Authentication of foreign documents, issues regarding Country Reports, and the limited value of impeachment evidence.

By Jonathan D. Montag

Authentication of foreign documents

In a removal proceeding it is quite common to present documents from foreign services in support of a client's case. Documentation could include birth certificates, marriage and divorce records, medical reports, school records, and arrest and conviction records. When seeking to admit official documents from foreign countries, there is a regulation[1] addressing the authentication of these documents. The regulation is derived from the Hague Convention

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[1]The regulation, at 8 CFR §287.6 states:(b) Foreign: Countries not Signatories to Convention. (1) In any proceeding under this chapter, an official record or entry therein, when admissible for any purpose, shall be evidenced by an official publication thereof, or by a copy attested by an officer so authorized. This attested copy in turn may but need not be certified by any authorized foreign officer both as to the genuineness of the signature of the attesting officer and as to his/her official position. The signature and official position of this certifying foreign officer may then likewise be certified by any other foreign officer so authorized, thereby creating a chain of certificates.

(2) The attested copy, with the additional foreign certificates if any, must be certified by an officer in the Foreign Service of the United States, stationed in the foreign country where the record is kept. This officer must certify the genuineness of the signature and the official position either of (i) the attesting officer; or (ii) any foreign officer whose certification of genuineness of signature and official position relates directly to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation.

(c) Foreign: Countries Signatory to Convention Abolishing the Requirement of Legislation for Foreign Public Document. (1) In any proceeding under this chapter, a public document or entry therein, when admissible for any purpose, may be evidenced by an official publication, or by a copy properly certified under the Convention. To be properly certified, the copy must be accompanied by a certificate in the form dictated by the Convention. This certificate must be signed by a foreign officer so authorized by the signatory country, and it must certify (i) the authenticity of the signature of the person signing the document; (ii) the capacity in which that person acted, and (iii) where appropriate, the identity of the seal or stamp which the document bears.

(d) Canada. In any proceedings under this chapter, an official record or entry therein, issued by a Canadian governmental entity within the geographical boundaries of Canada, when admissible for any purpose, shall be evidenced by a certified copy of the original record attested by the official having legal custody of the record or by an authorized deputy.

Abolishing the Requirement for Legalisation for Foreign Public Documents, also known as the Apostille Convention.

The regulations distinguish between signatories and non-signatories to the Convention and at 8 CFR §§287.6(c)(2) and (3)[2] provide simpler rules for many documents, including most of the documents a respondent in removal proceedings is likely to file. Fortunately, because of the difficulty in getting the type of authentication required by the regulations, even if a particular document is not exempted by the regulations, courts have found that the regulation is not absolutely binding. Documents may be authenticated in immigration proceedings through any "recognized procedure, such as those required by INS regulations or by the Federal Rules of Civil Procedure."[3] According to the Fed. Rules Civ. Proc. Rule 901, a document can be authenticated

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[2](2) No certification is needed from an officer in the Foreign Service of public documents.

(3) In accordance with the Convention, the following are deemed to be public documents:

(i) Documents emanating from an authority or an official connected with the courts of tribunals of the state, including those emanating from a public prosecutor, a clerk of a court or a process server;

(ii) Administrative documents;

(iii) Notarial acts; and

(iv) Official certificates which are placed on documents signed by persons in their private capacity, such as official certificates recording the registration of a document or the fact that it was in existence on a certain date, and official and notarial authentication of signatures.

(4) In accordance with the Convention, the following are deemed not to be public documents, and thus are subject to the more stringent requirements of §287.6(b) above:

(i) Documents executed by diplomatic or consular agents; and

(ii) Administrative documents dealing directly with commercial or customs operations.

