

Docket No. **07-4254-cr**

In the
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

RAMATULAI BARRY,
aka "Jeannita Richards",

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

Brief on Appeal for Defendant-Appellant

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Statement of Jurisdiction

The District Court had subject matter jurisdiction of this case under 18 U.S.C. § 3231. This case involves a criminal prosecution in which the Defendant - Appellant, Ramatulai Barry pled guilty to the three counts of an indictment charging violations of 18 U.S.C. § 1546(a), false impersonation; 18 U.S.C. § 1544, misuse of passport and 18 U.S.C. § 1543, false use of passport. A. 168-192. This Court has appellate jurisdiction under 28 U.S.C. § 1291. The Judgment was entered in the Office of the Clerk, Northern District of New York on September 25, 2007. A. 212-216. A notice of appeal was filed the same day. A. 217.

This appeal is taken from a judgment of conviction and sentence imposed after a guilty plea that disposed of all federal claims against Mrs. Barry.

Statement of Issues Presented

- I. Whether the District Court Clearly Erred When it Found that the Immigration Authorities had Inadequate Notice of the Claim for Asylum ?**

- II. Whether International and United States Law Prohibited the Criminalizing of an Asylum Seeker Prior to Adjudicating Her Claim for Safehaven ?**

- III. Whether the Criminal Charges and Eventual Indictment Violated the Statutes and Regulations Guiding the Conduct of Immigration Officials for Asylum Seekers Requiring Dismissal of the Indictment for Violating Due Process?**

Statement of the Case

Mrs. Barry was charged in the Northern District of New York by criminal complaint on September 9, 2006. A.8. She was remanded to the custody of the U.S. Marshals and transported to the Northern District Court in Albany New York for an appearance before Magistrate Judge Randolph Treece. A. 9. Undersigned, Gene Primomo was assigned to represent Mrs. Barry.

A grand jury returned a three count indictment on September 14, 2006 charging violations of 18 U.S.C. § 1546(a), false impersonation; 18 U.S.C. § 1544, misuse of passport and 18 U.S.C. § 1543, false use of passport. A. 10-11. Mrs. Barry was arraigned and was released on bond but remanded to the custody of immigration officials.

Mrs. Barry through counsel moved to the dismiss the indictment on March 9, 2007. A. 12- 68. The motion was denied on April 6, 2007. A. 153-157.

Mrs. Barry then decided to enter a plea of guilty to the violations charged in the indictment: 18 U.S.C. § 1546(a), false impersonation; 18 U.S.C. § 1544, misuse of passport and 18 U.S.C. § 1543, false use of passport 18 U.S.C. § 1543 pursuant to a plea agreement on May 2, 2007. A. 158-166.

She was sentenced on September 19, 2007 to a period of time served with one year of supervised release for each count to be served concurrently. A. 207-

208. She and her husband are currently in the United States hoping to be granted a stay of removal or asylum.

Statement of Relevant Facts

Mrs. Barry arrived at the border of the United States as a scarred, 28 year-old who had fled her native country, and her families in fear for her safety and in search of a husband she had not seen in over two years. A. 77

Mrs. Barry is a native of the country of Guinea on the coast of West Africa partially bordered by Sierra Leone and Liberia.¹ In July of 2002, Mrs. Barry married her husband, Aboubacar Barry. A. 70, 83. Prior to her marriage she had been politically active in an organization called the “UNR” which advocated improving the infrastructure and services to the people of Guinea. A. 63. After her marriage she increase her involvement with her husband. The UNR became the Union for the Democratic Forces of Guinea (“UFDG”).² Mrs. Barry wrote letters on behalf of the UFDG , one of which urged people to boycott the December 2003 election.

Mr. And Mrs. Barry were supporting a change from President Lansana CONTE who has been head of the military government since April 5, 1984 and had been elected president December 19, 1993. Mr. Barry had registered with the

¹ These facts are provided for context and taken from the CIA website publications library at <https://www.cia.gov/library/publications/the-world-factbook/geos/gv.html>

² The Union of Democratic Forces of Guinea or “UFDG” is an established political party in Guinea. *Infra., n.1*

UFDG and as an influential member of his community others in his village followed suit. A. 39-41.

The election was held December 21 2003. President Lansana CONTE was reelected president his term is up again in 2010. Prior to the election, representatives of the governing party, the Party for Unity and Progress or “PUP”, including police officers began to intimidate opposition party members and take them away. A. 40-41. Mr. and Mrs. Barry continued their support. Mr. Barry received a letter threatening his life so he hid with his family and then eventually hid in the capital of Conakry. A. 41-42. During that time, election officers came to the Barry home seeking Mr. Barry. A. 63.

In September of 2003 the police found him in Conkraty and arrested him. He was imprisoned and tortured. A. 42. He was finally released after five months (May, 2004) when his family paid a bribe. A. 43, 63. Mr. Barry did not return home, but stayed with friends until he could get out of Guinea. A. 43, 63. Mr. Barry reached the United States in September of 2004. A. 43.

