04-0832-pr

To be Argued By:
JAMES K. FILAN, JR.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-0832-pr

PRECIOUS BANKOLE,
Petitioner-Appellant,

-vs-

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent-Appellee,

PAM RICHARDS AND JOHN A. DANAHER III,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE IMMIGRATION AND NATURALIZATION SERVICE

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STATEMENT OF JURISDICTION

The district court (Ellen B. Burns, J.) had subject matter jurisdiction under 28 U.S.C. § 2241. The petitioner-appellant filed a timely notice of appeal within 60 days of the district court's judgment. *See* Fed. R. App. 4(a). This Court has appellate jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253(a).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the immigration judge committed an error of law or erroneously applied the law in denying the petitioner relief under the Convention Against Torture when the petitioner has not shown that she would be imprisoned if returned to Nigeria?

II. Whether the immigration judge committed an error of law when he concluded that the petitioner is ineligible for family hardship relief under § 212(h) of the Immigration and Nationality Act because that Section bars such relief to lawful permanent residents, such as the petitioner, who have been convicted of an aggravated felony?

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Preliminary Statement

This is a habeas immigration appeal by petitioner-appellant Precious Bankole, a lawful permanent resident alien who was convicted in the United States in 1997 on federal charges of conspiracy to commit money laundering, perjury and obstruction of justice. Her criminal conviction led the Immigration and Naturalization

Service ("INS") to seek and obtain a final order of removal to return the petitioner to her native country of Nigeria. Following entry against her of a final order of removal, the petitioner filed a petition for writ of habeas corpus in the district court. The district court denied relief, finding, as relevant here, that the petitioner was not eligible, as an aggravated felon, for a grant of discretionary relief from removal and that it lacked jurisdiction to consider the petitioner's claim under the Convention Against Torture ("CAT" or "Torture Convention") because the CAT was not a self-executing treaty. A.21-25.[1]

On appeal, this Court remanded for consideration of the petitioner's CAT claim in light of intervening precedent that established that the district court had jurisdiction to consider that claim. *See Wang v. Ashcroft*, 320 F.3d 130 (2d Cir. 2003). In addition, this Court remanded the case for consideration of the petitioner's claim for family hardship relief under 8 U.S.C. § 1182(h), INA § 212(h), and *Beharry v. Ashcroft*, 183 F. Supp. 2d 584 (E.D.N.Y. 2002), *rev'd*, 329 F.3d 51 (2d Cir. 2003).

On remand, the district court held that the petitioner failed to show that it was more likely than not that she would be imprisoned and tortured upon her removal to Nigeria and thus she was ineligible for relief under the CAT. The district court further held that the petitioner was statutorily ineligible for family hardship relief under

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[1] The petitioner has filed an extensive Appendix, and all citations in this brief to that Appendix are cited as "A. ___."

8 U.S.C. § 1182(h), INA § 212(h), and that even if *Beharry* was correctly decided, the petitioner was ineligible for relief under the framework announced in that case.

The district court was correct on both issues. The petitioner has not shown that she would be imprisoned if returned to Nigeria, and thus has not shown that it is more likely than not that she would be subjected to torture. And the petitioner, as an aggravated felon, is ineligible for family hardship relief under INA § 212(h) and under the *Beharry* framework.

STATEMENT OF THE CASE

On April 19, 2002, the petitioner filed a *pro se* petition for writ of habeas corpus in the United States District Court for the District of Connecticut (Ellen B. Burns, J.) seeking release from detention and relief from an immigration judge's order of removal from the United States.[2] On August 8, 2002, the district court denied the petition by written ruling.

The petitioner appealed, and on June 5, 2003, this Court vacated the district court's judgment and remanded the matter to the district court for consideration of the petitioner's CAT claim and the petitioner's eligibility for family hardship relief under *Beharry v. Ashcroft* and INA § 212(h).

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[2] On April 30, 2002, the Board of Immigration Appeals affirmed the immigration judge's ruling. A.167-168.

On December 5, 2003, the district court again denied the petition by written ruling, finding that "it is unreasonable to believe that Petitioner will be imprisoned upon her return to Nigeria, let alone tortured therein." The district court further found that the petitioner was not eligible for hardship relief from deportation under INA § 212(h) and *Beharry v. Ashcroft*. This second appeal followed.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

A. Bankole's Entry into the United States and Conviction of an Aggravated Felony

The petitioner is a native and citizen of Nigeria. A.118, 199. She was admitted to the United States in 1972 as a spouse of a non-immigrant student, and her status was adjusted to that of a lawful permanent resident in 1984. A.199. On June 6, 1997, the petitioner was convicted after a jury trial in the United States District Court for the Eastern District of Virginia of conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h); perjury, in violation of 18 U.S.C. § 1623; and obstruction of justice, in violation of 18 U.S.C. § 1503. A.120-124. She was sentenced to a total effective sentence of 63 months' imprisonment. *Id*. The Fourth Circuit affirmed the conviction and sentence. *See United States v. Bankole*, 164 F.3d 626, 1998 WL 722439 (4th Cir. Oct. 14, 1998) (per curiam).

