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# Seeking Asylum in a Hostile System: The Seventh Circuit Reverses to Confront a Broken Process

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## **SEEKING ASYLUM IN A HOSTILE SYSTEM: THE SEVENTH CIRCUIT REVERSES TO CONFRONT A BROKEN PROCESS**

JOHN R. FLOSS

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### INTRODUCTION.

The United States has long been known as a bastion of freedom and a nation that readily opens its arms to those seeking refuge from persecution. As emblazoned on the Statue of Liberty, “give me your tired, your poor, your huddled masses yearning to breathe free.”<sup>1</sup> This premise stems largely from principles considered fundamental to Americans, i.e. the free exercise of religion, freedom of speech, freedom of association, among others. Further, it has long been a practice that the U.S. will not return a foreign national to a country where that national’s life or freedom is threatened.<sup>2</sup> The U.S. promotes this policy through the application of its asylum laws.<sup>3</sup> The

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<sup>1</sup> EMMA LAZARUS, *THE NEW COLOSSUS* (1883), reprinted in EMMA LAZARUS: SELECTIONS FROM HER POETRY AND PROSE 48 (Morris Schappes ed. Jewish Historical Society of New York 1967). The poem was inscribed on the base of the Statue of Liberty in 1903.

<sup>2</sup> Ruth Ellen Wasem, *CRS Report for Congress: U.S. Immigration Policy on Asylum Seekers*, May 5, 2005, available at <http://www.fas.org/sgp/crs/misc/RL32621.pdf> (last visited Apr. 26, 2006).

<sup>3</sup> Asylum is the process by which the United States grants lawful presence to a refugee fleeing a foreign country due to persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. An alien who successfully demonstrates that he or she has faced past persecution in a foreign

United States' commitment to these principles and its ubiquitous reputation and stance as the land of the free has long provided persecuted aliens the opportunity to start life anew.

What is the result then, if the ability of aliens fleeing from genuine persecution becomes endangered in administrative blundering, ignorance, incompetence, or perhaps political posturing? Does this begin to taint our history as an oasis for persecuted refugees? Or is it necessary to rethink and reform our long held status as a sanctuary for the persecuted in light of the dangers a relatively open door policy can pose in the post-9/11 era?

The answers to these questions are complex and may differ amongst political ideologies, but what remains certain is that there exists a fundamental problem in the area of immigration adjudication, and in particular, asylum adjudication. The number of asylum adjudication cases appealed to the U.S. circuit courts of appeals from the government agencies charged with adjudicating such cases has risen sharply in the past several years.<sup>4</sup> In and of itself, a rise in the number of appeals to the federal courts poses little problem other than an increased burden on judicial resources. However, the troubling aspect of these appeals, and a further indication of a fundamental and underlying problem, is the unusually high rate at which aliens' petitions to review are granted and federal agencies' decisions are thereby reversed.<sup>5</sup> For example, in the period between June 15, 2005 and December 15, 2005, the United States Court of Appeals for the Seventh Circuit granted the alien's petition for review in approximately two-thirds (19 of 29) of the published opinions that

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country or likely would face future persecution if returned to that country is protected and immune from extradition to the country from which he or she has fled. 8 U.S.C. § 1158(b) (2005); 8 U.S.C. § 1101(a)(42)(A) (2006).

<sup>4</sup> U.S. Department of Justice: Executive Office for Immigration Review, *BIA Restructuring and Streamlining Procedures*, (Dec. 8, 2004 revised), <http://www.usdoj.gov/eoir/press/04/BIAStreamlining120804.pdf> (last visited Apr. 26, 2006). "The rate of new petitions — the number of BIA decisions appealed to the Federal courts compared to the total number of BIA decisions — has increased from an historical 5 percent (before 2002) to a current [December 8, 2004] level of approximately 25 percent." *Id.*

<sup>5</sup> See *Benslimane v. Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005).

dealt with asylum denial issues.<sup>6</sup> What is the source of this high rate of reversal and what can be done to remedy it? How are the Seventh Circuit and the U.S. Government responding to the problems identified?

This Comment will explore some of the problems inherent in the immigration adjudication system identified throughout opinions issued by the Seventh Circuit between June 15, 2005 and December 15, 2005. Part I introduces the basics of the asylum adjudication process. Part II addresses the unusually high rate of reversal seen in recent Seventh Circuit decisions. Part III explores several of the most common flaws identified in immigration judge (“IJ”) and Board of Immigration Appeals (“BIA”) decisions, particularly credibility determinations and corroboration requirements, and explores potential remedies to these problems. Part IV discusses several procedural problems created by federal agencies that have helped contribute to the high rate of reversals. In addition, this Comment explores the role the Seventh Circuit is playing in effectuating change in the system of asylum

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<sup>6</sup> Cases in which the petition was granted: *Kllokoqi v. Gonzales*, 439 F.3d 336 (7th Cir. 2005); *Durgac v. Gonzales*, 430 F.3d 849 (7th Cir. 2005); *Lhansom v. Gonzales*, 430 F.3d 833 (7th Cir. 2005); *Tabaku v. Gonzales*, 425 F.3d 417 (7th Cir. 2005); *Dawoud v. Gonzales*, 424 F.3d 608 (7th Cir. 2005); *Ssali v. Gonzales*, 424 F.3d 556 (7th Cir. 2005); *Tapiero de Orejeula v. Gonzales*, 423 F.3d 666 (7th Cir. 2005); *Galicia v. Gonzales*, 422 F.3d 529 (7th Cir. 2005); *Sosnovskaia v. Gonzales*, 421 F.3d 589 (7th Cir. 2005); *Dong v. Gonzales*, 421 F.3d 573 (7th Cir. 2005); *Hor v. Gonzales*, 421 F.3d 497 (7th Cir. 2005); *Haile v. Gonzales*, 421 F.3d 493 (7th Cir. 2005); *Nakibuka v. Gonzales*, 421 F.3d 473 (7th Cir. 2005); *Chen v. Gonzales*, 420 F.3d 707 (7th Cir. 2005); *Koval v. Gonzales*, 418 F.3d 798 (7th Cir. 2005); *Sahi v. Gonzales*, 416 F.3d 587 (7th Cir. 2005); *Mohideen v. Gonzales*, 416 F.3d 567 (7th Cir. 2005); *Soumahoro v. Gonzales*, 415 F.3d 732 (7th Cir. 2005); *Fessehaye v. Gonzales*, 414 F.3d 746 (7th Cir. 2005)

Cases in which the petition was denied: *Djouma v. Gonzales*, 429 F.3d 685 (7th Cir. 2005); *Hamdan v. Gonzales*, 425 F.3d 1051 (7th Cir. 2005); *Hussain v. Gonzales*, 424 F.3d 622 (7th Cir. 2005); *Firmansjah v. Gonzales*, 424 F.3d 598 (7th Cir. 2005); *Vasile v. Gonzales*, 417 F.3d 766 (7th Cir. 2005) (petition denied on jurisdictional grounds); *Mitreva v. Gonzales*, 417 F.3d 761 (7th Cir. 2005); *Singh v. Gonzales*, 417 F.3d 736 (7th Cir. 2005); *Hernandez-Baena v. Gonzales*, 417 F.3d 720 (7th Cir. 2005); *Li v. Gonzales*, 416 F.3d 681 (7th Cir. 2005); *Hysi v. Gonzales*, 411 F.3d 847 (7th Cir. 2005).

application adjudications and in the context of immigration adjudication as a whole.

I. THE ASYLUM ADJUDICATION PROCESS: BACKGROUND AND PROCEDURE.

A. *A Brief Introduction to the Asylum Process.*

Asylum is typically thought of as governmental protection and immunity from extradition or deportation granted to a political refugee fleeing from a foreign country. The process of applying for asylum in the United States, although not overly complicated, can be an arduous and often frustrating experience for those seeking such protection. In order to adequately address the issues that are currently contributing to the high rate of reversal amongst administrative asylum decisions, a brief overview of the asylum procedure is necessary.

There are several means by which an alien may attempt to gain lawful status within the United States as an asylee.<sup>7</sup> The context in which an alien applies for asylum differs depending on that particular alien's legal status within the U.S, whether present legally or illegally. Given this status, the alien will apply through either an agency of the Department of Homeland Security ("DHS") known as United States Citizenship and Immigration Services ("USCIS") or through the

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<sup>7</sup> "An asylum application can arise in three contexts: (1) an affirmative application, in which a noncitizen in valid nonimmigrant status applies for asylum with the . . . USCIS; (2) a defensive application filed with an immigration judge (IJ) in response to action taken against the noncitizen; and (3) in response to expedited removal proceedings." 3-34 CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 34.02 (2006). If an alien applies for asylum with the USCIS, an officer of the USCIS shall perform an initial interview with the alien to determine if the alien has a 'credible fear' of persecution. 8 U.S.C. § 1225(b)(1)(A)(ii)-(b)(1)(B)(ii) (1996). Should the USCIS determine that the alien does have a credible fear of persecution, the alien's asylum application will be referred to the DOJ immigration court for a hearing on the matter. 8 U.S.C. § 1225(b)(1)(B). Note also that should the officer determine that there is no 'credible fear' of persecution, an alien is entitled to prompt review by an IJ. 8 U.S.C. § 1225(b)(1)(B)(iii)(III).

Immigration Court of the Executive Office for Immigration Review, administered by the Department of Justice (“DOJ”).<sup>8</sup> Regardless of the manner in which asylum is sought, unless an alien’s asylum application is granted, that application will at some point be adjudicated in a hearing in front of an immigration judge or IJ.<sup>9</sup> At this hearing, an IJ “evaluates an alien’s claim for credibility, assessing internal consistency, plausibility, and detail,”<sup>10</sup> and may require the alien to provide corroborating evidence in certain circumstances.<sup>11</sup>

To qualify for asylum, an alien bears the burden of demonstrating that he or she is a refugee that is unable or unwilling to return to his or her home country because of past persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>12</sup> If an alien is able to demonstrate past persecution, this gives rise to a rebuttable presumption of a well-founded fear of future persecution.<sup>13</sup>

The IJ will either grant or deny asylum and will render a written decision addressing the merits of the alien’s claim. If asylum is denied by the IJ, the alien may appeal the decision to the BIA, which serves as the appellate entity of the Immigration Court. This appellate Board is made up of eleven members appointed by the Attorney General,<sup>14</sup> although temporary Board members may be added for periods not to exceed six months.<sup>15</sup>

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<sup>8</sup> See 3-34 CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 34.02 (2006).

<sup>9</sup> *Id.*

<sup>10</sup> *Ssali v. Gonzales*, 424 F.3d 556, 562 (7th Cir. 2005) (citing *Capric v. Ashcroft*, 355 F.3d 1075, 1085 (7th Cir. 2004)).

<sup>11</sup> See *Lin v. Ashcroft*, 385 F.3d 748, 751 (7th Cir. 2004) (quoting *Uwase v. Ashcroft*, 349 F.3d 1039, 1041 (7th Cir. 2003); *Georgis v. Ashcroft*, 328 F.3d 962, 969 (7th Cir. 2003). See also 8 C.F.R. § 208.13(a) (2000) (stating “[t]he testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.”)).

<sup>12</sup> 8 U.S.C. § 1158(b) (2005); 8 U.S.C. § 1101(a)(42)(A) (2006).

<sup>13</sup> See 8 C.F.R. § 208.13(b)(1).

<sup>14</sup> 8 C.F.R. § 1003.1(a)(1) (2005).

<sup>15</sup> *Id.* at § 1003.1(a)(4).

Under a ‘streamlining’ regulation enacted in 2002 by former Attorney General John Ashcroft,<sup>16</sup> a single BIA member is authorized to affirm an IJ’s decision without issuing an opinion if that Board member determines that the underlying result was correct, that any errors in the decision were harmless or nonmaterial, and that either (1) the issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation, or (2) the factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.<sup>17</sup> If the Board member determines that one of these two conditions is not met, a three-member Board panel will then review the application.<sup>18</sup> The Board panel may then reverse the lower decision and issue an opinion of its own, affirm the decision without issuing an opinion, or affirm the decision with an amended or new opinion.<sup>19</sup>

### *B. Judicial Review by the Federal Courts of Appeals.*

If the BIA affirms an IJ’s decision with its own opinion or amends the opinion of the IJ, the alien may appeal the BIA’s decision to the federal court of appeals having jurisdiction over the alien.<sup>20</sup> A federal circuit court reviews this decision under the deferential “substantial

<sup>16</sup> U.S. Department of Justice: Executive Office for Immigration Review, *BIA Restructuring and Streamlining Procedures*, (Dec. 8, 2004 revised), available at <http://www.usdoj.gov/eoir/press/04/BIAStreamlining120804.pdf> (last visited Apr. 26, 2006).

<sup>17</sup> 8 C.F.R. § 1003.1(e)(4)(i). Note also that “[A] decision to streamline does not mean that the BIA has adopted, or entirely approves of, the IJ’s determinations; it only means that the BIA deemed any errors by the IJ to be harmless.” *Hamdan v. Gonzales*, 425 F.3d 1051, 1058 (7th Cir. 2005) (citing *Falcon Carriche v. Ashcroft*, 350 F.3d 845, 849 (9th Cir. 2003)).

<sup>18</sup> See 8 C.F.R. § 1003.1(e)(6).

<sup>19</sup> *Id.* at § 1003.1(d)-(e).

<sup>20</sup> See 8 U.S.C. § 1252 (2005). See also 8-104 CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, *IMMIGRATION LAW AND PROCEDURE* §§ 104.05, 104.13 (2006).

evidence” standard<sup>21</sup> in which the decision “must be affirmed if it is supported by reasonable, substantial, and probative evidence on the record considered as a whole.”<sup>22</sup> Substantial evidence is more than a “mere scintilla” or “uncorroborated hearsay;” “it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>23</sup> Therefore, a court will grant a petition for review only if the alien appellant “shows that ‘the evidence not only supports [reversal of the BIA’s decision], but compels it.’”<sup>24</sup> In addition, an asylum grant is ultimately a discretionary decision by the Attorney General.<sup>25</sup>

If the BIA affirms an IJ’s ruling without opinion, the court reviews the decision of the IJ directly,<sup>26</sup> again applying the substantial evidence test, reversing only if the evidence compels a different result.<sup>27</sup> The IJ’s opinion must be supported by “specific, cogent reasons . . . [that] bear a legitimate nexus to the finding.”<sup>28</sup>

The Seventh Circuit has stated that under this standard, “outright reversal is almost never called for. More commonly, petitions for review will be granted when the court concludes that there is more that

<sup>21</sup> 5 U.S.C. § 706 (1966).

