

‘Conveyer Belt’ Justice: An Inside Look at Immigration Courts

Where the cases build up so relentlessly that there’s barely time for consideration – or lunch



BY ERIC KATZ

If not for a Homeland Security Department attorney requesting it, Judge Amiena Khan probably would not have taken a break at all, despite the 64 cases on her docket that day.

“Mr. McConnell wants to eat lunch,” Khan said, referring to the government lawyer who sat before her in court on an overcast day in December. She quickly corrected herself: “Mr. McConnell *rightfully* wants to eat lunch.”

Khan herself did not take time to eat during the break. Instead, she spent time preparing for the rest of her day.

“I live off of coffee,” she said.

Khan earlier in the day agreed to take a seven-minute break, likely the only one she would have scheduled if it had been up to her. Already by that time, petitioners awaiting their scheduled hearings were growing impatient.

“I was here before the judge,” an attorney complained. “That guy over there can vouch for me!”

“You’re at the bottom,” Khan’s legal assistant shot back, pointing to a stack of dozens of files on the floor next to the dais. “What do you want me to do, move all of these cases for you?”

The argument broke out on a busy day in Courtroom 19 on the 12th floor of the Jacob K. Javits Federal Building in downtown Manhattan. The court is one of about 60 across the country that make up the Executive Office of Immigration Review. As part of the Justice Department, the organization—unlike other federal courts—is positioned under the political leadership of the executive branch. The irritated attorney had five cases scheduled for what is known as a master calendar hearing before Administrative Judge Khan that morning, before having to hustle to a separate hearing elsewhere in the building in the afternoon.

The attorney’s files, it turned out, were not at the bottom of the pile on the floor, but on the judge’s desk, promising a more immediate time slot. Her five clients were among the dozens Khan would hear from that day, each facing the judge for about three minutes to make preliminary arguments for remaining in the United States. On the other side of the courtroom sat the Homeland Security Department attorney pushing for their expulsion from the country.

Khan would not issue final rulings for most of the petitioners, the majority of whom were present with their lawyers. Instead, she recorded pleadings, matched documents with files and noted what remedy the immigrant was seeking. She then confirmed with the Homeland Security attorney that the government was seeking to deport the individual, and set a date for an individual hearing. In most cases, the date was set for late 2022, the earliest opening given the current nationwide backlog of nearly 800,000 cases.



Judge Amiena Khan

Khan spends most days presiding over those individual hearings. By the time an immigrant makes it to the individual hearing phase, he or she will have spent years working with an attorney, obtaining all the proper documentation and lining up witnesses to testify on his or her behalf. But things go awry. Dozens of immigrants scheduled to appear on Khan's docket on Dec. 5, 2018 learned their cases would have to be rescheduled far into the future after President Trump declared a national day of mourning following the death of former President George H.W. Bush. The courts, along with much of the rest of government, the New York Stock Exchange and the Postal Service, were closed. Those individuals, who already have spent years preparing for their day in court, now will receive new court dates for sometime in 2022.

Later that month, parts of the government shut down. That included the Justice Department, and with it most of EOIR. All of the cases Khan had on her docket while the government was shuttered will now be reset, likely to the back of the line in 2022. Across the system, according to a immigration court tracking program maintained by Syracuse University, 42,000 hearings were already canceled as of Jan. 11. That would grow to more than 100,000 by Feb. 1.

Government Executive spent two days in early December inside the Javits building to observe the organized chaos of thousands of non-detained non-citizens seeking to resolve their unlawful status inside the United States. Immigrants and their families crowded into tight hallways, awaiting their 10 minutes or less—usually less—inside the cramped 20-foot by 20-foot courtroom. Those who had attorneys huddled with them, waiting for advice and updates in a language they often struggled to understand. Babies were quieted, children admonished to behave. And when the numbers corresponding to their case files finally were called, they rose, swore to tell the truth, and were swept out of the

room before most even had a chance to remove a jacket. In less time than it took to get through court security, they were told to return in four years for a more complete hearing.

