DANGEROUS SIDE EFFECTS MAY OCCUR: THE REAL ID ACT’S PRESCRIPTION FOR CHANGING STANDARDS OF CREDIBILITY AND CORROBORATION IN ASYLUM LAW

BY

SHEILAH C. O’GRADY

It is hard for those who have never known persecution,
And who have never known a Christian,
To believe these tales of Christian persecution – T.S. Eliot, “Choruses from ‘The Rock’."

I. Introduction

An asylum applicant begins with a formal application to the Attorney General for protection.[1] They must show in an interview with an asylum officer that they are a refugee, that they have been persecuted in the country of their nationality, and that they have a well founded fear of future persecution, on account of their race, religion, nationality, membership in a particular social group, or political opinion.[2] Their case will eventually land in front of an immigration judge (“IJ”), who will listen to their story and evaluate any corroborating evidence they can provide.[3] Before the IJ makes a decision, the judge must make a credibility finding based on the applicant’s testimony and any corroborating evidence.[4] If the IJ makes an adverse credibility determination, or finds a lack of corroborating evidence, the asylum petition is denied.[5] The applicant can then appeal, in turn, to the Board of Immigration Appeals (“BIA”), and to the federal appellate courts.[6]

Previously, the standard for reversing adverse credibility determinations on review in the federal courts was a ‘substantial evidence’ standard.[7] The circuits had a variety of interpretations of this standard. The standard for requiring corroborating evidence was also applied differently throughout the circuits. With the passage of the Real ID Act last year, Congress eliminated the
previous divergence in responses to adverse credibility determinations and corroborating evidence requirements.[8] The legislature’s response was to choose the stricter approach, eliminating federal circuit review for many legitimate asylum cases, and limiting the ability of the federal circuits to overturn erroneous IJ decisions.

This paper will examine the effects the Real ID Act has had on asylum law by following a constructed hypothetical through the different standards, before and after the Real ID Act. This paper will address in Part One the diverging standards for adverse credibility determinations and corroborating evidence that were in place before the Real ID Act. In Part Two, the paper will examine in closer detail the Real ID Act itself: its history, legislative history, purpose, and results. In Part Three, the paper will review the federal circuit responses to the Real ID Act so far by examining cases in detail that discuss the new standards, and evaluating whether these cases would have the same result as before the Real ID Act, and whether the new results are justified ones.

Hypothetical: J. Lin is applying for asylum, having left China on account of persecution based on his religious practices. He flees China with only his passport and birth certificate. Upon his arrival in the United States, Lin is questioned by an intake officer. Lin indicates that he wishes to apply for asylum, and tells the officer parts of his story, but gets a few dates confused. Lin’s case eventually lands before an Immigration Judge, who listens to Lin’s testimony about the persecution he has suffered – his beatings and torture, and his fear for his life if returned to China. Lin also describes his religious practices in detail, and provides some corroborating evidence as to his torture claims. During the course of the hearing, the judge does not make a specific finding on the availability of additional corroborating evidence. The judge
makes an adverse credibility determination, based on the inconsistencies in dates from Lin’s initial intake interview and his testimony, and also cites a lack of corroborating evidence as influencing his decision. Lin appeals to the BIA, which issues a summary affirmation of the IJ’s opinion, and the case is sent to the Federal Appellate Court.

II. Standards in Asylum Hearings Before the Real ID Act

A. Standards for Adverse Credibility Determinations at the IJ Level

In evaluating a claim for asylum, the Immigration Judge must determine whether the applicant’s evidence is credible. If the Judge finds that the applicant or their evidence is not credible, they enter an adverse credibility finding. The previous standard for adverse credibility determinations in asylum hearings was that the Immigration Judge must lay out specific, cogent reasons for the finding that bear a legitimate nexus to the finding, including demeanor, inconsistencies, and lack of detail or specificity.

When the judge bases his decision on the applicant’s demeanor, the appellate bodies generally give great deference to that decision, since the Immigration Judge personally experienced the applicant’s testimony. Determinations based on demeanor are rarely overturned on appeal, and only if the appellate body finds the applicant’s testimony to be detailed and consistent. The IJ may also base their findings on inconsistencies in the applicant’s testimony and other evidence in the record, but before the Real ID Act, those inconsistencies were not necessarily fatal to the claim if they were minor, isolated, or incidental. The courts, particularly the Third Circuit, used to allow for some inconsistencies between an applicant’s testimony at the asylum hearing and the applicant’s statements at initial
INS interviews. The adverse credibility determination could also be supported by finding a lack of detail or specificity in the applicant’s testimony. If the IJ based their decision on this, the finding must be supported by the record and may be reversed if the judge did not allow the applicant to elaborate on details or the judge did not specify which portions should have been more detailed. What an IJ could not base their finding on was “speculation and conjecture as to the plausibility of the applicant’s story”. Allowing the IJ to base their determination on demeanor has been criticized, as torture survivors often exhibit symptoms of post-traumatic stress disorder, such as not being emotional when recounting their experiences and refusing to make eye contact.

