

Date: 20090330

Docket: IMM-3121-08

Citation: 2009 FC 327

Ottawa, Ontario, March 30, 2009

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

JIN XIA ZHENG

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review brought by Jin Xia Zheng in connection with the refusal by the Refugee Protection Division of the Immigration and Refugee Board (Board) to grant her refugee status. This is Ms. Zheng's second application following on an earlier proceeding in this Court where Justice Eleanor Dawson set aside the Board's first decision because its plausibility findings were found to be patently unreasonable: see *Zheng v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 974.

I. Background

[2] Ms. Zheng claimed that she had been a bookseller in China and that she had sold Falun Gong material. She testified that after the ban on Falun Gong publications took effect in 1999 she placed the offending stock in a corner of her shop to avoid its detection. Nevertheless, in 2005 government inspectors found the material and she was fined. Later that year she said that she became pregnant by her boyfriend. When they attempted to obtain permission from the local authorities to marry she admitted to being pregnant. According to Ms. Zheng this caused the authorities to immediately attempt to induce an abortion by forcibly requiring her to ingest medication. She said that this procedure was repeated the next day and it led to an abortion. She also claimed that she was then told that she would be required to accept an intrauterine device (IUD) and to submit to a Falun Gong re-education program. Ms. Zheng was not compliant with these demands which led, in turn, to a confrontation with the local authorities and to the threat of sterilization. It was at that point and with the help of her parents that she came to Canada.

The Board Decision

[3] The Board accepted very little of Ms. Zheng's risk narrative and it found her not to be credible. This credibility conclusion was not based on internal inconsistencies in Ms. Zheng's testimony but instead arose from the Board's belief that most of her testimony was implausible or improbable.

[4] The only aspect of the Board's decision that is material to this application is its treatment of the evidence concerning Ms. Zheng's pregnancy, her abortion and her allegation that she was ordered to accept an IUD. That part of the decision was as follows:

The panel has found that the claimant's testimony regarding the Falun Gong incident is not credible and that the incident did not take place. The panel has further found that the claimant's testimony concerning the alleged forced abortion is not credible. The claimant disclosed a summons from the Public Security Bureau (PSB) dated May 25, 2005, requiring her to appear because she supported an evil cult and violated the Family Planning Policy. It was in response to this summons that the claimant decided to leave China.

There are some problems with this notice. There is no mention of Falun Gong. The term 'cult' is used by the Chinese government to describe a number of organizations and Falun Gong is generally specifically noted in such documents. In addition, the demand that the claimant wear an IUD was made by family planning officials. There is, however, no document from family planning officials regarding the claimant's failure to do so. The claimant alleged that family planning officials told her on April 20, 2005, to appear for an IUD insertion in a month. No specific date was noted in her testimony. There does not appear to be any reason for a PSB summons to be issued on May 25, 2005. These problems with the document raise a doubt regarding its authenticity.

Even if the claimant's testimony and narrative concerning the abortion were true and even if the summons is an authentic document, there remains no clear basis for a claim for refugee protection based on possible future risk of persecution. The claimant testified and noted in her PIF that family planning officials threatened sterilization if she did not wear an IUD and take the Falun Gong training course. However, there is no documentary evidence to support the claimant's assertion that this threat was made. As well, there is no mention of sterilization threat in the summons. When the claimant was asked why she feared being returned to China, she testified that she feared being required to wear an IUD and being forced to take a Falun Gong training course. There was no mention of the sterilization threat. Finally, there is, in this regard, no documentary evidence known to the panel that indicates that an unmarried woman without children would be sterilized because she refused to wear an IUD and refused to take a training course

regarding alleged Falun Gong activity. The panel finds, on a balance of probabilities and in the context of findings noted above, that no threat of sterilization was made by either agents of the PSB or the local family planning agency.

With regard to the requirement to wear an IUD, the panel has noted that this is a law of general application for women of child bearing age. Although it is clearly problematic, the panel finds that it does not rise to the level of persecution as prescribed under section 96 and subsection 97(1) of the Immigration and Refugee Protection Act. With regard to the requirement to take a Falun Gong training course, this is clearly a form of harassment and not persecution.

