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THE CURRENT STATUS OF REFUGEE AND ASYLUM LAW FROM THE PRACTITIONER'S PERSPECTIVE: INCREASING EFFICIENCY IN ASYLUM PROCEEDINGS

Michael Maggio*

Congress and the Immigration and Naturalization Service (INS) are grappling with statutory and regulatory responses to the perceived "flood" of "frivolous" asylum seekers. The concerns of Congress and the INS, as well as the public's perception that America is being overwhelmed by "phony" asylum seekers, have been reflected throughout this conference. There have been frequent references to those aliens who apply for asylum merely to obtain employment authorization and to others who insist before the Immigration Courts that they are entitled to asylum even though it is evident they fear nothing, except perhaps "the dark." These "phony" asylum seekers are responsible for the horrible backlog in asylum adjudications, according to politicians who blame aliens for almost all problems except California's earthquakes and fires, and according to the mainstream press, which now writes about "the plight of the INS" rather than that of the plight of refugees. There is a perception that greedy lawyers aid and abet these alleged culprits. Congress and the INS insist that new laws to curtail the rights of asylum seekers are necessary to end the backlog in asylum adjudications.

Although some aliens and attorneys twist and misuse U.S. asylum laws and procedures, historically and presently the asylum adjudications process victimizes the refugees, not vice versa. Moreover, there are readily available means for increasing efficiency in asylum proceedings which do not require the new legislation or regulations Congress and the INS are rushing to put into place.

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Those attorneys practicing immigration law since the enactment of the Refugee Act of 1980 witnessed dramatic improvements in the INS Asylum Corps and in asylum adjudications. I recall in 1981 being asked by an INS Asylum Officer who was aware of my interest in Central America whether "we support the guerrillas in Nicaragua or do we support the guerrillas in El Salvador?" Perplexed, I asked "Who do you mean by 'we'?" to which the INS officer responded "Well, the American Government, which side are we on down there?" On another occasion, an INS Asylum Officer informed a Somali asylum applicant that his story seemed questionable based upon what she knew about Somalia "from my good friend the Chargé at the Somali Embassy." Clearly, those sorry days are over. Today, most negative asylum decisions reflect at least some knowledge of the country in question and involve a certain amount of professionalism. Unfortunately, from the perspective of many immigration law practitioners, the INS does not yet fully understand the most fundamental aspect of asylum law - the burden of proof an asylum applicant must satisfy to be granted asylum - and this is the source of not only many injustices but indeed much of the backlog in asylum cases at the INS too.

Let us remember that for seven long years the INS and the Immigration Courts erroneously held that asylum applicants must establish "a clear probability of persecution." Under this rejected standard, an asylum applicant was required to prove that it was more likely than not that he or she would undergo persecutions to establish the "well-founded fear of persecution" which the statute requires for granting asylum. In *INS v. Cardoza-Fonseca*,¹ the Supreme Court instructed the INS and the Immigration Courts in 1987 that asylum applicants need only introduce enough evidence to show that "persecution is a reasonable possibility."² *Cardoza-Fonseca* demonstrates the dramatic lowering of the burden of proof to qualify for asylum. Under the former "clear probability" of persecution standard, an asylum applicant had to show that at least a fifty percent chance of persecution existed. The *Cardoza-Fonseca* Court suggested, however, that even a ten percent chance that the feared event might occur could make the fear well-founded.³

When listening to cries about frivolous and fraudulent asylum seekers victimizing the INS, remember too that many thousands of asylum applicants were denied asylum and deported to face persecution because

1. 480 U.S. 421 (1987).

2. *Id.* at 431.

3. *Id.*

the INS and the Immigration Courts applied an unlawful and artificially high burden of proof in asylum proceedings from 1980 until the *Cardoza-Fonseca* decision in 1987. Now, seven years later, there remains an institutional resistance within the INS to the application of *Cardoza-Fonseca's* mandate that an asylum applicant need only present enough evidence to show that persecution is a reasonable possibility.⁴ The INS has yet to explain adequately to its Asylum Corps the difference between the burdens of proof of a "clear probability" and a "reasonable possibility" of persecution creating a backlog in asylum cases and new injustices. Similarly, the Asylum Corps has difficulty in following the case law⁵ and regulations⁶ which instruct that uncorroborated testimony by the applicant may be sufficient to meet the burden of proof for asylum because it may be the best evidence available.

