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THE CHALLENGES OF REPRESENTING DETAINED
NONCITIZENS IN EXPEDITED REMOVAL PROCEEDINGS
FROM THE PERSPECTIVE OF THE DICKINSON SCHOOL
OF LAW IMMIGRATION CLINIC

Won Kidane*

I. INTRODUCTION

Persons deprived of their liberties as a result of administrative detention for immigration reasons face a multitude of serious challenges. There is currently no recognized right to government-appointed representation in immigration proceedings.¹ As a result, only a very small percentage of immigrants obtain pro bono or any other kind of legal representation.² This problem is compounded by the fact that most immigration detainees are detained in remote

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¹ See Immigration and Nationality Act ("INA"), ch. 477, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.

INA § 292, 8 U.S.C. § 1362 (2006).

² See UNITED STATES COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, VOL. I: FINDINGS AND RECOMMENDATIONS 34 (2005) (citing Susan Kyle, Cory Fleming & Fritz Scheuren, *Statistical Report on Immigration Proceedings, FY 2000-2004*, in REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, VOL. II: EXPERT REPORTS 383, 409 EOIR Table P, available at http://www.uscirf.gov/countries/global/asylum_refugees/2005/february/immigrationCourtStats.pdf), available at http://www.uscirf.gov/countries/global/asylum_refugees/2005/february/Volume%20I.pdf; see also Kate Jastram & Tala Hartsough, *A-File and Record of Proceeding Analysis of Expedited Removal*, in UNITED STATES COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, VOL. II: EXPERT REPORTS 44, 56 n.34, available at http://www.uscirf.gov/countries/global/asylum_refugees/2005/february/UCB%20report.pdf.

rural areas where the private bar is virtually unavailable.³ Those who are fortunate to obtain pro bono or other types of legal representation also face some serious challenges at the different stages of the deportation or removal proceedings.⁴ This article discusses the challenges of representing detained noncitizens in deportation proceedings from the prism of the Penn State Dickinson School of Law's Immigration Clinic ("DSL Immigration Clinic"). The discussion is presented in a continuum. Most of the immigration detainees are placed in deportation proceedings after serving a state or federal criminal sentence. What transpires in the criminal proceedings often carries serious immigration consequences. As such, the continuum must necessarily begin with a discussion of the challenges faced in deportation proceedings as a result of the nature of the state or federal criminal proceedings. These challenges are discussed under the title "Pretrial Challenges" in part II. Part III deals with the challenges associated with the merits hearing in the removal proceedings, including procedural and evidentiary issues. Part IV outlines posttrial challenges, including prolonged detention and the complexities of obtaining judicial review. Part V provides a brief conclusion.

³ Serena Hoy, *The Other Detainees: Lost in the Protests About the Detentions at Guantanamo Bay are 20,000 Immigrants Held Behind Bars in the United States*, LEGAL AFF., Sept. - Oct. 2004, at 58, 59, available at http://www.legalaffairs.org/issues/September-October-2004/review_hoy_sepoct04.msp.

⁴ The Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") of 1996 consolidated two proceedings formerly known as "deportation" and "exclusion" into a single proceeding called "removal proceeding." See IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009, 3009-546, 3009-607 to 3009-612 (codified as amended at 8 U.S.C. § 1101 note). As a result of this change, deportation as well as exclusion proceedings are now called removal proceedings. Although the terms deportation and exclusion still have significant relevance in immigration law, this article uses the term removal proceedings to refer to both exclusion and deportation proceedings.

II. PRETRIAL CHALLENGES

Most immigration detainees in expedited removal proceedings, with the exception of new arrivals,⁵ tend to be persons who have had criminal convictions in state or federal courts.⁶ This section briefly discusses the immigration consequences of criminal convictions or plea bargains and demonstrates the challenges that the detainees and their counsels face during deportation proceedings because of the shortcomings of such bargains.

A. Representation Challenges Posed by State and Federal Criminal Plea Bargains

When immigrants are accused of criminal conduct, the penalty that awaits them is not limited to incarceration for a certain period of time or a fine under the applicable criminal laws; it often includes deportation.⁷ Because deportation as a sanction is imposed after a separate proceeding, namely removal proceedings in immigration court, the consequences that criminal plea bargains may have on subsequent immigration court proceedings are easily overlooked. The immigration consequences could be very dramatic. For example, under section 101(a)(43)(F) of the Immigration and Nationality Act ("INA"), "a crime of violence . . .

⁵ For procedures of removing noncitizens arriving at ports of entry, see INA § 241(c), 8 U.S.C. § 1231(c) (2006).

⁶ The procedures for removing noncitizens convicted of committing aggravated felonies are contained under INA § 238, 8 U.S.C. § 1228 (2006). For example, subsection (a)(3)(A) of title eight of the United States Code provides:

Notwithstanding any other provision of law, the Attorney General shall provide for the initiation and, to the extent possible, the completion of removal proceedings, and any administrative appeals thereof, in the case of any alien convicted of an aggravated felony before the alien's release from incarceration for the underlying aggravated felony.