As noted in the Fourth Circuit's unpublished decision, the petitioner's money laundering conspiracy conviction

arose from her agreement to serve as a nominee owner of expensive cars on behalf of her son. *Id.* at *1. The petitioner obstructed justice by making a false claim to one of the cars in a civil forfeiture action and committed perjury by falsely testifying in a deposition that she purchased the car with her own money. *See id*.; *see also* A.156-157 (immigration judge decision describing basis for criminal charges).

B. INS Removal Proceedings

As a result of the above convictions, the INS instituted removal proceedings. In hearings before the immigration judge at which time the petitioner was represented by counsel, the petitioner conceded her removability but sought various forms of relief from removal, including, as relevant here, family hardship relief under INA § 212(h), 8 U.S.C. § 1182(h), and withholding of removal under the CAT, 1465 U.N.T.S. 85, G.A. Res. 39/46, 39th Sess., U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984). According to the petitioner, she was entitled to relief under the CAT because if she were returned to Nigeria, she faced imprisonment and possible torture as a result of her conviction in the United States.

The immigration judge specifically concluded that the petitioner was ineligible for the family hardship waiver because she had been convicted of an aggravated felony. A.162. *See* 8 U.S.C. § 1182(h) (family hardship waiver not available to lawful permanent resident alien convicted of aggravated felony).

In addition, the immigration judge found the petitioner ineligible for withholding of removal under the CAT. The immigration judge first noted that it was not clear that the petitioner would be imprisoned if she returned to Nigeria. While the petitioner had presented a decree from Nigeria that stated that individuals who had been convicted of narcotics offenses in foreign countries were guilty of a crime in Nigeria, the petitioner had not been convicted of a narcotics offense in the United States.

Even assuming the applicability of the decree, however, the immigration judge found that the petitioner was ineligible for CAT relief. The immigration judge acknowledged that conditions in Nigerian prisons could be "cruel, inhuman, and degrading," A.163, but found that the petitioner had not shown that the authorities *intentionally* inflicted harm on prisoners. A.164. In addition, the petitioner had not shown "that there would be any specific intent by the authorities in Nigeria to torture her" or that "torture would be specifically brought against [her] to inflict severe physical or mental pain or suffering." A.165. Based on these conclusions, the immigration judge found that the petitioner had "failed to establish that it [was] more likely than not that she would be tortured if returned to Nigeria" and thus denied her application for withholding of removal under the CAT. *Id.*

The petitioner filed an appeal with the Board of Immigration Appeals ("BIA") and, on April 30, 2002, the BIA affirmed without opinion the immigration judge's decision. A.167-168.

C. The Initial District Court Proceedings

On April 19, 2002, the petitioner, proceeding *pro se*, filed a habeas petition challenging her detention and the immigration judge's decision.[3] A.12-17. In a decision issued August 8, 2002, the district court denied the petition. A.21-24.

With respect to the petitioner's CAT claim, the district court concluded that the CAT was "not a self-executing treaty," and therefore that "a federal court has no general federal jurisdiction to entertain such a claim." A.21-22 n.1. "Resultingly, this Court may not consider Petitioner's claim under the Convention Against Torture." *Id*.

With respect to the petitioner's claim that she should receive a family hardship waiver pursuant to INA § 212(h), the district court held that she was ineligible for consideration for such a waiver because she was a lawful permanent resident convicted of an aggravated felony. A.24. "In *Jankowski-Burczyk v. INS*, 291 F.3d 172 (2d Cir. 2002), the Second Circuit found that lawful permanent aliens convicted of aggravated felonies are ineligible for Section 212(h) relief and that prohibiting such relief to those aliens while allowing it to non-lawful permanent aliens did not violate equal protection." *Id*.

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[3] Less than two weeks after the petitioner filed the petition for writ of habeas corpus, the BIA affirmed the immigration judge's decision, resulting in a final administrative order.

D. The Initial Appellate Proceedings

The petitioner appealed the district court's judgment to this Court. In her initial appeal, the petitioner first filed a *pro se* brief that the INS interpreted as raising two claims: (1) that she was entitled to relief under the CAT because of the treatment she would receive if returned to Nigeria; and (2) that she was entitled to a family hardship hearing pursuant to INA § 212(h). Counsel for the petitioner subsequently appeared and filed a reply brief that continued to press those claims on the petitioner's behalf.

