No. 09-912

In the Supreme Court of the United States

ISSAM MOHAMAD GHAZALI

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Board of Immigration Appeals reasonably interpreted 8 C.F.R. 1208.20 to mean that deliberate fabrications in an asylum application can be "material," and thus the basis for a frivolousness finding, even when the application is not timely filed.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 585 F.3d 289. The decisions of the Board of Immigration Appeals (Pet. App. 16a-18a, 40a-46a) and the immigration judge (Pet. App. 19a-37a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 13a) was entered on October 29, 2009. The petition for a writ of certiorari was filed on January 25, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the Secretary of Homeland Security or the Attorney General may, in her

or his discretion, grant asylum to an alien who demonstrates that he is a "refugee." 8 U.S.C. 1158(b)(1)(A). An alien who wishes to be granted asylum must file his application within one year of arriving in the United States, 8 U.S.C. 1158(a)(2)(B), unless he can establish "changed circumstances which materially affect the applicant's eligibility for asylum" or exceptional circumstances excusing his delay in filing. 8 U.S.C. 1158(a)(2)(D).[1]

An applicant for asylum bears the burden of demonstrating that he is eligible for that form of relief. 8 U.S.C. 1158(b)(1)(B)(i). If the applicant does not carry that burden and if the immigration judge (IJ) determines that the alien knowingly filed a "frivolous" asylum application, the alien "shall be permanently ineligible" for any discretionary form of relief under the INA. 8 U.S.C. 1158(d)(6); cf. 8 C.F.R. 1208.20 (bar does not apply to withholding of removal). The relevant regulation provides in relevant part that "an asylum application is frivolous if any of its material elements is deliberately fabricated." *Ibid.*; see *ibid.* ("Such finding shall only be made if the immigration judge or the [Board of Immigration Appeals (BIA)] is satisfied that the applicant, during the course of the proceedings, has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim.").

2. Petitioner is a native and citizen of Lebanon. See Pet. App. 20a. He entered the United States in 1999 on

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[1] An applicant who is ineligible for asylum because of an untimely filed application remains eligible for withholding of removal, see 8 U.S.C. 1231(b)(3)(A), and protection under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. See 8 C.F.R. 1208.13(c)(1), 1208.16(c).

a non-immigrant visa that entitled him to stay only until 2001. *Id.* at 2a. He remained past that date, and the Department of Homeland Security initiated removal proceedings against him by issuing a Notice to Appear in October 2003. *Id.* at 20a. Petitioner subsequently filed an application for asylum. *Ibid.*

On September 20, 2006, following a hearing on petitioner's asylum application, an IJ denied his application on three alternative grounds. Pet. App. 24a-27a. First, the IJ found that the application was untimely because it was filed more than a year after petitioner's arrival in the United States and that petitioner had not demonstrated changed circumstances in Lebanon that would justify his late filing. *Id.* at 24a-25a. Second, the IJ found that the application was barred because petitioner had previously been granted asylum in Switzerland and had been "firmly resettled" there. *Id.* at 26a. Third, the IJ denied the application on the merits, finding that petitioner had not carried his burden of establishing that he was a refugee for purposes of the INA. See *id.* at 27a.

The IJ also found that petitioner had made deliberate falsehoods to the court and that his application was thus frivolous. See Pet. App. 27a-36a. The IJ based this finding on two material misrepresentations. First, petitioner testified that he was forced to leave his town in Lebanon after members of Hezbollah, who he said targeted him because of his perceived affiliation with Israel and a group called the South Lebanese Army, came to his house and engaged in a two-hour gun battle with petitioner and his family members. *Id.* at 30a-31a. Petitioner's brother testified and gave a different account of this incident; for example, the brother testified that there was no gun battle. *Id.* at 34a-35a. The contradic-

tions led the IJ to conclude that "this incident absolutely did not happen" and that petitioner "made [it] up out of nothing." *Id.* at 31a.

Second, petitioner testified that he had not returned to Lebanon between his departure in 1988 and 1998 (when he returned for approximately a year) because of his fear of persecution by Hezbollah. Pet App. 29a, 32a, 34a. His passport, however, indicated that he had returned in 1992 and in 1994. *Id.* at 33a. When confronted with his passport, petitioner acknowledged the visits and admitted that his prior testimony had been false. *Id.* at 34a.

