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# Tackling Fraud Without Trampling Due Process: A Procedural Framework for Considering Document Similarities in Immigration Proceedings

*By Roberta Oluwaseun Roberts*

### Introduction

The Board of Immigration Appeals has long emphasized that "no decision should ever rest, or even give the slightest appearance of resting, upon generalizations derived from evaluations of the actions of members of any group of aliens. Every adjudication must be on a case-by-case basis." *Matter of Blas*, 15 I&N Dec. 626, 628 (BIA 1974). But what if counsel for the Department of Homeland Security ("DHS") or the Immigration Judge notices significant similarities between the documents submitted in an applicant's proceedings and the proceedings of another applicant with a similar claim? How can officers of the court raise these types of concerns about possible indications of fraud without compromising confidentiality or the due process rights of the applicant? In 2007, the United States Court of Appeals for the Second Circuit encouraged the Board to provide a framework for addressing inter-proceeding similarities and provide "expert guidance as to the most appropriate way to avoid mistaken findings of falsity, and yet identify instances of fraud." *Mei Chai Ye v. U.S. Dep't of Justice*, 489 F.3d 517, 524 (2d Cir. 2007). The Board provided this guidance in a 2015 decision, *Matter of R-K-K-*, 26 I&N Dec. 658 (BIA 2015), which has thus far been cited approvingly in published and unpublished decisions by two circuit courts of appeals. *See, e.g.*, *Wang v. Lynch*, 824 F.3d 587, 591–92 (6th Cir. 2016); *Zhang v. Lynch*, 652 F. App'x 23, 24 (2d Cir. 2016).

This article analyzes the procedural framework articulated by the Board in *Matter of R-K-K-* for considering document similarities in immigration proceedings. First, the article will briefly discuss the need for such a framework. Second, the article will provide examples of what

may—or may not—constitute each step that must be met in the three-step framework. Finally, the article will discuss due process and confidentiality concerns that arise when considering inter-proceeding similarities in making credibility determinations.

### *Matter of R-K-K-* Procedural Framework

A procedural framework for considering inter-proceeding similarities in making adverse credibility determinations in immigration proceedings was needed for a variety of reasons, such as the particular "dangers" unique to considering inter-proceeding similarities that require a reviewing court to use "an especially cautious eye." *See Mei Chai Ye*, 489 F.3d at 524 ("In light of these dangers, it is clear that inter-proceeding cases call for caution."); *Matter of R-K-K-*, 26 I&N Dec. at 661 ("we must also review such determinations with 'an especially cautious eye'") (quoting *Mei Chai Ye*, 489 F.3d at 520). The danger: "innocent similarities may be mistakenly interpreted as evidence of falsity." *Matter of R-K-K-*, 26 I&N Dec. at 661.

The Second Circuit noted that it is "problematic" to "assume that one asylum applicant is responsible for, or even aware of, the striking similarities that appear in an unrelated applicant's submissions" because there are many possibilities for the similarities where one, or both, applicants are blameless. *Mei Chai Ye*, 489 F.3d at 519–20. It could be:

> (1) that both applicants have inserted truthful information into a similar standardized template; (2) that the different applicants employed the same scrivener, who wrote up both stories in his own rigid style; (3) that "the other" applicant plagiarized the truthful statements of the petitioner; or (4) that the similarities resulted, not from the original documents themselves, but rather from inaccurate or formulaic translations—which unaffiliated applicants would not be in a position to discover or contest.

*Id.* at 520.

Keeping in mind these concerns, *Matter of R-K-K-* sought to provide courts with a uniform procedure to identify fraud and address inter-proceeding similarities while maintaining fairness in proceedings. *See* 26 I&N Dec. at 661 (stating that the Board's framework "will permit Immigration Judges to draw reasonable inferences of falsity from inter-proceeding similarities while establishing procedural safeguards to protect faultless applicants"). In developing a procedural framework to do just that, the Board looked to the Second Circuit's reasoning in *Mei Chai Ye*.[1] In *Mei Chai Ye*, the Immigration Judge noticed and annotated 23 "strikingly similar" portions of affidavits in that Chinese asylum case and the affidavit submitted by another Chinese asylum applicant represented by the same attorney. 489 F.3d at 520–21. The Second Circuit concluded that the adverse credibility determination was proper because the Immigration Judge "rigorously complied" with the notice requirements of *Ming Shi Xue v. Bd. of Immigration Appeals*, 439 F.3d 111, 125 (2d Cir. 2006) by:

> (1) notifying [the applicant] of the similarities, and providing her with copies of his annotations; (2) openly and exhaustively expressing to [the applicant] his concerns about the inter-proceeding similarities; (3) granting [the applicant] several opportunities to comment on those similarities; and (4) inviting [the applicant] to offer evidence of plagiarism, inaccurate translations, or any other possible innocent explanation.

*Mei Chai Ye*, 489 F.3d at 525.

