No. 06-367

In the Supreme Court of the United States

YI FENG ZHENG, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
FRANCIS W. FRASER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals properly upheld the immigration judge's findings that petitioner failed to demonstrate past persecution or a reasonable possibility of future persecution if he is removed to the People's Republic of China.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations:

Regulations—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 06-367

YI FENG ZHENG, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 451 F.3d 1287. The decisions of the immigration judge (Pet. App. 13a-22a) and the Board of Immigration Appeals (Pet. App. 12a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 2006. The petition for a writ of certiorari was filed on September 12, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA) defines a "refugee" as an alien who is "unable or unwilling to return" to his country of origin "because of persecution or a well-founded fear of persecution on account of

race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). If the "Secretary of Homeland Security or the Attorney General determines" that an alien is a "refugee," he may, in his discretion, grant the alien asylum in the United States. REAL ID Act of 2005, Pub. L. No. 109-13, Tit.I, § 101(a), 119 Stat. 302-303 (to be codified at 8 U.S.C. 1158(b)(1)(A)). In addition to the discretionary relief of asylum, mandatory withholding of removal is available if "the alien's life or freedom would be threatened in [the country of removal] because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3). That standard is more demanding than the standard for demonstrating eligibility for asylum. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430-431 (1987). The applicant bears the burden of establishing that he or she is a refugee eligible for asylum or that his or her life or freedom would be threatened so as to warrant withholding of removal. 8 C.F.R. 208.13(a), 208.16(b).

For purposes of both forms of relief, "persecution" generally refers to significant mistreatment by the government itself or by groups or individuals that the government is unable or unwilling to control. See *In re Villalta*, 20 I. & N. Dec. 142, 147 (B.I.A. 1990); *In re Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985), overruled in part on other grounds, *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987). Persecution is an "'extreme concept,' requiring 'more than a few isolated incidents of verbal harassment or intimidation,' and [] '[m]ere harassment does not amount to persecution.'" *Sepulveda* v. *United States Att'y Gen.*, 401 F.3d 1226, 1231 (11th Cir. 2005) (quoting *Gonzalez* v. *Reno*, 212 F.3d 1338,

1355 (11th Cir.), cert. denied 530 U.S. 1270 (2000)); see *Nelson* v. *INS*, 232 F.3d 258, 263 (1st Cir. 2000).

2. Petitioner is a native and citizen of the People's Republic of China (PRC). Pet. App. 14a. Petitioner began practicing Falun Gong in March 1998. *Id.* at 15a. He was never a leader of his Falun Gong group. *Id.* at 19a. In July 1999, the Chinese government banned the practice of Falun Gong. Pet. 3. On August 18, 1999, petitioner was arrested, taken to a police station, and placed in custody with other Falun Gong practitioners. Pet. App. 15a. He was informed by the police that Falun Gong was an evil cult that interfered with the stability of society, and was questioned about the identity of his Falun Gong instructor. When he refused to identify his instructor, he was forced to read anti-Falun Gong materials and watch anti-Falun Gong videotapes. *Id.* at 15a, 18a. Petitioner initially refused to watch the videotapes, and therefore was dragged to an exercise courtyard and required to stand in the sun for approximately two hours. He later agreed to view the tapes. After five days, petitioner promised to cease practicing Falun Gong and was released from custody. *Ibid.*

Upon returning to his place of employment in Guandong City, petitioner was informed that he had been fired because of his Falun Gong activities. Pet. App. 2a, 15a, 18a. Unable to find other work in the city, *id.* at 2a, petitioner returned to his parents' village, where he remained for approximately the next three years. *Id.* at 2a, 15a, 18a. During that time, village officials observed him and occasionally searched his house for Falun Gong materials. He also claimed that other villagers shunned him. *Ibid.*

Petitioner left China on September 17, 2002, and arrived in the United States on or about December 19,

2002. Pet. App. 2a, 14a, 15a. After being placed in removal proceedings, petitioner applied for asylum, withholding of removal, and other relief based on the United Nations Convention Against Torture. *Id.* at 1a, 14a.[1]

