No. 11-____

IN THE
Supreme Court of the United States

ARTHER DEYKE KASONSO,

Petitioner,

v.

ERIC H. HOLDER, JR.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In immigration cases, an applicant can establish a right to "withholding of removal" from the United States to another country by proving (1) that it is more likely than not that he or she will be individually singled out for persecution if deported to that country, or (2) that he or she is a member of a group that suffers a "pattern or practice" of persecution in that country. Four courts of appeals have recognized that, in addressing the former, an immigration court should conduct a "disfavored group analysis." That is, the immigration court should consider evidence that an applicant is a member of a disfavored group – a group that suffers mistreatment, but not severely and pervasively enough to constitute a pattern or practice of persecution – in considering an applicant's claim that he or she will be individually singled out for persecution. The question presented is whether the Tenth Circuit erred in following the courts of appeals that reject "disfavored group analysis" instead of the four courts of appeals that apply that analysis.

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PETITION FOR A WRIT OF CERTIOARI

Petitioner Arther Deyke Kasonso respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit at 445 F. App'x 76 (10th Cir. Case No. 10-9526).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is unreported but available at 445 F. App'x 76 and 2011 WL 4978898. App. 1a. The first decision of the Board of Immigration Appeals is unreported, App. 11a, as is the BIA's decision concerning Petitioner's motion to reopen and reconsider, App. 9a. The oral decision of the Immigration Judge is unreported. App. 19a.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered a judgment in this case on October 20, 2011. On December 21, 2011, Justice Sotomayor granted Petitioner's Application for Extension of Time to File up to, and including, March 19, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following provisions are set forth in the attached Appendix at 36a *et seq.*:

1. 8 U.S.C. § 1231(b)

2. 8 C.F.R. § 1208.16(b)

INTRODUCTION

Petitioner Arther Deyke Kasonso presented credible evidence to the immigration court that it was more likely than not that he would be persecuted if returned to Indonesia because he is a Christian. He presented evidence (1) that he would be individually singled out for persecution based on past personal incidents, and (2) that Christians are consistently subjected to persecution at the hands of Indonesia's Muslim majority. The First, Fourth, Fifth, and Ninth Circuits would consider the evidence of Christian persecution in Indonesia in determining whether Mr. Kasonso showed that it is more likely than not that he individually will be subject to persecution. This is because "one's chances of being singled out from the general population and subjected to persecution is often strongly correlated with the frequency with which others who share the same disfavored characteristics are mistreated and persecuted." *Wakkary v. Holder*, 558 F.3d 1049, 1063 (9th Cir. 2009). The Tenth Circuit below, however, joined the Third, Seventh, Eighth, and Eleventh Circuits in holding that group characteristics are not relevant to the determination of whether an applicant will be individually singled out for persecution.

The Court should grant Mr. Kasonso's petition to resolve this significant and irreconcilable conflict in the federal Courts of Appeals, and should reverse the Tenth Circuit.

STATEMENT

A. The Framework for Analyzing Withholding of Removal Claims

Withholding of removal prevents the removal of a person from the United States to a country when his "life or freedom would be threatened in that country because of his race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A). If an applicant cannot show that he has been persecuted in the past, he must show 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." 8 C.F.R. § 1208.16(b)(2). The Code of Federal Regulations states that an immigration judge "shall not require the applicant to provide evidence that he or she would be singled out individually for such persecution" if there is "a pattern or practice of persecution of a group of persons similarly situated to the applicant" in the country of removal. *Id.* § 1208.16(b)(2)(i). In that situation, the applicant need only show that he is a member of the persecuted group. *Id.* § 1208.16(b)(2)(ii).[1] Many circuits have been hesitant

[1] The BIA has set a high standard for persecution in pattern or practice cases. In *Matter of A-M-*, 23 I&N Dec. 737 (BIA 2005), the BIA stated that the threatened harm in the case was not "so systemic or pervasive as to amount to a pattern or practice of persecution." *Id.* at 741. The Tenth Circuit has joined several other circuits in applying this standard for persecution in "pattern or practice" cases. *See Woldemeskel v. INS*, 257 F.3d 1185, 1191 (10th Cir. 2001); *see also Ahmed v. Gonzales*, 467 F.3d 669, 675 (7th Cir. 2006); *Wijono v. Gonzales*, 439 F.3d 868, 874 (8th Cir. 2006); *Lie v. Ashcroft*, 396 F.3d 530, 537 (3d Cir.

to find a pattern or practice of persecution because of the dramatic effects of providing such significant relief to an entire class of individuals.[2]

The Courts of Appeals began to split in the mid-1990s over what kind of evidence is required in non-pattern or practice cases. In some circuits, an applicant can show a fear of future persecution by presenting evidence that he is a member of a group that suffers mistreatment – *i.e.* a "disfavored group" – coupled with evidence that he will be singled out individually for mistreatment. *Kotasz v. INS*, 31 F.3d 847, 853–54 (9th Cir. 1994). This analysis, integrating evidence that an applicant will be individually targeted for persecution and evidence that he is a member of a group targeted for mistreatment, has been labeled "disfavored group analysis." *Wakkary*, 558 F.3d at 1062 ("We begin by briefly reviewing the development, in the asylum context, of what has come to be called—perhaps unfortunately, as the terminology may be

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2005). "Persecution must be 'extreme' for an applicant to prevail in a pattern or practice case." *Ahmed*, 467 F.3d at 675.

[2] Several circuits have recognized that granting asylum or withholding of removal based solely on a pattern or practice of persecution can have far-reaching consequences. At least two circuits have expressly noted that "[t]he potential costs of a wrong decision on a pattern or practice claim are considerable because 'once the court finds that a group was subject to a pattern or practice of persecution, every member of the group is eligible for [relief].'" *Mufied v. Mukasey*, 508 F.3d 88, 93 (2d Cir. 2007) (quoting *Ahmed*, 467 F.3d at 675). The Seventh Circuit stated in *Mitreva v. Gonzales,* 417 F.3d 761 (2005), that pattern or practice is interpreted narrowly and found only in rare circumstances "to prevent an avalanche of asylum-seekers." *Id.* at 765.

misleading—'disfavored group' analysis."). Other circuits have rejected this view, holding instead that an applicant must show *either* membership in a group subjected to such severe and pervasive mistreatment as to constitute a "pattern or practice" of persecution *or* a purely individualized, targeted risk of persecution. *E.g. Lie v. Ashcroft*, 396 F.3d 530, 537-38 & n.4 (3rd Cir. 2005)

B. Proceedings Below

Petitioner Arther Deyke Kasonso is a native and citizen of Indonesia. App. 2a. He arrived in the United States in 1994 at the age of 26. App. 2a. Kasonso has been a Christian his entire life and is a practicing Seventh-day Adventist. App. 13a.

Before Kasonso left Indonesia, he and his family faced persistent prejudice, intimidation, and violence on account of their religion. App. 27a. When Kasonso lived in Jakarta, he feared being publicly identified as a Christian. *See* App. 27a. Throughout his time in Indonesia, neighbors who knew that Kasonso and his family were Christians threw stones at his house. App. 27a. When Kasonso was a teenager, his mother was attacked when the pair were walking to their church. App. 27a.[3] Two years before Kasonso came to the United States, he was forcefully ejected from a bus because the passengers and driver saw that he was carrying a Bible. App. 27a. Kasonso still fears that he will be persecuted by extremist Muslim

[3] As Kasonso and his mother were walking to their church, they passed a Muslim individual who knew they were Christian. The individual shoved Kasonso's mother to the ground and she did not receive help from any strangers in the area. App. 27a.

groups if forced to return to Indonesia because he is a practicing Seventh-day Adventist. App. 28a.

There continues to be violence against Christians in Indonesia. *July-December, 2010 International Religious Freedom Report: Indonesia*, U.S. Dep't of State, at 1 (Sept. 13, 2011), *available at* http://www.state.gov/documents/organization/171653.pdf. 88 percent of Indonesians are Muslim, while only nine percent are Christians. *Id.* at 2. In 2010, there were more than 75 attacks against Christians. *Id.* at 1.

In 2005, Kasonso applied for asylum, withholding of removal, and protection under the U.N. Convention Against Torture on the basis of religious violence occurring against Christians in Indonesia. App. 27a. In 2008, the Immigration Judge ("IJ") denied Kasonso's application for asylum, withholding of removal, and withholding under the Convention Against Torture because the IJ decided that Kasonso had not demonstrated a well-founded fear of future persecution that he faced as a Seventh-day Adventist. App. 33a. On August 31, 2009, the Board of Immigration Appeals affirmed the IJ's decision and dismissed Kasonso's appeal, finding that Kasonso failed to establish either (1) that he would be singled out for persecution, or (2) that there was severe and pervasive persecution of Christians in Indonesia sufficient to constitute a pattern or practice. App. 14a–15a.

On October 15, 2009, Kasonso filed a motion to reconsider, asking that the BIA consider his individualized evidence of persecution in conjunction with evidence that Christians in Indonesia are subjected to mistreatment – the "disfavored group

analysis" described by the Ninth Circuit in *Wakkary*, 558 F.3d 1049, App. 2a, 9a, and applied by other circuit courts. The BIA denied Kasonso's motion on the basis that *Wakkary* was not controlling in the Tenth Circuit, the jurisdiction in which the proceedings were pending. App. 10a. Kasonso appealed to the Tenth Circuit and the Tenth Circuit considered the sole issue of "whether the BIA abused its discretion when it declined to apply the disfavored-group analysis." App. 1a–2a. The Tenth Circuit held that the BIA did not abuse its discretion by denying Kasonso's motion because the Tenth Circuit "has neither adopted nor rejected the disfavored-group analysis." App. 7a.