<sup>22</sup> *Liu v. Ashcroft*, 380 F.3d 307, 312 (7th Cir. 2004) (quoting *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992)).

<sup>23</sup> *Willapoint Oysters, Inc. v. Ewing*, 174 F.2d 676, 691 (9th Cir. 1949), *cert. denied*, 338 U.S. 860 (1949), *reh. denied*, 339 U.S. 945 (1950) (citing *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229-30 (1938)).

<sup>24</sup> *Liu*, 380 F.3d at 312 (quoting *Elias-Zacarias*, 502 U.S. at 481 n.1).

<sup>25</sup> Asylum applications sometimes are denied in the exercise of discretion, even if the alien has established a well-founded fear of persecution on account of one of the five statutory grounds. 3-33 CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, *IMMIGRATION LAW AND PROCEDURE* § 33.05 (2006).

<sup>26</sup> *Durgac v. Gonzales*, 430 F.3d 849, 851 (7th Cir. 2005); *see also* *Soumahoro v. Gonzales*, 415 F.3d 732, 736 (7th Cir. 2005); *Lin v. Ashcroft*, 385 F.3d 748, 751 (7th Cir. 2004).

<sup>27</sup> *Durgac*, 430 F.3d at 851; *see also* *Mitreva v. Gonzales*, 417 F.3d 761, 764 (7th Cir. 2005); *Balogun v. Ashcroft*, 374 F.3d 492, 498 (7th Cir. 2004).

<sup>28</sup> *Ahmad v. INS*, 163 F.3d 457, 461 (7th Cir. 1999) (quoting *Nasseri v. Moschorak*, 34 F.3d 723, 726 (9th Cir. 1994), *overruled on other grounds by Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996)).



must be done at the agency level before final conclusion on an asylum application is possible.”<sup>29</sup> Thus, although an “IJ’s credibility determination is entitled to great deference,”<sup>30</sup> a court “will not automatically yield to the IJ’s conclusions when they are drawn from insufficient or incomplete evidence.”<sup>31</sup> As will be shown, insufficiently supported adverse credibility determinations represent a major source of errors identified in asylum decisions reviewed by the Seventh Circuit.

## II. RECENT DEVELOPMENTS IN THE SEVENTH CIRCUIT: REVERSE, REVERSE, REVERSE.

Given the deferential substantial evidence standard of review applied by the federal courts, one might speculate that the Seventh Circuit would rarely grant an alien’s petition for review, and would outright reverse the decision of the IJ or BIA in even fewer instances.<sup>32</sup> Surprisingly, this assumption is decidedly off base. As noted previously, during its last term, the Seventh Circuit granted the alien’s petition for review in approximately two-thirds of its published opinions concerning asylum.<sup>33</sup> Even more troubling is the fact that this alarmingly high rate of reversal applies not only to asylum decisions, but extends to all immigration decisions rendered by immigration adjudicators. For example, the Seventh Circuit recently noted:

<sup>29</sup> *Durgac*, 430 F.3d at 851-852.

<sup>30</sup> *Dong v. Gonzales*, 421 F.3d 573, 578 (7th Cir. 2005) (citing *see Uwase v. Ashcroft*, 349 F.3d 1039, 1041 (7th Cir. 2003)).

<sup>31</sup> *Dong*, 421 F.3d at 578 (citing *Georgis v. Ashcroft*, 328 F.3d 962, 968 (7th Cir. 2003)).

<sup>32</sup> The Seventh Circuit has noted that under the substantial deference standard, credibility determinations “should only be overturned under extraordinary circumstances.” *Ahmad v. INS*, 163 F.3d 457, 461 (7th Cir. 1999) (citing *Nasir v. INS*, 122 F.3d 484, 486 (7th Cir. 1997)).

<sup>33</sup> *See supra* note 6.

In the year ending [September 23, 2005], different panels of this court reversed the [BIA] in whole or part in a staggering 40 percent of the 136 petitions to review the Board that were resolved on the merits. The corresponding figure, for the 82 civil cases during this period in which the United States was the appellee, was 18 percent.<sup>34</sup>

However, the high reversal rate alone does not complete the story. Accompanying these reversals has been scathing critique of the analyses, methods employed, and conclusions formed by the underlying immigration adjudicators. A sampling of a recent Seventh Circuit decision provides but a small snippet of the varying critiques leveled upon the IJ or BIA:

[o]ur criticisms of the Board and of the immigration judges have frequently been severe . . . “the [immigration judge’s] opinion is riddled with inappropriate and extraneous comments” . . . “this very significant mistake suggests that the Board was not aware of the most basic facts of [the petitioner’s] case” . . . “the procedure that the [immigration judge] employed in this case is an affront to [petitioner’s] right to be heard”) . . . the immigration judge’s factual conclusion is “totally unsupported by the record” . . . the immigration judge’s unexplained conclusion is “hard to take seriously” . . . “there is a gaping hole in the reasoning of the board and the immigration judge” . . . “the elementary principles of administrative law, the rules of logic, and common sense seem to have eluded the Board in this as in other cases.”<sup>35</sup>

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<sup>34</sup> *Benslimane v. Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005).

<sup>35</sup> *Id.* (citations omitted).

This type of biting criticism has continued beyond those decisions of the Seventh Circuit's past term, thus indicating that the problem is persistent and fundamentally ingrained in the system.<sup>36</sup> Nor is the Seventh Circuit alone in rendering harsh criticism upon IJs and the BIA. In *Benslimane v. Gonzales* the Court cites language from the Second, Third, and Ninth Circuits:

[o]ther circuits have been as critical . . . “the tone, the tenor, the disparagement, and the sarcasm of the [immigration judge] seem more appropriate to a court television show than a federal court proceeding” . . . the immigration judge's finding is “grounded solely on speculation and conjecture” . . . the immigration judge's “hostile” and “extraordinarily abusive” conduct toward petitioner “by itself would require a rejection of his credibility finding” . . . “the [immigration judge's] assessment of Petitioner's credibility was skewed by prejudgment, personal speculation, bias, and conjecture” . . . “it is the [immigration judge's] conclusion, not [the petitioner's] testimony, that ‘strains credulity’”.<sup>37</sup>

Obviously the system is flawed and the Seventh Circuit has chosen to voice its rising indignation on this matter in a manner that has received growing publicity of late.<sup>38</sup> The criticism seems

<sup>36</sup>For example, in *Cecaj v. Gonzales* the court stated:

The immigration judge's analysis of the evidence was radically deficient. He failed to consider the evidence as a whole, as he was required to do by the elementary principles of administrative law. [citations omitted] Instead he broke it into fragments. Suppose you saw someone holding a jar, and you said, “That's a nice jar,” and he smashed it to smithereens and said, “No, it's not a jar.” That is what the immigration judge did.

440 F.3d 897, 899 (7th Cir. 2006).

<sup>37</sup>*Benslimane*, 430 F.3d at 829.

<sup>38</sup>Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, at A1.

warranted as well. An adjudicative body that is reversed in nearly two-thirds of its appeals represents an affront to the rights of those seeking protection in its courts. This is particularly true given that the high rate of reversals in the Seventh Circuit has taken place under the application of the deferential substantial evidence standard of review. But what is the root cause for this judicial breakdown? And is the system really as flawed as the Seventh Circuit claims it to be?

### III. COMMON ERRORS IN IJ AND BIA ANALYSES.

Despite the sometimes scathing and often pointed critiques by the Seventh Circuit, the majority of the asylum reversals issued by the Court in its last term can be attributed to one or both of two issues that form the crux of nearly every asylum claim analysis; (1) a credibility assessment of the alien's testimony as well as any accompanying evidence presented and, (2) the imposition of a corroborating evidence requirement on an otherwise credible alien. The immigration adjudicator must support decisions regarding these issues with substantial evidence gleaned from the record as a whole.<sup>39</sup> Yet, as identified by the Seventh Circuit, this is often not the case.

#### A. *Is the Asylum Claim Credible?*

During an asylum hearing an immigration judge will assess the credibility of the alien applicant, as well as the credibility of any accompanying witnesses, experts, and other evidence. DHS counsel will cross-examine the applicant, and the IJ may also question the alien. An interpreter, whether provided by the alien or by the DOJ, will almost always be present. An IJ will then, based on all the available evidence, determine whether the alien's claim of persecution is credible or incredible.<sup>40</sup> Credibility determinations "must be

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<sup>39</sup> Millar v. FCC, 707 F.2d 1530, 1540 (D.C.Cir. 1983) (stating that an agency's conclusions must be based on record as a whole).

<sup>40</sup> See 8 U.S.C. § 1158 (2005).

supported by specific, cogent reasons.”<sup>41</sup> In addition, any reason cited by an immigration judge must “bear a legitimate nexus to the finding.”<sup>42</sup> Credibility determinations in asylum claims are often dispositive, and are primarily based upon subjective analysis.<sup>43</sup> As such, these determinations are particularly prone to abuse and erroneous conclusions.

### 1. Grasping at Minor Inconsistencies.

Assessing the credibility of an alien claiming past or future persecution in a foreign country requires an astute judge of character. In a majority of cases, an alien has little or no supporting documentation due to the circumstances under which the alien left his or her respective country. Much of an IJ’s analysis will thus be predicated upon the testimony of an alien and accompanying witnesses, if any. To add to the difficulty of this process, it is inevitable that an IJ will be presented with fraudulent claims of persecution on a somewhat regular basis given the benefits a grant of asylum bestows. Yet, as an adjudicator, it is the responsibility of an IJ to sift through the testimony and discern that which is truthful and that which is false. The Seventh Circuit understands the gravity of this task, but insists that far too often immigration judges and the BIA cling to minor inconsistencies that have no bearing on the overall validity of the asylum claim.<sup>44</sup>

For example, in *Lhanzom v. Gonzales* the Seventh Circuit recently chastised the analysis of an IJ’s adverse credibility determination as fraught with findings of inconsistent testimony from the alien that in

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<sup>41</sup> *Ahmad v. INS*, 163 F.3d 457, 461 (7th Cir. 1999).

<sup>42</sup> *Lhanzom v. Gonzales*, 430 F.3d 833, 843 (7th Cir. 2005).

<sup>43</sup> *See* 8 U.S.C. § 1158(b) (2005).

<sup>44</sup> *Lhanzom*, 430 F.3d at 848 (citing *Korniejew v. Ashcroft*, 371 F.3d 377, 386-87 (7th Cir. 2004) to criticize the increasing reliance by the BIA and IJs upon perceived inconsistencies in testimony as the basis for adverse credibility determinations, even in cases where the alleged discrepancies are minor or easily explained).

fact did not exist.<sup>45</sup> Here, an alien who sought asylum supplemented her claim through the testimony of her father, a seventy-nine-year-old Tibetan man.<sup>46</sup> Throughout the father's lengthy examination by the immigration judge there appears in the record many instances of miscommunication between the witness and the IJ; miscommunications which the IJ deemed to represent inconsistencies.<sup>47</sup> The Court noted that the immigration judge responded with "unusual defensiveness" when the alien's attorney attempted to correct those misunderstandings.<sup>48</sup> The alien's father acknowledged that much of his testimony was based upon matters for which he had little personal knowledge and he was simply relaying what he had heard, yet the IJ based much of his incredibility decision on internal inconsistencies between the testimony of the alien's father and the account of the alien herself.<sup>49</sup> In fact, the Seventh Circuit noted that "the IJ did not comment on [the alien's] demeanor as a witness but relied entirely on these alleged inconsistencies in finding her not credible."<sup>50</sup> The Court further stated that "in reviewing the transcript of [the alien's father's] testimony, again, the only thing that is clear is the level of confusion during his testimony as the IJ continued to question him about matters for which he had no personal knowledge."<sup>51</sup> In granting the petition for review, the Seventh Circuit concluded that the "IJ's conclusion is based on an assumption and assumption cannot form the basis of impeachment."<sup>52</sup>

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<sup>45</sup> See *Lhanzom*, 430 F.3d 833.

<sup>46</sup> *Id.* at 837-39.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 837.

<sup>49</sup> *Id.* at 844-45.

<sup>50</sup> *Id.* at 843.

<sup>51</sup> *Id.* at 845. Moreover, the Court lamented the "frequent insensitivity in immigration hearings to the possibilities of misunderstandings caused by the use of translators of difficult languages such as Chinese. *Id.* (citing *Zen Li Iao v. Gonzales*, 400 F.3d 530, 534 (7th Cir. 2005)).

<sup>52</sup> *Lhanzom*, 430 F.3d at 846 (citing *Korniejew v. Ashcroft*, 371 F.3d 377, 383 (7th Cir. 2004)).

This case represents a mounting concern of the Seventh Circuit that IJs and the BIA have increasingly grasped onto “perceived inconsistencies” in testimony as the basis for incredibility determinations, even where such inconsistencies are immaterial and could be readily explained.<sup>53</sup> In an overzealous effort to weed out fraudulent claims from those with merit, or perhaps responding to internal pressure from the executive branch of the government, immigration adjudicators have scrutinized the record looking for gaps and latent ambiguities instead of looking at the overall plausibility of an alien’s claim.<sup>54</sup> This type of error was prevalent in the asylum decisions reviewed by the Seventh Circuit during its last term.<sup>55</sup>

This problem has been created by the DHS and the DOJ themselves. As the number of immigration appeals rises,<sup>56</sup> immigration adjudicators presumably need to cut corners at an

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<sup>53</sup> *Lhansom*, 430 F.3d at 848 (citing *Korniejew*, 371 F.3d at 386-87).

