

98-4131

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

MOUSSA DIALLO,
Petitioner,

-against-

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEAL

**BRIEF OF THE LAWYERS COMMITTEE FOR
HUMAN RIGHTS AS *AMICUS CURIAE* FOR THE PETITIONER**

STEVEN J. KOLLEENY
JENNIFER A. FERRANTE
Four Times Square - - 24th Floor
New York, New York 10036
(212) 735-3000
Pro Bono Attorneys for
The Lawyers Committee for Human Rights
as *Amicus Curiae* for Petitioner
(Supporting reversal of the decision of the
Board of Immigration Appeals)

Of Counsel:
ELEANOR ACER

OFFICE COPY

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BRIEF *AMICUS CURIAE* OF THE LAWYERS
COMMITTEE FOR HUMAN RIGHTS

INTERESTS OF THE *AMICUS CURIAE*

Since 1978, the Lawyers Committee for Human Rights ("Lawyers Committee") has worked to protect and promote fundamental human rights and to ensure protection of the rights of refugees, including the right to seek and enjoy asylum. The Lawyers Committee grounds its work on refugee protection in the international standards of the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees, and other international human rights instruments, and advocates adherence to these standards in U.S. law and policy.

The Lawyers Committee operates the largest and most successful pro bono asylum representation program in the country. With the assistance of volunteer attorneys, the Lawyers Committee provides legal representation, without charge, to hundreds of indigent refugees each year. The Lawyers Committee and its volunteer attorneys represent approximately 900 clients from more than 60 countries. The Petitioner in this proceeding was not represented through our program; however, as noted in our request to appear, the Lawyers Committee, upon learning that the Petitioner was unrepresented and unable to afford counsel, assisted Petitioner in seeking pro bono representation.

The Lawyers Committee has compelling case-specific and jurisprudential concerns about the present case. First, the result reached with respect to Petitioner is contrary to law. Most notably, the decision of the Board of Immigration Appeals ("BIA") embraces the terrible irony so recently rejected by this Court, when it emphasized that "it must be acknowledged that a genuine refugee does not flee her native country armed with affidavits, expert witnesses, and extensive documentation." Abankwah v. INS, 185 F.3d 18, 26 (2d Cir. 1999). Firmly settled United States asylum law consistent with international law discussed below has long recognized that documentation corroborating the specific claims of a refugee who has testified credibly is simply not required. For this reason, the BIA decision in this case, which requires such corroboration, has severe ramifications for a wide

range of asylum proceedings. Because the BIA's decision has been designated as a precedent decision, it has a broad adverse impact on all asylum adjudications by asylum officers, immigration judges and the BIA.

By order filed November 10, 1999, this Court granted the Lawyers Committee permission to file an amicus brief. See Ex. A. Accordingly, the Lawyers Committee respectfully submits this amicus brief for the Court's consideration.

STATEMENT OF THE ISSUES ADDRESSED BY THE AMICUS CURIAE

The Lawyers Committee will not attempt in this brief to address all of the issues which are briefed by Petitioner. Instead, the Lawyers Committee will focus upon an issue of systemic importance: [whether the decision of the BIA impermissibly heightens the burden of proof of asylum applicants beyond the well-established standard by requiring Petitioner to corroborate his specific claims with documentary evidence.]

SUMMARY OF ARGUMENT

The BIA's decision impermissibly raises the burden of proof for refugees seeking asylum and withholding of deportation beyond the well-established standard. It is beyond dispute that under the controlling law of this Court, credible and persuasive testimony of an

alien, alone, is sufficient to establish entitlement to asylum and withholding of deportation. Melendez v. Department of Justice, 926 F.2d 211, 215 (2d Cir. 1991); see also Osorio v. INS, 18 F.3d 1017, 1021 (2d Cir. 1994). The BIA improperly evaluated Petitioner's inability to produce corroborating documentation of his nationality, claims of persecution and his and his family's stay at a refugee camp in Senegal in upholding the Immigration Judge's determination that Petitioner was not entitled to asylum or withholding of deportation. In heightening the well-established standard, the BIA failed to adhere to domestic law and international standards governing the protection of refugees and utterly disregarded the realities of the refugee situation. For these reasons, it is critically important for this Court to reverse the BIA decision.

ARGUMENT

I. THE BIA'S DECISION IMPERMISSIBLY RAISES THE BURDEN OF PROOF OF ASYLUM APPLICANTS BEYOND THE WELL-ESTABLISHED STANDARD.

