No. 98-576

In the Supreme Court of the United States

OCTOBER TERM, 1998

GUEHENNO LABORDE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly upheld the Board of Immigration Appeals' conclusion that petitioner failed to meet his burden of proving eligibility for asylum and withholding of deportation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is unpublished, but the decision is noted at 145 F.3d 1325 (Table). The opinions of the Board of Immigration Appeals (Pet. App. 16a-29a) and the immigration judge (Pet. App. 30a-40a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1998. A petition for rehearing was denied on July 6, 1998 (Pet. App. 41a-42a). The petition for a writ of certiorari was filed on October 5, 1998 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner challenges the court of appeals' denial of his petition for review of a decision of the Board of Immigration Appeals (Board). Pet. App. 1a-15a. The Board dismissed petitioner's appeal from a decision of an immigration judge (IJ) denying his application for asylum and withholding of deportation. *Id.* at 16a-29a.

1. Petitioner, a native and citizen of Haiti, tried to enter the United States using fraudulent documentation. The Immigration and Naturalization Service (INS) apprehended him and charged him with being excludable for (1) fraudulently or willfully misrepresenting a material fact in seeking to procure entry into the United States, in violation of 8 U.S.C. 1182(a)(6)(C)(i) (Supp. IV 1992), and (2) being an immigrant who, at the time of application for admission, was not in possession of a valid unexpired immigrant visa or other valid entry document, and a valid unexpired passport or other travel document, in violation of 8 U.S.C. 1182(a)(7)(A)(i)(I). Pet. App. 2a-3a; Admin. R. 819-820.

After being found excludable, petitioner sought asylum and withholding of deportation. He claimed to have suffered past persecution, and to have a well-founded fear of future persecution, in Haiti on account of his political opinion and membership in various social groups. Pet. App. 3a; Admin. R. 150-152, 708-714. To support his claim, petitioner testified about several incidents that took place during the fall of 1993, while he was living with his aunt in Port-au-Prince and working at her grocery store. According to petitioner, members of the Front for the Advancement of Progress of Haiti (FRAPH) sent letters to many young men in his neighborhood—including him—explaining that it

wanted to create an office in the area and that it sought the support of the youth. Pet. App. 4a; Admin. R. 173, 176, 179-180. Two weeks later, members of FRAPH came to the store, seeking petitioner's response to the letter. Pet. App. 4a-5a; Admin. R. 182-183. Petitioner said he responded by giving the FRAPH members a sealed envelope containing $30; he explained that by giving the men money, he implicitly refused to join FRAPH. Pet. App. 5a; Admin. R. 183, 204-205, 220. The men left the store without opening the envelope and never returned. Admin. R. 183.

The next week, two unidentified men appeared at petitioner's aunt's house on two consecutive evenings looking for him, but he was not home. Pet. App. 5a; Admin. R. 183-184. Petitioner believed the men were members of FRAPH, although he admitted he was not certain. Pet. App. 5a; Admin. R. 184. Fearing what would happen if FRAPH found him, petitioner went into hiding and moved from place to place for three months. Finally, he decided to enter the United States using fraudulent documents. Pet. App. 5a; Admin. R. 184-187. Petitioner also testified that after he left Haiti, FRAPH members went to his parents' residence, asked for him, and then "ransacked" the house. Pet. App. 5a; Admin. R. 190-191. Based on those experiences, petitioner claimed that he suffered past persecution and has a well-founded fear of future persecution on account of his political opinion.

Petitioner filed his asylum application in May 1994, along with hundreds of pages of general documentary evidence regarding the political conditions in Haiti. Admin. R. 708-714, 236-777. Significantly, in his asylum application, petitioner stated that he refused to join FRAPH for religious reasons. *Id.* at 709. He also stated that, while in Haiti, the only politically moti-

vated action he took was to vote for President Aristide; he did not claim that FRAPH members were aware of his vote. Pet. App. 4a; Admin. R. 201. After petitioner left Haiti, President Aristide returned to power. Pet. App. 6a; Admin. R. 168, 217.

