

18-1440-ag

Tanusantoso v. Barr

1 In the
2 United States Court of Appeals
3 For the Second Circuit
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6 AUGUST TERM, 2019

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8 ARGUED: MARCH 31, 2020

9 DECIDED: JUNE 23, 2020
10

11 No. 18-1440-ag
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13 HARMANTO TANUSANTOSO, WIWIK WIDAYATI,
14 *Petitioners,*
15

16 *v.*
17

18 WILLIAM P. BARR, United States Attorney General,
19 *Respondent.*
20

21
22 On Petition for Review of a Final Order
23 of the Board of Immigration Appeals.
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26 Before: WALKER, CABRANES and SACK, *Circuit Judges.*
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29 Harmanto Tanusantoso and Wiwik Widayati (collectively, Petitioners)
30 petitioned for review after the Board of Immigration Appeals (BIA) denied their
31 third motion to reopen, in which they alleged a change of country conditions for
32 Christians in Indonesia. Petitioners argue that the BIA abused its discretion in

1 denying their motion to reopen because it (1) failed to address their primary
2 evidence of changed country conditions and (2) incorrectly concluded that their
3 failure to submit a new asylum application with their motion made the motion
4 procedurally deficient under 8 C.F.R. § 1003.2(c)(1). We agree with Petitioners.
5 We find that the BIA's one-and-a-half-page order failed to account for relevant
6 evidence of changed country conditions, and we hold that § 1003.2(c)(1) does not
7 require the submission of a new asylum application for motions such as this one.
8 We therefore GRANT the petition for review, VACATE the BIA's decision, and
9 REMAND for explicit consideration of Petitioners' changed country conditions
10 evidence.

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WILLIAM W. CASTILLO GUARDADO (Dan R. Smulian, *on the brief*),
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14 *Petitioners*.

15 ROBERT DALE TENNYSON, JR., Trial Attorney (Joseph H. Hunt,
16 Assistant Attorney General; Benjamin J. Zeitlin, Trial Attorney;
17 Nancy E. Friedman, Senior Litigation Counsel, *on the brief*),
18 Office of Immigration Litigation, United States Department of
19 Justice, Washington, D.C., *for Respondent*.

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JOHN M. WALKER, JR., *Circuit Judge*:

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2 denying their motion to reopen because it (1) failed to address their primary
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6 We find that the BIA's one-and-a-half-page order failed to account for relevant
7 evidence of changed country conditions and hold that § 1003.2(c)(1) does not
8 require the submission of a new asylum application for motions such as this one.
9 We therefore GRANT the petition for review, VACATE the BIA's decision, and
10 REMAND for explicit consideration of Petitioners' changed country conditions
11 evidence.

12 BACKGROUND

13 Petitioners are Indonesian citizens who adhere to the Catholic religion. In
14 December 1999, Petitioners entered the United States on non-immigrant visas set
15 to expire in March 2000. Petitioners overstayed their visas and, as relevant here,
16 applied for asylum in 2001 based on their Catholic faith and the persecution of
17 Christians in Indonesia. In 2003, an Immigration Judge (IJ) denied Petitioners'
18 asylum application on the bases that it was untimely and failed to meet the burden
19 of proof required for relief. In 2004, the BIA adopted the IJ's decision and affirmed
20 the denial of asylum.

21 Following that BIA decision, Petitioners filed three motions to reopen based
22 on ineffective assistance of counsel and changed country conditions for Christians
23 in Indonesia. The BIA denied the first of these motions in 2004 and the second in
24 2009, both times finding that the changes Petitioners alleged did not render the
25 country conditions for Christians in Indonesia materially different from those that

1 the IJ reviewed in 2003 when she denied their asylum claim.¹ In 2017, Petitioners
2 filed a third motion to reopen, alleging that country conditions for Christians in
3 Indonesia had substantially deteriorated in recent years and were now materially
4 different.

5 Together with their third motion to reopen, Petitioners submitted two recent
6 U.S. government reports on the freedom of religion in Indonesia, as well as two
7 articles detailing high-profile instances of Indonesian Christians being persecuted.
8 These materials described the rise to power of hardline “intolerant groups,” which
9 compelled “local governments and police . . . to close houses of worship . . . or
10 otherwise restrict the rights of minority religious groups,” like Christians.² The
11 reports expressed concern that parts of Indonesia had begun imposing Sharia law
12 on non-Muslims and, for the first time, had even publicly caned a Christian
13 woman for her noncompliance with Sharia rules. The reports also detailed how
14 Indonesia’s enforcement of its once-dormant 1965 anti-blasphemy law had
15 dramatically increased, in part based on its use against Christian politicians. The
16 reports and articles further suggested that private actors in Indonesia were
17 increasingly hostile toward Christians. In 2016, the State Department reported
18 that hundreds of thousands of protestors called for the arrest of the first Christian
19 governor of Jakarta after “he told a crowd of voters it was wrong to manipulate

¹ See *In re S-Y-G*, 24 I. & N. Dec. 247, 253 (BIA 2007) (“In determining whether evidence accompanying a motion to reopen demonstrates a material change in country conditions that would justify reopening, [the BIA] compare[s] the evidence of country conditions submitted with the motion to those that existed at the time of the merits hearing below.”).

