Seeking Answers: Exploring Policy Problems and Solutions in the Asylum Process

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I. INTRODUCTION

The United States offers asylum to individuals fleeing persecution in their home countries.[1] For many such asylum seekers, after facing torture, violence, and abuse, their biggest specter will not be their abusers, but rather judicially-imposed paperwork requirements. In some cases, an asylum seeker's application will be denied because the Immigration Judge (IJ) presiding over the case will determine that she was looking for certain evidence that was not presented to corroborate the persecution claims.[2]

And, in many circuits, the courts have held that the IJ is permitted to make these determinations without first giving the asylum seeker advance notice of this specific evidence or an opportunity to explain why the petitioner has not presented such evidence. The Sixth Circuit followed this trend in *Gaye v. Lynch*.[3] This approach, however, is not mandated by the law and does not result in positive policy outcomes.

Gaye gives an insight into the broken asylum process in the United States. The judicial system should impose advance notice and opportunity requirements for specific evidence necessary in credibility determinations. Beyond this, this Article will explore other options for reimagining the asylum system, highlighting efficiency concerns along the way.

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[1] *Asylum*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum [https://perma.cc/2XZF-SEMV] (last updated Feb. 12, 2024).

[2] *See, e.g.*, Raphael v. Mukasey, 533 F.3d 521, 530 (7th Cir. 2008).

[3] Gaye v. Lynch, 788 F.3d 519, 522–23 (6th Cir. 2015).

II. NO ADVANCE NOTICE FOR CORROBORATIVE EVIDENCE REQUIRED IN THE SIXTH CIRCUIT

In *Gaye v. Lynch*, a young man attempting to receive asylum, Babacar Gaye, was facing a big problem.[4] It was not that he had been taken to a military slave camp, along with his family, forced into beatings and slave labor in Mauritania.[5] It was not that he and his family had been marched to Senegal and told not to return to their home.[6] It was instead that the Immigration Judge said, in part, he did not have enough paperwork to prove these claims.[7]

When asylum seekers go through the immigration process, the final step may be the first time that they will learn they need additional evidence. Typically, at a merits hearing, an Immigration Judge will determine if the asylum seeker's testimony is credible.[8] The Immigration and Nationality Act (INA) provides:

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.[9]

In *Gaye*, the Sixth Circuit interpreted this provision to hold that "federal law does not entitle illegal aliens to notice from the Immigration Court as to what sort of evidence the alien must produce to carry his burden."[10] Thus, at a final merits hearing, an immigrant may learn that the IJ needed to see, for example, additional evidence of their torture experienced in a home country. If the immigrant did not bring that specific piece of evidence to that hearing, the Sixth Circuit does not require the judge to give the asylum seeker an opportunity to provide the evidence that was just deemed necessary at that same hearing.[11]

To support this holding, the Sixth Circuit relied on textualism: "this text does not suggest that the alien is entitled to notice from the IJ as to what evidence the alien must present."[12] There are echoes of judicial efficiency concerns, too. The Court is worried that if advance notice was required for the corroborating evidence needed by the IJ, then this would "'necessitate two hearings.'"[13]

The Sixth Circuit is not alone here; other appellate courts, along with the Board of Immigration Appeals, have found that no advance notice is required

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[4] *Id.* at 523.
[5] *Id.*
[6] *Id.*
[7] *Id.* at 525.
[8] *See* Matter of L-A-C, 26 I. & N. Dec. 516, 521 (BIA 2015) ("during the merits hearing, witness testimony and other evidence is presented, the Immigration Judge makes factual findings and legal conclusions").
[9] 8 U.S.C. § 1158(b)(1)(B)(ii).
[10] *Gaye*, 788 F.3d at 530.
[11] *See id.*
[12] *Id.*
[13] *Id.* at 529 (citing Raphael v. Mukasey, 533 F.3d 521, 530 (7th Cir. 2008).

by the relevant INA provision. The Seventh Circuit said that because the INA contained the provision at issue above, the law "clearly notifies aliens of the importance of corroborative evidence."[14] The Seventh Circuit also explicitly mentions judicial efficiency. In *Raphael v. Mukasey*, the court reasoned that because an additional notice requirement could necessitate a second hearing, this would "add to the already overburdened resources of DHS."[15]

Indeed, the Board of Immigration Appeals (BIA) itself found that advance notice is not required in these circumstances. The BIA, the controlling federal agency, does not require Immigration Judges to give asylum applicants advance notice to provide corroborating evidence.[16] In *Matter of L-A-C*, the BIA found advance notice is not required in part by examining the legislative history of the INA and its subsequent amendments.[17] Congress, with the INA, aimed to allow judges to "to follow commonsense standards in assessing asylum claims without undue restrictions."[18] In light of this legislative goal, the BIA concluded Congress did not intend to create a process that required judges to follow additional procedural steps.[19] Congress hoped to make the immigration system more efficient, and the BIA does not want to stand in its way.

