

No. 05-4488

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

IBRAHIM PARLAK,

Petitioners,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

ON REVIEW FROM THE BOARD OF IMMIGRATION APPEALS

**BRIEF OF AMICUS CURIAE AMERICAN IMMIGRATION LAWYERS
ASSOCIATION IN SUPPORT OF THE PETITION
FOR REHEARING EN BANC**

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TABLE OF CONTENTS

Table of Authorities	ii
Introduction	1
Statement of Interest	2
Argument	3
I. The interpretation of the persecutor bar is evolving at the administrative level	3
II. Circuit law cautions against prematurely deciding issues within the agency's jurisdiction to administer	6
Conclusion	9
Certificate of Service	10
Appendix A: Letter of David Neal, Acting Chairman, Board of Immigration Appeals (June 15, 2009)	

TABLE OF AUTHORITIES

Table of Cases

<i>Boshtrakaj v. Holder</i> , No. 08-1417-ag, 2009 WL 1211014 (CA2 May 4, 2009)	8-9
<i>Diaz-Zanatta</i> , 558 F.3d 450 (CA6 2009)	3-4, 6-7
<i>Fedorenko v. United States</i> , 449 U.S. 490 (1981)	1, 4
<i>Fernandez v. Keisler</i> , 502 F.3d 337 (CA4 2007)	7
<i>Im v. Gonzales</i> , 497 F.3d 990 (CA9 2007)	8
<i>Im v. Holder</i> , No. 05-70027, 2009 WL 2039108 (CA9 June 19, 2009)	8
<i>Lian v. Holder</i> , No. 08-60589, 2009 WL 1582559 (CA2. June 8, 2009)	8
<i>Liu v. DOJ</i> , 455 F.3d 106 (CA2 2006)	8
<i>Matter of A-H-</i> , 23 I&N Dec. 774 (A.G. 2005)	1, 3
<i>Matter of Maldonado-Rodriguez</i> , 19 I&N Dec. 811 (BIA 1988)	1
<i>Matter of McMullen</i> , 19 I&N Dec. 90 (BIA 1984)	1
<i>Miranda-Alvarado v. Gonzales</i> , 449 F.3d 915 (CA9 2006)	3-4
<i>National Cable & Telecommunications Ass’n v. Brand X Internet Service</i> , 545 U.S. 967 (2005)	6
<i>Negusie v. Holder</i> , 129 S. Ct. 1159 (2009)	1, et seq.
<i>Nguyen v. Holder</i> , No. 05-73353, 2009 WL 1956238 (CA9 June 23, 2009)	8
<i>Parlak v. Holder</i> , 578 F.3d 457 (CA6 2009)	1, et seq.
<i>Singh v. Gonzales</i> , 417 F.3d 736 (CA7 2005)	3

<i>United States v. Muckleshoot Indian Tribe</i> , 235 F.3d 429 (CA9 2000)	7
<i>Weng v. Holder</i> , 562 F.3d 510 (CA2. 2009)	8
<i>Xie v. INS</i> , 434 F.3d 136 (CA2 2006)	3

Other Authorities

Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (Mar. 17, 1980)	1
Brief of the Department of Homeland Security in the Matter of R-A-, available at << http://www.aila.org/content/default.aspx?docid=29560 >>	6

Introduction

The meaning of “assisting in the persecution of others” has been addressed by the Board of Immigration Appeals in two published precedents, *Matter of Maldonado-Rodriguez*, 19 I&N Dec. 811 (BIA 1988); *Matter of McMullen*, 19 I&N Dec. 90 (BIA 1984) and by the Attorney General in *Matter of A-H-*, 23 I&N Dec. 774 (A.G. 2005). For nearly the entire time the United States has had an ideologically neutral procedure for providing asylum, *see* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (Mar. 17, 1980), these decisions have provided the framework for determining when to apply the “persecutor bar”. Their analysis was rooted in the reasoning used by the Supreme Court in *Fedorenko v. United States*, 449 U.S. 490 (1981) and revolves around the concept that an applicant will be barred from asylum protection if he has “furthered persecution in some way”. A few months ago, the Supreme Court explained that the Board’s analysis, as being based on *Fedorenko*, was incorrect and remanded the matter for a new analysis and decision. *Negusie v. Holder*, 129 S. Ct. 1159 (2009).

