UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 05-4488

IBRAHIM PARLAK,
Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL,
Respondent.

REPLY MEMORANDUM IN SUPPORT OF PETITIONER'S MOTION FOR STAY OF REMOVAL PENDING PETITION FOR REVIEW

In its brief, the Government offers little or no opposition to Petitioner's arguments for three of the four Bejjani factors governing the grant of a stay of removal. Bejjani v. INS, 271 F.3d 670, 688 (6th Cir. 2001).

First, the Government does not allege—nor can it—that granting this stay would result in *any* harm or inconvenience to the Department of Justice or the Department of Homeland Security. Second, the Government misconstrues the Bejjani standard by stating that Mr. Parlak would not suffer irreparable harm because he could continue to prosecute his Petition for Review after the Department of Homeland Security ("DHS") deports him to Turkey. Opposition at 10. The Bejjani court rejected this argument, ruling that evidence of *potential* harm that could result from

removal weighs in favor of granting a stay. 271 F.3d at 689 (referring to "potential harm"). If DHS removes Mr. Parlak to Turkey, then the potential harm that could befall him is dire. As the BIA opined:

> We acknowledge [Mr. Parlak's] argument that his return to Turkey would not go unnoticed….The 2002 State Department Country Report for Turkey states that the use of torture is "regular[]," "widespread" and "pervasive" by security forces. *See* Exh. 2, Tab S at 5. The torture was administered by local level authorities regardless of whether it was sanctioned by higher authority. *Id*. The fact that [Mr. Parlak] has been associated with the PKK renders him vulnerable to notice by these security forces, many of whom apparently operate with impunity in certain regions of the country, including the southeast, where [Mr. Parlak's] family is from and where many Kurds live.

BIA at 14.[1] It is therefore clear-cut that given (1) the conceded lack of harm or inconvenience the grant of a stay would cause the Government, and (2) the potential harm that could result to Mr. Parlak, "the potential harm to the movant outweighs the harm to the opposing party" if the Court does not grant a stay here. Bejjani, 271 F.3d at 688.

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[1] A December 5, 2005 decision by the Seventh Circuit, which found that Turkish security forces had inflicted "blindfolding, underfeeding and multiple beatings" on a Turkish Kurd because he had formed a Kurdish study group at a Turkish university, underscores the BIA's finding here. Durgac v. Gonzales, __ F.3d __, 2005 WL 3275790 at *5 (7th Cir., Dec. 5, 2005). Moreover, the record in Durgac suggests that the Turkish government viewed the student as a "traitor" because his brother had sought asylum in Great Britain. 2005 WL 3275790 at *1.

The Government also gives short-shrift to the question of whether removing Mr. Parlak would serve the public interest. Respondent summarily dismisses the possibility that this Court might grant Mr. Parlak's petition, paying no heed to the alarming number of BIA decisions reversed in the last 12 months and the severity of criticism of the BIA and immigration judges by the circuit courts.[2] Respondent has no challenge to Mr. Parlak's broad and unwavering support from his southwestern Michigan community. Respondent merely recites the rubric that "the law changed, Petitioner's activities fall within the definition of 'engaged in terrorist activity,' and the Congressional mandate is that he be deported." Opposition at 8. Contained therein is the important question of law that Mr. Parlak's petition presents for review, which also weighs in favor of granting a stay. Bejjani, 271 F.3d at 689.

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[2] In a recent opinion from the Seventh Circuit, Judge Posner excoriates the BIA and immigration judges, stating "the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice." Benslimane v. Gonzales, __ F.3d __, 2005 WL 3193641, *1 (7th Cir., Nov. 30, 2005). In support of this statement, Judge Posner notes the "staggering" 40% reversal rate for the BIA in the Seventh Circuit over the past year and observes that "[o]ther circuits have been as critical." Benslimane, 2005 WL 3193641 at *1. "All that is clear is that it cannot be in the interest of the immigration authorities, the taxpayer, the federal judiciary, or citizens concerned with the effective enforcement of the nation's immigration laws for removal orders to be routinely nullified by the courts, and the power of correction lies in the Department of Homeland Security, which prosecutes removal cases, and the Department of Justice, which adjudicates them in its Immigration Court and Board of Immigration Appeals." Id.

At its most fundamental level, Mr. Parlak's petition presents the following question: can an immigrant like Mr. Parlak, who made forthright disclosures about his past association with the PKK on his asylum application in 1991 and was granted asylum with INS knowledge of these disclosures, be later deported under INA §237(a)(4)(B) on the basis of a retroactive recharacterization in 2004 of these 1980s events as "terrorist activity"?

No federal court has ever decided this specific issue.[3] This is not a case in which Mr. Parlak has been charged with being deportable for having been originally inadmissible/excludable for terrorist activity. Cf. Singh-Kaur v. Ashcroft, 385 F.3d 293, 297 (3rd Cir. 2004) (addressing 8 U.S.C. §1182(a)(3)(B)(i)(I), the "inadmissibility statute"); Daneshvar v. Ashcroft, 355 F.3d 615, 626-27 (6th Cir. 2004) (same). Instead, the specific issue here requires the determination by this Court of the constitutional limit of §237(a)(4)(B)'s retroactivity. See INS v. St. Cyr, 533 U.S. 289, 316 (2001) (Congress has the power to enact laws with retrospective effect "within constitutional limits"). The Government's repeated and veiled references to Mr. Parlak as a "terrorist" in its Opposition conveys the urgency of this question, as the Government did not

[3] In June 2005, the Ninth Circuit upheld the BIA's order to deport an alien charged with removal under INA §237(a)(4)(B) for engaging in "terrorist activity" in the United States *after* his lawful admission. Kelava v. Gonzales, 410 F.3d 625 (9th Cir. 2005). However, that court did not address the issue of whether the retroactive application of the "terrorist activity" definition was proper. Kelava, 410 F.3d at 628, n. 5.

consider him a "terrorist" between 1991 and 2004, even though the INS had knowledge during those years of his past association with the PKK. See, e.g., Opposition at 5.

