Right to counsel for immigrants: *Franco-Gonzalez v. Holder*

By Cindy Galway Buys

Experienced immigration practitioners know that while noncitizens enjoy a statutory right to counsel in immigration-related proceedings, there is no right to government-appointed counsel if the noncitizen cannot afford an attorney.[1] Legislative and advocacy efforts, as well as litigation, are underway to challenge this lack of government-appointed counsel, especially in cases involving particularly vulnerable groups such as minors, asylum seekers and the mentally disabled. Recently, the U.S. District Court for the Central District of California issued a decision favorable to this last group, which is the primary subject of this article.[2]

Jose Antonio Franco-Gonzalez is a Mexican citizen who has the cognitive abilities of a two-year-old. He cannot tell his own age or birthday, nor can he tell time. Mr. Franco-Gonzalez is the son of lawful permanent residents (LPRs) and had a petition to adjust to LPR status pending at the time of his arrest and detention.[3] Despite a 2005 psychiatric diagnosis of moderate mental retardation (defined as having an IQ between 35 and 55) and an inability to understand the immigration proceedings, Jose was held in immigration detention for another five years before being released.[4] The U.S. government expected Mr. Franco-Gonzalez and others like him to defend themselves in immigration proceedings.

Pro bono counsel learned of Mr. Franco-Gonzalez's situation and that of other mentally disabled immigration detainees and brought a class action in 2010 alleging violations of the Immigration and Nationality Act (INA), the Due Process Clause of the Fifth Amendment to the U.S. Constitution, and Section 504 of the Rehabilitation Act.[5] Plaintiffs sought an order requiring the government to: (1) conduct competency evaluations for all those whom the government knows or should know may be incompetent to represent themselves; (2) appoint attorneys for those found in need of counsel as a result of the evaluations; and (3) conduct custody hearings for those persons who face prolonged detention as a result of delays caused by their mental disabilities. The complaint requested class certification, injunctive and declaratory relief, and attorney fees.

In November 2011, the U.S. District Court for the Central District of California certified the class and two sub-classes. The class consisted of:

> All individuals who are or will be in [Department of Homeland Security] custody for removal proceedings in California, Arizona and Washington who have been identified by or to medical personnel, DHS or an Immigration Judge, as having a serious mental disorder or defect that may render them incompetent to represent themselves in detention or removal proceedings, and who presently lack counsel in their detention or removal proceedings.[6]

Following certification of the class, the court turned its attention to the merits of the dispute. The court first addressed the right to appointment of a qualified representative in immigration proceedings as a reasonable accommodation under Section 504 of the Rehabilitation Act. To establish a prima facie case under this provision, plaintiffs must establish that: (1) class members are persons with disabilities within the meaning of the Act; (2) they were "otherwise qualified for the benefit or service sought;" (3) they were denied the benefit or services solely by reason of their disability; and (4) the entity to provide the benefit receives federal funding.[7] The government did not contest that plaintiffs met the first, second and fourth requirement, so the only issue in dispute under the Rehabilitation Act was whether plaintiffs were denied a benefit solely because of their disabilities.

Plaintiffs pointed out that they have a statutory right in a removal proceeding to "a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf and to cross-examine witnesses presented by the Government."[8] Plaintiffs' disabilities prevented them from exercising this right.

The government argued that the action should be dismissed because some of the Plaintiffs, including Mr. Franco-Gonzalez, had been released from custody during the pendency of the litigation. The court quickly dismissed this argument, stating that it is well established that the mere voluntary cessation of an illegal activity in response to pending litigation does not moot a case.[9]

Defendants also argued that the Plaintiffs were not denied a benefit solely by reason of their disability because the government does not intend to prevent them from full participation in their removal proceedings. The court disagreed, stating that for purposes of an action for injunctive relief, "it is sufficient that Plaintiffs are unable to meaningfully access the benefit offered—in this case, full participation in their removal and detention proceedings—because of their disability."[10]

Defendants next argued that legal representation for all mentally incompetent immigration detainees is far beyond a "reasonable accommodation" and would constitute a fundamental alternation of the immigration court system because the government does not have the capacity or the funding to implement such a program. In response, the court stated that whether an accommodation is reasonable depends on the individual circumstances of each case.[11] The court held that the provision of a "qualified representative" would be a reasonable accommodation.[12] The court further stated that it "is wary of issuing an unfunded mandate requiring Government-paid counsel for all mentally incompetent class members"; however, this decision does not require paid legal counsel. Counsel may be *pro bono* or may be a non-attorney law student or accredited representative.

Defendants further argued that the requirement of representation contradicts the INA which provides that legal representation at no cost to the government in immigration proceedings is a "privilege."[13] According to the government, the INA bars the use of federal funding to provide direct representation to noncitizens. However, the government was not consistent in its position. David P. Martin, writing on behalf of the Office of the General Counsel for DHS, confirmed that the plain language of the INA does not prohibit the provision of counsel at government expense.[14] The court agreed with this assessment and held that the proposed accommodation would not contravene any existing statutory provision.

Finally, the government argued that Plaintiffs' requested relief would put them in a better position than nondisabled, detained individuals because providing legal representation would do more than simply remove a

barrier to access, it would expand the scope of benefits provided to this particular class of noncitizens. In response, the court stated that the government mischaracterized the nature of the benefit sought.[15] Plaintiffs sought the ability to meaningfully participate in their immigration proceedings, which is beyond their reach as a result of their disabilities. Thus, the provision of a qualified representative is merely a means to allow them to exercise the same benefits as other detainees.