In *Parlak v. Holder*, 578 F.3d 457, published on August 24, 2009, the panel opinion proffers its own interpretation of the persecutor bar. Relying in part on its own case law, in part of the law of other circuits, and, importantly on the Supreme Court’s *Fedorenko* decision, the panel opinion puts forth a standard for determining the applicability of the persecutor bar to asylum applicants.

The panel opinion in *Parlak* was prematurely decided. Its analysis and holding on the persecutor bar question will have the tendency to disrupt or unnecessarily stymie the administrative evolution of how the persecutor bar should apply. Amicus, the American Immigration Lawyers Association, offers this brief to explain that in the same way that *Negusie* placed the complicated public policy choice at the heart of the persecutor bar before the politically-accountable executive branch, the panel opinion in *Parlak* should have done the same. As explained below there are important indicators that the administrative interpretation of the persecutor bar will undergo a comprehensive review and until an administrative interpretation is finalized, judicial pronouncements on the legal questions should be reserved. *Parlak* should be reheard and the discussion on the persecutor bar appearing on pages 468-470 of the published opinion should be modified accordingly. AILA takes no position on any other question.

Statement of Interest

The American Immigration Lawyers Association (“AILA”) is a national association with more than 11,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice

and to elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members regularly practice before the Department of Homeland Security and before the Executive Office for Immigration Review (immigration courts), as well as before the United States District Courts, Courts of Appeal, and the Supreme Court of the United States.

Argument

I. The interpretation of the persecutor bar is evolving at the administrative level.

It has become a nearly universal opinion that the standard utilized by the Board in adjudicating the persecutor bar question is unhelpful.¹ Taken together, the Board's decisions offer that assistance involves furthering the persecution in "some way". These prior precedents have failed to offer the guidance necessary to balance the many nuances in refugee and asylum policy. The Courts of Appeal have supplemented this "in some way" standard with their own practical analysis. *E.g.*, *Diaz-Zanatta*, 558 F.3d 450 (CA6 2009); *Xie v. INS*, 434 F.3d 136 (CA2 2006); *Singh v. Gonzales*, 417 F.3d 736 (CA7 2005); *Miranda-Alvarado v. Gonzales*, 449 F.3d 915 (CA9 2006). Most have determined that "in some way"

¹ Our references to the "Board" include the Attorney General's decision in *Matter of A-H-*.

actually means that a person must act with scienter and the action must bear a nexus to the ultimate act of persecution. *Diaz-Zanatta*, 558 F.3d at 455.

There is much to like in the *Diaz-Zanatta* analysis as there is in several of the Courts of Appeal opinions on this point. It is surprising, though, that most of the courts that have addressed the issue, and thus developed their own sense of the standard, have done so without a view as to whether the statute is *Chevron*-clear. Indeed, the Ninth Circuit has held “the statute does not spell out what is meant by ‘assist[ing], or otherwise participat[ing]’ in the persecution of others[.]” *Miranda-Alvarado*, 449 F.3d at 921 (first two alterations in original). Neither *Diaz-Zanatta* nor *Parlak* offers any guidance on whether the statute is amenable to a plain language interpretation. This may be so because the interpretation of the persecutor bar has for so long been burdened by the belief that the *Fedorenko* analysis – whether viewed as binding or guiding – was the most appropriate mode of adjudicating these claims, the majority of courts skipped over the administrative deference rules that apply in agency cases.

