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Article

A GUINEAN REFUGEE'S ODYSSEY: IN RE JARNO, THE BIGGEST ASYLUM CASE IN U.S. HISTORY AND  
WHAT IT TELLS US ABOUT OUR BROKEN SYSTEM

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*Confinement and loss of liberty profoundly disturbed asylum seekers and triggered feelings of isolation, powerlessness and disturbing memories of persecution that asylum seekers suffered in their countries of origin. Asylum seekers were treated as criminals, a demeaning status, even though they were not convicted of any crime .... Even when conditions were relatively good, the experience haunted them. Approximately one quarter of the study participants reported suicidal thoughts while in detention.*

Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture<sup>1</sup>

*It is [the United Nations High Commissioner for Refugees'] policy that refugee children should not be detained .... If refugee children are detained in airports, immigration holding centres or prisons, they must not be held under prison-like conditions .... Strong efforts must be made to have them released from detention and placed in other accommodation .... Asylum seekers and refugees should never be placed with common criminals.*

United Nations High Commissioner for Refugees<sup>2</sup>

It is an elemental theme in American mythology: our nation, which was founded by refugees, has, in turn, consistently opened its doors to the refugees of the world. Emma Lazarus' inscription, which adorns the Statue of Liberty in New York, is the apotheosis of this notion:

**\*650** Give me your tired, your poor,

Your huddled masses yearning to breathe free,

The wretched refuse of your teeming shore.

Send these, the homeless, tempest-tost to me.

I lift my lamp beside the golden door.<sup>3</sup>

Not surprisingly, the truth is far less pristine. In the Declaration of Independence, the Founding Fathers listed King George's restrictions on the "Naturalization of Foreigners" among the "causes which impel them to the separation."<sup>4</sup> In the Naturalization Act of 1790, however, many of those same Founding Fathers denied the rights of citizenship to all non-"white" immigrants and to slaves, providing that "any alien, being a free white person ... may be admitted to become a citizen [of the United States]."<sup>5</sup>

In addition to welcoming the world's refugees, then, the United States has also exhibited a long history of bigotry and alarmist "nativism" in its immigration policies.<sup>6</sup> In boom times, when extra hands have been essential, immigrants have been welcomed, even encouraged. In times of crisis or economic difficulty, however, immigrants have been treated as scapegoats

and subjected to cries for severe restrictions and even confinement. The 1850s, for example, witnessed the rise of the “Know-Nothing Party” (so named because members were advised to maintain secrecy by stating that they “know nothing” about the party), a party that nakedly sought to restrict German and Catholic immigration to the United States; to require that all public school teachers be Protestants; and to enforce a 21-year waiting period before an immigrant could achieve citizenship. The party achieved some success, winning state and local elections, and even running former President Millard Fillmore for high office in 1856. Said Abraham Lincoln of the Know-Nothings: “As a nation we began by declaring that ‘all men are created equal.’ We now practically read it ‘all men are created equal, *except negroes.*’ When the Know-Nothings get control, it will read, ‘all men are \*651 created equal, *except negroes, and foreigners, and catholics.* When it comes to this, I shall prefer emigrating to some country where they make no pretense of loving liberty ....”<sup>7</sup>

Later in the century it was the Chinese, at first welcomed to the United States, who faced increasing hostility and discrimination. Speaking in 1879, President Rutherford Hayes lectured that the “Chinese invasion” was “pernicious and should be discouraged. Our experience in dealing with the weaker races--the Negroes and Indians ... is not encouraging,” said Hayes. “I would consider with favor any suitable measures to discourage the Chinese from coming to our shores.”<sup>8</sup> In 1882, Congress passed the Chinese Exclusion Act,<sup>9</sup> prohibiting the immigration of Chinese laborers, ostensibly over fears of competition in the tight job market. As historian Ronald Takaki notes, however, in 1880, the Chinese represented merely .002% of the U.S. population.<sup>10</sup> “Behind the exclusion act were fears and forces that had little or no relationship to the Chinese,” Takaki explains.<sup>11</sup> “Congress was responding to the stressful reality of class tensions and conflict within white society during an era of economic crisis.”<sup>12</sup> The exclusion was later extended to all Chinese immigrants,<sup>13</sup> and similar restrictions on Japanese immigrants followed.<sup>14</sup>

In 1924, Congress enacted the National Origins Act,<sup>15</sup> setting quotas for “Nordic” and “non-Nordic” immigration that favored the former and severely restricted the latter. In order to ensure a “racial” composition that reflected the earlier “Nordic” immigrants to the United States, and not, for example, the Italians, Slavs, Jews, and Japanese who arrived later, Congress set quotas on immigrants by country based upon the number of immigrants per country who arrived before the year 1890.<sup>16</sup>

In May of 1939, 936 Jews set sail from Hamburg, Germany on the *S.S. St. Louis*, seeking asylum six months after the infamous Kristallnacht, or “Night of the Broken Glass.”<sup>17</sup> Denied entry in Cuba, the ship headed for the United \*652 States, where officials turned the passengers away.<sup>18</sup> Although the crematoria had not yet begun to operate in Germany, American officials were well aware of the persecution of the Jews, and of the existence of concentration camps at Dachau and Buchenwald.<sup>19</sup> With 30 million Americans unemployed, however, a strong anti-immigrant fervor gripped the country: 83% of Americans polled in 1939 opposed an increase in the number of refugees permitted into the country.<sup>20</sup> With an election looming, politicians acceded to the populist sentiment. Ultimately, the passengers of the *St. Louis* were granted asylum in Great Britain, where 288 found safety, and in the Netherlands, France, and Belgium, where hundreds later perished at the hands of the Nazis.<sup>21</sup>

After World War II, the international community adopted a series of rules and conventions to prevent a recurrence of the *St. Louis* affair and others like it. Among other things, in 1951, the United Nations General Assembly enacted the Convention Relating to the Status of Refugees (the “Convention”)<sup>22</sup> to provide protection for displaced WWII refugees. The United States did not ratify the Convention, instead passing the Immigration and Nationality Act of 1952, which allowed the U.S. Attorney General to withhold the deportation of aliens facing “physical persecution.”<sup>23</sup> Subsequent amendments limited the protection to refugees from communist countries or countries in the “general area of the Middle East.”<sup>24</sup> In 1967, the United Nations revised the Convention with the Protocol Relating to the Status of Refugees,<sup>25</sup> a protocol that the United States signed and ratified in 1968.<sup>26</sup> The Protocol provides that “equal status should be enjoyed by all refugees,” and defines a refugee as a person who:

Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country \*653 of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>27</sup>

It was not until 1980, however, that the United States expressly adopted this definition of a refugee, concomitantly eliminating the longstanding geographical limitations on asylum.<sup>28</sup>

Unfortunately, the United States' record in observing this and other international conventions on the treatment of refugees has been uneven, and, at times, shameful. All too often, U.S. policy has adhered more closely to the vicissitudes of popular opinion and political maneuvering than to international norms. The unprincipled and discriminatory treatment of asylum seekers from El Salvador and Guatemala in the 1980s, and from Haiti in the 1980s and 1990s, particularly when compared with the warm reception of Cuban asylum seekers during the same period, provide but a few of many examples.<sup>29</sup>

### ASYLUM POLICY AND PRACTICE TODAY: A NATIONAL SHAME

The mid-1990s witnessed another period of anti-immigrant fervor in the United States, a fervor renewed by the events of September 11, 2001. Congress reacted by passing severe immigration restrictions, including, notably, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.<sup>30</sup> The desire to root out terrorism is understandable, but the act's harsh and sweeping restrictions on asylum seekers, including asylum seekers from myriad nations with no hint of terrorist activity, are not.

Among other things, the 1996 Act allows immigration officials at U.S. ports of entry to summarily expel aliens lacking valid entry documents, including asylum seekers whom officials deem--through perfunctory interviews-- not to possess a credible fear of persecution.<sup>31</sup> Of greater relevance to this article, the act also permits immigration officials to detain asylum \*654 seekers lacking valid documentation pending resolution of their claims.<sup>32</sup> The decision by the Department of Homeland Security ("DHS")<sup>33</sup> to detain an asylum seeker cannot be appealed. As Human Rights First (formerly the Lawyers Committee for Human Rights) observes: "The Department of Homeland Security acts, in effect, as both judge and jailer with respect to parole decisions for asylum seekers. If parole is denied by DHS, the decision cannot be appealed to a judge--even an immigration judge."<sup>34</sup> More recent immigration laws, including the PATRIOT Act of 2001,<sup>35</sup> have only worsened the plight of asylum seekers.<sup>36</sup>

In 2002-03, at least 16,000 asylum seekers were detained upon arrival,<sup>37</sup> often for periods of months or even years. In 2001, the *Dallas Morning News*, reviewing records obtained from the federal government, reported that hundreds of asylum seekers and other foreigners, "convicted of no crime, are trapped indefinitely in U.S. jails. More than 800 people from 69 countries have been locked up by the Immigration and Naturalization Service for at least three years ...."<sup>38</sup> By comparison, in Germany, detention of more than twenty-four hours must be ordered by a court, and can be appealed within two weeks; in Canada, an asylum seeker detained for more than forty-eight hours must be brought before an independent review board to determine whether continued detention is justified under established law.<sup>39</sup>

In violation of international law and norms, moreover, the United States detains thousands of asylum seekers in jails and prisons, often mixed in with the criminal population. (The United Nations High Commissioner for Refugees ("UNHCR") has expressly stated: "Asylum seekers and refugees should never be placed with common criminals.")<sup>40</sup> A 2003 report by Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture found that "[a]pproximately 20% of asylum seekers in this study were held in county jails at some point during their detention. In county jails, asylum seekers are often held in the same cells with convicted criminals, including violent offenders. These jails subject asylum seekers to the same policies as \*655 the general criminal population."<sup>41</sup> The same study found that "[i]mprisonment, and as such being treated like criminals, exacerbated the psychological symptoms of most asylum seekers studied, often individuals who had already experienced traumatic events."<sup>42</sup>

Even more appalling are the conditions to which our government subjects asylum seekers in detention--individuals fleeing persecution, torture, rape, and wrongful imprisonment in their homelands. In 1997, for example, a class of asylum seekers detained at a facility in Elizabeth, New Jersey filed suit against INS and the private corrections company that INS hired to run the facility.<sup>43</sup> As federal judge Dickinson Debevoise opined, the plaintiffs' allegations could be "summarized as follows: Every moment of plaintiffs' detention was filled with abuse."<sup>44</sup> Among other things, twenty to forty asylum seekers were packed into each filthy room in the facility.<sup>45</sup> The shower and toilet in each dormitory were located in the same room as the eating and sleeping facilities, and the asylum seekers were forced to eat their meals inches away from the bathroom area, an area in use during meals.<sup>46</sup> The plaintiffs were physically, sexually, and verbally abused. Guards beat them, hurled racial epithets, and awakened them before sunrise, forcing them to stand and face a wall, legs spread, for up to an hour at a time.<sup>47</sup> Guards performed strip searches and cavity searches designed to humiliate the plaintiffs, and often shackled the plaintiffs to their beds.<sup>48</sup>

Ultimately, the asylum seekers rose in revolt, leading to the closing of the facility. After Judge Debevoise upheld the plaintiffs' right to pursue human rights violations under the Alien Tort Claims Act, the corrections company settled the plaintiffs' claims in 2005 for \$2.5 million.<sup>49</sup> Unfortunately, this was by no means an isolated case.<sup>50</sup>

All of these problems are accentuated for unaccompanied, juvenile asylum seekers who have been traumatically separated from their families. "U.S immigration authorities take them into custody, and approximately one-third are detained in harsh conditions in a secure jail-like facility designed for the incarceration of juvenile offenders .... Not charged with committing any crime, these unaccompanied minors may be held for months or even years, in punitive conditions alongside juvenile offenders pending resolution of their \*656 [status]."<sup>51</sup> As the opening UNHCR quotation specifies,<sup>52</sup> the practice of detaining juvenile asylum seekers, and of doing so alongside offenders or criminals, contravenes international norms for the treatment of children.<sup>53</sup>

The case of Malik Jarno, a juvenile asylum seeker from Guinea, is emblematic of the inhumanity of our current asylum system. Malik garnered the support of over seventy members of Congress, numerous national and international rights groups, and, critically, the pro bono assistance of nine legal organizations, including some of the country's top law firms. In all, those firms spent more than \$4 million in fees and expenses in support of Malik's claim.<sup>54</sup> Yet, despite benefiting from this extraordinary and unprecedented assistance, Malik suffered year upon year of profound injustice in his quest for asylum. At every turn in the narrative that follows, one must ask: if this was Malik's experience, what is the experience of the thousands of adult and juvenile asylum seekers in America each year who are wholly unrepresented and unsupported in their asylum applications?

## GUINEA

Guinea, with a population of approximately 9.7 million, is about the size of Oregon. Located on the West Coast of Africa, Guinea shares its borders with Guinea-Bissau, Senegal, Mali, the Ivory Coast, Liberia, and Sierra Leone. Although rich in natural resources, Guinea is one of the poorest countries in the world, ranking 167th out of 179 countries on the United Nations Development Programme's Human Development Index.<sup>55</sup> French is Guinea's official language, but Guinea is ethnically and linguistically diverse; among others, the Puhlar (about 40% of the population, also known as the Fulani), the Malinke (about 30% of the population, also known as the Mandingo), and the Soussou (about 20% of the population) all speak a distinct primary language, with many dialects, and each occupies a different \*657 region of the country.<sup>56</sup> While the Soussou are the smallest of these groups, they are dominant in Guinean politics, as well as in the military and in the public sector.

After seizing power in a bloodless military coup in 1984, and until his death in December 2008, President Lansana Conte, who is Soussou, ruled Guinea with an iron fist while maintaining the pretense of a constitutional republic. In 1998, a critical year in this story, President Lansana won a second five-year term in an election that the U.S. State Department described as "marred by violence and civil unrest before and after election day," with "the arrest and detention of major opposition candidates during the vote-counting process" and widespread irregularities in the government's favor.<sup>57</sup> The State Department's "Guinea Country Report on Human Rights Practices for 1998" detailed widespread human rights violations under the Conte regime:

Major human rights abuses include: Extrajudicial killings; disappearances; use of torture by police and military personnel; police abuse of prisoners and detainees; occasional instances of vigilante justice by unidentified uniformed personnel; inhuman prison conditions and frequent deaths due to these conditions and lack of medical care; instances of arbitrary arrest and detention; governmental failure to ensure access by attorneys to clients in prison; the executive branch's influence over the judicial system and the electoral process; infringement on citizens' privacy; and restrictions on freedom of speech and the press .... Other major human rights abuses included: Restrictions on freedom of assembly; societal discrimination and violence against women; and prostitution and genital mutilation of young girls; ethnic discrimination and interethnic violence; child labor; and vigilante actions by victims or others.<sup>58</sup>

In addition, Conte purposefully exacerbated ethnic tensions in Guinea, keeping his opponents divided and distracted, while giving preferential treatment to his own Soussou in governmental appointments and economic ventures.<sup>59</sup> In 2003, Conte was elected to a third term, essentially without opposition, since all of the major opposition parties boycotted the elections in protest to the patent unfairness of the electoral system.<sup>60</sup> The Conte regime remained in power until Conte's death in December 2008, whereupon a \*658 military junta assumed power by coup, vowing to rule the country for two years until

elections in 2010.<sup>61</sup>

### THE “JARNO” FAMILY: THE ULTIMATE PERSECUTION

Malik Jarno<sup>62</sup> was born in Kassongonye, Guinea, the village of his mother, on January 7, 1985.<sup>63</sup> When Malik was five months old, his mother, Aissato Diallo, returned with Malik to the family home in Kaporo Rails, a neighborhood of Conakry, the capital. Malik’s mother and his older brother, Thierno Ibrahim, closely tended to Malik throughout his childhood, since he is mentally disabled. Sadly, in December, 1997, when Malik was 12 years old, his mother died of an illness while in the hospital, leaving Ibrahim as his chief caretaker.