<sup>54</sup> Since 9/11, the rate at which asylum has been granted by the United States has dropped. In 2000, about forty-four percent of asylum cases were granted, in 2003 only twenty-nine percent of asylum cases were granted. Eleanor Acer, *Refuge in an Insecure Time: Seeking Asylum in the Post-9/11 United States*, 28 *FORDHAM INT’L L.J.* 1361, 1384 (2005); see also Karen C. Tumlin, *Suspect First: How Terrorism Policy is Reshaping Immigration Policy*, 92 *CAL. L. REV.* 1173, 1190 (2004) (discussing Mar. 18, 2003 press conference of Secretary of Department of Homeland Security Tom Ridge introducing Operation Liberty Shield, a transcript of which is available at <http://www.dhs.gov/dhspublic/display?content=525> (last visited Apr. 26, 2006)). From the context of this briefing, there seems to be a government presumption against the validity of asylum claims.

<sup>55</sup> See, e.g., *Tabaku v. Gonzales*, 425 F.3d 417 (7th Cir. 2005); *Ssali v. Gonzales*, 424 F.3d 556 (7th Cir. 2005); *Galicia v. Gonzales*, 422 F.3d 529 (7th Cir. 2005); *Sosnovskaia v. Gonzales*, 421 F.3d 589 (7th Cir. 2005); *Dong v. Gonzales*, 421 F.3d 573 (7th Cir. 2005); *Hor v. Gonzales*, 421 F.3d 497 (7th Cir. 2005); *Nakibuka v. Gonzales*, 421 F.3d 473 (7th Cir. 2005).

<sup>56</sup> “The expanded streamlining procedures have allowed the BIA to allocate its limited resources to adjudicate more than 40,000 new appeals and other matters filed annually, and to steadily reduce its pending caseload from 56,000 in August 2002 to approximately 33,000 by October 2004.” U.S. Department of Justice: Executive Office for Immigration Review, *BIA Restructuring and Streamlining Procedures*, (Dec. 8, 2004 revised), available at <http://www.usdoj.gov/eoir/press/04/BIASstreamlining120804.pdf> (last visited Apr. 26, 2006).

increased rate. With the enactment of the streamlining policy, discussed in more depth below, the number of cases reviewed by a BIA panel has sharply dropped.<sup>57</sup> The result is less scrutiny given to adverse credibility determinations based on perceived inconsistencies; culminating in a breakdown or at least a dilution of the appellate process. A procedural change in the immigration adjudication process is necessary to combat this problem unless the level of analysis provided by IJs begins to increase across the board. However, the proposition of an increased quality of analysis provided by IJs is unlikely to come to fruition without a major increase in training and resources, particularly since immigration adjudication error stems from a variety of sources.

## 2. Do Cultural Bias, Indifference, or Unjust Skepticism Factor Into Asylum Adjudications?

An alternative problem in credibility assessments is the lack of cultural awareness exhibited by many IJs and the BIA. The Seventh Circuit recently noted that the “lack of familiarity with relevant foreign cultures” evidenced in immigration cases was “disturbing.”<sup>58</sup> This problem is almost exclusively isolated to the arena of asylum adjudication. Each decision in an asylum case has the distinction of being generally unique from all other asylum cases. An alien’s application is based on the particular circumstances surrounding that alien’s life as seen through his or her own eyes. Though many aspects of asylum cases may be similar, particularly when aliens are seeking asylum from the same country, the factors incumbent to an alien’s claim for asylum, such as his or her ethnicity, religion, political or social beliefs, and the varying degrees of persecution that a particular alien has been subjected to, are highly individualized and ensure that no two stories will be exactly the same. Moreover, conditions in countries from which aliens seek asylum continually change as governments rise and fall and popular opinions sway. This state of

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<sup>57</sup> *Id.*

<sup>58</sup> *Zen Li Iao v. Gonzales*, 400 F.3d 530, 533 (7th Cir. 2005).



perpetual flux poses difficulties for an immigration judge in assessing the validity of an asylum claim. For instance, *stare decisis* will rarely be invoked unless an asylum application and country conditions essentially mirror that of a prior opinion. In addition, an IJ must attempt to accurately determine the state of the conditions in the country the alien is fleeing both at the time of alleged past persecution and at a future time should the alien be returned to that country.<sup>59</sup>

Despite all of these issues, an immigration judge and the BIA are still representatives of the judiciary and must behave accordingly to preserve our notions of justice and judicial impartiality. Therefore, it is incumbent upon each immigration adjudicator to approach each asylum case without preconceived notions of proper behavior or mannerisms without sufficient and reliable knowledge of an applicant's culture, ethnicity, and religion among other factors, and the geopolitical state of affairs in the country from which that alien is fleeing. This must be done in order to correctly assess the inherent plausibility of that applicant's asylum claim. Although it may seem natural to believe that IJs and the BIA are continually mindful of these factors in processing asylum claims, recent opinions of the Seventh Circuit prove otherwise.

In *Tabaku v. Gonzales*, a Christian church driver did not report a rape and murder he had witnessed after his life had been threatened in the same incident. One of the grounds relied upon by the immigration judge in a finding of adverse credibility was the conclusion that a Christian had a moral and legal obligation to report the incidents, and that some sort of record would thus have been formed.<sup>60</sup> Since the alien was unable to provide documentation to support this story, this became a factor in the IJ's finding of adverse credibility. The Seventh Circuit admonished the IJ for substituting the IJ's own concept of what it means to be a Christian, an impermissible error, and also noted that crimes continually go unreported when a witness's life is endangered even in the United States.<sup>61</sup>

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<sup>59</sup> 8 U.S.C. § 1158(b) (2005); 8 U.S.C. § 1101(a)(42)(A) (2006).

<sup>60</sup> *Tabaku v. Gonzales*, 425 F.3d 417, 422 (7th Cir. 2005).

<sup>61</sup> *Id.*

This type of error calls into question the level of influence subjective determinations made by immigration judges should warrant in credibility assessments. As shown by the high rate of reversals, the substitution of cultural contexts often leads to conclusions inappropriate under the circumstances the alien faced. This consequently deprives aliens of fair and impartial analyses of their applications.<sup>62</sup> Yet, aside from advising the judge to leave behind any preconceived notions of cultural decorum, the options to remedy this problem are few. Each case may represent an entirely different cultural context than the last and it can hardly be expected of an IJ or the BIA to become a veritable expert in every culture that comes before their court. Nor can it realistically be expected of any adjudicator to approach a case with an entirely blank slate.<sup>63</sup> What the Seventh Circuit seems to be advocating however, is that an IJ or the BIA take sufficient time to acquaint themselves with the relevant culture, discern the societal differences from United States' culture inherent to that culture, and make an unbiased and good faith credibility assessment applying those principles. However, without any further stimulus from the DHS and the DOJ, agencies not particularly responsive to lobbying on behalf of aliens, the Seventh Circuit may have to suffice for wishful thinking and the generation of recurring criticism in its opinions.

In addition to cultural bias, skepticism, although a healthy moderator of truth at certain times, has also become prevalent in asylum adjudication, at times unjustly. Perhaps there is a rational basis for this given that there are certainly a multitude of fabricated stories thrust upon IJs on a routine basis. Or perhaps it has more to do with political ideologies that disfavor immigrants and asylum seekers

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<sup>62</sup> “Fact-finders in the United States, blinded by their particular world-views, often expect other cultures to operate by familiar rules and reject information that does not conform to those expectations. This type of expectation colors the way fact-finders receive and evaluate asylum seekers’ testimony.” Carla Pike, *The Human Condition and Universality in Credibility Determinations: How Cultural Assumptions Skew Asylum Decisions*, 10-10 BENDER’S IMMIGR. BULL. 2 (2005).

<sup>63</sup> *Id.* (suggesting that immigration judges should receive training on their own cultural biases and how these biases effect their assessment of asylum claims).

following 9/11.<sup>64</sup> Regardless of its origin, the Seventh Circuit has held that unwarranted skepticism is not sufficient for an adverse credibility determination and that the record must substantiate any skepticism at all.<sup>65</sup>

In *Dong v. Gonzales*, a Chinese alien testified that four village officials came to her house upon learning she was pregnant, and coerced her into going to the hospital.<sup>66</sup> Upon arriving at the hospital the alien was subject to an abortion despite her pleas that she wanted to keep her child.<sup>67</sup> The immigration judge doubted whether four government officials would actually have traveled to the alien's house.<sup>68</sup> In granting the alien's petition for review, the Seventh Circuit responded that "[t]here is nothing in the record that affirmatively supports the IJ's assumption that village officials would not act as [the alien] described. The IJ's skepticism alone, in light of [the alien's] consistent testimony, does not support a negative credibility determination."<sup>69</sup>

Regardless of the underlying reason behind such skepticism, the fact remains that there are many honest applicants who have suffered horrific atrocities and who should not be subjected to warrantless skepticism. The Seventh Circuit has made it clear that immigration judges must be mindful of their appointments as adjudicators and that by allowing any cynical dismissal of an alien's claim to enter into their judgment they consequently ignore the responsibilities incumbent to that role.<sup>70</sup> As such, skepticism, though perhaps warranted in a number of cases, must be amply supported and tempered with an open mind.

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<sup>64</sup> See Tumlin, *supra* note 54, at 1190.

<sup>65</sup> *Dong v. Gonzales*, 421 F.3d 573, 578 (7th Cir. 2005).

<sup>66</sup> *Id.* at 575.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 578.

<sup>69</sup> *Id.* (citations omitted).

<sup>70</sup> See *Dong*, 421 F.3d 573; see also *Shtaro v. Gonzales*, 435 F.3d 711, 715 (7th Cir. 2006) ("[T]he IJ points to no evidence to support [the IJ's] assumptions about the motivations of [the alien's] alleged persecutors, and [the alien's] story is not so inherently improbable that we can uphold the IJ's decision without such evidence.").

It is difficult to discern precisely whether the tendency to be overly skeptical stems solely from the cultural backgrounds of IJs, or if it is also a product of governmental policy. It is no secret that the government has recently sought to curb high levels of immigration, particularly since 9/11.<sup>71</sup> Regardless of the root, the DOJ and DHS are the sole entities that can force immigration adjudicators to give a bit more credence to alien testimony.

### 3. Congress Creates New Standards for Credibility Assessments.

Congress recently enacted legislation that revised the standards by which immigration judges reach credibility determinations in asylum adjudications.<sup>72</sup> Perhaps this was an effort to remedy the large number of erroneous or unfounded immigration judge credibility assessments. However, under the newly enacted provisions, a grant of asylum may be much more difficult to obtain. The REAL ID Act of 2005 provides the following basis upon which credibility should be determined:

(iii) Credibility determination. -- Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without

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<sup>71</sup> See *supra* note 54.

<sup>72</sup> REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 § 101 (2005).

regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.<sup>73</sup>

However, this particular amendment of the Act took effect on May 11, 2005 and applies solely to applications for asylum made on or after that date.<sup>74</sup>

It may be possible that a more clearly delineated credibility assessment standard may help reduce the number of asylum reversals granted by the federal courts. However, the standard promulgated under the REAL ID Act greatly enlarges the authority of an IJ to rule adversely on the credibility of an alien, under conditions the Seventh Circuit has disapproved of in its recent opinions.<sup>75</sup> Moreover, the REAL ID Act did not expressly address the standard of review applicable to credibility determinations.<sup>76</sup> Therefore, the Seventh Circuit and other circuit courts will continue to review credibility determinations assessed under the new standards by application of the substantial evidence standard requiring support by reasonable, substantial, and probative evidence on the record considered as a

<sup>73</sup> *Id.* (codified as 8 U.S.C. § 1158(b)(1)(B) (2005)).

<sup>74</sup> REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 § 101(h)(2). *See also* Ssali v. Gonzales, 424 F.3d 556, 562 (7th Cir. 2005). The opinions of the Seventh Circuit issued within the applicable time period this Comment addresses do not apply this new standard; the adjudication, and accompanying review, of asylum applications often may take several years before a final administrative order is reached.

<sup>75</sup> *See* REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 § 101 (2005). *See also* Lhazom v. Gonzales, 430 F.3d 833 (7th Cir. 2005); Korniejew v. Ashcroft, 371 F.3d 377 (7th Cir. 2004).

<sup>76</sup> REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 § 101 (2005).

whole.<sup>77</sup> Indeed, the passage of this new standard may produce unanticipated problems further complicating the credibility determination process and resulting in little progress towards the reduction of circuit court reversals.

#### 4. Will the REAL ID Act of 2005 Benefit or Impair Credibility Assessments?

There has been, and continues to be, a substantial amount of opposition to the enactment of the REAL ID Act of 2005 from a large variety of sources, particularly the provisions concerning asylum applicants.<sup>78</sup> Initially, the language concerning credibility determinations performed by IJs has drawn serious ire from opponents.<sup>79</sup> The most troublesome language under the Act will allow an immigration judge to base an asylum credibility determination on the demeanor, candor, or responsiveness of the applicant or witness.<sup>80</sup> Although normally beneficial in the general civil or criminal hearing context, using these criteria is problematic in the asylum arena.

Demeanor is a highly cultural phenomenon and is a highly subjective determination. An evaluation of demeanor may be no more than an exercise in contrasting cultures. It essentially pits the cultural background of the IJ, established as the norm, against the background of the alien. This propensity to transpose may be based on the ingrained human tendency to perceive things based on our own experiences and point of view.<sup>81</sup> One can hardly fault immigration judges for being human. But the responsibilities of an IJ, like almost

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<sup>77</sup> *Id.* See also *Liu v. Ashcroft*, 380 F.3d 307, 312 (7th Cir. 2004) (quoting *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992)).

<sup>78</sup> REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 § 101 (2005). See also Human Rights First, <http://www.humanrightsfirst.org/asylum/realid/pdf/sign-on-letter-042105.pdf> (last visited Apr. 26, 2006) (Apr. 21, 2005 letter to Congress signed by over 80 organizations and 80 individuals opposing Section 101 of the REAL ID Act of 2005).

<sup>79</sup> *Id.*

<sup>80</sup> 8 U.S.C. § 1158(b)(1)(B) (2005).

