

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

MEVLUDI AJDARI, :  
Petitioner, :  
 :  
-vs- : Civ. No. 3:02cv1845(PCD)  
 :  
IMMIGRATION & NATURALIZATION :  
SERVICE and JOHN ASHCROFT, :  
Attorney General of the United States, :  
Respondents. :

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

Petitioner moves pursuant to 28 U.S.C. § 2241 for a writ of habeas corpus claiming the proceedings on his application for asylum violated his due process rights. For the reasons set forth herein, the petition for writ of habeas corpus is denied.

I. BACKGROUND

Petitioner is a citizen of the Republic of Macedonia. As evidenced by his Notice to Appear of December 13, 1997, petitioner entered the United States at Brownsville, Texas without first being admitted or paroled by an Immigration Officer. Petitioner conceded his removability in the proceedings and sought asylum alleging a likelihood of persecution because of his religion and political views and, in the alternative, voluntary departure.

On June 21, 1999, following a hearing at which petitioner was represented by counsel, Louis Rios, the Immigration Judge (“IJ”) denied his application for asylum and granted his motion for voluntary departure.

On June 28, 1999, the IJ reconsidered the ruling *sua sponte* because

it err[ed] in proceeding on [petitioner's] asylum application . . . [i]nasmuch as . . . the [petitioner] had attached a signed Form I-589<sup>1</sup> dated 8-12-98 . . . but that was not formally ever received in court . . . [and because] it held an unrelated merit hearing on June 24, 1999, in the matter of . . . [Feti Ajrulai], . . . [which individual lives at the same house in Connecticut as does the [petitioner], . . . filed the same application for asylum and withholding . . . [and who] stated at his hearing that he knew all of [petitioner's] situation and he agreed to offer his testimony.

Oral Op. of 6/28/99 at 18. The IJ incorporated Ajrulai's case file as an exhibit in petitioner's proceedings, noting that Ajrulai had withdrawn his application for asylum and had accepted voluntary departure. *Id.* at 19. Petitioner's counsel proffered Ajrulai's testimony to directly corroborate the allegations underlying the application for asylum, which proffer was accepted by the IJ without requiring live testimony from Ajrulai. *See* Trans. at 69.

In denying petitioner's application, the IJ found significant the fact that the claims of persecution in both cases lacked specificity and "that . . . [petitioner's] corroborative witness who . . . participated in all the same events that caused the same problems for each voluntarily withdrew his claim . . . [and was] not seeking merely to depart the United States but to return to Macedonia, where his family resides." Oral Op. of 6/28/99 at 19-20. The IJ concluded that petitioner did not meet his burden of proof, adhered to his original ruling and denied the application for asylum. The Board of Immigration Appeals affirmed the decision without opinion.

## II. DISCUSSION

Petitioner argues that a number of alleged improprieties in the course of two hearings on his asylum application violated his due process rights. The Government responds that no violations are

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<sup>1</sup> I-589 is the form number designation for the application for asylum and withholding of deportation. *See* 8 C. F. R. § 208.3.

evident and, assuming *arguendo* that there were violations, petitioner cannot establish that he was prejudiced thereby.

Review of the propriety of immigration proceedings through a petition for writ of habeas corpus is limited to questions of law. *See Liu v. INS*, 293 F.3d 36, 41 (2d Cir. 2002). District courts lack jurisdiction to review discretionary decisions. *Id.*; *Sol v. INS*, 274 F.3d 648, 651 (2d Cir.2001) (“federal jurisdiction over § 2241 petitions does not extend to review of discretionary determinations by the IJ and the BIA”). As such, review of the allegations within the present petition is limited to claimed due process violations and does not extend to scrutiny of the IJ’s exercise of discretion in denying the application for asylum.

The contours of due process associated with asylum proceedings, as in the present case, involve the “protected right to avoid . . . return to a country where the alien will be persecuted . . . [and] warrants a hearing where the likelihood of persecution can be fairly evaluated.” *Augustin v. Sava*, 735 F.2d 32, 37 (2d Cir. 1984). The essence of such a hearing is “a meaningful opportunity to be heard.” *Id.* (internal quotation marks omitted). The relevant question is therefore whether petitioner was “afforded a full and fair hearing as required by the Due Process Clause.” *Michel v. INS*, 206 F.3d 253, 260 (2d Cir. 2000); *Felzcerek v. INS*, 75 F.3d 112, 115 (2d Cir. 1996). The full and fair hearing requirement, or fundamental fairness inquiry, requires that petitioner establish both a deprivation of a constitutional right and prejudice resulting therefrom. *See Rabiou v. INS*, 41 F.3d 879, 882 (2d Cir. 1994).

