R. Congo in October 1997. The AO also gave Mr. B's legal representative an opportunity to question him. The legal representative questioned Mr. B about the Congolese consular official's visit. In response, Mr. B explained that he did not answer the official's questions about his political affiliation and prison camp experience because he was afraid to convey these facts to a representative of his government. The legal representative was allowed to give a closing statement summarizing Mr. B's claim, and to submit supporting documentation.

Based on the AO's determination that Mr. B had a credible fear of persecution, the INS placed him in removal proceedings on February 13, 1998. On March 9, Mr. B appeared without counsel for his master calendar hearing before the same IJ who had affirmed his prior negative credible fear determination. The IJ terminated the proceeding, ruling that he was not entitled to be placed in regular removal proceedings because he had arrived in the United States as a stowaway.<sup>108</sup> On March 13, the INS issued a new charging document, a Notice of Referral to the Immigration Judge, which is used to refer stowaways with a credible fear of persecution to an asylum hearing. On March 20, Mr. B appeared again before the IJ, represented for the first time by counsel, a pro bono attorney referred by the Lawyers' Committee for Human Rights.

At the March 20, 1998, master calendar hearing, the IJ questioned the legal basis for the INS's grant of a second credible fear interview to Mr. B. The IJ was informed of the December 1997 INS memorandum that permits the re-interview, before or after IJ review, of persons previously found not to have a credible fear of persecution by an AO. The IJ questioned whether that policy was binding on the Immigration Court because she believed that such a policy improperly vacated her own prior affirmance of the AO's negative credible fear determination. She instructed both parties to brief the question of the INS's authority to reconsider a prior adverse credible fear determination.

---

<sup>108</sup> INA § 235(a)(2) provides that stowaways are ineligible for a hearing under INA § 240. Stowaways determined to have a credible fear of persecution shall have their asylum applications adjudicated under 8 C.F.R. § 208.2(b)(1)(ii). 8 C.F.R. § 235.1(d)(4).

The parties submitted briefs on April 17, 1997. Both parties' briefs supported the INS's position. Several weeks later, at a conference conducted off the record, the IJ informed the parties that she preferred to proceed with Mr. B's asylum hearing by reopening the first credible fear proceeding on the INS's motion, rather than based on the second (favorable) credible fear determination. Shortly thereafter, the INS, joined by Mr. B's attorney, moved to reopen the first credible fear proceeding. The IJ granted the motion, vacated her affirmance of the AO's negative credible fear determination, and instructed the INS to file a second Notice of Referral to initiate asylum proceedings under INA § 208.

The INS filed the Notice of Referral on May 11, 1998. Mr. B's individual hearing on the merits of his asylum claim began on July 27, 1998, at the Elizabeth Detention Facility. He was represented by his pro bono attorney. Mr. B presented two experts: an expert on Congolese politics, society and culture, who offered corroborating evidence of Mr. B's identity and the danger he would face in D.R. Congo as a Hutu and UDPS supporter; and an expert on the evaluation and treatment of torture victims, who gave his opinion that Mr. B's allegations of past abuse were true. The latter expert also noted that Mr. B showed signs of stress and depression. Because the testimony did not conclude in the half-day allotted, the IJ adjourned the remainder of the hearing to September 9, 1998. Although the parties appeared for a hearing that day, the hearing was adjourned to October 22 because the interpreter provided by the Immigration Court spoke a different dialect of Swahili than Mr. B. In advance of the October 22 date, the IJ rescheduled the hearing for October 29. The parties appeared on October 29, but the hearing did not proceed, again because the interpreter provided by the Immigration Court was unsuitable. The next hearing, scheduled for November 20, was also adjourned for the same reason. Mr. B's asylum hearing was finally concluded on December 19, 1998. Mr. B testified in Swahili through an interpreter.

On January 29, 1999, the IJ issued a written opinion denying Mr. B's request for asylum. The IJ concluded that Mr. B did not show that a reasonable person in his circumstances would fear persecution on account of a protected ground if returned to D.R. Congo, although she made no findings of fact relating to Mr. B's claims of past persecution and fear of future persecution, and expressly declined to decide whether Mr. B was from D.R. Congo. Rather, the IJ based her decision on what she deemed to be inconsistencies between statements made by Mr. B in English shortly after he arrived in the United States (including statements he made during the credible fear review she conducted in June 1997, although neither a transcript nor a tape of that review was admitted into evidence), statements in his asylum application, and testimony at the hearing. The IJ did not give weight to Mr. B's explanation for certain omissions in his early statements to immigration officials and the Immigration Court upon IJ review. Mr. B testified, and stated in his asylum application, that when those initial statements had been made he could not understand or communicate well in English; that he was very scared; that he believed that he was about to be deported and that whatever he said would be conveyed to his government; and that he would be tortured and killed upon his return.

On February 25, 1999, Mr. B's attorney appealed the IJ's decision to the Board of Immigration Appeals (BIA). Mr. B's attorney cited errors in the IJ's decision, including: the failure to analyze the uncontradicted documentary and testimonial evidence of the persecution that Mr. B would face in D.R. Congo as a Hutu and UDPS supporter; the IJ's reliance on statements of the persecuting government as evidence against Mr. B; the IJ's reliance on material outside the record in reaching an adverse credibility determination; and improper conduct by the INS during the hearings, including forcing Mr. B to testify about his asylum claim while shackled in handcuffs and leg irons. The appeal is currently pending at the BIA.

### *Observations*

This case raises a number of issues regarding fundamental fairness in the expedited removal process. It also raises questions regarding the impact that the expedited removal process may have on the subsequent adjudication of an applicant's request for asylum or restriction on removal. In this case, at a time when Mr. B was unrepresented, he was interviewed in English without the assistance of an interpreter. Later, during his asylum hearing, he was represented and testified in Swahili with the assistance of an interpreter. The IJ then relied upon inconsistencies between these various statements to deny his claim for asylum. In addition, the IJ partially based her decision on evidence not in the record, and acted in a manner which raises the question of bias. Finally, it appears that the INS may have impermissibly supplied confidential information regarding Mr. B's claim to representatives of his government. Each of these issues is detailed below.

### *Interpretation*

8 C.F.R. § 235.3(b)(2)(I) provides that during secondary inspection, "[i]nterpretative assistance shall be used if necessary to communicate with the alien." 8 C.F.R. § 208.30 similarly provides: "If the alien is unable to proceed effectively in English, and if the asylum officer is unable to proceed competently in a language chosen by the alien, the asylum officer shall arrange for the assistance of an interpreter in conducting the interview." Finally, 8 C.F.R. § 3.42 provides that an interpreter will be provided during IJ review of a credible fear determination if necessary.

Mr. B was questioned during secondary inspection in English. His credible fear interviews and IJ review of his first credible fear determination were also conducted in English. He was not represented during these proceedings, and was not informed prior to agreeing to proceed in English that he had the right to interpretative assistance if unable to proceed competently in English. Once he was represented, the IJ agreed that it was appropriate to conduct Mr. B's asylum hearing with the assistance of a Swahili interpreter.

In denying Mr. B asylum, the IJ relied upon inconsistencies between statements made by Mr. B in English shortly after he arrived in the United States and subsequent statements which he



made in his asylum application and at the hearing.<sup>109</sup> Among the earlier statements was the testimony he gave at the IJ review of his first adverse credible fear determination. The IJ dismissed the possibility that the failure to provide interpretation may have resulted in miscommunication, stating that while Mr. B's English "is not perfect it is certainly good enough for him to clearly understand the differences between the stories he had previously presented and the story he told to this Court in support of his application for asylum."

Mr. B's attorney has challenged that assessment of his fluency, reporting to the Study that Mr. B's vocabulary, grammar, and ability to understand and to speak in sentences was extremely limited when he arrived in the United States. The attorney expressed serious concern that because the IJ relied on Mr. B's testimony at the credible fear review, without that testimony being part of the record, the BIA will be unable to make an independent evaluation of the IJ's characterization of his English ability. The possible prejudice caused by the failure to provide interpretation was compounded by this reliance on evidence not in the record, as described below.

#### *Reliance on Material Outside of the Record*

A number of the inconsistencies upon which the IJ relied in finding Mr. B not credible were made in statements to the IJ in her review of the first credible fear determination. The IJ's

---

<sup>109</sup> The IJ stated that the inconsistencies and admission made by Mr. B of his failure to previously present the whole truth of his claim rendered him not credible. She noted that generally, courts are "reluctant to rely upon any single previous interview or declaration of an applicant, especially where the statements were made in English" in making an adverse credibility determination. She cited *Senathirajah v. INS*, 157 F.3d 210, 218 (3rd Cir. 1998), and *Balasubramanrim v. INS*, 143 F.3d 157 (3rd Cir. 1998) for this proposition. In *Senathirajah*, a case involving alleged inconsistencies between an airport statement and later testimony, the Third Circuit found that there was no substantial evidence for a finding of adverse credibility. 157 F.3d at 222. It noted that neither the BIA nor the IJ considered "the difficulty someone from Sri Lanka might have in understanding 'American English,' particularly under the stressful circumstances of entry into a new country." *Id.* at 218. The court further noted that no testimony was offered as to the circumstances under which the affidavit was taken at an airport interview by INS, including whether it was necessary to use sign language or gestures to communicate with Senathirajah. *Id.* Last, although Senathirajah stated in his asylum application that he was fluent in English, the court noted that the Form I-589 asylum application only allows two choices when inquiring about English ability, whether or not one is fluent, and that the application did not inquire into the various degrees of proficiency a person could have in a language. *Id.*

In *Balasubramanrim*, another case involving alleged inconsistencies between an airport statement and later testimony, the Third Circuit similarly found that an adverse credibility finding based on discrepancies between a person's statement at the airport and later testimony in front of an IJ was not reasonable. 143 F.3d at 164. Noting that in reaching its credibility determination, the Board relied heavily on its conclusion that Balasubramanrim knew a "fair amount of English" at the time of the airport interview, the court stated that, based on a review of the record, it was "not confident the Board made an accurate assessment" of Balasubramanrim's English skills." *Id.* at 163. The court noted that from the handwritten record of the airport interview, it was not clear how the interview was conducted, how the airport statement was prepared, or whether the questions and answers were recorded verbatim, summarized, or paraphrased; that airport statements are not intended to be asylum applications; and that a person "who has suffered abuse during interrogation sessions by government officials . . . may be reluctant to reveal such information during the first meeting with government officials in this country." *Id.* at 162-63.

review of this adverse credible fear determination was not a part of the record in Mr. B's merits hearing. The IJ cited no legal authority for her decision to rely upon non-record evidence.

One of the inconsistencies which the IJ relied upon was that Mr. B had previously failed to tell the Court that his father had been beaten to death in front of him. Although Mr. B explained to the IJ that he had not told the whole truth previously because he was afraid that he would be returned to D.R. Congo, the IJ dismissed the possibility that he may have been too frightened at this early stage to provide full details.<sup>110</sup> It appears that she did not consider the effect which legal representation may have had on Mr. B's willingness to more fully recount his story.

### *The Appearance of Bias*

The IJ's comportment in this case creates the appearance of bias. The IJ's first contact with this case was when she upheld the AO's adverse credible fear determination. Her subsequent resistance to the re-interview process, which was expressly permitted under INS policy, her reliance upon material outside of the record, and her dismissal of the possibility that interpretation, fear, stress, and/or depression may have been factors explaining testimonial inconsistencies create the appearance that she was influenced by her early assessment of the case and, thus, unable to adjudicate the matter in an unbiased and fair manner.

### *Consular Visit*<sup>111</sup>

Although the INS may contact foreign government officials, including consular officers, to secure documents necessary for deportation,<sup>112</sup> the INS may only notify a consular officer of

---

<sup>110</sup> The IJ noted: "This Court does not believe that the Applicant could have been any less afraid of being sent back while testifying before this Court regarding his asylum claim." The INS's *Basic Law Manual* states: "A claim may be credible even though the claimant submits information during a second examination that was not submitted during the first examination. The claimant may have been reluctant to speak freely during the first examination . . . ." DEPARTMENT OF JUSTICE/INS, IMMIGRATION LAW AND PROCEDURE: BASIC LAW MANUAL (1995).

<sup>111</sup> Other issues that arise in regards to consular visits are discussed in Section VI(A) of the Report.

<sup>112</sup> In order to determine whether the country to which an individual will be returned will receive him or her, a request is made to its diplomatic or consular representative in the United States for a passport or other travel document on his behalf. A person cannot be removed until the country of destination issues a travel document or otherwise indicates that it will receive the individual. INS Operations Instruction 243.1c (Nov. 1997); GORDON, MAILMAN, ET AL., IMMIGRATION LAW AND PROCEDURE § 72.08. Further, where "a consulate is located within one hundred miles, each detained alien whose travel documentation is expected to prove difficult to obtain shall be escorted to the consulate for consular interview." *Id.* Thus, persons who are afraid to return to their home countries, who are placed in expedited removal, and who are ordered removed may nevertheless be forced to visit a consular office of their country.

(continued...)

the detention of a foreign national if a bilateral treaty between the United States and another country so requires, unless the individual requests such notification.<sup>113</sup> No treaty between the United States and D.R. Congo requires consular notification.<sup>114</sup> Nonetheless, in any case where consular officers are notified, the INS is prohibited from revealing the fact that the detained national has applied for asylum.<sup>115</sup> Additionally, under the Vienna Convention on Consular Relations, consular officers are allowed access to foreign detained nationals, although they may not take any action opposed by the detained individual.<sup>116</sup> The United States Department of State has stated that consular officers should be allowed access to their detained foreign nationals even if the national does not request a visit, but notes that the consular officer must refrain from actions the individual opposes.<sup>117</sup>

Mr. B was visited by a member of the Congolese consulate prior to his scheduled 1997 removal from the United States. The official questioned Mr. B about his origins, political activities, experiences in the prison camp, and reasons for coming to the United States. Mr. B's attorney noted that based on these questions, it appears that the official was given information about Mr. B's asylum case, without his knowledge or approval.

---

<sup>112</sup>(...continued)

Even where a government contacts consular officials for travel documentation purposes, UNHCR has advised caution in the cases of asylum-seekers. UNHCR has prepared a letter "to summarize its views on the current role of UNHCR in providing verification of residence in refugee camps and other documentation that may be requested of us relating to individual asylum-seekers." UNHCR, Re: Requests for Documentation in Support of Refugee Claim (on file with Expedited Removal Study). In this letter, UNHCR emphasizes that it has adopted a strict confidentiality policy regarding asylum proceedings, and recommends governments to do the same. Thus, UNHCR will not confirm to a country of origin whether or not a particular individual has been in contact with UNHCR. In this letter, UNHCR further states:

UNHCR does recognize the need for countries to contact consular officials in the course of removal of rejected asylum-seekers where the only obstacle to removal is the lack of travel documents. Such individuals, prior to contact with their consular officials, should be afforded an exhaustive and procedurally fair hearing. In these rejected cases, due to the special nature of asylum proceedings, information should be limited to that which is essential for establishing identity and national origin. The nature of the proceedings and information regarding an individual's asylum claim should be considered privileged from disclosure to the diplomatic representatives of the country of origin.

*Id.*

<sup>113</sup> 8 C.F.R. § 236.1(e); UNITED STATES DEPARTMENT OF STATE, CONSULAR NOTIFICATION AND ACCESS: INSTRUCTIONS FOR FEDERAL, STATE, AND LOCAL LAW ENFORCEMENT AND OTHER OFFICIALS REGARDING FOREIGN NATIONALS IN THE UNITED STATES AND THE RIGHTS OF CONSULAR OFFICIALS TO ASSIST THEM 20-21 (1998).

<sup>114</sup> 8 C.F.R. § 236.1(e).

<sup>115</sup> *Id.*

<sup>116</sup> Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36(1)(c), 596 U.N.T.S. 261, 292.

<sup>117</sup> UNITED STATES DEPARTMENT OF STATE, *supra* note 113, at 23.

This case raises questions about the potential effects of consular notification and access, whether pursuant to treaty obligations or for the purpose of obtaining travel documents prior to removal. Commentators have noted the potential increase in risk of harm an asylum-seeker may face when identified as an asylum-seeker to a consular officer of his or her country.<sup>118</sup> This case also raises a question whether the INS revealed the fact that Mr. B applied for asylum, in violation of 8 C.F.R. § 236.1(e). Mr. B's attorney noted that the nature of the questions asked by the consular officer, and the fact that the officer was brought to interview Mr. B at the Elizabeth Detention Facility, which is known to house asylum-seekers, indicated that the consular officer was aware that Mr. B was an asylum-seeker.

*Effect of Expedited Removal on the Treatment of Asylum-Seekers  
in Asylum Proceedings*

This case raises the question whether possible defects in the expedited removal process may prejudice asylum-seekers in the full adjudication of their claims. In this case, Mr. B was not represented in the earlier stages of expedited removal and he was not provided with an interpreter. Were it not for the intervention of the pilot of the plane in which he was being transported back to his home country, he would have been returned to D.R. Congo in 1997. Subsequently, Mr. B became a beneficiary of the INS's re-interview process, which resulted in a positive credible fear determination. More than one year after his arrival in the United States, at his asylum hearing, Mr. B was represented by counsel and testified in Swahili with the assistance of an interpreter. Relying on Mr. B's statements during the expedited removal process, where he did not have counsel and was not provided with an interpreter, the IJ denied his request for asylum.

### **3. Angolan Asylum-Seeker**

Mr. C, a 21 year old man from Angola, fled his homeland with the help of a Catholic missionary after his family was killed by the military. His father had been actively involved with the National Union for the Total Independence of Angola (UNITA), an organization that opposes the government of Angola. Mr. C did not find out about his father's activities with UNITA until 1993, when the military searched his family's home on several occasions and took his father away for questioning. In early 1994, when Mr. C was at church, the military came to his home and killed his father, his mother and his four brothers. When he returned to his home and discovered what had happened, he went into hiding at the house of a family friend. He remained in hiding for a year, spending part of the time in the homes of friends and part of the time in a Catholic church. In April 1995, soldiers came at night to the place where he was hiding, arrested him, and took him to a military camp, where he was questioned about UNITA activities. He was kept in the camp for two months. While he was detained he was tortured with electric shocks

---

<sup>118</sup> Such commentators include UNHCR. *See supra* note 112.

and severely beaten. He was released in late June with the help of some friends of his father who had presented documents requesting his release. The documents were forged with the signatures of officials with the authority to order his release. After his release, he went back into hiding because he was afraid that the military would eventually discover the forgery.

On the advice of members of the Catholic church, in which he had spent part of his time in hiding, Mr. C decided to leave Angola. The missionary at the church helped Mr. C obtain an Angolan passport in his name and an A2 visa (a visa for foreign government officials or their immediate family members). Neither the passport nor the visa had been legally issued to him. The missionary advised him to go to the United States and, once he was admitted, to seek assistance at a church there. The missionary helped him to get on a flight to the border of South Africa. Mr. C crossed into South Africa by truck. While he was in Johannesburg he met an Angolan man who gave him the address of a church in Dallas, Texas. He planned to go to that church for assistance. The church in Dallas was his only contact in the United States.

Mr. C arrived in the United States at John F. Kennedy International Airport on August 4, 1997. He was routed to secondary inspection where he was questioned about his travel documents. He spoke in Portuguese through an interpreter employed by the airlines. When asked whether he was a diplomat or a relative of a diplomat with the Angolan government, he responded negatively. Mr. C admitted that his passport and visa had not been legally issued to him, and told the immigration officer that they had been obtained for him by a missionary in his church. He told the officer that he was afraid of political persecution in Angola. When asked why he did not go to the United States Embassy in Luanda, he replied that he had feared that the Angolan military would have arrested him. He stated that he did not request political asylum in South Africa because he did not believe that the South African government would protect him. The officer asked Mr. C about the nature of his fear of being returned to Angola. Mr. C responded that his family had been killed by the government because his father had been active in an insurgent anti-government group. He told the officer that he did not want to return to Angola because he feared for his life. He was referred to a credible fear interview and detained at the Wackenhut Detention Facility in Jamaica, New York.

Mr. C's credible fear interview was held on August 11, 1997 at the detention facility. He was not represented. The interview was conducted in Portuguese with the assistance of a telephonic interpreter. Mr. C was found to have a credible fear of persecution because he had been harmed by the government of Angola in the past on account of political beliefs that were imputed to him. The AO that interviewed Mr. C found that "his alleged experiences are consistent with known country conditions" and that he had "formed a nexus between the alleged mistreatment and fear of future mistreatment on the protected ground of political opinion."

Mr. C's hearing on the merits of his case was held on November 6, 1997. He was represented by an attorney at this hearing. He spoke in Portuguese and a very competent live interpreter assisted. The IJ found that Mr. C had established eligibility for asylum. Mr. C was granted asylum and released that same day.

### *Observations*

This case reflects well on the expedited removal process. It demonstrates accord with Congress' intent to ensure that legitimate asylum-seekers have access to the asylum process. Mr. C alleged facts about his father's opposition activities, his father's murder, and his own imprisonment and torture. Based on these facts and a consideration of country conditions, the AO found that Mr. C had a credible fear of persecution and the IJ granted Mr. C asylum.

#### **4. Sri Lankan Asylum-Seeker #1**

Mr. D, a 46 year old Tamil, fled Sri Lanka in May 1998. He had been a truck driver in his home country. On several occasions the Liberation Tigers of Tamil Eelam (LTTE) had forcibly taken the merchandise that he was transporting. When the Sri Lankan army discovered this, they arrested and detained him and accused him of aiding the LTTE. Fearing that his life was in danger from both the army and the LTTE, Mr. D left Sri Lanka to seek asylum in Canada, where his nephew and two brothers had been granted asylum and had become naturalized citizens.

Mr. D's flight to Canada transited through San Juan, Puerto Rico. On May 18, 1998, when he arrived in San Juan, Mr. D was routed to secondary inspection because he had no travel documents in his possession. When he expressed a fear of being returned to Sri Lanka, he was referred to a credible fear interview. He was detained at the Metropolitan Detention Center in San Juan, a federal detention facility for persons awaiting federal prosecutions and proceedings. The INS leases a section of this facility for immigration detainees. Mr. D contacted his nephew in Canada, who in turn, contacted an attorney to represent Mr. D at his credible fear interview.

Mr. D's credible fear interview was held on May 27, 1998, at the INS office in the federal building in San Juan. He was represented by an attorney. The interview was conducted in Tamil and a telephonic interpreter assisted. Mr. D was found to have a credible fear of persecution based on imputed political opinion.

Mr. D's attorney requested parole. The District Director denied the request for parole without a bond, but granted conditional parole with a bond. He set the bond at \$10,000. Mr. D had a sponsor<sup>119</sup> who posted the bond. He was released from detention on July 20, 1998. Among the documents that his sponsor (the obligor) received upon posting the bond was the Notice to Deliver Alien (I-340). This form notified Mr. D's sponsor that Mr. D was to be delivered to the INS office in Guaynabo on August 5, 1998, the date of his scheduled master calendar hearing. Another document which the sponsor received was the Notice to the Obligor on a Cash Delivery

---

<sup>119</sup> Mr. D's sponsor was a relative of a sister of a friend of Mr. D.

Bond Posted with the Immigration and Naturalization Service (Notice to the Obligor). This notice states, in part, that:

2. The bond shall remain in effect until the alien for whom the bond is being posted: (a) departs the United States voluntarily; or (b) departs the United States as a result of a court order to depart and verification of the departure is received by the US Immigration Service; or (c) the alien's deportation proceedings are terminated by the Court due to the legalization of the alien's status (i.e. adjustment of status, reinstatement of lawful status, political asylum, etc.) and proof of the termination/legal status has been received in the Deportation Section of the US Immigration Service; or (d) the death of the alien and a death certificate has been received by the Deportation Section of the US Immigration Service; or (e) a new bond is posted to replace this bond.

(underscoring in original.) On July 21, the day after his release, the Immigration Court sent out a notice stating that the master calender hearing, originally scheduled for August 5, 1998, had been re-scheduled for October 13, 1998. No new I-340 reflecting this change of date was issued to Mr. D, his attorney or his sponsor.

Immediately following his release, Mr. D departed for Canada where he was legally admitted for the purposes of filing a claim for refugee status. On August 13, 1998, Mr. D went to the United States Embassy in Ottawa and obtained proof of his departure from the United States (Form G-146). He sent these papers to his attorney in Puerto Rico, who filed a motion to terminate proceedings on August 19, 1998, based on the fact that he had departed from the United States. The INS did not oppose this motion and on September 9, 1998, the IJ terminated removal proceedings.

On September 18, 1998, the INS issued a notice to Mr. D and his sponsor that the bond had been breached. The alleged breach was based on Mr. D's failure to appear at the interview scheduled with the INS for August 5, as required on the original notice received by Mr. D's sponsor when he posted bond. Although it was issued on September 18, the notice was not mailed until October 16, 1998, and Mr. D's sponsor did not receive it until October 20, 1998. Mr. D's attorney, the attorney of record, was never served with notice that the bond had been breached. The attorney learned of the bond breach from Mr. D's sponsor. The attorney filed an appeal to the Administrative Appeals Unit (AAU) with the INS on November 6, 1998. As of April 1999, Mr. D's attorney had yet to receive formal notice from the INS that it had forwarded the appeal to the AAU, as mandated by law.<sup>120</sup>

---

<sup>120</sup> Under 8 C.F.R. § 103.3(a)(2)(iv), if the reviewing official of an appeal of a bond breach determination decides favorable action is not warranted, "that official shall promptly forward the appeal and the related record of proceeding to the AAU in Washington D.C."

---

## *Observations*

### *Credible Fear Determination*

Mr. D alleged that he was forced to transport goods by the LTTE and that he was arrested and detained by the Sri Lankan army, who suspected that he supported the LTTE. The AO concluded that Mr. D had a credible fear of persecution. Given the alleged facts and country conditions in Sri Lanka, the AO's determination appears to be in accord with the intended application of the credible fear standard.

### *Parole*

Persons found to have a credible fear of persecution may be paroled into the United States.<sup>121</sup> The INS has stated that parole is a "viable option and should be considered for aliens who meet the credible fear standard, can establish identity and community ties, and are not subject to any possible bars to asylum involving violence or misconduct . . . ."<sup>122</sup> After Mr. D was found to have a credible fear of persecution, his attorney requested parole. Mr. D, who had a sponsor able to post a \$10,000 bond, was paroled into the United States two months after his credible fear interview. Mr. D's parole indicates accord with INS regulations and policy that allow and encourage the INS to consider parole where an asylum-seeker has been found to have a credible fear of persecution. However, a question is raised regarding the amount of the bond set in this case. Many asylum-seekers, who have fled their countries under difficult circumstances, and who may have limited resources, will encounter difficulties posting a high bond.

---

<sup>121</sup> In cases where an arriving alien has been found to have a credible fear, parole may be requested pursuant to 8 C.F.R. § 208.30(d), which states that such a person may be paroled into the United States in accordance with INA § 212 (d)(5) and 8 C.F.R. § 212.5. Parole of persons is allowed under 8 C.F.R. § 212.5 on a case by case basis for urgent humanitarian reasons or significant public benefit, if such persons do not provide a security risk or a risk of absconding. This is a discretionary grant; the factors to be considered have been set forth, as follows:

Parole is a viable option and should be considered for aliens who meet the credible fear standard, can establish identity and community ties, and are not subject to any possible bars to asylum involving violence or misconduct; for example, the applicant is an aggravated felon or a persecutor.

Office of Field Operations, *supra* note 106. The INS further clarified its policy on parole on October 9, 1998: persons subject to expedited removal who are determined to have a credible fear of persecution and referred to a regular removal hearing under INA § 240 fall under the INS's low priority detention group. Office of Field Operations, Memorandum: Detention Guidelines Effective October 9, 1998, at 6, *reprinted in* 75 INTERPRETER RELEASES 1523 (Nov. 2, 1998) (Attachment 10). Furthermore, the INS's guidelines and detention policy of October 1998 state that "it is INS policy to favor release of aliens found to have a credible fear of persecution, provided that they do not pose a risk of flight or danger to the community." *Id.* at 1526.

UNHCR has encouraged the INS's efforts to seek alternatives to detention and the continuing use of discretionary parole for asylum-seekers at ports of entry. *See* Letter from Karen Koning AbuZayd, *supra* note 68.

<sup>122</sup> *See* Office of Field Operations, *supra* note 106.



*Bond Breach*

In this case, Mr. D was placed in expedited removal while transiting through the United States en route to Canada, where his nephew and his two brothers lived. One of the stipulated conditions of his parole in the Notice to Deliver Alien (I-340), was that Mr. D was to be delivered to the INS office in Guaynabo on August 5, 1998, the date of his scheduled master calendar hearing. However, upon being paroled he departed for Canada. Mr. D's failure to appear at a hearing, which had been rescheduled for a later date, triggered the INS's determination that the delivery bond was breached. Under 8 C.F.R § 103.6(e), "a bond is breached when there has been a substantial violation of the stipulated conditions."

Mr. D's attorney has appealed this bond determination. In the appeal, the attorney argues that Mr. D did not breach his bond because his case had been terminated in Immigration Court without opposition by the INS, prior to his master calendar hearing, scheduled for October 13, 1998. Therefore, there was no demand for surrender which Mr. D or his sponsor could have breached. The attorney further argued that the Notice of Hearing of July 21, 1998, requiring Mr. D to appear on October 13, 1998, superseded the prior demand for Mr. D to appear on August 5, 1998. Furthermore, the IJ's order terminating the case on September 9, 1998 superseded the demand for surrender under which Mr. D was to appear for the master calendar hearing scheduled for October 13, 1998. Mr. D's attorney argued that even if Mr. D and his attorney had been notified of the demand for surrender, Mr. D's failure to appear would not have constituted a breach of the bond. The attorney based this argument on the fact that Mr. D submitted proof of his departure from the United States prior to the date of surrender, and that Mr. D's case had been terminated by the Immigration Court. The attorney cited case law which supports the argument that there is no substantial breach of a bond when an individual voluntarily departs from the country and submits evidence of his or her departure prior to the date of surrender.<sup>123</sup>

Mr. D's attorney has represented four other clients who had their bonds returned once they submitted proof that they had left the country and were seeking asylum in Canada. In the attorney's opinion, the decision to confiscate the bond in this particular case was a punitive

---

<sup>123</sup> The attorney cited *Matter of Don Donaldson's Key Bail Service*, 13 I. &N. Dec. 563 (BIA 1969). In that case, the individual contacted the INS during the latter part of June 1968 and made arrangements to depart the United States via Mexico at his own expense. Although he did not depart the United States within the time agreed upon, he departed on July 4. As evidence of departure, his attorney presented a receipt from a hotel in Vancouver, an original letter mailed from the individual from Portugal to the obligor, and copies of passport pages indicating an entry into Canada on July 5, 1968. The BIA found that

[a]lthough there was a technical violation of the conditions of the bond in that the obligor did not surrender the alien to the Service on July 8, 1968, technical violations do not necessarily justify a breach of bond, which is in the nature of a penalty. In fact, the regulations provide that there is a bond breach where there has been a substantial breach of the stipulated conditions.

*Id.* at 565. The BIA concluded that under these circumstances, there was no substantial violation of the conditions of the bond. *Id.* Mr. D's attorney noted that the BIA affirmed its holding in this case in *Matter of Peerless Insurance Co.*, 15 I. & N. Dec. (1974).

measure. The attorney also argued in the appeal that the purpose of a bond is to ensure the appearance of an individual, such as Mr. D, at his hearings in removal proceedings until he departs the United States voluntarily, rather than to penalize a person for seeking refugee status in another country.

The issue of whether the law permits the INS to find a bond to be breached under the circumstances of this case will be clarified in pending appellate proceedings. Regardless of the outcome of this issue as a matter of law, this case raises a significant policy issue; namely whether it is appropriate to impose a monetary penalty on an asylum-seeker who voluntarily leaves the United States in order to make a legal entry into a third country to pursue a claim for asylum. As described below, Mr. D had substantial ties in Canada, which was the reason he decided to seek refuge there, rather than in the United States.

#### *Application of Expedited Removal to Asylum-Seekers in Transit*<sup>124</sup>

Expedited removal applies not only to individuals seeking admission to the United States, but also to persons transiting through the United States.<sup>125</sup> A number of cases of expedited removal have involved individuals bound for Canada. As a result, refugee advocates in the United States and Canada have been discussing the manner in which expedited removal has impacted access to the Canadian asylum process.<sup>126</sup> Commentators have raised questions about the humanitarian aspects of this policy, including the forced application for asylum in one country despite ties to another country. This case demonstrates one such situation: Mr. D arrived in the United States en route to Canada, where he has three naturalized refugee relatives, including two brothers. Mr. D has no relatives and only a distant relative of a friend in the United States. Yet Mr. D was detained for two months before he was paroled and able to leave for Canada. If he had not been paroled, he would have essentially been left with no alternative but to apply for asylum in the United States. Such application for asylum, if granted, would have barred him from eligibility for asylum in Canada, where many of his close relatives live.

### **5. Sri Lankan Asylum-Seeker #2**

Mr. E, a 23 year old Hindu Tamil, came from a rural area of Sri Lanka. He fled Sri Lanka in June 1998 because he feared for his life. As a young Tamil man, he had been approached by the LTTE on several occasions. They tried to recruit him to fight with them against the Sri Lankan army. Mr. E did not agree with the LTTE's violent methods of addressing

---

<sup>124</sup> The issues raised by the application of expedited removal to asylum-seekers in transit are more thoroughly discussed in Section VI(B) of this Report.

<sup>125</sup> INA § 235(a)(2) provides that all individuals who transit through the United States shall be inspected by immigration officers.

<sup>126</sup> See *infra* Section VI(B).

the problems that Tamils face in Sri Lanka and did not want to fight with them. He was able to avoid being forced to join them by explaining that his father was old and needed help on the farm. The first few times the LTTE let him go. However, in October 1996, after he refused once again to join them, Mr. E was kidnapped off the street and taken to an LTTE camp, where he was forced to help build bunkers. He was released after ten days.

Mr. E and his family also had problems with the Sri Lankan army. Soldiers searched their home on numerous occasions, looking for LTTE members and weapons. Mr. E was stopped many times on the street by the army and asked about LTTE activities. He was accused of being a member of the LTTE. In February 1998, Mr. E was arrested by two soldiers as he was on his way to pick up his sister at school. He was accused of planting a bomb which had gone off earlier that day at a location nearby. He was taken to an army base and interrogated about the LTTE and his alleged involvement in the bomb blast. When he denied their accusations, the soldiers beat him on the back with sticks and squeezed his genitals hard with their hands. They hung him by his feet with a rope and submerged him in a tub filled with water. They beat the soles of his feet with a plastic pipe. He was tortured for two days and then locked in a room by himself for six days until his father was able to secure his release with a bribe. Mr. E returned to his village, where it took two months for him to physically recover from the torture.

After his recovery, Mr. E decided to leave his village because he was afraid that the army would arrest and torture him again. In May 1998, he left his village and went to Colombo to stay with a friend of his father's. Soon after he arrived, he was arrested by the police on suspicion of being a member of the LTTE. The police interrogated him about the LTTE. During the questioning they slapped him and hit him with a belt. They held a sack filled with chili powder over his head, causing excruciating pain. He was questioned and tortured in this manner for six days, and was only released when his father's friend paid a bribe to the police. When he was released, the police warned him that they still suspected him of being a member of the LTTE and that they would arrest him again. Less than a month later, Mr. E fled Sri Lanka.

Mr. E arrived in the United States on June 23, 1998, at San Francisco International Airport. He was traveling with a woman who was a landed immigrant in Canada, and posed as her son. Mr. E carried a Canadian passport issued to the woman's son and a visitor's visa. He was referred to secondary inspection because the immigration officer suspected that the documents did not belong to him. When he was questioned by the immigration officer at the airport, he admitted that the documents were not his. He told the immigration officer that he was afraid to return to Sri Lanka. He stated that he feared the LTTE and the army because of their "killing," and that he wanted refugee status.

Although Mr. E underwent secondary inspection at the airport, he was scheduled for deferred inspection. A second sworn statement was taken by an immigration inspector on July 2, 1998, at the INS Deferred Inspections office in San Francisco. Mr. E was represented by an attorney who appeared in person at the interview. Mr. E was questioned about his flight from Sri Lanka and his final destination. Mr. E explained that he had no relatives or friends in the United

States, but that he was on his way to Canada to join his brother who had been granted asylum in Canada and become a Canadian citizen. When asked how long he would spend in the United States, he stated that he wanted to stay in the United States until the problems in Sri Lanka ended, or to go to Canada. He told the inspector that he could no longer live in Sri Lanka because it was too dangerous. The inspector questioned Mr. E extensively about his background and his experiences in Sri Lanka with the LTTE and the army.<sup>127</sup> After Mr. E described the beatings or “loggings” that he had suffered at the hands of the army, the inspector asked him whether he had any scars from the torture. Mr. E said that he did not think so. At this point the inspector asked: “Are you aware that once you get scarred, in this case due to your beating, that they would not disappear completely?” Mr. E stated that it had been three months since he had been beaten and that the Inspector could look at his back if he wanted. At the conclusion of the questioning the inspector asked Mr. E where he had been beaten. Mr. E told the inspector that he had been beaten on his back and thighs. The inspector then asked Mr. E to remove his shirt so that he could see whether there were any scars on Mr. E’s back. In the “Record of Sworn Statement” the inspector noted: “I do not see any visible marks on the subject’s back where he claims to be ‘logged.’ I will not and did not check his thighs.” At the end of this second inspection, Mr. E was referred to a credible fear interview.

Mr. E’s credible fear interview was held at the INS office in San Francisco on July 10, 1998. He spoke in Tamil and was assisted by a telephonic interpreter. Mr. E’s attorney was present telephonically. The AO questioned him about his experiences in Sri Lanka. Mr. E told the AO that he had been kidnapped by the LTTE and forced to work for them. He stated that he had subsequently been arrested and tortured by both the army and the police. The AO found that Mr. E had a credible fear of persecution.

Mr. E was detained at the Oakland City Jail throughout his proceedings. His attorney did not request parole, for although Mr. E had been found to have a credible fear of persecution, she did not think that he would be granted discretionary parole because he had no family or community ties in the United States.<sup>128</sup> Mr. E was detained with at least one other Tamil, which alleviated his loneliness somewhat since he did not speak English. He did have some problems meeting his nutritional needs, however, since no effort was made by the Oakland City Jail to accommodate his vegetarian diet. On several occasions he had to ask his attorney to contact his brother in Canada for money to buy food that he was able to eat.

Mr. E’s merits asylum hearing was held on September 3, 1998 at the Immigration Court in San Francisco. He was represented by his attorney. The IJ found that Mr. E was credible, that he had suffered past persecution, and that he had a well-founded fear of future persecution on

---

<sup>127</sup> Mr. E was questioned in detail about the various forms of torture he had suffered. He was asked whether he had been hospitalized and if so, how many times. He was asked about each of the incidents that he had been “harassed” by the LTTE, the army and the police.

<sup>128</sup> For a discussion of parole, *see supra* note 121.

account of the political opinions imputed to him by the Sri Lankan army and police. Mr. E was granted asylum pending the clearance of his fingerprints by the FBI. Mr. E remained in detention in the Oakland City Jail until early October, when he was transferred by the INS to the Elmwood detention center, a minimum security correctional facility that also houses INS detainees, in Milpitas, about thirty-five miles from Oakland.

On October 6, 1998, Mr. E's attorney received a letter from the INS Trial Attorney that Mr. E's fingerprints had cleared and that he could be released from detention as soon as the final order of asylum was issued. Mr. E's attorney received the final order of asylum on October 21, 1998. She called the Detentions Unit of the INS that day to arrange for Mr. E's release, but was told that Mr. E could not be released until they received a copy of the IJ's final order. For the next week, Mr. E's attorney called daily, but was told that the IJ's final order had still not been received. During this time, the attorney left several messages with various INS personnel in an effort to secure Mr. E's release. On October 28, 1998, Mr. E's attorney called the Detentions Unit and spoke with a supervisor. The supervisor expressed surprise that Mr. E was still being detained. He told her that the paperwork would be sent down from San Francisco to the Elmwood detention center and that Mr. E would be released that same day. Mr. E's attorney explained to the supervisor that Mr. E could not read, write, or speak English and did not know anyone in the United States other than herself who could assist him upon his release. She requested that Mr. E be transferred to the INS office in San Francisco so that she could meet and take him to her office to make arrangements for a place for him to stay. Later that day, Mr. E's attorney received a call from the INS Duty Attorney who told her that the INS would not transfer Mr. E to San Francisco, but would release him directly from the detention facility in Milpitas.

Mr. E's attorney called the Detentions Unit periodically throughout the day to find out when Mr. E would be released. She was eventually told that the paperwork to release Mr. E was on a van which would depart the San Francisco INS office at approximately 4:00 p.m. The attorney arranged for a paralegal from her office to meet Mr. E upon his release, escort him to the train station, and help him buy a ticket to San Francisco. The paralegal waited until 8:30 p.m., but the papers had still not arrived at the detention facility. By then, Mr. E's attorney had made arrangements for Mr. E to stay with a Tamil asylee who lived near San Jose. The paralegal left this man's number with the guards at the detention facility and asked the guards to give the number to Mr. E when he was released, in the hope that he would understand to call that number. Mr. E's attorney also called Mr. E's brother in Canada and left the man's number with him. Finally, close to midnight, the INS released Mr. E. They drove him to a gas station in downtown Milpitas and dropped him off, alone and with no money. The guards had not given the phone number of the Tamil asylee to Mr. E. Mr. E was able to communicate his need to use the phone to an employee of the gas station. He called his brother who gave him the number of the Tamil asylee. Mr. E then called this man, who picked him up at the gas station.

---

## *Observations*

### *Secondary Inspection*

During secondary inspection, if a person expresses a fear of return or an intention to apply for asylum, the immigration officer must refer the person to a credible fear interview. Although the immigration officer should ask enough questions to “ascertain the general nature of the fear or concern,” they may not “go into detail on the nature of the alien’s fear of persecution or torture.”<sup>129</sup> This task is to be left to the AO.<sup>130</sup>

During secondary inspection, Mr. E expressed a fear of return to Sri Lanka based on the activities of the army and LTTE. He was not asked extensive questions about his fear of return to Sri Lanka during secondary inspection at the airport. Persons who express a fear of return to their country of citizenship are generally referred to a credible fear interview; however, Mr. E’s inspection was deferred.<sup>131</sup> During his deferred inspection, in which another “Record of Sworn Statement” was taken, he was questioned in detail about the various forms of torture he suffered, whether and when he had been hospitalized, and each of his encounters with the LTTE, the army and the police. The immigration officer also inspected Mr. E’s back for evidence of the torture alleged. Given the INS’s instructions that immigration officers should not ask detail about a person’s fear of return or asylum claim during secondary inspection, and that such task should be left to the AO, it appears that the level of detail of information sought at the deferred inspection may not have been appropriate at this stage of the expedited removal process.

### *Credible Fear Interview*

The determination of the AO reflects well on the expedited removal process. Mr. E, who alleged torture at the hands of the Sri Lankan army and police, and gave details on the nature of his experiences with these groups and the LTTE, was determined to have a credible fear of

---

<sup>129</sup> INS, *supra* note 22, at 17-29.

<sup>130</sup> *Id.*

<sup>131</sup> The INS may, after gathering the facts and usually in consultation with a supervisor, decide to defer the inspection of a person who has expressed a fear of return to their country of citizenship or residence or an intention to apply for asylum. *Id.* An examining officer may defer examination if he or she has reason to believe that the person can overcome a finding of inadmissibility based on public charge by posting a bond under INA § 213, obtaining a waiver under INA § 211 or 212(d)(3) or (4), or presenting additional evidence of admissibility not available at the time and place of the initial examination. 8 C.F.R. § 235.2. However, the INS has also stated that deferred inspection should not be used in cases involving obviously fraudulent documents. INS, 96 ACT TRAINING PHASE I LESSON PLAN 37 (Jan. 1997). Considering that Mr. E had expressed a fear of persecution at secondary inspection, and had admitted entering with false documents, a question is raised as to why his inspection was deferred, or what evidence of admissibility could have been presented, without having to proceed with the credible fear process and an asylum claim.

persecution. The attorney noted that she did not feel the need to interject during this interview, as the AO sufficiently covered the material aspects of Mr. E's fear of return to Sri Lanka.

#### *Detention Conditions*

Although Mr. E noted that the presence of another Tamil at the Oakland County Jail alleviated his loneliness,<sup>132</sup> he had difficulties meeting his nutritional needs because he was a vegetarian. The Oakland County Jail did not accommodate his diet, and Mr. E's attorney had to bring him food so that he could eat. This case raises a question about the humanitarian aspects of detention and the impact that conditions of detention may have on asylum-seekers, especially those who have cultural or religious norms which are not accommodated by the facilities in which they are held.

#### *Release*

Mr. E was not released for over a month and a half after his asylum hearing on September 3, 1998.<sup>133</sup> Mr. E was granted asylum at that hearing, pending the clearance of his fingerprints by the FBI. Although the fingerprints cleared on October 6, 1998, the INS did not release Mr. E because they had not received a copy of the final order from the IJ, which the attorney received on October 21, 1998. Mr. E's attorney spoke with an INS Supervisor, who expressed surprise that Mr. E had not been released.

Upon the day of his release, October 28, after several attempts to find out the time at which he would be released, Mr. E's attorney was informed that the necessary paperwork would be sent from San Francisco at 4:00 p.m. Mr. E's attorney, also in San Francisco, sent a paralegal down to Milpitas to await his release. However, Mr. E was not released until midnight, by which time the paralegal had departed. Although it was requested that he be given the phone number of a person whom he could call to help him upon release, the number was not given to him. Mr. E was dropped off at a gas station in the middle of the night, alone, without money and without being able to speak English. It was only because Mr. E's attorney had gone to such lengths to contact both another Tamil asylee and Mr. E's brother that Mr. E was not left sleeping on the street on the night of his release.

There is no legitimate policy reason for placing individuals, such as Mr. E, in such potentially dangerous situations. Although the INS may not be able to accommodate the request of the detainee as to the time and location of release, the INS could make greater efforts to assist

---

<sup>132</sup> The Expedited Removal Study has been informed that detainees often suffer loneliness and depression after being placed in detention upon their arrival in the United States. For an example, see *infra* note 137.

<sup>133</sup> In other cases in the Study's database, individuals were released from detention the day they were granted asylum.

asylum-seekers and other detainees with their releases, in order to avoid releasing individuals under unduly difficult and dangerous circumstances.

### **6. Sri Lankan Asylum-Seeker #3**

Ms. F, a Sri Lankan Tamil woman, and her two young daughters fled Sri Lanka to seek asylum in the United States. Her husband, who was also Tamil, had been a school teacher. The school where he taught was attacked on several occasions by the Sri Lankan army. Her husband was accused of supporting the LTTE and of giving them information. The family lived near an LTTE camp and on several occasions they were forced against their will to support the group with food and monetary contributions. After several encounters with the army, Ms. F's husband gave up his job. Soldiers also came to their home periodically to question both her and her husband about the activities of the LTTE in that area. In October 1995, the army launched an attack against the LTTE in their town. Many homes, including their own, were destroyed in the attack.

After the attack, Ms. F and her family left the town and lived for a year in a camp set up by the army for displaced persons. The conditions in the camp were very difficult. Ms. F and her family had to live in a small tent and were not allowed to work. They were allotted a small stipend for food, but it was not sufficient and they were left hungry. Each time Ms. F left the camp to take a shower or to look for food, she had to report back to the authorities within a few hours, or they would search for her. There were approximately 1,000 Tamils detained at the camp and everyone was forced to register with the army. Approximately two times a week, soldiers conducted surprise searches and interrogations. On one occasion, Ms. F and her husband were taken to a separate room, asked if they were connected to the LTTE, and threatened.

Finally, she and her husband decided that in order to find safety and security, they had to leave Sri Lanka. They felt that as Tamils, they would always be in danger, no matter where they lived in Sri Lanka. By selling their land, they were able to raise just enough money for Ms. F and their daughters to leave Sri Lanka with the help of an agent. Ms. F left for the United States, where one of her brothers, who was an asylee, was living. Although it is unclear if she had a connecting flight to Canada when she arrived in the United States, Ms. F intended to go to Canada, where four of five of her siblings lived. These siblings had similarly been granted refugee status in Canada.

Ms. F and her two daughters, ages three and eleven, arrived in the United States at San Francisco International Airport on March 23, 1998. They were accompanied by another young woman whom Ms. F had met while living in the camp in Sri Lanka. Ms. F was routed to secondary inspection because she attempted to enter the United States using a passport which did not belong to her. The passport was in another woman's name. At secondary inspection, which took place on the following day at the INS office in San Francisco, she told the Immigration officer that she was afraid to return to Sri Lanka because of the fighting there and because she



would be harmed. She was referred to a credible fear interview. She was detained at the Oakland City Jail, but her children were detained approximately ten miles away at Hosanna Foster Homes in Castro Valley, a private non-security foster facility that also houses INS juvenile detainees.

