02-4472-ag

To Be Argued By:
HENRY K. KOPEL

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 02-4472-ag

EDMOND SALAME,

Petitioner,

-vs-

JOHN ASHCROFT, UNITED STATES ATTORNEY GENERAL, IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

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

This Court has appellate jurisdiction under § 242(b) of the Immigration and Naturalization Act, 8 U.S.C. § 1252(b) (2004), to review the petitioner's challenge to the BIA's August 14, 2002, final order denying him asylum, withholding of removal, and relief under the Convention Against Torture.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether substantial evidence supports the immigration judge's determination that Edmond Salame failed to establish eligibility for asylum and for withholding of removal, where Salame's account lacked sufficient detail, was contradicted by the country report, and lacked credibility.

2. Whether the immigration judge properly rejected Edmond Salame's claim for relief under the Convention Against Torture, where Salame failed to show a likelihood that he would be tortured upon returning to Lebanon.

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BRIEF FOR JOHN ASHCROFT
Attorney General of the United States

Preliminary Statement

Edmond Salame, a native and citizen of Lebanon, petitions this Court for review of an April 14, 2002, decision of the Board of Immigration Appeals ("BIA") (Joint Appendix ("JA") 1-2). The BIA summarily affirmed the November 27, 2000, decision and order of an Immigration Judge ("IJ"), which denied petitioner's

applications for asylum, for withholding of removal, and for relief under the U.N. Convention Against Torture ("CAT")[1] under the Immigration and Nationality Act of 1952, as amended ("INA"), and which ordered him removed from the United States. (JA 1-2 (BIA's decision), 35-44 (IJ's decision and order)).

Substantial evidence supports the IJ's finding that petitioner failed to meet his burden of demonstrating eligibility for asylum. Petitioner's allegations were insufficiently specific and detailed to establish an objectively reasonable fear that he would be singled out for persecution upon returning to Lebanon. The State Department's Country Report for Lebanon, admitted into evidence, did not support petitioner's asserted fear. The record supports the IJ's adverse credibility determination regarding petitioner's claim that the reason he waited five years here before filing an Asylum Petition was because he was seeking to renew his prior marriage. The evidence strongly supported the conclusion that the marriage had been a sham. Petitioner's asserted fear is further discounted by his having stayed in Lebanon for seven years after the alleged mistreatment without suffering

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

further harm; and by the fact that the civil war in Lebanon ended after petitioner's departure. Petitioner also failed to meet his burden of showing that the risk of persecution by non-governmental militia existed country-wide.

Substantial evidence also supports the IJ's determination that petitioner failed to establish a basis for withholding of removal under the CAT. For the same reasons discussed above, petitioner failed to meet his burden of establishing that it is more likely than not that he would be tortured if removed to Lebanon.

Statement of Facts

A. Petitioner's Entry into the United States and Asylum, Withholding, CAT, & Voluntary Departure Application

Petitioner Edmond Salame is a native and citizen of Lebanon, where he was born on December 15, 1937. (JA 81, 122, 145). According to petitioner, he first came to the United States to visit an uncle in Detroit, and stayed between August 20, 1963 and October 22, 1963. (JA 88, 148). Petitioner returned to Lebanon, then came back to the United States a second time from August 28, 1965 through sometime in April 1968. (JA 88, 148). One month after his return to the United States, on September 27, 1965, petitioner married an American citizen named Mary E. Cox Kearns. (JA 88, 97, 160). Petitioner married Ms. Cox Kearns 14 days after the two had met, and after being informed by Ms. Cox Kearns that she had been married at least three times previously. (JA 97). A few months later, Ms. Cox Kearns applied for a green card on behalf

of petitioner, but subsequently withdrew the application. (JA 97). Lacking a green card, petitioner returned to Lebanon in 1968, where he remained until 1987. (JA 148).

On or about March 15, 1988, petitioner entered the United States a third time, by crossing the border from Mexico. (JA 123, 145). Petitioner's passport fails to document his 1988 border crossing into the United States. (JA 162-173). On February 4, 1993, nearly five years after that border crossing, petitioner submitted a request for asylum with the Immigration & Naturalization Service ("INS"). (JA 145-149). Petitioner based the asylum request on his Maronite Christian religion and his political beliefs as a supporter of the Lebanese government, asserting that the Lebanese Muslim "Druzos" militia had previously kidnapped and beaten him, and that his brother had been kidnapped after petitioner's departure from Lebanon. (JA 146-147). Although he did not know the whereabouts of the woman he had married in 1965, petitioner also asserted that he was seeking to locate his wife and resume his married life with her. (JA 149).[2] No action appears to have been taken on the petition for asylum prior to the petitioner's removal hearing in November of 2000. (JA 79).

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[2] On March 17, 1995, a judgment was entered in the California Superior Court, San Diego County, dissolving the marriage of Edmond Salame and Mary Salame. (JA 150). Petitioner contends that he found his long-lost wife in 1995, spent a few months with her, but "could not bear her domineering ways" and sued for divorce. (JA 123).

B. Petitioner's Removal Proceedings

On April 28, 1997, the INS served petitioner with a Notice to Appear for a removal hearing. (JA 176-177). The alleged bases for removal asserted in the Notice to Appear were that petitioner: (1) was neither a citizen nor a national of the United States; (2) was a native and citizen of Lebanon; (3) entered the United States at a place unknown on or about March 15, 1988; and (4) at that time, was neither inspected nor admitted by an immigration officer. (JA 176). The Notice to Appear concluded, therefore, that petitioner was subject to removal as an alien present in the United States who has not been admitted or paroled, under Section 212(a)(6)(A)(i) of the Immigration & Nationality Act. (JA 176).

After several continuances, a combined removal hearing and hearing on the asylum petition was held before the Immigration Judge ("IJ") on November 27, 2000 (hereinafter, "Removal/Asylum Hearing").

1. Documentary Submissions

Four numbered exhibits were submitted at the November 27, 2000, Removal/Asylum hearing. (JA 79-80). The INS Notice to Appear was submitted as Exhibit 1. (JA 79-80, 176-177).

