

1 UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF TEXAS
3 ABILENE DIVISION



4 BUREAU OF IMMIGRATION §
5 AND CUSTOMS ENFORCEMENT §
6 Plaintiff §
7 §
8 versus §
9 §
10 RRUSTEM NEZA §
11 Defendant §

Civil No. 1-07CV0176-C

12 **DEFENDANT’S MOTION TO DISMISS, MOTION FOR STAY, MOTION FOR MORE**
13 **DEFINITE STATEMENT, AND REPLY TO MOTION FOR PRELIMINARY INJUNCTION**

14 TO THE HONORABLE JUDGE OF THE COURT:

15 Defendant Rustem Neza files his *Defendant’s Motion to Dismiss, Motion for More*
16 *Definite Statement, and Reply to Motion for Preliminary Injunction*, respectfully showing the
17 following, therefore:

18 **The District Court lacks subject matter jurisdiction of the Plaintiff’s claim**

19 The Court has no more jurisdiction than that which the Congress has granted it. United
20 States Constitution, Article III. The Plaintiff alleges no basis for the subject matter jurisdiction
21 of the Court over its suit. The Plaintiff cites 8 USC §1329, which provides jurisdiction of suits
22 “brought by the United States that arise under the provisions of this title [Immigration and
23 Nationality Act].” However, this suit is an action for injunction, not a suit arising under the INA.
24 The INA provides no subject matter jurisdiction of suits for injunction, neither at §1329 nor
25 anywhere else.

26 The Plaintiff also cites the All Writs Act, 28 USC §1651, which provides that the courts
27 “may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable
28 to the usages and principles of law.” By no stretch of the imagination is the injunctive relief the

1 Plaintiff seeks “in aid of” its jurisdiction. That the injunction Plaintiff seeks is not “agreeable to
2 the usages and principles of law” is discussed more fully below in the description of the
3 Plaintiff’s “dirty hands.”

4 The Plaintiff’s suit should be dismissed, because the Plaintiff has failed to show that the
5 Court has subject matter jurisdiction of its suit. The Plaintiff has shown only that if subject
6 matter jurisdiction existed, this Court would have jurisdiction of Plaintiff’s claim. The Plaintiff
7 bears the burden of showing that jurisdiction exists, and Plaintiff’s complaint must demonstrate
8 on its face that subject matter jurisdiction exists. FRCvP 8(a), *Whitmire v. Victus Ltd*, 212 F3d
9 885, 887 (5th Cir 2000).

10 **The Plaintiff should be enjoined from disturbing the status quo until a final resolution of**
11 **this lawsuit**

12 The Defendant’s brothers have been granted asylum in the United States, because if
13 returned to Albania, they, like the Defendant would join the ranks of the many people murdered
14 in Albania to prevent their testimony about the murder of Democratic Party leader Azem
15 Hajdari. His brothers, however, were competently represented by counsel in their applications
16 for asylum. The Defendant was prevented by incompetent counsel from presenting the facts
17 supporting his asylum claim to the immigration court, and, to this date, he never has been
18 allowed to bring his claim before a competent tribunal. There now is pending before the Board
19 of Immigration Appeals a motion to reopen his asylum application because the performance of
20 previous counsel fell so far below the standard of competence required by the Fifth Amendment
21 to the United States Constitution. There also is pending before the United States Court of
22 Appeals for the 11th Circuit a petition for review and motion to remand asking that the Court of
23 Appeals, which lacks jurisdiction to make determinations of fact, send the case to the BIA for
24 evaluation of front-page newspaper reports in three different Albanian newspapers during

1 September 2007, announcing the imminent return to Albania of Rrustem Neza, and identifying
2 him by name as a witness to the Hajdari murder. The *Appendix to Amended Motion to Reopen*
3 *on Account of Changed Circumstances* that now is pending before the Board of Immigration
4 Appeals is Appendix 1 to the *Appendix to Defendant's Motion to Dismiss, Motion for More*
5 *Definite Statement, and Reply to Motion for Preliminary Injunction*, which is filed in this Court
6 in support of this pleading.

7 If this Court grants the Plaintiff's request for authorization to drug Rrustem Neza so
8 Plaintiff can deport him without his protest, then the deportation will deprive the US Court of
9 Appeals for the 11th Circuit and the BIA of jurisdiction of the actions now pending before them
10 to prevent the deportation of the Defendant. As the Appendix demonstrates undeniably, "If
11 Rrustem Neza is returned to Albania, he very likely will be killed on account of his political
12 activities related to the Hajdari assassination." *Affidavit of James Pettifer*, Exhibit 6 to the
13 *Appendix to Amended Motion to Reopen on Account of Changed Circumstances*, which is
14 Appendix 1 to the *Appendix to Defendant's Motion to Dismiss, Motion for More Definite*
15 *Statement, and Reply to Motion for Preliminary Injunction*.

16 **The Plaintiff fails to state a claim on which relief can be granted**

17 The BICE claims it has the authority to drug Rrustem Neza and put him on an airplane to
18 Albania pursuant to INA §241(f), 8 USC §1231(f). *Complaint*, p. 1. The Plaintiff says, "The
19 Secretary of Homeland Security, through [B]ICE, is authorized to provide medical treatment to
20 aliens who require such treatment during removal." *Idem*. The statute the Plaintiff cites says,

21 If the Attorney General believes that an alien being removed requires personal
22 care because of the alien's mental or physical condition, the Attorney General may
23 employ a suitable person for that purpose who shall accompany and care for the alien
24 until the alien arrives at the final destination." INA §241(f), 8 USC §1231(f).

1 The statute is not ambiguous. It says nothing about drugging anyone against his will. The
2 statute says “The Attorney General may employ a suitable person ... who shall accompany and
3 care for the alien until the alien arrives at the final destination.” The United States Supreme
4 Court has said repeatedly that the statute’s clear, unambiguous language must be given effect.
5 *INS v. Phinpathya*, 464 US 183 (1984), *INS v. Cardosa-Fonseca*, 480 US 421 (1987), *Chevron*
6 *USA, Inc v. Natural Resources Defense Counsel*, 467 US 837 (1984).

7 Moreover, the Plaintiff’s *Complaint* fails to specify the drug that the Plaintiff wants to
8 administer to the Defendant, or how the Plaintiff intends to administer it. Moreover, the Plaintiff
9 does not suggest that the Defendant has ever suffered from any mental illness for which
10 medication by a sedative or anti-psychotic drug might be appropriate, and in fact he never has. It
11 is clear that the Plaintiff does not allege that the Defendant “requires personal care,” which is the
12 only reason the Congress has authorized the Attorney General to attend the Defendant, but seeks
13 to drug him only for the convenience of the Plaintiff.

14 The *Complaint* indicates that the Plaintiff intends to have the drug prescribed by a
15 physician who will not even examine him. *Complaint*, paragraph 14. The Supreme Court has
16 recognized a substantive due process right to be free from unwanted psychiatric medication.
17 *Washington v. Harper*, 494 US 210, 227 (1990). This does not mean that no agency ever can
18 administer antipsychotic drugs against the will of the victim, but it means that such measures
19 require extraordinary safeguards, including a hearing to “ensure that the inmate received all
20 necessary procedural protections and that the justification for involuntary treatment or
21 medication is appropriate.” *US v. White*, 431 F3d 431, 434 (5th Cir 2005). Even the
22 government’s own standards forbid the use of forced medication for the reasons the Plaintiff
23 intends to use it on Rrustem Neza. “Medication shall not be used to subdue an uncooperative

1 detainee for staff convenience. Medication must be prescribed...for medical purposes only.”
2 INS Detention Standard III.B.8 (“Use of Force: Principles Governing the Use of Force and
3 Application of Restraints.” The Plaintiff has not supplied this Court with the information it
4 needs to determine whether the medication it intends to administer is “medically appropriate.”

5 The Plaintiff cites *US v. Bechara*, 935 FSup 892 (SD Tex 1996), affirmed, 116 F3d 478
6 (5th Cir 1996), cert denied, 522 US 843 (1997) as authority for its plan to drug the Defendant.
7 That case is no authority in the present circumstances. Plaintiff says Mr. Neza called out that he
8 is not a terrorist; in the *Bechara* case the detainee had repeatedly physically resisted deportation,
9 injured others, threatened to bring down the plane if he were put on it, and had been indicted by a
10 grand jury for obstructing his deportation. On those extreme facts, the court ordered forcible
11 sedation of the detainee if he continued to resist deportation, but distinguished the case from
12 *Washington v. Harper*, 494 US 210 (1990), *ibid*, specifically noting that in *Bechara* the court had
13 been given no alternative for resolving the situation. Rrustem Neza has not physically resisted
14 deportation, injured anybody, threatened anybody, or been indicted; and there are various
15 alternatives to drugging him and putting him on an airplane, not least of which would be to allow
16 him to present the facts of his asylum claim to an immigration judge. Not only does the
17 Plaintiff’s *Complaint* fail to establish the subject matter jurisdiction of the District Court, but also
18 it fails to state a claim cognizable under any statute or court precedent in the United States.

19 **The Plaintiff is not entitled to an injunction because it comes to the Court with “unclean**
20 **hands”**

21 Where, as in this case, no statute authorizes the injunctive relief the Plaintiff seeks,
22 traditional canons of equity apply. *Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc.*,
23 527 US 308, 330-31 (1999) (federal district courts have authority to issue injunctions under
24 traditional principles of equity exercised by English Courts of Chancery in 1789). The Plaintiff

1 is not entitled to injunctive relief if it comes to the court with “unclean hands.” *Original Great*
2 *American Chocolate Chip Co. V. River Valley Cookies, Ltd.*, 970 F2d 273, 281-82 (7th Cir
3 1992). Having acted inequitably toward the Defendant, the Plaintiff now cannot ask the Court to
4 issue an injunction against him. Even after the Plaintiff knew undeniably that the Defendant had
5 been denied the right to present the facts of his asylum claim to a competent tribunal by the
6 unconstitutionally incompetent performance of prior counsel, and after the Plaintiff knew that
7 three Albanian newspapers during September 2007 announced that the Defendant was a witness
8 in the Hajdari murder case, had been denied asylum, and would shortly be deported to Albania,
9 where the assassins had been alerted to his arrival, the Plaintiff persevered, as it perseveres even
10 in this lawsuit, in denying him the right to a fair hearing to which he is entitled both under the
11 treaty and statutory obligations of the Plaintiff and under the Constitution of the United States.

12 The Plaintiff says, “On several occasions, Neza has stated to an ICE (sic) Deportation
13 Officer that he will not voluntarily return to Albania.” *Complaint*, paragraph 12. The Plaintiff
14 neglects to mention that the Defendant has been detained at the Rolling Plains facility since
15 February 2007, and easily could obtain his release by agreeing to be deported. Instead, the
16 Defendant prefers to be imprisoned alive indefinitely in Texas over being dead forever in
17 Albania.

18 The unconstitutionally deficient performance of Defendant’s previous attorneys is
19 described in the *Motion to Reconsider and Amended Motion to Reopen Pursuant to Matter of*
20 *Lozada*, which is Exhibit 2 to the *Appendix to Amended Motion to Reopen on Account of*
21 *Changed Circumstances*, in the *Appendix to Defendant’s Motion to Dismiss, Motion for More*
22 *Definite Statement, and Reply to Motion for Preliminary Injunction*, which is filed with this
23 pleading.

1 The Plaintiff claims that “Neza was arrested by Texas Alcoholic Beverage Commission
2 agents for the offense of Falsifying Government Documents. The arrest was based on an
3 application for a liquor license completed by Neza, in which he falsely stated that he is a United
4 States citizen.” That statement, intended only to prejudice the reader against Mr. Neza, is false,
5 and the Plaintiff knew it was false when he wrote it. It breaches Texas Disciplinary Rule of
6 Professional Conduct 3.03 Candor Toward the Tribunal:

7 “(a) A lawyer shall not knowingly:

8 (1) make a false statement of material fact or law to a tribunal;

9 (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid
10 assisting a criminal or fraudulent act”

11 The Plaintiff knew full well that the application for a liquor license was not “completed by
12 Neza.” The Plaintiff knowingly made “a false statement of material fact or law” to this District
13 Court. Defendant and his brother jointly own a popular Italian Restaurant in Nacogdoches,
14 Texas. The person who in fact completed the application has explained that Mr. Neza is
15 innocent of the accusation, and the prosecuting attorney agreed. The *Affidavit of Jessica Ismaili*
16 is Appendix 2 in the *Appendix to Defendant’s Motion to Dismiss, Motion for More Definite*
17 *Statement, and Reply to Motion for Preliminary Injunction*. The Plaintiff knew that no charges
18 were filed against Mr. Neza. The Plaintiff, however did not mention to this Court that no
19 charges were filed and that Mr. Neza was innocent, and so failed to disclose a fact to a tribunal
20 when disclosure is necessary to avoid assisting a criminal or fraudulent act. The fraudulent act is
21 the Plaintiff’s attempt to discredit Mr. Neza by deceiving this Court. The unclean hands of the
22 Plaintiff therefore should preclude the equitable relief, the injunction and preliminary injunction,
23 it requests.

1 **The Plaintiff is not entitled to a preliminary injunction**

2 To obtain a preliminary injunction, the Plaintiff must demonstrate 1) a substantial
3 likelihood of success on the merits; 2) irreparable injury to the Plaintiff if the injunction is not
4 granted; 3) harm to Plaintiff if the injunction is not granted outweighs the harm to the Defendant
5 if it is; and 4) a preliminary injunction is in the public interest. *Canal Authority of State of*
6 *Florida v. Callaway*, 489 F2d 567 (5th Cir 1974). Moreover, no party is entitled to an injunction
7 as a matter of law without showing irreparable injury. *Amoco Production Co. v. Village of*
8 *Gambell, Arkansas*, 480 US 531 (1987). The preliminary injunction requested by Plaintiff must
9 be denied, therefore, because there is absolutely no way the Plaintiff can show it will suffer
10 irreparable injury before the Court can decide the merits of Plaintiff's case. "[A] preliminary
11 injunction is an extraordinary and drastic remedy, one that should not be granted unless the
12 movant, **by a clear showing**, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 US
13 968, 972 (1997) (emphasis in original).

14 **Imminent and Irreparable Harm to Plaintiff**

15 If the preliminary injunction is not granted, no harm at all will come to the Plaintiff. It
16 will cost the Plaintiff nothing to wait until after the BIA and the Court of Appeals for the 11th
17 Circuit have issued their final decisions on the Defendant's now pending request for the
18 opportunity to present the facts of his asylum claim to a competent tribunal. The time, trouble,
19 and expense to the Plaintiff in deporting the Defendant will be the same after he receives his day
20 in court as it is today. In fact, if the Defendant is allowed to present the facts of his asylum claim
21 to a competent tribunal, the Plaintiff almost certainly will be spared the considerable trouble and
22 expense of deporting him.

1 Likelihood of Success on the Merits

2 A preliminary injunction should not issue because it is likely the Plaintiff will fail on the
3 merits of its claim. The Defendant seeks only the opportunity to present his asylum case to a
4 competent tribunal with the assistance of competent counsel. To date, he has been prevented
5 from presenting the facts to the only tribunal competent to hear them, the Executive Office for
6 Immigration Review. The government has no legitimate, legal interest in preventing him from
7 being heard in accordance with the laws and Constitution of the United States. It is necessary
8 only to look at the three Albanian newspapers and read the translations provided to see that the
9 probability that the Defendant ultimately will succeed in his motions to reopen and his asylum
10 application are extremely high. *Appendix to Defendant's Motion to Dismiss, Motion for More*
11 *Definite Statement, and Reply to Motion for Preliminary Injunction*

12 It is significant, even though not dispositive, that the Defendant's two brothers were
13 granted asylum on the basis of the same events in Albania that forced the Defendant to flee. The
14 difference is that they had competent legal representation. The failure of the Defendant's
15 previous attorney to understand the basis of his asylum claim and, even more egregiously, his
16 failure to place into evidence in the hearing of the claim the newspaper reports corroborating the
17 fact of the murder of a cousin and the death certificates of two cousins who were murdered,
18 which documents were in the Defendant's possession at the time of the hearing, are described
19 fully in the *Appendix to Defendant's Motion to Dismiss, Motion for More Definite Statement,*
20 *and Reply to Motion for Preliminary Injunction.*

21 Balance of Hardship

22 The balance of hardship tilts decisively against issuing the preliminary injunction that the
23 Plaintiff requests. Plaintiff has nothing to lose by waiting to deport the Defendant until after the

1 EOIR and Court of Appeals for the 11th Circuit reach a final resolution of the Defendant's case.
2 The Plaintiff also has nothing to gain by deporting the Defendant before he has his day in court.
3 The Defendant, on the other hand, as his *Appendix to Defendant's Motion to Dismiss, Motion for*
4 *More Definite Statement, and Reply to Motion for Preliminary Injunction* makes absolutely and
5 unambiguously plain, stands to lose his life. The further hardship to the Defendant if the
6 preliminary injunction requested by Plaintiff is granted is that he will be denied his right to a fair
7 hearing on his asylum application before a competent tribunal.

8 The Public Interest

9 It cannot be in the public interest for the government of the United States to deliver the
10 prosecution's witness in an assassination case into the hands of the assassins, and much less in
11 the public interest to do so without allowing him to present his asylum claim to a competent
12 tribunal with the assistance of counsel that at least does not prevent him from putting the facts
13 before that tribunal. The public interest is served by respecting the laws and Constitution of the
14 United States, not by rushing the deportation of an asylum applicant without affording him an
15 opportunity to present the facts of his case to the EOIR. To date, the Defendant has been denied
16 the right guaranteed by the immigration law, INA §208(d)(1), 8 USC §1158(d)(1), and the due
17 process clause of the United States Constitution.

18 "The touchstone of due process is protection of the individual against arbitrary action of
19 government." *Daniels v. Williams*, 474 US 327, 331 (1986), quoting *Dent v. West Virginia*, 129
20 US 114, 123 (1889). Thus it clearly is in the public interest that the Plaintiff be prevented from
21 deporting the Defendant until they have afforded him an opportunity to present his case.

22 WHEREFORE, Defendant prays the Court to dismiss the Plaintiff's suit in its entirety, and in the
23 alternative to require the Plaintiff to plead specifically what drug it plans to use on the Defendant

1 and how it plans to administer it; and to deny the Plaintiff's motion for preliminary injunction,
2 and to grant the Defendant's motion to stay his deportation until all matters before this Court are
3 finally resolved in this Court, in the Court of Appeals, and, if necessary, in the Supreme Court of
4 the United States.

5
6 Respectfully submitted,

John Wheat Gibson

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9 _____
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16 ATTORNEY FOR PLAINTIFF
17
18
19
20
21

22 CERTIFICATE OF SERVICE

23 I certify that a true copy of the above *Defendant's Motion to Dismiss, Motion for More*
24 *Definite Statement, and Reply to Motion for Preliminary Injunction* was served on AUSA Steve
25 Mason, Assistant United States Attorney, counsel for Defendants, by fax and first class letter to
26 110 North College, Suite 700, Tyler, Texas 75702 Fax: 903-590-1436, and to Ruth Harris
27 Yeager to the same address and fax number on 10 September 2007.

28 *John Wheat Gibson*
29 _____