

03-60670

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

XIAODONG LI,

Petitioner,

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF
THE BOARD OF IMMIGRATION APPEALS
A76 942 606

BRIEF OF *AMICI CURIAE* CHRISTIAN LEGAL SOCIETY, NATIONAL
ASSOCIATION OF EVANGELICALS, THE ETHICS & RELIGIOUS LIBERTY
COMMISSION, AND AMERICAN IMMIGRATION LAWYERS
ASSOCIATION IN SUPPORT OF PETITIONER AND SUPPORTING
REHEARING *EN BANC* AND REVERSAL OF PRIOR DECISIONS

JONATHAN ROBERT NELSON
20 Exchange Place, 43rd Floor
New York, New York 10005
Telephone: (212) 593-5775
Attorney for *Amici Curiae*

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

CERTIFICATE OF INTERESTED PERSONS v

INTEREST OF THE *AMICI* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 2

I. The Agency’s Failure To Apply The International Religious Freedom Act of 1998 In Removal Cases Is An Issue Of Exceptional Importance 2

II. Under IRFA, Persecution May Be On Account Of Religious Practice 4

III. Under IRFA, China May Not Freely Criminalize Religious Practice 6

CONCLUSION 7

CERTIFICATE OF COMPLIANCE 9

STATUTORY ADDENDUM 10

22 U.S.C. §6401 10

22 U.S.C. §6402 13

CERTIFICATE OF SERVICE 16

TABLE OF AUTHORITIES

Judicial Decisions:

| | |
|---|---------------|
| Chevron, U.S.A., Inc. v. Nat'l Resources Defense Council, Inc., 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) | 7 |
| Li v. Gonzalez, 420 F.3d 500 (5 th Cir. 2005) | <i>Passim</i> |
| White v. INS, 75 F.3d 213, 215 (5th Cir.1996) | 7 |

Administrative Decisions:

| | |
|--|---------------|
| Matter of Li (BIA July 17, 2003) | <i>Passim</i> |
|--|---------------|

Statutes:

| | |
|---|---------------|
| International Religious Freedom Act of 1998, Pub. L. No. 105-292, 112 Stat. 27871 (Oct. 27, 1998), <i>codified in part at</i> 22 U.S.C. § 6401 <i>et seq.</i> | <i>Passim</i> |
| 8 U.S.C. § 1157(f) | 4 |
| 8 U.S.C. §1231(b)(3) | 8 |
| 22 U.S.C. §6401(a)(5) | 5, 7, 8 |
| 22 U.S.C. §6402(13) | 6, 8 |
| 22 U.S.C. § 6471 | 4 |
| 22 U.S.C. § 6473(b) | 4 |

Other Authorities:

| | |
|---------------------------------|---|
| Fed. R. App. P. 29, 29(a) | 1 |
|---------------------------------|---|

U.S. Department of State, Country Reports on Human Rights Practices for 1998, Vol. I, China (1999) 6, 7

Craig B. Mousin, “Standing With The Persecuted: Adjudicating Religious Asylum Claims After the Enactment of the International Religious Freedom Act of 1998,” 2003 BYU L. Rev. 541, 544. 4

Steven Wales, “Remembering the Persecuted: An Analysis of the International Religious Freedom Act,” 24 Hous. J. Int’l L. 579, 586, 587 (2002). 4

CERTIFICATE OF INTERESTED PERSONS

Amici identify the following persons who may be interested in the litigation in which this brief is presented:

Christian Legal Society

National Association of Evangelicals

The Ethics & Religious Liberty Commission of the Southern Baptist Convention

American Immigration Lawyers Association

Xiaodong Li

United States of America

Peoples' Republic of China

INTEREST OF THE *AMICI*

Pursuant to Fed. R. App. P. 29, *amici* Christian Legal Society (CLS), National Association of Evangelicals (NAE), The Ethics & Religious Liberty Commission (ERLC) and American Immigration Lawyers Association (AILA) (jointly, *amici* or *amici curiae*) submit this brief *amicus curiae* in support of Petitioner’s motion for *en banc* review. Pursuant to Fed. R. App. P. 29(a), *amici* state that Petitioner has consented to the filing of this brief, while Respondent has declined to do so. CLS is the largest national non-denominational Christian membership organization of attorneys, judges, law professors, and law students. The NAE is an association of evangelical Christian denominations, local churches, organizations and individuals serving over 20 million people. ERLC is the moral concerns and public policy agency of the Southern Baptist Convention, the Nation’s largest Protestant Christian denomination. AILA is the national association of immigration lawyers. The members of *amici* are deeply troubled by the failure of a panel of this Court (“Panel”) and the administrative agency to grant withholding of removal to Petitioner. The interest of *amici* is further detailed in the motion accompanying this brief, which is incorporated herein.

