02-4553-ag

To Be Argued By:
JAMES K. FILAN, JR.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 02-4553-ag

ARDIAN URITA,

Petitioner,

-vs-

JOHN ASHCROFT, ATTORNEY GENERAL,

Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

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BRIEF FOR JOHN ASHCROFT ATTORNEY GENERAL OF THE UNITED STATES

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

JAMES K. FILAN, JR.
Assistant United States Attorney
WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

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STATEMENT OF JURISDICTION

The petitioner is subject to a final order of removal. This Court has appellate jurisdiction under § 242(b) of the Immigration and Naturalization Act, 8 U.S.C. § 1252(b) (2000), to review the petitioner's challenge to the BIA's September 6, 2002, final order denying him asylum.

The petitioner did not file a petition for review of the BIA's September 6, 2002, decision affirming the Immigration Judge's denial of his applications for withholding of removal and voluntary departure or his application for relief under the Convention Against Torture. Therefore, this Court lacks jurisdiction to review those decisions. 8 U.S.C. § 1252(b)(1).

ISSUES PRESENTED FOR REVIEW

1. Whether a reasonable factfinder would be compelled to reverse the Immigration Judge's adverse credibility determination, where the petitioner's statements and evidentiary submissions were either implausible or internally inconsistent on material elements of his claim, and where the petitioner failed to adequately explain the inconsistencies?

2. Whether the Board of Immigration Appeals' ("BIA") streamlined review process violates due process?

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BRIEF FOR JOHN ASHCROFT
Attorney General of the United States

Preliminary Statement

Ardian Urita, a native and citizen of Albania, petitions this Court for review of a September 6, 2002, decision of the BIA (Govt. Appendix ("GA") 118).[1] The BIA

[1] The petitioner has filed an "Addendum" attached to his brief that contains an article from the *Los Angeles Times* and a (continued...)

summarily affirmed the May 10, 2001, decision of an Immigration Judge ("IJ") denying Urita's applications for asylum and withholding of removal under the Immigration and Nationality Act of 1952, as amended ("INA"), denying his application for voluntary departure, rejecting his claim for relief under the Convention Against Torture ("CAT"),[2] and ordering him removed from the United States. (GA 118) (BIA's decision), (GA 95-116) (IJ's decision and order)). The IJ expressly based his decision on his determination of the "complete lack of credibility of the respondent in this case." GA 110.

Urita claims that he fled Albania for Italy and then Italy for the United States because he was persecuted for being a member of the Roman Catholic faith, his political opinions and his family and social memberships. In his testimony before the IJ, however, the petitioner only testified regarding his alleged persecution on the basis of his political opinions. Further, the petitioner was unable to tell a consistent story about the instances of alleged

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[1] (...continued)
copy of the Seventh Circuit's decision in *Niam v. Ashcroft*, 354 F.3d 652 (7th Cir. 2004). The Government is filing as its Appendix relevant portions of the Certified Administrative Record of the Executive Office for Immigration Review.

[2] The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, has been implemented in the United States by the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. 105-277, Div. G. Title XXII, § 2242, 112 Stat. 2681-822 (1998) (codified at 8 U.S.C. § 1231 note). *See Khouzam v. Ashcroft*, 361 F.3d 161, 168 (2d Cir. 2004).

persecution. The IJ concluded that Urita failed to offer credible documentary evidence in support of his claim for asylum and his testimony was inconsistent with what little documentary evidence he did provide, as well as with his written application for asylum.

Substantial evidence supports the IJ's adverse credibility assessment of Urita. As the IJ properly found, Urita offered conflicting statements about his alleged arrests, detention and persecution. Urita's testimony was internally inconsistent, was contrary to statements he made in his asylum application, and the inconsistencies were not cured by the documentary evidence that Urita submitted in support of his asylum claim. Although the IJ gave him opportunities to explain the discrepancies, Urita failed to do so. In light of Urita's inability to tell a consistent and plausible story, substantial evidence supports the IJ's adverse credibility determination. As a reasonable factfinder would not be compelled to draw a different conclusion, this Court should deny the petition for review.

Statement of the Case

Urita entered the United States on September 18, 1999, on a tourist visa that authorized him to remain in this country for six months, until March 17, 2000. On November 29, 1999, Urita filed an Application for Asylum and Withholding of Removal. (GA 6)

On March 30, 2000, the Department of Homeland Security ("DHS" or "Government")[3] initiated these removal proceedings by issuing a Notice to Appear. An IJ conducted a removal hearing and, on May 10, 2001, issued an oral decision denying Urita's applications for asylum and withholding of removal and voluntary departure and rejecting his claim for relief under the CAT.

