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IN THIS ISSUE

On February 26, 2020, The Attorney General issued an opinion on Immigration law and the interpretation of relief under the United Nations Convention Against Torture in Matter of R-A-F. The opinion is inconsistent with the body of Court of Appeal case law and has been largely ignored by Courts of Appeal. This article examines Matter of R-A-F and discusses conflicting Court of Appeal case law issued before and after Matter of R-A-F.

Matter of R-A-F: The Attorney General Ignores the Circuit Courts and the Circuit Courts Ignore The Attorney General

ABOUT THE AUTHOR

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Matter of R-A-F 27 I & N Dec. 778 (A.G. 2020), (hereinafter "*R-A-F*") is an opinion issued by United States Attorney General William Barr on February 26, 2020. The opinion is the result of Attorney General Barr's self-referral of an unpublished September 11, 2019 Board of Immigration Appeals' ("BIA") decision[1] affirming the Immigration Judge's determination that the Respondent – R-A-F– was entitled to deferral of removal under the United Nations Convention Against Torture[2] ("CAT").

The *R-A-F* opinion is interesting because the Attorney General selectively cited United States Circuit Court opinions that supported his view that the BIA should review, *de novo,* whether a Respondent's predicted future maltreatment if deported qualifies as "torture" under the enabling regulations for CAT claims. The Attorney General suggests a bright line demarcation between an Immigration Judge's prediction of future harm – which is reviewed under the "clear error" standard – and whether the future harm is "torture" as defined by the CAT enabling regulations –which is reviewed *de novo*.

The Attorney General ignores Court of Appeal opinions that hold that the regulatory definition of "torture" includes the essential element of "specific intent". While the definition of "torture" may be a legal question, the essential element of "specific intent" is a factual determination subject to the deferential "clear error" review standard.

The Attorney General also ignores Court of Appeal opinions that find that the prediction of future harm and the determination of whether that future harm is "torture" under CAT is a fact-specific determination that must be made on a case-by-case basis. As if to illustrate the point, two Court of Appeal decisions since February 2020 have each found, under facts essentially identical to *R-A-F*, that the respondent was entitled to protection under CAT because the predicted future harm qualifies as "torture." Neither opinion even mentioned *R-A-F.* In fact, as of this writing, *R-A-F* has never been cited by a Court of Appeals, or any court.

Matter of R-A-F 27 I & N Dec. 778 (A.G. 2020)

In *R-A-F* the Respondent was a 71 year old Mexican man with documented "mental and physical health problems, including, inter alia, Parkinson's Disease, Dementia, Major Depressive Disorder, Traumatic Brain Injury, Post Traumatic Stress Disorder and chronic kidney failure". *Id.* at n. 1. The Immigration Judge found that the Respondent "exhibits both impaired cognitive functioning as well as loose unregulated mood states, inability

[1] The unpublished opinion can be found at https://drive.google.com/file/d/1Qivq_y8gz2AhrQuNgUr_CJZ7FO2f8xBH/view

[2] Formally "Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85; see also implementing regulations at 8 C.F.R. § 1208.17(a).

to be fully oriented to person, place, and time... delayed recall and the incapability to acquire any new knowledge." *Id* at p. 2. The Immigration Judge concluded, based on the factual record that the respondent is a "very high fall risk" and "is unable to successfully accomplish daily activities without support." *Id*. The Immigration Judge concluded that the Respondent is likely to be institutionalized if returned to Mexico.

The Immigration Judge also examined country conditions evidence and found that mental "institutions in Mexico, which are privately and government owned, operate under deplorable conditions, and patients are subjected to, inter alia, a lack of access to justice, the use of physical and chemical restraints, physical and sexual abuse, and disappearances as well as cages and isolation rooms, and lifetime segregation of people with disabilities." *Id.* The Immigration Judge concluded that mental institution patients in Mexico are subjected to human rights abuses which amounts to torture. *Id.* The Immigration Judge granted Respondent relief under CAT. *Id.*

The BIA examined the evidentiary record and concluded: "we discern no clear error in the Immigration Judge's determination that the respondent established that it is more likely than not that he will be tortured by or at the instigation of or with the consent or acquiescence (including willful blindness) of a public official or other person acting in an official capacity in Mexico for purposes of protection under the Convention." *Id.*

The BIA's application of the "no clear error" standard to the Immigration Judge's decision drew the condemnation of the Attorney General in *Matter of R-A-F.* The Attorney General took the (formerly) unusual step of referring the case to himself under 8 C.F.R., § 1003.1(h)(1)(i) (which allows the Attorney General to refer a BIA case to himself).

