



962 Wayne Avenue, Suite 500
Silver Spring, MD 20910
Phone: 301.589.0389
Fax: 301.562.8155
saalt@saalt.org
www.saalt.org

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The Honorable Paul J. McNulty
Deputy Attorney General
United States Department of Justice
Robert F. Kennedy Building
950 Pennsylvania Avenue, NW, Room 4111
Washington, DC 20530

The Honorable Robert D. McCallum, Jr.
Associate Attorney General
United States Department of Justice
Robert F. Kennedy Building
950 Pennsylvania Avenue, NW, Room 5706
Washington, DC 20530

Re: Comprehensive Review of Immigration Courts and Board of Immigration Appeals

Dear Mr. McNulty and Mr. McCallum:

South Asian American Leaders of Tomorrow (SAALT) is a national non-profit organization dedicated to ensuring the full and equal participation by South Asians in the civic and political life of the United States. We are writing to offer our input and suggestions as you conduct a comprehensive review of the immigration courts and the Board of Immigration Appeals (BIA).

As an organization that works with the South Asian community in America, we have an important stake in the outcome of this review process. Approximately two million South Asians live in the United States today. A significant percentage of our community is foreign-born with ties to Bangladesh, Bhutan, India, Nepal, Pakistan, Sri Lanka, the Maldives, and the diaspora, including the West Indies, Africa and Europe. All of us, citizen and noncitizen alike, rely on the immigration courts and the BIA to make fair and just decisions about crucial issues, including whether our family members may seek asylum in America, adjust their status, and obtain relief from deportation. As we are sure that you will agree, the perspectives of the individuals, families, and communities who are affected by our immigration court system must be an integral part of any review process. We hope that you will consider our suggestions and we welcome the opportunity to discuss this matter with you further.

As Attorney General Gonzales noted in his January 9th Memorandum to Immigration Judges, the judges in the immigration court system are truly "the face of American justice" for many of us. However, we are concerned that the immigration courts and the

BIA are failing to safeguard that justice for our community. In recent years, we have watched with deep concern as South Asians have received less than fair and meaningful hearings in immigration courts. Below are a few examples of the type of treatment that South Asians have faced in the immigration court system:

Treatment of South Asians in the Immigration Courts

Cultural and Linguistic Barriers

Cultural differences and linguistic barriers often affect South Asians in immigration court. Many South Asian asylum seekers, for example, do not speak English and are more culturally conservative than many other asylum seekers. As such, immigration judges who are not culturally sensitive may incorrectly conclude that an applicant is not credible based on an incorrectly translated statement or a statement taken out of cultural context.¹ For example, in *Singh v. INS*, the BIA concluded that an Indian asylum applicant's claim was not credible because of inconsistencies between statements from his airport interview and subsequent statements. However, the airport interview was conducted through an airport translator *who did not even speak the applicant's language*.² Because the inconsistencies in testimony could be attributed to poor translation, the Ninth Circuit vacated the BIA's credibility determination and remanded the case for further proceedings.³

Cultural insensitivity can be particularly harmful to South Asian women. South Asian women, such as the Tamil asylum seeker in *Paramasamy v. Ashcroft*, may be reluctant to report rape or sexual abuse to a male interviewer or attorney. Without an understanding of the culture, an immigration judge may incorrectly conclude that the inadequate detail or inconsistency in accounts of rape or sexual abuse support an adverse credibility finding.⁴

Credibility Determinations

The Ahmeds, a family fleeing persecution in Pakistan, received an unfair hearing before an immigration judge and were denied asylum. After the BIA affirmed without opinion and the Ahmeds appealed, the Sixth Circuit ordered a remand for a hearing before a new immigration judge in *Ahmed v. Gonzales*.⁵ Noting that the immigration judge's

¹ See, e.g., *Zhen Li Iao v. Gonzales*, 400 F.3d 530 (7th Cir. 2005) (Posner, J.) (criticizing IJ for being insensitive to cultural considerations such as errors that might have resulted from translation of Chinese and the level of understanding that members of Falun Gong would and should have of the formal doctrines of their religion); *Singh v. INS*, 292 F.3d 1017,1022 (9th Cir. 2002) (criticizing IJ for basing adverse credibility determination on possible mistranslation); see also Ann Simmons, *Some Immigrants Meet the Harsh Face of Justice*, L.A. TIMES, Feb. 12, 2006, at A18 (describing the cultural insensitivity of some IJs towards immigrants in hearings).

