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DETERMINING BETTER STANDARDS FOR FIRM RESETTLEMENT, JUDICIAL DISCRETION, AND IMMIGRATION ADMINISTRATIVE PRACTICE

DIALLO V. ASHCROFT, 381 F.3D 687 (7TH CIR. 2004).

*Matthew J. Fery**

I. INTRODUCTION

People from around the world desire to immigrate to the United States because of the promise of political freedom and economic opportunity. Conventional immigration, however, is a bureaucratic process, placing limits on the number of immigrants accepted. It often takes years for prospective immigrants to obtain the proper paperwork and documentation to legally enter the United States.[1] The process is particularly problematic for refugees, who, due to the immediacy of political persecution in their home countries, require expedited entry procedures to avoid further persecution.[2] The United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") provides relief to refugees, authorizing treaty signatories to enact expedited methods for refugees of political persecution to be granted asylum.[3] Asylum relief is what Mamadou Diallo, a Mauritanian national, sought and what the United States Seventh Circuit Court of Appeals was interested in granting in Diallo's case.[4]

Diallo and petitioners like him are subject to administrative procedures that are riddled with substantive and procedural difficulties. For example, judges wrestle with the amount of discretion they can assert over decisions of administrative law judges, how much weight to give external

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[1] And with the primacy of globalization, where the borders of the world have figuratively shrunk due to technological advances and economic liberalization, the velocity of people moving from country to country has, and undoubtedly will, increase, leading to even longer waits to enter the United States through conventional immigration and asylum. *See* Kevin R. Johnson, *Symposium: Law and the Border, Open Borders?* 51 UCLA L. Rev. 193, 263 (Oct. 2003).

[2] Approximately 400,000 refugees who have been physically abused or tortured in their home countries now live in the United States. Encarnacion Pyle, *Refugees Face Different Pain; Grant to Help Victims of Torture Disappears*, Columbus Dispatch 1A (Nov. 27, 2004).

[3] *United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT)* prt. I, art. 3 (Feb. 4, 1985) Intl. Human Rights Instruments T.S. No. 221.1[hereinafter *CAT*].

[4] *Diallo v. Ashcroft*, 381 F.3d 687, 701 (7th Cir. 2004).

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sources when assessing the credibility of a petitioner's testimony, and establishing precedent when reviewing administrative procedures relating to asylum claims. The role of circuit court judges is difficult because circuit court decisions can help guide administrative procedures. Therefore, it is imperative for circuit court judges to establish helpful and comprehensive standards that administrative law judges can use in their consideration of whether a petition for asylum can be granted or not.

In *Diallo v. Ashcroft*, the Seventh Circuit Court of Appeals did not establish helpful and comprehensive standards upon which administrative law judges could reasonably rely and enforce. In fact, the broad and vague firm resettlement standard established by the court, allowing Diallo asylum in the United States, may be improper because it fails to provide any instruction to administrative law judges on how to treat future cases like Diallo's. Therefore, this note seeks to explore how the Seventh Circuit Court of Appeals could have instructed administrative law judges on how to deal with asylum cases like Diallo's in a more effective and comprehensive way.

The background section of this note will tell Diallo's story, beginning from a small town in Mauritania all the way to the Seventh Circuit Court of Appeals. The argument section will critically analyze the standard established by the Seventh Circuit on the issue of firm resettlement, arguing that the standard is unnecessarily broad and vague. The section will argue that the Seventh Circuit should have adopted a test akin to the Third Circuit's test in *Abdille* and should have remanded Diallo's case for further proceedings on the issue of Diallo's possible resettlement in Senegal. The Seventh Circuit did properly remand for review the issues of whether Diallo had experienced past persecution and had a legitimate fear of future persecution if removed to Mauritania. Nonetheless, the court gave insufficient guidance to the immigration judge on remand as to what sources can be considered in determining whether conditions in Mauritania had changed to the extent that Diallo's claims could be rebutted. Furthermore, by remanding Diallo's case to the immigration judge, the court was implicitly acknowledging that a violation of Diallo's due process rights occurred when the asylum officer found that he failed to appear at the initial immigration interview. The conclusion section will provide a summation of the substantive arguments and give a general reflection on the important role circuit court judges play within the context of asylum and immigration law in general.

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II. BACKGROUND

A. *The Story of Mamadou Diallo: How He Got to the United States*

Diallo's claim arose on an application for political asylum, a common form of relief sought by immigrants seeking to flee persecution from their home governments and live peacefully within the borders of the United States.[5] The process of either receiving or being denied asylum is an administrative process. Immigration law judges, acting as administrative law judges, are warranted considerable deference towards their decisions by reviewing appellate courts.[6] Asylum hearings are a particularly unique type of administrative procedure because they have a foundation in international treaties, and generally exist as highly interesting and intriguing stories of human toil and struggle.[7]

Mamadou Diallo was born in Foundu, a town in the country of Mauritania, on August 20, 1958.[8] Mauritania is a state in west Africa[9] that has a considerably large and barren terrain.[10] Mauritania has a population of 2.8 million and the Mauritanian government is largely an Islamic republic with a strong presidency.[11] Until 1960, Mauritania was a colony of France.[12]

Considerable social, economic, and political strife has existed in Mauritania since becoming an independent state.[13] Mauritania is largely divided between a "white" or "*beydanes"* Moor ruling class and a "black" Moor underclass.[14] The black Moor population has suffered since independence, largely because of increased desertification (natural expansion of the Sahara Desert)[15] and political, economic, and social

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[5] 8 C.F.R. § 208.1 et seq. (2005).
[6] Decisions of administrative law judges, when subject to judicial review by appellate courts, are weighed against a substantial evidence standard, whether the substantial evidence supports the administrative law judge's decision. *See Chevron U.S.A. Inc. v. Natl. Resources Def. Council*, 467 U.S. 837, 844 (1984).
[7] *See CAT*, *supra* n. 3.
[8] Pets. Br. at 3, *Diallo v. Ashcroft*, 2003 WL 23339882 (7th Cir. Apr. 8, 2003); *Diallo*, 381 F.3d at 690.
[9] Mauritania is located on the Atlantic Ocean coast in western Africa at the southwestern end of the vast Sahara Desert. National Geographic Society (U.S.), *Atlas of the World*, 86 (8th ed., Natl. Geographic Socy. 2004). The country lies immediately north of the Senegal River and the country of Senegal. *Id.*
[10] While Mauritania is larger in surface area than the states of Texas and New Mexico combined, approximately eighty percent of its land consists merely of barren desert. *Background Note: Mauritania*, U.S. Dept. of State, Bureau of African Affairs 1 (Mar. 2005).
[11] *Id.*; *see also Mauritania Country Report on Human Rights Practices*, U.S. Dept. of State, Bureau of Democracy, Human Rights, and Lab. 1 (Feb. 25, 2004).
[12] *Atlas of the World*, at 129.
[13] *Id.*
[14] *Background Note: Mauritania*, *supra* n. 10, at 2.
[15] *Atlas of the World*, at 129; Pet.'s Br. 4 (Apr. 8, 2003).

