

Due Process Violations – IJ conduct

Serrano-Alberto v. A.G., 859 F.3d 208 (3d Cir. 2017)

“The [Fifth Amendment](#) protects the liberty of all persons within our borders, including aliens in immigration proceedings who are entitled to due process of law—that is, a meaningful opportunity to be heard—before being deported.” 211

“the Immigration Judge here denied Petitioner this fundamental right by actively preventing him from making his case for asylum” 211

“Throughout all phases of [\[**7\]](#) deportation proceedings, petitioners must be afforded due process of law.” 213

“The [Fifth Amendment](#) thus guarantees aliens who are seeking to forestall or terminate removal proceedings an “opportunity to be heard at a meaningful time and in a meaningful manner.” [Dia v. Ashcroft](#), 353 F.3d 228, 239 (3d Cir. 2003) (en banc) (quoting [Mathews v. Eldridge](#), 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)). This guarantee comprises three key protections: (1) “factfinding based on a record produced before the decisionmaker and disclosed to him or her”; (2) the opportunity to “make arguments on his or her own behalf”; and (3) “an individualized determination of his [or her] interests.” *Id.* (internal quotation marks omitted). In other words, petitioners must receive “a full and fair hearing that allows them a reasonable opportunity to present evidence on their behalf,” [Abdulrahman](#), 330 F.3d at 596 (internal quotation marks omitted), and a decision on the merits of their claim by a “neutral and impartial arbiter,” [Abulashvili](#), 663 F.3d at 207. 213

“A petitioner claiming a procedural due process violation because he was not afforded the opportunity to argue on his own behalf is required to show “(1) that he was prevented from reasonably presenting his case[,] and (2) that substantial prejudice resulted.” [Fadiga v. AG of the United States](#), 488 F.3d 142, 155 (3d Cir. 2007) (internal quotation marks omitted).” 213

“The nature of this right is one that focuses [\[**8\]](#) on the fairness of the process itself, see [Cham v. AG of the United States](#), 445 F.3d 683, 691, 693 (3d Cir. 2006), and the substantial prejudice standard “is not so high” as to require a petitioner to prove he “would have qualified for asylum, withholding of removal or CAT relief” but for the alleged violation, [id.](#) at 694. Rather, a petitioner establishes a due process claim by showing that the infraction has “the *potential* for affecting the outcome of [the] deportation proceedings.” *Id.* (quoting [Shahandeh-Pey v. INS](#), 831 F.2d 1384, 1389 (7th Cir. 1987)) (alteration in original).” 213

“the potential for affecting the outcome of any given deportation proceeding requires the court to consider the record in relation to the potential grounds asserted for relief[.]” 213

“While in the vast majority of cases, IJs diligently comport with their constitutional and statutory obligations, and while it is only on rare occasion that we have held an IJ’s conduct crosses the line, the record [\[**28\]](#) here compels us to conclude this is one of those rare cases.” 221

“First, in [Wang v. Attorney General](#), 423 F.3d 260 (3d Cir. 2005), we held the petitioner did not receive due process where the IJ employed a disparaging and sarcastic tone throughout the petitioner’s removal hearing and expressed great disapproval of aspects of the petitioner’s personal life that were irrelevant to his claims, [id.](#) at 263-65.” 221

“Similarly, one year later, in [Cham v. AG of the United States, 445 F.3d 683 \(3d Cir. 2006\)](#), we held due process was violated by an IJ who “continually abused an increasingly distraught petitioner, . . . wholesale nitpick[ed] . . . with an eye towards finding inconsistencies and contradictions,” and denied that petitioner the opportunity to present testimony from critical witnesses who were only available on dates after the hearing, [id. at 691-93](#).” 222

“In contrast, in [Abdulrahman v. Ashcroft, 330 F.3d 587 \(3d Cir. 2003\)](#), although we acknowledged “the language used by the IJ during the hearing and in her opinion [did] reflect an annoyance and dissatisfaction with [the petitioner’s] testimony that [was] far from commendable,” we held that this [\[**32\]](#) palpable “lack of courtesy” did not, without more, violate his due process rights, [id. at 597](#).” 223

