

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 - - - - -

4 August Term, 2005

5 (Argued: April 24, 2006

Decided: July 27, 2006)

6
7 Docket No. 05-2774-ag

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9 _____
10 SAN CHUNG JO,

11 Petitioner,

12 - v. -

13 ALBERTO GONZALES, Attorney General, DEPARTMENT OF
14 HOMELAND SECURITY,

15 Respondents.
16 _____

17 Before: WALKER, Chief Judge, and KEARSE and WINTER, Circuit Judges.

18 Petition for review of a decision of the Board of
19 Immigration Appeals adopting and affirming a decision of an
20 Immigration Judge denying petitioner's application for relief under
the Convention Against Torture.

21 Denied.

22 STUART ALTMAN, New York, New York, for
23 Petitioner.

24 ROBERT L. RAWLS, Assistant United States
25 Attorney, Beaumont, Texas (Matthew D. Orwig,
26 United States Attorney for the Eastern District
27 of Texas, Beaumont, Texas, on the brief), for
28 Respondents.

1 KEARSE, Circuit Judge:

2 Petitioner San Chung Jo, a native and citizen of the
3 People's Republic of China ("China"), seeks review of a May 13, 2005
4 decision of the Board of Immigration Appeals ("BIA") affirming a
5 December 18, 2003 decision of an Immigration Judge ("IJ") that
6 denied his application for relief from removal from the United
7 States pursuant to the United Nations Convention Against Torture and
8 Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted
9 Dec. 10, 1984, entered into force for the United States Nov. 20,
10 1994, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85
11 ("Convention Against Torture" or "CAT"), implemented by Foreign
12 Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277,
13 div. G, Title XXII, § 2242, 112 Stat. 2681-761, 2681-822 ("FARRA")
14 (codified at 8 U.S.C. § 1231 note (2000)). In his petition for
15 review, Jo contends principally that the IJ lacked substantial
16 evidence to support her finding that Jo failed to establish that he
17 would more likely than not be tortured upon return to his homeland.
18 For the reasons that follow, we deny the petition.

19 I. BACKGROUND

20 Jo entered the United States on or about January 30, 2001.
21 On February 13, 2001, the Immigration and Naturalization Service
22 served him with a Notice to Appear, charging that he was an

1 immigrant who lacked valid entry documents and was thereby subject
2 to removal from the United States pursuant to § 212(a)(7)(A)(i)(I)
3 of the Immigration and Nationality Act, as amended ("INA"), 8 U.S.C.
4 § 1182(a)(7)(A)(i)(I). Jo conceded removability, and he initially
5 applied for asylum and withholding of removal pursuant to INA §§ 208
6 and 241(b)(3), 8 U.S.C. §§ 1158 and 1231(b)(3), as well as for
7 relief under CAT, claiming that if he were returned to China he
8 would be fined and imprisoned on account of his past opposition to
9 China's coercive family planning policies. He later filed an
10 amended statement in support of his claim, adding, inter alia, that
11 because of his illegal departure from China and his opposition to
12 the family planning policies, the Chinese authorities would also
13 subject him to torture.

14 Thereafter, Jo requested and received permission to
15 withdraw his applications for asylum and withholding of removal; Jo
16 conceded that his claim of difficulties with China's family planning
17 officials was fabricated. He asserted that the real reason he
18 feared returning to China was that he had come to the United States
19 with the aid of smugglers, known as Snakeheads; that if he were
20 returned to China he would be unable to pay off the substantial debt
21 he still owed the Snakeheads; and that if he did not pay, the
22 Snakeheads would harm or torture him and his family. The written
23 statement submitted by Jo in support of this assertion included the
24 following:

1 I . . . borrowed sixty thousand dollars at a
2 high interest rate to come to the United States to
3 help family. I still owe half this money to the
4 [s]mugglers. If I am sent back to China there will
5 be no way to pay this money. I then fear that these
6 smugglers could harm or torture me for not repaying
7 the money. I believe they will also harm my family
8 and destroy my home if I am not able to pay. I do
9 not know for sure if these smugglers work with the
10 Chinese Government but I strongly suspect the[y] do.
11 The reason is they do their practice out in the open
12 and the Chinese Government would not allow[] them to
13 do this so freely if they weren't involved with it.