In his response, petitioner identifies nine alleged improprieties in the course of proceedings on his asylum application violating his due process rights. He argues that his application was decided

based on proceedings on Ajrulai's application,<sup>2</sup> that the reconsideration of his application in the second hearing could not cure prejudice visited on him by defects in the first hearing,<sup>3</sup> that the IJ erroneously indicated that he failed to receive documents and exhibits in support of petitioner's application,<sup>4</sup> that the entire contents of Ajrulai's proceedings were not disclosed to petitioner after the IJ sought to have Ajrulai testify as a corroborating witness,<sup>5</sup> that the IJ referred in his ruling to Ajrulai as a witness when Ajrulai did not in fact testify,<sup>6</sup> that the IJ considered that Ajrulai voluntarily withdrew his application for

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<sup>2</sup> Petitioner argues that his application was decided based on Ajrulai's petition, citing page 18 of the IJ's order, thereby implying that the IJ never considered his petition and mistakenly decided his case based on Ajrulai's application. This argument fails for two reasons. First, the record in no way supports the allegation, as the IJ indicated only that the application was "not properly received in open court." Trans. at 62. Second, Ajrulai's application was identical to petitioner's application, "word for word, comma for comma," *id.* at 65. As such, the mistake would, at best, be a technical defect and harmless error cured by the second hearing and would not itself substantiate a due process violation. It certainly would not constitute the sort of structural error not subject to harmless error analysis, thus not capable of being cured by the second hearing. *See United States v. Feliciano*, 223 F.3d 102, 111 (2d Cir. 2000) (distinguishing structural error not susceptible to harmless error analysis from harmless errors).

<sup>3</sup> Although petitioner argues he was somehow prejudiced by errors in the prior proceeding, he nowhere articulates how he was prejudiced and why the second hearing could not cure perceived violations. *See United States v. Medina*, 236 F.3d 1028, 1032 (9th Cir. 2001) (petitioner "must show plausible grounds of relief which might have been available to him but for the deprivation of rights" (internal quotation marks omitted)).

<sup>4</sup> To the extent petitioner argues that proof in the form of "affidavits and attachments to [petitioner's] application" were not received in the first hearing prior to ruling on the application, such failure was cured in the second hearing. If petitioner instead argues that attachments were lost and never considered by the IJ, petitioner fails to specify the substance of such attachments and how their absence affected the outcome of proceedings on his application as it is his burden to do. *See Rabiou*, 41 F.3d at 882.

<sup>5</sup> It was petitioner's counsel, not the IJ, who proffered the testimony of Ajrulai in proceedings on petitioner's application for asylum. Rios was also counsel for Ajrulai, and presumably was aware of the proceedings on Ajrulai's petition. Petitioner's argument, which appears to be something akin to a Confrontation Clause argument in a criminal proceeding, rings hollow as he offered the very testimony he now claims to be improper and cites no legal authority which would justify this Court's finding a due process violation under such circumstances. He further cites nothing in Ajrulai's proceedings which, if incorporated in his, would have buttressed his claims.

<sup>6</sup> At first blush, petitioner's argument appears to implicate a misrepresentation by the IJ in stating that Ajrulai had testified when in fact he had not. Such an argument is without merit. Petitioner may also argue that the IJ, having accepted petitioner's proffer of evidence, was required thereafter to hear the testimony of Ajrulai. Live testimony need not be taken if the proffer is accepted as

asylum in ruling on petitioner's application, that petitioner did not fully understand what was written in his application<sup>7</sup> and

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fully credible. See *United States v. Delker*, 757 F.2d 1390, 1396 (3d Cir.1985). The following exchange indicates that such was the case and that petitioner did not offer any live testimony beyond his proffer which the IJ accepted.

"Make an offer of proof please. What will he say that will corroborate the respondent's claim of persecution?"

