

02-2460

IN THE
United States Court of Appeals
FOR THE THIRD CIRCUIT

SAIDOU DIA,
Petitioner,

-against-

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

**BRIEF OF THE AMERICAN IMMIGRATION LAW FOUNDATION
AND THE LAWYERS COMMITTEE FOR
HUMAN RIGHTS AS *AMICI CURIAE* FOR THE PETITIONER**

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I. STATEMENT OF AMICI CURIAE

Amici curiae American Immigration Law Foundation (“AILF”) and the Lawyers Committee for Human Rights (“Lawyers Committee”) proffer this brief to assist the Court in its consideration of the serious constitutional and administrative law repercussions of the “affirmance without opinion” procedure utilized in this case by a single member of the Board of Immigration Appeals’ (“BIA” or “Board”). Under this procedure, single Board members are rubberstamping the results of decisions by Immigration Judges (“IJ”), without adopting the IJs’ reasoning and without providing any explanation of their own reasoning.

Amici have grave concerns about the fairness of this process. Meaningful appellate review is essential in all immigration proceedings. In asylum cases such as Mr. Dia’s, many appellants would face persecution, torture or even death in their home countries were they mistakenly denied protection by the United States.¹ Board review may be their only chance to correct an erroneous decision. Not only has Congress drastically curtailed federal court review of immigration cases, where it does exist it nevertheless remains unavailable to many non-citizens unable to afford representation

¹ Indeed, it was the Lawyers Committee’s concern about Mr. Dia’s fate that prompted it to recruit pro bono representation for him in this appeal.

and without pro bono counsel. For detained non-citizens, an appeal to federal court necessarily means additional months in detention – a fate that they might have been spared by a meaningful Board review.

AILF is a non-profit organization established to increase public understanding of immigration law and policy and to advance fundamental fairness, due process, and constitutional and human rights in immigration law and administration. AILF has a direct interest in ensuring that the due process rights of immigrants and refugees are protected in administrative removal proceedings and the federal courts.

Since 1978, the Lawyers Committee has worked to promote fundamental human rights and to protect the rights of refugees, including the right to seek and enjoy asylum. The Lawyers Committee advocates that U.S. law and policy adhere to the international standards of the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and other international human rights instruments.

The Lawyers Committee operates one of the largest and most successful *pro bono* asylum representation programs in the country. With the assistance of volunteer attorneys, the Lawyers Committee has provided representation to approximately 900 indigent refugees from more than 60 countries, including those detained at the 300-bed immigration detention

facility in Elizabeth, New Jersey where Petitioner Dia has been detained for 18 months. The Lawyers Committee and its volunteer attorneys represent approximately 900 clients from more than 60 countries.

II. SUMMARY OF THE ARGUMENT

Invoking 8 C.F.R. § 3.1(a)(7), a single member of the Board summarily affirmed the IJ's denial of Mr. Dia's application for asylum.

Under the mandate of the regulation, the Board Member offered no explanation for upholding the decision of the IJ and also failed to explain how the case met the prerequisite criteria for a summary affirmance.

Because the case was decided summarily, Petitioner was deprived of a full, considered and reasoned decision by a three-member panel of the Board.

The summary affirmance process violates both administrative law and due process. First, the summary affirmance procedure is limited to only those cases that satisfy certain specified criteria. Because the regulation prohibits the single Board Member from explaining his or her use of the procedure, the Court is deprived of the ability to determine whether the Board Member has adhered to the regulation. Second, the prohibition on any explanation of the reasons for the Board Member's decision violates fundamental rules of administrative law. It is impermissible for a Board Member to make an independent determination of a case and fail to either

explicitly adopt the reasoning of the IJ or explain his or her own independent reasons for affirming the results of the IJ decision. Third, the opaque nature of the process, which insulates the Board Member's decision from any federal court review, violates due process.

Amici urge this Court to invalidate the summary affirmance process and to instead require Board Members to issue decisions that clearly explain the reasoning behind the decisions.

III. ARGUMENT

A. OVERVIEW OF THE RELEVANT LAW

1. Background

The Department of Justice ("DOJ") first adopted the summary affirmance process in 1999. 8 C.F.R. § 3.1(a)(7) (1999). At that time, the process was limited by regulation to categories of cases designated by the Board Chairperson. *Id.* Initially, the process was used sparingly: the Board Chair made no designations during the first year, and only very narrow ones during the next eighteen months. *See, e.g.,* Streamlining Implementation - Phase III, Chairman of Board of Immigration Appeals (BIA), S-L 99-11 (Aug. 28, 2000).

In February 2002, the Attorney General proposed radical restrictions on Board review of cases that would (i) increase the use of summary affirmance and other brief decisions; (ii) limit the Board's *de novo* review

authority; (iii) decrease the time for filing briefs; and (v) reduce the Board from 23 Members (19 Board positions are currently occupied) to 11 Members. *See* 67 Fed. Reg. 7309 (February 19, 2002). The proposed changes sparked widespread concern, and 68 comments were filed. *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54878 (August 26, 2002) (hereinafter "Procedural Reform Regulation").

