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Immigration Law - El Rescate Legal Services v. EOIR: Immigration and Naturalization Service not Required to Provide Full Translation of Immigration Proceedings for Non-English Speaking Aliens

Helen J. Beardsley

IMMIGRATION LAW

SUMMARY

EL RESCATE LEGAL SERVICES v. EOIR: IMMIGRATION AND NATURALIZATION SERVICE NOT REQUIRED TO PROVIDE FULL TRANSLATION OF IMMIGRATION PROCEEDINGS FOR NON-ENGLISH SPEAKING ALIENS

I. INTRODUCTION

In *El Rescate Legal Services v. Executive Office of Immigration Review*[1], the Ninth Circuit upheld the practice and policy of the Executive Office of Immigration Review (EOIR)[2] of not providing a translation of the entire immigration hearing for aliens who speak little or no English.[3] The Ninth Circuit found that the plaintiffs need not exhaust statutory administrative remedies.[4] The court held the lack of interpretation of primarily legal parts of immigration hearings

1. 941 F.2d 950 (9th Cir. 1991) (per Beezer, J.; the other panel members were Hall, J. and Trott, J.).

2. The Executive Office of Immigration Review is the federal agency which supervises the Board of Immigration Appeals (BIA). 8 C.F.R. § 3 (1983) provides:

> The Executive Office for Immigration Review shall be headed by a Director, who shall be responsible for the general supervision of the Board of Immigration Appeals and the Office of the Chief Immigration Judge in the execution of their duties in accordance with 8 C.F.R Part 3. The Director may redelegate the authority delegated to him by the Attorney General to the Chairman of the Board of Immigration Appeals or the Chief Immigration Judge....

Id.

3. *El Rescate*, 941 F.2d at 956.

4. *Id.* at 954.

does not violate the statutory rights of Central American refugees seeking asylum in the United States.[5]

II. FACTS

The plaintiffs include organizations who assist Central American refugees in obtaining asylum in the United States.[6] In 1989 El Rescate Legal Services and others brought a class action in the district court for the Central District of California.[7] The class action was on behalf of non-English speaking and limited English speaking individuals subject to immigration proceedings in the Los Angeles, El Centro, and San Diego immigration courts.[8]

The plaintiff's complaint alleges the EOIR uses incompetent translators and does not interpret all portions of immigration court hearings, thus depriving aliens of their statutory rights to present evidence, to cross-examine witnesses, and to be represented and effectively assisted by counsel.[9] The plaintiffs claim this practice violates the due process and equal protection rights of aliens, and violates the Administrative Procedure Act (APA).[10]

The BIA has determined due process only requires translation of the judge's statements to the alien, the examination of alien (by alien's counsel, by the attorney for the service, and by the judge), and the alien's responses.[11]

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5. *Id.* at 956. The court further found it had jurisdiction, the organizational plaintiffs had standing, and the court need not defer to the (BIA). *Id.* at 955.

6. El Rescate Servs., Inc. v. EOIR, 727 F. Supp. 557 (C.D. Cal. 1989). Plaintiffs are El Rescate Legal Services, Inc., Central American Refugee Center, Shamila Ramin, Fereshteh Etemadi, Maria Antonia Gamero Colocho, Walter Octaviano Nochez Flores and Maria Dolores Parada. *Id.* at 727.

7. *Id.* at 558 n.1.

8. *El Rescate*, 727 F.Supp at 558.

9. El Rescate Legal Servs., Inc. v. EOIR, 941 F.2d 950, 952 (9th Cir. 1991).

10. *Id.* The section of the APA allegedly violated is 5 U.S.C. § 702 (1988), which provides in pertinent part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof....

Id.

