UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2005

(Argued: April 5, 2006 Decided: May 2, 2006)

Docket No. 04-4519-ag

XIAN TUAN YE,

Petitioner,

v.

DEPARTMENT OF HOMELAND SECURITY, ALBERTO R. GONZALES,[*] U.S. ATTORNEY GENERAL,

Respondents.

Before: CABRANES, SOTOMAYOR, and RAGGI, *Circuit Judges*.

We consider here principally (1) whether an adverse credibility finding is supported by substantial evidence where a petitioner's written asylum application and subsequent testimony contain material inconsistencies that "reach[ ] to the heart of the claim" of persecution; (2) whether an IJ was required to afford the petitioner an opportunity to respond before basing an adverse credibility determination on such inconsistencies; (3) whether the BIA engaged in improper fact-finding by relying on evidence in the record not cited in the IJ's decision; (4) whether the BIA erred in declining to make administrative findings regarding the "corrected" abortion certificate which petitioner submitted for the first time on appeal, and (5) whether the BIA erred in denying petitioner's request for withholding of removal or other relief under the CAT.

Petition for review denied.

RAMESH K. SHRESTHA, New York, NY, *for Petitioner*.

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[*] U.S. Attorney General Alberto R. Gonzales is substituted as Respondent. *See* Fed. R. App. P. 43(c)(2).

THOMAS I. MEEHAN, JR., Assistant United States Attorney (Chuck Rosenberg, United States Attorney for the Southern District of Texas, *on the brief*), United States Attorney's Office for the Southern District of Texas, Houston, TX, *for Respondent.*

PER CURIAM:

We consider here principally (1) whether an adverse credibility finding is supported by substantial evidence where a petitioner's written asylum application and subsequent testimony contain material inconsistencies that "reach[ ] to the heart of the claim" of persecution; (2) whether an IJ was required to afford the petitioner an opportunity to respond before basing an adverse credibility determination on such inconsistencies; (3) whether the BIA engaged in improper fact-finding by relying on evidence in the record not cited in the IJ's decision; (4) whether the BIA erred in declining to make administrative findings regarding the "corrected" abortion certificate which petitioner submitted for the first time on appeal, and (5) whether the BIA erred in denying petitioner's request for withholding of removal or other relief under the CAT.

BACKGROUND

Petitioner Xian Tuan Ye ("Ye"), a native and citizen of China, petitions this Court for review of a July 26, 2004 Order of the Board of Immigration Appeals ("BIA"), affirming an April 16, 2003 decision of Immigration Judge ("IJ") Sandy Hom, *see In re Xian Tuan Ye*, File No. A 72-780-428 (New York, NY),[1] which denied Ye's application for asylum, withholding of removal, and relief under Article 3 of the United Nations Convention Against Torture ("CAT").[2]

Ye illegally entered the United States at Puerto Rico over a decade ago, in February 1994. He applied for asylum and withholding of deportation in October 1994, claiming that his wife had been abducted and forced to undergo an abortion, that he opposed the abortion because of his

[1] Immigration Judge Sandy Hom presided over Ye's case in 1995 and again in 2003.

[2] United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Apr. 18, 1988, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, G.A. Res. 39/46, 39th Sess., U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984).

Christian beliefs, and that family planning officials fined and threatened him for speaking out against the abortion to others at his church. Following a hearing in October 1995, the IJ denied Ye's application, making an adverse credibility finding and concluding that Ye's forced abortion claim could not stand without a nexus to a protected ground, in light of then-prevailing law.[3] In denying Ye relief, the IJ noted that Ye's written application failed to mention that he had been "detained for a three-day period and beaten very badly," and in that respect was inconsistent with his later testimony.

Ye appealed to the BIA, which affirmed the IJ's decision in July 1996. The BIA found "ampl[e] support[]" for the IJ's adverse credibility determination, noting that "[t]he account in [Ye]'s asylum application omits events which were so crucial to his claim that it is not credible that [Ye] would have overlooked them when preparing the application if they had in fact occurred." The BIA specifically highlighted Ye's failure to mention in his I-589 form "the facts he testified to at his hearing regarding a 3-day detention in which he was beaten, and his having distributed anti-government leaflets."