Only then will they receive an initial resolution to their cases.

‘The Conveyor Belt’

“I’m going to be a robot up there,” is how Robert Adinolfi characterized his job in Courtroom 19. The attorney, who was sitting in the rows of benches waiting for his client to get called before the judge, was one of dozens of lawyers who rotated through Khan’s court that day. They passed the time reviewing notes, watching the proceedings in front of them or simply checking the bus schedule.

The master calendar proceedings were rehearsed and repetitive. “You’re here to see the conveyor belt?” a Homeland Security attorney asked after being informed that a reporter from *Government Executive* was present to observe the day’s activities.

Immigrants have a right to an interpreter during the proceedings, but they typically waive it and allow their attorneys to speak for them. Through their lawyers, most conceded the charges against them—namely that they were citizens of a foreign country and had entered the United States illegally. In most cases before the court that day, the immigrants had elected to place themselves into the system. They had established lives in the United States and were willingly coming out of the shadows in an effort to put themselves on firmer, more permanent footing.

The defendants came before the immigration court after making an asylum claim to U.S. Citizenship and Immigration Services. Following an interview with an asylum officer and a referral to the Executive Office for Immigration Review, they typically drop their asylum claims and seek alternative remedies. Many had young children born in the United States as citizens, and suggested at least one of those kids had a hardship that required a parent to stay by their side. When President Trump speaks of the “loopholes” in the immigration system, he is likely, at least in part, referring to this path for avoiding deportation. In Courtroom 19, Khan would note the pleadings, mark the change and set the date for an individual hearing.

“Counsel, are you and your client free on Oct. 6, 2022?” Khan asked repeatedly, each time substituting various dates after reviewing her calendar.

“Yes, judge,” the attorneys responded. They always were available.

For every case following a familiar pattern, there proceeded one with a unique circumstance. A Honduran national who entered the United States in 1999 now has two U.S. citizen children. She sought a hardship waiver, but did not yet have any documentation to prove it. The DHS attorney interjected, asking Khan to “pretermite” the case—to end it then and there. Attorneys awaiting their turn were taken aback by the government’s aggressive approach: “Such an asshole,” one whispered. Khan agreed Homeland Security was getting ahead of itself.

“That’s why we have a hearing,” the judge said.

Ritza Bulnes is also a Honduran citizen. One of her two U.S. citizen sons is on active duty in the Navy—the other, James Romero, took time off work to accompany her to court. Khan reminded Bulnes she could apply for “parole in place,” an avenue for temporary legal status afforded to immediate relatives of members of the armed services. The legal status she currently enjoys is set to end on Jan. 5, 2020, after President Trump terminated the Temporary Protected Status provided to many Honduran immigrants following devastating flooding there in 1999. Bulnes’ application for renewal of TPS was earlier denied by Homeland Security.

Other times, Khan halted proceedings when attorneys proved poorly prepared. One attorney did not have the proper paperwork and got the basic facts of a case wrong during initial questioning. In another case, the attorney had received the case just days before the hearing. In less than a minute, Khan declared herself uncomfortable moving forward, noting the filing was “bare bones.” That asylum applicant, facing deportation to China, will face another master calendar hearing later this year. In another case, where the immigrant’s initial attorney was recently disbarred, the new attorney was ill-prepared. Again, Khan quickly set another new date.

“We have to keep moving,” Khan said.

Khan reserved two types of cases for the end of the day. Those with *pro se* representation, meaning they had no attorneys, and those who did not show up at all. In the latter circumstance, Khan deemed all of the roughly half-dozen *in absentia* cases abandoned and she ordered the individuals deported. The orders were sent back to Homeland Security.

Those who did appear were afforded more lenient rulings.

