No. 23-279258

IN THE

Supreme Court of the United States

Annie Montrano,

Petitioner,

v.

Attorney General of the United States,

Respondent.

ON WRIT OF CERTIORARI TO THE
FIFTEENTH CIRCUIT COURT OF APPEALS

Issues on Writ of Certiorari:

1. Where is venue proper when removal proceedings are conducted by teleconference from a Circuit different from the Circuit in which the removal proceedings were initiated and where the noncitizen is detained?
2. What constitutes "contrary evidence," and would any reasonable adjudicator be compelled to conclude that Petitioner is a native of Asmar and a member of the particular social group "indigenous Marani persons?"

****NOTE TO COMPETITORS:**
No cases decided, nor legislation, regulation, or agency policy enacted after November 15, 2023, may be cited or relied upon in either briefs or oral argument.

No. 9382-3480

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTEENTH CIRCUIT

Annie Montrano

Appellant,

v.

Attorney General of the United States

Appellee.

ON APPEAL FROM BOARD OF IMMIGRATION APPEALS

Filed November 15, 2023

Before: Judges Frank, Santos, and Baker

Opinion by Judge Santos
Dissent by Judge Frank

Santos, Circuit Judge, joined by Baker, Circuit Judge:

I. Factual Background

Annie Montrano is a 36-year-old woman of indigenous Marani heritage. Montrano claims to be an Asmaran citizen. The Marani people are native to the Spine Mountains, a border region between Asmar and Morasia. When the two states incorporated their portions of the Spine Mountains into their territory, the Marani became citizens of the country in which they resided. There continues to be a Marani population in both Asmar and Morasia.

The Marani population in Asmar are effectively second-class citizens. The three most recent Asmaran presidents have all made derogatory remarks in public about the Marani. The State Department reports that the Marani are the victims of a disproportionate amount of violence compared to other Asmaran citizens, at least some of which is due to racial animus. Nongovernmental organizations have reported that when an indigenous Marani person reports a crime, police regularly refuse to investigate. The most recent Country Reports on Asmar have indicated that the government of Asmar has refused to take any action to remedy the plight of the Marani people. Nongovernmental organizations report that the Asmaran government regularly refuses to issue Marani persons identity documents, including passports.

Montrano worked as a librarian for 10 years. When she was 29, Montrano became pregnant. Montrano was let go from her job, ostensibly because of her pregnancy, but she suspects it was actually because of her indigenous heritage. Unfortunately, Montrano suffered a miscarriage. Despite complaining to her doctors multiple times about strange pains, the doctors ignored her pleas and never took action.

Montrano was forced to find a new job as a housekeeper. Despite working diligently, problems started to crop up when her cousin, Andrew Baxter, a well-known Marani activist, was beaten after being taken into custody by police. Andrew sued the local Asmaran police force for excessive violence, and used the lawsuit to draw attention to his greater campaign against Marani discrimination. Annie began to suffer slights at work, ostensibly on account of her indigenous heritage.

Her home life was affected as well. She arrived home multiple times to find her house was covered in eggs or toilet paper. One time, someone had spray painted, "Marani dog" on her front door. Finally, Montrano began to receive violent threats from neighbors. Among these were the statements, "you people shouldn't even exist" and "no one wants you in this country." When she received a death threat, she decided to leave for the United States to seek asylum.

Montrano entered the United States without inspection in June 2020. Within hours of entering, she was apprehended by Customs and Border Patrol ("CBP") agents.

II. Procedural History

Three days after Montrano's apprehension, the Department of Homeland Security issued a Notice to Appear charging her as removable under 8 U.S.C. § 1182(a)(6)(A)(i) and 8 U.S.C. § 1182(a)(9)(B)(i)(II) for her illegal entry and illegal stay in the United States. Montrano filed for asylum *pro se*.

In the immigration court, all proceedings in Montrano's case were conducted via teleconference. Montrano was detained within the Fourteenth Circuit, and the Department of Homeland Security ("DHS") filed the Notice to Appear in an immigration court within the Fourteenth Circuit. Due to a high caseload, the Immigration Judge ("IJ") who heard her case was physically located within this Circuit.

Montrano testified about inconsistencies in her asylum application. When asked why she listed only "English, Morasian" as her spoken languages, Montrano testified that her failure to list Asmaran on the asylum application was unintentional. When questioned why Montrano listed her race as "Hispanic," Montrano said that the Marani people typically consider themselves Hispanic, and she thought she was supposed to provide the broadest race to which she belongs.

