UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-40027
Summary Calendar

RALI RALEV,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the Immigration and Naturalization Service
(A71 778 230)

(October 25, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Petitioner Rali Valkov Ralev (Ralev) appeals the order of the Board of Immigration Appeals (the Board) affirming the ruling of the Immigration Judge that he is not eligible for either asylum or withholding of deportation as provided for by 8 U.S.C. §§ 1158(a)

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[*] 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

and 1253(h), respectively. Substantial evidence supports the Board's determination, and we affirm.

Facts and Proceedings Below

Ralev is a native of Bulgaria,[1] a country that for many years was ruled by a Communist government. From 1975 until his expulsion in 1989, Ralev participated in various incidents of political dissidence. In 1975, while still in high school, Ralev joined a small "literature group" organized by a teacher. The group was formed to combat government propaganda denigrating Western youth as lazy and drug addicted. Ralev was arrested for his participation. After being held for one month, during which he was beaten and kept incommunicado, Ralev was convicted of "breaking the national order." The penalty for this crime was a one year suspended sentence, three years' probation, and a required term of service in the Bulgarian navy.

Ralev was again arrested in August 1977, this time by military police, for lighting a candle in church. He was held for fifteen days without a hearing, then sentenced to one month's additional military service for violating regulations prohibiting religious activity by military personnel. He was discharged from the navy in November 1978.

In September 1982, Ralev was fired from his government job for

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[1] In the proceedings before the Immigration Judge, Ralev contended that his expulsion from Bulgaria rendered him "stateless." Based on amendments to the Bulgarian constitution, which provides that persons born in Bulgaria cannot be deprived of their citizenship, the Immigration Judge decided that Ralev was a citizen of Bulgaria. Ralev does not contest that finding here.

failing to attend a celebration of a Communist holiday. In August 1986, he was fined an amount almost equal to one year's salary for speaking out against Communism at a political meeting.

The final incident occurred in July 1989. A year earlier, Ralev had organized a dissident group called Glasnost, which held clandestine meetings to discuss political movements in the Eastern Bloc countries. Glasnost came to the attention of authorities when it agreed to participate in political demonstrations with Bulgaria's Turkish minority to protest human rights abuses. The July 1989 demonstration was overtaken by the country's militia, and Ralev was beaten unconscious. Held in prison without being charged, he was isolated, interrogated, denied medical attention, and given just enough food to survive. After thirty days, he was handed a passport and told to leave the country within forty-eight hours. He emigrated to Austria and lived there until his work permit expired in August 1991.[2]

He then travelled to Mexico and subsequently crossed the border at Brownsville, Texas, without being inspected by an immigration officer as required by 8 U.S.C. § 1251(a)(2). The Immigration and Naturalization Service (INS) instituted proceedings

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[2] Attendant on his claim before the Immigration Judge that he was stateless, Ralev attempted to show why he should not be deported to the country of his last habitual residence, i.e., Austria. Ralev testified that he was discriminated against in employment, provided substandard housing, and subjected to the general hatred of Bulgarians in Austria. The Immigration Judge determined that, if he were stateless, Ralev would not be entitled to asylum or withholding of deportation because he had neither been subject to persecution in Austria nor had a reasonable and well-founded fear of future persecution there. As noted above, *see supra* note 1, Ralev does not contest the Immigration Judge's findings on this issue.

against Ralev that same day by ordering him to show cause why he should not be deported. Ralev submitted an application for asylum on December 5, 1991.

An asylum hearing was held on February 14, 1992. Both parties submitted documentary evidence, compiled by government agencies and recognized human rights organizations, describing the current political climate in Bulgaria. In addition, Ralev testified in his own behalf concerning his past persecution at the hands of the Bulgarian government and his fear of further persecution if he were required to return. To further substantiate his claim, he offered two letters translated into English, one from his father dated September 9, 1991, and one from a friend dated December 10, 1991. Both letters state that the changes in Bulgaria have only been cosmetic, that hard-line Communists remain in power at the local level, and that Ralev's life would be in danger were he to return.

The Immigration Judge, in her August 6, 1992 decision, found that Ralev was a citizen of Bulgaria and that he was deportable. She determined that Ralev had been persecuted in Bulgaria because of his political views.[3] Having reviewed all the evidence, however, she concluded that changes in Bulgaria since the overthrow of the Communist regime were such that Ralev did not have a well-founded fear of further persecution were he to return. She therefore held that Ralev had failed to meet his burden of proof

[3] The Immigration Judge determined that Ralev had not been persecuted on the basis of his religion. The 1977 arrest for lighting a candle in church was the only evidence offered to support Ralev's assertion that he was persecuted for his religious convictions.

with respect to asylum; he therefore necessarily failed to qualify for withholding of deportation, which demands a higher evidentiary standard.

