
No. 20-5283

United States Court of Appeals
for the
Sixth Circuit

Pierre Salame Ajami,
Petitioner-Appellee.

v.

Veronica Tescari Solano,
Respondent-Appellant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
(NASHVILLE DIVISION) CASE NO. 3:19-cv-00161
THE HONORABLE ELI RICHARDSON

**BRIEF OF NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT
AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S PETITION FOR
PANEL REHEARING AND REHEARING EN BANC**

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Office of Immigration Statistics, *Fiscal Year 2020 Refugees and Asylees Annual Flow Report* (Mar. 8, 2022),
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U.S. Dep't of Health & Hum. Servs., *A Treatment Improvement Protocol (TIP) Series No. 57, Trauma-Informed Care in Behavioral Health Services* (2014),
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DISCLOSURE STATEMENT

Pursuant to Sixth Cir. R. 26.1, amicus curiae National Immigrant Women's Advocacy Project ("NIWAP") makes the following disclosure:

1. Is said amicus a subsidiary or affiliate of a publicly owned corporation?

No.

2. Is there a publicly owned corporation, not a party to the appeal or an amicus curiae, that has a financial interest in the outcome?

No.

Dated: April 19, 2022

/s/ Harry P. Rudo
Harry P. Rudo

INTEREST OF THE AMICUS CURIAE

NIWAP is a national organization advocating for greater asylum seeker protections and increased protections for immigrant victims of domestic and sexual violence under U.S. immigration, family, and child custody laws. NIWAP is well positioned to understand and describe the asylum process, how asylum seekers experience trauma, and how trauma affects the perception of their testimony. Given NIWAP's expertise in these areas, the amicus curiae submits that its views will be of considerable help to the Court. A Motion to permit the filing of this Brief is being submitted contemporaneously.¹

SUMMARY

This appeal raises the important issue of whether a judge must consider a party's prior grant of asylum when considering a petition filed under the Hague Convention and the International Child Abduction Remedies Act. Appellant, Ms. Veronica Tescari Solano, and her children EAST and PGST (the "Children") fled domestic abuse and persecution in Venezuela and were among the few applicants granted asylum in recent years. This successful petition demonstrates Ms. Tescari's

¹ NIWAP states that no party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person—other than NIWAP, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief. *See* FRAP 29(a)(4)(E).

ability to meet the high bar required to gain asylum, as well as her credibility. In affirming the District Court’s failure to consider Ms. Tescari’s and the Children’s asylee status before ordering that the Children be returned to Venezuela, the majority holds that it is acceptable to ignore clear proof that returning the Children to Venezuela would create an intolerable situation.

ARGUMENT

I. THE MAJORITY IMPROPERLY AFFIRMED THE DISTRICT COURT’S OPINION, WHICH IGNORED CRITICAL FACTS.

To obtain asylum status in the United States, Ms. Tescari had to prove she “is unable or unwilling to return to her home country because of past persecution or a ‘well-founded fear’ of future persecution ‘on account of race, religion, nationality, membership in a particular social group, or political opinion.’” *Juan Antonio v. Barr*, 959 F.3d 778, 789 (6th Cir. 2020) (quoting 8 U.S.C. § 1101(a)(42)). This Court has explained that “persecution,” as used in § 1101(a)(42)(A), “requires more than a few isolated incidents of verbal harassment or intimidation, unaccompanied by any physical punishment, infliction of harm, or significant deprivation of liberty.” *Pilica v. Ashcroft*, 388 F.3d 941, 950 (6th Cir. 2004). Rather, persecution requires “the infliction of harm or suffering by the government, or persons a government is unwilling or unable to control, to overcome a characteristic of the victim.” *Id.*

An applicant who establishes that she has suffered past persecution is presumed to have a well-founded fear of future persecution Alternatively, an applicant can demonstrate a well-founded fear of

future persecution by showing that she has a genuine fear and that a reasonable person in her circumstances would fear persecution on account of a statutorily-protected ground if she returned to her native country. To succeed, the applicant must present evidence establishing an ‘objective situation’ under which her fear can be deemed reasonable.

Juan Antonio, 959 F.3d at 789.

