Appealing Denials of Right to Counsel in Deportation Hearings: Do Noncitizens Have to Show Prejudice?

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A noncitizen subject to a removal proceeding has the right to be represented by counsel at no expense to the government. INA § 292 [8 USCA § 1362] provides, “In any removal proceedings before an immigration judge … the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel … as he shall choose.” 8 CFR § 1240.10(a)(1) to (2) provides that, “[i]n a removal proceeding, the immigration judge shall … [a]dvise the respondent of his or her right to representation, at no expense to the government, by counsel of his or her own choice” and “[a]dvise the respondent of the availability of free legal services.”1 Yet, neither INA § 292 nor any regulations state whether noncitizens challenging a violation of this right must show that they suffered prejudice as a result of the violation. Instead, it has been up to the courts to decide this issue. This has produced a circuit split: some courts of appeals have held that a noncitizen need only show that the immigration judge violated his or her right to counsel while others have held that a noncitizen must demonstrate that the violation of the right to counsel caused him or her prejudice.

This article details the decisions that make up this circuit split, including the recent decision of the U.S. Court of Appeals for the Ninth Circuit in Montes-Lopez v. Holder, 694 F.3d 1085 (9th Cir. 2012). The article also provides some insight regarding a potential U.S. Supreme Court decision on the issue.

Pre-Montes-Lopez Cases

Prior to the Ninth Circuit’s decision in Montes-Lopez, several other circuits had already decided the prejudice issue.

No Showing of Prejudice Required in the Second, Third, Seventh, and D.C. Circuits

Several circuits do not require a showing of prejudice. These circuits have used various rationales for not requiring that showing. First, multiple circuits have declined to require prejudice based on the rationale that the right to counsel is a fundamental right. For example, in Leslie v. Attorney General of U.S., 611 F.3d 171, 174 (3d Cir. 2010), the immigration judge conducting the removal hearing failed to alert the respondent of the existence of free legal services and subsequently ordered the respondent deported. After the Board of Immigration Appeals (BIA or Board) affirmed the deportation order, the U.S. Court of Appeals for the Third Circuit reversed, holding that the immigration judge had violated the respondent’s right to counsel under 8 CFR § 1240.10(a)(2) and that the respondent did not need to show that he was prejudiced by this violation.2 The court reasoned that requiring a showing of prejudice would be improper because the respondent’s right to counsel was a “fundamental” right derived from the Fifth Amendment right to a “fundamentally fair hearing.”3 The court further reasoned that the right to counsel in immigration proceedings was “particularly important” in light of the “grave consequences of removal” and “the complex adjudicatory process by which immigration laws are enforced.”4

Similarly, in Castaneda-Delgado v. Immigration and Naturalization Service, 525 F.2d 1295, 1297 (7th Cir. 1975), the immigration judge—prior to conducting the removal hearing at which he ordered the respondents deported—refused to grant the respondents a continuance so that they could obtain a lawyer. The BIA upheld the deportation order, finding that, even if

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1 See also Rageevan v. U.S. Attorney General, 151 Fed. Appx. 751, 753-54 (11th Cir. 2005) (holding that noncitizens’ statutory right to counsel is “grounded in the Fifth Amendment right to due process”).
3 Leslie, 611 F.3d at 180-81.
4 Leslie, 611 F.3d at 181.
the respondents’ statutory right to counsel had been violated, they had not been prejudiced by denial of that right. In reversing, the U.S. Court of Appeals for the Seventh Circuit held that “the right to be represented by counsel of their choice granted to aliens in deportation proceedings ... is too important and fundamental a right to be circumscribed by a harmless error rule.” The court noted that, in criminal proceedings, the denial of a defendant’s right to counsel “is reversible error which cannot be cured by the application of any harmless error test” and reasoned that a similar rule should apply in removal proceedings because, “[w]hile a deportation hearing is not a criminal proceeding, it is fraught with serious consequences to the alien.” Following its holding in Castaneda-Delgado, the Seventh Circuit held in Snajder v. I.N.S., 29 F.3d 1203, 1207 (7th Cir. 1994), that the noncitizen was denied his right to counsel in violation of the immigration regulations where he was not advised of his right to counsel when additional deportability charges were lodged at the deportation hearing.

