

March 7, 2018

James McHenry
Director, Executive Office for Immigration Review
U.S. Department of Justice
5107 Leesburg Pike, Suite 2600
Falls Church, VA 22041

VIA USPS AND EMAIL

Re: Atlanta Immigration Court Hearings for Persons Detained at Irwin County Detention Center

Dear Director McHenry:

The Southern Poverty Law Center (SPLC) has previously lodged three complaints with your office concerning potential due process violations in the conduct of hearings at the Atlanta and Stewart Immigration Courts. These complaints called attention to troubling incidents of bias in the conduct of certain Immigration Judges (IJs) and flagged serious deficiencies in language access for respondents with limited English proficiency.

In August 2016, SPLC surveyed more than 100 *pro se* respondents before the Stewart Immigration Court and found a pattern of bias against nationals of Central American countries. We filed a complaint with EOIR and your agency subsequently noted that it initiated discussions with local IJs. The second complaint came in March 2017, after SPLC observed that the Atlanta Immigration Court consistently failed to fully interpret during hearings where respondents lacked English proficiency. SPLC again raised this problem in an August 2017 complaint about the Stewart Immigration Court, where none of the four IJs ensured that English language conversations were consistently and completely translated. Instead, like their counterparts in Atlanta, they “often limited interpretation for questions directed to the respondent.” This pattern continues today. And, SPLC continues to observe conduct towards respondents that can only be described as inappropriate and intimidating.

We write now to lodge a complaint based on observations of Atlanta Immigration Court hearings for persons detained at the Irwin County Detention Center (ICDC), a privately-operated facility where at any given time, nearly 700 men and women are confined in the custody of U.S. Immigration and Customs Enforcement (ICE).¹

RESPONDENT'S APPEARANCE IN COURT BY VIDEO

ICDC is located in Ocilla, Georgia, about 200 miles from the Atlanta Immigration Court. The facility is owned by Irwin County and privately operated under a contract between the county, ICE, and LaSalle Corrections. In addition to housing persons in ICE custody, ICDC holds prisoners in the custody of the federal Bureau of Prisons. Persons in ICE custody at ICDC are currently under the jurisdiction of the Atlanta Immigration Court. Most people at ICDC are not transported to the Atlanta Immigration Court for their court hearings. Instead, they attend the hearings remotely through video teleconferencing (VTC) technology. SPLC staff observed twelve hearings in the Atlanta Immigration Court where respondents appeared via VTC. The observations occurred on January 25, 2018 and February 20, 2018. Seven hearings were observed in IJ William Cassidy's court on the morning of January 25, and five were observed in IJ Earle Wilson's court on the morning of February 20, 2018. In both courtrooms, respondents appeared on a television screen positioned on the right side of the courtroom, to the right of the ICE trial attorney. Where respondents had counsel, counsel was seated at a table on the left side of the courtroom. The observers of hearings in IJ Cassidy's court noted that about 10 respondents appeared to be seated in rows in a small room, men in the back, women in the front. Everyone appeared to be shackled. A different room appeared to be in use at ICDC on the morning of IJ Wilson's hearings. Based on the image on the screen, it appeared to be a more spacious room designated as a courtroom inside ICDC. Similarly, though, men and women sat segregated by rows, and all appeared to be shackled. One by one, respondents approached the camera when their case was called.

OBSTACLES TO ACCESS TO COUNSEL

The use of VTC technology is expanding in immigration courts across the country to enable immigrants to virtually appear at hearings from the confines of detention. In many of these jurisdictions – including Cleveland, Ohio, Detroit, Michigan and southern California – it is standard practice for attorneys to appear side-by-side with their clients inside detention centers.² That is not the case at the Atlanta Immigration Court, where attorneys have been prohibited from appearing at court hearings alongside clients detained at ICDC. Instead, attorneys must appear in the Atlanta Immigration Court, while their clients sit in confinement 200 miles away. The current practice deprives attorneys of the means to communicate privately with clients in the hours before, during, and after court hearings. Their sole means of interaction is through a television screen positioned on the other side of the courtroom, next to the ICE trial attorney, and an audio line broadcasted to the full court.

