03-4272-ag

To Be Argued By:
S. DAVE VATTI

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 03-4272-ag

MIKAIL ABDALLA MOHAMED,
Petitioner,

-vs-

JOHN ASHCROFT, ATTORNEY GENERAL,
Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

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BRIEF FOR JOHN ASHCROFT ATTORNEY GENERAL OF THE UNITED STATES

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STATEMENT OF JURISDICTION

The Petitioner is subject to a final order of removal. This Court has appellate jurisdiction under 8 U.S.C. § 1252(b) (2000) to review Petitioner's challenge to the BIA's January 9, 2003, final order denying his application for withholding of removal and denial of relief under the Convention Against Torture.

Pursuant to 8 U.S.C. §1158(a)(3), to the extent that the Immigration Judge and BIA denied Petitioner's application for asylum on the ground that it was untimely and that there were no exceptional circumstances that excused the delay, this Court does not have jurisdiction to review that determination.

ISSUES PRESENTED FOR REVIEW

1. Whether this Court has jurisdiction to review the Immigration Judge's denial of Petitioner's claim for asylum to the extent that denial was based on the untimeliness of the application and the absence of exceptional circumstances excusing the delay?

2. Whether a reasonable fact-finder would be compelled to reverse the Immigration Judge's adverse credibility determination, where Petitioner's testimony and earlier statements regarding incidents of past persecution were inconsistent with respect to material elements of his claim and where Petitioner failed to adequately explain those inconsistencies?

3. Whether the Board of Immigration Appeals' streamlined review procedures violate due process?

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Attorney General of the United States

Preliminary Statement

Mikail Abdalla Mohamed, a native and citizen of Somalia who entered the United States without authorization on April 16, 1999, petitions this Court for review of a January 9, 2003, decision of the BIA. The BIA summarily affirmed the August 16, 2001, decision of an Immigration Judge ("IJ") denying Mohamed's applications for asylum and withholding of removal under the Immigration and Nationality Act of 1952, as amended

("INA"), rejecting his claim for relief under the United Nations Convention Against Torture ("CAT"), and granting him sixty days to voluntarily depart the United States. In denying Petitioner's application, the IJ found that his request for asylum was untimely, and that, on account of inconsistencies in his accounts of past persecution to which he and his family had been subjected, Petitioner did not present credible evidence that he was persecuted in Somalia or that he would be persecuted upon his return.

In his petition for review, Mohamed claims that there was no substantial evidence to support the IJ's adverse credibility determination, that he presented sufficient evidence to establish he was a refugee with a well-founded fear of persecution, and that the BIA's summary affirmance of the IJ's decision violated due process. These claims have no merit.

First, to the extent that the IJ denied the asylum application because it was not filed within one year of Petitioner's arrival in the United States and there were no exceptional circumstances that excused the late filing, this Court lacks jurisdiction to review that decision. Second, substantial evidence supports the IJ's adverse credibility assessment. As the IJ properly found, Petitioner's testimony with respect to instances of persecution to which he and his family allegedly had been subjected were inconsistent with and contrary to statements he made in his asylum application and his credible fear interview. Despite opportunities to do so, Mohamed failed to explain the inconsistencies adequately. In light of his inability to tell a consistent story with respect to incidents that went to

the heart of his claims for asylum and withholding of removal, a reasonable factfinder would not be compelled to draw a different conclusion regarding Petitioner's credibility. Finally, this Court has previously held that the BIA's streamlined review procedures do not violate due process.

For these reasons, this Court should deny the petition for review.

Statement of the Case

Mohamed is a native and citizen of Somalia. (JA 363). He entered the United States at Miami, Florida on April 16, 1999, without valid entry documents. *Id.* On April 27, 1999, the Immigration and Naturalization Service initiated removal proceedings by issuing a Notice to Appear. (JA 346-347). On April 30, 1999, Petitioner was paroled into the United States and released from INS detention. (JA 343). On June 3, 1999, Petitioner moved to change venue from Miami to Buffalo, New York, which motion was granted on August 10, 1999. (JA 327, 335). On January 8, 2001, Petitioner filed an Application for Asylum and Withholding of Removal. (JA 272-280).

An IJ conducted a removal hearing on August 16, 2001, and on that same date, issued an oral decision denying Mohamed's applications for asylum and withholding of removal, rejecting his claim for relief under the CAT[1] and authorizing voluntary departure within 60

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[1] The United Nations Convention Against Torture and (continued...)

days (JA 83-175, transcript of hearing), (JA 51-64, oral decision of IJ). On September 13, 2001, Petitioner filed a notice of appeal to the BIA. (JA 41).

On January 9, 2003, the BIA summarily affirmed the IJ's decision. (JA 4). Mohamed filed a petition for review of the BIA decision in the United States Court of Appeals for the Second Circuit on February 5, 2003. (JA 1).

Statement of Facts

A. Petitioner's Entry into the United States, His Initial Sworn Statement Upon Entry and His Credible Fear Assessment Interview

Mohamed left Somalia in approximately December 1998 on a cargo ship bound for Caracas, Venezuela. After a very brief stay in Venezuela, he boarded a plane for Miami, Florida with the help of a friend and, on April 16, 1999, he arrived at Miami International Airport. (JA 119-129, 364). On that date, prior to taking a sworn statement from Mohamed, the INS informed him of, among other things, the following:

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[1] (...continued)
Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, has been implemented in the United States by the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. 105-277, Div. G. Title XXII, § 2242, 112 Stat. 2681-822 (1998) (codified at 8 U.S.C. § 1231 note). *See Khouzam v. Ashcroft*, 361 F.3d 161, 168 (2d Cir. 2004).

> This may be your only opportunity to present information to me and the Immigration and Naturalization Service to make a decision. It is very important that you tell me the truth. If you lie or give misinformation, you may be subject to criminal or civil penalties, or barred from receiving immigration benefits or relief now or in the future . . . . U.S. law provides protection to certain persons who face persecution, harm or torture upon return to their home country. If you fear or have a concern about being removed from the United States or about being sent home, you should tell me during this interview because you may not have another chance. You will have the opportunity to speak privately and confidentially to another officer about your fear or concern. That officer will determine if you should remain in the United States and not be removed because of that fear.

(JA 362).

Following this advisement of rights, Petitioner gave a sworn statement in question and answer format to the INS, of which there is a transcript. (JA 362-366). Several of the questions were designed to elicit details regarding the basis of Mohamed's claims of persecution or torture should he be returned to Somalia. (JA 365-366). Mohamed gave the statement in English, but before doing so, he indicated in English that he understood the rights of which he had been advised and that he was willing to answer questions. (JA 362). Moreover, he initialed every page of the transcript. In the statement, Mohamed claimed that he left Somalia "because there is no peace in Somalia.

I come here for peace and to save my life. I am running away from the civil war in Somalia." (JA 366). He did not mention any discrimination or persecution suffered as a result of his standing as an ethnic minority in Somalia or that he or any of his family members had otherwise been the victim of any inter-clan violence.[2] Subsequently, the INS detained Petitioner at the Krome Detention Center in Miami.

On April 20, 1999, the INS provided Petitioner Form M-444, Information About Credible Fear Interview, which set forth the purpose of the interview and informed Petitioner that the interview would be used in evaluating any claim of fear of persecution should he be returned to Somalia. (JA 368-369). This information was provided in writing in both English and Somali. Furthermore, the information was also provided by video in Somali. (JA 369-372). The advisory again emphasized that "it is very important that you tell the officer all of the reasons why you have concerns about being removed." (JA 368). On April 27, 1999, an INS asylum officer conducted the credible fear assessment. (JA 352-357). Prior to beginning the interview, the officer again explained the purpose of the interview and reiterated that "this may be your only opportunity to give such information" and further informed Petitioner to "please feel comfortable telling me why you fear harm." (JA 348). The officer advised Petitioner that the information he revealed would

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[2] Petitioner's relative comfort with the English language is also evidenced by his election to be questioned in English and testify in English at his removal hearing despite the presence of an interpreter. (JA 85).

not be disclosed to his government, except in exceptional circumstances. *Id.* The asylum officer conducted the interview in Somali with the aid of an interpreter who remained throughout the interview. Petitioner indicated that he was comfortable with and understood the interpreter. (JA 348, 353).

During the interview, Petitioner stated that he feared harm from rival clan groups in Somalia's ongoing civil war on account of his membership in Reer Hamar, a small, light-skinned Somali clan. (JA 356). When asked to describe specific instances of persecution to which he or his family had been subjected, Petitioner responded as follows:

> Q Have you or any member of your family ever been abused or mistreated in any way in your country?
>
> A Yes, while the war was raging. My cousins were killed and my property was looted from my home they took everything.
>
> Q Who are you referring to by "they"?
>
> A The people fighting in Somalia.
>
> Q Were you ever personally harmed?
>
> A Yes. I was beaten up with the butt of the rifle and money was taken from me and I had to flee the city in 1991-1992 when the war started.

Q Who beat you up?

A The people in control of the country, when we were fleeing beat me up.

Q Why were you beaten up?

A To take my money. Our light-skinned people were not fighting in the civil war, so we were attacked by the group. That group is in control of the country now. The Hawiye group. Our property was also stolen (my father's home and a warehouse and a car) by the Hawiye group in between 1991-1992. While I was beaten up they asked me if I was a combatant. I was not a combatant. None of my people were combatants. I fled Mogadishu for Kismayu in 1991-2 and stayed there for six years. I left there in December of 1998 because the different groups started to fight again in Kismayu, so I fled abroad in order to save my life.

. . . .

Q Why did you leave your country?

A Due to fear and hardship in the country, I wanted to save my life abroad so I left the country.

Q Who are you afraid of?

A The groups that are currently fighting in Kismayu, just like the groups that were fighting in Mogadishu. There were a lot of bombardments and shootings so I ran for my life.

(JA 355-356).

Petitioner did not mention any incident involving the alleged murder of his older brother or rape of his younger sister.

Following the interview, the INS initiated removal proceedings by issuing a Notice to Appear dated April 27, 1999. (JA 346-347). Thereafter, Petitioner was paroled into the United States and released from INS detention pending a full hearing on removal and Petitioner's request for asylum. (JA 343).

On June 3, 1999, Petitioner moved to change venue from Miami to Buffalo, New York, which motion was granted on August 10, 1999. (JA 327, 335).