Ms. F's credible fear interview was held at the San Francisco INS office on March 27, 1998. She did not have an attorney or a representative present. The AO questioned her about the destruction of her home and village and about her fear of returning to Sri Lanka. The AO found that Ms. F had a credible fear of persecution because she feared harm "on account of an imputed political opinion due to her ethnicity." After her credible fear interview, Ms. F retained an attorney to represent her during her asylum proceedings. She remained in detention at the Oakland City Jail and her children remained in the Hosanna facility.

Conditions in detention proved to be quite difficult for Ms. F. She could not speak, read or write in English. There were no other Tamil women detained in the Oakland City Jail. The Tamil woman who arrived with Ms. F at San Francisco International Airport was detained in North County Jail, another facility in Oakland. In addition, Ms. F, who had lived in an extremely rural part of Sri Lanka and had strong religious convictions, was now separated from her children and forced to live in close quarters with dozens of strangers. She was extremely modest and was embarrassed to take her clothes off and bathe with other women. She was also unfamiliar with the shower apparatus and avoided bathing. As a result, Ms. F, who had very long hair, contracted head lice. On one occasion when Ms. F's attorney went to visit her in detention, a guard told the attorney that Ms. F had head lice because she would not bathe, and that she refused to use chemical shampoos to kill the lice. The guard informed Ms. F's attorney that if she continued to refuse to bathe, they would have to shave her hair off completely. Fortunately, Ms. F's attorney was able to explain the situation through an interpreter, and Ms. F was able to get rid of the lice.

The INS permitted Ms. F to call her children, but it was difficult for her to place the calls. The INS was reluctant to release the phone number of the facility, even to Ms. F's attorney. Unfortunately, when Ms. F's attorney placed the call on her behalf, the authorities at the Hosanna facility refused to accept the call and told her that an immigration officer had to call first in order to connect her to the children. Since Ms. F did not speak English, she was unable to call the immigration officer herself. Ms. F's attorney placed several calls to INS and left messages. Many of these calls were not returned.

Apart from two court appearances, Ms. F was only allowed to see her children on one occasion during her eleven week detention.<sup>134</sup> On this occasion, Ms. F was brought to the INS office in San Francisco, as were her daughters. They were permitted to spend the day together in the holding cell at INS. Ms. F was never allowed to visit the facility where her daughters were

---

<sup>134</sup> Ms. F had three court appearances, but the children were only present at two.

kept. At each of her court appearances, Ms. F was brought to the court in handcuffs. Her attorney had to ask the guard to remove the handcuffs so that Ms. F's daughters would not become upset. On one occasion the guard refused to cooperate. The attorney appealed to the IJ who ordered the guard to remove the handcuffs.

On April 22, 1998, Ms. F's attorney drafted a letter to the District Director requesting parole for Ms. F and her daughters, pending a decision by the IJ on her asylum claim.<sup>135</sup> The attorney believed that the following compelling equities were a basis for parole: Ms. F had two small daughters who were being detained apart from her; she had a brother in New York who had been granted asylum and was willing to sign an affidavit of support; and she had been found to have a credible fear of persecution. Furthermore, Ms. F had never been charged with or convicted of any crime. However, before submitting the request for parole, Ms. F's attorney discussed the issue of parole with the Supervisor of Deferred Inspections in San Francisco, who advised the attorney that Ms. F would not be paroled. The INS in San Francisco had seen several cases where persons arrived at the United States accompanied by children and claimed to be their parents. When these persons were paroled, they abandoned the children. The Supervisor told Ms. F's attorney that there would be a presumption against her because she had entered with false documents and that the INS would not release her. The Supervisor said that they would release Ms. F's daughters if their uncle in New York came to San Francisco with their original birth certificates and their mother's marriage certificate, and if the INS found these documents to be authentic. Based on that information, Ms. F's attorney decided that it was better to keep the daughters in detention, where they would be closer to their mother, rather than releasing them to their uncle who lived in New York, which would cause a greater separation.

Ms. F's final merits hearing was held on June 5, 1998, at the Immigration Court in San Francisco. She was represented by her attorney. Her daughters were both present. At the merits hearing, Ms. F was able to establish her identity and those of her daughters by their original birth certificates that she had received from her family. The IJ granted her asylum and she was released and reunited with her daughters the same day. Soon thereafter, they left for New York to join Ms. F's brother.

### ***Observations***

#### *Detention*

This case raises significant questions about the detention of asylum-seekers, and especially of children, which has been a subject of controversy and debate.<sup>136</sup> Commentators

---

<sup>135</sup> For a discussion of parole, *see supra* note 121.

<sup>136</sup> UNHCR recently released guidelines on the detention of asylum-seekers, which recommend that as a general principle, with some exceptions, asylum-seekers should not be detained. *See generally supra* Part III(C) and (continued...)

have noted that detention may have harsh effects on persons who have been subjected to past persecution, torture, or other trauma.<sup>137</sup>

---

<sup>136</sup>(...continued)

Attachment 8. In the case of children accompanying their parents, UNHCR recommends that all appropriate alternatives to detention should be considered. *Id.* Human Rights Watch has similarly presented concerns regarding the detention of children by the INS and has proposed detention policies, standards, and monitoring. HUMAN RIGHTS WATCH, *DETAINED AND DEPRIVED OF RIGHTS, CHILDREN IN THE CUSTODY OF THE U.S. IMMIGRATION AND NATURALIZATION SERVICE* (Dec. 1998).

<sup>137</sup> In one case in the Study's database, a 20 year old Iraqi asylum-seeker tried to commit suicide while in detention. Mr. P was from a rural area and was not well-educated. He alleged that his father, a Kurd, was a member of the Kurdistan Democratic Party; that Kurds were treated more harshly than non-Kurds in the military; and that while in the military, his brother's ear was cut off as punishment for returning late to the base from a visit home. Mr. P left Iraq soon after he received his military conscription notice. Upon his arrival in the United States on November 7, 1997, Mr. P was referred to a credible fear interview. He was detained at the Wackenhut Detention Facility. Mr. P's credible fear interview was held on November 19, 1997. The AO found that Mr. P had a credible fear of persecution. Mr. P's hearing on the merits was held on May 7, 1998 at Wackenhut. The IJ denied Mr. P's asylum request on the grounds that he had failed to establish his identity and was not credible. (Mr. P's attorney tried to get verification of his identity, but letters sent to Iraq requesting evidence of Mr. P's identity were returned for being undeliverable.)

In mid-October 1998, Mr. P participated in a hunger strike with other asylum-seekers at Wackenhut in order to protest the lengths of their detentions. As a result, the INS placed Mr. P in isolation. In isolation, Mr. P grew despondent. In despair, he slit his wrists and tried to hang himself. He was taken to Jamaica Hospital Medical Center for psychiatric evaluation. After two weeks he was sent back to Wackenhut under medication. Prior to the suicide attempt he had written a letter to his attorney stating: "I'm in a confused state. I do not know what will become of me. I do not want to spend my life in INS jail indefinitely." Mr. P's attorney requested humanitarian parole for Mr. P. This request was denied on December 4, 1998, because Mr. P had not established his identity or that he had community ties in the United States; because he had been denied asylum and withholding by an IJ; and because of an interest in safeguarding the community and Mr. P. The INS District Director noted that because the attorney had mentioned that Mr. P had been hearing voices and the sounds of violent wind, it appeared that Mr. P was a danger to himself and the community. He was returned to the psychiatric unit at Jamaica Hospital for observation on two or three other occasions.

In early 1999, Mr. P was transferred to the Buffalo Federal Detention Facility in Batavia, New York, which mainly holds criminal detainees awaiting removal to their home countries, as well as United States citizens awaiting criminal trial. He was transferred without notice to his attorney. Despite the fact that Mr. P reported that the conditions of his detention were much better than at Wackenhut, he continued to suffer from feelings of extreme hopelessness and depression. On April 5, 1999, he began refusing to eat and was placed in segregated housing under close watch. Mr. P's Deportation Officer informed his attorney that the INS intended to seek a court order to force feed him if necessary. However, Mr. P voluntarily began to eat.

On April 21, 1999, Mr. P was transferred back to Wackenhut and again placed in isolation. His attorney received no notice of the transfer until his client called him. Mr. P stated that he did not know why he was in isolation. The attorney spoke with the Wackenhut director on April 30. The director stated that Mr. P had been examined by Wackenhut's medical director, a general physician, who determined that it was not safe for Mr. P to join the general population at Wackenhut. Mr. P's attorney learned from his client that Mr. P had met with the medical director for approximately five minutes on the day he was returned to Wackenhut.

This case raises serious humanitarian and policy concerns about the detention and treatment of asylum-seekers in the United States, and the use of isolation for persons suffering from depression and other mental

(continued...)

This case also raises the issue of detention conditions.<sup>138</sup> Humanitarian concern has been expressed by UNHCR regarding the conditions under which asylum-seekers are detained. UNHCR has set minimum standards for the detention conditions of asylum-seekers, and stated that children should be separated from adults, “except where they are part of a family group.”<sup>139</sup>

In this case, Ms. F was separated from her children for eleven weeks. She was only permitted to see her children on three occasions, two of which were in-court appearances. She and her youngest daughter did not speak any English, while her older daughter spoke only limited English. Further, there were no other Tamils in Ms. F’s facility. In addition to being separated from her family, Ms. F felt uncomfortable showering in the Oakland County Jail because of her cultural norms. Lastly, Ms. F was brought into court in front of her children in handcuffs. On one occasion, because a guard did not want to take the handcuffs off, her attorney had to appeal to the IJ to order that the handcuffs be removed so that her children would not be upset. Commentators have expressed concern that asylum-seekers are treated in the same manner as criminals in this respect.

### *Parole*

As noted above, the INS has stated that parole is a viable option for persons who have been determined to have a credible fear of persecution, who can establish identity and community ties, and who are not subject to any bars to asylum involving violence or misconduct.<sup>140</sup> In Ms. F’s case, her attorney felt that there were compelling equities which were a basis for parole. Ms. F had a brother living in the United States who had been granted asylum; she had never been convicted or charged with any crime; she had two children in detention; and

---

<sup>137</sup>(...continued)

conditions. Mr. P’s attorney expressed his opinion that the use of isolation in this case is punitive. He also expressed concern that the brief medical evaluation was insufficient to make a determination whether it was safe for Mr. P to return to the general population. If that diagnosis is in fact correct, the attorney feels that Mr. P should be transferred to a psychiatric facility, rather than be held in isolation.

<sup>138</sup> Currently, the FBI is investigating allegations of beatings, verbal abuse, and other violations of the civil rights of asylum-seekers at Elizabeth Detention Facility. Elizabeth Llorente, *Shackled on the Land of Hope: Asylum-Seekers Live in Jail-Like Conditions, FBI Studies Detainees’ Complaints of Cruelty*, BERGEN COUNTY RECORD, Apr. 11, 1999. In January, Mr. Aboyade, a Nigerian asylum-seeker at this facility alleged that he was a victim of excessive force and that he witnessed the use of excessive force on another detainee the same day. He has helped organize two hunger strikes to protest conditions at the center. Mr. Aboyade was recently transferred to a facility in Pennsylvania. *A Suspicious Transfer: Is the Immigration Service Being Vindictive?*, BERGEN COUNTY RECORD, Apr. 16, 1999.

In other cases in the Expedited Removal Study’s database, asylum-seekers have expressed a preference to return to their countries rather than remain in harsh conditions of detention.

<sup>139</sup> See Guidelines, *supra* note 60 (Attachment 8), at Guideline 10. See also generally *supra* Part III(C).

<sup>140</sup> For a discussion of parole, see *supra* note 121.

she had been found to have a credible fear of persecution. However, in a conversation with an INS supervisor, the attorney was informed that Ms. F would not be eligible for parole. He stated that this was in part because INS had encountered experiences where adults claiming to be parents arrived with children, were detained, and abandoned the children when they were paroled. Thus, the attorney did not submit a formal parole request.

### **7. Russian Software Engineer with Facially Valid Visa**

Mr. G is a thirty-two year old Russian software engineer. He has an advanced degree, a successful job, and a wife and children in Russia. At the suggestion of a friend of his who worked in the same field in Silicon Valley, he decided to visit the United States to explore the possibilities of finding future employment in the computer industry and the various legal avenues open to him for obtaining this employment. His friend suggested that he bring his resume and his diploma so that he could talk with the representatives of some California-based companies. Mr. G arrived in the United States on September 25, 1998. He was traveling with a valid passport and visitor's visa. He intended to return to his family and job in Russia at the end of his authorized stay in the United States.

Mr. G had filled out an I-94 (Arrival-Departure Record) on the plane, but did not provide his address. He was planning to stay with his friend in California, but did not have the address readily accessible. When he arrived at San Francisco International Airport, an immigration officer addressed him in English. When it was apparent that his English was limited, the immigration officer asked an employee of the airlines to interpret. The interview was conducted in Russian, but because the employee's ability to speak Russian was limited, Mr. G had a difficult time understanding what was happening.

The immigration officer asked Mr. G to fill in the address where he would be staying. Mr. G pulled out a folder which contained the address and other personal papers. The officer then asked to search the folder and found copies of Mr. G's resume and diploma. At this point, the immigration officer concluded that Mr. G had come to the United States to seek or accept unauthorized employment. He would not listen to Mr. G's explanation that he had a job and a family in Russia. Mr. G was then given two choices: to either sign some papers and withdraw his application for admission, or be barred from entry into the United States for five years. Because all the papers were in English, Mr. G could not read what he was signing. He chose to withdraw his application for admission to the United States. He was handcuffed to a chair at the airport and held for two hours before being taken to Oakland County Jail.

Mr. G was not allowed to contact anyone until he arrived at the jail. He called the friend with whom he planned to stay. His friend tried to contact an attorney, but was unsuccessful because it was a Friday night. His friend was finally able to retain an attorney on Sunday, and they went together to San Francisco International Airport to try to intercept Mr. G before he was returned to Russia. The INS did not allow Mr. G to speak with the attorney. The INS claimed that Mr. G had twice been offered the options of withdrawing his application for admission or

being barred for five years from entry into the United States. The attorney asked the immigration officer whether Mr. G had understood the options. The immigration officer stated that he had understood his options because they were translated in Russian with the assistance of a telephonic interpreter. Nevertheless, Mr. G was never given copies of the papers he signed. Nor were the papers ever translated for him. Mr. G was sent back to Russia and told that he had to begin anew the process of applying for entrance into the United States. According to his friend in California, Mr. G was shocked at the way he was treated, especially since he was traveling with valid documents. At this point he is very discouraged with his exposure to what he ironically calls American "democracy" and is not sure whether he will ever return.

### *Observations*

#### *Determination of Inadmissibility*

Expedited removal applies to persons who seek to enter the United States with: (1) no documents, (2) patently false documents, (3) invalid documents, such as an expired passport or visa, or (4) valid documents which the INS believes are not proper for the purpose of entry or were obtained by fraud or misrepresentation.<sup>141</sup> Application of expedited removal to the fourth category of person requires the greatest exercise of judgement on the part of officers, because it requires an evaluation of the individual's eligibility for the documents in question, the individual's intent, and the individual's motivations.<sup>142</sup> Thus, the application of expedited

---

<sup>141</sup> INA §§ 212(a)(6)(c), 212(a)(7), 235(b)(1)(A). Regarding the ground of inadmissibility for entry by fraud or willful misrepresentation of a material fact, the INS Inspector's Field Manual states: "Section 212(a)(6)(C) is an especially difficult charge to sustain, unless the case involves obviously fraudulent or counterfeit documents. Misrepresentation is even more difficult to determine. Also keep in mind that an alien who is determined to be inadmissible for fraud or misrepresentation is barred forever from the United States, with few waivers available." INS, *supra* note 22, at 17-26. The INS also has recommended that in the case of *prima facie* valid documents, immigration officers consider whether the immigration violation "warrants the serious consequences of a formal removal" in determining whether to allow withdrawal of applications for admission. Office of Programs, Withdrawal of Application for Admission (Dec. 22, 1997) (Attachment 4 to First Year Report, *supra* note 3).

<sup>142</sup> The media has reported on several cases in which persons with valid visas were found to be inadmissible to the United States and placed in expedited removal. Unlike the case at hand, the following two cases involved persons who were removed, rather than being permitted to withdraw their applications for admission. In one case, the media reported that a Venezuelan woman with a valid visitor's visa was detained for thirty-six hours and removed from the United States when she attempted to visit her children who were students in the United States, as she had done previously. Alan Dimond, *Immigration Law is Un-American*, MIAMI HERALD, Sept. 18, 1998. She was subjected to four invasive strip searches and fed nothing, despite the fact she told the immigration officers that she had low blood pressure. She was then forced to sign removal papers which stated that she attempted to enter the United States fraudulently, despite the fact she did not understand the papers and knew that her visa was valid. In another case, the media reported that a Czechoslovakian man, Zdenek Geres, who had a valid visitor's visa, was placed in expedited removal. Anthony Lewis, *Abroad at Home: Bullies at the Border*, NEW YORK TIMES, June 15, 1998. He was told that he was lying to the immigration officers, and that he could confess and leave for home on the next flight or not confess and be jailed for three years. Mr. Geres did not yield to this

(continued...)

removal to this group of persons has been a subject of controversy.<sup>143</sup>

A B-1/B-2 visa is a non-immigrant visa which allows foreign individuals to visit the United States temporarily for business or pleasure purposes. Although a person may travel to the United States on a B-2 visa to engage in business, he or she may not be gainfully employed.<sup>144</sup> In this case, Mr. G was in possession of a valid, unexpired passport and visitor's visa. The event which appears to have triggered his placement in expedited removal was the immigration officer's discovery of Mr. G's resume and diploma. Upon finding such documents, the immigration officer concluded that Mr. G intended to seek or accept unauthorized employment. Mr. G alleged that the immigration officer appeared unwilling to listen to his statements about his family and employment in Russia and did not place much weight on these factors in making an assessment.<sup>145</sup> Therefore, the question arises whether Mr. G's possession of a resume and diploma was an appropriate basis for the INS's determination of inadmissibility in expedited removal proceedings.

### *Interpretation*

Mr. G alleged that the immigration officer asked an employee of the airlines who spoke limited Russian to interpret for him. The interpreter's limited fluency raises questions about the accuracy of the interpretation of Mr. G's statements to the immigration officer, the ensuing determination of inadmissibility, and the interpretation of the consequence of a removal order and withdrawal of an application for admission.<sup>146</sup> Although an immigration officer stated that

---

<sup>142</sup>(...continued)

pressure, and was removed from the United States. His visa was canceled and he was barred from entering the United States for five years. Mr. Geres was traveling with two friends, who under similar pressure from immigration officers, falsely confessed that they wanted to work in the United States, and were removed. *Id.*

<sup>143</sup> As discussed above, the implementation of expedited removal as it affects applicants for admission to the United States with facially valid visas is the subject of current litigation. *See supra* Section III(B).

<sup>144</sup> 9 Foreign Affairs Manual 41.31 N.5.

<sup>145</sup> Although immigration officers perform an admissibility analysis independent of the consular officer who granted a visa, the existence of "reasonably good employment" and family abroad, such that they indicate a strong inducement to return to that country, are material factors considered by consular posts when granting visas. *Id.* at N.2.

<sup>146</sup> The use of airline employees as interpreters raises issues where the applicant for admission is an asylum-seeker, which Mr. G was not. Many airlines are government-owned, and airline employees may be employees of the same country of citizenship or residence of the applicant for admission to the United States. An asylum-seeker may be reluctant to express fear in the presence of an employee of his government. The presence of an employee of that country's government may subject the applicant for admission to a heightened risk of harm if returned to that country. The regulations that set forth the requirements for credible fear interviews appear to recognize the danger by providing that an interpreter at a credible fear interview "may not be a representative or

(continued...)

the assistance of a telephonic interpreter was later obtained to explain the options to Mr. G — either to be removed or to withdraw his application for admission — it is unclear whether they were explained in a manner that Mr. G could understand. Given that persons removed from the United States are subject to a five year bar on reentry, or ineligibility for certain relief if fraud or misrepresentation is found, inaccurate admissibility determinations and explanations of the consequences of removal orders raise legal and policy concerns.

### *Failure to Receive Copies of Signed Papers*

In this case, Mr. G alleged that he did not receive a copy of the papers he signed. This appears to be a violation of INS policy. An INS memorandum, distributed prior to Mr. G's arrival in the United States, provides: "The alien should be given a copy of the I-275 (Withdrawal of Application for Admission / Consular Notification) and any sworn statement taken, unless the Form I-275 contains classified or sensitive information."<sup>147</sup>

## **B. Case Studies from the EOIR Database**

### **1. Asylum-Seeker from Montenegro**

Mr. H, a Yugoslavian man from Montenegro, was born and raised in Montenegro. Mr. H's mother was Muslim and his father was an ethnic Albanian. Since the war in Yugoslavia began approximately ten years ago, Mr. H was often mistreated by the Serbian police. Serbian police officers insulted him, slapped him on the face, prevented him from walking around in the city, and beat him with a baton on two or three occasions. Serbian police officers also came looking for him at his house to arrest him and forcibly draft him into the military. Because of the mistreatment and fear of arrest, torture, and even death at the hands of the Serb police, Mr. H began hiding in the woods during the days. Mr. H felt that he was being mistreated because he was Muslim and Albanian. He also believed that he was unable to obtain a steady job because he was Muslim. Mr. H was afraid to participate in the military because he would have to kill people and be beaten and tortured. Mr. H noted that the war was not occurring in the area in which he was living, but that the militia was provoking the Muslims, while the Serbs were "not being touched."

Mr. H left Montenegro and arrived at Miami, Florida on September 21, 1997. During secondary inspection, Mr. H told the immigration officer that he left Yugoslavia because the situation there was very bad, that "they" wanted to kill him, that he could not get a job because of

---

<sup>146</sup>(...continued)

employee of the applicant's country of nationality or, if the applicant is stateless, the applicant's country of last habitual residence." 8 C.F.R. § 208.30. The Expedited Removal Study has other cases in its database where the INS utilized airline employees to interpret during secondary inspection.

<sup>147</sup> Office of Programs, *supra* note 141.



the assistance of a telephonic interpreter was later obtained to explain the options to Mr. G — either to be removed or to withdraw his application for admission — it is unclear whether they were explained in a manner that Mr. G could understand. Given that persons removed from the United States are subject to a five year bar on reentry, or ineligibility for certain relief if fraud or misrepresentation is found, inaccurate admissibility determinations and explanations of the consequences of removal orders raise legal and policy concerns.

### *Failure to Receive Copies of Signed Papers*

In this case, Mr. G alleged that he did not receive a copy of the papers he signed. This appears to be a violation of INS policy. An INS memorandum, distributed prior to Mr. G's arrival in the United States, provides: "The alien should be given a copy of the I-275 (Withdrawal of Application for Admission / Consular Notification) and any sworn statement taken, unless the Form I-275 contains classified or sensitive information."<sup>147</sup>

## **B. Case Studies from the EOIR Database**

### **1. Asylum-Seeker from Montenegro**

Mr. H, a Yugoslavian man from Montenegro, was born and raised in Montenegro. Mr. H's mother was Muslim and his father was an ethnic Albanian. Since the war in Yugoslavia began approximately ten years ago, Mr. H was often mistreated by the Serbian police. Serbian police officers insulted him, slapped him on the face, prevented him from walking around in the city, and beat him with a baton on two or three occasions. Serbian police officers also came looking for him at his house to arrest him and forcibly draft him into the military. Because of the mistreatment and fear of arrest, torture, and even death at the hands of the Serb police, Mr. H began hiding in the woods during the days. Mr. H felt that he was being mistreated because he was Muslim and Albanian. He also believed that he was unable to obtain a steady job because he was Muslim. Mr. H was afraid to participate in the military because he would have to kill people and be beaten and tortured. Mr. H noted that the war was not occurring in the area in which he was living, but that the militia was provoking the Muslims, while the Serbs were "not being touched."

Mr. H left Montenegro and arrived at Miami, Florida on September 21, 1997. During secondary inspection, Mr. H told the immigration officer that he left Yugoslavia because the situation there was very bad, that "they" wanted to kill him, that he could not get a job because of

---

<sup>146</sup>(...continued)

employee of the applicant's country of nationality or, if the applicant is stateless, the applicant's country of last habitual residence." 8 C.F.R. § 208.30. The Expedited Removal Study has other cases in its database where the INS utilized airline employees to interpret during secondary inspection.

<sup>147</sup> Office of Programs, *supra* note 141.

his religion, and that “they” wanted to draft him so that he could fight and be killed. Mr. H also told the immigration officer that he would rather be dead than to return to Yugoslavia. Mr. H was referred to a credible fear interview and detained at Krome Service Processing Center.

Mr. H’s credible fear interview was conducted on September 30, 1997. Mr. H waived the presence of a consultant. He told the AO that he had a consultant who was an attorney, but the consultant was not present and the AO was unable to contact him or her. During the interview, Mr. H told the AO of his experiences, set forth above, in Yugoslavia. He told the AO that the “hate” and the mistreatment began approximately ten years ago when the war began in Yugoslavia. Mr. H told the AO that he could be identified as Muslim by his name, and that the Serbs asked people for their names and identification in order to verify their names. Mr. H told the AO that once while being beaten, Serbian police officers said to him: “[Y]ou Muslims and Albanians are ours and we are going to slaughter you.” Mr. H expressed a desire to kill himself rather than be returned to Yugoslavia. When asked if he had any questions at the end of the interview, he stated: “I don’t have any questions but I just want to tell you that if you direct me over there, it’s better that you give me a gun so I can kill myself. I came here not to go back, if you are going to send me back, give me a gun so I can kill myself.”

Shortly after the interview, on October 1, 1997, Mr. A’s attorney sent the AO a letter with additional facts and legal authority as to why Mr. H had established a credible fear of persecution. She provided the AO with the following information. Mr. H had suffered discrimination and persecution due to his political beliefs, and more specifically, because he was a Muslim. The police stopped him and repeatedly beat him due to his ethnic and religious status. His two cousins were wounded during the war; one lost a leg and the other lost an arm. At the age of twelve, Mr. H was forced to leave school because he suffered ridicule and persecution for being a member of a Muslim minority group. She noted that Mr. H was unable to obtain employment due to continuing harassment and persecution by the government and instead, worked odd jobs. She also informed the AO that Mr. H had relatives in the United States who were citizens and lawful permanent residents. Additionally, the attorney submitted documentation including articles and reports on country conditions, and an unreported BIA case, *Matter of Adem Spajjoski*.<sup>148</sup> One of the country condition reports submitted by the attorney, United States Department of State, *Country Reports on Human Rights Practices, Serbia-*

---

<sup>148</sup> *Matter of Adem Spajjoski* was a non-precedent case decided by the BIA in 1990. It can be found in 8 Immigration Reporter B1-36 (March 9, 1990). In this case, the BIA reversed a denial of asylum where the applicant testified that he was active in an organization called the “Kosovo Republic,” which fought for the equal rights of ethnic Albanians in Yugoslavia. Many of his friends in the organization were arrested, and his wife was arrested and beaten while pregnant in order to get information about the applicant. The IJ had found that he was not credible principally because his wife and children were able to travel to the United States. The BIA found that their departure was not so implausible as to render the applicant’s testimony suspect. The BIA noted that the Service’s cross-examination of the applicant did not address the most significant facts raised in his asylum application or testimony on direct examination.

---

*Montenegro* (1996), noted discrimination and violence against Muslims and ethnic Albanians in Serbia-Montenegro.

On October 3, 1997, the AO found that Mr. H's testimony was not credible because it lacked detail regarding material portions of his claim. The AO found that while Mr. H indicated that he was mistreated at the hands of the Serbian authorities, he spoke in general terms and could not specify when these incidents occurred or the circumstances relating to these incidents.<sup>149</sup> The AO went on to conclude that even if Mr. H were found to be credible, the treatment he described would not rise to the level of past persecution, nor would it establish that he had been singled out by the Serbian authorities. The AO noted that according to Mr. H's own testimony, "all Albanians and Muslims are subject to discrimination and harassment by the Serbs." Last, the AO concluded that Mr. H's "reason for leaving the country, avoidance of compulsory military service, did not constitute persecution on account of one of the five grounds."

Mr. H requested IJ review of the negative credible fear determination. The review was held on October 10, 1997. During this review, testimony was taken regarding Mr. H's background and fear of return to Montenegro. The IJ affirmed the negative credible fear determination by the AO.

The Study recently learned that, following further efforts by Mr. H's attorney, Mr. H was re-interviewed by an AO to determine if he had a credible fear of persecution.<sup>150</sup> As it was determined that Mr. H had a credible fear of persecution at this re-interview, he was placed in removal proceedings and applied for asylum. The Study was unable to ascertain whether or not Mr. H has been granted asylum.

### ***Observations***

#### *Credibility Determination*

The AO found Mr. H not credible in part because his testimony lacked detail, because he spoke generally and because he failed to testify to the dates or circumstances of the events he described over a ten year period of time. Yet, the record indicates that Mr. H provided

---

<sup>149</sup> In concluding that Mr. H was not credible, the AO referred to the following testimony: When asked to explain why he feared torture, he stated: "When they [the Serbs] catch you they kill you or make you kill somebody else. They don't let you die with a bullet, they torture you with a knife and then they kill you." When asked how he knew this, Mr. H stated that he knew men that had come back from the army with scars. When asked if "[s]ome guys that came back had scars," the applicant stated: "Actually, they were killed." He said that he did not know how they were killed because he was not with them when they died.

<sup>150</sup> For further information regarding the INS re-interview policy, *see supra* note 106 and accompanying text.

information about these events. Mr. H stated that the maltreatment he suffered began approximately ten years prior, when the war began.<sup>151</sup> He also alleged that he was beaten two or three times with a baton, that Serbian militia members had asked for his name and stated that they were going to slaughter Muslims and Albanians, and that it was not the same persons who beat him on each of the occasions. Mr. H also said that Serbs came to his house to arrest him for purposes of compulsory military service and that he began hiding in the woods.

Additionally, the Expedited Removal Study noted that, either because of limitations in Mr. H's vocabulary, the interpretation, or other factors, it appeared Mr. H did not understand many of the questions asked of him. Some of Mr. H's answers to questions were non-responsive and/or incomprehensible. For example, when asked if military service was compulsory, he stated: "It's fine if it's normal but in this situation it's not normal because the Serbs would force me to go first to kill the people." When asked the question a second time, Mr. H stated: "It's compulsory but it's not compulsory to me because I was maltreated, I was slapped over my face and I would wind up with a bullet in my head." Furthermore, when asked if there were Muslims in the military, Mr. H said: "Somebody just got killed." When asked the same question again, he said: "Everybody runs away."

Last, while detail may be the central means of determining credibility, "an AO's evaluation of the details of an applicant's story . . . must be tailored to the level of openness and articulateness of which the applicant is believed to be capable."<sup>152</sup> Further, it is important for the AO to consider that some applicants have difficulty describing events and experience in rich detail, due to the traumatic nature of the events experienced and/or a low level of education.<sup>153</sup> It is unclear from the record whether the AO considered these factors in making her determination. As the credible fear standard, by definition, is lower than the burden of proof required to establish eligibility for asylum,<sup>154</sup> a question is raised regarding whether it was appropriate to make an adverse credible fear determination based on credibility at this stage of the process.

---

<sup>151</sup> The record indicates this is the only time when the AO asked a question regarding the dates of the alleged mistreatment.

<sup>152</sup> DEPARTMENT OF JUSTICE/INS, *supra* note 110, at 110-111.

<sup>153</sup> *Id.* at 111.

<sup>154</sup> A "credible fear of persecution" is defined as a "significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 208." INA § 235(b)(1)(B)(v). In order to establish eligibility for asylum, an applicant must prove that he has a well-founded fear of persecution, such that a reasonable person in his or her circumstances would fear persecution. INA § 208; *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987). Under the well-founded fear of persecution standard, an asylum applicant need not prove that is more likely than not that he or she would be persecuted; a one in ten possibility of persecution may be sufficient. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449-50 (1987).

---

*No Persecution*

The AO found that Mr. H's reasons for leaving the country, avoidance of compulsory military service, did not constitute persecution on account of one of the five grounds. Although as a general rule, punishment for the avoidance of compulsory military service does not constitute persecution, there are exceptions to this rule.<sup>155</sup> The AO's assessment of the case does not indicate that she was aware of these exceptions. Given the conditions in Yugoslavia at this time and the nature of the facts alleged, it appears that it would have been appropriate to consider if these exceptions were applicable.

The AO also found that the mistreatment alleged by Mr. H at the hands of the Serbian authorities did not rise to the level of past persecution. Under case law, persecution has been defined as "a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive."<sup>156</sup> In his testimony, Mr. H alleged beatings, slaps in the face by police, an attempted arrest, and the inability to obtain work because he was Muslim and Albanian.<sup>157</sup> It is unclear from the record of proceedings what the AO relied upon in reaching the conclusion that Mr. H had not suffered persecution in the past.

*"Singled-Out" Requirement*

The AO found that Mr. H did not establish that he was singled out by the Serbian authorities. She noted that according to his own testimony, all Albanians and Muslims are subject to discrimination and harassment by the Serbs. Under 8 C.F.R. §§ 208.13(b)(2), an applicant for asylum is not required to provide evidence that he or she would be singled out individually for persecution if he or she establishes that there is a pattern or practice of persecution of a group of persons similarly situated to the applicant on account of a protected ground, and that he or she identifies with and is included in such group. It is unclear whether the AO fully understood the applicable legal standards.

---

<sup>155</sup> Punishment for avoidance of compulsory military service has been found to constitute persecution under the following circumstances: (1) where the punishment is disproportionate on account of a protected ground, (2) where the military action is persecutory or condemned by the international community as contrary to the rules of human conduct, and (3) where a person is punished because of a political opinion the persecutor imputes to him or her because of the refusal of military service. *Matter of R-R-*, 20 I. & N. Dec. 547 (BIA 1992); *Barraza-Rivera v. INS*, 913 F.2d 1443, 1450-51 (9th Cir. 1990); *Ramos-Vasquez v. INS*, 57 F.3d 857, 863 (9th Cir. 1995); DEPARTMENT OF JUSTICE/INS, *supra* note 110, at 85.

<sup>156</sup> *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985), *overruled on other grounds*, *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987).

<sup>157</sup> Deprivation of virtually all means of earning a livelihood may constitute persecution. DEPARTMENT OF JUSTICE/INS, *supra* note 110, at 28.

The issues that arose in this case raise the question of whether Congress' intent to ensure that legitimate asylum-seekers have access to the asylum process is being fulfilled in all expedited removal cases.

## **2. Brazilian Asylum-Seeker**

Ms. J and her husband were part of a small group in Brazil that opposed police corruption and reported police officers who beat people or were involved in drug trafficking. Ms. J's husband worked at a factory in the transportation division. Employees in this factory were involved with drug trafficking activities in which the civil and military police were also involved. When her husband told his co-workers that he did not want to continue participating in these activities, he was beaten by the police. Ms. J reported the incident to her father, an attorney. Her father called the local police and an inquiry commenced which led to the arrest of the perpetrators. After her father reported these activities and those involved, Ms. J and her husband were threatened with death by the police who were involved in the drug trafficking. Her husband fled to the United States in September 1993, and Ms. J left Brazil in 1994. She entered the United States on a tourist visa and applied for political asylum. Her case was pending when she returned to Brazil in February 1996 because her grandmother died. Her husband returned to Brazil in July 1996. While in Brazil, Ms. J and her husband were again threatened with death by the same police officers, because they wanted her husband to continue his former drug trafficking activities and because they felt that Ms. J had ruined their lives by having them sent to jail. Ms. J attempted to obtain a visa to return to the United States but was unsuccessful, and ultimately obtained false documents from a travel agent to return to the United States.

Ms. J arrived at Miami, Florida, on April 6, 1997. During secondary inspection, she was questioned about the passport she presented and about her previous asylum claim. Ms. J told the immigration officer that she and her husband had been threatened when her husband told his co-workers that he wanted to terminate his participation in drug trafficking activities. She also informed the immigration officer that her daughter was a United States citizen. Ms. J was referred to a credible fear interview and detained at Krome Service Processing Center.

Ms. J's credible fear interview was conducted on April 11, 1997. She had an attorney present. During the interview, Ms. J told the AO that she and her husband had left Brazil because they had been threatened with death by the police and by the people he worked with, who were involved in drug trafficking. She described her experiences, as above. When asked why her husband did not leave to work somewhere else in Brazil, Ms. J stated: "[T]he police would follow us anyplace in Brazil." Towards the end of her interview, the attorney requested that Ms. J be asked additional questions, including whether the police looked for her upon her return, whether she was threatened with harm over the phone or otherwise, whether she tried to live elsewhere in Brazil, and whether her husband was in hiding. When asked if she had tried to live elsewhere, Ms. J told the AO that she spent one week in Brasilia in order to get away from the police, two weeks in Rio to try to renew her United States visa, and one week in Belo Horizonte to meet with her daughter and avoid the police. When asked about the location of her

husband, she stated that he was in hiding. The record indicates that Ms. J was not asked the remaining two questions requested by the attorney (whether the police looked for her upon her return and whether she was threatened with harm over the phone).

The AO found that Ms. J's testimony was credible. However, she also found that she had not established that the incidents that she described were on account of one of the five statutory grounds for asylum. The AO explained that Ms. J was not affiliated with any political party and that the incidents she described pertained to criminal activity or trafficking in narcotics. She further noted that "[t]he nature of applicant's claim does not change simply because the agents that threatened to harm her were members of the . . . [redacted] police." The AO also found that because the police involved in these incidents were prosecuted, not all police in Ms. J's local area were corrupt and involved in criminal activities. Finally, the AO found that Ms. J could have relocated elsewhere in Brazil due to the fact that the incidents occurred in one area of Brazil.

Ms. J requested review by an IJ of the negative credible fear determination. The review was held on May 2, 1997. The IJ affirmed the negative credible fear determination by the AO.

### ***Observations***

#### *Lack of Nexus to a Protected Ground*

The AO concluded that Ms. J's fear of persecution was not on account of race, nationality, religion, membership in a particular social group, or political opinion. The AO noted that Ms. J had never been affiliated with any political party, had never been harmed on account of one of these grounds, and that the nature of the claim did not change merely because those who threatened Ms. J were police officers.

The credible fear interview is an initial screening process to determine whether a person should be permitted to apply for asylum. The EOIR has stated that credible fear interviews are not intended to be full asylum hearings.<sup>158</sup> However, "nexus" or "on account of" determinations can involve highly complicated factual and legal issues.<sup>159</sup> In this case, Ms. J alleged participation in a small group that opposed corrupt police activity. She also alleged that she and her husband received threats from members of the police who wanted her husband to continue his drug trafficking activities and were upset that she reported their illegal activities. Thus, the legal issue arose as to whether opposition to police corruption can constitute a political

---

<sup>158</sup> Executive Office for Immigration Review, Interim Operating Policy and Procedure Memorandum 97-3: Procedures for Credible Fear and Claimed Status Reviews, at 7 (Mar. 25, 1997) (Attachment 10 to First Year Report).

<sup>159</sup> The INS has stated that "the fine points of 'political opinion' are often disputed." DEPARTMENT OF JUSTICE/INS, *supra* note 110, at 97.

opinion,<sup>160</sup> and a factual issue arose as to whether Ms. J feared persecution on account of this opinion. Further factual development may have aided this determination; for example, whether the police are commonly involved in drug trafficking in Brazil, whether the police target people who oppose police corruption, whether Ms. J's husband was in the group which opposed police corruption, and the manner in which Ms. J had tried to report on corrupt police.

Given the complexity of the nexus determination, and the nature of the credible fear interview as an initial screening process, questions arise regarding a denial of credible fear at this stage based on lack of a nexus. It is possible that the facts elicited at the credible fear interview in themselves, or together with facts elicited upon further questioning, could establish a nexus to a protected ground. This case may indicate the difficulty of making complex determinations of law and fact in an expedited proceeding.

#### *Internal Relocation*

Part of the AO's credible fear determination in this case rested on a finding that Ms. J could relocate within Brazil because the incidents she described were localized in one area. In order to qualify for asylum, a person must generally show country-wide persecution.<sup>161</sup> This determination, as to whether a fear of persecution is country-wide, can require a close inquiry into the facts of a case and current country conditions.

In order to establish a credible fear of persecution, a person must demonstrate a significant possibility of establishing eligibility for asylum. The credible fear interview was intended as a mechanism to screen out those individuals that should not be permitted to apply for asylum. During the interview, Ms. J stated that her husband could not work in other parts of Brazil because the police would follow them anywhere. Ms. J also stated that she spent a week in Brasilia in order to get away from the police and a week in Belo Horizonte to avoid the police and visit her daughter. It is unclear from the record whether Ms. J had problems when she

---

<sup>160</sup> In this case, Ms. J's husband refused to continue his drug trafficking activities. An asylum claim may exist under some circumstances for refusal to join a criminal enterprise, where nexus to a protected ground and the unwillingness or inability of the government to protect the applicant is established. *Id.* at 98.

<sup>161</sup> There are some exceptions to the requirement that an applicant for asylum establish country-wide persecution, including where a persecutor shows no intent to limit his persecution to one area of a country and the person can be readily identified, and where the government is the persecutor. *Damaize-Job v. INS*, 787 F.2d 1332 (9th Cir. 1986); *Singh v. Moshorak*, 53 F.3d at 1031, 1034 (9th Cir. 1995); *Singh v. Ilchert*, 63 F.3d at 1501, 1511 (9th Cir. 1995). Furthermore, a person should not be denied asylum on the basis that he or she could have relocated to another part of the same country where under the circumstances it would be unreasonable to do so. DEPARTMENT OF JUSTICE/INS, *supra* note 110, at 37-38.

The Ninth Circuit has suggested that in determining whether the threat of persecution is country-wide, one should consider whether the persecutor has the will and ability to enforce its will on a country-wide basis. *Id.* at 37 (citing *Beltran-Zavala v. INS*, 912 F.2d 1027, 1030 (9th Cir. 1990) and *Blanco-Lopez v. INS*, 858 F.2d 531, 534 (9th Cir. 1988)).



---

traveled to these places. Thus, it is also unclear whether, in this initial low-level screening procedure, there were sufficient facts to make an adverse credible fear determination on the basis of the availability of internal relocation.

### *Credible Fear Process*

In reviewing cases produced by the EOIR, the Expedited Removal Study has generally been limited to a review of the records of proceedings themselves, with no other information about a particular case. However, Ms. J was represented by an attorney who has provided the Study with further information regarding the process in this case. As the following makes clear, the type of problems reported by the attorney would not be evident from the review of a written record of proceedings. This underscores the importance of on-site observation coupled with document review, in order to allow a more comprehensive evaluation of the process.

First, the attorney noted several problems with interpretation. In this case, a telephonic interpreter assisted in Portuguese. The AO, who was fluent in Portuguese, caught several errors in the interpretation and verbally corrected such errors. The errors resulted both from the interpreter's unfamiliarity with certain vocabulary and from noise and transmission problems.<sup>162</sup> The attorney expressed concern that in most credible fear interviews, these errors would not be caught and would remain uncorrected. The attorney also noted that the interpreter was not instructed to give a literal interpretation, and that neither Ms. J or the interpreter were instructed to speak in manageable blocks of time.

Second, the attorney noted that, at the end of the credible fear interview, the AO did not summarize Ms. J's claim or allow her an opportunity to correct any errors, as required by 8 C.F.R. § 208.30. This interview took place in April 1997, the first month in which expedited removal was implemented, and the attorney expressed concern that compliance with the regulations was lacking at this time.

Third, the attorney informed the Study, as also indicated in the AO's Interview Notes, that she interjected to clarify and ask additional questions. She noted that these clarifications and questions were either "grudgingly accepted" or "ignored."

Fourth, the attorney noted a number of problems when Ms. J was issued the adverse credible fear determination of the AO. For example, the AO (a different AO than the one who conducted the interview) did not read the basis of the credible fear determination, and merely read Ms. J a summary statement of the legal finding in her case (that she had not established

---

<sup>162</sup> For example, the interpreter had difficulty translating that a false or frivolous asylum application can result in permanent ineligibility for relief under INA § 208. Also, the interpreter did not understand Ms. J's response to a question on the mistreatment she suffered in Brazil.

nexus to a protected ground). The AO did read the full assessment following the attorney's request.

When the attorney requested access to all documents that the AO relied upon in issuing her decision, including Ms. J's sworn statement that was taken at the airport (Form I-867, Record of Sworn Statement in Proceedings under § 235(b)(1) of the Act), her request was denied regarding certain documents.<sup>163</sup> The AO informed Ms. J's attorney that he could only give her documents generated by the Asylum Office, rather than those created by the INS, including Ms. J's airport statement.<sup>164</sup> Thus, the attorney did not receive a copy of Ms. J's airport statement. The attorney was provided with the Credible Fear Work Sheet/Record of Determination (I-870), the AO's assessment, and the AO's interview notes. However, because of the failure of the AO to summarize Ms. J's testimony at the end of the credible fear interview, and because production of the AO's decision and interview notes followed the credible fear determination, neither she nor Ms. J had the opportunity to correct any errors in testimony or the interpretation of such testimony.

Finally, after the determination was issued, the attorney wanted to consult with her client before Ms. J made a decision about whether to proceed with IJ review. The attorney was unable to communicate with Ms. J in her own language, and needed the assistance of an interpreter. The AO informed the attorney that a telephonic interpreter could assist, but only if the AO was present. Thus, the attorney was unable to properly consult with Ms. J. Due to the difficulties she had experienced with the expedited removal process, Ms. J stated that she did not want to go forth with IJ review. However, a few days later, Ms. J changed her mind, and decided to request IJ review of her claim.

In a series of letters to Doris Meissner, Commissioner of the INS, the attorney of record and her colleague communicated their concerns regarding this case, and other credible fear cases in which they had been involved.<sup>165</sup> They spoke with the INS Director of International Affairs in

---

<sup>163</sup> The attorney also wanted a copy of Ms. J's husband's asylum application. This was not provided to her prior to Ms. J's credible fear interview, and only a portion was later provided to her.

<sup>164</sup> The attorney noted serious concern about the failure to supply a person's sworn statement taken at the airport (Form I-867) in cases where credibility is at issue.

<sup>165</sup> See Letters from Cheryl Little and Joan Friedland, Florida Immigrant Advocacy Center, to Commissioner Doris Meissner, INS (dated Apr. 9, Apr. 14, Apr. 15, Apr. 23, & Apr. 28, 1997) (Attachment 11).

In these letters, the attorneys also expressed concern about the lack of correspondence between the AOs' credible fear interview notes, which are in the form of questions and answers and appear to be a transcript of the interview, and the credible fear interview itself. The attorneys noted that the credible fear interview notes did not correspond to the credible fear interview, left out critical testimony, and misrepresented other testimony in at least two other cases. They further noted that one AO's credible fear assessment was deficient, and conflicted with the notes of the AO in question and answer form. Some of the many additional concerns noted regarding the implementation of expedited removal in these letters, and in additional letters to Chief Immigration Judge Michael

(continued...)

mid-April 1997 to discuss these problems. They followed up with a letter to the Director summarizing what they believed the INS had agreed to during this conversation in order to ensure a fairer credible fear process. Subsequently they received a letter in response from the Director, dated June 23, 1997, that attempted to address their concerns.<sup>166</sup>

The attorney has informed the Study that some of these concerns about the credible fear process have since been addressed.<sup>167</sup> She reported that copies of Form I-867 are now generally provided to representatives of persons in the credible fear process. Further, she noted that asylum officers at Krome Service Processing Center usually summarize an applicant's claim at the close of credible fear interviews, allowing an opportunity for the correction of any errors made in giving or interpreting testimony.

### 3. Ecuadoran Asylum-Seeker #2

Mr. K was an elected Counselor of the Court of Second Instance, who was responsible for the appropriation of public money for a particular Ecuadoran municipality.<sup>168</sup> He belonged to the Social Christian Party (SCP). At a weekly meeting of elected counselors, it was discovered that a large quantity of money was missing. In October 1996, Mr. K reported the loss to the comptroller, who in turn, called in a man to take down Mr. K's story. At another meeting of the counselors, Mr. K accused the first (or main) counselor of the PRE (*Partido Rodolista Ecuatoriano*) of embezzling the money and sharing it with other counselors. All of the accused counselors soon obtained attorneys to defend themselves. That same month, Mr. K received a death threat, which he reported to the police. He was told that to kill him was "like killing a dog." After this threat, Mr. K began to live in different provinces, and traveled to and from his

---

<sup>165</sup>(...continued)

Creppy and INS Deputy General Counsel in May 1997 (Attachment 11) were: (1) the detainees' lack of understanding about the credible fear process; (2) misinformation about legal service providers; (3) inaccurate information regarding telephone access; (4) intimidation or improper treatment by immigration officers during secondary inspection; (5) substantial delays in bringing the detainees at Krome Service Processing Center to the attorney visitation area; (6) a failure by AOs to allow applicants to finish their answers in credible fear interviews; (7) the failure of AOs to introduce themselves at the beginning of credible fear interviews and few attempts, if any, to make the interviewees feel at ease; and (7) delays in the issuance of credible fear decisions.

