No. 02-2868

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

TAKKY ZUBEDA,
INS No. A78-824-095,
Petitioner,

v.

JOHN ASHCROFT, United States Attorney General,
Respondent.

ON PETITION FOR REVIEW OF A DECISION
OF THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

COUNTER STATEMENT OF JURISDICTION

This is an immigration case in which petitioner, Takky Zubeda, a native and citizen of the Democratic Republic of the Congo ("the Congo"), seeks review of a final order of removal issued by the Board of Immigration Appeals ("BIA" or "Board") on June 7, 2002. The BIA's jurisdiction arose under 8 C.F.R. §§ 3.1(b)(3) and 240.15 (2002), which grant the BIA appellate jurisdiction over decisions of Immigration Judges in removal proceedings.

Because petitioner's proceedings began with the service of a Notice to Appear by the Immigration and Naturalization Service ("INS" or "Service") on February 2, 2001, the Court's jurisdiction is governed by the "permanent rules" for judicial review set forth in section 306 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (September 30, 1996). A.R. 323-24.[1] Those rules specify that, for proceedings commenced on or after IIRIRA's effective date of April 1, 1997, petitions for review must be filed within thirty days of the date of the final order of removal. Immigration and Nationality Act ("INA") § 242(b), 8 U.S.C. § 1252(b). Petitioner timely filed her petition for review on July 8, 2002. See INA § 242(b)(2), 8 U.S.C. § 1252(b)(1) (2002). Venue is proper in this Court because the proceedings before the Immigration Judge were completed in York, Pennsylvania, which is within this judicial circuit. See INA § 242(b)(2), 8 U.S.C. § 1252(b)(2) (2002).

Finally, this Court lacks jurisdiction to review petitioner's claims related to the Immigration Judge's decision because this Court may only review the decision of the BIA. Abdulai v. Ashcroft, 239 F.3d 542, 544, 548-49 (3d Cir. 2001).

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[1] The abbreviation "A.R." followed by a number refers to a page of the Certified Administrative Record on file with this Court. The term "Pet. Br." refers to the brief filed by petitioner in this Court.

COUNTER STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the BIA's conclusion that the petitioner, an applicant for withholding of removal under the Convention Against Torture ("CAT"), failed to prove that she "more likely than not would be tortured if removed" to the Congo.

2. Whether substantial evidence supports the BIA's finding that the petitioner failed to establish CAT eligibility based on her unreliable testimony.

3. Whether the Court may properly consider the petitioner's arguments that the BIA abused its discretion by failing to adopt the Immigration Judge's findings when the BIA conducted a *de novo* review of the appeal.

COUNTER STATEMENT OF THE CASE

This is an immigration case in which the petitioner seeks review of the BIA's final order of removal, which vacated the Immigration Judge's decision to grant withholding of removal under the CAT.

COUNTER STATEMENT OF THE RELEVANT FACTS

Petitioner is a twenty-eight-year-old, married, and childless female, who is a native and citizen of the Congo. A.R. 284-86. The petitioner attempted to enter the United States on December 16, 2000. A.R. 295. The INS conducted a credible fear interview on February 1, 2001, and the INS served a Notice to Appear on the

petitioner on February 2, 2001. A.R. 295-99, 323-24. The INS charged that the petitioner is removable from the United States under section 212(a)(6)(C)(i) of the INA, 8 U.S.C. § 1182(a)(6)(C)(i), for seeking admission to the United States by fraud or willful misrepresentation, and under section 212(a)(7)(A)(i)(I) of the INA, 8 U.S.C. § 1182(a)(7)(A)(i)(I), for failing to possess a valid entry document when seeking admission to the United States. A.R. 323-24.

Petitioner's removal hearing began on March 15, 2001, in York, Pennsylvania, with Immigration Judge Walt Durling presiding. A.R. 58-60. Throughout her immigration proceedings, the petitioner was represented by counsel Judith Bernstein Baker and Iodeli Consalo. A.R. 62, 68. Through counsel, petitioner admitted several of the allegations of the Notice to Appear and conceded that she is removable under section 212(a)(7)(A)(i)(I) of the INA, 8 U.S.C. § 1182(a)(7)(A)(i)(I). A.R. 63-65.