A. The BIA's Decision Imposes an Improperly Heightened Standard of Proof on Asylum Applicants.

The BIA, in affirming the decision of the Immigration Judge, held that although Petitioner had presented his own testimony and documentation of persecution of black Mauritanians, he failed to meet his burden of proof to establish his asylum and withholding of deportation claims because he did not also provide documentary evidence corrobora-

rating his purported nationality, claim of persecution and his or his family's presence at a refugee camp. JA 2.¹ The BIA conceded that Petitioner had "submitted numerous articles and reports regarding general country conditions in Mauritania and the oppression of black Mauritians on account of their race," JA 4, and that the record contained a country profile prepared by the Department of State documenting this oppression, id. It further acknowledged that Petitioner had testified that his identity documents had been destroyed by his persecutors. Id. Nevertheless, the BIA faulted Petitioner's inability to produce a passport, birth certificate or identification card. JA 4-5. The BIA also faulted Petitioner for failing to come forward with letters or affidavits from his family members in Senegal and to provide documentary evidence of his and his family's stay at a refugee camp in Senegal. JA 6. The BIA's decision clearly contravenes United States law governing the protection of refugees.²

¹ References herein to "JA" are to the parties' Joint Appendix.

² The BIA purported to apply a test whereby Petitioner was required to either corroborate his testimony or provide an explanation for his inability to so corroborate. But, the BIA in fact disregarded Petitioner's explanations for his inability to verify portions of his testimony with documentation and disingenuously concluded that it "f[ou]nd significant the lack of any explanation for [his] inability to obtain such verification." JA 7. In any event, a test which requires documentation is inappropriate for the very reasons discussed in this brief.

B. The Governing Regulations and Firmly Settled Precedent Establish that Credible Testimony is Sufficient to Meet an Asylum Applicant's Burden of Proof.

Section 208(a) of the Refugee Act (which amended the Immigration and Nationality Act of 1952 ("INA") and is codified throughout 8 U.S.C.) authorizes the Attorney General, at her discretion, to grant asylum to eligible aliens. 8 U.S.C. § 1158(a). An asylum applicant must show he or she is a "refugee" within the meaning of the Act. 8 U.S.C. § 1101(a)(42)(A). A refugee is a person who is unable or unwilling to return to his home country because of "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." Id.³

The Supreme Court, after conducting an in-depth review of the applicable provisions of the Refugee Act, determined that the well-founded fear standard requires only proof of a "reasonable possibil-

³ Section 243(h) of the Refugee Act, by contrast, requires the Attorney General to withhold the deportation of an alien who demonstrates that if deported, his or her "life or freedom would be threatened" on account of one of the enumerated factors. 8 U.S.C. § 1253(h). The standard for granting withholding of deportation is more stringent than for granting asylum - - an applicant must establish that there is a clear probability, i.e., that it is "more likely than not," that he or she will suffer persecution if returned to the specified country. INS v. Cardoza-Fonseca, 480 U.S. 421, 423 (1987); Osorio, 18 F.3d at 1021; see also INS v. Stevic, 467 U.S. 407, 430 (1984) (holding that "clear probability of persecution" standard is applicable to withholding of deportation claims). Pursuant to the 1996 amendments to the INA, withholding of deportation is now called "withholding of removal." IIRIRA, § 309(a).

ity" of persecution. Cardoza-Fonseca, 480 U.S. at 440; see also id. (noting that an asylum applicant can have a "well-founded fear" of persecution even when he has only a "10% chance of being shot, tortured, or otherwise persecuted"). In so holding, the Supreme Court recognized that the very nature of asylum cases renders it inherent that applicants will not be able to prove for certain that they will be persecuted. See id. (explaining why asylum applicants are not required to show a clear probability of persecution).

In accordance with the Supreme Court's interpretation of the well-founded fear standard and in recognition of the difficulty asylum applicants face in obtaining documentation of their claims, the BIA subsequently held that "an alien's own testimony may in some cases be the only evidence available, and it can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear." In re Mogharrabi, 19 I. & N. Dec. 439, 445 (1987); see also In re B, Interim Decision 3251, 1995 BIA LEXIS 18, at *12 (May 19, 1995) (same); In re Villalta, 20 I. & N. Dec. 142, 143, 147 (1990) (asylum applicant met his burden of proof where he submitted general documentation about human rights conditions in El Salvador without producing evidence corroborating his specific claims of persecution).⁴

⁴ Some recent BIA decisions, however, in combination with the instant decision, have presented a disturbing trend in that they
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The Attorney General subsequently codified this principle in the regulations governing the Refugee Act by specifically providing that "[t]he testimony of the [asylum] applicant, if credible, may be sufficient to sustain [his or her] burden of proof without corroboration." 8 C.F.R. § 208.13(a) (the "burden of proof regulation").⁵ In proposing the burden of proof regulation, the Attorney General explained that the regulation reflected the Supreme Court's decision in Cardoza-Fonseca and was "drafted to recognize that the flight or defection of a bona fide refugee from a country that engages in widespread persecution may leave him in a difficult position to corroborate his claim." 52 Fed. Reg. 32,552, 32,553 (1987).⁶ The

⁴ (...continued)

stray from their precedent, as well as domestic and international standards, and condone an expectation that an alien's testimony will be corroborated by documentary evidence of some sort. See, e.g., In re Y-B, Interim Decision 3337, 1998 BIA LEXIS 3 (Feb. 19, 1998) (making adverse inference of credibility where documentation of stay at refugee camp was not produced). As discussed in this brief, such an approach impermissibly raises the burden of proof for asylum applicants.

