03-4258-ag

To Be Argued By:
KRISHNA R. PATEL

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 03-4258-ag

BALDEV SINGH,

Petitioner,

-vs-

JOHN ASHCROFT, U.S. ATTORNEY GENERAL,

Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

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BRIEF FOR JOHN ASHCROFT ATTORNEY GENERAL OF THE UNITED STATES

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STATEMENT OF JURISDICTION

The petitioner is subject to a final order of removal. Although the petitioner's brief states that the Board of Immigration Appeals ("BIA") granted a motion to reopen his case, Petitioner's Br. at 3, the record contains no evidence to support this statement. The law firm representing the petitioner in this case has informed the government that this statement in the brief was a mistake.

This Court has appellate jurisdiction under § 242(b) of the Immigration and Naturalization Act, 8 U.S.C. § 1252(b) (2000), to review the petitioner's challenge to the BIA's January 8, 2003 final order denying him asylum, withholding of removal, and relief under the Convention Against Torture.

The petitioner did not file a petition for review of the BIA's June 10, 2003 decision that denied his motion to reconsider and his motion to reopen. Therefore, this Court lacks jurisdiction to review that decision. 8 U.S.C. § 1252(b)(1).

ISSUES PRESENTED FOR REVIEW

1. Whether a reasonable factfinder would be compelled to reverse the Immigration Judge's adverse credibility determination, where the petitioner's statements and evidentiary submissions were either implausible or internally inconsistent on material elements of his claim, and where the petitioner failed to adequately explain the inconsistencies.

2. Whether a reasonable factfinder would be compelled to reverse the Immigration Judge's decision that the petitioner's asylum application was frivolous where the petitioner's statements and documentary submissions were materially inconsistent and where the petitioner failed to adequately explain the inconsistencies when given the opportunity to do so.

3. Whether a reasonable factfinder would be compelled to reverse the Immigration Judge's decision denying the petitioner relief under the Convention Against Torture where the petitioner presented no credible evidence to support a claim that he would be tortured if he returned to India.

4. Whether this Court should remand this case to the Immigration Court for consideration of the petitioner's claim for adjustment of status where the BIA has already rejected that claim, the petitioner failed to petition for review of that decision, and the petitioner has no legally viable grounds for adjustment of status in any event.

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BRIEF FOR JOHN ASHCROFT
Attorney General of the United States

Preliminary Statement

Baldev Singh, a native and citizen of India, petitions this Court for review of a January 8, 2003, decision of the BIA (Joint Appendix ("JA") 84-85).[1] The BIA summarily

[1] Singh has filed four separate appendices in this matter. (continued...)

affirmed the February 7, 2000, decision of an Immigration Judge ("IJ") denying Singh's application for asylum and withholding of removal under the Immigration and Nationality Act of 1952, as amended ("INA"), rejecting Singh's claim for relief under the Convention Against Torture ("CAT"),[2] and ordering him removed from the United States. (JA 85 (BIA's decision), 124-46 (IJ's decision and order)). The IJ expressly based his decision on his determination that Singh's testimony was completely lacking in credibility.

Singh claims that he fled India -- with a visitor's visa -- leaving his then-wife and their children behind because he was persecuted for being a member of the Sikh faith. Beyond this basic assertion, however, Singh was unable to tell a consistent story about the alleged persecution. The IJ concluded that Singh failed to offer credible evidence in support of his asylum claim in light of inconsistencies and implausibilities in his story.

Substantial evidence supports the IJ's adverse credibility assessment of Singh. As the IJ properly found,

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[1] (...continued)
Unless otherwise noted, all citations in this brief to the "Joint Appendix" refer to Volume 1 of the Joint Appendix.

[2] The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, has been implemented in the United States by the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. 105-277, Div. G. Title XXII, § 2242, 112 Stat. 2681-822 (1998) (codified at 8 U.S.C. § 1231 note). *See Khouzam v. Ashcroft*, 361 F.3d 161, 168 (2d Cir. 2004).

Singh offered conflicting and confused statements about his alleged arrests, detention and persecution. Singh's testimony was internally inconsistent, was contrary to statements he made in his asylum application and to the asylum officer, and was contrary to documents that he submitted in support of his asylum claim. Although the IJ gave him opportunities to explain the discrepancies, Singh failed to do so. In light of Singh's inability to tell a consistent and plausible story, substantial evidence supports the IJ's adverse credibility determination. As a reasonable factfinder would not be compelled to draw a different conclusion, this Court should deny the petition for review.

Statement of the Case

Singh entered the United States on April 3, 1997, on a tourist visa that authorized him to remain in this country for six months. On May 2, 1997, he filed an initial Application for Asylum and Withholding of Removal.

On October 21, 1997, Singh submitted to an asylum interview, and on October 31, 1997, the former Immigration and Naturalization Service ("INS" or "government")[3] initiated these removal proceedings by issuing a Notice to Appear.

An IJ conducted a removal hearing, and on February 7, 2000, issued an oral decision denying Singh's application

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[3] On March 1, 2003, the INS was abolished and its functions were transferred to three separate bureaus within the Department of Homeland Security.

for asylum and withholding of removal and rejecting his claim for relief under the CAT. The IJ further found that Singh's asylum application was frivolous.

On January 8, 2003, the BIA summarily affirmed the IJ's decision. Singh filed a petition for review of the BIA decision in the United States Court of Appeals for the Third Circuit on February 5, 2003, and the next day, moved to transfer the petition to this Court.

Contemporaneous with the filing of his petition for review, Singh filed with the BIA a motion for reconsideration and, two months later, a motion to reopen seeking an opportunity to apply for adjustment of status. The BIA denied both motions in an opinion dated June 10, 2003. Singh did not file a petition for review of the June 10 decision.

Statement of Facts

A. Singh's Entry into the United States and Initial Application for Asylum and Withholding of Removal

Singh is a native and citizen of India who was admitted to the United States at Los Angeles, California on or about April 3, 1997 as a non-immigrant visitor with authorization to remain in the United States for a temporary period not to exceed October 2, 1997. (JA 399). On May 2, 1997, Singh submitted an initial Application for Asylum and Withholding of Removal. In this application, Singh indicated that he was seeking asylum because he suffered persecution as a member of

the Sikh faith in his native India. (JA 367). In conjunction with this application, Singh was interviewed by an asylum officer on October 21, 1997. (JA 357).

Singh did not leave the United States as required by the terms of his visitor's visa but rather illegally remained in the United States. (JA 399). The INS determined Singh to be deportable from the United States and placed him in removal proceedings, serving him with a Notice to Appear (Form I-862). The INS charged that Singh was deportable under § 237(a)(1)(B) of the Act, 8 U.S.C. § 1227(a)(1)(B) (2000), for having remained in the United States without authorization. (JA 399).

B. Singh's Removal Proceedings

On or about October 31, 1997, the INS commenced removal proceedings against Singh, by filing with the immigration court a Notice to Appear charging that Singh was deportable as an alien who continued to remain in the United States without authorization. (*Id.*); *see* 8 U.S.C. § 1227(a)(1)(B).

Singh appeared, with counsel, before an IJ in San Francisco, California on April 27, 1998, conceded that he was removable as charged by the INS, and stated that he was seeking asylum and withholding of removal. (JA 147-51). Singh sought and was granted a change of venue to New York, New York, where his immigration hearing resumed on July 7, 1999. (JA 153; *see also* JA 359 (order granting change of venue)).

At the resumed hearing, Singh's counsel informed the IJ that Singh was also seeking relief pursuant to the CAT. (JA 154). The IJ marked several documents into evidence including an application for asylum, withholding of removal, and CAT relief. (JA 154-58; *see also* JA 367-75 (original asylum application); Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8485 (Feb. 19, 1999 (asylum application also serves as application for relief under CAT)). The IJ then continued the hearing so that Singh's counsel could file supplemental materials in support of his asylum application. (JA 157-58).

At the August 25, 1999 hearing, Singh's counsel offered a supplemental asylum application and affidavit. (JA 161; *see* JA 270-85). In response to the IJ's questioning about whether Singh understood the changes that had been made to his original application, Singh informed the IJ that his attorney had not advised him of the changes that had been made to the application nor was he aware of the contents of his own affidavit. (JA 162). Consequently, the IJ did not receive the documents and provided Singh and his counsel with the court's interpreter to review the supplemental application and supporting affidavit. (JA 162-64). After Singh and his counsel reviewed the documents, the IJ again questioned Singh as to whether the changes were true and accurate. (JA 169). Singh acknowledged that he had reviewed the documents and confirmed that the application and affidavit, as modified, were true and correct.[4] (JA 169-71).