Petitioner's February 4, 1993, Asylum Petition was submitted as Exhibit 2. (JA 79-80, 145-149). In this document, petitioner claimed asylum on the basis of his being "persecuted in Lebanon by the Muslim groups due to my political belief and because I am a Christian."

Petitioner stated that he had been "kidnapped, tortured and beaten" by these groups, and asserted that he would "probably be killed" if he returned to Lebanon. The asylum petition identified those responsible for such persecution as "the Druzos muslims," presumably meaning the Druze. No further detail was offered regarding those responsible for the asserted persecution. No date(s), time(s), place(s), or other identifying facts were listed regarding alleged incidents of persecution. The document also stated that, after petitioner left Lebanon, his brother was kidnapped, and that despite efforts to obtain information from the International Committee of the Red Cross, "we do not know whether he is alive or dead." No time, place, or other facts are listed regarding the asserted kidnaping. Petitioner acknowledged his two previous trips to the United States on the dates noted above, and acknowledged entering the United States a third time by crossing the border from Mexico on March 15, 1988. Petitioner listed his spouse as Mary E. Cox Kearns, and stated that "I am trying to locate her and resume our marriage life together." (JA 149).

The U.S. State Department's 1999 Country Report on Lebanon was submitted as Exhibit 3 ("Country Report"). (JA 79-80, 102-120). The Country Report makes clear that positions in Lebanon's national executive and legislature are divided between Christians, Sunni Muslims, and Shi'a Muslims under an agreed-upon formula. (JA 102). It also states that "[t]he constitution provides for freedom of religion, and the Government respects this right in practice." (JA 112). "Each religious group has its own courts for family law matters, such as marriage, divorce, child custody, and inheritance." (JA 117-118).

Under the heading "Respect for Human Rights," the Country Report states that "[t]here were no reports of political or extrajudicial killings by government authorities during the year." (JA 104). The Country Report makes several references to the fact that the national government exercises authority only in some parts of the country, while a variety militias with different national, ethnic, or religious affiliations control other areas: "Non-Lebanese military forces control much of the country," including primarily Syrian troops, but also Israeli Army and Israeli-supported militias in the south, and several armed Palestinian factions in other areas, all of which "undermine the authority of the central Government and prevent the application of law in the patchwork of areas not under the government's control." (JA 102).[3] Significantly, the Country Report appears to make no reference to any groups or militia of Druze or "Druzos" exercising any authority. Although the government does not control the entire country, the Country Report states that "the Government continued to consolidate its authority in those parts of the country under its control and continued to take tentative steps to exert its authority in the Biqa' Valley and Beirut's southern suburbs." (JA 102). While the government's human rights record was mixed, the Country Report stated, with respect to ongoing trials of

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[3] News articles annexed to Exhibit 4, a "Supplementary Affidavit of Edmond Salame," discuss Israel's having subsequently withdrawn its armed forces from southern Lebanon, and the region's having been occupied by Hizbollah forces (JA 142-143). The United States does not dispute that Israel did withdraw, and that forces other than Israel's now control that territory.

several hundred militia fighters who had opposed the government, "[h]uman rights groups . . . believe that the trials have been fair, procedurally correct, and open." (JA 109). The Country Report also noted that "[t]here were no reports of political prisoners." (JA 109). The Country Report says that Lebanon was in a state of civil war between 1975 and 1990, and that the civil war ended after a 1989 peace settlement brokered by the Arab League. (JA 102-103). The Country Report refers to "kidnappings of thousands of persons during the [civil] war between 1975 and 1990," noting that the Government has not yet taken judicial action against the groups known to have been responsible for such acts. (JA 105). The Country Report notes that human rights abuses occur "in areas outside the state's authority," which include the "Palestinian refugee camps," and areas controlled by the Iranian-backed group Hizballah. (JA 106). The Country Report refers to the government's security forces conducting arbitrary arrests, interrogations, and detentions of "predominantly Christian supporters of ousted General Michael 'Awn and of the jailed commander of the Lebanese Forces," and states that "[m]ost detainees were released after they were forced to sign documents stating they would abstain from politics." (JA 107). Similarly, "local militias and non-Lebanese forces continued to conduct arbitrary arrests in areas outside central government control." (JA 108).

A "Supplementary Affidavit of Edmond Salame," dated June 15, 2000, and notarized by appellant's counsel, was submitted as Exhibit 4 ("Affidavit"). (JA 79-80, 121-144). Annexed to the Affidavit were four exhibits, consisting of: (1) Salame's September 27, 1965, Marriage

Certificate to Mary E. Cox Kearns (JA 125); (2) the March 1995 Judgment of Dissolution of that marriage (JA 127); (3) a reprint of the U.S. State Department 1999 Country Report on Human Rights Issues in Lebanon (JA 129-140); and (4) two pages of newspaper articles discussing Israel's withdrawal of armed forces from southern Lebanon, and the occupation of former Israeli positions by Hizbollah forces (JA 142-143).

In the Affidavit, petitioner states that he and his family are all Maronite Christians, and that before the outbreak of civil war in 1975, he operated a clothing store in the Christian sector of East Beirut. (JA 122). He states that during the civil war, Muslim mobs burned the store to the ground, after which petitioner and his brother Salim fought with the Christian militia against the Muslim milita in Beirut; and that "we depended upon the Christian milita for food and clothing" during the period of the war. (*Id.*). The Affidavit says that in 1988, petitioner's brother Salim disappeared in Tripoli, and the family never learned what happened to him. (*Id.*). It also says, "I myself was once beaten by Muslim Druze militia, had my head smashed with a rifle butt, was tortured, and left to die." (*Id.*). No date, place, or other explanation is offered regarding this incident. The Affidavit mentions petitioner's second (but not his first) visit to the United States, and his marriage to Mary E. Cox Kearns. (*Id.*). The Affidavit does not mention that they married 14 days after first meeting, but says that the marriage "turned rocky," the INS "asked me to leave," and "I left her alone in the United States." (JA 122-123). Petitioner claims in the Affidavit that his "having married an American . . . was another reason for the Muslims to seek to harm me" during the civil war. (JA

123). Petitioner acknowledges crossing the Mexican border into the United States on March 15, 1988. (*Id*.). He applied for asylum in 1993 because Lebanon's small size "means that people know each other's backgrounds, and someone sooner or later would know that I fought with the Christian militia, and I would be killed." (*Id*.). Petitioner says the Muslims hate the Christian militia because the latter "helped Israel police and control southern Lebanon," and that with Israel just having pulled its troops out of southern Lebanon, "I, as a Christian militia, would certainly also be in severe danger," especially because "at my advanced age I will be easy prey" for the Muslims. (*Id*.).

