

by Dr. Alicia Triche



Due Process in a Deluge: Minimum Procedures for Meaningful Fact-Finding on an Overloaded Docket

The Fifth Amendment guarantees that “[n]o person shall ... be deprived of life, liberty, or property, without due process of law,” and one of the earliest lessons taught to immigration law students is that due process applies to removal proceedings.¹ The right to procedural due process ensures that certain minimum standards are upheld during the course of the hearing—including during fact-finding, which is among the most important functions performed by U.S. immigration judges. However, the sheer volume of cases these judges are currently being dealt raises a question of whether affording due process is, at present, a practical possibility. As of March, the total pending caseload in U.S. immigration courts was 441,939, with an average of more than 1,400 per judge.² Some individual judges have as many as 3,000 or even 4,000 cases on their docket at once. This situation has led Judge Dana Leigh Marks, president of the National Association of Immigration Judges, to call immigration court “death penalty cases in a traffic court setting.”³ In May, I spoke with Judge Marks, in her union capacity, about the extent of the current caseload and the implications this might hold for fact-finding and due process.

From an organizational standpoint, immigration court is the rough equivalent to a federal district court, serving as the place where pleadings and the trial take place, the record is made, and the judge makes findings of fact. Not every case on the docket involves a full application for relief on the merits, but those that do can be lengthy and complex. Each form of relief requires numerous factual requirements be met, and it is not unusual for a written decision to contain findings of fact that span 10 pages or more. Establishing the facts in persecution-based claims can be particularly complicated—or, as Judge Marks describes, “subtly ambiguous.”

As these findings of fact are being made, the immigration judge is also multitasking, in what Judge Marks calls “contemporaneous performance art.” Indeed, she says that she often feels like “the guy behind the curtain in *The Wizard of Oz*, in that I’m doing so many things on the bench.” Immigration judges must type notes as the case goes along, monitor security (as there’s no bailiff), mark exhibits, deal with translators about 83 percent of the time, and be mindful of cross-cultural issues that arise with people raised in various

demographics. This is a challenge under the best of circumstances, but from 2010 to 2014 alone, the immigration court caseload has grown by 87 percent.⁴ Individual trials that were once set aside for an entire morning or afternoon can now be allotted less than half that time. The pressure, says Marks, is to “do more and do it as fast as possible”—yet to ensure proceedings are “consistent with due process.” This, she says, is an “extreme challenge.”

Unfortunately, this amounts to due process in a pressure cooker, and it brings forth a question of where the bare minimum lines can be drawn. To find those, it is useful to consider basic concepts underlying the right itself. When it comes to fact-finding, one main purpose of due process is to ensure a sufficiently accurate result, and, in doing so, also assure that the system as a whole continues to merit the faith of the general public. A useful comparison occurs in the context of the earliest international humanitarian law. The Geneva Conventions contain one of the earliest international agreements to adhere to minimum procedures in a judicial setting. Common Article 3(1)(d) prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilized peoples.”⁵

Although one purpose of this article is to ensure humane treatment of those entitled to its protections, another is protection of the innocent from false convictions.⁶ The International Committee of the Red Cross’s *Commentary* on Article 3(1)(d) indicates that it is designed to protect “persons who are innocent of the crime which it is intended to prevent or punish,” and that “[a]ll civilized nations surround the administration of justice with safeguards aimed at eliminating the possibility of errors.”⁷ The clause is thus particularly designed to safeguard the truth, to prevent states from sacrificing accurate judgment in the name of expediency, punishment, or any other government objectives. This policy reflects an international relative to the U.S. concept of procedural due process.

International human rights law also affords examples of various lists found to constitute minimum judicial procedures. They are relevant to U.S. law because they illustrate the wisdom of collective contemplation, the expressions of a comity of nations, deliberated

Dr. Alicia Triche holds a doctorate of philosophy in law from Oxford University. In Memphis, Tennessee, she is sole proprietor at Triche Immigration Law; nationally, she serves on the FBA’s Immigration Law Section as board member and vice chair of the Publications Committee.

