

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK**

HANAD ABDI; JOHAN BARRIOS RAMOS;  
on behalf of himself and all others similarly situated,

Petitioners,

v.

KIRSTJEN NIELSEN, in her official capacity as  
Secretary of U.S. Department of Homeland Security;  
THOMAS BROPHY, in his official capacity as Acting  
Director of Buffalo Field Office of Immigration and  
Customs Enforcement; JEFFREY SEARLS, in his  
official capacity as Acting Administrator of the  
Buffalo Federal Detention Facility, and JEFFERSON  
SESSIONS, in his official capacity as Attorney  
General of the United States,

Respondents.

**DECLARATION OF  
THE HONORABLE  
CAROL KING**

Case No. 17-cv-721 (EAW)

I, Carol King, make this declaration based on my own personal knowledge and, if called to testify, I could and would do so competently as follows:

1. I was an Immigration Judge at the Executive Office for Immigration Review (“EOIR”)’s Immigration Court in San Francisco, California for more than 21 years, from October 1995 until my retirement in January 2017. In total, I have worked in the field of immigration and asylum law for more than 30 years, including my years in private practice prior to being appointed as an Immigration Judge.

2. I submit this declaration in support of the petitioners in the above-captioned case and in support of an injunction requiring defendants to provide bond hearings to the class of arriving asylum seekers who have been detained in the Batavia federal immigration facility for over six months. In this declaration I provide background on asylum proceedings in immigration

court and explain why providing bond hearings for arriving asylum seekers does not pose a burden on the government and in fact increases efficiency and efficacy in the system.

### **Background & Experience**

3. In my career as an Immigration Judge for more than 21 years, I presided over both detained and non-detained dockets and conducted countless master calendar hearings, individual merits hearings, and bond hearings.

4. The docket that I presided over included cases of asylum seekers. I have adjudicated numerous asylum applications from arriving asylum seekers. I have also conducted dozens of bond hearings for recently arrived asylum seekers who were incarcerated after entering the U.S. between ports of entry.<sup>1</sup>

5. While I was assigned to the Immigration Court in San Francisco, I was sent on detail to several different locations across the country, including two details in Tacoma, Washington and two in Texas at the Pearsall and Brownsville facilities. In those courts my docket included bond hearings, master calendar, and merits proceedings.

6. From November 1, 2010 to April 30, 2011, I was temporarily appointed to the Board of Immigration Appeals for six months, where I adjudicated immigration cases at an appellate level and participated in en banc deliberations.

7. Prior to becoming an Immigration Judge, I spent more than 10 years as a member of the private bar focusing on immigration law. I was a specialist in Immigration Law certified by the California State Bar and served for three years (1994 – 1996) as a member of the Immigration and Nationality Law Commission of the California State Bar Board of Legal

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<sup>1</sup> See *Matter of X-K*, 23 I. & N. Dec. 731 (BIA 2005) (currently under review by the Attorney General).

Specialization, which tests and certifies specialists on behalf of the State Bar. I represented asylum seekers and others in immigration court custody and non-custody proceedings through the Bar Association of San Francisco Pro Bono Project. I also advised attorneys practicing criminal law regarding the immigration consequences of criminal convictions and mentored attorneys inexperienced in immigration law through the Lawyers Committee for Civil Rights' Pro Bono Asylum Project.

8. Since I retired from my position as an Immigration Judge, I have been working as a consultant specializing in mentoring immigration attorneys. My areas of expertise include writing and research support for immigration attorneys preparing motions, trial and appellate briefs, and other documents.

9. For the last 20 years, I have frequently given trainings, made presentations, and participated on panels on U.S. immigration law, international refugee law, and the daily operations and policies of EOIR, including at the American Immigration Lawyers Association, the Lawyers Committee for Civil Rights Asylum Project, the Immigrant Legal Resource Center, the Children's Immigration Law Academy's National Institute of Trial Advocacy, the National Association of Women Judges, the International Institute of the Bay Area, and the California Superior Court Judges' Annual Conference (upcoming).

10. I have also been a guest lecturer on various topics of immigration law at the University of California, Berkeley, School of Law, and I am currently a guest faculty member of the Stanford Law School's Trial Advocacy Workshop. From August 2007 to 2011, I also worked as an immigration law professor at Golden Gate University School of Law.

11. Attached as Exhibit A is a true and accurate copy of my *curriculum vitae*.

12. The views and opinions expressed herein are entirely my own, and do not necessarily reflect those I consult, EOIR, or the DOJ.