2. Petitioner's Testimony

Petitioner was the only witness to testify at the November 27, 2000, Removal/Asylum hearing. On direct examination, petitioner testified among other things that: he was born in Lebanon (JA 81); his family were all Maronite Christians (JA 82-83); before the outbreak of civil war in 1974, he ran a clothing business in Terrablos (JA 29)[4]; at an unidentified time during the "revolution" a group of unidentified Muslims burned his store down (JA 30); he fought on the side of the Christian Lebanese party against the Muslims in the civil war (JA 85-86); and the war lasted "from '74 to '84, for 10 years." (JA 86).

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[4] As noted above, petitioner stated in his Affidavit that the store was in the Christian sector of East Beirut. (JA 122).

Petitioner testified about his prior interludes in the United States as follows: he first came to the United States "in '65 or '63 " to visit his mother's uncle in Detroit (JA 88); he returned to Lebanon, then came back to the United States (JA 88); he got married to Mary Cox, but "[w]e did not get along" (JA 88); he had to go back to Lebanon in 1968, because although his wife "had applied" on behalf of petitioner with the immigration authorities, "we did not get along and the Immigration did not like that." (JA 88-89). Petitioner testified that later, "[i]n '88 when I came here in the (indiscernible) we got divorced." (JA 88).[5]

Petitioner testified that after returning to Lebanon in 1968, he did not return to the United States until 1988. (JA 89). From that 20-year period, petitioner testified about one event that made him fear for his life and seek to leave the country. (JA 89-94). The incident consisted of petitioner's being stopped in his car and grabbed and mugged by a group of Druze. (JA 89-90). Petitioner testified that "they kept beating me up," then they left him in the street up in the mountains; "[a]nd when I gain[ed] conscious[ness], I took myself and left." (JA 90-91). Petitioner said he had been driving alone from Beirut to Terrablos, which took him through "their neighborhood," and was grabbed from the car in "a small town up by [the] road in the mountain." (JA 90). Asked to identify "who is they," petitioner first said "[t]he Muslims there," then when asked whether he could identify "which group it was," petitioner answered, "Druze." (JA 89-90). Asked why they grabbed him, petitioner said "[w]hen you go to

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[5] As noted above, the divorce did not occur in 1988, but on March 17, 1995. (JA 150).

their neighborhood they . . . grab you, they interrogate you, they want to know everything about you." (JA 90-91). Asked what month and year this happened, petitioner at first responded, "I can't answer the question, I honestly don't remember," adding "I'm a 60 years old man"; asked again which year it occurred, he replied, "'80." (JA 92).

Petitioner did not relate any other specific event that happened to him with respect to his fear for his life. Asked whether anybody else in his family had any experiences like that, petitioner stated, "[w]hen I left there, they killed my brother."(JA 92). Asked "how do you know he was killed," petitioner explained, "we inquired all over. Nobody knows. . . [W]e inquired from the Red Cross."(JA 92). Petitioner said his brother, named Salame, had a small delicatessen in Terrablos. JA 92). He acknowledged that he had sisters living in Lebanon, but when asked if they experienced "any of the difficulties you had," petitioner replied, "They are females. They don't fight." (JA 93).

Asked why he needed to apply for asylum in the United States, petitioner said, "My life is in danger there. They will kill me." (JA 92). Given several opportunities on direct exam to be more specific, petitioner responded each time with general assertions that his life was in danger. Asked "who would threaten" his life, petitioner said "You ask me the same question again. There all the Muslims are one party and all the Christians another party." (JA 92-93). Asked "[d]o you think they would still try to kill you now," petitioner replied, "They abducted several hundred people. . . . If they catch me, by God, they will kill me." (JA 93). Asked "why would you be subject to danger in Lebanon," petitioner said, "If you were engaged in politics

and you were engaged in that movement would it be danger for you or not." (JA 93-94). Asked by his attorney, "*[i]n particular*, what do you think you have done that would make you vulnerable or a target for the Muslims" (emphasis added), he answered, "[t]here is no peace in Lebanon". (JA 94). Asked "*particularly*, why would it be dangerous for you, yourself, to be in Lebanon" (emphasis added), he replied, "[b]ecause they know me over there." (JA 93). Asked "who knows you," petitioner declined to specify any particular individuals or groups, other than saying "[t]he Muslims . . . the Lebanese Muslims," and asserted that "Lebanon is a small country. Everybody knows the other, they know each other." (JA 94).

On cross-examination, petitioner admitted that when he married an American woman in 1965, this occurred within a month of petitioner's arrival in the United States, only fourteen days after he had met the woman, and with the knowledge that she had married three times before. (JA 42). Petitioner admitted that his new wife applied for his green card within two months of the marriage, and that she later withdrew the application. (JA 42). With respect to his 1988 return to the United States, petitioner was asked three times what it was about that particular year that made him have to flee the civil war, insofar as "that had been happening for over a decade." (JA 43). His three separate answers to the question, "why did you come specifically in 1988," were: (1) "[i]n '84 . . . they bombed the 250 marines that were there in Lebanon"; (2) "the war there . . . [t]hat's the reason why I left"; and (3) "[b]ecause I found out that I cannot stay there any longer. I had to leave." (JA 98-99). Asked why he waited until he had been in the United States for five years, from 1988 until 1993, before

he filed his Asylum Petition, he said that "I thought me and my wife can make up and live again together, but it did not work out." (JA 99).