B. Standard of Review for Credibility Determinations

The previous standard of review of credibility determinations for the circuit courts was the substantial evidence standard, which meant that the reviewing court would uphold the credibility determination of the Immigration Judge unless “any reasonable adjudicator would be compelled to conclude to the contrary.” Adverse credibility determinations would be upheld to the extent that they were “supported by reasonable, substantial, and probative evidence on the record considered as a whole.” Several of the circuits developed further requirements in their approaches.

In the Third and Eleventh Circuits, an Immigration Judge had to base an adverse credibility determination on “specific, cogent reasons”, such as “inconsistent statements, contradictory evidence, and inherently improbable testimony”. In the Sixth Circuit, the court noted that an adverse credibility determination must be based on issues that go to the heart of the applicant’s claim, specifically, “if discrepancies cannot be viewed as attempts by the applicant to
enhance his claims of persecution, they have no bearing on credibility.”[23] In the Seventh Circuit, the credibility determinations had to be supported by cogent reasons that bear a legitimate nexus to the findings.[24] In the Ninth Circuit, if the Immigration Judge did not make a specific credibility finding, the reviewing court accepted the applicant’s testimony as true, and minor inconsistencies that do not go to the heart of an applicant’s claim could not support an adverse credibility determination.[25] For example, in *Vilorio-Lopez v INS*, the court noted, “Discrepancies in dates which reveal nothing about an asylum applicant’s fear for [her] safety are not an adequate basis for an adverse credibility finding.”[26]

**C. Corroboration Requirements**

One of the key components of an adverse credibility determination is often the corroborating evidence that an applicant provides, or fails to provide. Previously, an applicant’s failure to corroborate testimony could support an adverse credibility finding, but it could not be the sole basis for the finding.[27] The Ninth Circuit further defined this requirement, and determined that if an applicant who has had an adverse credibility determination entered against them does not produce non-duplicative material or easily available corroborating evidence, with no explanation for failing to do so, the adverse credibility determination should stand on appeal.[28] However, in the same case, the court held that the Immigration Judge must give the applicant an opportunity to explain their failure to produce the corroborating evidence before entering their adverse finding.[29] A finding on the availability of corroborating evidence could be reversed “if a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.”[30]
It has been often noted that asylum seekers have difficulty in obtaining corroborating evidence due to the nature of their claims. “Due to the often-hurried nature of their flight, survivors usually bring little more than their clothes and a few personal belongings with them to the United States. More importantly, there are rarely records of their arrests in the country they fled, let alone documents to prove they were tortured.”[31] The United Nations High Commission on Refugees has also stressed the difficulties applicants have in obtaining evidence, and the need to give them the benefit of the doubt. “It would go counter to the principle of good faith if a Contracting State should place on a suppliant a burden of proof which he, in the nature of things, could not possibly cope with.”[32]

D. Credibility and Sufficiency of Evidence: When Corroboration is Required

Previously, credible testimony on its own could have been sufficient to meet the burden of proof in an asylum case, but the circuits and the BIA were split as to the nature of the cases in which corroborating evidence was needed. According to the BIA, where it was reasonable to expect corroborating evidence, such evidence must be provided, or else an explanation must have been given for its absence, for both general country human rights conditions and the applicant’s personal experiences.[33] Documentary corroboration would not be required unless normally created or available, and if it was accessible to the applicant.[34] Generally, the BIA followed the axiom that the weaker the applicant’s testimony, the greater the need for corroboration.[35]

The Second and Third Circuits criticized the BIA for applying the reasonable expectation requirement in an overly strict manner.[36] Both circuits stated that if the BIA found the evidence to be insufficient, it must fully explain its reasoning and identify which parts of the
claim should have been corroborated. These circuits accepted a requirement of corroboration even if the applicant was credible on their own, but supporting documentation must be provided only if it is the type that would normally be created or available, and is accessible to the applicant.

The Second Circuit noted that absence of proof should not necessarily be fatal to a claim, and might not be reasonably expected from an illiterate applicant who left their country of origin under difficult circumstances. The Second Circuit had a two part inquiry for corroborating evidence, that in order to deny an asylum claim based on failure to provide sufficient corroborating evidence, the IJ must “(a) identify the particular pieces of missing, relevant documentation, and (b) show that documentation at issue was reasonably available to the petitioner.” The Third Circuit recognized that an applicant’s ability to obtain corroborating evidence may depend on social and political circumstances. The Third Circuit adopted a three part inquiry, similar to the Second Circuit’s, that the Immigration Judge should apply with regard to requiring corroborating evidence: “(1) an identification of the facts for which ‘it is reasonable to expect corroboration’; (2) an inquiry as to whether the applicant has provided information corroborating the relevant facts; and if he or she has not, (3) an analysis whether the applicant has adequately explained his or her failure to do so.”

