

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-41361  
(Summary Calendar)

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CARLOS A. SOLIS-RODRIGUEZ,

Petitioner,

VERSUS

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

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Review of an Order of the Board of Immigration Appeals  
(A28-660-157)

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September 15, 1995

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:\*

Petitioner Carlos Alberto Solis-Rodriguez, a native citizen of Nicaragua, entered the United States without inspection. In 1989, Solis-Rodriguez applied for asylum in the United States, alleging that he would be killed if he were returned to Nicaragua. The immigration judge (IJ) found Solis-Rodriguez's testimony regarding

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\* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

his reasons for fearing persecution was neither plausible nor coherent, and denied his application for asylum and for withholding of deportation. The Board of Immigration Appeals (BIA) affirmed the IJ's decision. Solis-Rodriguez challenges the action of the BIA. We affirm.

#### I. FACTS AND PROCEDURAL HISTORY

Solis-Rodriguez, a citizen of Nicaragua, was born there in 1957 and entered the United States without inspection on or about May 22, 1988. At Solis-Rodriguez's August 25, 1989, deportation hearing, he admitted that he entered the country without inspection, conceded deportability, and requested the opportunity to apply for asylum. The Immigration Judge continued the deportation hearing to give Solis-Rodriguez an opportunity to file an asylum application.

In his application, Solis-Rodriguez stated that he was a welder, married with two children, that his brother had been granted asylum here, and that his father had been a member of Somoza's Liberal Independent Party which was overthrown in 1979. In the "annex" attached to his application, Solis-Rodriguez alleged that he had first been arrested, interrogated and beaten in his home town of Corinto in 1979, and was accused of being a counter-revolutionary. The detention had lasted for 15 days, and he was then told to report to the jail twice a month and told not to leave town.

His second arrest, Solis-Rodriguez claimed, was in October 1984 when he was accused of being a member of the Contra "Freedom Fighters," and suspected of participating in attacking and

destroying an oil refinery. This arrest, he claimed, lasted for two months and fifteen days, and afterward Sandinista Defense Committee ("C.D.S.") members continually harassed him and his family at his home in Corinto. In an attempt to avoid this harassment, he moved with his family to the outskirts of town in 1985, but he was still beaten, threatened, watched, and harassed by the C.D.S. He then moved his family to Leon. In February, 1988, he was detained for the third time during a public demonstration against the Sandinista government by the "January 22 Mothers' Committee," and held for two months. Upon his release, one of his interrogators told him that if he were arrested again, he would "disappear."

At the continued hearing on January 31, 1990, Solis-Rodriguez testified through an interpreter in support of his asylum application. He reiterated some of the facts listed in his application, and then stated that were he to return to Nicaragua, he would be "disappeared" because he participated in sabotaging the refinery. He then recanted and said that he had not participated in the sabotage, but had only been arrested for suspicion of sabotage. He became extremely nervous when his lawyer asked again about the oil-refinery arrest and the move to Leon, so much so that his attorney moved for a continuance, stating that his client was not only nervous, but also had a high fever and the flu. The hearing was continued until Feb. 19, 1991.

In his second hearing, Solis-Rodriguez fleshed out his family situation: he now had three children, and several members of his

family are now living in the United States. However, he was still so nervous that he admitted he did not know what he was saying. He stated that he had been mentally unstable since the beatings and had been hospitalized shortly after his arrival in the U.S. He stated that his father died six years ago in Nicaragua, but later said that he did not remember when his father had been "disappeared." He was unclear about how long he had lived in the house in Corinto with his wife before it was confiscated. He said twice that his first arrest was in 1988, rather than 1979, and he admitted that he helped bomb the refinery. His chronology was so confused that the IJ herself took over the questioning in an attempt to clear things up. Instead of 15 days, he stated that the 1979 arrest lasted a month and a half, and he now said that he had been detained four, rather than three times. He admitted being a Contra member -- something not stated on his application -- and indicated that he had been very involved in anti-government activities as a courier, photographer, and spy.

In her Oral Decision, the IJ denied Solis-Rodriguez's application for asylum, stating that there were many differences between his testimony at the hearing and his application and that the law requires the applicant prove his need for asylum with very coherent, consistent, and plausible testimony. In its review, the BIA reiterated the IJ's finding that the testimony was characterized by confusion, and that it was insufficient, for that reason, to establish an asylum claim. Moreover, although the IJ did not cite specific case law in her decision, the Board found

that she did consider the evidence under the proper legal standards, including those set forth in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). Solis-Rodriguez timely filed a petition for review in this court, alleging that the Board of Immigration Appeals failed to conduct an independent review, and that there was not sufficient evidence to support the immigration judge's denial of asylum and refusal to withhold deportation.

