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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 24th day of May, two thousand and six.

PRESENT:

HON. GUIDO CALABRESI,
HON. ROSEMARY S. POOLER,
HON. BARRINGTON D. PARKER,
Circuit Judges.

Orsin Turmalaj,

Petitioner,

-v.-

No. 05-4672-ag
NAC

Alberto Gonzales, Attorney General,

Respondent.

FOR PETITIONER: Aleksander B. Milch, Christophe & Associates, P.C., New York,
New York.

FOR RESPONDENT: Rodger A. Heaton, United States Attorney for the Central District of
Illinois, Bradley W. Murphy, Assistant United States Attorney,
Springfield, Illinois.

UPON DUE CONSIDERATION of this petition for review of the Board of Immigration Appeals (“BIA”) decision, it is hereby ORDERED, ADJUDGED, AND DECREED that the petition for review is GRANTED, the decision is VACATED and the case is REMANDED for further proceedings consistent with this order.

1 Orsin Turmalaj, through counsel, petitions for review of the BIA decision affirming
2 Immigration Judge (“IJ”) Michael W. Straus’s decision denying his application for asylum,
3 withholding of removal and relief under Article 3 of the Convention Against Torture (“CAT”). We
4 assume the parties’ familiarity with the underlying facts and procedural history.

5 Where, as here, the BIA issues an opinion that fully adopts the IJ’s decision, we review the
6 IJ’s decision. *See, e.g., Chun Gao v. Gonzales*, 424 F.3d 122, 124 (2d Cir. 2005); *Secaida-Rosales*
7 *v. INS*, 331 F.3d 297, 305 (2d Cir. 2003). Title 8, Section 1158(a)(3) of the United States Code
8 provides, *inter alia*, that no court shall have jurisdiction to review the agency’s finding that an
9 asylum application was untimely under 8 U.S.C. § 1158(a)(2)(B), or its finding of neither changed
10 nor extraordinary circumstances excusing the untimeliness under 8 U.S.C. § 1158(a)(2)(D). We do
11 not disturb the BIA’s affirmance of the IJ’s decision to pretermitt Turmalaj’s asylum application
12 because we find no legal or constitutional questions presented in this case that would warrant
13 judicial review.

14 However, we do review Turmalaj’s eligibility for withholding of removal and relief under
15 the CAT. Here, the IJ’s denial of relief was based on an adverse credibility determination that is
16 not supported by substantial evidence.

17 First, the IJ relied heavily on statements Turmalaj made at his asylum interview to assess
18 his credibility. Although we have held that “the imperative to ‘closely examine’ the reliability of
19 asylum interviews is not as pressing as it is in the airport interview context,” *Diallo v. Gonzales*, ___
20 F.3d ___, 2006 WL 1102819, at *7 (2d Cir. Apr. 26, 2006), an IJ and the BIA are nonetheless
21 required “carefully to consider the reliability of asylum interviews.” *Id.* Here, the record indicates
22 that the asylum officer only summarized Turmalaj’s statements. It did not describe the specific
23 questions asked or provide anything like a verbatim account of the proceeding. *See id.* at *8.
24 Turmalaj testified that he had experiences with interrogations and torture in Albania, which could

1 reasonably have made him reluctant to disclose the details of his story to the asylum officer.
2 Specifically, Turmalaj testified that during his interrogations, the police “beat me up if I didn’t
3 answer.” The IJ failed to evaluate these factors or discuss how they affected the reliability of the
4 officer’s account of Turmalaj’s asylum interview. Accordingly, we find that the IJ erred in relying
5 on discrepancies between the asylum officer’s assessment and Turmalaj’s otherwise consistent
6 statements. *See Latifi v. Gonzales*, 430 F.3d 103, 105 (2d Cir. 2005).

7 The IJ also erred in basing the credibility determination in part on finding that Turmalaj’s
8 statements about his first arrest were inconsistent with his asylum application. The record indicates
9 that Turmalaj testified at his hearing that he was beaten, taken to a police station, and held for four
10 or five hours after protesting at a rally outside of his Catholic Church. In his asylum application,
11 Turmalaj stated that the police beat protestors at the rally, arrested him and took him to the police
12 station, interrogated, tortured and detained him for an unspecified amount of time, then released
13 him because he was young and injured. These two accounts of his arrest are not contradictory.

14 Next, the IJ erred in finding that Turmalaj’s testimony that he decided to leave Albania
15 after he was arrested in March 2001 was contradicted by his gathering of evidence well in advance
16 of that date. The IJ failed to distinguish between Turmalaj’s preparations to leave Albania, and his
17 definitive decision to depart. Additionally, we have held that an IJ should not treat “the decision-
18 making process that an asylum applicant undergoes in deciding whether to leave one’s friends,
19 family, and country forever as if it were a mathematic equation — impersonal, predictable, and
20 static — . . . [where] the reality [is] that the decision to seek asylum is a process that, for many
21 applicants, is personal, inscrutable, and dynamic.” *Pavlova v. INS*, 441 F.3d 82, 89 (2d Cir. 2006).

22 Finally, the IJ found that it was implausible that the Catholic Church would have no
23 reaction to the beating and arrest of from 500 to 1,000 Catholic protestors in Albania. The IJ also
24 noted that “there is absolutely no corroboration about it,” and concluded that the police were not

1 persecuting Catholics, but were simply disbursing a rally. We do not find error in this finding, as
2 the newspaper article Turmalaj submitted as corroboration placed the number of protestors at 30
3 and does not mention whether or how police disbursed them.

4 However, because the adverse credibility determination is flawed in all respects but one, we
5 cannot confidently predict the same result absent the errors. *See Xiao Ji Chen v. U.S. Dep't of*
6 *Justice*, 434 F.3d 144, 162 (2d Cir. 2006); *Cao He Lin v. U.S. Dep't of Justice*, 428 F.3d 391, 395
7 (2d Cir. 2005). Although the IJ's analysis and errors concerned Turmalaj's claim of asylum, which
8 was pretermitted in this case, they are determinative here because the IJ found that Turmalaj failed
9 to establish his eligibility for withholding because he could not meet the lower burden of proof for
10 asylum. Similarly, the IJ's CAT analysis incorporates in large part the flawed adverse credibility
11 determination. Finally, because the IJ's premission of Turmalaj's asylum application may also
12 have been based at least in part on the erroneous adverse credibility finding, the BIA may wish to
13 reconsider its decision to uphold the IJ's decision to deny Turmalaj's asylum application as
14 untimely filed.

15 Therefore, based on the foregoing reasons, Turmalaj's petition for review is GRANTED,
16 the BIA's decision is VACATED and the case is REMANDED for further proceedings consistent
17 with this order. Having completed our review, any stay of removal that the Court previously
18 granted in this petition is VACATED, and any pending motion for a stay of removal in this petition
19 is DENIED. Any pending request for oral argument is DENIED in accordance with Federal Rule
20 of Appellate Procedure 34(a)(2), Second Circuit Local Rule 34(d)(1).

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24 FOR THE COURT:
25 Roseann B. MacKechnie, Clerk

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27 By: _____
28 Oliva M. George, Deputy Clerk