

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

August 16, 2021

Christopher M. Wolpert
Clerk of Court

EVENOR ANTONIO HIDALGO
PADILLA,

Petitioner,

v.

MERRICK B. GARLAND,
United States Attorney General,*

Respondent.

No. 20-9590
(Petition for Review)

ORDER AND JUDGMENT**

Before **MATHESON, BRISCOE, and CARSON**, Circuit Judges.

Evenor Hidalgo Padilla is a native and citizen of Nicaragua who entered the United States without permission. An immigration judge (IJ) found him removable and ineligible for asylum, withholding of removal, or protection under the

* On March 11, 2021, Merrick B. Garland became Attorney General of the United States. His name has been substituted for William P. Barr as Respondent, per Fed. R. App. P. 43(c)(2).

** After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Convention Against Torture (CAT), and ordered that he be returned to his home country. The Board of Immigration Appeals (BIA) dismissed his appeal in a single-member summary disposition. Hidalgo now petitions for review of the BIA's decision. We have jurisdiction under 8 U.S.C. § 1252(a), and we deny the petition.

I. STANDARD OF REVIEW

A single-member BIA order “constitutes the final order of removal” and “we will not affirm on grounds raised in the IJ decision unless they are relied upon by the BIA in its affirmance.” *Unreroro v. Gonzales*, 443 F.3d 1197, 1204 (10th Cir. 2006). “However, when seeking to understand the grounds provided by the BIA, we are not precluded from consulting the IJ’s more complete explanation of those same grounds.” *Id.* For example, we will consult the IJ’s decision “where the BIA incorporates by reference the IJ’s rationale or repeats a condensed version of its reasons while also relying on the IJ’s more complete discussion,” or “where the BIA reasoning is difficult to discern and the IJ’s analysis is all that can give substance to the BIA’s reasoning in the order of affirmance.” *Id.*

“[W]here the BIA determines a petitioner is not eligible for relief, we review the decision to determine whether the record on the whole provides substantial support for that determination.” *Id.* In so doing, we must treat “administrative findings of fact [as] conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.” 8 U.S.C. § 1252(b)(4)(B).

II. BACKGROUND & PROCEDURAL HISTORY

Border Patrol agents apprehended Hidalgo shortly after he waded across the Rio Grande River in May 2019. By July 2019, immigration authorities had sent him to a detention center in Oklahoma and commenced removal proceedings.

In September 2019, Hidalgo appeared before an IJ and admitted his unlawful entry, leading the IJ to find that the government had sustained its charge of removability. The IJ then asked why Hidalgo had left Nicaragua. He responded that he had participated in anti-Sandinista protest marches and had later received death threats from pro-Sandinista groups. He also noted that police had twice visited his home, although he was not there either time—apparently meaning to imply that, had he been home, the police would have harassed him for his anti-Sandinista views.

The IJ inquired further, “Have you ever been physically harmed in Nicaragua for any reason, sir?” R. at 123. Hidalgo responded that he had received threats but “was not beaten up or anything.” *Id.* The IJ then offered Hidalgo the opportunity to apply for asylum, which Hidalgo accepted.

Hidalgo soon submitted a formal application for asylum, withholding of removal, and CAT protection, claiming that he fears pro-Sandinista groups will kill him upon return to Nicaragua “because I am an active member and collaborator of [the] Partido Liberal Constitucionalista [PLC] political party and I am also a member of [the] Pacificas del Azul y Blanco Organization.” R. at 210; *see also id.* at 211 (stating that these two entities “go against the Sandinista Political party”). He elaborated that he had marched with the Azul y Blanco group in November 2018 and

had been attacked by riot police, who inflicted a severe injury on his right arm. He fled to Costa Rica for a few months but returned in February 2019 and resumed his job as a school bus driver. Pro-Sandinista groups learned of his return and, on at least one occasion, beat the outside of his bus with sticks while he was inside the bus with schoolchildren. Police twice came to his house around this time (although he was away), and he also began receiving death threats on his phone. He eventually decided that his life was genuinely in danger and, in April 2019, he fled Nicaragua for the United States, intending to seek asylum.