While this appeal was pending, this Court decided *Wang v. Ashcroft*, 320 F.3d 130 (2d Cir. 2003), in which it held that the Foreign Affairs Reform and Restructuring Act of 1988, which implements the relevant article of the CAT, does not deprive the federal courts of habeas jurisdiction to review the BIA's denial of claims for withholding of removal pursuant to the CAT. *Wang*, 320 F.3d at 142. In view of *Wang*, this Court vacated the district court's judgment and remanded the case to the district court for consideration of the petitioner's claim under the CAT. *Bankole v. INS*, 67 Fed. Appx. 49, 51 (2d Cir. 2003); A.279-84.

This Court also remanded the case for consideration of the petitioner's claim for family hardship relief under 8 U.S.C. § 1182(h), INA § 212(h), and *Beharry v. Ashcroft*, 183 F. Supp. 2d 584 (E.D.N.Y. 2002), *rev'd*, 329 F.3d 51 (2d Cir. 2003). *Bankole*, 67 Fed. Appx. at 52. This Court invited, but did not order, the district court to consider four issues on remand: "(1) whether the plaintiff's failure to make a *Beharry*-type argument during the administrative

proceedings (when she was counseled) amounts to a waiver; (2) whether, assuming *arguendo* that *Beharry* was rightly decided, petitioner was entitled to a § 212(h) hearing; (3) whether *Beharry's* 'international law' gloss on § 212(h) is correct; and/or (4) any other arguments that the court deems relevant to the petitioner's request for a § 212(h) hearing." 67 Fed. Appx. at 52; A.283.

E. The District Court Proceedings After Remand

On remand, after briefing by the parties, the district court again denied the petitioner's habeas petition. On the petitioner's claim for relief under the CAT, the court first announced that it disagreed with the immigration judge's finding that there was no evidence that there could be intentional infliction of harm by the Nigerian authorities. The court reviewed a State Department Report on prison conditions in Nigeria and noted that that report described an "extreme form of cruel, unusual or inhumane treatment." A.290-91. Nonetheless, the court denied the petitioner relief under the CAT because the petitioner would not be subjected to imprisonment upon her return to Nigeria. According to the court, while Nigeria's Decree 33 provides for imprisonment of Nigerians who have been convicted of a "narcotic drug offense" in a foreign country, the petitioner had not been convicted of such an offense. Thus, "it is unreasonable to believe that Petitioner will be imprisoned upon her return to Nigeria, let alone tortured therein." A.291-92.

Turning to the petitioner's claim for family hardship relief, the district court held that the petitioner did not

waive her *Beharry*-type argument. A.292. The district court then held, however, that the *Beharry* exception was not applicable to the petitioner based on the date of her conviction. A.294. The district court in *Beharry* had held that even though § 212(h) bars family hardship relief for aggravated felons, international law requires an exception to that bar for an alien whose prior crime was not an aggravated felony at the time he committed the crime. In this case, however, the petitioner's money laundering crime was an aggravated felony when she committed it, and thus she was ineligible for relief under the "*Beharry*" exception. Accordingly, the district court held that it was unnecessary "to explore the many esoteric issues of international law raised in [*Beharry*] and opine whether Judge Weinstein was right or wrong." A.295. Finally, the district court held that the petitioner was statutorily ineligible for family hardship relief under 8 U.S.C. § 1182(h), INA § 212(h). A.296.

SUMMARY OF ARGUMENT

I. The petitioner has failed to show any error of law or erroneous application of law by the immigration judge that would warrant a grant of relief under the CAT. To sustain a claim for relief under the Torture Convention, the petitioner bears the burden of proving that it is more likely than not that she will be tortured if returned to Nigeria. The petitioner has failed to meet this burden. Even accepting the petitioner's complaints concerning the impoverished prison conditions in Nigeria, the petitioner has failed to show that she would be imprisoned if she returned to Nigeria. Although Nigeria has issued a decree that purports to subject Nigerian citizens to imprisonment

in Nigeria if they were convicted of drug offenses in foreign countries, the petitioner was not convicted of a drug offense and thus faces no imprisonment under this decree.

II. Because the petitioner is a lawful permanent resident who has been convicted of an aggravated felony, she is categorically ineligible for family hardship relief under INA § 212(h). Moreover, *Beharry* has no application where, as here, the petitioner's crime was deemed an aggravated felony at the time of its commission. Accordingly, the Court should affirm the denial of habeas relief.

