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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

QIAN LI, AKA Amanda Lee, AKA Michelle Li, AKA Yu Fang Li, AKA Yufang Masone, Petitioner, v. MERRICK B. GARLAND, Attorney General, Respondent.	No. 18-73124 Agency No. A095-444-296 MEMORANDUM[*]

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted October 20, 2022[**]
Portland, Oregon

Before: PAEZ and BADE, Circuit Judges, and LEFKOW,[***] District Judge.
Dissent by Judge PAEZ.

Qian Li, a native and citizen of China, petitions for review of the Board of

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[***] The Honorable Joan H. Lefkow, United States District Judge for the Northern District of Illinois, sitting by designation.

Immigration Appeals' (BIA) denial of her second motion to reopen her removal proceedings. We have jurisdiction under 8 U.S.C. § 1252, and we deny the petition.

1. Although we review the BIA's decision denying a motion to reopen for abuse of discretion, *see Nababan v. Garland*, 18 F.4th 1090, 1094 (9th Cir. 2021), we may only grant petitions for review of the BIA's decision where the evidence "*compels* a contrary conclusion." *Bolshakov v. INS*, 133 F.3d 1279, 1281 (9th Cir. 1998) (emphasis added). "To prevail on a motion to reopen on the basis of changed country conditions, . . . [a] petitioner must (1) produce evidence that conditions have changed in the country of removal; (2) demonstrate that the evidence is material; (3) show that the evidence was not available and would not have been discovered or presented at the previous hearings; and (4) 'demonstrate that the new evidence, when considered together with the evidence presented at the original hearing, would establish prima facie eligibility for the relief sought.'" *Agonafer v. Sessions*, 859 F.3d 1198, 1204 (9th Cir. 2017) (citation omitted).

In motions to reopen based on changed circumstances, the "critical question is . . . whether circumstances have changed sufficiently that a petitioner who previously did not have a legitimate claim for asylum now has a well-founded fear of future persecution." *Malty v. Ashcroft*, 381 F.3d 942, 945 (9th Cir. 2004). The petitioner bears the burden of proving changed country conditions sufficient to

justify reopening. *See Agonafer*, 859 F.3d at1204.

The BIA concluded that the evidence Li submitted in support of her motion to reopen was "inadequate to show a material change in conditions or circumstances in China with respect to the treatment of Christian church members . . . since [Li's] removal hearing in 2003." Li contends this conclusion was in error because the evidence she presented to the BIA demonstrated that "in 2003 . . . unregistered family churches experienced varying degrees of official interference that were mostly limited to church leaders," but now the evidence demonstrates a "nationwide campaign of repressing and restricting religious freedom, including the newly enacted national policies and regulations that empowered the officials to crackdown on religion with increased severity." We disagree and find the evidence does not compel the conclusion that the BIA should have granted Li's motion to reopen.

First, the evidence indicates conditions for Christians in China were worse in 2003 than Li contends. For example, the record shows that "[m]any leaders *and adherents* of unregistered church groups ha[d] been detained, arrested, or sentenced to prison terms" in 2003. The record also shows that, in 2003, the Chinese government "sought to restrict religious practice to government-sanctioned organizations and registered places of worship" and that "unofficial religious groups"—such as Protestant house churches—were particularly at risk,

especially in areas where there had been a rapid growth in adherents. And Protestant house church groups were reporting more frequent police raids and detentions as far back as 2001, with 2003 showing a marked increase in "the number of detentions connected with house church membership."

Furthermore, the evidence cited by Li demonstrates that concerns about the Chinese government's persecution of Christians have been longstanding. The materials consistently note China's continuing practice of restricting the growth of Protestant church networks, including by harassing, detaining, and imprisoning members of both registered and unregistered church groups. They also demonstrate that persecution remained variable based on region. While, as the BIA acknowledged, Li's evidence "indicates incrementally stricter enforcement of restrictions against some religious practices and churches over the last several years," including house church Christians, the evidence does not establish that "circumstances have changed sufficiently [such] that [Li] previously did not have a legitimate claim for asylum [but] now has a well-founded fear of future persecution." *Malty*, 381 F.3d at 945.

In short, substantial evidence supports the BIA's conclusion that "mistreatment of some underground church members by the Chinese government has been a longstanding concern"; "the restrictions on unregistered religious groups and practices . . . varied significantly from region to region"; and detentions

were usually reserved for "leaders[] of underground churches." Li's arguments to the contrary are unpersuasive, and we accordingly reject them here.

2. Because there is substantial evidence that conditions for Christians in China have worsened only incrementally since 2003, Li failed to establish an exception to the rule permitting a single motion to reopen. *See* 8 C.F.R. §§ 1003.2(c)(2), 1003.2(c)(3)(ii) (stating that "a party may file only one motion to reopen [removal] proceedings" unless the motion is "based on changed circumstances arising in the country of nationality"). Accordingly, we do not consider Li's contentions that the BIA erred in denying Li's motion based on its determination that Li failed to establish prima facie eligibility for asylum or relief under the Convention Against Torture.

PETITION FOR REVIEW DENIED

Li v. Garland, No. 18-73124

Paez, J., dissenting.

I respectfully dissent. In my view, the BIA abused its discretion by finding that Li had not shown changed conditions in China without considering evidence of a significant material change. It then twice applied incorrect legal standards to conclude that Li was not prima facie eligible for relief. Accordingly, I would grant the petition and remand to the BIA.

