

TO DECIDE OR NOT TO DECIDE: *IS THAT THE QUESTION?* JURISDICTION OF IMMIGRATION APPEALS IN *KAMBOLLI V. GONZALES*, 449 F.3D 454 (2D CIR. 2006)

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I. INTRODUCTION

“Our attitude towards immigration reflects our faith in the American ideal. We have always believed it possible for men and women who start at the bottom to raise as far as their talent and energy allow. Neither race nor place of birth should affect their chances.”

—Robert Kennedy¹

Immigration issues have been at the forefront of political and social debate for decades.² After September 11, 2001, the stakes for immigration were raised because of its importance to the larger issue of national security. A policy-shuffle ensued, resulting in another important interest getting lost in the protectionist rhetoric and the political debate: that of the foreign refugee who has fled the oppression of his home country in order to live more freely and fearlessly in the United States. Immigrants like Mirdash Kambolli, a former citizen of Albania, brave the maze of administrative agencies for months and sometimes years in the hope that they might be allowed to remain on U.S. soil, and in many cases, avoid the certain death they will face if forced to return to their home countries. This maze became more complex, and far more daunting, in 2002 when Attorney General John Ashcroft authorized “streamlining” regulations aimed at reducing a backlog of immigration

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1. Quotable Online, Immigration Quotes, <http://www.quotableonline.com/Immigration.html> (last visited April 8, 2008).

2. See generally, Dory Mitros Durham, *The Once and Future Judge: The Rise and Fall (and Rise?) Of Independence in U.S. Immigration Courts*, 81 NOTRE DAME L. REV. 655 (January 2006).

appeals within the Department of Homeland Security. One of the most significant changes allowed single members of the Board of Immigration Appeals (BIA) to issue affirmances of lower immigration judges (IJ) without issuing a written opinion. Circuit courts have split over the issue of whether federal circuit courts have jurisdiction to review the decision to affirm an IJ decision unilaterally and without written opinion in accordance with the streamlining regulations.³ The First, Third, and Ninth Circuits have held that federal circuit courts have jurisdiction to review the decision to “streamline” a case⁴, whereas the Eighth and Tenth Circuits have held that the decision of a BIA judge to hear a case individually and affirm without written opinion is not reviewable.⁵

These courts have analyzed a number of issues including whether the decision to streamline is one of agency discretion,⁶ whether circuit court review would defeat the “streamlining” purpose,⁷ and whether a particular decision to streamline was “arbitrary or capricious.”⁸ The Second Circuit considered these issues in *Kambolli v. Gonzales*, the latest case to decide this jurisdictional issue.⁹ Miradash Kambolli is an immigrant from Albania whose asylum request was denied by the IJ.¹⁰ The BIA affirmed the IJ decision without written opinion in accordance with the streamlining provisions, meaning that Mr. Kambolli received a single sheet of paper with no legal reasoning in response to his agency-level appeal.¹¹ Mr. Kambolli appealed his case to the Second Circuit, which joined the Eighth and Tenth Circuits in denying jurisdiction to review the decision of a single member BIA judge to affirm without written opinion.¹²

The resolution of this circuit split does not lie in the determination of how much deference is owed to the BIA, or whether the streamlining regulations intended judicial review. The resolution must consider whether the regulations have made the BIA’s review meaningless, and whether the regulations continue to reflect the original intent of giving immigrants an appeals process at the agency level where expertise is alleged to reside.

3. *Smriko v. Ashcroft*, 387 F.3d 279, 290 (2d Cir. 2004).

4. *See Haoud v. Ashcroft*, 350 F.3d 201, 206 (1st Cir. 2003); *Smriko*, 387 F.3d at 290; *Chong Shin Chen v. Ashcroft*, 378 F.3d 1081, 1087–88 (9th Cir. 2004).

5. *Ngure v. Ashcroft*, 367 F.3d 975, 983 (8th Cir. 2004); *Tsegay v. Ashcroft* 386 F.3d 1347, 1353–58 (10th Cir. 2004).

6. *Ngure*, 367 F.3d at 983.

7. *Tsegay*, 386 F.3d at 1353–58.

8. *Smriko*, 387 F.3d at 296.

9. *Kambolli v. Gonzales*, 449 F.3d 454 (2d Cir. 2006).

10. *Id.*

11. *Id.*

12. *Id.*

Federal Circuit Courts are being bombarded with appeals from the BIA, effectively shifting the BIA backlog to the federal courts.¹³ Federal Judges from the Second, Seventh, and Ninth Circuits have publicly criticized the handling of immigration cases at the agency level,¹⁴ and further criticism from former BIA judges and commentators points out the possibility of a strong political motivation behind some of streamlining provisions enacted by former Attorney General John Ashcroft.¹⁵ The burden on the federal court system and the criticism of the federal bench are only symptoms of a larger problem that will not be solved through procedural posturing at the Circuit level. The problem is that one-sentence affirmances without opinion leave immigrants feeling like they did not have a hearing on the merits of their claim at the appellate level. As a policy-matter, and as a value judgment from a “nation of immigrants,”¹⁶ the regulations themselves must be examined not just in terms of what rights *can* be afforded to immigrants, but what rights *should* be afforded to them. The streamlining regulations have rendered BIA review meaningless, a result that is antithetical to the purpose of giving immigrants appellate review at the agency level.