Following the announcement of the proposed regulatory changes, and in anticipation of these changes, the Board dramatically increased the number of summary affirmance decisions being issued. The Chairperson designated broad new categories of cases as subject to summary affirmance, including all asylum, withholding of deportation, Convention Against Torture, suspension of deportation and cancellation of removal cases. *See* Use of Summary Affirmance Orders in Asylum and Cancellation Cases, Acting Chairman of BIA, S-L 99-25 (Mar. 15, 2002). Soon thereafter, the Chairperson designated a category including *all* appealable decisions in removal, deportation and exclusion cases. *See* Expanded Use of Summary Affirmance for Immigration Judge and INS Decisions, Acting Chairman of BIA, S-L 99-27 (May 3, 2002). As a result, thousands of summary

affirmance decisions have now been issued, particularly in the last six months. *See* Procedural Reform Regulation, 67 Fed. Reg. 54878.

The DOJ issued final regulations adopting the proposed reforms on August 26, 2002, effective September 25, 2002. Procedural Reform Regulation, 67 Fed. Reg. 54878 (Aug. 26, 2002).² The new regulation expands the use of summary affirmance: it no longer is limited to designated categories but instead is mandated in all cases satisfying the regulatory prerequisites.

2. Board procedure generally.

In a removal proceeding under INA § 240, 8 U.S.C. § 1229(a), both parties have a right of appeal to the Board. 8 C.F.R. § 3.38; *see also* 8 C.F.R. § 3.1(b). With the exception of appeals dismissed for procedural deficiencies, the Board must review and decide the merits of all appeals. *See generally*, 8 C.F.R. §§ 3.1(d), (e). Subject to governing law, Board Members must “exercise their independent judgment and discretion in considering and determining the cases.” 8 C.F.R. § 3.1(d)(1)(ii).

² The new regulations reassign the summary affirmance process to 8 C.F.R. § 3.1(e)(4). Should this court remand Mr. Dia’s case, further Board review will be subject to the new regulations. Consequently, *amici* reference the new regulation in this brief, but discuss the prior regulation where necessary.

Consequently, the Board exercises *de novo* review of all questions before it. *See In Re Burbano*, 20 I. & N. Dec. 872, 873 (B.I.A. 1994).³

At the time Petitioner's case was heard, three-Member panels of the Board generally decided all appeals, unless a case satisfied one of the exceptions for a decision by a single Board Member. *See* 8 C.F.R. § 3.1(a)(1) (prior to September 25, 2002). The new regulations reverse this procedure. Now, a single Member of the Board will generally decide appeals, and only those cases satisfying one of six criteria will be referred to a three-Member panel. The six categories include IJ decisions that are not in conformity with the law or applicable precedents; that contain clearly erroneous factual determination; or that require reversal. 8 C.F.R. § 3.1(e)(6).

In all other cases, a single Member of the Board is authorized to decide the case by either affirming without an opinion, discussed below, or by issuing a brief order affirming, modifying, or remanding the decision. 8 C.F.R. § 3.1(e)(4), (5). In any such brief order, the Board Member is required to explain the reasons for his or her decision. *See, e.g.*, Procedural Reform Regulation, 67 Fed. Reg. at 54880, 54886.

³ The new regulations specify that in appeals filed *after* September 25, 2002, an IJ's factual conclusions will be reviewed under a "clearly erroneous" standard. 8 C.F.R. § 3.1(d)(3)(i). This change is not applicable to Mr. Dia's case. *See* 8 C.F.R. § 3.3(f).

A decision of an immigration judge is not final when an appeal is taken to the Board. 8 C.F.R. § 3.39. Rather, following an appeal, it is the Board that issues the final decision in the case. 8 C.F.R. § 3.1(d)(6). The respondent in removal proceedings must appeal to the Board prior to seeking judicial review. 8 U.S.C. § 1252(d)(1). It is the final order of removal that a court of appeals reviews. 8 U.S.C. § 1252.

3. Affirmance without opinion by a single Member of the Board.

A summary affirmance is a decision by a Board Member on the merits of the case. *See* 8 C.F.R. § 3.1(e)(3). Unlike decisions rendered after review by a three-Member panel or by a single Member issuing a brief order, a single Board Member is prohibited from explaining his or her decision on the merits in an affirmance without opinion. 8 C.F.R. § 3.1(e)(4)(ii).

Moreover, the regulation is explicit in defining an affirmance without opinion as a Board approval of only the “result of the decision below;” the affirmance does not “necessarily imply approval of all of the reasoning” of the immigration judge’s decision, although it does signify the Board’s conclusion that any errors were harmless or nonmaterial. *Id.*

An affirmance without opinion is permissible *only if* a case satisfies the regulatory prerequisites for such a decision. 8 C.F.R. § 3.1(e)(4)(i). Thus, as a threshold matter, the Board Member must determine that the case

satisfies both of the first two criteria set forth below, as well as either part (a) or part (b) of the third criteria:

1. That the result reached by the immigration judge was correct;
2. That any errors in the decision below were harmless or nonmaterial; and either
3. (a) That the issue on appeal is squarely controlled by existing Board or federal court precedent and does not involve the application of precedent to a novel fact situation; or

(b) That the factual and legal questions raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.⁴

8 C.F.R. § 3.1(e)(4)(i).

Under the regulations in existence at the time Petitioner's case was decided, if an appeal did not satisfy these criteria, it would be "assigned to a three-Member panel for review and decision." 8 C.F.R. § 3.1(a)(7)(iv). Three-Member panels of the Board would give "additional time and consideration" to the review of a case. Executive Office of Immigration Review; Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56135, 56137 (1999) (hereinafter "Streamlining Regulation"). Additionally, the DOJ indicated that, at least in complex cases, "three-Member review could

⁴ At the time that the Petitioner's case was decided, this last prong of the regulation required that the factual and legal issues raised on appeal be "so insubstantial that three-Member review [wa]s not warranted." 8 C.F.R. § 3.1(a)(7)(ii)(B).

reduce the risk of error” that might otherwise occur by a single-Member review. *Id.* at 56139.