The Tenth Circuit's decision should be reversed. Failure to consider evidence of the disfavored status of Christians in Indonesia alongside evidence that Kasonso will be singled out for persecution in a claim for withholding of removal is an error of law, and is therefore an abuse of discretion.

REASONS FOR GRANTING THE PETITION

The Court should grant this Petition because it presents an important issue of national significance that has caused intractable division among the federal circuits. Furthermore, the Tenth Circuit below – along with other circuits aligning with it – disregarded the intent of the controlling federal statute and broke with this Court's interpretation of that statute. Finally, the facts of this case present a suitable vehicle for the resolution of the conflict between the Courts of Appeals. Because this Petition meets and exceeds this Court's requirements for review, *see* Sup. Ct. R. 10, it should be granted for review on the merits.

I. The Courts of Appeals are deeply and irreconcilably split over the proper evidentiary standard for asylum and withholding of removal.

The federal circuits are deeply divided on whether disfavored-group analysis is available to applicants seeking asylum or withholding of removal.[4] The split is remarkably well-defined; four circuits have plainly adopted the standard and five, including the court below, have rejected it.

Four circuits – the First, Fourth, Fifth, and Ninth – have all adopted tests that utilize an integrated analysis, combining elements of traditional pattern and practice with elements of individualized risk. These circuits conclude that an applicant's membership in a disfavored group is relevant to the ultimate statutory determination – whether the applicant's "life or freedom would be threatened . . . because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A).

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[4] Asylum and withholding of removal are distinct standards but they share many similarities. Applicants seeking asylum must show a well-founded fear of persecution and those seeking withholding of removal must show future persecution is more likely than not. Disfavored-group analysis has been applied to both. *See Wakkary*, 558 F.3d 1049 (applying disfavored-group analysis to withholding of removal claims); *see also Iqbal v. Att'y Gen.*, 331 F. App'x 186, 189 n.4 (3d Cir. 2009) (noting that disfavored-group analysis extends to both asylum and withholding of removal claims); *Kojo v. Holder*, 330 F. App'x 650, 652 (9th Cir. 2009) (unpublished) (noting the extension of disfavored-group analysis from asylum claims to pattern and practice claims).

The Ninth Circuit was the first circuit to distill this integrated analysis into a single, distinct test, referring to it as the "disfavored group analysis." *Kotasz v. INS*, 31 F.3d 847 (9th Cir. 1994). In *Kotasz*, the BIA had denied asylum to a political dissident in communist Hungary because he had not established a well-founded fear by showing that he was "singled out" or a member of a group subject to pattern and practice persecution. *Id.* at 854. The Ninth Circuit overturned the Board's decision, noting that:

> In non-pattern and practice cases, there is a significant correlation between the asylum petitioner's showing of group persecution and the rest of the evidentiary showing necessary to establish a particularized threat of persecution. Specifically, the more egregious the showing of group persecution—the greater the risk to all members of the group—the less evidence of individualized persecution must be adduced.

Id. at 853. The court reasoned that persecution in asylum claims is based on some kind of group membership, and that group and individual targeting are necessarily interrelated categories. *Id.*

Since *Kotasz*, the Ninth Circuit has affirmed that applicants can establish a well-founded fear of future persecution in asylum cases by showing group targeting, thereby offsetting the quantity of individualized targeting required.[5]

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[5] *E.g.*, *Hoxha v. Ashcroft*, 319 F.3d 1179, 1182 (9th Cir. 2003) ("Although Hoxha's fear must be based on an individualized rather than generalized risk of persecution, the level of individualized targeting that he must show is inversely related

In *Sael v. Ashcroft*, 386 F.3d 922 (9th Cir. 2004), the court held that a Chinese Christian living in Indonesia could establish a well-founded fear of future persecution in two ways: through pattern and practice persecution, or by proving she was a "member of a 'disfavored group' coupled with a showing that she, in particular, is likely to be targeted as a member of that group."[6] *Id.* at 925; *see also Lolong v. Gonzales*, 484 F.3d 1173, 1175 (9th Cir. 2007) (noting, in an *en banc* opinion, that some measure of individualized risk is required for a successful claim under disfavored group analysis).

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to the degree of persecution directed toward ethnic Albanians generally." (citation omitted)); *Lata v. INS*, 191 F.3d 460, 1999 WL 693571 at *1 (9th Cir. 1999) (unpublished) (memorandum) ("[T]he more the group to which an applicant belongs is discriminated against, harassed, or subjected to violence, the less the individualized showing an applicant must make to establish eligibility for asylum." (citations omitted)); *Singh v. INS,* 65 F.3d 175, 1995 WL 501461 at *2 (9th Cir. 1995) (unpublished) (memorandum) ("If the alien is a member of a "disfavored" group, but the group is not subject to systematic persecution, we will look to (1) the risk level of membership in the group . . . and (2) the alien's individual risk level . . . . [T]he more serious and widespread the threat of persecution to the group, the less individualized the threat of persecution need be." (citations omitted)).

[6] The court noted that,

> [The disfavored group approach] consists of two elements—membership in a "disfavored group" and an individualized risk of being singled out for persecution—that operate in tandem. Thus, the "more serious and widespread the threat" to the group in general, "the less individualized the threat of persecution needs to be."

Id. (citations omitted).

The Ninth Circuit extended the use of disfavored group analysis to withholding claims in *Wakkary*, 558 F.3d 1049. The court first reiterated the core principles of *Kotasz*, but then addressed the confusion in other circuits regarding disfavored-group analysis. *Wakkary*, 558 F.3d at 1062. The court clarified that disfavored-group analysis does not alter the quantitative level of risk to be shown; rather, it allows for a more accurate assessment of the qualitative evidence presented. *Id.* at 1064. Disfavored-group analysis allows a lower showing of individualized risk in light of a higher showing of group risk because "an asylum applicant's membership in a group whose members are shown to have been widely targeted for discrimination . . . is relevant evidence in assessing whether his fear of being personally targeted for persecution in the future rises to the requisite level of objective reasonableness." *Id.* at 1064. Rejecting claims that disfavored group analysis is a "judicially created alternative" or permits a "lower threshold of proof," the court cited to another circuit's understanding that "it may be that evidence short of pattern or practice will enhance an individualized showing of a future threat." *Id.* (quoting *Kho v. Keisler*, 505 F.3d 50 (1st Cir. 2007)). The court identified this as the "essence" of disfavored-group analysis. *Wakkary*, 558 F.3d at 1064. The court's undeniable conclusion – that although an applicant can prove that future persecution is more likely than not by showing a likelihood of being "individually singled out" or by showing a "pattern or practice" of persecution, "these two categories of future-fear claims should not be understood to require discrete sorts of *evidence*." *Id.* at 1062.

"[O]ne's chances of being singled out from the general population and subjected to persecution is often strongly correlated with the frequency with which others who share the same disfavored characteristics are mistreated and persecuted." *Id.* at 1063.

In the wake of *Lolong* and *Wakkary*, the Ninth Circuit continues to consistently apply disfavored-group analysis, reasoning that it is the most faithful application of the intent of the regulation. *See Tampubolon v. Holder*, 610 F.3d 1056, 1062 n.5 (9th Cir. 2010) ("Disfavored group analysis is triggered *only* when a petitioner attempts to show that she will more likely than not be singled out individually for persecution on account of a protected ground.").

While the Ninth Circuit has expressly labeled the integrated test "disfavored group analysis," the Fourth, First and Fifth Circuits have similarly integrated the inquiry without using that label. *See Chen v. INS*, 195 F.3d 198 (4th Cir. 1999); *Sugiarto v. Holder*, 586 F.3d 90 (1st Cir. 2009); *Kho*, 505 F.3d 50; *Zhao v. Gonzales*, 404 F.3d 295 (5th Cir. 2005).

In *Chen*, the Fourth Circuit adopted disfavored-group analysis in an asylum case. 195 F.3d at 203-04. The court echoed the Ninth Circuit's opinion in *Kotasz* that individual and group persecution are related. *Id.* "Individual targeting and systematic persecution do not necessarily constitute distinct theories. Rather, an applicant will typically demonstrate some combination of the two to establish a well-founded fear of future persecution." *Id.* Following *Chen*, the Fourth Circuit has continued to apply disfavored-group analysis. *See Ashqar v.*

Holder, 355 F. App'x 705 (4th Cir. 2009) (unpublished).

Although the First Circuit originally rejected disfavored-group analysis, it has since unambiguously adopted it. In 2007, in *Kho*, the court initially rejected the "establishment of a disfavored group category" as a "judicially created alternative to the statutory and regulatory scheme" that used "a lower standard for individualized fear absent a pattern or practice of persecution." 505 F.3d at 55. Despite rejecting the label "disfavored group analysis," the court noted that "evidence short of pattern or practice will enhance an individualized showing of likelihood of future threat to an applicant's life or freedom. This is a different matter." *Id.*

The First Circuit quickly retreated from its *dicta* in *Kho*. In *Pulisir v. Mukasey*, 524 F.3d 302 (1st Cir. 2008), the court declined to comment on disfavored-group analysis, but endorsed a nearly identical approach to analysis of individualized risk. *Id.* at 308–09 ("This case does not require us . . . to decide whether the Ninth Circuit's sliding scale approach is compatible with our precedents. Common sense suggests that larger social, cultural and political forces can lend valuable context to particular incidents, and, thus, can influence the weight that a factfinder may assign to those incidents." (citations omitted)).

