The Green Card

Judge Lawrence O. Burman, Founder and Designated Mascot of The Green Card. Photo by Helen Parsonage.

Quote of the Month

It is not the critic who counts, not the man who points out how the strong man stumbles, or where the doer of deeds could have done them better. The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly, who errs, who comes short again and again...

Theodore Roosevelt

In This Issue

Summer 2020 *Published by the Immigration Law Section of the Federal Bar Association*

Message from the Chair

Dear Section Members,

On March 11, while I was preparing for my individual court hearing in Miami, I had no idea that not only would the court close before that hearing, but that we would all be "grounded" at home within days. The home isolation has affected our diverse membership differently. Our monthly board meetings have continued as we work to support each other and our greater membership.

On the heels of the annual asylum law conference we co-sponsor with the New York Law School in late February, we were putting the final touches on our annual conference, which was to be in Detroit May 14-15. While we had to cancel the conference, we look forward to holding it next Spring in Detroit, so keep a lookout for information regarding next year's conference. Our annual meeting will take place in September, and will be online.

While public safety dictated that we could not hold the annual conference, nor an event we were planning in Orlando in July, our section understands the need to provide education to our members and the FBA at large. We have continued our webinar series. Jan Pederson and Chris Richardson, two of the most knowledgeable attorneys in the area, recently presented Visa Issuance and Expedite Requests for Foreign Medical Professionals—one of the most critical issues during the pandemic. We are in the process of finalizing our remaining Summer webinars, so please look for those announcements.

Because so many law students have lost all or part of their Summer legal employment, the ILS is also in the process of planning online meetings for law students with immigration judges and other government lawyers, along with non-profit attorneys and private bar attorneys.

As always please contact me with any ideas, feedback, or to get involved in our section activities. We are truly loaded with so many gifted attorneys from all walks of immigration law. Please keep safe and careful during this period, and enjoy the start of Summer.

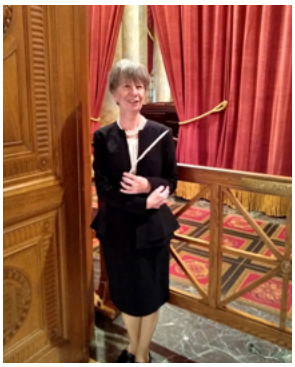
With warm wishes,

Mark J. Shmueli

ILS News: Rock Star Helen Parsonage wins Supreme Court Case

By Nikiya Vasudevan

Editor's note: Ms. Vasudevan is a law student at Catholic University, and a current intern at the Law Offices of Mark Shmueli.



Helen Parsonage in the Supreme Court after oral argument

On June 1, 2020 the Supreme Court ruled on the case, Nasrallah v Barr, holding that federal courts have jurisdiction to review substantive denials of relief under the Convention Against Torture.

The decision is available at

<https://www.supremecourt.gov/opinions/19pdf/18-1432_e2pg.pdf > (accessed Jun. 19, 2020).

Nidal Khalid Nasrallah emigrated from Lebanon as a young adult in hopes of establishing a better life with his family, after facing torture and persecution by Hezbollah. He was convicted of selling of cigarettes, and faced deportation under 8 U.S.C. § 1227(a)(2)(A)(i). A Stewart Immigration Judge deemed this a particularly serious crime, and so Nidal sought Torture Convention relief. Below is a Q & A with our star attorney Helen Parsonage, who was one of the attorneys representing Nasrallah.

Q: What was the name and docket number of the case?
A: Nasrallah v. Barr, Case No. 18-1432.

Q: What date was the oral argument?
A: 03/02/2020

Q: What was the date of the decision?
A: June 1, 2020

Q: In a nutshell, what was the issue in the case?
A: Is substantive judicial review of a claim under the Convention Against Torture barred by 8 U.S.C. 1252, in cases involving removal orders on certain criminal grounds?

8 U.S.C. § 1252(a)(2)(C) prohibits courts from reviewing questions of fact in "any final order of removal against" a noncitizen "removable by reason of having committed" certain criminal offenses.

Nasrallah had been convicted of a crime of moral turptitude [CIMT]. Our position was that, despite the CIMT, the Court did have jurisdiction to review the CAT claim, because 8 U.S.C. § Section 1252(a)(4) allows for judicial review of "any cause or claim under the United Nations Convention Against Torture." We weren't seeking review of a removal order, which would be subject to 1252(a)(2)(C), but of review of denial of relief under the Convention Against Torture, which was subject to 1252(a)(4). In the end, the Court agreed with us that these were two separate things, and we won the case.

Q: What was the procedural background of the case?
A: The immigration judge found that my client qualified for deferral of removal under CAT. She also found his CIMT to be a particularly serious crime, disqualifying him from asylum or withholding of removal.

The BIA agreed with the immigration judge's finding that Nasrallah had committed a particularly serious crime, but disagreed that he qualified for deferral of removal under the CAT. The U.S. Court of Appeals for the 11th Circuit found that it lacked jurisdiction to hear his appeal because 8 U.S.C. § 1252(a)(2)(C) prohibits courts from reviewing questions of fact in "any final order of removal against" a noncitizen "removable by reason of having committed" certain criminal offenses.