In the Seventh Circuit, a credible asylum applicant did not need to provide corroborating evidence in order to meet their burden of proof, and the court acknowledged the difficulties asylum applicants face in obtaining evidence: “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."[43] The Ninth Circuit also acknowledged the difficulties applicants face in obtaining evidence, and assumed that evidence not presented is unavailable.[44] The court found that applicant’s testimony is always sufficient to meet burden of proof if unrefuted, credible, direct, and specific.[45] In the Ninth Circuit, lack of corroborating evidence could not be grounds for denial of asylum merely on insufficiency of evidence.[46]

E. Hypothetical – Pre-Real ID Act

Prior to the Real ID Act’s passage, the hypothetical case would have had varying results in the circuits, depending on whether the circuit followed the BIA approach or not. The inconsistencies in Lin’s statement could not have been used against him, since confusing dates in an intake interview does not bear a legitimate nexus to the claim, and could be characterized as minor, inconsistent, or incidental.[47] The lack of corroborating evidence would not have been sufficient to uphold an adverse credibility determination in the Second, Third, Seventh, and Ninth Circuits. In the Second Circuit, the adverse determination would not be upheld since the IJ has not identified the specific pieces of corroboration that he is looking for, or shown that documentation was readily available.[48] The lack of corroborating evidence would also not have withstood scrutiny in the Third Circuit, since there was no identification of the facts where it was reasonable to expect corroboration, no inquiry as to whether Lin provided the relevant information, and no analysis of whether he adequately explained his failure to do so.[49] In the Seventh Circuit, the adverse determination would not be upheld because it was not required to meet the burden of proof.[50] In the Ninth Circuit, the determination would also not stand because that Circuit would assume that if the evidence was not presented, it was not available.[51] However, those circuits that accepted the BIA standard would possibly have
upheld the determination, since that standard only states that if it is reasonable to expect corroborating evidence, such evidence must be provided.[52]

The standards for both the adverse credibility determination and the requirement for corroborating evidence have dramatically changed with the passage of the Real ID Act.

III. The Real ID Act

A. History

The changes that were included in the Real ID Act were initially proposed as H.R. 10, which was a bill drafted to implement recommendations of the 9/11 Commission Report.[53] The bill contained several measures unrelated to national security or to the Commission Report, including attempting to heighten the asylum evidentiary standard, and would make the new evidentiary standard retroactive, denying the courts the jurisdiction to review whether an alien met the new evidentiary standards.[54] When H.R. 10 was enacted in December of 2004, it did not contain those immigration provisions.[55] The asylum measures of H.R. 10 were resurrected as the Real ID Act was then introduced as H.R. 418 in 2005 by Rep. James Sensenbrenner.[56] The law had three major functions: (1) to prevent terrorists from using the asylum laws to their advantage, (2) to establish federal standards for State driver’s licenses and other identification documents for security purposes, and (3) to provide for prompt construction of a border fence between Mexico and San Diego.

The bill came out of the House Rules Committee with only 1 hour and 40 minutes allowed for general debate, with no further consideration of the bill allowed.[57] It then passed the House, by a vote of 261 to 161.[58] The bill was later attached to a spending bill that funds military
activities in Iraq and Afghanistan and also gives relief to the areas affected by the tsunami. The attachment was without discussion, and there were no hearings about any of the measures in the Real ID Act.[59]

B. The Debate on the Real ID Act

The testimony from the Congressional Record gives further insight into the reasoning behind the Real ID Act. Representative Sensenbrenner, the sponsor of the bill, said, “This legislation will tighten our asylum system, which has been abused by terrorists. The 9/11 Commission staff report on terrorist travel states that ‘Once the terrorists had entered the United States, their next challenge was to find a way to remain here.’ Their primary method was immigration fraud.”[60] However, none of the terrorists involved in the September 11th attack gained entry through asylum, which already had measures in place to guard against fraud.[61]

The Real ID Act was also specifically directed against the Ninth Circuit. Representative Sensenbrenner said, “Irresponsible judges have made asylum laws vulnerable to fraud and abuse…The Real ID Act will reduce the opportunity for immigration fraud so that we can protect honest asylum seekers and stop rewarding the terrorists and criminals who falsely claim persecution.”[62] Sensenbrenner further stated, “Liberal activist judges in the Ninth Circuit have been overturning clearly established precedent and are preventing immigration judges from denying bogus asylum applications by aliens who are clearly lying.”[63]

There was opposition to the Real ID Act when it was introduced. Representative Conyers noted that, “If this measure becomes law, this will close America’s doors to Cubans fleeing from their
country, religious minorities attempting to escape religious persecution, women fleeing from sex trafficking, rape or forced abortions.”[64] Rep. Jackson-Lee further stated:

Supporters of H.R. 418 are afraid that terrorists are using our asylum laws as a means of entering and remaining in the United States. This fear has to be put in perspective. Terrorists are statutorily barred from asylum eligibility, and it is not apparent why they should choose such a complicated, time-consuming method for entering and remaining in the United States, in any event.[65]

Several groups, including religious organizations, asylum groups, and advocates, all entered their protests against the bill. The American Immigration Lawyers’ Association stated, “These controversial measures will not make America safer, but they will make ... our country less secure [and] prevent people fleeing from persecution from obtaining asylum ...”[66] The Lawyers committee for Human Rights [now known as Human Rights First] also released a statement that the Real ID Act would “harm the victims of human rights abuses, torture and religious and political persecution who seek the protection of this society.”[67] The United Nations High Commissioner for Refugees stated that while the provisions may be intended to prevent terrorists from entering through asylum, they “do not achieve this goal and could prevent those truly at risk of persecution from finding safety in the U.S.”[68] Amnesty International spoke out against the bill’s passage as well, calling it “a disturbing step toward dismantling the rights of asylum seekers.”[69] Nevertheless, the bill passed, and was signed in to law on May 11, 2005.[70]

C. The New Standards

For credibility determinations, inconsistencies, inaccuracies, or falsehoods identified by an Immigration Judge giving rise to an adverse credibility determination may now be made ‘without regard’ to whether they ‘go to the heart of applicant’s claim’.[71] Also, there shall be
no presumption of credibility if no adverse credibility determination is explicitly made. Instead, the applicant or witness shall have a rebuttable presumption of credibility on appeal. The valid bases for determining an applicant’s credibility were expanded to allow Immigration Judges to include the inherent plausibility of the applicant’s or witness’ account. The corroboration requirements were changed to now state that “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”.[72]

Essentially, the BIA approach was adopted and the leniency of the Seventh and Ninth Circuits and the multipart tests of the Second and Third Circuits were discarded. No exceptions or allowances are made for the difficult nature of obtaining corroborating evidence in many asylum cases.

IV. The Federal Circuits’ Response to the Real ID Act

As of this writing, most of the circuits have acknowledged the Real ID Act, but have also noted that its portions on adverse credibility determinations only apply prospectively and not to the appeal at hand. However, in some cases, the circuits have gone further in their discussion of the Real ID Act, particularly of the requirements for corroborating evidence.

A. The Second Circuit

In Cao He Lin v. DOJ, the Second Circuit reviews an asylum case where the key issue is the credibility of the applicant.[73] In Cao He Lin, the applicant was seeking asylum on the basis of he and his wife violating China’s strict Family Planning Guidelines, since he and his wife
refused to get an abortion when she became pregnant at the age of 21, instead of 23 as China
demands.[74] Fearing forcible sterilization if he remained, Cao left for the United
States.[75] The Immigration Judge denied his application, stating that she did not find Cao’s
testimony credible, though she did not indicate where it should have been more detailed, was
inconsistent, or unresponsive.[76] She speculated that if Cao had been truly concerned about a
forced abortion or sterilization, he would not have left China at all.[77] She also discounted the
corroborating evidence he did provide, such as his daughter’s birth certificate because “she did
not believe a midwife could simply go to a hospital, say a child was born, and get a
certificate.”[78]

In addressing the asylum claim, the court first notes that even with the Real ID amendments, the
IJ must still act fairly in judging credibility and in assessing the sufficiency of the
evidence.[79] The court notes that an Immigration Judge may not engage in speculation or rely
on minor inconsistencies to find an applicant incredible, and that the Immigration Judge must
give the applicant opportunity to explain the absence of corroborating evidence.[80] The court
lays out several avenues of response, stating that they will only grant an asylum petition if an
Immigration Judge’s decision if it is not supported by substantial evidence, and they will remand
where errors in the Immigration Judge’s fact finding leave doubt as to the validity of the
outcome.[81] Applying these principles to Cao He Lin’s case, the court finds that the
Immigration Judge made “significant errors” in determining credibility and finding his proof
insufficient.[82] The Immigration Judge “relied on speculation, failed to consider all of the
significant evidence, and appeared to place undue reliance on the fact that Cao’s documents were
not authenticated pursuant to regulation.”[83] The court thus remands the case for further
proceedings.
In *Weiliang Lin v. INS*, the Immigration Judge made an adverse credibility determination, stating that the applicant’s testimony was suspect “in the light of no corroborating evidence”, despite the petitioner presenting a marriage certificate, birth certificate, photographs of him with his wife and children.[84] The judge did not cite any other reasons for finding Lin’s testimony to be incredible, and the court reverses, stating “the IJ impermissibly relied exclusively on the lack of proper corroborating evidence.”[85] The court retains its two part test from before the Real ID Act, noting that the IJ “failed to explain why (1) it was reasonable to expect Lin to produce the documents and photographs mentioned; and (2) why Lin's excuses for the missing documents were insufficient.”[86] The court states that although the Real ID Act prevents reversal on this point, it does not apply in this case because the IJ did not explicitly make a finding on the availability of the documents that were not produced.[87]

