No. 12-3641

In the
United States Court of Appeals
for the Sixth Circuit

Uwe Andreas Josef Romeike, *et al.*,

Petitioner,

v.

Eric H. Holder, Jr., Attorney General,

Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals

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Response to Petition for Rehearing *En Banc*

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Introduction

This case does not involve an assessment of the merits of compulsory-school-attendance statutes. It does not involve the propriety of homeschooling versus schooling in a public or private school. Those judgments are properly left to the political branches of government, whether foreign or domestic.

Rather, the issue that a unanimous three-member panel of the Board of Immigration Appeals faced, and correctly resolved, was whether Petitioner Uwe Romeike met his burden of proving he had a well-founded fear of persecution on account of a protected ground under the Immigration and Nationality Act's ("INA") asylum provisions. *See* 8 U.S.C. §§ 1158, 1101(a)(42)(A). And a unanimous panel of this Court faced the question whether substantial record evidence supported the Board's conclusion that Germany's enforcement of its school-attendance law against Romeike did not constitute persecution.

Despite Romeike's best efforts to take the full Court through another attempt to characterize a German law, of universal application and not selectively or more punitively enforced against anyone, as being applied to persecute him, he has said nothing new. And nothing he does say is worthy of convening the full court.

En banc courts are not venues for dissatisfied litigants to go another round. They are "the exception, not the rule[,]" and are to be convened only when *extraordinary circumstances* exist. *United States v. American-Foreign S.S. Corp.*,

363 U.S. 685, 689 (1960). This Court does "not convene *en banc* [merely] to exercise plenary review over panel decisions." *Bell v. Bell*, 512 F.3d 223, 251 (6th Cir. 2008) (Moore, J., dissenting).

I.O.P. 35(a) makes plain that the *en banc* procedure is intended to bring to the full Court's attention a precedent-setting error of exceptional public importance or an opinion that directly conflicts with Supreme Court or Sixth Circuit precedent. The panel's thoroughly reasoned opinion here is correct in all respects. The factual circumstances of the case may be novel for an asylum case, but the panel broke no new ground. The case involves the application of settled principles of basic asylum law under the INA. And contrary to what Romeike claims, the panel's opinion conflicts with neither Supreme Court nor Sixth Circuit precedent.

Background

Romeike, his wife, and five children are German natives and citizens. Administrative Record ("A.R.") 4. Having arrived together in the United States, they applied for asylum on grounds that they'd be persecuted were they to be returned to Germany. *Id.* The way they contend they would be persecuted is that, while they would prefer to homeschool their children, Germany has in place a national law requiring children to attend either a public school or a government-approved private school. According to Romeike, there is no reason to believe that Germany would elect not to enforce its statute against him and his wife, given that it had

been enforced against them earlier, prompting their journey to the U.S. *Id.*

As the Board found, Romeike, in knowing violation of the German compulsory-attendance law, began homeschooling the children. *Id.* Several times in the ensuing months, he was warned, both verbally and in writing, that he was in violation of the statute. He was fined. Once, police forcibly escorted the children to school. *Id.* Romeike was notified that he could ultimately lose custody of the children if he refused to send the children to school. Legal proceedings resulted in his being found guilty of violating the compulsory school attendance law. When they came to the U.S., they had accrued fines of 7,000 Euros (about $9,000). *Id.*

An immigration judge held a hearing on the asylum application and concluded that Romeike had a well-founded fear of persecution if returned to Germany; in an exercise of discretion, he therefore granted Romeike's asylum application. *Id.*; Supp. R. 17-18. On the Government's appeal to the Board, it reversed the asylum grant. A.R. 3-7. It concluded that the German statute is one of general application and that Germany did not selectively enforce it against Romeike (or homeschool advocates in general) nor did it punish them more severely so as to be a pretext for persecution. *Id.* Rather, it had been enforced solely because Romeike violated it. A.R. 5.

