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Trust, but Verify: Document Similiarities and Credibility Findings in Immigration Proceedings

by Jonathan Calkins and Elizabeth Donnelly

Introduction

Inconsistencies arising in an asylum application remain a well-recognized reason for questioning an asylum seeker's truthfulness, particularly in the wake of the REAL ID Act of 2005. So routine are denials based on inconsistent statements that the circuit courts of appeals affirmed several on this basis in the first few weeks of 2011 alone—typically through summary unpublished dispositions. *E.g.*, *Ademi v. Holder*, No. 09-4379-ag, 2011 WL 9823, at *1 (2d Cir. Jan. 4, 2011); *Seydy v. Holder*, No. 09-3822, 2011 WL 111735, at *1-2 (6th Cir. Jan. 13, 2011); *Lin v. U.S. Att'y Gen.*, No. 10-12962, 2011 WL 9359, at *3 (11th Cir. Jan 3, 2011). A more difficult question is if and to what extent an Immigration Judge may rely on *similarities*—either between documents presented in the same proceeding or between claims—to find an applicant not credible. While neither the Act nor the regulations specifically address similarities as a basis for an adverse credibility finding, the REAL ID Act authorizes Immigration Judges to consider "other relevant factors" in determining credibility. One such factor may be intra- and inter-proceeding similarities.

Nonetheless, under the right circumstances, suspicious similarities may support an adverse credibility finding, in whole or in part, for related reasons. In a handful of published opinions and a significant number of unpublished dispositions, several circuit courts have confronted a range of issues presented by Immigration Judges' reliance on document similarities. Two main types of similarities—intra-proceeding and inter-proceeding similarities—have been identified in these cases. This article will discuss each in turn.

Intra-proceeding Similarities

The term "intra-proceeding similarities" refers to similarities appearing in evidence presented in a single case. *Mei Chai Ye v. U.S. Dep't of Justice*, 489 F.3d 517, 519 (2d Cir. 2007). Similar language, phrasing, structure, and even grammatical or spelling errors in statements allegedly provided by different individuals in support of a claim may create credibility issues. In such cases, the corroborating letters or affidavits may replicate aspects of the applicant's own written statements or each other. Additionally, suspect typographical similarities in documents, indicating fraud in their production, may undermine their believability as corroborating evidence.

The United States Court of Appeals for the Second Circuit has held that "nearly identical language" appearing in affidavits purportedly written by different people in the applicant's home country supported an adverse credibility finding. *Singh v. BIA*, 438 F.3d 145, 148 (2d Cir. 2006) (per curiam). As the court subsequently explained, it has "allowed IJs to take into account such 'intra-proceeding' similarities because, in most cases, it is reasonable and unproblematic for an IJ to infer that an applicant who herself submits the strikingly similar documents is the common source of those suspicious similarities." *Mei Chai Ye*, 489 F.3d at 519 (footnote omitted). The Second Circuit has regularly followed this holding in unpublished orders. *See, e.g.*, *Jun Song Chen v. Holder*, 364 F. App'x 691, 692 (2d Cir. 2010); *Liming Wu-Fan v. Holder*, 354 F. App'x 535, 536-37 (2d Cir. 2009); *Xian Chen v. Holder*, 333 F. App'x 614, 615 (2d Cir. 2009); *Duan Hang Chen v. Holder*, 324 F. App'x 103, 104-05 (2d Cir. 2009); *Dalip v. Mukasey*, 298 F. App'x 49, 51 (2d Cir. 2008); *Kadriovski v. Gonzales*, 246 F. App'x 736, 741 (2d Cir. 2007); *Singh v. Gonzales*, 230 F. App'x 70, 72 (2d Cir. 2007); *Xiao Zhen Wang v. Gonzales*, 201 F. App'x 806, 808 (2d Cir. 2006).

Other courts have also endorsed this logic, as did the Eighth Circuit in a published opinion, *Nadeem v. Holder*, 599 F.3d 869, 873 (8th Cir. 2010) (citing *Mei Chai Ye*), and the Third Circuit in unpublished orders, *Xiurong Liu v. Att'y Gen. of U.S.*, 343 F. App'x 788, 790 (3d Cir. 2009); *Wu Chen v. Att'y Gen.* of U.S., 230 F. App'x 152, 154 (3d Cir. 2007). Likewise, questionable language similarities in supporting statements may be a basis for rejecting the statements as corroborating evidence, even where the Immigration Judge determines that they do not necessarily undermine the applicant's credibility as a whole. *See, e.g.*, *Oudit v. Holder*, No. 09-3425-ag, 2010 WL 4997429, at *2 (2d Cir. Dec. 7, 2010); *Xia Pan Dong v. Holder*, 339 F. App'x 11, 13 (2d Cir. 2009). In either scenario, however, the Immigration Judge has often articulated other reasons for finding the applicant not credible or rejecting the corroborating evidence. Intra-proceeding similarities usually do not constitute the only suspicious aspect of the evidence presented.

Similar problems arise when documents that are allegedly prepared by different individuals contain typographical similarities. The Eighth Circuit has addressed this issue at some length. Its analysis of this problem suggests that convincing, detailed, and corroborated explanations may be needed to overcome the negative implications of such similarities.

In *Eta-Ndu v. Gonzales*, 411 F.3d 977 (8th Cir. 2005), the Cameroonian petitioner submitted letters that were allegedly from different branches of his political party, the Social Democratic Front ("SDF"). The letters lacked official letterhead, were apparently typed on the same typewriter, and bore identical postmarks from from the same place on the same day. Evidence from a forensic document examination confirmed that the letters came from the same machine. When the Immigration Judge questioned the authenticity of the documents, the petitioner claimed he had no idea how the letters were prepared. Eta-Ndu did, however, submit an additional letter from one of the authors explaining that the author had sent the letter to a regional office to be typed because he did not have access to a typewriter. The petitioner further explained that people frequently mailed letters from the capital, as these had been, because of irregular mail service in smaller towns. An expert confirmed in an affidavit that he had heard stories of haphazard mail service and inaccurate postmarks.

The Immigration Judge found the documents incredible but did not, by extension, explicitly find that Eta-Ndu's testimony lacked credibility as a whole. Rather, the Immigration Judge found that the applicant had not established past persecution and determined that the unbelievable documents and lack of other "objective" corroborating evidence meant that he did not meet his burden of proof as to future persecution. The Board faulted Eda-Ndu's explanations, noting that he had failed to obtain a letter of explanation from the second author or from the location where the letters had been typed.

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Additionally, Eta-Ndu had failed to explain how the letters traveled back and forth from the regional offices for a handwritten signature for postmark on the same day.