Since September 2017, SPLC's Southeast Immigrant Freedom Initiative (SIFI) has been appearing before the Atlanta Immigration Court on behalf of clients detained at ICDC. SIFI attorneys have since moved

¹ Department of Homeland Security, U.S. Immigration and Customs Enforcement, Enforcement and Removal Operations Custody Management Division, Authorized DMCP Facility List, Irwin County Detention Center (Fiscal Year), available at: http://altgov2.org/wp-content/uploads/ICE_detention-facilities-2017July.pdf?7ba951&7ba951.

² Emails from Matthew L. Benson, former chair of American Immigration Lawyers Association Ohio chapter (Cleveland Immigration Court allows attorneys to appear via VTC alongside clients detained in southern Ohio), Michele Redburn (same for Detroit Immigration Court), Nora Milner (same for Imperial Immigration Court) (on file with SPLC).

for the Court's leave to appear alongside clients inside ICDC in eight cases.³ IJs Baird, Cassidy, Pelletier, and Wilson have denied all these motions. With one exception, the IJs issued written orders. Four included rationales, which appear below in full:

- "solely within 'jurisdiction' and discretion of ICDC,"⁴
- "permission to appear @ ICDC lies with ICDC, not the court,"⁵
- "security protocols at the facility do not permit counsel to appear at the detention facility"⁶
- "current regulations at the detention facility do not allow attorneys to appear there"⁷

This rationale appears to condition attorneys' ability to appear with clients on the details of the contractual arrangement between ICE and LaSalle Corrections. However, this ignores EOIR's mandate to ensure the fair, expeditious, and uniform administration of the Nation's immigration laws. This mandate implicates the fundamental rights of immigrants and attorneys, rights that cannot be abridged by contracts with private prison companies.

Immigrants in removal proceedings have a statutory right to counsel, a right all the more vital when they are confined against their will in remote locations such as ICDC. See 8 U.S.C. § 1362 (right to counsel); 5 U.S.C. § 555(b); 8 C.F.R. §§ 292.1, 1240.3. They have a right to a fundamentally fair hearing. See Reno v. Flores, 507 U.S. 292, 306 (1993); Dakane v. U.S. Att'y General, 399 F.3d 1269, 1273 (11th Cir. 2005) (recognizing Fifth Amendment Due Process right to fundamentally fair hearing in removal proceedings). And attorneys have a right to communicate with their clients. See Jean v. Nelson, 727 F.2d 957, 983-84 (11th Cir. 1984) (recognizing First Amendment right of attorneys to speak to clients). Yet the current practice virtually prohibits attorneys from preparing their clients on the day of the hearing, especially if the hearing is a bond hearing or master calendar hearing, which are typically set between 8 a.m. and 10:30 a.m. Attorneys who want to see their clients on the hearing day must go to ICDC early enough to leave themselves three additional hours to make the drive to Atlanta in time for the hearing. During actual hearings, SIFI attorneys and clients cannot lean over and whisper to one another or pass notes to confer about the case. The attorney-client separation interrupts the flow of communication necessary for attorneys to make moment-to-moment decisions about the proper course of action, thereby interfering with attorneys' right to speak with clients. By foreclosing close communication, this practice also interferes with clients' right to make decisions in their cases, and ultimately, their right to a fundamentally fair hearing.

These obstacles are not unique to SIFI attorneys. While observing court hearings, SIFI staff noted that similar challenges to representation surfaced in several hearings whether other counsel represented clients detained at ICDC. In the VTC hearings SIFI staff observed on January 25 and February 20, counsel and clients did not exchange any words immediately before, during, or after the hearing. Routinely, IJ Cassidy and IJ Wilson asked counsel questions about the cases which counsel did not have an immediate response to. Many of these questions could be answered directly by clients, but attorneys could not confer off-the-record with them. Thus, attorneys were presented with the unenviable choice of breaching attorney-client privilege or not answering the court's questions. This not only undermines immigrants' right to

³ J.P.C., A# XXX-XXX-068, C.N.T., A# XXX-XXX-463, I.S.C., A# XXX-XXX-041, A.F.R., A# XXX-XXX-333, I.E.I., A# XXX-XXX-041, R.B.P.T., A# XXX-XXX-316, M.G.V.H., A# XXX-XXX-481, and S.H.B. A# XXX-XXX-588. Respondents' names and A numbers are available upon request.

