FILED
United States Court of Appeals
Tenth Circuit

May 30, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

NORA CABALLERO-TARAZONA; XIOMARA NIKOLE HINOJO-CABALLERO,

Petitioners,

v.

MERRICK B. GARLAND, United States Attorney General,

Respondent.

No. 22-9565
(Petition for Review)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **BALDOCK**, and **McHUGH**, Circuit Judges.

Lead Petitioner, Nora Caballero-Tarazona (Ms. Caballero), and her daughter, Xiomara Nikole Hinojo-Caballero, are natives and citizens of Peru who entered the United States illegally. They applied for asylum, restriction on removal,[1] and relief

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this petition for review. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

[1] Restriction on removal used to be called "withholding of removal." *Neri-Garcia v. Holder*, 696 F.3d 1003, 1006 n.1 (10th Cir. 2012) (internal quotation marks omitted).

under the United Nations Convention Against Torture (CAT), claiming they fear that if they return to Peru they will be persecuted based on Ms. Caballero's political opinion. An Immigration Judge (IJ) denied their applications after finding their testimony not credible and their corroborating evidence insufficient to establish their entitlement to relief. The Board of Immigration Appeals (BIA) dismissed their appeal, finding no clear error in the IJ's determinations. They now seek review of the BIA's order. Exercising jurisdiction under 8 U.S.C. § 1252, we deny the petition.

BACKGROUND

1. Petitioners' Evidence

At the merits hearing, Ms. Caballero testified that beginning in 2011, her partner, Eleazar Hinojo-Curilla (Mr. Hinojo), who owned a business, started receiving threatening letters and phone calls demanding money. The perpetrators threatened to harm the family if he did not pay them.

In 2013, Ms. Caballero changed her political allegiance from the Fuerza Popular party (Fuerza) to the Patria Joven party (Joven) because she thought many Fuerza members were criminals and misused party funds. Later that year, Mr. Hinojo was robbed at gunpoint on his way home from selling his products. The thieves did not mention Ms. Caballero's political opinion or affiliation. Mr. Hinojo left Peru about six months later. Petitioners then moved to Lima.

Soon thereafter the extortionate threats resumed. Although Ms. Caballero initially thought the people who robbed Mr. Hinojo were "extortionist[s] who were trying to steal [his] money," R., vol. 1 at 130, when the threats continued after he left,

she concluded Fuerza was responsible. She testified that Fuerza was her only enemy and its members wanted to "threaten [and] intimidate [her] so [she] would not talk about the things [she] knew [about] what was happening within the party." *Id.*

The last threatening call she received was in June 2015. The callers said they knew Mr. Hinojo was in the United States and they threatened to hurt her and her children if she did not pay. During her credible fear interview, Ms. Caballero told the asylum officer the extortionists were angry that Mr. Hinojo had evaded them and "once they found out where he was," they started targeting her. *Id.*, vol. 2 at 530. She also said the extortionists were confident she could pay because they thought Mr. Hinojo had "left [her] in charge" of his business. *Id.* at 532. At the hearing, she testified that she believed Fuerza was responsible for the extortionate threats and robbery of Mr. Hinojo, but she did not say that during her credible fear interview.

Two weeks after the June 2015 call, an unknown woman went to Petitioners' home when the daughter was home alone and sold her food that made her sick. Ms. Caballero testified that she believed the food had been intentionally poisoned. The medical records indicated that the daughter was treated for food poisoning or a bacterial infection. At the hearing, the daughter admitted the food may have just gone bad, and she acknowledged that she told a social worker during her mental health evaluation that "the food did not look very good," *id.* vol. 1 at 169, 239.

Ms. Caballero testified that she believed right away that Fuerza was responsible for the poisoning incident. The IJ questioned her about differences between that testimony and what she told Peruvian police. Specifically, she told

police she did not know who was responsible but thought the perpetrators were people "who want[ed] to harm [her family] for envy." *Id.* at 133-34, 229. She told the IJ she did not implicate the party in her statements to police because "[t]he justice system in [Peru is] bought . . . by the party." *Id.* at 135. She also suggested the police "redacted the statement the way the[y] please[d]." *Id.* at 136. In her credible fear interview, Ms. Caballero said she suspected extortionists poisoned her daughter to "follow[] through on their threats" to harm her family if she did not pay them. *Id.*, vol. 2 at 529. When the asylum officer asked whether she had ever been threatened for being in a political party, she said that after Joven won in 2014, other parties "threaten[ed] her" by saying "let's see what it will be like for you when your party's period is over." *Id.* at 531. At that point, she suggested the party may have been responsible for the poisoning incident. She did not answer the IJ's question about why she did not mention the party to the asylum officer earlier.