On September 18, 2001, Immigration Judge Durling conducted the petitioner's evidentiary hearing, admitting the following exhibits into evidence: the Notice to Appear (A.R. 323-24); the I-870, which is the record of determination of the credible fear interview (A.R. 295-99); the I-589 asylum application (A.R. 284-92); an affidavit and background evidence issued by Amnesty International and Human Rights Watch from the petitioner (A.R. 207-83); a memorandum, sworn

statement, the State Department's Country Reports on Human Rights Practices for the Democratic Republic of the Congo from 2000, and the Bureau of Democracy, Human Rights and Labor Profile of Asylum Claims and Country Conditions for Zaire dated 1996 from the INS (A.R. 154-206); and an affidavit from an expert witness (A.R. 83-84, 141-53). Petitioner was the only witness to testify during the hearing. A.R. 75-140.

I. The Petitioner's Testimony and Asylum Claim

Through testimony and in her asylum application, the petitioner set forth the following claim. Petitioner asserted that on November 13, 2000, her mother was raped by soldiers. A.R. 89, 208. Petitioner's father intended to report the rape to human rights workers, but before he could make that report, ten soldiers returned to the family home on November 15, 2000, and brutalized the family. A.R. 89-94, 208. Petitioner claimed that these soldiers raped her, beheaded her father, uncle, and brothers, and set fire to the family house while her mother and sister were still inside. A.R. 89-94, 208. The petitioner claimed that the soldiers committed these atrocities against her and her family in order to prevent them from reporting the rape of the petitioner's mother to human rights workers. A.R. 91, 100-01, 104-08, 123-24, 135, 208, 210-11. According to the petitioner's testimony, the soldiers kidnaped her, held her for one week at a military camp, sexually abused her, and

forced her to cook and clean for them until she escaped. A.R. 94-100, 108-20, 125-32, 208-10. Petitioner claimed that she escaped from the soldier's compound with three other women while the soldier's were eating. A.R. 114, 209. In making her escape, the petitioner identified that she found a boat and crossed into Tanzania, where she received assistance in traveling to the United States. A.R. 114-15, 125-32, 209-10.

II. The Immigration Judge's Decision

In his written decision and order dated October 22, 2001, the Immigration Judge determined that the petitioner was not a credible witness. A.R. 49-51. The Immigration Judge cited numerous inconsistencies between the petitioner's testimony and written asylum application in support of his adverse credibility finding, and the Immigration Judge found that these inconsistencies undermined the heart of the petitioner's asylum claim. A.R. 49-51. In addition, the Immigration Judge stated,

> 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.

A.R. 51. The Immigration Judge, therefore, denied the petitioner's applications for asylum and withholding of removal. A.R. 51.

Despite these findings and the petitioner's failure to testify regarding the likelihood of detention and torture or necessity of protection under the CAT, the Immigration Judge granted the petitioner withholding of removal under the CAT. A.R. 54. In pertinent part, the Immigration Judge stated the following in support of his grant of protection under the CAT.

> 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 . . . 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 citizens. Forcibly returning there any citizen of that troubled land . . . should give any judge great pause. At 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.

A.R. 54.

III. The Decision of the BIA

The INS filed a timely Notice of Appeal with the BIA. A.R. 43-44. The Service argued that the Immigration Judge erred by granting the petitioner withholding of removal under the CAT because the petitioner failed to establish that she more likely than not would be tortured if returned to the Congo. A.R. 43. The INS also submitted a brief in support of its appeal, which set forth its claim that the petitioner failed to establish entitlement for relief under the CAT. A.R. 26-33. On April 19, 2002, the petitioner filed a brief with the BIA, contending that the Immigration Judge properly granted the petitioner protection under the CAT based on the country conditions in the Congo. A.R. 4-12. In her brief, the petitioner did not challenge the Immigration Judge's denial of asylum or contest the Immigration Judge's adverse credibility finding. A.R. 4-12.

On June 7, 2002, the BIA sustained the Service's appeal, vacated the Immigration Judge's decision granting withholding of removal under the CAT, and ordered the petitioner removed to the Congo. A.R. 2-3. Upon its own *de novo* review of the case, the BIA concluded that the evidence of record failed "to support any finding that the respondent is likely to be detained for any reason." A.R. 3. Moreover, the BIA concluded, "The evidence of record does not remotely

establish a likelihood that the respondent will be tortured by the government of the Congo. . . . As such, the respondent has failed to meet her burden of proof." A.R. 3. In support of its finding, the BIA discussed Matter J-E-, 23 I. & N. Dec. 291 (BIA 2002), which established that the detention of deportees from the United States upon arrival in the country of removal "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." A.R. 3.

