

**FILED**

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U.S. COURT OF APPEALS

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANCISCO JOSE FERNANDEZ  
ARGUIJO,

Petitioner,

v.

MERRICK B. GARLAND, Attorney  
General,

Respondent.

No. 21-618

Agency No. A087-471-366

MEMORANDUM\*

On Petition for Review of an Order of the  
Board of Immigration Appeals

Submitted February 13, 2024\*\*  
Honolulu, Hawai'i

Before: PAEZ, M. SMITH, and KOH, Circuit Judges.

Francisco Jose Fernandez Arguijo (Fernandez Arguijo), a native and citizen of Honduras, petitions for review of the Board of Immigration Appeals's (BIA) order affirming an immigration judge's (IJ) denial of his application for asylum,

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

\*\* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

withholding of removal, and relief under the Convention Against Torture (CAT). We have jurisdiction under 8 U.S.C. § 1252(a), and we grant the petition for review in part, deny in part, and remand to the BIA.

**1. Adverse Credibility Determination.** Fernandez Arguijo contends that the BIA erred when it found no clear factual or legal error in the IJ’s adverse credibility finding. Adverse credibility determinations are reviewed for substantial evidence. *Garcia v. Holder*, 749 F.3d 785, 789 (9th Cir. 2014). In assessing an adverse credibility finding, we look to the “totality of the circumstances and all relevant factors.” *Alam v. Garland*, 11 F.4th 1133, 1135 (9th Cir. 2021) (en banc) (discussing 8 U.S.C. § 1158(b)(1)(B)(iii)). We review de novo the BIA’s interpretation of purely legal questions. *Shrestha v. Holder*, 590 F.3d 1034, 1048 (9th Cir. 2010).

“Where, as here, the BIA reviewed the IJ’s credibility-based decision for clear error and ‘relied upon the IJ’s opinion as a statement of reasons’ but ‘did not merely provide a boilerplate opinion,’ we ‘look to the IJ’s . . . decision as a guide to what lay behind the BIA’s conclusion.’” *Lai v. Holder*, 773 F.3d 966, 970 (9th Cir. 2014) (quoting *Tekle v. Mukasey*, 533 F.3d 1044, 1051 (9th Cir. 2008)). “If the BIA relies on inconsistencies” in the record to affirm an IJ’s adverse credibility finding, the BIA “must explain the significance of the discrepancy or comment on the petitioner’s evasiveness when asked about it.” *Kin v. Holder*, 595 F.3d 1050,

1055 (9th Cir. 2010).

The BIA relied on three perceived inconsistencies in Fernandez Arguijo's testimony: (1) his brother's cause of death; (2) the identity of his mother's attackers; and (3) why two of his brothers and his nephew were murdered. Because the agency committed legal error in its analysis of the first inconsistency, we grant the petition and remand for further consideration of the agency's adverse credibility determination. *See Barseghyan v. Garland*, 39 F.4th 1138, 1141 (9th Cir. 2022).

First, Fernandez Arguijo contends that the agency erroneously discounted the credibility of his testimony when it relied on an inconsistency between his testimony and a newspaper article regarding his brother's cause of death. Fernandez Arguijo testified that his brother was tortured and died by hanging, whereas a newspaper article stated that his brother was shot. Fernandez Arguijo's brother's death certificate lists his cause of death as "[a]sphyxia from strangulation." Fernandez Arguijo argues that he provided an adequate explanation for the discrepancy and that the BIA erred in ignoring record evidence that supported the veracity of his testimony. We agree.

At the merits hearing, the government asked Fernandez Arguijo about the inconsistency between his testimony and the newspaper article regarding his brother's cause of death. Fernandez Arguijo replied that his brother "wasn't shot,

he was just tortured” and that only his brother’s friend was shot. Fernandez Arguijo also explained that the newspaper article “only gave an approximation of his [brother’s] death” and had also misreported his brother’s age. Fernandez Arguijo specified that his brother’s attackers used a tourniquet on his throat and a stick to hang him. At no point did Fernandez Arguijo acquiesce in the newspaper’s report that his brother had been shot.

The IJ determined that Fernandez Arguijo did not testify credibly about his brother’s cause of death and did not provide a reasonable explanation for the inconsistency between his testimony and the newspaper article. The BIA found no clear error in the IJ’s conclusion that this discrepancy undermined his credibility and concluded that Fernandez Arguijo did not contest the newspaper article’s reliability to the IJ. Neither the IJ nor the BIA addressed Fernandez Arguijo’s brother’s official death certificate, which states that he died by asphyxiation.

The record does not support the agency’s reliance on this alleged inconsistency. In making its determination, the agency ignored key record evidence which confirmed the veracity of Fernandez Arguijo’s testimony. Fernandez Arguijo’s testimony that his brother was hanged is directly supported by his brother’s death certificate, which lists his cause of death as asphyxiation. “By ignoring documents consistent with [Fernandez Arguijo’s] testimony, the IJ did not consider ‘the totality of the circumstances’ when making its adverse credibility

determination.” *Barseghyan*, 39 F.4th at 1146 (citing 8 U.S.C. § 1158(b)(1)(B)(ii)). This was error. *See Shrestha*, 590 F.3d at 1044.

