No. 05-852

In the Supreme Court of the United States

GURPREET KHURANA, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

DONALD E. KEENER
ALISON MARIE IGOE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals properly sustained the immigration judge's finding that petitioner's asylum application was frivolous based on determinations that petitioner fabricated her testimony and that the fabrication was material to her claim.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and regulation:

In the Supreme Court of the United States

No. 05-852

GURPREET KHURANA, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not published in the *Federal Reporter*, but is *reprinted in* 134 F. App'x 147. The decisions of the Board of Immigration Appeals (Pet. App. 5-8) and the immigration judge (Pet. App. 9-20) are unreported.

JURISDICTION

The court of appeals entered its judgment on June 8, 2005. A petition for rehearing was denied on September 30, 2005 (Pet. App. 21). The petition for a writ of certiorari was filed on December 29, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act provides that, "[i]f the Attorney General determines that an alien

has knowingly made a frivolous application for asylum * * *, the alien shall be permanently ineligible for any benefits under" the Act's provisions. 8 U.S.C. 1158(d)(6).[1] By regulation, the Attorney General has determined that an application will be deemed "frivolous," within the meaning of Section 1158(d)(6), if the immigration judge or the Board of Immigration Appeals (Board) "specifically finds that the alien knowingly filed a frivolous asylum application." 8 C.F.R. 1208.20. An asylum application is "frivolous" if "any of its material elements is deliberately fabricated." *Ibid.* The regulation further provides that a finding of frivolousness shall be made only if, in the view of the immigration judge or the Board, the alien has had a "sufficient opportunity to account for any discrepancies or implausible aspects of the claim." *Ibid.*

2. Petitioner is a native and citizen of India who has made numerous entries into the United States. Pet. App. 10-11. According to petitioner, "she was never politically active in India." *Id.* at 11. She claimed, however, that after participating in a Sikh rally on March 30, 1999, she was arrested by Indian police and detained until April 2, 1999. Petitioner alleged that, during her detention, she was physically abused and raped. *Id.* at 11-12. Petitioner further alleged that the police visited her house on April 13, 1999, and three days later she left for the United States. She testified that, after arriving in the United States, she lived with a friend to whom she was later married. *Id.* at 12.

Petitioner returned to India in August 2000 and again in March 2001. Pet. App. 12-13. She testified that

---

[1] A finding of frivolousness does not preclude the alien from seeking withholding of removal, however. 8 C.F.R. 1208.20.

she was arrested and beaten on April 13, 2001, following another Sikh rally. *Id.* at 13. Four days later, petitioner arrived in the United States on a visitor's visa. Petitioner testified that she was married eight days later at an elaborate wedding ceremony. She submitted photographs of her wedding to the immigration judge. *Ibid.*

3. When petitioner overstayed her visa, the Immigration and Naturalization Service commenced removal proceedings against her.[2] Petitioner applied for asylum and withholding of removal, claiming persecution on account of her religion, political opinion, and membership in a particular social group. Pet. App. 9-10. The immigration judge denied relief on the ground that petitioner's asylum application was not credible and was frivolous. *Id.* at 9-20.

In evaluating petitioner's claim, the immigration judge expressly took into account "the rationality, internal consistency and inherent persuasiveness of her testimony," the materiality of any discrepancies and inconsistencies, and petitioner's explanations for problems with her evidence. Pet. App. 14. The immigration judge identified two problems with petitioner's testimony that he considered to be "fatal" to her case. *Ibid.*

First, petitioner's claim that she was detained and abused by Indian police from March 30 to April 2, 1999, was irreconcilable with the evidence from her passport, which had "multiple stamps" demonstrating that she was in the United States from March 20, 1999, until April 2, 1999. Pet. App. 14-15. The immigration judge further noted that petitioner's passport showed that she

---

[2] The Immigration and Naturalization Service's immigration-enforcement functions have since been transferred to United States Immigration and Customs Enforcement in the Department of Homeland Security. See 6 U.S.C. 251 (Supp. II 2002).

had voluntarily returned to India on April 2, 1999, at the very time she claimed to be fleeing that country based on persecution. *Ibid.* When given the opportunity to explain the discrepancy, petitioner insisted that her testimony was accurate. *Id.* at 15. The immigration judge "d[id] not find th[at] explanation convincing" in light of the undisputed contents of the passport. *Ibid.* The immigration judge further found that this flaw in the evidence was "material" because "this is the most single serious element of her claim for asylum." *Ibid.*

Second, the immigration judge found that petitioner's testimony that she returned to the United States on April 13, 2001, "in fear of her life" was not credible because of the elaborate wedding ceremony that took place within days of her return. Pet. App. 13. The immigration judge reasoned that "a wedding on the scale depicted in [petitioner's] photographs," *id.* at 16—with 150 people in attendance, *id.* at 15—"is very unlikely to have been put together in such a short time," and in the wake of fleeing for one's life, *id.* at 16.

