

Immigration Law—First Circuit’s Deferential Standard for Reviewing Adverse Credibility Determinations in Asylum Cases Remains Unchanged—*Cuko v. Mukasey*, 522 F.3d 32 (1st Cir. 2008)

An Immigration Judge (IJ) or the Board of Immigration Appeals (BIA) will commonly deny an application for asylum in the United States as a result of an adverse credibility determination.¹ Appellate Courts give adverse credibility determinations great deference on appeal if the IJ gave specific reasons justifying the finding.² In *Cuko v. Mukasey*,³ the First Circuit Court of Appeals considered whether an adverse credibility determination based on perceived inconsistencies in testimony and the applicant’s demeanor should be upheld under this deferential standard of review.⁴ The First Circuit, applying the substantial evidence standard, denied the petition for review because the record did not compel a decision contrary to that of the IJ and BIA.⁵

Vllasi Cuko, a citizen of Albania, filed an application for asylum, withholding of removal, and protection under the Convention Against Torture (CAT) in response to removal proceedings initiated in July 2001.⁶ During the hearing, Cuko testified that prior to leaving Albania he was persecuted by the

1. See 3 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 33.04[3][e] (rev. ed. 2008) (discussing frequency of adverse credibility determinations in asylum cases); see also *infra* notes 17-19 and accompanying text (explaining burden of credible evidence on applicant and bases for adverse credibility determinations).

2. See *Dhima v. Gonzales*, 416 F.3d 92, 96 (1st Cir. 2005) (upholding IJ’s adverse credibility determination where IJ provided specific reasons, supported by record, for decision); *Akinwande v. Ashcroft*, 380 F.3d 517, 522 (1st Cir. 2004) (deferring to IJ’s determinations when specific reasons given).

3. 522 F.3d 32 (1st Cir. 2008).

4. See *id.* at 37 (setting forth allegations of error as basis for petition for review).

5. See *id.* (asserting IJ’s determination affirmed unless record compels contrary determination); see also *infra* notes 21-22 and accompanying text (detailing substantial evidence standard).

6. 522 F.3d at 34 (describing multiple applications brought by applicant). The court did not need to address the withholding of removal or CAT issues after upholding the denial of asylum because both claims carry higher burdens of proof than the asylum claim. *Id.* at 40; see also *Stroni v. Gonzales*, 454 F.3d 82, 87-90 (1st Cir. 2006) (detailing differences in burdens of proof). In order to qualify for withholding of removal, an applicant must establish a “clear probability” of persecution or that he or she would more likely than not be persecuted upon return to his or her country. See REGINA GERMAIN, AILA’S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 26 (5th ed. 2007) (describing required levels of certainty of proof). Withholding of removal differs from asylum in that if granted asylum, an individual has the right to remain in the United States; withholding of removal only prevents an individual from being returned to the country where the persecution would take place. See *id.* at 26-27 (distinguishing withholding-of-removal claim from asylum claim). If an applicant prevails on a withholding-of-removal claim, the immigration authorities may still remove the applicant from the United States; however, instead of returning the applicant to the home country, the authorities will undertake to find a third country where the applicant can live free of persecution. *Id.* at 27. In order to qualify for relief under the CAT, an applicant must show that it is more likely than not that he will be tortured upon return to his country. *Id.* at 273. Similar to withholding of removal, relief under the CAT prevents removal to the country where persecution occurs, but does not guarantee the right to remain in the United States. *Id.* at 259-60.

Albanian government because of his affiliation with the Democratic Party and was thus seeking asylum in the United States.⁷ According to the IJ's decision, Cuko changed his testimony multiple times with regard to how he obtained his Democratic Party membership card, seemingly because he realized it was inconsistent with his prior testimony.⁸ The IJ also made note of the fact that a certificate from the Democratic Party branch office dated December 28, 2001 contradicted Cuko's testimony that he was an active member of the party until March 2001.⁹ The IJ found that these two discrepancies were material because they went to the heart of his claim; consequently, Cuko was not eligible for asylum because his testimony was not credible.¹⁰ The IJ also mentioned other discrepancies that were not themselves material, but "became material in combination with Cuko's other perjurious testimony," and gave additional evidence for an adverse credibility finding.¹¹