Second, Fernandez Arguijo argues that the BIA erroneously discounted the credibility of his testimony by relying on inconsistencies regarding the identity of the individuals who assaulted his mother in 2012 while she was retrieving money Fernandez Arguijo had sent her. We disagree.

Fernandez Arguijo first testified that the individuals responsible for his mother’s attack were the MS-18 gang members whom he had previously identified to the police as having murdered his friend and business partner. Yet at other points in his testimony, Fernandez Arguijo testified that his mother’s attackers were not the same gang members who murdered his business partner. The IJ determined that Fernandez Arguijo’s testimony was inconsistent regarding the specific identities of his mother’s attackers. The BIA found no clear error in the IJ’s conclusion that this discrepancy undermined Fernandez Arguijo’s credibility, and it concluded that his explanations that he misidentified his mother’s attackers inadvertently and because he was nervous were not reasonable. The record here does not compel us to find that the IJ erred in concluding that Fernandez Arguijo had testified inconsistently. *See, e.g., Farah v. Ashcroft*, 348 F.3d 1153, 1156 (9th Cir. 2003). We therefore conclude that this determination was supported by substantial evidence.

Third, the IJ determined that Fernandez Arguijo offered inconsistent testimony about why MS-18 gang members murdered two of his brothers and his nephew. Fernandez Arguijo testified that his family members were murdered “to get even” with Fernandez Arguijo, for failing to pay extortion taxes imposed by the gang in exchange for their safety, or for resisting gang recruitment. The BIA found no clear error in the IJ’s conclusion that this discrepancy undermined Fernandez Arguijo’s credibility. Because Fernandez Arguijo did not address this inconsistency to the BIA, he has waived any challenge to that finding. *Arsdi v. Holder*, 659 F.3d 925, 928–30 (9th Cir. 2011).

Because we conclude that the IJ’s credibility finding as to the first inconsistency was infirm, we grant the petition and remand for further consideration of the adverse credibility determination. On remand, the BIA should determine “whether the remaining factors—considered on their own—suffice to support an adverse credibility determination.” *Kumar v. Garland*, 18 F.4th 1148, 1156 (9th Cir. 2021); *see also Barseghyan*, 39 F.4th at 1146.

**2. CAT Relief.** Fernandez Arguijo contends that the BIA also erred in affirming the IJ’s denial of CAT relief. “To receive deferral of removal under the CAT, an applicant must establish that ‘it is more likely than not that he or she would be tortured if removed.’” *Hernandez v. Garland*, 52 F.4th 757, 768–69 (9th Cir. 2022) (quoting 8 C.F.R. § 1208.16(c)(2)). “In addition, the petitioner must

demonstrate that he would be subject to a *particularized threat* of torture, and that such torture would be inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” *Dhital v. Mukasey*, 532 F.3d 1044, 1051 (9th Cir. 2008) (per curiam) (internal quotation marks and citations omitted).

The country conditions reports offered by Fernandez Arguijo do not demonstrate that it would be more likely than not that he would be tortured if removed to Honduras. *Wakkary v. Holder*, 558 F.3d 1049, 1067–68 (9th Cir. 2009). Substantial evidence thus supports the BIA’s determination that Fernandez Arguijo was not entitled to CAT relief. We therefore deny the petition as to CAT relief.

**3. Due Process Claim.** Finally, Fernandez Arguijo contends that the BIA erred in rejecting his contention that he was not afforded a full and fair hearing because of the IJ’s bias against him. We review such due process claims *de novo*. *Oshodi v. Holder*, 729 F.3d 883, 888–89 (9th Cir. 2013) (en banc). Specifically, Fernandez Arguijo argues that the IJ’s frustration with him for forgetting to pause for the translator and for not answering questions in a manner to the IJ’s liking prejudiced the IJ against him, ultimately leading the IJ to deny his counsel the opportunity to give a closing argument.

These facts fall short of showing that “the proceeding was so fundamentally

unfair” that Fernandez Arguijo “was prevented from reasonably presenting his case.” *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000). “[N]either adverse rulings nor impatient remarks are generally sufficient to overcome the presumption of judicial integrity, even if those remarks are ‘critical or disapproving of, or even hostile to, counsel, the parties, or their cases.’” *Larson v. Palmateer*, 515 F.3d 1057, 1067 (9th Cir. 2008) (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)). Fernandez Arguijo has failed to explain how these alleged errors potentially prejudiced the outcome of his case. *See Gomez-Velazco v. Sessions*, 879 F.3d 989, 993 (9th Cir. 2018). He merely argues that “[t]he IJ’s decision is tainted for these reasons.” This is insufficient to establish a due process violation.

The parties shall bear their own costs on appeal.

**PETITION GRANTED IN PART; DENIED IN PART; REMANDED.**