8 U.S.C. § 1228(a)(3)(A) (2006).

⁷ Although, for jurisprudential purposes, deportation is considered a civil sanction as opposed to a criminal punishment, there is no dispute about its severity. For a thorough discussion of the nature of deportation in light of the Supreme Court's jurisprudence in the last 150 years, see generally Won Kidane, *Committing a Crime While a Refugee: Rethinking the Issue of Deportation in Light of the Principle Against Double Jeopardy*, 34 HASTINGS CONST. L.Q. 383 (2007).

for which the term of imprisonment [is] at least one year" is considered an aggravated felony.⁸ An aggravated felony, in turn, excludes a noncitizen from almost all forms of relief including adjustment of status,⁹ cancellation of removal,¹⁰ voluntary departure,¹¹ and even asylum from persecution.¹²

The casual use of the terms "crime of violence" and "aggravated felony" might suggest that they refer to some serious crimes such as murder, rape, robbery, or other violent crimes. For purposes of immigration law, however, pulling someone else's hair during a night club fistfight might qualify as an aggravated felony barring almost all forms of relief.

This suggestion is based on the case of Mary Ann Gehris, which was reported by Anthony Lewis of the *New York Times*.¹³ According to the report, as cited by Professor Legomsky, Mary

⁸ See INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (2006).

⁹ See INA § 245(a), 8 U.S.C. § 1255(a) (2006) (requiring that a person must first be admissible to adjust status). For criminal grounds of inadmissibility, see generally INA § 212(a)(2), 8 U.S.C. § 1182(a)(2) (2006). For criminal grounds of deportability, see generally INA § 237(a)(2), 8 U.S.C. § 1227(a)(2) (2006).

¹⁰ See INA § 240A(a)(3), 8 U.S.C. § 1229b(a) (2006) (requiring that the alien not be convicted of an aggravated felony).

¹¹ See INA § 240B(a)(1), 8 U.S.C. § 1229c(a)(1) (2006) (requiring that the alien not be deportable under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (2006) relating to aggravated felony conviction).

¹² Asylum is granted to a person who can demonstrate that he has a well-founded fear of being persecuted because of his race, religion, nationality, political opinion, or social group if returned to his home country or the place of his habitual residence. See INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006); INA § 208(b)(2)(A), 8 U.S.C. § 1158(b)(2) (2006). Even if a person meets the well-founded fear standard, he may be excluded from asylum if, among other things, he has committed a particularly serious crime. See INA § 208(b)(2)(A)(ii), 8 U.S.C. § 1158(b)(2)(A)(ii) (2006). For purposes of asylum, a particularly serious crime is defined in the following terms: "For purposes of clause (ii) of subparagraph (A) [referring to particularly serious crime], an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime." INA § 208(b)(2)(B)(i), 8 U.S.C. § 1158(b)(2)(B)(i) (2006).

¹³ See STEVEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 562-63 (4th ed. 2005) (citing and discussing Anthony Lewis, *This Has Got Me in Some Kind of Whirlwind*, N.Y. TIMES, Jan. 8, 2000, at A13; Anthony Lewis, *Measure of Justice*, N.Y. TIMES, June 23, 2003, at A13).

Ann was adopted by United States-citizen parents when she was two years old.¹⁴ When she became of age, she got involved in a fistfight at a nightclub with another woman who had been with Mary Ann's boyfriend.¹⁵ For that offense, Mary Ann received a suspended sentence of one year.¹⁶ The former Immigration and Naturalization Service ("INS") instituted an action to remove her, alleging that she had committed an aggravated felony under section 101(a)(43)(F) of the INA, that is, a crime of violence for which a sentence of one year is imposed.¹⁷ The fact that the sentence was suspended is considered irrelevant for purposes of immigration.¹⁸

Although in this particular case the former INS decided not to pursue the deportation proceedings in the face of heightened publicity, there is no doubt that the law could have been interpreted to exclude Mary Ann. There is also no doubt that during her criminal trial or plea bargain, nobody thought about the immigration consequences of the criminal proceedings. If she had served eleven months and twenty-nine days, instead of negotiating for a suspended sentence of one year, she could have easily avoided the immigration consequences. A significantly lesser time of actual incarceration would undoubtedly have been attractive to the prosecutors.

A similarly tricky provision is section 101(a)(43)(G) of the INA. It defines an aggravated felony as "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year."¹⁹ Examples of the application of this provision include the finding of an aggravated felony in situations of attempted possession of stolen property,²⁰

¹⁴ LEGOMSKY, *supra* note 13, at 562.

¹⁵ *Id.* at 563.

¹⁶ *Id.*

¹⁷ *Id.*; see INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (2006).

¹⁸ See INA § 101(a)(48)(B), 8 U.S.C. § 1101(a)(48)(B) (2006) ("Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.").

¹⁹ See INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G) (2006).

²⁰ *In re Bahta*, 22 I. & N. Dec. 1381, 1381 (B.I.A. 2000).

possession of stolen mail,²¹ ordinary theft,²² petit larceny,²³ and, most interestingly, shoplifting.²⁴ In almost all of the cases cited in connection with the various offenses, the major problem was the disregard for immigration consequences during the criminal trials or plea bargains. Again, in almost all of the cases, the plea could have been reasonably negotiated to avoid immigration consequences. Reasonable prosecutors willing to negotiate a one-year suspended sentence would agree to a term of actual incarceration for a significantly lesser period of time.

DSL Immigration Clinic's representation of a client in deportation proceedings in York, Pennsylvania, offers a good example of the unfortunate results of criminal plea bargains that do not take immigration consequences into account and also the challenges that they bring to immigration representation.

