The Green Card

Welcome to the Newsletter of the FBA's Immigration Law Section

LARRY BURMAN, CHAIR

Quote of the Month

"With the freedom to speak, an individual is free. Without that freedom, an individual is not free. We easily get into trouble if our defense of free speech is premised on whether it contributes to truth-seeking or not, or whether it serves democracy or not, whether it is blasphemous or not, whether it undermines the war effort or not or, whether it is a threat to the common good or not—all these arguments are used every day to silence people all over the world." *Flemming Rose*

From the Chair

I am privileged to enter my second term as Chair of the Immigration Law Section. Since my first term in 2011-2012, we have more than doubled in membership. That is mainly a tribute to the energy and hard work of my successors—Ray Fasano, Judge Robin Feder, and Eileen Scofield. Each of them brought something special to the Section. Also contributing to the Section's success has been our superb Board of Governors, some of the most distinguished attorneys and Immigration Judges in the country.

But there is always room for improvement. Our Board has been expanding rapidly along with the Section, and now totals 55. This number is simply unwieldy. Our conference calls have become chaotic, and it was often impossible to know who was speaking (or trying to speak). It is simply not efficient, and must be reduced in size.

The fact is that many of the Board members were not really interested in the minutia of budget, minutes, elections, and other internal Section matters; their interest

FROM THE CHAIR continued on page 7

In This Issue

Immigration Rant 2
Some Comments on "Pattern or Practice of Persecution" 4
Immigration Law Section News 8
The Roberts Connection 9
Off the Bench- on the Brevity of Asylum Hearings 10
Michelle Obama's Powerful Voice is Needed to Put an End to Family Detention 12
Mind-Body Stress Management for Immigration Attorneys and Judges 13
The Doctrine of Consular Non-Reviewability: Why It Still Matters 15
Venture Capitalists and Immigration Proponents Likely Disappointed by USCIS Proposed Entrepreneurial Parolee Rule 17
Beginning a New Tradition: Younger Lawyers Division Hosts Happy Hour at Annual Conference in New Orleans 18
Section Leadership 19

DISCLAIMER: *The Green Card* is a journal of opinion by and for immigration professionals. All opinions expressed herein are those of the writers alone, and do not represent the official position of the Federal Bar Association, the Immigration Law Section, or any organization with which the writer is associated.

By Jason Dzubow

Where Terror Victims Are Treated as Terrorists

Let's say you own a grocery store in Mosul, Iraq. Your town is conquered by the Islamic State, and an IS fighter comes to your store, grabs your teenage daughter, puts a gun to her head, and threatens to rape and kill her unless you give him a glass of water. You pour a glass of water, hand it to your daughter, and she gives it to the fighter. Now, let's say that you, your daughter, and the IS fighter get to the United States and request asylum. Question: Who is barred from receiving asylum? (a) The IS fighter; (b) You; (c) Your daughter; (d) All of the above.

If you guessed "d", you win. By giving a glass of water to the IS fighter, you and your daughter have provided "material support" to a terrorist, and you are both barred from receiving asylum in the United States. Even though you gave the glass of water under duress to save your child's life. And even though it was only one glass of water (what we lawyers call "de minimis"). How can this be?

After the attacks of September 11, 2001, Congress greatly expanded pre-existing law in order to prevent terrorists from taking advantage of our immigration system. These laws include the rules relating to "material support," which one jurist has called "breathtaking in... scope," *see Matter of S-K-*, 23 I&N Dec. 936 (BIA 2006) (Acting Vice Chairman Osuna, concurring). The opinion continues:

> Any group that has used a weapon for any purpose other than for personal monetary gain can, under this statute, be labeled a terrorist organization. This includes organizations that the United States Government has not thought of as terrorist organizations because their activities coincide with our foreign policy objectives

Id. And anyone who provides any type of support to these "terrorists" is subject to the material support bar.

The problem is that under these rules, lots of people meet the definition of a terrorist or a person who provided material support to a terrorist. And it's not just people like the shop owners from Mosul. Under our existing law, George Washington would be considered a terrorist. He led an armed rebellion against Great Britain. Ditto for the other founding fathers. Betsy Ross gave material support by sewing a flag for the rebels. There are more modern examples, of course. How about Nobel-prize winning author and Holocaust survivor Eli Wiesel, who was interned in a Nazi slave labor camp where he provided—you guessed it—material support to the Germans. And how about John McCain, who gave material support to the North Vietnamese by participating in a propaganda video (after being tortured while a prisoner of war). Indeed, even Luke Skywalker would be considered a terrorist under the current rules since he participated in armed resistance against the Empire.

Maybe the picture I am painting is a bit too bleak. While there is no statutory exception for the material support bar, the Secretary of State and the Secretary of Homeland Security have the authority to waive certain Terrorism-Related Inadmissibility Grounds ("TRIG"). In that vein, DHS has issued group-based exemptions that allow people involved with certain "terrorist" groups to obtain status in the U.S. It is also possible to receive an individual exemption through a Byzantine (and sometimes infinite) process. If your application is being held because of TRIG, you can inquire about your case status at TRIGQuery@uscis.dhs.gov.

One government entity that does not have the authority to grant a TRIG exemption is the Department of Justice ("DOJ"). This is significant because the Immigration Courts are part of the DOJ. Thus, Immigration Judges cannot grant asylum cases where the alien is subject to TRIG, even when the alien provided material support under duress. In a depressing, but not particularly surprising decision last week, the Board of Immigration Appeals confirmed that there is no implied duress exception to the material support bar:

> [A]bsent a waiver [from the Secretary of State or the Secretary of Homeland Security], an alien who affords material support to a terrorist organization is inadmissible and statutorily barred from establishing eligibility for asylum and for withholding of removal under the Act and the Convention Against Torture, even if such support was provided under duress.

Matter of M-H-Z-, 26 I&N Dec. 757 (BIA 2016). The problem is that an alien can only get an exemption *after* he is ordered removed from the United States, and even then, there is no particular procedure to follow to request an exemption. It seems the best an alien (or his attorney) can do is to contact the DHS/ICE Office of the Chief Counsel and request consideration for an exemption. An exemption is only available if asylum would have been granted *but for* the TRIG issue. In other words, the alien needs to show that if it wasn't for the TRIG problem, the Immigration Judge would have granted him asylum (helpful hint to lawyers: If your client is barred from asylum solely due to TRIG, try to get the Judge to state that explicitly in her decision; this will help when applying to DHS for an exemption). If the Secretary of Homeland Security grants the exemption, the alien then needs to re-open his court case in order to receive asylum. Legend has it that DHS does sometimes grant exemptions, so it certainly is worth a try, but my guess is that this is a slooooow process.

Blocking terrorists and their supporters from the U.S. is obviously an important goal--it protects our country and it protects our immigration and asylum system. However, the material support bar is much too broad. It fails to distinguish between terrorists and their victims. Worse, it treats victims as if they were terrorists. The recent ruling from the BIA underlines this sad fact. It also illustrates why the law needs to be changed. As we continue to work for immigration reform, I hope we will keep in mind those who have been victimized by terrorists and victimized a second time by our overly-broad anti-terrorism law.

The Art of "No"

In the field of immigration law, if you're a reasonably-priced attorney in private practice, or if you work for a non-profit, you probably do a volume business. You have to, to make a living. And if you hope to get your work done, maintain a social/family life, stay healthy, and keep your sanity, there is one word that you need to keep handy at all times. As you might have surmised from the title of this piece, that word is "No."

"Can I ask one quick question about my brother-in-law's visa?"

- No.

"My friend's lawyer said I can expedite my case if you just call the Asylum Office and ask them. Can you call them today?"

- No.

"I don't have an appointment, but I stopped by to talk to you about my case. It will only take a few minutes. Can I see you?"

- No.

"You already completed and filed my asylum application, but I've decided I want to leave the country and withdraw my case. Can I have a refund?"

- No.

As the asylum backlog has turned into an unpleasant version of the (without a cute little boy named Bastian to save us), client demands have proliferated. This is not the clients' fault. It makes sense that they should turn to their attorneys with all their immigration questions (and their family member's immigration questions) (and their friends' immigration questions). While it's certainly understandable, it puts the attorney in a difficult position.

In the good ol' days, before the backlog, most asylum cases lasted less than six month. Even the slow cases were usually resolved in a year or so. But now, it takes years just to get an interview; never mind the delays post-interview. This means that the number of "active" asylum cases has increased. In my office, for example, I always had one large filing cabinet, where I kept my cases. Now I have three, and I might need to get a fourth soon (if you have one to sell, let me know). I've gone from maybe 60 or 70 active asylum cases to over 300.

With more numerous and longer-lasting cases, we lawyers have to spend much more time responding to our clients' queries. Most of my clients are not particularly high-maintenance people, but even if they call once a month, and it takes me five minutes per call, that's 1,500 minutes--or 25 hours--per month. That's time I can't spend working on other client matters, meeting deadlines or taking my traditional three-martini lunch. Indeed, if I was less protective of my time, I could spend all day addressing client questions, and no work would ever get done.

One way to turn these long-term cases in the lawyer's favor is to bill the client for the lawyer's time. That way, every five minute call translates into income. Many attorneys do that, but I suspect few lawyers specializing in asylum bill their clients this way, and it's not how I do things. I hate keeping track of such little periods of time, and I hate nickel-and-diming the clients. They don't much like it either.

