CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

THE POLICY IMPLICATIONS ARISING FROM THE BLANKET RECUSAL ORDER OF AN IMMIGRATION JUDGE

Posted on September 8, 2014 by Cyrus Mehta

By Parisa Karaahmet and Cyrus D. Mehta

All the rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous Judiciary.

Andrew Jackson

The recent lawsuit filed against the Department of Justice by an Iranian American immigration judge, raises interesting questions regarding the use of a blanket recusal order by the Agency in the absence of a fact-specific analysis or showing of actual bias on the part of the Immigration Judge, *See* *Tabaddor v Holder, et al*. Immigration Judge Ashley Tabaddor filed suit in US District Court for the Central District of California last month, alleging, among other things, discrimination, retaliation and violations of her constitutional right to free speech under the first amendment. The suit was in response to the Executive Office of Immigration Review's (EOIR) blanket recusal order issued to her in 2012 following Judge Tabaddor's participation in a White House sponsored forum on Iranian Americans. The complaint states that Judge Tabaddor initially received permission to attend the White House roundtable discussion, to which she was invited ostensibly because of her status as a prominent member of the Iranian American community. Consistent with EOIR policy, Judge Tabaddor was advised that she could attend the event in a personal capacity only, with the additional recommendation that she recuse herself from all cases involving Iranian nationals to avoid the appearance of impropriety following the event. The complaint alleges that upon her return from the White House event, Judge Tabaddor sought clarification regarding the recommendation, which was then

elevated to a recusal order. She has complied with the recusal order to date, albeit, under protest.

How common are blanket recusal orders by the EOIR? Although there may have been other less publicized instances of EOIR requiring a Judge to recuse himself or herself from a specific case, the use of a blanket recusal order would appear to be rare indeed. A good starting point in understanding the history and use of blanket recusal orders is to look to EOIR's internal guidance on this issue. EOIR's March 22, 2005 memorandum to Immigration Judges on Procedures for Issuing Recusal Orders in Immigration Proceedings cautions them to tread carefully in deciding whether recusal is appropriate. Judges are advised to review the overall circumstances of a matter, employing a "reasonable person" standard in deciding whether recusal is warranted in a particular case. "A judge should recuse him or herself when it would appear to a reasonable person, knowing all the relevant facts, that a judge's impartiality might reasonably be questioned." *Citing Liteky v. US*, 510 US. 540 (1994); *Liljeberg v. Health Servs. Acqusition Corp*, 486 U.S. 847 (1988); *US v Winston*, 613 F.2d. 221 (9th Cir. 1980); *Davis v. Board of Sch. Comm'rs of Mobile County*, 517 F.2d 1044, 1052 (5th Cir. 1975).

The memorandum cites certain situations enumerated in 28 USC § 455(b) where recusal would be mandated. These circumstances are largely fact-specific but can be summarized under two situations. First, where the Judge would appear to have an existing or prior relationship to one of the parties that is personal in nature, including financial or familial. Second, where the adjudicator has a personal bias, prejudice or knowledge of the evidentiary facts related to the underlying proceeding. Absent these specific circumstances, the general tone of the memorandum encourages Immigration Judges to consider carefully, on a reasoned, objective and fact-specific basis, whether recusal is a necessary and equitable action warranted under the circumstances. The memorandum stresses that a Judge has an obligation not to recuse him or herself arbitrarily and must therefore base his or her decision to do so on "compelling evidence" indicating that his or her judgment would be compromised, "rather than mere allegations or conclusory facts." *Citing U.S. v. Balistrieri,* 779 F.2d 1191, 1220 (7th Cir. 1985); *Sexson v. Servaas*, 830 F. Supp. 475, 477 (S.D. Ind. 1993); *Taylor v. O'Grady*, 888 F.2d 1189, 1201 (7th Cir. 1989).

