

Jurist's Asylum-Seeker Rulings Earn Rebukes -- 9th Circuit Rebukes Hard-Liner Judge on Unfairness to Asylum Seekers

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SAN FRANCISCO - Desperately trying to prove his U.S. citizenship, Salvador Rivera brought his mother and his Oregon birth certificate into court to show Immigration Judge Anna S. Ho.

It didn't do any good. Ho deported him to Mexico, where Rivera remains stuck four years later even as he and his lawyer insist he is a native of the United States.

A federal appeals court, saying that Ho acted more like a prosecutor than a judge, overruled her and gave Rivera another chance to show he is a citizen.

It was hardly an isolated incident. The 9th U.S. Circuit Court of Appeals has reversed Ho in favor of immigrants at least 11 times in her decade on the bench, and not just for technical legal mistakes.

In one of the circuit's bluntly worded critiques, a three-judge panel last year scolded Ho for "improper hostility" toward some of the foreign citizens who appear in her courtroom. She also has been chided for wrongly excluding witnesses, prejudging cases and disregarding important evidence.

Statistics on the nation's immigration courts show that Ho, who currently works in Los Angeles after stints in Seattle and San Francisco, grants political asylum to foreigners at less than half the rate of her colleagues.

Ho could not be contacted for comment for this story because Justice Department policy forbids immigration judges from talking to the media.

There is no publicly available data on how often higher courts find fault with the rulings by administrative judges who sit on the nation's immigration courts. Nor is there any way of knowing what remedial steps are taken when those judges go astray because oversight by the Justice Department is shrouded in secrecy.

But lawyers say a growing number of well-documented anecdotes of immigration judges giving short shrift to immigrants may have provoked

U.S. Attorney General Alberto Gonzales to recently order a top-to-bottom performance review of the immigration court system. In a toughly worded memo earlier this month, Gonzales publicly criticized "intemperate or even abusive" behavior by immigration judges.

"This is a systemic problem," said Jayne E. Fleming, an appellate specialist at Reed Smith in Oakland who heads the office's pro bono practice. "It's not just one particular bad apple. The overall sloppiness on the part of immigration judges just finally came to the attorney general's attention."

As the Statue of Liberty's shining torch beckons the world's downtrodden, the nation's 215 immigration judges act as gatekeepers to render what can be life-altering verdicts in asylum and deportation cases.

Most immigration judges are conscientious, well tempered and fair, say lawyers who regularly practice before them.

Anti-Immigrant Culture

"Not all immigration judges are callous and uncaring by any means," said Karen Musalo, a Berkeley immigration specialist who directs Hastings College of the Law's Center for Gender and Refugee Studies.

"But a culture [within the immigration judiciary] has developed over the years that views immigrants negatively. The people who come before immigration judges are a vulnerable population who may have suffered severe trauma. They retell their story to the judge, sometimes to be ridiculed or mocked."

In Ho's Seattle courtroom back in January 2001, Rivera's mother showed the judge a packet of documents, including his certified birth certificate from a Portland, Ore., hospital, a local middle school progress report, a high school yearbook with Rivera's photo and his H&R Block tax return.

Ho was unimpressed.

"You know," Ho said, according to a transcript of the hearing, "if you're a U.S. citizen, you certainly - your mother certainly would have more than just this for a record. My children were born in this country. I could trace them from their birth ... all the way up to adult age. And you have nothing here to show that."

Conduct Unbecoming

After reviewing the case, a three-judge panel on the 9th Circuit did not mince words:

"Both the decision issued by the IJ and her conduct of the hearing demonstrate that the IJ did not conduct herself as an impartial judge but rather as a prosecutor anxious to pick holes in the petitioner's story," Judge Warren Ferguson wrote. *Rivera v. Ashcroft*, 387 F.3d 835 (2004).

Judge Connie Callahan of Sacramento dissented only on the outcome of the ruling, saying that Rivera's past use of an alias and outstanding warrants raised serious doubts about his citizenship.

Either way, fixing Ho's mistake hasn't been easy. Rivera remains penniless and undocumented in Mexico as his petition for re-entry into the United States slowly grinds through federal court, according to his lawyer, Seattle sole practitioner Karen L. Gilbert.

The day that Ho shot down Rivera, he had no lawyer. Those facing deportation often appear unrepresented at crucial hearings before immigration judges because U.S. law grants them no right to free counsel at such proceedings. Some can later find pro bono appellate attorneys, who listen to audiotapes or scrutinize transcripts of the earlier hearings to learn what went on.

Gilbert later expressed disbelief at Ho's behavior.

"The way that hearing was conducted was horrifying to me," she said.