The case of Daniel Kim²⁵ is described as follows for purposes of demonstration. Daniel is a native of Cambodia. His family fled Cambodia at a time when the Khmer Rouge was killing and terrorizing ordinary Cambodians. When he was a young child, his parents took him to a refugee camp in Thailand to shield him from persecution. He lived in the refugee camp under very difficult conditions for ten years. He was then resettled as a refugee in the United States along with his family. Daniel did not speak any English when he arrived in the United States. He found attending school difficult and dropped out. He got involved in drug-related offenses, none of them very serious. More than about a decade after the two drug-related offenses, he was accused of possession of stolen property in Philadelphia, Pennsylvania. According to Daniel, he purchased the car that gave rise to the criminal charges without knowing that it was stolen. Regardless of the truth or

²¹ *Randhawa v. Ashcroft*, 298 F.3d 1148, 1151 (9th Cir. 2002).

²² *Fernandez-Ruiz v. Gonzales*, 410 F.3d 585, 588 (9th Cir. 2005).

²³ *United States v. Graham*, 169 F.3d 787, 789, 793 (3d Cir. 1999).

²⁴ *See United States v. Christopher*, 239 F.3d 1191, 1192, 1194 (11th Cir. 2001).

²⁵ This case was litigated in open court in the years 2006-2007. Although theoretically it is a matter of public record, his real name has been withheld to protect his identity. The entire file of this case is available with the DSL Immigration Clinic. All facts hereinafter pertaining to the Daniel Kim case are taken from the case files located at the DSL Immigration Clinic.

falsity of the allegations, however, he was counseled to plead guilty in exchange for a lighter sentence. He received an indeterminate sentence of six months to twenty-three months under Pennsylvania's indeterminate-sentencing guidelines. Under existing case law, for purposes of immigration law, in situations of indeterminate sentencing, the maximum penalty is considered the penalty actually imposed.²⁶ That made him guilty of an aggravated felony under section 101(a)(43)(G) of the INA, that is, a crime of theft for which one year imprisonment is given.²⁷ This classification virtually left him without any meaningful remedy.²⁸ He could have easily avoided the severe immigration consequences if he had agreed to serve up to 364 days in prison, which would certainly have been attractive to the prosecutors who agreed to give him six to twenty-three months.

B. Futility of Pleading Ineffective Assistance of Counsel

Save affirmative misrepresentation, failure to advise a client of the immigration consequences of a conviction or a plea bargain is considered a collateral issue and, as such, not an ineffective

²⁶ See, e.g., *Pichardo v. INS*, 104 F.3d 756, 759 (5th Cir. 1997) (holding that the maximum term of an indeterminate sentencing of a minimum and maximum term is considered the actual sentence for purposes of defining an aggravated felony).

²⁷ INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G) (2006).

²⁸ The only other forms of relief that were theoretically available to him were withholding of removal under INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2006) and relief under the Convention Against Torture ("CAT"). See *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, pt. 1, art. 3, June 26, 1987, U.N. Doc. A/39/51, reprinted in UNITED NATIONS CENTER FOR HUMAN RIGHTS, HUMAN RIGHTS, A COMPILATION OF INTERNATIONAL INSTRUMENTS 315, 316 (2002); see also Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681, 2681-822. Given his long time residence in the United States and changed circumstances in Cambodia, and given the high standard of proof for INA withholding or CAT relief, these forms of relief could not be obtained. For the standard of proof, see generally, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987) (holding that while the standard of proof for the discretionary grant of asylum might be about ten percent, the standard of proof for the mandatory relief of withholding of removal under INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2006), is "more likely than not").

assistance of counsel in most jurisdictions.²⁹ For example, in its 2005 decision in *Resendiz v. Kovensky*,³⁰ the United States Court of Appeals for the Ninth Circuit held that failure of counsel to advise of the immigration consequences of a criminal plea arrangement is a collateral issue that cannot be considered a violation of the Sixth Amendment right to counsel.³¹ In *United States v. George*,³² the United States Court of Appeals for the Seventh Circuit arrived at the same conclusion as far back as 1989.³³

Given the obvious nature of representation that indigent, immigrant criminal defendants receive, the immigration impact of this rule is not difficult to contemplate. Even in situations where the assistance of counsel may be considered ineffective, pleading this ground as an avenue of relief from deportation is often futile because of several reasons. For example, in the Daniel Kim case previously discussed, such a claim would have required the representatives to go back to the state court of Pennsylvania in Philadelphia, where he was convicted, and submit a motion to vacate the plea based on ineffective assistance grounds. Assuming that the motion would succeed, it would only mean that Daniel would stand trial anew. A new trial would mean that he could be convicted or exonerated. The more serious problem is, however, that by the time the new trial is conducted, Daniel would have served the maximum penalty possible under Pennsylvania law for the crime that he was accused of because he would not be released from prison during the criminal trial.³⁴ It is important to note that by the time Daniel was initially put in deportation proceedings, he had already served his initial time and also spent a significant

²⁹ See *United States v. Couto*, 311 F.3d 179, 187-88 (2d Cir. 2002).

³⁰ 416 F.3d 952 (9th Cir. 2005).

³¹ *Id.* at 956-58.

³² 869 F.2d 333 (7th Cir. 1989).

³³ *Id.* at 337-38.

