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INTRODUCTION

At her removal hearing, Afi Marie Apouviepseakoda testified about the day when soldiers came to her house in Togo, looking for her husband.[1] Through an interpreter, she told the Immigration Judge ("IJ") about how soldiers ransacked her home, searched the place, and confiscated personal documents and photos of her husband.[2] They were looking for her husband.[3] And when Afi Marie could not tell the soldiers where her husband was, the soldiers beat Afi Marie with their fists and their batons for thirty minutes.[4] The blows put her into a hospital for ten days and made her brain swell. [5]

Afterwards, Afi Marie recovered from her wounds, left the hospital, and took her children to her mother's home in a different part of Togo.[6] From there, Afi Marie and her children fled to neighboring Ghana and then to the United States.[7] After six months in the States,

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[1] Apouviepseakoda v. Gonzales, 475 F.3d 881, 883 (7th Cir. 2007).

[2] *Id*.

[3] *Id*.

[4] *Id*.

[5] *Id*. at 895 (Posner, J., dissenting).

[6] *Id*. at 884 (majority opinion).

[7] *Id*.

Afi Marie returned to Togo. Alone.[8] She went to secure money and to find her husband, whom she believed was in hiding in Ghana.[9]

Afi Marie's husband was a businessman in Togo.[10] He was friends with the mayor and held city contracts in waste disposal.[11] He first went into hiding when the mayor of Lome, the capital of Togo, had been arrested and jailed.[12] The mayor was a member of the opposition political party, and the government became interested in Afi Marie's husband because he was a known supporter and friend of the mayor.[13] When he learned that the government was sending soldiers after him, Afi Marie's husband fled.[14]

When Afi Marie went to look for her husband, she was able to enter Togo with the help of a friend who was a lieutenant in the army.[15] Upon her arrival into Togo, a warrant was issued for Afi Marie's arrest.[16] Six days later, a second warrant for her arrest was issued.[17] Three days after that, a summons was issued requiring Afi Marie's appearance before the police.[18]

During that time, Afi Marie stayed at her mother's house.[19] She was able to raise some money for herself and her children, but she was not able to find any information on the whereabouts or well-being of her husband.[20] Afi Marie once again enlisted the help of her friend in

[8] *Id*.
[9] *Id*.
[10] *Id*. at 883.
[11] *Id*.
[12] *Id*.
[13] *Id*.
[14] *Id*. at 883.
[15] *Id*. at 884.
[16] *Id*.
[17] *Id*.
[18] *Id*.
[19] *Id*.
[20] *Id*.

the military to help her back out of the country.[21] She returned to the United States, this time to Chicago, where she sought asylum.[22]

This is the story that Afi Marie began to tell during her removal hearing. But before she could get very far in this explanation, the IJ told her:

> [Y]ou have to speak up so I can hear your voice. Today passiveness and demureness is not the regiment [sic] of the day. Today aggressiveness and loudness is [sic] the regiment [sic] of the day and you can even scream at the Court. I will not take offense to that, but I want to hear your voice. So, if you force me repeatedly to ask you to raise your voice I will not be pleased. And also might indicate the posture of your case as well. If you're really strong in your convictions you'll express it in a strong manner. If your answers are weak the Court may believe that you're [sic] claim is also weak so conduct yourself accordingly.[23]

Then, at the end of her hearing, the IJ denied Afi Marie's asylum application on the basis of an adverse credibility determination.[24] The IJ held that Afi Marie was simply not believable.[25]

Central to asylum law is the simple premise that a refugee's testimony, in and of itself, can be enough to show eligibility.[26] The rationale is based upon the fact that refugees come from places where documentation is difficult to obtain, where governments are corrupt or

[21] *Id*.

[22] *Id*.

[23] *Id*. at 897 (Posner, J., dissenting) (quoting IJ's statement during the asylum hearing).

[24] *Id*. at 884 (majority opinion).

[25] *See Id*.

[26] *See* Georgis v. Ashcroft, 328 F.3d 962, 969 (7th Cir. 2003) (citing 8 C.F.R. § 208.13(a) (2007)).

ineffective, and where the refugee's life is in immediate peril.[27] Under such circumstances, it is simply illogical to require, in addition to escaping with one's life, that the refugee also escape with incontrovertible documentary proof.

In a perfect world, we would be able to take the asylum applicants at their word, and we would not have to worry about credibility. But taking the applicants at their word is difficult. The benefits of asylum are numerous, [28] and this creates a substantial incentive to lie.[29]

Sitting as the gatekeeper to asylum is the Immigration Judge. The IJ is tasked with serving the traditional role of the judge in an adversarial proceeding.[30] The IJ is also responsible for ensuring that the record is fully developed for each asylum applicant.[31]

Although this dual role may benefit the applicant, it also creates a potential problem. IJs are only human, and might exhibit bias against the asylum applicant. In a traditional jury trial, bias might not be problematic, as the trial judge's ability to participate is limited. However, because the IJ is acting as both fact-finder and advocate, the risk that bias may compromise a decision is magnified. This note will argue that, where the IJ makes an adverse credibility determination,

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[27] "Indeed, we frequently have acknowledged that it is unreasonable to expect asylum applicants to procure corroborating documents when official records are 'in disarray,' either because of war, revolution or simply lack of institutional regularity." Korniejew v. Ashcroft, 371 F.3d 377, 387 (7th Cir. 2004).

[28] 8 U.S.C. §1158(c)(1) (2006) states:

> In the case of an alien granted asylum under subsection (b) of this section, the Attorney General
>
> (A) shall not remove or return the alien to the alien's country of nationality or, in the case of a person having no nationality, the country of the alien's last habitual residence;
>
> (B) shall authorize the alien to engage in employment in the United States and provide the alien with appropriate endorsement of that authorization; and
>
> (C) may allow the alien to travel abroad with the prior consent of the Attorney General.

[29] *See Apouviepseakoda*, 475 F.3d at 892.

[30] 8 U.S.C. §1229a(b)(1) (2006); 8 C.F.R. §1240.1(c) (2007).

[31] *See* 8 U.S.C. §1229a(b)(1).

courts should apply a contamination theory that calls for remand where the IJ exhibits bias.

In Part I, I will discuss the critical role of the Immigration Judge in asylum proceedings. In Part II, I will discuss the case of Apouviepseakoda v. Gonzales. In Part III, I will discuss how a contamination theory of IJ bias will better achieve the goals of asylum law.

I. IMMIGRATION JUDGES AND THE ASYLUM PROCESS

The realities of removal hearings make it difficult to determine whether an asylum applicant satisfies these requirements of past persecution or reasonable fear of future persecution. Asylum applicants almost always need the aid of an interpreter. They will frequently be unable to obtain direct documentary proof.[32] Furthermore, asylum applicants frequently arrive from countries with customs and cultures that are very different from what the IJs will be familiar with.[33] This is what the IJ must deal with on a daily basis.

A. The role of the IJ

For the most part, the IJ functions as any other judge.[34] The IJ directs discovery, hears motions, conducts case management, and controls the removal hearing.[35] However, in the immigration court system, the IJ takes on responsibilities that are permissible because of the fact that it is an administrative court. The IJ is also charged with ensuring that the parties can fully develop the record.[36] An IJ may

[32] Capric v. Ashcroft, 355 F.3d 1075, 1085 (7th Cir. 2004) ("direct authentication or verification of an alien's testimony and/or evidence is typically very difficult and often impossible").

[33] *Apouviepseakoda*, 475 F.3d 897 (Posner, J., dissenting).

[34] 8 C.F.R. §1240.1(c).

[35] 8 U.S.C. §1229a(b)(1).

[36] Giday v. Gonzales, 434 F.3d 543, 549 (7th Cir. 2006) (citing Hasanaj v. Ashcroft, 381 F.3d 687, 701 (7th Cir. 2004), for the proposition that the IJ has an obligation to establish the record).

question a witness, and it does not necessarily matter if the IJ asks more questions than either party's counsel.[37] The IJ need only avoid exhibiting "impatience, hostility, or a predisposition" against the asylum applicant.[38] In addition, the IJ can bar evidence or testimony if it would be irrelevant, unreliable, duplicative, or otherwise a waste of judicial time.[39] The only limit to this discretion is that the judge should not bar whole chunks of the applicant's case.[40]

B. Asylum: An Overview

To be eligible for asylum, the applicant must be a refugee.[41] As defined by statute, a refugee is one who is unable or unwilling to return to their country due to persecution or a well-founded fear of persecution.[42] Persecution is described as actions that are distinguished from mere harassment, even if such harassment would be unfair, unjust, unlawful, or unconstitutional.[43] To show that she has been persecuted, an applicant must show that she has suffered harm such as, "detention, arrest, interrogation, prosecution, imprisonment, illegal searches, confiscation of property, surveillance, beatings, or torture" inflicted for political or religious reasons.[44]

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[37] *Apouviepseakoda*, 475 F.3d at 887.

[38] Huang v. Gonzales, 403 F.3d 945,948 (7th Cir. 2005).