⁵ Likewise, the Attorney General has promulgated regulations providing that an applicant for withholding of removal may meet his or her burden of proof with his testimony alone. 8 C.F.R. § 208.16(b).

⁶ Recently, the Attorney General reaffirmed that refugees are highly unlikely to flee persecution armed with any sort of documentation in promulgating regulations governing the section 203 of the Nicaraguan Adjustment and Central American Relief Act ("NACARA"). In explaining the difference between the burdens of proof of asylum applicants and those applying for suspension of deportation under NACARA, the Attorney General stated, "[a]n

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Basic Law Manual, a Department of Justice guide for federal government asylum law practitioners, affirms this principle. U.S. Dep't of Justice, Immigration & Naturalization Service, *The Basic Law Manual* 107 (Supp. 1995) ("An alien's own testimony may be sufficient, without corroborative evidence, to prove a well-founded fear of persecution."); *id.* at 110 (noting that asylum seeker's testimony "is often the most significant, if not the sole evidence presented").

Accordingly, this Court has held that in the absence of documentary proof, the applicant's testimony is sufficient to establish entitlement to asylum if it is "credible, persuasive and refers to specific facts that give rise to an inference that the applicant has been or has a good reason to fear that he or she will be singled out for persecution." *Melendez*, 926 F.2d at 215 (quoting *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1453 (9th Cir. 1985), *aff'd*, 480 U.S. 421 (1987)); see also *Abankwah*, 185 F.3d at 24; *Osorio*, 18 F.3d at 1031 (granting petition for review where asylum applicant's testimony sustained his burden of proof); *Carranza-Hernandez v. INS*, 12 F.3d 4, 7-8 (2d Cir. 1993) (credible testimony of asylum applicant demonstrated that he feared persecution if he returned to his home country). As this Court recently emphasized, "[w]ithout discounting the

⁶ (...continued)
asylum applicant understandably may not be able to provide documentary evidence of the circumstances that caused flight, given the nature of the claim." 64 Fed. Reg. 27,856, 27,867 (1999).

importance of objective proof in asylum cases, it must be acknowledged that a genuine refugee does not flee her native country armed with affidavits, expert witnesses, and extensive documentation." Abankwah, 185 F.3d at 26.

Other circuits have repeatedly confirmed that the well-founded fear standard does not require corroboration of credible and specific testimony. As the Third Circuit has stressed, "corroboration is not required to establish credibility." Senathirajah v. INS, 157 F.3d 210, 215-16 (3d Cir. 1998) (noting that "it is obvious that one who escapes persecution in his or her own land will rarely be in a position to bring documentary evidence or other kinds of corroboration" and that alien seeking refugee status may prove persecution claim with his own credible testimony); see also Gailius v. INS, 147 F.3d 34, 45 (1st Cir. 1998) (recognizing that alien seeking refugee status may prove persecution claim with his own credible testimony); Abdel-Masieh v. INS, 73 F.3d 579, 584 (5th Cir. 1996) (same). Similarly, in Lopez-Reyes v. INS, 79 F.3d 908, 912 (9th Cir. 1996), the Ninth Circuit reversed the Board's denial of asylum where an immigration judge had improperly found that the credibility of the applicant's testimony was weakened by his failure to corroborate his testimony with statements or letters from his mother in Guatemala or his friend in Mexico. The court explained that "[s]upplying corroborating affidavits . . . has never been required to establish an applicant's credibility." Id.

In Bolanos-Hernandez v. INS, 767 F.2d 1277, 1285 (9th Cir. 1984), the court again corrected the BIA where it required an asylum applicant to corroborate his claim. The court, in recognizing that "[a]uthentic refugees rarely are able to offer direct corroboration of specific threats," stressed that "the imposition of such a requirement would result in the deportation of many people whose lives are in jeopardy." Id.⁷

C. The BIA Erroneously Failed to Utilize the Proper Standard.

Despite the burden of proof regulation and well-developed precedent of this Court, the BIA here found that Petitioner failed to sustain his burden of proof because he did not provide documentary evidence, in addition to his credible testimony and documentation of the persecution of black Mauritians, corroborating the specifics of his claims. Because Petitioner's testimony was credible and persuasive - - indeed, the BIA did not conclude that Petitioner was not credible⁸ - - this ruling cannot be reconciled with the indisputable

See also Campos-Sanchez v. INS, 164 F.3d 448, 451 n.1 (9th Cir. 1999) (directing BIA on remand to refrain from requiring applicant to produce documents corroborating his claim of a well-founded fear of persecution); Sangha v. INS, 103 F.3d 1482, 1487 (9th Cir. 1997) (upholding BIA's denial of asylum but noting that "[b]ecause asylum cases are inherently difficult to prove, an applicant may establish his case through his own testimony alone").

