

No. 03-60670

---

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

XIAODONG LI

Petitioner,

v.

ALBERTO GONZALES, Attorney General of the United States,  
Respondent.

---

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

---

**BRIEF OF *AMICI CURIAE* AMNESTY INTERNATIONAL USA,  
MINNESOTA ADVOCATES FOR HUMAN RIGHTS, HUMAN RIGHTS  
FIRST, ASIAN AMERICAN JUSTICE CENTER AND EPISCOPAL  
MIGRATION MINISTRIES IN SUPPORT OF THE PETITIONER'S  
MOTION FOR REHEARING EN BANC**

---

**SUSAN BENESCH**  
Amnesty International USA  
600 Pennsylvania Avenue SE  
Washington, DC 20003  
(202) 544-0200

**BRIGGS AND MORGAN, P.A.**  
Jeffrey J. Keyes\*  
2200 IDS Center  
80 South Eighth Street  
Minneapolis, MN 55402-2157  
(612) 977-8400

**\*ATTORNEY OF RECORD  
FOR AMICI CURIAE**

---

## **CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. The interest of the following parties is not financial. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Amnesty International USA, Amicus Curiae.
2. Minnesota Advocates for Human Rights, Amicus Curiae.
3. Asian American Justice Center, Amicus Curiae.
4. Human Rights First, Amicus Curiae.
5. Episcopal Migration Ministries, Amicus Curiae
6. Jeffrey Keyes, Attorney of Record for amici curiae.
7. Susan Benesch, Attorney for amicus curiae Amnesty International USA.

---

JEFFREY J. KEYES  
ATTORNEY OF RECORD FOR  
AMICI CURIAE

## TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS .....	i
TABLE OF AUTHORITIES .....	iii
STATEMENT OF IDENTITY OF THE AMICI CURIAE .....	v
SUMMARY OF THE ARGUMENT .....	1
ARGUMENT .....	1
I. THE PANEL ERRED IN DISTINGUISHING PUNISHMENT BECAUSE OF RELIGION FROM PUNISHMENT FOR RELIGIOUS PRACTICE.....	1
A. International Human Rights Law Protects the Freedom to Worship .....	1
B. International Human Rights Law and Refugee Law Recognize that Persecution on Account of Religion Often Takes the Form of Restricting or Punishing Worship.....	2
C. U.S. Law Recognizes that Governments Often Curb Religious Freedom by Restricting Religious Practice.....	3
II. THE PANEL ALSO ERRED IN FINDING THAT MR. LI'S PROSECUTION FOR VIOLATING CHINESE LAWS AIMED AT RELIGION DID NOT CONSTITUTE PERSECUTION ON ACCOUNT OF RELIGION .....	4
A. Chinese Law Discriminates against Christians Who Choose to Worship Independently .....	6
B. Mr. Li's Punishment was Severe and Humiliating, Indicating Persecution .....	7
C. There is No Legitimate Public Purpose for the Restriction of Mr. Li's Worship.....	8
CONCLUSION.....	8

## TABLE OF AUTHORITIES

### CASES

<i>Bastanipour v. INS</i> , 980 F.2d 1129 (7th Cir. 1992).....	6
<i>INS v. Cardoza-Fonseca</i> , 480 U.S. 421 (1987) .....	3
<i>Rodriguez-Roman v. INS</i> , 98 F.3d 416 (9th Cir. 1996) .....	6

### STATUTES

22 U.S.C. § 6401-6481 .....	1, 2, 3, 4
-----------------------------	------------

### OTHER AUTHORITIES

Amnesty International, <i>Amnesty International Annual Report 2002: Egypt</i> .....	2
Amnesty International, <i>Amnesty International Annual Report 2005: China</i> .....	5, 7
Amnesty International, <i>Amnesty International Report: Pakistan (2001)</i> .....	2
Amnesty International, <i>Urgent Action Eritrea Index</i> , AFR 64/005/2005 .....	2
Annual Reports of the Bureau of Democracy, Human Rights and Labor of the U.S. Department of State .....	5, 7
Annual Report of the United States Commission on International Religious Freedom (May 2005) .....	7
Communication No. 208/1986, <i>K. Singh Bhinder v. Canada</i> (Views adopted on 9 November 1989), in UN doc. GAOR, A/45/40 (vol. II), p. 54, para 6.2 .....	8
<i>Congressional-Executive Commission on China, Annual Report 2004</i> .....	4
Handbook on Procedures for Criteria for Determining Refugee Status of the Office of the United Nations High Commissioner for Refugees ....	3, 5