Because the court found that plaintiffs were entitled to the relief they sought under section 504 of the Rehabilitation Act, it declined the reach the constitutional issue of whether appointment of counsel was necessary under the Fifth Amendment's Due Process Clause to ensure that the hearing was fundamentally fair.[16] The Court's refusal to consider the broader due process issue under the Fifth Amendment serves to limit the impact of its holding to persons with disabilities.

The court next addressed the prolonged detention of those with mental disabilities. In this case, Mr. Franco-Gonzalez had been found to have serious mental disabilities in 2005 and his removal proceeding was terminated at that time, but he was not released from DHS custody until three days after filing his habeas petition in 2010. The court determined that the INA requires a bond (or custody redetermination) hearing for detainees held for a prolonged period of time, regardless of the provision of the statute which authorizes the detention.[17] Relying in part on previous Supreme Court case law,[18] the court deemed a prolonged period of time to be more than 180 days.[19] Thus, in both pre- and post-removal order cases, immigration detainees are entitled to a bond hearing if they have been detained more than six months.

According to the Department of Immigration Health Services, between 2-5% of all immigration detainees have mental disabilities.[20] The government also estimates that it holds approximately 34, 000 persons in immigration detention at any given time and that well over 1,000 of those persons have mental disabilities.[21]

In recognition of the problems created by lack of access to counsel, on April 22, 2013 (one day before the decision in *Franco-Gonzalez*), the U.S. Departments of Justice and Homeland Security announced a new policy to provide representation to detained persons with mental disabilities nationwide.[22] Pursuant to the new policy, the government will work with staff at immigration detention facilities to better identify individuals with serious mental disorders, conduct screenings for serious mental disorders or conditions; make available competency hearings and independent psychiatric or psychological examinations; and make available qualified representatives to detainees who are deemed mentally incompetent to represent themselves in immigration proceedings and in bond hearings for seriously mentally disabled detainees who have been held in immigration detention for at least six months.[23]

The *Franco-Gonzalez* decision has been described as "the first fundamental expansion of the right to counsel in 30 years."[24] While that may be a slight overstatement (especially given the court's avoidance of the constitutional issue), the decision is certainly a crack in the door that has been shut tight against legal representation for indigent immigrant detainees for decades. As noted at the outset, there are a number of cases making their way through the federal court system that may help to define other aspects of the right to counsel, such as the current circuit split over whether an immigrant detainee must show that the lack of counsel caused prejudice.[25] 2013 seems a particularly appropriate year to reexamine the right to counsel for indigent immigration detainees as it is the 50th anniversary of the Supreme Court's decision in *Gideon v. Wainwright* holding that indigent defendants have a right to government-appointed counsel in state court criminal proceedings.[26] ■

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1. Immigration and Nationality Act, 8 U.S.C. § 1362. According to government statistics, approximately half of all persons in immigration proceedings lack counsel. Executive Office of Immigration Review, *FY 2012 Statistical Yearbook* at G1, <http://www.justice.gov/eoir/statspub/fy12syb.pdf>.

2. *Franco-Gonzalez v. Holder*, CV 10-02211, slip op. (C.D. Cal. Apr. 23, 2013).

3. *See Franco-Gonzalez et al. v. Holder*, CV 10-02211 DMG (DTBx), First Amended Class Action Complaint at ¶¶30-31 (C.D. Cal., Aug. 2, 2010), available at <http://www.aclu.org/files/assets/2010-8-2-GonzalezvHolder-AmendedComplaint.pdf>.

4. *See id.*

5. 29 U.S.C. § 794.

6. *Franco-Gonzalez*, slip op. at 3. The class was subdivided largely based on the length of detention.

7. *Franco-Gonzalez*, slip op. at 6, citing *Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002).

8. INA, 8 U.S.C. § 1229a(b)(4)(B).

9. *Franco-Gonzalez*, slip op. at 8, citing *Rosemere Neighborhood Ass'n v. U.S. EPA*, 581 F.3d 1169, 1173 (9th Cir. 2009).

10. *Franco-Gonzalez*, slip op. at 8.

11. *Id.* at 9.

12. Although Plaintiffs initially requested "legal representation," it was later clarified that the appointment of a "qualified representative" would suffice. The court determined that a "qualified representative" is an attorney, a law student or law graduate directly supervised by an attorney, or an accredited representative as defined in 8 C.F.R. §1292.1.

13. *See* 8 U.S.C. §§ 1229a(b)(4)(A), 1362.

14. *See Franco-Gonzalez*, slip op. at 12.

15. *Id.* at 14.

16. *Id.* at 18.

17. *See Franco-Gonzalez*, slip op. at 19-25.

18. *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Clark v. Martinez*, 543 U.S. 371 (2005).

19. *See Franco-Gonzalez*, slip op. at 21-22.

20. First Amended Complaint, at ¶ 23.

21. American Civil Liberties Union, *Federal Court Orders Legal Representation for Immigrant Detainees with Mental Disabilities* (Apr. 23, 2013), <http://www.aclu.org/immigrants-rights/federal-court-orders-legal-representation-immigrant-detainees-mental-disabilities>.

22. Department of Justice and Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions (Apr. 22, 2013), available at <http://www.justice.gov/eoir/press/2013/SafeguardsUnrepresentedImmigrationDetainees.html>.

23. *Id.*

24. Jenna Greene, *Incompetent Immigration Detainees Win Right to Counsel*, The National Law Journal (Apr. 25, 2013), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202597575709&Incompetent_Immigration_Detainees_Win_Right_to_Counsel>.

25. Compare *Montes-Lopez v. Holder*, No. 08-70229 (9th Cir. 2012) with *Farrokhi v. INS*, 900 F.2d 697, 702 (4th Cir.1990).

26. 372 U.S. 335 (1963).