Q: Is there a link to the audio of oral argument?
A: https://www.supremecourt.gov/oral_arguments/audio/2019/18-1432 and aligned audio at https://www.oyez.org/cases/2019/18-1432

Q: What stood out to you most about your experience?
A: Sitting just a few feet from Justice Sotomayor. I swear she smiled at me.

Q: Can you describe your experience working with your client, Nidal Khalid Nasrallah?
A: It has been several years since we worked together. It has been a long road and he was an extremely impressive young man who had made a good life in the states.

He had a compelling story as he finished university and had wonderful family who was very supportive, and everyone was willing to fight for this young man.

Q: Tell us about proceedings before the Immigration Judge.
A: Ms. Nasrallah was in the Stuart detention center, which is a private center in Georgia, and the conditions there have always been bad. At the time of the case, we had some of the most difficult immigration judges in the country, and he drew the short straw getting one of the most difficult immigration judges (who has since retired). We had a long and rather contentious set of hearings over his case. In the end we had to file a habeas corpus to get a deferral, and the judge accepted it.

Q: What is the legal standard for deferral of removal under the Convention Against Torture?
A: The Convention Against Torture basically says that the United States agrees to not send anybody back to their country of origin if it's likely that they would be tortured on their return—either by the government or basically with the acquiescence of the government. If the judge finds that it is more likely than not that they will be tortured, then the grant of protection under the Convention Against Torture is mandatory. It's not discretionary. So you don't have to worry about the question: do they deserve protection? If they've established the likelihood of torture, then relief is required. And, there is no criminal conviction that can disqualify you.

Q: Can you talk about how your client specifically was qualified for deferral of removal under the Convention Against Torture?
A: So the reason he qualified, in a nutshell, is that he established for the judge that it would be more likely than not he would be tortured in Lebanon, because he's a member of a religious sect called the Druze. Hezbollah, who are sort of the de facto government, have a history of persecuting, killing, and torturing members of the sect; and, in fact, Mr. Nasrallah had had an incident where he was quite severely injured in Lebanon by a number of Hezbollah militia. So that's why he qualified, and the judge granted; then the government appealed.

Q: Why did you seek Cert from the Supreme Court?
A: Well, the 11th circuit had said they could not conduct judicial review on the danger of torture, because of 8 U.S.C. § 1252. Not all Courts of Appeals had made that same determination, and that's why the Supreme Court actually took the case. There was a circuit split on the issue. But-- Why did we think it was it important to pursue? Why did we bother? Because individuals who are only eligible for Convention Against Torture, or the vast majority of them anyway, are going to have been barred from seeking asylum or withholding by some other thing, and it's possibly going to be some kind of minor criminal conviction. So with no judicial review, those individuals have been left high and dry with no ability to get a judge to review their claim, and yet they are the population the Convention Against Torture is designed to protect. However, heinous crime they might have committed, the CAT protects them from being returned to a country where they will be tortured and be at risk of being killed. So that's why it was important, why it has significance beyond just Nidal.

Q: Why did you choose three specific immigration/ foreign affairs related bills to support your argument?
A: The vast majority of the work at the Supreme Court level was done by Paul Hughes, in conjunction with some students at the Yale Law School's Supreme Court Appellate clinic. One of the things that the he did, which I think really swayed the Court, was he looked at the history of this particular jurisdictions stripping provision, 8 USC § 1252. He looked at how Congress had amended and modified and added to 8 USC § 1252, which supported our argument. This subsequent legislative history showed Congress had always intended Convention Against Torture claims to be reviewable.

Q: Are you satisfied by the outcome of the case, and what issues do you think should be further addressed on a federal level in the future?
A: So yes, I'm satisfied with the outcome of the case. You know the one thing I was not satisfied with, but hardly surprised by (it would have been a bit of a unicorn if I'd caught it) was the amount of deference that the circuit courts are to apply to review of CAT agency denials. Although there is now, unquestionably, review, the standard of review remains highly deferential. So, you know, does our victory mean that the circuit courts are going to actually be overruling BIA denials of relief under the Convention Against Torture? No, they will occasionally, but the standard is very deferential. But at least, now, we get to make the argument. So now, we go on to the next level of making those arguments in Nidal's case and hopefully others will benefit, as well. It's as much about moving the goal posts for everybody as it is about one individual, but of course I'm pleased that one individual finally gets to make that challenge.

Cut to the Chase: BIA: "Lock Them Up!"

By Jeffrey S. Chase[1]

In the words of the Supreme Court, "Freedom from imprisonment - from government custody, detention, or other forms of physical restraint - lies at the heart of the liberty that [the Due Process] Clause protects."[i] While imprisonment usually occurs in the criminal context, courts have allowed detention under our immigration laws, which are civil and (purportedly) non-punitive, only to protect the public from danger or to ensure the noncitizen's appearance at future hearings.[ii] Case law thus requires a determination that a detained noncitizen does not present a danger to the public, a risk to national security, or a flight risk in order to be eligible for bond under section 236 of the I&N Act.