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oppression by the white Moor leadership.[16] Discrimination exists at all levels of Mauritanian society and has gradually intensified over the years.[17]

Mamadou Diallo and his family, all black Moors, were presumably at the receiving end of this discrimination.[18] Both Mamadou Diallo and his younger brother, Saidou Diallo, were members of the principal Mauritanian armed opposition movement to the *beydanes* leadership, the African Liberation Forces of Mauritania, or FLAM.[19] FLAM was founded in 1983 from a coalition of 4 political groups[20] all seeking to end racial discrimination in Mauritania.[21] The founding members sought to promote a non-violent discussion about political oppression so that all Mauritanians, especially the disengaged and disenfranchised black Moor population, would have a legitimate stake in the country's future.[22]

In 1989 or 1990, Saidou Diallo, who was a leader of FLAM, was arrested by Mauritanian officials, imprisoned for six months, tortured and eventually killed.[23] Saidou's tragic death came at a time when the Mauritanian government was undertaking widespread arrests to thwart political instability and generally cleanse Mauritanian society from outspoken black Moor leadership.[24]

Mamadou Diallo was not affected by the government persecution until approximately May 1993.[25] At that time, Diallo was arrested by Mauritanian officials and sent to jail without having the opportunity for a trial or to speak to an attorney.[26] Diallo remained in jail for 6 months.[27] In prison, he was subject to "hard labor" practices and experienced abuse from a prison guard when his arm was slashed for working too slowly.[28]

Upon his release, Diallo's Mauritanian captors sent him on a boat to Senegal, with nothing but an identification card indicating his Mauritanian

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[16] Human Rights Watch, *Human Rights Watch World Report 1990 – Mauritania*, http://www.hrw.org/reports/1990/WR90/AFRICA.BOU-06.htm#P339_74389 (accessed Mar. 20, 2006) [hereinafter *World Report 1990*].
[17] *Id.*
[18] Pet.'s Br. 4.
[19] *Diallo*, 381 F.3d at 690.
[20] The four groups were "*Movement des Eleves Noir*, *L'Organization Pour la Defence des Interets des Negro-Africans de Mauritanie* or LODINAM, *Organization Popular des Africans de Mauritanie,* and *Lignee Democratique de Mauritanie*." Bill Weinberg, *Mauritania: Slavery, Ethnic Cleansing, Democratic Opposition; Voices of the African Liberation Forces of Mauritania (FLAM)*, http://www.ww4report.com/ node/1022 (accessed Mar. 20, 2006).
[21] *Id.*
[22] *Id.*
[23] *Diallo*, 381 F.3d at 690.
[24] *World Report 1990*, *supra* n. 16, at 4.
[25] *Diallo*, 381 F.3d at 691.
[26] *Id.*
[27] *Id.*
[28] *Id.*

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nationality.[29] Senegal lies immediately south of the inhabitable areas of Mauritania.[30] Diallo's forced expulsion to Senegal was not a unique experience among black Mauritanians at that time.[31] The governments of Mauritania and Senegal, as early as 1989, began a process of "Arabization," whereby the Mauritanian government would deport black citizens to Senegal.[32] The deportations continued in various forms.[33] By 1992, there was an estimated 50,000 Mauritanian refugees in Senegal.[34]

Diallo remained in Senegal for approximately 4 years.[35] To provide some sort of lifestyle, Diallo began selling small things.[36] Diallo lived in an apartment with a former acquaintance, went to church, and even made a trip to the capital city of Senegal.[37] Since Diallo was not living in a refugee camp, he did not seek asylum from Senegalese officials; nor was any offer of asylum ever proposed to him by those officials.[38] And even though he had no legal right to live in Senegal, Diallo was never bothered by Senegalese immigration officers.[39]

B. *Moving Through the Administrative Process: Diallo's Claim before the Immigration Judge and the Bureau of Immigration Appeals*

On June 3, 1997, Diallo arrived in the United States at Baltimore after stowing away on a ship bound from Senegal.[40] Approximately two months later, Diallo submitted INS Form I-589 seeking asylum refugee status with the United States government, and the application was received by the government on August 12, 1997.[41] However, Diallo's interpreter failed to appear at his asylum interview with immigration officials, making Diallo unable to participate in the interview, constituting a failure to appear.[42] Federal regulations stipulate that if an asylum applicant fails to

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[29] *Id.*
[30] *Atlas of the World* at 86.
[31] *World Report 1990*, *supra* n. 16, at 1.
[32] *Id.*
[33] *Id.* While concerted deportations occurred primarily in 1989-1990, deportations continued well after that, as the *Diallo* case suggests.
[34] Human Rights Watch, *Human Rights Watch World Report 1992 – Mauritania*, http://www.hrw.org/reports/1992/WR92/AFW-05.htm#P327_1144510 (accessed Mar. 20, 2006) [hereinafter *World Report 1992*].
[35] *Diallo*, 381 F.3d at 691.
[36] *Id.*
[37] Pet.'s Br. 5.
[38] *Diallo*, 381 F.3d at 691; Pet.'s Br. 5.
[39] *Diallo*, 381 F.3d at 691; Pet.'s Br. 5.
[40] *Id.*; Pet.'s Br. 6.
[41] *Diallo*, 381 F.3d at 691; Pet.'s Br. 6.
[42] *Diallo*, 381 F.3d at 691.

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appear for an interview, removal proceedings may immediately begin.[43] Subsequently, the immigration judge, receiving information from the asylum interview officer and listening to Diallo's testimony, but without making any determinations as to Diallo's credibility, found that Diallo's experiences in Mauritania—his detention, abuse, and expulsion—did not amount to persecution entitling Diallo to relief from deportation.[44] The immigration judge further found that Diallo had been firmly resettled in Senegal, was ineligible for asylum, and failed to meet the high burden for withholding his removal from the United States.[45]

The Board of Immigration Appeals ("BIA") took Diallo's appeal and summarily affirmed the findings of the immigration judge.[46] The BIA's decision hinged on the government's claim that Diallo was firmly resettled in Senegal.[47] The BIA's decision was the final step in the administrative process for Diallo, leaving his only route for review in the Seventh Circuit Court of Appeals.[48]

C. *The Decision of the Seventh Circuit Court of Appeals*

The Seventh Circuit Court of Appeals reversed the prior decisions of the immigration judge and the BIA.[49] First, the court found that the immigration judge failed to consider whether Diallo had received a vel-non offer of formal resettlement from the Senegalese government as a factor in determining whether Diallo was firmly resettled in Senegal.[50] An offer of formal resettlement, or an otherwise firm resettlement, in a third country has been determined by Congress to be a central factor in determining whether a party can be granted asylum.[51] Since the immigration judge and the BIA did not consider this factor in making its determination in Diallo's case, the

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[43] 8 C.F.R. § 1208.3(b) (2005). When a person seeking asylum submits their asylum application with immigration officials, they are also submitting a "withholding of removal" or deportation form simultaneously. Participation in the asylum process effectively prevents a premature removal. *See id.*
[44] *Diallo*, 381 F.3d at 691.
[45] *Id.*
[46] *Id.* Due to a backlog of asylum cases within the immigration courts, the United States Department of Justice has streamlined appellate procedures, where, according to Marshall Fitz, associate director of advocacy with the Washington, D.C.-based American Immigration Lawyers Association (AILA), "[w]hat we're seeing in a typical [asylum] case is that the immigration judge makes an oral decision, the noncitizen appeals that decision and the BIA invokes the streamlining regulations" affirming the immigration judge's decision to the Circuit Court. Richard Acello, *Asylum Logjam: Streamlined Immigration Cases Are Flooding Federal Appeals Courts*, 91 ABA J. 18 (Oct. 2005). And Congress has proposed to consolidate the immigration appeals process further by sending all appeals to the United States Court of Appeals for the Federal Circuit. Rachel L. Swarns, *In Bills' Small Print, Critics See a Threat to Immigration*, N.Y. Times (Mar. 25, 2006).
[47] *Diallo*, 381 F.3d at 692.
[48] *Id.*
[49] *Id.* at 690.
[50] *Id.* at 694.
[51] *Id.* at 693; 8 C.F.R. § 208.14 (2005); 8 U.S.C.A. § 1158(b)(2)(A)(vi) (West 2005).