ARGUMENT

I. THE IMMIGRATION JUDGE PROPERLY DENIED THE PETITIONER RELIEF UNDER THE CONVENTION AGAINST TORTURE

A. Relevant Facts

The petitioner, who is a native and citizen of Nigeria, was admitted to the United States in 1972 as a spouse of a non-immigrant student, and her status was adjusted to that of a lawful permanent resident in 1984. A.118, 199. On June 6, 1997, the petitioner was convicted on charges of conspiracy to commit money laundering, perjury and obstruction of justice, and she was sentenced to a term of 63 months' imprisonment. A.120-124. As a result of these convictions, the INS commenced removal proceedings against the petitioner. A.118-119.

The petitioner sought, *inter alia*, withholding of removal under the Convention Against Torture. She claimed that, as an alien convicted of a narcotics offense, she would be subject to mandatory imprisonment upon her return to Nigeria and that conditions in Nigerian prisons were so poor as to constitute torture. In support of this claim, the petitioner pointed to "Decree 33 of the Nigerian Drug Enforcement Agency." This Decree provides that a Nigerian citizen convicted of a narcotic drug offense in a foreign country is subject to prosecution in Nigeria and, if convicted, faces a five year prison term. *See McDaniel v. INS*, 142 F. Supp. 2d 219, 223 (D. Conn. 2001) (describing Decree 33).

The immigration judge denied the petitioner's claim for relief under the Torture Convention. The immigration judge concluded in pertinent part that "persons who are detained in Nigeria face very poor conditions but that does not rise to the level of torture as required in the Torture Convention." A.164. The judge further noted that "[w]hile the Court is very concerned about the lack of food[] [and] adequate hygiene in the prison system in Nigeria, there is no evidence that the authorities use this to intentionally harm prisoners in that country." *Id*. Finally, the immigration judge concluded that the petitioner's convictions do not involve narcotic drugs, but rather involve money laundering, perjury and obstruction of justice. Thus, it was not at all clear to the immigration judge that the petitioner would fall under the statute and be imprisoned upon her return to Nigeria. A.163.

In the district court, the petitioner renewed her request for relief under the Convention Against Torture. The

district court concluded that, although it disagreed with the immigration judge's finding that there was no evidence that there could be intentional infliction of harm by the Nigerian authorities, the petitioner did not fall within the class of persons who would be imprisoned and subjected to Nigerian prison conditions because she was not convicted of a narcotics offense. The district court thus concluded that the petitioner was not entitled to relief under the Torture Convention.

B. Governing Law and Standard of Review

Although this Court conducts a *de novo* review of the district court's ruling, its review is limited perforce by the constraints on a district court's jurisdiction to grant relief in the alien habeas context. Except to ascertain the existence of a due process minimum of "some evidence" in support of administrative factual determinations, the federal courts do not have habeas jurisdiction to review the administrative factual or discretionary determinations made by the immigration judge and the BIA. *See Sol v. INS*, 274 F.3d 648, 651 (2d Cir. 2001) (per curiam), *cert. denied*, 536 U.S. 941 (2002); *Henderson v. INS*, 157 F.3d 106, 116 (2d Cir. 1998). The habeas jurisdiction of the federal courts is otherwise limited to review whether the immigration judge and the BIA committed a pure error of law or erred in applying the law to the facts as found in administrative proceedings. *See Wang*, 320 F.3d at 143 ("the standard of review of a BIA's decision in a habeas case is generally more limited than on direct review").

The Attorney General has promulgated comprehensive regulations governing administrative consideration of

claims raised under the Torture Convention. *See* 8 C.F.R. § 208.16-18 (2004); *Ali v. Reno*, 237 F.3d 591, 596-97 (6th Cir. 2001) (describing regulatory framework).

Pursuant to the regulations implementing the Torture Convention,

> [t]orture 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.

8 C.F.R. § 208.18(a)(1).

A criminal alien like the petitioner may obtain deferral from removal if she satisfied her 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." *See* § 208.16(c)(2); *see also* § 208.17(a). In assessing the risk of torture, the adjudicator must consider the possibility of future torture, including among other things, any "[e]vidence of past torture inflicted upon the applicant" and evidence that the applicant is not likely to be tortured in another area of the country of removal.

§ 208.16(c)(3)(i)-(ii). "The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration." § 208.16(c)(2).

In sum, the standard of proof governing claims for protection under the Torture Convention requires a finding of substantial grounds for believing that an alien would be in danger of being subject to torture, *i.e.*, that it is more likely than not that she would be tortured. *See Wang*, 320 F.3d at 133-34. *See also* 8 C.F.R. § 208.16(c)(2). It is not enough that an alien "might" or "could" face torture. An alien must face a "greater than [] fifty percent chance . . . that he will be tortured" before Article 3 requires the United States to withhold removal to that country. *Id*. at 144 n.20.