III. ADVANCE NOTICE SHOULD BE REQUIRED

There are, however, compelling arguments for reading an advance notice requirement for corroborative evidence in these circumstances.

First, the grammar of the relevant provision of the INA indicates that advance notice is required. A textual principle dictates that Congress's use of a verb tense is significant in construing statutes.[20] Here, the statute does not say that when the IJ finds she needs additional corroborating evidence, the applicant "should have provided" such evidence. Instead, it says that once this determination is made, the applicant "should provide" such evidence.[21] This necessitates reading an advance notice requirement into the statute, as well as requiring the IJ to give the applicant an opportunity post-determination to provide corroborating evidence. The Ninth Circuit agreed, in *Ren v. Holder*: "[T]he applicant cannot act on the IJ's determination that he 'should provide' corroboration, of course, if he is not given notice of that determination until it is too late to do so."[22] Thus, the text can be read to compel an advance notice requirement despite the BIA's contrary decision.[23]

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[14] Raphael v. Mukasey, 533 F.3d 521, 530 (7th Cir. 2008).
[15] *Id.*
[16] *Matter of L-A-C-*, 26 I. & N. Dec. 516, 527 (BIA 2015).
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] United States v. Wilson, 503 U.S. 329, 333 (1992).
[21] 8 U.S.C. § 1158(b)(1)(B)(ii).
[22] Ren v. Holder, 648 F.3d 1079, 1091 (9th Cir. 2011).
[23] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 843–44 (1984).

Second, the constitutional avoidance canon necessitates requiring advance notice and opportunity to present corroborative evidence to avoid due process concerns.[24] The Fifth Amendment requires a "full and fair hearing" in deportation proceedings.[25] The Ninth Circuit, again, found that a requirement that something be provided "even *before* notice is given would raise" due process concerns.[26] There is no full nor fair hearing given in such a context. A fear of judicial inefficiency should pale in comparison to the fear of violating asylum seeker's rights of due process.

Finally, requiring advance notice of corroborative evidence just represents good policy. There are instances in which the IJ is searching for such specific evidence that it would be exceedingly difficult to predict the necessary documentation before being told by the judge.[27] It is simply unfair to require an applicant to be able to read an immigration judge's mind to predict the evidence necessary for corroboration of their claim.

Further, while judicial efficiency may be important, this concern is not as important as getting these decisions right, even if another hearing is necessary. If a decision is made before an opportunity to give the full context, asylum seekers are at the risk of being returned to a country where they have faced life-threatening danger or prosecution. The risk of sending someone back to a dangerous situation is so great that the added value of an additional safeguard—notice and opportunity to provide corroborating evidence—is similarly great.

If the IJ gives the applicant a second opportunity, the worst that happens is that the applicant could fail to provide the necessary corroborating evidence and the second hearing will have been wasteful. If the IJ does not give the applicant a full opportunity and notice to provide the necessary corroborating evidence and the applicant misses out on a chance to defend themselves, the harm is much greater—the applicant will now have been unfairly deported to a country where they must live in danger and fear.

IV. EXPLORING POLICY FIXES TO THE ASYLUM PROCESS

It would be a small but effective change in the asylum process if all appellate circuits concluded that asylum seekers were entitled to advance notice of specific pieces of evidence necessary to corroborate their claims.

But the United States asylum system is broken in a more fundamental sense—bigger changes need to be made. The concerns present in *Gaye* and similar cases disavowing additional notice requirements require larger policy solutions that both alleviate the strain on the American immigration system and promote humanitarianism. The primary solution is providing a right to counsel in immigration proceedings.

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[24] *Ren*, 648 F.3d at 1092.
[25] Campos-Sanchez v. I.N.S., 164 F.3d 448, 450 (9th Cir. 1999).
[26] *Ren*, 648 F.3d at 1092 (emphasis in original).
[27] *See, e.g.*, Yunxin Cao v. Sessions, 701 F. App'x 606, 607 (9th Cir. 2017).