The alternatives are not much better. Either the lawyer can say "no" to his clients, or he can go crazy trying to answer all their questions.

In my practice, I try to at least say "no" gracefully:

"Can I ask one quick question about my brother-in-law's visa?"

- I'm sorry, I can't answer questions that are not related to my clients' cases. If he wants to come in for a consultation, he is welcome.

"My friend's lawyer said I can expedite my case if you just call the Asylum Office and ask them. Can you call them today?"

- Actually, it does not work that way. I can email you a document explaining the expedite process.

"I don't have an appointment, but I stopped by to talk to you about my case. It will only take a few minutes. Can I see you?"

- Sorry, I have a deadline and I cannot meet right now. If you talk to my assistant, she can schedule an appointment for you.

"You already completed and filed my asylum application, but I've decided I want to leave the country and withdraw my case. Can I have a refund?"

- Hell no! Get outta here before I call ICE and have you deported!

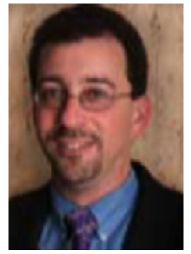
OK, that last one is not exactly how I would respond (and the subject of refunds is probably worth its own blog post one of these days), but you get the idea. You can say "no" and be protective of your time, at least to a large extent, while still helping your clients (though maybe on your time; not theirs).

And obviously there are real emergencies when the client does need advice immediately, but I find that these situations are rare. Indeed, many client "emergencies" are not urgent at all--the client just wants to know the answer to a run-of-the-mill question, and she wants to know it now. I usually ask the client to email me the basic details of the emergency, so I can decide for myself how urgently I am needed.

As with so many things in legal practice--and in life--the key here is balance. We need to be responsive to our clients, but we also need to protect our own time, so we

can get our work done. Learning to say "no" is not always easy, and for me at least, it does not come naturally. But saying "no" in a respectful way is an essential skill for all immigration lawyers. ■

Jason Dzubow is afounder of Dzubow & Pilcher, PLLC. His practice focuses on immigration law, asylum, and appellate litigation. In 2011 and 2013, Washingtonian magazine recognized him as one of the best immigration lawyers in Washington, DC. He is an adjunct professor at George Washington University Law School in Washington, DC. His blog, the Asylumist, is the only blog in the U.S devoted exclusively to asylum law: www.asylumist.com



Article

Some Comments on "Pattern or Practice of Persecution"

By Jeffrey S. Chase

Federal regulations guiding the adjudication of asylum claims contain the following provision:

> In evaluating whether the applicant has sustained the burden of proving that he or she has a well-founded fear of persecution, the asylum officer or immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution if: (A) The applicant establishes that there is a pattern or practice in his or her country of nationality…of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and (B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.[1]

A slightly different version of the above was first introduced as part of the asylum regulations that became effective on October 1, 1990. In reviewing the body of case law that has developed since, I would like to offer several comments.

1. *The concept predates the regulation*.

In *INS v. Cardoza-Fonseca*, its landmark 1987 decision establishing that the burden of proving a "well-founded fear of persecution" is significantly less than fifty percent, the Supreme Court relied on the following scholarly example:

"Let us…presume that it is known that in applicant's country of origin every tenth adult male person is either put to death or sent to some remote labor camp… In such a case it would be only too apparent that anyone who managed to escape from the country would have 'well-founded fear of being persecuted' on his eventual return."[2]

While the Court's decision predates the "pattern or practice" regulation by more than three years, the example it relies on (which predates the regulation by 24 years) presents a classic "pattern or practice" scenario. The hypothetical establishes (1) a group, i.e., all adult males in a particular country; and (2) information establishing systemic persecution of one in ten members of such group. all members of the group therefore have a well-founded without the need to explain their individual circumstances.

In its precedent decision implementing *Cardoza-Fonseca*'s holding, the BIA used language associated with a "pattern or practice" analysis:

> "Where the country at issue in an asylum case has a history of persecuting people in circumstances similar to the asylum applicant's, careful consideration should be given to that fact…A well-founded fear, in other words, can be based on what has happened to others who are similarly situated."[3]

In light of the limited guidance provided by post-regulation case law, reference to such earlier cases is helpful in establishing e.g. the necessary risk the group must show under section (A) of the above regulation (in *Cardoza-Fonseca*, one in ten sufficed), or the size that such a group may be (i.e. in the *Cardoza-Fonseca* example, all adult males in a country was not deemed too large a group).

2. *The Regulation Does Not Create a Lesser Burden of Proof*

An asylum applicant's burden of proof is not satisfied by the random threat of harm citizens are generally exposed to, even where such random threat is elevated by factors such as a highly oppressive government, civil conflict, or the existence of armed groups that the government is unable to control. An asylum applicant must instead establish a risk of persecution elevated above random to the point that a reasonable person would fear persecution. Since the Supreme Court's decision in *Cardoza-Fonseca*, an asylum applicant demonstrating a one-in-ten risk of persecution has established a fear sufficiently elevated to make its avoidance reasonable; such level of fear has been termed "well-founded."

While the same one-in-ten risk is the burden of proof borne by all asylum applicants, the above case law, treatises,

and regulation have established that there are different ways to meet this threshold. While such level of fear is most commonly reached through threats or other encounters personally experienced by the asylum seeker, the above sources recognize that persecution aimed at all members of a group may become systemic and pervasive enough to elevate the fear for all identifiable members of such group to the appropriate level without the need for personally encountering a specific fear-invoking incident.

3. *The Ninth Circuit's "Disfavored Group" Analysis Explained*

The Ninth Circuit's case law has provided significant analysis of this concept.[4] The court has explained that a well-founded fear may be demonstrated in one of two ways: (1) through a "pattern or practice," or (2) by proving membership in a "disfavored group, and "showing that she, in particular, is likely to be targeted as a member of that group."[5]

What is meant by a "disfavored group?" As the Ninth Circuit explained in *Kotasz v. INS*, "[g]roup membership is an aspect of nearly all asylum claims, not a special problem limited to pattern or practice cases." Noting the five protected grounds enumerated in the Refugee Act, the court observed that four (race, religion, nationality, and membership in a particular social group) "relate to group characteristics, and even...political opinion is largely group-based, although the group may not be formally structured or easily defined."[6] The court thus concluded that "[p]roof that the government...has discriminated against a group to which the petitioner belongs is, accordingly, *always* relevant to an asylum claim."[7]

The court has further explained that where the targeting of the disfavored group does not rise to the "pattern or practice" threshold, the "well-founded fear" analysis is conducted on something of a sliding scale (the author's term), in which the two factors of (1) the degree to which the disfavored group is mistreated, and (2) the applicant's "individualized risk of being singled out for persecution... operate in tandem. Thus, the 'more serious and widespread the threat' to the group in general, 'the less individualized the threat of persecution needs to be.'"[8]

In this author's opinion, there is nothing controversial about the above statement. An asylum applicant needs to show at least a one-in-ten risk of persecution. Let's assume a hypothetical in which an asylum applicant is trying to establish a well-founded fear of persecution because she is a practicing Christian in Country X. If the country condition materials of record make no mention whatsoever of mistreatment of Christians in Country X, and state that the government there protects the rights of all religious groups to practice their faiths freely, then obviously such reports have moved the applicant no closer to meeting her burden of proof. If she is to establish the necessary risk, she must do it entirely through her personal experiences (e.g. threats, attacks, etc.) that would give rise to her individualized fear of persecution.

Alternatively, if country condition evidence of record establishes that Christians are regularly attacked, arrested, and threatened with imprisonment unless they convert to the majority religion, then the applicant has already made headway towards establishing her one-in-ten risk before she has even begun to detail her own personal experiences. Nevertheless (and perhaps due to a perception that the Ninth Circuit has created an extra-regulatory category of asylum claimants entitled to a lower evidentiary standard), other circuits have taken a less than favorable view of the Ninth Circuit's approach.[9]

Interestingly, the First Circuit has similarly found that "evidence short of a pattern or practice [of persecution] will enhance an individualized showing of likelihood of a future threat to an applicant's life or freedom," but has stated that such approach is distinct from the Ninth Circuit's "disfavored group" approach.[10]

4. *What Triggers a "Pattern or Practice" Finding?*

In the 26 years since the publication of the regulation, the courts have provided little guidance as to what is required to trigger a "pattern or practice" finding. Case law has stated that persecution must be "systemic, pervasive, or organized" to constitute a "pattern or practice."[11] Courts have also held that the standard does not require that every member of the vulnerable group must face persecution.[12] In this author's analysis, such "universality" requirement (when combined with the need to establish inclusion in, and identification with, such group) would require an asylum applicant invoking the "pattern or practice" regulation to establish a 100 percent chance of persecution (thus imposing a burden of proof ten times greater than "well-founded fear"), which is clearly not the intent of the regulation.