The IJ, relying on inconsistencies in Cuko's testimony and an assessment of Cuko's overall demeanor, denied Cuko's applications on the grounds that Cuko had not presented credible evidence of a well-founded fear of persecution in Albania.¹² Furthermore, the IJ noted that even if Cuko could show past

7. 522 F.3d at 34 (detailing his family's internment in concentration camp by former communist government of Albania). Cuko also testified that after the Communist Party fell in 1990, he became active in his hometown chapter of the Democratic Party, whose main opposition is the Socialist Party, the successor to the Communist Party. *Id.* Cuko further testified that after he organized and participated in a Democratic Party event in February 2001, masked individuals stoned his house and "terrorized" his family. *Id.* at 35. He claimed that after this event, he received threats that his son would be kidnapped if Cuko did not stop his activities in the Democratic Party. *Id.* He also testified that after holding a party rally on March 21, he was arrested, insulted, and beaten by the police, whom he claims are allied with the Socialist Party. *Id.*

8. *Id.* at 35 (highlighting patent contradictions in testimony). Cuko first testified that he asked his father-in-law to obtain the card from the Democratic Party archives. *Id.* He then changed his testimony and said he left the card at his home in Albania. *Id.* Immediately after that, he again changed his testimony and said that he gave the card to his father-in-law before leaving Albania. *Id.*

9. *Id.* at 35-36 (noting discrepancies between certificate's contents and applicant's testimony). The certificate stated Cuko was a member of the Democratic Party from 1992 until November 2000 and acknowledged his regular payment of membership dues. *Id.* The IJ determined that because the certificate stated that Cuko stopped paying dues in November 2000, this evidence contradicted his testimony about being active in the party through March 2001. *Id.* at 36. Cuko attempted to explain this purported discrepancy by saying that he intended to move to a different town and register with a different chapter of the party but failed to ever move and re-register. *Id.* The IJ rejected this explanation as "wholly unsatisfactory," noting that the letter would likely indicate that he remained active in the party during this period if he had not moved or stopped participating in party activities. *Id.* The IJ also determined that it was "inconceivable" that the certificate did not mention the persecution that allegedly occurred in the spring of 2001. *Id.* The IJ never inquired as to whether Democratic Party rules restricted non-dues-paying members from remaining active in party activities or whether they even monitored this issue. *Id.* at 42 (Cyr, J., dissenting).

10. *See id.* at 36 (addressing materiality of discrepancies).

11. *See* 522 F.3d at 36 (listing other reasons for IJ's adverse credibility finding). The IJ noted that Cuko was "completely evasive and nonresponsive" when asked about the source of the money he paid to have his wife and child smuggled into the United States. *Id.* Additionally, his testimony on this topic directly contradicted the testimony of his wife. *Id.* She testified that they only owned one home in Albania, but Cuko at one point testified that he sold one of his two homes in Albania to pay to smuggle his family. *Id.*

12. *See supra* notes 8-11 and accompanying text (outlining IJ's bases for adverse credibility determination); *see also infra* note 18 and accompanying text (explaining proof of well-founded fear of

persecution, the State Department country reports showed changed conditions in Albania that overcame the presumption of a well-founded fear of persecution.¹³ Cuko then appealed the IJ's decision to the BIA, which affirmed and adopted the decision of the IJ upholding the adverse credibility finding and the determination that the State Department reports overcame the presumption of well-founded fear based on past persecution.¹⁴ Cuko then petitioned to the First Circuit Court of Appeals for review of the BIA's order, arguing that the IJ's adverse credibility finding was not supported by the record.¹⁵ After reviewing both the IJ's and the BIA's opinions, the First Circuit held that the record did not compel it to overrule the IJ's adverse credibility finding and therefore denied the petition for review.¹⁶

In order to qualify for asylum, applicants must present credible evidence demonstrating that they qualify as a "refugee," as defined by the Refugee Act of 1980.¹⁷ Under this standard, applicants must establish an unwillingness to return to their home country because of either past persecution or a "well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."¹⁸ If, during the

persecution and effect of past persecution).