On September 6, 2002, the BIA summarily affirmed the IJ's decision. Urita filed a petition for review of the BIA decision in the United States Court of Appeals for the Second Circuit on October 3, 2002.

Statement of Facts

A. Urita's Entry into the United States and Application for Asylum and Withholding of Removal

Urita is a native and citizen of Albania who was admitted to the United States at Detroit, Michigan, on or about September 18, 1999, as a non-immigrant visitor with authorization to remain in the United States for a temporary period not to extend past March 17, 2000. (GA 14). On November 29, 1999, Urita submitted an Application for Asylum and Withholding of Removal. In this application, Urita indicated that he was seeking

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[3] On March 1, 2003, the Immigration and Naturalization Service was abolished and its functions were transferred to three separate bureaus within the Department of Homeland Security. For convenience, this brief will refer throughout to the DHS.

asylum because he suffered for his Roman Catholic faith, his political opinions and his family and social memberships. (GA 9). In conjunction with this application, Urita was interviewed by an asylum officer. (GA 44).

Urita did not leave the United States as required by the terms of his visitor's visa but rather remained in the United States. (GA 14).

B. Urita's Removal Proceedings

On or about March 30, 2000, the DHS commenced removal proceedings against Urita by filing with the immigration court a Notice to Appear charging that Urita was deportable as an alien who continued to remain in the United States without authorization. (GA 14). *See* 8 U.S.C. § 1227(a)(1)(B).[4]

Urita appeared, with counsel, before an IJ in New York City on June 16, 2000, conceded that he was removable as charged by the DHS, and stated that he was seeking asylum, withholding of removal, relief under the CAT and, in the alternative, voluntary departure. (GA 18-19). Two continuances were granted and the immigration hearing on the merits resumed on May 10, 2001. (GA 29).

At the resumed hearing, the IJ marked several documents into evidence including an application for

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[4] That provision provides as follows: "Any alien who is present in the United States in violation of this chapter or any other law of the United States is deportable."

asylum, withholding of removal, and CAT relief.[5] (GA 20, 32-33; *see also* GA 6 (asylum application)).

At the May 10, 2001, hearing, Urita and his counsel noted the changes and corrections that were made during Urita's interview with an asylum officer and after Urita's review of the application with his counsel. (GA 44-47). After reviewing those corrections and changes, Urita's counsel noted that no further corrections or changes were necessary. (GA 47).

1. Documentary Submissions

Urita submitted several documents to the IJ in the course of his removal hearing. First, he submitted the application seeking asylum and withholding of removal, which provided the primary written information in support of Urita's request for asylum. (GA 6). In support of this application, Urita also submitted, *inter alia*, the following: a document described as a certificate from the Anti-Communist Political Association, December 13, 1990; a document described as a certificate dated August 5, 1999; an affidavit from a person named Alexander Volag used to establish the petitioner's residence; a 1999 tax return from Alexander Volag; a birth certificate from Albania referencing the petitioner; a document described as a membership book from the December 13, 1990, organization; a document on the letterhead of the December 13, 1990, organization that references the

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

petitioner; a document on the letterhead of the Healthy Center of the Commune Villa Poya, dated July 12, 2000; a document described as a certificate on the letterhead of the Inquest of Shkodra, dated March 17, 1994; a document described as a certificate on the letterhead of the Anti-Communist Association of the Political Persecuted Democrats, dated July 4, 2000; a document described as a certificate of family that referenced the petitioner; a certificate from a hospital referencing Husta Nicole Urita; a copy of the chapter regarding Albania from the Political Handbook of the World; and various background materials from the United States Department of State. These documents are included in the Certified Administrative Record filed with the Court on May 2, 2003. The Government's Appendix contains those documents that are relevant to the issues set forth in the petitioner's and the Government's brief.

In his application for asylum, the petitioner stated that the former Communist regime in Albania began persecuting his parents in 1945 because they were part of a well-known Catholic and anti-Communist family. He claimed that his father was arrested and detained for a week in 1974 for baptizing him and that his father was tortured and lost the vision in his right eye. (GA 9). He then stated in the application that his father was arrested in December 1985 because he "damned" the former Communist regime in December 1976. He states that his father died in prison in April 1986. (GA 9).

