Mock Trial

Miami's immigration judges are not interested in your problems

By Emily Witt

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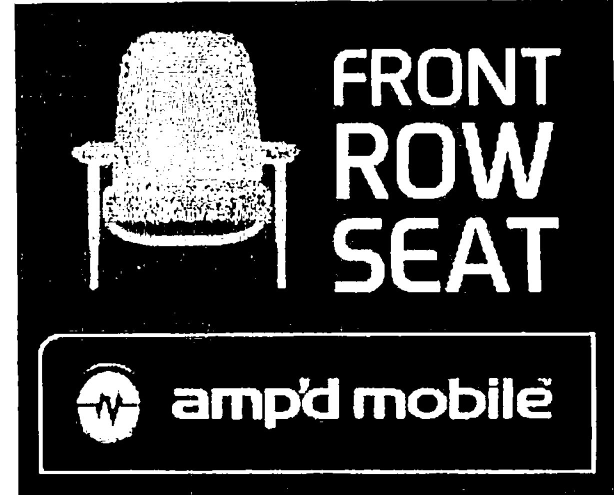

Awad grew up on a cattle farm in Ethiopia, a member of that country's underrepresented and sometimes persecuted ethnic minority, the Oromo. He had no formal schooling, though he possessed an excellent memory and was quick with figures from a lifetime of managing livestock. He knew violence: Government agents had beaten and killed his father for being a suspected member of the Oromo Liberation Front, a militia in conflict with the majority Tigray government (another Ethiopian clan). His brother also had been killed for his ethnicity, leaving Awad the eldest male in the family — and the next in line for a similar fate.

Illustrations by Todd Julie

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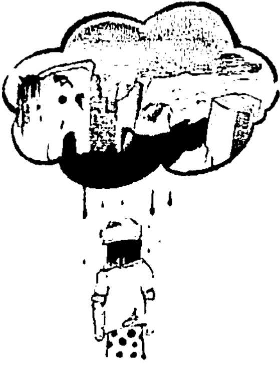
Awad fled Ethiopia in the mid-1990s, entering the United States with a false passport, as many asylum seekers do. He was detained and he petitioned for asylum. (In the interest of their safety, names of asylum seekers in immigration court are not public record. Unless a case reached a federal appeals court, where records are publicly accessible, names in this article have been changed.)

In 2002, Awad went before an immigration judge in Miami for a hearing. Awad testified his story and so compellingly presented his case that when the judge asked the Immigration and Naturalization Service attorney to state the government's position, the lawyer responded, "He's made out a case for past persecution, and the evidence in the records doesn't indicate that anything has changed since ... so the [INS] would ask the court to grant the respondent's application."

Awad's opponents had conceded he deserved asylum. The judge, however, thought otherwise. (Most judges are identified only as "Immigration Judge" on court transcripts, and a judge's name has been provided in this article only when known.) He questioned Awad's claim he hadn't been educated. Then the judge denied asylum because Awad changed the address on his driver's license four months before he changed it with the court. The judge saw this as a reason to doubt Awad's credibility.

Awad could have appealed but instead took his lawyer's advice. He went to Canada. That country took him in.

Every day hundreds of asylum seekers pass through the tall glass doors, under the metal detector, and into the spacious white lobby of the Miami Immigration Court. Nearly every one of them clutches a plastic folder or manila envelope, entire lives carefully penned into the blanks of the photocopied forms within. They ascend via elevator into the honeycomb of fluorescent-lit courtrooms where each will act as an ambassador — not of a nation, but of discrimination, tyranny, ethnic cleansing, or religious turmoil. The asylum seeker must convince a judge that such realities do exist and then politely ask for the right to live without them. For


Illustrations by Todd Julie

the would-be American in Miami, a successful outcome is less likely than in almost any major city in the nation. Last year the Miami Immigration Court granted 1407 cases and denied 5234 — a grant rate eighteen percent below the national average.