2. In May 1995, the IJ denied petitioner's application for relief, concluding that he did not satisfy the statutory requirements for asylum or withholding of deportation. Pet. App. 33a-39a. The IJ ruled that petitioner suffered no past persecution and did not have a well-founded fear of future persecution on account of his political opinion. *Id.* at 36a. The IJ was "not convinced that members of FRAPH perceive [petitioner] as an opponent and would wish to harm him." *Id.* at 38a. The IJ specifically rejected petitioner's assertion that providing financial support to FRAPH indicated opposition to that group. *Id.* at 36a. The IJ also expressed doubt that the attack on petitioner's family had anything to do with him, commenting that robbery is a frequent occurrence in Haiti. *Id.* at 39a. Finally, the IJ noted the significant changes in the government of Haiti since petitioner came to the United States, and concluded that even if petitioner could have shown he suffered past persecution, he was not entitled to asylum in light of Haiti's changed country conditions. *Ibid.*

3. In November 1996, the Board dismissed petitioner's appeal of the IJ's decision, holding that petitioner did not show either past persecution or a well-founded fear of future persecution in Haiti. Pet. App. 24a-29a. The Board applied the holding of *INS* v. *Elias-Zacarias*, 502 U.S. 478 (1992), that forced recruitment and reprisals for resisting recruitment do not by themselves constitute persecution on account of political opinion. Pet. App. 24a. The Board rejected petitioner's past persecution claim because he did not establish that

either FRAPH's initial recruitment efforts or its subsequent actions were motivated by his political opinion, as distinguished from FRAPH's desire to increase its membership. *Ibid.* The Board found it significant that FRAPH sought to recruit all of the local youth; that petitioner did not allege that the initial overtures that FRAPH made toward him were any different than those made toward other young people; and that petitioner did not claim that FRAPH was aware of his political opinion, except for the fact that he lived in an allegedly pro-Aristide area. *Id.* at 25a.

The Board also held that petitioner did not demonstrate a well-founded fear of future persecution should he return to Haiti. Pet. App. 26a-29a. Much of the evidence indicated significant improvements in human rights conditions in Haiti since multi-national forces secured President Aristide's return to power in 1994. *Id.* at 26a-27a. Although petitioner might have a genuine subjective fear, the Board held that it was not well-founded given the changed conditions in Haiti. *Id.* at 29a. For those reasons, the Board dismissed the appeal.

4. The court of appeals denied petitioner's petition for review in an unpublished order, ruling that the Board's decision was supported by substantial evidence.[1] Pet. App. 10a-11a. Petitioner argued that the Board ignored evidence that FRAPH imputed a pro-Aristide political opinion to him because he was an

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[1] In the court of appeals, petitioner abandoned his claims of persecution based on his membership in the various social groups cited to the Board; he did argue that he feared persecution based on his membership in the "social group" of "draft age men." Pet. App. 10a n.5, 22a. However, because he had not raised that claim before the Board, the court of appeals held that it lacked jurisdiction to consider it. *Id.* at 10a n.5. Only petitioner's claim of persecution on account of political opinion is before this Court.

educated young man working and living in a pro-Aristide neighborhood who refused to join FRAPH. *Id.* at 9a. Therefore, he claimed, he suffered past persecution and has a well-founded fear of future persecution by FRAPH based on his political opinion. *Id.* at 9a-11a. The court of appeals rejected that argument, stating that the record is "particularly lacking of probative evidence that FRAPH sought to persecute him on account of his political opinion prior to his fleeing Haiti or that it would seek to persecute, [*sic*] him on account of his political opinions if he returned to Haiti." *Id.* at 11a. The court pointed to four factors in support of its conclusion: (1) petitioner admitted that neither he nor his family was politically active in Haiti; (2) there was no evidence that his family became politically active after he left; (3) there was no evidence that FRAPH knew that petitioner voted for Aristide in the 1990 presidential election; and (4) his resistance to FRAPH's recruitment efforts did not, without more, compel the conclusion that subsequent adverse actions taken against him were on account of his political opinion. *Ibid.* In the absence of evidence that FRAPH sought to recruit solely Aristide supporters, the court of appeals concluded that the Board drew the permissible inference that FRAPH's recruitment efforts were conducted without regard to petitioner's political opinion. *Id.* at 14a.

5. A petition for rehearing was denied on July 6, 1998. Pet. App. 41a-42a.

ARGUMENT

Petitioner argues that the court of appeals' decision: (1) improperly required him to present direct evidence of FRAPH's motives, contrary to *INS* v. *Elias-Zacarias*, 502 U.S. 478 (1992); *Sangha* v. *INS*, 103 F.3d

1482, 1490 (9th Cir. 1997); and *Balasubramanrim* v. *INS*, 143 F.3d 157, 164-165 n.10 (3d Cir. 1998); (2) disregarded record evidence and required him to disprove all adverse inferences that could be drawn; and (3) is inconsistent with international norms, and the United Nations High Commissioner for Refugees, *Handbook on Procedure and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol to the Status of Refugees* (Jan. 1988) (UNHCR *Handbook*). Those contentions are meritless, and the unpublished decision of the court of appeals does not warrant review by this Court.

