



## **Practice Alert:** **Rights of noncitizens with significant mental health** **conditions in removal proceedings**

Noncitizens have a statutory right to fair removal proceedings under INA § 240(b)(4). In *Matter of M-A-M*, 25 I&N Dec. 474 (BIA 2011), the Board of Immigration Appeals (“BIA”) held that in order to ensure that removal proceedings are “as fair as possible,” an Immigration Judge (“IJ”) must institute “safeguards” if a respondent is found incompetent to proceed.<sup>1</sup> In subsequent decisions, the BIA held that “neither party bears a formal burden of proof” to determine whether the respondent is incompetent.<sup>2</sup> However, if there are “indicia of incompetency,” the IJ “should determine if a preponderance of the evidence establishes that the respondent is incompetent.”<sup>3</sup> The BIA reviews the IJ’s competency finding under a “clearly erroneous” standard<sup>4</sup>, and the appropriateness of the safeguards de novo.<sup>5</sup>

This Practice Alert will examine the decision of *Matter of M-A-M*, 25 I&N Dec. 474 (BIA 2011), the framework it established to determine the competency of a respondent in removal proceedings and safeguards that would allow them to proceed, what evidence may be sufficient to trigger a competency inquiry, determine a respondent’s competency, and the type of safeguards available to the Immigration Court to ensure the fairness of proceedings. This Alert provides Practice Tips that are especially relevant to noncitizen survivors and resources for further research and case preparation.

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<sup>1</sup> See *Matter of M-A-M*, 25 I&N Dec. 474, 476, 481 (BIA 2011).

<sup>2</sup> *Matter of J-S-S*, 26 I&N Dec. 679, 683 (BIA 2015).

<sup>3</sup> See *id.*

<sup>4</sup> *Id.* at 684.

<sup>5</sup> See *Matter of M-J-K*, 26 I&N Dec. 773, 776 (BIA 2016).

## I. The Decision in *Matter of M-A-M*, 25 I&N Dec. 474 (BIA 2011):

### Facts:

The respondent appeared pro se at his removal hearings.<sup>6</sup> The BIA noted that the respondent “had difficulty answering basic questions, such as his name and date of birth, and he told the Immigration Judge that he had been diagnosed with schizophrenia.”<sup>7</sup> The respondent “also indicated that he needed medication.”<sup>8</sup> “At the second hearing...the respondent indicated that he had a history of mental illness that was not being treated in detention.”<sup>9</sup> During additional hearings, “further reference was made to the respondent’s mental illness and he asked to see a psychiatrist.”<sup>10</sup> The record included “psychiatric reports that diagnos[ed] him with mental illness, and during criminal proceedings, the respondent was found to be unfit to proceed with a trial.”<sup>11</sup>

The IJ found the respondent removable and denied his applications for cancellation of removal, asylum, withholding, and CAT relief.<sup>12</sup> The IJ did not make a finding regarding the respondent’s competency.<sup>13</sup> The respondent retained counsel and appealed the IJ’s order to the BIA.<sup>14</sup>

### Question:

Should the IJ have made a competency determination for this respondent?

### Answer:

Yes.<sup>15</sup> The BIA held that here, there was “good cause to believe that the respondent lacked sufficient competency to proceed with the hearing.”<sup>16</sup> The BIA remanded the case to the IJ.<sup>17</sup>

### Reasoning:

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<sup>6</sup> *M-A-M*, 25 I&N Dec. at 475.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *M-A-M*, 25 I&N Dec. at 475.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 484.

