

1 UNITED STATES COURT OF APPEALS  
2 FOR THE SECOND CIRCUIT

3 SUMMARY ORDER

4 THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER  
5 AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER  
6 COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER  
7 COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN  
8 ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

9 At a stated term of the United States Court of Appeals for the  
10 Second Circuit, held at the Thurgood Marshall United States  
11 Courthouse, Foley Square, in the City of New York, on the 11th day  
12 of July, two thousand and six.

13 PRESENT:

14 HON. ROBERT D. SACK,  
15 HON. ROBERT A. KATZMANN,  
16 Circuit Judges,  
17 HON. J. GARVAN MURTHA,  
18 District Judge.

19 -----  
20 ASTGHEK RAFFI MISAK, SILAJ MISAK, MUSAK MISAK,

21 Petitioners,

22 - v -

No. 04-5962-ag

23 ALBERTO GONZALES, Attorney General,"

24 Respondent.  
25 -----

26 Appearing for Petitioners: Michael P. DiRaimondo, DiRaimondo &  
27 Masi LLP (Marialaina L. Masi, Mary

\* The Honorable J. Garvan Murtha, of the United States  
District Court for the District of Vermont, sitting by  
designation.

" Pursuant to Federal Rule of Appellate Procedure 43(c)(2),  
Attorney General Alberto Gonzales is substituted for former  
Attorney General John Ashcroft as Respondent.

1 Elizabeth Delli-Pizzi, Stacy A.  
2 Huber, of counsel), Melville, NY.

3 Appearing for Respondent:

4 Kristine L. Sendek-Smith, Assistant  
5 United States Attorney, District of  
6 Maryland (Rod J. Rosenstein, United  
7 States Attorney for the District of  
8 Maryland, of counsel), Baltimore,  
MD.

9 Petition for review of three decisions of the Board of  
10 Immigration Appeals ("BIA"), affirming without opinion an  
11 Immigration Judge's ("IJ") denial of petitioners' joint  
12 application for asylum, withholding of removal and relief under  
13 the United Nations Convention Against Torture ("CAT").

14 UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED AND  
15 DECREED that the petition for review of the decisions of the BIA  
16 be GRANTED in part, the orders of the BIA VACATED with respect to  
17 the denial of asylum and withholding of removal, and the case  
18 REMANDED for further proceedings.

19 A. Application for Asylum and Withholding of Removal

20 Astghek Raffi Misak (A75-025-716), Silaj Misak (A75-025-  
21 717), and Musak Misak (A75-025-718) petition for review of three  
22 BIA decisions affirming, without opinion, the decision of the IJ  
23 denying their joint application for asylum, withholding of  
24 removal, and CAT relief.

25 Where the BIA affirms without opinion, we review the IJ's  
26 decision directly, Twum v. INS, 411 F.3d 54, 58 (2d Cir. 2005),  
27 reviewing factual findings under the substantial evidence  
28 standard, Zhou Yun Zhang v. U.S. INS, 386 F.3d 66, 73 (2d Cir.  
29 2004). "However, when the situation presented is the BIA's  
30 application of legal principles to undisputed facts, rather than  
31 its underlying determination of those facts or its interpretation  
32 of its governing statutes, our review is de novo." Monter v.  
33 Gonzales, 430 F.3d 546, 553 (2d Cir. 2005) (internal quotation  
34 marks and citation omitted; alteration incorporated). "We [also]  
35 review de novo the IJ's determination of mixed questions of law  
36 and fact." Hong Ying Gao v. Gonzales, 440 F.3d 62, 65 (2d Cir.  
37 2006).

38 Reviewing the IJ's decision de novo, we conclude that the IJ  
39 correctly determined that the Misaks failed to demonstrate that  
40 they suffered past persecution. Cf. Ai Feng Yuan v. U.S. Dep't

1 of Justice, 416 F.3d 192, 198 (2d Cir. 2005); see Mikhailevitch  
2 v. INS, 146 F.3d 384, 390 (6th Cir. 1998).

