TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of:	)	
	)	
IMMIGRATION AND NATURALIZATION SERVICE,	)	
	)	
Petitioners,	)	
	)	
v.	)	No. 86-1128
	)	
ASSIBI ABUDU.	)	

Pages: 1 through 47

Place: Washington, D.C.

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IMMIGRATION AND NATURALIZATION SERVICE :

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ASSIBI ABUDU :

Washington, D.C.

Tuesday, December 1, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:08 p.m.

APPEARANCES:

ROBERT H. KLONOFF, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioners.

DOROTHY A. HARPER, ESQ., Los Angeles, California: on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear argument first this morning in No. 86-1128, Immigration and Naturalization Service versus Assisi Abudu.

Mr. Klonoff, you may proceed whenever you are ready.

ORAL ARGUMENT OF ROBERT H. KLONOFF, ESQ.

ON BEHALF OF THE PETITIONER

MR. KLONOFF: Thank you. Mr. Chief Justice, and may it please the Court, this case raises the issue of when a reviewing court can compel the immigration authorities to reopen a deportation proceeding for an evidentiary hearing after the alien has already been given a hearing and after an order of deportation has been entered.

The context in which the issue arises is as follows. Respondent has been here illegally for almost 12 years, since 1976. His deportation hearing was held in 1982, and involved five appearances before the immigration judge between 1981 and 1982. Respondent, who was represented by competent counsel at the hearing, declined to seek asylum despite specific questioning by the immigration judge on the issue.

In 1985, respondent filed a motion to reopen to apply for asylum and withholding of deportation based on an event that occurred in 1984, namely, a visit to respondent by a Ghanian official who was also respondent's personal friend, and I will have more to say about this event later in the argument.

The issue of the extent of deference in the context of a motion to reopen has been addressed by this Court three times in the immigration context, in Jong Ha Wang, in Rios-Pineda, and in Phinpathya. These cases emphasize the great deference that must be given to the Board of Immigration appeals in its decision not to reopen. The Court has emphasized the importance of finality and has pointed out that in this context reopening is not required by statute but is purely a product of regulation, and in fact the regulation itself does not mandate reopening in any particular circumstance, but rather, as the Court noted, is framed in the negative.

QUESTION: Mr. Klonoff, then reopening is not a procedure provided for by statute?

MR. KLONOFF: That's correct. It is purely a matter of regulation. And this Court has made that clear in Jong Ha Wang in its discussion. Notwithstanding this Court's decision, the Ninth Circuit held, contrary to the BIA, that respondent had alleged a prima facie case of eligibility for asylum, and that an evidentiary hearing was therefore required.

As a result of the Ninth Circuit's holding, the entire process will begin anew, including possible appeals, even though the deportation hearing was held more than five years ago, and even though the only fact that was offered by respondent in support of his motion to reopen is one that even

the Ninth Circuit itself said could be viewed as ambiguous or benign.

Now, if I could just elaborate briefly on some of the facts that are critical to this case, as I said, respondent entered the United States originally in 1965, approximately ten years ago. He left briefly during the summer of 1973, and the returned on a visa that was good until 1976.

In 1981, while respondent was here illegally, he pleaded guilty to three narcotics offenses, and based on his plea of guilty to those offenses, the Immigration and Naturalization Service instituted deportation proceedings and those proceedings in fact resulted in hearings that occurred between November and July, November, 1981, and July, 1982. There were five separate appearances. The continuances on each occasion being at respondent's request.

One of the continuances in the case, from November 10th, 1981, to January 11th, 1982, appears to have been requested in part so that respondent could prepare an application for asylum and withholding of deportation, and in fact respondent's counsel specifically represented to the immigration judge that such an application would be filed.

Respondent ultimately chose not to seek asylum or withholding of deportation, and he was consequently found deportable in July, 1982, and that decision was affirmed by the BIA in 1984. In February, 1985, while that appeal was pending

in the Ninth Circuit, respondent filed a motion to reopen with the Board of Immigration Appeals.

As respondent concedes, the only new fact that relates to the respondent other than just the general events in Ghana was this visit from the Ghanian official, and it is significant to note that although this visit occurred in the spring of 1984, respondent waited almost an entire year until February, 1985, before seeking reopening.

There is no dispute that this individual who made the visit is someone who respondent had known for many years. The additional fact which --

QUESTION: Mr. Klonoff, is that new evidence not available before within them engaging of the regulation, do you suppose?

MR. KLONOFF: It probably was not. Since the deportation hearing occurred in 1982, and since the visit did not occur until 1984, this was new evidence. We have a serious dispute with the Ninth Circuit's conclusion that it was material evidence.

QUESTION: So you think it was new evidence not available before, but you take the position that it just wasn't material.

MR. KLONOFF: That's exactly correct. The old facts which were in existence at the time respondent chose not to play or as you m essentially involved allegations involving his

brother and other close associates in terms of their associations with prior regimes in Ghana and the fact that those individuals may well be in danger. It is important to note, as the BIA pointed out in its opinion, that respondent doesn't explain how the risk to those individuals would necessarily translate into a risk to respondent.

Respondent now concedes --

QUESTION: Didn't that become clearer when this man came over from Ghana?

MR. KLONOFF: We don't think so. We are not sure what import ought to be --

QUESTION: I am not sure, either, but it could be argued, couldn't it? It was quite obvious that he was trying to get him back there for one purpose only.

MR. KLONOFF: Well, we don't think that is obvious, Justice Marshall.

QUESTION: What is the other reason?

MR. KLONOFF: Well, the reason --

QUESTION: That a man would spend that amount of money to come over here.

MR. KLONOFF: Oh, but it -- certainly there is no allegation in the motion to reopen that his man came forth sole purpose of visiting respondent, and in fact he didn't even know where to locate respondent, and had had to contact respondent through his brother. The more reasonable inference is that he

was here for another purpose, perhaps an official government purpose, and decide to contact the respondent.