The Board of Immigration Appeals has acknowledged the complexity of such determinations. In it's 2006 decision in *Matter of Guerra*,[iii] the Board suggested nine factors that an immigration judge may consider in deciding if bond is warranted. The list included whether the respondent has a fixed U.S. address; the length of residence, employment history, and family ties in this country (and whether suchties might lead to legal April 6, 2020. Reprinted with the author's permission.status); the respondent's criminalrecord, and their record of appearing in court, fleeing prosecution, violating immigration laws, and manner of entry to the U.S. But the Board made clear that an immigration judge has broad discretion in deciding what factors to consider and how much weight to afford each factor. The ultimate test is whether the decision was reasonable.

What makes such a decision reasonable? Given what the Supreme Court has called "an individual's constitutionally-protected interest in avoiding physical restraint,"iv Guerra's broad discretion must be interpreted as an acknowledgment of the inadequacy of relying on "one size fits all" presumptions as a basis for overriding such a fundamental constitutional right. In allowing IJs to consider what factors to consider and how to weigh them, Guerra should be read as directing those judges to delve deeply into the question of whether the noncitizen poses a danger or a flight risk.

Obviously, all recently-arrived immigrants are not flight risks, and all of those charged with crimes don't pose a threat to society. As the trier of fact, immigration judges are best able to use their proximity to the respondent, the government, and the evidence and witnesses presented to determine what factors are most indicative of the likelihood that the respondent will see their hearings through to the end and abide by the result, or in the case of criminal history, the likelihood of recidivism.

In considering the continued custody of one with no criminal record, the risk to public safety or national security are generally not factors. And in Matter of R-A-V-P-,[v] a case recently decided by the BIA, the immigration judge found that the respondent, an asylum-seeker with no criminal record, presented no risk on either of those counts. However, the immigration judge denied bond on the belief that the respondent was a flight risk, and it was that determination that the BIA was asked to consider on appeal.

How does one determine whether someone detained upon arrival is likely to appear for their hearings? It is obviously more complicated than whether one presents a threat to public safety, in which the nature of the criminal record will often be determinative. In R-A-V-P-, the Board repeated the nine Matter of Guerra factors, and added a tenth: the likelihood that relief will be granted.

As stated above, Guerra made clear that these were suggestions; the immigration judge could consider, ignore, and weigh whatever factors they reasonably found relevant to the inquiry. Furthermore, many of the listed Guerra factors were not applicable to the respondent. Guerra involved a respondent found to pose a danger to others. The nine factors laid out in the decision were not specific to the question of flight risk; clearly, all the listed factors were not meant to apply in all cases. As to the specific case of R-A-V-P-, obviously, someone who was detained since arrival can have no fixed address, length of residence, or employment history in this country. The respondent's history of appearing for hearings also reveals little where all appearances occurred in detention. And the Guerra factors relating to criminal record and history of fleeing prosecution are inapplicable to a respondent never charged with a crime.

[1] Originally published at jeffreyschase.com/blog April 6, 2020. Reprinted with the author's permission.

The Board's decision in R-A-V-P- is very short on details that would provide meaningful context. There is no mention of any evidence presented by DHS to support a flight risk finding. In fact, the absence of any listing of government counsel in the case caption indicates that DHS filed no brief at all on appeal, a point that doesn't appear to have made a difference in the outcome.[vi]

The few facts that are mentioned in the decision seem to indicate that the respondent sought asylum from Honduras based on his sexual orientation. Not mentioned were the facts that the respondent entered as a youth, and that although he entered the U.S. without inspection, he made no attempt to evade immigration authorities after entry. To the contrary, he immediately sought out such authorities and expressed to them his intention to apply for asylum. These facts would seem quite favorable in considering the Guerra factors of the respondent's "history of immigration violations," manner of entry to the U.S., and attempts to "otherwise escape from authorities."[vii] And although not mentioned in Guerra, the respondent is also represented by highly competent counsel, a factor that has been demonstrated to significantly increase the likelihood of appearance, and one within the IJ's broad discretion to consider as weighing in the respondent's favor.

Regarding the tenth criteria introduced by the Board, i.e., the likelihood of relief being granted, the persecution of LGBTI individuals is well-documented in Honduras, and prominently mentioned in the U.S. Department of State's country report on human rights practices for that country. The State Department reported an increase in killings of LGBTI persons in Honduras in 2019, and that 92 percent of hate crimes and acts of violence committed against the LGBTI community went unpunished. Such asylum claims are commonly granted by asylum officers, immigration judges, and the BIA.

Yet the Board took a very strange approach to this point. It chose to ignore how such claims actually fare, and instead speak in vague, general terms of how "eligibility for asylum can be difficult to establish," even for those who were found to have a credible fear of persecution. The Board next noted only that the immigration judge found that the respondent "did not demonstrate a sufficient likelihood that he would be granted asylum," without itself analyzing whether such conclusion was proper.