³⁴ Although technically if the plea is vacated, it would mean that he would no longer qualify as an aggravated felon and as such would not be subject to mandatory detention under INA § 236(c), 8 U.S.C. § 1226(c) (2006), he may still be held without bond under INA § 236(a), 8 U.S.C. § 1226(a) (2006) until his guilt or innocence is adjudged again in state court. On top of this, he faces state detention as well.

amount of time in immigration custody. Going back to state court for retrial would mean years of incarceration, regardless of his guilt or innocence. Thus, the damage done at the initial plea bargain stage is almost irreparable. That remains to be one of the greatest challenges of attorneys representing immigrants put in deportation proceedings—plea bargains that could have easily been modified to avoid severe immigration consequences.

C. Ambiguities in Criminal Conviction Records

Ordinarily, a noncitizen "who admits having committed or who admits committing acts which constitute the essential elements of . . . a crime of moral turpitude" or a violation of controlled substance laws is deemed inadmissible.³⁵ There are, however, reasonable exceptions to this rule which mitigate the harsh consequences. For example, the inadmissibility rule does not apply to a person who committed only one crime of moral turpitude when he was under the age of eighteen and more than five years have passed between the commission of the crime and the release from incarceration.³⁶ However, hopeless predicaments often befall a person convicted of an aggravated felony because of the reasons discussed in the previous subsection. Because of the seriousness of the consequences, including the denial of adjustment of status and the cancellation of removal and asylum, the law requires an actual conviction rather than the mere admission of the essential elements of an offense.³⁷ The

³⁵ See INA § 212(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i) (2006). There is no definition of the term "crimes of moral turpitude" under the INA. However, courts have adopted this general definition: "An act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." *Wing v. United States*, 46 F.2d 755, 756 (7th Cir. 1931); see also *Tillinghast v. Edmead*, 31 F.2d 81, 84 (1st Cir. 1929) (Anderson, J., dissenting); *Coykendall v. Skrmetta*, 22 F.2d 120, 120-21 (5th Cir. 1927); *Vidal y Planas v. Landon*, 104 F. Supp. 384, 389 (S.D. Cal. 1952); *United States ex rel. Manzella v. Zimmerman*, 71 F. Supp. 534, 537 (E.D. Pa. 1947); *United States ex rel. Ciarello v. Reimer*, 32 F. Supp. 797, 798 (S.D.N.Y. 1940); *United States v. Carrollo*, 30 F. Supp. 3, 6-7 (W.D. Mo. 1939).

³⁶ INA § 212(a)(2)(A)(ii), 8 U.S.C. § 1182(a)(2)(A)(ii) (2006).

³⁷ See, e.g., INA § 240A, 8 U.S.C. § 1229b(a)-(b) (2006) (providing that cancellation of removal may not be granted to a person who has been convicted

determination of whether there was a conviction for an aggravated felony or not is not as easy as it might seem. Again, the Daniel Kim case demonstrates the challenges in this area.

When Daniel pleaded guilty to the charge of possession of stolen property, he thought that he was given probation, not an actual sentence. His belief was justified because the order was issued on a preprinted form under a heading "Certification of Probation." In the probation certificate, the order reads: "placed the defendant on probation/parole for," and a handwritten entry following this sentence reads: "6-23 mos. immediate parole to US Marshals."³⁸ This record was obtained by Daniel's counsel from the clerk's office of the Court of Common Pleas of Philadelphia County, Pennsylvania. Because of the lack of clarity of the conviction records, the case had to be adjourned three times for the presentation of more evidence proving the nature of the sentence. The determination of the nature of the sentence was quite essential because under existing law, if the evidence suggested that the six to twenty-three month sentence was probation rather than an actual sentence, it would have meant that there was no conviction of an aggravated felony.³⁹ That in turn would have meant no deportation for Daniel, because his crime was only considered an aggravated felony because of the sentence, not the inherent nature of the crime.⁴⁰ If there was no conviction for an aggravated felony, Daniel would have qualified for cancellation of removal because

of any aggravated felony); *see also* INA § 208(b)(2)(B), 8 U.S.C. § 1158(b)(2)(B)(i) (2006) (providing that conviction of an aggravated felony is considered a particularly serious crime barring the granting of asylum).

³⁸ This certificate of probation is available on file with the DSL Immigration Clinic. It is dated June 20, 2006, and duly signed.

³⁹ *See, e.g.*, *United States v. Gonzalez-Coronado*, 419 F.3d 1090, 1093-94 (10th Cir. 2005) (holding that several years of probation cannot be considered an actual sentence for purposes of determining whether the conviction constituted an aggravated felony under section 101(a)(43)(F) of the INA); *see also* *United States v. Banda-Zamora*, 178 F.3d 728, 730 (5th Cir. 1999) (holding that a sentence of probation cannot be considered a suspended sentence for purposes of determining the meaning of aggravated felony).

⁴⁰ *See* INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G) (2006).

he had lawful permanent resident status, which he had acquired as a result of his refugee status as a child.⁴¹

Three adjournments and more evidence later, the immigration court became convinced that despite the confusion in the criminal records, the sentence was an actual sentence rather than probation. Daniel was finally ordered deported, having lost on every form of relief under the immigration law.⁴² His deportation could indeed have been avoided if the immigration consequences were considered during the criminal proceedings and subsequent recordkeeping.

