



BOARD OF IMMIGRATION APPEALS PROVIDES SAFEGUARDS FOR ASYLUM APPLICANT WITH MENTAL COMPETENCY ISSUES

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The Board of Immigration Appeal's decision in [*Matter of J-R-R-A-*](#), 26 I&N Dec. 609 (BIA 2015) is a milestone decision in protecting an asylum applicant who presented competency issues that were not appropriately assessed by the Immigration Judge. It also untangles the ethical conundrum that a lawyer has when the client is unable to testify credibly due to a cognitive disability.

The respondent in *Matter of J-R-R-A-* was a native and citizen of Honduras, who claimed that he would be harmed upon his return to Honduras by a man who had murdered his brother 15 years ago. His testimony was characterized as confusing, disjointed and self-serving. He also laughed inappropriately during the hearing. Although the Immigration Judge observed that the respondent's behavior and testimony were unusual, the BIA found that the respondent's competency should have been assessed under [*Matter of M-A-M-*](#), 25 I&N Dec. 474 (BIA 2011). In the landmark *Matter of M-A-M-* decision, the BIA held that for a respondent to be competent to participate in an immigration proceeding, he or she must have a rational and factual understanding of the nature and object of the proceeding and a reasonable opportunity to exercise the core rights and privileges afforded by the law. As the respondent demonstrated various indicia of incompetence in *Matter of J-R-R-A-*, the BIA held that the IJ should have taken measures to determine whether the respondent was competent to participate in these proceedings in accordance with the guidelines in *Matter of M-A-M-*, and remanded the case back to the IJ.

The BIA could have stopped there and it would have still been a good decision, but the BIA went further and acknowledged that the respondent's testimony was not credible due to the respondent's diminished capacity, which prevented

him from obtaining asylum. The IJ had denied the asylum claim by curtly opining that the respondent's cognitive difficulties are "not a license to give incredible testimony." A respondent presenting an asylum claim must establish a well-founded fear of persecution by demonstrating both a genuine subjective fear of persecution and by also presenting evidence establishing objectively that such a fear is reasonable. *See INS.v. Cardoza-Fonseca*, 480 U.S. 421 (1987). In light of such a standard, an asylum claimant must present credible testimony in order to establish his or her subjective fear of persecution, supported by objective evidence to establish that the fear is reasonable. A respondent with diminished capacity may not be capable of presenting credible testimony, and as in the case of the respondent in *Matter of J-R-R-A-*, may be at grave risk of being denied asylum even if he or she has a genuine fear of persecution.

One can also draw important lessons from this decision for the lawyer who represents a client with diminished capacity. A lawyer under the ethical rules of professional conduct cannot "offer evidence that the lawyer knows to be false." *See* ABA Model Rule 3.3(a)(3). Thus, when a lawyer observes a client presenting testimony knowing that it is false, the lawyer is under an ethical obligation to not have the client offer it. If the client has already offered evidence that the lawyer knows is false, under ABA Model Rule 3.3(b), the lawyer is under an ethical duty to take reasonable remedial measures to rectify the fraudulent conduct, and if necessary, disclose it to the tribunal. ABA Model Rule 1.14 also instructs a lawyer to maintain a normal lawyer-client relationship as far as possible with a client who presents competency issues, and thus all the ethical rules that affect the lawyer-client relationship are applicable even when a lawyer represents a client with diminished capacity, including the lawyer's duty of candor to the tribunal. Still, Rule 1.14 allows a lawyer to take reasonably protective action when a client with diminished capacity is at risk of harm by either consulting with individuals or entities, and in appropriate cases, seek the appointment of a guardian or guardian ad litem.

The BIA in *Matter of J-R-R-A-* implicitly recognized the lawyer's ethical conundrum regarding her duty of candor to the tribunal, but held that a client with diminished capacity should be allowed to provide testimony that may not be believable so long as there is "no deliberate fabrication involved." In this way, the lawyer may allow the client to meet the subjective fear prong under the asylum standard even if the testimony is not true, and the IJ should then focus on whether the respondent met his burden of proof based on the

objective evidence in the record. The BIA commendably recognized that “his safeguard will enhance the fairness of the proceedings by foreclosing the possibility that a claim is denied solely on testimony that is unreliable on account of the applicant’s competency issues, rather than any deliberate fabrication.”

When I last [blogged on mental competency issues in immigration practice](#), I noted that this area was a work in progress and there was much work that needs to be done to develop standards and provide clear guidance. *Matter of J-R-R-A-* goes a long way in filling this lacuna by recognizing the vulnerability of an asylum claimant with competency issues, and also reconciling the lawyer’s ethical conflict regarding not offering false evidence to a tribunal. I also commend readers to the ABA’s recent excellent publication entitled [Representing Detained Immigration Respondents of Diminished Capacity: Ethical Challenges and Best Practices](#). Representing clients with mental competency issues in immigration matters presents great challenges as well as amazing rewards. Such clients are indeed the most vulnerable, especially when presenting complex asylum claims in immigration court. The lawyer plays a vital role in ensuring that the client is protected and is provided with the necessary safeguards, and can also gain tremendous satisfaction in being able to assist such a client navigate through the labyrinthine immigration system and emerging victorious.

At a time when politicians in the western world, swayed by public opinion, are showing increasing hostility toward asylum seekers fleeing persecution, and making it harder for them to assert claims that are accorded to them under law, we can only hope that decisions such as *Matter of J-R-R-A-* break the mold and provide necessary safeguards, especially when asylum claimants have diminished capacity. While this decision involved an adult with diminished capacity, minors inherently have diminished capacity, and should be equally protected under *Matter of J-R-R-A-* especially when they have undertaken hazardous journeys fleeing persecution, and some have also died tragically in pursuit of freedom. Although only an administrative decision, *Matter of J-R-R-A-* is a shining example of how law ought to develop and evolve in safeguarding the rights of a vulnerable population fleeing persecution, notwithstanding the political attitudes of the day.