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Keeping It Real: Judicial Review of Asylum Credibility Determinations in the Eleventh Circuit After the REAL ID Act

TANIA GALLONI*

Judicial review in the circuit courts has been described as “the first line of defense against mistaken or biased immigration judge decisions.”¹ In the asylum context—where individuals seek protection in the United States based on a well-founded fear of persecution in their home country—the stakes are particularly high. After all, “errors of adjudication can deliver [asylum seekers] into the hands of their persecutors.”² When they arrive in the United States, however, many asylum seekers have fled urgent circumstances with “nothing but the shirts on their backs,”³ and thus have nothing but their own testimony to establish the truth of their claims. Judicial review of adverse credibility determinations in the asylum context is therefore of paramount importance.

The REAL ID Act of 2005⁴ created new statutory provisions governing immigration judges’ credibility determinations and requests for corroborating evidence in adjudicating claims for asylum and withholding of removal. Although the REAL ID Act applies to all claims filed after May 11, 2005, the Eleventh Circuit has only recently begun to apply the new provisions as denials of asylum reach the court after initial determinations by immigration judges and administrative review by the Board of Immigration Appeals. This article addresses the scope and

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1. Lindsey R. Vaala, Note, *Bias on the Bench: Raising the Bar for U.S. Immigration Judges To Ensure Equality for Asylum Seekers*, 49 WM. & MARY L. REV. 1011, 1024 (2007).

2. Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 388 (2007).

3. *Dawoud v. Gonzales*, 424 F.3d 608, 613 (7th Cir. 2005).

4. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, 302 (codified as amended in scattered sections of 8 & 49 U.S.C.). The REAL ID Act was passed as part of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, 119 Stat. 231. Among other things, the law enacted national standards for driver’s licenses and other forms of personal identification. REAL ID Act of 2005, Pub. L. No. 109-13, div. B, §§ 201–07, 119 Stat. 231, 311–16 (2005) (codified as amended in scattered sections of 8 U.S.C.).

importance of judicial review of adverse credibility determinations in the Eleventh Circuit, now under the REAL ID framework. Part I describes the critical role courts of appeal play in reviewing adverse credibility determinations, particularly in light of questions that have emerged regarding the quality of immigration judging and the severely curtailed administrative appellate review process. Part II addresses the centrality of credibility determinations in asylum law, and their heightened susceptibility to error based on issues of language, culture, and experience. Part III discusses the Eleventh Circuit's exceptionally narrow view of its role in reviewing credibility determinations, as the only circuit court never to have reversed an adverse credibility finding in a published opinion while ostensibly applying the same standards of review as other courts. Part IV.A. describes the REAL ID Act's "totality of the circumstances" test for credibility determinations and raises the interpretive questions the court will be called on to address as it begins to apply the new provision. Part IV.B. briefly describes the court's recent jurisprudence on the REAL ID Act's provision related to corroboration. The article concludes that, even with a limited standard of review both pre- and post-REAL ID, the court has an obligation to rigorously scrutinize adverse credibility determinations to ensure that asylum seekers with a well-founded fear of persecution are afforded the protections this country offers under the law. The REAL ID Act's "totality of the circumstances" test provides the court with an opportunity to do just that.

I. BACKGROUND

The United States has a long-standing humanitarian commitment to providing refuge to those who have a well-founded fear of persecution in their country of origin. Forty years ago, the United States ratified the United Nations Protocol Relating to the Status of Refugees,⁵ which incorporated most of the provisions of the United Nations Convention Relating to the Status of Refugees.⁶ In 1980, Congress passed the Refugee Act,⁷ creating statutory mechanisms for asylum seekers to avail themselves of this country's protections.⁸ Among other things, the Ref-

5. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

6. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150.

7. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8, 20, 22, 42 & 50 U.S.C.).

8. The Refugee Act provides three categories of humanitarian relief to those with a well-founded fear of persecution on account of a protected ground. First, "asylum" is available to any alien who is physically present in or arrives in the United States. 8 U.S.C. § 1158(a)(1) (2000). The applicant may establish eligibility for asylum if he shows that he has suffered past persecution or has a "well-founded fear of future persecution." 8 C.F.R. § 208.13(b) (2008). To be eligible

ugee Act adopted the Convention's definition of a refugee as someone with a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."⁹

The U.S. courts of appeals play an integral role in this country's commitment to the protection of refugees and asylum seekers. Applicants whose claims are initially denied by an immigration judge (or "IJ")¹⁰ may appeal to the Board of Immigration Appeals ("BIA"), an administrative appellate body.¹¹ If the appeal is denied, federal law provides for judicial review by the U.S. court of appeals in which the immigration judge completed the proceedings.¹² For asylum seekers in Florida, Georgia, and Alabama, then, a petition for review in the Eleventh Circuit is the first (and likely only) opportunity for judicial review of their claims.¹³ Judicial review is thus a vital safeguard both for the individual asylum seeker, for whom the denial of asylum may have been

for asylum, the applicant need only show a "reasonable possibility" that he or she will be persecuted if returned to the country of origin. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987) (quoting *INS v. Stevic*, 467 U.S. 407, 425 (1984)).

Second, "withholding of removal" prevents the removal (or deportation) of an individual where it is "more likely than not" that the applicant will suffer persecution if returned to his or her country of origin. *See* 8 U.S.C. § 1231(b)(3)(A) (2000); *Delgado v. U.S. Att'y Gen.*, 487 F.3d 855, 861 (11th Cir. 2007); *Niftaliev v. U.S. Att'y Gen.*, 504 F.3d 1211, 1215-16 (11th Cir. 2007). While the grant of asylum is discretionary under 8 U.S.C. § 1158, withholding of removal is mandatory where eligibility is established subject to limited exceptions. 8 U.S.C. § 1231(b)(3).

Finally, "refugee" status is available to a limited number of individuals outside the United States who have a well-founded fear of persecution and are of special humanitarian concern to the United States. 8 U.S.C. § 1157 (2000).

This article focuses on asylum and withholding of removal, for which the legal standards (other than the requisite likelihood of persecution to establish eligibility) are identical. It does not address the relief available under the Convention Against Torture ("CAT"), which prohibits the United States from removing anyone to a country where he or she will likely be tortured without regard to a protected ground. *See, e.g., Jean-Pierre v. U.S. Att'y Gen.*, 500 F.3d 1315 (11th Cir. 2007) (reviewing denial of CAT claim).

9. *See* 8 U.S.C. § 1101(a)(42) (2000). In 1996, Congress extended the definition of "political opinion" for purposes of asylum law to include resisting or opposing coercive population control policies such as forced abortion or sterilization, subject to numerical limitations. *See id.*

10. Individuals who are present (or arriving) in the United States may apply for asylum either "affirmatively" (if they are not in removal proceedings) or "defensively" (if they are already in removal proceedings). An affirmative application is first heard in a nonadversarial setting by an asylum officer. If the asylum officer does not grant relief, he or she will refer the case to an immigration judge. A defensive application is heard in the first instance by an immigration judge.

11. *See* 8 C.F.R. § 1003.1(b) (2008).

12. *See* 8 U.S.C. § 1252(b)(2) (2000). Before 1996, federal district courts heard appeals from BIA decisions in "exclusion" proceedings, but that is no longer the case. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 306, 110 Stat. 3009-546, -612 (repealing 8 U.S.C. § 1105a).

13. Immigration judges and members of the BIA are not part of the Judiciary, but rather employees of the Executive Branch. They fall under the Executive Office for Immigration Review ("EOIR") within the U.S. Department of Justice. 8 C.F.R. § 1003.0(a).

in error, and for the United States, which has committed to protect asylum seekers and refugees from persecution. Judicial review is supposed to guarantee that each decision to grant or deny asylum is lawful and consistent with this commitment.

In recent years, some circuit courts have sharply criticized the performance of immigration judges in particular cases. In *Benslimane v. Gonzales*, the Seventh Circuit observed that in one year, different panels of that court had reversed “a staggering 40 percent” of the petitions for review resolved on the merits, and that “the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice.”¹⁴ In *Wang v. Attorney General*, the Third Circuit lamented that “time and time again” it had admonished immigration judges for their conduct in the courtroom.¹⁵ The court then criticized the IJ in that case for “attack[ing] Wang’s moral character rather than conduct[ing] a fair and impartial inquiry into his asylum claims,” observing that the “tone, the tenor, the disparagement, and the sarcasm of the IJ seem more appropriate to a court television show than a federal court proceeding.”¹⁶ In *Lopez-Umanzor v. Gonzales*, the Ninth Circuit rejected an IJ’s adverse credibility determination that “was skewed by prejudice, personal speculation, bias, and conjecture.”¹⁷

A 2006 report by Syracuse University’s Transaction Records Access Clearinghouse (“TRAC”) revealed dramatic disparities in asylum grant rates even among judges in the same city hearing claims from the same population of applicants, all of whom were represented by counsel.¹⁸

The immigration judges within the Eleventh Circuit’s jurisdiction were no exception.¹⁹ For the period from 2000 to 2005, Miami immigration judge Mahlon F. Hanson’s denial rate was the highest in the

14. 430 F.3d 828, 829–30 (7th Cir. 2005).

15. 423 F.3d 260, 267 (3d Cir. 2005).

16. *Id.* at 269.

17. 405 F.3d 1049, 1054 (9th Cir. 2005).