Ms. Tescari was required to present “reasonable, substantial, and probative evidence” to the Department of Homeland Security’s U.S. Citizenship and Immigration Services office (“USCIS”) proving that she had a credible fear of persecution in Venezuela. *Id.* “The USCIS Asylum Division adjudicates claims and may grant asylum directly through the affirmative asylum process. Asylum officers conduct interviews to determine asylum eligibility using an applicant’s testimony, information on Form I-589, any accompanying evidence provided by the applicant, and material provided by DOS, other USCIS offices, or other credible sources.” Office of Immigration Statistics, *Fiscal Year 2020 Refugees and Asylees Annual Flow Report*, at 15 (Mar. 8, 2022), https://www.dhs.gov/sites/default/files/2022-03/22_0308_plcy_refugees_and_asylees_fy2020_1.pdf?msclkid=5036562cbc3511eca106cce6db7472f0. In other words, before she could have obtained asylum status for herself and the Children, Ms. Tescari had to submit substantial credible evidence and give credible testimony proving either past persecution or a genuine fear of future persecution in Venezuela.

Obtaining a grant of asylum is no small feat. Between 2001 and 2021, **more than half** of all applications for asylum in the United States were denied. *See* TRAC Immigration, *The Impact of Nationality, Language, Gender and Age on Asylum Success*, <https://trac.syr.edu/immigration/reports/668> (58% of all asylum decisions denied between 2001 and 2021). Between 2016 and 2020, asylum and refugee admission denials rose dramatically because of policies implemented by the Executive Branch. *See Fiscal Year 2020 Flow Report*, at 7. During the period of time in which Ms. Tescari was granted asylum, the asylum denial rate skyrocketed, rising to an all-time high of **71% denials** in 2020. *See* TRAC Immigration, *supra*.

Ms. Tescari's ability to obtain asylum in June of 2019 establishes that Ms. Tescari faces a genuine threat of persecution in her home country. Particularly given the high rates of asylum denials in 2016–2020, Ms. Tescari could not have tricked her way into obtaining asylee status, nor is it plausible to assume that she could have received a grant of asylum without credible evidence of persecution. The District Court's failure to consider Ms. Tescari's and the Children's asylum status amounts to a decision to ignore credible evidence concerning the conditions the Children would face if returned to Venezuela, and the majority should not have affirmed that decision.

A key feature of an asylum adjudication is a determination that the applicant is “unable or unwilling to return” to her home country. *Juan Antonio*, 959 F.3d at

789. The District Court’s order makes clear that it did not consider this feature of U.S. immigration law, stating that Ms. Tescari could “choose” to return to Venezuela with her children. *Ajami v. Solano*, No. 3:19-cv-00161, 2020 WL 996813, at *9 (M.D. Tenn. Feb. 28, 2020). But, as experts have noted, requiring a parent to choose between returning to a country to face persecution or separating from her minor children is an “anguishing dilemma,” and the law should not be read to impose such an impossible choice. *See, e.g., Abebe v. Ashcroft*, 379 F.3d 755, 762–64 (9th Cir. 2004) (Ferguson, J. dissenting) (“U.S. immigration law prioritizes the value of keeping families together. Family reunification is the dominant feature of current arrangements for permanent immigration to the United States.”); Kimberly Sowders Blizzard, *A Parent’s Predicament: Theories of Relief for Deportable Parents of Children Who Face Female Genital Mutilation*, 91 Cornell L. Rev. 899, 915 (2006); Alida Yvonne Lasker, *Solomon’s Choice: The Case for Granting Derivative Asylum to Parents*, 32 Brook. J. Int’l L. 231, 231 (2006). This impossible choice that Ms. Tescari now faces is relevant to the question of whether returning the Children to Venezuela created an intolerable situation, and the majority should have reversed for consideration of this issue.

Further, as Judge Moore’s dissent noted, overlooking Ms. Tescari’s grant of asylum also means the District Court failed to consider the practical fact that—setting aside her well-founded fear of returning to Venezuela—Ms. Tescari cannot

return to Venezuela without putting her grant of asylum at risk. *See* Dkt. 56-2 at 17–18 (citing U.S. Citizen & Immigration Servs., Policy Manual, Ch. 6, <https://www.uscis.gov/policy-manual/volume-7-part-m-chapter-6>).