The Eighth Circuit's majority opinion concluded that the Board's reasoning was sound. Regarding the letters, the court found that sufficient grounds existed to doubt their authenticity, emphasizing the forensic analysis showing that the documents had been produced by the same computer. It expressed no problem with the agency's discounting of Eta-Ndu's explanations for the suspicious documents. In dissent, Judge Lay argued in part that the SDF letters could not be dismissed as incredible on the grounds articulated by the agency, finding the explanations for their questionable production reasonable and corroborated. Therefore, Judge Lay believed that the "'IJ's proffered reasons for disbelieving' Eta-Ndu were based on mere 'personal conjecture about the manner in which' correspondence is written, signed, and circulated in the Cameroonian SDF." *Id.* at 994 (quoting *Kaur v. Ashcroft*, 379 F.3d 876, 877 (9th Cir. 2004)).

Unlike in the case of inter-proceeding similarities, discussed below, no circuit has outlined a procedural framework to use when relying on intra-proceeding similarities. *See Mei Chai Ye*, 489 F.3d at 526 n.8. However, the case law indicates that Immigration Judges should notify the applicant of the credibility issue and provide an opportunity to explain through specific questioning. Judge Lay explicitly raised the notice issue in his dissent in *Eta-Ndu*. Other courts have implicitly suggested the same. To that end, the Second Circuit noted its approval when an Immigration Judge asked an applicant if the author of the supporting document saw or had access to the applicant's I-589 or other witnesses' statements. *See Xiao Zhen Wang*, 201 F. App'x at 808. Other reasonable questions that might be asked by the Immigration Judge include (1) whether the applicant told the corroborating witness what to write; (2) whether the witness worked from a sample statement; (3) whether the applicant read the witness' statement before submitting it; and (4) whether the applicant believes the statement is in the witness' own words. *See Wu Chen*, 230 F. App'x at 154.

Inter-proceeding Similarities

By contrast, the term "inter-proceeding similarities" refers to those appearing in claims presented by different applicants. *See Mei Chai Ye*, 489 F.3d at 519-20. A host of questions and issues arise when an Immigration Judge seeks to rely on this type of similarity. When an Immigration Judge takes certain precautions, some circuits have nonetheless endorsed using inter-proceeding similarities as a basis for an adverse credibility finding. However, courts have faulted over-reliance on general similarities and have required detailed on-the-record reasoning to support such findings.

In *Nyama v. Ashcroft*, 357 F.3d 812 (8th Cir. 2004), the Eighth Circuit took up the threshold question of the admissibility of evidence demonstrating inter-proceeding similarities. The Cameroonian applicant sought asylum, withholding of removal, and protection under the Convention Against Torture based on his family's affiliation with the SDF. In support, Nyama offered letters from his sister and friends, as well as country conditions reports. He stated that his sister resided in Cameroon and that he had no siblings or other relatives in the United States.

At the end of Nyama's testimony, the Government presented three other asylum applications, all from individuals named Nyama who resided, like the applicant, in St. Paul, Minnesota. Several additional striking similarities appeared in the applications. All applicants claimed the same father, with slight variations in the spelling of his name. All claimed, again with slight variations, the same address in Cameroon. Finally, all the stories had similar basic elements: their father was highly involved in the SDF, their father disappeared, and their uncle or someone else helped them escape from the country. In response, Nyama at first asserted that he did not know the other individuals.

The Immigration Judge, concerned by the similarities and the general lack of corroborating evidence, granted a 6-month continuance to allow the applicant to rehabilitate his case and for the Government to subpoena the other three Nyamas to testify. When the hearing reconvened, the applicant did not produce additional corroborating evidence and was unable to explain the consistencies among the applications. Although the Government had subpoenaed the other applicants, none appeared, to which Nyama did not object. He further acknowledged that he did, in fact, know two of the other applicants. The Immigration Judge ultimately found the applicant not credible and denied relief. In doing so, the Immigration Judge stated his belief that the father's supposed political activities were entirely fabricated, in light of the other applications and the applicant's failure to

produce corroborating evidence when given an additional opportunity to do so.

The Eighth Circuit affirmed the adverse credibility finding under the circumstances, rejecting Nyama's challenges to the admission of the other applications. It disagreed with Nyama's argument that they were inadmissible hearsay. At the outset, the Eighth Circuit observed that the other applications were not, in fact, hearsay at all, because they were not offered to show the truth of the matter asserted, but rather to impeach Nyama's credibility. However, even if they were considered hearsay, the court held them to be nonetheless admissible, reasoning that the rules of evidence do not apply in immigration proceedings, the applications were probative, and their admission was fundamentally fair.

Regarding the last point, Nyama also argued that he had been unfairly "ambushed" by the admission of the applications, in violation of due process. *Id.* at 816. The Eighth Circuit responded that because the applications were offered as impeachment evidence, the Government had no duty to disclose them any earlier. *Id.* (citing Fed. R. Civ. 26(a)(1)(B)). Additionally, the court reasoned that there had been no actual surprise because the Immigration Judge had "generously" allowed Nyama a 6-month continuance before requiring his counsel to object and admitting the applications to the record. *Id.* at. 817. In so holding, the Eighth Circuit hinted at procedural protections fleshed out more fully by the Second Circuit in subsequent decisions.

The Second Circuit's opinion in *Mei Chai Ye*, 489 F.3d 517, highlights the dangers of relying on inter-proceeding similarities and outlines a procedural framework for safeguarding applicants' rights. The petitioner in that case was a Chinese applicant for asylum, withholding of removal, and relief under the Convention Against Torture who claimed that she had been forced to undergo two abortions in China and that she feared that she would be involuntarily sterilized if she were removed from the United States. The Immigration Judge noticed that the affidavit she submitted with her application strongly resembled an affidavit submitted by another Chinese asylum applicant represented by the same attorney in a different case before him. *Id.* at 520-21.

After instructing the Government to prepare redacted versions of the two applications, the Immigration Judge admitted the redacted applications into the record. He then identified 23 places in which the applicants' affidavits were grammatically or structurally identical and gave the applicant before him several opportunities to explain the similarities. 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. The attorney also speculated that the affidavits might have been inaccurately or formulaically translated by the same person. However, the Immigration Judge found that this explanation was not supported by any other evidence in the record. Relying on the similarities between the two affidavits and on minor inconsistencies in the applicant's testimony, the Immigration Judge found that the applicant had failed to meet her burden of proof to establish her eligibility for relief. Accordingly, he denied her applications and ordered her removed. *Id.* at 521-23.

The Second Circuit denied the applicant's petition for review. In its opinion, the court, citing *Singh*, 438 F.3d at 138, noted that its previous holdings supported the notion that intra-proceeding similarities between documents could undermine applicants' credibility and lead to an inference that the documents were fabricated, but it cautioned that "it is far more dangerous to draw such an inference from inter-proceeding similarities." *Id.* at 524. As the court explained, inter-proceeding similarities could arise for a number of innocent reasons:

> [I]t may well be, inter alia, (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 . . . .

Id. at 520.

The court found, though, that the Immigration Judge in the case had carefully considered these possibilities

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CIRCUIT COURT DECISIONS FOR FEBRUARY 2011

by John Guendelsberger

The United States courts of appeals issued 228 decisions in February 2011 in cases appealed from the Board. The courts affirmed the Board in 200 cases and reversed or remanded in 28, for an overall reversal rate of 12.3% compared to last month's 12.9%. There were no reversals from the First, Seventh, Eighth, and Tenth Circuits.