18. See TRAC Immigration, Immigration Judges, <http://trac.syr.edu/immigration/reports/160/> (last visited May 19, 2008). Although some disparities observed in the study may have been attributable to the country of origin of applicants, the country of origin cannot explain disparities among judges in the same city who hear claims from the same pool of applicants.

19. The study analyzed the performance of all immigration judges who heard more than 100 claims during the relevant time period. Within the Eleventh Circuit, this included twenty-five immigration judges in Miami (most of whom heard more than 1,000 claims each); three immigration judges in Orlando (between 600 to 1,500 claims each); two immigration judges in Atlanta (roughly 300 to 500 claims each); and one immigration judge in Bradenton (107 claims). TRAC Immigration, Asylum Denial Rates by Immigration Judge: FY 2000–FY 2005, http://trac.syr.edu/immigration/reports/160/include/judge_0005_name-r.html (last visited May 19, 2008).

country, at 96.7% of all cases before him.²⁰ By contrast, Miami immigration judge Sandra S. Coleman denied only 22.3% of the claims before her during the same time period.²¹ The twenty-three other immigration judges in Miami fell somewhere in between.²² In Orlando, denial rates among the three immigration judges there varied more than fifteen percentage points, ranging from 51.6% to 35.8%.²³ The two immigration judges in Atlanta were more consistent, with William A. Cassidy denying 87% of asylum claims, and G. Mackenzie Rast denying 82.2%.²⁴ The sole immigration judge in Bradenton, R. Kevin McHugh, denied 89.7% of the claims he heard.²⁵

TRAC's codirector, David Burnham, concluded that the study's "findings seemed to call into question the government's commitment to providing a uniform application of the nation's immigration laws in all cases."²⁶ The report stated that its "case-by-case analysis 'appears to document long-standing, widespread, and systematic weaknesses in both the operation and management of the court.'"²⁷ Some attributed these problems with the system to immigration judges being "seriously over-worked," hearing between ten to fifteen cases a day, and having "little time to provide a fair hearing."²⁸ Former Orlando immigration judge Roberto Moreno "said there also is a 'disparity of professional stan-

20. *Id.*

21. *Id.* Nationally, the median denial rate (with half of judges falling above and half falling below) was 65%. TRAC Immigration, *supra* note 18.

22. Beginning with the highest denial rates first, and in descending order, the remaining immigration judges in Miami had the following denial rates: Neale Foster (94.6%); Keith C. Williams (88.7%); Rex J. Ford (88.5%); Kevin G. Bradley (88%); Kenneth S. Hurewitz (87.9%); J. Daniel Dowell (87.6%); Denise A. Marks Lane (86.1%); Teofilo Chapa (85.6%); Ronald G. Sonom (82.1%); Scott G. Alexander (81%); H. Lloyd King Jr. (80.9%); Nancy R. McCormack (79.8%); Charles J. Sanders (78.7%); Bruce W. Solow (78.2%); Pedro A. Miranda (77.4%); Ira Sandron (72.9%); Stephen E. Mander (71.2%); Elisa M. Sukkar (70.4%); Lilliana Torreh-Bayouth (70.2%); Seymour R. Kleinfeld (70%); Michael C. Horn (64.6%); Anthony J. Randall (54.2%); and Denise N. Slavin (39.6%). TRAC Immigration, Asylum Denial Rates by Immigration Judge, *supra* note 19. That places the median denial rate in Miami at around 80%.

23. Rafael B. Ortiz-Segura (51.6% of 1,487 claims); Roberto Moreno (46% of 689 claims); and Renetta Smith (35.8% of 601 claims). *Id.*

24. *Id.*

25. *Id.*

26. Rachel L. Swarns, *Study Finds Disparities in Judges' Asylum Rulings*, N.Y. TIMES, July 31, 2006, at A15 (internal quotation marks omitted).

27. Eunice Moscoso, *Study: Asylum Requests Judged Inconsistently*, ATLANTA J. CONST., July 31, 2006, at 3A (quoting TRAC Report). Lindsey R. Vaala observes that "TRAC's findings confirmed what many federal jurists, asylum lawyers, and system observers already suspected: immigration decisions under the EOIR and the BIA vary widely and arbitrarily." Vaala, *supra* note 1, at 1023.

28. Elaine Silvestrini, *U.S. Asylum Cases Vary by Judge*, TAMPA TRIBUNE, Aug. 8, 2006, at 1 (quoting Thomas M. Davies, Jr., former director of the Center for Latin American Studies at San Diego State University). In 2006, Judge John M. Walker, Chief Judge of the U.S. Court of Appeals for the Second Circuit, testified before the Senate Judiciary Committee about the impact

dards' among judges, who come from different professional backgrounds."²⁹ Whatever the cause, the glaringly disparate results for similar applicant pools highlight the need for rigorous appellate review to correct errors and ensure consistency.

However, for the past several years, administrative appellate review of asylum claims has been sharply curtailed. In 2002, Attorney General John Ashcroft "streamlined" the BIA review process by requiring review by a single BIA member in most cases rather than the three-member panel employed before, and directing that most affirmances be rendered by one-sentence summary orders.³⁰ Ashcroft's reforms "dramatically expanded" summary review in the BIA.³¹ At the same time, Ashcroft also reduced the size of the BIA by half, from twenty-three to eleven members.³²

Several observers have called into question the quality of administrative appellate review that has resulted from these reforms.³³ In Febru-

of these reforms on the judiciary. Chief Judge Walker began by lamenting the lack of resources for the country's immigration judges:

The 215 Immigration Judges are required to cope with filings of over 300,000 cases a year. With only 215 Judges, a single Judge has to dispose of 1,400 cases a year or nearly twenty-seven cases a week, or more than five each business day, simply to stay abreast of his docket. I fail to see how Immigration Judges can be expected to make thorough and competent findings of fact and conclusions of law under these circumstances. This is especially true given the unique nature of immigration hearings. Aliens frequently do not speak English, so the Immigration Judge must work with a translator, and the Immigration Judge normally must go over particular testimony several times before he can be confident that he is getting an accurate answer from the alien. Hearings, particularly in asylum cases, are highly fact intensive and depend upon the presentation and consideration of numerous details and documents to determine issues of credibility and to reach factual conclusions. This can take no small amount of time depending on the nature of the alien's testimony.

Immigration Litigation Reduction: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2006) (statement of Hon. John M. Walker, Jr., C.J., U.S. Court of Appeals for the Second Circuit) [hereinafter *Immigration Litigation Reduction*], available at http://judiciary.senate.gov/testimony.cfm?id=1845&wit_id=5214.

29. Silvestrini, *supra* note 28 (quoting Moreno); see also Vaala, *supra* note 1, at 1040–41 (noting that although applicants for the position of immigration judge must be lawyers with relevant experience, they are not required to demonstrate a knowledge of immigration laws and procedures in order to be hired).

30. DORSEY & WHITNEY LLP, STUDY CONDUCTED FOR: THE AMERICAN BAR ASSOCIATION COMMISSION ON IMMIGRATION POLICY, PRACTICE AND PRO BONO RE: BOARD OF IMMIGRATION APPEALS: PROCEDURAL REFORMS TO IMPROVE CASE MANAGEMENT 15–16 (2003), http://www.dorsey.com/files/upload/DorseyStudyABA_8mgPDF.pdf; see also 8 C.F.R. § 1003.1(e) (2008); *Mendoza v. U.S. Att'y Gen.*, 327 F.3d 1283, 1288–89 (11th Cir. 2003) (describing summary affirmance procedure in context of due process challenge).

31. Susan Burkhardt, *The Contours of Conformity: Behavioral Decision Theory and the Pitfalls of the 2002 Reforms of Immigration Procedures*, 19 GEO. IMMIGR. L.J. 35, 47 (2004).

32. See *id.* at 51.

33. See John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration*

ary 2005 the bipartisan U.S. Commission on International Religious Freedom issued a report on the effect of Ashcroft's changes on asylum seekers who were detained upon arrival in the United States.³⁴ According to the Commission, the BIA had sustained 23% of asylum appeals in such cases in 2001.³⁵ After the 2002 changes were implemented, however, that number dropped to an average of 3%.³⁶ On April 3, 2006, Judge John M. Walker, Chief Judge of the U.S. Court of Appeals for the Second Circuit, testified before the Senate Judiciary Committee about the reforms. Judge Walker estimated that under the single-member review system, each BIA member must decide 4,000 cases a year, or eighty per week, in order to keep up with the rate of filings.³⁷ Judge Walker commented that because of these pressures, the BIA "rarely seems to adjudicate the outstanding legal issues in a case" and is unable to "properly play its role of providing uniform national rules of law in these cases."³⁸ Thus, "[t]he opportunity for meaningful administrative review has deteriorated to the point where the circuit courts now represent the first line of defense against mistaken or biased immigration judge decisions."³⁹ Given that certiorari review in the U.S. Supreme Court is rarely granted, the U.S. courts of appeals may provide the only meaningful review the overwhelming majority of appellants will receive.⁴⁰

As a result of the BIA reforms, the workload of the U.S. courts of appeals has increased dramatically.⁴¹ In 2005, Judge Julia Gibbons of the U.S. Court of Appeals for the Sixth Circuit testified in a Congressional committee hearing that, nationally, immigration appeals had

Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review, 20 GEO. IMMIGR. L.J. 1, 5 (2005) ("Many observers, including a commission of the American Bar Association, suggest that the appeal rate has increased, at least in part, because there has been a qualitative change in the BIA's decision-making. They argue that single Board members are bound to make more errors than three-member panels, especially when they are allowed to summarily affirm Immigration Judge (IJ) decisions.").