**Immigration Court Proceedings for Arriving Asylum Seekers**

13. Based on my experience as an Immigration Judge in the Immigration Court in San Francisco, as well as my experience on detail in other courts, I provide the following description of case processing for arriving asylum seekers' asylum claims in immigration court.

14. The first substantive hearing in any immigration case, including for arriving asylum seekers who have passed the credible fear interview, is called a master calendar hearing. The master calendar hearing is a preliminary proceeding in which the Immigration Judge usually first sees an immigrant.

15. A typical master calendar session can bring dozens of immigrants before a single Immigration Judge. At the hearing, the Immigration Judge will ask each immigrant whether she will be seeking any form of relief and if so, the Judge will ensure the immigrant has the necessary application forms for requesting their sought-after relief and estimate the time needed to resolve the application.

16. Based on the responses from the immigrant and the attorney for the government at the master calendar hearing, the availability of the parties, the necessity of locating interpreters, and the heavy demands on the court's calendar, the Immigration Judge will then schedule an individual merits hearing at a future date.

17. An individual merits hearing is a trial. Merits hearings last much longer than master calendar hearings and in asylum cases usually require judges to block off approximately a half day for the hearing. The factual record in an asylum case can be dense, consisting of testimony from the applicant, their friends, and their family members; detailed country

conditions reports and news articles; declarations and/or expert witness affidavits, and foreign documents such as police reports, medical reports, birth records, and proof of nationality and citizenship.

18. Given the complexity of asylum cases, asylum hearings often require more than one merits hearing. For example, the Immigration Judge's schedule may not permit sufficient time to hear all the evidence relevant to a detainee's application for relief from removal. In such cases, at the end of the initial merits hearing, the Immigration Judge is forced to set the case for another merits hearing. It is not uncommon for the next merits hearing in a detained setting to be scheduled weeks out from the initial one.

19. A bond hearing, if it is to happen in a case, could happen at any time including before the master calendar hearing. A bond hearing is separate from any determination on the merits. Evidence taken in bond proceedings is kept separate from the record in the substantive case.

20. Keeping in mind the complicated nature of asylum cases, and the delays due to the court's congested calendar, delays in adjudicating asylum cases are inevitable, especially if the due process rights of the asylum seeker are to be protected. Someone diligently pursuing their asylum claim could easily take more than six months before completing their case. As an Immigration Judge, I would often grant one or more continuances for good cause, including allowing the asylum seeker time to gather and prepare additional evidence or to find an attorney. This practice was typical of nearly all the Immigration Judges I worked with in San Francisco and the Immigration Judges in Texas and Washington State where I went on details for EOIR.

21. By granting continuances, and thus giving the asylum seeker more time to find an attorney and/or to prepare the case, the judge is attempting to bolster the fairness of the

proceedings. Asylum seekers face heightened difficulty gathering evidence in light of their distance from their home countries, lack of sophistication, lack of experience with legal proceedings, and limited financial resources. Immigration Judges also have the authority to deny continuances when it is apparent that an asylum seeker is not engaged in a good-faith effort to prepare for the case.

**Detaining Arriving Asylum Seekers Without Bond Hearings During Their Immigration Court Proceedings Burdens the System.**

22. In my experience as an Immigration Judge, a private practitioner, and in my decade training other immigration attorneys, detaining arriving asylum seekers without access to bond hearings while they litigate their claims burdens the system.

*Detained Asylum Seekers Have a Difficult Time Fully Developing Their Asylum Case.*

23. Based on my experience as an Immigration Judge and an immigration attorney, detained asylum seekers have a difficult time fully developing their asylum cases. It is very difficult to collect evidence relevant to an asylum case from inside a detention facility. For example, the restrictions on and cost of placing phone calls from the detention facility limits the individual's ability to collect the evidence they need for their case. Phone usage is only available at particular times of day, foreign calls are not allowed, and if a detainee does not reach someone, they cannot call back and the detainee will be forced to wait days at a time before trying to make contact again, depending on the rules of the detention center where the individual is being held. Language restrictions and restrictions on the use of Internet and other research methods at the detention facility also make it challenging for the individual to collect sufficient country conditions evidence relevant to their asylum claim. Even in cases where the individual is able to obtain country conditions evidence, they face greater challenges finding and affording translation services from detention so as to include the materials in their application. It is

therefore common for the factual records of proceedings for detained immigrants, especially if they are unrepresented, to be much less developed than those of respondents who are released from custody.