1. *Changed Country Conditions.* Although the BIA has broad discretion in deciding motions to reopen, it "must show proper consideration of all factors, both favorable and unfavorable . . . ." *Toufighi v. Mukasey*, 538 F.3d 988, 993 (9th Cir. 2008); *accord Chandra v. Holder*, 751 F.3d 1034, 1039 (9th Cir. 2014). The BIA abuses its discretion when its decision is "arbitrary, irrational, or contrary to law." *Singh v. Holder*, 658 F.3d 879, 885 (9th Cir. 2011) (internal quotation omitted). The BIA's failure to address a key portion of the evidence is an abuse of discretion. *See, e.g.*, *Agonafer v. Sessions*, 859 F.3d 1198, 1206-07 (9th Cir. 2017).

Li presented evidence of a material, qualitative change in China's persecution of mainstream house-church Protestants. The BIA failed to consider the evidence of this change or to explain why it rejected this evidence. Thus, its

finding that country conditions have not changed since 2003 was arbitrary and an abuse of discretion.

Li's evidence shows that around 2014, Chinese authorities began to target mainstream house-church Protestants using the criminal statute Article 300, which prohibits cult activity. China first enacted Article 300 in 1999 to target the Falun Gong spiritual movement. This statute and the government commission charged with implementing it became a vehicle for China to carry out its violent persecution of Falun Gong practitioners. *See, e.g.*, *Zhang v. Ashcroft*, 388 F.3d 713, 716 (9th Cir. 2004) (per curiam) (describing the wave of persecution against Falun Gong practitioners after China labeled it "an illegal cult under Article 300 of the Criminal Law"). The record shows that groups identified as cults under this scheme are the most vulnerable to detention, arrest, harassment, and persecution.

At the time of Li's scheduled merits hearing in 2003, Chinese authorities did not use Article 300 to persecute mainstream house-church Protestants. Her evidence shows that the anti-cult initiative targeted the Falun Gong and a few specific sects in 2003, extended to a longer list of Protestant sects between 2003 to around 2012, and ultimately began to target mainstream house-church Protestants around 2014. In addition, amendments to Article 300 in 2015 increased the maximum sentence from fifteen years in prison to a life sentence. After these

revisions, attacks on house churches and arrests of both church members and leaders for criminal cult activity continued.

The BIA determined that the evidence showed essentially the same conditions as in 2003. The record does not support this conclusion. The expanded use of Article 300 against mainstream house-church Protestants is a material change in the persecution of Li's protected religious group. In addition, although the BIA observed that persecution "varied significantly from region to region," it did not explain whether or how it considered the evidence that Li provided about developments in her home city. The BIA thus focused on evidence that supported a finding of continued circumstances without addressing evidence of new developments. Because of this arbitrary omission, I would hold that the BIA abused its discretion in finding that Li did not establish changed country conditions.

2. *Prima Facie Eligibility.* Second, remand is proper because the BIA incorrectly analyzed Li's prima facie eligibility for relief. Li asserted a fear of religious persecution due to China's "pattern or practice" of persecuting Protestant Christians. Accordingly, she was not required to show that she would be "singled out individually" for persecution. 8 C.F.R. § 1208.13(b)(2)(iii); *see Agonafer*, 859 F.3d at 1206; *Rusak v. Holder*, 734 F.3d 894, 896 (9th Cir. 2013).

The BIA based its conclusion that Li had not shown prima facie eligibility for asylum or withholding of removal on her failure to show that she would be "singled out" for religious persecution. The proper inquiry under 8 C.F.R. § 1208.13(b)(2)(iii) is whether Li's evidence established the pattern or practice of persecution that she alleged. The BIA thus misidentified the relevant issue and applied an incorrect legal standard.

The BIA also misapplied the law regarding Li's claim for CAT relief. A noncitizen must show a "reasonable likelihood that the statutory requirements for relief have been satisfied" to establish a prima facie CAT claim. *Ordonez v. INS*, 345 F.3d 777, 785 (9th Cir. 2003) (internal quotation omitted). "[E]vidence of country conditions alone" can satisfy this burden. *Aguilar-Ramos v. Holder*, 594 F.3d 701, 705 (9th Cir. 2010).

The BIA rejected Li's showing of a prima facie CAT claim because she "ha[d] not made a prima facie showing that it is more likely than not that she will be tortured in China . . . ." Again, the BIA applied an incorrect standard. "The 'reasonable likelihood' standard applies at the motion to reopen stage, while the 'more likely than not standard' applies to CAT protection claims themselves." *Kaur v. Garland*, 2 F.4th 823, 837 (2021) (citations omitted). To prevail on her motion to reopen, Li did not need to show that it was more likely than not that she will be tortured in China. *See id*. She needed "merely" to establish "a reasonable

likelihood that she will be able to show" that she could meet the CAT standard. *Id.* Because these errors amount to an abuse of discretion, remand is warranted so that the BIA may apply the correct legal standards.

The BIA abused its discretion in finding that country conditions had not changed and in failing to correctly assess Li's showing of prima facie eligibility for relief. Because Li established changed country conditions with respect to the persecution of her religious group, I would grant the petition and remand this case to the BIA for proper analysis of her prima facie eligibility for relief. I respectfully dissent.