The First Circuit finally embraced an integrated analysis, precisely as described in *Wakkary*, in *Sugiarto v. Holder*. 586 F.3d at 97–98. As the *Sugiarto* court recognized, the Ninth Circuit considered *Kho*'s language about group evidence –

despite its *dicta* rejecting the label "disfavored group analysis" – a recitation of the essence of disfavored-group analysis. *Id.* at 97.

As the First Circuit once did, the Fifth Circuit has applied disfavored-group analysis, at least in the asylum context, without labeling it as such.[7] In *Zhao v. Gonzales*, the court held that Zhao, a Falun Gong practitioner, could establish a well-founded fear of future persecution without showing he would be "personally targeted" or that a persecutor "was actually aware that he was a Falun Gong practitioner." 404 F.3d at 307–08.

On the other hand, five circuits have rejected disfavored-group analysis. Rather than acknowledge that group and individual targeting are interrelated inquiries, these circuits have declined to allow evidence of group persecution to inform and strengthen an individualized risk of future persecution. *E.g.*, *Lie v. Ashcroft*, 396 F.3d 530 (3rd Cir. 2005); *Firmansjah v. Gonzales*, 424 F.3d 598 (7th Cir. 2005); *Osuji v. Holder*, 657 F.3d 719 (8th Cir. 2011); *Kasonso*, 445 F. App'x 76; *Mohammed v. U.S. Att'y Gen.*, 547 F.3d 1340 (11th Cir. 2008).

The Third Circuit, for example, noted in 2005 that it "disagree[d] with the Ninth Circuit's use of a lower standard for individualized fear absent a

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[7] The Fifth Circuit has encountered at least two petitioners arguing for explicit use of disfavored-group analysis, but it dismissed both cases with unpublished opinions without adopting or rejecting the test. *See Lesmana v. Holder*, 423 F. App'x 384 (5th Cir. 2011) (unpublished); *Siagian v. Holder*, 398 F. App'x 69 (5th Cir. 2010) (unpublished)

'pattern or practice' of persecution." *Lie*, 396 F.3d at 538 n.4. The Court of Appeals recently noted that it "see[s] no reason to revisit [its] long held precedent." *Shin Thing Sudin v. Att'y Gen.*, 423 F. App'x 159, 162 (3rd Cir. 2011) (unpublished).

The Seventh Circuit has rejected disfavored-group analysis with equal vigor. *See Ingmantoro v. Mukasey*, 550 F.3d 646, 651 n.7 (7th Cir. 2008) ("[W]e have declined to adopt the disfavored group analysis, which is less stringent than the analysis adopted by this court." (citing *Kaharudin v. Gonzales*, 550 F.3d 619, 625 (7th Cir. 2007)).

Two circuits–the Eighth Circuit and the Eleventh Circuit–have implicitly rejected disfavored group analysis and have instead demanded that applicants show either a pattern and practice of group persecution or individualized persecution.

The Eighth Circuit held in *Woldemichael v. Ashcroft*, 448 F.3d 1000 (8th Cir. 2006) that an applicant may *only* prove a well-founded fear by showing a pattern and practice *or* an individualized risk of persecution. *Id.* at 1004; *see also Osuji*, 657 F.3d at 722; *Makatengkeng v. Gonzales*, 495 F.3d 876, 881 (8th Cir. 2007).

The Eleventh Circuit recently rejected disfavored group analysis in a split decision that triggered a strong dissent. *Mohammed*, 547 F.3d 1340. In that case, the majority refused to consider much of the evidence put forth by the applicant to prove the occurrence of various human rights abuses in his native country. In his dissent, Judge Wilson countered that the connection between those abuses and the applicant's individual risk should be obvious, noting that "there is a significant correlation

between the asylum petitioner's showing of group persecution and the rest of the evidentiary showing necessary to establish a particularized threat of persecution." *Id.* at 1357 (quoting *Kotasz*, 31 F.3d at 853).

In response to the dissent, the majority wrote:

> The dissent also objects that requiring Mohammed to prove that he will be singled out for persecution if he returns to Eritrea "neglects to appreciate" that some groups may be systematically persecuted on the basis of their religion or political opinions and "fails to engage in [the] weighing that the complex relationship between group and individual targeting requires [,]" but again, the law does not permit the approach the dissent suggests. The law provides that Mohammed bore the burden of proving *his* fear of future persecution.

Id. at 1348 (citations omitted) (italics in original).[8]

There is a deep and irreconcilable split between the circuits as to whether an applicant's membership in a disfavored group – that is, a group subject to general mistreatment that is not severe and pervasive enough to constitute a pattern or practice

[8] Only two circuits – the Second Circuit and the Sixth Circuit – have not taken a clear position on disfavored-group analysis. They both acknowledge its existence. *E.g.*, *Wijaya v. Gonzales*, 227 F. App'x 35, 38 n.1 (2d Cir. 2007) (unpublished) ("Although Wijaya urges us to follow the Ninth Circuit in [*Sael*], we decline to do so."); *Hamzah v. Holder*, 428 F. App'x 551, 557 n.3 (6th Cir. 2011) (unpublished) ("This court has not yet adopted [disfavored-group analysis].").

of persecution – can be considered in determining whether the applicant's individualized risk is sufficient to establish that future persecution is more likely than not. Several circuits consider an applicant's membership in a disfavored group alongside individualized evidence of persecution to determine whether the applicant has established that future persecution is more likely than not, while others refuse to.

The Tenth Circuit below erred when it failed to apply disfavored-group analysis and sided with those circuits that cordon off an applicant's group risk from his individualized risk. This Court should grant the writ of certiorari and reverse.

II. The Tenth Circuit's rejection of disfavored-group analysis is inconsistent with the congressional definition of "refugee" used to determine eligibility for asylum and withholding, and it is inconsistent with this Court's precedent.

As the Ninth Circuit explained in *Wakkary*, "disfavored group" has been misleadingly named. 558 F.3d at 1062. "Disfavored group" analysis does not create a new standard nor does it lower the bar for non-pattern or practice claims. *Id.* at 1064. ("[T]he 'lesser' or 'comparatively low' burden . . . refers not to a lower *ultimate* standard, but to the lower proportion of specifically individualized evidence of risk, counterbalanced by a greater showing of group targeting, that an applicant must adduce to *meet* that ultimate standard under the regulations' 'individually singled out' rubric."). Rather, disfavored-group analysis is a method to weigh the factors of individualized risk. *Id.* An

applicant for asylum or withholding of removal must show at least some evidence that he will be individually targeted for persecution, and evidence that he belongs to a group that is discriminated against is relevant to whether there is an individualized risk. *Id.*

The Code of Federal Regulations supports this view. Although the regulations clearly contemplate that an applicant must show some evidence that applicant will be singled out, the regulations do not state that an immigration judge must only consider evidence that an applicant will be personally singled out. *See* 8 C.F.R. § 1208.16(b)(2); *see also Wakkary*, 558 F.3d at 1062–63 ("The 'singled out' path is not reserved solely for those applicants whose would-be persecutors seek them out personally, by name."). Only for pattern or practice claims do the regulations explicitly state that an immigration judge does not have to consider any evidence of individualized persecution. 8 C.F.R. § 1208.16(b)(2)(i) ("In evaluating whether it is more likely than not that the applicant's life or freedom would be threatened . . . [the] immigration judge shall not require the applicant to provide evidence that he or she would be singled out individually if . . . [t]he applicant establishes that in that country there is a pattern or practice of persecution . . . .").

A. *The original purpose of the Refugee Act of 1980 supports disfavored-group analysis.*

The Tenth Circuit's rejection of disfavored-group analysis is inconsistent with the congressional definition of "refugee" used in the Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 107, later reaffirmed in the federal regulations that govern eligibility for

asylum and withholding, and it neglects the integrated approach that Congress intended. The Refugee Act of 1980 established for the first time an ongoing framework within which the United States would process and accept refugees for resettlement in the country. Congress intended to bring American law into compliance with the definition of "refugee" found in the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees. *See* S. Rep. No. 96-256, at 3–4 (1979) ("[T]he new definition will bring United States law into conformity with our international treaty obligations under the [1967 Protocol Relating to the Status of Refugees]."); H.R. Conf. Rep. No. 96-781, at 1 (1980) (Conf. Rep.) ("The Senate bill incorporated the internationally-accepted definition of refugee contained in the U.N. Convention and protocol relating to the status of refugees."). The United Nations High Commission for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (1979) illustrates the intent of the 1951 Convention and 1967 Protocols:

> [Establishment of refugee status] need not necessarily be based on the applicant's own personal experience. What, for example, happened to his friends and relatives and other members of the same racial or social group may well show that his fear that sooner or later he also will become a victim of persecution is well-founded.

Id. at ch. II, B(2)(a), § 43. This guideline is the heart of disfavored-group analysis and precludes approaches that disallow evidence of similarly

situated persons to show an individual's legitimate fear of future persecution.

Not only did Congress intend for U.S. protections to be in compliance with the U.N. Convention and Protocol, Congress expanded the U.S. definition to give the United States more flexibility in responding to humanitarian crises, such as refugee flight in the wake of the evacuation of Saigon, than the original language of the Convention would have required. S. Rep. No. 96-256, at 4. Congress intended for the courts to consider the risks faced by groups in determining refugee status.

B. This Court's guidance on the meaning of a "well-founded fear" and "clear probability of persecution" favors disfavored group analysis.

This Court was first asked to interpret the Refugee Act of 1980 in *INS v. Stevic*, 467 U.S. 407 (1984). There, the Court noted that the Refugee Act of 1980 brought withholding of removal into conformity with Article 33 of the 1967 Protocol. *Id.* at 421.