The final incident Ms. Caballero testified about was in July 2015, when "some people" shot at her. *Id.*, vol. 1 at 140. She testified that they did not say anything to her. In the written declaration she submitted with her application, however, she said one man shot at her and "yelled 'Next time you won't get out of here alive.'" *Id.*, vol. 2 at 498. She did not mention this incident during her credible fear interview.

Petitioners left Peru in July 2015. At the hearing, Ms. Caballero testified that Fuerza was responsible for all of the incidents she described—the extortion, robbery, poisoning, and shooting. She testified that Petitioners left Peru because of Fuerza's ongoing threats and that she feared Fuerza members would kill them if they returned.

The IJ asked her about differences between that testimony and what she told border patrol and the asylum officer. He reminded her that she told border patrol she left because she "was being threatened by gangs," *id.*, vol. 1 at 136; *see also id.* vol. 2 at 538, and he asked why she did not mention a fear of political persecution to border patrol. She said that when she told border patrol she was being threatened by "gangs," she "was referring to the . . . criminal people from . . . Fuerza." *Id.*, vol 1 at 137. The IJ also reminded her that she told the asylum officer her fear of returning to Peru stemmed from "two" sources—her affiliation with the Joven party and threats from "extortion[ists]," *id.* vol. 2 at 532, who had been "extorting [her family] for many years . . . [b]ecause [Mr. Hinojo] had a business." *id.* at 529. When the IJ asked why she did not tell the asylum officer she thought the people who extorted her and poisoned her daughter were motivated by her political affiliation, she said she made a "mistake" by not identifying the "criminals or the extortionists" as "the people from Fuerza" in her credible fear interview. *Id.* at 157.

2. The IJ's Decision

The IJ denied Petitioners' applications for relief for three reasons. First, he found they were not credible and that their corroborating evidence was insufficient to independently establish their eligibility for relief. Second, the IJ found them ineligible for asylum and restriction because the evidence showed that the individuals who targeted them were criminals motivated by greed, not by animus based on Ms. Caballero's political opinion. Third, the IJ found them ineligible for CAT relief

because they did not show a clear probability that they would be tortured by or with the acquiescence of the Peruvian government.

In support of the adverse credibility determination, the IJ identified numerous inconsistencies between Ms. Caballero's testimony and her statements to police, border patrol, and the asylum officer. The IJ also identified inconsistencies between both Petitioners' testimony, the written application, the daughter's medical records, and other documentary evidence. The IJ did not believe Ms. Caballero's explanation that when she referred to gangs and extortionists in her previous statements she was referring to Fuerza members, noting that she "distinguished the extortionists from the political party" during her credible fear interview. *Id.,* vol. 1 at 58. Instead, the IJ found that the inconsistencies suggested Petitioners changed their narrative as their case progressed through immigration proceedings to try to meet the asylum standard. Finally, the IJ found that both Petitioners were often unresponsive to questions at the hearing and that Ms. Caballero was unresponsive during her credible fear interview.

3. The BIA's Decision

On administrative appeal, the BIA found no clear error in the IJ's factual findings and upheld the adverse credibility determination, noting (1) differences in what Ms. Caballero said in her statements to police, credible fear interview, and testimony at the merits hearing about who she thought was responsible for the poisoning incident; (2) different accounts in Petitioners' testimony and the documentary evidence about Ms. Caballero's reasons for leaving her daughter alone and for how long; (3) Ms. Caballero's failure to mention the shooting incident to the

asylum officer; (4) her having told border officials she left Peru because she feared gangs, not because she was being persecuted for her political opinion; and (5) her statement in the credible fear interview distinguishing the extortionists and Fuerza.

