03-40753-ag

To Be Argued By:
EDWARD CHANG

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 03-40753-ag

MOHAMMED S. DIALLO,
Petitioner,

-vs-

JOHN ASHCROFT, Attorney General,
Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR JOHN ASHCROFT ATTORNEY GENERAL OF THE UNITED STATES

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STATEMENT OF JURISDICTION

This Court has appellate jurisdiction under § 242(b) of the Immigration and Naturalization Act of 1952, as amended ("INA"), 8 U.S.C. § 1252(b) (2000), to review the petitioner's challenge to the September 26, 2003 order of the Board of Immigration Appeals ("BIA") denying his motion to reopen. *See Infanzon v. Ashcroft*, 386 F.3d 1359, 1361-62 (10th Cir. 2004).

The Court does not have jurisdiction to review the BIA's January 27, 2000 order, affirming the immigration court's order denying the petitioner's applications for asylum and withholding of removal, because the petitioner never sought review thereof. *See id.*; *Malvoisin v. INS*, 268 F.3d 74, 75-76 (2d Cir. 2001).

ISSUES PRESENTED FOR REVIEW

1. Did the BIA abuse its discretion in holding petitioner's motion to reopen untimely, where the motion was filed more than two years after the final administrative decision, petitioner failed to exercise reasonable diligence, and petitioner failed to show changed country conditions?

2. Did the BIA abuse its discretion in denying petitioner's motion to reopen on the basis of new evidence, where the proffered evidence was previously available and not material?

3. Did the BIA abuse its discretion in denying petitioner's motion to reopen in order to apply for relief under the Convention Against Torture, where petitioner failed to establish a likelihood of any future harm, much less of torture?

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BRIEF FOR JOHN ASHCROFT
Attorney General of the United States

Preliminary Statement

Mohammed S. Diallo ("Diallo"), a citizen of Guinea, petitions this Court pursuant to section 242 of the INA, 8 U.S.C. § 1252 (2000), to review a September 26, 2003, decision of the Board of Immigration Appeals. The BIA denied Diallo's motion to reopen his removal proceedings

based on new evidence, changed country conditions, and a claim under the United Nations Convention Against Torture (the “Convention” or “CAT”).

The BIA acted well within its considerable discretion in denying the motion to reopen. In the first place, the motion was untimely. The motion was filed nearly three and a half years after Diallo’s order of removal had become final, well past the ninety days permitted by regulation. The BIA did not abuse its discretion in declining to equitably toll the limitations period based on the ineffective assistance of Diallo’s former attorney, because Diallo did not file his motion to reopen for more than eleven months after learning of his attorney’s misconduct and thus did not exercise reasonable diligence. The BIA also did not abuse its discretion in rejecting Diallo’s claim of changed country conditions, because the allegedly changed conditions were not actually changed but rather of long standing.

The BIA also did not abuse its discretion in denying the motion to reopen on alternative grounds. With respect to Diallo’s claim of new evidence, the BIA correctly found that the documents submitted by Diallo were previously available and not material. With respect to Diallo’s CAT claim, the BIA correctly concluded that the claim had no merit in light of the IJ’s findings, which Diallo did not rebut, including the finding that Diallo failed to show that he would face harm if returned to Guinea.

Statement of the Case

Diallo was placed into removal proceedings on July 14, 1997. (*See* A 328-329). Diallo's applications for asylum and withholding of removal were denied on October 5, 1998, and he was granted voluntary departure with an alternative order of removal to Guinea. (*See* A 197). Diallo's appeal to the BIA was dismissed on January 27, 2004. (*See* A 186-188).

Diallo filed a motion to reopen before the BIA on May 14, 2003. (*See* A 9). His motion was denied on September 26, 2003. (*See* A 1-4). This appeal followed.

Statement of Facts

A. Petitioner's Immigration History

Petitioner Mohammed S. Diallo entered the United States on November 18, 1995. (*See* Joint Appendix ("A") 328). On or about May 2, 1997, Diallo submitted an application for asylum and withholding of deportation. (*See* A 275-282). In a brief statement accompanying the application, Diallo claimed that he was a citizen and native of Guinea, that he belonged to the Union for the Renewal of the Republic ("UNR"), and that his stepfather Mamadou Barry was a founding member of the UNR and its second in command. (*See* A 282). Diallo also stated that he drove his stepfather to rallies and that he campaigned for the UNR. (*See id.*). Diallo further stated that, on March 28, 1993, "the government sent some people" to set his "space in the marketplace on fire" and that he was "arrested and detained in jail for 25 days." (*Id.*). Diallo added that his father had been killed under an

earlier regime, *i.e.*, "the government of Sekou Toure." (*Id.*).

