

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2006

4 (Argued: May 1, 2007

Decided: August 17, 2007)

5 Docket No. 06-3235-ag

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7 OMARO JALLOH,

8 Petitioner,

9 - v -

10 ALBERTO GONZALES,

11 Respondent.

12 -----  
13 Before: SACK, SOTOMAYOR, and HALL Circuit Judges.

14 Petition for review of an order of the Board of  
15 Immigration Appeals affirming the denial by an Immigration Judge  
16 of the petitioner's application for asylum, withholding of  
17 removal, and relief pursuant to the Convention Against Torture.

18 Petition denied.

19 THEODORE VIALET, Esq., New York, NY, for  
20 Petitioner.

21 THOMAS DUPREE, JR., Office of  
22 Immigration Litigation, Department of  
23 Justice (Matthew H. Mead, United States  
24 Attorney, Steven K. Sharpe, Assistant  
25 United States Attorney, District of  
26 Wyoming, Cheyenne, WY, of counsel),  
27 Washington, D.C., for Respondent.

28 PER CURIAM:

1                   Petitioner Omaro Jalloh, a citizen of Sierra Leone,  
2 petitions for review of a June 13, 2006 decision of the Board of  
3 Immigration Appeals ("BIA") adopting and affirming Immigration  
4 Judge ("IJ") Sarah M. Burr's decision dated April 26, 2004,  
5 denying Jalloh's applications for asylum, withholding of removal,  
6 and relief pursuant to the United Nations Convention Against  
7 Torture and Other Cruel, Inhuman or Degrading Treatment or  
8 Punishment, adopted Dec. 10, 1984, S. Treaty Doc. No. 100-20  
9 (1988), 1465 U.N.T.S. 85 ("CAT"). In re Omaro Jalloh, No. A95  
10 467 498 (B.I.A. June 13, 2006), aff'g No. A95 467 498 (Immig. Ct.  
11 N.Y. City Apr. 26, 2004). Jalloh argues principally that  
12 substantial evidence does not support the BIA's finding that his  
13 past persecution was not so severe as to warrant a grant of  
14 asylum notwithstanding the fact that Jalloh has no well-founded  
15 fear of future persecution. In light of the fact that Jalloh  
16 provided no evidence of long-lasting physical or psychological  
17 effects of the persecution he experienced, the BIA's decision to  
18 deny "humanitarian asylum" was supported by substantial evidence.

#### 19                   **BACKGROUND**

20                   Omaro Jalloh is a citizen of Sierra Leone. He is a  
21 member of the Fula tribe. He arrived in the United States on  
22 July 14, 2001, and was served with a Notice to Appear on July 1,  
23 2002, charging him with removability on the grounds that he  
24 lacked a valid entry document. Jalloh conceded removability and

1 applied for asylum, withholding, and CAT relief. The facts below  
2 are taken from his testimony before the IJ, as well as affidavits  
3 submitted with his applications for relief.

4 In 1991 civil war broke out in Sierra Leone between the  
5 Revolutionary United Front ("RUF") and the Civil Defense Force, a  
6 government militia. Jalloh testified before the IJ that, in  
7 1994, he joined a trader's union supporting democracy in Sierra  
8 Leone. Jalloh also supported the Sierra Leone People's Party  
9 ("SLPP"), whose leader was Tejan Kabbah. Kabbah was elected  
10 president in 1996, but a military coup led by the RUF and the  
11 Armed Forces Revolutionary Council ("AFRC") overthrew his SLPP  
12 government the next year.

13 Members of the RUF physically attacked Jalloh on at  
14 least two occasions, once also attacking members of his family.  
15 In February or March 1997, RUF and AFRC rebels looted his house  
16 in Freetown. He pleaded for his life and was spared. The rebels  
17 took his valuables, claiming that they were the fruits of  
18 Jalloh's support of the opposition.

19 On January 6, 1999, the RUF attacked Freetown, its  
20 soldiers reaching Jalloh's house four days later. The soldiers  
21 brought Jalloh and his family out of the house and tied Jalloh's  
22 and his wife's hands behind their backs. They proceeded to beat  
23 Jalloh and rape his wife, and to burn his house to the ground.  
24 They then took him to a mountainous area, where he was held  
25 captive for two weeks. There, the RUF beat their prisoners,

1 including Jalloh, keeping them bound and threatening them with  
2 death and amputation. Jalloh survived, however, and was rescued  
3 by ECOMOG<sup>1</sup> and government forces.

4 After spending some time in refugee camps, Jalloh  
5 reunited with his family. Jalloh and his family ultimately  
6 crossed over the border into Guinea. There, he stayed with some  
7 business associates for about two years. He then came to the  
8 United States on July 14, 2001, entering with a friend's passport  
9 and leaving his family in Guinea, where apparently they still  
10 reside. When asked whether he could return to his home country,  
11 Jalloh stated that in Sierra Leone, his "life is not guaranteed,  
12 it is not secure. The older town, they are still there, the  
13 rebels, they are still there. . . . It may be true but it can  
14 happen anytime and you have people, you have the rebels in the  
15 country, they can go there any day." Hr'g Tr. dated Apr. 26,  
16 2004, at 36.

