

**Immigration Court: BIA****Case:** *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989)**Date:** April 25, 1989**Adjudicated by:** Milholan, Dunne, Vacca, Morris, Heilman**Opinion:** Per Curiam**Tags:** Asylum, humanitarian asylum, refugee, well-founded fear, clear probability of persecution,**Question Presented:** Did defendant establish eligibility for asylum based on a showing of past persecution, even if there is little likelihood of future persecution?**Holdings:**

“We . . . conclude that asylum should be granted in this case in the exercise of discretion.” (21)

- (1) Asylum claims may be established “by presenting evidence of past persecution in lieu of evidence of a well-founded fear of persecution.” (16)
- (2) If past persecution established acc. to protected grounds, “the likelihood of present persecution then becomes relevant as to the exercise of discretion” re. granting asylum. (16)
- (3) DHS may need to show changed circumstances in country re. likelihood of present persecution.
- (4) “A favorable exercise of administrative discretion in an asylum application may be warranted for humanitarian reasons notwithstanding the fact that there is little likelihood of future persecution.” (16)

**Rationale:**

- “...our determination that the respondent has not established a well-founded fear of present or future persecution is not in itself determinative, since we have found that the respondent has clearly established that he and his family were severely persecuted in the past in China.” (21) (Particularly “atrocious” persecution, leaving significant psychological and physical scars.)

**Facts:** Native & citizen of China admitted to US in 1980 as a nonimmigrant student. Remained past deadline in 1982. Charged with overstay in 1984. History of severe past persecution during Cultural Revolution (1966-mid-70s) because father was a Christian minister (respondent was 8 years old when it began!).

**History of the Case:**

- **Nov. 1984:** IJ decided that respondent was deportable, denied applications for asylum, withholding & vol departure.
- **Oct. 1988:** BIA upheld respondent’s appeal and granted application for asylum.

**Appeals to Statute & Precedent:**

- **INA 8 U.S.C. §1158:** Asylum claims may be established by presenting evidence of past persecution

- ***INS v. Stevic*, 467 U.S. 407, 413 (1984)**: Asylum applicant “must establish a clear probability of persecution on account of one of the enumerated grounds.” (17)
- ***INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987)**: well-founded fear: lower probative standard than “clear probability.” Also: asylum based on past persecution.
- ***Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987)**: “an applicant for asylum has established a well-founded fear if he shows that a reasonable person in his circumstances would fear persecution.” (18)
- ***Guevara Flores v. INS*, 786 F.2d 1242 (5<sup>th</sup> Cir. 1986)**: well-founded fear & reasonable person standard applied
- ***Carcamo-Flores v. INS*, 805 F.2d 60 (2d Cir. 1986)**: well- founded fear & reasonable person standard applied
- ***Desir v. Ilchert*, 840 F.2d 723, 729 (9<sup>th</sup> Cir. 1988)**: asylum based on past persecution.
- ***Blanco-comarribas v. INS*, 830 F.2d 1039, 1043 (9<sup>th</sup> Cir. 1987)**: asylum based on past persecution.
- ***Matter of Pula*, 19 I&N Dec. 467 (BIA 1987)**: discretionary asylum—factors favorable and adverse should be considered.

#### Relevant U.S./Immigration Law/World History:

- ***Handbook on Procedures (UNHCR, Geneva, 1988)***: “It is frequently recognized that a person who—or whose family—has suffered under **atrocious forms of persecution** should not be expected to repatriate.” (q.p.19)
- “It seems beyond dispute that the respondent has in fact suffered persecution in China. However, it is also true that, since the time of the Cultural Revolution, conditions in China have changed significantly. . . . While religious freedom as we understand it may still not be enjoyed in China, we are not persuaded by the evidence presented that a reasonable person in the respondent’s circumstances would have a well-founded fear of persecution on account of his religion, if returned to the China of 1989.” (20-21)

#### Commentary:

- “If an alien establishes that he has been persecuted in the past for one of the five reasons listed in the statute, he is eligible for a grant of asylum” (presumably by discretion, because it can be rebutted by DHS if changed circumstances can be shown). (18)
- “...a rebuttable presumption arises that an alien who has been persecuted in the past by his country’s government has reason to fear similar persecution in the future.” (18)
- “**However, there may be cases where the favorable exercise of discretion is warranted for humanitarian reasons even if there is little likelihood of future persecution.**” (19)