Under the new regulations, any case not decided by summary affirmance will either be decided by a single Board Member issuing a short order or by a three-Member panel. 8 C.F.R. § 3.1(e)(5), (6). Three-Member panels will continue to provide the most searching and comprehensive review of a case, and will issue full written decisions in each case they review. *See, e.g.*, Procedural Reform Regulation, 67 Fed. Reg. at 54880. Nevertheless, a single Board Member will give more time and attention to a case that results in a short order than to a case that is summarily affirmed. In particular, in short-order cases, the Board Member will take the additional time necessary to provide “some explanation of the Board’s rationale.” Procedural Reform Regulation, 67 Fed. Reg. at 54879; *see also id.*, 67 Fed. Reg. at 54891.

When an immigration judge’s decision is affirmed without opinion, the Board member is required to issue an order that states *only* the following: “The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. See 8 C.F.R. § 3.1(e)(4).” The regulation specifically prohibits the Board member from including any further explanation or reasoning. 8 C.F.R. § 3.1(e)(4)(ii).

B. THE SUMMARY AFFIRMANCE PROCESS DEPRIVES THE COURT OF THE ABILITY TO DETERMINE WHETHER THE BOARD HAS CORRECTLY ADHERED TO THIS REGULATION.

A single Board Member is authorized to summarily affirm a decision of an Immigration Judge only if the appeal satisfies *all* of the threshold criteria of the regulation. *See* 8 C.F.R. § 3.1(e)(4); *see also* Streamlining Regulation, 64 Fed. Reg. at 56138. Where such criteria have not been met, the regulations dictate that some explanation for the decision must be provided. 8 C.F.R. § 3.1(e)(5), (e)(6).

The summary affirmance process improperly insulates from judicial review the adjudicatory process for determining whether a case satisfies the threshold requirements for summary affirmance. Because a Board Member is prohibited from offering any reasons for the decision, there is no way for a court to know why the Board Member found that the case satisfied the requirements for summary affirmance – in fact, the lack of transparency makes it impossible to even determine which of the alternate criteria the Board Member relied upon. *See, e.g.*, 8 C.F.R. § 3.1(e)(4)(i)(A), (B). A court is thus unable to ensure that the Board Member strictly adhered to the regulation, acted within the scope of his or her authority, followed necessary procedural requirements, and did not act arbitrarily or abuse his or her discretion. *See Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402,

415-17 (1971); accord *Abdulai v. Ashcroft*, 239 F.3d 542, 545 (3d Cir. 2001) (reversing where Board's lack of explanation raised a serious question about whether its own rules were applied); *Reid v. INS*, 949 F.2d 287, 288-89 (9th Cir. 1991) (reversing Board where it failed to follow its own regulations and provide notice of its decision to the parties); *Vargas v. INS*, 938 F.2d 358, 361 (2d Cir. 1991) (remanding where, *inter alia*, the Board acted inconsistently with the regulations).

A reasoned statement is particularly important here because the threshold test for summary affirmance is not a simple, clear-cut one. Prior to summarily affirming a case, the Board member must determine: 1) whether the result reached below was correct; 2) whether errors committed by the Immigration Judge were harmless or immaterial; and either 3) (a) whether the case is squarely controlled by either BIA or federal court precedent *and* does not involve a novel factual situation; or, alternatively, (b) whether the factual and legal questions raised on appeal are not so substantial that the case warrants the issuance of a written decision. 8 C.F.R. § 3.1(e)(4)(i).

Without an explanation of the reasons for the decision, the court cannot determine whether the Board – applying the proper standards – adequately and correctly evaluated each of these criteria. For instance, a single Board Member is required to determine whether any errors below are

harmless or immaterial. There is no indication in a summary affirmance decision whether the single Board Member even correctly identified any errors, much less how they were evaluated. Federal courts have frequently overruled the Board in its determination of harmless error. *See, e.g., Sewak v. INS*, 900 F.2d 667, 670 n.7 (3d Cir. 1990) (rejecting as “incorrect” BIA formulation of harmless error); *Bui v. INS*, 76 F.3d 268, 270 (9th Cir. 1996) (rejecting Board’s harmless error determination as based on speculation); *Podio v. INS*, 153 F.3d 506, 511 (7th Cir. 1998) (reversing BIA determination that IJ’s refusal to allow witnesses to testify was not prejudicial); *Colemenar v. INS*, 210 F.3d 967, 973 (9th Cir. 2000) (finding prejudice where petitioner was “so clearly. . . denied a full and fair hearing”).

