

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Niang v. Barr

No. 18-1692, United States Court of Appeals for the Second Circuit (September 4, 2020)

SUMMARY

****Niang v. Barr, 2d Cir. 2020 (unpublished).**** The Second Circuit denied a petition for review of the BIA's denial of asylum, withholding of removal, and CAT relief, holding that substantial evidence supported the adverse credibility determination. The court found that the agency reasonably relied on inconsistencies between the applicant's asylum application and testimony regarding persecution in Brazil, as well as the lack of reliable corroborating evidence, despite a minor error in the vagueness finding. The adverse credibility determination was dispositive of all three claims because they shared the same factual predicate.

CASE DETAILS

COURT	United States Court of Appeals for the Second Circuit
WRITING FOR THE COURT	José A. Cabranes; Denny Chin; Joseph F. Bianco
JURISDICTION	Federal
DECIDED	September 4, 2020
DOCKET	18-1692
DISPOSITION	denied
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 for credibility determinations; abuse of discretion standard; 8 U.S.C. § 1252(b)(4)(B).
PRECEDENTIAL VALUE	Unpublished
PARTIES	Abdou Lahad Niang v. William P. Barr, United States Attorney General

TOPICS

immigration

asylum

administrative law

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether substantial evidence supports the agency's adverse credibility determination.
2. Whether the agency erred in finding Niang's testimony vague without seeking further details.

HOLDINGS

1. Yes, substantial evidence supports the adverse credibility determination given the inconsistency in Niang's statements regarding persecution in Brazil and his lack of reliable corroboration.
2. The agency erred in finding Niang's description of injuries in Senegal vague without first eliciting further details, but this error was harmless because the Brazil inconsistency and lack of corroboration independently support the adverse credibility determination.

KEY QUOTATIONS

"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." (2-3)

"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 consistency between the applicant's . . . written and oral statements . . . , the internal consistency of each such statement, the consistency of such statements with other evidence of record . . . 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." (2)

"An applicant's failure to corroborate his or her testimony may bear on credibility, because the absence of corroboration in general makes an applicant unable to rehabilitate testimony that has already been called into question." (5-6)

"That determination is dispositive of asylum, withholding of removal, and CAT relief because all three claims were based on the same factual predicate." (6-7)

FACTUAL BACKGROUND

Petitioner Abdou Lahad Niang, a native and citizen of Senegal, applied for asylum, withholding of removal, and CAT relief, claiming fear of persecution in Senegal and Brazil. The Immigration Judge found Niang not credible, based in part on inconsistencies between his asylum application and his testimony regarding harm in Brazil. The application described general name-calling and sexual harassment, while the testimony described a specific attack by a co-worker's ex-boyfriend and a group of friends. The IJ also found Niang's description of injuries in Senegal vague, but the court noted that the IJ should have sought further details. Despite this error, the court found that the inconsistency regarding Brazil and the lack of reliable corroboration provided substantial evidence for the adverse credibility determination.

PROCEDURAL HISTORY

Petitioner Abdou Lahad Niang, a native and citizen of Senegal, seeks review of a May 18, 2018 decision of the BIA affirming an October 5, 2017 decision of an Immigration Judge denying his application for asylum, withholding of removal, and relief under the Convention Against Torture.

DISPOSITION

denied

CASES CITED

- Yun-Zui Guan v. Gonzales, 432 F.3d 391, 394 (2d Cir. 2005)
- Hong Fei Gao v. Sessions, 891 F.3d 67, 76 (2d Cir. 2018)
- Xiu Xia Lin v. Mukasey, 534 F.3d 162, 167 (2d Cir. 2008)
- Ming Shi Xue v. BIA, 439 F.3d 111, 122 (2d Cir. 2006)
- Lianping Li v. Lynch, 839 F.3d 144, 150 (2d Cir. 2016)
- Gurung v. Barr, 929 F.3d 56, 61 (2d Cir. 2019)
- Siewe v. Gonzales, 480 F.3d 160, 168 (2d Cir. 2007)
- Biao Yang v. Gonzales, 496 F.3d 268, 273 (2d Cir. 2007)
- Y.C. v. Holder, 741 F.3d 324, 332 (2d Cir. 2013)
- Xiao Ji Chen v. U.S. Dep't of Justice, 471 F.3d 315, 335 (2d Cir. 2006)
- Paul v. Gonzales, 444 F.3d 148, 156-57 (2d Cir. 2006)

OPINION

PER CURIAM.