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[4] Upon reviewing the application, Singh noticed that the (continued...)

Having confirmed that Singh had read and adopted the revised asylum application, the IJ accepted the asylum application and other documentary materials offered in support of Singh's application. (JA 170-71). The hearing was continued to February 7, 2000, when it was completed after the close of Singh's testimony. (JA 173, 174-232).

1. Documentary Submissions

Singh submitted several documents to the IJ in the course of his removal hearing. He submitted a supplemental application seeking asylum and withholding of removal. (JA 274-85). In support of this application, Singh submitted a series of documents relating to the abduction of certain human rights activists and other human rights violations of Sikhs in India. (JA 287-327). He also submitted a copy of his passport, which contained a copy of a visitor's visa from the United States embassy permitting Singh to travel to the United States from January 29, 1997 until July 28, 1997. (JA 334-56; *see* JA 350 (visitor's visa)).

In addition to these documents, Singh submitted three affidavits in support of his claim. (JA 328-30). Two of the affidavits, executed by residents of Singh's hometown in India, are virtually identical. (*Compare* JA 328 *with* JA 329). Both affidavits state that Singh was arrested by the police on two separate occasions: on August 17, 1995, he was arrested for his participation in a demonstration

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[4] (...continued)
year of his wife's birth was listed incorrectly and so made that change to the application in open court. (JA 169-70).

against the government, and on July 25, 1996, he was arrested due to a bomb explosion at Jalmana Mandi. (JA 328, 329). Both deponents claim that they aided with Singh's release from prison. (*Id.*). Both affidavits further state that after Singh was released, there was a militant encounter at his farmhouse. (*Id.*). Finally, both affidavits claim that Singh's life is at risk if he returns to India. (*Id.*).

The third affidavit is from Dr. Ramesh Chand,[5] another resident of Singh's hometown of Jalmana, and speaks primarily to Singh's encounter with the police in July 1996. (JA 330). Dr. Ramesh's affidavit states that he is a doctor who operates a hospital known as the Ramesh Clinic, and that he knows Singh. (*Id.*). According to Dr. Ramesh, on July 25, 1996, Singh was taking medication for a "very serious" physical condition when the police suddenly arrived at the hospital. (*Id.*). Dr. Ramesh reports that the police "pushed [Singh] very badly and insulted me." (*Id.*). Dr. Ramesh also claims that Singh's life is at risk if he were to return to India. (*Id.*).

Finally, the report of the asylum interview conducted on October 21, 1997 was introduced into evidence. (JA 357-58). Singh's attorney stated that he had reviewed the report and did not object to its introduction. (JA 177).

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[5] Throughout the proceedings below, Dr. Ramesh Chand was referred to as "Dr. Ramesh." For consistency, the government has adopted that convention for this brief.

2. Singh's Testimony

At the February 7, 2000, hearing, Singh testified that he was born a Sikh in India in 1954, and was a farmer by trade. (JA 178-81). He left India in April 1997 because, according to Singh, Sikhs in India were subject to persecution by Hindus because they wanted to establish their own country. (JA 182). With this background, the balance of Singh's testimony covered four topics: three separate incidents in which he was personally persecuted, and the general harassment he suffered at the hands of the militants and the police.

a. The August 17, 1995 Incident

On August 17, 1995, according to Singh, he was home with his father, mother, wife and children when six police officers raided his house. (JA 183-85). The police told his father that Sikhs were a minority and that they "have no right to have their hair," that they should "cut [their] children's hair," and that they should not wear turbans. (JA 185). When the police threatened and slapped his father, Singh told the officers that "they had no right to humiliate [his] father and slap [him]." (JA 186). The police then took Singh and his father to a police station where Singh's father was detained for approximately four days and Singh was detained for one week. (JA 186-88).

Singh testified that while he was detained, the police beat him with sticks and then he "was made to lie down on the ground and then [his] body was rolled with a heavy wooden log." (JA 189). Singh indicated that he was beaten for three days and that he was beaten so badly that

each time he passed out. (*Id.*). By contrast, Singh's father was beaten only on the first day of his detention and even then, he was beaten only "lightly" or "moderately." (JA 190).

After he was released, Singh checked into the Ramesh hospital for five or six days because his entire body ached from the beatings. (JA 191-92). While he was hospitalized, Singh was given capsules and injections but does not know what specific medications he was given. (JA 192).

According to Singh, the police arrested and detained Singh and his father because they had raised slogans against a right wing Hindu group known as the Hidu Shiv Sena and because they held gatherings at their temple. (JA 188). Singh also stated that the police accused him of harboring militants. (JA 189-90). In response to the IJ's questioning, Singh stated that he had harbored militants approximately twenty days before his August 1995 arrest because the militants had forced him to provide them assistance. (JA 194).

The IJ confirmed with Singh that this incident, just twenty days prior to his August 1995 arrest, was Singh's first encounter with the militants. (JA 230-31). The IJ then asked Singh whether he recalled telling the asylum officer that the militants had come in 1994; Singh stated that he did not recall making such a statement. (*Compare* JA 231 *with* JA 357).

b. The July 25, 1996 Incident

Singh testified that he was arrested while at the Ramesh hospital on July 25, 1996, but he gave conflicting statements about several aspects of that incident.

For example, Singh gave several different explanations for his presence at the hospital on July 25. In his direct testimony, Singh testified that he was "passing by" the Ramesh hospital on that date and decided to stop in to visit his friend, Dr. Ramesh. (JA 195-96). The IJ specifically asked Singh whether he was sick, and Singh replied that he was not sick but rather was only going in to see Dr. Ramesh. (JA 196). On cross examination, however, Singh changed his testimony and stated that he had gone to the hospital to visit with a sick friend. (JA 220). When confronted with the fact that Dr. Ramesh's affidavit states that Singh visited with him on July 25 because Singh was taking medication, (*compare* JA 223 *with* JA 230), Singh changed his story yet again. In this latest version, Singh stated that he went to the hospital on July 25 to obtain medication. (JA 223).

In an attempt to reconcile his testimony, Singh stated that after his second arrest, he was beaten and then he went to the hospital to obtain medication. (*Id.*). When reminded that he could not have gone to the hospital on July 25, 1996, because he had earlier testified that he had been detained for two weeks beginning on that date, Singh stated that he was in fact detained for two weeks. (JA 224). At that point the IJ stopped the questioning and advised Singh's counsel that his client had credibility problems.

JUDGE TO MR. LEE

Q. Mr. Lee, your client's got a very bad credibility problem.

A. I see that, Your Honor.

Q. You think maybe he want to cut his losses at this point?

A. I'll talk to him about it.

Q. Don't waste a lot of time.

A. I won't.

. . .

(JA 224).

The IJ asked the INS attorney whether the government would agree to a short period of voluntary departure if Singh withdrew his application, and the government agreed. (JA 225). Nevertheless, after conferring with his client off the record, Singh's attorney informed the IJ that Singh wished to proceed. (*Id.*). At that point, the INS attorney resumed questioning Singh about his second arrest. (JA 225-26). Singh insisted that he was arrested on July 25, 1996, detained for two weeks and sought treatment at the hospital after his release. (JA 226). When asked why Dr. Ramesh's affidavit stated that Singh obtained medication on July 25, 1996, Singh stated that "Dr. Ramesh made a mistake." (*Id.*).

Regardless of why Singh was at the hospital, according to Singh, while he was there, the police arrived and started to question Singh and Dr. Ramesh. (JA 196). The police questioned them about a bomb blast that had occurred in a market several days earlier. (JA 197). Singh told the police that he had nothing to do with the bomb blast. (JA 197, 199).

According to Singh, both men were arrested by the police and taken to a police station where Singh was detained for two weeks and Dr. Ramesh was detained for about nine or ten days. (JA 197-98). In his direct testimony, Singh stated that he was beaten a "little bit" during this detention, while Dr. Ramesh was threatened and received "some slappings." (JA 199).

Questioning by both the IJ and the INS's counsel revealed discrepancies between Singh's testimony and other evidence in this case. For example, when asked why Dr. Ramesh's affidavit was silent about the fact that they had both been arrested, detained and beaten, Singh's response was evasive and confusing. He stated: "I don't know what had happened. I had told everything to him." (JA 222).

Further, on cross examination, the INS's attorney identified several discrepancies between Singh's testimony and the statements in his asylum applications. While Singh testified that he and Dr. Ramesh received only slight beatings during their detention, his asylum application stated that "[t]hey beat us very badly." (JA 213). Singh attempted to reconcile these statements by suggesting that the beating he received after his second arrest was milder

than the beating he had received after his first arrest. (JA 214).

