No. 12-3641

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UWE ANDREAS JOSEF ROMEIKE, et al.,
Petitioners,

v.

ERIC H. HOLDER, JR., UNITED STATES ATTORNEY GENERAL,
Respondent.

ON PETITION FOR REVIEW FROM A FINAL ORDER
OF THE BOARD OF IMMIGRATION APPEALS
Agency Nos. 087-368-600, et seq.

BRIEF FOR RESPONDENT

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defined a partial loss of custody as "the right to determine the whereabouts of the child during school hours." *Id.* at 914.

IV. Decision of the immigration judge.

On January 26, 2010, the immigration judge rendered a decision granting asylum. Immigration Judge Decision, S001-S018. The immigration judge found, however, that the Romeikes' experiences in Germany "certainly" did not amount to "past persecution" under the INA and the law of the Sixth Circuit. *Id.* at S011-12. The Romeikes had put forward three possible protected grounds for asylum: political opinion, religion, and membership in a particular social group. *Id.* at S012. The immigration judge rejected the political opinion category as a basis for asylum, reasoning that the family was never involved in any political organization, nor had they taken any genuine political stand on any issue. *Id.* at S012-013. As to religion, the immigration judge agreed with the DHS attorney that the Romeikes were vague in their description of their religious beliefs, and did not affiliate with any particular denomination, but found that nonetheless, they had *bona fide* religious beliefs. *Id.* at S013-14. Still, the immigration judge found that the Romeikes failed to establish that the government of Germany was, in any way, attempting to suppress their religious beliefs. *Id.* at S014. The immigration judge did find, however, that the German government was "attempting to *circumscribe* their

religious beliefs" and that their religious beliefs were "being frustrated" insofar as they wanted to homeschool their children for religious reasons. *Id.* at S014, S016 (emphasis added).

Finally, as to their particular social group, the immigration judge noted that "initially, I did not see that either," but after listening to the testimony of Michael Donnelly, counsel to the Home School Legal Defense Association, the immigration judge was persuaded that the government of Germany resents homeschoolers "not just because they are not sending the children to school, but because they constitute a group that the government, for some unknown reason, wishes to suppress." *Id.* at S014. The immigration judge further noted that he would not "attempt to understand exactly what the government would mean by suppressing a parallel society, because it is so silly, obviously there are parallel societies in Germany as everywhere." *Id.* at S014. The immigration judge found that "homeschoolers" are a particular social group in Germany despite his explicit finding that the group "do[es] not have any social visibility" in that the group could not be identified if they were "walking down the street." *Id.* at S015. Despite mistakenly conflating the "social visibility" standard with actual ocular visibility, and wondering aloud whether the Sixth Circuit may or may not require deference to the Board's social visibility requirement, the immigration judge decided that homeschoolers in Germany

are a particular social group because, the group "has been fined, imprisoned, had the custody of their children taken away from them," and "there actually seems to be a desire to overcome something, in the homeschooling movement, even though the Court cannot really understand what that might be . . ." *Id.* at S016.

The immigration judge concluded from this that the Romeikes had a well-founded fear of persecution in Germany. *Id.* at S017. Without analyzing whether the Romeikes faced "prosecution" rather than "persecution," the immigration judge found that the possibility of losing custody of their children or facing jail time for homeschooling were severe enough to constitute future persecution. *Id.* at S017. In sum, the immigration judge found that "if Germany is not willing to let [the Romeikes] follow their religion, not willing to let them raise their children, then the United States should serve as a place of refuge for [them.]" *Id.* at S018.

V. Decision of the Board.

On May 4, 2012, the Board overturned the decision of the immigration judge. Board Decision, A.R. 1-7. The Board found that Germany had the authority to require school attendance and that the law itself was one of general application; accordingly, the law could not be considered persecution unless it is selectively enforced or one is disproportionately punished on account of a

protected ground such that enforcement of the law is simply a pretext for persecution. *Id.* at A.R. 4. In this case, the Board found that the record failed to show that the law in question was selectively applied to homeschoolers; the record contained a single statement, from a homeschooling advocate, which indicated that the law was selectively applied to homeschoolers. *Id.* at A.R. 5. The Board noted that this statement was purely anecdotal and insufficient to show selective application of the law. *Id.* at A.R. 5. The Board further noted that the compulsory attendance law is not pretextual simply because the mandatory attendance law is intended to encourage socialization as well as education. *Id.* at A.R. 6. The record does not show that the law is aimed at silencing dissent, but, rather, integrating minority religious voices. *Id.* at A.R. 6. The Board noted that Germany's own assessment is that the purpose of the law is to promote tolerance and pluralism. *Id.* at A.R. 6. Moreover, the existence of exemptions to the law for individuals in professions that prevent the establishment of a fixed residence simply reflected the impracticality of public education for children of such parents, and also did not establish selective application of the law. *Id.* at A.R. 5.

