

No. 04-3014

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JEAN NOEL FONGWO

Petitioner

v.

JOHN ASHCROFT, United States Attorney General,

Respondent.

PETITIONER'S OPENING BRIEF
On Petition for Review of an Order of the Board of Immigration Appeals
AGENCY NO. A77-003-326

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IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
NO.04-3014

JEAN NOEL FONGWO)
)
 Petitioner,)
)
 v.)
)
 JOHN ASHCROFT, Attorney General of)
 The United States)
)
 Respondent.)

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rules 26.1-1 and 28-2(b) of the Rules of the United States Court of Appeals for the Eighth Circuit, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case:

1. Board of Immigration Appeals, Falls Church, VA;
2. Peter D. Keisler, Assistant Attorney General, Civil Division, U.S. Department of Justice, Attorney for Respondent, Washington, D.C.;
3. David V. Bernal, Assistant Director, Office of Immigration Litigation, Civil Division, U.S. Department of Justice, Attorney for Respondent, Washington, D.C.;

4. Ari Nazarov, Esquire Attorney, Office of Immigration Litigation, Civil Division, U.S. Department of Justice, Attorney for Respondent, Washington, D.C.;
5. Terry M. Louie, Department of Homeland Security, Bureau of Immigration and Customs Enforcement, Minneapolis, MN;
6. Jean Noel Fongwo, Petitioner, and
7. Joseph M. Kum, Petitioner's Counsel, Takoma Park, Maryland.

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STATEMENT REGARDING ORAL ARGUMENT

Petitioner hereby requests oral argument in this case. Oral argument is necessary for the reason that the issues addressed in this appeal involve complex factual and country specific issues as well as the applicability of asylum law and jurisprudence to this matter especially in light of the adoption of new regulations governing the appeal process before the Board of Immigration Appeals. To date, these issues continue to plague this and other Circuit Courts of Appeals. Consequently, Petitioner believes that the issues presented in this appeal will be aided by having counsel present argument and be able to respond to questions.

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- c. The IJ erred and abused her discretion in denying to reopen the hearings especially where, as here, the confidentiality rules of 8 CFR 208.6(a) were breached given the additional evidence establishing Petitioner’s true and correct identity as Jean Noel Fongwo.
- d. The IJ erred and abused her discretion by failing to fully articulate and apply the standards for determining if an application is frivolous even in the face of additional evidence establishing his true and correct identity as Jean-Noel Fongwo.
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I. STATEMENT OF JURISDICTION

This Court's jurisdiction is based upon 28 USC §1105(a), which grants appellate jurisdiction to courts of appeal for judicial review of denials in removal proceedings. INA § 106(a) and Rule 28(a)(2) of the Federal Rules of Appellate Procedure authorize the petitioners' action for relief. The Board's jurisdiction arose under 8 CFR § 3.1(b)(2)(2001), as amended.

Because the Board's decision was entered after October 30, 1996, this petition is governed by the permanent rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-204, 110 Stat. 3009 (Sept. 30, 1996), as amended by Pub. L. 104-302, 110 Stat. 3656 (Oct. 11, 1996). See § 309(a), 119 Stat. at 3009-625. Pursuant to IIRIRA § 309 (C)(4)(C), an alien may seek review of the Board's decision within thirty days of the date of the Board's decision. The Board handed down its ruling on July 22, 2004 and petitioner timely filed a petition for review within the 30-day limit.

II. STATEMENT OF THE ISSUES

1. Whether the Board and/or the IJ's decision is supported by substantial evidence considering the entire administrative record and the facts in these proceedings so that the Court will conduct a meaningful review of the agency's decision. Most apposite cases: *Matter of S-M-J*, 21 I&N Dec. 722 (BIA 1997); *Menendez-Donis v. Aschroft*, 360 F.3d 915, 918-19 (8th Cir. 2004).
2. Whether, the Board and/or the IJ erred and abused their discretion in denying a motion to reopen where facts to be proven upon reopening were material, relevant and unavailable or incapable of proof during the prior proceedings. (Most apposite case: *INS v. Abudu* 485 U.S. 94 (1988))
3. Whether the confidentiality rules of 8 CFR 208.6(a) are breached where a Petitioner and/or members of his family are clearly identified in a consular investigation. (Most apposite: *Matter of O-D-*, 21 I&N Dec. 1079 (BIA 1998); *Kiareldeen v. Aschroft*, 273 F.3d 542, 549 (3rd Cir. 2001))

4. Whether the Board and/or IJ erred in failing to fully articulate and apply the standards for determining a frivolous application as enunciated by 8 CFR 208.20. (Most apposite: *Matter of Pula 19 I&N Dec. 467 (BIA 1987)*).

