



**Statement of
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Senate Committee on the Judiciary

**“Renewing America’s Commitment to the Refugee Convention:
The Refugee Protection Act of 2010”**

Wednesday May 19, 2010

I. Introduction

Heartland Alliance’s National Immigrant Justice Center (NIJC) commends Senators Patrick Leahy (D-VT) and Carl Levin (D-MI) for introducing the Refugee Protection Act of 2010 (S. 3113). NIJC also welcomes the support of co-sponsors Senators Daniel Akaka (D-HI), Richard Durbin (D-IL), and Roland Burris (D-IL). We appreciate the opportunity to submit a statement on this important issue.

The bill’s introduction coincided with the 30th anniversary of the Refugee Act of 1980, a landmark piece of legislation that made the United States a beacon of hope for men, women, and children fleeing persecution in foreign lands. Unfortunately, over the past 30 years the legal protections for refugees in the United States have been significantly weakened. Refugees and asylum seekers today face a broken system of laws that frequently results in needless delay, unnecessary detention, and deportation to countries where they face persecution, torture, or death. Enactment of the Refugee Protection Act of 2010 would go a long way toward restoring the United States as a human rights leader and a welcoming nation for those fleeing danger. The Refugee Protection Act would also bring the United States into compliance with our obligations under the United Nations Protocol Relating to the Status of Refugees (Refugee Protocol).

NIJC is a non-governmental organization based in Chicago and dedicated to safeguarding the rights of noncitizens. NIJC advocates for immigrants, refugees, and asylum-seekers through direct legal representation, policy reform, impact litigation, and public education. NIJC and its *pro bono* partners provide legal representation to approximately 10,000 individuals annually, including low-income immigrants, refugees, victims of human trafficking, unaccompanied minors, and asylum seekers. Since its founding 25 years ago, NIJC has developed the largest *pro bono* network in the United States, totaling more than 1,000 attorneys from the nation’s leading law firms.

NIJC’s experience in asylum issues derives from direct experience providing assistance to individuals fleeing persecution. NIJC’s Jeanne and Joseph Sullivan Project for Protection of Asylum Seekers provides free legal representation to asylum seekers fleeing persecution in their homelands. NIJC's National Asylum Partnership on Sexual Orientation serves immigrants seeking asylum based on persecution related to their sexual orientation, gender identity, or HIV status.

NIJC endorses the Refugee Protection Act of 2010. This legislation includes many provisions that would ensure the protection of vulnerable individuals seeking asylum, including codification of parole guidance for arriving asylum seekers, creation of a nationwide “alternatives to detention” program, and elimination of the one-year asylum application deadline.

Our statement today, however, will focus on the following five sections of the bill: Elimination of Arbitrary Time Limits on Asylum Applications (Section 3); Protecting Victims of Terrorism from Being Defined as Terrorists (Section 4); Effective Adjudication of Proceedings (Section 6); Scope and Standard for Review (Section 7); and Conditions of Detention (Section 10).

II. Elimination of Arbitrary Time Limits on Asylum Applications (Section 3)

Under current law, asylum seekers may be denied asylum even for meritorious claims if they have not filed for asylum within one year of entry into the United States. 8 U.S.C. 1158(a)(2). Under this provision, individuals who suffer from Post-Traumatic Stress Disorder, or who are simply ignorant of the requirement, must be denied asylum without regard to the merits of their claims, if they cannot fit into either of two narrowly-interpreted waiver provisions. This affects thousands of asylum-seekers every year, including NIJC clients:

- The Jimenez Viracacha family fled Colombia due to political persecution. Consumed by fear from their ordeal, the family kept to themselves, and did not know about the one-year requirement. They failed to file for asylum within one year, but did seek asylum promptly after the peace process in Colombia collapsed. The immigration judge granted the family withholding of removal, finding that they had met the higher standard for that relief (a 50.1% likelihood of persecution if deported), but denied the family asylum due to their failure to file within one year of arrival. NIJC appealed the case to the Seventh Circuit arguing that the family fell under one of the exceptions, but the Seventh Circuit is in the majority of circuits which find no jurisdiction to consider waiver eligibility. *Jimenez Viracacha v. Mukasey*, 518 F.3d 511 (7th Cir. 2008), cert. denied, 129 S. Ct. 451 (2008).