In fact, the immigration judge did deny the asylum claim; a separate appeal form that decision remains pending before the BIA. But the Board missed an important point. The question isn't whether the respondent will be granted asylum; it's whether his application for asylum will provide enough impetus for him to appear for his hearings relating to such relief.

From my experience both as an attorney and an immigration judge, the answer in this case is yes. One with such a claim as the respondent's who is represented by counsel such as his will almost certainly appear for all his hearings. From my experience both as an attorney and an immigration judge, the answer in this case is yes. One with such a claim as the respondent's who is represented by counsel such as his will almost certainly appear for all his hearings. The author of the Board's decision, Acting BIA Chair Garry Malphrus, did sit as an immigration judge in a non-detained court for several years before joining the BIA. I'm willing to bet that he had few if any non-appearances on cases such as the respondent's.

Yet the Board's was dismissive of the respondent's asylum claim, which it termed a "limited avenue of relief" not likely to warrant his appearance in court. Its conclusion is strongly at odds with actual experience. Early in my career, I represented asylum seekers who arrived in this country in what was then known as "TRWOV" (transit without visa) status, which meant that the airline they traveled on was responsible for their detention. The airline in question hired private guards to detain the group in a Queens motel. As time passed, the airline calculated that it would be cheaper to let those in their charge escape and pay the fine than to bear the ongoing detention costs. The airline therefore opened the doors and had the guards leave, only to find the asylum seekers waiting in the motel when they returned hours later. None were seeking to abscond; all sought only their day in court. And that was the determinative factor in their rejecting the invitation to flee; none had employment records, community ties, or most of the other factors held out as more important by the BIA in R-A-V-P-. They chose to remain in detention rather than jeopardize their ability to pursue their asylum claims.

My clients in the above example had a good likelihood of being granted asylum. But volunteering in an immigration law clinic three decades later, I see on a weekly basis individuals with much less hope of success nevertheless show up for all of their hearings, because, even in these dark times, they maintain faith that in America, an impartial judge will listen to their claim and provide them with a fair result. In one case, an unrepresented asylum applicant recently released from detention flew across the country for a preliminary master calendar hearing because the immigration judge had not yet ruled on his motion for a change of venue.

So for what reason did the BIA determine that the respondent in R-A-V-P- would behave to the contrary? The Board made much of the fact that an individual who promised to pay for the respondent's bus ticket and provide him with a place to live

(an offer which the Board referred to as "laudable") was a friend and not a family member of the respondent.

But on what basis can it be concluded that living with a cousin rather than a friend increases the chances of his future appearance in court? In the absence of statistics or reports that support such determination, is this fact deserving of such discretionary weight?

The Board felt it could rely on this factor simply because it was mentioned in Matter of Guerra. But while that decision requires a finding that the IJ's conclusion was reasonable, the decision in R-A-V-P- appears to be based more on a hunch than a reasoned conclusion, with the Board referencing seemingly random factors in support of its conclusion without explaining why such factors deserve the weight they were afforded, while ignoring other more relevant factors that would weigh in favor of release.

The respondent has now been detained for well over a year, including the seven months his bond appeal lingered before the Board, a very significant deprivation of liberty. The respondent's asylum appeal remains to be decided, likely by a different Board Member or panel than that which decided his bond appeal. But now that the majority of the Board has voted to publish the bond denial as a precedent decision, what is the likelihood that any Board member will review that appeal with an unbiased eye?

As a final point, although the drafting of the decision likely began months earlier, the Board nevertheless chose to allow the decision to be published as precedent in the midst of an unprecedented health pandemic that poses a particular threat to those detained in immigration jails. So at a time when health professionals and numerous other groups are pleading for the government to release as many as possible from immigration detention centers, the BIA chose to instead issue a decision that will likely lead to an opposite result.

[i] *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).
[ii] *Ibid*; Robert Pauw, *Litigating Immigration Cases in Federal Court (4th Ed.)* (AILA, 2017) at 418.
[iii] 24 I&N Dec. 37 (BIA 2006).
[iv] *Kansas v. Hendricks,* 521 U.S. 346, 356 (1997).
[v] 27 I&N Dec. 803 (BIA 2020).
[vi] Appeals may be summarily dismissed due to the failure to file a brief or to sufficiently state a ground for appeal. However, the BIA does not view an appeal or motion as unopposed where ICE files no brief.
[vii] *Matter of Guerra, supra* at 40.

Section News: ILS Members Brief Congress on Article I Court

By Betty Stevens

On November 22, 2019, the Immigration Law Section partnered with the Government Relations Committee of FBA National to present a briefing to House staff on Capitol Hill. The briefing centered on the reasons for Congress to legislate moving the immigration courts from the Executive Office for Immigration Review into an independent, Article I court. Colleagues from the American Immigration Lawyers Association, the American Bar Association, and the National Association of Immigration Judges, who have joined with FBA on the push for an independent Article I immigration court system, participated in the presentation.

