

No. 06-1448

In the Supreme Court of the United States

MAMADOU SY, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether there was substantial evidence to support the immigration judge's finding that petitioner's testimony was not credible.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-14a) is not published in the *Federal Reporter* but is reprinted in 199 Fed. Appx. 444. The decisions and orders of the Board of Immigration Appeals (Pet. App. 15a-17a, 18a-19a, 20a-21a, 22a, 23a-24a) and the immigration judge (Pet. App. 25a-35a, 36a-48a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 2006. A petition for rehearing was denied on January 29, 2007 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on April 27, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Naturalization Service (INS) charged petitioner under 8 U.S.C. 1182(a)(6)(A)(i) with being removable from the United States as an alien present in the country without being admitted or paroled. Pet. App. 36a-37a. Petitioner, who claimed to be a native and citizen of Mauritania, responded to those charges by seeking asylum, withholding of removal, and protection under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Dec. 10, 1984, 1465 U.N.T.S. 85, alleging that he had been persecuted in his home country after he supported a reform politician. Pet. App. 4a; see *id.* at 7a. At a hearing before an immigration judge (IJ) in December 1999, petitioner offered in support of his claim documents that he asserted were (1) a French original and English translation of a Mauritanian nationality certificate, and (2) a French original and English translation of a Mauritanian birth certificate excerpt. *Id.* at 5a.

a. The IJ admitted those documents into evidence but postponed the cross-examination of petitioner by the INS so that the INS could submit the documents for forensic examination. Pet. App. 5a. The INS was unable to obtain the results of that examination before the IJ resumed the hearing. The INS nonetheless proceeded to cross-examine petitioner and elicited testimony revealing that he was not familiar with the geography of Nouadhibou, the city in which he claimed to have gone to high school. *Id.* at 5a-7a. The IJ noted that petitioner “flunk[ed]” at least part of this geography “quiz,” *id.* at 44a, but stated that he did not want to deny asylum “simply because of a poor sense of direction or an ignorance” of the geography of Mauritania, *id.* at

46a. Lacking the results of the forensic examination of petitioner's documents, the IJ decided to "give [petitioner] the benefit of the doubt," *id.* at 34a, and granted him asylum, *id.* at 48a. The IJ denied petitioner's applications for withholding of removal and relief under the CAT. *Ibid.*

b. On December 16, 1999, the day after the IJ issued his decision, the INS submitted a letter from Senior Forensic Document Examiner Larry F. Ziegler, who had examined petitioner's documents and concluded they were fraudulent. Pet. App. 26a, 28a. The IJ reopened petitioner's case, and at a hearing on August 24, 2000, Examiner Ziegler testified that he believed the nationality and birth certificates submitted by petitioner were not authentic. *Id.* at 27a-29a. Examiner Ziegler explained that petitioner's documents had been produced on a photo copy machine, rather than the "off-set printing" used in all known Mauritanian certificates. *Id.* at 28a. He also noted that petitioner's documents contained brown stains that suggested that someone had attempted to artificially age them and "a lot of * * * photo copy trash" from being copied again and again. *Ibid.*

Petitioner produced no expert testimony to contradict Examiner Ziegler's testimony but submitted additional documentation in support of his claim. Pet. App. 28a-29a. The second set of documents did not match the typeset and general appearance of the first set, however, and one document stated that petitioner had obtained his declaration of nationality on April 22, 1989, although petitioner had testified that he had obtained the declaration on June 18, 1988. *Id.* at 30a-31a. Petitioner could not explain the discrepancies in appearance and content. Petitioner also offered inconsistent testimony about the

origin of the first set of documents, at first claiming they came from his father's library and later stating that his sister had obtained them from city hall. *Id.* at 29a.

Based upon the additional evidence and testimony, the IJ found that petitioner "[wa]s not credible." Pet. App. 32a-25a. The IJ noted that the new documents submitted by petitioner "look completely different and * * * actually contain[ed] different information" than the first documents did, and petitioner could not explain the difference. *Id.* at 34a-35a. The IJ also noted that petitioner had demonstrated poor geographic knowledge and given conflicting testimony about how he had obtained the documents. Refusing "to give [petitioner] the benefit of the doubt" in light of the new evidence and testimony, the IJ rescinded his previous order, denied petitioner's application for asylum, and ordered him removed to Mauritania. *Id.* at 35a.