D. Prosecutorial Discretion

Like any area of law enforcement, Immigration and Customs Enforcement ("ICE") exercises tremendous prosecutorial discretion with respect to the selection of cases that it decides to prosecute. This prosecutorial discretion is virtually unreviewable.⁴³ Although the exercise of prosecutorial discretion often follows commonsense, reasonable minds can differ on the prosecutorial decisions of some cases. The DSL Immigration Clinic faced only one case in which it considered that the unnecessary harm it caused outweighed any legitimate law enforcement benefits that it was meant to serve. That case was the case of Halima Omar.⁴⁴ Ms. Omar was an elderly woman from The Republic of Mali. She was granted asylum several years back on the basis of severe persecution she had suffered in her country of origin over a period

⁴¹ See INA § 240A(a)(1)-(3), 8 U.S.C. § 1229b(a)(1)-(3) (2006) (excluding a lawful permanent resident convicted of an aggravated felony from the relief of cancellation of removal).

⁴² In this case, the Immigration Court rendered a written ruling. The court's decision is available on file with the DSL Immigration Clinic.

⁴³ See INA § 242(g), 8 U.S.C. § 1252(g) (2006) ("Except as provided in this section . . . no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Chapter."); see also *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 477-81 (1999).

⁴⁴ Although this case was adjudicated in open court and as such is a matter of public record, the real name of the respondent is withheld to protect her identity. The entire case records are available on file with the DSL Immigration Clinic.

of several years. The nature of the persecution was such that it included every conceivable form of violence and indignity. She brought three of her teenage children to the United States right after she was granted asylum. The children acquired derivative status under section 208(b)(3) of the INA. Some years later, she was implicated for fraudulent conduct and served a sentence of more than one year. As soon as she completed serving her criminal sentence, she was transferred to immigration custody. The immigration service revoked her asylum on the basis of her conviction,⁴⁵ which qualified as a particularly serious crime for purposes of exclusion from asylum,⁴⁶ and put her in deportation proceedings. Unfortunately, the revocation of her asylum status also meant the revocation of her children's derivative asylum status,⁴⁷ although they may be able to seek asylum on their own based on the persecution they shared with their parents and independently. Finally, because the persecution Ms. Omar suffered was so severe, the court granted her withholding of removal under 8 U.S.C. § 1231(b)(3)(A). That could not, however, reinstate her children's derivative asylum. The prosecutorial decision to revoke her asylum, while it was reasonably clear that she would qualify for withholding of removal, became a source of great hardship on the part of four refugees, Ms. Omar and her three children. Moreover, it probably consumed significant government resources, including the expenses of detaining Ms. Omar for several months, the adjudication of her claim, and also expenses associated with the possible future adjudication of her children's asylum claims. The legitimate law enforcement objective served in this case was greatly outweighed by the unnecessary hardship caused to the refugees, as well as the expenses incurred. The challenge, of course, is that there is nothing that counsel and representatives could do because the exercise of prosecutorial discretion is unreviewable. Even if it were reviewable, in circumstances such as this where the law perfectly allows the course of conduct the

⁴⁵ See INA § 208(c)(2)(B), 8 U.S.C. § 1158(c)(2)(B) (2006).

⁴⁶ See INA § 208(b)(2)(A)(ii), 8 U.S.C. § 1158(b)(2)(A)(ii) (2006); INA § 208 (b)(2)(B)(i), 8 U.S.C. § 1158 (b)(2)(B)(i) (2006) (providing that an aggravated felony is considered a particularly serious crime for purposes of asylum).

⁴⁷ See 8 C.F.R. § 208.24(d) (2003); § 1208.24(d) (2005).

prosecutors took, there is really nothing that could be done except to seek the appropriate form of relief. But ultimately, the power rests with the prosecutors. Experience suggests that they often exercise it judiciously; however, not all prosecutorial decisions can be praised as such. This case demonstrates the occasional flaws.

III. TRIAL CHALLENGES

Trial challenges in immigration cases are enormous and relate to the inability to obtain evidence as a result of the respondent's incarceration, as well as the informal procedural and evidentiary rules. This part discusses these challenges.

A. Challenges in Obtaining Evidence as a Result of Mandatory Detention

Detained immigrants often face difficulty producing evidence because of their incarceration. They cannot go out and gather documentary evidence from their homes and other places or convince friends and family to testify on their behalf. This problem is real. For example, one of the DSL Immigration Clinic's clients was a forty-eight-year old man who was born in Mexico and lived in the United States since age three, but whose citizenship was uncertain.⁴⁸ The DSL Immigration Clinic got involved at the appellate level before the Board of Immigration Appeals ("BIA"). The client was put in deportation proceedings after serving a sentence for criminal conduct. The client claimed United States citizenship by virtue of his father's United States citizenship which was not disputed. The problem was, however, under section 301(g) of the INA, for the client to acquire United States citizenship by birth, his United States-citizen father must have resided in the United States for a total period of five years, two of which after he turned fourteen.⁴⁹ The only issue in this case was the father's residence in the United States during the qualifying time period. Unfortunately for the client, his father died while the client was in

⁴⁸ As of the writing of this article, this case is pending before the BIA. The records are available on file with the DSL Immigration Clinic.

