

DAILY JOURNAL NEWSWIRE ARTICLE

<http://www.dailyjournal.com>

© 2012 The Daily Journal Corporation.

All rights reserved.

-----

Wednesday, February 1, 2012

9th Circuit to reconsider asylum issue

Court to consider whether foreign gang testimony warrants protection.

By Laura Ernde

Daily Journal Staff Writer

The 9th U.S. Circuit Court of Appeals signaled Tuesday that it might start granting asylum to people who have testified in criminal gang violence cases in other countries.

Three other circuits have recognized that such witnesses deserve protection under the Immigration and Nationality Act because they are subject to persecution. The 9th Circuit voted Tuesday to have an en banc panel review the issue. *Hernandez-Rivas v. Holder*, 09-71571.

Circuit Judge Carlos T. Bea, a native of Spain who is moderate to conservative on immigration issues, raised the issue in September in an unpublished opinion. He questioned the wisdom of the 9th Circuit precedent that compelled a three-judge panel to reject the asylum request of Rocio Henriquez-Rivas, an El Salvadoran woman who testified against gang members who murdered her father.

"Were I writing on a clean slate - an honor reserved only for an en banc panel ... I would hold that Hernandez-Rivas's proposed group (persons who have risked their lives by testifying in open court against murderous gangs) has sufficient 'social visibility' and 'particularity' to qualify as a particular social group for purposes of asylum," Bea wrote.

At the age of 12, Henriquez-Rivas watched her father be killed by members of the MS (Mara Salvatrucha) gang. Her testimony led to murder convictions of two gang members, but she fled the country over fears of retaliation by the gang.

An immigration judge granted her asylum, but the Board of Immigration Appeals reversed.

UC Davis School of Law Dean Kevin R. Johnson, who specializes in immigration law, said Bea's colleagues may have been persuaded to take up the issue en banc because the appeal came from a moderate on the court.

The issue is also one that's been percolating throughout the country. The law, approved by Congress in 1980, offers asylum to groups who are persecuted based on a number of factors, including race, religion or "particular social group." Courts have struggled to define what constitutes a "particular social group," Johnson said, with many concluding that such groups must have "social visibility" and "particularity."

Bea pointed out that courts haven't done a good job of defining those terms and Judge Richard Posner, writing for the 7th Circuit, went so far as to conclude the "social visibility" prong "makes no sense."

"I do think this is an area of ferment in the law," Johnson said. "I can see why the 9th Circuit decided to revisit it."

Attorneys at the Center for Gender and Refugee Studies at UC Hastings College of the Law said they hope the court clears up the confusion over application of the law, which has arbitrarily denied protection to bona fide refugees. The lawyers were also encouraged by Bea's opinion.

"We see that as a potentially positive sign that could lead to an influential decision in this area," said staff attorney Blaine Bookey.

[laura\\_ernde@dailyjournal.com](mailto:laura_ernde@dailyjournal.com)