03-4044-ag

To Be Argued By:
GEOFFREY M. STONE

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 03-4044-ag

MEHMET KAREMAN BALA,
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

GEOFFREY M. STONE
Assistant United States Attorney
WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

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STATEMENT OF JURISDICTION

This Court has appellate jurisdiction under § 242(b) of the Immigration and Naturalization Act, 8 U.S.C. § 1252(b) (2004), to review the petitioner's challenge to the BIA's December 13, 2002, final order denying him asylum, withholding of removal, and relief under the Convention Against Torture.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1a. Whether a reasonable factfinder would be compelled to reverse the Immigration Judge's finding that the changed country conditions in Albania represented a fundamental change in circumstances such that the petitioner no longer had a well-founded fear of persecution based upon his political activities.

1b. Whether a reasonable factfinder would be compelled to reverse the Immigration Judge's determination that the petitioner failed to demonstrate a well-founded fear of future persecution in Albania from the current Albanian government where there is no record evidence that the Socialist Party would persecute the petitioner based upon his activities in support of the Democratic Party.

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

3. Whether summary affirmance by the Board of Immigration Appeals was appropriate in this case.

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BRIEF FOR JOHN ASHCROFT
Attorney General of the United States

Preliminary Statement

Mehmet Kareman Bala, a native and citizen of Albania, petitions this Court for review of a December 13, 2002, decision of the Board of Immigration Appeals ("BIA") summarily affirming a decision of an Immigration Judge ("IJ") denying Bala's applications for asylum, for withholding of removal and for relief under the U.N.

Convention Against Torture ("CAT"), and ordering him removed from the United States.

The petitioner sought asylum based on his past persecution by the Communist government in the 1950s, and based on harassing telephone calls by anonymous persons and alleged employment discrimination. Substantial evidence supports the IJ's determination that the petitioner failed to establish his eligibility for asylum. First, Bala failed to provide probative evidence establishing that he was persecuted by the former Communist government after his families' internment in the 1950s. Second, even if Bala had established such persecution (and he plainly did not), the government fully rebutted any presumption that the petitioner has a well-founded fear of future persecution since the Communist regime was eradicated in 1990. Third, Bala did not experience past persecution in Albania after the Socialist party assumed power in 1997. The alleged employment discrimination and the threats Bala allegedly received failed to rise to the level necessary to constitute "persecution," and Bala failed to establish that the current Albanian government was unable or unwilling to control the alleged "persecution." Fourth, Bala did not demonstrate a well-founded fear of future persecution in Albania. Bala's allegations failed to establish an objectively reasonable fear that the current Albanian government would persecute Bala based upon his past activities in support of the Democratic Party.

Substantial evidence also supports the IJ's determination that the petitioner failed to establish a basis for withholding of removal under the CAT. For the same

reasons discussed above, the petitioner failed to meet his burden of establishing that it is more likely than not that he would be tortured if removed to Albania.

Statement of the Case

Bala entered the United States on December 18, 1998, on a tourist visa that authorized him to remain in this country for six months, until June 17, 1999. On August 23, 1999, Bala filed an Application for Asylum. (Joint Appendix ("JA") 252-262).

On March 13, 2000, Bala was issued a Notice to Appear for removal proceedings. (JA 300-301). On January 26, 2001, a removal hearing was held before an IJ. (JA 64-148). The IJ issued an oral decision denying Bala's applications for asylum and withholding of removal and rejecting his claim for relief under the CAT. (JA 48-61). The IJ granted Bala's request for voluntary departure. (JA 61).

On or about February 23, 2001, Bala filed a Notice of Appeal to the BIA. (JA 42-45). On December 13, 2002, the BIA summarily affirmed the IJ's decision. (JA 1-2). On January 8, 2003, Bala filed a petition for review with this Court.

Statement of Facts

A. Bala's Entry into the United States and Application for Asylum

Bala is a native and citizen of Albania, where he was born on November 22, 1951. (JA 89). On December 17, 1998, Bala flew from Rinas Airport, Tirana, Albania to Rome, Italy. (JA 89, 257). On December 18, 1998, Bala flew from Rome to Newark, New Jersey. (JA 89, 257). Bala arrived in Newark as a non-immigrant visitor with authorization to remain in the United States for a temporary period not to extend past June 17, 1999. (JA 89, 252).

Instead of leaving the United States as required by his visa, Bala remained in the United States (JA 300) and on August 23, 1999, submitted an Application for Asylum. (JA 252-262). In his Application, Bala indicated that he was seeking asylum because of his "persecution in the past and the current threatening situation" in Albania. (JA 255). Bala alleged that he fears being subjected to persecution in Albania as a result of his membership in the Democratic Party and his opposition to the Communist Party. (JA 255-257, 261-262).

In his Application, in response to a question regarding whether he had ever been mistreated or threatened by the Albanian authorities, Bala identified four instances: (i) his family's property was confiscated; (ii) Bala's uncle was "put in jail"; (iii) Bala's family was sent to an internment camp from 1952 to 1959; and (iv) Bala was fired from his job in 1997. (JA 256). In response to a question regarding

whether Bala had ever been detained, interrogated or imprisoned, Bala identified three instances: (i) Bala's father was detained, interrogated and beaten; (ii) Bala's uncle was sentenced to years in prison; and (iii) Bala's family was sent to internment. (JA 256). In addition, Bala attached a supplement form to his Application, providing greater detail regarding his alleged mistreatment by the Albanian authorities. (JA 261-262). The facts set forth in the supplement form are summarized as follows:

Bala's family opposed the Communist Party, which took power in Albania after World War II. (JA 255-257, 261-262). The Communist authorities "took away [two] restaurants" owned by Bala's father and uncle, by imposing unreasonably high taxes. (JA 261). Bala's father was detained, interrogated and tortured by police and, in 1951, his uncle was imprisoned. (JA 256, 261). In addition, Bala's family was sent to an internment camp from 1952 to 1959. (JA 256, 261).

In 1959, Bala's family was allowed to return to their home. (JA 261). After returning home, Bala's family was "mistreated and under constant surveillance and we felt isolated and ostracized all the time." (JA 261). As a student, Bala's application "to become a member of the Youth Organization . . . was rejected" and after Bala completed high school, he was not allowed to "enroll in Higher Education." (JA 261). After high school, Bala joined the Albanian military, but was "not allowed to carry weapons and w[as] not treated like other soldiers." (JA 261). After completing his military service, Bala "could only work in the coal mine; they would not give [him] a better job." (JA 261). Two years later, in 1975, Bala

started "working at Korce Water Supply State Company, but the company's officials would mistreat [Bala] and assign [the] hardest piece of work to [Bala]." (JA 261). Bala's friends and relatives kept a distance because they feared getting into trouble with the authorities. (JA 261).