III. STATEMENT OF THE CASE

i. The Nature of the Case

Jean Noel Fongwo, by his attorney, petitions this Court for review of an order of the Board of Immigration Appeals (Board) entered on July 22, 2004, affirming a decision of the Immigration Judge (IJ) which denied his application for asylum and withholding of removal under the Immigration and Nationality Act (INA) § 208, as amended and the Convention Against Torture, and above all, entering a finding of filing a frivolous application.

ii. The Course of Proceedings and Disposition in Immigration Court

Mr. Fongwo first appeared before the IJ in Miami, Florida (no date) for a Master Calendar Hearing where he conceded the charges of removability and sought relief in the form of asylum, withholding of removal under the Statute and the Convention against Torture. He subsequently appeared before the same court to file his application for relief and a scheduled merits hearing on June 19, 2000. On that date the matter

was venued to Minnesota. A merits hearing was set on May 14th 2001 but which was subsequently continued to October 29, 2001.

After taking testimony and reviewing the documentary evidence, the IJ denied the Petitioner's application for asylum principally because she doubted Petitioner's identity. The IJ also found that Petitioner had filed a frivolous asylum application, which subjected him to a lifetime ban of immigration benefits. Petitioner then timely filed a motion to reopen and reconsider in which he included additional documents and an affidavit establishing his true identity. The IJ denied the Motion. Petitioner then appealed to the BIA.

iii. The Course of Proceedings and Disposition at the Board of Immigration Appeals

A one-member panel of the BIA affirmed, without opinion, the IJ's decision.

iv. Brief Review of Facts and Procedural History

Petitioner is a native and citizen of Cameroon who entered the United States on or about February 8, 1999 at Miami, Florida. According to Immigration Officer J. Ortiz, Petitioner:

...presented the passport number 98/351281 issued to Jean Tamu from Cameroon to the primary officer L. Renna, seeking political asylum. Subject mentioned that his real name is Jean Noel Fongwo, DOB: 01/03/78, and that he is a citizen of Cameroon. Subject was referred to the expedite removal office for processing. (See, Certified

Administrative Record (CAR) p. 000054.

A sworn statement was taken from the Petitioner whereby he mentioned that he had been arrested in Cameroon and that he had been imprisoned. He mentioned that he never requested a valid visa to travel to the United States and that he was coming to this country “to request protection from the United States government”. Petitioner successfully underwent a credible fear interview, was subsequently paroled and placed in removal proceedings. (*CAR, 001103- 001126*). He continued to maintain and assert his true identity as “Jean Noel Fongwo”. As relief Petitioner applied for asylum and withholding of removal under the statute and the convention.

At the merits hearing, Petitioner continued to maintain his true identity and offered a birth certificate as evidence of his identity. He was a member of the Social Democratic Front (SDF) party in Cameroon who was arrested on two occasions. After the second arrest in April 1997, he was sentenced to two years in jail. His uncle, Fred Fonji, corroborated Petitioner’s true and correct identity as “Jean Noel Fongwo”, as well as his 1997 arrest. (*See, CAR 000229-256*).

The merits hearing was continued at some point, in part, to allow for Overseas Consular Investigation of certain documents that were presented at trial. Though the Consular Officer would not investigate Petitioner’s SDF

membership, he contacted various Cameroon government authorities including the prison warden at the notorious Kondengui prison and the Gendarmerie where Petitioner was referred to by the name, “Jean Noel Fongwo”. (*See, CAR, 000478-482*).

The Court’s primary focus in determining Petitioner’s credibility has been on correctly ascertaining his true and correct identity. But the Court discounted the validity of Petitioner’s proffered birth certificate, did not consider the uncles’ testimony, and refused to acknowledge the consistency of Petitioner’s testimony about his true and correct name as well as the plausibility of Petitioner’s claim of persecution in Cameroon. In the end the IJ entered an oral decision denying Petitioner’s applications for relief, finding that his application for asylum was frivolous, and ordering him removed from the United States.