In Section II, I will explain the background of immigration removal procedure, including the evolution of appellate-level review by the BIA and the influence of the new streamlining procedures that allow for single member affirmances without written opinion. In Section III, I will outline the case of *Kambolli v. Gonzales*¹⁷ and examine the Second Circuit’s analysis of federal court jurisdiction, and the opinion’s lack of consideration for the purpose and need for thorough BIA review. Finally, in Section IV, I will take a closer look at the lack of meaningful BIA review under the streamlining provisions, and the consequences immigrants face without meaningful agency-level appellate review, including a lack of uniformity in the application of immigration law.

13. John Palmer et. al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 3 (2005).

14. Adam Liptak, *Courts Criticize Judges’ Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, at A1.

15. In addition to streamlining procedures that allowed for single-member review and affirmance without opinion, then-Attorney General John Ashcroft also reduced the number of judges from 23 to 11. One former BIA judge has stated that Mr. Ashcroft “hacked off all the liberals.” Adam Liptak, *Courts Criticize Judges’ Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, at A1.

16. Durham, *supra* note 2, at 667.

17. *Kambolli*, 449 F.3d 454.

II. BACKGROUND

Federal courts have struggled over the years to define their role in immigration issues. Because these issues touch on foreign affairs, judicial intervention runs the risk of being seen as judicial foreign policy-making and an usurpation of power from executive agencies.

A. Due Process and Immigration Appeals

Historically, the power to define the scope of immigrants' rights has belonged to Congress and the Executive Branch.¹⁸ The Supreme Court has deferred to the other branches in deciding immigration policy based on the idea that "the power to . . . admit subjects of other nations to citizenship [is a] sovereign power, restricted in [its] exercise only by the constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations."¹⁹ However, the judicial branch has stepped in and deemed immigrants worthy of Constitutional rights when Congress or the Executive has not. In 1896, the Supreme Court ruled that aliens, as "persons," must be afforded due process in the form of a hearing.²⁰ The Court also ruled that immigrants' due process rights extend to removal (deportation) hearings,²¹ regardless of immigration status.²² The case of *Matthews v. Eldridge*, established a three-prong test to determine whether government action violates due process.²³ These prongs include: "(1) The private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of that interest through the procedures used, and the probable value, if any, of additional substitute procedural safeguards; [and] (3) Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."²⁴ Although immigrants have no constitutional right to an appeal,²⁵ the BIA has traditionally been an important step in the procedural due process afforded to immigrants because of its role as the final word from

18. The Chinese Exclusion Case of 1889 likened the power to admit immigrants to those of declaring war, making treaties, suppressing insurrection, repelling invasion, regulating foreign commerce, and securing republican government. *The Chinese Exclusion Case; Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889).

19. *The Chinese Exclusion Case; Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889).

20. *Wong Wing v. United States*, 163 U.S. 228 (1896).

21. *Reno v. Flores*, 507 U.S. 292, 306 (1993).

22. *Zadvydas v. Davis*, 533 U.S. 678 (2001).

23. *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

24. *Id.*

25. *Kambolli v. Gonzales*, 449 F.3d 454, 455 (2d Cir. 2006).

the agency charged with executing immigration policy, and because of its role in establishing precedent for lower IJ's to follow.²⁶ The importance of BIA review in safeguarding the rights of immigrants is discussed further in Section IV.

A general application of the *Matthew* analysis to an immigrant seeking refugee status in the United States involves balancing the interest of the immigrant in remaining in the U.S. (oftentimes to avoid persecution), and the risk of the IJ and BIA erroneously removing him from the U.S., against the interest of the government in reducing its BIA backlog. However, this is not the form that due process analysis of the BIA streamlining procedures has taken.

The "seminal" case²⁷ on the issue of BIA streamlining and due process is *Albathani v. INS*, a First Circuit case that upheld the affirmance without opinion procedure to be constitutional.²⁸ Mr. Albathani was an immigrant seeking asylum on the grounds that his Christian faith created a credible fear of persecution in his home country of Lebanon.²⁹ His request for asylum was denied by the IJ based on a finding that he did not show a credible fear of persecution³⁰ (contradicting the finding of the INS officer who initially interviewed him).³¹ A single BIA judge affirmed the decision without opinion in accordance with the streamlining regulations.³² The court first noted in its due process analysis that aliens have no constitutional rights to an administrative appeal.³³ The court then goes on to defer entirely to INS's (now the Department of Homeland Security) determination of what constitutes due process for immigrants when they come before the BIA.³⁴ The court does not refer to the *Matthews* test at all, instead basing its decision almost entirely on the need to defer to administrative agencies.³⁵

26. Maurice A. Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 SAN DIEGO L. REV. 29 (1977).

27. Evelyn Cruz, *Symposium: Globalization, Security, & Human Rights: Immigration in the Twenty-First Century: Double the Injustice, Twice the Harm: The Impact of the Board of Immigration Appeals's Summary Affirmance Procedures*, 16 STAN. L. & POL'Y REV. 481, 503 (2005).

28. *Albathani v. INS*, 318 F.3d 365 (1st Cir. 2003).

29. *Id.* at 367.

30. *Id.* at 371-72.