In response to a question from the IJ, petitioner admitted that he had failed to renew his passport. (JA 95). The IJ then commented that petitioner "would not be able to qualify for voluntary departure in that he doesn't have the means to leave this country." (JA 95).

C. The IJ's Decision

The IJ issued an oral ruling on November 27, 2000, denying Salame's Asylum Petition, and his requests for withholding of removal, for withholding of removal under the CAT, and for voluntary departure. (JA 39, 43).

The IJ began his ruling by noting that petitioner "has admitted all the factual allegations contained in the Notice to Appear . . . and conceded removability." (JA 38-39). With removability established by clear and convincing evidence (JA 39), the IJ observed that petitioner had declined to designate a country of removal, and designated Lebanon "pursuant to section 243(a) of the act . . . ." (JA 39).

The IJ next ruled that petitioner was barred from voluntary departure. (JA 39). Having admitted that he lacked a valid passport, petitioner could not establish "by clear and convincing evidence that he has means to depart the United States." (JA 39).

After summarizing the hearing testimony, the IJ found that petitioner "has not articulated a claim for asylum." (JA 41). The IJ observed that petitioner's claim "is generally that he was a member of the Christian faith in Lebanon and would be singled out for persecution because of his religion by the Muslims." (JA 41). The IJ contrasted this claim with the description of conditions in Lebanon contained in Exhibit 3, the 1999 Country Report (JA 41-42). As discussed by the IJ, the Country Report confirms among other things that both the executive and legislative power in Lebanon are shared by constitutional mandate among Maronite Christians, Sunni Muslims, and Shiite Muslims. (JA 41-42). Acknowledging that the Country Report shows Lebanon to be "a deeply divided country," the IJ also found that "nothing in the Country Report would support the Respondent's fear of returning." (JA 42).

The IJ also focused on the "very general" nature of petitioner's alleged fear, namely, that it was based solely on his status as a Christian. (JA 42.) The IJ observed that petitioner's story was "very sketchy." (JA 42). Compounding the case against petitioner was the lack of corroborative evidence, including petitioner's failure even to "provide[] any proof that he is a Christian." (JA 42). The only corroborating submission about petitioner's personal history was "a marriage license and a . . . certificate showing dissolution of the marriage." (JA 42-43). Noting that the marriage "was entered 14 days after he met his wife," that the woman "was married three times before," and that she withdrew the application (for petitioner's green card) back in 1968," the IJ concluded that this was "a marriage of convenience," and therefore

refused to credit petitioner's "contention that he returned in 1988 to try to revive his marriage." (JA 43).

The IJ also found petitioner's claim undermined by the facts that he "has made three trips to this country and returned twice to Lebanon and finally decid[ed] to stay in this country in 1988."

In sum, the IJ concluded that petitioner could not meet his burden of proof, given the combination of his "general and meager testimony" (JA 42) and the lack of independent corroboration. Citing BIA precedent, the IJ reasoned that "the weaker the applicant's testimony, the greater the need for corroborative evidence" to prove an asylum claim. (JA 42). Lacking any corroborating evidence other than the marriage and divorce certificates -- which did nothing to help petitioner's marriage revival contention -- the IJ concluded that petitioner "has absolutely no claim for asylum . . . ." (JA 43). Accordingly, petitioner also could not establish a claim for either withholding of removal, or for relief under the CAT. (JA 43).

D. BIA's Decision

On August 14, 2002, 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).[6] (JA 01-02). This petition for review followed.

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

SUMMARY OF ARGUMENT

Substantial evidence supports the IJ's finding that petitioner failed to meet his burden of demonstrating eligibility for asylum. The record supports the IJ's conclusion that petitioner's allegations were insufficiently specific and detailed to establish an objectively reasonable fear that he would be singled out for persecution upon returning to Lebanon. The IJ also correctly concluded that the Country Report did not support petitioner's asserted fear. The record supports the IJ's adverse credibility determination with respect to petitioner's story that the reason he waited five years (1988-1993) in the United States before filing an Asylum Petition, was because he was seeking to renew his prior marriage. The pertinent evidence strongly supported the IJ's conclusion that this was nothing but a "marriage of convenience," i.e., a sham marriage. Petitioner's asserted fear is further discounted by his having chosen to stay in Lebanon for seven years after the single episode of alleged mistreatment without having suffered any further harm. Also, conditions have changed in Lebanon since petitioner's 1987 departure, in that the civil war ended with the establishment of a government of shared power among all religious groups. Finally, petitioner failed to show that the risk of persecution by non-governmental militia exists country-wide.

Substantial evidence also supports the IJ's determination that petitioner failed to establish a basis for withholding of removal under the CAT. For the same reasons discussed above, petitioner failed to adduce sufficient proof to meet his burden of establishing that it is

more likely than not that he would be tortured if removed to Lebanon.

ARGUMENT

I. THE IMMIGRATION JUDGE PROPERLY DETERMINED THAT EDMOND SALAME FAILED TO ESTABLISH ELIGIBILITY FOR ASYLUM AND FOR WITHHOLDING OF REMOVAL, BECAUSE SALAME'S ACCOUNT LACKED SUFFICIENT DETAIL, WAS CONTRADICTED BY THE COUNTRY REPORT, AND LACKED CREDIBILITY

A. Relevant Facts

The relevant facts are set forth in the Statement of the 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 country: asylum and withholding of removal.[7] *See* 8

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[7] "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 (continued...)

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 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

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[7] (...continued)
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.

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).