⁴⁹ See INA § 301(g), 8 U.S.C. § 1401(g) (2006).

deportation proceedings before he had a chance to testify.⁵⁰ The client was denied relief for lack of evidence and he appealed to the BIA. In the process of writing the appellate brief, the student representatives contacted the client's brother, per the request of the client, and asked if he was willing to testify should the case get remanded to the immigration court. The brother refused to testify claiming that his brother only contacted him when he got in trouble.⁵¹ This is indicative of the fact that if he was not incarcerated during his deportation proceedings, he could have obtained sufficient evidence to prove his United States citizenship, including convincing his brother and others to testify. It is quite possible that United States citizens are in fact deported because they are unable to produce evidence because of their incarceration on immigration charges.

The only source of evidence that incarcerated persons could produce without much difficulty is their own testimony. Self-serving testimonial evidence is, of course, often very vulnerable for a variety of reasons. The following subsection discusses the challenges of testimonial evidence in immigration proceedings.

B. Credibility

When the only form of evidence is the respondent's testimony, credibility means everything. Admittedly, even in ordinary civil and criminal proceedings, vigorous and tactful cross examination has the potential of undermining the credibility of totally honest and truthful witnesses. In immigration proceedings, this situation is compounded by various considerations. First of all, the rules on credibility are very broad. The INA, as amended by the Real ID Act of 2005, elaborates the credibility rule in many ways. This rule makes it clear that "[t]here is no presumption of credibility"⁵² and goes on to state that the trier of fact must consider "the totality of

⁵⁰ Transcript of Hearing at 11, *In re* N.V. (2007). Transcript available on file with the DSL Immigration Clinic.

⁵¹ See Affidavit of Student-Representative, Connie A. Gadell-Newton (dated Nov. 9, 2007) filed with the BIA, available on file with the DSL Immigration Clinic.

⁵² INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii) (2006).

the circumstances, and all relevant factors"⁵³ to determine credibility. Such factors include: "demeanor, candor, or responsiveness . . . the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements . . . the internal consistency of each such statement, the consistency of such statement, [and] with other evidence of record"⁵⁴

Although this rule seems to be reasonably calculated to determine the credibility of a witness, particularly in refugee situations, applicants are not usually well-equipped to present their stories, even if completely true, in a manner that could pass this test. Their demeanor might suggest lack of credibility in the eyes of a judge who may not be familiar with the culture of the applicant. Evidently, in some cultures, eye contact with a person in an authority position may be interpreted as a sign of disrespect.⁵⁵ Similarly, a refugee may demonstrate lack of responsiveness for a variety of reasons, which may have nothing to do with the truthfulness of the story. There could also be various reasons for inconsistencies between previous filings and live testimony, such as bad counseling, language barriers, illiteracy, and even an attempt to embellish the story out of desperation—even if the real story would have sufficed for the grant of asylum.⁵⁶ It is often easier to impeach the credibility of a detained noncitizen. The following subsections discuss the challenges in this area.

⁵³ INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii) (2006).

⁵⁴ INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii) (2006).

⁵⁵ See, e.g., Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373, 394 (2002) (citing WANDA M. L. LEE, AN INTRODUCTION TO MULTICULTURAL COUNSELING 104-13 (1999) (explaining that in Chinese and Japanese cultures avoiding eye contact is considered a sign of respect)).

⁵⁶ See Allen Keller et al., *Evaluation of Credible Fear Referral Expedited Removal at Ports of Entry in the United States*, in REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, VOL. II: EXPERT REPORTS, *supra* note 2, at 1, 30, available at http://www.uscirf.gov/countries/global/asylum_refugees/2005/february/evalCredibleFear.pdf.

i. Criminal Conviction as a Presumption of Lack of Credibility

Evidently, society regards a person once convicted of a crime as a person of questionable character. The stigma continues to affect that person's credibility not only in subsequent court proceedings, but also in daily life. To avoid prejudice to such persons in subsequent criminal proceedings, in ordinary criminal proceedings, the disclosure of previous convictions is often prohibited at least until the sentencing stage in most jurisdictions.⁵⁷ However, such rules do not apply in immigration proceedings.⁵⁸ In fact, the respondent is often put in removal proceedings precisely because of the convictions.⁵⁹ If such person seeks asylum and testifies on his own behalf, he obviously needs to overcome a negative presumption that he suffers because of his criminal past. The slightest inconsistency or contradiction could completely damage the credibility of the respondent, even if the story is totally accurate. It is not difficult to impeach a witness under these circumstances, particularly because of the relaxed rules of admissibility in removal proceedings.

C. *Relaxed Rules of Procedure and Evidence*

There are no meaningful limitations on the admissibility of evidence in deportation proceedings except generally applicable due process considerations.⁶⁰ The Immigration Regulations provide for the admissibility of "any oral or written statement that is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial" to impeach the credibility of the respondent or his witnesses testifying in removal proceedings.⁶¹

One of the most important tools used to impeach witnesses in asylum proceedings is the presentation of airport interview documents. Although reliability of airport interview documents could be questioned for various reasons, these documents are

⁵⁷ See FED. R. EVID. 609, 404(b).

⁵⁸ See 8 C.F.R. § 1003.41 (2007).

⁵⁹ See *Murray v. Ashcroft*, 285 F. Supp. 2d 664, 670 (E.D. Pa. 2003).

⁶⁰ See 8 C.F.R. § 1240.7(a) (2007). For the due process exception see, for example, *Hassan v. Gonzales*, 403 F.3d 429, 435 (6th Cir. 2005).

