

No. 10-1545

IN THE
Supreme Court of the United States

RUDINA DEMIRAJ AND REDIOL DEMIRAJ,
Petitioners,

v.

ERIC H. HOLDER, JR.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE NATIONAL IMMIGRANT
JUSTICE CENTER
AS AMICUS CURIAE
IN SUPPORT OF PETITIONER
AND URGING VACATUR AND REMAND

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INTEREST OF THE *AMICUS CURIAE*

The National Immigrant Justice Center (“NIJC”) is a non-governmental organization that provides direct legal services to thousands of immigrants and asylum-seekers each year.¹ This direct services expertise informs NIJC’s advocacy, litigation, and educational efforts. NIJC writes separately to draw the Court’s attention to the inconsistencies and ambiguities of the agency decisions below, which ought to be clarified before the legal questions presented in the petition are addressed.

SUMMARY OF ARGUMENT

It is possible that the Board of Immigration Appeals (“Board”) meant to issue a sweeping decision below, as Petitioners argue. It is possible that the Board meant to issue a narrow decision, though one inconsistent with other agency adjudications regarding this family. The problem is that the decision of the Board is muddled. The matter ought to be remanded to permit the Board to clarify its reasoning before the federal courts intervene to decide the matter.

The Board’s decision found Petitioners ineligible for asylum based on a lack of “nexus” to a protected ground, i.e., whether they faced persecution “on

¹ Counsel for all parties received timely notice of *Amicus*’ intention to file this brief, and consented to its filing. No party, counsel for a party, or person other than the NIJC, its members, or its counsel authored this brief in whole or in part or made a monetary contribution intended to fund its preparation or submission.

account of race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1101(a)(42)(A). However, it is unclear whether the Board meant to hold that it was not convinced that the lead Petitioner’s husband, Edmond Demiraj (“Mr. Demiraj”), was being persecuted due to a protected ground, or whether it meant to say that whenever persecutors vengefully target family members, that this motivation leaves them ineligible for protection. It seems unlikely that the Board meant to sweepingly affect asylum law by the unpublished decision below. Thus, the former possibility is more plausible; but it runs into the fact that the Agency had already determined that Mr. Demiraj had been targeted for persecution on account of a protected ground.

Inconsistent asylum adjudications among spouses based on the same facts is offensive to basic administrative law principles. Yet adjudication of this case requires either an assumption of such arbitrariness, or the assumption that the agency meant to make a major asylum pronouncement by an unpublished decision. Either result is problematic.

This agency-level ambiguity should have given pause to the Court of Appeals, regardless of post hoc rationalization by the Agency’s counsel. The Court should grant the petition, vacate the decision below, and direct the Court of Appeals to remand the case to the Board to permit it to clarify its decision.

ARGUMENT

I. The Agency Decisions Below Are Ambiguous and Irreconcilable.

Amicus sees three possible readings of the agency decisions: (a) that Petitioners could not prevail on their claim because Mr. Demiraj had not been persecuted on account of a protected ground; (b) that family members facing revenge due to their spouse or parent triggering a persecutor's ire are categorically unable to access protection, even if the targeting and persecution of the parent or husband was on account of a protected ground; or (c) that even if Petitioners might have prevailed by arguing that they had been persecuted "on account of" the reasons underlying Mr. Demiraj's persecution, that they had unwisely chosen to advance only a claim based on the Demiraj family as a particular social group.

Amicus believes that the first understanding is the most likely. The agency's analysis consistently focused on the reasons for the persecution of Mr. Demiraj, which would be relevant only if the Agency was denying Petitioners' claims due to its view of Mr. Demiraj's claims. The Immigration Judge found it "clear that but for Mr. Demiraj's service as a witness, the respondents would not be at risk... they are being targeted in retaliation to protect a criminal enterprise and, therefore, they are not being persecuted because they are members of a particular social group." Petition for Writ of Certiorari at 45a. The Board adopted and affirmed the Immigration Judge's decision, *id.* at 34a, finding that "the respondents have failed to demonstrate that the lead respondent's spouse's enemy seeks to harm them on

account of ... [a] protected ground.” *Id.* at 34a-35a. Noted the Board, “the individuals involved were seeking revenge against [Mr. Demiraj] for his testimony, and seek to harm [him] by attacking the respondents. We do not ordinarily find that acts motivated solely by criminal intent, personal vendettas, or personal desires for revenge establish the required nexus.” *Id.* at 31a.