13. See 522 F.3d at 35 (describing IJ's impressions of conditions in Albania). According to the IJ, the State Department reports showed there was no longer any indication of "systemic political persecution" against opponents of the Communist Party in Albania. *Id.* at 35.

14. See *id.* at 36-37 (discussing BIA's basis for affirming IJ's decision). The BIA determined there was sufficient evidence in the record for the IJ's credibility finding and for the finding that the State Department report showed there was no well-founded fear of persecution. *Id.*

15. See *id.* at 37 (describing basis for appeal to First Circuit). Cuko also argued that the IJ had "improperly assumed the role of a government attorney." *Id.* The First Circuit rejected this position because the petitioner's brief did not indicate any specific instance in support of this claim. See *id.* at 40 (citing lack of argumentation on role-of-government-attorney claim); see also *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) (holding issues waived on appeal if referred to without developed argument).

16. See 522 F.3d at 40-41 (denying petition for review); see also *infra* note 23 and accompanying text (citing instances where appeals court reviewed findings of both IJ and BIA).

17. See 8 U.S.C. § 1101(a)(42) (2005) (providing statutory definition of "refugee"); see also 8 C.F.R. § 208.13(b) (2008) (setting forth qualifications of refugee based on past persecution); Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 416 (2007) (explaining burden of proof on applicant to prove refugee status). If the IJ does not explicitly make an adverse credibility determination, there is a rebuttable presumption that the applicant is credible. See RICHARD D. STEEL, STEEL ON IMMIGRATION LAW 2D 8:8 (re. 5 2003) (discussing credibility findings regarding asylum applicants).

18. See 8 U.S.C. § 1101(a)(42)(A) (2005) (providing statutory definition of "refugee"); see also THOMAS ALEXANDER ALEINKOFF ET AL., IMMIGRATION PROCESS AND POLICY, ch. 8, sec. C (3d ed. 1995) (examining precedent for defining "well-founded" fear). An applicant is presumed to have a well-founded fear of persecution if he establishes past persecution in a given country. See 8 C.F.R. § 208.13(b)(1) (2008) (discussing effect of past persecution). This presumption can be overcome if an IJ determines that the country at issue has undergone a "fundamental change in circumstances" sufficient to dispel any prior fear of persecution in that country. See 8 C.F.R. § 208.13(b)(1)(i)(A) (2008) (establishing rebuttable presumption of well-founded fear). An applicant has a well-founded fear of persecution in the future if there is a "reasonable possibility of suffering such persecution" if he returned to his country and he is "unable or unwilling" to return to his country because of that fear. See 8 C.F.R. § 208.13(b)(2)(i)(B), (C) (2008) (defining "well-founded fear of persecution"); see also SARAH IGNATIUS ET AL., REPRESENTING ASYLUM SEEKERS 19-21 (1997)

course of the proceeding, the IJ makes a determination that an applicant is not a credible witness, and there is insufficient evidence introduced to corroborate that testimony, the applicant will not meet the requisite burden, and the IJ will consequently deny the application.¹⁹ Additionally, for asylum applications filed prior to the passage of the REAL ID Act, an adverse credibility finding by the IJ must rest on discrepancies that go to the “heart of the asylum claim” and not on inconsequential inconsistencies in the applicant’s testimony.²⁰

Provided the IJ puts forth specific reasons for making an adverse credibility determination, its findings are reviewed under a deferential “substantial evidence standard.”²¹ Under this standard, the IJ’s findings will only be overturned if the record would *compel* a reasonable fact-finder to conclude differently.²² The First Circuit will review the decisions of both the IJ and the BIA if the BIA has adopted and affirmed the IJ’s credibility determinations and discussed some of the bases of the IJ’s determination.²³ Furthermore, pursuant

(distinguishing concepts of past persecution and well-founded fear of future persecution). To establish a well-founded fear, the applicant need not prove that he will more likely than not be persecuted upon return to his country. *See* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987) (accepting basis for well-founded fear when chance of event occurring is less than fifty percent). A well-founded fear of persecution can be based on an actual affiliation with a group or a perceived affiliation with a group if that perception is reasonable. *See* 8 C.F.R. § 208.13(b)(2)(iii)(B) (2008); Mekhouk v. Ashcroft, 358 F.3d 118, 124 (1st Cir. 2004) (defining standard for perceived affiliation with persecuted group).