B. Proceedings Before the Immigration Judge

On July 14, 1997, Diallo was served with a Notice to Appear, charging that he was subject to removal for overstaying his visa. (*See* A 328-329). Diallo appeared before an immigration judge on November 7, 1997, February 23, 1998, and September 11, 1998, represented each time by Theophilus Maranga, Esq. (*See* A 207, 213, 219).

On October 5, 1998, still represented by Mr. Maranga, Diallo testified at an asylum hearing. (*See* A 223). Diallo testified that he belonged to the UNR, where his role was "[t]o bring people together, to campaign for it." (A 229). Diallo also testified that he would "drive" his stepfather, Mamadou Barry, who was second in command of the UNR. (A 229-231). Diallo testified that, as of March 23, 1998, his stepfather had been detained, together with the head of the UNR, by the government of President Lansana Conte. (*See* A 232-233; *see also* A 243). With respect to his father, Diallo testified that his father died after being arrested in 1977 by the previous government. (*See* A 230).

When Diallo was asked why he left Guinea, he answered: "Because I had a business. They came, they destroyed it by burning it, and they arrested me. They burned the place. They arrested me and they detained me for 25 days." (A 234). Diallo attributed his arrest and detention to "[t]he people, the military of the government." (*Id.*).

Diallo testified that his mother, who was married to his stepfather (*see* A 229), was living in Guinea. (*See* A 234). Diallo testified: "I know she's there. She's fine now." On cross-examination, Diallo also testified that his mother was working at a government hospital, and that he had two sisters and two brothers who lived with his mother and attended school. (*See* A 236-237). Finally, Diallo testified that he received a passport from the government in 1994 (*see* A 237) and that he was permitted to leave Guinea in 1995, after obtaining an exit stamp from police in the airport (*see* A 238).

The immigration judge ("IJ") denied Diallo's application, finding that Diallo had not established a well-founded fear of persecution. As an initial matter, the IJ found that Diallo had not established past persecution, because there was no evidence that the 1993 arrest and detention were related to Diallo's political activities. Specifically, the IJ found no evidence that, "prior to 1993, [Diallo] engaged in acts or any conduct that would have caused anyone in a position of authority in Guinea to take adverse action against him." (A 202).

The IJ referred to an arrest warrant, which had been admitted into evidence but not mentioned during Diallo's testimony. (*See* A 292-293). The warrant, dated October 1, 1995, charged Diallo as an "agitator" with respect to the events that took place on March 28, 1993, *i.e.*, the date of his arrest and detention more than two years earlier. (A 203; *see also* A 282 & 292). The court noted that Diallo provided no explanation for why, if "they were after him, . . . no adverse action was taken against him" during the intervening two years. (A 203).

The IJ also found that Diallo could not rely on his relationship with his stepfather as a basis for persecution, given that there was no evidence of persecution against Diallo's mother or siblings and no evidence that the government impeded Diallo's departure. (*See* A 202-204). With respect to Diallo's mother, the court observed that, by Diallo's own testimony, his mother was employed in a government hospital and doing "fine." (A 202). Diallo's four siblings remained in Guinea and attended school. (*See* A 203). In short, "[n]o evidence was offered by [Diallo] that anyone in his immediate family was ever harmed by the government of Guinea, simply because of their family relationship to [his stepfather]." (A 203).

Finally, the IJ rejected Diallo's claim that he would face harm if returned to Guinea:

> His mother remains in Guinea. She is employed in a government-run hospital. [Diallo] had two separate contacts with the Guinean government, both in 1994 and 1995. On both of those occasions, those contacts were a manifestation of [his] desire to leave Guinea.
>
> [Diallo] sought a Guinean passport from the Guinean government in 1994. No action was taken against [him] at that point, and for a year after that. [Diallo] admitted that he was given an exit stamp in 1995. In essence, permission to leave Guinea in 1995.
>
> [Diallo] was not stopped or prevented from leaving Guinea in 1995 by the police. Therefore, his claim that he would face harm if he returns to

> Guinea is not well-founded. It is totally unsupported by the evidence.

(A 204).

C. The BIA's Decision on Appeal

Diallo filed a timely notice of appeal on November 2, 1998. (*See* A 192-194). Still represented by Mr. Maranga, Diallo indicated that he would file a separate brief in support of his appeal. (*See* A 194). The BIA consequently issued a scheduling order, directing Diallo to file a brief by April 5, 1999. (*See* A 191).

On January 27, 2000, the BIA summarily dismissed the appeal, having not received a brief from Diallo. (*See* A 189-190).