[39] *Apouviepseakoda*, 475 F.3d at 887.

[40] Kerciku v. INS, 314 F.3d 913, 918 (7th Cir. 2003).

[41] 8 U.S.C. § 1158(b)(l) (2006).

[42] 8 U.S.C. § 1101(a)(42)(A) (2006).

[43] Firmansjah v. Gonzales, 424 F.3d 598, 605 (7th Cir. 2005).

[44] *Id*. (quoting Toptchev v. I.N.S., 295 F.3d 714,720 (7th Cir. 2002) (internal quotations omitted)). Many of the asylum cases that reach the Seventh Circuit require the court to place the harm that the asylum applicant suffers on a point on that persecution spectrum. This has lead to what seems to be comparison of evils in terms of what degree of harm inflicted that it will take to be granted asylum. For example, in reversing an IJ's determination that the harm suffered did not rise to the level of persecution, the court in Tchemkou v. Gonzales, 495 F.3d 785, 791-792 (7th Cir. 2007) cited the following examples:

> *See*, *e.g*., Gomes v. Gonzales, 473 F.3d 746, 754 (7th Cir. 2007) (reversing agency finding of no persecution where petitioner had

In the alternative, an applicant can obtain asylum where she can show a well-founded fear of persecution.[45] In such a case, the asylum applicant needs to show that her fear of future persecution is subjectively and objectively reasonable.[46] The subjective component is satisfied via credibility determination that the applicant possesses actual fear.[47] The objective component is satisfied by showing "credible, direct and specific evidence in the record of facts that would support a reasonable fear that the petitioner faces persecution."[48]

If the asylum applicant's claim is rejected, the asylum applicant may appeal to another administrative court, the applicant may make file a motion to reopen or a motion to reconsider.[49] Motions to reopen are will be granted where the asylum applicant is aware of new material facts or evidence that was not reasonably available at the time

> been beaten, had his home invaded and had been threatened, and noting that "[t]here is no requirement ... that a person must endure repeated beatings and physical torment in order to establish past persecution"); Soumahoro v. Gonzales, 415 F.3d 732, 737 (7th Cir. 2005) (holding that imprisonment for two weeks, during which time petitioner was beaten, denied adequate food and water, and had salt rubbed in his wounds, constituted past persecution); Vaduva v. INS, 131 F.3d 689, 690 (7th Cir. 1997) (noting that "the Board reasonably concluded Vaduva ... suffered at least one instance of political persecution" when "he was beaten up (he was punched, his face bruised, and his finger broken) by strangers who told him to stay away from the pro-democratic forces in the country").

Tchemkou, 495 F.3d at 791-792.

[45] 8 U.S.C. § 1158(b)(1)(B)(i) (2006); 8 U.S.C. § 1101(a)(42)(A); 8 C.F.R. 1208.16(b)(2) (2007).

[46] INS v. Cardoza-Fonseca, 480 U.S. 421,430-31 (1987); Liu v. Ashcroft, 380 F.3d 307, 312 (7th Cir 2004).

[47] *Liu*, 380 F.3d at 313.

[48] *Id*. (quoting Ahmad v. INS, 163 F.3d 457, 461 (7th Cir. 1999) (citations omitted)).

[49] 8 C.F.R. §1003.23(b)(1) (2007).

of the initial removal hearing.[50] Motions to reconsider will be granted where the IJ has made errors of law or fact.[51]

The denied asylum applicant may also file an appeal of the IJ's decision with the Board of Immigration Appeals ("BIA").[52] Asylum applicants may appeal to these three-member panels as a matter of right.[53] If the BIA affirms the IJ's denial, the asylum applicant then can take her appeal outside of the administrative system by filing a petition for review in the relevant Circuit Court of Appeals.[54]

C. IJ Bias

On appeal, IJ bias can be attacked in two ways. First, where the application is denied on the merits of the claim, the applicant may challenge the IJ's behavior as denying due process.[55] Aliens must be given "a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government."[56]A petition for review may be granted where the applicant is denied a "full and fair opportunity to put on [their] case."[57] Ultimately, the question is whether the asylum applicant had a full and fair opportunity to present her case.[58] Similarly, if by asking questions to the applicant, an IJ

[50] *Id*. at (b)(3).

[51] *Id*. at (b)(2).

[52] 8 C.F.R. § 1003.38(a) (2007).

[53] *See id*.; 8 C.F.R. §1003.1(a)(3) (2007).

[54] 8 U.S.C. §1251(a)(1), (b)(2) (2006).

[55] *See* Reno v. Flores, 507 U.S. 292, 306 (1993); Floroiu v. Gonzales, 481 F.3d 970, 973 (7th Cir. 2007).

[56] 8 U.S.C. §1229a(b)(4)(B) (2006).

[57] *Floriou*, 481 F.3d at 974 (quoting Giday v. Gonzales, 434 F.3d 543, 548 (7th Cir. 2006)).

[58] Rodriguez Galicia v. Gonzales, 422 F.3d 529, 538 (7th Cir. 2005).

begins to act as if the IJ were an attorney for the government, the petition for review should be granted.[59]

Second, if the IJ denies the application on the basis of an adverse credibility determination, the asylum applicant can challenge IJ bias by challenging the adverse credibility determination itself. In making an adverse credibility determination, the IJ may rely upon inconsistencies between documents in the record or the testimony of the asylum applicant.[60] However, to support an adverse credibility determination, an inconsistency in the testimony must be substantial, and it must constitute a linchpin of the asylum claim.[61]

The adverse credibility determination is not necessarily fatal to an asylum applicant's claim. An applicant can rehabilitate her claims by providing corroborating evidence.[62] However, because documentary evidence may simply not be available for certain types of injuries or from certain countries, the IJ must explain why it would be reasonable to expect the corroborating evidence before the IJ can penalize the applicant for failing to provide it.[63] Thus, if the asylum applicant is unable to produce the required corroborating evidence, the IJ must allow the asylum applicant to explain that failure.[64] Where the IJ does not accept the applicant's explanation, the IJ must state a specific reason why the failure to produce is unacceptable.[65]

[59] *Id*. at 538-39. *See* Elias v. Gonzales, 490 F.3d 444, 451 (6th Cir. 2007) ("An immigration judge has a responsibility to function as a neutral, impartial arbiter and must refrain from taking on the role of advocate for either party.").

[60] Korniejew v. Ashcroft, 371 F.3d 377, 382-83 (7th Cir. 2004)..

[61] *See id*. at 383-384.

[62] Gontcharova v. Ashcroft, 384 F.3d 873, 877 (7th Cir. 2004).

[63] *Id*.

[64] *Id*. at 877.

[65] *Id*.

II. *APOUVIEPSEAKODA V. GONZALES*

The IJ denied Afi Marie's request for asylum and ordered Afi Marie removed to Togo.[66] The BIA summarily affirmed the decision.[67] Afi Marie filed her petition for review with the Seventh Circuit.

A. The Immigration Court

In addition to her testimony, Afi Marie brought a medical certificate issued at the time of her hospitalization, as well as some photos that were taken at the hospital.[68] Other documents submitted included two arrests warrants issued against Afi Marie by the Togolese government; her membership card to the opposition party; letters from the opposition party's First Vice President, her father, and her cousins; and country reports issued by the State Department and Amnesty International.[69] She also brought two witnesses: her daughter and a family friend who had fled Togo in 1996.[70]

Nevertheless, the IJ made an adverse credibility determination against Afi Marie at the end of her removal hearing and found that her proffered documentary evidence did not sufficiently corroborate her claims.[71] The IJ did not reach the merits of Afi Marie's claims and did not analyze whether Afi Marie would have qualified for asylum if her story were believable.

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[66] Apouviepseakoda v. Gonzales, 475 F.3d 881, 884 (7th Cir. 2007).

[67] *Id*. at 883.

[68] *Id*. at 890.

[69] Decision of the Immigration Judge at 3, In the Matter of Afi Marie Apouviepseakoda, Immigration Court, Chicago, Illinois, (June 14, 2004) (File: A78-863-025), *available at* www.ca7.uscourts.gov (follow "Briefs" link, search for case No. 05-3752, follow "05-3752" link, follow "05-3752_002.pdf" link).

[70] Brief of Petitioner at 20, Apouviepseakoda v. Gonzales, 475 F.3d 881 (7th Cir. 2007) (No. 05-3752), *available at* www.ca7.uscourts.gov (follow "Briefs" link, search for case No. 05-3752, follow "05-3752" link, follow "05-3752_001.pdf" link).

[71] *Apouviepseakoda*, 475 F.3d at 884.