The chart below shows the results from each circuit for February 2011 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	2	2	0	0.0
Second	71	70	1	1.4
Third	21	17	4	19.0
Fourth	10	9	1	10.0
Fifth	16	14	2	12.5
Sixth	9	7	2	22.2
Seventh	5	5	0	0.0
Eighth	2	2	0	0.0
Ninth	71	55	16	22.5
Tenth	1	1	0	0.0
Eleventh	20	18	2	10.0
All	228	200	28	12.3

The 228 decisions included 128 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 48 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	140	128	12	8.6
Other Relief	40	30	10	25.0
Motions	48	42	6	12.5

The 12 reversals or remands in asylum cases involved the level of harm for past persecution (4 cases); credibility (2 cases); nexus (2 cases); the 1-year bar; firm resettlement; ineffective assistance of counsel; and a frivolousness determination.

The 10 reversals in the "other relief" category covered a variety of issues, including 3 cases from the Ninth Circuit reversing removal orders based on pre-November 18, 1998, aggravated felony convictions under *Ledezma-Galicia v. Holder*, Nos. 03-73648, 04-35048, 2010 WL 5174979 (9th Cir. Dec. 22, 2010). Other reversals involved eligibility for a section 212(h) waiver, ineffective assistance of counsel, indecent exposure as a crime involving moral turpitude, and denial of a continuance to await approval of a pending visa petition.

The six reversals in motions cases included two motions to reopen for ineffective assistance of counsel, two for changed country conditions, and one for misapplication of the departure bar, as well as a motion to rescind an in absentia order of removal.

The chart below shows the combined numbers for January and February 2011 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Tenth	5	4	1	20.0
Ninth	249	200	49	19.7
First	6	5	1	16.7
Fourth	19	16	3	15.8
Third	38	33	5	13.2
Sixth	18	16	2	11.1
Eleventh	33	30	3	9.1
Fifth	33	31	2	6.1
Second	126	124	2	1.6
Eighth	3	3	0	0.0
Seventh	8	8	0	0.0
All	538	470	68	12.6

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Last year's reversal rate at this point was 8.2%, with 820 total decisions and 67 reversals.

The numbers by type of case on appeal for the first 2 months of 2011 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	303	280	23	7.6
Other Relief	121	92	29	24.0
Motions	114	98	16	14.0

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Life Does Not *Always* Imitate Television:
The "Exclusionary Rule" in Immigration Proceedings
by Edward R. Grant and Patricia M. Allen

It is a staple of most episodes of *Law & Order*: After the initial suspect turns out to be completely innocent, the cops (our favorite: Lennie Briscoe, played by the inestimable Jerry Orbach) obtain gold-plate evidence that nails the real culprit. But there is always a technicality, Judge Bradley throws out the evidence on Fourth Amendment grounds, and Jack McCoy and his colleagues (Jill Hennessy? Angie Harmon?) are back to square one. Predictable? Yes. Often contrived? Surely. But without it, each episode would be like *Dragnet* and last only 30 minutes. And let's face it—would you rather watch Jack Webb or Chris Noth/Benjamin Bratt? (Caution: Your answer might be self-incriminating, or at least reveal your age.)

The original *Law & Order* may, finally, have shot its last episode, but the exclusionary rule under the Fourth Amendment will always be with us. The question of the day, however, is whether the exclusionary rule is with *us*, meaning Immigration Judges and the Board of Immigration Appeals?

Despite clear Board—and Supreme Court—precedent that the exclusionary rule does *not* apply to deportation or removal proceedings, the question arises with considerable frequency, accompanied at times by considerable confusion. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1048-49 (1984) (holding that the exclusionary rule barring admission of evidence obtained in violation of the Fourth Amendment does not apply to civil deportation proceedings); *Matter of Sandoval*, 17 I&N Dec. 70, 80 (BIA 1979) (same). However, in *Matter of Toro*, 17 I&N Dec. 340, 343 (BIA 1980), the Board found that the circumstances surrounding an arrest and interrogation in violation of the Fourth Amendment may result in evidence, the admission of which would be fundamentally unfair and violate the Fifth Amendment guarantee of due process. *See also Lopez-Mendoza*, 468 U.S. at 1050 n.5, 1051 (citing *Matter of Toro*, and noting that an "egregious" violation of the Fourth Amendment may result in the suppression of evidence). All of these authorities emphatically state, however, that the identity of an alien is never suppressible, even when the search, arrest, or interrogation violated the Fourth Amendment. *See, e.g.*, *id.* at 1039-40. Furthermore, the Fourth Amendment issue is not even reached if the actions of law enforcement did not constitute a "seizure." *See Pinto-Montoya v. Mukasey*, 540 F.3d 126 (2d Cir. 2008) (holding that questioning by plain-clothes immigration agents at the end of an airplane departure ramp was not a seizure).

The "egregious conduct" exception, however, has led to a handful of circuit court decisions either mandating the suppression of evidence or drawing lines indicating when suppression should occur. *See Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1018 (9th Cir. 2008) (holding that a warrantless entry without consent into a home was an "egregious" violation warranting suppression of evidence, because "reasonable" officers should know that such conduct violates the Fourth Amendment); *Orhorhaghe v. INS*, 38 F.3d 488 (9th Cir. 1994) (holding that a nonconsensual warrantless search based on an alien's foreign-sounding name was an egregious violation warranting suppression); *cf. Melnitsenko v. Mukasey*, 517 F.3d 42 (2d Cir. 2008) (holding that a 3-hour detention at a checkpoint near the border was not an "egregious" violation, if any, of the Fourth Amendment); *cf. Singh v. Mukasey*, 553 F.3d 207 (2d Cir. 2009) (holding that the all-night questioning of a lawful permanent resident at the Canadian border, accompanied by pressure tactics, required suppression of the alien's statement as a violation of the *Fifth* Amendment right to due process).

