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2021 UC DAVIS ASYLUM AND REFUGEE LAW NATIONAL MOOT COURT COMPETITION

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NO. 20-201112

IN THE

Supreme Court of the United States

Mashi Canto,
Petitioner,

v.

Attorney General of the United States,
Respondent.

ON WRIT OF CERTIORARI TO THE
FOURTEENTH CIRCUIT COURT OF APPEALS

Issues on appeal:

1. Does Appellant have a well-founded fear of persecution?
2. Were Applicant's due process rights violated when he was not informed of potential avenues of relief during his first deportation proceedings?

****NOTE TO COMPETITORS:** No cases decided, nor legislation passed after November 12, 2020 may be cited or relied upon in either briefs or oral argument.

Names and Pronunciations

Chakoursia (cha-COOR-see-uh): demonym Chakoursian.
Chakoursi (cha-COOR-see): national language of Chakoursia. Appellant's mother tongue.
Yan'guo (YAHN-gwoh): demonym Yan'guan (YAHN-gwan).

Mr. Mashi Canto (MA-shi CAN-to), Appellant

No. 0814-9619 _____

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

Mashi Canto

Appellant,

v.

Attorney General of the United States

Appellee.

ON APPEAL FROM BOARD OF IMMIGRATION APPEALS

&

ON APPEAL FROM X DISTRICT COURT

Filed November 13, 2020

Before: Judges Yaoz, Galan, and Lenga

Opinion by Judge Yaoz

Dissent by Judge Lenga

YAOZ, Circuit Judge, joined by GALAN, Circuit Judge:

I. FACTUAL BACKGROUND

A. Historical Background

Chakourisa and Yan'guo are located in Central Asia. Until 1997, they constituted the nation of Chakorska, a former European colony. Prior to European colonization, Chakoursians and Yan'guans lived in separate geographical areas and had unique cultural identities. European colonization and subsequent creation of what became known as Chakorska brought the two ethinic groups into close physical and political proximity. Although the two nations are now separate, there is a sizable population of Yan'guans living in Chakoursia. Some moved to Chakoursian locales in the days of Chakorska and never moved back, some immigrated more recently, searching for a better life in the more economically prosperous Chakoursia. The government of Chakoursia has always emphasized its friendliness towards immigrants, especially immigrants from Yan'guo, proclaiming a "friendship of nations" approach towards their geographic neighbor.

B. Case Facts

Mashi Canto is a citizen of Chakoursia, but his parents immigrated to Chakoursia from Yan'guo shortly before his birth. Mr. Canto's parents' nationality is well known in his hometown. Despite being Chakoursian by birth and nationality, while growing up in Chakoursia, Mr. Canto faced taunts and threats because of his family's Yan'guan roots and his perceived identity as Yan'guan. Mr. Canto's classmates and other children around his neighborhood called him slurs and told him to "go back home," despite Chakoursia being the only home Mr. Canto has ever known. As Mr. Canto grew up, the taunts and threats became more serious in nature.

Once, Mr. Canto was apprehended on the street and beaten up by a group of Chakoursian teens. Another time, he found slurs written on the doors of the apartment building where he and several other Yan'guan families lived.

Mr. Canto reached out to the police numerous times, but they laughed at his reports and told him that policing interpersonal disputes was "not their responsibility." When Mr. Canto expressed concern over his life and safety, the police told him not to come back until he had a "real crime" to report.

Around this time, a new people's movement, the Chakoursian Purity Power ("CPP") movement, gained popularity in Chakoursia. The CPP's goal was to promote the superiority of ethnic Chakoursians over people of other ethnicities living in Chakoursia. The CPP blamed immigrants, and especially Yan'guans, for Chakoursia's job shortages, growing crime rates, and political corruption. CPP members harassed immigrants and Yan'guans both in person and on social media, and several CPP demonstrations ended in riots. Shortly after the CPP first gained social popularity, the Chakoursian president issued a televised appearance to address the CPP. While he condemned the use of civil violence in Chakoursia, the president nevertheless stated that he admired the CPP's dedication to championing the greatness and prosperity of the Chakoursian nation.

