

BURGER

03-40395-ag, 05-1058-ag  
Burger v. Gonzales

1 UNITED STATES COURT OF APPEALS  
2 FOR THE SECOND CIRCUIT

3 -----  
4 August Term, 2006

5  
6 (Argued: June 11, 2007 Decided: August 17, 2007)

7  
8 Docket Nos. 03-40395-ag(L), 05-1058-ag(CON)

9 -----X  
10 SANJA BURGER and MILICA SAVIC, minor child A74-850-657,

11  
12  
13 Petitioners,

14  
15 - v. -

16  
17  
18 ALBERTO R. GONZALES, ATTORNEY GENERAL,

19  
20 Respondent.

21  
22 -----X  
23  
24  
25 Before: McLAUGHLIN, CALABRESI, SOTOMAYOR, Circuit Judges.

---

\* Pursuant to Federal Rule of Appellate Procedure 43(c) (2), Attorney General Alberto R. Gonzales is automatically substituted for former Attorney General John Ashcroft as respondent in this case.

1           Petition for review of an order of the Board of Immigration  
2 Appeals revoking an Immigration Judge's ("IJ") grant of asylum to  
3 Sanja Burger and Milica Savic.

4           Petition for review GRANTED.

5                           MICHAEL P. DIRAIMONDO, DiRaimondo &  
6 Masi LLP, Melville, N.Y. (Marialaina  
7 L. Masi, Mary Elizabeth Delli-Pizzi,  
8 Stacy A. Huber, on the brief), for  
9 Petitioners.

10                           SCOTT REMPELL, Trial Attorney, Office  
11 of Immigration Litigation, United  
12 States Department of Justice,  
13 Washington, D.C. (Anne M. Hayes;  
14 Jennifer May-Parker, on the brief),  
15 for Respondent.

16 -----X

17  
18  
19  
20 McLAUGHLIN, Circuit Judge:

21           This Court recently held that if the Board of Immigration  
22 Appeals ("BIA") intends to take administrative notice of  
23 potentially dispositive facts, it must warn a petitioner and  
24 provide the petitioner with an opportunity to respond before it  
25 denies a motion to reopen on the basis of those facts. See Chhetry  
26 v. U.S. Dep't of Justice, 490 F.3d 196, 201 (2d Cir. 2007) (per  
27 curiam). The Court declined to resolve the related question  
28 whether due process requires this same result before the BIA enters  
29 a final order of removal on the basis of administratively noticed  
30 facts. We now address this question and hold that it does.

31                           **BACKGROUND**

32           In June 1996, petitioners Sanja Burger and her daughter,

1 Milica Savic, entered the U.S. as non-immigrant visitors and  
2 remained without authorization. At her removal hearing four years  
3 later, Burger, a native of the former Yugoslavia and a citizen of  
4 Serbia-Montenegro, conceded removability but sought asylum,  
5 withholding of removal, and relief under the Convention Against  
6 Torture ("CAT"). Burger testified to the following facts.

7 From 1989 to 1991, Burger was a widely-recognized stage and  
8 screen actress in the former Yugoslavia. Because of her celebrity,  
9 Burger was regularly contacted by people whom then-President  
10 Slobodan Milosevic had placed in prominent positions in theater and  
11 television. These people pressured her to show support publicly  
12 for Milosevic by attending various political events. Burger  
13 refused to do so.

14 In June 1991, Burger was contacted by a man named Arkan, who  
15 was introduced to her as a businessman. Burger revealed her strong  
16 anti-Milosevic political views to Arkan. To her chagrin, she later  
17 learned that Arkan was a major organized crime figure and was  
18 working for Milosevic while maintaining a paramilitary group that  
19 had committed genocidal acts in Croatia, Bosnia, and Kosovo.  
20 Burger testified that Arkan had recently been murdered in the  
21 middle of the day in a Belgrade hotel lobby.

22 In October 1991, Burger fled Yugoslavia for Munich, where she  
23 remained for five years before coming to the U.S. Burger insisted  
24 that if she returned to Yugoslavia, she would be targeted as both a  
25 spy and a traitor, and because of her status as a famous actress

1 would be singled out and forced to support Milosevic.

2 In an oral decision, an Immigration Judge ("IJ") granted  
3 Burger's application for asylum, expressly finding that she had  
4 demonstrated a well-founded fear of persecution were she to return  
5 to Serbia-Montenegro. The IJ saw no need to address Burger's  
6 requests for withholding of removal and CAT relief.