C. Discussion

The petitioner's CAT claim is two-fold. First, she claims, citing Decree No. 33 of the Nigerian National Drug Law Enforcement Agency, that she would be imprisoned upon her return to Nigeria. Decree 33 provides in part that a "Nigerian citizen found guilty in any foreign country of an offence involving narcotic drugs . . . and who thereby brings the name Nigeria into disrepute" shall be guilty of "an offence" under this subsection and, if convicted, "shall be liable to imprisonment for a term of five years without an option of fine and his assets and properties shall be liable to forfeiture as provided by this Decree." *See McDaniel v. INS*, 142 F. Supp. 2d 219, 223 (D. Conn. 2001) (quoting Decree No. 33) (omission in original). Second, she claims

that, once imprisoned, she would be subjected to conditions that would amount to torture.

The petitioner's claim of future torture fails at the first step of her argument.[4] As the district court and the immigration judge properly found, the petitioner was found guilty of conspiracy to commit money laundering, perjury and obstruction of justice. She was not convicted of a narcotics offense. Thus, because she was not found guilty of a narcotics offense, she has failed to establish even that she would be imprisoned if returned to Nigeria, which would be a requirement, at least under her theory, that she would be tortured.

The petitioner -- who carries the burden of proving that it is more likely than not that she would be tortured if returned to Nigeria -- responds by arguing that her conviction for money laundering was the "functional equivalent" of a narcotics conviction because the "money laundering in question was drug-related." Pet. Br. at 21.

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[4] The State Department Report relates, and the district court found, that Nigerian prison conditions are troubling. *See also In re M-B-A-*, 23 I. & N. Dec. 474, Interim Dec. 3480, 2002 WL 31201697 (BIA 2002) (opinions describing harsh conditions in Nigerian prisons; dissent concludes that prison conditions would likely result in torture for respondent). This Court need not decide, however, whether any conditions in those prisons amount to torture as defined by the Convention Against Torture and its implementing regulations. Resolution of that difficult issue is unnecessary because, as described in the text, the petitioner has not shown that she would be imprisoned in Nigeria.

She has presented no evidence, however, whether through expert testimony or Nigerian legal opinions, to support the claim that Nigerian authorities would consider a money laundering conviction a narcotics conviction for purposes of Decree 33. And indeed it seems highly unlikely that they would do so; Nigerian law, like American law, distinguishes between narcotics offenses and money laundering for narcotics offenses. *See United Nations Office on Drugs and Crime, Nigeria CountryProfile*, found at http://www.unodc.org/nigeria/en/govt_response.html. (describing Decree 3 of 1995, a law governing drug money laundering). With no evidence to suggest that Nigerian authorities would interpret her money laundering conviction as a narcotics conviction, the petitioner has failed to carry her burden of proving that it is more likely than not that she would be subjected to torture if returned to Nigeria.[5]

In the absence of any evidence about the interpretation and application of Decree 33 in Nigeria, the petitioner rests her "functionally equivalent" argument on two cases interpreting American constitutional law. Pet. Br. at 21-22

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[5] The petitioner also presented no evidence to suggest that Decree 33 is being enforced in Nigeria at this time, and there is reason to believe that it is not being enforced. *See* Statement by Femi Oloruntoba, Esq., Director of Prosecution and Legal Services of the National Drug Law Enforcement Agency in Nigeria, submitted in *United States v. Odulate*, 03-CR 808 (N.D. Ill.) (stating that no Nigerian drug traffickers have been prosecuted under Decree 33 since April 1, 2003). The government has moved to supplement the record in the district court with this document.

(citing *Illinois v. Thompson*, 765 N.E.2d 1209 (Ill. App. 2002) and *Department of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994)). Neither of these cases shed any light on the interpretation of a Decree issued by the Nigerian Drug Law Enforcement Agency, but even if Nigerian law followed the American constitutional principles described in these cases, these cases do not help the petitioner.

In *Illinois v. Thompson*, the Illinois Appellate Court held that prior "commissions" of the offense of driving under the influence of alcohol (*i.e.*, incidents which resulted in probation or supervision but not a conviction) were functionally equivalent to prior "convictions" for driving under the influence for purposes of an Illinois statute that provided enhanced penalties for recidivist drunk drivers. 765 N.E.2d at 365. In reaching this conclusion, the court noted that the underlying conduct for both a "commission" and a "conviction" -- driving under the influence -- was the same, and indeed a defendant had to admit to the underlying conduct to have a prior "commission" disposed of without a conviction. *Id.* Thus, for purposes of the recidivist drunk driving statute, a "commission" of driving under the influence was functionally equivalent to a "conviction" for driving under the influence. *Id.*

Here, by contrast, the conduct underlying the petitioner's money laundering conviction is not the same as conduct that would support a narcotics conviction. Moreover, the petitioner has never admitted to having violated the drug laws, and there is no suggestion that the petitioner was charged with a drug offense and was able to

receive a disposition of that offense short of conviction. In sum, *Thompson* does not help the petitioner.

