

Delegating Leads to Judge's Reversal

By Sandra Hernandez
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When Edgar Lacsina Pangilinan walked into an immigration courtroom inside a remote Arizona detention center, the transsexual detainee stood alone.

Unable to pay an attorney, she listened carefully as a government attorney questioned her for hours about her asylum application.

Pangilinan waited to tell her side of the story, of life in the Philippines, of abuse by police, and of a gang rape.

But Immigration Judge Sean H. Keenan never asked.

Instead, Keenan delegated the duty of developing the record to the prosecution, and then ordered Pangilinan deported.

This month the 9th U.S. Circuit Court of Appeals overturned Keenan, citing serious due process concerns.

The immigration judge has "inexplicably delegated his duties.. to the attorney for the government," the three-judge panel said in a published decision. "The result was to impose an unfair conflict of interest on the government and prejudicially to deprive petitioner of development of the record." *Pangilinan v Holder*, 08-71274 (9th Cir. June 1, 2009).

A veteran judge, Keenan denied 99 percent of the asylum cases that came before him over the past five years, according to a recent study by Transactional Records Access Clearinghouse, a Syracuse-based non-profit that studies government data.

It is unclear how many of those decisions involved immigrants who were barred from receiving asylum because of restrictions that require would-be asylum seekers to apply within one year of arriving in the U.S. A spokesman for the U.S. Department of Justice declined comment.

Legal experts said the case is troubling because immigration judges have a unique role in cases involving unrepresented immigrants in detention.

"The consequences in these cases can be so severe that I think the immigration judge has not only a statutory obligation but a moral obligation to act on the behalf of these pro se clients and doing effective

questioning is part of that obligation," said Kathleen C. Kim, a professor at Loyola Law School in Los Angeles.

Unlike criminal defendants who are provided a public defender, immigrants are not entitled to a court appointed lawyer because deportation cases are considered civil matters, even in cases of detention.

Those concerns came up during the oral arguments about the matter before the 9th Circuit on April 19, when the judges appeared to grow impatient with government lawyers who said it was not inappropriate for a prosecutor to help establish the immigrant's record.

"Tell us why it was okay to delegate this to the immigration attorney: it is quite unusual," Judge John T. Noonan Jr. asked the government attorney.

"You don't have a clean hearing. That is my concern," said Judge M. Margaret McKeown during the hearing. "I don't understand why the department fights so hard in these cases. Why not just have a fair hearing?"

Immigration judges face a difficult choice in such cases, said Gilbert T. Gembacz, a retired immigration judge in Los Angeles.

"It's a razor's edge," Gembacz said. "If an immigration judge asks too many questions the judge is being prosecutorial. If the judge doesn't ask enough questions the judge is abrogating their responsibility."

Lawyers for Pangilinan said the June 1 ruling could have a significant impact on how immigration judges deal with unrepresented immigrants in detention settings.

"This is precedent-setting given that no other case addresses this issue," said Christopher Nugent, an attorney with Holland & Knight who represented Pangilinan pro bono before the appeals court.

"And it should ultimately help countless pro se respondents have a fair hearing who are routinely subjected to immigration judges' delegation of examination of respondents to Department of Homeland Security prosecutors. There is no other court of law, to my knowledge, where this practice takes place besides in immigration court with pro se respondents."

Kim said the decision will likely have a precedent-like impact.

"I think this is a pretty amazing decision because of the emphasis on the due process rights of immigrants in proceedings," Kim said.

Pangilinan, who has spent nearly four years in immigration detention, will get a new hearing in her deportation case.

In the new proceeding, Nugent said his client will likely only request relief under the Convention Against Torture.

This is not the first time Pangilinan faced deportation.

A legal permanent resident, she was put in removal proceedings in 2005 following a drug conviction. An immigration judge awarded her discretionary relief in that case.

In 2006, Pangilinan was detained after a second drug conviction.

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