Petitioner filed a Motion to reopen and reconsider and offered the Court additional documents which continued to establish clearly that he is “Jean Noel Fongwo” and not “Jean Tamu” as the Court erroneously found.

The documents were:

- i. Catholic Testimonial Book (for Baptism, Holy Communion and Marriage records) in the name of Jean Noel Fongwo, apparently established on April 22, 1978;
- ii. United States Peace Corps Certificate of Attendance in the name of

Jean Noel Fongwo, established in 1992, and

- iii. Cameroon National Identity in the name of Jean Noel Fongwo issued in 1996. (*See, CAR, 000055-60*).

Petitioner also provided a sworn declaration explaining the difficulty of providing these and any other documents before the trial. Essentially, Petitioner asserted that he relied on prior counsel for what documents to provide, and even so, it was difficult to retrieve any of his papers especially considering the way he left Cameroon. The IJ ruled that the information Petitioner attached to his motion “is not new, it was available, and it could have been discovered and presented at the prior hearings”. The IJ summarily added that the “Court is not swayed by the Petitioner’s legal arguments, nor is there a change of law, or an argument or aspect of the case which was overlooked.” Petitioner respectfully asserts the contrary; hence, this appeal.

Petitioner, Jean Noel Fongwo, is appealing the decision of the Immigration Judge (IJ) denying his motion to reopen and reconsider the April 14, 2003 decision denying his application for asylum in the United States.

The IJ found that Petitioner had presented “a false switched Cameroon passport in the name of Jean Tamu” (*CAR 000072*) and that he had “misrepresented his entire real identity and failed to establish that he is not

Jean Tamu”. The IJ concluded, “Respondent failed to present objective, credible, corroborating information documentation (sic) to show that he is actually Jean Noel Fongwo.” (CAR 000075). Since, according to the IJ, Petitioner was not “Jean Noel Fongwo”, the Overseas Consular Investigation could not have breached the confidentiality rules under 8 CFR 208.6(a). In addition, the IJ found that Petitioner had filed a frivolous application because he had not been forthcoming about his true identity; statements and responses had been deliberately fabricated and various documents were determined to be fraudulent following an Overseas Consular Investigation in Yaounde, Cameroon.

The crux of the IJ’s negative decision was her determination of Petitioner’s “true and correct” identity, and the issue continues to be whether Petitioner is indeed “Jean Noel Fongwo” or “Jean Tamu” as the IJ allegedly found. But the Court downplayed, if not ignored, the most important evidence establishing Petitioner’s true and correct identity. His uncle’s testimony is neither mentioned nor considered and the IJ was factually wrong especially in recounting how Petitioner entered the United States and presented himself before an Immigration Officer at Miami Airport. The IJ prejudged this Petitioner; he was just another Cameroonian making an asylum claim based on membership in the SDF where the Court may have

had previous problems.

IV. ANALYSIS OF LAW AND FACTS

A party may file only one motion to reconsider and one motion to reopen. *8 CFR Sections 1003.2(b)(2), 1003.2(c)(2) and 1003.23(b)(1)*. The Motion to Reopen must be filed within ninety days of the date of entry of a final administrative order of removal, deportation or exclusion. *8 C.F.R. Section 1003.23(b)*. A Motion to Reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. A Motion to Reopen will not be granted unless the Board is satisfied that the evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing. *8 C.F.R. Section 1003.23(b)(3)*. In addition, a motion to reopen will not be granted unless the Petitioner establishes a prima facie case of eligibility for the underlying relief sought. See, *INS v. Abudu, 485 U.S. 94 (1988)*.

The BIA has found that a Petitioner demonstrates prima facie eligibility for relief where the evidence reveals a reasonable likelihood that