Finally, in affirming, the majority blessed the District Court’s failure to consider not just Ms. Tescari’s asylum status, but the fact that the Children were also granted asylum. “The spouse and unmarried children under the age of 21 of a principal refugee may obtain refugee status as an accompanying ... derivative.” *Fiscal Year 2020 Flow Report*, at 3. “[T]he principal reason for granting asylum to spouses and children of asylees [is to] keep[] families together.” Blizzard, *supra*, at 915. But, as this Court has recognized, even outside the derivative asylum framework, a family member can demonstrate a well-founded fear and obtain asylum based on the persecution of another family member. *See Abay v. Ashcroft*, 368 F.3d 634, 641 (6th Cir. 2004).

All of these considerations concerning the import and effect of USCIS’s grant of asylum to Ms. Tescari and the Children should have been considered before the Children were ordered to be returned to Venezuela, and the majority erred in affirming the District Court.

II. THE MAJORITY IMPROPERLY CREDITED THE DISTRICT COURT'S CREDIBILITY DETERMINATIONS DESPITE ITS FAILURE TO CONSIDER RELEVANT EVIDENCE.

To obtain asylum, Ms. Tescari presented credible arguments to prove her well-founded fear of persecution in Venezuela. In many asylum applications, the strongest—if not the only—evidence of an applicant's experiences is her own testimony. In such cases, immigration factfinders must determine whether the applicant's testimony is credible. As a result, these individuals have substantial experience analyzing the credibility of asylum-seekers. Such factfinders consider an applicant's demeanor, entire story, and other pertinent evidence to gauge credibility.

Ms. Tescari's ability to obtain asylum speaks to her credibility. USCIS asylum officers directly observe asylum applicants and consider their live testimony in the context of the entire record. This allows them to assess whether applicants have testified credibly even though their testimony may lack stereotypical indicia of credibility (such as minor inconsistencies or omitting specific dates). Such individuals are well trained to distinguish between common *perceptions* of credible testimony and what is *actually credible* in the context of asylum cases, particularly where the petitioner suffered personal trauma. *See Improving Efficiency and Ensuring Justice in the Immigration Court System: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 4 (2011),

<https://www.justice.gov/sites/default/files/eoir/legacy/2011/05/18/EOIRtestimony05182011.pdf>.

The majority found the District Court’s credibility determinations not clearly erroneous without discussion of the importance of Ms. Tescari’s asylum grant. Op. at 5. But overlooking Ms. Tescari’s grant of asylum means the District Court ignored corroboration of Ms. Tescari’s credibility. This may well have impacted the District Court’s overall consideration of Ms. Tescari’s defense, because the District Court ultimately determined Ms. Tescari’s testimony concerning her history of abuse was not credible, concluding that “[a]lthough the Court finds that something happened between Petitioner and Respondent on one occasion in 2013, Respondent’s vague reference to other incidents of violence is insufficient to establish that these additional incidents of abuse occurred.” *Ajami*, 2020 WL 996813, at *8. The District Court refused to credit Ms. Tescari’s testimony absent additional “context to determine what, if anything, happened on these two or three other occasions.” *Id.*

This finding ignores pertinent evidence, not only that an Executive Branch official already found Ms. Tescari to be credible, but also the impact that past abuse can have on a witness’s ability to testify. Trauma directly affects what a person can remember or say about a specific event, often leading to incomplete descriptions of past trauma (the very basis for the District Court’s refusal to credit Ms. Tescari’s

testimony). *Id.* Immigration cases recognize that abusive behavior frequently pervades an entire relationship, impacting memories of many years, not just specific incidents. *See, e.g., Hernandez v. Ashcroft*, 345 F.3d 824, 836–37 (9th Cir. 2003) (“[A]lthough a relationship may appear to be predominantly tranquil and punctuated only infrequently by episodes of violence, ‘abusive behavior does not occur as a series of discrete events,’ but rather pervades the entire relationship.”).