Malik’s father, Thierno Ousmane Baldé, was the chief imam at the Grand Mosque in Kaporo Rails, which stood beside the family home. A religious scholar and respected leader in the Puhlar community, Baldé was also a critic of the Conte regime and a well-known associate of Mamadou Bah, leader of the Party for Renewal and Progress (“PRP”), a Guinean opposition party. Bah and other PRP members regularly visited Baldé and prayed with him at the Grand Mosque.<sup>64</sup>

In early March 1998, Kaporo Rails, a predominantly Puhlar neighborhood known to support opposition political parties, faced escalating violence with the arrival of government forces accompanied by bulldozers. The government declared its intention to reclaim the land and ordered all “squatters” to vacate immediately, notwithstanding the fact that the residents had paid for permits to erect homes and businesses on the land. Fearing the impending violence, Ibrahim took Malik to stay with Ahmed Touré,<sup>65</sup> a family friend living in nearby Matoto, returning to Kaporo Rails to help resist the government forces. A short time later, the government launched an attack on Kaporo Rails, demolishing Malik’s home and thousands of others. Government \*659 forces killed many of Kaporo Rails’ citizens and arrested dozens more. As the State Department’s 1998 Country Report describes, the government’s destruction of houses and shops “left 100,000 persons homeless, mostly members of the Puhlar ethnic group.”<sup>66</sup> By the State Department’s conservative estimate, government forces “killed 8 civilians and injured 40 others, and 1 gendarme was killed and his body mutilated by protesters during 2 days of disturbances.” Fifty-nine people were arrested, including religious leaders and three members of the National Assembly.<sup>67</sup>

Among those arrested was Malik’s father, along with Mamadou Bah. From his position of safety, Malik watched in horror as the television news reported the bulldozing of his neighborhood and the arrest of his father.<sup>68</sup> Bah and other leaders were eventually released, but Malik’s father died in prison, quite possibly after enduring torture. Another imam died just after being released. Meanwhile, Malik’s brother Ibrahim went missing; he has never been seen again and is presumed dead.<sup>69</sup>

Ahmed Touré arranged for Malik to join his uncle Mamadou-Ouri Baldé, his aunt, and two cousins in Abidjan, in the Ivory Coast. The Ivory Coast was hardly a haven from danger, however. In January 2000, facing increasing threats to foreigners and Muslims, the family was forced to leave the Ivory Coast. They traveled on Baldé’s tourist visa to France, and the outskirts of Paris, taking Malik with them. About four months later, Malik’s uncle traveled to Guinea--on a round-trip ticket--to see if it was now safe for the entire family to return. He was never heard from again, and it is presumed that he was arrested upon his return, and possibly killed, by government forces.<sup>70</sup>

In late 2000, Malik’s aunt, having run out of funds, decided to take her children to Belgium and seek asylum, taking Malik’s passport and other documents with her.<sup>71</sup> Malik was left in France with a neighbor named Rashid, who looked after Malik. In January 2001, when Malik was sixteen, he learned that Rashid was returning to Morocco, and that he would not be taking Malik with him. Instead, Rashid provided Malik with a fake passport and put him on a plane to America, suggesting that Malik seek asylum in the United States. According to Malik, Rashid assured him that everything would be okay in the United States, since “it is the land of freedom.”<sup>72</sup> He advised Malik, who speaks Puhlar and basic French (although he is illiterate in French), to declare that he was seeking asylum from Congo. The fake \*660 passport listed Malik’s age as twenty-five.

### THE AMERICAN ODYSSEY BEGINS

On January 28, 2001, Malik arrived alone at Dulles International Airport in Virginia. When immigration officials learned that his passport was forged, they took Malik into custody. An immigration official proceeded to interview Malik, whereupon

Malik declared that he was seeking political asylum.

Initial airport interviews like this are typically terrifying for asylum seekers. Unfamiliar with the operative laws, and with the language and customs, their terror is compounded by the fact that, as in Malik's case, it was often government agents who persecuted them at home. Asylum seekers are understandably fearful of immigration officials, and unsure of what to tell them, even wondering whether the information they provide will be passed on to their persecutors at home.<sup>73</sup> Such interviews, often conducted in the open, occur before anyone, much less legal counsel, has had a chance to explain to the asylum seeker precisely what is happening, and the nature and purpose of the interview. As a federal appeals court has explained, "we are generally skeptical of reliance on reports of airport interviews .... [T]he airport interview is usually not 'valid grounds upon which to base a finding that an applicant is not credible.'"<sup>74</sup>

In Malik's case, the terror was compounded by the fact that he was a mentally-disabled minor. The actions of the INS official, however, turned an excruciating experience into a charade. Neither a Puhlar interpreter nor a French interpreter was provided to Malik. Instead, the official enlisted the services of an unknown, Spanish-speaking baggage handler,<sup>75</sup> wholly unqualified as an interpreter, much less a Puhlar, or even French, interpreter.<sup>76</sup> The interview was understandably bizarre as a result. As is typical for a juvenile, particularly a mentally disabled juvenile, Malik tried his best to do as he was told, and to assert that he was seeking asylum from Congo. As we shall see, however, given his mental disability, Malik was incapable of constructing a coherent fabrication of his experiences. Accordingly, through this "interpreter," Malik, who does not speak Spanish, proceeded to claim that he worked as a shepherd in Paris, herding sheep, and that he lived for two years in Paris, then for a year and a half in Spain, and then moved back to Paris.<sup>77</sup> When asked the purpose of his trip to the United States, he allegedly \*661 responded, "I went to Germany and they refused me."<sup>78</sup> Malik was then forced to sign an *English* transcription of the interview. There is a reason that these interviews are considered unreliable, without even factoring in the mysterious Spanish-speaking baggage handler translating for a mentally disabled juvenile whose native language is Puhlar.

Malik told the INS officer one other salient fact: he stated that he was actually born in 1985, making him a juvenile. On the basis of Malik's fake passport, however, INS placed him in an adult jail, the Piedmont Regional Jail in Virginia, to await immigration proceedings. It was the first of several adult jails to which INS would subject Malik. He had endured the trauma of losing his entire family, his home, his village, and his country. He had endured the further trauma of abandonment by his relatives in Paris, only to be abandoned once again and put on a plane to another strange land, his fourth country and third continent in less than three years. Here, in "the land of freedom," Malik hoped finally to end his odyssey and find refuge. Instead, he found himself handcuffed and placed behind bars with adult convicts. Alone, terrified, mentally disabled, and wholly unfamiliar with his surroundings or with the English language, Malik was forced to endure nine months in adult jails without a hearing of any kind. Officials simply ignored his protestations that he wished to seek asylum. "All those months I was alone, I knew they had forgotten about me," Malik later commented. "I would tell people who came to see me about my situation, but they would go away and never come back."<sup>79</sup>

As previously noted, it is a violation of international norms to house even adult asylum seekers in jails, and to commingle or detain them with criminals,<sup>80</sup> but that is precisely what INS did with Malik. In fact, international law expressly prohibits the detention of asylum seekers except when absolutely necessary, as when an individual poses a threat to public safety.<sup>81</sup> Malik clearly posed no such threat. The outrageous delay in providing Malik a hearing, in turn, violated the International Covenant on Civil and Political Rights, to which the United States is a party, which provides that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that [the] court may decide *without delay* on the lawfulness of his detention and order his release if the detention is not lawful."<sup>82</sup>

\*662 Throughout his detention, Malik and his fellow inmates repeatedly informed INS that Malik was a juvenile and thus that he did not belong in an adult facility. "I wrote several letters with the help of other prisoners, explaining that I was 16 years old and that I had been in prison for a long time, and that I had not seen a judge," Malik explained in his December 2001 declaration.<sup>83</sup> "Other prisoners would send these letters for me, although I am not sure how many were sent and where these letters were sent to."<sup>84</sup> In addition, Malik explained, "INS people came to visit us. We explained them how young I am. They took my information, but they do nothing."<sup>85</sup> Instead, they continued to incarcerate Malik at the adult jail, conducting wrist and dental x-rays in October 2001 and January 2002 in an attempt to ascertain Malik's age. This, too, was a violation of Malik's rights. As the UNHCR's "Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum" directs: "The child should be given the benefit of the doubt if the exact age is uncertain."<sup>86</sup>

The x-rays, INS claimed, suggested that Malik was not a juvenile. The problem is that these tests are wholly unreliable and

thus non-probative of an individual's age. As Physicians for Human Rights explains, "medical experts have routinely discredited the accuracy of such tests."<sup>87</sup> Medical studies have shown that these tests, which examine the eruption of molars and the density of the wrists, are inaccurate, with doctors reaching quite varied conclusions based upon the same x-rays. In a 2002 letter to INS, Dr. Nalton F. Ferraro, an oral and maxillofacial surgeon at Children's Hospital in Boston, Massachusetts and an expert in the field, explained the fundamental flaws in the tests:

[C]hronologic age, dental age and skeletal (bone) age are not necessarily the same in a given individual.

In fact, deviation among these three "ages" is common and well appreciated in pediatric medical and dental practice. Discrepancies among these ages can amount to as much as five years; this is substantial when one is considering a span as short as the first two decades of life .... Every recognized authority on physical development has stressed this fact.<sup>88</sup>

Additionally, no studies have been done to assess the bone and molar development, and thus the corresponding age, of individuals from Africa, much less Malik's area of the continent.<sup>89</sup> A dental study upon which INS \*663 purported to derive its conclusions about Malik's age, for example, was based entirely upon White Americans.<sup>90</sup>

In 2002, the INS Commissioner acknowledged criticism of the tests and announced that INS was reviewing its policy. In 2003, Senator Diane Feinstein (D-Calif.) introduced the Unaccompanied Alien Child Protection Act,<sup>91</sup> among other things to prohibit DHS from relying upon these tests. The bill passed the Senate in 2004 and still awaits passage in the House. Meanwhile, both the U.S. State Department and the Department of Health and Human Services have abandoned the tests because of their inherent unreliability.<sup>92</sup> Yet, on the basis of these uniformly discredited tests, INS kept Malik in adult jails, co-mingled with adult criminals.

In October 2001, Malik was finally brought before Immigration Judge Joan Churchill for removal proceedings, without counsel. Although asylum proceedings typically involve matters of life or death, they are considered civil rather than criminal proceedings in the United States, and there is thus no right to free counsel for indigent asylum applicants.<sup>93</sup> Asylum seekers can be, and frequently are, returned to the country from which they fled without ever seeing a lawyer or obtaining assistance to help them negotiate a wholly alien system. In fact, up to 80% of unaccompanied juvenile asylum seekers appear in court without a lawyer or legal guardian.<sup>94</sup> In one case, for example, an immigration judge was forced to adjourn proceedings when an 18-month-old child appeared in court without representation.<sup>95</sup>

You have a right to counsel in the United States if charged with littering, but when the government seeks to deport you to the very killing fields from which you fled, you have no such right. And the lack of representation in asylum proceedings is profoundly consequential:

Asylum seekers referred through the affirmative process to Immigration Court are more than six times more likely to be granted asylum if they are represented. Those placed into defensive proceedings by the INS are more than four times more likely to be granted asylum if they have representation .... For certain nationalities with relatively average or low rates of success ..., representation is particularly meaningful: 31% of those represented from India won asylum as opposed to 1% \*664 who were not represented, and 60% of Liberian asylum seekers were granted asylum when represented but only 8% when *pro se*.<sup>96</sup>

Thankfully, Judge Churchill adjourned the proceedings, in Malik's case to permit Malik to try to find representation. Upon hearing of the postponement, Malik told the court, "That's too long. I'm tired. Ten months I've been in prison now."<sup>97</sup>

## THE FIRST ASYLUM TRIAL

The adjournment stood, however, and another month would pass before Malik finally secured representation with help from the Capital Area Immigrants' Rights Coalition. Benoit Jacqmotte, a French-speaking lawyer from the law firm of Latham & Watkins in Washington, D.C., agreed to represent Malik pro bono, adjourning the case until March of 2002. He immediately assembled a team, including supervising partner Claudia O'Brien, and began what would turn out to be thousands of hours of meeting with Malik and preparing his case. "My first impression," said Jacqmotte, "was that he looked like a kid. It was obvious." Jacqmotte also discovered "early on" that Malik had mental disabilities, an impression confirmed by later tests.<sup>98</sup>

While Jacqmotte and his team prepared the case, Malik continued to suffer in adult confinement. Among other things, Malik was beaten by other inmates, placed in solitary confinement, pepper-sprayed in the face, and, he claimed in a civil lawsuit brought by the Washington Lawyers' Committee for Civil Rights, beaten by guards.<sup>99</sup> At trial, the defendants admitted that Malik was pepper-sprayed in the face, but insisted that it was an accident, occurring in the midst of subduing other inmates. They also admitted to placing Malik in solitary confinement, but revealed that they did so upon the instructions of INS, ostensibly to ensure Malik's safety.<sup>100</sup> "That's where you go if you do something wrong, like break your TV," Malik explained. "It's very cold in there. I asked for a blanket, but they didn't give me one. You cannot see outside or talk to anyone. They give you only two breads and lemon juice. I just felt like dying in there."<sup>101</sup>

Ultimately, a jury believed the testimony of the guards over that of a \*665 mentally disabled, juvenile alien. The litigation nonetheless revealed that Malik was suffering shameful mistreatment, as one might expect given the wholly inappropriate setting and Malik's age, his mental and linguistic disabilities, and his cultural unfamiliarity. As Jacqmotte commented, "he is the poster child for a person with the potential to be abused in jail."<sup>102</sup>

In February 2002, Dr. Judy Okawa conducted a seven-hour psychological evaluation of Malik, concluding that he was moderately "mentally retarded,"<sup>103</sup> with "severe intellectual deficits."<sup>104</sup> Based upon this finding, Jacqmotte requested that INS move Malik to a facility designed to serve mentally disabled individuals. INS refused to do so. In March, Dr. David Gold performed an evaluation of Malik for the purposes of confirming Dr. Okawa's February results. Malik began the evaluation by asking Dr. Gold if INS was going to kill him, or send him back to Guinea.<sup>105</sup> Dr. Gold's evaluation confirmed that Malik functions in the "Mentally Retarded range."<sup>106</sup> "Returning Malik to Guinea," Dr. Gold opined, "is the equivalent of sending an 11 year-old child to a country where he has no living family or support system and no foreseeable means of caring for himself."<sup>107</sup>