Marvin is an 18-year-old citizen of El Salvador the government accused of entering the country without ever being “admitted or paroled” (read: illegally) and was representing himself in court. He lives with his father, who did not attend the hearing. It was not Marvin’s first time before Khan. He had previously promised to get an attorney, but said his dad was “taking care of his family,” including his sick grandparents, and therefore could not afford a lawyer. Unlike in other U.S. courts, indigent plaintiffs before the Executive Office of Immigration Review are not entitled to public defenders if they cannot afford an attorney.

“Marvin, you have to get yourself an attorney,” Khan said. “You’re 18 now.”

Despite already providing him with one extension, Khan was uncomfortable moving forward. She told Marvin she was again giving him more time to get a lawyer and had her legal assistant hand him a list of free legal services providers in the area. She then gave him a new date to appear for a hearing.

“Be well, do well in school and see you back in court on that date,” Khan said.

Carlos, a 16-year-old citizen of Guatemala, did not receive such encouragement from the judge. He is not in school.

“I need to support my family,” Carlos said through an interpreter. He was released into the custody of his aunt by the Health and Human Services Department’s Office of Refugee Resettlement after entering the country illegally in 2017. Khan was unmoved, telling him the state of New York requires 16-year-olds to be in school. She reset his case to another date.

“Carlos, you must come back or I will order you removed to Guatemala,” Khan warned.

Sometimes, the flow of the day was disrupted simply by the overwhelming logistics challenge of handling 64 cases in a few hours.

“I apologize to you on behalf of the court,” Khan told one respondent, after spending a few minutes shuffling through paperwork, trying to determine why a case made it onto her docket that day. The individual had been before Khan earlier in the year, an usually tight turnaround. “I really don’t understand why we had to bring you in.”

Later, an attorney corrected Khan after she mistakenly repeated back the wrong date in confirming a future individual hearing.

“As you can see,” the judge said, “as the day wears on, one gets a tad tired.”

"Counsel, are you and your client free on Oct. 6, 2022?" Khan asked repeatedly, each time substituting various dates after reviewing her calendar.

New Demands

It’s not hard to see how Khan’s docket got so full. About a quarter of the master calendar hearings before her were reset to another date. Like most of the 400 immigration judges in the country, Khan holds the preliminary proceedings once per week. Every day she has about 25 resets, plus another 35 new cases EOIR places on her docket. The Trump administration has been particularly focused on reducing the backlog, sending judges to the border, boosting the use of video conference hearings and hiring more judges.

Khan, who spoke to *Government Executive* in her capacity as executive vice president of the National Association of Immigration Judges, said she welcomed the new hires, but it was not a panacea. Those judges will take on new cases not already part of existing judges’ “crushing caseload,” she explained. She speaks from experience. She’s been on the bench for eight years after more than two decades in private practice, including extensive pro bono work on behalf of asylum seekers through the Lawyers Committee for Human Rights.

Perhaps not surprisingly, Trump is no fan of EOIR. He recently complained about the law's requirement to "bring [immigrants] before a ridiculous court system" in calling for legislative changes to the process and in December said the country "can never have enough judges."

"We should be able to say, 'Sorry you can't come in. You have to come in legally.' End. That's your court case," Trump said.

In the meantime, former Attorney General Jeff Sessions attempted to alleviate the pressures on the system with his own idea: quotas. Judges now must resolve 700 cases annually in order to receive top performance reviews. Critics of the policy, including the American Bar Association, legal scholars and immigration experts, were quick to denounce what they saw as an attempt at short-circuiting constitutionally guaranteed justice.

"The government has now tied our financial interest in keeping a job with the outcome of our decision," Khan said, adding that "right there the integrity of the process as a whole" has now been "put into question."

In one case earlier that day, the government attorney did not have the proper paperwork and was not ready to move forward. Khan said she was tempted in that moment to terminate the case.

"For me that would have meant an easy completion," she said. "One more number toward that 700."

Ultimately, she concluded that would be too rash. She was in a "quandary," she said, but the respondent got a new date.

"Could immigration judges be put in the position of, 'Hmm, maybe I'll deny this case, it's just a little faster, and I'll make my number,' or the direct opposite. 'Maybe I'll grant this case. It'll help me make my number?'" Khan asked rhetorically. "Neither one of those considerations should ever take place in my decision-making, period."