It seems unlikely that the Board meant to find family members categorically ineligible for asylum where a persecutor seeks to revenge themselves on them, in lieu of an inaccessible target whom it wishes to persecute on account of protected grounds. The Board gave no indication that it believed that it was making a sweeping holding which would affect a large number of potential applicants.² Indeed, the decision was issued by a single Board Member; a single-member Board decision cannot be precedential. 8 C.F.R. § 1003.1(g). Nor did the Board suggest that it was denying asylum based on a strategic misstep by Petitioners.

However, the more limited view of the agency decision runs into a problem: it is flatly inconsistent with the Agency’s adjudication of Mr. Demiraj’s case itself. Page 636 of the Administrative Record

² *See e.g.*, U.S. Dept. of State, Bureau of Democracy, Human Rights & Labor, 2010 Country Reports on Human Rights Practices: Democratic People’s Republic of Korea, Apr. 11, 2011, at 11, accessible at <http://www.state.gov/documents/organization/160466.pdf> (last visited July 20, 2011) (collective punishment for families of defectors, extending to three generations).

contains a summary of the 2003 decision issued in Mr. Demiraj's case, indicating that Mr. Demiraj was granted withholding of removal under 8 U.S.C. § 1231(b)(3). In the course of granting withholding of removal under that provision,³ the Immigration Court necessarily found that, if removed to Albania. Mr. Demiraj's "life or freedom would be threatened in that country *because of* the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A) (emphasis added). Nexus to a protected ground is part of the refugee definition, 8 U.S.C. § 1101(a)(42)(A), and has always been a requirement in withholding cases. *INS v. Stevic*, 467 U.S. 407, 428-29 (1984).

It is true that the summary order in Mr. Demiraj's case did not specify *which* ground had been the basis for that decision; but any of the five grounds would be inconsistent with the Board's reason for denying asylum to Petitioners. The summary order introduced below was the only official document produced regarding that decision;⁴ it was sufficient to conclusively show a prior agency finding that the persecution of Mr. Demiraj was on account of one of the five protected grounds.

³ The Immigration Judge denied Withholding of Removal under the Convention Against Torture, which requires no nexus to one of the five protected grounds. *Cf.* 8 C.F.R. § 1208.16(c).

⁴ Transcripts of Immigration Court decisions are only available where a party appeals. BIA Practice Manual, 4.2(f), available at <<http://www.justice.gov/eoir/vll/qapracmanual/pracmanual/chap4.pdf>> (last visited July 12, 2011).

II. This Type of Inconsistency Violates Fundamental Administrative Law Principles.

Inconsistency between these adjudications is problematic for reasons entirely distinct from the legal issues presented by the Petition for Writ of Certiorari; “[a]n agency cannot merely flit serendipitously from case to case, like a bee buzzing from flower to flower, making up the rules as it goes along.” *Henry v. INS*, 74 F.3d 1, 6 (1st Cir. 1996). Federal courts have refused to uphold removal orders where the Agency has issued irreconcilably divergent decisions as to two spousal asylum applications based on precisely the same facts.⁵

Under traditional administrative law principles, an agency must provide a reasoned decision “so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate.” *Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) (plurality). Inconsistent decisions – even non-precedential decisions – are problematic: “the prospect of [the Board] treating virtually identical legal issues differently in different cases, without any semblance of a plausible explanation, raises ... concerns about arbitrary agency action.” *Davila-Bardales v. INS*, 27 F.3d 1, 5 (1st Cir. 1994).