That is one of the ambiguities, in fact, in the evidence.

QUESTION: You mean, they is trying to kill his own family but they are going to bring him back and let him live?

MR. KLONOFF: We don't know if they are trying to kill his whole family. All we know --

QUESTION: That was the testimony.

MR. KLONOFF: There was no testimony -- the only reference to the brother were very brief statements in the motion to reopen, a one-line sentence indicating that the brother's house had previously been surrounded, and then a vague allegation that the brother had made his way out of Ghana, but let me respond --

QUESTION: And was still out and was still wanted.

MR. KLONOFF: According to the conclusory allegation, with no explanation as to why, but let me respond, justice Marshall, to your --

QUESTION: Well, the way to get around and find out whether a conclusory allegation is correct is one way only, and that is to hold a hearing. Isn't that right?

MR. KLONOFF: We don't think so.

QUESTION: Isn't that right?

MR. KLONOFF: We don't think so. We think that the

purpose of an evidentiary hearing is not to give the alien an opportunity to flesh out the motion to reopen. It is not a preview of things to come. We think that the purpose of an evidentiary hearing is to see if respondent can prove the facts that he alleges in the motion to reopen. And let me give you an example in the criminal context, in the context of a motion for a new trial on the grounds of newly discovered evidence.

Every court would agree that it is inadequate for a defendant to come in after trial and say, I have found a new witness who is going to exonerate me. I am not going to tell you all the details now, but if you give me a new trial and vacate my conviction, we will tell you all about it. That is simply not the proper way to go about it.

The case law was clear at the time in every circuit that respondent needed to lay out in detail exactly what his theory was or he would risk denial of the motion to reopen on the ground that it was conclusory, but let me, Justice Marshall, get back to your original question, because there is a very important reason why this individual may have wanted the respondent to return to Ghana, and that is because he was a medical doctor who was trained in the United States, was highly educated, and in fact respondent's own evidence in the motion to reopen indicates that the prior Ghanian regimes had also tried very, very hard to get respondent back. He was highly sought after regardless of the regime in power, and we don't

think that there is anything that can be viewed --

QUESTION: They had kept up with the history, hadn't they?

MR. KLONOFF: I am sorry?

QUESTION: He had kept up with the doctor and what he was doing and all.

MR. KLONOFF: Well, we don't know. Apparently not, because the visitor didn't know where he was --

QUESTION: That is what I am saying, so why do they want him back if they don't know where he is?

MR. KLONOFF: Well, we think that, as I said, this is a situation, you have a developing country.

QUESTION: That is not clear one way or the other.

MR. KLONOFF: Admitted. That's correct. And consequently it is the kind of fact that cries out for additional facts before an individual would have a well founded fear. Certainly at least given the ambiguity of the fact, given the colloquy that we have had right now, it seems to me quite clear that this is simply not enough for the extraordinary remedy of reopening a deportation proceeding five years later in a situation in which the individual has already been found deportable, has already had a full opportunity to assert his claim for asylum and chose not to do so.

The Board of Immigration Appeals in its holding held, Number One, that respondent did not adequately explain his

failure to apply for asylum and withholding during the deportation hearing and that consequently he failed to comply with the regulatory requirements. 8 CFR 208.11 specifically requires that an alien give an adequate explanation.

Secondly, the board held that the new fact as alleged by respondent was ambiguous, just as we have recognized here today. It could be viewed as benign but it could be viewed as threatening. And when you have a fact like that that could be viewed so many different ways, it is not the kind of fact that would compel the immigration authorities to reopen for a deportation hearing.

The Ninth Circuit reversed and remanded the case for an evidentiary hearing.

QUESTION: Excuse me. Is it at least the kind of fact that establishes a prima facie case?

MR. KLONOFF: We don't think it is. As I said, and again, this is just to dovetail the question that was asked by Justice Marshall, we agree with the definition of prima facie case given by the Ninth Circuit on Page 7A of the petitioner's appendix that it is a case in which -- where the affidavits or other evidentiary material, if true, would satisfy the requirements for substantive relief, so we don't view a prima facie case as being enough to show that a hearing might be useful.

QUESTION: Wait a minute. He has conclusory

allegation, as you say, and he had in addition a fact to support that which you claim was ambiguous. Now, that may not be enough to carry the day, but isn't that enough to establish prima facie case?

MR. KLONOFF: We don't think it is. We think that what a prima facie case means is that if he came in and proved everything that he alleged, he would be entitled to the relief, or at least would have established eligibility for the relief. And again, that is now the Ninth Circuit itself uses prima facie case. We don't think -- if it were true that a prima face case was somehow less, that only required you to somehow get in the door or provide a nonfrivolous case, then in almost every situation it would be very difficult for the board to say this is not enough, because the existence of even --

QUESTION: But that is just one of the conditions. I mean, it isn't as though the only thing standing before the board and reopening is the prima facie case requirement. There are other requirements, as you are urging upon us, right?

MR. KLONOFF: Well, that is true, and as we have argued, we believe it is quite clear that the board was within its discretion in denying reopening on the separate ground that the explanation was inadequate.

QUESTION: Do the regulations in any way define what a prima facie case is?

MR. KLONOFF: They do not, Chief Justice.

QUESTION: So then it is really up to the BIA to determine what a prima facie case is?

MR. KLONOFF: That is exactly right, and there is really no dispute here about prima facie case. I don't think the Ninth Circuit was applying the test in the manner suggested by Justice Scalia where it is simply enough to show that you might be able to prove a case.