As a further basis for his claim, the petitioner stated that "[o]n June 10th, 90 my brother and I were caught by the former Communist border patrol in the moment we

were tried to escape from Albania and come to US. We were beaten, interrogated, threatened to be killed and tortured by the secret police of former communist dictatorship. Our [brother] was killed by their after he didn't stop."

He later states that in March 1991 he and his family members joined the FPPAA, a democratic and anti-Communist organization and that he joined the Balli Kombetar Party of Albania in October 1992. He states that he was elected secretary of its Youth Forum from May 1994 until he left Albania in March 1995.

He further states in his asylum application as follows:

> My mother and I were beaten by the uniformed and the secret police of former Communist regime on Dec. 13, 90 protests to shut down the statue of Stalin and Hoxha, the hardest communist dictators. I was arrested for 15 days at Shkoder prison. I was injured in my right knee by a secret police officer and I was treated for a month and a half in my house.
>
> ***
>
> In August 14, 94 the Berisha's police and SHIK forces beaten me with rifle butts and injured me in the head during their brutal intervention against the hunger strike organized by the FPPAA against the repressive policy of Berisha. I was detained for 24 hours on February 4th, 95 at Shkoder Prison, where I was interrogated, beaten and threatened to be

> killed by the SHIK and the police of Berisha corrupted regime because my activity with Balli Kombetar and the FPPAA in the hunger strike of Aug. 94 and [in] the November 6th, 94 activity. After that incident I decided to leave the country as soon as I could. On March 17th, 95 I escaped to Italy by a speed boat.

(GA 10).

The petitioner further stated as follows:

> In Italy I didn't have problems until the former communist of Nano restored their power after the Elections of June 29th, 97, when unknown persons of Albanian Mafia and the SHIK starts to threaten me by phone and twice on Nov. 8th, 98 and by the end of May of 1999 I was threatened to be killed in a red light stop close to my house by two people who showed me their short guns and [one] of them[] pointed it against me and opened fire against my car. I cross the red light and escaped before was too late.
>
> By the end of May 1999 in the moment that I was entering the house in the late hours of the night somebody closed the light of the stairways to my apartment and I was beaten with a gold stick in the shoulder and in the head until I lost the consciousness. After that they escaped thinking that I was died. God saved me for a miracle. After that incident I decided to leave Italy and come to US as the greatest and safest democratic country in

> the world a soon as I got a valid travel document or a visa, what was realized on June 14th, 99, when I got the US visa. On August 7th, 99 my mother suffered a heart attack at Velipoja and I went to saw her[]. Three times in three weeks I was advised by SHIK people to leave Albania before was to late and on Sept 11, I went back to Italy and from there I fled to US on Sept. 18th, 99.

(GA 10).

2. Urita's Testimony

At the May 10, 2001, hearing, Urita testified about the various incidents described in detail in his application for asylum and which he claimed supported his claim for asylum. Urita's testimony concerning these incidents is described below.

a. The June 10, 1990, Incident

According to Urita, on June 10, 1990, Urita, his brother and his cousin tried to swim across either the Buna River or the Lake of Shkodra in an attempt to escape Albania. He testified that the border guards noticed him and his cousin because his brother was drowning in the water and he and his cousin were trying to search for him and were making noise. As a result, the border guards captured Urita and his cousin. He testified that his brother's body was found six months later in the fishing net of fishermen from Montenegro. (GA 52-53).

Urita testified that after he was arrested by the border patrol he was beaten and tortured for the night and then released the next day. (GA 53).

The IJ questioned Urita at some length about this incident after confirming that he made all the corrections described in Section B of the Statement of Facts, *supra*. The following exchange took place:

> Q. Now, a correction was made to your application today where it was indicated that it was a brother, not a cousin who was killed in the escape attempt from Albania.
>
> A. Yes, because that's the truth.
>
> Q. Okay. But the rest of the paragraph was not corrected.
>
> A. For instance?
>
> Q. For instance, the way it reads right now on June 10, '90, my brother and I were caught by the former Communist border patrol in the moment we were tried to escape from Albania and to come to U.S. We were beaten, interrogated, threatened to be killed and tortured by the secret police. Is that correct?
>
> A. No. He was under water, how could they take him?