Although withholding of removal may protect some refugees from persecution, it also leaves them in a permanent limbo. Without asylum, the family is ineligible to obtain lawful permanent residence status. Without permanent resident status, the children are not eligible for student loans to attend college in this country. Under the Refugee Protection Act of 2010, legitimate asylum seekers and their families would no longer be prevented from gaining protection and lawful status in the United States. By eliminating the one-year deadline under 8 U.S.C. § 1158(a)(2), the Refugee Protection Act will give asylum-seekers an opportunity to have their claims approved or denied based on the merits of the claim, rather than on the arbitrary basis of whether they have formally sought asylum within a year of arrival.

III. Protecting Victims of Terrorism from Being Defined as Terrorists (Section 4)

Currently asylum seekers and refugees who flee to the United States to escape persecution and torture in their native countries face barriers to obtaining protection due to the so-called “terrorism bars” of 8 U.S.C. § 1182(a)(3)(B). Under this provision, the Department of Homeland Security (DHS) and the Department of Justice (DOJ) have found asylum seekers and refugees ineligible for protection in the United States despite the fact that they were forced,

under severe duress, to participate in the activities of alleged terrorist organizations. DHS and DOJ have also barred asylum seekers from protection if they participated in pro-democracy organizations that supported activities many years after the asylum seekers left the group or because they belonged to pro-democracy groups that were part of a broad coalition that included groups involved with violence. The agencies have further relied on 8 U.S.C. § 1182(a)(3)(B) to bar the spouses and children of these individuals.

At present, DHS and DOJ have asserted that over 25 of NIJC's clients are inadmissible under 8 U.S.C. § 1182(a)(3)(B). Because of the terrorism bar charge, these individuals are unable to move forward with their lives, integrate into U.S. society, and face long-term separation from their families, who often remain in extremely dangerous situations in their home countries. NIJC clients affected by the current terrorism bar legislation include:

- “Solomon,”¹ a 58-year-old Ethiopian man who was involved with the Coalition for Unity and Democracy (CUD), a coalition of Ethiopian pro-democracy political parties. Solomon viewed the CUD as an entirely peaceful party and never participated in or knew of any violent activities related to the CUD. In 2005, government officials arrested Solomon and detained him for two months, during which they frequently beat and tortured him. After his release, Solomon fled to the United States, where he applied for and received asylum in 2007. However, when Solomon filed petitions to bring his wife and three children to the United States, he was told that their petitions were placed on hold because, according to DHS, Solomon may be inadmissible due to his prior involvement with the CUD. DHS asserts that the CUD is a “Tier III” or undesignated terrorist organization. The petitions remained on hold for three years, during which time Solomon's wife was arrested and interrogated regarding Solomon's activities and she and the children had to live in hiding, separated from Solomon. After advocacy by NIJC, USCIS finally granted the petitions for Solomon's wife and children in 2010, three years after applying.
- “Agnes” is a 31-year-old woman from Uganda. When she was 29 years old, her father, an officer in the Ugandan military, kidnapped her and took her to the camp of the Lord's Resistance Army (LRA), a group designated as a terrorist organization by the United States. At the camp, Agnes's father offered her as a wife for Joseph Kony, the leader of the LRA. Over a week, Kony and his guards raped Agnes multiple times and detained her in a prisoner's pen with other men and women who had been beaten and mutilated. Agnes was repeatedly ordered to join the LRA and she consistently resisted, until her father told her she must join or die. Three days after she agreed with her father's order, Agnes managed to escape from the camp during an LRA raid. After returning to her home, Ugandan paramilitaries arrested, tortured, and raped Agnes because they believed she held pro-LRA sympathies. Agnes fled Uganda and went to the United States, where she applied for asylum. During her immigration court proceedings, the Immigration and Customs Enforcement (ICE) trial attorney accused Agnes of having provided material support to the LRA and asserted that she was barred under the law from obtaining asylum.

¹ All client names have been changed to protect identity.