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court reversed the decision.[52]

Second, the court found that the immigration judge and the BIA failed to determine the credibility of Diallo's testimony on claims of past persecution.[53] The court noted that credibility determinations made by immigration judges are granted considerable deference in federal appellate courts, and a court "must be convinced" that evidence warrants a contrary conclusion.[54] The court found that it was very difficult to ascertain the immigration judge's impression of Diallo's credibility because no such impression could be gleaned from the record.[55] Therefore, the court remanded the decision to the immigration judge for further consideration of the credibility of Diallo's testimony.[56]

Third, the court found that the immigration judge and the BIA "failed to support its decision on [Diallo's] fear of future prosecution with reasonable or substantial evidence."[57] The court found that the immigration judge "waffled" on the credibility of Diallo's testimony; relied on information provided by the State Department that is prone to bias; and rather than premising the Diallo's claim that he was expelled because of his political opinions, the court assessed Diallo's claim fearing future persecution on a discussion of Mauritanians who had been expelled because of their race and ethnicity.[58] Therefore, the court reversed the immigration judge's decision and remanded it for further proceedings.[59]

III. ARGUMENT

A. *The Firm Resettlement Standard Which the Seventh Circuit Establishes is Much too Vague and Broad*

A person seeking asylum can be barred from receiving asylum if a court finds that person was firmly resettled in a country other than his home country prior to fleeing to the United States.[60] The doctrine of firm resettlement has considerable history in immigration law and practice, having its formal, modern root in the 1951 Convention Relating to the Status of Refugees.[61] Since no binding precedent or elaborative authority exists on

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[52] *Diallo*, 381 F.3d at 690.
[53] *Id.*
[54] *Id.* at 698.
[55] *Id.* at 698-99.
[56] *Id.* at 699.
[57] *Id.* at 690.
[58] *Id.* at 700.
[59] *Id.* at 701.
[60] 8 U.S.C.A. § 1158(b)(2)(A)(vi).
[61] The convention states that a person seeking asylum is not a refugee if the person "has acquired a new nationality, and enjoys the protection of the country of his new nationality . . . ." U. of Minn. Human Rights Library, *Convention relating to the Status of Refugees* art. I § C(3) (Apr. 22, 1954), 189 U.N.T.S. 150, http://www1.umn.edu/humanrts/instree/v1crs.htm (accessed Mar. 7, 2006).

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what constitutes firm resettlement, individual states, through their own jurisprudence and regulatory powers, have created their own standards toward determining whether a party was firmly resettled prior to seeking asylum.[62]

The United States government has formally integrated the concept of firm resettlement into its regulatory and legislative immigration regime. Federal regulations state that persons resettled in another country who seek asylum in the United States will not be granted asylum.[63] A person will be considered to have been firmly resettled in another country 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."[64] A person can rebut a court's firm resettlement finding by asserting that he or she only stayed in the other country until it was safe to flee, or that even with a formal offer, the third country severely restricted the person's personal rights.[65] This mandatory bar to asylum was enacted into the United States Code by Congress in 1996.[66]

The exact parameters of what constitutes an offer of permanent settlement have been the subject of considerable discussion and debate among the courts. In order to determine whether such an offer has been made, circuit courts have remanded an asylum decision back to the agency for further investigation to determine whether, pursuant to the immigration laws and practice of the country where resettlement is an issue, an offer had been made to the petitioner seeking asylum.[67]

When remanding an asylum petition back to the agency, the Third Circuit established a standard of practice for the government and the asylum petitioner for determining whether an offer was made.[68] The Third Circuit found that upon remand, the agency carries the initial burden of showing that an offer was made, and that such an offer can be proven with sufficient

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[62] *See* Robert D. Sloane, *Article: An Offer of Firm Resettlement*, 36 Geo. Wash. Intl. L. Rev. 47 (2004). Sloane notes that a Canadian court found that rights and obligations constituting firm resettlement include rights to work and receive social services, whereas United States regulations encourage asylum officers to consider the totality-of-the-circumstances to ascertain whether the person was firmly resettled and some courts, like the Seventh Circuit Court of Appeals in *Diallo*, more squarely focus on a formal offer of citizenship to constitute firm resettlement.
[63] 8 U.S.C.A. § 1158(b)(2)(A)(vi).
[64] 8 C.F.R. § 208.15 (2005).
[65] The C.F.R. gives two methods of evaluation for rebuttal: 1) entry was a necessary consequence of flight from persecution, the applicant remained in the third country only until able to resume travel and established no significant ties to the country; or, 2) the authorities of the country of refuge substantially and consciously restricted conditions of the applicant's residence with respect to housing, employment opportunities, education or travel documentation. *Id.*
[66] 8 U.S.C.A. § 1158(b)(2)(A)(vi).
[67] *Abdille v. Ashcroft*, 242 F.3d 477, 480 (3d Cir. 2001).
[68] *Id.*

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evidence that the petitioner for asylum was firmly resettled.[69] The petitioner then has the burden of rebutting the agency's conclusion, also using provisions from foreign law to their support.[70]

In the event that no formal offer was made, the Third Circuit Court of Appeals postulated that a modified "totality-of-the-circumstances" test should be used by the agency to determine whether the petitioner was firmly resettled.[71] Factors that the agency should consider include the length of the alien's stay in a third country, the alien's intent to remain in the country, and the extent of the social and economic ties developed by the alien.[72] Such information would be considered as circumstantial evidence of a government offer of resettlement, or the lack of such an offer.[73]

The approach adopted by the Third Circuit in *Abdille* was not new, but reflected several years of precedent established by other circuit courts. In the late-1990s, the Ninth Circuit Court of Appeals found that when direct evidence of an offer does not exist, other non-offer factors may be used to establish a presumption of firm resettlement.[74]

The Seventh Circuit Court of Appeals in *Diallo* should have adopted the approach taken by the Third Circuit in *Abdille* and remanded the case to the immigration judge for further investigation into whether Diallo was firmly resettled in Senegal.[75] While U.S. immigration regulations clearly state the primacy of a vel-non offer of citizenship as a clear indication of whether a petitioner was firmly resettled in another country, if clear evidence of an offer does not exist, a court's analysis should not end there.[76] Asylum is a very important and integral right of people seeking

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[69] *Id.*
[70] *Id.*
[71] *Id.* at 486-87.
[72] *Id.* at 487.
[73] *Id.*
[74] *Cheo v. INS*, 162 F.3d 1227, 1229 (9th Cir. 1998) (finding that the petitioners length of stay may create a rebuttable presumption of firm resettlement); *see also Andriasian v. INS*, 180 F.3d 1033 (9th Cir. 1999).

While the Ninth Circuit has been criticized in the past for its approach to asylum law, Hall notes that improvements have been made, largely because of communication between the BIA and the Ninth Circuit. Shelley M. Hall, *Quixotic Attempt? The Ninth Circuit, the BIA, and the Search for a Human Rights Framework to Asylum Law*, 73 Wash. L. Rev. 105, 118-27 (Jan. 1998). Hall recommends that further review of the BIA (made in context of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA")) is important to the successful and equitable development of asylum law. *Id.* at 127.

