Judicial Deference to Incomplete Asylum Analysis

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You are the owner of a small shop and mill in El Salvador. The MS-13 gang begins calling your store, demanding payment in exchange for not killing your family. You pay in the hopes of being left alone. A few weeks later, while running errands with a co-worker, you are kidnapped by armed men who threaten to kill you for entering their territory. Miraculously, your co-worker's cousin is in the gang, and a phone call to the cousin leads them to spare your life. MS-13 is not done with you yet, though; they begin demanding "rent" for your business and threaten to kill your family if you do not pay. This situation is relatively common in your country, and you have seen how MS-13 has infiltrated the police and government, assassinating civilians who cause problems by reporting gang activity. After the gang demands more and more money, you decide to sell your business and flee the country, fearing for your family's life. When you apply for asylum in the United States, would you want your immigration judge to look at the evidence you have provided that illustrates your predicament?

The foregoing is an overview of the situation Iris Rodriguez de Palucho and Jose Miguel Palucho Lara found themselves in. In *Rodriguez de Palucho v. Garland*, the Sixth Circuit denied a petition for review from Iris and Jose, granting broad deference to the Board of Immigration Appeals (BIA).[1] Under the legal standard articulated in *K.H. v. Barr*, the BIA must investigate (1) El Salvador's response to an asylum applicant's persecution and (2) general evidence of El Salvador's conditions.[2] The majority opinion found that unless the BIA commits a legal error or their findings are unreasonable under this test, it must be given broad deference.[3] Here, the BIA was granted such deference and the petition was denied for review despite the BIA's failure to completely articulate the *K.H.* test and fully analyze its second prong.[4] This is troubling because it allows administrative law judges to satisfy elements of a test by simply making a passing reference without in-depth or substantive analysis. As a result, asylum-seekers in the Sixth Circuit appear to be at the sole mercy of immigration judges who are not held accountable by legal standards.

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1 Palucho v. Garland, 49 F.4th 532, 542 (6th Cir. 2022).

2 K.H. v. Barr, 920 F.3d. 470, 476 (6th Cir. 2019) (citing Perez-Aguilon v. Lynch, 674 F. App'x 457, 463 (6th Cir. 2016)).

3 *Palucho*, 49 F.4th at 537–42.

4 *Id.* at 546. (Clay, J., dissenting).

I. MAJORITY APPLICATION

The federal asylum statute provides relief for "refugees,"[5] who are defined as those with a "well-founded fear of persecution" in their home countries.[6] Although "persecution" is not defined by statute, the BIA and courts interpret this element to require a fear of harm from either the government or "private parties that the government is 'unable or unwilling' to control."[7] Therefore, Iris and Jose were required to prove that the government of El Salvador is "unable or unwilling" to control MS-13.[8] The BIA found that because the country is "taking steps" to protect civilians, it is not "unable or unwilling" to control MS-13.[9]

Judge Murphy's majority opinion took a hands-off approach, at one point claiming that the court "cannot reverse the agency's finding simply because [it] might have come out the other way."[10] Judge Murphy failed to outline a concrete legal standard for an evaluation of such a determination, citing two approaches: in some cases, asylum-seekers must prove "they cannot 'reasonably expect the assistance of the government' in deterring the criminal actor"[11] while in other cases, they must show that "the government must have either 'condoned' the private violence 'or at least demonstrated a complete helplessness to protect the victims.'"[12]

In any event, Judge Murphy explained that courts and the BIA should look to "the immigrant's specific facts and the country's general conditions," a capacious and vague reference to the *K.H.* test.[13] Under the *K.H.* test, a tribunal should look into "two general categories of information: (1) the government's response to an asylum applicant's persecution and (2) general evidence of country conditions."[14] The factors in the first prong include "whether the police investigated, prosecuted, and punished the persecutors;" "the degree of protection offered to an asylum applicant;" and "any concessions on the part of the government" admitting an inability to protect the victim from the persecutor.[15] In terms of general country conditions, courts should look to "how

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5 8 U.S.C. § 1158(b)(1)(A).

6 *Id.* § 1101(a)(42)(A).

7 Ortiz v. Garland, 6 F.4th 685, 688 (6th Cir. 2021) (quoting Matter of Acosta, 19 I. & N. Dec. 211, 222 (B.I.A. 1985)).

8 *Palucho*, 49 F.4th at 536.

9 *Id*. at 537.

10 *Id.* at 541.

11 *Id*. at 536 (quoting Juan Antonio v. Barr, 959 F.3d 778, 793 (6th Cir. 2020)).

12 *Id.* at 536 (quoting Kere v. Gonzales, 252 F. App'x 708, 712 (6th Cir. 2007); Ortiz v. Garland 6 F.4th 685, 691 (6th Cir. 2021)).

13 *Id.* at 537.

14 K.H. v. Barr, 920 F.3d. 470, 476 (6th Cir. 2019) (citing Perez-Aguilon v. Lynch, 674 F. App'x 457, 463 (6th Cir. 2016)).

