

Testimony of The Legal Aid Society
on
RESOLUTION 1153
PROSECUTORIAL DISCRETION IN IMMIGRATION CASES

Presented before:

The New York City Council

Presented by:

Olivia Cassin, Staff Attorney

September 22, 2005

The Legal Aid Society welcomes this opportunity to testify before the City Council in support of Resolution 1153 which urges the United States Immigration and Customs Enforcement to exercise prosecutorial discretion in exceptional cases like the one of our client Andrea Mortlock. We urge the City Council to pass the Resolution.

The Immigration Law Unit of The Legal Aid Society

The Legal Aid Society was created in 1876 to serve the immigrant community in New York City and is the nation's oldest and largest non-profit provider of legal services. For decades, it has maintained a widely respected city-wide Immigration Law Unit. This unit is the only non-profit legal service provider in New York City that specializes in representing non-citizens with criminal convictions in removal proceedings initiated by Immigration and Customs Enforcement (ICE), formerly Immigration and Naturalization Service (INS). The unit's attorneys represent non-citizens at hearings before immigration judges and on administrative and judicial appeals in deportation cases.

In 1996, Congress passed the most comprehensive changes in our nation's immigration laws in decades: the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). The 1996 legislation eliminated relief from deportation for large numbers of non-citizens with criminal convictions. The legislation made deportation mandatory for non-citizens convicted of ever expanding categories of crimes without consideration of countervailing equities, such as length of residence in the United States, family ties to the United States, health conditions or even the presence of life-threatening conditions in the country of origin.

Since September 11th, 2001, the federal government has also drastically increased immigration enforcement through expanded detention and has shifted New York non-citizens from New York City detention facilities to New Jersey County jails where there are scant free legal resources to help detainees. The Immigration Law Unit responded to this crisis in 2002 by broadening our outreach to New Jersey county jails where we conduct Know-Your-Rights sessions and offer hundreds of detainees their only opportunity for legal advice and counsel. Attorneys from the Legal Aid Society conduct these Know-Your-Rights sessions on a monthly basis in both the Bergen and Passaic County Jails with the assistance of students from Seton Hall University School of Law. In addition, the Society has operated a weekly hotline where families may call for information and advice regarding their relatives who have been detained by immigration authorities. Through these efforts, the Legal Aid Society advised or assisted over 500 detainees and their families in 2004.

Since the 1996 legislation, ICE has sought the removal of all deportable non-citizens irrespective of their individual facts and circumstances. When asked to exercise prosecutorial discretion, ICE attorneys refuse to do so. The case of Ms. Mortlock exemplifies ICE's prosecutorial mandate to deport all deportable non-citizens without any consideration of the tragic consequences of such action. This case also exemplifies the dire need for ICE to exercise discretion in cases where deportation will create extraordinary hardship to the deportee and her family and may well amount to a death sentence.

The case of Andrea Mortlock

Ms. Mortlock is a 41 year old native and citizen of Jamaica. She emigrated to the United States on December 20, 1979 at the age of 15. In the United States, she was reunited with her mother and other family members who emigrated before her. She is the mother of two United States citizen children, ages 22 and 12. She has a sister and a half brother, both United States citizens, who live in the United States. In Jamaica she has no family or acquaintances. In 1988, Ms. Mortlock tested positive for the Human Immunodeficiency Virus ("HIV") and was diagnosed with the Acquired Human Immunodeficiency Syndrome ("AIDS"). As a result of her HIV/AIDS infection, she has suffered from many opportunistic infections and HIV/AIDS related maladies, such as pneumonia, extreme wasting and neuropathy. Some 17 years since her diagnosis, Ms. Mortlock relies on constant monitoring of her illness by a specialized physician and a complex regimen of anti-retrovirals to stay alive. She is also prescribed growth hormones to control her wasting syndrome.

In August 1989, the former Immigration and Naturalization Service, commenced deportation proceedings against Ms. Mortlock as a result of a conviction in 1987 for criminal sale of a controlled substance in Kings County, New York. For this conviction, Ms. Mortlock served a sentence of one year. In 1995, Ms. Mortlock failed to appear for a deportation hearing at the Immigration Court in New York, New York. An Immigration Judge ordered her deported to Jamaica in absentia. In April 2000, the INS took custody of Ms. Mortlock after she completed a ten-day sentence for possession of stolen property and held her in various detention centers in Pennsylvania and Texas for almost three years. Despite her compliance with INS's efforts to deport her, Ms. Mortlock was not deported to Jamaica because the government of Jamaica would not take her back. During her three years of detention, Ms. Mortlock was separated from her family and did not receive appropriate medical care and treatment. At the last detention facility in Texas she was not getting the medications she needed for her HIV infection.