"[E]stablishing past persecution is a daunting task." *Guzman v. INS*, 327 F.3d 11, 15 (1st Cir. 2003). Establishing persecution for purposes of an asylum claim is especially difficult where the alleged mistreatment involves one or very few incidents, and the circumstances fall short of extreme hardship or suffering. *See Tawm v. Ashcroft*, 363 F.3d 740, 743-44 (8th Cir. 2004) (persecution not shown by member of the 'Lebanese Forces' who "was detained twice, th[e] incidents were four years apart, lasted only a few hours each, and did not result in serious injury"); *Eusebio v. Ashcroft*, 361 F.3d 1088, 1090-91 (8th Cir. 2004) (persecution for political beliefs not shown by asylum-seeker who was briefly beaten and detained in connection with political rallies, was arrested for anti-government statements made as schoolteacher, and whose home was damaged and looted by the military; court reasoned, "minor beatings and brief detentions, even detentions lasting two or three days, do not amount to political persecution, even if government officials are

motivated by political animus"); *Dandan v. Ashcroft*, 339 F.3d 567, 573-74 (7th Cir. 2003) (persecution not shown where asylum-seeker was "detained, beaten and deprived of food for three days"); *Guzman*, 327 F.3d at 15-16 (asylum-seeker's "one-time kidnaping and beating [during civil war] falls well short of establishing 'past persecution'" necessary to obtain asylum; court reasoned that "more than harassment or spasmodic mistreatment by a totalitarian regime must be shown"); *Ravindran v. INS*, 976 F.2d 754, 756-59 (1st Cir. 1992) (persecution not shown by member of Sri Lankan ethnic minority who participated in protest activities, was later arrested, detained for 3 days, and interrogated and struck by soldiers during detention, and whose uncle suffered destruction of house and one year's arrest for political activities); *Kapcia v. INS*, 944 F.2d 702, 704-05, 708 (10th Cir. 1991) (Polish asylum-seeker failed to establish "severe enough past persecution to warrant refugee status," where petitioner's anti-government activities resulted in his being "arrested four times, detained three times, . . . beaten once," having "his house . . . searched," and being "treated adversely at work"); *Skalak v. INS*, 944 F.2d 364, 365 (7th Cir. 1991) (persecution not shown by Polish Solidarity member whose activities "resulted in her being jailed twice for interrogation, each time for three days [and] officials at the school where she taught harassed her for her refusal to join the Communist Party"; such "brief detentions and mild harassment . . . do not add up to 'persecution").

Proving persecution is also difficult where the account of the alleged mistreatment lacks detail or corroboration. *See, e.g., Dandan v. Ashcroft*, 339 F.3d 567, 574 (7th Cir. 2004) (asylum-seeker alleging "three-day interrogation

resulting in a 'swollen' face," without furnishing more detail, "fail[ed] to provide sufficient specifics" to establish persecution); *Bhatt v. Reno*, 172 F.3d 978, 982 (7th Cir. 1999) ("[Petitioner's] testimony of the threats and harm he says he received from radical Hindus is too vague, speculative, and insubstantial to establish either past or future persecution. . . . Beyond his own allegations and testimony that he was beaten on several occasions by Hindus, the record contains no evidence corroborating the beatings or describing the severity of his injuries.").

Similarly, persecution will not be found where the alleged mistreatment cannot be distinguished from random violence, such as a criminal assault, or arbitrary mistreatment during a state of civil war. *See INS v. Elias-Zacarias*, 502 U.S. 478, 483-484 (1992) (asylum seeker must provide "proof of his persecutors' motives . . . [whether] direct or circumstantial"); *Albathani v. INS*, 318 F.3d 365, 373-374 (1st Cir. 2003) (former Lebanese armed forces member failed to establish asylum claim, because record failed to establish political basis of alleged beatings by Hezbollah militia; "[t]he two incidents on the road may well have been . . . nothing more than the robbery of someone driving a Mercedes with cash in his pocket"); *Ravindran*, 976 F.2d at 759 (political bases of mistreatment not established by member of Sri Lankan ethnic minority who participated in protest activities, was later arrested, detained for 3 days, and interrogated and struck by soldiers during detention, because "[e]xcept for the vague statement by a prison official upon petitioner's release that he should avoid political activities, no other facts were offered to show that the authorities ever questioned petitioner about, or even knew about, his

political activities or opinions"). *See also Sivaainkaran v. INS*, 972 F.2d 161, 165 (7th Cir. 1992) ("[P]olitical turmoil alone does not permit the judiciary to stretch the definition of 'refugee' to cover sympathetic, yet statutorily ineligible, asylum applicants. . . . [C]onditions of political upheaval which affect the populace as a whole or in large part are generally insufficient to establish eligibility for asylum.").

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, the 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.

An alleged fear of future persecution will be discounted by evidence that, after the mistreatment complained of, the asylum-seeker returned or stayed for some length of time in his country and suffered no further harm. *See Tawm*, 363 F.3d at 743-744 (asylum claim denied because, among other reasons, claimant "also lived there for two years after the second incident, still an active member of the Lebanese Forces, without any harassment"); *Velasquez v. Ashcroft*, 342 F.3d 55, 58 (1st Cir. 2003) (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 guerrillas"); *Albathani*, 318 F.3d at 373-74 (asylum claim denied because, among other reasons, claimant's "fear of persecution was undercut by his twice returning to Lebanon after trips abroad"); *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 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); *Vaduva v. INS*, 131 F.3d 689, 691-92 (7th Cir. 1997) (asylum claim denied because, among other things, after alleged beating, claimant "apparently felt comfortable enough to remain in Romania until he obtained a job on a cruise ship in August 1993 . . . [and] he does not claim that he was physically assaulted after the December 1992 incident").

An alleged fear of persecution will also be discounted by evidence that objective conditions in the country have changed in a manner that eliminates or substantially

mitigates the basis for the fear. *See Dandan*, 339 F.3d at 575 ("[Petitioner] does not have a well-founded fear of future persecution. The ending of the civil war has restored physical security to parts of the country. The Country Report indicates that Lebanese Christians can settle in and around Beirut without fear of persecution for their religion."); *Vaduva*, 131 F.3d at 691-92 (Petitioner's appeal "cannot overcome a simple reality: a dramatic change has swept through the Balkan countries, making asylum in this one unnecessary. . . [C]onditions have improved substantially since the regime of Ceausescu . . . [Petitioner] lacks a well founded fear of future persecution in Romania."); *Kapcia*, 944 F.2d at 705-07 ("[T]he Board correctly took administrative notice of the changed political conditions in Poland . . . [and] found that neither petitioner presently could claim a well-founded fear of persecution.").

