Appeal No. 08-71478

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OLAKUNLE OSHODI,

Petitioner,

v.

ERIC H. HOLDER, JR., U.S. Attorney General,

Respondent.

On Petition for Review of the Decision of the Board of Immigration Appeals

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BRIEF FOR THE NATIONAL IMMIGRANT JUSTICE CENTER AND THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

The National Immigrant Justice Center ("NIJC") is a program of the Heartland Alliance for Human Needs and Human Rights, a 501(c)(3) non-profit corporation located in Chicago, Illinois. NIJC and the Heartland Alliance are not publicly held, and no person or corporation owns any percentage of NIJC or the Heartland Alliance.

The American Immigration Lawyers Association ("AILA") is a non-profit association of lawyers practicing immigration law. AILA is not publicly held, and no person or corporation owns any percentage of AILA.

DATED: September 28, 2012

Respectfully submitted,

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By: */s/ Julian L. André*
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INTERESTS OF *AMICI CURIAE*

Amici Curiae[1] National Immigration Justice Center ("NIJC") and the American Immigration Lawyers Association ("AILA") are two immigration-focused organizations with substantial interest in this Court's resolution of this case.

Amicus NIJC is a non-profit organization recognized by the Board of Immigration Appeals to provide immigration assistance since 1980. NIJC promotes human rights and access to justice for immigrants, refugees, and asylum seekers through legal services, policy reform, impact litigation, and public education. NIJC provides legal education and representation to low-income immigrants, including asylum seekers, refugees, human trafficking victims, detained adults and children, and other noncitizens facing removal and family separation. NIJC *pro bono* attorneys currently represent more than 250 asylum applicants.

Amicus AILA is a national organization comprised of more than 11,000 immigration lawyers throughout the United States. AILA's objectives are to advance the administration of law pertaining to immigration, nationality, and

[1] No party nor counsel for a party authored this brief in whole or in part, nor contributed money intended to fund the preparation or submission of the brief. No person other than *Amici Curiae*, their members, and their counsel contributed money that was intended to fund the preparation or submission of the brief.

naturalization; to promote reforms in the laws; to facilitate the administration of justice; and to elevate the standard of integrity, honor, and courtesy of those appearing in immigration, nationality, and naturalization matters. AILA's members regularly appear in immigration proceedings, often on a *pro bono* basis.

Accordingly, NIJC and AILA are interested in ensuring that all noncitizens are provided with a full and fair hearing and a reasonable opportunity to present evidence during deportation proceedings.

INTRODUCTION AND SUMMARY OF ARGUMENT

The principal issue in this appeal is whether 8 U.S.C. § 1158(b)(1)(B)(ii), as amended by the REAL ID Act, requires an immigration judge ("IJ") to provide an asylum applicant with actual notice that specific corroborating evidence is required and a reasonable opportunity either to produce the required corroborating evidence or to explain why such evidence is unavailable. As this Court explained in *Ren v. Holder*, 648 F.3d 1079 (9th Cir. 2011), the plain text of the REAL ID Act requires that IJs provide an asylum applicant with specific notice and a meaningful opportunity to respond before denying an asylum application for failure to provide corroborating evidence. The REAL ID Act's specific notice requirement ensures that asylum applicants are provided a full and fair hearing, and that asylum claims will be decided on their actual merits. Such a procedure prevents *bona fide* asylum

seekers from being returned to countries where they face persecution and even death.

Nevertheless, the government has advanced an interpretation of the REAL ID Act that requires only broad general notice that corroboration might be necessary. From a practical perspective, a general notice standard does not work. Given the nearly limitless universe of potential corroboration (most of which would be circumstantial) for an asylum claim, the limited resources of most asylum applicants, and the significant variations among the practices of IJs throughout the country, a general notice standard places asylum applicants in an impossible and impractical situation. A general notice standard essentially makes asylum applicants strictly liable for not having corroborated any point a judge or appellate board might identify as potentially amenable to corroboration, resulting in denial of the claim without further notice.

Unless IJs are required to follow the REAL ID Act by providing specific notice of the corroboration that is required and a meaningful opportunity for the applicant to respond, asylum applications will be denied for reasons separate from the merits of the claim. Indeed, absent a specific notice standard, many applicants will be deported and forced to endure persecution and torture simply because they failed to predict accurately which facts might require corroboration, or because they did not have the resources to obtain corroborating evidence of every potential

fact relating to their application. This is not the system Congress envisioned when it enacted the REAL ID Act.

