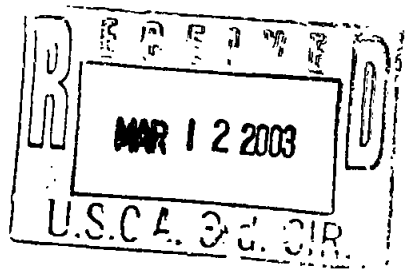
IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-2868



TAKKY ZUBEDA,
Petitioner

v.

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

REPLY 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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The Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 contesting the legality of Petitioner's two-plus years of detention in INS custody, which Petition was filed in the United States District Court for the Eastern District of Pennsylvania (Docket No. 02-CV-8394), was denied on January 24, 2003. Petitioner waived her right to appeal that denial. Accordingly, Petitioner remains in INS custody. As of the date of filing of this Reply Brief, Petitioner is detained in an INS contract facility in Texas.

ARGUMENT

The main thrust of the arguments made in the Brief for Respondent John Ashcroft is that the BIA's seven-sentence disposition of Petitioner's claim for withholding of removal under the Convention properly addressed the evidence in the record and reasonably rejected Petitioner's claim. For the reasons stated below, Respondent's arguments are demonstrably unpersuasive.

I. THE BIA'S MERE REFERENCE TO "BACKGROUND EVIDENCE" DOES NOT AMOUNT TO ADEQUATE CONSIDERATION OF PETITIONER'S TORTURE CLAIM.

As Respondent acknowledges, the BIA "did not specifically identify" the documents on which it relied in concluding that Petitioner had failed to demonstrate a likelihood of torture upon her forcible removal to the DRC. Resp. Br. at 17. Notwithstanding this omission, Respondent argues, the BIA's mere reference to the "background evidence" demonstrates that the BIA "adequately comprehended and addressed [the] torture claim." *Mansour v. INS*, 230 F.3d 902, 908 (7th Cir. 2000). As set forth in this Court's decision in *Sevoian v. Aschroft*, 290 F.3d 166 (3d Cir. 2002), however, the BIA's reference to "background evidence," without more, is legally insufficient.

The Petitioner in *Sevoian* was a member of the Kurdish ethnic minority in Georgia. *Id.* at 168. Upon receiving draft notices from the Georgian army,

Sevoian, who feared that Georgian soldiers would abuse him because of his Kurdish ethnicity, fled the country and, ultimately, ended up in the United States. *Id.* The INS commenced removal proceedings against Sevoian; an Immigration Judge rejected his asylum claim and ordered him removed; and the BIA affirmed. *Id.* at 168-69. Sevoian then filed with the BIA a Motion to Reopen on the ground that he was entitled to withholding of removal under the Convention. *Id.* The BIA denied the Motion. In its opinion, the BIA discussed the U.S. State Department's report on human rights conditions in Georgia, which "indicated that official torture of prisoners was used 'for the most part' to extract confessions." *Id.* In light of this limited scope of torture, the BIA concluded that "torture would not be used in a case involving Sevoian, who had simply avoided conscription." *Id.*

Sevoian sought review in this Court of the BIA's decision denying his claim under the Convention. In considering Sevoian's argument that the BIA had not properly considered the evidence supporting his claim under the Convention, this Court emphasized the BIA's focus on, and discussion of, the record evidence of human rights conditions in Georgia. As the Court stated, the BIA decision

"*specifically addresse[d]* the State Department report on [Sevoian's] country." *Id.* at 178 (emphasis added).[1] The BIA's discussion of torture in Georgia – that it was used "usually to extract confessions" of prisoners – "reasonably characterized the State Department report," and justified the BIA's rejection of Sevoian's claim, which raised no argument as to the likelihood of an extracted confession. *Id.*

In sharp contrast to the BIA decision that this Court found acceptable in *Sevoian*, the BIA decision in this case makes no mention of the U.S. State Department Report on human rights conditions in the DRC,[2] nor does it mention any of the four other country reports entered into evidence before the Immigration Judge. *See* Resp. Br. at 16 (citing country reports entered into evidence). Instead, the BIA made the token declaration that the "background evidence" failed to

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[1] The relevant portion of the BIA decision stated:

> In [Sevoian's] motion, he simply argues that he will be jailed due to his refusal to serve in the military and that torture is used against prisoners in Georgian jails.... [W]hile mistreatment may occur in Georgian prisons, it appears from the record that for the most part torture is used to extract confessions from prisoners (Exh. 11) [(containing the State Department country report on Georgia)], which would not be the case in the respondent's situation.... Insufficient evidence supports the respondent's claim that he will face torture in Georgia. *Sevoian*, 290 F.3d at 177-78.