<sup>81</sup> Pike, *supra* note 62, at 2.

no other legal profession, require a worldly perspective on cultural differences. What may seem to be irrational behavior based on U.S. standards may be entirely appropriate given the circumstances and conditions concurrent in the country from which an alien is fleeing. To then gauge an alien's credibility based on his or her demeanor in such a context unfairly creates bias against that alien. For example, refraining from making eye contact may represent a sign of respect and submission to authority in some cultures, wherein the U.S. an immigration judge may perceive an avoidance of eye contact as an indication that an alien is being untruthful.<sup>82</sup>

In addition, emotions can often play a large factor in credibility assessments performed by IJs, yet they may often be misleading. In asylum claims, an alien may often be forced to discuss horrible traumas perpetrated upon themselves and their families. It is not uncommon, and in most cases the norm, to encounter stories of beatings, rape, and murder. One might expect highly emotional testimony exhibited by an alien when discussing such incidents, yet this is not always the case. "Torture victims often have what mental health professionals call a 'blank affect' when recounting their experiences, a demeanor that an adjudicator might misinterpret as demonstrating lack of credibility."<sup>83</sup> Even in the presence of a judge, aliens, and humans in general, deal with emotional issues in different ways; some may break down in sorrow at a hearing while others may contain their emotions inside as a coping mechanism. An IJ that is indifferent, aloof, skeptical, or perhaps even biased against these differences can have a profound effect on an alien's ability to freely discuss the events surrounding that alien's asylum claim. This, in turn, can unfairly result in an adverse credibility determination due to the alien's demeanor, candor, or responsiveness under the new credibility

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<sup>82</sup> Human Rights First, *REAL ID Endangers People Fleeing Persecution*, [http://www.humanrightsfirst.org/asylum/asylum\\_10\\_sensenbr.asp](http://www.humanrightsfirst.org/asylum/asylum_10_sensenbr.asp) (last visited Apr. 26, 2006).

<sup>83</sup> Amnesty International U.S.A., *The REAL ID Act of 2005 and Its Negative Impact on Asylum Seekers*, Mar. 2005, [http://www.amnestyusa.org/uspolicy/pdf/realid\\_0305.pdf](http://www.amnestyusa.org/uspolicy/pdf/realid_0305.pdf) (last visited Apr. 26, 2006).

standards. This may produce erroneous conclusions as to the credibility of an alien or his or her witnesses. When reviewing decisions using these standards in the future, the Seventh Circuit may use some skepticism of its own.

The REAL ID Act may also increase the prevalence of immigration adjudication error concerning adverse credibility determinations based on minor inconsistencies.<sup>84</sup> The amended language allows immigration judges and the BIA to base an adverse credibility determination on any inconsistencies, regardless of whether they go to “the heart of the applicant’s claim.”<sup>85</sup> Consider this new standard in the context of *Lhanzom*.<sup>86</sup> The inconsistencies between the father’s testimony and that of the alien, which arose primarily from the father’s confusion and miscommunication with the IJ, would be a suitable basis for an adverse credibility finding under the REAL ID Act language.<sup>87</sup> This conclusion seems to be a particularly harsh result and may clash with the Seventh Circuit’s notion of fairness in asylum adjudications.<sup>88</sup>

Cultural bias and erroneously subjective analyses of immigration judges in credibility assessments already has become a veritable, recurring cornerstone of immigration reversals, rearing their heads in decisions such as *Dong*, *Tabaku*, and *Lhanzom*.<sup>89</sup> Therefore,

<sup>84</sup> REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 § 101 (2005).

<sup>85</sup> *Id.* (codified as 8 U.S.C. § 1158(b)(1)(B) (2005)).

<sup>86</sup> *Lhanzom v. Gonzales*, 430 F.3d 833, 837-39 (7th Cir. 2005).

<sup>87</sup> *See Lhanzom*, 430 F.3d at 837-39. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 § 101 (2005).

<sup>88</sup> The Seventh Circuit has also reversed cases concerning material inconsistencies upon discovering that the inconsistencies are not inconsistencies at all. *See Ssali v. Gonzales*, 424 F.3d 556, 563 (7th Cir. 2005) (In which both an IJ and the BIA mistakenly thought that an alien was from an entirely different part of his respective country, a location in which membership in the alien’s political group would be unlikely and would pose no danger. Yet, the alien actually hailed from the opposite side of the country, which supported his claim. The Court noted that this represented a “very significant mistake” which “suggests the Board was not aware of the most basic facts of [the alien’s] case.”).

<sup>89</sup> *Dong v. Gonzales*, 421 F.3d 573 (7th Cir. 2005); *Tabaku v. Gonzales*, 425 F.3d 417 (7th Cir. 2005); *Lhanzom v. Gonzales*, 430 F.3d 833 (7th Cir. 2005).



application of new standards under the REAL ID Act will serve only to exacerbate the current credibility assessment problems the Seventh Circuit is forced to address through its reversals.<sup>90</sup> Thus, it stands to reason that the Court's high reversal rate in asylum petitions will continue until the government addresses the problem from within.

The problems recently noted by the Seventh Circuit, reliance on minor inconsistencies, cultural bias or indifference, and unjust skepticism among others, can only be addressed organically by the DHS and DOJ. The Seventh Circuit can reverse and not so subtly hint at what can be done to remedy these problems, but Congress and the agencies themselves are ultimately responsible for changing procedures and policies. Perhaps this was the goal when the new credibility standards were recently enacted. Yet, the new language includes highly subjective terms and may actually result in asylum adjudications becoming more susceptible to the problems addressed. Although the agencies may have meant to alleviate error in credibility assessments, substantially increased subjective leeway given to asylum adjudicators is not the answer the Seventh Circuit had in mind. In order to comport with the Seventh Circuit's decisions, asylum adjudicators should be given less subjective sway in asylum decisions.

*B. When May an Immigration Adjudicator Require an Alien to Provide Corroborating Evidence?*

1. Is an Alien's Credible Testimony Alone Sufficient for an Asylum Grant?

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<sup>90</sup> “[T]he natural tendency of the asylum provisions of the REAL ID Act will likely be to provide statutory cover for shoddy decision-making.” Acer, *supra* note 54 at 1393.

As noted previously, credibility determinations play a vital role in the success of an asylum application.<sup>91</sup> Yet, intertwined with credibility is the concept of corroboration. In certain circumstances an immigration judge or the BIA may require an alien to produce evidence in addition to his or her own testimony which corroborates the alien's claim of past persecution or a well-founded fear of future persecution.<sup>92</sup>

The Seventh Circuit has often held that a credible asylum applicant need not provide corroborating evidence in order to meet his or her burden of proof.<sup>93</sup> Indeed, the plain language of 8 C.F.R. § 208.13(a) provides that “the testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.”<sup>94</sup> However, the BIA has not been quite as lenient in its interpretation. The BIA has interpreted the regulatory language above as permitting an immigration judge to require corroboration from an alien deemed credible in situations “where it is reasonable to expect corroborating evidence for certain alleged facts pertaining to the specifics of an applicant's claim.”<sup>95</sup> The Seventh Circuit, however, has been uncomfortable with an imposed requirement of corroborating evidence when an alien is otherwise credible, even when such imposition is discretionary, and has reversed IJ decisions that have denied a credible alien's asylum claim solely because that alien could not provide corroborating documents.<sup>96</sup>

Choosing to invest more credence in the testimony of alien applicants, the Seventh Circuit has held that “corroborating evidence is essential to bolster an otherwise unconvincing case, but when an

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<sup>91</sup> See *supra* Part III.A.

<sup>92</sup> *Dawoud v. Gonzales*, 424 F.3d 608, 612 (7th Cir. 2005).

<sup>93</sup> *Id.*

<sup>94</sup> 8 C.F.R. § 208.13(a) (2000).

<sup>95</sup> *Dawoud*, 424 F.3d at 612 (citing *In re S-M-J*, 21 I. & N. Dec. 722, 725 (B.I.A. 1997)).

<sup>96</sup> *Id.* (citing *see Zheng v. Gonzales*, 409 F.3d 804, 810 (7th Cir. 2005); *Lin v. Ashcroft*, 385 F.3d 748, 756 (7th Cir. 2004); *Diallo v. Ashcroft*, 381 F.3d 687, 695 (7th Cir. 2004); *Ememe v. Ashcroft*, 358 F.3d 446, 453 (7th Cir. 2004); *Uwase v. Ashcroft*, 349 F.3d 1039, 1045 (7th Cir. 2003)).

asylum applicant does testify credibly,<sup>97</sup> it is not necessary for [the alien] to submit corroborating evidence in order to sustain [the alien's] burden of proof."<sup>98</sup> In order to deny asylum relief for lack of corroborating evidence, an immigration judge must: (1) make an explicit credibility finding; (2) explain why additional corroboration is reasonable; and, (3) explain why the alien's explanation for not producing the requested corroboration is inadequate.<sup>99</sup>

The Seventh Circuit has also taken notice that the federal circuit courts have split on their application of corroboration requirements; the Ninth Circuit dispensing of any corroboration requirement once credible testimony has been established and the Second, Third, Sixth, and Eight Circuits essentially deferring to the BIA's position that an alien may be required to submit corroborating evidence even after a favorable credibility determination has been made.<sup>100</sup> Yet, while the Seventh Circuit's interpretation of 8 C.F.R. § 208.13(a) is applicable to its decisions reviewed for this Comment, this split has become moot as applied to future asylum adjudications given the enactment of the REAL ID Act.<sup>101</sup>

## 2. Congress Creates New Standards for the Requirement of Corroborating Evidence.

<sup>97</sup> Credible testimony defined as testimony that is "specific, detailed, and convincing." *Dawoud v. Gonzales*, 424 F.3d 608, 612 (7th Cir. 2005).

<sup>98</sup> *Lin v. Ashcroft*, 385 F.3d 748, 751 (7th Cir. 2004) (quoting *Uwase*, 349 F.3d at 1041). "The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration." 8 C.F.R. § 208.13(a) (2000).

<sup>99</sup> *Dong v. Gonzales*, 421 F.3d 573, 579 (7th Cir. 2005) (citing *Gontcharova v. Ashcroft*, 384 F.3d 873, 877 (7th Cir. 2004); *see also* *Huang v. Gonzales*, 403 F.3d 945, 951 (7th Cir. 2005)).

<sup>100</sup> *Dawoud*, 424 F.3d at 613 (citing *Ladha v. INS*, 215 F.3d 889, 899 (9th Cir. 2000); *see also* *Dorosh v. Ashcroft*, 398 F.3d 379, 382-83 (6th Cir. 2004); *El-Sheikh v. Ashcroft*, 388 F.3d 643, 647 (8th Cir. 2004); *Abdulai v. Ashcroft*, 239 F.3d 542, 551 (3d Cir. 2001); *Diallo v. INS*, 232 F.3d 279, 285-86 (2d Cir. 2000)).

<sup>101</sup> REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 § 101 (2005).

Congress addressed situations in which an immigration adjudicator may require an alien to provide corroborating evidence through the enactment of the REAL ID Act of 2005.<sup>102</sup> Specifically, the Act provides that a requirement of corroboration necessary to supplement testimony is to be assessed as follows:

(ii) Sustaining burden. -- The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.<sup>103</sup>

However, similar to the amendments to credibility assessments addressed above in Part III.A.3, the amendments addressing corroboration requirements applies solely to asylum applications made on or after May 11, 2005.<sup>104</sup>

The amended language which allows an adjudicator to impose a requirement of corroborating evidence on a credible alien, albeit when evidence is reasonably available, is incongruent with the Seventh Circuit's previous standard that an otherwise credible alien may not be

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*; 8 U.S.C. § 1158 (2005).

<sup>104</sup> REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 § 101(h)(2) (2005). Therefore, recent opinions of the Seventh Circuit have not reviewed decisions subject to the new standards.

forced to provide corroborating evidence.<sup>105</sup> Thus, although utilizing the new burden of proof test for corroborating evidence may lead to a reduction in the number of reversals issued by the Seventh Circuit concerning corroboration, this will simply be because the Seventh Circuit must acquiesce to the statutory language, not because it agrees with the imposition of a corroborating evidence requirement on an otherwise credible alien. The new standard of sustaining burden mirrors the aforementioned position of the BIA,<sup>106</sup> and prior decisions of the Seventh Circuit have demonstrated its disapproval of the BIA's position and the subsequent outcomes rendered in the application of this position.<sup>107</sup>

An alternative provision of the REAL ID Act amends the standard of review to be applied by federal circuit courts when assessing an imposed requirement of corroborating evidence.<sup>108</sup> In contrast to the provision above, the language amending the standard of review became immediately applicable to all asylum adjudications in which a final administrative order has been issued.<sup>109</sup> The amended section provides that “[n]o court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence . . . unless the court finds . . . that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.”<sup>110</sup>

<sup>105</sup> *Dawoud*, 424 F.3d at 612 (holding that a credible asylum applicant need not provide corroborating evidence in order to meet his or her burden of proof).

<sup>106</sup> *Id.*, (citing *In re S-M-J*, 21 I. & N. Dec. 722, 725 (BIA 1997); *see also* *In re M-D-*, 21 I. & N. Dec. 1180, 1183-84 (B.I.A. 1998)).

<sup>107</sup> *Dawoud*, 424 F.3d at 612 (citing *Zheng v. Gonzales*, 409 F.3d 804, 810 (7th Cir. 2005); *Lin v. Ashcroft*, 385 F.3d 748, 756 (7th Cir. 2004); *Diallo v. Ashcroft*, 381 F.3d 687, 695 (7th Cir. 2004); *Ememe v. Ashcroft*, 358 F.3d 446, 453 (7th Cir. 2004); *Uwase v. Ashcroft*, 349 F.3d 1039, 1045 (7th Cir. 2003)).

<sup>108</sup> REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 § 101(e) (2005) (codified as 8 U.S.C. § 1252(b)(4) (2005)).

<sup>109</sup> REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 § 101(h)(3) (2005).