Department of Revenue is similarly unhelpful to the petitioner. In that case, the Supreme Court held that a state tax on the possession of illegal drugs "assessed after the State has imposed a criminal penalty for the same conduct," was a "second punishment" for that conduct. 511 U.S. at 769, 784. In other words, it was "the functional equivalent" of a second prosecution for the same offense and thus barred by the Double Jeopardy Clause. 511 U.S. at 784.

In this case, by contrast, the petitioner's money laundering conviction cannot be said to be functionally equivalent to a narcotics conviction. Indeed, under the traditional "same elements" test used to determine whether a subsequent prosecution violates the Double Jeopardy Clause, *see Blockburger v. United States*, 284 U.S. 299, 304 (1932), there is no suggestion that a narcotics conviction would qualify as a subsequent prosecution for the same conduct as a prior money laundering conspiracy conviction.

In sum, there is nothing in *Thompson* or *Department of Revenue* to suggest that the petitioner's money laundering conviction would be considered the "functional equivalent" of a narcotics conviction. Because the petitioner has not been convicted of a drug crime, the immigration judge properly concluded that she had not

shown that she would be imprisoned if she returned to Nigeria.[6]

In this case, the petitioner's speculative claim that she *might* be imprisoned if she returned to Nigeria does not meet her burden of showing that it is more likely than not that she would be tortured. It is not enough that an alien "might" or "could" face torture. An alien must face a clear probability of torture in a country before the Convention Against Torture requires the United States to withhold removal to that country. Here, with mere speculation about potential imprisonment -- speculation with no basis in the record or evidence -- the petitioner has not met her burden of proving "that it is more likely than not that . . . she would be tortured if removed to the proposed country of removal." 8 C.F.R. § 208.16(c)(2); *see id.* § 208.17(a).

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[6] Indeed, to the extent U.S. law could be viewed as shedding any light on the potential interpretation of Nigerian law, case law suggests that offenses which relate to drugs only by reference to predicate offenses are not offenses that "relate to" narcotics. *See Castaneda de Esper v. INS*, 557 F.2d 79, 84 (6th Cir.1977) (holding misprision of felony not to be offense "relating to" drug possession or trafficking for purposes of deportability, regardless of whether underlying felony was drug-related); *In re Carrillo*, 16 I. & N. Dec. 625, 626-27 (BIA 1978) (conviction for possession of a firearm during commission of felony not deportable offense "notwithstanding the fact that the underlying felony may, in a particular case, be a narcotic-related offense"); *In re Velasco*, 16 I. & N. Dec. 281 (BIA 1977) (same, where felony underlying misprision was "possession of marihuana with intent to distribute").

On this record, ample evidence supported the immigration judge's decision to deny relief under the CAT, and thus that decision cannot be overturned on habeas review. Simply put, it is clear from the record that the petitioner's claim is insufficient to support relief under the Torture Convention. The petitioner has failed to show an error of law or erroneous application of law that would warrant a grant of relief under the Torture Convention. Accordingly, the Court should affirm the district court's denial of habeas relief for the Torture Convention claim.

II. THE IMMIGRATION JUDGE PROPERLY DENIED THE PETITIONER RELIEF UNDER § 212(h)

A. Relevant Facts

On June 6, 1997, the petitioner, a lawful permanent resident, was convicted of conspiracy to commit money laundering, obstruction of justice, and perjury in the Eastern District of Virginia. A.120-124. She was sentenced to a term of 63 months' imprisonment. *Id.* After her conviction, the INS instituted removal proceedings, and during those proceedings, the petitioner claimed she was entitled to family hardship relief under § 212(h). The immigration judge denied her this relief because she was statutorily ineligible for such relief as an aggravated felon. A.162.

On habeas, the district court denied the petitioner's request for § 212(h) relief. The petitioner appealed, and for the first time argued that she was eligible for this relief under *Beharry v. Ashcroft*, 183 F. Supp. 2d 584 (E.D.N.Y.

2002). In *Beharry*, Judge Weinstein had interpreted § 212(h) in light of treaty and customary law obligations to require the INS to grant discretionary relief hearings for aliens not otherwise eligible for relief under § 212(h) if they have resided in the United States for at least seven years, their removal would constitute an extreme hardship to family, and their crime of conviction was not classified as an "aggravated felony" at the time of commission. *Beharry*, 183 F. Supp. 2d at 604.

