

NOTES

“SPEAK ENGLISH:” LANGUAGE ACCESS AND DUE PROCESS IN ASYLUM PROCEEDINGS

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I. INTRODUCTION

Language access in the United States immigration system gained national media attention in December 2018 when a seven-year-old migrant girl from Guatemala, Jakelin Caal, died of dehydration while in U.S. government custody.¹ Jakelin had been apprehended by Customs and Border Protection, a law enforcement agency within the Department for Homeland Security (DHS) tasked with, among other functions, border management and control.² Jakelin's father, who entered the United States with her, spoke an indigenous Guatemalan language called Q'eqchi'.³ Hours before her death, he signed a form in English saying that Jakelin was in good health.⁴ The form was translated to him in Spanish, a language he barely spoke.⁵ He was not offered a Q'eqchi' interpreter, nor did he realize he could have asked for one.⁶ The absence of qualified interpreters ultimately results in a question of life or death, like in Jakelin's case.

Jakelin's tragic story of the failure of the U.S. immigration system to provide language access was highly publicized in the media,⁷ highlighting major issues with how immigration agencies certify interpreters, provide essential forms—like the one Jakelin's father signed—only in English, and train officers and adjudicators to detect problems of interpretation.⁸ Jakelin's story is a tragic example of the language access problems faced by new arrivals to the United States and raises questions about the right to language interpretation in the U.S. immigration system.”

But do immigrants have a right to interpretation and translation? The answer is more complex than one might think. This Note addresses one of the many issues raised with regard to language interpretation in the immigration system: how language access in both affirmative and defensive asylum proceedings can and should be framed as an issue of due process. Following this Introduction, Part II offers a primer on the connection between language access and due process for asylum-seekers. As Part II explains, due process does not apply uniformly to all people who are not citizens of the United

1. See, e.g., Geoff Nunberg, *Opinion: Migrant Girl's Death Reveals a Need for More Interpreters Along the Border*, FRESH AIR (Jan. 3, 2019), <https://www.npr.org/2019/01/03/681942831/opinion-migrant-girls-death-reveals-a-need-for-more-interpreters-along-the-borde/>.

2. See U.S. Customs and Border Protection, *About CBP*, U.S. CUSTOMS AND BORDER PROTECTION (Nov. 21, 2016), <https://www.cbp.gov/about>.

3. Nunberg, *supra* note 1.

4. *Id.*

5. *Id.*

6. *Id.*

7. See, e.g., Eileen Traux, *The U.S. Must Provide Interpreters for Indigenous Migrants: It Could Save Lives*, WASH. POST (Dec. 19, 2018), https://www.washingtonpost.com/opinions/2018/12/19/us-must-provide-interpreters-indigenous-migrants-it-could-save-lives/?utm_term=.ec478a5a55b8; Victoria Macchi, *Questions Surround Death of Guatemalan Girl in US Custody*, VOICE OF AM. (Dec. 14, 2018), <https://www.voanews.com/a/questions-surround-death-of-guatemalan-girl-in-us-custody/4701896.html>.

8. See, e.g., Traux, *supra* note 7.

States in immigration proceedings. However, one can easily see how questions of due process are implicated in language access issues. The fundamental components of due process are notice and a hearing; however, how can you have reasonable notice if you cannot understand the language in which the notice is given? How are you afforded the opportunity to be heard if you do not understand what is happening or cannot understand the evidence presented against you? Part II also expands upon why non-citizens seeking asylum in the United States merit special consideration within the broader issue of language access in the immigration system.

Part III considers statutory, administrative, and other sources of law that establish what rights, if any, asylum-seekers have to quality interpretation. It also examines the qualifications government interpreters must have and the procedures for adjudicators to evaluate the quality of language interpretation in the proceeding they are overseeing. Part III concludes with a review of materials that illustrate the divergence between these standards and procedures and the reality of language access on the ground. Part IV offers a brief overview of how courts have historically treated interpretation and translation in the U.S. immigration system. Part V reviews the relevant Board of Immigration Appeals (BIA) and circuit case law, tracing how courts have actively avoided framing asylum-seekers' language access in terms of constitutional due process. Part VI concludes with final observations and recommendations.

II. THE CONNECTION BETWEEN LANGUAGE ACCESS AND DUE PROCESS

A. *Constitutional Due Process and Non-Citizens*

Before reaching the question of language access, it is useful to first examine the extent to which constitutional due process applies to non-citizens. That non-citizens are entitled to constitutional protections would, at first glance, appear to be well-settled; however, there are important considerations, like whether the non-citizen in question is at a port of entry or already present within the territorial United States, that significantly impact which due process rights, if any, attach.

In 1896, the Supreme Court for the first time articulated due process protections for non-citizens in *Wong Wing v. United States*.⁹ Wong Wing, along with three other Chinese citizens, was determined to be unlawfully present in the United States and was sentenced to sixty days imprisonment and hard labor.¹⁰ The Court acknowledged that while it was well within the power of Congress to restrict immigration and expel those unlawfully within its borders, it nonetheless rejected the sentence of hard labor, holding that “to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the

9. 163 U.S. 228, 237 (1896).