The immigration judge further noted that petitioner's responses to questioning about the wedding arrangements were "evasive," "vague and disjointed." Pet. App. 15. She insisted that the 150 guests were not guests, but were individuals who happened to be at the temple on Sunday because a common meal was served. *Ibid.* When petitioner was informed that her wedding date fell on a Wednesday, rather than a Sunday, the only explanation that she offered was that "she had been thinking of somebody else." *Ibid.* The immigration judge found that explanation unconvincing, and concluded that the evidence demonstrated that "the wedding had been planned some time in advance and [petitioner] had previously planned to leave India when she

did" because of her impending wedding, rather than because of any fear of persecution. *Id.* at 16. Because the flaw in petitioner's testimony went to the basis for her departure from India, the immigration judge found the inconsistency to be material and "serious[]." *Id.* at 15, 16.

The immigration judge accordingly denied petitioner relief on the ground that her application was not credible. Pet. App. 16-17. The immigration judge also separately ruled that her application was "frivolous," under 8 U.S.C. 1158(d)(6). In so holding, the immigration judge emphasized that a frivolousness determination must be based upon a finding that petitioner "knowingly" filed and pursued an application that "contains statements or responses that are deliberately fabricated." Pet. App. 18. The immigration judge then found that those requirements were satisfied by the same evidence that established petitioner's application to be noncredible, citing both the timing of the re-entry and wedding as well as the conflict in timing between the claimed persecution and petitioner's presence in the United States. *Ibid.*; see *id.* at 20 (petitioner "has given false testimony for the purpose of obtaining * * * benefits under this Act"). Finally, the immigration judge noted that, although petitioner was given the opportunity to explain the problems in her testimony, she "[had] not done so convincingly." *Id.* at 18.

4. Petitioner appealed to the Board, but challenged only the immigration judge's credibility determination. Petitioner did not appeal the immigration judge's finding that her application was frivolous. Pet. App. 6, 7 n.1, The Board affirmed, *id.* at 5-8, holding that

> [t]he record reflects that the shortcomings and inconsistencies cited by the Immigration Judge are present in the record; that such shortcomings and inconsistencies provide specific and cogent reasons to conclude that the respondent's claim is not credible; and that the respondent on appeal has not provided an adequate explanation for these discrepancies and shortcomings.

Id. at 6. In particular, the Board noted that petitioner's claim that she was detained and abused by Indian police at a time when she was already in the United States "is an extremely substantial discrepancy which goes to the substance of her claim." *Id.* at 7. The Board also found it "difficult to reconcile the respondent's return to India with her claimed fear of persecution." *Ibid.*

5. The court of appeals unanimously affirmed in an unpublished decision. Pet. App. 1-3. The court did not address the government's argument that petitioner's challenge to the frivolousness ruling had been waived by her failure to appeal that determination to the Board. Gov't C.A. Br. 20-22. The court did conclude, however, that substantial evidence in the record supported the immigration judge's finding that petitioner had filed a "frivolous application" that "contain[ed] deliberate fabrications," within the meaning of 8 U.S.C. 1158(d)(6) and 8 C.F.R. 1208.20. Pet. App. 2. The court also held that the immigration judge had afforded petitioner "ample opportunity to explain the several inconsistencies that led to the finding of frivolousness," but that petitioner had not satisfactorily done so. *Id.* at 3.

ARGUMENT

Petitioner argues (Pet. 6-14) that this Court should grant review to address whether a determination of frivolousness under 8 U.S.C. 1158(d)(6) can be made in the absence of findings that the alien "knowingly or deliberately fabricated a material fact," Pet. 6 (emphasis omitted). That claim does not warrant review for three reasons.