Also in March of 2002, Malik's asylum hearings finally began before Judge Churchill in Arlington, Virginia; they would continue, off and on, until late June. Winning before Judge Churchill would be excruciatingly difficult. Prior to her appointment as Immigration Judge in 1980, Judge Churchill was engaged in private practice and, for five years, served as an INS attorney (i.e., across the table from the attorneys representing asylum seekers). As the *Los Angeles Times* opined, Judge Churchill, who retired in 2005, was "the toughest immigration judge in the Washington, D.C. area," approving fewer asylum applications than any of her colleagues.<sup>108</sup> From October 1994 to 2001, Judge Churchill awarded asylum in only 233 of the 2,302 hearings before her, a rate of one in ten claims, significantly below the national average. Time and again, Judge Churchill denied asylum to compelling and meritorious applicants: "In a system that rarely reverses judges," the *Los Angeles Times* observed, "she has had 50 cases overturned outright in [a] six-year period, more than any other sitting judge in the nation."<sup>109</sup>

Before the hearings began, however, Malik and his legal team were buoyed by the arrival of a critical piece of evidence: Malik's birth certificate. \*666 Malik had finally made contact with his aunt in Belgium, and she had located and sent the birth certificate, which established that Malik was indeed born in Guinea on January 7, 1985, the son of Ms. Diallo and Mr. Thierno Ousmane. Malik's lawyers promptly sent the birth certificate to INS, which forwarded it to the Guinean Embassy for authentication (with Malik's name naturally redacted).<sup>110</sup>

The birth certificate was not central to Malik's claim for asylum, but it was important in establishing his credibility, often the key factor in gaining asylum. To win asylum, an applicant must demonstrate that she has a "well-founded fear of persecution" if returned to the country in question.<sup>111</sup> To meet this burden, an applicant may show either past persecution or that a reasonable person in her circumstances would fear future persecution based upon one or more of five grounds: political opinion, race, religion, nationality, or membership in a social group.<sup>112</sup> An applicant need not establish her claim with certainty, but only that there is a "reasonable possibility" of persecution.<sup>113</sup> In fact, the Supreme Court has suggested that even a one in ten chance of persecution may establish a well-founded fear.<sup>114</sup> Finally, courts recognize that asylum seekers rarely have the opportunity to gather corroborating evidence. Hence, provided that the testimony is plausible and consistent, asylum may be granted upon an applicant's testimony.<sup>115</sup> As the Ninth Circuit has observed:

We recognize that omitting a corroboration requirement may invite those whose lives or freedom are not threatened to manufacture evidence of specific danger. But the imposition of such a requirement would result in the deportation of many people whose lives genuinely are in jeopardy. Authentic refugees rarely are able to offer direct corroboration of specific threats. "It is difficult to imagine what other forms of testimony the petitioners could present other than [their] own statement[s]." Persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution.<sup>116</sup> Malik's claim for asylum fit snugly within the requirements. Malik could show not only past persecution, based upon the

murder of his father, brother, and likely his uncle, along with the destruction of his home and his village, \*667 but also upon a well-founded fear of future persecution:

Malik believes that if he is forced to return to Guinea, he will be stopped at the airport because he is Puhlar and, more importantly, because he shares his father's name--making Malik a likely target of government persecution because of his father's political affiliations and religious activities and his family's reputation. Malik believes he will be arrested and perhaps tortured and killed. Even-if Malik somehow gets past the airport, he has nowhere to go in Guinea. His neighborhood and his house were destroyed, so Malik believes that he will be unlikely to find a neighbor willing to care for him .... With no close family or relations in Guinea, Malik believes he will be forced to live on the streets -- a highly precarious situation for any child, but particularly for a mentally retarded child like Malik.<sup>117</sup>

In support of his claim, Malik presented several pieces of evidence in addition to his own testimony. This included the written testimony of Djibril Djourou, a friend of Malik's from Guinea living in New York, who corroborated a significant portion of Malik's story, and the affidavit of Timothy W. Docking, an Africa specialist and former team leader for a United States Agency for International Development ("USAID") mission to Guinea in 1999-2000. Docking described the March 1998 Kaporo Rails attacks and testified that Malik's story was "credible and consistent with the events that took place before and during the Kaporo Rails riots."<sup>118</sup> Moreover, Docking confirmed through conversations with "longtime contacts" at the Guinean Organization for the Defense of Human Rights "that a religious leader (imam) named Thierno Ousman Diallo Baldé was detained during the Kaporo Rails incident and later died from injuries sustained while in police detention."<sup>119</sup> Docking expressed "grave concerns for Malik Jarno's safety and personal welfare if he were forced to return to Guinea," stating that there was a "strong possibility" that Malik could be jailed indefinitely, tortured, or even killed.<sup>120</sup>

In short, Malik provided the kind of corroboration that few asylum seekers can provide. And there was more: in April 2002, the Guinean Embassy confirmed the authenticity of Malik's birth certificate. This document proved what the x-rays could not: Malik was, in fact, a minor. In April 2002, on the basis of the authentication, INS finally moved Malik from an adult jail to an \*668 INS juvenile detention facility in Berks County, Pennsylvania.<sup>121</sup> After fifteen months of enduring abysmal conditions in three different adult jails, Malik was finally placed in a juvenile facility. His detention was still a violation of international law, but at least Malik was in a less abusive setting.

Meanwhile, each of the doctors who examined Malik explained that he was mentally disabled and accordingly incapable of fabricating the cohesive and consistent testimony he presented. "His performance on the nonverbal test of intelligence and his difficulty responding to all but the simplest questions," Dr. Okawa explained, "are strongly suggestive of considerable cognitive impairment, which makes it highly unlikely that Mr. Jarno would be capable of fabricating an elaborate and consistent story about his experience in Guinea, Ivory Coast, France, and the U.S."<sup>122</sup> Dr. Gold concurred: "Based on my assessment of Malik, I believe that Malik does not have a level of planning, organization or sophistication to fabricate a convincing and compelling story not based on truth and tell it consistently to his attorneys, numerous mental health officials and to the court."<sup>123</sup>

The hearings concluded in June 2002, with INS strongly opposing Malik's claim. Unlike prosecutors, whose goal is to win their case, INS attorneys are expected to achieve justice, regardless of the outcome.<sup>124</sup> In practice, however, and particularly since 9/11, INS lawyers have assumed fully adversarial roles, fighting asylum claims vigorously, regardless of their merit. "Before 9/11, we used to be able to negotiate with INS, and work something out in a case like this," said one member of Malik's legal team, "but post-9/11, their lawyers try to cream you."<sup>125</sup> Notably, after the second day of hearings, Judge Churchill asked INS if they would stipulate to granting Malik asylum, so strong was the case in his favor. INS refused, citing what O'Brien described as "red herring issues."<sup>126</sup>

Although the Piedmont Jail was located four hours away from Arlington, INS refused to arrange for Malik to stay in Arlington during his trial. Instead, they woke him up each day at about midnight and put him in a holding pen. Around 1:00 a.m., they drove Malik the four hours to Arlington, forcing him to wait several hours for the hearings to begin. When the proceedings ended each afternoon, INS shackled and handcuffed Malik once again and drove him back to Piedmont, another four-hour journey. "I didn't eat even," said Malik. "They never give you even food."<sup>127</sup> At one point, said O'Brien, Judge Churchill commented derisively on Malik's "glazed affect," utterly \*669 "disregarding the fact that Malik was mentally

disabled and sleep-deprived,” not to mention famished.<sup>128</sup>

### JUDGE CHURCHILL’S DECISION

At the close of proceedings, Judge Churchill read her decision aloud. Remarkably, she ruled against Malik. In denying Malik’s claim Judge Churchill drew every inference against him; she erected burdens of proof unsupported in the law, including a burden imposed upon criminal prosecutors; and she accorded no weight whatsoever to Malik’s supporting evidence and witnesses. If the Supreme Court suggested that even a one in ten chance of persecution might suffice, Judge Churchill’s decision, and the INS argument in opposition to Malik’s claim, essentially inverted that standard, seemingly demanding a showing beyond a reasonable doubt. In the context of asylum, such a standard is not only unrealistic and inappropriate, but it can be deadly.

For example, Judge Churchill accorded no weight to Malik’s birth certificate, despite its authentication by the Guinean Embassy after proceedings had begun. “There’s no evidence in this record that connects this document with the respondent. We have no way of knowing whether this document, which was validly issued, relates to the respondent,” Judge Churchill ruled.<sup>129</sup> In criminal cases, where guilt must be proved beyond a reasonable doubt, prosecutors are required to show a “chain of custody” for the evidence introduced, i.e., proof that the evidence presented came directly from the source, without an opportunity for tampering.<sup>130</sup> Applying such a standard to asylum proceedings is unprecedented and illogical. Refugees lucky enough to secure birth certificates or other documents, in addition to the shirts on their backs, are rarely in a position to demonstrate the precise provenance of the documents, much less to obtain official verification of issuance from the very government that persecuted them.<sup>131</sup> It is for this reason that such documents are not even required to establish an asylum claim.<sup>132</sup>

In Malik’s case, however, there *was* proof of the document’s source and authenticity. Malik’s translator was actually on the phone with him when he finally reached his aunt in Belgium and asked her to send the birth certificate to his attorneys. The translator testified that Malik’s aunt promised to send the document, and sure enough, the document arrived from Belgium a short \*670 time later, in the return DHL envelope that Jacqmotte had sent to Belgium for this purpose.<sup>133</sup> An INS forensic report confirmed, moreover, that the authenticated birth certificate had not been tampered with or altered.<sup>134</sup> Few, if any, asylum seekers are able to provide such corroboration. Judge Churchill was completely unswayed: “The respondent has presented no identification documentation whatsoever.”<sup>135</sup>

Wholly disregarding the authenticated birth certificate, Judge Churchill proceeded to rely on the pseudo-scientific bone and dental analysis for her finding that “the respondent is likely not telling the truth regarding his age.”<sup>136</sup> In doing so, the judge ignored evidence that squarely impeached this analysis. She even cited some of this evidence, noting, “It was acknowledged by all the experts that there have been no known studies of persons from the respondent’s region of the world,” and that the dental study on which the INS relied “included only American whites.”<sup>137</sup> In addition, Judge Churchill “failed to consider uncontroverted evidence that Africans, such as Malik, typically have much earlier bone and tooth development than Caucasian-Americans.”<sup>138</sup> Finally, she completely ignored the up to five-year margin of error in the INS tests,<sup>139</sup> which meant that the tests could not refute Malik’s testimony as to his age, much less his authenticated birth certificate.

Judge Churchill also found Malik’s story incredible based upon apparent discrepancies in the order, spelling, and representation of his name, including “Jarno Malek” on documents prepared by INS officers at the airport; “Thierno Malik” on the authenticated birth certificate; and “Malik Jarno” on the asylum application and subsequent testimony. Malik’s lawyers demonstrated, however, that the first was simply an INS mistransliteration of Malik’s name. The third was a transposition of the names in accordance with the American custom of placing the given name first. And the second was the Guinean spelling of the same name, with the honorific “Thierno” listed first, according to Guinean custom.

Churchill suggested that Malik added “Baldé” to his name only after Docking testified that an imam of that name was killed following the Kaporo Rails incident.<sup>140</sup> In fact, Malik listed Baldé as his family name in his declaration, signed on December 17, 2001, three months before Docking testified. He also listed his father’s brother as Mamadou Ouri Baldé in the \*671 same document.<sup>141</sup>

As for Docking, who confirmed the imprisonment and death of Malik’s father, Judge Churchill refused to credit his testimony entirely, explaining: “[W]e cannot rely on statements that he was told by persons who are unwilling to reveal their

identity or their sources.”<sup>142</sup> This was not, however, a criminal trial, or even a standard civil trial. Hearsay is permitted in asylum hearings,<sup>143</sup> where the goal is to assess whether there is a “reasonable possibility” of persecution, rather than to prove guilt or culpability. Guinean sources had taken great risk to provide Docking—an exceedingly credible witness—with corroborating evidence about Baldé. Naming the sources would only have placed further lives in jeopardy, something Docking could not do.<sup>144</sup>

Finally, and perhaps most disturbingly, Judge Churchill ruled that Malik provided no evidence of past persecution, and no basis to conclude that he might suffer future persecution if returned to Guinea. Looking at the first of these, for example, Judge Churchill announced: “There’s no claim in this case that anything ever happened to the respondent himself.”<sup>145</sup> Churchill held that there was not so much as a “claim” of past persecution, much less any evidence. Malik’s entire world was destroyed: his father and brother were murdered, leaving him an orphan; his uncle was imprisoned and likely murdered; his house was destroyed—his entire neighborhood, in fact, was destroyed, forcing him to leave his country and ultimately everyone and everything he had ever known. All of this, Judge Churchill opined, was insufficient to advance a claim of past persecution.<sup>146</sup>

As commentators have observed, under such a standard, the Pilgrims landing at Plymouth Rock today or Jews fleeing Nazi Germany in the 1930s would be denied asylum on the basis that they had not (yet) been physically harmed.<sup>147</sup>

### BACK TO ADULT JAIL

“We felt that we had been kicked in the guts,” said Jacqmotte. “Judge \*672 Churchill completely reversed the normal presumptions, a turning of the normal tables of the asylum system. She ignored all of Malik’s evidence, drew every inference against Malik, and cherry-picked inconsequential facts to reach the erroneous conclusion that Malik did not deserve asylum.” Jacqmotte and his team were left “wondering what we were going to do to keep Malik safe.”<sup>148</sup>

In July 2002, their job got even tougher. Unbeknownst to Malik’s legal team, less than a month after Judge Churchill’s ruling, INS launched an investigation of Malik and his birth certificate in Guinea. INS apparently believed that further tax dollars should be spent trying to contradict the claim of this mentally disabled, orphan asylum-seeker, even after the Guinean Embassy had authenticated his birth certificate. Astoundingly, INS employees submitted Malik’s birth certificate without redaction to Guinean government officials, revealing Malik’s identity and location to the officials, and the fact that he was seeking asylum in the United States.<sup>149</sup>

For obvious reasons, federal regulations prohibit this precise activity: “Information contained in or pertaining to any asylum application ... shall not be disclosed without the written consent of the applicant ....”<sup>150</sup> INS internal policy, moreover, specifically prohibits the submission of asylum seekers’ birth certificates to foreign governments. In the course of their investigation, INS officials also conducted an interview of Malik without notifying his lawyers or permitting them to be present, a further violation of Malik’s rights.<sup>151</sup> “If Malik had no valid claim up to this point,” O’Brien explained, “what they did in breaching his confidentiality and placing his life in danger created a valid asylum claim.”<sup>152</sup>

Not surprisingly, a low-level Guinean official reviewed Malik’s birth certificate and declared it to be false. As Malik’s lawyers pointed out, the unlawful disclosure of Malik’s birth certificate undermined any credibility the Guinean official might have, credibility already undermined by the fact that it was Guinean nationals working for the U.S. Embassy—members of the ruling party—who were conducting the investigation.<sup>153</sup> “In addition to signaling Jarno’s whereabouts, the investigation signaled that the veracity of his birth certificate was important to the United States. This may well have given the Guinean officials incentive to deny the validity of the birth \*673 certificate.”<sup>154</sup> Indeed, it turns out that the Guinean official’s determination was ostensibly based upon a claim that the officer on Malik’s birth certificate could not have been operating in the registry office in question at the time of issuance. Malik’s attorneys gathered substantial evidence, however, that the officer was in fact operating in his official capacity at the time of issuance, including an affidavit from the widow of the very officer in question.<sup>155</sup> (As we shall see, Judge Churchill refused to allow Malik’s lawyers to present this evidence at his subsequent trial.)