10. *Id.* at 239.

sphere of constitutional legislation.”¹¹ In 1903, in *Yatamaya v. Fisher*, the Court held that deportation procedures must conform to due process requirements, including the right “to be heard upon the questions involving [the] right to be and remain in the United States.”¹² Over seventy years later, the Supreme Court clarified that “[e]ven one whose presence in this country is unlawful, involuntary, or transitory is entitled to . . . constitutional protection.”¹³ Thus, non-citizens present within the borders of the United States, whether or not they have lawful status, are entitled to due process constitutional protections in challenging deportation charges.¹⁴

However, the due process rights for those arriving at the border who have not been admitted are much more limited.¹⁵ Non-citizens at the border without permission to enter the United States are considered “excludable” and can face immediate deportation without the due process safeguards that apply to those who have already entered the United States. For immigration purposes, presence at a port of entry is not considered an admission, nor is being transferred “from ship to shore,” in the case of stowaways on shipping vessels, for example.¹⁶ This Note focuses only on non-citizens who are considered to have entered the United States for immigration purposes, although the application of due process protections to non-citizens, particularly those who assert a claim to asylum, arriving at American ports of entry, is a topic that merits more scholarly treatment.¹⁷

B. *The Asylum Process*

Language access issues permeate the U.S. immigration system. This Note narrows its focus to asylum as a lens through which to explore broader issues of language access. Under international and domestic law, people fleeing a well-founded fear of persecution on account of five protected grounds—race, religion, nationality, political opinion, or membership in a particular social

11. *Id.*

12. *Yamataya v. Fisher* (The Japanese Immigrant Case), 189 U.S. 86, 101 (1903).

13. *Mathews v. Diaz*, 426 U.S. 67, 77 (1976).

14. See generally, Nimrod Pitsker, *Due Process for All: Applying Eldridge to Require Appointed Counsel for Asylum Seekers*, 95 CAL. L. REV. 169, 173 (2007).

15. See, e.g., *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (“It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law . . . But an alien on the threshold of initial entry stands on a different footing: ‘Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned’” [internal citations omitted]); *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (holding that denying an arriving alien a hearing was not a violation of due process; the Court indicated that “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”).

16. Pitsker, *supra* note 14, at 174.

17. See Leidy Perez-Davis and Kate Voigt, *Policy Brief: “Remain in Mexico” Plan Restricts Due Process, Puts Asylum Seekers Lives at Risk*, AM. IMMIGRATION LAWYERS ASS’N (Feb. 1, 2019) <https://www.aila.org/File/DownloadEmbeddedFile/78615>. For example, the “Remain in Mexico” policy recently implemented by the Trump administration in January 2019 implicates the question of due process rights for asylum-seekers arriving at certain ports of entry along the US-Mexico border. The new policy requires arriving asylum-seekers to wait in Mexico for their asylum hearing before a U.S. immigration judge.

group—may fit the definition of “refugee.”¹⁸ This definition is laid out in the U.N. Protocol Relating to the Status of Refugees, a binding international agreement to which the United States is a party.¹⁹ With the passage of the 1980 Refugee Act, Congress incorporated its international obligations to refugees into domestic law and established a statutory right for all non-citizens, including those excludable and deportable, to apply for asylum.²⁰

Non-citizens may apply for asylum affirmatively before an asylum officer through U.S. Citizen and Immigration Services (USCIS), an agency within DHS, or defensively in a removal proceeding before an immigration judge through the Executive Office of Immigration Review (EOIR), within the Department of Justice.²¹ Non-citizens with valid or lapsed non-immigrant status in the United States (i.e., tourist visas, student visas) may apply affirmatively for asylum with USCIS.²² The interview with USCIS takes place with an asylum officer (AO) in one of eight regional asylum offices in the United States.²³ The interview is technically non-adversarial; an asylum-seeker may have counsel and an interpreter present, but neither can be at the expense of the Government.²⁴ If asylum is granted at this stage, the asylum-seeker may later adjust their status and obtain legal permanent residency, putting them on the path to citizenship.²⁵ If asylum is not granted and the non-citizen’s visa has lapsed, the non-citizen is referred to EOIR and placed into removal proceedings.²⁶ If their non-immigrant status is still valid and asylum is not granted, their claim is simply rejected and they are permitted to remain in the United States until the end of their visa’s validity.

Non-citizens raise defensive applications for asylum after they are placed in removal proceedings before EOIR.²⁷ Non-citizens are placed in removal proceedings for a number of different reasons: their affirmative asylum application may have been denied, their non-immigrant visa may have lapsed, they may be arriving at a port of entry without entry documents and express a fear of return to their home country, they may have entered the United States without passing through an official port of entry and thus have “undocumented” status, or they may have valid immigrant status but have been convicted of a crime that makes them removable from the United States. In a removal hearing before an EOIR immigration judge, the asylum-seeker may have counsel present, but, as in the affirmative process, not at the expense of

18. United Nations Protocol Relating to the Status of Refugees, art. 1, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577.

19. *Id.*

20. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A)(2005); See, e.g., *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1038 (5th Cir. 1982).

21. JAYA RAMJI-NOGALES, ET AL., *REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM* 11 (2009).

22. *Id.*

23. *Id.* at 12.

24. *Id.*

25. *Id.* at 14.

26. *Id.* at 13.

27. *Id.* at 14.

the Government.²⁸ An interpreter is provided at Government expense at this stage. Interpreters are either contractors or work directly for EOIR.²⁹ If the asylum-seeker speaks a language other than the most commonly spoken languages (i.e., Spanish, Chinese, etc., although this is dependent on the location of the Immigration Court), the asylum-seeker must make a motion for an interpreter who speaks their language ahead of their asylum merits hearing.

The issue of language access for both affirmative and defensive applications for asylum is crucial because the potential for miscommunication is high without quality interpretation, and the consequences of deportation can be dire for asylum-seekers. Asylum-seekers, by definition, are seeking safety from specific kinds of persecution in their home countries.³⁰ As such, the stakes of a hearing are quite high; the outcome of an asylum hearing (before USCIS) or removal hearing (before EOIR) can mean the difference between freedom and persecution, or even life and death.³¹ Some commentators have suggested that because the consequences of deportation can be so serious for asylum-seekers, they constitute a particularly vulnerable group and there should thus be additional procedural safeguards to protect asylum-seekers' due process rights, such as a categorical right to legal counsel³² or, in the alternative, a "front end" due process analysis to determine whether asylum-seekers require legal representation.³³

In addition to the high stakes of deportation, there are other compelling arguments advanced in favor of greater due process protections for asylum-seekers. One is that people who have experienced persecution are much more likely to have experienced trauma, which can significantly inhibit one's ability to "articulate a linear narrative that effectively summarize[s] their experiences."³⁴ Language access is particularly relevant here: interpretation inaccuracies can blend with other challenges to articulating a clear narrative, such as trauma and resulting memory loss, to compound inconsistencies and credibility issues, leading to a denial of relief.

