For Unaccompanied Minors, a Lack of Lawyers

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The trek that took Katherine from El Salvador to just steps inside Texas, where she was apprehended by U.S. Border Patrol agents, spanned more than 1,500 miles. But what stands out about that journey in 2009 was something else: Katherine was just 14 years old, and her only companion was her 10-year-old sister Tania. "When [the Border Patrol] picked us up, I began to cry, because I didn't know what was going to happen to us," says Katherine, who says she was fleeing an abusive grandmother in El Salvador and hoping to reunite with her mother, who had come to the United States years earlier. (Katherine asked that her last name not be published because some members of her family have an uncertain immigration status.)

Katherine and her sister were at the forefront of what has been a steady increase in unaccompanied youths immigrating to the United States. Three years ago, a little less than 8,000 unaccompanied youths were taken into custody. Last year that figure hit 24,000, and estimates are that the total will exceed 60,000 this year and 100,000 next year. "The number of immigrant children crossing the border is skyrocketing," says Eve Stotland, director of the Legal Services Center at The Door, a New York-based nonprofit that represents undocumented youth in immigration proceedings. "We are at the beginning of a crisis."

Many of those minors are eligible for permanent legal residency, often under the Special Immigrant Juvenile Status (SIJS) program, which allows undocumented minors who have been abandoned to gain permanent legal status. But as a practical matter, they can't access such programs without the assistance of counsel. In immigration matters, whether they involve adults or children, there is no guarantee to counsel.

According to a 2012 report by the Vera Institute of Justice, 40 percent of children placed in the custody of the Office of Refugee Resettlement are eligible for SIJS or other forms of help. "SIJS is a very powerful relief for undocumented youth fleeing significant violence and trauma," says Maureen Ketler Schad, pro bono manager at Chadbourne & Parke, who has successfully handled
dozens of SIJS cases, including those involving Katherine and her sister. "But for many of these young people, finding a lawyer becomes that last insurmountable hurdle."

In recent years, dozens of Am Law 200 firms, including Chadbourne, Kirkland & Ellis and Paul Hastings, have responded to this growing need by initiating or expanding pro bono dockets representing undocumented minors in SIJS and other immigration proceedings, especially in California, New York and Texas. "The immigration legal services community is small and underfunded," says Wendy Young, president of Washington, D.C.–based Kids in Need of Defense (KIND), which partners with more than 200 law firms, law schools and corporate law departments to represent undocumented youth. "Law firms have stepped up in such a robust way, and that has meant that thousands of kids who would have gone pro se get representation." Nonetheless, the unaccompanied minors who gain representation and permanent legal status represent the lucky exceptions. Instances of young undocumented migrants attempting to represent themselves or simply skipping hearings, which usually results in removal orders, remains a problem that is only likely to worsen.

The increase in the number of unaccompanied minors arriving in the U.S. has been driven in large part by rampant drug and gang violence in Latin America. In a recent United Nations study of unaccompanied or separated children from El Salvador, Mexico, Guatemala and Honduras, 48 percent of participants indicated that they suffered harm because of a lack of sufficient protection by the state or that they had experienced or been threatened with serious harm by organized armed criminals, government officials or others in their community. "It is more of a refugee movement than an immigration movement," says Young. Still, many of these immigrants are better bets for SIJS than for asylum, which is reserved specifically for those who face persecution in their home country because of race, religion, nationality, political opinion or membership is a particular social group.

SIJS dates back to a 1990 act of Congress that sought to provide an avenue to permanent legal status for undocumented children who have been abused, neglected or abandoned by one or both parents. In 2008 the William Wilberforce Trafficking Victims Protection Reauthorization Act (so named for a 19th-century Englishman who helped lead the movement to abolish the slave trade) revised some of the program's qualifications, which currently include being under 21 at the start of the application process and unmarried. Unlike some other application processes for permanent residency, SIJS applicants are not required to provide proof of lawful entry into the United States. By statute, an SIJS application must be adjudicated within 180 days, making it the preferred option in situations in which an undocumented minor might qualify for more than one type of relief. (Asylum cases can drag on for years.)

"SIJS offers what's usually the quickest route to permanent status," says Young. The population of immigrants gaining permanent legal status through SIJS remains relatively low at 2,280 last year. But it has been on a steady upswing since 2007, when the total was just 796.

SIJS numbers are likely to be boosted in coming years by minors seeking Deferred Action for Childhood Arrivals (DACA) status—the so-called Dreamers who may be covered by a 2012 Obama administration memorandum that directs government agencies to exercise prosecutorial discretion toward undocumented immigrants who arrived as children and meet other criteria. "We see
people come in because they want to apply for Deferred Action, and they qualify for SIJS," says Kristen Jackson, senior staff attorney for the Public Counsel Law Center. Since SIJS offers a direct path toward permanent legal status and citizenship, it is the better option for someone who qualifies for both SIJS and DACA.

