03-4741-ag

To Be Argued By:
PATRICK F. CARUSO

==========

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 03-4741-ag

ALVAR DRENI,

Petitioner,

-vs-

ALBERTO R. GONZALES,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

==========

BRIEF FOR ALBERTO R. GONZALES ATTORNEY GENERAL OF THE UNITED STATES

==========

KEVIN J. O'CONNOR
United States Attorney
District of Connecticut

PATRICK F. CARUSO
Assistant United States Attorney
SANDRA S. GLOVER
Assistant United States Attorney (of counsel)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

STATUTES

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of the Board of Immigration Appeals under § 242(b) of the Immigration and Nationality Act, 8 U.S.C. § 1252(b) (2004).

On March 28, 2003, the Board of Immigration Appeals entered a final order affirming an Immigration Judge's denial of petitioner's application for asylum and withholding of removal. On April 18, 2003, petitioner filed a timely petition for review with this Court.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether a reasonable factfinder would be compelled to reverse the Immigration Judge's conclusion that petitioner failed to establish eligibility for asylum and withholding of removal, where the Immigration Judge's conclusion was based upon an adverse credibility finding supported by specific reasons set out in his decision.

2. Whether this Court lacks jurisdiction over petitioner's claim for relief under the Convention Against Torture because he failed to exhaust his administrative remedies; or in the alternative, whether the Immigration Judge properly rejected petitioner's claim, where petitioner failed to show a likelihood that he would be tortured upon return to Albania.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 03-4741-ag

ALVAR DRENI,

Petitioner,

-vs-

ALBERTO R. GONZALES,[1]
ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR ALBERTO R. GONZALES, ATTORNEY GENERAL OF THE UNITED STATES

Preliminary Statement

Alvar Dreni ("Dreni"), a native and citizen of Albania, petitions this Court for review of a March 28, 2003

[1] Under Federal Rule of Appellate Procedure 43(c)(2), Alberto R. Gonzales is substituted as the respondent in this case.

decision of the Board of Immigration Appeals ("BIA"). The BIA affirmed the February 8, 2000, decision of an Immigration Judge ("IJ") denying Dreni's application for asylum and withholding of removal under the Immigration and Nationality Act of 1952, as amended ("INA"), and ordering Dreni removed from the United States.

Dreni testified that, before coming to the United States, he and his family were confined to an internment camp until he was five years old. Dreni also testified that he was a member of the Albanian Democratic Party and a political activist who was beaten and mistreated on two occasions for his participation in protests against the communist regime in Albania. The IJ noted that country conditions had changed significantly after many of the events Dreni described. Furthermore, with respect to Dreni's alleged activities as a democratic activist, the IJ properly found that Dreni's testimony regarding this claim of past persecution lacked credibility and specificity. This determination was based upon inconsistencies between Dreni's testimony and the information he provided in his asylum application, inconsistencies between Dreni's testimony and the documentary evidence he presented, the suspicious nature of the documents Dreni submitted, as well as the general lack of specificity in Dreni's allegations. The IJ's adverse credibility finding was, therefore, supported by substantial evidence.

The IJ also rejected Dreni's claim for protection under the Convention Against Torture ("CAT").[2] Dreni,

---

[2] Convention Against Torture and Other Cruel, Inhuman (continued...)

however, did not appeal the IJ's denial of his CAT claim to the BIA and, therefore, failed to exhaust his administrative remedies. Even if Dreni had exhausted the CAT claim, moreover, substantial evidence supported the IJ's conclusion that Dreni failed to establish his eligibility for relief under the CAT.

Statement of the Case

Dreni entered the United States near Los Indios, Texas on or about December 2, 1998. Joint Appendix (Certified Administrative Record) ("JA") 370, 430. He was taken into custody by border patrol agents of the Immigration and Naturalization Service ("INS") who determined that he had entered the country illegally. JA431-33. The INS initiated removal proceedings by issuing a Notice to Appear on December 3, 1998, and Dreni was released on a $10,000 bond. JA430-32.

Dreni requested a continuance and a change of venue from Texas to New York. Both motions were granted, and the case was transferred to New York. JA414, 419.

Dreni obtained New York counsel, and on September 30, 1999, he submitted an Application for Asylum and Withholding of Removal and a request for relief under the

---

[2] (...continued)
or Degrading Treatment or Punishment, adopted and opened for signature Dec. 10, 1984, G.A. Res. 39/46 (annex, 39 U.N. GAOR Supp. No. 51 at 197), U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987; for United States Apr. 18, 1988).

CAT.[3] JA370-81. On February 28, 2000, the IJ held a hearing regarding Dreni's application. JA69-129. The IJ issued an oral decision that same day denying all claims for relief, finding that Dreni had filed a frivolous asylum application, and ordering him removed to Albania. JA44-57; *see also* JA43.

Dreni, through counsel, filed a Notice of Appeal with the BIA. JA36-41. He also filed a brief in support of the appeal. JA10-27. Neither Dreni's Notice of Appeal nor his brief mentioned, much less challenged, the IJ's denial of his CAT claim. JA36-41, 10-27.

On March 28, 2003, the BIA upheld the IJ's adverse credibility finding and dismissed Dreni's appeal from the IJ's denial of asylum and withholding of removal. JA2-3. The BIA sustained Dreni's appeal from the IJ's finding that Dreni had filed a frivolous asylum application. *Id.*

On April 18, 2003, Dreni filed a petition for review of the BIA's decision with this Court. Dreni, however, never pursued the appeal, and the Court dismissed his case on April 12, 2005. Four months later, on August 11, 2005, Dreni moved to reinstate the appeal, and the Court granted this motion on September 9, 2005.

---

[3] An asylum application also serves as an application for relief under the CAT. *See* Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8485 (Feb. 19, 1999).

Statement of Facts

A. Petitioner's Application for Asylum and Withholding of Removal

Dreni filed his application for asylum and withholding of removal on or about September 30, 2000. In it, he claimed the Albanian communist regime persecuted him in the past and expressed fear that he would be persecuted in the future if forced to return to his native country. JA379-81.

The narrative portion of Dreni's application set out the following relevant factual allegations: Dreni's grandfather, Marash Dreni, was executed in 1946 for opposing Albania's communist government. JA379. Thereafter, Dreni's father was sent to an internment camp in Puke, Albania, where he and his family remained until 1981. *Id.* Dreni himself was born in the Puke internment camp on June 10, 1976, and lived there until age five when his family was released. *Id.* After being released from the camp, Dreni's family moved to Shkoder (or Shkodra), Albania, where Dreni attended school. *Id.*

According to his asylum application, in 1990, at the age of 14, Dreni began participating in political demonstrations. *Id.* In December 1990, Dreni was arrested, held, and tortured for 24 hours after a demonstration that resulted in the demolition of a statute of Stalin in Shkoder. *Id.* In April of the following year, he participated in a demonstration protesting the outcome of recent elections in Albania. JA380.

