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Fight for refuge

By Howard Mintz
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Each year, tens of thousands of people, many fearing torture or death in their homelands, turn to a little-known federal agency as their last hope to win permission to remain in the United States.

But since the Sept. 11 terrorist attacks, this agency, the Board of Immigration Appeals, has been dispensing rapid-fire immigration justice, rejecting the pleas of refugees and other immigrants more than ever.

Post-Sept. 11 reforms to this top branch of the immigration system, made in the name of efficiency and national security, have had profound consequences that have little to do with fighting terrorism. Judges, lawmakers, immigration rights lawyers and even members of the immigration system say the appeals board is no longer able to serve as a trustworthy safety net for the very immigrants it was designed to protect.

As a result, unprecedented numbers of board decisions are being appealed to the federal courts, where judges are regularly kicking cases back to the immigration system to start all over. The board's cold shoulder has made immigrants put their lives on hold for years as they fall in love, take jobs and have children, all the while unsure whether they'll be allowed to stay or be forced to leave.

The fallout has hit hardest in California and the West. Immigration appeals in the 9th U.S. Circuit Court of Appeals, which covers California and eight other states, jumped from 900 five years ago to more than 5,000 last year. A Mercury News review of hundreds of 9th Circuit rulings since January 2003 shows that nearly two-thirds of the most important immigration cases in the West are so flawed when they emerge from the appeals board that they are shipped back for more thorough consideration.

The Bay Area's Reina Garcia-Martinez is an example. She fled to America after being tortured and gang-raped in Guatemala. An immigration judge had denied her plea for political asylum, and she was taking her case to the board, often called the supreme court of the immigration system.

It was October 2002. Her timing couldn't have been worse. It was just a few weeks after former Attorney General John Ashcroft radically changed how the board would handle tens of thousands of cases like hers every year.

In a government office in Falls Church, Va., board official Kevin Ohlson scribbled his signature on a boilerplate three-paragraph document rejecting her appeal. There was no discussion of the woman's plight, no explanation for why she should be returned to her homeland. This was the board's new way of conducting much of its business -- as swift and jarring as a door slamming shut.

But last year, an outraged 9th Circuit panel, in more than 20 pages of harrowing detail, declared that the East Bay woman was an exceptionally worthy candidate for asylum and deserved more than a silent rejection.

``Reina Garcia-Martinez," the 9th Circuit judges said in the first line of their decision, ``has survived atrocities that most of us experience only in our worst nightmares."

Garcia-Martinez's case exemplifies what critics say has become rubber-stamp justice in the immigration system. Since the appeals board downsized its chief mechanism for catching its own mistakes, immigrant rights advocates say they've had no choice but to go above the board to the next level -- the federal courts of appeal.

With two American-born children and a certainty that she would face retribution if she returned to Guatemala, Garcia-Martinez's decadelong fight to stay in this country depended on all corners of the immigration courts to pay close attention.

``I thought that with what I lived and suffered, I could stay here without problems if I asked for asylum," Garcia-Martinez said. ``But I never imagined it would be so complicated."

Defending record

● Board officials rebut claims

The board defends its record and says it still adequately screens the work of more than 200 immigration judges across the nation. And the board insists that the majority of its decisions hold up overall when reviewed by federal appeals

courts.

“We do not believe that procedural reforms have meaningfully changed the role of the BIA in any way,” officials with the Executive Office for Immigration Review, which includes the appeals board, said in written responses to the Mercury News.

But the board's performance is not making the grade in the court that reviews its decisions far more than any other -- the San Francisco-based 9th Circuit. From Jan. 1, 2003, when the reforms fully took hold, through earlier this month, the 9th Circuit rejected the findings of the board in 131 of 208 “published” asylum and deportation decisions, which the court identifies as cases of the greatest legal and public policy importance, the Mercury News found. Many of those cases involved refugees who fled horrific strife.

In addition, even in what should be routine asylum and deportation appeals, the court is regularly rejecting board decisions. From last September to July 1, the court overturned 25 percent of the more than 700 “unpublished,” or relatively routine, immigration appeals it ruled upon, a figure that means hundreds of cases are heading back for another round in the immigration courts each year.

“Clearly,” said U.S. Rep. Zoe Lofgren, D-San Jose, and member of the House subcommittee on immigration and border security, “bad mistakes are being made.”

Critics of the 9th Circuit, including some of its own conservative members, say the court is simply exerting its liberal muscle to interfere with the executive branch. Conservatives have for years targeted the 9th Circuit, a court dominated by Democratic appointees, for being too liberal on issues ranging from immigration to the death penalty.

But many judges, lawmakers, immigration rights lawyers and even members of the immigration system say the 9th Circuit's record is proof that the appeals board is no longer able to serve as a reliable safety net for the system, or for immigrants like Garcia-Martinez.

“It's very clear he didn't want it to be a court,” said Lory Rosenberg, who had been one of the board's most liberal members and left when the Ashcroft reforms went into effect. “He wanted it to be a meatpacking plant.”

