



Children Without a Country

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DEPENDING ON WHOM YOU ASK, MALIK JARNO IS EITHER: A mentally challenged, orphaned teenager born in Guinea, with an IQ of about 60, who arrived in the United States bearing false identification papers and a plane ticket obtained by a friend in France who grew tired of caring for him; or he is a 20-something man, possibly born in the Congo, who tried to sneak into the States using papers he knew and understood were fake.

The first version comes from a team of lawyers from three of the country's largest and most formidable firms, who have been representing Jarno pro bono for the past several years. They say his parents were killed because they opposed the government in Guinea. Jarno fled with an aunt and two cousins to France, where the aunt left Jarno in the care of a family friend when she and her children moved to Belgium, the lawyers say. The friend cared for the rambunctious teen for several months, then bought Jarno a stolen passport and a plane ticket to the States in hopes that he would find asylum here.

The second version is the assertion of the U.S. Department of Homeland Security's Bureau of Immigration and Customs Enforcement. It is based on an investigation of Jarno's claims, the specifics of which have not been made public.

What is undisputed is that Jarno has spent nearly three years in federal cus-

Thousands of Kids Arrive Each Year Without an Adult and Without Knowing English. Lacking a Lawyer, They Face a Daunting Legal System.

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tody—from January 2001, when customs agents stopped him upon his arrival from Paris at Dulles International Airport near Washington, D.C., until December 2003.

What is unclear is why the government is taking so long to figure out which version of Jarno's story is true—and why, even with an estimated \$1 million worth of pro bono aid, his case remains mired in immigration court. A recent decision clears the way for Jarno to be deported, but other motions pending in his case have delayed his removal for now, according to his lawyers.

Organizations such as Amnesty International, Mental and Physical Disability Rights International, and other disability advocacy groups have petitioned immigration authorities and Attorney General John Ashcroft to intervene in Jarno's removal proceedings, so far to little avail.

In December, 24 members of Congress calling themselves the Refugee Caucus wrote to Asa Hutchinson, undersecretary for border and transportation security, asking that Jarno be released. The letter said that an investigation by the U.S. Agency for International Development supported Jarno's claims that he is an or-

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phan who would be subject to harsh treatment if he were sent back to Guinea.

In late December, DHS ordered Jarno's case re-opened. Then, Hutchinson released Jarno to the custody of a York, Pa., refugee agency. On Dec. 24th, DHS lawyers appealed the order to reopen Jarno's case, and that appeal remains pending before the Board of Immigration Appeals. As of press time, no final adjudication of the deportation order or Jarno's asylum petition had been made.

ONE OF MANY

ADVOCATES FOR JARNO ARGUE THAT HE SHOULD BE ALLOWED to stay because of his mental capacity and what they say is the very real threat of persecution should he be returned to Guinea. But even as this team of experienced and powerful attorneys fights for Jarno, dozens of other children and teens wait in federal custody, most with no attorneys to advocate for them.

They are among the 5,000 children who arrive in the United States each year without a responsible adult or proper papers, according to reports from organizations that have studied children in U.S. immigration detention. They are Amnesty International, the United Nations High Commission on Refugees and the Women's Commission for Refugee Women and Children, an international non-profit organization that tracks and provides aid to women and children from war-torn parts of the world.

On any given day, some 500 kids are in federal custody awaiting the outcome of removal—or deportation—proceedings filed with the Executive Office for Immigration Review, commonly known as immigration court. The EOIR reports to the Department of Justice and is part of the executive, not the judicial, branch. Because of that, appeals are limited and, critics say, immigration judges are more likely to follow executive policy and, consequently, are less objective.

Teens like Jarno, whose age is in dispute, may wind up in adult jails, usually in remote counties that rent their extra jail space to the federal government. These kids are subject to the same rules as the criminals they live among.

