

**NOTE:** Contact Rex at rexnyc@gmail.com if you want to join a secret discussion group, share case stories, or want a copy of the Vera Institute practice advisory or recent ACLU practice advisory!

There are two ways to win:

Termination motions: Throw the case out because of something stinky (doesn't matter whether ICE meets its burden of proof). ICE's burden of proving alienage is irrelevant.

Suppression motions: Keep certain evidence out and hope ICE cannot meet its burden of proof. Weaken ICE's ability to meet its burden of proof. In most cases, ICE must prove the client's alienage. 8 CFR 1240.8(c).

### **Practical steps**

I. Ask the IJ to set a deadline for ICE's evidence.

II. If ICE submits material late, ask the IJ to terminate. (ICE's unusually heavy workload is no excuse).

III. To fight this or not? Consider:

Want to fight for relief (seek a conditional order), Good chance for other relief (100%??), Follow what you learn your specific IJ prefers, Fear that the IJ will improperly punish you just because you file the motion, Save the lawyer's time/effort. (Ethics?), Save the client's time/fees, Fear that ICE will improperly punish you just because you file the motion. What if you will later make iffy request for PD?, The lawyer's reputation, Establish facts to help others who have been mistreated, Lawyer's wish to take cases likely to win to have a nice victory percentage, Lawyer's feeling for or against doing these

### **Termination: regulatory violations**

Throw the case out because the government violated a regulation and that regulation was intended to benefit the non-citizen. *Matter of Garcia-Flores*, 17 I&N Dec. 325 (BIA 1980).

Possible even if ICE has proof of alienage.

### **Prejudice – the BIA**

Either:

- A. mandated by Constitution/federal law,
- B. creates a procedural framework, or
- C. benefits non-citizen plus proof of actual prejudice

**The Second Circuit:** for years, a better rule. But a three-judge panel in *Rajah v. Mukasey*, (2d Cir. 2008) is illogically muddying the waters. Is the rule for pre-hearing regulatory violations that we either show: (see next slide) **The Third Circuit:** presume prejudice if it affects fundamental rights derived from the Constitution or a federal statute. *Leslie v. Holder* (3d Cir. 2010)

### **I-770 termination**

The government must give it to all <18, even those with parents. 8 CFR 236.3(h).

If <14 or doesn't understand it, DHS must read and explain it in a language the child understands. Providing another similar form does not cure the violation according to a NYC IJ but then the BIA in an unpublished decision said the opposite (case litigated by Jason Cade the n at The Door). Victories in NYC, NJ, MA (MTT or settled)

**Check for:**

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- Gave I-770 but kids didn't understand it
- Gave in wrong language (winner!)
- Forced to sign without reading it (good if we can prove it)
- Did not offer a copy (unclear)
- Analyze whether CBP wrote they gave it to the kid but in fact never did so (liars!)
- Warning: some IJs misinterpret how an unpublished BIA decision involved an odd situation – DHS gave similar advisals.
- Warning: some IJs illogically say the I-770 does not implicate fundamental rights where the child in question by chance was eventually able to get a lawyer.
- Warning: some IJs say the I-770 is focused on when those <18 are pushed to accept voluntary departure and will not grant our motions where vol dep not involved.

**CBP only gave the I-770 to a conservator**

- 8 CFR 1236.2 only lets them serve the NTA and arrest warrant like that if the kid is under 14.
- 8 CFR 103.8(c)(2)(i) says can do that where a completely incompetent person is in an institution.
- Also: due process trumps regulations.

**NTA Service**

Must give the NTA for those <14 to parents and a person where kid resides, not just the kid. 8 CFR 103.5a(c)(2)(ii).

Ninth Circuit requires it for kids 14-17 and after release. *Flores-Chavez* (9th Cir. 2004).  
*But see Nolasco v. Holder*, 537 F.3d 159 (2d Cir. 2011) (no remedy if no prejudice).

- Incomplete certificate of service
- Merely told the child to give a copy to the sponsor
- Unknown signature supposedly by a child personally served who was only 6 years old.
- Says given to a conservator but no signature or name
- Says given to a conservator but illegible signature and no name.
- Given to conservator before child was in that shelter.
- CBP in McAllen, TX lies about supposedly giving the NTA but the child refused to sign.

**Talk to Jodi Zeisemer!**

- Says personally served but nothing on the line for a signature when personal service is done.

**ICE's lame attempt to cure:**

- ICE belatedly tries to serve in court. Should be invalid under 8 CFR 1003.14(a) (complete service before filing the NTA). Also, due process concerns to deny our chance to challenge it.
- ICE claims IJ should give time to serve the NTA under Matter of E-S-I- (BIA 2013).
- Service on the child's immigration lawyer is not service on the custodian.
- Service on a family court lawyer is not service on the child.

**Flores settlement**

Applies to all minors in detention

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Access to temperature control and ventilation

Unless an emergency/influx, Placed within 72 hours, Held in licensed child-care facilities, Held in safe and sanitary conditions.

If an emergency, then DHS must place children expeditiously.

Aug 2015: Judge Gee ruled that DHS has been violating Flores and must enact certain remedies by 10/23/2015

### **Orantes injunction rules**

If from El Salvador, see *Orantes-Hernandez* rules. (This applies to adults too) In writing and verbally give advisals. Cannot coerce them to drop asylum claims. Must make legal materials about relief available in Spanish and have accessible law libraries.

### **CBP Hold Rooms Memo**

**Hold Rooms Memo:** CCAN and the National Immigration Forum stitched pieces of it.

Food (e.g. snacks every 4 hours), Bedding: all required will get clean bedding. Detained >24 hours must get a blanket and mattress, I-770 advisals, Adequate temperature control/ventilation

### **Suppression**

#### **Three Well-Established Grounds**

Egregious 4th Amendment Racial profiling. Bad faith violations. Severe seizure.

*Almeida-Amaral v. Gonzales*, 461 F.3d 231 (2d Cir. 2006). Offensive sexual touching. Cold cells? Even if local police did it.

Widespread 4th Amendment. Factors listed in *Oliva-Ramos v. Holder*, 694 F.3d 259 (3d Cir. 2012). Wild guess is any violation you see will be widespread against kids. Home raids: ask Rex for lots of research.

5th Amendment, Coercion. Such as late-night intimidation. How about cold room treatment? Certain conduct violates both regulations and can be grounds for a suppression motion

#### **Ambitious Grounds**

Fourth Amendment violations even if not egregious nor widespread, State Constitutional rights Vienna Convention on Consular Relations, Outrageous trickery, Ask Rex for research and to coordinate!, \* Civil rights lawsuits are another tactic

### **Near-Final Points**

Make the stories vivid! Boldly evoke pain caused, not a dry legal recitation!

Waves of shameful practices? Stay in touch with each other through Rex.

Discussions: groups such as the National Immigration Project

Motions to suppress and terminate

Practice advisory: Vera Institute

New ACLU advisory on CBP and MTT

Advocacy

Civil litigation for damages

Collaboration! Secret listserve

Opinions about IJs?

### **Discovery**

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Ask if ICE will get it and give it

Demand that the IJ compel production of the A-file and documents about admission/presence.

INA 240(c)(2)(B)

Track 3 FOIA request (limited to the A-file)

Broad FOIA requests

Brady, subpoenas (8 CFR 1003.35(b)(3)), interrogatories, depositions

Call the agency/police for documents

State law equivalent to FOIA

File complaints about misconduct

Jencks Act

What kinds of documents?

The A-file

Policies and memos (for the date/place)

Records about how our client was treated

Evidence of widespread violations

Pictures of officers? Disciplinary records?

Meta-data

Feedback

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