No. 10-840

In the Supreme Court of the United States

KANCHHI MAYA SHERPA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in affirming the Board of Immigration Appeals' discretionary decision to deny petitioner's untimely motion to reopen her immigration proceedings.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unreported. The decisions of the Board of Immigration Appeals (Pet. App. 5a-9a) and the immigration judge (Pet. App. 17a-30a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 2010. A petition for a writ of certiorari was filed on December 22, 2010. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the Secretary of Homeland Security or the Attorney General may, in their discretion, grant asylum to an alien who demon-

strates that she is a "refugee." 8 U.S.C. 1158(b)(1)(A). The INA defines "refugee," in relevant part, as an alien who is unwilling or unable to return to her country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). In addition to the discretionary relief of asylum, mandatory withholding of an alien's removal from the United States is available "if the Attorney General decides that the alien's life or freedom would be threatened in [the country of removal] because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). The alien bears the burden of establishing her eligibility for asylum or withholding of removal. 8 C.F.R. 208.13(a) and .16(b).[1]

Additionally, an alien who fears torture if removed to a particular country may obtain protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. The CAT has been implemented through Department of Justice regulations. See 8 C.F.R. 208.16-208.18; see also Foreign Relations Authorization Act, Fiscal Years 1998 and 1999, Pub. L. No. 105-277, 112 Stat. 2681-2822 (8 U.S.C. 1231 note). To obtain protection under the CAT, an alien must dem-

[1] These requirements are now codified at 8 U.S.C. 1158(b)(1)(B)(i) and 1231(b)(3)(C), which were added to the INA by Sections 101(a)(3) and (c) of the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, 303-304. Because petitioner's asylum application was filed before the May 11, 2005, effective date of the REAL ID Act, C.A. App. 318, the provisions of that Act do not apply to this case. See REAL ID Act § 101(h)(2), 119 Stat. 305.

onstrate that it is more likely than not that she would be tortured, by or with the acquiescence of the government, in the country of removal. 8 C.F.R. 208.16(c)(2); 8 C.F.R. 208.18(a)(1).

2. Petitioner is a native of Nepal who entered the United States in 2003 on a nonimmigrant visa, with the period of authorized stay set to expire on February 4, 2004. Pet. App. 18a; Gov't C.A. Br. 4. Following that expiration date, petitioner conceded her removability, but sought asylum, withholding of removal, and relief under the CAT. Pet. App. 18a, 30a. Petitioner claimed that Maoist rebels had persecuted her in Nepal because of her husband's membership in, as well as her own support of, the Nepali Congress Party. *Id.* at 19a-23a.

a. After an evidentiary hearing, the immigration judge denied relief. Pet. App. 30a. The immigration judge first concluded that petitioner's testimony was not credible. *Id.* at 26a. Petitioner's "major credibility issue" was a "significant discrepancy" in her description of an alleged abduction by Maoists; in her asylum application and interview with an asylum officer, she had claimed a much more prolonged abduction than she had testified to at the hearing. *Ibid.* The immigration judge also found a number of more minor inconsistencies: petitioner "really did not know much about the Nepalese Congress Party"; she lacked knowledge regarding what caste she was in; she was inconsistent about which relative of hers had allegedly been killed by the Maoists; and her claim that she had stated in applying for her nonimmigrant U.S. visa that she was fleeing persecution (a statement that would have rendered her ineligible for such a visa) was "hard to believe." *Id.* at 25a. All of these discrepancies, taken together, led the immigration judge to find petitioner not to be credible. *Id.* at 26a.

The immigration judge then held that petitioner had not satisfied the criteria for asylum, withholding of removal, or CAT protection, and he ordered her removal to Nepal. Pet. App. 30a. As to asylum, the immigration judge determined that petitioner's previous problems with Maoists were "[c]riminal extortion" of money due to her relative wealth rather than "persecution based on political opinion," and that there was insufficient evidence that she had a reasonable fear of persecution by Maoists if she were to return to Nepal. *Id.* at 27a-29a. Those same findings also led the immigration judge to deny withholding of removal. *Id.* at 29a. And the immigration judge additionally denied CAT relief because there was insufficient evidence "to show that it is more likely than not that [petitioner] would be tortured by the Nepalese government or anyone acting with the acquiescence of that government." *Ibid.*

b. Petitioner appealed to the Board of Immigration Appeals (Board), which adopted and affirmed the immigration judge's decision. C.A. App. 185. The Board denied petitioner's motion to remand in order for her to present testimony from her husband. *Ibid.* The Board concluded that remand was not warranted, as petitioner "failed to explain either how her husband's testimony would change the Immigration Judge's adverse credibility finding or why her husband failed to provide a statement or an affidavit in support of her applications for relief during the proceedings before the Immigration Court." *Ibid.* Petitioner did not seek judicial review of the Board's decision.