⁶¹ 8 C.F.R. § 1240.7(a) (2007).

admissible without any restriction.⁶² Evidently, airport interviews tend to be quick and general.⁶³ The interviews occur immediately upon arrival and under stressful situations.⁶⁴ Moreover, the casual nature of the recordkeeping makes them more unreliable.⁶⁵ In fact, in its 2005 report, the United States Commission on International Religious Freedom identified some serious irregularities in airport interviewing, which makes the records unreliable.⁶⁶ Despite that, however, the rules allow the admissibility of such records in removal proceedings, creating a serious challenge for respondents as well as their representatives.

More importantly, conviction records containing graphic details of the criminal conviction are often brought to the attention of immigration judges under many circumstances. For example, in one of the cases that the DSL Immigration Clinic represented, the respondent, Ali Mohamed, was put in removal proceedings after serving a term of imprisonment, which was less than five years, for the offense of corrupting a child.⁶⁷ He sought withholding of removal because he was not qualified for asylum under section 208(b) of the INA because his crime clearly qualified as an aggravated felony.⁶⁸ The issue in this case was whether the crime also excluded him from withholding of removal under section 241(b)(3) of the INA, which defines "a particularly serious crime"⁶⁹ as "an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years."⁷⁰ The same provision states that this minimum threshold does not prevent the Attorney General (*i.e.*, the

⁶² See, e.g., *Ramsameachire v. Ashcroft*, 357 F.3d 169 (2d Cir. 2004) (holding that such records are generally admissible).

⁶³ See *id.* at 181.

⁶⁴ See *id.* at 179.

⁶⁵ See Keller et al., *supra* note 56, at 30.

⁶⁶ *Id.*

⁶⁷ See the case of Ali Mohamed on file with the DSL Immigration Clinic. The real identity has been withheld to protect identification.

⁶⁸ See INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A) (2006); see also INA § 208(b)(2)(A)-(B), 8 U.S.C. § 1158(b)(2)(A)-(B) (2006) (excluding a person who has been convicted of a particularly serious crime from asylum and defining a particularly serious crime as an aggravated felony).

⁶⁹ INA § 241(b)(3)(B)(ii), 8 U.S.C. § 1231(b)(3)(B)(ii) (2006).

⁷⁰ INA § 241(b)(3)(C), 8 U.S.C. § 1231(b)(3)(B)(iv) (2006).

immigration judge) "from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime."⁷¹ To determine whether a certain crime is a particularly serious crime for purposes of withholding of removal under section 241(b)(3) of the INA, immigration judges need to look at the nature of the crime.⁷² To do so they usually examine the criminal records, including the charging documents, and jury instructions.⁷³ In most instances, the examination of charging documents and other related records are prejudicial to the respondent as they tend to expose unproven allegations described in prosecutorial language. In the case of Ali Mohamed noted above, all the criminal records were admitted as evidence. The judge had to examine all the graphic details of the corruption of a minor charge to determine whether the crime, although the penalty was less than five years, constituted a particularly serious crime under section 241(b)(3) of the INA. The details of the allegations would obviously not help the respondent, whether they were true or not; there is no rule that could be used to keep them out.

IV. POSTTRIAL CHALLENGES

The rendering of a removal order is unfortunately not the end of the story; in fact, it is sometimes the beginning of a more serious challenge. In ideal circumstances, the noncitizen would obtain travel documents from the government of his home country, the home country would agree to take him, and he would be deported to that country without difficulty. Not infrequently, however, a

⁷¹ INA § 241(b)(3)(C), 8 U.S.C. § 1231(b)(3)(C) (2006).

⁷² See INA § 241(b)(3)(B)(ii)-(C), 8 U.S.C. § 1231(b)(3)(B)(ii)-(C) (2006).

⁷³ See, e.g., *Taylor v. United States*, 495 U.S. 575, 602 (1990). In *Taylor*, the defendant was convicted of burglary in Missouri. The Missouri criminal statute pertaining to burglary had multiple elements, some of which qualify as crimes of violence, but some do not. *Id.* at 580, 599. In such circumstances, the Court held that the immigration court may look at charging documents, jury instructions, and the actual records to determine "all the elements of [the crime] in order to convict the defendant." *Id.* at 602. See also *United States v. Landeros-Gonzales*, 262 F.3d 424, 426 (5th Cir. 2001); *United States v. Doe*, 960 F.2d 221, 224 (1st Cir. 1992) ("[W]here a single statutory provision defines several different crimes . . . a court may have to look at the indictment . . . to see which of the several different statutory crimes . . . was at issue.").

number of serious challenges arise. This part discusses those challenges.

A. Enforcement of Deportation Orders

Section 241 of the INA sets forth the rules that need to be followed for the removal of aliens ordered removed.⁷⁴ The statutory removal period is ninety days;⁷⁵ however, a more stringent rule applies to "inadmissible or criminal aliens."⁷⁶ It states that

[a]n alien ordered removed who is inadmissible under section 212, removable under section 237(a)(1)(C), 237(a)(2), or 237(a)(4) or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).⁷⁷

In situations where no state wants to receive their would-be deportee, the consequence could be indefinite detention, at least in some cases.⁷⁸

Although in *Zadvydas v. Davis*,⁷⁹ the Supreme Court of the United States held that indefinite detention of noncitizens ordered removed when there is no possibility of removal violated due process, it failed to make this rule applicable to all cases.⁸⁰ One obvious exception is considerations of dangerousness. Based on this gap, the Immigration Regulations carved out four possible exceptions to the *Zadvydas* "No Indefinite Detention Rule." These exceptions include: (1) people afflicted with highly contagious diseases; (2) people whose release would have adverse foreign policy consequences; (3) people who are considered significant

⁷⁴ See generally INA § 241, 8 U.S.C. § 1231 (2006) (addressing the detention and removal of aliens ordered removed).