⁸ While the Immigration Judge opined at one point that Petitioner "[had] not offered . . . specific, credible detail," JA 4, the BIA did not adopt this reasoning. In fact, nowhere did the BIA

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rule that credible testimony alone is adequate to satisfy an asylum applicant's burden of proof of a well-founded fear of persecution.

Indeed, this Court recently reversed a decision of the BIA where, as here, the BIA had faulted an asylum applicant for failing to produce evidence corroborating the specifics of her claims. Abankwah, 185 F.3d at 26. The Court in Abankwah, stressing that the consistent and specific testimony of an asylum applicant is enough to demonstrate a well-founded fear of persecution, criticized the BIA for being "too exacting both in the quantity and quality of evidence that it required." Id. at 24. Upon reading the applicant's testimony and affidavit and reviewing general evidence of persecution in the subject country, the Court determined that the BIA had erred in determining the applicant had not met her burden of proof. Id. Similarly, in Sotelo-Aguije v. Slattery, 17 F.3d 33, 36 n.2 (2d Cir. 1994), rev'd on other grounds, 62 F.3d 54 (2d Cir. 1995), the Court, citing the burden of proof regulation discussed above, rejected the BIA's suggestion

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assert that Petitioner did not provide enough detail to be believed. Moreover, the two dissenting board members specifically found Petitioner to be credible. JA 21 (Board Member Rosenberg finding that Petitioner had provided "credible and accurate testimony of his knowledge of Mauritania, and of his physical mistreatment, injuries, and other persecution suffered on account of his race, which is specific and internally consistent, containing detail that can be verified as plausible in light of known country conditions"); JA 10 (Chairman Schmidt finding that Petitioner's testimony was specific, detailed, consistent, believable and plausible).

that an applicant who had presented credible testimony should have provided additional corroborative evidence of the threats made against him.

In faulting Petitioner for failing to come forward with documentation of his identity and stay in a refugee camp, as well as evidence from his family in Senegal, the BIA impermissibly heightened his burden of proof. In strongly worded separate dissenting opinions, Board Chairman Paul W. Schmidt and Board Member Lory D. Rosenberg admonished the majority for deviating from the proper standard. See JA 13 (Chairman Schmidt discussing BIA's error in requiring corroboration); JA 15 (Board Member Rosenberg expressing belief that the majority's decision is "at odds" with the holdings of this Court). Numerous refugee law analysts who have reviewed the BIA's decision agree with the dissenters. See, e.g., Karen Musalo, *Credibility and Burden of Proof in Asylum Claims After the Board of Immigration Appeals' Four 1998 Decisions*, 1080 *PLI/Corp.* 277, 279-80 (1998) (discussing how BIA's recent decisions, including the instant decision, in expecting corroborating evidence in various circumstances, appear to have "raised the bar for asylum seekers"); Harvey Kaplan & Maureen O'Sullivan, *The Role of the BIA in Reviewing Negative Credibility Findings: Circumventing the Well-Founded Fear Standard*, 75 *Interpreter Releases* 1181, 1181 (1998) (noting that recent BIA decisions, including the instant decision, have raised the burden of proof

on the applicant and have invented "unjustified new standards for corroboration and credibility"); see also Deborah E. Anker, *Law of Asylum in the United States* 158 (3d ed. 1999) (noting that recent BIA decisions, including the instant decision, have "complicated" the application of the principle that an alien's credible and persuasive testimony is sufficient without corroboration).

In improperly heightening the burden of proof, the BIA has effectively limited the scope of its review of decisions of immigration judges. See Kaplan & O'Sullivan, *supra*, at 1181 (noting that decisions condoning an "artificial expectation of corroboration . . . show the Board reneging on its review responsibilities, adopting the findings of the [Immigration Judges] and attempting to insulate those findings from meaningful review"); Thomas K. Ragland, *Presumed Incredible: [A View from the Dissent]*, 75 Interpreter Releases 1541, 1546 (1998) (noting that in recent decisions, including the instant decision, the BIA has "devised a succession of tests whereby the Board can dispose of a claim without conducting a meaningful analysis of an applicant's credibility").