3. Petitioner subsequently filed a series of three motions to reopen her immigration proceedings. In general, an alien may file only one motion to reopen, which must be filed within 90 days of the entry of the final ad-

ministrative decision of removal. 8 U.S.C. 1229a(c)(7)(A) and 1229a(c)(7)(C)(i); 8 C.F.R. 1003.2(c)(2). There is an exception to those limitations, however, if the motion to reopen alleges that asylum or withholding of removal is appropriate based on "changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding." 8 U.S.C. 1229a(c)(7)(C)(ii); 8 C.F.R. 1003.2(c)(3)(ii). "The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board," subject to regulatory requirements. 8 C.F.R. 1003.2(a). "The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief." *Ibid.*

a. Petitioner filed her first motion to reopen approximately six months after the Board's decision. C.A. App. 139-140. The Board denied the motion as untimely. *Id.* at 140.

Petitioner argued for equitable tolling of the 90-day limitations period based on allegations of ineffective assistance of counsel, but the Board determined that "counsel did not commit any error in this case." C.A. App. 139. Petitioner also argued for an exception to the 90-day period on the ground of changed circumstances, claiming that Maoists were now part of the Nepalese government. *Id.* at 140. The Board first observed that the immigration judge had made an adverse credibility finding regarding petitioner's claims of Maoist persecution and concluded that "even if [petitioner] established changed country conditions, * * * this cannot alter her asylum and withholding claims based on facts found not to be credible." *Ibid.* The Board additionally concluded that the documents petitioner had submitted "fail[ed] to establish" that she "has a well-founded fear of persecution by the Maoists in Nepal, given that her testimony regarding her past activities and claimed harm was found not credible, and she has not established that she falls within one of the groups targeted by the Maoists." *Ibid.* Petitioner did not seek further review of the Board's decision.

b. Over seven months later, petitioner filed a second untimely motion to reopen to seek CAT relief based on changed country conditions, claiming that various letters showed that the Maoists were looking for her and were threatening and demanding money from her parents. C.A. App. 104. The Board denied the motion, which it noted was both untimely and successive. *Ibid.* (citing 8 C.F.R. 1003.2(c)(2)). The Board observed that petitioner had made claims "similar" to those in her motion to reopen "during proceedings before the Immigration Judge" and had been deemed not credible. *Id.* at 104. It further observed that petitioner's parents had been able to escape the Maoists and that news articles submitted by petitioner gave "no indication" that the Maoists, who had joined the government, "have been responsible for, or acquiesced to, the torture of any particular person or group." *Ibid.*

Petitioner sought judicial review in the court of appeals. *Sherpa* v. *Mukasey*, 301 Fed. Appx. 19 (2d Cir. 2008). The court affirmed, concluding that the Board had not abused its discretion in denying the motion to reopen. *Id.* at 20. The court reasoned that, because petitioner had not demonstrated government-sponsored Maoist torture, she had failed to show how her claimed change in country conditions "was, in itself, material." *Ibid.* "Moreover, in light of the [immigration judge's] adverse credibility determination, the [Board] reasonably declined to credit the letters [petitioner] submitted, allegedly from her parents and the Maoists, indicating that the Maoists were searching for [petitioner] and her husband." *Ibid.* (citing *Qin Wen Zheng* v. *Gonzales*, 500 F.3d 143, 147 (2d Cir. 2007)).

c. Approximately eight months later, petitioner filed a third motion to reopen, styled as a motion to reopen and reconsider, again seeking CAT relief. C.A. App. 10-12.[2] She claimed that the Maoists had carried on with persecution despite signing a peace accord and joining the government; that the Maoists continued to threaten her through her parents; and that the Maoists had beaten her father while inquiring about her. *Id.* at 11.