1. Adverse credibility determination

The IJ began by identifying six bases upon which he found Afi Marie's testimony to be unbelievable.[72] First, he found her explanation as to why she was being targeted to be "vague and unconvincing."[73] The IJ noted that Afi Marie claimed that the Togolese government was targeting her family because of her husband.[74] Given that her husband was not directly supporting the opposition party but was merely supporting the mayor, who happened to be a member of the opposition party, the IJ thought that this was a tenuous basis for the government to target her and her family.[75]

This tenuousness continued to be a concern in the second basis for the IJ's adverse credibility determination. Surely, if Afi Marie truly were a card-carrying member of the opposition party,[76] the soldiers who came to her home would have taken her documents too, in addition to her husband's.[77]

The third basis for the IJ's adverse credibility determination was his disbelief that Afi Marie was hospitalized for ten days.[78] The medical certificate seemed to have inconsistent dates on it. Although it was dated on September 18, 2001, the document's text indicated that Afi Marie would be discharged on the 28th.[79] To the IJ, this indicated that the document seemed to know the future.[80] In addition, the document was signed by "Dr. Theophile Fonkoue, M.D., Gynecology-

[72] Decision of the Immigration Judge, *supra* note 69, at 8-10.
[73] *Id*. at 8.
[74] *Id*.
[75] *Id*.
[76] *Id*. at 11.
[77] *Id*. at 8.
[78] *Id*.
[79] *Id*.
[80] *Id*. at 8-9.

Obstetrics-General Medicine."[81] The IJ found it inconsistent that Afi Marie would see a gynecologist, if she had actually been beaten. [82]

The IJ next turned his attention to the photographs that Afi Marie had submitted.[83] These photographs were taken by Afi Marie's cousin, and they depicted Afi Marie in a medical facility.[84] However, in the pictures, it did not look like Afi Marie had been beaten at all.[85] Afi Marie's face and arms did not seem to have any bruises or bandages on them, which the IJ presumably anticipated would have been there if Afi Marie had actually been beaten by soldiers for thirty minutes.[86] In addition, most of Afi Marie's body was covered in those pictures.[87] Afi Marie was wearing a scarf covering her head, so any injuries that would have been visible on her head were not depicted in the pictures.[88]

The lack of visible injuries in the pictures only exacerbated an additional problem that the IJ saw with the photographs – they seemed to be dated incorrectly.[89] They were all marked with what appeared to be a stamp of "03 4 16."[90] The IJ saw that this too was an inconsistency in Afi Marie's testimony.[91] She testified that she was beaten in 2001, but the photos that she submitted as proof of the resulting hospitalization did not seem to have been taken until 2003.[92] The IJ reasoned that, if the photos were not taken during the

[81] *Id*. at 9.
[82] *Id*.
[83] *Id*.
[84] *Id*.
[85] *Id*.
[86] *Id*.
[87] *Id*.
[88] *Id*.
[89] *Id*.
[90] *Id*. at 5, note 11.
[91] *Id*. at 9.
[92] *Id*.

hospitalization as Afi Marie had claimed they were, this cast doubt onto whether Afi Marie was ever hospitalized at all.[93]

Fourth, the IJ questioned the fact that Afi Marie was able to travel safely back to Togo without being harmed or arrested. Typically, the concern with applicants who are able to return to the country they fled is that, if they were willing to return voluntarily, then the conditions they had previously fled might not have been that bad after all.[94] Indeed, other cases have laid out this concern more explicitly.[95] And in these cases, the conclusion drawn from the ability of a asylum applicant to return to safely travel to and from their home country, even if temporarily, is that the people who were persecuting the applicants either have lost interest in exacting further persecution or the harms that were previously inflicted were not that bad after all.[96]

The IJ in *Apouviepseakoda* was no exception, as the IJ expressed incredulity at the fact that Afi Marie was able to travel into and out of the country, despite the fact that warrants had been issued for her arrest.[97] Afi Marie explained that she was able to do so with the help of a friend in the army.[98] The IJ rejected this explanation in two parts. First, he noted that, although Afi Marie mentioned her return to Togo in her asylum application, this assistance of her military friend was omitted in her asylum application.[99] But what really stood out to the IJ was the fact that Afi Marie took the time to go to the hospital.[100] And

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[93] *Id*.

[94] *See* Firmansjah v. Gonzales, 424 F.3d 598, 606-607 (7th Cir. 2005) (stating that, "We have recognized before that the absence of any evidence of harm to family members undermines an applicant's claim of a fear of future persecution.").

[95] Recently, the Seventh Circuit stated in a non-precedential decision: "The fact that [the asylum applicant] has returned to [to her home country] several times since her encounter, and that both her family members and those of her husband still live there peacefully, undercuts her claim to fear returning." Pupella v. Gonzales, 207 Fed.Appx. 683, 686 (7th Cir. 2006).

[96] *See id*.

[97] Apouviepseakoda v. Gonzales, 475 F.3d 881, 891 (7th Cir. 2007).

[98] *Id*.

[99] *Id*.

[100] *Id*.

what's more, she went to the very same hospital in her hometown that had treated her for her post-beating injuries.[101] Presumably, if Afi Marie really did fear persecution, she would have avoided the places that authorities would know to look for her.

Fifth, the IJ found a testimonial inconsistency as to the whereabouts of her husband.[102] She testified that her husband came to the United States on August 20, 2002, and the affidavit of a friend indicated that her husband was living with her in the States.[103] However, her asylum application, which was submitted on August 22, 2002, stated that she had no idea where he was.[104]

Finally, the IJ found another consistency in the testimony that Afi Marie's husband returned to Togo from neighboring Ghana to try and sell the radio station that he owned.[105] The problem that the IJ had with this testimony is similar to the problem he had with Afi Marie's ability to return to Togo.[106] If Afi Marie, or her husband, was willing to go back to Togo for something as mundane as selling a radio station, then maybe the risks appurtenant were not all that bad.[107]

2. Corroborative evidence

Having made the adverse credibility determination, the IJ then evaluated whether any of the documentary evidence rehabilitated Afi Marie's claim.[108] The IJ began his analysis by evaluating the submitted photographs and medical record for a second time, again stating that the photos did not prove any injuries and seemed to be taken after the

[101] *Id*.

[102] Decision of the Immigration Judge at 9-10, In the Matter of Afi Marie Apouviepseakoda, Immigration Court, Chicago, Illinois, (June 14, 2004) (File: A78-863-025), *available at* www.ca7.uscourts.gov (follow "Briefs" link, search for case No. 05-3752, follow "05-3752" link, follow "05-3752_002.pdf" link).

[103] *Id*. at 10-11.

[104] *Id*.

[105] *Id*. at 10

[106] *Id*.

[107] *Id*.

[108] *Id*.

dates Afi Marie claimed injury.[109] On the second time around however, the IJ attributed another fault to the medical certificate, this time noting that it was suspicious that the document was signed by a consulting doctor.[110]

The IJ then evaluated other forms of corroborating evidence, none of which was sufficient to rehabilitate Afi Marie's credibility.[111] First, Afi Marie submitted two warrants issued by the Togolese government for her arrest.[112] The IJ found the arrest warrants for Afi Marie issued by the Togolese government to be suspect because one of the warrants referred to Afi Marie as a "Mme" and the other referred to her as a "Mlle."[113] In addition, one of the arrest warrants was issued after she returned to Togo, but it did not seem to affect her ability to leave using her own passport.[114]

The IJ then proceeded to give similarly brief analysis to the rest of Afi Marie's documents. The IJ did not give any weight to Afi Marie's membership in the opposition political party because, although she submitted a membership card, there was no indication on the card that Afi Marie was a dues-paying member.[115]

Similarly, the IJ declined to give much weight to the letters from the opposition political party's First Vice President because it did not mention the fact that Afi Marie was beaten or that Afi Marie's husband had contributed to the party.[116] The letter written by her father suffered the same shortcoming in the eyes of the IJ.[117] It, too, failed to mention Afi Marie's 2001 beating.[118]

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[109] *Id*. at 11.
[110] *Id*. at 8.
[111] *Id*. 11-12.
[112] *Id*. at 11.
[113] *Id*.
[114] *Id*.
[115] *Id*.
[116] *Id*.
[117] *Id*.
[118] *Id*.

The affidavit of a friend who knew Afi Marie's family in Togo was rejected because the affiant had left for the United States prior to the events upon which Afi Marie founded her claim.[119] The IJ did not even bother to discuss the contents of this affidavit.

Photocopied letters from her cousins in Togo indicated that her home had been looted and that the reigning political party was upset with her for contacting opposition activists.[120] The IJ dismissed these letters as exaggerations.[121]

Even the Togo country reports issued by the Amnesty International and U.S. State Department were not sufficient to help Afi Marie.[122] They only went so far as to establish that political activists might be targeted in Togo. However, they did not establish that Afi Marie herself would be targeted.[123]

After reviewing the evidence, the IJ found that Afi Marie was not credible and that her documentary submissions were not sufficient to rehabilitate her credibility.[124] The IJ thus denied Afi Marie's application for asylum[125]

B. Seventh Circuit Majority

On appeal to the Seventh Circuit, Afi Marie made two arguments. First, she argued that the IJ erred in making an adverse credibility determination.[126] Second, Afi Marie argued that the IJ's conduct during

[119] *Id*. at 11-12.

[120] *Id*. at 12.

[121] *Id*.

[122] *Id*.

[123] *Id*.

[124] *Id*.

