The Association of the Bar of the City of New York

Office of the President

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September 30, 2005

VIA FAX AND MAIL

Roseann B. MacKechnie
Clerk of the Court
United States Court of Appeals
For the Second Circuit
40 Foley Square
New York, N.Y. 10007

Re: Notice Relating to Non-Argument Calendar

Dear Ms. MacKechnie:

The Association of the Bar of the City of New York, through its Committee on Immigration and Nationality Law, writes to express our deep concern with the new procedure established by the United States Court of Appeals for the Second Circuit to handle all asylum based appeals. Under this system, set to begin on October 3, 2005, all appeals that include an asylum, withholding of removal or Convention against Torture claim will be placed on a Non-Argument Calendar. The rules of the court have also been altered in other respects in order to expedite the handling of theses cases, in particular imposing tight deadlines for the filing of briefs.

We are well aware of the surge in petitions for review of removal orders to the circuit courts and the burden they have placed upon this court. We also know and appreciate that the court has attempted to address this surge in a number of ways including volunteer mediators and extra staffing. Nevertheless, we have several concerns regarding the new Non-Argument Calendar rule.

We believe that no other circuit court of appeals has designated asylum cases for categorical exclusion from oral argument. We are concerned that, in and of itself, the treatment of an entire category of cases in a manner that presumptively limits the role of the advocate will be read by those within and outside the court as an indication that these cases are not as important as other cases handled by the court. This is particularly troubling because asylum decisions can involve matters of life or death, of persecution or

protection from persecution. We believe that there may be other mechanisms that would result in the accommodation of oral argument in asylum cases short of automatically scheduling oral argument in all cases.

It is generally agreed that one, if not the primary, reason for the surge is the change in the BIA rules which allows for single judge affirmance of the Immigration Judge's decision without an opinion. The review by the circuit court of appeals has therefore become the only meaningful review of an Immigration Judge's order of removal. The expedited treatment of asylum denials by the Second Circuit, coupled with the anticipated use of orders rather than decisions, may further erode the legal process that is so critical in insuring that litigants are not sent back to countries where they face persecution, and perhaps torture and death.

We are concerned with the procedure established to handle asylum denials. We understand that transcripts and briefs will be read by staff attorneys who are mostly new law school graduates. They will write bench memoranda that are sent on to panels that will be under pressure to dispose of cases quickly if the Court is to meet its goal of dispensing with 2,200 cases per year.

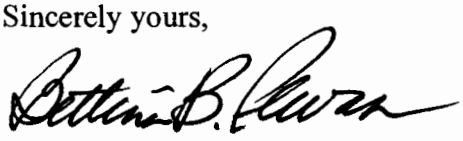
The history of asylum jurisprudence in this country is relatively short. The Refugee Act, which brought the United States into conformance with the U.N. Refugee Convention, was enacted by Congress in 1980. The body of asylum law is growing and evolving, shaped by changes in the world and the development of new theories of protection from persecution. We are concerned that the accelerated pace of the new process may sacrifice the essential deliberative process and the need for development of the law in this area.

Several specific details of the plan also concern us. We understand that the court anticipates an accelerated rate of receipt of administrative records from the BIA because of the conversion that will soon take place from paper to electronic transmission. This will result in the issuance of simultaneous briefing schedules for many cases handled by practitioners with large numbers of asylum appeals before the court. The court's announcement states that an attorney with a large volume of petitions for review at the court will not be accommodated with briefing schedules that allow for time to prepare a large number of briefs, and there is no mechanism provided for dealing with valid circumstances under which an exception to the single 30 day adjournment policy should be considered, even in the early stages of this program. Offices that provide pro bono assistance to asylum seekers, including those that draw on a large number of volunteer lawyers to handle those matters, may be also negatively impacted.

Further potentially exacerbating this situation is the rule that if an appellant's brief is not timely filed, the petition for review will be dismissed in 15 days. Defaults will inevitably occur, to the detriment of asylum seekers. In contrast, if the government fails to file a timely brief the case will not be defaulted, as it is not legally possible to enter a default against the government, but will go on to the panel for disposition without the government's brief.

The City Bar requests that this court stay the implementation of the Non-Argument Calendar and that you meet with representatives of the Committee and other interested parties so that we may better understand the specific needs of the court at this juncture and how we may participate in finding solutions for the effective representation of the asylum applicants in the court's backlog and continuing caseload.

Sincerely yours,



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cc: Claudia Solvinsky