In *Matter of R-K-K-*, the applicant's asylum application and accompanying declaration were substantially similar to an asylum application filed by his brother, who was granted asylum in 2009. *See* 26 I&N Dec. at 659, 663. "To preserve the fairness of the proceedings," the Board adopted a "three-part framework for Immigration Judges to use when relying on inter-proceeding similarities as part of an adverse credibility determination." *Id.* at 661. First, the Immigration Judge should provide "meaningful notice of the similarities that are considered to be significant." *Id.* Second, the Immigration Judge should provide "a reasonable opportunity to explain the similarities." *Id.* Third, "the Immigration Judge should consider the totality of the circumstances in making a credibility determination." *Id.* Furthermore, the Board explained that "[e]ach of these steps must be done on the record in a manner that will allow the Board and any reviewing court to ensure that the procedures have been followed." *Id.*

*Identifying Similarities and Providing Meaningful Notice*

To meet the first step of the procedural framework, the Immigration Judge should identify the similarities between the documents or other evidence under consideration and notify the applicant of the similarities that require an explanation.[2] *Matter of R-K-K-*, 26 I&N Dec. at 661. Case law provides examples of evidentiary characteristics that may indicate suspicious similarities, including "a substantial number of instances where the same or remarkably similar language is used to describe the same kind of incident or encounter;" ancillary material in two statements that "wouldn't necessarily have to be mentioned but [was] mentioned;" the use of distinct language or peculiar factual circumstances without reasonable explanation; and usage of the same formatting, typeface, headings, etc. *Id.* at 661–62; *see also Zhang*, 652 F. App'x at 24 (observing that similar information was presented in the same order in both statements).

Whatever the identified similarities in question, an Immigration Judge could provide meaningful notice by providing the applicant with annotated copies of the documents under scrutiny and clearly identifying all the similarities on the record. *Matter of R-K-K-*, 26 I&N Dec. at 661. "Identifying all the similarities clearly on the record will make it easier for the Immigration Judge to ascertain the extent and nature of similarities in the case and will facilitate any appellate review of the credibility finding." *Id.* The importance of providing notice was demonstrated in *Kourouma v. Holder*, 588 F.3d 234, 242 (4th Cir. 2009), where the Fourth Circuit found that the adjudicator's statement that "[t]he documents speak for themselves" was not sufficiently meaningful notice to sustain an adverse credibility finding based on inter-proceeding similarities. Instead, many circuit courts have held that an Immigration Judge must state "specific, cogent reasons" for adverse credibility findings. *See id.* at 242–43 (citing *Camara v. Ashcroft*, 378 F.3d 361, 367 (4th Cir. 2004)); *Shrestha v. Holder*, 590 F.3d 1034, 1043–44 (9th Cir. 2010).

An Immigration Judge's identification and provision of specific, cogent examples and explanation of significant document similarities would give an applicant meaningful notice of the similarities in question and fulfill the first step in the procedural framework for considering inter-proceeding similarities. Repetition may also serve as a procedural safeguard and help fulfill the notice requirement of the *R-K-K-* framework. *See Dehonzai v. Holder*, 650 F.3d 1, 9 (1st. Cir. 2011) (finding that "at various times during the hearings the [Immigration Judge] explicitly stated that [the applicant's] credibility was in doubt, giving [him] more than fair warning of the need to buttress his case").

*Opportunity to Explain Similarities*

The Board in *Matter of R-K-K-* noted that there may be cases where an applicant could provide a reasonable explanation for inter-proceeding similarities. 26 I&N Dec. at 662 ("We can envision scenarios in which an applicant will offer a reasonable explanation or credible evidence to dispel doubts about the authenticity or reliability of the initial evidence."). To help determine whether an explanation is reasonable, the Board noted that an Immigration Judge should consider the following possibilities:

> (a) whether there is a meaningful likelihood that [the inter-proceeding similarities] resulted from mere coincidence, (b) whether it is plausible that different asylum applicants inserted truthful information into a standardized template or, for illiteracy reasons, conveyed it to a scrivener tied to an unchanging style; (c) whether the same translator converted valid accounts into a peculiarly similar story; and (d) whether there is a likelihood that the petitioner was an innocent "plagiaree."

*Id.* (quoting *Mei Chai Ye*, 489 F.3d at 526–27) (alteration in original). Although applicants must be granted an opportunity to provide an explanation for inter-proceeding similarities, an Immigration Judge is not required to accept as true any explanation an applicant provides. *See Matter of L-A-C-*, 26 I&N Dec. 516, 526 (BIA 2015) (citing *Matter of D-R-*, 25 I&N Dec. 445, 455 (BIA 2011)).

The Immigration Judge in *Matter of R-K-K-* asked the applicant to explain several items of concern, including why the applicant and his brother's experiences were so similar, "why identical language was used by each brother to explain what happened and how those events made them feel, [and] why each declaration had the same syntax and spelling irregularities." 26 I&N Dec. at 664. The applicant's explanation was that he and his brother were "brought up in similar ways and experienced

mistreatment in a similar place," and that they used the same transcriber, "who may have inserted his own flair for words and syntax." *Id.* The Immigration Judge did not find these explanations persuasive based on other record evidence.