Of equal importance, neither INS nor the Guinean government produced any evidence, birth certificate or otherwise, to contradict Malik’s authenticated birth certificate. On the basis of this investigation, however, INS actually removed Malik from juvenile detention in July of 2002, without warning, and in handcuffs, and placed him once again in an adult prison, this

time in York, Pennsylvania.<sup>156</sup> It was another huge psychological and emotional blow for Malik. He was devastated. In fact, Malik's attorneys say that he was so despondent that he wanted to give up, to submit to being returned to Guinea, "even if he was going to die."<sup>157</sup> Jacqmotte and his team redoubled their efforts on Malik's appeal before the Board of Immigration Appeals ("BIA"), knowing that he would languish in the York prison until a decision was rendered. It would be another year, however, before the BIA decided the appeal.

In 2002, United States Attorney General John Ashcroft narrowed the scope of the BIA's review of asylum denials. The BIA would no longer be permitted to make its own findings with regard to the facts (i.e., a *de novo* review). Instead, the BIA would only be permitted "to determine whether the findings of the immigration judges are clearly erroneous."<sup>158</sup> As the *Los Angeles Times* reported, even before this policy change, the BIA was "reluctant to overrule judges, even when some members believe the judges are wrong."<sup>159</sup> After Ashcroft's changes, winning Malik's appeal would be even more difficult.

True to form, on June 26, 2003 the BIA issued its decision upholding Judge Churchill's ruling, albeit with reservations. "[W]hile we are reluctant to uphold the adverse credibility finding in light of these possible explanations offered on appeal," the BIA announced, "we find that the respondent has submitted insufficient evidence to meet his burden of proof in this \*674 case."<sup>160</sup> The BIA observed that "it is rare in immigration proceedings to require a chain of custody as is, for example, required in criminal proceedings,"<sup>161</sup> and that Judge Churchill "did not give sufficient weight to [Docking's] testimony," since his "refusal to reveal his sources in Guinea because of their fear of government retribution is plausible."<sup>162</sup> Yet, the BIA refused to reverse Judge Churchill's decision, finding that Malik had not shown past or potential future persecution. Tellingly, the BIA added that Malik "has not established that the government is even aware of him or considers him to be a threat in light of his having left well before the altercations between the locals and government officials occurred."<sup>163</sup> After INS' July 2002 investigation in Guinea, this was shown to be patently false. Subsequent events would leave no room for doubt.

## A GROUNDSWELL OF SUPPORT

By this time, Malik's case had attracted the attention and support of numerous members of Congress and human rights organizations. In mid-August of 2003, Representative Chaka Fattah (D-PA) wrote to DHS appealing for Malik's release.<sup>164</sup> A week later, ten members of the Congressional Human Rights Caucus, including Representative Christopher H. Smith (R-NJ), Dennis J. Kucinich (D-OH), and John Conyers, Jr. (D-MI), wrote a letter to DHS undersecretary Asa Hutchinson demanding Malik's immediate release, citing the "reprehensible mistreatment" of Malik by DHS officials. "Malik's treatment by immigration officials represents a miscarriage of justice," the lawmakers stated.<sup>165</sup> They added that "the immigration system failed to afford sufficient due process safeguards for Jarno given his mental retardation," and noted that the contacting of Guinean officials regarding Malik was "in direct violation of immigration procedures intended to protect the identity of asylum-seekers."<sup>166</sup> Citing the abuse that Malik had suffered in adult jail and the "injustices wrought upon him," the lawmakers concluded: "We strongly urge you to either release him from custody under deferred action or to grant him humanitarian parole to the care of the International Friendship House, a reputable and responsible nonprofit home for refugees in York, Pa., that is willing and able to take him."<sup>167</sup> By this time, Malik had spent twenty-eight of the preceding thirty-two months incarcerated \*675 in adult jails or prisons. INS responded by telling reporters that they were reviewing Malik's case, and that he was "being afforded due process just like anyone else."<sup>168</sup>

In late September 2003, the unlikely trio of Senators Rick Santorum (R-PA), Edward Kennedy (D-MA), and Sam Brownback (R-KS) sent a similar letter urging DHS to release Malik or parole him into the custody of the International Friendship House. Among other things, the senators noted: "It appears that Malik has been erroneously detained, based on immigration officials' use of unreliable age determination methods, in various adult jails since his arrival."<sup>169</sup> This extraordinary support failed to move DHS: that same month, DHS officials contacted the Guinean Embassy, egregiously submitting Malik's unredacted birth certificate and requesting that the Embassy provide DHS with travel documents in order to send Malik back to Guinea. "DHS fought us tooth and nail on the authenticity of Malik's birth certificate," said Jacqmotte.<sup>170</sup> "DHS never accepted that Malik was who he said he was or that the birth certificate related to him in any way. The agency even refused to stipulate that Malik was from Guinea. DHS then turned around and used that very birth certificate to obtain travel documentation for Malik to be deported to Guinea."<sup>171</sup> To make matters worse, regulations technically required that Malik be returned to France. "If DHS truly did not believe Malik was from Guinea," says Jacqmotte, "the agency should have returned him to France and let the French government determine how to proceed. DHS repeatedly displayed the ability to challenge basic facts about Malik (e.g., the authenticity of his birth certificate and identity as a Guinean) while relying on those very

facts in an attempt to punish him or put him in jeopardy (e.g., by using his birth certificate to obtain travel documents from the Guinean Embassy).<sup>172</sup> In addition, if at least some Guinean officials believed Malik's passport was false, why did the Guinean Embassy agree to provide travel documents to Guinea based solely upon the passport?

In November 2003, the *Washington Post* published an editorial denouncing DHS's treatment of Malik's case. "Mr. Jarno's case proves that the system is still deeply flawed," the paper opined.<sup>173</sup> Despite proof that Malik was a minor, Malik "has nevertheless been kept in prison with adult criminals since his arrival nearly three years ago," and "[w]hen officials were shown proof that Mr. Jarno was only 16, they responded by placing him in solitary \*676 confinement."<sup>174</sup> The editorial noted that, ironically, Malik was "probably better protected than others who have no legal assistance at all," and urged DHS to prevent his deportation.<sup>175</sup> "The fact that he remains in prison, at risk of deportation, following a capricious legal process, nevertheless makes a mockery of this country's laws on political asylum and refugees."<sup>176</sup>

Meanwhile, Malik's attorneys had been busy gathering additional evidence to support his case, including written testimony from Neil Woodruff, a USAID officer stationed in Guinea, attesting to the death of Malik's father and the destruction of his family home. Woodruff also confirmed that a vulnerable and mentally disabled orphan would face persecution in Guinea. This was another highly credible corroboration of Malik's story and of his father's persecution. In November of 2003, Malik's legal team, which now included asylum specialist Christopher Nugent at the D.C.-based law firm Holland & Knight, submitted an appeal to the BIA to reopen Malik's case based upon this compelling new evidence. In December, over the strong objections of DHS, the BIA agreed to reopen the case, remanding it for a second trial before Judge Churchill. There was hope for Malik, and with compelling evidence in hand, there was even cause for optimism.

That same month, Amnesty International joined a bipartisan group of 24 lawmakers in urging DHS not to deport Malik to Guinea. "It is beyond the bounds of decency that the US would consider deporting this young man," said Dr. William F. Schulz, Executive Director of Amnesty International USA.<sup>177</sup> "Not only does Malik Jarno clearly deserve asylum, it adds insult to injury that he has languished in prison with adults for the better part of three years, despite his mental incapacity and youth."<sup>178</sup> Days later, twenty-four lawmakers signed a letter to Undersecretary Hutchinson urging him to stay Malik's removal and release him to the International Friendship House.<sup>179</sup>

Finally, on December 23, 2003, just before Christmas, Hutchinson agreed to release Malik to the International Friendship House. In a touching show of humanity, Malik's York County Prison block cheered as he walked out to freedom.<sup>180</sup> A DHS spokesman told the press that Mr. Hutchinson released Malik because he was not a security threat.<sup>181</sup> Sadly, it took three years for DHS to acknowledge that this young, gentle, mentally disabled asylum seeker was not a threat and did not merit incarceration with adult criminals. \*677 He would see snow for the first time in his life over the holidays. Thousands other juvenile asylum seekers throughout the country lacking Malik's support, however, would spend the holidays behind bars.

As the case headed toward a second trial set to begin in August 2004, support for Malik continued to grow. In March 2004 the Congressional Black Caucus and the N.A.A.C.P. called for Hutchinson to grant Malik asylum.<sup>182</sup> In April, Amnesty International, joined by twenty-four members of Congress, did the same.<sup>183</sup> And in May 2004, nearly forty different organizations urged DHS to grant immediate asylum to Malik.<sup>184</sup> The appeals fell upon deaf ears: DHS insisted upon a new trial.

In late May and early June 2004, to prepare for that trial, Nugent took the extraordinary step of traveling six thousand miles to Guinea to gather evidence for Malik's case, at considerable risk to his own safety. Considering that Malik's life was at stake, Holland & Knight was treating his case with all of the gravity and resources of a pro bono death penalty case.<sup>185</sup> Nugent was terrified, but after making it through customs and hiring a driver, an interpreter and a bodyguard, his nerves calmed and he began his whirlwind search for witnesses. Nugent saw first-hand the remains of what was once Malik's neighborhood, including the charred remains of his house and his father's mosque. Over a six-day period, Nugent secured written statements from ten new witnesses, including two who knew Malik from childhood. They wept at the news that Malik was still alive, commenting that he looked "bigger and fatter" in the photos that Nugent showed them.<sup>186</sup> Others knew Malik's father, and of his fate, and all advised that if Malik were deported to Guinea, he would face certain death at the hands of the government. Many were themselves living in fear for their lives. Nugent took great pains to securely ship his treasure trove of new evidence out of the country. When Nugent returned home, Malik confided that he could not sleep the entire time, fearing for Nugent's life.<sup>187</sup>

In July 2004, one month before the second trial was to begin, Rep. Chris Van Hollen (D-MD) introduced legislation to make

Malik a permanent resident of the United States and thereby end the legal proceedings. “Deporting Malik to Guinea to face life-threatening circumstances would run contrary to the standard of human rights and decency this country maintains,” \*678 Rep. Van Hollen announced.<sup>188</sup> “In these troubled times, where our reputation as a beacon for human rights has been challenged by the situation in Iraq, the United States has a heightened responsibility to guarantee justice and humane treatment to the most vulnerable in society instead of relegating a mentally disabled orphan to such a horrific fate.”<sup>189</sup> By this time, more than seventy members of Congress had spoken out for Malik, along with dozens of national and international rights organizations, all to no avail: DHS refused to grant Malik asylum. Denise Gilman, director of immigrant and refugee rights at the Washington Lawyers Committee and yet another member of Malik’s legal team, told the *Washington Post*: “I honestly think what Homeland Security is doing in continuing to pursue this case despite the pile of evidence in his favor is, in a word, cruel.”<sup>190</sup>

## THE SECOND TRIAL

Months before the second trial was to begin, Malik’s attorneys received troubling news: Neil Woodruff, the USAID officer who had provided critical affidavits attesting to the death of Malik’s father and the destruction of his home, sent a letter to Nugent seeking to retract his affidavits. It appears that DHS contacted USAID and insisted that Woodruff do so.<sup>191</sup> Woodruff was not in any way recanting his story, but rather acting under orders on the ostensible grounds that regulations prohibited federal employees from serving as expert witnesses in such proceedings.<sup>192</sup> But this was plainly incorrect: Woodruff was not serving as an expert witness; he was providing *factual* testimony regarding conditions in Guinea and the fate of Malik’s family and neighborhood. The applicable regulation limits only expert testimony, expressly stating that it does not prohibit “an employee from serving as a *fact witness* when subpoenaed by an appropriate authority.”<sup>193</sup> Malik’s attorneys therefore insisted that Woodruff’s statements be admitted, an issue Judge Churchill would decide at trial.

The second trial began in August 2004 and lasted until October, with Jones Day, one of the world’s largest law firms, now serving as Malik’s lead counsel. Page constraints do a disservice to the case that Malik’s team presented, for they assembled a mountain of evidence never seen before in an \*679 asylum hearing. This included numerous new declarations and witnesses, along with photographs and other evidence that Nugent had gathered during his trip to Guinea. In addition to his central claim of persecution based upon political opinion, Malik advanced two new bases for asylum: (i) membership in a particular social group targeted for persecution in Guinea, namely, “mentally retarded, homeless orphans with no family to care for them,” and (ii) status as a refugee *sur place*. A refugee *sur place* is one who, as a result of his actions while abroad, faces persecution if forced to return home. The UNHCR Handbook explains: “A person may become a refugee ‘*sur place*’ as a result of his own actions, such as associating with refugees already recognized, or expressing his political views in his country of residence.”<sup>194</sup> Malik clearly fit this description, as his lawyers explained:

Malik and his pursuit of asylum have been the subject of unprecedented media and congressional attention in the United States and abroad. His notoriety alone places him at even greater risk for persecution in Guinea should he be forced to return, as the Guinean government is known to persecute those who damage the country’s international reputation. Malik is perceived to have leveled criticism against that government for its treatment of his family and for its human rights abuses more generally, which makes him an almost certain target for the oppressive Guinean government. The extraordinary circumstances of his case independently warrant a grant of asylum.<sup>195</sup>

In support of each of his claims, Malik presented a wealth of evidence, including the testimony (whether oral or written) of:

- Neil Woodruff, who confirmed the death of Malik’s parents and the destruction of homes and mosques during the Kaporo Rails incident.
- Malik Cissé, a former member of a Guinean opposition party during \*680 the Kaporo Rails incident, who confirmed Baldé’s political activities and the fact that Baldé was jailed during the Kaporo Rails incident and ultimately killed based on his political, religious, and civic activities.
- Haroun Diao, a resident of Kaporo during the Kaporo Rails incident and a childhood neighbor of Malik. Mr. Diao identified Malik from a recent photograph and confirmed that he is the son of the Baldé, explaining that, among other things, he attended religious classes with Malik that Baldé conducted. He confirmed that Malik’s mother died when Malik was a child; that Baldé participated in opposition political meetings at the Grand Mosque of Kaporo; that Baldé was arrested during the

Kaporo Rails incident, jailed and ultimately killed; and that both Malik's family home and the Grand Mosque of Kaporo were destroyed during the incident.