² *Singh*, 292 F.3d at 1022 (explaining that the applicant may have provided incorrect answers to some questions even though he provided correct answers to questions about dates and birthplaces because those questions "did not present the translational difficulty that a legal term of art such as "persecution" would).

³ *Id.*

⁴ *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1053 (9th Cir. 2002).

⁵ *Id.*, 398 F.3d 722 (6th Cir. 2005).

"persistent mischaracterization of the Ahmeds' testimony biased his decision against them," the Sixth Circuit concluded that "the Ahmeds did not receive a meaningful hearing of their case."⁶

Similarly, the Ninth Circuit issued two decisions in a case criticizing an improper credibility determination in the case of a woman fleeing persecution in Sri Lanka. In *Thangaraja v. Ashcroft*,⁷ the Ninth Circuit noted that the immigration judge "ignored record evidence" and improperly denied Thangaraja's claim because she "'had to look up to the ceiling'" at times when she was testifying.⁸ The Ninth Circuit ordered a remand and later criticized the judge's decision, the BIA's summary affirmance, and the litigation position taken by the government on appeal.⁹

Claims brought by South Asians have also been denied on the basis of inexplicable legal reasoning regarding important issues. In *Sahi v. Gonzales*,¹⁰ the Seventh Circuit remanded a case in which an immigration judge denied asylum to a Pakistani man fleeing persecution due to his religious practices. The Seventh Circuit criticized the immigration judge's reasoning as unclear and noted that the judge failed to cite to any relevant authority to support his erroneous interpretation of the scope of "persecution."¹¹ Since the BIA had simply affirmed the immigration judge, Judge Richard Posner was left to explain the alarming repercussions of the immigration judge's improper reasoning in the context of religious persecution.¹²

These are just some of the recent cases in which immigration judges failed to provide South Asians with a fair and proper adjudication of their claims – errors that the BIA then failed to address in the course of their review. As Judge Posner concluded in a recent decision, the "adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice."¹³

⁶ *Id.* at 724, 727.

⁷ *Thangaraja v. Ashcroft*, 107 Fed. Appx. 815 (9th Cir. 2004), later proceeding at 428 F.3d 870 (9th Cir. 2005).

⁸ *Id.*, 107 Fed. Appx. at 816-17.

⁹ *Id.*, 428 F.3d at 874.

¹⁰ *Id.*, 416 F.3d 587 (7th Cir. 2005).

¹¹ Specifically, the Seventh Circuit noted that "the [immigration] judge's oral opinion is meandering and none too clear," and explained that "the judge neither defined 'persecution' nor cited a decision by the Board, or for that matter any other source of guidance, on what constitutes, or should be deemed to constitute, persecution in an asylum case." *Id.* at 588.

¹² *Id.*

¹³ *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005).

Recommendations

We express our support for the following suggested reforms. As we explain in more detail below, we support changes that will improve the capacity of immigration judges and the BIA to produce fair, well-reasoned decisions and to protect immigrants' rights. The first three sets of recommendations we list apply broadly to all immigrants in immigration court proceedings. The fourth set of recommendations is particularly tailored to applicants for asylum. We believe that, by taking these steps, the United States Department of Justice can ensure more fairness in the immigration court system for members of our community and others seeking to join or remain a part of American society.

