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Maya A. Nair

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SEVENTH CIRCUIT REITERATES THE IMPORTANCE OF IMMIGRANT DUE PROCESS

By MAYA A. NAIR

After the U.S. government extradited Vatcharee Pronsivakulchai from Thailand to the United States and promised her protection in exchange for cooperation in a drug trafficking investigation, it sought to deport her.¹ At her immigration hearing, the immigration judge precluded Pronsivakulchai from presenting evidence on her own behalf to rebut the government's claim that she committed a non-political crime in Thailand and therefore, was ineligible for asylum.²

In *Pronsvakulchai v. Gonzales*, the Seventh Circuit overturned the immigration judge's ruling that Pronsvakulchai was ineligible for asylum in the United States and emphasized the need for immigration judges to ensure that non-citizens receive adequate due process in all cases.³ The court held the immigration judge's decision to prevent Pronsvakulchai from rebutting the government's claim that she committed a non-political crime in Thailand denied her right to a fair hearing.⁴

Pronsvakulchai's story began in 2000 in her native Thailand where she was arrested for drug trafficking based on a U.S. warrant.⁵ After spending seven months in Lad Yao prison in Bangkok, she was extradited to the United States.⁶ Once she arrived, U.S. government officials promised her that if she assisted the Drug Enforcement Administration (DEA) in a drug trafficking investigation, she and her family would be able to remain in the United States for their protection.⁷ She agreed, and was required to write letters to known drug traffickers and gang members imprisoned in Lad Yao as well as those living in her hometown Ranong.⁸ In the letters, she falsely stated that she was acquitted, and that she wished to buy drugs.⁹

When the U.S. government decided that Pronsvakulchai would no longer be helpful to its investigation, it dropped the charges against her and turned her over to the Department of Homeland Security, who sought to deport her.¹⁰ Because Pronsvakulchai believed that upon returning to Thailand she would be killed by the gang members she implicated, she filed for political asylum.¹¹

At her deportation hearing, the government argued that Pronsvakulchai was ineligible for asylum because there was reason to believe that she had committed a non-political crime of drug trafficking in Thailand.¹² Yet, the sole evidence that the government had to support the charge was a partial and uncertified translation of a Thai warrant that did not even contain Pronsvakulchai's last name.¹³

"I have never believed the government has a strong case against Vatcharee, which is why we have been fighting it for so long," said Pronsvakulchai's attorney Claudia Valenzuela.¹⁴ "I believe the fact that criminal charges were dismissed against her in the Northern District of Illinois speaks best to the weakness of the government's case against her."¹⁵

Even though the immigration judge referred to the warrant as “not much evidence,” she agreed with the government that Pronsivakulchai had committed a non-political crime and therefore, was ineligible for asylum.¹⁶ She then disallowed Pronsivakulchai from attacking the credibility of the warrant by presenting her own evidence.¹⁷

The Seventh Circuit found the immigration judge’s ruling to be “fundamentally unfair.”¹⁸ “The problem with this conclusion is that the IJ [immigration judge] made her determination before Pronsivakulchai was able to present evidence on her behalf,” wrote Judge Bauer.¹⁹ “The IJ’s refusal to consider Pronsivakulchai’s rebuttal evidence denied her an opportunity to be heard and present evidence on her behalf.”²⁰ “We fail to see how the evidence the immigration judge considered was reasonable, substantial, and probative. Accordingly we find that the IJ violated Pronsivakulchai’s statutory and regulatory rights. . . .”²¹ The panel vacated the decision and remanded for further proceedings, giving Pronsivakulchai a second chance at her asylum claim.²²

The case is one of many recent cases where the Seventh Circuit has found a lack of due process in immigration hearings.²³ In the last year, the Seventh Circuit has reversed more immigration judge rulings than any other federal circuit, including the Ninth Circuit.²⁴ This trend is remarkable given the Seventh Circuit’s reputation for being traditionally more conservative than the Ninth Circuit.²⁵

Last year in *Benslimane v. Gonzales*, writing for a unanimous panel, Judge Richard Posner noted that in the preceding year the Seventh Circuit reversed a “staggering” forty percent of the petitions for review and that criticisms of immigration judges by the Seventh Circuit have “frequently been severe.”²⁶ The Seventh Circuit has criticized immigration judges for being unfamiliar with the facts of the cases before them, denying immigrants a right to be heard, making decisions that are totally unsupported by the record, and for “gaping holes” in their reasoning.²⁷