[2] To the extent that Respondent's statement that "the BIA noted *from the Department of State's Country Report* that '[p]rison conditions remained harsh and life threatening,'" Resp. Br. at 16-17 (emphasis added), suggests that the BIA actually quoted, discussed, or even referenced the State Department report, that suggestion is incorrect. The BIA decision makes *no mention* of any country report.

support Petitioner's claim. Such perfunctory language leaves this Court without any clue as to what evidence the BIA found relevant in its denial. In so doing, the BIA utterly failed to "announce its decision in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted." *Sevoian*, 290 F.3d at 177 (quoting *Mansour*, 230 F.3d at 908).

Most telling about the BIA's decision is the lack of any reference to the use of rape and other sexual torture by the Congolese government and autonomous rebel forces in the DRC. *See* Pet. Br. at 10-12 (citing and discussing findings of various country reports on the DRC as to the use sexual violence). The prevalence of sexual violence in the DRC is at the core of Petitioner's torture claim. Thus, unlike *Sevoian*, where the BIA considered Sevoian's claim that he would likely be abused in Georgian prisons and rejected that claim on the *specific* ground that country reports showed abuse of prisoners in only a limited scope of cases, in this case, the BIA has given no indication as to why the country reports do not support Petitioner's claim.

Further, did the BIA did not give any indication as to why it disagreed with the Immigration Judge's reading of the country reports. It bears noting that, in citing to the Immigration Judge's decision, Petitioner does not, as Respondent suggests, ask this Court to review the "specific findings made by the Immigration Judge." Resp. Br. at 27. Instead, Petitioner merely cites to the Immigration

Judge's decision as a point of reference – that is, an evaluation of Petitioner's claims which Petitioner maintains is based on a comprehensive and considered review of the record. In a case like this one, where the BIA has reversed the Immigration Judge's grant of relief to the Petitioner,[3] this Court's analysis of whether the BIA has sufficiently addressed the Petitioner's legal claims as required by law is significantly aided by reference to the Immigration Judge's decision. Upon a review of the Immigration Judge's thorough review of the country reports in comparison to the BIA's mere reference to "background evidence," the conclusory and inadequate nature of the BIA's analysis is manifest.

Acceptance of Respondent's argument that the BIA's analysis was legally sufficient would permit the BIA to insulate itself from appellate review in *all* cases by merely mentioning that it considered "background evidence." Clearly, this is not a result countenanced by the statutory framework granting this Court authority to review the BIA's decisions. Accordingly, the Court must conclude that the BIA has failed to "show that it has reviewed the record and grasped the movant's claim," *Sevoian*, 290 F.3d at 178, and the Petition for Review must be granted.

[3] In light of this procedural posture, Petitioner's case should be distinguished from *Abdulai v. Ashcroft*, 239 F.3d 542 (3d Cir. 2000), where the Immigration Judge denied relief and the BIA affirmed.

II. TO THE EXTENT THAT IT IS RELEVANT TO THE COURT'S ANALYSIS, PETITIONER HAS PROVIDED OBJECTIVE EVIDENCE THAT SUPPORTS A CLAIM FOR RELIEF UNDER THE CONVENTION.

Respondent suggests four separate reasons as to why the evidence of record does not support Petitioner's claim under the Convention. Resp. Br. at 20-23. At the outset, the irony of Respondent's discussion of the evidence must be noted. Were Respondent's evaluation of the evidence accurate – which, as discussed immediately below, it is not – such an evaluation would constitute the type of record review and discussion of Petitioner's claims that the BIA should have provided in its decision. Respondent's discussion of the record does not change the fact that the BIA's decision failed to do exactly that. The BIA may not deny a claim upon a minimalistic review of the record and then have that denial justified in an *ex post* explanation of the record by Justice Department lawyers defending the denial of relief before the Court of Appeals.

