No. 05-4488

In the United States Court of Appeals for the Sixth Circuit

IBRAHIM PARLAK,

PETITIONER,

V.

ERIC HOLDER, ATTORNEY GENERAL,

RESPONDENT.

On Petition for Review from the Board of Immigration Appeals

BRIEF AMICI CURIAE OF THE NATIONAL IMMIGRANT JUSTICE CENTER AND OTHER ORGANIZATIONS REPRESENTING ASYLEES, REFUGEES, ASYLUM-SEEKERS, AND IMMIGRANTS, IN SUPPORT OF THE PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

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The *amici curiae* are nonprofit organizations which represent asylees, refugees, asylum-seekers, and immigrants. They are: the National Immigrant Justice Center, the Pennsylvania Immigrant Resource Center, the Northwest Immigrant Rights Project, the Immigrant Law Center of Minnesota, the Central American Resource Center, Florence Immigrant and Refugee Rights Project, the Immigration Law Clinic at UC Davis School of Law, Florida Immigrant Advocacy Center, and the Advocates for Human Rights. Amici have no direct interest in the resolution of this matter.

Amici seek the Court's leave to appear *amicus curiae* in this case for three reasons. First, Amici agree that torture-related evidence ought to be excluded from the immigration courts. Second, Amici submit that the Board made logical errors in purporting to decide the case without reference to the torture-related evidence, leaving the Board's decision unsupported by substantial evidence. Third, the Panel's opinion erroneously failed to consider whether any omissions were innocent mistakes or misunderstandings, simultaneously refusing to consider the Petitioner's entire file; a misreading of the statute which places other immigrants at risk of being wrongfully detained and removed.

ARGUMENT

I. Because torture-derived evidence ought to have been excluded below, the Board's attempt to decide the case without considering such evidence was appropriate; in principle, this could have permitted an adequate review of the removal order.

The Board of Immigration Appeals purported to avoid the thorny issues relating to torture evidence by considering whether "the record contains enough evidence, even without resort to the Turkish conviction documents, to affirm most of the Immigration Judge's findings." Joint Appendix ("J.A.") at 8. Amici read this as expressing a reluctance to rely on evidence allegedly produced through torture.

The Board had the power and the obligation to refuse to consider torture-related evidence. Article 15 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) ("CAT") prescribes a mandatory duty on the United States to ensure that torture-related evidence is excluded from evidence.

> Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

The CAT is not self-executing,[1] and Article 15 has not been expressly incorporated into U.S. law. However, the Government rightfully takes voluntary steps to ensure compliance with the treaty obligations. See e.g., Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8479 (Feb. 19, 1999) ("the United States Senate ... made a declaration that Articles 1 through 16 were not self-executing. Recognizing, however, that ratification of the Convention represented a statement by the United States to the international community of its commitment to comply with the Convention's provisions to the extent permissible under the Constitution and existing federal statutes, the Department of Justice sought to conform its practices to the Convention"). The immigration statutes, such as 8 U.S.C. § 1229a(b)(4)(B), ought to be read to preclude consideration of evidence where consideration would be contrary to U.S. treaty obligations. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (statutes presumed to be consistent with international law).

All that being said, if the Board had analyzed the case looking only to other record evidence, that ought in principle to have been adequate to

[1]Congress ordered various agencies to implement Article 3 of the CAT, Foreign Affairs Reform and Restructuring Act of 1998, § 2242(b) (Pub. L. 105-277, Division G, Oct. 21, 1998), but Amici can locate no similar command as to Article 15.

avoid questions related to the admissibility of torture evidence. The problem is the adequacy of the Board's analysis.

II. The Board's decision lacks a reasoned foundation once the disputed evidence is taken away.

The Court's review ought to address the rationality of the Board's decision, without considering the contested evidence. To the extent that the Board's final decision is not rational absent the disputed evidence, the Court ought to remand the Petition to the Board to permit it to either: (a) decide the case rationally based on the evidence it claims to be considering, (b) decide whether the disputed evidence was properly introduced, either because it is not torture-related or because torture-related evidence is admissible, or (c) reach some other reasoned decision based on this record.

A. The Board's decision is similar to other Board decisions, in being illogical once the purportedly disregarded evidence is subtracted.