[125] *Id*. The IJ also denied Afi Marie's applications for withholding from removal and protection under the Convention Against Torture. These forms of relief were similarly denied for the same reasons why he denied the asylum claim. *Id*. at 12-14.

[126] Apouviepseakoda v. Gonzales, 475 F.3d 881, 884 (7th Cir. 2007).

the removal hearing denied her due process.[127] The Seventh Circuit rejected both of Afi Marie's arguments.[128]

1. Due Process Challenge

On appeal, the Seventh Circuit first looked to Afi Marie's argument that IJ bias in her removal hearing denied her due process.[129] The majority noted that "the form of [the IJ's] interruptions were occasionally jarring,"[130] but this was not enough to warrant remand.[131] In reviewing the IJ's behavior, the Seventh Circuit seemed to ignore any transgressions or excesses the IJ may have committed, so long as the IJ was not barring testimony or evidence.[132]

First, the Seventh Circuit noted that Afi Marie's hearing lasted six hours and reasoned that six hours was a strong indication that Afi Marie had a reasonable opportunity to present her case.[133] Second, although the two witnesses who appeared at Afi Marie's hearing did

[127] *Id*.

[128] *Id*. at 893.

[129] *Id*. at 884. This type of due process claim seems to be common amongst petitioners before the Seventh Circuit. *See id*. at 885 (citing Rehman v. Gonzales, 441 F.3d 506, 508 (7th Cir. 2006); Boyanivsky v. Gonzales, 450 F.3d 286, 292 (7th Cir. 2006); Pornsivakulchai v. Gonzales, 461 F.3d 903, 907 (7th Cir. 2006)). A recent trend in the treatment of the due process challenge has been to reclassify these arguments as statutory violations instead of constitutional claims: "In other words, Apouviepseakoda, like many before her, has made the mistake of employing "flabby constitutional arguments to displace more focused contentions," and is really arguing that the IJ's hearing violated these statutory and regulatory provisions." *Apouviepseakoda*, 475 F.3d at 885 (internal citations omitted). However, Seventh Circuit panels have been inconsistent in this nomenclature. Although no panel has declined review for failure to correctly classify the claim, some panels apply the flabby constitutional claim critique while others discuss the issue in terms of due process. Nevertheless, the Seventh Circuit was willing to address Afi Marie's argument as if it were appropriately proposed. *Apouviepseakoda*, 475 F.3d at 884.

[130] *Apouviepseakoda*, 475 F.3d at 887.

[131] *Id*. at 889.

[132] *See id*. at 888-889.

[133] *Id*. at 889.

not testify, the Seventh Circuit did not think it was a problem because the IJ accepted the offer of proof on what their testimony would have been.[134]

2. Adverse Credibility Determination

Having determined that the IJ's behavior did not have an adverse affect on Afi Marie's case, the majority then evaluated the substance of the IJ's adverse credibility determination.[135] First, the majority looked at the two problems the IJ had with the photos that Afi Marie had submitted with her claim.[136] The Seventh Circuit joined in the IJ's critique that the photos could not offer evidence of the wounds because Afi Marie was wearing a headdress and gown that covered the areas she claimed were injured.[137] Furthermore, the majority also noted parenthetically that, in some of the pictures, Afi Marie appeared to be relatively mobile.[138]

The IJ and the majority were also troubled by what appeared to be a date stamp on all of the photos.[139] It is unclear from the record as to why, but the originals that were part of Afi Marie's asylum files were not before the IJ.[140] Instead, the IJ only had photocopies available, and these photocopies made it difficult to read what seemed to be a date stamp "03 4 16" on all of the photos.[141] On the one hand, if the 03 stood for 2003, that would mean that the pictures were taken almost two years after Afi Marie claimed that the events had transpired in 2001. But on the other hand, Afi Marie filed her asylum claim in

[134] *Id*. at 888-89.
[135] *Id*. at 889.
[136] *Id*. at 890.
[137] *Id*.
[138] *Id*.
[139] *Id*.
[140] *Id*.
[141] *Id*.

2002.[142] When asked about the "03 4 16" marking, Afi Marie could only offer that she was not in Togo in 2003.[143]

The majority decided to address this issue by way of footnote, explaining that the pictures may have been submitted even after the 2002 asylum application because it was not certain that photographs were a part of that application:

> [T]he application itself does not refer to these documents or suggest additional attachments; the exhibits offer no stamp to certify their filing with the original application; and they do not carry any page numbers that would suggest they are part of a package. Finally, while some of the documents in these exhibits are dated based on when they were translated into English, the photos offer no indication of when they were placed there.[144]

The majority took these shortcomings to be sufficient to support the IJ's concerns, reasoning that Afi Marie had simply failed to satisfy her burden of explaining away this uncertainty.[145]

Second, the Seventh Circuit majority next looked to what has often been a fatal fact to many other asylum applicant's claims.[146] The Seventh Circuit majority echoed the IJ's concern regarding Afi Marie's ability to return to Togo by noting that, not only did she return, she went back to the same hospital she had last been the last time she needed medical attention.[147] Furthermore, unlike the first time, the majority noted that the condition for which she was risking capture on

[142] *Id*.

[143] *Id*.

[144] *Id*. at 890 n.5.

[145] *Id*.

[146] *See* Firmanshjah v. Gonzales, 424 F.3d 598 (7th Cir. 2005); Pupella v. Gonzales, 207 Fed.Appx 683 (7th Cir. 2006).

[147] *Apouviepseakoda*, 475 F.3d at 891.

this second visit was not even a matter of life and death. It was gynecological.[148]

3. Corroborative Evidence

In its review of the IJ's treatment of Afi Marie's corroborative evidence, the majority rehashes many of the same inconsistencies in the documentary evidence that it first propounded in its analysis of Afi Marie's testimony. Although Afi Marie presented several pieces of corroborative evidence, the only new analysis the Seventh Circuit majority conducts is to review the letter from Afi Marie's father.[149] Although the Seventh Circuit majority concedes that the letter does describe hardships experienced by other members of her family and warns Afi Marie to be cautious with whom she speaks with in United States regarding Togo, both the IJ and the Seventh Circuit fault the letter for not mentioning either Afi Marie's arrest warrants or her earlier beating.[150]

C. Judge Posner's Dissent: A Critique in Three Parts

Judge Posner's dissent in Afi Marie's case is particularly scathing. He begins by identifying the IJ by name in his dissent, adding that this is not the first time that the Seventh Circuit has reviewed an allegation that this particular IJ exhibited less than decorous behavior in a

[148] *Id*. at 891 n.6 (stating that "This *April* visit to a *gynecologist* prompts us to note a coincidence not recognized by the IJ.") (emphasis in original). Afi Marie testified that the beating and its subsequent hospitalization occurred in April, 2001. Her return to that same Togo hospital also occurred in the month of April – the implication being that, on both occasions, Afi Marie was simply visiting her gynecologist for her annual exam. Notwithstanding that there was nothing in the record to indicate whether Togolese standards in gynecology adopted the American standard of care in annual exams, what the Seventh Circuit majority seems to be doing is masking a *de novo* finding of fact by burying it in a footnote.

[149] *Id*. at 892.

[150] *Id*.

removal hearing.[151] Judge Posner notes that, the last time the Seventh Circuit reviewed one of his decisions, the panel was left with "no idea why the IJ ruled as he did."[152]

Judge Posner's dissent takes on three major issues in the majority opinion. First, Judge Posner attacks the IJ's evaluation of Afi Marie's evidence. Second, he addresses the inappropriateness of the IJ's behavior. Third, he then discusses how the problems in this case are institutional.

1. On the IJ's Reasoning

In reviewing the IJ's decision in Afi Marie's case, Judge Posner addressed each inconsistency that the IJ identified. First, Judge Posner notes that it is "often bad news" for the entire family of a person who is a member of a political party that opposes a dictator.[153] So, the IJ's confusion as to whether Afi Marie was targeted because of her own, personal membership in the opposition party or because of her husband's connections to the mayor did not matter to Judge Posner. Each basis could independently support an asylum claim.[154]

Judge Posner then addressed the IJ's concerns over why the soldiers were ransacking Afi Marie's house.[155] He found particularly troubling the IJ's conclusion that, because Afi Marie could not explain why the soldiers did not find and take Afi Marie's travel documents, she must have been lying.[156] In response, Judge Posner points out that Afi Marie should not be blamed for her inability to explain the

[151] "As is apparent from his opinion and from the transcript of the hearing, the immigration judge, O. John Brahos, has, once again, 'doubted the applicant's credibility on grounds that, because of factual error, bootless speculation, and errors of logic, lack a rational basis.'" *Apouviepseakoda*, 475 F.3d at 894 (Posner, J., dissenting) (quoting Pramatarov v. Gonzales, 454 F.3d 764, 765 (7th Cir 2006)).

[152] *Id*. (quoting Gomes v. Gonzales, 473 F.3d 746, 755 (7th Cir.2007)).

[153] *Id*.

[154] *Id*. ("[t]his is not an esoteric point, but Judge Brahos overlooked it").