D. The BIA's Decision on the Motion to Reopen

On May 14, 2003, represented by new counsel, Diallo filed a motion to reopen his removal proceedings. (*See* A 9-183). Diallo based his motion on grounds of ineffective assistance of counsel, availability of new evidence, and changed country conditions. (*See* A 15). Diallo asserted, *inter alia*, that his stepfather had been recommended for asylum. (*See* A 24). Alternatively, Diallo moved to reopen in order to present a claim under CAT. (*See id.*).

The BIA denied Diallo's motion on September 26, 2003. (*See* A 2-4). Initially, the BIA observed that the motion to reopen was filed almost three and a half years after its decision dismissing Diallo's appeal, far beyond the ninety days permitted by regulation. (*See* A 3 (citing

8 C.F.R. § 1003.2(c)(2))). The BIA determined that Diallo was not entitled to equitable tolling of the ninety-day period, because he failed to exercise due diligence. Specifically, even after Diallo learned of the purported ineffective assistance of his former counsel, he did not file the motion to reopen until "more than 8 months later." (*Id.*).

Accordingly, the BIA declined to reopen on the basis of new evidence because the motion was untimely. (*See* A 3). The BIA further held, in the alternative, that the purported "new" evidence proffered by Diallo was not previously unavailable and that his stepfather's eligibility for asylum did not establish his own eligibility for asylum. (*See* A 3-4).

With respect to Diallo's claim of changed country conditions, the BIA observed that Diallo had not established his prima facie eligibility for asylum, *i.e.*, that he faced persecution on account of political opinion or another statutory basis. (*See* A 4). The BIA further held that Diallo failed to show "that country conditions in Guinea . . . changed so significantly since [his] previous hearing that it would result in a material change in [his] own personal circumstances." (*Id.*).

Finally, the BIA declined to reopen on the basis of Diallo's CAT claim. The BIA reasoned that the motion and supporting evidence "simply reiterate the factual basis underlying [Diallo's] asylum claim and fail to meaningfully address the Immigration Judge's findings or other deficiencies noted in the Immigration Judge's decision." (*Id.*).

SUMMARY OF ARGUMENT

The BIA did not abuse its discretion in denying Diallo's motion to reopen. The motion was filed nearly three and a half years after Diallo's order of removal became final, well past the ninety days permitted by 8 C.F.R. § 1003.2(c)(2). *See* Point I, *infra*.

Although the ninety-day limitations period is subject to equitable tolling, the BIA did not abuse its discretion in determining that Diallo was not entitled to equitable tolling because of his failure to exercise reasonable diligence. *See* Point I.C.1, *infra*. Specifically, Diallo seeks to toll the limitations period based on his former attorney's failure to file a brief in support of his appeal to the BIA, but even after learning of the misconduct, Diallo did not file the motion to reopen for more than eleven months. *See id.* Moreover, Diallo cannot justify his lack of diligence by claiming that he was attempting to comply with *In re Lozada* (a decision of the BIA establishing certain requirements with respect to motions to reopen based on ineffective assistance of counsel). Even after learning of his former attorney's misconduct, Diallo did not begin attempting to comply with *Lozada* until six months had passed. *See id.*

The BIA also did not abuse its discretion in concluding that Diallo failed to show a material change in country conditions, as required in order to avoid the ninety-day limitations period pursuant to 8 C.F.R. § 1003.2(c)(3)(ii). *See* Point I.C.2, *infra*. Diallo submitted documents to show the repression of political freedoms in Guinea, but the record firmly establishes that such repression is a problem of long duration and, in particular, existed at the

time of Diallo's asylum hearing. *See id.* Indeed, by contending in his motion to reopen that conditions "have not improved" and that Guinea "remains a dangerous place," Diallo recognizes that political repression in Guinea is of a continuing nature, not a changed country condition that warrants reopening. *See id.*

Even if Diallo's motion to reopen was timely, the BIA did not abuse its discretion in denying the motion on alternative grounds. With respect to Diallo's claim of new evidence, the BIA correctly found that the documents submitted by Diallo were previously available and not material. *See* Point II, *infra*. Notably, the documents merely served to corroborate facts that were questioned by the IJ; the documents did not address the fundamental shortcoming of Diallo's asylum application, *i.e.*, his inability to show that he himself had a well-founded fear of persecution. *See id.*

With respect to Diallo's CAT claim, the BIA observed that Diallo failed to rebut the findings of the immigration judge, one of which was that Diallo had not shown that he would face harm if returned to Guinea. *See* Point III, *infra*. Because Diallo had not shown that he would face harm, *a fortiori* he had not shown that he would face torture. Accordingly, the BIA properly denied Diallo's motion to reopen to assert a CAT claim. *See id.*

ARGUMENT

I. The BIA Properly Denied Petitioner's Motion to Reopen As Untimely

A. Relevant Facts

The relevant facts are set forth in the Statement of the Facts, above.

