

Case Summary: Immigration Law Advisor

U.S. Department of Justice, Executive Office for Immigration Review

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Angov v. Lynch, No. 07-74963, 2015 WL 3540764 (9th Cir. June 8, 2015): The court amended its decision in *Angov v. Holder*, 736 F.3d 1263 (9th Cir. 2013), and voted to deny rehearing en banc. In its amended decision, the court reaffirmed its holding to allow reliance on overseas investigation reports as a basis to deny asylum. The circuit courts are split as to whether these reports contain sufficient indicia of reliability to be admissible as evidence against an asylum seeker. The Ninth Circuit noted that the Third, Fourth, Sixth, and Eighth Circuits have found the reports inadmissible on due process grounds. The Second Circuit also does not allow the use of consular reports, but on statutory (rather than constitutional) grounds. The Ninth Circuit disposed of the petitioner's due process argument on the ground that he was not entitled to such protection because he had not been formally admitted to the United States. Addressing the report's admissibility as a statutory matter, the court disagreed with the Second Circuit's determination that the lack of certain details or the availability of the report's preparer for cross-examination should render the document inherently unreliable. In reaching this conclusion, the Ninth Circuit focused on the unique context in which such claims arise. The court concluded that "pervasive, structural incentives for fraud" in the asylum system require that triers-of-fact be allowed to consider findings of consular investigations that might lack particular details bearing on credibility. The court stated that allowing consideration of such reports will not always lead to an adverse credibility finding. Rather, the Immigration Judge should be allowed to determine the individual reliability of any such document. The court additionally noted that the asylum seeker carries the burden of proof and is afforded the right to provide rebuttal evidence in response to a consular report. The court noted that Supreme Court and Ninth Circuit precedent afford a presumption of regularity to Government officials carrying out their official responsibilities. The court opined that the Second Circuit's requirements are unrealistic given the consulates' limited resources. As a result, the Ninth Circuit stated that the Second Circuit's rule would exclude from consideration certain evidence "which may be essential to weeding out fraudulent claims." The decision included a dissenting opinion.