Denver Law Review

Volume 84
Issue 4 *Symposium - Immigration: Both Sides of the Fence*

Article 10

December 2020

Putting the Form in Immigration Court Reform

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PUTTING THE "FORM" IN IMMIGRATION COURT REFORM

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"Form: procedure according to rule."

-- Merriam Webster's Collegiate Dictionary (10th ed. 1994)

A number of changes in the immigration court system in the past decade have brought to light serious problems confronting adjudicators, applicants and attorneys who practice in the system. To address this growing crisis,[1] the Attorney General proposed a series of measures to reform the immigration court system.[2] The proposed reforms, while greatly needed, fall short because they fail to include one of the basic tenets of our American court system – rules. It is hard to play by them, invoke them, or enforce them if there are none. This author proposes that the Attorney General put "form" into his immigration court reform proposal by mandating and implementing procedural rules for immigration courts.

THE PROBLEM

Let's suppose you are one of many volunteer attorneys who has agreed to take a pro bono asylum case before the Denver Immigration Court. You might want information about the discovery process, filing deadlines, briefing requirements, entering an appearance before the court or basic information such as how to review your client's court file. You would find very few rules to guide you through the immigration court maze. If you went to the website of the Executive Office for Immigration Review (EOIR), the agency within the Department of Justice which controls both the immigration courts and the Board of Immigration Appeals (BIA), and you clicked on the Denver Immigration Court, you

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1. *See* Ray Rivera, *Court Urges Review of New York Judge's Immigration Cases That Are on Appeal*, N.Y. TIMES, Feb. 25, 2007, at 1.

2. *See* Press Release, United States Department of Justice, Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals (Aug. 9, 2006), *available at* http://www.usdoj.gov/opa/pr/2006/August/06_ag_520.html.

would be informed that there are "No Local Operating Procedures."[3] This is a bit misleading, because the Denver Immigration Court does have unwritten local operating procedures. For example, one judge requires all documents to be filed thirty days before a hearing, another judge requires fifteen days. According to the EOIR website, there are currently eleven immigration courts with no local operating procedures (LOPs).[4] Of course, those courts, like Denver, have unwritten rules. Courts that do have written operating procedures offer more guidance to the attorneys who practice before them. Those local procedures can range from one and one-half pages that the Arlington Immigration Court has available online,[5] to the twelve pages of local procedures from the Baltimore Immigration Court which includes sample pleadings and motions.[6] Some of the LOPs, however, are more than a decade old and cite to out-dated regulations.

What might appear most disturbing to an attorney coming to immigration court from a different area of practice is that even when there are rules, what is noticeably absent from them are some of the most common areas covered by civil rules of procedure and rules of evidence in other courts. For example, there are very limited rules of discovery. In fact, the discovery rules are so limited in immigration court settings that Department of Homeland Security attorneys, who represent the government in removal proceedings, will often tell private attorneys that there is no discovery in immigration court proceedings. The few discovery rules that exist relate to prehearing statements,[7] subpoenas,[8] and depositions.[9] There is no routine procedure for the government to turn over any prior statements to immigration officials or for access to information contained in previous filings with the U.S. Citizenship and Immigration Service (USCIS). The Freedom of Information Act (FOIA) requests which are filed because there is no other system in place for sharing documents necessitates that files be sent to Lee's Summit, Missouri for copying by FOIA officers, a process that further gums up an already overburdened system.[10] While USCIS recently announced that it will provide acceler-

3. Executive Office for Immigration Review, U.S. Dep't of Justice, Local Operating Procedures, http://www.usdoj.gov/eoir/efoia/ocij/locopproc.htm (last visited Apr. 10, 2007).

4. *Id.*

5. Executive Office for Immigration Review, U.S. Dep't of Justice, Local Operating Procedures, http://www.usdoj.gov/eoir/efoia/ocij/locopproc.htm (follow "Arlington" hyperlink) (last visited Apr. 10, 2007).