18-1692 Niang v. Barr BIA Reid, IJ A209 426 111 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 September, two thousand twenty. 5 6 PRESENT: 7 JOSÉ A. CABRANES, 8 DENNY CHIN, 9 JOSEPH F. BIANCO, 10 Circuit Judges.

11 _____ 12 13 ABDOU LAHAD NIANG, 14 Petitioner,
15 16 v. 18-1692 17 NAC 18 WILLIAM P. BARR, UNITED STATES 19 ATTORNEY
GENERAL, 20 Respondent. 21 _____ 22 23 FOR
PETITIONER: Kathryn C. Meyer, International 24 Refugee Assistance Project, New 25 York, NY.
26 27 FOR RESPONDENT: Ethan P. Davis, Assistant Attorney 28 General; Sabatino F. Leo,
Senior 29 Litigation Counsel; Tracey N. 30 McDonald, Trial Attorney, Office 1 of Immigration
Litigation, United 2 States Department of Justice, 3 Washington, DC.

4 UPON DUE CONSIDERATION of this petition for review of a 5 Board of Immigration Appeals
("BIA") decision, it is hereby 6 ORDERED, ADJUDGED, AND DECREED that the petition for
review 7 is DENIED. 8 Petitioner Abdou Lahad Niang, a native and citizen of 9 Senegal, seeks
review of a May 18, 2018 decision of the BIA 10 affirming an October 5, 2017 decision of an
Immigration Judge 11 ("IJ") denying his application for asylum, withholding of 12 removal, and
relief under the Convention Against Torture 13 ("CAT").

In re Abdou Lahad Niang, No. A209 426 111 (B.I.A. 14 May 18, 2018), aff'g No. A209 426 111
(Immig. Ct. N.Y. City 15 Oct. 5, 2017). We assume the parties' familiarity with the 16 underlying
facts and procedural history. 17 We have reviewed the decisions of both the IJ and the 18 BIA. See
Yun-Zui Guan v. Gonzales, 432 F.3d 391, 394 (2d 19 Cir. 2005).

The standards of review are well established. 20 See 8 U.S.C. § 1252(b)(4)(B); Hong Fei Gao v.
Sessions, 891 21 F.3d 67, 76 (2d Cir. 2018). "Considering the totality of the 22 circumstances, and
all relevant factors, a trier of fact may 23 base a credibility determination on the demeanor, candor,
or 2 1 responsiveness of the applicant or witness,... the 2 consistency between the applicant's...
written and oral 3 statements..., the internal consistency of each such 4 statement, the consistency
of such statements with other 5 evidence of record... and any inaccuracies or falsehoods 6 in such
statements, without regard to whether an 7 inconsistency, inaccuracy, or falsehood goes to the
heart of 8 the applicant's claim, or any other relevant factor." 8 9 U.S.C. § 1158(b)(1)(B)(iii). "We
defer... to an IJ's 10 credibility determination unless, from the totality of the 11 circumstances, it is
plain that no reasonable fact-finder 12 could make such an adverse credibility ruling." Xiu Xia Lin
13 v. Mukasey, 534 F.3d 162, 167 (2d Cir.

2008); accord Hong Fei 14 Gao, 891 F.3d at 76. Although one of the IJ's findings is 15
questionable, substantial evidence supports the adverse 16 credibility determination given Niang's
inconsistent 17 statement regarding his persecution in Brazil and his lack of 18 reliable
corroboration. 19 We agree with Niang that the agency erred in finding his 20 description of his
injuries in Senegal vague, without first 21 eliciting further details.

See Ming Shi Xue v. BIA, 439 F.3d 22 111, 122 (2d Cir. 2006) ("[W]here a petitioner's testimony
3 1 was seemingly too vague, we have asked immigration judges to 2 request additional details
before concluding that the 3 narrative was not credible."). 4 However, with respect to Niang's

allegations of past harm 5 in Brazil, the agency reasonably relied on Niang's 6 inconsistent descriptions of his claim.