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").

The asylum applicant bears the burden of demonstrating eligibility for asylum by establishing either that he was persecuted or that he "has a well-founded fear of future persecution on account of, *inter alia*, his political opinion." *Wu Biao Chen v. INS*, 344 F.3d 272, 275 (2d Cir. 2003); *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); *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)(2)(ii) (2004); *INS v. Stevic*, 467 U.S. 407, 429-30 (1984); *Melgar de Torres*, 191 F.3d at 311. Because this standard is higher 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 Zhang v. INS*,

386 F.3d 66, 71 (2d Cir. 2004); *Wu Biao 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[8] that an alien

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[8] 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 1-2), the BIA adopts that decision. *See* 8 C.F.R. § 3.1(a)(7)(2004); *Secaida-*
(continued...)

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. 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 71; *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 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

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[8] (...continued)
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.

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. *Zhang v. INS*, 386 F.3d at 74; *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 finding that petitioner failed to meet his burden of demonstrating eligibility for asylum. The record supports the IJ's conclusion that petitioner's allegations were insufficiently credible, specific, and detailed to establish an objectively reasonable fear that he would be singled out for persecution upon returning to Lebanon. It is certainly not the case that "any reasonable adjudicator would be compelled to conclude to the contrary," 8 U.S.C. § 1252(b)(4)(B) (2004), and therefore the IJ's ruling should be affirmed.

The testimonial record clearly supports the IJ's characterization of petitioner's account as "sketchy." Petitioner's experiences that allegedly give rise to his fear of persecution comprise two events that occurred during a fifteen-year civil war: his clothing store, which he testified was located in Terrablos,[9] was burned down by an unidentified group of Muslims at some unidentified time during the fifteen-year civil war; and in 1980, while driving alone through a Druze region of Lebanon, he was forcibly taken from his car and beaten up.

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[9] Contrary to this sworn testimony (JA 29), in his sworn Affidavit petitioner stated that he operated the clothing store in the Christian sector of East Beirut. (JA 122). In his testimony regarding his 1980 assault, petitioner clearly distinguished between Beirut and Terrablos, indicating that he had to drive through Druze-controlled territory to pass from one to the other. (JA 91).

With respect to the burning of the store, petitioner fails to give a date, or even a year, when this happened -- all we can infer is that it happened sometime during the approximately fifteen years when Lebanon was torn by a civil war. The record is devoid of any explanation of why petitioner cannot even vaguely recall the year of such a significant event in his life. The record similarly lacks any explanation of why, as noted above, petitioner places the store in two separate cities in two retellings of the same story. Further, petitioner fails to offer any information about whether he personally witnessed the store being burned, how he learned that the store was burned, or how he learned that it was Muslims who burned it down.

With respect to the 1980 assault, petitioner was at first unable to remember the year when it occurred. Even after recalling the year, he could not recall the month or even the season when it happened. Petitioner made no attempt to explain how the Druze knew he was a member of a Christian militia, or how he knows that the mugging was based on either his religious or political affiliation. If petitioner knew, heard, or observed anything about the encounter that showed it to be something other than a local crime or arbitrary mugging, he has not placed such information on the record. However, it is significant that the one time petitioner was assaulted by Muslims, they had not come looking for him. Rather, they assaulted petitioner while he was passing through their territory: as petitioner admitted when explaining why they grabbed him, "[w]hen you go to their neighborhood, . . . they grab you, they interrogate you." (JA 90-91).

Petitioner also testified that after he left Lebanon, his brother was kidnapped and remains missing. Here too, petitioner offers only the most vague account possible: no information is offered about the time, place, or circumstances of the abduction. Insofar as family members must have told petitioner of the abduction, it strains credulity to assume that they failed to tell him anything at all about when, where, and how the abduction occurred. This is even more unlikely given petitioner's asserted knowledge of his family's inquiries about his brother that were made to the Red Cross. Surely the most detailed information known to the family would have been discussed in connection with such efforts.

Especially revealing of the flaws in petitioner's asylum claim are the numerous vague answers he gave to various phrasings of the questions, why did he need asylum, and why did he believe he was in danger. As discussed at greater length above, the answers to the first four phrasings of the question ran something like: (1) his life was in danger and they would kill him; (2) all the Muslims are one party, all the Christians another party; (3) they abducted several hundred people and will kill him; and (4) if you were in politics, would it be a danger for you? Then, asked twice in a row, why *in particular* he believed himself to be a target of the Muslims or otherwise in danger, petitioner responded, respectively: "[t]here is no peace in Lebanon"; and "[b]ecause they know me over there . . . Lebanon is a small country. . . ." Under different circumstances -- for instance, if petitioner had been a well-known leader of a military or political faction that was now facing systematic persecution -- the analysis here might be different. But neither the Asylum Petition, the

Affidavit, nor petitioner's testimony suggests that he was anything other than an anonymous member of a Christian Lebanese faction during the civil war. In none of these statements did petitioner offer any specifics about what, if anything, he did in the civil war -- much less, why this role turned him into such a target for the former opponents of the Christian Lebanese, more than a decade after the end of the civil war.