Hidalgo's asylum hearing took place in December 2019. He was the only witness. He mostly testified consistently with the narrative in his asylum application. As we will discuss in more detail below, the government attorney and the IJ extensively questioned him regarding potential inconsistencies and gaps in his story.

After the hearing, the IJ issued a written decision finding that (i) Hidalgo did not testify credibly; and (ii) he had not adequately corroborated his story with other evidence, such as documentary evidence. The IJ therefore denied Hidalgo's asylum application. The IJ likewise denied his applications for withholding of removal and CAT protection because they were based on the same alleged events underlying the asylum application.

Hidalgo appealed to the BIA, which held that the IJ had not clearly erred in its credibility and corroboration findings. The BIA therefore affirmed in all respects.

Hidalgo then filed a timely petition for review with this court.

III. ANALYSIS

A. Relationship Between Credibility and Corroboration

Hidalgo argues that the agency did not support its credibility finding with substantial evidence. But the agency made findings about both credibility and corroboration, and the government asserts that Hidalgo must convince us to reverse or vacate both findings to obtain relief. Because he does not challenge the corroboration finding, the government further argues that “the agency’s adverse credibility determination should not be disturbed, and the Court should deny the petition on that basis alone.” Resp’t Answering Br. at 22.

This argument assumes that the agency’s credibility and corroboration findings were independent, alternative bases for denying asylum. The assumption is incorrect.

An asylum applicant must prove that he or she is a “refugee.” 8 U.S.C. § 1158(b)(1)(A). A “refugee” is a person unable or unwilling to return to his or her country “because of persecution or a well-founded fear of persecution on account of,” as relevant to Hidalgo, “political opinion.” *Id.* § 1101(a)(42)(A). The applicant bears the burden of proof. *Id.* § 1158(b)(1)(B)(i). “The testimony of the applicant may be sufficient to sustain the applicant’s burden *without corroboration*, but only if the applicant satisfies the trier of fact that the applicant’s testimony is *credible . . .*” *Id.* § 1158(b)(1)(B)(ii) (emphasis added).

Given this standard, the IJ first considered whether Hidalgo’s testimony alone (*i.e.*, without corroboration) satisfied his burden of proof. Concluding it did not, the IJ then moved on to corroboration. *See* R. at 45 (“Since [Hidalgo] did not carry his

burden of proof on testimony alone, the Court turns to the documentary evidence in the record to determine whether he sufficiently corroborated his claim.”). Thus, the IJ’s corroboration analysis was not an independent basis for denying asylum, but subsidiary to the testimonial credibility analysis.

Hidalgo argues that he was credible enough to carry his burden based on testimony alone. If true, then the IJ was looking for corroboration where none was needed. For this reason, the agency’s credibility finding matters even if Hidalgo does not attack its corroboration finding. We therefore reject the government’s argument that we should not address the credibility issue.

B. Credibility

We now turn directly to Hidalgo’s attack on the agency’s credibility finding.

1. Legal Standard

The statute governing asylum sets the following standard for judging an applicant’s credibility:

Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant’s or witness’s account, 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), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or

falsehood goes to the heart of the applicant's claim, or any other relevant factor.

8 U.S.C. § 1158(b)(1)(B)(iii); *see also id.* § 1229a(c)(4)(C) (setting the same standard for immigration proceedings generally).

The agency's credibility findings, "like other findings of fact, are subject to the substantial evidence test." *Elzour v. Ashcroft*, 378 F.3d 1143, 1150 (10th Cir. 2004). We require the agency to give "specific, cogent reasons for disbelieving [the applicant's] testimony." *Id.* (internal quotation marks omitted). An adverse credibility determination "may not be based upon speculation, conjecture, or unsupported personal opinion." *Id.* at 1153.

