The Real Message of Matter of R-A-F-

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On February 26, the Attorney General (or more likely, someone authorized to speak on his behalf) issued a precedent decision in *Matter of R-A-F-*. My take on the import of this decision seems to be different than most. Let me first provide some background.

Most people seeking asylum in this country also apply for a lesser form of protection called withholding of removal under Article III of the U.N. Convention Against Torture ("CAT" for short). Whereas asylum provides a path to U.S. permanent residence, CAT only prevents someone with a deportation order from being sent to a country in which they are likely to suffer torture. CAT generally only comes into play where the applicant isn't found eligible for asylum, something which is happening more frequently as the present administration churns out new bars and obstacles to eligibility.

To provide an example, someone who establishes they will likely be murdered or raped if returned to their country may be barred from even applying for asylum if they didn't file their application within one year of their arrival in this country, or if they did not apply for asylum in a third country they passed through en route to the southern border. Even if allowed to apply, they may still be denied asylum if the immigration judge does not determine that their persecution would be for the proper motive. But while our asylum laws as written allow some leeway as to whom the government will afford permanent status in the U.S., the same government is bound by international treaty not to send an individual to a place where they would suffer persecution. It is often CAT that fills the gap between those who are not permitted to remain permanently but should nevertheless not be repatriated.

The U.S. was one of 154 countries to sign the U.N. Convention Against Torture. However, it was the only country to add a "specific intent" requirement to its internal regulations implementing the convention, requiring a finding that the torture "be specifically intended to inflict severe…pain and suffering," and specifically excluding acts that result "in unanticipated or unintended severity of pain or suffering."1 The specific intent requirement seriously undermines the purpose of the law, as many are forced to rely on CAT specifically because they couldn't prove the proper intent of their persecutor that is required for asylum. It is thus necessary for the specific intent provision to be interpreted in the least restrictive manner for CAT to function in its intended way.

In 2002, the BIA had its first chance to interpret how the specific intent requirement should be applied in a case called *Matter of J-E-*. At the time, the BIA was comprised of judges holding diverse views of the law. As a result, the Board was sharply split on the issue. The more restrictive reading won out, but 6 judges dissented.2 Five of them were no longer on the BIA a year later following then Attorney General John Ashcroft's infamous purge of Board judges whom he viewed as too liberal.

An important point that was glossed over in the majority opinion in *Matter of J-E-* and its progeny is that where governments *do* intentionally maintain horrific conditions in its prisons or mental institutions that are intended to punish those institution's populations, they tend to be smart enough not to admit to it. To illustrate this point, I refer to a November 12, 2019 report of the *Washington Post* finding that although the Trump Administration characterized its outrageous treatment of unaccompanied immigrant children as an unintended consequence of the volume of immigrants seeking asylum at the border, such outcome "also was a result of policy decisions that officials knew would ensnare unaccompanied minors in bureaucratic tangles and leave them in squalid conditions."

Cognisant of this fact, in his dissenting opinion in *Matter of J-E-*, Hon. Paul W. Schmidt found the specific intent requirement to be satisfied by a "clearly documented acceptance of extreme mistreatment amounting to torture as a routine aspect of detention in Haiti." Concluding that the Haitian government "cannot claim it does not know what happens to detainees in its prisons," Judge Schmidt found the specific intent requirement to have been met. Hon. Lory D. Rosenberg began her companion dissenting opinion in the case by quoting from the Second Circuit that "Among the rights universally proclaimed by all nations . . . is the right to be free of physical torture."3

In late 2018, the BIA again rejected such arguments and reiterated the majority view of *J-E-* in another precedent decision, *Matter of J-G-R-P-*. This time, the BIA did so in a three-judge panel decision in which there were no dissents. As this decision was published less than 16 months prior to the A.G.'s decision in *R-A-F-*, there was really no need at the time the A.G. issued *R-A-F-* for another decision on the topic.

I thus believe the real motive behind issuing the decision was not to give guidance, but rather to serve warning. While published precedential decisions have always received broad attention, individual BIA appellate judges have felt safe affording relief in sympathetic cases in unpublished decisions where the outcome is generally known only to the parties involved.

A colleague recently made me aware of a job posting within EOIR for an attorney to work not for the Immigration Courts or the BIA, but rather within the office of EOIR's director, James McHenry, who has imposed the administration's political will on the agency's judges with a heavy hand. The job description included "review(ing) court cases including appeals cases for adherence to procedural requirements, proper interpretation and application of statutes, regulations and precedents," and "recommend(ing) action on precedent-setting issues to senior officials." In other words, McHenry was looking to hire what is commonly referred to as a "snitch" to sort through decisions that might not pass muster with the likes of Stephen Miller, and flag them for corrective action. One such shameless staffer apparently flagged *R-A-F-* in this manner, and through the resulting A.G. certification, the case will serve as a cautionary tale for a group of BIA judges that certainly hasn't forgotten the fate of the *Matter of J-E-* dissenters.

The decision in question was issued in September by Appellate Immigration Judge Linda Wendtland, whose retirement party was held this past week. Judge Wendtland is by no means a liberal, and worked the majority of her career for the Department of Justice; prior to her appointment to the BIA, she had been an assistant director with the DOJ's Office of Immigration Litigation. But Judge Wendtland is highly knowledgeable of the law, and is reasonable and fair (all endangered qualities on the present BIA).

Looking to Judge Wendtland's decision below, it would be difficult to find a more sympathetic applicant than R-A-F-. The respondent seeking CAT protection is in his 70s, and suffers from Parkinson's disease, dementia, Major Depressive Disorder, traumatic brain injury, PTSD, and chronic kidney disease. The evidence of record established that if returned to his native Mexico, R-A-F- faced a significant risk of being institutionalized in a facility in which he could be subject to physical and sexual abuse, physical and chemical restraints, and containment in cages and isolation rooms, all without access to justice. Judge Wendtland agreed with the Immigration Judge that such treatment rose to the definition of torture.

Based on her reputation and body of work, Judge Wendtland is undoubtedly someone who had earned the right to have her decision in R-A-F- accorded deference. However, these are different times. And instead of deference, the A.G. (who, of course, knows next to nothing about immigration law or the specific matter in question) chose to unceremoniously refer to himself and then slam the BIA's decision. The legacy of such action will be fully felt the next time a single judge at the BIA has the opportunity to affirm a similarly sympathetic grant of relief, but will instead choose not to do so out of fear and self-preservation. This is not how justice should be afforded to our country's most vulnerable population.

Notes:

1. 8 C.F.R. § 1208.18(a)(5).
2. I am proud to note that the authors of the two dissenting opinions, Paul W. Schmidt and Lory D. Rosenberg, and former BIA judge Cecelia Espenoza, who joined in both dissents, are presently members of the Round Table of Former Immigration Judges.
3. *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

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Jeffrey S. Chase is an immigration lawyer in New York City. Jeffrey is a former Immigration Judge and Senior Legal Advisor at the Board of Immigration Appeals. He is the founder of the Round Table of Former Immigration Judges, which was awarded AILA's 2019 Advocacy Award. Jeffrey is also a past recipient of AILA's Pro Bono Award. He sits on the Board of Directors of the Association of Deportation Defense Attorneys, and Central American Legal Assistance.