INS's letters of response to the attorneys are contained in Attachment 11.

<sup>166</sup> Letter to Phyllis Coven, Director of International Affairs, INS, from Cheryl Little and Joan Friedland, Florida Immigration Advocacy Center (April 21, 1997); Letter from Phyllis Coven, Director of International Affairs, INS, to Cheryl Little, Florida Immigrant Advocacy Center (June 23, 1997) (Attachment 11).

<sup>167</sup> The attorney also informed the Study that the percentage of persons subject to expedited removal in Miami who are determined to have a credible fear of persecution has increased since the implementation of expedited removal in April 1997, although there have been no changes in the credible fear standard.

<sup>168</sup> In Ecuador, municipalities represent geographical divisions of jurisdiction of the courts and government.

home province to the area in which he worked. In May 1997, Mr. K was threatened a second time. While filling up his car with gas, a man approached him, pointed a gun at Mr. K, and stated: "You lived until now." Mr. K hid behind his car. Mr. K reported the first threat to the police, but noted that the police were "humbled / humiliated in front of this powerful man." After Mr. K was threatened a second time, he requested and received a "paper for protection" from the police.<sup>169</sup>

Mr. K left Ecuador on October 8, 1997. His destination was the United Kingdom, where he intended to apply for asylum. His flight to the United Kingdom transited through the United States, where he had a six hour and twenty minute layover in Miami, Florida. When Mr. K applied for asylum in the United Kingdom, his claim was "refused without substantive consideration" because there was a safe third country, the United States, to which he could be returned.

Mr. K was returned to the United States on June 10, 1997. Upon his arrival at Miami International Airport the second time, he was referred to secondary inspection. The record indicates that during secondary inspection, Mr. K said that he was a member of Congress and that he left Ecuador because a man wanted to kill him and had made attempts against his life. Mr. K explained that the man who tried to kill him was a government official who was indicted for embezzlement based on his testimony. In response, the only thing the government did for him was to give him a passport to leave the country. Mr. K was referred to a credible fear interview and detained at the Elizabeth Detention Facility.

Mr. K's credible fear interview was conducted on June 19, 1997. Mr. K had no representative present. During the interview, Mr. K stated that he had a fourth grade education. He told the AO that he had received threats after he accused the first counselor of the municipality with embezzlement. When asked, Mr. K told the AO that internal relocation would not resolve his situation because the first counselor was powerful and had sufficient money to hire someone to kill him. Mr. K also told the AO that the first counselor, a member of the PRE, had humiliated other SCP members, but that Mr. K was treated the worst because he had reported this counselor. Mr. K said that the first counselor had since left office.

The AO found Mr. K's testimony to be credible, clear and detailed. However, the AO found that he had not established a credible fear of persecution for several reasons. First, the AO found that his problem appeared to be "a personal vendetta" without relation to race, religion, nationality, membership in a particular social group, or political opinion. Second, the AO found that Mr. K failed to establish that the government was unwilling or unable to protect Mr. K, noting that the police were willing to take protective action after he was threatened a second time. Third, the AO found that internal relocation was available to Mr. K, noting that after he received the first threat, he had spent six months living in other provinces, traveling to and from

---

<sup>169</sup> The paper warns of police intervention upon further incidents involving the first counselor.

his hometown without threats. Finally, the AO concluded that Mr. K's fear of persecution appeared speculative, especially in light of the government's willingness to help him and the fact that his family had not been threatened in his hometown.

Mr. K requested IJ review of the negative credible fear determination. The review was held on June 26, 1997. No testimony was taken regarding the background of Mr. K or his fear of return to Ecuador. The IJ affirmed the negative credible fear determination by the AO.

### *Observations*

#### *Lack of Nexus to a Protected Ground*

The AO found that Mr. K had not established that the threats he suffered and his fear of persecution were on account of race, nationality, religion, membership in a particular social group, or political opinion. Rather, the AO found that his problems appeared to be the result of a "personal vendetta."

As previously noted, nexus determinations can be among the most complex determinations in asylum law. They may involve complicated issues of law and fact. In this case, the issue arose of whether opposition to political corruption in itself constitutes a political opinion, and whether the threats against him were on account of that opinion. The record does not indicate whether the AO considered this possibility. Second, when Mr. K alleged that the first counselor mistreated members of the SCP, the issue arose whether Mr. K may have, in part, been targeted on account of his political opinion and party membership. Without further exploration of this statement, it is unclear how a nexus determination could have been made. This case raises a question whether expedited proceedings provide an adequate forum for the making of complex legal and factual determinations, such as those related to nexus.

#### *Internal Relocation*

Part of the AO's credible fear determination rested on the finding that Mr. K could relocate within Ecuador. The AO concluded that internal relocation was available to Mr. K because he was able to live in the provinces, while returning to and from his hometown, for six months after the first threat. In order to establish eligibility for asylum, an applicant must prove that his fear of persecution is "country-wide," and that relocating within the country is not a viable alternative.<sup>170</sup> Determinations based on internal relocation may require a close inquiry into the facts of a case and current country conditions.

In order to establish a credible fear of persecution, a person must show that there is a significant possibility that he or she could establish eligibility for asylum. By definition, the

---

<sup>170</sup> See *supra* note 161.

credible fear standard is lower than the burden of proof necessary to establish eligibility for asylum. In this case, Mr. K claimed a fear of a powerful elected official. He stated that he received a threat in October 1996, that as a result, he began to live in different places and commute as necessary for work, and that he received another threat in May 1997. When asked if he could relocate, he stated that he could not because the first counselor was powerful and had sufficient money to hire someone to kill him. Given the facts alleged, a question is raised about the appropriateness of a denial on this basis in a lower-level asylum screening procedure.

#### *Government's Willingness to Aid*

In finding that Mr. K did not have a credible fear of persecution, the AO noted that the police demonstrated willingness to aid Mr. K by providing him with "protection papers." Thus, she concluded that Mr. K failed to establish that the government was unwilling or unable to help him, and that, therefore, his fear of persecution was speculative.

In order to establish eligibility for asylum, an applicant must demonstrate that the persecution suffered or feared is at the hands of the government or persons who the government is unwilling *or* unable to control.<sup>171</sup> The application of this two-part inquiry raises questions in the context of this case. Although the government may have evidenced a willingness to protect Mr. K, it is unclear from the facts whether the government would have been able to control the persecutor. Mr. K alleged that the police were intimidated by the first counselor, and there is no additional evidence in the record on the issue of the ability of the Ecuadoran police to provide protection. Thus, it is unclear what the AO relied upon in denying on this basis.

#### *Safe Third Country*

Documentation in the record of proceedings indicates that Mr K's asylum claim in the United Kingdom was "refused without substantive consideration" because there was a safe third country, the United States, to which he could be sent.<sup>172</sup> For this reason, refugee representatives in countries such as the United Kingdom share an interest in more comprehensive data on decision-making in the expedited removal process.

#### **4. Haitian Asylum-Seeker**

Mr. L participated with a Haitian group in support of Lavalas distributing leaflets and pictures for four months in 1989. His father's boutique was broken into and two of his brothers were killed. In 1990, a group of masked "Zenglendos" raped his sister and hit him on the head.

---

<sup>171</sup> See, e.g., *Singh v. INS*, 94 F.3d 1353, 1360 (9th Cir. 1996).

<sup>172</sup> For more on the "safe third country" issue, see *supra* note 104. See also *infra* Part VI(B).

Mr. L arrived at Miami, Florida on September 4, 1997. He was routed to secondary inspection. During secondary inspection, Mr. L told the immigration officer that he had to leave because “Zenglendos” had come to his house and raped his sister. When asked if he had been persecuted, Mr. L stated that he had been persecuted because of his religion. He said that he had been slapped in the face by “Zenglendos” while preaching. He was referred to a credible fear interview and detained at Krome Service Processing Center.

Mr. L’s credible fear interview was conducted on September 9, 1997. The language used in the interview was English and a telephonic interpreter assisted. The interpreter was changed twice during the interview because the AO found that the first two were not competent. (The AO noted that they were new interpreters.) Mr. L had a consultant, who was an attorney, present at the interview. At the end of the interview, Mr. L was asked to verify his testimony. When asked about the Lavalas government, Mr. L stated: “These things happened a long time ago. I need some time to think and see if there are any errors.”

The AO found that Mr. L’s testimony was not credible because “[i]t lacked pertinent details, was internally inconsistent and contradicted reliable country conditions.”<sup>173</sup> The AO noted that Mr. L failed to provide details about the group in which he participated, the identity of the group of individuals who harmed his sister, and the reasons why they mistreated his family.

Mr. L requested review by an IJ of the negative credible fear determination. His attorney submitted a brief in which he argued that the credible fear interview was not conducted in a manner that provided Mr. L with “his Fifth Amendment right to a due process fair hearing.”<sup>174</sup> The attorney noted the following: the interview began over an hour late; the AO raced through the interview and asked perfunctory questions without much follow-up for detail<sup>175</sup> or to clear up any “questions” of credibility;<sup>176</sup> the interview was conducted with three different interpreters;

---

<sup>173</sup> The AO noted that Mr. L stated that the group he participated in discussed “information about the government of Lavalas” and that he stated the names of persons in the government of Lavalas. However, the AO found that “this information contradicts known country conditions which indicate that Jean-Bertrand Aristide and Evans Paul among others are generally associated with Lavalas whereas . . . [redacted] and . . . [redacted] comprised the military triumvirate that controlled the country after the ouster of Aristide on September 29, 1991.” The AO further noted that the Lavalas movement did not exist as such in 1989.

<sup>174</sup> This brief is on file with the Expedited Removal Study.

<sup>175</sup> The attorney noted that when Mr. L said that he used to pass out pictures and leaflets for Lavalas, the AO did not ask about the nature of the picture or the leaflets.

<sup>176</sup> The attorney noted, that as to Mr. L’s credibility:

Officer . . . [redacted] asked him, ‘How can you say you lived in Gonaives when you said before you lived in Croix des Bouquets?’ [Mr. L] began to try to explain to Officer . . . [redacted] why he ran away to hide with his family in another town when they feared the authorities were looking for them. Before [Mr. L] could explain, Officer . . . [redacted] interrupted to say ‘This has no

(continued...)

the third interpreter incorrectly translated some words;<sup>177</sup> the AO had problems with the English language; and that at times the AO misrepresented or omitted what Mr. L stated.

Review by an IJ was held on September 23, 1997. Testimony was not taken regarding the background of Mr. L or his fear of returning to Haiti. The IJ affirmed the negative credible fear determination.

### *Observations*

This case raises the question of whether various factors — including the quality of interpretation, an applicant's age, an AO's knowledge of country conditions, and different manners of questioning — may affect a credibility determination and result in the screening out of a legitimate asylum-seeker. Mr. L's attorney felt that poor interpretation, the AO's unfamiliarity with certain details about Haitian history, Mr. L's young age at the time he participated in political activities, and a lack of follow-up questioning affected the credibility determination in Mr. L's case, to his detriment.

### **5. Nigerian Asylum-Seeker**

Mr. M, an Ogoni man from Nigeria, was a spokesperson for his village. Mr. M was arrested on January 4, 1996, for attending a peaceful political demonstration in honor of Ogoni Day. The protesters were asking the government for compensation for Ogoni land that had been polluted and for the release of detainees. The police and military tried to stop the demonstration by shooting into the crowd and dispersing tear gas. Mr. M began to run, but stopped when his friend was shot. At this time, he was arrested, in addition to sixty others. Other members of his group were killed.

---

<sup>176</sup>(...continued)

place in [sic] credible fear determination.' I then tried to explain to her how [Mr. L] was trying to answer her question as to why he said he had lived in two different places. Officer . . . did not want to hear it. Her response: 'It is only supposed to be a summary.'

The attorney further noted, regarding Mr. L's credibility:

The AO "asked who was in the government of Lavalas. He answered Biamby, Cedras, and Michel Francois. 'That's not correct (they weren't in the Lavalas)['] was her answer. . . . Officer . . . [redacted] apparently did not take into account that Cedras was part of the Aristide government at first. Nor did she take into account the fact that my client was fourteen years old when he said he first became politically involved with the group supporting Aristide.

<sup>177</sup> The attorney noted that when asked if he had been involved in a political party, Mr. L included the word "Aristide" in his response. The interpreter translated what he said as "Sa Seed" or "Three Cs." When the attorney objected, the AO "made a face and motioned for [the attorney] to be quiet with her finger to her lip. Officer . . . [redacted] chose not to note [Mr. L's] correct answer, for whatever reason."



Those arrested, including Mr. M, were taken to Boni Camp, a camp located approximately forty-five minutes from his village. Upon arrival at Boni Camp, he was accused of being involved with riots against the government. He was frequently beaten with electric wires and rifle butts. In 1996, he was raped by three male officers. Although he reported the rape, the superior officers did not believe his story. Mr. M was told by his captors that they had tried to arrest him on two different occasions because he was the spokesman for his village. Mr. M's father had also told him that the police had twice tried to capture him, in 1995 and 1996, and that his father had told them that he was not at home. Mr. M was detained for one year and five months at Boni camp. On June 12, 1997, Mr. M escaped from the camp with the aid of a guard, who was a friend from school. The guard agreed to leave a door open so that Mr. M could escape. Mr. M went to his mother's village for one day, to Lagos, Nigeria, to Abidjan, Ivory Coast, to Sierra Leone, to Brazil, and then to the United States.

Mr. M sought admission to the United States at John F. Kennedy International Airport in New York on July 4, 1997. At secondary inspection, he stated that he had fled Nigeria because of a political problem and wanted to seek political asylum. When asked about the political problem he had, he stated: "The killing and all the rest." The immigration officer asked Mr. M when he fled Nigeria. The officer recorded Mr. M's response as two years ago. When the officer asked if he returned to Nigeria after he left two years prior, Mr. M responded negatively. Mr. M was referred to a credible fear interview and detained at the Wackenhut Detention Facility.

Mr. M's credible fear interview was conducted on July 9, 1997. Mr. M did not have an attorney or representative present, although he had contacted the Lawyers Committee for Human Rights in New York, and had been told to call back. During the interview, Mr. M said that he was Ogoni and told the AO of his experiences, as set forth above. He offered to show the AO his scars. Mr. M told the AO that after he escaped, he went to his mother's village for one day, to Lagos, Nigeria, to Abidjan, Ivory Coast, to Sierra Leone, to Brazil, and then to the United States. When asked what would happen to him upon return, he stated that he would be "tortured or worse." He told the AO that the police would know that he was back in Nigeria because "[t]hey have syndicates who follow up on people who return." When asked why he stated that he had never been arrested or persecuted in Nigeria when asked by the immigration officer at the airport, he stated: "I was afraid to tell them that I had been arrested for fear that they would send me back home." When asked why he told the immigration officer at the airport that he left Nigeria two years ago, and spent those two years mostly in Abidjan, while later telling the AO that he was in Boni Camp from January 1996 until June 1997, Mr. M stated: "This was a mistake. It should be two days not two years."

The AO found that Mr. M's testimony was not credible, and thus that he had not demonstrated a significant possibility that he could establish eligibility for asylum. The AO found that Mr. M had given two conflicting stories. She noted that during secondary inspection, he "stated . . . that he left Nigeria two years ago" and answered other questions regarding his two-year stay in Abidjan. She further noted that during his credible fear interview, he stated that

he was arrested, imprisoned, and beaten during this time and that when he left Nigeria, he spent only two days in Abidjan. The AO found that Mr. M's explanation that this inconsistency was a mistake was not sufficient. Additionally, although the AO noted she did not consider it in assessing credibility, she found that Mr. M's escape was not plausible. She noted that it did not seem likely that Mr. M "would choose to remain in the deplorable conditions of the camp for one year and five months if he had the opportunity to escape in such an easy manner as described and probably could have escaped at any time."

Review by an IJ of the credible fear determination was held on July 18, 1997. During the review, testimony was taken regarding Mr. M's background and fear of return to Nigeria. The IJ vacated the negative credible fear determination by the AO, finding that Mr. M had established a significant possibility that he would be persecuted on the basis of his race, religion, nationality, membership in a particular social group, or political opinion.

### ***Observations***

#### *Credibility*

In making her credibility determination, the AO relied on an alleged inconsistency regarding the date of Mr. M's departure from Nigeria. The AO ruled that Mr. M's testimony during the credible fear interview contradicted his responses recorded on Form I-867, Record of Sworn Statement in Proceedings. The AO also found that Mr. M's description of his escape from Boni camp was implausible, although she noted that she did not rely on this in making her credible fear determination.

If the AO relied solely on the inconsistency regarding Mr. M's date of departure, the question is raised whether it is appropriate to find a person not credible on the basis of a conflict with statements made immediately upon arrival, where mistake is alleged as an explanation for the inconsistency. A question is also raised as whether the AO considered Mr. M's statement that he was afraid to speak about his arrest as he feared he would be returned to his country on that basis.

Although the AO stated that she did not rely upon the "implausibility" of Mr. M's escape, her mention of this finding raises the question whether it influenced her credibility determination. It would have been improper for the AO to rely upon this, given that the basis for her finding of implausibility was that Mr. M would not have remained in such deplorable conditions if such an easy manner of escape was available to him. There was nothing in the record that indicates that his escape was "easy" nor that the manner in which he escaped was inconsistent with known country conditions in Nigeria.

---

*Torture Convention*

Under the expedited removal process, persons who express a fear of return during secondary inspection are routed to a credible fear interview to determine if they will be allowed to present their claims through the regular process provided by law to apply for asylum, restriction on removal, or protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention).<sup>178</sup> The Convention entered into force in the United States in November 1994. Although federal legislation and interim regulations have recently been implemented,<sup>179</sup> at the time of this case, there were none. However, an INS memorandum issued in May 1997 required INS attorneys to observe the duty not to return a person to another country where there are substantial grounds for believing that he would be in danger of being subjected to torture under the Convention.<sup>180</sup> The records of proceeding on file with the Expedited Removal Study indicate that few AOs consider eligibility for protection under the Torture Convention in their narrative credible fear determinations.<sup>181</sup>

In this case, Mr. M alleged repeated beatings with electric wires and rifle butts and a rape. He offered to show the AO his scars. The AO did not reach the question of eligibility for protection under the Convention. Rather, she found him to be not credible.

*Vacation by Immigration Judge*

Mr. M's claim was vacated by the IJ who reviewed his claim and took further testimony on his background and fear of return to Nigeria. This case demonstrates the importance of the availability of immigration judge review of credible fear determinations.

---

<sup>178</sup> 1465 U.N.T.S. 85 (1985).

<sup>179</sup> Pub. L. No. 105-277, § 242(a) (Oct. 19, 1998). The interim regulations are codified principally in 8 C.F.R. § 208. The interim regulations were published on February 19, 1999, and took effect on March 22, 1999. Public comments were due by April 20, 1999. UNHCR was among those that submitted comments on these regulations. UNHCR's comments are on file with the Expedited Removal Study.

<sup>180</sup> Office of the General Counsel, INS Memorandum: Compliance with Article 3 of the Convention Against Torture in the Cases of Removable Aliens (May 14, 1997).

<sup>181</sup> The document that asylum officers utilize to make a record of the credible fear interview is the Record of Determination / Credible Fear Work Sheet (I-870). It is generally accompanied by the asylum officer's notes in question and answer form, and his or her determination in narrative form. The I-870 indicates that asylum officers are to notify asylum applicants that even if they do not establish eligibility for asylum, they will not be returned to a country where there are substantial grounds for believing that they will be subjected to torture. There is a box for asylum officers to check if the case "may merit *non-refoulement*" under the Convention. The form does not request other information regarding eligibility or determinations under the Convention.

## 6. Venezuelan Asylum-Seeker of Haitian Descent

Mr. N, a native of Haiti and citizen of Venezuela, lived in Venezuela from 1979 until 1994. Mr. N's wife was turned away from a hospital in Venezuela when she was in labor, after the doctor asked if she was Haitian. Mr. N's wife lost the baby while en route to another center of care. Furthermore, someone painted "Go back to Haiti or be killed" on Mr. N's home. Mr. N did not want to return to Haiti because his wife had been raped there in 1994 when she made a brief return in an attempt to resume her business and re-establish a home for the family. The business had been destroyed under the prior government of President Preval.

Mr. N felt that he and his wife were well-known in Haiti. Mr. N had belonged to a small group while Aristide was in power, and marched in a demonstration. Upon his return to Haiti, he had spoken up and said things that "people were not happy" about. Yet, in Venezuela, Mr. N suffered other problems. A son of his returned from school one day after being beaten and robbed by thieves, or "Zenglendos." Three days later, when Mr. N went with his son to school, the thieves arrived and tried to beat his son again. Mr. N intervened, and a fight ensued. Soon after, his son was shot at on his way to school, but was not injured.

Mr. N began traveling back and forth from Venezuela to the United States on a visitor's visa in 1988, in order to buy items for sale outside of the United States. On December 1, 1997, he arrived at Fort Lauderdale, Florida, by boat, and was routed to secondary inspection. During secondary inspection, when asked if he had any fear of return to his home country, Mr. N said that he feared persecution by the Venezuelan police. He also told the immigration officer that his sister was a permanent resident of the United States. Mr. N was referred to a credible fear interview and detained at Krome Service Processing Center.

Mr. N's credible fear interview was conducted on December 11, 1997. He had a consultant present. Mr. N described to the AO the above problems that he and his family experienced in Venezuela and Haiti, as set forth above. The AO found that Mr. N's testimony was credible. However, the AO determined that the events he described did not constitute persecution. The AO explained that "[a]lthough he and his family were the victims of both criminal acts and overt discrimination in Venezuela, they do not rise to the level of persecution." The AO noted that Mr. N intended to return to Venezuela. The AO further noted that his wife's experiences in Haiti were the "unfortunate result of sweeping civil unrest and a random act of violence versus her being targeted because of one of the characteristic [sic] covered by the five protected grounds."

Mr. N requested IJ review of the negative credible fear determination. The review was held on December 31, 1997. The IJ affirmed the negative credible fear determination by the AO.

---

## *Observations*

### *No Persecution*

The AO found Mr. N had no credible fear of persecution in Venezuela in part because “[a]lthough he and his family were the victims of both criminal acts and overt discrimination in Venezuela, they do not rise to the level of persecution.”<sup>182</sup> The AO did not discuss the basis for his conclusion.

In this case, Mr. N alleged that his wife was denied medical treatment at a hospital because she was Haitian, and that her baby died en route to another care facility. Mr. N also alleged that a death threat was painted on the family’s home because they were Haitian, and that his son was beaten, shot at, and robbed. The AO found that Mr. N had testified credibly. Under case law, persecution has been defined as “a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive.”<sup>183</sup> In order to establish a credible fear of persecution, a person must show that there is a significant possibility that he or she could establish eligibility for asylum. This standard is a lower one than that required of asylum applicants, and was intended to screen in those who should be permitted to apply for relief. Given the nature of the credible fear standard and the type of harm alleged, it is unclear whether under this standard Mr. N should have been denied the opportunity to apply for asylum.

### *Lack of Nexus*

The AO also found that Mr. N’s wife’s experiences in Haiti were the “unfortunate result of sweeping civil unrest and a random act of violence” rather than persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

As has been noted, nexus determinations may be complex and require many facts from the applicant in addition to familiarity with country conditions. Mr. N credibly testified that he and his wife had been involved with a small organization in Haiti when Aristide was in power, that he had marched in a demonstration, and that he and his wife were well-known. He further stated that his wife had been attacked and raped there upon a brief return in 1994, and that during that time he had spoken up and said things with which other Haitians disagreed.

---

<sup>182</sup> Although discrimination does not normally constitute persecution, “discriminatory practices and experiences can accumulate over time or increase to an intensity so that they rise to the level of persecution.” DEPARTMENT OF JUSTICE/INS, *supra* note 110, at 28. Further, “[h]arassment is also a recognized factor in asylum claims.” *Id.* at 29.

<sup>183</sup> *Matter of Acosta*, 19 I. & N. Dec. at 222-23.

The facts Mr. N alleged regarding his and his wife's activities in Haiti raised the issue of whether Mr. N or his wife had been or could be targeted on account of their political opinion. No questions were asked to further explore these alleged facts.

### **7. Asylum-Seeker from the Republic of the Congo**

Mr. O, a Tutsi and Muslim man from the Republic of the Congo, returned home on May 23, 1997, to find the dead bodies of his brother, wife, aunt, uncle, and cousin. He was told that the military had fired their weapons into the house while on patrol, killing members of his family.<sup>184</sup> Mr. O was afraid and felt that he had to flee the country. He took his cousin's passport and fled the country. Mr. O suffers nightmares about finding the bodies of his family members and cries often.

Mr. O arrived at John F. Kennedy International Airport in New York on July 10, 1997. During secondary inspection, Mr. O told the immigration officer that he had come to the United States "to get protection from the killing" and that the situation in Brazzaville was bad. He said that after his brother was murdered, he took his brother's passport<sup>185</sup> because it contained a United States visa. Mr. O told the immigration officer that the government would kill him. Mr. O was referred to a credible fear interview and detained at the Wackenhut Detention Facility. While in detention, Mr. O threatened to kill himself and was placed in a psychiatric unit for observation on July 14, 1997.

Mr. O's credible fear interview was conducted on July 31, 1997. Mr. O did not have an attorney or representative present. The record of proceeding indicates that at the time of the interview, Mr. O was taking two or three different medications for his psychological conditions. During the interview, Mr. O told the AO that he was a Tutsi and Muslim. He recounted the killing of his family by the military on May 23, 1997, as described above. Mr. O told the AO that after he left his country, he had to take medication in order to "forget the nightmares." When asked why the military killed his family, he said that there was a civil war going on in his country, that the military was "against the civilians," that "everyone" was fleeing, and that "everyone" was dying. Mr. O also told the AO that he had been crying a lot due to his "problems."

The AO found that Mr. O's testimony was credible and that he had a subjective fear of persecution. However, the AO found he was unable to articulate a nexus between the killings of

---

<sup>184</sup> Mr. O had suffered previous abuse at the hands of the military. In 1991, on his way home, a couple of police officers asked him to wash three cars for them but did not want to pay for these services. When Mr. O declined to do the work, the police officers beat him up and stood on his back. As a result, Mr. O was unable to stand up, had to have surgery, and was in the hospital for one year.

<sup>185</sup> Mr. O later explained to the AO at his credible fear interview that he had taken his cousin's, rather than his brother's, passport. He stated that the interpreter during secondary inspection had made an error.

his family or his fear of persecution and one of the five protected grounds of asylum. The AO noted that individuals harmed by generalized violence in a civil war situation are not necessarily persecuted unless they can show that the harm relates to a protected ground. The AO also found that despite Mr. O's mental suffering, he was not eligible for relief under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment because torture requires specific intent on the part of the offender to cause severe pain or suffering. The AO stated that "[a]n action that result [sic] unintentionally or unforeseeable [sic] in severe pain or suffering does not qualify as torture." The AO found that since Mr. O "did not witness his family being killed and it appears that the offender did not have the specific intent to cause applicant any pain and suffering, his unforeseeable or unintentional mental condition would not qualify as torture under Article 3."

Review by an IJ was held on August 14, 1997. The IJ affirmed the negative credible fear determination by the AO.

### *Observations*

#### *Lack of Nexus*

The AO found that Mr. O had not established a nexus between the killings of his family and his fear of persecution. The AO correctly set forth the general rule that suffering imposed during civil war does not amount to persecution unless it relates to a protected ground.

As has been noted, nexus determinations can involve complex questions of fact. In this case, Mr. O alleged that he was a Muslim and a Tutsi. He further alleged that his family was killed by the military. When asked why his family was killed, Mr. O said that there was a civil war, and that the military was "against the civilians." The record indicates that no further questions were asked.<sup>186</sup> The record further indicates that there was no discussion in the AO's Assessment of the significance that Mr. O's ethnicity or religion would have in the context of the situation in the Republic of the Congo at the time of the alleged events. It is unclear how the nexus determination was made without such considerations. This case raises the question of whether complex determinations, such as nexus, should be made in an expedited proceeding where there is limited factual development of a claim.

---

<sup>186</sup> The AO's notes on the questions and answers during the credible fear interview indicate that only twenty-seven questions were asked, of which more than half were basic biographic questions largely unrelated to the substance of Mr. O's asylum claim. This represents one of the shorter credible fear interviews in the EOIR cases on file with the Expedited Removal Study.

## VI. Current Occurrences and Trends which Raise Broader Legal or Policy Issues

In its second year, the Expedited Removal Study continued to gather and broaden its data on individuals subject to the expedited removal process. The preceding two sections (IV and V) report on the quantitative and qualitative components of such data. In its second year, the Study also identified instances in which the application of expedited removal to an individual or group of individuals illustrated broader legal or policy issues. The Report has selected two such instances for close examination. The first is the application of expedited removal to Chinese migrants aboard the *Chih Yung* who arrived in August 1998. The second is the transnational implications of the application of expedited removal to persons who transit through the United States intending to apply for refugee status in the country of their destination, particularly those bound for Canada. Many of the issues that arise in this discussion complement issues discussed in the individual case studies (Part V).

### A. Asylum-Seekers on the *Chih Yung*<sup>187</sup>

#### 1. Background

In early July 1998, over 170 Chinese nationals set sail from China for the United States on the *Chih Yung*.<sup>188</sup> On August 27, 1998, the *Chih Yung* was intercepted by United States federal authorities in international waters, 100 miles off the coast of northern Mexico.<sup>189</sup> The vessel was held in international waters for approximately three weeks. The press reported that negotiations between Mexico and the United States over whether the boat would be brought to a Mexican port were ongoing when the United States government decided to bring the *Chih Yung* to San Diego.<sup>190</sup> The press reported that the INS had provided 40,000 pounds of food and medical care to the passengers on the boat during this three-week period.<sup>191</sup> Finally, the press noted that the INS had conducted brief interviews with the passengers on the boat, that few of the

---

<sup>187</sup> The information in this section of the Report has been provided by the Casa Cornelia Law Center and the San Diego Volunteer Lawyer Program in San Diego, except where indicated otherwise. Casa Cornelia Law Center is a public service law firm in San Diego, California. It provides pro bono legal assistance to indigent members of the immigrant community in San Diego and Imperial Counties. Its staff attorneys represent persons seeking asylum, battered immigrant women and children, and detained persons applying for relief under the INA and Convention Against Torture.

<sup>188</sup> Newspapers reported the total number of persons on the boat to be 172 — 152 men and 20 women — of whom 34 were juveniles. Leonel Sanchez, *172 Immigrants Turned Over to INS, Most to be Deported*, SAN DIEGO UNION TRIBUNE, Sept. 19, 1998. However, the Study received reports with varying numbers. Other sources indicated that the total number of persons was 140 — 122 males and 18 females — 25 of whom were juveniles.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*



Chinese nationals had credible claims to asylum, and that further interviews of the passengers by INS were expected.<sup>192</sup>

After the Chih Yung was brought into San Diego, many of the Chinese nationals were detained at CCA (Corrections Corporation of America), a privately-run INS contract facility in San Diego, and at the INS's El Centro Service Processing Center (El Centro). The INS then began the process of secondary inspection.

### *Secondary Inspection*

UNHCR informed the Study that, in September 1998, it was invited by Jeffrey Weiss, INS Acting Director of International Affairs, to observe the asylum processing of the Chinese nationals at El Centro, which was scheduled to take place that same month. When a representative of UNHCR arrived at the El Centro facility on Tuesday, September 21, she learned that secondary inspections were underway. She requested that she be allowed to observe, but was informed by the INS officer in charge at El Centro that she was not authorized to be at the facility or to observe secondary inspections. While waiting outside the facility, the UNHCR representative contacted officials at INS Headquarters, including the Director of Asylum. She tried to contact the Director of International Affairs, who was out of town. She was given an accompanied tour of the facility that same day, but was otherwise required to wait outside of the facility for two hours. She asked if she could speak with an immigration judge and was allowed to after he requested permission from the EOIR office in Falls Church, Virginia.

The UNHCR representative remained in El Centro through the end of the week. INS Headquarters did not immediately respond to her request, and the secondary inspections of the Chinese nationals continued. Concerned that the inspections might be completed before INS responded, the UNHCR representative called INS on a daily basis to get an update on whether permission had been granted. She also spoke with the AOs at El Centro, who appealed to their superiors in order to help expedite the authorization of access. The representative received daily updates on the number of inspections that had been conducted. Several days later, after the UNHCR representative returned to Washington D.C., she learned that she had been approved to observe secondary inspections on Friday, September 24. However, the secondary inspections had been completed on Thursday, September 23. Thus, UNHCR was unable to observe any secondary inspections.

The INS has since suggested that a protocol be set up to facilitate access by UNHCR to secondary inspections. UNHCR is awaiting the INS's draft proposal.

---

<sup>192</sup> *Id.*

### *Credible Fear Interviews*

After secondary inspections were conducted, credible fear interviews were scheduled. In September 1998, the Los Angeles Asylum Office in Anaheim contacted the San Diego Volunteer Lawyer Program (SDVLP) and Casa Cornelia Law Center (CCLC) to inquire if these programs might be able to assist the Chinese nationals in the credible fear determination process. CCLC and SDVLP agreed to provide services to as many of the Chinese nationals as possible. A toll-free phone line was installed at CCLC, and CCLC produced a video in the Fuchow language to provide background information and an explanation of asylum law in the United States to the Chinese nationals. On September 29, 1998, an SDVLP attorney and a CCLC attorney went to El Centro together with volunteer interpreters to show this video to interested Chinese detainees. They were allowed to meet individually with each detainee for five to ten minutes.<sup>193</sup>

Volunteer attorneys, law students, and Mandarin and Fuchow interpreters were recruited and trained to provide direct assistance to the Chinese nationals at the credible fear interviews, and to those who needed assistance in presenting their asylum claims after having been found to have a credible fear of persecution. Each organization provided a staff attorney to supervise the law students and other volunteers who would assist during the credible fear process at El Centro and to monitor the program. In January 1999, after the credible fear interviews were conducted, CCLC organized a *pro se* clinic to assist the Chinese in El Centro who had been found to have a credible fear of persecution and were applying for asylum. SDVLP entered a Notice of Entry of Appearance as Attorney or Representative (Form G-28) for the six unrepresented female Chinese nationals detained at CCA. Out of ninety male detainees at El Centro, CCLC filed G-28s for fifteen detainees.<sup>194</sup>

Credible fear interviews were conducted in late September and early October 1998 at CCA, and on October 15 and 22 at El Centro.<sup>195</sup> The majority of the Chinese nationals were fluent in Fuchow, although some spoke Mandarin at differing levels of fluency. Because the

---

<sup>193</sup> Forty detainees saw the video, which was shown in a trailer on the facility's grounds. Twenty-one detainees also met with CCLC and SDVLP attorneys. Inside the trailer, there were thin dividers to box off areas in which the attorneys could meet with the Chinese nationals. However, there was no auditory privacy, and other detainees could overhear the conversation between attorneys and detainees.

<sup>194</sup> G-28s were only entered for fifteen Chinese nationals at El Centro because there was confusion over whether the remaining individuals were already represented by counsel. There were G-28s in a number of the files from a law firm that had not communicated its representation to the detainees, but later stated that it intended to represent sixty of the Chinese at El Centro. This confusion delayed the credible fear interview process.

<sup>195</sup> CCLC and SDVLP attorneys spoke several times with asylum officers at El Centro to arrange times when CCLC and SDVLP attorneys, law students, and volunteers interpreters could assist some of the Chinese nationals in their credible fear interviews. Due to scheduling difficulties, two consecutive Thursdays were chosen: October 15 and 22. Seven credible fear interviews were held on October 15, 1998, rather than the ten scheduled, due to delays caused by confusion over which location within the detention facility at El Centro the credible fear interviews would be held. On October 22, 1998, nine credible fear interviews were conducted.

AOs had difficulties obtaining sufficient interpreter services in Fuchow, many Chinese nationals were given the option of waiting until interpreter services in Fuchow could be obtained (and possibly proceeding without counsel)<sup>196</sup> or proceeding with their credible fear interviews in Mandarin. Many of the Chinese, including some who were not comfortable with Mandarin, proceeded with their interviews in that language. Where it was clear that a person could not communicate sufficiently in Mandarin, CCLC and SDVLP representatives recommended termination and postponement of the credible fear interview.

Interpretation services were provided by telephonic interpreters at both El Centro and CCA. CCLC and SDVLP had recruited volunteer interpreters to assist them with their interviewing of the Chinese nationals. The volunteers, who were fluent in Fuchow and Mandarin, observed the credible fear interviews. When there were problems with telephonic interpretation, the volunteers took note of it, and often interjected to clarify and correct the telephonic translation. The volunteer interpreters noted that several AOs were very responsive to such interjections, accepting their modified interpretations and giving further instructions to the official interpreters. The problems with telephonic interpretation, as noted by CCLC and SDVLP volunteers, included the following:

- Interpreters were unfamiliar with certain terms that were material to the individuals' asylum claims.<sup>197</sup>
- Certain interpretations were inaccurate.<sup>198</sup>
- Certain interpreters did not provide literal translations, and went beyond the scope of questions asked by the AOs and the ensuing responses to engage in conversations themselves in order to find answers to questions.<sup>199</sup>

---

<sup>196</sup> Due to limited resources, the two hour drive from San Diego to El Centro, and the varying schedules of the volunteer interpreters, attorneys, and law students, arranging assistance for interviews to take place at an undetermined date in the future at El Centro would have been particularly difficult for SDVLP and CCLC.

<sup>197</sup> For example, the interpreters had difficulty translating the terms "forced sterilization" and "forced abortion," the names of certain occupations and religions, and the nature of the many permits that Chinese citizens are required to have. When asked about forced sterilization, one Chinese national's translated response addressed the cleanliness of a room, indicating a misunderstanding about different uses of the word "sterilization." One volunteer interpreter informed the Study that Chinese citizens are required to have different permits and identification cards, including permits which allow you to have a child, a resident permit, and a work unit identification card. While certain interpreters translated literally and asked the Chinese interviewees for an explanation, others unsuccessfully attempted to explain these permits and identification cards on their own.

<sup>198</sup> For example, one official interpreter translated that a person had been raped, when in fact that person said that she had been beaten. Another gave an inaccurate interpretation of the amount of time that had passed since the occurrence of an event described by one of the Chinese nationals. Another interpretation was so problematic, the AO had to stop the interview and obtain another telephonic interpreter, and the interview had to begin anew.

<sup>199</sup> For example, when one person stated that they were Christian when asked about religion by the AO, the  
(continued...)

- Hostility was expressed by at least one interpreter.<sup>200</sup>
- The audio-quality of the interpretation in some interviews, due to the low volume control on certain phones, was poor. In these interviews, the Chinese nationals could not hear the interpreter. This problem was magnified by the noise from the typing of the AOs.

The volunteer interpreters noted that the problems they observed were exacerbated by the limited ability of some of the Chinese detainees to speak Mandarin. Two of the interpreters, who were also law students, expressed their belief that the interpreters' unfamiliarity with the law, and — more particularly — with immigration proceedings, contributed to some of the problems. They noted that several interpreters were unfamiliar with essential legal terms, and did not understand the importance and relevance of certain lines of questioning by the AOs nor the responses of the Chinese. This impacted the way in which the interpreters translated the questions and testimony. One volunteer interpreter noted that the errors in interpretation were so pervasive that she was unable to interject upon each error because it would have caused disruption or significant delay of the interview. As a result, more than half of the noted errors went uncorrected. This interpreter also noted that certain inconsistencies noted by an AO were results of errors in interpretation, and that she attempted to explain the errors which had resulted in the AO's false impression that the applicant gave inconsistent testimony.

The volunteer interpreters at El Centro reported other aspects of the credible fear interviews which raised concerns. First, the hands and feet of the Chinese nationals were chained together while they were being interviewed. Second, because of the space constraints, the interviews were held in rooms at the INS's Deportation office. On several occasions, immigration officers wandered in and out of the rooms. One of the interview spaces was an employee break room, and immigration officers would come into the room to make popcorn and other snacks while the interview was being conducted. Third, one of the Chinese nationals, after a five-hour credible fear interview at El Centro on October 15, had to be re-interviewed on October 22 after the AO lost that person's file. Fourth, one AO repeatedly asked questions about Christianity of a person whose claim was not based on religion.<sup>201</sup> Last, certain AOs incorrectly

---

<sup>199</sup>(...continued)

interpreter further asked whether he or she was Catholic or Protestant. The volunteer interpreter present noted that upon her interjection, the AO instructed the interpreter only to translate the questions asked by the AO and the responses given by the person being interviewed. The interpreter also noted that such questions reflected a western cultural bias, as many Chinese persons are unfamiliar with Catholicism and Protestantism.

<sup>200</sup> For example, one of the volunteer interpreters interjected to inform an AO that an interpreter was yelling at the person being interviewed. The AO instructed the official interpreter to refrain from yelling at the person.

<sup>201</sup> The AO asked questions such as: "When was Jesus born," "What are the four books of the Bible," and "When is Passover?" In this case, although the AO found that the detainee had met the credible fear standard, the AO found the detainee "not credible."

informed the Chinese nationals that as soon as the AOs finished their credible fear reports, the asylum-seekers would be released.

Despite the above-noted difficulties, every Chinese national represented by SDVLP and CCLC was found to have a credible fear of persecution. The interviews revealed that several of the Chinese nationals had asylum claims based on their religion, involvement in student activism, violation of Chinese exit laws, and opposition to the forced family planning laws in China. SDVLP and CCLC did not receive the credible fear decisions and notes of the AOs for approximately one month. CCLC received these documents on or about November 6, 1998.

### *Visits to Asylum Applicants at CCA*

After receiving notice of the AOs' decisions, SDVLP arranged for meetings with its clients, who were detained at CCA, in order to prepare for their asylum claims. These attorneys reported difficulty with access to the detainees and with conducting confidential interviews. For example, SDVLP had arranged with INS for its clients to be transferred to INS offices in San Diego for interview purposes<sup>202</sup> on October 7, 1998. When an SDVLP attorney, a volunteer attorney, and a volunteer interpreter showed up on that date, the INS was at first only able to locate three of the five clients scheduled for interviews. After one and a half hours, they were informed that one of the missing clients had been transported elsewhere to receive medical attention, without notice to SDVLP. After commencing her interview of a client, the SDVLP attorney inquired into the presence of a female detainee near the others, but was told this person was not the other missing client. However, after the SDVLP attorney requested that another INS officer investigate, she was notified that this woman was SDVLP's fifth client from CCA. When the attorney then requested to see her client, INS officers refused access on the basis that she was being questioned by INS investigators with the assistance of a telephonic interpreter, because a Notice to Appear had been filed in her case that day, placing her in regular removal proceedings.

Both the SDVLP and volunteer attorneys were prohibited from conducting individual interviews of their three clients who were present. Furthermore, an armed INS officer was physically present during the entire interview, either standing in the doorway or sitting in the room close enough so that he could overhear the client interviews. For both reasons, the attorneys had to avoid any confidential conversations and limited the interview to general information and a discussion of the services offered by SDVLP.

On October 13th, an SDVLP attorney, a volunteer attorney, a law clerk, and a volunteer interpreter returned to INS offices in San Diego for another pre-arranged visit with three clients. The attorney requested that she be permitted to interview each detainee individually, and was again not permitted to do so. At first, all three women were squeezed into an interview booth

---

<sup>202</sup> When CCA first opened in the fall of 1998, many attorney-client interviews were held at INS offices in San Diego, rather than at CCA.

designed for a single person, with one chair and telephone to permit communication through the plate glass separating the detainee from the attorney. After the attorney complained, the clients were taken to a courtroom where again, individual interviews were not permitted and INS officers were present. The SDVLP attorney again complained to a supervisor, and it was agreed that the INS should remain outside the courtroom with the door ajar so that the INS could observe SDVLP's clients. However, after SDVLP began to give the clients general information, a security officer came into the room, loudly insisting that a table must separate the detainees from the attorney. (The detainees, with their feet in chains, had been sitting across from the attorneys and interpreter at a distance considered by SDVLP to be sufficient to prevent physical contact.) All present complied with this request immediately to avoid conflict; at least one of the women was startled and frightened to the point where she began to shake. The same security officer remained inside the courtroom.

Again, the SDVLP attorney left the courtroom to speak with a supervisor and insisted that the guard be taken out of the room. The supervisor finally moved everyone to a separate room, where the door remained ajar so that the INS officers could observe SDVLP's clients. Those present inside the room could hear the officers talking outside the room, and the officers could hear discussions from inside the room. Later, the SDVLP attorney insisted that two clients be removed, so that she could conduct a confidential interview of at least one of the clients. She was permitted to do so. However, due to the many delays, there was only sufficient time for one client to be interviewed.

SDVLP continued to experience problems of access and confidentiality at later interviews of clients at the INS office in San Diego. SDVLP scheduled an interview with a client for October 29, 1998. On this day, a law clerk and volunteer interpreter waited over an hour at the INS office before they were informed that INS had forgotten to transport the client from CCA. On November 5, 1998, while interviewing a client at the INS office in the glass interview booth, an SDVLP law clerk was interrupted by an attorney who informed him that he needed the room to speak with a client. Soon after, an INS officer similarly interrupted the interview, telling the law clerk to hurry up. The law clerk refused to do so, and continued the interview.

### ***Master Calendar Hearings***

On November 11, 1998, approximately one week after CCLC was notified of the credible fear determinations at El Centro, an SDVLP attorney was informed by an INS deportation officer, that pursuant to directives from Washington D.C., no master calendar hearings were being scheduled for the Chinese cases due to "special circumstances." On Friday, December 11, 1998, an SDVLP attorney spoke with the head of Detention and Deportation regarding the fact that master calendar hearings had not been scheduled for the Chinese detainees represented by SDVLP and CCLC. She had called him regularly over the previous two weeks, without response. During this conversation, he apologized for the delay in returning her phone calls, informed her that there was no directive that prohibited the scheduling of master calendar hearings, and promised to look into why master calendar hearings had not been scheduled.

Two days later, on Sunday, December 13, 1998, a volunteer interpreter called SDVLP to inform them that a concerned detainee had called about a hearing scheduled for her on the following day, Monday, December 14. SDVLP confirmed, by calling the INS information line, that four detainees at CCA had been scheduled for master calendar hearings on Monday, December 14th. Although G-28s were on file, SDVLP was not notified of these hearings. CCLC similarly did not receive notice of master calendar hearings (although the G-28s filed by CCLC had limited its scope of representation to the credible fear interview stage).

On December 14, an SDVLP attorney, a volunteer attorney, and a volunteer interpreter attended the scheduled master calendar hearings for clients detained at CCA.<sup>203</sup> The cases were re-scheduled for December 18 because a Fuchow interpreter was not available. Since one client understood Mandarin sufficiently, and a Mandarin interpreter was present, that person's case moved forward. The SDVLP attorney was allowed to speak with her clients afterwards to explain what had happened.

### *Preparation of Asylum Claims and Motions to Change Venue*

In November, CCLC was contacted by the "Liaison Judge" of the Immigration Court in El Centro, who was concerned that over ninety Chinese nationals were now scheduled for court appearances. After a lengthy discussion, CCLC agreed to assist thirty-four of the Chinese detainees with their asylum claims, including the fifteen that they had already represented. CCLC proposed a model and schedule for assistance that included the services of volunteer interpreters and law students.<sup>204</sup> The Liaison Judge expressed gratitude, agreed to CCLC's proposal, and stated that he would communicate the arrangement to the other judges in El Centro. A memorandum from CCLC memorializing the conversation was faxed to the court on November 25, 1998.

On December 4, 1998, CCLC received thirteen copies of motions to change venue, filed by the INS, and later learned that motions for all thirty-four that they had agreed to assist had been filed, although they did not receive written or oral notice of the motions in the other cases. In these motions, the INS argued that space constraints and related concerns necessitated the transfer of all of the Chinese nationals to a detention center in New Orleans. After receiving the motions, CCLC contacted the Liaison Judge, who expressed awareness and concern that it was unlikely that the thirty-four individuals would receive any legal assistance if transferred to New

---

<sup>203</sup> The detainees were brought into the court chained and handcuffed to each other.

<sup>204</sup> CCLC explained to the court that constraints of resources and time would make individual attorney representation of all thirty-four unrepresented individuals impossible, but that they could assist such persons with certain aspects of the asylum process with the aid of volunteers. Ten law student/interpreter teams were trained and scheduled to go to El Centro on two occasions to interview the detainees, and prepare and review asylum applications and declarations. Meanwhile, law students assembled country conditions packets to accompany the asylum applications.

Orleans. When a CCLC attorney inquired whether oppositions to the venue motions should be filed, the Liaison Judge stated that because the court was aware of the scope of CCLC's commitment, no opposition was necessary. However, when asked how CCLC could safeguard the interests of all the Chinese detainees it represented at El Centro other than by filing individual oppositions, the Liaison Judge suggested that CCLC could file an *amicus* brief. On December 8, 1998, CCLC filed an *amicus* statement opposing the change of venue.