We think a prima facie case means, if the facts alleged could be proved at an evidentiary hearing, would you be eligible for the relief? The Ninth Circuit, we think it is quite significant, simply ignored one of the two grounds relied upon by the BIA. The Ninth Circuit didn't even address the issue of whether respondent had met the regulatory requirement 208.11 in his adequate explanation. We think that that ground alone is basis for reversal.

In addition, we submit --

QUESTION: May I as -- I am a little puzzled now about what the exact issue is. Do you think we have to decide whether the motion to reopen states a prima facie case or not?

MR. KLONOFF: Well, at least -- well, not -- technically the Court doesn't have to reach that issue. The case could be reversed solely on the ground that respondent did not meet the regulatory requirements for reopening. One thing that is important to point out is that even the Ninth Circuit did not decide that here was a prima facie case for

withholding.

QUESTION: In other words, are you arguing that because he didn't meet the regulatory requirements for failing to explain why he didn't make the point earlier, that ends the case and we don't even have to look at the motion to see --

MR. KLONOFF: That very well could end the case. That is a separate and independent ground.

QUESTION: But is that your principal submission? What is your principal submission? I have a little difficult with these question presented --

MR. KLONOFF: Well, there are two grounds. This case is quite analogous to John Haw Lang, in which the Court reached both the regulatory requirement issue and the prima facie case issue.

QUESTION: You certainly don't have to reach both, do you?

MR. KLONOFF: You don't have to. That is correct.

QUESTION: My question is, which is your principal claim? What are you really asking us to decide?

MR. KLONOFF: Our principal concern deals with the way the Court analyzed and came to the conclusion that there was a prima facie case, the standard that has to be applied. One approach for this Court would be to rule on those two points --

QUESTION: I understand we have alternative ways of

doing it. I am trying to find out what you are -- if you could write the opinion, what would you say in the opinion? Do you put it on one ground only.

MR. KLONOFF: The one ground would be that the Ninth Circuit improperly second guessed the BIA's holding that there was no prima facie case, and it did so for two reasons.

QUESTION: So that you mainly wanted to decide whether the motion states a prima facie case. And if that is true, I don't even find the motion in the papers before me.

MR. KLONOFF: The motion is there, Justice Stevens. We submitted a lodging with the clerk which has the entire motion to reopen, and --

QUESTION: But it is not in the printed materials.

MR. KLONOFF: No, because we always --

QUESTION: Why isn't there a joint appendix within it?

MR. KLONOFF: This is a substitute for the joint appendix. We have filed a motion to waive the printing. We thought that particularly since --

QUESTION: At that time you apparently didn't think we'd need to even read the motion.

MR. KLONOFF: No, that was not true. We felt that because the entire administrative record was reproduced in this volume, and since we had already submitted it to the clerk --

QUESTION: I see.

MR. KLONOFF: -- counsel did not pose that. Obviously, the Court may well wish to read the motion to reopen.

QUESTION: Well, I think we would have to read it to decide your theory of the case.

MR. KLONOFF: The Court could --

QUESTION: Where does the term "prima facie' case come in here? It is not in the regulations. It is not in the statute. Does the BIA use it in its opinions?

MR. KLONOFF: It does. The history of that was discussed in Wang. There were two cases in which the BIA stated that a prima facie case is a requirement for a motion to reopen. And this Court noted that in Jong Ha Wang, and in fact has reaffirmed those requirements.

QUESTION: So that is really is interpretation then of the applicable regulations?

MR. KLONOFF: That's correct. That's correct. And the board would be, we submit, entitled to deference, and if I could follow up on Justice Stevens' question, this Court doesn't necessarily have to reach the final issue of whether or not there is a prima facie case. What the Court could decide is that the Ninth Circuit applied the erroneous standard in analyzing the standard and simply send the case back. We would urge the Court to reach the issue.

But let me explain the two points --

QUESTION: Let me ask, while we were trying to decide what we have on our plate here, even assuming that we disagreed with you and thought the Ninth Circuit was correct on the prima facie case point, and on ignoring the regulatory requirements, do you concede then that if they were right about that, the proper relief that the Ninth Circuit should have afforded was to require a reopening?

MR. KLONOFF: We don't concede that at all.

QUESTION: Because those regulatory requirements and the prima facie case are conditions to a reopening, but there is nothing that I know of that says that if you meet those there must be a reopening.

MR. KLONOFF: That is absolutely correct, and in fact --

QUESTION: So that is another piece on our plate. We could go off on that ground, too.

MR. KLONOFF: That is correct, and in that regard, Justice Scalia, I would ask the Court to look at Page 20A, Footnote 2 of the petitioner's appendix, where it points out that another ground that the board did not decide but could have would be the impact of this individual's criminal convictions. The board could have decided here that this individual as a matter of discretion did not merit asylum and therefore that reopening could be denied without an evidentiary hearing. So that again is another group. There was simply no

warrant for the Ninth Circuit to jump to the conclusion that an evidentiary hearing was appropriate.

The Court of Appeals adopted two principles that enabled it to reach the conclusion that respondent had made a prima face case. The first was, it held that in ruling on it, when the Court of Appeals rules on the issue of whether there is a prima facie case, it considered the issue de novo. The agency is not given any deference whatsoever in its judgment.

The second point that the Ninth Circuit held in reviewing these cases is that when the board reviews a motion to reopen, it has to give the alien all inferences or all benefits of the doubt. It was only by A, reviewing the case de novo, and B, reading every inference in the alien's favor, that even the Ninth Circuit was able to hold that there as a prima facie case, and we would submit that if this Court disagrees on those two points, we think it necessarily follows that there is no prima facie case. If the board is not required, for example, to draw the inferences in the alien's favor.

Now, if I could just very briefly discuss why it is that we disagree with the Court --

THE WITNESS: May I ask you one other question about the prima facie case? When this was before the Board of Immigration Appeal, had we decided Cardoza-Fonseca yet?