Ralev appealed to the Board of Immigration Appeals. The Board, in a decision handed down December 7, 1993, affirmed the Immigration Judge's ruling that Ralev no longer had a well-founded fear of persecution in Bulgaria and was therefore not eligible for asylum or withholding of deportation. The Board also held that Ralev was not eligible for asylum under the rationale of *Matter of Chen*, No. A-26219652, 1989 BIA LEXIS 10 (April 25, 1989). In *Chen*, the Board recognized that, in some instances, past persecution may have been so severe that requiring the applicant to return to the country of origin would be inhumane. When such circumstances exist, the Board may grant asylum even in the absence of a well-founded fear of future persecution. The Board determined, however, that the persecution that Ralev suffered did not rise to the level required by *Chen*.

Ralev now appeals to this Court. He claims that there is no substantial evidence to support the Board's conclusion that conditions have changed in Bulgaria. In particular, he asserts that the evidence, especially the two letters, confirms the continuity of Communist rule at the local level and demonstrates that he has a well-founded fear of further persecution in Bulgaria. In the alternative, he claims that the Board erred in denying him asylum on the basis of humanitarian concerns as set forth in *Chen*. He also contends that it was error for the Board to take administrative notice of a State Department "country conditions"

report.

Discussion

I. Standard of Review

The standard we follow in reviewing the Board's order is a deferential one. We will uphold the Board's factual conclusion that Ralev is not eligible for asylum or for withholding of deportation under the appropriate legal standard if the record as a whole shows that the factual conclusion is supported by substantial evidence. *INS v. Elias Zacarias*, 112 S.Ct. 812, 815 (1992); *Zamora-Morel v. INS*, 905 F.2d 833, 838 (5th Cir. 1990). This means that if the Board's conclusion is substantially reasonable, based on the evidence presented, we must affirm. *Rojas v. INS*, 937 F.2d 186, 189 (5th Cir. 1991). "[T]o obtain judicial reversal of the [Board's] determination, [the applicant] must show that the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution." *Elias Zacarias*, 112 S.Ct. at 817.

Even when the applicant has shown that he has a well-founded fear of persecution in the nation of origin and is therefore eligible for asylum, the ultimate decision to grant or deny the application rests in the sound discretion of the Attorney General; exercise of that discretion will be upheld "`absent a showing that such action was arbitrary, capricious or an abuse of discretion.'" *Zamora-Morel*, 905 F.2d at 838 (quoting *Young v. INS*, 759 F.2d 450, 455 n.6 (5th Cir.), *cert. denied*, 106 S.Ct. 412 (1985)). Similar discretion does not exist, however, to deny an application for withholding of deportation if a clear probability of persecution is

shown. *Ganjour v. INS*, 796 F.2d 832, 837 (5th Cir. 1986).

II. Asylum

To be eligible for asylum, an applicant must prove that he is a refugee, that is, that he is unable or unwilling to return to his country of origin "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." 8 U.S.C. § 1101(a)(42)(A). The applicant must present specific facts demonstrating that he has been subject to persecution or has reason to fear persecution. *Ganjour*, 796 F.2d at 837. If an applicant establishes that he has been persecuted in the past, there arises a rebuttable presumption that he has a well-founded fear of future persecution; this presumption can be overcome by a showing that conditions in the country of origin have changed to such an extent that the applicant's fear of returning can no longer be considered well-founded. 8 C.F.R. § 208.13(b)(1)(i). A well-founded fear can also be established by showing that a reasonable, objective person in the same circumstances would fear further persecution; there must be a reasonable possibility of persecution. *Rojas*, 937 F.2d at 189; 8 C.F.R. § 208.13(b)(2).

Although the Immigration Judge found that Ralev had been persecuted in the past, she determined that conditions in Bulgaria had changed so substantially that he no longer had a well-founded fear of persecution. The Board agreed with this reading of the record.[4] Ralev claims that this conclusion was not supported by

[4] Alternatively, the Board held that, assuming that Ralev had a well-founded fear of persecution, it would not exercise its

substantial evidence and was therefore error.