This matters a great deal because Justice Kennedy’s opinion in *Negusie* has set in motion at the agency level a new look at a *comprehensive* approach to the persecutor bar. In *Negusie*, Justice Kennedy foresaw some of the complications with which the *Parlak* opinion grappled. In his opinion, he urged the agency to tackle the issue of the persecutor bar comprehensively. Indeed, he invited the

agency to engage in a process whereby an “interpretation of the statutory meaning of “persecution” may be explained by a more comprehensive definition, one designed to elaborate on the term in anticipation of a wide range of potential conduct; and that expanded definition in turn may be influenced by how practical, or impractical, the standard would be in terms of its application to specific cases.” *Negusie*, 126 S. Ct. at 1168.

Justice Kennedy’s invitation appears to have been taken up by the agency.² The *Negusie* case is presently before the Board of Immigration Appeals. In anticipation that it would use the *Negusie* case as a form for developing a comprehensive definition of the persecutor bar – not just the voluntariness question, a large array of stakeholder organizations were participating in the proceedings. See Letter of David Neal, Acting Chairman, Board of Immigration Appeals (June 15, 2009); attached as Appendix. Chairman Neal suspended the briefing schedule, though, shortly thereafter. AILA, like other organizations, anticipates that the agency may intend to engage in a rulemaking procedure instead of adjudication to craft a balanced, practical, and lawful definition that comprehensively deals with the persecutor bar. There is precedent for doing so.

² In addition to the Board, the Department of Homeland Security interprets and applies the persecutor bar as well. In fact, through its Asylum Division, the Department of Homeland Security probably processes the vast majority of claims. It has developed its own guidance on what the terms mean. Its views, not considered yet in this case, may bear some relevance.

See, e.g. Brief of the Department of Homeland Security in the Matter of R-A-, available at << <http://www.aila.org/content/default.aspx?docid=29560>>> (last visited Oct. 19, 2009) (asking the Board to remand the case without issuing a binding rule because of the anticipated rulemaking procedure on gender-based asylum claims). A rulemaking procedure or the Board's eventual decision in *Negusie* will likely address many of the analytical problems that have plagued the Board's "in some way" standard. This administrative interpretation (when it comes) will provide the appropriate base on which the Courts of Appeal can engage in judicial review.

II. Circuit law cautions against prematurely deciding issues within the agency's jurisdiction to administer

The propriety of remand in this case makes itself evident when looking at the long picture of what *Parlak* and *Diaz-Zanatta* may do in terms of hampering stability in the development of the persecutor bar standard. It is true that there may be ways to distinguish *Negusie* from the record in Mr. Parlak's case. *Parlak*, 578 F.3d at 469; *but see, id.* 578 at 473 (Martin, J. dissenting). But that just begets other doctrinal difficulties and pushes the inevitable *Brand X* conflict down the line for some other panel to resolve. *National Cable & Telecommunications Ass'n v. Brand X Internet Service*, 545 U.S. 967 (2005). In this sense, it is irrelevant that the panel opinion distinguished *Negusie* because as it stands now, the panel opinion made law by interpreting and applying the persecutor bar. *Parlak*, 578

F.3d at 469-470. If the statute is not clear enough to satisfy *Chevron* step-one, then whatever rule *Parlak* or *Diaz-Zanatta* may have set forth is subject to administrative re-interpretation.³ Non-citizens pay a price when a judicial opinion does not communicate with clarity its *Chevron* analysis. While “[o]pinions, unlike statutes, are not usually written with the knowledge or expectation that each and every word may be the subject of searching analysis[.]” *United States v. Muckleshoot Indian Tribe*, 235 F.3d 429, 433 (CA9 2000), and a court’s statutory analysis need not “say in so many magic words that its holding is the only permissible interpretation of the statute in order for that holding to be binding on an agency,” *Fernandez v. Keisler*, 502 F.3d 337, 347 (CA4 2007) (applying *Brand X*), it is helpful as it provides stability to the law. When, as it seems here, that the administrators of the asylum statute are working to formulate a comprehensive approach on the definition of the persecutor bar prodded by a Supreme Court opinion, it would be prudent to avoid premature statements of Circuit law that