Mrs. Barry continued to be harassed by the local authorities looking for her husband. A. 64. In October of 2004, they came to the house looking for Mr. Barry, beat his brothers and left a notice for Mrs. Barry to report to the police station. A. 64, 97. She went to the station and was interrogated. They imprisoned her

During the two week imprisonment she was raped by two officers when she told them she did not know where her husband was. A. 64. After the rape a female officer saw she was bleeding and told the officers Mrs. Barry was “uncircumcised”.³ The officers threatened to circumcise her but she was taken back to her room where she was left alone. After two weeks of detention Mrs. Barry was released because of bribes paid her family. A. 65.

Upon her release she received treatment at the hospital which alleviated the fear that she may be pregnant and informed her that had Hepatitis B. She continued to be harassed by officers when she returned to her husband family’s home. During a visit in 2005 the officers burned her arm with a cigarette when she could not answer their questions. A. 65.

In January of 2006 she was again told to report to the police station. a. 86, 98. She immediately started hiding. she was being pressured by her family to divorce her husband and marry an officer. A. 65. She used the same means to leave her country as her husband had. A. 65. The man only known to her as “Andrew” used a Canadian visa to get her to Canada. A. 66. Once in Canada she

³ Mrs. Barry had in fact been “secretly” taken to be “circumcised” by an aunt after her mother had refused to subject her to what is now known as “FGC.” A. 62-63. The physical scarring makes intercourse painful. This practice has been condemned by the World Health Organization and human rights organizations. *see* <http://www.4woman.gov/faq/fgc.htm>

stayed for two weeks. She obtained transportation to the United States from another Guinean who she had met at the Montreal train station. A. 66, 128.

On September 9, 2006 Mrs. Barry was stopped at the Champlain Port of Entry. She presented a Canadian passport and claimed to be the person named in that passport. It appeared that the passport was altered and Mrs. Barry was referred to secondary inspection. At secondary inspection Customs and Border Patrol Officer Noel Barriere questioned Mrs. Barry. A.48. When asked why she was seeking admission to the U.S., Mrs. Barry indicated that she was seeking to find her husband whom she believe had applied for asylum. A. 49. She gave his name and date of birth. A. 127-28.⁴ She also stated that she had problems in her country and was asking the U.S. for protection. A. 49. She ended her interview by asking for help in finding her husband. A. 50-51.⁵

The agents contacted the U.S. Attorney's Office and she was charged by criminal complaint with a violation of 18 U.S.C. § 1543. Mrs. Barry was initially arraigned on the criminal complaint before Magistrate Judge Kudrle at 7:50 p.m.

⁴ The last page of the "Report on Deportable or Inadmissible Aliens" completed by CBP Barriere at 5:38 p.m. on September 9, 2006 includes an area for "Records Checks" which was left blank appearing to indicate that the officer did not check on Mr Barry's status. A. 129. A memo of CBP Barriere dated September 19, 2006 indicates that the status of Mr. Barry was checked and he had an asylum claim pending. A. 132.

⁵ The interview was conducted in English. A. 48.

A. 9. A French interpreter was available telephonically. A. 9.

The U.S. Attorney's sought and obtained an indictment against Mrs. Barry on September 14, 2006. The three count indictment charged violations of 18 U.S.C. § 1546(a), false impersonation; 18 U.S.C. § 1544, misuse of passport and 18 U.S.C. § 1543, false use of passport. A. 168-192. She was transported to Albany and arraigned on the indictment before Magistrate Judge Randolph Treece on September 22, 2006. A. 4.

The Asylum Office eventually received notice of Mrs. Barry's claim on September 22, 2006, over two weeks after her initial request for refuge. A. 101. On September 29, 2006, Mrs. Barry was issued a Notice of Threshold Interview (From G-56) and related forms. A. 87-90. She was interviewed on October 10, 2006. On October 17, 2006 a decision excepted her from the Safe Third Country Agreement with Canada based upon her credible testimony and the mention of her in her husband's asylum application filed on December 26, 2004. A. 101-02.⁶ On October 16, 2006, the asylum officer determined that Mrs. Barry had demonstrated a credible fear of persecution. A. 57-59

On October 19, 2006 she was issued a Notice to Appear for removal proceedings based upon: not being a citizen or national of the U.S., being a native

⁶ Mrs. Barry was eligible to seek asylum in the United States instead of Canada. A. 101.

and citizen of Guinea, attempting to enter the U.S., not being admitted or paroled after inspection by an Immigration Officer, being ineligible for admission because of fraud or willful misrepresentation of a material fact and not being in possession of proper immigration documents. A. 93.

Mrs. Barry was released from federal custody and eventually joined her husband from whom she had been separated from for over two years. Mr. Barry had filed an application for asylum on December 26, 2004 including reference to Mrs. Barry in that application. A. 69-79. Mrs. Barry has also pursued her claim for asylum.