Similarly, while Singh had testified that he was detained for two weeks and Dr. Ramesh was detained for nine or ten days, his asylum application stated that they were both detained for two weeks. (JA 215-16). When confronted with this inconsistency, Singh indicated that he may have given his lawyer "wrong" information or that his attorney may have made a mistake. (JA 216). The trial attorney reminded Singh that both his original asylum application and his supplemental asylum application stated that Singh and Dr. Ramesh had been detained for two weeks. (JA 216; *see also* 278, 374). Singh simply responded that "[i]t should not be like that." (JA 216).

Eventually, according to Singh, the village council intervened on his behalf and a bribe of 35,000 rupees was paid to secure his release. (JA 199). At the time of his release, Singh claims that he was told that if he ever got "arrested in the future, then it will be the last time and [he] will be killed." (JA 200). Singh testified that after he left the police station, he went to the hospital to obtain medication, but did not check into the hospital. He took medication for about four or five days. (*Id.*).

c. The February 10, 1997 Incident

Singh testified that on February 10, 1997, he was working on his dairy farm at 10:00 pm when three armed men (militants) approached him and demanded food and shelter. (JA 202-203). He told the militants that he did not want to be involved with them in any way, but they

threatened Singh and brandished a gun to him. (JA 203). In the face of this threat, Singh permitted the militants to stay at his home. (*Id.*). The militants were finishing their meals when the police came and raided his home. (JA 204). Singh testified that he was frightened and was able to escape to a friend's home, where he stayed overnight. (JA 205). The next day, Singh learned from his father that the "three terrorists" and eight cows were killed on his dairy farm during the police raid the previous night. (JA 206).

When the IJ asked why Singh had told the asylum officer that two people had been killed (*see* JA 357-58 (asylum interview report)), Singh stated that he told the asylum officer that three people had been killed. (*Compare* JA 230 *with* JA 357).

Singh testified that after the February 10th raid on his farm, he decided to leave India. (*Id.*). He borrowed money from his friend and traveled to New Delhi on February 11th or 12th. (JA 206-07). Singh testified that in New Delhi, he met an agent who was able to obtain a visa for Singh to come to the United States. (JA 207). Under questioning from his own attorney, however, Singh admitted that he obtained the visa on January 29, 1997. (JA 207-08). Singh testified that the agent filled out the application for the visa, but that he had had an interview at the American Embassy at which time he provided them proof of the ownership of his land. (JA 208).

When questioned by his own attorney about the fact that his testimony was not consistent as to when he had decided to leave India, Singh changed his testimony and

stated that he had in fact decided to leave the country after his arrest in July 1996. (JA 208-209).

d. Harassment by Militants and the Police

Singh also described harassment he suffered at the hands of the militants and the police. First, Singh testified that, in addition to the incident on February 10, 1997, militants came to his farm on three separate occasions between August 1996 and February 1997. (JA 210). On each occasion, the militants threatened Singh (or his family, when Singh was not home), and on each occasion, they received food and lodging. (JA 211).

Second, Singh testified -- for the first time on cross examination -- that between his first and second arrests, the police visited his farm every few weeks. They questioned him about the militants and told him not to hide militants at his house. (JA 217-18). Singh further testified that he has been in contact with his family in India and that while none of his family members have been arrested, the police have visited his family to ask about him. (JA 228).

After the Government completed its cross-examination, the IJ asked Singh why his asylum application did not state that the militants had visited him on three other occasions and that the police had visited him every two weeks or once a month between his two arrests. (JA 229). Singh responded that he didn't know. (*Id.*).

C. The Immigration Judge's Decision

At the conclusion of the February 7, 2000, hearing, the IJ issued an oral decision denying Singh's applications for asylum, withholding of removal, and relief under CAT, and ordering him removed to India. (JA 125-46). After summarizing Singh's testimony (JA 129-42), the IJ concluded that Singh was not credible. (JA 142).

The IJ noted a number of inconsistencies and implausibilities in Singh's statements and testimony. First, the IJ noted that Singh was unable to explain why he had changed his testimony regarding his second arrest on July 25, 1996. Specifically, the IJ noted that Singh initially testified that his visit to the hospital on that date was a social visit but after he was confronted with Dr. Ramesh's affidavit, he changed his testimony. (JA 143). Second, the IJ noted that there was no reasonable explanation as to why Dr. Ramesh neglected to include the fact that Singh had been hospitalized five to six days after his first arrest in August 1995 but mentioned that Singh visited him in July 1996 for medical reasons. (*Id.*).

Third, the IJ noted that both Singh's original and his supplemental asylum applications state that Singh and Dr. Ramesh were detained for two weeks after their arrest in July 1996 but that Singh testified that he was detained for two weeks and that Dr. Ramesh was detained for nine or ten days. (*Id.*). The IJ determined that these discrepancies made Singh's testimony "less than credible." (JA 143). The IJ also questioned the reliability of Dr. Ramesh's affidavit and found that a more plausible explanation was that the affidavit was fabricated or contained

misinformation in an effort to convince the IJ to grant Singh's asylum application. (JA 142-43).

Fourth, the IJ noted that Singh had told the asylum officer that two men had been killed on his farm during the February 10, 1997 raid, but in his asylum application he indicated that there were three men killed. (JA 143-44). Fifth, the IJ found that Singh testified that the first time militants came to his home was at the end of July 1995 but that he told the asylum officer that militants had come to his home in 1994. (JA 143-44). Sixth, Singh failed to note in his asylum application the numerous visits by the militants and the police to his home. (JA 144). Finally, the IJ deemed Singh's testimony about when he decided to leave India as incredible. (JA 14). Singh initially stated that he decided to leave India on account of the February 10, 1997 incident but when confronted with the fact that he had already obtained his visa from the U.S. Embassy on January 29, 1997, he changed his testimony and stated that he had decided to leave after his second arrest. (JA 144).

For these reasons, the IJ deemed that Singh's testimony was "anything but credible." (*Id.*). The IJ determined that because Singh's testimony was incredible, he had not met his burden for asylum, withholding of removal or CAT relief. (JA 145). Moreover, the IJ determined that Singh "submitted an application containing information that he knew was not true in order to induce this Court to grant him asylum." (JA 144). Consequently, the IJ determined that pursuant to the relevant statute and regulations, Singh's application was frivolous. (*Id.*). On the same date, the IJ issued an Order denying Singh's applications for asylum, withholding of removal and CAT relief. (JA

145-46 (missing one page of IJ's order); *see also* Special Appendix to the Brief of Petitioner at 27-28).

D. The BIA's Decision

On January 8, 2003, the BIA summarily affirmed the IJ's decision and adopted it as the "final agency determination" under 8 C.F.R. § 3.1(e)(4) (2002).[6] (JA 85). On February 5, 2003, Singh filed a petition for review of this decision in the United States Court of Appeals for the Third Circuit. This proceeding was transferred to this Court on February 11, 2003.

E. Subsequent Proceedings

Contemporaneous with the filing of a petition for review, on February 7, 2003, Singh filed a motion to reconsider with the BIA claiming that the IJ's credibility determination was in error. (*See* JA 53; 65-66). Singh also challenged the IJ's finding that the asylum application was frivolous. (JA 12-13).

On April 9, 2003, Singh moved to reopen the proceedings with the BIA to allow him to apply for an adjustment of status based on his marriage to a United States citizen. (JA 13).

By decision dated June 10, 2003, the BIA denied the motions to reconsider and reopen. (JA 2-3). The BIA found that the IJ's conclusion that the asylum application

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[6] That section has since been redesignated as 8 C.F.R. §1003.1(e)(4). *See* 68 Fed. Reg. 9824, 9830 (Feb. 28, 2003).

was frivolous was based not only on Singh's lack of credibility but also on the finding that Dr. Ramesh's affidavit in support of the asylum claim was "completely fabricated or contained misinformation in order to convince the Court to grant his asylum application." (JA 2).

The BIA denied the motion to reopen finding that Singh married a United States citizen after the dismissal of his appeal, that Singh had failed to produce any evidence showing that a visa petition had been filed and approved, and that Singh had failed to produce clear and convincing evidence regarding the bona fides of the marriage. (JA 2). Finally, the BIA determined that because the asylum application was frivolous, Singh is precluded from adjusting his status. *See* 8 U.S.C. § 208(d)(6).