Similarly, even where the Board Member determines that any errors are harmless, he or she must still determine either that (a) the issue on appeal is squarely controlled by existing Board or federal court precedent *and* does not involve the application of precedent to a novel fact situation; or (b) the factual and legal questions raised on appeal are not so substantial that the case warrants a written decision. 8 C.F.R. § 3.1(e)(4)(i)(A) and (B). A summary affirmance does not indicate which of these alternatives was applied to the case. It is equally impossible to determine how the criteria

were analyzed: what precedent was considered; why the facts were found not to be novel; what factual and legal questions were considered; and the standard for determining whether questions raised on appeal were “not so substantial” as to warrant a written decision.

There is room for significant error in each of these determinations. For example, in *In re Ramos*, the Board reconsidered a summary affirmance by a single Board Member and determined, upon closer scrutiny, that its precedent decision on the deportation consequences of DWI convictions did not, in fact, apply to the case. *In Re Ramos*, 23 I. & N. Dec. 336, 337 (B.I.A. 2002). The Board subsequently reconsidered the case a second time and determined that the issues were so significant that they published a precedent decision overruling their earlier precedent on DWI convictions. *Id* at 346.⁵ Federal courts have similarly corrected the Board’s misapplication of precedent. *See, e.g., Vargas* 938 F.2d at 360-61 (relied solely on inapplicable case); *Yepes-Prado v. INS*, 10 F.3d, 1363, 1372 (9th Cir. 1993)

⁵ Notwithstanding the outcome in *Ramos*, a motion to reconsider is not in general a remedy for an incorrect summary affirmance. First, the issue of whether a case falls within the guidelines for summary affirmance cannot be the sole basis for a motion to reconsider. 8 C.F.R. § 3.2(b)(3). Additionally, the same Board Member who summarily affirmed the case may well review the motion to reconsider. *See* 8 C.F.R. § 3.1(a)(1).

(inexplicably departed from prior precedent); *Akinyemi v. INS*, 969 F.2d 285, 1280-90 (7th Cir. 1992) (same).

With regard to the factual issues, the DOJ has clarified its intent that cases *not* involving a “novel” fact situation are limited to certain situations in which “legally significant facts [] fall into recognizable patterns.” Streamlining Regulation, 64 Fed. Reg. at 56140. Yet the Board has been chastised for failing to recognize which facts are legally significant and for making findings of fact that are “wholly unsupported by the record,” *Li Wu Lin v. INS*, 238 F.3d 239, 244 (3d Cir. 2001); for making “faulty” credibility findings and attributing significance to acts about which it lacked key information, *Obianuju Ezeagwuna v. Ashcroft*, No. 01-3294, 301 F.3d 116, 130 (3d Cir. 2002); for undertaking legal reasoning that had no applicability to the facts, *Stankovic v. INS*, 94 F.3d 1117, 1120 (7th Cir. 1996); and for “substitution of assumption for fact” in the record, *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1052 (9th Cir. 2002).

Under the current regulatory structure, a Board Member’s decision about using the summary affirmance process is completely opaque. As shown above, the issues involved in this determination are not simple ones and can be subject to numerous errors – even when decided by a three-Member panel of the Board subject to explaining its reasoning for federal

court review. By shielding this decision-making process from all review, the summary affirmance process impermissibly strips the federal courts of the ability to properly review critical agency action.

**C. AN AFFIRMANCE WITHOUT OPINION VIOLATES
FUNDAMENTAL RULES OF ADMINISTRATIVE LAW BY
FAILING TO PROVIDE PETITIONER OR THIS COURT
WITH A REASONED EXPLANATION OF THE AGENCY'S
FINAL DECISION**

The summary affirmance process violates the basic rule of administrative law that an agency explain the reasons for its decision. The affirmance without opinion regulation mandates that the Board Member affirm only the *result* of an IJ's decision without adopting the IJ's *reasoning*, and without offering his or her own reasoning. A summary affirmance thus signifies only that the Board Member determined that any errors of the IJ were harmless or nonmaterial – that is, that these errors did not affect the *result* of the decision. As a consequence, a Board Member can summarily affirm a decision on grounds that are significantly different from those relied upon by the IJ – and thereby reject the reasoning of the IJ – as long as the result reached in the case is the same. On appeal, a court has before it only the rejected reasoning provided by the IJ, and has no way to discern the Board Member's real reasons for reaching the result. Thus, a court will frequently be in a position of reviewing anew the erroneous reasoning of the IJ, without the benefit of the Board Member's corrections to this reasoning.

This process makes a mockery of the requirement that an agency explain its decisions.

1. The single Board Member is required to provide an explanation of the reasons for the decision.

The requirement that an administrative agency provide a reasoned explanation for its decision is a "fundamental rule of administrative law." *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947); *see also Guentchev v. INS*, 77 F.3d 1036, 1038 (7th Cir. 1996) (statement of reasons is a "norm of administrative law"). The Supreme Court has found that an agency statement of reasons is necessary for several reasons. First, it allows a court to carry out an intelligent review. *Dunlop v. Bachowski*, 421 U.S. 560, 572 (1975). As explained in *Chenery*:

If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive.

332 U.S. at 196-97.

Additionally, "a 'reasons' requirement promotes thought by the [decision-maker] and compels him to cover the relevant points and eschew irrelevancies, and . . . assure[s] careful administrative consideration."