Amici submit this brief to emphasize that the International Religious Freedom Act of 1998 (“IRFA”) sets forth guidelines that must be followed in

religious persecution cases, and which require reversal of the agency decision in Petitioner’s case. *Amici* CLS, NAE and ERLC also believe that their deep experience with the application of U.S. law to religious practice will aid the Court in the resolution of this case. This brief will not duplicate the briefs of the parties.

SUMMARY OF ARGUMENT

In the International Religious Freedom Act (“IRFA”), Congress set forth findings, definitions and guidelines for determining whether religious persecution is occurring. In IRFA, Congress specifically found that religious persecution includes punishment on account of peaceful religious practice. IRFA also reinforced principles, set forth in international human rights instruments, for determining whether or not foreign restrictions on religious freedom violate international law. Because the agency and the Panel ignored IRFA’s standards in Petitioner’s case, their decisions must be reversed.

ARGUMENT

I. The Agency’s Failure To Apply The International Religious Freedom Act of 1998 In Removal Cases Is An Issue Of Exceptional Importance

The Board of Immigration Appeals (“BIA”) found that the Petitioner suffered beatings, detention, interrogation, and forced labor, and would suffer imprisonment upon return to China, as a consequence of his religious activities, which Chinese law made criminal. BIA Decision dated July 17, 2003 (“BIA Dec.”)

or “BIA Decision”), Certified Administrative Record (“CAR”) at 2, *aff’d*, Li v. Gonzalez, 420 F.3d 500 (5th Cir. 2005) (“Panel Decision”). Those activities included organizing an unregistered house church, conducting a Bible study in his home, and distributing Bibles. BIA Dec. 2. Yet the BIA found that these punishments were “prosecution,” not “persecution.” *Id.* at 3. The BIA also found that “the Government of China has a legitimate right to enforce the laws which it creates,” and that China’s law that prohibits and criminalizes unregistered religious activity “is a legitimate sovereign right not ‘institutional persecution.’” *Id.* Both these findings reflect the BIA’s failure to apply a statute that is intended to guide “religious persecution” determinations under United States law. The BIA’s refusal to do so is an issue of exceptional importance, as it is likely adversely to affect thousands of worthy asylum and refugee cases if it is not corrected.

Congress enacted the International Religious Freedom Act of 1998, Pub. L. No. 105-292, 112 Stat. 27871 (Oct. 27, 1998), *codified in part at* 22 U.S.C. § 6401 *et seq.* (“IRFA”), in order, among other purposes, “to express United States foreign policy with respect to, and to strengthen United States advocacy on behalf of, individuals persecuted in foreign countries on account of religion.” *Id.*,

Preamble.¹ IRFA was enacted in part in order to remedy deficiencies which Congress perceived in the adjudication of religious persecution claims by immigration judges and others.² As an aid to “advocacy” on behalf of the religiously persecuted, IRFA sets forth guidelines that are to be followed not only by American diplomats, but also by asylum adjudicators, in the identification and condemnation of international religious persecution.³ Nevertheless, in the seven years since its enactment the BIA has never directly applied IRFA’s findings or definitions or cited its provisions in its adjudication of religious persecution cases. It is exceptionally important that this Court instruct the BIA to do so.

II. Under IRFA, Persecution May Be On Account Of Religious Practice

IRFA provides compelling evidence that Petitioner’s case was incorrectly

¹ In enacting IRFA, Congress was particularly concerned about the persecution of unregistered Christians by the Chinese Government. *See* Steven Wales, “Remembering the Persecuted: An Analysis of the International Religious Freedom Act,” 24 Hous. J. Int’l L. 579, 586, 587 (2002).

² Craig B. Mousin, “Standing With The Persecuted: Adjudicating Religious Asylum Claims After the Enactment of the International Religious Freedom Act of 1998,” 2003 BYU L. Rev. 541, 544.