In June 1997, Ye moved the BIA to reconsider its decision in light of Congress's 1996 expansion of the definition of "refugee" to include victims of coercive family planning policies. *See* 8 U.S.C. § 1101(a)(42) (providing that involuntary sterilization constitutes persecution "on account of political opinion"); *Matter of C-Y-Z-*, 21 I. & N. Dec. 915 (BIA 1997) (holding that an alien whose wife has been subjected to coercive family policy may establish past persecution to himself).

In April 2002, the BIA granted Ye's motion and remanded the case to the same IJ who had presided over Ye's initial application. Once again, the IJ denied Ye's asylum application, finding that

[3] Initially, Ye presented his religious and family planning persecution claims as intertwined, and the IJ identified several major inconsistencies in his testimony that were fatal to the claim as a whole.

he failed to demonstrate eligibility under either a religious persecution[4] or coercive family planning theory. Regarding Ye's family planning claim, the IJ again found that Ye was not credible, this time emphasizing inconsistencies between (a) Ye's 2003 testimony and an abortion certificate submitted in support of his application, and (b) Ye's 1995 and 2003 testimony concerning how and when his wife's pregnancy was discovered. The IJ also found Ye ineligible for withholding of removal or relief under the CAT because he had not demonstrated that he was "more likely than not" to be tortured or persecuted upon his return to China.

Ye appealed to the BIA, which affirmed the IJ's adverse credibility finding, relying on inconsistencies highlighted by the IJ and BIA in their 1995 and 1996 opinions but not reiterated in the IJ's 2003 decision. Specifically, the BIA noted that: (1) while Ye's I-589 form indicated that he was taken to the family planning office and threatened with arrest, he later testified that he was detained and severely beaten over a three-day period; and (2) while Ye testified in 1995 that he was released after he asked someone to do him a favor, he testified in 2003 that he was released because his uncle posted bond for him. In light of these inconsistencies, which the BIA found "reach[ ] to the heart of Ye's [asylum] claim," the BIA declined to address the IJ's findings about the authenticity of the abortion certificate.[5] Finally, the BIA affirmed the IJ's finding that Ye failed to meet his burden with respect to CAT relief. Ye filed a timely petition for review.

DISCUSSION

"When the BIA issues an opinion, 'the opinion becomes the basis for judicial review of the decision of which the alien is complaining.'" *Yan Chen v. Gonzales*, 417 F.3d 268, 271 (2d Cir. 2005)

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[4] The IJ held that Ye's religious persecution claim was foreclosed because he already had a "full and fair opportunity" to litigate it before the IJ and BIA in 1995. The BIA later affirmed this finding. Because Ye does not petition for review of the IJ's denial of his religious persecution claim, we provide no further analysis of the IJ's holding in this regard. *See* Pet'r's Br. at 21 n.1, 23 n.2.

[5] The BIA also declined to consider the "corrected" abortion certificate that Ye attempted to submit for the first time on appeal, noting that the function of the BIA is "to review, not create, a record."

(quoting *Niam v. Ashcroft*, 354 F.3d 652, 655 (7th Cir. 2004)). Here, the BIA adopted the conclusions of the IJ and upheld its adverse credibility finding, but did so for reasons other than those cited in the IJ's most recent decision. Because this is most analogous to a case in which "the BIA adopts the decision of the IJ and merely supplements the IJ's decision," we will "review the decision of the IJ as supplemented by the BIA." *Id.*; *cf. Xue Hong Yang v. U.S. DOJ*, 426 F.3d 520, 522 (2d Cir. 2005) (holding that when the BIA rejects part of the basis of an IJ's decision, but affirms the holding in every other respect, we review the IJ's opinion as modified by the BIA); *Yan Chen*, 417 F.3d at 271 (holding that when the BIA does not "adopt the decision of the IJ to any extent," we review the BIA decision only).