From 1992 until 1997, the Democratic Party was in power in Albania. Dreni joined the Democratic Party, and in 1993, became a member of the "Association of Former Politically Persecuted People of Albania." *Id.*

In 1997, after the Socialist Party prevailed in nationwide elections, Dreni, as a member of Albania's Democratic Party, was under constant surveillance and was frequently summoned for questioning at the police station in Shkoder. *Id.* In September 1998, after an anti-government demonstration associated with the funeral of a prominent Democratic Party leader, Dreni was arrested, interrogated, and beaten severely. He was released three days later after he was forced to sign a document agreeing to cooperate with the police as an informant. JA381.

In addition to this narrative account, Dreni's asylum application contained his responses to basic background questions. As relevant here, Part A, Question 23 asked "What country issued your last passport or travel document?" JA371. To this question, Dreni responded "N/A." *Id.* The following questions sought information pertaining to Dreni's passport, including the number and expiration date. *Id.* Dreni, once again, responded "N/A" to both questions. *Id.*

Dreni submitted several documents in support of his asylum application. Among them were a "Characteristic" from the Albanian Democratic Party, which purported to summarize Dreni's political activism, a Democratic Party membership dues booklet, and a "Certificate" from the "Association of Ex-Political Prosecuted Persons," which

also purported to chronicle Dreni's activism. JA344-45, 349-58.

B. Petitioner's Hearing Before the IJ

At the beginning of Dreni's removal hearing, on February 28, 2000, the IJ identified several exhibits in the record, including Dreni's asylum application, the documents submitted in support of the application, and State Department Profiles of Albania. JA70-71. After the identification of exhibits, Dreni testified as the only witness at the hearing. JA72-124.

On direct, Dreni testified that following his grandfather's execution, the Dreni family was interned at Chafbari, which is a village located in the Puke (or Puka) region of Albania. JA77-78. Conditions at Chafbari were "very inhospitable." JA78. Dreni's father and mother met, and were married, while interned. JA81. Dreni was born at Chafbari and lived there, with his parents, until 1981, when he was five years old and he and his parents were released. JA79-80. Upon their release, the Dreni family settled in Shkodra. JA81. Dreni attended school in Shkodra, earned a degree and went on to serve in the Albanian army. JA74-76, 82-85, 104-105.

Dreni testified that he began his political activism in 1990, at the age of 14, when he and other Albanian youths assembled in Shkodra and "topple[d] the statue of Stalin that was in the center" of the city. JA86-87. He claimed that he was taken into custody immediately following this event, beaten, and held for 24 hours. JA87-88.

He also alleged that he participated in a demonstration following the 1991 election, which the communists won. JA89-90. Specifically, Dreni claimed that, during the 1991 demonstration, he and others stormed a communist party building and set fire to it. JA90. He was not arrested for his participation in this protest. *Id.*

Dreni then testified generally about the 1992 elections that brought the Democratic Party to power in Albania, the pyramid schemes that ravaged the country's economy in 1997, and the subsequent elections that returned the communists to power. JA90-93. Following this testimony, the IJ advised petitioner's counsel that he was troubled by Dreni's lack of specificity. JA93.

In the IJ's view, much of Dreni's testimony was a generalized recitation of well-known Albanian historical events, all of which were documented in the State Department's Albanian profile. JA93-94. The IJ encouraged counsel to adduce testimony that was more specific to Dreni's alleged persecution. *Id.*

Following the IJ's admonition, Dreni testified about his participation in a 1998 demonstration. JA94-96, 107. According to Dreni, he attended the September 1998 funeral for Azem Hajdari (a prominent Democratic Party official), and this ceremony turned into a large protest demonstration. JA94. Dreni alleged that he was taken into custody by the secret police during this demonstration and held for three days, during which time he was repeatedly beaten. JA94-96, 107. He was released, according to his testimony, only after he signed a

document indicating that he wished to be an informant for the secret police. JA94-95.

Cross examination revealed problems with Dreni's credibility. For example, Dreni, a purported political activist, forgot that elections were held in Albania in 1997. JA101.

In addition, Dreni admitted that his responses to questions on the asylum application regarding his passport were inaccurate. JA99-103. Specifically, he conceded that he received a passport from the Albanian government, but that he had not disclosed this information on his asylum application:

> Q. Well, your asylum application asks what country issued your last passport and then it asks for your last passport and the date it expires. Is there any reason you failed to give the information in your written application?
>
> A. No, I just honestly didn't think it was very important.
>
> Q. Well, you were warned not to make any false statements in your application. I am going to pen in this correction to show that your application in writing was not, in fact, correct.

JA103.

Questioning by the IJ about documents Dreni had submitted revealed further problems with Dreni's

credibility. For example, the IJ asked Dreni about a Democratic Party membership dues booklet, or what Dreni referred to as his membership "ID card." JA112-19. Dreni claimed that he joined the Democratic Party in 1994. JA115-16. The membership dues booklet, however, indicates that Dreni joined the party in 1996. JA115.

Dreni claimed that the membership booklet contained enough space to record only one year of dues payments. JA115. In fact, the booklet contained space for seven years of dues payments. JA119.

Finally, Dreni claimed that he paid his membership dues in monthly installments of 1,500 lek (approximately $1.50), and that these payments were recorded in his dues booklet. JA113-14. But the membership booklet, which Dreni claimed was his, only showed two *annual* payments, prompting the IJ to state:

> Instead of writing individual payments of dues, they have written across the entire page to show that you paid the dues for those two years. This would clearly indicate that you paid your dues on an annual basis or this booklet was issued much later. Your testimony indicates to me that you have never studied this booklet before you were asked questions about it today here in court.

JA119.

The IJ also question Dreni about the other documents he had submitted, including the "Characteristic" from the Albanian Democratic Party and the "Certificate" from the

Albanian Association of Formerly Persecuted Persons. JA119-24, 349, 352. The IJ noted that the "Characteristic," which purported to be from the Albanian Democratic Party, was not on the party's letterhead. JA120-21, 349. Dreni conceded that the Albanian Democratic Party was an organization that utilized letterhead. JA121.

The IJ also noted that both the "Characteristic" from the Democratic Party, and the "Certificate" from the Association of Formerly Persecuted Persons, appeared to have been typed on the same typewriter. JA121, 349, 352. Dreni, in response, surmised that it was "possible that one person working for both . . . [organizations] could have typed these documents out for" him. JA121.

Finally, the "Characteristic" from the Albanian Democratic Party, indicates that Dreni was taken into custody and beaten by the secret police in 1997. JA349. Dreni, however, testified that he was beaten by the secret police in 1998, not 1997. JA123. The IJ questioned Dreni about this inconsistency:

> Q. Well, how would the party, this is from the chairman of the Shkodra branch, how would the party know if you were beaten in 1997 if you don't remember any such thing. What would be the cause of the confusion?
>
> A. As I said before, for this 1997 incident, I have no idea why it would be there.

Q. Do you have any idea why the party doesn't mention in their certificate that you were arrested and mistreated in 1998?

A. For this also, I have no idea why they wouldn't write it down.

JA123-24.

C. The Immigration Judge's Decision

On February 28, 2000, the IJ rendered an oral decision, denying Dreni's application for asylum, withholding of removal, and protection under CAT, and ordering Dreni removed to Albania. JA44-58.