<sup>110</sup> *Id.* at § 101(e) (codified as 8 U.S.C. § 1252(b)(4)). This section of the Act applies “to all cases in which the final administrative removal order is or was issued before, on, or after [May 11, 2005],” thus providing for express retroactive application of the Act. *Id.*

This language does not significantly differ from the substantial evidence standard normally employed by the circuit courts and should not significantly alter the level of scrutiny applied.<sup>111</sup> However, the new standard of review does provide the Seventh Circuit and other circuit courts with some ability to limit impositions of corroborating evidence requirements on credible aliens, albeit only to the extent that the reviewing court finds that such corroborating evidence would be unavailable.<sup>112</sup> Pity the credible alien who leaves behind available evidence.

### 3. Will the REAL ID Act of 2005 Allow Fair Application of Corroboration Requirements?

As noted, the new language concerning an alien's burden stands in contrast to the Seventh Circuit's prior tenet that credible aliens need not supply corroborating evidence.<sup>113</sup> The Seventh Circuit's position may stem from the logical premise that if an alien has provided testimony that an adjudicator deems credible, it is unnecessary and perhaps unfair to require more from that alien.<sup>114</sup> In addition, recent opinions of the Seventh Circuit have identified many of the same types of subjectivity problems in corroboration requirements as those found

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<sup>111</sup> Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Willapoint Oysters, Inc. v. Ewing*, 174 F.2d 676, 691 (9th Cir. 1949) *cert. denied*, 338 U.S. 860 (1949), *reh. denied*, 339 U.S. 945 (1950) (citing *Consolidated Edison Co. v. Nat'l Labor Relations Bd.*, 305 U.S. 197, 229-230 (1838)).

<sup>112</sup> REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 § 101(e) (2005) (codified as 8 U.S.C. § 1252(b)(4) (2005)).

<sup>113</sup> *Dawoud v. Gonzales*, 424 F.3d 608, 612 (7th Cir. 2005) (holding that a credible asylum applicant need not provide corroborating evidence in order to meet his or her burden of proof).

<sup>114</sup> "The BIA's rule unfairly casts the asylum applicant as 'guilty until proven innocent' in her efforts to establish a claim for which she has already provided credible, unrefuted, direct, and specific testimony." 3-34 CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, *IMMIGRATION LAW AND PROCEDURE* § 34.02 (2006).

in credibility assessments.<sup>115</sup> Both the standard of review and burden of proof tests are premised on the interpretation of what is reasonable and when evidence is obtainable or available.<sup>116</sup> These are subjective tests that remain susceptible to the same criticisms of bias, indifference, or ignorance applicable to credibility determinations. Although the amended standard of review language may enable the Seventh Circuit and other reviewing courts to remedy some of these issues, several recent Seventh Circuit decisions exemplify the problems inherent in applying the new standards.

In *Hor v. Gonzales*, the Seventh Circuit's concern with cultural bias is noticeably pronounced.<sup>117</sup> Here, an alien sought to escape an Islamic guerrilla movement engaged in civil war against the Algerian government.<sup>118</sup> The alien was nearly executed by the guerillas, escaping only after police shot and killed two of the assailants.<sup>119</sup> The IJ, in holding that corroborating evidence was available and could have been obtained, criticized the alien's failure to provide newspaper articles or affidavits from his co-workers and his inability to corroborate the story of a roadblock and ensuing gun battle with any paperwork.<sup>120</sup> The Seventh Circuit noted that the IJ failed to take into account that Algeria was a military dictatorship with a state run media.<sup>121</sup> Nor did the IJ take into account the probability that the acquaintances of the alien still located within Algeria would not want to go on public record describing the actions of the guerillas;<sup>122</sup> to make this assumption implies the IJ did not view the availability of the

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<sup>115</sup> See *Galicia v. Gonzales*, 422 F.3d 529 (7th Cir. 2005); *Hor v. Gonzales*, 421 F.3d 497 (7th Cir. 2005); *Soumahoro v. Gonzales*, 415 F.3d 732 (7th Cir. 2005).

<sup>116</sup> REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 § 101 (2005).

<sup>117</sup> *Hor*, 421 F.3d 497.

<sup>118</sup> *Id.* at 498-500.

<sup>119</sup> *Id.* at 499.

<sup>120</sup> *Id.* at 499-501.

<sup>121</sup> *Id.* at 500-501.

<sup>122</sup> See *Matter of S-M-J-*, 21 I. & N. Dec. 722 (B.I.A. 1997) (Rosenberg, Board Member, concurring).

evidence from the perspective of the alien. In granting the petition for review, the Court stated:

[t]he notion that documentation is as regular, multicopied, and ubiquitous in disordered nations as in the United States, a notion that crops up frequently in decisions by immigration judges . . . is unrealistic concerning conditions actually prevailing in the Third World. To be entitled to deference, a determination of availability must rest on more than implausible assertion backed up by no facts.<sup>123</sup>

In another example exemplifying the dangers of subjectivity and bias inherent in the corroboration requirement, the alien in *Soumahoro v. Gonzales* sought to provide the IJ with corroborating documents such as a birth certificate, national identification card, newspaper articles, and official letters that had been airmailed to the United States by a friend of the alien still located within the alien's former country of Côte d'Ivoire (Ivory Coast).<sup>124</sup> The outbreak of war delayed the shipment and the package was originally shipped to the wrong address (the alien provided a copy of the incorrect mailing airbill).<sup>125</sup> The IJ came to the puzzling conclusion that the alien had arranged for an empty box to be sent to himself in order to delay his proceedings.<sup>126</sup> The immigration judge denied a request by the alien's attorney for a continuance until the documents could arrive and subsequently held a hearing in which asylum was denied (the package containing the documents arrived two days later).<sup>127</sup> This clearly represented a situation in which it was unreasonable for the IJ to require the

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<sup>123</sup> *Hor*, 421 F.3d at 501 (citing *Zen Li Iao v. Gonzales*, 400 F.3d 530, 534 (7th Cir. 2005); *Gontcharova v. Ashcroft*, 384 F.3d 873, 877-78 (7th Cir. 2003); *Muhur v. Ashcroft*, 355 F.3d 958, 959-60 (7th Cir. 2004); *Mulanga v. Ashcroft*, 349 F.3d 123, 134 (3d Cir. 2003); *Qiu v. Ashcroft*, 329 F.3d 140, 153 (2d Cir. 2003)).

<sup>124</sup> *Soumahoro v. Gonzales*, 415 F.3d 732, 736-37 (7th Cir. 2005).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 735.

<sup>127</sup> *Id.*



corroborating documents at the time of the original hearing, particularly when the alien's reason for not producing the documents on time was much more plausible than that provided by the IJ.<sup>128</sup>

In yet another recent opinion, both cultural differences and immigration judge bias factor into an erroneous denial due to an alien's failure to provide sufficient corroborating evidence.<sup>129</sup> In *Galicia v. Gonzales*, an alien asserted that the Guatemalan government had persecuted her and that her husband was a dissident who had been murdered.<sup>130</sup> In an effort to corroborate her claim, she attempted to enter into the record the testimony of two experts, only to have the immigration judge deny such testimony citing time constraints.<sup>131</sup> In addition, the IJ also held that the alien's lack of evidence corroborating the registration of a car allegedly owned by the alien found near her husband's body adversely affected her credibility.<sup>132</sup>

The Seventh Circuit disagreed with this analysis, holding that the refusal of the court to hear the expert testimony represented a denial of due process, that the experts could have provided corroborating testimony, and that the IJ's reliance on the lack of evidence corroborating the car registration failed because it was irrelevant to the issues the alien presented.<sup>133</sup> Echoing the language of the amended standard of review, the Court held that "a reasonable trier of fact [would be] compelled to conclude that such corroborating evidence was unavailable."<sup>134</sup> Moreover, the Seventh Circuit has previously held that "corroboration should be required only as to 'material facts'."<sup>135</sup> Thus, the registration of a car located near the alien's recently murdered husband did not constitute a material fact, was

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<sup>128</sup> *Id.* at 737.

<sup>129</sup> *See* *Galicia v. Gonzales*, 422 F.3d 529 (7th Cir. 2005).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 533.

<sup>132</sup> *Id.* at 537.

<sup>133</sup> *Id.* at 537-39.

<sup>134</sup> *Id.* at 538.

<sup>135</sup> *Balogun v. Ashcroft*, 374 F.3d 492, 502 (7th Cir. 2004).

irrelevant to the issues, and would have provided little corroboration towards the relevant issues.<sup>136</sup>

This case demonstrates the dangers inherent in allowing the applications of otherwise credible aliens to be denied based solely on the subjective test of when corroborating evidence is available and when it is reasonable to require such evidence. The IJ may substitute his or her own notions concerning the availability of paperwork and other evidence in countries across the world that the IJ may know little or nothing about. Further, and even more grievous, an immigration judge may show simple bias in the application of “subjective” tests, such as the exclusion of the alien’s corroborating experts do to “time constraints” as witnessed in *Galicia*.<sup>137</sup>

Similar to problems identified in credibility determinations, the Seventh Circuit seems to believe errors commonly arise when adjudicators substitute their own experiences, or perhaps expectations, for that of the alien.<sup>138</sup> In other words, the IJ does not consider the circumstances under which a particular alien has been forced to depart his or her country. An IJ, or any individual living in the U.S., has an expectation that should someone be injured, harassed, or killed, records will be readily accessible and available. Such a person expects almost every type of record to be available, whether it be birth certificates, death certificates, arrest records, hospital records, or anything of the like. Yet, as the Seventh Circuit has noted:

[m]any asylum applicants flee their home countries under circumstances of great urgency. Some are literally running for their lives and have to abandon their families, friends, jobs, and material possessions without a word of explanation. They often have nothing but the shirts on their backs when they arrive in

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<sup>136</sup> See *Galicia*, 422 F.3d at 537.

<sup>137</sup> *Id.* at 533. In addition, the immigration judge in this proceeding imposed a strict time limit concerning the testimony of the alien herself, which prevented her from introducing the testimony of her expert witnesses. *Id.* at 539.

<sup>138</sup> *Dawoud v. Gonzales*, 424 F.3d 608, 612-13 (7th Cir. 2005).

the country. To expect these individuals to stop and collect dossiers of paperwork before fleeing is both unrealistic and strikingly insensitive to the harrowing conditions they face.<sup>139</sup>

Under the prevailing standards, it is entirely possible for an otherwise credible alien, one who has provided specific, detailed, and persuasive testimony, to be denied asylum if that alien is unable to provide corroborating evidence if an IJ deems that such evidence is available.<sup>140</sup> The Seventh Circuit has consistently disapproved of the BIA position congruent with the prevailing standard.<sup>141</sup> The imposition of such a requirement has been likened to a request for a note of persecution from an alien's persecutors.<sup>142</sup> However, a safety valve of sorts lies in the newly promulgated standard of review that allows a court to overturn erroneous corroboration requirements if "a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable."<sup>143</sup> Yet, this "safety valve" does little to benefit a credible alien that has failed to obtain presumably available evidence.

Ultimately, the decision to amend the corroborating evidence language and allow the imposition of a corroboration requirement despite credible testimony represents the resolution of the federal government to provide immigration adjudicators greater latitude in which to deny asylum applicants. The new language under which both corroboration and credibility are assessed provides adjudicators increased authority to deny asylum applications under a wider variety of factors. Yet, the Seventh Circuit has recently called immigration adjudicators to task for their subpar analysis on both credibility

<sup>139</sup> *Id.* (citing *see* Balogun v. Ashcroft, 374 F.3d 492, 502 (7th Cir. 2004)).

<sup>140</sup> *See* 8 U.S.C. § 1158(b)(1)(B) (2005).

<sup>141</sup> *Dawoud*, 424 F.3d at 612 (citing *see* Zheng v. Gonzales, 409 F.3d 804, 810 (7th Cir. 2005); *Lin v. Ashcroft*, 385 F.3d 748, 756 (7th Cir. 2004); *Diallo v. Ashcroft*, 381 F.3d 687, 695 (7th Cir. 2004); *Ememe v. Ashcroft*, 358 F.3d 446, 453 (7th Cir. 2004); *Uwase v. Ashcroft*, 349 F.3d 1039, 1045 (7th Cir. 2003)).

<sup>142</sup> *See* *Ladha v. INS*, 215 F.3d 889, 900 (9th Cir. 2000).

<sup>143</sup> REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 § 101(e) (2005).

assessments and corroboration requirements.<sup>144</sup> This misalignment certainly will not solve the problem of high immigration petition reversal. Given the Seventh Circuit's disapproval of a hard and fast corroboration requirement that may be imposed regardless of credibility, and the seemingly cavalier application of the corroboration requirement by IJs and the BIA as evidenced in recent Seventh Circuit opinions, it is likely that the Seventh Circuit will attempt to make full use of the amended standard of review requiring that corroborating evidence be "available" in order to protect asylum applicants against erroneous and unsound asylum denials.

### *C. Are State Department Reports Being Used as a Crutch?*

Each year, the United States Department of State issues a report for every country that assesses and critiques the human rights situation in that country during the prior year.<sup>145</sup> These reports often provide an extensive reference guide to human rights abuses, frequently citing specific and often graphic examples.<sup>146</sup> Thus, these reports seem to provide a solid basis upon which immigration judges may begin to familiarize themselves in order to fairly adjudicate asylum claims from a particular country. However, it seems that IJs have often ended their research at this stage as they have been reprimanded by the Seventh Circuit and other circuit courts of appeals for their continued over-reliance on State Department country reports.<sup>147</sup> Yet, the lack of otherwise verifiable information concerning conditions inside many of the oppressive countries from which alien applicants are fleeing makes

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<sup>144</sup> See *Tabaku v. Gonzales*, 425 F.3d 417 (7th Cir. 2005); *Lhansom v. Gonzales*, 430 F.3d 833 (7th Cir. 2005); *Hor v. Gonzales*, 421 F.3d 497 (7th Cir. 2005); *Soumahoro v. Gonzales*, 415 F.3d 732 (7th Cir. 2005).

<sup>145</sup> See U.S. Department of State, *Country Reports on Human Rights Practices*, March 8, 2006, available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61551.htm> (last visited Apr. 26, 2006).