B. Mohamed's Removal Proceedings

Following the change of venue and after several postponements, Petitioner appeared, with an authorized representative, before an IJ in Buffalo for a removal hearing on August 21, 2000. (JA 66-75). At that hearing, Petitioner stipulated to facts in the Notice to Appear establishing that he was removable, but asserted that he was seeking asylum, withholding of removal, relief under the CAT and, in the alternative, voluntary departure. *Id.*

At that time, the Government advised the Court that Petitioner had not filed an application for asylum within one year of the date of his attempted entry into the United States (April 16, 1999) and that this issue had to be addressed. (JA 70). The IJ continued the hearing to January 8, 2001, to permit Petitioner to file the application, indicated that he would revisit the limitations issue thereafter and noted that the application had to be filed in any event in light of Petitioner's intent to seek relief under the CAT. (JA 70-71).

On January 8, 2001, Mohamed appeared with a representative and filed a Form I-589, Application for Asylum and Withholding of Removal. (JA 76-82, 272-280). The IJ set a hearing date of August 16, 2001, at which time Petitioner appeared with counsel. (JA 83).

At the hearing, the IJ marked several documents into evidence, including the Notice to Appear and related documents such as the Credible Fear Assessment Interview transcript and Petitioner's sworn statement provided on his date of arrival in the United States; an application for asylum, withholding of removal, and CAT relief[3]; and an index of supporting documentation provided by Petitioner. (JA 340-372, 272-280 and 176-270).

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[3] Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8485 (Feb. 19, 1999) (asylum application also serves as application for relief under CAT).

1. Documentary Submissions

Mohamed submitted several documents to the IJ at his removal hearing. First, he submitted the application seeking asylum and withholding of removal, which provided the primary written information in support of his request for asylum. (JA 272-280). In support of this application, Mohamed also submitted, among other things, the following: a sworn written statement dated August 14, 2001, in support of his application for asylum and withholding of removal (JA 181-182); a letter dated December 9, 1993, from the Office of the General Counsel, INS to the Director of the Refugee Branch of the Office of International Affairs titled "Whether Somali Clan Membership May Meet the Definition of Membership in a Particular Social Group under the INA" (JA 188-194); a document described as Section 7 (Benadir), Report on Minority Groups in Somalia based in part on a Joint British, Danish and Dutch Fact-Finding Mission to Nairobi, Kenya conducted September 17-14, 2000, that describes the characteristics of the Benadiri group and their status within Somalia relative to other groups (JA 197-205); a document described as United States Department of State Country Report on Human Rights Practices 2000 dated February 2001 (JA 211-223); and an Amnesty International Report 2001 describing Human Rights conditions within Somalia (JA 229-232).

In his application for asylum dated January 8, 2001, Petitioner stated that he seeks asylum based upon his ethnic background and membership in a particular social group. (JA 275). He indicated that he belongs to a minority clan known as Reer Hamar, which consists of

light-skinned people who lived in Mogadishu and were known for their ownership of small businesses such as grocery stores. *Id.* In narrating the basis for his claim that he and his family had allegedly been subjected to past persecution, Petitioner stated as follows:

> After the collapse of Siad Barre, the Hawiye Clan, the main opposing party to Siad Barre, committed many human rights violations. They killed everybody who did not support their cause. My clan is a minority in Somalia that did not have the power to defend itself. The Hawiye militia killed many people from my clan and looted my family's house and business. My brother was killed and my sister raped by the Hawiye militia because we refused to support the Hawiye clan during the collapse of the Siad Barre regime. In 1991, I escaped Mogadishu with my father, mother, brothers and my sister to Kismayu, a small Somali town on the Kenyan border. There I stayed until 1998.

(JA 275).

However, in response to a specific question as to whether he belonged to or had been associated with any groups in Somalia, including any ethnic group, Petitioner stated that he did not. (JA 276). Petitioner also stated that he had never been accused, charged, arrested, detained, interrogated, convicted, sentenced or imprisoned. But, in responding to whether he or any family member had been subjected to abuse and if such abuse occurred on account of membership in a particular social group, Petitioner

stated that "[t]he Hawiye militia killed my older brother because of his light skin and his refusal to support their cause. They also raped my sister in front of me after they physically hurt me. I was about 18 years old. They took over my family's house and looted my father's business. These armed militias are still occupying our house and bhusiness (sic)." (JA 276). When asked whether he would be tortured if he returned to Somalia, Petitioner responded "I will definitely be tortured and killed if I return to Somalia," but he did not offer any further explanation for this belief. (JA 277).

Petitioner described leaving Somalia altogether in 1998, first entering Kenya and then going to Venezuela by ship. From Venezuela, he flew to the United States where he surrendered to U.S. authorities and requested asylum. (JA 275).

2. Mohamed's Testimony

At the August 16, 2001, hearing, Mohamed testified that he is part of a clan known as Reer Hamar, which clan is part of a group of clans referred to as Benadiri, a minority group within Somalia. Benadiri is not itself a clan, but more of a cultural description. According to Mohamed, Benadiri tend to be light-skinned, and their manner of dress and their language is different from other major clans in Somalia. Mohamed further explained that most Benadiri are educated and operate grocery stores and other businesses. He stated that other groups do not believe Benadiri to be from Somalia and view them as foreigners. (JA 98-100). Mohamed also stated that Benadiri have historically suffered discrimination in

Somalia in that they were denied government jobs and were forced to pay money to the government for no reason. (JA 101).[4] In addition, Benadiri had no military training and thus were unable to defend themselves against other larger groups. (JA 102). Mohamed testified that the larger Hawiye clan in Mogadishu used to kill Benadiri people who refused to support the Hawiye clan in inter-clan fighting. (JA 103).

When asked to describe instances in which he and his family members have suffered harm, Mohamed testified as follows:

> It's real hard to say this but I will say it. I remember my big brother died in 1991, end of 1991, after that we go get the body and reclaim come our home, one day I was in my room and I was relaxing in my bed, on my bed, so I heard big scream and noise. That day I tried to go out the door and one of the Hawiye clan, the malitia Hawiye clan hit me of the back of the gun, very badly, until I fell down. And he tell me, listen bad little boy, if you move I shoot your head and my dad is, dad he say, son don't move it please. Then I was on the floor and he put his gun in my head and I said okay I won't move. After that, I mean, I am grieving to say this, my sister, my little sister, they rape in front of my parents, my dad, my mom

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[4] Mohamed's claim of past persecution was based solely on alleged conduct of the Hawiye clan and did not implicate the Siad Barre regime that had been toppled prior to the civil war. (JA 114).

> and me. I will try to stop it but I can't, I can't do it my, i mean, my dad told me, son, don't move it, let them do whatever they wanted and dad told them, please you can have it where ever you want it, stay away from my daughter. And they say, the malitia Hawiye clan, shut up old Banadiri man and we shoot you and they rape every age one, four of them, there are four of them and some of them was outside but I didn't see them, how many they are, they was on the (indiscernible), my dad he was in front of him, my mom in front of, they do that and my dad told them, please this only daughter I having, she is a little daughter, so you can have it what ever you want it, please stay away from her. And they point the gun and my dad he say, please, okay, do what ever you want, don't kill us please. I wish I can try to stop them, my dad told me, son, please don't move and there are four of them, they took my mom jewelry and some cash money, then they left. After that, we decide every day to leave Mogadishu, every single day, because we have no life, they, I mean, do it very badly, very bad things.

(JA 103-105).

Mohamed explained that his sister was fourteen years old at the time, that he suffered injuries to his lips and his ribs, and that after this incident, "we decide every day to leave Somalia to go somewhere that we can have peace and we can survive." (JA 105). Within a short time thereafter, during a period when the Hawiye were fighting amongst themselves, he fled Mogadishu, leaving his family behind, and went to Kismayu where he spent

approximately seven years without incident. (JA 106, 118-119). In approximately December 1998, he left Kismayu when violence similar to that in Mogadishu began, although he did not offer any specific incidents that personally or directly affected him, or even his particular clan. (JA 106-107).

As to the whereabouts of his family, Mohamed testified that he learned in 1999 from an acquaintance that they were living in a refugee camp in Kenya. Since learning of their whereabouts, he has been in contact with his parents once a month. (JA 107-108). The following exchange took place between the IJ and Mohamed:

> Q Sir, where is your, Mr. Mohamed, where is your sister right now? Is she still in this refugee camp?
>
> A Yes, your Honor.
>
> Q You've been in touch with your mother, am I correct?
>
> A Yes, your Honor.
>
> Q Okay. Is your sister there with her? Have you been in touch with her?
>
> A Yes, your Honor.
>
> . . . .
>
> Q Can they send you a letter though?

A No.

Q Why not?

A Because I call them, and I ask them, that's fine and I tell them I'm doing good, I don't have any problem, but they don't send me any letter.

Q But why couldn't they send you any letters?

A My mommy, she can't write actually.

Q You can make a phone call but she can't write. There's technology to make a phone call to you or you to them but there's no technology or processing place for them to send you any mail?

A Your Honor, when I call once a month, I tell them I call once a month, every month, that I tell them I'm doing good.

Q Okay, but why can't they send you a letter. Why can't they write you a letter.

A My mom, she can't write. But the kids write but I don't request that, I say that I call every once a month.

. . . .

Q Let me reword it. Have they ever sent you any letters talking about what happened to your sister and brother.

A From my parents?

Q Yes.

A No, your Honor.

Q Have you ever asked them to do that?

A No, your Honor.

Q Why wouldn't you do that?

A Because they know I was there that time when it happened.

Q Supposing you had to prove to others and you needed a letter to prove it. Why didn't you ask for it.

A I didn't ask it, your Honor.

(JA 167-169).

Mohamed expressed concern that he *might* be killed if he returned to Somalia and further expressed fear that he might be conscripted against his wishes into the Hawiye militia and that he was afraid of retaliation if he did not agree to join the militia. (JA 109). However, his testimony continued to be rife with inconsistencies and raised serious doubts regarding his fears of persecution if he were to return to Somalia.

For instance, Mohamed explained that he left Mogadishu approximately 20 days after the incident at his house in which his sister was raped. (JA 116). Although he indicated in his asylum application that he left with his family (JA 275), he acknowledged in his testimony that this was untrue and that he had, in fact, left with a friend. (JA 116-117).

Mohamed further stated that although Hawiye were present in Kismayu, it was peaceful and that he did not have any problems with the Hawiye clan during the approximately seven years that he lived there, a fact that belies the notion that he might be killed were he to return to Somalia. (JA 118-119).