1. Strengthen BIA oversight of immigration judge (“IJ”) decisions

- *Terminate the "summary affirmances without opinion" procedure:* The BIA’s practice of summarily affirming appeals has transformed the federal court system into the first real venue for appeal for immigrants seeking review of the IJ decisions in their cases. The dockets of circuit courts are clogged with immigration appeals without the benefit of reasoned analysis by the BIA.¹⁴ The backlog at the federal courts has trickled back down to the immigration judges through reversals and multiple remands.¹⁵ Inefficiencies are not the only problems created by summary affirmances. Through summary affirmances, the BIA has endorsed the logical fallacies, prejudices and unsupported conclusions in immigration judge decisions.¹⁶ As such, the BIA has discredited itself and undermined its own relevance. Therefore, we agree with the comments of several federal judges and organizations such as Human Rights First and the American Bar Association that the BIA needs to provide the reasoning behind its opinions.¹⁷

¹⁴ See Hon. John M. Walker, Chief Judge, U.S. Court of Appeals for the Second Circuit, *Keynote Address*, N.Y. LAW SCHOOL’S JUSTICE ACTION CENTER FALL 2005 SYMPOSIUM -- SEEKING REVIEW: IMMIGRATION LAW AND FEDERAL COURT JURISDICTION, available at <http://www.nyls.edu/pages/3870.asp> (discussing backlog of 5000 immigration cases in Second Circuit); Adam Liptak, *Courts Criticize Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, at A1 (discussing increase in immigration caseload in Second and Ninth Circuits).

¹⁵ See Dorsey & Whitney, LLP., *Board of Immigration Appeals: Procedural Reforms To Improve Case Management – Summary-Conclusion*, for the American Bar Association Committee on Immigration Policy, Practice and Pro Bono (2003), available at http://www.dorsey.com/files/upload/Summary-Conclusion_DorseyABASTudy.pdf, at 4 ("Dorsey-ABA Summary-Conclusion"), full study available at http://www.dorsey.com/files/upload/DorseyStudyABA_8mgPDF.pdf ("Dorsey-ABA Full Report") ("This wasteful and slow 'back to square one' sequence has already been identified by the federal courts as one inevitable result of opaque BIA affirmances. Already, one federal circuit court has explicitly complained that it had to do 'what the BIA should have done.'").

¹⁶ See *Benslimane*, 430 F.3d at 829 (Posner, J.) (collecting cases from numerous circuits that have criticized the reasoning and conclusions of IJs and the BIA).

¹⁷ See *Courts Criticize Handling of Asylum Cases*, *supra* note 14 (quoting from several federal appellate judges calling for reasoned BIA decisions); Human Rights First, *Letter to DOJ re: Comprehensive Review of Immigration Courts and Board of Immigration Appeals* (Jan. 31, 2006), available at <http://www.humanrightsfirst.info/pdf/06202-asy-initial-hrf-ltr.pdf> ("HRF Letter"); American Bar Association, *News Release: American Bar Association Calls on Board of Immigration Appeals to Discard*

- *Expand the number of BIA judges:* It will be easier for BIA judges to provide more detailed and thoughtful review of immigration judge decisions if the cases in the docket are spread out among a larger number of judges. We agree with the federal judges and organizations that have recommended that the BIA be expanded to include more judges.¹⁸ We suggest that this expansion be conducted in an independent, transparent manner.¹⁹
- *Reinstate three-judge panels for all appeals:* The purpose of having a panel of three judges, rather than only a single judge, conduct review of IJ decisions is to ensure that (a) decisions are carefully deliberated, (b) errors are caught, and (c) future litigants and the federal courts are provided with well-reasoned discussions of the pertinent legal issues. Prior to restricting the availability of the three-judge panel, the BIA often produced detailed analytical opinions, at times with concurrences or dissents, which provided guidance on the law and fostered a sense of fairness in the proceedings. A single judge affirming another single judge's opinion does not produce the same benefits as a three-judge panel.
- *Allow BIA judges to review factual issues de novo:* Immigration judges have misinterpreted demeanor evidence and made improper credibility findings in many cases, including ones involving South Asians.²⁰ Given the disturbing factual errors made in asylum cases and non-asylum cases alike, we recommend that the DOJ should return authority to the BIA to review factual issues *de novo*.²¹

2. Improve the quality and accountability of immigration courts

- *Provide more training for immigration judges on the role of cultural differences and linguistic barriers:* We agree with Judge Posner's comment that immigration judges' "lack of familiarity with relevant foreign cultures" is "disturbing."²² As such, we recommend that immigration judges and staff undergo training in cultural sensitivity, so that they understand relevant cultural practices and

Procedural Changes Adopted in 2002 (Oct. 13, 2003), available at <http://www.abanet.org/media/oct03/101303.html> ("ABA News Release").