New system

• Appeals process gets a makeover

Under the innocuous title of “Procedural Reforms to Improve Case Management,” the Justice Department in February 2002 unveiled its plan to reduce a staggering 55,000-case backlog at the appeals board. The Justice Department oversees the immigration courts.

Pushed by Ashcroft, who said he wanted swift justice to make sure terrorists and others wouldn't slip through the system's cracks, the plan for the most part did away with the board's custom of assigning three-member panels to decide many of its cases, and including explanations with most of their decisions. Instead, single board members would be deciding the vast majority of cases, many through brief orders without explanations, like the one received by Garcia-Martinez.

At the same time, Ashcroft reduced the board's size from 23 members to 11, sweeping away appeals board judges with a track record of overturning the work of immigration judges. The board, set up as a watchdog in the 1940s, was now deciding more cases than ever with fewer members.

The board has dramatically reduced its backlog, and says it has done so without jeopardizing the rights of immigrants.

But critics say the overhaul has undermined the ability of the board to catch mistakes by overworked immigration judges, and shifted that role to the nation's federal judges, who are even further removed from the accounts immigrants provide to bolster their efforts to remain in the United States.

“In each case, you have to decide every issue because the BIA hasn't been through it,” said 9th Circuit Chief Judge Mary Schroeder, who has met with top immigration officials to discuss the problem. “The odds of having a mistake there are much higher.”

By necessity, dealing with immigration cases is a volume business. The nation's 215 immigration judges handled nearly 300,000 matters last year. There were more than 60,000 asylum claims. Coming from 53 courts around the country, rulings from immigration judges funnel into the Virginia offices of the 11-member appeals board. By last year, the board was deciding more than 48,000 cases, 45,000 of those by single board members.

Board members issued roughly 16,000 summary orders last year like the one used in Garcia-Martinez's case, in appeals they consider easy enough to dispose of quickly.

Some of those appeals were as straightforward as whether to deport a non-citizen for committing a felony. But others raise complex international human rights issues in tense bids for refuge. A recent case argued in the 9th Circuit centered on whether the threat of a girl's genital mutilation in Somalia is grounds for her family's asylum.

Appeals board records show that it affirmed immigration judges more than 90 percent of the time the past two years, compared with 75 percent of the time in the pre-streamlining era, according to an American Bar Association study. Many experts see the board's increasing tendency to rule for the government as proof that high-speed justice has stacked the deck against immigrants.

"It's a recipe for injustice," said Stephen Legomsky, a St. Louis law professor and national expert on the board.

Current immigration judges generally won't say much about the controversy. But San Francisco's Dana Marks, president of the National Association of Immigration Judges, makes it clear they would prefer more resources and a strong appeals board reviewing their work, given the pressure on them to move cases quickly.

Marks said she knows her decisions no longer get the "polishing" they used to get from the board. She particularly worries about asylum cases, where "if we make a mistake, we could be sending somebody home to die."

"As an immigration judge for 18 years, you would get it done, you get it done quickly and you didn't worry -- the board would clean it up," said Marks, who stressed the association has not taken a formal position on streamlining.

Cases overturned

• Court points out more problems

As the 9th Circuit decides more cases, the rate of overturning the appeals board appears to be accelerating. From 1999 to 2001, before streamlining, the 9th Circuit overturned the board in about 58 percent of its published cases, compared with 63 percent the past three years. In 2001, the last full year before streamlining, the court overturned the board in just a third of its 30 published rulings. Thus far this year, the court has overturned the board in nearly 65 percent of its published immigration rulings.

Even in the more routine immigration cases, the 9th Circuit is overturning far more decisions than in other kinds of cases it rules on, according to the U.S. Administrative Office of the Courts. The Mercury News found the 9th Circuit overturned 25 percent of its unpublished immigration appeals from Sept. 1, 2004, through July 1, while the Administrative Office of the Courts figures show in 2004 the court reversed 6.8 percent of all the 12,151 cases it decided, from criminal convictions to business disputes.

In addition, a review of the rulings shows the 9th Circuit is finding problems in appeals board decisions of all stripes, whether they were handled by single judges or the now more rare three-member board panels.

"We used to review thoughtful decisions from the BIA," said 9th Circuit Judge Sidney Thomas, on the court since 1996. "Now, because of streamlining, we're not getting the BIA's point of view."

Federal judges make their displeasure known, as in an April 2003 ruling that granted relief to Jose Murillo-Salmeron, a Mexican national who immigrated to the United States in 1977 at age 15. Murillo married a U.S. citizen, had three children and raised two stepchildren. His parents and siblings moved to the United States and most became citizens. He had no relatives left in Mexico.

Yet when Murillo applied for an adjustment of his legal status because of his marriage to a citizen, immigration authorities moved to deport him because of suspicions he'd originally entered the country illegally. In a two-paragraph decision by three members, the board affirmed the order to deport Murillo, based on what was later determined to have been evidence that never existed.

The 9th Circuit sided with Murillo, and made it clear it didn't think the appeals board had really examined his case.