The importance of meaningful BIA review of asylum decisions is indisputable. As three board members recently stated in discussing the nature of the BIA's review, the BIA cannot "surrender [its] authority to review the record." In re O-D-, Interim Decision 3334, 1998 BIA LEXIS 36, at *35 (Jan. 8, 1998) (Board Chair Schmidt, Board

Members Rosenberg and Guendelsberger, dissenting). The Courts of Appeal have consistently been concerned with the BIA's responsibilities in reviewing decisions of immigration judges. See, e.g., Watkins v. INS, 63 F.3d 844, 851-52 (9th Cir. 1995) (stressing requirement that BIA conduct a "meaningful" review of immigration judge's decision); Cortes-Castillo v. INS, 997 F.2d 1199, 1203 (7th Cir. 1993) (discussing importance and nature of BIA's review); Becerra-Jimenez v. INS, 829 F.2d 996, 1000 (10th Cir. 1987) (same). Indeed, Congress itself has recognized the critical importance of meaningful review in asylum cases when, in passing the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, it specifically preserved the federal appellate courts' review of asylum decisions despite attempts to deprive federal courts of review in other areas. Pub. L. No. 104-208, 110 Stat. 3009.

II. THE BIA'S DECISION IS INCONSISTENT WITH INTERNATIONAL STANDARDS AND JEOPARDIZES THE UNITED STATES' ABILITY TO COMPLY WITH ITS OBLIGATIONS UNDER INTERNATIONAL LAW.

The modern refugee regime developed in the wake of the World War II refugee crisis. See Robert L. Newmark, *Non-Refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs*, 71 Wash. U.L.Q. 833, 863 (1993) (noting that "the aftermath of World War II illustrated the importance of providing some protection for those in flight"). Between 1948 and 1951, the Convention Relating to the Status of Refugees ("1951 Convention") was drafted to establish

protections for those who had a well-founded fear of being persecuted as a result of events occurring before January 1, 1951. 189 U.N.T.S. 2545; Anker, *supra*, at 2-3; James C. Hathaway, *The Law of Refugee Status* 7 (rev. ed. 1998).⁹ Then in 1967, the Protocol Relating to the Status of Refugees ("1967 Protocol") undertook to ensure that the protections of the 1951 Convention were applied to all refugees, regardless of the 1951 deadline. 19 U.S.T. 6224; Hathaway, *supra*, at

7. The United States agreed to be bound by the provisions of the 1951 Convention in 1968 when it adhered to the 1967 Protocol. 19 U.S.T. 6224. At the heart of the 1951 Convention is the non-refoulement principle, which provides: "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." 189 U.N.T.S. 150, 176 (1954), 19 U.S.T. 6259, 6278, T.I.A.S. No. 6577 (1968).

The Refugee Act¹⁰ amended the INA to bring the United States into conformity with the analogous provisions of the 1951 Convention. See Cardoza-Fonseca, 480 U.S. at 436-37 ("If one thing is clear from the

⁹ The Convention was drafted because the U.N. had "manifested its profound concern for refugees and endeavored to assure refugees the widest possible exercise of their fundamental rights and freedoms." 1951 Convention, Preamble ¶ 2.

¹⁰ Pub. L. No. 96-212, 94 Stat. 102.

legislative history of [the Refugee Act], it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 [Protocol]."). Indeed, the Refugee Act specifically incorporated the Convention's definition of a refugee. *Id.* at 437 (comparing meaning of refugee under Refugee Act with meaning under the 1951 Convention and holding that Refugee Act adopted the Convention's definition of refugee).

The handbook published by the Office of the United Nations High Commissioner for Refugees ("UNHCR") to assist parties to the Convention in determining refugee status¹¹ recognizes that "the requirement of evidence should . . . not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself." UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951*

¹¹ The Handbook, although not binding authority on the federal courts, has been given great weight by the courts, including this Court, when reviewing asylum decisions and interpreting the Refugee Act, including its provisions governing an asylum applicant's burden of proof. See *Cardoza-Fonseca*, 480 U.S. at 439 n. 22 (recognizing that Handbook provides "significant guidance" in construing provisions of the Convention which are mirrored in the Refugee Act); *Osorio*, 18 F.3d at 1027 n.4 (same); *Ramos-Vasquez v. INS*, 57 F.3d 857 (9th Cir. 1995) (same); *Zavala-Bonilla v. INS*, 730 F.2d 562, 567 (9th Cir. 1984) (citing Handbook for principle that because aliens have difficulties collecting proof, their credible testimony should be given the benefit of the doubt); see also *INS v. Aquirre-Aquirre*, 119 S. Ct. 1439, 1447 (1999) (noting that Handbook may be "useful and interpretive aid" but is not binding on the BIA or the federal courts and rejecting BIA's reliance on Handbook).

Convention and the 1967 Protocol Relating to the Status of Refugees ¶ 197 (1992) (the "Handbook"). Accordingly, the Handbook advocates that an asylum applicant who testifies credibly be given the "benefit of the doubt." *Id.* ¶ 196. More specifically, the Handbook states:

It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all of his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently leave without personal documents . . . [I]f the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.