1. Contrary to petitioner's argument, the Fourth Circuit's decision does not conflict with either *INS* v. *Elias-Zacarias*, 502 U.S. 478 (1992), or subsequent circuit court decisions.

In *Elias-Zacarias*, the Court considered whether forced conscription into a guerrilla group—or suffering retaliation for resisting recruitment—is sufficient by itself to establish persecution on account of political opinion. The Court concluded that it is not, because "[e]ven a person who supports a guerrilla movement might resist recruitment for a variety of [non-political] reasons." 502 U.S. at 482. The Court ruled that an applicant seeking asylum must show that the guerrilla group is motivated by his political opinion, rather than by a desire to fill its ranks. *Ibid.* Finally, the Court held that although an applicant need not present direct proof of the persecutor's motive, "since the statute makes motive critical, he must provide *some* evidence of it, direct or circumstantial." *Id.* at 483. Importantly, the Court stressed that Board decisions are entitled to great deference, and that to obtain judicial reversal of a Board decision, an applicant "must show that the evidence he presented was so compelling that no reason-

able factfinder could fail to find the requisite fear of persecution." *Id.* at 483-484.

Consistent with *Elias-Zacarias*, the Fourth Circuit held in this case that it "[could not] reverse the Board unless the evidence cited by [petitioner] is such that no reasonable fact finder could fail to find that FRAPH imputed pro-Aristide political opinions to [petitioner], and sought to persecute him on account of those political opinions." Pet. App. 14a. The court acknowledged that petitioner offered evidence that FRAPH tended to view students of petitioner's education level as Aristide supporters, but ruled that that evidence "is simply too general to compel such a finding [of persecution]." *Id.* at 13a-14a. The court continued: "In the absence of evidence that FRAPH sought to swell its ranks solely with pro-Aristide recruits, the Board drew a permissible inference that FRAPH conducted recruitment efforts without regard to the actual political opinions of a potential individual recruit. For the same reason, the evidence does not compel a finding that FRAPH's subsequent actions with respect to [petitioner] were on account of [his] political opinions rather than simply his unwillingness to join FRAPH." *Id.* at 14a.

Petitioner contends that the court of appeals required him to present "specific and direct evidence of the FRAPH's motivation" (Pet. 13), and that such a requirement conflicts with *Elias-Zacarias*'s holding that either direct or circumstantial evidence is sufficient. 502 U.S. at 483. Specifically, petitioner argues that by asking him to present evidence that FRAPH "sought to swell its ranks *solely* with pro-Aristide recruits," the Fourth Circuit required specific (and, presumably, direct) proof of FRAPH's motives. Pet. 13-14. Petitioner misreads the court of appeals' opinion. The court of appeals was commenting about a lack of

evidence of any sort compelling reversal of the Board when it commented on the "absence of evidence that FRAPH sought to swell its ranks solely with pro-Aristide recruits." Pet. App. 14a. The Fourth Circuit did not hold that petitioner was required to present "direct" evidence of FRAPH's motives for recruiting him in particular. Rather, the court carefully followed the Court's guidance in *Elias-Zacarias* and considered petitioner's circumstantial evidence.

Petitioner complains (Pet. 15) that the Fourth Circuit should have given more weight to third-party reports indicating that FRAPH often imputed pro-Aristide sentiments to people like petitioner, and thus should have inferred that petitioner was forcibly recruited based on that imputed political opinion. However, "petitioner must prove something more than violence plus disparity of views." *Sangha*, 103 F.3d at 1487. And *Elias-Zacarias* makes clear that petitioner must do more than prove that he had a political opinion—he must offer evidence that FRAPH "will persecute him *because* of that political opinion, rather than because of his refusal to fight with them." 502 U.S. at 483.

Furthermore, even if the evidence were adequate to support the conclusion he would draw, petitioner would not be entitled to reversal. Given the applicable deferential standard of review, the evidence must "not only *support[]* that conclusion, but *compel[]* it." *Elias-Zacarias*, 502 U.S. at 481 n.1; see also *id.* at 483-484 (petitioner "must show that the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution."). Here, the court of appeals properly held that the evidence—including the circumstantial evidence—did not compel a finding that FRAPH's recruitment efforts were motivated by petitioner's political opinion rather

than by a general desire to fill its ranks. See *id.* at 483 (finding failure to establish requisite motivation "with the degree of clarity necessary to permit reversal of a [Board] finding to the contrary.").

