Jul 22 Attorneys and Credible Fear Review

It is difficult not to cry (as I did) while listening to the recording of a recent immigration court hearing at a detention facility near the border. The immigration judge addresses a rape victim who fled to this country seeking asylum. She indicates that she does not feel well enough to proceed. When asked by the judge if she had been seen by the jail's medical unit, the woman responds that she just wants to see her child (who had been forcibly separated from her by ICE), and breaks down crying. The judge is heard telling a lawyer to sit down before he can speak. The woman, still crying, repeats that she just wants to see her child. The immigration judge proceeds to matter-of-factly affirm the finding of DHS denying her the right to apply for asylum. The judge then allows the attorney to speak; he points out for the record that the woman was unable to participate in her own hearing. The judge replies "so noted." He wishes the woman a safe trip back to the country in which she was raped, and directs her to be brought to the medical unit. He then moves on to the next case on his docket. Neither

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DHS (in its initial denial) nor the immigration judge (in his affirmance) provided any explanation or reasoning whatsoever for their decisions. According to immigration attorneys who have recently represented asylum seekers near the border, this is the new normal.

Under legislation passed in 1996, most non-citizens seeking entry to the U.S. at airports or borders who are not deemed admissible are subjected to summary removal by DHS without a hearing. However, those who express a fear of harm if returned to their country are detained and subjected to a "credible fear interview" by a USCIS asylum officer. This interview is designed as a screening, not a full-blown application for asylum. The noncitizen being interviewed has just arrived, is detained, often has not yet had the opportunity to consult with a lawyer, probably does not yet know the legal standard for asylum, and has not had the opportunity to compile documentation in support of the claim. Therefore, the law sets what is intended to be a very low standard: the asylum officer need only find that there is a significant possibility that the noncitizen could establish in a full hearing before an immigration judge eligibility for asylum.1

If the asylum officer does not find credible fear to exist, the noncitizen has one chance for review, at a credible fear review hearing before an immigration judge. This is an unusual hearing. Normally, immigration judges are trial-level judges, creating the record of testimony and other evidence, and then entering the initial rulings on deportability and eligibility for relief. But in a credible fear review hearing, the immigration judge also functions as an appellate judge, reviewing the decision of the asylum officer not to vacate an already entered order of removal. The immigration judge either affirms the DHS determination (meaning that the respondent has no right to a hearing, or to file applications for relief, including asylum), or vacates the DHS removal order. There is no further appeal from an immigration judge's decision regarding credible fear.

Appeal courts do not hear testimony. At the appellate level, it is the lawyers who do all of the talking, arguing why the decision below was or was not correct. The question being considered by the immigration judge in a credible fear review hearing - whether the asylum officer reasonably concluded that there is not a significant possibility that the applicant could establish eligibility for asylum at a full hearing before an immigration judge - is clearly a lawyer question. The noncitizen applicant would not be expected to understand the legal standard.

At the present time, determining the legal standard is especially complicated. In light of the Attorney General's recent decision in *Matter of A-B-*, all claims involving members of a particular social group fearing what the A.G. refers to as "private criminal actors" must clearly delineate the particular social group, explain how such group satisfies the requirements of immutability, particularity, and social distinction, meet a heightened standard of showing the government's inability or unwillingness to protect, and show that internal relocation within the country of nationality is not reasonable.

An experienced immigration lawyer could make these arguments in a matter of minutes, by delineating the group, and explaining what evidence the applicant expects to present to the immigration judge to meet the required criteria.

However, the Office of the Chief Immigration Judge's Practice Manual states the following:

(C) Representation. — Prior to the credible fear review, the alien may consult with a person or persons of the alien's choosing. In the discretion of the Immigration Judge, persons consulted may be present during the credible fear review. **However, the alien is not represented at the credible fear review.** Accordingly, persons acting on the alien's behalf are not entitled to make opening statements, call and question witnesses, conduct cross examinations, object to evidence, or make closing arguments. (emphasis added).

Therefore, at best, a credible fear review hearing consists of the immigration judge asking the respondent an abbreviated version of the questions already asked and answered by the asylum officer. Often, the judge merely asks if the information told to the asylum officer was true (without necessarily mentioning what the asylum officer notes contain), and if there is anything else they wish to add. If the issue was whether the respondent was believable, this might make sense.2 However, the issue is more often whether the facts will qualify for asylum under current case law.

I have canvassed retired immigration judges, as well as attorneys whose clients have been through such hearings. The good news is that it is the practice of a number of judges (past and present) to allow attorney participation. And in some cases, it is making a difference. One lawyer who recently spent a week in south Texas was allowed by the judge there to make summary arguments on behalf of the respondents; the judge ended up reversing DHS and finding credible fear in all but one case. In Fiscal Year 2016 (the last year for which EOIR has

posted such statistics), immigration judges nationally reversed the DHS decision and found credible fear less than 28 percent of the time (i.e., in 2,086 out of 7,489 total cases).

However, other judges rely on the wording of the practice advisory to deny attorneys the right to participate. According to a July 14 CNN article, one lawyer recently had a judge deny 29 out of 29 separated parents claiming credible fear. Another lawyer was quoted in the same article citing a significant increase in credible fear denials since the Attorney General's decision in *A-B-* last month. https://www.cnn.com/2018/07/14/politics/sessions-asylum-impact-border/index.html (https://www.cnn.com/2018/07/14/politics/sessions-asylum-impact-border/index.html) This demonstrates why it is now even more important to allow attorney participation to assist judges in analyzing the facts of the respondent's case in light of this confusing new decision that many judges are still struggling to interpret. And as I recently reported in a separate blog post, USCIS just recently issued guidelines to its asylum officers to deny credible fear to victims of domestic violence and gang violence under a very wrong interpretation of Sessions' *A-B-* decision.

It is hoped that, considering the stakes involved, the Office of the Chief Judge will consider amending its guidelines to ensure the right to meaningful representation in credible fear review hearings.

Notes:

1. It should be noted that when legislation created the "well-founded fear" standard for asylum in 1980, both INS and the BIA seriously misapplied the standard until the Supreme Court corrected them seven years later. Although when it created the "credible fear" standard in the 1990s, INS assured that it would be a low standard, as credible fear determinations may not be appealed, there can be no similar correction by the federal courts.

2. Although credibility is not usually an issue, attorneys point out that while they are merely notes which contain inaccuracies and are generally not read back to the asylum-seeker to allow for correction, the notes are nevertheless often treated as verbatim transcripts by immigration judges.

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Jul 13 Matter of A-B- Being Misapplied by EOIR, DHS

(/blog/2018/7/13/matter-of-a-b-being-misapplied-by-eoir-dhs)

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