The quotas already are influencing all sorts of decisions judges make. On average, they must rule on three to four cases each day. Many have determined that it is now impossible to keep pace if they take any days off. Khan said

occasionally a non-citizen's attorney will ask for a delay because their expert witness is not available on the scheduled date.

"Do I say to that person, 'Oh, that's too bad, too bad for you?'" Khan asked, noting she does not want to make any decisions on factors other than the merits of the case. "I want to make a decision based on the rights of the individual before me."

Making matters worse, Khan said, is a directive from the Justice Department to expedite cases involving recent border crossings. The speeded-up consideration, similar to that instituted under the Obama administration "rocket docket," is forcing judges to push back existing cases and adding "years and years" to the backlog. Khan recalled being sent for a short time to Texas during the Trump administration's infancy to handle cases there, an experience she said was for "visual effect" that only added to her backlog in New York.

Those decisions, Khan said, amounted to a politicization of the process, because they prioritize cases of importance to the Trump administration. She suggested that such instances in which political appointees put their thumbs on the scale, as well as their interference with judges' scheduling writ large, would do more to influence the backlog than a quota system. The "oppressive" overbooking, she said, is distracting from the core issues of each case. Her attention is instead turned toward the logistics of ensuring things are entered into each file properly.

"We are, based on our experience and expertise, able to manage what we believe can get done," Khan said. Left to their own devices, she argued, judges could actually move cases along more quickly. On the day with 64 master calendar hearings, for example, EOIR also placed an individual hearing on her docket. She knew she almost certainly would not be able to get to it that day, but the attorney and client had to come in and wait for it to become official. Khan eventually rescheduled the hearing for 2020. She added that if the conveyor belt were not moving so quickly, additional deliberation during the preliminary phase might allow her to pretermite more cases, thereby clearing them off the backlog.

Khan described several other tweaks that could get the backlog down to six months or a year, and said they don't involve "throwing money at the problem." She said giving immigration judges the power to hold people, mostly attorneys, in

contempt of court would help eliminate bad behavior and get things moving along more quickly. She reiterated she was grateful for more judges—the administration has hired nearly 100 since Trump took office and pushed for more during the shutdown fight—but said other resources, such as support staff, would go a long way toward helping judges focus on the merits of cases rather than getting distracted by logistics.

On top of everything else the judge juggles, she has to monitor the recording equipment to ensure everyone is being heard, write new orders, keep track of the interpreters' schedules and, of course, make sure everyone gets an opportunity to eat lunch.

She also believes immigration judges should be involved in policy- and decision-making. The judges, she says, are attuned to the constant array of changes that dictate court proceedings. Khan recalled an instance in court recently in which she got confused and had to pause to reflect on what course of action would be correct under the most recent guidelines.

“Change is good,” Khan said. “Every agency needs change to remain effective. But external change too rapidly applied, not letting the workforce, not letting the immigration judges catch up with the change that is being instituted is problematic and ends up, again, in delay.”

Those are all changes Khan believes can be implemented relatively quickly. In the meantime, her caseload continues to be oppressive. She stays in her chambers until after 7 p.m. most nights—hours after her last case—reviewing all the files for the next day. She ensures each person has submitted the requisite paperwork and confirms why those who are coming for a second master calendar were asked to return.

“Nobody wants to wing it,” Khan said.

Winging it, however, is the only way to describe how immigration judges reach a decision after individuals return to court for their formal hearings.

A Unique System

“You previously said you were beaten by police, and now you say you were only shocked by an electronic baton,” said Katrina Jackson-Brown, an assistant chief counsel with Homeland Security. “Which was it?”

A Chinese citizen, seeking asylum at an individual hearing on a separate day in Khan’s court, expressed some confusion at the question before conceding she was merely shocked on her arms and legs repeatedly and not “beaten” in the traditional sense.