The IJ found Montrano to be credible and granted her asylum, finding that the past persecution she suffered gave rise to a rebuttable presumption of future persecution on account of her membership in the group "indigenous Marani persons" if she returned to Asmar. The government appealed to the Board of Immigration Appeals ("BIA").

The BIA reversed the IJ's decision. The BIA found that Montrano had not sufficiently proven that she would be persecuted on account of her membership in a particular social group because she failed to show (1) she is a national of Asmar, and (2) she is an indigenous Marani. The BIA noted that Montrano had not provided any evidence beyond her own testimony of her Asmaran nationality or her membership in the group "indigenous Marani persons." Additionally, the BIA found Montrano's oral testimony and written application contained inconsistencies—her spoken languages and race—that called into question the persuasiveness of her testimony.

Montrano was able to obtain representation through a nonprofit after the BIA reversed the grant of asylum. Montrano timely filed her petition in this Court—as opposed to the Fourteenth Circuit Court of Appeals— for review of the BIA's determination that she failed to sufficiently prove her Asmaran nationality and her Marani identity.

III. Analysis

A. Standard of Review

"Our review is limited to the BIA's decision except where the IJ's opinion is expressly adopted." *Plancarte Sauceda v. Garland*, 23 F.4th 824, 831 (9th Cir. 2022) (citing *Cordon-Garcia v. INS*, 204 F.3d 985, 990 (9th Cir. 2000)). We review legal conclusions de novo. *Davila v. Barr*, 968 F.3d 1136, 1141 (9th Cir. 2020). We review for substantial evidence factual findings underlying the BIA's determination that a petitioner is not eligible for asylum, withholding of removal, or CAT relief. *Plancarte*, 23 F.4th at 831. To prevail under the substantial evidence standard, the petitioner "must show that the evidence not only supports, but compels the conclusion that these findings and decisions are erroneous." *Id.* (quoting *Davila*, 968 F.3d at 1141).

B. Venue

Montrano was detained in the Fourteenth Circuit, and the Department of Homeland Security initiated removal proceedings in an Immigration Court in that Circuit. When proceedings are completed via teleconference, it is possible for the subject of the removal proceedings and the IJ presiding over those proceedings to be in different circuits. Here, the presiding IJ sat within our Circuit—the Fifteenth—and presided over the proceedings via teleconference. Montrano filed her petition for review in this Circuit, despite being located in the Fourteenth. The question thus arises: is venue proper in the Fourteenth Circuit or in our Circuit?

The government argued the proper venue for this petition is the Fourteenth Circuit, where the removal proceedings were initiated and where Montrano was detained. The government noted that the BIA applied Fourteenth Circuit precedent, in accordance with *Matter of Garcia*, 28 I.&N. Dec. 693 (BIA 2023). The government argued that Montrano filed her petition in this Circuit because of our Circuit's higher rate of reversing the BIA's asylum denials.

The statute states that venue is proper in the circuit "in which the immigration judge completed the proceedings." 8 U.S.C. § 1252(b)(2). The plain meaning of the statute controls. The subject of the sentence is "the immigration judge," and we look to where the IJ "completed the proceedings." *Id.* While the respondent in removal proceedings may be elsewhere, the IJ "complete[s] the proceedings" where the judge sits at the time of the hearing. Here, the IJ sat within our Circuit during the proceedings, and thus this court is the proper venue for review.

We find support for our analysis of the statutory text in a decision from the Fourth Circuit. In *Herrera-Alcala v. Garland*, 39 F.4th 233 (4th Cir. 2022), the court reached the same conclusion. There, the noncitizen[1] appeared at the removal proceedings from Louisiana, where he was detained. *Id.* at 240. Louisiana is

[1] Following Justice Jackson's lead, "[t]his opinion uses the term 'noncitizen' as equivalent to the statutory term 'alien.'" *Santos-Zacaria v. Garland*, 598 U.S. 411, 414 n.1 (2023).

located in the Fifth Circuit. 28 U.S.C. § 41. The presiding IJ sat in Virginia during the proceedings that were conducted via videoconference. *Herrera-Alcala*, 39 F.4th at 240. Virginia is located in the Fourth Circuit. 28 U.S.C. § 41.