B. Governing Law and Standard of Review

The purpose of a motion to reopen is to permit an alien to seek relief from deportation based on new facts or evidence. *See Socop-Gonzalez v. INS*, 272 F.3d 1176, 1180 (9th Cir. 2001) (*en banc*); *In re Cerna*, 20 I. & N. Dec. 399, 402 (BIA 1991). Such motions are "disfavored" in light of the "strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases." *INS v. Abudu*, 485 U.S. 94, 107 (1988).

A motion to reopen must generally be filed "no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened." 8 C.F.R. § 1003.2(c)(2) (2004). The limitations period was established by congressional directive in order to redress the problem of "successive and frivolous administrative appeals and motions." *Stone v. INS*, 514 U.S. 386, 400 (1995).

The limitations period is subject to equitable tolling. *See Iavorski v. INS*, 232 F.3d 124, 129-34 (2d Cir. 2000). "Equitable tolling applies 'as a matter of fairness where a [party] has been prevented in some extraordinary way

from exercising his rights.'" *Id.* at 129 (alteration in original) (quoting *Johnson v. Nyack Hosp.*, 86 F.3d 8, 12 (2d Cir. 1996)). A party invoking equitable tolling must establish that it acted "'with reasonable diligence through the period it seeks to have tolled.'" *Id.* at 134 (quoting *Johnson*, 86 F.3d at 12).

In addition, the limitations period does not apply to a claim of changed country conditions if the evidence thereof "is material and was not available and could not have been discovered or presented at the previous hearing." 8 C.F.R. § 1003.2(c)(3)(ii) (2004).

The BIA's decision not to reopen removal proceedings is reviewed only for abuse of discretion. *Infanzon*, 386 F.3d at 1362 (holding that BIA did not abuse its discretion in denying untimely motion to reopen); *see also Iavorski*, 232 F.3d at 128.

C. Discussion

1. The Petitioner Is Not Entitled to Equitable Tolling

In this case, Diallo's motion to reopen was filed over three years after the BIA's January 27, 2000, decision dismissing his appeal. (*See* A 9-183, 189-190). As a consequence, his motion is untimely.

Diallo claims, however, that he is entitled to equitable tolling based on the ineffective assistance of his former counsel. According to Diallo, he did not learn of the ineffective assistance until after he retained new counsel, on May 6, 2002, and "a FOIA request was received and reviewed several months later." (A 20; *see also*

Petitioner's Brief at 17 ("Pet. Br.") (claiming that Diallo first learned of his former counsel's misconduct in September 2002)).

In fact, the record clearly establishes that Diallo received the BIA's decision no later than June 11, 2002, about one month after retaining new counsel. (*See* A 79). Diallo did not then contact his former counsel until six additional months passed (*see id.*); he did not file a disciplinary complaint against his former counsel until another three months passed (*see* A 90-93); and he did not file his motion to reopen until May 14, 2003, more than eleven months after receiving the BIA's decision (*see* A 9). Thus, Diallo is not entitled to equitable tolling; even after learning of his former counsel's misconduct, he failed to exercise reasonable diligence.

Diallo speciously blames his lack of diligence on *In re Lozada*, 19 I. & N. Dec. 637 (BIA 1988), which established certain requirements with respect to motions to reopen based on ineffective assistance of counsel. Specifically, the movant must submit:

> (1) an affidavit setting forth in detail the agreement with former counsel concerning what action would be taken and what counsel did or did not represent in this regard; (2) proof that the alien notified former counsel of the allegations of ineffective assistance and allowed counsel an opportunity to respond; and (3) if a violation of ethical or legal responsibilities is claimed, a statement as to whether the alien filed a complaint with any disciplinary authority regarding counsel's conduct

> and, if a complaint was not filed, an explanation for not doing so.

Esposito v. INS, 987 F.2d 108, 110-11 (2d Cir. 1993). Diallo's reliance on *Lozada* is unavailing, because Diallo offers no explanation for the six-month delay from the time he purportedly first received the BIA's decision until the time he contacted his former attorney. (*See* A 79).

Moreover, compliance with *Lozada* cannot justify the lengthy delays in the present case. Diallo waited five months after contacting his former counsel before filing the motion to reopen; one day would have sufficed. *See Esposito*, 987 F.2d at 111. Diallo's lack of diligence defeats his claim to equitable tolling, and on that basis alone, the BIA properly denied his motion to reopen with respect to new evidence and CAT relief.