In 1990, "the creation of other [political] parties was authorized" and "[t]he Democratic party was created." (JA 261). In February 1991, Bala "was amongst those that pulled down the dictator's monument." (JA 261-262). In March 1992, "the Democratic Party won the election." (JA 262). At the time, Bala was a member of the Anticommunist Association. (JA 262). Bala also became a member of the Democratic Party and the Association of the Former Political Persecuted. (JA 262).

The anti-communist efforts, however, "were not a success." (JA 262). According to Bala, "[t]he Former Persecutors survived," "[t]hey were able to lead the country to civil war in 1997," "[t]hose that supported the Democratic Party were terrorized," "[e]lections were held in a climate of terror," "Democrats were murdered" and "[t]he Communists won the election." (JA 262).

In September 1997, Bala and many others were "fired by the new director [at the Korce Water Supply Company]." (JA 262). The schools were unsafe and armed criminals terrorized students. (JA 262). With the help of a foundation in Oklahoma, Bala's daughter was able to come to the United States to study in Waterbury, Connecticut. (JA 262).

In December 1998, he was issued a visa to travel to the United States to visit his daughter. (JA 262). Bala does not "want to return that country under communist rule and in Political growing tensions." (JA 262). Bala wants "to remain, live and work" in the United States. (JA 262).

Importantly, other than his family's internment from 1952 through 1959, Bala's Application does not identify a single instance in which he was accused, charged, detained, interrogated or imprisoned by the Albanian authorities. (JA 252-262). In addition, Bala does not discuss -- or even reference -- any instances in which Bala was beaten or physically abused by anyone, let alone by the Albanian authorities; nor does he discuss any instances in which he was threatened, with physical harm or otherwise. (JA 252-262).

On May 23, 2000, Bala's counsel completed a Pleadings Form. (JA 250-251). In the Pleadings Form, Bala's counsel indicated on a checklist that Bala was seeking the following relief: (a) asylum and withholding, (b) withholding or deferral of removal pursuant to the Convention Against Torture[1] and (c) voluntary departure. (JA 251).

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[1] 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).

B. Bala's Removal Proceedings

On or about March 13, 2000, the INS served the petitioner with a Notice to Appear for a removal hearing. (JA 300-301), asserting that he was a removable alien based on his having overstayed his tourist visa.

After several continuances, a removal hearing was held before the Immigration Judge ("IJ") on January 26, 2001. (JA 84-148). Bala appeared with counsel before the IJ in Hartford, Connecticut on January 26, 2001, and conceded that he was subject to removal. (JA 48). The IJ stated that Bala's application for asylum would also be considered an application for withholding of removal.[2] (JA 48-49). The IJ also noted that Bala requested voluntary departure in the alternative. (JA 49).

1. Documentary Submissions

Four numbered exhibits were submitted at the January 26, 2001, hearing and made part of the administrative record. (JA 85-87). The INS Notice to Appear was Exhibit 1. (JA 85, 300-301).

Bala's August 23, 1999 Application for Asylum was submitted as Exhibit 2. (JA 252-262). In support of this Application, Bala also submitted copies of the following: Bala's visa; Bala's passport; Bala's birth, marriage, and

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[2] Under the Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8485 (Feb. 18, 1999), an asylum application also serves as an application for relief under the CAT.

family certificates (with English translations); documents showing his membership in the Democratic Party of Albania (with English translations); documents attesting to Bala's membership associations of former politically persecuted persons in Albania (with English translations); a certificate stating that Bala was interned by the Communist Regime from April 1952 through June 1959 (with an English translation); a letter from a guidance counselor at Crosby High School in Waterbury, Connecticut stating that Bala's daughter is enrolled in the school's College Prep Program and is maintaining high grades; and Bala's daughter's visa and passport. (JA 85-87, 224-247, 252-284).

Bala's pleading dated May 23, 2000, was submitted as Exhibit 3. (JA 87, 250-251).

Supplemental material filed by Bala was submitted as Exhibit 4. (JA 87). Exhibit 4 included the same certificates that were included in Exhibit 2 (referenced above), a list of proposed witnesses and a certificate of service. (JA 224-249). In addition, Exhibit 4 included copies of numerous articles, reports and news releases regarding Albania, including the U.S. State Department's 1998 and 1999 Country Reports on Human Rights Practices in Albania. (JA 87, 152-223). The State Department's Country Reports state that, *inter alia*, the "Law on Fundamental Human Rights and Freedoms" provides for "freedom of speech," "the right of association" and "the right of peaceful assembly" and "the [Albanian] Government generally respect[s] these rights." (JA 160, 162). In addition, while the Country Reports note that there were allegations of politically motivated arrests,

harassment and violence, the State Department reported that: "[t]here were no confirmed cases of political killings by the Government"; "[t]here were no confirmed reports of politically motivated disappearances"; and "[t]here were no clear cases of detainees being held [by police] for strictly political reasons." (JA 154, 155, 157).

2. Testimony of Bala, Bala's Daughter and Bala's Wife

Bala, Bala's daughter and Bala's wife testified at the January 26, 2001, hearing. Their testimony is discussed in greater detail below.

a. Bala's Testimony

Bala testified that he was born in Korce, Albania on November 22, 1951. (JA 69). In 1952, his "uncle was arrested for political propaganda and they sentenced him to eight years in jail." (JA 71). Bala testified that his father also was arrested in 1952 and was kept for a few hours before being released. (JA 72-73). From 1952 through 1959, Bala's family was placed in an internment camp. (JA 72-74). While in the camp, Bala was not allowed to go to school. (JA 74).

In 1959, Bala's family returned to Korce, Albania. (JA 74). Bala testified that his family was mistreated by the authorities, but provided little if any details regarding the alleged mistreatment. (JA 75). Bala stated that "[w]e couldn't find no jobs," "a lot of times we went to sleep without food" and his family was only able to socialize with other bourgeois. (JA 75). Bala admitted, however,

that he was allowed to travel outside Korce and to go to school. (JA 75-76).