6. Executive Office for Immigration Review, U.S. Dep't of Justice, Local Operating Procedures, http://www.usdoj.gov/eoir/efoia/ocij/locopproc.htm (follow "Baltimore" hyperlink) (last visited Apr. 10, 2007).

7. *See* 8 C.F.R. § 1003.21 (2007).

8. *See* 8 C.F.R. § 1287.4 (2007).

9. *See* 8 C.F.R. § 1240.7(c) (2007).

10. Jill Sheldon, *FOIA In Flux*, IMMIGRATION DAILY, http://www.ilw.com/articles/2005,0726-Sheldon.shtm (last visited Apr. 10, 2007).

ated FOIA access for individuals in removal hearings,[11] that process does not guarantee that access will be received prior to a removal hearing and immigration judges routinely deny requests for continuances on the basis that an individual is awaiting a response to a FOIA request.

Nature, as the saying goes, abhors a vacuum. The vacuum that has been created because of the lack of rules has been filled by an entity that has become an all too common source, the federal courts of appeals. The courts have stepped in time and time again to tell immigration court judges or the BIA that the unwritten rules they have been imposing are so onerous that, at times, they amount to a denial of due process or deprive the respondent of a reasonable opportunity to be heard.[12] Such errors require a remand, sometimes resulting in the same decision that the immigration judge initially made. When the Attorney General has on occasion reversed the BIA on an evidentiary matter, he has done so in an unpublished decision that is not binding on immigration courts or the BIA.[13]

WHO'S AT FAULT?

The author cannot fault the immigration judges themselves for the failure to set forth comprehensive procedures for practice in immigration court. That type of comprehensive reform must come from the top. As one federal judge recently stated:

> The system is in turmoil as the nation's immigration judges (218 at last count) struggle to complete some 350,000 cases a year, all without law clerks, bailiffs, stenographers, and often incompetent lawyers and interpreters. Often, immigration judges are hearing three contested hearings a day and up to 15 in a week. As Judge John M. Walker, Jr., of the United States Court of Appeals for the Second Circuit, told the Senate Judiciary Committee last April, "I fail to see how immigration judges can be expected to make thorough and competent findings of fact and conclusions of law under these circumstances."[14]

And the dissent in that case added:

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11. *See* U.S. Citizenship & Immigration Services, Fact Sheet: Freedom of Information Act (Feb. 28, 2007), *available at* http://www.uscis.gov/files/pressrelease/FOIAProcessing022807FS.pdf.

12. Niam v. Ashcroft, 354 F.3d 652, 659-60 (7th Cir. 2004) (finding that it would be odd for an agency to adopt an even more stringent filter for expert testimony than that used for judicial proceedings and that therefore the summary exclusion of the expert's testimony was arbitrary); Kerciku v. Ashcroft, 314 F.3d 913, 918 (7th Cir. 2003); *see, e.g.*, Solomon v. Gonzales, 454 F.3d 1160, 1167-68 (10th Cir. 2006) (noting that there are no court rules requiring the presence of a witness who has provided an affidavit).

13. *In re* Marshi, File No. A26-980-386 (Op. Off. Legal Counsel Feb. 13, 2004), 2004 OLC LEXIS 1, 7 (finding immigration judge erred in disallowing testimony from a U.S. Marine Colonel who had extensive experience and qualifications, where his testimony would have been material and supportive of the applicant's asylum claim).

14. Apouviepseakoda v. Gonzales, 475 F.3d 881, 886 n.2 (7th Cir. 2007).

> It may be true . . . that the conditions under which the immigration judges labor are such that these judges cannot be expected to make "competent findings of fact." But the majority is wrong to think that therefore a reviewing court should uphold immigration judges' incompetent findings of fact. For then an agency could insulate its decisions from judicial review simply by understaffing.[15]

Obviously the immigration judges, who have had to keep pace with an ever-increasing case load[16] cannot be expected to write a comprehensive set of procedural rules. But they should have input and there should be some flexibility built into the rules.

