Matter of E-F-N-, Respondent

Decided June 30, 2022

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

An Immigration Judge may rely on impeachment evidence as part of a credibility determination where the evidence is probative and its admission is not fundamentally unfair, and the witness is given an opportunity to respond to that evidence during the proceedings.

FOR THE RESPONDENT: Rose T. Owhanda, Esquire, Houston, Texas

FOR THE DEPARTMENT OF HOMELAND SECURITY: Carrie Law, Assistant Chief Counsel

BEFORE: Board Panel: MALPHRUS, Deputy Chief Appellate Immigration Judge; CREPPY and PETTY, Appellate Immigration Judges.

MALPHRUS, Deputy Chief Appellate Immigration Judge:

In a decision dated July 15, 2019, an Immigration Judge denied the respondent's applications for asylum and withholding of removal under sections 208(b)(1)(A) and 241(b)(3)(A) of the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1158(b)(1)(A) and 1231(b)(3)(A) (2018), and for protection under the regulations implementing the Convention Against Torture[1] based on an adverse credibility determination. The respondent has appealed from that decision. The appeal will be dismissed.

I. FACTUAL AND PROCEDURAL HISTORY

The respondent is a native and citizen of Cameroon who applied for admission to the United States without valid immigration documents. The Department of Homeland Security ("DHS") charged him with inadmissibility. He conceded that he was inadmissible as charged and applied for asylum, withholding of removal, and protection under the Convention Against Torture.

[1] The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100–20, 1465 U.N.T.S. 85 (entered into force for United States Nov. 20, 1994).

The respondent alleges that Cameroonian authorities persecuted him in that country on account of his involvement with the Southern Cameroons National Council ("SCNC"). He asserts that the Cameroonian authorities arrested him in 2004 and 2011 based on his political activity on behalf of the SCNC, interrogated and beat him on multiple occasions, and unlawfully imprisoned him between October 2011 and February 2012. He alleges he fled to Nigeria in February 2013.

The Immigration Judge denied the respondent's applications for relief and protection from removal based on an adverse credibility determination. In addition to other findings, the Immigration Judge found that there were inconsistencies between the respondent's testimony and images from the respondent's Facebook profile that DHS submitted during the respondent's cross-examination to impeach his credibility.

On appeal, the respondent challenges the Immigration Judge's adverse credibility determination. In this regard, he contends, among other arguments, that DHS' impeachment evidence, namely, the images from his Facebook profile, is inadmissible hearsay and that its admission was fundamentally unfair. We review the Immigration Judge's findings of fact, including her credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i) (2021). Whether the impeachment evidence was admissible is a question of law, which we review de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

II. ANALYSIS

There is no clear error in the Immigration Judge's adverse credibility finding, which is based on "specific and cogent reasons derived from the record." *Arulnanthy v. Garland*, 17 F.4th 586, 593 (5th Cir. 2021) (citation omitted); *see also, e.g.*, *Matter of J-Y-C-*, 24 I&N Dec. 260, 263 (BIA 2007). Based on the totality of the circumstances, the Immigration Judge found that there were: inconsistencies between the respondent's testimony and the documentary evidence; similarities between the respondent's statement and a witness's affidavit; and implausible aspects of his testimony. *See Avelar-Oliva v. Barr*, 954 F.3d 757, 763–64 (5th Cir. 2020) (citing INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii) (listing factors an Immigration Judge may consider in making an adverse credibility determination)); *see also* INA § 241(b)(3)(C), 8 U.S.C. § 1231(b)(3)(C) (incorporating section 208(b)(1)(B)(iii) by reference).

As noted, the respondent testified and wrote in his asylum application that he was in prison between October 2011 and February 2012. After he left prison, he claimed he went into hiding in Cameroon—in a location where he allegedly lacked access to electricity, a cell phone, or the internet—between

February 2012 and February 2013, when he fled to Nigeria. During cross-examination, DHS submitted social media images showing that the respondent posted and shared pictures on his Facebook profile between June 20, 2012, and January 18, 2013, when he was allegedly in hiding and without internet access. The respondent objected to the admission of the images, denied posting or sharing them on his Facebook profile, and speculated that his former girlfriend may have posted or shared pictures on his profile while he was in hiding, since she had access to his account. The Immigration Judge overruled the respondent's objection and admitted the impeachment evidence into the record. She did not accept the respondent's explanation for the inconsistency between his testimony and application and the images from his Facebook profile, in part, because he initially claimed he lost access to the Facebook account but later admitted that he had full access to it. *See Matter of Y-I-M-*, 27 I&N Dec. 724, 726 (BIA 2019) ("[A]n Immigration Judge is not required to adopt an applicant's explanation for an inconsistency if there are other permissible views of the evidence based on the record.").