When on December 9, 1998 a second IJ contacted CCLC to inquire on the scope of services CCLC was willing to provide the individuals, CCLC reiterated what had been laid out in the November 25, 1998, memorandum and *amicus* statement. After discussing the cases for about thirty minutes this IJ agreed that he would not grant changes of venue for any of the individuals in his courtroom.

On December 17, 1998, a CCLC staff attorney and a law student interpreter went to El Centro to meet with the thirty-four detainees to explain to them the status of their cases, the assistance to be provided by CCLC, and their rights and responsibilities should they be released. During these meetings, CCLC learned that at least four of its thirty-four clients had been transferred to New Orleans with no notice to CCLC. A number of the remaining detainees indicated that venue had been changed in their cases as well. CCLC called the Immigration Court to discuss these developments. The Liaison Judge indicated that he had, indeed, changed venue for some of the individuals on CCLC's list. Although unable to explain why he granted the motions, he assured CCLC that he would not grant changes of venue for any of the individuals remaining on his docket.

A third IJ, who had granted several motions to change venue in the cases of the Chinese nationals, contacted CCLC on December 18, 1998. After CCLC prepared a brief affidavit with attachments of previous correspondence addressing CCLC's assistance to the thirty-four unrepresented detainees at El Centro, this IJ agreed to vacate the orders granting changes of venue for individuals represented by CCLC.

### ***Visit by the Chinese Consulate***

On January 6, 1999, a volunteer attorney went to CCA to speak with his client. The visit had been pre-arranged with CCA. The attorney waited for one hour, as the staff at CCA could not locate the client. Later, he was informed that the client had been taken downtown where she was being fingerprinted for the purposes of her asylum application. He returned the following day, January 7. While interviewing his client, he was interrupted by a guard who informed him that representatives from the Chinese Consulate had arrived to speak with his client and the other Chinese detainees. The attorney asked that he be permitted to complete his interview, to advise his client before meeting with the consular officer, and to be present during the visit by the consular officer. Each request was denied. The interpreter managed to translate the attorney's warning not to tell them anything as his client was being taken out of the room.



Mixed reports were received from the detainees regarding their contact with Chinese consular representatives. The clients reported that the meeting took place in a room with a group of detainees. They also reported that INS officers were present, and that it was difficult to distinguish between the INS officers and consular representatives. Most reported feeling intimidated or worried because they believed the consular representatives were in a position to send them home.

After being informed of the visit, an SDVLP attorney spoke with the INS's head of Detention and Deportation regarding this consular contact. The INS official confirmed that the Chinese consular representatives had visited the detainees, and that he was aware that the visit was to take place. He informed the attorney that INS is required to facilitate contact with the consulates and detained nationals. He recognized that SDVLP should have been notified and that there was an issue of whether the volunteer attorney who was present should have been allowed to consult with his client and be present during the consular visit. The head of Detention and Deportation insisted that the consulate was not, at any time, privy to the fact that the detainees intended to apply for asylum.

A meeting was then scheduled between INS, CCLC, and SDVLP to discuss the problems that had arisen in this case. During this meeting, INS Deportation officials again acknowledged that the attorneys of record should have been notified of the consular visit to the Chinese detainees at CCA, and recognized that an issue had arisen over the role of representatives in relation to consular visits. CCLC and SDVLP noted that this meeting has led to further constructive meetings with the INS in which they have been able to discuss problematic issues.

### *Release*

On November 11, 1998, an SDVLP attorney was informed by an INS deportation officer that, pursuant to directives from INS Headquarters in Washington D.C., none of the Chinese from the Chih Yung were to be released from detention. In mid-December, at the direction of the head of Detention and Deportation, an SDVLP attorney faxed a request for bond for a client; although he left several phone messages, no response was ever received. On January 5, 1999, SDVLP learned from a volunteer attorney that a \$5,000 bond had been set for one of SDVLP's clients at CCA. SDVLP confirmed with INS that bonds had been set for all of SDVLP's clients at CCA. Only one of the attorneys received notice by phone from a detention officer that a bond had been set for her client.

On January 6, 1999, CCLC was notified by an INS detention officer that one of the Chinese detainees at El Centro was to be released on \$5,000 bond. No other calls were received from INS regarding the release of the other Chinese detainees at El Centro. On January 7, CCLC contacted the INS head of Detention and Deportation in El Centro to inquire about the status of bonds and release for the thirty-four individuals they represented. On January 8, CCLC, unable to contact the head of Detention and Deportation, learned from an INS spokesman that all but four of the Chinese had been authorized for release on \$5,000 bond. Within a few days, all

bonds had been paid and the Chinese were released, without notice to SDVLP or CCLC regarding who had paid the bonds or the dates of release. A list of the addresses of the released detainees that CCLC had agreed to assist was provided to CCLC upon request. Although SDVLP similarly requested the addresses of their released clients, they did not receive this information, and only later learned such addresses in communications with their clients.

### *Juveniles*

The status of many juveniles who were on the Chih Yung remains unknown to SDVLP and CCLC. At first, CCLC was informed that the juveniles were being held in San Francisco, and later, in Chicago. To date, it is unclear where many of the juveniles are being detained. Some were located at Polinsky Center in San Diego, a short-term facility housing abused and abandoned children.

## **2. Observations**

### *UNHCR's Lack of Access to Secondary Inspection*

Although a UNHCR representative traveled to El Centro to observe asylum processing at the invitation of the INS Acting Director of International Affairs, she was not permitted to observe an important aspect of the process. When she learned that secondary inspections were ongoing, she requested access to the facility in order to observe such inspections. The representative was informed that she was not authorized to enter the facility or to observe secondary inspections. She was given an accompanied tour of the facility and was allowed to speak with an IJ, but otherwise was required to wait outside. The representative spent the week in the area, and waited for permission to be granted. Secondary inspections ended on Thursday of that week. She was granted permission to observe on Friday, after secondary inspections concluded. However, she was not notified that she had been granted permission until several days later, upon her return to Washington, D.C.

Although the INS has stated that it would allow UNHCR access to secondary inspection, UNHCR has reported to the Study that its access has been “theoretical.”<sup>205</sup> UNHCR’s experience at El Centro further raises questions about the INS’s willingness to grant access. The INS’s

---

<sup>205</sup> UNHCR has been granted some access to primary data and on-site observations, including visits to ports of entry and detention facilities, observation of credible fear interviews, and permission to look at the files of individuals processed under expedited removal. However, such access has been granted on the agreement that UNHCR’s observations and feedback to the INS be confidential. UNHCR has also met with asylum-seekers and NGOs. Although UNHCR has agreed to keep its observations confidential, it has stated that issues of concern raised with the INS include: access to basic necessities and privacy in secondary inspection areas, interpretation, interviewing techniques, release policies and use of detention, methods of restraint in secondary inspection areas, access to consultants and non-attorney consultants (such as family members), separation of parents and children, and access to pay telephones or non-collect call telephones.

denial of access by UNHCR to secondary inspection for observation purposes raises more troubling concerns, as UNHCR is the only organization to which the INS has stated it would permit any such access.<sup>206</sup> Requests by the Study and other NGOs, including Amnesty International, for on-site observation of secondary inspections, in addition to credible fear interviews, have been denied.

The denial of access to observe secondary inspection raises significant policy concerns. The expedited removal laws grant immigration officers the unreviewable authority to return a person to his or her country of origin based on an abbreviated inspection. Without observation and study of the implementation of these laws, it is difficult to evaluate whether Congress' intent to screen in legitimate asylum-seekers, while screening out those presenting false claims, is being fulfilled.

### *Efforts of Asylum Office*

CCLC and SDVLP noted that their experience with the Los Angeles Asylum Office was a positive one, overall. CCLC noted that the Asylum Office was instrumental in obtaining the aid of CCLC and SDVLP in representing the Chinese nationals; that the AOs demonstrated genuine concern and interest in conducting the fairest credible fear interviews under the circumstances (for example, by working with CCLC to schedule dates for the interviews on which attorneys, volunteer interpreters, and law students could be available); and that the AOs demonstrated concern that a correct finding was made in each case. Further, when telephonic interpretation problems were brought to their attention, many AOs accepted clarifications and corrections by CCLC's volunteer interpreters, gave further instructions to the official interpreters, or even obtained different telephonic interpreters.

### *Quality of Interpretation During Credible Fear Interviews*

The volunteer interpreters who observed the credible fear interviews noted numerous problems with the interpretation of the Chinese nationals' testimony, including an inability to interpret certain key words, inaccurate translations, a failure to perform literal translations, hostility towards the applicants, and an inability of the parties at the credible fear interview site to hear the interpreter.

Regarding interpretation during credible fear interviews, 8 C.F.R. § 208.30 provides: "If the alien is unable to proceed effectively in English, and if the AO is unable to proceed competently in a language chosen by the alien, the asylum officer shall arrange for the assistance of an interpreter in conducting the interview." In the cases at hand, the AOs were unable to

---

<sup>206</sup> UNHCR has stated that it does not have the resources to monitor expedited removal, and that such monitoring is best carried out by national organizations. Nonetheless, as UNHCR's mandate entails the protection of *bona fide* refugees world-wide, its ability to observe the implementation of the immigration procedures of all countries, to the extent that it is able, is essential.

obtain sufficient Fuchow interpreters due to a scarcity of interpreters in that language. A number of the Chinese nationals chose to proceed with Mandarin interpreters. Several AOs sought to ensure interpretation in accord with this regulation. One AO terminated an interview due to the poor quality of interpretation; another turned to the volunteer interpreters for clarification and corrections. In some cases, when the volunteer interpreters noted that the official interpreter was acting improperly, the AOs gave further instructions as to how they should conduct their interpretation.

Notwithstanding these attempts, numerous interpretation errors were made. One interpreter noted that the errors were so pervasive that she could not interrupt or intervene each time there was an error, because it would have caused a significant disruption and delay of the interview. Thus, she noted that overall more errors went uncorrected than corrected. She further noted that at times seeming inconsistencies in the testimony would be noted by the AO, which she would have to explain were the result of inaccurate interpretation.

The problems noted by these volunteer interpreters raise questions about the quality of interpretation and the effect that interpretation may have on credibility determinations. CCLC and SDVLP expressed serious concern that without the presence of the volunteer interpreters, these errors would have gone uncorrected, and could have been used against the applicants in later asylum proceedings in making a negative credibility determination. It was further noted that in most cases, due to the rapid scheduling of credible fear interviews and a lack of resources, no other interpreter would be present to modify or correct any errors made by the official interpreter. The impact that interpretation errors may have on credibility determinations raises a question regarding whether expedited removal procedures are sufficient to ensure that legitimate asylum-seekers are not being screened out of the asylum process.

### ***Confidentiality and Access to Detainees***

As described above, after offering its assistance to the Chinese nationals at the request of the Los Angeles Asylum Office in Anaheim, SDVLP experienced numerous difficulties with the confidentiality of attorney-client interviews at INS offices in San Diego. In January 1998, the INS issued uniform standards addressing visitation by legal workers for detainees at INS Service Processing Centers and INS contract facilities, such as CCA in San Diego.<sup>207</sup> These standards

---

<sup>207</sup> INS, Detention Standard: Detainee Visitation, at 3 (1998) (on file with the Expedited Removal Study); *INS Releases Uniform Detention Guidelines*, 75 INTERPRETER RELEASES 199, 199 (Feb. 9, 1998). These standards address detainee visitation, telephone access, access to legal materials, and group legal rights presentations. The American Bar Association (ABA) worked closely with the INS in the development of these four access standards. DETENTION WATCH NETWORK, U.S. DETENTION WATCH NETWORK CONFERENCE REPORT AND RECOMMENDATIONS 11 (Sept. 17-20, 1998). The ABA also has advocated for enforcement of these standards. The INS appointed Dave Venturella to the position of national facilitator for detention access. *Id.* The INS has also created a mechanism for addressing access problems. First, advocates should contact the responsible local officer in charge, and if such problems are not resolved, the district director. If the problem remains unresolved at this level, advocates should

(continued...)

provide that legal visits are confidential, that legal visits must occur in private rooms not subject to auditory supervision, and that private consultation rooms “shall be available for such meetings.”<sup>208</sup> They emphasize that neither contract facility personnel nor INS staff are permitted to be present in the private area during the attorney-client meeting, but that such staff may observe such meetings visually through a window or camera “to the extent necessary to maintain security.”<sup>209</sup>

The conduct of the guards in this case appears to have violated the INS’s detention standards.<sup>210</sup> In addition, the conduct of the officers and guards at INS’s offices in San Diego appears to have infringed upon the legal principles of confidentiality and the attorney-client privilege. Protection of confidentiality is particularly important in the context of interviews of asylum-seekers, who may be revealing sensitive information that could put them at a high risk of persecution if they are returned to their home countries. In this case, the attorneys and their clients had to choose between compromising the confidentiality of the detainees’ asylum claims or terminating the interviews. On one occasion, an SDVLP attorney chose to proceed only with general information about SDVLP’s services, and avoided any confidential discussions relating to her clients’ substantive asylum claims.

Also, despite prior arrangements with the INS and CCA, SDVLP’s clients were at times not accessible at the scheduled time. One detainee could not be located until, after an hour and a half, an SDVLP attorney repeatedly inquired into the identity of a nearby female detainee. On another occasion, a legal visit at CCA was interrupted and terminated due to the unannounced

---

<sup>207</sup>(...continued)

contact the INS’s regional access facilitator, and then the national facilitator. *Id.* See also *INS Releases Uniform Detention Guidelines, supra*, at 200. The ABA believes that asylum-seekers should not be detained except in extraordinary circumstances, that detention facilities should not be located in remote areas, that the detention access standards should be applied to all local jails and other facilities which the INS uses for detention, and that the INS should develop alternatives to detention, such as supervised conditional prehearing release programs.

<sup>208</sup> INS, *supra* note 207, at 12. This standard recognizes that “on occasion, a situation may arise where private conference rooms are in use, and the attorney wishes to meet in a regular or alternate visiting room.” *Id.* It states that in such situations, requests by attorneys should be accommodated to the extent practicable, and that such meetings “should be afforded the greatest degree of privacy possible under the circumstances.” *Id.*

The INS standard states that persons subject to the expedited removal process shall be afforded the same privacy between legal service providers and detainees during live and telephone communications as other immigration detainees. *Id.* at 16.

<sup>209</sup> *Id.* at 12. This standard allows for brief interruptions of meetings between attorneys and clients for official head counts, which are to be “as unobtrusive as possible.”

<sup>210</sup> In the case at hand, it is unclear if there were private conference rooms generally available for the purposes of attorney-client interviews, as required by the INS’s detention standard. Even if there were, the guards’ insistence on being close enough to overhear the conversations between the attorney and clients, and their, at times, rude and authoritative conduct, resulted in the attorneys and clients not being afforded the greatest degree of privacy possible under the circumstances.

visit of representatives of the Chinese Consulate, who wanted to speak with the client being interviewed. Last, despite a pre-arranged visit, one detainee was not transferred to INS's office in San Diego for a scheduled attorney visit. These occurrences seem inconsistent with INS policy to "assure access to the detained aliens to the fullest extent possible consistent with the safe operation of INS facilities."<sup>211</sup> Such problems have been reported by other monitoring agencies, such as Human Rights Watch.<sup>212</sup>

### *Notice to Attorneys*

SDVLP and CCLC had together filed Notices of Appearance as Attorneys or Representatives (Form G-28) for approximately twenty Chinese detainees. Yet, they were not notified of several significant developments relating to their clients, including the scheduling of master calendar hearings, the setting of bond, a visit by the Chinese Consulate, the transport of a detainee for medical purposes with whom SDVLP had scheduled an interview, and the granting of motions to change venue despite express assurances that venue would not be changed.

Federal law applicable to administrative agencies provides that when a person is represented in a matter before an agency, any notice or other written communication to that person shall be given to the representative.<sup>213</sup> Thus, SDVLP should have been notified of the scheduling of master calendar hearings and the setting of bond for its six clients detained at CCA. Further, although initially served with thirteen motions to change venue by the INS, questions are raised whether CCLC should have been served with all thirty-four motions to change venue, for all the Chinese nationals they had agreed to assist, and whether they should have received notice of the transfer of those for whom venue had been changed.

Other problems experienced by SDVLP, such as failure to provide notice when a client was transferred to a medical facility prior to a prearranged interview, and interruption of an attorney interview by the visit of consular representatives, raise questions about the ability of

---

<sup>211</sup> INS, Detention Standard, *supra* note 207.

<sup>212</sup> Human Rights Watch reported that written correspondence to detainees in Orleans Parish Prison was returned "unable to locate," that a visit by an attorney and representatives of Amnesty International to Orleans Parish Prison was flatly refused, and that frequent transfers without notification to legal representatives impeded representation efforts. HUMAN RIGHTS WATCH, LOCKED AWAY: IMMIGRATION DETAINEES IN JAILS IN THE UNITED STATES (Sept. 1998).

On a related subject, in early March 1999, representatives from the Central Region Detention Watch group met with the Central Region INS and discussed various issues regarding detention. Reports had been received that law students and accredited representatives had had difficulty gaining access to INS detainees housed in local facilities within the Central Region. At that meeting a draft memo was distributed by immigration advocates that clarified categories of non-attorneys that should have access to immigration detainees, and proposed procedures for such access. These advocates requested that the memorandum be considered by and distributed throughout INS districts in the Central Region.

<sup>213</sup> 5 U.S.C. § 500; GORDON, MAILMAN, ET AL., IMMIGRATION LAW AND PROCEDURE § 4.01.

advocates to effect their right to consult with and represent persons in the asylum process. Due to constraints on their resources, CCLC and SDVLP were in a great part dependent on the assistance of volunteer interpreters and interpreters, whose schedules involved other work and study. The day that SDVLP's client was transferred without notice to SDVLP, an SDVLP attorney arrived with a volunteer attorney and volunteer translator to interview this person. Further, it was a volunteer attorney that visited CCA to interview a client and was interrupted by the visit of the Chinese consulate. The lack of notice to SDVLP and CCLC caused the volunteer attorneys and interpreters to suffer apparently avoidable last minute scheduling difficulties and conflicts.

### *Visit by the Chinese Consulate*<sup>214</sup>

While interviewing a client, an SDVLP attorney was interrupted and notified that representatives of the Chinese Consulate had arrived and would meet with his client. The attorney had received no notice of the visit. He was not allowed to continue his interview, to consult with his client about the consular visit, or to be present during the questioning of the Chinese nationals by the Chinese Consulate. The Chinese nationals reported feeling worried and intimidated, in part because they felt that the Chinese consular representatives could send them back to China. Their worries were further reinforced by the fact that INS officers were also present.

A bilateral treaty between China and the United States provides for mandatory consular notification where any Chinese national is detained, whether or not the national is an asylum-seeker or has consented to such notification.<sup>215</sup> Such notification is mandatory even where the detainee claims a fear of his or her own government,<sup>216</sup> although the INS is prohibited from

---

<sup>214</sup> Other questions that arise regarding consular visits are raised in Section V(A), Case Study 2.

<sup>215</sup> U.S.-China Consular Convention, Sept. 9, 1980, U.S.T. 2973, T.I.A.S. 10209, 1529 U.N.T.S. 199. Under Article 35, a consular officer is entitled to communicate and meet with any of its nationals who are detained in the other party's country; to notification of the detention of its nationals in the other party's country; and to visit such nationals in detention.

Under the Vienna Convention on Consular Relations (Vienna Convention), to which the United States is a signatory, notification of a foreign consulate that a national of the foreign consulate's country is detained is conditioned on request of the foreign national in detention. Vienna Convention on Consular Relations, Apr. 24, 1963, art. 6, 596 U.N.T.S. 261, 268. Further, under the Vienna Convention, consular officers have the right to visit a national of their state who is in detention, although they may not take any action that the detained national opposes. *Id.* Consent is not explicitly required for visits from consular officials.

A full list of countries to which the United States is obligated to provide mandatory consular notification can be found at 8 C.F.R. § 236.1(e).

<sup>216</sup> UNITED STATES DEPARTMENT OF STATE, CONSULAR NOTIFICATION AND ACCESS: INSTRUCTIONS FOR FEDERAL, STATE, AND LOCAL LAW ENFORCEMENT AND OTHER OFFICIALS REGARDING FOREIGN NATIONALS IN THE UNITED STATES AND THE RIGHTS OF CONSULAR OFFICIALS TO ASSIST THEM 21 (1998).

revealing the fact that the detainee has applied for asylum.<sup>217</sup> Regarding consular access, the United States interprets its obligation under international law as allowing consular officers to visit and communicate with its detained nationals, even if the national has not requested a visit.<sup>218</sup> No exception is made for refugees or asylum-seekers.

This case raises many complex questions. First, a question is raised regarding the effect that consular notification and access may have on asylum-seekers. Commentators, including UNHCR, have recognized that a refugee may face an increased risk of harm when identified to a consular officer of his or her country as an asylum-seeker.<sup>219</sup> These commentators have argued for an exception under which consular officers will not be notified of the detention of or have access to a refugee or asylum-seeker.<sup>220</sup> Furthermore, several countries have adopted laws or practices under which consular officers need not be notified of or allowed access to refugees who are in detention outside their countries, except at the request of the detained national.<sup>221</sup>

In this case, many of the Chih Yung Chinese nationals had claims that related directly to the policies of the Chinese government, including violation of country exit and family planning laws. They felt intimidated and worried by the visit of officials of the Chinese government. As

---

<sup>217</sup> 8 C.F.R. § 236.1(e).

<sup>218</sup> Although a consular officer is entitled to visit a foreign detained national, the consular officer must refrain from taking action on behalf of the detained national if that persons so requests. UNITED STATES DEPARTMENT OF STATE, *supra* note 216, at 23.

<sup>219</sup> See *supra* note 112.

<sup>220</sup> LUKE T. LEE, *CONSULAR LAW AND PRACTICE* (1991). During the drafting of the Vienna Consular Convention, and due to humanitarian concern, a representative of UNHCR attempted to have the participants recognize, in reference to the provisions on consular access and notification, its role in providing the international protection of refugees, and thus the issue arose of the application of the Convention to refugees. *Id.* at 353-354; U.N. Doc. A/CONF.25/L.6 (1963). As a result, a nine-power joint proposal was presented to add a new article to the Convention under which countries would not be required to recognize a consular officer of another country as entitled to act on behalf of, or to otherwise concern himself with, a national of the consular officer's country who is a refugee or an asylum-seeker. LEE, *supra*, at 354; U.N. Doc. A/CONF.25/C.1/L.124 (1963). The issue split the Conference into two groups, neither of which could muster a two-thirds majority, and in the end a compromise left the issue undecided. LEE, *supra*, at 354-56; U.N. Doc. A/Conf.25/13/Add.1 (1963). Instead, it was requested that the issue be further considered by organs of the United Nations. The United States took no official position on the issue. Official Record of the United Nations Conference on Consular Relations, U.N. Doc. A/CONF.25/16 (1963).

<sup>221</sup> It has been noted that "the practice of Western States has continued to reflect their position that in the case of a refugee or a person seeking political asylum, a consular officer is not informed (whether or not the person is in police or prison custody) or given access except at the express request of the person concerned." LEE, *supra* note 220, at 357. Furthermore, the 1967 European Convention on Consular Functions, Dec. 11, 1967, 15 E.Y.B. 285, E.T.S. 61, provides: "The receiving State shall not be obliged to recognise a consular officer as entitled to exercise consular functions on behalf of, or otherwise to act on behalf of or concern himself with, a national of the sending State who has become a political refugee for reasons of race, nationality, political opinion, or religion." *Id.* at art. 47.



attorneys were unable to observe the consular officers' visits, it is unclear whether questions revealing their asylum claims were asked or answered. In any event, the question arises whether, based on their knowledge of the laws of the United States, and the particular circumstances in this case,<sup>222</sup> the consular representatives might have inferred that the detainees were asylum-seekers.

For the same reasons, a question arises as to whether prohibiting INS officers from revealing the fact that a detainee has requested asylum is sufficient protection for asylum-seekers. Again, based on United States law, and the particular circumstances of a case, one might conclude that consular officers could infer that the individuals were detained because they were asylum-seekers.

A final issue that arises is the nature of the procedures for facilitating consular access, where allowed. More specifically, a question arises regarding the role of a legal representative in a visit by a consular officer. Neither the INA nor its accompanying regulations give instructions on the facilitation of consular access. Notice to a representative is not required and presence during a consular visit is not expressly permitted. The position of the United States Department of State is that consular officers should be allowed privacy in their communications with their nationals.<sup>223</sup> It has further instructed that where the detained national opposes a private meeting requested by the consular official, immigration officers should contact the Department of State.<sup>224</sup> However, this instruction fails to address a situation where a detainee requests that an attorney be present, or what action a federal officer should take where the detainee opposes a meeting with consular officers. In this case, the attorney was meeting with a client when the representatives of the Chinese Consulate arrived. The attorney requested to consult with his client and to be present during the consular visit. The immigration officers did not inquire if the client wanted his attorney present. It is unclear what policy reasons exist for refusing to allow a representative to be present during a consular visit where the detained national, who is seeking asylum, consents to or requests the presence of such representative.

### *Release*

Persons determined to have a credible fear of persecution may seek parole; the INS has stated that parole is a viable option for persons who can establish identity and community ties

---

<sup>222</sup> For example, the arrival of the Chinese nationals was widely covered in the press; including the fact that initial interviews revealed at least seven appeared to have legitimate claims to political asylum, and that further interviews with the Chinese nationals were expected. *See Sanchez, supra* note 188.

<sup>223</sup> UNITED STATES DEPARTMENT OF STATE, *supra* note 216, at 23.

<sup>224</sup> *Id.*

and are not subject to any possible bars to asylum.<sup>225</sup> CCLC and other attorneys note that prior to the release of persons who are determined to have a credible fear of persecution, parole requests generally require letters and phone calls setting forth the equities of a case which support a grant of parole, including community ties and the absence of criminal convictions, and are granted on a case by case basis.

CCLC and SDVLP expressed concern regarding the circumstances under which their clients were released from El Centro and CCA. CCLC and SDVLP had expended a great amount of effort and resources on behalf of their clients, including seeking their release from detention. The INS had informed CCLC and SDVLP that their clients would not be released. The INS then suddenly released the individuals without any explanation. According to CCLC and SDVLP, the most troubling aspect of the circumstances of the release was the fact that bond was set and paid by third parties without any notice to the attorneys of record.

### **3. Conclusion**

In conclusion, the cases of the Chinese aboard the Chih Yung raise many questions about qualitative aspects of the expedited removal process. Difficulties were experienced in the process, with translation, with access to detainees, and with notification of material developments in the cases. These cases suggest that such problems can impact the substantive determinations made during the credible fear process. They also raise the question of whether an asylum-seeker may be placed at greater risk when identified to a representative of the consulate of his or her country. These occurrences, which would not be apparent from a review of records of proceeding or statistics, further highlight the need for on-site observation of the expedited removal process.

## **B. Detention of Canadian-Bound Asylum-Seekers: Transnational Implications of Expedited Removal<sup>226</sup>**

### **1. Background**

INA § 235(a)(2) provides that all individuals who transit through the United States shall be inspected by immigration officers. Thus, persons seeking refugee status in other countries who transit through the United States by land, air, or sea, may be inspected upon arrival, placed in expedited removal proceedings, and detained. If such persons are identified as asylum-seekers

---

<sup>225</sup> 8 C.F.R. § 208.30(d). For a discussion of parole, *see supra* note 121.

<sup>226</sup> The Expedited Removal Study examines all aspects of the implementation of expedited removal procedures. In addition to its quantitative and qualitative analysis, the Study attempts to identify and evaluate the transnational impacts of this statutory provision. The application of expedited removal to Canadian-bound asylum-seekers is one example of the transnational effects of expedited removal, and will continue to be an area of focus for the Study.

but found not to have a credible fear of persecution, they will be returned to the country from which they departed, rather than their intended destination.<sup>227</sup> Persons who are found to have a credible fear of persecution may be granted parole and subsequently continue on to their final destination.<sup>228</sup> However, the many who are not granted parole must apply for asylum in the United States in order to avoid removal to their country of citizenship or residence. A grant of asylum in the United States is a bar to eligibility to refugee status in Canada, unless a person cannot be returned to the United States.

Pursuant to these provisions of the INA, a number of persons who have attempted transit through the United States to Canada, and have expressed a fear of return to their country and/or an intent to seek asylum in Canada, have been placed in expedited removal and detained by INS. As a result, refugee advocates and NGOs in Canada and the United States have begun to increase their focus on the issue of the detention of Canadian-bound refugees, including VIVE,<sup>229</sup> Vermont Refugee Assistance, and the Canadian Council for Refugees (CCR).<sup>230</sup>

An initial request for information made by NGOs, including VIVE and Vermont Refugee Assistance, revealed several cases of persons from Sri Lanka and Africa who had been placed in expedited removal while transiting through the United States by plane en route to Canada, where they intended to apply for refugee status. At a March 2, 1999, roundtable between CCR and Citizenship and Immigration Canada (CIC),<sup>231</sup> CCR raised the issue of the detention of such persons in the United States and requested a meeting on this subject involving representatives from United States NGOs. CIC agreed to this request, and the meeting is currently being

---

<sup>227</sup> Under INA § 241(b)(1)(A), a person who is placed in INA § 240 (regular removal) proceedings upon arrival at the United States, and is ordered removed, is removed to the country in which he or she boarded the vessel or aircraft on which he or she arrived in the United States. Alternatively, INA § 241(b)(2) provides that "other aliens" shall be removed to the country that such persons designate. The INA does not expressly state which provision applies to persons being returned under an order of expedited removal. As persons in expedited removal fall under § 235 of the INA, rather than § 240, a facial reading of the INA indicates that persons in expedited removal should be able to designate their country of return. In an internal memo the INS has stated that persons in expedited removal proceedings are to be removed in accordance with INA § 241(b)(1). See Brian Hayes, HQCOU, Internal Memo (Apr. 30, 1997) (on file with Expedited Removal Study).

<sup>228</sup> For a discussion of parole, see *supra* note 121.

<sup>229</sup> VIVE, located near the Canadian border, is a New York non-profit organization which assists Canadian-bound refugees. In addition to directly assisting such refugees, VIVE provides assistance to attorneys who have cases involving Canadian-bound refugees.

<sup>230</sup> Detention Watch Network News, at 8 (April 1999). The Canadian Council for Refugees is an umbrella organization with some 140 member groups from across Canada concerned with refugee rights and newcomer settlement.

<sup>231</sup> The Department of Citizenship and Immigration Canada is responsible for Canada's immigration program and for certain aspects of the refugee program, excluding refugee determination, which is the responsibility of the Immigration and Refugee Board.

organized. After the roundtable between CIC and CCR, a teleconference of immigration and refugee advocates in Canada and the United States was organized by VIVE and Vermont Refugee Assistance and took place on March 29, 1999.<sup>232</sup> This meeting confirmed that a number of cases exist in which individuals seeking refugee status in Canada were placed in expedited removal proceedings in the United States and prevented from continuing on to Canada. This includes a large number of Sri Lankans with relatives in Canada, in addition to a smaller number of persons from other countries.

Participants in the March 29 meeting also reported that policies on parole in these cases vary in different regions. In a few INS districts, and as reported in Case Study 4 in Part V(A) of this Report, a number of Canadian-bound individuals seeking refugee status in Canada have been paroled after receiving positive credible fear determinations,<sup>233</sup> and were able to depart for Canada.<sup>234</sup> However, in the majority of INS districts with which they had experience, few such individuals, if any, appear to have been paroled after receiving a positive credible fear determination.<sup>235</sup>

Individuals who are not paroled have no option other than to apply for asylum in the United States in order to avoid being returned to a country in which they fear persecution. As stated above, a grant of asylum in the United States is a bar to eligibility for asylum in Canada, and may preclude a person from reuniting with family and friends or living in a region where he or she has community ties. Thus, the practice of placing Canadian-bound refugees in expedited removal and detaining them raises significant humanitarian and policy issues, as demonstrated by the following case.

---

<sup>232</sup> This teleconference was not limited to the issue of detention of Canadian-bound refugees who are placed in expedited removal, but rather focused on the broader issue of all Canadian-bound refugees who have been detained and prevented from arriving at the Canadian border.

<sup>233</sup> The Study database has at least ten cases in which asylum-seekers in transit to Canada were placed in expedited removal, detained, and paroled after receiving a credible fear determination. After being paroled, these asylum-seekers left for Canada, where the majority had family. For an example of one of these cases, see *supra*, Part V(A), Case Study 4.

<sup>234</sup> Departure for Canada after receiving a grant of parole raises other issues, including bond issues, that are discussed in Part V(A), Case Study 4.

<sup>235</sup> The Study has received reports from several immigration attorneys and NGOs that the INS's New York District has adopted a policy under which few persons subject to the expedited removal process are paroled.

*The Case of Charles Namakando*<sup>236</sup>

Mr. Namakando, a Lozi man from Barotseland<sup>237</sup> in Zambia, came from a family that was very politically active.<sup>238</sup> Mr. Namakando was also politically active; he was a member of the United National Independence Party (UNIP) and worked as a statistician for the Office of the President in the National Commission for Development and Planning (NCDP). In 1990, he married a woman he met in Egypt while studying abroad. When the Movement for Multi-Party Democracy (MMD) emerged as the governing party, Mr. Namakando lost his job, was evicted from his home, and was arrested and detained by police from the MMD party intelligence network. While detained, he was repeatedly tortured and interrogated. Upon his release, he and his wife left for the United States, where they applied for asylum. Their first child was born in the United States, and is a United States citizen. While their claims were pending, the family left for Canada because Mr. Namakando's wife had family members living there, and because the waiting period for determination of asylum claims in the United States was lengthy. A second child was born to the family in Canada, and is a Canadian citizen.

In 1994, while his refugee status claim in Canada was still pending, Mr. Namakando returned to Zambia, at the request of his uncle, in order to fulfill his political duties. As his only other brother of sufficient age had been killed in November 1993, as was his cousin,<sup>239</sup> Mr. Namakando was the only person who could perform such duties. In the following years, he was arrested, detained, and tortured on a number of occasions. In August 1998, days after he had participated in a meeting of Lozi representatives from an organization concerned about many issues relating to Barotseland, Mr. Namakando was arrested, detained, and tortured. After his release, a relative helped him to obtain a passport, and he fled Zambia. A travel agent booked him on a flight through Johannesburg to the United States and arranged a ticket for him on a train from New York to Canada, where Mr. Namakando intended to reunite with his wife and family.

When Mr. Namakando reached New York on October 19, 1998, he was referred to secondary inspection because, although he had a valid Zambian passport, he did not have proper entry documents, and was found to be inadmissible to the United States. Because he expressed a fear of return to Zambia, he was referred to a credible fear interview, and detained at the

---

<sup>236</sup> The facts of Mr. Namakando's case are based on his declaration in support of his claim for asylum and an interview with Deborah Greitzer of VIVE on May 5, 1999.

<sup>237</sup> The political status of Barotseland has been at the center of a highly controversial debate in Zambia in the past years. *Politicians Debate Barotse Self-Rule*, AFRICA NEWS, Oct. 2, 1998.

<sup>238</sup> Mr. Namakando's father was the first mayor of Livingstone and the Mongu province, served as official translator for Kenneth Kaunda, and worked for the Ministry of Education as Chief Education Officer. He is currently chairman of the National Party, an opposition party which is prominent in Barotseland.

<sup>239</sup> This brother was a journalist who reported on UNIP activities. Mr. Namakando's cousin was a lawyer for UNIP party members.

Wackenhut Detention Facility. Mr. Namakando was found to have a credible fear of persecution by an AO. After his credible fear interview, a staff attorney at VIVE, Deborah Greitzer, provided legal assistance to Mr. Namakando. The attorney submitted a request for parole to the District Director of New York, Edward McElroy, on November 12, 1998. In support of her request, she pointed out that Mr. Namakando fell under the INS's low priority detention group because he had been determined to have a credible fear of persecution, was not a security risk, and intended to return to Canada where his wife and younger child had lawful status.<sup>240</sup> On December 2, 1998, this parole request was denied. The denial indicated that Mr. Namakando fell under a high priority group for detention. It further indicated that the fact that Mr. Namakando was in transit to Canada was not a basis for parole; to the contrary, his attempt to transit through the United States without a visa was the basis for his detention.<sup>241</sup> Soon after, on December 14, 1998, Congressman John LaFalce, a member of the House of Representatives from New York, wrote to the District Director urging the INS to parole Mr. Namakando; this request was similarly rejected.<sup>242</sup> The attorney also contacted the INS Office of General Counsel, UNHCR, Amnesty International, and officials of the Canadian government. As the INS did not reconsider its denial of parole, the only way for Mr. Namakando to obtain release from detention was to apply for asylum in the United States.

Mr. Namakando's merits asylum hearing took place on February 24, 1999. The IJ granted asylum and Mr. Namakando was released that same day. Mr. Namakando is now barred from obtaining refugee status in Canada, because he was granted asylum in the United States. Although he is eligible for lawful status in Canada through his wife and child, who have lawful

---

<sup>240</sup> Letter from Deborah Greitzer, Staff Attorney, VIVE, to Mr. Edward McElroy, District Director, INS (Nov. 12, 1998) (Attachment 12). For the INS's Detention Guidelines, *see supra* note 207. In her letter, Ms. Greitzer also informed Mr. McElroy that Mr. Namakando intended to return to Canada; that Mr. Namakando was eligible for landed immigrant (permanent resident) status in Canada through his wife; that he could stay at VIVE's shelter, where he would be provided with food and other assistance until he entered Canada; and that VIVE would satisfy all the requirements for termination of Mr. Namakando's immigration proceedings in the United States. *See* Letter from Deborah Greitzer, *supra*.

<sup>241</sup> In Mr. McElroy's response, he said that Mr. Namakando fell under the INS's high priority detention group, which includes "aliens whose detention is essential for border enforcement but are not subject to required detention," without further explanation. Letter from Edward McElroy, District Director, INS, to Deborah Greitzer, Staff Attorney, VIVE (Dec. 2, 1998) (Attachment 12). In his letter, Mr. McElroy also noted that the credible fear standard is lower than that of the well-founded fear of persecution standard, and that "[i]t is conceivable that one may pass the credible fear portion, but still be denied asylum before the Immigration Judge." *Id.* Mr. McElroy then cited 8 C.F.R. § 212.5(a), which preceded the INS's detention guidelines of October 1998, and states that parole of persons who are or have been detained under 8 C.F.R. § 235.3(b) or (c) — pertaining to expedited removal — will "generally be justified only on a case-by-case basis for "urgent humanitarian reasons" or "significant public benefit," provided the aliens present neither a security risk nor a risk of absconding . . ." *Id.*

<sup>242</sup> Letter from John J. LaFalce, Member of the House of Representatives, to Edward McElroy, District Director, INS (Dec. 14, 1998) (Attachment 13); Letter from McElroy to Congressman LaFalce (Feb. 16, 1999) (Attachment 13).

status, he has decided to remain in the United States, and to arrange for his family to join him here.

## 2. Observations

Mr. Namakando's case is not unique, in that many refugees transit through other countries en route to their final destination, where they may have familial or other ties. Because expedited removal applies to persons in transit, these persons may be detained and put in a situation where their only option is to apply for asylum in the United States to avoid return to the country of feared persecution. Because a grant of asylum in one country may bar future applications in another country, such as Canada, this policy may permanently preclude a refugee from reuniting with family or living in a country where they have cultural ties.<sup>243</sup>

The application of expedited removal under these circumstances has a *de facto* effect similar to that of two debated and intertwined principles: (1) "country of first asylum," under which refugees must apply for asylum in the first country they arrive in after flight from a country in which they fear persecution,<sup>244</sup> and (2) "safe third country," under which refugees can be denied asylum in one country if they can reasonably be expected to find protection in another "safe" country, including one through which they transited when they fled their own country.<sup>245</sup>

---

<sup>243</sup> A grant of asylum in the United States bars eligibility for refugee status in Canada unless the person cannot be returned to the United States. In the United States, the INA and accompanying regulations provide for a mandatory denial of asylum where a person can be removed to a third country pursuant to a bilateral or multilateral agreement, where his or her life would not be threatened and where he or she would have access to a full asylum process. INA § 208(a)(2)(a); 8 C.F.R. § 208.13(c). In 1995, an agreement was drafted between Canada and the United States which provided that persons who previously made a refugee status claim that was determined by one of the parties to the agreement should be returned to that country for subsequent determination of the claim when and if that person made a second claim in the other country of the other party to the agreement. Preliminary Draft Agreement between the Government of Canada and the Government of the United States of America for Cooperation in Examination of Refugee Status Claims from Nationals of Third Countries (Draft Agreement), art. 6(4) (Oct. 24, 1995). In February 1998, it was announced that negotiations on this agreement would not continue, and at the time of this writing, have not re-commenced. See *Adjournment of Discussions Between Canada and the United States on Responsibility-Sharing for Asylum Seekers*, CANADA NEWSWIRE, Feb. 5, 1998.

<sup>244</sup> See generally JAMES HATHAWAY, *THE LAW OF REFUGEE STATUS* 46-47 (1991).

<sup>245</sup> See U.S. COMMITTEE FOR REFUGEES, *AT FORTRESS EUROPE'S MOAT: THE "SAFE THIRD COUNTRY" CONCEPT 2-5* (July 1997); DANISH REFUGEE COUNCIL, "SAFE THIRD COUNTRY" POLICIES IN EUROPEAN COUNTRIES 1 (1997). Safe third country laws have been enacted among many members of the European community. See generally *id.* The Dublin Convention, which entered into force for a majority of the European Union countries in September 1997, and which superseded the asylum provisions of the Schengen Implementation Agreement, aims to avoid multiple applications for asylum within European Union member states and sets criteria for determining which countries are responsible for examining asylum applications. U.S. COMMITTEE FOR REFUGEES, *supra*, at 1; DANISH REFUGEE COUNCIL, *supra*, at 4. Under this Convention, it is assumed that the country which authorized entry is responsible for processing the asylum claim. *Id.* at 4. If no country has authorized entry, the country which

(continued...)

Certain refugee scholars oppose the strict application of these principles, both on humanitarian grounds and on the grounds that the 1951 Convention Relating to the Status of Refugees does not require that a refugee seek protection in the first state to which he or she flees.<sup>246</sup> They argue that from a humanitarian standpoint, refugees should be allowed to continue on to their desired destination, and that whether an asylum-seeker has family, community, or cultural ties to the country of destination should be considered.<sup>247</sup> On the other hand, commentators who support these principles focus on the interests of states in setting burden-sharing guidelines for the determination of responsibility for refugees based on the first safe country entered. They further note a concern over increasing tension in relationship with neighbor states, who consider countries that allow refugees to pass through to a contiguous territory to be “bad neighbors.”

Neither the United States nor Canada formally apply the country of first asylum and safe third country principles to refugees, although the law of the United States does permit international agreements that adopt safe third country provisions.<sup>248</sup> In 1995, the United States and Canada attempted to come to an agreement that would adopt these principles, but

---

<sup>245</sup>(...continued)

the asylum-seeker first entered bears that responsibility. *Id.* Although under article 7 of the Dublin Convention, mere transit through an airport is not considered an “entry,” countries such as the United Kingdom apply the safe third country rule where an asylum-seeker has had a mere transit stay in a safe third country. *Id.* at 164. *See also supra* Part V(A), Case Study 1 and Part V(B), Case Study 3.

<sup>246</sup> *See generally* HATHAWAY, *supra* note 244, at 46. UNHCR has stated that asylum-seekers who move in an irregular manner from a country where they have already found protection, may be returned to that country if they are protected against *refoulement*, if they are permitted to remain, and if they are treated in accordance with recognized basic human standards. Conclusion 58 (XL) of the Executive Committee of UNHCR (1989). *See supra* note 104.

<sup>247</sup> UNHCR has stated that in determining the country responsible for examination of an asylum request, the “intentions of the asylum-seeker as regards to the country in which he wishes to request asylum should as far as possible be taken into account.” Conclusion 15 (XXX) of the Executive Committee of UNHCR, at para. (h)(iii-iv), U.N. Doc. HCR/IP/2/Eng./REV.1986 (1979). It has further stated that:

Regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another State. Where, however, it appears, that a person, before requesting asylum, already has a connection or close links with another state, he may if it appears fair and reasonable be called upon first to request asylum from that State. . . .

*Id.* Furthermore, during the drafting of the 1951 Convention Relating to the Status of Refugees, a discussion arose regarding Article 31, which provides that refugees present or entering a country illegally are not to be penalized. During the discussion, a representative of UNHCR expressed concern about penalizing refugees for not proceeding directly to a country of refuge. GOODWIN-GILL, *supra* note 104, at 88. However, other states expressed concern that refugees who had settled temporarily in a receiving country or found asylum should not be allowed to move to another country to apply for asylum for reasons of mere personal convenience. *Id.*

<sup>248</sup> *See* INA § 208(a)(2).



negotiations stalled.<sup>249</sup> Nonetheless, the application of expedited removal to refugee claimants en route to Canada has the same practical effect of laws based on these principles. Thus, these cases raise issues similar to those debated in the context of country of first asylum and safe third country; namely, whether refugees have the right to choose their country of asylum, and the manner in which countries determine responsibility for the processing of refugee claims.

Mr. Namakando's case demonstrates a number of the humanitarian issues which are debated in this context, and is illustrative of the impact of expedited removal in situations of transit to a third country. Mr. Namakando had previously lived in Canada and his immediate family continued to live there. After fleeing his country because he had been imprisoned and tortured, he was placed in expedited removal in the United States and detained. Thus, Mr. Namakando was left with no alternative but to apply for asylum in the United States, despite the fact his immediate family awaited him in Canada, including a Canadian-born child and a wife with lawful status.

In addition to the humanitarian issues, the application of expedited removal to Canadian-bound individuals who intend to seek refugee status in Canada also raises substantial resource issues. Some commentators have argued that the detention of persons who are en route to a country in which they intend to apply for refugee status results in unnecessary taxpayer expense. Figures vary, but it may cost \$128 a day to detain a person at a facility such as Wackenhut in New York.<sup>250</sup> In her parole request, Mr. Namakando's attorney argued that his parole, in addition to being the most humane alternative, would relieve the INS and the Immigration Court of further detention and legal costs.<sup>251</sup>

Canada's recent change in its procedure at the land border with the United States may prevent some Canadian-bound individuals seeking refugee status from being placed in expedited removal. Previously, Canadian immigration officers at land ports of entry in Canada temporarily returned refugee claimants to the United States as part of the application process for refugee status under Canadian law.<sup>252</sup> This put these persons at risk of being placed in expedited removal. Recently, Canada announced a change in policy under which asylum-seekers are not to

---

<sup>249</sup> See *Adjournment of Discussions Between Canada and the United States on Responsibility-Sharing for Asylum Seekers*, *supra* note 243. The draft agreement would have required persons who make or attempt to make a refugee status claim in the United States or Canada, and who arrive in Canada directly from the United States or vice versa, to have their refugee status claims examined by the country of first arrival. See Preliminary Draft Agreement, *supra* note 243, at art. 6(1).

<sup>250</sup> Minh T. Vo, *Quests for Canada Carry U.S. Cost*, CHRISTIAN SCIENCE MONITOR, Dec. 3, 1998.

<sup>251</sup> See Letter from Deborah Greitzer, *supra* note 240.

<sup>252</sup> See generally Part III(D), *supra*.

be temporarily returned to the United States.<sup>253</sup> Nonetheless, this change will only affect persons who arrive at the Canadian land border. The majority of refugees in transit are likely to be placed in expedited removal upon arrival at the United States, whether by sea, land, or air, prior to reaching the Canadian border.

In summary, the placement of asylum-seekers transiting through the United States into expedited removal raises questions about the balance between humanitarian aspects of expedited removal, the protection of the interests of the United States, and conformity with international law. Due to the compelling humanitarian issues involved, and the interests of states, continuing debate and resolution of this issue is required.

---

<sup>253</sup> See Enforcement Branch Memo, *supra* note 72.

