U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: MAGRUFKHODZHAYEV, AKMAL

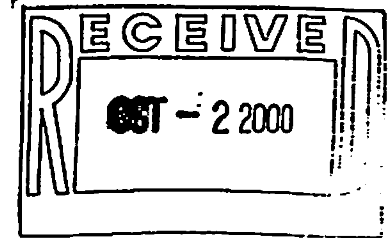
A74-753-675

Date of this notice: 09/20/2000

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Verv Trulv Yours.

Paul W. Schmidt



Paul W. Schmidt
Chairman

Enclosure

Panel Members:
MATHON, LAUREN R.
MILLER, NEIL P.
SCHMIDT, PAUL W.

File: A74 753 675 - Newark

Date: SEP 20 2000

In re: AKMAL MAGRUFKHODZHAYEV a.k.a. Akmal Madroufkhodjaev
a.k.a. Magrufkhodzoev

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Michael P. DiRaimondo, Esquire

ON BEHALF OF SERVICE: Jeffrey L. Romig
Appellate Counsel

ORAL ARGUMENT: June 16, 2000

CHARGE:

Order: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] -
In the United States in violation of law

APPLICATION: Withholding of removal under the Convention against Torture; Reopening

This case presents cross appeals relating to the respondent's application for relief under the Convention against Torture.[1] Oral argument was heard before a Panel of the Board on June 16, 2000. The respondent's appeal from the Immigration Judge's denial of withholding of removal under the Convention against Torture will be sustained. The Immigration and Naturalization Service appeal from the Immigration Judge's grant of deferral of removal under the Convention against Torture will be dismissed. The respondent's motion to reopen for consideration of his application for asylum based on his religion will be denied.

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[1] See Article 3 of the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted and opened for signature* Dec. 10, 1984, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (entered into force June 26, 1987; for the United States April 18, 1988).

I. PROCEDURAL HISTORY

This is the third time this case has been before the Board. On September 9, 1997, we dismissed the respondent's appeal from an Immigration Judge's November 27, 1996, decision denying him asylum and withholding of deportation under former section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1253(h). We found the respondent ineligible for asylum and withholding because he did not show that any persecution he might face upon return to his native Uzbekistan would be on account of a protected ground, rather than a result of efforts at extortion. The Board relied on its decision in *Matter of T-M-B-*, 21 I&N Dec. 775 (BIA 1997). Because this ruling was determinative, we did not reach the other issues raised in the case.[2]

The case was again before us on July 9, 1999, when we granted the respondent's motion to reopen to apply for protection under the Convention against Torture (hereafter CAT), and remanded the case to the Immigration Judge for a hearing on his application for such protection. A hearing on the application was held on August 25, 1999, and September 24, 1999. The Immigration Judge, in his September 24, 1999, decision on the application, denied withholding of removal under the CAT based on certain of the findings he had made in his November 27, 1996, decision denying asylum and withholding of deportation. In that decision, the Immigration Judge had found that there was reason to believe the respondent was a security risk and that there were serious reasons to believe that he had committed a serious non-political crime outside the United States. He also found that any persecution the respondent might suffer in Uzbekistan would not be on account of a protected ground.

Although the Immigration Judge denied withholding of removal under the CAT, he granted deferral of removal under the CAT. In granting deferral of removal, the Immigration Judge relied on a 1998 report from the Department of State that indicates that the police in Uzbekistan routinely beat and mistreat criminal defendants to obtain confessions.

As indicated above, the respondent appealed from the denial of his application for withholding of removal under the CAT, and the Service appealed from the grant of deferral of removal.

In addition to the present appeals regarding the CAT, the respondent has now submitted a motion to reopen/remand based on the claim that he will face persecution if returned to Uzbekistan based on his Muslim religion. In support of this claim, the respondent submitted evidence that he helped fund the construction of a mosque in Uzbekistan in 1992 and 1993. He also submitted a U.S. Department of State Report on Uzbekistan dated September 9, 1999. The respondent asserts that the new report supports his religious persecution claim. The respondent tried to submit this evidence at the CAT hearing before the Immigration Judge, but it was not allowed. The Immigration Judge noted, and counsel at the time seemed to agree, that he had no jurisdiction over this claim in

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[2] This case does not arise in the Ninth Circuit, so *Matter of T-M-B-, supra,* is applicable in this case. *See Borja v. INS*, 175 F.3d 732 (9th Cir. 1999) (en banc).

any event, because it did not relate to the CAT claim. Sept. 24, 1999, Tr. at 21. The Immigration Judge also noted at the hearing that the religious persecution claim should have been made earlier.

