Ensuring Fairness and Due Process for Noncitizens in Immigration Proceedings

By Christopher Nugent

Imagine fleeing and fearing torture as a gay man in your home country of Guyana, where homosexuality is a crime carrying a sentence of life imprisonment. While detained by the U.S. Department of Homeland Security (DHS) for more than six years in ten jails, you seek protection under the United Nations Convention against Torture before the Executive Office for Immigration Review (EOIR or immigration court). You face an aggressive DHS trial attorney and skeptical immigration judge (IJ) who has the distinction of holding one of the lowest approval ratings of all such judges in the area of asylum. This IJ denies your claim for a variety of reasons and the Board of Immigration Appeals (BIA) affirms the denial. On appeal however, in a precedential decision issued by Judge Guido Calabresi, the Second Circuit Court of Appeals rescues you from imminent removal to feared torture by holding that "the IJ's seeming bias against the petitioner and reliance on unfounded assumptions about homosexuals deprived the petitioner of his right to a fair hearing." *Ali v Mukasey,* 529 F.3d 478 (2d Cir. 2008).

According to the Second Circuit, the IJ's homophobic stereotypes included that you would not be perceived as a homosexual absent a partner or cooperating person and that you were incapable of developing a strong or close homosexual relationship in the United States or Guyana in part because "you are not particularly communicative or articulate and skilled and mature in the way you express yourself and show your feelings." *Id.* The Second Circuit remands your case to a different IJ, and you now face yet another round of these administrative proceedings.

This is the Kafkaesque odyssey of Peter Conrad Ali, represented pro bono by the Legal Aid Society of New York and my law firm. The years of immigration proceedings to remove Ali from the United States are in many ways an illustrative case study of the structural and procedural challenges for EOIR that the Obama administration can help ameliorate.

Background on the Breakdown

By way of background, as an executive branch agency within the Department of Justice (DOJ), EOIR oversees more than fifty courts around the nation staffed with close to 240 IJs. These judges are charged with administering U.S. immigration law through civil immigration removal proceedings initiated by the DHS against aliens. Last year, IJs handled a record 328,425 court completions involving aliens. The BIA is the administrative appellate body, composed of fifteen members within EOIR, that reviews appeals of IJ decisions. IJs and BIA members are DOJ career appointments.

While civil in nature, immigration proceedings are adversarial, with the government represented by trained DHS Immigration and Customs Enforcement prosecutors. Without the right to government-appointed counsel in these proceedings, and coupled with the scarcity of nonprofit or pro bono resources, the majority of detained and nondetained aliens go unrepresented in these proceedings due to indigence. The stakes of these proceedings are high, however, such as in Ali's case. Return to one's home country can be tantamount to torture or death. Legal representation clearly has an impact on results. According to the bipartisan U.S. Commission on International Religious Freedom, in its seminal report on expedited removal, aliens represented by counsel in their asylum claims had up to an eightfold greater likelihood of being granted asylum than unrepresented aliens.

However, according to recent academic studies, the most significant variable in asylum adjudications is the particular IJ the alien draws. Indeed, according to the Transactional Records Access Clearinghouse's *Report on Asylum Decision Disparities Among the Nation's IJs*, http://trac.syr.edu/immigration/reports/160/, which studied asylum adjudications from 1994 through beginning of 2005, there is a wide disparity in asylum approval rates by IJs, ranging from 2 to over 90 percent, with an overall average of 46 percent. This study found the same wide disparities exist even within the same court, with the same composition of cases.

Throughout the past several years, EOIR has attracted increasing scrutiny from the Federal Courts of Appeals, Congress, the organized bar, the media, and the public. First, in 2002, ostensibly to reduce appellate case backlogs at the BIA, then Attorney General John Ashcroft imposed on EOIR an array of procedural reforms for the BIA, including an expansion of single-member review (when most cases were decided by three-member panels), an increase in decisions issued without opinion (known as "affirmances without opinion"), a narrow standard of review for factual findings and credibility de-

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terminations, a reduction in the number of BIA members from twenty-three to eleven, and abbreviated deadlines for briefing and deciding appeals. According to expert commentators, the decision to reassign several BIA members was based on ideological grounds, as they were perceived to be too supportive of aliens.