EOIR's directive to carefully consider the grounds of recusal to ensure that they are based in fact and not on innuendo or inference is supported by the relevant

case law. For example, in *Matter of Exame*, 18 I&N Dec. 303 (BIA 1982), the Board recognized that a respondent is not denied a fair hearing when a Judge has a "point of view about a question of law or policy." *Id.* at 306. Specifically, the Board noted that in order to warrant a recusal order a Judge must have a personal bias arising out of an "extrajudicial" source which would inform his or her opinion on the merits of the particular proceeding. *Id*.

Moreover, several notable decisions issued by Federal District Court Judges following recusal hearings seem to support the Board's position. In particular, a spirited 1988 opinion from Judge William M. Acker, Jr., addressing allegations of bias made by the government on appeal, stresses that innuendo of bias made by a party is alone insufficient for a Judge to recuse himself. *In re Possible Recusal of William M. Acker, Jr. in Government's Cases,* 696 F. Supp. 591, 597 (D.N.A. 1988). Similarly, a more recent decision by Judge Paul D. Borman in the Eastern District of Michigan maintains that a Judge's prior activities have to be specifically connected to the matter under consideration in order to make a credible argument regarding his or her bias. *U.S. v. Odeh*, Case No. 13-cr-20772 (Jul. 31 2014). In that decision, a Palestinian-American defendant accused of fraud in her naturalization application moved for Judge Borman's recusal because of his strong support for Israel. After reviewing the case law, Judge Borman concluded that "ike every one of colleagues on the bench, a history and heritage, but neither interferes with ability to administer impartial justice to or to the Government." *Id.* at 9. Judge Borman's remarks should be understood in light of the reasonable person standard that governs EOIR and federal recusal case law. Although Judge Borman later recused himself after he realized that he had tangential financial ties to the supermarket in Israel that was allegedly bombed by the criminal defendant (the facts of which were not disclosed in her naturalization application) his prior ruling against recusal is a good example of why a judge should not be biased even if he or she has political affiliations and interests. Therefore, the prevailing view appears to be that if a judge has no specific close familial or financial relationship to the parties in a case, and there is no demonstrated personal bias relating to the evidentiary facts, recusal would be unwarranted, nothwithstanding the judge's political views or support for particular causes.

While it is too early to judge the merits of Judge Tabaddor's case, her complaint raises important questions about EOIR policy with respect to an adjudicator's impartiality and the careful balance between an appearance of bias and actual

bias. The United States District Court for the Central District of California has not yet ruled on this or any other contention made in the complaint. It, therefore, remains to be seen whether Judge Tabaddor's suit will have a lasting impact on EOIR policy with respect to recusal.

Even while we wait for an outcome on this law suit, the authors wonder whether such a blanket recusal reveals a lack of independence of Immigration Judges. The EOIR is already part of the Department of Justice, and under the direction of the Attorney General. Immigration Judges are thus employees of the DOJ. Quite apart from the facts in Judge Tabaddor's case, will an Immigration Judge feel secure if his or her decisions are contrary to the Administration's policy? For instance, the Administration has created "rocket dockets" to expeditiously hold removal proceedings against child migrants and their families who recently came from Central American countries. If an Immigration Judge issues rulings or sets procedures that run contrary to the Administration's efforts to quickly deport such respondents, will such an Immigration Judge feel insecure? The following extract from the Supreme Court's decision in *Bridges v. Wixon,* is worth noting: "Although deportation is not technically a criminal proceeding, it visits a great hardship on the individual, and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty — at times, a most serious one — cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness." 326 U.S. 135 (1945). In light of these important rights at stake in removal proceedings, it is imperative that the DOJ make every effort to ensure that Immigration Judges can issue rulings concerning the lives of immigrants in a totally impartial setting.

(*Guest author Parisa Karaahmet is a Partner at Fragomen. The views expressed herein are not intended to represent those of the organizations that Ms. Karaahmet or Mr. Mehta have been part of in the past and presently*)