Photo Book: 5th Annual New York Asylum & Immigration Law Conference

February 28, 2020 the annual New York Asylum and Immigration Law Conference took place at New York Law School. The conference was sold out. It featured 3 tracks and a day of extremely informative panels by experts and scholars in the field. Organizers were the NY Law School Asylum Clinic, the NY Law School Safe Passage Clinic, and our FBA Immigration Law Section. Welcome remarks were delivered by our Chair, Mark Shmueli, Judge Amiena Khan in her NAIJ capacity, and Asylum Clinic Director Claire Thomas. Below are some of the hilights, in a photo diary of the conference.

Left to right: Rex Chen, Kaaya Viswanthan, Nicole Johnson and Alex Rizio

Prof. Theo Liebmann, Lauren Anselowitz and Carmen Carillo

An attentive audience enjoys Track A

Helen Parsonage and ILS Chair Mark Shmueli

Former ILS Chair Betty Stevens and OIL Attorney Jeffrey S. Robins

Jeffrey S. Chase and Judge Amiena Khan

The NYLS front window

NYLS Safe Passage Director Lenni Benson and Helen Parsonage

What Due Process Rights Apply to Aliens in Removal Proceedings?

By Colton Bane

Colton Bane is a recent graduate of the Cecil C. Humpheys School Law

Editor's note:
The following is an excerpt from "Procedural Due Process in Removal Proceedings: History, Overview, and Recent Developments", a featured article in the May/June 2020 edition of the Federal Lawyer magazine. As law students find themselves quarantined due to COIVD-19, the Green Card is making an effort to feature more student articles, and our next edition will be authored exclusively by law students.

Introduction.

"The bosom of America is open to receive not only the Opulent and respectable Stranger, but the oppressed and persecuted of all Nations and Religions; whom we shall welcome to a participation of all our rights and privileges, if by decency and propriety of conduct they appear to merit the enjoyment." These are the words of our nation's first president, George Washington. Immigration has been a cornerstone of the United States' foundation, and welcoming immigrants—especially the downtrodden or persecuted—has been a national ideal since our nation's beginning. However, national views on immigration have shifted significantly since that time. Throughout American history, there has been a constantly oscillating balance struck between humanitarian immigration policies and other national concerns, such as national security and societal cohesion. At this time in US history, there is a strong swing of the pendulum towards the latter ideal. Now, competing ideals of "national security" and, at worst, exclusion, have come to dominate the stage of US immigration law and policy.

The question of whether "due process" applies to immigrants has, throughout U.S. history, occurred against that background. Under the due process clause of the Fifth Amendment, "no personal shall be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. This article, after setting out history and context, will address how the right to procedural due process applies to modern removal hearings. More specifically, the scope of this article includes only what are known as § 240 removal proceedings, rather than other, more limited hearings. *See* 8 U.S.C. §§ 1225 (expedited removal for inadmissible aliens), 1228 (expedited removal of aliens convicted of committing aggravated felonies), 1229a (removal proceedings), 1534 (alien terrorist removal hearing).

...

II. What Due Process Rights Apply to Aliens in Removal Proceedings?)

A. Statutory Rights

> With the enactment of the INA, Congress provided all aliens in § 240 proceedings three enumerated statutory rights.
> In proceedings under this section, under regulations of the Attorney General--
> **(A)** the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings,
> **(B)** the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this chapter, and
> **(C)** a complete record shall be kept of all testimony and evidence produced at the proceeding.

INA § 240(b)(4); 8 U.S.C. 1229a(b)(4). First, aliens have the *privilege* to effective representation. Unlike criminal defendants in our legal system, aliens have the privilege (rather than right) to effective representation at their proceedings at no expense to the government. *Id.* Unless the alien expressly waives this privilege, an Immigration Judge must "grant a reasonable and realistic period of time of time to provide a fair opportunity for a respondent to seek, speak with, and retain counsel." *Matter of C-B-*, 25 I&N Dec. 888 (BIA 2012). Additionally, the waiver of such privilege must be knowing and voluntary. Id. It is important to note that in order for waiver to be effective, the alien's right to adequate interpretation should be complied with so that the alien is acting with knowledge of the right and the consequences of waiving it.

Secondly, the alien has the *right* to examine evidence that the government is using against them, as well as present their own evidence, in removal proceedings. INA § 240(b)(4)(B); 8 U.S.C. 1229a(b)(4)(B). Arguably, the right of an alien to present evidence should include both lay and expert witnesses. *See id.* It is often necessary to have the testimony of others to corroborate the alien's claims, and the testimony of experts to effectively explain country conditions. The ability to present witnesses, lay and expert, is thus fundamental to a fair hearing. Furthermore, it is often necessary for a successful claim to relief from removal. Subject to a national security exception, the alien also has the right to cross-examine any witnesses that the governments presents in their case to have the alien removed. *Id.*

And lastly, the alien has the right to have a complete record of testimony and evidence from their removal proceedings. INA § 240(b)(4)(C); 8 U.S.C. 1229a(b)(4)(C). Meaningful judicial review of an agency decision requires such. Now, for context, we will momentarily delve into some fundamental administrative law, as it involves this third right and, more precisely, judicial reviewability of an order of removal from an agency's informal adjudication.