<i>International Covenant on Civil and Political Rights</i> , G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966).....	2, 8
Office of the High Commissioner for Human Rights, General Comment No. 22: The right to freedom of thought, conscience, and religion (Art. 18) (1993) .....	5
<i>Religious Freedom in China: Hearings Before the Congressional-Executive Commission on China</i> , 108th Cong. ....	4
<i>Universal Declaration of Human Rights</i> , G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948) .....	2

## **STATEMENT OF IDENTITY OF THE AMICI CURIAE**

Pursuant to Fed. R. Civ. P. 29(a), amici curiae submit this brief in support of Mr. Li's Petition for an En Banc Review. Amici submit that Petitioner has consented to the filing of this brief, while Respondent has declined to do so, and amici are filing herewith a Motion for Leave to File Amicus Brief.

Amnesty International USA is the U.S. branch of Amnesty International, a worldwide grassroots organization committed to promoting and defending human rights. Amnesty International undertakes research and action focused on preventing and ending grave abuses of the rights to physical and mental integrity, freedom of conscience and expression, and freedom from discrimination, within the context of its work to promote all human rights.

Minnesota Advocates for Human Rights is a non-profit organization dedicated to the promotion and protection of internationally recognized human rights. Minnesota Advocates for Human Rights works locally, nationally, and internationally on human rights issues affecting children, women, refugees & immigrants, and marginalized populations. Minnesota Advocates for Human Rights documents human rights abuses, advocates on behalf of individual victims, educates on human rights issues, and provides training and technical assistance to address and prevent human rights violations.

The Asian American Justice Center (“AAJC”) is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Americans. Collectively, AAJC and its affiliates, the Asian American Institute, Asian Law Caucus and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education on immigration and immigrants' rights issues. AAJC has a deep and abiding interest in ensuring that these laws are properly implemented and enforced.

Human Rights First is a non-governmental organization that works in the United States and abroad to create a secure and humane world, advancing justice, human dignity, and respect for the rule of law. Human Rights First operates one of the largest pro bono legal representation programs for asylum seekers in the U.S.; many Human Rights First refugee clients have fled religious persecution and have sought and received the protection of the United States.

Episcopal Migration Ministries (“EMM”) and its partners in the Episcopal Office of Government Relations carry forth the voice of the Church on behalf of refugees, immigrants, and other at-risk uprooted groups for whom protection through better public policy is needed. EMM has been actively involved in promoting the rights of asylum seekers.

Amici submit this brief to emphasize that international human rights law, as incorporated into U.S. law by Congress, requires reversal of the agency decision in Petitioner's case. Amici also believe that their substantial experience in the application of U.S. law, and international law and practice, to the protection of refugees, including those persecuted on account of religion, will aid the Court in the resolution of this case. This brief will not duplicate the briefs of the parties.

## SUMMARY OF THE ARGUMENT

The decision of the BIA, affirmed by a panel of this Court, would violate international human rights and refugee law, as adopted and promoted by this country. Amici respectfully submit that the panel erred in holding that punishment under a state's criminal law prohibiting all non-government regulated religious activity is not persecution on account of religion. To the contrary, international law, incorporated by U.S. law, recognizes that freedom of religion necessarily includes freedom to practice one's religion. Specifically, international refugee law, as interpreted by U.S. courts, recognizes that prosecution for religious practices is persecution where, as in Mr. Li's case, the law violates accepted human rights standards and cannot be justified by any compelling public interest, such as safety.