Similarly, in *Mei Chai Ye*, the Immigration Judge identified 23 places in which the applicants' affidavits were grammatically or structurally identical and afforded the applicant several opportunities to explain the similarities. 489 F.3d at 521–23. The applicant's attorney argued that the similarities might have arisen from the Chinese Government's use of similar methods to enforce its coercive family planning policies, but the Immigration Judge found this reasoning insufficient to explain the striking linguistic similarities. *Id.* at 521. In another case, the Sixth Circuit addressed an applicant's argument that because thousands of Chinese people suffer religious persecution it is reasonable to expect their asylum applications to be similar. However, the Sixth Circuit noted that there is an "important distinction [] between applications that are very similar and applications that are identical in many respects." *Wang*, 824 F.3d at 592 (adopting the *R-K-K-* framework).

In addition to considering possible innocent explanations for inter-proceeding similarities, an Immigration Judge may also continue a hearing to allow the applicant opportunity to obtain evidence. *Matter of R-K-K-*, 26 I&N Dec. at 662; *see also Nyama v. Ashcroft*, 357 F.3d 812, 816–17(8th Cir. 2004) (finding that the applicant was not unfairly "ambushed" by admissions of asylum applications from other proceedings where the Immigration Judge had "generously" allowed the applicant a 6-month continuance before admitting the applications to the record after allowing for objections). In *Matter of R-K-K-*, the Immigration Judge granted the applicant approximately 3 months to locate the transcriber and present his testimony or a statement describing the preparation of the application. However, Immigration Judges are not required to provide applicants with lengthy continuances. *See generally Matter of Villarreal-Zuniga*, 23 I&N Dec. 886, 891 (BIA 2006).

As stated in *Mei Chai Ye*, if an applicant does not take advantage of the opportunity to explain remarkable inter-proceedings similarities, it may become reasonable for the Immigration Judge to draw a negative inference with respect to the credibility of an applicant's asylum claim. 489 F.3d at 525.

*Considering the Totality of the Circumstances*

To fulfill the third step of the *R-K-K-* procedural framework, an Immigration Judge should look at all relevant factors and consider the totality of the circumstances when making an adverse credibility determination, rather than focus on only one aspect of the inter-proceeding similarities. *See Matter of R-K-K-*, 26 I&N Dec. at 662. Consideration of the totality of the circumstances requires an individualized approach as the relevant factors present may differ from case to case. In the Board's analysis of the Immigration Judge's credibility determination in *Matter of R-K-K-*, the Board detailed many factors the Immigration Judge assessed in considering the totality of the circumstances. These factors included: (1) the numerous similarities in the inter-proceeding applications; (2) "the conflicting accounts of how the respondent's application was prepared and his brother's incredible explanation for the inconsistency;" (3) the absence of testimony or other additional evidence from the transcriber; (4) a thorough analysis of the applicant's explanations for the similarities and the Immigration Judge's outlined reasons for finding the explanations to be unpersuasive; and (5) the lack of any other persuasive evidence to establish that the applicant's claim was credible. *Id.* at 665–66.

As illustrated by the Immigration Judge's consideration of a variety of factors, each of the previous two steps of the procedural framework operate in concert to fulfill the third step of considering the totality of the circumstances. The identification of similarities and the applicant's explanations for these similarities are factors that contribute to the totality of the circumstances analysis, demonstrating the comprehensive nature of *R-K-K-*'s procedural framework. While *Matter of R-K-K-*'s procedural framework has been discussed, the issues of due process and confidentiality concerns remain. The second section of the article discusses these issues and how *Matter of R-K-K-* addresses (or does not address) these concerns.

## Due Process and Confidentiality Concerns When Taking Notice of Inter-Proceeding Similarities

The Board in *Matter of R-K-K-* and circuit courts of appeals in other cases stressed the importance of procedural safeguards, such as providing an applicant with notice that inter-proceeding similarities have been identified, time for the applicant to prepare a response, and an opportunity to


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# CIRCUIT COURT DECISIONS FOR JANUARY 2017

*by John Guendelsberger*

The United States courts of appeals issued 130 decisions in January 2017 in cases appealed from the Board. The courts affirmed the Board in 115 cases and reversed or remanded in 15, for an overall rate of reversal and remand of 11.5%. There were no reversals or remands from the First, Third, Sixth, Eighth, Tenth, and Eleventh Circuits.

The chart below shows the results from each circuit for January 2017 based on electronic database reports of published and unpublished decisions.

| Circuit | Total | Affirmed | Reversed | % Reversed |
|---|---|---|---|---|
| | | | | |
| First | 3 | 3 | 0 | 0.0 |
| Second | 26 | 24 | 2 | 7.7 |
| Third | 7 | 7 | 0 | 0.0 |
| Fourth | 13 | 12 | 1 | 7.7 |
| Fifth | 11 | 8 | 3 | 27.3 |
| Sixth | 2 | 2 | 0 | 0.0 |
| Seventh | 7 | 4 | 3 | 42.9 |
| Eighth | 4 | 4 | 0 | 0.0 |
| Ninth | 49 | 43 | 6 | 12.2 |
| Tenth | 0 | 0 | 0 | 0.0 |
| Eleventh | 8 | 8 | 0 | 0.0 |
| | | | | |
| All | 130 | 115 | 15 | 11.5 |

The 130 decisions included: 69 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 40 direct appeals from denials of other forms of relief from removal or from findings of removal; and 21 appeals from denials of motions to reopen or reconsider. Reversals or remands within each group were as follows:

| | Total | Affirmed | Reversed | % Reversed |
|---|---|---|---|---|
| Asylum | 69 | 62 | 7 | 10.1 |
| Other Relief | 40 | 33 | 7 | 17.5 |
| Motions | 21 | 20 | 1 | 4.8 |

The seven reversals or remands in asylum cases involved particular social group (two cases), Convention Against Torture (two cases), past persecution, firm resettlement, and frivolousness. The seven reversals or remands in the "other relief" category included divisibility (four cases), crimes involving moral turpitude (two cases), and derivative citizenship. The motion to reopen case was remanded to further address an issue concerning asylum eligibility.

