

1
2
3
4 UNITED STATES COURT OF APPEALS
5 FOR THE SECOND CIRCUIT
6

7 SUMMARY ORDER
8

9 Rulings by summary order do not have precedential effect. Citation to summary
10 orders filed after January 1, 2007, is permitted and is governed by this court's Local Rule
11 0.23 and Federal Rule of Appellate Procedure 32.1. In a brief or other paper in which a
12 litigant cites a summary order, in each paragraph in which a citation appears, at least one
13 citation must either be to the Federal Appendix or be accompanied by the notation:
14 "(summary order)." Unless the summary order is available in an electronic database which
15 is publicly accessible without payment of fee (such as the database available at
16 <http://www.ca2.uscourts.gov/>), the party citing the summary order must file and serve a
17 copy of that summary order together with the paper in which the summary order is cited.
18 If no copy is served by reason of the availability of the order on such a database, the
19 citation must include reference to that database and the docket number of the case in which
20 the order was entered.

21
22 At a stated term of the United States Court of Appeals for the Second Circuit, held at the
23 Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York,
24 on the 8th day of January, two thousand seven.

25
26 PRESENT:

27 HON. ROGER J. MINER,
28 HON. JOSÉ A. CABRANES,
29 HON. PETER W. HALL,
30 *Circuit Judges.*

31
32
33 He Pan,

Petitioner,

34
35
36 v.

No. 03-40687-ag
NAC

37
38 Alberto R. Gonzales,¹

Respondent.

39
40
41 FOR PETITIONER:

Peter D. Lobel (Joshua Bardavid, on the brief), Law Office of

42

¹Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Alberto R. Gonzales is automatically substituted for former Attorney General John Ashcroft as the respondent in this case.

1 Peter

2 D. Lobel, New York, New York.

3
4 FOR RESPONDENT: Troy A. Eid, United States Attorney, District of Colorado, Terry
5 Fox, Assistant United States Attorney, Denver, Colorado.
6

7 UPON DUE CONSIDERATION of this petition for review of a decision of the Board of
8 Immigration Appeals (“BIA”), it is hereby ORDERED, ADJUDGED, AND DECREED, that
9 the petition for review is GRANTED in part and DISMISSED in part.

10 Petitioner He Pan, a native and citizen of China, seeks review of the September 11, 2003
11 order of the BIA affirming the January 29, 2002 decision of Immigration Judge (“IJ”) Paul L.
12 Johnston denying petitioner’s application for asylum, withholding of removal, and relief under
13 the Convention Against Torture (“CAT”). *In re He Pan*, No. A77 340 349 (B.I.A. Sept. 11,
14 2003), *aff’g* No. A77 340 349 (Immig. Ct. N.Y. City Jan. 29, 2002). We assume the parties’
15 familiarity with the underlying facts and procedural history of the case.

16 When the BIA affirms the IJ’s decision in all respects but one, this Court reviews the IJ’s
17 decision as modified by the BIA decision, i.e., “minus the single argument for denying relief
18 that was rejected by the BIA.” *Xue Hong Yang v. U.S. Dep’t of Justice*, 426 F.3d 520, 522 (2d
19 Cir. 2005). This Court reviews *de novo* questions of law and the application of law to
20 undisputed fact. *See, e.g., Secaida-Rosales v. INS*, 331 F.3d 297, 307 (2d Cir. 2003). This
21 Court reviews the agency’s factual findings under the substantial evidence standard, treating
22 them as “conclusive unless any reasonable adjudicator would be compelled to conclude to the
23 contrary.” 8 U.S.C. § 1252(b)(4)(B); *see, e.g., Zhou Yun Zhang v. INS*, 386 F.3d 66, 73 & n.7
24 (2d Cir. 2004). However, the Court will vacate and remand for new findings if the agency’s
25 reasoning or its fact-finding process was sufficiently flawed. *Cao He Lin v. U.S. Dep’t of*
26 *Justice*, 428 F.3d 391, 406 (2d Cir. 2005); *Tian-Yong Chen v. INS*, 359 F.3d 121, 129 (2d Cir.

1 2004); *see also Xiao Ji Chen v. U.S. Dep't of Justice*, 434 F.3d 144, 158–60 (2d Cir. 2006).

2
3 Pan challenges the BIA's affirmance of the IJ's decision denying relief and asserts that
4 he has met his burden of proof. Our review of the record leads us to conclude that the agency's
5 decision was not supported by substantial evidence insofar as it failed to examine relevant
6 country reports pertaining to the treatment of Christians in China.