The present appeals followed the Immigration Judge's September 24, 1999, decision.

II. FACTS

The respondent is a 39-year-old native and citizen of Uzbekistan. He entered the United States as a nonimmigrant visitor on March 22, 1995. He was placed in deportation proceedings on June 21, 1996, charged with being an overstay. This is the only charge against him, and the respondent conceded deportability at a hearing on July 22, 1996. The main issue at the respondent's 1996 deportation hearing was his application for asylum and withholding of deportation.

Evidence was presented at the 1996 hearing which indicated that the respondent was being sought in Uzbekistan in connection with an April 12, 1994, shooting in Tashkent, Uzbekistan, in which five people were killed. This evidence includes a "RESOLUTION on instituting criminal proceedings against accused," dated May 5, 1994. This document, from an Uzbeki prosecutor's office, states that the respondent and others exchanged fire with their "competitor gang," and alleges that the respondent and his "gang" took this action, "with the aim of expanding their sphere of influence." Exh. F.

Also presented was a warrant of arrest for the respondent, noting his alleged involvement in the shooting. Exh. G. In addition, there is a July 30, 1996, letter from the Tashkent prosecutor to a Newark Division Federal Bureau of Investigations agent stating that the respondent is wanted for this crime, and that an "Interpol National Office Red Notice" had been issued regarding the respondent. Exh. X.

A Department of State Bureau of Human Rights and Humanitarian Affairs letter to the Immigration Judge, dated October 15, 1996, states that the U.S. Embassy in Tashkent has been involved in this criminal case since June of 1996, and that the respondent is a fugitive from justice in Uzbekistan. The letter goes on to state that the facts as conveyed by the Uzbeki government "are in stark contrast to the account of events provided by" the respondent. The letter notes that it has no information on the respondent's claim that officials are trying to "shake him down," though there have been other reports of such behavior by officials in Uzbekistan. However, this letter also states that "criminality on the part of self-described 'businessmen' is not uncommon" in Uzbekistan.

In response to this evidence, the respondent presented two undated, uncertified statements, one from "Kadirov" and one from Sabitov." These statements indicate that Kadirov and Sabitov did not in fact see the respondent near the scene of the April 1994 shooting incident, and suggest that they had previously made claims that he was there under pressure. Exh. 8. These statements are unsworn and unauthenticated.

At his hearing, and in the briefs on appeal, the respondent categorically and consistently denied involvement in the 1994 shooting incident in Tashkent. He claims that he did not learn he was wanted for the Tashkent murders until June 1996, when he was picked up by immigration officials in the United States and placed in deportation proceedings. Tr. of 1996 hearing (hereafter, Tr.) at 140-141. He testified that he did have problems in Uzbekistan in that, starting in 1991, the KGB and police officials started "chasing the businessmen," asking for bribes. Tr. at 89. He testified regarding the regular extortion demands made upon him so that he could keep his businesses running. He claims that he was beaten on more than one occasion, by people he knew. Tr. at 91. On several occasions, he was taken to the police station by those who beat him, and threatened there, as well. Tr. at 91, 94.

The respondent also testified that on one occasion at the police station, he was told about people had been framed for crimes, and warned that if he complained about the extortion, he would be framed for criminal offenses, too. Tr. at 96. He testified that after that, in 1993, his car was taken from him, and when it was returned, drugs and a knife had been planted in it. Tr. at 99, 181. He was warned not to go to other authorities with any complaint, or they would charge him with a crime. The respondent also testified that he was forced to give away two of a number of stores he owned, one to the wife of the mayor, and another to the Chief of Police. Tr. at 97-99, 153.

The respondent testified that he left Tashkent on April 25, 1994, because he feared he could be thrown in jail or killed. Tr. at 103. He went to Moscow, where he lived and set up business for a time. In May of 1995, he came to the United States.