2. The Petitioner Has Not Shown Changed Country Conditions

The BIA also did not abuse its discretion in denying Diallo's motion to reopen in order to present evidence of changed country conditions. As the BIA correctly found, the evidence submitted by Diallo does not show "that country conditions in Guinea have changed so significantly since [his] previous hearing that it would result in a material change in [his] own personal circumstances." (A 4); *see Harchenko v. INS*, 379 F.3d 405, 410 (6th Cir. 2004) (sustaining denial of motion to reopen where alien failed to establish existence of materially changed country conditions).

In support of his motion, Diallo submitted the 2002 Country Report on Guinea and two articles (*see* A 155-

182), apparently to establish the government's repression of political dissent. (*See* A 25). But it is clear from the record, and from Diallo's own papers, that political repression in Guinea is a problem of long duration, not a change in country conditions that warrants reopening.

The 1997 Country Report on Guinea, which was admitted into evidence at Diallo's asylum hearing, describes the Government's "tight control over the political process" (A 244), including restrictions on the rights to assemble and to associate (*see* A 248) and the detention of political prisoners "arrested and convicted under criminal laws" who "received disproportionately harsh punishment due to their political opposition" (A 247). Voting irregularities were observed, including "various means of intimidation" used at polling places. (A 250). The report also noted numerous extrajudicial killings, including 30 to 50 deaths by security forces following an attempted coup d'etat and the death of a youth at a rally. (*See* A 244).

The conditions in Guinea are troubling, but they are not new. Indeed, based on the report and other background material, the IJ observed at Diallo's asylum hearing that "the Guinean government abhors due process of law, the rule of law, and equality and political pluralism . . . ." (A 204-05). Moreover, "conditions common to all citizens of the affected country do not present a prima facie case warranting reopening of an asylum claim." *Pelinkovic v. Ashcroft*, 366 F.3d 532, 539 (7th Cir. 2004).

Diallo himself recognizes that political repression in Guinea is nothing new. In his motion to reopen, he states that the government "has not relented" in its efforts to

control the opposition, that conditions "have not improved" for individuals such as himself, and that Guinea "remains a dangerous place" where the government "continues to engage in the repression of political opponents." (A 25); *see also* Pet. Br. at 23. Rather than demonstrating changed country conditions, Diallo's statements "severely undermine" his position. *Betouche v. Ashcroft*, 357 F.3d 147, 152 (1st Cir. 2004) (affirming denial of motion to reopen where alien asserted that "'the human rights situation in Algeria *remained* poor . . . and serious problems *persisted*'" (emphasis and omission in original)). Because Diallo has not submitted evidence of changed country conditions, he should not be allowed to relitigate the merits of his asylum claim. *See id.* Accordingly, the BIA properly denied his motion to reopen based on changed country conditions.

II. In the Alternative, the BIA Properly Rejected Petitioner's Claim of Newly Discovered Evidence, Because the Evidence Was Neither Previously Unavailable Nor Material

A. Relevant Facts

The relevant facts are set forth in the Statement of the Facts, above.

B. Governing Law and Standard of Review

A motion to reopen must "state the new facts that will be proven" and "be supported by affidavits or other evidentiary material." 8 C.F.R. § 1003.2(c)(1) (2004). The motion "shall not be granted" unless the evidence to be offered "is material and was not available and could not have been discovered or presented at the former hearing." *Id.*

The BIA may deny a motion to reopen on at least three independent grounds: "First, it may hold that the movant has not established a prima facie case for the underlying substantive relief sought. . . . Second, the BIA may hold that the movant has not introduced previously unavailable, material evidence . . . . Third, in cases in which the ultimate grant of relief is discretionary . . . , the BIA may leap ahead, as it were, over the two threshold concerns . . . and simply determine that even if they were met, the movant would not be entitled to the discretionary grant of relief." *Abudu*, 485 U.S. at 104-05.

The BIA, acting on behalf of the Attorney General, has "'broad discretion'" to deny a motion to reopen. *INS v. Doherty*, 502 U.S. 314, 323 (1992) (quoting *INS v. Rios-Pineda*, 471 U.S. 444, 449 (1985)). "This is especially true in a deportation proceeding, where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *Doherty*, 502 U.S. at 323. Accordingly, the BIA's decision to deny a motion to reopen is reviewed only for abuse of discretion. *See Abudu*, 485 U.S. at 106-07; *Guan v. INS*, 345 F.3d 47, 48 (2d Cir. 2003) (per

curiam); *Maindrond v. INS*, 385 F.3d 98, 100-01 (1st Cir. 2004).

C. Discussion

Assuming *arguendo* that the motion to reopen was timely, the BIA did not abuse its discretion in declining to reopen based on the purported "new" evidence. To the contrary, the BIA correctly determined that the proffered evidence was previously available and not material.