**Table 1. Number of Cases in Attorney Year-1 Database, Largest Countries of Nationality**

Country	Number of Cases	Percent of Total
Sri Lanka	80	26.2%
Somalia	20	6.6%
Haiti	14	4.6%
China	14	4.6%
Cuba	14	4.6%
Nigeria	12	3.9%
Mexico	11	3.6%
Iraq	8	2.6%
Albania	7	2.3%
Iran	7	2.3%
Pakistan	6	2.0%
Sudan	6	2.0%
Ghana	5	1.6%
D.R. of Congo	5	1.6%
Liberia	5	1.6%
Guatemala	4	1.3%
El Salvador	4	1.3%
Russia	4	1.3%
Cameroon	4	1.3%
Peru	4	1.3%
Sierra Leone	3	1.0%
India	3	1.0%
Ecuador	3	1.0%
Honduras	3	1.0%
England	3	1.0%
Lebanon	3	1.0%
Togo	3	1.0%

**Table 2. Number of Cases in Attorney Year-2 Database, Largest Countries of Nationality**

Country	Number of Cases	Percent of Total
Sri Lanka	52	27.7%
China	37	19.7%
Haiti	20	10.6%
Somalia	14	7.4%
Cuba	9	4.8%
Nigeria	8	4.3%
Mexico	7	3.7%
Guatemala	7	3.7%
El Salvador	4	2.1%
Sierra Leone	3	1.6%
Russia	3	1.6%

**Table 3. Number of Cases in EOIR Database, Largest Countries of Nationality**

Country	Number of Cases	Percent of Total
Haiti	47	35.6%
China	12	9.1%
Albania	11	8.3%
Nigeria	5	3.8%
Mexico	5	3.8%
Ghana	5	3.8%
Pakistan	4	3.0%
India	4	3.0%
Sri Lanka	3	2.3%
Guatemala	3	2.3%
El Salvador	3	2.3%
Jamaica	3	2.3%
Sierra Leone	2	1.5%
Serbia	2	1.5%
Colombia	2	1.5%
Brazil	2	1.5%

**Table 4: Largest 10 U.S. Ports of Entry in the Attorney Year-1 Database**

Port	Percentage of Cases
Miami	10.7%
New York / JFK	19.1%
Los Angeles	19.8%
Newark	6.0%
Brownsville	7.4%
San Ysidro	5.4%
San Francisco	5.0%
Atlanta	3.0%
Chicago	2.3%
San Juan, P.R.	3.0%
Percentage in These 10 Ports	78.9%
Number of Cases	298

**Table 5: Largest 10 U.S. Ports of Entry In the Attorney Year-2 Database**

Port	Percentage of Cases
San Diego	18.1%
Los Angeles	16.5%
Miami	14.9%
San Ysidro	12.2%
New York / JFK	6.9%
San Juan, P.R.	6.9%
Brownsville	6.4%
San Francisco	4.8%
Newark	2.7%
Honolulu	2.1%
Percentage in These 10 Ports	89.4%
Number of Cases	188

Port	Percentage of Cases
Miami	46.9%
New York / JFK	25.0%
Newark	7.8%
Fort Lauderdale	3.9%
San Ysidro	3.1%
Boston	2.3%
Champlain	2.3%
El Paso	2.3%
Chicago	1.6%
Denver	0.8%
Jacksonville	0.8%
Lewiston	0.8%
Ogdensburg	0.8%
Philadelphia	0.8%
Ysleta	0.8%
Percentage in These Ports	100%
Number of Cases	128

		Number of Cases
Age (Average in Years)	28.2	240
Gender		300
Male	67.7%	
Female	32.3%	
English		243
Fluent	15.6%	
Limited	32.5%	
None	51.9%	
Urban Origin	72.3%	130
Schooling		176
< 6 Years	8.5%	
7-12 Years	50.0%	
> 12 Years	39.2%	
> 16 Years	18.2%	
Family in		198
US	42.9%	
Canada	30.8%	
US or Canada	72.2%	

		Number of Cases
Age (Average in Years)	28.0	182
Gender		188
Male	77.7%	
Female	22.3%	
English		180
Fluent	15.0%	
Limited	20.6%	
None	64.4%	
Urban Origin	52.2%	136
Schooling		134
< 6 Years	22.4%	
7-12 Years	44.8%	
> 12 Years	27.6%	
> 16 Years	9.0%	
Family in		175
US	53.1%	
Canada	25.1%	
US or Canada	77.7%	



<b>Table 9: Socio-Demographic Characteristics, EOIR Database</b>		<b>Number of Cases</b>
Age (Average in Years)	26.1	35
Gender		132
Male	67.4%	
Female	32.6%	
English		126
Fluent	11.1%	
Limited or None	88.9%	
Urban Origin	65.5%	58
Schooling		61
< 6 Years	11.5%	
7-12 Years	67.2%	
> 12 Years	21.3%	
> 16 Years	11.5%	
Family in		129
US	81.4%	
Canada	3.1%	
US or Canada	84.5%	

**Table 10. Share of Females in EOIR and Attorney Databases, Largest Countries of Nationality**

Country	Percent Female	Number of Cases from Country
Sri Lanka	21.6%	139
Haiti	52.0%	75
China	21.1%	71
Somalia	18.4%	38
Nigeria	14.3%	35
Albania	40.7%	27
Mexico	42.3%	26
Cuba	45.8%	24
Guatemala	73.7%	19
El Salvador	28.6%	14
Ghana	28.6%	14
Democratic Republic of Congo	25.0%	12
Iran	8.3%	12
Pakistan	0.0%	11
Sierra Leone	18.2%	11
Others	27.4%	186

**Table 11: INS Basis of Inadmissibility (Charge),  
Attorney Year-1 Database**

False Documents	56.7%
No Documents	21.9%
Facially Valid Documents Deemed Invalid	16.6%
Invalid Documents	3.6%
Stowaway	1.2%
Total Number of Cases	247

**Table 12: INS Basis of Inadmissibility (Charge),  
Attorney Year-2 Database**

False Documents	53.2%
No Documents	41.9%
Facially Valid Documents Deemed Invalid	1.6%
Invalid Documents	3.2%
Number of Cases	186

**Table 13: INS Basis of Inadmissibility (Charge),  
EOIR Database**

False Documents	75.8%
No Documents	7.8%
Facially Valid Documents Deemed Invalid	7.8%
Invalid Documents	7.0%
Stowaway	1.6%
Total	100.0%
Total Number of Cases	128

**Table 14. Country of Nationality and Charge, Largest Countries of Nationality, Attorney Year-1 Database**

Nationality	Charge					Number of Cases from Country
	Facially Valid Documents Deemed Invalid	Invalid Documents	No Documents	False Documents	Stowaway	
Sri Lanka	1.3%	0.0%	16.7%	82.1%	0.0%	78
Somalia	0.0%	5.9%	29.4%	64.7%	0.0%	17
Cuba	0.0%	0.0%	91.7%	8.3%	0.0%	12
Mexico	44.4%	0.0%	11.1%	33.3%	0.0%	9
Nigeria	0.0%	0.0%	25.0%	75.0%	0.0%	8
Iraq	0.0%	0.0%	50.0%	25.0%	25.0%	8
China	42.9%	0.0%	14.3%	28.6%	14.3%	7
Albania	0.0%	0.0%	0.0%	100.0%	0.0%	6
Ghana	0.0%	0.0%	0.0%	100.0%	0.0%	5
Iran	20.0%	0.0%	0.0%	80.0%	0.0%	5
Pakistan	0.0%	40.0%	40.0%	20.0%	0.0%	5
All Others	36.8%	6.9%	16.1%	40.2%	0.0%	87

**Table 15. Country of Nationality and Charge, Largest Countries of Nationality, Attorney Year-2 Database**

Nationality	Charge				Number of Cases from Country
	Facially Valid Documents Deemed Invalid	Invalid Documents	No Documents	False Documents	
Sri Lanka	0.0%	1.9%	40.4%	57.7%	52
China	0.0%	0.0%	94.6%	5.4%	37
Haiti	0.0%	0.0%	0.0%	100.0%	20
Somalia	0.0%	0.0%	35.7%	64.3%	14
Nigeria	0.0%	0.0%	12.5%	87.5%	8
Cuba	0.0%	25.0%	62.5%	12.5%	8
Mexico	0.0%	14.3%	14.3%	71.4%	7
Guatemala	14.3%	0.0%	0.0%	85.7%	7
El Salvador	0.0%	0.0%	0.0%	100.0%	4
Sierra Leone	0.0%	0.0%	33.3%	66.7%	3
Russia	33.3%	0.0%	0.0%	66.7%	3
All Others	1.9%	3.8%	41.6%	52.6%	23

**Table 16. Nationality and Charge, Largest Countries of Nationality, EOIR Database**

Country	Charge					Number of Cases from Country
	Facially Valid Documents Deemed Invalid	Invalid Documents	No Documents	False Documents	Stowaway	
Haiti	4.3%	6.4%	0.0%	87.2%	2.1%	47
China	0.0%	9.1%	0.0%	90.9%	0.0%	11
Albania	27.3%	0.0%	0.0%	72.7%	0.0%	11
Nigeria	0.0%	0.0%	0.0%	100.0%	0.0%	5
Mexico	0.0%	0.0%	80.0%	20.0%	0.0%	5
Ghana	0.0%	0.0%	0.0%	100.0%	0.0%	5
Pakistan	0.0%	25.0%	25.0%	50.0%	0.0%	4
India	0.0%	0.0%	0.0%	100.0%	0.0%	4
Sri Lanka	0.0%	0.0%	66.7%	33.3%	0.0%	3
Guatemala	0.0%	33.3%	0.0%	66.7%	0.0%	3
El Salvador	0.0%	0.0%	100.0%	0.0%	0.0%	3
All Others	9.7%	7.7%	6.5%	74.2%	1.9%	27

**Table 17. Gender and Charge, Attorney Year-1 Database**

Gender	Charge					Number of Cases
	Facially Valid Documents Deemed Invalid	Invalid Documents	No Documents	False Documents	Stowaway	
Females	24.4%	0.0%	13.4%	59.8%	1.2%	82
Males	12.2%	5.5%	25.6%	55.5%	1.2%	164
Grand Total	16.6%	3.6%	21.5%	56.7%	1.2%	247

**Table 18. Gender and Charge, Attorney Year-2 Database**

Gender	Charge				Total
	Facially Valid Documents Deemed Invalid	Invalid Documents	No Documents	False Documents	
Female	2.4%	7.3%	12.2%	78.0%	41
Male	1.4%	2.1%	50.3%	46.2%	145
Grand Total	1.6%	3.2%	41.9%	53.2%	186

**Table 19. Gender and Charge, EOIR Database**

Gender	Charge					Total
	Facially Valid Documents Deemed Invalid	Invalid Documents	No Documents	False Documents	Stowaway	
Female	14.0%	4.7%	0.0%	81.4%	0.0%	43
Male	4.7%	8.2%	11.8%	72.9%	2.4%	85
Total	7.8%	7.0%	7.8%	75.8%	1.6%	128

Port	Average Days of Detention	Number of Cases
Houston	356	1
Portland	295	2
Philadelphia	269	1
Chicago	241	2
Boston	122	3
Champlain	118	1
New York / JFK	115	32
Los Angeles	108	39
Minneapolis	108	4
Brownsville	91	9
San Ysidro	90	4
Baltimore	86	3
Newark	77	13
Dulles	59	2
Miami	57	6
Atlanta	55	3
San Francisco	50	5
El Paso	15	3
St. Louis	14	1
New Orleans	8	1
Total	103	137

**Table 21. Average Days of Detention, by U.S. Port of Entry, Attorney Year-2 Database**

Port	Average Days of Detention	Number of Cases
New York / JFK	116	9
Honolulu	108	1
Minneapolis	90	1
Boston	89	2
Brownsville	86	1
Los Angeles	62	7
Newark	56	4
San Ysidro	42	1
Chicago	37	1
Houston	29	1
Miami	25	20
Detroit	8	1
San Francisco	2	1
Total	61	50



Country	Average Days of Detention	Number of Cases
D.R. of Congo	223	2
Cambodia	196	1
Algeria	147	1
Nigeria	139	7
Pakistan	135	3
Guyana	134	1
Somalia	121	14
Sri Lanka	117	51
Sudan	112	4
Iraq	105	2
Liberia	100	3
Ghana	99	4
Bulgaria	97	1
Angola	94	1
Iran	94	4
Mexico	93	2
Egypt	92	1
Cameroon	91	3
Serbia	91	2
Azerbaijan	90	1
Honduras	79	2
India	75	1
Peru	73	2
China	71	4
Togo	53	2
Cuba	51	6
Sierra Leone	46	1
Guatemala	36	1
Philippines	35	1
Albania	30	3
Total	103	131

**Table 23. Average Days of Detention, by Country of Nationality, Attorney Year-2 Database**

Country	Average Days of Detention	Number of Cases
Algeria	152	1
Guinea	151	1
Nigeria	128	2
D.R. of Congo	112	1
Sri Lanka	79	13
Iran	65	1
Somalia	53	6
Sierra Leone	42	1
Serbia	33	2
Mexico	29	1
Haiti	26	17
Russia	2	1
Total	61	47

**Table 24. Average Days of Detention, by Gender, Attorney Year-1 Database**

Gender	Average Days of Detention	Number of Cases
Female	90	45
Male	111	91
Total	103	136

**Table 25. Average Days of Detention, by Gender, Attorney Year-2 Database**

Gender	Average Days of Detention	Number of Cases
Female	46	12
Male	66	38
Total	61	50

**Table 26. Grounds for Asylum Claims, Attorney Year-1 Database**

Ground	% of Cases	Number of Cases
Race	2.6%	6
Religion	7.0%	17
Nationality	19.8%	48
Political Opinion	68.9%	166
Particular Social Group	62.9%	151
<b>Gender, Family Planning, and Torture Convention</b>		
Gender Related	12.7%	29
Grounds (% of Gender-Related Cases)		
Religion	10.3%	
Nationality	6.9%	
Political Opinion	51.7%	
Particular Social Group	31.0%	
Potential Torture Convention	3.5%	8
Grounds (% of Potential Torture Convention Cases)		
Political Opinion	87.5%	
Particular Social Group	12.5%	
Family Planning	4.8%	11
Grounds (% of Family Planning-Related Cases)		
Religion	9.1%	
Political Opinion	72.7%	
Particular Social Group	18.2%	
Sexual Orientation	0.0%	0
Total Number of Cases		229

<b>Table 27. Grounds for Asylum Claims, Attorney Year-2 Database</b>		
Grounds	% of Cases	Number of Cases
Race	5.7%	10
Religion	2.7%	5
Nationality	26.3%	49
Political Opinion	46.8%	87
Particular Social Group	73.1%	136
<b>Gender, Family Planning, and Torture Convention</b>		
Gender Related	29.7%	52
Grounds (% of Gender-Related Cases)		
Religion	1.9%	
Nationality	7.7%	
Political Opinion	30.8%	
Particular Social Group	59.6%	
Potential Torture Convention	2.3%	4
Grounds (% of Potential Torture Convention Cases)		
Race	25.0%	
Particular Social Group	75.0%	
Family Planning	42.3%	74
Grounds (% of Family Planning-Related Cases)		
Race	10.8%	
Nationality	8.1%	
Political Opinion	14.9%	
Particular Social Group	66.2%	
Sexual Orientation	17.1%	30
Grounds (% of Sexual Orientation-Related Cases)		
Race	16.7%	
Nationality	6.7%	
Particular Social Group	76.7%	
Total Number of Cases		175

Ground	Percentage of Cases	Number of Cases
Race	0.0%	0
Religion	4.6%	6
Nationality	3.8%	5
Political Opinion	63.4%	83
Particular Social Group	12.2%	16
<b>Gender, Family Planning, and Torture Convention</b>		
Gender Related	2.3%	3
Grounds (% of Gender-Related Cases)		
Political Opinion	66.7%	
Particular Social Group	33.3%	
Family Planning Related	3.8%	5
Grounds (% of Family Planning-Related Cases)		
Political Opinion	100.0%	
<b>Number of Cases</b>		<b>131</b>

**Table 29. Grounds for Asylum Claims by Gender, Attorney Year-1 Database**

Gender	Grounds					Number of Cases
	Race	Religion	Nationality	Political Opinion	Particular Social Group	
Female	3.1%	7.2%	15.9%	58.0%	67.1%	37
Male	2.4%	6.9%	21.3%	73.3%	61.2%	138
Total	2.6%	7.0%	19.8%	68.9%	62.9%	175

**Table 30. Grounds for Asylum Claims by Gender, Attorney Year-2 Database**

Gender	Grounds					Number of Cases
	Race	Religion	Nationality	Political Opinion	Particular Social Group	
Female	2.7%	4.8%	19.0%	33.3%	57.1%	37
Male	6.5%	2.1%	28.5%	50.7%	77.8%	138
Total	5.7%	2.7%	26.3%	46.8%	73.1%	175

**Table 31. Grounds for Asylum Claims by Gender, EOIR Database**

Gender	Grounds					Number of Cases
	Race	Religion	Nationality	Political Opinion	Particular Social Group	
Female	0.0%	0.0%	0.0%	64.3%	4.8%	42
Male	0.0%	6.7%	5.6%	62.9%	15.7%	89
Total	0.0%	4.6%	3.8%	63.4%	12.2%	131

**Table 32. Grounds for Asylum Claims by Port of Entry, Attorney Year-1 Database**

Port of Entry	Grounds					Number of Cases from Port
	Race	Religion	Nationality	Political Opinion	Particular Social Group	
Los Angeles	0.0%	3.6%	69.1%	92.7%	80.0%	55
New York / JFK	6.0%	7.8%	2.0%	55.8%	54.0%	50
Newark	5.6%	0.0%	5.6%	82.4%	44.4%	18
San Francisco	0.0%	7.1%	21.4%	78.6%	92.9%	14
San Ysidro	0.0%	0.0%	23.1%	46.2%	58.3%	13
Brownsville	0.0%	13.6%	9.1%	36.4%	59.1%	10
Miami	0.0%	33.3%	0.0%	88.9%	55.6%	9
Boston	0.0%	50.0%	0.0%	75.0%	25.0%	4
Atlanta	0.0%	25.0%	0.0%	50.0%	50.0%	4

**Table 33. Grounds for Asylum Claims by Port of Entry, Attorney Year-2 Database**

Port of Entry	Grounds					Number of Cases from Port
	Race	Religion	Nationality	Political Opinion	Particular Social Group	
San Diego	23.5%	0.0%	17.6%	0.0%	94.1%	34
Los Angeles	0.0%	3.2%	83.9%	93.5%	90.3%	31
Miami	0.0%	7.1%	0.0%	64.3%	50.0%	28
San Ysidro	10.0%	0.0%	13.0%	4.3%	65.2%	20
San Juan, P.R.	0.0%	0.0%	7.7%	92.3%	100.0%	13
New York / JFK	0.0%	0.0%	0.0%	83.3%	66.7%	12
San Francisco	0.0%	11.1%	33.3%	0.0%	55.6%	9
Brownsville	0.0%	8.3%	8.3%	33.3%	41.7%	6
Newark	0.0%	0.0%	20.0%	60.0%	100.0%	5
Honolulu	0.0%	0.0%	100.0%	100.0%	100.0%	4

**Table 34. Grounds for Asylum Claims by Port of Entry, EOIR Database**

Port of Entry	Grounds					Number of Cases from Port
	Race	Religion	Nationality	Political Opinion	Particular Social Group	
Miami	0.0%	3.3%	3.3%	80.0%	8.3%	60
New York / JFK	0.0%	6.5%	3.2%	38.7%	16.1%	31
Newark	0.0%	0.0%	0.0%	70.0%	0.0%	10
Fort Lauderdale	0.0%	0.0%	20.0%	20.0%	40.0%	5
San Ysidro	0.0%	0.0%	0.0%	50.0%	0.0%	4
Boston	0.0%	0.0%	0.0%	66.7%	33.3%	3
El Paso	0.0%	0.0%	0.0%	66.7%	0.0%	3
Champlain	0.0%	0.0%	33.3%	66.7%	33.3%	3
Chicago	0.0%	0.0%	0.0%	50.0%	0.0%	2
Philadelphia	0.0%	100.0%	0.0%	100.0%	0.0%	1

**Table 35. Grounds for Asylum Claims, Largest Countries of Nationality, Attorney Year-1 Database**

Country	Grounds					Number of Cases from Country
	Race	Religion	Nationality	Political Opinion	Particular Social Group	
Sri Lanka	0.0%	0.0%	62.2%	98.6%	100.0%	74
Somalia	21.1%	0.0%	0.0%	21.1%	84.2%	19
Nigeria	0.0%	9.1%	0.0%	90.0%	20.0%	11
China	0.0%	20.0%	0.0%	50.0%	70.0%	10
Mexico	0.0%	0.0%	0.0%	12.5%	50.0%	8
Iraq	12.5%	0.0%	0.0%	87.5%	37.5%	8
Iran	0.0%	14.3%	0.0%	85.7%	14.3%	7
Cuba	0.0%	0.0%	7.1%	42.9%	50.0%	6
Albania	0.0%	40.0%	0.0%	100.0%	60.0%	5
Ghana	0.0%	20.0%	0.0%	60.0%	0.0%	5
D.R. of Congo	0.0%	0.0%	0.0%	100.0%	40.0%	5



**Table 36. Grounds for Asylum Claims, Largest Countries of Nationality, Attorney Year-2 Database**

Country	Grounds					Number of Cases from Country
	Race	Religion	Nationality	Political Opinion	Particular Social Group	
Sri Lanka	0.0%	0.0%	63.5%	100.0%	100.0%	52
China	21.6%	0.0%	18.9%	2.7%	91.9%	37
Haiti	0.0%	10.0%	0.0%	65.0%	40.0%	20
Somalia	0.0%	0.0%	0.0%	50.0%	78.6%	13
Nigeria	0.0%	0.0%	37.5%	12.5%	50.0%	7
Guatemala	0.0%	0.0%	0.0%	0.0%	57.1%	6
Mexico	0.0%	0.0%	0.0%	0.0%	0.0%	5
Cuba	0.0%	0.0%	11.1%	33.3%	55.6%	4
El Salvador	0.0%	0.0%	0.0%	25.0%	50.0%	4
Sierra Leone	0.0%	33.3%	0.0%	66.7%	66.7%	3
Russia	0.0%	0.0%	33.3%	0.0%	66.7%	3

**Table 37. Grounds for Asylum Claims, Largest Countries of Nationality, EOIR Database**

Country of Nationality	Grounds					Number of Cases from Country
	Race	Religion	Nationality	Political Opinion	Particular Social Group	
Haiti	0.0%	0.0%	0.0%	76.6%	4.3%	47
China	0.0%	0.0%	0.0%	27.3%	0.0%	11
Albania	0.0%	0.0%	0.0%	63.6%	9.1%	11
Nigeria	0.0%	0.0%	0.0%	100.0%	0.0%	5
Mexico	0.0%	0.0%	0.0%	40.0%	0.0%	5
Ghana	0.0%	0.0%	0.0%	20.0%	20.0%	5
Pakistan	0.0%	0.0%	0.0%	75.0%	0.0%	4
India	0.0%	50.0%	0.0%	75.0%	25.0%	4
Sri Lanka	0.0%	0.0%	33.3%	100.0%	100.0%	3
El Salvador	0.0%	0.0%	0.0%	100.0%	0.0%	3
Guatemala	0.0%	0.0%	0.0%	33.3%	0.0%	3

**Table 38. Percentage of Cases with Attorney or Consultant Present at Credible Fear Interview, Largest Countries of Nationality, Attorney Year-1 Database**

Country	Percent	Number	Total Cases from Country
Sri Lanka	68.3%	41	60
Somalia	20.0%	3	15
Nigeria	50.0%	5	10
Cuba	80.0%	8	10
China	55.6%	5	9
Mexico	0.0%	0	7
Iraq	0.0%	0	7
Haiti	83.3%	5	6
Albania	20.0%	1	5
Pakistan	80.0%	4	5
D.R. of Congo	20.0%	1	5
All Others	42.0%	29	69
Total	49.0%	102	208

**Table 39. Percentage of Cases with Attorney or Consultant Present at Credible Fear Interview, Largest Countries of Nationality, Attorney Year-2 Database**

Country	Percent	Number	Total Cases from Country
Sri Lanka	86.4%	38	44
China	40.5%	15	37
Haiti	0.0%	0	20
Somalia	35.7%	5	14
Cuba	77.8%	7	9
Guatemala	57.1%	4	7
Nigeria	57.1%	4	7
Mexico	40.0%	2	5
El Salvador	75.0%	3	4
Sierra Leone	66.7%	2	3
Algeria	0.0%	0	2
All Others	49.0%	96	196
Total	51.0%	176	348

**Table 40. Credible Fear (CF) Status, Attorney Year-1 Database**

Not Referred to CF	0.7%
Referred to CF	81.9%
CF Interview Conducted	97.1%
Positive CF Decision	94.1%
Adverse CF Decision	3.8%
Referred to IJ	88.9%
IJ Vacated Neg. CF	62.5%
IJ Affirmed Neg. CF	37.5%
Number of Cases	298

**Table 41: Credible Fear (CF) Status, Attorney Year-2 Database**

Not Referred to CF	0.0%
Referred to CF	97.9%
CF Interview Conducted	98.9%
Positive CF Decision	99.5%
Adverse CF Decision	0.5%
Referred to IJ	100.0%
IJ Vacated Adverse CF	0.0%
IJ Affirmed Adverse CF	100.0%
Number of Cases	188

**Table 42. CFI Decision by Country of Nationality, Largest Countries of Nationality, Attorney Year-1 Database**

Country of Nationality	Positive CF Decision	Adverse CF Decision	Number of Cases from Country
Sri Lanka	98.7%	1.3%	77
Somalia	100.0%	0.0%	17
Cuba	100.0%	0.0%	14
Nigeria	100.0%	0.0%	9
China	50.0%	12.5%	8
Haiti	12.5%	87.5%	8
Iraq	87.5%	12.5%	8
Mexico	37.5%	12.5%	8
Iran	100.0%	0.0%	7
Sudan	100.0%	0.0%	6
D.R. of Congo	80.0%	20.0%	5
Others	79.5%	5.1%	66
<b>Total Number of Cases</b>	<b>210</b>	<b>16</b>	<b>233</b>

**Table 43: Post-ER Outcome, Attorney Year-1 Database**

Number of 240 Cases in Data Base	210
240 Pending	20.0%
Of Nonpending Cases...	
Asylum Granted	58.3%
Asylum & Other Relief Denied	13.1%
Appealed	18.5%
240 Terminated	9.5%

**Table 44: Post-ER Outcome, Attorney Year-2 Database**

Number of 240 Cases in Data Base	178
240 Pending	74.2%
Of Nonpending Cases...	
Asylum Granted	67.4%
Asylum & Other Relief Denied	8.7%
Appealed	10.9%
240 Terminated	13.0%

**Table 45: Post-ER Outcome, by Gender, Attorney Year-1 Database (Percent)**

Gender	240 Pending	Asylum Granted	Asylum & Other Relief Denied	Appealed	240 Terminated	Number of Cases
Female	19.3%	52.2%	13.0%	0.0%	19.6%	57
Male	20.3%	60.7%	13.1%	4.9%	5.7%	153
Total	20.0%	58.3%	13.1%	0.0%	9.5%	210

Country	240 Pending	Asylum Granted	Asylum & Other Relief Denied	Appealed	240 Terminated	Number of 240 Cases
Sri Lanka	8.5%	53.8%	3.1%	18.5%	24.6%	71
Somalia	18.8%	100.0%	0.0%	0.0%	0.0%	16
Cuba	0.0%	100.0%	0.0%	0.0%	0.0%	13
Nigeria	18.2%	55.6%	22.2%	22.2%	0.0%	11
China	40.0%	100.0%	0.0%	0.0%	0.0%	5
Mexico	0.0%	25.0%	50.0%	0.0%	0.0%	4
Haiti	100.0%	N/A	N/A	N/A	N/A	1
Iraq	0.0%	62.5%	12.5%	25.0%	0.0%	8
Iran	14.3%	83.3%	16.7%	0.0%	0.0%	7
Albania	25.0%	0.0%	33.3%	66.7%	0.0%	4
Sudan	16.7%	80.0%	0.0%	20.0%	0.0%	6
D.R. of Congo	40.0%	66.7%	0.0%	33.3%	0.0%	5
Liberia	20.0%	75.0%	25.0%	0.0%	0.0%	5
Pakistan	0.0%	25.0%	25.0%	50.0%	0.0%	4
Other	44.0%	28.6%	39.3%	32.1%	0.0%	50

**Table 47. Percentage of Cases with Attorney or Consultant Present at Credible Fear Interview, by Country of Nationality, EOIR Database**

Country	Percent	Number of Cases from Country
Haiti	48.9%	47
Albania	18.2%	11
China	36.4%	11
Ghana	0.0%	5
Mexico	0.0%	5
Nigeria	20.0%	5
India	50.0%	4
Pakistan	25.0%	4
El Salvador	0.0%	3
Guatemala	33.3%	3
Jamaica	33.3%	3
All Others	40.0%	3
Total	36.0%	131

**Table 48. Basis for Denial in Credible Fear Interview, by Gender, EOIR Database**

	Females	Males	Total
Percentage with Basis of:			
Harm Not Persecution	25.0%	15.7%	18.6%
No Nexus	52.5%	23.6%	32.6%
No Well Founded Fear	0.0%	9.0%	6.2%
Not Credible	22.5%	48.3%	40.3%
Total	100.0%	100.0%	100.0%
Number of Cases	40	89	129



**Table 49. Basis for Denial in Credible Fear Interview, by Country of Nationality, EOIR Database**

Country	Harm Not Persecution	No Nexus	No Well Founded Fear	Not Credible	Bar	Number of Cases
Haiti	17.8%	37.8%	0.0%	44.4%	0.0%	45
Albania	45.5%	36.4%	9.1%	9.1%	0.0%	11
China	27.3%	36.4%	0.0%	36.4%	0.0%	11
Ghana	0.0%	60.0%	0.0%	40.0%	0.0%	5
Mexico	20.0%	40.0%	20.0%	0.0%	20.0%	5
Nigeria	0.0%	0.0%	0.0%	100.0%	0.0%	5
India	0.0%	0.0%	50.0%	50.0%	0.0%	4
Pakistan	0.0%	0.0%	25.0%	75.0%	0.0%	4

**Table 50. Immigration Judge Review Outcomes, EOIR Database**

IJ Vacated Adverse Credible Fear Decision	12.4%
IJ Affirmed Adverse Credible Fear Decision	87.6%
Number of Cases	131

**Table 51. Immigration Judge Review Outcomes, by Basis of Adverse Credible Fear Determination, EOIR Database**

	Percent Vacated*	Number of Cases Vacated	Grand Total
Harm Not Persecution	0.0%	0	24
No Nexus	7.1%	3	42
No Well Founded Fear	0.0%	0	8
Not Credible	23.1%	12	52
Unknown	50.0%	2	4
Grand Total	13.0%	1	132

\* Percentage of Cases in which Immigration Judge Vacated Adverse Credible Fear Determination

**Table 52. Immigration Judge Vacation of Adverse Credible Fear Determination, by Gender, EOIR Database**

Gender	Percent Vacated*	Number of Cases Vacated
Female	11.6%	5
Male	13.6%	12
Total	13.0%	17

\* Percentage of Cases in which Immigration Judge Vacated Adverse Credible Fear Determination

**Table 53. Immigration Judge Vacation of Adverse Credible Fear Determination, by Country of Nationality, EOIR Database**

Country	Percent Vacated*	Number of Cases from Country
Haiti	8.5%	47
China	16.7%	12
Albania	9.1%	11
Ghana	0.0%	5
Mexico	0.0%	5
Nigeria	40.0%	5
Others	17.4%	46

\* Percentage of Cases in which Immigration Judge Vacated Negative Credible Fear Determination



SANTA CLARA UNIVERSITY



MARKKULA CENTER  
FOR APPLIED ETHICS

June 1, 1998

U.S. Department of Justice  
Freedom of Information Act Request  
Immigration and Naturalization Service  
425 I Street, N.W.  
Washington, D.C. 20536

Re: Request by Expedited Removal Study pursuant to Freedom of Information Act

To whom it may concern:

I am writing in my capacity as co-director of the Expedited Removal Study ("Study") which is a program of the International Human Rights and Migration Project at Santa Clara University's Markkula Center for Applied Ethics. The Study's co-director is Deborah Anker. The primary purpose of the Study is to determine whether the expedited removal provision of the Illegal Immigration Reform and Immigrant Responsibility Act is meeting the dual congressional objectives of ensuring that persons arriving at a U.S. ports of entry with bona fide asylum claims have access to the full asylum process while at the same time deterring the admission of fraudulent claimants. The Study was designed to examine all components of the new provision including secondary inspection, credible fear interviews, immigration judge reviews of credible fear determinations, and claimed status review. The Study seeks to provide solid statistical and qualitative information to policy makers and to the public about the new procedure as it affects asylum seekers and non-asylum seekers.

The Study's methodology includes primary data collection through on-site observation of expedited removal procedures, as well as review and analysis of data associated with expedited removal which has been compiled by the INS. The Study has been in contact with the office of the Deputy Attorney General regarding its need for access to INS procedures and data relevant to the expedited removal process. In a letter addressed to John Morton, Counsel to the Deputy Attorney General, the Study detailed its attempts to reach a reasonable accommodation regarding such access with both the EOIR and the INS and requested the assistance of the Office of the Deputy Attorney General in coming to a resolution of these issues. (See February 3, 1998 letter from the Study to John Morton, Counsel to the Deputy Attorney General, Attachment 1). Deputy Attorney General Eric Holder responded to this letter, assuring the Study of the Department of Justice's willingness to accommodate the needs of the Study regarding access to

data by providing "salient statistical information" as well as copies of INS and EOIR files of persons in the expedited removal process "consistent with the provisions of the Freedom of Information Act and subject to redactions of identifying information to protect the aliens' privacy and ensure confidentiality." (See March 9, 1998 letter from Eric Holder to the Study, Attachment 2). By way of this correspondence, the Study is now making a formal request for the relevant data pursuant to the Freedom of Information Act, 5 U.S.C. § 552 et seq.

The Study requests copies of the following documents subject to redaction in compliance with relevant statutory provisions:

1. All files and/or documents concerning individuals who have been placed in expedited removal proceedings since April 1, 1997, including but not limited to the following documents:
  - a. Forms I-867 A/B (Record of Sworn Statement)
  - b. Forms I-860 (Notice and Order of Expedited Removal)
  - c. Forms M-444 (Information About Credible Fear Interview)
  - d. Forms I-870 (Record of Determination/Credible Fear Work Sheet)
  - e. Forms I-862 (Notice to Appear)
  - f. Forms I-863 (Notice of Referral to Immigration Judge)
  - g. Forms I-869 (Record of Negative Credible Fear Finding and Request for Review by Immigration Judge)
2. All Forms I-275 (Withdrawal of Application for Admission/Consular Notification) executed on behalf of individuals believed to be inadmissible under Section 235(b)(1).
3. All data which reflect statistics concerning the implementation of expedited removal, including but not limited to, information on:
  - a. Numbers and significant characteristics of persons who have been routed to secondary inspection, including port of entry, nationality, gender, age, native language spoken, statutory ground(s) for which the person is believed to be inadmissible, and disposition of the case (i.e. withdrawal, exclusion, expedited removal order or referral to credible fear interview).
  - b. Numbers and significant characteristics of persons referred to credible fear interviews, including port of entry, nationality, gender, age, language in which they were interviewed, availability of an interpreter and the outcome of the interview.

If you determine that any of the documents requested above are exempt from release, we would appreciate your advising us as to which exemption(s) you believe to be applicable to the material that you are not releasing.

The Study understands that applicable regulations state that requests made under the

Freedom of Information Act are ordinarily subject to reasonable charges for documentation search, duplication and review. See 28 C.F.R. § 16.10(b)(1)-(3). However the Study also believes that it qualifies for and hereby requests the following fee waivers.

First, the Study qualifies for the preferential fee waiver for educational institutions under 5 U.S.C. § 552(a)(4)(A)(ii)(II). The regulations state that "[n]o search fee shall be assessed with respect to requests by educational institutions," 28 C.F.R. § 16.10(b)(1)(i), and "review fees shall be assessed with respect to only those requesters who seek records for a commercial use," 28 C.F.R. § 16.10(b)(3)(i). The Study is a research project being conducted under the auspices of Santa Clara University, an institution of undergraduate and graduate education established in 1851 and located in Santa Clara, California. It is therefore exempt from document search fees. Furthermore, because the Study has no commercial interest in the requested documents, it is also exempt from document review fees. The findings and conclusions of the Study concerning the expedited removal process will be disseminated free of charge to policy makers and to the public. Under this preferential fee waiver, the only fee applicable to our request would be for reasonable document duplication.

Second, the Study qualifies for the "public interest" fee waiver for document duplication costs under 5 U.S.C. § 552(a)(4)(A)(iii). By law, requests for a fee waiver in the public interest must be granted if the requester establishes that: 1) the fee waiver is in the public interest because the release of information would likely contribute significantly to the public understanding of government operations or activities; and 2) the disclosure of the information is not primarily in the commercial interest of the requester. *Id.* The Expedited Removal Study is the only comprehensive and independent examination of the newly implemented expedited removal procedure. Therefore, the release of the records to the Study for its analysis and dissemination will contribute significantly to the public understanding of expedited removal.

The Study requested a fee waiver for a FOIA request submitted for EOIR records and reports. This fee waiver was granted to the Study by the EOIR. (See March 11, 1998 letter from Margaret Philbin, General Counsel of the Executive Office for Immigration Review to the Study, Attachment 3.) In her letter, Ms. Philbin found that the Study had "demonstrated that the disclosure of the requested information is likely to contribute significantly to public understanding of the operations or activities of the government and is not in [the Study's] commercial interest."

If you have any questions regarding this request or have suggestions that will expedite the process of production, please contact me at (510) 486-1406. Thank you for your cooperation.

Sincerely,



Karen Musalo  
Co-Director  
Expedited Removal Study

The legibility of the writing in this excerpted sample INS file reflects that of the copy provided to the Expedited Removal Study by the INS.

UNITED STATES DEPARTMENT OF JUSTICE  
IMMIGRATION AND NATURALIZATION SERVICE  
NEWARK INTERNATIONAL AIRPORT  
NEWARK, NEW JERSEY 07114

A No. ( PLEASE REFER TO FILE )

MEMO TO FILE

I-94: ( \_\_\_\_\_ )  
RE: ( \_\_\_\_\_ )  
DOB: ( \_\_\_\_\_ )  
POB: ( \_\_\_\_\_ )  
DATE: April 14, 1997

(b)(6)

(b)(6)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

( \_\_\_\_\_ ) (b)(6)  
IMMIGRATION INSPECTOR

*[Signature]*  
SUPERVISORY IMMIGRATION INSPECTOR

The legibility of the writing in this excerpted sample INS file reflects that of the copy provided to the Expedited Removal Study by the INS.

U.S. Department of Justice  
Immigration and Naturalization Service

Record of Sworn Statement and Proceedings  
under Section 235(b)(1) of the Act

Office: NEWARK, NEW JERSEY

File No. ( )

Statement by  
in the case of:

( )  
( )

(b)(6)

At Newark International Airport, New Jersey,

Before ( ) Immigration Inspector, in the French language.  
Interpreter ( ) (Continental Airlines) used.

I am an officer of the United States Immigration and Naturalization Service, authorized by law to administer oaths and to take evidence and testimony in connection with the enforcement of the Immigration and Nationality laws of the United States. I am also authorized by law to order certain inadmissible aliens removed from the United States without a hearing or review. I wish to take your sworn statement regarding your application for admission to the United States.

Before I take your sworn statement, I want to explain your rights and purposes and consequences of this process.

Any statement you make may be used against you in this or any subsequent administrative proceedings. You appear to be inadmissible to the United States. If a decision is made to refuse your admission into the United States, you may be barred from reentry for a period of 5 years or longer. This may be your only opportunity to present information to assist the Immigration and Naturalization Service in making a decision in your case. It is very important that you tell the truth. Except as I will explain to you, you are not entitled to a hearing or review of this decision.

U.S. law provides protection to certain persons who face persecution or harm upon return to their country. If you fear or have a concern about being removed from the United States or about being sent home, you should tell me so. You will have the opportunity to speak privately and confidentially to another officer about your fear or concern. That officer will determine if you should not be removed from the United States because of that fear. It is important that you tell the truth. If you give misinformation, you may be subject to criminal or civil penalties, or barred from receiving certain immigration benefits or relief. Until a decision is reached in your case, you will remain in the custody of the Immigration and Naturalization Service.

Q: Do you understand what I have explained to you?

A: YES

Q: Are you willing to answer my questions at this time?

A: YES

Q: Do you swear that the statement you are about to make will be the truth, the whole truth, and nothing but the truth?

A: YES

Q: ( )

A: ( )

Q: ( )

A: ( )

A: ( )

Q: ( )

A: ( )

Q: ( )

A: ( )

(b)(6)



The legibility of the writing in this excerpted sample INS file reflects that of the copy provided to the Expedited Removal Study by the INS.

Q How did you come to the United States today?  
A \_\_\_\_\_

Q What is the purpose of your trip to the United States?  
A \_\_\_\_\_

Q Why are you in fear for your life?  
A \_\_\_\_\_

Q Why were you out to jail and why are you in jail?  
A \_\_\_\_\_ ( \_\_\_\_\_ )

Q Where are you coming from now?  
A \_\_\_\_\_ (b)(6)

Q \_\_\_\_\_  
A \_\_\_\_\_

Q \_\_\_\_\_  
A \_\_\_\_\_

Q What happened to your brother?  
A \_\_\_\_\_

Q \_\_\_\_\_  
A \_\_\_\_\_

Q \_\_\_\_\_  
A \_\_\_\_\_

Q \_\_\_\_\_  
A \_\_\_\_\_

Q \_\_\_\_\_  
A \_\_\_\_\_

Q \_\_\_\_\_  
A \_\_\_\_\_

Q \_\_\_\_\_  
A \_\_\_\_\_

Q \_\_\_\_\_  
A \_\_\_\_\_

Q \_\_\_\_\_  
A \_\_\_\_\_

Q \_\_\_\_\_  
A \_\_\_\_\_

The legibility of the writing in this excerpted sample INS file reflects that of the copy provided to the Expedited Removal Study by the INS.

A: (Cont)

( [redacted] )

Q:

( [redacted] )

(b)(6)

A:

Q: I believe that you are inadmissible to the United States pursuant to section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act, as amended, because you are an immigrant not in possession of an immigrant visa or an acceptable substitute, and are not exempt from presentation of the same. I believe that you are further inadmissible pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act, as amended, because you seek to enter the United States through fraud and by misrepresenting material facts. Specifically, I believe that you have presented a travel document which does not reflect your true identity and which was not issued to you by proper authorities, and have misrepresented your true intent in coming to the United States.

Pursuant to section 235(b)(1) of the Act, I intend to order your removal from the United States. You will be referred for an interview with an Asylum Officer, who will determine if you should not be removed because of the fear you have expressed. Do you understand that?

A: YES.

(END OF STATEMENT)

I have read, or have had read to me, the foregoing statement consisting of 3 pages (including this page). I state that the answers made herein by me are true and correct to the best of my knowledge and belief and that this statement is a full, true and correct record of my interrogation by the above-named officer of the Immigration and Naturalization Service. I have initialed each page of this statement and any corrections therein.

( [redacted] )

(b)(6)

(Signature of Alien)

SWOF

NEWARK, NEW JERSEY

( [redacted] )

Immigration Inspector  
United States Immigration and Naturalization Service

WITNESSED BY

( [redacted] )

(b)(6)

(Signature of Witness)

APRIL 14 1994

SAMPLE TWO

UNITED STATES DEPARTMENT OF JUSTICE  
IMMIGRATION AND NATURALIZATION SERVICE  
NEWARK INTERNATIONAL AIRPORT  
NEWARK, NEW JERSEY 07114

A No.: ( PLEASE REFER TO FILE )

MEMO TO FILE

I-94: ( \_\_\_\_\_ )  
RE: ( \_\_\_\_\_ )  
DOB: ( \_\_\_\_\_ )  
POB: ( \_\_\_\_\_ )  
DATE: April 25-1997

(b)(6)

SUBJECT ARRIVED VIA ( \_\_\_\_\_ )

(b)

( \_\_\_\_\_ )  
IV. JR'

*[Handwritten Signature]*  
SUPERVISORY IMMIGRATION INSPECTOR

U.S. Department of Justice

# Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act

Immigration and Naturalization Service

Office: Newark, NJ

File No: ( )

Statement by ( )

In the case of: ( )

Date of Birth: ( )

Gender: (Male/Female) ( )

At: ( )

Date: April 25, 1997

Before: ( )

Immigration Inspector

(Name and Title)

In the Gujarati

language. Interpreter: Kirit Shah

Employed by: language service associates

I am an officer of the United States Immigration and Naturalization Service. I am authorized to administer the immigration laws and to take sworn statements. I want to take your sworn statement regarding your application for admission to the United States. Before I take your statement, I also want to explain your rights, and the purpose and consequences of this interview.

You do not appear to be admissible or to have the required legal papers authorizing your admission to the United States. This may result in your being denied admission and immediately returned to your home country without a hearing. If a decision is made to refuse your admission into the United States, you may be immediately removed from this country, and if so, you may be barred from reentry for a period of 5 years or longer.

This may be your only opportunity to present information to me and the Immigration and Naturalization Service to make a decision. It is very important that you tell me the truth. If you lie or give misinformation, you may be subject to criminal or civil penalties, or barred from receiving immigration benefits or relief now or in the future.

Except as I will explain to you, you are not entitled to a hearing or review.

U.S. law provides protection to certain persons who face persecution, harm or torture upon return to their home country. If you fear or have a concern about being removed from the United States or about being sent home, you should tell me so during this interview because you may not have another chance. You will have the opportunity to speak privately and confidentially to another officer about your fear or concern. That officer will determine if you should remain in the United States and not be removed because of that fear.

Until a decision is reached in your case, you will remain in the custody of the Immigration and Naturalization Service.

Any statement you make may be used against you in this or any subsequent administrative proceeding.

Q. Do you understand what I've said to you?

A. yes

Q. Do you have any questions?

A. no.

Q. Are you willing to answer my questions at this time?

A. Yes

Q. Do you swear or affirm that all the statements you are about to make are true and complete?

A. Yes

Q. What is your signature and correct name?

( )

( )

Q What is your date of birth?

A ( )

Q Of what country are you a citizen?

A ( )

Q What is the citizenship of your parents?

A ( )

Q Are you a permanent resident of the United States of America?

A (-)

Q What is the reason for your visit here today?

A I came her for one month to visit.

Q ( )

A

Q ( )

A

Q

A

C

A

Q

A

Q

A

Q

A

Q

A

Q

A

Q

(b)(6)

(b)(6)

( )

A Less than one month.

Q Did you work her on yuor last visit?

A Nn I never worked.

Q Were you intending to work on this visit?

A No.

.S. Department of Justice  
Immigration and Naturalization Service

**Jurat for Record of Sworn Statement in  
Proceedings under Section 235(b)(1) of the Act**

Q. Why did you leave your home country or country of last residence?

A. TO VISIT AMERICA

Q. Do you have any fear or concern about being returned to your home country or being removed from the United States?

A. NO

Q. Would you be harmed if you are returned to your home country or country of last residence?

A. NO

Q. Do you have any questions or is there anything else you would like to add?

A. I HAVE 2 CHILDREN IN MY COUNTRY AND I WANT TO RETURN TO MY COUNTRY

I have read (or have had read to me)the foregoing statement, consisting of 4 pages(including this page). I state that my answers are true and correct to the best of my knowledge and that this statement is a full, true and correct record of my interrogation on the date indicated by the above-named officer of the Immigration and Naturalization Service. I have initialed each page of this statement (and the corrections noted on page(s) 3).

Signature (\_\_\_\_\_) (b)(6)

Sworn and subscribed to before me at Newark, NJ \_\_\_\_\_

on April 25, 1997 \_\_\_\_\_

(\_\_\_\_\_)  
Office. (\_\_\_\_\_) and Naturalization Service

Interpreter: Re: the case of \_\_\_\_\_ ; File # \_\_\_\_\_  
I, \_\_\_\_\_ swear that I have correctly translated from \_\_\_\_\_ into english \_\_\_\_\_

from english into to best of my abilities. <

Interpreter:

Telephonic Interview

Witnessed by:

X ( \_\_\_\_\_ )

(b)(6)

1867B(4-1-97)

This document has been retyped by the Expedited Removal Study for enhanced reading quality. A copy of the original document is on file with the Expedited Removal Study.

### Expedited removals

	FY97 (April-Sept)	FY98 (Oct-Aug)
All countries	23,507	68,826
Africa	194	379
Ghana	34	66
Guinea	Z	33
Nigeria	31	86
Senegal	Z	26
Asia	493	964
Bangladesh	Z	29
China, Peoples Rep.	131	268
India	71	129
Israel	36	24
Korea	26	43
Pakistan	76	171
Philippines	55	120
Turkey	Z	30
Europe	264	377
Albania	24	41
Bulgaria	Z	24
Czechoslovakia (unspecified)	Z	59
Poland	56	70
Russia	Z	26
United Kingdom	21	Z
North America	21,699	65,752
Canada	205	313
Mexico	20,373	63,856
Caribbean	629	935
Dominican Republic	177	358
Haiti	52	67
Jamaica	329	422
Trinidad & Tobago	51	52
Central America	492	648
Costa Rica	72	53
El Salvador	85	164
Guatemala	171	243
Honduras	91	100
Nicaragua	39	37



**This document has been retyped by the Expedited Removal Study for enhanced reading quality. A copy of the original document is on file with the Expedited Removal Study.**

Oceania	14	27
South America	837	1,320
Bolivia	72	127
Brazil	147	190
Chile	21	30
Colombia	212	221
Ecuador	145	314
Guyana	32	78
Peru	116	252
Venezuela	73	87

Note: Z indicates fewer than 20 expedited removals.