Mohamed further testified that after arriving in the United States, he was held at Krome Detention Center. While detained, he participated in a Credible Fear Assessment Interview with an asylum officer. Prior to that interview, he participated in an orientation during which he spoke with and received advice from a lawyer. (JA 134).

Mohamed made clear that there were only two incidents in which he and his family had been subjected to past persecution on account of their clan affiliation. (JA 114-115). With regard to the circumstances surrounding the death of his older brother, the following exchange took place:

> Q . . . . When your brother was killed what was the motivation for his death? Who killed him?

A The malady Hawiye clan.

Q Malitia. Okay.

A Malitia.

Q Malitia of the Hawiye clan. Do you know why they killed him?

A No. Because we know there are a lot of people dying, Banadiri people, we used to heard they die every day and they are the only militia Hawiye clan that patrol that area and there's not any that patrol and we believe they kill him, my brother.

(JA 138-139).

Mohamed did not mention in his testimony that his brother was killed on account of being light-skinned or otherwise because of his membership in a particular social or ethnic group.

Similarly, there was inconsistency between his asylum application and his testimony regarding the alleged rape of his sister by Hawiye militia as illustrated by the following testimony:

Q Sir, you remember that an asylum officer interviewed you to establish whether or not you demonstrated a credible fear, correct?

A Yes, ma'am.

. . . .

Q Do you recall the officer asking you why you were beaten up in connection with that incident at his home he's testified to?

A Yes, ma'am.

. . .

Q Do you remember what you told her in response to that question as to why you were beaten up?

A I tell the officer they wanted money--

. . . .

Q Well, from the piece of paper I'm looking at, I'll be happy to share it with you. It does indicate that they beat you up to take your money, there is, however, no statement about your sister ever being raped, in fact, you say it was the Hawiye group, they wanted the property, they had stolen it from your dad, they asked if you were a combatant, you told them you were not, and then you said you fled Mogadishu to Kismayu and that was it. Why didn't you mention your sister's rape in here. Wasn't that important?

A Yeah, ma'am. Because I was really shocked, I didn't know I was in Krome Service, I was in

there, it's like jail and I was shocked, I was thinking, what are you doing?

(JA 148-149).

Finally, Mohamed testified that if it were not for the war between the various factions of the Hawiye clan, he would return to Somalia with prospects of continuing his education and finding work. (JA 143). He did not suggest that, even if the civil war ended, he would continue to be subject to persecution by the dominant clan on account of his minority status or that he might be killed in any event because of his light complexion.

C. The Immigration Judge's Decision

At the conclusion of the removal hearing, the IJ issued an oral decision denying Mohamed's applications for asylum, withholding of removal, relief under CAT, and granted him sixty days in which to depart voluntarily, after which he would be subject to deportation without further notice. The IJ concluded that Petitioner's request for asylum was barred by the limitations period and that there were no exceptional circumstances that excused the delay in filing the application. (JA 53, 58). Nevertheless, "out of an abundance of fairness," the IJ proceeded to consider the merits of the application. (JA 58). After summarizing the applicable legal standards, Mohamed's testimony and the application for asylum and supporting documentation, the IJ concluded that Mohamed was not credible.

The IJ noted a number of inconsistencies in Mohamed's testimony and the documentation submitted

with his request for asylum, all of which went to the heart of his claims for asylum. First, the IJ noted that Mohamed testified that he left Mogadishu for Kismayu with a friend 20 days after an attack upon himself and his family and that this was inconsistent with his asylum application in which Mohamed indicated that he left Mogadishu with his father, mother, brothers and sisters after this attack. (JA 57). Second, the IJ pointed out that Mohamed initially claimed that his older brother had been killed because he was light-skinned but admitted on cross-examination that he did not know why his brother had been killed. *Id.* Given the testimony of Petitioner on this issue, the IJ commented that there was no competent evidence as to exactly who killed Petitioner's brother and the reasons for doing so. (JA 59). Third, the IJ noted Petitioner did not mention his sister's rape during his initial credible fear interview. (JA 57-58). Fourth, Petitioner's failure to submit a corroborating letter from family members with respect to the incidents he described, in light of the amount of time available to him and the frequency of his contact with them, undermined his credibility in the eyes of the IJ. (JA 59-60). Fifth, the IJ noted that Mohamed had lived among Hawiye clansmen for nearly seven years in another area of Somalia without incident. (JA 61). Finally, the IJ highlighted Mohamed's testimony that he would return to Somalia if there was no war and if he was able to work (JA 57), and noted that "respondent's fear of the general conditions of violence or unrest or criminality going on in Somalia. . . . are simply not sufficient to establish a well-founded fear of a clear probability of persecution." (JA 60).

The IJ concluded that he "carefully considered and weighed all of the testimony and documentary evidence of record and does not find any competent, credible or substantial evidence that shows the respondent was persecuted while in Somalia, or that he would be persecuted upon his return to Somalia." (JA 58). The IJ also held that "the respondent has not carried the burden of proof showing that it is more likely than not that he would be tortured upon his return to his home country." (JA 62).

D. The BIA's Decision

On January 9, 2003, the BIA summarily affirmed the IJ's decision and adopted it as the "final agency determination" under 8 C.F.R. § 3.1(e)(4) (2002).[5] (JA 4). This petition for review followed.

SUMMARY OF ARGUMENT

1. To the extent that Petitioner's application for asylum was denied on grounds that it was untimely and that Petitioner failed to establish exceptional circumstances excusing that delay, this Courts lacks jurisdiction to review that determination. *See* 8 U.S.C. § 1158)(a)(3).

2. The IJ properly denied Mohamed's application for asylum because his testimony was not credible. The IJ identified multiple inconsistencies between Mohamed's

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[5] That section has since been redesignated as 8 C.F.R. § 1003.1(e)(4). *See* 68 Fed. Reg. 9824, 9830 (Feb. 28, 2003).

Credible Fear Interview, his asylum application and his testimony that went to the heart of the two incidents that Mohamed offered in support of his claims of persecution. For example, in an opportunity to explain his claim for asylum only eleven days after arriving in the United States after a four-month odyssey, Mohamed failed to mention the most significant event triggering his desire to leave Mogadishu: the rape of his sister in his presence while he was held at gunpoint. He did not mention this incident until over two years later. While he claimed he was in shock during the interview and omitted this incident as a result, this explanation is dubious as there was ample time between his arrival in the United States and the credible fear interview for Mohamed to gather his thoughts and state his case for asylum. Additionally, although he explained in his asylum application that his older brother had been killed because of his light skin, he backtracked in his testimony and conceded that he did not know the reason. For these reasons, substantial evidence supports the IJ's determination that Mohamed failed to provide credible testimony in support of his claim for asylum. The evidentiary record does not compel the opposite conclusion. Therefore, the petition for review should be denied.

3. This Court, in *Zhang v. United States Department of Justice*, 362 F.3d 155, 157 (2d Cir. 2004) (per curiam), rejected the claim that the BIA's streamlined review procedures violate due process. Accordingly, Petitioner's claim for review on this basis fails.

ARGUMENT

I. TO THE EXTENT THAT THE IMMIGRATION JUDGE DENIED PETITIONER'S APPLICATION FOR ASYLUM FOR UNTIMELINESS, THIS COURT DOES NOT HAVE JURISDICTION TO REVIEW THAT DECISION.

8 U.S.C. § 1158(a)(1) provides in pertinent part that "any alien who is physically present in the United States or who arrives in the United States . . . . may apply for asylum in accordance with this section . . . ." This relief is not available, however, "unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States." 8 U.S.C. § 1158(a)(2)(B). "An application for asylum may be considered, notwithstanding [the time limitation], if the alien demonstrates to the satisfaction of the Attorney General . . . . extraordinary circumstances relating to the delay in filing an application within the period specified . . . ." 8 U.S.C. § 1158(a)(2)(D). Significantly, however, "[n]o court shall have jurisdiction to review any determination of the Attorney General under paragraph 2." 8 U.S.C. § 1158(a)(3).

Since § 1158(a)(3) encompasses all of paragraph 2 including the "extraordinary circumstances" tolling provision, the INS's determination of whether an application for asylum is untimely and whether extraordinary circumstances exist that excuse the late filing is not subject to appellate review. *See Molathwa v.*

Ashcroft, 390 F.3d 551, 553 (8th Cir. 2004); *Sanchez v. U.S. Attorney General*, 392 F.3d 434, 437 (11th Cir. 2004); *Njenga v. Ashcroft*, 386 F.3d 335, 339 (1st Cir. 2004); *Zaidi v. Ashcroft*, 377 F.3d 678, 680-81 (7th Cir. 2004); *Castellano-Chacon v. INS*, 341 F.3d 533, 544 (6th Cir. 2003); *Tarawally v. Ashcroft*, 338 F.3d 180, 185 (3d Cir. 2003); *Tsevegmid v. Ashcroft*, 336 F.3d 1231, 1235 (10th Cir. 2003); *Molina-Estrada v. INS*, 293 F.3d 1089, 1093 (9th Cir. 2002).[6]

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[6] Congress enacted the one-year limitations period as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, §604(a), 110 Stat. 3009. This provision had an effective date of April 1, 1997 (the first day of the first month 180 days after enactment), and, therefore, is clearly applicable to Mohamed, whose date of entry was April 16, 1999. *See id.* § 604(c). To the extent that Mohamed argues that he was given permission at the hearing on January 8, 2001, for a late filing, this claim is faulty. The IJ gave him permission to file the asylum application on August 16, 2001, subject to a later ruling on the limitations issue and also because the IJ recognized that the application acts also as a claim for withholding of removal and for relief under the CAT to which the one-year limitations period does not apply. (JA 70-71). In addition, Mohamed's arguments that his declaration of intent to seek asylum in his credible fear interview constituted "filing" of an asylum application and that he was not effectively put on notice of the one-year deadline were also considered and rejected. (JA 53, 58, 86-95). Pursuant to §1158(a)(3), whether these circumstances were sufficiently " extraordinary" to excuse late filing of the asylum application is not a subject for appellate review. Indeed, the United States was unable to locate any judicial opinion that (continued...)

