Nov 9

IJs, Tiered Review, and Completion Quotas

EOIR recently announced its intent to subject immigration judges to tiered performance reviews. Most notably, EOIR plans to impose case completion quotas on the individual judges. The American Bar Association, American Immigration Lawyers Association (AILA) and the National Association of Immigration Judges (NAIJ) were among the many organizations to express their strong objection to the proposal.

Immigration judges have always been exempt from the tiered reviews that other Department of Justice attorneys undergo each year. The Office of the Chief Immigration Judge deserves credit for understanding that it is not possible to impose any type of review criteria without impeding on judges' neutrality and independence. To begin with, how many cases should a judge complete in a given period of time? Are the judges with the most completions affording due process to the respondents? Are they identifying all of the issues, spending enough time reviewing the records, and giving proper consideration and analysis to the facts and the law? Do their decisions provide sufficient detail for meaningful review? Are those at the other end of the scale completing less cases because they are working less hard, or to the contrary, because they are delving deeper into the issues and crafting more detailed and sophisticated decisions? Or is it because they are granting more continuances out of a sense of fairness to the parties, or to allow further development of the record in order to allow for a more informed decision? And regardless of the reasons, might they be prejudicing some respondents by delaying their day in court? How would management turn all of these factors into an objective grade?

In terms of completion quotas, all cases are not equal. A respondent who has no relief and simply wants to depart can have his or her case completed in minutes, whereas a

respondent seeking relief in New York will presently be scheduled for a merits hearing in the Spring of 2020, at which time the lengthy testimony of multiple witnesses, disputes over the admissibility of evidence, the need to wait for DHS to adjudicate pending petitions for relief, etc. might result in months or even years of additional continuances. Decisions in some cases are delivered orally in just a few sentences; others require 25 written pages. Yet all count the same in EOIR's completion ledger.

I am pretty certain that the move for tiered review is not coming from the Office of the Chief Immigration Judge, but from higher up - either the new Acting Director of EOIR, or Main Justice. Even under more liberal administrations, the Department of Justice never really understood the IJs, who are the only judges within a predominantly enforcement-minded department. The need for neutrality and fairness is further lost on the present Attorney General, who has made his anti-immigrant agenda clear. IJs are in an interesting position: they represent the Attorney General (i.e. are acting as the AG's surrogates, where the statute delegates authority to make determinations or grant relief to the AG). Yet in spite of such posture, IJs often reach decisions that are at odds with the AG's own views. For example, does Jeff Sessions, who last month issued a memo allowing discrimination against LGBTQ individuals under the guise of protecting the discriminators' "religious liberty,", approve of his immigration judges granting asylum claims based on sexual orientation or sexual identity? In light of Sessions' recent charges of widespread asylum fraud, does he agree with his judges' high asylum grant rates?

It is probably this tension that provides the impetus for the Department's present proposal. The tiered criteria and completion quotas are likely designed to pressure judges with more liberal approaches into issuing more removal orders. They would also provide the department with a basis to take punitive action against judges who resist such pressures. Given the high percentage of immigration judges who are retirement eligible, the department might be counting on judges targeted under the new

review criteria to simply retire, allowing them to be replaced with more enforcement-minded jurists.

It should be noted that the changes are at this point proposals. The immigration judge corps is represented by a very effective union. As the present leadership within the Office of the Chief Immigration Judge is fair minded, there is hope that reason will prevail. However, in a worst-case scenario in which the plan is implemented, what should immigration judges do?

Having worked both as an IJ and a BIA staff attorney subjected to both quotas and tiered review, I can state that there are big differences. BIA staff attorneys draft decisions that Board members then have to approve, whereas immigration judges are in complete control of the case outcome. Furthermore, unlike BIA attorneys who are dealing with records of completed decisions, immigration judges are conducting proceedings in which the protection of due process must be safeguarded above all, as the Chief Immigration Judge pointed out in her July 31, 2017 memo on continuances. Circuit courts are not going to excuse due process violations because immigration judges have to meet arbitrary completion goals.

Although the intent may be to create more removal orders, completion quotas can prove to be a two-edged sword. Should the ICE attorney not have the file at the first Master Calendar hearing, or should they lack a certified copy of the conviction record or proof of service of the NTA, will the IJ feel compelled to terminate proceedings (which constitutes a completion) rather than grant the government a continuance? Many hearings turn on credibility findings, but credibility findings take time to get right. The Second Circuit, for example, has held that an immigration judge should probe for additional details to clear up doubts about credibility.[1] As Deborah Anker has pointed out in her Law of Asylum in the United States, "Federal courts have overturned adverse credibility findings where an immigration judge has interrupted an applicant repeatedly, rushed the hearing, and then criticized an applicant's testimony for lacking specificity."[2] But won't completion quotas likely encourage exactly such prohibited

behavior? In order to avoid reversal on appeal, judges who are forced to rush or curtail hearings will may need to give the benefit of the doubt to respondents and find them credible. Additionally, judges may no longer be able to continue cases to allow DHS to subject documents to forensic examination, or to conduct consular investigations in the applicants' home countries. Under pressure to complete cases, judges may be forced to credit witness affidavits as opposed to allowing DHS to subject those witnesses to cross-examination.

For the above reasons, it is not impossible that completion quotas might actually result in more grants of relief and terminations of proceedings, resulting in fewer removal orders. Like so many of the poorly thought out policies of the current administration seeking to erode individual protections, completion quotas (if implemented) may just be the latest that will fail to achieve its intended result. The proposal provides further evidence of the need for a truly independent immigration court.

Notes

1. Yang v. Board of Immigration Appeals, 440 F.3d 72, 74 (2d Cir. 2006).
2. Anker, Law of Asylum in the United States (2017 Edition) at 199.

JEFF CHASE

Jeffrey S. Chase is an immigration lawyer in New York City. Jeffrey is a former Immigration Judge, senior legal advisor at the Board of Immigration Appeals, and volunteer staff attorney at Human Rights First. He is a past recipient of AILA's annual Pro Bono Award, and previously chaired AILA's Asylum Reform Task Force.

https://www.jeffreyschase.com/blog/2017/11/9/ijs-tiered-review-and-completion-quotas