[75] The Seventh Circuit could remand the decision in *Diallo* based on the immigration judge's failure to properly determine the petitioner's credibility, thus constituting either the failure to prove firm resettlement by substantial evidence or an act that constituted an abuse of discretion, whichever standard the circuit wishes to apply. *Elzour v. Ashcroft*, 378 F.3d 1143, 1150 (10th Cir. 2004).

[76] Such a recommendation exists not only to avoid an overbroad standard like the one made in *Diallo*, but also from creating a standard that allows fraudulent claims to proceed. *See* Deborah E. Anker, *Discretionary Asylum: A Protection Remedy for Refugees Under the Refugee Act of 1980*, 28 Va. J. Intl. L. 1, 6-16 (1987) (describing how fraud can occur within the context of an asylum claim).

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entry into the United States.[77] Considering the sheer volume of people seeking entry into the United States through conventional immigration methods, and given the primacy that scholars and legislators give to the concept of asylum,[78] the facts proffered by the petitioner for asylum should not be taken lightly or glossed over. Here, the Seventh Circuit ignores Diallo's length of stay in Senegal, as well as his connections to the geographic area, in favor of relying on the lack of an offer of permanent resettlement by the government of Senegal.[79] The court clearly had high goals in mind when it reversed the immigration judge's findings on firm resettlement, but adherence to the Third Circuit's standard would make the analysis considerably less vague and would provide more comprehensive procedural guidelines for immigration judges, the BIA, and circuit courts in the future. If the Seventh Circuit would have adopted the Third Circuit's process of analysis in *Abdille*, Diallo would still have been granted asylum in the United States, but future courts would have clearer and more specific guidelines to use in assessing whether a party has not been firmly resettled in a third country.[80]

If the Seventh Circuit had adopted the method of the Third Circuit in *Abdille*, the result of Diallo's asylum petition would have been the same. Such a result would occur because the circumstances upon which Diallo entered Senegal were unique. Plainly, Diallo contended, and the Seventh Circuit endorsed the fact, that he was forced to Senegal when his captors sent him away on a boat with nothing but his Mauritanian identification card.[81] Diallo was essentially deported from his home country to a neighboring state.

Diallo's situation is unique, worthy of closer consideration, because his exile to Senegal took place within the context of an extremely large, forced displacement movement initiated by the Mauritanian government of black Moors to Senegal.[82] Beginning in the late 1980s, the Mauritanian government, in a bold disregard for human rights, began forced expulsion of black Moors from the country.[83] As a result, thousands of Mauritanians

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[77] *See* Sarah Ignatius, *Recent Development: Restricting the Rights of Asylum Seekers: The New Legislative and Administrative Proposals*, 7 Harv. Hum. Rts. J. 225, 228-29 (1994).
[78] *See supra* n. 61, at art. I § C(3).
[79] *Diallo*, 381 F.3d at 690.
[80] Commentators noted the sweeping effect *Diallo* would have on asylum law because of the Seventh Circuit's reliance on such scant evidence when finding no firm resettlement occurred. *See* Ron Browning, *Refugee may seek asylum: 7th Circuit Issues First Firm Resettlement Decision Since 1954*, Ind. Law. 3 (Oct. 16, 2004); *see also* David Ziemer, *Firm resettlement requires more than passage of time*, Wis. L. J. (Sept. 1, 2004).

For a particularly harsh assessment of the Seventh Circuit's decision, *see* Patricia Manson, *7th Circuit Tackles 'novel' issue of whether alien resettled elsewhere*, Chi. Daily L. Bull. 1 (Aug. 27, 2004).
[81] *Diallo*, 381 F.3d at 691.
[82] *See World Report 1992*, *supra* n. 34.
[83] *Id.*

were placed into refugee camps in Senegal.[84] The United Nations High Commission on Refugees got involved, brokering a settlement between the governments so as to allow the refugees the option of returning to Mauritania upon a guarantee that they would not be oppressed by the Mauritanian government.[85]

In this context, it is difficult to place the rigid offer of formal settlement upon a person like Mamadou Diallo.[86] The precarious situation between Mauritania and Senegal may have created a situation where the Senegalese government tacitly accepted the existence of displaced Mauritanians because of the political situation in Mauritania. Furthermore, since developing countries like Senegal lack the physical and administrative infrastructure of the United States, it would have been logistically and financially difficult for the Senegalese government to document the Mauritanian immigrants when they entered Senegal. And just because an offer of formal resettlement was not extended to Diallo by the Senegalese government, it may have been extended if Diallo had inquired to government officials. The court cites the lack of any meaningful life experiences for Diallo in Senegal as support for their conclusion that he was not firmly resettled.[87] However, without acknowledgment of the unique social and political circumstances that Diallo was a part of, the Seventh Circuit may have set a standard so vague and broad for rebutting a claim of firm resettlement that anyone, absent receiving an offer of formal citizenship from a country, would be able to receive entry to the United States on the basis of asylum.

While asylum cases are to be decided on a case-by-case basis, criticism questioning the standards courts use to ascertain whether an asylum claim is validly substantiated exists.[88] Especially in consideration of what constitutes an offer of firm resettlement, as has been demonstrated in this section, courts are not uniform in their approach of whether an offer

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[84] *Id.*
[85] *See infra* n. 127 and accompanying text.
[86] As the Seventh Circuit notes, Diallo's capture was several years after the forced deportation and torture campaign of the Mauritanian government. There is an issue whether the passage of time would make Diallo subject to the changed conditions presumption used by so many courts. *See infra*, n. 127 and accompanying text.
[87] *Diallo*, 381 F.3d at 694-95.
[88] *See* Kathryn A. Dittrick Heebner, *Protecting the Truly Persecuted: Restructuring the Flawed Asylum System*, 39 U.S.F. L. Rev. 549 (2005). In this comment, Dittrick Heebner argues that the current asylum system is flawed because even though the burden of proof for petitioners of asylum is low, the significant amount of discretion allotted immigration judges, discretion that is executed unevenly, makes the administrative procedure for asylum petitions unfair and inefficient. *Id*.

Commentators have also criticized that the United States Supreme Court, when hearing an appeal of an asylum case (where the petitioner usually prevailed in the circuit court), is often likely to find in favor of the government. *See* Michael G. Heyman, *Immigration Law in the Supreme Court: The Flagging Spirit of the Law*, 28 J. Legis. 113, 144-46 (2002).

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exists.[89] Courts should not totally disregard the surrounding political and social circumstances, as they may be very relevant in determining whether a party was actually firmly resettled. The Seventh Circuit should have acknowledged the greater social and factual circumstances surrounding Diallo's stay in Senegal. Not necessarily because further analysis would have led to a different conclusion as to whether Diallo was firmly resettled in Senegal, but because further analysis would guide future judges to comprehend the big picture when looking at whether a petitioner is justified to receive asylum when no vel-non offer of resettlement has been extended to the petitioner by the country.

Consideration of the surrounding circumstances in absence of a vel-non offer not only is relevant for courts in ascertaining whether the petitioner is firmly resettled, but also is helpful for determining more accurate and precise judgments. Many cases where firm resettlement is an issue take place in areas of the world where there is considerable political, social, and economic instability.[90] The highly-formal and administrative immigration process in the United States makes it relatively simple for judges in determining whether the United States government has made an offer of formal resettlement to immigrants; but judges should not rest on the American immigration model when looking at whether less wealthy and stable countries have made an offer of formal resettlement to immigrants. Borders are amazingly porous throughout much of the developing world, making it frighteningly simple to enter another country without being noticed by government or immigration officials.[91]

Therefore, the Seventh Circuit should have remanded Diallo's case to the immigration judge on the issue of whether Diallo was firmly resettled because not enough facts existed to effectively conclude that Diallo was not firmly resettled. The court's failure to consider the *big picture* when looking

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[89] Sloane, *supra* n. 62.

