

PRO BONO AWARDS

A SPECIAL REPORT

Asylum cases keep her on the cutting edge

Reed Smith's Jayne Fleming is building
a human-rights infrastructure.

BY EMILY HELLER

The emotional intensity of pro bono work can make lawyers feel overwhelmed. Feeling that they've seen enough pain and suffering, some might even turn away from the work.

But gut-wrenching cases, especially those with an aura of hopelessness, are just the thing for human-rights lawyer Jayne Fleming of Reed Smith's San Francisco office.

"I tend to really like doing cutting-edge cases and cases that seem impossible to win," she said. "I absolutely refuse to accept" a client getting deported.

Fleming, a full-time pro bono counsel, heads the 50-member human-rights team at the nearly 1,500-lawyer firm, representing refugees, torture victims and violence survivors seeking asylum in the United States.

Winning asylum cases is extremely difficult because the burden of proof is so high and there are so many variables, she said.

First and foremost, a petitioner must be credible. Fleming's clients—mainly from Central America—may



FLEMING: "I tend to really like doing cutting-edge cases and cases that seem impossible to win."

not come across as credible because of their traumatic experiences. Trauma can affect the ability to remember and communicate consistently, she said. It's hard to talk about awful things that happened to you or your family. People sometimes forget key things or give inconsistent accounts of what happened.

Still, asylum cases are winnable with the right litigation strategy, she said. None of Fleming's clients to date has been deported.

What's her secret? Experts. Through personal outreach, Fleming has assembled a team of overseas expert witnesses, mostly activists from human-rights groups. They travel to the United States to give live testimony in immigration court, explaining the nature of the violence at issue and predicting what could happen if petitioners are forcibly returned home.

The experts' job is to turn generalizations, abstractions and false perceptions about life in these countries into reality, Fleming said.

She used expert testimony in recent cases involving a Honduran boy, A.H., who came to the United States at age 7, and his female cousin, D.H., who was 6. They were

picked up at the U.S. border after fleeing gang violence. Their grandfather had openly opposed criminal gangs, which sought retribution by murdering three family members and pledging to eliminate the entire family. Gang members had thrown rocks at A.H. and threatened him and his cousin. Fleming represented both kids in separate asylum proceedings in immigration court.

In the case of A.H., the judge granted asylum, finding that he had been persecuted and had a well-founded fear of continued persecution. The government has appealed and the case is pending. As for D.H., Fleming said, a decision is pending before an immigration judge.

"Some cases are really tough," she said. Gang violence cases are hard to win because that's not a clear basis for asylum. Fleming flew in an expert on gangs from a Honduran nonprofit organization who testified about the prevalence of gang-related murders and the consequences of opposing the groups.

BUILDING RELATIONSHIPS

She created her team of experts by traveling to Central America twice or more a year to build relationships with human-rights organizations. The goal of these support groups is to enable people to stay in their home countries, and they often question and reject outsiders' inquiries, Fleming said. "It can be tricky," she said. "I'm not there because I have all the answers." She goes beyond lawyering and has raised money to support these groups, such as an organization that helps mothers and children who live in garbage dumps in Guatemala City.

"She really is indefatigable," said Karen Musalo, director of the Center for Gender and Refugee Studies at the University of California Hastings College of the Law. "She just does not tire. She can't walk by an injustice. I've seen her do this time and time again." Musalo noted that Fleming serves on her group's executive committee.

In another case, Fleming came across a U.S. Court of Appeals for the 5th Circuit opinion about a woman from Congo who had been repeatedly raped by prison guards but escaped and came to the United States to seek asylum. The appellate court denied her petition, ruling that, although her story was credible, the asylum law did not apply.

The appellate decision was "egregiously wrong," Musalo said.

Fleming wrote to the lawyer on the case, offering to assist with a petition for en banc review or reconsideration. Fleming took over the case, but her motions were denied.

10,000 LETTERS

With no recourse in the law, she turned to a letter-writing campaign. At her urging, human-rights activists wrote 10,000 letters to the Justice Department and then-Attorney General John Ashcroft. The federal government ultimately agreed to support Fleming's motion to reopen the case and remand for further proceedings. The published 5th Circuit ruling still stands as precedent, but Fleming's client won asylum.

Fleming believes she is in an ideal position to win cases because she—unlike her colleagues in nonprofit human-rights groups—has the resources to litigate cases fully. "If you are going to litigate the cases, you are going to do it right," she said.

Reed Smith finances the work, including the cost of experts. (The firm declined to disclose its spending for pro bono work.) Fleming is quick to add that she negotiates experts' fees, which the experts often waive in exchange for transportation costs. "I'm really good at Priceline," she said with a laugh.

In-country expert testimony "has been the key to success," said longtime Reed Smith Philadelphia litigator Christopher Walters, the firm's senior pro bono counsel. The impact of having experts in court "makes all the difference in the world."

Judges are always a bit skeptical, he said. But a recognized human-rights activist's testimony goes a long way toward explaining the petitioner's plight. "It's desperately needed work," Walters said of handling asylum cases. Many refugees who have fled persecution are being deported, he said.

Fleming also participates in numerous law school and community programs. She directs asylum law training programs at the University of California, Berkeley School of Law and the University of Pennsylvania Law School, where students do research, writing and some representation in asylum cases.

In addition to international human-rights work, Fleming founded a nonprofit law center to address local issues in the San Francisco Bay Area. The Legal Justice Center, headquartered in downtown Oakland, Calif., is overseen by Fleming and

staffed by local attorneys and paralegals who provide legal education and community support to low-income residents.

While accepting an award last summer recognizing her contributions in immigration law, Fleming noted that she had learned from her clients that healing comes through telling others about their experiences. She plans to expand her program's international reach, helping asylum seekers from Asia and Africa tell their stories. "I would love to see where this goes," she said.

Emily Heller is a regular contributor to the National Law Journal.