

Seeking Freedom: A Child Finds Himself behind Bars

LEONARD S. GLICKMAN

Abstract

This article examines the case of a seventeen-year-old Algerian teen, indefinitely detained by the United States Immigration and Naturalization Service in an adult facility, on the basis of radial and dental exams.

Résumé

Cet article se penche sur le cas d'un jeune Algérien de dix-sept ans détenu indéfiniment par le service d'immigration et de naturalisation des États-Unis dans un établissement pour adultes, à partir d'examen dentaires et d'examen du radius.

Seventeen-year-old Mohamed Boukrage, an asylum seeker currently in the care of the United States Immigration and Naturalization Service (INS), fled his native Algeria several years ago, after a terrorist group composed of religious fundamentalists murdered his family.¹ A stowaway on an Italian container ship making its way to Canada, he was discovered by the captain of the ship, turned over to U.S. customs officials at the New Jersey port, and subsequently detained by the INS. Because he did not have Algerian citizenship papers, his age was determined through outdated procedures – dental and radial exams.² Although Mohamed said he was under the age of eighteen, a dentist determined that he was an adult. Since being discovered, he has been kept in a prison-like adult detention facility, in violation of international law signed by the U.S.³

Mohamed has been fortunate in only one aspect of his life since arriving in the U.S.: he has a lawyer. Erin Corcoran of HIAS, the Hebrew Immigrant Aid Society, provides him, and other refugees, with pro bono counsel. In discussing his case, she says, “Children are the most vulnerable of any

refugees, especially the unaccompanied ones. They are not even guaranteed counsel.”⁴

Mohamed’s story has come out in interviews with Corcoran and the child psychologist she found to evaluate him. He was ten when his parents and sister were killed in a car bomb set off by Islamic fundamentalists. After his parents’ death, he sought shelter at an aunt’s house. She took him in for a while, but believed his presence endangered her. So she beat him and eventually threw him out of her house, at the age of twelve. He wandered from place to place for years, eventually making it to the Italian ship when he was sixteen. He has been in INS custody since October 23, 2000, and recently marked his seventeenth birthday behind bars.

If Mohamed were recognized as a child, he would be subject to certain protections under U.S. law after experiencing so much suffering in his native country.⁵ As a minor, he could receive a “special immigrant juvenile status visa,” which allows abused, neglected, or abandoned children to remain in the United States.⁶ But his teeth – which the INS has ruled could only belong to an adult – are in the way.

Most government agencies, such as the United States Department of State and Office of Refugee Resettlement, have discarded dental and radial exams as the sole means for age determinations because they are inherently inaccurate.⁷ Other countries, including the Netherlands, have ruled that the tests are unconstitutional. The INS still uses them to determine the age of people who arrive in this country without documentation, such as Mohamed. However, the UNHCR’s handbook *Refugee Children: Guidelines on Protection and Care* cautions that, even when these exams are used, authorities should let common sense and decency guide their actions: “When identity documents are not relied on to establish age, authorities usually base age assessments on physical appearance. Sometimes scientific procedures are used, such as dental or wrist bone x-rays.

Precautions must be taken if such methods are used. First such methods only estimate age.... [S]pecial procedures or programmes usually are intended to help younger persons when their needs are greater. When the exact age is uncertain, the child should be given the benefit of the doubt.”⁸

The dentist who examined Mohamed, Dr. Robert M. Trager, was recently profiled in the *New York Times*.⁹ Although he is not trained in orthopedics, Dr. Trager takes teeth and wrist X-rays of undocumented refugees to determine their age. The article quotes Dr. Trager, who examines around six hundred people for the INS each year, saying, “I would say at least 90 per cent don’t tell the truth [about their age].”

However, child psychologist Dr. Alice Frankel evaluated Mohamed and determined that he did not have the sophisticated knowledge necessary to lie about his age. In addition, based on her evaluation of Mohamed, she found that he is under eighteen. Corcoran reports that he looks and acts like a child. The Immigration Judge who heard his asylum claim expressed doubts that the age procedures conducted by the INS were determinative, but she does not have the authority to overrule the INS’ decision. And so he continues to be treated as an adult.

This has important legal ramifications. People seeking asylum in the U.S. are put through extensive background checks and an intensive interviewing process to verify their claims that they are unsafe in their native country.

Mohamed is being held to the same standards of proof as an adult (although the INS recognizes that children may not be able to recall events that give rise to their claim of persecution with the clarity and detail as an adult).¹⁰ But, because of his youth and the trauma he has undergone, he is unable to remember or clearly describe what happened to him. It doesn’t help that, as Corcoran has observed, “people that have been trained to work with adults often have not developed sensitivity to child issues.” Judges rejected Mohamed’s claims on the grounds that his testimony was not detailed enough, and have denied his petitions for appeal.

In detention, Mohamed has been sexually harassed by adult men. He has not had access to the much-needed counselling and educational services that would be available in a children’s facility. In fact, he has been placed in solitary confinement several times for month-long stretches, as a punishment for wetting the bed during nightmares.

The INS has denied Mohamed an opportunity to seek a determination in state family court that he is eligible for foster care. The INS’s sole reasoning for this denial is that Mohamed is over eighteen. At this point, his best hope lies in an appeal Corcoran – with the law firm of Latham and

Watkins, which runs a pro bono project to assist immigrant children – is preparing to the INS ruling. On February 1, 2002, they filed a complaint in federal court to compel the INS to release Mohamed to the family court’s jurisdiction. The federal judge has temporarily stayed the immigration judge’s order of removal and is currently deciding whether he has jurisdiction to hear Mohamed’s claim.