Summary of the Argument

The decision of the District Court which denied the motion to dismiss the indictment disregarded the intent of the applicable statutes, the governing agency's regulations, and constitutional considerations. Further, the District Court ignored the adoption of the Protocol Relating to the Status of Refugees, and the subsequent federal regulations governing the asylum process and assertion of asylum at land border ports of entry indicates congressional intent against returning native to their county of origin. The decision by Agent Barriere to charge a crime rather than assist Mrs. Barry in her claim for asylum is contrary to the acts of law and the intentions behind those acts. 8 U.S.C. §§ 1225(a)(1), (b)(1)(A)(I) and (b)(1)(A)(ii); 8 U.S.C. § 1158; 8 C.F.R. 270.2(j).

The choice of the government agents seeking the criminal charges prior to the resolution of the defensive claim of for asylum unduly prejudiced Mrs. Barry's international, statutory and constitutional rights by undermining the fair balance of the totality of factors to be considered in determining her request for safehaven as a refugee and the possibility for withholding removal violating her due process right to fair determination of her asylum claim and adding a factor considered against her in the process.

Argument

The District Court denied the Motion to Dismiss submitted by Mrs. Barry. In so doing Judge McAvoy relied heavily upon the decision of Judge Sharpe in, *United States v. Malenge*, 472 F.Supp.2d 269 (N.D.N.Y. 2007) which is currently before this Court on appeal.

Judge McAvoy denied the relief because “as a matter of fact there was no violation of treaty obligations or other substantive provisions of U.S. immigration law.” A. 154 quoting *Malenge*, 472 F.Supp.2d at 269.

The problem with both the *Malenge* decision and the present decision is the conclusion that the Government was free to prosecute a refugee entering the country illegally from a country where they had “settled” or because of a failure to immediately notify authorities that they are seeking asylum and explain their illicit entry. A. 155 quoting *Malenge*, 472 F.Supp.2d at 274.

As noted by the *Malenge* decision, the immigration authorities had three options at the time that Mrs. Barry presented herself for inspection at the border and they believed she was entering under false pretenses. Malenge, at 274. She could have been returned back to Canada, 8 U.S.C. § 1225(b)(1)(A); arrested and detained pending a removal decision, 8 U.S.C. § 1226(a) or arrested for a criminal offense. *Id.* Of the three, the government agents chose to arrest and charge her

with a criminal offense. This choice undermines the guarantees of international law and compromises that fairness of the asylum determination by increasing the likelihood of return over refuge.

The Standard of Review

The Second Circuit Court of Appeals reviews the denial of a motion to dismiss *de novo*. United States v. Lopez, 445 F.3d 90, 94 (2d Cir. 2006). Further, the factual findings are reviewed for clear error. United States v. Yousef, 327 F.3d 56, 133 (2d Cir. 2003). The interpretation of an international treaty is reviewed *de novo*. United States v. Al-Hamdi, 356 F.3d 564, 569 (4th Cir. 2004).

I. The District Court Findings of Fact were Erroneous and Without Basis in the Record Because the Immigration Authorities Had Timely Notice of the Claim and Acted Contrary to Federal and International Law.

The District Court clearly erred when it based part of its decision on the untimely request for asylum by Mrs. Barry. During the first opportunity to fully explain her situation with an immigration official she expressed the need for protection and that her husband may have also sought asylum. A. 48-50.

The District Court relied on the proffer of the Government and the unsworn statements of Custom and Border Patrol Agent Barriere who conducted the questioning of Mrs. Barry. The District Court based part of its decision on Mrs.

Barry's "failing" to immediately notify the authorities of her desire for asylum.

A. 155. However, at the first prolonged interaction with an immigration official Mrs. Barry requested protection, indicated her husband was in the country and had already possibly sought asylum. A. 48-50 It appears the status of Mr. Barry was not checked until after Mrs. Barry had been charged. A. 132.

At the first indication of the need for asylum Agent Barriere did not attempt to verify the status of Mrs. Barry, Mr. Barry nor the basis for the request for asylum. He instead questioned her in relation to supporting a criminal charge. A. 48-51. According to the Record of the Determination/Credible Fear Determination Worksheet the asylum office was not notified until September 22, 2006, almost two weeks after her request for protection. A. 53.

The focus on the timing of Mrs. Barry's request for protection was "without delay" as contemplated by the Convention and Protocols. *See* Goodwin-Gill, Guy S., *Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection*, Refugee Protection in International Law Part 3.1, p. 217 (Edited by Erika Feller, Volker Türk, and Frances Nicholson 2003)(Noting that States may be operating in breach of Article 31(1) and restating the meanings to be given to the language of the article with reference to more

recent international discussions of those definitions.)⁷

The factual focus of the court for determining whether Mrs. Barry presented her claim in a timely manner should not have been solely on Mrs. Barry but on her overall circumstances. *See* Goodwin-Gill, Guy S., Refugee Protection in International Law Part 3.1, p. 217. A time limit cannot be mechanically applied or associated with the expression ‘Without delay’ because it is a matter of fact and degree which depends on the circumstances of the case. In particular, the asylum seeker may be suffering from the effects of trauma, language problems, lack of information, previous experiences which often result in a suspicion of those in authority, feelings of insecurity, and the fact that these and other circumstances may vary enormously from one asylum seeker to another. *Id.*

