Matter of J-C-H-F-, Respondent

Decided February 20, 2018

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

When deciding whether to consider a border or airport interview in making a credibility determination, an Immigration Judge should assess the accuracy and reliability of the interview based on the totality of the circumstances, rather than relying on any one factor among a list or mandated set of inquiries.

FOR RESPONDENT: Michael Franquinha, Esquire, Phoenix, Arizona

FOR THE DEPARTMENT OF HOMELAND SECURITY: Nelson Echevarria-Tolentino, Assistant Chief Counsel

BEFORE: Board Panel: MALPHRUS, CREPPY, and LIEBOWITZ, Board Members.

MALPHRUS, Board Member:

In a decision dated March 16, 2017, an Immigration Judge denied the applicant's request for protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted and opened for signature* Dec. 10, 1984, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988) ("Convention Against Torture").[1] The applicant has appealed from that decision. The appeal will be dismissed.

I. FACTUAL AND PROCEDURAL HISTORY

The applicant is a native and citizen of Mexico who attempted to enter the United States on April 20, 2010. At that time, the applicant stated in a border interview that he came to the United States to look for his father. He

[1] The applicant is in withholding of removal only proceedings, where we refer to aliens as "applicants." In such proceedings, the Immigration Judge's jurisdiction is limited to addressing claims for withholding of removal and protection under the Convention Against Torture. *See* 8 C.F.R. §§ 1208.2(c)(2)(i), 1208.31(a), (e), 1241.8(e) (2017). The applicant's attorney clarified during his hearing that he only seeks protection under the Convention Against Torture. *See Perez-Guzman v. Lynch*, 835 F.3d 1066, 1082 (9th Cir. 2016) (determining that an alien "is not eligible to apply for asylum . . . as long as he is subject to a reinstated removal order").

said that his father "went to the United States three years ago and we have not heard anything from him since." He also stated that he intended to stay for "a week or two," and when asked whether he feared persecution or torture if he returned to Mexico, he said, "No." The applicant signed a sworn statement before the Border Patrol officer and was ordered removed on April 20, 2010. When the applicant returned to the United States illegally on May 11, 2016, the Department of Homeland Security ("DHS") reinstated his prior order of removal from 2010.

The applicant now claims that he fears he will be tortured at the hands of the Michoacán Cartel if he returns to Mexico. He asserts that members of the cartel came to his aunt's house in March 2010 and kidnapped his father. According to the applicant, they returned 2 days later and kidnapped him, threatening to brutally murder him, like they had his father, if he did not give them information. The applicant stated that he has not seen his father since his kidnapping. He asserts that he was released by the cartel after they determined he was not a member of a rival cartel.

Relying on substantial discrepancies between the applicant's 2010 border interview and his testimony in these proceedings, the Immigration Judge found that the applicant lacked credibility and denied his request for protection under the Convention Against Torture. On appeal, the applicant asserts that the Government documents the Immigration Judge considered are not reliable and that the record demonstrates he testified credibly.

II. ANALYSIS

A. Border and Airport Interviews

As a preliminary matter, the applicant challenges the reliability of his border interview and contests its consideration in the adverse credibility finding. Generally, there is a presumption of reliability of Government documents. *See Espinoza v. INS*, 45 F.3d 308, 310 (9th Cir. 1995) (stating that "information on an authenticated immigration form is presumed to be reliable in the absence of evidence to the contrary presented by the alien").

Information obtained from DHS interviews conducted at the border or an airport prior to removal proceedings must be both accurate and reliable for the purposes for which the document is being used. Circuit courts, including the United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, have reversed adverse credibility findings based on such interviews when they lacked adequate safeguards. *See Yan Xia Zhu v. Mukasey*, 537 F.3d 1034, 1040−41 (9th Cir. 2008); *Singh v. Gonzales*, 403 F.3d 1081, 1088−90 (9th Cir. 2005); *see also Tang v. U.S. Att'y Gen.*, 578 F.3d 1270, 1279−80 (11th Cir. 2009); *Moab v. Gonzales*, 500 F.3d 656,

660−61 (7th Cir. 2007); *Balasubramanrim v. INS*, 143 F.3d 157, 162−64 (3d Cir. 1998). However, the courts have upheld the use of these interviews if there were adequate indications of their reliability. *See Li v. Ashcroft*, 378 F.3d 959, 962−63 (9th Cir. 2004); *see also Conde Cuatzo v. Lynch*, 796 F.3d 153, 156 (1st Cir. 2015); *Qing Hua Lin v. Holder*, 736 F.3d 343, 352−53 (4th Cir. 2013); *Rama v. Holder*, 607 F.3d 461, 466−67 (7th Cir. 2010); *Shkambi v. U.S. Att'y Gen.*, 584 F.3d 1041, 1049−52 (11th Cir. 2009); *Ramsameachire v. Ashcroft*, 357 F.3d 169, 178−82 (2d Cir. 2004).