28. *Id.*

29. Laura Abel, *Language Access in the Immigration Courts*, BRENNAN CTR FOR JUSTICE (2011) at 1, available at https://www.brennancenter.org/sites/default/files/legacy/Justice/LangAccess/Language_Access_in_Immigration_Courts.pdf.

30. Miguel A. Gradilla, *Making Rights Real: Effectuating the Due Process Rights of Particularly Vulnerable Immigrants in Removal Proceedings Through Administrative Mechanisms*, 4 COLUM. J. RACE & L. 225, 240–41 (2014).

31. Dree K. Collopy, *Lost in Translation: Why Professional Interpreters are Critical in Asylum Interviews*, 27 IMMIGRATION LAW TODAY 12, 13 (May/June 2008) <http://www.ailadownloads.org/ilt/2008/May-June08ILTFullText.pdf>.

32. Pitsker, *supra* note 14, at 171.

33. Gradilla, *supra* note 30, at 240.

34. Alana Mosley, *Re-Victimization and the Asylum Process: Jimenez Ferreira v. Lynch: Re-Assessing the Weight Placed on Credible Fear Interviews in Determining Credibility*, 36 LAW & INEQ. 315, 326 (2018).

C. *The Nexus of Due Process and Language Access*

The Fifth and Fourteenth Amendments of the Constitution of the United States provide, in relevant part, that no person should be “deprived of life, liberty, or property” without due process of law.³⁵ While the Constitution does not explicitly define what is needed for due process of law, it is well-accepted that the two primary components are 1) notice and 2) opportunity to be heard.³⁶ The connection between language access and due process is simple enough: limited English proficient (LEP) persons can neither receive notice nor can they enjoy a reasonable opportunity to be heard without interpretation from their language to English, the language of the notice and proceedings, and vice versa.

The right to an interpreter in the criminal justice system is well-settled and instructive for examining the nexus between due process and language access. As the American Civil Liberties Union (ACLU) has pointed out, “Every federal court of appeals to consider the question [of the constitutional right to an interpreter for LEP defendants in criminal cases] has recognized that the right to an interpreter implicates rights” of the Fifth and Fourteenth Amendment right to due process and a fair hearing.³⁷ Elsewhere, the ACLU has argued that: “the Constitution’s promise is meaningless when a defendant’s right to liberty is determined at a trial that is incomprehensible to her.”³⁸ For example, the Nevada Supreme Court has emphasized the futility of a trial without interpretation; “a criminal defendant who cannot understand the proceedings going on around him . . . has not received due process of law. He or she might as well have been tried in his or her absence.”³⁹ The suggestion that a defendant who cannot understand the trial because of language interpretation issues is tantamount to the defendant not even being physically present powerfully illustrates just how crucial accurate language interpretation is for ensuring due process and fundamental fairness. However, these considerations do not play out in the same way in the asylum context for three main reasons: 1) deportation is a civil penalty, not a criminal one, so due process rights are abridged; 2) unlike the criminal context,⁴⁰ an applicant in the immigration context must show that interpretation errors or an altogether

35. U. S. Const. amends. X, XIX.

36. See, e.g., *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (“The fundamental requisite of due process of law is the opportunity to be heard . . . This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.” (internal citations and quotation marks omitted)).

37. Brief for American Civil Liberties Union of Georgia as Amici Curiae Supporting Respondent, *Ling v. Georgia*, (No. S10-C0460) at 1, 4, available at https://www.aclu.org/sites/default/files/field_document/2010-5-28-LingvGeorgia-AmicusBrief.pdf.

38. American Civil Liberties Union, *ACLU Filed Friend-Of-The-Court Brief with Georgia Supreme Court* (June 7, 2010), <https://www.aclu.org/news/defendants-limited-english-proficiency-have-constitutional-right-court-interpreters-says-aclu>.

39. *Ton v. State*, 110 Nev. 970, 971–72 (Nev. 1994).

40. See *State v. Calderon*, 13 P.3d 871, 879 (Kan. 200) (reversing conviction because the failure to provide interpretation during key parts of the hearing violated a constitutional right, even though no prejudice was shown).

lack of interpretation prejudiced the outcome of her case, and; 3) courts are extremely wary of explicitly articulating a due process right to language interpretation in immigration proceedings for non-citizens in the Constitution, opting instead as framing the issue as a statutory right.

III. STANDARDS FOR LANGUAGE ACCESS IN ASYLUM PROCEEDINGS

The following section details the relevant statutes and administrative sources of law that comprises the current state of play of language access and due process in affirmative and defensive asylum proceedings.

A. *Statutory and Administrative Sources of Law*

The Immigration and Nationality Act (INA), the main statute governing all immigration policy and procedures, is silent as to language access. It does, however, establish that non-citizens should have “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.”⁴¹

Agency-made regulations explicitly address the issue of interpretation, but only briefly. The relevant provision, “Interpreters,” requires that: “Any person acting as an interpreter in a hearing shall swear or affirm to interpret and translate accurately, unless the interpreter is an employee of the United States Government, in which event no such oath or affirmation shall be required.”⁴²

Another important source of law for language access in both affirmative asylum interviews before USCIS and removal proceedings before EOIR is Executive Order 13166. Signed by President Clinton in 2000, the Executive Order directed agencies to identify and address the needs of Limited English Proficiency, or LEP persons. While some find that this Executive Order was not effective in addressing the needs of LEP persons,⁴³ the fact that the issue of language access was elevated to such a high level is striking.

