Matter of Jasso Arangure Blows a Huge Hole in *Res Judicata*

by Alicia Triche

Dr. Alicia Triche is sole proprietor at Triche Immigration Law, a Memphis, Tenn.-based private practice that focuses on appeals, research support for fellow attorneys, and refugee cases. In 2013, Dr. Triche received a D.Phil. in international refugee law from Oxford University.

> Few legal doctrines are more intrinsic or necessary in our system than res judicata.[1] *Medina v. INS,* 993 5. 3d 499 (5th Cir. 1993).

Until recently, *res judicata* in immigration proceedings went mostly like this: Unless the law or the facts changed significantly, Immigration and Customs Enforcement (ICE)[2] got one shot at prosecuting removal. In other words, a charge ICE "could have brought in the first case" could not be raised in subsequent proceedings.[3] To varying degrees, both *res judicata* and collateral estoppel served as a barrier, preventing either the government or the alien from taking endless bites at the apple—from trying again and again, under the same circumstances, "until the desired result is achieved."[4]

But now, in a striking development, the U.S. Board of Immigration Appeals (BIA) has issued *carte blanche* for ICE to keep prosecuting the same aggravated felony case, with no limits or explanations, until they finally find the one that sticks. With *Matter of Jasso Arangure*,[5] the BIA effectively *eliminated* both collateral estoppel and *res judicata* in the aggravated felony context.[6] Citing the "societal interest" in removing aggravated felons, the BIA ruled that ICE is "not precluded" from initiating multiple proceedings under the various aspects of the aggravated felony definition. Although *res judicata* has always been open to exceptions in the administrative law context, the sheer girth of this newest "exception" renders it a staggering departure from previous law and policy—the implications of which can hardly be understated.

"Aggravated felony" is a phrase that rings (largely negative) Pavlovian bells to any U.S. crimmigration practitioner. It is defined at § 101(a)(43) of the Immigration and Nationality Act (INA),[7] where its reach is considerably expansive and often contested. Section 101(a)(43) contains 23 different sections—(A) through (U)—and some of those have subparts. Combined, §§ (A) through (U) span the reach of hundreds, if not thousands, of criminal statutes and boast a body of jurisprudence all their own.

Ramon Jasso Arangure was a Mexican national with a felony conviction for a "home invasion" under Michigan Compiled Laws § 750.110a(2).[8] The aggravated felony definition contains a section for a "theft offense … or burglary offense" with a one-year prison term. This is located at INA § 101(a)(43)(G), it's often used, and, if you're looking right above it (at § (F)), it's even easy to spot. However, ICE ignored (G) and went to (F), instead charging Jasso Arangure solely under the "crime of violence" section of aggravated felony.[9] Under 8 C.F.R. § 1003.30 (2017), ICE has broad discretion to add charges at any time during proceedings. But in this case, ICE did not exercise that discretion, even though proceedings went on for some time.

While the case was pending, the Sixth Circuit became one of several courts to rule that the applicable portion of the "crime of violence" statute, 8 U.S.C. § 16(b), was void for vagueness.[10] The BIA then remanded the case back to the immigration judge.[11] Because Jasso Arangure was a legal permanent resident and the "crime of violence" allegation was the only charge against him, the immigration judge ultimately terminated proceedings.[12] Two days after the decision became final, ICE issued a new notice to appear, this time alleging that the same conviction was a "burglary" offense under INA § 101(a)(43)(G).[13]

The BIA decision rightly asserts that *res judicata* is marked as "flexible" in the administrative law context.[14] Collateral estoppel, in particular, allows for exceptions when there is an intervening change in the law.[15] However, until *Jasso Arangure,* no published decision had ever stated that the government could use the same facts *and* the same law and effectively "relitigate" a *particular* statute of deportability.

The Ninth Circuit seems to be the only court of appeals to explicitly (and repeatedly) address this circumstance—jurisprudence that the BIA expressly declined to follow in the *Jasso Arangure* decision.[16] But other non-circuit courts, *including* the BIA, have also held that multiple deportation proceedings cannot be based on the same law and facts.[17] Before *Jasso Arangure,* in at least one decision, the BIA denied ICE

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the opportunity to re-try an Oakdale removal case on the same set of facts.[18] In 2004, the District of Connecticut trial court was asked to allow new deportation proceedings, charging a conviction "relating to" a controlled substance, where an aggravated felony drug charge had failed.[19] Invoking *Medina v. INS,* the court found the following:

> Respondents argue that *res judicata* should not apply to immigration removal proceedings involving a criminal alien. However, as *Medina* warns, carving out a large exception to the *res judicata* doctrine "would allow the agency to eschew direct appeal—either inadvertently, through error, or consciously as a strategic decision—then years later, collaterally attack decisions of immigration judges.[20]