A study released this past July tracked asylum denial rates by individual judges from 2000 to 2005. Seven of the fifteen judges with the highest denial rates in the nation were based in Miami. Judge Mahlon Hanson, of the Miami court, had the highest rate, having denied 96.7 percent of his 1118 cases during those years. Judge Neale Foster, who until his death this past June presided over the court at Krome Detention Center (where illegal aliens are detained), had the third-highest denial rate, at 94.6 percent. The Department of Justice forbids immigration judges from speaking to the press.

"There are courtrooms where you go in and you know you're going to lose," says Barbara Kamali, who has practiced immigration law in Miami for sixteen years. "You won't see a judge with a 99 percent grant rate, but you will see one with a 99 percent denial rate. All the cases going before that judge cannot be that bad."

But the chances of successfully appealing an unfairly judged case are even worse. Such claims are reviewed by an administrative body known as the Board of Immigration Appeals (BIA). A 2004 study commissioned by Congress found that in fiscal year 2001, the BIA granted 24 percent of asylum appeals. A year later, Attorney General John Ashcroft sought to decrease a backlog of cases and streamline the process. Appeals could now be reviewed by a single board member. Rejections no longer had to be explained in a written opinion. And Ashcroft reduced the board in size, from 23 judges to 11.

"Ashcroft basically purged the board of liberal members," says Ira Kurzban, a prestigious Miami immigration attorney and author of *Kurzban's Immigration Law Sourcebook.*

The grant rate plummeted. Since 2002, only two to four percent of appeals have been granted. "Statistically it is highly unlikely that any asylum seeker denied by an immigration judge will find protection by appealing to the BIA," the study concluded.

Another direct consequence of the streamlining process — and the decline in quality review — was an increase in immigration cases reaching the level of federal appeal. Across the country, federal judges were reviewing more immigration appeals than ever, and they often marveled at the poor quality of judgment exhibited in the asylum cases before them. Their scathing opinions condemning immigration judges in the lower courts made national news. In Miami, however, the asylum seeker is again unlikely to find sympathy. The Eleventh Circuit Court of Appeals, a Miami immigrant's final level of appeal, has yet to reverse a single asylum denial that cannot claim legal error.

The U.S. Immigration Court is downtown, where South Miami Avenue meets the Miami River, the view of water wasted on the impervious backside of the large, windowless building. One day in fall 2004, an asylum seeker from the Bahamas passed through its doors, accompanied by the pastor of his church.

George was an ex-seaman with the Royal Bahamas Defence Force (RBDF). He patrolled Bahamian waters for illegal activity from 1984 until 1992, when he says he quit out of disgust with corrupt colleagues who would sell the drugs they seized from smuggling boats. After his honorable discharge, he worked as a truck

driver.

In September 1998, a number of former colleagues informed him that RBDF officials were now smuggling drugs through Nassau International Airport, and George brazenly informed the U.S. Drug Enforcement Administration of their activities. He was told to "keep his ear to the ground." DEA agents have confirmed that over the next seven months, George contacted them about corrupt Bahamian law enforcement officials on several occasions.

In April 1999, George found a note under his windshield wiper. "[George], we hope that you are not a snitch," it read. George took the warning as a serious threat. He severed ties with the DEA and relocated his family to another apartment. They left for the United States in October 1999 with a visitor's visa. George followed a month later. He filed for political asylum shortly after arrival and was hired as the sexton at the Palm Beach County church of a rector, who now accompanied him into the courtroom.

The pastor, who wore clerical attire, was the only nonparticipant in attendance at the hearing. When Immigration Judge Bruce Solow entered the courtroom, the pastor says the judge's first words to him were: "What's with the collar?" The following is an excerpt from a transcript of Solow's interrogation of George:

Solow: Now what was your plan in order to go to the DEA? Where were you going and how were you going to go about this?
George: Well, I called the U.S. Embassy and they put me onto ...
Solow: Wait. You called the U.S. Embassy?
George: Yes, sir.
Solow: And you said, "Hi, my name is Mr. [last name omitted]."
George: [Defendant states first and last name.]
Solow: Then they said, "That's nice. How can we help you?" And you said?
George: I told them I have some information that might be useful in the fight against ...
Solow: And then the operator said, "Well that's good." And then you said what?
George: Then they put me on hold.
Solow: They what?
George: They put me on hold.
Solow: Right.
George: Then an agent came on.
Solow: An agent came?
George: Yes.
Solow: I don't believe that.

