

Ex-Judges Say BIA Wrongly Looking For 'Sushi-Grade Tuna'

By **Lauren Berg**

Law360 (April 16, 2025, 10:11 PM EDT) -- Former immigration judges and members of the Board of Immigration Appeals told the Eleventh Circuit on Wednesday that the BIA has recently departed from the clear error standard to reverse relief to those seeking protection under the Convention Against Torture, emphasizing that the error needs to smell like "five-week-old, unrefrigerated dead fish."

Their **amicus curiae brief** offered support to petitioner Juan Carlos Hernandez-Landaverde — who was initially granted CAT relief based on reports of systemic torture in Salvadoran detention and accusations that he is gang-affiliated — saying they've "observed a troubling pattern" of the BIA reversing relief by weighing the evidence differently instead of looking for clear errors in the immigration judge's decision.

"The BIA frequently relies on language like 'the record does not support' the IJ's conclusion, a phrase that reflects disagreement rather than the identification of any clear error," the amici said, adding that the practice violates regulations and "undermines both the regulatory framework and the fairness of the appellate process."

In this case, the immigration judge granted CAT relief based on the substantial record and made findings grounded in that credible evidence, but the BIA in a 2-1 decision reversed the relief without identifying any clear error, the amicus brief said.

The amici said that the BIA is increasingly engaging in prohibited fact-finding on appeal and that "these patterns of behavior erode the principles of appellate review and result in outcomes that are neither procedurally fair nor legally sound."

The Eleventh Circuit should reaffirm that immigration judges are the primary fact-finders and that the BIA cannot overturn those findings unless they are clearly erroneous, the amici said, noting that the BIA didn't apply that standard in this case.

The clear error standard dates back more than two decades in the immigration court system after the U.S. Department of Justice in 2002 engaged in notice and comment rulemaking, recognizing that fact-finding is best left to the trial-level adjudicator, according to the brief. The DOJ found that this standard reduces the risk of caseload bottlenecks while protecting the integrity of the trial process, the amici said.

And the Eleventh Circuit has long recognized the clear error standard, "articulating it memorably as requiring the appellate body to find that the factual findings are 'wrong with the force of a five-week-old, unrefrigerated dead fish,'" the amici said, citing [Cox Enterprises Inc. v. News-Journal Corp.](#) 📌

"Rather than follow this approach, in the case at bar the board instead treated the immigration judge's findings like fresh sushi-grade tuna, ready to be cut and served as the BIA wished," they added.

The immigration judge determined that Hernandez-Landaverde would more likely than not be tortured if he were returned to El Salvador, where the U.S. Department of State, Amnesty International and Human Rights Watch all report systemic abuse in detention facilities, the Wednesday brief said.

The judge also credited evidence showing that Salvadoran authorities frequently torture detainees who deny gang affiliation, which is "an especially salient risk given petitioner's denial of any such affiliation," the amici said.

"The IJ's conclusion was not speculative; it was reasoned and well supported," the brief said. But "the BIA stepped out of its regulatory role when it reversed that decision. Rather than show that it had a 'definite and firm conviction that a mistake has been committed' ... the board reached its own independent conclusion."

"The BIA's approach in this case reflects de novo review in everything but name," it said.

Representatives for the parties did not immediately respond to requests for comment Wednesday evening.

The former immigration judges are represented by Ashley Vinson Crawford of Akin Gump Strauss Hauer & Feld LLP.

The petitioner is represented by Ben Winograd of the Immigrant and Refugee Appellate Center and Eddie Lopez-Lugo of Lopez-Lugo Immigration LLC.

The federal government is represented by Virginia Lee Gordon of the U.S. Department of Justice's Office of Immigration Litigation, Appellate Section.

The case is Juan Carlos Hernandez-Landaverde v. Pamela J. Bondi, case number 25-10166, in the U.S. Court of Appeals for the Eleventh Circuit.

--Editing by Rich Mills.