[90] Asylum is logically sought by a person who has borne the brunt of considerable social and political strife in an unstable part of the world. Most petitioners for asylum are victims of political instability. The Seventh Circuit should have taken such circumstances into account and remanded the case for further proceedings on the issue of whether Diallo was firmly resettled. Many other circuits consider the larger political situation when assessing whether a petitioner is firmly resettled. *Salazar v. Ashcroft*, 359 F.3d 45 (1st Cir. 2004) (finding that a Peruvian national was firmly resettled in Venezuela and received Venezuelan approval to be in that county when he fled Peru after an extremist group killed his uncle, he moved to Venezuela, married a woman he met in line at the American embassy, and moved to the United States); *Rife v. Ashcroft*, 374 F.3d 606 (8th Cir. 2004) (finding that a Azerbaijani citizen was firmly resettled in Israel because of the Israeli birthright standard, the Israeli government offered benefits); *Mussie v. INS*, 172 F.3d 329 (4th Cir. 1999) (finding an Ethiopian national to have firmly resettled in Germany after fleeing Ethiopia through Sudan, receiving significant benefits from the German government, and was considered to have firmly resettled even though she was subject to racial taunting and threats from German citizens).

[91] Furthermore, such an argument is further supported by the fact that even the borders of the United States are considerably porous as well, as the problem with illegal immigration from the U.S.-Mexico border has shown.

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at Diallo's case creates a standard for considering firm resettlement that is much too vague and broad.

B. *The Seventh Circuit Court of Appeals Properly Remanded Because There Was a Credible Issue as to Whether Diallo Had a Well-Founded Fear of Future Persecution in Mauritania.*

1. What is Persecution Under U.S. Immigration Law?

Finding that a petitioner for asylum either experienced persecution in the past or has a legitimate fear of future persecution is a difficult determination to make because persecution has no formal, concise definition under immigration regulations. Even the United Nations High Commission on Refugees ("UNHCR"), the organization that determines the international standard on the fair treatment of refugees, struggles to discretely define persecution.[92] Since no definition of persecution exists in federal regulations either, asylum cases truly end up being fact-intensive analyses.

The BIA and circuit courts have found that persecution exists in many different factual circumstances, yet years of agency practice has not produced a bright line rule. Persecution has been generally defined by the Seventh Circuit Court of Appeals as "punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate."[93] Courts should measure contentions of the petitioner objectively, without placing very much weight on the alleged motivation and intent of the supposed persecutors.[94] Persecution may exist when a petitioner has been raped or sexually assaulted,[95] has been abused or beaten due to their political opinions,[96] intimidated by government officials,[97] detained against their will by government officials,[98] or has been assaulted and accosted by members of the military.[99] However, the occurrence of violence against the petitioner is often not enough to establish a claim that

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[92] *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* ¶¶ 51-53 (UNHCR, ed. 1992). While the Handbook states that there is no universal definition of persecution, it can be inferred that "a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group" is always persecution. Other serious violations of human rights—for the same reasons—would also constitute persecution. However, the Handbook articulates that signatories to the Convention are generally able to determine themselves whether a petitioner has been persecuted based on case-by-case factual analysis.
[93] *Mitev v. INS*, 67 F.3d 1325, 1330 (7th Cir. 1995).
[94] *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997).
[95] *Kebede v. Ashcroft*, 366 F.3d 808 (9th Cir. 2004); *Lopez-Galarza v. INS*, 99 F.3d 954 (9th Cir. 1996).
[96] *Corado v. Ashcroft*, 384 F.3d 945 (9th Cir. 2004); *Rajaratnam v. Moyer*, 832 F.Supp. 1219 (N.D. Ill. 1993).
[97] *Thomas v. Ashcroft*, 359 F.3d 1169 (9th Cir. 2004).
[98] *Ndom v. Ashcroft*, 384 F.3d 743 (9th Cir. 2004); *Lopez v. Ashcroft*, 366 F.3d 799 (9th Cir. 2004).
[99] *Baballah v. Ashcroft*, 367 F.3d 1067 (9th Cir. 2004); *Ashcroft*, 366 F.3d at 808; *Begzatowski v. INS*, 278 F.3d 665 (7th Cir. 2002).

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persecution exists.[100]

A petitioner's allegation that removal back to their home country is accompanied by a legitimate and reasonable fear of persecution by officials is not enough for courts, even when a court could find that past persecution existed. In such instances, courts look at the totality of the circumstances of the petitioner's allegations.[101] Considerations include: a comparison of the conditions in the country at the time when the alleged persecution occurred and the time at which the asylum proceedings take place, the petitioner's credibility, and any other factors the immigration judge determines.[102]

2. Past Persecution as a Foundation for Substantiating a Claim for Asylum

A successful petition for asylum can be based upon the petitioner's presentation of evidence and steadfast contention that his/her entry into the United States was out of fear of past persecution.[103] Past persecution validly occurs on account of the petitioner's "race, religion, nationality, membership in a particular social group, or political opinion . . . ."[104] Even if a party can show that past persecution exists, changed conditions in the home country will rebut that claim.[105] The validity of the petitioner's claim of past persecution is determined by the immigration judge, who assesses the petitioner's credibility.[106] Here, the immigration judge failed to make a credibility determination of Diallo's testimony, so the Seventh Circuit was correct in remanding the case for further proceedings on the issue.[107]

3. Fear of Future Persecution as the Foundation for Substantiating an Asylum Claim

When a petitioner for asylum has successfully established a claim of asylum based on a fear of past persecution, the court presumes that the petitioner also has a well-founded fear of future persecution if forced to return to his/her home country.[108] The immigration judge may grant asylum

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[100] *Dandan v. Ashcroft*, 339 F.3d 567 (7th Cir. 2003) (finding that petitioner's alleged unjustified detention for three days by police was not enough to show persecution); *Ciorba v. Ashcroft*, 323 F.3d 539 (7th Cir. 2003) (finding that petitioner's alleged claims of police intimidation did not rise to persecution); *Melgar de Torres v. Reno*, 191 F.3d 307 (2nd Cir. 1999) (finding that petitioner's alleged rape by Salvadorean soldiers did not rise to persecution); *Bhatt v. Reno*, 172 F.3d 978 (7th Cir. 1999) (finding that petitioner's claim of oppression based on political opinions did not rise to persecution).
[101] *See generally* Regina Germain, *AILA's Asylum Primer: A Practical Guide to U.S. Asylum Law and Procedure*, §§ 4.5.1 - 4.5.3, 27-32 (3d ed., Am. Immig. Laws. Assn. ("AILA") 2003).
[102] *Id.*
[103] 8 C.F.R. § 208.13(b)(1) (2005).
[104] *Id.*
[105] *Id.* at (b)(1)(A)-(B).
[106] *Id.*
[107] *Diallo*, 381 F.3d at 690.
[108] 8 C.F.R. § 208.13(b)(1). This rule carries an assumption that the source of past persecution and the well-founded fear of future persecution are essentially the same. *See In re N-M-A-*, 22 I. & N. Dec. 312

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to a person who can demonstrate at least a reasonable possibility that he will be persecuted if forced to return to his country of origin.[109] However, the presumption in favor of the petitioner can be rebutted if a fundamental change in circumstances has occurred in the home country, thus allaying fears of future persecution, or if the petitioner could avoid persecution by moving to a part of the country away from his/her persecutors.[110]

Furthermore, courts have found that a petitioner's well-founded fear of future persecution has both subjective and objective components. First, the petitioner must show that his fear of future persecution is subjectively genuine.[111] Second, the petitioner must show that his fear is justified by objective evidence.[112] Petitioner must present evidence proving that the conditions in his home country justify his fear of persecution.[113] The judge must ascertain what level of credibility to attach to the evidence petitioner presents in support of his claim of persecution.[114] In *Diallo*, since the immigration judge failed to make a determination as to Diallo's credibility, the Seventh Circuit was correct in remanding the case for further proceedings to determine the credibility of Diallo's testimony. While the use of State Department Country Reports by immigration courts to support a contention that conditions in petitioner's home country have fundamentally changed are relevant to the immigration judge's determination, the immigration judge should consider an array of secondary sources when considering a country's conditions.