a. Country Condition Information

Circuit courts have based "pattern or practice" determinations on country condition information of record, often citing the Department of State's *Country Reports on Human Rights Practices*. For example, the Third Circuit cited to a State Department country report indicating a sharp decline in violence against ethnic Chinese Christians after 1998, and its statement that "the Indonesian government officially promotes religious and ethnic tolerance" in concluding that no "pattern or practice" of persecution existed.[13] However, the Fifth Circuit relied on different portions of a similar report to reach the opposite conclusion.[14] The Seventh Circuit has stated that the State Department Country Reports may be too generalized for the purpose of "pattern or practice" determinations, noting that such reports "may reveal which groups are at greatest risk, but not how much risk and not how the country's forces operate day to day."[15]

b. The Seventh Circuit's Proposal

In *Banks v. Gonzales*, a panel of the Seventh Circuit called on immigration officials to emulate the system employed by the Social Security Administration in disability determinations. According to the Seventh Circuit, the SSA employs detailed regulations (i.e. "The Grid"), which include "those that classify some conditions as automatically disabling." Where the regulations "don't provide definite resolution,"

the SSA employs its own "vocational experts" in making determinations. The court stated that the "pattern or practice" regulation "cries out for systemic decisions. While Taylor ruled Liberia, all ethnic Krahns (and Unity Party supporters) should have been treated the same way. Similarly, adherents to the Ahmadi sect either are or are not persecuted in Pakistan." The court concluded that such groups of claims "could be handled by the sort of detailed regulations that the Social Security Administration uses. Others, of the kind that arise less frequently, could be resolved with the assistance of country specialists along the lines of vocational experts."[16]

Interestingly, another panel of the Seventh Circuit stated in a subsequent published decision that an asylum applicant's claim of a pattern or practice of persecution against ethnic Chinese Christians in Indonesia was not precluded by the court's negative determination of the same argument in a prior published decision. The court explained that "[a] s a general matter, our holding in one fact-specific case does not bind us in another fact-specific case when the two cases have different records." The court continued that although it again reached the same conclusion in the instant case, such holding "does not decide the issue in future cases," noting that "later petitioners may develop different records" containing better information, "or conditions in Indonesia may worsen."[17]

c. *Legislative Determinations?*

Legislation commonly referred to as the "Lautenberg Amendment," creates a presumption of eligibility for individuals applying for refugee status overseas pursuant to section 207 of the I&N Act. The original legislation identified for such status religious minorities in the former Soviet Union "who share common characteristics that identify them as targets of persecution in that state" on account of a protected ground.[18] The law was amended in 2005 to also include members of religious minorities in Iran. The law was last renewed by Congress in December 2015.

Does the identification of such groups by Congress as "targets of persecution" based on their shared common characteristics satisfy the requirements of section (A) of the regulation?[19] Does such language alternatively fall short of establishing a "pattern or practice," but still reduce the degree of individualized a fear a member of such group must establish under the Ninth Circuit's "disfavored group" analysis? Or does the fact that such statute applies only to overseas refugee processing under section 207 of the I&N Act mean that its content should carry no evidentiary weight in asylum proceedings under section 208?

In *Halaim v. INS*,[20] the petitioner argued that "the Lautenberg Amendment...represents a congressional declaration that Ukrainian Pentecostals suffer in their native land from a pattern or practice of persecution based on religion."[21] The Ninth Circuit found such argument "creative but not persuasive." Although no other circuit has specifically addressed whether the Lautenberg Amendment can trigger a "pattern or practice" finding under the regulation in a published decision, a concurring opinion contained in the Seventh Circuit's decision in *Kossov v. INS* contained the following language:

> Although [the Lautenberg] Amendment does not directly apply to the Kossovs' case, the Amendment evidences Congress' belief that Evangelical Christians living in Latvia continue to be "targets of persecution..." I believe that on remand, the IJ should analyze the claim by granting the Kossovs the presumption in favor of asylum to which they are entitled, and by allowing the INS to present whatever evidence it has to rebut that presumption.[22]

5. *Conclusion*

We await further guidance in future decisions of the BIA (which has not issued a published decision finding a pattern or practice of persecution) and the circuit courts. ■

The author is an Attorney Advisor at the Board of Immigration Appeals, Executive Office for Immigration Review (EOIR), U.S. Department of Justice. The author wrote this article in his personal capacity, and the views expressed herein are solely his own, and do not necessarily represent the positions of EOIR or the Department of Justice.

Endnotes

[1]8 C.F.R. §§ 208.13(b)(2)(iii), 1208.13(b)(2)(iii).

[2]*INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (citing 1 A. Grahl-Madsen, *The Status of Refugees in International Law* 180 (1966).

[3]*Matter of Mogharrabi*, 19 I&N Dec. 439, 446 (BIA 1987). *See also, e.g. Hernandez-Ortiz v. INS*, 777 F.2d 509 (9th Cir. 1985) ("threat of persecution 'need not be based on the applicant's own personal experiences…'" (citing ¶ 43 of the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva 1979)).

[4]*See Sael v. Ashcroft*, 386 F.3d 922 (9th CIr. 2004); *Knezevic v. Ashcroft*, 367 F.3d 1206 (9th Cir. 2004); *Mgoian v. INS*, 184 F.3d 1029 (9th Cir. 1999); *Hoxha v. Ashcroft*, 319 F.3d 1179 (9th CIr. 2003); *Singh v. INS*, 94 F.3d 1353 (9th Cir. 1996); *Kotasz v. INS*, 31 F.3d 847 (9th Cir. 1994).

[5]*Sael v. Ashcroft*, *supra* at 925.

[6]*Kotasz v. INS*, *supra* at 853.

[7]*Ibid*

[8]*Sael v. Ashcroft*, *supra* at 925 (citing *Mgoian*, *supra* at 1035 n.4).

[9]*See* A. Fleming, "Organized Atrocities: Asylum Claims Based Upon a 'Pattern or Practice' of Persecution," *7 Immigration Law Advisor* No. 3 (March 2013) at 9.

[10]*Sugiarto v. Holder*, 586 F.3d 90, 97-98 (1st Cir. 2009).

[11]*Lie v. Ashcroft*, 396 F.3d 530, 537 (3d Cir. 2005); *Ngure v. Ashcroft*, 367 F.3d 975, 991 (2004); *Makonnen v. INS*, 44 F.3d 1378, 1383 (8th Cir. 1995); *see also Matter of A-M-*, 23 I&N Dec. 737, 741 (BIA 2005) (finding the threat to Chinese Christians not "so systemic or pervasive as to amount to a pattern or practice of persecution" (citing *Lie v. Ashcroft*, *supra*).

[12]*Avetova-Elisseva v. INS*, 213 F.3d 1192, 1201 (9th Cir. 2000); *Makonnen v. INS*, *supra*.

[13]*Lie v. Ashcroft*, *supra* at 537-38.

[14]*Eduard v. Ashcroft*, 379 F.3d 182, 192 (5th Cir. 2004).

15 *Banks v. Gonzales*, 453 F.3d 449, 453 (7th Cir. 2006).

[16]*Ibid*

[17]*Ingmantoro v. Mukasey*, 550 F.3d 646, 651 (7th Cir. 2008).

[18]*See* Foreign Operations, Export Financing, and Related Program Appropriations Act of 1990, Pub.L. No. 101--167, § 599D(a), 103 Stat. 1195, 1261-62 (1989) (codified as amended at 8 U.S.C. § 1157 (1994 & Supp. IV. 1998)).

[19]The author advocated for such interpretation in a 1994 article, J.S. Chase and S.Marks, "'Pattern or Practice'-Based Asylum Claims," AILA 1994-95 Annual Handbook, vol. 2 (Advanced Topics), pp. 633, 640.

[20]358 F.3d 1128 (9th Cir. 2004).

[21]*Ibid* at 1134.

[22]*Kossov v. INS*, 132 F.3d 405, 409 (7th Cir. 1998) (Rovner, Circuit Judge, concurring).

FROM THE CHAIR continued from page 1

was mainly in substantive immigration law and speaking at CLEs. However, being on the Board was effectively the only way in which they could fully participate in planning and presenting at our conferences.

My solution is to amend the Bylaws to limit the Board to no more than 24 (including the officers), with 12 members elected by judicial circuit, and a few appointed by the sitting Chair to help execute his/her plans and goals. So, the majority of the Board would be elected, either as officers for a one-year term, or as Board members for 3 years. This would give the Board continuity and stability, rather than be entirely dependent on the whims of the current Chair. This is, of course, subject to discussion and debate within the Board, as amendments to the Bylaws requires a 75% vote.

For the balance of our 2015-2016 Board, as well as other members who wish to become more active within the Section, I propose the creation of a new body, the Advisory Council, to serve as a pool of interested and active members to help plan and speak at the annual conference as well as regional CLEs. Other than receiving a lot of email, there are no particular duties or responsibilities for serving on the Advisory Council. Members may be as active as they wish.

If you would like to join the Advisory Council, just send me an email. Let me know in what areas of law you have expertise, whether you would like to speak at the annual conference, or would like to help organize regional conferences, such as the fine efforts we currently have in Chicago, DC, New York, and El Paso. I can't guarantee that you will be selected to speak (we are rather selective, especially for the annual conference), but we will consider your assistance where it will do the most good.

We are also working on an expanded committee structure. It will not be necessary to be a member of the Board in order to participate on committees. The committee chairs will be announced on the Section's website, as soon as they are appointed and confirmed by the Board.

Our next annual conference is scheduled for Denver, May 11-12, 2017. Make your plans now—I hope to make this one of the best. More information will be forthcoming soon as to details, special hotel rates, etc.

2016-2017 should be a great year for the Immigration Law Section. I hope that it will also be a great year for each of you, both personally and professionally. ■

Larry Burman
Chair
LBurman@aol.com

PUBLISH IN THE FEDERAL LAWYER!