We review an IJ's factual findings, including his adverse credibility determinations, under the substantial evidence standard. *See* 8 U.S.C. § 1252(b)(4)(B) ("[T]he administrative findings of fact are *conclusive* unless any reasonable adjudicator would be *compelled* to conclude to the contrary . . . . ") (emphases added); *Zhou Yun Zhang v. INS*, 386 F.3d 66, 73 (2d Cir. 2004) ("[W]e will not disturb a factual finding if it is supported by 'reasonable, substantial, and probative' evidence in the record when considered as a whole.") (internal quotation marks omitted).

As we have reiterated on multiple occasions, we afford "'particular deference to the credibility determinations of [an] IJ.'" *Wu Biao Chen v. INS*, 344 F.3d 272, 275 (2d Cir. 2003) (quoting *Montero v. INS*, 124 F.3d 381, 386 (2d Cir. 1997)). "Accordingly, our review does not permit us to engage in an independent evaluation of the cold record or ask ourselves whether, if we were sitting as fact finders, we would credit or discredit an applicant's testimony." *Guan v. Gonzales*, 432 F.3d 391, 394-95 (2d Cir. 2005). "Where the IJ's adverse credibility finding is based on specific examples in the record of inconsistent statements by the asylum applicant about matters material to his claim of persecution, or on contradictory evidence or inherently improbable testimony regarding such matters, a reviewing court will generally not be able to conclude that a reasonable adjudicator

was compelled to find otherwise." *Zhou Yun Zhang* , 386 F.3d at 74.

Of course, "the fact that the [agency] has relied primarily on credibility grounds in dismissing an asylum application cannot insulate the decision from review." *Ramsameachire v. Ashcroft,* 357 F.3d 169, 178 (2d Cir. 2004). An adverse credibility determination must be based on "specific, cogent reasons" that "bear a legitimate nexus" to the finding. *Secaida-Rosales v. INS*, 331 F.3d 297, 307 (2d Cir. 2003) (citation and internal quotation marks omitted). Inconsistent testimony often bears a legitimate nexus to an adverse credibility finding, but it need not be fatal if it is minor and isolated, and the testimony is otherwise generally consistent, rational, and believable. *See Diallo v. INS*, 232 F.3d 279, 288 (2d Cir. 2000).

In upholding the IJ's adverse credibility determination, the BIA relied primarily on omissions in Ye's written application for asylum that were inconsistent with his subsequent testimony.[6] Specifically, the BIA emphasized that, in describing his mistreatment at the hands of Chinese authorities, Ye "testified to a significantly different event" that was nowhere outlined in his 1994 application. Far from being "a mere omission" in his paperwork, the BIA concluded that this inconsistency "reaches to the heart of [Ye's] claim" because "this is the only persecutory event which the respondent claims happened to him directly, aside from his wife's alleged abortion."

Upon our review of the record, we agree with the BIA's assessment that Ye's inconsistent statements concerning the nature of his mistreatment support the IJ's adverse credibility finding. In his written application, Ye claimed only that Chinese family planning officials took him to a government office to teach him a lesson, told him to stop speaking out against the abortion, and fined him. He made no mention of any detention or other punishment for his opposition to the

[6] Because we conclude that the BIA's adverse credibility determination was supported by its analysis of inconsistencies between Ye's written application and subsequent testimony concerning the nature of his punishment for disobeying Chinese family planning officials, we need not discuss additional inconsistencies between Ye's 1995 and 2003 testimony concerning the circumstances of his *release* from custody.

family planning policy. In 1995, however, Ye testified that he was detained for three days in a dirty, mosquito-infested room, given no food, and punched and beaten with sticks. He repeated this latter claim, in less detail, at his hearing in 2003.

In *Majidi v. Gonzales*, 430 F.3d 77, 80 (2d Cir. 2005), we held that "an IJ may rely on an inconsistency in an asylum applicant's account to find that applicant not credible—provided the inconsistency affords 'substantial evidence' in support of the adverse credibility finding—without soliciting from the applicant an explanation for the inconsistency." Because the BIA has "identified a material inconsistency in an aspect of [Ye]'s story that served as an example of the very persecution from which he sought asylum," *id.*, we hold that the inconsistency afforded substantial evidence to support the adverse credibility finding. *See also Xu Duan Dong v. Ashcroft*, 406 F.3d 110, 111-12 (2d Cir. 2005) (upholding adverse credibility determination where an omission was not "incidental or ancillary" but rather concerned an "essential factual allegation underlying petitioner's asylum claim").