31. *Id.* at 369.

32. *Id.* at 372.

33. *Id.* at 376.

34. *Id.* at 377-79.

35. *Id.* at 377-79.

B. Procedure

Today, affording due process to immigrants involves a number of federal administrative agencies applying a number of different rules and standards. The Department of Labor, the Department of Justice, the State Department, and the Department of Homeland Security all administer parts of the immigration laws.³⁶ Some immigrants apply for immigration benefits through the United States Citizenship and Immigration Service (USCIS),³⁷ while others seek asylum status only after being placed in removal proceedings by the Department of Homeland Security.³⁸ The next step is to appear in immigration court before an IJ³⁹ who will determine whether removal of the immigrant is appropriate.⁴⁰ It is the Department of Homeland Security (DHS) that initiates the process for removing an immigrant.⁴¹ Acting as the prosecutor, DHS has the burden of proving that the immigrant is a removable alien, and the immigrant has the burden of proving that he has permission to be in the United States, or is entitled to such permission.⁴² If the IJ determines that the immigrant has no basis for remaining in the U.S., the IJ orders the immigrant to be removed.⁴³ Immigrants then must seek relief from removal by appealing the IJ's decision to the BIA.⁴⁴

For those immigrants whose status affords them the right of review by the BIA, the appeal must be filed within 30 days of the IJ's removal order.⁴⁵ The BIA is a single administrative board charged with deciding individual appeals from all over the country, and issuing potentially precedent-setting decisions.⁴⁶ Most of the decisions made by the BIA are reviews of IJ decisions to remove aliens.⁴⁷ Prior to 1988, the BIA considered all appeals en banc, and was comprised of five permanent members.⁴⁸

36. Immigration and Nationality Act of 1952 § 103–104, 8 U.S.C. § 1103–1104 (2006).

37. Cruz, *supra* note 27, at 491–92.

38. John Palmer et. al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 12 (2005).

39. Cruz, *supra* note 27, at 495.

40. *Id.* at 491–92.

41. 8 C.F.R. § 1240.2 (2006).

42. 8 C.F.R. § 1240.8(b) and (d) (2006).

43. 8 C.F.R. § 1240.12 (2006).

44. 8 C.F.R. §§ 1003.3, 1003.38(b) (2006).

45. *Id.*

46. 8 C.F.R. § 1003.1(d)(1) (2006).

47. Palmer, *supra* note 38, at 19.

48. *Id.* at 18.

C. “Streamlining Regulations”

Over the years the number of BIA judges has fluctuated from five, gradually up to twenty-three, and back down to eleven in 2002.⁴⁹ An increased number of appeals and rapidly evolving immigration law may have contributed to a docket of nearly 50,000 pending cases in the late nineties.⁵⁰

In 1998, the Attorney General changed procedures so that instead of a permanent five member BIA meeting en banc, one or two IJ’s were appointed to sit with BIA judges to hear appeals in panels of three.⁵¹ In 1999, to further respond to the backlog, the Chairman of the BIA authorized single BIA members to hear certain types of cases, instead of a panel, and to summarily dismiss appeals and affirm decisions without a written opinion.⁵² Single-member affirmances without written opinion were issued at the discretion of the single BIA judge who had the choice of deciding it alone and without written opinion, or sending it to a three member panel if the IJ decided it was not appropriate for summary procedures.⁵³

Reforms issued in 2000 and 2002 expanded the categories of cases appropriate for single-member affirmance without opinion.⁵⁴ In March of 2002, two categories of cases were added that shifted the majority of the BIA’s caseload to single BIA members to review and affirm without written opinion.⁵⁵ Finally, the “streamlining” was complete in May, 2002 when the Chairmen of the BIA designated “all cases involving appeals of IJ or INS decisions” subject to single-member review and affirmance without written opinion, “so long as the BIA had jurisdiction and so long as the cases met the regulatory requirement for streamlining (i.e., correct result, only harmless or nonmaterial errors, and issues either squarely controlled by existing precedent or insubstantial).”⁵⁶ This change in the category system made single-member affirmance without opinion the default procedure for appeals to the BIA, and the three-member panel review an exception to be used in only a few circumstances.⁵⁷ These circumstances include:

49. *Id.*

50. *Id.* at 22–23.

51. *See* Executive Office for Immigration Review; Board of Immigration Appeals; Expansion of the Board, 59 Fed. Reg. 47, 231 (Sept. 15, 1994).

52. Executive Office for Immigration Review, Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135 (Oct. 18, 1999).

53. *Id.* at 141–42.

54. Palmer, *supra* note 38, at 22–27.

55. *Id.* at 27.

56. *Id.*

57. *Id.* at 28.