The pastor, who asked that his name and the church's be withheld in consideration of George's safety, says the transcript cannot truly convey the judge's berating tone and confrontational attitude, which the cleric described as "unconscionable." George continued his testimony. He said he was asked to come to the U.S. Embassy to meet with an agent. The judge interrupted again:

"Wait, wait. Told you to come to the U.S. Embassy, and what was the rest of the conversation? And ask for who, Zelda Jones or Mark Gummit?"

(Zelda Jones is the wacky assistant of fictional crime detective Scotia MacKinnon, star of such novels as *The Lavender Butterfly Murders*, by Sharon Duncan. Mark Gummit's identity is unclear – perhaps a second sarcastic reference to a gumshoe, whose name was misspelled in the transcript.

The Bahamian named the agents he spoke with at the embassy; the agents themselves corroborated the claim. Regardless, the judge continued to express his incredulity. His final opinion dripped with derision:

"I think this case, quite frankly — I hate to use the word, but I think it stinks."

According to the transcript, Solow said he did not understand George's sudden impetus to expose corruption:

"What was the epiphany that suddenly drove him to this? 'Oh, I got fed up with life in the Bahamas.' Well, maybe he wanted to come to the United States; maybe as an ex-agent he knew this."

Solow briefly considered the integrity of the DEA, adding that "it wouldn't be the first time in my checkered career that I heard that our government screwed someone, to put it bluntly, to use the vernacular, by not doing what was right."

But this case, he repeated, "smells bad. This is so vague and general you could vomit.... He wants me to become a magician here and grant it merely based on this kind of testimony."

The Bahamian lost his case. George's lawyer turned to the Board of Immigration Appeals. The BIA made note of Solow's "inappropriate" demeanor. "This conduct was not limited to only the respondent," their decision read. "In fact, at one point, the Immigration Judge characterized the government's attorney as 'obnoxious.'" But the BIA upheld the denial, asserting that Solow's declared disgust for George's story did not mean the Bahamian had not received a fair trial.

George's pastor was appalled. "How can we have a judge who is supposed to represent this country and our standards of liberty and justice intimidating somebody appealing for asylum?" he wondered in a recent phone conversation. He is not the only one dismayed by George's experience. On Friday, September 8, the pastor e-mailed to his congregation a petition urging the Miami Eleventh Circuit Court of Appeals to consider reviewing George's case. He included the above transcript excerpts. Three days later he had 440 signatures, some even faxed by out-of-state snowbirds. Today he has more than 600 signatures, and state Reps. Clay Shaw and Alcee Hastings are looking into the matter.

Immigration judges have recently taken heat. In September of last year, Immigration Judge Mitchell Levinsky of New York lost his job after the Department of Justice found he had made insensitive generalizations from the bench, including "statements to the effect that: women are inherently homosexual ...; all Colombians and Cubans are drug dealers ...; Mexicans are drunks ...; Salvadorans prefer incest ...; Dominican women will have children with anyone ...; Poles drink too much ...; Chinese are kidnappers ...; Jamaicans, Dominicans, and Cubans are murderers ...; Jamaican women make good housekeepers and nannies ...; and [he did] not like Japanese people...." Levinsky claimed the comments had been made during "off-the-record courtroom banter among the courtroom staff."

In another ruling from September 2005, Philadelphia Circuit Judge Julio Fuentes complained that "Time and again, we have cautioned immigration judges against making intemperate or humiliating remarks during immigration proceedings." He added that "The tone, the tenor, the disparagement, and the sarcasm" of the immigration judge in question "seem more appropriate for a court television show than a federal court proceeding."