"Your honor, Mr. Adjari, is ready to offer corroborating evidence on the one, the ethnic background of the respondent; two, that the respondent is a member of the Albanian Democratic Party; three, that the respondent participated in many demonstrations for equal rights for ethnic Albanians in Macedonia as part of the Democratic Party and further that he participated or worked for radio, T.V. Contrina [as a video audiographer for meetings as well as demonstrations . . .] and that lastly, Your Honor, [as a member of the party has had difficulties with the Serbian peoples in Macedonia as well as the authorities, the police authorities in Macedonia, specifically. That that is the reason he left for fear from both those parties.

"Anything further?"

"Nothing further, Your Honor.

\* \* \*

"Okay. The proffer is accepted.

Trans. At 68-69.

"Mr. Rios, anything further?"

"If we may proceed with the corroborating evidence?"

"Well I don't - -

"If [Your] Honor would allow it?"

"You've proffered the corroborating evidence from the witness. What else do I need to hear from him?"

"I didn't know if, Your Honor, wanted the opportunity to speak to him directly?"

"No thank you."

*Id.* at 75.

<sup>7</sup> The record does not support petitioner's argument that he was unaware of the contents of his application for asylum. The following exchange indicates that petitioner could not read the

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application written in English, but that he was read the contents of his application through an interpreter and thus understood its contents.

“Sir, are you familiar with the written application?”

“On the application it’s written . . . situation over there is not very good.

“Well, do you know what’s on the application?”

“No, I don’t.

“Has your attorney or anyone from his office gone over the application with you?”

“No.

JUDGE TO MR. RIOS

“Counsel?”

“I’m confused also, Your Honor. We did it in my conference room with Islam Deshari . . . as the interpreter --

JUDGE TO RESPONDENT

“Sir?”

MR. RIOS TO JUDGE

“At the initial filing.

JUDGE TO RESPONDENT

“Your attorney tells me he went over the application with you with an interpreter in his office.

\* \* \*

“Yeah, uh, they read it to me . . . a few times.

“Did you understand what is on the application?”

. . . I, I, I remember what was written.

“I didn’t ask you if you remember. I asked you if you understood what you were told? It’s your application, but it’s in English. You don’t read English do you?”

“No.

“So, the only way I know that you know what’s in there is somebody read it to you. And, that happen[ed], correct?”

“Yes.

petitioner may have received ineffective assistance of counsel and bias on the part of the IJ in Rios's inability to keep petitioner's and Ajrulai's proceedings separate.<sup>8</sup>

Prior to reaching the question of whether the admission of evidence in the present case violated due process, it is worthwhile to review the relevant evidentiary standard governing immigration proceedings. "The immigration judge may receive in evidence any oral or written statement that is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial." 8 C.F.R. § 1240.7(a). The standard of admissibility therefore requires that the statement be relevant to any issue in petitioner's case and that such statement be made by any other person in the course of a hearing. As such, an identical application for asylum from Macedonia by an individual residing with the petitioner cannot be said to be an irrelevant consideration in light of the governing evidentiary standard and the similarity and suggested linkage of the cases for the two applications.

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"Well, the answers that you provided that are in your application are they true and correct?"

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"Yes, they are true."

Trans. at 7-9.

<sup>8</sup> Petitioner raises his ineffective assistance of counsel claim for the first time in response to the Government's opposition to his petition. Although claims of judicial bias and ineffective assistance of counsel constitute alleged constitutional violations which generally merit habeas review, and that the BIA lacks authority to address constitutional claims, exhaustion is required in situations where the BIA may order the proceedings reopened and cure defects incident to such constitutional violation. See *Arango-Aradondo v. INS*, 13 F.3d 610, 614 (2d Cir. 1994). There is no indication that the claimed violations were raised before the BIA, thus that that claims were properly exhausted. Nor is it apparent, were this Court inclined to reach the merits of an ineffective assistance of counsel claim, that petitioner could make "a prima facie showing that he would have been eligible for the relief and that he could have made a strong showing in support of his application." *Rabiu*, 41 F.3d at 882.

Leaving the specific evidentiary standard aside and returning to considerations specific to a due process analysis in the context of immigration proceedings, “the Federal Rules of Evidence do not apply in asylum proceedings. . . . The test for admissibility of evidence . . . is whether the evidence is probative and whether its use is fundamentally fair so as not to deprive the alien of due process of law.” *Ezeagwuna v. Ashcroft*, 325 F.3d 396, 405 (3d Cir. 2003) (internal quotation marks omitted); *see also Ladha v. INS*, 215 F.3d 889, 904 (9th Cir. 2000) (“an alien who faces deportation is entitled to a full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf”). “In the evidentiary context, fairness is closely related to the reliability and trustworthiness of the evidence.” *Felzcerek v. INS*, 75 F.3d 112, 115 (2d Cir.1996).

