UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
EL PASO, TEXAS

EDUARDO SOTO, ESQ.
999 PONCE DE LEON BLVD, #940
CORAL GABLES FL 33134

IN THE MATTER OF FILE A 2-419-708 DATE: Sep 26, 2005
POSADA-CARRILES, LUIS CLEMENTE FAUSTINO

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

✓ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO:

BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
P.O. BOX 8530
FALLS CHURCH, VA 22041

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
8915 MONTANA AVENUE
EL PASO, TX 79925

__ OTHER: _____

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CC: ICE-DHS-OFFICE OF THE CHIEF COUNSEL
1545 HAWKINS BLVD - SUITE 167
EL PASO, TX, 79925

SLM

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
United States Immigration Court
El Paso, Texas

A-12 419 708

In the Matter of

In Removal Proceedings

Luis Posada-Carriles,
Respondent

CHARGES: Section 212(a)(6)(A)(i)(physical presence in the United States without admission or parole by an immigration officer); and

Section 212(a)(7)(A)(i)(I)(intending immigration without a proper immigrant visa).

APPLICATION: Withholding of Removal, Section 241(b)(3); alternatively

Deferral of Removal, 8 C.F.R. part 1208.17 (as to Cuba and Venezuela)

ON BEHALF OF RESPONDENT:

Eduardo Soto, Esq. (Lead)
Matthew Archambeault, Esq.

ON BEHALF OF HOMELAND SECURITY:

Gina Garrett-Jackson, Esq. (MIA-Lead)
Stephen Ruhle, Esq. (ELP
Renata Aurelius (HQ)

DECISION OF THE IMMIGRATION JUDGE

1. Background

On May 18, 2005, the Department of Homeland Security (DHS) issued a Notice to Appear charging the respondent with being deportable as articulated above. Thus, this Court has subject matter jurisdiction to consider the respondent's presence in the United States.

A. Deportability

During the course of a master calendar hearing respondent admitted the factual allegations contained in the Notice to Appear with the exception of the allegation relating to abandonment of his permanent resident status. Respondent conceded deportability for his physical presence in the United States without proper admission or parole by an immigration officer. However, respondent denied deportability for being an immigrant without a proper immigrant visa.

Subsequently, respondent changed his position and conceded that based upon counsel's review of past case law, the respondent's acquisition of Citizenship in Venezuela constitutes an abandonment of his legal resident alien status in the United States. Thereafter, respondent conceded deportability for being an immigrant without a proper immigrant visa.

Based upon these considerations, the Court finds the respondent deportable as charged in the Notice to Appear

B. Relief from Removal

In lieu of deportation, respondent applied for asylum and withholding of removal under both Section 241 b)(3)(refugee protection) and Art. III of the Convention Against Torture (8 C.F.R. part 1208.16(c)). After presentation of oral testimony, written and video evidence, the respondent orally withdrew his application for asylum under Section 208, and withholding of removal under Section 241(b) of the Act. Respondent continued with his application for Withholding of Removal under Art. III of the Convention Against Torture.

The DHS then submitted a written motion to pretermit the respondent's remaining application for withholding of removal under Art. III of the Convention against Torture. In response to the DHS motion to pretermit, respondent conceded ineligibility for withholding of removal under Section 241(b)(3)(B)(iii)(serious nonpolitical crime outside the United States before arrival).[1]

As a result of this change in circumstance, respondent is seeking only deferral of removal under 8 C.F.R. part .208.17. The DHS has stipulated to a grant of deferral of removal in relation to respondent's potential deportation to Cuba. Remaining, however, is the respondent's request for deferral of removal as to Venezuela. This decision follows.

2. Facts

A. Respondent's Testimony

Respondent testified, in a nutshell, that as a result of his more than 40 years of anti-Castro activities, both on behalf of himself and other Cuban exiles, and also on behalf of the United States Government, he would be tortured and killed if he returned to either Cuba or Venezuela. Respondent is worried that existing ties between Fidel Castro, the President of Cuba, and Hugo Chavez, the President of

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[1] This motion, and the Court's response, are articulated in more detail in the Court's order relating to the motion. Therefore, it is not necessary to detail the Court's analysis further in this decision.