<sup>146</sup> *Id.*

<sup>147</sup> See, e.g., *Koval v. Gonzales*, 418 F.3d 798, 807-08 (7th Cir. 2005); *Shah v. INS*, 220 F.3d 1062, 1069 (9th Cir. 2000); *El Moraghy v. Ashcroft*, 331 F.3d 195, 204 (1st Cir. 2003).

it almost certain that these country reports become the yardstick against which the credibility of an alien's claim is measured. In addition, IJs may feel that they are entitled to rely on such documents given that federal regulations permit such reliance, although information from other agencies and sources may be submitted as well.<sup>148</sup>

Yet, as noted, the Seventh Circuit seems to believe that immigration adjudicators defer too often and too quickly to the information provided in these reports, thus using the reports as a veritable crutch upon which the support of the adjudicator's decision relies.<sup>149</sup> The problem is that an alien may often disagree with some or many of the findings asserted in the anonymously compiled country reports, and he or she is left with little or no recourse to challenge those findings.<sup>150</sup> The Seventh Circuit recently voiced its concern with an over reliance on country reports in *Koval v. Gonzales*, noting:

State Department country reports are anonymous in their authorship. Decision-makers in the asylum determination process do not know the identity of the author, the credentials of the individuals who assemble the reports, or the trustworthiness of the evidence upon which the assessments contained in these reports are based . . . As we have noted previously, the country reports are prepared in general terms and offer more of a statement on the relationship of the United States Government to that country than an account of individual circumstances.<sup>151</sup>

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<sup>148</sup> An "asylum officer may rely on material provided by the Department of State." 8 C.F.R. § 208.12(a) (2000).

<sup>149</sup> See *Koval*, 418 F.3d at 807-08.

<sup>150</sup> "Nothing in this part shall be construed to entitle the applicant to conduct discovery directed toward the records, officers, agents, or employees of the Service, the Department of Justice, or the Department of State." 8 C.F.R. § 208.12(b).

<sup>151</sup> *Koval*, 418 F.3d at 807 (citing *Galina v. INS*, 213 F.3d 955, 959 (7th Cir. 2000) (noting that country reports are "brief and general, and may fail to identify specific, perhaps local, dangers to particular, perhaps obscure, individuals"); see also

In *Koval*, an alien sought asylum from Ukraine due to her membership in the Mormon Church.<sup>152</sup> The alien attempted to provide expert testimony from several sources, including a former KGB agent whom had been based in Ukraine and had been assigned to a department that monitored the daily activities of the churches in the Soviet Union.<sup>153</sup> The former agent stated that, although he had not returned to Ukraine in 12 years, he had maintained his contacts with sources developed in the KGB and that at the time of the hearing he currently worked for the United States Government on security issues relating to Russia and Ukraine.<sup>154</sup> The immigration judge excluded the testimony of the former KGB agent, asserting that he was not a qualified expert regarding the treatment of Mormons in Ukraine, particularly since he had not traveled to Ukraine in 12 years.<sup>155</sup> In denying the asylum application, the IJ based his conclusion substantially on the State Department country reports that, in his view, did not indicate severe mistreatment of Mormons in Ukraine.<sup>156</sup> In reversing the decision, the Seventh Circuit noted:

[the former KGB agent's] testimony, had it been considered, would have placed [an excerpt from the country report] in a very different light than the one in which it was placed by the IJ . . . The exclusion of his testimony was improper; it prevented the petitioners from showing that the broad assertions of the country report were indeed subject to qualification – a

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*El Moraghy v. Ashcroft*, 331 F.3d 195, 204 (1st Cir. 2003) (noting that country reports should be used for purposes of providing “context and generalized credibility assessment”).

<sup>152</sup> *Koval*, 418 F.3d at 800-03.

<sup>153</sup> *Id.* at 802.

<sup>154</sup> *Id.* at 802-03.

<sup>155</sup> *Id.* at 803.

<sup>156</sup> *Id.* at 807.

qualification that might well have made a difference in this case.<sup>157</sup>

In order to prevent this type of bias in the utilization of these reports, the Seventh Circuit recommended that immigration adjudicators take into account both the “practical limitations of these reports *and* the practical limitations on asylum applicants to present other expert testimony and other evidence to rebut the ipse dixit assertions of the reports.”<sup>158</sup>

The prevention of such bias and over reliance is critical in situations such as this in which an alien is forced to challenge or contest the assertions of a government-sponsored report in front of a government-sponsored adjudicatory body. The cards are often not stacked in the alien’s favor. The Seventh Circuit recognizes the dangers in this type of reliance and its opinions have clashed with the regulation allowing such reliance,<sup>159</sup> often simply pointing out the plausibility of the alien’s claim in spite of, and in the context of, the country reports. Yet it seems that the Seventh Circuit is swimming upstream in its criticism of such reliance; the new credibility standards enacted under the REAL ID Act of 2005 expressly allow an immigration judge to base credibility determinations upon the consistency of statements with other evidence of record “including the reports of the Department of State on country conditions.”<sup>160</sup> Here again, as with credibility and corroboration, a common error in adjudicative procedure noted by the Seventh Circuit has been codified as acceptable in contravention of the Court’s notion of fair and impartial adjudication. However, it seems doubtful that the Seventh Circuit will simply acquiesce to asylum denials relying solely or irrationally upon Department of State country reports. To that end, the Court may restrain the use of these reports by holding that the

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<sup>157</sup> *Id.* at 808.

<sup>158</sup> *Id.*

<sup>159</sup> See 8 C.F.R. § 208.12(a) (2000). See also *Koval*, 418 F.3d at 807.

<sup>160</sup> REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 § 101(e) (2005).

conjecture often contained in such reports is not a substitute for substantial evidence.<sup>161</sup>

#### IV. SHOULD BLAME LIE WITH THE DEPARTMENT OF JUSTICE?

##### A. *Immigration Judges are Given Little Guidance.*

Notwithstanding the problems identified above, it may be unfair to assume that all fault lies squarely on immigration judges or the BIA. There are a host of other factors that may play roles responsible for the high level of reversals issued by the circuit courts of appeals. Despite all of its criticism, the Seventh Circuit is not entirely without empathy for the plight of IJs. In the recent decision *Djouma v. Gonzales*, the Seventh Circuit opined that the DHS and the DOJ have failed to provide IJs with systematic guidance as to resolving credibility issues, and indeed have done little to address problems in these assessments;<sup>162</sup> problems which leave the Seventh Circuit with little recourse short of reversals and the granting of petitions for review.<sup>163</sup>

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<sup>161</sup> “We will not permit the BIA to use either its own or the State Department’s conjecture to deem a person not credible. ‘Because conjecture is not a substitute for substantial evidence, we cannot uphold this finding.’” *Shah v. INS*, 220 F.3d 1062, 1069 (9th Cir. 2000) (citing *Lopez-Reyes v. INS*, 79 F.3d 908, 912 (9th Cir. 1996)).

<sup>162</sup> “The Attorney General shall establish a procedure for the consideration of asylum applications filed under subsection (a).” 8 U.S.C. § 1158(d)(1) (2005).

<sup>163</sup> In *Djouma v. Gonzales* the Seventh Circuit noted:

We understand the dilemma facing immigration judges in asylum cases. The applicant for asylum normally bases his claim almost entirely on his own testimony, and it is extremely difficult for the judge to determine whether the testimony is accurate. Often it is given through a translator, and even if the applicant testifies in English, as a foreigner his demeanor will be difficult for the immigration judge to “read” as an aid to determining the applicant’s credibility. Unfortunately, the [DHS] and the [DOJ], which share responsibility for processing asylum claims, have, so far as appears, failed to provide the immigration judges and the members of the [BIA] with any systematic guidance on the resolution of credibility issues in these cases. The departments have not conducted studies of patterns of true and false



The lack of a clearly defined protocol thus leads to uncertainty in the adjudicative process for prospective alien applicants,<sup>164</sup> which in turn may force an alien to file for as many forms of relief as possible given that he or she may be unable to determine the merits of a particular claim of relief. This adds additional adjudications to already overcrowded immigration court dockets, thus compounding and contributing to the problems already exposed within the system. In an effort to relieve the burden of overcrowded immigration dockets, the DOJ recently undertook a major procedure renovation addressed below. However, the DOJ and DHS have to date failed to incorporate Seventh Circuit recommendations on improving the asylum adjudication system such as those outlined in *Djouma*, in which the Court suggested the need for a more clearly delineated protocol to be utilized in investigating cultural phenomena and characteristics

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representations made by such applicants, of sources of corroboration and refutation, or of the actual consequences to asylum applicants who are denied asylum and removed to the country that they claim will persecute them. Without such systematic evidence (which the State Department's country reports on human rights violations, though useful, do not provide), immigration judges are likely to continue grasping at straws--minor contradictions that prove nothing, absence of documents that may in fact be unavailable in the applicant's country or to an asylum applicant, and patterns of behavior that would indeed be anomalous in the conditions prevailing in the United States but may not be in Third World countries--in an effort to avoid giving all asylum applicants a free pass. The departments seem committed to case by case adjudication in circumstances in which a lack of background knowledge denies the adjudicators the cultural competence required to make reliable determinations of credibility.

429 F.3d 685, 687-88 (7th Cir. 2005).

<sup>164</sup> "There are significant variations in the rate at which immigration judges grant asylum - from court to court, and from judge to judge within the same court - requiring better quality assurance and administrative review." Human Rights First, *New Report From U.S. Religious Freedom Commission Exposes Barriers Facing Refugees* (February 8, 2005), [http://www.humanrightsfirst.org/media/2005\\_alerts/asy\\_0208\\_relig.htm](http://www.humanrightsfirst.org/media/2005_alerts/asy_0208_relig.htm) (last visited Apr. 26, 2006).

pertinent to asylum applicant countries as well as the need for follow-up assessments on the actual consequences of asylum applicants who have been returned to their respective countries subsequent to asylum denials.<sup>165</sup>

### *B. The Fateful Decision to Streamline*

In 2002, then acting Attorney General John Ashcroft finalized the implementation of a ‘streamlining’ procedure into BIA protocol.<sup>166</sup> According to the DOJ, the regulations promulgated under the streamlining amendments were “designed to address extensive backlogs and lengthy delays . . . [t]he new procedures enabled the BIA to reduce delays in the administrative review process, eliminate the existing backlog of cases, and focus more attention and resources on those cases presenting significant issues for resolution.”<sup>167</sup>

Under the modified procedures a single member of the BIA will initially review an appealed IJ asylum decision in order to determine if a three-member panel should review the decision.<sup>168</sup> If review is warranted, a panel shall review the decision and may then reverse the IJ decision, affirm the decision without opinion, or the panel may affirm the decision with an amended or new opinion.<sup>169</sup> The single Board member who initially reviews the IJ decision may also affirm the lower opinion without review if that Board member believes it was correctly decided, although the regulations make clear that this “does not necessarily imply approval of all of the reasoning of that decision, but does signify the Board’s conclusion that any errors in the decision of the immigration judge or the Service were harmless or

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<sup>165</sup> See *Djouma*, 429 F.3d at 687-88.

<sup>166</sup> See U.S. Department of Justice: Executive Office for Immigration Review, *BIA Restructuring and Streamlining Procedures*, (Dec. 8, 2004 revised), available at <http://www.usdoj.gov/eoir/press/04/BIASstreamlining120804.pdf> (last visited Apr. 26, 2006).

<sup>167</sup> *Id.*

<sup>168</sup> See 8 C.F.R. § 1003.1(e)(4) (2005).

<sup>169</sup> See 8 U.S.C. § 1158 (2005); 8 C.F.R. § 1003.1 (2005).

nonmaterial.”<sup>170</sup> In addition, the streamlining regulation decreased the number of Board members from 23 to 11 in number.<sup>171</sup>

Critics quickly responded to the new regulations by challenging their constitutionality concerning due process of law in federal courts, although each federal circuit court has held that the restructuring regulation is valid and does not violate due process standards.<sup>172</sup> Despite these setbacks, opponents of the new regulations have continued to voice their concerns and much of their criticism possesses validity which may yet force the DOJ to critically analyze the merits of the new streamlining procedure.<sup>173</sup>

Initially, the decision to reduce the number of BIA members has been criticized as political in nature. Several critics believe that the Attorney General simply removed the Board members most likely to disagree with his position on immigration issues and that this, in turn, undermined the independence of the remaining Board members.<sup>174</sup>

<sup>170</sup> 8 C.F.R. § 1003.1(e)(4)(ii) (2005).

<sup>171</sup> *Id.* at § 1003.1(a).

<sup>172</sup> U.S. Department of Justice: Executive Office for Immigration Review, *BIA Restructuring and Streamlining Procedures*, (Dec. 8, 2004 revised), available at <http://www.usdoj.gov/eoir/press/04/BIASstreamlining120804.pdf> (last visited Apr. 26, 2006) (noting that federal circuit courts have denied challenges to the streamlining regulation). The Seventh Circuit has passed on the issue of whether streamlining is constitutional, that is, whether due process is denied to an alien when a single Board member affirms a denial as opposed to a BIA panel. *See Hamdan v. Gonzales*, 425 F.3d 1051, 1057-58 (7th Cir. 2005). It was unnecessary to determine this issue since an affirmance without opinion of an IJ's decision issued by a single Board member becomes the final decision of the BIA, and the Court reviews all final BIA asylum decisions under the same standard of review. *Id.* at 1058.

<sup>173</sup> *See* John R.B. Palmer, Stephen W. Yale-Loehr & Elizabeth Cronin, *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, 29-30 (2005) (noting “[a]part from legal challenges, however, criticism of the procedural changes continues to be voiced loudly by lawyers, scholars, members of Congress, and even by IJs and a former Board member.”).

<sup>174</sup> John R. B. Palmer, *The Immigration Surge in the Federal Courts of Appeals*, 11-2 BENDER'S IMMIGR. BULL. 2 (2006) (citing *see* Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369 (2006); Peter J.