The CPP originated in town Xoe, on the other side of the country from Mr. Canto's hometown, and initially the CPP's official actions were limited to that locale. However, supporters of the CCP could be found throughout Chakoursia, and as the movement's popularity grew, the number and severity of the hostilities that Mr. Canto experienced rose as well. Finding derogatory graffiti aimed at Yan'guans became commonplace in Mr. Canto's hometown, and he received several anonymous phone calls, calling him ethnic slurs, asking him why he hasn't "run

off" yet, and threatening him with "consequences on his life" if he did not leave town. Due to their previous uselessness, Mr. Canto did not report these threats to the police.

Mr. Canto illegally entered the United States no later than June 2017, and 4 months later, was apprehended by ICE and put into removal proceedings. Mr. Canto never retained counsel, nor were any Chakoursi interpreters available to assist in translating the proceedings. At his Master Calendar hearing, Mr. Canto said in halting English, "I don't know what will happen to me if you send me back to Chakoursia. Bad things happened to me back there. Chakoursians don't like people like me, and the police won't help me because they also don't like people like me. I'm afraid of what could happen to me if I go back." The IJ stated, "But you are Chakoursian, aren't you?" Mr. Canto replied, "Well, yes but-" The IJ interjected, "Then there shouldn't be an issue. Now, moving on, I need to clear today's calendar. Are you planning on raising defenses in your merits hearing?" Mr. Canto replied, "I came here for a better life than what I had in Chakoursia." The IJ asked, "I understand, Mr. Canto, but that isn't a legal defense and I asked if you planned on raising one at your merits hearing." Intimidated and unsure of what a legal defense was, Mr. Canto said tentatively, "I do not think so."

At Mr. Canto's merits hearing, again without a Chakoursi interpreter, the IJ made no further inquiries into Mr. Canto's trepidation about being removed to Chakoursia and did not inform him about any forms of discretionary relief. The IJ asked Mr. Canto, "Will you accept today's ruling or reserve your right to appeal?" Mr. Canto did not know what the judge meant by "appeal," but nodded his head and said, "Yes." The IJ then said, "You'll accept today's ruling?" "Yes," Mr. Canto replied. The IJ entered his judgement that Mr. Cantowould be removed. Mr. Canto was subsequently deported in November 2017.

During the year that Mr. Canto spent in the U.S., nationalistic and discriminatory sentiments grew in Chakoursia. The CPP had gained power, establishing bases and fan-organizations all over Chakoursia. While previously the movement focused its hatred on immigrants broadly, it now targeted Yan'guans specifically. Members and supporters of the CPP organized raids to trash Yan'guan businesses, break into Yan'guan apartment, stop ethnic Yan'guans on the street and demand that they pay a "fine" for clogging the Chakoursian economy, or face consequences. Yan'guans throughout the country had disappeared or been killed in convenient "accidents." In response, the Chakoursian government deployed police squadrons to towns with the most reports of riots and disappearances. While these squadrons' stated purpose was to "keep the peace" and investigate disappearances, police mostly stood by to make sure the rioting did not get so out of control as to damage government property and institutional buildings, and to make occasional arrests. These arrests tended to be minor detentions for incitements of violence and violation of the peace. Not long after Mr. Canto returned to his hometown, two of his Yan'guan neighbors disappeared at night from a nearby apartment. Mr. Canto reported this to the police, but his neighbors were never found. Two weeks later, an ethnically Chakoursian family moved into the flat.

Mr. Canto had no hope of relocating to another part of Chakoursia due to CPP's wide range of activity, and he did not consider immigrating to Yan'guo for fear of facing violence there. As the CPP gained power in Chakoursia, a similar movement - the Yan'guan Nationalist Group ("YNG") terrorized Yan'guo. The YNG focused on systematically harassing and driving out immigrants, especially immigrants from Chakoursia. YNG saw Yan'guans living in Chakoursia as traitors, and targeted them specifically.

Fearing for his life, Mr. Canto illegally reentered the US in February 2018 and was apprehended again.