Prepared by: Office of Policy and Planning, INS

This document has been retyped by the Expedited Removal Study for enhanced reading quality. A copy of the original document is on file with the Expedited Removal Study.

Expedited removals

	FY97 (April-Sept)	FY98 (Oct-Aug)
All Districts/ports	23,507	68,826
Atlanta, GA	102	247
Atlanta, GA	98	238
Boston, MA	Z	37
Buffalo, NY	170	257
Champlain, NY	48	76
Niagara Falls, NY	73	110
Peace Bridge, NY	Z	35
Chicago, IL	279	581
Dallas, TX	41	260
Denver, CO	Z	23
Detroit, MI	125	171
Detroit, MI	99	123
Port Huron, MI	24	45
El Paso, TX	1,703	10,071
Bridge of the Americas, TX	395	1,658
Columbus, NM	21	193
El Paso (port), TX	36	47
El Paso, TX	Z	63
Fabans, TX	Z	126
Paso Del Norte Bridge, TX	981	6,516
Presidio, TX	23	84
Ysleta, TX	216	1,372
Harlingen, TX	2,189	5,830
Brownsville, TX	803	2,524
Hidalgo, TX	1,010	2,294
Los Indios, TX	43	95
Pharr, TX	74	233
Progreso, TX	153	292
Roma, TX	82	353
Honolulu, HI	Z	50
Houston, TX	131	268
Los Angeles, CA	337	602
Miami, FL	1,036	799
Miami, FL	969	717
Orlando, FL	Z	29
Port Everglades, FL	50	44
New Orleans, LA	Z	22
New York, NY	838	1,701
Newark, NJ	206	423

**This document has been retyped by the Expedited Removal Study for enhanced reading quality. A copy of the original document is on file with the Expedited Removal Study.**

Phoenix, AZ	1,115	3,793
Douglas, AZ	238	530
Lukeville, AZ	27	79
Nogales, AZ	456	1,763
San Luis, AZ	370	1,390
Portland, ME	Z	21
San Antonio, TX	2,683	6,302
Del Rio, TX	142	390
Eagle Paso, TX	283	638
Laredo, TX	2,251	5,247
San Diego, CA	12,270	36,926
Andrade, CA	Z	35
Calexico, CA	1,942	6,327
Otay Mesa, CA	293	987
San Ysidro, CA	10,013	29,479
Tecate, CA	Z	80
San Francisco, CA	57	140
San Juan, PR	63	112
Mayaguez, PR	Z	31
San Juan, PR	62	80
Seattle, WA	22	64
Pacific Highway, WA	Z	21
St. Paul, MN	43	26
Washington, DC	Z	41

Note: Z indicates fewer than 20 expedited removals.

Prepared by: Office of Policy and Planning, INS

**Selected Subcategories of Formal Removals: FY 1998 by Month\***

	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	FY TOTAL
--	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	----------

<b>Expedited</b>													
<b>Servicewide</b>	4,397	4,305	3,870	7,490	6,397	6,670	6,513						39,642
<b>    Eastern</b>	331	290	290	337	361	393	348						2,350
<b>    Central</b>	1,564	1,433	1,347	2,683	2,306	2,524	2,079						13,936
<b>    Western</b>	2,502	2,582	2,233	4,470	3,730	3,753	4,086						23,356

The following is a statistic report of all the individuals placed in expedited removal / credible fear interviews during the months of October 1998 through February 1999 at San Francisco International Airport. This statistic report has been compiled by nationality and number of individuals by country.

**Expedite Removal**

Bulgaria	1
Cameroon	1
China	7
Ecuador	1
El Salvador	2
Guatemala	2
India	2
Korea	1
Malaysia	1
Mexico	32
Nigeria	1
Pakistan	1
Peru	3
Philippines	3
Singapore	1
Sri Lanka	1
Thailand	1
Venezuela	1
Yemen	1

**Credible Fear**

Albania	2
Algeria	2
China	43
India	2
Indonesia	1
Nigeria	4
Philippines	3
Sri Lanka	6
Sudan	1

**UNITED NATIONS  
HIGH COMMISSIONER  
FOR REFUGEES**



**NATIONS UNIES  
HAUT COMMISSARIAT  
POUR LES REFUGIES**

*Regional Office  
for the United States of America &  
the Caribbean*

1775 K Street, NW  
Suite 300  
Washington DC 20006

*Bureau Régional  
pour les États-Unis d'Amérique et  
Caraïbes*

Telephone: (202) 296-5191  
Fax: (202) 296-5660  
E-mail: USAWA@UNHCR.CH

**EXPEDITED REMOVAL STATISTICS<sup>1</sup>  
UNHCR REGIONAL OFFICE WASHINGTON DC  
1 APRIL 1997 - 24 MARCH 1999**

**Total Number of Cases: 109**

**Gender: Number of Men: 95  
Number of Women: 14**

**Nationalities (Top Five):**

Somalia	15
Sierra Leone	11
Nigeria	11
China	10
India	5

**Age Ranges: (ages are approximate in some instances)**

10-14:	1
15-20:	4
21-25:	16
26-30:	23
31-35:	16
36-40:	10
41-50:	2
51-60:	1

**Unknown: 36**

<sup>1</sup> UNHCR recognizes that these statistics do not represent the total number of individuals placed in expedited removal and may not reflect overall national trends. Please note that the statistics provided here include only persons who contacted UNHCR while in expedited removal and also include stowaway cases, which are not technically "expedited removal" cases but involve credible fear interviews.

**Detention Center Sites:**

**Facility Names (Top six):**

<b>Elizabeth CCA:</b>	<b>15</b>
<b>Wackenhut CC NY:</b>	<b>11</b>
<b>El Centro SPC:</b>	<b>7</b>
<b>San Pedro SPC:</b>	<b>7</b>
<b>Krome North SPC:</b>	<b>5</b>
<b>Oakland Jail:</b>	<b>5</b>

**Facility Type:**

<b>INS/Contract:</b>	<b>49</b>
<b>County:</b>	<b>41</b>
<b>Other:</b>	<b>9</b>
<b>Unknown:</b>	<b>10</b>

**Facility State (Top five):**

<b>CA:</b>	<b>28</b>
<b>NJ:</b>	<b>16</b>
<b>NY:</b>	<b>15</b>
<b>VA:</b>	<b>8</b>
<b>IL:</b>	<b>8</b>

**Port of Entry:**

**City (Top five):**

<b>NYC (JFK):</b>	<b>10</b>
<b>Miami:</b>	<b>9</b>
<b>Chicago:</b>	<b>7</b>
<b>San Diego:</b>	<b>7</b>
<b>Los Angeles:</b>	<b>7</b>

**State (Top six):**

<b>CA:</b>	<b>20</b>
<b>NY:</b>	<b>17</b>
<b>FL:</b>	<b>9</b>
<b>IL:</b>	<b>7</b>
<b>TX:</b>	<b>7</b>
<b>VA:</b>	<b>6</b>

**CFI Results-Asylum Officer (AO):** (Percentage does not include cases which are "unknown")

<b>Failed:</b>	<b>9</b>	<b>Percentage:</b>	<b>11%</b>
<b>Passed<sup>2</sup>:</b>	<b>73</b>	<b>Percentage:</b>	<b>88%</b>
<b><u>Withdrawn:</u></b>	<b><u>1</u></b>	<b><u>Percentage:</u></b>	<b><u>1%</u></b>
<b>Sub-Total:</b>	<b>83</b>	<b>Subtotal %</b>	<b>100%</b>
<b>Unknown:</b>	<b>26</b>		

**Immigration Judge Review of the 9 CFI Cases Denied by Asylum Officers**

<b>Failed:</b>	<b>4</b>	<b>Percentage:</b>	<b>45%</b>
<b>Passed:</b>	<b>3</b>	<b>Percentage:</b>	<b>33%</b>
<b><u>Unknown:</u></b>	<b><u>2<sup>3</sup></u></b>	<b><u>Percentage:</u></b>	<b><u>22%</u></b>
<b>Total</b>	<b>9</b>	<b>Total</b>	<b>100%</b>

**Overall CFI Results** (Percentage does not include cases which are "unknown")

<b>Failed:</b>	<b>5</b>	<b>Percentage:</b>	<b>6%</b>
<b>Passed:</b>	<b>76</b>	<b>Percentage:</b>	<b>93%</b>
<b><u>Withdrawn:</u></b>	<b><u>1</u></b>	<b><u>Percentage:</u></b>	<b><u>1%</u></b>
<b>Sub-Total:</b>	<b>82</b>	<b>Subtotal %</b>	<b>100%</b>
<b>Unknown:</b>	<b>27</b>		

**IJ Merits<sup>4</sup>:** (Percentage does not include cases which are "unknown")

<b>Denied:</b>	<b>32</b>	<b>Percentage:</b>	<b>68%</b>
<b><u>Granted:</u></b>	<b><u>15</u></b>	<b><u>Percentage:</u></b>	<b><u>32%</u></b>
<b>Sub-Total</b>	<b>47</b>	<b>Subtotal %</b>	<b>100%</b>
<b>Unknown:</b>	<b>62</b>		

<sup>2</sup> For Credible Fear (CF) Results, "Passed" includes cases where UNHCR has direct information regarding the CF results, as well as cases where it has no direct information, but where it is assumed the individual passed because the Executive Office of Immigration Review (EOIR) Information Line indicates that the individual continued on to have a master calendar or individual hearing before an Immigration Judge (IJ). It is assumed that the individual passed CF before the AO, rather than before an IJ on review of an initial negative CF decision;

<sup>3</sup> For one "unknown" case, the individual ultimately failed CF, although it is unclear if a review by an IJ was conducted. For the other unknown case, information regarding the results of his IJ review is unavailable.

<sup>4</sup> For IJ Merits Results, "Relief Granted" is assumed to mean "Asylum Granted," and "Ordered Removed" is assumed to mean "Asylum Denied."





UNIVERSITY OF CALIFORNIA

HASTINGS COLLEGE OF THE LAW

200 McALLISTER STREET  
SAN FRANCISCO, CA 94102-4978  
(415) 565-4600 • FAX (415) 565-4865

*Expedited Removal Study*

---

December 14, 1998

Co-Director, Office of Information and Privacy  
U.S. Department of Justice  
Flag Building, Suite 570  
Washington, D.C. 20530

Re: Freedom of Information Act Appeal, Control No. 98005731

Dear Co-Director of the Office of Information and Privacy:

I am writing to appeal the determination of the Freedom of Information Act (FOIA) request in the above-referenced matter. A copy of my June 1, 1998 request (without attachments) pursuant to FOIA is appended to this appeal. I realize that the sixty day appeal period may have passed. If you determine that the sixty days have passed, I would ask you to consider this appeal nonetheless, since I intend to re-file the identical FOIA request, which will lead us to exactly the same juncture in which we currently find ourselves. If you do not intend to accept and process this appeal because of a question regarding the running of the sixty days to appeal, please contact me immediately by phone (510 486-1406) or fax (510 486-1409).

This appeal is based principally upon the fact that the materials which were produced are, for the most part, not responsive to the request contained in the June 1, 1998 letter. The request asked for: (1) all files or documents concerning individuals placed in expedited removal proceedings since April 1, 1997; 2) all forms I-275 executed on behalf of individuals believed to be inadmissible under INA 235(b)(1); and 3) all statistical data on the implementation of expedited removal.

In response to #1, the request for all files or documents of persons in expedited removal, only four files were produced. There was no explanation regarding the failure to fully produce the documents requested. There were no documents produced in response to #2, the request for forms I-275 executed on behalf of individuals deemed inadmissible under INA 235(b)(1). There were only two documents produced in response to #3, the request for statistical data. One of the

two documents contained statistics for expedited removals by district and nationality dated April 1997. Although more than nineteen months have passed since April 1997, no subsequent monthly statistics were produced. The only other statistical data produced was a one page table which includes three lines addressing expedited removal statistics.

In addition to appealing the fact that the documentation produced was non-responsive to the request, I appeal the determination that the materials, or portions of materials which were withheld were appropriately withheld pursuant to 8 U.S.C. 552(b)(6).

I look forward to your response. Correspondence should be sent to me at the University of California, Hastings College of the Law, at the address on this letterhead (rather than to the previous address at Santa Clara University).

Sincerely,



Karen Musalo  
Director

\*S-7

IMMIGRATION COURT  
18201 S.W. 12TH ST  
MIAMI, FL 33194

In the Matter of:

Case No: [REDACTED]

IN: CREDIBLE FEAR REVIEW PROCEEDINGS

[REDACTED]  
Applicant

ORDER OF THE IMMIGRATION JUDGE

*ATTN, 97  
Krone*

On at a review of the INS Credible Fear Determination was held in the matter noted above. Testimony  was [ ] was not taken regarding the background of the Applicant and the Applicant's fear of returning to his/her country of origin or last habitual residence.

After consideration of the evidence, the Court finds that the Applicant [ ] has  has not established a significant possibility that he/she would be persecuted on the basis of his/her race, religion, nationality, membership in a particular social group, or because of his/her political opinion:

ORDER: It is hereby ordered that the decision of the immigration officer is:

Affirmed, and the case is returned to the INS for removal of the alien.

[ ] Vacated.

This is a final order. There is no appeal available.

DONE and ORDERED this 10 day of Oct, 19 97.

*Neale S. Foster*  
\_\_\_\_\_  
Immigration Judge  
*Neale S. Foster*

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL (P)  
() ALIEN ALIEN c/o Custodial Officer ( ) ALIEN'S ATT./REP. () INS  
E: 10-10-97 COURT STAFF BY: HA  
ATTACHMENT(S) ( ) EOIR-33 ( ) EOIR-28 ( ) LEGAL SERVICES LIST ( ) OTHERS \_\_\_\_\_

IMMIGRATION COURT  
18201 S.W. 12TH ST  
MIAMI, FL 33194

[REDACTED]  
KROME NSPC 18201 SW 12 ST  
MEAME, FL 33194

FILE: [REDACTED]

RE: [REDACTED]

NOTICE OF REVIEW OF CREDIBLE FEAR DETERMINATION

PLEASE TAKE NOTE THAT YOUR REQUEST FOR REVIEW OF THE INS CREDIBLE FEAR DETERMINATION HAS BEEN SCHEDULED/RESCHEDULED BEFORE THE IMMIGRATION COURT ON 10/10/97 AT 10:30am, AT THE FOLLOWING ADDRESS:

18201 S.W. 12TH ST  
MEAME, FL 33194

YOU MAY CONSULT WITH A PERSON OR PERSONS OF YOUR CHOOSING PRIOR TO THE REVIEW. SUCH CONSULTATION IS AT NO EXPENSE TO THE GOVERNMENT AND MAY NOT UNREASONABLY DELAY THE PROCESS.

IN THE EVENT THAT YOU ARE RELEASED FROM CUSTODY, YOU MUST IMMEDIATELY REPORT ANY CHANGE IN YOUR ADDRESS AND TELEPHONE NUMBER TO THE IMMIGRATION COURT ON THE ATTACHED FORM EOIR-33. IF YOU FAIL TO PROVIDE AN ADDRESS, YOUR SCHEDULED REVIEW MAY BE HELD IN YOUR ABSENCE.

FOR INFORMATION REGARDING THE STATUS OF YOUR CASE, CALL TOLL FREE 1-800-898-7180 OR 703-305-1662.

CERTIFICATE OF SERVICE

HIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL (P)  
DATE: 10/19/97 ( ) ALIEN ALIEN c/o Custodial Officer ( ) ALIEN'S ATT./REP. ( ) INS  
ATTACHMENT(S) ( ) EOIR-33 ( ) EOIR-28 ( ) LEGAL SERVICES LIST ( ) OTHERS \_\_\_\_\_  
COURT STAFF BY: I. U.

cc. #0699f

(X) ASYLUM OFFICER/ALIEN

U.S. Department of Justice  
Immigration and Naturalization Service

Notice of Referral to Immigration Judge

Date 09/21/97 10/8/97

File [REDACTED]

Name (Family Name in CAPS, First, Middle)

Place and Manner of Arrival  
Miami International Airport

Date of Arrival  
09/21/97 OK

To immigration judge:

- 1. The above-named alien has been found inadmissible to the United States and ordered removed pursuant to section 235(b)(1) of the Immigration and Nationality Act (Act). A copy of the removal order is attached. The alien has requested asylum and the matter has been reviewed by an asylum officer who has concluded the alien does not have a credible fear of persecution. The alien has requested a review of that determination in accordance with section 235(b)(1)(B)(iii)(III) of the Act.
- 2. The above-named alien arrived in the United States as a stowaway and has been ordered removed pursuant to section 235(a)(2) of the Act. The alien has requested asylum and the matter has been reviewed by an asylum officer who has concluded the alien does not have a credible fear of persecution. The alien has requested a review of that determination in accordance with section 235(b)(1)(B)(iii)(III) of the Act.
- 3. The above-named alien arrived in the United States in the manner described below and has requested asylum. The matter is referred for a determination in accordance with 8 CFR 208.2(b). Arrival category (check one):

- Crewmember/applicant
- Crewmember/overstay
- 235(c) order
- Crewmember/refused
- VWPP/applicant
- S-visa nonimmigrant
- Crewmember/landed
- VWPP/overstay
- Stowaway: credible fear determination attached

4. The above-named alien has been ordered removed by an immigration officer pursuant to section 235(b)(1) of the Act. A copy of the removal order is attached. In accordance with section 235(b)(1)(C) of the Act, the matter is referred for review of that order. The above-named alien claims to be (check one):

- a United States citizen
- an alien granted refugee status under section 207 of the Act
- a lawful permanent resident alien
- an alien granted asylum under section 208 of the Act

NOTICE TO APPLICANT

You are ordered to report for a hearing before an immigration judge for the reasons stated above. Your hearing is scheduled on

TO BE SET at 19701 SW 12th St MIAMI FL 33194. You are to appear at KROME SPC

You may be represented in this proceeding, at no expense to the government, by an attorney or other individual authorized and qualified to represent persons before an Immigration Court. If you wish to be so represented, your attorney or representative should appear with you at this hearing. In the event of your release from custody, you must immediately report any change of your address to the Immigration Court on Form EOIR-73, which is provided with this notice. If you fail to appear for a scheduled hearing, a decision may be rendered in your absence.

You may consult with a person or persons of your own choosing prior to your appearance in Immigration Court. Such consultation is at no expense to the government and may not unreasonably delay the process.

Attached is a list of recognized organizations and attorneys which provide free legal services.

*[Handwritten Signature]*

(Signature and title of immigration officer)

(Certificate of Service is included on the reverse of this notice)

RECEIVED  
DEPARTMENT OF JUSTICE  
OCT 29 PM 11:11  
Form I-863 (Rev. 4/1/97)

CERTIFICATE OF SERVICE

The contents of this notice were read and explained to the applicant in the AFRANIAN language.

<sup>COPY</sup> The original of this notice was delivered to the above-named applicant by the undersigned on 10/15/97 and the alien has been advised of communication privileges pursuant to 8 CFR 236.1(e).

Michelle R. Lonsdale AO  
(Signature and title of immigration officer)

Michelle R. Lonsdale, AO  
ZMI 048

ATT 375E 2:58pm -  
3:10pm

Attachments to copy presented to immigration judge:

- Passport
- Visa
- Form I-94
- Forensic document analysis
- Fingerprints and photographs
- EOIR-33
- Form I-860
- Asylum officer's credible fear determination worksheet
- Other (specify): ICE 67 A & B, I E (E)

File No: [REDACTED]

1. To be explained to the alien by the asylum officer:

The INS has determined that you do not have a credible fear of persecution for the following reasons:

- You were not found credible because:
  - Your testimony was internally inconsistent on material issues.
  - Your testimony was not consistent with country conditions on material issues.
  - Your testimony was not consistent with documentation on material issues.
  - Your testimony was vague and lacked detail on material issues.
- You have not established a credible fear because:
  - You have not expressed a credible fear.
  - There is no significant possibility that any harm you suffered in the past or fear in the future constitutes persecution.
  - There is no significant possibility that the harm you fear in the future is well-founded.
  - There is no significant possibility that any harm or fear you expressed is on account of one or more of the five grounds for asylum.
- You are subject to the following mandatory bar(s) to being granted asylum:
  - You have been convicted of an aggravated felony.
  - (Other mandatory bar):  
\_\_\_\_\_  
\_\_\_\_\_
- Other reason:  
\_\_\_\_\_  
\_\_\_\_\_

Therefore, I will order you removed from the United States. You may request that an immigration judge review this decision. If you request that an immigration judge review this decision, you will remain in detention until an immigration judge reviews your case. That review could occur in as long as 7 days after you receive this decision. If you do not request that an immigration judge review this decision, you may be removed from the United States immediately.

2. To be completed by the alien:

- Yes, I request immigration judge review of the officer's decision that I do not have a credible fear of persecution.
- No, I do not request immigration judge review of the officer's decision that I do not have a credible fear of persecution.

[REDACTED]  
\_\_\_\_\_  
Last Name/Surname (Print)  
[REDACTED]  
\_\_\_\_\_  
Signature

[REDACTED]  
\_\_\_\_\_  
First Name, Middle Name  
10/8/97  
\_\_\_\_\_  
Date

ATT 3758 2:58 pm - 3:10 pm

District Office Code: <u>MIA</u>	File No: [REDACTED]	Expedited? <input checked="" type="checkbox"/> Y <input type="checkbox"/> N
Asylum Office Code: <u>ZMT</u>	Alien's Name: [REDACTED]	
Asylum Officer's Initials (when page is completed) <u>Am</u>	Nationality: <u>Yugoslavia (Montenegro)</u>	

**SECTION I: APSO INTERVIEW CHECKLIST**

1. Language used in interview: English
2. AT 64449 1.03. 10:30 AM 1.04. 11:30 AM  
 Interpreter ID # ASA Rt 293 Time Interview Started Time Interview Completed
5.  Interpreter has APSO Packet. 11:15-11:44 AM Consul
6.  If there is a ~~G-28~~ in the applicant's file, then either the ~~attorney~~ is present or APSO FORM G, waiver of attorney presence, has been completed:
7.  Applicant received and signed *Information about Credible Fear Interview* (Form M-444 for Expedited removal, Form M-445 for Non-Expedited Removal).

**For Expedited Removal Cases:**

8.  APSO read the following paragraph to the applicant at the beginning of the interview:

*The purpose of this interview is to determine whether you have a fear of persecution or harm in your home country. I am going to ask you questions about why you fear being removed from the United States or returned to your country. It is very important that you tell the truth during the interview and that you respond to all of my questions. This may be your only opportunity to give such information. There are regulations in the United States that protect the information you tell me from being disclosed to persons in your home country. The statements you make today may be used in deciding your claim and in any future immigration proceedings. Presenting a false or frivolous asylum application can result in permanent ineligibility for any immigration benefits under section 208(d)(6) of the Immigration and Naturalization Act, provided that you have notice. After the interview, the INS will decide whether you have a credible fear of persecution in your country.*

**For Non-Expedited Removal Cases:**

9.  APSO read the following paragraph to the applicant at the beginning of the interview:

*The purpose of this interview is to determine whether you have a fear of persecution or harm in your home country, and whether you would appear at further immigration proceedings if you are released from detention. I am going to ask you questions about why you fear being removed from the United States or returned to your country. It is very important that you tell the truth during the interview and that you respond to all of my questions. There are regulations in the United States that protect the information you tell me from being disclosed to persons in your home country. The statements you make today may be used in deciding your claim and in any future immigration proceedings. After the interview, the INS will decide whether you can be released from detention while waiting for your hearing before an immigration judge.*

10.  Interpreter was NOT changed during the interview, OR
11.  Interpreter was changed during the interview:
12.  Applicant requested a female interpreter replace a male interpreter, or vice versa
13.  Applicant asserted interpreter was not competent
14.  Applicant asserted interpreter was not neutral
15.  APSO found interpreter was not competent
16.  APSO found interpreter was not neutral
17.  Before concluding the credible fear portion of the interview, APSO read the following paragraph related to the Torture Convention to the applicant, and asked appropriate questions:



District Office Code: <u>MIH</u>	File No: [REDACTED]	Expedited? <input checked="" type="checkbox"/> Y / <input type="checkbox"/> N
Asylum Office Code: <u>2MT</u>	Alien's Name: [REDACTED]	
Asylum Officer's Initials (when page is completed) <u>UM</u>	Nationality: <u>WACUBUNGA (white negro)</u>	

So far I have been asking you questions to see if you have a significant possibility of getting asylum. Whether or not you obtain asylum, the United States will not return any alien when there are substantial grounds for believing that he or she would be in danger of being subjected to torture. In order to evaluate whether you should not be returned to your country under this provision, I will now ask you some questions related to torture.

- 18.  Interview was completed at scheduled time, or postponed for less than 24 hours, OR
- 19.  Interview was postponed, and APSO provided applicant with Form M-444 (expedited) or Form M-445 (non-expedited) and explained re-interview procedures.
- 20.  Applicant appears to have met the credible fear standard, OR
- 21.  Applicant does not appear to have met the credible fear standard. The APSO summarized the applicant's claim orally, and asked the applicant if she or he had anything to add or change. The APSO's statement and the answer were recorded, in Q&A format, in the interview notes.

or Expedited Removal:

- 22.  APSO read the following statement:

*We will now determine whether you have a credible fear of persecution. If the INS determines that you have a credible fear of persecution, your case will be referred to an immigration judge where it will receive further consideration. The INS will also consider whether you may be released from detention pending your hearing. If the INS finds that you do not have a credible fear of persecution, you may ask that an immigration judge review the decision. If you are found not to have a credible fear and you do not request review, you will be removed from the United States. Do you have any questions?*

- 23.  APSO found applicant had established credible fear, and completed Form I-862, OR
- 24.  APSO found applicant did not have a credible fear or warrant relief under the Torture Convention. APSO read Form I-869 to applicant, and obtained decision and signature, AND
- 25.  APSO gave applicant a copy of the completed Form I-870 and a blank copy in the applicant's language, or if translation not available or applicant illiterate, read through Form I-870 with applicant.

SECTION II: APSO INTERVIEW INFORMATION

2.01. 09/30/97 Date of Interview      2.02. Khomo SPC Site of Interview      2.03. CF Interview Type of Interview

2.04. Albanian Language(s) of Fluency

2.05. English Language used in interview      2.06. Erinice Lawry, ZMT-022 Name of Asylum Officer or Trial Attorney and ID Number

2.07. Does the applicant have an attorney or representative?  Yes  No [REDACTED] \* (1)

2.08. If YES, indicate name, attorney identification number listed on the G-28, and telephone number and facsimile number (include address if different from G-28):  
 [REDACTED]

2.09. If YES:  Attorney Present  Attorney Waived Presence  Applicant Waived Attorney Presence

2.10. Other(s) present at interview: consultant

District Office Code: M14  
 Asylum Office Code: ZMT  
 Asylum Officer's Initials (when page is completed) um

File No: [REDACTED] Expedited? (Y/N)  
 Alien's Name: [REDACTED]  
 Nationality: YUGOSLAVIA

**SECTION III: BIOGRAPHIC INFORMATION**

1. [REDACTED]  
 2. [REDACTED]  
 3. [REDACTED] Last Name (ALL CAPS) 3.03.  
 4. [REDACTED] Middle Name 3.06. M  
 5. [REDACTED] Country of Birth Yugoslavia 3.05.  
 6. [REDACTED] Date of Birth (MM/DD/YY) 3.08. 09/12/1977 Gender (M/F)  
 7. Montenegro Country of Last Habitual Residence, if relevant  
 8. MIA IAP Country of Citizenship  
 9. Krome SPC Port of Arrival  
 10. 09/12/1977 Date of Arrival  
 11. MARRIED Place of Detention  
 12. 2 Date of Detention  
 13. 2 Number of children  
 14. [REDACTED] Current Place of Residence of Children  
 15. [REDACTED] Other Names Used (Aliases)  
 16. [REDACTED] Other Date of Birth Used 3.17. 1/1

**SECTION IV: APPLICANT'S IDENTITY** How has it been determined?

4.01.  Applicant's identity was determined with a reasonable degree of certainty:  
 4.02.  Applicant's own credible statements  
 4.03.  Passport which appears to be authentic  
 4.04.  Other evidence presented by applicant or in applicant's file (see document list in training binder).  
 List: \_\_\_\_\_  
 4.05.  Other evidence applicant stated could be obtained (see document list in training binder)  
 List: \_\_\_\_\_  
 4.06.  Identity not determined with reasonable certainty. Explain: \_\_\_\_\_

**SECTION V: OTHER RELEASE CRITERIA**

5.01. Does the applicant have a relative, sponsor or other community ties?  Yes  No  
 5.02. If yes, please provide details such as name, address and telephone of relative or sponsor:  
A sister [REDACTED]  
[REDACTED] N. York [REDACTED]  
A cousin, [REDACTED] I don't have  
has phone number [REDACTED]  
A neighbor in Florida - [REDACTED]

District Office Code: <u>MIA</u>	File No: [REDACTED]	Expedited? <u>Y/N</u>
Asylum Office Code: <u>ZMT</u>	Alien's Name: [REDACTED]	
Asylum Officer's Initials (when page is completed) <u>CM1</u>	Nationality: <u>ZIMBABWE</u>	

3. Does the applicant agree to all of the following three conditions?  Yes  No

Check all that apply:

- 4.  Appear for all hearings before INS and EOIR
- 5.  Report any change in address, support or representation
- 6.  Appear at the local INS office or any other required location when ordered to do so

**SECTION VI: OTHER CONSIDERATIONS**

11. Does the applicant have a medical condition (physical or mental)?  Yes  No  
 12. If yes, Explain: As an alien

- 13. Does medical condition appear to require immediate attention?  Yes  No
- 14. Does medical condition appear to be serious?  Yes  No
- 15. Does applicant claim that medical condition relates to torture?  Yes  No
- 16. Should other factors be considered for a public interest parole?  Yes  No
- 17.  Applicant may be pregnant (for non-expedited removal only)
- 18.  Applicant appears to be a juvenile (for non-expedited removal only)
- 19.  Applicant may have close family relatives lawfully in the United States (parent, spouse, children, or siblings who are U.S. citizens or lawful permanent resident aliens) (for non-expedited removal only)
- 20.  Applicant may be a witness in judicial, administrative, or legislative proceedings in the United States.
- 21.  Applicant may merit *non-refoulement* under the Torture Convention (INS use only)
- 22.  Other information that the applicant would like considered
- 23. Explain: \_\_\_\_\_

**SECTION VII: SUMMARY OF PERSON'S STATEMENT** Attach a typewritten page if preferred. Interview notes must be attached to the back of this page. For Expedited Removal cases, interview notes must be typed.

See attached

District Office Code: <u>MLA</u>	File No: <u>[REDACTED]</u>	Expedited: <u>(Y) N</u>
Asylum Office Code: <u>ZMA</u>	Allen's Name: <u>[REDACTED]</u>	
Asylum Officer's Initials (when page is completed) <u>ChL</u>	Nationality: <u>MEXICAN</u>	

**SECTION VIII: CREDIBLE FEAR DETERMINATION**

person has a credible fear of persecution if there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 208 of the INA.

**CREDIBILITY:**

- 01.  **APPLICANT CREDIBLE:** Testimony detailed, internally consistent, consistent w/ country conditions and any other intrinsic evidence
- 02.  **APPLICANT NOT CREDIBLE:**
- 03.  Testimony internally inconsistent on material issues
- 04.  Testimony not consistent with country conditions on material issues
- 05.  Testimony not consistent with documentation on material issues
- 06.  Testimony was vague and lacked detail on material issues
- 07. Explain: \_\_\_\_\_

**BASIS FOR CREDIBLE FEAR:**

- 08.  Race      8.09.  Religion      8.10.  Nationality      8.11.  Political Opinion
- 12.  Check if Political Opinion is related to Coercive Family Planning
- 13.  Membership in a Particular Social Group
- 14. If Social Group, Define: \_\_\_\_\_
- 15.  No nexus to one of the five grounds (APSOs should refer to Section IX below for information on Torture Convention, humanitarian grounds for parole)

**ANALYSIS:**

- 16.  **Eligibility.** Assume that the applicant is credible:
- 16.  Applicant **HAS** a significant possibility that he or she could establish eligibility for asylum
- 17.  Applicant **DOES NOT HAVE** a significant possibility that he or she could establish eligibility for asylum
- 18. Explain: \_\_\_\_\_

- 19. Is the applicant subject to any bars to asylum?       Yes       No
- 20.  Particularly Serious Crime      8.21.  Security Risk      8.22.  Aggravated Felon
- 23.  Persecutor      8.24.  Terrorist      8.25.  Firmly Resettled
- 26.  Serious Non-Political Crime Outside the United States (see Immigration Act 1996 definition)
- 27. Explain: \_\_\_\_\_

District Office Code: MIA File No: [REDACTED] Expedited? Y/N  
 Asylum Office Code: ZMC Alien's Name: [REDACTED]  
 Asylum Officer's Initials (when page is completed) all Nationality: Montenegro

**SECTION IX: DECISION SECTION**

**ASYLUM PRE-SCREENING OFFICER FINDINGS:**

9.01. Credible Fear Established?  Yes  No 9.02. Bar Established?  Yes  No

**OTHER CONSIDERATIONS:**

9.03. Identity Established?  Yes  No 9.04. Community Ties?  Yes  No

**For Non-Expedited Removal Cases Only:**

- 9.05.  Applicant DOES NOT APPEAR Eligible for Release on Humanitarian Grounds
- 9.06.  Applicant DOES APPEAR Eligible for Release on Humanitarian Grounds:
- 9.07.  Medical Emergency 9.08.  Pregnancy 9.09.  Juvenile 9.10.  Close Relatives Lawfully in U.S.
- 9.11.  Witness 9.12.  Torture Convention (INS use only) 9.13.  Other
- 9.14. If Other, Explain: \_\_\_\_\_

**APSO/ APSO SUPERVISOR NAMES AND SIGNATURES**

9.15. CAROLINE LAWSON APSO Name 9.16. [Signature] APSO Signature 9.17. 10 10 6 1977 Date  
 9.18. ERIKH CAULLER SAO Name 9.19. [Signature] SAO Signature 9.20. 10 10 7 1977 Date

**DETENTION AND DEPORTATION FINDINGS (FILE REVIEW):**

9.21.  Alien has been convicted of an aggravated felony  
 9.22. Type and Date of Conviction[s]: \_\_\_\_\_

9.23. \_\_\_\_\_ Signature of INS Officer 9.24. \_\_\_\_\_ Date

District Office Code: <u>MIA</u>	File No: _____	Expedited? <u>Y</u> <u>N</u>
Asylum Office Code: <u>ZM</u>	Alien's Name: _____	
Asylum Officer Initials (when page is completed) <u>CM</u>	Nationality: <u>YUGOSLAVIA (MONTENEGRO)</u>	

**SUMMARY OF DISTRICT DIRECTOR RELEASE DECISION:**

5.  Release 9.26. Bond \$ \_\_\_\_\_
7.  No Release (If No Release, please complete Section IX, Subsection F of this form (optional if detainee is released))
8. \_\_\_\_\_ 9.29.   /  /    
District Director Signature Date

**DETAILS OF DISTRICT DIRECTOR RELEASE DECISION: (Optional if detainee is released)**

30.  Applicant Established Credible Fear, Release. Applicant's identity was established by:
31.  Applicant's statement 9.32.  Other evidence 9.33.  Both
- Applicant's community ties are:
34.  Family 9.35.  Sponsorship
36.  Applicant Has Not Established Credible Fear, Release 9.37.  Medical Emergency 9.38.  Witness
39.  Law Enforcement Necessity 9.40.  Torture Convention (INS use only)

**For Non-Expedited Removal Cases Only**

41.  Pregnancy 9.42.  Juvenile
43.  Other: \_\_\_\_\_

44.  Applicant Has Not Established Credible Fear, No Release.
45.  Applicant Has Established Credible Fear, No Release
46.  Applicant is subject to a bar: Please check bar(s) that apply:
47.  Security Risk 9.48.  Aggravated Felon 9.49.  Particularly Serious Crime
50.  Persecutor 9.51.  Firmly Resettled 9.52.  Terrorist
53.  Serious Non-Political Crime Outside the United States (see Immigration Act 1996 definition)
54. If reason checked is different from bar(s) the APSO found, explain: \_\_\_\_\_

- 9.55.  Documents or other evidence do not support applicant's claimed identity
- 9.56. Explain: \_\_\_\_\_

- 9.57.  Applicant does not have close relatives or sponsor

District Office Code: <u>MLA</u>	File No: <u>[REDACTED]</u>	Expedited? <u>Y</u> / N
Asylum Office Code: _____	Alien's Name: _____	
Asylum Officer Initials (when page is completed) _____	Nationality: _____	

58.  Other: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**CREDIBLE FEAR INTERVIEW NOTES - [REDACTED]**

**For biographical information see appropriate sections of the I-870**

---

Q. Where were you living?

A. [REDACTED] where I was born

Q. Who lived in your household?

A. I was living apart from my brother.

Q. Living alone?

A. Yes.

Q. And where were your wife and children?

A. She was there at her home.

Q. Are you separated from your wife?

A. No..

Q. Did you live with you wife and children?

A. Before I used to live with my wife and children.

---

Q. What was your occupation in your country?

A. I used to work as a driver.

Q. Where did you work?

A. [REDACTED] (spelling?), in the military.

Q. Were you member of the armed forces?

A. I was a driver, and I had a driver's license.

Q. Did you serve in the armed forces? (Q repeated)

A. I have.

Q. When?

A. I was drafted on Oct. 13, 1978.

Q. How long were you in the military?

A. 15 months.

Q. What did you do after left the military?

A. After I left the army?

Q. Yes.

A. I was unemployed for 1 1/2 months.



Q. Were you ever arrested, beaten or jailed in your country?  
A. They arrested my friend in my country and sent him to rape girls, 15 year-old girls.

Q. I don't want to know about your friend now. Were you ever arrested, beaten or detained?

A. They arrested me because I didn't want to go around raping and mistreating Albanian people.

Q. Who ordered your friend or you to rape, mistreat people?

A. ~~The Serbian military men.~~ *They didn't order us. They just took us by hand (x)*

Q. When did this happen?

A. This thing happened a month before I left.

Q. Do you know why the Serbians wanted you to rape girls?

A. Because we were Albanians and Muslims.

Q. Listen well. Why did the Serbians wanted you to rape girls?

A. The purpose was to force Albanians to act that way towards Albanians to create antagonism among the Albanians

Q. The girls who were raped, who were raped, were they Albanians, Muslims, who were they?

A. Albanians, Muslims.

Q. You stated you were arrested. When?

A. I escaped before they took me. When I saw the picked-up my friend, I escaped.

Q. You escaped from where?

A. I went to the mountains. I went into hiding.

---

#### SUMMARIZATION:

Q. Is this summary correct?

A. Yes.

Q. Is there anything else you'd like to add?

A. My wife escaped with our 2 children and she was raped.

Q. When?

A. It happened while I was at the Reserves.

*(x) Who took your friend and you?  
1. The Serbian military men.*

**Q.** Who raped her?

**A.** The military.

**CONSULTANT:** He stated that the alien has scars from mistreatment. And also that APSO did not specifically ask the alien if Serbians beat him on the streets.

**APSO:** I specifically asked him if he was ever mistreated. Then I specifically asked him if he was **beaten** twice and he did not mention any beating incidents.

**CONSULTANT:** Stated the alien did not want to serve in the army because it persecutes, commits war crimes, and likened the Serbain army to Nazis.

APSO Credible Fear Assessment

ALIEN NUMBER: [REDACTED]  
NAME: [REDACTED]  
NATIONALITY: Yugoslavia (Montenegro)

DATE: 10/6/97  
APSO: C. Lawson, ZMI-022  
SAO: Warren Janssen, ZMI-012  
LOCATION: Krome, SPC

Applicant indicated that he is a [REDACTED]-year old male, native and citizen of Yugoslavia who applied for admission at Miami International Airport on 9/21/97.

Applicant testified that he is an ethnic Albanian who fled Montenegro to avoid serving in the armed forces reserves and fears that he will be harmed by Yugoslavian authorities on account of his Albanian nationality. He testified that he was drafted by the armed forces on 10/13/78 and served for 15 months, driving a truck because he had a driver's license. Applicant stated that after his discharge from the military he was unemployed, then worked as a butcher and lastly as a truck driver for a company in [REDACTED] of Montenegro. Applicant testified that on 9 August 1996 the Serbian military picked him up at his place of employment and sent him to the reserves. Then he stated that on 8/2/86 they picked them up at their place of employment took them to the military headquarters in [REDACTED]. He stated they were there for one month and then were sent to Sutterman to work for three and a half months.

Applicant testified that the Serbian (military) sent his friends to villages to gang rape and murder people. He related that they arrested his friend and sent him to rape 15-year old Albanian and Muslim girls. And that they (military) arrested him because he did not want to go around raping and mistreating the Albanian people. When asked who ordered him and his friend or friends to rape girls, he stated that they did not "order us. They just took us by hand". Applicant testified that this (incident) happened one month before he left and explained that the Serbian military wanted to force Albanians to act that way (rape and murder villagers) to create antagonism among the Albanian people. When the APSO officer attempted to obtain details about his arrest, Applicant testified that that he was not arrested because he escaped and went into hiding in the mountains when he saw military picking-up his friend. Applicant added after the summary of his testimony that while he was serving in the reserves the military raped his wife and she escaped with their two children.

Applicant's testimony lacked material details and was internally inconsistent. Therefore, his testimony was not found to be credible. Applicant was unable to articulate a sufficiently detailed account of his experiences in Montenegro to enable this Service to make a determination of whether he has a credible fear of persecution on account of the statutory grounds for asylum. When asked what he did in his country, he stated that he drove a truck. However, when asked where he worked, he stated that in [REDACTED] in the military and indicated that he was drafted on 10/13/78. Following this event, however, Applicant was unable to provide a sufficiently consistent account of his experiences in his country despite the fact the Officer gave him several opportunities to do so. For instance, Applicant's testimony of the harm he suffered, or feared, at the hands of the military was vague and internally inconsistent. When specifically asked whether he was harmed by the military, Applicant stated that they (Serbian Military) sent his friends to villages to gang rape and murder people and/or that a friend of his was picked-up by the military and sent to rape 15-year old Muslim and Albanian girls. At one point he testified that the military arrested him because he did not want to gang rape and murder villagers. However, he contradicted that part of his testimony by stating that he was not arrested because he escaped before they could pick him up and went into hiding in the mountains.

As Applicant's testimony was not found credible in material respect, he did not show he has a credible fear of persecution.

Record of Sworn Statement in Proceedings  
under Section 235(b)(1) of the Act

Office: Miami International Airport File No: [REDACTED]

Statement by: [REDACTED]

In the case of: [REDACTED]

Date of Birth: [REDACTED] Gender (circle one):  Male  Female

At: Miami International Airport, Miami, FL Date: 09/21/97

Before: ISABELLE BRYANT SOI  
(Name and Title)

In the YUGOSLAVIAN language. Interpreter VLASTIMIT MIKIC Employed  
by [REDACTED]

I am an officer of the United States Immigration and Naturalization Service. I am authorized to administer the immigration laws and to take sworn statements. I want to take your sworn statement regarding your application for admission to the United States. Before I take your statement, I also want to explain your rights, and the purpose and consequences of this interview.

You do not appear to be admissible or to have the required legal papers authorizing your admission to the United States. This may result in your being denied admission and immediately returned to your home country without a hearing. If a decision is made to refuse your admission into the United States, you may be immediately removed from this country, and if so, you may be barred from reentry for a period of 5 years or longer.

This may be your only opportunity to present information to me and the Immigration and Naturalization Service to make a decision. It is very important that you tell me the truth. If you lie or give misinformation, you may be subject to criminal or civil penalties, or barred from receiving immigration benefits or relief now or in the future.

Except as I will explain to you, you are not entitled to a hearing or review.

U.S. law provides protection to certain persons who face persecution harm or torture upon return to their home country. If you fear or have a concern about being removed from the United States or about being sent home, you should tell me so during this interview because you may not have another chance. You will have the opportunity to speak privately and confidentially to another officer about your fear or concern. That officer will determine if you should remain in the United States and not be removed because of that fear.

Until a decision is reached in your case, you will remain in the custody of the Immigration and Naturalization Service.

Any statement you make may be used against you in this or any subsequent administrative proceeding.

Q: Do you understand what I have said to you?

A. YES

Q: Are you willing to answer my questions at this time?

A. YES

Q: Do you swear or affirm that all the statements you are about to make are true and complete?

A. YES

Q: What is your full, true and correct name?

A. [REDACTED]

Q: Of what country are you a citizen?

A. YUGOSLAVIA

Q. When and where were you born?

A. [REDACTED], YUGOSLAVIA

Q. Do you have any family; mother, father, brother, sister, spouse, or child who are citizens or permanent residents of the United States?

A. MY SISTER IS A CITIZEN.

Q. Do you have any reason to believe that you are a citizen of the United States?

A. NO.

Q. Where do you currently reside? State your full address and telephone number.

A. [REDACTED] YUGOSLAVIA [REDACTED]

Q. What was your purpose in attempting to enter the United States today?

A. HE ESCAPED FROM THE RESERVE ARMY, WHEN I WAS BEING PERSECUTED AND TORTURED, I AM COMING BECAUSE OF ECONOMIC REASONS, I HAVE SOME FAMILY HERE,

Q. How much money do you have with you?

A. 182.00 U.S. DOLLARS COUNTED AND VERIFIED BY SOI LOLAGNE.

Q. What is your occupation?

A. I WORKED AS A BUTCHER

Q. Where are you currently employed?  
YES I WAS BEFORE I CAME.

A.

Q. Have you ever been arrested anywhere at any time?

A. NEVER.

Q. What documents did you present today to the immigration inspector in the booth?

A. AN ITALIAN PASSPORT # [REDACTED] AN I-94W AND A CUSTOMS DECLARATION.

Q. What name is on the document(s)?

A. [REDACTED]

Q. Have you ever used any other names?

A. NEVER.

Q. ARE YOU MARRIED OR SINGLE?

A. I AM MARRIED

Q. DO YOU HAVE CHILDREN?

A. I HAVE TWO CHILDREN.

Q. WHERE ARE YOUR WIFE AND CHILDREN NOW?

A. I DO NOT KNOW.

Q. WHY DON'T YOU KNOW WHERE YOUR WIFE AND CHILDREN ARE?

A. I ESCAPED FROM THE ARMY RESERVES AND LOST CONTACT WITH THEM.

Q. WHERE ARE YOU COMING TODAY?

A. I AM COMING FROM SAO PAOLA , BRAZIL.

Q. DID YOU ASK FOR POLITICAL ASYLUM IN BRAZIL?

A. NO.

Q. WHY NOT?

A. BECAUSE I DO NOT KNOW ANYONE THERE?

Q. ARE YOU AN ITALIAN CITIZEN?

A. NO, I AM NOT.

Q. WHY DID YOU PRESENT AN ITALIAN PASSPORT IF YOU ARE NOT AN ITALIAN?

A. I BOUGHT IT FROM SOMEONE.

Q. WHO DID YOU BUY THIS PASSPORT FROM?

A. I DO NOT KNOW THE PERSON.

Q. WHERE DID YOU BUY THE PASSPORT?

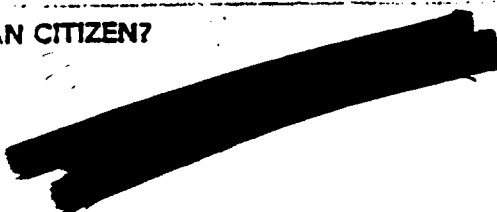
A. I BOUGHT IT IN [REDACTED] THE PLACE WHERE I LIVE.

Q. HOW MUCH DID YOU PAY FOR IT?

A. I PAID 7000.00 U.S. DOLLARS AND I BORROWED SOME OF IT.

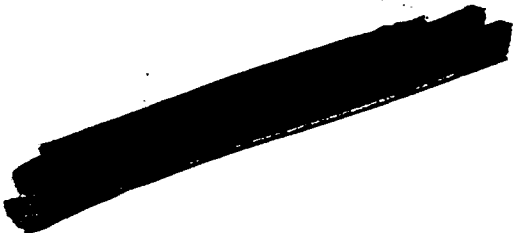
Q. WHAT DO YOU HAVE TO PROVE YOU ARE A YUGOSLAVIAN CITIZEN?

A. I HAVE NOTHING.



2. DID YOU KNOW IT IS AGAINST U.S. IMMIGRATION LAW TO PRESENT A DOCUMENT TO  
TO AN U.S. IMMIGRATION OFFICER THAT IS NOT YOUR OWN?

A I WAS AWARE.