First, trauma survivors may have difficulty recalling specific details of their experiences. Heightened stress can “inhibit processing of and memory for peripheral details.” Deborah Davis & William C. Follette, *Foibles of Witness Memory for Traumatic/High Profile Events*, 66 J. Air L. & Com. 1421, 1455–56 (2001). These problems are especially acute for victims of repeated abuse, who may “confuse the details of particular incidents,” such as times, dates, and “which specific actions occurred on which specific occasion.” *Id.* at 1514. Indeed, it is “normal” for victims of trauma and sexual assault “to not know or remember complete details.” *Sexual Assault Incident Reports: Investigative Strategies*, Int’l Ass’n of Chiefs of Police (Aug. 8, 2018), <https://www.theiacp.org/resources/document/sexual-assault-incident-reports-investigative-strategies>; *see* J. Douglas Bremner, *Traumatic Stress: Effects on the Brain*, 8 Dialogues Clinical Neuroscience 445, 448–49 (2006). “An inability to accurately recall the date when a traumatic event occurred is not particularly probative of a witness’s credibility when alleging traumatic persecution,

because such traumatic persecution itself may cause the witness difficulty in recalling details of the incident.” *Marouf v. Lynch*, 811 F.3d 174, 185 (6th Cir. 2016). The same phenomenon can prevent survivors of trauma from recalling other details. *See Morgan v. Mukasey*, 529 F.3d 1202, 1209 (9th Cir. 2008) (noting applicant’s “inability to be exact” about where her attackers came from was “a trivial element of her traumatic experience” and did not undermine her credibility).

Second, trauma survivors may be reluctant to discuss details of their abuse because they do not want to suffer the pain of reliving their experiences. *See* David S. Gangsei & Ana C. Deutsch, *Psychological Evaluation of Asylum Seekers as a Therapeutic Process*, 17 *Torture* 79, 80 (2007) (“[S]urvivors most often don’t want to talk about the torture[.]”); Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors’ Credibility and Dismissing Their Experiences*, 167 *U. Pa. L. Rev.* 399, 410–11 (2019); U.S. Dep’t of Health & Hum. Servs., *A Treatment Improvement Protocol (TIP) Series No. 57, Trauma-Informed Care in Behavioral Health Services*, at 73–74 (2014), <https://store.samhsa.gov/sites/default/files/d7/priv/sma14-4816.pdf>.

Third, trauma survivors can struggle to describe linear narratives. Traumatized individuals may focus on sensory or emotional perceptions, such as “thoughts of dying,” “trying not to panic,” or “loved ones also in danger.” Davis & Follette, *supra*, at 1459. Later memories of the traumatic event may consist of

“sensory data ... but without the linguistic narrative structure that gives a person’s ordinary memories a sense of logical and chronological coherence.” Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum*, 56 Santa Clara L. Rev. 457, 487 (2016).

Fourth, trauma survivors may suffer from an “impairment of recall.” Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 Geo. Immigr. L.J. 367, 388 (2003) (quoting Juliet Cohen, *Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers*, 13 Int’l J. Refugee L. 293, 298, 308 (2001)). At its most extreme, trauma survivors may suffer from “psychogenic amnesia,” or “loss of memory caused by psychological trauma.” Davis & Follette, *supra*, at 1462. Loss of memory can be broad or narrow, “even as narrow as selected components of the traumatic event,” and can affect how a survivor recounts any event related to trauma. *Id.* at 1462–63.

Trauma can thus manifest itself in many ways that contradict stereotypes about candor, consistency, and memory. But these effects, far from signaling a lack of credibility, can in fact be evidence of the very abuse that leads individuals like Ms. Tescari—a survivor of abuse and persecution in Venezuela—to flee their home countries in the first place. Ignoring Ms. Tescari’s grant of asylum, and the finding of credibility that led to the grant of the asylum, may have colored the District

Court's view of Ms. Tescari's credibility and caused the District Court to overlook the impact past trauma had on Ms. Tescari's testimony. It was improper for the majority to affirm the District Court's decision in light of its failure to consider this pertinent corroborating evidence of Ms. Tescari's credibility.

CONCLUSION

For the foregoing reasons, NIWAP urges the Court to grant Ms. Tescari's petition for panel rehearing or for rehearing en banc.

Dated: April 19, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the length limit permitted by Fed. R. App. P. 29(b)(4), because the brief contains 2,550 words, excluding the parts of the petition exempted by Fed. R. App. P. 32(f). This petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2020 14-point Times New Roman font.

/s/ Harry P. Rudo _____
Harry P. Rudo

CERTIFICATE OF SERVICE

I certify that on April 19, 2022, I electronically filed the foregoing document with the Clerk of Court of the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system, with will send notice to all registered CM/ECF users. Participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

/s/ Harry P. Rudo

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