Petitioner suggests that the decision below conflicts with *Sangha*, *supra*, and *Balasubramanrim*, *supra*. In *Sangha*, the Ninth Circuit held that a finding of political persecution could be justified "when there is no other logical reason for the persecution." 103 F.3d at 1490. Presumably, petitioner believes that there is no logical reason for FRAPH to seek his recruitment other than because of his political opinion. This Court rejected that exact conclusion in *Elias-Zacarias*. See 502 U.S. at 482 (guerrilla groups may forcibly recruit members for the purpose of filling their ranks). The Third Circuit's decision in *Balasubramanrim* likewise does not conflict with the Fourth Circuit's decision in this case. Petitioner relies on a footnote in *Balasubramanrim* stating that "persecution may be on account of a political opinion the applicant actually holds or on account of one the foreign government has imputed to him." Pet. 10 (citing 143 F.3d at 164-165 n.10). But the court in this case did not reject the concept of "imputed" political opinion. Moreover, even the court in *Balasubramanrim* noted that an applicant to whom a political opinion is imputed must show that the group at issue targeted him on account of that imputed opinion. See 143 F.3d at 164-165 n.10.

The court of appeals' decision is consistent with *Elias-Zacarias* and subsequent circuit authority, since it did not exclude circumstantial evidence and it applied the proper, deferential standard of review to the Board's decision. Further review by this Court therefore is unwarranted.

2. Petitioner argues that the court of appeals disregarded record evidence and required him to disprove all adverse inferences that could be drawn. Pet. 13-15. Determining whether petitioner produced sufficient record evidence of FRAPH's motivation involves the sifting and weighing of evidence, and does not present a novel or unsettled question of federal law worthy of this Court's review. In any event, petitioner is mistaken; the court of appeals did consider the third-party reports. See Pet. App. 13a. The Fourth Circuit, moreover, did not require petitioner to disprove all adverse inferences; it merely held that he did not present compelling evidence that would allow it to reverse the "permissible inference" drawn by the Board. *Id.* at 14a.

3. According to petitioner, the court of appeals' supposed requirements that "all inferences must be drawn against the applicant," and that he must produce "direct evidence" to satisfy his burden, conflict with "the international norms as expressed by the UNHCR" *Handbook*. Pet. 16, 17. Petitioner's argument fails on several grounds. First, as explained above, the court of appeals did not create a "requirement of direct evidence." Pet. 17. Also, the court did not hold that all inferences must be drawn against the applicant. Instead, the court simply held that petitioner failed to offer evidence that would suffice to compel a reversal of either the Board's inferences or its ultimate conclusion.

The court of appeals is not bound by the UNHCR *Handbook* in any event. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987) ("We do not suggest, of course, that the explanation in the U.N. Handbook has the force of law or in any way binds the INS with reference to the asylum provisions of § 208(a). Indeed, the *Handbook* itself disclaims such force, explaining that 'the determination of refugee status under the

1951 Convention and the 1967 Protocol . . . is incumbent upon the Contracting State in whose territory the refugee finds himself.'"). Here, the court of appeals properly relied on the holding of *Elias-Zacarias*, 502 U.S. at 482-483, that an alien must demonstrate that the persecution he faced was on account of his political opinion, rather than on account of a guerrilla group's general desire to fill its ranks. Pet. App. 11a-14a. To the extent the UNHCR *Handbook* contradicts that holding, it must be disregarded. See *Cardoza-Fonseca*, 480 U.S. at 439 n.22.[2]

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[2] As the court of appeals noted in its decision, petitioner is a beneficiary of the directive signed by President Clinton on December 23, 1997, deferring for one year the enforced departure of certain Haitians who were paroled into the United States or applied for asylum in the United States prior to December 31, 1995. Pet. App. 15a n.7. Also, on October 21, 1998, President Clinton signed into law the Omnibus Budget Bill, Pub. L. No. 105-277. See 144 Cong. Rec. H11,044, H11,190 (daily ed. Oct. 19, 1998). Title IX, 144 Cong. Rec. H11,190-H11,191, entitled "The Haitian Refugee Immigration Fairness Act of 1998" (HRIFA), establishes procedures for granting amnesty to certain Haitians who can prove, *inter alia*, that they are otherwise admissible to the United States. The new law grants an exception from several grounds of inadmissibility, including one that is applicable to petitioner, Immigration and Nationality Act (INA), § 212(a)(7)(A), 8 U.S.C. 1182(a)(7)(A). 144 Cong. Rec. H11,044, H11,190. Petitioner does not appear to be eligible for HRIFA relief, however, because he is also inadmissible under INA § 212(a)(6)(C)(i), 8 U.S.C. 1182(a)(6)(c)(i) (Supp. IV 1992).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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