[3]*Espinoza v. INS*, 45 F.3d 308, 309-310 (9th Cir. 1995); *Chung Young Chew v. Boyd*, 309 F.2d 857 (9th Cir. 1962). The procedure specified in"8 CFR §287.6 provides one, but not the exclusive, method." *Iran v. INS*, 656 F.2d 469, 472 n.8 (9th Cir. 1981); *Hoonsilapa v. INS*, 575 F.2d 735, 738 (9th Cir. 1978). It was error to exclude the official records based solely on the lack of consular certification. *Khan v. INS*, 237 F.3d 1143, 1144 (9th Cir. Cal. 2001); *Vatyan v. Mukasey*, 508 F.3d 1179, 1182-1183 (9th Cir. Cal. 2007) ("... an immigration petitioner may resort to any recognized procedure for authentication of documents in general, including the

by the testimony of a witness.[4] Official documents are also properly authenticated.[5] Further, the federal rules allow for self-authentication of Foreign public documents.[6]

When submitting documents, the Immigration Court Practice Manual requires that the original documents be made available to the Office of Chief Counsel for scientific examination.[7] The implication of the rule is that the Department of Homeland Security has the means to analyze documents to ascertain their genuineness, *i.e.*, authentication.

Practice Pointers

When filing any copies of original documents to the immigration court, make sure to note that the originals are available to the government should it request them, citing to Immigration Court Practice Manual § 3.3(d)(iii). Bring originals to any hearings as the rule also requires.

If it appears that the immigration judge or the government attorney will raise the issue of a U.S. consular officer needing to authenticate documents, email the U.S. consulate at the earliest stage of your case with the document attached and ask for authentication. Keep a copy of the email in your file along with any response, should you miraculously receive one. This will show your attempt to obtain consular verification.

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procedures permitted under Federal Rule of Evidence 901, and thus a petitioner's failure to obtain government certification of a foreign public document's authenticity is not necessarily a bar to admission of the document.")

[4]Fed. Rules Civ. Proc. Rule 901(b) states, "Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule: (1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be."

[5]Fed. Rules Civ. Proc. Rule 901(b)(7) states, "Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept."

[6]Fed. Rules Civ. Proc. Rule 902(3) states, "A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation.

[7]Immigration Court Practice Manual §3.3(d)(iii).

Department of State Country Reports

Many immigration judges require country reports to be submitted as part of asylum applications. Asylum applicants rely on them when the country report supports an asylum claim. In other types of cases, they can be helpful to establish hardship where hardship is a factor in a relief application. The government may also use them to try to show changed country conditions. The Ninth Circuit Court of Appeals has repeatedly referred to country reports as "perhaps the best resource on political situations.[8] Court decisions regarding country reports have focused on their usefulness to the government in rebutting the presumption of future persecution when there is a finding of past persecution.[9] Some decisions have found that standing alone, Country Reports are not sufficient to rebut the presumption of past persecution.[10] These cases stress that an

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[8] *See*, *inter alia*, *Kazlauskas v. INS*, 46 F.3d 902, 906 (9th Cir.1995); *Sowe v. Mukasey*, 538 F.3d 1281, 1285 (9th Cir. 2008); *Singh v. Holder*, 753 F.3d 826, 831 (9th Cir. 2014).

[9]An applicant shall be found to be a refugee on the basis of past persecution if the applicant can establish that he or she has suffered persecution in the past in the applicant's country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to, or avail himself or herself of the protection of, that country owing to such persecution. An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim. That presumption may be rebutted if an asylum officer or immigration judge makes one of the findings described in paragraph (b)(1)(i) [There has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality or, if stateless, in the applicant's country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion; or (B) The applicant could avoid future persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, and under all the circumstances, it would be reasonable to expect the applicant to do so. (ii) Burden of proof. In cases in which an applicant has demonstrated past persecution under paragraph (b)(1) of this section, the Service shall bear the burden of establishing by a preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (B) of this section.] 8 CFR §1208.16(b)(1)(i)(A). The same presumption and burden shift occurs in the withholding of removal context. 8 CFR §1208.16(b)(1)(i). That presumption is rebutted if the government shows by a preponderance of the evidence that there has been a fundamental change in circumstances such that the petitioner's life or freedom would not be threatened on account of a protected ground upon his return to that country.