This past December, an article in the *New York Times* quoted an opinion by Richard Posner, a federal appeals court judge in Chicago, who wrote that conditions at the level of immigration court had "fallen below the minimum standards of legal justice." An *L.A. Times* story a short while later told of a judge in San Francisco who ordered the deportation of a U.S. citizen after he failed to verify the authenticity of his birth certificate and tax records, and a judge in Boston who earned a year's suspension for referring to himself as "Tarzan" during the trial of a Ugandan woman named Jane.

In January 2006, Attorney General Alberto Gonzalez responded to the criticism with a memo to immigration judges, expressing his concern about their behavior. He announced a Department of Justice review of immigration court. "While I remain convinced that most immigration judges ably and professionally discharge their difficult duties, I believe there are some whose conduct can aptly be described as intemperate or even abusive and whose work must improve," he wrote.

Some blame the problems on the shrunken Board of Immigration Appeals. "They transformed the board into a rubber stamp," says Ira Kurzban. "They're taking so little time to review the record that it reinforces the errors immigrant judges are making."

This past August, after officials visited twenty immigration courts, conducted more than 200 interviews, and pored over transcripts, the DOJ review was complete — with no change to the streamlined appeals process. Instead Gonzalez announced that judges would now routinely undergo performance reviews. New immigration judges must pass an immigration law exam to test their knowledge of the law. Another change — apparently rooted in the theory that dishonest asylum applicants provoke bad judicial behavior — proposes stiffer penalties for immigrants who make false claims, to "reduce the pressures that may have contributed to intemperate conduct in the past."

Immigration court is an administrative body, run by the Executive Office of Immigration Review (EOIR), a division of the DOJ. Attorneys wishing to become immigration judges apply through the civil service process and are hired according to the preferences of the EOIR. Immigration judges can choose to close their courtrooms to the public and the media. Attorneys worry that speaking out about an unfair hearing will result in retaliation by a vindictive judge the next time they argue a case before him or her. As such, there is very little public accountability unless a case reaches the level of a federal appeal. (Many lawyers interviewed for this article would only speak on background, if they agreed to speak at all.)

Judge Denise Slavin, who presides over the immigration court at Krome Detention Center and who may speak to the press in her capacity as president of the National Association of Immigration Judges, contends the judges have a difficult job. New York has 26 judges, and Miami, which Slavin says hears a greater number of cases every year, has only 20, plus the two at Krome. Judges are under pressure to move cases quickly, but the court is slow to replace staff members who leave. In immigration court, there are no bailiffs and no court reporters. (Cases are taped and usually transcribed only if there is an appeal.)

"The software on the computers was state-of-the-art in 1985," says Slavin. "There are only three law clerks for 22 judges in the area." The Miami court has also seen a 62 percent increase in matters received over the past five years, although the number at Krome has declined slightly.

Slavin, whom area immigration lawyers say is a fair and considerate judge, recently launched a feel-good offensive on behalf of the maligned adjucators, announced in the pages of the *Miami Herald* with the headline "Respect Sought for Busy Judges."

Immigration attorneys agree the judges' caseload is a large part of the problem. Local attorney Tammy Fox-

Isicoff said she would prefer a system that employs more immigration judges in order to reduce pressure on courts but that would also provide higher standards for their knowledge of the law. She also says the court could do more to "monitor and sanction judges who engage in improper conduct."

Judge Slavin says she hasn't believed hostile behavior to be a widespread problem. "You hear lots of mixed things and rumors about any judge. That's true of any court."

Tarek is an immigrant from the former Republic of Yugoslavia, an Albanian Moslem whose problems began during the Balkan wars that devastated the region between 1991 and 2001. Recognized as the bloodiest European conflict since World War II, the Balkan wars were the arena for genocide and war crimes.

Tarek was recruited into the Yugoslavian army, but he refused to join. In his 2004 asylum hearing at the Miami Immigration Court, he reasoned that he had been "recruited into an army that waged war on its own citizens of different ethnicities and religions" and that he had acted as a conscientious objector. He claimed his refusal to fight had resulted in the physical mistreatment of his family members, problems that continued even after he left the country. The immigration judge disagreed.