MR. KLONOFF: No, the Court had not. However --

QUESTION: So they had the case at a time when the

law was somewhat unclear as to what the prima facie case might be.

MR. KLONOFF: Well, that is corrected except let me note a number of points in that regard. First of all, on page 19A of the petitioner's appendix, in the board's opinion, the board cites the Ninth Circuit's opinion in Cardoza-Fonseca, which was affirmed by this Court. We would submit that the board understood the difference between the standards and applied it here. There is nothing in the opinion to suggest that the board was applying the same standard here, and a couple of other points are quite significant in that regard.

As we have noted in our reply brief, in the Court of Appeals, respondent clearly indicated -- I believe it was Page 28 of his Court of Appeals brief -- that he had no objection whatsoever to the legal principles applied by the BIA. We noted in our Court of Appeals brief that in our interpretation of the BIA's opinion the BIA's was correctly applying the lower standard for asylum. We made that quite clear in our brief, and respondent in his reply brief never challenged that and the Court of Appeals never questioned the fact that the Ninth Circuit -- or the fact that the Board of Immigration Appeals understood and was applying a lower standard for asylum. So would submit that that is simply not an issue in this case.

If I could make a few points as to why we disagree on the de novo review point, first of all, as I have noted, this

Court has made clear on several occasions that it is not appropriate for the Court to engage in de novo review in these contexts. Rios-Pineda could not have been clearer in stating that it is not the function of a court to review the attorney General's decision de novo. That was at 471 U.S. at Page 452.

QUESTION: Yes, but that was a decision after a hearing, wasn't it? It wasn't a review of a pleading. Or was it? I don't --

MR. KLONOFF: Well, there -- no, that --

QUESTION: There s a difference between reviewing whether a leading is sufficient to state a cause of action or prima facie case on the one hand and reviewing whether the evidence made out a case on the other.

MR. KLONOFF: Rios-Pineda was also a question whether the lower court had ordered that the case be sent back for an evidentiary hearing.

QUESTION: Had there been no evidentiary hearing before?

MR. KLONOFF: I don't believe there had been, and this Court said that there did not need to be because the board had denied relief to the aliens as a matter of discretion. And there are numerous -- the same thing is true in Jong Ha Wang. by the way. There is not a hearing. The Ninth Circuit held that even though no affidavits had been submitted, that the alien had made out a prima facie case that required a hearing,

and again the Court held that no evidentiary hearing was required, that same circumstance, by the way, is present in numerous Court of Appeals cases.

We have cited cases from circuits throughout the country involving a situation exactly like this in which there is a motion to reopen, alleging prima facie eligibility for asylum and withholding of deportation, and the Courts of Appeals prior to this case have unanimously held that under this Court's decisions in Rios-Pineda and Jong Ha Wang, the decision on whether or not there is a prima facie case for reopening is one that must be given deference to the administrative agency, and that is all we are asking for here.

The Ninth Circuit has held --

QUESTION: Let me just also get something straight. A prima face case for reopening in other words, is a different -- something different from a prima face case for eligibility for withholding of deportation or asylum?

MR. KLONOFF: It is the same thing.

QUESTION: Is it the same, the same facts would -- if facts A, B, and C in an original claim would constitute a prima facie case for a claim of asylum, that would also constitute a prima facie case for reopening after?

MR. KLONOFF: Well, as Justice Scalia correctly pointed out, the fact that you allege a prima facie case does not mean you are entitled to a hearing. It just means that you

have met one of the requirements that the board has set for a hearing. The board has not said that a hearing is required in any circumstance, however, and again, I would point out, even if a prima facie case has been alleged, the board held that its regularly requirements have not been met for a different reason.

QUESTION: You keep using the word "deference." Do you mean that a decision of the BIA on the question of a prima facie case is unappealable?

MR. KLONOFF: No, we don't mean that, Justice Marshall.

QUESTION: Well, what do you mean by deference?

MR. KLONOFF: What we mean is that the Court of Appeals --

QUESTION: Abandon?

MR. KLONOFF: What we mean is that the Court of Appeals should not substitute its judgment for that of the immigration authorities. If reasonable minds could differ, if the board's opinion is a reasonable analysis of the evidence, then it must be affirmed. If the board's opinion makes no sense whatsoever, if there is something egregiously wrong about it, then obviously there is a role for the Court to play.

We are not arguing that it is totally unreviewable, and we don't think that the Court has to reach that issue. It is really the difference between how the circuits other than

this case have approached the issue and how this Court approaches the issue. This Court says that the inquiry is whether or not the board's assessment is correct.

QUESTION: What you mean by us using deference --

MR. KLONOFF: Deference means, in our view --

QUESTION: Abandonment?

MR. KLONOFF: No, it just means as generally in administrative law, that there ought to be weight given to the administrative agency's views, and even if the Court independently --

QUESTION: Well, can't I give weight to them and rule against them

MR. KLONOFF: Only if the decision --

QUESTION: Can I?

MR. KLONOFF: You could, but only if the decision is so extreme as to be unreasonable. If the decision would reasonably go either way, we think that the role of the Court is to simply affirm.

QUESTION: Mr. Klonoff, I have a problem with deference to a judgment about a prima facie case or not. I mean, it is one thing to say that on the ultimate question, the ultimate factfinding, you go along with the agency if there is substantial evidence. Reasonable minds could go either way and therefore you let the agency go the way it wants so long as it is reasonable. But the whole notion of a prima facie case

is rock bottom. It means a reasonable mind. If the phrase means anything, it means a reasonable mind could find for someone one these allegations, giving them the benefit for the doubt, interpreting doubts in favor of the person making the allegations. Isn't that what a prima facie case means, and then to say you have a sort of applying a reasonableness standard to a reasonableness standard. It is once removed. I don't know.