In *Diallo*, the Seventh Circuit Court of Appeals questioned the persuasiveness, validity, and even the accuracy of the U.S. State Department's Asylum and Country Reports.[115] The court noted that the reports had a "potential of bias" and that applicants for asylum have difficulty rebutting the Department's conclusions because of a general lack of resources.[116] While the court is right to question the validity of these reports, the dearth of evidence contradicting the State Department's conclusion about human rights conditions in Mauritania, combined with the fact that the only contrary evidence comes from Diallo's own testimony is too narrow a basis for future courts to rely on in ascertaining whether conditions have fundamentally changed in the country upon which an

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(Dept. of Just. 1998); *see also* Susannah C. Vance, *An Enduring Fear: Recent Limitations on the Past Persecution Ground For Asylum*, 91 Ky. L.J. 947, 979-80 (2002-2003).

[109] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 438-39 (1987).

[110] 8 C.F.R. § 208.13(b)(1)(i)(A)-(B); *Ouda v. INS*, 324 F.3d 445 (6th Cir. 2003).

[111] *Bhatt*, 172 F.3d at 981.

[112] *Id.*

[113] 8 C.F.R. § 208.12(a) (2005).

[114] *Id.*

[115] 381 F.3d at 700.

[116] *Id.*

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applicant for asylum is a citizen.[117]

This is not to say that the State Department's Asylum and Country Reports are not persuasive resources; to the contrary, they provide valuable insight on how the Executive Branch of the United States Government interacts with countries around the world and how it views the political situations of other countries.[118] Courts should be wary to usurp the conclusions of the Executive Branch, as agencies like the State Department are uniquely trained to assess the livability and human rights conditions of countries around the world.[119]

An analysis of State Department Reports on Mauritania's Human Rights Practices holds up to scrutiny and criticisms of alleged bias. The 1999–2004 reports show that the State Department has harshly noted and criticized the Mauritanian government for past and current abuses of human rights.[120] Furthermore, the reports are highly detailed and maintain a sufficient level of objective analysis of the conditions within Mauritania that it would be proper for a reasonable trier-of-fact to use the reports as evidence of changed conditions. Regardless of the reliability of the reports, however, commentators argue that immigration judges and the BIA may place too much emphasis on the reports to show that conditions in the petitioner's home country have changed to rebut a petitioner's claim of fear of future persecution.[121] Immigration judges may rely too heavily on State Department reports because with asylum-seekers arriving from many

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[117] Margulies postulates that the expansion of the changed conditions rebuttal to an asylum claim will unjustifiably lead to the demise of the protection of refugees who seek asylum in the United States. Peter Margulies, *Democratic Transitions and the Future of Asylum Law*, 71 U. Colo. L. Rev. 3, 4 (2000) (citing Deborah Anker, *Law of Asylum in the United States* (5th ed. 1999)); Guy Goodwin-Gill, *The Refugee in International Law* 84-87 (1996). Margulies contends that courts' misinterpretation of the influence of changed conditions in the home country creates a formalistic doctrine upon which otherwise valid asylum claims are unnecessarily denied. Margulies, 71 U. Colo. L. Rev. at 17-35.

[118] Historically, executive branch documents, specifically those in relation to immigration law and practice, have been questioned for a continuing "palpable lack of respect for the political values underlying the human rights protections for refugees . . . ." Carolyn Patty Blum, *A Question of Values: Continuing Divergences Between U.S. and International Refugee Norms*, 15 Berkeley J. Intl. L. 38, 50 (1997). While such an accusation raises a legitimate question of whether executive branch documents can exist as rational, persuasive authority for judicial bodies, such an assessment must be made on a case-by-case basis; no presumption of invalidity should exist.

[119] The Seventh Circuit Court of Appeals has been critical of the State department reports in the past. *See Niam v. Ashcroft*, 354 F.3d 652, 657 (7th Cir. 2004).

[120] "The Government's human rights record remained [generally] poor"; there was some improvement in a few areas, but problems remain in others. U.S. Dept. of State Bureau of Democracy, Human Rights, and Lab., *U.S. Department of State Country Report on Human Rights Practices for Mauritania - 1999* 1 (U.S. Dept. of State 1999). The State Department continued to criticize the human rights practices of the Mauritanian government in the reports for 2000, 2001, 2002, 2003, and 2004.

[121] Vincente A. Tome, *Administrative Notice of Changed Country Conditions in Asylum Adjudication*, 27 Colum. J.L. & Soc. Probs. 411 (1994). Tome argues that the BIA should at least provide a procedural guideline for asylum petitioners on the weight given to Executive Branch documents that provide insight from the federal government on whether conditions in the petitioner's home country have changed to rebut a claim of asylum. *See also* Margulies, *supra*, n. 117.

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obscure parts of the world, there simply are not many secondary sources judges can use to make a determination of changed conditions. In addition, the State Department reports may also allow judges to show that conditions in the country have fundamentally changed without ever concluding on the credibility of the petitioner's testimony.[122] Overall, however, a general reliance on executive branch sources is proper because they exist as persuasive examples of U.S. government policy towards the home country.

Nonetheless, the Seventh Circuit was correct to acknowledge that immigration judges should not place too much weight on Country Reports.[123] The Seventh Circuit should have gone a step further, encouraging immigration judges and the BIA to use other secondary sources as evidence of assessing a country's condition to provide a comprehensive and full analysis of human rights conditions. Many secondary sources exist on human rights abuses in Mauritania and an assessment of them shows that they are in general agreement with the conclusions and factual findings of the State Department documents.[124] Secondary sources should be relevant to any agency's assessment and have even been used by petitioner's counsel to substantiate an asylum claim.[125]

The Sixth Circuit Court of Appeals has routinely relied on State Department Country Reports for Mauritania when assessing whether changed conditions exist to rebut an asylum petition.[126] Many of the asylum

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[122] Indeed, the almost boilerplate reliance that the Sixth Circuit Court of Appeals places on the Country Reports raises a legitimate question as to whether the credibility of petitioners' testimony is truly being considered. *See also Diallo v. Gonzales*, 140 Fed. Appx. 612 (6th Cir. 2005) (unpublished).

[123] *Diallo*, 381 F.3d at 700.