11. Matter of Exilus, 18 I&N 276 (BIA 1982). The judge in *Exilus* reasoned:

> However, the immigration judge may determine, in the sound exercise of his discretion that the alien's understanding of other dialogue is essential to his ability to assist in the presentation of his case....For example, where a witness testifies regarding factual matters which specifically relate to the alien's own testimony, effective

The district court awarded partial summary judgment to plaintiffs[12] and permanently enjoined EOIR from failing to provide a full translation of immigration court hearings where the judge concludes an interpreter is required to guarantee due process to aliens.[13] The district court held this procedure seriously undermines an alien's rights to counsel, to examine evidence, to confront and cross examine witnesses, and to be present at his or her own proceeding.[14] The district court also held that the EOIR policy and practice violates the APA.[15] EOIR appealed to the Ninth Circuit.

III. THE COURT'S ANALYSIS

The Ninth Circuit considered whether the plaintiffs had standing,[16] whether the federal courts must defer to the

> cross-examination may necessitate translation of the witnesses testimony....On the other hand, arguments presented by counsel and the rulings of the immigration judge are primarily legal matters, the translation of which generally would not be required where the alien is represented and the protection of his interests is ensured by counsel's presence.

Id. at 281.

See also El Rescate Legal Servs., 727 F.Supp at 560, quoting from EOIR's response to plaintiff's interrogatory no. 15:

> It should be stressed that the interpreter is interpreting primarily for the benefit of the [immigration judge] and the creation of the record. The interpreter is not an agent of the respondent and is not there for the primary use of the respondent....The following excerpt is taken from the deposition of Chief Immigration Judge William Robie...
> Q: [Y]ou do not interpret a witness' English testimony to Spanish for the benefit of the respondent?
> A: That's correct.
> Q: And why is that?
> A: Because it is not needed for the function that interpreters perform in our system, which is to provide for the official record of the proceeding for review in English by the immigration judge who has to make the decision and ultimately for review by the Board of Immigration Appeals and the Court of Appeals or the District Court....

Id.

12. *El Rescate*, 727 F. Supp at 564. The district court granted summary judgment to plaintiff's first cause of action, violation of the Immigration and Naturalization Act (INA), and granted summary judgment to the plaintiff's third cause of action, violation of the APA. *Id.*

13. *Id.* at 563. "Given the present position and practice of EOIR and the immigration judges, this court cannot conclude that the due process rights of the plaintiffs should be a matter of discretion. Only when the entire hearing is translated will those rights be secure." *Id.*

14. *El Rescate*, 941 F.2d at 952.

15. *Id.*

16. El Rescate Legal Servs., Inc. v. EOIR, 941 F.2d 950, 954-55 (9th Cir. 1991).

BIA,[17] including whether an exhaustion of administrative remedies was required,[18] and whether or not providing a full translation of the proceeding violates plaintiffs statutory rights.[19] The court held there was no statutory rights violation where the plaintiffs failed to show they could not provide their own interpreters, or where they did not show they had been prevented from doing so.[20] The court found that in failing to show either circumstance the plaintiffs had not proved they were denied a reasonable opportunity to be present.[21]

A. STANDING

In *Havens Realty v. Coleman*[22] the United States Supreme Court defined the test for finding standing of plaintiffs in rights violation cases as a demonstration of injury in fact.[23] El Rescate Legal Services alleges the EOIR's policy frustrates its goal of assisting Central American refugees in obtaining asylum.[24] The Ninth Circuit concluded that since this policy requires El Rescate Legal Services to spend money on translators, which it would otherwise spend differently, it establishes injury in fact.[25]

B. EXHAUSTION OF ADMINISTRATIVE REMEDIES

1. *Statutory Requirements*

The Immigration and Naturalization Act (INA) provides for judicial review of orders of deportation and exclusion; it further establishes review by the court of appeals as the exclusive means of reviewing final orders of deportation.[26] However, the

17. *Id.* at 955.

18. *Id.* at 952-54.

19. *Id.* at 955-56.

20. *Id.* The court did not address the constitutional issues because the district court did not reach them in its decision. *Id.* at 955.

21. *Id.* at 955-956.

22. 455 U.S. 363 (1982).