The Board denied the motion. Pet. App. 7a-9a. Insofar as the motion sought reconsideration of the previous Board order, the Board denied it as untimely. *Id.* at 7a-8a. The Board then observed that the documents submitted in support of the motion to reopen "are not authenticated and have little indicia of reliability, particularly in light of the adverse credibility finding made by the Immigration Judge in this case, and affirmed by this Board on appeal." *Id.* at 9a (citing *Qin Wen Zheng*, 500 F.3d 143). It concluded that the motion did not establish changed country conditions warranting an exception to the time and number limitations on motions to reopen. *Ibid.*

The court of appeals affirmed. Pet. App. 1a-4a. The court concluded that petitioner's motion was "indisputably" untimely and successive, and that the Board "did not abuse its discretion in finding that she failed to establish changed country conditions excusing her un-

[2] The motion to reopen reprinted in the petition appendix, Pet. App. 10a-16a, is petitioner's second motion to reopen.

timely filing." *Id.* at 3a. The court concluded that the Board "properly relied on the immigration judge's underlying adverse credibility determination to reject her documentary evidence as insufficient to establish changed country conditions." *Ibid.* (citing *Qin Wen Zheng*, 500 F.3d at 147-148). It further stated that "[i]ndeed, the [Board] reasonably applied the doctrine *falsus in uno, falsus in omnibus*, in rejecting [petitioner's] unauthenticated and unreliable affidavits." *Id.* at 4a (citing *Siewe* v. *Gonzales*, 480 F.3d 160, 170 (2d Cir. 2007)). "Moreover," the court reasoned, "the record does not indicate that the [Board] failed to consider any of the evidence [petitioner] submitted." *Ibid.* (citation omitted).

ARGUMENT

Petitioner contends (Pet. 4-8) that the court of appeals erred by reciting the *falsus in uno, falsus in omnibus* (false in one thing, false in all things) maxim in affirming the Board's decision. The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. This case is in any event an unsuitable vehicle for addressing the question presented. Further review is unwarranted.

1. The court of appeals correctly concluded that the Board did not abuse its discretion in denying petitioner's third untimely motion to reopen her immigration proceedings. In contending otherwise, petitioner overlooks the procedural posture of the case. This Court has explained that motions to reopen are "disfavored" and that the Board has "'broad discretion' to grant or deny such motions." *INS* v. *Doherty*, 502 U.S. 314, 323 (1992) (citation omitted); see 8 C.F.R. 1003.2(a). The Court has analogized such a motion to "a motion for a new trial in

a criminal case on the basis of newly discovered evidence, as to which courts have uniformly held that the moving party bears a heavy burden." *INS* v. *Abudu*, 485 U.S. 94, 110 (1988). And the Court has recognized that "[i]f INS discretion is to mean anything, it must be that the INS has some latitude in deciding when to reopen a case," and that "[g]ranting such motions too freely will permit endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a prima facie case." *Id.* at 108 (citation omitted).

The Board here permissibly exercised its discretion to deny petitioner's repeated, similar motions to reopen. Petitioner's motions all related to her original claim of persecution by Maoists. The immigration judge, citing the cumulative impact of a number of discrepancies, found petitioner's testimony regarding Maoist persecution not to be credible. Pet. App. 26a. The Board affirmed and adopted that conclusion in the original administrative appeal, C.A. App. 185, and petitioner did not seek judicial review of that determination. The Board is not required at this point to reopen proceedings based on an untimely motion presenting new testimony and unauthenticated documents concerning a matter as to which an alien has been deemed not credible. See, *e.g.*, *Le Bin Zhu* v. *Holder*, 622 F.3d 87, 92 (1st Cir. 2010) (within Board's discretion to give little weight to unauthenticated document submitted in support of alien's motion to reopen where the Board's decision "is supported by [a prior] adverse credibility finding"); *Zhang* v. *Mukasey*, 543 F.3d 851, 855 (6th Cir. 2008) (within Board's discretion, "[a]gainst [the] background" finding alien "not credible and her documents fraudulent," to discount letter by petitioner's best friend).

2. Petitioner focuses (Pet. i, 6-8) on the court of appeals' mention of the *falsus in uno, falsus in omnibus* maxim and argues that the court of appeals' decision conflicts with the Seventh Circuit's decision in *Kadia* v. *Gonzales*, 501 F.3d 817 (2007). The court in *Kadia* vacated a removal order and remanded for further proceedings in circumstances in which an immigration judge "had failed to distinguish between material lies, on the one hand, and innocent mistakes, trivial inconsistencies, and harmless exaggerations, on the other hand." *Id.* at 821. The court concluded that the immigration judge had, "[i]n effect, * * * applied the discredited doctrine of *falsus in uno, falsus in omnibus*," which the court (citing several authorities) characterized as an "absolutely false maxim of life." *Ibid.* (quoting 3A John Henry Wigmore, *Evidence in Trials at Common Law* § 1008, at 982 (James H. Chadbourn ed., rev. ed. 1970)).