Id. (emphasis added).¹²

Authorities on international refugee law have similarly recognized that asylum seekers cannot be expected to produce documentary proof and corroboration of their claims. For instance, Guy Goodwin Gill has pointed out:

¹² The Handbook even recognizes that asylum applicants who do possess valid passports may be perceived (at times incorrectly) as not being authentic refugees. Handbook ¶ 47 (explaining that some may assume that authorities would not have issued the passport if they intended to persecute the holder). See also *Dobrota v. INS*, 195 F.3d 970, 974 (7th Cir. 2000) (holding that issuance of a passport by an alleged country of persecution "may constitute evidence that future persecution is unlikely") (emphasis added); *Urukov v. INS*, 55 F.3d 222, 229 (7th Cir. 1995) (noting that applicant's ability to leave country with a valid passport undermined his political persecution argument).

Arg for de novo
BIA Review of
facts.

Refugee claims are not like other cases; they rarely present hard facts, let alone positive proof or corroboration. More often than not, the decision-maker must settle for inferences instead, that is conclusions drawn from the generally inadequate material available. In the absence of hard evidence, the possibility of persecution must be inferred from the personal circumstances of the applicant, and from the general situation prevailing in the country of origin.

Guy S. Goodwin Gill, *The Refugee in International Law* 136, 356 (2d ed. 1996). Another commentator notes:

In one respect . . . a liberal attitude is called for outright, in order that full effect be given to the provisions of the Refugee Convention and the purposes for which they are intended: it is a well-known fact that a person who claims to be a refugee may have difficulties in proving his allegations. He may have left his country without any papers, there may be nobody around who may testify to support his story, and other means of corroboration may be unavailable. It would go counter to the principle of good faith if a Contracting State should place on a suppliant a burden of proof which he, in the nature of things, could not possibly cope with.

1 Atle Grah-Madsen, *The Status of Refugees in International Law* 145-46 (1966).

Thus, by requiring asylum applicants to provide documentary corroboration of their claims, the BIA's decision runs contrary to international refugee law obligations to provide refugee protection.¹³

¹³ As observed by dissenting Board Member Rosenberg, the majority's decision, coupled with other recent BIA decisions distorting the asylum applicants' burden of proof, "have impermissibly diminished our statutory obligations (which mirror those assumed by virtue of our accession to the 1967 Protocol Relating to the
(continued...)

Moreover, the imposition of such a heightened burden of proof dramatically increases the likelihood that genuine refugees will be deported in violation of our non-refoulement obligation. See Bolanos-Hernandez, 767 F.2d at 1285 (noting that "[a]uthentic refugees rarely are able to offer direct corroboration of specific threats," and stressing that "the imposition of such a requirement would result in the deportation of many people whose lives are in jeopardy").

III. THE BIA'S DOCUMENTARY CORROBORATION REQUIREMENT IS AT ODDS WITH THE REALITIES OF THE REFUGEE SITUATION.

The BIA's decision is particularly disturbing given the realities of the refugee situation. The BIA requires just the sort of documentation that an individual fleeing persecution will typically not be able to produce. As noted throughout the discussion above, U.S. courts, commentators, the Attorney General's regulations, the UNHCR Handbook and international refugee law scholars, have all repeatedly recognized the difficulty faced by refugees in producing documents. The Third Circuit eloquently underscored this difficulty just last year:

It is obvious that one who escapes persecution in his or her own land will rarely be in a position to bring documentary evidence or other

¹³ (...continued)
Status of Refugees), which incorporated provisions of the 1951 Convention, by wrongly elevating technical evidentiary tests - - which often are misapplied . . . - - over our obligation to provide refugee protection." JA 14 (citing Cardoza-Fonseca, the Handbook and various Board authorities) (footnotes omitted).

kinds of corroboration to support a subsequent claim for asylum. It is equally obvious that one who flees torture at home will rarely have the foresight or means to do so in a manner that will enhance the chance of prevailing in a subsequent court battle in a foreign land. Common sense establishes that it is escape and flight, not litigation and corroboration that is foremost in the mind of an alien who comes to these shores fleeing detention, torture and persecution. Accordingly, corroboration is not required to establish credibility. The law allows one seeking refugee status to "prove his persecution claim with his own testimony if it is credible."

Senathirajah, 157 F.3d at 215-16 (citation omitted).

The recent Kosovo refugee crisis illustrates the stark reality refugees face in preserving and collecting documentation of any sort. The systematic destruction of the identity documents of the Kosovars has been well-documented. See, e.g., UK 'Foot Dragging' on Refugee Crisis, *The Times* (London), Apr. 30, 1999, at 27 (noting that it is "common knowledge that Kosovar refugees are being stripped of their documents on leaving their homeland"); Susan Milligan, *Kosovars Struggle to Rebuild Identity; Records Destroyed by Serbs Held Pieces of Returning Refugees' Lives*, *Boston Globe*, July 15, 1999, at A7 (describing burning of Kosovars' identification cards, passports, driver's licenses, license plates and work records); Drusilla Menaker, *Lost Identities*, *Dallas Morning News*, May 17, 1999, at 1A (describing how Kosovars "poured out of Kosovo with little more than the clothes they wore" and noting their loss of all records that gave them a past).