SUMMARY OF ARGUMENT

1. The IJ properly denied Singh's application for asylum and withholding of removal because Singh's testimony was wholly incredible. The IJ identified multiple inconsistencies and contradictions in Singh's testimony and submissions on issues that went to the heart of Singh's claim for asylum. For example, the IJ noted that Singh had offered multiple, contradictory explanations for why he was at the hospital on July 25, 1996 when the police arrived and arrested him. In addition, Singh's account of the July 25 events differed from the account as given by Dr. Ramesh, and from the account Singh himself had made in his asylum application. Similarly, Singh's statements about when he decided to leave India were contradictory and in conflict with the documentary

evidence. Finally, Singh's statements about visits from the police and the militants conflicted with the evidence in the record. For all of these reasons, substantial evidence supports the IJ's determination that Singh failed to provide credible testimony in support of his claim for asylum and withholding of removal. The petition for review should be denied.

2. The IJ properly concluded that Singh's asylum application was frivolous. After listening to Singh's testimony, and his futile attempts to reconcile his testimony with his earlier statements and his evidentiary submissions, the IJ found that Singh had fabricated material elements of his asylum claim. This finding was supported by substantial evidence, and should be upheld.

3. The IJ properly rejected Singh's CAT claim. Because the IJ found Singh's testimony wholly lacking in credibility, he properly concluded that Singh had not shown that it is more likely than not that he would be subjected to torture at the hands of government officials if returned to India.

4. This Court should deny Singh's request to remand this case to the BIA for consideration of his claim that he is eligible to adjust his status based on his marriage to a United States citizen. This Court lacks jurisdiction to consider this issue because the BIA already rejected Singh's argument that he is entitled to adjustment of status, and Singh did not petition for review of that decision. In any event, the BIA properly rejected Singh's argument on the merits. Because the IJ properly found that Singh's asylum application was frivolous, the INA

bars him from seeking adjustment of status. Moreover, Singh has not made a *prima facie* showing of eligibility for adjustment of status as required by statute.

ARGUMENT

I. THE IMMIGRATION JUDGE PROPERLY DETERMINED THAT SINGH FAILED TO ESTABLISH ELIGIBILITY FOR ASYLUM OR WITHHOLDING OF REMOVAL SINCE HE OFFERED NO CREDIBLE TESTIMONY IN SUPPORT OF HIS APPLICATIONS

A. Relevant Facts

The relevant facts are set forth in the Statement of Facts above.

B. Governing Law and Standard of Review

Two forms of relief are potentially available to aliens claiming that they will be persecuted if removed from this country: asylum and withholding of removal.[7] *See* 8

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[7] "Removal" is the collective term for proceedings that previously were referred to, depending on whether the alien had effected an "entry" into the United States, as "deportation" or "exclusion" proceedings. Because withholding of removal is relief that is identical to the former relief known as withholding of deportation or return, *compare* 8 U.S.C. § 1253(h)(1) (1994) *with id.* § 1231(b)(3)(A) (2004), cases relating to the former (continued...)

U.S.C. §§ 1158(a), 1231(b)(3) (2004); *Zhang v. Slattery*, 55 F.3d 732, 737 (2d Cir. 1995). Although these types of relief are "'closely related and appear to overlap,'" *Carranza-Hernandez v. INS*, 12 F.3d 4, 7 (2d Cir. 1993) (quoting *Carvajal-Munoz v. INS*, 743 F.2d 562, 564 (7th Cir. 1984)), the standards for granting asylum and withholding of removal differ, *see INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-32 (1987); *Osorio v. INS*, 18 F.3d 1017, 1021 (2d Cir. 1994).

1. Asylum

An asylum applicant must, as a threshold matter, establish that he is a "refugee" within the meaning of 8 U.S.C. § 1101(a)(42) (2004). *See* 8 U.S.C. § 1158(a) (2004); *Liao v. U.S. Dep't of Justice*, 293 F.3d 61, 66 (2d Cir. 2002). A refugee is a person who is unable or unwilling to return to his native country because of past "persecution or a well-founded fear of persecution on account of" one of five enumerated grounds: "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42) (2004); *Liao*, 293 F.3d at 66.

Although there is no statutory definition of "persecution," courts have described it as "'punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate.'" *Mitev v. INS*, 67 F.3d 1325, 1330 (7th Cir.

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[7] (...continued)
relief remain applicable precedent.

1995) (quoting *De Souza v. INS*, 999 F.2d 1156, 1158 (7th Cir. 1993)); *see also Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995) (stating that persecution is an "extreme concept"). While the conduct complained of need not be life-threatening, it nonetheless "must rise above unpleasantness, harassment, and even basic suffering." *Nelson v. INS*, 232 F.3d 258, 263 (1st Cir. 2000). Upon a demonstration of past persecution, a rebuttable presumption arises that the alien has a well-founded fear of future persecution. *See Melgar de Torres v. Reno*, 191 F.3d 307, 315 (2d Cir. 1999); 8 C.F.R. § 208.13(b)(1)(i) (2004).

Where an applicant is unable to prove past persecution, the applicant nonetheless becomes eligible for asylum upon demonstrating a well-founded fear of future persecution. *See Zhang*, 55 F.3d at 737-38; 8 C.F.R. § 208.13(b)(2) (2004). A well-founded fear of persecution "consists of both a subjective and objective component." *Gomez v. INS*, 947 F.2d 660, 663 (2d Cir. 1991). Accordingly, the alien must actually fear persecution, and this fear must be reasonable. *See id.* at 663-64.

"An alien may satisfy the subjective prong by showing that events in the country to which he. . . . will be deported have personally or directly affected him." *Id.* at 663. With respect to the objective component, the applicant must prove that a reasonable person in his circumstances would fear persecution if returned to his native country. *See* 8 C.F.R. § 208.13(b)(2) (2004); *see also Zhang*, 55 F.3d at 752 (noting that when seeking reversal of a BIA factual determination, the petitioner must show "'that the evidence he presented was so compelling that no

reasonable factfinder could fail'" to agree with the findings (quoting *INS v. Elias-Zacarias*, 502 U.S 478, 483-84 (1992)); *Melgar de Torres*, 191 F.3d at 311.

The asylum applicant bears the burden of demonstrating eligibility for asylum by establishing either that he was persecuted or that he "has a well-founded fear of future persecution on account of, *inter alia*, his political opinion." *Chen v. INS*, 344 F.3d 272, 275 (2d Cir. 2003); *Osorio*, 18 F.3d at 1027. *See* 8 C.F.R. § 208.13(a)-(b) (2004). The applicant's testimony and evidence must be credible, specific, and detailed in order to establish eligibility for asylum. *See* 8 C.F.R. § 208.13(a)(2004); *Abankwah v. INS*, 185 F.3d 18, 22 (2d Cir. 1999); *Melendez v. U.S. Dep't of Justice*, 926 F.2d 211, 215 (2d Cir. 1991) (stating that applicant must provide "credible, persuasive and . . . . specific facts" (internal quotation marks omitted)); *Matter of Mogharrabi*, Interim Dec. 3028, 19 I. & N. Dec. 439, 445, 1987 WL 108943 (BIA June 12, 1987), *abrogated on other grounds by Pitcherskaia v. INS*, 118 F.3d 641, 647-48 (9th Cir. 1997) (applicant must provide testimony that is "believable, consistent, and sufficiently detailed to provide a plausible and coherent account").

Because the applicant bears the burden of proof, he should provide supporting evidence when available, or explain its unavailability. *See Zhang v. INS*, No. 02-4252, 2004 WL 2223319, at *4 (2d Cir. Oct. 5, 2004) ("[W]here the circumstances indicate that an applicant has, or with reasonable effort could gain, access to relevant corroborating evidence, his failure to produce such evidence in support of his claim is a factor that may be

weighed in considering whether he has satisfied the burden of proof."); *see also Diallo v. INS*, 232 F.3d 279, 285-86 (2d Cir. 2000); *In re S-M-J-*, Interim Dec. 3303, 21 I. & N. Dec. 722, 723-26, 1997 WL 80984 (BIA Jan. 31, 1997).

Finally, even if the alien establishes that he is a "refugee" within the meaning of the INA, the decision whether ultimately to grant asylum rests in the Attorney General's discretion. *See* 8 U.S.C. § 1158(b)(1) (2004); *Ramsameachire v. Ashcroft*, 357 F.3d 169, 178 (2d Cir. 2004); *Zhang*, 55 F.3d at 738.

