

Falls Church, Virginia 22041

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Date: JUN 11 2001

In re: HONG BAO ZHANG a.k.a. Wang By Yong a.k.a. Su Yong Wang

IN ASYLUM PROCEEDINGS PURSUANT TO 8 C.F.R. §§ 208.2(b)(1) and (2)

APPEAL

ON BEHALF OF RESPONDENT: Charles Kinnunen, Esquire
Theodore N. Cox, Esquire
Robert L. Shapiro, Esquire

ON BEHALF OF SERVICE: Jeffrey L. Romig
Appellate Counsel

APPLICATION: Asylum, Withholding of Removal, Convention Against Torture Relief

On September 20, 2000, an Immigration Judge denied the respondent's application for asylum under section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158, but granted him withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3), and withholding of removal under Article 3 of the Convention Against Torture.¹ The respondent and the Immigration and Naturalization Service (the "Service") have appealed. The respondent's appeal will be sustained and the Service's appeal will be dismissed. The respondent's request for oral argument is denied. See 8 C.F.R. § 3.1(e).

I. FACTUAL SUMMARY

The respondent is a 47-year-old native and citizen of the People's Republic of China who arrived in the United States on January 29, 2000, under the Visa Waiver Pilot Program (Form I-863; Exh. 2). He requested asylum and was referred for an asylum only hearing before an Immigration Judge by the Service (Form I-863, Exh. 2). The respondent bases his written asylum application on his fear of persecution by the Chinese government based on his membership in a particular social group, as the master of the Zhong Hua Life Preservation and Mentality Promotion Qigong ("Zhong Gong"), a group that has been banned by the Chinese Communist Party (Form I-589; Exh. 4).

¹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature Dec. 10, 1984, G.A. res. 39/46 (annex, 39 U.N. GAOR Supp. (No. 51) at 197), U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988).

On July 28, 2000, after several hearings in this case and the completion of testimony, the Service provided evidence to the Immigration Judge that the respondent's FBI background check was clear (Exh. 13). During that hearing, the Service also requested a continuance to allow it to further review a letter regarding the respondent received by the Service Liaison Officer from the Chinese Embassy (I.J. at 6). The respondent was surprised by this turn of events. The continuance was granted and eventually, the Service filed copies of Chinese criminal documents alleging that the respondent committed at least 15 rapes (Exh. 25). The Immigration Judge also requested an advisory opinion from the United States Department of State (I.J. at 6). The immigration court received an opinion dated August 16, 2000 (I.J. at 6). The respondent then presented rebuttal evidence (Exhs. 23, 24). The Service also requested a legal opinion from the Library of Congress (Exh. 31). The Service repeatedly requested that the Immigration Judge reopen the record to allow the respondent to testify regarding the Chinese criminal documents. The Immigration Judge denied that request because it was clear that the respondent would not admit that he committed the crimes in his testimony (I.J. at 8-9).

A. The Respondent's Testimony

The respondent testified to the following information: He did not request asylum immediately upon his arrival in Guam because he had read in the newspapers that Chinese government spies were there (Tr. at 28). He revealed his actual identity after other detainees informed him that Service inspectors pay attention to most Chinese nationals entering Guam because of the smuggling that takes place there and probably did not single him out for any other reason (Tr. at 30).

The respondent explained that after he entered Guam, he planned to contact the United States government with the help of his assistant, who speaks English and can use a computer (Tr. at 36-37). The respondent does not know who is in charge of Guam's government (Tr. at 36). Prior to their arrival in Guam, the respondent purchased a Guam guide book and had his assistant find out about Guam "through the computer" (Tr. at 39). He came to Guam for the sake of his organization (Tr. at 40). The respondent's organization is a "deep breathing group" (Tr. at 40). He founded the Kylin culture, which includes eight aspects (Tr. at 43).

The respondent is afraid to return to China because in December 1993, one of the five top Chinese leaders ordered the government to check into the respondent's Chinese and American corporation (Tr. at 45). In March 1994, the respondent's corporation was shut down by the Chinese government and a few of his students were pursued by Chinese government authorities (Tr. at 45, 72). At the same time, his students who worked at the police station told him that the Chinese government was pursuing him and that he should go away quickly (Tr. at 45, 72). The respondent ran away from China in June 1994 (Tr. at 45). The respondent believes that the Chinese government is aware that he left the country (Tr. at 45).

The respondent lived in Australia from June 1994 until June 1997 (Tr. at 71). The respondent did not apply for asylum there because he did not yet think that his situation was that serious (Tr. at 73). He resided in Cambodia and other Asian countries from July 1997 until July 1998 (Tr. at 71).

From July 1999 through January 2000, the respondent lived in Thailand and other Asian countries (Tr. at 71). None of these countries allowed him to permanently resettle, or gave him any type of refugee status (Tr. at 71-72).