The evidence proffered by Diallo consisted of: (1) two newspaper articles that "further document the involvement of his step-father in opposition politics" (A 24; *see* A 133-143); (2) a letter and a purported attendance card providing "further evidence of his continued involvement with the UNR (now UPR) in the United States" (A 24; *see* A 126-127 & 148-151); and (3) a letter showing that his stepfather, mother, and younger brother are eligible for asylum (*see* A 152-154).

As the BIA pointed out, three of the documents -- the two newspaper articles and the attendance card -- are dated before Diallo's asylum hearing (*see* A 3, 137, 142 & 150). Diallo did not explain why that evidence "could not have been discovered or presented at the former hearing." 8 C.F.R. § 1003.2(c)(1) (2004). Accordingly, the BIA properly declined to reopen the removal proceedings based on that evidence. *See Sinistaj v. Ashcroft*, 376 F.3d 516, 519 (6th Cir. 2004); *Guzman v. INS*, 318 F.3d 911, 913 (9th Cir. 2003); *Krougliak v. INS*, 289 F.3d 457, 460 (7th Cir. 2002); *Karapetian v. INS*, 162 F.3d 933, 937 (7th Cir. 1998).

The BIA also correctly held that Diallo could not rely on his stepfather's eligibility for asylum, because "[an alien's] application for asylum and withholding of removal is based on persecution to [the alien] personally." (A 4); *see Melgar de Torres v. Reno*, 191 F.3d 307, 313 (2d Cir. 1999) (upholding denial of asylum notwithstanding politically motivated killing of uncle); *Karapetian*, 162 F.3d at 936 (finding no abuse of discretion where alien was only member of "entire immediate and extended family" who failed to obtain asylum based on claim of religious persecution); *cf. Mabikas v. INS*, 358 F.3d 145, 148-49 (1st Cir. 2004) (holding that BIA did not abuse discretion in declining to reopen notwithstanding father's grant of asylum in France).

Diallo contends that the decision to grant asylum to his stepfather "enhances the credibility of his claims," Pet. Br. at 21, but Diallo's credibility is not in issue. To the contrary, the evidence concerning Diallo's stepfather and Diallo's activities in the United States is immaterial, because the IJ did not question those facts. *See Zhang v. INS*, 348 F.3d 289, 292 (9th Cir. 2003) (holding that BIA did not abuse its discretion in declining to reopen where new evidence simply corroborated testimony, testimony had been accepted as credible, and evidence was therefore superfluous). The IJ specifically reported that Diallo's stepfather was a deputy mayor, second-in-command of the UNR, and under detention. (*See* A 199). Diallo, on the other hand, was merely a party member, albeit one related by marriage to an important party leader. Diallo and his stepfather are not similarly situated, so the evidence submitted by Diallo concerning his stepfather has no

bearing on whether Diallo himself would face harm if returned to Guinea.

In short, the evidence submitted by Diallo does not rebut the IJ's determination that Diallo himself would not face harm if returned to Guinea. Accordingly, the motion to reopen was properly denied. *See Zhang*, 348 F.3d at 293; *Boudaguian v. Ashcroft*, 376 F.3d 825, 829 (8th Cir. 2004) (finding no abuse of discretion in declining to reopen where proffered evidence "does not undermine the essential findings that [aliens] failed to prove the requisite well-founded fear of persecution").

III. In the Alternative, the BIA Properly Rejected Petitioner's CAT Claim Because There Is No Evidence That He Would Be Harmed, Much Less Tortured, If Returned to Guinea

A. Relevant Facts

The relevant facts are set forth in the Statement of the Facts, above.

B. Governing Law and Standard of Review

The Convention prohibits the removal of an individual to a country if there are "substantial grounds for believing that [the individual] would be in danger of being subjected to torture." *Wang v. Ashcroft*, 320 F.3d 130, 133 (2d Cir. 2003) (internal quotation marks omitted). An individual seeking relief under CAT must prove, by a preponderance of the evidence, that he would be subjected to "'an extreme form of cruel and inhuman treatment.'" *Id.* at 133-34 (quoting 8 C.F.R. § 208.18(a)(2) (2002)). The

definition of "torture" does not include "lesser forms of cruel, inhuman or degrading treatment," 8 C.F.R. § 208.18(a)(2) (2004), nor does it include "pain or suffering arising only from, inherent in or incidental to lawful sanctions," *id.* § 208.18(a)(3).

An individual may be entitled to relief under CAT even if not eligible for asylum:

> A CAT claim focuses solely on the likelihood that the alien will be tortured if returned to his or her home country, regardless of the alien's subjective fears of persecution or his or her past experiences. Unlike an asylum claim, the CAT claim lacks a subjective element, focuses broadly on torture without regard for the reasons for that treatment, and requires a showing with respect to future, rather than past, treatment.

Ramsameachire v. Ashcroft, 357 F.3d 169, 185 (2d Cir. 2004).