When Congress codified factors to be considered in credibility determinations, it authorized Immigration Judges to base an adverse credibility finding on a consideration of "the totality of the circumstances, and all relevant factors," including, as relevant here, "the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made)," as well as "the consistency of such statements with other evidence of record." REAL ID Act of 2005, Div. B of Pub. L. No. 109-13, § 101(a)(3), 119 Stat. 302, 303 ("REAL ID Act"); *see also* sections 208(b)(1)(B)(iii), 240(c)(4)(C), 241(b)(3)(C) of the Act, 8 U.S.C. §§ 1158(b)(1)(B)(iii), 1229a(c)(4)(C), 1231(b)(3)(C) (2012).[2] This broad language encompasses statements made in border and airport interviews, as long as the Immigration Judge takes into account any issues regarding the circumstances under which they were made.[3] *See Ye v. Lynch*, 845 F.3d 38, 45 (1st Cir. 2017).

The import of the case law regarding these DHS interviews is that, as a preliminary issue, it is necessary to consider whether there are persuasive reasons to doubt the alien's understanding of the interviewer's questions. *See Nadmid v. Holder*, 784 F.3d 357, 360−61 & n.1 (7th Cir. 2015) (noting that the interpreter spoke a language in which the alien was only minimally proficient); *Balasubramanrim*, 143 F.3d at 159−64 (doubting the reliability of the interview, in part because of the alien's inability to understand and respond to questions); *cf. Ye*, 845 F.3d at 44 (rejecting a challenge to an adverse credibility finding where the alien indicated at the time of the interview that he understood the interpreter's questions but subsequently claimed otherwise). The most basic consideration is whether an interpreter was provided if one was requested. *Senathirajah v. INS*, 157 F.3d 210, 213

[2] The REAL ID Act applies to applications for asylum, withholding of removal, and protection under the Convention Against Torture, as well as all other applications for relief.

[3] These interviews are typically memorialized in a Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act (Form I-867A). *Cf. Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988) (admitting the Record of Deportable/Inadmissible Alien (Form I-213) when it is reliable and fundamentally fair to do so).

(3d Cir. 1998) (noting that the alien requested an interpreter before making a statement, but none was provided).

If the alien's statements from the interview are being contrasted with his or her subsequent testimony, it is important to have a detailed and reliable recitation of the questions and answers from the interview. *See Moab*, 500 F.3d at 660−61; *Singh*, 403 F.3d at 1089−90; *see also Matter of S-S-*, 21 I&N Dec. 121, 124 (BIA 1995) (stating the importance of having "a reliable record of what transpired at [the] interview" in order to "evaluate questions with respect to credibility"). Further, to support a finding that the statements are actually inconsistent, the questions asked during the interview should be designed "to elicit the details of an asylum claim," and the interviewer should ask follow-up questions to develop the alien's account. *Ramsameachire*, 357 F.3d at 180 (citation omitted); *see also Yan Xia Zhu*, 537 F.3d at 1041 (rejecting an adverse credibility finding because the alien's interview statements, rather than being inconsistencies, were a "vague outline" of her more detailed testimony at the hearing and were not followed up with additional questions).

Finally, some courts have recognized special considerations related to an alien's individual circumstances that may affect the reliability of his or her answers. *See, e.g.*, *Moab*, 500 F.3d at 661 (finding that the alien's unwillingness to disclose his sexual orientation out of fear of further harm was reasonable); *Fiadjoe v. Att'y Gen. of U.S.*, 411 F.3d 135, 159−60 (3d Cir. 2005) (recognizing that a female alien who suffered sexual abuse in her home country may be less willing to provide details of the trauma to a male immigration official); *cf. Shkambi*, 584 F.3d at 1049−52 (rejecting the alien's explanation that his inconsistencies and omissions in an airport interview resulted from his fear of being returned to his home country). The Immigration Judge should address any arguments made regarding these issues and explain why they are or are not persuasive in the case.

In assessing the interview, the Immigration Judge should consider the totality of the circumstances presented, based on the evidence presented and the arguments raised by the parties. In *Ramsameachire*, 357 F.3d at 180, the Second Circuit enumerated the following factors to be considered in determining whether the interview is reliable: (1) whether the record of the interview is verbatim or merely summarizes or paraphrases the alien's statements; (2) whether the questions asked are designed to elicit the details of a claim and the interviewer asks follow-up questions that would aid the alien in developing his or her account; (3) whether the alien appears to have been reluctant to reveal information to the interviewer because of prior interrogation sessions or other coercive experiences in his or her home country; and (4) whether the alien's answers to the questions posed suggest that he or she did not understand English or the interpreter's translations.