With *Jasso Arangure,* the BIA has now carved out just such an exception. To its credit, the decision is transparent regarding its main intent—to serve the "societal interest in removing criminal aliens" in the aggravated felony context,[21] which the BIA states overrides the "public policy" behind *res judicata.*[22] What is so striking about this—and such a departure—is that it effects a *general policy.* The BIA could have issued an individual exception to *res judicata* in an unpublished decision. Such a holding could have indicated, for example, that Jasso Arangure's conviction was particularly dangerous, and that an honest mistake by ICE should not effect to preclude removal in this particular instance. But, that is not what the BIA did. Instead, they issued a published, blanket rule that seeks to effectively eliminate the historic doctrine of *res judicata* in the aggravated felony context. And in that context, and with a vast arsenal of jurisprudence at its disposal, ICE now has the ability to keep fishing for legal theories until they find one that a judge will accept.[23]

There is a reasonable argument that *Jasso Arangure* might be limited to his particular fact pattern. Applying headnote 1, the strictest interpretation of the ruling would hold that it applies *only* to §§ 101(a)(43)(F) and 101(a)(43)(G) of the aggravated felony definition. A broader interpretation, however, would apply it to the entirety of the aggravated felony spectrum. Using dicta, the decision could even conceivably be expanded to cover all of the criminal grounds of removability at INA. This is why the decision is poised to effect such severe consequences on the rule of law.

Jasso Arangure is a very new decision, and its fate in the courts of appeal remains to be seen. However, it is difficult to envision that the decision will be taken lightly. This newly imparted "flexibility" actually turns *res judicata* on its head, allowing for the unstable and "vexatious litigation" that doctrine was designed to prevent.[24] ⊙

Endnotes

[1]*Medina v. INS*, 993 F.3d 499, *reh'g denied,* 1 F.3d 312, 313 (5th Cir. 1993).

[2]Removal is prosecuted by the Department of Homeland Security's Office of the Principal Legal Advisor, a branch of Immigration and Customs Enforcement (ICE), also referred to as the Office of Chief Counsel. *See* Principal Legal Advisor Offices, Immgr. & Customs Enforcement, https://www.ice.gov/contact/legal (last visited Feb. 6, 2018).

[3]*See, e.g., Bravo-Pedroza v. Gonzales,* 475 F.3d 1358, 1358 (9th Cir. 2007).

[4]*Duvall v. Att'y Gen.,* 436 F.3d 382, 388 (3d Cir. 2006).

[5]*Matter of Jasso Arangure*, 27 I&N Dec. 178 (BIA 2017).

[6]"*Res judicata"* refers both to claim preclusion and to the overall concept of limiting too-similar attempts at litigation. "In its broadest sense," the term "covers four distinct types of preclusion: bar, merger, collateral estoppel, and direct estoppel." *Moch v. East Baton Rouge Parish Sch. Bd.*, 548 F.2d 594, 596 (5th Cir. 1977) (citing Restatement (First) of Judgments § 45). For a useful overview of the difference between collateral estoppel and *res judicata* in immigration proceedings, *see* Greg Pennington, *A Preclusive Effect: Issue Preclusion in Immigration Practice,* 9 Immigr. L. Advisor 1, 1 (Jan. 2015), https://www.justice.gov/sites/default/files/eoir/pages/attachments/2015/02/26/vol9no1final.pdf.

[7]8 U.S.C. § 1101 *et seq.* (as amended) [INA]

[8]27 I&N Dec. at 178-79. The Michigan statute prescribes various means of breaking and entering into a "dwelling" while carrying a weapon or while another person is present. Mich. Comp. L. A. § 750.110a(2) (Westlaw 2018).

[9]INA § 101(a)(43)(F).

[10]*Shuti v. Lynch,* 828 F.3d 440 (6th Cir. 2016).

[11]27 I&N Dec. at 182, 184.

[12]*See id*. at 178, 184.

[13]*Id.*

[14]27 I&N Dec. at 181; *see, e.g., Alvear-Velez v. Mukasey,* 540 F.3d 672, 677 (7th Cir. 2008).

[15]*See* Restatement (Second) of Judgments § 28.

[16]27 I&N Dec. at 178, n.1 (citing *Bravo-Pedroza, supra* note 3).

[17]It is beyond the scope of this column to challenge *Jasso Arangure's* assertion that, since the new prosecution charged a different aggravated felony section, the "operative facts" of the two cases were somehow different; however, that finding is certainly open to legal challenge. 27 I&N Dec. at 181-82.

[18]In re Edward Omar Spence, A044 853 587 (BIA Jun. 8, 2007), 2007 WL 2074507.

[19]*Murray v. Ashcroft,* 321 F.Supp. 385 (D. Conn. 2004).

[20]*Id.* at 387 (citation omitted).

[21]Another question that is beyond the scope of this column is whether the BIA is correct to assert that Congress has expressed an implied intent to override *res judicata* in the aggravated felony context. 27 I&N Dec. 183; *see Astoria Fed. Sav. and Loan Ass'n v. Solimino,* 501 U.S. 104, 107-109 (1991).

[22]27 I&N Dec. at 183.

[23]ICE is also the agency responsible for apprehension and detention, and since ICE also has complete discretion over where to detain any respondent. Although it would not necessarily exercise this option, *Jasso Arangure* does provide ICE now theoretical power to "forum shop" among the various detention courts.

[24]540 F.3d at 677.