While the SIJS path to citizenship may be fast and direct, it is impossible to navigate without a lawyer. Typically, the process consists of two distinct proceedings. First, a state court, for which the minor is already a declared dependent, must issue a special-findings order that the minor cannot be reunited with one or both parents because of abuse, neglect or abandonment and that it would not be in the best interest of the minor to return to his or her country of origin. And then, after the issuance of the special findings by the state court judge, a petition (I-360) and relevant documents must be submitted to U.S. Citizenship and Immigration Services (USCIS). The process also includes an in-person session in which a USCIS official interviews the applicant. In addition to the I-360 petition, an I-485 form seeking the actual adjustment of citizenship status must be filed.

The first SIJS matter handled by Los Angeles-based DLA Piper associate Esteban Morales followed a typical pattern. In 2011 Morales represented a high school student who immigrated to the U.S. years earlier with his mother. After the death of his mother and also his father, who had remained in South America, a family friend had been appointed guardian, but nothing had been done to remedy the student's undocumented status. Morales' representation included filing a petition (and making an appearance) that demonstrated, among other things, why his client could not be reunited with his parents. Following the issuance of the special findings by the state court judge, Morales submitted the I-360 petition and relevant documentation to USCIS. Morales also accompanied his client to an adjustment of status interview with a USCIS official.

"In my experiences, neither the family court portion or the USCIS interview were contentious, where the court or the government is trying to poke holes in your case," says Morales, who is now working on his third SIJS case. "But the process certainly is likely too daunting for someone who isn't familiar with the legal process and the manner in which SIJS matters are adjudicated." In some cases, additional hearings and fillings are needed because the SIJS applicant is in removal proceedings or formal guardianship needs to be established.

Occasionally, there's a need for appellate hearings. In one recent case, Paul Hastings handled a case that raised the question of whether SIJS applicants need to show whether they had been abandoned by one parent, or both.

The case had been referred to Paul Hastings from KIND in 2011. It involved a brother and a sister from Honduras who had immigrated to the United States by themselves. Their mother had come to the U.S. years earlier. The siblings eventually reunited with their mother, so the New York state judge overseeing the case denied the siblings' special-findings request because he interpreted SIJS to require them to show that they could not reunite with either parent, not just one.

Although courts elsewhere, including the Nebraska Supreme Court, have made similar rulings, other judges across the country have also routinely considered the provision to be met by showing only that reunification with one parent was impossible. The Paul Hastings case became two separate appeals, one for each sibling. "Our arguments to the appeals courts were that the factual
record supported the application of the statute," says New York-based Paul Hastings associate Kevin Broughel, who led the appeals, "and that the correct reading of the statute was that reunification with one or both parents had to be not viable."

The brother's appeal was ultimately remanded and assigned to a different judge who made the SIJS special findings. The appeals court in the sister's case took the opportunity to weigh in more thoroughly, not only overruling the lower court but making the SIJS findings itself.

That case stands out because it resulted in a published appellate opinion, but it is just one of the many SIJS cases Paul Hastings has handled in recent years. The firm's relationship with KIND dates back to 2008, when the organization was founded. In addition to five active SIJS cases, the firm's pro bono case load includes asylum and visa matters in which clients, most of whom are adults, seek permanent legal residency. According to Paul Hastings senior attorney Brian Moran, the firm's concerted foray into representing young undocumented aliens in SIJS matters was directly a result of the commitment made to KIND. But he says, lawyers have continued to gravitate toward the work because of "an awareness of the degree to which this population is vulnerable and deserving."

Much of Kirkland & Ellis' pro bono work representing undocumented youth in immigration matters also stems from the firm's now 3-year-old relationship with KIND. The firm has become especially adept at cases requiring fast turnarounds because of approaching 21st birthdays. In total, Kirkland & Ellis has handled 28 SIJS cases during the past four years, including representing clients escaping gang violence and siblings overcoming abusive home lives. "For our lawyers, the work has been incredibly rewarding," says Jeanne Cohn-Connor, a Washington, D.C., Kirkland partner who oversees matters referred to the firm by KIND. "It's amazing to be able to help kids who have struggled so much in their lives get on a path that will allow them to thrive."

While legal services organizations and their law firm partners routinely pointed to the increasing number of undocumented minors as one reason for their commitment to this type of work, they were quick to stress the need for overall immigration reform. In addition to its work pairing pro bono clients with law firms, KIND has also lobbied for specific elements of immigration reform, such as guaranteeing that minors will be represented during immigration proceedings. (In June, the U.S. Department of Justice said it plans to provide $2 million in grants to train about 100 lawyers and paralegals for such representations.) To support their argument, they point to examples like Katherine, now 19. The successful SIJS petition and legal permanent residency Katherine obtained with Chadbourne's help has allowed her to enroll in a New York community college, where she just completed her first year. "Having a lawyer in court was a good feeling," Katherine says. "There was somebody there defending me and someone protecting me."

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