Excerpt from Immigration motion by Daniel Cohen, Legal Research and Writing

MOTION TO TERMINATE REMOVAL PROCEEDINGS

I. SUMMARY OF CASE

1. In violation of due process guaranteed by the Fifth Amendment to the Constitution, the Government failed to provide Respondent with reasonable notice of a compulsory USCIS marital interview pursuant to his I-751 petition to remove the condition of his permanent residence.

2. At the time of the interview, the Government unilaterally deprived Respondent of his fundamental right to counsel as guaranteed by (A) the Constitution; (B) federal statutory law; (C) federal regulatory law; and (D) federal rules.

3. At the mandatory interview, the Government then proceeded to subject Respondent to questioning (A) likely to elicit incriminating responses, as well as(B) questioning likely to elicit statements adverse to Respondent's liberty and property interests in remaining in the United States.

4. Hence, (A) deprived of reasonable notice, (B) compelled to appear at the interview, (C) denied his right to counsel, and then (D) asked prejudicial questions, the consequential statements attributed to Respondent were involuntary.

5. Because the statements attributed to Respondent were involuntary, they were inadmissible in the decision whether to grant or deny Respondent's I-751 petition to remove the condition of his residence.

6. Consequently, USCIS' termination of Respondent's conditional permanent residence based upon his involuntary and inadmissible statements was unlawful.

7. Therefore in the case at bar, (A) the involuntary statements attributed to Respondent should be suppressed, (B) USCIS's decision denying Respondent's I-751 petition should be vacated, and (C) this case should be terminated.

. . .

III. ARGUMENT 1

FAILING TO PROVIDE RESPONDENT WITH REASONABLE NOTICE OF A COMPULSORY INTERVIEW PURSUANT TO HIS I-751 PETITION, THE GOVERNMENT DEPRIVED RESPONDENT OF HIS DUE PROCESS RIGHT TO BE HEARD "AT A MEANINGFUL TIME AND IN A MEANINGFUL MANNER." THEREFORE THE ADVERSE STATEMENTS ELICITED FROM RESPONDENT SHOULD BE SUPPRESSED.

According to the United States Supreme Court, notice must be:

> reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, *and it must afford a reasonable time for those interested to make their appearance.*
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> *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950). (emphasis added) (citations omitted).

As held by the United States Supreme Court, the opportunity to be heard must be "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge,* 424 U.S. 319, 333, (1976). The Eleventh Circuit has held that "procedural due process in the deportation context requires a meaningful and fair hearing with a reasonable opportunity to be heard." *Anin v. Reno*, 88 F.3d 1273, 1277 (11th Cir. 1999) (citations omitted).

In the case at bar, pursuant the I-751 petition filed with his then-wife, Respondent was given notice of a mandatory interview. The mandatory nature of the interview was demonstrated by:

(1) The USCIS notice informing Respondent, with ominous language, that

> FAILURE TO COMPLY WITH THE INTERVIEW NOTICE MAY RESULT IN THE DENIAL OF YOUR REQUST, TERMINATION OF YOUR STATUS, AND DEPORTATION FROM THE UNITED STATES.
>
> Ex. A (all capitals emphasis in the original).

(2) the phone conversation with Respondent's attorney in which USCIS advised the lawyer that Respondent's absence at the interview could adversely affect Respondent's case. Ex. D; and,

(3) at the time of the interview, one of the USCIS officers categorically informed Respondent and his then-wife that, they could walk away from the USCIS office and so, decline to be interviewed, but as a consequence, USCIS *will deny Respondent relief, and close the case*. Ex. C; Ex. D.

In giving Respondent only seven working days' notice of the mandatory interview concerning his I-751 petition, the Government provided notice that was unreasonable. Seven days was an insufficient period of time for Respondent, a working man, a night student, and a man of limited financial means (*see*, Ex. C) to find and hire competent counsel who would, despite the short notice, also be available to be attend the mandatory interview.

And the said notice was particularly insufficient when one considers the commonly pre-existing demands upon the time of attorneys for appearances in court, deposition of witnesses, preparation for motion hearings and trials, as well as attending bar conferences.

In fact, here, Respondent *did* succeed in retaining an attorney on a Sunday, two days before the scheduled, mandatory interview. However, the lawyer was unavailable to appear at the interview, and his oral and written requests for a continuance were not granted. See Ex. D.