24. Immigrants in detention also have reduced access to counsel. As an initial matter, they are less likely to be able to find counsel because detention facilities are often located in remote areas without a community of lawyers. Even when they manage to find representation, their access to their lawyers is limited due to the facilities' restrictions on access to the Internet, access to the telephone, and visitation, even by attorneys.

*When Detained Asylum Seekers Have Not Fully Developed Their Case, Immigration Judges' Workload Increases.*

25. Because of the complex nature of an asylum inquiry and the specialized role of the Immigration Judge, the Immigration Judge's workload increases when asylum seekers are in detention and as a result are less likely to have counsel or to fully develop their cases.

26. Immigration Judges have a duty to develop the record, especially when the immigrant is unrepresented by counsel.<sup>2</sup> Unlike other trial judges, Immigration Judges must ascertain and assess all the relevant facts so as to ensure that the applicant presents his or her case as fully as possible.<sup>3</sup> It is every Immigration Judge's duty to make an informed decision as to whether the facts before them meet the existing requirements for a grant of asylum and as to whether the applicant deserves asylum in the exercise of discretion.

27. To perform this duty adequately, Immigration Judges often serve some of the functions normally served by counsel. For example, judges in asylum proceedings frequently

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<sup>2</sup> See *Secaida-Rosales*, 331 F.3d 297, 306 (2d Cir. 2003); *United States v. Copeland*, 376 F.3d 61, 71 (2d Cir. 2004) (as cited in *Delgado v. Mukasey*, 508 F.3d 702 (2d Cir. 2007)).

<sup>3</sup> See *Yang v. McElroy*, 277 F.3d 158 (2d Cir. 2002).

pose questions directly to the asylum seeker to develop better details as to the nature of the feared persecution and the severity of past experiences, especially if the record is not fully developed.<sup>4</sup> If the individual is unrepresented, the Judge must spend time asking questions that would not otherwise be necessary if there was an attorney available to take direct testimony.

28. Workload also increases if the asylum seeker does not have an attorney to help formulate legal arguments. Because Immigration Judges have a duty to determine whether the facts of a given case meet the legal requirements for a grant of asylum, Immigration Judges must spend significant time researching and considering the law in cases in which immigrants do not have counsel. Separately, the Immigration Judge must also take the time to elicit factual information as to whether a discretionary grant of asylum is merited where an immigrant lacks an attorney.

*The Use of Video Teleconferencing for Detained Immigrants Burdens the System.*

29. EOIR relies on a system known as Video Teleconferencing (“VTC”) in order to allow Immigration Judges to conduct custody and individual merit hearings for immigrants detained in geographic areas far away from the immigration court. I have used VTC in San Francisco in instances where the individual was detained in distant locations across California, including Los Angeles, Sacramento, and elsewhere.

30. Based on my experiences, VTC burdens the system because it is a poor substitute for having the individual present in my courtroom where they can speak directly to the Immigration Judge, their attorney, and opposing counsel. Common problems include that the individual was unable to view both the Judge and their lawyer in the same screen, making it

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<sup>4</sup> INA § 240(b)(1) expressly gives Immigration Judges the authority to interrogate, examine, and cross-examine the applicant and any witnesses in the hearing.

more difficult for the Immigration Judge to adequately and fairly evaluate the person's credibility and for the person to follow along with the proceedings. In addition, the use of simultaneous interpretation by telephone and VTC sometimes resulted in overlapping voices in the recordings, rendering the recordings useless. The recordings are the "record" of the proceeding, which is transcribed when the case is appealed, and forwarded to the parties and any reviewing court. Going back to re-do a hearing and retake testimony is a waste of government resources and further delays resolution of the case.

31. All in all, each time I completed a VTC hearing, I left with the feeling that the entire effort was both professionally unacceptable and insufficient to meet basic due process owed to the asylum seeker.

**Providing Bond Hearings for Arriving Asylum Seekers Poses Only a Minimal Burden on the Government.**

32. Based on my experience as an Immigration Judge, I believe the burden to the government of providing bond hearings is minimal because (1) bond hearings are not resource-intensive, (2) Immigration Judges already know how to conduct bond hearings, and (3) the bond hearing system is effective at securing future appearances.

33. First, bond hearings are not resource-intensive for the court system or for the litigants. Generally, in bond hearings the Immigration Judge is tasked with determining whether: (i) the immigrant is a flight risk and (ii) whether they are a danger to the community. Because the bond hearing is limited to facts relevant to these two factors, the hearing requires limited testimony and the bond record of proceedings contains much less evidence (and much less complicated evidence) than the individual's merit proceedings. This was equally true for asylum seekers and other groups of immigrants.