[124] Extensive state-sponsored human rights abuses have occurred in Mauritania of late, including forcible expulsions of minority ethnic groups, land expropriation of minority ethnic groups, particularly Black Moors, particularly horrendous allegations of slavery, and other forms of discrimination. Human Rights Watch/Africa, *Mauritania's Campaign of Terror: State-Sponsored Repression of Black Africans* (Human Rights Watch 1994) [hereinafter *Mauritania's Campaign of Terror*]. Many important resistance leaders were arrested and disappeared, including many members of FLAM, the group that Diallo's brother was very involved with. *Id.* Further accounts of slavery in Mauritania have been substantiated in other sources, which have on occasion been used by counsel for petitioners to help solidify an asylum claim. *See Diallo*, 140 Fed. Appx. at 612.

It is also important to note that Mauritania's spotty human rights record remains controversial. *See* Jason Motlagh, *Protesters blast Arab rule in Mauritania*, United Press Intl (UPI) (Apr. 5, 2005); *see also* Sherri Williams, *Asylum-Seekers May Face Tougher Challenge*, Columbus Dispatch 10A (Apr.10, 2005).

[125] And a petitioner's use of secondary sources to substantiate a claim that asylum is warranted does not always succeed. *See Diallo*, 140 Fed. Appx. 612; *Sarr v. Gonzales*, 127 Fed. Appx. 815 (6th Cir. 2005) (unpublished) (finding that the petitioner's proffered evidence of the book *Silent Terror*, documenting slavery in Mauritania, did not effectively rebut changed country conditions); *see also* Samuel Cotton, *Silent Terror: A Journey into Contemporary African Slavery* (Writers & Readers Publg. 1999).

In *Niang v. INS*, petitioner proffered testimony from a professor of African studies to support their claim of fear of future persecution, however unsuccessfully, because of the presumptive force ascribed by the Sixth Circuit to the State Department Country Reports. 106 Fed. Appx. 970, 972 (6th Cir. 2004) (unpublished).

[126] *See Diallo*, 140 Fed. Appx. at 615-16.

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cases brought before the Sixth Circuit use the Country Reports as an effective rebuttal to claims of Mauritanian nationals who alleged persecution from a state-sponsored act that occurred between 1989–1991.[127] The Sixth Circuit precedent, while illustrative of a cohesive and comprehensive approach of deference to agency and executive branch authority, is not directly helpful to *Diallo*. However, it provides a persuasive guideline on the weight to attach to such documents in relation to the use of other secondary sources.

Since the majority of these fact-finding determinations are to be conducted by immigration law judges, the Seventh Circuit was correct in remanding *Diallo* for further consideration.[128] The court's questioning of the State Department Country Report for Mauritania was not particularly helpful to immigration judges because the Sixth Circuit has given considerable weight to the information within those reports.[129] As this section indicates, the court would have been wise to instruct immigration judges to allow the use of a wide variety of sources in their consideration of asylum claims, so as to avoid any potential bias that may exist in Executive Branch documents. While all information in this case suggests that bias probably does not exist, for future precedent, the court would have been wise to mplement such a standard to prevent even the remote possibility of bias. A Credibility Determination is necessary to determine whether a petitioner has sufficiently shown that he has not been firmly resettled in a third country. The Seventh Circuit, by failing to conduct or allow a Credibility Determination of Mr. Diallo's resettlement in Senegal, has usurped the ability of immigration courts to conduct such determinations.

A petitioner's credibility is initially determined at the asylum interview conducted by the Executive Office for Immigration Review ("EOIR").[130] At the interview, the applicant has the opportunity to present witnesses and affidavits to support his claim.[131] The asylum officer is

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[127] The Country Reports indicated that a majority of those forcibly deported by the Mauritanian government between 1989-1991 have "successfully returned to Mauritania." *Id.* Reason for their return is the involvement of the UNHCR in brokering an agreement with the Mauritanian and Senegalese government. *Id.* Such evidence was found to rebut fear of persecution upon return to Mauritania because the conditions in the country had changed. *Id.*; *see also Sall v. Gonzales*, 124 Fed. Appx. 377 (6th Cir. 2005) (unpublished); *Diack v. Ashcroft*, 110 Fed. Appx. 648 (6th Cir. 2004) (unpublished); *Kalidou v. Ashcroft*, 108 Fed. Appx. 381(6th Cir. 2004) (unpublished); *Aw v. INS*, 107 Fed. Appx. 585 (6th Cir. 2004) (unpublished); *Diaw v. Ashcroft*, 108 Fed. Appx. 318 (6th Cir. 2004) (unpublished); *Guisse v. INS*, 107 Fed. Appx. 564 (6th Cir. 2004) (unpublished); *Mbaye v. INS*, 106 Fed. Appx. 371 (6th Cir. 2004) (unpublished).
[128] *Diallo*, 381 F.3d at 701.
[129] *See supra*, n. 127 and accompanying text.
[130] The EOIR is a division of the Department of Justice ("DOJ") and is generally responsible for the oversight and adjudication of immigration cases. Courts under the auspices of the EOIR include the individual immigration judges and the BIA.
[131] 8 C.F.R. § 208.9(b) (2005).

charged to consider all the information presented and assess whether the applicant has demonstrated a viable claim of asylum. If the asylum officer finds that the applicant has met his burden of proof, then asylum is granted.[132] However, the asylum officer also has the discretion to deny the application for asylum, as the asylum officer found in *Diallo*.[133] In the denial, the asylum officer must present an assessment of the credibility of the petitioner's testimony and representations.[134] When the asylum officer denies the petitioner's request for asylum, the officer must also automatically refer the applicant's request to the immigration judge for further adjudication.[135]

A petitioner's testimony is credible if it is sufficient to sustain a burden of proof "in light of general conditions in the applicant's country of nationality" or, if stateless, "last habitual residence."[136] The immigration judge has responsibility for making a credibility determination, and the judge's conclusion is given *Chevron*-like deference by the BIA and circuit courts.[137] Credibility findings are important because they weigh heavily on whether a petitioner's application for asylum will succeed. So the failure of an immigration judge to make such a determination is grounds for remand. In *Diallo*, the immigration judge failed to make a credibility determination on Diallo's testimony.[138] Since a credibility determination would affect all material parts of Diallo's application for asylum, as well as the validity of any defenses and contentions raised by the government, it would behoove the Seventh Circuit not to remand Diallo's entire application, including the portions regarding firm resettlement, back to the immigration judge for further proceedings. Such a result would be appropriate as it would provide Diallo with adequate due process standards in administrative procedures. The failure of Mr. Diallo's interpreter to appear before the asylum officer at his interview should not constitute a failure to appear under immigration law because it resulted due to no fault of Mr. Diallo; courts acknowledge a due process right for petitioners who need an interpreter; and the failure of the interpreter to appear could be construed as Mr. Diallo being subjected to an incompetent interpreter.

The right to an interpreter at an asylum hearing is a right incumbent

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[132] 8 C.F.R. § 208.14(e).
[133] 8 C.F.R. § 208.14(c)(2); *Diallo*, 381 F.3d at 691.
[134] Germain, *supra* n. 101, at § 2.5.6, 109.
[135] 8 C.F.R. § 208.14(c).
[136] 8 C.F.R. § 208.13(b)(1).
[137] See *Chevron U.S.A. Inc.*, 468 U.S. at 1227 (finding that a court should not overturn an agency's interpretation of a statute unless it is contrary to clear congressional intent).

Some commentators argue that the deferential standard established in *Chevron* should not be controlling, and courts should take a "hard look" at an agency's asylum decisions. *See* Kevin R. Johnson, *A "Hard Look" at the Executive Branch's Asylum Decisions*, 1991 Utah L. Rev. 279 (1991).
[138] 381 F.3d at 691.