- (i) The need to settle inconsistencies among the rulings of different immigration judges;
- (ii) The need to establish a precedent construing the meaning of laws, regulations, or procedures;
- (iii) The need to review a decision by an immigration judge or the [Immigration and Naturalization] Service that is not in conformity with the law or with applicable precedents;
- (iv) The need to resolve a case or controversy of major national import;
- (v) The need to review a clearly erroneous factual determination by an immigration judge; or
- (vi) The need to reverse the decision of an immigration judge or the Service, other than a reversal [by a single-member BIA judge that deemed the case inappropriate for affirmance without opinion.]⁵⁸

These changes have caused a hardship on immigrants who are left with a single sentence of boilerplate language after appealing their case to the BIA.⁵⁹ Instead of having their cases heard by three collaborating BIA judges, the decision is based on the opinion of just one other person.⁶⁰ Instead of having a written, reasoned opinion to look to for guidance on other appealable issues, they are left with a sheet of paper.⁶¹

D. Shifting Backlogs

The hardship is not only being felt by immigrants, but by the overloaded United States Courts of Appeal.⁶² Because decisions issued by the BIA are considered “agency actions” under the federal Administrative Procedure Act, they are subject to judicial review when they cause a person to suffer a “legal wrong” or “adverse affect or grievance within the meaning of a relevant statute.”⁶³ There are two exceptions to judicial review of agency action: (1) when a relevant statute or statutes specifically preclude judicial review, and (2) when the agency action is committed to agency discretion by law.⁶⁴ Judicial review will take the form prescribed by the agency’s governing

58. 8 C.F.R. § 1003.1(e)(5)–(e)(6) (2006).

59. Palmer, *supra* note 38, at 26.

60. Cruz, *supra* note 27, at 501.

61. *Id.*

62. Palmer, *supra* note 38, at 3.

63. 5 U.S.C. § 701(b)(1) and 702 (2006).

64. 5 U.S.C. § 701(a) (2006).

statute,⁶⁵ which in this case gives circuit courts the jurisdiction to “review... all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States”⁶⁶

With the BIA leaving immigrants dissatisfied,⁶⁷ and the U.S. Courts of Appeal having authority to review cases where immigrants suffer a “legal wrong” or “adverse affect or grievance,”⁶⁸ it is not surprising that the federal courts have seen a surge in the number of petitions requesting review of BIA decisions.⁶⁹ In 2001, immigration appeals accounted for 3% of all federal appeals cases; in 2004, they accounted for 17%. In New York and California immigration appeals make up almost 40% of the cases heard in the circuit courts.⁷⁰ The amount of review U.S. courts of appeal can provide is the subject of debate in *Kambolli v. Gonzales*.⁷¹

E. Circuit Split

Thus far, federal circuit courts have focused solely on the procedural implications of finding jurisdiction to review BIA decisions to streamline cases, specifically whether that decision is one that is “committed to agency review.” The *Kambolli* court’s denial of jurisdiction was based on the idea that federal courts have no standard to apply in deciding whether or not a particular case should be referred to a three-member panel or streamlined, but other courts have found grounds for federal circuit court involvement in streamlining decisions.

1. *Smriko v. Ashcroft*

Prior to *Kambolli*, the Third Circuit Court of Appeals heard a case on the issue of whether federal circuit courts had jurisdiction to review the decision of a single BIA judge to affirm an IJ decision unilaterally and without written opinion.⁷² In the case of *Smriko v. Ashcroft*, Sejid Smriko was admitted to the United States as a “refugee” and lived as a lawful permanent resident for five

65. 5 U.S.C. § 703 (2006).

66. 8 U.S.C. § 1252 (2006).

67. Cruz, *supra* note 27, at 501.

68. *Smriko v. Ashcroft*, 387 F.3d 279, 290 (2d. Cir. 2004) (citing 5 U.S.C. § 701(b)(1) and 702.).

69. Palmer, *supra* note 38, at 3.

70. Adam Liptak, *Courts Criticize Judges’ Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, at A1.

71. *Kambolli v. Gonzales*, 449 F.3d 454 (2d Cir. 2006).

72. *Id.* at 279.

years.⁷³ Smriko was convicted of retail theft, a crime considered by the government to be one of “moral turpitude,”⁷⁴ and grounds for the removal of a lawful permanent resident if committed within five years of gaining admission to the country.⁷⁵ According to the Immigration and Nationality Act (INA), refugees may only be removed for particular offenses, none of which included shoplifting.⁷⁶ Smriko argued that although he gained Lawful Permanent Resident status (LPR) after receiving “refugee status,” the INA refugee regulations still protected him from removal, even when he committed acts of “moral turpitude.”⁷⁷ Smriko also argued that his shoplifting did not constitute “moral turpitude” under the statute.⁷⁸

The Immigration and Naturalization Service initiated removal proceedings (a function now carried out by Department of Homeland Security⁷⁹) and the IJ ordered removal based on Smriko’s illegal conduct as it related to his status as a LPR.⁸⁰ The IJ held that when a refugee becomes an LPR, she gives up her refugee status and the protections and regulations that go with it.⁸¹ There was no precedent to support the IJ’s holding, and it was appealed to the BIA.⁸² The BIA affirmed the IJ’s decision without opinion⁸³ despite the lack of supporting precedent.⁸⁴ When no controlling precedent is available and the outcome of the case is “significant,” the BIA judges are required to assign the case to a three-member panel for decision.⁸⁵ The Third Circuit held that the BIA judge’s affirmance without opinion was “arbitrary and capricious,”⁸⁶ and remanded the case to be heard by a three-member BIA panel “so that the BIA may exercise its expertise and address Smriko’s proposed reading of the INA.”⁸⁷

73. *Id.* at 281.

74. *Id.* at 282.

75. 8 U.S.C. § 1227(a)(2)(A)(i)(I) (2006).

