IN THE SUPREME COURT OF THE UNITED STATES

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No. 19A-_____

WILLIAM P. BARR, ATTORNEY GENERAL,
APPLICANT

v.

MING DAI

_____

APPLICATION FOR AN EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Pursuant to Rules 13 and 30.2 of the Rules of this Court, the Solicitor General, on behalf of the Attorney General, respectfully requests a 30-day extension of time, to and including February 19, 2020, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit this case. The opinion of the court of appeals (App., infra, 1a-36a) is reported at 884 F.3d 858. The court of appeals entered its judgment on March 8, 2018, and denied the government's petition for rehearing on October 22, 2019 (App., infra, 56a-78a). Therefore, unless extended, the time within which to file a petition for a writ of certiorari will expire on January 20, 2020. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1).

1. This case concerns the standards that apply when a court of appeals reviews a decision of the Board of Immigration Appeals (Board) denying an application for asylum.

a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq., authorizes the Attorney General and the Secretary of Homeland Security to grant asylum to an alien who has been persecuted or has "a well-founded fear of persecution" by government actors in his home country. 8 U.S.C. 1101(a)(42)(A), 1158(b)(1)(A). Under the INA, as amended by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302, the testimony of an asylum applicant "may be sufficient" to sustain his burden of proving his eligibility, "but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee." 8 U.S.C. 1158(b)(1)(B)(ii). The immigration judge "may weigh the credible testimony along with other evidence of record" to determine whether the applicant has demonstrated eligibility for asylum. Ibid.

When reviewing the denial of an asylum application, a court of appeals must treat "the administrative findings of fact [as] conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. 1252(b)(4)(B); see INS v. Elias-Zacarias, 502 U.S. 478, 483-484 (1992) (a petitioner who "seeks to obtain judicial reversal" of a finding that he was

ineligible for asylum "must show that the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution"). The INA adds that "no presumption of credibility" may be used in assessing the applicant's testimony, but provides an exception: "if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal." 8 U.S.C. 1158(b)(1)(B)(iii).

b. Respondent Ming Dai is a native and citizen of China who entered the United States on a tourist visa in 2012. App., infra, 7a. Later that year, he filed an affirmative application for asylum. Ibid. Respondent claimed that in 2009, two months after his wife discovered that she was pregnant with their second child, family-planning officials and police came to his home to take his wife to have a forced abortion. Id. at 6a. According to respondent, he had a physical altercation with the police, who took him into custody for ten days. Ibid. Respondent claimed that when he arrived home after being released, he learned that his wife had been subjected to a forced abortion. Id. at 7a. Respondent also claimed that he was fired from his job as a result of resisting the family-planning officials. Ibid. After that, he departed for the United States. Ibid.

Respondent's application for asylum failed to disclose that his wife and daughter had traveled to the United States with him

in 2012 but had -- unlike him -- voluntarily returned to China several weeks later. App., infra, 64a (Callahan, J., dissenting from denial of rehearing en banc). The notes of the asylum officer who interviewed respondent in connection with his application likewise reflect that when respondent was asked whether his wife had ever traveled outside of China, respondent failed to disclose that his wife and daughter had accompanied him to the United States. Id. at 48a (amended dissent of Trott, J.). When respondent was asked to explain why he never disclosed that information, there was a long pause before respondent admitted he was afraid he would be asked to explain his family's return to China. Ibid. Respondent eventually told the asylum officer that the "real story" was that his daughter returned to China to go to school and his wife returned to her job, while he stayed in the United States to work. Ibid. Respondent's affirmative asylum application was denied. Id. at 7a (majority opinion).

c. Respondent was then placed in removal proceedings, where he again sought asylum and also sought withholding of removal. App., infra, 7a. During direct testimony before the immigration judge, respondent again did not initially disclose that his wife and daughter had accompanied him to the United States. Id. at 64a (Callahan, J., dissenting from denial of rehearing en banc). Respondent was questioned during cross-examination about his testimony to the asylum officer, and he confirmed that the contents

of the asylum officer's notes were accurate. Id. at 44a-45a (amended dissent of Trott, J.). Respondent then admitted that he remained in the United States while his family returned to China because he did not have a job in China and was seeking employment in the United States. Id. at 46a-47a.

The immigration judge denied respondent's claim for asylum, noting "concern with regard to [respondent's] testimony" and concluding that he had "failed to meet his burden of proving eligibility for asylum." App., infra, 58a (amended dissent of Trott, J.) (citation and emphasis omitted).

d. The Board "adopt[ed] and affirm[ed] the Immigration Judge's decision," concluding that respondent's "family voluntarily returning" and respondent's "not being truthful about it is detrimental to his claim and is significant to his burden of proof." App., infra, 61a-62a (amended dissent of Trott, J.) (citation and emphasis omitted). The Board determined that "the Immigration Judge need not have made an explicit adverse credibility finding to nevertheless determine that the respondent did not meet his burden of proving his asylum claim." Id. at 62a.

