FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MING DAI, *Petitioner*, v. MERRICK B. GARLAND, Attorney General, *Respondent.*	No. 15-70776 Agency No. A205-555-836 OPINION

On Remand from the United States Supreme Court

Filed August 20, 2021

Before: Sidney R. Thomas, Chief Judge, and Stephen S. Trott and Mary H. Murguia, Circuit Judges.

Per Curiam Opinion

SUMMARY*

Immigration

On remand from the United States Supreme Court, which vacated the divided panel's prior opinion and remanded with instructions and for further proceedings, the panel denied Ming Dai's petition for review of a decision by the Board of Immigration Appeals denying his application for asylum and withholding of removal.

The Board adopted and affirmed the immigration judge's determination that Dai failed to meet his burden of proof for asylum and withholding relief, adding that the voluntary return of Dai's wife and daughter to China, and his not being truthful about it, was detrimental to his claim and was significant to his burden of proof. The IJ and the Board based their determinations on: (1) Dai's intentional concealment of "highly probative and damaging facts;" (2) his lack of forthrightness; (3) his inadequate explanation for his wife's voluntary return to China, given that she was the primary object of alleged persecution in China; (4) admitted germane inconsistencies between his testimony and the story he told an asylum officer; and (5) his equivocating answers and unconvincing demeanor while testifying.

In the prior opinion, the panel majority granted Dai's petition, applying what the Supreme Court referred to as the judge-made "deemed-true-or-credible rule," which required

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

the court, in the absence of an explicit adverse credibility finding by the agency, to assume the credibility and truth of an alien's factual contentions. The Supreme Court held that the "deemed-true-or-credible rule" was irreconcilable with the Immigration and Nationality Act (INA), emphasizing that the INA provides that a reviewing court must accept administrative findings as conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary, and explaining that the only question for judges reviewing the Board's factual determinations is whether any reasonable adjudicator could have found as the agency did.

The Supreme Court further held that the INA's rebuttable presumption of credibility on appeal (where the IJ has not rendered an explicit finding on this issue) is limited to an appeal to the Board. Moreover, so long as the Board's reasons for rejecting an alien's credibility are reasonably discernible, the agency must be understood as having rebutted the presumption of credibility, and a reviewing court must uphold that decision unless a reasonable adjudicator would have been compelled to reach a different conclusion. Applying this guidance, the panel concluded that the Board implicitly considered Dai's statutory rebuttable presumption of credibility on appeal to have been conclusively rebutted by the factual record.

The panel concluded that any fair reading of the agency's decisions in this case indicates that it did not find Dai's case to be persuasive. The panel explained that the Supreme Court pointed out that simple credibility is not the only component of an applicant's burden of proof. By statute, an alien must also satisfy the trier of fact that his factual claim is not only credible, but also persuasive. Thus, even if the Board treats an individual's testimony as credible, the agency need not find his evidence persuasive or sufficient to

meet the burden of proof. The panel wrote that in this respect, the agency's findings of fact and conclusions drawn therefrom are demonstrably reasonable, and no reasonable adjudicator would be compelled to conclude to the contrary.

COUNSEL

David Z. Su, Law Offices of David Z. Su, West Covina, California; David J. Zimmer and Edwina B. Clarke, Goodwin Procter LLP, Boston, Massachusetts; for Petitioner.

Brian M. Boynton, Acting Assistant Attorney General; John W. Blakeley, Assistant Director; Aimee J. Carmichael, Senior Litigation Counsel; Office of Immigration, Civil Division, United States Department of Justice, Washington, D.C.; for Respondent.

OPINION

PER CURIAM:

Ming Dai petitions for review of a decision by the Board of Immigration Appeals (BIA) denying his application for asylum and withholding of removal. On his first trip to our court, a divided panel granted his petition and remanded his case to the BIA for the exercise of its statutory discretion and to grant withholding of removal. *Dai v. Sessions*, 884 F.3d 858, dissent amended by, 916 F.3d 731 (9th Cir. 2018) (Trott, J., dissenting).

Pursuant to a writ of certiorari, the government took the case to the U.S. Supreme Court. The Court vacated our

opinion and remanded the matter to us with instructions and for further proceedings. *Garland v. Dai*, 141 S. Ct. 1669, 1681 (2021). After considering the litigants' new briefs, we deny Dai's petition.

I

Because the facts of this case are exhaustively arrayed in previous opinions, including the Immigration Judge's (IJ) and the BIA's decisions, we repeat them here only as necessary to illuminate our analysis and conclusions.