The *Herrera-Alcala* court found that the IJ had completed the proceedings in the Fourth Circuit, and thus that venue was proper in the 4th Circuit. *Herrera-Alcala*, 39 F.4th at 241. The court focused on the text of 8 U.S.C. § 1252(b)(2) and concluded that the location of the IJ controlled the venue question. *Id.* The court declined to defer to the BIA's holding that the removal proceedings were completed in Louisiana because the statute was unambiguous. *Id.* at 242.

The government's argument that the proceedings were completed in the Fourteenth Circuit, and thus that this court is not the proper venue, fails for the same reason. The text of 8 U.S.C. § 1252(b)(2) states that venue is proper where the IJ completed the proceedings; not where the noncitizen was detained. Thus, venue is proper in this Circuit.

C. Asylum

"To be eligible for asylum, a petitioner has the burden to demonstrate a likelihood of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *Garcia v. Wilkinson*, 988 F.3d 1136, 1142–43 (9th Cir. 2021). The applicant must

demonstrate a nexus between her past or feared harm and a protected ground. *Garcia* , 988 F.3d 1142–43.

The BIA may not "arbitrarily reject an alien's evidence." *Garland v. Ming Dai*, 141 S. Ct. 1669, 1677 (2021). But, "so long as the record contains contrary evidence of a kind and quality that a reasonable factfinder could find sufficient, a reviewing court may not overturn the agency's factual determination." *Id.* (internal quotations omitted). "In order for an alien's testimony to carry the day on its own, the statute requires the alien to . . . show[] his testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee." *Id.* at 1680 (internal quotations omitted). "Even if the BIA treats an alien's evidence as credible, the agency need not find his evidence persuasive or sufficient to meet the burden of proof." *Id.* (citing *Doe v. Holder*, 651 F.3d 824, 830 (CA8 2011). "When determining whether an alien has met his burden of proof, the INA further provides that the agency may weigh the credible testimony along with other evidence of record." *Id.* (internal quotations omitted). We "must accept the agency's findings of fact as conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." *Id.* at 1681.

Here, the BIA did not disturb the IJ's finding that Montrano is credible or that Montrano suffered harm rising to the level of persecution. However, the BIA did find that Montrano failed to prove her membership in the particular social

group "indigenous Marani persons." While the BIA found that "indigenous Marani persons" would indeed constitute a particular social group, it held that Montrano failed to produce enough evidence to show she was a member of that group. Though Montrano was found credible, there is contrary evidence of a kind that the BIA could reasonably find sufficient, and which, under *Ming Dai*'s high bar, we may not overturn on review.[2] There are three reasons for this.

First, the only evidence provided to meet her burden is Montrano's own testimony that she is a native and citizen of Asmar and of Marani heritage. But cutting against Montrano's claim is her failure to provide any identifying documents. Second, the BIA could have reasonably interpreted the inconsistencies in her application as casting a shadow on her credibility.[3] Lastly, Montrano had an opportunity to claim her Marani heritage in her application, but instead chose to identify herself as "Hispanic." "Faced with conflicting evidence, it seems likely

---

[2] In overruling the Ninth Circuit's longstanding, but flawed, deemed-true-or-credible rule, the Court gave us clear instructions on our role: "First, the factfinder—here the IJ—makes findings of fact, including determinations as to the credibility of particular witness testimony. The BIA then reviews those findings, applying a presumption of credibility if the IJ did not make an explicit adverse credibility determination. Finally, the court of appeals must accept the agency's findings of fact as 'conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.'" *Ming Dai*, 141 S. Ct. at 1681 (2021).

[3] "Admittedly, credibility and persuasiveness are closely bound concepts, sometimes treated interchangeably, and the line between them doesn't have to be drawn the same way in every legal context." *Ming Dai*, 141 S. Ct. at 1680–81.

that [the BIA] could find the unfavorable account more persuasive than the favorable version." *Id.* Thus, nothing in the record compels us to conclude that Montrano is Asmaran or of Marani heritage.

III. Conclusion

Thus this court is the proper venue for review under 8 U.S.C. § 1252(b)(2), and substantial evidence supports the BIA's finding that Montrano failed to prove her membership in a particular social group.

The BIA's decision is AFFIRMED.