ARGUMENT

I. THE REAL ID ACT REQUIRES SPECIFIC NOTICE THAT CORROBORATING EVIDENCE IS REQUIRED AND A MEANINGFUL OPPORTUNITY TO RESPOND

The REAL ID Act governs when an asylum applicant such as Petitioner Olakunle Oshodi may be required to provide corroborating evidence to meet his burden of proof. The relevant portion of the Act provides:

> Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

8 U.S.C. § 1158(b)(1)(B)(ii). As this Court noted in *Ren*, the plain text of the REAL ID Act and due process require that "[a]n applicant must be given notice of the corroboration required, and an opportunity to either provide that corroboration or explain why he cannot do so." *Ren*, 648 F.3d at 1091-92. Indeed, in *Ren*, this Court made clear that general notice is insufficient. *See id.* at 1092-93 (rejecting argument that "any required notice is provided by the statute"). Rather, the IJ must first consider the evidence presented, and then provide specific guidance as to what, if any, corroborating evidence is required to meet the applicant's burden of proof. *See id.* at 1093 (noting that petitioner "was given notice of the parts of his

testimony that required corroboration and the evidence the IJ found necessary to corroborate that testimony").

The specific notice standard is critical to ensuring that asylum applicants receive a full and fair hearing. Specific notice provides applicants with a reasonable opportunity to either obtain additional corroborating evidence that could result in asylum being granted or explain why such evidence is unavailable. The specific notice standard increases overall efficiency by avoiding unnecessary appeals in some cases and clarifying contested issues in others. Importantly, it would also increase the accuracy and reliability of agency decisions in this critical area.

II. A GENERAL NOTICE STANDARD IS UNREASONABLE AND INSUFFICIENT BECAUSE IT WOULD DEPRIVE ASYLUM APPLICANTS OF A FULL AND FAIR HEARING

Contrary to the plain text of the REAL ID Act, the government has advanced an interpretation under which the broadest of notice to an applicant that corroboration may be required (*i.e.*, the statute itself) would be sufficient. (Resp't Br. at 27.) The practical realities of asylum hearings demonstrate that such general notice would not work.

A general notice standard puts applicants in the untenable position of having to accurately anticipate which facts presented in an asylum claim will require corroboration. This deprives applicants of a full and fair hearing by forcing them

either to: (1) produce corroborating evidence for every factual issue that might arise during the asylum hearing (an impossibility); or (2) predict accurately what evidence the IJ may determine is necessary and obtainable. These two alternatives place an impossible and impractical burden on asylum applicants, and would result in asylum applications such as Oshodi's being denied for reasons other than the merits of the claim. Moreover, the lack of adequate alternative procedural mechanisms to remedy the denial of meritorious claims highlights the critical need to provide applicants with specific notice of required corroboration.

A. It is Impossible for Applicants to Provide Corroborating Evidence for Every Factual Issue that Could Arise During an Asylum Hearing

1. The Scope of Factual Issues that Could Arise During an Asylum Hearing is Virtually Unlimited

A general notice standard presumes that it is possible for an asylum applicant to produce corroborating evidence of every fact relating to his application. Compliance with a general notice standard, however, would be practically impossible for most applicants because the evidence that could corroborate an asylum claim is virtually unlimited.

The central issue in an asylum case is whether the applicant has a well-founded fear of future persecution on account of one of the five protected grounds set forth in 8 U.S.C. § 1101(a)(42). Because "[a]uthentic refugees rarely are able to offer direct corroboration" of their claims, *Bolanos-Hernandez v. INS*, 767 F.2d

1277, 1285 (9th Cir. 1984), however, the case often comes down to whether the applicant can show credibility. *See* David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. Pa. L. Rev. 1247, 1280-82 (1990). A limitless breadth of facts in someone's life could undercut his claim by raising doubts as to who he is and how he has lived. Conversely, corroboration for any fact in an applicant's life might be seen as useful to his claim, helping to bolster credibility. Accordingly, asylum applications and, in particular, credibility determinations often turn on minor factual issues that are impossible to predict. Indeed, any real or perceived factual inconsistency may impact the IJ's decision. *See, e.g.*, *Xiu Xia Lin v. Mukasey*, 534 F.3d 162 (2d Cir. 2008) (reasoning that claim may be false because of various small inconsistencies); *Don v. Gonzales*, 476 F.3d 738 (9th Cir. 2007) (noting that an asylum claim was undercut by minor inconsistencies).