The Federal Lawyer continues to accept submissions for feature articles of 3000 to 8000 words, as well as letters to the editor, book reviews and commentaries. Guidelines for submission can be found at the fedbar.org website under publications/federal lawyer. Deadlines fall on the first of each month from December 2016 through most of 2017. The Immigration Law issue will be May 2017 and submissions are due Jan. 1, 2017. If authors wish to submit an article with the official endorsement of ILS, they can send their draft at least two weeks in advance of the FBA deadline to Dr. Alicia Triche at aliciatricheclc@gmail.com. She will consider whether ILS will endorse the submission and, if so, provide edits and submit on the author's behalf.
Dr. Alicia Triche is Chair of the Section's Publications Committee.

Immigration Leadership Monthly Luncheon Series with David Shahoulian

On September 21, 2016, the DC Chapter and Immigration Law Section co-sponsored its Immigration Leadership Monthly Luncheon Series at Carmine's. David Shahoulian, Deputy General Counsel, U.S. Department of Homeland Security, spoke on Immigration Law and Policy.

(l to r): Prakash Khatri, DC Leadership Luncheons Chair, and David Shahoulian, Deputy General Counsel, U.S. Department of Homeland Security

(l to r): Prakash Khatri, DC Leadership Luncheons Chair; Elizabeth Stevens, Immigration Law Section Secretary; David Shahoulian, Deputy General Counsel, U.S. Department of Homeland Security; Patricia Ryan, DC Chapter Board Member; and Ozlem Barnard, DC Chapter Member

L to R: Patricia Ryan, Michael McGoings, Manuel Rivera, Prakash Khatri and Betty Stevens gathered at the monthly Immigration Law Section Luncheon in Washington, DC.

The Roberts Connection
By Paul Wickham Schmidt

When I mention the "Roberts Connection," most people understandably think of Chief Justice John Roberts. To be sure, Chief Justice Roberts has made some notable contributions to immigration law. One of my all-time favorite quotations is from his opinion in *Nken v. Holder*:[1] "It takes time to decide a case on appeal. Sometimes a little; sometimes a lot." [2] In immigration, this is very true not only on the appellate level at the Board of Immigration Appeals ("BIA"), but also at the trial level in Immigration Court.

Notwithstanding the Chief Justice's involvement with immigration law, my "Roberts Connection" refers to a *different* Roberts: the late Maurice A. ("Maury") Roberts, Chairman of the BIA from 1968 to 1974. The BIA is essentially the "Supreme Court" of the administrative branch of immigration adjudication. Chairman Roberts was a noted legal scholar in the field of immigration who, prior to his appointment as BIA Chairman, argued several cases before the Supreme Court.[3] After retiring as Chairman, Roberts became the beloved Editor-in-Chief of *Interpreter Releases*, a leading weekly immigration news publication, as well as a teacher, commentator, and frequent public speaker at immigration conferences and seminars. He was one of the true "gurus" of 20th Century American immigration law.[4]

Chairman Roberts hired me for my first job after law school as an Attorney Adviser with the BIA in 1973. I remember his words that started my legal career: "I discussed it with the other Board Members, and we think you'll do." Chairman Roberts had a "steel trap mind." Off the top of his head, he could quote from and rattle off the page citations for many of the most important immigration cases.

Although kind and genial by nature, Chairman Roberts had no tolerance for the sloppy or unprepared lawyer or for those who wasted the BIA's time with frivolous claims. At that time, oral argument before the BIA was a matter of right.[5] Therefore, arguments were held almost every afternoon, and the staff was welcome to attend. Most attorneys treated oral argument as their best and last chance personally to convince the BIA of the legal merit of their client's cause, and prepared accordingly. However, a few treated oral arguments more or less as an excursion to Washington, D.C.,[6] at their client's expense and gave little advance thought to the actual argument.

I remember Chairman Roberts telling one particularly bewildered attorney that he now would be given "fifteen minutes to defend your totally indefensible position." Chairman Roberts then proceeded to rip apart the counsel's rather incoherent argument with penetrating questions and pinpoint citations to precedent decisions that clearly refuted that counsel's position. I imagine that those fifteen minutes seemed more like fifteen hours to the hapless lawyer.

At the BIA, I shared an office (the former typing pool) with another "Attorney General's Honor Grad," the late Lauri Steven Filppu, and we became instant best friends. Chairman Roberts was our teacher and mentor. He shared with us his comprehensive knowledge of immigration law; his insistence on impeccable scholarship and clear, well-organized writing; his meticulous editing style; the importance of pointed questioning at oral argument; and the use of principled, spirited debate among colleagues in reaching fair decisions. He also reminded us that behind every blue file (containing the "record of proceedings" in the Immigration Court) stood a *real* flesh and blood *person* with very human hopes and aspirations who wanted someone to listen carefully and respectfully to his or her story.

After several years of learning, following Chairman Roberts's retirement in 1974, both Lauri and I left the BIA and moved on to other positions in the immigration field. But, by the end of 1995, Lauri had been appointed as a Member of the BIA and I had been appointed Chairman, thus following in Chairman Roberts's footsteps. Additionally, Lory Diana Rosenberg, who had a close long-standing professional relationship with Chairman Roberts in her capacity as an attorney for the American Immigration Law Foundation, joined the BIA in 1995.

In the summer of 2000, we were joined on the BIA by another "Roberts protégé" Juan P. Osuna, who had worked closely with Chairman Roberts as a Senior Editor of *Interpreter Releases* and eventually succeeded him as Editor-in-Chief.[7] Juan later became Chairman of the BIA and now serves as the Director of the Executive Office for Immigration Review, the "parent organization" for both the BIA and the Immigration Courts within the U.S. Department of Justice.

Thus, more than a quarter-century after the end of his Chairmanship, the "Roberts Connection" remained very strong and influential at the BIA. The record shows that Lauri, Lory, Juan, and I did not always agree on results and, when appropriate, each was willing publicly to articulate and support his or her reasons for principled disagreement with our colleagues. To be "in the Roberts tradition," meant a shared commitment to fairness, scholarship, informed dialogue, and persuasive legal writing, but not necessarily an adherence to any particular legal philosophy.

The four of us have since departed the BIA. Sadly, Lauri

died in 2011, shortly after his retirement,[8] while, as mentioned earlier, Juan became the Director of EOIR. Lory left the BIA in 2002 to return to the private sector, and I became an Immigration Judge shortly thereafter, serving until retiring at the end of June 2016. Hopefully, however, the "Roberts Connection" continues through our published opinions and the mentoring that each of us has provided to new generations of attorneys working their way "up the ladder" in the immigration field. ■

NOTE: The author is a retired U.S. Immigration Judge who served at the U.S. Immigration Court in Arlington Virginia, and previously was Chairman and Member of the Board of Immigration Appeals. He is also a former Deputy General Counsel and Acting General Counsel of the former Immigration and Naturalization Service and a former partner at two major law firms. His career in the field of immigration and refugee law spans 43 years. He has served as a career member of the Senior Executive Service in Administrations of both parties. © 2016 Paul Wickham Schmidt, All Rights Reserved.

Endnotes

[1]556 U.S. 418 (2009).

[2]556 U.S. at 421.

[3]*U.S. ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72 (1957); *Chaunt v. United States*, 364 U.S. 350 (1960)

[4]*See* "Maurice A. Roberts, 1910-2001," AILA Doc. No. 01110531, available online, for a detailed biographic obituary.

[5]The regulations have since been changed to make oral argument discretionary with the BIA. 8 C.F.R. §3.1(e). Currently, the BIA hears oral argument in only a small number of cases.

[6]At that time, the BIA was located in the heart of downtown Washington, D.C. It now sits in Falls Church, Virginia.

[7]*See* www.justice.gov/eoir/meet-director for Director Osuna's biographical statement.

[8]*See* Schmidt, "Lauri Steven Filppu: A Recollection with Appreciation," *The Green Card* (FBA), Feb. 2012, at 2.

Opinion | Off the Bench

On the Brevity of Asylum Hearings

By Hon. Eliza C. Klein (Ret.)

During the years I served as an Immigration Judge, I believed that although the law requires precise analysis and respect for precedent, its fair application to the person whose life hangs in the balance demands an exercise of the heart. An Immigration Judge's decisions have the potential to either end a life prematurely, or give hope where there previously there was none. The decision as to whether someone can remain in their country of choice has primordial significance: Immigration Judges grant the chosen life or take it away, and must do so while balancing the interests of the individual and society, as well as the dictates of fact and law. It is an honor to serve this nation as an Immigration Judge, but it also bestows a heavy burden-- providing fairness and soundness of mind in decisions which are frequently rendered under tremendous pressure and with less than clear records.

On occasion, I found myself both grateful that I was, at least, not a surgeon whose wrong decisions could instantly end a life. When I made a mistake, there was an appeal process to make things right. In light of that, I frequently felt that the most important part of my job was making sure the recording device was working and that everyone's voice was picked up. No matter how faulty my findings of fact or rulings of law, if the record was clear and complete, the Board of Immigration Appeals could mop up my mistakes and make things right. And, if they failed to do so, the appropriate Circuit Court of Appeals would certainly show us all the way.

Recently, though, I was introduced to a quote from Louis Pasteur which made me re-think whether members of the medical profession may in fact have it easier than my judicial colleagues:

One does not ask of one who suffers: What is your country and what is your religion? One merely says: You suffer, that is enough for me.