On petition for review, a panel concluded that the Board permissibly found that there was no indication in the record that German officials were motivated in

their actions by anything other than law enforcement. *Romeike v. Holder*, ___ F.3d ___, ___, 2013 WL 1955679, at *4 (6th Cir. May 14, 2013). Romeike simply failed to meet his burden of showing his eligibility for consideration for the discretionary relief of asylum *Id.*

Argument

I. The panel hewed to established precedent when determining that Romeike failed to meet his burden of proof.

Romeike contends that the panel rejected "the established criteria for evaluating asylum claims arising from prosecutions of laws of general applicability."[1] Pet. at 1. He further charges that the panel "effectively create[d] its own new rule for such cases," one that conflicts with established Sixth Circuit precedent and that of other circuits. *Id.*

Romeike's characterization of the panel's well-reasoned decision is inaccurate. The panel first stated that when a foreign government enforces a law that persecutes on its face based on the protected categories, i.e., race, religion, nationality, membership in a particular social group, or political opinion, it is easy to demon-

[1] Under established law, the disposition of an application for asylum involves deciding whether an applicant qualifies as a "refugee" as defined in the INA. *Gilaj v. Gonzales*, 408 F.3d 275, 283 (6th Cir. 2005). A "refugee" is an alien who is unable or unwilling to return to his home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . ." 8 U.S.C. § 1101(a)(42)(A). The burden of proof is always *on an asylum applicant* to establish that he qualifies as a refugee. *Gilaj*, 408 F.3d at 283.

strate that its enforcement is a form of persecution. *Romeike*, 2013 WL 1955679, at *2 (so-called "easy-way" cases). Most cases, however, seem not to be so easily susceptible of proof, for the law the country seeks to enforce is one that applies to everyone. *Id.* The panel recognized that enforcement of even a generally applicable law can constitute persecution in limited circumstances and offered a few non-exhaustive examples. *Id.* (so-called "hard-way" cases).

One such example occurs when a government selectively enforces an otherwise neutral law, prosecuting some people but not others based on a protected ground. *Id.* Or the government may punish some people more harshly than others for the same violation based on a protected ground. *Id.* Still another example is a law that the government has enacted but that no one would feel compelled to break except on the basis of a protected ground. *Id.* In this case, the panel concluded that Romeike failed to meet his burden to show that Germany's enforcement of its general school-attendance law amounts to persecution against him. *Id.* In using these examples, the panel at no point even intimated that its examples were the only ways of showing persecution when applying a generally applicable law.

Nevertheless, Romeike faults the panel for inventing "a new list of criteria to define those prosecutions under generally applicable laws [that] are in fact persecution." Pet . at 8. And he picks two cases in particular, *Stserba v. Holder*, 646 F.3d 964 (6th Cir. 2011), and *Beskovic v. Gonzales*, 467 F.3d 223, 226 (2d Cir. 2006),

that he says are impossible to reconcile with the panel's examples of "hard-way" cases. Pet. at 6. A quick focus on those cases, though, makes the explanation plain—they're not "hard way" cases. *Stserba* involved an alien who was held to have been persecuted by a generally applicable Estonian law that denied recognition to all college degrees awarded by Russian institutions after the breakup of the Soviet Union. The Estonian law, on its face, singled out those who, based on their nationality, were to be subjected to a "sweeping limitation" on their ability to make a living. 646 F.3d at 977 (citing *In re T-Z-*, 24 I. & N. Dec. 163, 174 (B.I.A. 2007) (observing that the economic harm must be "of a deliberate and severe nature . . . that is condemned by civilized governments")). Under the panel's descriptions, this would be an "easy-way" case, especially in light of Board precedent. So, too, with *Beskovic*. The Second Circuit's hypothetical example involved an arrest combined with physical mistreatment or degradation for violation of a generally applicable law outlawing possession of an American flag. *See* 467 F.3d at 226. Such a case does not require reconciling with "hard-way" cases, as that action would be persecutory on its face, an "easy-way" case.

The panel carefully discussed the Board's findings and determined that record evidence supports its conclusion that Germany does not selectively enforce its statute against homeschoolers like Romeike nor does it punish them for violating the statute in greater measure than others who do not comply with the statute. *Id.*

at *3. Among other things, the panel found significant the fact that Romeike's own witness, Michael Donnelly, testified that all parents who do not send their children to school face consequences ranging from fines to jail time to loss of custody. He identified parents punished for homeschooling their children for religious *as well as* secular reasons and parents punished for having truant children, too. *Id.*

Romeike continues to make much of a single line in a German court's opinion upholding the law involved here, indicating that the public has an interest in counteracting the development of religious or philosophically motivated "parallel societies." Pet. at 3, 10. This, according to him, is proof positive of Germany's malign intent to marginalize homeschoolers, especially those with religious objections. But one need look no further than the same paragraph from which the "offending" line is drawn to determine that, in the German court's view, the law has nothing to do with marginalizing Romeike based on any protected status.