B. *Agency Guidance*

1. *USCIS*

As stated previously, USCIS is the agency within DHS that conducts non-adversarial interviews with affirmative asylum applicants. USCIS does not provide interpreters if language interpretation is needed; the asylum-seeker must provide their own.⁴⁴ The rationale often given for the agency’s inability

41. 8 U.S.C. § 1229a(b)(4)(B).

42. 8 C.F.R. § 1003.22.

43. See Abel, *supra* note 29, at 5 (arguing that EOIR does not provide “meaningful access” according to the language access requirements prescribed by EO 13166).

44. U.S. CITIZENSHIP & IMMIGRATION SERVS., RAIO Directorate - Officer Training: Interviewing – Working with an Interpreter Training Module (Nov. 25, 2015) 11, available at https://www.uscis.gov/sites/default/files/files/nativedocuments/Interviewing_-_Working_with_an_Interpreter_LP_RAIO.pdf. [hereinafter RAIO Officer Training].

to provide an interpreter is that it would be too expensive for the government to provide all applicants who are affirmatively applying for a benefit, asylum, with interpreters.⁴⁵ However, USCIS does pay for interpreters, but asylum-seekers are not allowed to use their services: USCIS utilizes “professional interpreter monitors” via telephone to check the accuracy, completion, and neutrality of the asylum-seeker’s interpreter.⁴⁶ Thus, the asylum-seeker incurs a cost in paying an interpreter to accompany them to the interview (who may or may not be a professional), or they must bring along a friend or family member who is likely not trained in interpretation, which can result in a number of communication issues.⁴⁷

USCIS has developed detailed guidance for how its adjudicators, including Asylum Officers, should evaluate the interpretation of interviews; this guidance changed in 2017, when the agency made a number of modifications to its policy. One major change was the prohibition of family members of the asylum applicant or any individuals under the age of 14 from serving as interpreters.⁴⁸

Significantly, USCIS has separate guidance for its officers working with refugees and asylum-seekers from the Refugee, Asylum, and International Operations Directorate (RAIO), suggesting that the agency recognizes the high stakes of accurate interpretation in asylum proceedings.⁴⁹ Within that guidance is a training module on working with interpreters, which comprises over forty pages of detailed guidelines, exercises, and additional recommended reading for USCIS asylum adjudicators to ensure language access and evaluate the accuracy and adequacy of interpretation during the interview.⁵⁰ The existence of thoughtful and detailed guidance exhibits a clear commitment to ensuring language access through training of its adjudicators.

However, the stark fact remains that USCIS does not provide interpreters to affirmative asylum applicants. Thus, the onus is on individual AOs to identify any interpretation problems, but the responsibility for ensuring language access should be on the agency as a whole to provide certified and trained interpreters. The fact that interpreters are already present telephonically to check the interpretation—at government expense—further strengthens the argument that the agency should simply provide interpreters.

45. See, e.g., *Abdullah v. Immigration and Naturalization Serv.*, 184 F.3d 158, 165 (2d Cir. 1999) (finding that the individual interest in having an interpreter furnished at government expense is mitigated when it involves an affirmative, “generous” immigration benefit, as opposed to punishment or deprivation; as such, the government is not required by due process to provide interpreters in affirmative immigration settings).

46. RAIO Officer Training, *supra* note 44.

47. Collopy, *supra* note 31, at 14.

48. U.S. CITIZENSHIP & IMMIGRATION SERVS., PM-602-0125.1, THE ROLE AND USE OF INTERPRETERS IN DOMESTIC FIELD OFFICE INTERVIEWS 4, 5 (2017), available at <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-17-1-RoleUseInterpreters-PM-602-0125-1.pdf>.

49. See RAIO Officer Training, *supra* note 44.

50. *Id.*

2. *Executive Office for Immigration Review*

As stated, EOIR oversees the immigration courts and the BIA. Unlike in affirmative asylum interviews, interpreters are provided for all removal hearings before the immigration courts, including those in which non-citizens assert a defensive application for asylum.

EOIR offers multiple sources of guidance for how interpretation should be conducted and monitored. First, the Immigration Court Practice Manual states that: “Interpreters are provided at government expense to individuals whose command of the English language is inadequate to fully understand and participate in removal proceedings. In general, the Immigration Court endeavors to accommodate the language needs of all respondents and witnesses.”⁵¹

The EOIR plan for implementing President Clinton’s Executive Order to ensure access for LEP persons, published over a decade after the Executive Order was issued, also offers some indication for how interpreters are selected:

[Interpreters] must have at least one year of specialized experience interpreting non-routine material consecutively in a judicial environment. They must also have at least one year of specialized experience interpreting non-routine material simultaneously in a judicial environment. Additionally, interpreters must have comprehensive knowledge of the linguistic aspects of court interpretation and a mastery of vocabulary, grammar, syntax, idiom, colloquialism, culturally-based terms, and technical terms in English and a foreign language. EOIR interpreters must also pass a test and skills assessment, which is modeled on the requirements used by the federal judiciary and many state courts.⁵²

Another important source of guidance on interpretation in the immigration courts is the Immigration Judge Benchbook. However, in 2017, many materials regarding the training and certification of immigration judges, including the Benchbook, were removed from EOIR’s website, and thus they are no longer publicly available. As of May 2019, EOIR had released some training materials in response to a Freedom of Information Act request, but none of the materials appeared to pertain to language interpretation in immigration court proceedings.⁵³

51. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL ¶ 4.11 (2018), available at <https://www.justice.gov/eoir/page/file/1084851/download>.

52. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW’S PLAN FOR ENSURING LIMITED ENGLISH PROFICIENT PERSONS HAVE MEANINGFUL ACCESS TO EOIR SERVICES 3 (2012), available at <https://www.justice.gov/sites/default/files/eoir/legacy/2012/05/31/EOIRLanguageAccessPlan.pdf>.