8 U.S.C. 7 § 1158(b)(i)(B)(iii). In his asylum application, Niang 8 asserted that he feared returning to Brazil because people in 9 Brazil called him names such as "monkey" or "donkey" and 10 wanted to "misuse [him] sexually because of [his] height." 11 Certified Administrative Record at 443.

In contrast, he 12 testified that he dated a co-worker and her ex-boyfriend 13 became angry about the relationship and the fact that Niang 14 was black, so he continuously harassed Niang and attacked him 15 with a knife at work. Niang testified that his attacker was 16 arrested and jailed for one month but continued to harass and 17 spy on Niang after his release, and a group of the attacker's 18 friends beat Niang and threatened to cut his genitals.

19 Although omissions are less probative than inconsistencies, 20 and an asylum applicant is not required to list every detail 21 to which he later testifies in as asylum application, the 22 agency did not err in relying on these differing descriptions 4 1 and the omission of the concrete allegations of harm from the 2 application. See *Hong Fei Gao*, 891 F.3d at 78–80 (weight 3 given to an omission depends, in part, on whether "facts are 4 ones that a credible petitioner would reasonably have been 5 expected to disclose under the relevant circumstances"); 6 *Lianping Li v. Lynch*, 839 F.3d 144, 150 (2d Cir.

2016) 7 (upholding adverse credibility determination where 8 petitioner's "asylum application did not simply omit 9 incidents of persecution... [but rather] described the 10 same incident of persecution differently").

Moreover, 11 Niang's reliance on *Gurung v. Barr*, 929 F.3d 56, 61 (2d Cir. 12 2019), is misplaced, as the inconsistencies between the 13 language of his application and his testimony were more than 14 trivial. See also *Siewe v. Gonzales*, 480 F.3d 160, 168 (2d 15 Cir. 2007) ("So long as there is a basis in the evidence for 16 a challenged inference, we do not question whether a different 17 inference was available or more likely.").

18 Because the IJ properly found that Niang's credibility 19 was questionable as to these events in Brazil, the IJ was 20 entitled to find that Niang's testimony was not credible as 21 a whole. See *Siewe*, 480 F.3d at 167–68. And because Niang's 22 testimony was improbable, the IJ reasonably relied on Niang's 5 1 failure to rehabilitate his testimony with any reliable 2 corroborating evidence. "An applicant's failure to 3 corroborate his or her testimony may bear on credibility, 4 because the absence of corroboration in general makes an 5 applicant unable to rehabilitate testimony that has already 6 been called into question." *Biao Yang v. Gonzales*, 496 F.3d 7 268, 273 (2d Cir.

2007). The IJ reasonably declined to give 8 weight to letters from Niang's cousin and a family friend, 9 particularly as Niang testified that his cousin did not have 10 independent knowledge, his cousin's letter was a single 11 paragraph without detail, and the other letter was from a 12 family friend that Niang had not seen since 1998 and that did 13 not address his personal circumstances.

See *Y.C. v. Holder*, 14 741 F.3d 324, 332 (2d Cir. 2013) ("We generally defer to the 15 agency's evaluation of the weight to be afforded an 16 applicant's documentary evidence."). 17 Accordingly, although the vagueness finding is 18 problematic, substantial evidence supports the agency's 19 adverse credibility determination under the totality of the 20 circumstances, given the inconsistency as to Niang's alleged 21 harm in Brazil and the lack of reliable corroboration.

See 22 8 U.S.C. § 1158(b)(1)(B)(iii); *Xiu Xia Lin*, 534 F.3d at 167; 6 1 *Biao Yang*, 496 F.3d at 273; see also *Xiao Ji Chen v. U.S. 2 Dep't of Justice*, 471 F.3d 315, 335 (2d Cir. 2006) (holding 3 that, despite error, remand is futile if "we can state with 4 confidence that the same decision would be made if we were to 5 remand"). That determination is dispositive of asylum, 6 withholding of removal, and CAT relief because all three 7 claims were based on the same factual predicate.

See *Paul 8 v. Gonzales*, 444 F.3d 148, 156-57 (2d Cir. 2006). 9 For the foregoing reasons, the petition for review is 10 DENIED. All pending motions and applications are DENIED and 11 stays VACATED. 12 FOR THE COURT: 13 Catherine O'Hagan Wolfe, 14 Clerk of Court 7