

The “Upside Down World”: Winning Asylum in El Paso Immigration Court

By Karen E. Smeda¹

My interest in international law grew in my second year at Cornell Law School. I participated in Stephen Yale-Loehr’s immigration law seminar in the fall 2016 semester, in the basic asylum and convention against torture clinic during the spring 2017 semester, and as the 2017–2018 Cornell International Law Journal’s Senior Notes Editor. I enjoyed learning about the state of affairs around the world. Through the basic asylum clinic, I considered this knowledge in light of a complex U.S. immigration system. By writing an appellate brief to the Board of Immigration Appeals, my partner and I in the basic asylum clinic digested the cultural norms and conditions of an unfamiliar country, strategized various case theories, and narrated the story of a single mother in Mexico fleeing cartel persecution against her two children.

As an advanced asylum clinic student in the spring of 2018, I pursued a new learning opportunity: trial advocacy. I would assist Taylor Levy, an accredited representative and head of the legal department at the Annunciation House, a refugee shelter and legal assistance center in El Paso, Texas. Unlike my previous appellate work, this case would allow me to second-chair an immigration hearing in one of the toughest federal circuits in the country.

Our client was a Quiché-Mayan, Guatemalan woman seeking asylum on the basis of her ethnicity. As an educated woman, our client violated established cultural norms for women in Guatemala. The discrimination against her escalated after she married a Ladino man. The primary persecutors became her sisters-in-law. After years of verbally abusing and threatening our client, they hired an assassin who opened fire on our client’s car one day, injuring her. She fled Guatemala shortly afterwards.

After several months of preparation, I flew to El Paso for the hearing. My time in El Paso started like my initial reaction to this case—a tiny flicker of hope. Taylor had similar anxieties. Her fears and worries were reflected in her rapid speech, agitated driving, and tired eyes. It was contagious.

Given El Paso’s close proximity to the Mexican border, Taylor and I traveled to Juarez, Mexico upon my arrival. Juarez felt like the “upside down world,” a reference to the Netflix series *Stranger Things*. As we drove back across the border into El Paso, I looked behind me to see the longing faces of many Mexican nationals. In that moment, I felt the weight of my privilege—

¹ Karen is a J.D. candidate for the Class of 2018 at Cornell Law School. She worked as a 1L legal intern for the Public Interest Law Center in Philadelphia, PA during the summer of 2016, and as a 2L law clerk for the U.S. Department of Labor during the summer of 2017. She was the 2017–2018 Senior Notes Editor for the Cornell International Law Journal, a Managing Editor for the LII Supreme Court Bulletin, and on the Moot Court Board. Since 2L year, Karen has worked in a clinic every semester. She participated in the N.Y. Attorney General’s Clinic, the Asylum and Convention Against Torture Clinic, and the International Human Rights Clinic. In her final semester of law school, Karen worked in both the Juvenile Life Without Parole and the Advanced Asylum Clinics. Karen graduated from the University of Florida *summa cum laude* with a B.S. in Psychology and a B.A. in Criminology in 2012. As a dual degree student, she also graduated from Cornell University with an M.A. in Human Development in February 2016.

privileged to cross into a new country for a few hours on a Sunday afternoon without the fear of stigmas or difficult decisions of relocation out of desperation.

The day before the hearing, Taylor and I visited our client at the detention center in El Paso. The detention center reminded me of prison. The outside of the center had barbed wire, armed guards, and a similar coldness in the environment. In contrast, our client was polite, thankful, and warm. We spent two hours going over questions she should anticipate at the hearing, specific mannerisms that could impact the immigration judge's credibility determination (e.g., eye contact), and checked in with her fears and anxieties about the hearing. After meeting with our client, we finalized the closing brief and developed questions for re-direct. Taylor's personal knowledge of our immigration judge's practices, like denying the applicant's counsel the right to present a closing statement or direct examine her client, informed our strategy. I struggled to rest that evening, worrying about the case.

Court started at 9 AM. Our client sat directly across from the immigration judge, an image reminiscent of the accusatorial-style exemplified by the Wizengamot in the Harry Potter series. The courtroom included the support of ten elderly U.S. nuns and priests with whom our client formed a relationship with through her Catholicism. After introductions, the judge immediately began asking Taylor why she applied for multiple grounds for asylum instead of pursuing one theory. He mentioned that being Quiché-Mayan is more of a PSG [particular social group] rather than a race. The judge also pointed out his suspicions about how her story of potential persecutors and their respective motive had evolved since our client failed to tell both the initial asylum officer and the police investigators in Guatemala that she suspected her sisters-in-law were behind the attack. He told our client that she should have understood she was giving a sworn statement. At this point, I was sure we were going to lose.

On cross-examination, the Department of Homeland Security's counsel questioned our client about the identity of the attacker, reasonable relocation, and her report to Guatemalan police. Although our client generally answered the counsel's questions, the judge intervened to comment on the implications of her failure to tell Guatemalan police about her sisters-in-laws' involvement in the attempted assassination. He referenced his personal experiences as a former law enforcement officer and concluded that she withheld important information and that police needed a motive for the attack. He decided that he was not sure what she expected the police to do if she provided only minimal information to them. I observed our client's eyes begin to fill with tears. Although she knew her story better than anyone, she was beginning to feel cornered by the questions and started to lose some of the details crucial to her case.

The judge ordered a 10-minute recess, which we frantically used to strategize. After the recess, the judge resumed his commentary. Asserting this was a mixed motive case, he agreed that her sisters-in-laws' hatred was clearly triggered by her ethnicity. He then recommended keeping the case simple: our client's sisters-in-law were motivated to kill her at least in part because of her indigenous ethnicity.

Suddenly, the judge announced: "I am going to grant asylum." The nuns gasped. I stared in disbelief. Our client, shaking, responded in Spanish, "Thank you, Mr. judge." The immigration judge said that he believed her fear and her trauma, stating that he can usually look at an applicant and know whether they are telling the truth within five minutes. Although the judge felt

at times that she lacked physical evidence that the Guatemalan government refused to help her due to her indigenous ethnicity, she, herself, was the strongest piece of evidence presented in court. Since the hearing, the government has appealed.

By having counsel, our client was well prepared to testify at the hearing, even in the face of the immigration judge's hostile questioning. We submitted a closing brief that summarized why the case law supported her asylum claim, and were able to make timely objections (e.g., to interpretation errors) during the hearing. However, most asylum cases do not have a happy ending. Indeed, our victory highlights the truth behind the statistics: Immigration courts handle over 200,000 removal cases a year, many involving asylum applications. Asylum seekers are five times more likely to win if they are represented, but most cannot find an attorney.²

On the eve of my law school graduation, I hope to continue to offer pro bono representation to asylum seekers. Legal representation played a notable role for our client—a courageous young woman merely one year older than me, who defied oppressive *machista* norms in her home country to flee to the United States, where she can become an influential and inspiring member of society.

² Transactional Records Access Clearinghouse, *Continued Rise in Asylum Denial Rates: Impact of Representation and Nationality* (Dec. 13, 2016), at <http://trac.syr.edu/immigration/reports/448/> (last visited Apr. 27, 2018).