Bachowski, 421 U.S. at 572. Thus, the Supreme Court has found that a

statement of reasons is relevant even where an agency decision is unreviewable. *Id.*

These principles have uniformly been applied to decisions of the Board. For instance, this Court has remanded cases in which the Board failed to adequately state the rationale for its decisions; in doing so, the court explained that the “availability of judicial review ... necessarily contemplates *something* for [the Court] to review.” *Abdulai*, 239 F.3d at 555. Similarly, other courts have required the Board to “articulate a reasoned basis for its decisions.” *Panrit v. INS*, 19 F.3d 544, 546 (10th Cir. 1994) quoting (*Turri v. INS*, 997 F.2d 1306, 1309 (10th Cir. 1993)). Moreover, the Board must “actually consider the evidence and argument that a party presents” and demonstrate that the case received individualized review. *Abdulai*, 239 F.3d at 549-50 (citation omitted). As the Ninth Circuit recently explained, “Although not a high bar, the Board must ‘provide a comprehensible reason for its decision sufficient for us to conduct our review and to be assured that the petitioner’s case received individualized attention.’” *Paramasamy*, 295 F.3d at 1050-51 (citation omitted).

A decision of the BIA, “cannot be sustained on a ground appearing in the record to which the [Board] makes no reference; to the contrary, the Board’s decision stands or falls on its express findings and reasoning.”

Vargas, 938 F.2d at 363 (citation omitted); *see also Abdulai*, 239 F.3d at 554-55 (rejecting speculation about what the Board might have found reasonable); *Angoucheva v. INS*, 106 F.3d 781, 789-90 (7th Cir. 1997) (cannot uphold a Board decision on the basis that it might have been able to eliminate the flaws and reach the same conclusion). Thus, where the Board fails to support its conclusion with a reasoned explanation based on legitimate concerns – or in the case of summary affirmance, with any explanation at all – the case will be remanded. *See Abdulai*, 239 F.3d at 555; *Tukhowinich v. INS*, 64 F.3d 460, 464-65 (9th Cir. 1995).

An affirmance without opinion is different in this crucial aspect from earlier cases in which the Board issued summary decisions that explicitly adopted the reasoning of the IJ. *See, e.g., Abdulai*, 239 F.3d at 549 n.2 (citing cases from other circuits).⁶ The courts uniformly upheld such decisions precisely because the Board did adopt the reasoning of the IJ as its

⁶ These decisions consistently contained language such as:

The appeal is dismissed. We have reviewed the record of proceedings, the immigration judge's decision, and the respondent's contentions on appeal. As we find that the immigration judge adequately and correctly addressed the issues raised on appeal, his decision is affirmed *based upon and for the reasons set forth in that decision*. (Emphasis added).

Panrit v. INS, 19 F.3d 544, 545 (10th Cir. 1994) (emphasis added); *see, e.g., Guentchev v. INS*, 77 F.3d 1036, 1037 (7th Cir. 1996); *Arango-Aradondo v. INS*, 13 F.3d 610, 613 (2nd Cir. 1994); *Chen v. INS*, 87 F.3d 5, 7 (1st Cir. 1996).

own; as the Seventh Circuit explained, “[t]o adopt someone else’s reasoned explanation is to give reasons.” *Guentchev*, 77 F.3d at 1038. As a result, the court was informed of the basis for the decision and could carry out its review. *See, e.g., Abdulai* 239 F.3d at 549 n.2; *Panrit*, 19 F.3d at 545; *Chen v. INS*, 87 F.3d , 5, 8-9 & n.3 (1st Cir. 1996); *Arango-Aradondo v. INS*, 13 F.3d 610, 613 (2nd Cir. 1994); *Maashio v. INS*, 45 F.3d 1235, 1238-39 (8th Cir. 1995); *Tukhowinich*, 64 F.3d at 464-65; *Prado-Gonzalez v. INS*, 75 F.3d 631, 632 (11th Cir. 1996); *Giday v. INS*, 113 F.3d 230, 234 (D.C. Cir. 1997).

These earlier summary affirmances were not approved without limitation, however. As the Tenth Circuit explained, the Board’s authority to adopt the reasoning of the IJ does not grant “unrestricted license” for the Board to do so “without examining those decisions to ensure that all of the factors urged by the alien were in fact fully considered.” *Panrit*, 19 F.3d at 546. The court noted that such unrestricted license would effectively remove the Board as a separate reviewing body and would “free[] [it] of the obligation to articulate a reasoned basis for its decisions.” *Id.* (quoting *Turri*, 997 F.2d at 1310).

The DOJ has acknowledged that appellants in removal proceedings have a “right to a reasoned administrative decision.” Streamlining Regulation, 64 Fed. Reg. at 56135, 56137. Relying on the line of cases

discussed above, the DOJ contended that this right was satisfied by the combination of a written decision of the immigration judge and a determination by the Board that the *result* below was correct. *Id.* (emphasis added). The DOJ reaffirmed this position in its publication of the new regulations, disingenuously relying upon *Chen v. INS*, 87 F.3d 5, 7 (1st Cir. 1996) for support. See Procedural Reform Regulation, 67 Fed. Reg. at 54885-86. However, *Chen* is not an affirmance without opinion case; to the contrary, the Board in *Chen* explicitly adopted the majority of the IJ's reasoning, while also explaining why it was not adopting one portion of the decision below. *Chen*, 87 F.3d at 7 n.1.