76. *Smriko v. Ashcroft*, 381 F.3d 279, 281 (2d. Cir. 2004).

77. *Id.* at 281.

78. *Id.* at 282.

79. Palmer, *supra* note 38, at 13.

80. *Smriko*, 387 F.3d at 282 (citing 8 U.S.C. § 1227(a)(2)(A)(i)).

81. *Smriko*, 387 F.3d at 281.

82. *Id.* at 281.

83. *Id.*

84. *Id.* at 296.

85. *Id.* at 293.

86. *Id.* at 296.

87. *Id.* at 281.

2. *Finding Jurisdiction*

The Third Circuit held that it had power to review the decision of the BIA judge to streamline the case because the decision is not one “committed to agency review.”⁸⁸ The First and Ninth Circuits have also held that federal circuit courts have jurisdiction to review a BIA judge’s decision to streamline for largely the same reasons as *Smriko*.⁸⁹ In contrast, the Second Circuit (joining the Eighth and Tenth Circuits) in *Kambolli*, held that the circuit court lacked power to review because only the agency (represented by the single BIA judge) has the discretion to decide the appropriateness of issuing an affirmance without opinion or referral to a BIA panel.⁹⁰ This difference in opinion as to whether a single BIA member’s “streamlining” decision is subject to review has led to the circuit split over immigrants’ appellate rights.

III. EXPOSITION OF THE CASE

In *Kambolli*, the Second Circuit considered whether federal circuit courts have the authority to review the decision of a single BIA judge to decide the case alone and affirm without opinion as opposed to referring the case to a three-member panel of BIA judges.⁹¹ This *Kambolli* court thus disagreed with the earlier Third Circuit decision of *Smriko*, and held that judicial review is not available.

A. Statement of Facts

On November 15, 2001, Immigration Judge Michael W. Strauss denied Mirdash Kambolli’s request for asylum.⁹² Kambolli, a citizen of Albania, joined the Democratic political party in Albania after the fall of communism in 1991.⁹³ Kambolli eventually ran for local office and won, but the Socialist incumbent refused to abdicate his office.⁹⁴ Political corruption kept Kambolli from successfully taking office, and allegedly caused him to be persecuted.⁹⁵ He and his family were threatened by police officers at his home who told

88. *Id.* at 292.

89. *See* *Haoud v. Ashcroft*, 350 F.3d 201, 206 (1st Cir. 2003); *Chong Shin Chen v. Ashcroft*, 378 F.3d 1081, 1087–88 (9th Cir. 2004).

90. *Kambolli v. Gonzales*, 449 F.3d 454, 461–62 (2d Cir. 2006).

91. *Id.* at 454.

92. *Id.* at 456.

93. *Id.*

94. *Id.*

95. *Id.* at 456–57.

Kambolli that he or his family would be “damaged” if he continued his quest for the office he had won.⁹⁶ Kambolli moved his family to another city, and eventually to the United States where he received a visa.⁹⁷ He requested asylum under the Immigration and Nationality Act⁹⁸ and under the United Nations Convention Against Torture (CAT).⁹⁹ Kambolli also claimed that his house was vandalized, that members of the Democratic party were sometimes killed for their political activity, and that his affiliation was so well-known that he would be subjected to harassment or death if forced to return to Albania.¹⁰⁰ The IJ denied Kambolli’s request for asylum because he found nothing in those facts to support a “well-founded fear of future persecution.”¹⁰¹ Since his request was denied by the IJ, Kambolli faced removal from the United States.¹⁰²

Kambolli appealed the IJ’s decision on his INA claim to the Board of Immigration Appeals, where a single BIA judge affirmed the IJ’s decision against Kambolli without a written opinion.¹⁰³ Kambolli argued that his case should have fallen into one of the categories enumerated in the “streamlining” regulations¹⁰⁴ that requires a three-member BIA panel to consider the case instead of a single judge’s affirmance without opinion.¹⁰⁵ Kambolli asked the Second Circuit to decide whether the single BIA judge erred in issuing “affirmance without opinion by a single Board member acting alone under the [BIA’s] ‘streamlining’ regulations-without reference to a three-member BIA panel.”¹⁰⁶ This issue is separate from the issue of whether or not the IJ erred in its decision that Kambolli would not be persecuted if removed to Albania.¹⁰⁷

B. Procedural History

According to the new streamlining regulations, the single BIA judge shall affirm the decision of the immigration judge without opinion if the BIA

96. *Id.* at 456.

97. *Id.*

98. 8 U.S.C. § 1231(b)(3) (2006).

99. United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1456 U.N.T.S. 85, S. Treaty Doc. No. 100–20 (1988); implemented at 8 C.F.R. § 1208.16(c) (2006).

100. *Kambolli*, 449 F.3d at 457.

101. *Id.* at 456.

102. *Id.* at 457.

103. *Id.* at 458.

104. 8 C.F.R. § 1003.1(e)(5)–(e)(6) (2006).

105. *Kambolli*, 449 F.3d at 458.

106. *Id.* at 458.