After completing high school, Bala joined the army. Bala alleged that he "was discriminated [against] in the army because [he] stayed there two years but didn't carry guns because they didn't trust us." (JA 77-78). Bala further testified that "after he finished the army they sent [him] to work in a mine, which we worked in a coal mine and the[] condition was very, very bad to work over there." (JA 78). Bala did not, however, provide any additional information regarding the "bad conditions" in the coal mine. From 1975 through 1997, Bala was gainfully employed as a mechanic in the water department in Korce. (JA 78).

Bala admitted that the former Communist regime was overthrown in or around 1990. (JA 78). Asked whether he was ever beaten under the Communist regime, Bala replied as follows:

> A: Yes. When we knocked down the statute of dictatorship in (indiscernable) in 1990 there was a demonstration there about for two days straight. The police, they were very violent against demonstrators. I was naturally in the front of the demonstration. We were asked when we were discriminated and the police used force and they started beating us. They mistreated us but the crowd was so big and we tried to manage to put down the statute . . . and for us there was a winning situation because we knocked down the dictatorship.

Q: Before this 1990, under the communist before 1990, were you ever beaten by the authorities.

A: No.

Q: Were you ever threatened by the authorities?

A: No.

Q: Were you ever arrested by the authorities other than the internment in 1952 to '59?

A: No.

Bala testified that he joined the Democratic Party as soon as it started. (JA 80). Bala was a chairman of the branch of his neighborhood. (JA 81). In 1997, Bala was appointed to an election committee and was responsible for counting votes. (JA 82). Bala testified that the Socialist Party won the 1997 election. (JA 83). Bala testified that he was supposed to sign the election results in his neighborhood. (JA 84). Bala said that he "didn't do that because the people with the masks they came over there and they, and they would threaten us. They beaten us and they say we win the election you supposed to sign here." (JA 84). Bala did not provide any more details regarding this event, including who made the threats, the nature of the threats, what he meant by "beaten us," whether anyone was physically harmed and, if so, by whom, or whether these unknown persons followed through on any of these alleged threats.

Also in 1997, Bala was dismissed from his job. (JA 85). Bala was told that they did not have enough work for him. (JA 85). Bala testified that two of his colleagues, who also were in the Democratic Party, were laid off. (JA 86). Bala alleged that two months after he was laid off, they put somebody else in his place. (JA 86). After he was laid off, Bala could not get a government job. (JA 86-87). Bala was forced to do a myriad of odd jobs, which Bala did until he left Albania in December of 1998. (JA 87-88).

Bala testified that his main problem after the elections in June of 1997 was that he received harassing telephone calls. (JA 88). Bala testified that "they were offending [Bala] and they would threaten [him] . . . [and t]hey used all kind[s] of . . . dirty words." (JA 88). Bala did not provide any testimony or evidence that he was ever threatened with violence or physical harm or that any other alleged "threat" was ever carried out. When questioned further by the IJ regarding the unwanted telephone calls, Bala admitted that "they used bad words against [Bala] and they told [him] to stop, to quit the democratic party essentially." (JA 109). Bala also testified that "they send me . . . letters put underneath my door . . . warning me . . . to quit being member of [the Democratic] party." (JA 88-89). Bala admitted that he did not know who was sending the letters or making the harassing telephone calls. (JA 89). Bala also admitted that he never complained to the police regarding the harassment because he "believe[d] it was the same people." (JA 89).

Bala also alleged that the leader of the democratic party was "assassinated" and "nobody got arrested." (JA 91).

Bala testified that the funeral was turned into a big rally that charged "against the communist system" and there was "fighting between the police and the people and accidently [Bala] happen[ed] to be there." (JA 92). Bala testified "[t]hat's when they grab us and they took us and they brought us in [a] big room somewhere and that's where they start beating us. When the rally, the rally was so big and they kept us only a few hours and they released us." (JA 92). Once again, Bala failed to provide any details regarding this incident. He did not, for example, provide any testimony or other evidence that he himself had in fact been beaten or physically harmed by authorities during this incident. Further, Bala admitted that the police told him "what you are doing now is against the law" and warned "if you continue to do that you're going to be punished by the law because what you are doing is against the law." (JA 92). Bala also admitted that he was not arrested or interrogated any other times. (JA 92).

Bala testified that after he left Albania, his wife continued to receive harassing telephone calls, saying that her husband left and he was a coward. (JA 98). Bala said that his son was detained for a few hours and told not to follow his father's footsteps. (JA 98). Bala testified that his wife traveled to the United States two weeks before the January 26, 2001, hearing (JA 97), but his son is still in Albania and is living with Bala's brother and sister. (JA 98).

Bala testified that a lot of his friends had left the country. (JA 91). Bala testified that he and his wife got their passports "through some friends that we knew in government." (JA 103). Bala admitted that he had no

problem traveling from Albania to Macedonia to get a visa to visit the United States. (JA 103).

Bala acknowledged that members of the Democratic Party were in the Albanian parliament, but that he did not know how many. (JA 104). Bala admitted that he did not know the then-current situation in Albania. Asked if the government respected the right of association, Bala stated "Right now I don't live there. I don't know how to answer that. I don't know if there is respect or no[t]." (JA 112).

b. Testimony of Bala's Daughter

The petitioner's daughter, Alona Bala, testified that the petitioner was a member of the Democratic Party and a member of the election committee. (JA 118). She also testified that after the election, the petitioner was fired. (JA 119). In addition, Alona Bala testified that her father frequently received threatening telephone calls. (JA 119-120). Alona Bala, however, did not have direct knowledge of the nature of these alleged "threats." (JA 120). Only once did she answer one of these unwanted telephone calls and she simply handed the telephone to her father because the caller asked to talk to her dad. (JA 120). Alona said that the callers always asked for money. (JA 123, 131-132). She admitted that they did not know who was making the calls. (JA 123).

Alona Bala testified that the Balas still had a house in Albania and that her brother and grandmother lived there. (JA 122). She testified that her brother was taken into custody for two or three hours in connection with a demonstration. (JA 122). Although her mother and father

both did not mention any physical mistreatment or "beatings" relating to this incident, Alone Bala alleged that her brother was "beaten." (JA 122). She did not know any other details regarding the demonstration, including whether there was a government-issued permit; nor did she provide any additional details regarding the alleged detainment. (JA 122, 124-125).

c. Testimony of Bala's Wife

The petitioner's wife, Refrede Bala, testified that her son was detained for a couple of hours and then let go by the police. (JA 135). She did not mention any alleged beatings. (JA 135). Refrede Bala testified that she was laid off from her work and is receiving social assistance from the government. (JA 136).