3 With respect to the Misaks' claim of a well-founded fear of  
4 future persecution, however, we conclude that the IJ's decision  
5 "is based on reasoning that, in light of the record, is  
6 insufficient . . . to permit meaningful review." Ivanishvili v.  
7 U.S. Dep't of Justice, 433 F.3d 332, 338 (2d Cir. 2006).

8 In explaining why they feared returning to Iraq, the Misaks  
9 testified that they feared that they would be specifically  
10 targeted for violence as Armenian Christians. In rejecting the  
11 Misaks' claim, however, the IJ failed to undertake any analysis  
12 of whether there was a factual basis for this fear, noting only  
13 that with respect to Iraq generally: "What we have today is life  
14 without Saddam Hussein and the Hussein regime. There is  
15 lawlessness and there is conflict and there is difficulty . . . .  
16 But that difficulty is not a basis for relief under [the INA]." .  
17 J.A. 58-59. It thus appears that the IJ failed to consider  
18 properly the claims made by the petitioners. Cf. Ivanishvili,  
19 433 F.3d at 341-42.

20 The IJ's decision also suffers from a second flaw. In  
21 support of the reasonableness of their fears, the Misaks  
22 submitted news articles and non-governmental reports discussing  
23 the alleged increase in anti-Christian violence in Iraq since the  
24 fall of Saddam Hussein's regime. In concluding that the Misaks'  
25 fears were not well-founded, the IJ failed to mention any of  
26 these articles or reports. In the context of this case, where  
27 the reasonableness of the petitioners' fears depended upon an  
28 evaluation of conditions in a fast-changing part of the world and  
29 no other evidence was apparently available, we think this was  
30 error. See Yan Chen v. Gonzales, 417 F.3d 268, 272-75 (2d Cir.  
31 2005).

32 Because the IJ failed to consider properly the petitioners'  
33 claims, and in any event appears to have failed to consider the  
34 evidence the petitioners submitted in support of their claims, we  
35 grant the petition in part, vacate the BIA's decisions that  
36 affirmed so much of the IJ's decision as denied asylum and  
37 withholding of removal, and remand the case to the BIA. We think  
38 that on remand both parties should be given an opportunity to  
39 supplement the record to reflect changes in country conditions in  
40 Iraq. See Latifi v. Gonzales, 430 F.3d 103, 106 n.1 (2d Cir.  
41 2005); see also INS v. Orlando Ventura, 537 U.S. 12, 18 (2002).

42 B. Application for CAT Relief

1 Because the Misaks did not appeal to the BIA the IJ's denial  
2 of their joint application for CAT relief, they failed to exhaust  
3 all administrative remedies available with respect to that  
4 application, and we lack jurisdiction to review the denial. See  
5 8 U.S.C. § 1252(d)(1).

6 C. Other Issues

7 Because we conclude that the petition for review should be  
8 granted in part for the reasons set forth above, we need not  
9 reach the Misaks' other arguments.

10 D. Conclusion

11 For the foregoing reasons, the petition for review is hereby  
12 GRANTED in part, and the BIA's decisions affirming the denial of  
13 asylum and withholding of removal is VACATED. Insofar as the  
14 petition seeks review of the denial of CAT relief, it is  
15 dismissed for lack of jurisdiction. The case is hereby REMANDED  
16 for further proceedings consistent with this order.

17 FOR THE COURT:

18 ROSEANN B. MACKECHNIE, Clerk

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20  
By: \_\_\_\_\_

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\* Although we thus do not reach the Misaks' argument that the BIA erred in "streamlining" their appeal and issuing affirmances without opinion, we note that in making this argument the Misaks cite a version of the BIA's regulations that no longer applied at the time the BIA rendered its decisions in this case. See Executive Office for Immigration Review; Definitions; Fees; Powers and Authority of DHS Officers and Employees in Removal Proceedings, 69 Fed Reg. 44903-01, 44906 (July 28, 2004) (codified at 8 C.F.R. § 1003.1(a)(7)). As the BIA's decisions themselves note, see Special App. 2-4, the pertinent regulation at the time the BIA issued its decisions is the same regulation in effect today, 8 C.F.R. § 1003.1(c)(4).