Given the unprecedented nature of the issues in this case, the Government's flat rejection of Mr. Parlak's constitutional arguments is without basis. For example, Respondent's heavy reliance on Carlson v. Landon is misplaced and especially telling. That case addressed four aliens who were *active* members of the Communist party at the time Congress passed the Internal Security Act of 1950, which mandated the expulsion of Communists. Carlson v. Landon, 342 U.S. 524, 530 (1952) ("each was at the time of arrest a member of the Communist Party"). In other words, these aliens were *still engaging* in the very conduct that Congress made deportable in 1950. "They are deported for what they are now, not for what they were." Carlson, 342 U.S. at 536. But the Government does not seek to deport Mr. Parlak for what he is now—a model immigrant whose conduct has been exemplary since his arrival in 1991. Parlak v. Baker, 374 F. Supp. 2d 551, 561 (E.D. Mich. 2005). They seek to deport him for what they *now* claim he *was* back in the 1980s. In light of Mr. Parlak's 1991 disclosures to the INS and the exemplary life he has lived since entering the United States, this amounts to an unconstitutional violation of his due process rights.

The Government's reliance on Carlson for its dismissal of Mr. Parlak's non-delegation claim is similarly flawed. The central non-delegation issue in Carlson was whether Congress had articulated sufficient standards for the Attorney General to make bail determinations for detained immigrants. Carlson, 342 U.S. at 526-27. Although Carlson did not require Congress to set forth "specific standards" dictating how the Attorney General should determine an alien's bail, it did restate the general rule that "a permissible delegation of legislative power" requires that "executive judgment [be] limited by adequate standards." 342 U.S. at 544. [4] But recent confusion in the immigration courts indicates that these standards are unclear. For example, an immigration judge recently asked attorneys to brief the question of whether pro-U.S. participants in the Bay of Pigs (who were armed by the U.S.) fall under the definition of "terrorist activity." See, e.g., Alicia A. Caldwell, *Judge Denies Bond for Cuban Militant*, ASSOC. PRESS, Jul. 25, 2005. If, as the Government suggests, there is no difference between an Iraqi Kurd fighting Saddam Hussein and a Turkish Kurd, and both are

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[4] In an associated matter involving Mr. Parlak, a federal court rejected the Government's claim of Congressional vesting of untrammeled discretion in the Attorney General. In Parlak v. Baker, the Government argued that the Attorney General had discretionary authority to detain aliens without bail pending removal, even without evidence of threat or flight risk. 374 F. Supp. 2d at 559. Judge Cohn rejected this argument, holding that Mr. Parlak's detention without bond was unconstitutional. Id. at 561. That decision is currently on appeal before this Court. Baker v. Parlak, No. 05-2003 (6th Cir., filed Jul. 15, 2005).

equally deportable, then Congress must have articulated "adequate standards" to suggest that it is now the will of Congress to penalize immigrants who acted on behalf of U.S. interests in years past, or were involved in any way in a civil war that did not threaten U.S. national security.[5] But no evidence exists that such adequate standards were ever articulated.

Finally, the Ex Post Facto question at issue here does not pertain to whether *deportation* is punitive. Instead, the question is whether the Government's recent, incessant and unwarranted *stigmatization of Mr. Parlak as a terrorist* within the context of deportation is punitive and thus unconstitutional.[6] Under the seven-factor test in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963), the retroactive application of the terrorism deportation statute and its associated stigmatization of Mr. Parlak as a terrorist—all on the basis of an

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[5] As Judge Cohn explained, at the time Mr. Parlak sought refuge in the United States, the Turkish/Kurdish conflict "could be characterized as a civil war. In short, activities which occurred in 1988 may not be viewed in the same light as activities occurring after 1997 [the year the PKK was designated as an FTO by the State Department]." Parlak, 374 F. Supp. 2d at 561.

[6] Judge Cohn found that the Government's motives in its prosecution of Mr. Parlak were suspect. "[T]he Court observes what appears to be a piling on of removability charges against [Mr. Parlak].…The manner in which [his] case has proceeded, or rather escalated, raises suspicion as to the actions of ICE under the circumstances. Once [Mr. Parlak] was labeled a terrorist, the proceedings took on a decidedly more complex, if not high-profile, aura." Parlak, 374 F. Supp. 2d at 560.

association with the PKK that the INS was aware of since 1991—is punitive in this case and violates the Ex Post Facto clause.

Respondent also directs this Court's attention to the BIA's affirmance of the fraud charge against Mr. Parlak. Opposition at 9. Although this issue will be argued in detail in Petitioner's brief on the merits, it is sufficient to say here that this charge, by itself, would not compel Mr. Parlak's removal. If this Court grants Mr. Parlak's petition for the "terrorist activity" and persecutor charges, then he would become eligible for forms of relief not currently available to him even if the Court sustains the fraud charge. See 8 U.S.C. §1229b (cancellation of removal); 8 U.S.C. §1231(b)(3) (withholding of removal).

In summary, Mr. Parlak plainly meets the Bejjani criteria for granting a stay. Moreover, "[h]e has been a model immigrant vigorously asserting his right to remain in the United States. He is not a threat to anyone nor a risk of flight. He has strong ties to the community in which he resides." Parlak, 374 F. Supp. 2d at 561. For the foregoing reasons, this Court should grant the stay of removal and allow Mr. Parlak to remain in the United States pending the adjudication of his Petition for Review.

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Respectfully submitted,

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