### B. The Third Circuit

In *Awan v. Attorney General*, the Third Circuit notes that the Real ID Act requires them to give an even greater deference to an Immigration Judge’s credibility determinations, even to determinations relying on inconsistencies and omissions that do not go to the heart of an alien’s claims.[88] In the Third Circuit, then, the former requirement that any inconsistencies must bear a legitimate nexus to the finding has been eliminated. The court address the new corroboration requirements in *Qun Zheng v. Gonzales*, [89] where although the Immigration Judge based his adverse credibility determination on pure speculation and minor inconsistencies[90], the application is still denied based on the corroborating evidence, or lack thereof.[91] The court found that the amendments on requiring corroborating evidence apply immediately to Qun Zheng’s petition.[92] They agree that the Immigration Judge properly concluded that it was
reasonable to expect corroboration. They also state that they “are sympathetic to Zheng’s argument that the Immigration Judge was merely speculating that such records exist, but we note that the Real ID Act largely forecloses it.”[93] Since they find “no compelling reason to believe such documents would be unavailable”, they are prevented from reversing the Immigration Judge on this point.[94] Given the other inconsistencies in Qun Zheng’s application, namely the corroborating evidence he did provide that did not correspond the IJ’s preconceptions, they still uphold the adverse credibility determination.[95]

C. The Sixth Circuit

In *Shkabari v. Gonzales*, the Sixth Circuit reviews an asylum case where the applicants are a husband, wife, and child from Albania, fleeing persecution after participating in demonstrations against the communist regime.[96] The court acknowledges that the Real ID Act has altered the standard of review, but goes even further to say “we affirm the Immigration Judge’s determination under any standard.”[97] They also apply the new corroborating evidence standard retroactively, stating that the provision applies to petitions “where the BIA acted prior to the enactment of the legislation.”[98] The court upholds the Immigration Judge’s speculation that one of the co-applicants, the wife, could have obtained documents confirming her hospital visit after being beaten in June 1997.[99] Although the Immigration Judge did not make any reference to the wife’s credibility, “the failure to provide reasonably available corroborating evidence ‘can lead to a finding that an applicant has failed to meet her burden of proof.’”[100]

In *Begu v. Gonzales*, the court notes that it had already previously upheld credibility findings based on a lack of corroborating evidence in cases where it was reasonable to expect corroboration and where the petitioner could not offer a reasonable explanation for failure to
produce such evidence, and that the Real ID Act simply codifies this approach.\[101\] In Begu, the applicant was fleeing persecution in Albania based on her political activity with the Democratic Party.\[102\] She was criticized by the Immigration Judge for not producing documentary evidence of her claim that her store was burned down, or of her fiancé’s assassination.\[103\] The IJ even states that “a young, petite female could not participate in a political demonstration.”\[104\] The corroborating evidence that she did provide, namely, an article from an Albanian newspaper describing her flight and persecution, attestations of her membership in the Democratic Party, and testimony describing the political persecution of party members, was all discounted by the IJ.\[105\] The reviewing court is unsympathetic to the applicant’s response that she could only provide those documents if she returned to Albania or had known ahead of time that they would be necessary, and states that her responses “do not adequately establish her inability to furnish documentary evidence to corroborate her claims”.\[106\] The court states that this failure to provide corroborating evidence supports the adverse credibility determination.

D. The Seventh Circuit

The Seventh Circuit takes a different view of the Real ID Act. In Dawoud v. Gonzales, the court reviews an asylum case where the applicant had fled religious persecution in Egypt, after a video of his Christian wedding aired on Egyptian television.\[107\] The IJ denied Dawoud’s claim, finding his testimony to not be credible “because of the ‘swiftness’ with which he obtained his passport and travel visa”, and for not corroborating his narrative with affidavits.\[108\] The reviewing court notes that, even after the Real ID amendments, IJs will still face “applicants whose cases hinge on their own testimony – those who neither have nor can
reasonably obtain corroborating evidence”. They add, though, that there is no dispute about the appropriateness of asking for corroborating evidence in the common situation when the Immigration Judge has some doubt about an applicant’s credibility. The court further discusses the prior standards for corroborating evidence, stating that a credible asylum applicant did not need to provide corroborating evidence to meet his burden of proof in the Seventh Circuit. The court states that it has reversed Immigration Judges’ “decisions that a credible asylum applicant's claim can be rejected solely because she did not supply corroborating evidence”. The court notes the difficulties in obtaining corroborating evidence, stating, “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.” In the case at hand, the court notes that since Dawoud did provide “credible, detailed, and convincing testimony” and the State Department Report provided did corroborate Dawoud’s claims, the IJ erred in denying his application.