After several failed attempt to secure Ms. Mortlock's release from INS custody, including the filing of a request for deferred action and for release from custody, working with pro bono counsel at Hughes Hubbard & Reed LLP, the Legal Aid Society filed a federal habeas corpus petition which enabled Ms. Mortlock, finally, in March 2003, to be released from detention, required only to report regularly to ICE. In the petition, Ms. Mortlock sought release from custody on the ground that Jamaican authorities refused to accept her and issue travel documents for her repatriation based on her dire medical condition.

Upon her release from INS custody, Ms. Mortlock returned to New York where she was reunited with her family and has put herself on the path of becoming a productive member of society. She enrolled in vocational training at the International Center for the Disabled, secured specialized medical and mental health care and re-established relationships with her children.

Since her release from INS custody in March 2003, Ms. Mortlock reported with her attorneys to the deportation office of ICE at 26 Federal Plaza approximately once a month. Despite her deteriorating health condition, she never missed an appointment. On August 11, 2005 Ms.

Mortlock was asked to report to the deportation office at 26 Federal Plaza for what was described to her attorney as a "routine update" of her information. She was tricked. Upon her arrival at the deportation office with her attorney, she was taken into custody without the opportunity to collect her medications or prepare in any other way. She was detained in the Passaic County Jail, in Paterson, New Jersey, a jail notorious for its lack of care for AIDS patients.

Efforts made to prevent removal

Within hours of Ms. Mortlock's arrest by ICE officers on August 11, 2005, the Legal Aid Society attempted to reopen Ms. Mortlock's 10 year old deportation order. Because of procedural bars to reopening, we sought the ICE Chief Counsel's Office agreement to a joint request to the Immigration Judge to reopen the case. This would have allowed Ms. Mortlock to have her day in court and would have allowed for the adjudication of Ms. Mortlock request to remain in the United States to be made by an independent adjudicator, the Immigration Judge. In support of our motion, we submitted documentation explaining how Ms. Mortlock's case had changed since she was initially ordered deported. We documented how Ms. Mortlock's more advanced AIDS would put her at serious risk of death if she was returned to Jamaica. We explained the hardships Ms. Mortlock would face if deported to Jamaica, including the virtual impossibility of obtaining medical care and treatment, being stigmatized as a person living with HIV/AIDS, and becoming subject to violence on account of being a criminal deportee and a person with visible signs of advanced HIV/AIDS disease.

The Chief Counsel's office refused our request for leniency, notwithstanding Ms. Mortlock's late stage of illness. Shortly thereafter, we filed an application for a stay of removal and a request for deferred action with the ICE Field Director for Detention and Removal. Those requests have not yet been responded to by ICE. Next, we filed a motion to the Immigration Judge to reopen Ms. Mortlock's proceedings, sua sponte, in light of the compelling humanitarian factors in her case. While the Immigration Judge has granted a stay of removal pending her adjudication of the motion, no decision has yet been rendered on our motion to reopen the deportation proceedings.

In addition to exhausting domestic remedies, we also advocated on another front, seeking to preclude Ms. Mortlock's deportation on the grounds that it would violate international human rights laws. We filed a request for precautionary measures with the Inter-American Commission on Human Rights. On or about August 19, the Commission requested the United States State Department to refrain from deporting Ms. Mortlock to Jamaica.

Thanks to the Council's introduction of this resolution, press on Ms. Mortlock's situation in the New York Times and the New York Daily News, as well as an outpouring of support from civil and human rights organizations, physicians, attorneys and concerned citizens, on September 13, 2005, ICE released Ms. Mortlock from the Passaic County Jail. Although ICE determined that her health was so fragile she could no longer remain in detention, they continue to pursue Ms. Mortlock's deportation to Jamaica, where experts believe she will be subject to extreme stigma, discrimination and violence and may not receive the life-saving medical care she needs.

Conclusion

The Legal Aid Society is grateful to the Council Members and the Council's Immigration Committee for introducing this resolution and for the opportunity to present testimony. We urge the Council to pass Resolution 1153. By passing the resolution, the Council will contribute to our efforts to seek a humane resolution for our very ill client, setting the stage to compel ICE in the future to exercise prosecutorial discretion where the consequences of removal are so dire. There are other long term residents in New York City who will benefit from the initiation of humane policies in immigration enforcement.