"The judge sentenced an American citizen to four years in exile and counting," she added, summing up the effect of Ho's deportation order.

Lawyers as Judges

Immigration judges are lawyers appointed by the attorney general. As civil servants with no fixed terms of office, most are members of a union, the National Association of Immigration Judges. In San Francisco, their salaries, adjusted for the regional cost of living, ranged from \$124,128 to \$149,200 last year.

The attorney general's directive to immigration judges to treat immigrants respectfully echoes the ethics manual developed by the Justice Department's Office of Professional Responsibility

"Judges can be prompt and efficient while being patient, deliberate, dignified and courteous," it says.

Gonzales' call for an internal investigation was seen as a response to mounting criticism from lawyers, academics, federal appellate judges and the media that the nation's immigration courts are performing poorly.

One of the nation's most prominent appellate judges, Richard A. Posner of the 7th Circuit in Chicago, wrote in a Nov. 30 opinion that the immigration courts have "fallen below the minimum standards of legal justice." *Benslimane v. Gonzales*, 430 F.3d 828 (2005).

Most everyone agrees a big part of the problem is the crushing caseload in the immigration courts that requires administrative judges, on average, to decide nearly 1,000 cases per year, or about four cases each working day.

High-Pressure Adjudicating

Dana Leigh Marks, vice president of the National Association of Immigration Judges, said critics fail to appreciate how much pressure judges are under.

That argument has drawn sympathy from some federal circuit judges, who are themselves overloaded with immigration appeals.

In one case last year, the 9th Circuit tore into Los Angeles Immigration Judge Nathan W. Gordon for issuing "a literally incomprehensible opinion" in the case of a Guatemala man seeking asylum to avoid reprisals for political activity at home.

But Judge Marsha Berzon went on to describe the "sobering realities" of the crowded docket in Los Angeles, where 26 immigration judges disposed of more than 28,000 cases in 2003, including more than 12,000 asylum claims.

"We acknowledge," Berzon wrote, "that under current circumstances, it is difficult for IJs to explain their often complicated decisions adequately." Her panel sent the Guatemalan's case back for another hearing. *Recinos de Leon v. Gonzales*, 400 F.3d 1185 (2005).

Rarely do federal appeals judges speak up in defense of the immigration courts, but one of the influential conservatives on the 9th Circuit, Alex Kozinski, vented frustration about 10 days ago that his colleagues engage in too much "nitpicking" and sometimes take a "know-it-all approach" in second-guessing immigration judges.

"Circuit judges should not pretend to be immigration judges," he wrote. *Kumar v. Gonzales*, 2006 U.S. App. Lexis 1576 (Jan. 23, 2006).

Sympathy for Tough Judges

Activists who support tighter restrictions on immigration say judges who take a tough stand on immigrants ought to be applauded rather than chastised.

Andy Ramirez of Chino, founder of Friends of the Border Patrol, which places surveillance cameras and civilian guards on the U.S.-Mexican frontier, said the attorney general had no business blasting immigration judges in his Jan. 9 memo.

"Attorney General Gonzales of course takes the side of illegal aliens over the rights of U.S. citizens," he said. "Mr. Soft-on-Immigration would turn immigration judges into Wal-Mart greeters. Why should judges be friendly? If you're here illegally, you deserve a scolding."

Ho's critics say her track record is troubling not because she makes mistakes on tricky points of law, but because the 9th Circuit has repeatedly rebuked her for her lack of fundamental judicial qualities such as temperament and fairness.

"If a judge misunderstands the law, appellate courts often clarify things, and that's fine," said Musalo, the Hastings scholar. "But any judge should know how to comport herself impartially and with decency."

A recent visit to Ho's courtroom found her dispensing justice swiftly and certainly.

During a typical 10-minute hearing in Los Angeles last week, Ho never looked at a Mexican man and woman threatened with deportation. She denied their lawyer's request to let the man's boss, who was seated in the courtroom, testify to his good moral character. When Ho learned the man was once convicted of misdemeanor forgery, she ordered the prosecutor to add additional charges.

Ho told the couple's attorney he could agree to have their cases heard separately or she would rule right then and there. She didn't wait long for an answer.

"I've already told you what the choices are," she said. "What will it be?" The lawyer agreed that the cases could be heard independently.

By the Numbers

Ho's toughness on the bench is also seen in statistics. From 2000 to 2004, she granted asylum in 16.4 percent of the cases she decided, according to figures compiled by the Midwest Immigrant and Human Rights Center in Chicago.

The asylum-grants average for all U.S. immigration judges during the same period was 38 percent.

Details of Ho's background are sketchy because she was not available for an interview.

What is known is that she is herself an immigrant, a native of China who was raised in Taiwan, according to an interview that she granted to a Seattle-based weekly newspaper in 1998.