II. PROCEDURAL HISTORY

Following Mr. Canto's apprehension, the US Attorney charged him with illegal reentry under 8 U.S.C. section 1326(a)(1). Mr. Canto collaterally attacked his underlying 2017 order on the basis that it violated his due process rights. The district court ruled that Mr. Canto's collateral attack on his initial deportation order was proper under 8 U.S.C. section 1326(d)'s required showing that "(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order; (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and (3) the entry of the order was fundamentally unfair." 8 U.S.C. § 1326(d). The term "noncitizen," as it appears in this opinion, is used in lieu of and carries the same legal meaning as the term "alien," as used in the U.S. Code and Code of Federal Regulations.

After a brief bench trial, the district court found that although Mr. Canto did not exhaust his administrative remedies by appealing his initial removal decision, his waiver was not "considered or intelligent" under the Due Process Clause and was thus exempt from the exhaustion bar. The court then found that the IJ's sole mention of Appellant's right to appeal the removal determination was insufficient to inform the Appellant of his right to appeal the underlying deportation order, and therefore deprived him of meaningful judicial review. Finally, the court determined that the IJ's failure to inform Appellant of his eligibility for asylum was fundamentally unfair because it was a violation of the IJ's duty to make such a disclosure. Finding the elements of section 1326(d) satisfied, the judge found Mr. Canto not guilty of illegal reentry.

While in custody during his criminal trial, Mr. Canto learned about the possibility of applying for asylum. Following his criminal trial, the DOJ initiated removal proceedings against Mr. Canto for his second illegal reentry. At his master calendar hearing, Mr. Canto applied for asylum.

The IJ found Mr. Canto did not demonstrate a well-founded fear of persecution, and denied Mr. Canto's asylum claim. Mr. Canto appealed the decision to the Board of Immigration Appeals ("BIA"), which summarily upheld the IJ's ruling.

Mr. Canto appealed the asylum finding to the Fourteenth Circuit Court of Appeals, where he argued that he has a well-founded fear of persecution on the basis of the past threats combined with the growing hostilities in Chakoursia. Simultaneously, the government appealed his criminal case, arguing that the district court decided the due process issue incorrectly. The Fourteenth Circuit ordered a combined briefing and will hear the appeals from each case separately.

III. ANALYSIS

A. Appellant's Asylum Claim

1. Standard of Review

When the BIA affirms the IJ's ruling summarily - that is, without issuing an opinion - the IJ's decision becomes the "final agency determination." *Sviridov v. Ashcroft,* 358 F.3d 722, 727 (10th Cir. 2004). This Court will review the IJ's decision under the substantial evidence standard, and uphold it if it is "supported by reasonable, substantial, and probative evidence on the record considered as a whole." *I.N.S. v. Elias-Zacarias,* 502 U.S. 478, 481 (1992). We may overturn the IJ's decision only if the evidence provided would compel a reasonable factfinder to

conclude that the elements of an asylum claim have been met. *Elias-Zacarias* at. 481. Questions of law, however, will be reviewed *de novo. See Garcia-Martinez v. Sessions,* 886 F.3d 1291, 1293 (9th Cir. 2018).

1. Bringing an Asylum Claim

Asylum is a form of discretionary relief. The Attorney General may grant asylum to a noncitizen "refugee," as defined by the Immigration and Nationality Act, 8 U.S.C. § 1158(a). *Elias-Zacarias* at. 481. To qualify as a refugee, an applicant must prove that they are unable or unwilling to return to their home country due to past persecution, or due to a well-founded fear of future persecution on account of a protected ground: "race, religion, nationality, membership in a particular social group, or political opinion." *Ali v. Holder,* 637 F.3d 1025, 1029 (9th Cir. 2011). Whether Appellant suffered past persecution is not an issue on appeal. Rather, Appellant contends that he has a well-founded fear of persecution on account of his race if he were to return to Chakoursia.

1. Appellant's Pattern or Practice of Persecution Claim

One of the ways an asylum seeker may establish a well-founded fear is by demonstrating a pattern or practice of persecution in his country of origin. *See Ghebrehiwot v. Attorney General of U.S.,* 467 F.3d 344, 351 (3d Cir. 2006). A pattern or practice of persecution is found if an applicant establishes (1) that there is a pattern or practice, in their country of origin, of persecution of a group similarly situated to the applicant on account of one of the protected grounds; and (2) his membership in and identification with the group, to the extent that his "fear of persecution upon return is reasonable." 8 C.F.R. § 1208.13(b)(2)(iii). An applicant must also

demonstrate that the origin country's government has perpetuated, sanctioned, or failed to combat the persecution. *See Diaz-Garcia v. Holder,* 609 F.3d 21, 29 (1st Cir. 2010).