The IJ reviewed Dreni's claims of political persecution, including his claimed history of family persecution, and his beatings in 1990 and 1998. JA46-47. As a preliminary matter, the IJ noted that there had been significant changes in country conditions in Albania since the events Dreni described. JA48-49.

With respect to Dreni's claims that in the 1990s he suffered past persecution in Albania because of his anti-communist views and political activism, the IJ acknowledged that, if true, these allegations would constitute past persecution and would support not only Dreni's asylum claim, but also his withholding and CAT claims. JA47-48. The IJ, however, did not believe Dreni. He expressly found that Dreni was not credible, and he denied Dreni's application on this basis. JA50-57.

The IJ identified several factors to support his adverse credibility determination. The IJ was particularly troubled by Dreni's testimony about his membership in the Democratic Party and the membership dues booklet Dreni submitted in support of his application. JA52-53.

> The respondent testified he carried this booklet with him in Albania, that he had it on his person often, that each time he paid his monthly dues of 1,500 lek they would write in the receipt for him. This booklet bears no resemblance to the respondent's testimony. It clearly indicates that his 1997 dues were recorded as having been paid at one time and, likewise, his 1998 dues. There is no reference, in fact, to a payment of 1,500 lek or any amount in this booklet and certainly no record that this booklet was marked month by month whenever the respondent happened to pay his dues. It doesn't matter when the respondent might have paid his dues, but it is extremely suspicious that the respondent can't remember the appearance of his own membership dues certificate which he said he carried with him in Albania and as far as the Court is concerned, there is overwhelming evidence that the respondent's testimony on that point is a lie.

JA53.

The IJ was also troubled by inconsistencies between Dreni's testimony and the documents Dreni submitted, as well as the suspect similarities in documents purportedly from different Albanian organizations. JA52.

> The respondent has documents, as mentioned earlier, which not only do not mention specific events that he says he took part in but which also mention the respondent having been arrested and beaten in March 1997 which even the respondent says did not occur. So, the validity of these documents is very suspect. The Court does believe that by plain examination of the naked eye, there is good reason to believe that all these documents were typed on the same typewriter or, at least, that they were typed by the same person.

JA52.

In addition, although Dreni claimed to have been persecuted for his political activism and membership in the Democratic Party, the IJ found Dreni's asylum case to be "bereft of any details about politics in Albania, political party activities, his activities with the parties, etc., except for three extremely prominent events in Albanian history." JA54.

> Now, of course, a prominent event may often involve a large number of people, but as far as the Court is concerned, it's peculiar that the respondent's three incidents that he has described in his testimony and really his only references to any activities by democratic forces, the Democratic Party or even himself in terms of an interest of democracy in Albania are of such well known events. These are the late 1990 demonstration with the statue of Stalin being torn down, the spring '91 demonstration that is well known enough that it is

> frequently mentioned in human rights surveys, etc., about that period and the extremely well known demonstration on the occasion of the funeral or memorial service of Mr. Hajdari in the fall of 1998. . . . As far as the Court is concerned, it's extremely likely that the respondent has manufactured most of his claim about having been an activist with the Democratic Party . . . .

JA54-55. The IJ also noted that, Dreni, a purported activist in the Democratic Party, did not even recall that there was an election in Albania in 1997. JA54.

The foregoing led the IJ to conclude that Dreni was not credible:

> The conclusion the Court reaches is the respondent, first of all, has by a far measure failed to come close to establishing that his testimony is more likely true than not in terms of his activities in Albania, certainly has failed to convince the Court that he was ever taken in to custody or beaten for any political activity in Albania and, in fact, has failed to convince the Court that he even has any political interest in Albania or was ever interested in political events there.

JA55.

The IJ found, in addition, that there were "clear indications" that Dreni had fabricated at least part of his testimony, and, therefore, had submitted a frivolous asylum application. JA55-56.

> This respondent's case is extremely fishy in the view of the Court or in the sense of the Court. The testimony about the dues booklet, as far as the Court is concerned, cannot possibly be true or even subjectively believed by the respondent. As far as the Court is concerned, this is definitely false testimony by the respondent. No one who was involved in this party for a two year period and who regularly made dues payments would testify that his dues payments were written down in his membership book when, in fact, it is clear that they were not and the respondent's testimony on this point is the clearest indication that his testimony is, in fact, partly fabricated.

JA55-56.

D. The BIA's Decision

Dreni appealed the IJ's decision to the BIA. Neither Dreni's Notice of Appeal, nor his memorandum in support of the appeal, challenged the IJ's denial of Dreni's CAT claim. JA36-41, 10-27. On March 28, 2003, the BIA affirmed the IJ's adverse credibility finding. JA2. It also affirmed the IJ's denial of Dreni's application for asylum and withholding of removal. JA3. It concluded, however, that Dreni had not filed a frivolous asylum application, and, therefore, sustained Dreni's appeal from the IJ's contrary finding. JA2-3. This petition for review followed.

SUMMARY OF ARGUMENT

I. The IJ properly denied Dreni's application for asylum and withholding of removal. To the extent Dreni claimed that his internment through age five constituted past persecution, the IJ properly concluded that country conditions in Albania had changed significantly. The IJ further found that neither Dreni, nor Dreni's claims of political activism, participation in protests and corresponding mistreatment, were credible. The IJ provided specific, cogent, reasons for this finding, and the finding was, therefore, supported by substantial evidence. A reasonable factfinder would not be compelled to find otherwise. Accordingly, the instant petition should be denied.

II. Dreni failed to preserve a claim for relief under the Convention Against Torture. His Notice of Appeal to the BIA challenged only the IJ's denial of asylum and withholding of removal. His brief in support of his appeal to the BIA, moreover, made absolutely no mention of the CAT claim. Because petitioner failed to administratively exhaust his CAT claim, this Court lacks jurisdiction to consider it. In any event, even if Dreni had properly preserved his CAT claim, substantial evidence supports the IJ's denial of that claim.

ARGUMENT

I. Substantial Evidence Supports the Immigration Judge's Determination That Dreni Failed To Establish Eligibility for Asylum and Withholding of Removal

A. Relevant Facts

The relevant facts are set forth in the Statement of Facts above.

B. Governing Law and Standard of Review

Two forms of relief are potentially available to aliens claiming that they will be persecuted if removed from this country: asylum and withholding of removal.[4] *See* 8 U.S.C. §§ 1158(a), 1231(b)(3) (2004); *Zhang v. Slattery*, 55 F.3d 732, 737 (2d Cir. 1995). Although these types of relief are "closely related and appear to overlap," *Carranza-Hernandez v. INS*, 12 F.3d 4, 7 (2d Cir. 1993) (citation and internal marks omitted), the standards for granting asylum and withholding of removal differ, *see*

---

[4] "Removal" is the collective term for proceedings that previously were referred to, depending on whether the alien had effected an "entry" into the United States, as "deportation" or "exclusion" proceedings. Because withholding of removal is relief that is identical to the former relief known as withholding of deportation or return, *compare* 8 U.S.C. § 1253(h)(1) (1994) *with id.* § 1231(b)(3)(A) (2000), cases relating to the former relief remain applicable precedent.