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## RECENT COURT OPINIONS

***First Circuit***

*Swaby v. Yates*, 847 F.3d 62 (1st Cir. 2017): The First Circuit held that section 21-28-4.01(a)(4)(i) of the Rhode Island General Laws (manufacturing, delivering, or possessing with intent to distribute a controlled substance) is categorically overbroad but divisible as to the specific controlled substance. Under the modified categorical approach as set forth in *Mathis v. Lynch*, 136 S. Ct. 2243 (2016) and *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015), the First Circuit held that the petitioner's controlled substance conviction involving marijuana qualified as a removable offense.

***Fourth Circuit***

*Sijapati v. Boente*, No. 15-1204, 2017 WL 437663 (4th Cir. Feb. 1, 2017): The Fourth Circuit accorded *Chevron* deference to *Matter of Alyazji,* 25 I&N Dec. 397, 406 (BIA 2011) (holding that the phrase "date of admission" in section 237(a)(2)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(i), refers to the date of admission by virtue of which the alien was present in the United States when he committed his crime).

*United States v. Evans*, No. 16-4094, 2017 WL 444747 (4th Cir. Feb. 2, 2017): The Fourth Circuit concluded that the Federal offense of carjacking, 18 U.S.C. § 2119, is categorically a "crime of violence" under the Armed Career Criminals Act.

*United States v. Dozier*, No. 15-4532, 2017 WL 395098 (4th Cir. Jan. 30, 2017): The Fourth Circuit held that West Virginia's attempt statute, W. Va. Code § 61-11-8, is a categorical match to the generic definition of attempt and that a categorical analysis is *also* required for the underlying offense.

***Fifth Circuit***

*United States v. Rico-Mejia*, No. 16-50022, 2017 WL 568331 (5th Cir. Feb. 10, 2017): The Fifth Circuit held that section 5-13-301(a)(1) of the Arkansas Code (terroristic threatening) is not categorically a "crime of violence" as defined in U.S.S.G. § 2L1.2(b)(1)(A)(ii).

*United States v. Montiel-Cortes*, No. 16-50074, 2017 WL 416970 (5th Cir. Jan. 30, 2017): The Fifth Circuit held that section 200.380 of the Nevada Revised Statutes Annotated (robbery) is a "crime of violence" as defined in U.S.S.G. § 2L1.2(b)(1)(A)(ii).

***Seventh Circuit***

*Fitzpatrick v. Sessions*, No. 15-2204, 2017 WL 562452 (7th Cir. Feb. 13, 2017): The Seventh Circuit held that the defense of "entrapment by estoppel" or of "official authorization" is not available to respondents found removable under section 237(a)(6)(A) of the Act, 8 U.S.C. § 1227(a)(6) (removal of aliens who vote in violation of State or Federal law).

*Garcia-Hernandez v. Boente*, No. 15-2835, 2017 WL 495543 (7th Cir. Feb. 7, 2017): The Seventh Circuit held that a conviction for violation of a protection order is not subject to the categorical and modified categorical approaches and ultimately concluded that a violation of 720 Ill. Comp. Stat. 5/12-3.4 can constitute a removable offense under section 237(a)(2)(E)(ii) of the Act, 8 U.S.C. § 1227(a)(2)(E)(ii).

***Eighth Circuit***

*United States v. Lamb*, No. 15-2399, 2017 WL 461094 (8th Cir. Feb. 3, 2017): Applying the categorical and modified categorical approaches, the Eighth Circuit held that section 943.10(1m)(a) of the Wisconsin Statutes Annotated is facially overbroad and indivisible, but not over-inclusive—after considering the realistic probability test—with respect to the "dwelling" element of the offense.

*Fuentes-Erazo v. Sessions*, No. 15-3149, 2017 WL 629283 (8th Cir. Feb. 16, 2017): The Eighth Circuit dismissed the petition for review, concluding that even if "Honduran women in domestic relationships who are unable to leave them," is a cognizable particular social group, the petitioner was not a member because she had successfully left her abusive relationship 5 years prior to fleeing Honduras. Moreover, despite noting widespread domestic violence in Honduras and that its laws to assist victims are largely ineffectual, the panel gave the Board and the Immigration Judge deference in concluding that this evidence did not compel an acquiescence finding.

***Ninth Circuit***

*United States v. Peralta-Sanchez*, No. 14-50394, 2017 WL 510454 (9th Cir. Feb. 7, 2017): The Ninth Circuit held that there is no statutory or due process right to counsel in expedited removal proceedings under section 235 of the Act, 8 U.S.C. § 1225.