The respondent's wife also testified. Her testimony was also detailed, and was basically consistent with that of her husband. She testified that her husband had been attacked on a number of occasions to extort bribes, and he left Tashkent in April of 1994. She remained in that city. Shortly after her husband's departure, she said, about a dozen men came to her door early one morning. They kept beating on the door, so eventually she let them in. Tr. at 236-239. They searched her apartment until night-time. She said they were looking for guns and drugs, but found none. She said they took away her jewelry, as well as videos, phones, and a tape cassette. Tr. at 241.

The respondent's wife further alleged that she was called to the prosecutor's office in Tashkent and asked about her husband. Tr. at 241. She stated that she did not know why they were looking for him. Tr. at 257. She said she was called to the prosecutor's office on several more occasions, and prosecutors also went again to her home. Tr. at 242-243. Finally, she was told that if she went to a hotel room with a certain official, they would stop calling her into the prosecutor's office. Tr. at 244-246. She left the country with her children soon thereafter and went to Germany. The family later came to the United States. Like the respondent, she stated that she did not know about the murder charges against her husband until she learned about them here. Tr. at 259.

III. APPLICABLE LAW

An alien seeking protection from removal under the Convention against Torture must show that it is more likely than not that he would be tortured if returned to the proposed country of removal. *See* 8 C.F.R. §§ 208.16-208.18 (2000). *See also Matter of S-V-*, Interim Decision 3430 (BIA 2000). Unlike an applicant for asylum or for withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3) (former section 243(h)), an applicant for protection under the CAT need not show that he would be tortured on account of race, religion, nationality, membership in a particular social group, or political opinion. *See* Report of the Committee on Foreign Relations, S. Exec. Rep. No. 101-30, at 16 (1990).

Under the applicable interim regulations implementing the CAT, however, an alien is ineligible for withholding of removal under the CAT if, inter alia, there are serious reasons to believe he committed a serious nonpolitical crime outside the United States, or there are reasonable grounds to believe the alien is a danger to the security of the United States. 8 C.F.R. § 208.16(d)(2). These bars to protection are essentially the same as the bars imposed on applicants for asylum and withholding of removal under sections 208(b)(2)(A) and 241(b)(3)(B).

The Convention against Torture, however, mandates that aliens not be returned to places where they are more likely than not to be tortured. To ensure compliance with this mandate, the interim regulations provide that even an alien barred from withholding under 8 C.F.R. § 208.16(d)(2), may have his removal deferred. *See* 8 C.F.R. § 208.17. This form of protection from removal is commonly referred to as deferral of removal.

It is in the context of these relatively new provisions that we consider the respondent's case.

IV. IMMIGRATION JUDGE'S DECISIONS

As indicated above, the Immigration Judge denied withholding of removal under the CAT based largely on the findings he made in his November 27, 1996, decision denying asylum and withholding of deportation under former section 243(h) of the Act. In that decision, the Immigration Judge concluded that there are reasonable grounds for believing that the respondent is a security risk and that there are serious reasons to believe he had committed a serious non-political crime outside the United States. The Immigration Judge made other findings in his first decision, but these are the findings that are currently relevant, as only they relate to the present CAT claims.

In his November 27, 1996, decision, the Immigration Judge set forth the evidence (described above) regarding the respondent's alleged involvement in the murders. However, he did not state in his decision what weight he was giving to any of this evidence. Further, the Immigration Judge did not make any findings regarding the respondent's credibility as it related to the asylum and withholding claim generally, or regarding his testimony about the 1994 shootings. The only statements the Immigration Judge made regarding the respondent's credibility related to a visa

petition filed on the respondent's behalf. The Immigration Judge indicated that he did not believe the respondent's statements regarding that petition. In fact, the Immigration Judge seemed to credit the respondent's testimony that he had problems with extortion in Uzbekistan.

After setting forth the evidence and discussing the law to be applied, the Immigration Judge found there were serious reasons for regarding the respondent as a security risk because he has a warrant against him for capital murder and, "the documentary evidence in this case contains serious allegations of organized crime involvement." I.J. Dec. at 18. He next concluded, without discussion, that there were serious reasons to believe the respondent had committed a serious nonpolitical crime.

In his subsequent decision on the CAT motion, the Immigration Judge specifically referred to and relied on his earlier decision in finding the respondent ineligible for withholding of removal under the CAT. He refused to grant an adjournment of the proceedings to allow submission of evidence that counsel stated he had just received. This evidence related primarily to the respondent's claim of religious persecution. The Immigration Judge also refused to allow the respondent to testify at the CAT hearing.