B. Statutory Rights

When dealing with judicial review of an agency, one must first determine whether their actions are adjudicatory or rulemaking. The agency here is the Executive Office of Immigration Review ("EOIR"), which is a component of the Department of Justice. The removal procedures that EOIR conducts are the agency action we are addressing.

Agency action is considered to be adjudication if there is individualized finding of fact, such as in removal proceedings for aliens. *See Bi-Metallica Investment Company v. State Board of Equalization*, 239 U.S. 441, 445-46 (1915) (citing *Londoner v. City and County of Denver*, 210 U.S. 373, 385 (1908)). Adjudication is defined by the Administrative Procedures Act ("APA") as an "agency process for the formulation of an order" (i.e., an "order of removal"). 5 U.S.C. § 551(7); APA § 551(7); 8 U.S.C. § 1252. Rulemaking, on the other hand, is generally policy determination through "formulating, amending, or repealing a rule" without individualized fact finding. 5 U.S.C. § 551(5); see 5 U.S.C. § 551(4).

After making the determination that removal proceedings are in fact adjudications, the next determinative issue is whether the adjudications are considered formal or informal. Formal adjudication is only trigged where the "organic statute," or statute that Congress enacted to create the agency and its purpose, requires "a hearing" that is "on the record." 5 U.S.C. § 554; APA § 554; *see Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12, 17-18 (2006).

In the case of § 240 removal proceedings before a Department of Justice Executive Office of Immigration Review court, this is informal adjudication because Congress did not give express language that requires formal adjudication. *See Gonzalez ex rel. Gonazalez v. Reno*, 215 F.3d 1243, 1245 (11th Cir. 2000). Furthermore, informal adjudication tends to be the "default" and most common agency procedure. Jill E. Family, *No Agency Adjudication?*, Center for Migration Studies (Dec. 18, 2018) https://cmsny.org/publications/family-agency-adjudication/.

Because removal proceedings are informal adjudication and APA protections do not apply, the only protections available to aliens arise through due process. See 5 U.S.C. § 554(a); APA § 554(a). This only emphasizes the importance of due process protections for aliens in § 240 removal proceedings, as it is their only protection. A complete record of evidence and testimony from the removal proceeding ensures the judicial review necessary to satisfy the most fundamental of due process rights; as well as satisfying the third and final enumerated right for aliens in § 240 removal proceedings.

The question then arises, are the three statutory protections, and their fundamental interpretations, under § 240(b)(4) of the INA (8 U.S.C. §1229a(b)(4)) the *only* due process protections for aliens? It would seem a "fundamentally fair hearing" would require more.

C. Other Procedural Due Process Rights

In addition to the statutory rights of all aliens in § 240 removal proceedings under § 240(b)(4), there are a number of rights provided by common law that are often penumbras of the understanding of "fundamentally fair hearing."

1. Notice and Hearing

Notice and hearing are considered the most basic of procedural rights. *Matter of Samai*, 17 I&N Dec. 242, 243 (BIA 1980) (citing *Yiu Fong Cheung v. INS*, 418 F.2d 460, 462-63 (D.C. Cir. 1969)). The entirety of INA § 240 (8 U.S.C. § 1229a) is devoted to creating the § 240 proceedings as a hearing. As previously discussed in *Yamataya*, the Supreme Court determined the right to be heard is protected by the Fifth Amendment. Yamataya, 189 U.S.at 100-101. Notice has recently been the subject of recent cases concerning what is considered sufficient notice, but that is not the purpose of this article. See 8 U.S.C. § 1229; *but see Pereira v. Sessions*, 138 S.Ct. 2105 (2018) (holding an NTA without a time or place does not stop trigger the Act's stop-time rule); *Rojas v. Johnson*, 305 F.Supp.3d 1176 (W.D. Wash. 2018). Nonetheless, notice is recognized a basic procedural right by the Supreme Court. *Pereira*, 138 S.Ct. at 2108.

2. Neutral Finder of Fact (Immigration Judge)

Another basic due process protection is an alien's right to a neutral finder of fact. *Yosd v. Mukasey*, 514 F.3d 74 (1st Cir. 2008); see *Kheireddine v. Conzales*, 427 F.3d 80, 84 (1st Cir. 2005); *Marcinas v. Lewis,* 92 F.3d 195, 203-04 (3d Cir. 1996). Whenever Congress instructs an agency to create a hearing, like removal proceedings, "it can be assumed that Congress intends that procedure to be a fair procedure." *Marincas*, 92 F.3d at 203; *See Califano v. Yamasaki,* 442 U.S. 682, 693 (1970) (stating only explicit statutory language to the contrary may remove the default fair proceedings); *see also Meachum v. Fano*, 427 U.S. 215, 226 (1976); *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974).