B. The Respondent's Assistant's Testimony

The respondent's assistant, Ms. Fang Wang, testified as follows: She began working for the Zhong Gong organization in Shanghai, China on July 31, 1996 (Tr. at 48). The organization sold books describing its technique to enhance and preserve the body, the Kylin culture and the mystery of life (Tr. at 64-65). Regarding her arrival in Guam, Ms. Wang stated that the managing director planned and made arrangements to come to Guam and she followed his instructions (Tr. at 52). She only knew that she was getting on an airplane and coming to Guam (Tr. at 53).

Ms. Wang reported that the Chinese government is oppressing the Zhong Gong organization (Tr. at 53). She left China on January 14, 1999, and went to Thailand (Tr. at 54). In Thailand, she performed daily tasks such as cooking, as well as typing documents regarding the Zhong Gong's deep breathing tenet on a computer (Tr. at 54). Before arriving in Guam, Ms. Wang downloaded information about Guam from a website and obtained the addresses of two hotels (Tr. at 55). Ms. Wang performed whatever tasks were required by the respondent and Mr. Xin, including translation, and traveled to Guam with the respondent (Tr. at 57, 58). She had no personal reasons to come to Guam and only came because she was told to do so (Tr. at 58). Ms. Wang believes that the Zhong Gong organization has been greatly harmed in China (Tr. at 60).

Ms. Wang has not seen her son since December of 1998, when she left China according to instructions she received from the Zhong Gong leadership (Tr. at 61). She did not take her son with her because the situation in China was tense and Chinese government agents, sometimes disguised as tourists, often searched or checked on their organization (Tr. at 61). The organization's leaders have to move around frequently, since the Chinese government officially decreed the Zhong Gong to be an evil sect (Tr. at 61). Ms. Wang did not think of her own safety when she went to Thailand with the respondent, she only thought of the organization (Tr. at 62).

According to Ms. Wang, the respondent would be killed by the Chinese government or the police if he returned to China (Tr. at 63). The Zhong Gong does good things for people, but the government will not let it expand its business and enterprises (Tr. at 63). She did not personally observe the Communist Party's actions against the Zhong Gong, but the organization received a considerable amount of material relating to such actions (Tr. at 65). Ms. Wang has not received similar information from her mother in China because for safety reasons, they seldom communicate (Tr. at 66).

Ms. Wang is somewhat concerned for her own safety if she is forced to return to China, but the Zhong Gong leaders are in a much more dangerous situation because they founded and wanted to expand the organization, while she was just a common worker (Tr. at 66). The United States would be benefitted by the respondent's presence because his deep breathing tenet could expand throughout

the country, employ individuals as trainers and save many lives (Tr. at 67). Ms. Wang was in an emotionally unstable condition, had just given birth to a child and her hair was falling out, when she began to teach the Zhong Gong technique and she became healthy again (Tr. at 68). Ms. Wang's mother had performed hard labor for 2 years and as a result, suffered from drug-resistant bronchitis, which was cured by the Zhong Gong method (Tr. at 68-69).

II. THE IMMIGRATION JUDGE'S DECISION

The Immigration Judge found that the respondent is a refugee, based on the voluminous background material as well as the United States Department of State materials, including its 2000 Annual Report on Religious Freedom: China ("Report on Religious Freedom"), which mentions the Zhong Gong and the respondent by name (I.J. at 9; Exh. 23 at 16).² She noted that the respondent is not barred from a grant of asylum under section 208(b)(2)(A)(iii) of the Act, because he was not convicted of any crimes and because the materials provided by the Service to establish that the respondent committed crimes are of a dubious nature (I.J. at 10). Furthermore, the respondent submitted considerable evidence indicating that the charges against him were fabricated, including a letter for the Hong Kong-based Information Center for Human Rights and Democracy and letters of support from friends and a colleague (I.J. at 12). The Immigration Judge found, however, that the respondent found safe havens in Australia and other countries, since he was able to run his business from there, and could "probably have resettled permanently in one of those countries" (I.J. at 15). The Immigration Judge also stated that the medical benefits of the respondent's health products were not documented for the record (I.J. at 15). The Immigration Judge therefore denied the respondent's application for asylum solely in the exercise of discretion, but granted his request for withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3), and under the Convention Against Torture, noting in particular that the Report on Religious Freedom states that the Zhong Gong was banned by the Chinese government; that leaders of groups like the Zhong Gong and Falun Gong are singled out for particularly serious treatment; that a local Zhong Gong leader was convicted of illegally practicing medicine and sentenced to 2 years of incarceration; and that the respondent was charged with rape, forgery and illegal crossing of boundaries (I.J. at 18; Exh. 23).