Petitioner's reliance on *Kadia* is misplaced. First of all, the court in *Kadia* was *directly* reviewing a credibility determination, rather than reviewing the denial of a motion to reopen. See 501 F.3d at 819-820; see also *Meçe* v. *Gonzales*, 415 F.3d 562, 576 (6th Cir. 2005) (observing, on direct review of asylum denial, in pre-REAL ID Act case, that "[a]n adverse credibility finding must be based on issues that go to the heart of the applicant's claim") (citation omitted). The case therefore neither presented nor addressed the question here: how an adverse credibility finding, affirmed by the Board and never presented for judicial review, might factor into the Board's subsequent exercise of discretion to deny a third untimely motion to reopen.

Second, *Kadia* did not concern a situation, like in this case, where an alien's inconsistencies were *not* "trivial," "innocent," or "harmless," but instead went to the heart of her persecution claims. 501 F.3d at 821. As previously discussed, the immigration judge here concluded, based on a combination of suspicious statements, that petitioner was not credible in claiming persecution by Maoists. Pet. App. 26a. Petitioner's self-authenticated statements and documents in her motions to reopen made contentions similar to those as to which petitioner had already been discredited. As the Seventh Circuit explained in a case discussing *Kadia*, it "is only the *automatic* inference from disbelief in one part of a witness's testimony to disbelief in the rest that the modern cases reject," and it is the job of the "trier of fact" (in this case, the immigration judge) to "consider whether * * * particular falsehoods in a witness's testimony so undermine his credibility as to warrant disbelieving the rest of his testimony." *United States* v. *Edwards*, 581 F.3d 604, 612 (2009), cert. denied, 130 S. Ct. 1301 (2010). Even in *Kadia*, the Seventh Circuit acknowledged that some "slips," "whether or not they go to the core of the witness's testimony," could establish "that the witness is a liar or his memory completely unreliable." 501 F.3d at 822.

Third, the Second Circuit has recognized "limits" on the *falsus* rationale that are generally consistent with the Seventh Circuit's view and demonstrate that its application requires a case-by-base inquiry. *Lin* v. *Gonzales*, 445 F.3d 127, 133 (2d Cir. 2006). The Second Circuit has stated that "while an [immigration judge's] application of the maxim *falsus in uno, falsus in omnibus* may *at times* be appropriate, an applicant's testimonial discrepancies—and, at times, even outright lies—must be weighed in light of their significance to the total context of his or her claim of persecution. * * * Testimonial inconsistencies are not sufficient as the sole basis for an adverse credibility finding where the inconsistencies do not concern the *basis for the claim of asylum or withholding*, but rather matters collateral or ancillary to the claim." *Zhong* v. *United States Dep't of Justice*, 480 F.3d 104, 127 (2007) (first emphasis added, citations omitted, and internal quotation marks omitted); see *Siewe* v. *Gonzales*, 480 F.3d 160, 170-171 (2d Cir. 2007) ("False evidence that is wholly ancillary to the alien's claim may, in some circumstances, be insufficient by itself to warrant a conclusion that the entirety of the alien's uncorroborated material evidence is also false.") The court of appeals' context-dependent decision to cite the maxim approvingly in this particular case accordingly does not warrant review.

3. Even assuming that the result in this case were inconsistent with *Kadia*, this case would not provide a suitable vehicle for addressing reliance upon the *falsus* rationale in immigration proceedings. The court of appeals' mention of that point was not outcome-determinative in this case, because its judgment is supported on an alternative ground. In addition to discussing petitioner's adverse credibility determination, the court stated that "[m]oreover, the record does not indicate that the [Board] failed to consider any of the evidence [petitioner] submitted." Pet. App. 4a. That statement is properly construed as an alternative holding recognizing that the Board permissibly exercised its discretion to deny the motion to reopen based on its evaluation of the evidence. See *id.* at 9a (conclusion of Board that petitioner's motion "does not establish changed country conditions that would warrant an exception to the limitations on motions to reopen").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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