“What these cases teach us is that, where a petitioner claims to have been deprived of the opportunity to “make arguments on his or her own behalf,” [Dia, 353 F.3d at 239](#), there is a spectrum of troubling conduct that is fact-specific and must be evaluated on a case-by-case basis to determine if (1) the petitioner “was prevented from reasonably presenting his case[,] and (2) . . . substantial prejudice resulted,” [Fadiga, 488 F.3d at 155](#) (internal quotation marks omitted). 223

“Where these component parts of an IJ’s conduct are sufficiently egregious, at least in combination, a petitioner’s procedural due process rights are violated.” 223

“the pervasiveness and egregiousness of the other problematic conduct here—the IJ’s interrupting and cabining Serrano-Alberto to “yes or no” answers during critical testimony, honing in on various and sundry irrelevant details, making findings contradicted by the record, and maintaining a condescending and belligerent tone throughout the hearing, *see supra* Sec. III.B—evinced bias and created an intolerable atmosphere of intimidation.” 224

“We also urge the BIA, upon its further remand, to reassign this matter to a new IJ. As the BIA itself has recognized, “Conduct by an Immigration Judge that can be perceived as bullying or hostile can have a chilling effect on a respondent’s testimony and thereby limit his or her ability to fully develop the facts of the claim,” [Matter of Y-S-L-C-, 26 I. & N. Dec. at 690](#), and when this type of “belittling . . . and insensitive” conduct occurs, [id. at 691](#), it is “appropriate to . . . remand . . . for a new hearing before a different Immigration Judge,” *id.* 226

Matter of Y-S-L-C-, 26 I. & N. Dec. 688

“Second, and more significantly, we cannot condone the Immigration Judge’s treatment of the respondent through this questioning. Courts have stressed that a respondent in immigration proceedings should expect dignity, respect, courtesy, and fairness in a hearing before an Immigration Judge. [Cham v. Att’y Gen. of U.S., 445 F.3d 683, 690-91 \(3d Cir. 2006\)](#) (stating that such terms are “not merely advisory or aspirational” and that an alien is “entitled, as a matter of due process, to a full and fair hearing on his application”).

Conduct by an Immigration Judge that can be perceived as bullying or hostile can have a chilling effect on a respondent’s testimony and thereby limit his or her ability to fully develop the facts of the claim. *See id. at 692*; [Wang v. Att’y Gen. of U.S., 423 F.3d 260, 271 \(3d Cir. 2005\)](#). Such behavior also creates the appearance that an Immigration Judge has abandoned his or her role as a neutral fact-finder and raises a question [\[*691\]](#) whether the respondent was given a “full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf.” [Colmenar v. INS, 210 F.3d 967, 971 \(9th Cir. 2000\)](#). [\[**7\]](#) Moreover, the mere appearance of bias on the part of an Immigration

Judge can diminish the stature of the judicial process that he or she represents. [*Sukwanputra v. Gonzales*, 434 F.3d 627, 638 \(3d Cir. 2006\)](#). 690-91

"We conclude that this hearing was not conducted in a manner that meets the high standards expected of Immigration Judges. Consequently, we find it appropriate to vacate the Immigration Judge's decision and remand the record to the Immigration Court for a new hearing before a different Immigration Judge. See [*Ali v. Mukasey*, 529 F.3d 478, 492-93 \(2d Cir. 2008\)](#) (remanding with instructions to reassign the case where the Immigration Judge's conduct resulted in an appearance of bias or hostility that precluded the court's meaningful review); [*Sukwanputra v. Gonzales*, 434 F.3d at 638](#) (suggesting that the case should be reassigned to a different Immigration Judge on remand "to ensure fairness and the appearance of [*692] impartiality")." 691-92

***Wang v. A.G.*, 423 F.3d 260 (3d Cir. 2005)**

"We have stressed previously that "as judicial officers, [immigration judges] have a responsibility to function as neutral and impartial arbiters and must assiduously refrain from becoming advocates for either party." [*Abdulrahman v. Ashcroft*, 330 F.3d 587, 596 \(3d Cir. 2003\)](#). Here, we find the immigration judge (IJ) failed this basic requirement." 261

"The IJ's questioning of Wang during his asylum hearing preshadowed her hostile attitude towards him and his claims." 262