The number of children and purported children—those whose age is uncertain but who claim to be under 18—held in secure settings has increased to about 68 percent of all those who enter the United States illegally, up from about 35 percent in 1999, according to Justice Department figures. No official explanation has been given for the increase, but reports from the three organizations indicate that the reason simply may be that more secure facilities are available: Juvenile detention centers and jails often have room for more detainees, while nonsecure facilities such as shelters and foster homes are in short supply.

Under international law and domestic policy, however, children are supposed to be held in secure facilities only when they are considered a flight risk or are found to pose a risk of violence to themselves or others if they are released into a nonsecure setting.

In many cases, the kids appear before immigration judges without any representation. Or where there is representation, it tends to be spotty. Officially, these children are not entitled to lawyers at all because immigration proceedings are deemed civil, not criminal.

As a practical matter, however, the outcome of these

proceedings will set the course for the minor's future—whether the youth stays in the United States or is sent back to his or her country of origin.

DETAINED IN THE U.S.A.

"WE'RE TALKING ABOUT LIFE AND DEATH DECISIONS IN some cases. Kids who've fled armed conflict in a world where children are specifically targeted. Places where girls get prostituted or sold into marriage, boys are forced into being soldiers," says Wendy Young, director of government relations for the Women's Commission for Refugee Women and Children.

The ABA Commission on Immigration Policy, Practice and Pro Bono has compiled profiles of dozens of children in immigration detention. The stories come from first-hand research by interns working for the commission, as well as accounts from lawyers representing some of the children and from photographer Steven Rubin, whose photos accompany this story.

Take the case of Mohamed Boukfrage, who was 10 when his parents and sister were killed by a car bomb in his native Algeria. He spent several years wandering Europe, living in abandoned buildings and doing odd jobs. In an effort to hide from Italian authorities, he boarded a United States-bound cargo ship. Authorities here did not believe that he was only 16, and after a controversial dental test to try to assess his age, he was determined to be over 18 and placed at an adult detention facility. Some 21 months later, without the prior knowledge of his pro bono attorney, he was deported in July 2002, according to Christopher Nugent of the Washington, D.C., law firm Holland & Knight. Nugent coordinates pro bono attorneys to work with children in immigration detention.

And then there's Huai Chun Zheng, known as "Danny." He was held in detention for at least three years, most recently at the Colquitt County Jail in Moultrie, Ga. He arrived as a stowaway from China when he was 15 and turned 18 while in custody. His first lawyer, hired by the company that smuggled him into the States, withdrew his asylum application without his permission. He's had several pro bono lawyers who were trying to get the application for asylum reinstated, according to Nugent, who met with Danny in 2001 and helped find pro bono counsel for him.

Another youth, Edwin Muñoz, arrived in the United States from Honduras in 2001 at the age of 14. He told a congressional committee in February 2002 that he was held for more than six months in a juvenile detention facility in San Diego, where he was pepper-sprayed by guards for minor offenses and strip-searched every time he returned from meeting with his lawyer. He was taken back and forth to immigration court in shackles. Even after he was granted asylum with the help of a pro bono attorney, he remained in detention for another month until finally being released to a foster family in Michigan.

The Department of Homeland Security declined to comment on the Boukfrage, Zheng and Muñoz cases. Spokesman Garrison Courtney says department policy prohibits comment on specific cases. An exception was made in Jarno's case, he says.

THE ABA TAKES ACTION

THE ABA IS TAKING STEPS TO ENSURE BETTER CARE OF

children like these. Its immigration policy commission has convened domestic and international children's experts to develop and propose standards for the care, representation and adjudication of claims by immigrant and refugee children, according to staff director Carol Wolchok. Latham & Watkins researched and drafted the proposed standards.

In addition, the ABA operates ProBAR, a pro bono program in South Texas, where the federal government detains a daily average of 150 children—more unaccompanied immigrant children than anywhere else in the nation. ProBAR has had a full-time lawyer dedicated to assisting these children since 2001.

The ABA also made grants to develop pro bono representation efforts for children detained in Arizona, California, Florida, Georgia, Illinois, Pennsylvania, Texas, New York and Washington state, and has adopted policy favoring the appointment of counsel for children at government expense when pro bono counsel is not available.