On appeal, the respondent argues that the Immigration Judge abused her discretion in denying his application for asylum (Respondent's Brief in Support of Appeal at 10).³ The Service argues that

² The Immigration Judge did not make an explicit adverse credibility finding, but did state that the respondent's demeanor was consistent with the information he provided in his biographical notes (I.J. at 5). Since the Immigration Judge did not impugn the respondent's credibility, we will assume that he was a credible witness.

³ The respondent also requests that we consider a transcript of his sworn deposition testimony in a federal habeas corpus action. We point out that we will normally not consider any evidence presented for the first time on appeal, and will adjudicate the appeal on the basis of the evidence in the record at the time of the Immigration Judge's decision. See *Matter of Haim*, 19 I&N Dec. 641 (BIA 1988); *Matter of Fedorenko*, 19 I&N Dec. 57 (BIA 1984).

the respondent did not establish prima facie eligibility for the forms of relief for which he applied and that the Immigration Judge erred in not allowing cross-examination of the respondent based on the evidence it received from Chinese Embassy (Service's Opening Brief in Support of Appeal at 2).

III. LEGAL STANDARDS

An alien seeking asylum in the United States "bears the burden of establishing that he or she meets the 'refugee' definition of section 101(a)(42)(A) of the Act." *Cordon-Garcia v. INS*, 204 F.3d 985, 990 (9th Cir. 2000); *Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996); 8 C.F.R. § 208.13 (a) (2001). Refugee status is established by evidence that an applicant is unable or unwilling to return to his home country "because of a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." See 8 U.S.C. § 1101(a)(42)(A) (1994); *INS v. Elias-Zacarias*, 502 U.S. 478 (1992); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 (1987); *Singh v. Ilchert*, 63 F.3d 1501, 1505 (9th Cir. 1995); *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

To satisfy the well-founded fear standard, an alien must show that a reasonable person in his circumstances would fear persecution. *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996), citing *Matter of Mogharrabi*, *supra*, at 445; 8 C.F.R. § 208.13(b)(2)(i) (2001).⁴ An alien may prove that his fear of future persecution is well-founded by "adducing credible, direct, and specific evidence in the record of acts that would support a reasonable fear of persecution." *Duarte de Guinac v. INS*, 179 F.3d 1156, 1159 (9th Cir. 1999); 8 C.F.R. § 208.13(b)(2)(i)(B) (2001). If the agent of persecution is other than the government or a government sponsored force, an alien must show that it would not be reasonable to expect him to relocate internally to avoid the risk of persecution. 8 C.F.R. §§ 208.13(b)(2)(ii), and (b)(3)(i) (2001). If the agent of persecution is the government, internal relocation shall be presumed not to be reasonable, unless the Service establishes that under all the circumstances such relocation would be reasonable. 8 C.F.R. § 208.13(b)(3)(ii) (2001).

An alien also may prove that his fear of persecution is well-founded by proving past persecution, which gives rise to a rebuttable presumption that he has a well-founded fear of future persecution. See *Ladha v. INS*, 215 F.3d 889, 897 (9th Cir. 2000); 8 C.F.R. § 208.13(b)(1) (2001). That presumption may be rebutted and the application denied as a matter of discretion under 8 C.F.R. § 208.13(b)(1)(i), if the Immigration Judge finds that the Service has shown by a preponderance of the evidence that there has been a fundamental change in circumstances such that the respondent no longer has a well-founded fear of persecution. 8 C.F.R. §§ 208.13(b)(1)(i)(A), and (b)(1)(ii); see also *Matter of H-*, 21 I&N Dec. 337 (BIA 1996); *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989); *Singh v. INS*, 94 F.3d 1353 (9th Cir. 1996). The presumption also may be rebutted and

¹ New regulations governing asylum claims by an applicant who may reasonably be expected to relocate internally to avoid persecution or who has established past persecution, but may not have a well-founded fear of future persecution, became effective January 5, 2001. See 65 Fed. Reg. No. 235, pp.76121 et seq, (December 6, 2000), 8 C.F.R. §§ 208.13(b), 208.16(b) (effective January 5, 2001).

the application denied if the Immigration Judge finds that the Service has established that the respondent could avoid persecution by relocating and that it would be reasonable to expect him to do so. 8 C.F.R. §§ 208.13(b)(1)(B) and (b)(1)(ii).