The Attorney General concluded that the BIA had applied too deferential a review standard to the Immigration Judge's decision. The Attorney General stated that the "no clear error" standard applied by the BIA was the standard for factual determinations, not questions of law. See *Matter of R-A-F* 27 I & N Dec. at 779. The Attorney General held that the Immigration Judge's determination that Respondent would be institutionalized, and likely subjected to physical and chemical restraints, physical and sexual abuse, cages, isolation and a lifetime of segregation from the community at large, was a factual determination. *Id.* The determination that those forms of abuse constituted "torture" under 8 C.F.R. § 1208.18(a)(5) was a legal determination that should have been reviewed *de novo* by the BIA. *Id.*

The Attorney General remanded the case to the BIA with orders to consider, *de novo,* whether the physical, chemical, sexual and other abuses that Respondent was likely to face in Mexico constituted torture under the regulations. *Id.* at 780. The Attorney General focused on the specific intent element of those regulations and directed the BIA to determine whether the physical, chemical, sexual and other abuses were due

to neglect or a specific plan to abuse mental institution patients. *Id*. at 780 – 781. The Attorney General ordered that the BIA address the elements of CAT including the requirement that torture be for purposes of obtaining information, punishment for an act committed, intimidation or "any reason based on discrimination of any kind". *Id* at 781 citing 8 C.F.R. § 1208.18(a)(1).

The Attorney General cited select Court of Appeals cases in support of his opinion in *R-A-F* but also ignored clear precedent that conflicted with his interpretation. For example, the Attorney General never referenced the seminal case that distinguished the fact-based determination – predicting the likelihood of future harm – from the legal determination – is the future harm "torture": *Kaplun v. Attorney General* 602 F.3d 260, 271 (3rd Cir. 2010).

Prior Circuit Court Precedent

In *Kaplun*, the Third Circuit identified the distinction between the fact based determination of "what is likely to happen" and the legal determination as to whether that is torture:

> "In the case of the likelihood of torture, there are two distinct parts to the mixed question: (1) what is likely to happen to the petitioner if removed; and (2) does what is likely to happen amount to the legal definition of torture? The two parts should be examined separately.
>
> The first question is factual. A finding that a petitioner is likely to be imprisoned (based, for instance, on the evidence of gross violations of human rights in the country of removal) is a finding of fact. . . . This is to be distinguished from the legal consequence of those underlying facts.
>
> The second question, however, is a legal question. Torture is a term of art, and whether imprisonment, beating, and extortion are severe enough to rise to the level of torture is a legal question.

Id.

The Third Circuit cautioned, however, that the BIA cannot use its legal review of "torture" to second guess the Immigration Judge's factual findings: "Glueing the two questions together, however, does not entitle the BIA to review the first question, the factual one, *de novo" Id.*

Cases interpreting CAT follow *Kaplun* and do not permit the BIA to re-weigh the factual evidence under the guise of analyzing whether the facts meet the definition of "torture".

> The BIA summarily rejected (or ignored) these findings with the oblique statement that while we acknowledge that prison conditions in Haiti appear to have deteriorated since we rendered our decision in [*In re*] *J-E-, supra*, that does not

> undermine the rationale of our decision. This short shrift approach is error. The BIA cannot, under a clear error standard of review, override or disregard evidence in the record and substitute its own version of reality.

Ridore v. Holder, 696 F.3d 907, 917 (9th Cir. 2012)(internal quotations omitted) citing *Kaplun, supra*.

> If the BIA reviews the IJ's factual findings de novo instead of for clear error, or makes its own factual findings, it has committed an error of law.