³ AILA does not take a position in this brief on whether the statute is ambiguous. While it is normally for the courts to decide whether a statute is plain or not in the first instance, it makes sense in this case to have the Board address this issue first in light of the other issues that must be addressed following *Negusie* and the need for comprehensive interpretation as suggested by Justice Kennedy’s concurrence. Indeed, setting aside the likelihood that the agency might engage in a rulemaking or other comprehensive procedure, the *Negusie* remand was not limited to issues of voluntariness. The Supreme Court remanded to allow the Board to consider whether and to what extent “motivation or intent on the alien’s part” is relevant when determining whether the alien assisted in the persecution of others. *Negusie*, 129 S. Ct. at 1166-67. These are factors which are directly implicated in the *Parlak* opinion.

could create a *Brand X* question and leave asylum applicants in doubt as to what law – the agency rule believed to be forthcoming or the *Parlak/Diaz-Zanatta* rule – actually applies. The court need not decide if remand is *required* in *Parlak*; rather it can remand because the persecutor bar requires interpretation and clarification and that is best done, at this point, by the agency. *See Liu v. DOJ*, 455 F.3d 106, 116 (CA2 2006) (citing *Brand X* and remanding to avoid potential agency-circuit court conflict).

The panel opinion's reliance on *Nguyen v. Holder*, No. 05-73353, 2009 WL 1956238 (CA9 June 23, 2009), and *Weng v. Holder*, 562 F.3d 510 (CA2. 2009), is unpersuasive. In *Nguyen*, it was not necessary to remand because the alien "admitted to assisting in the persecution and possible torture of others on account of their association with communism." 2009 WL 1956238 at *1. A non-citizen who admits to persecuting others is ineligible for asylum under any legal standard. In *Weng*, the Second Circuit did not remand because the non-citizen's conduct did not trigger the persecutor bar under any possible construction of the statute. 562 F.3d 510, 514 n.1 (CA2 2009). Other cases outline the better procedure. *See Im v. Holder*, No. 05-70027, 2009 WL 2039108 (CA9 June 19, 2009)⁴; *Lian v. Holder*, No. 08-60589, 2009 WL 1582559 (CA2. June 8, 2009); *Boshtrakaj v. Holder*, No.

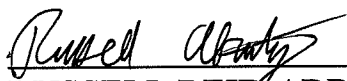
⁴ Of note, the Ninth Circuit previously granted the alien's petition for review in *Im v. Gonzales*, 497 F.3d 990 (CA9 2007) but withdrew that decision in light of *Negusie*.

08-1417-ag, 2009 WL 1211014 (CA2. May 4, 2009). Because the Board has not yet had an opportunity to comply with *Negusie* and this case involves a disputed question at the heart of the scope of the persecutor bar, remand is the most appropriate resolution of this legal question.

Conclusion

Asylum and refugee law is meant to protect victims of persecution from being returned to the country of persecution. Those who engage in the same conduct that they fear cannot receive this nation's protections. A standard that is too vague or broad will, aside from the practical problems of applying it in a uniform manner, will result in the return of bona fide refugees to the country of persecution. The panel opinion has spoken prematurely on the question of what the persecutor bar means. The courts and agencies have different roles in questions of statutory interpretation. For matters within the agency's expertise, the agency must have the first opportunity to offer a reasonable construction of an ambiguous statute and then apply the facts to the law. The matter should be reheard and the opinion modified accordingly.

Respectfully submitted this 21st day of October 2009.



