

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Ye v. Barr

Ye v. Barr, No. 17-1425 (2d Cir. June 4, 2019) · No. 17-1425 · Decided June 4, 2019

SUMMARY

The Second Circuit granted Ye's petition for review of the BIA's denial of asylum, withholding of removal, and CAT relief, vacating the decision and remanding for further proceedings. The court held that substantial evidence did not support the adverse credibility determination because the IJ's demeanor finding was contradicted by the record (Ye responsively answered why she was Christian), the purported inconsistency regarding detention dates was a miscalculation, and the IJ improperly speculated about Chinese recordkeeping practices without supporting evidence. The case addresses standards for credibility determinations under 8 U.S.C. § 1158(b)(1)(B)(iii), including the requirement that demeanor findings be supported by the record and that foreign recordkeeping practices not be assumed without evidence.

CASE DETAILS

COURT	United States Court of Appeals for the Second Circuit
WRITING FOR THE COURT	Robert D. Sack; Gerard E. Lynch; Christopher F. Droney
JURISDICTION	Federal
DECIDED	June 4, 2019
DOCKET	17-1425
DISPOSITION	vacated
PROCEDURAL POSTURE	Petition for review of a Board of Immigration Appeals decision affirming an Immigration Judge's denial of asylum, withholding of removal, and CAT relief.
STANDARD OF REVIEW	Substantial evidence; the court reviews both BIA and IJ decisions. Credibility determinations are reviewed under the totality of circumstances, deferring unless no reasonable fact-finder could make such a ruling.
PRECEDENTIAL VALUE	non-precedential
PARTIES	YanJun Ye v. William P. Barr, United States Attorney General

TOPICS

immigration

asylum

PRACTICE AREAS

Immigration

QUESTIONS PRESENTED

1. Whether the agency's adverse credibility determination was supported by substantial evidence.

HOLDINGS

1. The adverse credibility determination was not supported by substantial evidence because the IJ's demeanor finding was contradicted by the record, the inconsistency about detention dates was a miscalculation, and the agency speculated about foreign recordkeeping practices.

KEY QUOTATIONS

"The IJ found that Ye was not responsive when asked why she was a Christian. But the transcript reveals that Ye responsively answered the question by stating, 'Because I believe in God.'" (3)

"[A]bsent record evidence of practices in foreign countries, the IJ must not speculate as to the existence or nature of such practices." (4)

FACTUAL BACKGROUND

Ye, a native and citizen of China, applied for asylum, withholding of removal, and CAT relief based on her Christian faith and related detention. The IJ found her not credible, citing demeanor, an inconsistency in the length of detention, and discrepancies with documentary evidence. The court found these findings were not supported by substantial evidence.

PROCEDURAL HISTORY

The BIA affirmed the IJ's October 5, 2015 decision denying Ye's application. Ye petitioned for review to the Second Circuit.

DISPOSITION

vacated

REMAND INSTRUCTIONS

Remanded for further proceedings consistent with the order.

CASES CITED

- Zaman v. Mukasey, 514 F.3d 233 (2d Cir. 2008)
- Hong Fei Gao v. Sessions, 891 F.3d 67 (2d Cir. 2018)

- Xiu Xia Lin v. Mukasey, 534 F.3d 162 (2d Cir. 2008)
- Majidi v. Gonzales, 430 F.3d 77 (2d Cir. 2005)
- Li Hua Lin v. U.S. Dep't of Justice, 453 F.3d 99 (2d Cir. 2006)
- Cao He Lin v. U.S. Dep't of Justice, 428 F.3d 391 (2d Cir. 2005)

OPINION

PER CURIAM.

17-1425 Ye v. Barr BIA Cheng, IJ A206 061 653 UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT SUMMARY ORDER RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT=S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION “SUMMARY ORDER”).

A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL. 1 At a stated term of the United States Court of Appeals 2 for the Second Circuit, held at the Thurgood Marshall 3 United States Courthouse, 40 Foley Square, in the City of 4 New York, on the 4th day of June, two thousand nineteen. 5 6 PRESENT: 7 ROBERT D. SACK, 8 GERARD E. LYNCH, 9 CHRISTOPHER F. DRONEY, 10 Circuit Judges.

11 _____ 12 13 YANJUN YE, 14 Petitioner, 15 16 v. 17-1425 17 NAC 18 WILLIAM P. BARR, 19 UNITED STATES ATTORNEY GENERAL, 20 Respondent. 21 _____ 22 23 FOR PETITIONER: Thomas V. Massucci, New York, NY. 24 25 FOR RESPONDENT: Chad A. Readler, Acting Assistant 26 Attorney General; Kiley Kane, 27 Senior Litigation Counsel; Lynda 28 A. Do, Attorney, Office of 29 Immigration Litigation, United 30 States Department of Justice, 31 Washington, DC.