The INS presented numerous reports of government agencies and human rights organizations that demonstrated that the political climate in Bulgaria had changed dramatically since Ralev's forced expulsion in 1989. In opposition, Ralev offered evidence suggesting that the changes in Bulgaria have been merely cosmetic. In particular, Ralev points to two letters.[5] One, from his father, dated September 9, 1991, warns that

> "the country is still ruled by neo-communist powers. There are not any changes in the military and police forces of the country and the laws under which they act. I think that if Rali Ralev returns to Bulgaria in the near future, his life may be in danger."

The other, dated December 10, 1991, from a friend, says,

> "The political situation in Bulgaria now is virtually the same as before. The country is governed by hard-line communists, masked as blue democrats. The laws are still the same, as are the judges and local police chiefs. For these reasons, I think that Mr. Ralev's return to Bulgaria may endanger his life."

The Board held that these letters were stale, and we are unable to find this conclusion unreasonable. Since the letters were written, a sea change has taken place in Bulgaria, as the record amply reflects. The democratically elected prime minister is a member of the former opposition party, the first non-Communist, non-Socialist leader in almost half a century. Expatriated Bulgarians are returning in significant numbers and receiving government compensation for lost jobs and property.

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discretion to grant asylum.

[5] He also testified that radio broadcasts and conversations he had with other Bulgarians while in Austria supported the sentiments expressed in the letters.

Political prisoners have been released, and human rights violations prosecuted. The new Bulgarian constitution grants all natural-born persons full citizenship rights and guarantees basic democratic freedoms.[6] In short, regardless of their relevance to Ralev's individual circumstances, these letters could reasonably be considered out-of-date and insufficient to overcome the substantial evidence of changed conditions since his expulsion.

Even if these letters are not out-of-date, however, we cannot say that the Board was bound to find that they tipped the balance of the evidence in Ralev's favor.[7] Ralev contends that they show that the authorities who were responsible for his persecution remain in power at the local level. Therefore, he claims, reports of changes at the national level cannot be substantial evidence sufficient to overcome his well-founded fear of persecution from local authorities.

We do not find this argument persuasive. The letters are fairly general and lacking in detail; they demonstrate no specific threats to Ralev as an individual. Even assuming that the authorities responsible for Ralev's persecution remain in power at

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[6] It is true that the letters post-date the adoption of the Bulgarian constitution in July 1991. We do not find this fact dispositive, however. The letters were written no more than five months after the adoption of the constitution; arguably, it would not be realistic to expect the sweeping changes that the constitution contemplates to have been fully implemented in such a short time.

[7] Ralev alleges error in the Immigration Judge's decision to give the letters no weight. We are not empowered to review the Immigration Judge's decision independently of its impact on the Board's order. *Adebisi v. INS*, 952 F.2d 910, 912 (5th Cir. 1992).

the local level (which we do not believe these letters tend to prove), nothing in the record demonstrates that they feel emboldened to defy the new national government. Although there is some evidence that a certain amount of fear and mistrust persists among Bulgarians, such vestiges of years of repressive rule are not unexpected. That Bulgaria's evolution towards democracy has been difficult and is not yet complete, however, does not compel the inference that there is a reasonable possibility that the types of abuses Ralev suffered before the overthrow of the Communist government would resume were he to return today. We therefore do not find this evidence so compelling that, had it been considered, reversal would have been required. *Elias Zacarias*, 112 S.Ct. at 817.

III. Withholding of Deportation

An application for asylum is automatically considered as a request for withholding of deportation. 8 C.F.R. § 208.3(b). Withholding of deportation is mandatory if a clear probability of persecution is proven. 8 U.S.C. § 1253(h)(1)*; Ganjour*, 796 F.2d at 837. The applicant bears the burden of demonstrating a clear probability of persecution, that is, that "it is more likely than not that the alien would be subject to persecution" on one of the statutory bases if deported. *INS v. Stevic*, 104 S.Ct. 2489, 2498 (1984); *see also Ganjour*, 796 F.2d at 837. This standard is more stringent than its counterpart under asylum law. *Adebisi v. INS*, 952 F.2d 910, 913 (5th Cir. 1992).

Because Ralev failed to satisfy the Board that he was entitled to relief under the more relaxed standard for an application for

asylum, the Board determined that he necessarily failed to meet the higher standard for withholding of deportation. We find no error in this conclusion.