Jackson-Brown then asked the young woman why she at one point testified that she was beaten, or shocked, five times, and at another point said it was only four times. The woman clarified that she was interrogated five times by Chinese police during her initial, 10-day detention, but only physically abused four times.

The questioning took place during the government’s cross examination. She had already answered her attorney’s questions for about an hour, laying out the specifics of the persecution she faced in her home country for practicing Christianity in an underground church. She laid out in detail the abuse she faced; told of her journey to the United States through Russia, Cuba and Mexico before eventually being detained in Arizona; and identified all the pieces of evidence she submitted to the court, including medical bills for the injuries she sustained during her Chinese detention, her U.S. tax returns and photographs of her continuing to practice Christianity in America.

That occurred only after Khan spent 15 minutes cataloguing all the evidence and going “off the record” to note what she and the government saw as the primary points of contention in the case. Courtroom 19 had an entirely different feel on this day. Those present, besides a Mandarin interpreter, were all directly involved in the case. Events transpired more formally and deliberately, with frequent pauses for translations. The few other immigrants on the docket that day waited nervously outside the courtroom behind a closed door.

During the government’s cross examination, the Homeland Security attorney sought to poke holes in the asylum-seeker’s story, looking for discrepancies that would bring into question her credibility. Jackson-Brown’s tone wavered between impatient and angry when identifying potential inconsistencies. She and a colleague laughed and shook their heads when the woman described, perhaps in

oversimplified terms, a particular sermon her American pastor delivered about a short man who grew taller.

Khan at one point paused the questioning to play back a recording that had just taken place after the government suggested the respondent used two different dates to refer to the same event. She had, but the respondent said she misspoke and they moved on. The judge repeatedly interjected with her own questions, which she later said she did to “speed the process along.” Khan was also seeking to develop a more complete record, ever conscious of the potential for her proceedings to face review.

“If I have a doubt, I have to address that doubt,” Khan said after the hearing.

The court brought a witness into the courtroom, who testified to seeing the asylum-seeker frequently in their American church. He also faced cross examination from the government and explained that he had not been paid for his testimony, nor was he seeking a *quid pro quo* arrangement for his own case before EOIR. All the while, the respondent sat on a bench in the back of the room, staring at the ground and nervously shaking her feet while rubbing her thumb against her palm.

Both sides presented their closing arguments, with the government suggesting the respondent was not credible, had missing documents, was unable to convince her pastor to testify on her behalf and, ultimately, could return to China and continue to practice Christianity without fear. Khan asked for two minutes to gather her thoughts, but after 30 seconds launched into her decision. She summarized the details of the case, said the respondent was credible, called the treatment the respondent endured in China “abhorrent” and granted asylum.

Jackson-Brown declined to consider the matter final, however, leaving the government 30 days to appeal the decision to EOIR’s central board.

“There’s no other system where the judge issues a decision at the hearing of the case,” Khan later said of the condensed schedule.

What should not happen is the agency should not in any opaque measures one way or the other interfere with our independent decision-making authority. To impose an external political reality onto that is problematic. AMIENA KHAN, FEDERAL IMMIGRATION JUDGE

Not everyone on the schedule actually got their day in court, something Khan had predicted. “I’m triple booking,” she had told *Government Executive* a day earlier. “I’m putting four to five cases on a day. We know I can’t address those cases. I know that.”

Khan’s first two cases that day dragged on for several hours. Well into the afternoon, an individual and his attorney were still waiting in the courtroom for what was to have been their 10:30 a.m. hearing. Another attorney in the courtroom that day said it was common for the 10:30 hearings to get rescheduled, as there is rarely enough time budgeted. Eventually, Khan called the individual before her and asked to reschedule. She suggested a date in 2020, but the attorney—whose client paid her fee for the day despite the postponement—said the man had a wife and children at home and would like an earlier date. Khan managed to squeeze him in for a January 2019 hearing.

“Is 10:30 AM ok?” Khan asked. Momentarily relieved, the attorney agreed.