Basing part of the denial of relief on a truncated factual consideration because of the District Court’s lack of assessment of the intended definition created a factual and legal error undermining the decision. The decision also failed to address the situation of Mrs. Barry and the services provided to her by the authorities which should have informed the Court’s assessment. *See e.g. Orantes-Hernandez, et al., v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990)(Upholding permanent injunction requiring affirmative notice of right to asylum be provided to

⁷ Full text available at <http://www.unhcr.org/publ/PUBL/419c778d4.pdf>

El Salvadoran aliens because of history of coercing and denying access to certain forms of relief from deportation). *See also* Orantes-Hernandez v. Gonzales, 504 F.Supp.2d 825, 875-876 (D.C. Cal. 2007)(Documented levels of non-compliance with relevant standards related to providing information on asylum and other forms of relief supported maintaining the notification part of the injunction to ensure that Salvadorans are able to exercise their right to apply for asylum freely and intelligently).

The uncontroverted facts demonstrated that the United States Customs and Border Patrol was on notice that Mrs. Barry wanted protection and that she possibly had a derivative asylum claim

A. *Mrs. Barry Did Not Waive or Forfeit Her Ability to Seek Asylum*

There is no evidence that Mrs. Barry was aware at the time of her entry that she had to allege asylum or refugee status prior to coming into contact with the border authorities. There was no evidence that she intentionally relinquished or abandoned a known right. *See* United States v. Olano, 507 U.S. 725, 733 (1993)(Distinguished “forfeiture” of a claim, which results from failure to assert the claim in a timely fashion, and which does not prevent an appellate court from reviewing the claim for plain error, from “waiver,” which is the “intentional relinquishment or abandonment of a known right,” and which permanently

extinguishes the right to raise the claim).

Nor is a finding that the claim was waived supported. There is no record that Mrs. Barry knew she had to assert asylum until she was asked if that was what she needed. The customs and border patrol agents did not ascertain whether she was entering the United States to obtain asylum even after she informed them that she was in danger and her husband was here as a refugee. Mrs. Barry could additionally have sought asylum as part of a later withholding of removal claim as well. 8 C.F.R. § 208.2.

Mrs. Barry made the claim while the government still had the ability to review its actions in relation to the governing law and take the necessary steps to comply with that law. Olano, 507 U.S. at 733 (1993). A number of hours passed from the time Mrs. Barry initially indicated she wanted protection to the arraignment on the criminal complaint. A. 8. The indictment was handed down over a week later. A. 10. Mrs. Barry pled guilty eight months later pursuant to a plea agreement after the motion to dismiss was denied. A. 166.

The government had the ability to request dismissal of the indictment without prejudice until the asylum claim was adjudicated. FED. R. CRIM. PROC. 48(a). The government would have been in no different position whether the prosecutor initially declined charges or later withdrew them. No injustice would

have occurred in either case and Mrs. Barry 's rights to asylum would have remained intact.

B. *Federal Statutes, Agency Regulations, Constitutional Considerations and International Law Require Asylum and Refugee Status over the Initiation and Pursuit of a Criminal Proceeding.*

The Supreme Court has historically recognized that statutes should not be construed in a manner that would place the United States in violation of the laws of nations, unless that language of the statute unambiguously compels the result. *See Weinberger v. Rossi*, 456 U.S. 25, 32 (1982)(Recognizing the statutory maxim of *Charming Betsy* that an act of Congress ought not to be construed in contravention of the laws of nations in any other construction is possible.). As a result, a statute that can be interpreted in more than one manner must be interpreted consistent with international treaties. *See Chew Heong v. United States*, 112 U.S. 536, 539-540 (1884)(Immigration statute interpreted to avoid conflict with international treaty allowing Chinese alien entry into the United States).

The government is obligated to utilize every conceivable precaution to secure the rights of persecuted aliens as set out in 8 U.S.C. §1158.⁸ The cost of protecting a constitutional right cannot justify its total denial. *Bounds v. Smith*,

⁸ Title 8 of Section 1158 (a) provides that, [a]uthority to apply for asylum...,

(1) In general,

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

430 U.S. 817, 825 (1977), and instead imposition of a penalty.

In 1968, the United States was a signatory to and ratified the Protocol Relating to the Status of Refugees. January 31, 1967, 19 U.S.T. 6223 (Nov. 1, 1968). In so signing, the United States assented to the provision of certain substantive protections to refugees regardless of their legal status outlined by the 1951 Convention Relating to the Status of Refugees in Articles 2 through 34. *See I.N.S. v. Stevic*, 467 U.S. 407, 416 (1984).

- i. The Intent of the Convention and Protocols Was to Promote Asylum Without Criminalizing Refugees for their Attempts to Gain Refuge.