2. Hidalgo's Challenges to the IJ's Reasoning

As relevant here, the IJ gave four reasons which, considered together, convinced him that Hidalgo's story of persecution in Nicaragua was not credible.¹ Hidalgo challenges all of them, so we discuss each in turn.

a. *September 2019 Account vs. December 2019 Account, and Implausibility of Hidalgo's Explanation*

The IJ first noted that, at the September 2019 hearing, Hidalgo said he had "not [been] beaten up or anything," R. at 123, but at his asylum hearing in December 2019, he testified that police had indeed attacked him during a protest march,

¹ The IJ actually set forth five reasons, but the BIA only relied on four of them. "[W]e will not affirm on grounds raised in the IJ decision unless they are relied upon by the BIA in its affirmance," *Uanreroro*, 443 F.3d at 1204, so we discuss only the reasons relied upon by the BIA. But we reference the IJ's order, rather than the BIA's, because it contains a "more complete discussion" of those reasons, *id.*

severely injuring his arm. Then, when pressed about the inconsistency, Hidalgo claimed he had been flustered at the September hearing and “was only able to answer yes or no . . . to all the questions that were asked.” R. at 184. Yet the transcript of the September hearing shows Hidalgo consistently gave cogent narrative answers, with important details where appropriate (such as specific dates).

Hidalgo counters that “close examination” of his September testimony shows he was “somewhat confused and unable to express himself well.” Pet’r Opening Br. at 16. As for his explanation that he had been flustered at the time and could only answer yes or no questions, Hidalgo says he was “clearly eager to prove his honesty and utilized absolute words in a misguided but passionate attempt to show his sincerity.” *Id.* at 13. These explanations are plausible but not compelled by the evidence, so we cannot say the IJ erred in finding that the inconsistency between Hidalgo’s testimony at the two hearings cast serious doubt on his credibility.

Hidalgo further argues that “[o]ne statement on a day where . . . he was confused and mentally at odds should not cancel out” other, more favorable evidence. *Id.* at 17. Again, the evidence does not compel the conclusion that Hidalgo was “confused and mentally at odds” when he said he had not been beaten up, so the premise of this argument does not hold. In any event, the IJ did not rely solely on the inconsistency between the September and December 2019 testimony to find him incredible—as we discuss in the ensuing subsections.

b. *“Accident” vs. “Attempt” or “Attack,” and Lack of Explanation*

The IJ next observed that Hidalgo repeatedly referred to the alleged police attack during the protest march as an “accident.” R. at 156, 176. But he also repeatedly denied that it was an accident when questioned about his use of that word.

Hidalgo, who testified in Spanish, likens this to a translation error. He does not claim that he used something other than the Spanish word for “accident,” but rather that “it is simply a word [he] uses to describe an incident.” Pet’r Opening Br. at 14. He also claims that this should raise no suspicion because the Latin root of “accident” supposedly refers generically to a “happening.” *Id.*

We need not address Hidalgo’s etymological argument because the record adequately supports the IJ’s sentiment that Hidalgo’s description of the alleged police attack was inconsistent. When the government first pointed out Hidalgo’s use of “accident” to refer to the alleged police beating, he responded, “No, no, it wasn’t an accident. It was an attempt done by the police.” R. at 166. Soon after, however, Hidalgo again used “accident” to refer to the time when a pro-Sandinista group allegedly beat the outside of his bus with sticks. When the government again questioned him about his use of that word, he responded, “No, it was not an accident. It was an attack.” R. at 171. Finally, during additional questioning about the alleged police beating, Hidalgo returned to his “accident” terminology and the IJ insisted, “I need an explanation. Why do you keep referring to it as an accident?” R. at 176.

