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The Second Circuit's Expedited Adjudication of Asylum Cases: A Case Study of a Judicial Response to an Unprecedented Problem of Caseload Management

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A CASE STUDY OF A JUDICIAL RESPONSE TO AN UNPRECEDENTED PROBLEM OF CASELOAD MANAGEMENT

Judge Jon O. Newman[†]

The flood of asylum claims that came to the Second Circuit from 2002 through 2004 presented an unprecedented challenge of case management, to which the court of appeals developed an unprecedented response. This is the story of how the problem arose and how it was met.

I. THE LEGAL CONTEXT

A. Substantive Provisions

The Immigration and Nationality Act makes an alien eligible for asylum in the United States upon a showing of past persecution on any of several enumerated grounds or fear of future persecution on such grounds.[1] The grounds are "race, religion, nationality, membership in a particular social group, [and] political opinion."[2] If an alien is found to be eligible for asylum, the decision whether to grant asylum rests in the discretion of the Attorney General or the Secretary of Homeland Security.[3]

B. Procedural Provisions

An alien may generally assert an asylum claim in two ways. First, the alien may file an affirmative application for asylum, which will be considered by an asylum officer.[4] The asylum officer may either grant the application or deny it and, if the alien is not entitled to remain in the

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[†] Judge Newman has served on the Second Circuit Court of Appeals for twenty-nine years, serving as Chief Judge from 1993-1997. He serves as a member of the court's Backlog Committee, which developed a response to the court's backlog of asylum cases. The committee has primary responsibility for supervising the implementation of the court's Non-Argument Calendar.

[1] 8 U.S.C. §§ 1101(a)(42), 1158(b)(1) (2000).

[2] *Id.* § 1101(a)(42).

[3] *Id.* § 1158(b)(1)(A).

[4] 8 C.F.R. §§ 208.2(a), 208.3(a) (2007).

country on some other ground, refer the alien for removal proceedings before one of the more than 200 Immigration Judges ("IJs") serving within the Department of Justice.[5] Alternatively, the alien may assert an asylum claim for the first time as a defense to removal proceedings before an IJ.[6] From a decision of an IJ, both the alien and the Government may appeal to the Board of Immigration Appeals ("BIA").[7] In 2007, the BIA had fifteen members and adjudicated appeals by three-member panels.[8] From an adverse decision of the BIA, an alien may appeal to the court of appeals for the circuit in which the IJ's hearing was held.[9] The administrative factual findings must be upheld if supported by substantial evidence and "unless any reasonable adjudicator would be compelled to conclude to the contrary."[10]

II. THE COURT'S VOLUME INCREASES

The roots of the increase in petitions to review decisions of the BIA trace back to the 1990s when the Government stepped up its efforts to locate and deport illegal aliens.[11] In 1990, the Government initiated about 30,000 expulsion proceedings; in 2000, that number increased to about 185,000.[12] The number of IJ decisions in which review was sought in the BIA also surged, from less than 3000 in fiscal year ("FY") 1984 to just under 30,000 in FY 2000.[13] In 1999, the Department of Justice began to streamline its procedures for disposing of BIA cases.[14] It authorized, for limited categories of cases, decisions without written opinions, issued by only one Board member, instead of three-member panels.[15]

In 2002, then-Attorney General John Ashcroft, concerned that the BIA had accumulated a backlog of 56,000 cases, announced a

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[5] *Id.* § 208.14(a)-(c).

[6] *Id.* § 208.2(b).

[7] *Id.* § 1003.1(b).

[8] *Id.* § 1003.1(a).

[9] 8 U.S.C. § 1252(a)-(b) (2000).

[10] *Id.* § 1252(b)(4)(B).

[11] For a comprehensive empirical account of the increase in appeals of BIA decisions, see John R. B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1 (2005); *see also* COMM. ON FED. COURTS, ASS'N OF THE BAR OF THE CITY OF NEW YORK, THE SURGE OF IMMIGRATION APPEALS AND ITS IMPACT ON THE SECOND CIRCUIT COURT OF APPEALS (2004), *available at* http://www.abcny.org/pdf/report/AppealSurgeReport.pdf.

[12] DORSEY & WHITNEY LLP, BOARD OF IMMIGRATION APPEALS: PROCEDURAL REFORMS TO IMPROVE CASE MANAGEMENT app. 6 (2003), *available at* http://www.dorsey.com/files/upload/DorseyStudyABA_8mgPDF.pdf.