IV. ANALYSIS

We agree with the Immigration Judge that the respondent established his statutory eligibility for asylum, but disagree with the Immigration Judge's ruling that he did not merit a grant of asylum in the exercise of discretion. See 8 C.F.R. §208.13(d) (2001). Once a respondent has demonstrated eligibility for asylum, the decision whether to grant that relief is assigned by statute to the Attorney General. See *id.* Factors to be considered in the exercise of discretion include: the totality of the circumstances of a respondent in his flight from the country of persecution, whether the respondent passed through any other countries on his way to the United States, whether orderly refugee procedures were available to help him in the country he passed through, whether he made attempts to seek asylum before coming to the United States, the length of time the respondent remained in a third country, and his living conditions, safety and potential for long-term residency there. See *Matter of Pula*, 19 I&N Dec. 467, 473-474 (BIA 1987). Another factor is whether the respondent has relatives or other personal ties in the United States that motivated him to seek asylum here, rather than elsewhere. See *id.* at 474. Given the unusually harsh consequences which may befall an alien who has established a well-founded fear of persecution, the danger of persecution should generally outweigh all but the most egregious of adverse factors. *Matter of Kasinga, supra*, at 368 citing *Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987).

Regarding the Service's argument on appeal that the respondent should have been subject to cross-examination based on the new evidence of record, we note that we agree with the Immigration Judge's decision to disallow further testimony. The new documentary evidence in question, including witness statements, indicate that a case was brought against the respondent 10 years after the alleged crimes took place, no explanation was provided for why it took so long for the Chinese government to obtain these documents, why it took the victims 10 years to report the case, or why no supporting documentation is provided from the time period in question. Furthermore, the Service did not establish a chain of custody for the documents, which raises questions as to their authenticity. Furthermore, the respondent submitted a sworn declaration in which he denies every allegation presented in the documents (Exh. 30). The Immigration Judge therefore determined correctly that any further testimony as to the dubious documents was unnecessary.

In this case, the respondent is a religious leader whose business was shut down by the Chinese government and whose organization has been publicly condemned by that government. For approximately 6 years living in self-imposed exile he evaded the Chinese government and traveled between countries based on visa requirements. He entered the United States using an Indonesian passport, but there is no evidence to indicate that he committed an outright fraud.

To our knowledge, the respondent was not offered any type of protection or permanent status from any of the countries in which he resided. The Service presented no evidence establishing that the respondent could have obtained refugee status or legalization in any of these countries, or that

he was informed of such by any other individual. The respondent's ability to manage his business from the countries in which he resided does not indicate that any of those governments offered him any permanent status. The respondent was not firmly resettled in Australia or in any of the countries in which he resided, since he did not receive an offer of permanent resident status, citizenship, or other type of permanent resettlement. *See* 8 C.F.R. 208.15 (2001). The Immigration Judge's conclusion that the respondent could have resettled in those countries is speculative. Such conjecture is not a substitute for substantial evidence. *See Maini v. INS*, 212 F.3d 1167, 1175 (9th Cir. 2000); *Lopez-Reyes v INS*, 79 F.3d 908, 912 (9th Cir. 1994), *citing Del Valle v. INS*, 776 F.2d 1407, 1413 (9th Cir.1985).

Furthermore, we find that the nature of the respondent's business and whether or not he provides medical or other help to his followers is irrelevant to the exercise of discretion. The respondent has not been convicted of a crime related to his organization; the point at which the benefits of his practices would enter the determination of the exercise of discretion.

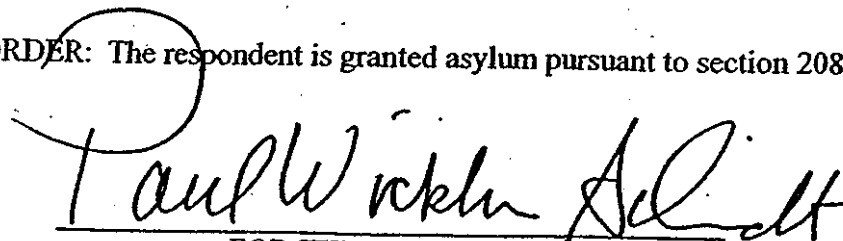
The aforementioned factors do not constitute the type of egregious factors that support a denial of asylum in the exercise of discretion. The fact of the past persecution suffered by the respondent, and the likelihood of future persecution, as documented by the reports of the United States Department of State, outweigh the dubious documents presented by the Service and the time the respondent remained in Australia and other countries without any permanent status. We find, therefore, that the respondent is entitled and deserving of asylum in the United States. *Matter of Kasinga, supra* at 368 ("We have weighed the favorable and adverse factors and are satisfied that discretion should be exercised in favor of the applicant").

Therefore, we will not reach the respondent's applications for withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3) and under the Convention Against Torture. Based on the foregoing, the Service's appeal is dismissed. The respondent's appeal is sustained and he is granted asylum under section 208 of the Act.

ORDER: The Service's appeal is dismissed.

FURTHER ORDER: The respondent's appeal is sustained.

FURTHER ORDER: The respondent is granted asylum pursuant to section 208 of the Act.


FOR THE BOARD