[155] *Id*.

[156] *Id*. at 894-895.

soldier's actions or omissions.[157] After all, she could not possibly know what the soldiers were each individually thinking at the time of the ransacking. If she had offered any further explanation, it would have been pure speculation.[158]

Judge Posner next addresses the IJ's problems with the medical certificate that Afi Marie submitted with her asylum claim. Although the IJ found it problematic that Afi Marie was treated by a gynecologist, Judge Posner quickly points out that the doctor who signed the certificate listed his practices as "Gynecology-Obstetrics-General Medicine."[159] To Judge Posner, this indicated that, not only was the doctor a gynecologist, but he also practiced general medicine, which would have made the diagnosis the doctor gave within his realm of expertise.[160]

Additionally, Judge Posner addresses a problem with other assumptions of the IJ in regards to the medical certificate. The IJ found it troubling that Afi Marie's medical certificate was signed by a consulting physician rather than a treating physician.[161] Because a treating physician would have had access to information regarding any pre-existing conditions, only a treating physician, the IJ reasoned, would have noted whether the injuries, if any, were the result of a new trauma.[162] The IJ then concluded that, because a consulting physician would not have had similar access to prior medical history, the medical

[157] *Id*. at 894.

[158] *Id*. Judge Posner additionally suggests that, since the soldiers weren't looking for her or her children, it makes complete sense that they didn't care about their documents. *Id*.

[159] *Id*. at 895.

[160] *Id*. Afi Marie's diagnosis was for "chronic insomnia, psychosis, and total [illegible] cerebral edema." *Id*. However, Judge Posner concedes a "genuine anomaly" in the fact that the medical document was signed on September 18th but indicated that Afi Marie would be discharged ten days later. *Id*. But he dismisses this anomaly as being no more than a "mistake" that can be found in generally in medical records, even in the U.S. *Id*.

[161] *Id*.

[162] *Id*. at 896.

certificate signed by the consulting physician deserved little weight.[163] Judge Posner addresses this line of reasoning simply: the IJ is not an expert in Togolese medicine and his conclusions were based on an assumption that medicine is practiced in Togo in the exact same way it is practiced in the United States.[164] Such "*a priori* views about how authoritarian regimes conduct themselves" are no substitute for evidence, Judge Posner said.[165]

Judge Posner next addresses the IJ's treatment of Afi Marie's photos.[166] Whereas the IJ was concerned that Afi Marie's seemed to be covered or masked in the photos, Judge Posner notes that women in Togo commonly wear headdresses.[167] In addition, even if she were not wearing a headdress, Judge Posner notes that Afi Marie was diagnosed with cerebral edema, a swelling of the brain which simply would not be outwardly visible.[168] And in case there was any doubt that Afi Marie had a head injury, Judge Posner points out that her other two diagnoses, chronic insomnia and psychosis are two symptoms a cerebral edema.[169]

When Judge Posner addresses the date stamp on the photos, he notes that whatever the "03 4 16" marking on the photos means, it is not a date.[170] The numbers could not represent a 2003 photo date because the photos were submitted with Afi Marie's 2002 asylum application.[171] Furthermore, the numbers could not be the result of a

[163] *Id*.
[164] *Id*.
[165] *Id*. (quoting Banks v. Gonzales, 453 F.3d 449, 453 (7th Cir. 2006)).
[166] *Id*. at 895.
[167] *Id*.
[168] *Id*.
[169] *Id*.
[170] *Id*. at 896.
[171] *Id*.

forgery attempt because then they would have had the correct date on them.[172]

Finally, Judge Posner addresses Afi Marie's ability to return to Togo and then later leave a second time.[173] For Judge Posner, because Afi Marie was relatively wealthy and, because her husband was still in hiding, the desire to return to Togo to retrieve money and to find her husband would have been sufficient to overcome any fear that she would be harmed on her return.[174] Furthermore, because she was able to enlist the protection of an officer to escort her through customs, this explained to Judge Posner why she was able to enter and then subsequently leave the county where there were warrants outstanding for Afi Marie's arrest.[175]

2. Judge Posner on the IJ's Behavior

Searching for an explanation as to why the IJ would make such seeming lapses in logic, Judge Posner then looks to the transcript.[176] There, he notes some appalling behavior on the part of the IJ.[177] When Afi Marie began her testimony in a soft voice, the IJ stopped her and told her to shout out her testimony, warning, "if you force me repeatedly to ask you to raise your voice I will not be pleased"[178] Judge Posner points out that this invitation ("you can even scream at the court"[179]) could not have been motivated by difficulty in hearing.[180] Afi Marie was speaking through a French interpreter.[181] The

[172] Judge Posner also notes that the record only provides photocopies of the photographs. And he notes that it would have been the Department of Homeland Security, not Afi Marie, who had control over the photos. *Id*.

[173] *Id*.

[174] *Id*.

[175] *Id*.

[176] *Id*. at 897.

[177] *Id*.

[178] *Id*.

[179] *Id*.

[180] *Id*.

interpreter had no problems hearing Afi Marie.[182] And the IJ did not seem to have any problems hearing the interpreter.[183]

Another reason why the IJ asked Afi Marie to speak loudly was because he felt that it "also might indicate the posture of [Afi Marie's] case as well."[184] Apparently, the IJ presumed some sort of positive correlation between the loudness of testimony and its truthfulness – to which Judge Posner notes, "I have never before heard it suggested that truthfulness can be inferred from a witness's decibel level."[185]

Had the IJ's behavior simply remained unorthodox, that might not have warranted criticism. However, this unorthodoxy turned into hostility, which Judge Posner additionally commented upon. The IJ asked for proof that Afi Marie's husband owned a radio station, and she was able to provide a photograph of her husband at the radio station.[186] In response, he stated, "I have photographs also in high school where I took pictures with a radio transmitter there. Does that mean that that is an operating business because you have a photograph?"[187] And lest there be any confusion as to what the IJ was specifically looking for, the IJ clarified that he was looking for evidence in the record "from the listeners to verify that they heard the station."[188]

Judge Posner also noted two problems with the way the IJ treated Afi Marie's testimony about her husband's garbage collection business. The IJ wanted more information about the nature of the

[181] *Id*.

[182] *Id*.

[183] *Id*.

[184] *Id*. (quoting the IJ as explaining, "If you're really strong in your convictions you'll express it in a strong manner. If your answers are weak the Court may believe that you're [*sic*] claim is also weak so conduct yourself accordingly.").

[185] *Id*.

[186] *Id*.

[187] *Id*.

[188] *Id*.

collection business, to which Afi Marie admitted that she could not provide much help.[189] But the IJ just would not let it go:

> Q: A spouse does not know what her husband is doing when he's working, is that what you wish me to believe?
> A: Yes. In Africa, it is very difficult for a woman to be involved in her husband's business.
> Q: So, when he goes to work in the morning you don't know where he's going, is that what you're saying? He doesn't tell you.
> A: He tells me that he goes to work but I don't follow him to see where he, he's would go.
> Q: That's amazing.
> Q: (to the interpreter) You want to tell her that's amazing. You want to tell her.[190]

To his credit, the IJ eventually did let Afi Marie know what type of evidence he was looking for.[191] He explained that he was looking for statements from former employees of Afi Marie's husband that would verify their employment.[192] To which Judge Posner replied, "does Judge Brahos really expect garbage men in Togo to provide affidavits concerning their former employer, now an enemy of the state?"[193]

Based upon these exchanges, Judge Posner believes that the deference normally afforded to an IJ's adverse credibility determination should not apply.[194] Typically, such deference derives from being able to observe the demeanor of a witness who testifies.[195] The majority relies heavily on this point, stating that it was the IJ and

[189] *Id*.
[190] *Id*. at 898.
[191] *Id*. at 897.
[192] *Id*.
[193] *Id*.
[194] *Id*. at 893-894.
[195] *Id*. at 897.

not the appellate court that spent six hours with Afi Marie.[196] Judge Posner responds, however, that the deference should not apply where the underlying rationale is absent.[197] Because of the fact that the IJ had to listen to the testimony through an interpreter and had to observe the mannerisms of a person from another culture, Judge Posner doubts that mere observation gives an IJ any more of an ability to filter for the truth.[198]

3. Judge Posner on the Problems with the Immigration Court System in General

As scathing and thorough as Judge Posner's dissent was, he ultimately signals that the shortcomings in the handling of Afi Marie's case are institutional rather than individual.[199] He cites the Herculean task ascribed to IJs, noting the horrendous workloads, the typical lack of reliable evidence, the generally poor conditions from which the asylum applicants arrive, and the overall unfamiliarity of Americans with those foreign countries and cultures.[200]

Judge Posner personally, along with other judges from several circuit courts of appeal, has criticized the immigration system as necessarily engendering bad decisions.[201] Here, Judge Posner once

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[196] *Id*. at 893 (majority opinion).

[197] *Id*. at 897 (Posner, J., dissenting).

[198] *Id*.

[199] *Id*. at 898.

[200] *Id*.