## ARGUMENT

### I. THE PANEL ERRED IN DISTINGUISHING PUNISHMENT BECAUSE OF RELIGION FROM PUNISHMENT FOR RELIGIOUS PRACTICE.

#### A. International Human Rights Law Protects the Freedom to Worship

The protection that must be afforded to a refugee who faces persecution on account of religious activity is rooted in the international recognition of the need to protect freedom of religion, including religious belief and practice, as a universal human right and fundamental freedom. 22 U.S.C. § 6401(a)(2). Under international human rights law, the freedom to practice one's religion – to worship – is an ineluctable component of religious freedom. Article 18 of the Universal

Declaration of Human Rights (UDHR) specifies that freedom of religion includes "freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."<sup>1</sup> Article 18(1) of the International Covenant on Civil and Political Rights (ICCPR) likewise holds that freedom of religion or belief includes the freedom to "manifest" one's beliefs, in public or in private.<sup>2</sup>

B. International Human Rights Law and Refugee Law Recognize that Persecution on Account of Religion Often Takes the Form of Restricting or Punishing Worship

It is not surprising that the drafters of international human rights law referred explicitly and repeatedly to freedom of worship. Persecution on account of religion often takes the form of persecution for religious practice.<sup>3</sup> Therefore, in order to protect religious freedom, international law must protect free worship.

---

<sup>1</sup> *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948); *see also* 22 U.S.C. § 6401(a)(3).

<sup>2</sup> *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966); *see also* 22 U.S.C. § 6401(a)(3).

<sup>3</sup> Recent examples include: China's restrictions on the practices of Christians, Falun Gong members, and Tibetan Buddhists; Eritrea's persecution of evangelical Christians; Pakistan's treatment of Ahmadis and Christians; and Egypt's discrimination against the Baha'i. See Amnesty International, *Urgent Action Eritrea Index*, AFR 64/005/2005, available at <http://web.amnesty.org/library/print/ENGAFR640052005>; Amnesty International, *Amnesty International Report: Pakistan* (2001), available at <http://web.amnesty.org/library/print/ENGASA330082001>; Amnesty International, *Amnesty International Annual Report 2002: Egypt*, available at <http://web.amnesty.org/web/ar2002.nsf/mde/Egypt?Open>.

Similarly, refugee law offers a safe haven for people who, like Mr. Li and like the Pilgrims, fled because they were persecuted "on account of religion" – because they were not free to practice their religion. The Handbook on Procedures and Criteria for Determining Refugee Status of the Office of the United Nations High Commissioner for Refugees ("UNHCR Handbook"), which has been held by the United States Supreme Court to provide "significant guidance" in construing the provisions of the INA at issue here,<sup>4</sup> describes how religious persecution may take the form of punishment for the type of religious activity engaged in by Mr. Li:

72. Persecution for 'reasons of religion' may assume various forms, *e.g.* prohibition of membership of a religious community, of worship in private or in public, of religious instruction, or serious measures of discrimination imposed on persons because they practice their religion or belong to a particular religious community.

C. U.S. Law Recognizes that Governments Often Curb Religious Freedom by Restricting Religious Practice

The International Religious Freedom Act (IRFA), 22 U.S.C. §§ 6401-6481 (2000), incorporates international human rights law's protection of the freedom to worship as an inherent part of religion by citing language from Article 18 of the UDHR, and Article 18(1) of the ICCPR, *supra*. The IRFA specifies that "violations of...rights to religious freedom" include "denial of the right to assemble and relegation of religious communities to illegal status through arbitrary

---

<sup>4</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987). The UNHCR Handbook is available at <http://www.hrea.org/learn/tutorials/refugees/Handbook/hbpart1.htm>.

registration laws." 22 U.S.C. § 6401(a)(4). The IRFA applies precisely to Mr. Li's case: he was denied the right to assemble as he chose, and his religious community is illegal under China's arbitrary registration laws.

II. THE PANEL ALSO ERRED IN FINDING THAT MR. LI'S PROSECUTION FOR VIOLATING CHINESE LAWS AIMED AT RELIGION DID NOT CONSTITUTE PERSECUTION ON ACCOUNT OF RELIGION.

Amici respectfully submit that it was dangerous error to distinguish between persecution for religion and prosecution for illegal religious activity, where the activity in question was peaceful worship in a house church in China. In international human rights law and refugee law, on which relevant U.S. statutes are directly based, such a distinction can only be made in cases where the law has a neutral purpose and application, where the punishment is not disproportionate or severe, and where a legitimate public purpose, such as safety, requires limits on particular religious practices. To the contrary, as the U.S. Department of State, the United States Commission on International Religious Freedom and human rights organizations such as Amnesty International have documented in detail, China has a long record of severely punishing citizens who wish to practice certain forms of worship, with no apparent purpose other than exerting and protecting the power of the Chinese state.<sup>5</sup> Such punishment cannot correctly be understood as prosecution

---

<sup>5</sup> See, e.g. *Religious Freedom in China: Hearings Before the Congressional-Executive Commission on China*, 108th Cong. (2004). See also *Congressional-Executive Commission on*

of a citizen for violating a generally applicable, legitimate law. It is persecution on account of religion.