The BIA also found no clear error in the IJ's other findings. It upheld the IJ's determination that the documentary evidence was insufficient to meet Petitioners' burden of proof, noting in particular that the medical records did not show that the daughter had been "intentionally poisoned." *Id.* at 5. The BIA also upheld the IJ's determination that they failed to show past persecution or a well-founded fear of future persecution on a protected ground. In that regard, the BIA held that the IJ's finding that the extortionists were motivated by greed, not politics, was supported by Ms. Caballero's statement to the asylum officer and evidence that the family had been extorted because of Mr. Hinojo's business since 2011—before she changed parties. Finally, the BIA upheld the IJ's determination that they were not eligible for CAT relief because they did not show they would be tortured if returned to Peru.

DISCUSSION

Where, as here, a single BIA member issues the decision affirming an IJ's order, we review the BIA's order but we may consult the IJ's decision when necessary to understand the grounds for the BIA's decision. *See Uanreroro v. Gonzales*, 443 F.3d 1197, 1204 (10th Cir. 2006).

The BIA reviews an IJ's factual findings, including credibility findings, "for clear error, and only clear error." *Kabba v. Mukasey*, 530 F.3d 1239, 1244 (10th Cir. 2008). It may not substitute its judgment for the IJ's because when "there are two permissible

views of the evidence . . . the factfinder's choice between them cannot be clearly erroneous." *Id.* at 1245-46 (internal quotation marks omitted). When the BIA's application of the clear error standard amounts to a factual determination, we review its decision under the deferential substantial-evidence standard. *Id.* at 1244.

Under that standard, "our duty is to guarantee that factual determinations are supported by reasonable, substantial and probative evidence considering the record as a whole." *Elzour v. Ashcroft*, 378 F.3d 1143, 1150 (10th Cir. 2004). We ensure that the IJ gave "specific, cogent reasons for disbelieving [the petitioner's] testimony," *id.* (internal quotation marks omitted), and that the IJ's decision was not based on "unsupported personal opinion," *id.* at 1153. But we do not reweigh the evidence, *Vladimirov v. Lynch*, 805 F.3d 955, 960 (10th Cir. 2015), or "question credibility findings that are substantially reasonable," *Ismaiel v. Mukasey*, 516 F.3d 1198, 1205 (10th Cir. 2008) (internal quotation marks omitted). The agency's factual findings "are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B). Thus, if the evidence and reasonable inferences support different conclusions, we may not disturb the BIA's choice between them—to reverse its decision "we must find that the evidence not only *supports* [the] conclusion [that the petitioner's version of events is correct], but *compels* it." *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 481 n.1 (1992).

1. Adverse Credibility Determination

Petitioners challenge the agency's finding that Ms. Caballero's testimony was not credible; they do not challenge the adverse credibility finding as to her daughter.

Considering the record as a whole, we conclude the BIA's decision is supported by substantial evidence. The IJ gave specific, cogent reasons for finding Ms. Caballero not credible and properly based that determination on inconsistencies between her testimony and her prior statements, inconsistencies between her testimony and the documentary evidence, and her unresponsiveness. *See* 8 U.S.C. § 1158(b)(1)(B)(iii) (the factfinder "may base a credibility determination on the [applicant's] . . . responsiveness . . . , the consistency between [her] written and oral statements, . . . , [and] the consistency of such statements with other evidence of record"). Although she offered plausible explanations for the inconsistencies, the IJ was not required to believe them, and he found them not credible. *See Diallo v. Gonzales*, 447 F.3d 1274, 1283 (10th Cir. 2006) (upholding credibility finding where the petitioner "was given the opportunity to explain the inconsistencies but failed to do so to the IJ's satisfaction")*; Matter of D-R-*, 25 I. & N. Dec. 445, 455 (B.I.A. 2011) (an IJ "is not required to accept a respondent's assertions, even if plausible, where there are other permissible views of the evidence based on the record."). And those explanations are insufficient to demonstrate that any reasonable factfinder would be compelled to credit Ms. Caballero's testimony, because the agency's view of the evidence—that she changed her narrative to try to meet the requirements for obtaining asylum—was also plausible. *See Elias-Zacarias*, 502 U.S. at 481 n.1; *Kabba*, 530 F.3d at 1245-46

We are not persuaded otherwise by Petitioners' contention that the IJ "cherry-pick[ed] facts," Pet'rs' Br. at 12-13, and focused on irrelevant issues and insignificant inconsistencies. A factfinder may consider inconsistencies in an applicant's various

statements "without regard to whether [they] go[] to the heart of [her] claim." 8 U.S.C. § 1158(b)(1)(B)(iii). In any event, most of the inconsistencies the IJ identified were about issues that were critical to Petitioners' claim for relief—who was threatening them and why. *See Uanreroro*, 443 F.3d at 1211 (the requirement that the factfinder consider "'all relevant factors' cannot mean ignoring the claim itself, including the applicant's testimony about [her] reasons for fearing persecution" (quoting § 1158(b)(1)(B)(iii))).