Venezuela, could result in his rendition from Venezuela to Cuba. Additionally, respondent is concerned that he would not be able to receive a fair trial if deported to Venezuela due to Castro's influence in Venezuelan civil affairs.

B. Background Information

In addition to his testimony, respondent submitted numerous articles and papers regarding current affairs in Venezuela and Cuba. Most, if not all of the articles submitted by the respondent discuss him or his specific case in Venezuela and/or Cuba.

Respondent also submitted the testimony of one witness, Mr. Joaquin Fernando Chaffardet Ramos, an attorney from Venezuela. Mr. Chaffardet testified that due to the rise in power of President Chavez, and President Chavez's extraordinary interest in the Posada case, it was his opinion that respondent could not receive a fair trial in Venezuela. Mr. Chaffardet also testified as to his personal observations of victims of torture at the hands of Venezuelan security personnel.

C. Government Evidence

The attorney for DHS did not submit any rebuttal evidence in the respondent's case relating specifically to his application for deferral of removal.[2] During closing statements made at the end of the presentation of evidence the DHS articulated that the Venezuelan Constitution prohibits the extradition of its citizens to other countries. However, while they have no specific information indicating this would happen, the United States Government is concerned that the growing economic and political ties between Cuba and Venezuela might persuade President Chavez to allow Cuban agents to come to Venezuela where the respondent could possibly suffer torture at the hands of these Cuban agents.

D. Court Provided Documents

The Court provided no documents in this case.

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[2] The DHS submitted numerous newspaper articles, video interviews, unclassified cables, etc. in support of their arguments relating to the respondent's participation in various activities which render him ineligible for withholding of removal. This evidence was not considered in the respondent's deferral case as it was not relevant to a consideration of his eligibility. For more information regarding this issue, please see the Court's decision relating to respondent's Motion to Exclude Evidence.

3. Credibility

The Court has listened to the respondent's testimony and observed his demeanor. His testimony is basically consistent with his application and affidavit. There are no significant discrepancies. The Court has also listened to and observed the testimony of respondent's witness, Mr. Chaffardet.

Based upon a totality of the circumstances, the Court finds the respondent's testimony to be direct, plausible, and credible. There is no substantial evidence to suggest respondent's testimony is not credible. The Court also finds Mr. Chaffardet's testimony to be direct, plausible, and credible.

4. Withholding of Removal (and Deferral of Removal) Convention Against Torture

A. The Law

Respondent must establish that it is more likely than not that he would be tortured in the proposed country of removal. All evidence relevant to the possibility of future torture shall be considered, including, but not limited to; (i) evidence of past torture inflicted upon the respondent; (ii) evidence that the respondent could re-locate to another part of the country of removal where he is not likely to be tortured; (iii) evidence of gross, flagrant or mass violations of human rights within the country of removal; and (iv) other relevant information regarding conditions in the country of removal. 8 C.F.R. part 1208.16(c).

B. Deferral of Removal

As mentioned above, respondent and the DHS agree that he is not statutorily eligible for Withholding of Removal because of his conviction for a serious non-political crime committed outside the United States before he arrived. Section 241 b)(3)(B)(iii.). However, under the Convention Against Torture, an alternative form of protection exists if the respondent can meet the burden of proof; deferral of removal under 8 C.F.R. part 1208.17.

Under this section of the code of federal regulations, implementing Art. III of the Convention Against Torture, anyone who meets the burden of proof regarding the probability of torture shall be granted deferral of removal so long as that threat exists. Deferral of removal is available to terrorists, aggravated felons, persecutors and torturers alike if the burden of proof is established. Consideration of their past is not relevant to whether they qualify or not.

c. **Respondent's Case**

Respondent's case reads like a character from one of Robert Ludlum's espionage thriller, with all the plot twists and turns Ludlum is famous for. By all accounts (other than the respondent's) he was a cold war warrior, working on behalf of the United States in the early days of the Cuban problem. After leaving the CIA, the respondent began working in Venezuela in the internal and external security field. Respondent is also reported to have worked with the United States government in Central America during the time when the United States supported the Contras in their fight against the Sandinista government of Nicaragua.