Appellant contents that the CPP's oppression of Yan'guans, combined with the personal threats he has experienced based on his Yan'guan ethnicity, demonstrate a pattern or practice of persecution of ethnic Yan'guans in Chakoursia. He points to his own ethnic heritage and the anti-Yan'guan threats he has experienced to claim his membership and identification with the group of ethnic Yan'guans. While we do not argue with Appellant's membership in the Yan'guan ethnic group, we find Appellant's claims insufficient to demonstrate a pattern or practice of persecution. To rise to the level of a pattern or practice of persecution, there must be a "systematic, pervasive, or organized effort to kill, imprison, or severely injure members of the protected group," perpetuated or tolerated by the government. *Ingmantoro v. Mukasey,* 550 F.3d 646, 651 (7th Cir. 2008). Satisfying this high standard requires the finding of an "extreme level of persecution," as once a pattern or practice of persecution is found against a group, every member of the group becomes eligible for asylum. *Halim v. Holder,* 755 F.3d 506, 512 (7th Cir. 2014).

Appellant has demonstrated that anti-Yan'guan animus is ongoing in Chakoursia, however this is not enough to make a showing of country-wide persecution. General claims of civil strife and ethnically motivated violence are insufficient proof of a practice or pattern of persecution. *Lolong v. Gonzales,* 484 F.3d 1173, 1179 (9th Cir. 2007). In deciding whether a Chinese Christian had an objectively reasonable fear of persecution in Indonesia, the Ninth circuit found that "the mere fact that some attacks on [ethnic and religious minorities] occur," and that evidence of discrimination and ethno-religious conflict exists, is not sufficient to prove an applicant's objectively reasonable fear of future persecution when the country at issue has

shown a "general commitment to freedom of religion," and a "lack of institutional discrimination" against the ethnic minority. *Id.* The Eleventh circuit has held that "sporadic deaths" of a minority in certain areas of the country do not make a showing of a pattern or practice of persecution in the country as a whole. *Sutanto v. U.S. Atty. Gen.,* 344 Fed.Appx. 584, 586 (11th Cir. 2009). The Second Circuit has also found that simply facing "incidents of harm," especially when the harm is perpetrated by non-state actors, does not qualify an ethnic group for asylum under the pattern or practice of persecution approach. *Hok Tjoen Tjiang v. Holder,* 447 Fed.Appx. 241, 242-43 (2d Cir. 2011).

While Appellant has certainly demonstrated ongoing ethnic conflict in Chakoursia, this conflict does not rise to *systematic* murder, imprisonment, or physical harm to Yan'guans. As such, it does not satisfy the high standard of harm a group must suffer to qualify for protection on a pattern or practice of persecution basis. *Ingmantoro,* 550 F.3d at 651. Furthermore, the Chakoursian government has proclaimed its friendliness towards Yan'guans within its borders, and attempted to counteract CPP attacks by sending police squadrons to keep the peace and investigate alleged disappearances of Yan'guans. Even if one argues that Chakoursian government's attitudes towards Yan'guans have worsened recently, there is still no evidence to suggest an official systematic discrimination of Yan'guans in Chakoursia. While regrettable, general ethnic conflict does not rise to the level of a pattern or practice of persecution.

For the above reasons, we find that Appellant has not demonstrated a pattern or practice of persecution of Yan'guans in Chakoursia.