In sum, petitioner's claim is barely distinguishable from the assertion that present-day conditions in Lebanon make *every* former affiliate of the Christian Lebanese side in the civil war a target of systematic and extreme mistreatment, thereby making every such individual a valid candidate for asylum. But the only pertinent evidence of record -- the State Department's 1999 Country Report for Lebanon -- furnishes no basis for such a sweeping assertion. As discussed at greater length above, and as relied on by the IJ in his ruling, the Country Report makes clear that political power in the Lebanese government is now shared among Christians, Sunni Muslims, and Shiite Muslims. The government respects the different religious communities' freedom of worship, and permits each religious community to operate its own courts governing family law matters. While the government does not control the entire countryside -- Syrian troops and other militia control certain areas -- and while arbitrary arrests have occurred, the Country Report failed to describe any systematic pattern of persecution directed against any particular religious or ethnic group. With respect to the Christian community, the Country Report's most negative information was its mention of government security forces conducting arbitrary arrests,

interrogations, and detentions of "predominantly Christian supporters of ousted General Michael 'Awn and of the jailed commander of the Lebanese Forces." (JA 107). However, the Country Report also stated that "[m]ost detainees were released after they were forced to sign documents stating they would abstain from politics." (JA 107)[10]. The Country Report further stated, "[t]here were no reports of political prisoners." (JA 109). With respect to ongoing trials of several hundred militia fighters who had opposed the government, the Country Report stated, "[h]uman rights groups . . . believe that the trials have been fair, procedurally correct, and open." (JA 109). In sum,

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[10] Given petitioner's single, vague reference to having fought on the side of the Christian Lebanese party against the Muslims in the civil war, there is no factual basis to assume that, upon returning to Lebanon, he would be identified specifically as one of the Christian supporters of the faction headed by General Michael 'Awn. Even if he were, it is far from certain whether he would be subject to any adverse treatment. After all, petitioner was never arrested during the twelve years (1975-1987) that he spent in Lebanon during the civil war. In any event, the adverse treatment described in the Country Report for supporters of General 'Awn falls far short of the standard for "persecution" described in the several above-cited cases. In sum, there are a number of unanswered "ifs" standing between petitioner's facts and the conclusion that he might be adversely treated upon returning to Lebanon; and the adverse treatment at the end of that chain of ifs cannot be deemed "persecution" as defined in the context of an asylum claim.

the IJ appropriately found that the Country Report fails to support petitioner's fear of persecution. (JA 42).

In addition to the vagueness of petitioner's account are serious credibility problems that the IJ mentioned in his opinion. As the IJ correctly noted, the sole items of documentary evidence relating to petitioner's personal history -- the marriage license and dissolution of marriage certificate -- fail to corroborate petitioner's claim that he returned to the United States in 1988 to try to revive his marriage. (JA 43). Petitioner relied on that marriage story to explain, on cross-examination, why he waited five years after his 1988 return to the United States before filing an Asylum Petition: "I thought me and my wife can make up and live again together, but it did not work out." (JA 99). In finding this story incredible, the IJ relied on petitioner's own admissions that the marriage occurred 14 days after he met the woman, that the petitioner knew the woman had been married three times before, and that she filed but later withdrew an application for a green card on behalf of petitioner soon after the marriage.

The IJ also cited the fact that petitioner had made three trips to the United States and two trips back to Lebanon, before finally deciding in 1988 to stay in the United States. Of particular relevance here is the fact that the beating petitioner claims the Druze Muslims inflicted on him occurred in 1980, at least *seven* years before petitioner decided to leave Lebanon for the last time, at least *eight* years before petitioner reentered the United States, and at least *thirteen* years before petitioner decided to file an Asylum Petition. Nowhere in the Asylum Petition, Affidavit, or testimony does petitioner say or imply that he

experienced any further mistreatment over the seven subsequent years that he chose to remain in Lebanon.[11] As discussed at length above, an asserted fear of future persecution will be discounted by evidence that the claimant chose to remain in the country for several years after the alleged mistreatment and suffered no further harm. *Tawm*, 363 F.3d at 743-44; *Velasquez*, 342 F.3d at 58; *Albathani*, 318 F.3d at 373-74; *Manivong*, 164 F.3d at 433-34; *Vaduva*, 131 F.3d at 691-92.

Also, although not directly discussed by the IJ, we note that petitioner's alleged fear of persecution is further cast into doubt by the changed circumstances in Lebanon since his departure.[12] Petitioner left Lebanon in 1987. The civil war that pitted Christian and Muslim factions against each other lasted from 1975 to 1990. Petitioner filed his Asylum Petition in 1993, three years after the civil war ended. As noted above, the Country Report fails to corroborate petitioner's assertion that, after the civil war ended, Lebanese Christians who sided with the government during the war remained subject to systematic campaigns of violence perpetrated by Muslims. As the Seventh Circuit Court of Appeals stated in *Dandan v. Ashcroft*, 339 F.3d 567, 575 (7th Cir. 2003): "[Petitioner] does not have a well-founded fear of future persecution.

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[11] In his Asylum Petition, Petitioner listed February 1987 as the date he departed Lebanon before entering the United States in 1988. (JA 148).

[12] The petitioner may have indirectly incorporated this fact into his finding that the 1999 Country Report fails to support petitioner's fear of persecution.

The ending of the civil war has restored physical security to parts of the country. The Country Report indicates that Lebanese Christians can settle in and around Beirut without fear of persecution for their religion."

Finally, although the IJ did not address this subject, a significant fact in the record triggers an additional proof burden that petitioner failed to meet. Petitioner has consistently described those responsible for the alleged persecution as non-governmental groups or militias.[13] Therefore petitioner bears the burden of showing that this non-governmental persecution extends country-wide. *Melecio-Saquil*, 337 F.3d at 988; *Abdille*, 242 F.3d at 496; *Mazariegos*, 241 F.3d at 1326. Petitioner has failed to attempt, much less successfully make, any such showing.

For all the foregoing reasons, the record provides substantial evidentiary support for the IJ's finding that petitioner failed to carry his burden of demonstrating a well-founded fear of persecution, and hence failed to establish his eligibility for asylum. Moreover, because the proof burden for seeking withholding of removal is greater than the burden for establishing eligibility for asylum, failure to establish the latter will *per se* preclude the

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[13] The Asylum Petition refers to "the muslim groups" that would persecute petitioner. (JA 146). The Affidavit refers to the "muslim militia" who want to kill former Christian militia members. (JA 123). In his hearing testimony, when asked to identify the "they" who make Lebanon dangerous for him, petitioner answered, "The Muslims, the Lebanese, the Lebanese Muslims, this is the party in Lebanon." (JA 94).

former. Accordingly, for all the same reasons, the record supports the IJ's finding that petitioner failed to establish a basis for withholding of removal.

