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## Tough Odds Face Those Pushing For Attys For Immigrant Kids

By Kevin Penton

Law360, New York (February 5, 2018, 7:03 PM EST) -- The Ninth Circuit recently dealt a blow to immigration advocates who have pushed for court-appointed attorneys for children appearing in immigration courts, but the quest for increased attorney access is not over. Here's what you need to know about the ongoing fight.

### Ninth Circuit Blow May Not Be the Last Word

Last week a Ninth Circuit panel said a Honduran immigrant who entered the United States with his mother when he was 13 did not establish that he had a right to court-appointed counsel. But that may not be the end of the road, as the American Civil Liberties Union and other organizations involved in the case say they are considering asking the full court to hear the case.

As it stands now, the case was a blow to immigration advocates. The Ninth Circuit panel rejected arguments advanced by the attorneys representing the minor — referred to in the court filings as C.J.L.G. — that under the Immigration and Nationality Act's fair hearing provision, there exists an implicit requirement that the federal government provide an attorney to immigrant minors.

The panel also dismissed arguments that previous rulings enshrining due process rights under the Fifth Amendment for immigrant minors should include counsel that is paid for by the government.

C.J.L.G. entered the U.S. with his mother without inspection in June 2014, when he was 13, according to the opinion. The family came from Honduras, where they allege that gang members put a gun to C.J.L.G.'s head and threatened to harm him and members of his family if he did not join the gang, according to court documents.

C.J.L.G. appeared before an immigration judge without a lawyer, accompanied only by his non-English-speaking mother. The immigration judge denied C.J.L.G.'s bids for asylum, withholding of removal and relief under the Convention Against Torture. The Board of Immigration Appeals affirmed the ruling in November 2016, according to the Ninth Circuit's Jan. 29 opinion.

The Ninth Circuit held that C.J.L.G. failed to establish that his constitutional rights were

violated by not having a government-funded attorney present at the initial proceedings. The court also determined that C.J.L.G. failed to establish that not having such an attorney was prejudicial toward the conclusion of his removal proceeding, according to the opinion.

Ahilan Arulanantham, an attorney with the American Civil Liberties Union Foundation of Southern California, said the organization, which is representing C.J.L.G. together with attorneys with K&L Gates LLP, the Northwest Immigrant Rights Project and several other immigrant rights organizations, are considering whether to ask the full Ninth Circuit to hear the case.

"The reality is that these children, thousands of children now, will be unable to obtain a fair day in court," Arulanantham said.

As the case was not decided by the full Ninth Circuit, but by a three-judge panel, organizations such as the National Coalition for a Civil Right to Counsel are hopeful the full court will recognize the importance of the issue and clarify its position, said John Pollock, the organization's coordinator.

"I think we're still very optimistic," Pollock said. "It's not uncommon for the full en banc court to come to a different conclusion than just the three-judge panel."

### **Unaccompanied Minors Could See Different Result**

After the Ninth Circuit issued its ruling, many advocating for increased legal representation for immigrant children seized on comments in the concurring opinion as a possible avenue forward.

The ruling included a concurring opinion by U.S. Circuit Judge John B. Owens that held that while the due process clause does not require that the federal government pay for an attorney to represent C.J.L.G. and similar immigrant minors who are accompanied, the ruling does not necessarily apply to immigrant minors who are unaccompanied.

"That is a different question that could lead to a different answer," Judge Owens wrote.

While that sounds hopeful, it may be difficult to make the case that unaccompanied minors are entitled to an attorney. Arulanantham believes that such an argument would be complicated by a September 2016 Ninth Circuit ruling that held that a federal district court doesn't have jurisdiction over claims that immigrant children have rights to attorneys in deportation cases.

Under the process proffered by the Ninth Circuit's opinion, children from other countries who are not represented by attorneys would need to bring their claims in immigration court, be ordered deported, appeal the ruling to the Board of Immigration Appeals and then raise the claims for counsel to be appointed to them in petitions for review.

"There is no way for an unrepresented, unaccompanied child to file an appeal that would present the issue that the concurrence suggests may be open," said Arulanantham, referring to Judge Owens' opinion. "The issue will never be presented to the court to be resolved because a child would never be able to get it presented."

Jorge Baron, executive director of the Northwest Immigrant Rights Project, said his organization believes that narrowing the issue of representation to unaccompanied immigrant children would miss the point that all minors undergoing such proceedings should

have the right to an attorney paid for by the government.

It is clear in the instant case, Baron said, that neither C.J.L.G. nor his mother, who relied on interpreters to understand the proceedings and had no legal background, were capable of navigating the world of immigration law, which is noted for its complexity.

"The deciding factor as to whether someone gets an attorney appointed or not should not be whether they are accompanied," Baron said.

### **Advocates Look to Congress**

Should the full Ninth Circuit not agree to hear the case, the next recourse for those pushing for immigrant children to have attorneys paid by the government would be for legislation through Congress. But that's a proposition that seems difficult in the current climate, said Pollock.

The current talks on immigration reform have not included discussion of attorneys for immigrant kids. Immigration advocates in Congress are focused on holding onto protections under the endangered Deferred Action for Childhood Arrivals program, while President Donald Trump is calling for rolling back initiatives such as the diversity visa lottery program, cutting back on the ability of residents and U.S. citizens to sponsor relatives and coordinating stricter enforcement of the nation's immigration laws.

In 2013, the immigration bill passed by the U.S. Senate that died in the House of Representatives included a provision that would have provided government funding for counsel in certain circumstances, such as for children and those with mental disabilities, Baron said. While at least one other bill since then has included a similar provision, none have advanced, he said.

"When I go out into the community, most people can't understand how this can be the case, that children who don't know the language are expected to represent themselves in immigration proceedings," said Baron, who believes a campaign to increase awareness of the issue could have a positive impact. "Our resources may be limited, but the fight will continue."

--Editing by Jack Karp.