[201] *Id*. at 886 n.2 (majority opinion):

> The system is in turmoil as the nation's immigration judges (218 at last count) struggle to complete some 350,000 cases a year, all without law clerks, bailiffs, stenographers, and often competent lawyers and interpreters. Often, immigration judges are hearing three contested hearings a day and up to 15 in a week. As Judge John M. Walker, Jr., of the United States Court of Appeals for the Second Circuit, told the Senate Judiciary Committee last April, "I fail to see how immigration judges can be expected to make thorough and competent findings of fact and conclusions of law under these circumstances."

Id.

again faults both Congress and the Justice Department for failing to correct at least those conditions over which it has control.[202] Ultimately, however, as morally forgivable as Judge Posner finds the actions of the IJ in this case, he reasons that the behavior was still legally deficient.[203] Therefore, he dissents, stating, "The immigration judge's opinion is pervaded by gross errors of fact and logic, and read in light of the hearing transcript is an embarrassment to American justice."[204]

III. IJ BIAS: THE CONTAMINATION THEORY

Courts have had a difficult time figuring out quite how to address the various arguments raised on appeal where there is both IJ bias and an adverse credibility determination involved. The following section will first discuss the shortcomings in the current scheme. Then, this section will discuss the benefits of applying a contamination theory in adverse credibility determination cases. Finally, this section will conclude with a discussion of how the contamination theory would apply in Afi Marie's case.

A. The Existing Standards are Inadequate

The problem with the due process challenge is that it is too narrow and only detects the most egregious cases of IJ bias. The Seventh Circuit's approach to due process challenges based on IJ bias, and that of many other circuits, requires actual prejudice.[205] Only in

[202] *Id*. at 898 (Posner, J., dissenting).

[203] *Id*.

[204] *Id*.

[205] *See*, *e.g*., Abdulrahman v. Ashcroft, 330 F.3d 587, 597 (3d Cir. 2003) (declining to find a due process violation even though IJ exhibited "a lack of courtesy and the absence of the expected level of professionalism."); Elias v. Gonzales, 490 F.3d 444, 450 (6th Cir. 2007) ("we are especially troubled by the conduct of the IJ during the hearing and its effect on the petitioner's ability to testify accurately."); *e.g*., Ciroba v. Ashcroft, 323 F.3d 539, 544 (7th Cir. 2003) (holding that IJ's initial assessment of the evidence "without more, do[es] not establish bias

the most flagrant of circumstances does improper IJ behavior constitute reversible error.[206] Otherwise, the applicant must show that they suffered a physical or procedural inability to testify. A physical inability occurs when harsh or over-zealous cross-examination frazzles the witness, making it difficult for the witness to continue testifying.[207] A procedural inability occurs when an IJ's actions bars critical testimony or evidence.[208]

This standard overlooks the possibility that there are cases where the bias of the IJ, albeit falling short of the due process violation standard, has incorrectly denied benefits to a deserving applicant. Assume that two asylum applicants with identical histories of actual persecution face the same, biased IJ. If one asylum applicant breaks down in tears in response to inappropriate IJ behavior, and if the other asylum applicant merely withdraws into silence, this would lead to an odd result upon review of the adverse credibility determination. Because of the prejudice requirement, the same behavior of the IJ could produce different results for the similarly situated asylum applicants who faced similar IJ bias. The petitioner who broke down in tears would have shown actual prejudice, warranting remand. The petitioner who simply remained silent under the same inappropriate IJ behavior would not be able to show prejudice – she would not be entitled to a new hearing. Thus, because it could produce different results between two identically situated asylum applicants, a prejudice requirement is inappropriate in the review of adverse credibility determinations.

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on the part of the IJ."); Colmenar v. INS, 210 F.3d 967, 971 (9th Cir. 2000) (requiring a showing that the outcome of the proceeding may have been affected).

[206] For example, in Floriou v. Gonzales, 481 F.3d 970, 974 (7th Cir. 2007), where the Seventh Circuit granted a petition for review where the IJ blamed the asylum applicants themselves for being persecuted. *Id*. The IJ called the asylum applicants "zealots" and concluded that they were harmed only because they provoked their attackers with their religious beliefs. *Id*.

[207] *Apouviepseakoda*, 475 F.3d at 885-886 (majority opinion) (quoting Giday v. Gonzales, 434 F.3d 543, 549 (7th Cir. 2006)).

[208] *Id*. (quoting Kerciku v. INS, 314 F.3d 913, 918 (7th Cir. 2002)).

There are instances, however, where the requirement of actual prejudice is desirable. If an IJ has found an applicant to be credible but has denied the application on the merits, remand for a new hearing may not be necessary. In that situation, the IJ takes the asylum applicant's claims as true. The only challenge would be whether the facts, as the applicant portrays them, qualify the applicant for asylum. The denied but credible applicant would factually have nothing new to add. This challenge on the merits is adequately addressed by the existing standards of review.

However, where the rejection is based on an adverse credibility determination, courts should apply a contamination standard. Once it is determined that the IJ has crossed that line into IJ bias, this should constitute reversible error. Where the IJ has exhibited an inability to remain impartial in making subjective evaluations such as is required in gauging truthfulness, such subjective evaluations should not be given much weight.

B. The Contamination Theory Better Achieves the Goals of Asylum Law

What is unique to the immigration systems is the extent to which bias is tolerated. In a state or federal court, potential jurors may be excused for cause, or they may be excused through a peremptory challenge.[209] Judges in jury trial or a bench trial may excuse themselves if their participation would be biased or would harbor even the appearance of bias.[210] Removing bias from the courtroom is necessary to the accuracy of the fact-finder's result. Similarly, in the immigration context, we should demand impartiality from the IJ, particularly when the IJ makes as subjective a determination as truthfulness.

Applying a contamination theory to inappropriate IJ behavior better achieves the goals of asylum law because of the intermediate standard it provides. When reviewing an adverse credibility

[209] *E.g.*, 28 U.S.C. § 1870 (2006); 725 ILCS 5/115-4(d).
[210] 28 U.S.C. §144 (2006).

determination, even bias that does not reach the level of a due process violation should be considered grounds for granting a petition for review. The IJ is unique in that the IJ is called upon to make findings in a system that cannot avail itself to the normal barometers of truthfulness. As Judge Posner's dissent noted, the ability to observe the witness testify is of lesser value when the asylum applicant testifies through an interpreter and brings to the stand the cultural mannerisms of the unfamiliar country from which she came.[211] Where the IJ has very little corroborative documentary evidence to go on and must make decisions on whether an asylum applicant is telling the truth, we should demand the highest degree of impartiality and tolerate the least amount of bias. Where the IJ shows bias, it not only "demeans the witness,"[212] but this also affects the IJ's ability to appropriately weigh the evidence.

Yet, except in the most extreme cases,[213] IJ bias does not constitute a factor in whether the IJ's decision was an abuse of discretion. For example, in Afi Marie's case, the Seventh Circuit majority examined the due process argument first and then separately analyzed the challenge to the adverse credibility determination.[214] This has the effect of insulating IJ bias from detection. On review, even a biased credibility determination will be reviewed under an abuse of discretion.

The unacceptability of this result is highlighted when placed up against the rationales for why IJs are even allowed such a degree of

[211] *Apouviepseakoda*, 475 F.3d at 897 (Posner, J., dissenting)

[212] Islam v. Gonzales, 469 F.3d 53, 55 (2d Cir. 2006) (granting petition for review where IJ argued with and intimidated asylum applicant).

[213] Recently, the Seventh Circuit joined the Second, Third, Sixth, and Ninth Circuits in recognizing that there are instances where the effect of IJ bias is palpable from the cold record alone. Foriou v. Gonzales, 481 F.3d 970, 974 (7th Cir, 2007). Those cases do not preempt the need for a contamination theory of IJ bias. In each of those cases, the petition for review could have been granted on other bases, such as through a challenge of the adverse credibility determination or through the due process analysis. If IJ bias is to serve as a basis for remand, it should be construed to have its own distinct purpose.

[214] *Apouviepseakoda*, 475 F.3d at 884 (majority opinion).

participation in the first place. The presumption supporting the ability of the IJ to depart from a judge's normally hands-off role is that, without such interference by the IJ, the asylum applicant, who is unfamiliar with the English language and American legal system, would be unable to sufficiently plead their case for asylum.[215] And so to avoid this injustice, and so as to ensure that we grant asylum to those who deserve it, we allow the IJs to step in and develop the record more fully. However, where the policy concerns that permit the IJ to interfere are absent, tolerance of IJ participation should decrease.

Thus, where the asylum applicant is represented by an attorney, the IJ should not be as intrusive as the IJ might be if the asylum applicant were proceeding *pro se*. If the asylum applicant is represented, and if the government's interests are similarly represented by counsel, the rationale for departing from the traditional adversarial system disappears. Yet, there is no rule against IJ participation, even where all parties are represented by counsel.