> The general public has a justified interest in counteracting the development of religiously or philosophically motivated "parallel societies" and in integrating minorities in this area. Integration does not only require that the majority of the population does not exclude religious or ideological minorities, but, in fact, that these minorities do not segregate themselves and that they do not close themselves off to a dialogue with dissenters and people of other beliefs. Dialogue with such minorities is an enrichment for an open pluralistic society. The learning and practicing of this in the sense of experienced tolerance is an important lesson right from the elementary school stage. The presence of a broad spectrum of convictions in a classroom can sustainably develop the ability of all pupils in being tolerant and exercising the dialogue that is a basic requirement of democratic decision-making process.

A.R. 760 (quoting the Federal Constitutional Court of Germany in *In re Konrad*).

The German court thus explained what it saw as the value of the law in bringing people of differing views together to learn from each other and to learn to accept those whose views differ from their own. The goal in Germany is for an "open, pluralistic society." Teaching tolerance to children of all backgrounds helps to develop the ability to interact as a fully functioning citizen of Germany. It is scarcely feasible, with those stated goals in mind, to tease from the opinion, a persecutory motive on the part of those who enforce the law. Along with the other evidence that Germany punishes *all* parents who fail to comply with the law, regardless of the reasons the parents may provide for failing to comply, substantial evidence exists to support the Board's determination that Germany has no persecutory motive against religious minorities when enforcing the compulsory-attendance statute.

The panel correctly concluded that the Board permissibly found that there is no indication that the German officials, in enforcing the law, are motivated by anything other than law enforcement. "These factors reflect appropriate administration of the law, not persecution." *Romeike*, 2013 WL 1955679, at *4. Giving the Board's ruling on asylum eligibility the deference that the substantial-evidence standard mandates, the panel broke no new ground. Indeed, the panel did consider the evidence of the motivation for the prosecution of Romeike but properly deter-

mined that Romeike failed to meet his burden to prove that Germany enforced its school-attendance law in an impermissibly discriminatory manner. And Romeike has pointed to no evidence that would compel a reasonable adjudicator to reach a conclusion contrary to the one reached by the Board.

II. The panel was not bound by international law.

Romeike complains that the panel should have used international human rights law to guide its evaluation of the legitimacy of laws of general applicability. Pet. at 10. The suggestion is that a treaty violation might suffice to salvage the case when there is otherwise a total failure of proof. In the first place, the international human rights treaties here are not self-executing. *See Renkel v. United States*, 456 F.3d 640, 644-45 (6th Cir. 2006); *Buell v. Mitchell*, 274 F.3d 337, 372 (6th Cir. 2001). Hence, they are not binding on federal courts in the U.S. *See also Taveras v. Taveras*, 477 F.3d 767, 780 (6th Cir. 2007) (U.S. not party to Convention on the Rights of the Child).

And second, the panel properly characterized, as *dicta*, the portion of *Perkovic v. INS*, 33 F.3d 615, 622 (6th Cir. 1994), upon which Romeike places so much emphasis. The *Perkovic* court added, when holding that the aliens there were refugees, eligible for asylum, that Yugoslavia's treatment of them violated international law. That passing observation, though, did not dictate the outcome of

the case, and it was no part of its holding.[2]

Conclusion

This case poses no question worthy of full-court review. Further, the case was correctly resolved, under applicable Sixth Circuit precedent. Respondent Holder thus prays that the Court deny the petition for rehearing *en banc*.

[2] While international courts cannot resolve issues of American asylum law, and they can issue no precedent to bind any U.S. court, it may prove helpful for the Court to be aware, when acting on Romeike's petition, that even a tribunal specifically dedicated to enforcing the European Convention on Human Rights has upheld Germany's school-attendance law. The European Court of Human Rights has held that parents could not refuse the right to education of a child on the basis of the parents' convictions, because the child has an independent right to education. *See Konrad v. Germany*, 2006-XIII Eur. Ct. H.R. 355, 364. According to the court, this latter right, by its nature, calls for regulation by the state, which enjoys a degree of flexibility in setting up and interpreting rules governing its education system. *Id.* at 365. Regarding the "avoiding the emergence of parallel societies" language, the "[Human Rights] Court regards this as being in accordance with its own case-law on the importance of pluralism for democracy." *Id.* Ultimately, the court upheld the German law, noting—importantly for purposes of this petition—that compulsory attendance does *not* deprive parents of their right to exercise, with respect to their children, "natural parental functions as educators[] or to guide their children on a path in line with the parents' own religious or philosophical convictions." *Id.* at 366. The parents are free to attend to their children's religious training and to offer the children opposing viewpoints from those taught in school, should they feel it necessary to do so. *Id.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on June 26, 2013, I electronically filed the foregoing Response in Opposition to Rehearing *En Banc* with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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