23. *Id.* at 379. "If...petitioner's steering practices have perceptibly impaired Housing Opportunities Made Equal's (HOME) ability to provide counselling and referral services for low and moderate-income homeseekers...the organization has suffered injury in fact....it was improper for the district court to dismiss for lack of standing." Id.

24. *El Rescate*, 941 F.2d at 954-55.

25. *Id.* at 955.

26. 8 U.S.C. § 1105a(a) (Supp. II 1990) provides in pertinent part:

> The procedure prescribed by, and all the provisions of chapter 158 of Title 28 shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all

INA also provides deportation and exclusion orders shall not be reviewed by a federal court if the alien has not exhausted administrative remedies.[27]

The Ninth Circuit Court considered the reasoning and holding of *Reid v. Engen*,[28] where the court held when a federal statute requires exhaustion, failure to exhaust administrative remedies deprives federal courts of jurisdiction.[29] However, since the Ninth Circuit Court's decision in *Reid* a United States Supreme Court case, *Jean v. Nelson*,[30] and a line of circuit court cases[31] have concluded the exhaustion requirement of the INA is *co-extensive* with its exclusivity provision.[32] The Ninth Circuit, along with other circuits,[33] adopted a distinction between

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> final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b)...

Id.

27. 8 U.S.C. § 1105a(c) (1988) provides in pertinent part: "An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations...."

28. 765 F.2d 1457 (9th Cir. 1985). *See* Montgomery v. Rumsfeld, 572 F.2d 250, 252-53 (9th Cir. 1978).

29. *El Rescate*, 941 F.2d at 953; *Reid*, 765 F.2d at 1462.

30. 727 F.2d 957 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985).

31. *See, e.g.*, Montes v. Thornburgh, 919 F.2d 531 (9th Cir. 1990); National Center for Immigrants' Rights, Inc. v. INS, 913 F.2d 1350, 1352 (9th Cir. 1990), *cert. granted in part*, 481 U.S. 1009 (1991); National Center for Immigrants' Rights v. INS, 743 F.2d 1365, 1368-69 (9th Cir. 1984); Salehi v. District Director, INS, 796 F.2d 1286, 1290 (10th Cir. 1986); Haitian Refugee Center v. Smith, 676 F.2d 1023, 1032-33 (5th Cir. 1982), *overruled on other grounds*.

32. *El Rescate*, 941 F.2d at 953; *Montes*, 919 F.2d at 537.

33. The Fifth Circuit discussed this distinction in *Haitian Refugee Center*, 676 F.2d at 1033:

> Although a court of appeals may have sole jurisdiction to review alleged procedural irregularities in an individual deportation hearing to the extent these irregularities may provide a basis for reversing an individual deportation order, that is not to say that a program, pattern or scheme by immigration officials to violate the constitutional rights of aliens is not a separate matter subject to examination by a district court and to the entry of at least declaratory and injunctive relief. The distinction we draw is one between the authority of a court of appeals to pass upon the merits of an individual deportation order and any action in the deportation proceeding to the extent it may affect the merits determination, on the one hand, and, on the other, the authority of a district court to wield its equitable powers when a wholesale, carefully orchestrated, program of constitutional violations is alleged.

Id. The Fifth Circuit emphasized that the district court had no authority to rule on the merits of the underlying issue of deportability or discretionary relief, but could provide injunctive relief against a program which violated constitutional rights. *Id.*

the exclusive jurisdiction of the court of appeals to review alleged procedural irregularities and the authority of the district court to wield equitable powers.[34]

This approach has been clarified and upheld by decisions of the United States Supreme Court.[35] Where an alien seeks relief not inconsistent with the deportation order, the Court has ruled that federal courts have jurisdiction.[36] This distinction also comports with the holding in *United States v. California Care Corp.* where no statute was in effect, and the Ninth Circuit developed a prudential exhaustion test.[37]

