THE GLOBE
The newsletter of the ISBA's Section on International & Immigration Law

September 2016, vol. 54, no. 1

Removal proceedings: A right of cross-examination

By
Patrick M. Kinnally

As we know, immigration tribunals are courts created by Congress, so, through the Executive Branch, it can control the process of civil immigration removal hearings. The Executive Office for Immigration Review (EOIR) is the federal agency which presides over immigration courts. All of its employees are appointed to their positions—whether judges or otherwise—by other federal employees. One might find it surprising with this federal regime, that in immigration proceedings, the Federal rules of Evidence (FRE) do not apply. If this seems odd to you, it should. Federal immigration law, federal regulations created by EOIR, judges and employees appointed by the federal government, but no Federal Rules of Evidence? See, *Doumbia v. Gonzales*, 472 F.3d 957 (7th Cir. 2007). As our 7th Circuit Court of Appeals noted:

> * * * the promise of a reasonable opportunity offered by 8 U.S.C. 1229(b)(4) should not be confused to mean that the Federal Rules of Evidence apply in immigration proceedings – they do not. *Niam v. Ashcroft*, 354 F.3d 652 (7th Cir. 2004). Rather, "the sole test for admission of evidence is whether evidence is probative and its admission is fundamentally fair * * * where "fundamentally fair" should simply be read to mean "in accordance with the reasonable opportunity guaranteed by 8 U.S.C. 1229 (b)(4)" * * *

At first glance, this holding seems circular since the reason given for not employing the FRE is the fact the statutory provisions supplants them. The statute does not say that the FRE does not apply in removal proceedings, nor for that matter, does it say it does apply; or is a substitute for the FRE. The conclusion the FRE does not apply in removal proceedings is based on the fact Congress never said it did, or did not. Statutory law merely provides a framework of procedural guarantees for immigrants in the midst of adversarial, civil immigration hearings. Regardless, the focus is that the evidence offered must be probative, reliable and therein, fundamentally fair. See, *Pouhova v. Holder*, 726 F.3d 1007, pp. 1011-1012, (7th Cir. 2013). (But, *cf.*) *Antia-Perea v. Holder*, 768 F.3d 647, 657-658) (7th Cir. 2014). The 7th Circuit has been steadfast in that holding. See, *Olowo v. Ashcroft*, 368 F.3d 692 (7th Cir. 2004); *Lam v. Holder*, 698 f.3d 529(7th Cir. 2012) ("*Lam*"). The hearsay rule as to documents used as evidence in removal hearings, as we shall see, creates special considerations.

In distinguishing *Pouhova*, however, the Seventh Circuit has stated that a Record of Deportable Alien (Form I-213), is inherently trustworthy and admissible even without the testimony of the officer who prepared it. It is quintessentially a hearsay document. The I-213 is prepared by a government agent and is used universally in removal hearings. This is because the maker of the record (a government agent), "cannot be presumed to be an unfriendly witness other than an accurate recorder." *Antia-Perea* at 657. That proposition is quite debatable since the recorder agent's job is to enforce immigration law. But the Seventh Circuit and other courts have held that unless there is

some indication, some attack on when the document was made, how it was completed and whether it contained statements of third parties, it may be admitted as the only proof of removability. Since Antia-Perea was present when the I-213 was recorded and never challenged its contents or creation, its efficacy as being reliable was not in controversy.

The *Antia-Perea* Court relied on two factors. First, the I-213 in *Antia-Perea* was created contemporaneously in Antia-Perea's presence. It was his statement, not another's. In *Pouhova*, the written document was created six years later. Additionally, in *Pouhova*, the I-213 documented an interview with a person other than the respondent without giving the respondent the right to cross examine the utterer of the statement. *Antia-Perea*at 658, citing *Malave.*

Here is the Framework

Immigrants in removal proceedings are entitled to due process of law as guaranteed by the Fifth Amendment. This is a constitutional requirement. See, *Pouhova v. Holder*, 726 F.3d 1007, pp. 1011-1012 (7th Cir. 2013). But what constitutes due process in the immigration area is, largely, left to Congress. It has provided a statute which states:

> * * *
>
> (4) Aliens rights in proceedings. -- In proceedings under this section, under regulations of the Attorney General –
>
> > (A) the alien shall have the privilege of being represented at no expense to the government, by counsel of the Alien's choosing who is authorized to practice in such proceedings,
> >
> > (B) the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence of the alien's own behalf, *and to cross-examine witnesses presented by the government* * * * (8 U.S.C. 1229a(b)(4). (Emphasis added.)

And, if removal proceedings comport with these statutory rights, no due process violation will occur, save a constitutional challenge to the statute. See, *Malave v. Holder*, 610 F.3d 483, (7th Cir. 2010) ("*Malave*");*Barradas v. Holder*, 582 F.3d 754 (7th Cir. 2009) ("*Barradas*").

Here is the Hearsay Rule

So, let's go back and refresh ourselves about what we learned in law school.

The problem hearsay statements create during administrative hearings are frequent. *Malave*. Documents that are hearsay are admitted routinely, which lessens the burden of proof for government trial attorneys who are prosecuting removal cases. *Barradas*. There are only four risks which pertain to evaluating the trustworthiness of in-court witness testimony. Administrative and trial court judges should observe them. See,*Graham, Handbook of Illinois Evidence* (2016), §801.1, pp. 857-862. These are:

- Perception in the sense of capacity and actuality of observations through any of the senses
- Recordation and recollection (memory)
- Narration (ambiguity)

- Sincerity (fabrication)

These inquiries exist for evaluating in-court witness testimony. In that setting, the adjudicator has the opportunity to determine the witness' credibility as to each risk factor since the witness is present for direct and cross examination. Yet, this evaluative protocol is remarkably different when the witness or declarant is unavailable to testify. This is because the person or document is not under oath, is not subject to observation during direct examination and finally, is not subject to any cross examination. Under such circumstances, the trustworthiness of the process is undermined, which is why hearsay evidence should be excluded. We need to remember that.