[13] *See Operations of the Executive Office for Immigration Review (EIOR): Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 107th Cong. at 22 (2002) (statement of Stephen Yale-Loehr, Professor, Cornell Law School and Member, American Immigration Lawyers Association).

[14] *See* Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135 (Oct. 18, 1999) (codified at 8 C.F.R. § 1003.1(e) (2007)).

[15] *See id.*

proposed regulation to expand the BIA's streamlining procedures and clear its backlog.[16] The BIA responded in two ways. First, it authorized single members to make decisions by "brief order instead of the usual written opinion."[17] Second, it increased its dispositions from 31,797 in FY 2001 to 47,321 in FY 2002.[18] The impact of this flood of decisions was not distributed evenly among the courts of appeals. For example, in the summer of 2004 the Second and Ninth Circuits received about 70 percent of the petitions challenging BIA decisions.[19]

The Second Circuit does not separately count cases presenting asylum claims but includes them within a category denominated "agency" cases. However, the overwhelming majority of agency cases come from the BIA, and nearly all cases from the BIA include denials of asylum claims. On September 30, 2002, there were 691 agency cases pending in the Second Circuit; on the same date in 2003, 2004, and 2005, the total increased to 2493, 4647, and 5299, respectively.[20] Two factors caused the increase. First, and most obviously, was the BIA's action in reducing its backlog by deciding so many asylum claims in such a short time. The second factor, less obvious, was the increase in aliens' rate of filing petitions from adverse BIA decisions. From July 2001 to March 2004 that rate increased from less than 5 percent to more than 25 percent.[21] One theory for the increased rate of appeal holds that the BIA's streamlined procedures were largely responsible because they drastically reduced the time an alien could expect to remain in this country while his or her case languished in the administrative process. Many aliens, this theory maintains, hope to remain here for about five years in order to earn money for themselves and relatives back home. With their cases moving through the administrative process in less than one year, a

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[16] *See* Attorney General John Ashcroft, News Conference—Administrative Change to Board of Immigration Appeals (Feb. 6, 2002), *available at* http://www.usdoj.gov/archive/ag/speeches/2002/020602transcriptadministrativechangetobia.htm.

[17] 8 C.F.R. § 1003.1(e)(5) (2007).

[18] *See* U. S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, STATISTICAL YEARBOOK 2002 T2 tbl.18 (2003), *available at* http://www.usdoj.gov/eoir/statspub/fy02syb.pdf.

[19] From June to September 2004, the Second Circuit received 945 petitions to review BIA decisions, while the Ninth Circuit received 1918 petitions, for a combined total of 2863 out of the 3857 (74 percent) total petitions in circuit courts. *See* Palmer et al., *supra* note 11, at 54 tbl.1 (2005). In the same period, the Fifth Circuit received 166 petitions (4 percent), and the Eleventh Circuit received 172 petitions (4 percent), *id.*, even though both the Fifth Circuit and the Eleventh Circuit include major ports of entry.

[20] *See* LEONIDAS RALPH MECHAM, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 2002 ANNUAL REPORT OF THE DIRECTOR 105 (2002), *available at* http://www.uscourts.gov/judbus2002/appendices/b06sep02.pdf; LEONIDAS RALPH MECHAM, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 2003 ANNUAL REPORT OF THE DIRECTOR 102 (2003), *available at* http://www.uscourts.gov/judbus2003/appendices/b6.pdf; LEONIDAS RALPH MECHAM, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 2004 ANNUAL REPORT OF THE DIRECTOR 108 (2004), *available at* http://www.uscourts.gov/judbus2004/appendices/b6.pdf; LEONIDAS RALPH MECHAM, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 2005 ANNUAL REPORT OF THE DIRECTOR 134 (2005), *available at* http://www.uscourts.gov/judbus2005/appendices/b6.pdf [hereinafter 2005 ANNUAL REPORT].

[21] Palmer et al., *supra* note 11, at 53 fig.5.

petition for review in a court of appeals, with the likely prospect of a stay of removal while the petition was pending, afforded hope of maintaining a five-year residence in this country with the petition remaining in the judicial process for four years.

