



National Immigrant Justice Center

Interim Report

Submitted to the Barbara McDowell and Gerald S. Hartman Foundation

April 2011

With the support of the Barbara McDowell and Gerald S. Hartman Foundation, the National Immigrant Justice Center (NIJC) is filing a lawsuit on behalf of an individual who received inadequate medical care while detained by the Department of Homeland Security's (DHS) Immigration and Customs Enforcement (ICE) for nearly five years. Carlyle Dale, a chronically ill lawful permanent resident, suffered serious health complications as a result of the government's negligence. Following successful litigation in the United States Court of Appeals for the Fifth Circuit and with the *habeas* petition pending in federal and district court, eventually the government released Mr. Dale. Now, he is challenging the government's failure to provide adequate medical care under U.S. law. Success in this case would force the government to change its policies and provide a basis for litigation nationwide.

Mr. Dale's case highlights a number of challenges facing immigrants which have been the subject of litigation: access to judicial review; access to medical care; and prolonged detention. NIJC is now moving forward to litigate the government's failure to provide adequate medical care and to compel the government to take steps to reform its policies and practices, particularly with respect to treatment of individuals with chronic illness.

Progress to Date

Victory at the Fifth Circuit: Access to Judicial Review

- In *Dale v. Holder* 610 F.3d 294 (5th Cir. 2010), Mr. Dale sought judicial review of the immigration court's decision finding him deportable. The government conceded that Mr. Dale's underlying offense was not a deportable offense. However, the government argued that the court did not have jurisdiction to review Mr. Dale's appeal as he had not exhausted his administrative remedies by seeking reconsideration at the Board of Immigration Appeals (BIA) level, after he lost his case. The Fifth Circuit rejected the government's argument in a published decision, finding that "Federal jurisdiction is not conditioned upon the petitioner affording the BIA a second bite at the apple to rid its opinion of any legal error." It is anticipated that this case will provide immigrants with greater access to judicial review.

Prolonged Detention of Immigrants: Mr. Dale's *Habeas* Petition and Petition before the United Nations Working Group on Arbitrary Detention

- *Dale v. Holder* (W.D.La.): Before prevailing in the Fifth Circuit Court of Appeals on the merits of his removability, NIJC filed a *habeas* petition on behalf of Carlyle Dale, as well as a petition to the United Nations Working Group on Arbitrary Detention. Before the *habeas* petition and the UNWGAD issued their decisions, the government released Mr. Dale.
- Like *Dale*, in *Diouf v. Napolitano*, ___ F.3d ___ (9th Cir. 2011), the Ninth Circuit considered the argument that all individuals in extended detention, including those with pending motions to reopen, must be afforded a bond hearing at which the government bears the burden of proving danger or flight risk. The government argued that individuals seeking to reopen their cases have fewer constitutional rights, because they have already been ordered removed, and therefore, they

should receive no protection against unreasonable or extended detention. NIJC authored an *amicus* brief explaining the importance of reopening to the fairness of the removal process, arguing that the interests at stake for individuals in that circumstance should lead the court to restrict the extended detention of these individuals as well. The Ninth Circuit agreed, finding that Mr. Diouf and individuals like him have a right to an individualized hearing on their detention if their detention exceeds six months. The Court of Appeals cited NIJC's *amicus* brief prominently in its decision.

Settlement Agreement Improves Immigrants Access to Medical Care

- *Woods v. Myers*, (9th Cir. 08-55376) (*amicus*): The *Woods* settlement is an important step toward forcing the government to provide adequate medical care to immigrant detainees. NIJC filed an *amicus* brief at the Ninth Circuit in support of the ACLU's request to certify a class of immigrant detainees in the San Diego Correctional Facility, for purposes of obtaining injunctive relief to fix systemic failures in immigrant health care. The Ninth Circuit sent the case to mediation and a class settlement was eventually reached. The settlement agreement requires the government to modify its "benefits package" for immigrant detainees, to require treatment of a "serious medical need," and to eliminate the policy that the government would only cover emergency medical care for detainees.

Next Steps

FTCA Claim Ripe for Impact Litigation

In August 2010, NIJC filed an administrative claim under the Federal Torts Claims Act (FTCA) on behalf of Carlyle Dale. By law, NIJC was required to wait at least six months before filing any litigation in the federal district court. In the interim, NIJC conducted research necessary for the lawsuit and obtained updated information regarding the government's policies and protocols relating to treatment of immigrants in immigration custody.

Now that the required waiting period has expired, NIJC is preparing to file a lawsuit on behalf of Mr. Dale, seeking damages and reform of the government's policies relating to the treatment of detained immigrants with chronic illnesses. NIJC is moving forward in assessing the appropriate venue and causes of action for the lawsuit.

It is hoped that the impending District Court litigation will hold the government liable for its mistreatment of Mr. Dale, secure some remuneration for our client, expose the flaws in the immigration detention system to the public through a trial in open court, and attain injunctive relief aimed at avoiding the repeat of this situation for Mr. Dale and other immigrant detainees suffering chronic medical conditions.