Khan heard one more case, her fourth of the day. She had taken a brief break—again only after the Homeland Security attorney complained that she was going to pass out from hunger. Again, Khan did not take time to eat, instead running to a nearby restaurant to put down a deposit for the EOIR New York division holiday party. In the final case, a father and daughter from Bangladesh were jointly seeking asylum. The judge was forced to push back the father’s case to another day, as it was already late in the afternoon. The daughter, however, had gotten married to a U.S. citizen since her last court appearance and was seeking a change in status. Khan, who said she typically prefers to leave such matters to U.S. Citizenship and Immigration Services, agreed to hear the case.

“Where was your wedding?” the Homeland Security attorney asked the husband during the government’s cross examination.

“Queens,” he responded.

“Are you a terrorist?”

“No,” he calmly replied.

Eventually, Khan ruled in the daughter’s favor.

“Let me be the first to welcome you to the United States as a lawful permanent resident,” Khan said from the bench, as the woman, her husband and father quietly exulted. “As much as we’d like to bask in that happiness . . . ,” Khan continued, before moving to reschedule the father to appear before her next year.

After the hearing, Khan said those are “the most pleasurable of the proceedings,” pausing before adding, “those that are granted.” For a moment, a look of satisfaction and relief washed over her face, as the woman and several members of her family who accompanied her to court that day could be seen in the hallway hugging and celebrating.

Independence

As Khan described the problems with immigration court proceedings, and her short-term solutions to solving them, a more fundamental issue emerged: the very foundation upon which her agency was established was built on shaky ground, atop tectonic plates that collided with new administrations and new priorities. Courts, inherently, should be apolitical, Khan said. But EOIR sways in the wind at the whims of the attorney general.

“What should not happen is [the Justice Department] should not in any opaque measures one way or the other interfere with our independent decision-making authority,” Khan said. “To [impose] an external political reality onto that is problematic.”

Recently resigned Attorney General Jeff Sessions demonstrated Khan’s fears. On several occasions, Sessions reached down into the courts to issue his own precedent-setting decisions. Those rulings had wide-ranging impacts, such as ending domestic violence as a qualification for receiving asylum (a decision a

federal court has since struck down) and terminating the practice by which judges could “administratively close” cases in which an individual facing removal proceedings is set to receive legal status through another avenue.

In welcoming a slate of new judges to the EOIR bench at a ceremony last year, Sessions made clear he prioritized speedy decision-making.

“As you take on this critically important role, I hope that you will be imaginative and inventive in order to manage a high-volume caseload,” Sessions said. “I do not apologize for expecting you to perform at a high level, efficiently and effectively.”

Khan takes issue with that directive. She believes immigration judges can only truly fulfill their duties if the entire system is taken out from under the Justice Department and provided independent status as provided under Article I of the Constitution. Judges should not be fighting for resources with law enforcement, she explained. Until they are separated, she said, the system is setting judges up for failure.

“I also question at certain points whether due process is even being afforded to these individuals when the judge is so exhausted and we are sort of just processing them in a clerical fashion,” Khan said. At another point she summarized her feelings on the backlog through an old legal maxim: “Justice delayed is justice denied.”

Absent change, the backlog is likely to continue to grow. Some judges hear more than 80 cases a day and are pushing hearings years into the future. For some immigrants, the delays may provide relief—relief that Trump has consistently bemoaned—as those in removal proceedings are largely shielded from immediate deportation. But for others who have come out of the shadows to be legally recognized, it means continued difficulty in securing employment and other benefits, the pursuit of a better life frozen in seemingly endless uncertainty.

After her preliminary hearing, Bulnes, the Honduran with a son in the Navy, waited patiently for her attorney to join her in the hallway and explain the next steps. She will wait a couple more years to find out her long-term fate in the country she has called home for three decades. But she was not in a rush.

“We want to stay doing the right thing in the right country,” Bulnes said. “It’s given us so many opportunities. It’s worth it, no matter what.”

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