Refrede Bala testified that all of the members of her family and her husband's family are members of the Democratic Party. (JA 138). She stated that her brother and sisters still live in Albania. (JA 137). She said that her sisters both are working and her brother occasionally works. (JA 137). She did not mention any threats or abuse suffered by her brother or sisters.

Refrede Bala testified that no member of her family or her husband's family has run for political office as a member of the Democratic Party. (JA 138). She said that there are active members of the Democratic Party in the Albanian parliament. (JA 139).

Refrede also testified that after the petitioner left Albania, the anonymous callers were only interested in money. (JA 140).

C. The Immigration Judge's Decision

The IJ issued an oral ruling on November 27, 2000, denying Bala's applications for asylum, withholding of removal and relief under the CAT. (JA 48-62). The IJ granted Bala's request for voluntary departure. (JA 60).

The IJ began his ruling by noting that the petitioner "has admitted through counsel that [he] is subject to removal." (JA 48). With removability established by clear and convincing evidence (JA 48), the IJ observed that the petitioner had declined to designate a country of removal, and designated Albania. (JA 48).

After summarizing the hearing testimony (JA 49-54), the IJ found that the petitioner had established past persecution based on his families' internment from 1952-1959. (JA 56-57). The IJ found, however, that "there was a fundamental change in circumstance which rebuts the finding of past persecution." (JA 57). The IJ found "that when the communist government fell in 1990, [] there was a fundamental change of circumstances." (JA 57). The IJ further stated that "[i]ndeed, the whole communist government was overthrown and th[e] [internment] camps were eliminated." (JA 57).

In addition, the IJ found that there were not any "compelling reasons not to return arising out of the severity of the past persecution." (JA 57). As the IJ

recognized, the petitioner "lived in Albania for almost 40 years after he was released from the [internment] camp." (JA 57-58).

The IJ also found that the petitioner did not establish a well-founded fear of persecution if he returned to Albania. (JA 58-59). The IJ noted that Bala "came to the United States to escape a bad life in Albania." (JA 58). The IJ recognized that Bala "was not doing well economically after having lost his job" and that Bala was subject to harassment in the form of anonymous telephone calls and letters. (JA 58).

The IJ expressly declined to "find that the fact that [Bala] lost his job and the harassment rises to a level of a possibility of future persecution." (JA 59). After first receiving the harassing telephone calls and letters, Bala was able to live in his house in Albania for 18 months without harm. (JA 58-59). The harassment appears to be "a way to persuade [Bala] to suspend his political activities." (JA 59). The IJ found, however, "that there is no evidence that he was ever threatened with death or other sort of harm." (JA 58). The IJ concluded that Bala did not present evidence "to show that he would be otherwise harmed by the authorities." (JA 59).

The IJ noted that the State Department's 1999 Country Report for Albania contained "allegations by members of the democratic party that some of their members have been murdered." (JA 59). The IJ found, however, that Bala failed to "establish that this is widespread" or that "[Bala] himself would be targeted." (JA 59).

In addition, the IJ found that a significant motivation in this case was that Bala wanted to come to the United States "to improve his life." (JA 59). The IJ ruled that living in a state of privation does not give rise to a well-founded fear of future persecution. (JA 59-60).

In conclusion, the IJ held that Bala failed to establish his eligibility for asylum or for withholding of removal. (JA 60). Likewise, the IJ held that Bala "has not established enough evidence to show that the Government of Albania would be inclined to torture him" and, as such, denied Bala's request for relief under the CAT. (JA 47, 60). The IJ granted Bala's request for voluntary departure until March 27, 2001. (JA 47, 60).

D. The BIA's Decision

On December 13, 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).[3] (JA 1-2). This petition for review followed.

SUMMARY OF ARGUMENT

1. Substantial evidence supports the IJ's determination that the petitioner failed to provide sufficient evidence for his asylum claim. First, Bala failed to provide probative evidence establishing that he was persecuted by the former Communist government after his families' internment in the 1950s. Second, even if Bala had established such

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

persecution (and he plainly did not), the government fully rebutted any presumption that the petitioner has a well-founded fear of future persecution since the Communist regime fell in 1990. Third, Bala did not experience past persecution in Albania after the Socialist party assumed power in 1997. The alleged employment discrimination and the threats Bala allegedly received failed to rise to the level necessary to constitute "persecution," and Bala failed to establish that the current Albanian government was unable or unwilling to control the alleged "persecution." Fourth, Bala did not demonstrate a well-founded fear of future persecution in Albania. More specifically, Bala's allegations failed to establish an objectively reasonable fear that the current Albanian government would persecute Bala based upon his past activities in support of the Democratic Party.

2. The petitioner failed to preserve a claim for relief under the Convention Against Torture. His notice of appeal to the BIA challenged the immigration judge's decision only with respect to asylum and withholding of deportation. Moreover, there was absolutely no mention made of the CAT or any claim of torture in the petitioner's brief to the BIA. Because the petitioner failed to administratively exhaust his claim, this Court lacks jurisdiction to consider it. In any event, even if such a claim had been properly preserved, there is no evidence in the record to support such a claim.

3. Summary affirmance by the BIA was appropriate under the applicable regulations, and the immigration judge's oral decision contains sufficient reasoning and

evidence to enable this Court to determine that it was issued only after consideration of the requisite factors.

ARGUMENT

I. THE IMMIGRATION JUDGE PROPERLY DETERMINED THAT BALA FAILED TO ESTABLISH ELIGIBILITY FOR ASYLUM OR WITHHOLDING OF REMOVAL

A. Relevant Facts

The relevant facts are set forth in the Statement of the 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)

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

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

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 "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).

If past persecution is established, 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). 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 or the presumption relating to future persecution is rebutted, the applicant may nonetheless become 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." *Chen v. INS*, 344 F.3d 272, 275 (2d Cir. 2003); *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. 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) (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); *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; *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[5] that an alien has failed to satisfy his burden of proof, Congress has

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[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 (JA 1-2), the BIA adopts that decision. *See* 8 C.F.R. § 1003.1(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.

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. 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).