Petitioner filed her petition for review with this Court on July 8, 2002.

SUMMARY OF ARGUMENT

Substantial evidence supports the BIA's denial of withholding of removal under the CAT because the petitioner failed to prove through objective evidence that she is likely to be targeted for detention and torture upon her removal to the Congo. In addition, substantial evidence supports the BIA's finding that the petitioner failed to establish CAT eligibility based on her unreliable testimony. Finally, this Court lacks jurisdiction to consider the petitioner's arguments that the BIA abused its discretion by failing to adopt the Immigration Judge's factual findings because the BIA conducted a *de novo* review of the appeal.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BIA'S DECISION THAT THE PETITIONER FAILED TO DEMONSTRATE ELIGIBILITY FOR PROTECTION UNDER THE CAT

A. Standard Of Review

Courts apply the "substantial evidence" standard to review the BIA's factual determinations. Elias-Zacarias, 502 U.S. 478, 481 (1992); Abdille v. Ashcroft, 242 F.3d 477, 483-84 (3d Cir. 2001); Senathirajah v. INS, 157 F.3d 210, 216 (3d Cir. 1998); INA § 106(a)(4), 8 U.S.C. § 1105a(a)(4) (1994). Under this standard, the Court is required to affirm the BIA if "supported by reasonable, substantial, and probative evidence on the record considered as a whole." 8 U.S.C. § 1105a(a)(4) (1994); e.g., Elias-Zacarias, 502 U.S. at 481 & n.1; Abdille, 242 F.3d at 483. The Court "is not entitled to reverse 'simply because it is convinced that it would have decided the case differently.'" Marquez v. INS, 105 F.3d 374, 378 (7th Cir. 1997) (quoting Anton v. INS, 50 F.3d 469, 472 (7th Cir. 1995)); see also Arkansas v. Oklahoma, 503 U.S. 91, 113 (1992) (discussing that under the substantial evidence standard a court may not "supplant the agency's findings merely by identifying alternative findings that could [also] be supported by substantial evidence."). The fact that the evidence supports more than one inference, or that inconsistent inferences might be drawn from the

evidence, does not prevent the BIA's findings from being supported by "substantial evidence." See American Textile Manufacturers Institute Inc. v. Donovan, 452 U.S. 490, 523 (1981); Cardillo v. Liberty Mut. Ins. Co., 330 U.S. 469, 478 (1947). Thus, the Court may not reverse simply because it finds another inference more reasonable. See American Textile, 452 U.S. at 523; Cardillo, 330 U.S. at 478; Marquez, 105 F.3d at 378. This would be to improperly substitute inferences drawn by the Court for the inferences found reasonable by the fact-finder, which would violate the "substantial evidence" standard of review. Cardillo, 330 U.S. at 478; see generally Elias-Zacarias, 502 U.S. at 481 & n.1.

Finally, under this deferential standard of review, "the BIA's finding must be upheld unless the evidence not only supports a contrary conclusion, but compels it." Abdille, 242 F.3d at 483-84 (citing Elias-Zacharias, 502 U.S. at 481 & n.1; Chang v. INS, 119 F.3d 1055, 1060 (3d Cir. 1997)). As stated previously, this Court's review is limited to the decision of the BIA because the BIA conducted its own *de novo* review of the record in this case. A.R. 2-3. Abdulai, 239 F.3d at 548-49. Accordingly, the BIA's decision is the one before the Court for review.

B. Statutory Framework and Burden Of Proof

Withholding of removal under the CAT is available to qualified aliens who demonstrate that they "more likely than not would be tortured if removed to the proposed country of removal." 8 C.F.R. § 208.16(c)(2) (2002). If an alien establishes that she "more likely than not would be tortured" upon return to her home country, withholding of removal or deferral of removal is mandatory. INA § 241(b)(3); 8 C.F.R. §§ 208.16-208.18 (2002). "The standard for relief 'has no subjective component, but instead requires the alien to establish by objective evidence' that [s]he is entitled to relief." Sevoian v. Ashcroft, 290 F.3d 166, 175 (3d Cir. 2002) (citing Matter of J-E-, 23 I. & N. Dec. 291, 302 (BIA 2002)). The objective evidence to be considered includes "[e]vidence of past torture inflicted upon the applicant;" "[e]vidence of gross, flagrant or mass violations of human rights within the country of removal . . . ;" and "[o]ther relevant information regarding conditions in the country of removal." 8 C.F.R. § 208.16(c)(3) (2002).