Thus, the DOJ's contention ignores altogether the central and controlling fact of *Chen* and the earlier line of cases: that, unlike summary affirmance decisions, the Board in those cases explicitly adopted the *reasoning* of the IJ. *Tukhowinich v. INS*, 64 F.3d 460 (9th Cir. 1995), illustrates precisely the flaw in the current summary affirmance regulation as compared with the Board's former practice. In that case, the court distinguished between a Board decision explicitly adopting a "thorough" and "well[-]reasoned" IJ decision – in which "it is clear. . . that [the BIA] gave individualized consideration to the particular case, but chose to use the IJ's words rather than its own" *Id.* at 464 (second alteration in original) (citation

omitted) – and a Board affirmance that did not explicitly adopt the IJ’s reasoning. In *Tukhowinich*, the Board decision stated only “[f]inding no error. . . , we . . . affirm.” *Id.* at 465 (citation omitted). Because the court could not be sure “that the BIA [wa]s actually adopting reasoning that it considers satisfactory to fulfill its own burden of de novo appellate review,” the court remanded. *Id.* at 465.

2. The Board’s summary affirmance – not the IJ’s decision – constitutes the final decision of the agency.

The regulation requires all summary affirmance decisions to state that the IJ’s decision below is the “final agency determination.” 8 C.F.R. § 3.1(e)(4)(ii). To interpret this language as encompassing the reasoning of the IJ – rather than only the result that the Board has affirmed – would ignore the reality of the regulatory review process. It would also leave the Court reviewing reasons that may not represent the actual reasons behind the decision of the agency’s final adjudicator – in fact, reasons that may have been rejected by the single Board Member.

There is no question that under the regulation, the single Board Member remains – in actuality – the final agency adjudicator in the case. This is so because the Board Member is required to conduct an independent review of the merits of the case to determine, among other things, whether the result of the decision below is correct. 8 C.F.R. § 3.1(e)(4)(i). The

regulation also requires that the single Board Member review the IJ's reasoning and determine whether it is correct. *See* 8 C.F.R. § 3.1(e)(4)(i) (requiring review of IJ's reasoning for harmless error). To carry out this responsibility, the single Board Member must first determine the correct reasons for the result being affirmed. After all, the Board Member cannot reject reasoning of the IJ as erroneous if he or she has not first determined what the correct reasoning is.

Thus, the summary review process not only requires the single Board Member to determine the correct result of the case, it also necessarily requires the Board Member to determine the correct reasons for that result – either by agreeing with the reasoning of the IJ or by rejecting some or all of that reasoning as erroneous, and instead identifying the correct reasoning.

Because the DOJ adopted a system in which the Board Member remains the final adjudicator of the merits of the case – under a *de novo* standard of review – his or her decision should contain an explanation that the Court can review.⁷ As this Court succinctly explained:

⁷ The Department of Justice specifically rejected a selective review process, under which a Board Member would not be required to carry out an independent merits review of all appeals. Streamlining Regulation, 64 Fed. Reg. at 56137 (rejecting “leave to appeal” and certiorari systems in favor of a focus on “correct results” in every appeal). Had it adopted such a system, federal court review of IJ

Congress has granted [the federal courts] power to review only “final order[s] of removal.” Because an alien facing removal may appeal to the BIA as of right, and because the BIA has the power to conduct a *de novo* review of IJ decisions, there is no “final order” until the BIA acts. Accordingly, we now expressly hold that the “final order” we review is that of the BIA.

Abdulai, 239 F.3d at 548-49 (alteration in original) (citations omitted).

Similarly, the Ninth Circuit has explained that the “BIA has the power to conduct a *de novo* review of the record, to make its own findings, and to determine independently the sufficiency of the evidence, and for us to review the IJ’s decision under our deferential substantial evidence test essentially would deprive the petitioner of the BIA’s *de novo* review of his case.” *Castillo v. INS*, 951 F.2d 1117, 1120-21 (9th Cir. 1991) (citations omitted). It is for this reason, that courts have consistently required the Board to explain the reasons for its decisions, even to the extent of making clear when it was adopting the reasoning of the IJ. *See, e.g., Tukhowinich*, 64 F.3d at 465.

Because the single Board Member who summarily affirms a case is the final agency adjudicator who carries out an independent review of the appeal on its merits, the Board Member is required,

decisions would be appropriate in those cases in which the Board declined review.

under fundamental rules of administrative law, to explain his or her reasons for affirming the result of the decision below.

D. DUE PROCESS ALSO REQUIRES THAT BOARD MEMBERS INFORM APPELLANTS OF THE REASONS FOR THEIR DECISIONS.

“It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.” *Reno v. Flores*, 507 U.S. 292 (1993); *see also Obianuju Ezeagwuna v. Ashcroft*, 301 F.3d 116, 127 (3d Cir. 2002); *Chong v. INS*, 264 F.3d 378, 386 (3d Cir. 2001). This Court has found that the right to an individualized determination by the Board is a necessary component of due process in the deportation context. *Abdulai*, 239 F.3d at 549 (*citing Llana-Castellon v. INS*, 16 F.3d 1093, 1096 (10th Cir. 1994)). Moreover, the individualized review must be meaningful and this Court has criticized the Board when it has simply rubber-stamped decisions of the IJs. *See, e.g., Abdulai v. Ashcroft*, 239 F.3d at 549-50 (“This Court has suggested that the BIA denies due process to an alien when it ‘act[s] as a mere rubber-stamp.’”) (alteration in original) (citation omitted); *Marincas v. Lewis*, 92 F.3d 195, 202 n.7 (3d Cir. 1996) (“It is disturbing that the BIA appears to have acted as a mere rubber-stamp in this case.”); *De la Llana-Castellon v. INS*, 16 F.3d 1093, 1098 (10th Cir. 1994) (“‘boilerplate paragraphs ... cast [] a cloud over the [BIA’s] decisions and hinder[] meaningful judicial review.’”) (citation omitted)). *See also*

UNHCR Handbook, par. 192 (refugee applicant should be given opportunity to appeal for a formal reconsideration of a denial).