the statutory requirements for relief have been satisfied. *Matter of L-O-G-*, 21 I & N Dec. 413, 419 (BIA 1996). The Board has not required a conclusive showing that eligibility for relief has been established. *Id. at 418-19*. Rather the BIA has reopened proceedings “where the new facts alleged, when coupled with the facts already of record, satisfy us that it would be worthwhile to develop the issues further at a plenary hearing on reopening.” *Id.* (quoting *Matter of Sipus*, 14 I & N Dec. 229 (BIA 1972)). Indeed as stated in *Matter of Rodriguez-Vera*, Interim Decision 2727 (BIA 1979), reopening may not be had, as of right, upon a bare showing of statutory eligibility for the discretionary relief sought; rather, it is incumbent upon the alien to make a prima facie showing that the statutory requirements for the relief sought have been satisfied and that a grant of relief may be warranted as matter of discretion. And, in adjudicating a motion to reopen, the IJ and the Board are entitled, at a minimum, to factual allegations, which indicate that the adverse factors of record may be overcome by the equities presented. In essence a motion to reopen, according to the BIA, seeks a second review of a case based on new or previously unavailable evidence. *Matter of J-J-*, Int. Dec. 3323 at 3, n.1 (BIA 1997).

In contrast, a Motion to Reconsider must be filed within 30 days of the date of entry of a final administrative order of removal, deportation or

exclusion. *8 C.F.R. Section 1003.23(b)*. A Motion to reconsider shall state the reasons for the motion by specifying the errors of fact or law in the prior decision and shall be supported by pertinent authority. *8 C.F.R. Section 1003.23(b)(2)*. In essence a “motion to reconsider questions the [adjudicator’s] decision for alleged errors in appraising the facts and law” and seeks a reexamination of the decision, “in light of additional legal arguments, a change in law, or perhaps an argument or aspect of the case which was overlooked.” *Matter of J-J- at 3, n. 1 (citations omitted)*.

According to the September 25, 2002 final regulations issued by the Attorney General restructuring the appeal process before the Board of Immigration Appeals, the Board is now prohibited from considering any new evidence on appeal. The regulations provide that a party asserting that the Board cannot resolve a case without further fact-findings must file, with the Board, a Motion to Remand to the IJ for consideration of the new evidence. *8 C.F.R. Section 1003.1(d)(3)(iv)*. Additionally, *8 CFR Sec. 1003.1(e)(6)* lists six factors, one of which must exist, for cases to be assigned to a three member panel. The need to review a decision by an IJ that is not in conformity with the law or precedent, is one such factor.

SUMMARY OF ARGUMENT

The issues presented for *de novo* review to this Court turn on a critical

examination of the facts and asylum law and jurisprudence. In sum, there is substantial, credible and probative information, in examining the totality of the record and analyzing asylum jurisprudence, that Petitioner has a well-founded fear of future persecution should he return to Cameroon at this time. In addition, the government has breached its own confidentiality requirements and the IJ did not follow the well-laid statutory and judicial standards for making a frivolity finding.

ARGUMENT

- a. *The IJ erred and abused her discretion by ignoring testimony and facts which bore on Petitioner's identity, and the new facts to be proven upon reopening were material, relevant and unavailable or incapable of proof during the prior proceedings*

The key underpinning of the IJ's decision is that the Petitioner is not who he says he is, in spite of testimonial and other documentary evidence establishing the fact that he is Jean-Noel Fongwo. Given this posture, Petitioner has to prove the negative; that he is not "Jean Tamu". But he has shown conclusively that he is indeed "Jean Noel Fongwo". He provided new material and relevant evidence, which further corroborates earlier testimonial and documentary evidence (birth certificate) that was presented previously at the merits hearing considering especially the fact that a frivolous finding also rested on the identity question. And because these

documents were unavailable they were also incapable of proof at the merits hearing.

In *Matter of O-D-*, 21 I&N Dec. 1079 (BIA 1998), the Board of Immigration Appeals (BIA) held that where an applicant submits corroborative identity documents that are found to be counterfeit by forensic experts such a presentation not only discredits the applicant's claim as to the critical elements of identity and nationality, but, in the absence of an explanation or rebuttal, also indicates an overall lack of credibility regarding the entire claim. But none of the documents Petitioner submitted as to his identity were declared fraudulent or counterfeit by "forensic experts"; indeed the Forensic Document Laboratory (FDL) found that the documents submitted for analysis conformed to genuine samples. To the extent then that the Court relied on *Matter of O-D-* in assessing the credibility of this claim, it must be in error.

