

UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
UNITED STATES IMMIGRATION COURT  
NEW YORK, NEW YORK

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In the Matter of

Aug 29, 2007

Nikolla PAPAJORGJI,  
A73-162-313,

DEPORTATION PROCEEDINGS

- Respondent -

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ON BEHALF OF RESPONDENT

DiRaimondo & Masi, LLP  
401 Broadhollow Road, #302  
Melville, NY 11747

ON BEHALF OF SERVICE

S. Egan, Esq.  
Assistant Chief Attorney  
New York District, ICE

CHARGE: Section 241(a)(1)(B) of the Immigration & Nationality Act ("INA").

APPLICATIONS: Request for asylum in the United States pursuant to § 208 of the INA.

Request for withholding of removal to Albania pursuant to § 241(b)(3) of the INA.

Request for relief under Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), 8 C.F.R. §§ 1208.16 through 1208.18 (effective March 22, 1999).

Request for voluntary departure pursuant to § 240 of the INA.

**DECISION OF THE IMMIGRATION JUDGE**

The Board of Immigration Appeals ("BIA") remanded this matter on Dec 22, 2005 based upon US Federal Appeals Court, Second Circuit stipulation and order entered on Oct 18, 2005. The remand was to reconsider the respondent's claim in light of new country conditions that have occurred in Albania since the court conducted its last hearing and issued a determination in 1999.

Procedural

The court rendered an oral determination on July 12, 1999 denying the respondent's applications for asylum pursuant to § 208 of the INA, denying the respondent's application for withholding of deportation under the § 241(b)(3) of the INA and under CAT. The court also entered an order granting the respondent the privilege of voluntary departure with an alternate order of deportation from the US should respondent fail to meet the conditions for posting a voluntary departure bond or for overstaying the period fo voluntary departure.

The BIA issued a written decision dated Dec 16, 2002 dismissing the respondent's appeal. The respondent subsequently sought to reopen the proceedings in a motion to the BIA due to new country conditions. The Board in a written decision dated Aug 15, 2003 denied the motion. Thereafter, the respondent sought review of the motion denial and in a stipulation between the respondent and a Assist. U.S. Attorney, the matter was remanded back to the BIA for reassessment of the country conditions in Albania since the court's last determination in 1999. Instead, the BIA remanded the matter back to the court in a written decision dated Dec 22, 2005 indicating that fact-finding was the province of the Immigration Court. *Ex. R1*. In accord with the regulations, the matter was set for a master calendar proceeding and the respondent indicated that he wished to provide additional background testimony of an expert witness regarding Albanian country conditions. The documentation was taken and placed in the record. The respondent, aside from the expert testimony, did not want to offer any further testimonial evidence and both parties elected to rest their cases upon the existing hearing transcript and evidence contained in the Record of Proceedings, along with the telephonic testimony of the expert.

The court also inquired whether the DHS wanted to re-paper the respondent regarding eligibility for Special Rule Cancellation of Removal based upon the substantial equities. That exist in his case The DHS declined.

As the respondent offered no additional substantive testimony of any further incidents or objective facts, the court's earlier written decision is primarily intact regarding the court's factual findings and credibility determination, which established that the respondent is a male, native and citizen of Albania. The respondent, through counsel, conceded the truth of the factual allegations in the Order to Show Cause and conceded that he is deportable from the US, as charged. *Exhibit 1*. Therefore, the court finds that the respondent is deportable from the US pursuant to § 241(a)(1)(B) of the INA and that such finding is supported by clear, convincing and unequivocal evidence. The respondent declined to indicate a country in the event of removal, the ICE directed Albania.

As relief from removable, the respondent has applied for asylum under Section 208 of the Immigration and Nationality Act, as amended ("INA"), by filing Form I-589, *Ex. 2*. The respondent's request for asylum is also considered a request for withholding of removal under § 241(b)(3) of the INA. The respondent also request withholding of removal under the CAT. The respondent submitted additional background materials for the court's review.

## TESTIMONY

The respondent offered no further oral testimony of any new facts. The court heard the testimony of a university professor that gave his opinion regarding the current political conditions in Albania and an assessment of the security and safety issues that currently exist. As such, the court's earlier 1999 capitulation of the testimony offered by the respondent and other witnesses will be incorporated herein, as if it was more fully stated.

The professor gave testimony about the changes in Albania resulting from the general and local elections of 2000 and 2003. The expert also gave some details about the recent 2005 elections that resurrected the Democratic Party ("DP") to national control of the government. The expert indicated that the Socialist Party ("SP") still has control of local areas due to the recent local elections and that the SP also currently control Tirana. The expert indicated that progress has been made in the government's attempt to install democracy in Albania, but that the reports are generally too optimistic and fails to reveal the flaws in the electoral process that have occurred and observed by the expert in 2000. The expert also noted that automatic weapons and guns still remain a problem in Albania and the criminal element has gained prominence with extortion and kidnaping. The expert also noted that police corruption still exist, but less so than in 1997, when the country suffered a complete economic collapse.

The respondent has also submitted a request for Suspension of Deportation under § 244 of the INA and argues that the respondent is eligible despite having only having a few years of residence in the US before the service of the OSC.

The court will pre-terminate the respondent's request for suspension as he fails to have the requisite seven years of continuous residence. *See Matter of Mendoza-Sandino*, 22 I.&N. Dec 1236 (BIA 2000).