The court further discusses the corroboration requirements in *Hor v. Gonzales*, where the applicant fled political persecution in Algeria. The IJ criticized the applicant for not providing corroborating evidence in the form of newspaper articles or affidavits from his coworkers, without providing any explanation as to why he though these documents had been available. The court notes that the IJ’s opinion, as in several asylum opinions, “would depend on a knowledge of conditions in Algeria nowhere indicated in the opinion.” The reviewing court in its analysis notes that the Real ID amendment only means “that an immigration judge's determination that if there was evidence to corroborate the alien's testimony the alien could and should have presented it is entitled to reasonable deference.” To be entitled to such deference, the Immigration Judge must explain “why he thinks that corroborating evidence, if it existed, would have been available to the alien”, and that “a determination of
availability must rest on more than implausible assertion backed up by no facts.”[119] In the case at hand, then, the IJ’s finding is overturned and the case remanded for further consideration.[120] The court raises an additional concern with presuming that corroborating evidence is available, noting that expecting corroborating evidence in “disordered nations” is “unrealistic concerning conditions actually prevailing in the Third World.”[121]

E. The Ninth Circuit

The Ninth Circuit, the seeming target of the Real ID act amendments, notes it in Kaur v. Gonzales.[122] The court upholds the Immigration Judge’s adverse credibility determination, since it is supported by substantial evidence, but states in a footnote: “With the passage of the Real ID Act, our review of an Immigration Judge’s adverse credibility finding is significantly restricted.”[123] The court expands its analysis in Jibril v. Gonzales to comment on the Real ID Act.[124] In Jibril, the applicant was fleeing persecution in Somalia based on his membership in a persecuted minority clan.[125] The IJ denied Jibril’s claim because he did not believe that while pretending to be dead during his severe beating by the militia, that Jibril would also remember details about the men.[126] The reviewing court notes that the inconsistencies are only with regard to trivial or minor facts, and do not go to the heart of his asylum case, and that it cannot support the IJ’s adverse credibility determination.[127] The court notes that the case at hand would be denied if the Real ID amendments applied retroactively, “since demeanor and any inaccuracies in statements, without regard to whether they go to the heart of the claim, would be all be valid bases for the IJ’s adverse credibility determination.”[128] The court further notes, “The terms of this section of the Act are a welcome corrective, which coupled with Congress’s clear direction to Immigration Judges that there is to be no presumption of credibility, will mean
that in the future only the most extraordinary circumstances will justify overturning an adverse credibility determination.”[129]

The Ninth Circuit discusses the corroborating evidence requirement in *Safarian v Gonzales*, where it overturns the IJ’s determination that the applicant did not provide sufficient corroborating evidence for her claim.[130] The IJ states that Safarian provided no corroborating evidence, but did not provide reasons for discounting the corroborating evidence she did provide.[131] The court states that since the IJ’s reasons for the adverse credibility determination can be discounted, the petitioner’s testimony is accepted as credible, and corroboration is not required.[132] The court discusses in a footnote that although the Real ID Act seems to preclude reversal on this point, the provision applies only to the question of whether corroborating evidence is available, and not to the question of whether the IJ properly required the applicant to provide corroborating evidence.[133] The court then remands the case for further review.

**F. The Eleventh Circuit**

In *Shizhuang Zheng v. Attorney General*, the court highlights a claim that would have different results if brought after the Real ID Act. [134] In Zheng, the applicant for asylum is escaping persecution in China for being a follower of the Falun Gong.[135] The IJ denies his petition, citing several alleged inconsistencies and weaknesses, including “Zheng’s ‘sniffing like crazy’ during the hearing, despite his claim that he practiced Falun Gong because it ‘fixed him up’”[136]. The IJ also cited inconsistencies with his own experience with Falun Gong[137] and Zheng’s testimony, such as Zheng testifying that he occasionally practiced Falun Gong indoors and by himself, as opposed to outdoors and in groups.[138] Furthermore, the IJ discounted
Zheng’s testimony because he did not provide corroborating evidence of his practicing Falun Gong upon his arrival in New York. The reviewing court states that these supposed inconsistencies are adequately explained in the record, and that the IJ did not ask Zheng why he did not provide corroborating evidence. The court states that none of the IJ’s findings were supported by the record, and were based instead upon his own speculation[139], and states, “The IJ’s own personal knowledge or experience of Falun Gong does not constitute a portion of the record, particularly not when it is directly contradicted by materials that are a part of that record”[140]. The court notes in a footnote, however, that the Real ID Act has changed their standard of review, and that it would permit an adverse credibility finding based on any inconsistencies, but that since Zheng’s application was filed before it went into effect, those provisions do not apply.[141] If Zheng’s case had come up for review after the passage of the Real ID Act, presumably his appeal would have been denied.