Article 31(1) of the 1951 Convention provides that refugees 'coming directly from a territory where their life or freedom was threatened' in the sense of the definition in Article I *shall be exempt from punishment for illegal entry or presence if they 'present themselves without delay to the authorities and show good cause for their illegal entry or presence.'* CONVENTION RELATING TO THE STATUS OF REFUGEES, July 28, 1951, 189 U.N.T.S. 150 (*emphasis added*). The District Court read the language of the international protocols as limited to only those refugees who had committed the crime of illegal entry or remained illegally present in the United States. A. 106. However, the international mandates should have been read broadly to confer more rights to refugees as opposed to limiting the

right to asylum. The Supreme Court has stated that a more liberal interpretation is preferred where a treaty could generally be construed in two ways, one restricting and the other enlarging, to give effect to the purpose which animates it. United States v. Stuart, 489 U.S. 353, 368 (1989); *see* Asakura v. City of Seattle, 265 U.S. 332, 342 (1924)(“Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred.”).

On the fiftieth anniversary of the Convention, the United Nations High Commissioner on Refugees published Refugee Protection in International Law. In an article addressing the non-penalization of refugees, Mr. Goodwin-Gill interpreted the obligations of the 1951 Convention and the treatment of the obligations by the signatories. He advised that the States which were penalizing asylum seekers contravening the plain meaning of the Convention:

The 1951 Convention establishes a regime of rights and responsibilities for refugees. In most cases, only if an individual’s claim to refugee status is examined *before* he or she is affected by an exercise of State jurisdiction (for example, in regard to penalization for ‘illegal’ entry), can the State be sure that its international obligations are met. Just as a decision on the merits of a claim to refugee status is generally the only way to ensure that the obligation of *non-refoulement* is observed, so also is such a decision essential to ensure that penalties are not imposed on refugees, contrary to Article 31 of the 1951

Convention.

To impose penalties without regard to the merits of an individual's claim to be a refugee will likely also violate the obligation of the State to ensure and to protect the human rights of everyone within its territory or subject to its jurisdiction.

Goodwin-Gill, Guy S., *Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection in Refugee Protection in International Law Part 3.1 p.187* (Edited by Erika Feller Volker Türk, and Frances Nicholson 2003)

Article 31(1) exempted refugees from punishment because of their illegal entry or presence which read broadly necessarily includes attempting to enter a country through fraudulent means as part of an entry. CONVENTION RELATING TO THE STATUS REFUGEES, July 28, 1951, 189 U.N.T.S. 150. The interpretation of the obligations of the United States under the Convention and Protocols by the District Court is not in accordance with international law. *See Goodwin-Gill, Guy S., Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection*, pp. 188-89 (Advising that the interpretation of international treaties is governed by the Vienna Convention Law of Treaties). International treaties which have been ratified by the United States, are the law of the United States. U.S. Const. art. IV. They must be respected and enforced.

ii. Immigration Laws Enacted In Conformity With the

Convention and Protocols Relating to the Status of Refugees Demonstrate a Federal Intent to Provide Safehaven and Refuge Over the Imposition of Criminal Liability.

At the time that Mrs. Barry expressed the need for asylum, she placed herself at the mercy of the customs and border patrol agents. Instead of recognizing the needs of a refugee, they initiated a criminal investigation. The criminal complaint was not filed until after Mrs. Barry had indicated that she wanted protection. Under the statutes and regulations governing entry and asylum, the immigration and customs enforcement authorities wear two hats as both the investigating and enforcement component and the adjudicatory component. The decisions made by the customs and enforcement officers and furthered by the United States Attorney was an arbitrary and capricious act contradicting the legislative administrative acts.

According to the Asylum Division of the Office of International Affairs, an applicant for admission at a land border port of entry is ineligible to make an affirmative application for asylum. Instead, an applicant for admission at land border ports of entry is to be placed in an expedited removal proceedings and referred for a credible [fear] interview pursuant to 8 CFR 208.30. *See* AFFIRMATIVE ASYLUM PROCEDURES MANUAL, III.B, 2, U.S. Citizenship and

Immigration Services (USCIS), Office of International Affairs, Asylum Division
(Revised February 2003).

In 1980, the U.S. Congress enacted the Refugee Act for the purpose of conforming its laws with the language and requirements of the Protocol and Convention. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 436 (1987). Congress further acted to assure substantive protections to refugees when it amended the Immigration and Nationality Act (“INA”) to include the statutory provision codified at 8 U.S.C. § 1958 which outlined the method for obtaining asylum. Cardoza-Fonseca, 480 U.S. at 436.

The pursuit of the criminal charge in the face of a request from Mrs. Barry for safe haven violated international law, the intent of United States statutes, federal regulations, policies and procedures. The Refugee Act's expressed purpose was to enforce “the historic policy of the United States to respond to the urgent needs of the persons subject to persecution in their homelands”, *See* REFUGEE ACT OF 1980, § 101(b), Pub. L. No. 96-212, 94 Stat. 102 (codified as Congressional Declaration of Policies and Objectives at 8 U.S.C. §1521 (1988). *See also* Goodwin-Gill, Guy S., *Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection* , p. 217 (Recognizing United States enactment of 8 C.F.R. 270.2(l) for rule against filing of

charges in face of a claim of asylum).

Mrs. Barry indicated that she need protection and her husband was seeking asylum in the United States. She later to fulfilled the necessary threshold standards for seeking asylum. A. 53-59. She is a refugee.