Judge Bybee noted in his concurring opinion in *Lopez-Rodriguez* that the case law of the Ninth Circuit appears to be on a "collision course" with the Supreme Court's fundamental holding in *Lopez-Mendoza* that the exclusionary rule does not apply in immigration

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proceedings. *Lopez-Rodriguez*, 536 F.3d at 1019 (Bybee, J., concurring). "Our case law appears destined to import the exclusionary rule, with all of its attendant costs, back into immigration proceedings, after the Court has taken it out. At some point, we may wish to revisit our position." *Id.* at 1020. The Second Circuit, as he noted, takes a more stringent view of what constitutes "egregious" conduct. *Id.* at 1020 n.1. A two-part test set forth in *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235 (2d Cir. 2006), requires either (a) that an egregious violation that was fundamentally unfair occurred, or (b) that the violation—regardless of the egregiousness or unfairness—undermined the reliability of the evidence in dispute. Regarding the first prong, the court emphasized that focus cannot be placed merely on the validity or invalidity of the seizure or interrogation—focus must also be placed on the characteristics or severity of the offending conduct. On the flip side, even if the seizure is not "severe," it may be egregious if motivated by a "grossly improper consideration" such as race. *Id.*

Recently, the Seventh, Eighth, and Ninth Circuits have ruled on several issues raised in motions to suppress filed by alien petitioners. *Martinez-Medina v. Holder*, No. 06-75778, 2011 WL 855791 (9th Cir. Mar. 11, 2011), *superseding* 616 F.3d 1011 (9th Cir. 2010); *United States v. Garcia-Garcia*, No. 09-1840, 2011 WL 206153 (7th Cir. Jan. 25, 2011); *Puc-Ruiz v. Holder*, 629 F.3d 771 (8th Cir. 2010). Most of the issues addressed in these decisions echo the case law cited above and have been analyzed comprehensively in these pages. *See* Sara A. Stanley and Daniel L. Swanwick, *Suppression: Respondents Look for a Shield and Sword in Immigration Proceedings*, Immigration Law Advisor, Vol. 2, No. 6 (June 2008). The cases under discussion break no new ground, yet address situations common to the motions to suppress most frequently filed in immigration court: aliens apprehended in the course of police enforcement of unrelated criminal laws; aliens detained by local law enforcement, pending the arrival of immigration agents, once they admit their unlawful status; and aliens who seek to suppress "identity" evidence linking them to past immigration violations.

Finally, the Supreme Court, in a case argued March 21, 2011, will address the scope of the rule that "identity" can never be suppressed on Fourth Amendment grounds. We will conclude with a brief discussion of the issues in that pending case.

***Puc-Ruiz*: Show Me the Way To Go Home?**

The petitioner in *Puc-Ruiz*, 629 F.3d 771, had been arrested during an early morning police raid on a restaurant that was serving alcohol in violation of a municipal ordinance. He moved to suppress evidence on grounds that it was obtained in violation of his Fourth and Fifth Amendment rights and in contravention of agency regulation. *Id.* at 775. The evidence the petitioner sought to suppress included his statements relating to his immigration status made to an ICE agent, a Form I-213 issued after his interviews with the agent, and a prior IDENT record that revealed that he had previously been granted voluntary departure. After finding that the probative value of the evidence obtained was undisputed, the Eighth Circuit addressed, as a matter of first impression, whether the alleged violation was "egregious . . . to 'transgress notions of fundamental fairness'" under *Lopez-Mendoza*. *Id.* at 778 (quoting *Lopez-Mendoza*, 468 U.S. at 1050). The court applied *Rochin v. California*, 342 U.S. 165, 172-73 (1952) (stating that "brutal conduct," which "shocks the conscience" and "offend[s] the community's sense of fair play and decency" constitutes egregious behavior), and the Ninth Circuit's *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1449 (9th Cir. 1994) (stating that physical brutality is not necessary for conduct to be egregious), and found no egregiousness in the police arrest and detention of the petitioner. The court further found that the police had probable cause to carry out the petitioner's arrest because they were acting on a tip—thanks to the wife of one of the early morning imbibers.

The Eighth Circuit also dismissed the petitioner's argument that admission of the information he provided in his interview with ICE officers violated his rights of due process because the agent's questioning was coercive, and he was not informed of his rights or provided an explanation of the reasons for his arrest. Finding that the petitioner had not asserted in his affidavit that ICE had engaged in any particular misconduct and that his statements were given freely and voluntarily, the court concluded that no due process violation occurred.

The court also dismissed the petitioner's final claim that ICE had violated agency regulations under 8 C.F.R. §§ 287.3(a) and (c) regarding procedures for aliens arrested without a warrant. The court found the regulations inapplicable because ICE had obtained the

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evidence establishing the petitioner's unlawful status in the United States over the phone while the petitioner was still in police custody. *See Puc-Ruiz*, 629 F.3d at 780-81; *see also Samayoa-Martinez v. Holder*, 558 F.3d 897 (9th Cir. 2009) (holding that a border patrol agent's telephone interview of an alien detained by the military police was not a regulatory violation); *Rajah v. Mukasey*, 544 F.3d 427 (2d Cir. 2008) (holding that violations of 8 C.F.R. §§ 287.3 and 287.8 cannot result in suppression where the violations were harmless and nonegregious); *cf. de Rodriguez-Echeverria v. Mukasey*, 534 F.3d 1047 (9th Cir. 2008) (holding that border patrol officers are required to comply with the regulations when an alien is arrested without warrant and is interrogated overnight).

Martinez-Medina: Perhaps Overheated, But Not Egregious

In *Martinez-Medina*, 2011 WL 855791, the petitioners, a father and son, were approached by a deputy sheriff at a gas station, where they had stopped to cool down an overheated engine. The sheriff inquired about their immigration status. Upon informing the deputy sheriff that they had unlawful status in the United States, the petitioners were detained for an hour and a half or 2 hours "solely by verbal instruction" until an immigration officer arrived. *Id.* at *2. The petitioners were then transported to a border patrol station by an immigration agent without any notice of the reasons for their arrest. *Id.* They were interviewed at the patrol station and a Form I-213 was issued for each. *Id.* at *3.

The Ninth Circuit first determined that because the petitioner's initial encounter with the deputy sheriff was "consensual," in that the petitioners felt they were free to leave and not answer his questions, it was not a violation of their Fourth Amendment rights. *Id.* at *4. It thus gave greater focus to whether the petitioners' subsequent detention by the deputy sheriff until the immigration agent arrived was egregious. In so doing, the court relied upon its prior holdings that an egregious violation is found where "evidence is obtained by deliberate violations of the [F]ourth [A]mendment, or by conduct a reasonable officer should have known is in violation of the Constitution." *Id.* at *5 (quoting *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1448 (9th Cir. 1994) (internal quotations marks omitted)). The court looked first for evidence demonstrating that the deputy sheriff "deliberately violated the Fourth Amendment." *Id.* at *6. Finding that because "[t]he law was unclear as to whether an alien's admission to being illegally present in the United States created probable cause," the court found that the deputy sheriff "was not acting against an unequivocal doctrinal backdrop," and thus, there was no egregious Fourth Amendment violation. *Id.* The court held that in light of the lack of clarity of the case law on the issue, "a reasonable officer could have concluded that an alien's illegal presence in the United States is a crime." *Id.* However, the court further held that a closer reading of the case law reveals the "the law of the circuit" on the issue, which it reasserted as "'an alien who is illegally present in the United States . . . [commits] only a civil violation,' and . . . [his] 'admission of illegal presence . . . does not, without more, provide probable cause of the criminal violation of illegal entry.'" *Id.* (quoting *Gonzales v. City of Peoria*, 722 F.3d 468, 476-77 (9th Cir. 1983)). The court then provided a reminder that this law is binding on law enforcement officers. *Id.*

The petitioners also argued that the deputy sheriff committed an egregious Fourth Amendment violation because he should have known that he violated State law when he detained them or because he seized them "based solely on the fact they are Hispanic." *Id.* at *8. The court was not persuaded by either argument. Although the court found that the deputy sheriff, indeed, lacked authority under State law "to apprehend Petitioners based solely on a violation of federal immigration law," this violation did not amount to an infringement on the petitioners' Fourth Amendment rights. *Id.* Moreover, the court found that evidence did not support the petitioners' race-based contention against the deputy sheriff, particularly where they had already informed the deputy sheriff of their illegal immigration status when they were seized by him. *Id.*

Garcia-Garcia: I Yam What I Yam— But Do You Have a Right to Know?