Even if Respondent's characterization of the evidence were proper in this forum, however, the characterization set forth in Respondent's brief is misguided. First, Respondent's assertion as to the lack of evidence concerning the likelihood that Petitioner will be detained upon forcible removal to the DRC is irrelevant. As set forth in Petitioner's opening brief, the Immigration Judge found this fact by

administrative notice, thereby omitting the need for presentation of any evidence as to the likelihood of such detention.[4] *See* Pet. Br. at 31-32.

Second, Respondent's assertion that Petitioner failed to establish that she "would be personally at risk" of torture disregards Petitioner's burden of proof under the Convention: that it is "more likely than not" that she will be subject to torture in the country of removal. 8 C.F.R. § 208.16(c)(2). Before the Immigration Judge, Petitioner submitted an abundance of objective evidence concerning the use of sexual violence against women in the DRC.[5] *See* Pet. Br. at 10-12 (summarizing evidence as to sexual violence). Indeed, in his decision granting Petitioner withholding of removal under the Convention, the Immigration Judge found that rape was "almost *modus operandi*" in the DRC. App. at 11. Respondent appears to argue that Petitioner must definitively show that she will be raped upon removal to the DRC. Aside from the fact that it is logically impossible to provide evidence that events *will* take place in the future, Petitioner has submitted more than enough evidence to show the *likelihood* of rape upon her removal. As such, she has met her burden of proof under the Convention.

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[4] Petitioner addresses Respondent's argument that the BIA properly rejected the Immigration Judge's finding by administrative notice, Resp. Br. at 27 n.3, below. *See infra* § IV.

[5] Respondent does not contest Petitioner's argument that the sexual violence she fears constitutes torture under the Convention, *see* Pet. Br. at 25-28; accordingly, Petitioner does not provide any further amplification of this argument.

Third, Respondent's assertion that Petitioner has failed to show the likelihood of torture at the hands of DRC government forces because she is from a rebel-held area of the DRC disregards the evidence of record. Contrary to Respondent's characterization of the conflict in the DRC, the Congolese government has carried out civil war by use of the Mai Mai, associations of "traditional Congolese local defense forces." App. at 16; *see also* Pet. Br. at 6-7. The State Department Report entered into evidence confirmed accounts of these traditional defense forces (i.e. government soldiers) "commit[ing] serious abuses, including many killings, torture, and the arbitrary arrest and detention of civilians." App. at 18. Additionally, the evidence shows that government soldiers often direct their torturous activities at civilians suspected of supporting rebel forces. App. at 101 (noting that government forces killed civilians "suspected...of supporting armed opposition groups and their allies").[6] Upon return to the DRC, Petitioner will most certainly be identified as a native of a rebel-held area and will be viewed as sympathetic to rebel soldiers. Given government soldiers' treatment of individuals suspected to be sympathetic to the rebels, it is indeed more likely than not that Petitioner will suffer torture at the hands of the DRC's government.

[6] Violence against civilians based on their suspected loyalties cuts both ways, as rebels have habitually carried out abuses against civilians suspected of supporting the government. *See* App. at 21-22 (State Department report's discussion of rebel soldiers killing villagers "believed...to be sympathetic to the Mai Mai"); App. at 101 (stating that rebel forces "carried out widespread unlawful killings and other human rights abuses against unarmed civilians suspected of supporting the government and local armed groups").

Fourth, Respondent's assertion that Petitioner has "failed to submit evidence to show that the government of the Congo willfully accepts or acquiesces in the violence committed by the rebel forces," Resp. Br. at 22, misstates Petitioner's argument. As set forth in the opening brief, Petitioner does not advance an "acquiescence" argument. *See* Pet. Br. at 29 (stating that "acquiescence" analysis "does not apply to Petitioner"). Instead, Petitioner argues that because of the factional divisions of the DRC resulting in the formation of autonomous rebel-controlled governments, Petitioner will be tortured at the hands of governmental officials regardless of where she is sent upon her removal. Respondent's assertion that "the petitioner failed to introduce evidence to support her claim that the rebel forces constitute a de facto government in the Congo," Resp. Br. at 22, is patently false. Petitioner submitted evidence that rebels perform government functions in areas they control. *See* Pet. Br. at 30-31 (quoting U.S. State Department's report as to rebel forces' integration of governmental functions in portions of the DRC). Other than to clarify[7] the record and the nature of her claim, Petitioner will not restate this argument and will rest on the discussion in her opening brief.