Under the Refugee Protection Act of 2010, these legitimate asylum seekers and their families would no longer be prevented from gaining protection and lawful status in the United States. The Refugee Protection Act removes the statutory provision that bars spouses and children from status in the United States simply by virtue of their familial relationship to an individual who might be inadmissible under 8 U.S.C. § 1182(a)(3)(B). The Refugee Protection Act also amends the “material support” provision of 8 U.S.C. § 1182(a)(3)(B) to exempt individuals who coerced to provide support for terrorist organizations.

As it currently exists, 8 U.S.C. § 1182(a)(3)(B) prevents legitimate asylum seekers and refugees who have suffered immense persecution and face certain death in their home countries from obtaining the protection in the United States. This is not what Congress intended. The Refugee Protection Act amends 8 U.S.C. § 1182(a)(3)(B) so that bona fide asylum seekers who pose no danger to the United States and have had no involvement with violent activities remain eligible for the protection they need and deserve.

IV. Effective Adjudication of Proceedings (Section 6)

The Refugee Protection Act would permit the Attorney General to appoint counsel in cases where appointed counsel would contribute to the fair resolution or effective adjudication of the case. In 2009, NIJC, along with a number of other human rights organizations, filed a Petition for Rulemaking with the Department of Justice to authorize immigration judges to appoint counsel where it is necessary to ensure fundamental fairness.²

Representation by counsel is critically important in immigration cases, where the complexity of immigration law can be overwhelming for noncitizens to navigate. Counsel is especially important for vulnerable noncitizens, including children and individuals with mental impairments. The situation of NIJC client “Maleah” illustrates the problems that arise for vulnerable individuals in proceedings:

- “Maleah,” a 50-year-old native of the Philippines and mother of three children, lived in the United States as a lawful permanent resident since 1990. In October 2008, she was detained by following two minor convictions. She had suffered depression for years and had been under regular care of a doctor, but that care ended once she was in ICE custody. Suffering from severe depression exacerbated by her detention, and unable to understand the full nature of the proceedings against her, Maleah appeared at her immigration hearing without a lawyer. The judge did not tell Maleah that she had the right to seek free legal assistance from a legal aid organization before he ordered her removal. Several days after the hearing, Maleah met attorneys from NIJC during a “know your rights” presentation in the detention facility. By the time the attorneys agreed to represent Maleah a few days later, she had already been transferred from Chicago to El Paso, Texas, and was about to be deported. The attorneys convinced a judge to stop the deportation and allow Maleah to reopen her case. Over the next six months, the attorneys helped Maleah gather the evidence she needed to demonstrate she was eligible to remain in the United States. In August 2009, the court reinstated Maleah’s permanent resident status and she was released from detention.

² The petition is available on-line at <http://www.immigrantjustice.org/news/litigation/petition-apptcounsel.html>.

Under the Refugee Protection Act, an immigration judge could appoint counsel in cases such as Maleah’s, where fundamental fairness requires representation by counsel. In addition to protecting constitutional due process rights, this provision would also increase the efficiency of immigration court proceedings. As the Executive Office for Immigration Review has commented, “Non-represented cases are more difficult to conduct. They require far more effort on the part of the judge.” The Refugee Protection Act would increase the efficiency and fairness of court proceedings.

V. Scope and Standard for Review (Section 7)

The Refugee Protection Act would restore judicial review to ensure fair and reasonable adjudication of asylum claims in a manner consistent with principles of administrative law. Currently, many noncitizens cannot seek judicial review of adverse immigration decisions, due to jurisdiction-stripping provisions added to the statute by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) and REAL ID Act (1995). The lack of review is particularly troubling given the serious concerns advocates have raised about the ability of the immigration court system to adjudicate cases competently. Several U.S. Circuit Courts of Appeals have found that current immigration court practice has “fallen below the minimum standards of legal justice.”³

In its recent decision in *Kucana v. Holder* (558 U.S. ____ (2010)), the U.S. Supreme Court ruled that noncitizens seeking to reopen their removal orders have a right to judicial review if their motion to reopen is denied. The Court applied the long-standing presumption in favor of judicial review of administrative actions, reaffirming that only clear and convincing evidence of congressional intent to deny review will suffice to insulate agency action from scrutiny. The Court noted that Congress had explicitly limited review in many other contexts, but had not done so here.

