



March 17, 2020

Assistant Chief Immigration Judge Philip J. Montante, Jr.
Office of the Chief Immigration Judge
Batavia Immigration Court
4250 Federal Drive, Room F108
Batavia, NY 14020

Re: Urgent request for changes in the Batavia Immigration Court in response to the COVID-19 outbreak

Dear Honorable Judge Philip J. Montante, Jr.:

We write on behalf of Prisoners' Legal Services of New York ("PLSNY") and the ECBA Volunteer Lawyers Project ("VLP") – who collectively provide free legal representation to all indigent non-citizens in the Batavia Immigration Court – to urge Your Honor to immediately implement the following changes at the Batavia Immigration Court in response to the COVID-19 outbreak.¹ These changes are necessary to safeguard the health of our employees and clients, in addition to courtroom staff, opposing counsel, detention center personnel, and the surrounding Western New York community. The threat to human safety is not theoretical. It is real. A staff attorney from one of our programs has already been quarantined due to exposure to someone who tested positive for COVID-19.

1. Cancel all master calendar hearings for a four-week period, and allow bond and merits hearings to proceed only with attorney approval

As Your Honor is no doubt aware, Governor Cuomo has enacted a regional shutdown of New York State which began at 8 p.m. yesterday,² while President Trump issued guidelines yesterday afternoon advising against gatherings of more than 10 people.³ These drastic policies have been enacted to minimize human contact and thereby reduce the rapid spread of COVID-19, in accordance with guidance from the Center for Disease Control ("CDC") and with the

¹ We are writing with respect to the Batavia Immigration Court given our organizational presence in this Court, but our requests can and should be extended to the Buffalo Immigration Court for the reasons stated in this letter.

² <https://twitter.com/NYGovCuomo/status/1239558725528178689>

³ <https://www.politico.com/news/2020/03/16/trump-recommends-avoiding-gatherings-of-more-than-10-people-132323>

emerging medical consensus that “social distancing” is required to prevent additional COVID-19 infection.⁴

As part of this state- and nation-wide strategy to minimize human contact, the New York State Unified Court System has issued new protocols under which all “non-essential functions” are suspended until further notice.⁵ The New York State policy cancels all new trials and provides that arraignments be conducted remotely by video or at places “designated as arraignment sites where persons believed to be at medical risk related to the coronavirus will appear remotely by video.”⁶ Federal courts in New York State have issued similar guidance, including the Western District of New York, which has effectively cancelled hearings for a period of 60 days.⁷

We urge Your Honor to follow these prudent policies and cancel all master calendar hearings for a period of four weeks. As Your Honor is well aware, master calendar dockets in the Batavia Immigration Court are very busy and often result in a packed court waiting room filled with attorneys and family members. Promoting such large gatherings is dangerous and so the Batavia Immigration Court master calendar docket should be immediately discontinued.

We recognize that our clients are detained, and that a full closure of the Batavia Immigration Court would result in the additional detention of our clients. As such, we recognize the continued need for merits and bond hearings in some instances, both of which may result in release from detention and the amelioration of health risks to detainees. But we respectfully request that the Court allow such hearings to proceed only with the approval of the attorneys involved. Such a policy is necessary to safeguard the health of PLSNY and VLP attorneys in light of the significant safety concerns involved with appearing in the courtroom in close proximity to other attorneys and courtroom personnel; visiting detained clients; and arranging for the transportation of out-of-town witnesses to Batavia to appear in court, all of which impose a grave risk to the safety of our staff.

2. In making the decision to set bond and/or release an individual on his or her own recognizance, consider the vulnerability of the person to COVID-19

COVID-19 is a serious disease, ranging from no symptoms or mild ones for people at low risk, to respiratory failure and death in older patients and patients with chronic underlying conditions. “People in the high-risk category for COVID-19, i.e., the elderly or those with underlying disease, are likely to suffer serious illness and death. According to preliminary data from China, 20% of people in high risk categories who contract COVID-19 have died.”⁸

⁴ <https://www.cdc.gov/coronavirus/2019-ncov/downloads/community-mitigation-strategy.pdf>

⁵ <https://www.nycourts.gov/whatsnew/pdf/Updated-Protocol-AttachmentA3.pdf>

⁶ *Id.*

⁷ https://www.nywd.uscourts.gov/sites/nywd/files/Court%20Operations%20Under%20COVID-19_signed.pdf

⁸ Declaration of Dr. Robert Greifinger ¶ 5, *Dawson v. Asher*, No. 2:20-cv-409, Docket No. 4 (W.D. Wash. March 16, 2020).

In light of the heightened risk of illness or death for these vulnerable populations, we respectfully urge Your Honor to immediately institute a policy under which Immigration Judges conducting bond hearings must consider the age of a detainee, as well as his or her underlying medical conditions, in assessing whether the detainee should be released from detention on bond or on his or her recognizance. Such a policy would promote the safety of vulnerable detainees and would greatly help to minimize COVID-19-related deaths in immigration detention.

3. Allow for the telephonic appearance of attorneys without motion

If the Court does continue operation, we urge Your Honor to allow attorneys appearing in Batavia Immigration Court to appear by telephone to minimize unnecessary and potentially hazardous human interaction. To facilitate such a policy, we respectfully request that Your Honor temporarily suspend the Immigration Court Practice Manual's requirement that motions be filed 15 days before a hearing, since such a requirement is wholly inappropriate in the rapidly changing COVID-19 situation. In addition, we urge Your Honor to provide a means (whether via email or phone) for attorneys to easily communicate with the Court to facilitate telephonic appearances.

4. Allow for continuances due to difficulties in client meetings

In addition, if the Court does continue operation, it should allow for continuances based on the significant logistical difficulties currently involved with visiting detained clients in the Buffalo Federal Detention Facility ("BFDF") as a result of the COVID-19 outbreak.

On Friday, March 13, 2020, Jeffrey J. Searls, Assistant Officer in Charge of BFDF, informed PLSNY and VLP via email that in-person legal visitations at BFDF have been temporarily suspended, and that all visits must be conducted in the only "no contact" visit room available at BFDF.⁹ As Officer Searls noted in his email, "ICE recognizes the considerable impact of temporarily suspending personal visitation but has determined it necessary to temporarily suspend such visitation in order to maintain the safety and security of its detention facilities, its employees, and those detained in its custody."¹⁰ Officer Searls also noted that ICE was exploring the possibility of video or telephone legal calls but that no such policy was currently implemented.¹¹

These policies, while commendable for the health and safety of detainees, will result in serious delays in client visitation, which will make it extremely difficult for PLSNY and VLP to adequately prepare for court hearings. We therefore urge Your Honor to issue guidance allowing for Immigration Judges to take these logistical issues into account in granting continuances.

* * *

⁹ Email from Jeffrey J. Searls, March 13, 2020.

¹⁰ *Id.*

¹¹ *Id.*

We thank Your Honor for your attention to this letter and to your efforts to preserve the health of persons appearing before and working in the Batavia Immigration Court during these difficult times.

Very truly yours,

Karen L. Murtagh
Executive Director
Prisoners' Legal Services of New York

Robert M. Elardo
Executive Director/CEO
ECBA Volunteer Lawyers Project

cc: Stephanie L. Kerr, Acting Court Administrator, Batavia, NY
Department of Homeland Security, Office of Chief Counsel, Batavia, NY