For example, an applicant may not think that his identity is in dispute because he has been issued a charging document reflecting his name and country of origin. Production of a government identification form, however, does not always resolve all potential doubts regarding a person's identity. *See, e.g.*, *Singh v. Gonzales*, 439 F.3d 1100, 1109 (9th Cir. 2006) (doubting applicant's identity documents); *Lin v. Gonzales*, 434 F.3d 1158, 1163 (9th Cir. 2006) (same). Those doubts could, in turn, lead an IJ to determine that additional corroborating evidence

is required – perhaps a friend or relative who knows nothing of the facts of the case, but can vouch for the simple fact that the applicant is indeed the person he claims to be. Without pretrial discussions or preliminary corroboration findings, corroboration issues tend to arise only at trial, when it may be too late. *See Marcos v. Gonzales*, 410 F.3d 1112, 1118 n.6 (9th Cir. 2005) (IJ demanded that the applicant produce a Red Cross employee identification document on the day of the hearing).

Similarly, an IJ might have doubts about an applicant's significant life events that are not directly pertinent to his asylum claim, such as a marriage, the death of a family member, religious involvement, or other personal biographical information. *See, e.g.*, *Lin*, 434 F.3d at 1165 (noting IJ's doubts regarding applicant's marriage); *Zolotukhin v. Gonzales*, 417 F.3d 1073, 1076 n.4 (9th Cir. 2005) (noting IJ's sua sponte phone call to confirm church attendance); *Muhur v. Ashcroft*, 355 F.3d 958 (7th Cir. 2004) (seeking corroboration of religious involvement while abroad). Minor details such as the dates on affidavits and letters may be subject to confirmation or refutation; in other words, even corroboration may be subject to corroboration. *Gui v. INS*, 280 F.3d 1217, 1227 (9th Cir. 2002) (noting that the IJ required corroboration of details in two letters included in 130 pages of supporting documentation).

Applicants commonly submit dozens of documents to support their claims, but sometimes that corroboration is found inadequate. In this case, for example, corroboration evidence was rejected for lack of authentication. A general notice standard would require an applicant, on pain of removal to persecution, to prospectively produce evidence to address any potential factual issues that could arise during the hearing. This is simply unfair.

2. A General Notice Standard Fails to Account for the Limited Resources of Most Applicants

Expecting asylum applicants to prospectively produce evidence to corroborate, often circumstantially, every potential factual issue that could arise during an asylum hearing would also place an impossible financial burden on applicants. On average, asylum applicants have extremely limited financial resources. *See generally*, Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 Fordham L. Rev. 541, 548 (2009). The process of obtaining, or even attempting to obtain, corroborating evidence from other countries is often expensive, time-consuming, and dangerous for applicants and their family members. Under a general notice standard, many applicants could face deportation and torture simply because they did not have the resources to pursue evidence.

B. It is Fundamentally Unfair to Expect Applicants to Guess Which Corroborating Evidence Will Turn Out to be Required

Given the practical impossibility of providing corroborating evidence for every factual issue that could arise during an asylum hearing, a general notice standard will leave most applicants with no choice but to guess what corroborating evidence the IJ may require. The Immigration Court system, however, makes it virtually impossible to predict accurately what corroborating evidence will be necessary.

First, preliminary hearings in the Immigration Court system rarely put litigants on notice of the issues that are likely to be contested at the hearing. While pretrial hearings are authorized by regulation, 8 C.F.R. § 1003.21, they rarely occur. *Assembly Line Injustice*, Appleseed, 16-18 (May 2009), *available at* http://chicagoappleseed.org/wp-content/uploads/2012/08/assembly_line_injustice_june09.pdf. Moreover, because the Department of Homeland Security does not generally assign an attorney to a case in advance of the hearing, when an applicant's attorney seeks to speak with opposing counsel to determine the likely issues in the case, there is usually no one with whom to speak until mere days before trial. *Id.* at 18. If an applicant knew, as in a civil litigation setting, which facts were likely to be contested, he could focus his resources on corroboration of those points. That is impossible under the current system.