The BIA's decision not to reopen removal proceedings is reviewed only for abuse of discretion. *See* Point II.B., *supra*; *see also Pelinkovic*, 366 F.3d at 541-42 (holding that BIA did not abuse discretion in declining to reopen with respect to CAT claim).

C. Discussion

Assuming *arguendo* that the motion to reopen was timely, the BIA did not abuse its discretion in denying the motion with respect to the CAT claim. As the BIA explained, Diallo "fail[ed] to meaningfully address the Immigration Judge's findings." (A 4). The IJ rejected

Diallo's contention "that he would face harm if he returns to Guinea," finding it "totally unsupported by the evidence." (A 46). The IJ's finding, although made in the course of analyzing Diallo's asylum claim, is determinative of his CAT claim. Because Diallo failed to rebut the IJ's finding, the BIA properly denied his motion to reopen.

As an initial matter, the IJ's finding was not an abuse of discretion. As the IJ observed, Diallo's mother remained in Guinea after he left (*see* A 46), as did Diallo's two brothers and two sisters (*see* A 45). "No evidence was offered by [Diallo] that anyone in his immediate family was ever harmed by the government of Guinea, simply because of their familial relationship to [his stepfather]." (A 45). To the contrary, Diallo's mother was employed by a government hospital. (*See* A 237).

In addition, Diallo himself suffered no adverse consequences from his interactions with the government in 1994 and 1995. As the IJ observed, Diallo applied for a passport from the government in 1994, and "[n]o action was taken against [him] at that point, and for a year after that." (A 46). He then obtained an exit stamp and "was not stopped or prevented from leaving Guinea in 1995 by the police." (*Id.*). Under the circumstances, the IJ properly found that Diallo did not show he would face harm if returned to Guinea; *a fortiori*, Diallo failed to show he would face "extreme" harm, *i.e.*, mistreatment amounting to torture.

Diallo's motion to reopen also fails to establish that he would likely face torture if returned to Guinea. Diallo relies on the same factual predicate for his CAT claim as

he did for his asylum claim, *i.e.*, his 1993 arrest and his relationship to his stepfather. (*See* A 26). Neither of those shows that he would likely face harm, much less torture, if returned to Guinea. *Cf. Hassan v. Ashcroft*, 388 F.3d 661, 668 (8th Cir. 2004) (rejecting CAT claim where alien "[did] not point to any specific reasons to demonstrate why he would be subjected to torture, other than the reasons supporting his asylum and withholding of removal claims.").

Diallo points out that his stepfather and mother have been granted asylum (*see* A 26), but he fails to explain the relevance of that fact: nothing in the record indicates that Guinea tortures the relatives of successful asylum seekers. There is also nothing in the record to suggest that Diallo's siblings who remain in Guinea (only one of whom was included in his stepfather's asylum application) are now facing torture or, indeed, any harm whatsoever.

In sum, the BIA properly relied on the IJ's analysis of Diallo's asylum claim in rejecting his motion to reopen to present a CAT claim. In particular, the same issue -- whether Diallo would face harm if returned to Guinea -- was dispositive with respect to both claims. To be sure, this Court recently cautioned that asylum and CAT claims should be treated "independently," *Ramsameachire*, 357 F.3d at 184, but *Ramsameachire* is distinguishable; there, the BIA erroneously treated adverse credibility (which is not in issue here) as dispositive with respect to a CAT claim.

In *Ramsameachire*, a native of Sri Lanka applied, *inter alia*, for asylum and relief under the CAT. *See id.* at 174. The BIA affirmed the IJ's decision denying all relief,

based on its determination that Ramsameachire was not credible. *See id.* at 177. This Court sustained the adverse credibility finding and consequently affirmed the denial of asylum, *see id.* at 178-83, but vacated and remanded with respect to the CAT claim: "Because the INS's regulations require it to consider all relevant evidence of the possibility of torture, and the CAT and asylum analyses focus on different elements and therefore must be treated independently, we hold that the INS may not deny an alien's CAT claim solely on the basis of its determination that the applicant's testimony is not credible." *Id.* at 184.

The CAT and asylum analyses focus on different elements, *see id.*, but they have at least one critical element in common: objective evidence of potential future harm. *See id.* at 178 (describing subjective and objective components of well-founded fear required to qualify for asylum); *id.* at 185 (describing CAT's "objective focus" on possible future torture). As to that element, it is more difficult in two respects to obtain relief under CAT than to qualify for asylum: (1) relief under CAT requires that the risk of future harm be more likely than not, rather than just well-founded, and (2) relief under CAT requires that the future harm amount to torture, not mere persecution. It follows that an alien who does not qualify for asylum due to a failure to show potential future harm is also not entitled to relief under CAT. *See Tawm v. Ashcroft*, 363 F.3d 740, 744 (8th Cir. 2004); *Selimi v. Ashcroft*, 360 F.3d 736, 741 (7th Cir. 2004); *Abdulrahman v. Ashcroft*, 330 F.3d 587, 591 n.2 (3rd Cir. 2003); *Najjar v. Ashcroft*, 257 F.3d 1262, 1303-04 (11th Cir. 2001). For that reason, the BIA did not err in declining to reopen to allow Diallo to present a CAT claim.