Popeye may have fulsomely crowed his identity, but not all do so, particularly those for whom such disclosure may put them at risk of legal enforcement. Nevertheless, courts have consistently held that the "body" or identity of an individual is never suppressible, even if the fruit of an unreasonable search or seizure, and the Seventh Circuit recently expanded the understanding of "identity" to include information regarding the petitioner's actual illegal presence in the United States. *Garcia-Garcia*, 2011 WL 206153, at *7.

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The petitioner was pulled over on I-55 in Illinois by a State trooper, ostensibly for having objects too large (air freshener) hanging from his rearview mirror, a violation of State law. During the course of the traffic stop, the petitioner's passengers informed the trooper that they were all illegally present in the United States. The trooper had his dispatcher contact ICE, which sent an agent to the scene; the agent brought the petitioner and his passengers in for questioning. Based on his admissions during questioning, the petitioner was charged with knowingly transporting illegal aliens.

The bulk of the court's decision focused on the reasonableness of the stop—specifically, did the trooper act reasonably when he determined that the air freshener constituted a "material obstruction" of the driver's view. It concluded that while the object was small, a reasonable officer could conclude that its placement violated the law and that this reasonable belief was all that was needed to justify the stop. But even if the stop did violate the Fourth Amendment, this would not justify suppression of the "most important" evidence the petitioner sought to exclude: his identification as an illegal alien. *See id.* at *2, *7. The petitioner, "having previously been deported, and not having obtained the consent of the Attorney General to return, is a person whose presence in this country, without more, constitutes a crime." *Id.* at *7. The court linked the petitioner's illegal presence in the United States to his identity, which it reasserted "may not be suppressed even if it was obtained in violation of the Fourth Amendment." *Id.* This approach suggests a conflict with the Ninth Circuit's understanding that there is no "federal criminal statute making unlawful presence in the United States, alone, a federal crime." *Martinez-Medina*, 2011 WL 855791, at *6.

The issue whether identity can be suppressed will be further examined by the Supreme Court in a case argued on March 21, 2011. S*ee People v. Tolentino*, 926 N.E. 2d 1212 (N.Y. 2010), *cert. granted*, *Tolentino v. New York*, 131 S. Ct. 595 (U.S. Nov. 15, 2010) (No. 09-11556). *Tolentino* will address whether preexisting government records that were accessed by identity information allegedly obtained in violation of the Fourth Amendment are subject to the exclusionary rule. The New York Court of Appeals, citing *Lopez-Mendoza*, held that the exclusionary rule cannot operate to exclude evidence of identity and that identity evidence so obtained can be used to obtain existing government records to establish criminal liability.

The petitioner was pulled over by New York police officers, ostensibly for playing music too loudly. Upon obtaining the petitioner's identity, the police officers searched State motor vehicle records and discovered that the petitioner was driving on a suspended license. The petitioner was arrested and later pled guilty to aggravated unlicensed operation of a motor vehicle in the first degree. The petitioner argues that his traffic stop was "random" and "baseless," in that he was not playing his music at a high volume or driving contrary to traffic law, and that the DMV records should be suppressed as the poisonous fruits of an illegal stop. See Brief for Petitioner at 11, *Tolentino v. State of New York*, 131 S. Ct. 595 (2011) (No. 09-11556), 2011 WL 118264, at *11.

The petitioner also argues that the "independent source" doctrine is inapplicable to his case because "the police gained knowledge of [his] status as an unlicensed driver entirely as a result of their illegal [arrest]." Brief for Petitioner, *supra*, at 30. In immigration cases, it has long been held that once a respondent is in proceedings, evidence obtained as the result of an alleged illegal arrest is admissible, as long as evidence obtained independently from the arrest (such as a judicial admission) supports the charge of deportability. *Rodriguez-Gonzalez v. INS*, 640 F.2d 1139 (9th Cir. 1981); *see also Lopez-Mendoza*, 468 U.S. at 1047 n.3 (stating that the exclusionary rule would not apply if an alien voluntarily admitted his status in an application for relief). This "independently obtained" evidence has included information pulled from official records. *See United States v. Guzman-Bruno*, 27 F.3d 420 (9th Cir. 1994) (noting that the defendant's statement of his name during his arrest allowed officials to pull up the record of his prior deportations).

Tolentino is clearly intended to address and resolve pending concerns on the scope of the rule that the "body" or identity of a criminal defendant can never be suppressed. Whether the Court affirms, extends, or retreats from that rule could have significant impact on still-pending and future motions to suppress in Immigration Court.

Conclusion

Judge Bybee's comments regarding the Ninth Circuit notwithstanding, no circuit has rejected the proposition that as a starting point in addressing a motion to suppress, the "exclusionary rule" does not apply to removal proceedings. Nevertheless, motions to invoke the rule persist. The cases discussed here suggest a

multipart inquiry in addressing such motions: (1) was there was a seizure, *see Pinto-Montoya*, 540 F.3d 126; (2) if so, was the seizure justified by reasonable suspicion of illegal activity, *see Garcia-Garcia*, 2011 WL 206153; *Puc-Ruiz*, 629 F.3d 771; (3) if not, were the facts and circumstances of the seizure—including whether it was justified by a wholly impermissible factor such as race—sufficiently severe as to constitute "egregious" conduct; and (4) even if the conduct was egregious, does the evidence sought to be suppressed relate to the "body" or identity of the respondent.

Cases arising in the Ninth Circuit will require a somewhat different approach—one that could equate a deliberate or clearly unreasonable violation of the Fourth Amendment to "egregious" conduct. However, decisions such as *Martinez-Medina*, 2011 WL 855791, and *Samayoa-Martinez*, 558 F.3d 897, establish that not all seizures without warrant will constitute such a violation. Finally, close attention should be paid to the forthcoming Supreme Court decision in *Tolentino* relating to the admissibility of evidence based on identity-based information obtained through allegedly unconstitutional means.