This position is supported by DOJ supplemental language accompanying the regulation which purports that uniformity in decisions was a goal of the new regulation.<sup>175</sup> It stands to reason that this uniformity does not favor the positions brought by alien asylum applicants.<sup>176</sup> Yet, the unintended, or perhaps implicitly intended, effect of the streamlining procedure has been a stark increase in the number of BIA decisions appealed to the federal courts.<sup>177</sup> While the dockets of the BIA have decreased under the new regulations,<sup>178</sup> the number of petitions filed with the federal courts has sharply increased.<sup>179</sup> “The rate of new petitions – the number of BIA decisions appealed to the Federal courts compared to the total number of BIA decisions – has increased from an [sic] historical 5 percent (before 2002) to a current [December 8, 2004] level of approximately 25 percent.”<sup>180</sup> The result of the streamlining procedure has simply

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Levinson, *The Facade of Quasi-Judicial Independence in Immigration Appellate Adjudications*, 9 BENDER’S IMMIGR. BULL. 1154 (2004)).

<sup>175</sup> John R. B. Palmer, *The Immigration Surge in the Federal Courts of Appeals*, 11-2 BENDER’S IMMIGR. BULL. 2 (2006) (citing Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,894 (Aug. 26, 2002)).

<sup>176</sup> “In endorsing the removal of [the 12 Board members removed under the regulations], the Executive Director of the Center for Immigration Studies, which advocates significant restrictions on immigration, observed that ‘Board members should clearly represent the attorney general’s views, since they are carrying out his responsibility.’” Andrew I. Schoenholtz, *Refugee Protection in the United States Post-September 11*, 36 COLUM. HUM. RTS. L. REV. 323, 357 (2005) (citing Ricardo Alonso-Zaldivar & Jonathan Peterson, *5 on Immigration Board Asked to Leave; Critics Call It a ‘Purge’*, L.A. TIMES, Mar. 12, 2003, at A16).

<sup>177</sup> U.S. Department of Justice: Executive Office for Immigration Review, *BIA Restructuring and Streamlining Procedures*, (Dec. 8, 2004 revised), available at <http://www.usdoj.gov/eoir/press/04/BIASstreamlining120804.pdf> (last visited Apr. 26, 2006).

<sup>178</sup> *Id.* (noting “[t]he expanded streamlining procedures have allowed the BIA to allocate its limited resources to adjudicate more than 40,000 new appeals and other matters filed annually, and to steadily reduce its pending caseload from 56,000 in August 2002 to approximately 33,000 by October 2004.”).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

been the transfer of meaningful appeals on the merits from the BIA to the federal courts.

It seems the streamlining procedure allows the BIA to probe less thoroughly into the merits of an asylum case and the corresponding IJ opinion. Indeed, the streamlining regulations have largely eliminated the BIA's *de novo* review of factual issues "by establishing 'the primacy of the immigration judges as factfinders' and requiring the Board to defer to the Immigration Judge unless a decision is 'clearly erroneous.'" <sup>181</sup> Further, the affirmance without opinion portion of the regulations allows a single Board member to affirm even if there are harmless or nonmaterial errors within that opinion. <sup>182</sup> Given the large number of appeals filed with the BIA, there may be an inherent temptation to characterize flaws in the analysis of an immigration judge as harmless in an effort to reduce the number of docketed cases at both the IJ and BIA level. In addition, the removal of immigration judges who represent a broader ideological and cultural base may strip the BIA of the benefits of more rigorous judicial debate. Thus, the reduction of the number of BIA members, coupled with the streamlining system, may seriously hamper the "filtering process" which the BIA as an appellate entity represents. <sup>183</sup> Therefore, erroneous IJ decisions that would normally have been reversed and remedied by the BIA now slip through to the Seventh Circuit and other federal courts where these opinions garner heavy criticism. <sup>184</sup>

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<sup>181</sup> Schoenholtz, *supra* note 176, at 355 (citing Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,881 (Aug. 26, 2002)).

<sup>182</sup> 8 C.F.R. § 1003.1(e)(4)(ii) (2005).

<sup>183</sup> Although, as the Seventh Circuit has noted, this may not ultimately prejudice an asylum applicant since meaningful review will be provided on some level. *See Hamdan v. Gonzales*, 425 F.3d 1051, 1058 (7th Cir. 2005) (citing *Georgis v. Ashcroft*, 328 F.3d 962, 967 (7th Cir. 2003)). Yet, asylum applicants (1) must pay additional court filing fees if forced to appeal to federal circuit courts, (2) must wait additional time periods for resolution of their claims in the federal circuit courts, and (3) undoubtedly would benefit from the full application of DOJ-sponsored BIA review prior to entering the federal circuit court arena.

<sup>184</sup> *See Benslimane v. Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005).

The DOJ disagrees with these conclusions, instead attributing the rise in the number of federal court appeals to an increased processing time for appeals and motions within the BIA, which then prompts an alien to appeal an adverse decision in order to stave off deportation as long as possible.<sup>185</sup> However, this seems a rather simplistic and ill-supported explanation, as aliens have long resorted to appeals as a means of delaying an inevitable deportation and there would thus be no reason for a sustained spike in the number of federal appeals. Rather, more plausible explanations would be a drop in the quality of IJ analysis, a less probing BIA, and a decrease in the physical number and ideological diversity of BIA members. These explanations are supported by the high rate of reversal in immigration appeals noted by the Seventh Circuit.<sup>186</sup>

It is evident that the problem here is the procedural design implemented by the DOJ. What then can be done to remedy the effects of the streamlining process? The most obvious answer would be to restore or increase the number of BIA members reviewing immigration appeals. This would allow the BIA to again provide meaningful review of IJ decisions and thus alleviate the burdens placed on the federal courts. Since aliens are often required to exhaust their administrative options before proceeding to federal court, those options should at least have some teeth in their review.<sup>187</sup> In addition, restoring meaningful BIA review would spare the DHS and the DOJ from the national exposure and embarrassment that accompany those IJ opinions that draw public ire and the wrath of the federal courts. Alternatively, the elimination of the affirmance without opinion provision may force the BIA to delve more thoroughly into the merits of the decision it reviews. By forcing the BIA to address the analysis of IJ decisions, the BIA may think twice about the rationality of the conclusions contained therein.

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<sup>185</sup> U.S. Department of Justice: Executive Office for Immigration Review, *BIA Restructuring and Streamlining Procedures*, (Dec. 8, 2004 revised), available at <http://www.usdoj.gov/eoir/press/04/BIASstreamlining120804.pdf> (last visited Apr. 26, 2006).

<sup>186</sup> See *Benslimane*, 430 F.3d at 829.

<sup>187</sup> See 8 U.S.C. § 1252(d)(1) (2005).

Although the Seventh Circuit has acknowledged the constitutionality of the streamlining procedures,<sup>188</sup> the high rate of reversals issued in the Court's last term indicate that the Seventh Circuit is forced to suffer the adverse effects of these procedures. The Seventh Circuit often provides the first meaningful substantive review of asylum denials and is therefore forced to confront problems concerning credibility and corroboration, those rampant in the Court's recent opinions, head on. The streamlining procedures thus compound, and possibly create, several of the prime errors upon which many of the Seventh Circuit's reversals are based. To this end, eliminating the streamlining procedures will aid in alleviating the high rate of asylum adjudication reversals issued by the Seventh Circuit.

### C. *Is the Immigration Judiciary Too Homogeneous?*

Another problem inherent in the immigration system could be a lack of diversity amongst immigration judges. Does the court lack enough diversity to properly address cultural diversity? Or is that just a red herring? Attorneys and legal scholars have attributed some of the inappropriate decisions and behavior exhibited by IJs to racial or ethnic bias and a lack of cultural sensitivity.<sup>189</sup> A recent Los Angeles Times article, citing government records, noted that "of the 224 immigration judges in the U.S., 166 are white, 26 African American, 22 Latino, nine Asian and one Native American."<sup>190</sup>

It would be thoroughly discouraging to imply that a lack of racial or ethnic diversity as an explanation for subpar immigration judge analysis warrants merit, as these individuals are fully licensed legal practitioners and adjudicators charged with interpreting and applying the laws of the U.S.<sup>191</sup> If it were to be assumed that the racial or ethnic biases of our immigration judges were impeding a fair

<sup>188</sup> See *Georgis v. Ashcroft*, 328 F.3d 962, 966-67 (7th Cir. 2003).

<sup>189</sup> Ann M. Simmons, *Some Immigrants Meet Harsh Face of Justice*, L.A. TIMES, Feb. 12, 2006, at A18.

<sup>190</sup> *Id.*

<sup>191</sup> 8 C.F.R. § 1.1(l) (2003).

application of our immigration laws, the entire legacy of the open arms of the U.S. would be lost. Yet, it still remains a distinct possibility for error and one that would be extremely difficult to verify or substantiate.

Furthermore, an expansion of races and ethnicities in the immigration courts and BIA would not necessarily translate to an expanded cultural base. Several of the problems discussed in this Comment stem from American cultural context as a whole, which is comprised on nearly every ethnic background.<sup>192</sup> Thus, adding more ethnicities pulled from a generalized (at least in theory) American cultural existence would not necessarily provide a much more diverse cultural context, thus not providing a more evenhanded and acute application of our immigration laws.

Moreover, it is highly doubtful that the DOJ would be able to recruit or obtain a meaningful number of United States citizen attorneys hailing natively from foreign countries in order to represent a broader cultural base within our immigration judiciary. Nor could we assume that an immigration judge born, raised, or culturally steeped in a foreign country would not then simply apply that judge's own cultural context, thus favoring or disfavoring certain aliens depending upon that foreign country's cultural tendencies.

This does give rise to an interesting possibility though. Should the government attempt to regionalize the geographic or cultural areas in which certain IJs practice? That is to say, should immigration judges be charged with adjudicating asylum applications for a limited and prescribed number of countries? Presumably, an IJ charged solely with adjudicating asylum claims (without reference to the adjudication of non-asylum claims) from a geographic region such as the South Pacific would be able to familiarize himself of herself more thoroughly with the current political and social conditions, the cultural backgrounds of people native to the countries in that area, and perhaps even the languages to some extent. This would likely have a profound effect on the accuracy of credibility determinations and demeanor interpretations, and may offer valuable insight to immigration

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<sup>192</sup> See *supra* Parts III.A.1-2.



adjudicators on when and where they should reasonably expect corroborating documentation.

Yet there are problems in this scenario as well. Governments rise and fall and wars come and go. At any one point in history, disproportionate numbers of refugees seek asylum from different corners of the world.<sup>193</sup> Conflicts today may generate a large number of refugees from a certain country that might stabilize and produce no refugees in the near future. If the United States Government were to focus asylum adjudications by region with correspondingly specialized IJs, it is plausible that at certain periods many IJs will have no asylum applications on their dockets while others are overwhelmed with an influx of applications from one geographic area. Moreover, venue would pose a problem in this scenario too. Often refugees and asylum applicants have little or no money upon entering the United States. It would be impracticable and unreasonable to require an applicant to travel across the country in order to have his or her application adjudicated by a specialized IJ. Yet, this problem could possibly be remedied by simply creating specialized immigration judges within each DOJ Immigration Court.<sup>194</sup> Therefore, despite the procedural difficulties inherent with the implementation of geographically regionalized immigration judges, the benefits afforded by this concept may be worth contemplating its realization in the future.

Although the racial and ethnic constituency of the immigration court is not a beacon of diversity, it is not entirely homogeneous

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<sup>193</sup> See Department of State - Department of Homeland Security - Department of Health and Human Services, *Report to Congress: Proposed Refugee Admissions for Fiscal Year 2005*, available at <http://www.state.gov/documents/organization/36228.pdf> (last visited Apr. 26, 2006).

<sup>194</sup> As of April, 2006, there were 51 U.S. DOJ Immigration Courts located throughout the following States: Arizona, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, Oregon, Pennsylvania, Puerto Rico, Tennessee, Texas, Utah, Virginia, and Washington. United States Department of Justice, Executive Office for Immigration Review, *available at* <http://www.usdoj.gov/eoir/sibpages/ICadr.htm> (last visited Apr. 26, 2006).

either.<sup>195</sup> Broad racial divisions such as white, black, and Asian may encompass literally hundreds of different ethnicities and cultures. However, increased diversity is always a goal to strive towards. Yet a system in which immigration adjudicators remain mindful of the myriad variety of cultural and ethnic backgrounds in the claims before them is a system that can be successful in an evenhanded and fair application of our immigration laws.

The problematic areas of streamlining, guidance to immigration judges, and diversity amongst immigration adjudicators all represent procedural policies, both explicit and implicit, of the DOJ.<sup>196</sup> However, all of these problems could be remedied without a serious restructuring of the existing adjudicatory process. The recent streamlining regulations can be repealed, thus reforming a larger and more diverse BIA, which reviews all IJ decisions by panel with an accompanying opinion. More comprehensive guides and regulations concerning credibility determinations and other subjective analysis can be enacted and a concerted effort can be made to broaden the racial and ethnic composition of the immigration judge pool. Although the Seventh Circuit has not specifically addressed these procedural policy issues, the role of the judiciary is not to critique the policy reasons that may form the basis for common immigration adjudication errors,<sup>197</sup> but simply to correct those errors that come before the courts. Yet, the Seventh Circuit may ultimately prompt the DOJ to take the Court's considerations into account through the use of systematic, but valid, reversals.<sup>198</sup>

## V. IS THE PROBLEM REALLY AS BAD AS IT SEEMS?

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<sup>195</sup> Ann M. Simmons, *Some Immigrants Meet Harsh Face of Justice*, L.A. TIMES, Feb. 12, 2006, at A18.

<sup>196</sup> See 8 C.F.R. § 1003.1 (2005) (concerning streamlining procedure and the appointment of BIA Board Members by the Attorney General); 8 U.S.C. § 1158(d)(1) (2005) (concerning adjudication procedures set down by the Attorney General).

<sup>197</sup> Although it seems the Seventh Circuit has taken certain liberties with this principle. See *Benslimane v. Gonzales*, 430 F.3d 828, 829-30 (7th Cir. 2005).