- Kesso Diallo, a neighbor of Malik in Kaporo Rails, who identified Malik from a recent photograph and confirmed that he is the son of Baldé. Diallo also confirmed that Baldé was arrested, jailed, and killed during the Kaporo Rails incident, that Malik's mother died of natural causes before the incident, and that both Malik's home and the Grand Mosque were destroyed during the incident.
- Mohamed Baba, a prominent Guinean,<sup>196</sup> who confirmed the politically motivated arrest, imprisonment, and murder of Baldé during the Kaporo Rails incident. Baba also explained that Malik likely appears on government watch lists in Guinea based on his family membership, and that he would be singled out and punished if forced to return to Guinea.
- Ibrahima Barry, a childhood friend of Malik who was arrested while attending religious services at the Grand Mosque, later escaping prison and fleeing to Belgium. Mr. Barry confirmed Baldé's political association with opposition leader Mamadou Bah and explained that he later learned of Baldé's arrest. He also explained that he met Malik's aunt in Belgium and learned that Malik had been left behind in Paris, eventually arriving in the United States only to be jailed pending his asylum claim.<sup>197</sup>

In support of his "social group" claim, Malik presented conclusive evidence of his disabilities, not only from the experts, but also from his Kaporo Rails neighbors, who confirmed that Malik was "much slower in his abilities" than other children, and that "the residents of Malik's neighborhood knew that Malik was mentally retarded."<sup>198</sup> In addition, Malik presented \*681 numerous witnesses attesting to the persecution that a mentally disabled "street youth" such as Malik would face if returned to Guinea, completely aside from the political persecution he was likely to suffer, including:

- Aine Breathnach, Former International Rescue Committee Protection Coordinator for Guinea, who confirmed that Guinea provides no medical or psychiatric services, or even educational programs, for the mentally disabled, and that a mentally disabled street child or street youth would be at high risk of egregious abuse.
- Rosaline Idowu, United Nations High Commissioner for Refugees, Guinea Bureau. Ms. Idowu confirmed that the mentally retarded are subject to significant stigma in Guinea, often ending up living on the streets due to a lack of services and protection, where they are vulnerable to abuse, including imprisonment without charges.
- Nadine Touré, a prominent Guinean activist, who confirmed that Malik would face stigma, ostracism, and severe discrimination and harm, including imprisonment, if forced to return to Guinea.<sup>199</sup>

Finally, Malik presented chilling evidence in support of his claim for status as a refugee *sur place*. In upholding Judge Churchill's denial of asylum, the BIA had emphasized that Malik "has not established that the government is even aware of him or considers him to be a threat in light of his having left well before the altercations between the locals and government officials occurred."<sup>200</sup> Of course, DHS had already explicitly brought Malik to the Guinean government's attention during its investigation of Malik's birth certificate, and it did so again in applying for travel documents for Malik in October 2003. An affidavit submitted on Malik's behalf by John Tate, a paralegal at the law firm Baker & Botts, however, definitively established the Guinean government's awareness of Malik and his case: Tate testified that, during discussions with the Guinean Embassy in April 2004, a consular officer said of Malik, "He's been a bad boy in the United States. He will be punished in Guinea."<sup>201</sup>

Several other witnesses supported Malik's refugee *sur place* claim, including:

- Jean Francois Julliard, head of the Africa Desk at Reporters Without Borders, who confirmed that the Guinean government closely follows local and international press relating to its international reputation, \*682 and that it persecutes actual and perceived critics of the government.
- Abdoul Camara, a prominent Guinean, who confirmed that the Guinean Embassy in Washington likely informed the Guinean government of the press coverage of Malik's case, and that Malik was at risk of arrest and imprisonment upon his return to Guinea.

- Mohamed Baba, a prominent Guinean, who testified that the government of Guinea was already aware of and hostile to Malik because of the significant press coverage of his case, and that he likely would be arrested, imprisoned, tortured, and possibly killed for the perceived damage that he has caused Guinea's international reputation.<sup>202</sup>

If there had been any doubt about Malik's identity or claims after the first trial, there could be none after the second. An army of witnesses had corroborated Malik's story, some at great risk to their safety and lives. Even if the judge credited none of his claims, moreover, it was clear that by now Malik was a refugee *sur place*. As Nugent explained, "if he is the one called Malik Jarno, it becomes irrelevant whether any of the story is believable, because he would still be dead upon return."<sup>203</sup> (Or maybe not: in June 2004, the Guinean Embassy wrote the Washington Lawyers' Committee and kindly explained: "The Embassy is not informed of any persecution against Malick [*sic*] or his family in Guinea.")<sup>204</sup>

### DHS: UNBENDING

DHS was apparently watching an entirely different movie. It refused to consent to asylum, or to concede a single issue: DHS would not even concede at trial that Malik was from Guinea, *the country to which they had arranged to send him*. (Perhaps Malik learned his distinctive dialect of Puhlar<sup>205</sup> during his sojourn in Germany, or while herding sheep in Paris?) Through torturous cross-examination, DHS disparaged every minute claim: Malik's name, his age, his country of origin, his family ties, his mental disability, etc. "They tell me I'm not who I am. They tell me my father isn't my father," Malik commented during the trial. "Don't tell me who is my dad. My mom tells me she loves me, and my dad tells me he loves me. I miss them lots, billions of \*683 times. I will miss them all my life."<sup>206</sup>

Malik and his witnesses remained resolute in the face of persistent attacks on their credibility, including several witnesses who had agreed to testify on Malik's behalf by telephone from Guinea and Belgium. Normally, Jacqmotte explained, such witnesses are treated with kindness and respect, a show of appreciation for assisting a U.S. proceeding on their own time, and at great risk, despite significant logistical hurdles. Malik's trial was different. Witnesses--many of whom had suffered horrible persecution at the hands of government actors--were put through torturous cross-examination, with DHS lawyers "questioning their competence and their intelligence."<sup>207</sup>

"I am appalled that the government for whatever reason decided not to credit anything Malik has said about his case and has instead dug in its heels," said Jacqmotte. The role of DHS in an asylum case "is somewhat different from the normal adversarial role," he explained. Yet, in Malik's case, "the government's posture generally and the attorneys specifically were geared at a deeply adversarial, unbending posture. At times it led to vicious treatment of this mentally retarded kid .... We were shell-shocked by the government's posture in this case."<sup>208</sup>

And there was more. In May 2004, several months before the trial was to begin, Malik's lawyers made a request under the Freedom of Information Act ("FOIA") for documents pertaining to Malik's case. DHS simply ignored the request, despite a legal obligation to respond within a month and persistent letters and phone calls from counsel. With Malik's trial looming, his lawyers were forced to sue DHS, filing an emergency motion for production of the documents before it was too late. A Virginia federal court later ordered DHS to pay Malik's lawyers \$11,837.00 in attorneys' fees expended on that unnecessary motion;<sup>209</sup> DHS' unlawful conduct meant that taxpayers would be left footing this bill. In an April 2005 decision, the Virginia federal court explained: "[I]t was not until plaintiff filed an Emergency Motion ... on August 19, 2004 that [DHS] negotiated with Plaintiff for the issuance of a Court's Order for the release of documents .... [DHS] has not presented the Court with a reasonable basis in law for not responding to Plaintiff's FOIA request."<sup>210</sup>

All told, the second trial lasted 15 days, quite possibly the longest asylum trial in U.S. history. The government put on virtually no evidence, save the highly unreliable investigation of Malik's birth certificate, which, as we have seen, yielded no tangible evidence, such as official records or a "real" birth certificate, to contradict Malik's authenticated birth certificate. Malik's \*684 lawyers moved to have the investigation deemed inadmissible on the grounds that it had been conducted in an illegal and unethical manner. To accept into evidence the "fruits of the poisonous tree" was to allow DHS to profit from its outrageous actions. Judge Churchill denied the motion. In fact, Judge Churchill even denied Malik's lawyers the right to cross-examine the individuals who conducted the investigation. "We don't know what took place in Guinea. We had no way

of testing the Guinean officials' allegations," Jacqmotte observed.<sup>211</sup> Judge Churchill then refused to permit Malik's attorneys to present evidence that refuted the investigation, evidence that showed that the birth certificate was indeed issued by the Guinean official in question.<sup>212</sup>

That was not all Judge Churchill denied. Although Malik's attorneys demonstrated that regulations permitted Woodruff to testify upon service of a subpoena, Judge Churchill refused to issue the subpoena, thereby preventing Woodruff's appearance at trial. "We feel obliged to respect the retraction," Judge Churchill explained, "given that the writer was apparently unauthorized to participate in this case ...."<sup>213</sup> Malik's lawyers had established that Woodruff *was* authorized to participate, and merely required a subpoena, a routine procedure. "Judge Churchill just threw up one hurdle after another, and the case just became harder and harder to litigate," said Jacqmotte.<sup>214</sup>

## THE DECISION (PART II)

On December 29, 2004, Judge Churchill issued a 135-page, single-spaced decision once again denying Malik's claim for asylum. She noted that Malik had proffered a wealth of new evidence: "Counsel located more than 20 new witnesses, whose statements have been presented."<sup>215</sup> She then proceeded to disregard every one of those new witnesses, as well as Malik's consistent testimony, his authenticated birth certificate, and other evidence. Among other things, Judge Churchill ruled that Malik was ineligible because he had not proven that he did not permanently resettle in France or the Ivory Coast prior to arrival; that he presented no credible proof of past or future persecution; and that, even if what he said was credible and true, he did not merit asylum.

It is a bar to asylum if an applicant obtained permanent resident status or citizenship (i.e. if he "firmly resettled") in another country prior to arrival in the United States.<sup>216</sup> Judge Churchill ruled against Malik on the grounds that \*685 he "has not met his burden to show that he was not firmly resettled in France or Ivory Coast."<sup>217</sup> However, the burden rested with DHS to produce evidence that Malik had firmly resettled in another country.<sup>218</sup> DHS presented no such evidence with respect to France or the Ivory Coast. There was simply no such evidence to be had, and Malik consistently testified that he neither sought nor obtained lawful status in either country. In fact, with respect to the latter country, Judge Churchill expressly stated that she had made "no finding that [Malik] was ever in the Ivory Coast."<sup>219</sup> Judge Churchill refused to acknowledge that Malik was ever *in* the Ivory Coast, yet she denied him asylum based, in part, on the wholly unsubstantiated proposition that he may have been "firmly resettled" there.

As for France, not only was there no evidence of firm resettlement in the short time that Malik was there, but Malik also provided un rebutted testimony from the French Government itself that he never received an offer of resettlement. The French Ministry of the Interior, contacted by Latham & Watkins' Paris office, represented that it had no record of Malik in its database of residents or requests for residency, even using seven different variations of Malik's name. If he had obtained permanent residency in France, he would have been listed in its database.<sup>220</sup> Judge Churchill completely ignored this evidence, and instead relied upon the fact that "[t]he French government had taken no action to remove him from France."<sup>221</sup> The French government had no record of Malik whatsoever. The fact that the government never attempted to remove Malik—about whom it had no knowledge—was hardly evidence of firm resettlement.

As in the first ruling, Judge Churchill found that Malik had not stated a claim for past persecution, echoing DHS' argument. "The reports he received of the death of his father and the destruction of his childhood home no doubt were causes for distress," Judge Churchill observed, "but they did not amount to persecution of him."<sup>222</sup> Malik was rendered a homeless orphan by a government that targeted his family and his neighborhood for destruction, forcing him to flee his homeland and everything he knew. This, according to Judge Churchill, was "distressing," but not evidence of persecution.

Judge Churchill again refused to credit any part of Malik's testimony, this time rejecting the corroborating testimony of twenty additional witnesses, together with expert testimony that Malik was incapable of fabricating a convincing and cohesive story. For example, Malik's attorneys had presented \*686 uncontroverted expert testimony of his mental illness, now buttressed by the testimony of Guineans who knew him from childhood. Even DHS' deeply flawed examination of Malik had yielded a score consistent with a finding that Malik was mildly mentally retarded.<sup>223</sup> In the face of this uncontroverted and *expert* testimony, along with credible eyewitness testimony, Judge Churchill simply concluded, on her own, that Malik was arguably not mentally disabled. To support this position, she cited some random facts: "We note that Malik himself does not claim to be mentally retarded."<sup>224</sup> If anything, would this not add credibility to his claim? As noted,

Malik speaks Puhlar and French, the language of both the Ivory Coast and France. Fellow inmates had also taught Malik a few words and phrases in Spanish. With no scientific basis, Judge Churchill cited this as evidence of Malik's mental competence. "He seems to have a gift for languages," Judge Churchill announced.<sup>225</sup> "He speaks both his native tongue of Puhlar and French; he knows a few words of Arabic, and knows some Spanish." "While Dr. Gold testified ... that [this] ... does not suggest that he is not retarded, Malik's language abilities are impressive."<sup>226</sup>

Judge Churchill even suggested, out of thin air, that Malik's parents might still be alive. "We are not convinced on this record that Malik's father is dead."<sup>227</sup> And since there were no official hospital records or government reports establishing the death of Malik's mother, Judge Churchill actually drew an inference that she was still alive: "[T]he absence of corroboration concerning her alleged final illness and death leads to an adverse inference regarding the claim that she is deceased."<sup>228</sup> As we have seen, established law recognizes that asylum seekers are lucky to emerge with the shirt on their backs, and, as a result, that only their credible testimony is required to prove asylum. Under such circumstances, demanding documentation of Malik's mother's death, upon penalty of an adverse inference, was flabbergasting.

In rejecting Malik's *sur place* claim, Judge Churchill ruled that "the notoriety [of Malik's claim] was the result of choices made by the applicant to bring his asylum application to the attention of the media; he cannot benefit from problems he created."<sup>229</sup> In fact, prior to INS' disclosure of Malik's name and claim in Guinea, Malik and his attorneys had punctiliously avoided any comment on his asylum claim; they had strictly lobbied for Malik to be moved out of adult detention.<sup>230</sup> Malik's asylum claim was disclosed to the Guinean government through the INS investigation and not through the media. In addition, it is legally untenable, to say nothing of \*687 morally outrageous, to posit that an asylum seeker cannot claim a well-founded fear of future persecution because he sought media support to help save his life, particularly when DHS and the immigration court proved stridently opposed to his claim. For that matter, if a citizen of Syria-or Nazi Germany--proved that his government was likely to persecute him based upon statements he made to the U.S. press, would the government return him to his homeland on the grounds that "he shouldn't have opened his mouth," thereby negating his claim? As the UNHCR Handbook explains, "[a] person becomes a refugee *sur place* as a result of his own actions, such as ... expressing his political views in his country of residence."<sup>231</sup>

Malik's case was unique, and certainly unprecedented for Guinea. Yet Judge Churchill ruled that "[t]here is no evidence in the record that the Government of Guinea would persecute a returning citizen for having generated international media coverage about his/her unsuccessful asylum application abroad."<sup>232</sup> In truth, there was no evidence that such a citizen had ever returned to Guinea. But there *was* proof of the Guinean government's intentions with respect to Malik; a Guinean consular officer had stated: "He's been a bad boy in the United States. He will be punished in Guinea."<sup>233</sup> Wholly ignoring this evidence, and that of prominent and well-informed Guineans, Judge Churchill stated, "We do not believe that the notoriety Malik has acquired from the public relations campaign on his behalf would result in his being persecuted in Guinea. On the contrary, we find it more likely that his notoriety would protect him from any harm .... [W]e do not believe the Government of Guinea would risk international condemnation by causing him any harm were he to return there."<sup>234</sup> This is a government that had been committing what the U.S. State Department labeled "major human rights abuses" for years,<sup>235</sup> killing untold numbers of citizens and torturing and imprisoning countless more, a government that deliberately rendered 100,000 citizens homeless at Kaporails alone.<sup>236</sup>

As for international condemnation, the cruel irony is that, over the objections of outraged Kaporails victims and several members of Congress, the United States government chose to construct its Embassy on the very site of the Kaporails incident. Indeed, in July 2004, Representative Donald Payne (D-NJ) wrote to Secretary of State Colin Powell to question why the U.S. would choose to build its embassy on "an area of past bloodshed and destruction."<sup>237</sup> He noted that the government would never do so at Tiananmen Square. The Conte government had reason not to fear international \*688 condemnation.