Tarek, according to the judge, was "about as much of a conscientious objector as I am of the pope in Rome."

Tarek's attorney submitted as evidence an Amnesty International report about the region, which called on authorities in countries of refuge to not deport deserters from the Yugoslavian army back to the Balkans. "While NATO states encouraged Yugoslav soldiers and reservists to desert, they are now failing to provide those who did so with adequate protection," it read.

The immigration judge dismissed the Amnesty International report as "dribble" and a "hood ornament."

"You ever read Amnesty reports about the U.S.?" he asked later in the hearing. "You'll hear it's the same story. So what? I don't know of a country in the world that ... Amnesty International wouldn't say something about."

Since arriving in the United States, Tarek had married a woman from Georgia. Although the couple had a child together, at one point the judge asked Tarek: "By the way, did anybody arrange your marriage with the lady you married in Georgia?" And in a final show of disrespect, the appeal brief states that the immigration judge repeatedly said "sustained" even though the government's attorney had made no objection to a question.

The BIA did not grant the appeal but sent the case back to the judge for a proper hearing. As for disciplinary measures, the criticism appears to have stopped there, although the judge recused himself from hearing the case a second time at the behest of Tarek's lawyer. The Albanian is currently seeking adjustment of status — relief from deportation because a spouse who is a U.S. citizen files a visa petition. Tarek's wife has done so, and they await the results. He is lucky to have the option.

"Sometimes people on the bench seem to forget that what they're supposed to do is listen to evidence and make a decision," says Ira Kurzban. "They substitute personal views for the evidence in front of them."

Judge Slavin counters that sometimes a judge's knowledge of the history and context of a particular country can be helpful. "I had a case with a Haitian who claimed he was taken from his house on December 17, 2001.

I knew information from other cases that on that date a raid on the national palace was used as an excuse to attack anti-Aristide activists."

But consider the case of a Mexican immigrant, Jaime Rodríguez-Navarette, who applied for cancellation of removal via a form of relief available for nonpermanent residents. As part of his petition, the Mexican had to prove continuous residence in the United States for a period of at least ten years. Miami Judge Teofilo Chapa did not believe the immigrant's residency claim based on the following reasoning:

"I have nothing that would show it, but I would suspect that this respondent has been coming and going to and from Mexico ...," said Chapa. "If I hadn't worked for the Mexican consulate for three years doing pro bono work in the migrant farm camps, I wouldn't have realized just how many people just come back and forth.... They'll come to the U.S. three, four, five, six months a year, go back to Mexico, live off what they earned while they were here. They just keep doing that." Later he said, "I'm Mexican. I know what he's thinking. Okay?" Both Chapa and the BIA rejected Rodríguez-Navarette's application. The Eleventh Circuit Court of Appeals declined to review the case.

Impropriety by judges in the Miami court has been known to extend to the basic principles of due process. The recent rejection of a Venezuelan asylum applicant is being appealed because the judge accepted a slanderous letter sent anonymously to the court as evidence.

"At Respondent's last hearing on September 14, 2005, the Immigration Judge provided Counsel for Respondent and the [Department of Homeland Security] trial attorney a copy of an anonymous letter received by the Court on May 6, 2005, wherein serious allegations were made regarding the Respondent's claim for asylum, his character, and his credibility," states the appeal brief sent to the BIA.

"No real Court would ever permit an unauthenticated document of such a disparaging nature to be admitted into the record," it continues. "No real Court would ever ask counsel to address the contents of an anonymous, disparaging letter. The Court's acceptance of this letter into the record in this case is especially egregious given the nature of the Respondent's application for relief, asylum.... What is to stop governments or countries from addressing anonymous letters to Court to derail asylum claims? Even in immigration proceedings, due process must prevail!"

The brief continues that after accepting the anonymous letter into evidence, the judge refused to accept a letter that the immigrant said was from his physician in Venezuela, which attested to the medical injuries suffered in a beating related to the asylum claim.