While the Board of Immigration Appeals purported to uphold the Immigration Judge's (IJ's) decision in this case without substantial reference to the disputed Turkish conviction documents, Parlak accurately points to a number of factual findings which would have no support in the record except for evidence derived from that disputed evidence. He also points out that the Board did not explain how it could adequately review

an adverse credibility finding against Parlak which was based in part on the IJ's review of the disputed evidence. The Board might have found any error harmless, based on its review of the record; but the Board made no finding of harmless error. As Parlak points out, a harmless error finding would not be based on the "clear error" standard.

This might be seen as evidence that the Board failed to adequately refuse to consider torture-derived evidence, but Amici would submit that it is more likely that the Board simply made a logical error. This error – claiming to dodge a complicated aspect of a case, but then issuing a decision which is illogical considered in that light – is one the Board has made in various other cases. In *Kadia v. Holder*, 557 F.3d 464, 468 (7th Cir 2009), the Board denied an appeal while purporting not to address the issue of credibility, but the Board's decision was illogical without an adverse credibility finding: "the BIA could not have affirmed the IJ without adopting his adverse credibility finding, which it said it declined to reach, [therefore] we must conclude that the BIA's decision is unsupported by a reasoned analysis." See also, *Zheng v. Gonzales*, 409 F.3d 804 (7th Cir. 2005) ("[i]f Zheng's testimony is accepted as true (the BIA assumed this)… then Zheng necessarily has met her burden"); *Halo v. Gonzales*, 419 F.3d 15 (1st

Cir. 2005) (BIA did not reach adverse credibility finding, without such a finding the Board's decision was not sufficiently explained).

Here, various findings of the Board – notably the finding that he possessed not merely small arms, but "rockets," a finding which underlay the Board's adverse credibility finding – seem not to have been based on the record evidence as the Board characterized it. That is, having stated that it was deciding the case without reference to the torture-related evidence (except to the extent that it confirmed Parlak's arrest by the Turkish government), the Board's decision needed to be based only on the other record evidence. The exclusion of the torture-related evidence, as noted by Parlak, left "a gaping hole in the reasoning of the board and the immigration judge." *Niam v. Ashcroft*, 354 F.3d 652, 655 (7th Cir.2004).

That is sufficient to compel reversal of the Board's decision. The Court need not reach the more difficult question of how to deal with torture-related evidence, because it ought to analyze the Board's decision under the assumptions made therein.

B. It is irrational to review an IJ credibility decision for clear error while assuming *arguendo* that certain evidence was inappropriately considered; the proper standard is the harmless error standard.

Similarly, the Board purported not to consider the torture-related evidence, but then applied a clear error standard to the IJ's credibility assessment. This is not a rational conclusion. If one assumes *arguendo* that it was error for the IJ to consider the disputed evidence, then the clear error standard has been met. The question ought then to be whether the error was harmless.

The Board did not say that it was assuming *arguendo* that the IJ erred in admitting the evidence; the Board simply said that it was going to ignore the disputed evidence in reviewing the IJ's decision. However, this is either a failure to respond to Parlak's arguments – in which circumstance this case ought to be remanded under *INS v. Ventura*, 537 U.S. 12 (2002) to permit an assessment in the first instance – or is an illogical way of responding to those arguments.

Amici note that if the Board were empowered to make credibility findings de novo, it would not have been illogical for the Board to simply not consider certain pieces of evidence. However, the regulations do not grant authority to the Board to engage in de novo credibility assessments. 8 C.F.R. § 1003.1(d)(3)(i). Because the Board's credibility review is deferential, the question the Board ought to have asked is whether it could have

confidence that the IJ would have reached the same conclusion if the matter were remanded. Because the Board did not ask that question – the proper question – its analysis was not a logically adequate response to the points raised by Parlak. The correct solution is remand to the Board.

III. The Panel's opinion creates an inappropriately harsh standard for innocent misstatements in asylum and immigration applications.

The Board's misrepresentation decision is based on two items. First, Parlak, despite having discussed his Turkish arrest at length in his asylum application, did not respond "yes" to a question on subsequent forms asking whether he had ever been arrested. Second, Parlak's asylum application included a translation which was inaccurate. The Board's analysis, which the Panel approved, fails adequately to ask whether these omissions or errors were deliberate, as opposed to innocent mistakes.