Immigration Judges are daily confronted with the suffering of humanity; within an increasingly limited environment they must determine the fate of those who suffer. When resolving an asylum claim, they must ask: What is your country? What is your religion? What are your political views; how have you proven you hold them? How have you suffered; by whom, and why? What makes you believe you will you suffer again? Why do you seek solace here and not in the country where you suffered? Why do you deserve solace?

In the asylum context, answering these questions can re-traumatize the applicant. Family members and other witnesses may themselves suffer from learning what their loved one has endured. The attorneys and judges participating in the hearings themselves frequently endure secondary trauma. Listening to and absorbing the details of another's suffering in the context of determining the fair outcome of a case is extraordinarily difficult under the best of circumstances. Our Immigration Judges do not operated under the

best of circumstances.

It may be tempting to cut short the testimony, to limit the nature of what one "hears" and absorbs. I found myself on occasion wishing I could just reach a conclusion without listening to the voices of the applicants who had suffered. Yet without a full hearing, how could anyone ascertain credibility, or make accurate findings of fact, or know if the outcome was just and fair?

Some cases remain with you, even after you leave the bench. One which remains with me is the case of a young woman from a West African country. She had travelled to the U.S. on a visa, and sought asylum upon her arrival at the airport. Her case was compelling - she had been previously granted refugee status in France but had returned to her native land after a change in government. Upon her return, she formed a coalition with women leaders from several opposing political factions in an attempt to promote women's rights. Her own political party viewed her a traitor for working with the opposition. The new government viewed her as an enemy for attempting to change the status quo and promoting equality. She was thrown in prison and brutally mistreated, including being subjected to rape. The leaders of her party could have secured her immediate release, but did not do so because they themselves sought to punish her. Amnesty International learned of her plight and named her as a Prisoner of Conscience. Eventually, international pressures caused the government of her country to release her.

This asylum applicant could have returned to France, but many members of her political party resided there and she could not bear to face them for their failure to obtain her release. She came to the U.S. instead. She did not have an attorney, but had prepared her application carefully and had significant supporting documentation: party membership cards, French refugee documents, a letter from Amnesty International verifying her claim of imprisonment and mistreatment, drafts of legislation she had authored, letters from the other women in her coalition.

When she appeared in Court on the day of her hearing, she appeared easily twenty years older than her actual age. Her skin was lined, her face stony, her body drawn into itself. Every aspect of her seemed shriveled.

I had reviewed her application carefully. After she was sworn in, and verified that all information she had presented in her application was true, I told her that I did not see the need for her to retell her story, and that I just had a few questions. What had the prison guards told her when they mistreated her? "Here's a taste of democracy." Why didn't she want to return to France? "I would be reminded every day of the betrayal of my comrades."

I told her I was granting her application. The government attorney waived appeal. I left to make a copy of my order and when I returned five minutes later (half as long as the hearing had taken), I was stunned by her appearance. She sat erect, her unlined face relaxed and smiling. Her eyes were glossy. Her voice no longer quavered. She was of course happy with the decision to grant asylum, but the immediate relief was that she did not have to retell her story.

This was a clear case. Most are not. The law on asylum continues to evolve. Immigration Judges should never cut short the process. They should not discourage applicants from filing their claims, nor prejudge their eligibility. They should never forget that they may well be the applicant's only hope, that their decision could end the applicant's life. The "hearing" which they provide the applicant must be full and fair, and comport with due process. Their decision should reflect the high stature of their position and the trust and honor placed in them by the Attorney General. Immigration judges need to encourage the applicant to tell their story, but since leaving the bench, I have observed that some do not do so. I have heard an Immigration Judge cut off the very opportunity to file an application by saying "I cannot help you. You can choose voluntary departure or I will order you deported. If you choose voluntary departure, you will not be able to appeal my decision." No explanation of the right to seek asylum or of the appeal rights were provided. This was done with the awareness that the applicant left a country which is one of the world's most violent, and had sought protection upon her arrival in the U.S. Cutting short the very opportunity to seek protection is dereliction of duty. No kind-sounding tone camouflages the heartlessness, the lack of respect for due process, the disregard for fact or law.

I write this piece from a place of heartbreak, of outrage. Yet I have hope that those who remain on the Immigration bench will not lose sight of what a tremendous opportunity and power they exercise every day, or their obligation to apply their power fairly, or what they will deprive themselves of if they leave the bench not having honorably carried out their duties to asylum seekers.

I have a Christmas card which bears this inscription:

"Every time I think of you, you remind me of my freedom"

I held the aspiration of deserving this memory through all my years in the Immigration Court - and used it to respond to the bureaucratic pressures of an administrative agency. When I denied relief or ordered deportation, I tried my best to ensure that the hearing itself was fair, to honor the person whose life my decision affected. I completed over 20,000 cases as an Immigration Judge - I'm not convinced I succeeded in my aspiration, but it saw me through. I hope my former colleagues inspire such a memory. ■

Eliza C. Klein served as an Immigration Judge for over 20 years. Since retiring from government service, she has returned to private practice, working "of-counsel" with two law firms: The Gil Law Group in Aurora, IL and the Law Offices of June J. Htun in Chicago, IL. Judge Klein volunteered for a week with the CARA project at the South Texas Family Residential Center in Dilley, Texas preparing women for their Credible Fear Interviews and hearings before her former colleagues. She finds it refreshing to freely speak her mind, and is grateful for the opportunity to do so.

Michelle Obama's Powerful Voice is Needed to Put an End to Family Detention

By Matthew Kolken

Last July I watched Michelle Obama's eloquent and persuasive speech in Philadelphia that many will remember as the highlight of the Democratic National Convention. The First Lady invoked vivid images of her children, and the joy she experienced watching them grow from "bubbly little girls" into poised young women. I couldn't help but think to myself, where has Mrs. Obama's powerful voice been over the last two years when an entirely different set of children were under the watchful eye of "big men with guns" and "black SUVs."

No, I'm not talking about Trump's children, but unaccompanied minors from Central America who have been locked away in remote deportation internment camps, where they are held in substandard and life threatening conditions by Mrs. Obama's husband, the President. Only for these vulnerable children, the big men with guns aren't there to shuttle them off to school, but to keep them locked in cages, or to tear them from the safety of their beds and deport them in the middle of the night.

I'm talking about the scared nine-year-old little boy suffering from a dislocated shoulder that shrieked through the night in pain and was told by facility doctors to drink more water. I think about three-year-old Catherine Checas, whose t-shirt was stained from the blood in her vomit, and the victims of sexual assault. I also think about children being caged in cold concrete cells where they sit shivering, and alone.

All I can think about is State sponsored child abuse.

See, because that is what immigration lawyers in the trenches think about every day as we try to protect these kids through the challenges of this unusual life in the dark shadows of deportation jails, and how we urge them to ignore those who question their humanity. And yes, I just intentionally paraphrased Mrs. Obama's speech. Deal with it.

In all fairness, maybe Mrs. Obama's silence was mandated by the powers that be, a.k.a. her husband. With the Wikileak release of DNC emails we recently learned that Democratic insiders viewed advocate's calls for temporary protection of Central American children to be "irresponsible." This is as troubling as it is outrageous, but not as outrageous as the shadow war that the Obama administration has waged against the children fleeing for their lives, or Hillary Clinton's call to deport them in the height of the refugee crisis in order to send a clear message.

But there is hope, if not change.

On July 6, 2016, the Ninth Circuit Court of Appeals ruled that the Obama administration must immediately move to release detained immigrant children "as expeditiously as possible." The Center for Human Rights and Constitutional Law (CHRCL) who represents the immigrant children in the lawsuit, has issued a demand that the Obama Administration "reassess" its "inhumane" practices of caging children in deportation jails.

CHRCL Executive Director, Peter Schey released the following statement to the Court's decision: "We hope this decision by the Federal Court of Appeals convinces the Obama Administration that its policy of detaining immigrant mothers and children is inhumane and illegal and must come to an end. During the past two years this Administration has wasted over one hundred million dollars unnecessarily detaining thousands of refugee children commingled with unrelated adults in unlicensed secure facilities in violation of well-established child detention standards. This disgraceful policy should now be brought to an end by President Obama."

Victor Nieblas, the past President of the American Immigration Lawyers Association (AILA) was similarly disturbed. He remarked that: "Detaining and re-traumatizing children and their mothers fleeing widespread violence in Central America is a shameful legacy for President Obama to leave behind. This detention and rapid deportation policy is fundamentally inhumane, undermines refugees' access to legal counsel and fair process, and is in violation of federal Court Orders issued in the Flores class action case. It has already resulted in the wrongful deportation of children and families back into the very violence from which they fled and must end once and for all."

Immigration lawyer and whistleblower Bryan Johnson was not so political in his response to the members of the Obama administration who he accuses of being complicit in the commission of crimes against thousands of children: "We will hold you accountable. We will not stop. Justice will be had, however long it may take."

So, Mrs. Obama, as your daughters set out on the world, let's hope that when they look back they can see that their mother had the courage to fight for all children, *especially* the most vulnerable among us. There is still time. Please use your voice to help put an end to your husband's shameful and illegal family detention practices.