1 UPON DUE CONSIDERATION of this petition for review of a 2 Board of Immigration Appeals (“BIA”) decision, it is hereby 3 ORDERED, ADJUDGED, AND DECREED that the petition for review 4 is GRANTED. 5 Petitioner Yanjun Ye, a native and citizen of the 6 People’s Republic of China, seeks review of an April 13, 2017, 7 decision of the BIA affirming an October 5, 2015, decision of 8 an Immigration Judge (“IJ”) denying Ye’s application for 9 asylum, withholding of removal, and relief under the 10 Convention Against Torture (“CAT”).

In re Yanjun Ye, No. A 11 206 061 653 (B.I.A. Apr. 13, 2017), aff’g No. A 206 061 653 12 (Immig. Ct. N.Y. City Oct. 5, 2015). We assume the parties’ 13 familiarity with the underlying facts and procedural history 14 in this case. 15 Under the circumstances of this case, we have

reviewed 16 both the BIA's and IJ's decisions. See *Zaman v. Mukasey*, 514 F.3d 233, 237 (2d Cir.

2008). The applicable standards of review are well established. See 8 U.S.C. § 1252(b)(4)(B); *Hong Fei Gao v. Sessions*, 891 F.3d 67, 76 (2d Cir. 2018). In making a credibility determination, the agency must "[c]onsider[] the totality of the circumstances" and may base a finding on the applicant's "demeanor, candor, or responsiveness,... the inherent plausibility of the applicant's... account," inconsistencies in the applicant's statements or between her statements and other evidence or witness 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); *Xiu Xia Lin v. Mukasey*, 534 F.3d 162, 163-64, 166-67 (2d Cir.

2008). "We defer... to an IJ's credibility determination unless, from the totality of the circumstances, it is plain that no reasonable fact-finder could make such an adverse credibility ruling." *Xiu Xia Lin*, 534 F.3d at 167.

As discussed below, we cannot conclude that substantial evidence supports the adverse credibility determination. Although the IJ may rely on "demeanor, candor, and responsiveness" in assessing credibility, 8 U.S.C. § 1158(b)(1)(B)(iii), and we generally defer to a fact-finder's assessment of demeanor, see *Majidi v. Gonzales*, 430 F.3d 77, 81 n.1 (2d Cir.

2005), the IJ's finding is, at least in part, contradicted by the record. The IJ found that Ye was not responsive when asked why she was a Christian. But the transcript reveals that Ye responsively answered the question by stating, "Because I believe in God." The fact that she gave additional answers when repeatedly pressed by the Government to answer the same question does not undermine her credibility.

Because a substantial part of the IJ's demeanor finding is contradicted by the record, it provides little support for the adverse credibility determination. Cf. *Li Hua Lin v. U.S. Dep't of Justice*, 453 F.3d 99, 109 (2d Cir. 2006) ("We can be still more confident in our review of 11 observations about an applicant's demeanor where... they are supported by specific examples of inconsistent testimony.").

The agency also erred in finding Ye inconsistent regarding the dates and length of her detention. Ye maintained that, in 2012, she was detained from August 19 to September 4, which she said totaled 15 days.

The IJ simply disagreed with Ye's calculation of the length of her detention. This disagreement does not render Ye's testimony inconsistent, particularly given her explanation

that she was counting the full days of her detention, not the day of her arrest or the morning of her release.

The IJ's misconstruing of this point infected her assessment of Ye's medical evidence, which was consistent with Ye's testimony that she was released from detention on September 4. Finally, the agency erred in finding discrepancies between Ye's testimony and her documentary evidence.

The IJ made three findings: the household register omitted Ye's family's identification as Christian; the household register should have listed a current address; and the fine receipt should have listed Ye's parents as the payers of the fine, rather than Ye who was the person fined.

However, there is no evidence in the record of China's recordkeeping practices relevant to either household registers or fine receipts. "[A]bsent record evidence of practices in foreign countries, the IJ must not speculate as to the existence or nature of such practices." *Cao He Lin v. U.S. Dep't of Justice*, 428 F.3d 391, 405 (2d Cir. 2005).

Given the agency's significant errors regarding Ye's demeanor, testimony, and documentary evidence, we remand because "we cannot confidently predict that the IJ would reach the same conclusion in the absence of these deficiencies." *Hong Fei Gao*, 891 F.3d at 77 (internal quotation marks omitted). For the foregoing reasons, the petition for review is GRANTED, the BIA's decision is VACATED, and the case is REMANDED for further proceedings consistent with this order.

FOR THE COURT: Catherine O'Hagan Wolfe, Clerk of Court