14 (Jo's Amended Statement dated October 22, 2003.) Jo pursued this
15 claim as a basis for relief under the Convention Against Torture.

16 At an evidentiary hearing, the IJ questioned Jo about the
17 basis of his fear of the Snakeheads. Jo testified that he had paid
18 half of his debt to the smugglers (see Hearing Transcript, December
19 18, 2003 ("Tr."), at 31); that he would be unable to pay the
20 remainder if he were returned to China because work is difficult to
21 find and salaries in China are low (see id. at 38); and that he
22 feared that if he failed to repay the Snakeheads, his parents "will
23 be beaten up, and my, the things in the house will be destroyed"
24 (id. at 37). Jo testified that if he thereafter still failed to
25 make repayment, "they will kill my parent" (id. at 38). The IJ
26 asked Jo what evidence he had that the Snakeheads would harm or kill
27 him or his parents if he were returned to China, and Jo's testimony
28 was as follows:

29 Q. . . . How do you know that the
30 Snakeheads will come after you if you are returned
31 to China?

1 A. Because similar thing happen to my
2 neighbor. So that's how I know.

3 Q. Tell me what happened to your neighbor.

4 A. Also in the same situation, the person came
5 through, came to the United States through it. And
6 then demanded to send money back.

7 Q. And what happened?

8 A. He, it was demanded to make the payment but
9 because no money then forced, forced he or him or
10 her, them, to make the money, make the payment.

11 Q. And then what happened.

12 A. Then it was resulted in the, in the pulling
13 down of the house.

14 Q. And then what happened?

15 A. Then when the house was pulled down, they
16 had no house to live in.

17 Q. Anything else?

18 A. Well more or less like this, then the
19 parents had no house to live, then they have to
20 move, move away.

21 Q. Anything else?

22 A. Even they moved away but the Snakeheads was
23 determined to find you out. Then after they locate
24 them the Snakehead make the same demand to make the
25 payment.

26 Q. Then?

27 A. Then they moved again, well then I have no
28 more idea about what happened next.

29 (Tr. 39-40.)

30 In response to further questioning, Jo testified that the
31 Snakeheads did not wear uniforms and that he did not know whether

1 they worked for the Chinese government. (See id. at 43.) Jo's
2 counsel conceded that the Snakeheads "don't work for the Chinese
3 Government." (Id. at 44.)

4 In an oral decision dated December 18, 2003 ("IJ
5 Decision"), the IJ denied Jo's application for relief under CAT,
6 finding, for two reasons, that Jo had not established that it was
7 more likely than not that he would be subjected to torture in
8 violation of CAT if he were returned to China. First, the IJ noted
9 that to be eligible for relief under CAT, the alien must show that
10 the anticipated torture would be "at the instigation of, with the
11 acquiescence of, or through the wilful omission of a public official
12 or one acting in an official capacity." IJ Decision at 4. Although
13 finding that Jo's testimony as to his indebtedness to the Snakeheads
14 was credible, the IJ was unpersuaded that the Snakeheads were part
15 of the Chinese government. Second, assuming that the Snakeheads
16 were part of the government, the IJ noted that the only evidence
17 that Jo had presented as to the Snakeheads' response to nonpayment
18 of debt was that his neighbors' house had been pulled down and the
19 neighbors had had to move away. The IJ concluded that this
20 "description . . . as to what happens to people who are returned
21 does not rise, in the Court's mind, . . . to the kind of harm that
22 is torture--extreme punishment contemplated by the Torture
23 Convention." IJ Decision at 6. The IJ stated that, while "cruel,
24 destroying someone's home" does not, within the meaning of CAT,

1 constitute "torture." Id. Accordingly, the IJ concluded that Jo
2 had not shown his entitlement to relief under CAT.

3 Jo appealed the IJ Decision to the BIA. In a brief per
4 curiam opinion dated May 13, 2005, the BIA adopted and affirmed the
5 IJ Decision. This petition for review followed.