INS v. Cardoza-Fonseca, 480 U.S. 421, 430-32 (1987); *Osorio v. INS*, 18 F.3d 1017, 1021 (2d Cir. 1994).

1. Asylum

An asylum applicant must, as a threshold matter, establish that he is a "refugee" within the meaning of 8 U.S.C. § 1101(a)(42) (2000). *See* 8 U.S.C. § 1158(a) (2004); *Liao v. U.S. Dep't of Justice*, 293 F.3d 61, 66 (2d Cir. 2002). A refugee is a person who is unable or unwilling to return to his native country because of past "persecution or a well-founded fear of persecution on account of" one of five enumerated grounds: "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42) (2004); *Liao*, 293 F.3d at 66.

Although there is no statutory definition of "persecution," courts have described it as "'punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate.'" *Mitev v. INS*, 67 F.3d 1325, 1330 (7th Cir. 1995) (quoting *DeSouza v. INS*, 999 F.2d 1156, 1158 (7th Cir. 1993)); *see also Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995) (stating that persecution is an "extreme concept"). While the conduct complained of need not be life-threatening, it nonetheless "must rise above unpleasantness, harassment, and even basic suffering." *Nelson v. INS*, 232 F.3d 258, 263 (1st Cir. 2000).

Upon a demonstration of past persecution, a rebuttable presumption arises that the alien has a well-founded fear of future persecution. *Melgar de Torres v. Reno*, 191

F.3d 307, 315 (2d Cir. 1999); 8 C.F.R. § 208.13(b)(1)(i) (2004). The government may overcome this presumption by establishing by a preponderance of the evidence that since the persecution occurred, "there has been a fundamental change in the country's circumstances," such that the alien no longer has a well-founded fear of persecution, or that the alien can reasonably relocate within his or her native country. *See* 8 C.F.R. § 1208.13(b)(1)(i)(A) & (B) (2003).

Where an applicant is unable to prove past persecution, the applicant nonetheless becomes eligible for asylum upon demonstrating a well-founded fear of future persecution. *See Zhang*, 55 F.3d at 737-38; 8 C.F.R. § 208.13(b)(2) (2004). A well-founded fear of persecution "consists of both a subjective and objective component." *Gomez v. INS*, 947 F.2d 660, 663 (2d Cir. 1991). Accordingly, the alien must actually fear persecution, and this fear must be reasonable. *Id*.

An alien may satisfy the subjective prong by showing that events in the country to which he will be deported have personally or directly affected him. *Id*. With respect to the objective component, the applicant must prove that a reasonable person in his circumstances would fear persecution if returned to his native country. *See* 8 C.F.R. § 208.13(b)(2) (2004); *Zhang*, 55 F.3d at 737-38 (noting that when seeking reversal of a BIA factual determination, petitioner must show "'that the evidence he presented was so compelling that no reasonable factfinder could fail'" to agree) (quoting *INS v. Elias-Zacarias*, 502 U.S. 478, 483-84 (1992)); *Melgar de Torres*, 191 F.3d at 311.

The asylum applicant bears the burden of demonstrating eligibility for asylum by establishing either that he was persecuted or that he has a well-founded fear of future persecution on account of, *inter alia*, his political opinion. *Chen v. INS*, 344 F.3d 272, 275 (2d Cir. 2003) (per curiam); *Osorio*, 18 F.3d at 1027. *See* 8 C.F.R. § 208.13(a) (2004). The applicant's testimony and evidence must be credible, specific, and detailed in order to establish eligibility for asylum. *See* 8 C.F.R. § 208.13(a)(2004); *Abankwah v. INS*, 185 F.3d 18, 22 (2d Cir. 1999); *Melendez v. U.S. Dep't of Justice*, 926 F.2d 211, 215 (2d Cir. 1991) (stating that applicant must provide "credible, persuasive . . . [and] specific facts") (internal quotation marks omitted)); *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 445 (BIA June 12, 1987) (applicant must provide testimony that is "believable, consistent, and sufficiently detailed to provide a plausible and coherent account"), *abrogated on other grounds by Pitcherskaia v. INS*, 118 F.3d 641, 647-48 (9th Cir. 1997).

Because the applicant bears the burden of proof, he should provide supporting evidence when available, or explain its unavailability. *See Zhang v. INS*, 386 F.3d 66, 71 (2d Cir. 2004) ("where the circumstances indicate that an applicant has, or with reasonable effort could gain, access to relevant corroborating evidence, his failure to produce such evidence in support of his claim is a factor that may be weighed in considering whether he has satisfied the burden of proof."); *see also Diallo v. INS*, 232 F.3d 279, 285-86 (2d Cir. 2000); *In re S-M-J-*, 21 I. & N. Dec. 722, 723-26 (BIA Jan. 31, 1997).

Finally, even if the alien establishes that he is a "refugee" within the meaning of the INA, the decision whether ultimately to grant asylum rests in the Attorney General's discretion. *See* 8 U.S.C. § 1158(b)(1) (2004); *Zhang*, 55 F.3d at 738.

2. Withholding of Removal

Unlike the discretionary grant of asylum, withholding of removal is mandatory if the alien proves that his "life or freedom would be threatened in [his native] country because of his race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A) (2004); *Zhang,* 55 F.3d at 738. To obtain such relief, the alien bears the burden of proving by a "clear probability," *i.e.*, that it is "more likely than not," that he would suffer persecution on return. *See* 8 C.F.R. § 208.16(b)(1) (2004); *INS v. Stevic*, 467 U.S. 407, 429-430 (1984); *Melgar de Torres,* 191 F.3d at 311. Because this standard is higher than that governing eligibility for asylum, an alien who has failed to establish a well-founded fear of persecution for asylum purposes is necessarily ineligible for withholding of removal. *See Chen*, 344 F.3d at 275; *Zhang*, 55 F.3d at 738.

3. Standard of Review

This Court reviews the determination of whether an applicant for asylum or withholding of removal has established past persecution or a well-founded fear of persecution under the substantial evidence test. *Zhang v. INS*, 386 F.3d at 73 ("we must uphold an administrative finding of fact unless we conclude that a reasonable

adjudicator would be compelled to conclude to the contrary.") (citations omitted); *Chen,* 344 F.3d at 275 (factual findings regarding asylum eligibility must be upheld if supported by reasonable, substantive and probative evidence in the record when considered as a whole); *see Secaida-Rosales v. INS*, 331 F.3d 297, 306-07 (2d Cir. 2003); *Melgar de Torres*, 191 F.3d at 312-13 (factual findings regarding both asylum eligibility and withholding of removal must be upheld if supported by substantial evidence); *Ali v. Reno*, 237 F.3d 591, 596 (6th Cir. 2001) (same standard applicable to Torture Convention).

Where an appeal turns on the sufficiency of the factual findings underlying the IJ's determination[5] that an alien has failed to satisfy his burden of proof, Congress has directed that "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B) (2004). This Court "will reverse the immigration court's ruling only if 'no reasonable fact-finder could have failed to find . . . past persecution or fear of future persecution." *Chen*, 344 F.3d at 275 (omission in original) (quoting *Diallo*, 232 F.3d at 287).