A. The panel's opinion appears to leave no room for innocent mistakes and misstatements

The Panel's analysis of the misrepresentation question was as follows. First, it correctly found that misrepresentations had to be "deliberate and voluntary," which, it said, requires only "knowledge of the falsity." Second, the misstatement must be material. *Parlak v. Holder*, 578

F.3d 457, 463 (6th Cir. 2009). Amici believe that neither prong was met here, but the Panel's treatment of the first was particularly troubling.

Under the Panel's view, it is sufficient to establish that a misstatement was "deliberate and voluntary" if the person knew of the facts which ought to have led to the correct answer. *Id*. Thus the Panel found that "Parlak's 'no' answer provided the BIA with some evidence that Parlak's falsity was deliberate and voluntary," *id*. at 464, in and of itself.

Respectfully, this approach leaves no room for misstatements that arise from "innocent mistake, negligence or inadvertence." *Emokah v. Mukasey*, 523 F.3d 110, 116-17 (2d Cir. 2008) (citing *United States v. Dixon*, 536 F.2d 1388, 1397 (2d Cir.1976)). Although it is perhaps "rare that a lie which has been shown, clearly, unequivocally, and convincingly, *** will have a 'completely innocent explanation,'" *Kungys v. U.S.*, 485 U.S. 759, 777 n.11 (1988), immigration forms by their nature tend to be completed, often pro se, by individuals for whom English is not their first language. Thus, there is substantial room for the possibility that misstatements are nonintentional – and thus, not lies at all.[2]

[2] This is a somewhat different issue from whether willful misrepresentation must include an intent to deceive. While Amici would agree that a specific intent requirement would have been the best reading of *Singh v. Gonzales*, 451 F.3d 400 (6th Cir. 2006), the Panel seems to have

Willful misrepresentation is a subjective matter. *Garcia v. I.N.S.*, 31 F.3d 441, 443 (7th Cir. 1994) ("The language of the statute is phrased in terms of subjective intent and, indeed, the INS's longstanding interpretation of the statute supports such a reading.") (citing *Suite v. INS*, 594 F.2d 972, 973 (3d Cir.1979) ("judicial and administrative decisions have interpreted 'willful' for purposes of section 212(a)(19) as entailing voluntary and deliberate activity")). Yet the Panel's decision leaves no room for any analysis of Parlak's subjective intent in this case.

A subjective intent analysis ought to be dispositive of this case. It would be nonsensical for an individual who obtained asylum on account of an arrest abroad to believe that by not mentioning the arrest on a subsequent form, that he could somehow hide that fact. The very oddness of the idea strongly supports the supposition that the omission was innocent, as opposed to deliberate.

B. The "arrest" question is easily misperceived by applicants who commonly speak no or limited English.

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rejected not only specific intent, but any *mens rea*, effectively turning misstatements into strict liability offenses. Willful misrepresentation must encompass *at least* willfulness as to the fact that something is being misstated. Misstatements which are innocent, unintentional or the result of misunderstandings cannot meet the willfulness standard.

Amici have substantial experience in completing the forms which were involved in this case. The questions on these forms are compound and complicated, *Atunnise v. Mukasey*, 523 F.3d 830 (7th Cir. 2008), composed of multiple parts and subparts, with internal references within the form itself, and with separate form instructions which are often not referenced within the form itself.[3] Amici are concerned that innocent form mistakes should become per se evidence of deliberate intent to mislead.

To any asylee filling out the forms to adjust status, the common sense purpose of the forms is to determine whether something has changed about that person's status, to render them subject to removal, because that is in fact the issue in their case.

> To be eligible for adjustment of status under section 209 of the Act, an alien who has been granted asylum must actually apply for such relief and must demonstrate to the Attorney General's satisfaction that she has been physically present in the United States for at least 1 year after being granted asylum, that she continues to be a "refugee" under section 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A) (2000), that she is not "firmly resettled" in any foreign country, and that she is admissible to the United States as an immigrant.

[3] The current form I-485 is located at <http://www.uscis.gov/files/form/i-485.pdf>, while the form instructions are located at <http://www.uscis.gov/files/form/i-485instr.pdf>. Page three of the form instructions currently instructs the applicant with regard to criminal history, though nothing within the form itself would direct someone to those instructions.