<sup>198</sup> *Id.*

Many of the problems identified by the Seventh Circuit during its last term are acknowledged by federal circuit courts across the nation.<sup>199</sup> The Seventh Circuit's opinions provide examples of how these problems, those such as cultural bias and skepticism, manifest themselves in asylum cases.<sup>200</sup> At the same time the Court's opinions are often indicative of the manner in which it believes these problems should be remedied.<sup>201</sup> A majority of the problems discussed in this Comment are touched upon, whether expressly or implicitly, by recent Seventh Circuit decisions and thus are problems that play a large part in the asylum adjudication process.<sup>202</sup> Yet, the Seventh Circuit as a court of law is bound by the application of the appropriate standards of review and reverses cases only when the law dictates they must. However, the Court can attempt to shift the policies of immigration adjudication through persistent reversal and biting language; at least to the extent that proper application of the law allows. But to what extent can the Seventh Circuit actually begin to change immigration policy? Certainly the Court has the ability to interpret the meaning of statutes and regulations that Congress, the DHS, and the DOJ promulgate.<sup>203</sup> But can the Seventh Circuit provide the impetus for a policy shift?

As noted, between June 15, 2005 and December 15, 2005, the Seventh Circuit granted a petition to review or reversed the decision of the BIA in nearly two-thirds of its published decisions.<sup>204</sup> This high rate of reversal is certainly discomfoting and has obtained the attention of the government and the general public as will be discussed below. Yet, could this simply be a strategy contrived by the Seventh Circuit and other federal circuit courts designed to provide change?

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<sup>199</sup> *See id.* at 829.

<sup>200</sup> *See, e.g.,* *Tabaku v. Gonzales*, 425 F.3d 417 (7th Cir. 2005); *Dong v. Gonzales*, 421 F.3d 573 (7th Cir. 2005).

<sup>201</sup> *See generally* *Tabaku*, 425 F.3d 417; *Dong*, 421 F.3d 573.

<sup>202</sup> *See, e.g.,* *Lhazom v. Gonzales*, 430 F.3d 833 (7th Cir. 2005); *Zen Li Iao v. Gonzales*, 400 F.3d 530, 533 (7th Cir. 2005).

<sup>203</sup> *See* 5 U.S.C. § 706 (1966).

<sup>204</sup> *See supra* note 6.

There exists a school of thought on “selective publishing” in which courts choose to publish only those opinions that further preordained goals.<sup>205</sup> Judges exercise considerable discretion, even under a court’s publication guidelines, in deciding which opinions should be prepared or published, and thus, which decisions become laws.<sup>206</sup> Although it may take a concerted effort from several judges, it is entirely plausible that this strategy could be utilized to draw attention to, and instigate reform in, certain problematic areas of law.

For example, note the high rate of reversal in recent asylum opinions published by the Seventh Circuit.<sup>207</sup> However, during the contemporaneous period in unpublished decisions the Seventh Circuit *denied* petitions for review in 22 out of 24 appeals; results nearly polar opposite those of the published opinions.<sup>208</sup> This represents an astounding contrast.

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<sup>205</sup> See Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U.L. REV. 757, 785-90 (1995).

<sup>206</sup> See *id* at 790.

<sup>207</sup> See *supra* note 6.

<sup>208</sup> Cases in which the petition was granted: Kiggundu v. Gonzales, 151 Fed. App’x 481 (7th Cir. 2005); Huang v. Gonzales, 139 Fed. App’x 753 (7th Cir. 2005).

Cases in which the petition was denied: Miron v. Gonzales, 159 Fed. App’x 731 (7th Cir. 2005); Siqeca v. Gonzales, 157 Fed. App’x 912 (7th Cir. 2005); Zagorcani v. Gonzales, 145 Fed. App’x 184 (7th Cir. 2005); Feto v. Gonzales, 148 Fed. App’x 559 (7th Cir. 2005); Zheng v. Gonzales, 155 Fed. App’x 913 (7th Cir. 2005); Weng v. Gonzales, 155 Fed. App’x 927 (7th Cir. 2005); Ponomareva v. Gonzales, 156 Fed. App’x 845 (7th Cir. 2005); Zheng v. Gonzales, 156 Fed. App’x 830 (7th Cir. 2005); Zhang v. Gonzales, 154 Fed. App’x 520 (7th Cir. 2005); Chen v. Gonzales, 152 Fed. App’x 528 (7th Cir. 2005); Tchoukreeva v. Gonzales, 150 Fed. App’x 570 (7th Cir. 2005); Agraja v. Gonzales, 152 Fed. App’x 524 (7th Cir. 2005); Bah v. Gonzales, 143 Fed. App’x 709 (7th Cir. 2005); Caushi v. Gonzales, 147 Fed. App’x 603 (7th Cir. 2005); Loli v. Gonzales, 147 Fed. App’x 598 (7th Cir. 2005); Lin v. Gonzales, 140 Fed. App’x 621 (7th Cir. 2005); Malik v. Gonzales, 137 Fed. App’x 916 (7th Cir. 2005); Li v. Gonzales, 135 Fed. App’x 881 (7th Cir. 2005); Zhang v. Gonzales, 136 Fed. App’x 930 (7th Cir. 2005); Ni v. Gonzales, 134 Fed. App’x 977 (7th Cir. 2005); Stermoli v. Gonzales, 134 Fed. App’x 970 (7th Cir. 2005); Kebe v. Gonzales, 134 Fed. App’x 966 (7th Cir. 2005).

Perhaps the Seventh Circuit became tired of wading through irrational immigration decisions. Perhaps the Court responded to the transplantation of the BIA's docket to its own.<sup>209</sup> Or perhaps this is solely coincidence and there is no agenda or implicit meaning behind the numbers. It is true that the period reviewed for this Comment represents only a six-month window of Seventh Circuit decisions. Yet, the striking disparity between the reversal rates in published versus unpublished opinions, coupled with the Seventh Circuit's biting criticism in the published opinions seems to convey a stern message to the DHS and the DOJ that this system needs to be remedied. To that end, it appears that the message has been received.

## VI. CHANGE IS IN THE AIR

In recent opinions the Seventh Circuit and the federal circuit courts of appeals have demonstrated a rising impatience with immigration judges and the BIA's pattern of serious misapplication of elementary adjudication principles in asylum cases.<sup>210</sup> It appears that these opinions have not fallen on deaf ears. A front-page column on the New York Times' December 26, 2005 issue bore the headline "Courts Criticize Judges' Handling of Asylum Cases."<sup>211</sup> The article addresses the sharp criticism levied on immigration judges from federal circuit courts across the nation while quoting language from the recent Seventh Circuit decision *Zen Li Iao v. Gonzales*.<sup>212</sup> The

<sup>209</sup> U.S. Department of Justice: Executive Office for Immigration Review, *BIA Restructuring and Streamlining Procedures*, (Dec. 8, 2004 revised), available at <http://www.usdoj.gov/eoir/press/04/BIASstreamlining120804.pdf> (last visited Apr. 26, 2006).

<sup>210</sup> See, e.g., *Benslimane v. Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005).

<sup>211</sup> Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, at A1.

<sup>212</sup> *Id.* (quoting *Zen Li Iao v. Gonzales*, 400 F.3d 530, 533-35 (7th Cir. 2005), immigration judges' "lack of familiarity with relevant foreign cultures" was "disturbing," and the BIA often affirmed "either with no opinion or with a very short, unhelpful, boilerplate opinion even when" the immigration judge had committed "manifest errors of fact and logic.").

article notes that the gravity of these statements is amplified by their issuance from courts known for their “temperate language.”<sup>213</sup> It further cites to recent immigration opinions issued by several circuit court judges which address the inadequacy of the current situation and suggest that more thorough review be reinstated at the BIA level.<sup>214</sup> DOJ officials respond and caution against drawing conclusions, denying that a serious problem exists. They note that nearly 300,000 matters are handled by IJs yearly and the negative opinions cited represent a small minority of decisions issued.<sup>215</sup> Yet, despite the disparity in positions between these entities it appears the United States Government has taken stock.

On January 9, 2006, Attorney General Alberto Gonzales issued a Memorandum to Immigration Judges and a Memorandum to the Board of Immigration Appeals that appear to have been prompted by recent federal circuit court decisions and the accompanying public outcry.<sup>216</sup> In both memoranda Gonzales stated that he “has watched with concern the reports of immigration judges who fail to treat aliens appearing before them with appropriate respect and consideration and who fail to produce the quality of work that I expect from employees of the Department of Justice.”<sup>217</sup> According to these memoranda the Deputy Attorney General and Associate Attorney General have been instructed to develop a comprehensive review of the immigration courts, including the quality of work and procedural manners of both immigration judges and the BIA.<sup>218</sup> Gonzales concluded the

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<sup>213</sup> Adam Liptak, *Courts Criticize Judges’ Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, at A1.

<sup>214</sup> *Id.*

<sup>215</sup> *See id.*

<sup>216</sup> Human Rights First, Attorney General Alberto Gonzales: Memorandum to Immigration Judges (Jan. 9, 2006), <http://www.humanrightsfirst.info/pdf/06202-asy-ag-memo-ijs.pdf> (last visited Apr. 26, 2006); Human Rights First, Attorney General Alberto Gonzales: Memorandum to Members of the Board of Immigration Appeals (Jan. 9, 2006), *available at* <http://www.humanrightsfirst.info/pdf/06202-asy-ag-memo-bia.pdf> (last visited Apr. 26, 2006).

<sup>217</sup> *See supra* note 216.

<sup>218</sup> *Id.*

memoranda by noting that while not all aliens will be entitled to the relief they seek, they are entitled to courtesy and respect from “the face of American justice.”<sup>219</sup>

The Seventh Circuit and the federal circuit courts of appeals should view the issuance of these memoranda as a success. The Seventh Circuit stood its ground in a rising tide of immigration adjudication incompetence through the use of both a high, yet validated, level of reversals and harsh criticism designed to underscore the prevalent problems hindering proper adjudication.<sup>220</sup> These problems appear to be based in part on erroneous subjective analyses performed by immigration judges and the BIA.<sup>221</sup> Yet, under the newly enacted provisions of the REAL ID Act of 2005, it appears these problems may only become amplified and endorsed by the DOJ and the DHS.<sup>222</sup> Therefore, in order for the critiques of the Seventh Circuit to truly remedy the problems identified, the DOJ must scrutinize the possible ramifications these new provisions may bring when applied by the current immigration adjudicatory bodies.

#### CONCLUSION

It is evident that the asylum adjudicatory process administered by the immigration courts and the BIA remains flawed. Recurring and widespread errors manifest themselves throughout the asylum application process, often resulting in unjust asylum denials. The Seventh Circuit has consistently demonstrated its concern with the quality of adjudicatory analysis conducted by the DHS and the DOJ,<sup>223</sup> noting, “the adjudication of these cases at the administrative

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<sup>219</sup> *Id.*

<sup>220</sup> *See, e.g.,* *Benslimane v. Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005); *See generally* *Tabaku v. Gonzales*, 425 F.3d 417 (7th Cir. 2005); *Soumahoro v. Gonzales*, 415 F.3d 732 (7th Cir. 2005); *Koval v. Gonzales*, 418 F.3d 798 (7th Cir. 2005).

<sup>221</sup> *See supra* Parts III.A.4, III.B.3.

<sup>222</sup> REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 § 101 (2005).

<sup>223</sup> *See Benslimane*, 430 F.3d at 829.

level has fallen below the minimum standards of legal justice.”<sup>224</sup> Although the identification of recurring errors is a step in the right direction, it may be difficult to remedy the system given that these errors represent both procedural flaws such as streamlining and a lack of proper DOJ guidance, as well as flaws inherent to immigration adjudicators themselves such as cultural indifference, bias, and impartial subjective claim analysis.<sup>225</sup>

However, in its recognition of fundamental flaws within the immigration adjudication context, the Seventh Circuit has made clear which entities it believes can begin remedying this situation:

[w]hether [the unacceptable quality of adjudication] is due to resource constraints or to other circumstances beyond the Board’s and the Immigration Court’s control, we do not know, though we note that the problem is not of recent origin . . . [a]ll that is clear is that it cannot be in the interest of the immigration authorities, the taxpayer, the federal judiciary, or citizens concerned with the effective enforcement of the nation’s immigration laws for removal orders to be routinely nullified by the courts, and that the power of correction lies in the [DHS], which prosecutes removal cases, and the [DOJ], which adjudicates them in its Immigration Court and [BIA].<sup>226</sup>

The Seventh Circuit correctly recognized the existence of fundamental problems in the current status of asylum adjudications, and immigration adjudications as a whole. The Court has also correctly taken a firm stance concerning the problems identified, reversing immigration judge and BIA decisions at a disproportionately

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<sup>224</sup> *Id.* at 829-30 (citing *Niam v. Ashcroft*, 354 F.3d 652, 654 (7th Cir. 2004)).

<sup>225</sup> *See supra* Part III.A.2.

<sup>226</sup> *Benslimane*, 430 F.3d at 830 (citing *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000)).



high rate.<sup>227</sup> The number of reversals and the harsh criticisms leveled on immigration adjudicators within these reversals appears designed to bring these issues to the attention of those capable of addressing them; to wit: the Department of Homeland Security and the Department of Justice.

In addition, the Seventh Circuit has provided express and implicit remedies for many of the problems identified throughout its opinions, although the Court is limited in its ability to dole out unsolicited advice as an impartial judiciary. However, it initially appears the Seventh Circuit's suggestions were not given due credence as recent legislative enactments such as the REAL ID Act of 2005 may serve to actually exacerbate many of the common problems recognized by the Court as opposed to remedying them.<sup>228</sup> Nevertheless, the Seventh Circuit may yet induce positive changes within the immigration adjudication system given Attorney General Alberto Gonzales' recent announcement of a comprehensive review concerning the consistent failings and incompetence of immigration adjudicators.<sup>229</sup> Perhaps this review may ultimately result in the application of principles the Seventh Circuit has long espoused through its opinions, although only time will tell. However, until the DHS and the DOJ actually take proactive and concrete steps to address the problems identified by the Seventh Circuit, the Court may be forced to continue reversing poorly adjudicated administrative asylum decisions at a disproportionately high rate.

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<sup>227</sup> *Benslimane*, 430 F.3d at 829.

<sup>228</sup> REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 § 101 (2005).

<sup>229</sup> *See supra* note 216.