*Sandoval v. Yates*, 847 F.3d 697 (9th Cir. 2017): After applying the categorical approach, the Ninth Circuit held that conviction for delivery of a controlled substance pursuant to section 475.992(1)(a) of the Oregon Revised Statutes is not categorically an aggravated felony as defined in section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B).

## BIA PRECEDENT DECISION

In *Matter of Kim*, 26 I&N Dec. 912 (BIA 2017), the Board concluded that the offense of mayhem in violation of California Penal Code § 203 is categorically a crime of violence under 18 U.S.C. § 16(a). Applying the categorical approach outlined in *Taylor v. United States*, 495 U.S. 575 (1990), and more recently in *Mathis v. United States*, 136 S. Ct. 2243 (2016), the Board compared the elements of section 203 to the generic definition of a crime of violence under section 101(a)(43)(F) of the Act. Pointing out that section 16(a) defines a crime of violence as including the use, attempted use, or threatened use of physical force against another person or property, the Board explained that controlling case law such as *Johnson v. United States*, 559 U.S. 133 (2010), *Leocal v. Ashcroft*, 543 U.S. 1 (2004), and *Matter of Chairez*, 26 I&N Dec. 819 (BIA 2016), interprets the phrase "physical force" as necessarily involving violent force capable of causing physical pain or injury. The Board also observed that even where the terms "use" and "force" are not explicitly articulated in the state statute or its jury instructions, the requisite use of force may necessarily be involved in all violations of the statute.

Reviewing the jury instructions for a criminal trial involving section 203, the Board observed that to convict the State must prove, and the jury must find, that the accused committed an unlawful and malicious act that resulted in another person's body part being removed, disabled, or disfigured. In this case, the parties and the Board agreed that section 203 requires the requisite use of force. The Board additionally noted that mayhem must be committed maliciously, which, under California law means, that the proscribed conduct was "deliberate and intentional," a mens rea that is greater than "reckless." Further, the Board reasoned that the use of "force" is inherent in removing, disabling, or disfiguring another person's body part; the Board concluded that the force necessary to cause such "great bodily injury" is violent. Because section 203 requires the deliberate and intentional use of violent force causing great bodily injury, the Board concluded that a violation of the statute is categorically a crime of violence under 18 U.S.C. § 16(a), and renders the respondent removable under section 237(a)(2)(A)(iii) of the Act for sustaining a conviction for an aggravated felony as defined in section 101(a)(43)(F) of the Act.

**Tackling Fraud Without Trampling Due Process:** *continued*

explain the identified similarities. *See Matter of R-K-K-*, 26 I&N Dec. at 660–61. These procedural safeguards stem from constitutional due process requirements in all proceedings, including immigration proceedings. *See Reno v. Flores*, 507 U.S. 292, 306 (1993) (stating that due process is required in immigration proceedings). *Matter of R-K-K-* also explicitly states that taking notice of inter-proceeding similarities must comply with the confidentiality requirements pursuant to 8 C.F.R. § 1208.6. 26 I&N Dec. at 661 n.3. This section of the article explores the due process and confidentiality concerns of taking administrative notice of inter-proceeding similarities and relying on judicial experience in identifying significant similarities.

*Administrative Notice*

Agencies may take official or administrative notice, similar to judicial notice, of extra-record facts. *See Gebremichael v. INS*, 10 F.3d 28, 37 (1st Cir. 1993). Pursuant to 8 C.F.R. § 1003.1(d)(3)(iv), the Board can take administrative notice of "commonly known facts such as current events or the contents of official documents." Although there is no such provision that specifically applies to Immigration Judges, "the Board and circuit courts have recognized Immigration Judges' ability to take administrative notice of certain types of evidence." *See* Robyn Brown and Vivian Carballo, "Beyond the Record: Administrative Notice and the Opportunity To Respond," *Immigration Law Advisor*, Vol. 9, No. 8, at 2 (Sept. 2015). In addition to commonly known facts, Immigration Judges can take administrative notice of matters relating to the administrative agency's expertise or "specialized experience in a subject matter area." *Vasha v. Gonzales*, 410 F.3d 863, 874 n.5 (6th Cir. 2005) (quoting *de la Llana-Castellon v. INS*, 16 F.3d 1093, 1096 (10th Cir. 1994)). The Tenth Circuit in *de la Llana-Castellon* highlighted that a driving factor necessitating administrative notice is the "repetitive nature of many administrative proceedings." 16 F.3d at 1096. Multiple circuit courts have also held that adjudicators may draw reasonable inferences from administratively noticed evidence that "comport with common sense." *See Kapcia v. INS*, 944 F.2d 702, 705 (10th Cir. 1991) (quoting *Kaczmarczyk v. INS*, 933 F.2d 588, 594 (7th Cir. 1991)). As such, "[t]he appropriate scope of notice is broader in administrative proceedings than in trials, especially jury trials." *Castillo-Villagra v. INS*, 972 F.2d 1017, 1026 (9th Cir. 1992) (citing *Banks v. Schweiker*, 654 F.2d 637 (9th Cir. 1981)).