Matter of K-A-, 23 I&N Dec. 661, 663 (BIA 2004). In light of the actual and perceived purpose of this form, it does not seem improbable for a *pro se* applicant to understand this question as relating only to arrests within the United States, or only to events arising since the asylum grant. The question the Board and the Panel ought to have asked is whether Parlak had that subjective belief when completing this form, a question which would be informed by the reasonable probability of an individual forming that belief. Again, the Board did not properly analyze the question below, and remand ought to follow.

C. Asylum applicants commonly speak no English and have little ability to judge whether translations into English are accurate and complete.

The Board also found Parlak removable for willful misrepresentation for submitting a translation of a document, in his asylum application, which was not complete. J.A. at 10. It is uncontested that Parlak spoke no English at the time of his application.

Amici concede that it would be possible as a factual matter for a non-English-speaking asylum-seeker to conspire to engage in fraud. However, the possibility that such events could occur is a far cry from a finding that it occurred in a given case. The Board recounts no evidence which would

suggest that Parlak knew that the translation herein was incomplete, that he played any substantial role in obtaining the translation, that he sought to procure an incomplete translation, or that he had any reason to believe that the incompleteness of the translation would benefit him.

The absence of any analysis along these lines strongly suggests that the Board did not analyze this case with reference to Parlak's subjective intent, and that it did not consider whether the mistranslation was something innocent or unintentional as to Parlak himself.

It might make sense to hold someone strictly liable for the submissions in their asylum application, or it might not; but the statute asks whether any misrepresentations were "willful." The Board's analysis on this ground makes no account for Parlak's will.

D. Individual applications should not be viewed in isolation from the individual's permanent A-file.

Finally, Amici would note one other odd aspect of the Board's decision. The Board says that "the fact that the respondent disclosed this arrest in an earlier filing… does not change the fact that he later failed to advise the former INS of a material fact." J.A. at 10. With respect, the fact that the former INS was well-aware of the arrest does not change the

incorrect answer to the question on the form, but it says volumes about the willful nature of that misstatement, and about its materiality.

When an individual applies for an immigration benefit, the U.S. Government does not adjudicate that application in a vacuum. Rather, the U.S. Government maintains a permanent "A-File" for each noncitizen residing in the U.S., *see e.g., U.S. v. Cruz-Rodriguez*, 570 F.3d 1179, 1180 (10th Cir. 2009), and prior to adjudication of any individual application, the adjudicator must obtain the A-file. *See Hashmi v. Attorney General of U.S.*, 531 F.3d 256, 258-59 (3d Cir. 2008) (representing USCIS's requirement that A-file is required for adjudication of applications). Given this well-known fact, the Board's refusal to view the application form in light of the permanent file strikes Amici as obtuse and contrary to common sense.

CONCLUSION

Amici submit that rehearing is appropriate in order to secure the uniformity of the Court's decisions, and because the Panel's decision involves issues of exceptional importance. Fed. R. App. Pro. 35(a)(1), (2). The Panel eschewed the approach taken by the First and Seventh Circuits, which determine the rationality of a Board decision in light of the assumptions the Board claims to have made in reaching the decision. The

Panel's analysis of misrepresentation is inconsistent with this Court's prior holdings on this issue in *Singh*, as well as with decisions of the Second, Third, and Seventh Circuits. Finally, Supreme Court precedent requires remand for matters not already reached by the Agency, which the Panel declined to do.

As importantly, the decision threatens to send a man back to a land where he has been tortured and faces future persecution, and would tend to require similar dire results for other asylees and refugees who make innocent mistakes in completing immigration forms. Such results would suffice to lend this case exceptional importance, and to justify panel or en banc rehearing.

Dated this 14th day of October, 2009.

Respectfully submitted:

/s

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Certificate of Service

I hereby certify that on October 14, 2009, I caused the foregoing BRIEF AMICI CURIAE OF THE NATIONAL IMMIGRANT JUSTICE CENTER AND OTHER ORGANIZATIONS REPRESENTING ASYLEES, REFUGEES, ASYLUM-SEEKERS, AND IMMIGRANTS, IN SUPPORT OF THE PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING *EN BANC* to be served on the following individuals by Federal Express, a private courier.

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