---

[5] Although judicial review ordinarily is confined to the BIA's order, *see, e.g.*, *Abdulai v. Ashcroft*, 239 F.3d 542, 549 (3d Cir. 2001), courts properly review an IJ's decision where, as here, the BIA adopts that decision. 8 C.F.R. § 3.1(e)(4)(2002); *Secaida-Rosales*, 331 F.3d at 305; *Arango-Aradondo v. INS*, 13 F.3d 610, 613 (2d Cir. 1994). Accordingly, this brief treats the IJ's decision as the relevant administrative decision.

The scope of this Court's review under that test is "exceedingly narrow." *Zhang v. INS*, 386 F.3d at 74 ("Precisely because a reviewing court cannot glean from a hearing record the insights necessary to duplicate the fact-finder's assessment of credibility, what we 'begin' is not a *de novo* review of credibility, but an 'exceedingly narrow' inquiry . . . to ensure that the IJ's conclusions were not reached arbitrarily or capriciously") (citations omitted); *see also Chen*, 344 F.3d at 275; *Melgar de Torres*, 191 F.3d at 313. Substantial evidence entails only "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938)). The mere "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966); *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992).

Indeed, the IJ's and BIA's eligibility determination "can be reversed only if the evidence presented by [the asylum applicant] was such that a reasonable factfinder would have to conclude that the requisite fear of persecution existed." *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992). In other words, to reverse the BIA's decision, the Court "must find that the evidence not only *supports* th[e] conclusion [that the applicant is eligible for asylum], but *compels* it." *Id.* at 481 n.1 (emphasis in original).

This Court gives "particular deference to the credibility determinations of the IJ." *Chen*, 344 F.3d at 275 (quoting

Montero v. INS, 124 F.3d 381, 386 (2d Cir. 1997)); *see also Qiu v. Ashcroft*, 329 F.3d 140, 146 n.2 (2d Cir. 2003) (the Court "generally defer[s] to an IJ's factual findings regarding witness credibility"). This Court has recognized that "the law must entrust some official with responsibility to hear an applicant's asylum claim, and the IJ has the unique advantage among all officials involved in the process of having heard directly from the applicant." *Zhang v. INS*, 386 F.3d at 73.

Because the IJ is in the "best position to discern, often at a glance, whether a question that may appear poorly worded on a printed page was, in fact, confusing or well understood by those who heard it," this Court's review of the fact-finder's determination is exceedingly narrow. *Id.*; *see also id.* ("'[A] witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may convey a most favorable impression.'") (quoting *Arnstein v. Porter*, 154 F.2d 464, 470 (2d Cir. 1946)) (citation omitted); *Sarvia-Quintanilla v. United States INS*, 767 F.2d 1387, 1395 (9th Cir. 1985) (the IJ "alone is in a position to observe an alien's tone and demeanor [and is] uniquely qualified to decide whether an alien's testimony has about it the ring of truth"); *Kokkinis v. District Dir. of INS*, 429 F.2d 938, 941-42 (2d Cir. 1970) (court "must accord great weight" to the IJ's credibility findings). The "exceedingly narrow" inquiry "is meant to ensure that credibility findings are based upon neither a misstatement of the facts in the record nor bald speculation or caprice." *Zhang v. INS*, 386 F.3d at 74.

In reviewing credibility findings, courts "look to see if the IJ has provided 'specific, cogent' reasons for the

adverse credibility finding and whether those reasons bear a 'legitimate nexus' to the finding." *Id.* (quoting *Secaida-Rosales*, 331 F.3d at 307). Credibility inferences must be upheld unless they are "irrational" or "hopelessly incredible." *See, e.g.*, *United States v. LaSpina*, 299 F.3d 165, 180 (2d Cir. 2002) ("we defer to the fact finder's determination of . . . the credibility of the witnesses, and to the fact finder's choice of competing inferences that can be drawn from the evidence") (internal marks omitted); *NLRB v. Columbia Univ.*, 541 F.2d 922, 928 (2d Cir. 1976) (credibility determination reviewed to determine if it is "irrational" or "hopelessly incredible").

C. Discussion

Substantial evidence supports the IJ's determination that Dreni failed to establish eligibility for asylum. The IJ found that country conditions had changed in Albania since the events described by Dreni, and, moreover, that Dreni had not offered credible and specific testimony to support his claim for political asylum. For these reasons, the IJ found that Dreni had failed to meet his burden of proof in establishing his status as a refugee. Furthermore, because Dreni failed to prove he was eligible for asylum, he necessarily failed to meet the higher standard required to establish eligibility for withholding of removal. *See Chen*, 344 F.3d at 275; *accord Zhang v. INS*, 386 F.3d at 71.

First, substantial evidence in the record supports the IJ's finding that country conditions changed in Albania after the events described by Dreni. JA48-49. The IJ's conclusion that country conditions in Albania had changed

significantly was based, in part, upon information contained in the State Department's Country Report -- or "Profile" -- on Albania, and the corresponding Addendum (or update). JA48-49, 361-69.[6] In the IJ's view, these documents betrayed the accuracy of Dreni's characterization of the current situation in Albania. JA48.

For example, the 1998 Albanian Profile Addendum indicates that asylum "[a]pplicants frequently and incorrectly seek to portray the socialist government as "Communist" and actively targeting supporters of the opposition." JA361. The Addendum also indicates that:

> The settling of accounts persists but individuals are rarely targeted for mistreatment on political grounds. The government lacks the resources and will to carry out such retribution. For example, the secret police (SHIK) has become smaller and less active in recent years, and the organization no longer has an apparent political role.

JA361.

Dreni does not challenge the IJ's conclusion on changed country conditions except to argue that the IJ erred by relying on general statements in the State

---

[6] Courts have recognized that the State Department's Country Reports "ha[ve] been described as 'the most appropriate and perhaps the best resource' for 'information on political situations in foreign nations.'" *Kazlauskas v. INS*, 46 F.3d 902, 906 (9th Cir. 1995) (quoting *Rojas v. INS*, 937 F.2d 186, 190 n.1 (5th Cir. 1991)).

Department Profile instead of specific facts related to the case at hand. Pet. Brief at 12-13. The only specific facts in this case, however, came from Dreni's own testimony, and as described below, the IJ found his testimony lacking in credibility and specificity. Thus, substantial evidence supports the conclusion that changed country conditions undermined Dreni's asylum claim.

Substantial evidence also supports the IJ's determination that Dreni's testimony was lacking in credibility. Dreni claimed that he was beaten in 1990 and 1998 for participating in anti-government demonstrations and that he was detained for three days after the 1998 incident and released only after he was forced to sign a statement agreeing to be an informant for the police. The IJ acknowledged that, if true, these allegations would constitute past persecution and would likely support not only Dreni's asylum claim, but also his withholding and CAT claims. JA47-48.