## II. STANDARD OF REVIEW

We are authorized to review an order of only the BIA, not the IJ, and we may review actions of the IJ only when they have some impact on the BIA's decision.<sup>1</sup> In this case, we review the findings of the IJ because the BIA specifically adopted them.

The BIA's factual conclusion that an alien is not eligible for asylum is reviewed under the substantial evidence test.<sup>2</sup> The substantial evidence standard also applies to the BIA's factual conclusion that an alien is not eligible for withholding of deportation.<sup>3</sup>

Under substantial evidence review, we may not reverse the BIA's factual determinations unless we find not just that the evidence supports a contrary conclusion, but that the evidence

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<sup>1</sup>*Chun v. INS.*, 40 F. 3d 76, 78 (5th Cir. 1994), citing *Adebisi v. INS*, 952 F. 2d 910, 912 (5th Cir. 1992).

<sup>2</sup>*Adebisi v. INS*, 952 F. 2d 910, 912 (5th Cir. 1992), citing *Campos-Guardado v. INS*, 809 F. 2d 285, 290 (5th Cir.), cert. denied, 484 U.S. 826, 108 S. Ct. 92, 98 L. Ed. 2d 53 (1987).

<sup>3</sup>*Id.*

actually *compels* it.<sup>4</sup> In other words, the alien must show that the evidence was so compelling that no reasonable fact finder could conclude against it.<sup>5</sup>

Moreover, it is the fact finder's duty to make determinations based on the credibility of the witness, and we cannot substitute our judgment for that of the BIA or IJ with respect to the credibility of the witness.<sup>6</sup> Thus, as we have previously made clear, "[w]e will not review decisions turning purely on the immigration judge's assessment of the alien petitioner's credibility."<sup>7</sup> The petitioner must show that the BIA's action was arbitrary, capricious, or an abuse of discretion.<sup>8</sup>

### III. DISCUSSION

Solis-Rodriguez argues that the BIA's decision was fatally defective because it was not an independent review of his case, citing to *Osuchukwu v. INS*, 744 F. 2d 1136. In *Osuchukwu*, this court held that it is sufficient review where the BIA meaningfully addresses the applicant's specific assertions.<sup>9</sup> What is required of the BIA is merely that it consider the issues raised, and

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<sup>4</sup>*Chun v. INS*, 40 F. 3d at 78, citing *INS v. Elias-Zacarias*, 502 U.S. 478, 481 n.1, 112 S. Ct. 812, 815 n.1, 117 L. Ed. 2d 38 (1992).

<sup>5</sup>*Chun v. INS*, 40 F. 3d at 78 (citations omitted).

<sup>6</sup>*Id.*

<sup>7</sup>*Mantell v. INS*, 798 F. 2d 124, 127 (5th Cir. 1986).

<sup>8</sup>*Jukic v. INS*, 40 F. 3d 747, 749 (5th Cir. 1994).

<sup>9</sup>*Osuchukwu*, 744 F. 2d at 1142.

announce its decision in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted.<sup>10</sup> The court did not mandate, as suggested by Solis-Rodriguez, that the BIA independently review all of the applicant's contentions.<sup>11</sup> In his appeal to the BIA, Solis-Rodriguez alleged that he had been persecuted for political reasons and challenged the IJ's credibility finding. In response to this appeal, the BIA found that the evidence supported the IJ's decision and the IJ's credibility finding. The BIA made an independent review of the IJ's decision in response to Solis-Rodriguez's appeal, and that review was not arbitrary, capricious, or an abuse of discretion.

Solis-Rodriguez next argues that the IJ's decision was fatally defective because it lacked sufficient reasoning and substantial evidence. In order to qualify for asylum, an alien must prove that he has a "well-founded fear of persecution."<sup>12</sup> The applicant must show that a reasonable person in the applicant's circumstances would fear persecution.<sup>13</sup> In her oral decision, the IJ stated that Solis-Rodriguez had offered insufficient evidence to establish a well-founded fear of persecution because his testimony had been incoherent, inconsistent, implausible, and unbelievable, although

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<sup>10</sup>*Id.* At 1142-43.

<sup>11</sup>See *id.* at 1142 (the BIA "has no duty to write an exegesis on every contention.").

<sup>12</sup>*INS v Cardoza-Fonseca*, 480 U.S. 421, 449, 107 S. Ct. 1207, 94 L. Ed. 2d 434, 458 (1987).