MR. KLONOFF: But our point is, again, we do not disagree with the definition of prima face used by the Court. The question is whether or not the Court can simply ignore what the agency has done, and decide independently whether there is enough or whether it has to give deference, as we have said, to what the agency has said, and as I have indicated, ever circuit that has analyzed this issue has explained that the agency's view has to be given great weight in this context.

QUESTION: Is it any different form, in civil cases, we defer to the factfinders, let's say, a case tried to a judge. We defer to the judge's findings of fact. Unless there is no reasonable basis for them, we accept them. But do we defer to the trial judge's determination that summary judgment could be granted.

MR. KLONOFF: The Court does defer --

QUESTION: Do we? Do we say, well, you know, maybe summary get could be granted, maybe it couldn't. It is a close

question. We defer to the trial judge. We don't do that. Summary judgment is rock bottom, and so, it seems to me, is prima facie case.

MR. KLONOFF: We think the better analogy is a reopening for an administrative hearing or a motion for a new trial in either a civil or a criminal case, and there the courts repeatedly give great weight or deference to --

QUESTION: Not to factfinding, though. You are referring -- we defer to them because we defer to their judgment about whether they want to reopen or not. You are asking us to defer s to factfinding about whether there is a prima facie case or not. I am perfectly willing to defer to the board's determination that it doesn't want to reopen for policy reasons, for whatever else, but you are asking us not to defer to that, you are asking us to defer to their determination that there was or was not a prima facie case. And that seems to me like deferring to a district judge's determination that there was enough evidence or was not enough evidence to grant a summary judgment.

MR. KLONOFF: We think it is more like deferring to a court's determination that the newly discovered evidence is not enough to warrant a new trial, and there there is substantial deference.

If there are no more questions, I would like to refers the balance of my time for rebuttal

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Klonoff.

Ms. Harper, we will hear from you now.

ORAL ARGUMENT OF DOROTHY A. HARPER, ESQ.

ON BEHALF OF THE RESPONDENT

MS. HARPER: Mr. Chief Justice, may it please the Court, we would like to first state our view of what the Ninth Circuit did in this case. When we look at the finding of the Circuit Court, we remember basic rules, basic things that we were supposed to be studying in law school, the approach to a case, the approach to resolving a conflict. In Pullman Standard versus Swint this Court did make reference to this in the context of discussing whether there are mixed questions of law and fact.

The approach that was discussed and which we remember from those days, three steps. First, there is the establishing of the historical facts. Second, there is selecting the applicable rule of law. And third is applying the rule of law to the established facts.

In the prima facie case test, however, I think one comes through the same steps, but at the first step of establishing the historical evidentiary facts, in the traditional prima facie case test, the adjudicator of the tests does not determine the facts, he or she accepts the facts that have been offered.

QUESTION: Ms. Harper, that may well be true in the

context of, say, a motion to dismiss under the Rules of Civil Procedure or the analog in the Rules of Criminal Procedure, but why should the BIA be governed by that kind of a strict legal mode that we allege certain things, and then if there is a contest we have a hearing?

MS. HARPER: Mr. Justice, we believe that is because the BIA chose the prima facie case test, chose prima facie case. This is not in the regulations, as came out in the earlier discussion, when the Attorney General made the regulations he did not state in what instance motions to reopen should be granted.

The Board of Immigration Appeals in 1972 in the case of In re Sipus said ordinarily we would grant reopening if this person would have given us a prima facie case. And it is our view that because the board selected it wasn't imposed upon the board by the courts. They voluntarily selected prima facie case, a term that has general meaning that they should --

QUESTION: And you think it should be analyzed just as if we were in a Federal District Court on a motion to dismiss with the Rules of Civil Procedure?

MS. HARPER: No, I don't think foursquare exactly on all of the Federal Rules of Civil Procedure. No, Mr. Justice, I certainly don't, because we are not talking about exactly the same thing. I am talking about the underlying principle. I am

talking about the basics of what a prima facie case is and the basic approach in any context of deciding if there has been a prima facie case, but I am not arguing the Federal Rules for Civil procedure.

QUESTION: Ms. Harper, do you think that at bottom in this immigration setting, that the BIA had discretion to decide whether to decide whether to grant someone status to remain or not and discretion to decide whether to grant rehearing or not?

MS. HARPER: Madam Justice, I think the board of Immigration Appeals certainly can exercise its discretion in the discretionary aspect of the case, but in this case they didn't. They did not address or examine any discretionary factors. I don't think that the fact -- the standard as announced by --

QUESTION: You don't think that if they decide -- if the BIA decides to deny rehearing, that that could be an exercise of discretion?

MS. HARPER: If the BIA denies, period, without announcing a standard, simply in essence, if you will, we just don't want to hear this one today, that is arbitrary, and even if it is discretion, it is an arbitrary exercise of discretion.

QUESTION: Well, yes, certainly it could be, but you are not arguing that that was the situation here.

MS. HARPER: No, we are arguing that the Board of Immigration Appeals chose not to examine the discretionary

factors, chose not to exercise that discretion, which it has. Instead, it chose to make the decision that there had not been a prima facie case shown and that is the finding that was reviewed. The Ninth Circuit did also review and made very brief reference to the establishing of new facts.

If we very carefully examine the BIA decision, we find that the manner in which they interpreted, they, one, chose to interpret, chose to determine, and the manner in which they did determine the motive of the caller from the Ghanian government was the fact that led to their conclusion that this was not -- that there had not been a sufficient explanation.

The Board of Immigration Appeals said we don't think that by itself this visit sufficiently explains failure to raise this earlier. And when the Ninth Circuit found that they had determined a fact they shouldn't have determined, and that the facts should be interpreted otherwise, then it became an explanation. That answered the question, and there was reference to that in the Circuit Court opinion. It was not a lengthy reference because it did sort of emerge as self-proving fact.

