How Sound Is YOUR Judgment?
By Joseph P. Whalen (May 25, 2014)

Introduction

When it comes to making an adjudication decision, it can be the easiest thing in the world; or it may seem and feel like the most difficult thing you have ever done in your entire lifetime. Some of those super simple decisions require neither an exercise of discretion nor the weighing of evidence in order to make a judgment on the merits of the case. An adjudication often involves “... a mixed question of law and fact, or a question of judgment.” Matter of V-K-, 24 I&N Dec. 500 (BIA 2008). A judgment on the merits has long been recognized as just such a “mixed question”, or dare I say, a mixed-up or confusing question of fact and law.

The AAO1 reviews de novo the benefit determination decisions of USCIS Adjudicators (done in the name of their Director) in a manner similar to the BIA which ...

“reviews de novo an Immigration Judge’s prediction or finding regarding the likelihood ... [of some fact] ... because it relates to whether the ultimate statutory requirement for establishing eligibility for relief from removal has been met ... [(a point of law,)] ... and is therefore a mixed question of law and fact, or a question of judgment.” [Emphases Added.] Id.

I highly recommend that ALL individuals inside USCIS or who will apply for anything from USCIS or in Immigration Court, or go before the Board of Immigration Appeals (BIA) read Matter of V-K- supra (linked above) as it is barely two (2) pages long and really lays this issue out there for all to understand. The issue had long been unquestioned and engrained in the Immigration Court system and Legacy INS processes such that it did not have to be laid out until a changing of the guard, so to speak, took place. As newer players entered the field (new practitioners graduated and new government employees came on board), it became necessary to reiterate the simple premise that all judgments on the merits of a case are almost invariably and thus nearly always inherently mixed

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1 AAO = Administrative Appeals Office which is a semi-autonomous administrative appellate body housed within U.S. Citizenship and Immigration Service (USCIS) within the Department of Homeland Security (DHS) that exercises authority delegated by the Secretary of DHS. AAO also reviews bond breach determinations made by DHS’ Immigration and Customs Enforcement (ICE).
questions of law and fact. This is something that is so deeply anchored in ordinary human brains that it usually goes without says.

Reconciling I.R.A.C., Kazarian, and Rijal

For those who need this analytical methodology for evaluating mixed questions of fact and law spelled out in practical terms, we have the I.R.A.C. method of approaching a legal case. I.R.A.C. utilizes and therefore “teaches” the basic process or methodology required for handling a mixed question of fact and law in order to arrive at a proper judgment on the merits of a case. Please remember for future reference that the I.R.A.C. method entails identifying the most pertinent, critical, and/or controlling legal or factual ISSUE(s); and the critical, applicable, and controlling legal RULE(s); which, can come from a statute, regulation, or precedent plus specific agency policies, or a combination of any or all of them. The next step is the ANALYSIS in which the facts and law are compared, contrasted, and/or jumbled together to see how they fit and lead to a proper CONCLUSION. The part of the described methodology I want to discuss further is the analysis.

I believe that an I.R.A.C. analysis will almost always involve a qualitative analysis and evaluation even if a quantitative analysis is a required antecedent procedural question in a particular case. This might be best illustrated through a short refresher on the two-part Kazarian analysis that has been adopted by USCIS’ AAO. A second case, originally from the Western District of Washington, which very competently applied the analytical approach from Kazarian, has been adopted by the 9th Circuit without any changes. Judge Richard A. Jones, in Seattle, penned the adopted decision in the case of Rijal v. United States Citizenship & Immigration Servs., 772 F.Supp. 2d 1339 (W.D. Wash. 2011). These cases involved EB-1 visa petitions for self-petitioning aliens claiming to have an “extraordinary ability” in either, the “sciences, arts, education, business, or athletics.” Anil Rijal based his I-140 visa petition on his career as a

SEE: Kazarian v. USCIS, 596 F.3d 1115 (9th Cir. 2010)

I have written about this before in my amicus brief to AAO, which is posted on their website and appears to have been largely adopted by USCIS and AAO, and at least one other poignant article on this topic has help shape AAO’s application of the Kazarian Analysis as illustrated in a now somewhat ubiquitous footnote that explains that AAO is reserving the right to conduct a “Final Merits Determination” (FMD) if required to do so as a result of an administrative Motion or a judicial Litigation. That is, of course, if the case did not reach a point to demand one yet.
documentary film maker. Judge Jones went about his examination of the evidence of record with the understanding of the Kazarian Court’s edict which he expressed in the analytical methodology he applied.

“The parties’ disputes about Mr. Rijal’s awards amount to a debate over what constitutes a "major" international award. This is a debate that neither party can hope to win. Common experience draws no line of demarcation between those awards that are "major" and those that are not. The applicable law in this case draws no clearer line, other than to establish that some awards are "major, international recognized award[s]" and others are "lesser nationally or internationally recognized prizes or awards". 8 C.F.R. § 204.5(h)(3) & (3)(i). Nothing in either the INA or the regulations implementing it explains how USCIS or a reviewing court is to differentiate between "major" and lesser awards. In legislative history, Congress named the Nobel Prize as its sole example of a major, internationally recognized award that would by itself demonstrate "extraordinary ability." Kazarian, 596 F.3d at 1119 (citing 1990 U.S.C.C.A.N. 6710, 6739). No one suggests that an alien must win a Nobel Prize to qualify, and no one suggests that Mr. Rijal’s awards are on par with a Nobel Prize. What awards less prestigious and recognized than the Nobel Prize qualify as major, international awards is a question that the law does not answer. There is little question, moreover, that Congress felt it unnecessary and perhaps inadvisable to define "major" in this context. It entrusted that decision to the administrative process.