The petitioner must prove the following to demonstrate her eligibility for protection under the CAT. First, the petitioner must establish that the act of torture alleged is an "extreme form of cruel and inhuman treatment," which causes severe physical or mental pain and suffering. Matter of J-E-, 23 I. & N. Dec. 291, 297 (BIA 2002); 8 C.F.R. §§ 208.18(a)(1)-(4) (2002). "[L]esser forms of cruel,

inhuman, or degrading treatment or punishment that do not amount to torture" do not implicate the CAT. Sevoian, 290 F.3d at 175; Matter of J-E-, 23 I. & N. Dec. at 297; 8 C.F.R. § 208.18(a)(2). Second, the act must specifically be intended to inflict severe physical or mental pain or suffering. Matter of J-E-, 23 I. & N. Dec. at 297; 8 C.F.R. § 208.18(a)(5) (2002). Third, the act must have an illicit purpose, such as: "obtaining information or a confession; punishment for a victim's or another's act; intimidating or coercing a victim or another; or any discriminatory purpose." Matter of J-E-, 23 I. & N. Dec. at 298. See 8 C.F.R. § 208.18(a)(3).

Fourth, "torture covers intentional government acts, not negligent acts or acts by private individuals not acting on behalf of the government," that are "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." Sevoian, 290 F.3d at 176; Matter of J-E-, 23 I. & N. Dec. at 299; 8 C.F.R. § 208.18(a)(1). "Violence committed by individuals over whom the government has no reasonable control does not implicate the treaty." Matter of Y-L-, A-G-, R-S-R-, 23 I. & N. Dec. 270 (AG 2002); 8 C.F.R. §§ 208.18(a)(1), (7) (2002). Moreover, "gross, flagrant, or mass violations of human rights in a particular country do[] not, as such, constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture . . . . Specific grounds must exist that indicate the

individual would be personally at risk." Matter of S-V-, 22 I. & N. Dec. 1306, 1313 (BIA 2000) (internal citations omitted). And fifth, torture "does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions." Matter of J-E-, 23 I. & N. Dec. at 299; 8 C.F.R. § 208.18(a)(3). As set forth below, the petitioner failed to meet her burden of proving eligibility for protection from removal under the CAT.

C. Substantial Evidence Supports the BIA's Conclusion that the Petitioner Failed to Show that She More Likely Than Not Would Be Tortured in the Congo

(1) The BIA Sufficiently Considered and Addressed The Objective Evidence in the Record

The BIA's decision is supported by substantial evidence because the BIA clearly relied upon the objective evidence in the record to determine that the petitioner failed to meet her burden of proving eligibility for protection under the CAT. This Court explained in Sevoian v. Ashcroft, 290 F.3d 166 (3d Cir. 2002), how it will review a case such as that presented here. In Sevoian, 290 F.3d at 175, the Court deferred to the BIA's decision because it found that the BIA sufficiently considered the evidence of record to determine Sevoian failed to meet his burden of proving eligibility for protection under the CAT. Specifically, the BIA concluded that there was "insufficient evidence" to support Sevoian's CAT claim.

The Sevoian Court determined that the BIA's "insufficient evidence" finding indicated that the BIA "weighed the evidence and found it lacking, and thus made a factual finding about Sevoian's claim." Id. The Court found the BIA's decision supported by substantial evidence because the BIA "recognized and addressed Sevoian's key contention under the Convention Against Torture," the BIA "stated that it surveyed the record," and "[t]he State Department report apparently provided the chief basis for the Board's conclusions . . . ." Id. at 178. The Court also explained that "[t]he Board 'is not required to write an exegesis on every contention,' but only to show that it has reviewed the record and grasped the movant's claims." Id. (citing Mansour v. INS, 230 F.3d 902, 908 (7th Cir. 2000)) (internal citation omitted). Therefore, the Sevoian Court deferred to the BIA's decision because it was based on substantial evidence and because a reasonable fact finder would not be compelled to conclude to the contrary. Sevoian, 290 F.3d at 175.