We also reject Petitioners' argument that the BIA's no-clear-error determination was flawed because the IJ's finding that Ms. Caballero's testimony was inconsistent with her statement to Peruvian police was based on an inaccurate translation of the police report. Petitioners submitted the translated police report the IJ relied on, and it was their responsibility to ensure the accuracy of the translation. *See* 8 C.F.R. § 1003.33 ("[a]ny foreign language document offered by a party in a proceeding shall be accompanied by an English language translation and a certification . . . that the translation is true and accurate to the best of the translator's abilities"). Moreover, that was only one of many inconsistencies the IJ identified.

Contrary to Petitioner's argument, nothing in the record suggests that the agency's adverse credibility finding was based on the IJ's bias and "preconceived opinion" about Ms. Caballero's credibility. Pet'rs' Br. at 19-20. After the IJ questioned her about some of the inconsistencies, he commented that he had encountered cases where applicants' statements about why they feared returning to their home countries changed between the time they arrived at the border and when they testified in court because they were coached by attorneys to add a protected ground to the reasons for their fear. But the

IJ stated that he was "not saying that happened here." R., vol. 1 at 138. And his adverse credibility finding was grounded in her testimony and in inconsistencies between her testimony and her prior statements and other evidence. *Cf. Liteky v. United States*, 510 U.S. 540, 555 (1994) ("[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.").[2]

At base, all of Petitioners' attacks on the adverse credibility determination boil down to an argument that the agency gave too much weight to the inconsistencies it identified and too little weight to other aspects of their testimony that they think are more important. But we do not reweigh evidence. *See Vladimirov*, 805 F.3d at 960. And because decisions about the relative weight of the evidence are within the factfinder's discretion, we will not disturb them unless any reasonable adjudicator would be compelled to reach a different conclusion. That is not the case here.

2. **Eligibility for Relief**

Petitioners next argue the BIA erred by denying their claims for relief because they showed a well-founded fear of persecution (asylum), a likelihood of persecution (restriction on removal), and a likelihood of torture (CAT), if they return to Peru. But as discussed above, the IJ concluded that they failed to meet their burden to establish their

[2] Petitioners did not raise a due process claim based on the IJ's alleged bias or argue that his comments rose to the level of impartiality requiring recusal. *See Lucio-Rayos v. Sessions*, 875 F.3d 573, 576 (10th Cir. 2017) (holding that the right to a "removal hearing that comports with due process" includes the right to "a fair and impartial decision-maker," and setting forth the recusal standard).

eligibility for relief because they did not testify credibly and did not submit other evidence that could independently meet their burden.[3] The BIA upheld the IJ's adverse credibility finding, and if the agency determines that an applicant's testimony is not credible, it may deny relief on that basis alone. *See In re M-S-*, 21 I. & N. Dec. 125, 129 (B.I.A. 1995) ("A persecution claim which lacks veracity cannot satisfy the burdens of proof and persuasion necessary to establish eligibility for asylum and withholding relief."); *Ismaiel*, 516 F.3d at 1206 (holding that an adverse credibility determination was sufficient to preclude a claim under CAT). The BIA did not err in upholding the IJ's adverse credibility determination. It thus did not err in upholding the IJ's conclusion that Petitioners had not met their burden to establish eligibility for asylum, restriction on removal, and CAT relief.

CONCLUSION

We deny the petition for review.

Entered for the Court

Bobby R. Baldock
Circuit Judge

[3] Petitioners do not challenge the IJ's conclusion, which the BIA upheld, that their other evidence was insufficient without credible testimony from them to meet their burden to establish entitlement to relief. They have therefore waived any such challenge. *See Krastev v. INS*, 292 F.3d 1268, 1280 (10th Cir. 2002) ("Issues not raised on appeal are deemed to be waived.").