7 As an initial matter, Pan fails in his argument that the BIA erred by focusing solely on
8 future persecution while neglecting to consider the "principal basis" of his claim of past
9 persecution, namely that he was prohibited from practicing his religion in China. Pan did not
10 raise this claim before the BIA and is raising it here for the first time. The Immigration and
11 Nationality Act provides that federal courts may review a final order of removal only if
12 petitioners have exhausted not just the categories of relief they are claiming, but also the
13 individual issues on which that relief may turn. *See* 8 U.S.C. § 1252(d)(1); *Foster v. INS*, 376
14 F.3d 75, 77–78 (2d Cir. 2004); *Cervantes-Ascencio v. INS*, 326 F.3d 83, 87 (2d Cir. 2003); *see*
15 *generally Gill v. INS*, 420 F.3d 82, 86 (2d Cir. 2005). Exhaustion generally means presenting
16 these issues on appeal to the BIA, which Pan has not done. *See Abimbola v. Ashcroft*, 378 F.3d
17 173, 180 (2d Cir. 2004). It is true that a petitioner is not limited to the "exact contours" of his or
18 her argument to the agency, *Gill*, 420 F.3d at 86, however the significance of Pan's failure to
19 raise his argument before the BIA is heightened by the fact that it is not well-settled law that the
20 prohibition of practicing a chosen religion is itself persecution. We have never held this to be
21 so, although we acknowledged that other courts have. *See Yan Chen v. Gonzales*, 417 F.3d 268,
22 275 (2d Cir. 2005) (citing *Bucur v. INS*, 109 F.3d 399, 405 (7th Cir. 1997)). Pan's failure to

1 raise before the BIA his relatively novel claim that he was persecuted in the past because he was
2 prohibited from practicing his religion bars this Court from examining this particular basis for
3 relief.

4 With respect to Pan’s claimed fear of future persecution on account of his religion,
5 however, the BIA’s decision to credit his testimony that he is Christian while failing to conduct
6 any analysis of the current conditions in China is deficient and warrants remand. *See Paul v.*
7 *Gonzales*, 444 F.3d 148, 154–55 (2d Cir. 2006); *Yan Chen*, 417 F.3d 268, 275 (2d Cir. 2005).
8 Country reports, particularly those from the Department of State, are important to an assessment
9 of the subjective and objective components of an applicant’s claim of a well-founded fear. *See*
10 *Yan Chen*, 417 F.3d at 273–75. We have previously found that an agency decision is
11 incomplete in its analysis of an asylum applicant’s well-founded fear if it does not examine
12 evidence of country conditions in the record, especially when it credits an applicant’s testimony
13 that he or she possesses characteristics encompassed by one or more of the five protected
14 grounds. *See Paul*, 444 F.3d at 154-55; *Yan Chen*, 417 F.3d at 273-275. The State
15 Department’s Human Rights Report found in the record “corroborates [Pan’s] accounts of what
16 occurred to him . . . and bolsters [his] subjective fear of future persecution.” *Yan Chen*, 417
17 F.3d at 275. The report indicates, *inter alia*, that the Chinese government has destroyed
18 unregistered houses of worship and has used threats, extortion, interrogation, detention, and at
19 times beating and torture to harass unofficial Christian religious figures and followers.
20 Although this information does not mean that Pan’s fear is well founded *per se*, it certainly
21 deserves to be examined by the BIA when determining Pan’s eligibility for asylum, particularly
22 in light of his credible testimony that he is Christian, that his mother was arrested and detained

1 by police after being warned to stop her religious practices, and that police continue to search
2 for him. See *Paul*, 444 F.3d at 154–55; *Yan Chen*, 417 F.3d at 275.

3 _____As to Pan’s withholding of removal claim under 8 U.S.C. § 1231(b)(3), because the BIA
4 credited Pan’s testimony that he is a Christian, the only other factor that must be established is
5 whether, if returned to China, “he would likely be persecuted on the basis of his religious
6 beliefs.” *Paul*, 444 F.3d at 157. Evidence in the record that the Chinese government persecutes
7 members of unofficial Christians churches “would clearly bear on this objective inquiry.” *Id.*
8 Thus, we also remand Pan’s withholding claim to the BIA.

9 Pan’s failure to raise his CAT relief claim before the BIA precludes our review, and
10 therefore Pan’s CAT claim is dismissed. See *Karaj v. Gonzales*, 462 F.3d 113, 119 (2d Cir.
11 2006); 8 U.S.C. § 1252(d)(1).

12 For the foregoing reasons, the petition for review is GRANTED, in part, and
13 DISMISSED, in part. The pending motion for a stay of removal in this petition is DISMISSED
14 as moot. The pending request for oral argument in this petition is DENIED in accordance with
15 Federal Rule of Appellate Procedure 34(a)(2), and Second Circuit Local Rule 34(d)(1).

16
17 FOR THE COURT:
18 Thomas Asreen, Acting Clerk
19

20
21 By: _____