

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4984
Summary Calendar

DARYOUSH ARBABIAN,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the
Immigration and Naturalization Service
A27 231 984

June 4, 1993

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

EDITH H. JONES, Circuit Judge:*

The petitioner, an Iranian national, appeals an order of deportation issued pursuant to the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1251(a)(11) (1988), because he entered the United States without inspection. We affirm the order.

Mr. Arbabian was conscripted into the Iranian military in 1983. After three months of military training, he was sent to the

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Kurdish front in the ongoing Iran-Iraq war. Because he did not wish to kill his Kurdish "brothers", Arbabian deserted after a week at the front.

The petitioner managed to secure a passport in his own name and, through a bribe arranged by his father, a certificate indicating he had completed his duty in the military. He then went to Turkey, where he lived for a year. When his Turkish visa expired, Arbabian travelled to Mexico, where, for \$1,000, he managed to have himself smuggled into the United States through Juarez.

The Immigration and Naturalization Service charged Arbabian with deportability on April 2, 1987. The petitioner conceded deportability on August 5, 1987, but sought asylum and withholding of deportation. At the hearing before the Immigration Judge the petitioner was represented by C.V. Catuogno, of Catholic Services for Immigrants. Arbabian testified that, in violation of his moral scruples, he was forced to fight against the Kurds. He averred that he opposed the government of Iran because "they don't care about people, they kill them for their own benefits to stay in power." He further testified that the authorities approached his family in Iran to investigate his desertion, but that they have not investigated further.

The Immigration Judge found Arbabian deportable by clear and convincing evidence, and denied his request for asylum and withholding of deportation. The petitioner next took his case to the Board of Immigration Appeals (BIA), which denied his motion to

remand and reopen the proceedings on the grounds of inadequate assistance of counsel. Now he comes to us.

We review factual determinations of an alien's eligibility for asylum and withholding of deportation for substantial evidence. INS v. Elias-Zacarias, ___ U.S. ___, ___, 112 S. Ct. 812, 815 (1992). This is a deferential standard. Id. at 817.

We first address Arbabian's claim that he should have been given asylum in this country. Asylum may be given to a "refugee" who has a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 243(h).¹ Prosecution for failure to perform compulsory military service is not persecution, unless 1) the petitioner would be subjected to disproportionately severe punishment on account of political views or 2) the service would have compelled the petitioner to perform inhumane acts outside the ordinary course of war. Alonzo v. INS, 915 F.2d 546, 548 (9th Cir. 1990); Barraza Rivera v. INS, 913 F.2d 1443, 1451 (9th Cir. 1990).

At his hearing, the petitioner did not present any evidence to satisfy either exception to the ordinary rule that punishment for resistance to compulsory military service is not persecution. There is no evidence that he would be punished disproportionately for desertion. There is also no evidence that

¹ Withholding of deportation may be granted only if there is a clear probability of persecution. INS v. Stevic, 467 U.S. 407, 430 (1984). Since this standard is more demanding, we analyze only the asylum question.

he was or would be required to participate in any atrocities against Kurdish civilians. The record is devoid of any evidence that Iranian authorities even knew of his political opposition to the government much less that they are waiting to persecute him for it.

Arbabian next claims that he was denied the effective assistance of counsel at his hearing because his attorney failed to develop an adequate record to support his claim for asylum. In a deportation proceeding, this claim will succeed only where the ineffective counsel establishes a due process violation. Paul v. INS, 521 F.2d 194 (5th Cir. 1975). The BIA fully considered the evidence the petitioner presented. None of the "new" evidence the petitioner seeks to have considered establishes persecution. Arbabian was not prejudiced by ineffective counsel before the BIA.

The decision of the Board of Immigration Appeals is AFFIRMED.