53. AM. IMMIGRATION LAWYERS ASS’N, AILA DOC. NO. 18082203, EOIR RELEASES MATERIALS FROM THE 2018 LEGAL TRAINING PROGRAM FOR IMMIGRATION JUDGES (2018), available at <https://www.aila.org/infonet/eoir-2018-training-program-judges>.

C. *The Reality on the Ground*

Although top-down initiatives on language access, like Executive Order 13166, and guidance and standards for interpretation and language access in both USCIS and EOIR give the appearance of a comprehensive framework for language access, the reality on the ground is concerning.

As noted, in the USCIS context, the asylum-seeker must provide their own interpreter for their interview with an AO. This means that the asylum-seeker must pay someone to accompany them (who may or may not be a professional) or bring along a friend or family member who speaks English but is likely not trained in language interpretation. As one commentator has pointed out, this means that the government depends on the asylum-seeker to ensure effective communication, but asylum applicants often experience challenges in securing any interpreter at all, let alone someone qualified.⁵⁴ Even if they are able to find someone, either through their immigrant community or paying someone from the growing industry of uncertified interpreters who accompany asylum-seekers to their asylum interviews, the interpreter is likely untrained and thus not suitable to interpret an often detailed and technical interview with specialized language.⁵⁵

Regarding EOIR, where interpreters are provided at government expense, a number of language access problems persist. The Brennan Center for Justice at the New York University School of Law published a report in 2011 that detailed pressing language access problems in four different areas: “1) Partial interpretation impedes LEP respondents’ ability to understand proceedings; 2) Inconsistent interpreter quality impedes LEP respondents’ understanding of proceedings and prejudices testimony; 3) Inadequate telephone and videoconference technology compromise interpretation quality, and; 4) Immigration Court forms and websites are not available in commonly spoken languages.”⁵⁶

The Brennan Center report also highlights concerns with the way that the agency certifies its interpreters:

Unlike the federal district courts, EOIR does not require that its court interpreters be certified by the Administrative Office of the U.S. Courts, nor does EOIR use the certification exam developed by the Consortium for Language Access in the Courts, which is used by the majority of state court systems. Instead, Immigration Court interpreters are screened internally either by EOIR’s Language Services Unit or through a proprietary process developed by Lionbridge Global Services, a private language contractor. Neither EOIR nor Lionbridge appears to have made public any information regarding the content,

54. Collopy, *supra* note 31, at 14.

55. *Id.*

56. Abel, *supra* note 29, at 5.

reliability or validity of the screening processes used by the Language Services Unit or Lionbridge.⁵⁷

An immigration court interpreter similarly noted the following in his blog: “Rigorous criteria for court interpreter certification, created for legal certainty, are not applied or followed by most administrative courts . . . EOIR[] requires no reputable universally accepted court interpreter certification (federal or state level). It only requires candidates to pass a test with no scientific validation offered online . . .”⁵⁸

Thus, as this review demonstrates, problems of language access and quality exist in both agencies where people fleeing persecution in their home countries must petition for a grant of asylum. Because of this reality on the ground, in combination with the high stakes of deportation for asylum seekers and our international obligation not to return asylum-seekers to a country where they will face persecution, courts should be all the more vigilant about ensuring that asylum-seekers are granted the full panoply of constitutional due process rights available to them, including meaningful language access.

IV. THE HISTORY OF LANGUAGE ACCESS AND DUE PROCESS

The case law dealing with language access has evolved a great deal since the late nineteenth century, when the Supreme Court considered a number of landmark immigration cases that formed the basis for modern immigration-related jurisprudence in the United States. While some early cases indicated that language access could be framed as a constitutional due process right,⁵⁹ courts eventually retreated from this position to one whereby language access was guaranteed by statute only, not the Constitution.

Interestingly, in *Yamataya v. Fisher*, the very Supreme Court case that established in 1903 that deportation hearings for legal immigrants must comport with due process requirements, the Court held that failure to provide interpretation to an immigrant who did not speak English in her deportation hearing *did not* violate due process.⁶⁰ A young Japanese girl, lawfully admitted as a student, was pronounced to be deportable because she was likely to become a public charge.⁶¹ Her uncle, who lived in the United States, filed a habeas corpus petition on her behalf. The petition alleged that her deportation hearing violated due process because, among other reasons, she neither spoke nor understood the language of her hearing, English. The Supreme Court’s sharp response to this claim is illustrative of the perspective of the time:

57. *Id.* at 6.

58. *Ignoring Court Certifications is Turning Fashionable*, THE PROF. INTERPRETER (Apr. 23, 2018), <https://rpstranslations.wordpress.com/2018/04/23/ignoring-court-certifications-is-turning-fashionable/>.

59. *See, e.g.*, *Gonzales v. Zurbrick* 45 F.2d 934, 936 (6th Cir. 1930).

60. *Yamataya*, 189 U.S. at 102.

61. *Id.* at 94.

If the appellant's want of knowledge of the English language put her at some disadvantage in the investigation conducted by that officer, that was her misfortune, and constitutes no reason, under the acts of Congress, or under any rule of law, for the intervention of the court . . . for the contention that due process of law was denied to appellant.⁶²

In *Yamataya*, the court was unequivocally clear that immigrants who could not speak English had no due process right to have their deportation hearing interpreted into a language they could understand.