34. U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, STUDY ON ASYLUM SEEKERS IN EXPEDITED REMOVAL (2005), http://www.uscirf.gov/images/stories/pdf/asylum_seekers/ERS_RptVolII.pdf.

35. *Id.* at 413-14.

36. *Id.*

37. *Immigration Litigation Reduction*, *supra* note 28.

38. *Id.*

39. Vaala, *supra* note 1, at 1024 ("The exponential increase in immigration cases has not gone unnoticed by federal judiciary members, several of whom have repeatedly expressed frustration and disappointment over the immigration system's current state.").

40. In most cases, this means reviewing the immigration judge's decision directly, which is typically rendered as an oral decision from the bench at the conclusion of the hearing.

41. See Vaala, *supra* note 1, at 1021 ("Although the BIA changes strove to streamline the process, [the reforms] backfired, creating more work at the federal appellate level."); see also Palmer et al., *supra* note 33, at 3; John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y.L. SCH. L. REV. 13, 14 (2006).

“risen from 1,642 cases in 2001 to 11,366 cases in 2004 (an increase of 592%).”⁴² In 2001, appeals of BIA decisions comprised just 3% of appeals filed in federal circuit courts.⁴³ By the end of 2007, they constituted 16% of all federal appeals.⁴⁴ In the Eleventh Circuit, BIA appeals jumped from 1% to 8% of the court’s workload during that same time.⁴⁵

It is against this backdrop that the Eleventh Circuit will increasingly be tasked with reviewing the denial of asylum based on adverse credibility determinations under the standards announced in the REAL ID Act. Given the strain on court resources, the challenge becomes ensuring that each appeal of an adverse credibility determination receives the individualized scrutiny that it deserves and that the law requires. After all, the stakes could not be higher. As the Second Circuit observed in *Ming Shi Xue v. Board of Immigration Appeals*:

Asylum petitions of aliens seeking refuge from alleged persecution are among the hardest cases faced by our courts. They are not games. And, despite their volume, these suits are not to be disposed of improvidently, or without the care and judicial attention—by immigration judges, in the first instance, and by federal judges, on appeal—to which all litigants are entitled. We should not forget, after all, what is at stake. For each time we wrongly deny a meritorious asylum application, concluding that an immigrant’s story is fabricated when, in fact, it is real, we risk condemning an individual to persecution. Whether the danger is of religious discrimination, extrajudicial punishment, forced abortion or involuntary sterilization, physical torture or banishment, we must always remember the toll

42. *Comm. on the Budget of the Judicial Conf. of the United States: Hearing Before the Subcomm. on Transportation, Treasury, Housing and Urban Development, the Judiciary, District of Columbia and Independent Agencies of the Comm. on Appropriations of the United States H.R.*, 109th Cong. 9 (2005) (statement of Hon. Julia S. Gibbons, Chair, Comm. on the Budget of the Judicial Conf. of the United States), available at http://www.uscourts.gov/Press_Releases/judge_gibbons041505.pdf.

43. Eleanor Acer & Anwen Hughes, *The Post–September 11 Asylum System*, LITIGATION, Summer 2006, at 43.

44. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, U.S. COURTS OF APPEALS—SOURCES OF APPEALS AND ORIGINAL PROCEEDINGS COMMENCED, BY CIRCUIT, DURING THE 12-MONTH PERIODS ENDING SEPTEMBER 30, 2003 THROUGH 2007 (2007), <http://www.uscourts.gov/judbus2007/appendices/B03Sep07.pdf>. The Second and Ninth Circuits had by far the largest percentage of BIA appeals, with 34% of their appeals arising out of BIA decisions. *Id.* The Third Circuit came close to the national average, with 15% of its appeals arising out of BIA decisions. The remaining circuits fell below the national average, with between 3% and 11% of all appeals arising out of BIA decisions: First Circuit (11%); Eleventh Circuit (8%); Fifth Circuit (6%); Sixth Circuit (6%); Fourth Circuit (5%); Seventh Circuit (5%); Eighth Circuit (4%); and Tenth Circuit (3%). *Id.*

45. *Id.*; see also ADMINISTRATIVE OFFICE OF THE U.S. COURTS, U.S. COURTS OF APPEALS—SOURCES OF APPEALS AND ORIGINAL PROCEEDINGS COMMENCED, BY CIRCUIT, DURING THE 12-MONTH PERIODS ENDING SEPTEMBER 30, 1998 THROUGH 2002 (2002), <http://www.uscourts.gov/judbus2002/appendices/b03sep02.pdf>.

that is paid if and when we err.⁴⁶

II. THE CENTRALITY OF CREDIBILITY DETERMINATIONS TO ASYLUM CLAIMS

As mentioned earlier, credibility determinations are central to an immigration judge's adjudication of an asylum claim. The applicant's testimony has been described as "the critical core of the asylum determination," because refugees and asylum seekers "generally are unable to produce external corroborative evidence."⁴⁷ Indeed, as one court has observed:

Many asylum applicants flee their home countries under circumstances of great urgency. Some are literally running for their lives and have to abandon their families, friends, jobs, and material possessions without a word of explanation. They often have nothing but the shirts on their backs when they arrive in this country. To expect these individuals to stop and collect dossiers of paperwork before fleeing is both unrealistic and strikingly insensitive to the harrowing conditions they face.⁴⁸

Recognizing these challenges, U.S. regulations provide that "[t]he testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration."⁴⁹ By the same token, "an adverse credibility determination alone may be sufficient to support the denial of an asylum application."⁵⁰

Yet many factors inherent in the asylum process also render these determinations particularly susceptible to error. Accurate credibility determinations must overcome differences in cultural modes of expression (such as whether it is appropriate to make eye contact with authority figures), applicants' limited access to competent legal counsel, and apparent inconsistencies or contradictions due to factors not bearing on credibility (such as language barriers, cultural norms affecting linear thought or the recall of specific dates, and the effects of post-traumatic

46. 439 F.3d 111, 113–14 (2d Cir. 2006) (footnote omitted).

47. DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 150 (3d ed. 1999).

48. *Dawoud v. Gonzales*, 424 F.3d 608, 612–13 (7th Cir. 2005).

49. 8 C.F.R. §§ 208.13(a), 208.16(b) (2008); *see also* *Niftaliev v. U.S. Att'y Gen.*, 504 F.3d 1211, 1217 (11th Cir. 2007) (reversing denial of asylum based on lack of corroborative evidence where applicant's credible and specific testimony was sufficient for applicant to show past persecution, noting "[w]e are also troubled by the notion of condemning the petitioner for failing to obtain some sort of documentation from the same government that persecuted and imprisoned him, concerning incidents that occurred approximately ten years ago"); *Forgue v. U.S. Att'y Gen.*, 401 F.3d 1282, 1287 (11th Cir. 2005) (recognizing that credible testimony of an applicant "is alone sufficient" to establish eligibility for asylum); *D-Muhumed v. U.S. Att'y Gen.*, 388 F.3d 814, 818–19 (11th Cir. 2004).

50. *Forgue*, 401 F.3d at 1287 (citing *Dia v. Ashcroft*, 353 F.3d 228, 247 (3d Cir. 2003) (en banc) ("An alien's credibility, by itself, may satisfy his burden, or doom his claim.")).

stress). For example, in *Mwembie v. Gonzales*, the Fifth Circuit expressed concern over an IJ's "incorrect and irrational assumptions about human behavior and especially the behavior of people from foreign cultures, such as her assumptions about a victim's ability to remember phone numbers, about all aliens' behavior in saying good-bye to their families before fleeing, or about the 'incomprehensible' [and thus 'implausible'] brutality of the persecutors."⁵¹ Similarly, in *Iao v. Gonzales*, the Seventh Circuit cautioned against basing credibility determinations on judgments about demeanor that may reflect more about the witness's culture than his or her reliability.⁵² Specifically, in the case of a Chinese applicant, the court observed that "[b]ehaviors that in our culture are considered evidence of unreliability, such as refusing to look a person in the eyes when he is talking to you, are in Asian cultures a sign of respect."⁵³ In *Castañeda-Castillo v. Gonzales*, the First Circuit sitting en banc reversed an adverse credibility determination where the record showed that perceived inconsistencies or evasiveness in the applicant's testimony were attributable to poor translation.⁵⁴ In addition, the adversarial setting of an immigration court hearing can be intimidating and confusing to the asylum seeker, given that "most refugees have lived experiences in their country of origin which give them good reason to distrust persons in authority."⁵⁵ These factors can "adversely affect the adjudicator's ability to interpret accurately behavioral signals or to evaluate evidentiary discrepancies."⁵⁶ Not surprisingly, proper credibility determinations have been described as "the most difficult and elusive aspect of asylum adjudication."⁵⁷

Although, as a matter of law, appellate bodies properly accord considerable deference to an immigration judge's credibility findings,⁵⁸ the centrality of this determination in the asylum context—coupled with the vast potential for error and the enormous consequences of an erroneous determination—call for meaningful judicial review. This is not a radical proposition. Governing law provides for judicial review of adverse credibility determinations in asylum cases.⁵⁹ That review must therefore have meaning.

51. 443 F.3d 405, 413 (5th Cir. 2006).

52. 400 F.3d 530, 534 (7th Cir. 2005).

53. *Id.*

54. 488 F.3d 17, 26–30 (1st Cir. 2007) (en banc).

55. JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 84 (1991).

56. ANKER, *supra* note 47, at 153 (quoting Joanna Ruppel, *The Need for a Benefit of the Doubt Standard in Credibility Evaluation of Asylum Applicants*, 23 COLUM. HUM. RTS. L. REV. 1, 12 (1991–1992)) (internal quotation marks omitted).

57. *Id.* at 152 n.316 (quoting Ruppel, *supra* note 56, at 39).

58. See, e.g., *D-Muhumed v. U.S. Att'y Gen.*, 388 F.3d 814, 818–19 (11th Cir. 2004).

59. See *id.*

III. THE ELEVENTH CIRCUIT'S RECORD—AN EXCEPTIONALLY NARROW VIEW

Notwithstanding the centrality of proper credibility assessments to the adjudication of asylum claims, the Eleventh Circuit has long taken an exceptionally narrow view of its role in reviewing these determinations, even when ostensibly applying the same standards as other courts of appeals.

Like other courts of appeals, the Eleventh Circuit reviews credibility determinations under the “substantial evidence” test,⁶⁰ which is “deferential” and does not allow “‘re-weigh[ing] the evidence’ from scratch.”⁶¹ As with other questions of fact, a credibility determination “may not be overturned unless the record compels it.”⁶²

In addition, although the Eleventh Circuit never expressly adopted the “heart of the claim” test articulated by other courts before the REAL ID Act⁶³—the principle that minor inconsistencies or contradictions that are not material to the asylum claim cannot, standing alone, support an adverse credibility determination—the court regularly applied the test in practice.⁶⁴ For example, in *Nreka v. U.S. Attorney General*, the court held that an asylum seeker’s use of a false passport to enter the United States would not support an adverse credibility finding, citing the distinction between false statements that involve the heart of the asylum claim (which affect credibility) and those that are incidental to the claim

60. *Id.* at 817–18.

61. *Mazariegos v. U.S. Att’y Gen.*, 241 F.3d 1320, 1323 (11th Cir. 2001) (internal quotation marks omitted); *see also* *Forgue v. U.S. Att’y Gen.*, 401 F.3d 1282, 1286 (11th Cir. 2005); *Yang v. U.S. Att’y Gen.*, 418 F.3d 1198, 1201 (11th Cir. 2005) (credibility is a question of fact for the immigration judge, and the court may not substitute its judgment for that of the IJ).

62. *Forgue*, 401 F.3d at 1287 (internal quotation marks omitted); *see also* 8 U.S.C. § 1252(b)(4)(B) (2000) (“[A]dministrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary . . .”).

63. The REAL ID Act abrogates the “heart of the claim” test by providing that immigration judges may consider inconsistencies, inaccuracies or falsehoods without regard to whether they go to the heart of the applicant’s claim, applying a “totality of the circumstances” test instead, as discussed in Part IV. *See, e.g.,* *Mitondo v. Mukasey*, 523 F.3d 784, 787 (7th Cir. 2008) (REAL ID Act abrogates “heart of the claim” test); *Lin v. Mukasey*, 521 F.3d 22, 26 (1st Cir. 2008) (REAL ID Act supersedes circuit’s “heart of the claim” test).

64. Most other courts expressly adopted and applied the test. *See, e.g.,* *Stroni v. Gonzales*, 454 F.3d 82, 88 (1st Cir. 2006); *Leia v. Ashcroft*, 393 F.3d 427, 436 (3d Cir. 2005); *Capric v. Ashcroft*, 355 F.3d 1075, 1090 (7th Cir. 2004); *Daneshvar v. Ashcroft*, 355 F.3d 615, 619 n.2 (6th Cir. 2004); *Kondakova v. Ashcroft*, 383 F.3d 792, 796 (8th Cir. 2004); *Korniejew v. Ashcroft*, 371 F.3d 377, 383–84 (7th Cir. 2004); *Sylla v. INS*, 388 F.3d 924, 926 (6th Cir. 2004); *Ymeri v. Ashcroft*, 387 F.3d 12, 20 (1st Cir. 2004); *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 660 (9th Cir. 2003); *Secaida-Rosales v. INS*, 331 F.3d 297, 308–09 (2d Cir. 2003); *Uwase v. Ashcroft*, 349 F.3d 1039, 1043 (7th Cir. 2003); *Gao v. Ashcroft*, 299 F.3d 266, 272 (3d Cir. 2002).

These courts continue to apply the “heart of the claim” test to their review of applications filed before the Act’s effective date, May 11, 2005. *See, e.g.,* *Kaita v. U.S. Att’y Gen.*, 522 F.3d 288, 296 (3d Cir. 2008).

(which do not).⁶⁵ The court ultimately affirmed the denial of asylum based on the applicant's lack of credibility on "key elements of the claim, and Nreka's failure to rebut these with sufficient corroborating evidence and explanation."⁶⁶ Following *Nreka*, the court continued to apply the test in practice in a series of unpublished opinions.⁶⁷

The Eleventh Circuit has also followed other courts of appeals to insist that dispositive adverse credibility determinations be expressly made on the record, because otherwise "the reviewing Court is left in the dark."⁶⁸ Thus, absent an express adverse credibility determination, an IJ's conclusory reference to an applicant's claim as a "ridiculous fabrication," or blanket description of her testimony as "extremely inconsistent and [making] . . . no sense whatsoever," does not constitute an explicit (and thus sufficient) finding to be dispositive of the applicant's claim.⁶⁹ Rather, "IJ's must make clean determinations of credibility."⁷⁰ Where the IJ has failed to make an express adverse credibility determination, the Eleventh Circuit accepts the testimony as true.⁷¹

Moreover, like other courts, the Eleventh Circuit has recognized that, unlike other types of credibility findings such as those made by juries in civil or criminal trials, a credibility determination by an immigration judge is subject to judicial review, and therefore must be review-

65. 408 F.3d 1361, 1368–69 (11th Cir. 2005).

66. *Id.* at 1369.

67. See *Vasily v. U.S. Att'y Gen.*, No. 07-12476, 2008 U.S. App. LEXIS 11572, at *7–9 (May 28, 2008) (declining to address whether "heart of the claim" test applies because adverse credibility determination was based on inconsistencies that related to the heart of the applicant's claim); *Paniagua v. U.S. Att'y Gen.*, No. 07-13044, 2008 U.S. App. LEXIS 5166, at *4–5 (11th Cir. Mar. 7, 2008) (affirming adverse credibility determination where inconsistencies were material to claim); *Bertrand v. U.S. Att'y Gen.*, No. 07-13485, 2008 U.S. App. LEXIS 1613, at *7 (11th Cir. Jan. 24, 2008) ("Although minor inconsistencies that are immaterial will not support an adverse credibility finding, inconsistencies about material matters will."); *Melo-Saganome v. U.S. Att'y Gen.*, 227 F. App'x 809, 816 n.7 (11th Cir. 2007) (declining to address whether "heart of the claim" test applied because IJ based his adverse credibility finding on discrepancies related to the "major incident" on which claim was based); *Drejaj v. U.S. Att'y Gen.*, 192 F. App'x 847, 855 n.4 (11th Cir. 2006) (declining to adopt test but finding that inconsistencies were material to claim); *Medina v. U.S. Att'y Gen.*, 188 F. App'x 807, 808–09 (11th Cir. 2006) (applying "heart of the claim" test); *Valderrama v. U.S. Att'y Gen.*, 180 F. App'x 122, 125–26 & n.4 (11th Cir. 2006) (declining to adopt test but finding that inconsistencies were material to claim); *Thamsir v. U.S. Att'y Gen.*, 167 F. App'x 788, 790 (11th Cir. 2006) (applying "heart of the claim" test).

The author is unaware of any Eleventh Circuit case—published or otherwise—where the court has affirmed a dispositive adverse credibility determination based on matters that did not go to the heart of the claim.

68. *Yang v. U.S. Att'y Gen.*, 418 F.3d 1198, 1201 (11th Cir. 2005) ("We agree with our sister Courts that when an IJ 'says not that [s]he believes the asylum seeker or [that] [s]he disbelieves her . . . the reviewing Court is left in the dark.'") (quoting *Iao v. Gonzales*, 400 F.3d 530, 534 (7th Cir. 2005)) (alterations in original).

69. *Id.* (internal quotation marks omitted).

70. *Id.* (internal quotation marks omitted).

71. See, e.g., *Mejia v. U.S. Att'y Gen.*, 498 F.3d 1253, 1255 n.2, 1257 (11th Cir. 2007).

able.⁷² The immigration judge therefore may not simply rely on a “gut feeling” to disbelieve the applicant and deny his claim. Rather, the IJ “must offer specific, cogent reasons for an adverse credibility finding,”⁷³ which are supported by substantial evidence in the record.⁷⁴ As with other aspects of the asylum determination, the IJ must “announce [his or her] decision in terms sufficient to enable a reviewing court to perceive that [he or she] has heard and thought and not merely reacted.”⁷⁵ In at least one unpublished case, *Juliao v. U.S. Attorney General*, the Eleventh Circuit expressly remanded the matter for a reviewable credibility determination, requiring the IJ to make “explicit, considered and detailed findings” as to whether the petitioner’s testimony was credible, and if not credible, to specify “what testimony was not credible (all or what portions) and explicit findings why.”⁷⁶

Yet, when it comes to actually reviewing the merits of an adverse credibility determination, the Eleventh Circuit has taken an exceptionally narrow view of its role and the applicable standard of review. Indeed, the Eleventh Circuit has never expressly reversed an adverse credibility determination in a published opinion.⁷⁷ It has the dubious

72. See, e.g., *Castañeda-Castillo v. Gonzales*, 488 F.3d 17, 22 (1st Cir. 2007) (“Although the fact-finder on the scene has the advantage as to demeanor evidence, judges are expected—unlike juries—to give reasons for their conclusions even on credibility.”) (citation omitted).

