

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.

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 17 F.3d 233, 237 (2d Cir.

2008). The applicable standards of 18 review are well established. See 8 U.S.C. § 1252(b)(4)(B); 19 *Hong Fei Gao v. Sessions*, 891 F.3d 67, 76 (2d Cir. 2018). In 20 making a credibility determination, the agency must 21 “[c]onsider[] the totality of the circumstances” and may base 2 a finding on the applicant’s “demeanor, candor, or 2 responsiveness,... the inherent plausibility of the 3 applicant’s... account,” inconsistencies in the 4 applicant’s statements or between her statements and other 5 evidence or witness statements, “without regard to whether an 6 inconsistency, inaccuracy, or falsehood goes to the heart of 7 the applicant’s claim, or any other relevant factor.” 8 8 U.S.C. § 1158(b)(1)(B)(iii); *Xiu Xia Lin v. Mukasey*, 534 F.3d 9 162, 163-64, 166-67 (2d Cir.

2008). “We defer... to an 10 IJ’s credibility determination unless, from the totality of 11 the circumstances, it is plain that no reasonable fact-finder 12 could make such an adverse credibility ruling.” *Xiu Xia Lin*, 13 534 F.3d at 167.

As discussed below, we cannot conclude that 14 substantial evidence supports the adverse credibility 15 determination. 16 Although the IJ may rely on “demeanor, candor, and 17 responsiveness” in assessing credibility, 8 U.S.C. 18 § 1158(b)(1)(B)(iii), and we generally defer to a fact- 19 finder’s assessment of demeanor, see *Majidi v. Gonzales*, 430 20 F.3d 77, 81 n.1 (2d Cir.

2005), the IJ’s finding is, at least 21 in part, contradicted by the record. The IJ found that Ye 3 1 was not responsive when asked why she was a Christian. But 2 the transcript reveals that Ye responsively answered the 3 question by stating, “Because I believe in God.” The fact 4 that she gave additional answers when repeatedly pressed by 5 the Government to answer the same question does not undermine 6 her credibility.

Because a substantial part of the IJ's 7 demeanor finding is contradicted by the record, it provides 8 little support for the adverse credibility determination. 9 Cf. *Li Hua Lin v. U.S. Dep't of Justice*, 453 F.3d 99, 109 (2d 10 Cir. 2006) ("We can be still more confident in our review of 11 observations about an applicant's demeanor where... they 12 are supported by specific examples of inconsistent 13 testimony.").

14 The agency also erred in finding Ye inconsistent 15 regarding the dates and length of her detention. Ye 16 maintained that, in 2012, she was detained from August 19 to 17 September 4, which she said totaled 15 days.

The IJ simply 18 disagreed with Ye's calculation of the length of her 19 detention. This disagreement does not render Ye's testimony 20 inconsistent, particularly given her explanation that she was 21 counting the full days of her detention, not the day of her 4 1 arrest or the morning of her release.

The IJ's misconstruing 2 of this point infected her assessment of Ye's medical 3 evidence, which was consistent with Ye's testimony that she 4 was released from detention on September 4. 5 Finally, the agency erred in finding discrepancies 6 between Ye's testimony and her documentary evidence.

The IJ 7 made three findings: the household register omitted Ye's 8 family's identification as Christian; the household register 9 should have listed a current address; and the fine receipt 10 should have listed Ye's parents as the payers of the fine, 11 rather than Ye who was the person fined.

However, there is 12 no evidence in the record of China's recordkeeping practices 13 relevant to either household registers or fine receipts. 14 "[A]bsent record evidence of practices in foreign countries, 15 the IJ must not speculate as to the existence or nature of 16 such practices." *Cao He Lin v. U.S. Dep't of Justice*, 428 17 F.3d 391, 405 (2d Cir. 2005).

18 Given the agency's significant errors regarding Ye's 19 demeanor, testimony, and documentary evidence, we remand 20 because "we cannot confidently predict that the IJ would reach 21 the same conclusion in the absence of these deficiencies." 5 1 *Hong Fei Gao*, 891 F.3d at 77 (internal quotation marks 2 omitted). 3 For the foregoing reasons, the petition for review is 4 GRANTED, the BIA's decision is VACATED, and the case is 5 REMANDED for further proceedings consistent with this order.

6 FOR THE COURT: 7 Catherine O'Hagan Wolfe, 8 Clerk of Court 6