107. *Id.*

judge finds that: (1) the lower decision was correct, (2) that the mistakes of the lower level were harmless or nonmaterial, and (3) there is precedent that squarely applies to the facts of the case (presenting no novel situation for which written opinion would be necessary to demonstrate novel reasoning), or (4) “the factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion on the case.”¹⁰⁸ In other words, if the BIA judge believes that the case in question is similar enough to a case that has already been decided, or it deals with issues that are not substantial, he cannot issue a written opinion, not even to explain why he believes the issues are governed by precedent or are unsubstantial. The BIA judge followed these “streamlining” provisions and affirmed the IJ’s decision to remove without referring the case to a three-member BIA panel, and without issuing a written opinion.¹⁰⁹

C. Decision and Rationale

The Second Circuit looked first at the “streamlining regulations” themselves and noted that immigrants, generally, do not have a constitutional right to appeal an asylum decision.¹¹⁰ In other words, Congress or the Office of the Attorney General would be within its rights to completely do away with the BIA.¹¹¹ The court then noted that administrative decisions may be reviewed by courts, and specifically, final removal orders under the INA may be reviewed with the court allowed to consider “all questions of law and fact, including interpretation and application of constitutional provisions, arising from any action taken or proceeding brought to remove an alien.”¹¹² With respect to procedural administrative action, judicial review is appropriate for final action by the BIA unless the decision covers an issue “committed to agency discretion.”¹¹³ If there is a “meaningful standard” by which the circuit court can determine whether the BIA judge applied the correct procedure in deciding the case alone without opinion, then the circuit court can review the procedural decision.¹¹⁴ Essentially, this standard is asking the court to look at the “streamlining regulations” and decide whether Mr. Kambolli’s case falls

108. Organization, Jurisdiction, and Powers of the Board of Immigration Appeals, 8 C.F.R. § 1003.1(e)(3)–(6) (2006).

109. *Kambolli*, 449 F.3d at 455.

110. *Id.* at 460 (citing *Yu Sheng Zhang*, 362 F.3d 155, 157 (2004)). There are some situations where the right to appeal is guaranteed by treaty.

111. *Kambolli*, 449 F.3d at 460.

112. *Id.* at 460–61 (citing 8 U.S.C. § 1252(b)(9)).

113. *Id.* at 461 (citing *Smirko*, 387 F.3d at 291).

114. *Id.*

into a category that requires a three-member panel and a written opinion. The regulations themselves do not create a standard for the court to use, and, because there is no written opinion from the single BIA judge, there is nothing for the Circuit Court to look to for guidance as to why or why not a particular case is appropriate for single-member review.¹¹⁵ According to the court, the fact that there is no review process in the regulations shows that the authors did not intend judicial review of the decision to put the case before a single judge.¹¹⁶

Other reasons to decline jurisdiction to review decisions by single BIA members to “streamline” cases include: (1) judicial review would undermine the BIA’s streamlining regulations; (2) the fact that cases *may* (as opposed to *shall*) be referred to a three-member panel; (3) the fact that administrative agencies have free reign to design their own procedures in way that will allow them to carry out their duties (as long as there are no compelling reasons that negate that free reign and the regulations are constitutional); and (4) the circuit court’s lack of expertise to decide which cases should go before a three-member panel instead of a single BIA judge.¹¹⁷ The court ultimately stated that, “it is not the role of the federal courts to dictate the internal operating rules of the BIA.”¹¹⁸

IV. ANALYSIS

The *Kambolli* Court’s conclusion is flawed because, while it may not be the role of the federal courts to dictate BIA procedure, it *is* the role of the federal courts to ensure that due process afforded is not meaningless. The BIA was intended to provide one last line of expert review at the agency level, and therefore needs to be more than a mere exercise of rubber-stamping a lower court decision. The streamlining regulations have rendered BIA review meaningless, which can lead to disparate results that depend less on the immigrant and more on which IJ hears the case.

A. Streamlined BIA Review is Meaningless

The resolution of the circuit split is not found in the reasoning on either side of the debate because the courts are focusing entirely on the procedural

115. *Id.*

116. *Id.* at 462.

117. *Id.* at 463.

118. *Id.* at 464–65.

complexities of the APA, and not on the human complexities of the immigrant experience. Immigrants who appeared before immigration judges in fiscal year 2005 spoke a total of 227 different languages,¹¹⁹ and only about one-third of them had legal counsel to represent them.¹²⁰ It is under these circumstances that immigration judges make life or death decisions about granting U.S. asylum, and it is under these circumstances that mistakes are often made.¹²¹ In *Albathani*, the “seminal” case that upheld streamlining on due process grounds, the First Circuit noted that the presiding single-BIA member had decided over 50 cases on the day that Mr. Albathani’s case was decided.¹²² The BIA member had only an average of ten minutes to decide each case over the course of a nine-hour workday, which is less time than it took for the court to review the record from the IJ.¹²³ The court essentially found the BIA member likely did not review the entire record, and yet found BIA review to be meaningful due process. The court rationalized this by stating that no evidence existed of systematic violations of the streamlining regulations, and a reviewing court should presume that the required review is taking place.¹²⁴

But what if the violations are systematic? Until 2002, summary affirmances (which were allowed in a small number of categories) were used in 3% of immigration cases.¹²⁵ After the Attorney General “streamlined” the procedures, summary affirmances were issued in 60% of cases.¹²⁶ Judge Richard Posner, a conservative member of the Seventh Circuit has stated that, “the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice,” and that the board has affirmed decisions “either with no opinion or with a very short, unhelpful, boilerplate opinion even when” the immigration judge had committed “manifest errors of fact and logic.”¹²⁷ Posner further commented that immigration judges have a “disturbing” lack of expertise and familiarity with relevant foreign cultures.¹²⁸

119. Executive Office for Immigration Review, U.S. Dept. Of Justice, FY 2005 Statistical Yearbook, at F1 (2005), available at <http://www.usdoj.gov/eoir/statspub/fy05syb.pdf>.