#EndFamilyDetention ■

Matthew Kolken the managing partner of Kolken & Kolken Immigration Lawyers,

located in Buffalo, New York. He has appeared nationally on both MSNBC and CNN, and his legal analysis has been solicited by the Washington Post's Fact Check of the immigration statements of Secretary Hillary Clinton, and Presidential candidate Donald Trump. His opinions on immigration issues have been published in Forbes Magazine, The Los Angeles Times, Fox News Latino, and NBC Latino among others.

Article

Mind-Body Stress Management for Immigration Attorneys and Judges

By Lory D. Rosenberg, Esquire, Certified Coach

In the midst of movement and chaos, keep stillness inside of you.

—Deepak Chopra

Law Practice and Stress

Law practice today is inherently stressful. Simply answering a few of the following questions will illustrate the truth of this statement.

For example, do you panic over looming deadlines, yet procrastinate? Do you experience constant pressure trying to "be productive?" Are you frustrated by poorly performing staff, uncooperative clients, or unprepared attorneys who come before you when you are on the bench? Is there tension in your office or in your personal life?

Do you have insomnia, or do you wake up at night worrying about finances, clients, or cases? Do you experience headaches, back pain, or feel exhausted? Do you hate picking up the phone? Do you fantasize about quitting? Are you overworked and overwhelmed by demands on your time, trying to remember when you had a "life?"

If you answered "yes" to any of these questions - you're stressed.

Stress and burnout are not uncommon afflictions among lawyers, and particularly among immigration attorneys. Similar levels of stress may be experienced by immigration judges and federal judges as well.

In fact, attorneys often become dependent on the adrenaline rush that accompanies stress to handle the challenges of day to day practice. Why? Because private and non-profit immigration attorneys have to deal with government bureaucracy and often inexplicable resistance, while at the same time, serve business, family and refugee clients who, for all their virtues, can be difficult, demanding, traumatized and needy.

Government attorneys and immigration judges may experience similar frustrations with the bureaucracy in which they work, and with the colleagues and practitioners with whom they must interact. Attorneys and judges alike also face the likelihood of experiencing secondary trauma resulting from listening to, investigating and ruling upon the hardships suffered by severely traumatized individuals. Obviously, exposure to any of these circumstances can trigger similar tensions and stress responses in your team or staff. And of course, you can bring stress home.

As attorneys, we are trained to function in an adversarial and competitive environment, even though, ironically, our success often requires collaboration and cooperation. Martin P. Seligman, Ph.D., professor of Psychology at the University of Pennsylvania and author of *Authentic Happiness*, points out that:

> … The ability to anticipate the whole range of problems and betrayals that non-lawyers are blind to is highly adaptive for the practicing lawyer who can, by so doing, help his clients defend against these far-fetched eventualities.

Seligman cautions, however, that "while it makes lawyers better at their job, it comes at a high price." Indeed, researchers have found statistically significant elevations of depression, alcohol and drug use, and rates of divorce in lawyers.

Still, not all stress is bad: it can be inspiring, spark creativity, and push you farther than you believe you can go. But the kind of chronic stress that sabotages your confidence and motivation, leaves you sleep-deprived, and threatens your self-esteem and happiness is not good and leads directly to burnout.

Burnout often manifests in feelings of detachment, cynicism, irritability, anger, fear, paranoia, and even sadness and depression. The downward spiral that often occurs once constant stress takes hold not only leaves you miserable and isolated, but adversely affects your clients, partners, associates, and staff, putting your firm or organization's productivity and reputation at risk. If you are feeling out of touch with your old dreams of success and your mission of making a difference in the world, it's very likely due to stress and burnout.

So, is chronic stress and burnout inevitable in our profession? It need not be. This article focuses on the impact of stress and mind-body healing techniques that can alleviate

stress and change the way you handle business and professional challenges.

The Mind-Body Connection

In managing stress, it is important to look beyond the adversarial training, intellectual demands, and professional responsibilities that make lawyers more likely to endure conflict and anxiety- producing situations. The negative effects of stress are not merely emotional or behavioral, they are physiological as well. This matters, because it indicates that the solution to the problem of chronic or 'bad' stress must be holistic, impacting all of our systems - mental, emotional, physical, and spiritual.

The stress response is rooted in the most fundamental components of the human body, our genes. *See* Dawson Church, Ph.D., *The Genie in Your Genes, Epigenetic Medicine and the New Biology of Intention,* at 37-43, 75 (2d edition 2009). Put simply, recent developments in the science of epigenetics illustrate that our DNA is not static or unchangeable.[1] Rather, our circumstances and our environment impact our genes, turning them on and off in different combinations. Thus, stress affects our physical body at its core.

Likewise, advances in neuroscience reveal that our brains are not "hardwired" as was once believed. Instead, we can make new neural connections and use specific neurocognitive strategies to reduce stress and increase mental concentration. This resilience and flexibility, known as brain neuroplasticity, allows us develop our thoughts, feelings and actions in any direction we choose. *See* Deepak Chopra, M.D, and Rudolph E. Tanzi, Ph.D., *Super Brain,* at 18, 29 (2012).

Recent breakthroughs concerning the biochemical effects of brain functioning show that all the cells of our body are affected by our thoughts. *See* Bruce Lipton, Ph.D., *The Biology of Belief, Unleashing the Power of Consciousness, Matter, & Miracles* (2005, 2008). This means that our thoughts can change the way our brain experiences and responds to stressful circumstances.

Thus, neuroscience and epigenetics reveal that our consciousness—that is, our self-awareness, or what we think and the emotions we feel—can be adjusted, modified and improved, making a mind-body approach essential if we seek to fully understand and alleviate or avoid chronic stress and burnout.

The Fight or Flight Response

As Dr. Daniel Amen explains in *Change Your Brain, Change Your Life* (1998), when one has a thought, the brain releases chemicals, an electric transmission takes place across the brain, and the person become aware of what she is thinking. *Id.* at 57. The deep limbic system in the brain is responsible for translating our emotional state into feelings of relaxation or tension. *Id.* at 58.

When our brains register fear, frustration, anxiety, guilt, or panic—all emotional components of feeling stressed—a small almond-shaped portion of the deep limbic system called the amygdala reacts as though we are facing an actual life-threatening situation. This survival mechanism served historically to address the body's demand for resources necessary to outrun or outfight a wild animal or dangerous human attacker.

In effect, the fight or flight response turns the body's attention away from critical mental processes and other essential processes. Once the amygdala senses danger, the branches of the autonomic nervous system (ANS) connect the brain with various organs and muscles that can deal with such threats. Activation of the fight or flight response triggers a hormone cascade that results in the release of cortisol from the adrenal cortex, which increases blood pressure, elevates blood sugar, suppresses the immune system, decreases our ability to think creatively or resourcefully, and is associated with other deleterious effects on health and well-being, such as diabetes, obesity, anxiety, and adrenal exhaustion.

These days, cortisol is likely to be perpetually present in the body of someone whose constant stress level is sending danger signals to the autonomic nervous system. Excess stimulation of the amygdala suppresses the higher levels of brain activity that occurs in the prefrontal cortex, where our executive function and creative thinking take place. We need to allow brain activity in the pre-frontal cortex to excel and succeed in our endeavors.

Mind-Body Antidotes for Managing Stress

There are antidotes for chronic stress and burnout that you can make part of your personal and professional practice, as well as your law firm's practice management system. Adopting one or more of these antidotes and integrating them into your law or court room practice can profoundly change your working environment, as well as the ways in which you experience it.

1. The practice of mindfulness involves being fully present in the moment and reserving judgment during your observation. This may be challenging for both attorneys and judges for obvious reasons. Nonetheless, practicing mindfulness is an effective method for dealing with emotional pain, anger, and irritating situations that may arise during the work day or at home. It also helps in setting reasonable boundaries with family, clients and colleagues while maintaining your feeling of compassion. By consciously setting your intention to observe the situation with slight detachment, and not simply react, you can consciously choose your response to it.

2. Just breathing in and out 3 times while calming observing your thoughts without imposing a judgment on them will provide a welcome respite from a hectic day. Taking 2 or 3 minutes between client consultations or hearings to repeat this breathing exercise can be surprisingly effective in altering your mood and level of stress.

3. Another amazing mind-body practice that uses the meridian points on the body is "tapping," also known as EFT (Emotional Freedom Technique). *See* http://huff.to/1u7uPSa. Studies performed at Harvard Medical School and other institutions over the past 2 decades verify that the brain's stress and fear response can be reduced significantly by stimulating the meridian points on the body with acupuncture or acupressure. Tapping on these points (many of which are located on the face and upper body) with 2 or 3

fingertips while expressing the negative emotion or stressor bothering you until the level of emotional discomfort subsides often does the trick.

By addressing and clearing the negative emotions experienced due to trauma, overwhelm, anger, fear, or stress, tapping enhances the function of the parasympathetic branch of the autonomic nervous system, which in turn activates the relaxation response. Dr. Dawson Church, author of *The Genie in Your Genes,* who has engaged in randomized trials establishing the efficacy of tapping, created a first-of-its-kind project to teach tapping to Iraqi war veterans suffering with PTSD, which has yielded impressive results -- an average 63% decrease in PTSD symptoms after tapping for 20-30 minutes). *See* http://stressproject.org.