III. THE COURT RESPONDS

This influx of cases confronted the Second Circuit with a difficult threshold choice. It could either continue with its normal case processing procedures or adopt some new procedure. Making no adjustment would have caused a huge increase in the time all litigants would have to wait to have their appeals considered. With agency cases constituting 53 percent of the court's total pending caseload on September 30, 2005,[22] the court's criminal and civil caseloads would languish, as each week's calendar of cases for argument or submission on briefs would be dominated by petitions for review of BIA decisions. On the other hand, making an adjustment itself posed significant issues. Should the adjustment apply to the court's entire pending caseload or only to the BIA cases that had precipitated the problem? And, if an adjustment was to be made, what should it be?

The court faced these issues in two meetings in 2005. First, on May 16, 2005, the court decided, with only slight disagreement, that some adjustment in procedure needed to be made. The judges favoring this course expressed concern for their institutional responsibility to the public and the bar to decide cases in approximately the same time intervals that had historically been the hallmark of the Second Circuit. The court authorized its Backlog Reduction Committee to consider ways to reduce the extraordinary backlog precipitated by the avalanche of asylum cases.

Since almost any system to expedite the consideration of cases would likely entail some curtailment of oral argument, a digression must be made at this point to explain the screening procedure in use in most of the other circuits and the limited extent to which a virtual screening procedure exists in the Second Circuit. In most other circuits, all cases are reviewed at an early stage to determine whether they warrant oral argument or should be decided on the briefs without argument. Acting on staff recommendations, a panel of three judges makes the decision whether to permit oral argument. As a result, the extent of oral argument has declined significantly. Several circuits hear oral argument in no more than half of their cases, and in the Eleventh Circuit, only 15 percent of the cases are argued.[23]

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[22] 2005 ANNUAL REPORT, *supra* note 20, at 134.

[23] LEONIDAS RALPH MECHAM, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 2006 ANNUAL REPORT OF THE DIRECTOR 50 (2006), *available at* http://www.uscourts.gov/judbus2006/tables/s1.pdf.

The Second Circuit has prided itself as the last remaining circuit to afford oral argument to all litigants, with the exception of prisoners whose cases have been deemed of insufficient merit to warrant the appointment of counsel. All other parties, including litigants proceeding as *pro ses* (if not incarcerated), have had the opportunity for oral argument. The court has used one procedure, however, which amounts to a modified form of screening for *pro se* cases. Whenever a *pro se* litigant moves for leave to proceed *in forma pauperis*,[24] for a free transcript,[25] or for appointment of counsel, that motion is decided by a motions panel, without argument. Because the motion will not be granted if the case is frivolous, consideration of the motion entails enough consideration of the merits to determine if the standard of frivolousness is exceeded. If it is not, which is true of the vast majority of *pro se* cases in which motions are filed, the court denies the motion and simultaneously dismisses the appeal.[26] In effect, the court has screened *pro se* cases in which motions are made and has made a disposition without oral argument in those cases deemed frivolous.

Thus, the second issue for the court, once it determined to attack its backlog of pending cases, was whether to screen all cases to determine which ones appeared sufficiently lacking in merit that they could be decided under some accelerated procedure, without oral argument, using some procedure similar to our *pro se* motion practice, or to apply an accelerated procedure only to asylum cases. The court discussed this choice extensively at a second court meeting on June 23, 2005. Again, with only slight disagreement, the court accepted the recommendation of its Backlog Reduction Committee and decided to apply an expedited procedure only to asylum cases. The principal reason for doing so was that most asylum cases present a single issue—whether an adverse credibility finding by the BIA is supported by substantial evidence[27]—and the court and its staff counsel could be expected to develop expertise with respect to this recurring issue that would permit use of an expedited process of decision-making without impairing the fairness or quality of decisions.

The Backlog Reduction Committee proposed, and the court approved, the establishment of a special Non-Argument Calendar (the "NAC")[28] for all cases involving a challenge to the BIA's denial of an asylum claim. Cases on the NAC are submitted to panels of three judges, any one judge on a panel having the option of removing the case from the NAC and transferring it to the court's Regular Argument Calendar

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[24] *See* 28 U.S.C. § 1915 (2000).

[25] *See id.* § 2250.

[26] *See id.* § 1915(e)(2).

