

law meaning and thus is not in violation of foreign patrimony law and the NSPA.²³⁷ Finally, the Second Circuit rejected the Fifth Circuit's analysis of the NSPA, because they stated that the facts in the Fifth Circuit *McClain* case are distinguishable from this case.²³⁸

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VII. CONVENTION AGAINST TORTURE AND HABEAS CORPUS PETITION

Wang v. Ashcroft

A. Introduction

In *Mu-Xing Wang v. John Ashcroft*, the United States Court of Appeals for the Second Circuit announced that they had not set forth a test as to how the Board of Immigration Appeals should apply the facts to the relevant law in habeas review petitions.²³⁹ A specific test was not outlined, because the court decided that the Board of Immigration Appeals [hereinafter BIA] applied the facts properly to the law in Wang's Convention Against Torture claim.²⁴⁰ Furthermore, on the due process claim, in looking at whether Wang has been denied his due process rights under the Fifth Amendment of the United States Constitution, the Second Circuit analyzed this claim as one of substantive rather than procedural due process.²⁴¹ This analysis varies from how the lower court analyzed the claim; however, the Second Circuit still denied that there has been a violation of Wang's due process rights.²⁴²

B. Parties

The plaintiff, Mu-Xing Wang [hereinafter Wang], a thirty- one year old Chinese immigrant, entered the United States without being lawfully admitted.²⁴³ The Superior Court of New Haven Connecticut convicted Wang of robbery and unlawful restraint and sentenced him to ten years imprisonment.²⁴⁴ Wang sought relief and brought action

237. *Schultz*, 333 F.3d at 408.

238. *Id.* at 404.

239. *Wang v. Ashcroft*, 320 F.3d 142 (2d Cir. 2003).

240. *Id.* at 142.

241. *Id.* at 144.

242. *Id.*

243. *Id.* at 134.

244. *Wang*, 320 F.3d at 134.

against John Ashcroft [hereinafter Ashcroft], the United States Immigration and Naturalization Service [hereinafter INS], Steven J. Farquharson (District director of the INS), and Gary Cote (Officer in charge of the INS).²⁴⁵

C. Facts

In June 1993, Wang entered the United States.²⁴⁶ Two years later, the Superior Court of New Haven convicted Wang of robbery and unlawful restraint.²⁴⁷ While serving his prison term, the INS brought removal proceedings against Wang based on his status as an alien present in the United States pursuant to §§ 212 (a)(6)(A)(i), 237 (a)(2)(A)(i)(I), and 237(a)(2)(A)(iii) of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1182 (1994).²⁴⁸ They also brought the claim upon Wang’s status as an alien ineligible for parole by the INS because of his “moral turpitude and aggravated felony.”²⁴⁹ Wang asked for political asylum and a withholding of deportation on the grounds that if he returned to China he would be executed for deserting the China Army.²⁵⁰

E. Discussion

The United States Court of Appeals for the Second Circuit reviews a district court’s denial of habeas petition brought pursuant to 28 U.S.C. § 2241, *de novo*.²⁵¹

i. Scope of Habeas Review

The United States Court of Appeals has not articulated a standard for reviewing an application of the facts to the law by the BIA in a habeas setting since the enactment of the Illegal Reform and Immigrant Responsibility Act [hereinafter IRIRA] (1996) and the Antiterrorism and Effective Death Penalty Act of 1996 [hereinafter AEDPA]

245. *Wang*, 320 F.3d at 130.

246. *Id.* at 134.

247. *Id.*

248. *Id.*

249. *Id.* at 135; Moral turpitude generally refers to conduct that shocks the public conscience as being inherently base, vile or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general. *Id.* at 135.

250. *Wang*, 320 F.3d at 135.

251. *Id.* at 139–140. *De novo* judicial review is a court’s non-deferential review of an administrative decision, usually through a review of the administrative record plus any additional evidence of the parties present. BLACKS LAW DICTIONARY 382 (2d ed. 2001).

(1996).²⁵² However, in looking at the merits of Wang's CAT claim, the Second Circuit decided that the BIA correctly applied particular facts in this case to the relevant law.²⁵³

ii. Merits of Wang's CAT claim

Prior to this case, the Second Circuit had not examined how the BIA should review an application of facts to the law in a § 2241 habeas setting. Although the Second Circuit did not set a standard in this case, they stated that the BIA was correct in their review. The BIA, in analyzing this case, decided to not affirm the immigration judge's decision on the basis of an adverse credibility finding.²⁵⁴ They denied Wang's claim because there was no evidence in the record that China tortured deserters from its military.²⁵⁵ The BIA decided that Wang failed to show that he would be tortured by the Chinese military if he returned to China, and United States Court of Appeals for the Second Circuit agrees.²⁵⁶ Both Courts found that Wang, in relying on his own experiences that he was beaten when he first deserted and that he would likely be beaten to death if he deserted again, did not constitute enough evidence to prove that Wang will be more likely than not tortured if he returned to China.²⁵⁷ Thus, imprisonment of military deserters does not constitute torture.²⁵⁸