34. Although it is difficult to estimate the average length of a bond hearing because the length depends on many factors, in my experience such hearings always took less time than an individual merits hearing. I routinely spent as little as five to thirty minutes on a bond hearing as an Immigration Judge, allowing me to conduct multiple custody hearings for several individuals in a single morning or afternoon.

35. Second, requiring bond hearings for arriving asylum seekers would not require EOIR to conduct training for existing Immigration Judges, other than the practical applications for how to incorporate such hearings into existing EOIR case management. All Immigration Judges are already familiar with administering bond hearings and applying the standards for release because there is a fair amount of bond practice already happening across the board for varying classes of immigrants. Additionally, bonds are covered during onboarding training and during the annual Immigration Judges' conference. Regardless of the status of the immigrant, the standard for making decisions on bond remains the same and is easy to apply to any immigrant. Moreover, Immigration Judges are already currently conducting bond hearings for a nearly identical group of individuals as arriving asylum seekers: recently arrived asylum seekers who sought asylum after entering between ports of entry rather than at a port of entry.<sup>5</sup>

36. Finally, in my experience and also according to studies I have reviewed, bond hearings are an effective process for releasing certain asylum seekers from custody while securing their appearances at future appearances.<sup>6</sup> For asylum seekers, having a credible claim

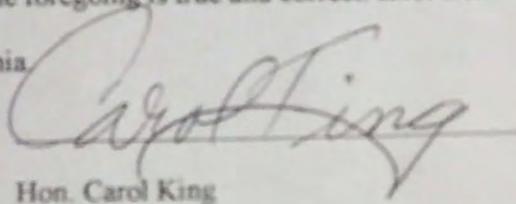
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<sup>5</sup> See *Matter of X-K*, 23 I. & N. Dec. 731 (BIA 2005) (currently under review).

<sup>6</sup> See e.g. "Immigration Court Appearance rates," Human Rights First, Feb. 9, 2018, *available at* <https://www.humanrightsfirst.org/resource/immigration-court-appearance-rates-0>; *see also Access to Counsel in Immigration Court*, American Immigration Council, Sept. 26, 2016, <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>; U.S. Dep't of Justice Executive Office of Immigration Review, *Statistics Year Book Fiscal Year 2017* at 33, <https://www.justice.gov/eoir/page/file/1107056/download>.

for relief is one of the most relevant factors in determining whether they constitute a flight risk. In my experience, if they have a credible claim for relief, they will likely continue to appear in court to pursue that relief.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 5<sup>th</sup> day  
of December 2018, in Oakland, California.

A handwritten signature in cursive script that reads "Carol King". The signature is written in dark ink and is positioned above the printed name.

Hon. Carol King

# EXHIBIT A

**Carol A. King**

*4377 Townsend Avenue, Oakland, Ca 94602*

*(E-mail) carolkinglawoffice@gmail.com*

*(H) (510) 482-1410*

*(C) (510) 910-0995*

**Member in Good Standing:** State Bar of California      December 1984 to Present

**EMPLOYMENT EXPERIENCE**

**Attorney at Law / Consultant**      September 2017 to Present

Self-employed solo practitioner

Mentors and provides strategic support for immigration attorneys on a contract basis. Provides writing and research services to immigration attorneys for motions, trial and appellate briefs, and other documents. Edits the written work of attorneys with an eye toward teaching better substantive, stylistic and persuasive writing skills.

**U.S. Immigration Judge**      October 1995 January 2017

United States Department of Justice, Executive Office for Immigration Review  
San Francisco Immigration Court

Presided over and rendered decisions in Immigration Court hearings to determine the status of aliens in removal proceedings under the immigration laws of the United States. Determined eligibility for relief from removal in the forms of Asylum, Withholding of Removal, Protection under the United Nations Convention Against Torture, Adjustment of Status, Suspension of Deportation, Cancellation of Removal and for various waivers available under United States Immigration Laws. Responsible for maintaining and meeting case completion goals and other Departmental priorities for a large caseload in one of the busiest Immigration Courts in the nation while protecting the due process rights of aliens with compassion. Appointed as a temporary member of the Board of Immigration Appeals, adjudicating cases at an appellate level and participating in en banc deliberations during a six-month period in 2010 – 2011.