On appeal, petitioner contends that the reference in his written application to the "Birth Control Officials" bringing him "down to the government office to teach [him] a lesson" is not inconsistent with his later testimony because the "lesson" mentioned in his I-589 form referred to his having been subjected to a three-day detention and severe beatings. Even were we inclined to credit this argument, "[a] petitioner must do more than offer a plausible explanation for his inconsistent statements to secure relief; he must demonstrate that a reasonable fact-finder would be *compelled* to credit his testimony." *Majidi*, 430 F.3d at 80 (internal quotation marks and citations omitted). Because Ye has failed to make that showing, and because we are not "charged with the task of justifying the contradictions in asylum applicants' submissions," *id.* at 80-81 (internal quotation marks and citation omitted), we uphold the adverse credibility determination of the IJ and BIA.

In *Ming Shi Xue v. BIA*, 439 F.3d 111 (2d Cir. 2006), we recently held that where "the asserted inconsistencies [between a petitioner's statements] were not so dramatic as to be self-evident," and where "neither the IJ nor the government identified the concerns undergirding the IJ's credibility finding before the IJ announced them in his ruling," the IJ's adverse credibility determination may be set aside and the case remanded. *Id.* at 118. Here, the inconsistency was "self-evident." Unlike the alleged inconsistencies at issue in *Ming Shi Xue*—such as the "perceived contradiction between Xue's assertion that he wanted to have a second child to help with farm work and his later testimony that he gave his second child to another family to be raised," *id.* at 126—which consist of assertions that are arguably not inconsistent at all, Ye's failure to include any reference to his detention and beating in his I-589 form is "self-evident[ly]" inconsistent with his later testimony.[7] Accordingly, the IJ and BIA were not required to give Ye an opportunity to respond in his 2003 hearing before basing an adverse credibility determination on the omissions in his written application.

The procedural posture of this case requires us to consider whether the BIA's reliance on an inconsistency not mentioned in the IJ's most recent decision constitutes improper "fact-finding." For appeals filed with the BIA after September 25, 2002,[8] the BIA may only review the IJ's factual findings to determine whether they are clearly erroneous, and may not engage in fact-finding, other than taking administrative notice of commonly known facts. *See* 8 C.F.R. § 1003.1(d)(3)(i), (iv). Normally, when the BIA determines that further fact-finding is needed, the appropriate course is

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[7] The I-589 form that Ye completed and signed required him to "[e]xplain fully what is the basis" for seeking asylum and asked whether he "or any member of [his] family [had] ever been mistreated/threatened by the authorities of [his] home country." The form directed Ye to "[s]pecify for each instance . . . what occurred and the circumstances, date, exact location, who took such action against [him], what was his/her position in the government or group, [and the] reason why the incident occurred." In response to the specific question whether he "or any member of [his] family [had] ever been . . . [i]mprisoned in [his] country," Ye replied "No." Inasmuch as Ye purported to provide an exhaustive account of the grounds for his claim of asylum that included no reference to his detention and beating, this account of persecution was inconsistent with his later testimony before the IJ.

[8] Ye filed his appeal to the BIA in May 2003.

remand to the IJ. 8 C.F.R. § 1003.1(d)(3)(iv).

In the circumstances presented, however, the BIA did not overstep its authority because it based its decision on facts already in the record. The IJ, in his 1995 decision, found adverse credibility in part based on Ye's failure to include in his written statement that he was beaten and detained for three days. Moreover, the IJ specifically rejected Ye's assertion that he had "attempted to correct" the discrepancy, noting that Ye never sought to amend or supplement his application. The BIA also addressed this specific omission in 1996, finding the detention and another omission "so crucial to [Ye's] claim that it [was] not credible that [he] would have overlooked them if they had in fact occurred." For the foregoing reasons, the BIA did not engage in improper "fact-finding" when it again emphasized the significance of Ye's omission in its 2003 opinion.