On April 17, 2008, the BIA dismissed petitioner's appeal, agreeing with all three bases for the IJ's decision, as well as the IJ's frivolousness finding. Pet. App. 40a-45a. On August 29, 2009, the Board denied petitioner's motion to reconsider its affirmance of the IJ's finding that he filed a frivolous asylum application. *Id.* at 16a. As an initial matter, the BIA found no error in its previous determination that petitioner "deliberately fabricated elements of his asylum application." *Id.* at 17a.

The BIA also declined petitioner's request that it reconsider its decision in light of *Luciana* v. *Attorney General of the United States*, 502 F.3d 273 (3d Cir. 2007), which held that the BIA's regulations did not permit a frivolousness finding for an untimely asylum application. Pet. App. 17a. The BIA said it "disagree[d]" with *Luciana*; it could "find nothing in the statutory or regulatory schemes that would divest an [IJ] of the authority to make a finding of frivolousness on an asylum application that was also determined to be untimely or otherwise subject to a bar." *Id.* at 18a (citing 8 U.S.C. 1229a(a)(1) and (3); 8 C.F.R. 1208.20). In addition, the

BIA noted that such a rule "could conceivably allow an alien to file an untimely application for asylum that contained deliberately fabricated material elements because there would be no penalties for doing so." *Ibid.* (citing *Mingkid* v. *United States Att'y Gen.*, 468 F.3d 763, 768 (11th Cir. 2006)). The BIA found no indication that Congress would have intended such a result, "particularly since the fabricated material element could also influence a grant of withholding of removal or protection under the Convention Against Torture." *Ibid.*

3. Petitioner filed a petition for review with the court of appeals. On October 29, 2009, the court of appeals denied the petition for review. Pet. App. 1a-12a. The court determined that the IJ's finding that the asylum application was time-barred did not preclude the IJ from also finding that the asylum application was frivolous. *Id.* at 5a. The court agreed with the BIA that "[n]othing in the statute says that an [IJ] may enter a frivolousness finding only when the application is timely filed or otherwise free of statutory bars." *Id.* at 5a-6a (citing 8 U.S.C. 1158(d)(6)).

The court of appeals explained that the prohibition on untimely asylum applications was not "akin to a restriction on subject matter jurisdiction that might require the [IJ] to address the procedural and substantive claims in a prescribed sequence." Pet. App. 6a. An IJ was therefore free to deny an application on the merits without reaching the question of timeliness or, as in this case, to deny on alternative grounds. *Id.* at 6a-7a. The court of appeals likewise read the applicable regulation to authorize the IJ to make a frivolousness finding "regardless of whether the judge ultimately denies the application on statutory-bar or substantive grounds." *Id.* at 8a. The court noted that its conclusions were sup-

ported by "[p]rinciples of administrative deference," since they were consistent with the BIA's reasonable interpretation of the statute and the BIA's own regulations. *Id.* at 8a-9a.

The court of appeals noted that the Third Circuit had come to a different conclusion in *Luciana*. The Third Circuit in *Luciana*, however, did not have an agency decision on point before it, so it came to its conclusion without any consideration of "agency deference." Pet. App. 10a.

ARGUMENT

The court of appeals decision is correct. Petitioner claims there is a conflict between the decision below and the Third Circuit on the question whether 8 U.S.C. 1158(d)(6) permits an IJ to make a frivolousness finding in connection with an asylum application when that application is untimely filed. In fact, there is no split on that question, as the Third Circuit expressly declined to reach it. The two courts did interpret an implementing regulation differently, but the Third Circuit reached its conclusion in the absence of any interpretation of the regulation by the BIA. The court of appeals here properly deferred to that administrative interpretation, and the Third Circuit should do so as well in a future case. The disagreement between the circuits could thus prove ephemeral and does not merit this Court's attention.