³ To ensure that they would be aware of international religious freedom issues, Congress mandated that immigration judges and other asylum adjudicators refer to the State Department’s annual religious freedom reports, IRFA § 601, *codified at* 22 U.S.C. § 6471, and receive training “on the nature of religious persecution abroad, including country-specific conditions, instruction on the internationally recognized right to freedom of religion, instruction on methods of religious persecution practiced in foreign countries, and applicable distinctions within a country in the treatment of various religious practices and believers.” IRFA §603 (b), *codified at* 22 U.S.C. § 6473(b); *id.* §602(a), *codified at* 8 U.S.C. § 1157(f).

decided by the BIA and this Court's Panel. In contrast to the Panel's finding that the term "persecution" is not defined in the immigration laws so as to protect religious practice, 420 F.3d at 508, 510, IRFA sets forth a congressional finding that "religious persecution" does occur on account of religious practice:

. . . religious believers in many countries face *such severe and violent forms of religious persecution* as detention, torture, beatings, forced marriage, rape, imprisonment, enslavement, mass resettlement, and death merely for the peaceful belief in, change of *or practice of their faith*. IRFA, § 2(a)(5), *codified at* 22 U.S.C. Sec. 6401(a)(5) (emphasis added).

This congressional finding – that "religious persecution" occurs when governments punish believers for the peaceful practice of their faith – cannot be reconciled with the prior decisions in Petitioner's case. The Panel depended on reasoning that directly contradicts Congress:

Li argues that it should be beyond peradventure that he was persecuted on account of his religion because he was arrested and abused as a result of clearly religious activities. We agree that it is axiomatic that Li was punished because of religious activities, nonetheless, it does not necessarily follow that Li was punished because of his religion. 420 F.3d 510.

Congress' finding that "religious persecution" includes detention, beatings and imprisonment, when inflicted on a person of faith for the peaceful practice of his religion, requires this Court to reconsider the Panel's denial of Li's claim.

III. Under IRFA, China May Not Freely Criminalize Religious Practice

IRFA is also inconsistent with the BIA's key conclusion, that China's law criminalizing religious practice is "a legitimate sovereign right not 'institutional persecution,'" BIA Dec., CAR 3. IRFA defines a set of acts which Congress considers to violate international law:

(13) Violations of religious freedom – The term "violations of religious freedom" means violations of the internationally recognized right to freedom of religion and religious belief and practice, [as set forth in international human rights instruments], including violations such as–

- (A) arbitrary prohibitions on, restrictions of, or punishment for–
 - (i) assembling for peaceful religious activities such as worship, preaching, and prayer, including arbitrary registration requirements;
* * * *
 - (iv) possession and distribution of religious literature, including Bibles; * * * * or
- (B) any of the following acts if committed on account of an individual's religious belief or practice: detention, interrogation, . . . forced labor, . . . imprisonment, . . . beating, torture, . . . IRFA §3(13), *codified at* 22 U.S.C. §6402(13).

Petitioner's punishments – beating, forced labor, interrogation, detention, and his likely future imprisonment – were "violations of religious freedom" under this standard, because they occurred on account of Petitioner's religious practice.

The Department of State found that such punishments violated international law:

Although the [Chinese] Government denies that it holds political or religious prisoners, and argues that all those in prison are legitimately

serving sentences for crimes under the law, an unknown number of persons, estimated at several thousand, are *detained in violation of international human rights instruments* for peacefully expressing their political, religious, or social views. Persons detained ... include ... leaders of a national house church movement” (emphasis added).⁴

Under IRFA, a foreign law or police action that violated Petitioner’s religious freedom cannot also be “a legitimate sovereign right.”

Because Congress has evidenced a clear and unambiguous intent concerning the question before the Court, the Court must give effect to that intent. White v. INS, 75 F.3d 213, 215 (5th Cir.1996) (citing Chevron, U.S.A., Inc. v. Nat'l Resources Defense Council, Inc., 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). IRFA shows the intent of Congress that believers who pursue peaceful religious activities should not be punished by foreign governments, and that when they are so punished, it is religious persecution. Accordingly, the rule of *Chevron* requires that the BIA Decision be overturned and that Petitioner’s grant of withholding of removal be reinstated.

CONCLUSION

The BIA’s holding that the Chinese Government prosecuted, not persecuted, Li based on his religion is in direct conflict with 22 U.S.C. § 6401(a)(5). The

⁴ U.S. Department of State, Country Reports on Human Rights Practices for 1998, Vol. I, China (1999), CAR 291(A).

actions by the Chinese Government against Petitioner are violations of both 22 U.S.C. §§ 6401(a)(5) and 6402(13), and thus constitute religious persecution. As the IJ found, it is more likely than not that the Chinese Government will persecute Petitioner if he is returned to China. Therefore, the Court should grant a rehearing *en banc* to reconsider the Panel Decision, vacate the Panel and BIA Decisions,⁵ and grant withholding of removal to Petitioner pursuant to 8 U.S.C. §1231(b)(3).