Here, it is undisputed that Petitioner arrived in the United States on April 16, 1999. (JA 272). Despite having representation in drafting his change of venue motion that was filed in June 1999 and having secured representation if the matter were transferred to Buffalo (JA 329, 335), he failed to file an application for asylum until January 8, 2001, well over one year after his date of arrival. (JA 280). The IJ concluded that "exceptional circumstances are absent in justifying the late filing of the [Petitioner's] request for asylum and the filing of the application for political asylum." (JA 58). However, the IJ "out of an abundance of fairness" considered the application on the merits as well and denied it on the grounds that there was no credible evidence of past persecution or future persecution. *Id.* Nevertheless, to the extent that the IJ denied the asylum application on the ground that it was untimely and there were no circumstances excusing that untimeliness, this Court has no jurisdiction to review that determination, despite the IJ's subsequent consideration and rejection of the merits of

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[6] (...continued)
even addresses what constitutes "extraordinary circumstances" for purposes of § 1158(a)(3), which is not surprising given that the circuit courts have viewed the jurisdictional bar as absolute. Nor does the statutory scheme provide a definition of "extraordinary circumstances" that is expressly applicable to § 1158(a)(3). Instead, this term is defined by regulation, 8 C.F.R. § 208.4(a)(5), for application by the appropriate administrative bodies. In effect, the arguments advanced by Petitioner to justify his late filing were subsumed within the IJ's determination that extraordinary circumstances did not exist.

the claim. *See Ngure v. Ashcroft*, 367 F.3d 975, 988-89 (8th Cir. 2004) (where IJ rejected asylum application on both limitations grounds and on the merits, Court of Appeals was divested of jurisdiction under 8 U.S.C. § 1158(a)(3)).[7]

II. THE IMMIGRATION JUDGE PROPERLY DETERMINED THAT MOHAMED FAILED TO ESTABLISH ELIGIBILITY FOR ASYLUM AND WITHHOLDING OF REMOVAL SINCE HIS TESTIMONY IN SUPPORT OF HIS APPLICATION WAS NOT CREDIBLE.

A. Relevant Facts

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

B. Governing Law and Standard of Review

Two forms of relief are potentially available to aliens claiming that they will be persecuted if removed from this

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[7] The one-year filing deadline is not applicable to claims for withholding of removal and for relief under CAT. *See Ngure*, 367 F.3d at 989. Accordingly, as the standards for asylum and withholding of removal overlap to some degree and in the event this Court is inclined to review the asylum claim on its merits, the Government has nonetheless addressed below the merits of both claims.

country: asylum and withholding of removal.[8] *See* 8 U.S.C. §§ 1158(a), 1231(b)(3) (2004); *Zhang v. Slattery*, 55 F.3d 732, 737 (2d Cir. 1995). Although these types of relief are "'closely related and appear to overlap,'" *Carranza-Hernandez v. INS*, 12 F.3d 4, 7 (2d Cir. 1993) (quoting *Carvajal-Munoz v. INS*, 743 F.2d 562, 564 (7th Cir. 1984)), the standards for granting asylum and withholding of removal differ. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-32 (1987); *Osorio v. INS*, 18 F.3d 1017, 1021 (2d Cir. 1994).

1. Asylum

An asylum applicant must, as a threshold matter, establish that he is a "refugee" within the meaning of 8 U.S.C. § 1101(a)(42) (2004). *See* 8 U.S.C. § 1158(a) (2004); *Liao v. U.S. Dep't of Justice*, 293 F.3d 61, 66 (2d Cir. 2002). A refugee is a person who is unable or unwilling to return to his native country because of past "persecution or a well-founded fear of persecution on account of" one of five enumerated grounds: "race, religion, nationality, membership in a particular social

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[8] "Removal" is the collective term for proceedings that previously were referred to, depending on whether the alien had effected an "entry" into the United States, as "deportation" or "exclusion" proceedings. Because withholding of removal is relief that is identical to the former relief known as withholding of deportation or return, *compare* 8 U.S.C. § 1253(h)(1) (1994) *with id.* § 1231(b)(3)(A) (2004), cases relating to the former relief remain applicable precedent.

group, or political opinion." 8 U.S.C. § 1101(a)(42) (2004); *Liao*, 293 F.3d at 66.

Although there is no statutory definition of "persecution," courts have described it as "'punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate.'" *Mitev v. INS*, 67 F.3d 1325, 1330 (7th Cir. 1995) (quoting *De Souza v. INS*, 999 F.2d 1156, 1158 (7th Cir. 1993)); *see also Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995) (stating that persecution is an "extreme concept"). While the conduct complained of need not be life-threatening, it nonetheless "must rise above unpleasantness, harassment, and even basic suffering." *Nelson v. INS*, 232 F.3d 258, 263 (1st Cir. 2000). Upon a demonstration of past persecution, a rebuttable presumption arises that the alien has a well-founded fear of future persecution. *See Melgar de Torres v. Reno*, 191 F.3d 307, 315 (2d Cir. 1999); 8 C.F.R. § 208.13(b)(1)(i) (2004).

Where an applicant is unable to prove past persecution, the applicant nonetheless becomes eligible for asylum upon demonstrating a well-founded fear of future persecution. *See Zhang*, 55 F.3d at 737-38; 8 C.F.R. § 208.13(b)(2) (2004). A well-founded fear of persecution "consists of both a subjective and objective component." *Gomez v. INS*, 947 F.2d 660, 663 (2d Cir. 1991). Accordingly, the alien must actually fear persecution, and this fear must be reasonable. *See id.* at 663-64.

"An alien may satisfy the subjective prong by showing that events in the country to which he . . . will be deported

have personally or directly affected him." *Id.* at 663. With respect to the objective component, the applicant must prove that a reasonable person in his circumstances would fear persecution if returned to his native country. *See* 8 C.F.R. § 208.13(b)(2) (2004); *see also Zhang*, 55 F.3d at 752 (noting that when seeking reversal of a BIA factual determination, Petitioner must show "'that the evidence he presented was so compelling that no reasonable factfinder could fail'" to agree with the findings (quoting *INS v. Elias-Zacarias*, 502 U.S 478, 483-84 (1992)); *Melgar de Torres*, 191 F.3d at 311.

The asylum applicant bears the burden of demonstrating eligibility for asylum. *Wu Biao Chen v. INS*, 344 F.3d 272, 275 (2d Cir. 2003) (per curiam); *Osorio*, 18 F.3d at 1027. *See* 8 C.F.R. § 208.13(a)-(b) (2004). The applicant's testimony and evidence must be credible, specific, and detailed in order to establish eligibility for asylum. *See* 8 C.F.R. § 208.13(a)(2004); *Abankwah v. INS*, 185 F.3d 18, 22 (2d Cir. 1999); *Melendez v. U.S. Dep't of Justice*, 926 F.2d 211, 215 (2d Cir. 1991) (stating that applicant must provide "credible, persuasive and . . . . specific facts" (internal quotation marks omitted)); *Matter of Mogharrabi*, Interim Dec. 3028, 19 I. & N. Dec. 439, 445, 1987 WL 108943 (BIA June 12, 1987), *abrogated on other grounds by Pitcherskaia v. INS*, 118 F.3d 641, 647-48 (9th Cir. 1997) (applicant must provide testimony that is "believable, consistent, and sufficiently detailed to provide a plausible and coherent account").

Because the applicant bears the burden of proof, he should provide supporting evidence when available, or

explain its unavailability. *See Zhang v. INS*, 386 F.3d 66, 71 (2d Cir. 2004) ("[W]here the circumstances indicate that an applicant has, or with reasonable effort could gain, access to relevant corroborating evidence, his failure to produce such evidence in support of his claim is a factor that may be weighed in considering whether he has satisfied the burden of proof."); *see also Diallo v. INS*, 232 F.3d 279, 285-86 (2d Cir. 2000) (corroborating evidence may be required where it would reasonably be expected); *In re S-M-J-*, Interim Dec. 3303, 21 I. & N. Dec. 722, 723-26, 1997 WL 80984 (BIA Jan. 31, 1997).

Finally, even if the alien establishes that he is a "refugee" within the meaning of the INA, the decision whether ultimately to grant asylum rests in the Attorney General's discretion. *See* 8 U.S.C. § 1158(b)(1) (2004); *Ramsameachire v. Ashcroft*, 357 F.3d 169, 178 (2d Cir. 2004); *Zhang*, 55 F.3d at 738.

2. Withholding of Removal

Unlike the discretionary grant of asylum, withholding of removal is mandatory if the alien proves that his "life or freedom would be threatened in [his native] country because of his race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A) (2000); *Zhang,* 55 F.3d at 738. To obtain such relief, the alien bears the burden of proving by a "clear probability," *i.e.*, that it is "more likely than not," that he would suffer persecution on return. *See* 8 C.F.R. § 208.16(b)(1) (2002); *INS v. Stevic*, 467 U.S. 407, 429-430 (1984); *Melgar de Torres,* 191 F.3d at 311. Here, too, "if the applicant is determined to have suffered past

persecution in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that the applicant's life or freedom would be threatened in the future..." 8 C.F.R.§208.16(b)(1)(i). If the alien does not establish past persecution, the presumption does not apply and the applicant must show "a good reason to fear future persecution by adducing credible, direct and specific evidence in the record of facts that would support a reasonable fear of prosecution." *Duarte de Guinac v. INS*, 179 F.3d 1156, 1159 (9th Cir. 1999); *see also Ramsameachire v. Ashcroft*, 357 F.3d 169, 178 (2d Cir. 2004). As the standard applicable to withholding of removal is more stringent than that governing eligibility for asylum, an alien who has failed to establish a well-founded fear of persecution for asylum purposes is necessarily ineligible for withholding of removal. *See Chen*, 344 F.3d at 275; *Zhang*, 55 F.3d at 738.

3. Standard of Review

This Court reviews the determination of whether an applicant for asylum or withholding of removal has established past persecution or a well-founded fear of persecution under the substantial evidence test. *Zhang v. INS*, 386 F.3d at 73; *Wu Biao Chen*, 344 F.3d at 275 (factual findings regarding asylum eligibility must be upheld if supported by "reasonable, substantive and probative evidence in the record when considered as a whole") (internal quotation marks omitted); *see Secaida-Rosales v. INS*, 331 F.3d 297, 306-07 (2d Cir. 2003); *Melgar de Torres*, 191 F.3d at 312-13 (factual findings regarding both asylum eligibility and withholding of

removal must be upheld if supported by substantial evidence). "Under this standard, a finding will stand if it is supported by 'reasonable, substantial, and probative' evidence in the record when considered as a whole." *Secaida-Rosales*, 331 F.3d at 307 (quoting *Diallo*, 232 F.3d at 287).