In addition, the Board found that the law did not disproportionately burden any one particular religious minority. *Id.* at A.R. 5. In the Board's view, the record did not suggest that the Romeikes were targeted because of

their philosophical opposition to the law; rather, the law was being enforced simply because the Romeikes were violating it. *Id.* at A.R. 5. In addition, homeschoolers were not more severely punished than others whose children violate the law. *Id.* at A.R. 5.

Considering the evidence, the Board specifically rejected the immigration judge's finding regarding Germany's alleged "animus and vitriol" toward homeschoolers as clearly erroneous. *Id.* at A.R. 6. In addition, the Board noted that the record did not contain the text of the compulsory education law or the legislative history that would support the inflammatory suggestion that the law was a "Nazi-era law," and, importantly, the law was not geared at enforcing separation of children from parents for the purpose of ideological indoctrination. *Id.* at A.R. 6. Thus, the Board observed that while the Romeikes clearly homeschool their children for religious reasons, they failed to show that their religion, or their religious-based decision to homeschool, constitutes "one central reason" for Germany's decision to enforce the mandatory attendance law against them. *Id.* at A.R. 6.

Finally, the Board concluded that even if the Romeikes were able to show selective enforcement or disproportionate punishment, "German homeschoolers" still did not constitute a viable particular social group under the INA. *Id.* at A.R. 7. The group lacks social visibility because society at large is

not generally aware enough of homeschoolers to consider them a group. *Id.* at A.R. 7. Further, the group lacks particularity because "[o]ne becomes or ceases to be a member of the group by a mutable choice[:] sending one's children to school or not." *Id.* at A.R. 7. Moreover, the group of homeschoolers is relatively small, composed of approximately 500 people, and the reasons for homeschooling are disparate. *Id.* at A.R. 7. Accordingly, the Board found the group too indistinct to be considered a particular social group under the INA. *Id.* at A.R. 7. The Board therefore sustained DHS's appeal, found that Romeike had not established his eligibility for asylum or withholding of removal, and ordered the Romeikes' removal to Germany. *Id.* at A.R. 7.

SUMMARY OF THE ARGUMENT

Romeike's petition for review should be denied because the record does not compel the conclusion that he faces a possibility of future persecution in Germany based on a protected ground under the INA. In order to prevail, Romeike must show that the record compels the conclusion that Germany's mandatory public school attendance law is selectively enforced, or that Germany metes out disproportionate punishment, on account of religious affiliation or another protected ground. Here, no record evidence compels the conclusion that Germany selectively enforces its public school attendance

requirement, or that it disproportionately punishes any particular group for failing to comply with the law.

Moreover, as the Board properly found, "German homeschoolers" do not constitute a viable particular social group. The group lacks social visibility and particularity, and this Circuit's asylum law requires both elements for a cognizable "social group." The petition for review should therefore be denied.

SCOPE AND STANDARD OF REVIEW

Where, as here, the Board reviews the immigration judge's decision and issues a separate opinion, this Court reviews the decision of the Board as the final agency determination. *See Khalili v. Holder*, 557 F.3d 429, 435 (6th Cir. 2009) (citing *Morgan v. Keisler*, 507 F.3d 1053, 1057 (6th Cir. 2007)). Contrary to Romeike's claim that this Court's review is *de novo*, Pet'r Br. at 10-12, and his suggestion that clear error review may be appropriate, Pet'r Br. at 21, the agency's findings of fact are reviewed under the substantial evidence standard and are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary. *See* INA § 242(b)(4)(B), 8 U.S.C. § 1252(b)(4)(B) (codifying the substantial evidence standard of review set forth in *INS v. Elias-Zacarias*, 502 U.S. 478, 483-84 (1992)); *Allabani v. Gonzales*, 402 F.3d 668, 674 (6th Cir. 2005) ("We will reverse only if the evidence presented by [the alien] was such that a reasonable factfinder would have to