But time is running out. When Mohamed turns eighteen in June, he will be ineligible for foster care, a prerequisite for obtaining a special immigrant juvenile visa, which would eventually make him eligible for a green card.¹¹ If Mohamed is unable to secure a dependency order in state court, the INS will actively begin trying to remove him to Algeria. However, as he has no citizenship papers, the Algerian government is under no obligation to accept him back into the country. If Algeria refuses to issue him travel documents, he could remain in detention in the U.S. indefinitely.

In the meantime, Mohamed, who speaks only Arabic, has a sense of isolation and growing desolation. Corcoran does whatever she can for him, becoming more engaged in his life than she would for an adult client. “It’s hard because he needs so many things. The facilities aren’t providing them, or allowing access to social workers or child psychologists. I’m the only one who has contact with him – I end up fulfilling all of these roles, which is really tough.”

The two have developed a close relationship. “Mohamed is a very smart kid. The psychologist said he’s above average intelligence. But he doesn’t get any schooling. He is so thirsty to learn.” She has given him a math workbook and an Arabic/English dictionary, both of which he studies eagerly. He also called her after the terror attacks of September 11, knowing that HIAS’s offices are in Manhattan. “You’re the only family I have,” he tells her. “You’re like my sister.”

Gridlock within the INS bureaucracy over hearings is not unheard of. HIAS staff report having several child clients in the past who have been held as adults. Proposed U.S. legislation offers hope for similar future cases. On February 28, 2002, a Congressional hearing was held for S.121/H.R. 1904 – The Unaccompanied Minor Act. Introduced by Senator Dianne Feinstein of California, the bill proposes the elimination of dental and radial exams as the sole means for determining the age of an unaccompanied minor. It also would give unaccompanied minors the right to counsel. However, the bill has not yet been passed, and may not pass before Mohamed turns eighteen, effectively aging out of the benefits the bill would bring.

Corcoran has great hopes for the bill, but, in the meantime, continues to closely follow Latham and Watkins’ federal court actions on Mohamed’s behalf. She says, “I

think we're going to have to go the court route rather than the legislative route, because I think judges are sympathetic to how children are treated, and are less sensitive to politics. It can be faster, too, and time is really running out for Mohamed."

For the moment, Mohamed remains unembittered. But he worries that, after his eighteenth birthday, he is fated to remain in detention. Corcoran says, "This kid is so great. He just needs a break – a chance. To survive so much and then be detained indefinitely, it's just such a waste of human life."

Notes

1. Such attacks are common in Algeria. Amnesty International's 2001 report on this troubled country states that, in the year 2000 alone: "More than 2,500 people were killed in individual attacks, massacres, bomb explosions, ambushes and armed confrontations between the security forces and armed groups. Hundreds were civilians killed by armed groups in individual attacks, massacres and indiscriminate bomb explosions. Often groups of up to 25 civilians, including women and children and entire families, were killed in their homes or at false checkpoints set up in rural areas by armed groups. Most killings and attacks took place outside the main cities and the perpetrators were routinely able to escape undisturbed, even though some attacks were committed near army and security force checkpoints or outposts. Hundreds of members of the security forces, paramilitary militias and armed groups were killed in ambushes and armed confrontations. However, as a result of official restrictions on such information it was often impossible to obtain precise details about the identity of the victims or the exact circumstances of their deaths."
2. For articles detailing the known inaccuracy of these techniques, see Chris Hedges, "Crucial I.N.S Gatekeeper: The Airport Dentist," *New York Times*, July 22, 2000; Alan Elsner, "Harsh Fate Can Await Young Refugees in U.S.," Reuters, December 20, 2001; Alan Elsner, "New York Dentists Can Settle Fate of Migrants," Reuters, January 11, 2002.
3. Convention on the Rights of the Child, G.A. Res. 44/25, Sept. 2, 1990 (US signatory as of 1997).
4. Other studies reinforce her point. See Jacqueline Bhabha and Wendy A. Young, *Through a Child's Eyes: Protecting the Most Vulnerable Asylum Seekers*, 75 Interpreter Releases 757, 772 (1998).
5. This is part of the settlement reached in *Flores v. Reno*, Case No. CV-85-4544-RJK (Px) (1997), governing the treatment of minors in INS custody.
6. 8 United States Code § 1101 (a)(27)(J).
7. See United States Department of State cable No. 98-State-096341 (May 28, 1998); Letter from Carmel Clay Thompson, Acting Director, Office of Refugee Resettlement to State Refugee Coordinators, ORR State Letter #01-27 (Oct. 2, 2001).
8. United Nations High Commissioner for Refugees, Geneva 1994.
9. Chris Hedges, "Crucial I.N.S Gatekeeper: The Airport Dentist," July 22, 2000.
10. Memorandum from Jeff Weiss, Acting Officer for Int'l Affairs, to Asylum Officers, Immigration Officers and Headquarter Coordinators, *Guidelines for Children's Asylum Claims* (December 10, 1998).
11. See the New Jersey state law defining who is eligible for foster care, New Jersey Statutes Annotated 9:2-13 (b).

Leonard S. Glickman is the president and CEO of HIAS, the Hebrew Immigrant Aid Society, based in New York City.