Where an appeal turns on the sufficiency of the factual findings underlying the IJ's determination[9] that an alien has failed to satisfy his burden of proof, Congress has directed that "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B) (2004). *Zhang v. INS*, 386 F.3d at 73 n.7. This Court "will reverse the immigration court's ruling only if 'no reasonable fact-finder could have failed to find . . . past persecution or fear of future persecution." *Wu Biao Chen*, 344 F.3d at 275 (omission in original) (quoting *Diallo*, 232 F.3d at 287).

The scope of this Court's review under that test is "exceedingly narrow." *Zhang v. INS*, 386 F.3d at 74; *Wu Biao Chen*, 344 F.3d at 275; *Melgar de Torres*, 191 F.3d at 313. *See also Zhang v. INS*, 386 F.3d at 71 ("Precisely

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[9] Although judicial review ordinarily is confined to the BIA's order, *see, e.g.*, *Abdulai v. Ashcroft*, 239 F.3d 542, 549 (3d Cir. 2001), courts properly review an IJ's decision where, as here (JA 4), the BIA adopts that decision. *See* 8 C.F.R. § 3.1(a)(7) (2004); *Secaida-Rosales*, 331 F.3d at 305; *Arango-Aradondo v. INS*, 13 F.3d 610, 613 (2d Cir. 1994). Accordingly, this brief treats the IJ's decision as the relevant administrative decision.

because a reviewing court cannot glean from a hearing record the insights necessary to duplicate the fact-finder's assessment of credibility, what we 'begin' is not a *de novo* review of credibility, but an 'exceedingly narrow inquiry' . . . to ensure that the IJ's conclusions were not reached arbitrarily or capriciously") (citations omitted). Substantial evidence entails only "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938)). The mere "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966); *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992).

Indeed, the IJ's and BIA's eligibility determination "can be reversed only if the evidence presented by [the asylum applicant] was such that a reasonable factfinder would have to conclude that the requisite fear of persecution existed." *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992). In other words, to reverse the BIA's decision, the Court "must find that the evidence not only *supports* th[e] conclusion [that the applicant is eligible for asylum], but *compels* it." *Id.* at 481 n.1 (emphasis in original).

This Court gives "particular deference to the credibility determinations of the IJ." *Wu Biao Chen*, 344 F.3d at 275 (quoting *Montero v. INS*, 124 F.3d 381, 386 (2d Cir. 1997)); *see also Qiu v. Ashcroft*, 329 F.3d 140, 146 n.2 (2d Cir. 2003) (the Court "generally defer[s] to an IJ's factual findings regarding witness credibility"). This Court has

recognized that "the law must entrust some official with responsibility to hear an applicant's asylum claim, and the IJ has the unique advantage among all officials involved in the process of having heard directly from the applicant." *Zhang v. INS*, 386 F.3d at 73.

Because the IJ is in the "best position to discern, often at a glance, whether a question that may appear poorly worded on a printed page was, in fact, confusing or well understood by those who heard it," this Court's review of the fact-finder's determination is exceedingly narrow. *Id.*; *see also id.* ("'[A] witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may convey a most favorable impression.'") (quoting *Arnstein v. Porter*, 154 F.2d 464, 470 (2d Cir. 1946)) (citation omitted); *Sarvia-Quintanilla v. United States INS*, 767 F.2d 1387, 1395 (9th Cir. 1985) (noting that IJ "alone is in a position to observe an alien's tone and demeanor [and is] uniquely qualified to decide whether an alien's testimony has about it the ring of truth"); *Kokkinis v. District Dir. of INS*, 429 F.2d 938, 941-42 (2d Cir. 1970) (court "must accord great weight" to the IJ's credibility findings). The "exceedingly narrow" inquiry "is meant to ensure that credibility findings are based upon neither a misstatement of the facts in the record nor bald speculation or caprice." *Zhang v. INS*, 386 F.3d at 74.

In reviewing credibility findings, courts "look to see if the IJ has provided 'specific, cogent' reasons for the adverse credibility finding and whether those reasons bear a 'legitimate nexus' to the finding." *Id.* (quoting *Secaida-Rosales*, 331 F.3d at 307). Credibility inferences must be

upheld unless they are "irrational" or "hopelessly incredible." *See, e.g.*, *United States v. LaSpina*, 299 F.3d 165, 180 (2d Cir. 2002) ("we defer to the fact finder's determination of . . . the credibility of the witnesses, and to the fact finder's choice of competing inferences that can be drawn from the evidence") (internal marks omitted); *NLRB v. Columbia Univ.*, 541 F.2d 922, 928 (2d Cir. 1976) (credibility determination reviewed to determine if it is "irrational" or "hopelessly incredible").

C. Discussion

Substantial evidence supports the IJ's determination that Mohamed failed to provide credible testimony in support of his application for asylum, and thus failed to establish eligibility for relief. Mohamed's testimony at the hearing was at odds with the account he gave in a sworn written statement on the day of his arrival in the United States, conflicted with the account of past persecution he gave in his credible fear interview only eleven days after his arrival and was also inconsistent with his asylum application. The inconsistencies between Petitioner's testimony and his earlier accounts of past persecution of himself and his family went to the heart of his claims. Moreover, Mohamed failed to adequately explain the evidentiary deficiencies at the administrative level. As such, substantial evidence supports the IJ's decision, *see, e.g.*, *Qiu*, 329 F.3d at 152 n.6 ("incredibility arises from 'inconsistent statements, contradictory evidence, and inherently improbable testimony'" (quoting *Diallo*, 232 F.3d at 287-88)), and thus Mohamed has not met his burden of showing that a reasonable factfinder would be compelled to conclude he is entitled to relief.

For instance, Mohamed testified that the most significant event that prompted his and his family's desire to leave Mogadishu was the rape of his sister while he and his parents were held at gunpoint by Hawiye militia. Yet, after leaving Kismayu seven years later because it had become like Mogadishu and arriving in the United States after a journey that included a grueling four months on a ship to Venezuela, Mohamed failed to mention this incident at all on at least two occasions despite having the opportunity to do so.

First, in his sworn statement dated April 16, 1999 (the day of his arrival) about his reasons for seeking asylum, he failed to mention the rape of his sister. There is no evidence that the atmosphere in which he gave the statement was coercive; on the contrary, the tone of the transcript suggests it was professional and cooperative. Several questions were directed to details of Petitioner's asylum claim, he consented to the statement being conducted in English, he received an advisement of rights prior to giving the statement, and he acknowledged that he understood the rights and was willing to answer questions. (JA 362-366). There is no question that this statement reliably sets forth the substance of the conversation that Mohamed had with the asylum officer on that occasion. *See Ramsameachire v. Ashcroft*, 357 F.3d 169, 180 (2d Cir. 2004) (inconsistency between airport interview and testimony may form basis for adverse credibility determination where airport interview is reliable account of alien's statement).

Second, in his Credible Fear Interview on April 27, 1999, he again failed to mention the circumstances

surrounding his sister's rape. Prior to the interview, an asylum officer had advised him that this was his opportunity to explain his fear of persecution should he be sent back to Somalia. In addition, he previously consulted an attorney and was provided an advisement of rights in English and Somali. He was specifically instructed that he should feel comfortable in telling the interviewer about his circumstances. A Somali interpreter was present during the credible fear interview. (JA 352-358).

Given that there were only two incidents that formed the universe of Petitioner's claims of past persecution, his omission of this incident in his initial sworn statement on April 16, 1999, and from his interview on April 29, 1999, was glaring. As the IJ correctly found, the first time the rape incident is mentioned at all is in his asylum application filed on January 8, 2001, nearly two years later. Given the initial omission of this incident from Petitioner's accounts of past persecution and substantial time lapse before it was disclosed, it was entirely reasonable for the IJ to be skeptical of Petitioner's claims regarding this incident.[10]

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[10] In light of Petitioner's initial account in the credible fear interview of the incident in which he was beaten where he suggested that the motive behind the incident was financial (JA 355-356), it is questionable whether such an incident, even if it did take place exactly as described, occurred "on account of" clan affiliation or simply was financially or otherwise criminally motivated.

Moreover, the nearly two-year time lapse between his arrival in the United States and his mention of the rape incident highlighted both the need for and lack of corroborative evidence of this incident. As the IJ correctly noted, the circumstances here suggest it was plausible for Petitioner to obtain corroborating evidence in the form of a letter from his family members. The removal hearing took place in August 2001. Petitioner testified that he had been in contact with his family, including his mother and sister, since 1999. (JA 107-108). In light of the frequency and nature of his contact with them, he had ample time prior to the removal hearing to secure a letter attesting to the rape incident.

Not only did Petitioner fail to secure such evidence when it was feasible to do so, he was unable to offer a satisfactory explanation for his failure. While Petitioner stated that his mother can't write, he testified that most Benadiri are educated, that his father, a businessman, was also in the Kenyan refugee camp, and that his siblings can write. (JA 32, 107-108, 168, 275-276). Even if the English language was a problem and a letter had to be written in Somali, Petitioner was aware from his own experience in the credible fear interview that translators are available. Furthermore, he had representation in this matter at the time venue was changed to Buffalo. (JA 329, 335). Thus, not only did his omission of the rape incident from his initial accounts contribute to his lack of credibility, his failure to present reasonably available corroborating evidence when he had two years to do so underscored that lack of credibility. In short, given the inconsistent statement in the record with respect to one of the principal incidents underlying Petitioner's claim for

asylum, the IJ reasonably and justifiably concluded that he was not credible.

Petitioner argues that the IJ improperly required him to produce corroborative documentation, contrary to the holding of *Diallo v. INS*, 232 F.3d 279 (2d Cir. 2000). Pet. Br. at 16. *Diallo* approvingly summarized the standard by which the BIA evaluates the testimony of an asylum claimant: "While consistent, detailed, and credible testimony may be sufficient to carry the alien's burden, evidence corroborating his story, or an explanation for its absence, may be required where it would reasonably be expected." *Id*. at 285. The issue faced by the *Diallo* court was the BIA's erroneous application of that standard. In *Diallo*, unlike the instant case, the petitioner's testimony "provided 'specific, credible detail'" in support of the asserted fear of persecution. *Id*. at 287. Accordingly, the petitioner in *Diallo*, unlike Mohamed, might have qualified for asylum based solely on his detailed and convincing testimony. Furthermore, unlike Mohamed, the petitioner in *Diallo* furnished specific explanations why personal documents such as identity cards had been rendered unavailable to him by the time of the hearing. *Id*. It was against this more compelling record that the Court found the IJ to have erred by denying asylum on the basis of insufficient corroborative materials. Faced with this record, the Court found unreasonable the IJ's expectation that Petitioner have possessed documentary "corroboration of the specifics of [his] personal experiences . . . ." *Id*. at 288.

