NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 06-2318

YING CHEN,
Petitioner

v.

ATTORNEY GENERAL OF THE UNITED STATES,
Respondent

On Petition for Review of an Order
of the Board of Immigration Appeals
(No. A77-341-063)
Immigration Judge: Hon. William VanWyke

Submitted Under Third Circuit LAR 34.1(a)
October 22, 2007

Before: SLOVITER, CHAGARES, and HARDIMAN, Circuit Judges

(Filed: October 26, 2007)

OPINION

SLOVITER, Circuit Judge.

Ying Chen ("Chen"), a Chinese citizen, petitions for review of an order of the Board of Immigration Appeals ("BIA") denying his application for asylum, withholding of removal, and relief under the Convention Against Torture ("CAT"). The Immigration Judge ("IJ") found that Chen had established a well-founded fear of future persecution, but the BIA reversed. Chen petitions for review.

I.

Chen was born in 1983 and raised in the Fujian Province of China in a family of practicing Christians. He entered the United States at Los Angeles International Airport on October 18, 2000 without valid entry documents. The Immigration and Naturalization Service ("INS") (now Department of Homeland Security) initiated removal proceedings. Chen then applied for asylum, withholding of removal, and CAT protection. At the conclusion of a merits hearing, the IJ issued an oral decision granting Chen's application for asylum because he possessed a reasonable fear of persecution resulting from his illegal departure from China.[1] The IJ found that the evidence demonstrated a reasonable possibility that Chen would face fines and/or administrative detention of specific significance because Chen was a juvenile. The IJ found that administrative detention often includes "re-education," which indicates a political

[1]The IJ denied Chen's claims for asylum based on political opinion or religion, but Chen did not appeal those claims to the BIA, and the IJ's decision with respect to these claims is therefore not at issue.

element because "the [Chinese] government is politically motivated to make sure those who have left the country . . . [are] made to be 'politically correct' in their views." A.R. at 91-92. However, the IJ denied Chen's applications for withholding of removal and CAT protection because the evidence did not clearly establish that it is "more likely than not" that Chen would suffer future persecution or torture.

The BIA reversed the IJ's decision and found that asylum was not warranted based on any possible prosecution Chen might face for having departed China without permission. Chen filed a timely petition for review.[2]

II.

When the BIA conducts a de novo review of the record, as it did here, we review the BIA's decision and not the decision of the IJ. Zubeda v. Ashcroft, 333 F.3d 463, 471 (3d Cir. 2003). We will sustain the BIA's decision if there is substantial evidence in the record to support it. Id.

To establish a well-founded fear of future persecution sufficient to qualify for asylum, the applicant must demonstrate both a subjective fear of persecution and objectively that a reasonable person would also fear persecution under the same circumstances. Lie v. Ashcroft, 396 F.3d 530, 536 (3d Cir. 2005).

The IJ had determined that he could not rely on Chen's testimony regarding his subjective fear of persecution, "because he does not have much concrete information

[2]We have jurisdiction to review final orders of the BIA under 8 U.S.C. § 1252(a)(1).

about people returning to China except that smugglers are apparently treated harshly." A.R. at 85. The IJ therefore focused primarily on the objective prong, as recommended by the United Nations High Commissioner for Refugees Handbook when the claims of unaccompanied minors are involved. The BIA also focused on objective considerations.

Here, Chen has not shown objectively that a reasonable person in his shoes would fear persecution if returned to China. We have noted that, although fear of prosecution for "'fairly administered laws' does not itself qualify one as a 'refugee,'" fear of prosecution under such laws of general applicability may sometimes provide the basis for asylum "if the law itself is based on one of the enumerated factors and if the punishment under that law is sufficiently extreme to constitute persecution." Chang v. I.N.S., 119 F.3d 1055, 1060-61 (3d Cir. 1997). However, "potential prosecution for violating [China's] illegal departure law on its face does not give rise to a fear of persecution." Si v. Slattery, 864 F. Supp. 397, 406 (S.D.N.Y. 1994) (cited in Chang, 119 F.3d at 1063); see also Li v. I.N.S., 92 F.3d 985, 988 (9th Cir. 1996) ("Criminal prosecution for illegal departure is generally not considered to be persecution."). There is nothing in this record to suggest that Chen will be prosecuted for his illegal departure while other violators will not.

The BIA did not find that Chen would face a reasonable possibility of "disproportionately severe" punishment. A.R. at 4. Substantial evidence does not compel a contrary conclusion with respect to that finding. Indeed, the BIA cited to a report from the Canadian Refugee Board dated March 14, 2000, which specifically

studied local[3] implementation of Chinese government policies on a number of issues, including treatment of individuals who return to China after illegal departure. According to the Report:

> There is evidence of wilful deception of foreign governments as to sanctions against returned illegal migrants. Much touted policies of prison sentences and extensive reeducation programs are apparently mostly not implemented. Rather we have become aware of preferential economic policies and business loans made available to returnees by local governments. We are assured that children under 16 returned to China would not be subject to incarceration under any circumstances.

A.R. at 184.

The Report further found that prison sentences or detention "are only applicable to those illegal emigrants 'who bring disgrace to the nation.'" A.R. at 188. Moreover, the February 2000 U.S. Department of State Report, "1999 Country Reports on Human Rights Practices," noted, in discussing trafficking in persons, that "[t]rafficked persons who are repatriated may face fines for illegal immigration upon their return; after a second repatriation, persons may be sentenced to a term in a reeducation-through-labor camp." A.R. at 281 (emphasis added). This evidence therefore does not support a well-founded fear of harm for someone in Chen's position – a first-time illegal emigrant "with no record of political opposition or other conflict with the authorities." A.R. at 4. There is substantial evidence to support the BIA's conclusion that Chen could not demonstrate

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[3] Four counties of metropolitan Fuzhou were studied in the Report; Chen himself was born in Fuzhou City and still lived there in 1999.

that any punishment for his illegal departure would be a pretext to persecute him for his political opinions or for any of the other statutory grounds for asylum.[4]

III.

For the above-stated reasons, we will deny Chen's petition for review.

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[4]Because Chen failed to address the BIA's denial of withholding or CAT protection in his brief to this court, we do not address them as they are deemed waived. Battle v. Pennsylvania, 629 F.2d 269, 271 n.1 (3d Cir. 1980).