

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Dong v. Barr

No. 18-1805, United States Court of Appeals for the Second Circuit (September 8, 2020)

SUMMARY

The Second Circuit denied review of the BIA's denial of a motion to reopen removal proceedings, holding that the petitioner's conversion to Christianity in the United States was a change in personal circumstances, not a material change in country conditions excusing the untimely filing. The court found no abuse of discretion because the petitioner failed to submit evidence of changed conditions specific to his home province of Fujian, as required where policies vary by region. The timeliness finding was dispositive, and the court did not reach the alternative ruling on prima facie eligibility for asylum, withholding of removal, or CAT relief.

CASE DETAILS

COURT	United States Court of Appeals for the Second Circuit
WRITING FOR THE COURT	Debra Ann Livingston; Joseph F. Bianco; William J. Nardini
JURISDICTION	Federal
DECIDED	September 8, 2020
DOCKET	18-1805
DISPOSITION	denied
PROCEDURAL POSTURE	Petition for review of a Board of Immigration Appeals decision denying a motion to reopen removal proceedings.
STANDARD OF REVIEW	Abuse of discretion for denial of motion to reopen; substantial evidence for changed country conditions finding.
PRECEDENTIAL VALUE	Unpublished
PARTIES	Xing Feng Dong v. William P. Barr, United States Attorney General

TOPICS

- asylum
- removal proceedings
- administrative law
- appellate procedure
- burden of proof

QUESTIONS PRESENTED

- Whether the BIA abused its discretion in denying the motion to reopen as untimely because Dong failed to demonstrate a material change in country conditions in China, specifically in Fujian Province.

HOLDINGS

1. The BIA did not abuse its discretion because Dong failed to show a material change in conditions in China. His conversion to Christianity was a personal change, not a country condition change. He did not submit evidence of prior conditions or specific evidence of change in Fujian Province.

KEY QUOTATIONS

“When policies ‘vary widely from one area of the country to another . . . it is appropriate to review the evidence to determine, first, what policy applies to the circumstances at issue and, second, whether local officials would be inclined to view the petitioner’s actions as a violation of that policy.’” (at 3)

“the time limitation for filing a motion to reopen does not apply if reopening is sought to apply for asylum and the motion ‘is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.’” (at 2-3)

FACTUAL BACKGROUND

Xing Feng Dong, a native and citizen of China, was ordered removed. He filed a motion to reopen to apply for asylum, withholding of removal, and CAT relief, claiming he converted to Christianity in the United States and that conditions for Christians in China had worsened. The motion was untimely, filed more than a year after the final removal order. Dong needed to show a material change in country conditions to excuse the untimeliness.

PROCEDURAL HISTORY

The BIA affirmed a removal order in 2016. Dong filed a motion to reopen in 2018, over a year later, based on changed country conditions. The BIA denied the motion as untimely, finding no material change in conditions. Dong petitioned for review.

DISPOSITION

denied

CASES CITED

- Jian Hui Shao v. Mukasey, 546 F.3d 138 (2d Cir. 2008)
- Li Yong Zheng v. U.S. Dep’t of Justice, 416 F.3d 129 (2d Cir. 2005)
- In re S-Y-G-, 24 I. & N. Dec. 247 (BIA 2007)
- INS v. Abudu, 485 U.S. 94 (1988)
- INS v. Bagamasbad, 429 U.S. 24 (1976)
- Poradisova v. Gonzales, 420 F.3d 70 (2d Cir. 2005)
- Jian Xing Huang v. U.S. INS, 421 F.3d 125 (2d Cir. 2005)

OPINION

PER CURIAM.

18-1805 Dong v. Barr BIA A087 651 012 UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT SUMMARY ORDER RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT=S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION “SUMMARY ORDER”).

A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL. 1 At a stated term of the United States Court of Appeals 2 for the Second Circuit, held at the Thurgood Marshall 3 United States Courthouse, 40 Foley Square, in the City of 4 New York, on the 8th day of September, two thousand twenty. 5 6 PRESENT: 7 DEBRA ANN LIVINGSTON, 8 JOSEPH F. BIANCO, 9 WILLIAM J. NARDINI, 10 Circuit Judges.

11 _____ 12 13 XING FENG DONG, 14 Petitioner, 15 16 v. 18-1805 17 NAC 18 WILLIAM P. BARR, UNITED STATES 19 ATTORNEY GENERAL, 20 Respondent. 21 _____ 22 23 FOR PETITIONER: John Chang, Esq., New York, NY. 24 25 FOR RESPONDENT: Joseph H. Hunt, Assistant Attorney 26 General; Papu Sandhu, Assistant 27 Director; Matthew A. Connelly, 28 Senior Litigation Counsel, Office 29 of Immigration Litigation, United 1 States Department of Justice, 2 Washington, DC.

3 UPON DUE CONSIDERATION of this petition for review of a 4 Board of Immigration Appeals (“BIA”) decision, it is hereby 5 ORDERED, ADJUDGED, AND DECREED that the petition for review 6 is DENIED. 7 Petitioner Xing Feng Dong, a native and citizen of the 8 People’s Republic of China, seeks review of a June 7, 2018, 9 decision of the BIA affirming denying his motion to reopen 10 his removal proceedings.