**Jurat for Record of Sworn Statement in  
Proceedings under Section 235(b)(1) of the Act**

1. Why did you leave your home country or country of last residence?

I WENT TO ALBANIA FOR 9 MONTHS AND RETURNED TO YUGOSLAVIA AND I COULDN'T FIND MY WIFE AND CHILDREN, SO I LEFT YUGOSLAVIA, SO I WOULD'N HAVE TO GO TO JAIL.

2. Do you have any fear or concern about being returned to your home country or being removed from the United States.

YES

3. Would you be harmed if you are returned to your home country or country of last residence?

YES.

4. Do you have any questions or is there anything else you would like to add?

I WANT TO HAVE MY NOTEBOOK.

ANSWER: I WILL GIVE IT TO HIM?

I have read (or have had read to me) this statement, consisting of \_\_\_\_\_ pages (including this page). I state my answers are true and correct to the best of my knowledge and that this statement is a full, true and correct record of my interrogation on the date indicated by the above-named officer of the Immigration and Naturalization Service. I have initialed each page of this statement (and the corrections noted on page(s) \_\_\_\_\_).

Signature: \_\_\_\_\_

Sworn and subscribed to before me Miami International Airport

9-21-97

Isabelle Bryant SOI  
Officer, United States Immigration and Naturalization Service

Witnessed by: \_\_\_\_\_

Aline Lopez SOI



DETERMINATION OF INADMISSIBILITY

File No. [REDACTED]

Date: 09/21/97

In the Matter of: [REDACTED]

Pursuant to section 235(b)(1) of the Immigration and Nationality Act (Act), (8 U.S.C. 1225(b)(1), the Immigration and Naturalization Service has determined that you are inadmissible to the United States under section(s) 212(a)  (6)(C)(i);  (6)(C)(ii);  (7)(A)(i)(I);  (7)(A)(i)(II);  (7)(B)(i)(I); and/or  (7)(B)(i)(II) of the Act, as amended, and therefore are subject to removal, in that:

- You are ineligible for admission to the United States because
- You have sought to procure a visa, other documentation, or admission into the United States by fraud or by willfully misrepresenting a material fact. to wit: a photosubbed passport
- You did not then possessor present a valid immigrant visa, reentry permit, border crossing identification card, or other valid entry document.

ISABELLE BRYANT SOI, Immigration Inspector  
Name and title of immigration officer (Print)

*Isabelle Bryant SOI*  
Signature of immigration officer

ORDER OF REMOVAL  
UNDER SECTION 235(b)(1) OF THE ACT

Based upon the determination set forth above and evidence presented during inspection or examination pursuant to section 235 of the Act, and by the authority contained in section 235(b)(1) of the Act, you are found to be inadmissible as charged and ordered removed from the United States.

Michelle R. Lonsdale, AO  
Name and title of immigration officer (Print)

*Michelle R. Lonsdale*  
Signature of immigration officer

Warren H. Janssen, SA  
Name and title of supervisor (Print)

*Warren H. Janssen*  
Signature of supervisor, if available

Check here if supervisory concurrence was obtained by telephone or other means (no supervisor on duty).

CERTIFICATE OF SERVICE

I personally served the <sup>Copy</sup> original of this notice upon the above named person on 09/21/97 10/8/97  
(Date)  
*Michelle R. Lonsdale*  
Signature of immigration officer

**UNITED NATIONS  
HIGH COMMISSIONER  
FOR REFUGEES**



*Regional Office  
for the United States of America &  
the Caribbean*

1775 K Street, NW  
Suite 300  
Washington DC 20006

**NATIONS UNIES  
HAUT COMMISSARIAT  
POUR LES REFUGIES**

*Bureau Régional  
pour les Etats-Unis d'Amérique et  
Caraïbes*

Telephone: (202) 296-5191  
Fax: (202) 296-5660  
E-mail: USAWA@UNHCR.CH

Copy

17 February 1999

Dear Commissioner Meissner:

In the light of recent news articles focusing on mandatory detention laws enacted in 1996 in the United States and the INS's implementation of these laws, the Washington Regional Office of the United Nations High Commissioner for Refugees (UNHCR) would like to take this opportunity to share with you the *UNHCR Revised Guidelines on the Detention of Asylum-Seekers*, released on 10 February 1999, and to reiterate UNHCR's concerns regarding the detention of refugees and asylum-seekers. It is UNHCR's position that, with limited exceptions, refugees and asylum-seekers should not be detained and that, whenever feasible, alternatives to detention should be used. When you met with UNHCR's High Commissioner last May, we were pleased to hear that your office was looking at alternatives to detention, and we hope that serious consideration continues to be given to finding such alternatives.

Among our concerns is the recent detention, mandated by Congress, of asylum-seekers and refugees, some of whom have become lawful permanent residents of the United States, without regard for whether the individuals pose a danger to the community or a risk of flight. Some may have been convicted of nonviolent crimes or crimes for which no incarceration was ordered; some may have been convicted and served their sentences many years ago, at a time when their offenses were not grounds for deportation. In some regions, strict implementation of the law has resulted in the detention of legal immigrants, including refugees, for minor crimes committed years ago. Such individuals now face long term detention or removal to countries where they may suffer threats to their life or freedom or other serious violations of their human rights. Moreover, we are disturbed by recent reports by Human Rights Watch and Amnesty International that individuals in detention are subjected to harsh conditions, including lack of access to adequate health care and prolonged detention in solitary confinement. Such conditions, as well as the lack of access to lawyers and interpreters, are problems that are exacerbated as more individuals are detained and the INS resorts to the use of local jails in isolated areas.

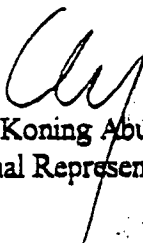
Doris Meissner  
Commissioner  
Immigration and Naturalization Service  
425 Eye Street, NW  
Washington, DC 20536

The increase in detention is not limited to those who may have been convicted of crimes, but includes asylum applicants who arrive at ports of entry and are detained while their cases are pending, even though they are eligible for parole. Many of these individuals remain in detention for months and even years, regardless of the fact that they have not been accused or convicted of any crime, that they have established that they have a credible basis for their asylum claim, and that they have a place to live while their cases are pending. In such cases, as well as in those noted above, where it is determined that the individual is neither a threat to society nor a flight risk, detention is an undeserved punishment that is also costly to the United States government and that can be avoided with appropriate alternatives.

While recognizing the dual nature of your mandate both to provide service and enforce restrictions, and the conflicts that arise as a result, we applaud efforts by your agency to continue to use its discretion to parole individuals who seek asylum at ports of entry and to decide on the detention, release, or removal of individuals who have been convicted of crimes. We agree that such decisions should be made after full review of an individual's record. Consideration must be given to mitigating or aggravating factors surrounding any criminal conviction, as well as to the dire consequences of removal of a refugee to a country of feared persecution.

We hope that our views are helpful and that we can continue to work together to ensure the humane implementation of laws regarding the detention of refugees and asylum-seekers. With this goal in mind, we strongly encourage the development and implementation of alternatives to detention whenever appropriate.

Sincerely,



Karen Koning AbuZayd  
Regional Representative

Appendix I



U.S. Department of Justice  
Immigration and Naturalization Service

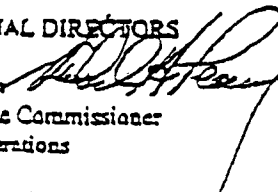
HCOPS (DDP) 50/16-C

Office of the Executive Associate Commissioner

415 I Street NW  
Washington, DC 20536

OCT - 7 1998

MEMORANDUM FOR REGIONAL DIRECTORS

FROM: Michael A. Pearson   
Executive Associate Commissioner  
Office of Field Operations

SUBJECT: Detention Guidelines Effective October 9, 1998

As you know, the Immigration and Naturalization Service (INS) supported a legislative proposal for extension of the Transition Period Custody Rules (TPCR). This extension will allow us to continue the exercise of discretion in custody determinations. However, we expect that it will be some time before this discretion is granted with the result that as of October 9, 1998, TPCR discretionary authority will no longer be in effect. Attached with this memorandum are the detention guidelines which will be in effect as of October 9.

I recognize that 100 percent compliance with these guidelines will be virtually impossible to achieve immediately. Furthermore, 100 percent adherence to the guidelines would have major impacts on other program operations which are critical to the overall INS mission. We have met with Congressional staff to advise them of the impacts on our operations resulting from the expiration of TPCR. We have been advised that we may get future Congressional support for some type of discretionary relief from mandatory detention, but only if we can document and demonstrate that a maximum effort to comply with the detention mandates has been made. Shortly, we will provide you with guidance concerning additional data that we will need to collect and provide to Congress.

At this time, I am directing that, to the extent possible, you adhere to the detention scheme outlined in the attached and work toward utilizing 80 percent of your bedspace for mandatory detention cases. In the event that a District Director, Chief Patrol Agent, or Officer In Charge makes a custody determination which is not in keeping with the guidelines (e.g., a Category 1 case is released to make detention space for a Category 2 or 3), the reasons for the decision must be clearly documented in writing and placed in the alien's file. At any time the mandatory detention occupancy falls below 80 percent of available bedspace, the responsible field manager must notify the Regional Director.

In the event that your District Directors have released someone prior to October 9, who is now subject to detention, nothing in this memorandum should be construed as requiring their re-arrest/detention. However, if conditions have changed or circumstances warrant, nothing should preclude you from exercising your authority to re-arrest and detain.

## Appendix I, continued

MEMORANDUM FOR REGIONAL DIRECTORS  
Subject: Detention and Deportation Effective October 9, 1998

Page 2

Additionally, each Regional Director is directed to prepare a written monthly summary of custody determinations made by field offices within your respective jurisdictions which are inconsistent with the attached detention guidelines. The monthly summaries will be used to justify our need for continued discretion in detention decisions in our ongoing discussions with the Department of Justice, the Administration, and the Congress. The first monthly summary will be for the month ending October 31. Regions should forward the summaries to this office not later than 1 week after the end of the month.

Attachment:



U.S. Department of Justice  
Immigration and Naturalization Service

HQOPS 50/10

425 I Street NW  
Washington, DC 20536

OCT - 7 1998

INS DETENTION USE POLICY  
October 9, 1998

## I. INTRODUCTION

This policy governs the detention of aliens and supercedes the Detention Use Policy issued July 14, 1997. The purpose of this policy is to revise the detention priorities of the Immigration and Naturalization Service (INS) in light of the expiration of the Transition Period Custody Rules (TPCR). Section 236(c) of the Immigration and Nationality Act (INA) is now in full force and effect. With the expiration of the TPCR, certain portions of 8 C.F.R. § 3.19 and § 236.1, as noted in those sections, no longer apply.

Under this policy, the four categories of alien detention are: (1) required (with limited exceptions), (2) high priority, (3) medium priority, and (4) lower priority. Aliens in category 1--required detention--must be detained, with a few exceptions. Aliens in categories 2, 3, and 4 may be detained depending on the availability of detention space and the facts of each case. Aliens in category 2 should be detained before aliens in categories 3 or 4, and aliens in category 3 should be detained before aliens in category 4. The District Director or Sector Chief retains the discretion, however, to do otherwise if the facts of a given case require.

These instructions do not apply to the detention and release of juveniles, which is covered in other INS policies.

Appendix I, continued

PAGE 2

III. DEFINITIONS

- **Required detention:** Detention of certain classes of aliens required by the INA or applicable regulations. With few exceptions, aliens subject to required detention must be detained and are not eligible for release.
- **Discretionary detention:** Detention of aliens authorized but not required by the INA or applicable regulations. All aliens in proceedings are subject to discretionary detention unless they fit into one of the categories covered by required detention. Aliens subject to discretionary detention are eligible to be considered individually for release.
- **Final order of removal:** Final removal order issued by an immigration officer, an immigration judge (IJ), the Board of Immigration Appeals, or a Federal judge to an alien placed in proceedings on or after April 1, 1997. INS officers should consult District counsel on issues regarding the finality of removal orders.
- **Final order of deportation or exclusion:** Final deportation or exclusion order issued by an immigration officer, an immigration judge, the Board of Immigration Appeals, or a Federal judge to an alien placed in proceedings before April 1, 1997. INS officers should consult District counsel on issues regarding the finality of deportation or exclusion orders.

III. DETENTION CATEGORIES

A. Arriving Aliens: Expedited Removal under INA § 235.

Category 1: Required detention (with exceptions)

- **Aliens in Expedited Removal.** Arriving aliens at Ports-of-Entry who are inadmissible under INA § 212(a)(6)(C) or 212(a)(7) are subject to expedited removal proceedings pursuant to INA § 235(b)(1). Any alien placed into expedited removal must be detained until

## Appendix I, continued

PAGE 3

removed from the United States and may not be released from detention unless (1) parole is required to meet a medical emergency or legitimate law enforcement objective, or (2) the alien is referred for a full removal proceeding under § 240 (for example, upon a finding of "credible fear of persecution"). Although parole is discretionary in all cases where it is available, it is INS policy to favor release of aliens found to have a credible fear of persecution, provided that they do not pose a risk of flight or danger to the community. See INA §§ 235(b)(1), 8 C.F.R. § 235.1.

Aliens who are ordered removed under expedited removal and who make an unverified claim to United States citizenship, or to lawful permanent resident, refugee, or asylee status, are referred to an IJ for a status review under 8 C.F.R. § 235.3(b)(5)(iv). Such aliens must be detained pending this review, unless parole is required to meet a medical emergency or legitimate law enforcement objective.

If there is insufficient detention space to detain an alien in expedited removal who arrived at a land border Port-of-Entry and claims a fear of persecution unrelated to Canada or Mexico, that alien may be required to wait in Canada or Mexico pending a final determination of his or her asylum claim. If an alien expresses a fear of persecution related to Canada or Mexico, the alien must be detained for proceedings and may not be required to wait in that country for a determination of the claim.

Aliens subject to expedited removal who arrive at a land border Port-of-Entry, but do not claim lawful status in the United States or a fear of persecution, should be processed immediately and detained until removed. These aliens should not be required to wait in Mexico or Canada pending the issuance of an expedited removal order.

The INS may permit an alien in expedited removal to withdraw his or her application for admission.

## Appendix I, continued

PAGE 4

Note that the INS maintains approximately 1,100 User Fee beds, which are funded by the User Fee Account. The INS can only use these beds for aliens arrested in support of airport operations.

- B. Aliens in Proceedings: INA § 240 (Removal), § 238 (Expedited Removal of Criminal Aliens), Former INA § 236 (Exclusion), and Former INA § 242 (Deportation).

1. Category 1: Required detention (with exceptions)

- Aliens subject to required detention in removal and deportation proceedings. Pursuant to INA § 236(c), the INS must take into custody all aliens who are chargeable as terrorists, and virtually all aliens who are chargeable as criminals, upon their release from criminal incarceration or custody. § 236(c) does not apply to the following groups of aliens who are removable as criminals: (a) aliens who are removable under § 237 for a single crime involving moral turpitude, if they were sentenced to less than a year; (b) aliens who are removable under § 237 for a conviction for high-speed flight from an immigration checkpoint (18 U.S.C. § 758); and (c) aliens who are removable under § 237 for crimes relating to domestic violence, stalking, and the abuse or neglect of children.

§ 236(c) applies to aliens in both removal proceedings under § 240 and deportation proceedings under former § 242. Therefore, under § 236(c) the INS must continue to detain aliens who are described in that section (by their § 237 equivalents) if (a) they were previously taken into custody while in deportation proceedings (i.e., charged under § 241 in proceedings commenced prior to April 1, 1997) and (b) they are still in custody upon the expiration of the TPCR. Note that current § 236(c) does not apply to aliens in exclusion proceedings under former § 236.



Appendix I continued

PAGE 5

Once in INS custody, the alien may be released during proceedings only if the Attorney General determines that it is necessary to protect a witness, a person cooperating with an investigation, or a family member of such a person. To be considered for release in the exercise of discretion, the alien must also demonstrate that release would not pose a danger to persons or property and that the alien does not pose a flight risk. See the requirements set forth at INA § 236(c)(2).

- Aliens with aggravated felony convictions in exclusion proceedings. The INS must detain any alien in exclusion proceedings under former § 236 (i.e., charged under § 212 in proceedings commenced prior to April 1, 1997) who has been convicted of an aggravated felony, as currently defined under INA § 101(a)(43). The INS may not parole such an alien during exclusion proceedings. Note that the expiration of the TPCR has no effect on these aliens since the TPCR did not apply to them.
- 2. Category 3: High Priority
  - Aliens removable on security and related grounds, if not subject to required detention.
  - Other criminal aliens not subject to required detention.
  - Aliens who are a danger to the community or a flight risk, if not subject to required detention.
  - Aliens whose detention is essential for border enforcement but are not subject to required detention.
  - Aliens engaged in alien smuggling, if not subject to required detention.

Appendix I. continued

PAGE 6

3. Category 3: Medium Priority

- Inadmissible, non-criminal arriving aliens who are not in expedited removal proceedings and are not subject to required detention.
- Aliens who have committed fraud before the INS, if not subject to required detention.
- Aliens apprehended at the worksite who have committed fraud in obtaining employment, if not subject to required detention.

4. Category 4: Low Priority

- Other removable aliens, if not subject to required detention.
- Aliens originally placed in expedited removal who have been referred for a full removal proceeding under § 240 upon a finding of a "credible fear of persecution." See the discussion at section A.1 above regarding the INS policy favoring release.

C. Aliens with Final Orders of Removal, Deportation, or Exclusion.

1. Category 1: Required detention (with exceptions)

- All aliens who have final orders of removal and all aliens who have final orders of deportation and are subject to required detention. This category includes all aliens ordered removed under revised § 240, whether or not they are terrorists or criminals, and all criminal aliens ordered removed under revised § 238. It also includes all terrorist and criminal aliens ordered deported under former § 242 if subject to required detention under § 236(c).

Revised INA § 241(a) requires the INS to remove within 90 days any of the aliens in this category. The alien

## Appendix I, continued

PAGE 7

may not be released during this 90-day period. See INA § 241(a)(2).

Aliens whom INS is unable to remove within 90 days should be released under an order of supervision. See INA § 241(a)(3). However, the INS may continue to detain certain aliens, including, among others, those who are inadmissible on any ground; deportable or removable on criminal or security grounds; dangerous; or flight risks. See INA § 241(a)(6).

- Aliens with final orders under expedited removal. The INS must detain aliens who have been issued final orders under expedited removal (revised § 235(b)(1)) on grounds of being inadmissible under INA § 212(a)(6)(C) or § 212(a)(7). Pending immediate removal, the INS must detain such an alien. However, the INS may stay the removal of such an alien if removal is not practicable or proper, or if the alien is needed to testify in a criminal prosecution. See INA § 241(c)(2).
  - Aliens convicted of aggravated felonies with final orders of exclusion. The INS must continue to detain until removal any alien with a final order of exclusion (i.e., charged under section 212 in proceedings commenced prior to April 1, 1997) who has been convicted of an aggravated felony, as currently defined under INA § 101(a)(43). The INS may not parole such an alien unless the alien is determined to be unremovable pursuant to old INA § 236(e)(2) and the alien meets the criteria for release under that provision. See former INA § 236(e) (as designated prior to April 1, 1997) and the Mariel Cuban parole regulations at 8 C.F.R. §§ 212.12 and 212.13.
2. Category 2: High Priority
- Aliens with final orders of deportation (if not terrorists or criminals subject to required detention under § 236(c) and § 241(a)) or exclusion (if not aggravated felons). Aliens placed into proceedings

## Appendix I, continued

PAGE 8

prior to April 1, 1997, who were or are ordered deported or excluded, are only subject to required

- detention if terrorists or convicted of certain crimes. See part C.1 above. Otherwise, they are subject to discretionary detention and, once they have a final order of deportation or exclusion, their detention should ordinarily be a high priority.

Please note that the 6-month rule of former INA § 242(c) and (d), which regards detention and release, continues to apply to those non-terrorist and non-criminal aliens with final orders of deportation. Non-aggravated felon aliens with final orders of exclusion may be paroled from custody in the discretion of the INS.

## IV. GENERAL DIRECTIONS

A. CATEGORY 1

- Aliens subject to required detention shall have first priority for all available<sup>1</sup> INS detention space.
- With the exceptions noted above, category 1 aliens shall be detained.
- Each Region should ensure that it maintains sufficient non-criminal detention space to provide basic support for its full spectrum of law enforcement objectives. However, with the exception of this basic level of non-criminal detention space, each Region, District,

<sup>1</sup> Available detention space means space that is both available and suitable for the detention of the alien in question. For example, an alien terrorist subject to required detention would have first priority for all INS beds suitable for the detention of terrorists. No alien should be detained in an INS bed unsuitable for that alien's detention (regardless of the detention category).

Appendix I, continued

PAGE 3

- and sector must seek to comply with the detention priorities outlined above.

If a category 1 alien comes into INS custody but no detention space is available locally, the responsible office should pursue the following options in rank order:

- 1) acquire additional detention space locally, securing funds from the Region if necessary;
  - 2) transfer the alien to another INS District or Region where space or funding is available;
  - 3) release an alien in local INS custody who is not subject to required detention (i.e., an alien in category 2, 3, or 4) to make space for the category 1 alien; or
  - 4) release an alien in INS custody in another District who is not subject to required detention (i.e., an alien in category 2, 3, or 4) to make space for the category 1 alien.
- If a category 1 alien comes into INS custody when all INS criminal beds nationwide (i.e., beds not reserved for juveniles, User Fee operations, or non-criminal detention) are occupied by other category 1 aliens and there are no additional detention funds available, the responsible office should contact its Regional Director to arrange for the release of a lower-priority category 1 alien in order to permit the detention of a higher-priority category 1 alien.
  - INA § 236(c) does not require the INS to arrest any alien who is described in that section but was released from criminal incarceration or custody previously. However, if the INS later encounters such an alien in a non-custodial setting and elects to initiate immigration proceedings, the alien is subject to required detention.

Appendix I, continued

PAGE 10

- INA § 236(c) does not require the INS to re-arrest any alien who is described in that section but was released from INS custody under the TPCR.

However, the INS may re-arrest such an alien under INA § 236(b) if conditions have changed or if circumstances otherwise warrant.

B. Categories 2, 3, and 4

- Aliens in categories 2, 3, or 4 should generally be detained according to rank, higher priorities before lower priorities. Exceptions to this general rule may be made as follows:

- 1) The District Director or Sector Chief may make an exception in individual cases if local circumstances require.

- 2) The Regional Director, with the concurrence of the Executive Associate Commissioner for Field Operations, may make an exception to accommodate special regional enforcement initiatives.

- 3) The Executive Associate Commissioner for Field Operations may make an exception to accommodate special national enforcement initiatives or to address an emergency.

C. Juvenile Aliens

- This Detention Use Policy does not apply to juvenile aliens or juvenile detention spaces. Please refer to the instructions for the detention and release of juvenile aliens issued previously.

## LAW OFFICES

**FLORIDA IMMIGRANT ADVOCACY CENTER, INC.**

A NON-PROFIT ORGANIZATION DEDICATED TO PROTECTING AND PROMOTING  
THE BASIC HUMAN RIGHTS OF IMMIGRANTS OF ALL NATIONALITIES.

By fax: (702) 514-3296

April 9, 1997

Doris Meissner  
Commissioner, Immigration and Naturalization Service  
425 Eye St., N.W.  
Washington, D.C. 20536

Dear Commissioner Meissner:

We met with one Brazilian and several Haitian detainees at Krome yesterday who are scheduled for credible fear interviews under the new expedited removal process and would like to advise you of serious problems we have encountered with the process.

1. The detainees did not remotely understand the process they were undergoing. The "Information about Credible Fear Interview" handout is written only in English. No Creole speaking person read the form to the Haitian detainees at Krome or at the airport, nor was the process verbally explained to them. None of the Haitians received a notice with an interpreter's certificate. The detainees do not speak English and so could also not read the notice themselves. The notice was read once to the Portuguese-speaking detainee. Since she does not speak English, she could not then study the notice. The notices are apparently not available in any language other than English, and the content is not understandable with only one reading. The notice had significant typographical errors and still does not refer to past persecution, which is also a basis for a grant of asylum.
2. Because the detainees did not have a clue as to the process, we had to spend an inordinate amount of time explaining it and had little time to talk to them about the substance of their asylum claims.
3. It appears that a document entitled "Florida Listing of Legal Services Available" was supposed to be attached to the notice given to the detainees. The listing is only in English and was not translated to the detainees. They had no idea what the document was. In addition, it is extremely useless and inaccurate and gives detainees a false impression that legal help is readily available. Most of the organizations listed do not represent people in detention. Many are not even in South Florida.



FLORIDA IMMIGRANT  
ADVOCACY CENTER, INC.  
3000 BISCAYNE BLVD.  
SUITE 400  
MIAMI, FLORIDA 33137

TEL: (305) 573-1106  
FAX: (305) 576-6273  
CLIENTS: 1-800-386-0274

*Board of Directors**Officers:*

President  
Raquel Mateo, Esq.  
Vice-President  
Rev. Priscilla Whitehead  
Secretary/Treasurer  
Rev. Frank Smith

*Directors:*

Marleine Bastien, M.S.W.  
John Dua, Esq.  
Judy Gilbert-Gould  
Candace L. Jean, Esq.  
Janet McAliley  
Alan L. Michael, Esq.  
L. Kim Porter  
Melinda Paniagua Riddle, Esq.  
Bernie Perimutter, Esq.  
Franklin Tse, P.E.  
Peter Upton, Esq.  
Father Thomas Wenzki

*Advisory Board Members*

Deborah Anker, Esq.  
Patti Blum, Esq.  
Edgar Calm, Esq.  
Jonathan Demme  
Bill Frellick  
Niels Frezza, Esq.  
Arthur Helton, Esq.  
Ira Kurzman, Esq.  
Bishop John J. Nevins, D.D.  
Michael Ramer, Esq.  
James Silk, Esq.  
Mgr. Bryan O. Walsh

It does not include others that might provide representation. Even if a detainee could read the notice, he or she would waste a lot of time trying to contact an organization that will provide no assistance. Some of the detainees were only given one page of the list, and that page included no agencies in South Florida. The four agencies listed on that page limit their services to completing and filing immigration forms, have no attorney on staff, and provide no asylum services. Moreover, these detainees also did not receive the first page that contains the explanation of the list.

4. The notice inaccurately states "you may use the telephone while you are in detention to call a representative, friend or family member in the United States, collect or at your own expense." This is not correct. The phone system at Krome has been changed to require that all long distance calls be made collect. Detainees can no longer buy phone cards. As a result, many detainees cannot contact their families or organizations in their home countries to obtain supporting documentation or proof of identity, since many countries do not have a telephone system that permits collect international calls. The telephone system was restricted precisely at the time it needed to be most available. No mechanism exists to make free calls to legal service organizations or human rights organizations. We are not certain if local calls can still be made with coins. However, many detainees have no money. They cannot reach local legal organizations by collect calls, either because the organizations do not accept collect calls or have telephone systems (like ours) that are automated so that a live person does not answer to accept the call. There is also a continuing problem with broken telephones.
5. Some detainees report being yelled at or otherwise intimidated by the questions, manner of questioning, and statements of inspections personnel at the airports. They felt embarrassed and intimidated and did not have the chance to complete answers to questions. They were told to sign forms that hadn't been read to them and without being given an explanation of the forms. They also report being handcuffed within the airport, and that they had to lie on the floor in the cells.
6. The detainees were not brought to the attorney visitation area at Krome in a timely fashion. We lost hours awaiting their arrival and were initially told that people who were in fact there were not there. In addition, the officer in the lobby no longer has a list of detainees with alien numbers and country. It is therefore now more difficult to identify and locate detainees.
7. Some of the detainees who we were told were there for credible fear interviews had been transferred. No one could explain whether this was by error or because it had been determined that they should not be in that process. We lost valuable time trying to locate them. Not knowing whether a detainee will actually be at Krome makes bringing interpreters very difficult and expensive.
8. The telephone available to attorneys is a pay phone outside the lobby. It was broken and had been broken at least since Monday when we reported to the lobby officer it wasn't working.

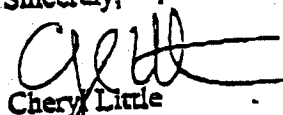


9. There are no facilities to copy documents.


The asylum officers who were at Krome were very cooperative; however, what happens at the airports or in obtaining access to detainees at Krome cannot be solved by them. We have written several letters to District Director Robert Wallis asking to meet with him concerning establishing a pro bono program legal representation program at Krome. This will be a joint project with the Catholic Legal Immigration Network (CLINIC) for which we will soon have funding. While people from his office have advised us that he will meet with us, they have not arranged such a meeting. We believe that establishment of such a project and resolution of the problems at the airports and in access at Krome are of crucial importance.

We look forward to hearing from you soon concerning the matters raised in this letter. Thank you.

Sincerely,



Cheryl Little

  
Joan Friedland

cc: Phyllis Coven  
(202) 633-1068

Robert Wallis  
(305) 530-7978

Judy Rabinovitz, ACLU  
(212) 221-5937

Christina DeConcini, ABA  
(202) 662-1032

## LAW OFFICES

**FLORIDA IMMIGRANT ADVOCACY CENTER, INC.**

A NON-PROFIT ORGANIZATION DEDICATED TO PROTECTING AND PROMOTING  
THE BASIC HUMAN RIGHTS OF IMMIGRANTS OF ALL NATIONALITIES.



FLORIDA IMMIGRANT  
ADVOCACY CENTER, INC.  
3000 BISCAYNE BLVD.  
SUITE 400  
MIAMI, FLORIDA 33137

TEL: (305) 573-1106  
FAX: (305) 576-6273  
CLIENTS: 1-800-396-0334

*Board of Directors**Officers:*

*President:*  
Raquel Matas, Esq.  
*Vice-President:*  
Rev. Priscilla Whitehead  
*Secretary/Treasurer:*  
Rev. Frank Smith

*Directors:*

Marieine Bastien, M.S.W.  
John Duc, Esq.  
Judy Gilbert-Gould  
Candace L. Jean, Esq.  
Janet McAliley  
Alan L. Michael, Esq.  
L. Kim Porter  
Melinda Paniagua Riddle, Esq.  
Bernie Perlmutter, Esq.  
Franklin Tac, P.E.  
Peter Upton, Esq.  
Father Thomas Wenzki

*Advisory Board Members*

Deborah Anker, Esq.  
Patti Blum, Esq.  
Edgar Cahn, Esq.  
Jonathan Demme  
Bill Fretlick  
Niels Frenzen, Esq.  
Arthur Helton, Esq.  
Ira Kurzman, Esq.  
Bishop John J. Nevins, D.D.  
Michael Ratner, Esq.  
James Silk, Esq.  
Magr. Bryan O. Walsh

By fax: (202) 514-3296

April 14, 1997

Doris Meissner  
Commissioner, Immigration and Naturalization Service  
425 Eye St., N.W.  
Washington, D.C. 20536

Dear Commissioner Meissner:

We are writing concerning the four credible fear interviews that we attended at Krome on April 10 and 11, 1997. Two of the applicants were Haitian, one was Albanian, and one was Brazilian. For the reasons outlined below, we are concerned that interviews like these further undermine an asylum applicant's ability to seek asylum:

TELEPHONE TRANSLATIONS:

- ◆ **Competence:** All translations were done by AT&T translators on the telephone. The interpreters identified themselves only by number, not name. There was no mechanism to test their competence, and, in fact, there was a great range of competence. One of the Creole interpreters made repeated and serious mistakes in translation. The corrections to his translations were very confusing to the applicant, to such an extent that the attorney had to stop making corrections. The Portuguese translator's errors were corrected by the asylum officer who spoke Portuguese. We were able to identify the errors only because we brought along a Creole interpreter to tell us if the translation was accurate and because the Portuguese-speaking officer herself corrected errors. In most credible fear interviews, this will not happen.
- ◆ **Instructions to translators:** The asylum officers did not give initial instructions to the applicant or the interpreter about speaking in manageable blocks of testimony. Nor were the interpreters consistently instructed to translate literally. As a result, the interpreter sometimes appeared to be condensing an answer. This became clear when the Albanian interpreter herself responded to the officer's question with the information the applicant had obviously given previously but which had not been translated. Also, the incompleteness of a Creole interpreter's translation was pointed out by our translator. Moreover, applicants were

not aware they should continue an answer when interrupted to allow for translation. Sometimes, the officer went on to another question although the applicant had not completed an answer or was even in mid-sentence.

- ◆ **Noise and transmission problems:** It was extremely difficult to hear either because of background noise at Krome or the quality of the transmission. Errors occurred because the translator and the applicant could not hear properly, and extra time had to be taken to repeat testimony or to correct errors. Some errors were likely not caught.
- ◆ **Visual cues:** Translators rely on visual cues. Telephone translations eliminate a critical source of determining the applicant's meaning. Since the interpreter is not in the room, he/she cannot tell when an applicant has not completed an answer. The disembodied voice translating questions and testimony was unnerving to some of the applicants.

### THE RECORD

- ◆ **Documents in the INS file:** We were denied access to all documents in the INS file, including the applicants' sworn statement at the airport. These documents will be relied on by asylum officers in making their determination. Given what we know of early proceedings at the airport, these records may well be inaccurate but the applicant will not have an opportunity with the asylum officer to explain or correct the record. Additionally, one of the applicants interviewed last week is the dependent in an asylum application previously filed by her husband, but we were not given the complete application to review before the interview and were given only a portion of the application after the interview. Fundamental fairness requires that the applicant have access to the documents the officer will rely on.
- ◆ **Asylum office record of interview:** The interviews are not taped. One officer did not consistently write down critical parts of the applicant's answers. The incompleteness or inaccuracy of the officer's notes could hurt an applicant either in the credible fear decision or in later proceedings.

### CONDUCT OF INTERVIEW

- ◆ **Preliminary information:** The asylum officers did not introduce themselves and had apparently not received instructions to attempt to make the applicant feel at ease, nor did they acknowledge the emotional nature of the interview, including when the applicants cried. They simply read a written statement at the beginning explaining in very brief, legalistic and formal terms certain matters related to the interview.
- ◆ **Information about the interview:** The asylum officers do not review the information that the applicant was supposed to be given at the airport and in written form. They therefore cannot know if the applicant was given that information. The information read to the applicant at the interview is entirely insufficient to explain the process.

- ◆ Lack of proper follow through: One of the officers interrupted answers to critical questions to allow for translation but then did not instruct the applicant to complete his answer. Only at the end of the interview was the attorney permitted to ask the officer to allow the applicant to complete his answer.
- ◆ Length of interview: The interviews were quite long. The officers asked in great detail about matters relevant to an ultimate grant of asylum. This hurts applicants who are not yet prepared for an interview in such depth and provides insufficient time for their representative to gather information that may be helpful to their claims.

### THE ROLE OF THE ATTORNEY

- ◆ Attorney as representative: The attorney is not viewed as the applicant's representative and G-28's are neither required nor accepted.
- ◆ Right to function as attorney: The asylum officers were apparently not instructed that the attorney should play a meaningful role. The attorneys' suggestion of questions was either ignored or only grudgingly accepted, and a clarification was viewed as an interruption. The officers attempted to end the participation of the translators without asking the attorneys if they had anything to say.
- ◆ Lack of access to documents: As a result of the lack of access to the INS file, as described above, an attorney cannot properly perform her role at the interview.
- ◆ Notice of decision: The asylum officers would not promise to provide notice to the attorney of their decision. Since communications from Krome by telephone are difficult and time is so short, it is critical that the attorney receive immediate notice (for example by fax) of the credible fear decision.

### WAITING AND TIME OF INTERVIEW

- ◆ Waiting: The interviews started late. One began at noon, hours after its scheduled time, when a detainee would normally be eating lunch. The loss of time is particularly troubling given the scarcity of pro bono attorneys, the quickness with which interviews are scheduled, the need for attorneys to spend considerable time to educate applicants about the credible fear process, and the delays in bringing detainees out for attorney consultation. We should point out that officers at Krome instructed us last week that we needed to sign a "Release of Liability" form if we wished to speak to detainees during meal times. This form states that the meal period cannot be changed nor can meals be saved, and requires us to release the INS from any responsibility to "make extra considerations" for detainees' meals and to acknowledge that the detainee might not be fed until the next available meal.

As the above problems make clear, the role of an attorney in the credible fear process is critical. The Miami District Director has not yet scheduled a meeting with us to discuss a pro bono

representation project at Krome. Robert Wallis's assistant called several weeks ago and said we would be contacted concerning an appointment; however, at a press conference last week, Mr. Wallis advised Cheryl Little he was unaware of our requests but that a meeting would be arranged.

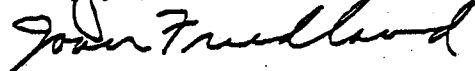
We understand the asylum officers are working under difficult circumstances and appreciate their efforts to accommodate our schedules and to hear our complaints. The officers appeared to be trying to do the interviews "by the book." We are all doing this for the first time, and the INS may not have anticipated all the problems we have encountered. We hope by bringing them to your attention, these problems will be resolved.

We look forward to hearing from you soon concerning the matters raised in this letter. Thank you.

Sincerely,



Cheryl Little



Joan Friedland

cc: Phyllis Coven  
(202) 633-1068

Robert Wallis  
(305) 530-7978

Judy Rabinovitz, ACLU  
(212) 221-5937

Christina DeConcini, ABA  
(202) 662-1032

## LAW OFFICES

**FLORIDA IMMIGRANT ADVOCACY CENTER, INC.**

A NON-PROFIT ORGANIZATION DEDICATED TO PROTECTING AND PROMOTING  
THE BASIC HUMAN RIGHTS OF IMMIGRANTS OF ALL NATIONALITIES.



FLORIDA IMMIGRANT  
ADVOCACY CENTER, INC.  
3000 BISCAYNE BLVD.  
SUITE 400  
MIAMI, FLORIDA 33137

TEL: (305) 573-1106  
FAX: (305) 576-6273  
CLIENTS: 1-800-396-0334

*Board of Directors**Officers:*

**President**  
Raquel Matas, Esq.  
**Vice-President**  
Rev. Priscilla Whitehead  
**Secretary/Treasurer**  
Rev. Frank Smith

*Directors:*

Marlene Bastien, M.S.W.  
John Due, Esq.  
Judy Gilbert-Gould  
Candace L. Jean, Esq.  
Janet McAliley  
Alan L. Michael, Esq.  
L. Kim Porter  
Melinda Pennington Riddle, Esq.  
Bernie Perlmutter, Esq.  
Franklin Tsai, P.E.  
Peter Upton, Esq.  
Father Thomas Wenski

*Advisory Board Members*

Deborah Anker, Esq.  
Paul Blum, Esq.  
Edgar Cahn, Esq.  
Jonathan Demmes  
Bill Frelick  
Niels Frenzen, Esq.  
Arthur Halton, Esq.  
Ira Kurzban, Esq.  
Bishop John J. Nevins, D.D.  
Michael Ramer, Esq.  
James Silk, Esq.  
Magr. Bryan O. Walsh

By fax: (202) 514-3296

April 15, 1997

Doris Meissner  
Commissioner, Immigration and Naturalization Service  
425 Eye St., N.W.  
Washington, D.C. 20536

Dear Commissioner Meissner:

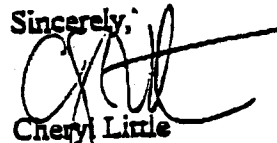
We are writing to supplement our April 14, 1997 letter concerning credible fear interviews and to express our concern about the lack of sufficient time for asylum applicants to consult with attorneys.

First, substantial time was lost tracking down detainees and waiting to interview them. Second, because the INS did not provide the applicants with information about the asylum process in their own language, much of our time was spent explaining the process. Third, time is needed to locate interpreters. Fourth, preparation for credible fear interviews, especially in light of the detailed questions that were asked, requires repeated meetings with the applicant. This is necessary not only to establish a level of trust with the applicant, but also to explain the American legal system and the importance of giving concrete and specific information. Adequate time to prepare for such an interview goes well beyond the few days we were given and would not unreasonably delay the process..

In addition, we were not permitted to confer privately with our clients during the interview. We requested time to confer privately with a Haitian asylum applicant whose interview lasted at least two hours. The interview was an emotionally trying experience for her because her husband and two children had been murdered in Haiti. We asked to speak to her privately after the asylum officer finished his questions, but before the interview was concluded, so that we could ensure that she had had an opportunity to adequately explain her experiences in Haiti and her fear of returning there. The officer denied the request. The denial appeared to be related to the fact that the interpreter was waiting on the telephone and would have to be paid for the time we were conferring outside his presence.

We hope this additional information is helpful to you.

Sincerely,



Cheryl Little



Joan Friedland

cc: Phyllis Coven  
(202) 633-1068

Robert Wallis  
(305) 530-7978

Judy Rabinovitz, ACLU  
(212) 221-5937

Christina DeConcini, ABA  
(202) 662-1032

LAW OFFICES

# FLORIDA IMMIGRANT ADVOCACY CENTER, INC.

A NON-PROFIT ORGANIZATION DEDICATED TO PROTECTING AND PROMOTING  
THE BASIC HUMAN RIGHTS OF IMMIGRANTS OF ALL NATIONALITIES.



By fax: (202) 305-2918

April 21, 1997

Phyllis Coven  
Immigration and Naturalization Service  
425 Eye St., N.W.  
Washington, D.C. 20536

Dear Phyllis:

Thank you for taking the time to speak to us on April 17. We believe the INS agreed to take the following steps to ensure a fairer process:

1. Translators will be given orientation.
2. If a translator appears to be doing a poor job, the attorney can request a different translator.
3. The Asylum Office will bring in their own conference phones to improve telephone quality.
4. D&D personnel will be given a checklist to ensure applicants received forms such as M-444.
5. Asylum officers will participate in an orientation process when they first go to Krome.
6. Asylum officers will make regular trips to Krome and will see new arrivals to ensure they received M-444 and orientation.
7. Asylum orientation information for applicants will be put on video.
8. Attorneys will have the same role they have in asylum office interviews, and asylum officers will be reminded of this.
9. Lisa Ford will be the INS liaison.
10. Jack Shackles will manage the program at Krome.

If our understanding concerning the above steps is incorrect, please advise us.

FLORIDA IMMIGRANT  
ADVOCACY CENTER, INC.  
3000 BISCAYNE BLVD.  
SUITE 400  
MIAMI, FLORIDA 33137

TEL: (305) 573-1108  
FAX: (305) 576-6273  
CLIENTS: 1-800-386-0334

#### Board of Directors

##### Officers:

President, Raquel Matos, Esq.  
Vice-President, Catherine  
Cassidy, Esq.  
Secretary/Treasurer,  
Maureen Kelleher, Esq.

##### Directors:

Marieine Bastien, M.S.W.  
John Duc, Esq.  
Judy Gilbert-Gould  
Janet McAilley  
Alan I. Michael, Esq.  
Melinda Paniagua Riddle, Esq.  
Rev. Frank Smith  
Franklin Tse  
Peter Upton, Esq.  
Father Thomas Wenski  
Rev. Priscilla Whitehead

#### Advisory Board Members

Deborah Aaker, Esq.  
Patti Blum, Esq.  
Edgar Cahn, Esq.  
Jonathan Demme  
Bill Fretlick  
Niris Freeman, Esq.  
Arthur Helton, Esq.  
Ira Kurzban, Esq.  
Bishop John J. Nevins, D.D.  
Michael Ratner, Esq.  
James Silk, Esq.  
Magr. Bryan O. Walsh



While we are encouraged that you are willing to discuss these matters, we feel that the above measures fall far short of resolving the many issues we raised in our April 9, 14, and 15 letters. Since this is an expedited process and people's lives are at stake, we request a more detailed and comprehensive response to our concerns.

In addition, we are very concerned about the misinformation provided by inspectors and asylum officers. As we mentioned on the telephone, an airport inspector advised an applicant that the legal services agencies that provide free services are paid by the government. During his credible fear interview, he was also told by the asylum officer that Central Americans will be denied asylum since their countries are now democratic, and that he would be detained during the asylum process which would likely last 6 months. As a result, he withdrew his request for asylum. He is not willing to give his name to INS regarding this matter because he fears reprisals.

We would also like to reiterate the need for adequate time to prepare prior to credible fear interviews. Our first interviews were conducted on April 10 and 11, and we have not received decisions. Under these circumstances, additional time prior to the interview would not have caused unreasonable delay.

Finally, as we also mentioned on the phone, the interviews can easily be heard outside the interview room and therefore are not confidential.

We look forward to your prompt response.

Sincerely,



Cheryl Little

  
Joan Friedland

## LAW OFFICES

**FLORIDA IMMIGRANT ADVOCACY CENTER, INC.**

A NON-PROFIT ORGANIZATION DEDICATED TO PROTECTING AND PROMOTING  
THE BASIC HUMAN RIGHTS OF IMMIGRANTS OF ALL NATIONALITIES.



FLORIDA IMMIGRANT  
ADVOCACY CENTER, INC.  
3000 BISCAYNE BLVD.  
SUITE 400  
MIAMI, FLORIDA 33137

TEL: (305) 573-1106  
FAX: (305) 573-6273  
CLIENTS: 1-800-396-0334

*Board of Directors**Officers:*

**President**  
Raquel Matas, Esq.  
**Vice-President**  
Rev. Priscilla Whitehead  
**Secretary/Treasurer**  
Rev. Frank Smith

*Directors:*

Marleine Bastien, M.S.W.  
John Due, Esq.  
Judy Gilbert-Gould  
Candace L. Jean, Esq.  
Janet McAilley  
Alan I. Mishaal, Esq.  
L. Kim Porter  
Melinda Pinnaguan Riddle, Esq.  
Bernie Perlmutter, Esq.  
Franklin Tee, P.F.  
Peter Upton, Esq.  
Father Thomas Wendt

*Advisory Board Members*

Deborah Anker, Esq.  
Patti Blum, Esq.  
Edgar Cahn, Esq.  
Jonathan Demme  
Bill Frelick  
Niels Frenzen, Esq.  
Arthur Helton, Esq.  
Ira Kurzman, Esq.  
Bishop John J. Nevins, L.D.  
Michael Ratner, Esq.  
James Silk, Esq.  
Magr. Bryan O. Walsh

By fax: (202) 514-3296

April 23, 1997

Doris Meissner  
Commissioner, Immigration and Naturalization Service  
425 Eye St., N.W.  
Washington, D.C. 20536

Dear Commissioner Meissner:

We are writing to inform you of our most recent concerns regarding the expedited removal process in Miami.

We have still not received any decisions from the asylum office regarding our clients' credible fear interviews which took place on April 10 and 11. All last week we were told that the decisions would be provided the next day. On Friday, April 18 we were told the decisions would be provided on Monday, April 21 at 2:30 P.M. On April 21 we were told the appointments would be postponed. Yesterday, April 22, we were advised that two of the decisions would be provided at 9:00 a.m. today. After traveling to Krome, Joar. Friedland and a Creole interpreter were told at 9:45 a.m. that the decisions could not be issued because an issue regarding forms remained to be decided by headquarters. The delays and postponements have wasted our time and caused great inconvenience.

While we do not dispute that adequate time should be taken in issuing a decision, the interviews themselves were conducted without allowing us adequate time to prepare. Furthermore, the immigration judges at Krome have stated that they can schedule appeals within 24 hours of a decision, including holding the hearings the same day as the decision. It appears that the process is expedited to the detriment of an asylum applicant whenever possible, while the INS can take whatever time it deems necessary to carry out its role.

On April 18 Don Kerwin, Chief Operating Officer of the Catholic Legal Immigration Network (CLINIC), was told by an INS trial attorney at Krome that the trial attorneys would summarize the asylum applicant's case in writing for the Immigration Judge. He also told Mr. Kerwin that none of the 10 people thus far interviewed had been found to have a credible fear of persecution. In addition, the Immigration Judges at Krome have advised us that attorneys may not represent applicants at the immigration court appeals since neither the statute nor the regulations provide a right to representation.

We are also very concerned about the misinformation provided by inspectors and asylum officers. An airport inspector recently advised one applicant that the legal services agencies that provide free services are paid by the government. During this applicant's credible fear interview, he was also told by the asylum officer that Central Americans will be denied asylum since their countries are now democratic, and that he would be detained during the asylum process which would likely last 6 months. As a result, he withdrew his request for asylum.

We have been informed by another attorney that two asylum applicants he represented were interviewed without notice to him. They were not asked if they were represented by an attorney nor were they advised that their attorney could be present at the interview. Moreover, credible fear interviews can easily be heard outside the interview room and therefore are not confidential.

While the asylum applicants have a right to consult with family and friends before their interviews, in practice there are serious impediments to this. For example, the cousin of our Albanian client flew from New York to meet with his cousin at Krome on Monday. He did not get past the guard post because the officer advised him that he could only visit with his cousin on the weekend. He could not wait for the weekend because of his job. The Krome visitation schedule therefore makes the right to consultation meaningless.