Ho told Northwest Asian Weekly that after leaving Taiwan, she spent time as a young adult in Spain and learned to appreciate the differences in people as well as learning Mandarin, Sichuan, Cantonese, Spanish and English. "I try to pay attention to what people are saying," she told the newspaper.

It's Ho's temperament on the bench that seems to bother lawyers most. Several attorneys in Seattle and San Francisco who have appeared before her over the years said she was sometimes downright rude.

"There have been cases in which she has been very concerned with coming to a fair and just result," Seattle immigration lawyer Robert Pauw told the Daily Journal in October 2002.

But Pauw also spoke of "situations in which my clients have not been treated fairly and she has not made reasonable credibility determinations."

Pauw stood by his words Monday in a brief phone message.

No Complaints

None of the lawyers who have criticized Ho said they made the effort to file a formal complaint.

"It's taboo," said one Seattle lawyer who often clashed with Ho and asked for anonymity to shield himself and his clients from retaliation by immigration judges. "You're screwing yourself. It's best to complain in your brief to the circuit, because the immigration judges don't see that."

Gilbert, Rivera's lawyer, is another skeptic.

"What's the use of filing a complaint?" she said. "It's better to just beat 'em in court."

Robert B. Jobe, a veteran San Francisco immigration lawyer, said complaints would fall on deaf ears because Ho is very productive: She clears a lot of cases.

"From what some judges say, [her superiors] think she's doing a fine job," he said. "It's a question of how many cases she can complete, not whether she does it fairly."

Lawyers representing the federal government frequently win in Ho's courtroom, but they declined to comment. Two lawyers with the Department of Homeland Security who have appeared before Ho referred inquiries to a press office that did not return phone calls.

Some attorneys who have protested the behavior of immigration judges said it was a waste of time.

Two San Francisco lawyers said they filed formal complaints about one of their local judges, Mimi S. Yam, but said the Department of Justice didn't do much beyond interviewing them.

Attorney Jonathan M. Kaufman complained that Yam wrongly accused him of threatening her in court. A year after Kaufman was questioned by an investigator, he said, he has yet to hear anything from Washington.

"I write them every month or two inquiring about the status of the investigation," he said. "They don't respond."

Robert G. Ryan, practicing at the Law Offices of Eugene Wong, also said he complained about Yam's courtroom demeanor.

Ryan declined to offer specifics, but he said it took nine months for the Executive Office of Immigration Review to send him a letter following up on an initial interview conducted by an assistant chief immigration judge.

"It was short, cryptic and inadequate," Ryan said.

Some attorneys said they suspect the way the immigration courts deal with problem judges is to move them around to different cities.

They point out that Yam moved from San Francisco to Houston and that Ho bounced from Seattle to San Francisco to Los Angeles. Ho worked in Seattle from the time of her appointment in 1995 until she moved to Los

Angeles in June 2004. From 2000 to 2004 she heard more than 100 asylum cases in San Francisco as a visiting judge.

"There's a strong immigration bar with a lot of pro bono practitioners here" in San Francisco, Musalo said. "Difficult judges may be moved to places where there are fewer practitioners to challenge them."

That theory doesn't hold water for Marks, the immigration judges' union vice-president who sits on San Francisco's bench

"There's no evidence for it that I'm aware of," she said. "I understand both of them asked for their reassignments."

She declined to discuss any specific criticisms of Ho and Yam.

Hidden Discipline

Little is known about the inside workings of the discipline system for immigration judges.

The Justice Department's professional responsibility office investigates complaints against immigration judges, according to Gregory M. Gagne, spokesman for the Executive Office of Immigration Review in Falls Church, Va. But Gagne said that under civil service personnel rules, he is not allowed to disclose information about individual complaints or how they are resolved.

The Daily Journal submitted a freedom of information request seeking a summary of disciplinary actions for the nation's immigration judges. But the department declined to release any data on discipline.

By contrast, disciplinary actions taken against immigration lawyers are prominently displayed on the Web site maintained by the Executive Office of Immigration Review.

Marks said her union is currently seeking to negotiate a collective bargaining agreement with a new approach to grievances and discipline.

"We understand the public nature of our job," she said. "We do believe it's a public office where transparency is needed. And yes, the upswell of interest in the [discipline] topic has certainly moved it to our front burner."

Musalo, at Hastings, said a well-functioning system to regulate immigration judges' conduct might have helped to avoid the frequent reversals and critiques from the nation's appellate courts.

"If there had been serious mechanisms in place that really worked, then perhaps we wouldn't see immigration judges' behavior reach this crisis level," she said.

Staff writer Sandra Hernandez contributed to this story.