1. Appellant's Reasonable Possibility of Persecution Claim

Apart from the pattern or practice of persecution analysis, Applicant has also failed to demonstrate a well-founded fear of persecution were he to return to Chakoursia. The probability

that an applicant will face persecution need not be great to demonstrate a well-founded fear - even a 10% chance of persecution upon an applicant's return to their country of origin is enough. *I.N.S. v. Cardoza-Fonseca,* 480 U.S. 421, 438 (1987); *Knezevic v. Ashcroft,* 367 F.3d 1206, 1212-13 (9th Cir. 2004). To be eligible for asylum based on a well-founded fear of future persecution, an applicant must demonstrate both a subjective fear or persecution and an "objectively 'reasonable possibility' of persecution upon return to the country in question." *Duran-Rodriguez v. Barr,* 918 F.3d 1025, 1029 (9th Cir. 2019), quoting *Recinoz De Leon v. Gonzalez,* 400 F.3d 1185, 1190 (9th Cir. 2005). Applicant has demonstrated a subjective fear through his testimony. The objective element of a well-founded fear requirement may be established either through proof of past persecution, or through "the presentation of 'credible, direct, and specific evidence in the record of facts that would support a reasonable fear of persecution.'" *Rusak v. Holder,* 734 F. 3d 894, 896 (9th Cir. 2013). Appellant argues that the past threats against him, as well as the current ethnic conflict in Chakoursia, satisfy the objective element of the well-founded fear requirement.

Taken in isolation, generalized ethnic conflict is not enough to establish not only a pattern or practice of persecution showing, but an objectively reasonable fear showing as well. *Lolong,* 484 F.3d at 1179. Therefore, appellant may not satisfy the objective element of the well-founded fear requirement by simply pointing to the ongoing racial conflict in Chakoursia. The threats suffered by Appellant do not satisfy this standard either. A well-founded fear of persecution rests on more than simply proving "restrictions or threats to life and liberty." *Baka v. I.N.S.,* 963 F.2d 1376, 1379 (10th Cir. 1992). While death threats, combined with repeated harassment, economic harm, serious physical violence may constitute persecution, isolated instances of physical violence, detention, and threat do not. *Mashiri v. Ashcroft,* 383 F.3d 1112,

1120-21 (9th Cir. 2004); *Bhosale v. Mukasey,* 549 F.3d 732, 735-36 (8th Cir. 2008). Where threats are insufficient to demonstrate past persecution, they may be evidence of a well-founded fear of future persecution. *See Khodaverdian v. Ashcroft,* 111 Fed.Appx. 489, 490 (9th Cir. 2004). In *Khodaverdian v. Ashcroft,* the Ninth circuit found that past death threats, combined with "life-threatening attacks, harassment, and systemic discrimination," as well as widespread mistreatment within a country, provide "objective support" for a well-founded fear finding. *Id*. Appellant has suffered no life-threatening attacks, and, as we discussed above, the mistreatment that Yan'guans currently suffer does not rise to the level of systemic discrimination. Without a showing of such extreme danger as in *Khodaverdian*, the threats and harassment that Appellant suffered do not give him an objective reason to fear returning home.

The dissent relies on *Marcos v. Gonzales* to argue that the threats made against Appellant should be examined in the context of the CPP's rise to power - yet, in *Marcos,* the death threats that were deemed sufficient basis for a well-founded fear were made by the New People's Army, a communist militia with a history of violence. *Marcos v. Gonzales,* 410 F.3d 1112, 1112-15 (9th Cir. 2005). In the case at bar, Appellant has not provided evidence to clarify who made threats against him. The CPP is an ideological movement, rather than an armed militia, and while members of the CPP have wrought havoc and destruction, in terms of ability to carry out death threats the CPP may hardly be likened to a military organization like the New People's Army. As such, the threats suffered by Appellant do not constitute reason for him to have an objectively reasonable, well-founded fear of persecution upon return to Chakoursia.

For the foregoing reasons, we find that Appellant has not demonstrated an objectively reasonable well-founded fear of persecution upon his return to Chakoursia. We therefore affirm the IJ and BIA's rulings, and deny Appellant's asylum claim.

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B. Appellant's Due Process Claim

In attacking his criminal indictment of illegal reentry under 8 U.S.C. section 1326, Appellant employed a collateral attack on his 2017 removal order, in order to undermine the prior deportation element in the illegal reentry charge. Appellant's collateral attack asserts that his due process rights were violated when the IJ presiding over his 2017 removal hearing failed to inform him of his avenues for discretionary relief, namely asylum under 8 U.S.C. section 1158. We hold that the failure to inform Appellant of his options for discretionary relief violates the Fifth Amendment's Due Process Clause, and affirm the district court's finding.