The scope of this Court's review under that test is "exceedingly narrow." *Zhang v. INS*, 386 F.3d at 71; *Chen*, 344 F.3d at 275; *Melgar de Torres*, 191 F.3d at 313. *See also Zhang v. INS*, 2004 WL 2223319, at *6 ("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

C. Discussion

Substantial evidence supports the IJ's determination that Bala failed to establish eligibility for asylum and withholding of removal. As the IJ found, there was a fundamental change in circumstances in Albania that rebuts any finding of past persecution under the former Communist government. (JA 57). Moreover, Bala failed to establish that he has a well-founded fear of future persecution under the current Albanian government if he were to return to Albania. (JA 59-60).

Nevertheless, Bala argues in this appeal that "the Immigration Judge erred by failing to find that the events following [Bala's] release from the internment camp . . . constituted past persecution"; that "by failing to find [such] past persecution, [Bala] was denied the benefit of the [legal] presumption" of a well-founded fear of future persecution; and that the IJ "erred in finding that [Bala] did not have a well-founded fear of future persecution, were he to return to Albania." *See* Pet. Br. at 8, 9 and 13.

As discussed in detail below, Bala's arguments are not supported by the record. In short, Bala has not demonstrated, as he must, that a reasonable factfinder

would be compelled to conclude that Bala is entitled to asylum or withholding of removal.

1. The Evidence Does Not Compel A Finding That Bala Suffered Past Persecution By The Communist Regime After His 1959 Release From The Internment Camp

As established, *supra*, courts have construed the term "persecution" to mean the "'punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate.'" *Mitev*, 67 F.3d at 1330 (quoting *De Souza*, 999 F.2d at 1158). "[P]ersecution is an extreme concept," *Ghaly*, 58 F.3d at 1431, and while the conduct complained of need not be life-threatening, it nonetheless "must rise above unpleasantness, harassment, and even basic suffering." *Nelson*, 232 F.3d at 263.

In the instant case, there is absolutely no evidence establishing that the petitioner suffered persecution at the hands of the Communist government (or any other government official) after his family's internment in the 1950s. As discussed *supra*, Bala's Application did not identify a single instance in which he was accused, charged, detained, interrogated or imprisoned by the Albanian authorities after 1959. (JA 252-262). In addition, Bala's Application did not discuss -- or even reference -- any instances in which Bala was beaten or physically abused by anyone, let alone by the Albanian authorities; nor does it identify any instances in which

Bala was threatened, with physical harm or otherwise. (JA 252-262).

Likewise, the testimony and evidence submitted by Bala at the January 26, 2001, hearing did not show that Bala was persecuted after 1959. Bala alleged, in a conclusory manner, that his family was mistreated by the authorities, they were shunned and ostracized by the community, and he was discriminated against at school and in the army. (JA 75-78). This does not come close to establishing the "extreme concept" of persecution. *See Ghaly*, 58 F.3d at 1431. Additionally, Bala's admissions that he was allowed to travel, attend school and join the army, and that he worked for a state company for fifteen years under the Communist regime, further undermined any claim of persecution.

Moreover, Bala did not submit any evidence that he was ever threatened, harmed or abused, by government officials or anyone else, during the Communist regime. Indeed, Bala admitted that he was never arrested, beaten or threatened by the authorities prior to 1990. (JA 79). Further, the 1990 demonstration in which Bala helped "knock[] down the statute of dictatorship" (JA 79) adds little to his claim. First, Bala does not provide, as he must, details and specifics regarding any alleged abuse by the authorities. (JA 79). Second, Bala did not even mention this incident in his Application. (JA 252-262). Third, by his own account, Bala was part of an extremely large crowd, and implicit in his testimony is that the crowd was disobedient and combative. (JA 79) Fourth, Bala described this incident as "a winning situation because we knocked down the dictatorship" (JA 79) -- this is a far cry

from an incident that would give rise to a claim of persecution.

In sum, Bala has not established that a reasonable fact finder would be compelled to find that Bala was persecuted by the Communist regime (or as discussed *infra*, by any other government) after 1959.

2. The Record Does Not Compel The Conclusion That The Government Failed To Rebut Any Presumption That Bala Has A Well-Founded Fear Of Future Persecution By The Communist Regime

As discussed *supra*, if an applicant establishes that he or she suffered past persecution, a presumption arises that he or she has a well-founded fear of future persecution and the government bears the burden of rebutting the presumption by a preponderance of the evidence. *See* 8 C.F.R. § 1208.13(b)(1)(i) (2003). The government may do so by establishing that "[t]here has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution . . . on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 C.F.R. § 1208.13(b)(1)(i).

In this case, the IJ determined that Bala's internment in the 1950s constituted past persecution. (JA 56-57). The IJ reasonably found, however, that the government had successfully rebutted the presumption that Bala had a well-founded fear of future persecution on this basis. (JA

57). More specifically, the IJ found that changed country conditions in Albania, including the fall of the Communist government, represented a fundamental change in circumstances such that Bala no longer had a well-founded fear of persecution on the basis of his anti-Communist political opinion. (JA 57).

This conclusion is supported by Bala's own testimony. Bala admitted that the Communist government was overthrown in the early 1990s. (JA 78-79). In fact, as discussed *supra*, Bala testified that he participated in a two-day demonstration in 1990 during which he and others knocked down the statute of Enver Hoxha, the former leader of the Communist regime. (JA 79). According to Bala, the demonstration "was a winning situation because we knocked down the [Communist] dictatorship." (JA 79).

The articles and reports submitted by Bala also support the IJ's conclusion regarding the changed conditions in Albania. The State Department's Country Reports[6] for Albania, for example, state that the "Law on Fundamental Human Rights and Freedoms" provides for "freedom of speech," "the right of association" and "the right of peaceful assembly" and "the [Albanian] Government generally respect[s] these rights." (JA 160-162, 203-204).

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[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)).

In addition, while the Country Reports note that there were allegations of politically motivated arrests, abuse and murders, the State Department reports that: "[t]here were no confirmed cases of political killings by the Government"; "[t]here were no confirmed reports of politically motivated disappearances"; and "[t]here were no clear cases of detainees being held [by police] for strictly political reasons." (JA 154, 155 and 157).

Likewise, the Human Rights in Post-Communist Albania article submitted by Bala states that "Albania has made substantial progress toward respect for civil and political rights." (JA 180). In fact, the article reports that "[t]he government has undertaken an ambitious effort to prosecute former communist officials who committed crimes during the previous regime." (JA 181).