over time. One example is 2001 guidance of the United Nations High Commissioner for Refugees (UNHCR) regarding “the core elements necessary for fair and efficient decision-making in keeping with international refugee protection principles.”⁸ “While by no means exhaustive,” the guidelines sought to “establish a common understanding of and structure for asylum procedures and to identify core procedural safeguards necessary to preserve the integrity of the asylum regime ...”⁹ Aspects applicable to a fact-finding process include:

- (1) Guidance on the procedure and access to legal counsel and interpretation
- (2) In the first instance, a personal interview before a competent authority and the right to present evidence
- (3) A “single, central specialized authority” to make decisions in the first instance
- (4) Decision-makers with relevant knowledge, expertise, and information on the case
- (5) A written and reasoned decision

Another international agreement regarding minimum judicial procedures is Article 14 of the International Covenant on Civil and Political Rights,¹⁰ which applies to criminal proceedings.¹¹ Article 14(3) includes the minimum procedures considered necessary for accurate judicial fact-finding. It provides:

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
 - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - (c) To be tried without undue delay;
 - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
 - (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
 - (g) Not to be compelled to testify against himself or to confess guilt.

The version of due process found in the Immigration and Nationality Act (INA) is more concise. Section 240(b) guarantees “the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien’s own behalf, and to cross-examine witnesses presented by the Government ...”¹² This is the only statutory delineation of the due process rights potentially involved in fact-finding in immigration proceedings. As indicated

above, general due process also applies to deportation decisions; however, the U.S. Supreme Court has not specifically delineated any rights outside of the INA. The Seventh Circuit has elaborated somewhat, indicating that immigration court procedures “must satisfy currently prevailing notions of fairness.”¹³ That court has also characterized Section 240(b) as affording the right to be “meaningfully present” and present evidence in a “meaningful way.”¹⁴ The question thus arises: What is “meaningful”? When it comes to fact-finding, the real push and pull lies in the application of the principle. In the midst of a one- or two-hour slot, what minimum requirements *must* be honored for due process to be satisfied?

To conduct meaningful fact-finding, an immigration judge needs enough time to assess the witness. Determining credibility is a complex process that requires time and attention. In 1998, *Matter of A-S-15* established the modern judicial guidelines for credibility determinations. The board emphasized what an important role judges play on the front lines, stating “the Immigration Judge is in the unique position of witnessing the live testimony of the alien at the hearing.”¹⁶ The BIA recognized the immigration judge’s “advantage of observing the alien as he testifies,”¹⁷ and observed that the judge “is in the unique position to observe the alien’s tone and demeanor, to explore inconsistencies in the testimony, and to determine whether the testimony has ‘the ring of truth.’”¹⁸ Concluding, the BIA stated: “Because an appellate body may not as easily review a demeanor finding from a paper record, a credibility finding which is supported by an adverse inference drawn from an alien’s demeanor generally should be accorded a high degree of deference.”¹⁹

Credibility is assessed not only through demeanor but also careful attention to content—a task that also requires time and attention. In *Matter of A-S-*, the BIA also set forth substantive requirements for a negative credibility determination: “(1) the discrepancies and omissions described by the Immigration Judge are actually present; (2) these discrepancies and omissions provide specific and cogent reasons to conclude that the respondent provided incredible testimony; and (3) the respondent has not provided a convincing explanation for the discrepancies and omissions.”²⁰ This is a detail-oriented, complex assessment; yet, as the numbers clearly indicate, in the current caseload, it can be conducted through approximately one or two hours of testimony and by a judge with a total docket of 1,500, 2,000, or even 3,000 cases.

Due process also applies from the alien’s perspective. The INA’s right to “present evidence” is only meaningful when there is sufficient opportunity to do so. An applicant for relief needs *time* to present testimony, including expert witnesses and corroborating witnesses. Acknowledging this, courts of appeals have found a lack of due process when the opportunity to testify thoroughly, or to present witnesses, is unreasonably denied. For example, in *Padio v. INS*, the Seventh Circuit considered a case where a Ukrainian asylum applicant claimed to have been sent to Siberia due to his Baptist religion.²¹ The immigration judge had substantially cut short the respondent’s testimony and also refused to allow testimony of the brother and sister.²² The Seventh Circuit held this was a violation of procedural due process.