“The adjudication of these cases,” Judge Posner wrote, “has fallen below the minimum standards of legal justice.”²⁸

According to the National Immigrant Justice Center, the organization that represented Pronsivakulchai in her appeal along with the law firm of Winston and Strawn, the case “illustrates the fundamental need to ensure and apply due

process rights as guaranteed by U.S. law to all people, including immigrants.”²⁹

Advocates and legal scholars criticize the current immigration process as failing to provide adequate due process safeguards.³⁰ They believe that the large volume of cases in the immigration courts greatly affects the quality of justice immigrants receive.³¹

“There is sometimes too much deference given to the government in immigration court in the current climate of ‘national security’” says Valenzuela.³² “The judges do not always hold the government accountable for proving its case, as was the situation for Vatcharee.”³³

In a letter to Senator Richard Durbin last March, Judge Posner noted that immigration judges are overwhelmed.³⁴ He stated that only 215 judges handle about 300,000 cases a year “which is the principal reason why so many of their decisions are erroneous.”³⁵

“Immigrants’ due process rights are being curtailed in the interest of expediting court dockets. Immigration judges are under a great deal of pressure to get cases completed, and it’s difficult even for the best of them to always give appropriate time to each case.” says Valenzuela.³⁶ “The Seventh Circuit has played a key role in the immigration judicial system: to catch those faulty decisions and ensure the immigrant has had a meaningful opportunity to be heard in our courts.”³⁷

NOTES

1 *Pronsvakulchai v. Gonzales*, 461 F. 3d 903, 904-907 (7th Cir, Aug. 29, 2006).

2 *Id.* at 907.

3 *Id.* at 904.

4 *Id.*

5 *Id.* at 907.

6 *Id.* at 904.

7 Brief of Petitioner-Appellant at 5, *Pronsvakulchai v. Gonzales*, No. 05-2662 2005 WL 3739425 (7th Cir. Oct. 31, 2005).

- 8 *Pronsvakulchai*, 461 F. 3d at 904.
- 9 *Id.* at 905.
- 10 *Id.* at 906.
- 11 *Id.*
- 12 *Id.*
- 13 *Id.* at 909.
- 14 Email from Claudia Valenzuela, In-house Attorney, Detention Project, National Immigrant Justice Center (NIJC) to author (Oct. 24, 2006, 12:04 P.M.) (on file with the author).
- 15 *Id.*
- 16 *Pronsvakulchai*, 461 F. 3d at 906-907.
- 17 *Id.* at 907.
- 18 *Id.* at 909.
- 19 *Id.* at 908.
- 20 *Id.*
- 21 *Id.*
- 22 *Id.* at 909.
- 23 Telephone Interview with Brian Neuffer, Pro Bono Attorney, Winston & Strawn, in Chicago, Ill. (Sept. 29, 2006).
- 24 Telephone Interview with Tara Magner, Policy Director for National Immigrant Justice Center (NIJC), in Chicago, Ill. (Oct. 20, 2006).
- 25 *Id.*
- 26 *Benslimane v. Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005).
- 27 *Id.*
- 28 *Id.* at 830.
- 29 Press Release, National Immigrant Justice Center, Seventh Circuit Rules Asylum Seeker Was Denied Fair Hearing (Aug. 30, 2006), <http://www.immigrantjustice.org/mediaAdvocacy.asp>.
- 30 Evelyn H. Cruz, *Double the Injustice, Twice the Harm: The Impact of the Board of Immigration Appeals' Summary Affirmance Procedures*, 16 STAN. L. & POL'Y REV. 481, 484 (2005); Telephone Interview with Brian Neuffer, *supra* note 23.
- 31 Telephone Interview with Brian Neuffer, *supra* note 20; *Benslimane*, 430 F.3d at 830.
- 32 Email from Claudia Valenzuela,, *supra* note 13.
- 33 Telephone Interview with Brian Nueffer, *supra* note 20.
- 34 Letter from Richard Posner, Circuit Judge, Seventh Circuit Court of Appeals, to Senator Richard Durbin, United States Senate (Mar. 15, 2006) available at <http://www.aila.org/issues/issue.aspx?docid=18635&doctypeid=31>.
- 35 Letter from Richard Posner, Circuit Judge, Seventh Circuit Court of Appeals, *supra* note 34.
- 36 Email from Claudia Valenzuela,, *supra* note 13.
- 37 *Id.*.