Zumel v. Lynch, 803 F.3d 463, 476 (9th Cir. 2015)

> The third circuit [in *Kaplun]* concluded that the Board is entitled to adopt an independent view about whether a potential harm identified by an IJ amounts to "persecution" or "torture," but that an IJ's predictions (which it called the "present probability of a future event")—such that a particular harm is "likely" should an alien return to his native land—are "facts" under clause (i), and the Board's role is limited to identifying clear error by the IJ. . . .
>
> ***Kaplun* observed that many predictions are facts, in the sense that they rest on subsidiary facts and can be true or false**. It gave this example: "It is likely that it will take less than 3 hours to drive the 100 miles to grandmother's house next week." Likewise, a medical prediction about whether a victim of injury will recover is factual, even though it rests on the application of medical knowledge to subsidiary facts. These illustrations show how person-specific circumstances (adjudicative facts) can give rise to predictions that also are sensibly treated as facts. **That is as true when a prediction depends on country conditions as when it depends on what happened to a particular alien. We therefore agree with *Kaplun* and similar decisions.**

Rosiles-Camarena v. Holder, 735 F.3d 534, 537 - 539 (7th Cir. 2013)(citations omitted)(emphasis added).

The Attorney General did not discuss or even cite any of these cases in *R-A-F.* Instead, he cited a handful of cases that supported his proposition that the definition of "torture" under the CAT enabling regulations requires proof of "specific intent", i.e. proof that the government specifically intend to harm the Respondent rather than harm the Respondent "as a result of poverty, neglect or incompetence.". *R-A-F* at 27 I & N Dec. at 781 citing *Pierre v. Gonzales* 502 F.3d 109, 111 (2d Cir. 2007).

But the case law – even the law cited by the Attorney General – stands for the proposition that "specific intent" is a fact-specific exercise that varies from case to case.

> While the overall determination of whether an act is torturous is a matter of law to be reviewed de novo, **an inference that an actor specifically intends to cause severe pain or suffering is a matter of fact to be reviewed under the substantial evidence standard.**

Clemente-Pacheco v. Sessions, 732 Fed. Appx. 537, fn. 3 (9th Cir. April 30, 2018)(emphasis added)(citing *Ridore* and *Kaplun supra*).

In fact, the case cited by the Attorney General – *Pierre,* and its progeny – illustrate this point. *Pierre* involved a Haitian immigrant subject to deportation for committing crimes in the U.S. *Pierre* 502 F.3d at 111. Pierre sought relief under CAT because Haiti had adopted a policy of indefinite detention of returning immigrants who had been convicted of a crime in their former country. *Id.* at 112. Pierre offered evidence that he had hypertension; would not be effectively treated in Haiti jail; would not get adequate nutrition in Haiti jail and that Haiti law enforcement commonly engages in beatings, chokings and burnings as means of punishment. *Id.*

The Immigration Judge and the BIA found that, although Pierre presented evidence that conditions in Haiti were "barbaric" they were not specifically intended to torture. *Id.* at 121. The Immigration Judge denied relief under CAT and the BIA affirmed.

The Second Circuit also affirmed denial of relief under CAT but specifically criticized the Immigration Judge's blanket conclusion that poor prison conditions cannot show specific intent to torture:

As to Pierre's attempt to distinguish his case from In re J-E- on the basis of his medical condition, the IJ appeared to opine in passing that as to the issue of specific intent, Pierre's condition was irrelevant. We disagree to the extent this suggests that a petitioner's individual circumstances are per se irrelevant under In re J-E- and can have no bearing on the likelihood that the petitioner would be subjected to torture.

Id at 121 (emphasis added).

The Second Circuit explained that a Respondent's particular circumstance can establish that poor prison conditions show specific intent under CAT:

Nothing in In re J-E- or in our opinion **dictates that a petitioner cannot present evidence that the severe suffering to which the petitioner is likely to be subjected is motivated by some actor's specific intent** – that is, some intent not present in In re J-E- . As In re J-E- acknowledged, **acts of abuse committed by prison guards are not infrequent in Haiti, and it might be that petitioners with certain histories, characteristics, or medical conditions are more likely to be targeted not only with these individual acts but also with particularly harsh conditions of confinement**. But Pierre adduced no evidence suggesting this to be the case as to diabetics or as to him individually.