2. Withholding of Removal

Unlike the discretionary grant of asylum, withholding of removal is mandatory if the alien proves that his "life or freedom would be threatened in [his native] country because of [his] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A) (2000); *Zhang*, 55 F.3d at 738. To obtain such relief, the alien bears the burden of proving by a "clear probability," *i.e.*, that it is "more likely than not," that he would suffer persecution on return. *See* 8 C.F.R. § 208.16(b)(2)(ii) (2004); *INS v. Stevic*, 467 U.S. 407, 429-30 (1984); *Melgar de Torres*, 191 F.3d at 311. Because this standard is higher than that governing eligibility for asylum, an alien who has failed to establish a well-founded fear of persecution for asylum purposes is necessarily ineligible for withholding of removal. *See Zhang v. INS*, 2004 WL 2223319, at *4; *Chen*, 344 F.3d at 275; *Zhang*, 55 F.3d at 738.

3. Standard of Review

This Court reviews the determination of whether an applicant for asylum or withholding of removal has established past persecution or a well-founded fear of persecution under the substantial evidence test. *Zhang v. INS*, 2004 WL 2223319, at *5; *Chen*, 344 F.3d at 275 (factual findings regarding asylum eligibility must be upheld if supported by "reasonable, substantive and probative evidence in the record when considered as a whole" (internal quotation marks omitted)); *see Secaida-Rosales v. INS*, 331 F.3d 297, 306-07 (2d Cir. 2003); *Melgar de Torres*, 191 F.3d at 312-13 (factual findings regarding both asylum eligibility and withholding of removal must be upheld if supported by substantial evidence). "Under this standard, a finding will stand if it is supported by 'reasonable, substantial, and probative' evidence in the record when considered as a whole." *Secaida-Rosales*, 331 F.3d at 307 (quoting *Diallo*, 232 F.3d at 287).

Where an appeal turns on the sufficiency of the factual findings underlying the IJ's determination[8] that an alien

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[8] Although judicial review ordinarily is confined to the BIA's order, *see, e.g.*, *Abdulai v. Ashcroft*, 239 F.3d 542, 549 (3d Cir. 2001), courts properly review an IJ's decision where, as here (JA 84-85), the BIA adopts that decision. *See* 8 C.F.R. § 3.1(a)(7)(2004); *Secaida-Rosales*, 331 F.3d at 305; *Arango-Aradondo v. INS*, 13 F.3d 610, 613 (2d Cir. 1994). Accordingly, this brief treats the IJ's decision as the relevant administrative decision.

has failed to satisfy his burden of proof, Congress has directed that "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B) (2004). *Zhang v. INS*, 2004 WL 2223319, at *19, n.7. This Court "will reverse the immigration court's ruling only if 'no reasonable fact-finder could have failed to find . . . past persecution or fear of future persecution." *Chen*, 344 F.3d at 275 (omission in original) (quoting *Diallo*, 232 F.3d at 287).

The scope of this Court's review under that test is "exceedingly narrow." *Zhang v. INS*, 2004 WL 2223319, at *6; *Chen*, 344 F.3d at 275; *Melgar de Torres*, 191 F.3d at 313. *See also Zhang v. INS*, 2004 WL 2223319, at *6 ("Precisely because a reviewing court cannot glean from a hearing record the insights necessary to duplicate the fact-finder's assessment of credibility what we 'begin' is not a *de novo* review of credibility but an 'exceedingly narrow inquiry' . . . to ensure that the IJ's conclusions were not reached arbitrarily or capriciously") (citations omitted). Substantial evidence entails only "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938)). The mere "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966); *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992).

Indeed, the IJ's and BIA's eligibility determination "can be reversed only if the evidence presented by [the asylum applicant] was such that a reasonable factfinder would have to conclude that the requisite fear of persecution existed." *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992). In other words, to reverse the BIA's decision, the Court "must find that the evidence not only *supports* th[e] conclusion [that the applicant is eligible for asylum], but *compels* it." *Id.* at 481 n.1 (emphasis in original).

This Court gives "particular deference to the credibility determinations of the IJ." *Chen*, 344 F.3d at 275 (quoting *Montero v. INS*, 124 F.3d 381, 386 (2d Cir. 1997)); *see also Qiu v. Ashcroft*, 329 F.3d 140, 146 n.2 (2d Cir. 2003) (the Court "generally defer[s] to an IJ's factual findings regarding witness credibility"). This Court has recognized that "the law must entrust some official with responsibility to hear an applicant's asylum claim, and the IJ has the unique advantage among all officials involved in the process of having heard directly from the applicant." *Zhang v. INS*, 2004 WL 2223319, at *6.

Because the IJ is in the "best position to discern, often at a glance, whether a question that may appear poorly worded on a printed page was, in fact, confusing or well understood by those who heard it," this Court's review of the fact-finder's determination is exceedingly narrow. *Zhang v. INS*, 2004 WL 2223319, at *6; *see also id.* ("'[A] witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may convey a most favorable impression.'") (quoting *Arnstein v. Porter*, 154 F.2d 464, 470 (2d Cir. 1946) (citation omitted); *Sarvia-Quintanilla v. United States INS*,

767 F.2d 1387, 1395 (9th Cir. 1985) (noting that IJ "alone is in a position to observe an alien's tone and demeanor . . . [and is] uniquely qualified to decide whether an alien's testimony has about it the ring of truth"); *Kokkinis v. District Dir. of INS*, 429 F.2d 938, 941-42 (2d Cir. 1970) (court "must accord great weight" to the IJ's credibility findings). The "exceedingly narrow" inquiry "is meant to ensure that credibility findings are based upon neither a misstatement of the facts in the record nor bald speculation or caprice." *Zhang v. INS*, 2004 WL 2223319, at *6.

In reviewing credibility findings, courts "look to see if the IJ has provided 'specific, cogent' reasons for the adverse credibility finding and whether those reasons bear a 'legitimate nexus' to the finding." *Id.* (quoting *Secaida-Rosales*, 331 F.3d at 307). Credibility inferences must be upheld unless they are "irrational" or "hopelessly incredible." *See, e.g.*, *United States v. LaSpina*, 299 F.3d 165, 180 (2d Cir. 2002) ("we defer to the fact finder's determination of . . . the credibility of the witnesses, and to the fact finder's choice of competing inferences that can be drawn from the evidence" (internal marks omitted)); *NLRB v. Columbia Univ.*, 541 F.2d 922, 928 (2d Cir. 1976) (credibility determination reviewed to determine if it is "irrational" or "hopelessly incredible").

C. Discussion

Substantial evidence supports the IJ's determination that Singh failed to provide credible testimony in support of his application for asylum and withholding of removal, and thus failed to establish eligibility for relief. Singh's account contained inconsistencies and implausibilities that

went to the heart of his claims and when questioned about the conflicting responses, Singh failed to adequately explain the evidentiary deficiencies at the administrative level. As such, substantial evidence supports the IJ's decision, *see, e.g.*, *Qiu*, 329 F.3d at 152 n. 6 ("incredibility arises from 'inconsistent statements, contradictory evidence, and inherently improbable testimony'" (quoting *Diallo*, 232 F.3d at 287-88)), and thus Singh has not met his burden of showing that a reasonable factfinder would be compelled to conclude he is entitled to relief.

As the IJ correctly found (JA 142-45), Singh gave inconsistent statements about the facts underlying his alleged arrests and periods of detention by the Indian authorities. Moreover, Singh's claims concerning when he intended to leave India and his statements about alleged visits from police and militants to his home were confusing and contrary. *Id.* All of these statements went to the heart of Singh's claims of persecution. The IJ justifiably relied on all of these confusing, contradictory and inconsistent statements in the record in finding that Singh's testimony lacked credibility.

1. Singh's Alleged Arrests

The IJ properly concluded that Singh's statements regarding his alleged arrests and detentions, especially with regard to the July 25, 1996, arrest, were incredible. (JA 143). *First*, in the course of his testimony, Singh gave at least four conflicting statements about why he was at the hospital on July 25, 1996. He first testified that he was "passing by" and stopped in to see his friend, Dr. Ramesh

(JA 195), but then changed his story to say that he was at the hospital to see a sick friend (JA 220). Later, when confronted with Dr. Ramesh's affidavit, which states that Singh was at the hospital on July 25 to obtain medication, Singh changed his story yet again to conform to Dr. Ramesh's account. (JA 223). And finally -- after the IJ had stopped questioning to allow Singh to confer with counsel and consider his response -- Singh abandoned this last story and stated that he obtained medication from the hospital only after his release from detention two weeks later. (JA 226). When asked why Dr. Ramesh might have stated that he was at the hospital on July 25 to obtain medication, Singh's only response was that the doctor must have been mistaken. (*Id.*).