The IJ hearing Dai's case denied his application because the IJ concluded that Dai had failed to meet his burden of proving eligibility for asylum under Section 208(a) of the Immigration and Naturalization Act (INA). The BIA "adopt[ed] and affirm[ed]" the IJ's decision, adding that the voluntary return of Dai's wife and daughter to China "and his not being truthful about it is detrimental to his claim and is significant to his burden of proof." 884 F.3d at 890 (Trott, J., dissenting). The IJ and the Board based their determinations on (1) Dai's intentional concealment of "highly probative and damaging facts," 141 S. Ct. at 1680; (2) his lack of forthrightness; (3) his inadequate explanation for his wife's voluntary return to China, given that she was the primary object of alleged persecution in China; (4) admitted germane inconsistencies between his testimony and the story he told an asylum officer; and (5) his equivocating answers and unconvincing demeanor while testifying.

II

Our panel majority arrived at its decision by applying a non-statutory "special rule" we had long employed in immigration disputes. 141 S. Ct. at 1674. This rule required

us in the absence of an explicit adverse credibility finding by the agency to assume the credibility and truth of an alien's factual contentions. *See, e.g., Kataria v. INS*, 232 F.3d 1107, 1114 (9th Cir. 2000); *Zhiqiang Hu v. Holder*, 652 F.3d 1011, 1016 (9th Cir. 2011). The Court referred to this judge-made formulation as our "deemed-true-or-credible rule." 141 S. Ct. at 1677.

III

The Court disapproved our rule as irreconcilable with the INA, 66 Stat. 163, as amended, 8 U.S.C. §1101 *et seq*. *Id.* The Court emphasized that "the INA provides that a reviewing court must accept 'administrative findings' as 'conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.'" *Id.* (citing 8 U.S.C. § 1252(b)(4)(B)). Thus, "[t]he only question for judges reviewing the BIA's factual determinations is whether *any* reasonable adjudicator could have found as the agency did." *Id.* at 1678 (emphasis in original). The Court called this standard "highly deferential," adding that "reasonable findings may not be disturbed." *Id.* at 1677. The Court reiterated that we are only a reviewing court in this context, not one to which litigants come on appeal. *See id*. at 1677–78.

As for the INA's statutory rebuttable presumption of credibility on appeal where the IJ has not rendered an explicit finding on this issue, *see* 8 U.S.C. §§ 1158(b)(1)(B)(iii), 1231(b)(3)(C), 1229a(c)(4)(C), the Court limited its applicability to an appeal to the BIA. *Id.* The Court said that our "deemed-true-or-credible rule" therefore has no proper place in a reviewing court's analysis. *Id.* at 1678. The Justices enjoined us to assess the lawfulness of the BIA's action "in light of the explanations the agency offered for it," not "any *ex post* rationales" we might devise.

Id. at 1679. "So long as the BIA's reasons for rejecting an alien's credibility are reasonably discernible, the agency must be understood as having rebutted the presumption of credibility. It need not use any particular words to do so. And, once more, a reviewing court must uphold that decision unless a reasonable adjudicator would have been compelled to reach a different conclusion." *Id.* (citing 8 U.S.C. § 1252(b)(4)(B)). Accordingly, the Court left it to us on remand to apply this test.

IV

Complete with detailed supporting findings of material fact, the IJ's adverse decision is a careful, extensive, and thorough explanation of Dai's failure to sustain his burden of proof, which required him to prove that his claim was not only credible, but also persuasive. The BIA added to the IJ's convincing reasoning its own assessment of the effect of Dai's intentional lack of truthfulness on a crucial point, stating that it was "significant to his burden of proof." 884 F.3d at 876 (Trott, J., dissenting).

Following the Court's guidance, which eschews looking for formulaic words, we conclude that the BIA implicitly considered Dai's statutory rebuttable presumption of credibility on appeal to have been conclusively rebutted by the factual record. There is no other rational way to read its decision. To conclude otherwise would require us to turn a blind eye to the Board's statement that Dai had "not [been] truthful" about highly probative and damaging facts detrimental to his case. 884 F.3d at 890 (Trott, J., dissenting).

In addition, the Court pointed out that simple credibility is not the only component of an applicant's burden of proof. By statute, an alien must also satisfy the trier of fact that his

factual claim is not only credible, but also persuasive. 141 S. Ct. at 1680. The Court explained that testimony which is credible might nonetheless not be persuasive. *Id.* at 1681. "Accordingly, even if the BIA treats an alien's testimony as credible, the agency need not find his evidence persuasive or sufficient to meet the burden of proof." *Id.* at 1680.

Any fair reading of the agency's decisions in this case indicates that it did not find Dai's case to be persuasive. In this respect, the agency's findings of fact and conclusions drawn therefrom are demonstrably reasonable. No reasonable adjudicator would be compelled to conclude to the contrary.

Because the standard for withholding of removal is a more demanding version of the same test, 141 S. Ct. at 1675 n.2, Dai is not entitled to that relief either.

Petition **DENIED**.