In *Ye*, 845 F.3d at 44, the First Circuit rejected the argument that it should adopt these factors. Noting that the REAL ID Act was enacted after the Second Circuit's decision in *Ramsameachire*, the court declined to employ a checklist or require specific dispositive considerations that must be addressed. The First Circuit stated that Immigration Judges are not required "to undertake an inquiry into the reliability of initial interviews with Border Patrol agents using specifically enumerated factors." *Id.* We agree. In our view, although the factors listed in *Ramsameachire* are proper considerations for assessing the reliability of an interview, the Immigration Judge should assess the accuracy and reliability of the interview based on the totality of circumstances, rather than relying on any one factor among a list or mandated set of inquiries. *See Ye*, 845 F.3d at 44.

Moreover, under the REAL ID Act, there is a presumption that interviews of this nature are proper to consider in an adverse credibility determination. *See* sections 208(b)(1)(B)(iii), 240(c)(4)(C), 241(b)(3)(C) of the Act. However, as is generally the case with evidence presented in immigration proceedings, the Immigration Judge should address any arguments raised regarding the accuracy and reliability of the interview and explain why the arguments are or are not persuasive.

B. Applicant's Interview and Credibility

In this case, the applicant claims that he had difficulty understanding the immigration officer at his 2010 border interview, that he does not remember if he was asked about his fear of harm upon return, and that the resulting statement was in English, which he could not read. However, the record supports the Immigration Judge's findings to the contrary.

The Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act (Form I-867A), which was prepared during the applicant's border interview, contains a detailed recitation of the questions and answers relating to the applicant's claim, including the purpose of his visit, the length of his stay, and the issue whether he feared any harm if returned to Mexico.[4] It indicates that the interview was conducted in Spanish, the applicant's native language. While no separate interpreter was used, the applicant and the immigration officer discussed the applicant's travel to the United States and his intent in coming to this country. The record does not indicate that they struggled to communicate or that there was any misunderstanding regarding

[4] The applicant initialed each page of the document and the Border Patrol agent signed it. In addition, the record includes a Jurat for Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act (Form I-867B), which included a statement affirming the truth and accuracy of the applicant's responses. *See Ye*, 845 F.3d at 44. It was also signed by the applicant and the interviewing agent and was witnessed by a second Border Patrol agent.

the matters discussed. *See Ye*, 845 F.3d at 44. Moreover, as acknowledged during his hearings, the applicant can understand and read English.

The accuracy and reliability of DHS interviews is a matter of fact to be determined by the Immigration Judge and reviewed by us for clear error. 8 C.F.R. § 1003.1(d)(3)(i) (2017). The applicant's interview was conducted in his native language, the documentary evidence in the record demonstrates that specific, detailed questions were asked of the applicant regarding his prior experiences and fear of future harm, and he has presented no other circumstances that affected the reliability of the interview. We therefore conclude that the Immigration Judge did not clearly err in finding that the applicant's border interview documents were accurate and reliable and could properly be considered in the context of making his credibility determination.

The Immigration Judge's adverse credibility determination is also not clearly erroneous. 8 C.F.R. § 1003.1(d)(3)(i). The Immigration Judge based his determination on specific and cogent reasons, which involved discrepancies between the applicant's testimony and documentary evidence, as well as his implausible explanations for such inconsistencies. *See* section 240(c)(4)(C) of the Act; *Singh v. Lynch*, 802 F.3d 972, 974−77 (9th Cir. 2015); *see also Shrestha v. Holder*, 590 F.3d 1034, 1043−45 (9th Cir. 2010).

The applicant's sworn statement in his April 2010 border interview is clearly inconsistent with his current claim. Although he now asserts that he and his father were kidnapped in March 2010, just weeks before his interview, he did not express any fear of harm if he was returned to Mexico at that time. He explains this inconsistency by stating that he was traumatized and scared, despite the fact that he was told he could speak confidentially with an officer if he preferred. The Immigration Judge determined that it was unlikely that the applicant would not mention his own experiences or his father's kidnapping and murder in his interview, if those claims were true. *See Ye*, 845 F.3d at 44.

Moreover, the applicant's statement in his interview that he was in the United States to look for his father, who came to this country 3 years earlier, directly contradicted his later claim that his father was kidnapped and brutally murdered shortly before the applicant's arrival at the border. *See Yan Liu v. Holder*, 640 F.3d 918, 925−26 (9th Cir. 2011) (affirming an adverse credibility finding and distinguishing between a subsequent elaboration of the claim the alien made at an airport interview and a clear contradiction in her statements); *see also Muñoz-Monsalve v. Mukasey*, 551 F.3d 1, 4 (1st Cir. 2008) ("Simply put, this is a case in which the [alien] has told different tales at different times."). These are significant discrepancies on which the Immigration Judge properly relied in determining that the applicant lacked credibility. *See Yan Liu*, 640 F.3d at 925−26; *see also Shrestha*, 590 F.3d at 1046−47.