7 In July 2003, the BIA reversed the IJ's grant of asylum and  
8 ordered Burger removed. The BIA took administrative notice of  
9 changed country conditions, to wit, that following the IJ's  
10 decision, Milosevic was removed from power and faced trial for  
11 crimes against humanity in the International Criminal Tribunal for  
12 the former Yugoslavia in the Hague. The BIA concluded that because  
13 the Milosevic government no longer existed and Burger's claims  
14 rested on her anti-Milosevic views, Burger no longer had a well-  
15 founded fear of persecution. The BIA did not give Burger notice of  
16 its intent to take administrative notice and it provided no  
17 opportunity to rebut the BIA's conclusion before issuing its  
18 decision. The BIA did not address Burger's withholding of removal  
19 and CAT claims.

20 Three months later, Burger moved to reopen. She furnished an  
21 affidavit from an expert in 20th century Western Balkan affairs and  
22 professor of history. The affidavit stated that Serbia-Montenegro  
23 was currently a "semi-mafioso" state with power shared among the  
24 old Milosevic structure, the new government structure, and  
25 organized crime.



1 current events must be "commonly known." See 8 C.F.R. §  
2 1003.1(d)(3)(iv); cf. Fed. R. Evid. 201(b) ("A judicially noticed  
3 fact must be one not subject to reasonable dispute in that it is  
4 either (1) generally known . . . or (2) capable of accurate and  
5 ready determination by resort to sources whose accuracy cannot  
6 reasonably be questioned.").

7 Here, the ouster and subsequent trial of Milosevic were  
8 commonly known facts whose accuracy Burger herself has not  
9 disputed. These facts fall squarely within the definition of  
10 "current events bearing on an [asylum] applicant's well-founded  
11 fear of persecution." Yang, 277 F.3d at 163 n.4. Thus, the BIA  
12 did not engage in improper fact-finding.

13 B. Due Process

14 Aliens, of course, are entitled to due process. Zadvydas v.  
15 Davis, 533 U.S. 678, 693 (2001). They must be afforded "the  
16 opportunity to be heard 'at a meaningful time and in a meaningful  
17 manner,'" Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting  
18 Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

19 To establish a violation of due process, an alien must show  
20 "that she was denied a full and fair opportunity to present her  
21 claims" or "that the IJ or BIA otherwise deprived her of  
22 fundamental fairness." Xiao Ji Chen v. U.S. Dep't of Justice, 434  
23 F.3d 144, 155 (2d Cir. 2006), reh'g granted, vacated on other  
24 grounds by Xiao Ji Chen v. U.S. Dep't of Justice, 471 F.3d 315 (2d  
25 Cir. 2006). Critically, an asylum applicant "must be given notice

1 of, and an effective chance to respond to, potentially dispositive,  
2 administratively noticed facts." Chhetry, 490 F.3d at 200.

3 The Government does not dispute that the noticed facts were  
4 dispositive of Burger's claim, and it concedes that the BIA failed  
5 to warn Burger that it would take notice. Rather, the Government  
6 contends that Burger's motion to reopen gave her a full and fair  
7 opportunity to present her claim and thus cured the lack of advance  
8 notice. The circuits are divided.

9 The Fifth, Seventh, and D.C. Circuits have held that a motion  
10 to reopen suffices to satisfy due process in this context. See  
11 Gutierrez-Rogue v. INS, 954 F.2d 769, 773 (D.C. Cir. 1992) ("The  
12 availability of the petition to reopen secures [petitioner's] due  
13 process right to a meaningful hearing."); Rivera-Cruz v. INS, 948  
14 F.2d 962, 968 (5th Cir. 1991) (same); Kaczmarczyk v. INS, 933 F.2d  
15 588, 597 (7th Cir. 1991) (same).

16 The Ninth and Tenth Circuits, however, have held that due  
17 process requires that the BIA provide applicants with notice and an  
18 opportunity to be heard before the BIA determines on the basis of  
19 administratively noticed facts that a petitioner lacks a well-  
20 founded fear of persecution. See Getachew v. INS, 25 F.3d 841, 846  
21 (9th Cir. 1994) (advance notice and opportunity to respond required  
22 when BIA determines, on the basis of administrative notice, whether  
23 an "election has vitiated any previously well-founded fear of  
24 persecution"); de la Llana-Castellon v. INS, 16 F.3d 1093, 1100  
25 (10th Cir. 1994) (availability of motion to reopen did not satisfy

1 due process where BIA reversed IJ's finding that petitioners had a  
2 well-founded fear of persecution based solely on administratively  
3 noticed facts).