When Congress passed the Refugee Act of 1980, it established "for the first time a provision in federal law specifically relating to asylum" in order "*to ensure a fair and workable asylum policy which is consistent with this country's tradition of welcoming the oppressed of other nations and with our obligations under international law.*" Azzouka v. Sava, 777 F.2d 66, 72-73 (2d Cir. 1985) quoting H.R.Rep. No. 608, 96th Cong., 1st Sess. 17 (1979)(*emphasis added*). The Refugee Act brought federal statutory law into general agreement with the United States's existing obligations under the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577 ("UN Protocol"). Azzouka at 71-72; *See also* Stevic, 467 U.S. 407 (1984).

The Act did not construct a comprehensive asylum scheme but directed the Attorney General... *establish a procedure for an alien physically present in the United States or **at a land border or port of entry**, irrespective of such alien's status*, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee

within the meaning of section 1101(a)(42)(A) of this title. Azzouka, 777 F.2d at 71-72; 8 U.S.C. § 1158(a) (*emphasis added*). The federal statute emphasized the irrelevance of the alien's status in relation to asylum. 8 U.S.C. § 1158(a).

Generally, any alien present in the United States or at a port of entry may apply for asylum regardless of his or her immigration status. Yiu Sing Chun v. Sava, 708 F.2d 869, 876 (2d Cir. 1983)(Congress only distinguished aliens present in the United States or "at a land border or port of entry" and *other refugees* in. 8 U.S.C. § 1158(a))(*emphasis added*). See also Goodwin-Gill, Guy S., *Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection*, p. 196 (Illegal entry would include arriving or securing entry through the use of false or falsified documents, the use of other methods of deception, clandestine entry (for example, as a stowaway), and entry into State territory with the assistance of smugglers or traffickers).

According to the "Affirmative Asylum Procedures Manual of the Office of International Affairs," an application for asylum can be made at a land border port of entry AFFIRMATIVE ASYLUM PROCEDURES MANUAL (Rev. February 2003), Sec. III. B. 2., p. 48. The District Court acknowledged this ability. A. 108. *citing* 8 U.S.C. § 1225(b)(1)(A)(ii).

The Attorney General (or now the Director of Homeland Security) and the

governing agency have acted to honor a liberal construction of the provisions of Article 31. The Immigration authorities enacted regulations under Subchapter B of its Immigration Regulations relating to Penalties for Document Fraud. These regulations governed the acts committed by Mrs. Barry and other illegal acts involving attempted entries into the United States. 8 CFR § 270.2 (j):

Declination to file charges for document fraud committed by refugees at the time of entry. The Service shall not issue a Notice of Intent to Fine for acts of document fraud committed by an alien pursuant to direct departure from a country in which the alien has a well-founded fear of persecution or from which there is a significant danger that the alien would be returned to a country in which the alien would have a well-founded fear of persecution, provided that the alien has presented himself or herself without delay to an INS officer and shown good cause for his or her illegal entry or presence. Other acts of document fraud committed by such an alien may result in the issuance of a Notice of Intent to Fine and the imposition of civil money penalties.

8 C.F.R., Part 270.2 (j).

The exercise of discretion as an administrative authority must be compatible with the asylum statute that conferred the ability to act. *See, e.g., Manhattan Gan'l Equip. Co. v. Commissioner, 297 U.S. 129, 134 (1936) (holding that agency action inconsistent with the statute in question was void).* Second, where a statute is silent or ambiguous with respect to a specific issue, the agency interpretation must

be upheld so long as it is based on a permissible construction of the statute. *See* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984). This broad test has been limited to situations involving the application of specific legal standards to particular facts. *See, e.g.,* Cardoza-Fonseca, 480 U.S. at 444, nn.29-30 (1987)(Recognizing the need and use of *Chevron* deference in relation to the laws guiding asylum.)

The administrative agency enacted rules that prohibit penalizing document fraud at the time of entry. The ability to enact these rules and prescribe procedures guiding asylum was appropriately delegated to the agency by Congress and therefore other government acts should defer to the agency's interpretations. 8 U.S.C. § 1158(a). An agency's interpretation of its own regulations, and the statute under which they are promulgated, is entitled to substantial deference. *See, e.g.,* Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565 (1980). Here the actions of the Customs and Border Patrol violated their own regulations and the intent behind them. Deference to their interpretations is not warranted.

III. The Request for Asylum Takes Precedent over Prosecution of the Crime Committed at Entry Otherwise a Claim for Asylum is Prejudiced and Due Process is Violated.

The 1967 Protocol sets forth two basic protections for refugees present without lawful status in the territory of a signatory nation: a guarantee against “refoulement” or return to the country of origin and a *prohibition against the imposition of criminal penalties for unlawful entry*. These concepts are part of the minimal standards for any alternative refuge provided by assentors to the Protocols. Criminalizing asylum seekers at the threshold of the United States undermines these guarantees by creating a negative factor which is used in consideration of the totality of the circumstances determination of whether to grant asylum.

