



FINAL IMMIGRATION LESSON FROM THE DISMISSAL OF THE STRAUSS-KAHN CASE

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By [Cyrus Mehta](#)

Much has been written about the amazing turn of events in the Strauss-Kahn case that resulted in the dismissal of the criminal charges against him. The Manhattan DA's [motion to dismiss](#) the indictment reads like a treatise on the ethical role of the district attorney in prosecuting a case, while also richly detailing the inconsistencies of the accuser, Nafissatou Diallo. According to the motion, if the prosecutor does not believe that a crime was committed beyond a reasonable doubt, he or she cannot ask the jury to do so. Moreover, the motion goes on to state that the prosecutor's duty is to seek justice and not just to win cases. Under New York ethical rule 3.3, a lawyer cannot offer evidence that he or she knows is false and has a duty to correct any false evidence that the lawyer has already offered to the court. I do not fault the ethical judgment of Cyrus Vance, the Manhattan DA, in declining to prosecute this case, as well as alerting the court of the many inconsistencies of Ms. Diallo after they came to light, although Slate has offered a [well reasoned rebuttal](#) of the inconsistencies of Ms. Diallo that have been alleged by the DA's office.

The [main concern](#) for this writer, as stated in prior blogs on the Strauss-Kahn case, is that in the future immigrants will be more reluctant to come forward and press charges if they have been victims of sex crimes. Since in most such cases, the success of the prosecution depends on the credibility of the accuser, one with a less than perfect immigration past will be susceptible to her credibility being attacked in a trial. It is not uncommon for asylum seekers who have been persecuted to be coached by unscrupulous immigration practitioners, both authorized and unauthorized, to exaggerate their claims. For instance, one who may have suffered female circumcision, which in itself is a

basis for asylum, may be coached to also state that she was raped by governmental actors to bolster the claim. This is not to suggest that asylum seekers do not present truthful claims. In the experience of this writer, most do, but it is also possible that some may not, especially if they are not represented by an ethical practitioner, and still obtain asylum. If they become victims of a horrific rape in the future, they may be discouraged from coming forward even if the prosecutor is willing to take up the case.

As the recent [New York Times editorial](#) on the Strauss-Kahn case aptly states:

There is a legitimate concern that his decision may discourage rape victims from coming forward in the future. Women who have been assaulted often worry, with reason, about being victimized a second time in court. And those with problematic backgrounds must feel confident that they can demand and receive justice.

Finally, what about the fate of Ms. Diallo? Will she be thrown to the wolves even though it is possible that a crime may have been committed during those few minutes in the hotel room, but the prosecutors have declined to go forward because they cannot convince a jury beyond a reasonable doubt that it occurred? If her asylum case was fabricated, the DHS could potentially reopen the case and place her in removal proceedings. She can try to again seek asylum on the genuine grounds of persecution that she suffered, but did not reveal in her asylum application. On the other hand, because she has a minor daughter, and she has been a victim of female circumcision, she could also merit the exercise of the government's prosecutorial discretion.

Ms. Diallo can also seek a U visa if all else fails and her back is pushed against the wall. To qualify for the U visa under Section 101(a)(15)(U) of the Immigration and Nationality Act, the foreign national must demonstrate that she "has been helpful, is being helpful, or is likely to be helpful" to the prosecutor in addition to demonstrating substantial physical or mental abuse from the criminal activity. After all this, one's instinctive reaction is that Ms. Diallo was not helpful to the prosecution in investigating or prosecuting criminal activity that would qualify one for the U visa, such as a rape or related sex offenses. The applicant must also possess "credible and reliable information that he or she has knowledge of the details concerning the qualifying criminal activity upon which his or her petition is based." See 8 C.F.R. 214.14(b)(2). However, in the U visa immigration context, it can be argued that she was helpful to the prosecution, despite her many inconsistencies, but it was ultimately the prosecutor's office

that decided to drop the case as they could not prove to a jury beyond a reasonable doubt that the offense was committed. A careful read through the motion to dismiss does not suggest that the prosecution was convinced that criminal activity did not occur in the hotel room. A U visa applicant should not be deprived of this benefit only because the prosecution ultimately decided, based on the flaws in the case, that it could not take the case forward in a criminal proceeding under a higher "beyond a reasonable doubt" standard. Also, the grant of a U visa ought not to be based on whether the victim was able to prove the charges against the accuser. Thus, even if there is an acquittal against the defendant who is found not guilty, the U visa ought to still be approved for the crime victim who was helpful to the prosecution, even though unsuccessful. Moreover, the U visa depends on whether the prosecutor will sign the crucial certificate of helpfulness that provides the basis for a successful U visa application. Even if the Manhattan DA's office dismissed the indictment, it should not shy away from certifying that Ms. Diallo was helpful for purposes of the U visa. This is the least that Cyrus Vance can do if Ms. Diallo needs to remain in the United States. Such a gesture would also provide some encouragement for other immigrants to come forward who have been victims of sex offenses.