1. Discussion

We review a collateral attack on a deportation order de novo. *See United States v. Estrada*, 876 F.3d 885, 887 (6th Cir. 2017); *United States v. Lopez-Velasquez*, 629 F.3d 894, 896 (9th Cir. 2010); *United States v. Copeland*, 376 F.3d 61, 70 (2d Cir. 2004).

a. Appellant's Collateral Attack on Underlying Removal Orders

No person shall be deprived of liberty without due process of law. US Const. Amend. 5. The Due Process Clause applies to noncitizens within the country, regardless of whether their presence is lawful or unlawful. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). The right to due process requires that judicial review of an administrative decision must be made available before the administrative proceedings may be used to prove an element in a criminal charge. *United States v. Mendoza-Lopez*, 481 U.S. 828, 837-39 (1987). It is a crime for a noncitizen to reenter the United States following removal without the Attorney General's express consent. 8 U.S.C. § 1326(a). Due process requires that a collateral attack on the use of deportation proceedings to

prove a criminal offense be permitted where "where the deportation proceeding effectively eliminates the right of the alien to obtain judicial review." *Id.* at 839. In response to this holding in *Miranda-Lopez*, Congress amended Section 1326(d), codifying that such a collateral attack requires a showing that:

> 1) the noncitizen exhausted any administrative remedies that may have been available to seek relief against the order;
> 2) the deportation proceedings at which the order was issued improperly deprived the noncitizen of the opportunity for judicial review; and
> 3) the entry of the order was fundamentally unfair.

An IJ's failure to advise a noncitizen of their potential eligibility for relief from removal, when the record makes such eligibility apparent, violates due process and can serve as the basis for a collateral attack on removal proceedings being used to prove an illegal entry charge under Section 1326. *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1050 (9th Cir. 2003).

We will examine each element in turn, with respect to the facts from Appellant's 2017 removal hearing.

i. Administrative Exhaustion

A noncitizen is barred from collaterally attacking the underlying removal order supporting Section 1326 charges if they validly waive their right to appeal their removal order during those original proceedings. *Id.* at 1048. However, Section 1326(d)(1)'s exhaustion requirement cannot bar a collateral challenge when a waiver of a noncitizen's right to appeal their removal order violates due process. *See id.* Waivers of the right to appeal that were not knowing and intelligent violate due process. *Mendoza-Lopez*, 481 U.S. at 840.

In *Ubaldo-Figueroa*, the presiding IJ failed to inform Ubaldo-Figueroa about his eligibility for a waiver from removal under former INA section 212(c). The Ninth Circuit held that a noncitizen's waiver of their right to appeal is not knowing or intelligent when "'the record

contains an inference that the petitioner is eligible for relief from deportation,' but the Immigration Judge fails to 'advise the alien of this possibility and allow him to develop the issue.'" *Ubaldo-Figueroa*, 364 F.3d at 1049 (quoting *United States v. Muro-Inclan*, 249 F.3d 1180, 1182 (9th Cir. 2001)). *See also* 8 CFR 1240.11(c)(i). The court also held that under these circumstances, the IJ's duty to inform a noncitizen of their ability to apply for relief from removal is mandatory. *Id.* at 1050. Because Ubaldo-Figueroa's waiver could not be considered knowing and intelligent due to the IJ's failure to disclose potential avenues for relief, he was exempted from the exhaustion despite the fact that he had not completed administrative exhaustion. *Id.*

Appellant's faced a similar circumstance during his removal hearing, but the law cuts even more strongly in his favor. Per 8 CFR section 1240.11(c)(1), if an

> alien expresses fear of persecution or harm upon return to any of the countries to which the alien might be removed pursuant to § 1240.10(f)... an immigration judge *shall*: (i) Advise the alien that he or she may apply for asylum in the United States or withholding of removal to those countries.