The regulations provide that the IJ may perform a direct examination, a cross examination, or otherwise participate in order to fully develop the record.[216] However, the trend has been for IJs to take this privilege one step further. Rarely do IJs help elicit favorable testimony. Instead, they more often try to debunk the asylum applicant's claims.[217] While there is no regulatory bar against pressing an asylum applicant to find the truth, there needs to be something more than the due process consideration to prevent the IJ from

[215] *See* Hasanaj v. Ashcroft, 385 F.3d 780, 783 (7th Cir. 2004) (agreeing with the government's contention during oral argument that "the fact that an IJ asks questions during the proceedings is helpful to develop the record and is better than a silent bench that says nothing throughout the proceedings and then denies the request for asylum because the petitioner did not provide sufficient evidence").

[216] 8 U.S.C. § 1229a(b)(1) (2006).

[217] *E.g.*, Benslimane v. Gonzales, 430 F.3d 828, 829 (7th Cir. 2005) (listing various cases within the Seventh Circuit where IJs were hostile, abusive, biased, or skewed with prejudgment). *See also* Reyes-Melendez v. INS, 342 F.3d 1001 (9th Cir 2003) (discussing cases where IJ has "behaved not as a neutral fact-finder interested in hearing the petitioner's evidence, but as a partisan adjudicator seeking to intimidate the [alien] and his counsel.").

becoming a second Attorney General working against the asylum applicant.

C. Applying the Theory to Afi Marie's Case

Creating a rule to detect IJ bias will necessarily be multi-factored, and it will also necessarily require a case-by-case development of IJ contamination law. But that doesn't mean that Courts would be without guidance. To determine whether an IJ was biased, courts should look to the same factors that IJs use for making adverse credibility determinations: demeanor, internal inconsistency, corroboration, and plausibility.

1. Demeanor

As a factor in the contamination analysis, courts should view combative demeanor as circumstantial evidence of pre-decision. In examining the IJ's demeanor for bias, courts should compare the IJ's behavior with what would normally be expected of a judge. Where the IJ fails to show the "patience and dignity befitting a person privileged to exercise judicial authority,"[218] courts should construe the IJ's demeanor as circumstantial evidence of a compromised decision-making ability.

In Afi Marie's case, Judge Posner found the IJ's performance in Afi Marie's case to be "appalling."[219] To conclude, he went so far as to call the IJ's decision as "an embarrassment to American justice."[220] Even the majority conceded that the IJ's behavior was "hardly a model of patience and decorum."[221] The majority further described the IJ's behavior as "unseemly,"[222] "mocking,"[223] "demonstrat[ing]

[218] *See* Islam v. Gonzales, 469 F.3d 53, 55 (2d Cir. 2006),
[219] *Apouviepseakoda*, 475 F.3d at 898 (Posner, J., dissenting).
[220] *Id*.
[221] *Id*. at 886 (majority opinion).
[222] *Id*.
[223] *Id*.

intemperance,"[224] and "jarring."[225] Under either the majority's or the dissent's view of this case, the IJ's behavior falls far short of the level of decorum necessary to impart a sense of reliability in the result. Thus, under a contamination theory, the demeanor factor would favor remand.

2. Internally Inconsistent

When immigration judges conduct their adverse credibility determination analyses, they frequently rely upon internal inconsistencies to discredit the testimony.[226] Similarly, if an IJ is internally inconsistent in terms of what is required of the asylum applicant, courts should consider the reliability of the IJs rulings to be undermined. Internal inconsistency in IJ decisions presents itself as the impossibility of satisfying the IJ's evidentiary requirements. This factor may be satisfied where the IJ requires supporting documents for certain portions of the asylum applicant's testimony but simultaneously rejects the supporting evidence that same type of document when produced for other portions of the testimony.

Letters from home are one frequent way in which asylum applicants try to corroborate their claims. Some letters will function more like affidavits and describe the persecutory behavior expressly, but most will discuss persecution tangentially. For example, asylum applicants have submitted letters indicating whether it would be safe to return,[227] whether the applicant's friends back in their home countries were killed,[228] or whether others were under surveillance or were arrested.[229] However, when submitted, these types of letters are

[224] *Id*.

[225] *Id*. at 887.

[226] *See, e.g*., Kadia v. Gonzales, 501 F.3d 817, 820 (7th Cir. 2007) (explaining that an applicant's claims "may be so internally inconsistent or implausible on its face that a reasonable fact-finder would not credit it").

[227] Oyekunle v. Gonzales, 498 F.3d 715, 716 (7th Cir. 2007).

[228] Tchemkou v. Gonzales, 495 F.3d 785, 794 (7th Cir. 2007).

[229] Gebreeyesus v. Gonzales, 482 F.3d 952, 954 (7th Cir. 2007).

frequently discounted by IJs on the grounds that they were written by family members who would write anything,[230] were not specific enough,[231] or otherwise deserved little weight.

In Afi Marie's case, the IJ wanted some sort of evidence from listeners of her husband's radio station in Togo or evidence from former employees of her husband's garbage collection company.[232] When she could not provide either type of letter, the IJ presumed that her husband must not have held waste disposal contracts and must not have had a radio station at all, even despite the fact that Afi Marie also submitted a photo of her husband at the station.[233]

What is perhaps the most baffling in the IJ's treatment of the documentary evidence is that, when Afi Marie provided letters from her cousins that her home had been looted and from her father that the authorities were looking for her, the IJ deems the letters as deserving little weight.[234] He criticizes one letter as not being specific enough, while the other one as containing apparent "exaggerations."[235] This is an evidentiary game that seems impossible for asylum applicants to win.

The impossibility of satisfying the IJ in this case is further exemplified by the treatment of the other witnesses in this case. The IJ

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[230] Islam v. Gonzales, 469 F.3d 53, 55 n.1 (2d Cir. 2006). The asylum applicant had his family mail his father's death certificate to him to support his applicant's claim. The IJ expressed his concerns as to the authenticity of such a document by asking, "Well, sir, if you asked for a certificate saying that you're the president of Bangladesh, would they send you something?" *Id*.

[231] Adekpe v. Gonzales, 480 F.3d 525, 530 (7th Cir. 2007). Although the asylum applicant in this case submitted corroborating letters from his family, the IJ found them insufficient because they did not "corroborate the incidents that occurred specifically to him." *Id*.

[232] Apouviepseakoda v. Gonzales, 475 F.3d 881, 897 (7th Cir. 2007) (Posner, J., dissenting).

[233] *Id*.

[234] Decision of the Immigration Judge at 11-12, In the Matter of Afi Marie Apouviepseakoda, Immigration Court, Chicago, Illinois, (June 14, 2004), *available at* www.ca7.uscourts.gov (follow "Briefs" link, search for case No. 05-3752, follow "05-3752" link, follow "05-3752_002.pdf" link).

[235] *Id*.

noted that it was already 6:45pm and that "there's only so much time that the Court can grant to you."[236] In the interests of time, the IJ stated that he would accept an offer of proof regarding the testimony of the Apouviepseakoda family friend and Afi Marie's daughter.[237] The family friend was also a refugee of Togo who began working with a Canadian organization that documented Togolese abuses.[238] In addition, this witness also had direct, personal knowledge on the participation and support of the Apouviepseakoda family for the opposition party.[239] If the IJ accepted the offer of proof, as he stated that he would, the inconsistencies questioning Afi Marie's and her husband's affiliation with the opposition party should have dissolved. Yet, despite the IJ's acceptance of the offer of proof, this witness' testimony was ignored and the alleged inconsistencies remained.

The second witness who would have testified, were it not for the IJ, was Afi Marie's daughter.[240] She was going to testify to the beating that she saw the Togolese soldiers inflict upon her mother.[241] If the IJ is going to accept the offer of proof, he should have considered the fact that Afi Marie's daughter would have provided testimony consistent with Afi Marie's. This would have been a crucial point of corroborating testimony—one that the IJ frequently complained was lacking in Afi Marie's asylum claim[242]—but the ability of the offers of

[236] Brief of Petitioner at 19, Apouviepseakoda v. Gonzales, 475 F.3d 881 (7th Cir. 2007) (No. 05-3752), *available at* www.ca7.uscourts.gov (follow "Briefs" link, search for case No. 05-3752, follow "05-3752" link, follow "05-3752_001.pdf" link).

[237] *Apouviepseakoda*, 475 F.3d at 888 (majority opinion).

[238] Brief of Petitioner, *supra* note 70, at 19-20.

[239] *Id*. at 20.

[240] *Apouviepseakoda*, 475 F.3d at 888.

[241] Brief of Petitioner, *supra* note 70, at 19.

[242] *See, e.g*., Decision of the Immigration Judge at 5, In the Matter of Afi Marie Apouviepseakoda, Immigration Court, Chicago, Illinois, (June 14, 2004), *available at* www.ca7.uscourts.gov (follow "Briefs" link, search for case No. 05-3752, follow "05-3752" link, follow "05-3752_002.pdf" link) (discussing photos and medical certificate).

proof to rehabilitate and corroborate Afi Marie's testimony did not figure into the IJ's calculus.