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RECENT COURT OPINIONS

Third Circuit:

Chen v. Att'y Gen. of U.S., No. 09-3459, 2011 WL 923353 (3d Cir. Mar. 18, 2011): The Third Circuit denied the petition for review of a Board decision (affirming the Immigration Judge) that denied asylum to a couple from China claiming a well-founded fear of persecution based on the birth of two U.S. citizen children and their stated desire to have a third child. The Immigration Judge rejected, for lack of authentication, a letter, purportedly obtained by the female petitioner's mother from the local Village Committee in China, indicating that the female petitioner would be sterilized upon return to China. On appeal, the petitioners challenged the Board's "generic reliance" on *Matter of J-W-S-*, claiming that the Immigration Judge and the Board ignored evidence that the U.S.-born children would be treated as Chinese citizens. In its decision, the circuit court acknowledged the Board's recent precedent decision in *Matter of H-L-H- & Z-Y-Z-*, a case that the court had not previously considered in a published decision. The court found that the Board's decision in that case comprehensively discussed, and persuasively addressed, many of the issues presented in the instant case. Thus the court found substantial evidence of record to support the denial of asylum. The court further concluded that the Immigration Judge and the Board did not ignore evidence of record, and it considered appropriate the Immigration Judge's reliance on State Department and Library of Congress reports in the record indicating that the U.S.-born children would not be treated as Chinese citizens in that country.

Fifth Circuit:

Kohwarien v. Holder, No. 09-60937, 2011 WL 754259 (5th Cir. Mar. 4, 2011): The Fifth Circuit denied the petition for review of a pro se petitioner who claimed that his acceptance of a grant of voluntary departure and waiver of appeal was not knowing and intelligent. The petitioner had previously been represented by an attorney who was eventually suspended from practice after the Immigration Judge had granted five adjournments. The petitioner was subsequently granted seven more continuances to obtain counsel, after which he proceeded pro se. Citing from the transcript of proceedings before the Immigration Judge, the circuit court rejected the petitioner's arguments that he had not requested voluntary departure and had not been asked if he accepted the Immigration Judge's decision as final. The court further found that the record did not support the conclusion that no reasonable fact finder could have found (as the Board did) that the petitioner's waiver of appeal was valid.

Gregoire v. Holder, No. 09-60254, 2011 WL 754873 (5th Cir. Mar. 4, 2011): The Fifth Circuit denied the petition for review of a decision of the Board reversing an Immigration Judge's order to reopen proceedings. The petitioner failed to appear for a removal hearing in March 2000. After being taken into custody by DHS more than 6 years later, the petitioner filed a motion to reopen claiming ineffective assistance of counsel. The Immigration Judge entered a decision reopening proceedings sua sponte on the grounds that petitioner's original asylum application had not been adjudicated and that she was now the beneficiary of an approved spousal immigrant visa petition. On appeal, the Board reversed, ruling that the motion to reopen was untimely. The petitioner argued before the circuit court that the

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Immigration Judge's authority to reopen sua sponte "at any time" trumps the 180-day statutory time limit on motions to rescind in absentia orders. Acknowledging a tension between the language of the two statutory provisions, the court found the Board's interpretation—that the specific statutory requirements governing the rescinding of an in absentia order trumps the general authority to reopen sua sponte—to be reasonable.

Ninth Circuit:

Ali v. Holder, Nos. 07-71195, 07-73559, 2011 WL 923412 (9th Cir. Mar. 18, 2011): The Ninth Circuit granted the petitions for review of an asylum applicant from Fiji whose applications for relief and subsequent motion to reopen based on changed country conditions had been denied. The Immigration Judge found that the alien had suffered past persecution but held that the resulting presumption of fear had been rebutted by the DHS's showing of changed country conditions. The Board affirmed and also denied a motion to reopen filed during the pendency of the appeal based on a 2006 coup in Fiji. The court held that in reaching its determination that the changed country conditions rebutted the applicant's fear, the agency failed to make an individualized determination as to how the changes impacted on the his specific circumstances. The court also found that the Board abused its discretion in denying the motion to reopen by similarly failing to analyze the impact of the coup on the applicant's well-founded fear. The record was remanded to the Board for reconsideration.

Tenth Circuit:

Padilla-Caldera v. Holder, No. 10-9520, 2011 WL 856272 (10th Cir. Mar. 14, 2011): The Tenth Circuit denied the petition for review of the Board's decision finding the alien ineligible for adjustment of status and ordering his removal. The Board based its decision on the fact that the alien, after remaining illegally in the U.S. for more than 1 year, had departed and reentered the U.S. without inspection, which rendered him inadmissible under section 212(a)(9)(C)(i)(I) of the Act. The Board further found that the alien's statutory inadmissibility made him ineligible for a waiver under section 245(i) of the Act. The circuit court had initially remanded the matter to the Board after holding that the two sections of the statute were contradictory. However, the Board subsequently issued a precedent decision, *Matter of Briones*, examining the interplay between the two sections of the Act. On the second appeal, the circuit court held that *Matter of Briones* was a reasonable interpretation of the statutes that was worthy of deference and therefore affirmed the Board's decision.

Eleventh Circuit:

Accardo v. U.S Att'y Gen., No. 09-15446, 2011 WL 814840 (11th Cir. Mar 10, 2011): The Eleventh Circuit granted the petition for review of a decision of the Board affirming an Immigration Judge's finding that the petitioner was removable as one convicted of an aggravated felony. The Immigration Judge held that the petitioner's offense, making an extortionate extension of credit in violation of 18 U.S.C. § 892(a), was categorically a crime of violence. The court disagreed, finding that although the language of the statute covered acts of violence that would result from the failure to repay a loan, it also included actions (such as causing harm to the defaulter's reputation) that could be accomplished through nonviolent means. The court therefore remanded the record for the Board to apply a modified categorical approach in the first instance.

BIA PRECEDENT DECISIONS

In *Matter of Vo*, 25 I&N Dec. 426 (BIA 2011), the Board considered whether the respondent's conviction for attempted grand theft, along with an earlier conviction for grand theft, rendered him removable under section 237(a)(2)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(ii), for conviction of two crimes involving moral turpitude. The Immigration Judge found that because section 237(a)(2)(A) does not expressly reference "attempts," as does section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), the respondent's crime did not qualify as a deportable offense, so he terminated the proceedings. The Department of Homeland Security appealed. The Board first stated the well-established principle that with respect to moral turpitude, there is no distinction between the commission of a substantive crime and the attempt to commit it. Noting that Congress added the "attempt" language to various sections of the Act at different times, the Board determined that it could not reasonably conclude that the inclusion of attempts in those other sections represented a unified design to effectuate a single intent or that Congress' express inclusion of attempt offenses in some sections indicated its intentional exclusion of them from other sections.

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The Board therefore held that the respondent's attempt conviction was for a crime involving moral turpitude within the meaning of the statute and that he was deportable as charged.