While the occasion may arise where evidence admitted in an immigration proceeding is so unreliable or untrustworthy as to offend due process, *see Ezeagwuna*, 325 F.3d at 406 (involving letter indicating that documents submitted in support of her petitioner were fraudulent), such is not evident given the facts of the present case. All evidence derived from proceedings on Ajrulai’s petition constitutes either a document filed in or testimony taken in the course of an administrative hearing. Petitioner’s counsel, who represented Ajrulai as well as petitioner, and the IJ, who presided over the hearings of petitioner and Ajrulai, were familiar with the facts of both hearings, and both hearings took place less than one week apart. Given these facts, it cannot be said that consideration of the facts derived therein constitutes the admission of evidence sufficiently unreliable or untrustworthy to establish a due process violation. Petitioner’s counsel did not object to the admission of evidence from Ajrulai’s proceedings and argued as to why Ajrulai’s withdrawal of his application of asylum did not justify denial

of petitioner's application.<sup>9</sup> Under the circumstances, it cannot be said that the evidence derived from Ajrulai's proceedings was not probative of the merits of petitioner's application, nor can it be said that admission of such evidence was fundamentally unfair. *See Ezeagwuna*, 325 F.3d at 405.<sup>10</sup>

Having reviewed the record presented herein, it is not apparent that petitioner's due process rights were violated in the proceedings on his application for asylum. It is evident that he was afforded a meaningful opportunity to be heard, and any failure to obtain the relief sought is attributable not to deficiencies in the proceedings but rather what the IJ found to be a failure to provide sufficient evidence in support of his application for asylum. This conclusion is buttressed by a *sua sponte* rehearing of the petition in which the IJ again provided petitioner the opportunity to present evidence in support of his

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<sup>9</sup> It is evident that the IJ found Ajrulai's testimony of dubious value in supporting petitioner's application. "Well, I'm somewhat . . . [c]oncerned when you say you are going to provide corroborating evidence. Apparently from an individual that has withdrawn his claim, identical to the respondent's and accepted voluntary departure. On his own motion." Trans. at 64. He further stated

[m]ake an offer of proof that he's going to be able to corroborate, now that he's in court, not because the respondent brought him here, but because I told you I was going to issue a subpoena to have him here if he didn't voluntarily come to court. Because frankly I'm irritated that I get the exact same asylum application for two individuals that live in the same house in Connecticut, but they don't appear at each other [']s hearing to corroborate their claim[s].

*Id.* at 67.

<sup>10</sup> The parties do not provide specifics as to the nature of the evidence involved herein, and this Court will not speculate as to whether the proceedings, by their nature, would render documents derived therefrom reliable or trustworthy. Under the circumstances, it is not apparent that testimony from Ajrulai's proceedings would fall within a firmly-rooted hearsay exception, *see* FED. R. EVID. 803, thus justifying the presumption that such evidence is reliable. *See Idaho v. Wright*, 497 U.S. 805, 817-18, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990). Beyond that conclusion, it need only be said that under the present circumstances, given the involvement of petitioner's counsel in both proceedings and his failure to object to the admission of the case file, the admission would not be considered fundamentally unfair. At the time the evidence was admitted, petitioner was aware that he had not established, in the IJ's opinion, the merits of his asylum claim. The only relevant difference between the first and second hearings was the evidence of Ajrulai's proceedings and, as such, the admission could only serve to benefit petitioner in an effort to remedy deficiencies evident in the first hearing. As the outcome was no different than the first hearing, petitioner was not unfairly disadvantaged by the evidence.

application and establish that he likely would be persecuted if returned to Macedonia. The proceedings were not fundamentally unfair, and as such no due process violation is evident.

### III. CONCLUSION

The petition for writ of habeas corpus (Doc. No. 1) is **denied**. The Clerk shall close the file.

SO ORDERED.

Dated at New Haven, Connecticut, June \_\_\_\_, 2003.

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Peter C. Dorsey  
United States District Judge