The Immigration Judge also noted other inconsistencies relating to the injuries that the applicant says he experienced and to the medical treatment he received in the aftermath of his purported kidnapping and beating. The applicant testified that he was cut and received medical treatment, including stitches, when he went to the doctor. However, the doctor's letter in the record does not discuss any specific injuries or reference any stitches or other treatment that was provided. The letter does state that the applicant was beaten with "multiple hits in his whole body" and that he was threatened with death. But the applicant testified that he did not tell the doctor anything about the harm he suffered. While he indicated that his aunt may have discussed his situation with the doctor, given that she made the appointment, this possibility does not sufficiently explain or undermine the multiple discrepancies concerning the letter. *See Shrestha*, 590 F.3d at 1046−47.

The applicant asserts that his explanations for these discrepancies were not "internally inconsistent or inherently implausible." However, an Immigration Judge is not required to "interpret the evidence in the manner advocated by [the applicant]." *Don v. Gonzales*, 476 F.3d 738, 744 (9th Cir. 2007). An Immigration Judge may make "reasonable inferences from direct and circumstantial evidence of the record as a whole" and "is not required to accept [an alien's] assertions, even if plausible, where there are other permissible views of the evidence based on the record." *Matter of D-R-*, 25 I&N Dec. 445, 454−55 (BIA 2011), *remanded on other grounds*, *Radojkovic v. Holder*, 599 F. App'x 646 (9th Cir. 2015).

The Immigration Judge considered the respondent's explanations but rejected them based on other plausible views of the evidence. *See Mondaca-Vega v. Lynch*, 808 F.3d 413, 426 (9th Cir. 2015) (en banc) ("As long as 'there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.'" (citation omitted)); *Matter of J-Y-C-*, 24 I&N Dec. 260, 263 (BIA 2007) (noting that "a factual finding is not 'clearly erroneous' merely because there are two permissible views of the evidence" (citation omitted)).

Based on the significant inconsistencies in the applicant's statements and his unpersuasive explanations for those discrepancies, we conclude that there is no clear error in the Immigration Judge's adverse credibility finding. *See Enying Li v. Holder*, 738 F.3d 1160, 1163−68 (9th Cir. 2013) (explaining that significant inconsistencies concerning a material aspect of a claim support a determination that the applicant's entire claim is not credible); *Rivera v. Mukasey*, 508 F.3d 1271, 1275 (9th Cir. 2007) (affirming an adverse credibility finding because inconsistencies regarding details of the claim, when viewed cumulatively, deprived the claim of the "ring of truth" (citation omitted)).

C. Convention Against Torture

The applicant did not show that "it is more likely than not" that he would be tortured upon his removal to Mexico, 8 C.F.R. § 1208.16(c)(2) (2017), or that any claimed torture would be "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity," 8 C.F.R. § 1208.18(a)(1) (2017). *See Zheng v. Ashcroft*, 332 F.3d 1186, 1194−97 (9th Cir. 2003). Since the applicant lacked credibility and the objective evidence in the record does not independently establish his claim, he did not satisfy his burden to prove his eligibility for protection under the Convention Against Torture.[5] 8 C.F.R. § 1208.16(c)(2); *see also Shrestha*, 590 F.3d at 1048−49 (upholding the denial of protection where the alien's testimony was discredited and other objective evidence was insufficient to establish that it was more likely than not that he would be tortured if removed). We therefore discern no clear error in the Immigration Judge's determination that the record does not independently demonstrate a likelihood that the applicant will be tortured upon his return to Mexico. *See Matter of Z-Z-O-*, 26 I&N Dec. 586, 590 (BIA 2015) (holding that an Immigration Judge's predictive findings of fact are subject to a clear error standard of review).

III. CONCLUSION

The Immigration Judge properly considered the applicant's border interview in making his credibility determination. Based on significant inconsistencies between the applicant's statements in the interview and his testimony at removal proceedings, the Immigration Judge determined that the applicant's claim was not credible under the totality of the circumstances. We conclude that there is no clear error in the Immigration Judge's findings in this regard. We also conclude that the record supports the denial of the applicant's request for protection under the Convention Against Torture. Accordingly, the applicant's appeal will be dismissed.[6]

ORDER: The appeal is dismissed.

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[5] The corroborating evidence presented to establish the applicant's claim consisted of the doctor's letter, as well as a written declaration from his aunt and evidence of general country conditions. There is no error in the Immigration Judge's determination that this evidence was insufficient to overcome the fundamental inconsistences in the applicant's testimony as to the purported harm he and his father experienced in 2010.

[6] In light of the Immigration Judge's adverse credibility determination and our conclusion regarding the applicant's inability to establish his eligibility for relief, we need not address the applicant's challenge to the Immigration Judge's findings regarding the issue of internal relocation.