"While we recognize that the BIA is swimming in a sea of cases, barely able to keep itself afloat, there remains no excuse for the apparent failure to read the decision one is reviewing and to review the decision that was made," the court said.

Critics are particularly concerned about asylum cases, where the standard for overturning the appeals board is extremely high, and the stakes for refugees are even higher. In order to overturn the board, a federal court must find the evidence "compels" a reversal, and an asylum-seeker must establish strong evidence of a "well-founded" fear of persecution based on a recognized ground, such as politics or religion.

The appeals board was considered the check against uneven rulings from immigration judges who have been found to have wildly divergent approaches to asylum claims throughout the country. Experts say it is doubly important for the board to explain its reasoning when dealing with the life-or-death concerns of refugees.

"By and large, asylum cases would tend to merit more thorough review," said David Martin, general counsel for the Immigration and Naturalization Service from 1995 to 1998.

Case in point

● Court sides with refugees

Over the past few years, the 9th Circuit has repeatedly sided with refugees whose factual claims were not in dispute. A typical case involved Afroza and Khandker Hasan, refugees from Bangladesh now living in Los Angeles.

Afroza Hasan had been a journalist who was attacked and threatened after exposing wrongdoing by a major Bangladeshi political leader. Her husband, Khandker, and her father also were attacked and threatened. They fled to the United States in 1999.

Without an explanation, the appeals board had affirmed an immigration judge's decision to deny the couple asylum.

Noting that the Hasans' account was undisputed, the 9th Circuit said their petition ``compels the conclusion that the persecution the Hasans experienced was on account of Afroza's political opinion."

The Hasans, who have two young children, are now in limbo, hoping the immigration courts give them asylum the second time around. They are now waiting to hear again from the appeals board.

``If I go back," Afroza Hasan said recently, ``they will kill my husband and my children."

While there are no firm statistics, the Mercury News found the 9th Circuit appears to disagree with the board more than other federal appeals courts. Some of the 9th Circuit judges say their colleagues are too often second-guessing immigration judges.

``There are cases where I don't think everything is golden," said Judge Alex Kozinski, one of the 9th Circuit's more conservative members. ``But I think sometimes we are a little hard on them."

The board argues that attacks on the reforms are misguided, noting that the percentage of streamlined decisions being appealed is dropping. In its response to the Mercury News, board officials said the overall increase in appeals is driven in large part by non-citizens who want to delay their deportation as long as possible.

Yet the 9th Circuit is far from alone in blasting the board. Other appellate judges around the country have had harsh words. A federal appeals court in Philadelphia in August concluded that the government should pay for board mistakes by paying lawyer fees for immigrants in cases kicked back to the immigration courts. And ripping the board in several asylum cases last year, Judge Richard Posner, a widely-respected conservative on the 7th U.S. Circuit Court of Appeals in Chicago, said that ``elementary principles of administrative law, the rules of logic and common sense seem to have eluded the board in this as in other cases."

Victory secured

● Long legal road to stay in U.S.

On a recent June afternoon in her bungalow in a working-class Richmond neighborhood, Reina Garcia-Martinez's 3-year-old son was racing back and forth across the living room in a Batman cape.

Garcia-Martinez, 31, said she cannot discuss what happened to her back in the war-torn rural village in Guatemala because ``it hurts my soul." But in the ruling that gave her new hope, the 9th Circuit described how everyone in her village feared knocks on the door, first from rebel guerrillas and later from the Guatemalan military when they suspected her village was rebel turf.

As a young child, guerrillas took Garcia-Martinez's brother and he was never seen again. When she was 16, she woke up one morning to find eight dead bodies outside her neighbor's house.

Three years later, at 19, soldiers invaded her house. They tied up her father. Her mother was taken to the kitchen and ordered to cook. After hitting Garcia-Martinez with a gun, three soldiers took turns raping her. At the time, it was common for soldiers to rape women, and human rights reports found that the government did little to discourage the conduct.

With the help of an aunt, Garcia-Martinez fled, fearing the military would target her, and entered the United States through Mexico.

The immigration judge who reviewed her case found she testified ``sincerely and genuinely," but concluded that the rape was ``simply a criminal act that was committed against her by a soldier" and not a form of persecution. He rejected her plea for asylum. The appeals board affirmed that order without elaborating.

But citing human rights abuses during Guatemala's long civil war, the 9th Circuit said the immigration courts had ``treated Garcia's personal experiences as if they had occurred in a vacuum." The Garcia-Martinez decision led the court to establish new legal protections for victims of wartime sexual violence.

The 9th Circuit's ruling in Garcia-Martinez's case came more than a year ago. In July, Oakland attorney Jayne Fleming received an order from the board granting her client asylum after all.

``I'm secure that I can stay here with my kids and I won't have any problems," said Garcia-Martinez, who ran from ``room to room" in her house when she got news of her asylum. ``I can learn to drive, without the fear that the police will stop me. I can walk free in all directions without worrying they will deport me.

``It's what I always wanted."

The Mercury News does not name the victims of rapes except in special instances and only with the victim's permission. Contact Howard Mintz at hmintz@mercurynews.com or (408) 286-0236.

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