In *Matter of Sesay*, 25 I&N Dec. 431 (BIA 2011), the Board addressed the process of adjustment of status for K-1 visa holders. The issue presented was whether a K-1 visa holder who timely marries the I-129 visa petitioner remains eligible to adjust status outside the conditional residence period, after dissolution of the bona fide marriage. The respondent was admitted to the United States in April 2000 as a K-1 nonimmigrant (fiancé of a United States citizen) for a 90-day period. He married his fiancée (the I-129F visa petitioner) 10 days later, and they had a son in 2001. The respondent filed an application for adjustment of status, which the former Immigration and Naturalization Service ("INS") improperly denied on the basis that it was not adjudicated within 2 years of his marriage. The respondent divorced the I-129F petitioner in June 2003 and a Notice to Appear was issued, charging the respondent with removability under section 237(a)(1)(B) of the Act. In 2004, the respondent married his second wife, who filed an immediate relative visa petition (I-130) on his behalf. In removal proceedings, the respondent renewed his adjustment application based on his I-129F fiancé petition. He also filed an adjustment application premised on the I-130 petition filed by his current wife. The Immigration Judge denied both adjustment applications, finding that he had no jurisdiction to adjudicate the adjustment application based on the respondent's first marriage because it was no longer in existence. The Immigration Judge denied the I-130 adjustment application because the respondent had been admitted on a fiancé visa and therefore could only adjust based on the I-129F petition.

The Board concluded that a K-1 nonimmigrant is eligible to adjust if, at the time of adjustment, the applicant can demonstrate that he or she entered into a valid marriage within the 90-day period to the I-129F petitioner, provided that the requirements of section 216 of the Act, 8 U.S.C. §1186a, do not apply. The Board first recognized statutory gaps and ambiguities, primarily in the question whether a K-1 visa holder can satisfy the immigrant visa eligibility and availability requirements of sections 245(a)(2) and (3) of the Act, 8 U.S.C. §§ 1255(a)(2) and (3). Noting that Congress did not specify the statutory mechanism that would allow nonimmigrant fiancé(e)s to qualify as immigrants, the Board determined that fiancé(e) visa holders are the functional equivalents of immediate relatives and found that to avoid the absurd result of disqualifying all such visa holders from statutory eligibility, fiancé(e)s may adjust status.

The Board then considered whether K-1s remain admissible, as required by section 245(a)(2) of the Act, despite divorce from the I-129F petitioner. Noting that an I-129F, unlike an I-130 petition, is not automatically revoked when the marriage terminates, the Board found that a K-1 applicant for admission to the United States satisfies the requirements for adjustment at the time of admission, conditioned on a subsequent, timely marriage to the I-129F petitioner. Therefore, the Board concluded that a fiancé(e) visa holder is not precluded from adjusting, even if the marriage no longer exists, if he or she is not otherwise inadmissible and merits a favorable exercise of discretion.

The Board next addressed whether K-1s are uniformly affected by the requirements of section 216 of the Act, as described in section 245(d). The Board agreed with an interpretation put forth by the former INS that a K-1 visa holder whose valid marriage is over 2 years old at the time of adjustment can adjust without meeting the section 216 requirements. The Board therefore found that the statutory language does not require a K-1 visa holder's marriage to the I-129F petitioner to be intact if the adjustment application is adjudicated outside the 2-year conditional residence period.

Lastly, the Board considered the appropriate discretionary factors for K-1 adjustment applications, finding that a divorce should not be considered an automatic negative factor unless circumstances surrounding that marriage indicate otherwise. Turning to the respondent's situation, the Board concluded that he had completed the required steps in the fiancé adjustment process and that he was not subject to the provisions of section 216 because his marriage was more than 2 years old when his adjustment application was adjudicated. Thus, the Board found that his divorce did not render him ineligible for adjustment of status and remanded the record for consideration of his application as a matter of discretion.

REGULATORY UPDATE

76 Fed. Reg. 16,525
DEPARTMENT OF JUSTICE
Executive Office for Immigration Review

Reorganization of Regulations on Control of Employment of Aliens

SUMMARY: This final rule adopts without change an interim rule with request for comments published in the Federal Register on January 15, 2009. The interim rule amended regulations of the Executive Office for Immigration Review (EOIR), Department of Justice, by deleting the unnecessary, duplicative provisions in part 1274a of chapter V in title 8 of the Code of Federal Regulations (CFR) that are the responsibility of the Department of Homeland Security (DHS). This rule also revised the remaining provisions in part 1274a to reference the applicable DHS regulations.
DATES: This rule is effective March 24, 2011.

76 Fed. Reg. 16,231
DEPARTMENT OF HOMELAND SECURITY
U.S. Customs and Border Protection

Clarification of Countries and Geographic Areas Eligible for Participation in the Guam-Commonwealth of the Northern Mariana Islands Visa Waiver Program

ACTION: Interim final rule; solicitation of comments.
SUMMARY: This interim final rule amends Department of Homeland Security regulations to clarify that individuals holding British National (Overseas) (BN(O)) passports as a result of their connection to the Hong Kong Special Administrative Region (Hong Kong) are eligible for participation in the Guam-Commonwealth of the Northern Mariana Islands (CNMI) Visa Waiver Program. The Guam-CNMI Visa Waiver Program allows certain nonimmigrant aliens to enter Guam and/or the CNMI as nonimmigrant visitors for business or pleasure without a visa for a period of authorized stay not to exceed forty-five days. This interim final rule provides that beginning May 23, 2011, individuals holding BN(O) passports as a result of their connection to Hong Kong and traveling to Guam and/or the CNMI under the Guam-CNMI Visa Waiver Program on such BN(O) passport must present it and a Hong Kong identification card.
DATES: Effective Date: The effective date of the rule is May 23, 2011.

76 Fed. Reg. 14,679
DEPARTMENT OF HOMELAND SECURITY
U.S. Citizenship and Immigration Services

Prevailing Wage Rates for Construction Occupations on Guam for Purposes of the H–2B Temporary Worker Program

ACTION: Notice.
SUMMARY: U.S. Citizenship and Immigration Services (USCIS) is requesting comments from the public on the system that the Governor of Guam is using to determine prevailing wage rates for construction occupations on Guam. In addition, USCIS is posting the most recent prevailing wage rates that have been proposed by the Governor of Guam based on the system described in this notice. Based on its own analysis and input from the public, USCIS will determine whether the prevailing wage rates suggested by the Governor of Guam are reasonable and whether USCIS should require a new system to be used by the Governor of Guam in determining the prevailing wage rates.
DATES: Written comments must be submitted on or before April 18, 2011.

Trust, but Verify: Document Similiarities *continued*

and appropriately dismissed them after applying rigorous procedural safeguards in the proceedings before the Immigration Court. First, the Immigration Judge had notified the applicant of the similarities and provided her with a copy of his annotations; second, he had clearly expressed his concerns about the similarities; third, he had given her several opportunities to comment; and finally, he had invited her to offer evidence of an innocent explanation. *Id.* at 525 (applying the notice requirements of *Ming Shi Xue v. BIA*, 439 F.3d 111 (2d Cir. 2006)). The court held that the Immigration Judge's application of these procedures warranted its deference to the inferences he drew from the inter-proceeding similarities. It indicated, though, that it would "view much more skeptically an adverse credibility finding by an IJ who, in relying on inter-proceeding similarities, adopted a less rigorous approach." *Id.* at 527.