Id. at 121 -122 (emphasis added).

As if to prove this point, the Court of Appeals in *Ridore v. Holder supra* granted CAT relief to a Haitian immigrant under factual circumstances nearly identical to *Pierre*. *Ridore* 696 F. 3d at 913-914. In *Ridore*, the Immigration Judge found that the Respondent, like Pierre, would probably be detained indefinitely in a Haitian jail staffed by violent criminals when deported. *Id.* at 913; 914. The Immigration Judge found that Ridore (like Pierre) would be exposed to fatal diseases due to the squalor in Haitian jails. *Id.*at 913. Based on these factual findings, the Immigration Judge found that the Haitian government's long-standing knowledge that disease was rampant in its jails coupled with its intentional appointment of violent criminals as jail staff was substantial evidence that the government specifically intended to harm returning immigrants like Ridore. *Id* at 914. The Immigration Judge granted Ridore relief under CAT. *Id.*

The BIA vacated the Immigration Judge's grant of relief under CAT. *Id.* The BIA applied *de novo* review and rejected the Immigration Judge's CAT ruling "in a single, largely conclusory paragraph". *Id* at 915. The BIA concluded that the Immigration Judge's ruling was a "mixed question of law and fact" that was reviewed *de novo*. *Id.*

The Court of Appeals reversed the BIA's decision to vacate CAT relief. *Id.* at 911 The Court of Appeals held that the BIA, under the guise of de novo review of legal conclusions, had re-examined the Immigration Judge's factual findings:

> **This short shrift approach is error**. **The BIA cannot, under a clear error standard of review, override or disregard evidence in the record and substitute its own version of reality.** *See Kaplun*, 602 F.3d at 271-73 & n.9. This is particularly so when the BIA's justifications for rejecting a finding of torture in *In re J-E-* turned on the respondent's failure to meet his burden to produce evidence to support a finding of torture sanctioned by the Haitian government. *See In re J-E-*, 23 I. & N. Dec. at 303. **The IJ found that the evidence Ridore produced, both as to worsened prison conditions and the Haitian government's complicity in creating those conditions, was sufficient to distinguish his case from *In re J-E-*, and the BIA was obligated to explain why the IJ clearly erred in so finding.**

Id. at 917 (emphasis added).

The Court of Appeals also criticized the BIA for dismissively rejecting the inferences that the Immigration Judge drew from the factual record:

> For instance, in addressing the IJ's findings regarding the government's hiring of likely abusive prison officials, the BIA tersely concluded that "the Immigration Judge's leap, from noting that persons accused of committing human rights abuses have been placed in charge of some of Haiti's prisons, to his conclusion that the government, therefore, put those people in charge

> because it wishes to have the prison population subjected to torture [is] illogical." **Such a conclusory pronouncement does not constitute clear error review. If it is true that the Haitian government has a policy of placing accused human rights violators in charge of prisoners, as the IJ found it does, then there is nothing illogical in inferring the government intends to put those prisoners at risk of cruel, abusive treatment that would qualify as "severe suffering" or "torture" – as the IJ found**. If the BIA found clear error in the IJ's evidentiary basis for his finding, it surely did not reveal what that error was. **Instead, it appears to have relied simply on its own interpretation of the facts, which is not clear error review.**

Id. (emphasis added).

In short, the Court of Appeals reversed the BIA because the BIA conducted a *de novo* review of the facts under the guise of reviewing the legal definition of "torture". But "specific intent" is an essential element of "torture" and "specific intent" is reviewed under the deferential "clear error" standard. The Attorney General makes the same mistake in *R-A-F.* The Attorney General concluded that inhumane conditions in jails, prisons and mental institutions cannot be "torture" because they are too widespread to be the product of specific intent. See *R-A-F* 27 I & N at 781. But the Courts of Appeal reject that argument and point out that "specific intent" can be reasonably and logically inferred from a pattern of institutional abuse and indifference:

> the IJ found that **"the conditions are so deplorable where disease is so rampant that these individuals detained in these prisons will have to suffer some long term problems that . . . can only be described as acts of torture."** "[T]he fact that they allow beriberi and tuberculosis to run rampant through the prison population, cannot be solely attributable to being unable to change those conditions. **Clearly, the fact that they do not maintain proper medical facilities in those institutions can only be attributable to their willingness to use the jails to harm the inmates so that they will never be a threat to the population again."**

Ridore v. Holder, 696 F.3d at 907 (emphasis added).