The Eleventh Circuit applies the new corroborating evidence requirement in Morales Rodriguez v. Attorney General, where the applicant did not provide any corroborating evidence for his claim for asylum based on political persecution in Colombia.[142] The IJ denied his claim without making an explicit finding as to his credibility or the availability of corroborating evidence. The reviewing court, instead of presuming the applicant to be credible in the absence of an explicit finding, or faulting the IJ for not detailing what corroborating evidence he expected, upholds the IJ’s determination.[143] The court notes that since Morales Rodriguez did not provide any corroborating evidence, under the Real ID Act, “we are not compelled to conclude that any corroborating evidence in support of Morales Rodriguez’s claim was unavailable at the time of his hearing.”[144]
G. Hypothetical – Post-Real ID Act

Since the amendments of the Real ID Act, the Lin’s case would have different results than it would prior to its passage, depending on what circuit the case is heard in. In all of the circuits except the Second, the inconsistencies that do not go to the heart of his claim can now support an adverse credibility determination against him. The Second Circuit continues to state that an IJ cannot rely on minor inconsistencies in making their credibility determinations.[145] For the corroborating evidence requirement, a circuit split remains even after the Real ID Act. In the Third, Sixth, and Eleventh Circuits, the courts have upheld IJ’s requirements for additional corroborating evidence, despite no explicit finding by the IJ (the Eleventh[146]), or requirements based only on speculation (the Third[147] and the Sixth[148]). In the Second, Seventh, and Ninth Circuits, Lin’s claim could still possibly be reversed on appeal, since the IJ did not specify why additional corroboration would be required. The Second Circuit has retained its two part test where an IJ does not explicitly make a finding on the availability of the corroborating evidence, and Lin’s case would fail to meet this test.[149] In the Seventh Circuit, the IJ must explain why corroborating evidence would have been available and cannot base his requirement solely on speculation, unsupported by facts.[150] And in the Ninth Circuit, the question of whether the IJ properly required Lin to provide corroborating evidence would still be open to review and not foreclosed by the Real ID Amendments.[151]

V. Conclusion

The Real ID Act has had a pervasive impact on asylum law. Many legitimate asylum claims that were erroneously denied by IJs would have been reversed on appeal prior to the Real ID Act’s passage[152]. Credibility determinations based on minor inconsistencies or IJs requiring
corroborating evidence based on their speculation that it such evidence exists, once unacceptable, have now become the standard in several circuits[153]. The Act severely limits the federal circuit’s ability to review these cases, and gives much greater deference to the IJ’s opinion. By choosing to codify the strictest of the prior approaches to requirements for corroborating evidence, the Real ID Act has caused previously legitimate asylum claims to be denied. Although the Act purports to prevent terrorism, it instead prevents victims of persecution and torture from finding a safe haven in the United States.

The Real ID Act needs to be redrafted, eliminating the provision that inconsistencies do not have to be essential to the claim, and adopting a standard for corroborating evidence more in line with the approach of the Second, Seventh, and Ninth Circuits. The IJ should still be required to provide a reason why additional corroboration is required, and should be disallowed from making requirements and decisions based on speculation and personal opinions. At the very least, additional Congressional hearings should be held on the Real ID Act and its provisions, since it was passed without any hearing and with limited debate.

[2] Id. at §33.05 [3][b][i]
[3] Id. at §1.03[5][d]
[4] Id. at §34.02 [9][b]
[5] Id.
[6] Id. at §34.02 [12][g]
“Denials of asylum applications based on factual determinations…will be reviewed to ascertain if the decision was supported by substantial evidence.” *Id.*


Gordon et al., *supra* n.1, at §34.02 [9][b].

*Id.*

*Id.*

*Id.*

*Id.*

*Id.*

*Id.*

*Id.*

*Id.*

*Id.*

*Id.*


*Id.*


*Vilorio-Lopez v INS*, 852 F.2d 1137, 1142 (9th Cir. 1988).

Gordon et al., *supra* n. 1, at §34.02 [ 9][b].

*Sidhu v. INS*, 220 F.3d 1085, 1092 (9th Cir. 2000).
[29] Id. at 1091.


[32] Gordon et al., supra n. 1, at §34.02 [9][c][ii][B]

[33] Id. at §34.02 [9][c][ii][A]

[34] Id.

[35] Id.

[36] Id.

[37] Id.

[38] Id.

[39] Id.


[41] Gordon et al., supra n. 1, at §34.02 [9][c][iii][A]


[44] Gordon et al., supra n. 1, at §34.02[9][c][iii][B]

[45] Id.

[46] Id.


[49] See Abdulai, supra n. 42.

[50] See Dawoud, supra n. 43.

[51] See Gordon et al., supra n. 1, at §34.02[9][c][iii][B].
[52] Id.


[54] Id.

[55] Id. at 374.

[56] Id. at 374-375.


[61] Rep. Sensenbrenner had cited the case of Ramzi Yousef, who was involved in the first World Trade Center bombing in 1993, but since that attack, specifically in response to Yousef’s application for asylum, the former INS made dramatic changes to the asylum program to eliminate the loopholes used by Yousef. Those loopholes were codified in 1996 and prevented terrorists from entering through the asylum program. *See* Lofgren, *supra* n. 47.