The INS could alleviate a discernible portion of its asylum backlog if the INS Asylum Corps understood and applied the law properly. After all, it takes much more time and effort to deny an asylum application than to grant one. Under the current regulations, the INS first notifies the asylum applicants of its intent to deny their application for asylum. It then allow the asylum applicants the opportunity to submit rebuttal evidence. In probably ninety-five percent of such cases, the asylum application is denied by the INS despite the rebuttal evidence. Then, the INS must prepare an Order to Show Cause placing the asylum applicant in deportation proceedings where he or she has an opportunity to renew his or her asylum application. Experience teaches that the INS denies asylum to many persons with excellent asylum claims only to have an Immigration Judge grant them asylum many months and many dollars later. More asylum grants by the INS would be consistent with case law, the agency's own regulations, and reality. Also, it would save time and money for all concerned.

The proposed new asylum regulations deserve some comment. Supposedly, these new rules will give us "express" denials, and presumably, "express" grants of asylum as well. Presently, when the INS denies asylum, the mandatory written decision is quite elaborate and sometimes well thought out. INS Trial Attorneys rely heavily, and in many instances exclusively, upon the INS written denials of asylum to prepare their opposition to asylum before the Immigration Judge. The INS should seriously consider what will happen to the asylum backlog it seeks to

4. *Id.* at 438-39.

5. *Matter of Acosta*, Int. Dec. 2986 (B.I.A. 1985).

6. 8 C.F.R. §§ 208.13(a), 208.16(b).

eliminate when its overworked Trial Attorneys begin receiving asylum denials with little more than the words "denied" in the file rather than a lengthy written decision explaining why the INS did not grant asylum. If the INS enacts the proposed regulations, many INS Trial Attorneys will be required to actually absorb entire asylum case files before they go to Court to reiterate the INS's opposition to asylum. These INS lawyers are already incredibly overworked, lacking the most basic clerical and paraprofessional support. The proposed rapid asylum denials by the INS without written reasons almost certainly will result in a shift of the asylum backlog from the INS to the Immigration Courts. Unfortunately, while asylum cases languish before the Immigration Courts applicants will be waiting without employment authorization, if the proposed new rules are enacted as drafted. Apparently, the INS seeks to diminish the backlog by forcing asylum applicants to abandon their claims and seek refuge in a country where they can work.

At the moment, due to the overall backlog of all types of cases in the Immigration Courts, persons who do not want to be deported, such as criminal aliens, often can successfully avoid their day in Court. On the other hand, aliens who seek relief from deportation in Immigration Court often cannot get their day in Court for a year or more, if ever. One should note that later this year Immigration Courts will be further clogged by hundreds of thousands of Salvadorans who will enter deportation proceedings upon the expiration of the Salvadoran Deferred Enforced Departure Program. Indeed, without the added burden the proposed asylum regulations will place on the Immigration Courts, the backlog the INS Trial Attorneys and the Courts already face is so severe that deportable persons who actually want to enter deportation proceedings to apply for relief from deportation must, in many INS jurisdictions, submit a written request to the INS District Director before the INS will issue an Order to Show Cause instituting deportation proceedings. In other words, the Immigration Court backlog is already so bad that illegal aliens in many cities, including Washington, D.C., New York, and San Francisco, must beg the INS to place them under deportation proceedings. New regulations which will shift the INS asylum backlog to the Immigration Courts will exacerbate this problem.

These realities make it incumbent upon the new INS General Counsel, Alex Aleinikoff, and the American Immigration Lawyers Association, to identify cost efficient ways to substantially increase efficiency in Immigration Judge proceedings without curtailing the rights of asylum seekers. A partial solution rests in a fundamental shift in attitude by attorneys, both INS and private, who practice in Immigration Court. As is

often the case when attempting to change bad attitudes, it may be necessary to couple compulsion with friendly persuasion if INS and private attorneys are to practice asylum law in a more efficient and professional manner. For starters, the INS General Counsel should educate the INS trial attorneys that it is wrong headed and self-destructive to treat every alien in Immigration Judge proceedings as if they had worked as a Nazi concentration camp guard. Clearly, the prevailing INS perspective on Immigration Court litigation—"never narrow issues or settle cases"—must change because it substantially contributes to the inefficiency of the Immigration Courts. The INS District Counsels, like United States Attorneys and States Attorneys Generals, should adopt the policy of narrowing issues and settling many cases entirely before trial. It is worth noting that the Baltimore District Office of the INS has long been led by District Counsel who believe in picking battles carefully and disposing of as many issues and cases as possible before trial. Consequently, the INS attorneys in Baltimore are renowned for their preparation and litigation skills. Additionally, although the Baltimore Immigration Court has a backlog, it is less lengthy than elsewhere.