<sup>13</sup>*Guevara Flores v. INS*, 786 F. 2d 1242, 1249 (5th Cir. 1986), *cert. denied* 480 U.S. 930, 107 S. Ct 1565, 94 L. Ed. 2d 757 (1987).

she noted that it did not appear that he had testified with the intent of defrauding the court. The IJ specifically noted that Solis-Rodriguez testified that his father died approximately six years before his 1991 hearing and later testified that his father died some time after the Sandinistas came to power in 1979. The IJ also noted the fact that Solis-Rodriguez had not mentioned the facts and circumstances of his father's death on his asylum application. Furthermore, Solis-Rodriguez initially testified that he was incarcerated on three occasions and then at a later point he stated that he had been incarcerated on four occasions.

With regard to his detentions, the IJ noted that although Solis Rodriguez had testified that his 1979 detention at the Port of Corinto was a result of his distribution of anti-Sandinista literature and for having organized anti-Sandinista meetings, these activities were not mentioned in his asylum application. In this regard, the IJ also noted that although Solis-Rodriguez's asylum application did not indicate that he was a member of any organization affiliated with the Contras, Solis testified that he had been a member of the Contra group known as the "Freedom Fighters" and that he worked steadily for the organization as a courier and spy from 1979 to 1988.

Additionally, the IJ noted that, although Solis-Rodriguez testified that he had no employment from 1979 until 1988 other than his job as a courier and spy, he later testified on cross-examination that he had a job as a mechanic. The IJ also pointed out that although Solis-Rodriguez had stated that he had been



living in his house with his wife for 13 years before it was confiscated by the Sandinistas, he testified previously that she moved in with him when they were married in 1981, only seven years before he left the country in 1988. The IJ concluded these observations by noting that "[t]hroughout his testimony, [Solis-Rodriguez] exhibited similar confusion about dates and sequences of events."

Furthermore, the IJ also took administrative notice of the fact that there was a new government in Nicaragua and that "former members of Contra organizations have reportedly been given zones in which they can live in Nicaragua with safety."<sup>14</sup> The IJ concluded that Solis-Rodriguez had failed to show that the incidents which allegedly happened to him are likely to reoccur. Solis-Rodriguez has thus failed to show that his evidence was so compelling that "no reasonable fact finder could fail to find the requisite fear of persecution."<sup>15</sup>

Solis-Rodriguez also argues that deporting him would be inhumane. Although some evidence of past persecution was presented, past persecution alone can warrant asylum even without the likelihood of future persecution if past persecution was so severe that return to the country of persecution would be inhumane.<sup>16</sup> The equivocal nature of Solis-Rodriguez's evidence

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<sup>14</sup>See *Rivera-Cruz v. INS*, 948 F. 2d 962, 966 (5th Cir. 1991)(recognizing the governmental change in Nicaragua).

<sup>15</sup>*Jukic*, 40 F. 3d at 749 (quoting *Elias-Zacarias*, 502 U.S. at 484).

<sup>16</sup>*Rivera-Cruz*, 948 F. 2d at 965-66.

supports the BIA's finding that there was insufficient evidence of past persecution and that evidence of future persecution was dubious. The BIA found no compelling humanitarian reason for granting asylum. Because the reasons discussed by the BIA in its written decision are grounded in the evidence of record, and because Solis-Rodriguez's testimony regarding his persecution fears was equivocal and uncertain, the BIA's decision is sufficiently supported by the evidence.

Solis-Rodriguez further argues that the Board erred in denying him a withholding of deportation. Congress has proscribed the deportation of an alien whose life or freedom would be threatened on account of race, religion, nationality, or membership in a social group. 8 U.S.C. §1253 (h)(1). A petitioner "must demonstrate a clear probability of persecution on one of the enumerated grounds."<sup>17</sup> The showing that is required to prove such a probability is greater than that required to prove a well-founded fear of persecution under the asylum remedy.<sup>18</sup> Because Solis-Rodriguez failed to prove that he was entitled to asylum, a *fortiori*, he is held ineligible for withholding of deportation.

We conclude that the IJ's finding that Solis-Rodriguez was not credible is a reasonable interpretation of the record and supported by substantial evidence. Certainly, the opposite conclusion, that

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<sup>17</sup>*Jukic*, 40 F. 3d at 749.

<sup>18</sup>*Id.* At 750.

Solis-Rodriguez was credible, is not compelled by the evidence. Therefore, we may not reverse this finding.<sup>19</sup>

Without credible evidence, the BIA had no basis upon which to grant asylum or withhold deportation. For the foregoing reasons, we AFFIRM the decision of the BIA.

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<sup>19</sup>*Elias-Zacarias*, 502 U.S. at n. 1, 112 S. Ct. At 812 n. 1, 817.