In granting deferral of removal, the Immigration Judge made it clear that he was relying primarily on a 1998 Department of State Report which states that the police in Uzbekistan routinely beat and mistreat criminal defendants to extract confessions. The Immigration Judge concluded that, according to the State Department report, "a gentleman who is accused of crime is likely to be tortured." I.J. Dec. at 4.

V. RESPONDENT'S ARGUMENTS

The respondent argues that the record does not support the Immigration Judge's finding that there are serious reasons to believe that he committed a serious non-political crime outside the United States. Counsel argues that the only evidence of the respondent's involvement in the murders are statements by Uzbeki police officials, who had regularly extorted the respondent. Counsel notes that the respondent had "emphatically protested his innocence" (Respondent's Brief at 12), and the Immigration Judge made no credibility findings on this testimony.

Counsel contends that 8 C.F.R. § 208.16(d)(2) puts the burden on the Service to come forward with "evidence indicating the applicability" of a bar to relief. He cautions against raising the bar to eligibility for relief where the evidence of criminal conduct comes from a criminal justice system that routinely uses torture to obtain evidence. The respondent states that the Service "produced absolutely no forensic, photographic, or physical evidence that even remotely linked the respondent with the crime..." Respondent's Brief at 14. According to the respondent, the Service has presented "only an accusation and not evidence of guilt," and that such evidence, especially coming from a country like Uzbekistan, is insufficient to raise the bar to withholding of removal. Respondent's Brief at 14.

The respondent also submitted substantial documentary evidence with his supplemental brief on appeal. The respondent argues that this evidence establishes that he was not involved in the 1996 shooting incident in Tashkent. The documents submitted relate to criminal proceedings brought in Tashkent against persons involved in that shooting incident. These documents on several occasions mention a "Magruphodjaev A" and a "Magrupkhojaev Akmal," who it appears may be the respondent. However, he is not one of the persons on trial for the shootings. The documents indicate that a number of people were convicted of murder relating to the shootings, and some were sentenced to death.

Counsel indicated in his supplemental brief that these documents mention the respondent, but show that while he may have been present at the shootings, he was not actually involved, and when the criminal case proceeded, there were no charges against the respondent. At oral argument, counsel stated that the documents presented with his supplemental brief do not mention the respondent at all.

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The respondent also argues that the Immigration Judge did not allow a full record to be developed on the CAT claim, and that he should have allowed the introduction of further evidence relating to torture in Uzbekistan, as well as the 1999 Department of State Report on the treatment of Muslims in Uzbekistan. He notes that the Board did not previously rule on the issue whether there was reason to believe the respondent may have committed a serious nonpolitical crime outside the United States, and that he therefore should have been given a full evidentiary hearing on that issue as it relates to his CAT claim. He argues that the Immigration Judge cannot deny the respondent the opportunity to be heard, then find that he has not met his burden of proof.

Finally, the respondent argues that the Immigration Judge pre-judged his CAT claim, and erred when he refused to grant his motion to recuse himself from the case.

VI. INS ARGUMENTS

The Service argues that the documents provided by Uzbeki officials regarding the respondent's involvement in the murders "beyond question" establish that there are serious reasons to believe that the respondent committed a serious nonpolitical crime. INS Brief at 4. The Service notes that under the statute and regulations, a conviction of a serious nonpolitical crime is not required, only "reason to believe" one has been committed. With regard to the possible security risk, the Service argues that the respondent's involvement in a shooting that killed five people is encompassed within the meaning and definition of "terrorist activity," and such activity renders the respondent a security risk.

The Service also argues in its brief that the Immigration Judge erred in granting deferral of removal. It contends that the State Department Report relied upon by the Immigration Judge does not establish that 51% of prisoners in Uzbekistan are tortured to obtain confessions. Moreover, the

Uzbeki officials may not need a confession in this case because they have eye-witnesses to the crime. At oral argument, the Service argued that the Immigration Judge was "premature" in granting deferral of removal. It suggested that a remand for further development of this issue was warranted.

In a supplemental brief, the Service argued that this case comes within the scope of *Matter of S-V-*, *supra*, and is controlled by that decision.