The IJ, however, did not believe Dreni. He expressly found that neither Dreni, nor Dreni's claims of political activism, participation in protests and corresponding beatings and mistreatment, were credible:

> [T]he respondent, first of all, has by a far measure failed to come close to establishing that his testimony is more likely true than not in terms of his activities in Albania, certainly has failed to convince the Court that he was ever taken in to custody or beaten for any political activity in Albania and, in fact, has failed to convince the Court that he even has any political interest in

> Albania or was ever interested in political events there.

JA55.

Dreni seizes on this language to argue that the IJ applied the wrong legal standard, Pet. Brief at 11-12, but this argument is unavailing. The IJ's comments merely demonstrate a recognition that Dreni, as the applicant, bears the burden of proving to the IJ (i.e., convincing the IJ) that he is eligible for asylum.[7]

The IJ's comments further summarize the IJ's basic conclusion with respect to Dreni's testimony, namely that it was not credible. The IJ, as the factfinder, properly made this credibility determination and provided "specific, cogent reasons" for his finding. *Secaida-Rosales*, 331 F.3d at 307. Furthermore, the specific reasons on which the IJ's adverse credibility finding was based bore a "legitimate nexus" to the finding. *Zhang v. INS*, 386 F.3d at 74 (quoting *Secaida-Rosales*, 331 F.3d at 307).

The IJ noted, for example, that Dreni, a purported political activist in the Democratic Party, at one point did not even recall that there was an election in Albania in 1997. JA54. The IJ also concluded that Dreni had lied about how he paid his Democratic Party membership dues. JA52. This determination was based upon troubling

---

[7] In the same vein, the IJ's comments that Dreni failed to produce witnesses to support his claims, JA50, reflects the IJ's conclusion that Dreni -- as the party with the burden of proof -- failed to produce evidence sufficient to support his claim.

inconsistencies between Dreni's testimony and the Democratic Party dues membership booklet Dreni submitted in support of his asylum application. JA52-53, 356-58.

Specifically, Dreni testified that he carried his membership booklet with him in Albania and each time he paid his monthly dues of 1,500 lek, a party official would record the payment in Dreni's booklet. JA53. The membership booklet submitted by Dreni, however, which Dreni claimed was his, did not show monthly dues payments but rather indicated that Dreni had paid his membership dues on an annual basis.[8] JA53, 356-58.

Dreni faults the IJ for relying on these inconsistences, claiming that they were minor and did not go to the heart of his claim for asylum. Pet. Brief at 18-19. As the IJ expressly recognized, however, the important point was not whether Dreni paid his dues on a monthly or an annual basis. The important was that Dreni's testimony was inconsistent with a document that he claimed to have carried with him in Albania and thus his testimony was likely a lie. JA 53. Because this testimony came in the

---

[8] Although not specifically discussed by the IJ in his decision, the booklet revealed other inconsistencies in Dreni's testimony. For example, Dreni testified that he joined the Democratic Party in 1994, JA 115-16, but the booklet indicates that he joined in May 1996, JA 355. Similarly, Dreni testified that his membership booklet contained enough space to record only one year of dues payments, but the booklet he submitted contained space for seven years of dues payments. JA119, 357-58.

context of testimony that was lacking in specificity and replete with other inconsistencies, the IJ properly relied on Dreni's lie about the payment of his dues in denying his application. *See Lin v. U.S. Department of Justice*, 413 F.3d 188, 190 (2d Cir. 2005) (whether petitioner married in spring or fall was not in itself significant to asylum application, but fact that petitioner could not recall when she was married, when coupled with other inconsistencies in her testimony, was significant).

Dreni's credibility was further undermined by the suspect nature of the other documents he submitted with his asylum application. JA52. For example, the "Characteristic," which purported to be from the Albanian Democratic Party, appeared, "by plain examination of the naked eye," to be typed on the same typewriter as another document submitted by Dreni -- the "Certificate" -- which was, purportedly, from a different organization, the Albanian Association of Formerly Persecuted Persons. The documents also had identical formats, with a distinctive form of indentation. *Id.*

Furthermore, at least some of the information in the documents was inconsistent with Dreni's testimony at the hearing. JA50. Dreni testified that, following a 1998 political protest in which he participated, he was taken into custody for three days, beaten, and forced to sign a document indicting that he wished to work as an informant for the secret police. JA94-96. As the IJ noted, however, the "Characteristic" from the Democratic Party does not appear to mention this important event in Dreni's political

life.[9] JA50. Moreover, this document, and the Certificate from the Association of the Formerly Politically Persecuted, fail to identify specific activities by Dreni. *Id.*

These inconsistencies, according to the IJ, were similar to inconsistencies between Dreni's testimony and the information in his asylum application. JA51. Specifically, on his asylum application, Dreni failed to disclose that he had been issued a valid passport by the Albanian government. JA51, 103, 371. Dreni claimed that he omitted information about his passport on the asylum application because the passport listed his date of birth incorrectly and therefore, he did not think the passport was important. JA100, 103. The IJ found this explanation to be unconvincing. JA51.

Finally, the IJ found that Dreni's claims of persecution for his political activities were plagued by a lack of specificity. JA54-55. In the IJ's estimation, Dreni's testimony was essentially a generalized recitation of three well-known Albanian historical events, all of which were documented in the State Department Profile and human rights surveys. JA53-55. In fact, Dreni's claims were so "bereft of any details," that the "story [he told] might be told by anybody who has read a few newspaper surveys about the recent history of Albania." JA 54-55.

---

[9] The Characteristic also indicates that Dreni was taken into custody and beaten in March 1997, JA 349, but even Dreni did not claim that he was persecuted based on any incidents in 1997, JA 123-24.

Thus, the IJ concluded, in light of the lack of specificity and the problems with "truthfulness" in Dreni's testimony and the suspect nature of Dreni's documents, it was "extremely likely that the respondent has manufactured most of his claim about having been an activist with the Democratic Party . . . ." JA54-55.

Based on the record in this case, a reasonable factfinder would not be compelled to find that Dreni had established a well-founded fear of persecution if returned to Albania. *Elias-Zacarias*, 502 U.S. at 481 n.1. Moreover, in cases like the instant one, where the decision turns on the IJ's credibility determination, this Court's review is "exceedingly narrow." *Zhang v. INS*, 386 F.3d at 73. *See also Qiu*, 329 F.3d at 146 n.2 (the Court "generally defer[s] to an IJ's factual findings regarding witness credibility"). Where, as here, "the IJ's adverse credibility finding is based on specific examples in the record of . . . 'contradictory evidence' . . . [the Court] will generally not be able to conclude that a reasonable adjudicator was compelled to find otherwise." *Zhang v. INS*, 386 F.3d at 74 (internal quotation marks and citations omitted). *See also id.* ("the court may not itself hypothesize excuses for the inconsistencies, nor may it justify the contradictions or explain away the improbabilities. Its limited power of review will not permit it to 'reverse the BIA [or IJ] simply because [it] disagree[s] with its evaluation of the facts.") (internal quotation marks and citations omitted).

In sum, the record evidence substantially supports the IJ's determination that petitioner failed to establish eligibility for asylum and withholding of removal because

his testimony was not credible. This Court, therefore, should deny Dreni's petition.