Certainly, there are many private attorneys who contribute to the backlog in asylum adjudications both before the INS and the Immigration Courts. Some private attorneys file asylum applications merely to "buy time" for their clients while others outright engage in the crime of submitting false statements to the Government.⁷ Asylum applications by these attorneys tend to be boilerplate embarrassments to the legal profession. For the most part, Immigration Judges let them get away with their often high priced and incompetent work. Although it may seem obvious to the uninitiated, private attorneys who engage in criminal and/or unethical conduct should have their behavior brought to the attention of the United States Attorney and the State Bar which has licensed them to practice law. Unfortunately, this is done by Immigration Judges and INS Attorneys only under the most egregious circumstances in part, possibly, because the principal victim of immigration attorney incompetence is an alien. The behavior of some private lawyers contributes to the backlog in asylum adjudications, and their attitudes and behavior can and must be changed.

Immigration Judges can use an existing regulation to compel attorneys on both sides to narrow issues, settle cases, and present only legally and factually justifiable positions to the Immigration Court. Under 8 C.F.R.

7. 18 U.S.C. § 1001 (1988 & Supp. 1993).

§ 3.21(b),⁸ a little known and under-utilized rule, Immigration Judges have authority upon motion or *sua sponte* to order a pre-hearing statement from the parties which would include:

facts to which both parties have stipulated, together with a statement that the parties have communicated in good faith, to stipulate to the fullest extent possible; a list of proposed witnesses and what they will establish; a list of exhibits; copies of exhibits to be introduced; any statement of reasons for their introduction; the estimated time required to present the case; and, a statement of unresolved issues involved in the proceedings.⁹

An order requiring a pre-hearing statement is appropriate either when the INS refuses to narrow issues and discuss settlement or when it appears that a private attorney's asylum application is frivolous. Attorneys, both public and private, will have serious second thoughts about their positions in asylum cases when the Judge enters an order requiring them to take time to prepare a written document justifying their positions. If Immigration Judges would routinely require pre-hearing statements, Judges would find that both parties would narrow issues, settle cases, and that fewer frivolous asylum applications would be submitted. This certainly will increase efficiency in the Immigration Courts.

Candor and the crisis faced by the Immigration Courts make it necessary to propose something unpopular with the private bar. More than two years ago, Congress enacted a regulation authorizing the sanctioning of lawyers, including disbarment and reprimand, for those who engage in "frivolous behavior." 8 C.F.R. § 292.3(a).¹⁰ This is another existing but under-utilized regulatory tool for increasing efficiency in Immigration Judge proceedings. It empowers Immigration Judges to seek "[a]ppropriate disciplinary sanctions . . . [including] disbarment, suspension, reprimand, or censor, or such other sanction as deemed appropriate" when any attorney engages in "frivolous behavior" which occurs

[w]hen he or she knows or reasonably should have known that his or her actions lack an arguable basis in law or in fact, or are taken for an improper purpose, such as to cause unnecessary delay. Actions that if taken inappropriately, may be subject to discipline include, but are not limited to, making an argument on any factual or legal question, submitting an application for discretionary relief, or filing a motion, or filing an appeal.¹¹

8. 8 C.F.R. § 3.21(b) (1994).

9. *Id.*

10. 8 C.F.R. § 292.3(a) (1994).

11. 8 C.F.R. § 292.3(a)(15).

Immigration Judges should use this rule to sanction private attorneys who file frivolous asylum applications. Likewise, INS attorneys who engage in "frivolous behavior" such as filing appeals for no reason other than that they are angry about losing, should also feel the sting of this rule. Consequently, I urge my colleagues in the Immigration Bar to file complaints against INS attorneys who engage in frivolous conduct with the INS Office on Professional Responsibility.

Keep in mind that no one wants asylum proceedings to be more efficient than those persons who fear persecution, and especially those many thousands who have asylum cases which have been pending before the INS for years. Many, if not most, of these asylum applicants have family members abroad, living in fear of persecution, who will join them in the United States if their asylum application is granted. Thus, most asylum seekers do not want the backlog about which Congress and the INS complain. Instead, they want and deserve action on their asylum applications. Their desires and increased efficiency in asylum proceedings can be achieved if the INS, the Immigration Courts, and the private bar work together for practical solutions to the asylum crisis. To reach this goal, existing laws and new attitudes and behavior should be used to improve efficiency in asylum adjudications, as opposed to new legislation or new regulations.