Just twenty-seven years later, the Sixth Circuit took a very different approach in *Gonzales v. Zurbrick*, another habeas case presenting egregious facts. In *Gonzales*, a Mexican citizen, Helen Gonzales, was abandoned by her husband. Subsequently, an immigration inspector accused her of prostitution, a deportable offense.⁶³ Through a Spanish interpreter, Alex Le Doulx, the woman denied she was a prostitute twice, but then admitted to practicing prostitution.⁶⁴ At a hearing about the prostitution charge, during which Le Doulx was again the interpreter, Gonzales stated that she did not understand Le Doulx.⁶⁵ Once another interpreter was brought in, Gonzales clarified that she had never practiced prostitution, and that she had not understood Le Doulx, particularly his translation of "prostitution," during the initial interview when she mistakenly admitted to having worked as a prostitute.⁶⁶ Gonzales was ordered deported, and she petitioned for review; after several hearings by reviewing bodies, the Spanish language qualifications of Le Doulx were examined.⁶⁷ Le Doulx, a Frenchman, testified that he had learned to "speak Mexican" while working in Egypt, where he occasionally met Mexicans and others who had lived in Mexico.⁶⁸

The Court determined that Le Doulx's "qualifications" did not allow him to competently interpret Spanish and made a number of powerful statements often cited in contemporary language access cases. While the Court did not reach the constitutional question in the case at bar, it stated in dicta that: "The function of an interpreter is an important one. It affects a constitutional right. The right to a hearing is a vain thing if the alien is not understood. Deportation is fraught with serious consequences."⁶⁹

Further, the Court carefully distinguished its holding from that in *Yamataya*, training its focus on the qualifications of the government-appointed interpreter instead of the non-citizen's lack of English abilities. The Sixth Circuit maintained that "[w]e do not regard the comment of Mr.

62. *Id.* at 102.

63. *Gonzales*, 45 F.2d at 935.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 936.

68. *Id.*

69. *Id.* at 937.

Justice Harlan in [*Yamataya*] . . . touching on the alien’s lack of knowledge of our language, as applicable, where a hearing is claimed unfair because of the incompetency [*sic*] of the government’s interpreter.”⁷⁰

The Sixth Circuit’s approach to language access and due process is significant for several reasons. First, this was the first time a federal court of appeal had indicated that language access in immigration proceedings implicated a due process right. The interpreter’s qualifications were so lacking that it would be difficult for any court to ignore completely his incompetence, but the court simply could have cited to *Gonzales*’s lack of English, as did the *Yamataya* court, to place the onus on the non-citizen for ensuring effective communication. Second, the Sixth Circuit navigated skillfully around *Yamataya*’s condemnation of immigrants for not speaking English, paving the way for other courts to do the same and preserve the right to competent interpretation for immigrants. Finally, the political and economic context in which this case was decided makes it all the more extraordinary. It was decided in 1930, just as the economic downturn of the Great Depression was producing widespread anti-immigrant sentiment, which translated into dramatic increases in deportations and “voluntary” departures of non-citizens.⁷¹ That *Gonzales v. Zurbrick* could withstand such powerful social and political forces is remarkable indeed. As demonstrated later,⁷² however, courts have since retreated from the position taken by the Sixth Circuit in 1930.

V. CASE LAW: MAPPING DUE PROCESS AND LANGUAGE ACCESS

Federal courts of appeal and the BIA shy away from framing language access as an issue of constitutional due process. Other scholars have noted that where courts suggest that constitutional due process may be implicated in the immigration context, the three-part *Mathews v. Eldridge* balancing test—which weighs private interests, government interests, and the risk of error—is appropriate (and indeed, courts sometimes apply it).⁷³ However, in language access due process cases, the *Eldridge* framework has not been explicitly applied in the context of asylum.⁷⁴ Despite this, some courts go through what appears to be a quasi-*Eldridge* balancing test, whereby courts weigh the interests of the non-citizen against those of the government, sometimes touching on the third prong—the risk of error.

The foregoing analysis reveals three different approaches to language access issues: 1) courts express general discomfort where language access is restricted but are unwilling to frame the issue as one of due process; 2) courts

70. *Id.*

71. *Migration and Immigration During the Great Depression*, AM. YAWP, available at <https://courses.lumenlearning.com/ushistory2ay/chapter/migration-and-immigration-during-the-great-depression-2/>.

72. See *infra* Section V.

73. Pitsker, *supra* note 14, at 174.

74. One example outside of the asylum context where a court has applied *Mathews* in a language access due process case is *Abdullah v. I.N.S.*, *supra* note 45 (holding that under *Mathews*, the government did not have to provide interpreters in cases involving an affirmative benefit).

hint, in varying degrees, at a constitutional due process right to language access but do not squarely address this in their holding, and; 3) courts locate language access as within the panoply of constitutional due process rights due to non-citizens, but are unwilling to find a violation because the non-citizen failed to show prejudice.

*Kovac v. INS*⁷⁵ illustrates the first approach: courts' discomfort with issues of language access but unwillingness to reach the question of constitutional due process. In this Ninth Circuit case from 1969, a Yugoslavian crewman sought political asylum after his ship docked in the United States.⁷⁶ He claimed that he had been discriminated against in his home country and would be subject to persecution upon return because of his Hungarian background.⁷⁷ At his deportation hearing, Kovac asserted that he could not understand the nature of the proceedings and the meaning of the questions presented to him.⁷⁸ Furthermore, the Court noted in a footnote that Kovac's answers were not responsive to the questions asked.⁷⁹ The Court cited as an example: "after the trial attorney had completed his examination, the special inquiry officer asked petitioner [Kovac] if he had anything else to present. The petitioner replied, 'I can't go back anymore because they would keep me out of that.' No effort was made to clarify this enigmatic response."⁸⁰

Because of his lack of understanding, the Court found that Kovac was unable to convey the full basis for his fear of persecution.⁸¹ As such, the Court expressed "grave doubt" whether the hearing gave Kovac a "reasonable opportunity" to present his evidence; having the opportunity to do so was "particularly important" in light of the "high stakes" involved in the deportation of someone who might face persecution in his or her home country.⁸² Here, the Court hinted at the idea of due process, saying that Kovac should have a "reasonable opportunity" to present his case and ultimately remanding the case to offer Kovac such an opportunity, but declined to even use the term "due process," and certainly not did not even reach the remotest margins of a constitutional due process argument. This is representative of one approach where the specter of due process looms in the background of the reasoning and outcome but is not cited explicitly.