This Court remanded the *Beharry* question to the district court for consideration in the first instance, inviting the district court to consider "(1) whether the plaintiff's failure to make a *Beharry*-type argument during the administrative proceedings (when she was counseled) amounts to a waiver; (2) whether, assuming *arguendo* that *Beharry* was rightly decided, petitioner was entitled to a § 212(h) hearing; (3) whether *Beharry's* 'international law' gloss on § 212(h) is correct; and/or (4) any other arguments that the court deems relevant to the petitioner's request for a § 212(h) hearing." 67 Fed. Appx. at 52; A.283.

On remand, the district court found that the petitioner did not waive her *Beharry* argument because she had specifically sought family hardship relief under INA § 212(h) before the immigration judge. Nevertheless, the district court held that the petitioner did not fall under Judge Weinstein's decision in *Beharry* because that decision applied only to "those aliens who have been convicted of an 'aggravated felony' as defined after they committed their crime, but which was not so characterized when they committed their crime." A.292-296. The

district court distinguished *Beharry* on the grounds that the petitioner's money laundering conviction was an aggravated felony for many years prior to the date her conviction became final and § 212(h) relief was eliminated for lawful permanent resident aggravated felons.

The district court thus concluded that because *Beharry* was inapplicable to the petitioner, it was unnecessary "to explore the many esoteric issues of international law raised in [*Beharry*] and opine whether Judge Weinstein was right or wrong." A.295. Finally, the district court held that the petitioner was statutorily ineligible for family hardship relief under 8 U.S.C. § 1182(h), INA § 212(h).

B. Governing Law and Standard of Review

In the absence of any factual findings by the district court, this Court reviews *de novo* the district court's denial of habeas relief. *See Wang v. Ashcroft*, 320 F.3d 130, 139-40 (2d Cir. 2003); *Kuhali v. Reno*, 266 F.3d 93, 99 (2d Cir. 2001).

Congress has categorically barred the grant of family hardship relief to lawful permanent resident aliens who have been convicted of an aggravated felony. *See* INA § 212(h), 8 U.S.C. § 1182(h); *see also Jankowski-Burczyk v. INS*, 291 F.3d 172, 178-79 (2d Cir. 2002) (rejecting Equal Protection challenge to categorical bar).

C. Discussion

The immigration judge and the district court properly rejected the petitioner's claim for family hardship relief

under § 212(h). This relief is barred by statute to a lawful permanent resident alien like the petitioner who has been convicted of an aggravated felony. *See* 8 U.S.C. § 1182(h).

Moreover, the district court properly concluded that the petitioner's reliance on Judge Weinstein's decision in *Beharry* was misplaced. Indeed, even assuming that *Beharry* was correctly decided, the decision extends relief only to an alien whose conviction was not an aggravated felony at the time of commission. *See* 183 F. Supp. 2d at 605. In the petitioner's case, however, the "aggravated felony" definition has included -- since at least 1991 -- money laundering offenses for which a defendant has received a term of at least five years imprisonment. *See* 8 U.S.C. § 1101(a)(43) (1991).[7] Accordingly, the petitioner

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[7] In 1991, the statutory definition of "aggravated felony" provided as follows:

> The term 'aggravated felony' means murder, any illicit trafficking in any controlled substance (as defined in section 802 of Title 21), including any drug trafficking crime as defined in section 924(c)(2) of Title 18, or any illicit trafficking in any firearms or destructive devices as defined in section 921 of such title, *any offense described in section 1956 of Title 18 (relating to laundering of monetary instruments)*, or any crime of violence (as defined in section 16 of Title 18, not including a purely political offense) *for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least 5 years, or any attempt or conspiracy to commit any such act. . . . .*

8 U.S.C. § 1101(a)(43) (1991) (emphasis added).

is not entitled to relief under *Beharry*. *See Alvarez-Garcia v. INS*, 234 F. Supp. 2d 283, 284-85 (S.D.N.Y. 2002) (no *Beharry* relief where alien convicted of drug trafficking crime that was aggravated felony at time of its commission).

The petitioner effectively acknowledges that she is ineligible for relief under *Beharry* because she asks this Court to extend that decision. Specifically, the petitioner asks this Court to create yet another exception to the statutory language to allow family hardship relief for those aliens having special circumstances, notwithstanding the fact that those aliens are aggravated felons. Pet. Br. at 25-26. This Court should decline the petitioner's invitation to rewrite § 212(h).

Under the most basic principles of statutory construction, in construing a statute, we begin with its language and plain meaning. *See United States v. Koh*, 199 F.3d 632, 636 (2d Cir.1999). When the language of a statute is unambiguous, the first canon is also the last, as the judicial inquiry ends when the ordinary meaning of Congress' words is clear. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (collecting cases). Here, the pertinent language of the statute is clear:

> No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States

> for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States.