[7] As a further point of clarification, Petitioner has raised alternative arguments as to which governmental body will likely abuse her in light of the unsettled conditions in the DRC. The point is: regardless of where Petitioner is sent upon her removal – either an area controlled by the formal government of the DRC (to the extent such a formal government exists) or an area controlled by autonomous rebel governments – Petitioner will, more likely than not, be tortured.

III. THE BIA'S RELIANCE ON AN ADVERSE CREDIBILITY FINDING WITH RESPECT TO PETITIONER'S ASYLUM CLAIM WAS IMPROPER.

Respondent's efforts to justify the BIA's application of an adverse credibility finding with respect to Petitioner's asylum claim to deny her claim under the Convention, Resp. Br. at 23-27, are not legally supportable.

In the first instance, the mere fact that Petitioner's testimony with respect to past torture may have been unreliable is not at all dispositive to the ultimate resolution of her claim for relief under the Convention. Although "[e]vidence of past torture inflicted upon the applicant," 8 C.F.R. § 208.16(c)(3)(i), is relevant to analysis of a claim under the Convention, other evidence must[8] be considered, including "[e]vidence of gross, flagrant or mass violations of human rights within the country of removal," 8 C.F.R. § 208.16(c)(3)(iii), and (in an expansive provision), "[o]ther relevant information regarding conditions in the country of removal." 8 C.F.R. § 208.16(c)(3)(iv). Indeed, the Immigration Judge properly did exactly this; notwithstanding his finding of discrepancies in Petitioner's factual account, he found that Petitioner was entitled to relief under the Convention based on "the State Department Country Reports, as well as other documentary evidence." App. at 11; *see also Kamalthas v. INS*, 251 F.3d 1279, 1280 (9th Cir.

[8] *See* 8 C.F.R. § 208.16(c)(3) ("[A]ll evidence relevant to the possibility of future torture *shall* be considered.").

2001) (noting that "country conditions alone can play a decisive role in granting relief under the Convention").

Courts of Appeals considering claims under the Convention have made clear that the BIA may not employ an adverse credibility determination with respect to an asylum claim in its analysis of a torture claim. *See Kamalthas*, 251 F.3d at 1280; *Mansour*, 230 F.3d at 908. These courts have so held with good reason. Proof of the "persecution" that an applicant for asylum must provide is necessarily factually based; thus, cases raising asylum claims rely heavily on the testimony of the applicant. On the other hand, claims under the Convention, as evidenced by the above-cited regulations, involve a much broader scope of evidence concerning objective conditions in the country of removal. Should the BIA be permitted to apply an adverse credibility determination made with respect to an asylum claim, it very likely will – as it did in this case – fail to consider other objective evidence in support of a claim under the Convention that it must consider under the relevant regulations.

Respondent has failed to distinguish the BIA's improper credibility analysis in this case from those at issue in *Kamalthas* and *Mansour*. The only difference between those cases and the instant case is that, in the former, the BIA considered both asylum claims and claims under the Convention, whereas, in this case, the

only claim before the BIA was Petitioner's claim under the Convention.[9] This is a classic distinction without a difference. The Immigration Judge's finding as to Petitioner's credibility was limited to the context of her asylum claim. App. at 11 (granting Petitioner relief under the Convention "[n]otwithstanding my concerns about [Petitioner's] testimony"). The BIA specifically adopted this finding. App. at 15 ("While [Petitioner] claims to have been previously tortured in the Congo, the Immigration Judge specifically found her to be incredible."). Thus, in taking a credibility finding from the asylum context and applying it to the context of a claim under the Convention, the BIA "impermissibly conflated the standards for granting relief in asylum and Convention cases." *Kamalthas*, 251 F.3d at 1280.