Similarly, in the petitioner's case, this Court should defer to the BIA's decision because it is also based on substantial evidence in the record. In this case, the BIA held,

> The background evidence establishes that prison conditions in the Congo remain harsh and life threatening. . . . 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 Congo.

A.R. 3.

The BIA clearly identified that it relied on "background evidence" to determine that the petitioner failed to prove she more likely than not will be tortured in the Congo. The "background evidence" in the record consists of the Department of States' Country Report on Human Rights Practices for the Democratic Republic of the Congo for 2000 (A.R. 163-99), the Zaire Profile of Asylum Claims & Country Conditions for 1996 (A.R. 200-06), two Amnesty International Reports on the Congo from 2000 (A.R. 212-21, 242-83), and a portion of a Human Rights Watch report on the Congo for 2000 (A.R. 222-40). In addition, the BIA made specific factual findings from its review of this background evidence related to prison conditions in the Congo and the likelihood that the petitioner would not be detained and tortured in the Congo. A.R. 3. In fact, the BIA noted from the Department of State's Country Report that "[p]rison

conditions remained harsh and life threatening."[2] A.R. 164. Similar to the situation in Sevoian, the BIA's factual findings in the instant case demonstrate that the BIA "recognized and addressed" the petitioner's application for protection under the CAT and establish that the BIA considered the "background evidence" in the record, which includes the Department of State report. Sevoian, 290 F.3d at 178.

Although the BIA did not specifically identify the exact documents upon which it relied, it is clear from the evidence of record that the BIA considered the objective evidence of country conditions in the record to conclude that the petitioner failed to demonstrate that she is eligible for protection under the CAT. A.R. 164. Id. at 178. Similar to Sevoian, the BIA in the instant case clearly identified its reliance on the objective "background evidence" in the record, the BIA "recognized and addressed" the petitioner's "key contentions" under the CAT, and the BIA demonstrated that it "reviewed the record and grasped the [petitioner's] claims." Id. at 178. Therefore, this Court should defer to the BIA's decision in the instant case because the BIA's decision is supported by substantial evidence. Id. at 175.

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[2] This Court identified in Sevoian, 290 F.3d at 176, that the BIA "could reasonably give the non-governmental sources of evidence . . . less weight than the State Department report."

Finally, the petitioner contends that the BIA failed to conduct an appropriate analysis of the evidence of record because one of the BIA's findings contains vague or ambiguous language. Pet. Br. 19-20. In its decision, the BIA stated, "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." A.R. 3. As set forth below, the petitioner's argument regarding this single finding is without merit because the BIA's decision is supported by substantial evidence.

In Tipu v. INS, 20 F.3d 580, 585 (3d Cir. 1994), this Court indicated that decisions of the BIA should be assessed in their entirety in order to determine whether the BIA applied an appropriate standard and considered relevant factors. In addition to this Third Circuit precedent, the Ninth Circuit identified in Celis-Castellano v. INS, 298 F.3d 888, 891 (9th Cir. 2002), that the Court should consider the BIA's entire decision to determine whether the BIA applied the proper test when the BIA's statements "could be clearer." In the instant case, although the BIA could have selected other phrasing to state this one finding, it is clear that the BIA's decision, "when assessed as a whole, demonstrates adequately . . . that the Board heard and thought about the relevant factors." Tipu, 20 F.3d

at 585 (quoting Vergara-Molina v INS, 956 F.2d 682, 685 (7th Cir. 1992)). A review of the BIA's decision reveals that the BIA relied upon the background evidence of country conditions to find that "harsh prison conditions" exist in the Congo and to conclude that the petitioner failed to demonstrate she is likely to be targeted for detention and torture in the Congo. A.R. 3. Therefore, even though the BIA could have phrased this single finding differently, it is clear that the BIA's decision is supported by substantial evidence because the BIA relied upon the background evidence in the record and the BIA "recognized and addressed" the petitioner's claim for protection under the CAT. A.R. 3. Celis-Castellano, 298 F.3d at 891; Sevoian, 290 F.3d at 175; Tipu, 20 F.3d at 585.