Court of Appeals Decisions After *R-A-F*

The Attorney General's failure to accurately address the Court of Appeal precedent was driven home less than a week after he issued his opinion in *R-A-F* when the Court of Appeals issued its CAT opinion in a case with a fact pattern nearly identical to *R-A-F : Guerra v. Barr* 951 F. 3d 1128 (9th Cir. March 3, 2020).

In *Guerra* the Ninth Circuit reversed a BIA reversal of CAT granted to Guerra who, like R-A-F, was a Mexican national with significant mental health issues including

auditory hallucinations and bizarre/disruptive behavior. *Id.* at 1131. Guerra was charged with removability by DHS and issued a Notice to Appear. *Id.* At his first immigration hearing, the Immigration Judge determined that he was not competent to represent himself and ordered appointment of counsel. *Id.*

Guerra applied for relief under CAT and argued, (like R-A-F), that he would become homeless if deported to Mexico and would likely end up in a Mexican jail or a Mexican mental institution. *Id.* at 1132. Guerra supported his application for CAT with a psychological evaluation, mental health records, letters from his family detailing his mental health condition, U.S. State Department "country condition reports and news articles about widespread abuse in Mexican jails and mental health facilities" *Id.*

The Immigration Judge granted Guerra's request for relief under CAT. *Id*. The Immigration Judge concluded that CAT was warranted because of Guerra's "specific circumstances which made it more likely than not that he would be harmed by police and government officials working in psychiatric institutions in Mexico." *Id.* She relied on "documented conditions in Mexico regarding discrimination against people with disabilities. *Id.* The Immigration Judge determined that systematic discrimination against people with mental disabilities and the abuse they face in Mexican institutions qualifies as torture. *Id.*

The DHS appealed the Immigration Judge's determination to the BIA. The BIA disagreed with the Immigration Judge's determination that Guerra would be subject to torture in Mexican mental institutions or jails. *Id.* at 1132. The BIA vacated the Immigration Judge's CAT relief. *Id.*

Guerra appealed the BIA decision to the Court of Appeals. The Court of Appeals agreed with Guerra that the BIA had improperly engaged in fact finding on appeal:

> Guerra argues that the BIA failed to apply clear error review in two ways**: when rejecting the IJ's determination that Mexican health care workers act with specific intent to harm mental health patients, and when rejecting the IJ's determination that it is more likely than not that Guerra faces a clear probability of being tortured in criminal detention**. We agree with him on both grounds.

Id. at 1133 (emphasis added).

The Court of Appeals started by pointing out that the Immigration Judge's holding that whether a government official acts with specific intent is a question of fact, not a question of law.

> First, we consider the BIA's rejection of the IJ's finding of specific intent to torture by Mexican officials in mental health institutions. **Whether government officials act with specific intent to torture is a question of fact that is subject to clear error review.**

Id. at 1134 (emphasis added)(citing *Ridore* 696 F. 3d at 916 – 917).

Next, the Court of Appeals pointed out the factual underpinning of the Immigration Judge's determination on specific intent:

> In reaching that conclusion, the **IJ made predicate factual findings, based on extensive record evidence** documenting that: (1) **individuals like Guerra face widespread systemic discrimination on the basis of their disabilities;** (2) the Mexican government does not enforce laws that prohibit discrimination against those with disabilities in employment, education, and in the provision of services; (3) the Mexican criminal justice system frequently denies persons with mental disabilities the right to make their own legal decisions and frequently subjects them to arbitrary detention during legal proceedings; (4) **individuals with disabilities are provided health care services only within institutions, where they are segregated from the rest of the community and have no right to make basic daily decisions; and (5) employees of mental health institutions carry out actions—including the use of permanent physical restraints, physical and sexual abuse, and heavy sedation to control the patients' behavior—that qualify as torture under CAT and sometimes cause death.**

Id. at 1134 (emphasis added).