Tapping is easily learned and can be done at home or in your law practice, although many people choose to work with a tapping coach. To try tapping right now if it's new to you, click here: http://www.eftuniverse.com/english/eft-tapping-how-to-video-with-dawson-church. You can make it a daily practice, or use it whenever the need arises. Be sure to be specific and zero in on the exact words describing your feelings to use when you tap. The key to this process is to focus on an issue systematically and make sure that you go through each of the different aspects that come up when you tap on the negative emotion or problem. Once you have reduced the intensity of the emotion, and alleviated the stress, you can then begin to tap in a better choice or alternative feeling. And don't stress out about tapping – trust me, you'll get results! ■

Lory D. Rosenberg is a former Member of the Board of Immigration Appeals. She is principal of IDEAS Consultation and Coaching, and will present the first ever conference for women immigration lawyers, in Las Vegas, June 22. © Lory D. Rosenberg 2016.

Endnotes

[1]Epigenetics is the study of changes in organisms caused by modification of gene expression, rather than alteration of the genetic code itself.

Article

The Doctrine of Consular Non-Reviewability: Why It Still Matters

By Lauren McClure

Consular non-reviewability has long protected the decisions of U.S. consular officers, including approvals and denials of visa applications, from review by U.S. federal courts. This doctrine provides tremendous discretion to consulate officers in reviewing visa applications and creates significant challenges for visa applicants who wish to secure details and a factual basis for a visa denial. The doctrine first emerged in *Kleindienst v. Mandel*, and since then, federal courts have interpreted the doctrine—in some circuits limiting the doctrine's scope and in others allowing for more judicial review. *See* 408 U.S. 753, 769-70 (1972) (explaining Congress's plenary power over admission and exclusion decisions involving immigration, but also recognizing that Congress has delegated some of its authority to the executive branch); *Bustamante v. Mukasey*, 531 F.3d 1059, 1061 (9th Cir. 2008); *Adams v. Baker*, 909 F.2d 643, 647 n.3 (1st Cir. 1990); *Centeno v. Shultz*, 817 F.2d 1212 (5th Cir. 1987).

On June 15, 2015, the U.S. Supreme Court published their decision in *Kerry v. Din*, 135 S. Ct 2128 (2015), a case where a U.S. citizen challenged the non-reviewability doctrine after her spouse was denied an immigrant visa by the U.S. Embassy in Islamabad, Pakistan. Although the majority, five of the nine Justices, agreed that the government should prevail over the U.S. citizen who filed the lawsuit, only three Justices supported the blanket notion that a U.S. citizen lacks the right to challenge the U.S. Department of State for a denial of a visa to his/her spouse. As a result, the Court issued a very narrow decision, finding that the U.S. citizen spouse was not deprived of any constitutional right entitling her to due process of law.

The *Kerry v. Din* decision has little direct impact on the doctrine of consular nonreviewability as a whole. The decision does not specifically limit review of a consular officer's decision to implicated First Amendment rights. Therefore, it remains unclear whether U.S. citizens have a procedural due process interest in the visa application process. As a result, there is still an opportunity for the Court to reexamine consular non-reviewability.

Why it matters

The doctrine of consular non-reviewability often contributes to unjustified visa denials that are based on incorrect or unsupported reasoning by the consulates. After a decision is made, there is little to no recourse for the consulate's decision to be reviewed. The State Department has no formal appeals process, or review process, for visas that have been denied.

The visas denied each year by the State Department range from nonimmigrant tourist and/or business visas to immigrant visa petitions to reunite families. After a some-

times lengthy process dealing with a number of U.S. government agencies, including the United States Citizenship & Immigration Services (USCIS), the U.S. consular official eventually issues a final decision of approval or denial before the visa applicant can travel to the United States. If a visa is denied, there is no real explanation. In many cases, the applicant's family loses their opportunity, often years in the making, to reunite with their family member.

In some instances, the federal courts have engaged in a limited review of a visa denial. Courts have interpreted *Kleindienst v. Mandel* to create an exception to consular nonreviewability, but there is a disagreement as to when an individual can seek review under this exception. *Compare Bustamante v. Mukasey*, 531 F.3d 1059, 1061 (9th Cir. 2008) (interpreting that under *Mandel*'s limited review, an exception does allow a foreign spouse's visa denial to implicate the fundamental marital and familial rights of a U.S. citizen) *with Adams v. Baker*, 909 F.2d 643, 647 n.3 (1st Cir. 1990) (citing *Centeno v. Shultz*, 817 F.2d 1212 (5th Cir. 1987) (expressing that a visa applicant has no standing to seek administrative or judicial review of a consular officer's decision denying a visa)).

The decision in *Kerry v. Din* did little to resolve these disagreements, but six of the votes in the decision supported the assumption that an exception exists where a U.S. citizen's fundamental rights required the State Department to provide a "facially legitimate and bona fide" explanation for denial of a visa. The amicus briefs filed in the case by the National Immigrant Justice Center, American Immigration Lawyers Association (AILA) and the National Immigration Project of the National Lawyers Guild further highlight why consular nonreviewability matters and why a Supreme Court decision on the reach of the doctrine is necessary. Specifically, the amicus brief filed by the American Immigration Lawyers Association (AILA) for the U.S. Court of Appeals for the Ninth Circuit highlights specific cases to demonstrate that the doctrine results in visa denials that have limited basis in law or fact and that separate loved ones from each other. *See* http://www.aila.org/infonet/amicus-brief-mora-huerta-v-united-states-of-americ.

The Importance of Litigating These Cases

Until the time the Court reexamines consular nonreviewability, the federal district courts and the United States Courts of Appeals will continue to hear cases and decide whether U.S. citizens' due process rights may be implicated by visa denials. It is important to note that the doctrine of non-reviewability is not a jurisdictional bar to review by the federal courts. Firstly, the doctrine does not take into account the significance of the Administrative Procedures Act (APA). This Act sets the default rules regarding federal agency action and provides that "any person suffering legal wrong because of any agency action… shall be entitled to judicial review thereof." 5 U.S.C. § 702. And although the APA does not provide an independent basis for jurisdiction, it does create a cause of action for those "aggrieved by agency action," and that alone is sufficient for jurisdiction before the federal courts. *See Robbins v. Reagan*, 780 F.2d 37, 42-43 (D.C. Cir. 1985) ("even though the APA itself technically grants no jurisdiction, power to review any agency action exists under 28 U.S.C. § 1331").

Secondly, there is a strong presumption in favor of judicial review of administrative action, even in the immigration context, and this presumption is stronger where constitutional claims are at stake. *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496-99 (1991). The Supreme Court has said that when "Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Webster v. Doe*, 486 U.S. 592, 603 (1988). This "heightened showing" is required to avoid the "serious constitutional question" that would arise if a "federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Id.* (quoting *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)); *see also, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (noting use of constitutional-avoidance canon in immigration context).

Despite last year's Supreme Court decision in *Kerry v. Din*, it is essential that lawyers continue to bring these cases before the federal courts until we receive a clear answer as to whether an exception exists, that is whether U.S. citizens have a procedural due process interest in the visa application process, thereby allowing review of consular decisions by the courts. ■

Lauren McClure is an Associate Attorney with Kriezelman Burton & Associates, LLC, Chicago, Illinois. She focuses her practice exclusively in the areas of immigration law, including family-based immigration, asylum, removal defense, employment-based immigration and federal court litigation. Lauren was recently named one of the 2016 Super Lawyers Rising Stars.

From the Editor

Please send all news items to me at LBurman@aol.com. We really want to know what is happening in the Section, and in the professional lives of our members. We especially would appreciate photographs. Kindly send submissions in Word format.

Larry Burman, editor

Venture Capitalists and Immigration Proponents Likely Disappointed by USCIS Proposed Entrepreneurial Parolee Rule

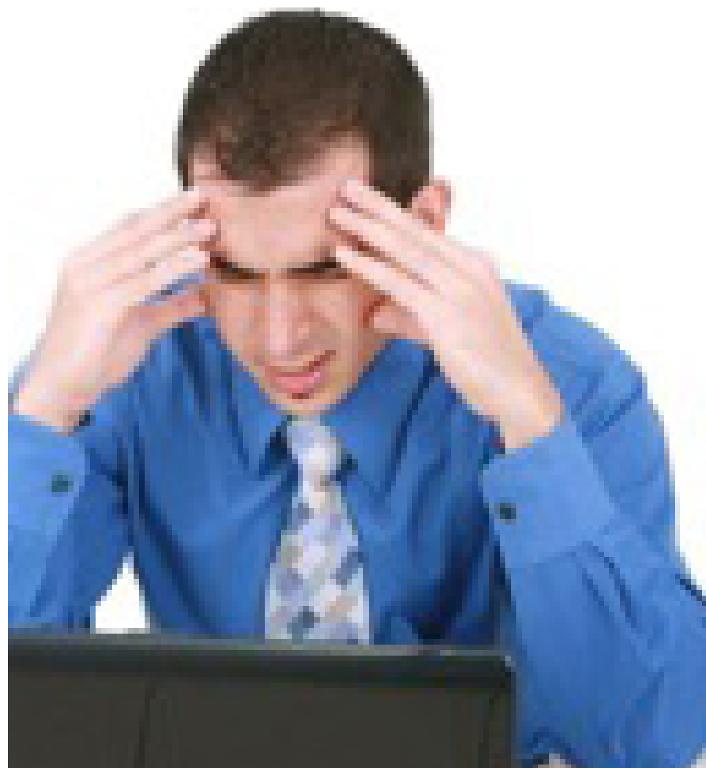
By Angelo A. Paparelli

The Department of Homeland Security, through its component agency, U.S. Citizenship and Immigration Services (USCIS), has issued a proposed regulation to allow a qualified foreign citizen to gain entry and be employed in the United States if he or she will engage in activities that are likely to "increase and enhance entrepreneurship, innovation, and job creation in the United States" with a "start-up" entity. The USCIS proposed regulation would not change any other means of gaining work permission under the existing employment-based visa categories, e.g., the EB-5 immigrant investment program, immigrant visa classifications based upon, or exempt from, PERM labor certification, or through family-based immigration avenues.