The instant case is easily distinguishable from *Diallo*. Here, Mohamed's testimony failed to give "specific,

credible detail" in support of his claims of persecution. Indeed, there were legitimate reasons to find it incredible. Given its inconsistencies, it can hardly be said that Mohamed's testimony alone could have supported his claims, unlike *Diallo* where the petitioner's testimony was sufficient in and of itself. Also here, as set forth above, Mohamed failed to provide a satisfactory explanation for the absence of a mere letter from his family attesting to the rape incident when he had been in touch with them once a month for nearly two years prior to the hearing. Accordingly, the IJ's findings regarding the lack of corroborative evidence were appropriate and did not run afoul of *Diallo*.

Inconsistencies with respect to the only other incident at the core of Petitioner's claims of past persecution further undermined his credibility and his claim of past persecution on account of membership in a particular social group. As a preliminary point, Mohamed had denied belonging to any specific ethnic group, a statement that did nothing to enhance his credibility in the eyes of the IJ. In any event, in his asylum application, Mohamed claimed that his older brother was killed by the Hawiye because of his light skin, a characteristic associated with the Benadiri group. (JA 275). However, at the removal hearing, Petitioner testified that he did not know why his brother had been killed, in effect undermining the very basis for his claim of past persecution. (JA 138-139). In addition, Petitioner did not even appear certain in his testimony that Hawiye militia killed his brother. (JA 139). Petitioner testified that Hawiye patrolled the area in which his brother were killed, and therefore, he and his family believed that Hawiye killed his brother. Even assuming

that Hawiye did kill Mohamed's brother, Petitioner's inconsistency as to the reasons raises serious doubts about whether the killing was on account of his brother's ethnicity, or was merely criminally or financially motivated or otherwise an unfortunate casualty of civil war. The ambiguity in Mohamed's testimony justified the IJ's holding that there was no competent evidence from which to determine exactly who killed his older brother and for exactly what reasons. (JA 59).

This is not a case where the IJ relied on a few minor omitted details in support of his incredibility finding. *See generally de Leon-Barrios v. INS*, 116 F.3d 391, 393 (9th Cir. 1997) (inconsistencies not minor where they relate to the basis for the alien's fear of persecution). The incidents to which the inconsistencies are directed are the only two incidents of past persecution to which Petitioner and his family were subjected and are the very foundation for his asylum claim. Mohamed could not adequately explain away the inconsistencies. He offered only that he failed to report the rape incident upon his arrival in the United States because he was in shock. (JA 149). It seems inconceivable that after finally fleeing Somalia and enduring four months of exhausting travel to finally reach the United States that Mohamed could not remember the one incident that left with him with "no life" in Somalia. (JA 105). Even if he was in shock on the day he arrived, it is reasonable to presume that the shock would have dissipated during the eleven days before his credible fear

interview.[11] In any event, the IJ was in the best position to evaluate the explanations offered by not only taking into account the substance of the explanation but the tone, affect and demeanor in which it was delivered. Here, Petitioner's defined universe of past persecution consisted of two incidents, accounts of which are full of inconsistencies as a result of which an adverse credibility determination was appropriate. *See also Pop v. INS*, 270 F.3d 527, 531-32 (7th Cir. 2001) (upholding adverse credibility determination based upon inconsistencies between application and testimony); *Pal v. INS*, 204 F.3d 935, 940 (9th Cir. 2000) (same).

Mohamed's principal argument against the negative credibility finding is that "the alleged inconsistencies discussed by the Immigration Court in its decision were based upon a mischaracterization of Petitioner's testimony and evidence." Pet. Br. at 11. Petitioner then proceeds to offer his own interpretation of the record. In suggesting a reading of the record that differs from that adopted by the IJ, Mohamed misconstrues the standard of review. The substantial evidence standard requires Mohamed to offer more than a plausible alternative theory; to the contrary, Mohamed "must demonstrate that a reasonable fact-finder would be compelled to credit his testimony." *Wu Biao Chen*, 344 F.3d at 275-76 (citing *Elias-Zacarias*, 502 U.S.

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[11] It appears that the IJ mistakenly interpreted Petitioner's statement regarding shock as referring to shock stemming from the rape incident rather than from his arrival and detention in the United States. (JA 58). Irrespective of which incident Petitioner was referring, the claims of shock ring hollow under the circumstances.

at 481& n.1). As the Supreme Court has held, "'the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'" *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 523 (1981) (quoting *Consolo*, 383 U.S. at 620); *accord Mar Oil, S.A. v. Morrissey*, 982 F.2d 830, 837-38 (2d Cir. 1993). It is not the role of the reviewing court to re-weigh the inconsistencies "to see if we would reach the same credibility conclusions as the IJ." *Zhang v. INS*, 386 F.3d at 77.

Accordingly, the only relevant question is whether there is substantial evidence to support the conclusion that the IJ in fact reached in the face of Mohamed's contradictory statements. *See Elias-Zacarias*, 502 U.S. at 481& n.1. Here, the discrepancies and omissions as to the principal incidents of past persecution that Petitioner relied upon in his claim for asylum are reflected in the evidentiary record, these discrepancies provide specific and cogent reasons to conclude that Petitioner's testimony was not credible and Petitioner did not offer convincing explanations for the inconsistencies.

Not only did Petitioner fail to establish a credible basis for a finding of past persecution, but he also failed to offer specific, detailed reasons to support his claim of future persecution were he to return to Somalia. As the State Department notes, the situation in Somalia "does not permit a categorical determination that violence directed at clan members is either the result of general strife or targeted persecution aimed at punishing (or obliterating) particular social groups. Such determination must be

made on a case by case basis, keeping in mind the requirement that the violence must be 'on account of' one of the five refugee grounds." State Department Memorandum, December 9, 1993 (JA 193). Generally, an asylum-seeker must show an objectively reasonable fear of "particularized persecution." *Feleke v. INS*, 118 F.3d 594, 598 (8th Cir. 1997). "It is not sufficient to show he was merely subject to the general dangers attending a civil war or domestic unrest." *Prasad v. INS*, 101 F.3d 614, 617 (9th Cir. 1996). While Petitioner argues that he supplied the IJ with documentation confirming the general conditions of violence, human rights abuses and inter-clan strife in Somalia, Pet. Br. at 26-27, there was no evidence that Petitioner himself would be directly and personally affected on account of his ethnicity should he be returned to his native country.[12]

Mere assertion of membership in a particular group, as Petitioner attempts to do, also does not suffice to establish a well-founded fear of future persecution. Pet. Br. at 27-28. As the State Department cautions, "there is no automatic correlation between clan affiliation and danger of persecution. Whether fears based on clan or sub-clan membership are well founded would depend on the nature and durability of the alleged threat and particularly on the

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[12] "Nor may a person whose fear of harm is based solely on inter-clan warfare qualify as a refugee." State Department Memorandum, December 9, 1993, "Whether Somali Clan Membership May Meet the Definition of Membership in a Particular Social Group under the INA." (JA 188).

applicant's physical location in the country." (JA 291).[13] Here, Petitioner offers only that he "might" be killed were he to return to Somalia. (JA 109). Such speculation does not constitute a clear probability of future persecution. Moreover, it appears that at the time Petitioner left Kismayu, he did so because of the general strife and civil war that had erupted, not on account of any particularized persecution directed at him. (JA 106, 143, 355-356, 363, 366). Congress, however, has not "generally opened the doors to those merely fleeing from civil war." *Velasquez v. Ashcroft*, 342 F.3d 55, 58 (1st Cir. 2003) (internal quotation marks omitted).

Additionally, Petitioner's own admissions that he had lived for nearly seven years in another area of Somalia without incident and that he would return to Somalia if the war ended undercuts any notion that fear of future persecution merely because of membership in the Reer Hamar clan is subjectively or objectively reasonable. *See id.* (asylum claim denied, because, among other reasons, petitioners spent "eight years in Guatemala after the alleged persecution, ...[and] petitioners were able to live and work without interference from the guerillas"); *Manivong v. District Director, INS*, 164 F.3d 432, 433-34 (8th Cir. 1999) (despite evidence of past persecution, fear of future persecution not objectively reasonable where

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[13] There is no evidence in the record that Reer Hamar in particular are subject to such systematic and pervasive targeting in Somalia at this time on account of their ethnicity that mere membership in that group alone results in a well-founded fear of future persecution.

asylum-seeker later attended and obtained degree from government university and obtained municipal government job, and petitioner's father and children continued to live in country without incident). Here, Petitioner's own testimony raised doubts as to whether his request for asylum was truly motivated by a desire to escape persecution on account of his ethnicity or solely to escape the general civil strife in Somalia which rationale undermines his claims to asylum and withholding of removal.

Nor can Mohamed demonstrate that his fear of persecution is country-wide. Where the alleged persecutors consist not of the government, but of independent militia or rebel groups, the law requires the asylum-seeker also to show that his or her fear of persecution exists "country-wide," not just in certain areas controlled by the non-governmental groups. *See Melecio-Saquil v. Ashcroft*, 337 F.3d 983, 988 (8th Cir. 2003) (fear of persecution by guerrilla force not shown, because "even at its strongest in the early 1980's, [guerrilla force] did not have the ability to persecute a political opponent countrywide"); *Abdille v. Ashcroft*, 242 F.3d 477, 496 (3d Cir. 2001) (affirming BIA finding in which, "[i]n reaching its conclusion that [petitioner] had not established a well-founded fear of future persecution, the BIA relied primarily on the fact that [he] had failed to establish that his fear of persecution exists country-wide, and is not confined solely to the Cape Town area"); *Mazariegos v. Office of U.S. Attorney General*, 241 F.3d 1320, 1327 (11th Cir. 2001) ("we conclude that the BIA did not err by interpreting the INA and the regulations to require that . . . an alien seeking asylum on the basis of

non-governmental persecution, face a threat of persecution country-wide").