Second, IJs' handling of asylum cases differs greatly from court to court. It

is well-documented that approval rates between Immigration Courts and IJs vary remarkably.[2] Likewise, particular IJs will find different types of corroboration to be appropriate, sometimes unreasonably so.[3] *See, e.g.*, *Smolniakova v. Gonzales*, 422 F.3d 1037 (9th Cir. 2005) (denying asylum claim for failure to obtain letter or declaration from unknown stranger who witnessed 1991 killing, and failure to offer death certificate in addition to newspaper reports of killing). Even an experienced immigration practitioner might fail to estimate whether a particular IJ would likely deny a claim for failure to obtain a particular document.

Third, it is often impossible to compare one asylum case to another. "Each asylum application is different, and factors that are probative in one context may not be in others." *Kalubi v. Ashcroft*, 364 F.3d 1134, 1139 (9th Cir. 2004). Each asylum applicant will have a different family situation, greater or lesser ability to reach family or friends in his home country, a claim susceptible to more direct proof or circumstantial evidence, and varying resources with which to pursue the claim. Cultural differences may also impact whether corroborating evidence is

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[2] For example, in this case, the IJ had a denial rate of 81.9% in asylum cases from 2000 to 2005. (AR 265; *see also* Jaya Ramji-Nogales, Andrew I. Schoenholtz, Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 329-30 (2007).)

[3] A specific notice standard would limit unreasonable corroboration demands by ensuring that applicants have an opportunity to explain, on the record, why certain evidence is unavailable.

available. *See Chouchkov v. INS*, 220 F.3d 1077, 1083 n.15 (9th Cir. 2000) ("It must be stressed that what sounds peculiar in one country may be the norm in another."). Indeed, the fact-specific nature of asylum claims makes it particularly difficult to estimate whether a particular IJ will find it reasonable to require a particular type of corroboration, what efforts to seek the documentation will be found sufficient, or how much danger one might reasonably cause to one's relatives or friends abroad in the quest for corroboration.

Given these harsh realities of the immigration system, expecting an asylum applicant to guess accurately, on pain of removal, which evidence may require corroboration is fundamentally unfair and would be inconsistent with the constitutional and statutory requirement that applicants be given a "reasonable" opportunity to present evidence. *See* 8 U.S.C. § 1229a(b)(4)(B). Indeed, an applicant cannot reasonably be expected to produce corroborating evidence that he could not anticipate would be required. *Ren*, 648 F.3d at 1091 ("The applicant cannot act on the IJ's determination that he 'should provide' corroboration, of course, if he is not given notice of that determination until it is too late to do so.").

C. Oshodi's Case Demonstrates that a General Notice Standard Would Inevitably Result in the Denial of Asylum Applications Without a Full or Fair Analysis of the Claims' Merits

A general notice standard will inevitably result in asylum applications being denied for reasons separate and apart from the merits. Indeed, Oshodi's case

demonstrates the significant perils of adopting a general notice standard. Oshodi's application was not denied because he failed to provide any corroborating evidence. Rather, Oshodi's application was denied because he produced the wrong corroborating evidence.

As noted in Petitioner's briefing, Oshodi provided extensive corroborating evidence that related to the key aspect of his requests for asylum, withholding of removal, and protection under the Convention Against Torture —Oshodi's claim that he was persecuted and tortured because of his political activities in Nigeria. (*See* Pet. Supp. Br. at 8.) For example, Oshodi produced medical reports detailing the abuse he suffered at the hands of Nigerian authorities. (*See* AR 749-52; 754-56; 762.) Oshodi also produced police reports describing two instances in which he had been attacked. (AR 758, 760.) He also produced letters from family members, which happened to confirm his identity, even though he had not yet been notified by the IJ that his identity needed corroboration. (AR 669-72; 933-37.)

Oshodi's application, however, was denied because he did not produce corroborating evidence that addressed the IJ's specific concerns regarding his identity and family history—concerns that Oshodi became aware of for the first time when the immigration court issued its decision. (*See* AR 343.) For example, the IJ faulted Oshodi for failing to corroborate Oshodi's statement that his father was deceased. (*See* AR 345.) Had Oshodi been given adequate notice of the IJ's

concerns, he could then have produced corroborating evidence or provided his best explanation as to why the requested corroborating evidence was unavailable.