Here is the Result

A recent opinion from our Seventh Circuit Court of Appeals is a fair example of why cross examination in immigration cases is a safeguard immigration courts need to not only implement, but require. *Karroumeh v. Lynch*, 820 F.3d 890 (7th Cir. 2016) ("*Karroumeh*")

Karroumeh was admitted to the United States as a visitor on May 2, 1996. Once he arrived, he obtained a proxy divorce from his wife, in Jordan, five months later. In February 1997, he married Terri Wright ("Wright"), a Untied States citizen. Wright filed a visa petition for Karroumeh, and he was granted conditional lawful resident status in June 1998. Both Wright and Karroumeh filed a joint petition to remove the conditional resident status which the United States Citizenship and Immigration Services (USCIS) approved in January 2001.

In May 2001, Karroumeh applied for naturalization as a United States citizen. During his interview on that application in February 2002, Wright did not accompany Karroumeh. Karroumeh told the USCIS adjudicator he was getting divorced from Wright. Karroumeh withdrew the application. He was divorced in March 2012.

Later, Karroumeh filed two subsequent nationalization applications, the latest being in 2006. USCIS initiated an investigation as to whether Karroumeh and Wright's marriage was fraudulent.

During the USCIS inquiry, a USCIS official, Leslie Alfred ("Alfred"), procured a statement from Wright in 2008. This statement, obtained six years after the couple's divorce, raised questions which were ambiguous and contradictory about the couple's living arrangements after their marriage. For example, Alfred asked Wright if she ever thought that Karroumeh married her to get his green card. She replied, "I felt he did not want to live with me."

As a result of the USCIS investigation, it denied his application for naturalization. Even though Karroumeh calendared his application with the federal district court in 2012 for review, USCIS placed him in removal proceedings, alleging he obtained his permanent resident status solely by marrying a United States citizen for an immigration benefit. Karroumeh denied the alleged charge in his removal hearing before an administrative, immigration judge (IJ).

The IJ required that the Department of Homeland Security (DHS) attorney file its evidence. DHS indicated it would call Wright, Wright's children, a landlord where Karroumeh resided and Alfred. DHS counsel requested a subpoena issue for Wright and her children, which was granted for a hearing scheduled on September 5, 2013. The subpoenas were never served. The hearing date was rescheduled to January 2014. A new subpoena was never requested. Wright never showed up for the hearing.

At the hearing, the only witness was Alfred. The IJ permitted Alfred to testify about Wright's sworn statement which said the couple never lived together. Karroumeh's attorney objected to the

admission of Wright's statement since she was unavailable for cross examination. The IJ concluded that because DHS had attempted to obtain Wright's presence in Court, he was going to admit Wright's statement. Thereafter, the IJ concluded Wright's statement was "extremely damaging" to Karroumeh and that Karroumeh fabricated evidence to show the couple's marriage was true, when it was not entered into in good faith. The IJ ordered Karroumeh's permanent resident status is terminated. The Board of Immigration appeals (BIA) affirmed that decision. It held DHS made reasonable efforts to have Wright present at the hearing, and Karroumeh's attorney had a reasonable opportunity to cross examine Alfred. Karroumeh was ordered removed from the United States.

The Seventh Circuit saw it differently, and granted Karroumeh's petition for review. It concluded the government's rulings finding Karroumeh's statutory procedural rights to cross examine the main witness against him was not only violated, but that such error was prejudicial.

Citing *Malave,* the Court found that the right to cross examine adverse witnesses extends not only to live witnesses, but to those third-party witnesses whose statements are presented in written declarations like the statement of Terri Wright.

DHS argued it used "reasonable efforts" to ensure Wright's attendance at the hearing. The court did not decide whether that conduct was adequate to comport with the fairness of admitting a document whose declarant is unavailable for cross examination. It did so because DHS never subpoenaed Wright for the January merits hearing. Nor did It seek the United States Attorney or District Court's authority in enforcing such a subpoena. 8C.F.R. 1003.35(b)(6).

Notwithstanding the procedural violation of Karroumeh's right to cross examination of Wright, he still had to show that abrogation resulted in prejudice. Here, since the IJ concluded Wright's statement was 'extremely damaging" to Karroumeh, prejudice, without cross examination of Wright, was apparent.

The Court concluded, as has been its history, that the admission of evidence must be probative, fundamentally fair, and trustworthy. *Lam*, at 555. Because the Wright statement could not be cross examined, and was prejudicial to Karroumeh, the Circuit Court of Appeals reversed the BIA and the IJ and remanded the case for a hearing with all the procedural guarantees due to Karroumeh, including the cross examination of Terri Wright.

Karroumeh v. Lynch involves a decade of litigation about a simple principle we cherish: the right to the protection a statute entails; a right to confront at least a third-party accuser; a right to the process that is due to every person whose right to live in this country may be in peril. It is a welcome precedent. ν

Patrick Kinnally concentrates in general and commercial litigation, immigration and citizenship and administrative, environmental and local government law. Pat, currently Chair of the International and Immigration Law Section Council, can be reached at Kinnally Flaherty Krentz Loran Hodge & Masur PC by phone at (630) 907-0909 or by email to pkinnally@kfkllaw.com.