120. Executive Office for Immigration Review, U.S. Dept. Of Justice, FY 2005 Statistical Yearbook, at F1 (2005), available at <http://www.usdoj.gov/eoir/statspub/fy05syb.pdf>.

121. See generally, *Third and Seventh Circuit Condemn Pattern of Error in Immigration Courts—Wang v. Attorney General*, 423 F.3d 260 (3d Cir. 2005), and *Benslimane v. Gonzales*, 430 F.3d 828 (7th Cir. 2005), 119 HARV. L. REV. 2596 (June 2006).

122. *Albathani v. INS*, 318 F.3d 365, 378 (1st Cir. 2003).

123. *Id.*

124. *Id.*

125. See Comm. Of Fed. Courts, *The Surge of Immigration Appeals and Its Impact on the Second Circuit Court of Appeals*, 60 REC. ASS’N B. CITY N.Y. 243, 245 (2005).

126. *Id.*

127. Adam Liptak, *Courts Criticize Judges’ Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, at A1.

128. *Id.*

In sum, circuit courts are deferring to agency discretion because of their assumed expertise on the topic, while acknowledging that the agency sometimes lacks such expertise. Further, circuit courts are finding due process in review procedures that do not even allow BIA members enough time to review the record of the lower court. Manifest errors at the immigration judge level and BIA review lasting minutes at a time can and does lead to arbitrary and capricious summary affirmances, thus denying immigrants meaningful review prior to review at the federal court level. The fact that summary affirmances are now used in a majority of cases means that immigrants run the risk of being unjustly removed from the United States more often than not. For a country whose “attitude towards immigration reflects our faith in the American ideal,”¹²⁹ we are failing miserably and our Courts are focusing on the wrong questions.

B. The Importance of Meaningful BIA Review

In 1977, former Chairmen of the Board of Immigration Appeals Maurice A. Roberts¹³⁰ wrote:

The importance of good Board opinions cannot be overemphasized. For instance, the Board is often innovative. It is frequently the first tribunal called upon to construe and apply new immigration statutes and regulations. It establishes uniform standards for the exercise of administrative discretion. It interprets and applies new court decisions. The Board must make its position as clear as possible so that the alien and the Service alike may be better able to appraise the need for further review. If there is a judicial review of the Board’s decision, it is important to the court of appeals that the Board’s rationale be clearly articulated, for there is no longer an intervening opinion from the District Court. In recent years, there has been an increasing tendency on the part of the courts of appeals to dispose of petitions for review of Board orders by brief, unpublished per curiam dismissals. Thus the Board’s opinions are increasingly the last exposition of the law in any forum. As a result, and in view of its enlarged role, there is greater need than ever for publication of more Board opinions, not only in defining immigration law and

129. Quotable Online, Immigration Quotes, <http://www.quotableonline.com/Immigration.html> (last visited April 8, 2008).

130. Mr. Roberts began working as a naturalization examiner in 1941, approximately a year after immigration authority was moved to the Department of Justice. He served as Head of the Immigration Litigation Unit, Criminal Division, from 1965 to 1968 and Chairman of the BIA from 1968–1974.

procedure, but in rationalizing its holdings. Unless the Board can produce opinions of high quality, its effectiveness will be impaired.¹³¹

Despite the passage of time and numerous alterations to immigration law, the words of Mr. Roberts ring true today. Whereas Mr. Roberts' concern was for the "brief, unpublished per curiam" opinions of federal circuit courts that left the BIA to be the final arbiter in many cases, the problem today is nearly the opposite. One-sentence affirmances from the BIA perpetrate the same evils as the brief opinions of federal courts did in 1977: failure to make its position clear to the alien and to those who may review the opinion later. If the BIA fails to rationalize its decision, then it is not fulfilling its role as the final administrative decision-maker, leaving that burden to federal circuit courts who are no longer issuing brief opinions, but pages and pages of opinions on a topic which the BIA is assumed to be the expert. Mr. Roberts stated that less review at the federal court level led to a greater importance of the decisions issued by the BIA. Presently, with federal courts rejecting jurisdiction (as in *Kambolli*), and the BIA failing to write opinions to justify decisions, the IJ decisions have become greater in importance.