Consequently, the combination of underlying inconsistencies within the IJ corps, the BIA procedural reforms, and the Real ID Act of 2005, Pub. L. No. 109-13 (imposing yet higher burdens and stricter standards of proof for asylum and other relief forms), led to a tsunami of alien appeals to the Federal Courts of Appeal, particularly given the private bar's dissatisfaction with the quality of the BIA review. The Second and Ninth Circuits were overwhelmed with immigration cases, now representing over 40 percent of their dockets.

Through circuit appeals such as Ali's, the underlying systemic analytical deficiencies in both IJ and BIA adjudication became readily apparent to the federal bench. In turn, the federal bench took to issuing decision after decision, remanding cases back to the BIA for further adjudication, and at times excoriating IJs by name for their flawed procedural and substantive application of the law. Indeed, consider, for example, Judge Julio M. Fuentes of the Third Circuit in *Wang v. Attorney General,* 423 F.3d 260 (3d Cir. 2005), finding a "disturbing pattern of [IJ] misconduct" given "an extraordinarily abusive" judge who ordered a sex slave back to face rape in her home country.

Such appellate decisions in part led then Attorney General Alberto Gonzales to be concerned about "intemperate or even abusive" IJ conduct against aliens, resulting in his order on January 9, 2006, for a comprehensive review to be conducted of the immigration courts and the BIA. This review resulted in the issuance of twenty-two comprehensive reforms announced in August 2006, spanning measures ranging from imposing annual performance evaluations for BIA members and IJs to establishing public complaint mechanisms against EOIR adjudicators, from decreasing the use of streamlining to increasing the number BIA members. The immigration bar and experts have embraced these reforms in large measure, notwithstanding that not all of the reforms have been implemented to date.

Ironically, however, in 2007 it became clear that on a parallel track, allegedly unbeknownst to Gonzales, White House DOJ liaisons Kyle Sampson and Monica Goodling had been illegally politicizing the appointment process for IJs. Most notably, this included discriminating against candidates who were not Republican or who were perceived as too liberal. This illegal hiring scheme resulted in thirty-one IJ appointments, including Garry D. Malphrus, to the Arlington, Virginia, immigration court. Before his tenure with EOIR, Malphrus served as associate director of the White House Domestic Policy Council and reportedly was a member of the "Brooks Brothers Riot" during the 2000 presidential elections recount in Florida. Much to many immigration commentators' consternation, Malphrus was later upgraded and appointed a BIA member in May 2008.

Additional Avenues for Reform

In addition to the twenty-two comprehensive reforms that have been or are in the process of being implemented, experts have suggested numerous additional recommendations to restore EOIR's credibility, transparency, and accountability. Some of these are listed below.

Additional appropriations. EOIR commands a meager budget of $238 million, which is insufficient to cover the number of IJs, law clerks, and other staff needed to alleviate the crushing workloads of IJs and to ensure quality adjudications. In this regard, the current ratio of IJs to law clerks is 1:4, which, according to the IJ's union, limits IJs' ability for research and to author rigorous written opinions (as opposed to issuing oral decisions from the bench). Absent such resources, in the words of one IJ working at EOIR, "It is like trying a death penalty case in traffic court."

Depoliticization, diversity, and judicial independence. Experts advise the Obama administration to avoid repeating the politicized pitfalls in personnel hiring within EOIR. This can only be accomplished with EOIR maintaining control over the hiring process, without political interference from the DOJ or the White House, and valuing diversity in background and judicial philosophies (to ensure that EOIR is not solely staffed by former DHS and DOJ personnel). Vis-à-vis judicial independence, some commentators recommend extracting EOIR from the DOJ altogether and making it an independent commission or an Article I court.