To ensure that the Petitioner's due process rights are protected, this Court must be able to discern, from the Board's rationale of its decision, that the Board in fact provided a meaningful, individualized review of the case. For this very reason, the Supreme Court has held that an agency's statement of reasons for its decision is one of several minimal due process requirements that must be observed in administrative proceedings in which a liberty interest is at stake. *Wolff v. McDonnell*, 418 U.S. 539 (1974) (finding such process due even in prison disciplinary proceeding where the liberty interest at stake is narrow and the government's interest is great); *see also Morrissey v. Brewer*, 408 U.S. 471 (1972) (parole revocation); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (probation revocation); *Dunlop v. Bachowski*, 421 U.S. 560, 572 (1975) (Secretary of Labor's decision not to challenge union election); *Willner v. Comm. on Character & Fitness*, 373 U.S. 96 (1963) (admission to the state bar).

There is no question that "the private liberty interests involved in deportation proceedings are among the most substantial." *Padilla-Agustin v. INS*, 21 F.3d 970, 974 (9th Cir. 1994). As this Court has recognized, deportation

visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty ... cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.

Chlomos v. U.S. Dep't of Justice, INS, 516 F.2d 310, 313 (3d Cir. 1975), quoting *Bridges v. Wixon*, 326 U.S. 135, 154 (1945). These concerns are clearly evidenced in asylum cases, where “an applicant erroneously denied asylum could be subject to death or persecution if forced to return to his or her home country.” *Marincas v. Lewis*, 92 F.3d 195, 203 (3d Cir. 1996).

Additionally, the private interest at stake here includes the right of an appellant before the Board to be assured that he or she has not been erroneously deprived of full appellate review and an individualized Board decision that states its reasons with sufficient specificity for federal court review.

The DOJ recognizes that the appellants’ liberty interests are “undoubtedly very weighty.” Streamlining Regulation, 64 Fed. Reg. at 56138. It contends, however, that under the balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 343, 347 (1976), the summary affirmance procedure provides all the process that is due. Streamlining Regulation, 64 Fed. Reg. at 56138. More specifically, the DOJ contends that an appellant’s liberty interests are outweighed by the government’s interest in a more efficient

Board and what it believes is a low risk of erroneous decisions as the result of the procedures. *Id.* These contentions fail to recognize the extent of the liberty interest of the non-citizen, the societal cost of an opaque decision-making process, and the individual risk of an erroneous decision.

There is no question that the government has a legitimate interest in ensuring that the Board manages a growing caseload. However, the interest at issue in this prong of the *Mathews* test is not simply that of government administration – rather it is the “public interest,” which includes not only administrative concerns but also other “societal costs.” See *Mathews*, 424 U.S. at 347. The public interest at stake here is “the benefit of an additional safeguard to ... society in terms of increased assurance that the action is just.” *Id.* at 348. Open and transparent government decision-making is a fundamental requirement for ensuring that actions by the government are in compliance with the law. As a result, the DOJ cannot be allowed to accomplish its goal of better management of the Board’s caseload by eliminating the most minimal of due process protections, with the result that the decisions of single Board Members are reduced to two line forms with no transparency whatsoever. As the Supreme Court has noted, “the Constitution recognizes higher values than speed and efficiency.” *Vlandis v. Kline*, 412 U.S. 441, 451 (1973) (quoting *Stanley v. Illinois*, 405 U.S. 645,

656 (1972)); *see also Salameda v. INS*, 70 F.3d 447, 452 (7th Cir. 1995) (recognizing the “resource constraints that prevent [Board Members] from doing a competent job,” but nevertheless finding that “understaffing is not a defense to a violation of principles of administrative law”).

Moreover, the entire point behind a reasons statement is to provide a basis upon which a reviewing court can determine whether or not a decision is erroneous. As discussed earlier, where the Board Member provides no reasons for a decision, a federal court is unable to review its correctness – as a matter of either procedural compliance or substantive accuracy. Without some explanation as to the *actual* substantive reasons for summary affirmance – as opposed to reasons which the Board Member may have rejected as erroneous – there is no way to ensure that the risk of erroneous decisions by individual Board Members is in fact minimal. The existing procedure is deficient precisely because it contains no method for assuring its own “fairness and reliability.” *See Mathews*, 424 U.S. at 343.

Careful and close appellate review is critical in all removal cases. In asylum cases, such review is crucial because of the highly factual nature of these cases. The courts have recognized the extremely fact-dependent nature of asylum cases. *See, e.g., Adhiyappa v. INS*, 58 F.3d 261, 267 (6th Cir. 1995). The testimony of the applicant is often the most important evidence

that must be assessed, *see* Deborah Anker, *Law of Asylum in the United States* 150 (3d. ed. 1999), and such testimony may last for hours or stretch over days.