The IJ's determination is further supported by a recent decision by the Court of Appeals for the Eighth Circuit in *Hasalla v. Ashcroft*, 367 F.3d 799 (8th Cir. 2004). In that case, the Eighth Circuit denied an Albanian couple's petition for review of the BIA's and the immigration judge's order denying their application for asylum. *Id.* at 805. The immigration judge found that although the petitioner's imprisonment by the Communist government from 1982 to 1986 constituted past persecution, "conditions in Albania have changed so that [the petitioner] no longer has a well founded fear of persecution" on the basis of his pro-Democratic activities. *Id.* at 804. The court noted that the immigration judge's conclusion is supported by the State Department's 1997 Country Report for Albania, "which states that 'there is no post-Communist tradition of retribution against political

leaders and few instances thereof.'" *Id.* (quoting the Department of State's 1997 Country Report on Human Rights in Albania).

Given this substantial evidence, a reasonable fact finder would not be compelled to reverse the IJ's conclusion that the government fully rebutted any presumption that Bala had a well-founded fear of future persecution based on his anti-Communist political activities.

3. Bala Has Not Shown That The Evidence Is So Compelling That A Reasonable Factfinder Would Have To Conclude That Bala Suffered Past Persecution By The Socialist Party

Bala alleges that he suffered persecution after the Socialist Party assumed power in 1997 as a result of harassing telephone calls and letters, his dismissal from his job and the clash between protestors and police following the funeral of Azem Hajdari, the former leader of the Democratic Party. This evidence does not, however, rise to a level necessary to establish "persecution."

It is well established that vague or unfulfilled threats generally do not constitute persecution. *See Lim v. INS*, 224 F.3d 929, 936 (9th Cir. 2000) (mere unfulfilled threats without harm or suffering do not constitute past persecution); *Roman v. INS*, 233 F.3d 1027, 1034 (7th Cir. 2000) (surveillance, threats and harassment prior to overthrow of Romanian government did not amount to persecution); *Nelson v. INS*, 232 F.3d 258, 264 (1st Cir.

2000) ("harassment and annoyance," including three episodes of solitary confinement of less than 72 hours, each accompanied by physical abuse and regular harassment in the form of periodic surveillance, threatening phone calls, occasional stops and searches, and visits to alien's workplace are not persecution); *Rucu-Roberti v. INS*, 177 F.3d 669 (8th Cir. 1999) (per curiam) (vague testimony regarding threats made by guerrillas in Guatemala was insufficient to show past persecution, even where the alien testified that those threats were accompanied by violence). In *Lim*, for example, the Ninth Circuit explained that "[t]hreats standing alone . . . constitute past persecution in only a small category of cases, and only when the threats are so menacing as to cause significant actual 'suffering or harm.'" 224 F.3d at 936 (quoting *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997)).

In the instant case, the harassing telephone calls and letters are, at best, unfulfilled threats and certainly did not cause "significant actual suffering or harm." Bala's evidence regarding these alleged "threats" was limited to the testimony of Bala and his family, which vaguely described the harassing telephone calls and letters. Bala testified, for example, that the telephone calls were "offending," "used bad words" and told Bala to quit the Democratic Party. (JA 88, 109). Bala did not provide any testimony or evidence that he was ever threatened with violence, physical harm or death. Moreover, even though Bala did not quit the Democratic Party or otherwise comply with the callers' demands for money, there is no evidence that any threat was ever carried out. As such, these alleged "threats" do not constitute persecution. *See*

Lim, 224 F.3d at 929; *Meghani*, 236 F.3d at 843; *Roman*, 233 F.3d at 1027; *Nelson*, 232 F.3d at 258; *Rucu-Roberti*, 177 F.3d at 669.

In addition, although the IJ did not address this subject, a significant fact in the record triggers an additional proof burden that the petitioner failed to meet. Bala failed to establish that these alleged "threats" were by the government or an entity the government was unable or unwilling to control. Inherent in the meaning of "persecution" is the requirement that the harm experienced or feared must be inflicted by the government or by persons or groups that the government is unable or unwilling to control. *See Meghani v. INS*, 236 F.3d 843, 847 (7th Cir. 2001); *Matter of Villalta*, 20 I & N Dec. 142, 147 (BIA 1990); *Matter of Acosta*, 19 I & N Dec. 211, 222 (BIA 1985).

Bala failed to attempt, much less successfully make, any such showing. Bala failed to establish that the threats he allegedly received were by the Albanian government or persons that the government is unable or unwilling to control. Indeed, Bala testified that he did not know who was sending the letters or making the harassing telephone calls. (JA 89). Further, Bala admitted that he never complained to the police regarding the harassment because he "believe[d] it was the same people." (JA 89) This is simply not sufficient. It fails to compel a determination that the Albanian government was unable or unwilling to control the individuals who "threatened" Bala and his family.

Likewise, Bala failed to establish that he was laid off due to his political activities or that his dismissal was perpetrated or authorized by the Albanian government. In any event, even accepting as true the petitioner's unsubstantiated belief that he was laid off based on his political beliefs, this does not add much if anything to establishing the "extreme concept" of persecution.

Bala also alleged that he was mistreated by authorities in connection with the demonstration following the funeral of Azem Hajdari. Importantly, as discussed *supra*, Bala's Application did not discuss -- or even reference -- any instances in which Bala was beaten or physically abused by anyone, let alone by the Albanian authorities; nor does it identify any instances in which Bala was threatened, with physical harm or otherwise. (JA 252-262). In addition, in his testimony, Bala failed to provide any details regarding this incident. (JA 92). He did not, for example, provide any information indicating that he was in fact beaten or physically harmed by authorities. (JA 92). Moreover, Bala himself acknowledges that the protestors charged "against the communist system" and were fighting with the police. (JA 92). This is supported by the Human Rights Watch's 1999 Human Rights Developments report regarding Albania submitted by Bala, which states that "Hajdari's funeral procession turned into a[] violent attack on the prime minster's office by armed [Democratic Party] supporters." (JA 173). Indeed, Bala admitted that the police told him "what you are doing now is against the law" and warned "if you continue to do that you're going to be punished by the law because what you are doing is against the law." (JA 92). Given this backdrop, Bala's vague testimony that the

police "brought us in a big room somewhere . . where they start beating us" (JA 92) does not support a claim of persecution.