Finally, the Service asserts that there was no denial of rights at the CAT hearing. The Service notes that the respondent testified at length at the previous asylum hearing, and the Immigration Judge was entitled to rely on that extensive testimony. Further, any claim regarding possible persecution as a Muslim could and should have made previously, and therefore is untimely.

VII. ANALYSIS

A. Serious Nonpolitical Crime

We shall first address the respondent's appeal from the Immigration Judge's denial of his application for withholding of removal under the CAT. As indicated above, the Immigration Judge denied this relief because he found both that there were serious reasons to believe the respondent committed a serious nonpolitical crime outside the United States and that the respondent was a security risk. We reject both these findings.

Critical to resolution of the issue whether there are serious reasons to believe the respondent committed a serious nonpolitical crime outside the United States is the question of what proof is necessary to establish that. There was considerable discussion at oral argument regarding the proper burden of proof. However, the interim regulations specify the burden of proof that is to be applied. Those regulations, as 8 C.F.R. § 208.16(d)(2), state, "[i]f the evidence indicates the applicability of one or more of the grounds for withholding enumerated in the Act, the applicant shall have the burden of proving by a *preponderance of the evidence* that such grounds do not apply" (emphasis added).

We note that counsel for the respondent has suggested that there was insufficient evidence even to raise the possibility of a bar to withholding of removal. He argues that the burden is on the Service to show that the "evidence indicates the applicability of a bar," and contends the Service did not meet that burden. We find that the evidence the Service presented, while insufficient to find a bar under the regulation, was enough to raise the issue whether the bar applied, and require the Immigration Judge and the Board to decide whether there were serious reasons to believe a serious nonpolitical crime had been committed.

As set forth above, the only evidence submitted by the Service to show the respondent's involvement in the Tashkent killings was the "RESOLUTION on instituting criminal proceedings against accused," a warrant of arrest for the respondent, and a letter to the FBI from the Tashkent prosecutor stating that the respondent is wanted in connection with the shootings.

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As noted above, prior to oral argument, the respondent's counsel submitted voluminous documentation from Uzbekistan relating to the criminal proceedings that ultimately were held regarding the April 1994 shootings. It appears from these documents that a trial was held, and that a number of people were convicted of serious offenses in connection with the Tashkent shootings. Several defendants were sentenced to death. These documents also indicate that the respondent was not tried in absentia, and in fact any possible reference to the respondent indicates only that he was present at the time of the incident; they do not suggest any active participation on his part.

Even absent this newly presented evidence, we find that the evidence of record is insufficient to show that there are serious reasons to believe the respondent was directly involved in the Tashkent shootings. The evidence presented by the Service amounts only to an accusation of involvement in a crime, an accusation which under all the circumstances must be carefully scrutinized. The respondent has himself steadfastly and consistently denied any involvement in the killings. He has also shown that he had a number of altercations with police and other officials in Tashkent in connection with their ongoing attempts to extort money from him. He was in fact taken into custody and beaten on more than one occasion, and was even warned that he could be falsely accused of a crime to force him to comply with their monetary demands. Further, the evidence indicates, as the Immigration Judge acknowledged, that the Uzbeki officials are known to gain criminal confessions through beating and torture of defendants. All this leads us to the conclusion that the evidence presented to show the respondent's involvement in criminal activity is not only thin, it is suspect.

We note in this regard that the consequences of finding that there are "serious reasons to believe" an alien committed a serious nonpolitical crime are serious indeed. Such a finding means that an alien who has established that he has been persecuted, or that he has a well-founded fear of persecution, or that there is a likelihood of torture, may not be granted asylum, or withholding of removal either under section 241(b)(3) of the Act, or under the CAT. If a likelihood of torture is established, deferral of removal may be granted, but with only this form of protection, the alien may be detained in this country for an indefinite period. We therefore think it proper to state that the evidence used to make such a finding must be more reliable than that presented here.

Having concluded that there is insufficient evidence to show that the respondent committed a serious nonpolitical crime in Uzbekistan, it follows, in this case, that there is not sufficient evidence to find that he is a security risk. Any finding that the respondent presents a security risk in this case is dependent upon a finding that he committed a serious crime in his homeland; he is charged only as an overstay in this country and there is no indication that he has engaged in any criminal or otherwise potentially dangerous activity here. We therefore need not address the issue whether an alien who has committed a nonpolitical crime such as murder is necessarily a security risk, as apparently argued by the Service.

