Case 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 OF AN ORDER OF
THE BOARD OF IMMIGRATION APPEALS
Case No. A71-803-930

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

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RULE 35(B)(1) STATEMENT

Ibrahim Parlak respectfully requests that this Court vacate the panel majority's decision concerning his deportability and grant a rehearing *en banc*. This case presents a question of exceptional importance: whether an immigration court, which is responsible for creating a clean factual record, can rely on torture-induced evidence without analysis or explanation to satisfy the government's "clear and convincing" burden in removal proceedings. The panel majority's opinion, if left standing, would also contradict binding precedent of this Court (consistent with its sister circuits) regarding application of the persecutor bar of the Immigration and Nationality Act ("INA"), and would conflict with Supreme Court precedent requiring remand to the BIA. The full Court's consideration is necessary to secure and maintain uniformity of the Court's decisions, to avoid a conflict with other circuits and the Supreme Court, and to provide guidance to the immigration courts on the exceptionally important issue of the proper standard for admissibility of torture-induced evidence in developing the factual record.

When it denied Mr. Parlak's petition for review, the majority erred in its analysis of the Immigration Judge's (IJ) reliance on Turkish Security Court documents that overwhelming evidence demonstrated were the result of torture. First, the majority does not address the IJ's failure to explain why she made no factual finding pertaining to these documents' reliability. This is crucial because

the record provides no clue of how much these documents—cited 88 times by the IJ—contributed to the Government's satisfaction of its "clear and convincing" burden. The majority compounds this error by approving the BIA's attempt to reconstruct the IJ's record by excluding the tainted evidence, even though this effort to unring the bell occurred after the burden had shifted to Mr. Parlak under the "clearly erroneous" standard. Mr. Parlak urges this Court to remand this case to develop a record in which the role of this evidence is certain and to articulate a clear standard for the immigration courts concerning the reliability and use of torture-induced evidence offered by the government in removal proceedings

The panel majority's ruling that Mr. Parlak is ineligible for withholding of removal as a persecutor of others squarely contradicts the requirements of the test adopted by this Court in *Diaz-Zanatta v. Holder*, 558 F.3d 450 (6th Cir. 2009), and followed by its sister circuits. Moreover, its failure to remand the case disregards the Supreme Court's decree that remand for analysis under the correct standard is required except in "rare circumstances." *Negusie v. Holder*, 129 S. Ct. 1159, 1167 (2009).

STATEMENT

Ibrahim Parlak is a "model immigrant" who has lived "an exemplary life" in the United States since his entry in April 1991. *Parlak v. Baker*, 374 F. Supp. 2d 551, 560-61 (E.D. Mich. 2005), *vacated as moot*, 2006 U.S. App. LEXIS 32285

(6th Cir. 2006). Born in Turkey, Mr. Parlak was beaten in school for speaking Kurdish and reading Kurdish books. J.A. 580, 588. In the mid-1980s, he organized Kurdish folk festivals in Germany for displaced Kurds for whom it had been illegal in Turkey to speak their language, sing their songs and dance their dances. J.A. 148. Most of the revenue from the singing and line-dancing festivals went toward entertainers' expenses, but if there were any profits, they were sent to the ERNK, a Kurdish political organization. J.A. 148, 150. Mr. Parlak had no further involvement with the funds, though he surmised the ERNK "could" have sent them to the PKK but had no way of knowing. J.A. 150-51.

In 1987, Mr. Parlak decided to return to his hometown of Gaziantep, Turkey to advocate Kurdish rights. J.A. 614. Because of his Kurdish activism and Turkey's revocation of his passport, Mr. Parlak believed he could only enter the country surreptitiously, and like other displaced Kurds, sought the help of the PKK in doing so. J.A. 605-08. After six months at Helve camp, which was run by the PKK as a refugee camp and political organizing center in addition to serving military training functions, J.A. 609, 775, Mr. Parlak and several others tried to cross into Turkey. A firefight broke out when the group was spotted by Turkish soldiers, two of whom died. J.A. 627-28, 1196-97. There is no evidence Mr. Parlak shot at or caused the deaths of the soldiers. J.A. 1015. Two months later, the group crossed the border and walked to Gaziantep, where they dug living spaces to hide

from Turkish authorities. J.A. 629, 633. They buried items they did not want to carry, such as books, ammunition and clothes. J.A. 295.