Afi Marie's daughter would have provided a second point of corroborating testimony that the IJ complained was missing. The daughter would have been able to provide precisely that information that the IJ wanted:

> Q: Do we have any license from the government of Togo authorizing your husband to operate a station in Togo?
> A. Yes, we had documents, but as I was leaving Lome I had difficulties and I couldn't collect all the documents.
> Q. I see you have some documents here, but does this mean that this is an operating business or how do I know this was not a station that was expected to go on line and needed completion before it did so?
> A. Well, you can ask my, my daughter.
> Q. I see. Well, would I expect your daughter to contradict you? And how, how ---this radio station, can you tell me what it's potential to reach the public?
> A. Yes.
> Q. And what, what – did it have a regular schedule operation?
> A. Yes, the radio has a schedule.
> Q. And how did the public understand when to tune in to this radio station?
> A. If you turn your radio on, turn your radio on 97.5 or you hear the radio.
> Q. I see. Now this radio station 95 – 97.5, well, how, how – was there any programming, any, any circulation of scheduling for the general public so they know when to tune in to hear any particular programming?
> A. This I, yes, there was a schedule circulated, but since I was not involved in, in that business I, I really can't tell you how they were circulated. All I know is that my husband had a functioning radio station.

> Q. I see. Do we have anything to verify that that was true other than your statements?
> A. I have a photo.
> Q. I see. I see a photo too. I have photographs also in high school where I took pictures with a radio transmitter there. Does that mean that that is an operating business because you have a photograph?
> A. I couldn't gather all the paper, all the documents together. It's necessary to ask my child.
> Q. To wit, ma'am, I don't want to hear the question ask my child because your child is not going to be the confirming information for the Court.[243]

Afi Marie consistently and repeatedly admitted that she knew very little about this business.[244] The daughter would have testified that the radio station did exist and that her father was indeed the owner.[245] But, even after the IJ accepted the offer of proof regarding the daughter's testimony, the IJ's skepticism regarding the operational status of the radio station remained. The impossibility of satisfying the IJ's evidentiary demands was clear. Afi Marie had the very evidence that the IJ was looking for, but when she presented it, it was always somehow insufficient.

3. Corroboration (Arguing Outside the Record)

When invoked, the corroboration requirement demands that asylum applicants be able to bolster their claims with documentary evidence.[246] Similarly, when an IJ's adverse credibility determination is being challenged for bias, reviewing courts should examine the extent to which an IJ forms conclusions based upon evidence not in the record on appeal. Typically, IJ opinions that lack such

[243] Brief of Petitioner, *supra* note 70, at 17-18.
[244] *Id*.
[245] *Id*. at 19.
[246] Gontcharova v. Ashcroft, 384 F.3d 873, 877 (7th Cir. 2004).

corroboration rely upon the personal experiences of the IJ to draw conclusions from the asylum applicant's testimony.[247] The problem with IJs relying upon personal experience, or what they perceive as "common sense," is that what is common in the United States is not necessarily common in a foreign culture.[248] The problem with reviewing a biased IJ's decision is that the reviewing court will be tempted in to looking for ways to show that the IJ wasn't that far off. This leads to the incorporation of unsupported assumptions of the IJ.

On several occasions, the Seventh Circuit majority's analysis becomes this sort of fact-finding foray. The IJ found two problems with the signed medical certificate that Afi Marie submitted. First, the IJ noted that the physician saw Afi Marie "in consultation" as opposed to having been her treating physician.[249] The IJ explained, "some injuries are a result of a complication because of preexisting condition and the treating doctor would have that information in his report."[250] Apparently, the IJ was concerned that, to the extent that Afi Marie was being treated for legitimate injuries, it may have been due to an automobile accident.[251] However, nothing in the record suggests that there was ever any car accident.[252] There is similarly nothing in the record to suggest that treating physicians in Togo would have information different than what consulting physicians in Togo would have.[253] The IJ's reliance upon this distinction to discredit Afi Marie's testimony should be construed as evidence of a tainted adverse credibility determination.

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[247] See e.g., Jiang v. Gonzales, 485 F.3d 992, 995 (7th Cir. 2007).

[248] As Judge Posner notes in his dissent, "Most asylum applicants come from distant, poor, and poorly governed countries about which Americans, including the immigration judges, who are not selected for their knowledge of foreign countries, know nothing." Apouviepseakoda v. Gonzales, 475 F.3d 881, 898 (7th Cir. 2007) (Posner, J., dissenting).

[249] *Id*. at 895.

[250] *Id*. at 896.

[251] *Id*.

[252] *Id*.

[253] *Id*.

Second, the physician who signed Afi Marie's medical certificate specialized in ''Gynecology–Obstetrics, General Medicine."[254] The IJ ignores the "General Medicine" portion of the title to find that it was inconsistent for Afi Marie to have been treated for serious bodily injuries by an Ob-Gyn.[255] The Seventh Circuit took this a step further when it noted that Afi Marie's initial visit to the doctor was in April which happened to be the same month she visited the doctor when she returned to Togo: "This *April* visit to a *gynecologist* prompts us to note a coincidence not recognized by the IJ."[256] This newly noted coincidence is problematic for the same reason that IJs are so strictly confined to the evidence in their records. The Seventh Circuit majority's intimation presumes to understand common medical practice amongst Togolese doctors and patients. The record is certainly silent as to whether Togolese woman have adopted the practice of obtaining an annual examination by the gynecologists. And there is nothing in the record to suggest that Afi Marie could not go to the same hospital for trauma as for a gynecological exam. Finally, the IJ's characterization of the second trip to the Togo hospital as being elective is entirely irrational. If Afi Marie simply needed to have a gynecological exam, why would she not have waited until she returned to the medical system of the United States? There must have been some reason for her to see a doctor there. Her attendance to her medical health should not be construed as an inconsistency, particularly where there is nothing in the record to support the IJ's or the Seventh Circuit's explanation.

4. Plausibility (logic)

Even if the asylum applicant's claim is internally consistent and supported through documentary evidence, the IJ may make an adverse

[254] *Id*. at 891 n.6 (majority opinion).

[255] *Id*. at 895 (Posner, J., dissenting).

[256] *Id*. at 891 n.6 (majority opinion) (emphasis in original).

credibility determination on the basis of implausibility.[257] Analogously, where the IJ's decision is being challenged for bias, reviewing courts should look to the plausibility of the reasons for the IJ's adverse credibility determination. In other words, courts should look simply to whether the IJ is being logical.

In Afi Marie's case, Judge Posner describes the logical pitfalls in the IJ's decision as "yawning chasms."[258] The biggest obstacle for the IJ seems to be the numbers stamped on the Lome hospitalization photos. Each of the two photographs submitted by Afi Marie had the numbers "03 4 16" on them,[259] with the "03" portion being more difficult to make out than the other numbers.[260] The IJ asked whether the numbers meant that the photos were taken on April 16, 2003—a problematic date given that her hospitalization occurred in 2001 and her asylum application was filed in 2002.[261] Afi Marie could only respond, "I think it's just a date because I wasn't in Lome in the year 2003."[262] Furthermore, Judge Posner notes that the IJ did not question the fact that the photos were submitted with the rest of the 2002 asylum application.[263] Given the date Afi Marie submitted her materials, it is simply implausible that the numbers represent a date.[264] The IJ's insistence, in the face of this apparent inconsistency, should be construed as evidence of bias.

CONCLUSION

It is far from clear whether Afi Marie qualifies for asylum. But what is clear is that her adverse credibility determination was tainted

[257] 8 U.S.C. §1158(b)(1)(B)(iii) (2006); Kadia v. Gonzales, 501 F.3d 817, 821 (7th Cir. 2007).

[258] *Apouviepseakoda*, 475 F.3d at 897 (Posner, J., dissenting).

[259] *Id*. at 896.

[260] *Id*. at 890 (majority opinion).

[261] *Id*.

[262] *Id*.

[263] *Apouviepseakoda*, 475 F.3d at 896 (Posner, J., dissenting).

[264] *Id*.

with bias. Her petition for review should have been granted with instructions to remand to a new immigration judge. Because the adverse credibility determination completely incapacitates the asylum claim, courts should be more cautious in the amount of bias that they tolerate on review. The four factors of IJ bias in an adverse credibility setting proposed in this note are by no means exhaustive. And by no means would all four factors need be present to warrant remand.

The current safeguards against pre-decision and IJ bias detect too few decisions that should be vacated. Where IJ bias reaches a level sufficient for reversal on due process considerations, a reviewing court would easily be able to reverse on a challenge to the adverse credibility determination itself. The contamination theory applies in those instances where the IJ's adverse credibility determination is not as patently incorrect. Where the IJ is denying an asylum applicant's claim not on the merits, but on the basis of an adverse credibility determination, the threshold tolerance for bias should be low. This is the only way that we can rely upon the findings of fact from a system where the usual aids in detecting truth are unavailable.

Because the denial of an asylum application can literally be a matter of life and death, the immigration system should strive to minimize the number of denials to deserving applicants. To the extent that some error is unavoidable, the immigration system should err on the side of caution.