

## Ninth Circuit Vacates *Matter of K-S-E-*

In *Sylvestre v. Garland*, No. 20-71316, 2021 WL 2453043, 2021 U.S. App. LEXIS 17269 (9th Cir. June 9, 2021), the Ninth Circuit vacated *Matter of K-S-E-*, 27 I. & N. Dec. 818 (BIA 2020), a published decision by the Board of Immigration Appeals. In *Matter of K-S-E-*, the Board improperly indicated that a third country's offer of contingent, possibly renewable, status might constitute an offer of "firm resettlement," notwithstanding the plain language of the statute and precedential decisions of circuit courts and the Board, which provide otherwise.

The Board also disregarded evidence that Mr. Sylvestre, a Black Haitian man, was not "firmly resettled" in Brazil because he feared persecution on account of his race and national origin. Mr. Sylvestre additionally challenged, among other legal errors, the agency's failure to correctly apply the "unwilling or unable" standard for failure of state protection in asylum and statutory withholding cases in the context of the persecution he faced in Haiti.

In remanding the case, the Court specifically directed the Board to reconsider its holdings that Mr. Sylvestre was "firmly resettled" in Brazil, and that the Haitian government was able and willing to control his persecutors. **If an appeal of a similar case is pending before the Board or a circuit court, practitioners should consider arguing for a remand in light of *K-S-E-*'s vacatur.**

**Practitioners representing applicants for Temporary Protected Status and/or asylum who may be subject to the firm resettlement bar may also consider notifying adjudicators of *K-S-E-*'s vacatur, either in response to a Request for Evidence from U.S. Citizenship and Immigration Services or in the context of an immigration court proceeding.**

If practitioners have questions about the implications of this decision, they can contact counsel for Mr. Sylvestre at Innovation Law Lab (Tess Hellgren, [tess@innovationlawlab.org](mailto:tess@innovationlawlab.org) & Kelsey Provo, [kelsey@innovationlawlab.org](mailto:kelsey@innovationlawlab.org)) and at the Harvard Immigration and Refugee Clinical Program (Sabi Ardalan, [sardalan@law.harvard.edu](mailto:sardalan@law.harvard.edu) & Zack Albun, [zalbun@law.harvard.edu](mailto:zalbun@law.harvard.edu)).

The litigation team greatly appreciates the hard work securing victory in this case by past and present Harvard Law students Rachel Cohen (JD '22) Gabriel Zimmerman (JD '22), Ayano Kitano (JD '22), and Andrew Patterson (JD '20).