**Adjunct Professor of Law**      August 2007 to 2011

Golden Gate University School of Law

Developed curriculum and teaching aids, lectured, designed and graded examinations and evaluated student performance for comprehensive course in Immigration and Nationality Law for accredited law school.

**Solo Practitioner**      1992 to 1995

Law Office of Carol A. King, San Francisco, California

Represented and advised immigrants and non-immigrants, as well as their family and/or business sponsors, in making all types of administrative applications before the legacy Immigration and Naturalization Service. Represented aliens charged with deportability and excludability before the Immigration Court. Advised attorneys practicing Criminal Law regarding the immigration consequences of criminal convictions. Mentored attorneys inexperienced in Immigration Law through the Pro Bono Asylum Project of the Lawyers Committee for Civil Rights. Represented aliens in Immigration Court custody and non-custody proceedings through the Bar Association of San Francisco Pro Bono Project.

**Associate Attorney**      1986 to 1992

Law Offices of Marc Van Der Hout, San Francisco, California

Represented clients before the legacy Immigration and Naturalization Service and the Immigration Courts and assisted on impact litigation engaged in by the office.

**Freelance Attorney, Labor and Immigration Law** 1985 to 1986

Clients: Law Offices of Marc Van Der Hout, San Francisco, California, Immigration Attorney  
Robert J. Bezemek, Oakland, California, Labor Attorney  
Francisco Barba, San Francisco, California, Immigration Attorney

**TEACHING AND RELATED EXPERIENCE**

**Stanford University School of Law, Palo Alto** 2016 to Present

Stanford Law School Trial Advocacy Program

As guest faculty, mentors students in semester-long intensive trial advocacy workshop, evaluating performances, providing practical feedback, and presiding over mock trials.

**ABA Children's Immigration Law Academy (CILA) / National Institute of Trial Advocacy**  
2018 Training

Currently on faculty for a NITA sponsored training in trial advocacy for immigration attorneys representing unaccompanied minors in Texas. Duties involve mentoring attorneys in a three-day intensive workshop on trial advocacy skills specific to representing unaccompanied minors in removal proceedings. Provides practical feedback on trial advocacy skills.

**Boalt Hall School of Law, University of California, Berkeley** ~1990 to 1996

As a guest lecturer on various occasions, prepared and taught discreet topics in Immigration Law including family visas, immigration through marriage and preference visa categories. Prepared materials for distribution to illustrate various issues and presented hypothetical situations for student analysis and discussion.

**Various Professional Organizations** ~1986 to 2010

As a guest lecturer, prepared and taught various courses for trainings and conferences on numerous Immigration Law topics. Prepared materials to illustrate various issues for publication in training materials. Answered questions related to a broad range of Immigration Law topics. Training topics included but were not limited to: asylum and refugee law, family visas, various applications for relief from deportation and removal, exhibit preparation for presentation to Immigration Court, ethical issues related to Immigration Law, Judicial Recommendations Against Deportation, and the impact of secondary trauma on credibility determinations.

Organizations have included: National Association of Women Judges  
American Immigration Lawyers Association  
Immigrant Legal Resource Center  
Lawyers Committee for Civil Rights: Asylum Project  
Various Unions with Immigrant Populations  
California Superior Court Judges' Annual Conference  
Golden Gate University School of Law

**California State Bar, Board of Legal Specialization, Immigration and Nationality Law Commission** 1993 to 1996

As a member of the Immigration and Nationality Law Commission, participated in writing, grading and evaluating legal specialization examinations for attorneys applying for Legal Specialist status.

**EDUCATION**

**J.D. with Highest Honors 1984:** Golden Gate University School of Law  
San Francisco, California

Class rank: 5 / 206  
Law Review: Associate Editor, 1983-84

Law Review: Staff Writer, 1982-83

Employment and Internships during law school:

Employment Law Center, San Francisco, California

San Francisco Interns and Residents Association – Robert J. Bezemek, Labor Attorney

Allan Brotsky, Professor of Law, Golden Gate University School of Law

Legal Aid Society of Alameda County, Hayward California

**Post J.D. Coursework in Immigration Law**

Annual Immigration Judges Training Conference, 1995 to 2016

Numerous training seminars through professional associations such as the American Immigration Lawyers Association, 1985 to 1995

Audited course in Advanced Legal Research – Golden Gate University School of Law, 2010

Audited comprehensive Immigration Law Course – Hastings College of Law, 1985

**B.A. in Community Studies 1978:** University of California, Santa Cruz

Highest Honors Thesis: Housing Needs of Senior Citizens

**References available upon request**