B. Likelihood of Torture

Having determined that the respondent is not ineligible for withholding of removal under 8 C.F.R. § 208.16(d)(2), we must now decide whether the respondent has shown that it is more likely than not that he will be tortured if returned to Uzbekistan. If we find that he is, then he is eligible for withholding of removal under the CAT, as we have concluded that there are no bars to that form of relief.

In deciding whether there is a likelihood of torture, we look to the Immigration Judge's decision granting the lesser protection of deferral of removal. The Immigration Judge, relying on a 1998 Department of State Report indicating that police in that country routinely beat and mistreat prisoners to obtain confessions, concluded, with little discussion, that the respondent would more likely than not be tortured upon his return. He therefore granted deferral of removal.

In arguing that the Immigration Judge should not have granted the respondent's application for deferral of removal under the CAT, the Service argued that the one-sentence reference to beating of prisoners in the State Department report was insufficient for a finding that the respondent was likely to be tortured. In its Supplementary Brief on Appeal, as well as at oral argument, the Service also argued that this case is governed by the Board's recent decision in *Matter of S-V-, supra.* The Service argues that the grant of deferral was "premature" at best, and that the Board, if it does not reject the Immigration Judge's findings altogether, should at least remand the record for a further hearing on this issue.

We do not agree that our decision in *Matter of S-V-, supra*, is controlling here. In that case, we held, inter alia, that a consistent pattern of gross, flagrant, or mass human rights violations in a particular country does not, by itself, constitute grounds for finding that a person would be likely to be tortured. A showing must still be made that the individual himself would be personally at risk of torture. *Id.* at 9.

In the case now before us, there is strong evidence that this particular respondent would be at risk if returned to Uzbekistan. First, there is the respondent's uncontroverted testimony that he was well-known to government officials in Tashkent, and they regularly harassed and interrogated him. The interrogations sometimes included physical assaults. Further, although we have found insufficient evidence that the respondent actually committed a crime in Uzbekistan, there is some evidence that officials have been seeking him for purposes of prosecution. This puts his situation in a very different posture than would be the case of other Uzbekis faced with return to their homeland, and distinguishes this case from *Matter of S-V-, supra*.

We find that the particular interest that government officials, including the police, have taken in this respondent, as well as the evidence from the State Department regarding the treatment of prisoners in Uzbekistan, warrant a finding that it is more likely than not that the respondent will be tortured if returned to that nation. Although the standard is more likely than not, we reject the

Service contention that relief under the CAT should not be granted absent a showing that 51% of prisoners are tortured in Uzbekistan.

Having found that the evidence of record is adequate to support our conclusion that the respondent should be granted withholding of removal under the Convention against Torture, there is no reason to remand this case for further proceedings.

VIII. MOTION TO REOPEN

We now turn to the respondent's motion to reopen to apply for asylum. The respondent's application for asylum was previously denied by the Immigration Judge and this Board based on the finding that the respondent had not shown that any harm he might suffer in Uzbekistan would be on account of a protected ground. In his present motion, the respondent asserts that he faces persecution in that nation based on his Muslim religion. He seeks reopening to pursue this claim.

The respondent argues that he has new evidence, specifically the "Department of State Annual Report on International Religious Freedom for 1999: Uzbekistan," to support his claim. This report discusses the treatment of Muslims in Uzbekistan. It does state that the Uzbeki government's respect for religious freedom "worsened during the period covered by this report." However, the report goes on to indicate that approximately 80% of population are "nominally Muslim," and states that the government has been particularly concerned about the spread of ultraconservative or extremist versions of the Sunni Muslims. We note that the respondent did not mention his religion, or any problems he had because of it, in his 1996 hearing, and there is no indication that the respondent belongs to any kind of an ultraconservative or extremist Muslim sect.

In most respects, the 1999 Department of State Report on religion is very similar in its essentials to the part of the 1998 Department of State Report on Uzbekistan that discusses freedom of religion. The two reports were released from the same office less than 7 months apart. The 1998 Report was admitted into evidence and considered by the Immigration Judge. Moreover, the other evidence presented with the motion, such as the evidence that the respondent contributed to the building of a mosque in 1992 and 1993, clearly is not new, and no showing whatsoever has been made that this evidence could not have been presented previously. *See* 8 C.F.R. § 3.2(c).

