

The Risk of Arbitrary Administrative Action When Judges Lose Their Discretion to Grant Continuances in Immigration Proceedings

by H. Raymond Fasano



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Immigration judges operate within the purview of the Executive Office for Immigration Review (EOIR). The stated mission of the EOIR is as follows:

To adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the nation's immigration laws. Under delegated authority from the attorney general, EOIR conducts immigration court proceedings, appellate reviews, and administrative hearings.¹

In a recent unfortunate action by the U.S. attorney general (AG) via a Jan. 17, 2018, memorandum from James McHenry, director of the EOIR, immigration judges (IJs) are now pressured under a new matrix that requires them to meet performance goals, effectively removing their discretion to grant continuances. Instead, IJs must now meet specific case processing goals.

The EOIR was born out of the former Immigration & Naturalization Service (INS) in 1983. Through a Department of Justice (DOJ) reorganization, the EOIR became independent from INS, as a separate and independent agency within the DOJ. Thus, the EOIR's director now reports to the AG.² According to the DOJ, the "EOIR interprets and administers federal immigration laws by conducting immigration court proceedings, appellate reviews, and administrative hearings. EOIR is committed to providing fair, expeditious, and uniform application of the nation's immigration laws in all cases."³ This may all be in the past once IJs no longer have independent control over their dockets.

IJs have the delegated authority to grant continuances pursuant to regulation and case law. Pursuant to 8 C.F.R. § 1003.29 (2018), an IJ in his or her discretion may grant a continuance for "good cause shown." It would appear that the AG is now attempting to take this discretionary authority away from IJs. In *Matter of Castro-Tum*,⁴ the AG referred *Matter of Aveytisyan*,⁵ questioning whether IJs have the authority to sua

sponte administratively close removal proceedings. Under *Aveytisyan*, IJs currently have the independent discretion to administratively close proceedings, weighing the following criteria:

All relevant factors, including but not limited to: (1) the reason administrative closure is sought; (2) the basis for any opposition to administrative closure; (3) the likelihood the respondent will succeed on any petition, application, or other action he or she is pursuing outside of removal proceedings; (4) the anticipated duration of the closure; (5) the responsibility of either party, if any, in contributing to any current or anticipated delay; and (6) the ultimate outcome of removal proceedings (for example, termination of the proceedings or entry of a removal order) when the case is re-calendared before the immigration judge or the appeal is reinstated before the Board [of Immigration Appeals].

This independence is now under attack. The erosion of the IJ's independence began with the AG referring *Castro-Trum* to himself. The AG now is placing a leash on IJs by referring *Matter of L-A-B-R et al.*⁶ to himself—a case in which the AG asks: "Under what circumstances does 'good cause' exist for an immigration judge to grant a continuance for a collateral matter to be adjudicated?"⁷

It is curious as to why the AG has a lack of faith in the body of case law that addresses motions for a continuance when an IJ may grant a continuance for "good cause shown." There is a body of administrative and circuit law that addresses the specific question raised by the AG. The AG would have no faith in the well-reasoned and applied body of case law that entrusts IJs with the discretion to manage their own dockets in an efficient, orderly, and fair manner. The leading administrative case on motions for continuance in removal proceedings is *Matter of Hashmi*,⁸ in

which the Board of Immigration Appeals (BIA) held that “an alien’s unopposed motion to continue ongoing removal proceedings to await the adjudication of a pending family-based visa petition should generally be granted if approval of the visa petition would render him prima facie eligible for adjustment of status.” In reaching this holding, the BIA followed its precedent in *Matter of Garcia*.⁹

The *Hashmi* panel devised the following test in order to determine whether “good cause” is shown in considering a motion for a continuance:

A variety of factors may be considered, including, but not limited to: (1) the Department of Homeland Security’s response to the motion to continue; (2) whether the underlying visa petition is prima facie approvable; (3) the respondent’s statutory eligibility for adjustment of status; (4) whether the respondent’s application for adjustment merits a favorable exercise of discretion; and (5) the reason for the continuance and any other relevant procedural factors.