Turning to that process, the court looks for evidence that USCIS considered the relevant factors and articulated a rational connection between the facts it found and the choice it made. USCIS explicitly considered the awards and all of the evidence Mr. Rijal submitted to support his claim that they were major, international awards. USCIS articulated a rational connection between those facts and its conclusion that his awards were not "major." May 2009 Dec. at 5-6. Another adjudicator might have come to a different conclusion, but that is irrelevant. Unless the court can conclude that no rational adjudicator would have come to that conclusion, the USCIS did not act arbitrarily and capriciously.” [Emphases Added.]

AAO is now applying the same approach as Judge Jones but initially it struggled to figure it out. It seems to me that there was still a bit of the “Culture of NO!” hanging around at CSC and AAO. Initially, AAO was always applying the second part of the Kazarian analysis in every case. It was a waste of resources (time, cost, and effort) and merely came across as mean-spirited. They have embraced the ability to simply just stop when the antecedent procedural/regulatory/evidentiary question or threshold was not reached. In other words, they are refraining from exhausting issues sua sponte. Another way of expressing the latest approach is that AAO has learned when to remain silent on an issue. Yet another way to think of it is
that AAO has learned that when it does not have to say anything, it is best
to keep your mouth shut.

**The Essence of Sound Judgment**

When I discuss such important and complex matters, I feel that it is
in the best interest of all to go back to the basics first. Let’s look at some
definitions and do some comparing and contrasting. I will first look at the
meanings of, and differences between, an exercise of “discretion” which,
has also been described as “Administrative Grace”, and “the rendering of a
judgment based upon a well-reasoned conclusion following an analysis of
the facts as applied to the pertinent law” or more simply, a “judgment”.

**What is Discretion?**

To my mind, the simplest way to describe “discretion” is as a balancing the
good vs. the bad factors using laundry lists from administrative and/or
judicial precedents or agency policy makers. Over the years the BIA and
Legacy INS have created a variety of such lists of factors. They have also
gone into deep discussions on their reasoning behind their lists and the
proper utilization of the facts found and the weight to be given to various
aspects. More recently USCIS has issued various Policy Memos based on
these various cases and concepts but it all finally coalesced after *Kazarian*
and *Rijal*. I will venture to say that there have always been mixed
quantitative and qualitative methods involved but it was not necessarily
described as such. It was not until the second *Kazarian* decision plus *Rijal*
that it was so formalized into a two-part analytical approach. Admittedly, a
lesser amount of qualitative analysis may be involved in the first part of
the *Kazarian* analysis in order to include or exclude a particular piece of
evidence in that quantitative step; it should not be an in-depth analysis.
Finally, an exercise of discretion may be left to the individual fact-finding
adjudicator and might involve personal perceptions of the case-specific
circumstances. Emotions may be involved and couched in terms of policy
decisions the way some in the judicial branch “legislate from the bench”.
However, in executive branch agencies policy is usually unabashedly
decided at the top and placed in a Policy and/or Procedural Memo.

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4 This requires the submission of the minimum number of pieces of evidence for the
particular regulatory criterion for which it has been proffered. This is the antecedent,
procedural, regulatory, threshold question to be answered; or in practical application is
simply a basic evidentiary showing as laid out in applicable implementing regulations.
What is Judgment?

To my mind, a “judgment” is a “well reasoned and proper conclusion”. It is arrived at through a thorough and often painstaking dissection and distillation of the evidence. There must be a finding-of-facts which are then compared and contrasted, as applicable and appropriate, to the controlling law. This is done to answer the overarching (or underlying) comprehensive question(s) of eligibility for something, namely a benefit or relief from a consequence. I discussed this concept previously in my amicus brief to AAO on the proper approach to the two-part Kazarian analysis. The following are excerpts from that brief. The highlighting is new for this article.

“G. Burden of Proof v. Standard of Proof

The various precedents noted above talk to the concepts of the “standard of proof” and “burden of proof”. Those considerations relating to the “burden” are actually quite simple mechanical operations and are the easier parts of the analysis. They largely address the quantitative portion of the Kazarian analysis. You only need to be able to count to three but you do have to know what to count. The in-depth qualitative analysis and evaluation portion comprise the essence of the Kazarian “final merits determination”. This is where things get more difficult. This second step is the step at which evidence is weighed. The “standard of proof” is relativistic in part because the preponderance of evidence standard is ultimately a judgment call. That judgment call must be in keeping with the spirit of the statute, guided by the regulations, tempered with wisdom, and made within the proper context.

These determinations involve judgment rather than discretion. Sound judgment can be nurtured but at least a kernel or spark must already exist. By comparison, in various decisions involving an exercise of discretion, the BIA, AAO, the various courts, and agency policy-makers have created a variety of “laundry lists” of “factors” to be “balanced” in order to determine if the good or positive factors outweigh the negative or bad factors. The proper exercise of this type of discretion is more akin to the quantitative step in the Kazarian analysis than to the qualitative component.” My Kazarian Brief at p. 14.

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“A person is the sum of their existence to any given moment and to this ... very point in their life. It is that sum total of your life experiences which guides your judgment on an issue. People can be educated but if they have been forced by their particular educational system to favor rote memorization rather than to — think outside the box, they will have a more difficult time weighing evidence.” My Kazarian Brief at p. 12.
Getting from Possible to Credible and Beyond

Just last week I wrote a very short article on this topic but I have written more comprehensively about it in the past, see here and here. I would like to leave you with the following simple graphic as a guide. I hope it helps.

One Way to Get from Here to There

Possible: Maybe it could happen.


Reasonable Inferences may be drawn by examining the credible facts.

Probable: More likely than not to happen.

Proper Conclusion is reached via a reasonable analytical methodology: Benefit or Relief is either Granted or Denied.

That’s my two-cents, for now.

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