For instance, in *Zhang v. Gonzales*, 452 F.3d 167 (2d Cir. 2006), the Board denied asylum to a Chinese

⁵ *Amicus* notes that the Agency also granted asylum to Mr. Demiraj's nieces, presumably finding the nexus requirement satisfied therein. Admin. Rec. at 351, 364.

woman who feared forced sterilization; but granted asylum to her husband on precisely the same ground. The Second Circuit reversed: “[a]lthough the BIA was aware of the former grant of relief ... it failed to address, much less explain, its apparent inconsistent treatment of the couple's seemingly identical future persecution claims.... A rational system of law would seem to require consistent treatment of such identical claims, or, at the very least, an explanation from the BIA for their seemingly inconsistent treatment.” *Zhang*, 452 F.3d at 173-74 (2d Cir. 2006) (citations and quotations omitted).⁶

Similarly, in *Wang v. Ashcroft*, 341 F.3d 1015, 1019 n. 2 (9th Cir. 2003), the Agency granted asylum to a husband based on abortions suffered by his wife, but denied the wife’s claim on credibility grounds. The Agency persisted in defending that treatment in the Court of Appeals, and refused to take any steps to reconcile the two inconsistent decisions. *Wang*, 341 F.3d at 1019 n. 2. Commented the Court of Appeals, “[w]e wonder how any rational system could tolerate such inconsistent treatment.” *Id.*

Divergent results among family members does not always signal inconsistency; but the Agency premised its denial of Petitioners’ claims on a view of Mr. Demiraj’s claims which cannot be reconciled with

⁶ *Amicus* notes that there is regulatory as well as logical interplay in asylum adjudications of family members. *See* 8 U.S.C. § 1158(b)(3)(A) (permitting derivative asylum status for asylee’s spouse and children); 8 C.F.R. § 208.21(d) (derivative status for spouses and children outside the United States).

the Agency's earlier decision in his case, a decision which it did not purport to reject. This inconsistency or arbitrariness is fundamentally problematic.

III. Remand for Clarity and Consistency Would Be Appropriate.

An agency issuing contradictory decisions leaves a reviewing court in an uncomfortable posture: "were we to accord *Chevron* deference to non-binding ... interpretations, we could find ourselves in the impossible position of having to uphold as reasonable on Tuesday one construction that is completely antithetical to another construction we had affirmed as reasonable the Monday before." *Lin v. U.S. Dep't of Justice*, 416 F.3d 184, 190 (2d Cir. 2005).

Ambiguous agency decisions sometimes implicate the ability of the federal courts to function as reviewing bodies, and require or counsel remand. *See, e.g., Mei Fun Wong v. Holder*, 633 F.3d 64, 77 (2d Cir. 2011). These principles ought to have governed at the Court of Appeals, and ought to govern now. If the Agency now defends the Board's holding arguing that family members qualify for asylum only if the trigger for the principle target's persecution were itself a protected ground, the Court would be forced to decide the case counterfactually, i.e., contrary to the Agency's holding in Mr. Demiraj's case, though it is not clear that the Board reached this result. Alternately, the Agency might now argue that family members are categorically unable to access protection from a persecutor's vengeance, even where the impetus for the vengeance is a protected ground. Particularly as to such an expansive theory, any decision ought to be made by the Board itself,

not as “a post-hoc rationalization by ... counsel of agency action that is under judicial review.” *Talk America, Inc. v. Michigan Bell Telephone Co.*, 131 S.Ct. 2254, 2263 (2011).

The Board has not authoritatively addressed the issues reached by the Court of Appeals. It has taken no steps to reconcile inconsistent adjudications as to the Demiraj family, despite having them drawn to its attention on reconsideration. Cert. Pet. at 26a. Rather than the federal courts stepping in to resolve these legal issues in the first instance, “the proper course ... is to remand to the agency for additional investigation or explanation.” *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (*per curiam*) (quoting *INS v. Orlando Ventura*, 537 U.S. 12, 16 (2002) (*per curiam*)).

CONCLUSION

For these reasons, *Amicus* suggests that the Court grant the Petition for a Writ of Certiorari, vacate the decision below, and remand for proceedings consistent with *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006), and the agency’s adjudication in *In Re Edmond Demiraj*, A74-700-122.

Respectfully submitted,

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