*Judicial Experience*

Judicial experience has been described as the expertise an Immigration Judge may develop through "repetitive examination of particular documents" or familiarity with practices of "certain foreign regions" gained through the course of presiding over hearings for cases with similar claims and documentary evidence. *See Lin v. Gonzales*, 434 F.3d 1158, 1163 (9th Cir. 2006). However, reliance upon judicial experience to determine evidentiary value does not give Immigration Judges *carte blanche* to use their experience as a sole basis for determining the credibility or weight of evidence. *See, e.g.*, *Matter of Gomez-Gomez*, 23 I&N Dec. 522, 525 & n.2 (BIA 2002) (stating it is "unclear" whether an Immigration Judge's administrative notice of the former Immigration and Naturalization Service's regional practice of releasing without bond adults accompanying juveniles, as well as her own awareness of false claims of parentage, "would be deemed the type of 'commonly acknowledged' fact about which administrative notice may legitimately

be taken"). Rather, it is acceptable for an Immigration Judge to combine his or her own judicial experience with "obvious warning signs of forgery" to the determination of how much weight to give a particular piece of evidence. *Id.* at 1164; *see also Vatyan v. Mukasey*, 508 F.3d 1179, 1185 n.4 (9th Cir. 2007).

As alluded to in *Gomez-Gomez*, an Immigration Judge should not make decisions based upon stereotypes, but instead must analyze each matter on a case-by-case basis. *See Matter of Blas*, 15 I&N Dec. at 628. Thus, Immigration Judges may want to be cautious in their reliance on judicial experience to justify taking administrative notice of extra-record evidence when the Judge's experience is based solely on hearing similar claims from a certain geographic region. An alien's constitutional due process rights could be violated when administrative notice is taken of disputed facts or when such notice adversely affects an alien's claim. As such, aliens must be given a "meaningful opportunity to be heard" in removal proceedings. *See, e.g.*, *Kaczmarczyk*, 933 F.2d at 595 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976)).

*Comporting with Due Process*

Fifth Amendment due process rights apply to aliens in removal proceedings, albeit in a more limited capacity than in criminal proceedings. *See Reno,* 507 U.S. at 306; *Kheireddine v. Gonzales*, 427 F.3d 80, 87 n.4 (1st Cir. 2005) ("We acknowledge that generally the due process requirements for immigration proceedings are lower than those for criminal proceedings."). Due process requirements for immigration proceedings include providing notice and a meaningful opportunity to respond to evidence submitted by the Government or to "potentially dispositive administratively noticed facts." *See, e.g., Burger v. Gonzales*, 498 F.3d 131, 134 (2d Cir. 2007) (internal quotation marks omitted); *see also Kaczmarczyk*, 933 F.2d at 595 (citing *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976)). "The essence of due process is the requirement that 'a person in jeopardy of serious loss (be given) notice of the case against him *and the opportunity to meet it.*'" *Mathews,* 424 U.S. at 348 (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 171–72, (1950) (Frankfurter, J., concurring)) (emphasis added).

The Federal Rules of Evidence, while certainly helpful guidance, are not binding in immigration proceedings, and Immigration Judges have broad discretion to admit and consider relevant and probative evidence. *Matter of D-R-*, 25 I&N Dec. at 458; *see also* section 240(b)(1) of the Act, 8 U.S.C. § 1229a(b)(1). In immigration proceedings, the "sole test for admission of evidence is whether the evidence is probative and its admission is fundamentally fair." *Espinoza v. INS*, 45 F.3d 308, 310 (9th Cir. 1995) (citing *Trias–Hernandez v. INS*, 528 F.2d 366, 369 (9th Cir. 1975)). Pursuant to 8 C.F.R. § 1240.7(a), the Immigration Judge "may receive in evidence any oral or written statement that is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial." These statements, including those involving hearsay, nonetheless, must be probative and fundamentally fair so as to comport with due process. *Anim v. Mukasey*, 535 F.3d 243, 257 (4th Cir. 2008) ("Although hearsay is admissible in immigration proceedings, highly unreliable hearsay might raise due process problems.") (internal quotation marks and alteration omitted); *see also Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 505 (BIA 1980).

The steps in *Matter of R-K-K-* requiring the Immigration Judge to provide an applicant with meaningful notice and an opportunity to respond together satisfy due process. An Immigration Judge's identification and articulation of significant similarities on the record and explanation of why these similarities raise concern provide an applicant with meaningful notice of the case against him. *Matter of R-K-K-* also provides examples of giving applicants opportunities to respond, object, and explain their case. These examples include granting continuances, reopening the record, and allowing applicants to submit additional evidence or present additional witnesses to explain or refute similarities. Each of the three steps in *Matter of R-K-K-*—providing meaningful notice, affording the applicant an opportunity to respond, and using the totality of the circumstances to make a credibility determination—ensures the admission and consideration of inter-proceeding similarities is fundamentally fair.

While precedent establishes that taking notice of inter-proceeding similarities comports with due process, it remains an unanswered question whether admitting documents from another proceeding without a confidentiality waiver complies with confidentiality concerns.