The Court addressed the "well-founded fear" standard in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987). In interpreting the standard, the Court looked to the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, and recognized the intention of Congress to incorporate the UN Convention and Protocol into the Refugee Act of 1980. *Id.* As noted above, the *Handbook on Procedures and Criteria for Determining Refugee Status* supports an integrated approach to evidence – disfavored-group analysis. Ch. II, B(2)(a), § 43.

In *Cardoza-Fonseca*, the Court presented a hypothetical to illustrate when a fear is "well founded":

> Let us...presume that it is known that in the applicant's country of origin every tenth adult male person is either put to death or sent to some remote labor camp. . . . In such a case it would be only too apparent that anyone who has managed to escape from the country in question will have 'well-founded fear of being persecuted' upon his eventual return. 1 A. Grahl-Madsen, The Status of Refugees in International Law 180 (1966). This ordinary and obvious meaning of the phrase is not to be lightly discounted.

480 U.S. at 431. The Court went on to say that:

> There is simply no room in the United Nations' definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no "well-founded fear" of the event happening. See supra, at 1213. As we pointed out in *Stevic*, a moderate interpretation of the "well-founded fear" standard would indicate "that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility."

Cardoza-Fonseca, 480 U.S. at 440. The court also noted the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *Id.* at 449; *see also INS v. St. Cyr*, 533 U.S. 289, 320 (2001); *Sepulveda v. Gonzales*, 407

F.3d 59, 62 (2d. Cir. 2005) (majority opinion of Sotomayor, Circuit Judge).

As this Court's comments show, an individual demonstrates a well-founded fear of persecution when he is part of a group in which every tenth member is persecuted. *See id.* This view is consistent with disfavored group analysis, which says that "although members of the disfavored groups are not threatened by systematic persecution of the group's entire membership, the fact of group membership nonetheless places them at some risk." *Kotasz,* 31 F.3d at 853.

C. The Immigration Reform and Control Act and agency guidelines support disfavored-group analysis.

In 1986, Congress passed the Immigration Reform and Control Act. The Act did not change the standards for granting asylum and withholding of removal. H.R. Conf. Rep. No. 99-1000, at 98. The Senate Committee on the Judiciary stated, however, that it favored consideration of the degree to which groups are persecuted in asylum and withholding of removal cases. The committee report expressed the expectation of committee members:

> [T]hat reports by the Secretary of State relating to whether or not persons in such country who are of the same race, religion, nationality, social group, or political opinion as the applicant are generally subject to persecution because of such characteristics, will be determinative unless the applicant presents evidence that he would be treated differently from such persons.

S. Rep. No. 97-845 (1982), at 36. The Committee believed that applicants who can show that members of their group suffer persecution will be assumed to have a well-founded fear of persecution. It understood information in State Department reports on group persecution to be evidence, perhaps dispositive, of the individual's risk of persecution.

The former Immigration and Naturalization Service's ("INS") guidelines have also incorporated the U.N. definition of "refugee" and analysis of evidence of group persecution. The 1990 final rule establishing procedures for determining asylum and withholding of deportation states that it is "consistent with the UN refugee definition." Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30,674, 30,675 (July 27, 1990) (codified at 8 C.F.R. §§ 3, 103, 208, 236, 242, 253). In 2000, the INS amended asylum procedures "in order to ensure that those provisions are applied in a manner that complies with our international obligations under the 1951 Convention relating to the Status of Refugees, as modified by the 1967 Protocol relating to the Status of Refugees." Asylum Procedures, 65 Fed. Reg. 76,121, 76,127 (Dec. 6, 2000) (codified at 8 C.F.R. § 208). The amended regulation, which related to the evidence required to overcome a presumption of fear based on past persecution, recognized the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* as "a useful interpretive aid" that "provides significant guidance" in helping the agency to conform to the U.N. Protocol. *Id.* (internal citations omitted). The U.N. refugee definition as explained by the Handbook

supports the type of integrated approach typified by disfavored-group analysis.

In 1998, the Executive Office for Immigration Review expanded the definition of refugee to include individuals who "may face a reasonable possibility of other serious harm" beyond the five previously-enumerated categories upon return. New Rules Regarding Procedures for Asylum and Withholding of Removal, 63 Fed. Reg. 31,945, 31,947 (proposed June 11, 1998) (internal quotation marks omitted). The Office was concerned about the possibility that the prior regulation did not protect people who might face persecution for reasons other than those for which they had been persecuted in the past. *Id.* The Office cited the case of a person who had faced past persecution in Afghanistan, who had new reasons to have a well-founded fear of persecution owing to civil strife in that country. *Id.* The amendment allowed the applicant to establish a well-founded fear of persecution based on evidence of persecution to others not related to the kind the applicant suffered in the past. *Id.* The INS consistently adopted the United Nations' integrated approach to determining refugee status, considering individualized evidence and evidence of group persecution. This approach is at the heart of disfavored-group analysis.

III. This case presents a suitable vehicle for deciding whether disfavored-group analysis is a proper method of showing that future persecution is more likely than not.

The Tenth Circuit should not have upheld the BIA's decision since the Board rejected disfavored-group analysis and considered individualized risk of persecution and group risk of persecution only as

separate inquiries. Disfavored-group analysis, integrating individual risk and group risk, is required by statute, INS regulations, and this Court's interpretation of the controlling authority.[9]

Prior petitions to this Court alleging the same circuit split have mischaracterized the nature of the split. In *Sanusi v. Gonzales*, for example, a petitioner claimed that a circuit split existed as to "whether an applicant for withholding of removal who has demonstrated membership in a 'disfavored group' . . . must still be required to show that she has been 'singled out individually' for persecution." Pet. for Writ of Cert. at ii, 127 S. Ct. 2935 (2007) (No. 06-1094). As the Solicitor General correctly noted in his response brief, "there is no conflict in the circuits on the question whether membership in a disfavored group alone, without any individualized evidence of persecution, is sufficient to establish a well-founded fear or likelihood of persecution." Br. Resp. in Opp. at 10, *Sanusi*, *supra; accord* Bridget Tainer-Parkins, Note, *Protection from a Well-Founded Fear: Applying the Disfavored Group Analysis in Asylum Cases*, 65 Wash. & Lee L. Rev. 1749, 1769–71 (2008) (noting

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[9] The BIA stated in its order denying rehearing and reconsideration that Petitioner "has not made an individualized showing of possible persecution," App. 10a. The Tenth Circuit avoided reviewing the BIA's cursory *dicta* – which was directly contradicted by the individualized evidence Kasonso presented, *see supra*, at 7–8 – by coming down on the side of the circuit split rejecting disfavored-group analysis. This case raises only the circuit split's pure question of law – to wit, whether a court reviewing an applicant's claim that future persecution is more likely than not should consider the applicant's membership in a disfavored group.

that Sanusi mischaracterized the nature of the circuit split).

By comparison, this petition asks a more modest question, and the one that has unquestionably divided the circuits: Whether an immigration court should consider evidence that an applicant is a member of a disfavored group – a group that suffers mistreatment, but not severely and pervasively enough to constitute a pattern or practice of persecution – in considering an applicant's claim that he or she will be individually singled out for persecution?

Petitioner's somewhat limited supply of individualized-risk evidence is characteristic of the evidence that claimants requesting disfavored group analysis typically show. *See, e.g.*, *Zhao*, 404 F.3d at 299–301. Were that not so – that is, were a petitioner to have a more substantial amount of evidence showing an individualized risk of persecution – the courts would never reach the question of disfavored-group analysis. Under the test applied, such an ample supply of evidence of individualized risk alone would be sufficient to grant withholding of removal in any circuit. There would be no occasion to determine whether the group to which the petitioner belonged was subjected to mistreatment. The case this Court uses to address the disfavored-group circuit split will necessarily involve a petitioner with more limited evidence of individualized risk, because cases with substantial evidence of individualized risk will never reach the question driving the split.

Also, the Court should address the question from this side of the circuit split, granting certiorari in a case in which a court of appeals rejected disfavored-

group analysis. The Immigration and Nationality Act provides only for judicial review of final *orders of removal*, that is, cases in which the applicant has lost before the BIA. *See* 8 U.S.C. § 1252. It provides no parallel appellate avenue for the government to appeal from a BIA's final determination that the applicant established a right to withholding of removal. Thus, where the BIA applies a disfavored-group analysis and grants relief, there will be no appeal to the federal courts; where the BIA applies a disfavored-group analysis and denies relief, the applicant will appeal the application of disfavored-group analysis, not whether the analysis should be applied at all. The only other potential procedural posture in which the circuit split could be presented to the Court would be a case in which the BIA denies relief, and the applicant successfully appeals. In that instance, the Court would be asked to reverse a court of appeals' grant of withholding of removal on grounds that evidence that the applicant is a mistreated minority should not have been considered by the court of appeals in ruling that the applicant's "life or freedom would be threatened in that country because of his race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A).

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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March 19, 2012

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ARTHER DEYKE KASONSO,

Petitioner,

v.

ERIC H. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,

Respondent.

No. 10-9526
Filed Oct. 20, 2011

Before LUCERO, EBEL, and O'BRIEN, Circuit Judges.

ORDER AND JUDGMENT*

Arther Deyke Kasonso petitions for review of a Board of Immigration Appeals (BIA) order denying his motion for reconsideration. His petition raises a single, narrow issue: whether the BIA abused its

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* After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R.App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R.App. P. 32.1 and 10th Cir. R. 32.1.

discretion in declining to apply the "disfavored group analysis" adopted by some of the other circuits, to determine whether Kasonso is entitled to restriction on removal. Exercising jurisdiction under 8 U.S.C. § 1252, we find no abuse of discretion and deny the petition.