⁴ J.P.C., A# XXX-XXX-068 (J. Pelletier, Nov. 20, 2017).

⁵ C.N.T., A# XXX-XXX-463 (J. Pelletier, Nov. 22, 2017).

⁶ I.S.C., A# XXX-XXX-041, (J. Baird Dec. 14, 2017).

⁷ A.F.R., A# XXX-XXX-333 (J. Wilson Jan. 4, 2018).

counsel and attorney's right to communicate with clients, it hampers the efficient adjudication of cases, a matter squarely within EOIR's authority.

The current practice is unjustified by security concerns and is completely unnecessary, as suitable alternatives are available. Attorneys could appear inside the ICDC courtroom. The courtroom is just down the hall from the visitation room that attorneys currently use, and is only steps from the facility's lobby, where attorneys are cleared through security on a daily basis. Also, ICDC has a room adjacent to the courtroom that could serve this purpose. In the past, ICDC has allowed attorneys and clients to meet in this very room to prepare for hearings.

Equally troubling, Atlanta Immigration Court clerks have dissuaded SIFI staff from filing any further motions to request leave to appear alongside their clients, indicating that they will be denied. The calls came in two cases after SIFI staff attorneys filed motions seeking to appear for hearings with clients detained at ICDC.⁸ In both instances, the Atlanta Immigration Court bond clerk called SIFI's Ocilla office and indicated that such requests would be denied. In one case, the bond clerk suggested to a SIFI staff attorney that she should not bother to file such requests in the future. This conduct is improper.

SIFI looks forward to discussing this issue and reaching a mutually acceptable resolution in the near future, especially in light of EOIR's plan to extend the use of VTC at the Atlanta Immigration Court to hear cases from the Folkston ICE Processing Center, another site where SIFI represents clients.

INTIMIDATION OF RESPONDENTS AND PARTICIPANTS IN COURT PROCEEDINGS

It is well established that immigrants in removal proceedings are entitled to due process. This right to due process includes "a hearing before a fair and impartial arbiter" without judicial conduct indicating "pervasive bias and prejudice." Matter of Exame, 18 I. & N. 303, 306 (BIA 1982). As EOIR's Ethics and Professionalism Guide for Immigration Judges specifies, IJs should be "patient, dignified, and courteous, and should act in a professional manner towards all litigants, witnesses, lawyers, and others with whom the Immigration Judge deals in his or her official capacity," and "[a]n Immigration Judge ... should not, in the performance of official duties, by word or conduct, manifest improper bias or prejudice." Ethics and Professionalism Guide for Immigration Judges p. 3. IJs are bound by ethical requirements to promote "public confidence in their impartiality, and avoid impropriety." IJs must be "faithful to the law and maintain professional competence in it" by being knowledgeable about immigration law, skillfully applying immigration law to individual cases, and engaging in reasonable preparation to perform their duties. Department of Justice, Ethics and Professionalism for Immigration Judges pp. 1-2 (2011). While not binding on IJs, the American Bar Association's Code of Judicial Conduct is referenced in EOIR's memorandum as setting forth principles to which IJs should aspire. The ABA Code's Preamble states that judges "should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional lives."