"The IJ's oral opinion was consistent in tone and substance with her comments during the preceding hearing." 265

"Time and time again, we have cautioned immigration judges against making intemperate or humiliating remarks during immigration proceedings. Three times this year we have had to admonish immigration judges who failed to treat the asylum applicants in their court with the appropriate respect and consideration." 267

"Thus, we have repeatedly sought to remind IJs of their duty to remain neutral and impartial when they conduct immigration hearings." 268

"In *Reyes-Melendez v. INS*, the Ninth Circuit held that an IJ violated an alien's due process rights by abandoning her role as a neutral factfinder. [*342 F.3d 1001, 1007 \(9th Cir. 2003\)*](#)." 268

"Earlier, in [*Iliev v. INS*, 127 F.3d 638 \(7th Cir. 1997\)](#), the Seventh Circuit explained why it is so important that immigration hearings are conducted without even the appearance of partiality: "In a country [*269] built on the dreams and accomplishments of an immigrant population, a particularly severe wound is inflicted on [the principle that anyone who appears in an American courtroom is treated with dignity and respect] when an immigration matter is not conducted in accord with the best of our tradition of courtesy and fairness." [*Id. at 643*](#)." 268-69

"No person [may] be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." [*Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 64 L. Ed. 2d 182, 100 S. Ct. 1610 \(1980\)](#). That assurance is absent - and judicial conduct improper - whenever a judge appears biased, even if she actually [**23] is not biased." 269

"Thus, even if the IJ was not actually biased - and we do not speculate here as to her state of mind - the "mere appearance of bias" on her part "could still diminish the stature" of the judicial process she

represents. [*Clemmons v. Wolfe*, 377 F.3d 322, 327 \(3d Cir. 2004\)](#). In other words, "justice must satisfy the appearance of justice." [*Offutt v. United States*, 348 U.S. 11, 13, 99 L. Ed. 11, 75 S. Ct. 11 \(1954\)](#); see also [*Peters v. Kiff*, 407 U.S. 493, 502, 33 L. Ed. 2d 83, 92 S. Ct. 2163 \(1972\)](#)." 269
"even if the IJ was reacting spontaneously to Wang's testimony, her attitude still may be characterized as "bias" or "prejudice" if her comments are so antagonistic or "so extreme as to display clear inability to render fair judgment." [*Liteky*, 510 U.S. at 551, 555](#). We have previously expressed our disapproval of all "'wrongful or inappropriate' bias, regardless of whether the improper bias arises from evidence adduced at trial or from some extraneous source." [*United States v. Bertoli*, 40 F.3d 1384, 1412 \(3d Cir. 1994\)](#)." 269
. [*Liteky v. United States*, 510 U.S. 540, 548, 127 L. Ed. 2d 474, 114 S. Ct. 1147 \(1994\)](#)

"Generally, "if the IJ's conclusion is not based on a specific, cogent reason, but, instead, is based on speculation, conjecture, or an otherwise unsupported personal opinion, we will not uphold it because it will not have been supported by such relevant evidence as a reasonable mind would find adequate. In other words, it will not have been supported by substantial evidence." [*Dia*, 353 F.3d at 250](#)." 270
Dia v. Ashcroft, 353 F.3d 228

"Moreover, the IJ's conduct so tainted the proceedings below that we cannot be confident that Wang was afforded the opportunity fully to develop the factual predicates of his claim." 271

***Abdulrahman v. Ashcroft*, 330 F.3d 587 (3d Cir. 2003)**

"Second, Abdulrahman contends that the [\[**17\]](#) IJ improperly acted as a witness at the removal hearing, conducting the proceedings in a biased manner that violated his due process rights." 595

"In the context of an immigration hearing, due process requires that "aliens threatened with deportation are provided the right to a full and fair hearing" that allows them "a reasonable opportunity to present evidence" on their behalf ([*Sanchez-Cruz*, 255 F.3d at 779](#) (internal quotation marks omitted)). And as [*Schweiker v. McClure*, 456 U.S. 188, 195, 72 L. Ed. 2d 1, 102 S. Ct. 1665 \(1982\)](#) recognized, it is well established that "due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities" (see also [*Marincas v. Lewis*, 92 F.3d 195, 204 \(3d Cir. 1996\)](#), describing the need for a neutral judge as one of the most basic due process protections). As judicial officers, IJs have a "responsibility to function as neutral and impartial arbiters" and "must assiduously refrain from becoming advocates for either party" ([*Aguilar-Solis v. INS*, 168 F.3d 565, 569 \(1st Cir. 1999\)](#))." 596