It should be noted that unlike the immigration courts, the BIA, has a comprehensive practice manual which addresses procedures for practice before the BIA, which is updated periodically and available on line.[17]

OPPORTUNITY KNOCKS

In response to the growing criticism of immigration judges, the BIA and the immigration court system in general,[18] the Attorney General issued a memorandum to immigration judges expressing concern about their conduct and the quality of their work.[19] Later, the Attorney General issued a document setting forth measures to improve immigration courts and the Board of Immigration Appeals.[20] Many of these measures are laudable. They include performance evaluations of immigration judges, giving new judges an immigration law examination, improving training for both judges and staff, improved reference materials for judges, instituting mechanisms for promptly detecting poor conduct and quality of decisions, a code of conduct for judges, an improved complaint procedure, a manual describing the "best practices" for immigration court, budget increases, improved interpreter selection, and expanded and improved pro bono programs.[21]

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15. *Id.* at 898 (Posner, J., dissenting).

16. According to the Denver Immigration Court, its caseload more than doubled in the last five years, but no additional judges or staff were added despite the increase.

17. BOARD OF IMMIGRATION APPEALS, BIA PRACTICE MANUAL (Sept. 25, 2002), *available at* http://www.usdoj.gov/eoir/bia/qapracmanual/BIA_Practice_Man_FullVer.pdf.

18. *See, e.g.*, Gabuniya v. Gonzales, 463 F.3d 316, 323 (3d Cir. 2006) (noting that the immigration judge eagerly jumped on each slip of the tongue or demanded that the applicant be infallible); Banks v. Gonzales, 453 F.3d 449, 454 (7th Cir. 2006) (the court, in proposing a system with agency experts, states: "What cannot continue . . . is administrative refusal to take a stand on recurring questions, coupled with the reliance on [immigration judges] to fill in for the expertise missing from the record."); Huang v. Gonzales, 453 F.3d 142, 148 (2d Cir. 2006) (criticizing the immigration judge for the bias and hostility he showed toward an asylum applicant).

19. Memorandum from Alberto Gonzales, Attorney General, U.S. Dep't of Justice, to Immigration Judges (Jan. 9, 2006), *available at* http://www.humanrightsfirst.info/pdf/06202-asy-ag-memo-ijs.pdf.

20. UNITED STATES DEPARTMENT OF JUSTICE, MEASURES TO IMPROVE THE IMMIGRATION COURTS AND THE BOARD OF IMMIGRATION APPEALS (2006), *available at* http://trac.syr.edu/tracatwork/detail/P104.pdf.

21. *Id.* at 1–7.

The measures do not go far enough because they do not mandate that immigration courts adopt procedural rules. What good are trainings and reference materials if judges are deprived of the guidance they need to make the most elemental decisions in a case? Suppose an unwritten rule requires filing thirty days before a hearing but a document arrives twenty days before the hearing and the applicant tries to file it? Must the judge deny its admission? What are the exceptions, if any, to an immigration court filing deadline if there are no written rules? If judges are trained that there should be exceptions, how do they impart that information to attorneys and applicants if there are no written rules? 218 immigration judges could decide the issue 218 different ways and the only way the issue will be finally resolved is through a precedent BIA decision or a decision from a federal appeals court. This is hardly the most efficient way to make procedural rules for a court and it is a recipe for inconsistency throughout the system. Yet this is precisely the body of law that is developing.

Even a manual of "best practices," while useful in improving the overall level of practice in immigration court, does not replace the need for concrete rules of procedure and evidence that can be applied across the board to wealthy and poor, represented and pro se, detained and non-detained. I would advise the Attorney General to change the "best practices" manual he has proposed into Rules of Procedure and Evidence for Immigration Court. He should include rules governing entry of appearance, discovery, witnesses, continuances, court filings deadlines (and exceptions), experts, affidavits, and telephonic testimony.

CONCLUSION

In the end, it is the fact that we are a country of laws that sets us apart from many other countries in the world. It is unfortunate, however, that many of the non-citizens who have fled oppressive regimes overseas get the first taste of the American justice system in a court without basic procedural rules.