Finally, even assuming *arguendo* that the BIA improperly relied on the IJ's asylum analysis, its decision to deny the motion to reopen may be affirmed on grounds not stated in its decision if it is "certain, given the facts, as to how the BIA would have resolved [the] issue." *Iavorski*, 232 F.3d at 134 (affirming decision denying motion to reopen on ground not addressed by BIA).

Here, it is patent that Diallo has not shown, more likely than not, that he will face torture if returned to Guinea. As the IJ observed, Diallo did not show that the government was aware of his political activities prior to his arrest (*see* A 201-202) or that the government paid him any heed for two years thereafter (*see* A 203). There is also no evidence that his activities since leaving Guinea have been of any concern to the government; indeed, the meager evidence of his activities suggests an inconsequential continuing involvement in opposition politics. (*See* A 126-127 (letter from party official stating that Diallo participated in rallies in New York and Washington, D.C.) & 148-151 (anonymous card purporting to document Diallo's attendance at general assembly in Brooklyn)). There is also no evidence in the record that Guinea harms, much less tortures, returned asylum seekers. *See Maindrond*, 385 F.3d at 101. *Compare Ramsameachire*, 357 F.3d at 184. Finally, there is no evidence in the record to suggest that the government has tortured Diallo's siblings or any other relatives of his stepfather. Under those circumstances, it could not be more certain that, if remanded, Diallo's CAT claim would and should be denied.

CONCLUSION

For the foregoing reasons, the Government respectfully requests that the petition be denied.

Dated: January 3, 2005

Respectfully submitted,

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Addendum

8 C.F.R. § 208.18(a)

(a) Definitions. The definitions in this subsection incorporate the definition of torture contained in Article 1 of the Convention Against Torture, subject to the reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.

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

(2) Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.

(3) Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture.

(4) In order to constitute torture, mental pain or suffering must be prolonged mental harm caused by or resulting from:

(i) The intentional infliction or threatened infliction of severe physical pain or suffering;

(ii) The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(iii) The threat of imminent death; or

(iv) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the sense or personality.

(5) In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture.

(6) In order to constitute torture an act must be directed against a person in the offender's custody or physical control.

(7) Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.

(8) Noncompliance with applicable legal procedural standards does not per se constitute torture.

8 C.F.R. § 1003.2(c)

(c) Motion to reopen.

(1) A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. A motion to reopen

proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation. A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Subject to the other requirements and restrictions of this section, and notwithstanding the provisions in § 1001.1(p) of this chapter, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(c) of the Act (8 U.S.C. 1182(c)) may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation.

(2) Except as provided in paragraph (c)(3) of this section, a party may file only one motion to reopen deportation or exclusion proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later. Except as provided in paragraph (c)(3) of this section, an alien may file only one motion to reopen removal proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final

administrative decision was rendered in the proceeding sought to be reopened.

(3) In removal proceedings pursuant to section 240 of the Act, the time limitation set forth in paragraph (c)(2) of this section shall not apply to a motion to reopen filed pursuant to the provisions of § 1003.23(b)(4)(ii). The time and numerical limitations set forth in paragraph (c)(2) of this section shall not apply to a motion to reopen proceedings:

(i) Filed pursuant to the provisions of § 1003.23(b)(4)(iii)(A)(1) or § 1003.23(b)(4)(iii)(A)(2);

(ii) To apply or reapply for asylum or withholding of deportation based on changed circumstances arising in the country of nationality or in the country to which deportation has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous hearing;

(iii) Agreed upon by all parties and jointly filed. Notwithstanding such agreement, the parties may contest the issues in a reopened proceeding; or

(iv) Filed by the Service in exclusion or deportation proceedings when the basis of the motion is fraud in the original proceeding or a crime that would support termination of asylum in accordance with § 1208.22(f) of this chapter.

(4) A motion to reopen a decision rendered by an Immigration Judge or Service officer that is pending when an appeal is filed, or that is filed while an appeal is pending before the Board, may be deemed a motion to remand for further proceedings before the Immigration Judge or the Service officer from whose decision the appeal was taken. Such motion may be consolidated with, and considered by the Board in connection with, the appeal to the Board.