It is our opinion that when we look at these steps in resolving the prima facie case test, we find that what the Ninth Circuit said here basically was, you determined a fact when you weren't supposed to determine it. You went wrong on the first step. The Circuit Court did not go on to examine the

application of the selection of the correct rule of law as applied to the refuge law. The Circuit Court did not do an examination of the application of the laws to the facts.

Now, this is the area where if there is discretion, deference to be given to the BIA, it would be in the last area of applying the facts to the law, an this was not examined by the Circuit Court. What they examined was -- what they found to be the error was the very first step. They were supposed to accept the facts and not decide them.

We talk about he prima facie case test, where it came from, the regulations, where they came from. It is respondent's position that this must begin with an analysis of what Congress did in refugee law. Prior cases have been before this Court dealing with immigration cases. This has been probably the central lesson, the common lesson. We look at what Congress has done in the area. That was done in Wang. It was done in Phinpathya, it was done in Stevic, it was done in Cardoza-Fonseca.

QUESTION: Well, of course, Congress didn't provide for rehearing motions at all.

MS. HARPER: No, that is correct, Madam Justice. What Congress did, Congress mandated that the Attorney General shall provide a procedure for aliens to apply for asylum irrespective of status. Dr. Abudu's status was a deportable alien. Irrespective of status, he has the right or should have

an opportunity to apply.

Now, thy didn't say reopening, but Congress not only considered changes of circumstances, Congress wrote changes of circumstances into the law, not the refugee law. Subsection B of the -- this section 208(a) provides that if you are granted asylum status and you lose your status as a refugee, your asylum status is terminated. Throughout they talk of refugee status. You have to have refugee status to be eligible to apply. You lose your asylum status if you lose your refugee status.

In the following section, section 209 of the Immigration and Nationality Act, after you have been -- you have been in refugee or asylum status for one year, you may apply to become a permanent resident, but you must also show that you have not lost your refugee status. And they use the word, they include the phrase, change of circumstances. If Congress foresaw that people would lose asylum status, not be able to become permanent residents because of changes of circumstances, certainly Congress also foresaw that one would acquire refugee status because of change of circumstances and would qualify upon events that occurred after they came into the country and after various events may have happened to change their status.

QUESTION: But Congress did not do it.

MS. HARPER: Pardon?

QUESTION: But Congress did not do it. Congress left it to the Attorney General.

MS. HARPER: Yes.

QUESTION: Well, I don't understand your argument at all. They left it to the Attorney General. They could have taken it over.

MS. HARPER: I am sorry, Mr. Justice. Would you repeat that, Mr. Justice?

QUESTION: I said, Congress could have said it and be reopened.

MS. HARPER: Yes.

QUESTION: Instead, Congress said the Attorney General shall decide whether it can be reopened.

MS. HARPER: I agree somewhat, Mr. Justice. They certainly did not say that it should be reopened. They left it up to the Attorney General to devise procedures, and then Attorney General devised procedures, including procedures for reopening, and these procedures for reopening were followed in this case, and incidentally, counsel would like at this point to point out a little correction,.

I understand that in preparing these cases the government is certainly no different from I and they make mistakes, but this is where we said we have no problems with the principles of the laws. In our brief to the Ninth Circuit on Page 28 discussing the regulations for reopening, 8 CFR

208.11 requires the alien to reasonably explain failure to request asylum prior to the completion of deportation, citation, and then we go on to say we have no quarrel with the principles of law. This is where we have no quarrel, and we have no quarrel with the regulations. We believe these regulations are proper. It is simply our position that we complied with the regulations. We respect them. Dr. Abudu played by the rules. He didn't bring this case when the law as it was being interpreted at that time together with the facts would not support all of the elements necessary for the trial. The government now says -- well, now that your case has ripened, your case should be -- reopening should be denied because you didn't bring it when it was premature. This is --

QUESTION: May I ask you, are you in effect conceding that if there had not been the visit by this gentleman from Ghana after, you know, that you use as a basis for the new evidence of well-founded -- without that visit you would not state a prima facie case for reopening then?

MS. HARPER: Under the law as it was when he was before the immigration judge in 1982 it would not have met -- would not have met the requirements at that time. At this time it is the visit that --

QUESTION: And what is the change of law that you rely on?

MS. HARPER: Pardon?

QUESTION: And how is the law different than it was in 1982?

MS. HARPER: This Court addressed the distinctions between clear probability, well founded fear in the Stevic case. Now, that case, I am well aware, of course, that was not the case that made the definitive ruling on well founded fear, but when this Court spoke in Stevic, those of us out there on the front lines trying to bring justice to our clients saw, we saw rays of hope that there was in fact a ground, that we had a sound legal basis to in good faith advance our theories that a well founded fear was different. Therefore what we would have brought in 1984, 1985 is quite different from what we would bring in 1982.

We didn't have the solid law, but this Court had spoken, and had given some guidance, we felt, in dictum, and as -- there also had been decision in the Circuit Courts that were beginning to develop. But to answer your question, yes, it was the visit which created the -- or gave the last of the elements that we believe clearly puts the case within the prima facie case test.

QUESTION: What about the regulatory requirements, Ms. Harper? Why were they met here?

MS. HARPER: The regulatory requirements were met by virtue of the fact the events that provided the objective

evidence that this man's fear is reasonable didn't even happen until after deportation proceedings were concluded. That, of course, met -- it meant a two-fold requirement. One, it met the requirement of new material, and two, in and of itself it explains why he didn't bring it in 1982, because it hadn't happened in 1982.

Also, I would like to just briefly mention, and I understand this record can get a little confusing. All of these continuances and how long this case has been going on. November 10, 1981, was when Dr. Abudu first stood before the immigration judge and he said, I am afraid to go back to Ghana.