* * *

Q. Now, the statement that's corrected presently reads, our brother was killed by their, THEIR, after he didn't stop. Is that correct? Is that correct?

A. He was under water and we were trying to, me and my cousin, to find him and they heard the noise and they came and caught us.

Q. Well, sir, according to this, he didn't drown. He was killed by the border patrol. Was he killed by the border patrol?

A. He was found after six months and you can imagine in what state his body was after six months.

Q. Well, sir, your application says that he was killed by the border patrol. It doesn't say that he drowned because he couldn't swim so well. Was he killed by the border patrol yes or no.

A. No.

(GA 85-87).

b. The December 13, 1990, Incident

Urita testified that on December 13, 1990, he participated in a demonstration at which dynamite was placed at the monument of Stalin and that government special forces came to break up the demonstration. Urita testified that he was shot in the right hand by a government agent. (GA 54-55). Urita testified that he was putting a cigarette on his hand to stop the bleeding and moments later he was arrested. He testified that after he was arrested he was punched and hit with wooden and rubber sticks, and that his wound was infected and that when he was released he was treated by a doctor who was a friend of his family. (GA 55-56).

The IJ questioned Urita about this incident as well as the document Urita submitted on the letterhead of the Healthy Center of the Commune Villa Poya, dated July 12, 2000. The following exchange took place:

> Q. Now, you submitted some documents in this case. Are you familiar with these documents?
>
> A. I don't have the photocopies but I more or less know.
>
> Q. All right. Now, you submitted a document from Healthy Center in Villa Poya.
>
> A. Yes.
>
> Q. Are you familiar with that document?

* * *

A. Yes.

Q. Why doesn't this say anything about you having been shot in the hand?

A. It says that I was treated for a month and a half.

Q. It says not -- it doesn't say what you were treated for beyond being wounded by a fire gun. It doesn't say where. It doesn't say what treatment you received.

A. Because I told my mother to go to the doctor and take a document that I was treated there. And as far as she knew, she, she requested a document.

Q. Well, sir, you say that you were shot in the hand. Your application says you were wounded in the knee. You produced a document which doesn't say where you were wounded. So I don't know where you were wounded or, in fact, if you ever were, in fact, wounded.

(GA 87-88).

The IJ's questioning about the December 13, 1990, incident also focused on the amount of time the petitioner was held in custody. The following exchange took place:

Q. Now, you said that when you were arrested in December of 1990, that you were detained for 15 days, is that correct?

A. Yes.

Q. You submitted a document from the December 13th, 1990, group, signed by Louise Kuri (phonetic sp.). Are you familiar with that document?

A. More or less, yes.

Q. Are you aware that the document indicates that you were arrested for two days in December of 1990?

A. That happened because the information was not given correct by the police on purpose. For every person that was being kept for more days, they said that the people were being kept for one or two days.

Q. Well, what is the source of M[s]. Kuri's information?

A. She must have taken it from the police of Shkodra. I have not been there. I don't know if that -- my mother went to the office of the December 13th, 1990, association.

Q. So, M[s]. Kuri, in fact, has no information personally about what happened to you in December of 1990?

A. She became the chairman of the Balli Kombetar party for the area of Shkodra after I left Albania. I know her as a person, but at the time she was not a chairman and maybe she didn't have enough information for all the arrests of the people in the party. Maybe she had asked help from the police at Shkodra.

(GA 90-91).

c. The August 14, 1994, Hunger Strike

Urita testified about a hunger strike in which he allegedly took part in August 1994. He first testified that the hunger strike took place in 1995 and then stated that it took place in August 1994. His attorney questioned him as follows:

Q. Okay. When was that hunger strike?

A. In 1995?

Q. Okay. When?

A. In August '94. I'm not very sure about the date.

Q. Okay. What was the purpose of the hunger strike?

A. The persecuted people not only wanted their rights like all the rest of the people but they wanted their properties back which had been confiscated and used by the Communist Party and the Party of Labor and were not being turned back.

Q. Okay. And what happened during the hunger strike?

A. In the hunger strike that was organized at Megennie Theater (phonetic sp.) in Shkodra, the former chairman of the Democratic Party, (indiscernible) was present. The special forces came and they said we had a certain deadline, all the people had to go away within 8:00 in the evening. After this hour the people didn't leave this place and they came and took the people out by force.