When Appellant expressed trepidation about returning to Chakoursia, the IJ made no effort to probe further, implying that Appellant had no reason to fear being removed to his homeland, and ending any further discussion of the matter. Appellant's statements that "Bad things happened to me back there…I'm afraid of what could happen to me if I go back." and "Chakoursians don't like people like me," raised the specter of facing sectarian hostility. Due to the IJ failure to comply with 8 CFR section 1240.11(c)(1) and inform Appellant of possible eligibility for an asylum application, Appellant's waiver of his right to appeal was not knowing and intelligent. Because the waiver was not knowing and intelligent, Appellant is exempt from Section 1326(d)(1)'s administrative exhaustion bar.

ii. Deprivation of Judicial Review

Section 1326(d)(2) requires that the noncitizen show the underlying removal proceeding deprived them of an opportunity for judicial review. An IJ must ensure that a noncitizen knows that they have the right to appeal. *Ubaldo-Figueroa*, 364 F.3d at 1049. If a waiver of a noncitizen's right to judicial review is not knowing and intelligent, a deportee is deprived of judicial review. *United States v. Zarate-Martinez*, 133 F.3d 1194, 1197 (9th Cir. 1998). As we found above, Appellant's waiver was not knowing and intelligent, and therefore he was deprived of judicial review.

iii. Fundamental Unfairness

The test for determining whether an underlying removal order was fundamentally unfair is twofold: a noncitizen must show that 1) his "due process rights were violated by defects in his underlying deportation proceeding, and 2) he suffered prejudice as a result of the defects." *United States v. Ubaldo-Figueroa*, 364 F.3d at 1048 (quoting *United States v. Zarate-Martinez*, 133 F.3d 1194, 1197.).

As discussed above, Appellant's due process rights were violated when the IJ failed to inform him about asylum as means of relief from removal. Appellant established in the record that he feared returning to Chakoursia. The IJ, though required by 8 CFR section 1240.11(c)(1) to advise Appellant that he may apply for asylum, failed to do so. The violation of the IJ's duty to inform in turn violated Appellant's due process rights.

To then establish prejudice, Appellant must show that it was plausible he may have been eligible for relief from removal. *See United States v. Arrieta*, 224 F.3d 1076, 1078 (9th Cir. 2000). The record reflects Appellant clearly established that he may have been eligible for relief through asylum. This was confirmed by the court below. Whether he would have received the discretionary relief is not pertinent to this analysis, so our findings in part A bear no consequence

in the present section. *See Ubaldo-Figueroa*, 364 F.3d at 1050 (stating, "To establish prejudice, Ubaldo-Figueroa does not have to show that he actually would have been granted relief."). Because Appellant could have submitted an application for asylum, but did not due to the judge's prejudicial failure, we find that Appellant was accordingly prejudiced.

The majority of circuits hold that an IJ's failure to disclose discretionary relief does not violate the Due Process Clause because the relief is discretionary, and thus creates no protected liberty or property interest that must be guarded by due process. *See United States v. Santiago-Ochoa*, 447 F.3d 1015, 1020 (7th Cir. 2006); *Bonhometre v. Gonzales*, 414 F.3d 442, 448 n.9 (3d Cir. 2005); *United States v. Aguirre-Tello*, 353 F.3d 1199, 1205 (10th Cir. 2004) (en banc); *United States v. Lopez-Ortiz*, 313 F.3d 225, 231 (5th Cir. 2002); *Smith v. Ashcroft*, 295 F.3d 425, 430 (4th Cir. 2002); *Oguejiofor v. Attorney Gen. of the United States*, 277 F.3d 1305, 1309 (11th Cir. 2002); *Escudero-Corona v. INS*, 244 F.3d 608, 615 (8th Cir. 2001).

We decline to follow the majority of our sister circuits here. The right to relief and right to be informed of relief are entirely different—one guarantees an outcome and the other guarantees some process. Furthermore, the majority, painting in broad strokes, disregards immigrants like Appellant that have a clear liberty interest. Asylum-seekers face danger in their home countries; fear for their lives is often the motivating factor behind their emigration. After receiving a grant of asylum, asylees are eligible for government benefits and programs. Eventually they are eligible for naturalization. This chance at freedom from persecution and route to starting a new life in our nation is not something we should so readily deprive applicants of.

We affirm the district court's finding of a due process violation and its not-guilty determination as to the Section 1326 charges.