Respondent is currently the subject of an extradition request by the government of Venezuela for his alleged role in the 1976 bombing of a Cubana Airlines flight which resulted in the deaths of 73 people on board.[3] Respondent previously stood trial for this offense and was acquitted by the court. Prosecutors appealed to an appeals court which overturned this acquittal on procedural grounds (the trial court was the wrong court to try the case). Respondent was pending retrial on the case when he escaped from prison.

Respondent is suspected in a 1997 bombing of tourist hotels in Cuba that killed one Italian tourist, and respondent was arrested in 2000 in Panama regarding an alleged plot to assassinate Fidel Castro. He was subsequently convicted of other charges, for which respondent was later granted a pardon by the President of Panama.

None of these events, even if true and proven in a Court of law, is a statutory bar to deferral of removal. In fact, there are no statutory bars to deferral of removal under existing law. Therefore, the most heinous terrorist or mass murderer would qualify for deferral of removal if he or she could establish the necessary burden of proof regarding the probability of torture in the future. It is our collective position as a nation that no one, no matter what their past, will be deported to a country where there is a clear probability of torture.

In this regard, the DHS stipulates that there is a clear probability that the respondent would face torture in Cuba. As such, respondent's application for deferral of removal to Cuba must be granted.

With regard to Venezuela, the DHS is not so clear on their position. After presentation of the respondent's case, the Court indicated that based upon a review of the evidence submitted by

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[3] The status of this extradition request is unknown to the Court, but it is presumed that the Department of State is awaiting a decision from this Court on the respondent's Torture Convention claim before proceeding.

respondent, a *prima facie* case under the Torture Convention had been established. The DHS was given a continuance to submit rebuttal evidence. However, at the resumed merit hearing the DHS had nothing to submit.

During a closing statement the DHS attorney indicated that the United States Government has serious concerns about the respondent being deported to Venezuela. The DHS stated that while the government did not have any specific information that would indicate any plans to torture the respondent, the growing political and economic ties between Venezuela and Cuba might foster a climate where Cuban agents might be allowed to travel to Venezuela to interrogate the respondent.

Based upon all country reports, both Department of State (DOS) and other Non-governmental organizations (NGO) indicate that Cuba, as a matter of state policy, engages in the systematic torture of detainees in order to extract information, intelligence, and confessions. While it is not so clear in the DOS and NGO reports that Venezuela systematically engages in torture as a matter of policy, incidents of torture by Venezuelan security officials does exist.

The testimony of Mr. Chaffardet indicated that he observed the effects of torture upon other criminal cases which, by their notoriety, should have been protected by the publicity. However, this was not the case.

In the absence of evidence to the contrary, the Court finds:

-that torture exists in Venezuela, although not on a widespread scale;

-that the notoriety of a case does not immunize the detainee from possible torture;

-that Cuban authorities, as a matter of official policy, engage in the systematic torture of detainees for the purposes of extracting information, intelligence, and confessions;

-that existing cultural, political, and economic ties between Cuba and Venezuela make the case of the respondent problematic, in that it appears plausible that Cuban agents may be allowed to interrogate the respondent while in the custody of Venezuelan authorities;

-that it is more likely than not that the Cuban agents would subject the respondent to torture as this is part of their interrogation technique;

-that there is nothing in the record to suggest that the Venezuelan authorities would prohibit this practice, and thus, would acquiesce in the torture of the respondent by Cuban agents.

Under these circumstances, the Court finds that respondent has established that it is more likely than not he would be subjected to torture if removed from the United States to Venezuela.

ORDER: Respondent's application for Withholding of Removal under Art. III of the Convention Against Torture is denied as statutorily barred.[4]

FURTHER ORDER: Respondent is granted deferral of removal under 8 C.F.R. part 1208.17 to Cuba and Venezuela

William Lee Abbott
United States Immigration Judge

Date: September 26, 2005

[4] See this Court's order in relation to the DHS' Motion to Pretermit Withholding of Removal under CAT.