During one hearing, IJ Cassidy engaged in conduct that can only be described as inappropriate and intimidating, in a way that would dissuade a reasonable litigant from pursuing her rights. A hearing was underway for a Spanish-speaking woman. Her husband and two young daughters were in IJ Cassidy's courtroom in person, while the woman, detained at ICDC, appeared via VTC. As the husband identified himself, IJ Cassidy, for the first time in the hearing directed the Spanish-speaking interpreter to ask the husband whether he had status in the United States. The husband was clearly nervous and appeared to reluctantly answer "no" he did not have status. Until that moment in the hearing, IJ Cassidy had not employed the services of the interpreter, nor did he indicate why such a question was necessary to the

⁸ M.G.V.H., A# XXX-XXX-481, R.B.P.T., A# XXX-XX-316. Respondents' names and A numbers are available upon request.

the ongoing proceedings. The only reasonable conclusion was that IJ Cassidy sought to intimidate or demean the respondent's husband. IJ Cassidy was no longer acting as a judicial officer when he questioned the husband regarding his immigration status. Instead he assumed the role of investigator and prosecutor, and chose as his target not a respondent, but a courtroom observer. No judicial officer should act in such a fashion.

When the judge abandons his role as an unbiased arbiter of fact and law, and becomes a prosecutor, the court contravenes its responsibilities as a neutral fact finder. Marshall v. Jerrico, Inc., 446 U.S. 238 (1980). See also Schweiker v. McClure, 456 U.S. 188 (1982) IJ Cassidy clearly acted outside his judicial duties by attempting to intimidate the husband of the respondent appearing in court by aggressive questions directed to the husband's immigration status, an issue not before the court. The Court of Appeals for the Ninth Circuit chastised an IJ who exhibited bias and prejudice during removal hearings by abandoning her neutrality in violation of due process. The Court stated that due process is violated when the judge acts not as a neutral fact-finder interested in hearing the evidence but "as a partisan adjudicator" seeking to intimidate those appearing before him. Reyes-Melendez v. INS, 342 F.3d 1001 (9th Cir. 2003). A judge is entitled to ask questions to develop the record in a hearing in his courtroom but that "discretion is bounded by the applicant's right to receive a fair hearing. Podio v. INS, 153 F.3d 506, 509 (7th Cir.1998).

Due process is denied where the trial judge's examination of a witness "depart[s] from his function as a judge to assume the role of an advocate." People v. Wesley, 18 Ill. 2d 138, 155 (1959). The propriety of such an examination is largely dependent upon the circumstances of an individual case and rests within the discretion of the circuit court. A trial judge may question witnesses "in order to elicit the truth or to bring enlightenment on material issues which seem obscure. It should rarely be extensive and should always be conducted in a fair and impartial manner." Even if there is no showing of actual bias in the tribunal, [the United States Supreme Court] has held that due process is denied by circumstances that create the likelihood or the appearance of bias. Peters v. Kiff, 407 U.S. 493, 502 (1972) ("Not only is it important that the trial court avoid explicitly acting as an advocate for the prosecution, it is equally important that the trial court avoid appearing as if it is advocating on behalf of the prosecution.").

DENIAL OF LANGUAGE ACCESS

Federal law requires EOIR to ensure all respondents with limited proficiency in English have "meaningful access" to immigration courts by, inter alia, providing interpreters "during all hearings, trials, and motions during which the [limited English proficient] individual must and/or may be present." Executive Order No. 13166, 65 Fed Reg. 50121, (Aug. 11, 2000). The Office of the Chief Immigration Judge's Immigration Court Practice Manual explains that interpretation must be provided at no cost to all respondents who are unable to "fully understand and participate in removal proceedings" in English. The standard for interpretation set forth in EOIR's own Interpreter Handbook is "to interpret in a manner which allows the respondent/applicant ... to understand the proceedings as if no language barrier existed." OCIJ Interpreter Advisory Committee, Office of the Chief Immigration Judge's Interpreter's Handbook p. 12.