<sup>12</sup> *Id.* at 476.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> See *id.* at 484.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

The statute's inclusion of safeguards supports a presumption that removal proceedings can continue even if the noncitizen is found incompetent, "provided the proceeding is conducted fairly."<sup>18</sup>

The Fifth Amendment "entitles" noncitizens to due process "in immigration proceedings."<sup>19</sup>

- This includes "the right to a full and fair hearing."<sup>20</sup>

## II. Determining Competency after Matter of M-A-M:

*Matter of M-A-M* set out the following test for competency:

- Does the noncitizen have "a rational and factual understanding of the nature and object of the proceedings?"
- Can the noncitizen "consult with" their attorney or representative?
- Does the noncitizen have "a reasonable opportunity to examine and present evidence and cross-examine witnesses?"<sup>21</sup>

**Practice tip:** A practitioner should consider the above questions when analyzing whether their client is competent to continue with removal proceedings.

There is a presumption of competency in removal proceedings.<sup>22</sup> The IJ is required to assess competency **only if** "there are indicia of incompetency."<sup>23</sup>

- Examples of such "indicia" may include:
  - "Inability to stay on topic"
  - "Inability to understand or respond to questions"

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<sup>18</sup> *Id.* at 477.

<sup>19</sup> *Id.* at 479.

<sup>20</sup> See *id.*, see also *Franco v. Holder*, a class-action lawsuit brought on behalf of detained noncitizens with severe mental illness. Further information about the lawsuit can be found at *Franco v. Holder*, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclusocal.org/en/cases/franco-v-holder> (last visited Sept. 12, 2022.) Practitioners are also encouraged to consult CLINIC's [practice advisory](#) on representing clients with mental illness for additional discussion of the basis for the BIA's decision in *Matter of M-A-M* and determination of competency.

<sup>21</sup> *M-A-M*, 25 I&N Dec. at 479.

<sup>22</sup> *Id.* at 477.

<sup>23</sup> See *id.* at 484.

- “High level of distraction.”<sup>24</sup>

**Practice tip:** Noncitizens with Post Traumatic Stress Disorder (“PTSD”), including survivors of gender-based violence with PTSD diagnoses that are related to abuse, may exhibit [similar behaviors](#) to the ones that *M-A-M* held may be “indicia of incompetency.” Consider whether you can argue for safeguards based on a survivor client’s PTSD diagnosis if the client displays behaviors similar to the behaviors highlighted in *M-A-M*.

**Practice tip:** Practitioners must ensure that “indicia of incompetency” are brought to the IJ’s attention as soon as possible, because the IJ is only required to assess the respondent’s competency if such “indicia” are present.<sup>25</sup> Practitioners should consider filing a motion to continue the removal proceeding in order to gather evidence and ensure “indicia of incompetency” are in the record.<sup>26</sup>

*Matter of M-A-M* noted that there may also be evidence in the record of the noncitizen’s mental illness, which can constitute “indicia of incompetency.”<sup>27</sup> Examples include “medical reports or assessments from past medical treatment,” “testimony from mental health professionals,” “school records regarding special education classes or individualized education plans; reports or letters from teachers, counselors, or social workers; evidence of participation in programs for persons with mental illness; evidence of applications for disability benefits; and affidavits or testimony from friends or family members.”<sup>28</sup>

When a noncitizen is detained, DHS is required “to provide the court with relevant materials in its possession that would inform the court about the respondent’s mental competency.”<sup>29</sup>

- **Practice tip:** If your client is detained, hold DHS to their duty to provide the court with these materials.

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<sup>24</sup> *Id.* at 479.

<sup>25</sup> *See id.* at 484.

<sup>26</sup> *Cf. id.* at 481. (“Proceedings may also be continued to allow the parties to gather and submit evidence relevant to these matters, such as medical treatment reports, documentation from criminal proceedings, or letters and testimony from other third party sources that bear on the respondent’s mental health.”)

<sup>27</sup> *M-A-M*, 25 I&N Dec. at 479.

<sup>28</sup> *Id.* at 479-80.

<sup>29</sup> *Id.* at 480, *see also Franco* and CLINIC’s practice advisory, *supra* note 20.

