

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-10263
Non-Argument Calendar

Agency No. A206-493-766

DUANNIE G. BELLO VALLENILLA,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals

(March 2, 2018)

Before WILLIAM PRYOR, FAY and ANDERSON, Circuit Judges.

PER CURIAM:

Duannie G. Bello Vallenilla seeks review of the Board of Immigration Appeals's ("BIA") final order adopting and affirming the Immigration Judge's ("IJ") denial of her application for asylum. We grant the petition.

I. BACKGROUND

On May 14, 2014, Vallenilla, a citizen of Venezuela, entered the United States on a four-month tourist visa; she last entered on October 27, 2014, upon disembarking from a cruise ship. On the date of her last entry, she was interviewed by a Customs and Border Patrol officer and said that she did not want to return to Venezuela because she had been attacked by a gang and feared if she returned she would be harmed. She later underwent a credible fear interview and alleged that she was afraid to return to Venezuela because the Tupamaros, an armed group, threatened and attacked her after they observed her reporting as a journalist on social media. She was found to have a credible fear of persecution and her case was referred for a full asylum hearing in removal proceedings.

On November 5, 2014, the government issued a Notice to Appear, charging Vallenilla as removable under the Immigration and Nationality Act ("INA") § 212(a)(7)(A)(i)(I), 8 U.S.C. § 1182(a)(7)(A)(i)(I), for being an applicant for admission without being in possession of a valid entry or travel document. She conceded removability as charged. Vallenilla filed an application for asylum asserting persecution on account of her political opinion. She described multiple

events where pro-government collectives attacked her for her reports on social media that portrayed them in a negative or violent light. She also attached a personal statement, exhibits, and a statement from her mother describing an attack.

At the merits hearing, Vallenilla testified that in May 2014 she fled to the United States from Venezuela because her life was in danger. She had worked as a journalist for the website La Patilla since 2010. She was a member of two political organizations in Venezuela. She had been a member of Primero Justicia since the age of 18 because it was a family custom; she also was a member of Voluntad Popular since 2013. She had worked as a volunteer for Voluntad Popular, handing out fliers, taking notes, gathering information, and organizing for the opposing party leader and candidate for president. She left Venezuela because she felt her life was in danger because of the Tupamaros.

The Tupamaros were collectives, a militia armed by the government to defend the government and threaten and kill anybody opposing the government. The first incident with the Tupamaros occurred on March 2, 2014, when they left a threatening note on her car the day after she had published comments urging people to march to the President's Mansion in Miraflores. Then, on March 18, 2014, she was returning from a political event where she had taken pictures of the National Guard attacking people during a demonstration. While she was in her car, police officers in a van behind her directed her to stop. She hid her camera under

the seat and stopped on the right side of the freeway. Police officers ordered her to get out of her car as they searched her vehicle.

On April 22, 2014, the National Guard detained her for about thirty minutes during a political demonstration that she had attended as a journalist. Officers asked for her identification as a journalist and took pictures of it. She then observed and photographed the Tupamaros throwing tear gas at the protestors, which the National Guard allowed them to do. Vallenilla heard shooting, which was being done by the Tupamaros, and she ran and hid behind a car. One of the collectives approached her on a motorcycle, ran after her, pushed her to the ground, grabbed her camera, and kicked her.

On May 8, 2014, she attended a demonstration at the United Nations building. As she arrived, the police and National Guard used tear gas on the journalists and demonstrators. She filmed the police allowing the armed government collectives to go through them to attack the demonstrators. When the police realized she was filming, officers threw tear gas toward the building where she was. When she arrived home, she published the photographs she had taken on her social networks. The same night, three armed men from the collectives entered her home. After her mother let them in, one of the men threw her mother to the floor and pointed a gun at her. The other two took Vallenilla into her room; one rummaged through her belongings and the other pointed a gun at her face. They

both requested the photographs she had taken that day. One of the men forced her at gunpoint to go onto her computer and delete the videos she had posted on her social networks. The incident lasted for no more than thirty minutes and once the men left, she and her mother called the police. The police never arrived.

Finally, on May 10, 2014, two men on a motorcycle stopped in front of her while she was driving. One of the men pointed a weapon at her car. She turned left, hit the median, and ducked in her seat. She then heard four shots. The men pointed the weapon directly at her and she then observed bullet holes in her vehicle. She was uninjured and people around her helped her. She called her father, who came with her brother to help her. She left the country a few days after that incident occurred. Since she had left, her mother informed her that the men still came around her parents' home and fired guns into the air outside the window when they saw her mother looking at them.

The IJ denied Vallenilla's application for asylum, concluding that she failed to present credible and sufficient evidence establishing that she was a victim of past persecution or had a well-founded fear of future persecution on account of her political opinion. The IJ found that Vallenilla's description of the incidents did not rise to the level of past persecution. The most serious incident was the search of her home, but she had failed to establish that the men who searched her home were associated with the government; while Vallenilla described the men as Tupamaros,

who would have been agents of the government, her mother referred to the men as “three armed men” and not Tupamaros. Even if both of the May 2014 incidents were enough to rise to the level of severity required to constitute past persecution, the IJ concluded Vallenilla failed to establish that the men were involved with the government, so it did not amount to past persecution.