In October 1988, Turkish soldiers captured Mr. Parlak and detained him for 26 days until the now-defunct Turkish Security Court indicted him for the crime of Kurdish "separatism." J.A. 331-32, 634, 1011. During his 26-day "interrogation," he was tortured by the Turkish *gendarma*, who shocked him, beat his genitalia, hung him by the arms, deprived him of sleep, food, and water, and anally raped him with a truncheon. J.A. 643-61. In March 1990, following his torture-induced "confessions," he was convicted of "separatism" and released after serving seventeen months. J.A. 1016-17.

Mr. Parlak came to the U.S. in 1991 as a political refugee, applying for and receiving asylum. J.A. 1165-66. He applied for his green card in 1993; the INS granted it in 1994. *Parlak*, 374 F. Supp. 2d at 553. In 1998, he applied for naturalization. J.A. 1155. In November 2001, the INS rejected his application. *Parlak*, 374 F. Supp. 2d at 553. In April 2002, the INS initiated removal proceedings against him, charging him with immigration fraud for not disclosing his 1988 arrest on the green card application (even though the arrest and prosecution formed the basis of his asylum application) and persecution of others based on his affiliation with the ERNK. *Id.* at 554. In 2004, the Department of Homeland Security ("DHS") received documents from an *in absentia* proceeding

of the recently-abolished Turkish Security Court, indicating that Mr. Parlak's sentence had been reduced to time served. *Id*.

On December 29, 2004, the IJ ruled that Mr. Parlak was removable. J.A. 83. Her opinion featured over 80 citations to the torture-induced Security Court documents and did not address Mr. Parlak's overwhelming, unrebutted evidence that the substance of these documents resulted from torture. *See* Dissent, Slip Op. at 19. Mr. Parlak timely appealed to the BIA, which purported to review the case "without resort to the Turkish conviction documents," concluding on November 22, 2005 that the remaining record supported "most" of the IJ's removability findings, including her adverse credibility determination. J.A. 8. The BIA also affirmed the persecutor charge, holding that one "assists in persecution of others when he furthers the persecution in some way." J.A. 11.

Mr. Parlak filed his Petition for Review with this Court on November 23, 2005. A divided panel denied the petition on August 24, 2009. The panel majority's opinion does not meaningfully analyze the multiple layers of unspoken reliance on torture-induced evidence that have tainted this case from the outset. And while acknowledging that the BIA's persecutor standard was "vague and unhelpful," Slip Op. at 15, the majority "strains to avoid a simple remand" despite the Supreme Court's mandate in *Negusie*. Dissent, Slip Op. at 24. Instead, it fails to apply this Court's rule from *Diaz-Zanatta,* ignoring its nexus and scienter

requirements and thereby threatening its "continued validity." *Id* at 25.

I. THE FULL COURT'S GUIDANCE IS REQUIRED TO SET OUT THE STANDARD FOR ADMISSIBILITY OF TORTURE-INDUCED EVIDENCE IN IMMIGRATION PROCEEDINGS

Three tribunals in this case have condoned a record incurably infected by evidence whose reliability was never articulated or established: the IJ who relied on and repeatedly cited to torture-induced evidence without explaining whether or why she found it credible, let alone clear and convincing; the BIA, which failed to remand, instead purporting to review the IJ's decision without regard to the tainted evidence; and the panel majority, which insists that the BIA's approach does "not seem problematic." Slip Op. at 10. The fundamental mistake here is that the majority has sanctioned the BIA's reconstruction of the record with regard to this tainted evidence after the burden has shifted from the Government to Mr. Parlak. This raises a basic fairness issue of exceptional importance.