The respondent argues that the Immigration Judge erred in admitting DHS' impeachment evidence into the record. The respondent first claims that the images of his Facebook profile are inadmissible hearsay. However, "it is well settled that hearsay rules are not binding in immigration proceedings." *Matter of O-R-E-*, 28 I&N Dec. 330, 337 (BIA 2021). "In immigration proceedings, the 'sole test for admission of evidence is whether the evidence is probative and its admission is fundamentally fair.'" *Matter of D-R-*, 25 I&N Dec. 445, 458 (BIA 2011), *remanded on other grounds*, *Radojkovic v. Holder*, 599 F. App'x 646 (9th Cir. 2015).

Here, the impeachment evidence was properly found to be probative of the respondent's credibility because it indicates that he was not actually in hiding—without access to electricity, a cell phone, or the internet—during the period he claims. *See Matter of Ruzku*, 26 I&N Dec. 731, 733 (BIA 2016) ("[T]o be probative, evidence must tend to prove or disprove an issue that is material to the determination of the case."). The respondent primarily contends that the admission of DHS' impeachment evidence is fundamentally unfair and violated his right to due process because it was submitted after the filing deadline for evidence, and it was unfair to "surprise" and "ambush" him with the Facebook images during his cross-examination. *See, e.g.*, *Santos-Alvarado v. Barr*, 967 F.3d 428, 439 (5th Cir. 2020) ("To satisfy due process, 'removal proceedings must be conducted according to standards of fundamental fairness' . . . ." (citation omitted)). We disagree.

It is well established that evidence may be submitted in immigration proceedings during the cross-examination of a witness in order to impeach

that witness's credibility. *See Matter of O-M-O-*, 28 I&N Dec. 191, 192, 196–97 (BIA 2021) (relying on impeachment evidence submitted during cross-examination in affirming an Immigration Judge's adverse credibility determination);[2] *cf. Matter of C-*, 9 I&N Dec. 650, 654 (BIA 1962) (collecting cases discussing the well-settled principle that a party may offer the testimony of a witness to impeach the truth or veracity of another witness who has previously testified). "[T]ruthful testimony and disclosures are critical to the effective operation of the immigration court system." *Matter of O-M-O-*, 28 I&N Dec. at 197 (citation omitted). Requiring possible impeachment evidence to be submitted in advance of the merits hearing would defeat the purpose of such evidence and undermine its ability "to prevent perjury and to assure the integrity of the trial process." *Kansas v. Ventris*, 556 U.S. 586, 593 (2009) (citation omitted).

Moreover, the submission of DHS' impeachment evidence did not violate the respondent's right to due process. Although the test for admitting evidence in immigration proceedings is broader than the test for admissibility under the Federal Rules of Evidence, the fact that the evidence in this case is admissible under those rules undermines the respondent's due process argument. *See Matter of D-R-*, 25 I&N Dec. at 458 n.9; *see also Matter of Y-S-L-C-*, 26 I&N Dec. 688, 690 (BIA 2015). As relevant here, the Federal Rules of Evidence provide that a party submitting evidence to impeach a witness's testimony "need not show [the evidence] or disclose its contents to the witness," except on the request of the adverse party's attorney, and such evidence "is admissible . . . if the witness is given an *opportunity to explain or deny the statement.*" Fed. R. Evid. 613(a)–(b) (emphasis added). Here, DHS provided the respondent and his counsel with copies of the impeachment evidence during cross-examination. The respondent was given an opportunity to respond and the Immigration Judge found his explanations unpersuasive.[3] Thus, an Immigration Judge may rely on impeachment evidence as part of a credibility determination where the evidence is probative and its admission is not fundamentally unfair, and the witness is given an opportunity to respond to that evidence during the proceedings.[4]

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[2] *See also* EOIR Policy Manual, Part II: Immigration Court Practice Manual § 3.1(b)(2)(A)–(B) (Feb. 14, 2022) (stating that the deadlines for the submission of evidence are inapplicable to evidence offered solely for the purpose of impeachment).

[3] The respondent's argument that he did not have reasonable time to examine the impeachment evidence is not borne out by the record, which reflects that proceedings were continued after the impeachment evidence was introduced, and both parties were permitted to offer additional questions and arguments.

[4] Because the evidence here clearly qualifies as impeachment evidence, we need not address a situation where a party has submitted evidence after the filing deadline that it claims is for impeachment purposes but is not evidence that is being used to impeach the

The Immigration Judge's findings regarding other inconsistencies are also not clearly erroneous. Although the respondent testified that he served as a regional secretary in the SCNC, his written statement describes his election to this post as being merely "possible." An affidavit from the Chairman of the Mezam County SCNC likewise references the respondent's "possible" election to the position of regional secretary and does not support the respondent's testimony that he actually served in this position. Moreover, the respondent's asylum application states he was only a member of the SCNC. When asked to explain these inconsistencies, the respondent stated that he purposely chose not to go into greater detail about his secretarial position. The Immigration Judge was not required to accept this explanation, especially since it does not explain the inconsistency between the documents describing his possible election to the secretarial position and his testimony that he actually served in that position. *See Matter of Y-I-M-*, 27 I&N Dec. at 726.