6 II. DISCUSSION

7 On this petition for review, Jo contends that the IJ's
8 ruling that he had not shown that it was more likely than not that
9 he would be subjected to torture if returned to China was not
10 supported by substantial evidence. We do not view this case as
11 turning on a question of evidentiary sufficiency. Rather, the IJ,
12 giving full credence to all nonspeculative evidence presented by Jo,
13 ruled that the type of retribution as to which Jo presented evidence
14 does not constitute "torture" within the meaning of CAT. That was
15 an application of law to fact, which we review de novo, see, e.g.,
16 Ramsameachire v. Ashcroft, 357 F.3d 169, 178 (2d Cir. 2004); Diallo
17 v. INS, 232 F.3d 279, 287 (2d Cir. 2000); see also Diallo v.
18 Gonzales, 445 F.3d 624, 628 (2d Cir. 2006) (where the BIA issues a
19 brief opinion adopting and affirming the ruling of the IJ, we review
20 the two decisions together). For the reasons that follow, we see no

1 error.

2 In seeking relief under the Convention Against Torture, an
3 alien bears the burden of proving that, "if removed to the proposed
4 country of removal," "it is more likely than not that he or she
5 would be tortured." 8 C.F.R. § 208.16(c)(2). At issue here is not
6 whether Jo proved it more likely than not that he would be treated
7 in the manner in which he testified that others in his circumstances
8 had been treated, but rather whether the type of treatment he
9 showed--deprivation of a home--falls within the meaning of
10 "torture." CAT itself defines "torture" as follows:

11 For the purposes of this Convention, the term
12 "torture" means any act by which severe pain or
13 suffering, whether physical or mental, is
14 intentionally inflicted on a person for such
15 purposes as obtaining from him or a third person
16 information or a confession, punishing him for an
17 act he or a third person has committed or is
18 suspected of having committed, or intimidating or
19 coercing him or a third person, or for any reason
20 based on discrimination of any kind, when such pain
21 or suffering is inflicted by or at the instigation
22 of or with the consent or acquiescence of a public
23 official or other person acting in an official
24 capacity. It does not include pain or suffering
25 arising only from, inherent in or incidental to
26 lawful sanctions.

27 Convention Against Torture art. 1, ¶ 1.

28 The United States Senate ratified CAT subject to certain
29 stated "understandings," which include the following with respect to
30 the meaning of "torture":

31 (1)(a) That with reference to Article 1 [of
32 CAT], the United States understands that, in order
33 to constitute torture, an act must be specifically

1 intended to inflict severe physical or mental pain
2 or suffering and that mental pain or suffering
3 refers to prolonged mental harm caused by or
4 resulting from: (1) the intentional infliction or
5 threatened infliction of severe physical pain or
6 suffering; (2) the administration or application, or
7 threatened administration or application, of mind
8 altering substances or other procedures calculated
9 to disrupt profoundly the senses or the personality;
10 (3) the threat of imminent death; or (4) the threat
11 that another person will imminently be subject to
12 death, severe physical pain or suffering, or the
13 administration or application of mind altering
14 substances or other procedures calculated to disrupt
15 profoundly the senses or personality.

16 (b) That the United States understands that the
17 definition of torture in Article 1 is intended to
18 apply only to acts directed against persons in the
19 offender's custody or physical control.

20 Senate Resolution of Ratification of the Convention Against Torture,
21 136 Cong. Rec. 36,192, 36,198 (1990) ("Senate Resolution")
22 ¶ II(1)(a) and (b). Congress authorized the appropriate federal
23 agencies to prescribe regulations to implement the obligations of
24 the United States under CAT in accordance with these understandings.
25 See FARRA § 2242(b).

26 The regulations promulgated by the Attorney General,
27 governing matters pertaining to immigration, begin by adopting
28 nearly verbatim the definition of torture that appears in Article 1
29 of CAT, and add clarifying elaborations:

30 **§ 208.18 Implementation of the Convention Against Torture.**

31 (a) Definitions. The definitions in this
32 subsection incorporate the definition of torture
33 contained in Article 1 of the Convention Against
34 Torture, subject to the reservations,
35 understandings, declarations, and provisos contained

1 in the United States Senate resolution of
2 ratification of the Convention.