73. *Forgue v. U.S. Att’y Gen.*, 401 F.3d 1282, 1287 (11th Cir. 2005).

74. *Id.* at 1286–87.

75. *Tan v. U.S. Att’y Gen.*, 446 F.3d 1369, 1374 (11th Cir. 2006) (citation and internal quotation marks omitted).

76. 209 F. App’x 955, 957 (11th Cir. 2006).

77. Perhaps the closest the Eleventh Circuit has come to reversing a credibility determination in a published opinion is *Mezvrishvili v. U.S. Attorney General*, 467 F.3d 1292 (11th Cir. 2006). In *Mezvrishvili*, the immigration judge found that the petitioner had “credibly testified to instances of abuse on account of his belief as a Jehovah’s Witness, but . . . found that Mezvrishvili lacked adequate knowledge about or commitment to that faith and denied Mezvrishvili’s application for asylum.” *Id.* at 1294. On appeal, the Eleventh Circuit did not frame the issue as a challenge to the IJ’s credibility finding regarding Mezvrishvili’s faith. Rather, the court characterized the case as one where the conclusion as to Mezvrishvili’s religion was not supported by evidence in the record. The court remanded after concluding that both “the BIA and the Immigration Judge failed to render a reasoned decision in consideration of Mezvrishvili’s credible testimony.” *Id.* at 1297. The Eleventh Circuit addressed a similar issue in *Tan*, 446 F.3d at 1371. There, the IJ found the applicant’s testimony that she had been attacked by men yelling ethnic slurs credible, but, without logical explanation, remained unconvinced that the attack was on account of a protected ground (race) as is required for purposes of asylum. The court reversed, reasoning that the IJ’s conclusion was not consistent with the favorable credibility finding. In neither case, however, did the court actually reverse an adverse credibility finding.

To date, the author has been able to locate only *two* reported, unpublished opinions where the Eleventh Circuit has expressly reversed an adverse credibility determination in the asylum context. In *Zheng v. U.S. Attorney General*, an asylum seeker from China claimed past persecution on account of his practicing Falun Gong. 171 F. App’x 799, 800 (11th Cir. 2006). The IJ denied the claim based on an adverse credibility determination, including the IJ’s belief that the applicant was not in fact a Falun Gong practitioner. The Eleventh Circuit reversed, finding that the supposed “inconsistencies” and “other weaknesses” relied on by the IJ to make an

distinction of being the only circuit court never to have done so (with the possible exception of the D.C. Circuit, which does not typically hear asylum appeals), even when applying the same standards of review as other courts.⁷⁸

adverse credibility finding were not “sufficiently explained by the record” and that the IJ offered no specific or cogent reasons for disbelieving the explanations. *Id.* The court rejected the IJ’s reliance on his own experiences in other Falun Gong cases rather than the record in this case, particularly since the IJ’s stated experiences were contradicted by the record. The court also criticized the IJ, who opined that petitioner’s knowledge about Falun Gong was “as instructive as opening a fortune cookie” and “quite off-the-wall,” for disbelieving that the petitioner was a Falun Gong practitioner based solely on his own experience or personal beliefs. *Id.* at 806.

In *Louis v. U.S. Attorney General*, the IJ had found the applicant not to be credible based on a lack of detail in his asylum application about two arrests to which he later testified, and on perceived inconsistencies between his application and later testimony. 2008 U.S. App. LEXIS 7434 (11th Cir. Apr. 11, 2008). The BIA affirmed the adverse credibility finding, adding that Louis had purportedly failed to mention the arrests in his asylum application. The Eleventh Circuit reversed, finding that in fact Louis *had* mentioned his arrests in the asylum application, that the only difference arose from Louis’s providing greater detail in his testimony, that the IJ erred by failing to afford Louis an opportunity to explain the perceived inconsistencies, and that on appeal Louis was able to explain how there was no inconsistency by reference to evidence in the record.

78. Every other U.S. court of appeals has found occasion to reverse an adverse credibility determination in a published opinion, and most courts have done so on several occasions. *See, e.g.,* *Shahinaj v. Gonzales*, 481 F.3d 1027, 1029 (8th Cir. 2007) (finding that the IJ’s adverse credibility determination was not supported by the record, where the IJ’s finding was based on his personal experience that the applicant did not dress, act, or speak like a homosexual); *Alexandrov v. Gonzales*, 442 F.3d 395, 408–09 (6th Cir. 2006) (reversing finding based on the IJ’s personal beliefs about how long beatings or detentions should last); *Giday v. Gonzales*, 434 F.3d 543, 553 (7th Cir. 2006); *Mwembie v. Gonzales*, 443 F.3d 405, 410–12 (5th Cir. 2006) (rejecting credibility determination where the IJ’s findings were not supported by the record and were instead based on pure speculation or conjecture, including the conclusions that the asylum seeker would have taken time to say good-bye to her family before fleeing persecution, and that her testimony about daily rapes while in detention was an “incomprehensible” and thus implausible level of brutality; affirming on other grounds); *Pavlova v. INS*, 441 F.3d 82, 88–90 (2d Cir. 2006) (reversing adverse finding where the IJ mischaracterized the substance of the applicant’s testimony, unreasonably found implausible the applicant’s explanation for why she waited nearly a year to apply for asylum, and relied on the applicant’s imprecise use of medical terminology); *Pramatarov v. Gonzales*, 454 F.3d 764, 765 (7th Cir. 2006) (“The immigration judge . . . doubted the applicant’s credibility on grounds that, because of factual error, bootless speculation, and errors of logic, lack a rational basis.”); *Rizal v. Gonzales*, 442 F.3d 84, 89–91 (2d Cir. 2006); *Shah v. U.S. Att’y Gen.*, 446 F.3d 429, 430 (3d Cir. 2006) (finding that while no reasonable person would have found the asylum applicant not credible, the IJ here in “his apparent zeal to deny relief” found the asylum applicant not credible by ignoring strong documents regarding the applicant’s father’s death and relying on weak support for his conclusion); *Singh v. Gonzales*, 439 F.3d 1100, 1106–10 (9th Cir. 2006); *Tewabe v. Gonzales*, 446 F.3d 533, 539 (4th Cir. 2006) (reversing adverse credibility determination where the IJ failed to provide specific, cogent reasons for disbelieving the applicant’s testimony as “implausible”); *Yang v. BIA*, 440 F.3d 72, 76 (2d Cir. 2006); *Zhang v. Gonzales*, 434 F.3d 993, 995, 997–98 (7th Cir. 2006); *Chaib v. Ashcroft*, 397 F.3d 1273, 1278–80 (10th Cir. 2005) (reversing where the IJ relied on speculation regarding the Algerian government’s treatment of suspected terrorist supporters and speculation regarding the Algerian bank’s computer system without evidence in the record to support the IJ’s conclusions); *Hor v. Gonzales*, 421 F.3d 497, 500 (7th Cir. 2005); *Chen v. U.S. Dep’t of Justice*, 426 F.3d 104, 115 (2d Cir. 2005) (reversing the immigration judge’s findings that were “grounded solely on

There is no reason to believe that immigration judges within the Eleventh Circuit's jurisdiction are somehow immune from committing reversible error in their credibility determinations, while immigration judges in every other circuit in the country are not. Certainly, the same troubling disparities in immigrant judging that have been observed nationally are also present in this circuit. Rather, the Eleventh Circuit's reluctance to reverse credibility determinations, and its refusal to do so in any published opinion to date, suggests that the court has applied an unduly narrow view of the standard of review.

Other courts have cautioned against construing the substantial evidence test so stringently so as to render it meaningless. The Fourth Cir-