NIJC welcomes the Refugee Protection Act’s provisions that will restore judicial review over asylum denials based on lack of corroboration of asylum claims. By permitting judicial review to these vulnerable individuals, the Refugee Protection Act reaffirms our country’s commitment to basic standards of fairness and due process.

VI. Conditions of Detention (Section 10)

The Refugee Protection Act would require the government to create and maintain minimum standards of care for immigrant detainees. Currently, Immigration and Customs Enforcement (ICE) detains 30,000 noncitizens a day. ICE’s detention authority is civil in nature. The purpose of immigration detention is to ensure that noncitizens appear for court hearings and removal; ICE does not have penal detention authority.

Despite the civil nature of immigration detention, however, many noncitizens are held in worse conditions than those experienced by convicted criminals. Although ICE has some guidelines on the treatment of detainees, these guidelines are based on a penal model and are not legally enforceable. ICE detains noncitizens in remote facilities, far from family or access to counsel, and often without access to adequate medical care. Since 2003, more than 111 noncitizens have

³ *Benslimane v. Gonzales*, 430 F.3d 828, 829-830 (7th Cir. 2005) (citing to decisions by the Second, Third and Ninth Circuit Courts of Appeals, which criticized the Board of Immigration Appeals and the immigration courts).

died in detention, some from chronic illnesses for which they did not receive appropriate treatment, others from suicide.

The conditions of immigration detention facilities are particularly inhumane for vulnerable populations such as asylum seekers, most of whom have fled brutal persecution in their home countries. Many detained asylum-seekers have physical injuries, as well as serious psychological issues related to their persecution, which frequently go untreated while they remain in detention for long periods, waiting to have a hearing on their asylum case. The situation of “Susan,” an asylum seeker currently detained by ICE in Illinois, illustrates the need for adequate and appropriate standards of care in detention:

- “Susan” is a transgender individual who became HIV positive after being gang raped several years ago. When ICE first detained Susan, jail staff immediately began to mock her and humiliate her for being transgender, using homophobic slurs and calling her “trash.” When she complained about her treatment, staff placed her in solitary confinement in retaliation. Throughout her detention, she was not allowed to speak to other detainees and had limited privileges. Jail staff also physically abused and humiliated her by forcefully grabbing her breasts. Susan reported her abuse to ICE officers, but her complaints went unanswered by officials until extensive advocacy by Susan’s attorney, in partnership with NIJC.

Under the Refugee Protection Act, the Secretary of Homeland Security would be required to promulgate legally binding regulations to establish conditions of detention that would ensure a safe and humane environment. The Act includes statutory language that specifically requires ICE to provide adequate medical care; access to counsel, including group legal orientations; access to visitation for family and religious visitors; adequate telephone access, including reasonable phone rates; and limitations on the use of shackling, strip searches and solitary confinement. In addition, the Act would require compliance with the Prison Rape Elimination Act, which would ameliorate some of the obstacles faced by detainees seeking redress for, and protection from, egregious forms of abuse by detention center staff and other inmates.⁴ These protections will help ensure that the basic human rights of noncitizens in immigration detention are respected.

VII. Conclusion

Based on our extensive experience representing noncitizens, including asylum seekers and refugees, in immigration proceedings, NIJC applauds the introduction of the Refugee Protection Act of 2010. This legislation would eliminate current legal barriers in the United States which limit compliance with obligations under the Refugee Protocol. We urge members of Congress to enact this important legislation, which is critical to ensuring that the United States upholds its commitment to fairness and due process and continues to be a welcoming nation for individuals fleeing danger and persecution.

⁴ Earlier this month, NIJC urged the Attorney General to adopt the national standards developed by the National Prison Rape Elimination Commission, particularly for individuals held in immigration detention. NIJC’s letter is available on-line at <http://www.regulations.gov/search/Regs/home.html#documentDetail?D=DOJ-OAG-2010-0001-0449>.