The second approach taken by courts is to hint, but stop short of squarely holding, that language access implicates a constitutional due process right. Often cited as the contemporary example of a federal court of appeal recognizing the right to competent interpretation in removal proceedings, *Augustin*

75. 407 F.2d 102 (9th Cir. 1969).

76. *Id.* at 103.

77. *Id.* at 104.

78. *Id.* at 108.

79. *Id.* at 108 n.12.

80. *Id.*

81. *Id.* at 108.

82. *Id.*

*v. Sava*⁸³ takes just this approach. The Third Circuit held that Augustin's procedural rights were violated by the inadequate and at times, "nonsensical" translation of his removal hearing before the immigration judge.⁸⁴ As an example of the interpretation errors that occurred, when Augustin was asked if he was a native of Haiti, the interpreter translated his answer as "I am not married yet, but I know I am the Haitian."⁸⁵ Here, the Court hinted at a constitutional interpretation of the right to an interpreter, stating that:

[T]hese elemental procedural protections may well be required not only by the pertinent statutes and regulations but also by the due process clause of the Fifth Amendment. In the absence of protected interests which originate in the Constitution itself, constitutionally protected liberty or property interests may have their source in positive rules of law creating a substantive entitlement to a particular government benefit.⁸⁶

Furthermore, although the Court declined to "precisely . . . map the contours of due process in the immigration area," it opined that "the protected right to avoid deportation or return to a country where the alien will be persecuted warrants a hearing where the likelihood of persecution can be fairly evaluated Since Congress intended this right to be equally available to all worthy claimants without regard to language skills, we think that an applicant for relief . . . must be furnished with an accurate and complete translation of official proceedings."⁸⁷

Finally, the Court explicitly disavowed the holding in *Yamataya* by saying "[t]o erect barriers by requiring comprehension of English would frustrate the inclusive aim of the UN Protocol and the intent of Congress," referring to the Refugee Act.⁸⁸

In *Marincas v. Lewis*,⁸⁹ the Third Circuit held that, to be consistent with due process, the INA should be construed to require interpreters when administrative officers interview asylum applicants who do not speak English.⁹⁰ The non-citizen, Marincas, was a stowaway on a ship that arrived in the United States in April 1994.⁹¹ As a former soldier in the Romanian army, Mr. Marincas expressed a fear of return to Romania because he claimed he had been subjected to political persecution there.⁹² He did not speak English, but he was not provided with any interpretation or translation assistance in

83. 735 F.2d 32 (2d Cir. 1984).

84. *Id.* at 33.

85. *Id.* at 35.

86. *Id.* at 37 (internal citations omitted).

87. *Id.*

88. *Id.* at 37-38.

89. *Marincas v. Lewis*, 92 F.3d 195, 204 (3d Cir. 1996).

90. *Id.*

91. *Id.* at 196-97.

92. *Id.* at 196.

preparing his application for asylum or during his asylum hearing.⁹³ The Court underscored the importance of an interpreter to anyone applying for asylum, including stowaways like Marincas:

Thus, in addition to requiring the INS [the Immigration and Naturalization Service, the agency that preceded the Department of Homeland Security] to apply to stowaways those procedures which are provided all asylum applicants, we also hold that at a minimum those procedures must also include the services of a translator. Otherwise, an asylum applicant's procedural rights would be meaningless in cases where the judge and asylum applicant cannot understand each other during the hearing.⁹⁴

In addition to federal appeals courts, the BIA took a similar approach. In *Matter of Tomas*,⁹⁵ the BIA held that a minor family member could not serve as a competent interpreter. In doing so, it established that the presence of a competent interpreter for non-citizens who cannot speak fluent English is important to the fundamental fairness of the hearing. The non-citizens were a Guatemalan family who all spoke Kanjobal.⁹⁶ The immigration judge denied the request for a Kanjobal interpreter and denied the application for asylum, as the judge found they had failed to show that they would be in danger of harm in Guatemala.⁹⁷ During the hearing, the respondents stated repeatedly that they were unable to communicate fully with the interpreter, who spoke Spanish.⁹⁸ As such, the immigration judge determined that the respondents could sufficiently present their case in Spanish with the help of the fifteen-year-old daughter who spoke Kanjobal and Spanish.⁹⁹ In remanding the case to the immigration judge, the BIA held that “[d]ue process requires that respondents must be able to participate meaningfully in certain phases of their own hearing.”¹⁰⁰ Reliance on the daughter of the family as an interpreter for the Spanish of the official interpreter into the native Kanjobal language of the respondents, thus violated due process.¹⁰¹ The BIA further recognized that there is an important difference between the ability to understand a language and the ability to fully translate thoughts from one language to another, which is why competent, professional interpreters are needed in this context.¹⁰²

93. *Id.* at 204.

94. *Id.*

95. 19 I. & N. Dec. 464 (BIA 1987).

96. *Id.* at 465.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 465-66.

102. *Id.* at 465.

Finally, there is a third approach to mapping the contours of language access and constitutional due process. Courts have found that language access issues implicate constitutional due process, but have declined to find a due process violation when the non-citizen is unable to make a showing of prejudice. *El Rescate Legal Services v. EOIR*, a Ninth Circuit case from 1991, is representative of such an approach.¹⁰³ In *El Rescate*, the Court held that the entire removal hearing did not have to be interpreted for immigrants with limited English abilities in order to comport with due process requirements.¹⁰⁴ Plaintiffs brought a class action on behalf of all non- and limited-English-speaking individuals in immigration court proceedings in the Los Angeles, El Centro, and San Diego immigration courts, alleging that EOIR's practice of using incompetent translators and not interpreting many portions of immigration court hearings violated constitutional due process and equal protection.¹⁰⁵ The Court recognized that constitutional due process applied in this case and clarified which due process protections applied:

We have spoken clearly regarding the protections that the Constitution affords aliens: an alien within the United States is entitled to the guaranty of procedural due process embodied in the Fifth Amendment in a deportation hearing. Constitutional due process requirements are satisfied in such an instance only by a full and fair hearing. The alien has been denied the full and fair hearing which due process provides only if the thing complained of causes the alien to suffer some prejudice.¹⁰⁶

However, the Court held that the non-citizens failed to show prejudice and articulated quite a high bar for showing prejudice: "Plaintiffs have failed to show 'that no set of circumstances exists under which the Act would be valid. The fact that [the regulations, which do not provide for the interpretation of the entire hearing into respondents' native languages] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid.'"¹⁰⁷ The court in *El Rescate* interpreted the bar for showing prejudice extraordinarily high, exhibiting what appears to be a very strong reluctance not only to overturn agency regulations, but also to articulating a constitutional due process right to the interpretation of an entire deportation hearing.