speculation and conjecture," including the conclusion that the birth certificate "appeared fabricated" absent any evidence to support that conclusion); *Korytnyuk v. Ashcroft*, 396 F.3d 272, 292 (3d Cir. 2005) (reversing the IJ where stated bases for conclusions did not logically flow from the facts considered, stating that "it is the IJ's conclusion, not [the petitioner's] testimony, that 'strains credulity'"); *Latifi v. Gonzales*, 430 F.3d 103, 105 (2d Cir. 2005) (reversing adverse credibility determination where Albanian applicant's credible fear interview at airport was only inconsistent with his testimony in trivial ways; the applicant offered explanation as to why he was not more forthcoming in initial interview, and the IJ did not evaluate his explanation); *Lin v. U.S. Dep't of Justice*, 428 F.3d 391, 404 (2d Cir. 2005); *Marcos v. Gonzales*, 410 F.3d 1112, 1116-18 (9th Cir. 2005); *Meçe v. Gonzales*, 415 F.3d 562, 573-75 (6th Cir. 2005) (reversing findings where the IJ relied on the omission of one of many beatings from the asylum application, inconsistencies that were not supported by the record, and misconstruction of the record); *Quan v. Gonzales*, 428 F.3d 883, 886-88 (9th Cir. 2005) (reversing where the IJ relied on minor inconsistencies and speculation, but did not give the applicant an opportunity to clarify unclear testimony); *Smolniakova v. Gonzales*, 422 F.3d 1037, 1044 (9th Cir. 2005) (reversing where "perceived contradictions" were based on a misconstruction of the record, insufficient evidence, and improper speculation and conjecture); *Tabaku v. Gonzales*, 425 F.3d 417, 422-23 (7th Cir. 2005); *Bellido v. Ashcroft*, 367 F.3d 840, 843 (8th Cir. 2004) (reversing adverse finding based on an asylum application's omission of certain details of claim, and certain "implausibilities" cited by the IJ that the reviewing court found not to be legitimate); *Elzour v. Ashcroft*, 378 F.3d 1143, 1153 (10th Cir. 2004) (reversing where the IJ "failed to substantiate his skepticism with any record support"); *Ge v. Ashcroft*, 367 F.3d 1121, 1124 (9th Cir. 2004); *Lin v. Ashcroft*, 385 F.3d 748, 755-56 (7th Cir. 2004) ("The IJ's skepticism—utterly unsupported by any facts in the record—with respect to [one] detail of her story does not form a valid basis for a negative credibility determination, in the face of the other corroborating information she presented."); *Mihaylov v. Ashcroft*, 379 F.3d 15, 22-23 (1st Cir. 2004) (reversing adverse credibility determination based on the IJ's belief that a Bulgarian asylum seeker was alcoholic, and finding incredible the applicant's beliefs about his persecutor's motives, rather than evaluating the evidence supporting those beliefs); *Dia v. Ashcroft*, 353 F.3d 228, 250 (3d Cir. 2003) (en banc); *Gao v. Ashcroft*, 299 F.3d 266, 279 (3d Cir. 2002); *Balasubramaniam v. INS*, 143 F.3d 157, 162-64 (3d Cir. 1998) (reversing credibility finding based on prior inconsistent statement made to INS officials where the handwritten record of the statement might not be reliable, the statement was not obtained for the purpose of an asylum claim, and BIA made assumptions about the applicant's understanding of English that were not supported by the record); *Cordero-Trejo v. INS*, 40 F.3d 482, 485 (1st Cir. 1994) (reversing where "the IJ's extensive negative credibility findings, [were] without foundation in the record"); *Turcios v. INS*, 821 F.2d 1396, 1400 (9th Cir. 1987) (reversing where the applicant's lie regarding his Mexican nationality was explained and accepted as part of his fear of persecution claim, because applicant feared deportation to El Salvador).

cuit has observed that although the court's deference under this standard is "broad, [it] is not absolute."⁷⁹ Similarly, the Seventh Circuit has stated that the standard, "[w]hile deferential . . . is not the functional equivalent of no review at all."⁸⁰

Of course, a "standard of review" that in practice is never met, is tantamount to no standard of review at all. In *Silva v. U.S. Attorney General*, Judge Carnes's dissent commented on that paradox in a related context: the court's determination of whether certain facts compel a finding of past persecution on account of a protected ground.⁸¹ Although the *Silva* case did not turn on a credibility finding, Judge Carnes's observations are nevertheless instructive here. In response to the majority's conclusion that death threats and an attempted shooting during the time of petitioner's political activities did not compel a finding of past persecution on account of a protected ground, Judge Carnes wrote:

The majority opinion refers to the often-mentioned, but never sighted, "rare case" in which the facts are so compelling that we will reverse an immigration judge's finding that a petitioner has failed to prove persecution on a protected ground. No published opinion of this Court has ever found that rare case, and today's decision indicates that such a case, like the fabled unicorn, exists only in our imagination.⁸²

Since *Silva*, the Eleventh Circuit has found that the record compelled a finding of past persecution in at least six published opinions.⁸³

79. *Camara v. Ashcroft*, 378 F.3d 361, 367 (4th Cir. 2004).

80. *Tabaku*, 425 F.3d at 421.

81. 448 F.3d 1229, 1244–49 (11th Cir. 2006) (Carnes, J., dissenting).

82. *Id.* at 1248–49.

83. See *De Santamaria v. U.S. Att'y Gen.*, No. 06-16221, 2008 WL 1787731, at *1, *8 (11th Cir. Apr. 22, 2008) (Record compelled a finding of past persecution where the petitioner was "repeatedly threatened, twice physically attacked, terrorized by the torture and murder of a family friend who refused to give information on her whereabouts, and finally, kidnapped and beaten only to narrowly escape with her life by the intervention of the Colombian military." Record compelled the conclusion that this mistreatment was on account of the petitioner's political opinion where her "attackers made painfully clear that their motivation for their threats and violence towards Santamaria was her support of the Colombian government and her work with various democratic organizations."); *Niftaliev v. U.S. Att'y Gen.*, 504 F.3d 1211, 1217 (11th Cir. 2007) (cumulative effect of numerous beatings, arrests, searches, and interrogations, culminating in a fifteen-day food-deprived detention, compelled a finding of past persecution); *Mejia v. U.S. Att'y Gen.*, 498 F.3d 1253, 1257–58 (11th Cir. 2007) (threats and attempted attacks over an eighteen-month period, which culminated in an at-gunpoint attack and the breaking of petitioner's nose, amounted to persecution as a matter of law, but the factual question of whether this was on account of a protected ground was for the immigration judge to decide in the first instance); *Sanchez Jimenez v. U.S. Att'y Gen.*, 492 F.3d 1223, 1233–35 (11th Cir. 2007) (record compelled conclusion that an attempted shooting by FARC was past persecution on account of political opinion and activities); *Delgado v. U.S. Att'y Gen.*, 487 F.3d 855, 861–62 (11th Cir. 2007) (record of threatening phone calls, vandalism of car, and physical attacks amounted to

The court's recent willingness to reverse conclusions regarding persecution may reflect a growing recognition that the inquiry is not strictly a factual one (for example, determining whether substantial evidence supports the IJ's factual findings as to what mistreatment the asylum seeker has experienced and whether that mistreatment was on account of a protected ground), but also involves legal questions where the court has a broader interpretive role (for example, determining whether the facts, taken cumulatively, meet the legal definition of persecution).

For now, however, we might say that in the Eleventh Circuit the hypothetically reversible credibility determination—"the often-mentioned, but never sighted, 'rare case'"⁸⁴—has assumed the status of the "fabled unicorn"⁸⁵ in the court's asylum jurisprudence, existing only in the court's imagination.⁸⁶ The question that remains is, how will the court approach credibility determinations in a post-REAL ID world?

IV. THE REAL ID ACT

The REAL ID Act, which articulates standards related to credibility and corroboration, will present the Eleventh Circuit with new challenges in its review of asylum decisions.⁸⁷ How the court responds to those challenges will have a tremendous impact on asylum seekers within its jurisdiction.

In *Terrorism and Asylum Seekers: Why the REAL ID Act Is a False Promise*, Marisa Silenzi Cianciarulo argues that the REAL ID Act amendments to asylum law largely codify existing case law in several areas, including corroboration and credibility.⁸⁸ The application of the new law should therefore not have a major effect on asylum adjudica-

persecution, and compelled finding that this was on account of political opinion even though petitioner could not identify his attackers); *Ruiz v. Gonzales*, 479 F.3d 762, 766 (11th Cir. 2007) ("[T]he BIA erred when it found that the cumulative effect of the beatings, the threatening phone calls, and the kidnaping did not amount to persecution. The record compels the conclusion that these events cumulatively amount to past persecution, and that this persecution was on account of [petitioner's] political opinion.").

84. *Silva*, 448 F.3d at 1248 (Carnes, J., dissenting).

85. *Id.* at 1249.

86. *See id.* at 1248–49.

87. The REAL ID Act's amendments to the immigration laws were purportedly designed to prevent terrorists from entering the United States or from obtaining relief from removal, but their reach into asylum law could adversely affect bona fide asylum seekers. Section 101 of the Act, which addresses credibility determinations and judicial standards of review for all asylum seekers, is titled "Preventing Terrorists from Obtaining Relief from Removal," and falls within Title I of the Act, which is titled "Amendments to Federal Laws To Protect Against Terrorist Entry." *Id.* § 101, 119 Stat. at 302. Other sections of the REAL ID Act did specifically create grounds of inadmissibility and removability for terrorists. *See, e.g., id.* §§ 103, 105, 119 Stat. at 306–09.

88. Marisa Silenzi Cianciarulo, *Terrorism and Asylum Seekers: Why the REAL ID Act Is a False Promise*, 43 HARV. J. ON LEGIS. 101, 115–16 (2006).

tions or how they are reviewed. Cianciarulo cautions, however, that the “careless” drafting of certain provisions could lead to unnecessarily stringent interpretations that adversely impact the asylum system by denying protection to those who are eligible for it.⁸⁹ She urges adjudicators to interpret and apply the provisions in a manner consistent with the case law from which the provisions were derived and with the humanitarian purpose of asylum law.⁹⁰

As with other courts, the Eleventh Circuit has not yet had much opportunity to interpret and apply the provisions of the REAL ID Act as they affect asylum adjudications.⁹¹ This is because claims filed after the law’s effective date, May 11, 2005, are only now beginning to reach the court after an initial determination by the immigration judge and administrative review by the Board of Immigration Appeals.

A. *Credibility*

While statutory law had previously been silent on the standard IJs should apply when making credibility determinations, the REAL ID Act has now announced a “totality of the circumstances” test. This test provides that credibility determinations must be based on both consideration of “the totality of the circumstances” and “all relevant factors,” and may take into account, among other things, “any inaccuracies or falsehoods . . . without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant’s claim.”⁹² The Act states:

Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant’s or witness’s account, the consistency between the applicant’s or witness’s written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsis-

89. *Id.* at 105 (“Improper interpretation of the Real ID Act’s language may have devastating consequences for bona fide asylum applicants while providing no additional protection against fraudulent claims.”); *see also id.* at 116–36 (discussing interpretations of the REAL ID Act in light of “careless” drafting).