*Confidentiality Concerns*

While *Matter of R-K-K-* addressed the aforementioned due process concerns, it did not flesh out the confidentiality issues that may arise when taking notice of similarities between asylum applications without a confidentiality waiver. *See Matter of R-K-K-*, 26 I&N Dec. at 663 n.4 ("We do not address what procedural protections are sufficient to offer an adequate opportunity to explain similarities between asylum applications absent a confidentiality waiver."). The Board in *Matter of R-K-K-* was not required to address this issue because the applicant's brother waived his confidentiality protections. *Id.* The brother's unredacted declaration was part of the record so the parties and the Immigration Judge were able to fully compare the two documents. *Id.* With respect to confidentiality and asylum applications, 8 C.F.R. § 1208.6(a) provides:

> Information contained in or pertaining to any asylum application, records pertaining to any credible fear determination conducted pursuant to § 1208.30, and records pertaining to any reasonable fear determination conducted pursuant to § 1208.31, shall not be disclosed without the written consent of the applicant, except as permitted by this section or at the discretion of the Attorney General.

However, the confidentiality regulation is not concerned about disclosures to an Immigration Judge or DHS officials. *See* 8 C.F.R. § 1208.6(c)(1)(i). It appears the primary concern of 8 C.F.R. § 1208.6 is that public disclosure of certain information provided in an asylum application may make its way back to the applicant's persecutor and consequently subject the applicant, or his or her family members, to persecution or harm.[3] Indeed, the instructions for Form I-589, Application for Asylum and for Withholding of Removal, cite the confidentiality regulations contained at 8 C.F.R. §§ 208.6 and 1208.6 (which apply to DHS and the Executive Office for Immigration Review, respectively). Another issue with respect to disclosure of asylum application information to third parties, albeit more rare in its occurrence, is the potential for public disclosure to create a new claim of relief for the applicant that did not exist absent the disclosure. *Id.*

*Breaches of Confidentiality*

Although courts and agencies have recognized that a violation of the confidentiality regulations could be cause for a new asylum claim, the regulations do not provide a remedy for breach of confidentiality.[4] According to a legacy Immigration and Naturalization Service ("INS") memorandum,

> a breach occurs when information is disclosed to a third party and the disclosure is significant enough that it allows the third party to connect the identity of the applicant to: (1) the fact that the applicant is seeking asylum; (2) specific facts or allegations pertaining to the individual asylum claim in the application; or (3) facts or allegations that are sufficient to give rise to a reasonable inference that the person is seeking asylum.[5]

A breach of the confidentiality regulations does not result in automatic reversal of a removal order. Instead, some courts have found that if a breach occurs, the court must determine "whether the disclosure gives rise to a new claim of asylum for the applicant that is independent of the original claim." *See* McGreal (Sept.–Oct. 2008) at 6 (citing *Corovic v. Mukasey*, 519 F.3d 90, 96 (2d Cir. 2008)); *Averianova v. Mukasey*, 509 F.3d 890, 899–900 (8th Cir. 2007); *Abdel-Rahman v. Gonzales*, 493 F.3d 444, 453 (4th Cir. 2007); *Lin v. U.S. Dep't of Justice*, 459 F.3d 255, 263 (2d Cir. 2006)). Then, the burden would be on the applicant to "submit additional evidence to establish the new claim of asylum." *See* McGreal (Sept.–Oct. 2008) at 7 (citing *Ghasemimehr v. Gonzales*, 427 F.3d 1160, 1161–63 (8th Cir. 2005)).

Notwithstanding the burden on the applicant to prove a new claim arising from a confidentiality breach, Immigration Judges may want to be cautious in admitting unredacted documents from one proceeding into another. While the confidentiality regulation allows the Attorney General "limitless discretion to disclose information in asylum files to third parties," this limitless discretion does not extend to "any other government official." Memorandum from Bo Cooper, Gen. Counsel, INS, to Jeffrey Weiss, Dir. of Int'l Affairs, INS, Confidentiality of Asylum Applications and Overseas Verification of Documents and Application Information 3 (June 21,

2001) (copy on file with author). Notably, the U.S. Court of Appeals for the Federal Circuit upheld a Merit Systems Protection Board ("MSPB") conclusion that a breach of 8 C.F.R. § 208.6 "was a firing offense irrespective of whether that breach was harmless." *See Lin*, 459 F.3d at 267 n.8 (citing *Lewis v. Dep't of Justice*, 34 F. App'x 774, 776 (Fed. Cir. 2002)). In *Lewis*, an asylum officer posted on an online forum that he had granted asylum to a famous athlete. Although the athlete did not hide that he had been granted asylum, the MSPB and the Federal Circuit found this disclosure of his asylum status without his written permission a breach of the regulation. *Lewis*, 34 F. App'x at 776 (stating that the regulation "makes no exception permitting 'harmless' disclosure of information relating to asylum applications or disclosure relating to applicants who did not hide the fact that they had been granted asylum"). Thus, Immigration Judges and other government officials should consider that unauthorized disclosure of asylum application information to third parties may carry consequences even if the disclosure may ultimately be deemed harmless.