15 *Id.* at 476–77.

certain crimes are prosecuted and punished" and "the efficacy of the government's efforts."[16]

Judge Murphy's majority opinion made a reference to the *K.H.* test but only stated that adjudicators must look to "the immigrant's specific facts and the country's general conditions," without discussing any of the factors within the two prongs outlined in Judge Clay's dissent.[17] Judge Murphy claimed that the Board, when looking at the specific facts and general conditions, made a "reasonable" finding for two main reasons: First, "Iris and Jose did not report any of the gang members' crimes to the police" despite the police helping them with non-gang related matters.[18] Second, the country has "problems with gang members and . . . . evidence of corruption" but is trying to protect ordinary people from gang violence as evidenced by the fact that "police conducted daily raids in their neighborhood to control the gang members there."[19] Iris and Jose alleged that the board made a procedural error in their failure to cite multiple reports of El Salvador's conditions in the record, and a substantive error in that "any reasonable adjudicator" would reach the conclusion that El Salvador is unable to protect them.[20]

Regarding the procedural claim, Judge Murphy admitted that the BIA did not expressly cite the evidence of country conditions that Iris and Jose entered into the record.[21] For the BIA to examine "every piece of record evidence that cuts against its findings" would simply be too burdensome and may overwhelm dockets with immigration remands.[22] Judge Murphy explained that even if the court would come to a different result or emphasize different pieces of evidence, judges must view BIA decisions as fact and cannot vacate a decision "unless it is so deficient that we cannot even evaluate whether a 'reasonable adjudicator would be compelled' to reach the opposite finding."[23] Here, the majority found that the BIA did not ignore the evidence of country conditions because it claimed, without citing the evidence on record, that the government was taking steps to protect citizens from gang violence.[24] Even Judge Murphy seemed to acknowledge the apparent deficiency: "Say what you want about its analysis on the merits," he conceded after describing the BIA's reasoning.[25] In short, since the BIA mentioned the country's conditions, even without a citation to evidence in the record or substantive discussion of those general conditions, judicial review remains highly deferential.[26] The majority denied Iris and Jose's petition

16 *Id.* at 477.
17 *Palucho*, 49 F.4th at 537.
18 *Id.*
19 *Id*. at 537, 539.
20 *Id.* at 537.
21 *Id.* at 537.
22 *See id.* at 538.
23 *Palucho*, 49 F.4th at 539 (quoting 8 U.S.C. § 1252(b)(4)(B)).
24 *Id.* at 539–40.
25 *Id.* at 539.
26 *See id*.

for review and upheld the BIA's order to remove the Rodriguez de Palucho family to El Salvador.[27]

II. DISSENT

Judge Clay's dissent delves further into just how bare-boned the BIA's analysis of Iris and Jose's predicament was. The BIA cited three pieces of evidence showing that Iris and Jose had not met their burden of proof that the government was unwilling or unable to control gang extortion: (1) that the police had helped Jose handle familial conflicts in the past; (2) that police conducted daily raids looking for gang members; and (3) "that while some officials may be corrupt . . . . such as the mayor of the town in which they live, there is no evidence that the mayor of the town was involved in the extortion of Jose."[28] There was no discussion of the evidence of the general country conditions entered into the record by Iris and Jose.[29]

According to Judge Clay, the lack of discussion of general country conditions represents a complete failure to analyze the second prong of the *K.H.* test, which requires an analysis of "how certain crimes are prosecuted and punished" and "the efficacy of the government's efforts."[30] Judge Clay further noted that judicial review of this issue is proper in this case because "factual errors can qualify as legal errors when 'important facts have been *totally overlooked*.'"[31] Those facts that were overlooked were contained in a report by the United Nations High Commissioner for Refugees indicating that police are an insufficient protection in gang cases, that MS-13 has infiltrated the police and the military, that MS-13 routinely kills civilians who file criminal complaints, and that police officers have allegedly killed civilians to protect gang interests.[32] Furthermore, the ability of the police to help Jose with familial disputes does not mean they are effective against gangs.[33] Lastly, the Mayor of Iris and Jose's town was convicted for working with MS-13, suggesting that gangs are "deeply embedded in authoritarian structures in El Salvador."[34] Since the dissent would have found that the general country conditions show that the government is unable to control MS-13, Judge Clay would have granted the petition for review and ultimately found that the BIA improperly denied the application for asylum.[35]

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27 *Id.* at 542.

28 *Id.* at 545 (Clay, J., dissenting).

29 *Palucho*, 49 F.4th at 545 (Clay, J., dissenting).

30 *Id.* at 545–46 (citing K.H. v. Barr, 920 F.3d 470, 477–78 (6th Cir. 2019)).

31 *Id.* at 546 (quoting Saleh v. Barr, 795 F. App'x 410, 418 (6th Cir. 2019)) (emphasis in original).