Likewise, in Yiu Fong Cheung v. Immigration and Naturalization Service, 418 F.2d 460, 464 (D.C. Cir. 1969), the immigration judge conducted the removal hearing very shortly after the respondent received notice of potential deportation, which deprived the noncitizen of a chance to consult with others about the possibility of obtaining a lawyer. After the immigration judge ordered the respondent deported and the BIA affirmed, the U.S. Court of Appeals for the D.C. Circuit reversed, holding that the respondent’s statutory right to counsel had been violated. In so holding, the D.C. Circuit rejected the government’s argument that the violation was harmless, reasoning that a noncitizen’s right to counsel was a “basic procedural right[]” and thus an “infraction” of that right could “never be treated as harmless error.” The court also noted that, even in cases where “deportability seemed clear,” a lawyer could still “be helpful to an alien” in various ways, such as by “seek[ing] more time for a voluntary departure” or by “advis[ing] the alien where to be deported.”

Second, at least one court based its decision to not require a showing of prejudice on the interests that would be promoted by not requiring such a showing. In Montilla v. I.N.S., 926 F.2d 162, 164 (2d Cir. 1991), the immigration judge conducted the removal hearing and ordered the respondent deported without first asking him to affirmatively state whether he desired to be represented by counsel. After the BIA affirmed the removal order, the U.S. Court of Appeals for the Second Circuit reversed, holding that the noncitizen had been denied his right to counsel under a regulation implementing INA § 292. In so holding, the court rejected the INS’ argument that the respondent was required to show prejudice resulting from the denial of his right to counsel. The court reasoned that “[a]s a practical matter, to remand for agency compliance with its own rules would actively encourage such compliance.” The court further reasoned that “the efficient use of scarce judicial resources” was also “promoted by remand” because “[a]dopting the prejudice test requires judicial exploration of petitioners’ arguments, and burdens a court with carefully balancing the positives and negatives reflected in petitioner’s circumstances to decide whether in hindsight the positives might so outweigh the negatives as to succeed in altering the result reached by the INS.”

Showing of Prejudice Required in Fourth, Fifth, Tenth, and Eleventh Circuits

Other circuits have required a showing of prejudice. For example, in Farrokhi v. U.S. I.N.S., 900 F.2d 697, 701 (4th Cir. 1990), the respondent appealed his deportation order, arguing that his pro se hearing before the immigration judge violated his right to due process. The U.S. Court of Appeals for the Fourth Circuit affirmed the immigration judge’s order, finding that the respondent had “explicitly waived his right to counsel.” The court further held that, even if the noncitizen could establish that his right to counsel was violated, “he would still have to demonstrate prejudice resulting from that
However, the court did not explain why it was requiring a showing of prejudice. Instead, the court merely cited two earlier cases—Delgado-Corea v. I.N.S., 804 F.2d 261, 263 (4th Cir. 1986), and Burquez v. Immigration and Naturalization Service, 513 F.2d 751, 754 (10th Cir. 1975)—involving noncitizens’ right to counsel. Further, although in both of the cited cases the court stated that a noncitizen is required to show prejudice as a result of a denial of the right to counsel, neither court gave much reasoning for requiring that showing. In Delgado-Corea, the court held that a noncitizen must show prejudice resulting from violation of the right to counsel merely because “as a general rule prejudice must be shown by the alien.” In Burquez, the court did not give any reasoning for its prejudice requirement because the noncitizen conceded that he had to show prejudice.

Similarly, in Patel v. U.S. I.N.S., 803 F.2d 804, 805-06 (5th Cir. 1986), the immigration judge ordered the respondent deported even though neither he nor his lawyer were present at the deportation hearing and even though the immigration judge did not grant a continuance that the respondent had requested. In affirming the deportation order, the U.S. Court of Appeals for the Fifth Circuit held that the immigration judge’s actions did not violate the respondent’s statutory right to counsel or his Fifth Amendment right to due process and that, even if the respondent’s rights had been violated, the respondent was required to show that he suffered “substantial prejudice” as a result. However, like the court in Farrokhi, the Patel court did not give any rationale for requiring a showing of prejudice.