Extensive documentary evidence corroborates Mr. Parlak's unrebutted testimony that the statements attributed to him in the Security Court documents were the product of nearly four weeks of brutal torture. J.A. 643-63. Yet the IJ ignored this evidence and cited these tainted documents 88 times, leaving no hint as to their impact on her findings of fact and the extent to which they boosted the Government's satisfaction of its "clear and convincing" burden of proof. The imperative here is that an IJ *must* describe the extent to which tainted evidence

boosts the government's case, as the government "carries a heavy burden"—clear and convincing evidence—when it seeks to deport a resident alien. *Pickering v. Gonzales*, 465 F.3d 263, 268 (6th Cir. 2006) (citing *Berenyi v. District Director, INS*, 385 U.S. 630, 636 (1987)); *see also* 8 U.S.C. § 1229a(c)(3)(A); *accord Pickering*, 465 F.3d at 268. Moreover, as this Court well knows, credibility determinations are fundamental to an IJ's decision. Because an adverse credibility determination must be supported by specific reasons and based upon issues "that go to the heart of the applicant's claim," the record must be clear as to what role, if any, torture-based evidence played in making that determination. *Duan Ying Chen v. Gonzales*, 447 F.3d 468, 472 (6th Cir. 2006), *Daneshvar v. Ashcroft*, 355 F.3d 615, 623 n.7 (6th Cir. 2004).

The foundation of the immigration court system's integrity is the IJ's creation of a clean, reviewable factual record. Once the case reaches the BIA, the burden shifts to the immigrant: instead of the government bearing a "clear and convincing" burden, the immigrant bears the burden of showing "clear error" by the IJ. 8 C.F.R. § 1003.1(d)(3)(i) (2004). The IJ's factual findings (including credibility) thus become "conclusive." Slip Op. at 4. This burden shifting means that an IJ's clean factual record, including a transparent basis for her credibility determination and an explicit disclosure of the basis on which torture-induced evidence is deemed reliable and used, is paramount to the immigrant's right to due

process.

Despite this fundamental requirement, the IJ failed to articulate why statements derived from 26 days of torture are "clear and convincing." Instead, the Security Court documents formed the *sole* basis for several of her critical findings of fact, Pet. Br. at 21; served as the foundation for the government expert's conclusions, which the IJ adopted wholesale, *id.* at 21-22; and contributed to her adverse credibility determination.[1] The IJ did not explain this reliance either by rejecting the evidence that Mr. Parlak had been tortured, or by giving any reason why she nevertheless cited 88 times to evidence that was the product of torture. There is no way a reviewing tribunal can assess the IJ's findings of fact without reconstructing the record through inferential guesswork.

On appeal, once the burden shifted to Mr. Parlak, the BIA effectively rewarded the IJ's failure to address whether those documents were torture-induced, concluding that it was a question of fact which could not be reviewed *de novo*. J.A. 8. Instead of assessing whether the IJ's reliance on the Security Court documents was erroneous or whether it had distorted her findings (including credibility), the BIA effectively reconstructed the record, suggesting that it could review the IJ's

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[1] For example, the IJ states in her credibility analysis that "[Mr. Parlak's] asylum application makes no mention . . . of Respondent transporting arms and ammunition for PKK use on any incursions into Turkey," and calls this a "misrepresentation[]." J.A. 42. Yet only the torture-based Security Court statements support a conclusion that Mr. Parlak transported anything into Turkey "for PKK use."

decision "without resort to the Security Court evidence." *Id.* But despite the BIA's assertion that there was enough other evidence in the record to affirm "most" of the IJ's removability findings, *id.*, the taint of the Security Court evidence still permeated its opinion.[2]

Fundamental fairness considerations require remand of this case for a fresh hearing, but the panel majority instead condones the BIA's approach as "not problematic." Slip Op. at 10. This assessment cannot be reconciled with the record. Though the IJ referred to the Security Court documents 88 times, and explicitly relied on them for crucial findings of fact, the majority mistakenly states that the IJ used them "primarily to support its findings as to the procedural history of the case." *Id.* But in fact the IJ relied on the Security Court documents "to support her finding that Parlak engaged in a terrorist activity," *id.* at 10 n.6—a finding far more substantial than "procedural history." Likewise, though the majority asserts that the BIA only used the Security Court as "reliable evidence of Parlak's conviction and resentencing," *id.* at 10, the BIA in fact relied extensively on the IJ's Security Court-based determinations. *See supra* note 6.

