

**Ninth Circuit Court****Case:** *Bartolome v. Sessions*, 904 F.3d 803 (9th Cir. 2018)**Date:** Sept. 14, 2018**Panel:** Bea, Smith, Nye**Opinion:** Smith**Tags:** Immigration, reinstatement of removal, MTR, reasonable fear determination, sua sponte, withholding, CAT, persecution, nexus.**Question(s) Presented:**

- Did provision of Spanish-language (rather than indigenous) interpreter cause due process or procedural violations for the reasonable fear hearing?
- Other questions about process
- Did IJ abuse discretion by failing to recognize that he had sua sponte jurisdiction to reopen reasonable fear proceedings?

**Holdings:**

- No due process or procedural errors found.
- “[A]n IJ’s failure to recognize that he or she has sua sponte authority to reopen any matter in which he or she made a decision (including reasonable fear review hearings) is an abuse of discretion.” 807

**Rationale:**

- Because these hearings are expedited, lower standards for evidentiary part. Also, respondent consented readily to arrangements for interpreter, and IJ was careful to ask attorney if there was any more evidence she wanted to present.
- There’s nothing in the regulations that precludes a sua sponte MTR for a reasonable fear hearing, since IJs can sua sponte open any case for any reason. [This is incorrect.]

**Facts:** Citizen of Guatemala first entered U.S. EWI in 1994. Applied for asylum and was denied. Deported in Feb. 2008. Attempted to reenter in June 2008 but DHS ordered expedited removal. Entered again in 2015. Served with reinstatement notice; declared fear of return because of gangs targeting him for economic gain.**Procedural History:**

- **May 6, 2015: Asylum Officer:** negative reasonable fear determination because respondent had failed to establish a reasonable possibility that he would be persecuted or subjected to torture upon his return.
- **May 22, 2015: IJ:** affirmed negative fear determination. Threats respondent experienced had no nexus to protected ground; no evidence that government would not help him with the villagers or the gangs.
- **Aug. 11, 2015: MTR:** IJ rejected it, concluding that court had no authority to consider this motion.
  - **Separate request to USCIS**, which responded that “reasonable fear screening determinations are not subject to motions to reopen or reconsider.” 811

**Appeals to Statute & Precedent:**

- **8 U.S.C. § 1231(a)(5) / INA §241:** expedited removal of noncitizen following reentry after previous removal. Can't reopen THAT removal order. Exceptions for fear of persecution / torture.
- **8 C.F.R. § 1208.31(g):** time limits: reasonable fear hearing with IJ should be conducted within 10 days of the review by asylum officer.
- **8 C.F.R. § 1003.23(b)(1):** on sua sponte reopening of cases—see red text below.

**Discussion:**

- Due Process:  
“these reasonable fear proceedings are to be streamlined, not intended to have full evidentiary hearings, because the alien continues to be subject to the expedited removal process used for previously removed aliens with reinstated orders of removal. Thus, an IJ’s failure specifically to address all of the evidence and claims before him or her (during the reasonable fear review proceedings) does not violate the alien’s due process rights.” 807
- Motion to Reopen:
  - “No statute or regulation specifically addresses whether an alien may file a motion to reopen reasonable fear proceedings.” 815
  - “Nothing in this regulation precludes an alien from filing a motion to reopen before an IJ. To the contrary, § 1003.23(b)(1) provides that an IJ has sua sponte jurisdiction to reopen “any case in which he or she has made a decision.”<sup>12</sup> (emphasis added).” 815 [This is just plain wrong. The rest of the sentence says “*solely in order to correct a ministerial mistake or typographical error in that decision or to reissue the decision to correct a defect in service.*”]

**Commentary:**

**Order of Removal → Reentry & Apprehension → Reinstatement of Order → Declaration of Fear → Reasonable Fear Screening by asylum officer → Negative determination → Appeal to IJ → Review Hearing → Affirmed negative determination → Removal reinstated → MTR sua sponte okay**

- Even a 10% chance of future persecution may establish a well-founded fear.
- Judge’s reasonable fear hearing is a de novo review of asylum officer’s negative fear determination. The manual says “it is not as comprehensive or in-depth as a withholding of removal hearing in removal proceedings.” Immigration Court Practice Manual, ch. 7.4(e)(iv)(E).
- No appeal available from BIA. Can request a review by Circuit Court.