Likewise, in Michelson v. I.N.S., 897 F.2d 465, 467 (10th Cir. 1990), the respondent appealed an immigration judge’s deportation order, arguing that the immigration judge’s failure to appoint him counsel violated his statutory right to counsel as well as his Fifth Amendment right to due process. In affirming, the U.S. Court of Appeals for the Tenth Circuit rejected those arguments. The court first held that the statutory right to counsel granted the respondent a right to counsel of his choice, not government-funded counsel. After finding that the respondent’s lack of counsel also did not violate his Fifth Amendment right to due process, the court held: “The fifth amendment guarantee of due process speaks to fundamental fairness; before we may intervene based upon a lack of representation, petitioner must demonstrate prejudice which implicates the fundamental fairness of the proceeding.”

Also, in Rageevan v. U.S. Attorney General, 151 Fed. Appx. 751, 753-54 (11th Cir. 2005), where the immigration judge conducted a pro se hearing and ordered the respondent deported after granting the respondent a continuance to obtain counsel and the respondent subsequently argued on appeal that he had been denied his right to counsel, the U.S. Court of Appeals for the Eleventh Circuit held that the “right to counsel at a removal hearing, although statutory, … is nonetheless grounded in the Fifth Amendment right to due process.” Accordingly, the court held, a noncitizen must show that the denial of the right to counsel caused “substantial prejudice” that affected the fairness of the proceeding. Thus, because the noncitizen could not show prejudice resulting from denial of his right to counsel, the court affirmed the removal order.

The Most Recent Decision: Montes-Lopez

In Montes-Lopez v. Holder, 694 F.3d 1085 (9th Cir. 2012), an immigration judge denied the respondent’s motion for a continuance so that he could obtain counsel, proceeded to the removal hearing, and ordered the respondent deported. After the BIA affirmed the removal order, the U.S. Court of Appeals for the Ninth Circuit reversed, holding that the denial of the continuance violated the noncitizens’ statutory right to counsel. In so holding, the court rejected the government’s

15 Farrokhi, 900 F.2d at 702.
16 Id.
17 804 F.2d at 263.
18 513 F.2d at 754.
20 Michelson v. I.N.S., 897 F.2d 465, 467 (10th Cir. 1990).
21 Michelson, 897 F.2d at 468.
24 Id.
25 Montes-Lopez v. Holder, 694 F.3d 1085, 1089 (9th Cir. 2012).
argument that the noncitizen was required to show prejudice as a result of the violation. After favorably citing several cases that did not require a showing of prejudice, including *Montilla*, *Leslie*, and *Castaneda-Delgado*, the court rejected as nonpersuasive the caselaw requiring such a showing.26 Specifically, the court held:

The Fourth, Fifth, and Tenth Circuits do require a showing of prejudice, but we think the decisions in which they adopted this requirement are less persuasive than the decisions discussed above. All of the cases of which we are aware arose from either relatively minor violations of the right-to-counsel regulations, … or from situations where there was no violation of the right to counsel at all, and the court of appeals noted the absence of prejudice only as an alternative holding. … None of the cases persuasively address the principles of administrative and constitutional law applied in the Second, Third, Seventh, and D.C. Circuit opinions.27

**Supreme Court to Take Up?**

Given the split identified above, the U.S. Supreme Court may decide to take up the issue at some point. If the Court does opt to decide the issue, its decision could very well boil down to a choice between two particular rationales discussed above. On one hand, there is the rationale—adopted by most circuits that do not require a showing of prejudice—that, because the right to counsel is a fundamental right, a noncitizen need not show that he or she was prejudiced by a violation of that right. On the other hand, there is the rationale embraced by other circuits (see *Michelson* and *Rageevan*) that, because the point of providing noncitizens a right to counsel is to ensure a fair proceeding under the Fifth Amendment Due Process Clause, a noncitizen should have to demonstrate that the denial of the right to counsel caused him or her substantial prejudice.

The Court may also rely on other, more pragmatic rationales, such as *Montilla*’s reasoning regarding judicial economy and encouraging agencies to comply with their own regulations.

**Conclusion**

As this article has discussed, noncitizens appealing denials of their right to counsel must show prejudice in certain circuits, but not in others. That disparity is undesirable and unfair especially given what is at stake for a noncitizen facing deportation. However, unless and until the Supreme Court decides the prejudice issue, that unfair disparity will continue to exist.

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26 *Montes-Lopez*, 694 F.3d. at 1089-1092.

27 *Montes-Lopez*, 694 F.3d. at 1092.