In light of his testimony and the documentary evidence he submitted, Mohamed's fear of persecution does not extend to Somalia in its entirety. That he would return to Somalia if the civil war ended and that he was able to live in another section of Somalia for a lengthy period before strife erupted calls into question the genuineness of any fear that he would be persecuted on account of his ethnicity at all, much less countrywide, should he return. Moreover, the State Department notes that widespread inter-clan fighting has subsided in the northern part of the country and that "conditions in the countryside are more stable than they have been in past years. Thousands of refugees have returned to the southern part of the country presumably because they thought it safe to do so." (JA 290-291). Benadiri clan members have also settled in Puntland, in Northeastern Somalia, without threat of persecution or fear for their safety. (JA 204). Accordingly, Mohamed cannot legitimately establish that his fear of persecution extends to Somalia as a whole.

Finally, there is also no merit to Petitioner's claim that fear of forced conscription into the Hawiye militia establishes persecution sufficient to grant him asylum. Not only do the State Department reports and other documentary evidence submitted by Petitioner fail to reveal that forced conscription was a widespread practice, but Petitioner has not provided any evidence that he would be targeted for such conscription because of his particular clan affiliation. *See Elias-Zacarias*, 502 U.S. at 482-83 (involuntary conscription into guerilla militia that does not

take place on account of one of the five enumerated grounds - - race, religion, nationality, political opinion, or membership in a particular social group - - that establish eligibility for asylum does not constitute persecution).

In sum, the IJ properly concluded that there was no "competent, credible or substantial evidence that shows the respondent was persecuted in Somalia, or that he would be persecuted upon his return to Somalia." (JA 58).

III. THE BOARD OF IMMIGRATION APPEALS' STREAMLINED REVIEW PROCESS DOES NOT VIOLATE DUE PROCESS.

A. Relevant Facts

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

B. Governing Law and Standard of Review

The streamlining regulation at issue in this case -- 8 C.F.R. § 3.1(a)(7)(2002) -- authorizes a single member of the BIA to affirm, without opinion, the results of an IJ's decision, when that Board Member determines:

> (1) that the result reached in the decision under review was correct;
> (2) that any errors in the decision under review were harmless or nonmaterial; and
> (3) that (A) the issue on appeal is squarely controlled by existing Board or federal court

> precedent and does not involve that application of precedent to a novel fact situation; or (B) the factual and legal questions raised on appeal are so insubstantial that three-Member [Board] review is not warranted.

8 C.F.R. § 3.1(a)(7)(ii) (2002).[14] Once the Board Member has made the determination that a case falls into one of these categories, the Board issues the following order: "The Board affirms, without opinion, the results of the decision below. The decision is, therefore, the final agency determination. 8 C.F.R. § 3.1(a)(7)(iii)(2002).[15] In keeping with the spirit of resource-conservation that was the impetus for the streamlining process, the regulation explicitly prohibits Board Members from including in their orders their own explanation or reasoning. *Id.*; *see* 64 Fed. Reg. 56,137 (Oct. 18, 1999) (stating that one reason for the streamlining initiative was the fact that "[e]ven in routine cases in which Panel Members agree that the result reached below was correct, disagreements concerning the rationale or style of a draft decision can require significant time to resolve"). Consequently, the regulation designates the decision of the IJ, and not the BIA's summary affirmance, as the proper subject of judicial review. *See* 64 Fed. Reg. 56,137 ("[t]he

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[14] The regulation has since been redesignated 8 C.F.R. § 1003.1(a)(7) (2004).

[15] The regulation clarifies that an affirmance without opinion "does not necessarily imply approval of all of the reasons of" the decision below. *Id.*

decision rendered below will be the final agency decision for judicial review purposes").

An "alien's right to an administrative appeal from an adverse asylum decision derives from statute rather than from the Constitution." *Zhang v. United States Dep't. of Justice,* 362 F.3d 155, 157 (2d Cir. 2004) (per curiam); *See also Guentchev v. INS*, 77 F.3d 1036, 1037 (7th Cir. 1996) ("The Constitution does not entitle aliens to administrative appeals . . . . The Attorney General could dispense with the Board and delegate [his] powers to the immigration judges, or could give the Board discretion to choose which cases to review . . . . ").

This Court recently joined the majority of circuits in holding that the BIA's decision to summarily affirm an IJ's decision, without opinion, in accordance with its streamlined review process "does not deprive an asylum applicant of due process." *Zhang,* 362 F.3d at 157; *see also Shi v. Board of Immigration Appeals,* 374 F.3d 64, 66 (2d Cir. 2004) (the BIA did not abuse its discretion in summarily affirming decision of IJ, without opinion, pursuant to streamlining regulations).

C. Discussion

This Court, in *Zhang v. U.S. Dep't of Justice*, 362 F.3d at 157, rejected the same claim that Petitioner raises in this case. This Court held in *Zhang* that "because nothing in the immigration laws requires that administrative appeals from IJ decisions be resolved by three-member panels of the BIA through formal opinions that 'address the record,' the BIA was free to adopt regulations permitting summary

affirmance by a single Board member without depriving an alien of due process." *Id.* at 157. This Court has long upheld the authority of the BIA to summarily affirm the IJ's decision even prior to promulgation of the streamlining regulations, provided "'the immigration judge's decision below contains sufficient reasoning and evidence to enable [the Court] to determine that the requisite factors were considered,'" *Shi,* 374 F.3d at 66 (quoting *Arango-Aradondo v. INS,* 13 F.3d 610, 613 (2d Cir. 1994)). *See also Zhang,* 362 F.3d at 158 ("Because the BIA streamlining regulations expressly provide for the summarily affirmed IJ decision to become the final agency order subject to judicial review, we are satisfied the regulations do not compromise the proper exercise of our [8 U.S.C.] § 1252 jurisdiction.") (footnote omitted).

Here, as in *Shi* and *Zhang,* the IJ's decision provides sufficient reasoning for review by this Court. The oral decision of the IJ summarizes key evidence, including Petitioner's testimony, comments on evidence which Petitioner reasonably could have submitted, but did not, and analyzed applicable caselaw as it applies to the record evidence. (JA 55-64). The decision also contains a recitation of the legal standards the IJ applied in assessing Petitioner's asylum, withholding of removal and CAT claims. (JA 51-55). Finally, the IJ's decision contains "'specific, cogent' reasons for [his] adverse credibility finding and . . . those reasons bear a 'legitimate nexus' to the finding." (JA 55-64); *See Zhang v. INS*, 386 F.3d at 74 (quoting *Secaida-Rosales*, 331 F.3d at 307). Thus, the IJ's decision provides ample basis for review by this Court.

Petitioner also claims that his due process rights were violated because "in this instance, the Immigration Court failed to provide any detailed analysis or explanation supporting the decision to deny Petitioner's application for asylum as untimely even though the record presented pertinent factors presented as "extraordinary circumstances" relating to the delay," and "the Board of Immigration Appeals affirmation without opinion fails to indicate that it gave individualized attention to Petitioner's explanations for untimely filing . . . ." Pet. Br. at 18. First, this argument is immaterial in that this Court does not have the jurisdiction to review an agency determination that an asylum application is untimely and that the applicant did not establish exceptional circumstances sufficient to excuse the delay. *See* Point I, *supra*. In the absence of such jurisdiction, whether or not the IJ or Board articulated the reasons for that conclusion is moot.

Moreover, this argument rests upon the faulty premise that the IJ rejected Petitioner's asylum application solely on the limitations ground. While the IJ noted that the application was untimely and that the delay was not justified by exceptional circumstances, he nonetheless also addressed the application on its merits and denied it because there was no credible evidence that Petitioner suffered past persecution or would suffer persecution in the future should he return to Somalia. (JA 8). Similarly, and contrary to Petitioner's assertions, his claim for relief under CAT was considered on the merits and rejected because Petitioner failed to meet "the burden of proof showing that it is more likely than not that he would be tortured upon his return to his home country." (JA 12).

This conclusion was certainly appropriate where Petitioner did not offer a scintilla of evidence that he would be subjected to torture by a government official or at the behest of a government official upon return to Somalia.[16]

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[16] Article 3 of CAT precludes the United States from returning an alien to a country where he more likely than not would be tortured by, or with the acquiescence of, government officials acting under color of law. *See Wang v. Ashcroft*, 320 F.3d 130, 133-34, 143-44 & n.20 (2d Cir. 2003); *Ali v. Reno*, 237 F.3d 591, 597 (6th Cir. 2001); *In re Y-L-, A-G-, R-S-R-*, 23 I. & N. Dec. 270, 279, 283, 285, 2002 WL 358818 (A.G. Mar. 5, 2002); 8 C.F.R. §§ 208.16(a), 208.17(a), 208.18(a) (2002).

To establish eligibility for relief under the Torture Convention, the applicant bears the burden of proof to "establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. § 208.16(c)(2) (2002); *see also Najjar v. Ashcroft*, 257 F.3d 1262, 1304 (11th Cir. 2001); *Wang*, 320 F.3d at 133-34, 144 & n.20.

The Torture Convention defines "torture" as " 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining . . . information or a confession, punish[ment] . . . , 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.*' " *Ali*, 237 F.3d at 597 (citing 8 C.F.R. § 208.18(a)(1) (2002))(emphasis added).

As a practical matter, a CAT claim would be difficult to prove in the absence of an official government authority in Somalia. *See D-Muhumed v. U.S. Attorney General*, 388 F.3d

(continued...)

In sum, in light of this Court's clearly established precedent, the BIA appropriately entered a summary affirmance. *See Zhang*, 362 F. 3d at 157.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Dated: January 24, 2005

Respectfully submitted,

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[16] (...continued)
814, 820 (11th Cir. 2004) (holding that Somali's claim for relief under CAT fails because "Somalia currently has no central government and the clans who control various sections of the country do so through continued warfare and not through official power").

CERTIFICATION PER FED. R. APP. P.32(a)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,990 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.

S. DAVE VATTI
ASSISTANT U.S. ATTORNEY

Addendum

8 U.S.C. § 1101(a)(42) (2004). Definitions.

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that 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, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. . . .

8 U.S.C. §§ 1158(a)(1), (a)(2)(B), (a)(2)(D), (a)(3), (b)(1) (2004). Asylum.

(a) Authority to apply for asylum

(1) In general

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

(2) Exceptions

....

(B) Time Limit

Subject to subparagraph (D), paragraph 1 shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States.

....

(D) Changed Circumstances

An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if

the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).

(3) Limitation of Judicial Review

No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2).

(b) Conditions for granting asylum

(1) In general

> The Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Attorney General under this section if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

....