(2) The Petitioner Failed To Prove Through Objective Evidence That She Is Eligible For Protection Under the CAT

The petitioner claims that the human rights violations in the Congo, which include the rape of women by both government and rebel forces, establish that she will be tortured upon her return. Pet. Br. 23-25. Specifically, the petitioner claims that she will be targeted for torture upon her return to the Congo because: (1) she is a deportee from the United States; (2) she is a woman; and (3) she is from a rebel-held region. Pet. Br. 23-24. The background evidence in the record, however, does not support these claims.

First, the background evidence in the record does not establish that deportees from the United States are detained upon arrival in the Congo or tortured because they were deported from the United States. See Matter of J-E-, 23 I. & N. Dec. at 299 ("It is undisputed that the respondent will be subject to detention of an indeterminate length on his return to Haiti."). In addition, the petitioner did not testify that she fears torture upon arrival in the Congo because she will be a deportee from the United States. See A.R. 100-133.

Second, the petitioner failed to provide evidence to show that she will be singled-out for detention and torture upon her arrival in the Congo because she is a woman. Contrary to the petitioner's argument, the Department of State report clearly states that "authorities do not target women for abuse . . . ." A.R. 174. Although the human rights abuses committed against women in the Congo by both government and rebel forces are well documented, the threat of rape and torture facing all women in the Congo does not constitute a ground for CAT eligibility. A.R. 164, 195, 226, 256. Matter of J-E-, 23 I. & N. Dec. at 303; Matter of S-V-, 22 I. & N. Dec. at 1313. In order to establish eligibility under the CAT, the petitioner must establish that she "would be personally at risk" or that she in particular would be in danger of being subjected to torture." Matter of J-E-, 23 I. & N. Dec. at 303; Matter of S-V-, 22 I. & N. Dec. at 1313. Therefore, the

fact that the petitioner is a woman does not satisfy the petitioner's burden of proving likelihood of detention and torture in the Congo.

Third, the petitioner claims that she will be detained and tortured in the Congo because she is from a rebel-held region. Although the background evidence of record establishes an ongoing civil war in the Congo, this evidence does not demonstrate that the petitioner would be targeted for detention and torture upon her return to the Congo because she is from a rebel-held region. The background evidence explains that the following categories of individuals are likely to be detained or subjected to torture by both government and rebel forces: political opponents, journalists, activists, criminals, public officials, missionaries, and human rights workers. A.R. 170-175. The petitioner did not testify that she is a member of any of these groups. In addition, the petitioner failed to provide objective evidence that individuals from rebel-held regions, who are similarly situated to her, are targeted for detention and torture upon return to the Congo.

Fourth, the petitioner failed to establish eligibility for protection under the CAT because she is not likely to be detained and tortured "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Sevoian, 290 F.3d at 176; Matter of J-E-, 23 I. & N. Dec. at 299; 8 C.F.R. § 208.18(a)(1). As outlined above, the petitioner failed to

demonstrate that the government of the Congo is likely to target her for detention and torture upon her arrival in the Congo. In addition, contrary to the petitioner's arguments, the petitioner failed to establish that she is likely to be targeted for detention and torture at the acquiescence of the Congolese government.

In Matter of S-V-, 22 I. & N. Dec. at 1312, the Board held that "a government's inability to control a group ought not lead to the conclusion that the government acquiesced to the group's activities." The record establishes that the civil war between the government and rebel forces is ongoing and indicates that most atrocities committed in the Congo result from general violence and human rights violations stemming from this war. A.R. 163-79, 181-90, 192-97. The petitioner failed to submit evidence to show that the government of the Congo willfully accepts or acquiesces in the violence committed by the rebel forces. Pet. Br. 29. See Matter of Y-L, A-G-, R-S-R-, 23 I. & N. Dec. at 280, 283; Matter of S-V-, 22 I. & N. Dec. at 1311-1312 ("the respondent must do more than show that the officials are aware of the activity constituting torture but are powerless to stop it. He must demonstrate that Colombian officials are willfully accepting of the guerillas' torturous activities."). In addition, the petitioner failed to introduce evidence to support her claim that the rebel forces constitute a de facto government in the Congo or that they operate with the willful acceptance of the

Congolese government. Pet. Br. 28-31. Therefore, the petitioner failed to demonstrate eligibility for protection under the CAT because the violence she fears is likely to be "committed by individuals over whom the government has no reasonable control . . . ." Matter of Y-L-, A-G-, R-S-R-, 23 I&N Dec. 270 (AG 2002); 8 C.F.R. §§ 208.18(a)(1), (7). Accordingly, the petitioner failed to demonstrate that she is likely to be targeted for torture as defined under the CAT, and she failed to prove eligibility for protection under the CAT.