Kasonso, a native and citizen of Indonesia, entered the United States in 1994 on a non-immigrant visa and overstayed his six-month authorization. He received a notice to appear, conceded removability, and filed applications for asylum, restriction on removal,[1] and relief under the Convention Against Torture. He alleged past persecution and a well-founded fear of future persecution in Indonesia because he is a Christian. After a hearing, an immigration judge denied his applications for relief from removal, but granted him voluntary departure. The BIA dismissed his appeal. Kasonso then filed a motion for reconsideration and request to reopen his case. As relevant to this appeal, he wanted the BIA to reconsider his application for restriction on removal and grant relief based upon the disfavored-group approach. *See Wakkary v. Holder,* 558 F.3d 1049, 1062-66 (9th Cir. 2009). The BIA denied his motion, stating,

> [T]he respondent seeks to have his applications for relief reviewed with consideration given to . . . *Wakkary v. Holder,*

[1] "Restriction on removal" was formerly known as "withholding of removal." *See Ismaiel v. Mukasey,* 516 F.3d 1198, 1200 n. 2 (10th Cir. 2008) (italics omitted). Although the applicable regulations, as well as the IJ and the BIA in this case, continue to refer to "withholding of removal," this court uses the current statutory term "restriction on removal." *Id.* (italics omitted).

> 558 F.3d 1049 (9th Cir. 2009) . . . . However, [that case] arose outside of the jurisdiction of the United States Court of Appeals for the Tenth Circuit, the jurisdiction in which these proceedings rest[], and therefore [is] not controlling. We further note that the respondent has not made an individualized showing of possible persecution, as required in *Wakkary*.

Admin. R. at 3. Kasonso filed a timely petition for review of the BIA's order denying his motion for reconsideration.[2]

Restriction on removal prevents the Attorney General from "remov[ing] 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. § 1231(b)(3)(A). The Attorney General has implemented this statutory language in regulations setting forth the evidence required to establish entitlement to restriction on removal. *See* 8 C.F.R. § 1208.16(b)(1)-(2). First, if an applicant can show he suffered past persecution in the proposed country of removal on account of one of the specified grounds, he is rebuttably presumed to be subject to future persecution in that country. *See id.* § 1208.16(b)(1)(i). The Attorney General may rebut that presumption by showing the applicant's life or freedom would not

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[2] Kasonso separately petitioned for our review of the BIA's removal order; we dismissed that petition for failure to prosecute. *See* Appeal No. 09-9557.

be threatened because of a fundamental change in circumstances in that country, or by showing it would be reasonable for the applicant to relocate to another part of the country in order to avoid such a threat. *See id.* § 1208.16(b)(1)(i)(A)-(B).

If an applicant is unable to show past persecution, he can qualify for restriction on removal by establishing that it is more likely than not that he would be persecuted in the country of removal on account of one of the specified grounds (race, religion, nationality, membership in a particular social group, or political opinion). *See id.* § 1208.16(b)(2). Under this standard an applicant must demonstrate a "clear probability of persecution." *Elzour v. Ashcroft,* 378 F.3d 1143, 1149 (10th Cir. 2004). The regulations provide two ways for an applicant to do so. He can show there is a pattern or practice of persecution of a group of people in the country of removal on account of one of the specified grounds and that his inclusion in and identification with that group makes it more likely than not that he would suffer persecution. *See id.* § 1208.16(b)(2)(i)-(ii). Alternatively, he can demonstrate a clear probability of persecution by "provid[ing] evidence that [he] would be singled out individually for such persecution." *Id.* § 1208.16(b)(2).[3]

In Kasonso's original appeal to the BIA it decided he failed to demonstrate that he suffered treatment amounting to past persecution or that would give

[3] An applicant claiming a clear probability of persecution upon removal to a country will not be entitled to relief if it would be reasonable for him to relocate to another area of that country in order to avoid future persecution. *See id.* § 1208.16(b)(2).

rise to a well-founded fear of future persecution if he returns to Indonesia.[4] Additionally, the BIA concluded he had "not demonstrated a reasonable fear of persecution based upon a pattern or practice of persecution of Christians in Indonesia." *Id.* Therefore, it decided he failed to establish eligibility for either asylum or restriction on removal.[5] In his motion for reconsideration, Kasonso asked the BIA to revisit its decision for the purpose of applying the disfavored-group analysis[6] and grant him restriction on removal based on that approach. *See Wakkary,* 558 F.3d at 1062-66.

The disfavored-group approach is merely a gloss on the evidence an applicant must submit to establish he will be singled out individually for persecution. Under that approach, if an applicant for

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[4] A "well-founded fear of persecution" is the standard for establishing eligibility for asylum. 8 U.S.C. § 1101(a)(42)(A) (defining who is a "refugee"); *see also* 8 U.S.C. § 1158(b)(1)(A) (providing an alien determined to be a refugee may be granted asylum). As with restriction on removal, an asylum applicant can rely on evidence of past persecution or a pattern or practice of persecution, or he can show he would be singled out for persecution. *See* 8 C.F.R. § 208.13(b)(1)-(2).

[5] *See Uanreroro v. Gonzales,* 443 F.3d 1197, 1202 (10th Cir. 2006) (holding applicant who cannot establish well-founded fear under asylum standard necessarily fails to meet higher burden of proof required for restriction on removal). A key distinction between asylum and restriction on removal is the burden of proof. While an asylum applicant need only show a "reasonable possibility" of future persecution, *id.* at § 208.13(b)(2)(i)(B), an applicant for restriction on removal must show a clear probability of persecution, *see Elzour,* 378 F.3d at 1149.

[6] The motion for reconsideration related to several matters but the only one germane to this petition for review related to the disfavored-group approach.

asylum or restriction on removal is unable to show past persecution or a pattern or practice of persecution in the country of removal, he may establish eligibility for relief by "prov[ing] that []he is a member of a 'disfavored group' coupled with a showing that []he, in particular, is likely to be targeted as a member of that group." *Sael v. Ashcroft,* 386 F.3d 922, 925 (9th Cir. 2004) (applying this standard in asylum case); *see also Wakkary,* 558 F.3d at 1065 (holding same standard applicable to restriction-on-removal claims). "[O]nce an applicant establishes that he is a member of a group that is broadly disfavored, the more egregious the showing of group persecution – the greater the risk to *all* members of the group – the less evidence of *individualized* persecution must be adduced to meet the objective prong of a well-founded fear showing." *Wakkary,* 558 F.3d at 1063 (quotation omitted). An applicant for restriction on removal still must show it is more likely than not that he will be persecuted in the country of removal. *See id.* at 1065. Accordingly, the Ninth Circuit has cautioned that "the impact of the disfavored group mode of analysis is likely to be of considerably less significance in [restriction on removal] than in asylum cases, due to the different standards of proof for these two forms of relief." *Id.* at 1062. In *Tampubolon v. Holder,* 610 F.3d 1056, 1062 (9th Cir. 2010), the Ninth Circuit held for the first time "that Christian Indonesians are a disfavored group."

The BIA declined to reconsider Kasonso's application for restriction on removal and grant him relief based on the disfavored-group approach. We review the BIA's denial of Kasonso's motion for reconsideration for an abuse of discretion. *See Belay-*

Gebru v. INS, 327 F.3d 998, 1000 n.5 (10th Cir. 2003). "The BIA abuses its discretion when its decision provides no rational explanation, inexplicably departs from established policies, is devoid of any reasoning, or contains only summary or conclusory statements." *Mickeviciute v. INS,* 327 F.3d 1159, 1162 (10th Cir. 2003) (quotations omitted). "[A]ny error of law is presumptively an abuse of discretion," *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.,* 425 F.3d 735, 750 (10th Cir. 2005), and we review the BIA's legal determinations de novo, *see Lockett v. INS,* 245 F.3d 1126, 1128 (10th Cir. 2001).

The sole issue we consider is whether the BIA abused its discretion when it declined to apply the disfavored-group analysis. The gist of Kasonso's argument is that the BIA was required to reconsider his application for restriction on removal based on that approach. But the BIA has "historically followed a court's precedent in cases arising in that circuit." *Matter of Anselmo,* 20 I. & N. Dec. 25, 31 (BIA 1989). As the BIA correctly observed, this court has neither adopted nor rejected the disfavored-group analysis.[7]

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[7] Nor is there an unchallenged tide of support for the Ninth Circuit's approach in our sister circuits. Some courts have criticized the approach as lowering the threshold for proof of individualized risk. *See Ingmantoro v. Mukasey,* 550 F.3d 646, 651 n.7 (7th Cir. 2008) ("This circuit has not recognized a lower threshold of proof based on membership in a 'disfavored group.'" (quotation omitted)); *Lie v. Ashcroft,* 396 F.3d 530, 538 n.4 (3d Cir. 2005) ("We disagree with the Ninth Circuit's use of a lower standard for individualized fear absent a 'pattern or practice' of persecution and, similarly, we reject the establishment of a 'disfavored group' category."). Two have agreed with the Ninth Circuit and one is, so far, agnostic. *Chen v. INS,* 195 F.3d 198, 203-04 (4th Cir. 1999) (citing with

Kasonso does not argue the BIA failed to follow its established policy to apply Tenth Circuit precedent or misapplied that law in his case. Nor does he provide any other basis for us to conclude that the BIA abused its discretion in denying his motion for reconsideration.

The petition for review is DENIED.