Publication of IJ and BIA decisions. All federal courts publish their decisions as either precedential or unpublished. The Supreme Court in fact expanded this practice by adopting Rule 32.1, in effect as of January 1, 2007, which allows federal court litigants to cite even unpublished decisions as precedent. Thus, EOIR and the BIA's current practice of not making written decisions public is at variance with federal court practices and purportedly contributes to widely inconsistent or absurd outcomes. According to some commentators, publication of decisions is vital to foster uniformity and consistency in adjudications and the application of law to facts. An alien's consent to publication would safeguard his or her privacy rights.

Improved training materials. For example, EOIR, in conjunction with nongovernmental (NGO) experts, desperately needs to develop a benchbook for assessing an alien's mental or physical competency considering that approximately 10 percent of alien respondents reportedly suffer from mental disabilities. Unlike in other administrative courts, IJs and BIA members lack substantive or procedural training and guidance in adjudicating the claims of incompetent respondents. This has resulted in a disturbing number of adverse credibility determinations on

incompetent respondents as well as decisions to order U.S. citizens removed from the United States. The attorney general in particular has yet to fulfill his statutory mandate to promulgate safeguards to protect the rights and privileges of vulnerable mentally incompetent aliens, as required by law pursuant to 8 U.S.C. § 1229(b)(3) (2001), 8 C.F.R. § 240(b)(3) (2001), including but not limited to publishing regulations subject to notice and public comment under the Administrative Procedures Act in the *Federal Register*.

Balanced training curriculum. EOIR currently only conducts IJ trainings on an annual basis, either through a live conference or via CD-ROM. To date, these trainings have not systematically included NGOs with relevant expertise. Instead, and strangely, the DHS and the DOJ's Office of Litigation (OIL), which defends the agency in federal court, typically act as trainers—even though the DHS has a conflict of interest since it is an adverse party and OIL has a restrictive interpretation of the law and typically sides with the DHS on a routine basis vis-à-vis appeals. Greater international, national, and local NGO participation and frequent trainings via videoconference and/or live for BIA members would help improve the quality of adjudication.

System-wide legal orientation program. EOIR can help level the playing field for aliens in removal proceedings, particularly the burgeoning annual population of 300,000 DHS detainees, through the system-wide expansion of the Legal Orientation Program (LOP). System-wide development of this innovative program has been recommended by the Commission on International Religious Freedom. Administered by the Vera Institute of Justice through a network of local NGOs, the LOP provides detained aliens with information on immigration law and court procedures and facilitates pro bono representation. The LOP reportedly has yielded (1) improved judicial efficiency by better preparing respondents for hearings, leading to fewer adjournments and faster hearings; (2) increased respondents' comprehension of complex law and procedures; and (3) added safeguards for aliens' due process rights in the absence of government-appointed counsel. *See* www.usdoj.gov/eoir/reports/LOPEvaluation-final.pdf.

Conclusion

After eight years of executive branch policies that experts concur adversely affected the rights of aliens, the Obama administration has the platform and mandate to further reform EOIR to ensure the robust protection and expansion of aliens' due process rights. Such change immediately necessitates the new administration's rescission of one of former Attorney General Michael Mukasey's last acts: *Matter of Compean,* 24 I&N Dec. 710 (AG. 2009), a BIA case the attorney general sua sponte certified to himself as precedent. In *Compean,* contrary to Supreme Court precedent recognizing the due process rights of *all* aliens in the United States and decades of jurisprudence affirming aliens' right to counsel, Mukasey declared that aliens do not have *any* right to legal representation in immigration proceedings, whether under statute or the U.S. Constitution, and consequently, there is no right to seek redress through a motion for a new immigration hearing when a lawyer is incompetent. Further reforms of EOIR would honor this nation's history as a global beacon for human rights and further give effect to the hallowed words etched on the Supreme Court of "Equal Justice under the Law."

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