At the time that Mrs. Barry indicated she sought asylum, the agency was more intent on prosecuting her rather than insuring her immigrations rights were protected. Under 8 U.S.C. §1158(a), “any alien who is physically present in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) irrespective of such alien's status, may apply for asylum, in accordance with this section. Section 1158 further mandates that any alien who fears persecution or requests asylum be granted a hearing or review. Section 1225

(b)(1)(A)(i) states that the alien indicating either an intention to apply for asylum under Title 8 U.S.C. §1158 or a fear of persecution, shall be referred for an interview by an asylum officer under subparagraph (B). 8 U.S.C. §1225(b)(1)(A)(i). The statements of the border authorities and the government failed to describe whether these measures had been followed.

Courts have recognized that an alien expressing a fear of persecution has a due process interest in the protections afforded by both the applicable treaty and federal statutes. *See Yiu Sing Chun*, 708 F.2d at 876-77 (A refugee with a well-founded fear of persecution in his homeland has a protectible interest recognized by both treaty and statute, and his interest in not being returned may well enjoy some due process protection not available to an alien claiming only admission). *See also Nunez v. Boldin*, 537 F Supp 578 (S.D.Tex 1982), *dism'd without opinion* 692 F2d 755 (5th Cir. 1982)(Detainees are entitled to notice of their right to apply for political asylum). *Accord Orantes-Hernandez v. Smith*, 541 F. Supp 351 (C.D.Cal. 1982)(Preliminary injunction issued against the Immigration and Naturalization Service's stopping summary removal of Salvadorans without notice of their right to apply for asylum and a knowing and intelligent waiver of that right).

A. ***The Right to Due Process was Violated by the Filing and Pursuit of a Criminal Matter against Mrs. Barry and She is Prejudiced by the Acts of the Government and the Customs***

and Border Patrol Agents.

The Constitution insures that “[n]o person shall,...., be deprived of life, liberty, or property without due process of law.” U.S. Const., amend., V. “[N]or shall any state,...., deny to any Person within its jurisdiction equal protection under the laws.” as further provided under the Fourteenth Amendment to the Constitution. *Id.* Even after Mrs. Barry expressed her request for asylum she was treated different from those who are arguably in a similar position under the laws of the United States.

Mrs. Barry is currently in the United States adjudicating her asylum claim. The same government that will ultimately rule on this claim had also undermined Mrs. Barry’s ability to get relief. By failing to follow its own policies, regulations, statutes and international treaties the enforcement component of the same agency that is charged with providing refugee relief undermined a refugee’s ability to obtain such relief. *See Sameena Inc. v. United States Air Force*, 147 F.3d 1148, 1153 (9th Cir. 1998) (stating that an agency's failure to follow its own regulations may violate due process where a procedure is intended to protect the interest of a party before the agency).

Under 8 U.S.C. §§ 1158(b)(2)(A)(ii) and 1231(b)(3)(B)(2) an alien who has

been convicted of a crime enters an asylum and removal proceeding with a strike against them depending upon how the crime resulting in the conviction is defined under the immigration laws. At the time that Mrs. Barry initially requested asylum she was in a more favorable position. Her husband was in the United States, she had suffered demonstrable past persecution and she had no previous criminal history. The filing and pursuit of the criminal charges against Mrs. Barry undermined her substantive due process rights to asylum in the United States.

To establish potential eligibility for asylum a petitioner must show that she satisfies the statutory definition of a “refugee,” *i.e.*, that she has suffered past persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or that she has a well-founded fear of future persecution on one of these grounds. *See Huang v. I.N.S.*, 436 F.3d 89, 94-95 (2d Cir. 2006); 8 U.S.C. § 1101(a)(42); *Jin Shui Qiu v. Ashcroft*, 329 F.3d 140, 148 (2d Cir. 2003). An applicant may establish past persecution, triggering a rebuttable presumption of a well-founded fear of persecution and thus of eligibility for asylum. Or an applicant may establish a well-founded fear of future persecution for which she would be automatically eligible for asylum. *Huang*, 436 F.3d at 94-95. *See Li Yong Cao v. U.S. Dep't of Justice*, 421 F.3d 149, 155 (2d Cir. 2005).

Mrs. Barry would have readily met the eligibility requirements.⁹

The substantive determination of whether an alien qualifies for a discretionary grant of asylum requires the immigration agency examine the totality of the circumstances. Huang at 997-98. Procedurally, an applicant for asylum bears the burden of establishing that the favorable exercise of discretion is warranted, but either party may proffer evidence relevant to any discretionary aspects of the case. 8 U.S.C. §1158(b)(1)(B)(i),(ii) and (iii). Huang at 98. The regulations envision that once the “past persecution” is established the immigration judge will accept further evidence concerning discretionary relief. *Id.* It was the preclusion of additional submissions in Huang that the Circuit found violated the substantive rights of the petitioner. *Id.* at 98. The Circuit held that the substantive determination requires an examination of the *totality of the circumstances*. Huang, at 98.

Mrs. Barry ’s conviction and surrounding circumstances would be part of the assessment of the totality of the circumstances for the immigration judge. Huang, at 98 (citing *In re Chen*, 20 I. & N. Dec.16, 19 (BIA 1989)), 1989 WL 331860 (BIA)(“...as with any case involving the exercise of discretion, all other factors, both favorable and adverse, should also be considered, with recognition of the

⁹ Mrs. Barry later fulfilled the initial asylum requirements. A. 53-59.

special considerations present in asylum cases.”)