AFFIRMED

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LENGA, Circuit Judge, Dissenting:

In denying Appellant's asylum, the majority fails to properly evaluate the circumstances of Appellant's case. This case should be remanded BIA for a reconsideration of Appellant's pattern or practice of persecution argument and well-founded fear argument.

1. Pattern or Practice of Persecution

The majority incorrectly denies Appellant's pattern or practice of persecution argument. Appellant comes from a country where his ethnic group has been threatened, harassed, and attacked. Members of his ethnic group have had their businesses raided, their homes overtaken, and have faced murder and disappearance. The CPP movement is founded in animus towards Yan'guans, and its actions have spoken to a primary objective of terrorizing and driving out Yan'guans. The destruction the CPP has wrought on the Yan'guan population is evidence of an organized and pervasive "effort to kill… or severely injure" the Yan'guan people, if not completely obliterate them. *Ingmantoro,* 550 F.3d at 651. The fact that the Chakoursian government may have proclaimed its acceptance of Yan'guans does nothing to negate the fact that Chakoursian police are woefully ineffective at carrying out this goal - both in keeping Yan'guans safe and ensuring justice for those harmed by the CPP. The fact that the Chakoursian government has condemned violence on television does nothing to negate the government's immense leniency in actually curbing the CPP's violence, especially when the government expressed agreement with the CPP's values. The Chakoursian government's lukewarm action in addressing the CPP crisis rises to, if not perpetration of the persecution, then at least toleration of

it. *Id.* The pattern or practice of persecution analysis may be extreme - yet so is the violence suffered by Yan'guans in Chakoursia for the last year. This Court should not condone the systematic persecution of an ethnic group out of the sole and cowardly fear of, possibly, granting asylum to too many of its members.

2. Well-founded Fear of Persecution

The majority also errs in failing to find that Appellant has established a well-founded fear of persecution. Where an applicant has been unable to demonstrate a pattern or practice of persecution against a group, they may still demonstrate a risk of persecution based on their membership in said group. *Makonnen v. I.N.S.,* 44 F.3d 1378, 1383 (8th Cir. 1995). This risk may rise to the level of an objective well-founded fear of persecution if the applicant demonstrates that they are at "greater risk of persecution than… the group as a whole." *Id.* Not only is Appellant ethnically Yan'guan, living in a town impacted by the violence of the CPP, but he has personally received death threats based on his ethnicity. Appellant's ethnicity alone puts him at risk, but the fact that he has previously been singled out for death threats raises this risk even higher. Appellant may rely on his membership in the group of ethnically Yan'guans to establish a well-founded fear of persecution, as past threats against him place him at even greater risk of persecution than Yan'guans as a whole.

Assuming, even, that the above analysis is insufficient in proving the objective reasonableness of Appellant's fear, he may claim a well-founded fear of persecution based specifically on the threats he experienced. The fact that a death threat has not been acted upon does not determine its probative value - courts focus instead on whether the group or entity making the threat has the "will or ability" to carry it out. *Marcos v. Gonzales,* 410 F.3d 1112, 1112-15 (9th Cir. 2005). Here, Appellant was threatened at a time when Yan'guans have

disappeared or died throughout Chakoursia. Certainly, Appellant had reason to think he could be next. In evaluating the severity of a death threat, the Ninth Circuit has relied upon the circumstances surrounding the threat, as well as the threat's specificity and whether it was "combined with confrontation or other mistreatment." *Duran-Rodriguez v. Barr,* 918 F.3d 1025, 1028 (2019). While the threats against Appellant may not have been very specific, they were made in an overall context of harassment of the Appellant personally, and violence against persons in a similar position to Appellant. While the death threats were not numerous and were never acted upon during Appellant's stay in Chakoursia, combined with the anti-Yan'guan violence spreading throughout the country and specific attacks the Appellant has faced himself, even these unsubstantiated death threats give Appellant a very real and objectively reasonable fear of returning home. I must remind the majority that Appellant needs only to prove a 10% chance of persecution upon return to his home country to demonstrate a well-founded fear. *Knezevic,* 367 F.3d at 1212-13. The chances of Appellant suffering persecution were he to return to Chakoursia are much higher.

For the forgoing reasons, I respectfully dissent.