3 (1) Torture is defined as any act by which
4 severe pain or suffering, whether physical or
5 mental, is intentionally inflicted on a person
6 for such purposes as obtaining from him or her
7 or a third person information or a confession,
8 punishing him or her for an act he or she or a
9 third person has committed or is suspected of
10 having committed, or intimidating or coercing
11 him or her or a third person, or for any reason
12 based on discrimination of any kind, when such
13 pain or suffering is inflicted by or at the
14 instigation of or with the consent or
15 acquiescence of a public official or other
16 person acting in an official capacity.

17 (2) Torture is an extreme form of cruel
18 and inhuman treatment and does not include
19 lesser forms of cruel, inhuman or degrading
20 treatment or punishment that do not amount to
21 torture.

22 (3) Torture does not include pain or
23 suffering arising only from, inherent in or
24 incidental to lawful sanctions. Lawful
25 sanctions include judicially imposed sanctions
26 and other enforcement actions authorized by
27 law, including the death penalty, but do not
28 include sanctions that defeat the object and
29 purpose of the Convention Against Torture to
30 prohibit torture.

31 (4) In order to constitute torture, mental
32 pain or suffering must be prolonged mental harm
33 caused by or resulting from:

34 (i) The intentional infliction or
35 threatened infliction of severe physical
36 pain or suffering;

37 (ii) The administration or
38 application, or threatened administration
39 or application, of mind altering
40 substances or other procedures calculated
41 to disrupt profoundly the senses or the
42 personality;

1 (iii) The threat of imminent death;
2 or

3 (iv) The threat that another person
4 will imminently be subjected to death,
5 severe physical pain or suffering, or the
6 administration or application of mind
7 altering substances or other procedures
8 calculated to disrupt profoundly the sense
9 or personality.

10 (5) In order to constitute torture, an act
11 must be specifically intended to inflict severe
12 physical or mental pain or suffering. An act
13 that results in unanticipated or unintended
14 severity of pain and suffering is not torture.

15 (6) In order to constitute torture an act
16 must be directed against a person in the
17 offender's custody or physical control.

18 (7) Acquiescence of a public official
19 requires that the public official, prior to the
20 activity constituting torture, have awareness
21 of such activity and thereafter breach his or
22 her legal responsibility to intervene to
23 prevent such activity.

24 8 C.F.R. § 208.18(a)(1)-(7) (emphases added).

25 As indicated by each part of the above definition, the
26 concept of torture has its focus on injury to persons, rather than
27 on damage to property. For example, reflecting the understanding
28 explicitly stated in the Senate's ratification of CAT, the
29 regulations specify that "[i]n order to constitute torture," the act
30 must be directed "against a person" and that that person must be "in
31 the offender's custody or physical control," 8 C.F.R.
32 § 208.18(a)(6); see Senate Resolution ¶ II(1)(b).

33 Further, although the definition of torture includes the

1 infliction of pain that is mental rather than physical, and the loss
2 of property, especially of one's home, can of course cause mental
3 anguish, the regulations make clear that in order to come within the
4 definition of torture, the mental anguish must have its origin in
5 the treatment, actual or threatened, of a person. As quoted above,
6 the regulations provide that in order for the infliction of "mental
7 pain or suffering" to constitute torture, it must be, inter alia,
8 "caused by or resulting from" either the "infliction or threatened
9 infliction of severe physical pain or suffering," or the "threat of
10 imminent death," or the "administration or application, or
11 threatened administration or application, of mind altering
12 substances or other procedures calculated to disrupt profoundly the
13 senses or the personality." 8 C.F.R. § 208.18(a)(4) (emphases
14 added). These regulations leave no room for the proposition,
15 advanced by Jo, that the CAT concept of torture encompasses simple
16 deprivations of property. See also Kyaw Zwar Tun v. INS, 445 F.3d
17 554, 567 (2d Cir. 2006) (noting that although confiscations of
18 property could be sufficiently severe to constitute persecution, a
19 claim of "torture requires proof of something more severe than the
20 kind of treatment that would suffice to prove persecution"). The
21 regulations' definition of torture makes clear that for the
22 infliction of mental pain to constitute torture, that pain must have
23 its origin in the actual or threatened infliction of harm on a
24 person.