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[2] *See* J.A. 11 ("As the [IJ] noted in a finding that is not clearly erroneous . . . knowledge of the location of stores of weapons, *and in particular rockets*, is inconsistent with respondent's explanation") (emphasis added); *id.* ("As the [IJ] stated, the respondent's burying of weapons and ammunition *for later use by PKK members*) (emphasis added); *id.* n.5 ("this finding of fact by the [IJ] is not clearly erroneous in light of . . . the *expert witness's testimony that the respondent fit the profile of a PKK fighter*") (emphasis added to indicate Security Court-based findings upheld by the BIA).

The majority affirms Mr. Parlak's removability on one ground only—a charge of willful misrepresentation under 8 U.S.C. § 1182(a)(6)(C)(i)—but even this finding is undermined by the IJ's and the BIA's reliance on torture-induced evidence. The fraud charge highlights the sad irony of this case: an immigrant who extensively disclosed in his asylum application his leading role in the ERNK, the months he spent at a PKK-run camp, the border skirmish between his group and Turkish soldiers, and his subsequent arrest and detention, is to be deported for mistakenly failing to disclose the arrest on his green card application. It strains belief to suggest that Mr. Parlak willfully misrepresented anything about his 1988 arrest when he knew that information about it filled his immigration A-file. Even under the panel majority's standard, willful misrepresentation requires "knowledge of falsity." Slip Op. at 7. But because the IJ inferred knowledge based on a record and a credibility determination thoroughly poisoned by the Security Court documents, there is no basis to review her judgment or the BIA's affirmance under any standard.

An IJ's opinion permeated with torture-induced findings but devoid of any finding as to torture permits no meaningful review and, in light of the shifting burdens of proof in these proceedings, is fundamentally unfair. Overlooking the fatal flaws of such a record cannot fix it; "the Board's evidentiary reconstruction is beyond what courts can or should do," for it is the job of the IJ, not the BIA, to

compile the record. Dissent, Slip Op. at 26. This Court should thus remand the case to a new IJ and provide guidance as to the appropriate standard for evaluating torture-induced evidence where it is offered to meet the government's "clear and convincing" burden in deportation proceedings.

II. THE PANEL MAJORITY'S PERSECUTOR BAR ANALYSIS CONFLICTS WITH DECISIONS OF THIS COURT AND THE SUPREME COURT.

The panel majority's persecutor ruling seriously errs in two respects. First, though it correctly notes that the BIA applied a "vague and unhelpful" persecutor standard (rather than this Court's *Diaz-Zanatta* test), the majority did not remand for consideration under the proper standard, as is required by the Supreme Court in all but "rare circumstances." Second, to avoid remand, the majority sought to apply the *Diaz-Zanatta* test for the first time on appeal, but failed to follow that test in a number of critical respects. These conflicts with binding Circuit and Supreme Court precedent require rehearing.

The two-part test for application of the persecutor bar[3] is well-defined in this Court and its sister circuits. *See Diaz-Zanatta*, 558 F.3d at 455; *Singh v. Gonzales*, 417 F.3d 736 (7th Cir. 2005); *Castaneda-Castillo v. Gonzales*, 488 F.3d 17, 20 (1st

[3] The INA's persecutor bar renders a removable immigrant ineligible for withholding of removal if he "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." *E.g.*, 8 U.S.C. §§ 1101(a)(42)(B).

Cir. 2007); *Balachova v. Mukasey*, 547 F.3d 374, 384 (2d Cir. 2008). First, the government must prove a "nexus between the alien's actions and the persecution of others such that the alien can fairly be characterized as having actually assisted or otherwise participated in such persecution." 558 F.3d at 455 (citing *Singh*, 417 F.3d at 736). Second, "if such a nexus is shown, the alien must have acted with scienter; the alien must have had some level of prior or contemporaneous knowledge that persecution was being conducted." *Id.* (citing *Singh*, 417 F.3d at 739, and *Castaneda-Castillo*, 488 F.3d at 20). Obviously, the Government's burden for *both* parts of the test is clear and convincing evidence.

Neither the IJ nor BIA applied this test, nor did they measure it against the government's "clear and convincing" burden of proof. Instead, the BIA invented on appeal a standard under which the persecutor bar is triggered when an immigrant "furthers the persecution in some way." J.A. 11. This formulation ignores both elements of the *Diaz-Zanatta* test—(1) nexus *and* (2) scienter. Per the Supreme Court, in this situation "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Negusie*, 129 S. Ct. at 1167 (quoting *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (per curiam); *INS v. Orlando Ventura*, 537 U.S. 12, 16-17 (2002) (per curiam)). No "rare circumstances" counsel against remand here, nor are any identified by the majority. *Negusie* and its Supreme Court predecessors mandate a remand here to

permit application of the proper test.