Q. Okay. And what happened to you that day?

A. Nothing happened to me. I was asked why did you took part in organizing this strike but they didn't have any proof against me and nothing happened.

(GA 60-61).

The IJ questioned the petitioner at some length about the August 1994 hunger strike. The following exchange took place:

> Q. Now, you also said that when you were at the hunger strike in August of 1994, that the special forces came and they broke it up, is that right?
>
> A. Yes.
>
> Q. And that the special forces were abusing a lot of people there?
>
> A. Yes, against all those that took part around the site?
>
> Q. But nothing happened to you that you were able to escape them?
>
> A. On that day I was not present but I had problems after because I was one of the person that organized the hunger strike and as a result of that I had problems from the police of my, my village.
>
> Q. Well, your application indicates not only that you were there but that you were beaten with rifle butts by the SHIK, Do you know why your application says that?
>
> A. The next day.

Q. It doesn't say that.

A. In the Albanian language I mentioned all the things the way I'm telling them today.

Q. Is it your testimony today that you were beaten with rifle butts by the police on the next day?

A. Not exactly the next day but behind the day. I don't remember the date exactly because a long time has passed.

(GA 43-44).

C. The Immigration Judge's Decision

At the conclusion of the May 10, 2001, hearing, the IJ issued an oral decision denying Urita's applications for asylum, withholding of removal, relief under CAT, for voluntary departure and ordered him removed to Albania. (GA 95-116). After summarizing Urita's testimony and the application for asylum and supporting documentation, the IJ concluded that Urita was not credible. (GA 113).

The IJ noted a number of inconsistencies in Urita's testimony and the documentation submitted with his request for asylum. First, the IJ noted that Urita had reviewed the application for asylum with his attorney and had made amendments to the application but that significant inconsistencies continued to exist in that application. The IJ held that these inconsistencies were prejudicial to the petitioner's claims. (GA 101-102).

For instance, the IJ noted the inconsistency between the petitioner's statements in the application about the death of his brother at the hands of the border patrol and his testimony at the hearing that his brother died by drowning. (GA 103). The IJ noted that the petitioner was given an opportunity to explain the inconsistency but was unable to supply a satisfactory explanation.

Concerning the December 13, 1990, incident, the IJ noted the inconsistencies between the written application and the petitioner's testimony and the documentation that was provided in support of the details of that event but found that the petitioner was unable to satisfactorily explain the inconsistencies. The IJ specifically noted the inconsistencies regarding the amount of time the petitioner was incarcerated and the nature of the alleged injury. (GA 106).

The IJ next rejected the petitioner's inconsistent evidence concerning the August 1994 hunger strike. He specifically noted that the petitioner testified that he was able to leave the scene of the hunger strike without incident but that in his application for asylum the petitioner stated that he was beaten with rifle butts. When confronted with these inconsistencies, the petitioner stated that he was beaten with rifle butts but it must have been some days later. (GA 109-110).

The IJ concluded that he considered "not only the inconsistency between the [petitioner's] testimony and his written request for relief, but also his complete omission of any reference to the physical assault allegedly perpetrated upon him in August of 1994 from his direct

testimony to be further evidence of a complete lack of credibility of the [petitioner] in this case." (GA 116).

In sum, the IJ held as follows:

> I am not convinced that the [petitioner] has presented any credible evidence in this case which would allow the Court to consider what subjective fear, if any, this respondent actually has of returning to his homeland.
>
> Consequently, the Court also finds that the respondent has not carried his burden of proving by sufficient evidence the harm he might suffer at the hands of any group in Albania is "on account of" any of the grounds enumerated in the Act."

(GA 113).

Accordingly, the IJ denied the petitioner's request for asylum, withholding of removal, relief under the CAT and voluntary departure.

D. The BIA's Decision

On September 6, 2002, the BIA summarily affirmed the IJ's decision and adopted it as the "final agency determination" under 8 C.F.R. § 3.1(e)(4) (2002).[6] (GA 118). This petition for review followed.

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[6] That section has since been redesignated as 8 C.F.R. §1003.1(e)(4). *See* 68 Fed. Reg. 9824, 9830 (Feb. 28, 2003).