Petitioner nonetheless argues in his appeal that the IJ's ruling was flawed, because it improperly required him to produce corroborative documentation, contrary to the holding of *Diallo v. INS*, 232 F.3d 279 (2d Cir. 2000). The comparison with *Diallo* is flawed, for at least two reasons: (1) *Diallo* involved a far stronger evidentiary record than petitioner's case; and (2) far from "requiring" petitioner to produce documentation, the IJ simply, and appropriately, took note of the lack of corroborating evidence in the record, which evidence might otherwise have strengthened petitioner's vague, and not very credible, narrative.

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.[14] Accordingly, the petitioner in *Diallo*, unlike petitioner Salame, might have

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[14] The Court of Appeals found that the IJ had erred in finding a lack of specific, credible detail. *Id*. The Court of Appeals summarized the details offered by *Diallo*'s testimony. *See* 232 F.3d at 283.

qualified for asylum based solely on his detailed and convincing testimony. Also unlike petitioner Salame, the petitioner in *Diallo* furnished the IJ with written materials that documented country conditions quite consistent with the petitioner's personal narrative, *viz*., systematic and ongoing human rights abuses, including mass arrests and tortures, perpetrated by his country's white-dominated government against black citizens like himself. *Id*. at 283. Finally, unlike petitioner Salame, 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 far more compelling record that the Court of Appeals found the IJ to have erred by denying asylum on the basis of insufficient corroborative materials. Faced with this record, the Court of Appeals found unreasonable the IJ's expectation that the petitioner have possessed documentary "corroboration of the specifics of [his] personal experiences . . . ." *Id*. at 288.

The instant case is easily distinguishable from *Diallo*. Here, the petitioner's testimony failed to give "specific, credible detail" in support of his asserted fear of persecution. Also here, the petitioner failed to provide any written materials documenting country conditions consistent with his asserted fear of persecution. Accordingly, and quite reasonably, the IJ simply observed that such a weak record could not support an asylum claim, absent some other compelling corroboration: "the weaker the applicant's testimony, the greater the need for corroborating evidence." (JA 42). Nothing in the IJ's

ruling ran afoul of *Diallo*.[15] Accordingly, there is no basis to set aside the IJ's well-founded ruling.

II. THE IMMIGRATION JUDGE PROPERLY REJECTED EDMOND SALAME'S CLAIM FOR RELIEF UNDER THE CONVENTION AGAINST TORTURE, BECAUSE SALAME FAILED TO SHOW A LIKELIHOOD THAT HE WOULD BE TORTURED UPON RETURNING TO LEBANON

A. Relevant Facts

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

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[15] Petitioner also asserts in his brief that the IJ "completely failed to consider" his having been "a victim of Muslim violence previously." Petitioner's Brief at 15. This is incorrect. The IJ's decision specifically noted petitioner's account of the burning of his store, the assault upon him by the Muslim militia, and the killing of his brother. (JA 40).

B. Governing Law and Standard of Review

1. Withholding of Removal Under the Convention Against Torture

Article 3 of the Convention Against Torture 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-*, Interim Dec. 3464, 23 I. & N. Dec. 270, 279, 283, 285, 2002 WL 358818 (BIA Mar. 5, 2002); 8 C.F.R. §§ 208.16(c), 208.17(a), 208.18(a) (2004).

To establish eligibility for relief under the Convention Against Torture, an 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) (2004); *see also Najjar v. Ashcroft*, 257 F.3d 1262, 1304 (11th Cir. 2001); *Wang*, 320 F.3d at 133-34, 144 & n.20.

The Convention Against Torture 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 (quoting 8 C.F.R. § 208.18(a)(1)).

Because "[t]orture is an extreme form of cruel and inhuman treatment," even cruel and inhuman behavior by officials may not warrant Convention Against Torture protection. *Sevoian v. Ashcroft*, 290 F.3d 166, 175 (3d Cir. 2002) (citing 8 C.F.R. § 208.18(a)(2)). The term "acquiescence" 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 C.F.R. § 208.18(a)(7) (2004). Under the CAT, an alien's removal may be either permanently withheld or temporarily deferred. *See* 8 C.F.R. §§ 208.16-17 (2004).

2. Standard of Review

This Court reviews the determination of whether an alien is eligible for protection under the CAT under the "substantial evidence" standard. *See Saleh v. U.S. Dep't of Justice*, 962 F.2d 234, 238 (2d Cir. 1992); *Ali*, 237 F.3d at 596; *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 353-54 (5th Cir. 2002).

C. Discussion

Substantial evidence supports the IJ's determination that petitioner failed to establish a basis for withholding of removal under the CAT. For all the reasons discussed in Part I,C, above, petitioner failed to adduce sufficient proof before the IJ to meet his burden of establishing that it is

more likely than not that he would be tortured if removed to Lebanon.

The shortcomings of petitioner's proof, all discussed above, include the following: petitioner gave only a vague account of the circumstances underlying his fear that he would be tortured upon returning to Lebanon; country conditions described in the 1999 Country Report did not support petitioner's fear that, having previously fought with a Christian force in the civil war, he is likely to be tortured or killed by Muslims; petitioner told an incredible story that the reason he waited five years (1988-1993) in the United States before filing an asylum petition was because he was seeking to renew his prior marriage, contrary to evidence showing that the brief liaison from the mid-1960's was a sham marriage; petitioner stayed in Lebanon for seven years after his alleged prior torture without suffering any further harm, and waited a total of thirteen years after the incident before filing an asylum petition; conditions changed in Lebanon after his 1987 departure, in that the civil war ended with the establishment of a government of shared power among all religious groups; and petitioner failed to show that the alleged torture by non-governmental militia is a country-wide risk.

In sum, an abundant array of persuasive reasons contradict any claim that petitioner would more likely than not be tortured if he returned to Lebanon. Accordingly, the IJ's ruling should be affirmed.

CONCLUSION

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

Dated: November 17, 2004.

Respectfully submitted,

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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 11,624 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.

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Addendum

8 U.S.C. §1101(a)(42)

(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. For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo

such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.