"The judge noted that he had issues with the stationery on the letter, which appeared to be a copy of stationery used by the doctor, despite the fact that the letter contained the physician's original signature and stamp authenticating the signature," the brief continued. "The doctor was never contacted by DHS counsel or the judge — there was no evidence presented that the letter was fraudulent. The letter very well could have been a copy of letterhead the doctor used because of available resources in Venezuela." The brief criticizes the judge for placing himself in the position of "forensic document expert," and concludes that "The medical letter was the applicant's best documentary evidence of his beating in Venezuela."

On the EOIR Website's home page, disciplinary actions against errant attorneys are prominently listed as links, a reasonable measure of consumer protection. Attorneys are disciplined for everything from charging excessive fees to coercion to "engaging in contumelious or obnoxious conduct." Disciplinary action against judges, however, can be accessed only under Freedom of Information Act requests.

According to Barbara Kamali, most judges are fair and respectful to immigrants. But she, Tammy Fox-Isicoff, and other local attorneys repeatedly cited the need for a way to express concerns. "We need a responsive complaint process, where a complaint against an immigration judge is really investigated," wrote Fox-Isicoff in an e-mail to *New Times*. An EOIR spokeswoman said the official procedure for complaining is to write letters — either to the Department of Justice Office of Professional Responsibility or to the chief immigration judge. Doing so has its hazards.

The law office of immigration attorneys Neil Kolner and Michael Ray is nestled in a bi-level storefront two blocks from the immigration courthouse. Passing through an entryway lined with law books, a secretary leads visitors up a lightless stairwell whose walls are hung with pictures of manatees, alligators, and sea otters. The dingy hallway opens into a shockingly pretty, if slightly unkempt, patio garden full of sprawling tropical plants, which passes into the attorneys' shared upstairs office. The whole setup is sort of ramshackle, with a poster of John Lennon giving the peace sign in front of the Statue of Liberty and another of an old *Mad* magazine satire of the U.S. Supreme Court. Kolner and Ray are also the most notorious local examples of what happens when attorneys criticize a judge too harshly.

The trouble began as far back as 1994, when an ongoing feud in the *Daily Business Review* pitted Ray and Kolner against former Miami Judge Philip Montante, whom they accused of universally denying asylum to Haitians. Responding in the newspaper, Montante's lawyer labeled Ray and Kolner as "chronic troublemakers" and countered that the judge "had granted asylum to numerous Haitians."

Annoyed, Ray and Kolner sued the government for records indicating the number of Haitians granted asylum by Montante (who now judges in Buffalo, New York). The answer: one. ("In an ongoing feud between Miami immigration lawyers and immigration judge Philip J. Montante, score one for the lawyers," quipped the *DBR*.)

In February 1996, Ray wrote a sharply worded letter to Chief Immigration Judge Michael Creppy, complaining again about Judge Montante. It wasn't the first time Ray filed a formal complaint about a judge — in fact he had written four previous letters about Montante and three other judges — but in his February letter, he laid out a "History & Background of Miami Immigration Court/Ray/Kolner Conflict."

By November 1996, this "conflict" had escalated to the level where Ray and Kolner asked Judge Montante to recuse himself from their cases. The judge refused. Ray went before him first.

"Normally they call a case by the order in which you arrive," he remembers. "But he wouldn't call me. I kept waiting." Ray and Kolner watched as the judge called case after case before theirs. "Finally I got up and asked to go next," says Ray. The ensuing confrontation was so tumultuous that the judge had security forcibly remove Ray and Kolner from the courtroom.

This encounter prompted Michael Ray's most inflammatory letter yet: "Montante's trial conduct towards Kolner and me (and who knows how many other attorneys afraid to speak up?) is just one more discouraging example of judicial railroads, kangaroo courts, lynchings, Inquisitions, Salem Witch Trials, Star Chambers, and Nazi Justice rearing up their heads like a plague in humankind's struggle upward through history. I make this unpalatable charge simply because you, not I, have the obligation and lawful authority to exercise that obligation to put a stop to Montante's abuses."