Entered for the Court

Terrence L. O'Brien
Circuit Judge

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approval Ninth Circuit's analysis requiring less evidence of individualized persecution where there is a showing of egregious group persecution); *Makonnen v. INS,* 44 F.3d 1378, 1383 (8th Cir. 1995) (citing with approval Ninth Circuit's application of disfavored-group analysis); *see Sugiarto v. Holder,* 586 F.3d 90, 97 (1st Cir. 2009) (declining to decide whether disfavored-group approach is consistent with the First Circuit's rule "that evidence short of a pattern or practice of persecution will enhance an individualized showing of likelihood of a future threat" (quotation and brackets omitted)).

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File A095 634 568 - Denver, Colorado
Date: APR 02 2010

In re: ARTHER DEYKE KASONSO

IN REMOVAL PROCEEDINGS

MOTION ON BEHALF OF RESPONDENT: Albert C. Lum, Esquire

ON BEHALF OF DHS: John M. Canedy, Assistant Chief Counsel

APPLICATION: Reopening and Reconsideration

ORDER:

The proceedings in this matter were last before the Board on August 31, 2009, at which time the Board dismissed the respondent's appeal of the decision of the Immigration Judge of January 25, 2008. The respondent's motion was filed on October 15, 2009. By the motion, the respondent seeks to have his applications for relief reviewed with consideration given to the cases of *Wakkary v. Holder*, 558 F.3d 1049 (9th Cir. 2009), and *Mufied v. Mukasey*, 508 F.3d 88 (2d Cir. 2007). However, those cases arose outside of the jurisdiction of the United States Court of Appeals for the Tenth Circuit, the

jurisdiction in which these proceedings rests, and therefore are not controlling. We further note that the respondent has not made an individualized showing of possible persecution, as required in *Wakkary*. Further, in this case, unlike in *Mufied*, the Board did specifically consider the respondent's pattern and practice claim. *See Santoso v. Holder*, 580 F.3d 110 (2d Cir. 2009).

Likewise, we will not consider the ineffective assistance of counsel argument made by the respondent insofar as he has failed to comply with the requirements for such claims set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). *See Mickeviciute v. INS*, 327 F.3d 1159, 1161 n.2 (10th Cir. 2003) (noting that motion based on claim of ineffective assistance of counsel must be supported as outlined in *Lozada*). Accordingly, the motion is, hereby, denied.

/s/ Molly Kendall-Clark
FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File A095 634 568 - Denver, CO
Date: AUG 31 2009

In re: ARTHER DEYKE KASONSO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Houman Varzandeh, Esquire

ON BEHALF OF DHS: John M. Canedy, Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; protection from removal under the Convention Against Torture

The respondent, a native and citizen of Indonesia, appeals from the decision of the Immigration Judge dated January 25, 2008. The Immigration Judge determined that the respondent is subject to removal as charged and denied his applications for asylum and withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158 and 1231 (b)(3), and protection from

removal under the United Nations Convention Against Torture, pursuant to 8 C.F.R. § 1208.16(c)(2).[1] The appeal will be dismissed.

This Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). *See also Matter of S-H-*, 23 I&N Dec. 462, 464-65 (BIA 2002). The Board reviews questions of law, discretion, and judgment and all other issues in appeals from decisions of Immigration Judges *de novo*. 8 C.F.R. § 1003.1(d)(3)(ii).

The record indicates that the respondent, a native and citizen of Indonesia, entered the United States on September 27, 1994, with authorization to remain until March 26, 1995. He remained beyond the authorized period, although he indicated that he registered for the National Security Entry/Exit Registration System ("NSEERS"). He filed his application for asylum on January 19, 2005. The respondent argues that his late filing should be excused because of changed circumstances, namely his discovery in 2005 that Christians were being subjected to acts of religious intolerance from Muslims in Indonesia. However, we will not address

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[1] As the respondent's asylum application was initially filed on January 19, 2005, it is not governed by the amendments to the Immigration and Nationality Act brought about by the passage of the REAL ID Act of 2005, Div. B of Pub. L. No. 109-13, 119 Stat. 302 ("REAL ID Act"). *See* section 101(h)(2), indicating that the new asylum provisions apply to asylum applications filed on or after the date of enactment, i.e., May 11, 2005. Although the respondent argues on appeal that the Immigration Judge applied a REAL ID Act standard of review to his case, we find no such application of the REAL ID Act in this case.

the timeliness of the respondent's asylum application, in light of our independently dispositive analysis below.

The respondent's claims for asylum and withholding of removal are based on his practice of Christianity as a Seventh Day Adventist. We find, as did the Immigration Judge, that the respondent failed to present sufficient evidence to demonstrate that he suffered treatment that constitutes past persecution or that would give rise to a well-founded fear of future persecution if he returns to Indonesia. *See, e.g., Sidabutar v. Gonzales*, 503 F.3d 1116, 1124 (10th Cir. 2007) (Indonesian Christian's experiences of being beaten by classmates and being confronted on the street for money did not rise to the level of past persecution). As the Immigration Judge correctly observed, key aspects of the respondent's testimony were inconsistent with his written application. For example, the respondent testified that during an incident on the bus his mother was thrown to the floor by a Muslim man. His written statement presented in 2005 regarding the same incident does not mention that his mother was thrown to the floor. Similarly, the respondent's 2005 written statement does not mention that Muslims threw rocks at his house or the church burning he described in his testimony. I.J. at 10. Perhaps most importantly, the respondent failed to produce any corroborative evidence that he is in fact a Seventh Day Adventist, or evidence that he was targeted in Indonesia or is in danger of being targeted on that basis if he returns.

This Board held in *Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997), that testimony, by itself, *may* be

sufficiently detailed and consistent to meet the burden of proof. In this case, we find that the Immigration Judge correctly determined that the respondent's testimony was insufficient by itself to carry his burden of proof and persuasion that he suffered past persecution on account of his religious beliefs or practices, in view of the concerns set forth above, as well as the overall need to provide corroboration of the specifics of the applicant's claim when such evidence is reasonably available. The Immigration Judge correctly determined that the corroborating evidence was required, and the respondent failed to explain why such evidence was unavailable. *See Matter of S-M-J-*, *supra*. Given our clearly established case law, we find no merit in the respondent's argument on appeal that he was provided no notice of the need to provide available corroborative evidence. Nor do we find any prejudice to have resulted from any deficiency in notice, given that no such corroboration has been produced even now.

We further find no error in the Immigration Judge's conclusion that the respondent failed to establish that anyone in Indonesia has any present interest in him. For the reasons stated above, we find no basis to disturb the Immigration Judge's conclusion that the respondent failed to carry his burdens of proof and persuasion required to establish eligibility for asylum or withholding of removal. *See, e.g., Matter of S-M-J-*, *supra*.

We further find that the respondent has not demonstrated a reasonable fear of persecution based upon a pattern or practice of persecution of Christians in Indonesia. *See Matter of A-M-*, 23 I&N

Dec. 737 (BIA 2005); 8 C.F.R. § 1208.13(b)(2)(iii). The evidence of record, including the United States Department of State Country Report on Human Rights Practices for Indonesia for 2005 ("Country Report"), indicates that incidents of harm related to religious or ethnic strife generally involved fellow citizens rather than the Government or Government agents, and that Government inaction is not the norm. *See Matter of A-M-*, 23 I&N Dec. at 741(noting that in order to be deemed "persecution," harm must be committed by government forces, or forces the government is unable or unwilling to control). In fact, the evidence reveals that despite some setbacks, the government has made progress in reducing interreligious violence in some areas. The 2005 Country Report further states that the Indonesian government officially promotes racial and ethnic tolerance. The Country Report for 2008, of which we take administrative notice, contains similar statements. *See Woldemeskel v. INS*, 257 F.3d 1185, 1192-93 (10th Cir. 2001). In sum, we find that the respondent failed to establish eligibility for asylum or withholding of removal.

The respondent has also appealed the Immigration Judge's denial of his application for protection from removal under the Convention Against Torture ("CAT"). Although the respondent contends that the Immigration Judge's analysis of the CAT application was insufficient, we are affording an independent assessment of that application upon our own review of the record. To demonstrate eligibility for protection from removal under the CAT, the respondent must demonstrate that it is more likely than not that he would be tortured, at the instigation or with the acquiescence

of a public official, if returned to Indonesia. *See* 8 C.F.R. §§ 1208.16(c)(4), 1208.18(a)(1). A showing of entitlement to CAT relief can be based upon evidence that officials of the government in the proposed country of removal either inflict torture or acquiesce in torture against persons similarly situated to the applicant. *See Ferry v. Gonzales*, 457 F.3d 1117, 1130-31 (10th Cir. 2006). The respondent failed to produce any evidence that officials of the Indonesian government have promoted torture or turned a willfully blind eye to torture. *See* Country Reports. To the contrary, the baekground material contained in the record indicates that the government is officially committed to the protection of Christians in Indonesia. *Id*.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security ("DHS"). *See* section 240B(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(b); *see also* 8 C.F.R. §§ 1240.26(c), (f). In the event the respondent fails to voluntarily depart the United States, the respondent shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent fails to voluntarily depart the United States within the time period specified, or any extensions granted by the DHS, the respondent shall be subject to a civil penalty as

provided by the regulations and the statute and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Act. *See* section 240B(d) of the Act.

WARNING: If the respondent files a motion to reopen or reconsider prior to the expiration of the voluntary departure period set forth above, the grant of voluntary departure is automatically terminated; the period allowed for voluntary departure is not stayed, tolled, or extended. If the grant of voluntary departure is automatically terminated upon the filing of a motion, the penalties for failure to depart under section 240B(d) of the Act shall not apply. *See* Voluntary Departure: Effect of a Motion To Reopen or Reconsider or a Petition for Review, 73 Fed. Reg. 76,927, 937-38 (Dec. 18, 2008) (to be codified at 8 C.F.R. §§ 1240.26(c)(3)(iii), (e)(1)).