8 U.S.C. § 1231(b)(3)(A) (2004). Detention and removal of aliens ordered removed.

(A) In general

> Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a

country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1252(b)(4) (2004). Judicial review of orders of removal.

(4) Scope and standard for review

Except as provided in paragraph (5)(B)--

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

8 C.F.R. §1003.1(a)(7) (2004), formerly 8 C.F.R. §3.1(a)(7)(2002). Organization, jurisdiction and powers of the Board of Immigration Appeals.

(7) Affirmance without opinion.

(i) The Chairman may designate, from time-to-time, permanent Board Members who are authorized, acting alone, to affirm decisions of Immigration Judges and the Service without opinion. The Chairman may designate certain categories of cases as suitable for review pursuant to this paragraph.

(ii) The single Board Member to whom a case is assigned may affirm the decision of the Service or the Immigration Judge, without opinion, if the Board Member determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that

(A) the issue on appeal is squarely controlled by existing Board or federal court precedent and does not involve the application of precedent to a novel fact situation; or

(B) the factual and legal questions raised on appeal are so insubstantial that three-Member review is not warranted.

(iii) If the Board Member determines that the decision should be affirmed without opinion, the Board shall issue an order that reads as follows:

"The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. See 8 CFR 3.1(a)(7)." An order affirming without opinion, issued under authority of this provision, shall not include further explanation or reasoning. Such an order approves the result reached in the decision below; it does not necessarily imply approval of all of the reasoning of that decision, but does signify the Board's conclusion that any errors in the decision of the Immigration Judge or the Service were harmless or nonmaterial.

(iv) If the Board Member determines that the decision is not appropriate for affirmance without opinion, the case will be assigned to a three-Member panel for review and decision. The panel to which the case is assigned also has the authority to determine that a case should be affirmed without opinion.

8 C.F.R. § 208.4(a)(5) (2004). Filing the Application

(5) The term "extraordinary circumstances" in section 208(a)(2)(D) of the Act shall refer to events or factors directly related to the failure to meet the 1-year deadline. Such circumstances may excuse the failure to file within the 1-year period as long as the alien filed the application within a reasonable period of time given those circumstances. The burden of proof is on the applicant to establish to the satisfaction of the asylum officer, the immigration judge, or the Board of Immigration Appeals that the circumstances were not

intentionally created by the alien through his or her own action or inaction, that those circumstances were directly related to the alien's failure to file the application within the 1-year period, and that the delay was reasonable under the circumstances. Those circumstances may include but are not limited to:

> (i) Serious illness or mental or physical disability including any effects of persecution or violent harm suffered in the past, during the 1-year period after arrival;
>
> (ii) Legal disability (*e.g.*, the applicant was an unaccompanied minor or suffered from a mental impairment) during the 1-year period after arrival;
>
> (iii) Ineffective assistance of counsel provided that:
>
> > (A) The alien files an affidavit setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard;
> >
> > (B) The counsel whose integrity or competence is being impugned has been informed of the allegations leveled against him or her and given an opportunity to respond;

(C) The alien indicates whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not;

(iv) The applicant maintained Temporary Protected status, lawful immigrant or non-immigrant status, or was given parole until a reasonable period before the filing of the asylum application;

(v) The applicant filed an asylum application prior to the expiration of the 1-year deadline, but that application was rejected by the Service as not properly filed, was returned to the applicant for corrections, and was re-filed within a reasonable period thereafter; and

(vi) The death or serious illness or incapacity of the applicant's legal representative or a member of the applicant's immediate family.

8 C.F.R. § 208.13 (2004). Establishing asylum eligibility.

(a) Burden of proof. The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in section 101(a)(42) of the Act. The testimony

of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The fact that the applicant previously established a credible fear of persecution for purposes of section 235(b)(1)(B) of the Act does not relieve the alien of the additional burden of establishing eligibility for asylum.

(b) Eligibility. The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution.

> (1) Past persecution. An applicant shall be found to be a refugee on the basis of past persecution if the applicant can establish that he or she has suffered persecution in the past in the applicant's country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to, or avail himself or herself of the protection of, that country owing to such persecution. An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim. That presumption may be rebutted if an asylum officer or immigration judge makes one of the findings described in paragraph (b)(1)(i) of this section. If the applicant's fear of future persecution is unrelated to the past persecution, the applicant bears the burden of establishing that the fear is well-founded.

(i) Discretionary referral or denial. Except as provided in paragraph (b)(1)(iii) of this section, an asylum officer shall, in the exercise of his or her discretion, refer or deny, or an immigration judge, in the exercise of his or her discretion, shall deny the asylum application of an alien found to be a refugee on the basis of past persecution if any of the following is found by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality or, if stateless, in the applicant's country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion; or

(B) The applicant could avoid future persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, and under all the circumstances, it would be reasonable to expect the applicant to do so.

(ii) Burden of proof. In cases in which an applicant has demonstrated past persecution under paragraph (b)(1) of this section, the Service shall bear the burden of establishing by a preponderance of the evidence the

requirements of paragraphs (b)(1)(i)(A) or (B) of this section.

(iii) Grant in the absence of well-founded fear of persecution. An applicant described in paragraph (b)(1)(i) of this section who is not barred from a grant of asylum under paragraph (c) of this section, may be granted asylum, in the exercise of the decision-maker's discretion, if:

(A) The applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution; or

(B) The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.

(2) Well-founded fear of persecution.

(i) An applicant has a well-founded fear of persecution if:

(A) The applicant has a fear of persecution in his or her country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion;

(B) There is a reasonable possibility of suffering such persecution if he or she were to return to that country; and

(C) He or she is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear.

(ii) An applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, if under all the circumstances it would be reasonable to expect the applicant to do so.

(iii) In evaluating whether the applicant has sustained the burden of proving that he or she has a well-founded fear of persecution, the asylum officer or immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution if:

(A) The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual residence, of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a

particular social group, or political opinion; and

(B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.

. . .

8 C.F.R. § 208.16 (2004). Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.

(a) Consideration of application for withholding of removal. An asylum officer shall not decide whether the exclusion, deportation, or removal of an alien to a country where the alien's life or freedom would be threatened must be withheld, except in the case of an alien who is otherwise eligible for asylum but is precluded from being granted such status due solely to section 207(a)(5) of the Act. In exclusion, deportation, or removal proceedings, an immigration judge may adjudicate both an asylum claim and a request for withholding of removal whether or not asylum is granted.

(b) Eligibility for withholding of removal under section 241(b)(3) of the Act; burden of proof. The burden of proof is on the applicant for withholding of removal under section 241(b)(3) of the Act to establish that his or her life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion. The testimony of the applicant, if credible, may

be sufficient to sustain the burden of proof without corroboration. The evidence shall be evaluated as follows:

(1) Past threat to life or freedom.

(i) If the applicant is determined to have suffered past persecution in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim. This presumption may be rebutted if an asylum officer or immigration judge finds by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant's life or freedom would not be threatened on account of any of the five grounds mentioned in this paragraph upon the applicant's removal to that country; or

(B) The applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so.

(ii) In cases in which the applicant has established past persecution, the Service shall bear the burden of establishing by a

preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (b)(1)(i)(B) of this section.

(iii) If the applicant's fear of future threat to life or freedom is unrelated to the past persecution, the applicant bears the burden of establishing that it is more likely than not that he or she would suffer such harm.

(2) Future threat to life or freedom. An applicant who has not suffered past persecution may demonstrate that his or her life or freedom would be threatened in the future in a country if he or she can establish that it is more likely than not that he or she would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion upon removal to that country. Such an applicant cannot demonstrate that his or her life or freedom would be threatened if the asylum officer or immigration judge finds that the applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so. In evaluating whether it is more likely than not that the applicant's life or freedom would be threatened in a particular country on account of race, religion, nationality, membership in a particular social group, or political opinion, the asylum officer or immigration judge shall not require the applicant to provide evidence that he or she would be singled out individually for such persecution if:

(i) The applicant establishes that in that country there is a pattern or practice of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(ii) The applicant establishes his or her own inclusion in and identification with such group of persons such that it is more likely than not that his or her life or freedom would be threatened upon return to that country.

. . . .

(c) Eligibility for withholding of removal under the Convention Against Torture.

(1) For purposes of regulations under Title II of the Act, "Convention Against Torture" shall refer to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, as implemented by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (Pub.L. 105-277, 112 Stat. 2681, 2681-821). The definition of torture contained in § 208.18(a) of this part shall govern all decisions made under regulations under Title II of the Act about the applicability of Article 3 of the Convention Against Torture.

(2) The burden of proof is on the applicant for withholding of removal under this paragraph to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

(3) In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered, including, but not limited to:

(i) Evidence of past torture inflicted upon the applicant;

(ii) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;

(iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and

(iv) Other relevant information regarding conditions in the country of removal.

(4) In considering an application for withholding of removal under the Convention Against Torture, the immigration judge shall first determine whether the alien is more likely than not to be tortured in the country of removal. If the immigration judge determines that the alien is more

likely than not to be tortured in the country of removal, the alien is entitled to protection under the Convention Against Torture. Protection under the Convention Against Torture will be granted either in the form of withholding of removal or in the form of deferral of removal. An alien entitled to such protection shall be granted withholding of removal unless the alien is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section. If an alien entitled to such protection is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section, the alien's removal shall be deferred under § 208.17(a).

(d) Approval or denial of application--

(1) General. Subject to paragraphs (d)(2) and (d)(3) of this section, an application for withholding of deportation or removal to a country of proposed removal shall be granted if the applicant's eligibility for withholding is established pursuant to paragraphs (b) or (c) of this section.

. . . .

8 C.F.R. § 208.17 (2004). Deferral of removal under the Convention Against Torture.

(a) Grant of deferral of removal. An alien who: has been ordered removed; has been found under § 208.16(c)(3) to be entitled to protection under the Convention Against Torture; and is subject to the provisions for mandatory denial of withholding of removal

under § 208.16(d)(2) or (d)(3), shall be granted deferral of removal to the country where he or she is more likely than not to be tortured.

. . . .

8 C.F.R. § 208.18 (2004). Implementation of the Convention Against Torture.

(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.

(b) Applicability of §§ 208.16(c) and 208.17(a)--

(1) Aliens in proceedings on or after March 22, 1999. An alien who is in exclusion, deportation, or removal proceedings on or after March 22, 1999 may apply for withholding of removal under § 208.16(c), and, if applicable, may be considered for deferral of removal under § 208.17(a).

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