Jarno has such top-shelf legal help. But all the lawyers involved can't seem to clear up his situation. His counsel and the government do not agree on his age, his background or even his mental abilities. Such confusion is common among immigrants from Third World countries, where record keeping is often spotty or unreliable, according to Amnesty International.

According to Benoit Jacqmotte, an associate at the Washington, D.C., office of Latham & Watkins, one of the three firms involved, Jarno was born in Guinea in 1985. His native language is French, and he understands little English. Jacqmotte, who is fluent in French, interviewed Jarno soon after he was detained in January 2001.

Jarno's cognitive difficulties are apparent to even the casual observer, says Jacqmotte, who is handling Jarno's case along with other lawyers from his firm.

"It quickly became apparent that he could not communicate in a normal fashion for someone his age. He was childlike. I knew there was something not right about him cognitively," Jacqmotte says.

Three IQ tests—one conducted by a psychologist hired by U.S. immigration officials and two ordered by his lawyers—seemed to confirm that Jarno's cognitive abilities were significantly below normal for his age. He appeared to function at about a second-grade level, the experts agreed.

But immigration officials were unconvinced.

"The tests he was administered were not based on cultural sensitivity or language. If someone gave you an IQ test in a language you don't speak, you'd look mentally retarded, too," says Anthony Tangeman, director of detention and removal operations for the Bureau of Immigration and Customs Enforcement, the agency in charge of Jarno's immigration case.

(Jacqmotte disputes Tangeman's characterization of the tests. He says one test was a special version designed to be administered in a "language neutral" fashion and another ordered by the lawyers was administered in French. Only the government's own test may have been administered in English, according to Jacqmotte.)

In fact, Tangeman says, much about the young man who arrived at Dulles with a French passport is hard to pin down. The passport Jarno presented that day in 2001 gave a birth date in April 1975, and Tangeman says Jarno

said he was an adult when questioned by customs officers. He was placed in an adult detention facility.

Several months later, Jarno's lawyers produced a document they say is his true birth certificate, which showed he was born in 1985. The government of Guinea verified the legitimacy of the certificate, and on that basis, Jarno was moved to a secure juvenile facility in Virginia.

U.S. investigators then tried independently to verify the birth certificate. Tangeman says a team traveled to Guinea and interviewed people in the neighborhood where Jarno's family had once lived. Based on the results of that investigation, which Tangeman would not specify, Jarno was moved once again to an adult facility.

Immigration officials then conducted a bone density exam, and Tangeman says the results indicated Jarno is in his 20s. His lawyers say bone density tests based on U.S. models are useless to pinpoint age in someone who has a completely different nutritional and medical care background than the typical Americans on whom the model is based. Scores of scientists, they say, have labeled use of such tests to verify age as "junk science."

"We know these are not perfect tests," Tangeman admits. "There are no perfect tests. If you find one, please let us know, because we'd love to use it."

As the tug of war continued, Jarno was telling the lawyers horror stories of guards using pepper spray if he did not follow directions he did not understand. He also told of physical abuse by guards and fellow prisoners, as well as other mistreatment. Jarno was moved several times, and some facilities were better than others, his lawyers say, but none gave him the treatment and assistance he needed nor made any real provisions for his mental deficiencies or language barriers.

After one pepper spray incident that was alleged to be particularly vicious, lawyers from Holland & Knight, working with the Washington Lawyers Committee for Civil Rights and Urban Affairs, filed a civil rights suit against the facility where the incident is said to have taken place.

Tangeman disputes most of Jarno's claims of mistreatment, and he says those he knows about have been thoroughly investigated. Tangeman has been in his current position for only a short time, but he says that state and private facilities with federal government contracts to house detainees will be held accountable for human rights violations occurring on their watch.

Meanwhile, other Holland & Knight lawyers began a Capitol Hill campaign to bring attention to Jarno's plight, while a team from Jones Day filed a habeas corpus petition in federal district court in Pennsylvania seeking Jarno's release.