SUMMARY OF ARGUMENT

1. The IJ properly denied Urita's application for asylum because Urita's testimony was wholly incredible. The IJ identified multiple inconsistencies and contradictions in Urita's testimony and submissions on issues that went to the heart of Urita's claim for asylum. For example, the IJ noted that Urita had offered multiple, contradictory explanations for the events of June 10, 1990, December 13, 1990, and August 14, 1994. The IJ noted the wildly inconsistent versions of these events between Urita's application and his testimony, and that Urita, despite having been given numerous opportunities to explain the inconsistencies, was unable to do so. For all of these reasons, substantial evidence supports the IJ's determination that Urita failed to provide credible testimony in support of his claim for asylum. The petition for review should be denied.[7]

2. This Court, in *Zhang v. United States Department of Justice*, 362 F.3d 155, 157 (2d Cir. 2004) (per curiam), rejected the claim that the BIA streamlined review process violates due process. Accordingly, the petitioner's claim fails.

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[7] Although the petitioner sought relief before the IJ and the BIA on his claims of withholding of removal, CAT and voluntary departure, he has not raised challenges to those decisions before this Court. By failing to raise such challenges in his brief, the petitioner has waived them. *See Storey v. Cello Holdings, L.L.C.*, 347 F.3d 370, 380 n.6 (2d Cir. 2003) (issue abandoned when not raised in opening appellate brief); *LoSacco v. Middletown*, 71 F.3d 88, 92-93 (2d Cir. 1995).

ARGUMENT

I. THE IMMIGRATION JUDGE PROPERLY DETERMINED THAT URITA FAILED TO ESTABLISH ELIGIBILITY FOR ASYLUM SINCE HE OFFERED NO CREDIBLE TESTIMONY IN SUPPORT OF HIS APPLICATION

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.[8] *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) (quoting *Carvajal-Munoz v. INS*, 743 F.2d 562, 564 (7th

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[8] "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) (2004), cases relating to the former relief remain applicable precedent.

Cir. 1984)), the standards for granting asylum and withholding of removal differ, *see INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-32 (1987); *Osorio v. INS*, 18 F.3d 1017, 1021 (2d Cir. 1994).[9]

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) (2004). *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

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[9] 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) (2000); *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)(2)(ii) (2004); *INS v. Stevic*, 467 U.S. 407, 429-30 (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 Zhang v. INS*, 386 F.3d 66, 71 (2d Cir. 2004), *Wu Biao Chen*, 344 F.3d at 275; *Zhang*, 55 F.3d at 738. Thus, although the petitioner has not raised a claim regarding withholding of removal, even if he had raised such a claim, it would necessarily lack merit because of the failure of the asylum claim.

"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 *De Souza 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. *See Melgar de Torres v. Reno*, 191 F.3d 307, 315 (2d Cir. 1999); 8 C.F.R. § 208.13(b)(1)(i) (2004).

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. *See id.* at 663-64.

"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.* at 663. 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); *see also Zhang*, 55 F.3d at 752 (noting that when seeking reversal of a BIA factual determination, the petitioner must show "'that the evidence he presented was so compelling that no reasonable factfinder could fail'" to agree with the findings (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." *Wu Biao 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)-(b) (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*, Interim Dec. 3028, 19 I. & N. Dec. 439, 445, 1987 WL 108943 (BIA June 12, 1987), *abrogated on other grounds by Pitcherskaia v. INS*, 118 F.3d 641, 647-48 (9th Cir. 1997) (applicant must provide testimony that is

"believable, consistent, and sufficiently detailed to provide a plausible and coherent account").

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) ("[W]here 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-*, Interim Dec. 3303, 21 I. & N. Dec. 722, 723-26, 1997 WL 80984 (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); *Ramsameachire v. Ashcroft*, 357 F.3d 169, 178 (2d Cir. 2004); *Zhang*, 55 F.3d at 738.

2. Standard of Review

This Court reviews the determination of whether an applicant for asylum has established past persecution or a well-founded fear of persecution under the substantial evidence test. *Zhang v. INS*, 386 F.3d at 73; *Wu Biao 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") (internal quotation marks

omitted); *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). "Under this standard, a finding will stand if it is supported by 'reasonable, substantial, and probative' evidence in the record when considered as a whole." *Secaida-Rosales*, 331 F.3d at 307 (quoting *Diallo*, 232 F.3d at 287).

Where an appeal turns on the sufficiency of the factual findings underlying the IJ's determination[10] 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). *Zhang v. INS*, 386 F.3d at 73 n.7. 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." *Wu Biao Chen*, 344 F.3d at 275 (omission in original) (quoting *Diallo*, 232 F.3d at 287).