Upon seeking admission to the United States, Petitioner made a timely retraction to the primary immigration officer as to his true identity. In promptly asking for asylum, Petitioner told the officer that he was arriving with a passport in a different name, and that his true and correct name was "Jean Noel Fongwo"; the passport was not "false switched", as the IJ asserted. An alien's fraud in entering the US or circumventing established

procedures for overseas refugee processing is a serious negative factor as a matter of discretion. *Farbakhsh v. INS*, 20 F. 3d 877 (8th Cir. 1994); *Matter of Salim*, 18 I&N Dec. 311 (BIA 1982). Unless there are other significant negative factors, however, a fraudulent entry alone will not normally warrant a discretionary denial of asylum. *Matter of Pula*, I & N Dec. 467 (BIA 1987); *Matter of Kasinga* 21 I & N Dec. 357 (BIA 1996).

The sound exercise of discretion depends on a balancing of the fact that the alien qualifies as a refugee together with any other positive factors against any negative factors in a given case. It is probably to be expected that one fleeing his country would travel with false documents. And in the present case, Petitioner promptly renounced the “alleged fraud” and truthfully declared his identity. The Court did not engage in this balancing exercise; it focused almost exclusively on the negative factors; it specifically ignored testimony and facts, which bore on Petitioner’s identity. The Court failed to examine, credit or at least refer to the testimony of Mr. Fred Fonji, Petitioner’s uncle as to his identity. Petitioner has also provided an affidavit explaining why the new facts were unavailable at the earlier hearing. The new documents clearly show that the Court was in error, and the IJ should have at least reviewed the documents especially in light of the consequences of having made a finding that Petitioner filed a frivolous asylum application.

- b. *The IJ erred and abused her discretion by failing to reopen and reconsider her decision where admitting the findings of the Overseas Consular Investigation clearly violated Petitioner's due process rights.*

The Due Process Clause applies to all “persons” within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent. See, *Zadvydas v. Davis*, 121 S. Ct. 2491 (2001); see also *Plyler v. Doe*, 457 U.S. 202 (1982); *Matthews v. Diaz*, 426 U.S. 67, 77 (1976); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-598, and n. 5 (1953); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); cf. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (“[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.”).

In the asylum context, due process protections are afforded to aliens facing removal. See, e.g. *Abdulai v. Ashcroft*, 239 F. 3d 542, 549 (3d Cir. 2001) (“Despite the fact that there is no constitutional right to asylum, aliens facing removal are entitled to due process.”); *Chong v. INS* 264 F. 3d 378, 386 (3rd Cir. 2001) (“Aliens facing removal are entitled to due process”). Because the Federal Rules of Evidence do not apply in asylum proceedings, “[t]he test for admissibility of evidence...is whether the evidence is

probative and whether its use is fundamentally fair so as not to deprive the alien of due process of law.” *Bustos-Torres v. INS*, 898 F. 2d 1053, 1055 (5th Cir. 1990); see *Lopez-Chavez v. INS*, 259 F. 3d 1176, 1184 (9th Cir. 2001) (“The sole test governing the admission of evidence in deportation proceedings is whether the evidence is probative and its admission is fundamentally fair.”(quotation omitted). As the Court of Appeals for the Second Circuit has explained: “In the evidentiary context, fairness is closely related to the reliability and trustworthiness of the evidence.” *Felzcerek v. INS*, 75 F. 3d 112, 115 (2d Cir. 1996). Thus the analysis as to whether an individual’s constitutional rights are violated turns on whether the evidence considered by the IJ is reliable and trustworthy.

The Consular Investigator’s reports from Yaounde, Cameroon do not satisfy standards of reliability and trustworthiness; they consist of multiple hearsay of the most troubling kind. Mr. Yaouba contacted the Kondengui prison warden and one of President Biya’s security services, the Gendarmerie to ascertain if indeed “Jean Noel Fongwo” had been arrested and was subject of a search and arrest warrant. Mr. Yaouba asserts “all the documents we verified from this Petitioner are fake”. The documents used in the consular investigation clearly refer to Petitioner as “Jean Noel Fongwo” (CAR 000480-1); as well as the arrest warrants (CAR000607-611) which

clearly identify Petitioner and his parents by their true and correct names.