Finally, the fact that Bala and his wife had no problems obtaining passports and visas to travel to the United States further undercuts any claim that Bala was persecuted by the Albanian government. Bala admitted, for example, that he had no problem traveling from Albania to Macedonia to get a visa to visit the United States. (JA 103). Moreover, Bala admitted that he and his wife got their passports "through some friends that we knew in government." (JA 103).

4. The Evidence Does Not Compel A Finding That Bala Demonstrated A Well-Founded Fear Of Future Persecution From The Current Albanian Government

If the government rebuts the presumption of a well-founded fear of persecution in relation to the source of past persecution, the burden then shifts to the petitioner to demonstrate a well-founded fear as to a different source. *See* 8 C.F.R. § 208.13(b)(1) (2003). In this regard, the IJ appropriately found that Bala failed to demonstrate a well-founded fear of persecution from the current (albeit in 2001) government in Albania.

As a preliminary matter, all of the arguments set forth in Section I.C.3. above establishing that Bala was not persecuted by the Socialist Party also support the IJ's determination that Bala does not have a well-founded fear

of future persecution by the Socialist-controlled government were he to return to Albania.

In addition, the IJ's finding is supported by the State Department's Country Reports for Albania. As the Eighth Circuit recognized, the State Department, in 1998, reported that "'[t]he settling of accounts persists but individuals are rarely targeted for mistreatment on political grounds.'" *Hasalla*, 367 F.3d at 804 (quoting Addendum to 1998 Country Report). In fact, the Eighth Circuit found that "[t]here is nothing in the State Department reports that indicate[s] that the Socialist Party routinely arrests, jails, or persecutes members of the Democratic Party." *Id.*

The State Department did report several arrests in 1998 of top Democratic Party leaders. The State Department noted, however, that "[t]here were no clear cases of detainees being held for strictly political reasons." (JA 157) In any event, there is no evidence that Bala held a high profile position in the Democratic Party or that he would otherwise be targeted for persecution. (JA 81). To the contrary, Bala was only a chairman of his neighborhood branch. (JA 81). Additionally, Bala's wife testified that no one in their family ever held a position in the Democratic Party government. (JA 138).

As the State Department reported, there is a high level of crime in Albania and, in fact, there are parts of Albania that "remain[] outside effective government control." (JA 191-192) "[O]rdinary criminal activity, [however], does not rise to the level of persecution necessary to establish eligibility for asylum." *Abdille v. Ashcroft*, 242 F.3d 477, 494 (3rd Cir. 2001).

Finally, the fact that Bala's relatives still reside in Albania (*i.e.,* the petitioner's son, his mother or mother-in-law and his wife's brother and two sisters) and there is no evidence that they have been subjected to persecution also demonstrates that Bala does not have a well-founded fear of persecution. *Romilus v. Ashcroft,* 385 F.3d 1, 8 (1st Cir. 2004) (where petitioner testified that his parents still lived in Haiti and they suffered no harm since he left, the BIA reasonably concluded that petitioner could return to Haiti without facing future persecution); *Aguilar-Solis v. INS*, 168 F.3d 565, 573 (1st Cir. 1999) ("[T]he fact that close relatives continue to live peacefully in the alien's homeland undercuts the alien's claim that persecution awaits his return."); *Melgar de Torres,* 191 F.3d at 313 (finding that the evidence that applicant's own mother and daughters continued to live in El Salvador after the applicant emigrated without harm cut against the argument that applicant had a well-founded fear of persecution).

For all the foregoing reasons, the record provides substantial evidentiary support for the IJ's finding that the petitioner failed to carry his burden of demonstrating a well-founded fear of persecution, and hence failed to establish his eligibility for asylum. Moreover, because the proof burden for seeking withholding of removal is greater than the burden for establishing eligibility for asylum, failure to establish the latter will *per se* preclude the former. Accordingly, for all the same reasons, the record supports the IJ's finding that the petitioner failed to establish a basis for withholding of removal.

II. THIS COURT LACKS JURISDICTION OVER THE PETITIONER'S CONVENTION AGAINST TORTURE CLAIM, BECAUSE HE FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES; IN THE ALTERNATIVE, THE IMMIGRATION JUDGE PROPERLY DETERMINED THAT THE PETITIONER FAILED TO ESTABLISH ELIGIBILITY FOR RELIEF UNDER THE CONVENTION AGAINST TORTURE

A. Relevant Facts

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

B. Governing Law and Standard of Review

1. Witholding of Removal Under the Convention Against Torture

Article 3 of the Convention Against Torture precludes the United States from returning 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-*, Interim Dec. 3464, 23 I. & N. Dec. 270, 279, 283, 285, 2002 WL 358818 (BIA Mar. 5, 2002); 8 C.F.R. §§ 208.16(c), 208.17(a), 208.18(a) (2004).

To establish eligibility for relief under the Convention Against Torture, an 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.

The Convention Against Torture 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 (quoting 8 C.F.R. § 208.18(a)(1)).

Because "[t]orture is an extreme form of cruel and inhuman treatment," even cruel and inhuman behavior by officials may not warrant Convention Against Torture 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 Convention Against Torture, an alien's removal may be either permanently withheld or temporarily deferred. *See* 8 C.F.R. §§ 208.16-17 (2004).

2. Standard of Review

This Court reviews the determination of whether an alien is eligible for protection under the Convention Against Torture under the "substantial evidence" standard. *See Saleh v. U.S. Dep't of Justice*, 962 F.2d 234, 238 (2d Cir. 1992); *Ali*, 237 F.3d at 596; *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 353-54 (5th Cir. 2002).

C. Discussion

The petitioner waived his claim under the Convention Against Torture by not including it in the Notice of Appeal to the BIA, which only sought review of the IJ's denial of the asylum and withholding of removal applications. (JA 43). Moreover, there was absolutely no reference made to the Convention Against Torture in the petitioner's brief to the BIA. (JA 3-26). The petitioner's brief was entirely devoid of any judicial decisions regarding claims of torture or any testimony in the record relating to a claim of torture, let alone any argument that the petitioner is entitled to relief under the CAT. (JA 3-26).

The 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, the petitioner's CAT claim before this Court is fatally deficient in that the petitioner fails to identify any specific testimony in the record relating to a claim of torture and fails to indicate how the Albanian government or any government official was, or would be, involved in any such torture. *Wang,* 320 F.3d at 133-34, 143-44 & n.20*; Ali,* 237 F.3d at 597. Indeed, there was absolutely no reference made to the Convention Against Torture during the hearing, and in fact the word torture never appears in the hearing transcript. (JA 64-148).