But Hidalgo did not offer an explanation (*e.g.*, that “accident” is his word for “incident”). He merely corrected himself: “No, it was an attempt against me.” *Id.*

In sum, although one could draw varying inferences from Hidalgo’s use of “accident,” the IJ had substantial evidence from which to conclude that Hidalgo’s word choice “undercuts his assertions [about being attacked].” R. at 44; *cf. Diallo v. Gonzales*, 447 F.3d 1274, 1283 (10th Cir. 2006) (“Although some of the inconsistencies in Diallo’s story can be attributed to translation problems, it is clear from the transcript of his hearing that he was given the opportunity to explain the inconsistencies but failed to do so to the IJ’s satisfaction.”).

c. “*Collaborator*” vs. “*Member*,” and Lack of Explanation

The third reason the IJ gave in support of a no-credibility finding also centered around word choice. On direct examination, Hidalgo’s counsel asked, “[D]o you still believe that you are a member of the [PLC]?” R. at 161. Hidalgo replied, “Not a member but a collaborator.” *Id.* Later, however, the IJ asked him about a document from the PLC representing him to be both “a collaborator and member of [the] party.” R. at 179. Hidalgo answered simply, “That’s right.” *Id.* When the IJ pointed out that Hidalgo had previously denied member status, Hidalgo responded, “For me, it’s the same.” *Id.*

Hidalgo does not propose a way to reconcile his earlier and later testimony, but instead asserts that “the inconsistency is minor, trivial, and ancillary and thus cannot be a basis for an adverse finding of credibility.” Pet’r Opening Br. at 15. We need not decide whether this inconsistency alone would be substantial enough to find

Hidalgo incredible. The fact remains that Hidalgo, without explanation, explicitly avowed and then explicitly disavowed a distinction between “member” and “collaborator” within the same hearing. The IJ appropriately took that into account.

d. *Shifting Testimony About Availability of Medical Records*

At one point during the asylum hearing, the IJ began to ask about any efforts Hidalgo had made before fleeing Nicaragua to collect evidence in support of his asylum claim. In this vein, the IJ noted Hidalgo’s testimony that the arm injury allegedly inflicted by police required stitches, and he asked why Hidalgo had not sought out records from the medical clinic to corroborate the injury. Hidalgo answered that “it’s a small clinic” and he did not ask anyone there if they kept records. R. at 182. He also said they never asked for an ID card because “they know me there,” but then retracted somewhat, stating that he “recognize[d] their faces” but had no relationship with them. *Id.* The IJ said that Hidalgo’s “evasiveness and non-responsiveness on this relatively minor issue simply adds to the Court’s concerns about his lack of credibility.” R. at 45.

Hidalgo argues that nothing about this exchange shows any inconsistency. The material just quoted shows otherwise. The inconsistency—particularly about his relationship with clinic personnel—is minor and may have been unintentional, but a facial inconsistency nonetheless exists. Again, we need not decide whether this alone would support the agency’s adverse credibility finding. It was appropriately part of the mix of evidence the IJ could consider when evaluating Hidalgo’s credibility.

* * *

The asylum statute requires the agency to “[c]onsider[] the totality of the circumstances,” and specifically authorizes it to weigh the significance of any “inconsistency, inaccuracy, or falsehood,” whether or not it “goes to the heart of the applicant’s claim.” 8 U.S.C. § 1158(b)(1)(B)(iii). The record shows that the agency discharged this duty and, in doing so, gave “specific, cogent reasons for disbelieving [Hidalgo’s] testimony,” *Elzour*, 378 F.3d at 1150 (internal quotation marks omitted). “[N]o reasonable adjudicator would be compelled to conclude [his] testimony was credible. Thus, the [agency’s] adverse credibility determination is conclusive.” *Igiebor v. Barr*, 981 F.3d 1123, 1135–36 (10th Cir. 2020) (internal quotation marks and citation omitted). As a result, we may not overturn its refusal to grant asylum. *See id.* And because the same credibility finding underlays the agency’s denial of withholding of removal and CAT protection, we may not overturn those decisions either.²

² Hidalgo argues that the IJ “erroneously foreclosed the [CAT] analysis” once it found that he lacked credibility. Pet’r Opening Br. at 22. This argument perhaps refers to the withholding-of-removal analysis too. *See id.* at 21. But Hidalgo does not explain how he could have satisfied his burden for withholding or CAT protection despite a finding that he did not testify credibly about the alleged persecution or torture he claims to have experienced in Nicaragua. We therefore do not address this argument.

IV. CONCLUSION

We deny the petition for review.

Entered for the Court

Mary Beck Briscoe
Circuit Judge