Rather than remand, the panel majority sought to perform the required factual analysis for the first time in this appeal. But the result of this effort is a good illustration of why *Negusie et al.* require remand in this circumstance. The fundamental problem is that the majority never conducts the requisite "'particularized, fact-specific inquiry into whether the applicant's personal conduct was merely indirect, peripheral and inconsequential association or was active, direct and integral to the underlying persecution.'" *Diaz-Zanatta*, 558 F.3d at 456 (quoting *Chen v. U.S. Attorney General*, 513 F.3d 1255, 1259 (11th Cir. 2008)). It instead relies on a broad assertion that nexus and scienter are met here because "Parlak voluntarily and knowingly provided money, which he knew could be used by the PKK for anything . . . and weapons, which directly supported the PKK's persecution of others." Slip Op. at 15. Neither of these conclusions satisfy *Diaz-Zanatta*. The majority has eschewed the particularized, clear and convincing analysis this Court requires for the generalized, guilt-by-association analyses of the IJ and BIA in which the role of the Security Court evidence is neither clear nor convincing.

First, as to provision of money, Mr. Parlak never provided money to the PKK, much less money that was used to finance persecution. He helped organize line-dancing festivals for displaced Kurds in Germany. If any profits remained

after festival performers and other expenses were paid, they would be sent to the ERNK, with Mr. Parlak having no further involvement. There is nothing approaching a *Diaz-Zanatta* "particularized fact-based determination" that even one cent from any of the festivals in Germany found its way from the ERNK to the PKK, let alone that such funds were "actually used [by the PKK] to persecute some individual or individuals" in Turkey. *See Diaz-Zanatta*, 558 F.3d at 460. The government needed to show—but did not—by clear and convincing evidence that (1) the festivals Mr. Parlak organized were profitable; (2) the ERNK in Germany used profits, if any, from these festivals to fund the PKK in Turkey rather than ERNK political action in Europe; (3) the PKK used those funds directly to persecute others, or indirectly, by using other funds freed by the donation; and (4) that Mr. Parlak intended such persecution to result from his actions. No record evidence supports any of these conclusions, and none of these critical issues was analyzed in the tribunals below or by the panel majority here. Remand for the proper analysis is required.

Second, as to provision of weapons, there is no evidence that any weapons Mr. Parlak carried to Turkey ever reached the PKK, much less that the PKK ever used them for any purpose or that Mr. Parlak intended such use. To the contrary, it is undisputed that Mr. Parlak's hometown of Gaziantep, where he set up camp and buried his weapons, was over 150 miles from the outside edge of the PKK conflict

with Turkey and never the site of PKK fighting. J.A. 772, 931. The panel majority relies on the notion that Mr. Parlak "smuggl[ed] weapons across an international border to aid the PKK in committing violent acts." Slip Op. at 16. But as the dissent spells out, there is no such finding in this case, let alone a *Diaz-Zanatta* analysis setting forth a "particularized fact-based determination" of the requisite nexus and scienter. Dissent, Slip Op. at 22-25. The unarticulated impact of the Security Court documents compounds this error. The majority cites to the FBI agent's profiling of Mr. Parlak as acting like a PKK fighter, Slip Op. at 12, but fails to recognize that this witness's "particularized" view of Mr. Parlak was fundamentally shaped by the Security Court documents. Likewise, the majority accepts the BIA's view that it was "implausib[le]" Mr. Parlak brought his weapons for personal use, *id*., but fails to recognize that the adverse credibility determination underlying this conclusion was thoroughly tainted by the IJ's Security Court-based assessment of Mr. Parlak. Remand for a proper *Diaz-Zanatta* analysis of the weapons issue is required, one in which the IJ cleanly identifies where and why any of the torture-based evidence is not only reliable, but clear and convincing, in a particularized fact-based determination.

Dated: October 8, 2009

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2009, I electronically filed the foregoing **PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*** with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ David S. Foster