In sum, the evidence presented does not show that there is a reasonable likelihood of success on the merits of a religious persecution claim, should the respondent's motion be granted. *See, e.g., Matter of L-O-G-*, 21 I&N Dec. 413 (BIA 1996). In addition, the respondent has not indicated why he failed to make a claim based on religious persecution earlier. As the respondent has failed to present new, material, and previously unavailable evidence in support of his motion to reopen, and failed to show a reasonable likelihood of success on the merits, the motion to reopen will be denied.

Finally, although we are granting the respondent's request for withholding of removal under the CAT, and find no need for a remand, we think it important to comment briefly on the Immigration Judge's handling of the respondent's CAT application. We agree with the respondent that the

Immigration Judge acted improperly in cutting off his efforts to fully present his application for protection under the CAT. We do not hold that all the issues previously considered in ruling on an application for asylum or withholding of removal under section 241 must be relitigated when a case is remanded for a CAT hearing. However, the issues in a CAT hearing may not always be precisely the same as those raised in an asylum hearing. The respondent must be given an opportunity to present evidence regarding his claim that he faces torture, and to testify in support of his application, if he chooses to do so. The respondent in this case was denied that opportunity.

IX. CONCLUSION

For the reasons discussed above, we find that the Service has not adequately shown that there are serious reasons to believe that the respondent committed a serious nonpolitical crime outside the United States. We further find that there is a likelihood that he will face torture if returned to his native Uzbekistan. Accordingly, we find that the respondent is eligible for withholding of removal under the Convention against Torture. Finally, we find that the respondent has not made a prima facie showing of persecution on account of his religion, and his motion to reopen to pursue that claim must therefore be denied. The following orders will be entered.

ORDER: The respondent's appeal from the Immigration Judge's decision denying his application for withholding of removal under the Convention against Torture is sustained, and that form of protection is hereby granted.

FURTHER ORDER: The Immigration and Naturalization Service appeal from the Immigration Judge's decision granting deferral of removal under the Convention against Torture is dismissed. However, because withholding of removal under the Convention has been granted, the application for deferral of removal is deemed moot.

FURTHER ORDER: The respondent's motion to reopen for further consideration of his application for asylum is denied.

FOR THE BOARD

File: A74 753 675 - Newark

In re: AKMAL MAGRUFKHODZHAYEV a.k.a. Akmal Madroufkhodjaev

CONCURRING AND DISSENTING OPINION: Lauren R. Mathon, Board Member

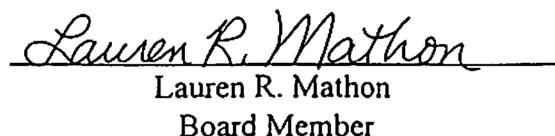
I agree with the majority that the evidence in this case is not sufficient to find that there are serious reasons for believing that the respondent committed a serious nonpolitical crime in Uzbekistan, nor is there reason to believe he is a security risk. I therefore agree that the respondent is not barred from withholding of removal under the Convention against Torture. I also agree with my colleagues that the Immigration Judge should have given the respondent a fuller opportunity to present his case at the Convention against Torture hearing.

However, I disagree with the majority's decision to grant withholding of removal under the Convention without further proceedings. I would remand the case to the Immigration Judge to enable both the respondent and the Service to present further evidence regarding the likelihood of torture. In my view, the evidence of possible torture that has so far been presented is not enough to show a likelihood that the respondent would face torture if returned to Uzbekistan. Moreover, the Immigration and Naturalization Service was not given any meaningful opportunity at the Convention against Torture hearing to rebut the evidence relied upon by the Immigration Judge when he found there was a likelihood of torture.

Remanding this case would give both sides the chance to present additional evidence and further develop the record on the basic issue remaining in this case: whether it is more likely than not that the respondent will be tortured in Uzbekistan. As counsel for the Service stated at oral argument, the Immigration Judge's decision on this issue was premature. It was made without full development of the critical issues or a full opportunity for both parties to present evidence. I would therefore remand the case for a further hearing on the respondent's application for withholding of removal under the Convention against Torture.

Finally, though the Immigration Judge did not properly handle this case at the last hearing, I do not believe that the record establishes bias on his part. I would therefore remand the matter to the same Immigration Judge.

For these reasons, I respectfully concur and dissent.



Lauren R. Mathon
Board Member