19. *See* Dhima v. Gonzales, 416 F.3d 92, 95 (1st Cir. 2005) (stating credible testimony is critical for asylum); *see also* Diaz-Escobar v. I.N.S., 782 F.2d 1488, 1492 (9th Cir. 1986) (requiring “credible, direct, and specific” evidence from applicant on possibility of persecution). If the applicant’s testimony is insufficient to sustain the burden of proving a well-founded fear, corroborating evidence may be used to bolster credibility. *See* 8 C.F.R. § 1208.13(a) (2008); Hoxha v. Gonzales, 446 F.3d 210, 216 (1st Cir. 2006) (permitting use of corroborating evidence). Such evidence may include expert testimony; “documentation from the applicant’s home country; newspaper articles; or human rights reports from the Department of State, Amnesty International, Human Rights Watch, or other reputable organizations.” GERMAIN, *supra* note 6, at 84. Under the REAL ID Act, the IJ can rely on inconsistencies between the applicant’s testimony and other evidence. *Id.*

20. *See* Hoxha v. Gonzales, 446 F.3d 210, 217 (1st Cir. 2006) (citing minor inconsistencies as insufficient bases for adverse credibility determination); *see also* Bojorques-Villanueva v. Immigration and Naturalization Serv., 194 F.3d 14, 16 (1st Cir. 1999) (adopting Ninth Circuit standard where discrepancy must involve heart of asylum claim). Any application for asylum or other type of relief from removal made on or after May 11, 2005 is not subject to the heart of the claim requirement as a result of the passage of the REAL ID Act of 2005. *See* Hoxha v. Gonzales, 446 F.3d 210, 216 n.4 (1st Cir. 2006) (noting changes in standards for credibility determinations under REAL ID Act); GORDON ET AL., *supra* note 1, at 34-54 (discussing impact of REAL ID Act on credibility determinations); *see also* 8 U.S.C. § 1158 (b)(1)(B)(iii) (2005) (listing factors to consider for credibility determination under REAL ID Act).

21. *See, e.g.,* Hoxha v. Gonzales, 446 F.3d 210, 216 (1st Cir. 2006) (reviewing asylum claim under substantial evidence standard); Dhima v. Gonzales, 416 F.3d 92, 95 (1st Cir. 2005) (applying substantial evidence standard to asylum claim); Afful v. Ashcroft, 380 F.3d 1, 3-4 (1st Cir. 2004) (using substantial evidence standard to review adverse credibility determination of IJ); *see also supra* note 2 and accompanying text (addressing need for IJ to give specific reasons for determination).

22. *See* 8 U.S.C. § 1252(b)(4)(B) (2005) (providing statutory basis for substantial evidence standard); I.N.S. v. Elias-Zacarias, 502 U.S. 478, 483-84 (1992) (reversing decision to overturn BIA ruling because record did not compel different decision from BIA); Dhima v. Gonzales, 416 F.3d 92, 96-97 (1st Cir. 2005) (affirming order of BIA because record does not compel, or even suggest, different conclusion).

23. *See* Chanthou Hem v. Mukasey, 514 F.3d 67, 69 (1st Cir. 2008) (reviewing decisions of both IJ and BIA).

to the three-pronged test set forth in *Hoxha v. Gonzales*,²⁴ the First Circuit will uphold an adverse credibility determination if the discrepancies and inconsistencies are actually present in the record, the discrepancies and inconsistencies provided specific and cogent reasons for an adverse credibility determination, and the applicant did not provide a convincing explanation for the discrepancies.²⁵

When reviewing adverse credibility determinations, some circuits distinguish between self-evident discrepancies and non-obvious discrepancies.²⁶ The Second Circuit has held that if the inconsistencies in the applicant's testimony are so obvious that the applicant should be aware of them without the IJ identifying them during the proceeding, then the IJ may rely on them in making an adverse credibility determination without seeking further explanation.²⁷ Regarding non-obvious discrepancies, however, the Second, Seventh, and Ninth Circuits have held that IJs cannot base adverse credibility determinations on minor or trivial inconsistencies unless they afforded the applicant an opportunity to explain the inconsistency.²⁸

In *Cuko v. Mukasey*, the First Circuit reviewed the IJ's adverse credibility determination under the substantial evidence standard and denied Cuko's

24. 446 F.3d 210 (1st Cir. 2006).