The United States Court of Appeals for the Second Circuit agreed with the BIA by declining to extend Wang's evidence of torture by the government of China in other contexts to the specific context of military discipline, and by denying Wang relief under CAT because Wang presented no evidence that the Chinese government tortures military deserters in particular.²⁵⁹

iii. Due Process Claim

Wang requested that the United States Court of Appeals for the Second Circuit give him a bond hearing as soon as possible.²⁶⁰ He states

252. *Wang*, 320 F.3d at 143. AEDPA and IIRIRA prevent certain classes of aliens from obtaining judicial review of their removal orders, do not deprive federal courts of jurisdiction to consider challenges by aliens in habeas corpus petitions. *Id.*

253. *Id.*

254. *Id.* at 137.

255. *Id.*

256. *Wang*, 320 F.3d at 144.

257. *Id.*

258. *Id.*

259. *Id.* at 145.

260. *Id.*

that the Government has violated the Due Process clause of the Fifth Amendment by holding him in detention since his release from state custody with no bond hearing.²⁶¹ The INS has set no limit as to how long after the detention period expires that an alien can be held in detention.²⁶² The United States Court of Appeals for the Second Circuit analyzed this claim as one of substantive, rather than procedural due process.²⁶³ INA § 241, 8 U.S.C. § 1231, governs the detention of aliens subject to final orders of removal.²⁶⁴ This statute states that the Attorney General during the removal period will detain the alien.²⁶⁵ It further says that certain classes of aliens, including criminal aliens, will be subject to supervision even after the 90 days are over if the aliens have not yet been removed.²⁶⁶

Wang's due process rights are not jeopardized as long as his removal remains reasonably foreseeable.²⁶⁷ This court has declined to grant Wang's habeas petition based upon his CAT claim, thus they found that his removal was not only foreseeable but also imminent.²⁶⁸ Finally, Wang's continued detention under INA § 241 without a bond hearing does not violate the Due Process Clause, and Wang is not entitled to relief.²⁶⁹

F. Holding of the Court

The United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court.²⁷⁰ The Second Circuit held that the "federal courts have jurisdiction to consider CAT claims raised in § 2241 petitions," that "Wang's claim falls within the scope of" their "habeas corpus review," that "Wang is not entitled to CAT relief in the circumstances presented because he failed to establish that he is" more likely than not "to be tortured if he returned to China," and that "Wang's continued detention without an opportunity for bail is not in violation his constitutional right to due process of law."²⁷¹

261. *Wang*, 320 F.3d at 145.

262. *Id.* at 145–46 (citing *Zadvydas v. Davis*, 533 US 678, 689, 1215 S.Ct. 2491, 150 L.Ed.2d 653 (2001)).

263. *Id.* at 145.

264. *Id.*

265. *Id.*

266. *Wang*, 320 F.3d at 145.

267. *Id.* at 146.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Wang*, 320 F.3d at 147.

G. Conclusion

Wang v. Ashcroft reviewed an alien's habeas corpus petitions, and the due process claims of aliens convicted of felonies.²⁷² Although the United States Court of Appeals for the Second Circuit affirmed the lower court's holdings, they analyzed the issues above and explained how the issues should be viewed by the lower courts.²⁷³ For example, when analyzing Wang's due process claim, the lower court perceived the claim as a procedural claim where as the Second Circuit reviewed the claim as a substantive one.²⁷⁴ Furthermore, in looking at the habeas review, the Second Circuit found that they need to outline a specific test as to how the lower courts should apply the law to the facts in these cases.²⁷⁵ The Second Circuit did not actually outline a test, but they did show that the BIA correctly applied the facts of Wang's CAT claim to the relevant law.²⁷⁶

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VIII. UNIVERSAL JURISDICTION

United States v. Yousef

I. Introduction

Belgium adopted the law of universal jurisdiction in 1993 as a recognition of the increasing acceptance of the *aut dedere aut judicare* principle of international law, introduced in the four Geneva Conventions of 1949.²⁷⁷ The law, which was inspired by a deep concern for justice and the firm determination to combat shocking impunity, confers to the Belgian judge universal jurisdiction to deal with war crimes, crimes against humanity and crimes of genocide, independently from the place where the crime was committed, the nationality of the victim and the location of the presumed perpetrator.²⁷⁸

272. *Wang*, 320 F.3d at 130.

273. *Id.*

274. *Id.*

275. *Id.* at 143.

276. *Id.*

277. Roemer Lemaître, Belgium rules the world: Universal Jurisdiction over Human Rights Atrocities, *Jura Falconis*, 37 (00-01) 2, available at http://www.law.kuleuven.ac.be/jura/37n2/lemaitre.htm#N_1.

278. Press Release, The Federal Public Service Foreign Affairs, Foreign Trade and Development Cooperation, The Law on Universal Jurisdiction Reviewed (June 24, 2003),