90. *Id.* at 106 (“[A]sylum adjudicators have a duty to interpret the Real ID Act in the spirit of humanitarian treaties and laws upon which the asylum system is based.”).

91. *See, e.g.,* *Mitondo v. Mukasey*, 523 F.3d 784, 787 (7th Cir. 2008) (stating that this case is the first time the circuit has applied the REAL ID Act’s credibility standard); *Lin v. Mukasey*, 521 F.3d 22, 26 (1st Cir. 2008) (applying REAL ID Act standard).

92. § 101(a)(3)(B)(iii), 119 Stat. at 303.

tency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.⁹³

Although the standard expressly states that adjudicators may consider matters not going to the heart of the claim, it does not authorize adverse credibility determinations based solely on minor inconsistencies, omissions, or contradictions. Rather, the standard requires that the adjudicator consider any inconsistencies, contradictions, or fabrications in light of the "totality of the circumstances."⁹⁴ As Cianciarulo has observed,

[The credibility] provision of the Real ID Act . . . is not a license to base a negative credibility finding in whole or in any significant part upon inconsistencies regarding immaterial facts. It merely permits immaterial inconsistencies to be considered as part of the totality of the circumstances. This is clear because the conference committee expressly rejected language in the House of Representatives version of the bill that would have allowed adjudicators to dispense with a reasoned totality of the circumstances analysis and make negative credibility determinations based on "*any such factor, including . . . any inaccuracies or falsehoods . . . without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim.*"

Therefore, the Real ID Act specifies that immaterial discrepancies should be factored in, but conclusively denies them controlling weight.⁹⁵

Indeed, the Conference Report for the Real ID Act states that credibility determinations under the new law must still be "reasonable" and "take into consideration the individual circumstances" of the applicant.⁹⁶

Moreover, it is worth noting that although under the REAL ID Act an immigration judge's determination whether an asylum seeker's testimony is credible continues to be a question of fact to be reviewed under the "substantial evidence" test, the court's statutory interpretation of the "totality of the circumstances" test is a legal question to be considered *de novo*.⁹⁷ The court's evaluation of whether a particular set of facts

93. *Id.* Other provisions apply the identical standard to individuals seeking any other relief from removal or withholding of removal. *Id.* § 101(c)-(d), 119 Stat. 303-05.

94. *Id.* § 101(a)(3)(B)(iii), 119 Stat. at 303.

95. Cianciarulo, *supra* note 88, at 135 (second and third alterations in original) (footnotes omitted).

96. H.R. REP. NO. 109-72, at 167 (2005), *reprinted in* 2005 U.S.C.C.A.N. 240, 292.

97. *See, e.g.,* Yang v. U.S. Att'y Gen., 418 F.3d 1198, 1201 (11th Cir. 2005) (legal determinations are reviewed *de novo*).

satisfies the “totality of the circumstances” test will present a mixed question of law and fact.⁹⁸

Although the REAL ID Act does not define the “totality of the circumstances” to be considered, relevant circumstances will include the context in which discrepancies or inaccuracies were found, whether the applicant brought the discrepancy to the attention of the adjudicator or whether it was revealed through cross-examination, whether apparent inconsistencies can be attributed to language difficulties or translation, whether the applicant was represented by competent counsel, whether the immigration judge allowed an opportunity to explain or clarify any perceived inconsistencies, whether the applicant provided credible explanations, whether the applicant suffered traumatic stress that affects the ability to recall dates and events with consistency and precision, whether cultural barriers affect perception and memory regarding time, whether there is a reasonable basis to conclude that any inaccuracies or inconsistencies that do not go to the heart of the claim undermine the applicant’s credibility as to a well-founded fear of persecution, and whether the immigration judge’s conduct may have affected his or her credibility assessment (for example, if the immigration judge was intemperate or abusive, or otherwise exhibited signs of bias, hostility, or other predisposition to disbelieve the applicant during the hearing).

After all, the object of credibility assessments in the asylum context is only to determine whether the applicant has a well-founded fear of persecution on the basis of a protected ground. It is not a game of “gotcha” where an insignificant detail that does not have any bearing on the veracity of the applicant’s fear should pass for a specific or cogent basis for a dispositive adverse credibility finding. Indeed, it would defeat the purpose of asylum and refugee law to interpret the credibility determination provision in a way that would permit the denial of relief to a bona fide asylum seeker simply because she failed to recall a detail, misspoke on some occasion, confused dates concerning a traumatic event, was mistranslated at some point in the process, or was understandably reluctant to disclose details of a harrowing experience, particularly in an initial application or interview.⁹⁹

98. See *Cadet v. Bulger*, 377 F.3d 1173, 1192, 1194 (11th Cir. 2004) (holding, in the context of a Convention Against Torture claim, that the question whether particular facts amount to torture is a mixed question of law and fact, requiring a legal conclusion); see also *Jean-Pierre v. U.S. Att’y Gen.*, 500 F.3d 1315 (11th Cir. 2007).

99. See generally Peter Margulies, *Difference and Distrust in Asylum Law: Haitian and Holocaust Refugee Narratives*, 6 ST. THOMAS L. REV. 135 (1993). Margulies argues that incredibility, inconsistencies and implausibility are part and parcel of any survivor’s story. Comparing the contemporary story-telling of Haitians fleeing persecution to the stories of his own parents, who survived the Holocaust, Margulies concludes that adverse credibility findings against Haitian asylum seekers are often unwarranted, and result in the improper denial of their claims for

The “totality of the circumstances” approach also suggests that adverse credibility determinations should be reversed where they are based on the selective consideration of evidence, for example, focusing on a minor detail in the face of overwhelming evidence supporting the applicant’s credibility. Courts have regularly criticized the “selective” consideration of evidence in credibility determinations as inconsistent with the basic obligation to consider the record as a whole. For example, in *Hanaj v. Gonzales*, the Seventh Circuit cautioned that an “IJ cannot selectively examine evidence in determining credibility, but must present a reasoned analysis of the evidence as a whole.”¹⁰⁰ In *Shah v. U.S. Attorney General*, the Third Circuit wrote that “[a]lthough we don’t expect an Immigration Judge to search for ways to sustain an alien’s testimony, neither do we expect the judge to search for ways to undermine and belittle it. Nor do we expect a judge to selectively consider evidence, ignoring that evidence that corroborates an alien’s claims and calls into question the conclusion the judge is attempting to reach.”¹⁰¹

Under the “totality of the circumstances” test, the question before the reviewing court becomes not merely whether a particular inconsistency or inaccuracy itself is supported by the record, but rather whether *the ultimate adverse credibility determination* is supported by substantial evidence, considering the totality of the circumstances and all relevant factors. In *Chen v. U.S. Attorney General*,¹⁰² the only published opinion to date where the Eleventh Circuit has applied the REAL ID credibility standard,¹⁰³ the court affirmed an adverse credibility finding¹⁰⁴ based on the immigration judge’s specific reference to ten inconsistencies in the record, including whether officials seized Falun Gong materials from Chen’s store when they arrested him, whether Chen admitted practicing Falun Gong while he was in custody, and several other discrepancies between his asylum application, credible fear inter-

protection. He writes that the lessons of the Holocaust should be instructive, including his parents’ admonition, as they recounted their experiences, that “No one would ever believe this if they did not know it already to be true.” *Id.* at 135.

100. 446 F.3d 694, 700 (7th Cir. 2006).

101. 446 F.3d 429, 437 (3d Cir. 2006) (citation and internal quotation marks omitted).

102. 463 F.3d 1228 (11th Cir. 2006).

103. *Id.* at 1231 n.3 (“Because Chen’s application for asylum and withholding of removal was filed on July 12, 2005, the amendment effected by the REAL ID Act of 2005 applies in this case.”). A series of recent unpublished opinions have also applied the new law. *See, e.g.,* Jian Gao v. U.S. Att’y Gen., No. 07-13990, 2008 U.S. App. LEXIS 7960, at *15–17 (11th Cir. Apr. 9, 2008); Bushi v. U.S. Att’y Gen., No. 06-11632, 2008 U.S. App. LEXIS 6120, at *5 n.2 (11th Cir. Mar. 21, 2008); Jian Chuan Xie v. U.S. Att’y Gen., No. 07-14272, 2008 U.S. App. LEXIS 7236, at *12–14 (11th Cir. Mar. 11, 2008); Fssahaye v. U.S. Att’y Gen., No. 07-12275, 2008 U.S. App. LEXIS 1594, at *4 n.1 (11th Cir. Jan. 23, 2008); Cala v. U.S. Att’y Gen., 250 F. App’x 296, 299 n.3 (11th Cir. 2007); Ndi v. U.S. Att’y Gen., 229 F. App’x 877, 879 n.1 (11th Cir. 2007).