25. See *Hoxha v. Gonzales*, 446 F.3d 210, 214 (1st Cir. 2006) (outlining requirements of three-prong test for review of adverse credibility determinations under substantial evidence standard); *In re A-S-*, 21 I. & N. Dec. 1106, 1109 (B.I.A. 1998) (outlining test adopted by First Circuit in *Hoxha*). In *Hoxha*, the First Circuit held that to satisfy the second prong, the inconsistencies must go to the heart of the applicant's claim. See *Hoxha v. Gonzales*, 446 F.3d 210, 217 (1st Cir. 2006) (applying heart-of-claim requirement to claim predating REAL ID Act). According to the *Hoxha* court, if the inconsistency does not go to the heart of the applicant's claim, there is not a sufficient reason for an adverse credibility determination. *Id.* The *Hoxha* court also held that the discrepancies must bear a "legitimate nexus" to the adverse credibility finding. *Id.* at 218.

26. See, e.g., *Kwok v. Gonzales*, 455 F.3d 766, 772 (7th Cir. 2006) (holding findings insufficient where IJ did not inquire into inconsistencies potentially caused by language barrier); *Xue v. Bd. of Immigration Appeals*, 439 F.3d 111, 114-15 (2d Cir. 2006) (requiring IJ to bring non-obvious discrepancies to applicant's attention before relying on them); *Chen v. Ashcroft*, 362 F.3d 611, 618 (9th Cir. 2004) (holding IJ cannot rest adverse credibility determination on latent discrepancy without seeking reasonable clarification). The *Xue* court identified three lines of reasoning to support its decision. See *Xue v. Bd. of Immigration Appeals*, 439 F.3d 111, 122 (2d Cir. 2006) (putting forth reasoning for distinguishing latent discrepancies). First, the court noted that IJs must give applicants a chance to address deficiencies when corroborative evidence is needed. *Id.* Second, it noted that IJs are required to clarify vague testimony. *Id.* Third, it noted that an IJ is still required to determine the credibility of these explanations once given. *Id.*

27. See *Xue v. Bd. of Immigration Appeals*, 439 F.3d 111, 125 (2d Cir. 2006) (instructing courts to determine whether inconsistencies are "plainly self-evident"); *Majidi v. Gonzales*, 430 F.3d 77, 81 (2d Cir. 2005) (holding IJ may rely on "dramatically different" inconsistencies without asking for clarification). The *Majidi* court concluded that a dramatic inconsistency will serve as substantial evidence for the adverse credibility determination even without further probing, and such a determination will stand on appeal. See *Majidi v. Gonzales*, 430 F.3d 77, 81 (2d Cir. 2005) (noting failure to solicit explanation does not insubstantiate evidence).

28. See *Kwok v. Gonzales*, 455 F.3d 766, 770 (7th Cir. 2006) (declaring IJ's analysis insufficient for not attempting to determine if applicant could account for inconsistencies); *Xue v. Bd. of Immigration Appeals*, 439 F.3d 111, 125 (2d Cir. 2006) (holding IJ erred in relying upon non-obvious inconsistency without asking applicant to clarify); *Chen v. Ashcroft*, 362 F.3d 611, 618 (9th Cir. 2004) (disallowing reliance on perceived inconsistency without allowing reasonable opportunity for explanation from applicant).

petition for review because the record did not compel a contrary determination from that of the IJ and BIA.²⁹ The court examined each of the discrepancies cited by the IJ separately and applied the *Hoxha* standard to determine whether the record compelled a contrary decision.³⁰ The majority first noted that the primary discrepancies relied upon by the IJ were present in the record and went to the heart of Cuko's claim of persecution for his political beliefs.³¹ Secondly, the court noted that the IJ based his adverse credibility determination on these specific inconsistencies and Cuko's demeanor as a witness.³² Finally, the court concluded that the judge was at least reasonable in determining that any explanations given by Cuko were inadequate.³³ After this application of the *Hoxha* standard, the court held that the record did not compel a different decision from that of the IJ, and Cuko's petition was therefore denied.³⁴