2. The Board of Immigration Appeals (BIA) affirmed the decision of the IJ without opinion. Pet. App. 22a. The Board reissued the decision on October 14, 2003 to accommodate petitioner's counsel's change in address. *Id.* at 20a-21a. On August 17, 2004, after the BIA discovered that the record it had reviewed contained "a transcript which did not relate to [petitioner's] proceedings," *id.* at 18a-19a, it issued a new decision. The Board concluded that "the record fully supports" the IJ's decision. *Id.* at 16a.

3. The court of appeals denied a petition for review of the Board's decision in an unpublished, per curiam opinion. Pet. App. 3a-14a. The court held that there was substantial evidence "to support the immigration court's decision that * * * petitioner was not entitled to a finding of credibility," *id.* at 13a, noting the "numerous inconsistencies in his testimony," his "lack of

knowledge of the critical geography of Mauritania,” and the INS forensic report indicating that the documents were not authentic, *id.* at 12a. The court rejected petitioner’s contention that “there was no evidence that [he] knew that the counterfeit document[s] w[ere] not genuine,” and thus he was entitled to relief under the rationale of *Kourski v. Ashcroft*, 355 F.3d 1038 (7th Cir. 2004). Pet. App. 11a. The court explained that the proper inquiry is whether a petitioner “knew or *should have known* that [submitted documents] were counterfeit,” *ibid.*, and it concluded that petitioner could not prevail under that standard because the documents were “obviously fake” and petitioner was unable “to offer an internally consistent explanation of how he came to possess” them. *Id.* at 12a. Finding no merit to petitioner’s allegation “that the BIA’s review of the immigration court’s decision was inadequate in any respect,” the court of appeals denied the petition for review. *Id.* at 14a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. It does not merit review.

1. Petitioner contends that the court of appeals departed from a “developing consensus” among the courts of appeals that, “absent proof that [an] alien knew or had reason to know” that a document provided to the immigration court was not genuine, the “document alone is insufficient” to cast doubt on an alien’s credibility and “justify the denial or revocation of an alien’s asylum claim.” Pet. 5; see 8 C.F.R. 208.13 (“The testimony of the applicant [for asylum], if credible, may be sufficient to sustain the burden of proof without corroboration.”).

That contention is incorrect. The court of appeals specifically stated that, for purposes of credibility, the question presented is whether petitioner “knew or *should have known* that [the documents] were counterfeit,” Pet. App. 11a, the same standard applied by the court of appeals in the cases cited by petitioner. See *Kourski v. Ashcroft*, 355 F.3d 1038, 1039 (7th Cir. 2004) (suggesting, in the context of a subtle forgery, that an IJ would have to find that a petitioner “knew or suspected that the birth certificate [at issue] was a forgery” in order to deny asylum on the basis of fraud); accord *Yeimane-Berhe v. Ashcroft*, 393 F.3d 907, 911 (9th Cir. 2002) (explaining that “the use of a fraudulent document may, considering the totality of the record, lend support to an adverse credibility finding,” and noting that a falsehood is less likely to be determinative of credibility “when there is no indication or finding by the IJ that the petitioner knew the document was fraudulent”).

2. Petitioner also suggests (Pet. 7) that the court of appeals somehow misapplied the applicable standard in determining that there was substantial evidence to support the IJ’s finding that petitioner was not credible. That fact-bound claim does not warrant this Court’s review. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951) (“Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.”). The court of appeals recognized that the IJ’s findings were based on several factors: (1) petitioner’s possession and submission of two sets of birth and nationality certificates that differed in both appearance

and content and were “obviously fake,” Pet. App. 12a; (2) petitioner’s conflicting testimony regarding how he obtained those documents; and (3) his confusion regarding “the critical geography” of the city where he claimed to have gone to high school. *Ibid.*; see *id.* at 6a. The court of appeals thus correctly determined that the evidence before the IJ supported the finding that petitioner was not credible.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2007