Along similar lines, the BIA properly declined to make any administrative findings regarding the "corrected" abortion certificate which Ye submitted for the first time on appeal. In his brief, Ye argues that the BIA should have remanded the case to the IJ for consideration of this new evidence. Pet'r's Br. at 48. However, Ye never made such a request of the BIA; instead, he merely requested that the BIA give the certificate "proper consideration." Under the regulation most applicable to this situation, "a party asserting that the Board cannot properly resolve an appeal without further factfinding *must* file a motion for remand." 8 C.F.R. § 1003.1(d)(3)(iv) (emphasis added). Inasmuch as Ye neither made such an assertion nor filed such a motion, the BIA was under no obligation to remand his case. Although the regulation also suggests that the BIA has *sua sponte* power to remand a case when further factfinding is needed, this authority is entirely discretionary. *Id.* In these circumstances, we hold that the BIA did not abuse its discretion in finding the evidence insufficiently material to warrant a remand.

Finally, Ye challenges the IJ's denial of CAT relief, having failed to do so before the BIA. While ordinarily, under 8 U.S.C. § 1252(d)(1), an alien may not raise before this Court an issue or

category of relief not raised before the BIA, *see Gill v. INS*, 420 F.3d 82, 86 (2d Cir. 2005); *Foster v. INS*, 376 F.3d 75, 78 (2d Cir. 2004), the BIA addressed Ye's CAT claim despite this oversight. Accordingly, Ye's failure to raise the CAT claim himself is excused, and we have jurisdiction to address it now. *See Waldron v. INS*, 17 F.3d 511, 515 n.7 (2d Cir. 1994).

The BIA found that Ye failed to present sufficient evidence that he would be tortured in China, for any reason. On appeal, Ye argues that the BIA thus "ignored the obvious record of the proceeding and relied on the IJ's adverse credibility determination" in order to deny his CAT claim. Pet'r's Br. at 55. An IJ may properly deny a CAT claim if he or she finds adverse credibility with respect to facts that form the "only potentially valid basis" for the CAT claim. *See Xue Hong Yang*, 426 F.3d at 523; *see also Xiao Ji Chen v. DOJ*, 434 F.3d 144, 163 (2d Cir. 2006) ("[W]here . . . the applicant relies largely on testimonial evidence to establish [his] CAT claim, and does not independently establish a probability of torture apart from [his] stated fear, an adverse credibility finding regarding that testimonial evidence may provide a sufficient basis for denial of CAT relief."). Here, the IJ and BIA both found adverse credibility with respect to the very facts which Ye now uses to support his fear of torture: his November 1993 beating and detention. *See* Pet'r's Br. at 54-56. Moreover, an IJ may properly deny a claim for CAT relief when the applicant has failed to demonstrate that he is "more likely than not" to be tortured upon his removal from the United States. *See Xue Hong Yang* at 522 (citing *Mu-Xing Wang v. Ashcroft*, 320 F.3d 130, 133-34 (2d Cir. 2003)). Upon our review of the record, we find no error in either the IJ or BIA's analysis in this regard.

CONCLUSION

In sum, we hold that

(1) where the BIA adopts the conclusions of the IJ and upholds its adverse credibility finding, but does so for reasons other than those cited in the IJ's

most recent decision, we will review the decision of the IJ as supplemented by the BIA;

(2) an adverse credibility finding is supported by substantial evidence where Ye's written asylum application and subsequent testimony contain material inconsistencies that "reach[ ] to the heart of the claim" of persecution;

(3) inconsistencies between Ye's written asylum application and subsequent testimony were "self-evident," and therefore the IJ and BIA were not required to give Ye an opportunity to respond before basing an adverse credibility determination on these inconsistencies;

(4) the BIA did not engage in improper fact-finding because it upheld an IJ's adverse credibility finding based on facts already in the record;

(5) the BIA did not err in declining to make any administrative findings regarding the "corrected" abortion certificate which Ye submitted for the first time on appeal, nor did it abuse its discretion in finding the evidence insufficiently material to warrant a remand; and

(6) the BIA did not err in denying Ye's request for withholding of removal or relief under the CAT.

* * * *

We have reviewed Ye's remaining arguments and find them to be without merit. Ye's stay of removal, granted by order of this Court on August 15, 2005, is hereby **VACATED**, and his petition for review is **DENIED**.