Dated: October 6, 2005

Jonathan Robert Nelson, Esq.
Attorney for *Amici Curiae*
20 Exchange Place, 43rd Floor
New York, New York 10005
Phone: (212) 593-5775
Fax: (212) 593-5115

⁵ *Amici* are informed that the Government has filed a motion to reopen BIA jurisdiction to submit new evidence – providing further reason to vacate the Panel Decision.

CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Fifth Circuit Rule 32.3, the foregoing brief is proportionally spaced, has a typeface of 14 points or more in its text, and of 12 points or more in its footnotes, and contains 1750 words in its body, as calculated by WordPerfect. *Amici Curiae* have used WordPerfect 12.0 to prepare this brief.

Dated: October 6, 2005

Jonathan R. Nelson

STATUTORY ADDENDUM

22 U.S.C. §6401:

§ 6401. Findings; policy

(a) Findings

Congress makes the following findings:

(1) The right to freedom of religion undergirds the very origin and existence of the United States. Many of our Nation's founders fled religious persecution abroad, cherishing in their hearts and minds the ideal of religious freedom. They established in law, as a fundamental right and as a pillar of our Nation, the right to freedom of religion. From its birth to this day, the United States has prized this legacy of religious freedom and honored this heritage by standing for religious freedom and offering refuge to those suffering religious persecution.

(2) Freedom of religious belief and practice is a universal human right and fundamental freedom articulated in numerous international instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Helsinki Accords, the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, the United Nations Charter, and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

(3) Article 18 of the Universal Declaration of Human Rights recognizes that "Everyone has the right to freedom of thought, conscience, and religion. This right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship, and observance.". Article 18(1) of the International Covenant on Civil and Political Rights recognizes that "Everyone shall have the right to freedom of thought, conscience, and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice, and teaching". Governments have the responsibility to protect the fundamental rights of their citizens and to pursue justice for all. Religious freedom is a fundamental right of

every individual, regardless of race, sex, country, creed, or nationality, and should never be arbitrarily abridged by any government.

(4) The right to freedom of religion is under renewed and, in some cases, increasing assault in many countries around the world. More than one-half of the world's population lives under regimes that severely restrict or prohibit the freedom of their citizens to study, believe, observe, and freely practice the religious faith of their choice. Religious believers and communities suffer both government-sponsored and government-tolerated violations of their rights to religious freedom. Among the many forms of such violations are state-sponsored slander campaigns, confiscations of property, surveillance by security police, including by special divisions of "religious police", severe prohibitions against construction and repair of places of worship, denial of the right to assemble and relegation of religious communities to illegal status through arbitrary registration laws, prohibitions against the pursuit of education or public office, and prohibitions against publishing, distributing, or possessing religious literature and materials.

(5) Even more abhorrent, religious believers in many countries face such severe and violent forms of religious persecution as detention, torture, beatings, forced marriage, rape, imprisonment, enslavement, mass resettlement, and death merely for the peaceful belief in, change of or practice of their faith. In many countries, religious believers are forced to meet secretly, and religious leaders are targeted by national security forces and hostile mobs.

(6) Though not confined to a particular region or regime, religious persecution is often particularly widespread, systematic, and heinous under totalitarian governments and in countries with militant, politicized religious majorities.

(7) Congress has recognized and denounced acts of religious persecution through the adoption of the following resolutions:

(A) House Resolution 515 of the One Hundred Fourth Congress, expressing the sense of the House of Representatives with respect to the persecution of Christians worldwide.

(B) Senate Concurrent Resolution 71 of the One Hundred Fourth Congress, expressing the sense of the Senate regarding persecution of Christians worldwide.

(C) House Concurrent Resolution 102 of the One Hundred Fourth Congress, expressing the sense of the House of Representatives concerning the emancipation of the Iranian Baha'i community.

(b) Policy

It shall be the policy of the United States, as follows:

(1) To condemn violations of religious freedom, and to promote, and to assist other governments in the promotion of, the fundamental right to freedom of religion.

(2) To seek to channel United States security and development assistance to governments other than those found to be engaged in gross violations of the right to freedom of religion, as set forth in the Foreign Assistance Act of 1961, in the International Financial Institutions Act of 1977, and in other formulations of United States human rights policy.

(3) To be vigorous and flexible, reflecting both the unwavering commitment of the United States to religious freedom and the desire of the United States for the most effective and principled response, in light of the range of violations of religious freedom by a variety of persecuting regimes, and the status of the relations of the United States with different nations.

(4) To work with foreign governments that affirm and protect religious freedom, in order to develop multilateral documents and initiatives to combat violations of religious freedom and promote the right to religious freedom abroad.