¹⁸ See *Courts Criticize Handling of Asylum Cases*, *supra* note 14; ABA News Release, *supra* note 17.

¹⁹ See Dorsey-ABA Full Report, *supra* note 15, at 27-28 (noting the perception of organizations that the initial reduction of BIA members "eliminated independent-minded BIA members" and thus was politically-biased); Pamela MacLean, *Judges Blast Immigration Rulings*, NAT'L L. J., Oct. 24, 2005, at S1 (noting that some observers called the initial reduction of BIA members "a purge of judges who were more likely to dissent from deportation orders").

²⁰ See, e.g., *Benslimane*, 430 F.3d at 828 (collecting cases where IJ made improper findings); *Paramasamy*, 295 F.3d at 1047 (9th Cir. 2002) (finding that IJ's assessment of Sri Lankan applicant's demeanor, in which IJ transplanted boilerplate language wholesale from other decisions involving Sri Lankan asylum applicants, demonstrated his "predisposition to discredit" her testimony); *Singh*, 292 F.3d at 1022-1023 (noting that IJ improperly based his adverse credibility determination on 'discrepancies' between Indian asylum applicant's statements at a poorly-translated airport interview and his properly-translated statements at his hearing).

²¹ See also ABA News Release, *supra* note 17 (calling for restored *de novo* BIA review).

²² *Zhen Li Iao*, 400 F.3d at 533-34.

- linguistic barriers. Immigration judges who display ignorance of relevant cultural issues in their decisions should be required to undergo further training and their decisions should be subject to careful scrutiny. Training should be focused on various ethnic communities, and not be a blanket “cultural sensitivity” curriculum. It is important that specific modules on various ethnic and religious communities be developed in conjunction with community-based groups and presented to judges and staff.
- *Provide more training for immigration judges on procedural rights of immigrants and changes in caselaw:* To properly adjudicate cases, the immigration judge must know the governing law, as it evolves through new cases and immigrants’ rights under the law. Given the discrepancies noted among the quality of decisions by immigration judges, training will help ensure that all judges are aware of the applicable law and that hearings are held with the appropriate procedural protections for immigrants.²³
 - *Create a diverse pool of immigration judges:* A diverse pool of immigration judges is important not just for diversity itself or for making administrative judges more reflective of America’s population – both admirable objectives – but also for helping to ensure that immigration judges as a group are more culturally sensitive. As explained in the previous recommendation, immigration judges who are unfamiliar with asylum seekers’ cultural values are more likely to make unwarranted adverse credibility findings.²⁴
 - *Improve the internal review process and take other appropriate measures to identify and eliminate bias and incompetence among immigration judges:* The federal circuit courts have cited numerous instances of bias and incompetence among immigration judges.²⁵ As Judge Boyce Martin of the Sixth Circuit recently commented, “[a] nation so concerned with freedom and liberty ought to accord a little more respect and dignity to those who seek from us that which we claim to be so proud to offer.”²⁶ To improve the quality and impartiality of decisions we recommend that DHS (1) hire more immigration judges to relieve caseload pressure; (2) enact stronger complaint review procedures so that immigration judges who demonstrate bias/incompetence are either suspended or placed under supervision; and (3) give immigration judges the resources they need (e.g., more support staff and better access to balanced country reports and background information) to improve the quality of their decisions.²⁷

²³ See also HRF Letter, *supra* note 17 (calling for training and quality assurance for IJs).

²⁴ See *Some Immigrants Meet the Harsh Face of Justice*, *supra* note 1 (“[A]ttorneys and legal scholars attribute some errant behavior to the judges’ racial bias and lack of cultural sensitivity. Of the nation’s 224 immigration judges, 166 are white, 26 black, 22 Hispanic, nine Asian and one American Indian, according to government records.”).