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[10] 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 (GA 118), the BIA adopts that decision. *See* 8 C.F.R. § 3.1(a)(7) (2004); *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; *Wu Biao Chen*, 344 F.3d at 275; *Melgar de Torres*, 191 F.3d at 313. *See also Zhang v. INS*, 386 F.3d at 71 ("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). 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." *Wu Biao 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) (noting that 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 Urita failed to provide credible testimony in support of his application for asylum, and thus failed to establish eligibility for relief. Urita's account contained inconsistencies and implausibilities that went to the heart of his claims and when questioned about the conflicting responses, Urita failed to adequately explain the evidentiary deficiencies at the administrative level. As such, substantial evidence supports the IJ's decision, *see, e.g.*, *Qiu*, 329 F.3d at 152 n.6 ("incredibility arises from 'inconsistent statements, contradictory evidence, and inherently improbable testimony'" (quoting *Diallo*, 232 F.3d at 287-88)), and thus Urita has not met his burden of showing that a reasonable factfinder would be compelled to conclude he is entitled to relief.

As the IJ correctly found, Urita gave inconsistent statements about the facts underlying his alleged arrests, injuries and periods of detention by the Albanian authorities. *Id.* All of these statements went to the heart of Urita's claims of persecution. The IJ justifiably relied on all of these confusing, contradictory and inconsistent statements in the record in finding that Urita's testimony lacked credibility.

The IJ properly concluded that the inconsistency between the petitioner's statements in the application about the death of his brother at the hands of the border patrol and his testimony at the hearing that his brother died by drowning seriously undermined his credibility. Even given an opportunity to address the inconsistency, the petitioner was unable to supply a satisfactory explanation.

The IJ also properly concluded that the petitioner's written and testimonial claims concerning the December 13, 1990, incident could not be reconciled. Indeed, the IJ relied on the obvious inconsistencies regarding the amount of time the petitioner was incarcerated and the nature of the alleged injury and the fact that the petitioner could not explain these inconsistencies. Nor did the petitioner even attempt to produce written statements from people who were there, *i.e.*, the petitioner's mother, who could shed light on the petitioner's confusing and inconsistent claims.

The IJ also rightfully rejected the petitioner's inconsistent evidence concerning the August 1994 hunger strike. Of particular concern was the fact that the petitioner specifically testified during the hearing that he was able to leave the scene of the hunger strike without incident but in

his application for asylum the petitioner stated that he was beaten with rifle butts. The IJ properly considered "not only the inconsistency between the [petitioner's] testimony and his written request for relief, but also his complete omission of any reference to the physical assault allegedly perpetrated upon him in August of 1994 from his direct testimony to be further evidence of a complete lack of credibility of the [petitioner] in this case." (GA 110).

The IJ also properly relied upon the nature and incompleteness of evidence that the petitioner supplied in support of his asylum claim in rejecting that very claim. For instance, the IJ properly concluded that the medical evidence concerning the petitioner's treatment for the alleged gunshot wound simply failed to support his claims and, in fact, added further confusion to that claim.

This is not a case where the IJ relied on a few omitted details in support of his incredibility finding. *See generally de Leon-Barrios v. INS*, 116 F.3d 391, 393 (9th Cir. 1997) (inconsistencies not minor where they relate to the basis for the alien's fear of persecution). Moreover, Urita was given an opportunity to explain the inconsistencies between his asylum application and his in-court testimony and was not able to do so. Prior to the hearing before the IJ, Urita availed himself of the opportunity to review and amend his asylum application with his lawyer's assistance. It was only after confirming Urita's satisfaction with the accuracy of his asylum application that the IJ pointed out the discrepancies noted above, and that Urita was unable to offer convincing explanations. Again, these discrepancies are directly related to and probative of his central claim. *See also Pop*

v. INS, 270 F.3d 527, 531-32 (7th Cir. 2001) (upholding adverse credibility determination based upon inconsistencies between application and testimony); *Pal v. INS*, 204 F.3d 935, 940 (9th Cir. 2000) (same).