In 2001, five years and many legal stages later, the Florida Supreme Court publicly scolded Ray for questioning Montante's integrity. A referee representing the Florida Bar said of Ray's letter: "I am utterly appalled that this kind of language would be used against anybody on evidence that barely qualifies as

sketchy."

The Florida Supreme Court's unanimous nine-page opinion read, "Although attorneys play an important role in exposing valid problems within the judicial system, statements impugning the integrity of a judge, when made with reckless disregard as to their truth or falsity, erode public confidence in the judicial system without assisting to publicize problems that legitimately deserve attention."

Ray and Kolner petitioned that the case be reviewed in the U.S. Supreme Court, arguing that their First Amendment right to opine had been denied to them as lawyers. The Supreme Court declined to hear the case.

Today a small replica of the Statue of Liberty stands on Ray's desk; the hand bearing the torch is broken off at the wrist. Ray and Kolner have not written a letter since. They can't think of any other attorneys who have, either.

The Board of Immigration Appeals is currently considering the case of a Colombian, Juan Carlos Ruano, who sought asylum in Miami. The BIA has denied Ruano once already, but a December 2005 opinion by the Eleventh Circuit Court of Appeals sent the case back down to the original immigration judge. The federal court stated the judge failed to provide specifics in his finding that Ruano would be safe in his own country.

The Colombian was a politically active member of the Liberal Union party in his native city of Palmito Valle. As political outreach, he would frequently visit rural communities, where he educated youth and helped coordinate public works projects, such as building roads to isolated enclaves. These actions put him on bad terms with the Revolutionary Armed Forces of Colombia (FARC), which had their own political interests in the area.

In September 2001, guerrillas stopped Ruano in a rural area. They kidnapped him and took him into the mountains, where a commander of the sixth front of the FARC threatened and beat him. The FARC commander told Ruano that if he did not stop his work in the area, he would be killed within a month.

On October 17, 2001, Ruano was staying at his grandmother's house when three shots were fired at the front door. He says FARC called the house immediately afterward and again threatened his life. He bought a ticket to the United States on October 28 and left Colombia two days later. On his written application, the Colombian added that another active member of the Liberal Union was assassinated in December 2001 for doing similar work.

In May 2006, the judge, Daniel Dowell, issued his second opinion. He believed Ruano had been threatened, he wrote. "His testimony was relatively clear and consistent with the information contained in the written application," states his opinion.

Yet in spite of conceding that Ruano was kidnapped, beaten, and shot at for his political work, the judge went on to define persecution according to a prior court precedent "as an 'extreme concept' requiring 'more than a few isolated incidents of verbal harassment or intimidation.'" He denied asylum for the second time.

"Mr. Ruano's case involves the unfortunate situation in which an Immigration Judge held that even though an asylum seeker credibly testifies that they were beaten, kidnapped, and subsequently had gunshots fired at their hiding place on the basis of his political opinion, that this suffering is somehow not enough to warrant a

grant of asylum from the United States," wrote Leon Fresco, Ruano's attorney, in an e-mail to *New Times*.

"If the BIA affirms the Immigration Judge's decision in this case, the result will be the elimination of asylum as we know it," he continued. "If being beaten, kidnapped, and shot at on the basis of one's political opinion is insufficient to merit a granting of asylum, only the rarest of cases will be granted."

Fresco is not the only one to warn that the definition of persecution seems to have narrowed to the point of near-extinction. In a May 2006 case, Federal Appellate Judge Ed Carnes, one of the more conservative on the Miami court, dissented from a majority opinion to throw out the case of another Colombian asylum seeker denied by the BIA. Like Fresco, Carnes opined that the rejection indicated asylum was all but impossible in the Miami Court of Appeals. He concluded his dissent via the following statement:

"The majority opinion refers to the often-mentioned, but never sighted, 'rare case' in which the facts are so compelling that we will reverse an immigration judge's finding.... No published opinion of this Court has ever found that rare case, and today's decision indicates that such a case, like the fabled unicorn, exists only in our imagination."