November 10, 1981, according to the record, and I understand there was somewhat of a problem here, but on that date, he was appearing on what we call a master calendar, sort of like an arraignment or plea court, and his attorney announced that they would be disputing, they were not conceding deportability, so the case was set for hearing.

It was not continued to give him an opportunity to file asylum. He was told, well, then we will have to set it at a time when we have more time to hear the issues on the issue of deportability. That is why it was continued the first time and set for another date. That is on Page 45 of Volume 1 of the record.

The second time they went in, ready to contest and go over the issue of deportability, and the government was there

with a new charge, so here was something new that had to be answered.

QUESTION: Ms. Harper, let's come back to the regulatory requirements. This visit by Al Hassan, it isn't just that this was new evidence demonstrating a need for asylum that had been asserted earlier. He had never asserted a need for asylum earlier. He had never even claimed that he was going to be persecuted if he went back in the earlier hearing. It isn't that this was a new piece of evidence to support a prior claim.

What he was asking the board to believe is that he had no reason whatever to believe he was going to be persecuted until this visit by Al Hassan occurred, that that alone is enough to explain why he never raised the asylum request before. Is the board really compelled to accept that as a reasonable proposition?

MS. HARPER: Mr. Justice, I think this again goes back to the problem with the record. On the November 10 hearing, he asked to -- if you are -- it is a standard part of the procedure to be asked if you have to be deported, what country would you wish to be deported to, and he named first Canada and was told he couldn't name Canada, and he named England, and he said, and the judge said, do you feel your life of freedom would be threatened in Ghana on accountant of race, religion, nationality, membership in a particular social group,

or a political opinion? Answer from Dr. Abudu. I can say my life, yes. On which of these groups? Political opinion. This is all that was said. At that time he asserted his fear. The first attempt to --

QUESTION: But didn't claim asylum.

MS. HARPER: He did not make an actual application. He did not pursue an application.

QUESTION: So he comes to the board now and he says, the one enormous thing that -- it is not just an additional piece of evidence, but what has made me change my mind about whether I need asylum or not is this possibly innocuous visit by Al Hassan. The board really must reopen because of that, and must believe that that one event is what suddenly changed this man from a person who didn't need asylum to one that did?

MS. HARPER: Yes, if we examine what elements of --

QUESTION: And it is irrational to conclude otherwise?

MS. HARPER: Yes, Mr. Justice, I believe so. If we examine the elements of the case, in 1981, when he first went before the judge, the government in Ghana was in shaky condition. It was still being led, at least figuratively, by Dr. Abudu's brother and friends. Two months later, they were ousted in a violent coup, and Flight Lieutenant Rawlings took over the government. Dr. Abudu is still in deportation proceedings.

Dr. Abudu's friend, the minister of state, was put in jail. His lifelong friend, Lieutenant Colonel Hamidu, was declared Number One Enemy. And his brother got out of the country and went into exile. That is what we have by the end of deportation proceedings We do not have any evidence, and what we have today shows that none of this existed to show that the government of Ghana knew who Dr. Abudu was, knew where he was, that they were interested in him in any way, and he had not taken a stand against the government of Ghana. That is what was missing in 1982.

And those were the elements that were --

QUESTION: Didn't the doctor through his counsel affirmatively say in April that he did not intend to apply for asylum, even though he had previously said he did intend?

MS. HARPER: Yes, he did not intend to apply.

QUESTION: And he never submitted his --

MS. HARPER: And he did not file an application.

QUESTION: -- in the deportation proceeding, although he had been reminded many times that he wanted to, he had better do it. Isn't that right?

MS. HARPER: That is correct, Mr. Justice.

QUESTION: And instead, he just applied for an adjustment of status.

MS. HARPER: That is correct, Mr. Justice.

QUESTION: So now the board has to reopen that

proceeding, because -- why?

MS. HARPER: Because he has stated new facts that were not in existence at that time that now support a case.

QUESTION: One fact. One fact. One fact.

MS. HARPER: The visit from the Ghanaian official combined with --

QUESTION: One fact.

MS. HARPER: -- combined with the fact that when this man came to see him, Dr. Abudu's brother and his lifelong friend, Lieutenant Colonel Hamidu, just the year before had been named as suspects in a plot to overthrow the Ghanian government on two separate occasions. Then the -- that was '83, one year after deportation proceedings. Eighty-four, somebody comes to see Dr. Abudu and wants to know about his brother, about Lieutenant Colonel Hamidu.

One fact by itself does not a case constitute. It is the attacking of the facts as they occur one after the other.

QUESTION: But you say one fact by itself requires the BIA to reopen.

MS. HARPER: If that fact adds the last of the needed ingredients for the case, yes, Mr. Justice. If that fact --

QUESTION: Even though there was no application for asylum previously?

MS. HARPER: Yes, Mr. Justice.

QUESTION: So how can you say the facts are stacked

when the facts previously were never used as a basis to apply for asylum?

MS. HARPER: Mr. Chief Justice, I would like to -- in response to that, I would like to inquire and make a rhetorical question. Had he filed an application in 1982, what would have happened to it? Would it have been granted? We know by looking at the cases that that would not have been granted. We looked at the precedent decisions. So where would he have been in 1984 with an application for asylum which had been denied that he wanted reopened for additional fact?

What I am saying, Mr. Chief Justice, is that I don't believe that our justice system, that our efficient running of the administrative and judicial system is served by requiring people to bring it, if it has any type of remotely colorable basis, bring it when you are in court, because if you don't bring it when you are in court, we are going to deny you later.