2. A divided panel of the court of appeals reversed. See App., infra, 1a-18a.

a. In an opinion by Judge Reinhardt, the court of appeals held that neither the immigration judge nor the Board had made an explicit finding that respondent's testimony was not credible, and

that "in the absence of an adverse credibility finding by the [immigration judge] or the [Board]," an asylum applicant's testimony must be "deemed credible." App., infra, 11a. The court acknowledged (ibid.) that Congress, in the REAL ID Act, provided for a "rebuttable presumption of credibility on appeal" when "no adverse credibility determination is explicitly made," 8 U.S.C. 1158(b)(1)(B)(iii) (emphasis added). But the court concluded that this rebuttable presumption applies only "on appeal" to the Board, and does not apply in a petition for review before the court of appeals. App., infra, 11a. It therefore concluded that under circuit precedent that predated enactment of Section 1158(b)(1)(B)(iii), the absence of an explicit adverse credibility finding meant that the court was required to treat respondent's testimony as credible, id. at 11a-12a, and could not attach significance to "concealment" by respondent that might in other circumstances have "undermine[d] [respondent's] credibility." Id. at 16a. Having thus deemed respondent's testimony credible, the court held that the testimony was sufficient to establish respondent's eligibility for asylum, and remanded to the agency for the discretionary determination of whether to actually grant asylum. Id. at 16a-17a. The court further determined that the same analysis that led it to conclude that respondent was eligible for asylum also established that respondent was entitled to

withholding of removal, and instructed the agency to grant respondent withholding of removal on remand. Id. at 17a.

b. Judge Trott dissented.[1] App., infra, 37a-55a. He criticized the majority for employing what he referred to as a "meritless irrebuttable presumption of credibility." Id. at 37a. In his view, "[t]he sole issue should be whether [respondent's] unedited presentation compels the conclusion that he carried his burden," such that "no reasonable factfinder could fail to find his evidence conclusive." Ibid. Pointing to the numerous inconsistencies in respondent's asylum application and statements that had been identified by the immigration judge and the Board, Judge Trott concluded that this was not the case here, and that the majority's contrary ruling was "another example of [the Ninth Circuit's] intransigence" in immigration cases. Id. at 41a.

3. The government's petitions for rehearing and rehearing en banc were denied over several dissents. App., infra, 56a-57a.

a. Judge Trott, who as a senior judge could not vote on the call for rehearing, issued a statement respecting the denial of rehearing en banc (joined by Judge R. Nelson) that reiterated many of the points from his dissent. App., infra, 57a-62a.

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[1] Judge Trott amended his dissent in February 2019, while the government's petitions for rehearing and rehearing en banc remained pending. See App., infra, 37a. This application refers to Judge Trott's amended dissent.

b. Judge Callahan issued a dissent from denial of rehearing en banc joined by Judges Bybee, Bea, M. Smith, Ikuta, Bennett, R. Nelson, Bade, Collins, and Lee. App., infra, 62a-71a.[2] She wrote that the majority's approach "ignores the realities of factfinding" in favor of a "prior errant rule" employing an irrebuttable credibility presumption "that Congress abrogated" in the Real ID Act. Id. at 62a. Judge Callahan explained that "the panel's decision squarely conflicts with our own precedent and every other circuit to address the issue." Id. at 68a (discussing, inter alia, Gutierrez-Orozco v. Lynch, 810 F.3d 1243 (10th Cir. 2016); Doe v. Holder, 651 F.3d 824 (8th Cir. 2011); and Kho v. Keisler, 505 F.3d 50 (1st Cir. 2007)).

c. Judge Collins also issued a dissent from denial of rehearing en banc, joined by Judges Bybee, Bea, Ikuta, Bennett, R. Nelson, and Bade. App., infra, 71a-78a. Judge Collins agreed with the criticisms in Judge Callahan's dissent, and added that "the problems with the panel majority's opinion run even deeper" by requiring that "unless the agency has made an explicit finding that the applicant's testimony is not credible, this court will conclusively presume that testimony to be credible." Id. at 71a.

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[2] Senior Judges O'Scannlain and Trott indicated that they agreed with the views expressed in Judge Callahan's dissent from denial of rehearing en banc. See App., infra, 71a.

That approach, Judge Collins wrote, has a "truth-distorting effect" and "reinforces a circuit split." Id. at 71a-72a.

4. The Solicitor General has not yet determined whether to file a petition for a writ of certiorari in this case. The additional time sought in this application is needed for further consultation within the government and to assess the legal and practical impact of the court of appeals' ruling. Additional time is also needed, if a petition is authorized, to permit its preparation and printing.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

JANUARY 2020