[27] *See, e.g.*, Guan v. Gonzales, 432 F.3d 391, 393 (2d Cir. 2005); Latifi v. Gonzales, 430 F.3d 103, 104 (2d Cir. 2005).

[28] In urging the court to implement the NAC procedure, I suggested that once the judges got the NAC of it, they would like it.

(the "RAC"). Counsel would also be permitted to request that a case assigned to the NAC should, for good cause, be transferred to the RAC for oral argument.

A distinctive feature of the NAC is the use of sequential voting. As used in the Second Circuit, sequential voting works as follows. A group of asylum cases are submitted each week to a NAC panel of three judges. In FY 2006, the first year of NAC, twelve cases were submitted to each of four panels; in FY 2007, nine cases were submitted to each of three panels, and in some weeks to each of four panels.[29] The submission, sent to the three panel members at their resident chambers, consists of the briefs, the record from the BIA, a memorandum prepared by a law clerk in the Staff Attorney's Office ("SAO"), and a draft summary order with a recommended disposition, prepared by the SAO law clerk.

A voting sheet accompanying the submission identifies each of the three panel members as either Judge No. 1, Judge No. 2, or Judge No. 3. Each of the judges on the panel is Judge No. 1 for one third of the week's cases, is Judge No. 2 for another third of the cases, and is Judge No. 3 for the final third. The judges vote in sequence on the voting sheet. Each Judge No. 1 votes first on the three or four cases for which that judge is Judge No. 1, and sends the voting sheet to Judge No. 2, who votes and sends it on to Judge No. 3. The voting options are: refer the petition to the RAC, deny, grant, remand, or other. The voting sheet provides blanks to be checked to indicate whether the proposed order from the SAO is acceptable (either as submitted or as edited by the judges) or whether Judge No. 1 (or occasionally Judge No. 2 or No. 3) has proposed a substitute order. In the absence of exceptional circumstances, each judge is required to vote and send the voting sheet on in one week. Thus, the voting is normally concluded within three weeks of submission.

If any judge on the panel votes to send the case to the RAC, the remaining judges who have not yet voted do not cast a vote; the case has been removed from the NAC.[30]

IV. THE RESULTS

The NAC has succeeded in accomplishing a significant reduction in the Second Circuit's backlog of petitions challenging the BIA's denials of asylum claims. On September 30, 2005, when the NAC program began, the court's total of pending agency cases (as noted, nearly all of which were BIA denials of asylum claims) was 5299.[31] Two

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[29] NAC Calendar Assignments for FY 2006 and 2007 (unpublished office document, on file with author and United States Court of Appeals for the Second Circuit Clerk's Office).

[30] 2D CIR. R. 0.29.

[31] U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, CASELOAD ANALYSIS: STATISTICAL YEAR 2005 (unpublished report, on file with author).

years later, on September 30, 2007, that total was down to 1465.[32] In the two-year period from October 1, 2005, to September 30, 2007, 73 percent of NAC petitions were denied or dismissed, 15 percent were remanded to the BIA, and 12 percent were referred to the RAC.

Although this downward trend was expected to continue through FY 2008, it did not do so for two reasons. First, the number of agency cases, primarily petitions seeking review of BIA decisions, increased significantly. The total of new agency cases filed increased from 1126 in FY 2007 to 2990 in FY 2008, an increase of 166 percent.[33] Second, the court reduced the burden of the NAC on its judges in FY 2008 by sending nine NAC cases to each of three panels a week, instead of twelve NAC cases to each of four panels as in the first year of the program. The total of agency cases terminated failed to keep pace with the increase in filings; the total agency case terminations increased from 2086 in FY 2007 to only 2340 in FY 2008.[34] As a result of these two developments, the number of pending agency cases increased in FY 2008 by 907 and reached 2372 on September 30, 2008.[35] This upward movement was reversed in the first three months of FY 2009 when the number of pending agency cases decreased from 2732 to 2299.[36]

V. AN ASSESSMENT

The quantitative results are clear. The NAC program obviously has accomplished its goal of reducing the Second Circuit's backlog of pending BIA petitions while enabling the court to maintain its normal pace for disposition of all other cases. The slight increase experienced in FY 2008 is expected to be reversed in FY 2009 as the court has partially reverted to the initial pace of assigning twelve NAC cases to each of three panels (but not each of four panels as in prior years), up from nine NAC cases to each panel in FY 2008.