*In Re: Juan Carlos Moreno-Tinoco*¹⁰⁸ also illustrates this line of reasoning; while unpublished BIA opinions do not carry precedential weight, this particular decision is instructive for its discussion of prejudice. The non-citizen in

103. *El Rescate Legal Servs., Inc. v. Exec. Office of Immigration Review*, 959 F.2d 742 (9th Cir. 1991).

104. *Id.* at 752.

105. *Id.* at 745.

106. *Id.* at 750.

107. *Id.* at 752.

108. No.: AXX XX0 133 - BATA, 2006 WL 1558721 (DCBABR Apr. 27, 2006).

this case stated that he could not understand what transpired in his removal proceeding due to interpreter error.¹⁰⁹ However, the BIA emphasized, as other courts have in the past, that the applicant must demonstrate that the interpreter error prejudiced his case:

Even if the respondent had established that the translation of his hearing was defective, moreover, such defects would not constitute a due process violation in the absence of prejudice—i.e., proof that the outcome of his proceedings would have been different had a proper translation been completed . . . In this instance, the respondent has merely made a generalized, unsubstantiated claim of prejudice; he has identified no fact or legal argument, which was not communicated either to himself or to the Immigration Judge but which would have compelled dismissal of the charges or the granting of relief had it been communicated. Accordingly, the respondent’s right to a full and fair hearing was preserved.¹¹⁰

These two cases illustrate how courts can use this prejudice requirement to sidestep the question of actually finding that a denial or lack of quality interpretation in immigration proceedings amounts to a violation of constitutional due process.

VI. CONCLUSION

When asked to comment on issues of language access in the U.S. immigration system in the aftermath of Jakelin Caal’s death, an interpreter of Guatemalan indigenous languages working within the system said, “[i]t’s a human right, I would say, that people are heard in their own language when they are in a foreign country.”¹¹¹ As the foregoing review illustrates, however, what seems like a straightforward premise—access to quality language interpretation for asylum-seekers who by definition are unlikely to speak English fluently because they are not from the United States—is not at all straightforward.

Following a review of the nexus between constitutional due process and language access in asylum proceedings in Section II, Section III demonstrated that despite efforts to ensure language access in the two agencies responsible for adjudicating asylum applications, USCIS and EOIR, major language access challenges remain in both the affirmative and defensive application processes. In the affirmative process through USCIS, asylum-seekers must provide their own interpreters, rendering them vulnerable to

109. *Id.* at 1.

110. *Id.* at 2.

111. Ashley Cleek, *The Government Says Border Patrol Agents in the Southwest Speak Spanish - But Many Migrants Speak Indigenous Languages*, THE WORLD, PUBLIC RADIO INT’L (July 2, 2018), <https://www.pri.org/stories/2018-07-03/government-says-border-patrol-agents-southwest-speaks-spanish-many-migrants-speak>.

exploitation or errors in interpretation due to the use of interpreters who may not have the language skills to interpret accurately. There is, however, detailed guidance for adjudicators to evaluate whether interpretation is accurate, which likely helps a great deal in ensuring asylum-seekers are able to present their case. In the defensive process, through EOIR, while interpreters are provided at government expense, there have been numerous complaints about the training and certification of these interpreters, which in turn can result in faulty interpretation with great potential to negatively affect the outcome of the asylum-seeker's case. As Section V then showed, if an interpretation error is identified, it can be very challenging for the asylum-seeker to make the required showing that the outcome of their case was prejudiced by that error.

Sections IV and V traced the trajectory of language access in immigration proceedings as an issue of constitutional due process and identified three main approaches, all of which fall short of identifying denial of language access in immigration proceedings as violating constitutional due process right. Even where courts frame the issue in terms of constitutional due process, they effectively hide behind the required prejudice showing to avoid articulating a clear constitutional due process right to quality language interpretation.

The road to ensuring effective language access for all asylum-seekers will be a long one, as the current system provides inadequate protections for asylum-seekers who may face persecution in their home country if deported from the United States. In the absence of major reforms in USCIS and EOIR guaranteeing asylum-seekers language access and given the high stakes of deportation for people fleeing persecution, the judiciary should subject any such agency findings to particularly strict scrutiny.

One potential way forward is for courts to recognize interpretation errors in the asylum context as *per se* prejudicial, as has been suggested for scenarios where non-citizens are deprived of counsel in removal proceedings.¹¹² Language interpretation is a highly nuanced area, and even a slight mistake, such as mis-translation of a date, could result in irreparable damage to an asylum-seeker's case. In many cases, it is very difficult, if not impossible, to determine the extent to which a faulty interpretation prejudiced the outcome of an asylum case without involving linguistic experts. Judges are not linguistic experts, and courts of review are thus ill-equipped or outright prohibited from taking on these questions. Such an approach merits more scholarly attention and could lend itself to furthering the small but crucial area of scholarship on language access in asylum proceedings.

112. See *Montes-Lopez v. Holder*, 694 F.3d 1085 (9th Cir. 2012); see also *Gomez-Velazco v. Sessions*, No. 14-71747 (9th Cir. May. 31, 2018) (Navarro, J., dissenting).