The *Gaye* decision illustrates the necessity of legal representation for asylum seekers. Currently, asylum seekers and immigrants facing removal do not have a Sixth Amendment right to counsel, because deportation is classified as a civil, rather than criminal, proceeding.[28] As a result, only 37% of all immigrants have counsel.[29]

Statistics suggest that legal representation in immigration proceedings is highly determinative of legal outcomes. For example, immigrants who are not detained and have legal representation are almost five times more likely to prevail than those without legal representation.[30] Data shows that 73% of represented asylum-seeking children are allowed to stay in the United States, while only 15% of unrepresented asylum-seeking children are allowed to stay.[31]

Guaranteeing a right to counsel of course promotes fairness. The above statistics alone suggest that many immigration proceedings will hinge on the availability of legal counsel rather than the strength of the immigrant's legal claims.[32] And, generally, it appears unfair to force immigrants, who can have limited English skills and who lack legal training, into defending themselves in court without legal representation.[33]

But, as the judicial discussions around advance notice requirements suggests, efficiency is a major concern for many. A right to counsel may also improve efficiency in the immigration system, including for asylum seekers. Onestudy found that in November 2016, more than 526,000 immigration removal cases were pending.[34] People facing removal were waiting an average of 678 days before the court date.[35] Improved access to counsel could decrease this immigration court backlog.[36] Another study found that the reduction in time required for immigration court proceedings when immigrants were assisted in navigating the system would result in cost savings of $677 per participant, totaling over $19.9 million annually.[37]

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[28] Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, AM. IMMIGR. COUNCIL (Sept. 28, 2016), https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court [https://perma.cc/R5JK-CUT7].

[29] *Access to Counsel*, NAT. IMMIGRANT JUST. CTR., https://immigrantjustice.org/issues/access-counsel [https://perma.cc/S2F6-5FPV] (last accessed Mar. 28, 2024).

[30] *Id.*

[31] *Id.*

[32] Jacob Czarnecki and Haley Hamblin, *Legal Representation for Asylum Seekers: An Overlooked Area of Reform for a System in Crisis*, NISKANEN CTR. (Aug. 24, 2021), https://www.niskanencenter.org/legal-representation-for-asylum-seekers-an-overlooked-area-of-reform-for-a-system-in-crisis/ [https://perma.cc/3CL2-CVAK].

[33] *Access to Counsel*, *supra* note 29.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Blazing a Trail: The Fight for Right to Counsel in Detention and Beyond*, NAT. IMMIGR. L. CTR. (Mar. 2016), https://www.nilc.org/wp-content/uploads/2016/04/Right-to-Counsel-Blazing-a-Trail-2016-03.pdf [https://perma.cc/N9K8-8YS4].

Consider efficiency, too, in the narrow setting of the advance notice requirement cases. If asylum seekers had lawyers, these lawyers will be better able to understand the requirements of the INA, and will have a better grasp on what corroborative evidence is required of the asylum seeker. Thus, concerns about endless hearings to produce evidence may be alleviated—counsel stands a better chance of anticipating what evidence will be reasonably relevant to bring to the initial hearing than the asylum seeker themselves. To improve fairness, and to alleviate efficiency concerns, the federal government should provide funding for legal counsel for asylum seekers.

Finally, if the United States *is* primarily concerned with efficiency and cost-savings, there is a solution that would provide a lot of both: welcome all asylum seekers. Judicial efficiency, for example, is a concern oft-cited by appellate courts in not requiring Immigration Judges to provide additional hearings for asylum seekers to produce more evidence for their claims, yet there is an efficiency issue almost every step of the way in the asylum process. Consider this: former President Trump's incomplete border wall has cost around $10 billion.[38] Meanwhile, if the United States granted asylum to everyone who submits an application, and gave each asylum seeker aid, this would cost around $1 billion per year.[39] Maybe this comparison is impractical. However, these disparities suggest merely that while the Board of Immigration Appeals and appellate judges opine about efficiency in piecemeal practices, there are opportunities to broaden the thinking around immigration efficiencies through large-scale policy changes.

[38] Perla Trevizo & Jeremy Schwartz, *Records Show Trump's Border Wall is Costing Taxpayers Billions More than Initial Contracts*, TEXAS TRIBUNE (Oct. 27, 2020), https://www.texastribune.org/2020/10/27/border-wall-texas-cost-rising-trump/ [https://perma.cc/JC5V-UP4Z].

[39] Ryan Baugh, *Refugees and Asylees: 2019*, DEP'T HOMELAND SEC. OFF. OF IMMIGR. STAT.(Sept. 2020), https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/refugee_and_asylee_2019.pdf [https://perma.cc/MQC8-296J].