3. Adequate Translation

Aliens in removal proceedings have the right to an adequate interpretation to ensure a fundamentally fair hearing. The BIA has recognized more than once that "a competent translation is fundamental to a full and fair hearing." I*n Re: Gladis Flores-Arvayo*, 2019 WL 3776096 (BIA April 25, 2019) (*citing Perez-Lastor v. INS*, 208 F.3d 773, 778 (9th Cir. 2000); *see also Matter of Tomas*, 19 I&N Dec. 464, 465 (BIA 1987). More often than not, respondents in immigration proceedings have little to no knowledge of the English language. The courts generally provide an interpreter of the immigrant's primary language. Languages such as Spanish, Mandarin Chinese, and Arabic are common enough, and interpreters of these languages are not usually difficult to obtain. But there is a higher level of concern when it comes to lesser known languages, such as indigenous languages of Central America and regional minority dialects. Many immigrants who speak these lesser known languages are provided telephonic interpretations rather than in-person interpreters. An adequate interpretation is necessary for the alien to be able to present their case, understand the necessary advisals regarding asylum, and understand the consequences of failing to comply with the court's orders and procedures.

4. Advisal of Rights

An alien has a somewhat limited right to advisal of their rights. *See Villegas de la Paz v. Holder*, 640 F.3d 650, 656-67 (6th Cir. 2010); *Alimi v. Gonzales*, 489 F.3d 829, 834 (7th Cir. 2007); *Jacinto v. INS*, 208 F.3d 725, 728 (9th Cir. 2000). But an alien must show actual prejudice due to the failure of the immigration judge to advise the alien of their rights. *Id*.

III. How to Test for Constitutional Sufficiency of Aliens' Due Process Rights in § 240 Proceedings

The final question involves the methodology for determining what due process protections are constitutionally satisfactory for a "fundamentally fair hearing." The Supreme Court has provided a tri-partite balancing test to assess constitutional sufficiency. *See generally Mathews v. Eldridge*, 424 U.S. 319 (1976). Additionally, this is the test suggested by Justice O'Connor in the opinion of *Landon v. Plasencia*, 459 U.S. 21, 34 (1982). Taking into consideration the scope and reach of due process, as well as practical consideration, this test is the proper analysis for whether aliens are given constitutionally sufficient due process rights in § 240 proceedings.

The first factor to consider is the interest of the individual that the government's actions would affect. *Mathews*, 424 U.S. at 335. The second factor consists of two components: "the risk of an erroneous deprivation of such interest through the procedures used" and "the probable value, if any, of additional or substitute procedural safeguards." *Id.* In other words, the second factor looks at the probability of a wrongful deprivation of the individual's interest by the procedures being used as well as the cost of adding more or different safeguards. The final factor is the interest of the government. *Id.* This includes the purpose of the procedures the government is using in addition to the "fiscal and administrative burdens" of providing more or different safeguards. *Id.*

The results of this analysis would differ greatly depending on whether the alien is an arriving alien (NTA category 1), an alien present in the United States without admission or parole (NTA category 2), or an alien who has been lawfully admitted to the United States (NTA category 3). All have distinctly different interests at stake. The closer the relationship the alien has with the United States, the more potent their procedural due process rights are. For example, an arriving alien who has not stepped foot onto U.S. soil does not have as high an interest at stake as an alien who has been living in the U.S., although unlawfully, and has a substantial relationship with the U.S. *See Yamataya*, 189 U.S. 86 (1903). This diminishing interest (from category 3 to category 1 aliens) should influence the *Mathews* test for Constitutional sufficiency of the procedures used to provide a fundamentally fair removal proceeding.

Conclusion.

The right to procedural due process is fundamental to the integrity of the rule of law; and, as a nation of immigrants, we should apply it to *all* those who are subject to our Constitution. The above delineated protections must apply to all aliens in § 240 proceedings—with enough rigor and substance to make their removal hearings fundamentally fair, and regardless of which box on the NTA is checked.

Editor's Corner: Does A mean A? Spotlight on *Pereira v. Sessions*, the BIA, and the Stop-Time Rule

By Dr. Alicia Triche

8 U.S.C. § 1229(a)(1)(G) is titled "Notice to appear," and in relevant part, it provides:

(1) In general

In removal proceedings under section 1229a of this title, written notice (in this section referred to as **a "notice to appear"**) shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following:

(G)(i) The time and place at which the proceedings will be held.

(Westlaw 2020) (emphasis added).

I have bolded "a 'notice to appear'" for reasons that will soon become apparent. A few days ago, the Supreme Court granted certiorari in *Niz-Chavez v. Barr,* 789 Fed. Appx. 523 (6th Cir. 2019), an unpublished Sixth Circuit case which (not the Onion) explicitly raises the issue of: does "a" means "a", or does "a" mean an unlimited number of parts? This Ionesco question originated in the Sixth Circuit's hopefully soon to be infamous decision in *Garcia-Romo v. Barr*, 940 F.3d 192 (6th Cir. 2019), which accepted the BIA's assertion that "a notice to appear" *really* means "a notice to appear, followed by, an EOIR notice of hearing." *Matter of Mendoza-Hernandez and Capula-Cortes,* 27 I&N Dec. 520 (BIA 2019). Now, due to a circuit split on the issue, the Supreme Court has accepted the case, and we will see just how far the BIA can get away with stretching the language of the INA, and ignoring clear Congressional intent.