RUSSELL REID ABRUTYN

STEPHEN W MANNING

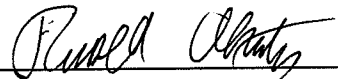
American Immigration Lawyers Association
Attorneys for Amicus

CERTIFICATE OF SERVICE

I, Russell Reid Abrutyn, hereby certify that, on October 21, 2009, I personally served a copy of the American Immigration Lawyers Association's Brief on:

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Russell Reid Abrutyn

Appendix A



U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

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June 15, 2009

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In re: Daniel Girmani Negusie, A015 575 924

Dear Counsel:

Pursuant to the Supreme Court's decision in *Negusie v. Holder*, 129 S.Ct. 1159 (2009), the respondent's case has been remanded to the Board of Immigration Appeals by the United States Court of Appeals for the Fifth Circuit. *See Negusie v. Holder*, 06-60193 (April 13, 2009) (unpublished). The Supreme Court held that the Board committed legal error in holding that the "persecutor bar" in sections 208(b)(2)(A)(i) and 241(b)(3)(B)(i) of the Immigration and Nationality Act did not require any motivation or intent on the alien's part. The Supreme Court reasoned that because the persecutor bar was ambiguous as to whether coercion or distress was relevant in evaluating whether an alien participated in persecution, the issue should first be addressed by the Board in accordance with standard principles of administrative law.

The Board is now seeking briefs from the parties, and amici curiae, regarding the scope of the persecutor bar; specifically, whether an involuntariness or duress exception exists to limit application of the bar. The Board is aware that the respondent, the government, and other interested parties filed detailed briefs before the Supreme Court which are available to the public. *See e.g., www.abanet.org/publiced/preview/briefs/nov08.shtml#07499*. These briefs will be considered by the Board, and need not be re-filed. The Board, however, encourages the parties and amici to submit briefs addressing the specific legal question(s) remaining in light of the Supreme Court's decision, and the application of the law to the facts of the respondent's case.

Hiroko Kusuda, Esquire

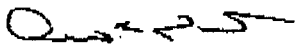
Page 2

June 15, 2009

Briefs on behalf of the respondent are due 30 days from the date of this letter, and any responsive briefs are due 60 days from the date of this letter. The briefs must be RECEIVED at the Board on or before this date. Please attach a copy of this letter to the front of your brief when you mail and deliver it to the Board, and keep a copy for your records.

Thank you for your attention to this matter. Instructions for filing the briefs are attached.

Sincerely,



David Neal
Acting Chairman, Board of Immigration Appeals

Enclosure: Filing Instructions

cc: David Landau, Chief Appellate Counsel
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U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals

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FILING INSTRUCTIONS

A fee is not required for the filing of a brief. Your brief must be RECEIVED at the Clerk's Office of the Board of Immigration Appeals within the prescribed time limits. It is NOT sufficient simply to mail the brief and assume your brief will arrive on time. We strongly urge the use of an overnight courier service to ensure the timely filing of your brief.

If you have any questions about how to file something at the Board, you should review the Board's Practice Manual and Questions and Answers at www.usdoj.gov/eoir.

Proof of service on the opposing party at the aforementioned address is required for ALL submissions to the Board of Immigration Appeals-including correspondence, forms, briefs, motions, and other documents. Your certificate of service must clearly identify the document sent to the opposing party, the opposing party's name and address, and the date it was sent to them. Any submission filed with the Board without a certificate of service on the opposing party will be rejected.

Filing Address:

To send by courier or overnight delivery service or to deliver in person:

Board of Immigration Appeals
Clerk's Office
5107 Leesburg Pike, Suite 2000
Falls Church, VA 22041

Business hours: Monday through Friday, 8:00 a.m. to 4:30 p.m.

To mail by regular first class mail:

Board of Immigration Appeals
Clerk's Office
Post Office Box 8530
Falls Church, VA 22041



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Name: NEGUSIE, DANIEL GHIRMAY

A015-575-924

Type of Proceeding: Asylum Only

Date of this notice: 8/25/2009

NOTICE OF SUSPENSION OF BRIEFING SCHEDULE

The above-referenced case is presently pending before the Board of Immigration Appeals.

The briefing schedule in the above-referenced case has been suspended. The Board will notify the parties when a new briefing schedule has been set.