We remain concerned about the inspections process at the airport. There is an inherent conflict between the investigative and accusatory role the inspectors play in questioning people about their admissibility and their other role in determining whether the same people should be referred for credible fear interviews. Our concerns about how the inspectors will carry out their dual role have been heightened by a complaint filed with us by an American citizen whose current passport, birth certificate, driver's license and other documents were erroneously declared false by inspectors at the Miami International Airport. She was not permitted to make a telephone call while being interrogated and held at the airport. She was then detained at Krome for three days, and was released only after her mother flew here from the Dominican Republic with her expired passport and there were press inquiries about her detention. Her current passport has still not been returned to her.

We have repeatedly asked to meet with District Director Robert Wallis concerning access to Krome for our pro bono representation project, which will be jointly carried on with CLINIC. In March, Mr. Wallis's assistant advised us that he was away for the whole month and would meet with us when he returned. At a conference on April 10, Mr. Wallis advised Cheryl Little he was unaware of our requests but that a meeting would be arranged. On April 21, Cheryl Little called Mr. Wallis's office concerning the appointment, and his assistant said that he would be away for the month of May and could not meet with us until he returned in June. When Cheryl Little said that was unacceptable, she was told they would see what they could do and get back to her. On April 23, INS District Counsel Dan Vara advised Cheryl Little that Mr. Wallis would not meet with us because FIAC is a plaintiff organization in a pending law suit.

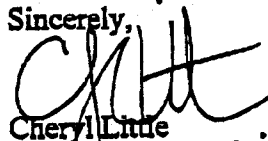
As a result, no progress has been made regarding meaningful access to Krome for legal representation, despite INS's claims of interest in seeing a pro bono project in operation at Krome.

Mr. Wallis's unavailability is compounded by the temporary assignment of officers in charge at Krome. The current O.I.C. will leave in May. She succeeded Terry Nelson, who was also a temporary O.I.C. The turnover in O.I.C.'s at Krome has resulted in constantly changing rules, to such an extent that even the officers at Krome are complaining.

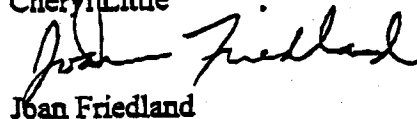
Finally, we have not received a response to our February 18 complaint to Mr. Wallis that a FIAC attorney was physically accosted by Krome officers and ordered off the premises. At a meeting on March 25, Joan Friedland was advised by the Krome O.I.C. that we would receive a response in a few days; however, we have heard nothing. Nor did we ever receive a response to our January 14 complaint to Mr. Wallis that our secretary was denied access to the INS District Office to deliver a release request to Mr. Wallis. These incidents seriously affect our ability to represent our clients and demonstrate the continuing saga of impediments to representation and unwillingness of the INS to address these concerns.

We look forward to hearing from you about these matters.

Sincerely,



Cheryl Little



Joan Friedland

cc: Phyllis Coven  
(202) 633-1068

Robert Wallis  
(305) 530-7978

Erich Cauller  
(305) 530-6071

Judy Rabinovitz, ACLU  
(212) 221-5937

Christina DeConcini, ABA  
(202) 662-1032

## LAW OFFICES

**FLORIDA IMMIGRANT ADVOCACY CENTER, INC.**

A NON-PROFIT ORGANIZATION DEDICATED TO PROTECTING AND PROMOTING  
THE BASIC HUMAN RIGHTS OF IMMIGRANTS OF ALL NATIONALITIES.



FLORIDA IMMIGRANT  
ADVOCACY CENTER, INC.  
3000 BISCAYNE BLVD.  
SUITE 400  
MIAMI, FLORIDA 33137

TEL: (305) 573-1106  
FAX: (305) 576-6273  
CLIENTS: 1-800-396-0334

*Board of Directors**Officers:*

President, Raquel Matas, Esq.  
Vice-President, Catherine  
Cassidy, Esq.  
Secretary/Treasurer,  
Maureen Kelleher, Esq.

*Directors:*

Martins Bastien, M.S.W.  
John Due, Esq.  
Judy Gilbert-Gould  
Jana McAiley  
Alan L. Mishael, Esq.  
Melinda Paniagua Riddle, Esq.  
Rev. Frank Smith  
Franklin Tsai  
Peter Upton, Esq.  
Father Thomas Wenski  
Rev. Priscilla Whitehead

*Advisory Board Members*

Deborah Anker, Esq.  
Patti Blum, Esq.  
Edgar Cahn, Esq.  
Jonathan Demme  
Bill Frelick  
Niels Fransen, Esq.  
Arthur Helton, Esq.  
Ira Kurzban, Esq.  
Bishop John J. Nevins, D.D.  
Michael Ratner, Esq.  
James Silk, Esq.  
Mgr. Bryan O. Walsh

By fax: (202) 514-3296

April 28, 1997

Doris Meissner  
Commissioner, Immigration and Naturalization Service  
425 Eye St., N.W.  
Washington, D.C. 20536

Dear Commissioner Meissner:

We are deeply troubled by yet another stage of the credible fear process: the asylum office decision and review by an immigration judge. On April 24, we received three decisions in cases in which interviews were conducted on April 10 and 11, 1997. One applicant was found to have a credible fear of persecution, the other two were issued negative decisions. Of those two, one appealed to the immigration judge at the time the decision was issued. On Friday, April 25, 1997 her hearing with the immigration judge was scheduled for Monday, April 28. The other did not appeal to the immigration judge at the time the decision was issued; however, on April 28 she advised us that she wished to appeal, and we advised the asylum officer of this fact.

THE RECORD

Asylum applicants and their "consultants" are denied access to documents that form the basis of the credible fear decision. The asylum officer relies on a sworn statement purportedly made by the applicant at the airport. Neither the applicant nor his attorney has access to the statement, which, given problems in airport inspection we have already described, may well be inaccurate. That statement is forwarded to the immigration judge, who already has refused to provide the sworn statement to the applicant and denied the applicant access to the court file. There may also be other documents in the court file that we are not aware of because we have not been permitted to review the court file.

THE DECISION

Form I-870 Record of Determination/Credible Fear Work Sheet has an addendum consisting of Credible Fear Assessment and APSO Interview Notes. The APSO Interview Notes are in the form of questions and answers which, on its face, appears to be a transcript of the interview. For two of our clients, this question and answer section does not correspond to the interview itself, leaves

out critical testimony, and misrepresents the testimony given. The credible fear assessment is likewise deficient and conflicts with the question and answer section.

The defects in the Credible Fear Assessment and APSO Interview notes are critical. Many applicants will be unaware of the errors because only a portion of the Credible Fear Assessment and none of the Q&A section was translated to the applicant. Unrepresented applicants will be unaware that the errors exist. Conflicts between the applicant's testimony at the review stage and the asylum officer's misleading notes will be held against the applicant. Conflicts between the applicant's testimony at a full asylum hearing and the officer's misleading notes will be held against the applicant in the final asylum determination. Applicants with lawyers will have to rely on lawyers with interpreters to translate these sections so that the applicant is aware of the errors.

The deficiencies are particularly damaging because the asylum officers do not tell the applicants, at any meaningful time, what they believe the testimony actually was. Section 1.20 of Form I-870 Record of Determination/Credible Fear Worksheet states "[t]he APSO summarized the applicant's claim orally, and asked the applicant if she or he had anything to add or change. The APSO's statement and the answer were recorded, in Q&A format, in the interview notes." While this section is checked off in Form I-870, at no time during the interview did the asylum officer summarize the applicant's claim orally and ask the applicant if she or he had anything to add or change. This conflicts with 8 CFR Section 208.30(b) which requires the officer to create a summary of the material facts and to provide the applicant with an opportunity to correct errors therein. The applicant does not receive the Credible Fear Assessment and APSO interview Notes until after the decision has been rendered when it is too late to make corrections.

The Credible Fear Assessment and APSO notes also omit any mention of the applicant's emotional state while testifying. For example, one denied applicant cried deeply when she talked about the murder of her husband and two of her children. Not only did the officer not mention this, but he attributed her difficulty in talking about these subjects to lack of credibility.

The decision read to the applicant is conclusory and incomprehensible, and unrepresented applicants will not have a clue as to the meaning or basis of the decision. For example, one denied applicant was told only that "[I]n the determination of credible fear, there was no nexus to one of the five grounds." As a summary of that decision, the asylum officer read only that "You have not established credible fear because there is no significant possibility that any harm or fear you expressed is on account of one of the five grounds for asylum." The third paragraph of the Credible Fear Assessment, which contains a summary of the reasons for the denial, was read to the applicant only after her attorney asked that the factual basis for the conclusion be disclosed and after the asylum officer conferred by telephone with the asylum office. There is no assurance that this procedure will be followed in other cases and, in any event, provides limited information as to the basis for the denial.

Because the credible fear assessment that is read to the applicant is so legalistic, the one applicant found to have a credible fear actually thought he had been denied.

Other basic information is inaccurate. For example, the asylum officers ignored testimony as to

the applicant's community ties in section 5 Form I-870 and testimony as to medical conditions in section 6.

The credible fear assessments include matters beyond the credible fear process or rely on impermissible factors: For example, the asylum officer issued the following credible fear assessment to the applicant who initially did not seek review from the immigration judge:

The applicant was not affiliated with any political party and, accordingly was not ever harmed due to the protected grounds. She described incidents pertaining to criminal activity or trafficking in narcotics. The nature of the applicant's claim does not change simply because the agents that threatened to harm her were members of the Governador Valadares police. That notwithstanding, the applicant testified that her father denounced the policemen, started an inquiry and the policemen, who were involved with narcotics trafficking, were prosecuted. This evidence, thus, indicates that not all police authorities in Governador Valadares are corrupt and involved in criminal activities. Moreover, applicant could have relocated elsewhere in Brazil as the incidents she described were localized to Governador Valadares, a city in the State of Minas Gerais.

The fact that not all police authorities are corrupt is not a proper basis for a denial, and the determination that an applicant could live elsewhere is not an appropriate matter at the credible fear stage.

#### REVIEW

The defects in the inspections and credible fear process take on enormous significance given the deficiencies of the review hearing.

The Notice to Applicant Section of the Form I-863 Notice of Referral to Immigration Judge includes the following section which was read to the applicant, checked off on the form which was provided to her:

You may be represented in this proceeding, at no expense to the government, by an attorney or other individual authorized and qualified to represent persons before an Immigration Court. If you wish to be so represented, your attorney or representative should appear with you at this hearing.

Despite this, we were not permitted to represent a denied Haitian applicant at the review hearing. The Immigration Court clerk refused to accept for filing an EOIR-28 and two motions which requested production of the documents submitted by the asylum officer to the immigration court, outlined defects in the credible fear interview, and requested a remand to the asylum officer and a continuance of the review hearing. At the hearing itself, the immigration judge advised Joan Friedland that she would not be permitted to represent her client at the hearing, including making an opening or closing statement, questioning applicant, or any other aspects of representation. He advised her that she could merely be present in the courtroom. He refused to even read the motions which she had attempted to file or to provide her with a copy of his decision. The entire

review hearing including arguments of counsel at the beginning to represent applicant, applicant's testimony (including translation), and reading of the decision to applicant took 30 minutes. The order issued by the judge is a form which gives no basis for his decision. The hearing was a travesty.

The immigration judges at Krome have told us they intend to hold review hearings within 24 hours of the decision, including the same day the decision is rendered by the asylum officer, with the possibility of a day's continuance. While review within 7 days provides little time for consultation and preparation, 24 or 48 hours is entirely insufficient given the problems we have described in this and previous letters. It is noteworthy that the INS may apparently take as much time as it deems convenient in rendering a decision, but applicants are subjected to crippling time limits in establishing credible fear.

### REMOVAL

The removal order is legalistic and incomprehensible and provides no information as to the consequences of a removal order.

### INTERPRETER PROBLEMS

The Interpreters were unfamiliar with the concepts and terms of the decision and forms: e.g. "nexus," "imputed", "INA", "CFR". For example, the asylum officer had to explain that nexus meant connection. Given the interpreters' unfamiliarity with legal terms, they were unable to explain the decisions and forms with clarity.

### DECISION WHETHER TO APPEAL

The instructions on review of the decision were in such legalese they were incomprehensible.

We had no opportunity to consult with our clients before they made their decision about whether to appeal. The asylum officer told us that there is no provision for this and that we could consult with our client only in the presence of the asylum officer: a clear violation of attorney-client confidentiality and a waiver of the attorney-client privilege. That this same officer has no understanding of attorney-client confidentiality was also demonstrated the next day when he burst into the room where the attorney and client were meeting, without knocking or otherwise asking permission.

The asylum officer also told us that if the client declined to appeal but subsequently changed her mind, the client needed to communicate that to the detention officers so that could be communicated to the asylum office. That "procedure" was not translated to the applicant, nor is it contained in any written instructions, nor is there any indication that the detention officers would consider that the applicant's change of mind superseded a removal order. Given the expedited nature of the process, carrying out this process through a detention officer may result in the applicant's removal before the asylum officer is notified and the removal order undone.



MISCELLANEOUS

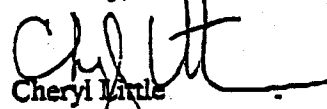
The asylum officer told one applicant that she could consult with family or friends prior to her removal concerning her appeal decision. She then asked if they could visit her, and the asylum officer told her yes. This information is incorrect and gravely misleading. Family and friends are only permitted to visit detainees on weekends and she could well be removed before the weekend. We were contacted by the relative of an applicant who was turned away from Krome on a Monday and told to return on the weekend.

The list of free legal help provided at the decision is the same inaccurate and misleading list that is supposed to be provided at the airport. The asylum officer also does not translate the list or the information provided for some of the agencies.

The initiation of the credible fear interviews has caused APISO interviews for detainees in exclusion proceedings to come to a complete halt. Detainees who should be released remained detained. In addition, it remains difficult to locate detainees for attorney visitation, as the lobby officer still does not have a list of detainees and their alien numbers. The list was returned to the lobby officer for a brief period after our April 9, 1997 letter, and then was taken away again.

We look forward to hearing from you about these matters.

Sincerely,



Cheryl Little



Joan Friedland

cc: Phyllis Coven  
(202) 633-1068

Robert Wallis  
(305) 530-7978

Erich Cauller  
(305) 530-6071

Judy Rabinovitz, ACLU  
(212) 221-5937

Christina DeConcini, ABA  
(202) 662-1032

**U.S. Department of Justice**  
**Immigration and Naturalization Service**

HQ 50/5.12

Office of the General Counsel

425 I Street, N.W.  
Washington, D.C. 20536**BY FACSIMILE**  
**(305)576-6273**  
**AND FIRST CLASS MAIL****MAY 6 1997**

Ms. Cheryl Little  
Ms. Joan Friedland  
Florida Immigrant Advocacy Center, Inc.  
3000 Biscayne Blvd. Suite 400  
Miami, Florida 33137

Dear Ms. Friedland and Ms. Little:

The Commissioner has asked my office to respond to your letters dated April 9th, 14th, and 28th. All three letters address various aspects of the implementation of the expedited removal process within the INS Miami district.

I understand that on April 17th you spoke with Phyllis Coven and Jeff Weiss. During the call Ms. Coven reviewed with you the duties and responsibilities of an asylum officer during the expedited removal process. In your letter to her dated April 21st, you outline certain refinements she adopted which address certain technical difficulties you claim to have observed during credible fear interviews.

As you know, the INS has worked hard to implement the new expedited removal provisions fairly and consistently. As part of that continuing effort, a group of INS officials from INS Headquarters and the Eastern Region have scheduled a visit to the Miami district to undertake additional training and to consider further the issues you have raised. Once that visit has taken place, we will address your correspondence in greater detail.

Very truly yours,

*Lori L. Scialabba*  
Lori L. Scialabba  
Deputy General Counsel

cc. Dan Vara, Miami District Counsel  
Robert Wallace, Miami District Director  
Phyllis Coven, Director of the Office of International Affairs

## LAW OFFICES

**FLORIDA IMMIGRANT ADVOCACY CENTER, INC.**

A NON-PROFIT ORGANIZATION DEDICATED TO PROTECTING AND PROMOTING  
THE BASIC HUMAN RIGHTS OF IMMIGRANTS OF ALL NATIONALITIES.



FLORIDA IMMIGRANT  
ADVOCACY CENTER, INC.  
3000 BISCAYNE BLVD.  
SUITE 400  
MIAMI, FLORIDA 33137

TEL: (305) 573-1106  
FAX: (305) 576-6273  
CLIENTS: 1-800-396-0334

*Board of Directors**Officers:*

**President**  
Raquel Matas, Esq.  
**Vice-President**  
Rev. Priscilla Whitehead  
**Secretary/Treasurer**  
Rev. Frank Smith

*Directors:*

Martine Bastien, M.S.W.  
John Duc, Esq.  
Judy Gilbert-Gould  
Candace L. Jean, Esq.  
Janet McAuley  
Alan L. Michael, Esq.  
L. Kim Porter  
Melinda Panigagus Riddle, Esq.  
Bernie Perimutter, Esq.  
Franklin Tac, P.E.  
Peter Upton, Esq.  
Father Thomas Wenzki

*Advisory Board Members*

Deborah Anker, Esq.  
Pam Elms, Esq.  
Edgar Cahn, Esq.  
Jonathan Demme  
Bill Frellick  
Niels Frenzen, Esq.  
Arthur Helton, Esq.  
Ira Kurzman, Esq.  
Bishop John J. Nevins, D.D.  
Michael Ramer, Esq.  
James Silk, Esq.  
Magr. Bryan O. Walsh

By fax: (202) 514-0455

May 21, 1997

Lori L. Scialabba  
Deputy General Counsel  
Immigration and Naturalization Service  
425 I Street, N.W.  
Washington D.C. 20536

Dear Ms. Scialabba:

Thank you for your May 6, 1997 letter.

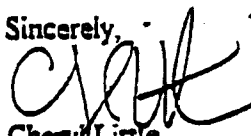
As we pointed out in our April 21, 1997 letter to Phyllis Coven, we were encouraged that she was willing to discuss matters raised in our April 9, 14 and 15, 1997 letters to Doris Meissner, but we felt that the measures she agreed to take fell far short of resolving the many issues we raised in those letters. Moreover, we do not know whether these measures have in fact been implemented. Since then, we have written two additional letters to Commissioner Meissner (April 23 and 28) raising additional concerns.

In our letter to Ms. Coven, we requested a more detailed and comprehensive response to our concerns and therefore appreciate your commitment in your May 6 letter to address our concerns in greater detail. However, we are disturbed that the delegation of INS officials which visited Miami last week failed to meet with us or other groups or private attorneys regarding Krome and implementation of expedited removal.

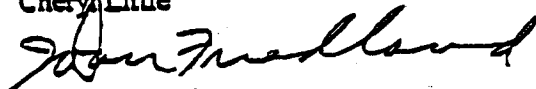
Furthermore, as we mentioned previously, FIAC and the Catholic Legal Immigration Network (CLINIC) will soon have funding to begin a pro bono representation project at Krome. We remain profoundly concerned about the Miami District's complete failure to meet with us and the CLINIC regarding access issues at Krome. Nor has the Miami District on its own taken steps to ease problems of access and meaningful representation at Krome.

We look forward to a meaningful response to our earlier letters and again request that local INS officials meet with us and CLINIC regarding the pro bono representation project at Krome. Thank you.

Sincerely,



Cheryl Lurie



Joan Friedland

cc: Don Kerwin, CLINIC

## LAW OFFICES

**FLORIDA IMMIGRANT ADVOCACY CENTER, INC.**

A NON-PROFIT ORGANIZATION DEDICATED TO PROTECTING AND PROMOTING  
THE BASIC HUMAN RIGHTS OF IMMIGRANTS OF ALL NATIONALITIES.

May 29, 1997



FLORIDA IMMIGRANT  
ADVOCACY CENTER, INC.  
3000 BISCAYNE BLVD.  
SUITE 400  
MIAMI, FLORIDA 33137

TEL: (305) 573-1108  
FAX: (305) 576-6273  
CLIENTS: 1-800-386-0334

*Board of Directors**Officers:*

**President**  
Raquel Matos, Esq.  
**Vice-President**  
Rev. Priscilla Whitehead  
**Secretary/Treasurer**  
Rev. Frank Smith

*Directors:*

Marieine Bassien, M.S.W.  
John Duc, Esq.  
Judy Gilbert-Gould  
Candace L. Jean, Esq.  
Janet McAlilly  
Alan L. Michael, Esq.  
L. Kim Porter  
Melinda Paniagua Riddle, Esq.  
Bernie Perimeter, Esq.  
Franklin Tse, P.E.  
Peter Upton, Esq.  
Father Thomas Wenski

*Advisory Board Members*

Deborah Anker, Esq.  
Paul Blum, Esq.  
Edgar Caba, Esq.  
Jonathan Demme  
Bill Frelick  
Niels Fuzzen, Esq.  
Arthur Helton, Esq.  
Ira Kurzman, Esq.  
Bishop John J. Nevins, D.D.  
Michael Ramer, Esq.  
James Silk, Esq.  
Magr. Bryan O. Walsh

Chief Judge Michael Creppy  
EOIR Office of the Chief Immigration Judge  
5107 Leesburg Pike #2545  
Falls Church, VA 22041

Dear Judge Creppy:

We are writing to express our profound concern with the review process conducted by immigration judges at Krome Service Processing Center of an asylum officer's determination that an applicant does not have a credible fear of persecution.

**TIME OF HEARING**

The immigration judges at Krome have told us they intend to hold review hearings within 24 hours of the decision, including the same day the decision is rendered by the asylum officer, with the possibility of a day's continuance. While review within 7 days provides little time for consultation and preparation, 24 or 48 hours is entirely insufficient given problems which have occurred at the airport and at Krome during the expedited removal process.

These problems include the following: inadequate explanation of the expedited removal process; use of an incomplete and misleading list of legal service providers; misinformation that the legal service providers were paid by the U.S. government; incorrect information about use of the telephone to call a "consultant", friend or family member; intimidating or otherwise improper treatment by inspections personnel at the airport; substantial delays in bringing detainees for attorney visitation at Krome; insufficient facilities (such as telephone or copy machine) for attorneys or other "consultants"; inadequate time to prepare for the credible fear interview; holding credible fear interviews without notice to attorneys; problems with the use of telephone translators during the credible fear interview including adequacy of translation and noise and transmission problems; denial of access to documents in the applicant's file including sworn statement; incompleteness of, or errors in, the asylum officer's notes; unreceptive attitude of asylum officers during the interview; failure of asylum officers to ensure that applicants were adequately advised concerning the credible fear process; failure to allow applicants to complete their answers; failure to allow the attorney to play a meaningful role at the interview; delays in conducting interviews which caused applicant's "consultants" to wait a

substantial time; inability for the "consultant" to talk to applicants during the interview; out of the presence of the asylum officer; to ensure the completeness of the testimony; failure of the asylum officer to summarize the testimony; and give the applicant an opportunity to make corrections and additions; issuance of a denial notice which is legalistic and incomprehensible; failure to translate and read in their entirety documents provided to the asylum applicant, so that the applicant does not know the basis for the officer's decision; and incorrectly informing the applicant that he/she can be represented by an attorney at the review hearing.

These matters are outlined in the enclosed letters which we have sent to INS Commissioner Doris Meissner.

The brief time before the review hearing is in stark contrast to the unlimited time given the INS to make its decision. Applicants are subjected to crippling time constraints. Given the defects in the process and the inequity in time limits, immigration judges should give applicants the maximum time permitted by the statute before their review hearing.

#### ATTORNEY'S ROLE AND CONDUCT OF THE HEARING

The Notice to Applicant Section of the Form I-363 Notice of Referral to Immigration Judge includes the following section which is read to applicants found not to have a credible fear of persecution and is checked off on the form provided to them:

You may be represented in this proceeding, at no expense to the government, by an attorney or other individual authorized and qualified to represent persons before an Immigration Court. If you wish to be so represented, your attorney or "consultant" should appear with you at this hearing.

Despite this, we were not permitted to represent a denied Haitian applicant at the review hearing. We were not permitted to review the court file. We were not provided a copy of, nor permitted to review, all documents presented to the judge by the INS. These included the sworn statement taken from the applicant at the airport.

In addition, the Immigration Court clerk refused to accept for filing an EOIR-28 and two motions which requested production of the documents submitted by the asylum officer to the immigration court, outlined defects in the credible fear interview, and requested a remand to the asylum officer and a continuance of the review hearing. Copies of these motions are enclosed.

These pleadings outlined critical flaws in the credible fear process. The asylum officer did not comply with 8 C.F.R. Sec. 208.30(b) which requires him to create a summary of the material facts and to provide the applicant with an opportunity to correct errors therein. The applicant was entitled to an opportunity to correct such errors before determination was made by the asylum officer. Since the officer found her not credible, his failure to allow her to correct his errors takes on enormous significance. Such errors in the credible fear process cannot reasonably be raised by applicants on their own.

At the hearing itself, the Immigration Judge Neale Foster advised Joan Friedland that she would not be permitted to represent her client at the hearing, including making an opening or closing statement, questioning applicant, or any other aspects of representation. He advised her that she could merely be present in the courtroom. He refused to even read the motions which she had attempted to file or to provide her with a copy of his decision. The entire review hearing including arguments of counsel at the beginning to represent applicant, applicant's testimony (including translation), and reading of the decision to applicant took 30 minutes. The order issued by the judge is a form which gives no basis for his decision. The hearing was a travesty.

Applicants will generally not even know the basis for the asylum officer's decision. The asylum officer did not translate to our clients the entire APSO Assessment, nor did he translate at all the APSO Credible Fear Interview Notes. We were therefore required to have these materials translated to our clients. Translation of these materials is critical, especially where they contain errors. Unrepresented applicants will not know what these documents say.

In our review hearing, the immigration judge did not in any way ensure that the applicant was aware of the basis of the asylum officer's decision or that the steps required in earlier phases of the credible fear process had been carried out. For example, applicants must be provided with certain information about the credible fear process and with a list of legal service organizations. Although the INS has carried out its obligations badly or not at all, as set forth in our letters to Commissioner Meissner, the judge did not, on his own, ask a single question which would have elicited this information.

While there have been serious problems with the credible fear interview, the asylum officers are now permitting applicants' "consultants" to play a more active role at that stage. The complete denial of any role to an attorney in the review process is in conflict with the role in the credible fear interview and is not required by the statute.

Even if the word "consultation" is given its narrowest interpretation, the attorney cannot adequately perform that role under the present process. The short time period before the review hearing is simply inadequate to prepare, especially because we have to carry out functions done inadequately or not at all by the INS. We do not have access to all the documents considered by the asylum officer and provided to the immigration judge and therefore cannot advise the applicant concerning those documents. We cannot reasonably instruct an asylum applicant, who is unfamiliar with the U.S. legal system and, generally, does not speak English, to describe to the judge defects in the process that have preceded the review or to correct the record.

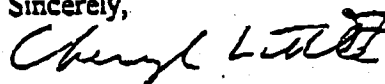
In addition, the INS has not cooperated in development of a meaningful "consultation" process at Krome. The Florida Immigrant Advocacy Center (FLAC) and the Catholic Legal Immigration Network (CLINIC) will soon have funding to begin a pro bono representation project at Krome. We remain very concerned about the Miami District's complete failure to meet with us and CLINIC regarding access issues there. Nor has the Miami District on its own taken steps to ease problems of access and meaningful representation.

The conduct of the review hearing that we witnessed was fundamentally unfair. We therefore request an immediate examination of the review process. In particular, we request the following:

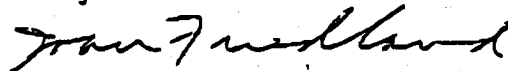
1. That applicants be given the maximum time to prepare before their review hearings.
2. That attorneys or other qualified persons be permitted to fully represent applicants in the review process.
3. That applicants and their "consultants" be given access to all documents provided to the judge and considered by the judge in the review process.
4. That immigration judges ensure that prior steps of the process have been fully complied with including information concerning the credible fear process, provision of the list of legal service organizations, access to counsel, family, and friends, and opportunity to correct errors in the asylum officer's summary of material facts prior to the credible fear decision.
5. That immigration judges ensure that the entire decision of the officer, including the officer's notes, and any documents relied upon by the officer have been provided to and translated to the applicant prior to the hearing, so that the applicant will have an adequate opportunity to refute or correct such documents at the hearing.
6. That applicants have access to an adequate law library and sources of documentation prior to their review hearing.
7. That immigration judges properly advise the applicant of the basis of their decisions.

We look forward to your early response to this letter. Thank you.

Sincerely,



Cheryl Little



Joan Friedland

cc: Doris Meissner, INS  
(202) 514-3296

Phyllis Coven, INS  
(202) 633-1068

Don Kerwin, CLINIC  
(202) 635-2649

Judy Rabinovitz, ACLU  
(212) 221-5937



**Christina DeConcini, ABA**  
**(202) 662-1032**



## Immigration and Naturalization Service

425 Eye Street N.W.  
Washington, D.C. 20536

JUN 23 1997

Ms. Cheryl Little  
Florida Immigrant Advocacy Center, Inc.  
3000 Biscayne Boulevard, Suite 400  
Miami, Florida 33137

Dear Cheryl:

I am writing in response to your April 21, 1997 letter and our phone conversation of May 23, 1997. We appreciate the attention you have given to the implementation of the new expedited removal provisions. Thank you for taking the time to share your observations and concerns with us. Jeff Weiss and I worked with officers from the Miami Asylum office earlier this month and also had the opportunity to observe the program at Krome.

In response to the specific issues raised in your letter, I want to provide the following update.

#### **TRANSLATORS**

As you know, the INS has contracted with several different translation services in order to provide telephonic translation to applicants who require it. We have asked these services to provide the translators with information regarding the program and copies of the forms. I will work to ensure that this is done consistently.

Our officers have been instructed to ensure that the translator is capable of providing sound services during the course of the interview and that they should secure another translator whenever necessary. Both the applicant and any consultant may make the same request during the course of an interview if they believe the translation is not adequate. Please bring your concerns in this regard to the direct attention of the APSO supervisor in charge at the facility.

#### **CONFERENCE PHONES**

The conference phones currently in use at Krome are working well. If for any reason this is not the case in the future, we will secure different equipment.

## **DETENTION & DEPORTATION CHECKLIST**

A standard checklist for handling expedited removal cases has been distributed to all detention facilities. The form is designed to ensure that the applicant has been given the M-444 and the list of legal services providers, and that other aspects of the expedited removal process are systematically followed.

## **ASYLUM OFFICE STAFFING**

We have detailed a team of officers to handle the expedited removal program at the Krome facility. As you know, Warren Janssen is the lead APSO supervisor. Asylum Director Erich Cauller and Deputy Director Jack Shackles are overseeing the program. Please feel free to raise any concerns you may have about cases at Krome directly to Erich.

## **NOTIFICATION OF NEW ARRIVALS**

The expedited removal team is present at Krome Monday through Friday. A system has been instituted to ensure that they are notified of new arrivals. Please let Erich know if you are having problems with the system. The M-444 is being translated into several languages, and I hope to have it available on video tape in the future.

## **INS LIAISON**

As indicated, please communicate with Erich concerning the asylum aspects of the expedited removal process. I need to refer you to the District for the name of the district liaison. As I said earlier, I have asked both Jack Shackles and Erich Cauller to manage the program at Krome.

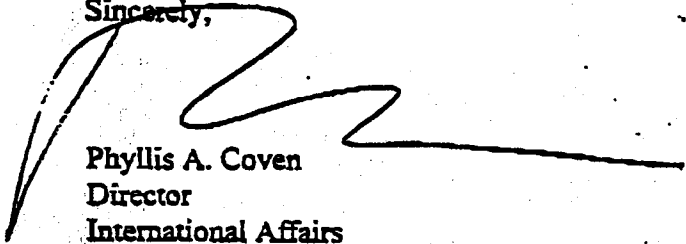
I share your interest in ensuring that expedited removal applicants receive complete and accurate information. If you have a specific instance in which you believe inaccurate or misleading information has been given to an applicant, please immediately notify Erich of the potential problem. Please understand that we need specific information in order to address any allegations.

I trust that since the time of your writing you have been updated concerning the status of pending cases. Please consult with Erich if there are outstanding cases about which you haven't been notified.

In response to your concerns regarding confidentiality, we believe that the interview rooms we have secured for our operations at Krome provide the privacy required for conducting expedited removal interviews.

Cheryl, thank you again for your attention to the program.

Sincerely,

A large, stylized handwritten signature in black ink, appearing to read 'Phyllis A. Coven', is written over the typed name and title.

Phyllis A. Coven  
Director  
International Affairs



U. S. Department of Justice

Executive Office for Immigration Review

Office of the Chief Immigration Judge

Chief Immigration Judge

5107 Leesburg Pike, Suite 2545  
Falls Church, Virginia 22041

June 25, 1997

Ms. Cheryl Little  
Ms. Joan Friedland  
Florida Immigrant Advocacy Center, Inc.  
3000 Biscayne Blvd.  
Suite 400  
Miami, Florida 33137

Dear Ms. Little and Ms. Friedland:

This is in response to your letter dated May 29, 1997, expressing your concerns with the Credible Fear Review process at Krome. Most of your concerns deal with procedures and processes under the control of the Immigration and Naturalization Service (INS). In regard to the review conducted by Immigration Judges you express concerns with the time frame for review, the role of representatives in the review, the standard of review, and the role of the alien in the review.


While I understand and appreciate your concern for the fate of your clients in these reviews, I cannot agree with your suggestions for changes to the review process. Assistant Chief Immigration Judge Gail Padgett, who has supervisory responsibility for the Immigration Court at Krome, has closely examined the review process there and is satisfied that as currently being conducted, the Credible Fear Reviews are in compliance with the applicable statutes and regulations.

Judge Padgett will be more than happy to talk with you further about the operations of the Krome Immigration Court and I understand she is arranging to meet with you the next time she is in Miami.

- 2 -

- Thank you for your continued interest in the Immigration Courts in Florida. Please feel free to give Judge Padgett a call if you have questions about this response or need more information. She can be reached at 703-305-1554.

Sincerely,

  
for Michael J. Creppy  
Chief Immigration Judge

cc: Doris Meissner, Commissioner, INS  
Phyllis Coven, Director, Office of International Affairs, INS  
Don Kerwin, CLINIC  
Judy Rabinovitz, ACLU

amb

Edward McElroy, District Director  
U.S. Immigration and Naturalization Service  
26 Federal Plaza, 14th Floor  
New York, N.Y. 10278

12 November, 1998

Re: Charles NAMAKANDO, A 76 416 706

Dear Mr. McElroy:

We would like to request the immediate release of Charles Namakando, a refugee from Zambia, on parole to our organization. Mr. Namakando's situation is favorable for release, because he has a wife who is a landed immigrant in Canada and is therefore himself immediately eligible to become a landed immigrant in Canada.

Mr. Namakando is married to Inas Ahmed, a citizen of Egypt. They were married in Zambia in 1990. Their marriage certificate is enclosed. The couple left Zambia in 1992 when the government changed. They came to the United States on B2 visas and applied for asylum status. Their first daughter, Sarah, was born in the United States. Her birth certificate is enclosed. Because of the length of the wait for asylum status at that time, the three went to Canada in July of 1993 and applied for refugee status there. A second child was born in Canada. The cases were still pending when Charles found that he had to return to Zambia. Because he was leaving Canada, he had to withdraw his own refugee claim.

His wife, however, proceeded with her claim and was granted refugee status on July 14, 1994. She became a landed immigrant (permanent resident) of Canada on May 15, 1995. The landing papers for Inas Ahmed and her U.S. citizen daughter, Sarah Namakando, are also enclosed. Because Ms. Ahmed is landed in Canada, her husband, Mr. Namakando, is eligible for derivative landed status.

Mr. Namakando entered the United States intending to return to his family in Canada. His travel route necessitated his passage through the United States. He has been detained by the Immigration and Naturalization Service since October 19, 1998. He is the son of a politician and has had significant involvement in the movement for self-rule in Barotseland, the western part of Zambia. When he returned to Zambia from Canada in 1994, it was because he had received assurances from the Zambian government that it was safe for him to return. However, he was instead detained, tortured, arrested, and deprived of his passport by the Zambian government. He tried several times to recover his passport so he could return to his wife and children in Canada and was only recently issued a passport and allowed to leave Zambia.

If you release Mr. Namakando from detention, he can stay at Vive/La Casa, a refugee shelter located at 50 Wyoming Avenue in Buffalo, New York 14215 until he enters Canada. I am enclosing a brochure which describes our organization and the services it provides. I am also enclosing a copy of an affidavit from the Executive Director of Vive, indicating that he will provide food, shelter, and other assistance to Mr. Namakando upon his release. When Mr. Namakando enters Canada, he will live with his wife and children at 75 Gage Avenue North, Hamilton, Ontario L8L 6Z8.

Mr. Namakando has been found to have a credible fear of refoulement to Zambia. He has no criminal record nor is he a terrorist or a security risk. From his previous visits to the United States, he has shown that he poses no danger to the community. Based on all of these facts, his detention is discretionary and considered to be a low priority under the Detention Guidelines set out by Michael A. Pearson in the Memorandum for Regional Directors of October 9, 1998.

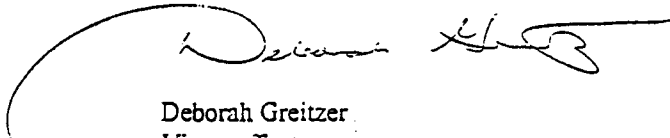
Our organization can obtain a Minister's Permit for Mr. Namakando at the Canadian border. He could then enter Canada immediately and make an inland sponsorship claim. Our organization would also satisfy all requirements of the Immigration Court to arrange for the termination of his U.S. immigration case. This solution would be the most humane alternative for Mr. Namakando and his family and would also relieve the Immigration and Naturalization Service of the burden of paying for his further detention and legal costs.

If you do not release Mr. Namakando on parole, he will be forced to seek asylum in the United States to buy time while his wife sponsors him to enter Canada. This will result in a lengthy incarceration for him at INS expense, as well as considerable cost to the court and the INS litigation division.

We therefore request the immediate release of Charles Namakando on parole.

If you have any questions or require further information, please telephone me.

Very sincerely,



Deborah Greitzer  
Vive staff attorney





U.S. Department of Justice  
Immigration and Naturalization Service

---

26 Federal Plaza  
New York, NY 10278

December 2, 1998

Deborah Greitzer  
Attorney at Law  
50 Wyoming Avenue  
Buffalo, NY 14215

Re: NAMAKANDO, Charles

A76 416 706

Dear Madam:

Reference is made to your letter dated November 12, 1998 requesting parole for Mr. NAMAKANDO, pending completion of removal proceedings.

A review of our records indicates that Mr. NAMAKANDO arrived at JFK International Airport on October 19, 1998 and was not in possession of a valid United States nonimmigrant visa. Mr. NAMAKANDO was subsequently referred for a credible fear interview, and ultimately placed in removal proceedings.

In your letter you state that "*Mr. NAMAKANDO situation is favorable for release, because he has a wife who is landed immigrant in Canada and is therefore himself immediately eligible to become a landed immigrant in Canada*". You continue by stating that "*He could then enter Canada immediately and make an inland sponsorship claim*". It is important to note that Mr. NAMAKANDO arrived in the United States without the required visa to transit through the United States to Canada. Mr. NAMAKANDO is in the process of making an application for political asylum as a form of relief from removal. Your request for parole is based on the INS doing what Mr. NAMAKANDO was attempting to do when he was apprehended. This notion is unacceptable.

Additionally, you stated that ... "*detention is discretionary and considered to be a low priority under the Detention Guidelines set out by Michael A. Pearson in the Memorandum for Regional Directors of October 9, 1998*". According to INS memorandum HQOPS (DD&P) SO/10-C, "Detention Guidelines Effective October 9, 1998" and its corresponding, "INS Detention Use Policy" HQOPS 50/10, Mr. NAMAKANDO falls under the category criteria of category 2 "Aliens whose detention is essential for border enforcement...". Pursuant to Section III (B)(2) of the policy, aliens in category 2 are considered a "High Priority" detention.

Finally, you state that "*Mr. NAMAKANDO has been found to have credible fear of refoulment to Zambia*". The 'credible fear' standard of proof is lower than the "well founded fear" threshold relevant in asylum determinations. It is conceivable that one may pass the credible fear portion, but still be denied asylum before the Immigration Judge.

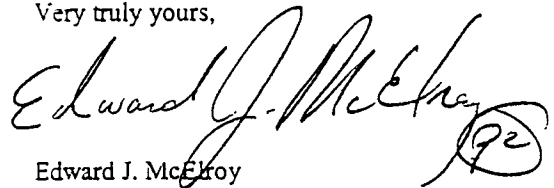
8 CFR 212.5(a) states that parole of aliens who, "...are detained in accordance with 235.3(b) or (c) of this chapter would generally be justified only on a case -by-case basis for 'urgent humanitarian reasons' or 'significant public benefit,' provided the alien is neither a security risk nor a risk of absconding." It is the congressional intent that "[p]arole should be only be given on a case by case basis for specific urgent humanitarian reasons, such as life threatening humanitarian medical emergencies, or for specific public interest reasons, such as assisting the government in a law enforcement activity" (h. Rep. 104-469).

Section 235(b)(B)(ii) states, "if the officer determines at the time of the interview that an alien has a credible fear of persecution; that alien shall be detained for further consideration of the application for asylum." Consideration of the application for asylum is done by the Immigration Judge during proceedings under section 240 of the Immigration & Nationality Act (Act), when presented as evidence for relief from removal.

8 CFR 235.3(c) reiterates this by stating: "...any arriving alien who appears to the inspecting officer to be inadmissible, and who is placed in removal proceedings pursuant to section 240 of the Act shall be detained in accordance with section 235(b) of the act." Since the regulatory rule is one of detention, the use of parole authority is an exception to that rule.

It is Service policy that such authority be carefully and narrowly exercised to be in conformity with statutory purpose and legislative intent. Therefore, after carefully considering the reasons set forth in your request for parole, I have denied your request. Parole for your client does not fulfill the criteria outlined above.

Very truly yours,

A handwritten signature in cursive script, reading "Edward J. McElroy". The signature is written in dark ink and includes a large, stylized initial "E" and "M".

Edward J. McElroy  
District Director  
New York District

Congress of the United States  
House of Representatives  
Washington, DC 20515-3229

December 14, 1998

Edward McElroy, District Director  
U.S. Immigration and Naturalization Service

Dear Director McElroy:

I am writing on behalf of Charles Namakando (A-76-416-706), who is being detained in the Wackenhut detention center.

Mr. Namakando is a political refugee seeking permanent resident status in Canada. Because his wife and two children were granted landed immigrant status by the Canadian government some years ago, and because he has no criminal record, Mr. Namakando is eligible for and is very likely to be granted the same status in Canada.

While he and his wife were waiting for an asylum determination in Canada in 1994, Mr. Namakando withdrew his refugee claim to return to do political work in his home country, Zambia. Upon arrival in Zambia, Mr. Namakando was imprisoned and tortured. Meanwhile, Canada granted his wife landed immigrant status.

After being released in Zambia, Mr. Namakando applied for a visa with the Canadian consulate in Lusaka, but fled out of fear of imminent political persecution before action could be taken on his visa application. There are few flights to Canada from anywhere in Africa. Unable to get a flight directly to Canada, Mr. Namakando found a flight to New York City and planned to transit to Canada by train. However, without a transit visa, he became subject to expedited removal proceedings upon arrival in New York City. In the course of these proceedings, he has been determined by INS to have a "credible fear" of political persecution in Zambia.

Mr. Namakando should be paroled, to enable him to apply for landed immigrant status in Canada. He wants to go to Canada, where his wife and children are. He has, in the interim, applied for asylum in the U.S. only to avoid deportation.

It is very likely that Mr. Namakando will be permitted entry to Canada to apply for residence under his wife's sponsorship. Alternatively, he may enter Canada to apply for refugee status. In the case of any delay, Vive La Casa in Buffalo would house

him, according to Vive's Director, Rev. John R. Long, with whom I have spoken. Rev. Long, who you may reach at 716-892-4354 and <[www.vivelacasa.org](http://www.vivelacasa.org)>, has filed an affidavit with your office so stating.

I urge you to expedite Mr. Namakando's parole. His further detention by INS serves neither our own country or Canada, with whom we share deep social, economic and cultural ties.

Sincerely,



JOHN J. LaFALCE  
Member of Congress

L:ga

[Seal Omitted]

U.S. Department of Justice  
Immigration and Naturalization Service

---

26 Federal Plaza  
New York, NY 10278

February 16, 1999

Congressman John J. LaFalce  
617 Federal Building  
111 Huron Drive  
Buffalo, NY 14202

Dear Congressman LaFalce:

I am writing to you today in response to your inquiry regarding Mr. Charles Namakando (A72 416 706), a detainee in the Queens Contract Facility, Jamaica, NY, located in my district.

A review of our records indicated that Mr. Namakando first arrived in the United States on March 3, 1991 as a visitor for pleasure for a period of six months. On April 25, 1992 he returned to Zambia, while his wife gave birth in the United States. He then returned a month later, and on August 20, 1992 Mr. Namakando applied for asylum in the United States. Prior to a decision on his asylum claim, Mr. Namakando departed the United States for Canada. On January 21, 1993 a notice of intent to deny his asylum application was filed, and on March 1, 1993 Mr. Namakando withdrew his asylum application in the United States. In July of 1993, Mr. Namakando and his family applied for asylum in Canada. Shortly after he applied for asylum in Canada Mr. Namakando departed Canada effectively removing his asylum claim, and opted to return back to Zambia the country from which he had claimed political asylum and expressed a fear of returning to. On July 14, 1994 his wife was granted refugee status in Canada. Once again, on October 19, 1998 Mr. Namakando made an entry at JFK International Airport, and was not in possession of a valid United States nonimmigrant visa. At that time, Mr. Namakando requested asylum once again in the United States. Mr. Namakando was referred to the Asylum Branch for a credible fear interview, and on October 27, 1998 the Asylum Branch found Mr. Namakando to have a credible fear. Since that time Mr. Namakando has been in Service custody pending the outcome of his asylum application before the Immigration Judge. A hearing is scheduled regarding the merits of the application before the Immigration Judge on February 24, 1999.

In your letter you state that "*Mr. Namakando should be paroled, to enable him to apply for landed immigrant status in Canada.*" It is important to note that Mr. Namakando is in the process of making an application for political asylum after his arrival in the United States without the required visa to transit through the United States to Canada. Additionally, Mr. Namakando had the opportunity to apply for asylum at the Canadian Consulate in Johannesburg, South Africa back on October 1998, and elected not to. Your request for parole is akin to asking that the INS circumvent US laws to do what Mr. Namakando was attempting to do when he was apprehended. I.e. [sic] travel into the United States without a proper visa.

This document has been retyped verbatim by the Expedited Removal Study for enhanced reading quality.

Furthermore, you state "...Mr. Namakando is a political refugee seeking permanent resident status in Canada. Because his wife and two children were granted landed immigrant status by the Canadian government some years ago." You continue by stating ... "Mr. Namakando is eligible for and is very likely to be granted the same status in Canada." According to Canadian authorities, Canada is reevaluating its refugee policy. According to the Border Accord, Mr. Namakando will have to make an application at the border for asylum, and then return to the United States until his application is reviewed, and a decision rendered. The Canadian authorities also advised Mr. Namakando could apply for status while in the custody of United States Immigration & Naturalization Service, by petitioning the Canadian Consulate at 1251 Avenue of the Americas, New York, NY, and if his application is accepted an interview will be scheduled.

Section 235(b)(B)(ii) of the INA states, "if the officer determines at the time of the interview that an alien has a credible fear of persecution, the alien shall be detained for further consideration of the application for asylum." Consideration of the application for asylum is done by the Immigration Judge during proceedings under section 240 of the Immigration & Nationality Act (Act), when presented as evidence for relief from removal.

8 CFR 235.3(c) reiterates this by stating: "... any arriving alien who appear [sic] to the inspecting officer to be inadmissible, and who is placed in removal proceedings pursuant to Section 240 of the Act shall be detained in accordance with section 235(b) of the Act." Since the regulatory rule is one of detention, the use of parole authority is an exception to that rule.

8 CFR 212.5(a) states the parole of aliens who, "...are detained in accordance with § 235.3(b) or (c) of this chapter would generally be justified only on a case-by-case basis for "urgent humanitarian reasons" or "significant public benefit" provided the alien is neither a security risk nor a risk of absconding." It is the congressional intent that "[p]arole should only be given on a case by case basis for specific urgent humanitarian reasons, such as life threatening humanitarian medical emergencies, or for specific public interest reasons, such as assisting the government in a law enforcement activity" (H. Rep. 104-469).

It is the District's policy that such authority be carefully and narrowly exercised to be in conformity with statutory purpose and legislative intent. Therefore, parole for Mr. Namakando does not fulfill the criteria outlined above.

Thank you for the opportunity to address this issue. If you have any further questions, please feel free to contact the detainee's case officer, Deportation Officer Brian Banks at 718-244-7971.

Sincerely,

[signature omitted]

Edward J. McElory [sic]  
District Director  
New York District