[63] Id.

[64] Id.

[65] Id.

[66] Lofgren, *supra* n. 53 at 376.


[69] Id.
Post 9-11, several other measures have been implemented to supposedly prevent terrorism, with questionable effectiveness. The National Security Exit Entry Registration System required [non-citizens?] from certain Arab and Muslim countries to register with immigration authorities, which led to several arrests and deportations, but no terrorism-related convictions. The refugee resettlement program was also suspended after September 11th, leaving refugees without entry to the United States, despite the fact that no terrorist in U.S. history has entered through this program. Marisa Cianciarulo, *Terrorism and Asylum Seekers: Why the Real ID Act is a False Promise*, 43 Harv. J. on Legis. 101, 103-104 (2006).


In his testimony, Cao explained that if he returned to China, either he or his wife would be forcibly sterilized. As long as he was not in China, his wife would not be subjected to sterilization. *Id.* at *9.

*Id.* at ** 9-10.

*Id.* at *10.

*Id.* at *2.

*Id.* at *4.

*Id.* at *38.


*Id.* at *3

*Id.*

*Id.*
For example, Zheng had written an essay on his mother for a school assignment that was highly critical of the Chinese government and his mother’s forced sterilization. Zheng was told to write a ‘self-criticism’ renouncing it, or risk being sent to a juvenile re-education camp. The IJ dismissed this claim because he found it “utterly implausible” that the principal let Zheng write his self criticism at home, instead of forcing him to write it immediately in his office. \textit{Id.} at 380.

Zheng did submit a copy of his essay, but the IJ stated that it was written solely for asylum purposes, and also submitted corroborating letters from two friends in China, but the IJ rejected them because they did not mention Zheng’s mother’s sterilization, only his essay. \textit{Id.}

The IJ stated that the newspaper article was not credible due to an unsupported belief that the applicant could have paid for its publication, and that the letters she provided were insufficient because “it was a form letter without detail.” \textit{Id.} at *7.
After his video aired on a show featuring local weddings, Islamic fundamentalists and the National Police of Egypt kidnapped and tortured Dawoud for being an “infidel”. Id. at **2-3.

The IJ’s opinion also contained several “inappropriate and extraneous” remarks, including the IJ’s personal drinking experiences in Egypt, commentary on tourism there, and the general appeal of the United States to asylum seekers. Id.

Hor was an active member of the FLN political party and was detained at a roadblock by members of the GIA, a radical military wing engaged in civil war with the Algerian government. Hor was threatened with execution on the spot for failing to support the GIA and supply them with information, and was saved only by the immediate arrival of the police. He left shortly thereafter for the United States. Id. at 499.
Jibril is a member of the Yibir, a minority clan considered outcasts in Somalia, and Jibril’s father was a high ranking member of the military. Jibril’s brother was killed and Jibril was severely wounded by the militia. He eventually escaped to a refugee camp, and then to the United States. *Id.* at *2.*

*Id.* at **7-8.

*Id.* at *10.

*Id.* at *20.

*Id.*

139 Fed. Appx. 875 (9th Cir. 2005).

*Id.* at 877. The court states that record does include some corroborating evidence, but does not describe what the evidence is.

*Id.*

*Id.* 2006 U.S. App. LEXIS 7076 (11th Cir. Mar. 21, 2006).

*Id.* at *2. His experiences include being jailed, beaten, and tortured for following the Falun Gong, a spiritual movement that is comprised of sets of exercises. The court notes the 2002 State Department Country Report on China, which further described the persecution that members of the Falun Gong suffer in China.

*Id.* at *12.

*Id.* According to the court, the IJ stated "I did a year's worth of Falun Gong. So . . . I can tell you I do Falun Gong standing on my head." *Id.* at *4.

*Id.* at *13.

*Id.* The IJ made comments that while Zheng’s testimony was possible, but “based on this Court’s experience”, he did not believe it. The IJ suggests that Zheng got his testimony out of a fortune cookie. *Id.* at *26.

*Id.*

*Id.* at *20.

*Id.* 2006 U.S. App. LEXIS 2214 (11th Cir. Jan. 30, 2006). The petitioner was threatened by a Colombian guerilla group, FARC, that if he did not pay them money they would kill him.
[143] Id. at *11.

[144] Id. at **7-8.

[145] See Cao He Lin, supra n. 73.

[146] See Morales Rodriguez, supra n. 142.

[147] See Qun Zheng, supra n. 89.


[149] See Weiliang Lin, supra n. 84.

[150] See Hor, supra n. 115.

[151] See Safarian, supra n. 130.

[152] See Qun Zheng, supra n. 89; Jibril, supra n. 124; Shizhuang Zheng, supra n. 134.

[153] See Qun Zheng, supra n. 89; Begu, supra n. 101.