Similar to the case in Sevoian, the BIA's decision in the instant case is supported by substantial evidence because the BIA clearly recognized and addressed the petitioner's claim for protection under the CAT, the BIA relied on relevant background information in the record when making its findings of fact and when rendering its conclusion, and the petitioner failed to provide objective evidence that she is likely to be targeted for detention and torture upon her return to the Congo. The evidence of record does not compel a contrary conclusion.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BIA'S FINDING THAT THE PETITIONER FAILED TO ESTABLISH CAT ELIGIBILITY BASED ON HER UNRELIABLE TESTIMONY AND EVIDENCE OF PAST TORTURE

When considering an application for protection under the CAT, the Board should consider "[e]vidence of past torture inflicted upon the applicant" in

addition to objective evidence of country conditions. 8 C.F.R. § 208.16(c)(3). Contrary to the petitioner's claim, the BIA did not improperly rely on the Immigration Judge's credibility determination to find her ineligible for protection under the CAT. Pet. Br. 40-43. The BIA properly considered the petitioner's claim of past torture, which the BIA found unreliable in light of the Immigration Judge's uncontested adverse credibility determination. A.R. 3.

In pertinent part, the BIA stated,

> The background evidence establishes that prison conditions in the Congo remain harsh and life threatening. . . . However, we note a dearth of evidence to support any finding that the respondent is likely to be detained for any reason. . . . 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.

A.R. 3. The BIA found the petitioner ineligible for protection under the CAT because she failed to provide sufficient background evidence of country conditions to support her claim, she failed to provide reliable evidence of past torture, and she failed to challenge the Immigration Judge's adverse credibility finding. Because the BIA's failure of proof finding stems from the petitioner's own failure to provide adequate proof of both background evidence and past

torture, the BIA's decision adequately considered the evidence as required under the regulations implementing the CAT. 8 C.F.R. § 208.16(c)(3) (identifying that the objective evidence to be considered in support of a CAT claim includes both "[e]vidence of past torture inflicted upon the applicant" and "[o]ther relevant information regarding conditions in the country of removal."). Accordingly, the BIA's finding that the petitioner failed to meet her burden of proof to establish eligibility for protection under the CAT is supported by substantial evidence in the record.

Moreover, the petitioner's reliance on Kamalthas v. INS, 251 F.3d 1279 (9th Cir. 2001), and Mansour v. INS, 230 F.3d 902 (7th Cir. 2000), is misplaced. In Kamalthas, the BIA did not consider necessary background evidence of country conditions, and "the BIA impermissibly conflated the standards for granting relief in asylum and [CAT] cases." Kamalthas, 251 F.3d at 1280. In addition, the Ninth Circuit found that the BIA "overrelied" on its adverse credibility finding. Id. at 1284. The instant case is easily distinguished from Kamalthas because: (1) the petitioner's asylum claim is not at issue before the BIA; (2) the BIA did not conflate the petitioner's asylum and CAT claims; (3) the BIA properly considered the background evidence in the record as noted in its decision; and (4) the BIA only addressed the petitioner's adverse credibility in the context of considering

whether the petitioner's evidence of past torture was reliable. A.R. 3. Therefore, the BIA's decision in the instant case cannot be compared to the Ninth Circuit's decision in Kamalthas. Accordingly, this Court should find that the BIA's decision is supported by substantial evidence.

In addition, the petitioner erroneously relied on Mansour v. INS, 230 F.3d 902 (7th Cir. 2000), to argue that the BIA erred in considering the petitioner's adverse credibility. In Mansour, the Seventh Circuit found that the BIA failed to adequately comprehend and address the CAT claim because the BIA misidentified the respondent's religious affiliation, which was central to the respondent's fear of torture. Mansour, 230 F.3d at 908-09. In addition, the Seventh Circuit stated that the "adverse credibility determination in the asylum context seems to overshadow [the BIA's] analysis of Mansour's torture claim." Id. at 908.