Mrs. Barry has not only been convicted of a crime. Her burden at her asylum hearing seeking the discretion of the immigration judge was increased and the assessment of the evidence was skewed in a negative manner. 8 U.S.C. § 1158(b)(1)(B)(i) and (ii).

B. ***The Right Not to Be Returned to the Country of Origin Is an Interest Protected by Procedural Due Process***

In *Yiu Sing Chun* the Second Circuit construed the asylum statutes and regulations as guided by the dictates of procedural due process. *Yiu Sing Chun*, 708 F.2d at 876-77. This Court acknowledged that an alien seeking initial admission is requesting a privilege and has very limited rights regarding his application. 708 F.2d at 876-77. But a refugee who has a “well-founded fear of persecution” in his homeland has a protectable interest recognized by both treaty and statute, “and his interest in not being returned may well enjoy some due process protection not available to an alien claiming only admission.” *Id.* at 877. *See Stevic*, 678 F.2d at 407. This Court further stated that the severity of harm to the erroneously excluded asylee outweighed the administrative burden of providing an asylum hearing, and a hearing would be required if the regulations did not do so already to determine whether applicants for asylum are, in fact, refugees within the

meaning of the Refugee Act. *Id.*

Mrs. Barry expressed a need for protection. At that time, she was entitled to procedures guiding asylum claims. The actions of the Customs and Border patrol agents thwarted and subverted her claims for refuge rather than providing the notice and process that was due and intended by policy, procedure and regulations.

The cases of *Orantes-Hernandez* are instructive. In *Orantes-Hernandez , et al. v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990)(*Orantes-Hernandez III*), the Circuit was asked to review the issuance of permanent injunction against the immigration authorities which has stopped them from forcing El Salvadoran refugees to sign voluntary departure forms and required them to inform the aliens of their right to asylum. *Id.* at 555-56.

The district court had found that a permanent injunction was necessary in light of the practices of the INS officers when faced with immigrant who feared returning to their country. This practice was directly contrary to the stated policy of the head of the INS, who had represented that INS agents provide notice of the right to apply for asylum to aliens who indicate they fear persecution in their homeland. *Id.*

The District Court had recognized that once the aliens at the border or elsewhere were indicating they had a fear of returning to their homeland, they

became entitled to certain due process rights as refugees. Orantes-Hernandez v. Meese, 685 F.Supp.1488, 1503 (D.C.Ca. 1988)(“*Orantes-Hernandez II*”). The District Court weighed the deprivation of rights against the expeditious removal procedures in effect and found the procedures violated due process rights. Orantes-Hernandez II, at 1504. In evaluating plaintiffs' due process claim to notice of the right to seek political asylum, the Court possesses jurisdiction and can evaluate evidence as to the levels of political violence in El Salvador. See Matthews v. Eldridge, 424 U.S. 319 (1976).

“Although the Executive and Legislative branches have the power to make foreign policy determinations, it is the responsibility of this Court to ensure that the due process rights of persons within the United States are respected”. Orantes-Hernandez II, 685 F.Supp at 1503. At the very least Mrs. Barry was entitled to notice and an adequate explanation of her right to asylum and the impact that her criminal charges had. See Orantes II, 685 F.Supp. at 1507-08. See also Augustin v. Sava, 735 F.2d 32, 38 (2d Cir.1984)(holding that an alien was denied procedural rights “where the translation of the asylum application was nonsensical, the accuracy and scope of the hearing translation are subject to grave doubt,” and the alien “misunderstood the nature and finality of the proceeding”); American Immigration Lawyers Ass'n v. Reno, 18 F.Supp.2d 38, 55 (D.D.C.1998) (“a system

that provides information that the recipient does not understand cannot be considered to be providing adequate notice”), *aff’d*, 199 F.3d 1352 (D.C.Cir. 2000).

Until a full asylum determination was completed and Mrs. Barry’s refugee status protected and adjudicated the actions of the charging officers and the government ignored international law, federal adoption of the international agreements, congressional acts and the authoritative agency’s own regulations undermining and sabotaging a protected and internationally recognized interest in not being returned to face persecution. *See I.N.S. v. Campos*, 32 F.Supp.2d 1337, 1348 (S.D.Fla 1998)(Procedural due process is wider in scope than substantive due process and a denial occurs when a government agency fails to follow its own regulations providing for procedural safeguards in adjudicative proceedings.)(quotations and citations omitted)

The criminal proceedings against Mrs. Barry should have been dismissed without prejudice and allowed for her to adjudicate her claim for asylum without a newly imposed criminal record skewing that determination in favor of refoulement.

Conclusion

WHEREFORE, Mrs. Barry respectfully requests the Second Circuit Court of Appeals reverse and vacate her the criminal convictions as violations of international law, in contravention of legislative acts and in violation of her rights to due process.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to 2ND CIR. R. 32 (a)(7), undersigned counsel certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32 (a)(7).

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Molly K. Corbett
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