²⁵ See *Benslimane*, 430 F.3d at 828.

²⁶ *N’Diom v. Gonzales*, No. 04-3742, ___ F.3d. ___ (6th Cir. Mar. 24, 2006) (Martin, J., concurring).

²⁷ See *Judges Blast Immigration Rulings*, *supra* note 19 (noting observers’ suggestions that immigration judges need more resources); *Some Immigrants Meet Harsh Face of Justice*, *supra* note 24 (noting the failure of current quality assurance and complaint procedures for reprimanding IJs who demonstrate bias).

3. Promote rights of immigrants in court proceedings

- *Ensure access to pro bono counsel and know-your-rights sessions, and promote immigrants' right to self-obtained counsel:* Immigrants' access to pro bono counsel can be the difference between a successful and failed claim.²⁸ All too often, immigrants are unrepresented or represented by ineffective counsel. Given how crucial it is for immigrants to be properly represented and given the frequency with which they are not, we agree with the recommendations of groups like the United States Commission on International Religious Freedom (USCIRF) and Human Rights First that immigration judges must ensure that immigrants have access to and are able to retain pro bono counsel.²⁹ Immigration judges must inform immigrants of their rights and provide them with the necessary information and time to retain pro bono counsel. The government should also ensure that attorneys and advocacy organizations have access to detention facilities to provide know-your-rights trainings for detainees on a regular basis.
- *Ensure access to translators:* As noted above, a qualified translator who speaks the asylum seeker's language and dialect must be present and translate the conversation between alien and the government at every interview. As in the case of the Indian asylum seeker in *Singh v. INS*, poor translation can lead to improper conclusions that the asylum seeker's statements are inconsistent and, in some instances, lead to an order of removal.³⁰ We strongly support measures to prevent the negative effects of such linguistic barriers. We suggest that immigration judges use qualified translators who are given training on how the immigration courts operate and on the rights of immigrants who come before immigration courts.
- *Discourage reliance on inappropriate legal positions by government attorneys and encourage the exercise of prosecutorial discretion:* Increasingly, courts have noted when DHS and DOJ attorneys have taken positions contrary to law in cases before immigration court and federal court.³¹ This undermines the credibility of these attorneys and our justice system as a whole. The DOJ should carefully review cases in which such litigation positions have been taken and ensure that

²⁸ See United States Commission on International Religious Freedom, *Asylum Seekers in Expedited Removal*, at 4, available at <http://www.uscirf.gov/countries/global/asylum%5Frefugees/2005/february/execsum.pdf> ("USCIRF Report").

²⁹ See *id.* at 8; HRF Letter, *supra* note 17, at 2.

³⁰ See, e.g., *Singh*, 292 F.3d at 1023-1024 ("The English-Hindi-Punjabi-Hindi-English round robin that occurred there begins to take on the patina of the children's game of 'telephone.' The Board in this case did not address the difficulties Singh may have had with multiple linguistic barriers. . . .")

³¹ See HRF Letter, *supra* note 17 ("The handling of cases like *Li v. Gonzales*, 420 F.3d 500 (5th Cir. 2005), vacated and dismissed by *Xiaodong Li v. Gonzales*, 429 F.3d 1153 (5th Cir. 2005), in which both ICE and Justice Department attorneys submitted legal briefs that were clearly inconsistent with both U.S. and international law, underscores the need for such a review."); see also *Thangaraja*, 428 F.3d at 875 ("The Attorney General's arguments on the merits of Thangaraja's asylum and withholding of removal claims were also not substantially justified. The IJ's decision, defended by the Attorney General, ran squarely counter to our precedent.").

"success" in immigration cases is not defined by, above all, obtaining and sustaining a removal order, but by a just and fair outcome for society in accordance with the law. Similarly, courts have noted when DHS and DOJ attorneys have pushed for removal -- and the BIA has acquiesced -- based on procedural technicalities or in cases where the petitioner was clearly disadvantaged due to lack of counsel or ineffective assistance of counsel.³² This, too, undermines the government's credibility in these cases, and we urge the government to exercise more prosecutorial discretion.