The stop-time rule is what's at issue in this case. It will be recalled that the Attorney General may cancel the removal of certain "nonpermanent residents" who can establish, among other requirements, that they have been continuously present in the country for at least ten years. 8 U.S.C. § 1299b(b). For LPR cancellation, the period is 7 years of continuous residence. 8 U.S.C. §§ 1229b(a)(2); 1229b(d)(1)(A). But, under the "stop-time" rule, continuous presence "shall be deemed to end ... when the alien is served **a notice to appear** under section 239(a) [8 U.S.C. § 1229(a)]." (Emphasis added).

Again, with the "a". It may well be the most important word in the English language.

By way of background, here, in *Pereira v. Sessions*, the Supreme Court ruled that a document missing 1229(a)'s "quintessential definitional language" of the required "time and place" is not a "notice to appear." ___ U.S. ____ ; 138 S. Ct. 2105, 2116 (2018). And if a document is not a "notice to appear under section 1229(a)," held, the Court, then the document "does not trigger the stop-time rule." Id. at 2114. Referencing Section 1229(a)(1)(a)(G)(i), the *Pereira* decision also stated: "[W]hen the term "notice to appear" is used elsewhere in the statutory section, including as the trigger for the stop-time rule, it *carries* with it the substantive time-and-place criteria required by § 1229(a)[sic]." 138 S.Ct. at 2116 (emphasis added).

This ruling caused potentially severe complications for DHS, which, along with predecessor INS, has been issuing deficient NTAs for decades. Accordingly, the BIA issued *Matter Mendoza-Hernandez and Capula-Cortes*, ruling that the Pereira deficiency (*i.e.,* a missing "time and place") was "cured" when EOIR delivers the first notice of hearing to a respondent. In doing so, the BIA opined that 1229(a)(1) contained no explicit restriction that everything had to be in one document, factually distinguished *Periera* (or tried to), and did not even attempt to address crystal clear Congressional intent in passing *IIRIRA*, that the old two-step notice process for an Order to Show cause was explicitly rejected (by 1229(a)(1)). See H.R. Rep. 104-469, pt. I, at 122, 159. The Fifth and Sixth Circuits both signed on, finding *Mendoza-Hernandez and Capula-Cortes* to be "reasonable" interpretations of the "statutory text," since, (again, not the Onion) "a" could mean "many," such as—chapters in "a book". *Yanez-Pena v. Barr*, 952 F.3d 239, 245 (5th Cir. 2020); *Garcia-Romo, surpa.*

It doesn't take much thought to reach the absurdity of this argument. As David Zimmer, counsel in *Niz-Chavez*, argues in his Petition for Certiorari, just because "a" thing can have component parts does not mean any part of it is the whole. < https://www.scotusblog.com/wp-content/uploads/2020/01/Niz-Chavez-Cert.-Petn.-Final.pdf> (accessed Jun. 19, 2020). For example, no professor who assigns "**a** term paper" would expect the student to send it in ten different chapters. No one who buys "**a** car," would expect it to be delivered without wheels. (Especially if Congress had said, explicitly, in the Congressional record, "we intend for a car to have wheels," and the government had acknowledged the requirement in the Federal Register a few months later. 62 Fed. Reg. 449 (Jan. 3, 1997).)

As zazen as it might seem to think of "many in a, and a in many," that stretch of language should, in this case, be rejected as antithetical to the rule of law. It is decidedly Orwellian; in fact, it reminds me of my favorite excerpt from George Orwell's essay, *Politics and the English Language:*

> MEANINGLESS WORDS. In certain kinds of writing, particularly in art criticism and literary criticism, it is normal to come across long passages which are almost completely lacking in meaning. Words like *romantic, plastic, values, human, dead, sentimental, natural, vitality,* as used in art criticism, are strictly meaningless, in the sense that they not only do not point to any discoverable object, but are hardly ever expected to do so by the reader. When one critic writes, 'The outstanding feature of Mr. X's work is its living quality', while another writes, 'The immediately striking thing about Mr. X's work is its peculiar deadness', the reader accepts this as a simple difference opinion. If words like *black and white* were involved, instead of the jargon words *dead and living,* he would see at once that language was being used in an improper way. Many political words are similarly abused. The word *Fascism* has now no meaning except in so far as it signifies 'something not desirable'. The words *democracy, socialism, freedom, patriotic, realistic, justice* have each of them several different meanings which cannot be reconciled with one another. In the case of a word like *democracy*, not only is there no agreed definition, but the attempt to make one is resisted from all sides. It is almost universally felt that when we call a country democratic we are praising it: consequently the defenders of every kind of regime claim that it is a democracy, and fear that they might have to stop using that word if it were tied down to any one meaning…

Meaningless words have no place in our jurisprudence, for they threaten the basic stability and predictability that underlies the rule of law.

The Green Card

Immigration Law Section
Federal Bar Association
1220 North Fillmore Street, Suite 444
Arlington, VA 22201