The Court of Appeals criticized the BIA for reflexively rejecting the Immigration Judge's findings and inferences drawn from those findings:

> The BIA also rejected Guerra's argument that **specific intent could be inferred from the fact that these practices continue to persist despite years of condemnation from the international community,** attributing the persistence of these problems to "the difficulties inherent in addressing a complex public policy issue with insufficient material resources." **This was not clear error review for multiple reasons.**

Id. at 1134-1135 (emphasis added)

The Court of Appeals rejected as "conclusory" the BIA's rationale that factual record was not sufficiently developed to support the Immigration Judge's CAT finding. *Id.* at 1135. The Court of Appeals was equally critical of the BIA's decision to make its own, alternative, explanation for the cruelty imposed in Mexican mental institutions:

> The IJ acknowledged and **rejected** the alternative explanation that mental health officials' actions can be explained by gross negligence and a misunderstanding of the nature of psychiatric illness. On appeal, the BIA stated that it "accord[ed] more weight to country reports in the record that [the IJ] did not find persuasive." But

> the BIA cannot reverse the IJ's factual finding "even though [it is] convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently."

Id. at 1135 (emphasis in original).

The Court of Appeals remanded the case to the BIA to allow it to conduct a proper appellate review. However, the Court of Appeals was careful to clarify the facts that supported Guerra and were not in dispute:

> For instance, **the BIA did not question the veracity of evidence about Guerra's mental health conditions and incapacity to take care of himself. The IJ found, and the BIA did not challenge, that Guerra will likely become homeless in Mexico and attract the attention of police or be institutionalized, or both, due to his "abnormal behavior," and that Guerra cannot safely and reasonably relocate within Mexico.** The IJ found, and the BIA agreed, that there is evidence of regressive, primitive, and extremely harmful practices in Mexican mental health institutions, as well as evidence of harsh conditions and harm amounting to torture against detainees in Mexican prisons. All these findings appear cogent and well supported by evidence in the record. We nonetheless remand this case to the BIA to apply clear error review.

Id. at 1138 (emphasis added).

In sum, the Court of Appeals reversed the BIA's decision denying CAT to Guerra. The Court of Appeals pointed out that, although the definition of "torture" under the regulations is a question of law, "specific intent" is an element of "torture" and "specific intent" is a question of fact. Moreover, "specific intent" can be logically inferred from a pattern and practice of cruel or reckless behavior, as the Immigration Judge found.

As noted above, *Guerra* was handed down a week after *R-A-F* and makes no mention of *R-A-F* . It might be easy to conclude that the Court of Appeals simply was unaware of *R-A-F* when it ruled on *Guerra.* However, nearly two months after *R-A-F* the Court of Appeals issued another opinion in *Resendiz v. Barr* 2020 U.S. App. LEXIS 13393 (9th Cir. April 27, 2020) that reversed the BIA and remanded the case for further proceedings.

Like *R-A-F* and *Guerra*, *Resendiz* involved a Mexican national with schizophrenia and adjustment disorder and was deemed unfit to represent himself at trial. *Id* at *2. The Immigration Judge and the BIA both summarily rejected Resendiz's evidence and arguments concerning CAT and the likelihood that he would be tortured in Mexican mental institutions. *Id.*

The Court of Appeals remanded the case but cautioned the agency to heed prior precedent:

> In its reconsideration, the agency should take note of our previous

> holdings regarding the standard of proof for the specific intent to torture in a CAT claim. . . . a torturer's specific intent in a CAT claim **may be established by direct or circumstantial evidence and inferred from evidence of prior harmful acts and practices**. *See Guerra v. Barr*, 951 F.3d 1128, 1135 (9th Cir. 2020) (approving an IJ's use of 'evidence of primitive and abusive practices on mental health patients . . . to support an inference of specific intent to inflict harm"); *Ridore v. Holder*, 696 F.3d 907, 917 (9th Cir. 2012) ("If it is true that the . . . government has a policy of placing accused human rights violators in charge of prisoners, as the IJ found it does, then there is nothing illogical in inferring the government intends to put those prisoners at risk of cruel, abusive treatment that would qualify as 'severe suffering' or 'torture' – as the IJ found.").