² Certified Administrative Record (CAR) at 78 (Exhibit E to Petitioners’ motion to reopen: the U.S. State Department’s 2016 International Religious Freedom Report on Indonesia).

1 verses from the Quran for political gain.”³ And in 2017, the U.S. Commission on
2 International Religious Freedom reported that non-Muslims faced increasingly
3 intense “interference with their ability to practice their faith,” including
4 “vandalism at existing houses of worship” and “violent protests.”⁴

5 On April 19, 2018, the BIA denied Petitioners’ third motion to reopen in a
6 one-and-a-half-page decision that by in large did not address any of the recently
7 reported facts pertaining to changed country conditions. The BIA simply stated
8 that “the Indonesian government continues to work to promote religious
9 freedom” and that “there has not been a showing of worsening conditions or
10 circumstances.”⁵ Although Petitioners had not been asked to file a new asylum
11 application with their previous motions to reopen, the BIA also denied Petitioners’
12 third motion on the basis that they did “not submit[] a new asylum application in
13 support of” the motion.⁶ The BIA cited 8 C.F.R. § 1003.2(c)(1) in support of this
14 supposed filing requirement. Petitioners challenge the BIA decision in full.

15 DISCUSSION

16 In this petition for review, Petitioners argue that the BIA abused its
17 discretion (1) in finding that Petitioners had not established changed country

³ *Id.* at 87 (Exhibit E to Petitioners’ motion to reopen: the U.S. State Department’s 2016 International Religious Freedom Report on Indonesia).

⁴ *Id.* at 106 (Exhibit F to Petitioners’ motion to reopen: the U.S. Commission on International Religious Freedom’s 2017 Annual Report).

⁵ *Id.* at 4 (BIA decision denying Petitioners’ third motion to reopen) (explicitly referencing only the ousted Jakarta governor and otherwise generally referring to Petitioners’ “Exhs. A-B, E-F, H”).

⁶ *Id.*

1 conditions for Indonesian Christians and (2) in denying their petition on
2 procedural grounds because § 1003.2(c)(1) does not require those who have
3 already filed a pertinent asylum application to resubmit that application with their
4 motion to reopen.⁷ We agree with Petitioners.

5 A. Changed Country Conditions

6 In general, noncitizens facing deportation may move to reopen removal
7 proceedings only once, within 90 days of their final order of removal.⁸ As an
8 exception, however, noncitizens may file additional motions to reopen beyond this
9 window, provided they allege “changed country conditions arising in the country
10 of nationality or the country to which removal has been ordered, if such evidence
11 is material and was not available” at the time of the previous proceeding.⁹ Because
12 Petitioners’ motion to reopen was their third motion and was filed 13 years after
13 the IJ denied their asylum application, Petitioners had to marshal evidence of
14 changed country conditions to support their motion. Petitioners argue that they
15 established changed country conditions but that the BIA improperly refused to
16 credit their evidence.

17 When reviewing whether Petitioners’ evidence established changed country
18 conditions, the BIA must “compare the evidence of country conditions submitted
19 with the motion to those that existed at the time of the merits hearing below.”¹⁰

⁷ See *Shao v. Mukasey*, 546 F.3d 138, 168–69 (2d Cir. 2008) (reviewing the BIA’s denial of a motion to reopen for abuse of discretion).

⁸ 8 U.S.C. §§ 1229a(c)(7)(A), 1229a(c)(7)(C)(i).

⁹ *Id.* § 1229a(c)(7)(C)(ii).

¹⁰ *In re S-Y-G-*, 24 I. & N. Dec. at 253.

1 The BIA has broad discretion in how it conducts this review, but it must “explicitly
2 consider any country conditions evidence submitted by an applicant that
3 materially bears on his claim,” particularly when such evidence is submitted
4 together with a motion to reopen.¹¹ We have previously held that the BIA abuses
5 its discretion when it fails to address material evidence or otherwise “provides no
6 rational explanation” and produces a decision “devoid of any reasoning, or
7 contain[ing] only summary or conclusory statements.”¹² We find that the BIA
8 abused its discretion when it denied Petitioners’ motion to reopen with a brief
9 decision that failed to mention, and in certain respects directly conflicted with, key
10 evidence submitted by Petitioners.