Finally, Urita provides little, if any, real analysis of the negative credibility finding, other than to conclude that "[w]hat the immigration judge has done is to improperly "impose a negative slant on the testimony provided which would have otherwise established Petitioner's claim of a well-founded fear of persecution." Pet. Br. at 23. In any event, in suggesting a reading of the record that differs (in an unspecified way) from that adopted by the IJ, Urita misconstrues the standard of review. The substantial evidence standard requires Urita to offer more than a plausible alternative theory; to the contrary, Urita "must demonstrate that a reasonable fact-finder would be compelled to credit his testimony." *Wu Biao Chen*, 344 F.3d at 275-76 (citing *Elias-Zacarias*, 502 U.S. at 481& n.1). As the Supreme Court has held, "'the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'" *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 523 (1981) (quoting *Consolo*, 383 U.S. at 620); *accord Mar Oil, S.A. v. Morrissey*, 982 F.2d 830, 837-38 (2d Cir. 1993). It is not the role of the reviewing court to re-weigh the inconsistencies "to see if we would reach the same credibility conclusions as the IJ." *Zhang v. INS*, 386 F.3d at 77. Accordingly, the only relevant question is whether there is substantial evidence to support the conclusion that the IJ in fact reached in the face of Urita's contradictory statements. *See Elias-Zacarias*, 502 U.S. at 481& n.1.

Here, in the complete absence of a plausible interpretation of his testimony that could harmonize his conflicting statements, nothing in the record compels such a reading. *See id.*

In sum, the IJ properly concluded that there was "a complete lack of credibility of the [petitioner] in this case." (GA 110).

II. THE BOARD OF IMMIGRATION APPEALS' STREAMLINED REVIEW PROCESS DOES NOT VIOLATE DUE PROCESS.

A. Relevant Facts

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

B. Governing Law and Standard of Review

An "alien's right to an administrative appeal from an adverse asylum decision derives from statute rather than from the Constitution." *Zhang v. U.S. Dep't. of Justice*, 362 F.3d 155, 157 (2d Cir. 2004) (per curiam). *See also Guentchev v. INS*, 77 F.3d 1036, 1037 (7th Cir. 1996) ("The Constitution does not entitle aliens to administrative appeals . . . . The Attorney General could dispense with the Board and delegate [his] powers to the immigration judges, or could give the Board discretion to choose which cases to review . . . . ").

C. Discussion

This Court, in *Zhang v. U.S. Dep't of Justice*, 362 F.3d at 157, rejected the same claim that the petitioner raises in this case. This Court held in *Zhang* that "because nothing in the immigration laws requires that administrative appeals from IJ decisions be resolved by three-member panels of the BIA through formal opinions that 'address the record,' the BIA was free to adopt regulations permitting summary affirmance by a single Board member without depriving an alien of due process." *Id.* at 157.

In view of this Court's clearly established precedent, the petitioner's claim must fail.[11]

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[11] The Government notes that the petitioner in his statement of the issues mentions the equal protection component of the Due Process Clause. Pet'r Br. at 2. He does not, however, provide any further briefing on that component. Thus, the claim is abandoned. *Storey v. Cello Holdings, L.L.C.*, 347 F.3d 370, 380 n.6 (2d Cir. 2003) (issue abandoned when not raised in opening appellate brief); *LoSacco v. Middletown*, 71 F.3d 88, 92-93 (2d Cir. 1995). In any event, such a claim would fail because the streamlining procedures apply to all applicants for asylum. As this Court held in *Jankowski-Burczyk v. INS,* 291 F.3d 172 (2d Cir. 2002), "[t]he Due Process Clause of the Fifth Amendment guarantees every person the equal protection of the laws, 'which is essentially a direction that all persons similarly situated should be treated alike.'" *Id.* at 176 (quoting *Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 439, 439 (1985)). Because all applicants for asylum are subject to the streamlining procedures, all applicants are similarly situated.

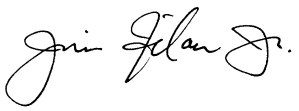
CONCLUSION

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

Dated: November 12, 2004

Respectfully submitted,

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

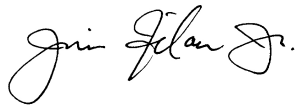


JAMES K. FILAN, JR.
ASSISTANT U.S. ATTORNEY

WILLIAM J. NARDINI
ASSISTANT U.S. 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 8,301 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.



JAMES K. FILAN, JR.
ASSISTANT U.S. ATTORNEY

Addendum

8 U.S.C. §1101(a)(42)

(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. For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

8 U.S.C. §1252(b)(1) & (b)(6)

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

. . . .

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.