3. a. The immigration judge (IJ) found that petitioner failed to demonstrate that he faced past persecution or a well-founded fear of future persecution. Pet. App. 17a-20a; see 8 U.S.C. 1101(a)(42)(A); 8 C.F.R. 208.13(a). The IJ, after crediting petitioner's account of the events in China, found that petitioner's short detention with minimal physical mistreatment did not amount to persecution. Pet. App. 18a. The IJ also noted that petitioner thereafter lived in China for three years without incident and that there was no evidence that petitioner was unable to obtain other work. *Id.* at 18a-19a. As to future persecution, the IJ cited a 2002 State Department report on conditions in China as evidence that petitioner's status as a mere practitioner of Falun Gong made persecution less likely. *Id.* at 19a (citing Certified Admin. Record (A.R.) 86, 91); U.S. Dep't of State, *China, Country Reports on Human Rights Practices – 2002,* at 1, 20 (Apr. 1, 2003) (Country Report). That fact, coupled with petitioner's previous experience in China, counseled against a finding of well-founded fear. *Id.* at 19a-20a.

b. The Board of Immigration Appeals affirmed without opinion. Pet. App. 12a; see 8 C.F.R. 1003.1(e)(4).

4. The court of appeals denied the petition for review. Pet. App. 1a-11a. The court held that substantial evidence supported the IJ's conclusion that petitioner was not persecuted in China. *Id.* at 6a-8a. The court

---

[1] Petitioner does not challenge the court of appeals' denial of his Convention Against Torture claims.

found that neither petitioner's "five-day detention during which he was not harmed," *id.* at 6a, nor his "termination from his job and his inability to find another job in Quandong City," *id.* at 7a, "compel[led] a conclusion that [petitioner] suffered past persecution." *Id.* at 8a. Similarly, the court found that the IJ had substantial evidence to conclude that petitioner lacked a well-founded fear of future persecution. *Ibid.* In particular, the court affirmed the IJ's finding - based on the 2002 State Department Country Report - that mere practitioners of Falun Gong were treated less harshly than leaders. *Id.* at 9a. That fact, combined with evidence that petitioner lived in China for three years without incident, belied petitioner's claim that he faced a reasonable possibility of persecution upon his return to China. *Ibid.* Having failed to "satisfy[y] the less stringent standard for asylum," the court of appeals denied the petition for review with respect to petitioner's mandatory withholding and Convention Against Torture claims. *Ibid.*

ARGUMENT

The Board's or IJ's findings of fact are "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. 1252(b)(4)(B); see *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 n.1, 483-484 (1992). The court of appeals correctly applied that deferential standard, and its fact-bound determination does not warrant this Court's further review.

Although the INA does not define "persecution," the Board and the courts of appeals have recognized that "persecution is an extreme concept that does not include every sort of treatment our society regards as offensive." *Ghaly* v. *INS,* 58 F.3d 1425, 1431 (9th Cir. 1995)

(quoting *Fisher* v. *INS*, 37 F.3d 1371, 1381 n.8 (9th Cir., amended and superseded, 61 F.3d 1366 (9th Cir. 1994)); see *Sepulveda* v. *United States Att'y Gen.*, 401 F.3d 1226, 1231 (11th Cir. 2005); *Nelson* v. *INS*, 232 F.3d 258, 263-264 (1st Cir. 2000) ("To qualify as persecution, a person's experience must rise above unpleasantness, harassment, and even basic suffering."); *Fatin* v. *INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) ("[T]he concept of persecution does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional."). The events that petitioner cited below to demonstrate past persecution do not—alone or together—compel the conclusion that a reasonable factfinder would reach a different result in this case. The IJ reasonably found that petitioner's short detention did not rise to the level of "persecution," Pet. App. 18a; see, *e.g.*, *Diallo* v. *Ashcroft*, 381 F.3d 687, 698 (7th Cir. 2004), that petitioner was not deprived of the ability to earn a living, Pet. App. 18a-19a, and that any additional burden imposed on petitioner for the three years following his detention was minimal. *Id.* at 19a. There is nothing to suggest that the IJ erred in evaluating the facts against the well-established standard for identifying conduct that amounts to persecution.

As to whether petitioner demonstrated a well-founded fear of future persecution, the IJ again applied the correct legal standard and no factual evidence compels a different conclusion. A "well-founded fear" has both objective and subjective components: To demonstrate a well-founded fear, an alien must show both that he subjectively fears persecution and that such fear is objectively reasonable. See *Shao* v. *BIA*, 465 F.3d 497, 501 (2d Cir. 2006); *Ruiz* v. *United States Att'y Gen.*, 440 F.3d 1247, 1257 (11th Cir. 2006); see also 8 C.F.R.