Hence, in giving Respondent notice of only seven working days for a mandatory interview, at which his liberty and property interests were at stake, the Government failed to provide Respondent a reasonable time to appear with the counsel of his choice. Hence, the Government deprived Respondent of his due process right to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge,* 424 U.S. 319, 333, (1976); *Anin v. Reno*, 88 F.3d 1273, 1277 (11th Cir. 1999) (citations omitted).

IV. ARGUMENT 2

THE GOVERNMENT DEPRIVED RESPONDENT OF HIS RIGHT TO COUNSEL AS GUARANTEED BY (A) THE CONSTITUTION, (B) FEDERAL STATUTORY LAW, (C) FEDERAL REGULATORY LAW, AND (D) USCIS'S OWN RULES. AS A RESULT, THE GOVERNMENT DEPRIVED RESPONDENT OF HIS RIGHT TO "A MEANINGFUL AND FAIR HEARING." THEREFORE, THE ADVERSE STATEMENTS THAT THE GOVERNMENT ELICITED FROM RESPONDENT SHOULD BE SUPPRESSED.

A. LAW

i. A NON-CITIZEN'S CONSTITUTIONAL RIGHT TO COUNSEL AS GUARANTEED BY THE FIFTH AMENDMENT

As held by the United States Supreme Court:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of the law . . . He lacks both the skill and knowledge adequately to prepare his defense . . . He requires the guiding hand of counsel at every step in the proceedings against him.
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> *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

As observed by the United States Ninth Circuit Court of Appeals, although the latter words refer to a criminal defendant's right to counsel under the Sixth Amendment, "the import of his words also speaks to the statutory right to counsel in immigration proceedings." *Hernandez-Gil v. Gonzales*, 476 F.3d 803, 807 (9th Cir. 2007). As explained by the appellate court, a person not native to the United States has an especially great need for counsel:

> [I]t is difficult to imagine a layman more lacking in skill or more in need of the guiding hand of counsel, than an alien who often possesses the most minimal of educations and must frequently be heard not in the alien's own voice and native tongue, but rather through an interpreter.
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> *Hernandez-Gil v. Gonzales*, 476 F.3d 803, 807 (9th Cir. 2007).

Moreover, when a person, as a consequence of governmental action, is (1) "in custody," and (2) asked questions that may elicit incriminating responses, the governmental actor must inform the person of specifically the right to consult with an attorney and have the attorney present during any questioning. *Edwards v. Arizona*, 451 U.S. 477, 482 (1981). Denial of the right subjects the incriminating information to suppression.

Hence, while the Sixth Amendment to the United States Constitution guarantees those *criminally* accused with the right to have assistance of counsel for their defense, U.S. Const. am. vi, in removal proceedings, an immigrant's right to counsel of choice at his or her own expense is protected by the Due Process clause of the Fifth Amendment that mandates that "[no] person . . . shall be deprived of life, liberty, or property" without due process of law. U.S. Const., amend. V. According to the United States Eleventh Circuit Court of Appeals: "It is well established in this Circuit that an alien in civil deportation proceedings . . . has the constitutional right under the Fifth Amendment Due Process Clause . . . to a fundamentally fair hearing." *Dakane v. U.S. Attorney General*, 399 F.3d 1269, 1273 (11th Cir. 2005). The Eleventh Circuit has also stated:

"Numerous courts have recognized that a deportation proceeding implicates an alien's liberty interest, which is protected by the Due Process Clause." *Mejia Rodriguez v. Reno*, 78 F.3d 1139, par. 40 (11th Cir. 1999).

The United States Ninth Circuit Court of Appeals has "characterized the alien's right to counsel of choice as 'fundamental' and ha[s] warned the INS not to treat it casually." *Baires v. INS*, 856 F.2d 89, 91 n.2 (9th Cir. 1988). A decision from the Board of Immigration Appeals must "reflect the care INS must exercise to protect the alien's right to counsel." *Reyes-Palacios v. INS*, 836 F.2d 1154, 1155 (9th Cir. 1988); *See also, Castro-O'Ryan v. INS*, 847 F.2d 1307, 1313 (9th Cir. 1988) ("Lacking the counsel he had asked for, [the noncitizen] lacked what Alexander Solzhenitsyn has said to be indispensible and missing in totalitarian countries- 'a clear-minded ally who knows the law.'").

The requirement that the Government, before custodial interrogation, inform a person of his right to remain silent, and his right to be represented by counsel, is *not* limited to criminal proceedings. According to the Eleventh Circuit, citing the authority of the Supreme Court: