IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-2868

TAKKY ZUBEDA,
Petitioner

v.

JOHN ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES OF AMERICA,
Respondent

BRIEF OF PETITIONER

Petition for Review of the June 7, 2002, Decision of the Board of Immigration Appeals, File No. A. 78 824 095 – York, Denying Withholding of Removal and Ordering Petitioner Removed to the Democratic Republic of the Congo.

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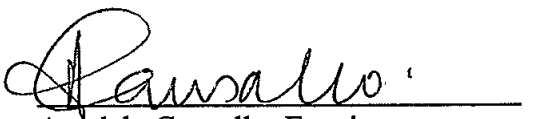
UNITED SATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

TAKKY ZUBEDA,	:	
	:	**No. 02-2868**
Petitioner	:	
	:	
vs.	:	
	:	
JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA,	:	
	:	
Respondent	:	

Corporate Disclosure Statement and
Statement of Financial Interest

Petitioner Takky Zubeda is not affiliated with any corporate entity.



Ayodele Gansallo, Esquire

Dated: January 13, 2003

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DOCKETING STATEMENT

Administrative Agency Review/Enforcement Proceedings
(To be completed by Petitioner)

1. DOCKET NO.: 02-2868 2. DATE DOCKETED: 07/08/02

3. CASE NAME
(Lead Parties Only) Takky Zubeda v. John Ashcroft

4. TYPE OF CASE: Review X Enforcement _____

5. CASE INFORMATION:

a. Identify agency whose order is to be reviewed: Board of Immigration Appeals

b. Give agency docket or docket number(s): A78824095

c. Give date(s) of order(s): June 7, 2002

d. Is a request for rehearing or reconsideration pending at the agency?
_____Yes X No

e. Are any other cases involving the same underlying agency order pending in this Court or in any other court? _____Yes X No

If Yes, identify name(s), docket number(s), and court(s):

_____

_____

f. Are any other cases, to counsel's knowledge, pending before the agency, this Court or the Supreme Court which involve substantially the same issues as the instant case presents? _____Yes _____No

If Yes, give name(s) of these cases and identify court/agency:

_____

_____

Signature: [signature] Date: 01/13/03

Name of Counsel or Pro Se Litigant (Print) Ayodele Gansallo

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Name of Party Represented: Takky Zubeda, Petitioner

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ATTACH A CERTIFICATE OF SERVICE

NOTE: If counsel for any other party believes that the information submitted is inaccurate or incomplete, counsel may so advise the Clerk within 10 days by letter, with copies to all other parties, specifically referring to the challenged statement. An original and three copies of such letter should be submitted.

REV. 7/93

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL AND ADMINISTRATIVE AGENCY CASES

FEDERAL STATUTES & REGULATIONS

MISCELLANEOUS

STATEMENT OF JURISDICTION

On October 22, 2001, Immigration Judge, the Honorable Walter A. Durling, of the Executive Office for Immigration Review in York, Pennsylvania, denied Petitioner Takky Zubeda's application for asylum but granted Petitioner's request for withholding of removal under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention").[1] The Immigration and Naturalization Service ("INS") appealed the decision of the IJ to the Board of Immigration Appeals ("BIA"). The BIA had jurisdiction pursuant to 8 C.F.R. § 3.1(b)(2).

On June 7, 2002, the BIA sustained the appeal, reversing the IJ's decision and denying Petitioner's request for withholding of removal under the Convention. The BIA ordered that Petitioner be removed back to the Democratic Republic of the Congo ("DRC").

Pursuant to 8 U.S.C. § 1252(a)(1), on July 16, 2002, Petitioner filed a timely Petition for Review in this Court, as the court of appeals for the judicial circuit in which the IJ completed proceedings.

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1 U.N. Doc.A/RES/39/708 (1984). The United States signed the treaty on Apr. 19, 1988, and the Senate adopted its resolution of advice and consent to ratification on Oct. 27, 1990. 136 Cong. Rec. S17486-92 (10/27/90).

This Court has jurisdiction to review the BIA's decision as a "final order of removal" pursuant to 8 U.S.C. § 1252(a)(1). Pursuant to 8 U.S.C. § 1252(b), this Court has jurisdiction to review the BIA's denial of Petitioner's request for withholding of removal.

STATEMENT OF ISSUES PRESENTED

1. Did the BIA abuse its discretion when it dismissed Petitioner's claim for relief under the Convention without adequate consideration of the record below and in a ["minimalistic and non-detailed manner"]?

2. Did the BIA abuse its discretion by disregarding objective evidence in the record concerning mass human rights violations in the DRC, specifically systematic rape of women, which unequivocally establishes a likelihood that Petitioner will be tortured upon return to the DRC?

3. Did the BIA abuse its discretion when it failed to defer to the IJ's determination by administrative notice that Petitioner will likely be turned over to government officials and detained upon her forcible removal to the DRC?

4. Did the BIA err as a matter of law when it conflated an adverse credibility determination on Petitioner's asylum claim with its analysis of her claim under the Convention Against Torture?

STATEMENT OF CASE

I. PROCEDURAL HISTORY

In December 2000, Petitioner Takky Zubeda, a native and citizen of the Democratic Republic of the Congo ("DRC"), attempted to enter the United States. (App. 4).[2] Petitioner was detained at entry and, upon expressing a fear of returning to her native country, she was referred to an Asylum Officer of the Immigration and Naturalization Service ("INS"). Subsequently, in early 2001, Petitioner filed an application seeking asylum and withholding of removal; she also sought protection under Article 3 of the Convention. (App. 4-5).

On September 18, 2001, a hearing was held before an IJ. (App. 5). At the hearing, Petitioner produced both testimonial and documentary evidence in support of her application for asylum and withholding of removal. The documentary evidence included reports about the situation in the DRC prepared by the U.S. Department of State, Amnesty International, and Human Rights Watch. (App. 5, 16, 53, 95, 101, 105). In a written decision dated October 22, 2001 ("IJ Decision"), the IJ denied Petitioner's

[2] All the citations in this brief are to the Appendix.

application for asylum. IJ Decision at 8 (App. 11-12). However, the IJ granted Petitioner's request for withholding of removal under the Convention. He did so based on his conclusion that, if Petitioner is forcibly returned to the DRC through the deportation process, she will (1) come to the attention of the government; (2) be detained for an indeterminate period; and (3) more likely than not, during the period of detention, be subjected to physical abuse and or rape since these were acts commonly employed by the government against its civilians. *See* IJ Decision at 8 (App. 11-12).

The INS appealed the decision of the IJ to the Board of Immigration Appeals ("BIA"). On June 7, 2002, the BIA sustained the appeal, reversing the IJ's decision, denying Petitioner's request for withholding of removal under the Convention, and ordering Petitioner removed to the DRC. (App. 15) The BIA issued a brief opinion ("BIA Decision") relying entirely on its decision in *In re J-E-,* 23 I.&N. Dec. 291, 2002 BIA LEXIS 6 (March 22, 2002). In that case, the 13-member majority, with six BIA members vigorously dissenting, held that the admittedly cruel and inhumane conditions in Haitian prisons did not rise to the level of torture and that acts of direct physical torture by prison officials were rare in Haiti. *See In re J-E-,* 2002 BIA LEXIS at *33-35. With respect to the instant case, the BIA held that *In re J-E-* was dispositive.

On July 18, 2002, Petitioner filed a timely Petition for Review in this Court, together with a Motion to Stay Deportation/Removal Pending Resolution of the Petition for Review ("Motion to Stay Removal"). (App. 3). On November 19, 2002, this Court granted Petitioner's Motion to Stay Removal. (App. 3).

Petitioner did not file a Motion to Reopen or to Reconsider with the BIA because Petitioner concluded that any such motion would be futile: In deciding Petitioner's claim, the BIA had held that its recent decision, *In re J-E-*, 23 I. & N. Dec. 291, 2002 BIA LEXIS 6, was dispositive, and Petitioner was of the view that it would be highly unusual for the BIA to reverse itself in such a short period of time.

To date, Petitioner remains in the custody of the INS and is being held at York County Prison. Petitioner has filed three applications for parole which have been all denied. Petitioner has also filed a Petition for Writ of Habeas Corpus, seeking release from INS detention where she has been held since her arrival in the United States. That application is pending in the United States District Court for the Eastern District of Pennsylvania.

II. STATEMENT OF FACTS

A. The Democratic Republic Of The Congo—Killing Human Decency.

Petitioner's native country, the DRC, formerly Zaire, is a country undergoing civil war, with flagrant human rights abuses perpetrated by both government and rebel forces. The vicious conflict in the DRC involves not only government and anti-government forces, but also six other African countries who have aligned themselves on either side of the conflict. *See* Amnesty International Reports, *Democratic Republic of Congo: Killing Human Decency* 2-3 (May 2000) ("AI: *Killing Human Decency*") (App.54-55). The opposition forces are comprised of two factions: the Rassemblement congolais pour la démocratie (Congolese Rally for Democracy) ("RCD"), and the Mouvement pour la libération du Congo (Movement for the Liberation of Congo) ("MLC"). *See id.* at 3 (App. 55). These fighters are supported by Tutsi factions from Burundi and Rwanda and by the Uganda People's Defense Forces. *See id.* (App. 55). The rebels control the eastern part of the DRC, including South Kivu, Petitioner's home region. Government forces, known as Forces armées congolaises (Congolese Armed Forces) ("FAC"), are supported by the governments of Angola, Namibia, and Zimbabwe and by Hutu militants from Rwanda known as the "interahamwe." *See id.* (App. 55). There are also armed groups supportive of the government known as mayi-mayi, or Mai Mai,

often fighting in rebel held areas. *See* U.S. Department of State, *2000 Country Reports on Human Rights Practices: Democratic Republic of Congo* 1 (February 2001) ("U.S. State Department Report") (App. 16).

Amnesty International has described the DRC as a brutal and life-threatening environment with a predatory, near-collapsed government:

> [A]t least 300,000 civilians have fled to neighbouring [sic] countries, while more than one million have been internally displaced in conditions that have caused numerous deaths from disease, starvation and exposure. This is a snapshot of a catalogue of human rights abuses and suffering that the people of the DRC have been subjected to since August 1998 by forces whose foreign and Congolese political and military leaders claim to be fighting for security or sovereignty. In reality, many of the leaders are involved in a fight for political and economic control of the DRC. Amnesty International has concluded that these leaders are perpetrating, ordering or condoning atrocities on a large and systematic scale, and deliberately violating people's individual and collective right to security and sovereignty.
>
> * * *
>
> . . . [S]ince the start of 1999, hundreds of unarmed civilians have been killed as a result of direct or indiscriminate attacks by forces loyal to President Kabila in clear violation of Common Article 3 of the Geneva Conventions.

AI: *Killing Human Decency*, *supra*, at 1; 7 (App. 53, 59). The deplorable conditions of the DRC have also been described in reports by Human Rights Watch, *Eastern Congo Ravaged: Indiscriminate Attacks and Extrajudicial Executions of Civilians* (2000) ("HRW: *Eastern Congo Ravaged:*

Indiscriminate Attacks") (App. 105), and *Eastern Congo Ravaged: Civil Society Under Attack* (2000) (App. 115). These reports of the U.S. Department of State, Amnesty International, and Human Rights Watch, all of which describe the deplorable conditions in the DRC, were entered into the record before the IJ.

Based on these reports as well as other documentary evidence in the record, the IJ concluded that the government of the DRC "takes upon itself the systematic abuse of large segments of its population" and that the country has been plunged into anarchy. *See* IJ Decision at 8 (App. 11).

B. Petitioner's Claim For Protection

The grounds for Petitioner's claim to protection arose from a series of events following the rape of her mother by soldiers believed to be from rebel forces. Petitioner and her family are from Baraka, a village in the South Kivu Province of the DRC. (App. 5). Petitioner testified that at the time of her mother's rape, Petitioner was living in Fizi, another village close by,

with her in-laws.[3] (App. 5). Petitioner returned home to care for her mother. (App. 5). Following the rape, Petitioner's father made plans to report the incident to human rights groups operating in the area. (App. 5). Before he was able to do so, however, on or about November 15, 2000, a group of five to ten soldiers – believed to be rebels based on their uniforms – forcefully entered Petitioner's home. (App. 5). The soldiers, apparently seeking to confront Petitioner's father concerning his plans to file a report with the human rights group, tied up Petitioner's father and her brother and forced them to watch as they gang raped Petitioner. (App.5). After the gang rape, the soldiers decapitated Petitioner's father and brother with machetes and set fire to the family home, with Petitioner's mother and sister believed to be still inside. (App. 5). The soldiers then took Petitioner to a detention

[3] Petitioner is legally married to a lawful permanent resident ("LPR") of the United States. Petitioner's husband entered the United States as a refugee from the DRC in 1993. In 1999, he traveled briefly to Tanzania where he and Petitioner were married. Under United States immigration laws, there is currently a wait of over four years for spouses of LPRs to enter the country as immigrants. Therefore, Petitioner's husband was unable to bring Petitioner with him when he re-entered the United States. Her husband is currently in the process of being naturalized as a citizen of the United States. A petition filed by petitioner's spouse for her to join him in the United States was approved by the Philadelphia INS on October 10, 2002. Although there are provisions in the Immigration and Nationality Act ("INA") for spouses of United States citizens to adjust their status to an LPR, this is only possible for someone who has been inspected and admitted or paroled into the country. *See* INA § 245a. Because Petitioner was apprehended at the border, she is considered not to meet these requirements and is therefore ineligible for adjustment. Any application Petitioner wishes to make must be made abroad. However, because Petitioner is currently subject to an order of removal, she is ineligible to return to the United States for five years, see INA § 212(a)(9)(A)(i), unless she has received prior permission to do so from the Attorney General. *See* INA § 212(a)(9)(A)(iii). This scenario does not, however, preclude an Order by this Court withholding removal under the Convention.

camp where she was held with other women and subjected to further systematic sexual and physical abuse. (App. 5).

Unfortunately, Petitioner's experience is typical of the South Kivu Province, which, as documented by Human Rights Watch, is a site of massive human rights abuses:

> [R]ape and other forms of sexual violence have become widespread as the war in eastern Congo has grown increasingly bitter. One Congolese women's rights group registered 115 rapes between April and July 1999 in just the two regions of Katana and Kalehe of South Kivu with thirty in just one April 5 attack on Bulindi and Maitu. Groups of ten or more men sometimes gang rape one woman. Assailants sometimes take women hostage to be used as sexual slaves. Both soldiers and armed opposition groups have engaged in such abuses, but Hutu armed groups are reported to have perpetrated rapes more often than other groups. They use sexual violence to terrorize civilians, especially those thought to be RCD supporters and most especially those who participate in civil self-defense forces.

HRW: *Eastern Congo Ravaged: Indiscriminate Attacks*, *supra*, at 5 (App. 109). The U.S. State Department Report has similarly described the use of rape by parties to the conflict:

> There were reports that Rwandan and Ugandan soldiers allegedly raped women during extensive fighting in Kisangani in May and June . . . . Rwandan troops and RCD rebels also reportedly engaged in the rape of women in public and often in the presence of their families and in-laws. A woman raped in this manner generally is forced out of the village, leaving her husband and children behind. . . . In June an RCD/Goma soldier . . . stopped a young girl, Fitina, on the road between Baraka and Mboko and raped her. After he raped her, the

> soldier discharged his weapon into her vagina. According to a number of credible human rights organizations, marauding bands of armed men in the occupied territories often put victims of rape through further painful humiliations by inserting rocks, sharp sticks, and hot peppers into their vaginas.

U.S. State Department Report, *supra*, at 10-11 (App. 25-26). The State Department has further documented examples of atrocities in the region:

> On May 14 and 15, in response to the apparent Mai Mai slaying of RCD commander Ruzagura during an ambush on his motorcade, RCD/Goma forces killed hundreds of civilians in and around the town of Katogota in South Kivu Province. According to some reports, RCD soldiers killed as many as 300 villagers by slitting their throats.
>
> * * *
>
> Between August 18 and 24, following a period of intense fighting between Mai Mai and RCD forces in the Shabunda region of South Kivu Province, the RCD carried out a punitive campaign against the villages between the towns of Lulingu and Nzovu. Soldiers sent by RCD Commandant Macumu burned the villages; more than 300 villagers were burned alive and 3,000 homes were destroyed.
>
> * * *
>
> . . . On July 19, in the Fizi district of South Kivu Province, Banyamulenge and Burundian soldiers killed an estimated 150 persons in the town of Lubamba by slitting their throats. The local population sought refuge in the nearby town of Dine.
>
> * * *
>
> There were numerous reported killings along the road from Uvira to Bukavu in South Kivu Province . . . . The climate of insecurity in the occupied territories and particularly in the Kivu Province forced many local residents to abandon their

> homes and created food shortages as armed bands kept farmers from working in their fields.

U.S. State Department Report, *supra*, at 6-7 (App. 21, 22).

Subsequent to the attacks on Petitioner and her family, she managed to escape imprisonment at the camp and flee to neighboring Tanzania. (App. 5-6). There, she received assistance from members of a Christian organization, who gave her a small amount of money and a passport belonging to one of the workers which, Petitioner was told, would allow her entry into the United States. (App. 5-6). Petitioner arrived in the United States at Newark International Airport on or about December 16, 2000. (App. 5-6). Upon arrival, Petitioner feared telling the truth to immigration inspectors, and, instead, asserted that she had come to the United States to visit her brother and attend bible school. Petitioner later admitted that she was seeking asylum. (App. 6).

STATEMENT OF RELATED CASES AND PROCEEDINGS

On November 8, 2002, pursuant to 28 U.S.C. § 2241, Petitioner filed a Petition for Writ of Habeas in the United States District Court for the Eastern District of Pennsylvania (Docket No. 02-CV-8394), claiming that her detention in INS custody for more than two years without a bond hearing is unconstitutional. The government has contested the Petition. The parties completed briefing on December 18, 2002, and a decision on that Petition is pending.

STANDARD OF REVIEW

This Court reviews the BIA's ultimate decision to deny Petitioner relief under the Convention for an abuse of discretion. The Court reviews the BIA's findings of fact under a substantial evidence standard. *Sevoian v. Ashcroft*, 290 F.3d 166, 174 (3d Cir. 2002).

In applying an abuse of discretion standard, the Court must reverse the BIA's decision if it is "arbitrary, irrational, or contrary to law." *Tipu v. INS*, 20 F.3d 580, 582 (3d Cir. 1994). Under the substantial evidence standard, the Court should reverse the BIA's findings of fact if, under a fair and objective view of the record, "the evidence compels the contrary conclusion." *Obianuju Ezeagwuna v. Ashcroft*, 301 F.3d 116, 126 (3d Cir.

2002) (citing *INS v. Elias-Zacarias*, 502 U.S. 478, 481 & n.1 (1992); *Abdille v. Ashcroft*, 242 F.3d 477, 484 (3d Cir. 2001)). Deference to the BIA's fact finding "is not due where findings and conclusions are based on inferences or presumptions that are not reasonably grounded in the record, viewed as a whole." *Id.* (quoting *Balasubramanrim v. INS*, 143 F.3d 157, 162 (3d Cir. 1998)). For example, "[a]dverse credibility determinations based on speculation or conjecture, rather than on evidence in the record, are reversible." *Gao v. Ashcroft*, 299 F.3d 266, 272 (3d Cir. 2002) (citing *Salaam v. INS*, 229 F.3d 1234, 1238 (9th Cir. 2000)).

If the Court determines that the BIA abused its discretion or that the BIA's factual findings are not supported by substantial evidence in the record, the Court may order the BIA to grant Petitioner's requested relief: withholding of removal under the Convention. *See Al-Saher v. INS*, 268 F.3d 1143, 1148 (9th Cir. 2001) (remanding to BIA "for entry of an order granting withholding of removal" upon determination that BIA failed to consider any country reports on human rights conditions in country of removal). If the Court determines that the BIA failed to address an issue that requires further consideration before disposition of Petitioner's claim, it may remand to the BIA or IJ. *See INS v. Ventura*, 123 S. Ct. 353, 356 (2002);

Kamalthas v. INS, 251 F.3d 1279, 1284 (9th Cir. 2001); *Mansour v. INS*, 230 F.3d 902, 909 (7th Cir. 2000).[4]

SUMMARY OF THE ARGUMENT

In considering Petitioner's claim under the Convention, the BIA failed to conduct a detailed analysis of the record, as it is required to do. Instead, it performed a perfunctory review in a minimalistic and non-detailed manner, resulting in a decision lacking in clarity and, in part, utterly illogical.

Finding that prison conditions in the DRC did not rise to the level of torture and therefore could not support a claim that Petitioner would be subjected to proscribed treatment, the BIA failed to consider evidence amply developed on the record detailing torture, beatings, rape and other forms of violence used by all sides of the conflict in the DRC against detainees and other civilians. This evidence unequivocally supported Petitioner's claim that there was a strong likelihood that she **will** be tortured upon her return to that country.

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[4] The Supreme Court's recent decision in *Ventura* does not uniformly prohibit this Court from granting Petitioner withholding of removal. To the contrary, *Ventura* reversed the Ninth Circuit's refusal to remand an issue only on the narrow ground that the BIA had not addressed it. Thus, even after *Ventura*, this Court may grant the relief sought in a Petition for Review if it finds an abuse of discretion or lack of substantial evidence to support the BIA's denial of such relief. The only Third Circuit decision to consider *Ventura*, an unpublished non-precedential opinion, supports this interpretation. *See Sene v. Ashcroft*, 2002 WL 31781089, at *6 & n.3 (3d Cir. Dec. 11 2002) (citing *Ventura*, 123 S. Ct. at 354) (explaining *Ventura* requires remand to BIA of issues that "BIA had failed to consider" and noting the possibility of granting petitioner's "application for asylum outright").

In reversing the IJ's finding that there was a strong likelihood **that** Petitioner **will** be detained for some period of time on her return to the DRC, the BIA failed to grasp that the IJ properly took administrative notice of the practices of foreign governments and of INS procedures with respect to failed asylum seekers. These procedures include a specific INS requirement that returnees be delivered directly into the hands of government officers waiting to receive them.

Finally, the BIA erred when it conflated the IJ's adverse credibility finding in the asylum context with Petitioner's claim for relief under the Convention. As a result, the BIA failed to conduct **the** individualized and detailed review of **Petitioner's claim under the Convention, as required by appellate case law.**

ARGUMENT

I. THE BIA ABUSED ITS DISCRETION WHEN IT DISMISSED PETITIONER'S CLAIM FOR RELIEF UNDER THE CONVENTION WITHOUT ADEQUATE CONSIDERATION OF THE RECORD.

When refusing an alien's request for relief under the Convention, the BIA must "show that it has reviewed the record and grasped the movant's claims." *Sevoian v. Ashcroft*, 290 F.3d 166, 178 (3d Cir. 2002); *see also Senathirajah v. INS*, 157 F.3d 210, 216, 222 (3d Cir. 1998) (reversing BIA's rejection of asylum claim when BIA's adverse credibility determinations were "not supported by its own independent review of the record"). In light of the "basic tenet that each petitioner is entitled to an individualized hearing," courts of appeals reviewing BIA adjudications have "repeatedly insisted that [they] 'will not tolerate boilerplate' decisions." *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1050 (9th Cir. 2002) (quoting *Ghaly v. INS*, 58 F.3d 1425, 1430 (9th Cir. 1995)). "[W]here consideration of a petitioner's appeal consists entirely of boilerplate . . . the BIA's consideration can be considered so deficient as to deny the petitioner due process." *de la Llana-Castellon v. INS*, 16 F.3d 1093, 1098 (10th Cir. 1994) (quoting *Rhoa-Zamora v. INS*, 971 F.2d 26, 36 (7th Cir. 1992)) (internal quotations omitted).

If the BIA addresses a claim for relief under the Convention "in a minimalistic and non-detailed manner," courts must "question whether the BIA adequately comprehended and addressed [the] torture claim." *Mansour v. INS*, 230 F.3d 902, 908 (7th Cir. 2000); *see also Sevoian*, 290 F.3d at 177 (explaining that *Mansour* held that a "minimalistic" opinion displays BIA's failure to "thoroughly explore[]" the basis of a claim under Convention); *see also Kamalthas v. INS*, 251 F.3d 1279, 1283-84 (9th Cir. 2001).

In this case, the BIA's discussion of the merits of Petitioner's claim constitutes exactly the kind of perfunctory consideration that courts of appeals have consistently found sufficiently objectionable to justify granting a Petition for Review. Close analysis of the BIA's single, conclusory paragraph addressing Petitioner's claims elucidates this point:

> The background evidence establishes that prison conditions in the Congo remain harsh and life threatening. The Immigration Judge found that the respondent would be detained upon return to the Congo (I.J. at 8). **[1]** However, we note a dearth of evidence to support any finding that the respondent is likely to be detained for any reason. **[2]** We find that the respondent has failed to establish that the harsh prison conditions establish a probability that she will be detained in a prison in the Congo, much less that she will be individually targeted for any harm by the government of the Congo. **[3]** The evidence of record does not remotely establish a likelihood that the respondent will be tortured by the government of the Congo. **[4]** While she claims to have been previously tortured in the Congo, the Immigration Judge specifically found her to be incredible and the respondent has not contested this finding (I.J. at 3-5). As such, the respondent has

failed to meet her burden of proof. Accordingly, the Service's appeal will be sustained.

BIA Decision at 2 (App. 15). (bold, bracketed numbers added).[5]

The bracketed numbers, which have been added for clarity of analysis, demonstrate that the BIA cited four reasons to deny Petitioner's claim. Independent evaluation of these reasons compels the conclusion that the BIA conducted only a minimal review of the record and did not thoroughly comprehend the nature of Petitioner's claims.

The most glaring example of the BIA's failure to conduct the analysis required by appellate case law appears in the BIA's utterly illogical, second stated "reason" – that the existence of harsh prison conditions does not demonstrate the likelihood of detention or torture. Petitioner agrees with this statement. Indeed, the existence of harsh prison conditions that are not extremely egregious could not establish the likelihood of detention. Nor does the mere fact that they exist establish that Petitioner will be tortured. The BIA's statement with respect to "harsh prison conditions" is simply

[5] The "boilerplate" nature of the BIA's decision is apparent in that the BIA's language merely parrots much of the language set forth in the INS brief submitted to the BIA. *See, e.g.*, INS Brief at 5 (App. 129) ("There is a dearth of evidence to support any finding that the respondent is likely to be detained for any reason."); INS Brief at 6 (App. 130). ("All that is reflected in the background evidence is that generally, prison conditions are poor and potentially life threatening."). Notably, the INS brief is also the product of a "cut-and-paste" analysis, devoid of careful attention to the record. *See, e.g.*, INS Brief at 7 (App. 7). (stating that "respondent has failed to demonstrate that the *Sierra Leone* government seeks to discriminate against her for any reason").

incomprehensible, and Petitioner does not deem necessary a more substantial response.[6]

Aside from using unintelligible language, and more fundamental to the merits of Petitioner's claim, the BIA's other three reasons cited in support of its conclusion exhibit a misunderstanding of the Immigration Judge's decision, inattention to the record, and legal error.

First, the BIA's conclusory determination that the record did not establish a likelihood of torture – a determination made without *any* reference to the country reports introduced before the IJ – shows that the BIA could not possibly have fully considered the record as it is required to do. *Cf. Sevoian*, 290 F.3d at 178 (emphasizing importance of BIA's consideration of country reports). Second, with respect to the BIA's assertion that the record contained a dearth of evidence as to the detention of deportees, the BIA failed to grasp the IJ's determination of this fact by administrative notice,[7] a determination that obviated the need for any evidence on that point. Third, the BIA's reliance on the IJ's credibility

[6] Although it is difficult to surmise the BIA's point with this statement, it is possible that the BIA was attempting to fit Petitioner's case within the scope of its precedential holding in *In re J-E-*, 23 I. & N. Dec. 291 (BIA 2002), which held that harsh conditions in Haitian prisons endured by deportees who are detained does not rise to the level of torture. It should be noted, the issues in that case are currently on appeal. More importantly, while the BIA may rely on its precedential decisions in deciding cases, it may not do so without a lucid explanation as to why the decision is analogous to the case before it.

[7] As discussed below, *see infra* § III, administrative or official notice is the equivalent of judicial notice for administrative proceedings.

determinations as to Petitioner's asylum claim, to conclude that Petitioner was insufficiently credible to establish a claim under the Convention, was legally erroneous under well-established principles requiring an independent review of distinct claims. *See Kamalthas*, 251 F.3d at 1284 (reversing BIA's rejection of Convention claim because it "overrelied on its prior adverse credibility determination" regarding the asylum claim); *Mansour*, 230 F.3d at 908 (stating "we are not comfortable with allowing a negative credibility determination in the asylum context to wash over the torture claim").

Petitioner will address more thoroughly each of these faults in the remainder of this Argument.

II. THE BIA ABUSED ITS DISCRETION WHEN IT DISREGARDED OBJECTIVE EVIDENCE IN THE RECORD, WHICH UNEQUIVOCALLY DEMONSTRATED THE LIKELIHOOD THAT PETITIONER WILL BE TORTURED IF SHE WERE FORCIBLY RETURNED TO THE DRC.

Petitioner has demonstrated that she is more likely than not to be tortured if she is removed to the DRC. Petitioner is thus entitled to withholding of removal under the Convention.

Under Article 3 of the Convention, as adopted by Congress, the United States shall not "expel, extradite, or otherwise effect the involuntary return of any person to a country where there are substantial grounds for

believing the person would be in danger of being subjected to torture . . . ." Foreign Affairs Reform and Restructuring Act of 1998, Pub.L. No. 105-277, § 2242(a); *see also Sevoian*, 290 F.3d at 172. An alien seeking relief under the Convention bears the burden of showing that it is "more likely than not" that she would be subjected to torture in the country of removal. *See* 8 C.F.R. § 208.16(c).

In assessing the likelihood of torture, the adjudicator shall consider all evidence relevant to the possibility of future torture, "including, but not limited to evidence of past torture inflicted upon the applicant . . . ; evidence of *gross, flagrant or mass violations of human rights within the country of removal* . . . ; and other relevant information regarding the conditions in the country of removal." 8 C.F.R. § 208.16(a)(3) (emphasis added). "The standard for relief has no subjective component, but instead requires the alien to establish, by objective evidence that [she] is entitled to relief." *Sevoian*, 290 F.3d at 175 (internal quotations omitted).

It deserves emphasis that relief from removal is mandatory, and there are no exceptions. *See* 8 C.F.R. § 208.17(a). "[C]ountry conditions alone can play a decisive role in granting relief under the Convention . . . and the relevant statutory and regulatory language . . . does not require that the

prospective risk of torture be on account of certain protected grounds." *Kamalthas*, 251 F.3d at 1280; *see also Mansour*, 230 F.3d at 908.

The record below contains abundant examples and descriptions of atrocities routinely committed within the DRC. Petitioner's claim that she will be tortured upon forcible return to the DRC must be considered against this background evidence of human rights abuses and deplorable country conditions. The government of the DRC has committed and continues to commit serious human rights abuses, and the security forces are responsible for numerous extrajudicial killings, disappearances, torture, beatings, rape and other abuses. *See* U.S. Department of State Report, *supra* at 2 (App. 17). In addition to the atrocities committed by government forces, rebel forces commit massacres and serious abuses against civilians living in territories under their control, including deliberate, large-scale killings, disappearances, torture, rape, extortion, robbery, dismemberment, arbitrary arrests and detention. *See id.* (App. 17). Important to Petitioner's case is the fact that, as a social group, women in the DRC are singled out, terrorized and silenced through actual or threatened sexual assaults. Violence against women is rampant and rarely punished. *See id.* (App. 17).

As the IJ properly found based on the country reports, excerpts of which are set forth *supra* at pages 8 through 13, if removed, Petitioner will

be turned over to authorities and detained for some period of time upon her arrival in the DRC.[8] Moreover, as the IJ concluded, based on the country reports entered into evidence, torture, including systematic rape of women, is *modus operandi* of government officials and rebel forces in the DRC. By virtue of being from a rebel-held region, Petitioner is a target; by virtue of being a woman, Petitioner is a more prominent target; and by virtue of being a deportee from the United States, Petitioner is most visible. The deplorable conditions in the Congo and the mass violations of human rights, particularly the staggering violence against women detainees, coupled with Petitioner's tragic repeated rape prior to her escape to the United States, warrant relief under the Convention.

The evidence of human rights violations in the record below, viewed objectively, unequivocally demonstrates that Petitioner will more likely than not be tortured upon removal to the DRC. As such, Petitioner is entitled to relief under the Convention. Accordingly, this Court should reverse the erroneous decision of the BIA, and grant Petitioner's request for withholding of removal.

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8 We address the propriety of the IJ's finding as to the likely detention of Petitioner *infra* § III.

A. Mass Violations Of Human Rights In The DRC – Specifically Systematic And Brutal Rape Of Women – Constitute Torture.

On appeal from the IJ's decision, the INS argued, and the BIA erroneously accepted, that the mass violations of human rights in the DRC, including systematic rape at the hands of soldiers, do not constitute torture. *See* BIA Decision at 2 (App. 2); INS Brief at 5-6 (App. 128-129). The BIA's conclusion, however, flies in the face of the Convention, well-accepted international principles, and the BIA's own precedent.

Torture within the scope of the Convention is defined as:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based upon discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

8 C.F.R. § 208.18(a)(1); *see also Sevoian*, 290 F.3d at 175. Further, torture is "*an extreme form of cruel and inhuman treatment* . . ." 8 C.F.R. § 208.18(a)(2) (emphasis added). As noted above, decisionmakers evaluating claims under the Convention must consider evidence of past torture as well as all other relevant evidence, including conditions in the proposed country of removal.

Rape is an egregious violation of humanity and a manifestation of aggression and severe torture. *See* Margaret A. Lyons, *Hearing The Cry Without Answering The Call: Rape, Genocide, And The Rwandan Tribunal*, 28 Syracuse J. Int'l L. & Com. 99, 99-100 (2001). Although the definition of torture does not specifically include rape, this definition is subject to the understanding of Congress, in ratifying the Convention, that "torture" includes "the use of *rape and other forms of sexual violence*." *See* Torture Victims Relief Act of 1998, Pub. L. No. 105-320 § 3, 112 Stat. 3016 (1998).

The BIA itself has held that rape and sexual assault constitute torture within the terms of the Convention. *See, e.g., Matter of Kuna*, A76491421 (BIA July 12, 2001) (unpublished decision). The BIA has also held that rape constitutes persecution, which would support a claim for asylum. *Matter of DV*, Interim Dec. 3252 (BIA 1993) (holding rape of Haitian woman constituted persecution and grounds for granting asylum). Courts have also held that rape and sexual violence against women may constitute persecution and warrant the granting of asylum. *See e.g., Shoaferna v. INS*, 288 F.3d 1070 (9th Cir. 2000); *Angoucheva v. INS*, 196 F.3d 781 (7th Cir 1997); *Lopez-Galarza v. INS*, 99 F.3d 954 (9th Cir. 1996); *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987).

Further, in recent years, international law has acknowledged that rape is a violation of personal dignity and does, in fact, constitute torture. *See, e.g.*, Pieter Kooijmans, *Torture and Other Cruel, Inhuman or Degrading Punishment: Report by the Special Reporteur*, UN Commission on Human Rights (1986) (discussing Inter-American Commission on Human Rights report confirming that rape of Haitian women constituted torture within the meaning of the Convention); *Raquel Mejia v. Peru*, Inter-American Commission on Human Rights, No. 5/96, Case No. 10, 970, 1 March 1996 (ruling the Peruvian military's multiple rapes of the wife of a political dissident constituted torture); *Prosecutor v. Delalic*, IT-96-21-T (1998)(concluding rape and sexual assault were clearly prohibited under international humanitarian law and noting rape causes severe mental suffering, condemnation, and isolation from society); *Aydin v. Turkey*, Judgment of 25 Sept. 1997 ECHR (holding cruel act of rape constituted torture)[9]; *see also* Lyons, *supra*, 28 Syracuse J. Int'l L. & Com. at 112-116.

In addition to systematic rape and sexual violence against women, the innumerable other abuses of human rights in the DRC also constitute torture. The record below is replete with accounts of extreme physical violence,

[9] For the Court's convenience, copies of the foregoing materials are provided in the Appendix of Unreported Authority.

arrests, detention, beatings, dismemberment, and even murder. Undoubtedly, such abuses, "by which severe pain or suffering, whether physical or mental, is intentionally inflicted," fall within the ambit of torture as defined under the Convention. *See* 8 C.F.R. § 208.19(a)(1); *see also Al-Saher*, 268 F.3d 1143 (considering beatings during detention as torture under the Convention).

There can be no doubt that based on the definition of torture in Federal regulations, the BIA's own precedent, and recent developments in international law, the deplorable conditions in the DRC – the well-documented mass violations of human rights, brutal beatings, murder, and systematic rape of women at the hands of soldiers – constitute torture under the Convention, warranting a reversal of the BIA's decision.

B. Petitioner Will Be Tortured By Public Officials, Either Within The Government Of The DRC Or By Rebel Groups Operating As Quasi Governments.

The regulations implementing the Convention, which mirror the wording of Article 3 of the Convention, require that torture be "inflicted by or at the instigation of or with the consent or *acquiescence* of a public official or other person acting in an official capacity." *See* 8 C.F.R. § 208.18 (a)(1). The regulations further clarify that "acquiescence of a public official requires that the public official, prior to the activity constituting torture, have

awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. § 208.18 (a)(7).

"Willful acceptance" by a government of "[v]iolence committed by individuals over whom the government has no reasonable control" is required in order to implicate the Convention. *In re Y-L-, In re A-G-, In re R-S-R-*, 23 I&N Dec. 270 (A.G. 2002). However, this standard does not apply to Petitioner because the DRC is in fact divided into several regions, some of which are controlled by the central government and rebel groups, respectively, operating as de facto governments.

The question of whether the Convention is implicated where rebel groups control various regions of a country and operate as quasi governments was reviewed by the Torture Committee.[10] In *Elmi v. Australia*, Comm No. 120/1998, CAT/C/22/D/120/1998, Australia sought to return a Somali national during a period when it was widely acknowledged that Somalia was without a central government and that various parts of the country were controlled by different warring factions. The Committee found

[10] This Committee is set up under Article 17 of the Convention to review claims brought by individuals under Article 22. The Committee determines whether an individual's forced removal would constitute a violation of a State's obligation not to refoul a person to a country where it is more likely than not that they will be tortured.

that the factions – which had, among other things, prescribed their own laws, created taxation systems and set up quasi-governmental institutions – "exercised certain prerogatives that are comparable to those normally exercised by legitimate governments." *See id.* at ¶¶ 5.6-6.5. As a result, the Committee determined that the factions functioned as "public officials or persons acting in an official capacity" as required under Article 1 of the Convention and therefore the forced removal of a person to Somalia would constitute a violation of the Treaty.

The situation in the DRC is analogous to that considered by the Torture Committee in *Elmi*. The U.S. Department of State Report states unequivocally that government forces controlled less than half of the country and that rebel groups control the remaining areas. *See* U.S. Department of State Report, *supra*, at 1 (App. 16). While a central government remains in place in the DRC, in reality, its area of control is limited, leaving an opening for factions in non-government controlled areas to adopt governmental functions within their own regions. Rebel groups have in fact done this, as demonstrated by the U.S. Department of State Report which states:

> Rebel-held areas increasingly were integrated financially and administratively with the economies of Rwanda and Uganda. The Governments of Rwanda and Uganda[11] established

[11] Rebel forces supported by the Rwandan government control the eastern part of the country, while Ugandan rebel groups similarly supported by their own government control the north.

> commercial agreements, maintained cadres in key income-collecting agencies, levied and collected taxes and customs duties, and systematically extracted hard currency from the regions they controlled.

Id. at 2 (App. 17). These traditional governmental functions demonstrate the level of control exerted by these forces within their respective regions,[12] while simultaneously highlighting the lack of control of the central government.

Whether Petitioner is detained by the government of the DRC or by rebel groups in control of her home region, it is more likely than not that she will be exposed to torturous activities "intentionally inflicted . . . by or at the instigation of or with the consent or the acquiescence of a public official or other person acting in an official capacity." Therefore, Petitioner is entitled to protection under the Convention.

III. THE BIA ABUSED ITS DISCRETION WHEN IT FAILED TO DEFER TO THE IMMIGRATION JUDGE'S FACTUAL FINDING, BY ADMINISTRATIVE NOTICE, THAT PETITIONER WOULD LIKELY BE DETAINED UPON REMOVAL TO THE DRC.

In concluding that Petitioner had satisfied her burden under the Convention, the IJ's decision rested on his finding that Petitioner would be

[12] The unusual nature of the conflict in the DRC, comprising forces or assistance from at least six other sovereign states, simplifies the creation of quasi governments within the various regions outside of the control of the Congolese government.

detained upon arrival in the DRC. The IJ's written decision reveals that he reasonably based his finding on his ample experience with immigration practices and procedures. Specifically, the IJ's statement that "[v]irtually every government detains its citizens for some period of time after that citizen is deported or forcibly removed from another country" demonstrates that he took *administrative notice* of that fact. IJ Decision at 8 (App. 11). The BIA's summary rejection of this administratively noticed fact – on the ground that there was no evidence in the record to support it – represents an abrupt departure from the BIA's own recognition of the propriety of administrative notice.

A. Official Notice Is The Proper Procedure For An Agency Decisionmaker To Apply Knowledge Not In The Record.

As this Court has explained, "[o]fficial notice, rather than judicial notice, is the proper method by which agency decisionmakers may apply knowledge not included in the record." *McLeod v. INS*, 802 F.2d 89, 93 n.4 (3d Cir. 1986). Although "[b]oth doctrines allow adjudicators to take notice of commonly acknowledged facts," official notice provides administrative judges much broader authority "to take notice of technical or scientific facts that are within the agency's area of expertise." *Id.* (citing *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344 (1975)). Administrative judges are statutorily

authorized to notice facts as to which the parties have adduced no evidence – "[t]he Administrative Procedure Act allows a decisionmaker to take 'official notice' of material *not appearing in the evidence in the record.*" *Id.* (citing 5 U.S.C. § 556(c)) (emphasis added); *see also de la Llana-Castellon v. INS*, 16 F.3d 1093, 1096 (10th Cir. 1994) (noting rule allowing administrative agency to find facts by administrative notice "emanates from the administrative agency's specialized experience in a subject matter area"); *Castillo-Villagra v. INS*, 972 F.2d 1017, 1026-27 (9th Cir. 1992) (discussing policies underlying administrative notice and noting that "tribunal learns from its cases").[13]

The BIA itself has recognized the propriety of administrative notice in immigration proceedings, *see Matter of H-Met Al.*, 20 I. & N. Dec. 683, 687 (BIA 1993); and INS regulations specifically endorse the practice. *See* 8 C.F.R. § 3.1(d)(3). Although much of the federal case law addressing administrative notice in immigration cases concerns the BIA's taking of

[13] *Cf.* Fed. R. Evid. 201(b) (providing that a judicially noticed fact "must be one not subject to reasonable dispute" that is either "generally known within the territorial jurisdiction of the trial court" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned").

administrative notice,[14] the BIA has acknowledged an IJ's authority to take administrative notice. *See Matter of Chen*, 20 I. & N. Dec. 16, 18 (BIA 1989) ("[T]he immigration judge or this Board may take administrative notice."); *Matter of Walsh and Pollard*, 20 I. & N. Dec. 60, 63 (BIA 1988) (noting "Chief Immigration Judge took administrative notice of the Immigration Inspector's Handbook, which is not in the record" and rejecting INS' argument that it was prejudiced by such administrative notice).

More recently, the BIA has specifically acknowledged the special role that Immigration Judges play in the administrative process. In *In re S-M-J-*, 21 I. & N. Dec. 722 (BIA 1997), the BIA interpreted the INA to explicitly authorize Immigration Judges to introduce evidence in removal proceedings. *Id.* at 727. Because "over time," after hearing numerous cases with similar facts and legal issues, "Immigration Judges will accumulate significant knowledge from their experience," the BIA has instructed Immigration

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[14] The majority of reported decisions on administrative notice consider the propriety of the BIA taking administrative notice of changed country conditions. *See de la Llana-Castellon*, 16 F.3d at 1098 (rejecting BIA's reversal of asylum based solely on administrative notice as to changed country conditions in Nicaragua); *Kapcia v. INS*, 944 F.2d 702, 705 (10th Cir. 1991) (approving BIA's taking administrative notice of Solidarity party's rise to power in Poland in rejecting asylum claim of Solidarity party members); *Kaczmarczyk v. INS*, 933 F.2d 588, 593-94 (7th Cir. 1991) (similar). The use of administrative notice is not, however, limited to situations involving changed country conditions; rather, the concept envisions administrative agencies taking notice of any "commonly acknowledged facts within the agency's area of expertise." *McLeod*, 802 F.2d at 93 n.4.

Judges to "consider background evidence" in deciding cases before the Immigration Court. *Id.* at 728.

Thus, under long-established administrative practices recognized by this Court and the BIA, the IJ properly determined, by administrative notice, that Petitioner would be detained upon return to the DRC.[15]

Because the likelihood of Petitioner's detention was a conclusively established fact,[16] the BIA's statement noting "a dearth of evidence to support any finding that the respondent is likely to be detained for any reason" is entirely unremarkable. *See* BIA at 2 (App. 15). As noted above, administratively noticed facts *need not be supported by evidence in the record. McLeod*, 802 F.2d at 93 n.4. The BIA's conclusion thus states the obvious – there is no evidence in the record concerning the likely detention of Petitioner upon return her to the DRC because the IJ found such a fact commonly acknowledged. Thus, there was *no need* to present evidence on that issue.[17] Accordingly, the BIA's citation of a lack of evidence on this point cannot possibly justify a denial of Petitioner's claim for relief under

[15] Notably, the INS regulations governing claims under the Convention broadly authorize consideration of "[o]ther relevant information" in adjudicating such claims. 8 C.F.R. § 208.16(c)(3)(iv).

[16] Judicially noticed facts are conclusive in civil proceedings. Fed. R. Evid. 201(g).

[17] The Immigration Judge in this case is well versed in immigration procedures. He has been an Immigration Judge since 1994 and prior to that worked as a BIA staff attorney for eight years.

the Convention.[18] Allowing the BIA's ruling on this issue to stand would effectively endorse the BIA's starkly inconsistent application of its stated policies permitting Immigration Judges to make factual determinations via administrative notice.

B. The IJ Properly Took Administrative Notice Of Likelihood Of Detention.

It should be noted that the IJ's determination by administrative notice that Petitioner will likely be detained upon removal to the DRC is well-supported by standard deportation practice. INS procedures place the government of the country of removal on notice that an individual will be removed to that country. The INS applies for travel documents through government officials of the intended country of removal; provides a flight itinerary to that government indicating when the person is expected to leave the U.S. and arrive in the country of removal; and prepares a form I-164, a series of documents pertaining to and identifying the intended deportee, which is then provided to the airline staff with the following instruction: "Please give this envelope to an immigration officer of this service, or of the

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[18] An analogy helps illustrate the point: The Immigration Judge's determination as to detention is the equivalent of a district court judicially noticing the fact that the United States Court of Appeals for the Third Circuit sits in Philadelphia, Pennsylvania. The BIA's ruling is the equivalent of the Third Circuit reversing the District Court on the ground that no evidence in the record supported a finding that the Third Circuit does in fact sit in Philadelphia. Clearly, such a reversal would constitute a misapplication of rules governing judicial notice.

government of the country to which destined, who will meet the plane upon arrival and *take custody* of the alien(s)." Thus, in stark contrast to the BIA's finding in this case, INS documents specifically acknowledge that a removed alien will enter government custody.

Based on his accumulated knowledge in the area of immigration and deportation, the IJ concluded that it was unlikely that Petitioner would be free to leave without being subjected to detention for some period of time. Indeed, the likelihood of detention subsequent to deportation is so well recognized that courts considering claims for relief under the Convention have assumed that likelihood without discussion. For example, in *Al-Saher*, 268 F.3d at 1144-45, the court considered claims of an Iraqi citizen for relief under the Convention. While living in Iraq, the Iraqi government arrested and detained Al-Saher on three separate occasions. *Id.* at 1144-45. Al-Saher testified that each time he was detained, officials beat him severely. *Id.* After he was arrested for the third time, Al-Saher escaped to the United States and sought asylum and relief under the Convention. *Id.* at 1144. The Ninth Circuit granted Al-Saher's claim for relief, explaining:

> When officials detained Al-Saher for the third time Al-Saher managed to escape from custody and avoid the possibility of further severe beatings and physical abuse. He then fled the country. If forced to return to Iraq, it is likely that Al-Saher would be tortured again. The Iraqi officials would correctly

> assume he has told of the beatings in making his claims in this proceeding.

Id. at 1147-48. The unstated assumption in the court's conclusion is that at some point after removal from the United States, Al-Saher would end up in the custody of the Iraqi government. Thus, the Ninth Circuit, just like the IJ in the instant case, logically assumed that governments receiving individuals removed from the United States immediately place those individuals into some form of detention.

C. The BIA's Finding Regarding Likelihood Of Detention Was Improper.

In light of the "commonly acknowledged fact" that deportees are detained upon return to their native countries, and in light of the IJ's explicit determination of that fact by administrative notice, the BIA should have accepted that Petitioner will likely be detained. If the BIA found the IJ's use of administrative notice improper – and the BIA's decision does not so state – it should have explained the basis for its conclusion. *See Tipu v. INS*, 20 F.3d 580, 585 (3d Cir. 1994) (quoting *Vergara-Molina v. INS,* 956 F.2d 682, 685 (7th Cir. 1992)) ("[T]he BIA 'abuses its discretion when it fails to state its reasons for denying relief.'"); *Vergara-Molina*, 956 F.2d at 685 (quoting *Becerra-Jimenez v. INS,* 829 F.2d 996, 1000 (10th Cir. 1987)) (noting BIA

must "announce its decision in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted").

Finally, if the BIA found that the IJ improperly took administrative notice, at the very least, it should have remanded back to the IJ. *See* 8 C.F.R. 3.1(d)(3)(iv) ("If further fact-finding is needed in a particular case, the Board may remand the proceeding to the immigration judge or, as appropriate, to the Service."). On remand, the IJ could have heard evidence regarding the DRC's specific procedures upon receiving individuals removed from the United States.

For these reasons, the BIA's conclusory determination that the IJ was incorrect to find that Petitioner would likely be detained upon return to the DRC constituted an abuse of discretion. In considering Petitioner's arguments, *supra*, that she has established a likelihood of torture, the Court should adopt the IJ's determination that Petitioner would be detained.

Alternatively, if this Court does not find the issue of detention one proper for administrative notice, the Court may – as the BIA failed to do – remand this case to the IJ for presentation of additional evidence on the issue.

IV. THE BIA ERRONEOUSLY RELIED ON THE IJ'S ADVERSE CREDIBILITY DETERMINATION WITH RESPECT TO PETITIONER'S ASYLUM CLAIM IN REJECTING HER CLAIM UNDER THE CONVENTION.

Because Petitioner's testimony with respect to her asylum application had been found incredible by the IJ, the BIA concluded that Petitioner could not support a finding that it is more likely than not that she will be tortured upon her return to the Congo. BIA at 2 (App. 15). As a result, the BIA reversed the IJ's decision to grant Petitioner relief under the Convention. The BIA reasoned that because Petitioner was insufficiently credible to establish an asylum claim, by definition, she was insufficiently credible to establish a claim for relief under the Convention. In employing such reasoning, the BIA directly contravened the holdings of two courts of appeals requiring that the BIA undertake independent analysis of asylum claims and claims for relief under the Convention.

Specifically, in *Mansour*, the Seventh Circuit considered the BIA's refusal to allow an Iraqi national an opportunity to reopen his case to apply for relief under the Convention. The BIA determined that because the IJ had made adverse credibility findings in the asylum context, Mansour was unable to demonstrate the likelihood of a successful claim under the Convention, and it denied the motion. In considering Mansour's petition for

review, the Seventh Circuit reversed the BIA. Explaining that it was "not comfortable with allowing a negative credibility determination in the asylum context to wash over the torture claim," the court emphasized the "critical" importance of considering Mansour's "torture claim...separate and apart from his earlier asylum claim." *Mansour*, 230 F.3d at 908.

Similarly, in *Kamalthas v. INS,* 251 F.3d 1279 (9th Cir. 2001), the Ninth Circuit considered almost identical issues with respect to a Sri Lankan national whose motion to reopen was also denied. The *Kamalthas* court held that the BIA "impermissibly conflated the standards for granting relief in asylum and Convention cases" when it found that an adverse credibility determination in the asylum context necessarily precluded a credible claim for relief under the Convention. *Kamalthas*, 251 F.3d at 1280.

Thus, both the Seventh and Ninth Circuits have concluded that the BIA commits legal error when it fails to consider that applications for asylum and protection under the Convention are two separate entities requiring individualized attention. Yet, this is exactly what the BIA did in this case.

If the BIA had conducted an independent analysis of Petitioner's claim under the Convention, it would have found ample evidence to support her claims for relief. Moreover, upon close examination of the IJ's decision,

the BIA would have found that Petitioner's credibility was much less relevant to the IJ's determination of likelihood of torture than was the objective evidence of human rights conditions in the DRC.

In his review, the IJ considered "the State Department Country Reports, as well as other documentary evidence" as he was required to do under Federal regulations. IJ at 8 (App. 11). These documents provided substantial evidence of the torture to which the Petitioner will be subjected in the event of her forced return to the DRC. *See* U.S. Department of State Report, *supra*, at 10 (App. 25). The IJ reasonably concluded that the government of the DRC engages in "systematic abuse of large segments" of its population, and is unwilling or unable to control either its own security forces or rebel forces. IJ at 8 (App. 11).

Given the preponderance of the documentary evidence supporting his finding, the IJ acted reasonably when he found – regardless of Petitioner's purported lack of credibility – that there was a high probability that Petitioner would be tortured upon her return to the DRC. In reversing the IJ's decision to grant Withholding of Removal under the Convention, the BIA offered no explanation as to why Petitioner's alleged lack of credibility

justifies denying relief under the Convention.[19] By inserting the IJ's credibility determination into its analysis for relief under the Convention, the BIA committed legal error.[20] This Court must, therefore, correct that error and grant Petitioner's requested relief.

Alternatively, Petitioner requests that the Court remand to the BIA with instructions to conduct further proceedings consistent with the arguments set forth in this brief.

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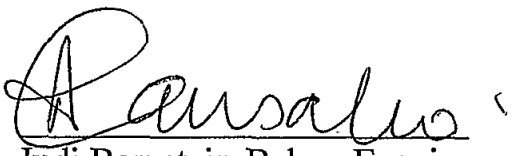
[19] Even if the BIA could have set forth a logical explanation as to why an adverse credibility ruling on the asylum claim was dispositive of the Convention claim, its failure to do so constituted an abuse of discretion. *See Sevoian*, 290 F.3d at 178 (explaining that BIA must "show that it has reviewed the record and grasped the movant's claims"); *Vergara-Molina v. INS,* 956 F.2d 682, 685 (quoting *Becerra-Jimenez v. INS,* 829 F.2d 996, 1000 (10th Cir. 1987)) (noting that BIA must "announce its decision in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted").

[20] The BIA's own rules require it to give deference to an IJ's findings. *See In re A-S-*, 21 I. & N. 1106, Interim Decision (BIA) 3336 (1998). Notably, these rules have now been codified in Regulations in effect as of September 25, 2002. The BIA is now required to apply a "clearly erroneous" standard of review to the IJ's findings on issues of fact and credibility. *See* 8 C.F.R. § 3.1(b)(3)(i).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court reverse the erroneous decision of the BIA, and grant Petitioner's request for Withholding of Removal under Article 3 of the Convention of Against Torture. Alternatively, Petitioner requests that the Court remand to the BIA with instructions to conduct further proceedings consistent with the arguments set forth in this brief.

Respectfully submitted,



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CERTIFICATION OF BAR MEMBERSHIP

I, Judith Bernstein-Baker, hereby certify pursuant to L.A.R. 46.1(e) that I am admitted to practice before the United States Court of Appeals for the Third Circuit.

Judi Bernstein-Baker
Judith Bernstein-Baker

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I, Ayodele Gansallo, Esquire hereby certify the following:

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Dated: January 13, 2003

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General Docket

APP1

US Court of Appeals for the Third Circuit

Court of Appeals Docket #: 02-2868 Filed: 7/8/02
Nsuit: 0
Zubeda v. Atty Gen USA
Appeal from: Immigration & Naturalization Service

- -
Lower court information:

District: 0090-1 : A78 824 095
Date Filed: **/**/**
Date order/judgment: 6/7/02
Date NOA filed: **/**/**

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Fee status: paid

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Prior cases:
None
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Docket as of January 10, 2003 4:09 pm Page 1

02-2868 Zubeda v. Atty Gen USA

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Petitioner

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v.

ATTY GEN USA
Respondent

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APP2

02-2868 Zubeda v. Atty Gen USA

TAKKY ZUBEDA

Petitioner

v.

ATTY GEN USA

Respondent

02-2868 Zubeda v. Atty Gen USA

7/8/02	Agency Case Docketed. Petition (rev) filed by Takky Zubeda. Service made on 7/8/02. USCA Receipt No. 43994 and Receipt Date 07/08/02. (cmh)
7/16/02	APPEARANCE from Attorney Terri J. Scadron on behalf of Respondent Atty Gen USA, filed. (cmh)
7/16/02	APPEARANCE from Attorney John M. McAdams on behalf of Respondent Atty Gen USA, filed. (cmh)
7/17/02	APPEARANCE from Attorney Judith Bernstein-Baker on behalf of Petitioner Takky Zubeda, filed. (cmh)
7/17/02	DISCLOSURE STATEMENT on behalf of Petitioner Takky Zubeda,

filed. (cmh) **APP3**

7/17/02 DOCKETING STATEMENT on behalf of Takky Zubeda, received. (cmh)

7/18/02 MOTION by Petitioner to stay deportation/removal pending resolution of the petition for review, filed. Answer due 7/31/02. Certificate of Service dated 7/17/02. (slc)

9/13/02 ADMINISTRATIVE RECORD received. (cmh)

11/19/02 ORDER (Scirica, Authoring Judge and Barry, Circuit Judges) granting motion for a stay of removal pending disposition of the petition for review. The Clerk is directed to enter a briefing schedule and to calendar this case for presentation to a merits panel. Request for extension of time by the parties will not be considered absent extraordinary circumstances, filed. BPS-21 (cmh)

11/19/02 ADMINISTRATIVE RECORD filed. (cmh)

11/19/02 BRIEFING NOTICE ISSUED. Petitioner brief due 12/30/02. (cmh)

12/18/02 Petitioner Takky Zubeda verbally granted an extension of time until 1/13/03 to file brief pursuant to LAR 31.4. (nmb)

12/20/02 Letter from Respondent Atty Gen USA confirming extension of time pursuant to LAR 31.4 with service on opposing counsel. Service Date 12/19/02. (nmb)

1/9/03 APPEARANCE from Attorney Jonathan Feinberg on behalf of Petitioner Takky Zubeda, filed. (cmh)

PACER Service Center			
Transaction Receipt			
01/10/2003 18:27:04			
PACER Login:	hm0023	Client Code:	9997-265
Description:	dkt report	Case Number:	02-2868
Billable Pages:	4	Cost:	0.28

File: A78 824 095 - York

Date: JUN 07 2002

In re: TAKKY ZUBEDA a.k.a. Lara Jean Akiniy Konditi a.k.a. Rose Zubeda Mwishehe

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se[1]

ON BEHALF OF SERVICE: Jeffrey T. Bubier
Assistant District Counsel

CHARGE:

Notice: Sec. 212(a)(6)(C)(i), I&N Act [8 U.S.C. § 1182(a)(6)(C)(i)] - Fraud or willful misrepresentation of a material fact

Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] - Immigrant - no valid immigrant visa or entry document

APPLICATION: Asylum; withholding of removal; Convention Against Torture

We have jurisdiction over this timely appeal pursuant to 8 C.F.R. § 3.1(b). Removability is not an issue. The Immigration and Naturalization Service argued on appeal that the Immigration Judge incorrectly found that the respondent was entitled to withholding of removal under Article 3 of the United Nations Convention Against Torture. The appeal is sustained.

In a decision dated October 22, 2001, an Immigration Judge denied the respondent asylum and withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 208 and 1231(b)(3), but granted her application for withholding of removal under the Convention. On appeal, the Service argued that the Immigration Judge incorrectly concluded that it was more likely than not that the respondent would be detained and thereafter face torturous prison conditions in the Congo. The respondent argued on appeal that the Immigration Judge correctly granted withholding of removal under the Convention, having determined that the government of the Congo systematically engages in torture.

[1] We note that this appeal was filed on behalf of the respondent by a person identified as Ayodele Gansallo. However, absent a Form G-28, Notice of Entry of Appearance by Attorney or Representative, Ayodele Gansallo cannot be recognized as the respondent's representative herein. Nevertheless, as a courtesy, we will furnish Ayodele Gansallo with a copy of our decision today.

We agree with the Service that the respondent is not entitled to withholding of removal under the Convention. In *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002), the Board concluded that the indefinite detention of criminal deportees by Haitian authorities does not constitute torture within the meaning of 8 C.F.R. § 208.18(a) where there is no evidence that the authorities intentionally and deliberately detain deportees in order to inflict torture. We further held that substandard prison conditions in Haiti do not constitute torture within the meaning of 8 C.F.R. § 208.18(a) where there is no evidence that the authorities intentionally create and maintain such conditions in order to inflict torture. *Id.* In addition, we found therein that evidence of the occurrence in Haitian prisons of isolated instances of mistreatment that may rise to the level of torture as defined in the Convention Against Torture is insufficient to establish that it is more likely than not that the respondent will be tortured if returned to Haiti. Based upon the facts of the instant case, we find dispositive our decision in *Matter of J-E-, supra.*

The background evidence establishes that prison conditions in the Congo remain harsh and life threatening. The Immigration Judge found that the respondent would be detained upon return to the Congo (I.J. at 8). However, we note a dearth of evidence to support any finding that the respondent is likely to be detained for any reason. We find that the respondent has failed to establish that the harsh prison conditions establish a probability that she will be detained in a prison in the Congo, much less that she will be individually targeted for any harm by the government of the Congo. The evidence of record does not remotely establish a likelihood that the respondent will be tortured by the government of the Congo. While she claims to have been previously tortured in the Congo, the Immigration Judge specifically found her to be incredible and the respondent has not contested this finding (I.J. at 3-5). As such, the respondent has failed to meet her burden of proof. Accordingly, the Service's appeal will be sustained.

ORDER: The Service's appeal is sustained.

FURTHER ORDER: The Immigration Judge's decision granting the respondent withholding of removal under the Convention Against Torture is vacated and the respondent is ordered removed to the Congo.

Frederick D. Hess
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATE IMMIGRATION COURT
YORK, PENNSYLVANIA

IN THE MATTER OF:	) **IN ASYLUM ONLY PROCEEDINGS**
	)
ZUBEDA, Takky	) **File # A 78 824 095**
	)
	)
Respondent	)
	)

APPLICATIONS: Asylum; Withholding of Removal; Torture Convention

ON BEHALF OF RESPONDENT:
Ayodelle Gansallo, Esq.
HIAS and Council Migration
Service of Philadelphia,
2100 Arch Street, 3rd Floor,
Philadelphia, PA 19103

ON BEHALF OF THE SERVICE
Jeffrey Bubier
Assistant District Counsel

WRITTEN DECISION AND ORDER

The respondent is a 26-year-old married female alien, native and citizen of the Congo, who arrived at Newark International Airport on or about December 16, 2000. Upon expressing a fear of returning to her native country, she was referred to an Asylum Officer of the INS, who issued his decision on February 1, 2001, finding that the respondent had testified credibly and had established a credible fear of persecution in being returned to the Congo.[1] Thereafter a Notice to Appear, Form I-862, was served upon the respondent the following day and she appeared in court with counsel of record. The respondent has conceded that she is subject to removal pursuant to section 212(a)(7)(A)(i)(I) for lack of valid travel documents, but has denied that she committed fraud or wilful misrepresentation of a material fact at the time of her request for admission to the United

[1] I am concerned with the length of time between the respondent's arrival and the time she was interviewed by the Asylum Officer, a period of 6 weeks. This is entirely too long a time for detaining an alien seeking asylum before that alien has the chance to be interviewed by an asylum officer, and is in apparent violation of the Service's standards in this regard.

States. As no effort has been made to establish that she is subject to removal pursuant to section 212(a)(6)(C)(i) of the INA, that ground of removal is dismissed.

On September 18, 2001, the respondent appeared in court with counsel of record to testify in support of her asylum application. I have fully considered all of the evidence presented in this case, both testimonial and documentary, whether specifically referenced in this decision or not. After full consideration of the respondent's claim, I must find sufficiently questionable testimony to warrant denying her claims on the grounds of lack of credibility. However, I further find sufficient background evidence which warrants withholding the respondent's removal to the Congo in accordance with Article 3 of the U.N. Torture Convention.

The respondent testified that she was born in Kivu, Congo, on November 14, 1974, and attended only 4 years of school. She married a Congolese man in Tanzania on February 6, 1999, who was residing in Tanzania for his own safety. She then returned to the Congo and resided in the town of Fizi with her husband's parents for a period of 22 months. The respondent testified that in November 2000 she returned to Kivu to assist her mother who had been raped by Congolese soldiers. When she arrived at her parent's house, her father and mother were there, as well as her two brothers, her sister, and an uncle.

On November 15, 2000, soldiers arrived at the house to confront her father, who had intended to file a report of the rape crime with local human rights observers. According to the respondent, the soldiers grabbed her and forced her to lie down. At the same time the soldiers confronted her father, demanding to know why he was going to file a report of the rape incident. At this time the respondent's father, brothers, and uncle, who had been tied up, were forced to witness the gang rape of the respondent, after which they were struck violently in their necks with a machete, severing their heads.

The respondent continued with her testimony that she was then placed into a truck and driven away, and that her mother and sister perished in their house which was set ablaze by the soldiers upon their departure. The respondent was taken to a military camp in the jungle where she was held for one week before escaping. In this regard, the respondent related that there were only female captives in the camp guarded by armed soldiers, who sexually abused the women and made them cook and clean for the soldiers. After one week, the respondent and three other women formed an escape plan where they asked to use the toilet, which was located outside the camp's perimeter, during the time when the guards were having their evening meal. The respondent explained that while ordinarily the captives were usually accompanied to the toilet by an armed soldier, the soldiers would permit them to use the toilet unguarded during meal times.

Once outside the camp perimeter, the women ran off into the jungle guided by one of them who lived in the area and who knew the country well. They made their way to a boat and rowed to freedom by reaching Tanzania, where they then made their way to a Christian church. The respondent remained at the church for one week before one of the church ladies provided the respondent a passport and $100. and took her to the train station to travel to Dar Es Salaam, where

she then helped the respondent board a plane to New York. Upon arriving at the port of entry, the respondent admits that she told the immigration inspectors that she came to the United States to visit her brother and to attend a bible school, fearful of telling the truth since the inspectors threatened to return her to the Congo. The respondent contends that she has suffered past persecution at the hands of Congolese soldiers who raped her on account of her political opinion, imputing to her her father's political opinion due to his intention of reporting his wife's rape to a human rights organization.

To establish a well-founded fear of persecution, an asylum applicant must demonstrate that the persecution is "on account of" one of the statutorily-protected grounds set forth at section 101(a)(42)(A) of the Act; i.e., race, religion, nationality, membership in a particular social group, or political opinion. Although an applicant need not show conclusively why persecution occurred or may occur, Matter of S-P-, 21 I&N Dec. 486 (BIA 1996), she must present some evidence of motive on the part of the persecutor, either direct or circumstantial, to demonstrate her eligibility for the relief she is seeking. INS v. Elias-Zacarias, 502 U.S. 478 (1992). In this regard, the asylum applicant must produce sufficiently detailed evidence and testimony from which it is reasonable to believe that the harm she fears, or the harm already suffered, is encompassed within one of the statutorily-protected grounds as set forth above. If a reasonable person in the same or similar circumstances would fear persecution, the asylum applicant may have presented sufficient evidence to be granted such relief as a matter of discretion. Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987).

To establish eligibility for withholding of removal in accordance with section 241(b)(3) of the Act, the applicant must establish a "clear probability" of persecution on one or more of the above-delineated grounds. An alien who meets this standard must be granted withholding of removal, which is mandatory unless the alien is statutorily precluded from such relief. It has been held that the burden of proof is higher to establish eligibility for withholding of removal than for asylum, and that if the alien cannot establish asylum eligibility, she therefore cannot meet eligibility for withholding of removal. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987); Matter of Mogharrabi, supra.

Underlying such applications is the requirement that the applicant's testimony be credible, persuasive, and specific, rather than general or vague. Balasubramanrim v. INS, 143 F3d 157 (3rd Cir. 1998); Matter of Y-B-, 21 I&N Dec. 1136 (BIA 1998). Thus, particularly in the asylum context where the alien's testimony will form the foundation of her fear of persecution, a determination of credibility must be made.

After closely listening to this respondent and observing her under oath during her testimony, I have concluded that the respondent has failed to present to me that quantum of credible testimony necessary to establish the basis of her claim. As Service counsel pointed out in his closing remarks at the conclusion of the respondent's hearing, certain of the respondent's testimony was inconsistent with her written asylum application. I must agree.

The first thing which didn't make much sense was the respondent's testimony about her

marriage to her husband, living in Tanzania at the time. According to the respondent, the marriage ceremony and time was arranged through her brother-in-law since her husband had a difficult time communicating with his parents living in Fizi, Congo. Exactly why he had such a difficult time communicating with his parents was not disclosed, but it must be pointed out that the respondent testified that she had no trouble communicating with her husband while he resided in Tanzania, they being engaged for many years, and that Fizi was close to Kivu where she resided with her parents before the marriage.

Second, the respondent testified that she had never before seen any of the 10 soldiers who came to their house on November 15, 2000, although she was familiar with the uniform they wore since it was readily seen throughout the region, and that it was well known that the soldiers were responsible for kidnaping and raping women. As point of fact, the respondent testified three times that she had not known any of the soldiers who committed the murder of her family and who raped her, although she could identify them now. However, in paragraph 16 of her written affidavit, the respondent states that she knew one of the soldiers: "I am afraid to go the Congo because I knew one of the soldiers who killed my father, brothers, and uncle and he would assume I would report his crime. This soldier was from my village and I recognized his face."

Third, the respondent testified that her mother and sister burned to death in their house when she was carried off by the soldiers. Paragraph 8 of her written affidavit states that she does not know if her mother and sister survived. Fourth, the respondent initially testified that after being repeatedly raped, she was placed aboard a truck with four other girls who were her neighbors and taken directly to a camp in the jungle. However, on cross-examination, she related that the soldiers immediately placed her into a car with one female neighbor, drove to a house in the forest, and then placed them aboard a truck which drove them to the camp. This latter scenario comports with paragraphs 8 and 9 of her written affidavit, but the respondent failed to satisfactorily explain the discrepancies in her testimony.

Fifth, the respondent testified that when she got to the camp in the jungle she observed Red Cross "people" who had been raped, and later testified that there were two female Red Cross workers, who told her that they were helping the women who had been raped. At paragraph 10 of her written statement the respondent refers to "a Red Cross worker" who had been captured. Sixth, the respondent testified that she made good her escape with 3 other female captives; paragraph 12 of her written statement refers to 2 other women.

Finally, I find it rather curious that the respondent could so easily make her escape from an armed camp simply by asking to go the toilet when the soldiers were eating and would be reluctant to guard them. Further, the respondent could not even surmise how long it took to row the boat to Tanzania, or whether it was a lake or river that they crossed.[2]

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[2] If the rowboat escape in fact occurred, the body of water may have been Lake Tanganyika, which is located on the very northeast border with Tanzania. Or perhaps it was one of the rivers which both countries share, although reference to a map shows the rivers running

Taken together, there are too many inconsistencies for me to ignore, and which go to the heart of her claim and are thus not merely collateral thereto. Furthermore, I do not find as persuasive the respondent's claim of fear as the basis for not informing the immigration inspectors at Newark International of her flight from the Congo. In this regard, the respondent related that she was fearful of being returned to the Congo and thus told the inspectors that she came to the United States to visit her brother and to attend bible school. How this would minimize the risk of immediate removal I cannot fathom. If anything, telling the inspectors of the horrendous murder of her family and her harrowing rape would dramatically increase the likelihood of her being permitted to remain pending further investigation.

I am not unmindful of the Third Circuit's admonitions in Balasubramanrim v. INS, *supra*, not to place too great an emphasis on "airport statements" of aliens seeking asylum in the United States.[3] I, too, have long held such statements to be suspect because of the coercive environment under which arriving aliens are held. However, that is not to say that "airport statements" cannot always be trusted. Here, as noted, we have numerous inconsistencies and other questionable in-court testimony. Taken together with the airport statement, we have an alien who has presented a claim which, when closely scrutinized, cannot be said to pass the credibility test in important aspects. I cannot just ignore these weaknesses, but must make the attempt to place them in their proper context. Doing so in this case, unfortunately, detracts from the respondent's veracity in relation to her claim.

Further, I am not unaware of the atrocious human rights violations in the Congo, including the raping of women by security forces, and the indiscriminate murders of civilians by these forces. All in all, the government of the Congo is a miserable excuse of a sovereign government. However, the Congo does not hold a monopoly on abusive treatment of its citizens, and I cannot grant relief to an alien on the mere fact of hailing from such a country. Again, this respondent's testimony is suspect for the reasons I have noted, and she has the burden of proof to present detailed and consistent testimony, which she has failed to do. Consequently, I have no alternative but to deny her application for asylum and withholding of removal pursuant to sections 208(a) and 241(b)(3), respectively.

The respondent's claim has also been automatically considered pursuant to Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, where the United States has agreed not to "expel, return or extradite" a person to another state where he or she would be tortured:

> 1. No State party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

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perpendicular between the two countries rather than parallel.

[3] *See also* Sanathirajah v. INS, 157 F.3d 210 (3rd Cir. 1998).

2. For the purposes of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant, or mass violations of human rights.

While there are similarities between Article 3 of the Torture Convention and Article 33 of the 1951 Convention Relating to the Status of Refugees, which the United States has implemented through application of withholding of removal pursuant to section 241(b)(3) of the Immigration and Nationality Act, there are also important differences between the two. *See generally* Matter of S-V-, Interim Decision 3430 (BIA 2000.

First, there are no exceptions carved out under the Torture Convention to exclude persons who may or must be exempted under Article 33, such as persecutors, those convicted of particularly serious non-political crimes, or terrorists. Second, section 241(b)(3) applies only to those aliens who would face persecution on account of the five grounds set forth at section 101(a)(42)(A) of the INA. Article 3 of the Torture Convention covers all persons who fear torture based on any consideration or basis. Third, torture is not synonymous with "persecution," although there may be an over-lapping of violence which may encompass both actions. Thus, a claim under Article 3 of the Torture Convention is broader in certain aspects, narrower in others, in relation to Article 33 of the 1951 U.N. Convention.

Aliens under removal proceedings under section 240, or under deportation or exclusion proceedings, may make a claim under Article 3, along with any other application, before an immigration court. The Attorney General of the United States has promulgated interim regulations which the courts must apply when adjudicating claims under the Torture Convention. These regulations are presently set forth at 8 C.F.R. §208.16 *et seq.*, entitled Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture. For all practical purposes, an alien making an application for asylum, also considered a tandem application for withholding of removal, should automatically be considered as making an application for relief under the Torture Convention. The regulations provide for the adjudication of such claims, and the framework for such adjudication. The burden of proof is on the alien to establish that "it is more likely than not that he or she would be tortured if removed to the proposed country of removal. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration." 8 C.F.R. § 208.16(c)(2).

In assessing whether it is "more likely than not" that an applicant 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 applicant:
(ii) Evidence that the applicant could relocate to a 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, where applicable; and:
(iv) Other relevant information regarding conditions in the country of removal.

8 C.F.R. § 208.16(c)(3).

If an alien expresses a fear of persecution in returning to his or her country of nativity, but if asylum must be pretermitted due to an aggravated felony conviction, or the other bars set forth under section 208(b)(2) of the Act, the judge must first hear testimony on the merits of the claim of persecution and/or torture before determining whether the aggravated felony conviction is a "particularly serious crime." 8 C.F.R. 208.16 (c)(4). If the judge determines that the alien has satisfied his or her burden of proof of establishing more likely than not that torture will occur in the country of removal, the judge must grant the alien withholding of removal under section 241(b)(3) of the Act under the auspices of Article 3 of the Torture Convention, unless the alien is barred from such relief in accordance with section 241(b)(3)(B) of the Act, in which case the judge must pretermit withholding of removal. At that point the regulations require the judge to defer the alien's removal in accordance with 8 C.F.R. § 208.17(a).

Further, the regulations provide a definition of "torture" at 8 C.F.R. § 208.18(a), which essentially tracks the definition of the term as set forth under Article 1 of the Torture Convention. It must be stressed that the definition of "torture" is not all encompassing, and it is not to be construed as a definitive list or types of acts which would constitute torture. Rather, the regulations set forth the general parameters under which the judge adjudicates the claim, expressing certain basic elements which must be present before a finding can be made that an act will constitute torture.

"Torture" is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. 8 C.F.R. § 208.18(a)(1).

Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman, or degrading treatment or punishment that do not amount to torture. 8 C.F.R. § 208.18(a)(2). Torture does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions. 8 C.F.R. 208.18(a)(3). Lawful sanctions include judicially imposed sanctions and other law enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture.

Furthermore, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering: an act that results in unanticipated or unintended severity of pain or suffering is not torture. 8 C.F.R. § 208.18(a)(5). Finally, in order to constitute torture, an act must be directed against a person in the offender's custody or physical control. 8 C.F.R. §

208.18(a)(6). Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity. 8 C.F.R. § 208.18(a)(7). Noncompliance with applicable legal procedural standards does not per se constitute torture. 8 C.F.R. § 208.18(a)(8).

Notwithstanding my concerns about the respondent's testimony, there has not been raised as an issue in this case the respondent's Congolese nationality and citizenship. Consequently, the United States must seek the permission of the government of Congo in returning this respondent to her homeland. And it is this very point which greatly troubles me. As noted above, the State Department Country Reports, as well as other documentary evidence, shows a government which takes upon itself the systematic abuse of large segments of its population. The security forces are out of control, if indeed the government has any real interest in exerting control over its forces. Not only is there arbitrary and random violence against opponents of the regime, but against the hapless population as well, including against those persons detained and imprisoned, including the systematic use of torture.

Can I state with any degree of confidence that this respondent would be permitted to arrive in the Congo and immediately go about her business unmolested? No I can't, and neither can I state with any degree of certainty that the respondent would be physically harmed upon her return. But if I am permitted to consider the present country conditions, which I am so permitted to consider, then I have little confidence that this respondent, whatever her background, would be treated with more deference than her fellow citizens, none of whom apparently is immune to government atrocities. It is clear from the evidence in this record that the Congolese government, through its security forces, are irresponsible as a whole and have no regard for the well being nor the human rights of its citizens.

Forcibly returning there any citizen of that troubled land, whatever his or her circumstances, should give any judge great pause. At the least I am convinced that the respondent would be detained upon her arrival. Virtually every government detains its citizens for some period of time after that citizen is deported or forcibly removed from another country. But given the atrocious history and present country conditions of the Congo, I believe that the respondent has shown the likelihood of being physically abused, perhaps raped, which is almost *modus operandi,* while detained. At the least it is highly doubtful that the respondent would be treated any more leniently than her fellow citizens under similar detention status. Stated differently, this respondent does not have to definitively show that she would in fact be tortured upon her return, only that there is the likelihood of that occurring. Consequently, I will grant her withholding of removal under the auspices of Article 3 of the Torture Convention.

The following orders are hereby entered in this case:

ORDER: The respondent's application for asylum and withholding of removal is hereby denied.

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FURTHER ORDER: The respondent is hereby ordered removed from the United States.

FURTHER ORDER: The respondent's order of removal is hereby withheld as to the Congo pursuant to Article 3 of the U.N. Torture Convention.

Walt Durling
Immigration Judge

October 22, 2001

CERTIFICATE OF SERVICE

I, Ayodele Gansallo, Esquire hereby certify under penalty of perjury, that on January 13, 2003, I caused to be served true and correct copies of the Petitioner Takky Zubeda's Brief in Support of Petition for Judicial Review, along with accompanying appendices, via Certified Mail, return receipt requested, upon the following:

Attorneys for Respondent

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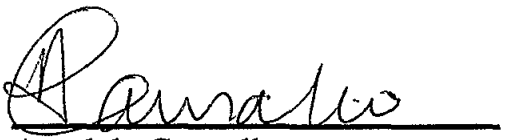

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