It should be noted that the Immigration Judge did not necessarily grant Petitioner relief under the Convention based solely on the country conditions. The Immigration Judge's decision may be interpreted to have found, alternatively, that, although Petitioner was not sufficiently credible to establish an asylum claim, she *was* sufficiently credible to establish a claim under the Convention. To the extent the Immigration Judge granted relief on this credibility basis, the BIA, under a long-established rule, owed deference to the Immigration Judge's favorable credibility determination. *See* 67 Fed. Reg. 54889 (explaining rule changes

[9] As discussed above, *supra* § I, Respondent's assertion that this case is distinguishable on the ground that "the BIA properly considered the background evidence in the record as noted in its decision," Resp. Br. at 25, is inaccurate.

adopted August 26, 2002, requiring the BIA to review findings of fact under clearly erroneous standard and stating "it is well established that, because the immigration judge has the advantage of observing the respondent as the respondent testifies, the Board already accords deference to the Immigration Judge's findings concerning credibility and credibility-related issues").

Thus, regardless of how the Immigration Judge's decision is viewed, the BIA's decision was legally erroneous.

IV. THE BIA MISCONSTRUED THE IMMIGRATION JUDGE'S FINDING, BY ADMINISTRATIVE NOTICE, REGARDING THE LIKELIHOOD OF PETITIONER'S DETENTION UPON RETURN TO THE DRC.

As set forth more fully in the opening brief, the Immigration Judge properly found, by administrative notice, that Petitioner would be detained upon her forcible return to the DRC. Pet. Br. at 31-39. Respondent's counter to that argument – that the BIA is not bound to accept the Immigration Judge's findings by administrative notice, Resp. Br. at 27 n.3 – misconstrues Petitioner's claim in much the same way that the BIA misconstrued the Immigration Judge's decision. Petitioner's point is simple: the BIA *did not understand* the nature of the Immigration Judge's finding by administrative notice. Specifically, the BIA addressed the Immigration Judge's finding regarding the likelihood of detention by stating that there was a "dearth of evidence" on that point. App. at 15. As such, the BIA stated the obvious: there

was no evidence in the record as to the likelihood of detention *exactly because* determination of a fact by administrative notice obviates the need for presentation of evidence on that fact.

Had the BIA understood the nature of the Immigration Judge's finding, and had it still disagreed with that finding,[10] it would have written a decision like those cited by Respondent, Resp. Br. at 27 n.3, *specifically* rejecting the Immigration Judge's finding by administrative notice. Had the BIA done so, then Petitioner could have sought to reopen her case before the BIA or sought remand to the Immigration Judge so that she could present evidence on the detention question. Petitioner never reached this juncture, of course, because of the BIA's misapplication of *In re J-E-* which led Petitioner to believe that a Motion to Reopen would be futile. *See* Pet. Br. at 5. Hypothetically, had the BIA properly analyzed the administrative notice question and then denied Petitioner an opportunity to present evidence on the detention issue, such a denial would raise substantial due process concerns.

Regardless of what may have happened, the point remains that the BIA did not properly consider the Immigration Judge's finding by administrative notice.

[10] Petitioner maintains that the BIA could not have disagreed with the Immigration Judge's finding on this point. *See* Pet. Br. at 36-38. Similarly, Petitioner disputes Respondent's implication that the detention of deportees in the DRC must be proved as a matter of "foreign law." Resp. Br. at 27 n.3. As set forth in the opening brief, the INS – an institution of *domestic law* – acknowledges that foreign governments take custody of deported aliens. Pet. Br. at 36-37.

As such, the BIA's misinterpretation and mistreatment of the detention question constituted an abuse of discretion, and the BIA's decision must be reversed.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in her opening brief, Petitioner respectfully requests that the Court grant her Petition for Review and order the BIA to grant Petitioner withholding from removal under the Convention. Alternatively, Petitioner requests that the Court remand to the BIA for further proceedings consistent with the arguments stated in the Brief of Petitioner and this Reply Brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jonathan H. Feinberg, hereby certify that, on March 12, 2003, I caused to be served true and correct copies of the foregoing Reply Brief of Petitioner via Federal Express, overnight delivery, upon counsel for Respondent:

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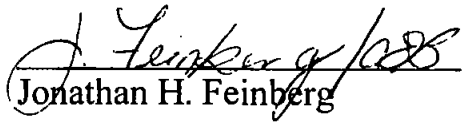

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