- *Discourage the practice of widespread detention, long-distance detention transfers, and the use of inappropriate detention facilities:* Detention presents a hardship for many -- for immigrants, who are kept away from their families and legal counsel; their families (which often include American citizens) who are separated from their loved ones; and American taxpayers, who must finance detention facilities. For immigrants who pose neither a flight risk nor a danger to the community, detention is simply inappropriate. We support USCIRF's recommendation that asylum seekers who pose neither a flight nor a security risk be consistently released on bail,³³ and we add that the same criteria should be used to determine whether detention is appropriate for any immigrant facing deportation. In addition, we recommend that, when immigrants are detained, they should be detained near their communities and given regular access to counsel and family networks. Immigrants who are not currently serving time for criminal convictions should be detained in immigrant detention facilities, rather than jails and prisons.³⁴

4. Create and strengthen protections for asylum applicants

- *Allow asylum hearing officers to grant asylum to asylum seekers who are facing Expedited Removal:* We agree with the USCIRF's recommendation that asylum hearing officers be allowed to grant asylum in approvable asylum cases at the time of the credible fear interview.³⁵ Currently, when asylum officers find that an asylum seeker facing Expedited Removal has a credible fear of persecution, the asylum officer must refer the case to an immigration judge. However, in affirmative asylum proceedings, the asylum officer has the right to grant asylum without referral. In such cases, the case will only go before an immigration judge if DHS decides to appeal. There is no good reason to eliminate the asylum officer's authority to grant asylum merely because a person is detained and facing removal. A qualified asylum officer does not suddenly lose the skills or judgment to make an asylum determination because the applicant is facing removal. Further, allowing asylum officers to grant asylum can only serve to further

³² See, e.g., *Benslimane*, 430 F.3d at 831 ("The Board's action is . . . not justifiable, only as punishment for a lawyer's mistaken belief that the filing of the I-485 form (which had already been filed!) would be premature. We are not required to permit Benslimane to be ground to bits in the bureaucratic mill against the will of Congress.")

³³ See USCIRF Report, *supra* note 28, at 8.

³⁴ See *id.* at 7.

³⁵ See *id.* at 8.

expedite removal proceedings. In the event that the asylum officer grants asylum, the extra step of taking the matter before the immigration judge for a court proceeding is eliminated. But, where the asylum officer finds no credible fear of persecution or believes that the applicant will not be eligible for asylum for some other reason, the case is immediately referred to an immigration judge (just as it would be under the current system).

- *Improve reliability of information considered by immigration judges:* We share USCIRF's concerns that immigration judges and the BIA give excessive weight to unreliable documents, particularly documents produced at the border.³⁶ This can be particularly harmful for asylum applicants. We support the USCIRF's recommendation that the government clarify the ultimate purpose of all forms and sworn statements to both the border patrol and immigrants at the border.³⁷ This should reduce the number of errors made by border patrol in filling out the forms and encourage immigrants to provide more complete answers.³⁸ We further recommend that statements be excluded from evidence if they are made without the benefit of a translator who speaks the immigrant's language in the appropriate dialect, or, alternatively, that immigration judges should be instructed to give little weight to inconsistencies between improperly-translated statements, made at the border or during initial interviews conducted without appropriate translation services, and subsequent statements made at the immigration hearing with appropriate translation services.

Thank you for considering our suggestions. Your efforts towards meaningful reform will ensure fairness and restore a sense of justice to a system that affects so many in our community. Given the important need for the changes that we have described, we are eager to participate in the review process and look forward to speaking with you about this matter.

I can be reached at (301) 589-0389 or by email at deepa@saalt.org. We appreciate your time and consideration.

Sincerely,

Deepa Iyer, Esq.
Executive Director
South Asian American Leaders for Tomorrow

C. Felix Amerasinghe, Esq.
SAALT Policy Action Taskforce

Cc: Eric Treene, Civil Rights Division, Department of Justice

³⁶ See USCIRF Report, *supra* note 28, at 5.

³⁷ See *id.* at 5.

³⁸ See, e.g., *Singh*, 292 F.3d at 1023-1024.