8 U.S.C. § 1182(h), INA § 212(h).

The petitioner, notwithstanding any difficult family situations, is simply not statutorily eligible for § 212(h) relief. Indeed, to grant the relief the petitioner requests would require this Court to rewrite the statute. As this Court has already recognized, however, it is for Congress, and not this Court, to rewrite statutes. *See Florez v. Callahan,* 156 F.3d 438, 443 (2d Cir. 1998) ("If courts were free to pick and choose what part of a statute . . . to rely on and what part to ignore, then the courts -- and not Congress or an executive agency promulgating its own regulations -- would, in effect, draft the law as well as construe its meaning.").

Moreover, this Court should not rewrite § 212(h) to extend *Beharry* because that decision itself was wrongly decided.[8] In *Beharry*, the district court held that § 212(h)'s directive to deport aggravated felons without consideration of potential family hardships violated international treaties (including a treaty to which the

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[8] This Court reversed Judge Weinstein's decision in *Beharry*, holding that Beharry had failed to exhaust his administrative remedies regarding the family hardship claim. Thus it did not reach the interpretation of international law relied upon by Judge Weinstein. This Court does not have to reach this issue here because even if *Beharry* was correctly decided, the petitioner is not entitled to relief.

United States was not a signatory) and customary international law, and thus the court construed the statute to avoid that result. 183 F. Supp. 2d at 603-605. In other words, the court "construed" the statute "in conformity with international law" principles. *Id.* at 604.

The *Beharry* court erred in its analysis. That court used international law as a tool of statutory construction, but when a statute is unambiguous, statutory construction begins and ends with the language of the statute. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). Because § 212(h), as construed by this Court and as candidly acknowledged by the *Beharry* court, unambiguously precludes family hardship waivers for aggravated felons, that is the end of the inquiry. *See Beharry*, 183 F. Supp. 2d at 603; *Jankowski-Burczyk*, 291 F.3d at 175.

Finally, the *Beharry* court's decision to rewrite § 212(h) cannot be justified by any principle of international law. Even if § 212(h)'s bar to relief for aggravated felons were somehow in tension with international law -- which it is not -- Congress would nonetheless have acted squarely within its power in enacting the statute. Congress's freedom to enact domestic legislation is not hampered by existing treaties, any more than by existing statutes. Rather, a federal statute "displace[s] any conflicting treaty provisions for purposes of domestic law" and must be enforced by the courts regardless of the terms of the superseded treaty. *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 936 (D.C. Cir. 1988). Furthermore, as this Court has held, "Congress is not bound by international

law" in enacting statutes. *United States v. Pinto-Mejia*, 720 F.2d 248, 259 (2d Cir. 1983), *opinion modified on denial of rehearing by* 728 F.2d 142 (2d Cir. 1984). Rather, when Congress legislates, the domestic statute "simply modifies or supersedes customary international law to the extent of the inconsistency." *Comm. of U.S. Citizens*, 859 F.2d at 938.

For all of these reasons, this Court should reject the petitioner's invitation to rewrite § 212(h) and should affirm the district court's denial of habeas relief on the petitioner's claim for family hardship relief under that section.

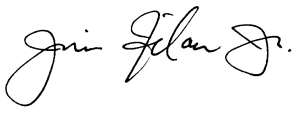
CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: December 9, 2004

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY



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ADDENDUM OF STATUTES AND REGULATIONS

8 U.S.C. § 1182(h), INS § 212(h). Waiver of subsection (a)(2)(A)(i)(I), (II), (B), (D), and (E).

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) of this section and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if--

(1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that--

(i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien; or

(C) the alien qualifies for classification under clause (iii) or (iv) of section 1154(a)(1)(A) of this

title or classification under clause (ii) or (iii) of section 1154(a)(1)(B) of this title; and

(2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

8 U.S.C. § 1101(a)(43) (1991)

The term "aggravated felony" means murder, any illicit trafficking in any controlled substance (as defined in section 802 of Title 21), including any drug trafficking crime as defined in section 924(c)(2) of Title 18, or any illicit trafficking in any firearms or destructive devices as defined in section 921 of such title, any offense described in section 1956 of Title 18 (relating

to laundering of monetary instruments), or any crime of violence (as defined in section 16 of Title 18, not including a purely political offense) for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least 5 years, or any attempt or conspiracy to commit any such act. Such term applies to offenses described in the previous sentence whether in violation of Federal or State law and also applies to offenses described in the previous sentence in violation of foreign law for which the term of imprisonment was completed within the previous 15 years.

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

(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).

8 C.F.R. § 208.18. 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.