2. *Prudential Requirement*

As a result of its analysis under the statutory construction and prudential exhaustion test,[38] the Ninth Circuit held administrative exhaustion is not required before the federal courts have jurisdiction to review as the plaintiffs do not challenge a deportation order directly.[39]

After analyzing under the prudential exhaustion test the Ninth Circuit concluded it is *unrealistic* to require administrative exhaustion in the present case.[40] First, under the circumstances, further development of the record is not necessary

See also Salehi, 796 F.2d at 1290. The Tenth Circuit relied on the reasoning of *Haitian Refugee Center* to hold that the district court had jurisdiction of claims seeking collateral relief from the orders pursuant to asylum claims. *Id.*

See also Jean, 727 F.2d at 980. The Eleventh Circuit, relying on the reasoning and holding of *Haitian Refugee Center* concluded that 8 U.S.C. § 1105(b) does not prohibit the circuit court from considering plaintiff's claims that they have a right to notice of opportunity to seek asylum. *Id.*

34. *El Rescate*, 941 F.2d at 953.

35. Chen Fan Kwok v. INS, 392 U.S. 206 (1988); INS v. Chadha, 462 U.S. 919 (1983); Jean v. Nelson, 472 U.S. 846 (1985).

36. *Chen Fan Kwok*, 392 U.S. at 216; *Chadha,* 462 U.S. at 939.

37. 709 F.2d 1241 (9th Cir. 1983). The Ninth Circuit found that administrative remedies need not be exhausted if a "prudential exhaustion" requirement is met. The test developed in *California Care Corp.* is three pronged; first, the court must consider whether agency consideration is necessary to generate a proper record; second, the court must decide whether relaxing the requirement of exhaustion of administrative remedies would encourage a deliberate bypass of them; finally, the court should assess whether administrative review is likely to allow the agency to correct its own mistakes. *Id.* at 1248.

38. *El Rescate*, 941 F.2d at 954.

39. *Id.* The plaintiffs challenged the failure of the Immigration and Naturalization Service (INS) to require translation of deportation proceedings in their entirely. *Id.* This is a challenge to policies and procedure, and is not consistent with a deportation order itself. *Id.*

40. *El Rescate*, 941 F.2d at 954.

because the plaintiffs raise legal issues outside the particular expertise of the Attorney General.[41] Second, relaxation of the exhaustion requirement would not significantly encourage bypassing of administrative procedures because the district court would only have jurisdiction in rare cases where alleged violations of the rights of a class of applicants existed.[42] Finally, there is no requirement of exhaustion where resort to an agency would be futile.[43] The BIA has already announced and reaffirmed its policy regarding translation of immigration proceedings, and its understanding of due process.[44] Furthermore, the court found this is not a situation where the BIA might take action rendering consideration of the issue unnecessary.[45]

C. DEFERENCE TO BIA

The United States Supreme Court held an agency's construction of statutes that it is entrusted to administer must be given "considerable weight".[46] The Court also gave deference to the BIA when the agency appropriately applies a statute to particular facts,[47] but held no deference is due when plaintiff does not contend an error of discretionary judgment.[48] However, the BIA has enunciated its policy only in terms of due

41. *Id. See Montes,* 919 F.2d at 537.

42. *Id.*

43. *El Rescate*, 941 F.2d at 954. The BIA has already announced its policy. *Infra*, note 44 and accompanying text. *See also* Saif Corp./Oregon Ship v. Johnson, 908 F.2d 1434 (9th Cir. 1990). "This court, along with every other circuit to consider the issue, has held that there is no exhaustion requirement if resort to the agency would be futile." *Id.* at 1441.