Many asylum seekers have fled from torture and other trauma, and may have great difficulty testifying about these experiences. Medical experts have documented the fact that many often suffer from post-traumatic stress disorder or major depression. *See, e.g.*, Michele R. Pistone & Philip G. Schrag, *The New Asylum Rule*, 16 *Geo. Immigr. L.J.* 1, 49 nn.272, 273 (2001) (citing numerous medical reports). As a result, the assessments of testimony that asylum adjudicators make are particularly complex and must often be undertaken with particular care. A decision-maker who does not fully understand the impact of torture on a survivor can come to the mistaken conclusion that an applicant is not credible, when in fact the inability of the applicant to provide factual detail is the direct result of the harm that the individual has suffered. The summary affirmance process does not provide the opportunity for the careful, meaningful review of the facts of a case required by due process.

Additionally, careful Board review is needed because many of the asylum seekers and other immigrants whose cases come before the Board are unrepresented. Many non-citizens cannot afford to pay for legal counsel.

One report indicates that 56% of non-citizens appearing before IJs, and 34% of those appearing before the Board, are *pro se*. Testimony of Stephen Yale-Loehr on the Operations of the EOIR before the House Committee on the Judiciary, Subcommittee on Immigration and Claims, Feb. 6, 2002 at 7-8. A Georgetown University study revealed that asylum seekers are four to six times more likely to be granted asylum when represented but that, in immigration court, more than one out of three lacks representation. Asylum Representation, Summary Statistics, Dr. Andrew I. Schoenholtz, Georgetown University, May 2000. For detained asylum seekers, the situation is even worse, as more than twice as many detained asylum seekers in defensive proceedings lack representation. *Id.*

Finally, the probable value of additional procedures is great. The many federal court decisions rejecting Board decisions as unreviewable because they lack a sufficient reasons statement are evidence of this. Moreover, the requirement of a reasons statement is not “a high bar” and requires only that the Board Member “provide a comprehensible reason for [his or her] decision sufficient for [the court] to conduct [its] review and to be assured that the petitioner’s case received individualized attention.” *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1050-51 (9th Cir. 2002) (citation omitted).

Here, the significant liberty interests of the Petitioner coupled with the public need for a transparent decision-making process capable of review by the federal courts, demonstrate that due process requires the “minimal” safeguard of a reasons statement, issued by the final adjudicator in the case and containing his or her actual reasons for the decision.

CONCLUSION

Under the summary affirmance process, the Board Member remains under a mandate to make an independent, de novo decision on the merits of the case, and yet is absolved of all responsibility for explaining that decision. The result is that the Board proceedings are carried out in secret. *Amici* urge this Court to invalidate the summary affirmance process to the extent that it frees the Board Member from explaining the reasons behind a decision. Instead, Board Members should be required to include in all decisions both an explanation of why the case was appropriate for summary affirmance and

an explanation as to why the decision below is being affirmed, even if that explanation consists simply of an adoption of the reasoning of the IJ.

Respectfully submitted,

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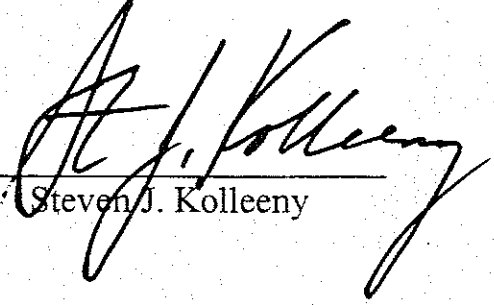
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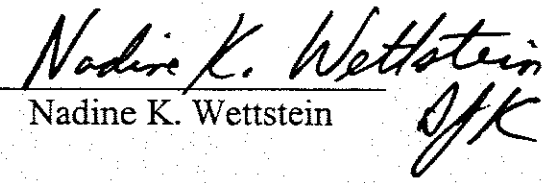
I hereby certify that I am a member of the Bar of this Court.

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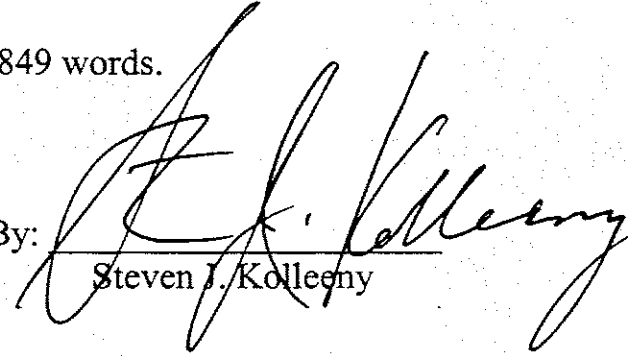
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Certificate of Compliance

Pursuant to Fed.R.App. 32(a)(7), I hereby certify, according to computerized count, that this Brief contains 6849 words.

By:

A handwritten signature in black ink, appearing to read "S. J. Kolleeny", written over a horizontal line.

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Certificate of Service

I hereby certify that on September 24, 2002, I served the foregoing Brief of the American Immigration Law Foundation and the Lawyers Committee for Human Rights as *Amici Curiae* for the Petitioner upon counsel of record by forwarding two copies thereof by Federal Express as follows:

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