In this Court, Singh asserts that the IJ's disbelief about the purpose of the July 25, 1996 visit demonstrates a "bias and prejudice" against him. *See* Petitioner's Br. at 6. Singh further claims that "[a]pparently, the IJ never had lunch with a doctor or any other similar social occasion where the conversation would start as a social encounter but then would progress to matter of the person's professional engagement." *Id.* Singh, however, did not testify that he began a discussion of his medical problems during the course of a social visit with Dr. Ramesh. Rather Singh does not -- and cannot -- dispute the fact that he gave at least four different explanations for why he went to Dr. Ramesh's clinic on July 25, 1996.

Second, Singh failed to explain conflicts between his testimony and the account offered by Dr. Ramesh in his affidavit. Dr. Ramesh's affidavit states that the police "pushed" and "insulted" the two men but contains

absolutely no mention of either man being arrested, beaten, and detained. (JA 330). Dr. Ramesh's affidavit also contains no mention of Singh's hospitalization after his August 1995 detention, even though Singh claims that he was hospitalized for five or six days at that time. (*Id.*).

Singh's only response is to assert that because Dr. Ramesh was not available for questioning, the "IJ acted unreasonably" in making any inferences based on facts that were not in Dr. Ramesh's affidavit. *See* Petitioner's Br. at 10. But Singh himself submitted the affidavit in support of his asylum application. The IJ acted reasonably and appropriately in evaluating the facts contained in the affidavit against statements by Singh, especially, where, as is the case here, the affidavit contains omissions that relate directly to Singh's central claim of persecution. It was completely reasonable for the IJ to conclude that it was not likely that Dr. Ramesh would state that the police "pushed" and "insulted" the men but not describe the far more severe arrests, detentions, and beatings that the men allegedly suffered. As the IJ determined, a more plausible explanation for the significant omissions in Dr. Ramesh's affidavit is that the affidavit was fabricated and submitted by Singh to convince the IJ to grant his asylum claim. (JA 142-43).

Third, Singh's testimony about the July 25, 1996 incident was inconsistent with statements made in his asylum application. In his asylum application, Singh stated that both men were arrested and detained for two weeks. During his testimony before the IJ, however, Singh stated that he was detained for two weeks and that Dr. Ramesh was detained for nine or ten days. Singh's

contention that the inconsistency is minor is simply incorrect, *see* Petitioner's Br. at 10, because it directly relates to the Indian government's alleged persecution of Singh. *See generally Leon-Barrios v. INS*, 116 F.3d 391, 393-94 (9th Cir. 1997) (inconsistencies not minor where they relate to the basis for the alien's fear of persecution). This is not a case where the IJ relied on a few omitted detailed in support of his incredibility finding. Singh cannot reasonably claim that conflicting statements about the amount of time that he and Dr. Ramesh were detained by the Indian authorities -- during which time they were allegedly beaten -- should be considered trivial errors that are not pertinent to Singh's credibility. Moreover, as evidenced by the record, the IJ did not seize on this inconsistency alone.

Singh's statements regarding the severity of the alleged beatings that he suffered were similarly contradictory. In his asylum application, Singh stated that he was beaten "very badly." (JA 213). During his testimony, however, Singh stated that he was beaten "a little bit." (JA 199). Singh asserts that the IJ should not be permitted to distinguish between whether an individual is beaten "badly" or "nicely." *See* Petitioner's Br. at 11. Here, Singh completely misses the point. The IJ did not evaluate the severity of Singh's alleged beatings. Rather, the IJ evaluated discrepancies between Singh's own statements about the alleged beatings. He was given an opportunity to explain the inconsistencies between his asylum application and his in-court testimony and was not able to do so. Again, these discrepancies are directly related and probative of his central claim. *See also Pop v. INS*, 270 F.3d 527, 531-32 (7th Cir. 2001) (upholding adverse

credibility determination based upon inconsistencies between application and testimony); *Pal v. INS*, 204 F.3d 935, 938 (9th Cir. 2000) (same).

2. Singh's Intention to Leave India

The IJ properly found that Singh's statements about when he decided to leave India were wholly incredible. (JA 144). Singh initially testified that he decided to leave India after the February 10, 1997 raid on his farm. (JA 206). But when his own lawyer pointed out that he had obtained a visa on January 29, 1997, Singh changed his story to say that he had decided to leave the country after his July 1996 arrest. (JA 208). In this Court, Singh's arguments are similarly confused and contrary. Here, he argues that he decided to leave after his "second" beating and that "[h]e was beaten in February of 1997." Petitioner's Br. at 11. But, according to Singh's case as presented below, Singh's second alleged beating occurred after his July 25, 1996 arrest, not in February 1997 as he asserts before this Court. And contrary to his statement here, he testified before the IJ that he was able to escape the February 1997 raid on his home without being beaten by the police. (JA 205).

Before this Court, Singh attempts to reconcile his testimony below by stating that he desired to travel to the United States after the 1996 events but that he formed his desire to apply for asylum after the February 1997 incident. Petitioner's Br. at 11-12. This belated explanation was not presented below and therefore petitioner is precluded from raising it here. (*See* JA 99-100 (argument to BIA)); *see also United States v.*

Gonzalez-Roque, 301 F.3d 39, 47 (2d Cir. 2002) (alien jurisdictionally barred from raising issue not presented to BIA); *Chour v. INS*, 578 F.2d 464, 468 (2d Cir. 1978) (failure to present "theory" to BIA "precludes review of that claim" before the court of appeals).

In any event, in suggesting one possible reading of the record, Singh misconstrues the standard of review. The substantial evidence standard requires Singh to offer more than a plausible alternative theory; to the contrary, Singh "must demonstrate that a reasonable fact-finder would be compelled to credit his testimony." *Chen*, 344 F.3d at 275-76 (citing *Elias-Zacarias*, 502 U.S. at 481 n.1). As the Supreme Court has held, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 523 (1981) (quoting *Consolo*, 383 U.S. at 620); *accord Mar Oil, S.A. v. Morrissey*, 982 F.2d 830, 837-38 (2d Cir. 1993). It is not the role of the reviewing court to re-weigh the inconsistencies "to see if we would reach the same credibility conclusions as the IJ." *Zhang v. INS*, 2004 WL 2223319, at *9. Accordingly, the only relevant question is whether there is substantial evidence to support the conclusion that the IJ in fact reached in the face of Singh's contradictory statements. *See Elias-Zacarias*, 502 U.S. at 481 n.1. Here, even if Singh has offered a plausible interpretation of his testimony that could harmonize his conflicting statements, nothing in the record compels such a reading. *See id.*

3. Visits from Militants and the Police

The IJ properly concluded that discrepancies between Singh's testimony and other evidence in the record about visits from the police and the militants undermined Singh's credibility. (JA 144).

For example, the IJ questioned Singh about why he told the asylum officer that two people had been killed during the February 10, 1997 police raid on his home, when he testified during his administrative hearing that three people had been killed. In response, Singh stated that he had told the asylum officer that there were three people -- not two -- who had been killed, and thereby suggested that the asylum officer made a mistake in his report. (JA 230). Having no explanation for the inconsistencies, Singh's pattern response was to blame the inconsistency on someone else's mistake. (*See, e.g.*, JA 266 (two separate lawyers made mistake in asylum application by stating that Dr. Ramesh was detained for two weeks); JA 276 (Dr. Ramesh made a mistake in his affidavit when he stated that Singh came to hospital on July 25, 1996 to obtain medication)).

Similarly, when asked why he told the asylum officer that militants had visited his home in 1994 when he testified that militants did not visit his home until July 1995, Singh responded that he did not recall making the statement to the asylum officer. (JA 231). These discrepancies between Singh's statements fully support the IJ's finding that Singh's testimony lacked credibility.

Singh argues that the asylum interview report is not reliable because it is hearsay and because the asylum officer was not available for cross-examination. *See* Petitioner's Br. at 15. Hearsay is admissible in administrative immigration proceedings, however, as long as the admission of evidence meets the tests of fundamental fairness and probity. *Felzcerek v. INS*, 75 F.3d 112, 115 (2d Cir. 1996) (hearsay evidence is admissible if it is probative and its use is fundamentally fair). Singh's statements to the asylum officer that are contained in the asylum interview report are probative and admission of the report was not fundamentally unfair. Singh was provided a copy of the report and did not object to its admission. (JA 177).

Moreover, the IJ's narrow use of the report to question Singh about two facts that he discussed during his oral testimony was not fundamentally unfair. Singh was given the opportunity to explain his testimony and resolve any discrepancies. That he could not do so does not mean that the IJ improperly relied on the report. The IJ justifiably considered the omissions and misrepresentations contained in the asylum interview report as one of the many factors supporting an incredibility finding. *See Secaida-Rosales*, 331 F.3d at 308 (discussing that "outright inconsistencies" and "omissions" must "be measured against the whole record before they may justify an adverse credibility determination").