[10]*Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1074 (9th Cir. 2004); *Ali v. Holder*, 637 F.3d 1025, 1030 (9th Cir. 2011); *Lopez v. Ashcroft*, 366 F.3d 799, 805-06 (9th Cir. 2004); *Gui v. INS*, 280 F.3d 1217, 1229 (9th Cir. 2002); *Popova v. INS*, 273 F.3d 1251, 1260 (9th Cir. Cal. 2001); *Molina-Estrada v. INS*, 293 F.3d 1089, 1096 (9th Cir. 2002); *Kamalyan v. Holder*, 620

individualized analysis of the case is necessary. However, other cases have relied on little more than a country report to rebut the presumption of a well-founded fear of future persecution.[11] These cases have been satisfied that a cursory application of the Country Report to the asylum applicant is a requisite individualized analysis. A complication is that Country Reports are often internally contradictory,[12] stating favorable and unfavorable facts for whatever human rights proposition one is trying to make. This is an issue where decisions are hardly clear and your result will depend on which of the conflicting cases your immigration judge, your Board member or members, or your appellate panel favors.

Besides using a Country Report to show changed country conditions, an immigration judge may use the Country Report to discredit an alien's testimony. While a Country Report can be used to contradict an alien's statement about general conditions in a country,[13] an assertion in a Country Report cannot be used to contradict specific testimony. In *Shah v. INS*,[14] the Ninth Circuit found that a statement in the Country Report about an Indian political party's gains in then-recent elections belying that political party members could face persecution could not be used to contradict an asylum applicant's claim of persecution as a member of that political party.[15] In *Zheng v. Ashcroft*,[16] the Ninth Circuit disallowed an adverse finding based on a contradiction between a Chinese asylum applicant's testimony about forced abortion and a Country Report about when forced abortions usually occur. Finally, in *Yongguo Lai v. Holder*,[17] the Ninth Circuit found invalid an immigration judge's finding of a contradiction where the Country Report for China indicated that perpetrators of illegal religious activity are usually

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F.3d 1054, 1057 (9th Cir. 2010).

[11]*Marcu v. INS*, 147 F.3d 1078, 1081-82 (9th Cir. 1998); *Gonzalez-Hernandez v. Ashcroft*, 336 F.3d 995, 998-1000 (9th Cir. 2003); *Sowe v. Mukasey*, 538 F.3d 1281, 1285 (9th Cir. 2008); *Singh v. Holder*, 753 F.3d 826, 833 (9th Cir. 2014) (holding same and citing unpublished decisions for the proposition).

[12]*See, Gonzalez-Hernandez v. Ashcroft*, 336 F.3d 995, *supra*, and *Singh v. Holder*, 753 F.3d at 831 pointing out the contradictions in Country Reports.

[13]In *Chebchoub v. INS*, 257 F.3d 1038, 1043 (9th Cir. 2001), an asylum applicant's assertion about how the Moroccan government forcibly exiles political opponents could be challenged by a Country Report assertion that there were no known instances of it.

[14] 220 F.3d 1062, 1069 (9th Cir. 2000)

[15]The Court also said the statement in the Country Report could not be relied on because it was speculation and conjecture. *Id*.

[16]397 F.3d 1139, 1145 (9th Cir. Cal. 2004).

[17]No. 10-73473 (9th Cir. filed Aug. 25, 2014).

denied the right to exit China, yet the asylum applicant was able to leave without problems.