The respondent's testimony was also inconsistent with the written statements from his father and brother. The respondent testified that he was arrested in October 2011, taken to an area called Buea in Cameroon, and first contacted his family following this arrest in 2013, after he fled to Nigeria. In contrast, the written statements from his father and brother, respectively, state that he was *arrested* in Buea and that he first contacted his family "a couple of months" after his October 2011 arrest. When asked to explain these inconsistencies, the respondent stated that his father was "trying to say" that he was taken to Buea, and his brother meant to say that he contacted his family after he arrived in Nigeria. The written statements are plainly inconsistent with the respondent's testimony, and the Immigration Judge was not required to accept these explanations.

The respondent additionally testified and wrote in his asylum application that his first arrest took place during an SCNC meeting in 2004, but a border official's notes from a 2013 border interview reflect that he was first arrested when he was caught with an SCNC placard.[5] When the respondent was questioned about this inconsistency, he explained that he had been carrying

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testimony of a witness. *See generally Matter of Interiano-Rosa*, 25 I&N Dec. 264, 265–66 (BIA 2010) (discussing an Immigration Judge's authority to enforce filing deadlines).

[5] The respondent does not challenge the Immigration Judge's determination that the border official's notes are accurate and reliable. *See generally Matter of J-C-H-F-*, 27 I&N Dec. 211, 216 (BIA 2018) (holding that an Immigration Judge may rely on a border patrol interview in making an adverse credibility finding where the contents of the interview are accurate and reliable).

placards before he was arrested at the meeting. However, the Immigration Judge was not required to find this explanation persuasive.[6]

There is also no clear error in the Immigration Judge's finding that the respondent's written statement and the affidavit from the Chairman of the Mezam County SCNC contain identical and uncommon phrases, namely, "conspicuous activism," "sold sensitization material," and "paneled in educational workshop." When asked about the similarities, the respondent said he often referred to himself as "conspicuous" and that is why the Chairman used that term to describe him. However, this statement does not explain why his written statement and the Chairman's affidavit use other identical language, and the Immigration Judge could reasonably infer that these similarities are indicative of fraud. *See Matter of O-M-O-*, 28 I&N Dec. at 195 (collecting cases affirming a "finding[] of fraud where an applicant has submitted documents that were purportedly created by different persons or organizations but have very close similarities to each other"); *see also Mei Chai Ye v. U.S. Dep't of Justice*, 489 F.3d 517, 524 (2d Cir. 2007) (embracing "the commonsensical notion that striking similarities between affidavits" are indicia of fraud); *cf. Matter of R-K-K-*, 26 I&N Dec. 658, 661 (BIA 2015) (concluding that an Immigration Judge may rely on similarities between statements submitted by applicants in different proceedings in making an adverse credibility determination).

Finally, the respondent testified that in September 2011, he experienced a beating resulting in an injury to his spine and a fractured eye and neck, which prevented him from bending down or turning his head, and he was hospitalized for these injuries. A doctor's note the respondent submitted to corroborate these injuries states that he was placed on 21 days of bed rest because of his "permanent incapacities." Nevertheless, the respondent testified that within a few hours of his hospital visit, he was out actively campaigning for the SCNC. He also submitted a photograph of him with a covered eye where he was sitting up on a bed unassisted, despite the alleged fracture to his neck and spinal injury. Based on the nature of the respondent's claimed injuries, and in light of the doctor's note and photograph, the Immigration Judge did not clearly err when she found it was implausible he would have been physically capable of campaigning within a few hours of being hospitalized and that the respondent had exaggerated the extent of his injuries. *See* INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii) (stating that an Immigration Judge "may base a credibility determination on . . . the inherent plausibility of the applicant's or witness's account"); *Matter of*

[6] The respondent characterizes the discrepancy between his border interview and his testimony as an "omission." Even if this is the case, an Immigration Judge may base an adverse credibility finding on "*any* . . . omission" under the totality of the circumstances. *Arulnanthy*, 17 F.4th at 593 (citation omitted).

D-R-, 25 I&N Dec. at 454 (providing that Immigration Judges may make factual findings "based on reasonable inferences from direct and circumstantial evidence of the record as a whole").

Because the respondent's applications are all based on the same factual basis, and the corroborating evidence did not independently establish his claims, the Immigration Judge's adverse credibility finding is dispositive of his ability to meet his burden of proof to establish his eligibility for asylum, withholding of removal, and Convention Against Torture protection. *See Suate-Orellana v. Barr*, 979 F.3d 1056, 1061 (5th Cir. 2020); *see also Matter of Y-I-M-*, 27 I&N Dec. at 732. We will therefore affirm the Immigration Judge's decision to deny these applications based on her adverse credibility finding, and we need not address the respondent's arguments regarding the merits of his claims for asylum, withholding of removal, and protection under the Convention Against Torture. *See Chun v. INS*, 40 F.3d 76, 79 (5th Cir. 1994).[7] Accordingly, the appeal is dismissed.

ORDER: The respondent's appeal is dismissed.

[7] We note that, while this appeal was pending, DHS designated Cameroon for Temporary Protected Status effective June 7, 2022, for 18 months. *See* Designation of Cameroon for Temporary Protected Status, 87 Fed. Reg. 34,706, 34,706 (June 7, 2022).