Finally, the IJ also properly noted that Singh had failed to include the alleged numerous visits by the militants and police to his home in his asylum application. (JA 144). Because these facts directly relate to his central claim of

harassment and persecution, the IJ properly relied on the omission of these facts in his asylum application together with all of the other discrepancies, confusing statements and omissions apparent in this record to reach his conclusion that Singh's testimony was "anything but credible." (*Id.*).

II. THE IMMIGRATION JUDGE PROPERLY DETERMINED THAT SINGH'S ASYLUM APPLICATION WAS FRIVOLOUS.

A. Relevant Facts

The relevant facts are set forth in the Statement of Facts above.

B. Governing Law and Standard of Review

Section 208(d)(6) of the INA, 8 U.S.C. § 1158(d)(6) (2004), provides that "[i]f the Attorney General determines that an alien has knowingly made a frivolous application for asylum" and the applicant has received notice of the consequences of making such an application, "the alien shall be permanently ineligible for any benefits" under chapter two of the INA. Pursuant to regulation, this bar to benefits may be invoked where the IJ or BIA "specifically finds that the alien knowingly filed a frivolous asylum application." 8 C.F.R. § 1208.20 (2004). An asylum application is frivolous if "any of its material elements is deliberately fabricated." *Id.* (alien is barred from most forms of relief from removal upon final order that alien knowingly filed frivolous application).

A finding that an asylum application is frivolous may be made "if the [IJ] or the [BIA] is satisfied that the applicant, during the course of the proceedings, has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim." *Id.*

This Court reviews the factual determinations about whether an alien's application was properly determined to be frivolous under the "substantial evidence" standard. *See* Part I.B.4., *supra*; *see also* 8 U.S.C. § 1252(b)(4). The Court reviews *de novo* the legal sufficiency of the findings. *See, e.g.*, *Barreto-Claro v. Attorney General*, 275 F.3d 1334, 1339 (11th Cir. 2001).

C. Discussion

Here, the IJ properly concluded that Singh's asylum application was frivolous. The blatant discrepancies between Singh's written application and his testimony, together with the many implausibilities in his testimony and inconsistencies in his supporting documentation, provide ample support for the IJ's factual determination that Singh's application constituted an intentional attempt to deceive the immigration court. (*See* JA 142-45).

The IJ's frivolousness determination rested on substantial evidence. Singh does not dispute that he was notified of the consequences of filing a frivolous application for asylum. (*See* JA 151, 161 (oral warnings given by IJ); JA 233 (written warning provided to Singh)). Moreover, as described above, the multiple inconsistencies and contradictions between his asylum application, supporting documentation, and testimony, all support the

IJ's finding that Singh's statements lacked credibility. *See* Part I.C., *supra*.

While Singh asserts that the IJ denied him a chance "to account for slight discrepancies" in the record, he cites to no examples in the record. *See* Petitioner's Br. at 14. In any event, the record clearly reveals that contrary to his assertions, Singh had ample opportunity to develop his case through counsel and through active questioning by the IJ and the government's lawyer. Throughout the administrative hearing, Singh was directly confronted with contrary evidence and inconsistent statements, and provided an opportunity to reconcile his testimony. (*See, e.g.*, JA 206; 208-10 (questioned by Singh's own attorney about his inconsistent statements regarding his intention to leave India); JA 213-14 (questioned about inconsistency between asylum application and oral testimony regarding the severity of the alleged beating Singh and Dr. Ramesh suffered after the 1996 arrest); JA 214-16 (questioned about discrepancies between asylum application and oral testimony regarding the period of detention after 1996 arrest); JA 221-22 (questioned about omissions in Dr. Ramesh's affidavit regarding the alleged arrest, detention and beatings after the 1996 arrest); JA 223-24 (questioned about inconsistencies relating to the purpose of Singh's visit to the hospital on July 25, 1996); JA 229 (questioned about the omission in both asylum applications regarding the number of times the militants allegedly visited his home); JA 229 (questioned about the omission in his asylum application regarding the alleged numerous visits by the police to Singh's home); JA 229-30 (questioned about the discrepancies between the asylum interview memorandum and Singh's oral testimony)). *Contrast*

Farah v. Ashcroft, 348 F.3d 1153 (9th Cir. 2003) (reversing determination that the petitioner's application was frivolous because the petitioner had not been given sufficient opportunity to explain the discrepancies in the record). Indeed, at one point during the proceedings, the IJ stopped the questioning and provided Singh an opportunity to speak with his counsel regarding his obvious credibility issues. (JA 224). As evidenced by the record, Singh was unable to explain his confusing and contradictory statements.

Singh also claims that the discrepancies and inconsistencies were minor and immaterial, but he is mistaken. The IJ found that Singh had made inconsistent statements about his alleged beatings and detentions, his desire to leave India, and the history of militant and police visits to his home. *Id.* These issues went to the heart of Singh's asylum claim -- the alleged persecution. They were not minor issues, and the IJ properly relied on the inconsistencies to find that Singh lacked credibility. Given the unexplained inconsistencies and the implausibilities in Singh's proof, the IJ properly found that Singh's application constituted a frivolous asylum application triggering 8 U.S.C. § 1158(d)(6) (2004).

In any event, the IJ's finding that Singh's application was frivolous also rested on the affidavit by Dr. Ramesh, an affidavit that the IJ found contained "misinformation" or was completely "fabricated." (JA 224-25). The affidavit was submitted by Singh when his hearing commenced in support of his asylum application. As described above, the IJ reasonably determined that when Dr. Ramesh's affidavit was considered vis-a-vis the whole

record in this case, the more plausible explanation was that the affidavit was completely fabricated or contained misinformation in an effort to convince the IJ to grant Singh's asylum application. The affidavit was submitted knowingly in support of the application, it contained material misinformation or outright fabrications and Singh had many opportunities to explain the discrepancies between the facts contained in the affidavit and his testimony. Accordingly, the IJ properly determined that Singh's asylum application was frivolous within the meaning of the statute.

Where, as here, the IJ properly makes a specific finding that the alien's claim was fabricated, the determination that the asylum application was frivolous should be affirmed. See *Efe v. Ashcroft*, 293 F.3d 899, 908 (5th Cir. 2002) (affirming frivolousness determination where applicant "[went] back and forth with the facts[,] . . . misrepresented his case several times[,]" and "failed to take advantage of ample opportunity to clarify his contradictory testimony").

III. THE IMMIGRATION JUDGE PROPERLY REJECTED SINGH'S CLAIM FOR RELIEF UNDER THE CONVENTION AGAINST TORTURE BECAUSE SINGH PRESENTED NO CREDIBLE EVIDENCE TO SUPPORT HIS CLAIM.

A. Relevant Facts

The relevant facts are set forth in the Statement of Facts above.

B. Governing Law and Standard of Review

1. Withholding of Removal Under the Convention Against Torture

Article 3 of the Convention Against Torture precludes the United States from returning an alien to a country where he more likely than not would be tortured by, or with the acquiescence of, government officials acting under color of law. *See Wang v. Ashcroft*, 320 F.3d 130, 133-34, 143-44 & n.20 (2d Cir. 2003); *Ali v. Reno*, 237 F.3d 591, 597 (6th Cir. 2001); *In re Y-L-, A-G-, R-S-R-*, Interim Dec. 3464, 23 I. & N. Dec. 270, 279, 283, 285, 2002 WL 358818 (BIA Mar. 5, 2002); 8 C.F.R. §§ 208.16(c), 208.17(a), 208.18(a) (2004).

To establish eligibility for relief under the Convention Against Torture, an applicant bears the burden of proof to "establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. § 208.16(c)(2) (2002); *see also Najjar*

v. Ashcroft, 257 F.3d 1262, 1304 (11th Cir. 2001); *Wang*, 320 F.3d at 133-34, 144 & n.20.

The Convention Against Torture defines "torture" as "'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining . . . information or a confession, punish[ment] . . . , or for any reason based on discrimination of any kind, when such pain or suffering is 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.'" *Ali*, 237 F.3d at 597 (quoting 8 C.F.R. § 208.18(a)(1)).