Under the Immigration and Nationality Act, parole (an immigration "term of art" having nothing necessarily to do with the criminal laws) is a discretionary grant of permission to enter the U.S. under narrowly prescribed terms. Parole is not a formal "admission" to the country but a specially permitted "entry." Unlike a green card or work visa -- both of which are considered a legal "status" in the United States -- parole can be automatically revoked by immigration officials without mandatory notice to the parolee. USCIS proposes that once the application for entrepreneurial parole is approved, the applicant and family members must leave the U.S. in order to be granted parole; they may not change to a nonimmigrant status within the United States.

USCIS proposes an initial two-year grant of parole to a qualifying "International Entrepreneur," with one additional three-year renewal allowed. Under the proposal, the entrepreneurial parolee may work only in a start-up entity formed within the last three years in which s/he (a) will play a "central role in the operations and future growth of the entity," and (b) owns at least a 15 percent interest. USCIS also proposes that the parolee's spouse and children may be given parole entry, and that the spouse can be granted open-market employment authorization. The entrepreneurial parolee, however, may only be employed by the USCIS-approved start-up entity. USCIS also proposes to amend its Form I-9 (Employment Eligibility Verification) to allow a start-up entity to accept an original foreign passport and Form I-94, issued by U.S. Customs & Border Protection with the notation "PE-1," as a "List A" document of identity and employment authorization.

The pre-publication version of the rule and its preamble run to 155 double-spaced pages. Once it is published in the Federal Register, expected in the next few days, the public will have 45 days to offer comments. Proving eligibility as an International Entrepreneur will require a $1,200 filing fee, completion of an Application for Entrepreneur Parole (Form I-941) and the submission of extensive evidence. USCIS will review the evidence and give a thumbs-up approval or deny the application with no right of rehearing or appeal.



In order to qualify, the parole applicant must show that the start-up entity has the "substantial potential for rapid growth and job creation." This can be established through investments from established "U.S. investors (such as venture capital firms, angel investors, or start-up accelerators)." The parole applicant may prove this with evidence that the "entity has received investments of capital totaling $345,000 or more from established U.S. investors with a history of substantial investment in successful start-up entities." USCIS proposes that aside from the parole applicant, only U.S. citizens and lawful permanent residents (green card holders) may invest in the start-up. A start-up entity may employ no more than three entrepreneurial parolees, according to the USCIS proposed rule.

Alternatively, the proposed rule suggests that the submit-

ted evidence should include proof of grants or awards of at least $100,000 from local, state or federal government entities that have "provided support for economic, research and development, or job creation purposes."

Venture capitalists and foreign entrepreneurs -- who have waited since November 2014 to see how USCIS would articulate President Obama's Executive Action announcing a proposed rule -- are likely to be disappointed. They may see the benefit of entrepreneurial parole as too small and too short in duration in return for the effort to establish the proposed rule's very burdensome and narrow requirements. Moreover, they may be disappointed to learn that the USCIS proposal fails to take into account the harm associated with a revocation of parole (whether based on material business changes or otherwise) and the absence of any administrative or judicial review. Also disappointing is the realization that the proposed regulation offers no pathway to lawful permanent resident status.

Fortunately, however, if USCIS receives compelling and substantiated comments within the next 45 days, the final rule may become a more viable avenue to jump-start innovation, job creation and economic growth. Only time will tell. ■

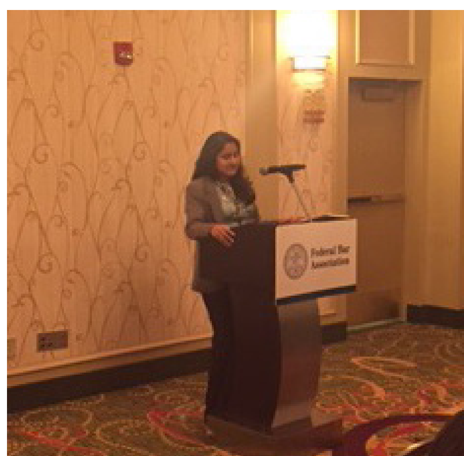
Angelo A. Paparelli, a partner in the Business Immigration Practice Group of Seyfarth Shaw LLP, where he leads the firm's EB-5 Immigrant Investment specialty team from offices in Los Angeles and New York. He primarily works with regional centers, project developers and banks and has been named in 2016 by EB-5 Investors Magazine as a Top-10 EB-5 Attorney in Specialized Fields (Complex Cases and RFEs). Paparelli runs a free monthly telephone roundtable through ILW.com for experts in the EB-5 arena to discuss specific issues in detail. Paparelli was named a Band 1 immigration lawyer in 2016 by Chambers & Partners and Legal 500. You can find Paparelli's musing on all things immigration law on his blog Nation of Immigrators, www.nationofimmigrators.com. He can be reached at 213-270-9797 or apaparelli@seyfarth.com.

News from the YOUNGER LAWYERS DIVISION

Beginning a New Tradition: Younger Lawyers Division Hosts Happy Hour at Annual Conference in New Orleans

For the second year in a row, the Younger Lawyers Division of the Immigration Law Section (ILS-YLD) hosted a Happy Hour during the Annual Immigration Law Conference in New Orleans on May 14, 2016. The purpose of the event was to encourage younger members of the ILS to meet other ILS members of all ages. With an estimated 200 attendees, the event was a tremendous success! As the final event of the Annual Conference, ILS members were able to relax, celebrate, and connect with other ILS members. We hope to see you all at our Happy Hour at the Annual Immigration Law Conference next year!
Robin Trangsrud, ILS-YLD Chair

ILS-YLD Happy Hour begins!



Presenting at the ILS-YLD Happy Hour, Tina Goel, Younger Lawyers Division Committee Member

Attendees enjoying the ILS-YLD Happy Hour

The Green Card

Immigration Law Section
Federal Bar Association
1220 North Fillmore Street, Suite 444
Arlington, VA 22201

2016-2017 Immigration Law Section Officers:

CHAIR
Hon. Lawrence O. Burman
Arlington, VA

VICE CHAIR
Barry L. Frager
Memphis, TN

TREASURER
Elizabeth (Betty) Stevens
Fairfax. VA

SECRETARY
Mark Shmueli
Takoma Park, MD

2016-2017 Immigration Law Section Board of Directors

BOARD OF GOVERNORS

Robert H. Beer, Marietta, GA
Justin R. Burton, Chicago, IL
H. Raymond Fasano, New York, NY
Amy Gell, New York, NY
Regina Germain, Washington, DC
Hon. Dorothy Harbeck, Elizabeth, NJ
Hon. William P. Joyce, Boston, MA
Hon. Amiena Khan, New York, NY
Prakash Khatri, Washington, DC
Hon. Lee O'Connor, Los Angeles, CA
Jan M. Pederson, Washington, DC
Gail Pendleton, Plymouth, MA
Christine L. Poarch, Salem VA
Hon. Lory D. Rosenberg, Darnestown, MD
Hon. A. Ashley Tabaddor, Los Angeles, CA
George A. Terezakis, Mineola, NY
Dr. Alicia J. Triche, Memphis, TN
David A. M. Ware, Metairie, LA
Douglas S. Weigle, Cincinnati, OH
Prof. Amelia Wilson, Newark, NJ

ADVISORY COUNCIL

Lori Adams, New York NY
Prof. Deborah Anker, Cambridge MA
Eileen P. Blessinger, Falls Church, VA
Prof. Richard Boswell, San Francisco, CA
Rina Ghandi. Washington, DC
George Ganey, Bethesda, MD
Tina Goel, Baltimore, MD
Desiree Goldfinger, Matawan, NJ
Hon. John F. Gossart, Bowie, MD
Jeff Joseph, Aurora, CO
Linda Kenepaske, New York, NY
Kristin Kimmelman, El Paso, TX
Matthew Kolken, Buffalo, NY
Lisa Johnson-Firth, Manassas, VA
Kevin Lashus, Austin, TX
Brandon Lowy, Boston, MA
Emily Mawhinney, St. Paul, MN
Rosie Milano, Boston, MA
Alicia Morgan, Miami, FL
Prof. Karen Musalo, San Francisco, CA
Danielle Rosche, San Diego, CA
Cynthia Russo, Newark, NJ
Marc Seguinot, Fairfax, VA
Irene A. Steffas, Marietta, GA
Margaret Stock, Anchorage, AK
Kimberly Sutton, Springdale, AR
Rachel Thompson, Salem, VA
Robin Transgrud, Sunnyvale, CA
Hon. Earle Wilson, Atlanta, GA
Ozlem B. Barnard Springfield, VA
Anna M. Hysell Escondido, CA
Helen Parsonage Winston-Salem, NC
Eileen Scofield Atlanta, GA