The Second Circuit applied the same logic to uphold an adverse credibility finding by an Immigration Judge based in part on inter-proceeding similarities in a

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recent unpublished order denying an asylum applicant's petition for review. *Deysi v. Holder*, 368 F. App'x 239 (2d Cir. 2010). There, the Immigration Judge had relied on linguistic and narrative similarities between the applicant's application, which had been prepared by the Chinese Indonesian American Society, and fraudulent applications prepared by the same organization. While the brief order does not indicate whether or not the Immigration Judge followed the procedural safeguards outlined in *Mei Chai Ye*, the court cited that opinion for the proposition that an Immigration Judge can rely on inter-proceeding similarities to undermine an applicant's credibility. *Id.* at 240-41.

In contrast, other courts have overturned adverse credibility findings based in part on inter-proceeding similarities in cases where the similarities between the cases were less obvious and the logic of the Immigration Judge's finding was less clear. Although these cases have, thus far, only dealt with asylum applications filed prior to the effective date of the REAL ID Act, the circuit courts' reasoning would apply with equal force in the post-REAL ID Act environment. The courts have been particularly skeptical of adverse credibility findings based on general similarities between applicants' narratives, rather than linguistic and structural similarities between particular documents.

For example, the Sixth Circuit, in *Chen v. Gonzales*, 447 F.3d 468 (6th Cir. 2006), considered the question whether an adjudicator can rely on the similarities between an asylum applicant's story and claims that, according to evidence in the record, frequently appear in fraudulent asylum applications. The Immigration Judge in that case based an adverse credibility finding for a Chinese applicant in part on the State Department's *Profile of Asylum Claims and Country Conditions*, which listed eight specific elements that frequently appear in the stories of asylum applications for individuals from Fujian Province. The profile stated that although each of these elements does, in fact, occur in Fujian Province, reporting from State Department officials indicates that they do not occur at the frequency with which they are reported. The Immigration Judge found that the story of the applicant in the case matched four of the elements identified by the State Department, which supported an inference that his account was fabricated. *Id*. at 473-74.

The Sixth Circuit held that the similarities identified by the Immigration Judge did not constitute substantial evidence on which to base an adverse credibility finding. In a detailed discussion of the Immigration Judge's findings, the court noted both that the applicant's story did not contain many of the elements identified by the State Department and that the elements that were present were not as similar in their specifics to the applicant's claim as the Immigration Judge had asserted. While the court did not expressly forbid the consideration of similarities between aspects of an asylum application and elements that are frequently fabricated in other cases, it held that "[a]bsent some other indicia of unreliability . . . mere reliance upon some similarities with frequently fabricated elements of other asylum claims provides no evidence to substantiate a determination that the petitioners lacked credibility." *Id*. at 474.

Similar issues arise when Immigration Judges use general similarities between applicants' claims and other claims outside the record that they have encountered on their dockets to impugn an applicant's credibility. In *Shahinaj v. Gonzales*, 481 F.3d 1027 (8th Cir. 2007), the Eighth Circuit considered a petition to review an adverse credibility finding based in part on the Immigration Judge's experience with similar overall claims. The petitioner in the case was an Albanian asylum applicant claiming that he had been persecuted on account of both his homosexuality and his political activities as an election observer. The Immigration Judge did not refer to specific inter-proceeding similarities, but he found the applicant not credible, in part because he observed that more than three-quarters of the gay Albanian asylum applicants he had encountered in his personal experience had also claimed to be election observers. *Id.* at 1028.

The Board declined to adopt the Immigration Judge's opinion "insofar as [it] referred to circumstances from other proceedings," but it found no clear error in the Immigration Judge's credibility determination. *Id.* The Eighth Circuit nevertheless granted the petition for review because it found that "the BIA did not explain how the IJ's remaining findings and credibility determination as a whole were not tainted by the IJ's bias." *Id.* at 1029.

Even where inter-proceeding similarities exist between specific documents and are entered into evidence, though, problems may arise if the adjudicator fails to explain how the similarities support the adverse credibility finding. In *Kourouma v. Holder*, 588 F.3d 234 (4th Cir. 2009), the Fourth Circuit addressed this issue. The case involved a Guinean asylum applicant who had submitted

an affidavit containing language "substantially similar" to the language of an affidavit in another proceeding. *Id*. at 242. The Immigration Judge admitted the affidavit from the other case into the record and used it to support her finding that the applicant was not credible. To explain her determination, the Immigration Judge merely stated, "The documents speak for themselves," and the Board repeated her language. *Id*.

The court, relying on precedent requiring that an Immigration Judge state "specific, cogent" reasons for an adverse credibility finding, found that the Immigration Judge's "conclusory statement" was insufficient to support this aspect of her determination. *Id*. at 242-43 (citing *Camara v. Ashcroft*, 378 F.3d 361, 367 (4th Cir. 2004)). It further noted that the Immigration Judge had made no finding as to which affidavit had been written first and held that, therefore, "the fact of similarity alone can have no effect on [the petitioner's] credibility." *Id.* at 243.

No court, however, has yet addressed the potential tension between the admission of evidence of inter-proceeding similarities into the record in asylum cases and the regulation at 8 C.F.R. § 208.6, which generally protects the information contained in asylum applications from disclosure to third parties without the written consent of the applicant. In the proceedings underlying *Nyama* and *Kourouma*, unredacted asylum applications from other proceedings were apparently entered into the record without comment from the Board or the circuit courts in those cases. In *Mei Chai Ye*, on the other hand, the Immigration Judge instructed the Government to redact the applications from the other proceedings. Neither the Immigration Judge nor the circuit court, though, mentioned that the redaction might have negative consequences for the applicant's practical ability to comment on and explain the similarities. It remains to be seen whether immigration adjudicators will be able to strike an appropriate balance between the right of one applicant to confidentiality and the right of the other applicant to respond to the evidence presented against him.

Conclusion

No court aside from the Second Circuit has yet outlined a framework to determine when it is appropriate for an adjudicator to use either intra-proceeding or inter-proceeding similarities in an adverse credibility determination. Generally, though, it is apparent that despite the unique issues this question poses, courts have been willing to accept the use of specific similarities between documents to support adverse credibility findings so long as the applicants' basic rights to respond to the evidence presented has been respected and the adjudicator's decision has been supported by cogent reasoning.

The circuit court opinions rejecting inter-proceeding similarities make it clear that their use is inappropriate in certain circumstances. As with all adverse credibility determinations, the decision must be based on evidence in the record, rather than on the adjudicator's personal experiences. If the adjudicator admits evidence of similarities into the record, the decision must be based on cogent, specific reasoning, and the similarities must themselves be sufficiently specific to support a determination that they impugn the applicant's credibility. It remains to be seen whether similarities in testimony alone or between narratives, as opposed to more specific similarities between documents, can be used in the same way. These constraints nevertheless give adjudicators a large degree of freedom to use both intra- and inter-proceeding similarities to support adverse credibility findings in certain cases.

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