1. The Sixth Circuit in this case properly deferred to the BIA's interpretation of both the INA and its implementing regulations. First, the court of appeals held that the BIA reasonably concluded that nothing in the INA "'divest[s] * * * authority to make a finding of frivolousness' on a statutorily barred application." Pet. App. 8a (brackets in original) (quoting *id.* at 18a); see *id.* at 5a; *Negusie* v. *Holder*, 129 S. Ct. 1159, 1163 (2009)

("[T]he BIA is entitled to deference in interpreting ambiguous provisions of the INA."). Second, the court of appeals concluded that the BIA had reasonably construed 8 C.F.R. 1208.20, which provides that "[a]n asylum application is frivolous if any of its *material* elements is deliberately fabricated." Pet App. 7a-8a (internal quotation marks omitted) (quoting 8 C.F.R. 1208.20). In the court of appeals' view, the BIA reasonably concluded that the statutory timeliness bar does not render a "deliberately fabricated element of the claim * * * not 'material' within the meaning of 8 C.F.R. § 1208.20 * * * [,] particularly since the fabricated material element could also influence a grant of withholding of removal or protection under the Convention Against Torture." *Id.* at 8a-9a (brackets in original) (citation omitted).

Contrary to petitioner's suggestion (Pet. 5), there is no disagreement between the Sixth Circuit and the Third Circuit on the first question—the meaning of the INA—because the Third Circuit expressly declined to reach it. In *Luciana* v. *Attorney General of the United States*, 502 F.3d 273 (2007), the Third Circuit granted a petition for review and vacated a frivolousness finding because it "conclude[d] as a matter of law that [the asylum applicant's] petition was not frivolous." *Id.* at 274. In reaching that conclusion, the Third Circuit said it "need not consider whether 8 U.S.C. § 1158 provides authority to issue a frivolousness finding in the context of an untimely asylum application." *Id.* at 280. There is therefore no circuit conflict on this question; the only two courts of appeals to address the question are in agreement. Compare Pet. App. 5a, 8a, with *Mingkid* v. *United States Att'y Gen.*, 468 F.3d 763, 768 (11th Cir. 2006) ("[W]e find nothing, jurisdictional or otherwise,

that divests an [IJ] of the authority to enter a ruling of frivolousness on an application for asylum that was found to be untimely.").

The difference in outcome between the Sixth and Third Circuits turns not on an interpretation of the INA but instead on the meaning of an implementing regulation. That regulation provides in relevant part that "an asylum application is frivolous if any of its *material* elements is deliberately fabricated." 8 C.F.R. 1208.20 (emphasis added). In *Luciana*, the Third Circuit held that the false statement at issue in that case was not "material" within the meaning of the regulation. 502 F.3d at 280 (Because the asylum application was untimely, "[e]vidence going to the merits of the application—such as [the applicant's] story about the stabbing—was of no consequence, no matter how persuasive or compelling it might have been."). When the Third Circuit reached this conclusion, there was no BIA decision on point and that court thus "did not consider a dispositive ground for embracing the [BIA's] decision—agency deference." Pet. App. 10a.

The Sixth Circuit in this case did consider the "dispositive ground" absent from the Third Circuit's decision in *Luciana*, because by the time of the Sixth Circuit's decision, the BIA had addressed the meaning of 8 C.F.R. 1208.20. See Pet. App. 17a-18a (explaining that a falsehood could be "material" for purposes of the regulation even if the application to which it pertained was untimely, and "disagree[ing]" with the Third Circuit's contrary view in *Luciana*). The question thus came to the Sixth Circuit in an entirely different posture than it had come to the Third Circuit.

Courts give "substantial deference to an agency's interpretation of its own regulations." *Thomas Jeffer-*

son Univ. v. *Shalala*, 512 U.S. 504, 512 (1994). "[T]he agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Ibid.* (internal quotation marks and citation omitted). While the Third Circuit reviewed the meaning of 8 C.F.R. 1208.20 "*de novo*," *Luciana*, 502 F.3d at 278-279, the Sixth Circuit correctly recognized that it was required to give "controlling weight" to the BIA's interpretation of its own regulation unless that interpretation was "plainly erroneous or inconsistent with the regulation," Pet. App. 9a (quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

