

Immigration Court: BIA**Case:** *Matter of Y-I-M-*, 27 I&N Dec. 724 (BIA 2019)**Date:** Dec. 12, 2019**Adjudicated by:** Malphrus, Creppy, Baird**Opinion:** Baird**Tags:** Immigration, asylum, testimony, inconsistencies, IJ responsibilities, adverse credibility determination**Question Presented:** Is the IJ responsible to personally point out inconsistencies in an applicant's testimony before issuing an adverse credibility determination?**Holdings:** No, the IJ doesn't have to point out inconsistencies in testimony, so long as the inconsistencies are obvious OR have been previously raised by IJ, DHS, or applicant during the hearing. (Appeal dismissed.) *See Matter of Y-I-M-*, 27 I&N Dec. 724, 729 (BIA 2019).**Rationale:** IJs do not have a personal duty to assist asylum applicants in this adversarial process.**Facts:** Native & citizen of Ukraine sought asylum because he had refused to serve in Ukrainian military due to his Russian Orthodox beliefs and was beaten by members of the military. Inconsistencies in his testimony regarding dates of service, medical attention.**History of the Case:**

- **Admitted to U.S. 2014** under Visa Waiver Program
- **Applied for asylum** within 1 year
- **2018: ICH before IJ**

Appeals to Statute & Precedent:

- **INA 208(b)(1)(B)(iii):** credibility determination based on "the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements . . . , the internal consistency of each such statement, the consistency of such statements with other evidence of record . . . , and any inaccuracies or falsehoods in such statements."
- ***Hong Fei Gao v. Sessions*, 891 F.3d 67 (2d Cir. 2018):** adverse credibility determination and inconsistent testimony
- ***Dayo v. Holder*, 687 F.3d 653 (5th Cir. 2012):** adverse credibility determination and inconsistent testimony
- ***Xiu Xia Lin v. Mukasey*, 534 F.3d 162 (2d Cir.2008) (per curiam):** IJ's credibility determination should be based on totality of circumstances
- ***Matter of B-Y-*, 25 I&N Dec. 236, 242 (BIA 2010):** adverse credibility determinations should not be based on anything that takes the applicant by surprise.

- ***Rizk v. Holder*, 629 F.3d 1083, 1088 (9th Cir. 2011)**: “an [Immigration Judge] cannot base an adverse credibility determination on a contradiction that the alien could reconcile if given a chance to do so.”
- ***Ming Shi Xue v. BIA*, 439 F.3d 111, 121 (2d Cir. 2006)**: “[W]here the perceived incongruities in an asylum applicant’s testimony are not plainly obvious, an [Immigration Judge] cannot rely on them to support an adverse credibility ruling without first identifying the alleged inconsistencies for the applicant and giving the applicant an opportunity to address them.”
- ***Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011)**: IJ can go with his/her interpretation of discrepancy rather than applicant’s explanation, as long as it’s reasonable.
- ***Kegeh v. Sessions*, 865 F.3d 990, 996 (8th Cir. 2017)**: “[E]ven where an applicant’s explanations are plausible, an agency is not required to accept the explanations if an alternative explanation is reasonable.” (citation omitted) Same:
 - ***Lianhua Jiang v. Holder*, 754 F.3d 733, 740 (9th Cir. 2014)**
 - ***Weng v. Holder*, 593 F.3d 66, 72 (1st Cir. 2010)**
 - ***Dankam v. Gonzalez*, 495 F.3d 113, 112 (4th Cir. 2007)**
 - ***Xiao Ji Chen v. U.S. Dep’t of Justice*, 471 F.3d 315, 336 n.17 (2d Cir. 2006)**
 - ***Ye v. Dep’t of Homeland Sec.*, 446 F.3d 289, 295 (2d Cir. 2006)**
 - ***Shkabari v. Gonzalez*, 427 F.3d 324, 330 (6th Cir. 2005)**
- ***Majidi v. Gonzalez*, 430 F.3d 77, 81 (2d Cir. 2005)**: not necessary to bring obvious inconsistency to the attention of applicant during hearing.

Discussion:

- “An inconsistency need not go to the heart of the claim.” *Matter of Y-I-M-*, 27 I&N Dec. 724, 726 (BIA 2019).
- “It is also well established that an Immigration Judge is not required to adopt an applicant’s explanation for an inconsistency if there are other permissible views of the evidence based on the record.” *Matter of Y-I-M-*, 27 I&N Dec. 724, 726 (BIA 2019).
- “If an Immigration Judge does not find a proffered explanation for an inconsistency persuasive, he or she should state the reasons why on the record to allow for proper appellate review.” *Matter of Y-I-M-*, 27 I&N Dec. 724, 727 (BIA 2019).
- “When an inconsistency is obvious or apparent, it is not necessary to bring it to an applicant’s attention.” *Matter of Y-I-M-*, 27 I&N Dec. 724, 727 (BIA 2019).
- “Because the alien carries the burden of proof for relief under section 208(b)(1)(B) of the Act, it is incumbent upon him to directly raise and clarify information that is obviously inconsistent.” *Matter of Y-I-M-*, 27 I&N Dec. 724, 728 (BIA 2019).
- “An obvious inconsistency is one that is ‘sufficiently conspicuous . . . as to be self-evident.’” *Matter of Y-I-M-*, 27 I&N Dec. 724, 728 (BIA 2019), citing *Ming Shi Xue*, 439 F.3d at 121.

- “Where an inconsistency is not obvious, the key consideration is whether it is reasonable to assume that the applicant was aware of it and had an opportunity to offer an explanation before the Immigration Judge relied on it.” *Matter of Y-I-M-*, 27 I&N Dec. 724, 728 (BIA 2019).