

## **Mentally Ill, Disabled, or Incompetent Immigration Detainees: Legal Treatment Issues**

*Alice CLAPMAN (2011). "Hearing Difficult Voices: The Due Process Rights of Mentally Disabled Individuals in Removal Proceedings." New England Law Review 45: 101 - 142.*

In this article, Alice Clapman provides an overview of the potential safeguards and remedies that ought to be due to mentally ill, disabled, or incompetent adults in US detention facilities. Although the US Supreme Court has required appointment of counsel in involuntary commitment proceedings and in juvenile delinquency proceedings, detention and deportation hearings are not included in this list. (114) This is odd because removal in particular “is akin to, and often worse than, penal incarceration.” (123) Nevertheless, Alice Clapman argues that there are three relevant, interrelated strands of law: “first, the rights of non-citizens in removal proceedings generally; second, the rights of individuals involved in civil matters where fundamental interests are at stake; and third, the rights of individuals in both civil and criminal proceedings who suffer from mental disabilities such that they cannot protect their own interests.” (111) She notes the relevance of the *Mathews v. Eldridge* factors that indicate the constitutional requirements for any civil procedure in the US: namely, (1) the private interests at stake; (2) the government’s interests; and (3) the risk of an erroneous decision in the absence of the safeguard at issue.” (115) An analogy would be that, in the absence of special assistance, mentally disabled defendants cannot exercise the basic civil procedural rights that the US Constitution requires, even for an immigration hearing. (121)

After outlining the manifest issues related to immigration hearings involving mentally ill non-citizens, Clapman offers a range of possible solutions. The most significant is the provision of counsel or a guardian. (127) She suggests filling the gap of implementing “a workable definition (or definitions) of incompetence”. (123) Courts should be instructed to determine whether respondents are capable of consulting with counsel, making decisions, presenting arguments for bail, and presenting defenses against removal. (123 - 124) She discusses the benefits and pitfalls of allowing family members to act as guardians ad litem (129 - 138) and argues that the imperfect but “best possible option” is the use of accredited representatives (136). Clapman also makes more general comments on the problematic nature of courts’ reliance on credible testimony – that is, consistent, persuasive presentation of evidence – and the adversarial nature of the courtroom. She advocates making accommodations for non-dangerous detainees, including removals of physical restraints and availability of emotional supports in the courtroom. (139 – 140)

### **Further reading:**

- Aronson, J. L. (2011 - 2012). "The Kafkaesque Experience of Immigrants with Mental Disabilities: Navigating the Inexplicable Shoals of Immigration Law." Interdisciplinary Journal of Human Rights Law 6(01): 145 - 166.
- Eisner, H. (2011). "Disabled, Defenseless, and Still Deportable: Why Deportation Without Representation Undermines Due Process Rights of Mentally Disabled Immigrants." University of Pennsylvania Journal of Constitutional Law 14: 511.
- Kanter, A. S., R. B. Chisam, et al. (2001). "The Right to Asylum and Need for Representation of People with Mental Disabilities in Immigration Proceedings." Mental and Physical Disability Law Reporter 25(04): 511 - 516.

- Klepps, C. (2012). "What Kind of 'Process' is This? Solutions to the Case-by-Case Approach in Deportation Proceedings for Mentally Incompetent Non-Citizens." Quinnipiac Law Review **30**(03): 545 - 585.
- O'Mahony, C. (2012). "Legal capacity and detention: implications of the UN disability convention for the inspection standards of human rights monitoring bodies." The International Journal of Human Rights **16**(06: Special Issue: Torture Prevention and Disability): 883 - 901.
- Ochoa, K. C., G. L. Pleasants, et al. (2010). "Disparities in Justice and Care: Persons With Severe Mental Illnesses in the U.S. Immigration Detention System." Journal of the American Academy of Psychiatry and the Law **38**(3): 392 - 399.
- Pitsker, N. (2007). "Due Process for All: Applying Eldridge to Require Appointed Counsel for Asylum Seekers." California Law Review **95**(01): 169 - 198.
- Schizophrenia Society of Ontario (2010). Double Jeopardy: Deportation of the Criminalized Mentally Ill. Schizophrenia Society of Ontario Discussion Papers. Ontario, Schizophrenia Society of Ontario: 44.
- Stevens, J. (2011). "U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens." Virginia Journal of Social Policy & the Law **18**(03): 606 - 720.
- Venters, H. and A. S. Keller (2013). "Diversion of Patients With Mental Illness From Court-Ordered Care to Immigration Detention." Psychiatric Services **64**(04).