Competency is not “static.”<sup>30</sup> Thus, IJs must consider competency at multiple stages of the removal proceedings.<sup>31</sup> A noncitizen may regain competence or become incompetent at some future time.<sup>32</sup>

- **Practice tip:** Practitioners should consider a client’s competence on an ongoing basis. Similarly, practitioners should be prepared to raise competency issues at any stage of the removal proceeding, even if the client was found competent during an earlier point in the proceedings.

### III. Safeguards if the noncitizen is found to be incompetent:

- The IJ is required to institute “safeguards” to protect the noncitizen’s “rights and privileges.”<sup>33</sup>
- Examples of safeguards:
  - Requesting that the client be exempted from testifying<sup>34</sup>
  - “Refusal to accept admission of removability from an unrepresented respondent”<sup>35</sup>
  - Continuance or administrative closure<sup>36</sup>
  - Re-serving the NTA<sup>37</sup>
  - “Closing the hearing to the public”<sup>38</sup>
  - Identifying and allowing “a family member or close friend” to appear to assist respondent and “provide the court with information.”<sup>39</sup>
  - Waiving the noncitizen’s appearance.<sup>40</sup>

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<sup>30</sup> *M-A-M*, 25 I&N Dec. at 480.

<sup>31</sup> *See id.*

<sup>32</sup> *Cf. id.*

<sup>33</sup> *See id.* at 478. *See also M-J-K*, 26 I&N Dec. at 775 (“the application of safeguards in cases of mental incompetency is mandatory under the Act.”)

<sup>34</sup> *Cf. Nee Hao Wong v. INS*, 550 F.2d 521, 523 (9<sup>th</sup> Cir. 1977) (noncitizen who had a conservator testify on his behalf in a deportation hearing “was not denied due process”), *M-J-K*, 26 I&N Dec. at 777 (“we have held that the parties can explore various alternatives with the Immigration Judge, short of obtaining testimony from the respondent”), *M-A-M*, 25 I&N Dec. at 483 (waiving the noncitizen’s appearance at the hearing is an example of a safeguard.), 8 C.F.R. § 1003.25(a)(1) (a noncitizen who has “mental incompetency” may have their presence at the hearing waived as long as they are “represented by an attorney or legal representative, a near relative, legal guardian, or friend.”)

<sup>35</sup> *M-A-M*, 25 I&N Dec. at 483.

<sup>36</sup> *See M-J-K*, 26 I&N Dec. at 778 (administrative closure.)

<sup>37</sup> *See Matter of E-S-I*, 26 I&N Dec. 136, 145 (BIA 2013)

<sup>38</sup> *See M-A-M*, 25 I&N Dec. at 483.

<sup>39</sup> *See id.*

<sup>40</sup> *See id.*

- Note: IJs “should apply appropriate safeguards” if the “respondent has a long history of mental illness.”<sup>41</sup>
  - **Practice tip:** If your client has a long history of mental illness, you may want to use this statement in *M-A-M* to argue that the IJ should institute safeguards.

The above list is non-exhaustive. *Matter of M-J-K* clarified that the regulations do not limit the safeguards that are available to a respondent.<sup>42</sup>

**Practice tip:** The IJ has discretion to determine which safeguards are appropriate<sup>43</sup>, but practitioners should still argue for the safeguards that they think are most appropriate for their clients. Be creative when requesting safeguards! Always consider which safeguards are necessary to ensure that your client can exercise their constitutional and statutory rights in removal proceedings.

### **Conclusion**

When a client in removal proceedings has a significant mental health condition, the client’s representative should be familiar with the competency framework articulated by the BIA. The practitioner should be prepared to use BIA precedent to support a request for safeguards that will ensure a fair proceeding in which their client is able to exercise their constitutional and statutory rights in removal proceedings. Practitioners should consult case law in their circuit for further guidance on competency in removal proceedings.

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<sup>41</sup> See *M-A-M*, 25 I&N Dec. at 480.

<sup>42</sup> See *M-J-K*, 26 I&N Dec. at 775.

<sup>43</sup> See *M-A-M*, 25 I&N Dec. at 481-82.