44. Matter of Thomas, 19 I&N 464 (BIA 1987). "[A]ll of the hearing need not be translated for the hearing to be fair...." *Id.* at 465. *Exilus,* 18 I&N at 281 "Exclusion and deportation proceedings are civil, rather than criminal, in nature, and the constitutional requirements of due process are satisfied by a full and fair hearing....[The guidelines] reasonably assure the alien will be afforded a fair hearing which comports with the standards of due process." *Id.; Supra* note 10 and accompanying text. *See also Saif Corp.,* 908 F.2d at 1441; Mathews v. Eldridge, 424 U.S. 319 (1976). "[I]t is unrealistic to expect the [agency] would consider substantial changes in the current administrative [procedures] at the behest of a single [applicant] raising a constitutional challenge in an adjudicatory context." *Id.* at 330.

45. *Cf.* Dhangu v. INS, 812 F.2d 455 (9th Cir. 1987). "However, if the BIA is permitted to address Dhangu's claims first, it may take action that would render unnecessary our consideration of constitutional issues." *Id* at 460.

46. Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984).

47. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987). When the issue is solely one of statutory interpretation, the court of appeals must consider it *de novo*. *Id.* at 445-48.

48. Briggs v. Sullivan, 886 F.2d 1132, 1144-45 (9th Cir. 1989).

process requirements.[49] The Ninth Circuit reasoned that since the plaintiffs do not contend the policy is an abuse of the BIA's discretion, but instead argue the BIA should get no discretion, no deference to the BIA is required.[50]

D. STATUTORY VIOLATIONS

In order to justify the EOIR's practice of not translating the entire immigration proceeding, the court relied upon the INA, in particular 8 U.S.C. §1252(b) (1988).[51]

The Ninth Circuit, unlike the district court, reasoned that the statutory provisions of the INA require only that aliens be given a "reasonable opportunity" to be present.[52] The court held where an alien's presence can only be meaningful if the hearing is fully translated, a right to reasonable opportunity to be present exists,

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49. *See, e.g.*, Exilus, 18 I&N at 281; Thomas, 19 I&N at 465; *supra,* note 44.

50. *El Rescate*, 941 F.2d at 955.

51. *Id.* at 955; 8 U.S.C. § 1252(b) (1988). This section provides that aliens must have reasonable opportunity to be present at their deportation proceedings: "the alien shall have the privilege of being represented (at no expense to the Government) by such counsel authorized to practice in such proceedings, as he shall choose." § 1252(b)(2). 8 U.S.C. § 1252 has been amended. The applicable sections now also include 8 U.S.C. § 1252b (Supp. II 1990). See also 8 U.S.C. § 1362 (1988):

> In any exclusion or deportation proceedings before a special inquiry officer and in any appeal proceedings before the Attorney General from any such exclusion or deportation proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government), by such counsel...as he shall choose.

Id. See 8 C.F.R. § 236.2(a) (1990):

> The immigration Judge shall...inform the applicant of the nature and purpose of the hearing, advise him of the privilege of being represented by an attorney of his own choice at no expense to the Government, and of the availability of free legal services programs...and request him to ascertain then and there whether he desires representation; advise him that he will have a reasonable opportunity to present evidence on his own behalf, to examine and object to evidence against him, and to cross-examine witnesses presented by the Government....

Id.

8 U.S.C. § 1252(b)(3) (1988) further provides that aliens must be given reasonable opportunity to examine evidence against them, to present evidence and to cross examine the government's witnesses. *Id.* See 8 C.F.R. § 236.2(a) (1990).

52. *El Rescate*, 941 F.2d at 955-56. The district court stated: "This court is appalled by the apparent lack of concern which EOIR and the immigration judges have demonstrated for the rights of alien respondent. Fundamental fairness and procedural due process appear to have taken a back seat to administrative convenience and bureaucratic guidelines." *El Rescate*, 727 F.Supp at 563. The district court noted that holding full translation was required to comport with due process conflicted with the holding in *Exilus*, but stated that for reasons given in its opinion it could not agree with the holding in *Exilus*. *Id.* at 564.

unless the alien shows an incapability to provide translation, or prevention from doing so.[53] Under the court's reasoning, the EOIR's refusal to provide an entire translation of the hearing does not deny an alien a reasonable opportunity to provide a full translation, and thus the alien is meaningfully present.[54]