The First Circuit correctly upheld the adverse credibility finding of the IJ in *Cuko v. Mukasey* under the substantial evidence standard.³⁵ Under this highly deferential standard, the court's role was to analyze the decisions of the IJ and BIA to determine whether the record compelled them to make a different determination.³⁶ The record did not compel a contrary determination because, among other things, Albania had undergone a fundamental change in circumstances sufficient to alleviate Cuko's alleged fear of persecution.³⁷

Notwithstanding the accuracy of the end result, the decision brings to light a deficiency in the First Circuit's handling of adverse credibility determinations

29. See 522 F.3d at 38-39 (granting IJ adverse credibility determinations great weight under deferential standard of review); see also *supra* notes 21-22 and accompanying text (describing standard of review for adverse credibility determinations).

30. See 522 F.3d at 37 (defining narrow inquiry for substantial evidence standard); see also *supra* note 25 and accompanying text (addressing three-prong test for application of substantial evidence standard).

31. See 522 F.3d at 37-39 (applying *Hoxha* standard to record); see also *supra* notes 8-9 and accompanying text (discussing material discrepancies in Cuko's testimony). Cuko's claim was subject to the "heart of the claim" rule because it was filed before May 11, 2005, pre-dating the enactment of the REAL ID Act. See 522 F.3d at 38 n.2 (noting applicability of "heart of the claim" rule); see also *supra* note 20 and accompanying text (articulating "heart of the claim" rule for adverse credibility determinations). The court also noted that inconsistencies regarding how Cuko smuggled his wife and child into the United States, though collateral to the claim, lent additional support to the adverse credibility finding. See 522 F.3d at 39 (examining additional inconsistencies that strengthened IJ's adverse credibility determination); see also *supra* note 11 and accompanying text (describing inconsistencies in testimony regarding smuggling of family to the United States).

32. See 522 F.3d at 39 (describing IJ's basis for determining Cuko had not met burden of showing well-founded fear). The IJ went as far as to suggest that Cuko and his family "concocted" their story in an effort to "obtain lawful permanent residence" in the United States. *Id.* at 36.

33. See *id.* at 38-39 (noting applicant given chance to clarify material inconsistencies in testimony).

34. See *id.* at 37, 41 (determining record did not compel contrary decision).

35. See *id.* at 38-39 (outlining bases for not overturning adverse credibility determination); see also *supra* notes 7-11 and accompanying text (detailing inconsistencies found by IJ in applicant's testimony); *supra* notes 21-25 and accompanying text (describing standard of review for appeal of adverse credibility determinations by IJ and BIA).

36. See *supra* note 23 and accompanying text (giving basis for review of both IJ and BIA determinations).

37. See *supra* note 18 (noting effect of fundamental change in circumstances in native country); see also *supra* notes 7-11 and accompanying text (detailing other aspects of applicant's testimony).

in asylum cases.³⁸ In applying the substantial evidence standard, the First Circuit focused solely on the record itself and whether it compelled a different conclusion, without giving sufficient examination to the actions and determinations of the IJ not expressed in the record.³⁹ In doing so, the First Circuit encourages the appellate court to affirm the IJ and BIA findings as a whole and to ignore questionable actions and determinations of the IJ.⁴⁰ Specifically, the First Circuit failed to require an IJ to probe the applicant for an explanation of testimonial discrepancies that are not self-evident, as many other circuits have done.⁴¹ As a result, the IJ has the ability to note inconsistencies that are not obvious or evident to the applicant and to factor them into an adverse credibility determination without asking for further clarification while the applicant is testifying.⁴²

When IJs are able to rely on non-obvious discrepancies without seeking clarification, a certain measure of truth and fairness is lost in asylum hearings, causing potentially serious ramifications.⁴³ In most asylum cases, there is little evidence outside of the testimony of the applicant, and the IJ is the only decision-maker in the process with the ability to ask questions to clarify any discrepancies in the testimony.⁴⁴ Furthermore, non-obvious discrepancies that could have been explained by the applicant if he had been probed further will be overlooked on appeal due to the deferential nature of the substantial evidence standard.⁴⁵ If an appellate court incorrectly upholds an adverse

38. See 522 F.3d at 41 (Cyr, J., dissenting) (arguing wholesale deference to credibility determinations makes review “exercise in rubber stamping”).