11 As outlined above, Petitioners attached to their motion to reopen two recent
12 U.S. government reports and two articles detailing how “intolerant groups”
13 seeking to persecute religious minorities have risen to power in Indonesia; how
14 Indonesian state and local governments have increasingly interfered with the free
15 exercise of religion, particularly for Christians; and how Christian public figures
16 and houses of worship increasingly have been the subject of opprobrium and
17 vandalism by members of the Indonesian public. The BIA’s decision did not
18 engage with this information. It did not account for Indonesia’s renewed use of
19 its 1965 anti-blasphemy law against Christian politicians or its first-ever
20 imposition of Sharia law on non-Muslims. Nor did the BIA account for the specific
21 findings of the 2017 Annual Report of the U.S. Commission of International

¹¹ *Fong Chen v. Gonzales*, 490 F.3d 180, 182 (2d Cir. 2007) (per curiam).

¹² *Zheng v. Gonzales*, 500 F.3d 143, 146 (2d Cir. 2007) (internal quotation marks omitted).

1 Religious Freedom, one of the reports submitted by Petitioners.¹³ That report
2 found that “regional government officials often are responsible for either
3 tolerating or directly perpetrating abuses” against minority religious groups and
4 that, “by many accounts, violations of the freedom of religion or belief continue to
5 rise and/or increase in intensity.”¹⁴ To the contrary and without citing evidence,
6 the BIA concluded that “the Indonesian government continues to work to promote
7 religious freedom” and that “there has not been a showing of worsening
8 conditions or circumstances.”¹⁵

9 Because the BIA failed to specifically address Petitioners’ key evidence, we
10 hold that it abused its discretion by denying Petitioners’ motion. While the BIA
11 “need not ‘expressly parse or refute on the record each individual argument or
12 piece of evidence offered by the petitioner,’” it still must address a petitioner’s
13 primary evidence, particularly when that evidence is credible and points toward
14 a conclusion contrary to that reached by the BIA.¹⁶ Here, it was incumbent on the
15 BIA to acknowledge Petitioners’ material evidence and to explain why its view of
16 the facts departed from that of the experts who produced the 2017 U.S.
17 Commission Report. In the absence of such acknowledgement and explanation,

¹³ See *Tian-Yong Chen v. U.S. INS*, 359 F.3d 121, 130 (2d Cir. 2004) (recognizing that government reports “are usually the result of estimable expertise and earnestness of purpose, and they often provide a useful and informative overview of conditions”).

¹⁴ CAR at 106, 108 (Exhibit F to Petitioners’ motion to reopen: the U.S. Commission on International Religious Freedom’s 2017 Annual Report).

¹⁵ *Id.* at 4.

¹⁶ *Gao v. Mukasey*, 508 F.3d 86, 87 (2d Cir. 2007) (per curiam) (citing *Wang v. Bd. of Immigration Appeals*, 437 F.3d 270, 275 (2d Cir. 2006)).

1 the BIA's decision can only be characterized as predicated on "summary or
2 conclusory statements."¹⁷

3 In finding that the BIA abused its discretion by failing to address recent
4 evidence of changed country conditions for Christians in Indonesia, we do not
5 write on a blank slate. Addressing a virtually-identical BIA decision that
6 concerned the same changed country conditions for Christians in Indonesia, the
7 Third Circuit held:

8 By failing to address [the petitioner's evidence of
9 changed country conditions in Indonesia]—let alone
10 merely acknowledge them—the BIA contravened our
11 mandate that it show that it considered the entire
12 evidentiary record . . . and clearly did not fulfill its
13 heightened duty to consider any country conditions
14 evidence submitted by [the petitioner] that materially
15 bears on his claim.¹⁸

16 While acknowledging that "the BIA was not required to cite every exhibit
17 provided" by the petitioner, the Third Circuit nevertheless concluded that, "given
18 the strength of the abovementioned evidence in favor of [the petitioner's] position,
19 [the BIA] was required to meaningfully account for it in some way."¹⁹ Similarly,
20 in *Sihotang v. Sessions*, the First Circuit found that the BIA "gave [an Indonesian

¹⁷ *Zheng*, 500 F.3d at 146.

¹⁸ *Liem v. Att'y Gen. U.S.*, 921 F.3d 388, 399–400 (3d Cir. 2019) (internal quotation marks and citations omitted).

¹⁹ *Id.* at 400.