17 The situation in Sierra Leone has improved dramatically  
18 since Jalloh fled. In 2002, the civil war ended, Kabbah was  
19 elected to the presidency, and the SLPP won a large majority in  
20 Parliament. The RUF was disarmed and demobilized, although some  
21 former RUF members continue to be trouble-makers. Indictments  
22 have been returned by The Special Court of Sierra Leone, a United  
23 Nations-Sierra Leone war crimes tribunal, against RUF leaders,

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<sup>1</sup> The ECOMOG, i.e., the Economic Community of West African States Monitoring Group, is a West African regional peacekeeping force.

1 including those responsible for the RUF's January 1999 attack on  
2 Freetown.

3 The IJ denied the application and ordered Jalloh  
4 removed. The BIA, assuming that Jalloh had established past  
5 persecution, concluded that the government's evidence of changed  
6 country conditions rebutted the resulting presumption of a well-  
7 founded fear of future persecution. It then reasoned that "the  
8 severity of any persecution which the respondent may have endured  
9 does not rise to a level warranting a grant of asylum based on  
10 such past persecution alone." In re Omaro Jalloh, No. A95 467  
11 498 (B.I.A. June 13, 2006).

12 Jalloh petitions this court for review.

### 13 **DISCUSSION**

#### 14 I. Standard of Review

15 "Where, as here, the BIA adopts and affirms the  
16 decision of the IJ, and supplements the IJ's decision, we review  
17 the decision of the IJ as supplemented by the BIA." Islam v.  
18 Gonzales, 469 F.3d 53, 55 (2d Cir. 2006). We review factual  
19 findings under the substantial evidence standard, which requires  
20 that findings "be supported by reasonable, substantial[, ] and  
21 probative evidence in the record." Lin Zhong v. U.S. Dep't of  
22 Justice, 480 F.3d 104, 116 (2d Cir. 2007) (quotation marks  
23 omitted). Questions of law are reviewed de novo, as are mixed  
24 questions of law and fact, including the "proper application of  
25 legal principles to the facts and circumstances of the individual

1 case at hand." Secaida-Rosales v. INS, 331 F.3d 297, 307 (2d  
2 Cir. 2003).

### 3 II. Asylum Based on Past Persecution

4 An alien is presumed to have a well-founded fear of  
5 future persecution -- and is thereby eligible for asylum -- if he  
6 can show that he "has suffered persecution in the past . . . on  
7 account of . . . membership in a particular social group, or  
8 political opinion, and is unable or unwilling to return to, or  
9 avail himself . . . of the protection of, that country owing to  
10 such persecution." 8 C.F.R. § 1208.13(b)(1). The government may  
11 rebut that presumption, however, if it can demonstrate that  
12 conditions in the country have changed such that the alien no  
13 longer has a well-founded fear of persecution. See 8 C.F.R.  
14 § 1208.13(b)(1)(i). Nevertheless, if the alien "has demonstrated  
15 compelling reasons for being unwilling or unable to return to the  
16 country arising out of the severity of the past persecution," he  
17 is still eligible for asylum even though he does not have a  
18 well-founded fear of future persecution. 8 C.F.R.  
19 § 1208.13(b)(1)(iii)(A); see also Matter of Chen, 20 I. & N. Dec.  
20 16 (B.I.A. 1989). Asylum granted pursuant to section  
21 1208.13(b)(1)(iii) is known as "humanitarian asylum." See Ben  
22 Hamida v. Gonzales, 478 F.3d 734, 740 (6th Cir. 2007).

1 Jalloh argues<sup>2</sup> in support of his petition primarily  
2 that substantial evidence does not support the BIA's conclusion  
3 that the severity of his past persecution was insufficient for a  
4 grant of humanitarian asylum.<sup>3</sup> The agency has required that in  
5 order for an alien to obtain humanitarian asylum, he or she must  
6 establish both "the severe harm and the long-lasting effects of  
7 that harm." In re N-M-A-, 22 I. & N. Dec. 312, 326 (B.I.A.  
8 1998).

9 In Matter of Chen, 20 I. & N. Dec. 16, for example, the  
10 BIA granted asylum to an alien who testified that because of the  
11 persecution he suffered, "he is physically debilitated, must wear  
12 a hearing aid due to his head injury, is always anxious and  
13 fearful, and is often suicidal." Id. at 20. Conversely, the BIA  
14 denied humanitarian asylum to another alien because of, inter  
15 alia, "the lack of evidence of severe psychological trauma  
16 stemming from the harm" he suffered in his native Afghanistan.  
17 In re N-M-A-, 22 I. & N. Dec. at 326.

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<sup>2</sup> Jalloh also contends that substantial evidence does not support the BIA's finding that country conditions had changed. We disagree. Substantial evidence supports the BIA's findings that 1) the civil war in Sierra Leone ended, 2) Jalloh's party, the SLPP, has gained control, and 3) Tejan Kabbah, Jalloh's preferred candidate, has been re-elected president of Sierra Leone.

<sup>3</sup> The government contends that this argument was waived by Jalloh's failure to raise it before the IJ. The argument was, however, raised before and addressed by the BIA. It is unclear whether this is sufficient to meet the exhaustion requirement. Cf. Abimbola v. Ashcroft, 378 F.3d 173, 180 (2d Cir. 2004). Because we need not resolve this question in order to decide this petition, we assume that the exhaustion requirements have been met and address Jalloh's argument on the merits. See id.