"No doubt the Government of Guinea would recognize that the media's focus is on criticism of the United States, not Guinea," Judge Churchill opined.<sup>238</sup> Malik and his lawyers had indeed criticized DHS for horribly mistreating a mentally disabled juvenile seeking asylum from the savage tyranny of his homeland. Judge Churchill posited that the Guinean government would only focus on the former and simply ignore the savage tyranny portion of the story. Judge Churchill expressed the same certainty in denying Malik's claim of future persecution based upon his homeless, "mentally retarded" orphan status: "[S]urely if he were to return to Guinea, he would have access to persons in the humanitarian aid community who would look out for his interests, and help him find some assistance."<sup>239</sup>

Most disturbing of all, Judge Churchill announced that even if Malik were telling the truth, he would not have a claim for

asylum: “We find that the applicant has not made out a case for which the relief sought can be granted, *even assuming that the basic facts are credible.*”<sup>240</sup> “If this is not a case for asylum, what is?” O’Brien reflected.<sup>241</sup>

## THE APPEAL

Malik was “very dejected” by Judge Churchill’s decision, Nugent observed, wondering whether he should even bother to appeal.<sup>242</sup> “She didn’t like me, or the people who care about my life. She hates all of us. She wanted to kill me.”<sup>243</sup> But there was every reason to fight the decision: not only were there strong grounds for reversal, but Malik had also established a home and a new life at the International House. Like the staff and residents of the International House, the citizens of York, Pennsylvania had fallen in love with Malik, providing him with tremendous support. Malik was enrolled in special classes tailored for immigrants and appropriate to his educational level. In this structured and compassionate environment, he was flourishing. “People over here, they love me like family,” Malik explained. “I feel like I’m home, like my biological family. Young and old love me, really, they love me lots.”<sup>244</sup>

As Malik’s legal team began work on the appeal, they continued their search for yet more witnesses, and more evidence. There would be plenty of time: the appeal could not be filed until the trial transcript was complete, and there were forty-two audio tapes to transcribe, or what amounted to 2,700 pages of testimony and proceedings. The transcript would not be ready until \*689 January of 2006.

During this time, Malik’s team found even more evidence. Among other things, they located a relative of Ahmed Touré, with whom Malik stayed during the Kaporo Rails incident. He testified that he knew Malik and his family, and that he saw Malik at Touré’s house prior to Malik’s departure for the Ivory Coast. And an investigator hired by Malik’s team visited the Conakry airport and confirmed that airport police were on high alert to arrest Malik upon his return to Guinea.<sup>245</sup> In February 2006, Malik’s lawyers completed their appeal to the BIA, together with a motion for remand based upon the compelling new evidence.

## THE SECOND BIA DECISION--A SOLOMONIC COMPROMISE

In late November 2006, the BIA issued its decision on appeal. Consonant with Ashcroft’s reforms, the BIA bent over backwards to uphold Judge Churchill’s findings of fact. “While we do have concerns about some aspects of the Immigration Judge’s conclusions,” the three-judge panel observed, “we find that an amalgamation of all of the credibility findings creates serious doubts about the credibility and truthfulness of the applicant’s story.”<sup>246</sup> The panel cited four elements of this “amalgamation.” First, the panel noted that Malik testified inconsistently about his name, “stating on different occasions that his name is Malik Jarno, Jarno Malik and Jarno Malik Balde.”<sup>247</sup> The panel apparently saw no need to address Malik’s dispositive explanation: the first two reflect the Western versus African custom, and the latter merely adds the seldom-used “Balde” family name.

Next, the panel cited Malik’s inconsistent, sworn “statement” given at the airport. Notably, the panel reversed Judge Churchill’s findings with respect to Malik’s cognitive abilities, agreeing that “the record contains extensive, consistent evidence showing that he functions in the mentally retarded range.”<sup>248</sup> This did not, however, stop the panel from relying upon the airport interview, an interview conducted in Spanish, by an airport baggage handler, of a mentally disabled speaker of Puhlar. “After taking his sworn statement, it was read back to him,” the panel explained, “and he signed it, giving the immigration officer the impression that he understood the statement.”<sup>249</sup> He’s terrified; he’s a juvenile; he is mentally disabled; he doesn’t speak Spanish; and the statement is in English. He did, however, sign the statement.

The panel then noted that the overseas investigation of Malik’s birth certificate “conducted by the DHS” (it was actually conducted by Guinean \*690 nationals, members of the ruling party, working for the U.S. Embassy), “revealed that the birth certificate ... is false.”<sup>250</sup> The panel made no attempt to reconcile this finding with the Guinean Embassy’s declaration of authenticity, and the substantial evidence that Malik proffered to impeach the subsequent Guinean “investigation.” In fact, they mentioned neither of these.

Finally, the panel noted that Malik’s “body language, visible discomfort and long pauses before answering certain questions ... indicated that he was being evasive or untruthful.”<sup>251</sup> At the risk of repetition, it bears noting that Malik was sleep-deprived,

terrified of being sent to his death by a judge he was certain “wanted to kill me,” and, as the panel acknowledged, “he functions in the mentally retarded range.” Might those factors not explain the “visible discomfort and long pauses?”

The decision was not, however, a disaster for Malik. On two key legal issues the panel reversed Judge Churchill, remanding the case for further proceedings and, quite possibly, final victory for Malik. Judge Churchill had found an inference of “firm resettlement” in the Ivory Coast or France, precluding a claim for asylum in the United States. The panel disagreed, finding no evidence of firm resettlement: “there is no evidence that the applicant was provided government housing, employment, held property, had a travel document or paid taxes in either the Ivory Coast or France.”<sup>252</sup> Applicable regulations require “an offer of permanent residence,” the panel explained, and there was no evidence of such an offer.<sup>253</sup>

Concluding that Malik was not barred by firm resettlement abroad, the panel then remanded the case for adjudication of his *sur place* claim.<sup>254</sup> Controlling law does not limit asylum requests to “claims of persecution arising from events prior to an alien’s arrival in the United States,” the panel ruled.<sup>255</sup> “Nor does the Act forbid relief if the applicant’s claim stems from actions taken by him after arriving in the United States.”<sup>256</sup> Finally, Judge Churchill’s ruling that Malik was barred because he brought the troubles upon himself was in error: “we reject the Immigration Judge’s conclusion that the fact that the applicant solicited media attention and brought notoriety upon himself is a bar to relief.”<sup>257</sup> Malik would have another chance “to present the evidence of extensive media coverage of his case and his possible appearance on a government black list ....”<sup>258</sup>

“It was a Solomonic decision,” said Nugent. “We won on legal issues but \*691 lost on factual issues given the stringent standard for review on appeal as a result of Ashcroft’s streamlining reforms. But most critically, we won a remand that gives us an opportunity to put forth the evidence to win Malik asylum.”<sup>259</sup>

### THE THIRD TRIAL

With Judge Churchill now retired, the case was remanded to Judge Wayne Iskra. Judge Iskra served as a trial judge on active duty in the United States Army from 1963 to 1993, with stints in Vietnam and at the Pentagon, retiring with honors as a colonel in the Judge Advocate General’s Corps before beginning his tenure as an immigration judge. Judge Iskra’s grant rate of 33% is slightly below the national average of 38%,<sup>260</sup> but still infinitely better than that of Judge Churchill.

The third trial was conducted from late April through July 2007, six years and six months after Malik had first arrived at Dulles Airport. Malik did not testify, but his lawyers at Holland & Knight and Fried Frank produced yet more witnesses, including a former high-level member of the Conte government and residents of Conakry.<sup>261</sup> These witnesses provided highly credible first-hand and expert evidence that the Guinean government was acutely aware of Malik; that Malik was on a secret list of “enemies” of the Guinean government; and that, upon arrival in Guinea, Malik would be identified, arrested, tortured, and made to “disappear.”<sup>262</sup>

Dismissing the objections of the DHS lawyers, Judge Iskra granted Malik asylum based upon a well-founded fear of future persecution. “[T]he record and testifying witnesses establish that media coverage of Respondent’s case was extensive in both Guinea and the United States,” Judge Iskra ruled, coverage that “imputes a political opinion to Respondent.”<sup>263</sup> Accordingly, “Respondent more likely than not will face detention upon his removal to Guinea.”<sup>264</sup> Judge Iskra rejected “the Government’s contention that [Malik] solicited this media coverage and brought notoriety upon himself,” observing:

Respondent, a mentally ill young adult, did not personally contact the news organizations that reported on his case .... Rather, witness testimony and the articles in the record indicate that his audience wrote about Respondent’s case after observing his hearing, reading the Immigration Judge’s opinion, and learning about the case from the large \*692 number of attorneys and nonprofit organizations that took an interest in Respondent.<sup>265</sup>

After more than six years, including almost three years behind bars, three trials and countless legal proceedings, motions, and appeals, and an unprecedented expenditure of time, effort and money, including international travel to Africa, Malik, an orphan of the world, had finally found freedom and a permanent home. “Malik’s odyssey,” Nugent reflected, “is an illustrative study of the structural and procedural challenges that asylum seekers can face in a Byzantine, under-funded, and under-resourced immigration system.”<sup>266</sup>

## POSTSCRIPT

DHS' treatment of Malik was nothing short of appalling, or, as the Congressional Human Rights Caucus concluded, "reprehensible." "If Malik went to another country," said O'Brien, "he could probably get asylum based upon the treatment he received at the hands of DHS."<sup>267</sup>

After WWII, the international community established protections to prevent the sort of arbitrary rejections that led to the tragedy, and subsequent outrage, of the S.S. St. Louis. Many recent immigration "reforms" have seriously eroded those protections, however, often resulting in the revictimization of asylum seekers, including, as in this case, juvenile, unaccompanied asylum seekers. Just as our criminal justice system is premised upon the noble assumption of "innocent until proven guilty," our asylum system must assume that asylum seekers are "credible until proven mendacious." Every Malik Jarno is potentially an Anne Frank, and our procedures in handling these claims should be judged according to this potentiality.

The imprisonment of asylum seekers alone, and imprisoning juvenile and/or mentally disabled asylum seekers in adult prisons in particular, is a disturbing human rights violation in urgent need of immediate reform. Individuals fleeing persecution, torture, rape, and imprisonment in their homelands are incarcerated for extended periods of time, despite posing no threat to society. Their only "crime" is to have entered the country without proper documentation. Precisely because they were persecuted and forced to flee, however, refugees typically lack valid travel documents. For this reason, established legal doctrine recognizes that the lack of proper documentation should serve as no bar to asylum. It should also serve as no license to incarcerate.

Incarceration was just one of many outrages to which the government subjected Malik in his quest for asylum. These outrages, from relying upon the "translation" of a Spanish-speaking baggage handler to revealing Malik's \*693 identity to the Guinean government, are too numerous to recount. Once again we are faced with the question posed at the start of this chapter: if this was the experience of Malik Jarno, aided by the most impressive team of lawyers in the history of asylum in this country, expending millions of dollars in fees and expenses, together with the support of over 70 members of Congress and numerous other advocates, what is the hope for the thousands of asylum seekers each year who must negotiate our system without the help of a single lawyer or advocate? One shudders to think.

### Footnotes

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<sup>1</sup> PHYSICIANS FOR HUMAN RIGHTS & THE BELLEVUE/NYU PROGRAM FOR SURVIVORS OF TORTURE, FROM PERSECUTION TO PRISON: THE HEALTH CONSEQUENCES OF DETENTION FOR ASYLUM SEEKERS 5 (June 2003) [hereinafter PHYSICIANS].

<sup>2</sup> UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, REFUGEE CHILDREN: GUIDELINES ON PROTECTION AND CARE (Geneva 1994) [hereinafter GUIDELINES].

<sup>3</sup> EMMA LAZARUS, *The New Colossus* (1883), reprinted in EMMA LAZARUS: SELECTIONS FROM HER POETRY AND PROSE 48 (Morris Schappes ed., 1967) (1883).

<sup>4</sup> THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776). Among the list of grievances with King George, the Declaration of Independence lists the following: "He has endeavored to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands." *Id.* at para. 9.

5 Naturalization Act of 1790, ch. 3, 1 Stat. 103.

6 See, e.g., James F. Smith, *United States Immigration Policy--A History Of Prejudice and Economic Scapegoatism?: A Nation That Welcomes Immigrants? An Historical Examination of United States Immigration Policy*, 1 U.C. Davis J. Int'l L. & Pol'y 227, 228 (1995) ("The United States has had one of the most generous and open immigration policies in the world. But since the ratification of the Constitution, United States immigration policy has been schizophrenic. Early Americans welcomed immigrants as a source of strength and vitality for a growing nation. However, from the 1830s on, when the Irish immigrants were castigated as unfit, some Americans began to view immigrants not as a resource, but as a cause of social and economic decline. These concerns have prompted a United States immigration policy that has at times been inconsistent, racist, and surprisingly un-American.").

7 Letter from Abraham Lincoln to Joshua F. Speed (August 24, 1855), available at <https://www.nps.gov/liho/historyculture/knownothingparty.htm>.

8 Quoted in RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE* 103 (Penguin Books 1989).

9 The Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (1882). Upholding the Act, the Supreme Court opined that "a limitation to the immigration of certain classes from China was essential to the peace of the community on the Pacific Coast, and possibly to the preservation of our civilization there." *Chae Chan Ping v. United States*, 130 U.S. 581, 594 (1889). See also *id.* at 595 (noting--with apparent approval--Californian's concern that Chinese immigration was "approaching the character of an Oriental invasion, and was a menace to our civilization.").

10 TAKAKI, *supra* note 8, at 110.

11 *Id.*

12 *Id.*

13 See Act of May 5, 1892, 27 Stat. 25; Act of April 29, 1902, Pub. L. No. 57-90, 32 Stat. 176; Act of April 27, 1904, Pub. L. No. 58-189, 33 Stat. 394, 428.

14 National Origins Act of 1924, ch. 190, 43 Stat. 153 (banning Japanese immigration).

15 *Id.*

16 See *id.*

17 GORDON THOMAS & MAX MORGAN WITTS, *VOYAGE OF THE DAMNED* 28 (Stein and Day 1974).

18 See generally, *id.*

19 *Id.* at 15.

20 *Id.* at 18.