"Abdulrahman does not [\[**19\]](#) cite specifically to the transcript of his removal hearing to support his allegation of bias, nor does he directly challenge any of the IJ's statements or conduct during that proceeding." 596

"That said, however, it must be added that there were places where the IJ did go beyond the bounds of propriety to make some additional and problematic generalized assertions of her own. While as discussed below we are understandably troubled by some of those comments, in the context of the record as a whole there is insufficient evidence to conclude that the overall proceedings were biased in violation of Abdulrahman's right to due process." 596

"Although the language used by the IJ during the hearing and in her opinion does reflect an annoyance and dissatisfaction with Abdulrahman's testimony that is far from commendable, such a lack of courtesy and the absence of the expected level of professionalism do not rise (or, more

accurately, fall) to a violation of due process ([Aguilar-Solis, 168 F.3d at 569](#), citing [Liteky v. United States, 510 U.S. 540, 555-56, 127 L. Ed. 2d 474, 114 S. Ct. 1147 \(1994\)](#)).” 597

Cham v. A.G., 445 F.3d 683 (3d Cir. 2006)

[Iliev v. INS, 127 F.3d 638, 643 \(7th Cir. 1997\)](#).

"It is a hallmark of the American system of justice that anyone who appears as a litigant in an American courtroom is treated with dignity and respect. That expectation must be met regardless of the citizenship of the parties or the nature of the litigation. In a country built on the dreams and accomplishments of an immigrant [\[**2\]](#) population, a particularly severe wound is inflicted on that principle when an immigration matter is not [\[*686\]](#) conducted in accord with the best of our tradition of courtesy and fairness." *Iliev* at 643

"The case now before us exemplifies the "severe wound . . . inflicted" when not a modicum of courtesy, of respect, or of any pretense of fairness is extended to a petitioner and the case he so valiantly attempted to present. Yet once again, under the "bullying" nature of the immigration judge's questioning, a petitioner was ground to bits." 686

"We began with a reminder of the "dignity," "respect," "courtesy," and "fairness," that a litigant should expect to receive [\[*691\]](#) in an American courtroom. These words, quoted by us at the very outset of this opinion, are not merely advisory or aspirational. Indeed, although Cham has no constitutional right to asylum, he was entitled, as a matter of due process, to a full and fair hearing on his application. [6](#) See [Abdulrahman v. Ashcroft, 330 F.3d 587, 596 \(3d Cir. 2003\)](#); [Abdulai, 239 F.3d at 549](#). A full and fair hearing would have provided him with a "neutral and impartial arbiter[]" of the merits of his claim and "a reasonable opportunity to present evidence on [his] behalf." [Abdulrahman, 330 F.3d at 596](#) (citing [Schweiker v. McClure, 456 U.S. 188, 195, 102 S. Ct. 1665, 72 L. Ed. 2d 1 \(1982\)](#); [\[**16\]](#) [Sanchez-Cruz v. INS, 255 F.3d 775, 779 \(9th Cir. 2001\)](#)). Cham received neither."

690-91

"“No person [may] be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.”” [Wang v. AG of the United States, 423 F.3d 260, 269 \(3d Cir. 2005\)](#) (quoting [Marshall v. Jerrico, Inc., 446 U.S. 238, 242, 100 S. Ct. 1610, 64 L. Ed. 2d 182 \(1980\)](#)).” 691

"Suffice it to say that what is readily apparent as to those "discrepancies" is Judge Ferlise's inability to concede that any discrepancy can be minor for fear, we suppose, that any such concession would undermine his bottom line credibility determination. We suggest that, given this inability, the credibility he undermined was his own." 692

"The standard for a due process violation, however, is not so high. It is only required "that the violation of a procedural protection . . . had the *potential* for affecting the outcome of [the] deportation proceedings." [Shahandeh-Pey v. INS, 831 F.2d 1384, 1389 \(7th Cir. 1987\)](#)." 694