IV. Administrative Notice

Ralev argues that, if there is substantial evidence to support the Board's denial of his application, then its decision to take administrative notice of a 1992 State Department country conditions report deprived him of his right to a fair hearing. We cannot review such a due process claim unless the applicant has made a motion to reopen before the Board. *Rivera-Cruz v. INS*, 948 F.2d 962, 968-69 (5th Cir. 1991).[8] Alternatively, Ralev argues that the Board acted improperly because the facts of which it took notice were not appropriate subjects for administrative notice. We review the taking of administrative notice for abuse of discretion. *Id.* at 967.

It is accepted practice for the Board to take administrative notice of changed conditions in the applicant's country of origin. *Id.* ("`The Board's notice of current events bearing on an applicant's well-founded fear or persecution . . . falls within this accepted category.'") (citation omitted); *see also Matter of Chen* No. A-26219652, 1989 BIA LEXIS at *7 (BIA April 25, 1989) ("[T]he immigration judge or this Board may take administrative notice of changed circumstances in appropriate cases, such as where

[8] An applicant who has not yet been ordered to depart the country may continue to petition the Board to reopen. This Court's determination that notice was properly taken has no res judicata effect on an applicant's motion to reopen. *Rivera-Cruz*, 948 F.2d at 969 n.9.

the government from which the threat of persecution arises has been removed from power."). Here, the Board took notice of a State Department finding that former political exiles were being granted passports and were returning to visit or live in Bulgaria.[9] This is precisely the type of "commonly acknowledged fact" of which the Board may appropriately take notice. *Rivera-Cruz*, 948 F.2d at 967.

We find no abuse of discretion here. The facts noticed find support elsewhere in the record. The report itself is a public, governmental document that was available to Ralev; that earlier country conditions reports were already part of the record supports the inference that Ralev could not have been surprised by the notice taken here. Moreover, Ralev was free both to object to the taking of notice and to offer contrary evidence. As noted above, the appropriate vehicle for such claims is a motion to reopen before the Board. *Rivera-Cruz*, 948 F.2d at 968.

V. Discretionary Asylum on Humanitarian Grounds

Even if an applicant does not have a well-founded fear of persecution, the Board has discretion to grant asylum if "the applicant has demonstrated compelling reasons for being unwilling to return to his country of nationality . . . arising out of the severity of the past persecution." 8 C.F.R. § 208.13(b)(1)(ii).

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[9] There appears to be some confusion as to what facts were specifically noticed. Ralev's argument centers on the Board's statement that basic freedoms were generally respected in Bulgaria in 1992; he claims this is an improper subject for administrative notice. Not only do we disagree with this assessment, we note that a similar statement is included in the 1991 country conditions report that Ralev himself made part of the record, although for the previous year. We cannot find an abuse of discretion in the taking of notice of this statement.

In *Matter of Chen*, the Board recognized that "there may be cases where the favorable exercise of discretion is warranted for humanitarian reasons even if there is little likelihood of future persecution." *Matter of Chen*, 1989 BIA LEXIS 10, at *7. The Board's decision to grant or deny asylum on this basis is discretionary. *Id.* at * 13.

In *Chen*, the applicant had suffered years of torture during China's Cultural Revolution. At the age of eight, the applicant's home was ransacked and he was locked in a room with his grandmother for six months; if he cried, he was kicked, bitten, and deprived of food. Thereafter began a long campaign designed to "reeducate" the applicant. He was exiled repeatedly. After falling asleep in a school lecture, he was pelted with rocks and suffered a serious head injury that required a month of intensive treatment and left him with permanent hearing loss. As the son of a Christian minister, he was subjected to abuse and humiliation; from 1976 until his departure in 1980, he lived in almost total social isolation, a "pariah." He testified that he would kill himself if forced to return to China. *Id.* at *10-*11.

Having reviewed its decision in *Chen*, the Board determined that Ralev's case did not merit a grant of asylum on this basis. Clearly, the Board reserves discretionary grants of asylum on humanitarian grounds for only the most extreme and atrocious instances of persecution. *See Rojas*, 937 F.2d at 188, 189-90 (affirming the Board's denial of discretionary asylum to applicant who was arrested, beaten, and tortured for refusing to serve in the Sandanista militia and subsequently fired from his job and refused

the necessary permit to obtain other employment by the Nicaraguan government). Without minimizing Ralev's suffering, we cannot say that the Board abused its discretion in finding that the persecution he endured did not rise to this level.

Conclusion

Accordingly, the decision of the Board is

AFFIRMED.