Because "[t]orture is an extreme form of cruel and inhuman treatment," even cruel and inhuman behavior by officials may not warrant Convention Against Torture protection. *Sevoian v. Ashcroft*, 290 F.3d 166, 175 (3d Cir. 2002) (citing 8 C.F.R. § 208.18(a)(2)). The term "acquiescence" requires that "the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. § 208.18(a)(7) (2004). Under the Convention Against Torture, an alien's removal may be either permanently withheld or temporarily deferred. *See* 8 C.F.R. §§ 208.16-17 (2004).

2. Standard of Review

This Court reviews the determination of whether an alien is eligible for protection under the Convention Against Torture under the "substantial evidence" standard.

See Saleh v. U.S. Dep't of Justice, 962 F.2d 234, 238 (2d Cir. 1992); *Ali*, 237 F.3d at 596; *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 353-54 (5th Cir. 2002).

C. Discussion

Substantial evidence supports the IJ's determination that Singh failed to provide credible testimony in support of his application for protection under the CAT. As discussed above, *supra* Part I.C., because the IJ properly determined that Singh's testimony was "anything but credible," the IJ properly concluded that Singh had presented no credible evidence to show that if removed to India, it is more likely than not that he will suffer torture by the government of India.

The documentary evidence in this case supports the IJ's conclusion. The 1997 Addendum to the State Department Country Report on India reports that "life for Sikhs and non-Sikhs alike, is normal." (JA 234). The State Department Report further states that since mid-1993, terrorist attacks have become "quite rare." (JA 252). Finally, it is noteworthy that in March 2004, Dr. Manmohan Singh became India's first Sikh prime minister. *See* http://pmindia.nic.in/former.htm; *see also* http://news.bbc.co.uk/2/hi/south_asia/3727225.stm.

IV. THIS COURT LACKS JURISDICTION TO REVIEW SINGH'S CLAIM FOR ADJUSTMENT OF STATUS, A CLAIM THAT IS MERITLESS, IN ANY EVENT

A. Relevant Facts

The relevant facts are set forth in the Statement of Facts above.

B. Governing Law and Standard of Review

To challenge an order of the BIA denying a motion to reopen or motion to reconsider, an immigrant must file a petition for review of that decision, directly in this Court, within thirty days of the BIA's decision. *See* 8 U.S.C. §1252(b)(1) (petition for review must be filed within 30 days of removal order); *see also* 8 U.S.C. § 1252(b)(6) (if review is sought of motion to reopen or reconsider it shall be consolidated with review of underlying deportation order). If no petition for review is filed to challenge a BIA decision, this Court lacks jurisdiction to review that decision. *Zhao v. United States Dep't of Justice*, 265 F.3d 83, 89 (2d Cir. 2001) (INA requires two separate petitions for review, one for underlying order and a separate petition for review of denial of motion to reopen).

This Court reviews *de novo* questions of subject matter jurisdiction. *Chase Manhattan v. American Nat'l Bank*, 93 F.3d 1064, 1070 (2d Cir. 1996). Moreover, the issue of subject matter jurisdiction may be raised "at any stage of the proceedings," and "the party asserting jurisdiction bears the burden of proving that the case is properly in

federal court." *United Food Local 919 v. Centermark Properties*, 30 F.3d 298, 301 (2d Cir. 1994).

C. Discussion

This Court lacks jurisdiction to consider Singh's claim that he is entitled to an adjustment of status because he did not petition for review of the BIA decision that rejected that claim. On January 8, 2003, the BIA summarily affirmed the IJ's decision denying him relief on his asylum, withholding of removal, and CAT claims. Singh promptly petitioned for review of that decision, and at the same time, asked the BIA to reconsider its decision, (JA 56-57). Two months later, Singh asked the BIA to reopen the proceedings to allow him to apply for adjustment of status. (JA 10-52). According to Singh, he was entitled to an adjustment of status because he was married to a United States citizen. (*Id.*).

On June 10, 2003, the BIA denied both of Singh's pending motions. (JA 1). With respect to Singh's motion to reopen, the BIA noted that the motion was untimely, that Singh had not submitted evidence that a visa petition filed on his behalf had been approved, that he had not submitted clear and convincing evidence of the bona fides of the marriage, and that he was ineligible for adjustment of status under the INA in any event because he had been found to have knowingly made a frivolous asylum application. (JA 2-3). Singh did not petition for review of the BIA's June 10 decision denying his motion to reopen.

Now, Singh asks this Court to grant him the very relief that the BIA already considered and denied.[9] Petitioner's Br. at 24. Because Singh did not petition for review, however, this Court lacks jurisdiction to hear this claim, and it must be denied. 8 U.S.C. §1252(b)(1).

Even if Singh had properly preserved the claim by filing a separate petition for review to challenge the denial of his motions to reopen and reconsider, his claim would fail on the merits. Singh is precluded from seeking adjustment of status pursuant to INA § 245 because his asylum application was properly deemed frivolous. *See* 8 U.S.C. § 1158(d)(6) (alien barred from applying for benefits, including adjustment of status); *see also* Part II, *supra* (IJ properly found that asylum application was frivolous).

Finally, even if Singh had properly preserved his adjustment of status claim and even if he were not precluded under INA § 208(d)(6) from seeking that relief, Singh has not made a showing -- as he is required to -- that he is *prima facie* eligible for adjustment of status. *See* 8

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[9] On or about October 1, 2004, Singh filed a motion to remand this case to the BIA based on his claim that he is eligible to adjust his status on account of his marriage to a United States citizen. To the extent that Singh relies on materials that are not contained in the administrative record, the Court should not consider those materials. *See* 8 U.S.C. § 1252(b)(4)(A) ("the court of appeals shall decide the petition only on the administrative record on which the order of removal is based."). In any event, even if this Court were to consider the additional documents, they would not assist Singh. As described in the text, Singh's arguments are meritless.

U.S.C. § 1255. In INA § 245, Congress gave the Attorney General discretion to adjust the status of an eligible alien already present in the country to that of a lawful permanent resident where the alien meets certain qualifications. *See* 8 U.S.C. § 1255(a).

The requirements are: (1) the alien must have been "inspected and admitted or paroled" into the United States; (2) he must have submitted an application; (3) an immigrant visa must be "immediately available" to him when he files his application; and (4) he must be "admissible to the United States for permanent residence." 8 U.S.C. § 1255(a); *see* 8 C.F.R. §§ 245.1(a) & 245.2(a) (2004) (implementing regulations).[10] Singh has made no showing that an immigrant visa is immediately available to him. In his motion to remand that was filed with this Court, Singh states that he has received a notice that his application for an I-130 petition is pending. The fact that an application has been filed and is pending, however, is not evidence that it has been approved and that a visa is immediately available. More importantly, in light of the fact that Singh is under an order of removal, he is no longer "admissible" and therefore he is barred from applying for adjustment of his status. For these reasons,

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[10] An alien seeking adjustment of status bears at all times the burden of persuading the Attorney General and his delegates to exercise their discretion in his favor. *Randall v. Meese*, 854 F.2d 472, 474 (D.C. Cir. 1988) (adjustment of status is considered "extraordinary relief") (quoting *Jain v. INS*, 612 F.2d 683, 687 (2d Cir. 1979)); *see also Elkins v. Moreno*, 435 U.S. 647, 667 (1978) ("adjustment of status is a matter of grace, not right").

Singh's request for a remand to allow him to apply for an adjustment of status should be dismissed, or alternatively, denied.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Dated: October 20, 2004

Respectfully submitted,

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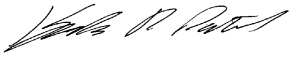

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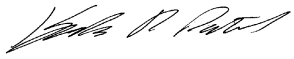
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 12,672 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.



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Addendum

Statutory Provisions

8 USC §1101(a)(42)

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, 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, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure,

refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

8 USC §1158(d)(6)

(6) Frivolous applications

If the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under paragraph (4)(A), the alien shall be permanently ineligible for any benefits under this chapter, effective as of the date of a final determination on such application.

8 USC §1252(b)(1) & (b)(6)

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

. . .

(6) Consolidation with review of motions to reopen or reconsider.

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

Regulations

8 C.F.R. § 1208.20

1208.20 **Determining if an asylum application is frivolous.**

For applications filed on or after April 1, 1997, an applicant is subject to the provisions of section 208(d)(6) of the Act only if a final order by an immigration judge or the Board of Immigration Appeals specifically finds that the alien knowingly filed a frivolous asylum application. For purposes of this section, an asylum application is frivolous if any of its material elements is deliberately fabricated. Such finding shall only be made if the immigration judge or the Board is satisfied that the applicant, during the course of the proceedings, has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim. For purposes of this section, a finding that an alien filed a frivolous asylum application shall not preclude the alien from seeking withholding of removal.