Frank, Circuit Judge, Dissenting:

A. Venue

I disagree with the majority's interpretation of 8 U.S.C. § 1252(b)(2). I am surprised by the majority's ability to find an unambiguous meaning in statutory text which has divided our sister Circuits. *See, e.g.*, *Sarr v. Garland*, 50 F.4th 326, 331-32 (2d Cir. 2022) (holding that an IJ completes proceedings where proceedings commenced, absent evidence of a change of venue); *Ramos v. Ashcroft*, 371 F.3d 948, 949 (7th Cir. 2004) (holding that the IJ "completed the proceedings" where "the court is located," meaning "where all parties were required to file their motions and briefs" and "where the orders were prepared and entered"); *Yang You Lee v. Lynch*, 791 F.3d 1261, 1266 (10th Cir. 2015) (considering various factors to determine where IJ "completed the proceedings").

Given this ambiguity, the BIA's position on the matter may be instructive given the agency's expertise. *Merrimon v. Unum Life Ins. Co. of Am.*, 758 F.3d 46, 55 (1st Cir. 2014). The BIA considered this issue in *Matter of Garcia*, 28 I.&N. Dec. 693 (BIA 2023). In *Matter of Garcia*, the Notice to Appear was filed in the Immigration Court in Philadelphia, Pennsylvania. *Id.* at 694. All of the proceedings prior to the final merits hearing were conducted in Pennsylvania. *Id.* The IJ presiding over the final merits hearing was physically located in Virginia. *Id.*

Given that Immigration Court procedures allow parties to appear remotely at every stage of the proceedings, the BIA noted the need for "a uniform rule that will provide transparency and predictability in the choice of law analysis." *Id.* at 698. Following the Second Circuit's approach in *Sarr v. Garland*, 50 F.4th 326 (2d Cir. 2022), the BIA held that " the controlling circuit law . . . is the law governing the geographic location of the Immigration Court where . . . proceedings commence upon the filing of a charging document." *Id.* at 703. The venue will change only if the IJ subsequently grants a change of venue. *Id.*

The majority's rule has the possibility of upsetting the noncitizen's expectations. The situation in *Matter of Garcia* is an illustrative example. It appears manifestly unfair to the noncitizen for the applicable circuit law to change from the Third Circuit to the Fourth because the IJ appeared from Virginia for the final merits hearing. Any legal arguments the respondent has prepared that are based on one Circuit's law risk becoming irrelevant simply because the IJ happened to physically appear from a different Circuit.

B. Asylum

Today, the majority allows the BIA to take from noncitizens something they thought an indelible truth: their identity. In so holding, the BIA sets up another hurdle for noncitizens to leap through, one which credible testimony—the primary tool of asylum seekers—may not be enough to overcome.

The IJ found Montrano credible. The BIA found Montrano credible. Indeed, nowhere in either agency decision do they question Montrano's unwavering honesty. And yet, the BIA, reversing the IJ's fact-finding, found that Montrano had not provided enough evidence to prove her Marani heritage. In the absence of contrary evidence to a noncitizen's credible testimony, any reasonable adjudicator would be compelled to find that a noncitizen is who they say they are.

Here, there was no contrary evidence. The majority points to the lack of identity documents as "contrary evidence." But the absence of evidence is not inherently "contrary evidence."[4] Conflating the two is illogical and sets a dangerous precedent for future holdings.

Similarly, application "inconsistencies" are not "contrary evidence of a kind" that would cast doubt on Montrano's credibility. The majority relies on *Ming Dai* to deny Montrano asylum, but the "contrary evidence" in *Ming Dai* is much more problematic for the credible petitioners in that case. The Court in *Ming Dai* highlighted the half-truths, mischaracterizations, outright lies, and minimizations that were fatal to the petitioners' claims. *Ming Dai*, 141 S. Ct. at 1679–80. Here, Montrano failed to write down her third spoken language.

[4] Particularly in a country with a history of denying identity documents to indigenous people.

Mistakes that could be attributable to, "I didn't have enough room on the paper" should not form the basis for discarding a noncitizen's heritage.

Lastly, the majority points to the fact that Montrano listed her ethnicity as Hispanic, rather than Marani. However, these two are not mutually exclusive; one can be both Marani and Hispanic. We cannot fault an applicant for being someone with multiple applicable identities. These application "inconsistencies" are not actually inconsistent with any fact in Montrano's testimony.

Though *Ming Dai* sets a high bar, it is met in this case. In the absence of contrary evidence, any reasonable adjudicator would have been compelled to conclude that Montrano was persecuted on account of her membership in the group "Marani persons."