WARNING: If, prior to departing the United States, the respondent files any judicial challenge to this administratively final order, such as a petition for review pursuant to section 242 of the Act, 8 U.S.C. § 1252, the grant of voluntary departure is automatically terminated, and the alternate order of removal shall immediately take effect. However, if the respondent files a petition for review and then departs the United States within 30 days of such filing, the respondent will not be deemed to have departed under an order of removal if the alien provides to the DHS such evidence of his or her departure that the Immigration and Customs Enforcement Field Office Director of the DHS may require and provides evidence DHS deems sufficient that he or she has remained outside of the United

States. The penalties for failure to depart under section 240B(d) of the Act shall not apply to an alien who files a petition for review, notwithstanding any period of time that he or she remains in the United States while the petition for review is pending. *See* 73 Fed. Reg. at 76,938 (to be codified at 8 C.F.R. § 1240.26(i)).

/s/ Linda S. Wendtland
FOR THE BOARD

Immigration Court
1961 Stout St., RM 1403
Denver, CO 80294

Case No.: A95-634-568

In the Matter of
KASONSO, ARTHER DEYKE, Respondent
IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 1-25-08. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion of the case.

[ ] The respondent was ordered removed from the United States or in the alternative to .

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to or in the alternative to .

[x] Respondent's application for voluntary departure was granted until 3-25-08 upon posting a bond in the amount of $ 500 with an alternate order of removal to INDONESIA.

Respondent's application for

[x] Asylum was ( ) granted (x) denied ( ) withdrawn.

[x] Withholding of removal was ( ) granted (x) denied ( ) withdrawn

[ ] A Waiver under Section ____ was ( ) granted ( ) denied ( ) withheld.

[ ] Cancellation of removal under section 240A(a) was ( ) granted ( ) denied ( ) withdrawn.

Respondent's application for:

[ ] Cancellation under section 240A(b)(1) was ( ) granted ( ) denied ( ) withdrawn. If granted, it is ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Cancellation under section 240A(b) (2) was ( ) granted ( ) denied ( ) withdrawn. If granted, it is ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Adjustment of Status under Section ____ was ( ) granted ( ) denied ( )withdrawn. If granted it is ordered that respondent be issued all appropriate documents necessary to give effect to this order

[x] Respondent's application of (x) withholding of removal ( ) deferral of removal under Article III of the Convention against Torture was ( ) granted (x) denied ( ) withdrawn.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a ____ until ____.

[ ] As a condition of admission, respondent is to post a $ ____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other: _____

Date Jan 25, 2008

/s/ David J. Cordova
DAVID J. CORDOVA
Immigration Judge

Appeal: Waived/Reserved

Appeal Due by: 2-25-08

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY: MAIL (M)
PERSONAL SERVICE (P)

TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer
[x] ALIEN's ATT/REP [x] DHS

DATE: 1-25-08 BY: COURT STAFF _____
Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

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U.S. Department of Justice
Executive Office for Immigration Review
Immigration Court
Denver, Colorado

File A 95 634 568
Date: January, 25 2008

In the matter of ARTHER DEYKE KASONSO, respondent

IN REMOVAL PROCEEDINGS

CHARGE:

APPLICATIONS:

ON BEHALF OF RESPONDENT: Ms. Rabin, Esquire and Mr. Kim, Esquire

ON BEHALF OF DHS: Mr. Kennedy, Esquire, Assistant Chief Counsel, Denver, Colorado

ORAL DECISION AND ORDER OF THE IMMIGRATION JUDGE

This matter comes before the Court today as a result of Form I-862 which is a Notice to Appear in Removal Proceedings which was issued to the respondent by the U.S. Immigration and Naturalization Service (now know as Homeland Security) on July 21st of 2003. The Notice to Appear alleges that the respondent is removable pursuant to Section 237(a)(1)(B) of the Immigration and Nationality Act, as amended, in that after admission

as a non-immigrant under Section 101(a)(15) of the Act, he remained in the United States for a time longer than that which was permitted.

In this particular matter, the respondent was in fact admitted into the United States legally. He is a native and citizen of Indonesia. He entered the United States at San Francisco, California on September 27th, 1994 as a non-immigrant visitor for business pleasure to remain for a temporary period not to exceed March 26th of 1995. The respondent remained beyond March 26th of 1995 without authorization from the Immigration and Naturalization Service. The issue of removability was resolved at a prior master calendar hearing where the respondent, through counsel, acknowledged proper service of the Notice to Appear, admitted the allegations of fact contained therein and conceded the charge of removability. Based on the evidence of record and the admissions of the respondent's counsel, this Court finds that removability has been established by clear, unequivocal and convincing evidence.

The respondent seeks relief in the form of political asylum pursuant to Section 208 of the Act, withholding of removability pursuant to Section 241(b)(3) of the Act in regards to his native country of Indonesia. In the alternative the respondent has requested voluntary departure pursuant to Section 240B of the Act. The Court will also look at 8 C.F.R. 208.13, withholding of removability under the Torture Convention Act.

The Court would indicate that this is a case that was before the Court the first time on 7/21/03. During this time we have had numerous hearings on

this particular matter. We've submitted the State Department Report that must be submitted to both parties for purposes of having this hearing. Some of them go back to 2005, 2006. The Court, again, would indicate the Court has given counsel for Homeland Security and counsel for the respondent the new State Department Report that the Court must use in its decision.

The Court would indicate that the Court has admitted this into evidence and marked as an exhibit. The Court would indicate that the respondent, through counsel, has given the Court numerous packets of materials, basically from A to Q. All of that material has been entered into evidence and marked as an exhibit. The Court would indicate that the respondent's application for asylum is on Form I-589. That was entered into evidence and marked as an exhibit.

The Court would indicate that statutory requirements for asylum and withholding of removability are as follows. Under Section 208 of the Immigration and Nationality Act the Attorney General, through an Immigration Judge, may grant asylum as a matter of discretion to an individual who is a refugee within the meaning of Section 101(a)(42) of the Act. This provision requires that the respondent show that he is unable or unwilling to return to his native country and unable or unwilling to avail himself 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 opinion. This is under Section 101(a)(42) of the Act. The

respondent in this particular matter through his attorney has checked religion.

The Court would indicate in order to establish a well-founded fear of persecution an alien must first of all show that he possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort. That the persecutor is already aware or could become aware that they possess this belief or characteristic. That the persecutor has the capability to punish the alien and that the persecutor has the inclination to punish the alien. Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987).

The United States Supreme Court has held that the well-founded fear standard requires a showing that the fear of persecution is based on a reasonable possibility that such harm will in fact occur.

In this particular matter the Court would indicate that persecution is not defined in the Act but includes both actual infliction of physical harm which is torture, prolonged detention, denial of an opportunity to earn a livelihood, restrictions on life and liberty and the threat that such harm will be imposed. INS v. Stevic, 467 U.S. 407 (1984). Persecution will only provide a basis for asylum if it is inflicted at the hands of the government or group which the government is unable or unwilling to control.

Past Persecution. If an applicant establishes that he has been persecuted in the past for one of the five grounds enumerated in the statute, he is eligible for a grant of asylum. The likelihood of present or future persecution then becomes relevant as to the exercise of discretion and asylum may be denied as a matter

of discretion if there is very little likelihood of present persecution. Matter of Chen, Int. Dec. 3104 (BIA 1989).

The Burden of Proof. The burden of proof is on the applicant for asylum to establish that he is a refugee as defined in Section 101(a)(42) of the Act. In some cases the only available evidence of the alien's subjective fears may be the alien's own testimony. It can suffice where the testimony is believable, consistent and sufficiently detailed to provide a plausible and coherent account of the basis for the alien's fear.

Withholding of Removability. In order to establish eligibility for withholding of removability the respondent must show that his life or freedom would be threatened in the country designated for removability on account of race, religion, nationality, membership in a particular social group or political opinion. Section 241(b)(3) of the Act. This statutory provision requires that the respondent demonstrate a clear probability of persecution on account of one of the five grounds enumerated in the Act. This clear probability standard requires a showing that it is more likely than not that the alien would be subject to persecution.

In this particular matter the Court will also look at 8 C.F.R. 208.13 which is withholding of removability under the Torture Convention. Under that particular statute there is no filing deadline. There must be a showing of fear of torture for such purposes as obtaining information, confession, punishment for an act committed, suspected, intimidation or coercion or discrimination. There must be a present fear. This must be instigated by or

with the consent or acquiescence of a public official or person acting in an official capacity. The burden of proof is more likely than not. There is not discretion. The Court must grant it if the Court finds this.

In this particular matter the Court has had an opportunity to look at the application for asylum. Has also had the opportunity to hear the respondent testify under oath today, the respondent indicated today that he is 38 years of age. That he was born in Indonesia. That he has been a Seventh Day Adventist, a Christian, since he was born. That there are problems between the Muslims and the Christians in that particular country. The majority of the individuals in that country are Muslim. They do not like Christians. He indicates that one of the incidents that he had was on a bus on a date that he was going to church. That he was on the bus. He had a Bible. That one of the individuals on that particular bus saw him and told him that that particular book was not allowed on the bus. That Muslim people did not believe in it and the bus driver then kicked him out of the bus and he had to walk to church from there.

He indicates that on a prior occasion when he was approximately 17 years old, that he was walking to church with his mother when they passed a Muslim individual, that this Muslim individual knew that they were Christian. That he pushed his mother to the floor. That no one came to help and his mother laid on the floor for quite some time until she got up. He indicates that they also have neighbors that used to live around them that would throw rocks in the house. He indicates that his parents still live in Indonesia. That he came to the United States in

1994. That he applied for asylum in 2005. He indicates that the reason he applied in 2005 is because there were that were being killed, churches being burned and he felt that it was time to apply for asylum at that time.