If the IJ effectively becomes the last true level of meaningful review, then the fate of a particular immigrant may depend largely on which IJ hears his case. A study conducted by the Transactional Records Access Clearinghouse, a research center at Syracuse University, shows a wide range of asylum-denial rates based on the IJ making the decision.¹³² One of the strongest examples in the report is a comparison of the denial rates of Immigration Judge Anthony Murry, and Immigration Judge Miriam Hayward, both of San Francisco.¹³³ Between fiscal year 2000 and fiscal year 2005, Judge Murry denied asylum in 8% of the cases before him, while Judge Hayward denied asylum in 23.9% of the cases before her.¹³⁴ The Report goes further in examining the denial rate of IJ's in conjunction with their work background.¹³⁵ Since 2000, Miami Immigration Judge Mahlon F. Hanson denied asylum in 96.7% of his decisions. Judge Hanson was appointed to the

131. Maurice A. Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 SAN DIEGO L. REV. 29, 36 (1977).

132. Transactional Records Access Clearinghouse, Syracuse University, *Immigration Judges*, 2006, <http://trac.syr.edu/immigration/reports/160/> (last visited April 3, 2008).

133. Transactional Records Access Clearinghouse, Syracuse University, *Immigration Judges*, 2006, <http://trac.syr.edu/immigration/reports/160/>. See Link for *Asylum Decisions by Individual Judge, FY 2000-2005*, http://trac.syr.edu/immigration/reports/160/include/judge_0005_name-r.html (last visited April 3, 2008).

134. *Id.*

135. Transactional Records Access Clearinghouse, Syracuse University, *Immigration Judges*, 2006, <http://trac.syr.edu/immigration/reports/160/> (last visited April 3, 2008).

Immigration Court after working for what was then the U.S. Immigration and Naturalization Service.¹³⁶ In contrast, New York Immigration Judge Margaret McManus came to the Immigration Court after working five years with Legal Aid Society's Immigration Unit.¹³⁷ Judge McManus' denial rate is 9.8%.¹³⁸

In light of these wide disparities, it is possible to infer that immigration judges carry their personal beliefs into each and every immigration hearing. Of course, this could be said for any judge in any hearing, however it is especially important to note in immigration cases where review of the IJ's decision by the BIA may ultimately be meaningless.

To illustrate, Immigrant A is seeking refugee status and comes before an Immigration Judge who denies asylum in 97% of cases. Immigrant A is denied refugee status, and appeals the IJ decision to the Board of Immigration Appeals, where his case is streamlined. He is handed a single sheet of paper affirming the IJ's decision with no justification for the affirmance. Immigrant A then appeals his decision to one of the federal circuit courts that deny jurisdiction over whether streamlining was appropriate, and that defers entirely to the BIA's expertise and decision-making. Immigrant A has been failed by the IJ, the BIA, and the federal court. In contrast, Immigrant B is from the same country and is also seeking refugee status, though in a different U.S. city. The IJ hearing Immigrant B's claim is one that grants asylum 90% of the time because of her background in pro bono immigration work. Immigrant B's request for asylum is granted, and he is allowed to begin his new life in the United States.

As oversimplified as this scenario might sound, the statistics outlined earlier make it completely possible. This unequal application of justice does not comport with the ideals of the United States, nor does it follow the stated goal of the Executive Office for Immigration Review, which states that it "is committed to providing fair, expeditious, and uniform application of the nation's immigration laws in all cases."¹³⁹

Obviously, there are counter-arguments that support the use of the streamlining measures, foremost of which is the interest of the government in quickly adjudicating immigration claims. The backlog at the BIA in the early nineties meant that removable aliens were allowed to remain in the United States longer, thus receiving the benefits of living in America without the legal permission to do so. The downside to illegal immigration has always been that American citizens may lose out on jobs or services to which they,

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

as legal citizens, seem more entitled. However, the broader picture here includes the very real risk that human lives could end if immigrants are mistakenly denied refugee status and returned to the dangerous conditions of their home countries. This risk may seem remote, but the statistics show that the increasing use of meaningless streamlined review increases the risk of arbitrary and disparate removal. When human life is weighed against the interest of administrative efficiency, the interest of life must win out.

V. CONCLUSION

It is as if the problems espoused by Mr. Roberts in 1977 have merely shifted down a rung on the administrative chain of command, leaving immigrants with the option of giving up at the IJ level, or appealing to the overloaded federal courts, many of which deny jurisdiction on procedural grounds. In *Kambolli*, the Second Circuit looked only to the procedure, and not to the policy, in deciding that it does not have jurisdiction to review BIA decisions to streamline cases. When a few sentences from the BIA are all that immigrants have to look to for guidance in how to proceed with their case, it is logical that they would appeal their cases to Federal Circuit Courts that will at least hand down an opinion in writing. The Circuit Split and the growing backlog of immigration cases at federal circuit courts will not be resolved by endless posturing about the amount of deference due to administrative agencies, nor by deciding at the federal level whether an immigration issue falls within established precedent. The issue here is much larger and its resolution, in the words of Robert Kennedy, will reflect our “faith in the American ideal.”

The United States is a country made up of immigrants, whose backgrounds and cultures have merged to create the “melting pot” that is so often talked about in American History classes across the country. The values of our country, and the decisions of our courts, must reflect our belief that those who are afforded rights in this country, shall have them. United States courts have ruled that immigrants deserve due process when there is a possibility of removal,¹⁴⁰ and the current streamlined procedures of the BIA do not afford meaningful due process. Federal Courts have stepped in before to ensure that immigrants receive certain rights, even when the “sovereign” power of the Executive has failed to do so, and the federal courts should again rise to that challenge by examining more than procedure.

140. *Reno v. Flores*, 507 U.S. 292, 306 (1993).