Furthermore, the petitioner's claim under the Convention Against Torture is meritless because

substantial evidence supports the IJ's determination that the petitioner failed to provide any testimony in support of his application for protection under the CAT. More specifically, there was no showing that the Albanian government or a government official would physically or mentally abuse the petitioner. (JA 60).

A CAT claim is considered independently of an asylum claim and focuses solely on the likelihood that the alien will be tortured if returned to his or her home country, regardless of the alien's subjective fears of persecution or his or her past experiences. Nevertheless, to prevail on a CAT claim the alien must proffer "objective evidence that he or she is likely to be tortured in the future." *Ramsameachire v. Ashcroft*, 357 F.3d 169, 185 (2d. Cir. 2004). The petitioner failed to do this. No objective evidence of torture was presented at the hearing -- certainly none that would be 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." 8 C.F.R. § 208.18(a)(1) (2004). Accordingly, the IJ's ruling should be affirmed.

III. THE SUMMARY AFFIRMANCE BY THE BIA WAS APPROPRIATE AND IN ACCORDANCE WITH THE REGULATIONS

A. Relevant Facts

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

B. Governing Law and Standard of Review

The procedure by which a single member of the BIA summarily affirms the IJ's decision is reviewed for abuse of discretion. *See Shi v. Board of Immigration Appeals*, 374 F.3d 64, 66 (2d Cir. 2004) (per curiam).

C. Discussion

This Court has clearly held in several recent cases that the streamlining regulations issued by the former Immigration and Naturalization Service (now the U.S. Citizenship and Immigration Services) expressly authorize summary affirmance by a single member of the BIA, citing 8 C.F.R. § 3.1(a)(7) (2002) (re-codified at 8 C.F.R. § 1003.1(a)(7) (2004)). *Shi*, 374 F.3d at 66; *see also Zhang*, 362 F.3d at 158 ("Because the BIA streamlining regulations expressly provide for the summarily affirmed IJ decision to become the final agency order subject to judicial review, we are satisfied that the regulations do not compromise the proper exercise of our [8 U.S.C.] § 1252 jurisdiction.") (footnote omitted). This practice of the BIA was upheld even prior to promulgation of these regulations, provided "'the immigration judge's decision below contains sufficient reasoning and evidence to enable [the Court] to determine that the requisite factors were considered,'" *Shi*, 374 F.3d at 66 (quoting *Arango-Aradondo v. INS*, 13 F.3d 610, 613 (2d Cir. 1994)). Just as in *Shi* and *Zhang*, the IJ's decision in this case clearly meets this standard.

The Oral Decision of the IJ recites in considerable detail the testimony of each witness and discusses the

State Department's 1999 Country Report for Albania as well as other reports and articles submitted by the petitioner in support of his application. (JA 49-54). In addition, the Oral Decision includes sections analyzing the applicable law, the petitioner's credibility and the petitioner's requests for asylum, withholding of removal, relief under the CAT or, in the alternative, voluntary departure. (JA 54-61).

In the petitioner's brief, there is virtually no analysis of why the summary affirmance is claimed to be inappropriate. *See* Pet. Br. at 19. The petitioner has not demonstrated, for example, that the IJ decision ignored a controlling BIA or federal court precedent. 8 C.F.R. § 1003.1(a)(7)(ii)(A) (2004). Likewise, nothing in the petitioner's submission to the BIA (JA 3-26) indicated that any purpose would have been served by issuing a separate opinion affirming the IJ's decision. In purely conclusory fashion, the petitioner now states that the IJ made his decision in complete disregard of the evidence in the record and that such errors substantially affected the outcome of the case. *See* Pet. Br. at 19. This is simply not enough. The BIA acted well within its discretion in adopting the IJ's decision as the "final agency determination" in adjudicating the petitioner's appeal (JA 1-2), and the IJ's decision provides an ample basis for review by this Court.

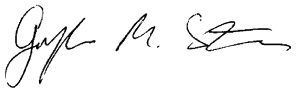
CONCLUSION

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

Dated: January 12, 2005

Respectfully submitted,

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

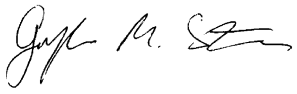


GEOFFREY M. STONE
ASSISTANT U.S. ATTORNEY

William J. Nardini
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 11,657 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.



GEOFFREY M. STONE
ASSISTANT U.S. ATTORNEY

Addendum

8 U.S.C. § 1101(a)(42) (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. § 1158(a)(1), (b)(1) (2004). Asylum.

(a) Authority to apply for asylum

(1) In general

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and

including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

. . . .

(b) Conditions for granting asylum

(1) In general

The Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Attorney General under this section if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

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), (d)(1) (2004). Judicial review of orders of removal.

(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:

. . . .

(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.

. . . .

(d) Review of final orders

A court may review a final order of removal only if--

> (1) the alien has exhausted all administrative remedies available to the alien as of right . . . .

8 C.F.R. § 3.1(a)(7) (2002)

(7) Affirmance without opinion.

> (i) The Chairman may designate, from time-to-time, permanent Board Members who are authorized, acting alone, to affirm decisions of Immigration Judges and the Service without opinion. The Chairman may designate certain categories of cases as suitable for review pursuant to this paragraph.
>
> (ii) The single Board Member to whom a case is assigned may affirm the decision of the Service or the Immigration Judge, without opinion, if the Board Member determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that
>
> > (A) the issue on appeal is squarely controlled by existing Board or federal court precedent and does not involve the application of precedent to a novel fact situation; or

(B) the factual and legal questions raised on appeal are so insubstantial that three-Member review is not warranted.

(iii) If the Board Member determines that the decision should be affirmed without opinion, the Board shall issue an order that reads as follows: "The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. See 8 CFR 3.1(a)(7)." An order affirming without opinion, issued under authority of this provision, shall not include further explanation or reasoning. Such an order approves the result reached in the decision below; it does not necessarily imply approval of all of the reasoning of that decision, but does signify the Board's conclusion that any errors in the decision of the Immigration Judge or the Service were harmless or nonmaterial.

(iv) If the Board Member determines that the decision is not appropriate for affirmance without opinion, the case will be assigned to a three-Member panel for review and decision. The panel to which the case is assigned also has the authority to determine that a case should be affirmed without opinion.

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).

. . . .