In Oshodi's case, it was the IJ's failure to provide Oshodi with specific notice of the corroboration that was required, rather than the merits of Oshodi's claim, that led to the denial of his requests for relief. Indeed, the IJ specifically recognized that there was "enough evidence within the record to suggest past persecution and/or a well-founded fear of future persecution." (AR 345.) Nevertheless, the IJ denied Oshodi's application because Oshodi failed to produce, or explain the unavailability of, additional corroborating evidence that the IJ never told Oshodi was required. (AR 349, 352.)

Under a general notice standard, occurrences such as this become the norm. Ambushing applicants with previously unarticulated demands for evidence inherently leads to the denial of meritorious applications, sending applicants home to face persecution, torture, and possibly death because they guessed wrong and failed to predict what corroborating evidence the IJ would require.

D. Existing Procedural Mechanisms are Insufficient to Remedy the Harm that Arises When Applicants are Not Made Aware of Specific Corroborating Evidence that Will Be Required of Them

Under a general notice system, there are no adequate procedural mechanisms for applicants whose claims are denied for failure to provide corroboration.

1. Motions to Reopen Will Be Unavailable to Most Applicants

Under applicable regulations, reopening will generally be unavailable to an applicant who failed to provide corroborating evidence if the evidence "could" have been obtained previously. 8 C.F.R. § 1003.2(c)(1) ("A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered … was not available and could not have been discovered or presented at the former hearing."). For example, where an applicant is denied asylum for failing to corroborate the age stated on his passport, and the applicant could obtain additional documentary evidence confirming his age, reopening is unavailable unless he shows that the additional evidence "could not have been discovered or presented" at the earlier hearing. *See, e.g.*, *INS v. Abudu*, 485 U.S. 94, 104-05 (1988); *Goel v. Gonzales*, 490 F.3d 735 (9th Cir. 2007). Thus, even where evidence could decisively dispel whatever doubts exist, the rules do not permit reopening.

Moreover, in the unusual case where the applicant could demonstrate that the corroboration "could not have been discovered or presented," motions to reopen are discretionary and may be denied if the IJ does not believe it would "alter the result." 8 C.F.R. § 1003.2(c)(1).

2. Continuance Requests Are Inadequate Without Specific Notice

Where an issue arises at hearing, *prior* to the IJ's decision, the applicant may request a continuance to seek additional corroboration. Under a general notice standard, however, an applicant is unlikely to learn of the need for a continuance to obtain additional corroborating evidence until *after* the IJ issues its decision and the proceedings have concluded. To obtain a continuance, an applicant would therefore have to guess whether an IJ is about to deny asylum based on a matter which arose at the hearing.

Even if an applicant anticipates the need for a continuance, there is no guarantee one will be granted. The continuance standard is discretionary in nature and the pressures of the immigration system make IJs loathe to grant continuances, even when fairness requires them. *See Cruz-Rendon v. Holder*, 603 F.3d 1104, 1110 (9th Cir. 2010) ("A further continuance would not have inconvenienced the court, except to the extent that the IJ wanted the case off her docket."). A continuance requires a "showing that the lack of preparation occurred despite a diligent good faith effort to be ready to proceed and that any additional evidence [the alien] seeks to present is probative, noncumulative, and significantly favorable to the alien." *Matter of Sibrun*, 18 I & N Dec. 354, 356 (BIA 1983). Moreover, a continuance denial will not be reversed "without a showing of actual prejudice or harm." *Id*. Together, this unfairly places all of the risk on asylum applicants. *See*

Guchshenkow v. Ashcroft, 366 F.3d 554, 560 (7th Cir. 2004) ("Asylum seekers should not bear the entire burden of adjudicative inadequacy at the administrative level.").

Thus, these administrative mechanisms are inadequate to avoid the denial of meritorious claims under a general notice standard. A specific notice standard is the only way to ensure that applicants are provided a full and fair opportunity to present the evidence required to support their claims.

CONCLUSION

For these reasons, and those stated in Petitioner's briefs, *Amici Curiae* respectfully urge the Court to find that some notice of perceived corroboration flaws is necessary prior to a corroboration-based denial of an application for asylum.

DATED: September 28, 2012

Respectfully submitted,

McDERMOTT WILL & EMERY LLP

By: */s/ Julian L. André*
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