Despite the Executive Order and the clear procedural guidelines set forth by EOIR, IJ Cassidy did not provide language interpretation in five of seven cases observed⁹. Out of this group, four of the respondents spoke Spanish and one spoke Romanian. Though a Spanish-language interpreter was present in IJ Cassidy's courtroom, the interpreter did not translate the content of the court proceedings, such as the dialogue between IJ Cassidy and the ICE trial attorney or the respondent's attorney. Instead, at the conclusion of each hearing, IJ Cassidy would explicitly state his intention to have a few sentences interpreted to the respondent. Then he would articulate a two or three sentence summary of the

⁹ Two had English-speaking respondents and did not require interpretation.

proceedings, the interpreter would translate that, and IJ Cassidy would ask one or two questions to determine whether the respondent understood what had just taken place. In the case of the Romanian respondent, IJ Cassidy did not even inquire about the need for an interpreter until the hearing was near completion. The respondent was represented by an attorney. As the hearing ended IJ Cassidy asked the attorney, “Do we need a Romanian interpreter? Or can you just relay what happened to him later?” The attorney replied that she would not request interpretation for the hearing. No portion of the hearing was translated for the Romanian respondent. His bond was set at \$25,000. Important decisions made by IJ Cassidy were never explained to the individuals appearing before him.

Similarly, the interpretation in IJ Wilson’s courtroom consisted of a two or three sentence summary, a far cry from the requirement that interpreters “interpret in a manner which allows the respondent/applicant ... to understand the proceedings *as if no language barrier existed.*” OCIJ Interpreter’s Handbook at 12 (emphasis added). The master calendar hearing of respondent, Chiang Hou Xing,¹⁰ is illustrative. When the respondent, an alleged Chinese national, appeared on the screen, IJ Wilson asked him: “Sir, do you speak any English?” The respondent answered “no.” IJ Wilson replied, “sounds like English to me,” and laughed. He then asked the attorney appearing for the respondent, Mr. Igo, whether he waived interpretation. Mr. Igo responded, “we’re definitely going to need a Mandarin interpreter.” Though IJ Wilson then contacted a Mandarin interpreter over the language line, none of the exchange between IJ Wilson, Mr. Igo, and the ICE Trial Attorney was interpreted. This included a discussion about Mr. Igo’s request for continuance due to a medical emergency of counsel of record and a separate discussion about respondent’s receiving a bond while detained in Arizona. The only portion of the hearing translated for the respondent was a response to a question by the respondent and this statement by IJ Wilson at the close of the hearing: “Sir, we’re going to continue your case and you have to file your asylum application at the next hearing which is March 1. You’ve been in detention since August, so you’re going to have to work quickly with your lawyer to get the application filed.”

Respondents who must participate in immigration hearings without adequate interpretation are not afforded a fair opportunity to present their cases and may suffer other prejudicial consequences. This must be remedied.

CONCLUSION

Based upon our observations of the Atlanta Immigration Court we respectfully recommend to EOIR the following corrective actions:

- Ensure that Atlanta Immigration Court IJs and staff are adequately informed of their ethical obligation to maintain impartiality, including by refraining from prejudging motions or dissuading the filing of motions;
- Guarantee high-quality interpretation in the Atlanta Immigration Court by ensuring that all interpreters, including telephonic interpreters, provide complete interpretation of hearings for all respondents, and instruct IJs that court proceedings cannot continue when interpretation is not available in a respondent’s language. EOIR should investigate the failure to provide adequate interpretation in non-Spanish languages, and ensure availability for interpretation in such settings;
- Review, investigate and monitor IJ Cassidy’s courtroom to ensure compliance with standards to protect due process, impartiality and professionalism; and

¹⁰ SPLC did not confirm the spelling of the respondent’s name.

- Consider reprimanding, suspending and/or removing IJ Cassidy based upon his unprofessional conduct.

We appreciate the opportunity to further engage with EOIR regarding these troubling practices and to discuss further corrective measures. Please contact SIFI Director Daniel Werner at daniel.werner@splcenter.org and SIFI Advocacy Attorney Laura Rivera at laura.rivera@splcenter.org with any questions. Mr. Werner or Ms. Rivera also may be reached at (404) 521-6700.

Sincerely,

A handwritten signature in blue ink, appearing to be 'Daniel Werner', written over a horizontal line.

Daniel Werner, Esq.
SIFI Director

A handwritten signature in blue ink, appearing to be 'Laura Rivera', written over a horizontal line.

Laura Rivera, Esq.
SIFI Advocacy Attorney