104. *Chen*, 463 F.3d at 1233.

view, and testimony.¹⁰⁵ The court noted that the IJ confronted Chen about the inconsistencies, and found that he was “evasive” in response, and did not provide satisfactory explanations.¹⁰⁶ The court rejected Chen’s arguments that the adverse credibility finding should be reversed because the inconsistencies were trivial and immaterial, noting that under the REAL ID Act amendments, the immigration judge was entitled to rely on them, while considering the totality of the circumstances.¹⁰⁷

A “totality of the circumstances” approach is not new to the Eleventh Circuit’s asylum jurisprudence. The court has long endorsed a similar approach to the substantial evidence test as applied to other aspects of asylum claims, by requiring that determinations regarding eligibility for asylum be based on the “record considered as a whole.”¹⁰⁸ In addition, the court has recently adopted a cumulative analysis to determine whether past mistreatment amounts to persecution as a matter of law.¹⁰⁹

Notably, the standard of review the courts of appeals must apply to credibility determinations has not changed. After the REAL ID Act, credibility determinations must still be supported by “substantial evidence,” as demonstrated by the immigration judge’s “specific, cogent reasons” for an adverse credibility finding.¹¹⁰ Again, Judge Carnes’s dissent in *Silva*¹¹¹ is instructive, as it cautions against a deconstructive approach to reviewing factual determinations in the asylum context. As Judge Carnes wrote:

In determining whether the facts and circumstances in any case compel a conclusion, we ought to face up to the full force of them in their entirety . . . [rather than employ a deconstructionist approach, which] proceeds by disassembling the whole of the evidence and then

105. *See id.* at 1232–33.

106. *Id.* at 1232.

107. *Id.* at 1233; *see also* *Kadia v. Gonzales*, 501 F.3d 817, 822 (7th Cir. 2007) (stating that the statutory credibility standard still explicitly requires the fact-finder to consider “the totality of the circumstances, and all relevant factors”).

108. *Antipova v. U.S. Att’y Gen.*, 392 F.3d 1259, 1261 (11th Cir. 2004) (quoting *Al Najjar v. Ashcroft*, 257 F.3d 1262, 1284 (11th Cir. 2001)) (internal quotation marks omitted).

109. *See, e.g.*, *De Santamaria v. U.S. Att’y Gen.*, No. 06-16221, 2008 WL 1787731, at *7 (11th Cir. Apr. 22, 2008) (stating that “these events, taken together, constitute extreme mistreatment” in concluding that the record compels a finding of persecution); *Niftaliev v. U.S. Att’y Gen.*, 504 F.3d 1211, 1217 (11th Cir. 2007) (finding that cumulative effect of numerous beatings, arrests, searches, and interrogations, culminating in a fifteen-day food-deprived detention, compelled a finding of past persecution); *Ruiz v. Gonzales*, 479 F.3d 762, 766 (11th Cir. 2007) (adopting a “cumulative” legal analysis for the question of whether acts of mistreatment amount to persecution).

110. *Chen*, 463 F.3d at 1231–32 (applying the REAL ID Act credibility standard and stating that the immigration judge provided “specific, cogent reasons for the adverse credibility determination”).

111. 448 F.3d 1229 (11th Cir. 2006).

explaining why each part by itself is insufficiently compelling. This is like a man who attempts to demonstrate that a bucket of water is not really that by emptying it cup by cup, asserting as he goes along that each cupful is not a full bucket's worth until, having emptied the whole, he proclaims that there just wasn't a bucket of water there.¹¹²

In the analogous credibility context, the court will have to determine whether facts found by the IJ to bear adversely on credibility are supported by substantial evidence (a factual question) and whether they are sufficient to constitute an adverse credibility determination under the totality of the circumstances test (mixed question of law and fact). The court will have to guard against adverse determinations that rely on isolated inconsistencies or contradictions in the record, when doing so flies in the face of the record as a whole, or that otherwise fail to consider inconsistencies or other potentially adverse findings in their complete context.¹¹³

B. Corroboration

Although the bulk of this article is devoted to credibility determinations, the REAL ID Act also added statutory provisions related to corroborating evidence, which largely codified existing case law.¹¹⁴ Credibility and corroboration are related concepts in asylum law, but they are analytically distinct and merit separate consideration.

In *Niftaliev v. U.S. Attorney General*, the Eleventh Circuit applied the REAL ID Act's provision relating to judicial review of corroboration determinations, and reaffirmed the principle that an applicant's testimony, alone, may be sufficient to establish his burden in a withholding of removal claim.¹¹⁵

Vyacheslav Niftaliev, a Ukrainian national, testified that he had suffered severe mistreatment amounting to past persecution, but offered no other evidence to corroborate his personal experiences. The IJ found Niftaliev to be credible, but concluded that he had not met his burden of proof because his testimony was not sufficiently detailed, and because Niftaliev had offered no corroborating evidence.¹¹⁶ Before the Eleventh Circuit, the government argued that the court could not reverse the

112. *Id.* at 1247–48 (Carnes, J., dissenting).

113. *See, e.g., Hanaj v. Gonzales*, 446 F.3d 694, 700 (7th Cir. 2006) (reversing adverse credibility determination; “An [immigration judge] must analyze inconsistencies against the backdrop of the whole record . . . No such examination occurred here . . .”).

114. *See, e.g., Toure v. U.S. Att’y Gen.*, 443 F.3d 310, 325 (3d Cir. 2006) (the REAL ID Act standard of review of corroboration determinations has not been altered from that created previously by case law).

115. 504 F.3d 1211, 1217 (11th Cir. 2007).

116. *See id.* at 1216.

immigration judge's ruling on corroboration, based on a new provision under the REAL ID Act.¹¹⁷ That provision states:

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence . . . unless the court finds . . . that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.¹¹⁸

The Eleventh Circuit disagreed. As a matter of law, the court held that Niftaliev's testimony about beatings, arrests, imprisonment, and threat to his life was sufficiently detailed to meet his burden of proof.¹¹⁹ Therefore, the court reasoned, the availability of corroborating evidence was immaterial, and the new provision irrelevant.¹²⁰ The court also concluded it was unreasonable for the IJ to have required corroborating evidence in this case, stating:

We are . . . troubled by the notion of condemning the petitioner for failing to obtain some sort of documentation from the same government that persecuted and imprisoned him, concerning incidents that occurred approximately ten years ago.¹²¹

The REAL ID Act's provision governing whether an IJ may require corroborating evidence will thus be subject to the sort of reasonableness limitation that existed in BIA and other case law before the amendments.¹²² That provision states:

117. *Id.* Although Niftaliev filed his claim before the effective date of the REAL ID Act's provisions governing immigration judge determinations (May 11, 2005), the Act's judicial review provisions took effect immediately and governed the court's analysis of his claim. *See id.* at 1215-16.

118. 8 U.S.C. § 1252(b)(4) (Supp. V 2000).

119. 504 F.3d at 1217. While adverse credibility determinations are questions of fact, whether an applicant's testimony is sufficiently specific or detailed to meet the burden of proof is a question of law subject to plenary review. *See, e.g.,* *Chen v. U.S. Dep't of Justice*, 426 F.3d 104, 114 (2d Cir. 2005) ("[T]he IJ's evaluation of Chen's testimony as 'scant of details' and 'lacking specificity' was incorrect as a matter of law. '[T]estimony is 'too vague' if it doesn't identify facts corresponding to each of the elements of one of the 'refugee' categories of the immigration statutes . . .'" (citations omitted)).

120. 504 F.3d at 1217 ("[T]his appeal does not concern whether corroborative evidence was available. . . . [I]t concerns whether or not the petitioner's credible testimony, in and of itself, establishes his past persecution.").

121. *Id.*

122. In *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 445 (B.I.A. 1987), the BIA recognized "the difficulties faced by many aliens in obtaining documentary or other corroborative evidence to support their claims of persecution." The BIA then stated the standard that would be adopted in future regulations: that "the alien's own testimony . . . can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear." In the case of *In re S-M-J-*, 21 I. & N. Dec. 722 (B.I.A. 1997), the BIA held that documentary corroboration of an applicant's experiences is not required unless (1) the experiences were of the type reasonably subject to verification; (2) the documentation is the type that would normally be created or available in the particular country; and (3) the corroborating evidence is accessible to the alien. *See id.* at 726.

Other courts of appeals have also reversed the denial of asylum based on unreasonable

The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.¹²³

The reasonableness limitation continues to be applied by other courts as well.¹²⁴

V. CONCLUSION

The Eleventh Circuit faces new challenges and opportunities in its review of adverse credibility determinations in a post-REAL ID world. Given the centrality of these determinations to bona fide asylum claims, the burdens on the country's immigration judges, and the limited administrative review process, it is now more critical than ever that the Eleventh Circuit identify unsupported and unreasonable adverse credibility determinations to fulfill its role in guaranteeing this country's commitment to protect refugees.

requirements for corroborating evidence. *See, e.g.,* Secaída-Rosales v. INS, 331 F.3d 297, 311–13 (2d Cir. 2003) (vacating denial of asylum where, inter alia, “the IJ applied too stringent a standard to his corroborating evidence,” and thus the judge’s demands were unreasonable); *Georgis v. Ashcroft*, 328 F.3d 962, 968–70 (7th Cir. 2003) (vacating the deportation order because the immigration judge’s demands for corroborating evidence were unreasonable, and *Georgis* did submit corroborating evidence); *Senathirajah v. INS*, 157 F.3d 210, 220–22 (3d Cir. 1998) (vacating denial of withholding where judge’s demands for corroboration were unreasonable in light of the validity of applicant’s testimony).

123. 8 U.S.C. § 1158(b)(1)(B)(ii) (Supp. V 2005).

124. *See, e.g.,* *Zhang v. Gonzales*, 434 F.3d 993, 998–99 (7th Cir. 2006); *Toure v. U.S. Att’y Gen.*, 443 F.3d 310, 325 (3d Cir. 2006); *Hor v. Gonzales*, 421 F.3d 497, 500–01 (7th Cir. 2005).