The facts and circumstances present in Mansour are distinguishable from the instant case. First, the BIA correctly identified and considered the petitioner's characteristics and claims related to whether she is eligible for protection under the CAT. A.R. at 3. The BIA, therefore, did not misstate a critical element that goes to the heart of the petitioner's CAT claim, which was the situation in Mansour. Second, the BIA in the instant case only considered the petitioner's CAT claim because the petitioner did not challenge the asylum denial or the

Immigration Judge's adverse credibility finding. A.R. 3-12. Therefore, because the BIA in the instant case did not commit the errors cited in Mansour, the petitioner's reliance on Mansour is misplaced. Accordingly, this Court should uphold the BIA's decision in the instant case because it is supported by substantial evidence and because the evidence of record does not compel a contrary conclusion.

III. THIS COURT LACKS JURISDICTION TO CONSIDER THE IMMIGRATION JUDGE'S DECISION

This Court is without jurisdiction to review the Immigration Judge's decision. Although the petitioner presents several arguments related to the specific findings made by the Immigration Judge, this Court reviews the decision of the BIA, not the decision of the Immigration Judge.[3] A.R. 48, 54-55;

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[3] The petitioner erroneously argues that the BIA abused its discretion by rejecting the Immigration Judge's finding, made pursuant to administrative notice, that the petitioner is likely to be detained as a deportee from the United States under the laws of the Congo. Pet. Br. 31-39. Under the BIA's ability to review the petitioner's case *de novo*, the BIA is not bound to accept the Immigration Judge's factual findings made pursuant to administrative notice. See Matter of Estrada-Betancourt, 12 I. & N. Dec. 191, 198 (BIA 1967) (finding that the special inquiry officer erred by taking administrative notice); Matter of G-Q-, 7 I. & N. Dec. 195, 200 (BIA 1956) (finding that the special inquiry officer erred by taking administrative notice of portions of the Mexican Code and Constitution); Matter of C- and S-, 6 I. & N. Dec. 597 (AG 1956) (approving the BIA's determination that the special inquiry officer erred by taking official notice). Moreover, this Circuit has stated that "foreign law is treated as a fact that must be proven by the parties," which renders issues of foreign law inappropriate for judicial

Pet. Br. 20, 31-39. Abdulai v. Ashcroft, 239 F.3d 542, 544, 548-49 (3d Cir. 2001). This Court considers the decision of the Immigration Judge only when the BIA has expressly adopted the Immigration Judge's reasoning or when the BIA has invoked regulations providing that the Immigration Judge's decision is the final agency determination. Abdulai, 239 F.3d at 549 n.2; 8 C.F.R. § 3.1(a)(7) (2002). Otherwise, the Immigration Judge's decision is beyond the Court's scope of review because it constitutes a non-final agency determination. Abdulai, 239 F.3d at 549. Therefore, because the BIA conducted a *de novo* review of the petitioner's case, this Court lacks jurisdiction to entertain the petitioner's arguments related to the Immigration Judge's decision.

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administrative notice. Abdille v. Ashcroft, 242 F.3d 477, 490 n.10 (3d Cir. 2001). See generally McLeod v. INS, 802 F.2d 89, 93 n.4 (3d Cir. 1986) (permitting notice of "commonly acknowledged facts" and "technical and scientific facts . . . within the agency's area of expertise.").

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Board of Immigration Appeals and deny the petition for review.

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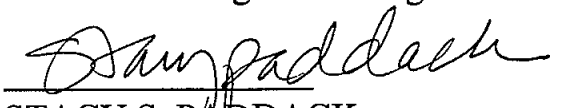

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(A)(7)(B),(C), I certify that the text of the answering brief is double spaced proportionately spaced 14 point Times New Roman type, the footnotes are single spaced proportionately spaced 14 point Times New Roman, and the brief contains 6825 words.

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STATEMENT OF RELATED CASES

Based on a survey of the attorneys in this office, Counsel for Respondent states that she is not aware of any pending cases in this Circuit that raise similar issues.

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CERTIFICATION OF BAR MEMBERSHIP

I, Stacy S. Paddack, hereby certify that I am not admitted to practice before the United States Court of Appeals for the Third Circuit. L.A.R. 46.1(e). I am permitted to appear before the Third Circuit because I am an attorney representing the federal government. See <http://www.ca3.uscourts.gov/admissio.htm>.

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of February, 2003, two copies of the foregoing Respondent's Brief were served on the petitioner's counsel by Federal Express addressed to:

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