QUESTION: I agree with you on that. That seems to me quite reasonably, that if he didn't think he had a case then or a case that would be denied, we shouldn't penalize him for that. But the problem I am having with your case is the assertion that this one fact does make so much of a difference, I mean, one might argue that it makes enough of a difference to just tip the scales, but the argument you are making to us is that it so clearly make that difference that it is arbitrary --

MS. HARPER: Mr. Justice, I understand --

QUESTION: -- for INS to -- not to allow it to --

MS. HARPER: I understand, Mr. --

QUESTION: That is a hard case.

MS. HARPER: But when we look at the elements, when we compare what happened in his one time in 1984 and we compare it to the elements, this visit is what let D. Abudu know, what gave him objective evidence of what he had felt, but you can prove your case on what you fuel, it gave him the objective evidence that the government of Ghana was interested in him, the government of Ghana wanted to talk to him.

QUESTION: But, Ms. Harper, why can't the BIA hearing officer say, let's accept this statement, and let's recognize that the visit had been made by the Ghanian official, but even recognizing that, I don't think that is enough to justify granting rehearing. I don't think that is enough to change this person's status. Now, isn't there some leeway there for the BIA to take that position?

MS. HARPER: There is leeway to exercise discretion. They chose not to do it. Their decision has to rise or fall on the basis stated. I see my light, and in conclusion, I would like to say --

QUESTION: You have some time still, Ms. Harper. Don't panic.

Assuming that you are right about the prima facie problem, and assuming that you are right about the regulatory

requirements, assuming, in short, that the Ninth Circuit was right on all of the points it decided, why was its proper action to direct an evidentiary hearing? Why shouldn't it have just remanded to have the board do it right next time?

MS. HARPER: Or reasons advanced --

QUESTION: As I understand it, there is no requirement in law that there been an evidentiary hearing. All that the Ninth Circuit decided is that the board gave the wrong reasons for denying an evidentiary hearing, but why could it command an evidentiary hearing? Where in the status or even in the board's regulation does it say your client is entitled to an evidentiary hearing if he makes out an evidentiary case and comes within the regulatory requirements? It is still within the board's discretion, isn't it?

MS. HARPER: The Board of Immigration Appeals has told us we would ordinarily grant, if you give us a prima facie case we will grant reopening.

QUESTION: Where is that?

MS. HARPER: And on reopening -

QUESTION: Where is that? Where is that? Where is that?

MS. HARPER: In re Sipus. First case it talked about the prima facie case. It is also mentioned In matter of Garcia, which was cited by the American Immigration Lawyers Association in their amicus brief.

QUESTION: You are claiming it is the board's laws that if you meet these two requirements, prima facie case and meet the regulatory requirements, you will get an evidentiary hearing.

MS. HARPER: They have stated, it is what we want, when we grant it -- I don't wish to be misleading. I fully recognize that subsequent to that time there has been the modification of this Court that the board may deny on the exercise of discretion, but the board gave us the test. They told us what they wanted, and we give them what they want. We meet -- we represent he facts that we believe are necessary to meet the prima facie case test.

I would like to say that I think that Congress has told us what their -- they have laid a narrow path for the Attorney General on refugee law. They have mandated that there be a procedure. The board has told us -- the Attorney General gave us regulations. The board told us what they were looking for. And I think that all of the use segments of the law --

QUESTION: What were you prepared to show at the hearing?

MS. HARPER: Pardon?

QUESTION: What were you prepared to put on in evidence at the hearing --

MS. HARPER: Additional --

QUESTION: -- if you have been granted a hearing?

MS. HARPER: Additional evidence.

QUESTION: What? On what particulars?

MS. HARPER: Additional possibly witnesses --

QUESTION: Not possibly, what you could do.

MS. HARPER: Okay.

QUESTION: What you had in hand, ready to do.

MS. HARPER: Okay. We have in hand Dr. Abudu's testimony. We have documents. We have some letters. I believe, and I do not wish to misrepresents, so I have to say I believe that we have a copy of the Ghanian newspaper with headlines, number one, about Hamidu being declared Number One Enemy, and a price on his head --

QUESTION: Could you have put that in your original motion?

MS. HARPER: We did not have it. It took us two months to get the evidence we were searching on three continents in order to meet our prima facie entry level of evidence. We didn't receive affidavits, and we were able to get the affidavits. We got materials from England. This did not come in, and this is one reason that it took two months to get the case together. We were waiting to try to get that.

CHIEF JUSTICE REHNQUIST: Your time has expired, Ms. Harper.

MS. HARPER: Thank you.

CHIEF JUSTICE REHNQUIST: Mr. Klonoff, you have two minutes remaining.

ORAL ARGUMENT BY ROBERT H. KLONOFF, ESQ.

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. KLONOFF: Ultimately, as Justices Scalia and O'Connor recognized, the issue is whether the BIA must reopen because of a new fact, whether it is compelled now. Now, the BIA accepts the fact that the visit occurred, and the questions whether or not that fact is so significant that the BA must give compelling weight to it, and the reason that we are arguing that he BIA should be given leeway in making these judgments is, Number One, because of the expertise that it has in reviewing thousands of cases, an expertise in fact recognized in Cardoza-Fonseca in the decision, making clear that there is a difference between a straight question of statutory interpretation and a question of applying the law to the facts of the particular case. I believe it is Slip Opinion Page 26.

And finally, the greatest deference of all because in this situation, as counsel concedes, Congress did not specify the reopening had to be required in any situation whatsoever, and for that reason we would submit a particular degree of deference should be given to the body.

Consequently, unless there are any further questions, we would urge that the judgement of the Court of Appeals be

reversed.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Klonoff. The case is submitted.

(Thereupon, at 11:08 a.m., the matter in the above-entitled case was submitted.)

REPORTER'S CERTIFICATE

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HEARING DATE: Tuesday, December 1, 1987

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the United States Supreme Court and that this is a true and accurate transcript of the case.

Date: 12/1/87

Margaret Daly

Official Reporter

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