Because the Third Circuit's decision was issued before the BIA's contrary interpretation of the regulation, that court will be required to revisit this issue if it is presented in the future. See *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982-983 (2005) (*Brand X*). As *Brand X* explained, an agency is permitted to interpret an ambiguous statute and come to a conclusion contrary to that of a court of appeals about its meaning. See *id.* at 982. When an agency does so, the court of appeals' only task in a subsequent case is to determine whether the agency's construction is reasonable; the court may not consider its own precedent on the best interpretation of the ambiguous statute controlling on that question. See *id.* at 982-983.[2] *Brand X* involved an agency's interpretation of a statute, but the same rule would clearly apply to an

[2] The only exception to this rule is when the prior court of appeals decision "hold[s] that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill." *Brand X*, 545 U.S. at 982-983. That exception would not apply here; the Third Circuit noted that "[n]either the relevant statute nor the regulations define material." *Luciana*, 502 F.3d at 280.

agency's construction of its own regulation, because the judicial deference owed the agency in that situation is even greater.

Because the Third Circuit has never decided whether the BIA's interpretation of its frivolousness regulation is reasonable, it has not passed on the question actually decided by the court of appeals below. When the Third Circuit has occasion to do so, that court may conclude that the BIA's interpretation is reasonable, thus eliminating any difference between the two circuits. Review by this Court of this question now would thus be premature.[3]

2. The court of appeals' decision is correct. The court properly deferred to the Board's reasonable interpretation of its own regulation to mean that a deliberate fabrication in an asylum application remains material under 8 C.F.R. 1208.20 even when that application is untimely. See Pet. App. 17a-18a (BIA); *id.* at 7a-9a (court of appeals). As an initial matter, the premise of the contrary view—that a false statement going to the merits of an untimely application for asylum is "of no consequence, no matter how persuasive or compelling it might have been," *Luciana*, 502 F.3d at 280—is wrong. Apart from the request for asylum, "the fabricated material element could * * * influence a grant of withholding of removal or protection under the Convention Against Torture." Pet. App. 18a; see *id.* at 8a-9a. Petitioner's fabrications thus had the capability of influencing the agency's action with respect to his other requests for relief.

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[3] Even if the Third Circuit ultimately found that the BIA's interpretation of the regulation is unreasonable (while again not reaching the statutory question), the split could be resolved by the agency, which could amend the regulation.

Moreover, the BIA's interpretation of the regulation would be reasonable even without the possible impact of a false statement on other grounds for relief. A rule prohibiting frivolousness findings when an asylum application fails for some other reason would "allow an alien to file an untimely application for asylum that contained deliberately fabricated material elements because there would be no penalties for doing so." Pet. App. 18a (citing *Mingkid*, 468 F.3d at 768). Additionally, there would be no logical stopping point to such a rule. "If the Third Circuit is right that a frivolousness finding is no longer 'material' once the [IJ] decides that it is time barred, the same would be true if the judge decided that the application failed on a distinct merits ground, whether related to the underlying frivolousness finding or not." *Id.* at 11a. "But [IJs] frequently offer a host of merits-related grounds for rejecting an asylum application, and they should be permitted to do so without compromising their authority to make a frivolousness finding when appropriate." *Ibid.* The result of a rule immunizing such applications from a frivolousness finding would be to increase the volume of frivolous applications. See *id.* at 25a.

Finally, the BIA's conclusion that a false statement in an untimely application for asylum can be "material" is consistent with the rule followed by courts in assessing materiality for purposes of the false statement statute, 18 U.S.C. 1001. See, *e.g.*, *United States* v. *Quirk*, 266 F.2d 26, 27 (3d Cir. 1959) (per curiam) ("[T]he wilful submission of the false document was * * * calculated to induce agency reliance or action, irrespective of whether actual favorable agency action was, for other reasons, impossible and so established the materiality of the submitted application.") (internal quotation marks and citation omitted); *United States* v. *Valdez*, 594 F.2d

725, 728-729 (9th Cir. 1979) (same); *United States* v. *Edgar*, 82 F.3d 499, 510 (1st Cir.) ("Edgar argues that * * * because the forms were filed late, his failure to set forth his self-employment was not material. However, the standard is not whether there was actual influence, but whether it would have a tendency to influence."), cert. denied, 519 U.S. 870 (1996).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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