## ASYLUM AND WITHHOLDING CRITERIA

A respondent who is seeking a discretionary grant of asylum must demonstrate status as a "refugee" as defined by §101(a)(42)(A) of the INA. The definition includes the requirement that the respondent demonstrate an unwillingness or inability to return to his or her home country because of persecution, or "well-founded fear" of persecution, on account of race, religion, nationality, membership in a particular social group, or political opinion. The requirement is met by a showing of circumstances under which a reasonable person would fear persecution. *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

Accordingly, in determining whether a respondent is eligible for asylum, a respondent's subjective mental state must be considered against the background of circumstances prevailing in the respondent's home country. The objective reasonableness of a respondent's fear can be based upon

what has happened to others similarly situated, as reported in the Dept of State, Country Reports on Human Rights Practice, or based upon other reliable sources. In some cases, the only available evidence of a respondent's subjective fears may be the respondent's own testimony. Such solitary evidence can suffice where the testimony is credible, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis of the respondent's fears. Finally, not just any fear of persecution will sustain the respondent's burden, the objective reasonability of persecution on account of a ground specified in §101(a)(42)(A) of the INA, and the respondent's subjectively reasonable fear of experiencing that persecution both must be established. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

The respondent bears the evidentiary burden of proof and persuasion in applications for asylum and withholding of removal. *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), see also 8 C.F.R. 242.17(c)(4)(iii). In addition to establishing eligibility for a grant of asylum, a respondent has the burden of establishing that a favorable exercise of discretion is warranted. *Matter of Shirdel*, 19 I&N Dec. 33 (BIA 1984).

Where a respondent has shown that he or she has been persecuted in the past on account of race, religion, nationality, membership in a particular social group, or political opinion, the likelihood of present persecution becomes relevant with regard to the exercise of discretion, and asylum can be granted, or denied, in the court's discretion even if there is little likelihood of present persecution. *Matter of Chen*, Int. Dec. 3104 (BIA 1989).

A respondent who is seeking withholding of removal from any country must show that such respondent's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion. See §243(h)(1) of the IN. In order to make this showing, the respondent must establish a "clear probability of persecution on account of one of the enumerated grounds." *INS v. Stevic*, 467 US 407 (1984). This clear probability standard requires a showing that is more likely than not that the respondent would be subjected to persecution. Under the Refugee Act of 1980, withholding of removal is mandatory. Therefore, once the respondent has established qualification for withholding, and that he or she is not ineligible, it must be granted and the respondent cannot be returned to the country where he or she would face persecution. The respondent may, however, be deported to another country under certain circumstances. In this regard, withholding of removal differs from asylum, which the granting is discretionary.

## ANALYSIS

In review, the court concludes that it's earlier determination will be changed. The respondent claims persecution due to his political activities and beliefs. It is the opinion of the court that the respondent is entitled to asylum. The court previously made no finding regarding the respondent's credibility, but denied his applications because it determined that materials and substantial changes took place in Albania to render the respondent claim of past persecution as adequately rebutted by the

background data provided by the DHS and the respondent himself. More importantly, the court focused on the national electoral success of the Democratic Party ("DP") in Albania and the substantive and political changes that occurred in the Albanian Government on the national level.

The case has been remanded back for a new determination based upon new and corroborative evidence that respondent's DP continued membership would subject him to further persecution in Albania. After listening, reading and assessing the new background data submitted by the respondent the court finds that the respondent is entitled to asylum based upon his past persecution and that the supporting materials show that the conditions in Albania have not changed given the election success of the DP.

The court did not find the bulk of the expert's testimony and affidavit of Dr. Fisher to be helpful since it was a broad assessment of the faults that the country has encountered while trying to install democracy. Dr. Fisher's evaluation is that Albania has suffered set backs in the economic, electoral and political progress, since the fall of the Albanian Communist Party. However, democracy does not come with a set plan for success. Moreover, democracy depends upon the unique factors that require debate and compromise, while recognizing that setbacks and failures may occur in the progress for democracy. The expert's recent written submission dated March 20, 2007 do nothing but confirm that un-democratic means have been used by both DP and SP supporters during elections and political encounters, none of which support persecution, but all of which supports the rough and tumble nature of emerging political democracy in Albania.

However, the court has reviewed additional materials found in Exhibit 2A to 2F to be supportive that the conditions in Albania have not changed as previously argued by the DHS and found by the court. The respondent's additional supporting background data The DHS have not presented any additional materials to offset the presumption of a well founded fear of persecution in favor of the respondent.

The DHS noted that the respondent's security checks and background checks were clear and current. Therefore, there did to appear to be any reasons why the respondent is not entitled to a favorable exercise of discretion.

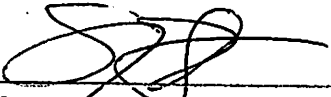
As the court is granting the affirmative relief of asylum to the respondent, the court will not issue a decision with respect to the respondent's applications for withholding of removal under the INA or CAT.

Accordingly, the following orders will be entered:

### **ORDER**

**ORDERED** that the respondent's request for asylum under § 208 of the INA is hereby

granted and the deportation proceedings are concluded.



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SANDY K. HOM  
U.S. Immigration Judge