Id. at *4-5 (emphasis added).

The Court of Appeals' Decisions Trump the Attorney General's Opinions

Recognizing that *R-A-F* conflicts with the weight of Court of Appeals precedent as it relates to the standard of review under CAT, the question becomes, which interpretation carries the day. Clearly, the Court of Appeals' precedent supersedes the Attorney General's opinions. This is apparent from recent United States Supreme Court precedent.

The Attorney General's interpretation of immigration law, – under 8 U.S.C. §§1101(a)(42)(A), 1158(b)(1)(a) and (b)(i) or other statutory provisions –, to the extent it conflicts with opinions issued by the federal Courts of Appeal, is entitled to no deference because "Chevron deference"[3] no longer applies to immigration law.

> The **proper rules for interpreting statutes** and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and t**he function and province of the Judiciary.**

Pereira v. Sessions, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J. concurring) (quotations omitted)(emphasis added).

Pereira involved the interpretation of the immigration statutes as they related to Notices to Appear. The BIA upended a consensus that had developed in the Circuit Courts concerning the application of the stop-time rule. *Id.* at 2120.

> The United States Supreme Court was critical of the BIA's illogical interpretation of the statute and equally critical of the slavish adoption of the BIA's interpretation by Circuit

[3]"*Chevron* deference" is a doctrine that originated in *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984) and holds that the administering executive branch agency of federal statute is entitled to deference in interpreting ambiguous provisions of that statute.

Courts: In according Chevron deference to the BIA's interpretation, some Courts of Appeals engaged in cursory analysis of the questions whether, applying the ordinary tools of statutory construction, Congress' intent could be discerned, and whether the BIA's interpretation was reasonable.. In, Urbina v. Holder, [745 F.3d 736 (4th Cir. 2014)] for example, the court stated, without any further elaboration, that "we agree with the BIA that the relevant statutory provision is ambiguous." It then deemed reasonable the BIA's interpretation of the statute, "for the reasons the BIA gave in that case." . . .

This analysis suggests an abdication of the Judiciary's proper role in interpreting federal statutes. . . .

The type of reflexive deference exhibited in some of these cases is troubling. And when deference is applied to other questions of statutory interpretation, such as an agency's interpretation of the statutory provisions that concern the scope of its own authority, it is more troubling still. . . . **The proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary**.

Pereira v. Sessions, 138 S. Ct. 2105, 2120-21 (2018)(emphasis added)(internal citations omitted).

Pereira established that the interpretation of immigration law is determined by the judiciary, not the executive branch. To the extent those two branches conflict, the judicial interpretation wins out.

Remarkably, the Attorney General never mentions *Periera* in the entirety of *R-A-F*. Notwithstanding the explicit statement in *Periera* – that the proper rules for interpreting the asylum statute is "the function and province of the Judiciary", the Attorney General fails to even mention, much less distinguish the recent and relevant opinions from Courts of Appeal.

Conclusion

In sum, *R-A-F*, like *Matter of A-B* 27 I & N 316 (A.G. 2018) fails to take into consideration the body of appellate case law that governs immigration decisions. Just as *Matter of A-B* engaged in extensive *dicta* *R-A-F* ignores binding precedent. Both flaws weaken the opinions which is perhaps why *R-A-F* – issued in February 2020 – has never been cited in an appellate court opinion.

Immigration practitioners can and should highlight the weakness of *R-A-F.* The most glaring weakness is that it attempts to make the definition of "torture" a purely legal determination subject to *de novo* review. However, the definition of "torture" under the regulations requires a finding of "specific intent" and "specific intent" is a factual determination subject to review for clear error. Because the factual underpinnings of

CAT must be reviewed for clear error and not *de novo* the Attorney General's efforts, in *R-A-F* to convert a factual determination into a legal issue fails. As the Third Circuit stated many years ago: "Glueing the two questions together, however, does not entitle the BIA to review the first question, the factual one, *de novo." Kaplun,* 602 F.3d at 271.

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