The IJ is just trying to rely on the prestige of the Department of State letterhead to credit rank hearsay. The IJ did not even consider the affidavit of Justice A.N.T. Mbu, a retired magistrate from Cameroon who clearly pointed out the plausibility of events in Biya's Cameroon as told by the Petitioner. (*See, CAR 000433-441*). The IJ erred and abused her discretion by dismissively claiming to be not persuaded by Petitioner's argument on this score. The IJ continued to violate Petitioner's due process rights by denying reopening and reconsidering her ruling.

c. The IJ erred and abused her discretion in denying to reopen the hearings especially where, as here, the confidentiality rules of 8 CFR 208.6(a) were breached given the additional evidence establishing Petitioner's true and correct identity as Jean Noel Fongwo.

The evidence presented by the Government was not only biased but also obtained from Petitioner's captors in violation of the confidentiality provisions of the above rule. Mr. Yaouba clearly disclosed Mr. Fongwo's name to members of the Biya government, his persecutor, to wit, the Gendarmerie and the Kondengui prison warden. Mr. Yaouba did not care to check on the authenticity of Petitioner's membership cards because "the police doesn't harass or arrest people anymore in Cameroon because they belong to an opposition party" and, in his sweeping assertion, "all the

documents we verified from this Petitioner are fake”. There is no doubt that Court’s decision was based on this unprofessional and biased evidence (which was not subject to cross-examination). And, if as has been shown that Petitioner is indeed “Jean Noel Fongwo”, it follows that the confidentiality rules have been breached and the IJ ought to have revisited her decision.

It is not appropriate to credit allegations made by officials of a government that a Petitioner fears because most governments accused of persecuting the citizenry would be inclined to make such allegations.

d. The IJ erred and abused her discretion by failing to fully articulate and apply the standards for determining if an application is frivolous even in the face of additional evidence establishing his true and correct identity as Jean-Noel Fongwo.

According to 8 CFR 208.20 an IJ must specifically find that the alien knowingly filed a frivolous asylum application. Further, the regulations state that:

...An asylum application is frivolous if any of its material elements is deliberately fabricated. Such finding shall only be made if the immigration judge or the Board is satisfied that the applicant, during the course of the proceedings, has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim.

Considering the harsh consequences of such a finding, it should not be

reached lightly especially where the Court is examining the motivations of the Petitioner. This Court has previously reversed a frivolousness determination where it was not shown that the “alien knowingly made material fabrications in his or her asylum application.” *Shi v. Aschroft*, 105 Fed. Appx. 125; 2004 U.S. App. LEXIS 15441).

The IJ found that Petitioner’s statements and responses were deliberately fabricated; he was not forthcoming about his identity (“he is actually Jean Tamu not Jean Noel Fongwo”) and various documents were determined to be fraudulent. But a careful examination of the evidence would have given the IJ some reason to pause before making this finding. The Petitioner conceded that he was not “Jean Tamu” at his first encounter with a U.S. government official. In testimony he disavowed some of the documents because he could attest to their veracity; these documents had been handed to him as he made his escape from Cameroon. Indeed, the Consular Investigator’s uncorroborated, biased and uncross-examined assertions, which form the basis of the Court’s findings, arise from those same documents whose veracity and authenticity Petitioner said he could not vouch for. While the IJ may have warned the Petitioner about the consequences of filing a frivolous application, he was not given a significant opportunity to “account for any discrepancies or implausible aspects of the

claim”, if at all there were any. Since the Court’s focus appeared to be the Petitioner’s identity, it did not articulate any discrepancies or implausible aspects of the Petitioner’s claim. The Court’s attempt to examine Petitioner’s motivations is also questionable in light of the substantial, credible and uncontroverted evidence (testimonial and documentary), which establish conclusively that Petitioner is indeed “Jean Noel Fongwo”.

It must bear noting at this point that the United States interest in asylum and refugee resettlement is based on this country’s inherent belief in human rights, which leads the US to strive to end the persecution of individuals by offering refuge to victims. (*See, Donald W. Cassidy, Basic Law Manual, NY, Mathew Bender & Co, Inc, 1995, p.3*). One of the overriding considerations of US Refugee protection policy is therefore humanitarian. It is in this sense that an overriding concern of Immigration Court is to reach a right and correct decision lest a Petitioner be sent to her death. In *In the Matter of James Robert Valinoti, No. 96-0-08095 (Cal. Bar Ct., Review Dept., Dec. 31, 2002)* (recommending the suspension of an immigration lawyer after many ethics complaints) the Bar Court noted that:

Asylum cases are probably the most sensitive cases that the field of immigration deals with. They are like death penalty cases...Petitioner’s misconduct not only presented the possibility of serious consequences, but actually resulted in substantial harm to many of his clients. (at 94-95).