- 21 *Id.* at 303. The United States government’s internment of Japanese and Japanese-Americans in concentration camps during WWII is another infamous example of U.S. immigration policy guided by popular fear and prejudice rather than by fundamental notions of justice. It should be noted, of course, that the action was taken not merely against Japanese immigrants, but American citizens of Japanese descent as well.
- 22 July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter Convention].
- 23 Pub. L. No. 82-414, 66 Stat. 163 (1952).
- 24 An Act to Amend the Immigration and Nationality Act, Pub. L. No. 89-236, 79 Stat. 911 (1965).
- 25 Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Protocol] (entered into force Oct. 4, 1967).
- 26 Protocol Relating to Refugees, Exec. Rep. No. 90-14 (1968), *reprinted in* 114 Cong. Rec. 29,607.
- 27 Protocol, *supra* note 25, at Article 1, Para. 2.
- 28 U.S. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified at 8 U.S.C. §§ 1101-1125 and 22 U.S.C. § 2601).
- 29 To take but one episode, the Convention (and established international law) prohibits states from returning refugees to territories where their lives or freedom would be threatened without first providing a hearing (an act known as “refoulement”). The Convention, *supra* note 19, art. 33, 189 U.N.T.S. at 176 (“No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where [the refugee’s] life or freedom would be threatened.”) In 1992, however, as large numbers of Haitians fled the political violence and murder that followed Jean Bertrand Aristide’s victory in Haiti’s presidential election, President George Bush (Sr.) issued an Executive Order instructing the U.S. Coast Guard summarily to “repatriate aliens interdicted beyond the territorial sea of the United States.” Exec. Order No. 12,807, 3 C.F.R. § 303 (1992). The United States Supreme Court refused to invalidate the Order, finding, *inter alia*, that the concept of refoulement as recognized in United States law did not apply outside U.S. borders. *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 173 (1993).
- 30 Pub. L. No. 104-208, 110 Stat. 3009.
- 31 See 8 U.S.C. § 1225(b)(1)(B)(iii)(I) (“[I]f the officer determines that an alien does not have a credible fear of persecution, the officer shall order the alien removed from the United States without further hearing or review.”).
- 32 See 8 U.S.C. § 1225(b)(1)(B)(ii) (“If the officer determines at the time of the interview that an alien has a credible fear of persecution ... the alien shall be detained for further consideration of the application for asylum.”).
- 33 DHS assumed the duties of the Immigration and Naturalization Service, or “INS,” in 2003.
- 34 HUMAN RIGHTS FIRST, IN LIBERTY’S SHADOW: U.S. DETENTION OF ASYLUM SEEKERS IN THE ERA OF HOMELAND SECURITY 9 (2004) [hereinafter, “IN LIBERTY’S SHADOW”].
- 35 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 412, 115, Stat. 272, 350-52 (amending the Immigration and Nationality Act (codified as amended at 8 U.S.C. 1101 et seq. (2000)), by inserting 236A, 8 U.S.C.A. 1226a (West Supp. 2002)).

36 *See, e.g.*, Eleanor Acer, *Refuge in an Insecure Time: Seeking Asylum in the Post-9/11 United States*, 28 FORDHAM INT'L L.J. 1361 (2005); Regina Germain, *Rushing to Judgment: The Unintended Consequences of the USA PATRIOT Act for Bona Fide Refugees*, 16 GEO. IMMIGR. L.J. 505 (2002).

37 IN LIBERTY'S SHADOW, *supra* note 34, at 7.

38 Dan Malone, *851 detained for years in INS centers--Many are pursuing asylum; agency challenges own records*, DALLAS MORNING NEWS, April 1, 2001 at A1.

39 IN LIBERTY'S SHADOW, *supra* note 34, at 10-11.

40 GUIDELINES, *supra* note 2, at 37.

41 PHYSICIANS, *supra* note 1, at 13.

42 *Id.* at 2.

43 *Jama v. INS*, 22 F. Supp. 2d 353 (D. N.J. 1998).

44 *Id.* at 358.

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.*

49 *Brown v. Esmor Correctional Svcs. Inc.*, Civ. No. 98-1282, 2005 U.S. Dist. LEXIS 17042 at \*8 (D.N.J. Aug. 10, 2005).

50 For an excellent expose on the horrible mistreatment of asylum seekers throughout the United States, *see generally*, MARK DOW, AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS (University of California Press 2004).

51 AMNESTY INTERNATIONAL, UNACCOMPANIED CHILDREN IN IMMIGRATION DETENTION 1-2 (2003), *available at* [http://www.amnestyusa.org/refugee/pdfs/children\\_detention.pdf](http://www.amnestyusa.org/refugee/pdfs/children_detention.pdf).

52 *See* GUIDELINES, *supra* note 2 and accompanying text.

53 *See also* International Covenant on Civil and Political Rights art. 10(2)(b), *entered into force* Mar. 23, 1976, 999 U.N.T.S. 171 (“Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.”); *id. at* Art. 10(3): (“Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.”) The

detention and co-mingling of juvenile asylum seekers also violates the Stipulated Settlement Agreement that the U.S. government signed in 1997 in the case of Flores v. Reno, which prohibits such actions. Stipulated Settlement Agreement, Flores v. Reno, No. CV85-4544-RJK (C.D. Cal. 1997), available at <http://web.centerforhumanrights.net:8080/centerforhumanrights/children/Document.2004-06-18.8124043749>.

54 Telephone Interview with Christopher Nugent, Senior Counsel and Immigration Specialist, Holland & Knight (May 15, 2009) [hereinafter 2009 Nugent Interview].

55 United Nations Human Development Index 2008 Statistical Update for Guinea, [http://hdrstats.undp.org/en/2008/countries/country\\_fact\\_sheets/cty\\_fs\\_GIN.html](http://hdrstats.undp.org/en/2008/countries/country_fact_sheets/cty_fs_GIN.html) (last visited May 14, 2009).

56 U.S. DEPT. OF STATE COUNTRY REPORT ON HUMAN RIGHTS PRACTICES 1998--GUINEAA, 26 Feb. 1999, <http://www.unhcr.org/refworld/docid/3ae6aa610.html> (last visited 18 Sept. 2009) [hereinafter 1998 DEPT. OF STATE COUNTRY REPORT].

57 *Id.*

58 *Id.*

59 *Id.*

60 U.S. DEPT. OF STATE, 2004 GUINEA COUNTRY REPORT ON HUMAN RIGHTS PRACTICES (2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41607.htm>. In 2006, Transparency International deemed Guinea the most corrupt country in the world, alongside Haiti. Chris McGreal, *Lansana Conté Profile: Death of an African 'Big Man'*, THE GUARDIAN, Dec. 23, 2008, available at <http://www.guardian.co.uk/world/2008/dec/23/lansana-conte-profile> (last visited May 13, 2009).

61 Peter Walker, *Guinea Coup Leaders Promise Poll Within Two Years*, THE GUARDIAN, Dec. 24, 2008, <http://www.guardian.co.uk/world/2008/dec/24/guinea-coup> (last visited Sept. 26, 2009).

62 Malik's proper name is Thierno Malik. Malik is his given name, and "Thierno" is the honorific bestowed upon his father as a religious leader and scholar. Malik utilizes Thierno rather than the family name, "Baldé," "Jarno" is the name that immigration officials gave him upon his arrival (an erroneous transliteration of "Thierno"), placing his given name first to produce Malik Jarno.

63 The background facts provided in the ensuing pages were gleaned from an interview with Malik himself; extensive interviews with various members of Malik's legal team; and a review of all of the papers and proceedings in the case of In re Jarno, I. & N. Case No. A 78 156 178 (all on file with author), unless otherwise attributed.

64 Oral Decision of Judge Joan V. Churchill at 10, In re Jarno, I. & N. File No. A 78 156 179 (Jun. 24, 2002) (copy of decision on file with author) [hereinafter Churchill I] (a copy of this decision is on file with the author).

65 Given the continued risk of retaliation and persecution, and on the advice of Malik's counsel, the author has given Mr. Toure and many other figures in this story false names.

66 1998 DEPARTMENT OF STATE COUNTRY REPORT, *supra* note 56.

67 *Id.*

68 Telephone Interview with Malik Jarno (October 7, 2006) [hereinafter Jarno Interview].

69 Churchill I, *supra* note 64, at 10.

70 *Id.* at 12.

71 Respondent’s Brief on Appeal at 3, In re Jarno, I. & N. File No. A78 156 178 (Mar. 7, 2006) (copy on file with author).

72 Dave Reynolds, *African Man’s Asylum Status in Hands of Immigration Judge*, THE NEW STANDARD, Oct. 21, 2004.

73 *See, e.g., Senathirajah v. INS*, 157 F.3d 210, 218 (3d Cir. 1998) (“Given Senathirajah’s allegations of torture and detention, he may well have been reluctant to disclose the breadth of his suffering in Sri Lanka to a government official upon arriving in the United States even if he could understand the questions he was being asked at the airport.”).

74 *Dia v. Ashcroft*, 353 F.3d 228, 257 (3d Cir. 2003) (en banc).

75 The INS later identified the individual as an “airline ground staffer.” E-mail from Dominic Ami, member of Malik Jarno’s legal team, to Armen H. Merjian (Sept. 8, 2006) (a copy of this email is on file with the author).

76 Respondent’s Brief on Appeal, *supra* note 71, at 50.

77 Churchill I, *supra* note 64, at 3.

78 *Id.*

79 Chris L. Jenkins, *Children Languish as INS Wards; Some Jailed for Months Without Asylum Hearing*, WASH. POST, May 6, 2002, at B1.

80 *See* GUIDELINES, *supra* note 2.

81 *Id.* *See also* U.N. High Comm’r for Refugees [UNHCR], *Detention of Refugees and Asylum-Seekers*, para. (b), U.N. Doc. A/41/12/Add.1 (Oct. 13, 1986) (“Detention should normally be avoided. If necessary, detention may be resorted to only on grounds prescribed by law to verify identity ... or to protect national security or public order.”).

82 United Nations International Covenant on Civil and Political Rights art. 9, para. 4, Dec. 16, 1966, 999 U.N.T.S. 171 (emphasis added).

83 Declaration of Malik Jarnoin Support of His Application for Asylum at 15, In re Jarno, I. & N. File No. A 78 156 178 (Dec. 17, 2001) (a copy of this document is on file with the author).

84 Jarno Interview, *supra* note 68.

85 *Id.*

86 U.N. High Comm’r for Refugees [UNHCR], *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, sec. 5.11, A/52/273 (Aug. 7, 1997).

87 PHYSICIANS, *supra* note 1, at 19.

88 *Id.* at 201.

89 *Churchill I*, *supra* note 64, at 33-34.

90 *Id.* at 34.

91 *See* S. 1129, H.R. 3361; 77 CONG. REC. S7019 (statement of Sen. Feinstein).

92 PHYSICIANS, *supra* note 1, at 133.

93 *See* 8 U.S.C. §1362 (permitting asylum seekers to have representation, but at no government expense).

94 *U.S. Weighs the Fate of Child Immigrants*, N.Y. TIMES, Mar. 28, 2002, at A24.

95 WOMEN’S COMMISSION FOR REFUGEE WOMEN AND CHILDREN, PRISON GUARD OR PARENT?: INS TREATMENT OF UNACCOMPANIED REFUGEE CHILDREN 30 (2002); Jacqueline Bhabha, *Crossing Borders Alone: The Treatment of Unaccompanied Children in the United States* (Jan. 2004), <http://www.immigrationpolicy.org/index.php?content=20040102>.

96 Andrew I. Schoenholtz and Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 GEO. IMMIGR. L.J. 739, 744 (2002).

97 Transcript of Hearing at 9-10, *In re Jarno*, I. & N. File No. A 78 156 178 (Oct. 11, 2001) (a copy of this document is on file with the author).

98 Telephone Interview with Benoit Jacqmotte (Sept. 3, 2006) [hereinafter Jacqmotte Interview].

99 *Id.*; *Jarno v. Lewis*, 256 F. Supp. 2d 499, 501 (E.D. Va. 2003).

100 Jacqmotte Interview, *supra* note 98.

101 *Jarno* Interview, *supra* note 68. The solid door to Malik’s cell was kept closed, entirely blocking his view of anything outside the cell and prohibiting contact with any other human beings. At one point, when Jacqmotte complained, an INS official told him, “I don’t see what the problem is. I think we should just leave him in solitary until his case is resolved.” Jacqmotte Interview, *supra* note 92.

102 Jacqmotte Interview, *supra* note 98.

- <sup>103</sup> Dr. Judy B. Okawa. Psychological Evaluation of Malik Jarno 11 (Feb. 4, 2002) [hereinafter Okawa Evaluation] (a copy of this document is on file with the author).
- <sup>104</sup> *Id.* at 7.
- <sup>105</sup> Dr. David A. Gold, Psychological Evaluation of Malik Jarno 2-3 (Feb. 4, 2002) [hereinafter Gold Evaluation] (a copy of this document is on file with the author).
- <sup>106</sup> *Id.* at 5.
- <sup>107</sup> *Id.* at 6.
- <sup>108</sup> TRAC Immigration, Judge Joan V. Churchill, <http://trac.syr.edu/immigration/reports/judge2007/223/index.html>; Lisa Getter, *A Man's Asylum Fight in the Land of the Free*, L.A. TIMES, Apr. 15, 2001, at A1.
- <sup>109</sup> *Id.*
- <sup>110</sup> Jacqmotte Interview, *supra* note 98.
- <sup>111</sup> 8 C.F.R. § 1208.13(b)(2)(i)(B) (2008).
- <sup>112</sup> 8 U.S.C. § 1101(a)(42)(A) (2006).
- <sup>113</sup> See 8 C.F.R. § 208.13(b)(2)(i) (2008) (“An applicant has a well-founded fear of persecution if: ... There is a reasonable possibility of suffering such persecution if he or she were to return to that country ...”).
- <sup>114</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987). See, e.g., *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2002).
- <sup>115</sup> See 8 C.F.R. § 208.13(a) (“The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.”).
- <sup>116</sup> *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1984) (citations omitted).
- <sup>117</sup> Brief in Support of Application for Asylum and for Withholding of Removal at 20-21, In re Jarno, I. & N. File No. A 78 156 178 (filed March 1, 2002) (a copy of this document is on file with the author).
- <sup>118</sup> Affidavit of Timothy W. Docking at 11, In re Jarno, I. & N. File No. A 78 156 178 (dated Feb. 28, 2002) [hereinafter Docking Affidavit] (a copy of this document is on file with the author).
- <sup>119</sup> *Id.*

120 *Id.* at 12-13.

121 *Guinean Immigrant in Custody Is a Minor, Agency Concedes*, N.Y. TIMES, Apr. 12, 2002, at A20.

122 Okawa Evaluation, *supra* note 103, at 12.

123 Gold Evaluation, *supra* note 105, at 5.

124 *See Reid v. INS*, 949 F.2d 287, 288 (9th Cir. 1991) (“Counsel for the government has an interest only in the law being observed, not in victory or defeat in any particular litigation.”).