II. This Court Lacks Jurisdiction Over Petitioner's CAT Claim Because He Failed to Exhaust His Administrative Remedies; In the Alternative, the Immigration Judge Properly Determined That Petitioner Failed to Establish Eligibility for Relief Under the CAT

A. Relevant Facts

The relevant facts are set forth in the Statement of Facts above.

B. Governing Law and Standard of Review

1. Deferral of Removal Under the Torture Convention

Under Article 3 of the Torture Convention, the United States cannot return an alien to a country where he more likely than not would be tortured by, or with the acquiescence of, government officials acting under color of law. *See Wang v. Ashcroft*, 320 F.3d 130, 133-34, 143-44 & n.20 (2d Cir. 2003); *Ali v. Reno*, 237 F.3d 591, 597 (6th Cir. 2001); *In re Y-L-, A-G-, R-S-R-*, 23 I. & N. Dec. 270, 279, 283, 285, 2002 WL 358818 (A.G. Mar. 5, 2002); 8 C.F.R. §§ 208.16(a), 208.17(a), 208.18(a) (2004).

To establish eligibility for relief under the Torture Convention, the applicant bears the burden of proof to

"establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. § 208.16(c)(2) (2004); *see also Najjar v. Ashcroft*, 257 F.3d 1262, 1304 (11th Cir. 2001); *Wang*, 320 F.3d at 133-34, 144 & n.20 (noting that this burden of proof is higher than that required of those seeking asylum). The applicant must show that someone in "his particular alleged circumstances" has a greater than 50% chance of torture. *Wang*, 320 F.3d at 144.

The Torture Convention defines "torture" as "'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining . . . information or a confession, punish[ment] . . . , or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.'" *Ali*, 237 F.3d at 597 (citing 8 C.F.R. § 208.18(a)(1) (2002)).

Because "[t]orture is an extreme form of cruel and inhuman treatment," even cruel and inhuman behavior by officials may not warrant Torture Convention protection. *Sevoian v. Ashcroft*, 290 F.3d 166, 175 (3d Cir. 2002) (citing 8 C.F.R. § 208.18(a)(2)). The term "acquiescence" requires that "the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. § 208.18(a)(7) (2004). Under the Torture Convention, an alien's removal may be either permanently withheld or temporarily deferred. *See* 8 C.F.R. §§ 208.16, 208.17 (2004).

2. Standard of Review

This Court reviews the determination of whether an alien is eligible for protection under the Torture Convention under the "substantial evidence" standard. *See Saleh v. U.S. Dep't of Justice*, 962 F.2d 239, 238 (2d Cir. 1992) (same); *Ali,* 237 F.3d at 596 (Torture Convention); *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 353 (5th Cir. 2002) (Torture Convention).

C. Discussion

Petitioner waived his claim under the Convention Against Torture by not presenting it to the BIA. Although petitioner claims that the BIA erred by failing to "adjudicate" his CAT claim, Pet. Brief at 22-23, his Notice of Appeal to the BIA (with accompanying narrative attachment) and his subsequent memorandum in support of his appeal made no reference to torture or to a CAT claim, JA38-41, 10-24. The BIA cannot be faulted for failing to resolve a question that was never presented to it.

Moreover, petitioner's failure to exhaust his administrative remedies deprives this Court of jurisdiction to consider his CAT claim. It is well settled that before an alien can seek judicial review of a removal order, the alien is statutorily required to exhaust all administrative remedies available. *See* INA § 242(d)(1), 8 U.S.C. § 1252(d)(1) ("A court may review a final order of removal only if . . . the alien has exhausted all administrative remedies available to the alien as of right"). This statutory administrative exhaustion requirement is

jurisdictional. *See Theodoropoulos v. INS*, 358 F.3d 162, 168, 170 (2d Cir.) (alien's "failure to exhaust his administrative remedies deprived the district court of subject matter jurisdiction to entertain his habeas petition"), *cert. denied*, 125 S. Ct. 37 (2004); *United States v. Gonzalez-Roque*, 301 F.3d 39, 49 (2d Cir. 2002) (petitioner forfeited his due process claim by failing to raise it before the BIA). The Supreme Court and this Circuit have made clear that when statutorily required, exhaustion of administrative remedies must be strictly enforced, without exception. *See McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) ("Where Congress specifically mandates, exhaustion is required."); *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001) (holding "we will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise"); *Bastek v. Federal Crop Ins. Co.*, 145 F.3d 90, 94 (2d Cir. 1998) ("Statutory exhaustion requirements are mandatory, and courts are not free to dispense with them.").

Even if it had been properly preserved, Dreni's CAT claim before this Court is deficient. The IJ concluded that Dreni, "by a far measure failed to come close to establishing that his testimony is more likely true than not in terms of his activities in Albania, certainly has failed to convince the Court that he was ever taken in to custody or beaten for any political activity in Albania . . . ." JA55. As discussed at length above, this conclusion was supported by substantial evidence; a reasonable factfinder would not be compelled to find otherwise. Accordingly, Dreni's CAT claim fails because he failed to provide credible testimony to support the claim. JA 47-57.

Dreni argues, nevertheless, that the IJ's ruling on his CAT claim was deficient because the IJ failed to separately analyze his CAT claim as required by *Ramsameachire v. Ashcroft*, 357 F.3d 169 (2d Cir. 2004). Pet. Brief at 20-22. But as this Court recently explained, where, as here, an applicant's asylum and CAT claims are based on the same factual predicate, and the IJ's adverse credibility determination goes to the heart of those claims, the IJ may properly rely on its credibility finding to deny both the asylum *and* the CAT claims without engaging in a separate analysis of the claims. *Yang v. United States Dep't of Justice*, 426 F.3d 520, 523 (2d Cir. 2005).

In sum, because Dreni did not demonstrate that he would "more likely than not" be tortured if returned to Albania, the IJ properly denied Dreni's request for protection under the CAT.

CONCLUSION

For each of the foregoing reasons, the petition for review should be denied.

Dated: November 15, 2005

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

PATRICK F. CARUSO
ASSISTANT U.S. ATTORNEY

SANDRA S. GLOVER
Assistant United States Attorney (of counsel)

CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 8,966 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.

PATRICK F. CARUSO
ASSISTANT U.S. ATTORNEY

Addendum

8 U.S.C. § 1101(a) (2004). Definitions.

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that 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, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. . . .

8 U.S.C. § 1231(b)(3)(A) (2004). Detention and removal of aliens ordered removed.

(A) In general

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a

country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1252(b)(4) (2004). Judicial review of orders of removal.

(4) Scope and standard for review

Except as provided in paragraph (5)(B)--

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

8 C.F.R. § 208.13 (2004). Establishing asylum eligibility.

(a) Burden of proof. The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in section 101(a)(42) of the Act. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The fact that the applicant previously established a credible fear of persecution for purposes of section 235(b)(1)(B) of the Act does not relieve the alien of the additional burden of establishing eligibility for asylum.

(b) Eligibility. The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution.