While Petitioner is not suggesting that the IJ engaged in any misconduct, the IJ at least failed to exercise some sensitivity to asylum cases especially from Cameroon. It would appear as if the IJ had made up her mind from the outset and was simply unwilling to consider any additional evidence that would undercut her decision. Such a posture produces unduly harsh results, as was the case here.

- e. *The IJ erred and abused her discretion by failing to examine the totality of the evidence especially in light of new and additional evidence establishing Petitioner's true and correct identity as Jean-Noel Fongwo*

In *INS v. Cardoza-Fonseca*, the Supreme Court held that asylum applications must be adjudicated on a case-by-case basis and that the evidence must establish a reasonable possibility that a person may be subject to persecution on account of a protected ground. An applicant's claim can only be understood in the context of the current political situation in his/her country. *Asano v. INS*, 154 F. 3d 719, 725-26 (7th Cir. 1998). In *Matter of S-M-J-*, 21 I & N Dec. 722 (BIA 1997) it was held that the general background information about a country must be included in the record as a foundation for the applicant's claim. And the denial of asylum has been reversed where the testimony and evidence is not considered "in light of general conditions" as required by 8 CFR Sec. 208.13(a). *Cordero-Trejo v.*

INS, 40 F. 3d 482, 490-91 (1st Cir. 1994). The Court did not examine the favorable and unfavorable factors in determining whether to exercise its discretion. The Court failed to examine the human rights record of the country in question here, Cameroon, and never considered the reasonable subjective fears expressed by the Petitioner which were genuine and supported by objective facts, to wit: his arrest, detention and torture in Cameroon. The record is replete with examples of the Biya government's harassment, detention and torture of its opponents. In light of the harsh consequences of a finding of filing a frivolous asylum application, a review of the totality of the evidence including country conditions and profile of asylum claims was warranted.

Such a review is warranted at this stage.

- f. *The factual and legal circumstances of this matter warrant a three member panel review, and at least a remand to the IJ.*

8 C.F.R Sec. 1003.1(e)(6) lists six factors, one of which must exist, for cases to be assigned to a three-member panel. Amongst such factors are: the need to review a decision by an IJ that is not in conformity with the law or precedent; the need to establish precedent, and the need to review a clearly erroneous factual determination by an IJ.

Petitioner is alleging that there was a breach of the confidentiality rules under 8 CFR 208.6(a). Since it does not appear as if the BIA has ruled definitively on this issue and there are different Circuit Courts of Appeals on this particular question as well, perhaps the Board, en banc, ought to review this matter. Secondly, the IJ engaged in an almost cavalier examination of the evidence, facts and the law in denying the motion to reopen. Petitioner is indeed “Jean Noel Fongwo” not “Jean Tamu”; there is no clearer recognition of this fact than the Court’s caption of the matter. Yet, the IJ ruled that Petitioner was not who he said he is. The BIA ought not to just rubber stamp an erroneous factual determination of the IJ; it must independently examine facts and circumstances and totality of evidence in light of precedence. Thirdly, the IJ did not consider Board and Supreme Court precedent in reaching a decision in this case and a narrow review and interpretation of the facts clearly do not warrant a summary affirmance in this matter. This matter ought to be remanded so that a richer record may be developed and the IJ review all the facts and evidence that have been presented.

V. CONCLUSION

Petitioner provided new evidence and facts warranting the reopening and/or reconsideration of his case; his affidavit also detailed the problems he

faced in retrieving documents from Cameroon. With all due respect, the IJ's findings, especially on the frivolous application finding, should be revisited. A remand is therefore appropriate in the name of justice and the protection of a vulnerable refuge seeker from the odious Biya regime.

Wherefore, Petitioner prays that the Court overturn the IJ's decision and grant Petitioner protection in the United States especially in light of the violation of the Confidentiality rules. In the alternative, the Court should remand the matter for further review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation 32(a)(7)(C) and word processing program local rules requirement of 28A(C) because:

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CERTIFICATE OF SERVICE

This is to certify that I have this 13th day of December 2004 served
counsel of record in the foregoing matter with two copies of the foregoing

Petitioner's Revised Opening Brief by having same delivered by First-Class

Mail to:

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