Regardless of how much evidence is in the record, an immigration judge needs sufficient time to review it. In practice, especially since there is so little time for testimony, an application for relief must be substantially documented. However, there can be precious little time to review that documentation or to review testimony in

a case that is held over for judgment. Judge Marks indicated that a typical workweek includes 36 hours on the bench and a meager four hours of time spent in chambers. That is four hours to review documentation for *every* individual case occurring that week—a total that, especially if a law school or large firm is involved, can span hundreds or even thousands of pages.

The above considerations are by no means exhaustive, but they do provide a few starting points to consider in the quest for due process amidst a docket deluge. One final factor, which is last but certainly not least, is the need for the subject of removal to feel heard—to experience his or her own case as thoroughly considered, even if the result is removal. Judge Marks stresses the need for explaining to aliens “why we do what we do in a way that they understand,” so that they will feel “the law treated them fairly, even if they do not get the result that they want.” To Marks, this is partly a matter of efficiency, since, in practice, good explanations diminish appeal rates, and “nobody benefits from appealing a case that is squarely correct on the record.” It also reveals the heart of the due process concept: protection of the integrity of our judicial system. If decisions are sufficiently accurate and fair, then the integrity of that system is not compromised, and faith of the public is maintained. Forcing immigration judges to cut more and more corners pushes them ever farther towards that bottom line—which some might argue we already have crossed—and threatens to create a weakest link that puts the entire system at risk. ☉

Endnotes

¹*Reno v. Flores*, 507 U.S. 292, 306 (1993); see also *Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-598 (1953).

²TRAC Immigration, “Backlog of Pending Cases in Immigration Courts as of March 2015,” trac.syr.edu/phptools/immigration/court_backlog (accessed May 9, 2015).

³Telephonic interview with Judge Dana Marks, May 8, 2015 (notes on file with author). I spoke with Judge Marks in her capacity as president of the National Association of Immigration Judges. Her views as expressed herein do not necessarily represent the official position of the U.S. Department of Justice, the attorney general, or the Executive Office for Immigration Review. The views do represent her personal opinions, which were formed after extensive consultation with the membership of NAIJ.

⁴Human Rights First, *Reducing the Immigration Court Backlog and Delays* (Apr. 2015), www.humanrightsfirst.org/sites/default/

[files/HRF-Backgrounder-on-Immigration-Courts.pdf](#) (accessed May 11, 2015).

⁵Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Art. 3, Aug. 12, 1949, 6 UST 3516, 75 UNTS 287.

⁶Jean S Pictet (ed), *International Committee of the Red Cross, Commentary, Vol. I: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (ICRC 1952) 52.

⁷*Id.* at 54.

⁸UNHCR Global Consultations on International Protection, Third Track, “Asylum Processes (Fair and Efficient Asylum Procedures),” UN Doc. EC/GC/01/12 (31 May 2001) [5].

⁹*Id.* at [6].

¹⁰Dec. 16, 1966, 99 U.N.T.S. 171, S. Exec. Doc. 95-2 (1978), 6 I.L.M. 368 (1967).

¹¹In 1993, one academic commentator conducted an extensive survey of state practice in order to delineate “general principles” of international law regarding criminal procedure. M. Cherif Bassouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT’L L. 235 (1993). Among his conclusions was that the right to a fair trial, often including all necessary aspects of defense, existed in “no less than thirty-eight national constitutions.” *Id.* at 267.

¹²INA § 240(b)(4)(B). The remaining text of this section provides: “... but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien’s admission to the United States or to an application by the alien for discretionary relief under this Act”.

¹³*Podio v. INS*, 153 F.3d 506, 509, (7th Cir. 1998), citing *Batanic v. INS*, 12 F.3d 662, 666 (7th Cir. 1993).

¹⁴*Drobny v. INS*, 947 F.2d 241, 245 (7th Cir. 1991).

¹⁵21 I&N Dec. 1106 (BIA 1998).

¹⁶*Id.* at 1101.

¹⁷*Id.*, citing *Matter of V-T-S-*, 21 I&N Dec. 792 (BIA 1997).

¹⁸*Id.*, citing *Sarvia-Quintanilla v. INS*, 767 F.2d 1387, 1395 (9th Cir. 1985).

¹⁹*Id.* at 1101.

²⁰*Id.* at 1109.

²¹153 F.3d 506, 508 (7th Cir. 1998).

²²*Id.* at 510.

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