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to receiving a full and fair hearing as part of an administrative adjudicative proceeding. Under current immigration law precedent, if a petitioner is provided with an interpreter that does not speak his native language, the petitioner's right to a full and fair hearing will be deemed as having been violated.[139] Such a violation of a petitioner's due process rights should extend to situations where, like in *Diallo*, due to no fault of the petitioner, the interpreter fails to show up. A petitioner for asylum should not be penalized by being classified as having "failed to appear" because such a determination could cast a negative shadow on the ultimate outcome of the petitioner's case. Therefore, Mr. Diallo's due process rights were violated when the immigration judge found that he failed to appear for his asylum interview when his interpreter failed to show up.

The United States Supreme Court has found that non-citizens entering the United States, whether lawfully or unlawfully, are entitled to protection under the Due Process Clause of the Fifth Amendment of the United States Constitution when subject to procedures of administrative agencies.[140] Circuit courts have upheld the due process rights of asylum applicants, finding various circumstances where administrative agencies had improperly denied process to asylum applicants. Such instances include: where documents provided by a government agency were speculative and unfairly used against the applicant,[141] where the applicant had insufficient time to prepare arguments showing valid fears of future persecution,[142] where the applicant was a stowaway and was denied an asylum hearing,[143] and where the asylum officer failed to allow the applicant to support his contention of presenting credible testimony.[144]

Courts have previously recognized that an asylum petitioner's due process right to a full and fair hearing has been violated when the petitioner's interpreter did not speak the petitioner's native dialect.[145] In *Amadou*, a Mauritanian citizen seeking asylum in the United States had an interpreter who failed to speak the applicant's native dialect.[146] The failure

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[139] *Amadou v. INS*, 226 F.3d 724, 725 (6th Cir. 2000).
[140] *U.S. ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954).
[141] *Ezeagwuna v. Ashcroft*, 301 F.3d 116, 128 (3d Cir. 2002) (finding reliance on State Department letter which contained multiple hearsay of the most troubling kind violated the applicant's due process rights).
[142] *Andriasian v. INS*, 180 F.3d 1033, 1041 (9th Cir. 1999) (holding that the last minute designation of Armenia as a country of deportation deprived applicant of the opportunity to prepare and present relevant arguments and evidence regarding the harm he would suffer in Armenia).
[143] *Selgka v. INS*, 184 F.3d 337 (4th Cir. 1999) (finding that the denial of opportunity for a stowaway from Kosovo to have his asylum claim heard before an impartial immigration judge violated due process).
[144] *Stoyanov v. INS*, 172 F.3d 735 (9th Cir. 1999) (finding that by raising the issue of the applicant's credibility sua sponte without affording the applicant an opportunity to offer an explanation of any supposed inconsistencies, the BIA violated the applicant's right of due process).
[145] *Amadou*, 226 F.3d at 725.
[146] *Id.*

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of the interpreter to properly translate the asylum officer's questions and the petitioner's answers resulted in miscommunications, leading to the denial of the petitioner's asylum request.[147] On appeal to the Sixth Circuit Court of Appeals, the petitioner successfully argued that the interpreter's failure to translate his statements and the asylum officer's questions constituted a violation of the petitioner's due process rights.[148] Furthermore, the court noted that the petitioner was prejudiced by the interpreter's error-ridden translation as both the immigration judge and the BIA relied on the petitioner's testimony in denying his request for asylum, and that the petitioner's testimony played an important role in the immigration judge's credibility determination.[149]

The failure of an interpreter to appear, where the failure of the interpreter to appear has occurred due to no fault of the petitioner, should not detrimentally affect the petitioner's ability to receive asylum. It is sometimes difficult to obtain an interpreter for asylum petitioners because of the primitive nature of the petitioners' language. This is especially problematic for petitioners of asylum because if their inability to obtain an interpreter eventually leads to an unsuccessful petition for asylum, then they will be removed to their home country (where they were previously subjected to persecution) due to what is essentially a procedural error. Such a result is not consistent with the words, spirit, and purpose of either the CAT or U.S. immigration regulations. Therefore, courts should extend guaranteed due process rights to petitioners for asylum whose interpreters fail to appear due to no fault of the petitioner.

Under current immigration law, the petitioner's failure to appear "may result in the dismissal of the asylum application or the waiver of the right to an interview."[150] A failure to appear may result if, without good cause shown, the applicant fails to procure an interpreter that can translate both the applicant's language and English.[151] The petitioner's failure to appear will expedite removal back to the petitioner's home country, with the application being referred to an immigration judge for adjudication.[152]

When an interpreter fails to appear, due to no fault of the petitioner for asylum, the immigration judge should not categorize such circumstances as a "failure to appear." There are several reasons for this: first, assuming that the petitioner has a valid case for asylum, saying that he "failed to

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[147] *Id.* at 725-26.
[148] *Id.* at 727.
[149] *Id.* at 725; *see also Perez-Lastor v. INS*, 208 F.3d 773 (9th Cir. 2000); *Augustin v. Sava*, 735 F.2d 32 (2d Cir. 1984); *Gonzales v. Zubrick*, 45 F.2d 934 (6th Cir. 1930).
[150] Germain, *supra* n. 101, at 107; *see also* 8 C.F.R. § 208.10 (2005).
[151] Germain, *supra* n. 101 at 107; *see also* 8 C.F.R. § 208.10 (2005).
[152] 8 C.F.R. § 208.14(c)(2); *see also Diallo*, 381 F.3d at 691.

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appear" makes his case much more difficult to prove.[153] Second, asylum is something that the federal government does not discourage.[154] Third, it makes more sense administratively for judges to grant deference and allow petitioners the requisite due process.

IV. CONCLUSION

The Seventh Circuit may have been correct in finding that Diallo was not firmly resettled in Senegal. Asylum is meant for people just like Diallo, who have been persecuted in the past because of their alleged political beliefs and/or their ethnicity. However, the issue of free riders is a persistent problem in the judicial system.[155] If courts allow asylum based on the broad and vague standards established by the Seventh Circuit in *Diallo*, a significant risk exists that many fraudulent claims could move through the system merely because no vel-non offer of resettlement was made to the petitioner. To avoid such a circumstance, circuit courts should impose clearer and more comprehensive guidelines on immigration courts so as to improve the probability that only legitimate claims filter through the system. Therefore, the Seventh Circuit should have considered the totality of the circumstances in ascertaining whether Diallo was firmly resettled. The court should have remanded on the issue because not enough facts existed on the topic. The court should have created a guideline on what sources can be considered in determining whether changed conditions exist in the home country. Finally, the court should have acknowledged that Diallo's due process rights were violated when he was deemed to have failed to appear when his interpreter did not show up at his asylum interview. While the administrative process is a creature of the Executive Branch, the Judicial Branch informs the process greatly through their precedence and reasoning. The Seventh Circuit should have better informed the immigration courts on the process to create a more efficient and fair asylum system.

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[153] This can be shown through the difficulty Diallo's counsel had in proving to the immigration judge and the BIA that he had been firmly resettled.
[154] *See* 8 C.F.R. § 208.1 et seq.
[155] And such free riding can have far-reaching effects. Take the case of young Adama Bah, who may be removed from the United States because of her father's false claim for asylum as a refugee from Mauritania. *See* Nina Bernstein, *An Art Class's Lesson in Politics*, N.Y. Times B3 (July 25, 2005); *see also* Dittrick Heebner, *supra* n. 88.