Similarly, many Jewish refugees during World War II, when trying to escape from the Nazi regime, were without documentation of any sort. To effectuate their escape, they were forced to obtain false documentation of their identity. See Maura Casey, *A Diplomat's Quiet Battle to Rescue Jews Emerges*, N.Y. Times, July 11, 1999, Section 14CN at 1 (discussing exhibit at the National Holocaust Museum in Washington, D.C. dedicated to those who provided Jewish refugees with fraudulent documentation); Kaplan & O'Sullivan, *supra*, at 1181 (same).

Indeed, refugees fleeing persecution in Mauritania are not unlike these other groups of refugees and are routinely unlikely to possess documentation of any sort. In fact, it is well-documented that black Mauritians were frequently stripped of their documents by their persecutors, leaving them without any record of their identities. See, e.g., JA 184 (Human Rights Watch World Report, *An Annual Review of Developments and the Bush Administration's Policy on Human Rights Worldwide* (Jan. 1991) (documenting how Mauritania tried to "get[] rid" of its black population by arresting people in their home, stripping them of their identity papers and deporting them)); JA 195 (*Group Eyes Mauritanian Rights*, Associated Press, Apr. 17, 1994) (discussing Mauritanian government's refusal to issue new citizenship papers to its black citizens)); JA 208 (U.S. Dep't of State, *Mauritania Country Report on Human Rights Practices for 1994* (1995) (stating that "the Government [of Mauritania] has so far failed to set up clear

administrative procedures for expellees wishing to obtain confirmation of their citizenship and associated rights").

Similarly, it is widely recognized that it can be difficult to impossible to obtain proof of presence at a refugee camp, and particularly in a refugee camp in Senegal. Indeed, Board Member Rosenberg advocated that the Board take administrative notice "that refugee camps in developing third world countries often lack the staff or advanced computer resources that would provide the accuracy necessary to treat the absence of any record as more than a mere anecdotal factor." JA 17-18.¹⁴ See also JA 11 (Chairman of the Board Schmidt

¹⁴ Board Member Rosenberg later highlights the injustice and impracticability of the majority's decision:

[T]he majority unreasonably expects [Petitioner] to obtain and provide affidavits from his family in a refugee camp, when he cannot even contact them, when conditions in that camp are such that the UNHCR has acknowledged the difficulty of verifying his or their presence there, and when it is likely that members of his family, like him, are illiterate. Certainly, it is highly unlikely that even if they could be located, their family relationship to him could be substantiated by valid and acceptable certifications, or that, if written statements were provided for their signature or mark, a notary public would be available in the camp.

.....

Likewise when one is a refugee from a country in which the government military destroyed his identification and expelled him, the impediments to obtaining identification documents that

(continued...)

adding in dissent that "the process of obtaining a document from a refugee camp has not been shown to be foolproof, and there is no basis for concluding that such a document is readily available"). In fact, the process of documenting refugees' stays in Sengalese camps is so deficient that the UNHCR itself has flat out declined to participate in the BIA's verification process, citing the fallibility of its own system. The UNHCR explained:

[T]he lack of specific documentation from our Office in support of [Mauritanian claims] has been given undue weight in determining . . . credibility [I]t is frequently necessary to give the applicant the benefit of the doubt.

It should be borne in mind that it is often difficult or impossible to obtain documentary support of an asylum seeker's claim We would not want verification, or lack of verification, or refugee registration in Senegal to substitute for a full assessment of evidence . . . in the form of coherent and plausible testimony, consistent with the conditions in the applicant's country.

JA 24 (UNHCR Letter of Dec. 29, 1997, as attached to BIA decision as App. A).

In order to properly uphold the mandates of U.S. and international refugee law, which developed from an understanding of the reality of the refugee situation, it is essential that the BIA's

¹⁴ (...continued)
normally would be issued by the government should be obvious.

JA 20-22.

decision, which has created an insurmountable evidentiary barrier to genuine refugees, be overturned. If left to stand, the decision is certain to foreclose the legitimate claims of many refugees.

CONCLUSION

The Lawyers Committee urges the Court to grant the Petitioner's petition for review and to reverse the BIA's decision upholding the Immigration Judge's denial of Petitioner's applications for asylum and withholding of deportation.