1 Christian] petitioner short shrift” by concluding “[i]n a terse one-and-a-half page
2 opinion” that conditions in Indonesia “show only a continuation of previously
3 existing conditions.”²⁰ The First Circuit held “that the BIA abused its discretion in
4 neglecting to consider significant facts” and remanded “so that the BIA may
5 determine, upon due consideration of all the relevant evidence, whether the
6 petitioner has shown a material change in country conditions.”²¹ Recently, the
7 Eleventh Circuit joined the First and Third Circuits, finding that a BIA decision
8 denying an Indonesian Christian’s motion to reopen “failed to address a single
9 piece of [the petitioner’s] evidence documenting the escalation of violence and
10 increased persecuting—including by government officials—of Christians” and
11 therefore required vacatur and remand.²² Our opinion aligns with those of our
12 sister circuits.

13 Although we find that the BIA abused its discretion in its conclusory
14 treatment of Petitioners’ claims, we, like our sister circuits, take no position on
15 whether Petitioners have actually established changed country conditions. We
16 simply hold that the BIA could not deny Petitioners’ motion without explicitly
17 addressing their primary evidence. On remand, the BIA must give full
18 consideration to Petitioners’ evidence, as well as any countervailing evidence,
19 before deciding whether to grant or deny their motion.

²⁰ 900 F.3d 46, 49 (1st Cir. 2018) (internal quotation marks omitted).

²¹ *Id.* at 53.

²² *Krisnawati v. U.S. Att’y Gen.*, 805 F. App’x 1015, 2020 WL 1487222, at *4 (11th Cir. 2020) (per curiam).

1 B. Filing Requirements

2 We also conclude that the BIA abused its discretion in denying Petitioners'
3 motion to reopen based on their failure to submit a new asylum application with
4 the motion. The BIA cited 8 C.F.R. § 1003.2(c)(1) in support of the supposed rule
5 that petitioners must submit a new asylum application together with any motion
6 to reopen. The BIA's reading of § 1003.2(c)(1) is contrary to the plain meaning of
7 its text:

8 A motion to reopen proceedings shall state the new facts
9 that will be proven at a hearing to be held if the motion
10 is granted and shall be supported by affidavits or other
11 evidentiary material. A motion to reopen proceedings for
12 the purpose of submitting an application for relief must
13 be accompanied by the appropriate application for relief
14 and all supporting documentation.²³

15 The text of § 1003.2(c)(1) requires that all "motions to reopen proceedings"
16 include new facts, supported by affidavits or other evidentiary material. By
17 contrast, it requires that "motions to reopen proceedings for the purpose of
18 submitting an application for relief" include an application for relief and
19 supporting documentation. We agree with Petitioners that the language "for the
20 purpose of submitting an application for relief" must be given effect; a motion to

²³ 8 C.F.R. § 1003.2(c)(1).

1 reopen for the purpose of submitting an application for relief has to be a particular
2 kind of motion to reopen, with particular procedural requirements.²⁴

3 Petitioners did not file a motion to reopen “for the purpose of submitting an
4 application for relief,” or to submit a new claim for relief.²⁵ Petitioners had already
5 submitted an application for relief based on their fear of persecution as Christians.
6 They filed a motion to reopen to seek “review of [that] previously submitted
7 application available to the BIA,”²⁶ in light of what they claimed were changed
8 country conditions. Consistent with the text of § 1003.2(c)(1), and with our past
9 practice of “overlooking” a petitioner’s failure to submit a new asylum application
10 when the petitioner has previously “pursue[d] an asylum claim before the
11 agency,”²⁷ we find that Petitioners did not have to submit a new—duplicative—
12 asylum application with their third motion to reopen. The BIA abused its
13 discretion by denying Petitioners’ motion based on their failure to submit a new
14 asylum application.

²⁴ See *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (describing the rule against surplusage as “a cardinal principle” for interpreting text); see also *Romero-Ruiz v. Mukasey*, 538 F.3d 1057, 1063 (9th Cir. 2008) (distinguishing between motions to reopen, in general, and motions to reopen for the purpose of submitting an application for relief).

²⁵ See *Jiang v. Holder*, 539 F. App’x 23, 23–24 (2d Cir. 2013) (denying a petitioner’s motion to reopen based on his “failure to file an asylum application to support his *new* religion-based asylum claim” arising from his conversion to Christianity in the United States (emphasis added)).

²⁶ *Liang Wang v. Whitaker*, 743 F. App’x 867, 868 (9th Cir. 2018) (citing *Socop-Gonzales v. INS*, 272 F.3d 1176, 1196–97 (9th Cir. 2001) (*en banc*)) (“Where, as here, the petitioner does not seek a new form of relief but rather review of a previously submitted application available to the BIA, the original application need not be attached.” (internal quotations omitted)).

²⁷ *Qin Jin Chen v. Mukasey*, 295 F. App’x 468, 469 n.3 (2d Cir. 2008).

CONCLUSION

For the reasons stated above, we GRANT the petition for review, VACATE the BIA's decision, and REMAND for explicit consideration of Petitioners' changed-conditions evidence.