It would appear that the AG’s concerns regarding when “good cause is shown” for a continuance has already been answered by the agency that he is delegated to oversee. Why would the AG seek to chill motions for continuances? Is it his infusion of political purpose, by streamlining EOIR to process the orderly deportation of aliens? How are the benefits of justice realized with zealously expeditious processing of removal cases? On their blog, my colleague Cyrus Mehta and his co-author Sophia Genovese opine, “In the Department of Justice’s Background on EOIR Strategic Caseload Reduction Plan ... [Attorney General Jeff] Sessions blames IJ’s low productivity levels and rising backlogs on ‘representatives of illegal aliens have purposefully used tactics designed to delay adjudication of their clients’ cases.’ Such as motions for a continuance.”¹⁰

It is troubling that the AG could potentially subvert fairness in the removal proceeding process when continuances are a tool used every day to efficiently and fairly exercise the discretion of IJs. Immigration cases are organic and take on a life of their own as life moves forward. For example, during the pendency of a removal proceeding people get married, they have kids, their spouses become citizens, they get hired in new jobs, or their circumstances otherwise change, and they need time in order to pursue a new application for relief from removal. There are a myriad of circumstances that occur as life goes on. Circuit courts are cognizant of this. In *Subhan v. Ashcroft*¹¹ the court held that the IJ abused his discretion in denying a motion for a continuance when the basis for the request was a pending labor certification. The court in *Ahmed v. Gonzales*¹² held that the IJ abused his discretion in denying a request for a continuance when the alien was “grandfathered” for a waiver of unlawful presence under INA § 245(i) since he was included in his parents’ family-based petition at the time the waiver existed. In the interest of justice, a continuance was justified to allow the alien to pursue the waiver. In *Montes-Lopez v. Holder*,¹³ the Ninth Circuit held that a continuance should have been granted to allow an alien time to secure counsel in removal proceedings. The court reasoned that it was a denial of due process for the IJ to compel the alien to proceed with the case without the benefit of counsel.

The motivations of the AG in calling back the issue of “good cause” to grant a continuance motion are not clear. It is puzzling why the matter has to be addressed for the AG’s consideration when

the standards for “good cause shown” have been followed across the nation. “Good cause” is not an arbitrary or capricious standard. Guidelines have been set forth in the body of case law developed by experts who address this issue every day. IJs understand the workings of their docket and are in the best position to determine when “good cause” for a continuance has been shown. As we witness the sunset of IJ independence, we are proceeding toward a dark tunnel of injustice. Hopefully there will soon be a reorganization of EOIR into an Article I court, which would allow the light of justice to shine again with the independence of the judiciary. ☺

Endnotes

¹*Executive Office for Immigration Review*, DEP’T OF JUSTICE, <https://www.justice.gov/eoir> (last visited Sept. 10, 2018).

²*About the Office*, DEP’T OF JUSTICE, <https://www.justice.gov/eoir/about-office> (last visited Sept. 10, 2018).

³*Id.*

⁴27 I&N Dec. 187 (A.G. 2018).

⁵25 I&N Dec. 288 (B.I.A. 2012).

⁶27 I&N Dec. 245 (A.G. 2018).

⁷*Id.*

⁸24 I&N Dec. 785 (B.I.A. 2009).

⁹16 I&N Dec. 653 (B.I.A. 1978).

¹⁰Cyrus Mehta & Sophia Genovese, *Making the Law Up As He Goes: Sessions Refers Another Case to Himself, This Time on Motions for Continuance*, INSIGHTFUL IMMIGR. BLOG (Mar. 26, 2018), <http://blog.cyrusmehta.com/2018/03/making-the-law-as-he-goes-sessions-refers-another-case-to-himself-this-time-on-motions-for-continuance.html>.

¹¹*Subhan v. Ashcroft*, 383 F.3d 591 (7th Cir. 2004).

¹²*Ahmed v. Gonzales*, 467 F.3d 669 (7th Cir. 2006).

¹³*Montes-Lopez v. Holder*, 694 F.3d 1085 (9th Cir. 2012).