The IJ also found Vallenilla failed to establish there was a nexus between her claim of past persecution and her political opinion, because she failed to provide the necessary corroborative evidence to support her claim that she was a member of Voluntad Popular. Additionally, the IJ found she failed to prove that any of the claims she made were the result of her practice as a journalist as she did not present a membership card confirming she legally was practicing journalism.

Next, the IJ concluded that Vallenilla had not established a well-founded fear of future persecution. The IJ noted that Vallenilla claimed that her family had seen people around their homes and men shooting into the air but her mother did not mention that in her statement; Vallenilla failed to provide any other evidence that she would be harmed in the future.

Lastly, the IJ made an adverse credibility finding based on omissions and inconsistencies. The IJ noted Vallenilla referred to the armed men that came into her home as Tupamaros, while her mother did not, and Vallenilla referred to shots being fired at her by men on motorcycles but omitted the fact that they were

Tupamaros until cross-examination. The IJ also noted she failed to provide necessary corroborative evidence, such as her membership card for Voluntad Popular or letters from other family members about the men around their house.

Vallenilla appealed. The BIA adopted and affirmed the IJ's decision, concluding that Vallenilla failed to meet her burden of proof for asylum eligibility. The BIA upheld the adverse credibility determination because it was not clearly erroneous and was based on specific and cogent reasons. It concluded Vallenilla's omitted and inconsistent evidence were significant because the identity of the men who committed the acts was material to her claim of persecution and she provided no other corroborative evidence of the event. The BIA also reasoned Vallenilla failed to reconcile the discrepancies in her asylum application with corroborative evidence, such as affidavits from witnesses, other family members, or other journalists receiving similar treatment. It concluded the IJ did not err in weighing the lack of corroborating evidence and omissions against Vallenilla's credibility.

II. DISCUSSION

On petition for review, Vallenilla argues that the BIA erred when it adopted the IJ's adverse credibility determination and that she provided adequate corroborative evidence to support her asylum claim. We review the BIA's decision as the final judgment, unless the BIA expressly adopted the IJ's decision. *Ruiz v. Gonzales*, 479 F.3d 762, 765 (11th Cir. 2007). As the BIA expressly

adopted the IJ's decision, we review both in full. We review factual determinations, including credibility determinations, under the substantial-evidence test. *Ruiz v. U.S. Att'y Gen.*, 440 F.3d 1247, 1254-55 (11th Cir. 2006). We must affirm the decision "if it is supported by reasonable, substantial, and probative evidence on the record considered as a whole." *Id.* (quotation omitted). We will view "the record evidence in the light most favorable to the agency's decision and draw all reasonable inferences in favor of that decision." *Id.* at 1255 (quotation omitted). Accordingly, in order for us to conclude that a finding of fact should be reversed, we must determine that the record "compels" reversal. *Id.* (quotation omitted).

The Attorney General may grant asylum to an alien who is a "refugee." INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A). A refugee is defined as:

[A]ny person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A). The asylum applicant bears the burden of establishing statutory "refugee" status. *Forgue v. U.S. Att'y Gen.*, 401 F.3d 1282, 1286 (11th Cir. 2005) (quotation omitted). Thus, the applicant must "with specific and credible evidence demonstrate (1) past persecution on account of a statutorily listed factor, or (2) a 'well-founded fear' that the statutorily listed

factor will cause future persecution.” *Ruiz*, 440 F.3d at 1257 (quoting 8 C.F.R. § 208.13(b)). Although persecution is “an extreme concept, requiring more than a few isolated incidents of verbal harassment or intimidation,” we have concluded that “being shot at in a moving car multiple times by two armed men on motorcycles qualifies as ‘extreme’ under any definition” because “attempted murder is persecution.” *Sanchez Jimenez v. U.S. Att’y Gen.*, 492 F.3d 1223, 1232-33 (11th Cir. 2007).

An applicant’s testimony, if credible, may be sufficient to sustain her burden of proof, without corroborating evidence. *Ruiz*, 440 F.3d at 1255. Conversely, if the applicant relies solely on her testimony, an adverse-credibility determination may alone be sufficient to support the denial of an application. *Forgue*, 401 F.3d at 1287. “If, however, the applicant produces other evidence of persecution, whatever form it may take, the IJ must consider that evidence, and it is not sufficient for the IJ to rely solely on an adverse-credibility determination in those instances.” *Id.* When the IJ makes an adverse-credibility finding, the applicant must demonstrate that the decision was not supported by “specific, cogent reasons” or was not based on substantial evidence. *Ruiz*, 440 F.3d at 1255.