32 *Id.* at 547–49.

33 *Id.* at 547, 547 n.2.

34 *Id.*

35 *Palucho*, 49 F.4th at 548–49 (Clay, J., dissenting).

III. RESULT AND IMPLICATIONS

Is it a good idea to allow administrative law judges the ability to totally overlook key facts and ignore court-articulated tests as the BIA did in this case? The Sixth Circuit seems to think so. As told by both the majority and dissenting opinions in *Palucho*, the BIA completely ignored evidence that could compel a different result in the case and utterly failed to analyze the second prong of the *K.H.* test.[36]

Allowing such lackluster analysis in immigration cases will certainly lead to fewer asylum grants overall. According to immigration and refugee advocates, this means the U.S. will miss out on a valuable source of entrepreneurship and economic productivity.[37] Data suggest that migrants and refugees account for 25% of entrepreneurs in the country despite representing only 15% of the total population.[38] Small businesses like those started by many migrants and refugees create roughly 1.5 million jobs per year.[39] In an analysis of refugee and migrant tax contributions, economists have found that the 86% drop in refugee resettlement that occurred during the Trump administration costs the U.S. economy over $9.1 billion every year.[40] Furthermore, many refugees may fill crucial roles in the labor market that American-born citizens are unable or unwilling to perform.[41] By refusing refugees without a thorough examination into their circumstances, the U.S. may miss out on valuable social resources and economic activity.

Setting aside economic arguments for accepting refugees, there is also strong historical precedent and humanitarian obligation for welcoming those fleeing unimaginable conditions in their home countries. Until the Trump administration began openly vilifying refugees, America had routinely and proudly been held up as a haven for foreign victims of persecution.[42] Removing refugees can have disastrous effects for the refugees themselves; without asylum, victims of persecution live in a state of uncertainty, fear, and, in some cases, mortal danger.[43] Asylum can be a life-saving act for those fleeing political or gang-related violence. Furthermore, refugees' origin countries may also gain long-term benefits of investment and networking with U.S. communities, which

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36 *See id.* at 546.

37 *See* Dany Bahar, *Why Accepting Refugees Is a Win-Win-Win Formula*, BROOKINGS INST. (June 19, 2018), https://www.brookings.edu/blog/up-front/2018/06/19/refugees-are-a-win-win-win-formula-for-economic-development/ [https://perma.cc/4Y77-V69N].

38 *Id*.

39 *Id*.

40 Stuart Anderson, *Refugees Make America Better Off*, FORBES (May 26, 2022), https://www.forbes.com/sites/stuartanderson/2022/05/26/refugees-make-america-better-off/?sh=185d45abdfa8 [https://perma.cc/RYD6-K499].

41 *See* Philippe Legrain, *Refugees Are Not a Burden But an Opportunity*, ORG. FOR ECON. COOP. & DEV. (2016), https://www.oecd.org/migration/refugees-are-not-a-burden-but-an-opportunity.htm [https://perma.cc/67Y3-CHGP].

42 *See* Anderson, *supra* note 40.

43 *See* Bahar, *supra* note 37.

may improve the conditions that caused asylum-seekers to flee in the first place.[44] Ultimately, while the acceptance of refugees requires an initial investment in supporting newly admitted asylum seekers, the benefits are a net positive for refugees, U.S. citizens, and the U.S. and global economy.[45]

Judicial deference to administrative law decisions is frequently justified by claims that agencies are "better positioned to reach a correct assumption of the facts" due to their participation in the hearing and adjudication process as well as their expertise in technical subject areas under the delegation of powers doctrine.[46] The court in *Palucho* is also concerned with creating a backlog of appeals from and remands to the BIA that would overwhelm tribunals.[47]

While these may be legitimate rationales for granting deference to agencies in rulemaking contexts, they seem to hold significantly less weight when administrative law judges are supposed to analyze cases within a court-articulated framework. Although the agency is indeed the decision-maker in the adjudication process, there is a clear test for making the decisions that purports to provide a relatively consistent system for review. In this case, the *K.H.* test aims to establish such a system for review. Policy implications relating to due process and legitimacy of the courts may also arise out of this decision. If, as this opinion states, administrative law judges can ignore legal standards by making a passing mention without independently analyzing issues, the foundation of the judicial branch—that it is based on the rule of law and offers an equal application of the rules to all—looks to be on shaky ground. Ultimately, while granting a measure of deference to administrative law judges may be justifiable as a means of docket control and delegation of power, courts should still hold agencies to the legal standards requiring thorough analysis of an appellant's situation and evidence in the record.

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44 *Id.*

45 *Id*.

46 Michael Kagan, *Dubious Deference: Reassessing Appellate Standards of Review in Immigration Appeals*, 5 DREXEL L. REV. 101, 117–18 (2012).

47 Palucho v. Garland, 49 F.4th 532, 539 (6th Cir. 2022).