OBLIGATIONS BUT NO GUIDELINES

WHILE JARNO'S CASE CONTINUES, SO DO THE LEGAL AND congressional battles designed to address these issues. And the obstacles are formidable.

On the legal front, an important 1997 settlement in a major class action case was expected to clear the path toward resolution. So far, the results are mixed.

The case, *Flores v. Reno*, No. CV85-4544-RJK (C.D. Cal. 1996), was settled after winding through the courts for a dozen years. The settlement spelled out three ob-

ligations on the part of the U.S. government regarding children in immigration proceedings:

- To act promptly to release children from immigration detention.
- To place those awaiting release in the least restrictive environment appropriate to their age and special needs.
- And to implement standards for the care and treatment of children in U.S. immigration detention.

Though the *Flores* settlement was hailed as an important step toward better treatment of children in immigration custody, the agency in charge of implementing the settlement, the former Immigration and Naturalization Service, never created the required guidelines. And implementation of the settlement terms was spotty at best, according to Young of the women's commission for refugees.

In November 2002, Congress passed the Homeland Security Act, one of the most sweeping changes to federal government structure in U.S. history. Some 170,000 employees of various government agencies were folded into the new department.

Among the most notable changes was the abolishment of the INS. It was replaced by the Directorate of Border and Transportation Security, which has two subdirectorates: the Bureau of Citizenship and Immigration Services, which administers immigration benefits and services such as citizenship and residency applications; and the Bureau of Immigration and Customs Enforcement, which is charged with investigation and enforcement of immigration laws.

The Homeland Security Act also transferred custody of children in immigration detention from immigration authorities to the Office of Refugee Resettlement, housed in the U.S. Department of Health and Human Services. The change became effective March 1, 2003. The move was hailed by lawyers and others who work on behalf of children in the immigration system because, they say, ORR is better equipped than a law enforcement agency such as BICE to respond to the needs of children.

"Care of children is just not a law enforcement function," Young says. She notes that ORR has already dramatically increased the number of nonsecure beds available to kids in custody, enabling more to avoid being held in juvenile or adult jails when they pose no security risk.

"Our overarching goal is to make sure that every child in the Unaccompanied Minors Program is in a placement that reflects the needs and circumstances of that child," says Wade F. Horn, assistant secretary for children and families, the HHS office that oversees ORR.

Of the about 90,000 children who enter the States illegally each year, 5,000 or so end up in the Unaccompanied Minors Program, says Horn, who has a doctorate in child psychology. The remainder are repatriated to their home countries within 48 hours of their arrest, he says.

Horn adds that ORR officials are visiting all facilities that have contracts with the government to house minors. Since his office took over, contracts with 20 secure facilities have been terminated, says Horn.

"We have a different culture" at HHS, as opposed to Homeland Security, Horn says. "We're about finding the most appropriate setting for the kids' needs. Many of these kids will still be deported, but while they're here

we have an ethical and moral duty to treat them well."

In Congress, meanwhile, Sen. Dianne Feinstein, D-Calif., introduced the Unaccompanied Alien Child Protection Act last May. The act would provide ORR with more authority over the care and custody of children in immigration proceedings, including the authority to make decisions about allowing certain children to apply for special asylum status.

Currently, the permission of BICE must be obtained before children can even apply for special asylum, a cumbersome process that critics charge allows law enforcement to control the asylum pipeline. They note that even if more kids are allowed to apply, the hurdle for proving special asylum cases is very high and an immigration judge will still make the final decision.

Feinstein's bill, which was set for markup in the Senate Judiciary Committee at press time, would also provide that all minors in removal proceedings be entitled to pro bono legal representation, a position long advocated by the ABA. The bill also calls for ORR to conduct a pilot program on the use of guardians ad litem to represent the child's interest in the immigration process. Rep. Zoe Lofgren, D-Calif., has introduced a similar bill in the House.