Assessment of NAC qualitatively is, of course, a matter of opinion. My view, admittedly not entirely objective, is that the fairness and quality of the decisions rendered by NAC panels have been equivalent to what would have occurred had all NAC cases been decided

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[32] U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, CASELOAD ANALYSIS: STATISTICAL YEAR 2007 (unpublished report, on file with author).

[33] *Id.*; U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, CASELOAD ANALYSIS: STATISTICAL YEAR 2008 (unpublished report, on file with author).

[34] U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, CASELOAD ANALYSIS: STATISTICAL YEAR 2008 (unpublished report, on file with author).

[35] During FY 2008, the court corrected its statistics for FY 2008 after noting that the pending caseloads for prior years were slightly overstated. That overstatement, however, did not affect the extent of decline in the pending agency caseload from FY 2005 to FY 2007. As a result of the correction, which slightly reduced the pending agency caseload as of September 30, 2008, the net increase in pending cases from September 30, 2007 to September 30, 2008 is slightly more than the increase derived from FY 2008 filings minus FY 2008 terminations. *Id.*

[36] U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, CASELOAD ANALYSIS: STATISTICAL YEAR 2009 (unpublished preliminary report, on file with author).

by RAC panels after oral argument. The lack of oral argument has had no effect. Indeed, in many of the cases transferred from the NAC to the RAC because one judge believed oral argument was warranted, counsel have often decided to forgo argument when the case was calendared and submitted on the briefs. Moreover, the inferior quality of many of the briefs submitted by petitioners in NAC cases indicates that oral arguments would not have been significant. And the thorough memoranda submitted to NAC panels by the SAO invariably provide more insightful and comprehensive analysis than the panels would have received just from counsels' briefs had the asylum cases been adjudicated without the NAC program.

Whether sequential voting and the compressed time schedule for adjudicating NAC cases have diminished decisional quality is harder to assess with any certainty, but I do not believe that these factors have had adverse consequences. I have not had a single NAC case in which I thought that more time to cast my vote would have been useful. Sequential voting likely, but not invariably, creates a bit of momentum for the outcome voted on by the first two judges to consider a case, but I doubt if this effect, to whatever extent it occurs, is significantly different from what occurs at a voting conference after the first two judges to speak express consistent views after an oral argument. There have been cases in which outcomes have been affected by the views of the third judge in the NAC voting sequence.

The NAC calendar has generated one unforeseen consequence. Although the judges of the Second Circuit are not sharply divided along an ideological spectrum in the general run of cases, they have split more often in their approaches to NAC cases than with other cases. Some judges appear to adhere rather strictly to the deferential standard of review and uphold BIA decisions with regularity; others take a more relaxed approach to the standard of review and often remand asylum denials to the BIA because of a perceived violation of some requirement that had not been previously established in the applicable case law.[37]

Although I would not have predicted this consequence, I believe there is an explanation for it. The NAC calendar represents the first occasion when all of the judges of the Second Circuit were considering variations on the same issue week after week. During almost the entirety of the first two years of the NAC, the court had thirteen active judges and ten senior judges. During the first year, different combinations of twelve of these twenty-three judges (in panels of three) were considering twelve cases every week; the active judges served on a NAC panel thirty-two weeks in that year. The pace dropped slightly in the second year, but

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[37] *Compare, e.g.*, Siewe v. Gonzales, 480 F.3d 160, 166 (2d Cir. 2007) (strict deference), *and* Borovikova v. U.S. Dep't of Justice, 435 F.3d 151, 155-56 (2d Cir. 2006) (same), *with* Ming Shi Xue v. Bd. of Immigration Appeals, 439 F.3d 111, 118 (2d Cir. 2006) (lenient deference), *and* Ramsameachire v. Ashcroft, 357 F.3d 169, 177-78 (2d Cir. 2004) (same).

different combinations of nine judges (in panels of three) still considered nine cases every week, and the active judges still served on a NAC panel for thirty-two weeks. With so many judges focused on similar cases week after week, I think it not surprising that disagreements would become more apparent in the frequent decision of asylum claims than when other issues do not confront the same judges until a lapse of many weeks, months, or even years.

CONCLUSION

The sudden influx of asylum cases at the start of this decade presented the Second Circuit with an extraordinary challenge. I think the court responded fairly, effectively, and efficiently.