125 This individual, at his or her request, shall remain anonymous.

126 Telephone Interview with Claudia O’Brien (Sept. 12, 2006) [hereinafter O’Brien Interview].

127 Jarno Interview, *supra* note 68.

128 O’Brien Interview, *supra* note 126.

129 Churchill I, *supra* note 64, at 14.

130 *See, e.g., United States v. Glawson*, No. 08-11197, 2009 U.S. App. LEXIS 8005 at \*2 (11th Cir. Apr. 15, 2009) (“The identification and authentication of tangible objects for admission into evidence require proof of their original acquisition and later custody in addition to a connection to the accused and the charged criminal offense.”).

131 As the Ninth Circuit has observed, “[p]ersecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution.” *Bolanos-Hernandez v. INS*, 767 F. 2d 1277, 1285 (9th Cir. 1984).

132 *Id.*

133 Jacqmotte Interview, *supra* note 98.

134 *See Reply Brief in Support of Application for Asylum at 24-25, In re Jarno, I. & N. File No. A 78 156 178* (filed Aug. 26, 2004) [hereinafter, “Jarno 2004 Reply”] (a copy of this document is on file with the author).

135 *Churchill I*, *supra* note 64, at 41.

136 *Id.* at 34-35.

137 *Id.* at 33.

- 138 Brief of Respondent on Appeal at 15, In re Jarno, I. & N. File No. A78 156 178 (2002) (a copy of this document is on file with the author).
- 139 See Jacqmotte Interview, *supra* note 98.
- 140 *Churchill I*, *supra* note 64, at 16.
- 141 See Jarno 2004 Reply, *supra* note 134, at 20.
- 142 *Churchill I*, *supra* note 64, at 24.
- 143 See, e.g., [Matter of Grijalva](#), 19 I. & N. Dec. 713 (BIA 1988).
- 144 Jacqmotte Interview, *supra* note 98.
- 145 *Churchill I*, *supra* note 64, at 19.
- 146 A complete analysis of the decision could fill dozens of pages, and would feature one anomalous finding after another. As to whether to impeach the uncontroverted evidence regarding Malik’s significant cognitive disabilities, for example, Judge Churchill observed: “We note that the respondent is able to speak, to some extent, in three different languages; French, Pular, and English.” *Churchill I*, *supra* note 64, at 27.
- 147 Wendy B. Davis and Angela D. Atchue, *No Physical Harm, No Asylum: Denying a Safe Haven for Refugees*, 5 TEX F. ON C.L. & C.R. 81, 120 (2000). As these authors conclude, “[u]ntil the courts uphold the human rights purpose of the asylum statute to include non-physical harm as persecution, there will be no safe haven for refugees in America. As a nation founded and built by persecuted immigrants, we should not be so quick to close the door on those who also yearn to breathe free.” *Id.*
- 148 Jacqmotte Interview, *supra* note 98.
- 149 Respondent’s Motion to Exclude July 2002 Report of Investigation and Accompanying Exhibits, In re Jarno, I. & N. File No. A78 156 178 (dated May 13, 2004) (a copy of this document is on file with the author).
- 150 [8 C.F.R. § 208.6\(a\)](#) (2000).
- 151 Respondent’s Motion to Exclude July 2002 Report of Investigation and Accompanying Exhibits at 5-6, In re Jarno, I. & N. File No. A78 156 178 (dated May 13, 2004) [hereinafter, “2002 Motion to Exclude”] (a copy of this document is on file with the author).
- 152 O’Brien Interview, *supra* note 126.
- 153 Telephone Interview with Christopher Nugent, Senior Counsel, Holland & Knight LLP (Oct. 6, 2006) [hereinafter 2006 Nugent Interview].
- 154 2002 Motion to Exclude, *supra* note 151, at 5.

- 155 2006 Nugent Interview, *supra* note 153.
- 156 Jarno Interview, *supra* note 68.
- 157 Jacqmotte Interview, *supra* note 98.
- 158 *See Board of Immigration Appeals: Procedural Reforms To Improve Case Management*, 67 Fed. Reg. 54,878, 54,902 (Aug. 26, 2002) (codified at 8 C.F.R. § 3.1 (d)(3), which was transferred to 8 C.F.R. § 1003.1(d)(3) in 2003).
- 159 Lisa Getter, *A Man's Asylum Fight in the Land of the Free*, L.A. TIMES, Apr. 15, 2001, at A1.
- 160 BIA Decision on Appeal at 4, In re Jarno, I. & N. File No. A78 156 178 (Jun. 26, 2003) (a copy of this decision is on file with the author).
- 161 *Id.* at 5.
- 162 *Id.* at 7.
- 163 *Id.* at 9.
- 164 Marc Levy, *Lawmakers Pressing for Detainee's Release*, ASSOCIATED PRESS, Aug. 18, 2003.
- 165 Bill Cahir, *Support for York Detainee; Bipartisan Group Says He's a Teen, Mentally Retarded*, N.Y. TIMES, Aug. 23, 2003, at A1.
- 166 *Lawmakers Demand Release of Mentally Disabled Immigrant*, U.S. NEWSWIRE, Aug. 25, 2003.
- 167 Cahir, *supra* note 165.
- 168 *Id.*
- 169 Letter from Rick Santorum, Senator, U.S. Congress, Sam Brownback, Senator, U.S. Congress & Edward Kennedy, Senator, U.S. Congress, to Eduardo Aguirre, Jr., Director, Bureau of Citizenship and Immigration Servs. (Sept. 30, 2003), <http://www.ilw.com/immigdaily/News/2003,1006-malik.pdf>.
- 170 *See* Jacqmotte Interview, *supra* note 98.
- 171 *Id.*
- 172 *Id.*

173 Editorial, *A Special Case*, WASH. POST, Nov. 28, 2003, at A40.

174 *Id.*

175 *Id.*

176 *Id.*

177 *Amnesty International Joins Members of Congress in Urging Stay of Removal for Malik Jarno*, U.S. NEWSWIRE, Dec. 15, 2003.

178 *Id.*

179 *Id.*

180 Artists for Amnesty, *Monthly Bulletin: Free At Last Amnesty International Celebrates the Release of Malik Jarno*, <http://www.amnestyusa.org/artistsforamnesty/jan2004.html> (last visited Sept. 21, 2009); Jarno Interview, *supra* note 68.

181 Cate Doty, *Teenage African Immigrant Is Freed After 3 Years in Detention*, N.Y. TIMES, Dec. 25, 2003, at A1.

182 John Files, *Black Groups Seeking Asylum for a Teenager from Guinea*, N.Y. TIMES, March 14, 2004, § 1, at 22.

183 *Amnesty International Joins Members of Congress in Urging DHS to Concede Asylum to Malik Jarno*, U.S. NEWSWIRE, Apr. 16, 2004.

184 *DHS Refuses Asylum to Guinean Teen Despite Appeals from Numerous Organizations and Members of Congress*, U.S. NEWSWIRE, May 18, 2004.

185 2006 Nugent Interview, *supra* note 153.

186 Christopher Nugent, *Practitioners Section: Representing Undocumented Minors in U.S. Courts*, 10 U.C. DAVIS J. JUV. L. & POL'Y 235, 236 (Winter 2006).

187 *Id.* at 237; 2006 Nugent Interview, *supra* note 153.

188 *Rep. Van Hollen Introduces Legislation to Assist Disabled Orphan*, HT MEDIA, July 20, 2004.

189 *Id.*

190 David Cho, *Immigrant's Troubles Continue; Mentally Disabled Guinean Man Held in Limbo for 3 Years*, WASH. POST, July 29, 2004, at A8.

- <sup>191</sup> 2006 Nugent Interview, *supra* note 153; Jarno 2004 Reply, *supra* note 134, at 12, n.7 (“[T]hat abrupt retraction appears to have been prompted by pressure brought to bear on USAID by DHS counsel.”).
- <sup>192</sup> See Jarno 2004 Reply, *supra* note 134 at 12, n.7 (“Mr. Woodruff did not retract his statements because they were factually incorrect. Rather, he was forced to retract them because of DHS’s erroneous reading of [the applicable regulation] ....”).
- <sup>193</sup> 5 C.F.R. § 2635.805(d) (2009).
- <sup>194</sup> U.N. High Comm’r for Refugees [UNHCR], *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, ¶ 96, HCR/IP/4/Eng/REV.1 (Jan. 1, 1992). See, e.g., *Lusingo v. Gonzales*, 420 F.3d 193, 196, 201 (3d Cir. 2005) (remanding asylum claim of Tanzanian who feared extensive media coverage of his case in the U.S., including “unflattering information about the Tanzanian government,” would lead to retaliation; court opined that “it is difficult for us to determine on this record why Lusingo is not entitled to the asylum he is seeking”); *Lukwago v. Ashcroft*, 329 F. 3d 157, 180-82 (3d Cir. 2003) (explaining it was not unreasonable to believe former child soldier of Lord’s Resistance Army (“LRA”) in Uganda and subject of widespread publicity would be in danger of retaliation by country of origin because of the notoriety); *Azarshahy v. Ilchert*, No. C-93-03978-CW, 1994 WL 446040, at \*7 (N.D. Cal. Aug. 10, 1994); *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987) (granting asylum application of Iranian applicant who, while in U.S., became involved in an altercation with an employee of the Iranian embassy, participated in anti-Khomeini demonstrations, and expressed political views and opinions extremely derogatory to the regime in power; B.I.A. found that “a reasonable person in the [applicant’s] circumstances would fear persecution if returned to Iran.”).
- <sup>195</sup> Pre-Hearing Brief in Support of Application for Asylum and Withholding of Removal and Protection Under the United Nations Convention Against Torture at 12-13, In re Jarno, I. & N. File No. A 78 156 178 (Aug. 2, 2004) [hereinafter, “Pre-Hearing Brief”] (a copy of this document is on file with author).
- <sup>196</sup> Issues of safety preclude more specific identification.
- <sup>197</sup> Pre-Hearing Brief, *supra* note 195, at 19-21.
- <sup>198</sup> *Id.* at 24.
- <sup>199</sup> *Id.* at 23-25.
- <sup>200</sup> *Id.* at 9.
- <sup>201</sup> This story was first revealed in April 2004, four months before Malik’s second trial. Press Release, Lutheran Immigration and Refugee Service, Malik Jarno Deserves America’s Sanctuary, (April 22, 2004), available at <http://www.lirs.org/News/NewsReleases/20040422MalikJarno.htm>.
- <sup>202</sup> Pre-Hearing Brief, *supra* note 195, at 33.
- <sup>203</sup> 2006 Nugent Interview, *supra* note 153.
- <sup>204</sup> Examining a similar claim by a Tanzanian government official in *Lusingo v. Gonzales*, 420 F.3d 193 (3d Cir. 2005), the Third Circuit opined: “[I]t should come as no surprise that that Tanzanian Ambassador managed a diplomatic response to inquiries about

[the petitioner]. It is, however, surprising that anyone would suggest that the ambassador's response proves anything other than his diplomatic acumen." *Id.* at 202.

- 205 At trial, an expert confirmed that Malik speaks a distinctively Guinean dialect of Puhlar. Jarno 2004 Reply, *supra* note 134, at 21.
- 206 Caryl Clarke, *Immigration Officials Would Deport Malik Jarno, Whose Asylum Trial Begins Today*, YORK DAILY RECORD, Aug. 12, 2004.
- 207 Jacqmotte Interview, *supra* note 98.
- 208 *Id.*
- 209 *Jarno v. Dep't of Homeland Security*, 365 F. Supp. 2d 733, 740 (E.D. Va. 2005).
- 210 *Id.*
- 211 Jacqmotte Interview, *supra* note 98.
- 212 2006 Nugent Interview, *supra* note 153.
- 213 Decision of Judge Joan V. Churchill at 24, *In re Jarno, I. & N. File No. A 78156178* (Dec. 29, 2004) [hereinafter, Churchill II] (a copy of this document is on file with the author).
- 214 Jacqmotte Interview, *supra* note 98.
- 215 Churchill II, *supra* note 213, at 3.
- 216 See 8 CFR § 208.13(c)(2) ("An immigration judge or asylum officer shall not grant asylum to any applicant ... if the alien: ... Has been firmly resettled within the meaning of § 208.15"); 8 CFR § 208.15 ("An alien is considered to be firmly resettled if, prior to arrival in the United States, he or she entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement ....").
- 217 Churchill II, *supra* note 213, at 4.
- 218 See, e.g., *Mussie v. INS*, 172 F.3d 329, 332 (4th Cir. 1999).
- 219 Churchill II, *supra* note 213, at 12.
- 220 2006 Nugent Interview, *supra* note 153.
- 221 Churchill II, *supra* note 213, at 11.

222 *Id.* at 23.

223 Pre-Hearing Brief, *supra* note 195, at 3 n.4.

224 Churchill II, *supra* note 213, at 28.

225 *Id.* at 30.

226 *Id.*

227 *Id.* at 27.

228 *Id.* at 51.

229 *Id.* at 5.

230 2006 Nugent Interview, *supra* note 153. *See also infra* note 265 and accompanying text.

231 *See* UNHCR, *supra* note 194 and accompanying text.

232 Churchill II, *supra* note 213, at 87.

233 *See* Lutheran Immigration and Refugee Service, *supra* note 201 and accompanying text.

234 Churchill II, *supra* note 213, at 38.

235 *See* 1998 DEPT. OF STATE COUNTRY REPORT, *supra* note 56 and accompanying text.

236 *See id.*

237 Letter from Rep. Donald M. Payne, U.S. Cong., to Colin Powell, U.S. Sec’y of State (July 22, 2004).

238 Churchill II, *supra* note 213, at 38.

239 *Id.* at 25-26.

240 *Id.* at 41 (emphasis added).

241 O’Brien Interview, *supra* note 126.

242 2006 Nugent Interview, *supra* note 153.

243 Jarno Interview, *supra* note 68.

244 *Id.*

245 2006 Nugent Interview, *supra* note 153.

246 Board of Immigration Appeals Decision at 4, In re Jarno, I. & N. File A78 156 178 (Nov. 28, 2006) (a copy of this decision is on file with the author).

247 *Id.*

248 *Id.* at 7.

249 *Id.* at 4.

250 *Id.* at 5.

251 *Id.*

252 *Id.* at 3.

253 *Id.*

254 The panel refused to formally incorporate the term “refugee *sur place*” into the Immigration and Nationality Act, but granted the remand upon the same concept. *Id.* at 12-13.

255 *Id.* at 12.

256 *Id.*

257 *Id.* at 13.

258 *Id.* at 12.

259 2006 Nugent Interview, *supra* note 153.

260 See [http://www.asylumlaw.org/legal\\_tools/index.cfm?fuseaction=showJudges2004](http://www.asylumlaw.org/legal_tools/index.cfm?fuseaction=showJudges2004).

- 261 For obvious reasons, these individuals cannot be named or more precisely identified.
- 262 Decision of Judge Wayne R. Iskra, In re Jarno, I. & N. File A78 156 178 (Oct. 23, 2007) (a copy of this document is on file with the author).
- 263 *Id.* at 20.
- 264 *Id.* at 21.
- 265 *Id.* at 20-21.
- 266 2009 Nugent Interview, *supra* note 54.
- 267 O'Brien Interview, *supra* note 126.