208.13(b)(2)(i) and (B), 1208.13(b)(2)(i) and (B) ("An applicant has a well-founded fear of persecution if * * * [t]here is a reasonable possibility of suffering such persecution if he or she were to return to [his or her] country [of removal]."). The IJ held that petitioner's limited role in the Falun Gong movement coupled with his previous time spent in China without incident undermined any reasonable belief that he would be subject to future persecution. Pet. App. 19a-20a; see *id.* at 8a-9a & n.3 (finding substantial evidence to support that holding).

Petitioner argues (Pet. 6) that the court of appeals' decision is at odds with the decisions of several other circuits that found Falun Gong practitioners eligible for asylum. Two of the decisions petitioner cites did not reach the underlying question whether the applicant had a well-founded fear of persecution. See *Gao* v. *Gonzales*, 424 F.3d 122, 129-130 (2d Cir. 2005) (remanding to the BIA for consideration of applicant's imputed political opinion theory); *Iao* v. *Gonzales*, 400 F.3d 530, 533-534 (7th Cir. 2005) (remanding for want of reasoned decisionmaking). In the two other cases petitioner cites, the particular applicant was deemed eligible for asylum, *Zhao* v. *Gonzales*, 404 F.3d 295, 310 (5th Cir. 2005), or mandatory withholding of removal, *Zhang* v. *Ashcroft*, 388 F.3d 713, 719-720 (9th Cir. 2004). No court of appeals has held that all Falun Gong practitioners are persecuted or have a well-founded fear of persecution. Nor could any court so hold; asylum determinations proceed "through a process of case-by-case adjudication," in which the Attorney General and the Secretary of Homeland Security are given significant deference. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 448 (1987). Indeed, in every case petitioner cites, the court of appeals made a fact-specific, individualized determination whether the

applicant had a well-founded fear. See *Zhao*, 404 F.3d at 309 (considering Chinese government's "inten[tion] to[] crack down on Falun Gong practitioners" as one factor alongside the applicant's subjective fear and the likelihood that authorities could become aware of his Falun Gong practice); *Zhang*, 388 F.3d at 718-719 (determining eligibility for mandatory withholding of removal based on (a) persecution of the applicant's family, (b) previous identification of the applicant by Chinese authorities as an anti-government activist, and (c) country conditions evidence).

The IJ and the court of appeals in this case relied in part on the Department of State's 2002 Country Report on Human Rights Practices in China. Pet. App. 8a-9a, 19a; see A.R. 86, 87, 91; Country Report 1, 16, 20.[2] Petitioner argues (Pet. 6-13) that the court of appeals' interpretation of that report conflicts with several other circuits' use of the same or predecessor reports. State Department reports, however, are not given dispositive weight in asylum determinations. They are informative background and, when made part of the administrative record, provide useful context against which an applicant's individual circumstances can be measured. See, *e.g.*, *Tambadou* v. *Gonzales*, 446 F.3d 298, 302-303 (2d Cir. 2006); *Zheng* v. *Gonzales*, 409 F.3d 804, 811 (7th Cir. 2005); *Gjyzi* v. *Ashcroft*, 386 F.3d 710, 715 n.1 (6th

---

[2] The report stated that "[s]ince the Government banned the [Falun Gong] in 1999, the mere belief in the discipline * * * has been sufficient grounds for practitioners to receive punishments ranging from loss of employment to imprisonment. Although the vast majority of practitioners detained since 2000 were released, those identified by the Government as 'core leaders' have been singled out for particularly harsh treatment. * * * However, most practitioners were punished administratively." A.R. 91.

Cir. 2004); *Yuk* v. *Ashcroft*, 355 F.3d 1222, 1236 n.12 (10th Cir. 2004). Petitioner therefore is mistaken when he asserts that different uses or applications of the State Department document create a circuit split that warrants review.

It is no surprise, moreover, that courts of appeals have reached different conclusions in similar immigration cases. Asylum determinations are highly fact-specific and largely left in the discretion of the immigration judge. A "court should not supplant the agency's findings merely by identifying alternative findings that could be supported by substantial evidence." *Arkansas* v. *Oklahoma*, 503 U.S. 91, 113 (1992). Although a different factfinder may have credited different evidence to reach a different conclusion, the court of appeals correctly deferred to the IJ's reasonable determination. See *Consolo* v. *FMC*, 383 U.S. 607, 620 (1966) ("[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."). No further review of this fact-bound conclusion is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
FRANCIS W. FRASER
Attorneys

DECEMBER 2006