He indicates that he has six sisters and two brothers. One of the sisters is in Seattle. He does not know whether she is here legally or illegally. The other sisters and brothers all reside in Indonesia. He is from Jakarta. Jakarta is the biggest city in Indonesia. He indicates that he has not kept in contact with his brothers and sisters. That it is hard for him to get a hold of his parents because they do not have a phone so he spoke to them approximately eight months ago. He indicates that he goes to church here every Saturday. That the church is in Thorton. That he has been a member of that particular church for five years. That he has never left the United States since he got here. That he has a college degree. That he went to the university in Jakarta. That when he graduated from this university, that he came to the United States immediately. He works for Wal-Mart. Has worked there for three years. He indicates that he still has a fear of going back to Indonesia at this particular time.

The Court would indicate that first of all, the first issue that has to be resolved is the issue of the one year deadline for filing for asylum. Under that particular statute it states that the deadline for filing for asylum is either April the 1st, 1998 or one year from the last arrival, whichever is later. There are exceptions. Exceptions are changed circumstances. These are things that materially

affect the eligibility for asylum or extraordinary circumstances for failing to apply for asylum within one year. Extraordinary circumstances are events or facts beyond the alien's control that cause failure to meet the one year deadline.

Changed Circumstances. These are changes in country conditions or relating to applicant's eligibility for asylum. The applicant has the burden of proof of showing extraordinary circumstances. The Court in this particular matter would indicate that the respondent at the time he filed his application for asylum in 2004 states on page eight, I was simply unaware of my legal rights and ability to file an application for asylum and didn't really know what the term meant until I consulted with my immigration attorney and was informed of this relief. The respondent now states that there were incidents that happened in 2005 of burning the church, a killing of an individual. The Court would indicate right now that the respondent also indicates to the Court that he felt that was the time to do it because the situation in Indonesia was extremely bad.

The Court would indicate that the worst time in Indonesia most recently was in 1998 when they had the major riots where churches were burned, people were killed and he didn't apply. I mean he doesn't apply until 2005 some seven years after this particular situation happened. So the Court would indicate the Court does not believe that the respondent has shown that in fact an exception should be made regarding this situation that there is proof of extraordinary circumstances. The Court believes that the respondent has failed to show that. I will not grant asylum.

At this particular time the Court is now going to hearing regarding withholding of removability under Section 241(b)(3) and withholding of removability under the Torture Convention Act. The Court would state the Court does not deny that the respondent would not want to return to Indonesia, however, the respondent's testimony has been considered along with the Form I-589 and the materials submitted by the respondent and this Court finds that his unwillingness to return does not stem from persecution he may face on account of any of the five enumerated grounds necessary to grant political asylum. The respondent has failed to show past persecution or a well-founded fear of persecution within the meaning of the Immigration and Nationality Act. In this particular matter the Court has had an opportunity to read all the material that was given to the Court. The Court would indicate that there is a declaration that he filed in 2005. It talks about the bus incident and never talks about his mother being thrown to the floor by a Muslim and never talks about the Muslim people throwing rocks at his house and never talks about this church being burned, this person being burned. None of that stuff was mentioned there. That's the time.

He indicates that he believes that maybe Mr. Cohler was Muslim and that's why he didn't put it down. Mr. Cohler has been before this Court on numerous occasions. He has practiced immigration law for years. He has represented Christians. Whether he is a Muslim or not, I have no idea. But I will tell you that he has always done a pretty respectable job for his clients. So the Court would indicate that the Court feels that he could have had and had the opportunity to do that and he has not

done it. The respondent has failed to meet his burden of proof that anyone in Indonesia is interested in him due to any of the enumerated grounds for asylum.

After a careful review of the record, the Court finds that the respondent's testimony was not sufficiently detailed, consistent or believable to provide a plausible and coherent account of the basis for his fears and thus cannot suffice to establish his eligibility for asylum without any further corroborating evidence.

The Court will first of all state that people that are in fact from Indonesia must have an ID on them. That ID states their name, their date of birth and whether they're Christian or Muslim. The respondent in this matter has been here since 2003. I cannot understand why he would not produce that particular document to the Court showing that in fact he is Christian. The other thing is there is no letters from the parents or the church in Indonesia indicating that this individual is in fact Christian. I don't know whether he is or not. He has testified. I am assuming he is. But none of that material was given to the Court.

Second, there is no letter from the church here in the United States indicating that this gentleman is part of that particular congregation. That he goes to church. That he is in fact a Seventh Day Adventist at all. I have no idea. There is no baptismal certificate that was given to the Court. In fact there is absolutely nothing that was given to the Court from anybody in Indonesia indicating this individual was in fact a Christian, that he was persecuted in Indonesia and that he should be granted asylum. I

mean he has his parents there. He has his brothers there. He has his sisters there. He said he had a church here. He has a pastor there. None of that stuff is here. I have no idea. This case has been open since 7/21/03, five years ago. If that doesn't give you enough time to get all that stuff together, I don't know what will.

Also, the Court would indicate that in Int. Dec. 3338 which is In Re: A-E-M, (February 20th, 1998) it states that the reasonableness of an alien's fear of persecution is reduced when his family remains in his native country unharmed for a long period of time after his departure. Well, he has been gone since 1994. His brothers, sisters, his family are all in Indonesia. They to my knowledge have not been harmed. He said he doesn't know whether they have been harmed or not. That his mom is afraid to go to church at this particular time because of the situation.

The Court would indicate that the Court has admitted into evidence the State Department Report on Indonesia. It is quite clear in that particular report that the Indonesian government is moving forward. That they are trying to include the Christians and the Chinese and the matters in that particular country. They have allowed religious services. The Seventh Day Adventist is a registered church in Indonesia. That is one of the registered religions that they do allow to practice in that particular country. The Court would indicate that also in that particular State Department Report it shows that the fanatic Muslim groups that are starting trouble have been arrested. They have been imprisoned and they have been prosecuted. So the

Court believes that the circumstance in Indonesia is getting better. I personally believe that this individual came to the United States for one purpose and one purpose only and that is to work and to make more money and that's I think why he came.

The Court would also indicate that there must be a showing that threat of persecution for him exists countrywide. This is under Matter of Feuntes, 19 I&N Dec. 658 (BIA 1988). Again, the respondent has indicated that he came straight from Jakarta, Indonesia to the United States. The Court would indicate that like North Sumatra, it is like 40 percent Christian. There are other islands that are predominantly Christian so there are plenty of places that in fact are predominantly Christian and allow Christianity in that community and allow them to practice their religion.

Inasmuch as the respondent has failed to satisfy the lower burden of proof required for asylum, it falls that he has also failed to satisfy the clear probability standard of eligibility required for withholding of removability. The evidence does not establish if he were now to return to Indonesia, it is more likely than not that he will be subject to persecution on account of one of the five grounds specified in Section 241(b)(3) of the Act. The Court will also indicate that under 8 C.F.R. 208, withholding of removability under the Torture Convention Act, it is obvious that the Government is moving in the right direction. It may not be as fast as I like it or as fast as counsel likes it but they are moving in that direction to insure that all individuals in that particular country are part of the government. That they are allowed religious freedom and the Court feels that the Court

has to look at the State Department Report. That is the one I have to definitely look at.

In light of the foregoing and after considering all the testimony and documentary evidence of record, the following orders shall be entered.

ORDER

WHEREFORE, IT IS ORDERED that the respondent's application for political asylum pursuant to Section 208 of the Act be denied.

WHEREFORE, IT IS ORDERED that the respondent's application for withholding of removability pursuant to Section 241(b)(3) of the Act be denied.

WHEREFORE, IT IS ORDERED that the respondent's application for withholding of removability pursuant to Section 8 C.F.R. 208.13, withholding under the Torture Convention Act, be denied.

WHEREFORE, IT IS ORDERED that in lieu of removability the respondent shall be granted voluntary departure without expense to the Government for a period of 60 days until 3/25/08 or any extension beyond such date as may be granted by the District Director and under such conditions as the District Director shall direct. The Court will also indicate that the Court has to impose a departure bond on this particular matter. The Court will impose the minimum which is $500, that must be posted with the Immigration authorities within five working days from today and as indicated, I will do the minimum amount which is $500.

WHEREFORE, IT IS FURTHER ORDERED that if the respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice and the proceedings and the following orders shall thereupon become immediately effective. The respondent shall be removed from the United States to Indonesia on the charges contained in the Notice to Appear in Removal Proceedings.

_____

DAVID J. CORDOVA
Immigration Judge

Relevant Statutory and Regulatory Provisions

1. 8 U.S.C. 1231(b)(3): *Restriction on removal to a country where alien's life or freedom would be threatened*

(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.

(B) *Exception*

Subparagraph (A) does not apply to an alien deportable under section 1227 (a)(4)(D) of this title or if the Attorney General decides that—

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States;

(iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States; or

(iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.

> For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime. For purposes of clause (iv), an alien who is described in section 1227 (a)(4)(B) of this title shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States.
>
> (C) *Sustaining burden of proof; credibility determinations*
>
> In determining whether an alien has demonstrated that the alien's life or freedom would be threatened for a reason described in subparagraph (A), the trier of fact shall determine whether the alien has sustained the alien's burden of proof, and shall make credibility determinations, in the manner described in clauses (ii) and (iii) of section 1158 (b)(1)(B) of this title.

2. 8 C.F.R. § 1208.16(b) provides in relevant part that:

> 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.

* * *