39. *But see id.* at 43 (describing shortcomings of review).

40. See *id.* at 38 n.3 (majority opinion) (accepting inference of IJ as “at least plausible”). The majority emphasized that the possibility of the opposite inference being true was not sufficient to overturn the determination of the IJ under the substantial evidence standard. *Id.*

41. See *supra* notes 26-28 and accompanying text (addressing expansion of review in other circuits). Even if the IJ had been required to make further investigation on non-obvious discrepancies, the First Circuit would likely have reached the same result regarding Cuko’s petition because the inconsistencies in his testimony regarding his Democratic Party membership card were self-evident, and conditions in Albania no longer threatened his security. See *supra* note 8 and accompanying text (describing inconsistencies in testimony regarding membership card).

42. See 522 F.3d at 43 (Cyr, J., dissenting) (describing IJ’s ability to “blindsides” applicant); see also *Xue v. Bd. of Immigration Appeals*, 439 F.3d 111, 113-14 (2d Cir. 2006) (describing consequences of incorrect adverse credibility determinations). The *Xue* court also recognized the possibility of false claims in immigration cases, but took steps to prevent IJs from making rash credibility determinations because of the serious nature of the consequences that mistakes in this process may cause. See *Xue v. Board of Immigration Appeals*, 439 F.3d 111, 114-15 (2d Cir. 2006) (warning of serious implications for applicants in asylum cases).

43. See 522 F.3d at 43 (Cyr, J., dissenting) (describing “essential truth-seeking function of asylum proceedings”); see also *infra* note 46 and accompanying text (describing potential consequences of incorrect adverse credibility determination).

44. See *Xue v. Bd. of Immigration Appeals*, 439 F.3d 111, 124 (2d Cir. 2006) (describing unique role of IJ in asylum proceedings process); see also *GORDON ET AL.*, *supra* note 1, § 34.02[9][a] (describing difficulty asylum applicants face in obtaining evidence to support their claim). Any physical evidence that applicants possessed is usually lost or destroyed in the process of fleeing their home country. *Id.* Even if evidence is not destroyed, it is nearly impossible to obtain it from the country from which the applicant fled. *Id.*

45. See *supra* notes 21-22 and accompanying text (illustrating use of substantial evidence rule in adverse

credibility determination on appeal, the court is effectively sentencing the applicant to return to a country where he will be persecuted.⁴⁶ Had the First Circuit followed the lead of other circuits, IJs would not be able to rest an adverse credibility determination upon a discrepancy that was not self-evident without asking for further clarification, perhaps preventing affirmations of incorrect determinations at the appellate level.⁴⁷

Some courts have held that an IJ is unable to base an adverse credibility determination on a discrepancy that is not self-evident without probing the witness for further testimony. In *Cuko v. Mukasey*, the First Circuit failed to expand their standard of review to implement such a requirement. This failure is particularly troubling in light of the enactment of the REAL ID Act because an IJ may now rely on a non-evident inconsistency that does not even go to the heart of the asylum claim to make an adverse credibility determination without seeking clarification from the applicant. Although altering the standard of review likely would not have affected the result in this case, by not addressing this issue the First Circuit allowed the continuation of asylum hearings in which the truth may be available, but may never be heard.

Jeffrey E. Dolan

credibility determination reviews).

46. See *Xue v. Bd. of Immigration Appeals*, 439 F.3d 111, 114 (2d Cir. 2006) (describing gravity of consequence of error in determination). Forced abortions, physical torture, and banishment are among the methods of persecution that await those incorrectly deemed ineligible. *Id.*

47. See *supra* note 26 and accompanying text (describing standards adopted by other circuits).