First, there is a procedural barrier to this Court's review of the question presented. Petitioner did not appeal the immigration judge's frivolousness determination to the Board or, more particularly, argue to the Board that the immigration judge had failed to make the findings required by the statute and regulation. See Pet. App. 7 n.1. That failure to exhaust the administrative remedies available to review the immigration judge's frivolousness determination bars the court of appeals and, in turn, this Court from considering the question presented. The Immigration and Nationality Act permits judicial review of a final order of removal "only if," *inter alia*, "the alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. 1252(d)1. Even apart from that statutory bar, petitioner's waiver of the claim would provide an independent basis for sustaining the court of appeals' judgment, and would pretermit resolution of the question presented.

Second, the record in this case does not present the question petitioner raises. Petitioner seeks this Court's review (Pet. 6) of whether a finding of frivolousness can be made "without finding that the alien *knowingly or deliberately fabricated* a material fact." In this case, the court of appeals did not eschew such findings; it af-

firmed because substantial evidence supported the "[immigration judge]'s finding that [petitioner] filed a frivolous application *containing deliberate fabrications*." Pet. App. 2 (emphasis added). The immigration judge, in turn, specifically noted that he was required to find, *inter alia*, that petitioner's application contained "deliberately fabricated" information, and he concluded that the record provided a "proper basis for finding" that legal standard to be met. *Id.* at 18; see *id.* at 20 (petitioner "has given false testimony for the purpose of obtaining * * * benefits under this Act").

Petitioner's insistence (Pet. 7) that this case concerns "purely innocent misstatements of fact" overlooks that petitioner never attempted to explain to the immigration judge that her repeatedly reaffirmed testimony that she was detained and abused by Indian guards during the same period in time that her passport places her in the United States (see Pet. App. 15) was actually a "purely innocent misstatement[] of fact," nor does she explain what "purely innocent misstatements of fact" underlay the attendance of 150 people at her elaborate wedding just days after she alleges she abruptly and unexpectedly fled India in fear for her life. In any event, the court of appeals' decision neither holds nor suggests that a frivolousness determination can be made based on innocent misstatements of fact or, more particularly, without a finding that the alien knowingly or deliberately fabricated material information.

Third, there is no conflict in the circuits. Petitioner notes (Pet. 6-11) that a number of circuits have sustained findings by immigration judges and the Board that asylum applications were frivolous. See *Selami* v. *Gonzales*, 423 F.3d 621 (6th Cir. 2005); *Efe* v. *Ashcroft*, 293 F.3d 899 (5th Cir. 2002); *Barreto-Claro* v. *United*

States Attorney General, 275 F.3d 1334 (11th Cir. 2001). The court of appeals in this case applied the same legal standard as those courts and its decision is in full accord with their rulings. See *Selami*, 423 F.3d at 624 (upholding finding of frivolousness based on the alien's submission of a fraudulent newspaper article intended to corroborate his testimony); *Efe*, 293 F.3d at 908 (frivolousness determination upheld based on the alien's having "gone back and forth with the facts and misrepresented his case several times," while failing to clarify his contradictory testimony); *Barreto-Claro*, 275 F.3d at 1339 (frivolousness determination based on a false statement in the alien's application, which he compounded with false testimony about how he came to the United States).

Petitioner's reliance (Pet. 6-7) on *Muhanna* v. *Gonzales*, 399 F.3d 582 (3d Cir. 2005), is misplaced. In that case, the Third Circuit reversed an immigration judge's determination of frivolousness that rested entirely on an inconsistency between the alien's testimony and asylum application. *Id.* at 586. The court stressed that a finding of frivolousness required more than a finding that the testimony was not credible, and required a full hearing on the applicant's underlying asylum claim. *Id.* at 588. The Third Circuit reversed because the immigration judge's truncation of the hearing following a preliminary determination that the alien was not credible precluded an assessment of whether the inconsistency was a "material element" of the asylum application. *Ibid.* The Third Circuit further found that the alien's explanation for the inconsistent testimony was plausible. *Ibid.* Here, by contrast, the court of appeals upheld the immigration judge's distinct finding, separate from his credibility ruling and after a full hearing, that the numerous

inconsistencies in petitioner's testimony were both deliberately fabricated and material. Pet. App. 2, 17-18, 20.

In the end, petitioner's argument for this Court's review rests not upon any new or different legal standard applied by the court of appeals, but upon petitioner's disagreement with that court's application of the law to the facts of her case. That record-bound question does not merits this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
ALISON MARIE IGOE
Attorneys

APRIL 2006