The UNHCR Handbook recognizes that persecution must be distinguished from punishment for a common law offense, but it warns against persecutory laws such as China's. According to the Handbook, in considering whether prosecution for religious activities constitutes persecution, the relevant factors include: whether the law itself is in conformity with accepted human rights standards,<sup>6</sup> whether the law is applied in a discriminatory manner, and the severity of the punishment. *See* Para. 59 of UNHCR Handbook, *supra*. U.S. federal courts have also used these

---

*China, Annual Report 2004*, 34-45 (2004), available at <http://www.cecc.gov/pages/annualRpt/annualRpt04/CECCannRpt2004.pdf> ("Chinese government repression of free religious belief and practice has grown more severe over the past year."). *See also* Annual Reports of the Bureau of Democracy, Human Rights and Labor of the U.S. Department of State, available at <http://www.state.gov/g/drl/rls/irf/>. *See also* Amnesty International, *Amnesty International Report 2005: China*, available at <http://web.amnesty.org/report2005/chn-summary-eng>.

<sup>6</sup> The General Comments of the Office of the High Commissioner for Human Rights of the United Nations on Art. 18 of the ICCPR call for careful scrutiny of any limitations on the freedom to manifest religion or belief. "In interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in Articles 2, 3 and 26. Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in Article 18. . . . Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated." Office of the High Commissioner for Human Rights, General Comment No. 22: The right to freedom of thought, conscience, and religion (Art. 18) (1993).

three standards in distinguishing between persecution and regular prosecution of the laws.<sup>7</sup>

The Chinese laws restricting religious practices under which Mr. Li was prosecuted violate international human rights standards protecting the freedom of religion. In addition, the laws are applied in a discriminatory manner against certain religious groups.

A. Chinese Law Discriminates against Christians Who Choose to Worship Independently

The Immigration Judge quite properly found, after a review of the evidence submitted by the U.S. Department of State and the record in the case, that:

Although the respondent has been charged formally under Chinese law, the Chinese law against unregistered religious activities is simply an institutional form of persecution aimed at people who engage in religious activities which cannot be controlled by the Chinese government. There is no indication based on State Department materials that the prohibition against unregistered religious groups in China is related to any legitimate attempt to stop terrorism or any other legitimate interest in public order. Rather, the law itself as it is reflected in the State Department materials, is aimed at purely religious activities. [Decision of Immigration Judge at 11.]

The IJ's finding is supported by a wide array of authoritative reports suggesting that the Chinese government uses its laws to persecute religious groups.

---

<sup>7</sup> See, e.g. *Bastanipour v. INS*, 980 F.2d 1129, 1133 (7th Cir. 1992) (holding that sanction constituted persecution on account of religion under a law criminalizing the conversion of a Muslim to a different religion); *Rodriguez-Roman v. INS*, 98 F.3d 416, 431 (9th Cir. 1996) (finding that labeling “traitor” and imposing severe penalties from three to 20 years imprisonment to death were indicative of political persecution rather than prosecution).

In May 2005, for example, the Annual Report of the United States Commission on International Religious Freedom summarized its findings on how the Chinese government continues to engage in systematic and egregious violations of religious freedom of various religious groups, including "house church" Protestants, such as Mr. Li, and "underground Catholics."<sup>8</sup>

B. Mr. Li's Punishment was Severe and Humiliating, Indicating Persecution

Since China's restriction on religious practice violates international law, any punishment under those laws would be impermissible. It is also worth noting that the punishments meted out by the Chinese government for attending house churches are severe and humiliating. Mr. Li reported that a friend was sentenced to two years' imprisonment. Mr. Li himself was detained under abusive conditions, beaten, kicked, and forced to work at cleaning public toilets without pay. These humiliating punishments indicate a persecutory purpose behind the Chinese government's treatment of Mr. Li.