> (1) Past persecution. An applicant shall be found to be a refugee on the basis of past persecution if the applicant can establish that he or she has suffered persecution in the past in the applicant's country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to, or avail himself or herself of the protection of, that country owing to such persecution. An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim. That presumption may be rebutted

if an asylum officer or immigration judge makes one of the findings described in paragraph (b)(1)(i) of this section. If the applicant's fear of future persecution is unrelated to the past persecution, the applicant bears the burden of establishing that the fear is well-founded.

(i) Discretionary referral or denial. Except as provided in paragraph (b)(1)(iii) of this section, an asylum officer shall, in the exercise of his or her discretion, refer or deny, or an immigration judge, in the exercise of his or her discretion, shall deny the asylum application of an alien found to be a refugee on the basis of past persecution if any of the following is found by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality or, if stateless, in the applicant's country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion; or

(B) The applicant could avoid future persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, and under

all the circumstances, it would be reasonable to expect the applicant to do so.

(ii) Burden of proof. In cases in which an applicant has demonstrated past persecution under paragraph (b)(1) of this section, the Service shall bear the burden of establishing by a preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (B) of this section.

(iii) Grant in the absence of well-founded fear of persecution. An applicant described in paragraph (b)(1)(i) of this section who is not barred from a grant of asylum under paragraph (c) of this section, may be granted asylum, in the exercise of the decision-maker's discretion, if:

(A) The applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution; or

(B) The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.

(2) Well-founded fear of persecution.

(i) An applicant has a well-founded fear of persecution if:

(A) The applicant has a fear of persecution in his or her country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion;

(B) There is a reasonable possibility of suffering such persecution if he or she were to return to that country; and

(C) He or she is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear.

(ii) An applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, if under all the circumstances it would be reasonable to expect the applicant to do so.

(iii) In evaluating whether the applicant has sustained the burden of proving that he or she has a well-founded fear of persecution, the asylum officer or immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution if:

(A) The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual residence, of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.

. . . .

8 C.F.R. § 208.16 (2004). Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.

(a) Consideration of application for withholding of removal. An asylum officer shall not decide whether the exclusion, deportation, or removal of an alien to a country where the alien's life or freedom would be threatened must be withheld, except in the case of an alien who is otherwise eligible for asylum but is precluded from being granted such status due solely to section 207(a)(5) of the Act. In exclusion, deportation, or removal proceedings, an immigration judge may adjudicate both an asylum claim and a request for withholding of removal whether or not asylum is granted.

(b) Eligibility for withholding of removal under section 241(b)(3) of the Act; burden of proof. The burden of proof is on the applicant for withholding of removal under section 241(b)(3) of the Act to establish that his or her life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The evidence shall be evaluated as follows:

(1) Past threat to life or freedom.

(i) If the applicant is determined to have suffered past persecution in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim. This presumption may be rebutted if an asylum officer or immigration judge finds by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant’s life or freedom would not be threatened on account of any of the five grounds mentioned in this paragraph upon the applicant’s removal to that country; or

(B) The applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so.

(ii) In cases in which the applicant has established past persecution, the Service shall bear the burden of establishing by a preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (b)(1)(i)(B) of this section.

(iii) If the applicant's fear of future threat to life or freedom is unrelated to the past persecution, the applicant bears the burden of establishing that it is more likely than not that he or she would suffer such harm.

(2) Future threat to life or freedom. An applicant who has not suffered past persecution may demonstrate that his or her life or freedom would be threatened in the future in a country if he or she can establish that it is more likely than not that he or she would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion upon removal to that country. Such an applicant cannot demonstrate that his or her life or freedom would be threatened if the asylum officer or immigration judge finds that the applicant could avoid a future threat to his or her life or freedom by relocating to

another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so. In evaluating whether it is more likely than not that the applicant's life or freedom would be threatened in a particular country on account of race, religion, nationality, membership in a particular social group, or political opinion, the asylum officer or immigration judge shall not require the applicant to provide evidence that he or she would be singled out individually for such persecution if:

(i) The applicant establishes that in that country there is a pattern or practice of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(ii) The applicant establishes his or her own inclusion in and identification with such group of persons such that it is more likely than not that his or her life or freedom would be threatened upon return to that country.

. . . .

(c) Eligibility for withholding of removal under the Convention Against Torture.

(1) For purposes of regulations under Title II of the Act, "Convention Against Torture" shall refer to the United Nations Convention Against Torture

and Other Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, as implemented by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (Pub.L. 105-277, 112 Stat. 2681, 2681-821). The definition of torture contained in § 208.18(a) of this part shall govern all decisions made under regulations under Title II of the Act about the applicability of Article 3 of the Convention Against Torture.

(2) The burden of proof is on the applicant for withholding of removal under this paragraph to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

(3) In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered, including, but not limited to:

> (i) Evidence of past torture inflicted upon the applicant;
>
> (ii) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;

(iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and

(iv) Other relevant information regarding conditions in the country of removal.

(4) In considering an application for withholding of removal under the Convention Against Torture, the immigration judge shall first determine whether the alien is more likely than not to be tortured in the country of removal. If the immigration judge determines that the alien is more likely than not to be tortured in the country of removal, the alien is entitled to protection under the Convention Against Torture. Protection under the Convention Against Torture will be granted either in the form of withholding of removal or in the form of deferral of removal. An alien entitled to such protection shall be granted withholding of removal unless the alien is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section. If an alien entitled to such protection is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section, the alien's removal shall be deferred under § 208.17(a).

(d) Approval or denial of application--

(1) General. Subject to paragraphs (d)(2) and (d)(3) of this section, an application for withholding of deportation or removal to a country

> of proposed removal shall be granted if the applicant's eligibility for withholding is established pursuant to paragraphs (b) or (c) of this section.
>
> . . . .

8 C.F.R. § 208.17 (2004). Deferral of removal under the Convention Against Torture.

(a) Grant of deferral of removal. An alien who: has been ordered removed; has been found under § 208.16(c)(3) to be entitled to protection under the Convention Against Torture; and is subject to the provisions for mandatory denial of withholding of removal under § 208.16(d)(2) or (d)(3), shall be granted deferral of removal to the country where he or she is more likely than not to be tortured.

. . . .

8 C.F.R. § 208.18 (2004). Implementation of the Convention Against Torture.

(a) Definitions. The definitions in this subsection incorporate the definition of torture contained in Article 1 of the Convention Against Torture, subject to the reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.

> (1) Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a

third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

(2) Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.

(3) Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture.

(4) In order to constitute torture, mental pain or suffering must be prolonged mental harm caused by or resulting from:

(i) The intentional infliction or threatened infliction of severe physical pain or suffering;

(ii) The administration or application, or threatened administration or application, of

mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(iii) The threat of imminent death; or

(iv) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the sense or personality.

(5) In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture.

(6) In order to constitute torture an act must be directed against a person in the offender's custody or physical control.

(7) Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.

(8) Noncompliance with applicable legal procedural standards does not per se constitute torture.

(b) Applicability of §§ 208.16(c) and 208.17(a)--

(1) Aliens in proceedings on or after March 22, 1999. An alien who is in exclusion, deportation, or removal proceedings on or after March 22, 1999 may apply for withholding of removal under § 208.16(c), and, if applicable, may be considered for deferral of removal under § 208.17(a).

. . . .