A. Credibility Determination

Pursuant to 8 U.S.C. § 1158(b)(1)(B)(iii), a credibility determination may be based on the totality of the circumstances, including: (1) the demeanor, candor, and

responsiveness of the applicant; (2) the plausibility of the applicant's account; (3) the consistency between the applicant's written and oral statements; (4) the internal consistency of each statement; and (5) the consistency of the applicant's statements with other record evidence, including country reports. INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii). An adverse-credibility determination may be based on inconsistencies, inaccuracies, or falsehoods, regardless of whether they relate to the heart of an applicant's claim. *Id.* Merely tenable explanations of inconsistencies or implausibilities in an applicant's testimony do not compel reversal of an adverse-credibility determination. *Chen v. U.S. Att'y Gen.*, 463 F.3d 1228, 1231 (11th Cir. 2006). However, perceived inconsistencies are insufficient to support an adverse-credibility finding where no reasonable fact finder would conclude that there in fact was a material and plausible inconsistency. *Kueviakoe v. U.S. Att'y Gen.*, 567 F.3d 1301, 1305-06 (11th Cir. 2009) (finding that three perceived inconsistencies were insufficient to support an adverse credibility finding because the inconsistent words were translated, the pertinent information remained the same, and the other cited inconsistencies were based on a misreading of the record). "Indications of reliable testimony include consistency on direct examination, consistency with the written application, and the absence of embellishments." *Ruiz*, 440 F.3d at 1255.

The perceived omissions and inconsistencies that the BIA and IJ relied on are not plausible or material inconsistencies and omissions. *See Kueviakoe*, 567

F.3d at 1305-06. As to Vallenilla's omission until her testimony on cross-examination that the men who shot at her car were Tupamaros, this omission is immaterial given that (1) she consistently described them as armed men on motorcycles, which matched her description of the Tupamaros in other contexts, (2) she was not directly asked what the men were wearing until cross-examination, and (3) she consistently stated and testified that they shot at her without any provocation, and later threatened her in a way that linked the attack to her being a "traitor to the homeland." As to the perceived inconsistency between Vallenilla's and her mother's statements regarding the home invasion, where Vallenilla referred to the invaders as Tupamaros and her mother referred to them as three armed men, this inconsistency is not material because the men did not self-identify as Tupamaros, her mother agreed with her account of what they did, and they came to find and destroy evidence that Vallenilla had gathered regarding what had happened at the demonstration. Accordingly, the perceived inconsistencies and omissions were not material and do not support the adverse-credibility determination. *See id.*

Further, the BIA and IJ's adverse-credibility determination is not supported by substantial evidence in light of the record as a whole. Vallenilla's personal statement, testimony, and application consistently described multiple events where pro-government collectives attacked her for her reporting on social media that

portrayed them in a negative or violent light. She consistently described the dates of each encounter, the details of each one, the persons who attacked and assisted her, and why she was targeted by the pro-government collectives. *See Ruiz*, 440 F.3d at 1255. She provided documents corroborating certain key aspects of her testimony and the documentary evidence reflected that she consistently described the details that preceded her application for asylum without embellishment and further consistently described other extraneous details to her application. *See INA* § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii); *Ruiz*, 440 F.3d at 1255.

Therefore, the record as a whole compels the conclusion that Vallenilla is credible.

B. Corroborating Evidence

To sustain an asylum applicant's burden of proof without corroborating evidence, her testimony must be credible, persuasive, and refer to specific facts sufficient to establish her refugee status. *See INA* § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii); *Forgue*, 401 F.3d at 1287. The weaker the applicant's testimony, the greater the need for corroborating evidence. *Yang v. U.S. Att'y Gen.*, 418 F.3d 1198, 1201 (11th Cir. 2005). If the IJ determines that an applicant should provide corroborating evidence, the applicant must provide it "unless the applicant does not have the evidence and cannot reasonably obtain [it]." *INA* § 208(b)(1)(B)(ii), 8 U.S.C. § 1158(b)(1)(B)(ii). We may not reverse the finding that corroborative evidence was reasonably available to an applicant unless

“a reasonable trier of fact is compelled to conclude that such corroborating evidence [was] unavailable.” INA § 242(b)(4), 8 U.S.C. § 1252(b)(4).

Vallenilla provided a substantial amount of corroborative evidence that supported her application, personal statement, and testimony, including her social-media post to Voluntad Popular about where to march against the government, emails sent to her by Voluntad Popular, a statement from her mother, her Primero Justicia identification card, her journalist’s credentials, and several photographs from demonstrations. The BIA made no finding that the corroborating evidence it determined she should have provided was reasonably available, *see* INA § 242(b)(4), 8 U.S.C. § 1252(b)(4); for much of the unprovided corroborative evidence, there is nothing in the record to support that it was reasonably available to Vallenilla. Additionally, she documented her political activities through photographs and social media posts; she explained and corroborated that her laptop, where she kept certain evidence, had been stolen. Finally, while Vallenilla did not provide affidavits or letters from her brother or father about the shooting, these affidavits would have been of limited value since they did not witness her car being shot, only the aftermath. Accordingly, the BIA and IJ’s determination that Vallenilla’s application was not sufficiently corroborated is not supported by substantial evidence.

PETITION GRANTED.