In re Xing Feng Dong, No. A 087 651 11 012 (B.I.A. Jun. 7, 2018). We assume the parties’ 12 familiarity with the underlying facts and procedural history. 13 We have reviewed the BIA’s denial of the motion to reopen 14 for abuse of discretion and considered whether its conclusion 15 regarding changed country conditions is supported by 16 substantial evidence.

See Jian Hui Shao v. Mukasey, 546 F.3d 17 138, 168–69 (2d Cir. 2008). 18 Dong moved to reopen in order to apply for asylum, 19 withholding of removal, and relief under the Convention 20 Against Torture, asserting that he had converted to 21 Christianity in the United States and that worsening 22 conditions for Christians in China excused the untimely 2 1 filing of his motion.

It is undisputed that Dong’s motion, 2 which was filed more than a year after the BIA’s 2016 decision 3 affirming his removal order, was untimely. See 8 U.S.C. 4 § 1229a(c)(7)(C)(i); 8 C.F.R.

§ 1003.2(c)(2). But the time 5 limitation for filing a motion to reopen does not apply if 6 reopening is sought to apply for asylum and the motion “is 7 based on changed country conditions arising in the country of 8 nationality or the country to which removal has been ordered, 9 if such evidence is material and was not available and would 10 not have been discovered or presented at the previous 11 proceeding.” 8 U.S.C. § 1229a(c)(7)(C)(ii); see also 8 12 C.F.R. § 1003.2(c)(3)(ii).

The agency did not err in finding 13 that Dong failed to demonstrate such conditions. 14 Dong’s conversion to Christianity and active religious 15 practice constituted changes in personal circumstances that 16 did not excuse the applicable time limitation. See *Li Yong Zheng v. U.S. Dep’t of Justice*, 416 F.3d 129, 130-31 (2d Cir. 18 2005).

Accordingly, Dong had to show a material change in 19 conditions in China. And because conditions for Christians 20 in China vary by province, Dong had to establish a material 21 change relevant to his home province of Fujian. See *Jian Hui Shao*, 546 F.3d at 149, 170 (When policies “vary widely from 2 one area of the country to another... it is appropriate to 3 review the evidence to determine, first, what policy applies 4 to the circumstances at issue and, second, whether local 5 officials would be inclined to view the petitioner’s actions 6 as a violation of that policy.”).

7 We find no error in the agency’s conclusion that Dong 8 failed to show a material change. “In determining whether 9 evidence accompanying a motion to reopen demonstrates a 10 material change in country conditions that would justify 11 reopening, [the agency] compare[s] the evidence of country 12 conditions submitted with the motion to those that existed at 13 the time of the merits hearing below.” *In re S-Y-G-*, 24 I. 14 & N. Dec.

247, 253 (BIA 2007). Dong did not submit any 15 evidence of the conditions for Christians at the time of his 16 2014 hearing before the IJ, and only one of his articles on 17 conditions at the time he filed his motion was particular to 18 Fujian Province.

Because regulation and suppression of 19 various religious groups by the government has been a 20 longstanding problem in China, and because Dong’s evidence 21 was not specific to his area of China, the BIA reasonably 4 1 concluded that he failed to establish the changed conditions 2 necessary to excuse his untimely filing. See *Jian Hui Shao*, 3 546 F.3d at 171.

The BIA therefore did not abuse its 4 discretion in denying Dong’s motion to reopen as untimely. 5 See 8 U.S.C. § 1229a(c)(7)(C). 6 The timeliness finding is dispositive, and we need not 7 reach the alternate ruling that Dong failed to establish prima 8 facie eligibility for relief. See *INS v. Abudu*, 485 U.S. 94, 9 104–05 (1988) (observing that the agency may deny untimely 10 motion for failure to demonstrate changed country conditions 11 or prima facie eligibility for the underlying relief); *INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (“As a general rule courts 13 and agencies are not

required to make findings on issues the 14 decision of which is unnecessary to the results they reach.”).

15 Regardless, Dong’s claim of prima facie eligibility for 16 asylum fails largely for the reasons discussed above: the 17 lack of evidence of persecution in Fujian province prevents 18 him from demonstrating an objectively reasonable fear of 19 persecution. See *Poradisova v. Gonzales*, 420 F.3d 70, 78 (2d 20 Cir. 2005) (providing that prima facie standard requires 21 applicant to show a “realistic chance” that he will be able 5 1 to establish eligibility for relief); *Jian Xing Huang v. U.S. 2 INS*, 421 F.3d 125, 129 (2d Cir.

2005) (holding that “[i]n the 3 absence of solid support in the record” and alien’s “fear is 4 speculative at best”). 5 For the foregoing reasons, the petition for review is 6 DENIED. All pending motions and applications are DENIED and 7 stays VACATED. 8 FOR THE COURT: 9 Catherine O’Hagan Wolfe, 10 Clerk of Court 6