4 As the Ninth and Tenth Circuits have noted, the reopening  
5 procedure has serious limitations as a guaranty of due process.  
6 See, e.g., de la Llana-Castellon, 16 F.3d at 1100; Castillo-  
7 Villagra v. INS, 972 F.2d 1017, 1029-30 (9th Cir. 1992). The BIA's  
8 decision to grant a motion to reopen is purely discretionary.  
9 8 C.F.R. § 1003.2(a). Moreover, because the filing of a motion to  
10 reopen does not automatically stay the execution of an order of  
11 removal, id. § 1003.2(f), the applicant's due process rights depend  
12 entirely on the BIA's good faith. Cf. Kaczmarczyk, 933 F.2d at 597  
13 n.9 ("We presume that when an asylum applicant uses a good faith  
14 motion to reopen to dispute officially noticed facts, the Board  
15 will exercise its discretion to stay the execution of its decision  
16 until it has had an opportunity to rule on the applicant's  
17 motion.").

18 These deficiencies become more acute in cases where  
19 administratively noticed facts are the sole basis for the BIA's  
20 reversal of an IJ's grant of asylum. See de la Llana-Castellon, 16  
21 F.3d at 1099 ("Because the administratively noticed facts  
22 constituted the sole evidence upon which the BIA relied to  
23 establish changed circumstances, advance notice and an opportunity  
24 to be heard on the significance of the political changes in  
25 Nicaragua was all the more crucial.").

1 Here, administratively noticed facts constituted the sole  
2 basis of the BIA's determination that Burger no longer harbored a  
3 well-founded fear of persecution. The BIA's conclusion rested  
4 foursquare on an assessment of conditions in the post-Milosevic  
5 world. Under these circumstances, it cannot be said that Burger's  
6 motion to reopen protected her right to be heard "at a meaningful  
7 time and in a meaningful manner." Mathews, 424 U.S. at 333. Thus,  
8 while the dismantling of the Milosevic regime may have been a  
9 commonly known current event, the BIA erred by failing to give  
10 Burger advance notice of its intention to consider this extra-  
11 record fact. Moreover, the BIA erred in depriving Burger of the  
12 opportunity to rebut this fact's significance before issuing its  
13 decision. The removal of a persecuting despot might vitiate an  
14 asylum applicant's well-founded fear of persecution, but in many  
15 cases lingering elements of a despot's regime may still pose a  
16 threat to an applicant's life and safety. See Getachew, 25 F.3d at  
17 846 (observing that individualized consideration of the relevance  
18 of administratively noticed facts is required to determine "whether  
19 a particular group remains in power after an election, and whether  
20 the election has vitiated any previously well-founded fear of  
21 persecution"). In this case, Burger presented to the BIA evidence  
22 that remnants of the Milosevic regime were still in power and  
23 threatened to persecute her were she returned to Serbia-Montenegro.  
24 The BIA's failure to consider this evidence was error.

25 Because we find that the BIA erred in these respects, we need

1 not decide whether the BIA abused its discretion in denying  
2 Burger's motion to reopen.

3 Finally, the BIA did not consider Burger's withholding of  
4 removal or CAT claims because the IJ never ruled on these claims in  
5 the first instance. On remand, the fate of Burger's withholding  
6 claim will depend on her asylum claim, as an applicant who fails to  
7 qualify for asylum necessarily fails to qualify for withholding of  
8 removal. See Hoxhallari v. Gonzales, 468 F.3d 179, 184 (2d Cir.  
9 2006). However, because "asylum and CAT claims warrant[]  
10 individualized treatment," Ramsameachire v. Ashcroft, 357 F.3d 169,  
11 186 (2d Cir. 2004) (internal quotation marks omitted), Burger's CAT  
12 claim will require separate consideration below.

### 13 CONCLUSION

14 For the foregoing reasons, we GRANT the petition for review,  
15 VACATE the BIA's reversal of the IJ's decision, and REMAND the case  
16 for further proceedings consistent with this opinion, including  
17 further factfinding before the IJ if appropriate. Burger's pending  
18 motion for a stay of removal is DENIED as moot.