A more subtle example of a confidentiality breach is a U.S. immigration official providing an asylum applicant's government with an unredacted document that is typically associated with an asylum claim. *See, e.g.*, *Lin*, 459 F.3d at 262 (finding a confidentiality breach where a consular officer asked the Chinese government to authenticate the asylum applicant's certificate of release from prison, which contained identifying information such as the applicant's name, prisoner number, and former residence); *Anim*, 535 F.3d at 254–56 (finding a confidentiality breach where an investigator asked the Cameroonian government to authenticate a copy of a summons identifying the applicant as a member of the Cameroon government).

A review of the aforementioned case law demonstrates that confidentiality violations most often involve disclosure of information to the general public or to government officials in the applicant's home country. Case law does not discuss confidentiality violations in the context of disclosure to an applicant accused of plagiarism or fraud. Interestingly, the Board and circuit courts did not address confidentiality concerns in pre-*R-K-K-* cases where unredacted asylum applications from other proceedings were admitted into the record seemingly without confidentiality waivers. *See generally* Jonathan Calkins and Elizabeth Donnelly, "Trust, but Verify: Document Similarities and Credibility Findings in Immigration Proceedings," *Immigration Law Advisor*, Vol. 5, No. 3, at 15 (Mar. 2011) (citing *Nyama*, 357 F.3d at 816; *Kourouma*, 588 F.3d at 242).

*Avoiding Confidentiality Breaches*

Formal mechanisms for Immigration Judges to admit asylum application information from other proceedings are also not clearly defined. Protective orders, which bar disclosure of certain information and which can be enforced if violated, ensure that Immigration Judges, the Board, and applicants "have full access to all unclassified sensitive information that is introduced in an immigration hearing, while preserving the Government's interest in protecting such information from general disclosure." Executive Office for Immigration Review, *Protective Orders & the Sealing of Records in Immigration Proceedings*, OPPM 09-02 (Feb. 9, 2009), *available at* https://perma.cc/AY6W-8KGY. Nevertheless, Immigration Judges may issue protective orders in immigration proceedings only if such disclosure would harm national security or law enforcement interests of the United States. *See id.* ("The regulation applies only to sensitive law enforcement or national security information (*e.g.*, grand jury information or names of confidential witnesses) which is not classified, but the disclosure of which could nonetheless jeopardize investigations or harm national security."); *see also* 8 C.F.R. § 1003.46. Thus, unless the inter-proceeding similarities are related to sensitive law enforcement or national security information, there does not seem to be a mechanism for an Immigration Judge to issue a protective order to allow an applicant and his or her attorney to view unredacted asylum applications of applicants who did not waive their confidentiality protections without a possible violation of the confidentiality regulations.

If issuing a protective order is not an option, then redaction of identifying information in applications and documents from other proceedings may address the confidentiality concerns of 8 C.F.R. § 1208.6. For example, the Immigration Judge in *Mei Chai Ye* instructed DHS to submit redacted versions of two similar affidavits before admitting them into evidence. *See* 489 F.3d at 521. It thus appears that an applicant may effectively and meaningfully respond to inter-proceeding similarities with redacted materials, but this is another unresolved area of the law that may develop further as circumstances arise.

## Conclusion

While the three-step procedural framework in *Matter of R-K-K-* endeavors to tackle fraud without trampling due process, additional steps may be needed to preserve fairness and protect confidentiality absent express waiver in asylum proceedings. An additional area of tackling fraud in cases where inter-proceeding similarities are present involves determining what steps an Immigration Judge should take when inter-proceeding similarities may not be the fault of the applicant. Nevertheless, the *R-K-K-* framework has provided Immigration Judges with a solid guide for undertaking an analysis of inter-proceeding similarities.

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1. The Board noted it was "not aware of any circuit court that had rejected the Second Circuit's approach." *Matter of R-K-K-*, 26 I&N Dec. at 660 n.2; *see also Nadeem v. Holder*, 599 F.3d 869, 873 (8th Cir. 2010) (citing *Mei Chai Ye*, 489 F.3d at 521); *Dehonzai v. Holder*, 650 F.3d 1, 13–15 (1st Cir. 2011) (Thompson, J., dissenting) (same).

2. Identifying inter-proceeding similarities should be done in a manner consistent with confidentiality requirements pursuant to 8 C.F.R. § 1208.6. *Matter of R-K-K-*, 26 I&N Dec. at 661 n.3.

3. USCIS Fact Sheet: *Federal Regulation Protecting the Confidentiality of Asylum Applicants* (Oct. 18, 2012), available at https://perma.cc/Y3A6-3F4A.

4. *See* Christopher McGreal, *Asylum Confidentiality: Disclosure of Asylum-Related Information to Unauthorized Third Parties*, Immigration Litigation Bulletin, Vol. 12, Nos. 9-10, at 6 (Sept.-Oct. 2008) (citing 8 C.F.R. §§ 208.6, 1208.6), *available at* https://perma.cc/RC4J-4DGM.

5. *Lyashchynska v. U.S. Atty. Gen.*, 676 F.3d 962, 970 (11th Cir. 2012) (citing Memorandum from Bo Cooper, Gen. Counsel, INS, to Jeffrey Weiss, Dir. of Int'l Affairs, INS, Confidentiality of Asylum Applications and Overseas Verification of Documents and Application Information 7 (June 21, 2001)).