(5) Standing for liberty and standing with the persecuted, to use and implement appropriate tools in the United States foreign policy apparatus, including diplomatic, political, commercial, charitable, educational, and cultural channels, to promote respect for religious freedom by all governments and peoples.

22 U.S.C. §6402:

§ 6402. Definitions

In this chapter:

(1) Ambassador at Large

The term "Ambassador at Large" means the Ambassador at Large for International Religious Freedom appointed under section 6411(b) of this title.

(2) Annual Report

The term "Annual Report" means the Annual Report on International Religious Freedom described in section 6412(b) of this title.

(3) Appropriate congressional committees

The term "appropriate congressional committees" means--

(A) the Committee on Foreign Relations of the Senate and the Committee on International Relations of the House of Representatives; and

(B) in the case of any determination made with respect to the taking of President [FN1] action under paragraphs (9) through (15) of section 6445(a) of this title, the term includes the committees described in subparagraph (A) and, where appropriate, the Committee on Banking and Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate.

(4) Commensurate action

The term "commensurate action" means action taken by the President under section 6445(b) of this title.

(5) Commission

The term "Commission" means the United States Commission on International Religious Freedom established in section 6445(b) of this title.

(6) Country Reports on Human Rights Practices

The term "Country Reports on Human Rights Practices" means the annual reports required to be submitted by the Department of State to Congress under sections 2151n(d) and 2304(b) of this title.

(7) Executive Summary

The term "Executive Summary" means the Executive Summary to the Annual Report, as described in section 6412(b)(1)(F) of this title.

(8) Government or foreign government

The term "government" or "foreign government" includes any agency or instrumentality of the government.

(9) Human Rights Reports

The term "Human Rights Reports" means all reports submitted by the Department of State to Congress under sections 2151n and 2304 of this title.

(10) Office

The term "Office" means the Office on International Religious Freedom established in section 6411(a) of this title.

(11) Particularly severe violations of religious freedom

The term "particularly severe violations of religious freedom" means systematic, ongoing, egregious violations of religious freedom, including violations such as--

(A) torture or cruel, inhuman, or degrading treatment or punishment;

(B) prolonged detention without charges;

(C) causing the disappearance of persons by the abduction or clandestine detention of those persons; or

(D) other flagrant denial of the right to life, liberty, or the security of persons.

(12) Special Adviser

The term "Special Adviser" means the Special Adviser to the President on International Religious Freedom described in section 402(i) of Title 50.

(13) Violations of religious freedom

The term "violations of religious freedom" means violations of the internationally recognized right to freedom of religion and religious belief and practice, as set forth in the international instruments referred to in section 6401(a)(2) of this title and as described in section 6401(a)(3) of this title, including violations such as--

(A) arbitrary prohibitions on, restrictions of, or punishment for--

(i) assembling for peaceful religious activities such as worship, preaching, and prayer, including arbitrary registration requirements;

(ii) speaking freely about one's religious beliefs;

(iii) changing one's religious beliefs and affiliation;

(iv) possession and distribution of religious literature, including Bibles; or

(v) raising one's children in the religious teachings and practices of one's choice; or

(B) any of the following acts if committed on account of an individual's religious belief or practice: detention, interrogation, imposition of an onerous financial penalty, forced labor, forced mass resettlement, imprisonment, forced religious conversion, beating, torture, mutilation, rape, enslavement, murder, and execution.

CERTIFICATE OF SERVICE

I hereby certify that two paper copies of the foregoing brief, and an electronic copy on a 3.5 diskette, have been served on

Peter D. Keisler, Assistant Attorney General, Emily Anne Radford, Assistant Director, and Keith Bernstein, Attorney, U.S. Department of Justice, Civil Division, Office of Immigration Litigation, 1331 Pennsylvania Avenue, National Place Building, Washington, D.C. 20530, (202) 514-3567, Counsel for Respondent

David A. Cortman, Alliance Defense Fund, 1000 Hurricane Shoals Road, Suite D-600, Lawrenceville, GA 30043, (770) 339-0774, Counsel for Petitioner

Garrett M. White, 4151 Southwest Freeway, Houston, TX 77027, (713) 621-5297, Counsel for Petitioner

and

Benjamin W. Bull, Gary S. McCaleb, Jeremy Tedesco, 15333 N. Pima Road, Suite 165, Scottsdale, AZ 85260, (480) 444-0020, Counsel for Petitioner

this the 6th day of October, 2005 via Federal Express overnight delivery.

Jonathan R. Nelson, Esq.