Dated: New York, New York
March 13, 2000

Respectfully submitted,

Steven J. Kolleeny
Jennifer A. Ferrante
Four Times Square - - 24th Floor
New York, New York 10036
(212) 735-3000

By: 

Steven J. Kolleeny

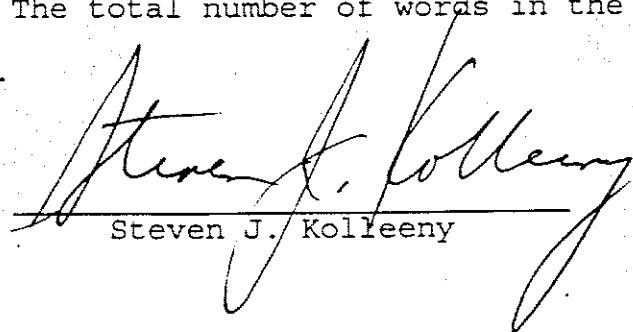
Pro Bono Attorneys for THE
LAWYERS COMMITTEE FOR HUMAN
RIGHTS as Amicus Curiae for
Petitioner

Of Counsel:

Eleanor Acer
THE LAWYERS COMMITTEE FOR
HUMAN RIGHTS
333 Seventh Avenue, 13th Floor
New York, New York 10001
212-845-5231

Certificate of Compliance

I, Steven J. Kolleeny, *pro bono* counsel of record for the Lawyers Committee for Human Rights as *amicus curiae* for Petitioner, do hereby certify that the foregoing brief complies with the type-volume limitation as set forth in FRAP 32(a)(7). The total number of words in the foregoing brief is 5,896.



Steven J. Kolleeny

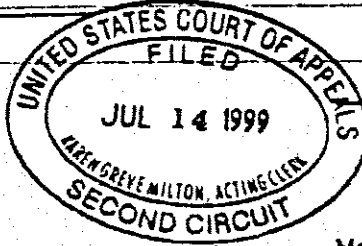
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12/98

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ORIGINAL

Each motion should be accompanied by a supporting affidavit with statement of issues. (Local Rule 27(a))
Include brief statement of facts with page references to the moving papers.

Moussa Diallo,
Petitioner,
v.
Immigration and Naturalization Service,
Respondent.



98-4131
Docket Number

MOTION INFORMATION FORM

Motion for Leave to File Amicus Brief

Use short title

MOTION BY: (Name, address and tel. no. of law firm
and of attorney in charge of case)

Lawyers Committee for Human Rights
333 Seventh Avenue - 13th Floor
New York, New York 10001
(212) 845-5200

Steven J. Kolleyen
919 Third Avenue
New York, NY
10022
(212) 735-3000

Has consent of opposing counsel:

A. been sought? Yes No
B. been obtained? Yes No

Has service been effected? Yes No

Is oral argument desired? N/A Yes No
(Substantive motions only)

Requested return date: _____
(See Second Circuit Rule 27(b).)

Has argument date of appeal been set:

A. by scheduling order? Yes No
B. by firm date/argument notice? Yes No
C. If yes, enter date: As early as week of October
26, 1999

Judge or agency whose order is being appealed: Board of Immigration Appeals

Brief statement of the relief requested: Permission to file an amicus brief in support of Petitioner's petition for review. (See attached Affidavit of Eleanor Acer)

By: (Signature of Attorney)

Signed name must be printed beneath.

Steven J. Kolleyen

Date: 7/13/99

ORDER

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BEFORE:

IT IS HEREBY ORDERED that the motion be and it hereby is

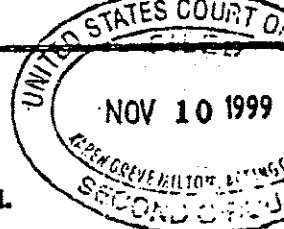
granted denied.

FOR THE COURT

Karen Greve Milton, Acting Clerk

By

Frank J. Scardilli
Frank J. Scardilli, Staff Counsel



K

AFFIDAVIT OF SERVICE BY MAIL


STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Maria Marin, being duly sworn, deposes and says:

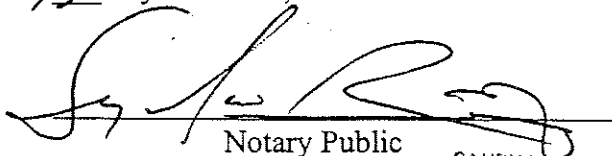
1. I am over eighteen years of age, not a party to the action and reside in Kings County, New York.
2. That on the 13th day of March, 2000, I served a true copy of the foregoing *Brief of the Lawyers Committee for Human Rights as Amicus Curiae for the Petitioner* by first-class mail by depositing same in a post-paid properly addressed envelope, in an official depository under the exclusive care and custody of the U.S. Postal Service within the State of New York upon all parties listed on:

James A. O'Brien, III, Esq.
Special Assistant United States Attorney
United States Attorney's Office for the
Southern District of New York
100 Church Street, 19th Floor
New York, New York 10007

Michael Dion, Esq.
Davis Polk & Wardwell
450 Lexington Avenue
New York, New York 10017


Maria Marin

Sworn to before me this
13th day of March, 2000


Notary Public

SANDY-MATTHEW REISIG
Notary Public, State of New York
No. 31-4800657
Qualified in New York County
Commission Expires 11-30-01