REACHING FOR FAIRNESS

YOUNG IS CAREFUL TO NOTE THAT providing better treatment of children in detention does not mean more of them will ultimately be allowed to stay. How children are treated while their cases are pending has no impact on the substance of the case. It's just good sense, says Young. She notes, however, that ensuring that children have representation when they go to immigration court might actually increase the number of children granted the right to stay—but only those who have legitimate claims. It's simple due process, Young says.

Tangeman, the immigration official, agrees. Though he is not convinced that his agency should have been stripped of its authority to care for children in detention, he says those in the immigration system should have adult advocates in order for the system to be fair.

"There was no one declared responsible to speak for the child," he says.

Tangeman, who had 30 years' experience as a Coast Guard officer before joining the immigration service, says he believes the law enforcement officers under his command want to ensure fairness for all the children in the immigration system.

He adds, "My people have a lot of gut-wrenching experiences in doing their jobs. But the law's the law, and we enforce the law humanely."

Young says that she believes there is still a long way to go toward making the system humane for children. She notes that Canada, for example, gives priority to kids' cases on its immigration docket, and the default is to place them in safe, protective group homes or foster families unless there is evidence that they must be locked up.

"There are categories of people where the system must bend to their needs, not the other way around. Children and people with mental disabilities are two of those categories," Young says. ■

WHERE THEY COME FROM, WHERE THEY GO

According to a 2001 U.S. Justice Department report, the top five countries from which unaccompanied minors arrive in the States are China, El Salvador, Guatemala, Honduras and Mexico. Other reports show that a significant number come from Africa and Asia.

A recent Amnesty International report, as well as reports from the Women's Commission for Refugee Women and Children, offers the following details about unaccompanied minors in immigration detention in the United States.

Many arrive by walking dozens of miles over the country's border with Mexico. Often led by "coyotes"—guides who charge high fees to sneak people over the border—some children are sent by parents desperate to help them find a better life than they face in their villages in Mexico, or in Central or South America. The fee sometimes represents the equivalent of a year's income to the families.

Often, unscrupulous coyotes—after promising to take care of the kids and help them find safe places to live—abandon them inside the border, where they are picked up by U.S. immigration authorities. Other minors make the arduous trek alone, fleeing abuse, neglect, war, persecution and poverty in their home countries.

Some arrive through normal travel channels—used by drug dealers who buy, rent or steal them from poor families in parts of Asia, South America and the Middle East. The drug runners hope that carrying children through airport customs makes them appear to be a legitimate tourist family and lessens the chances that their luggage will be thoroughly searched by customs agents. These kids are often abandoned as soon as the drug runners clear customs. At first they appear to be lost children in busy airports; by the time authorities figure out the real story, the "parents" have long fled.

Some children, especially girls, arrive as part of sex trafficking rings, having been kidnapped by the traffickers or sold by members of their families.

Some kids arrive with family members but become separated from them for a variety of reasons either before or after they are taken into custody.

Many of these children come to the United States knowing nothing of paperwork, visas or immigration status, expecting that the great and free United States of their storybooks will welcome them. Most soon find they are mistaken.

Once in custody, minors are sheltered in a variety of settings. Very small children often go to nonsecure places such as group homes set up by state agencies to house abused or neglected kids.

Older children may be sent to secure settings such as juvenile detention centers, where they are often housed with violent offenders and subject to the same rules and harsh discipline. For many, this means they are shackled and handcuffed whenever they are moved, including on the way to immigration court or medical appointments. Many are also strip-searched every time they return from outside a secure area of the facility, such as a trip to a reception room to meet with a visitor, or even after consulting with their lawyer, if they are fortunate enough to have one.

A lucky few go to family-based foster care.

For those whose native language is neither English nor Spanish, there is rarely anyone to interpret for them, and they are left to find their way in their new settings without even being able to communicate.

When it comes time for their removal hearings, the juveniles are often driven to immigration court by social workers, foster parents or employees of the facilities where they are housed. Much of the time, the drivers have no connection to or even knowledge of the child's immigration case—they are there merely as chaperones. The kids often appear before the immigration judge alone, with no one to speak for them.

—Margaret Graham Tebo