The Ninth Circuit emphasized that the plaintiffs fail to show they cannot provide their own translators.[55] The court held EOIR's failure to require a full translation of immigration proceedings did not undermine rights created by the statutory provision of the INA.[56]

IV. CONCLUSION

In *El Rescate* the Ninth Circuit Court held there is no statutory violation of aliens' rights when an entire immigration court proceeding is not translated.[57] The court perpetuates the practice of not affording aliens rights guaranteed by the Fifth Amendment.[58] By upholding the EOIR's practices of not

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53. *El Rescate*, 941 F.2d at 955-56.

54. *Id.*

55. *Id.*

56. *Id.* The court did not discuss the constitutional issues raised by the plaintiffs because the district court did not reach these claims. *Id.* at 956. Although the plaintiffs alleged a violation of the APA grounded on 5 U.S.C. § 702 (1988), *see supra* note 10, the court found this provision did not create substantive rights. *El Rescate,* at 956. Having held EOIR had not violated the INA, the court concluded there was no right to sue for an APA violation where no violation of a relevant statute existed, and there could thus be no APA violation. *Id.* citing Lujan v. National Wildlife Fed'n, 110 S.Ct. 3177, 3185-86 (1990).

57. El Rescate Legal Servs., Inc. v. EOIR, 941 F.2d 950, 955-56 (9th Cir. 1991).

58. Fiallo v. Bell, 430 U.S. 787 (1977) "Congress regularly makes rules that would be unacceptable if applied to citizens." *Id.* at 792; *See also El Rescate Legal Servs.*, 727 F.Supp at 559:

> There is no doubt that aliens in deportation hearings are entitled to protections under the Constitution. As the Supreme Court stated: 'There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life liberty, or property without due process of law.'

Id. at n.3 quoting Mathews v. Diaz, 426 U.S. 67, 77 (1976).

The district court also noted that the Ninth Circuit has consistently characterized the alien's right to counsel of choice as "fundamental" and warned the INS not to treat it casually, and emphasized that this right must be respected in substance as well as in name. *El Rescate Legal Servs.*, 727 F.Supp at 561, (citing Baires v. INS, 856 F.2d 89, 91 n.2 (9th Cir. 1988)).

providing full translation of immigration proceedings, the Ninth Circuit court leaves aliens seeking asylum, or fighting deportation orders, in a perilous position.[59]

The district court pointed to just the kind of situation in which the inability to comprehend immigration court proceedings seriously impairs aliens' ability to interact with counsel and assist in their own defense:

> Suppose that counsel unwittingly makes a mistake or misrepresents a fact of which the alien has knowledge - not an unusual occurrence in this court's knowledge. Without the benefit of an interpreter, this error would go uncorrected and well might determine the outcome of the proceedings and deprive the alien of a deserved appeal.[60]

In reversing the district court's grant of summary judgment for the plaintiffs, and the order enjoining EOIR from failing to translate the entire proceeding, the Ninth Circuit Court has effectively abrogated the right to be present at one's own immigration hearing for aliens and refugees who do not speak enough English to fully comprehend the content.[61]

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59. *See* 8 U.S.C. § 1252(b)(2) (Supp. II 1990). An indigent alien does not have the right to appointed counsel. *Id.*

60. *El Rescate Legal Servs.*, 727 F. Supp at 561. The district court also noted the language used in Negron v. New York, 434 F.2d 386 (2nd Cir. 1970):

> incapacity to respond to specific testimony would inevitably hamper the capacity of his counsel to conduct effective cross-examination. Not only for the sake of effective cross- examination, however, but as a matter of simple humaneness, [the defendant] deserved more than to sit in total incomprehension as the trial proceeded.

Id. at 390.

61. *El Rescate*, 941 F.2d at 956. The case was remanded to the district court for consideration of the constitutional claims. *Id.*

* Golden Gate University School of Law, Class of 1993.