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Oversight – Treatment of NYC’s Immigrants in Detention Centers

Testimony Before
The Committee on Immigration of
The New York City Council

December 13, 2011

Thank you for the opportunity to testify regarding detention for New Yorkers who run afoul of Immigration Control and Enforcement (ICE). My name is Lynn M. Kelly and I am the Executive Director of The City Bar Justice Center. The Justice Center is part of the Association of the Bar of the City of New York Fund, Inc., (“City Bar Fund”), the 501(c) (3) public service affiliate of the City Bar which is the largest local bar association in the country with over 23,000 lawyers as members. Our mission is to leverage the resources of the New York City legal community to increase access to justice through pro bono lawyers who volunteer their time to help low income and disadvantaged clients. The Justice Center assists more than 20,000 clients a year, approximately half of whom are helped with advice, brief services or tailored referrals through our free civil Legal Hotline. We thank Chairman Dromm, the Immigration Committee and The City Council for your past and continuing support for our immigration work to move clients toward citizenship status through the Immigrant Opportunities Initiative (IOI).

The topic of today’s hearing is of particular interest to the City Bar Justice Center because we operate programs serving New Yorkers in ICE detention. In addition to our work on naturalization and community education regarding immigration rights, the Justice Center has three main pro bono immigration programs. The Justice Center’s Immigrant Women & Children Project (“IWC”), assists survivors of violent crimes, including domestic violence, human trafficking, and sexual assault in applying for immigration relief. The Refugee Assistance Project helps those who have fled violence in their own countries to obtain asylum. The Varick Immigrant Detention Project specifically targets matching pro bono attorneys to New Yorkers who are detained and

cannot afford attorneys to enable them to raise cancellation and other defenses in the Immigration Court.

The lack of counsel for detained New Yorkers was brought to my attention three years ago when we received a petition from nearly 100 detainees at the Varick Street facility. We worked with The Legal Aid Society and the American Immigration Lawyers Association to create a pro bono clinic which we operated until the facility closed in February 2010. With our volunteers we have interviewed more than 400 detained New Yorkers and obtained the release and restoration to their families of more than a dozen. That experience is the basis for our testimony today.

The need is great. In 2010 there were over 23,000 removal hearings in NYC, a major increase from the 18,000 done in 2008. (EOIR, FY Statistical Year Books for 2008 and 2011 (Office of Planning, Analysis, and Technology)). Nationally, in 2009 nearly 400,000 immigrants were removed from the U.S., 67% of whom had no criminal records.

The Justice Center starts from the proposition that the biggest problem with immigration detention is the lack of counsel. To be clear, there is no right to government assigned counsel for anyone facing removal, including those with green cards (lawful permanent residents). According to a recent study by the Vera Institute of Justice, an immigrant with a lawyer who has been released from detention or never been detained has a 74% success rate in a removal hearing, compared to dismal 3% success rate for immigrants who were detained and lacked counsel. Immigrants who obtain release are more likely to obtain their own attorneys so the goal should be to decrease the numbers of non-violent offenders who are detained and increase counsel for those who are detained to ensure that all of their legal defenses are raised. In this regard, the recent city

funding for additional immigration attorneys at the defenders and domestic violence programs is a very good idea.

Prolonged detention creates all sorts of difficulties. Through our experience interviewing detainees, we heard complaints that medical needs are often not addressed, including difficulty in getting appropriate mental health treatment. We also heard about the difficulties that unrepresented detainees have in putting together claims and defenses because they are unable to reach or easily communicate with potential witnesses and family members. We were told that mail was not being forwarded and telephone calls were very difficult to make, were costly, and were not private. And, while we were able to get pro bono attorneys to staff the Varick weekly clinic, a key stumbling block in more extended legal representation was the fact that detainees could be transferred at anytime to ICE detention facilities in Louisiana or Texas, away from pro bono counsel. We brought these issues to ICE attention with mixed results.

In February 2010 Varick closed and since then the New Jersey detention facilities have provided more beds for New Yorkers. While there is a greater chance of New Yorkers being kept in the metropolitan region as detention capacity has expanded – and this is a far better option than detention in Texas or Louisiana– the New Jersey location is still an obstacle for representation as New York pro bono attorneys are not eager to travel to facilities in New Jersey. It was also a major step forward for access to justice when The Legal Aid Society received a contract from Vera to provide “know your rights” presentations to New York detainees for the first time.

While we have not had time to review and prepare comments on the two resolutions, we hope that our experiences with over 400 detained New Yorkers will be of assistance to the Committee in reviewing these issues. We remain very concerned that important defenses cannot be raised by New Yorkers in detention without attorneys. Our Immigration and Nationality Law Committee issued a report more than two years ago concluding that legal representation of detainees would make the system more efficient and less wasteful. Citing “serious due process concerns” based on ICE’s increased use of “detention as an enforcement policy”, resulting in more unrepresented respondents appearing before the Immigration Court, the Committee’s report concludes, “This glaring injustice can be remedied by recognizing the right to appointed counsel for indigent detained respondents.”

Several examples of the New Yorkers we have represented in the last year to defend their rights in Immigration Court are:

After arriving in NYC from China at the age of nine with a green card, Mr. Z had a traumatic childhood. He was abused and removed from his home by the Administration for Children’s Service and entered foster care. Returned to his mother, he dropped out of high school and went to work to help support his family. As a young adult he endured homelessness. As a result of this trauma, Mr. Z was ill equipped to make sound decisions which resulted in minor contacts with law enforcement. The City Bar Justice Center matched him with *pro bono* attorneys who took on his case and were able to retain an expert in trauma who ultimately concluded that Mr. Z’s Post Traumatic Stress Disorder contributed to the poor choices that led him to have contact with law enforcement. After nine months in detention, Mr. Z was granted cancellation of removal and released from detention by the Immigration Court. Only 23 years old, Mr. Z hopes to continue his education.

Mr. S is a young man who came to NYC as a Lawful Permanent Resident from El Salvador when he was seven years old. A recent arrest for a misdemeanor, which led to his transfer to immigration custody, could not have come at worse time as Mr. S was working multiple jobs to support his four U.S. citizen brothers and sisters

after their mother became injured and could no longer work. The judge granted cancellation of removal. After spending seven months in detention, Mr. S was reunited with his family at the hearing.

In 1994, Mr. T entered the U.S. as a green card holder from the Dominican Republic. Mr. T and his family are especially close – they have had to come together to support Mr. T’s youngest brother who has severe developmental issues. Mr. T. was picked up by ICE in June of 2011 following an arrest in the Bronx on charges of robbery that were dismissed. However, DHS ordered his removal based on a 2005 conviction. We matched his case with pro bono attorneys who successfully argued that recent 2d Circuit case law meant the 2005 conviction was not an aggravated felony subjecting him to removal. This complicated defense could never have been raised successfully by a pro se respondent. The pro bono attorneys argued that he should no longer be mandatorily detained and should be released. The government has indicated that they will terminate the case..

This issue of ICE detention of low income New Yorkers without counsel continues to be of major concern to the City Bar Justice Center. We are sending staff and encouraging pro bono attorneys to visit the detention facilities in New Jersey so that there will be increased access to representation by counsel and also an opportunity for immigrants to express concerns that they might have with conditions of confinement. We are fortunate to have the services of a fulltime Fragomen Fellow at the City Bar Justice Center donated by the immigration law firm of Fragomen, Del Rey, Bersen & Lowey to enhance our efforts. We applaud the Committee on Immigration for conducting these oversight hearings since the stakes are very high for New York families who have a loved one picked up by ICE.

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