⁷⁵ INA § 241(a)(1)(A), 8 U.S.C. § 1231(a)(1)(A) (2006).

⁷⁶ INA § 241(a)(6), 8 U.S.C. § 1231(a)(6) (2006).

⁷⁷ INA § 241(a)(6), 8 U.S.C. § 1231(a)(6) (2006).

⁷⁸ See INA § 241, 8 U.S.C. § 1231 (2006).

⁷⁹ 533 U.S. 678 (2001).

⁸⁰ *Id.* at 682, 690-95.

national security risks including terrorists; and, finally, (4) people who are considered "specially dangerous" because of their conviction for crimes of violence or because of mental conditions.⁸¹

As described above, the meaning of crimes of violence, aggravated felony, and related concepts in immigration law is a little different than in other areas of jurisprudence. Given the breadth of the exceptions under the regulations, indefinite or prolonged detention of those not only genuinely considered to be dangerous, but also those who are deemed dangerous just because they meet the board interpretation of the regulations, would be unavoidable. For example, in the case of Ali Mohamed cited above, as of the writing of this article, the respondent was awaiting his removal about a year after the final removal order was entered. He must have been released under *Zadvydas*, but obviously one of the four exceptions under the regulations must have been invoked to keep him in detention. The only way that the actual reasons for holding this individual for nearly a year could be ascertained is through habeas corpus. This will lead to the discussion of judicial review in the next subsection.

B. Judicial Review

In recent years, the United States Congress took several measures to curtail judicial review of immigration decisions in many ways. The evolution of judicial review in the immigration context is a complex subject and is outside the scope of this article.⁸² However, it is necessary to state the existing law to show the challenges that noncitizens ordered deported, and their representatives, routinely face. The general rule on judicial review of deportation orders based on criminal convictions is stated as, "Notwithstanding any other provision of law . . . no court shall have jurisdiction to review any final order of removal against an

⁸¹ See 8 C.F.R. § 241.14(b)-(d), (f) (2007).

⁸² For good discussion of some aspects of judicial review in the immigration context, see generally Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615 (2000).

alien who is removable by reason of having committed a criminal offense."⁸³ The exception is stated in the following terms:

Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.⁸⁴

A petition for review in an appellate court is thus the only way that a final removal order could be reviewed. Even then, the review is limited to constitutional issues and questions of law.⁸⁵ Determinations of fact including credibility, consistency, and sufficiency of evidence are almost always never reviewable.⁸⁶ Thus, a respondent who loses on factual findings at the trial level does not have any avenues of review unless, of course, the circumstances compel a contrary finding.⁸⁷ This is a very difficult burden to meet. It is fair to conclude that the chance of having a reversal on an appeal on questions of fact is close to none. Even when questions of law arise, the practical difficulty of proceeding with an appeal before an appellate court is a daunting task not only for the respondent, but also for his representatives. Unless some serious legal and constitutional issues are involved, the whole process of judicial review is so discouraging, particularly when the chances of success are balanced with the procedural hurdles and

⁸³ INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) (2006).

⁸⁴ INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D) (2006).

⁸⁵ INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D) (2006).

⁸⁶ For questions of fact, even the BIA employs the very deferential "clearly erroneous" standard. See DEPARTMENT OF JUSTICE, FACT SHEET: BOARD OF IMMIGRATION APPEALS: FINAL RULE at 3 (2002), <http://www.usdoj.gov/eoir/press/02/BIARulefactsheet.pdf>.

⁸⁷ This is particularly so in asylum situations. In *INS v. Elias-Zacarias*, 502 U.S. 478, 483-84 (1992), the Supreme Court held that courts may only reverse factual findings if the evidence presented is so compelling that no reasonable fact finder would have found the way the lower court found. See also INA § 242(b)(4)(B), 8 U.S.C. § 1252(b)(4)(B) (2006).

attending costs. A limited number of cases do, however, get appealed and continue to shape the jurisprudence in this area.⁸⁸

V. CONCLUSION

Involvement in the representation of noncitizens in expedited removal proceedings would provide the opportunity to observe the administration of an interesting brand of justice; the kind of justice that appears to balance humanitarianism with swift law enforcement. The balance is delicate. The guidance that decision-makers get from the substantive and procedural laws is less than perfect. The balance often shifts from one side to the other depending on circumstances. Administrative hurdles such as obtaining accurate criminal conviction records, plea bargains that do not take immigration consequences into account, lack of evidence, presumptions, relaxed rules of evidence and procedure, and lack of cooperation from countries of origin of persons ordered removed continue to complicate the administration of justice in immigration proceedings. In the end, however, the mix of variables that would determine the dispensation of justice in removal proceedings being too many, a not so unimportant variable seems to be good or bad luck.

⁸⁸ Although in recent years the number of appeals to the courts of appeals has grown significantly, it is still a fraction of the total number of cases adjudicated by the nations approximately 220 immigration judges. See Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, at A1 (reporting that in the year 2004, "Immigration cases, most involving asylum seekers, accounted for about 17 percent of all federal appeals cases").

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