

Third Circuit Court

Case: *Sunuwar v. A.G.*, 989 F.3d 239 (3d Cir. 2021)

Date: February 25, 2021

Panel: Restrepo, Bibas, Porter

Opinion: Porter

Tags: Immigration, asylum, adverse credibility, particularly serious crimes, deportation, removal, DV

Question(s) Presented: Were there errors in the deportability and particularly serious crime determinations? Was the adverse credibility finding supported by substantial evidence?

Holdings: No errors in deportability / PSC determinations; adverse credibility findings supported by substantial evidence.

Rationale: Significant inconsistencies between testimony of wife & husband and the record.

Facts: Citizen of Nepal immigrated to U.S. in 2017 as a LPR based on diversity visa. Was convicted of DV for beating and strangling his wife in 2018. Convicted of strangulation, attempt to violate PFA. Found removable; applied for political asylum. Could not establish any past harm in Nepal. Inconsistencies between application and testimony. (Wife testified on his behalf and denied most of the DV charges because of financial hardship if he were deported.)

Procedural History:

- **2018:** Conviction for strangulation, attempt to violate PFA
- **2019:** NTA
- **2019:** IJ denied I-589, finding that he is deportable; that he had committed a particularly serious crime; and deferral of removal under CAT based on adverse credibility finding.

Appeals to Statute & Precedent:

- ***Dia v. Ashcroft*, 353 F.3d 228, 247 (3d Cir. 2003) (en banc):** “If a reasonable fact finder could make [an adverse credibility] finding on the administrative record, then the finding is supported by substantial evidence.”
- ***Pan v. Holder*, 737 F.3d 921, 930 (4th Cir. 2013):** To prevail in this Court, a petitioner challenging an adverse credibility finding that is based on inconsistent testimony, or between his testimony and other evidence, “must do more than offer a plausible explanation for his inconsistent statements . . .; he must demonstrate that a reasonable fact finder would be *compelled* to credit his testimony.” [internal quotation marks omitted] (quoting *Majidi v. Gonzales*, 430 f.3d 77, 80 (2d Cir. 2005)) 247
- **8 U.S.C. § 1227(a)(2)(E)(ii) / INA 237:** an alien who any time after admission is under a PFA and who has violated this order is deportable.
- **8 U.S.C. § 1158(b)(2)(A)(ii) / INA 208:** ineligible for asylum if convicted of a Particularly Serious Crime.
- ***Luziga v. Att’y Gen.*, 937 F.3d 244 (3d Cir. 2019):** WH / CAT not available if convicted of PSC.

- ***Bastardo-Vale v. Att’y Gen.*, 934 F.3d 255 (3d Cir. 2019) (en banc)**: PSC includes crimes other than aggravated felonies.
- ***In re N-A-M-*, 24 I&N Dec. 336 (BIA 2007)**: relied upon for PSC determination, but overruled by
 - ***Bustos-Bustos v. Garland* (9th Cir. April 20, 2021)**

Relevant U.S. History:

- **May 11, 2005: effective date of REAL ID Act**: overturned *Gao v. Ashcroft* re. adverse credibility findings that rest solely on inconsistencies and improbabilities that go to the heart of the asylum claim.
 - Now, under the REAL ID Act, the trier of fact may “find a lack of credibility based on any inconsistency or falsehood, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant’s claim.” (Quoting *Zheng v. Gonzales*, 417 F.3d 379, 381 n.1 (3d Cir. 2005), now superseded)
 - No presumption of credibility

Discussion:

- Inconsistencies in testimony: did not mention a kidnapping in Nepal; wife & husband had significantly different accounts of mistreatment in Nepal; their testimony was also very different from the DV police report and previous testimony by wife.
- “The IJ found that Sunuwar’s lack of credibility undermined his claims [that he would face persecution in Nepal if returned].” 246
- Adverse credibility determination:
 - Is a finding of fact.
- Violation of protection order by writing letters counts as a threat of bodily injury because contact can escalate the risk of violence. 248
- PSC:
 - Decided on a case-by-case basis
 - Doesn’t necessarily have to be an aggravated felony, too
 - Consider elements of crime to see if it’s in this ballpark
 - “If so, the agency then determines whether the offense is particularly serious by considering all reliable information about the facts and circumstances of the offense, including conviction records and sentencing information, as well as other information outside the confines of a record of conviction.”²⁴⁹ (quoting *In re N-A-M-*, 24 I&N Dec. 336 (BIA 2007)). 249
 - Not amenable to bright-line rules (per *Nkoma*)
 - While the sentence imposed might be factored in, it is not a dominant factor.