---

<sup>8</sup> Annual Report of the United States Commission on International Religious Freedom (May 2005), available at <http://www.uscirf.gov/countries/publications/currentreport/index.html>. See also Annual Reports of the Bureau of Democracy, Human Rights and Labor of the Department of State, available at <http://www.state.gov/g/drl/rls/irf/>. See also Amnesty International, *Amnesty International Report 2005: China*, available at <http://web.amnesty.org/report2005/chn-summary-eng>.

C. There is No Legitimate Public Purpose for the Restriction of Mr. Li's Worship

Article 18.3 of the ICCPR permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others. *Supra*, n.2. The Human Rights Committee of the Office of the United Nations High Commissioner for Refugees<sup>9</sup> found, for example, that Canada did not violate Article 18 by requiring the use of hardhats in hazardous work areas, even though this infringed on a Sikh religious rule to wear a turban, and not a hardhat.<sup>10</sup> Safety was a legitimate motive for the limitation, the Committee found.

Here, there is no such legitimate purpose to trump freedom of worship. The record holds neither that China was protecting public safety, order, health or morals by punishing Mr. Li for reading the Bible and singing hymns with friends at home, nor that those acts infringed on the fundamental rights or freedoms of others.

## CONCLUSION

We urge the Court to rehear this matter. The Board clearly deviated from the obligation that this country has, as incorporated by Congress in the INA, under

---

<sup>9</sup> The Human Rights Committee is the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by the treaty's State parties.

<sup>10</sup> Communication No. 208/1986, *K. Singh Bhinder v. Canada* (Views adopted on 9 November 1989), in UN doc. GAOR, A/45/40 (vol. II), p. 54, para 6.2.

the international human rights regime to withhold the removal of a refugee whose life or freedom would be threatened because of persecution on account of religion. A rehearing would give the Court an opportunity to assess the adverse consequences of the decision.

Dated: October 12, 2005

Respectfully submitted,

---

Jeffrey J. Keyes, Esq.  
BRIGGS AND MORGAN, P.A.  
2200 IDS Center  
80 South Eighth Street  
Minneapolis, MN 55402  
(612) 977-8540 – Direct Dial  
(612) 977-8650 – Facsimile

Susan Benesch  
AMNESTY INTERNATIONAL USA  
600 Pennsylvania Avenue SE  
Washington, DC 20003  
(202) 544-0200

*Attorneys for Amici Curiae*

**FORM 6. CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(A)(7)(B) because:

- this brief contains **2,113** words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii), or
- this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typefaces requirements of FED. R. APP. P. 32(a)(6) because:

- this brief has been prepared in proportionally spaced typeface using Microsoft Word 2002 in 14 font size and Times New Roman type style.
- this brief has been prepared in a monospaced typeface using [*state name and version of word proceeding program*] with [*state number of characters per inch and name of type style*].

---

Jeffrey J. Keyes, Esq.  
Briggs and Morgan, P.A.  
2200 IDS Center  
80 South Eighth Street  
Minneapolis, Minnesota 55402  
(612) 977-8400

*Attorney for Amici Curiae*

Dated: October 12, 2005

**CERTIFICATE OF SERVICE**

I hereby certify that I served two copies of the attached papers, plus a 3.5-inch diskette containing an electronic copy of the same, to:

Peter Keisler, Assistant Attorney General  
Emily Anne Radford, Assistant Director  
Keith Bernstein, Attorney  
U.S. DEPARTMENT OF JUSTICE  
Civil Division  
Office of Immigration Litigation  
1331 Pennsylvania Avenue  
National Place Building  
Washington, D.C. 20530  
*Counsel for Respondent*

David A. Cortman  
Alliance Defense Fund  
1000 Hurricane Shoals Road  
Suite D-600  
Lawrenceville, GA 30043  
*Counsel for Petitioner*

Garrett M. White  
4151 Southwest Freeway  
Houston, TX 77027  
*Counsel for Petitioner*

Benjamin W. Bull  
Gary S. McCaleb  
Jeremy Tedesco  
15333 N. Pima Road  
Suite 165  
Scottsdale, AZ 85260  
*Counsel for Petitioner*

Counsel for Respondent on this 12<sup>th</sup> day of October, 2005, by Federal Express overnight delivery.

\_\_\_\_\_  
Jeffrey J. Keyes