Finally, silence in a Country Report should not be used to discredit an applicant for relief. In *Gaksakuman v. United States AG*,[18] a Sri Lankan presented evidence that failed asylum seekers are tortured when they are deported to Sri Lanka. The immigration judge held that because the Sri Lanka Country Report did not mention this, she would not credit any of the evidence the applicant presented. The 11th Circuit held, "State Department reports cannot rebut an applicant's evidence when those reports do not 'comment upon' the individual's application."[19]

Practice Pointer

Do not rely on a Country Report alone to try to prove a contention in your case. If the Country Report can support an argument that circumstances have changed, even obtusely, make sure to present other sources that show that things have not improved, or not improved that much. Should a Country Report indicate improvement in the human rights situation for certain people or in certain areas of the country, try to distinguish your client from these people or areas. Sources of information, all available online, include other reports from the U.S. Department of State such as International Religious Freedom Reports and travel advisories. Human rights organizations such as Human Rights Watch and Amnesty International also prepare human rights reports which are. The United Nations High Commission for Refugees also has a helpful website[20] for gathering information. Media reports available online are also a useful source for the most up-to-date country condition information.

Impeachment evidence

Often in a removal case, the government attorney will hold back on filing evidence and try to use it after the respondent testifies to impeach him. In *Urooj v. Holder,*[21] the 9th Circuit illuminated the dangers of holding back on timely submitting evidence for impeachment purposes. *Urooj* also illuminates an opportunity for a respondent to prevail in an otherwise hopeless case. Impeachment evidence is evidence that a party may submit for the first time when examining or cross examining a witness for the limited purpose of showing background facts which bear directly on whether the factfinder ought to believe one witness rather than other and conflicting witnesses. Impeachment evidence can include evidence attacking witness credibility

[18]No. 13-12893 (11th Cir. filed Sept. 18, 2014).

[19]*Id.,* Slip op. at 15.

[20]http://www.refworld.org/cgi-bin/texis/vtx/rwmain.

[21]734 F.3d 1075 (9th Cir. 2013).

and character for truthfulness or untruthfulness.[22] A common example of the use of impeachment in immigration court would be when a government attorney asks your client if he has ever been arrested, and upon answering that he has not, produce for the first time a rap sheet showing arrests.

As removal proceedings are civil in nature and one would hope all the evidence would be provided in advance of the hearing, the Immigration Court Practice Manual countenances this impeachment tactic. The manual prescribes filing deadlines stating, "For individual calendar hearings involving non-detained aliens, filings must be submitted at least fifteen (15) days in advance of the hearing. This provision does not apply to exhibits or witnesses offered solely to rebut and/or impeach."[23]

In *Urooj,* an alien was charged with removability for lying on her asylum application, which was earlier granted. After she was granted asylum, she admitted to DHS officers that she lied on her application and the persecution that formed the basis of her asylum claim did not actually occur. She signed a sworn statement to that effect. She was placed in removal proceedings to revoke her asylum status. In such a proceeding, the government bears the burden of proof and must establish the grounds for termination by a preponderance of the evidence.[24] The government did not file any evidence with the court before the hearing. At the hearing, the respondent, Ms. Urooj, refused to testify. The government entered the sworn statement as rebuttal evidence over the objection of Ms. Urooj who asserted that it was untimely pursuant to the then local rules which were similar to the current Immigration Practice Manual filing deadline rule.[25] The Ninth Circuit held, "Impeachment evidence alone cannot satisfy DHS' burden where there was no substantive evidence and thus nothing to impeach."[26] Consequently, the court found that the government failed to meet its burden to seek the alien's removal.

Practice pointer

Counsel should be aware of the burden of proof in a case and resist being forced to present evidence and testimony to meet the government's burden.

Counsel should object to the government's filing evidence late when that late-filed evidence is the linchpin to the government's case.

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[22] *Urooj*, at 1078 (citations omitted).

[23] Chapter 3(b).

[24] 8 CFR §1208.24(f).

[25] *Id*.

[26] *Urooj v. Holder*, at 1078.

Even though evidence is presented for impeachment purposes, it still must be probative, fair, and properly authenticated.