[Footnotes omitted]

II. Issues

- [5] (a) Did the Board draw an unreasonable credibility conclusion?
- (b) Did the Board err in law in finding that the obligation to submit to the use of an IUD does not constitute persecution under s. 96 of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (IRPA)?

III. Analysis

[6] The determinative issue in this application is whether the Board erred in law in finding the forced use of an IUD does not constitute persecution. Errors of law of this sort are to be reviewed on a standard of correctness: see *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392.

[7] The Board's credibility analysis is, in some aspects, rather strained. For instance, the Board expressed concern about Ms. Zheng's failure to lie to the authorities about her pregnancy. It seems

to me that a person's unwillingness to lie to the authorities is hardly a sound basis for questioning her credibility. At the same time the Board expressed some concern about Ms. Zheng's unwillingness to submit to an IUD pointing out that this was a law of general application not directed particularly at her. It is somewhat inconsistent to fault Ms. Zheng for failing to mislead the authorities about her pregnancy only to later criticize her for refusing to obey their demands concerning the use of an IUD.

[8] Ms. Zheng offered an entirely reasonable explanation for refusing to use an IUD as can be seen from the following testimony:

Q. Did you wear the IUD?

A. No.

Q. Why not?

A. I didn't want to.

Q. But the law said you had to.
Why not?

A. I was not willing to.

Q. Sorry?

A. I was not willing to do the insertion.

This is a torture to me. I don't want to have this kind of stuff in my body. I can't accept this fact physiologically. To insert - - the insertion of IUD, and getting married, and giving birth is something that should be decided by myself, and that's my own choice.

In western countries, everybody has this right to choose. I'm a human being. Why not that I could have this kind of freedom, and my body is my own and this is a basic freedom. I didn't ask for more.

Why should I do something that is against my own will?

Q. Countries have laws and they often require people to do things they would rather not do. This was a law of general application in regard to women of child bearing age in China. It was not directed personally at you.

[9] It was disingenuous for the Board to dismiss this testimony and to question Ms. Zheng's credibility about her refusal to use an IUD on the ground that such a requirement was not particularly directed toward her. From the perspective of Ms. Zheng this procedure was directed at her and it would provide no comfort that many others might be facing the same predicament. The Board's analysis reflects a troubling lack of sensitivity on this issue apparently driven by its view that the state's forcible insertion of an IUD is not persecutory conduct.

[10] The Respondent took no particular position concerning the Board's IUD conclusion arguing instead that it was an alternative finding and that Ms. Zheng's evidence about the IUD risk was also not believed. I do not accept that characterization of the decision.

[11] It is clear that the Board did not accept Ms. Zheng's story about the circumstances of the abortion including her claim that she was threatened with sterilization. But there is nothing in the decision which suggests that the Board did not accept her testimony that she had been pregnant, that the pregnancy had been terminated and that she was ordered to submit to an IUD. Indeed, the Board must have accepted the fact of Ms. Zheng's pregnancy because it had stipulated in its questioning of

her that she had been subjected to an abortion.¹ This also explains why the Board found it unnecessary to comment on the ultrasound report.

[12] Having accepted the fact of an abortion it would have been helpful for the Board to have determined the extent, if any, of the state's involvement in that process and whether the demand for an IUD was one of the resulting consequences. It appears to me that the Board found it unnecessary to close that evidentiary loop by its finding that the forcible insertion of an IUD does not, in any event, amount to state persecution.

[13] The Board's finding that the requirement to use an IUD is not persecutory because it arises from a law of general application for women of child bearing age, represents an over-simplification of the applicable legal principles and is an error of law. The issue of persecution arising from state interference with a woman's right to reproductive choice cannot be reduced to the simple determinant of whether that interference is supported by a law of general application. That the state is able to legislate in the area of family planning and population control is not the issue. It is the means by which the state's objectives are achieved that must be critically examined. The more coercive or physically intrusive the approach the more likely it is that the state's conduct will be seen to be persecutory. This point was clearly made as long ago as 1993 by the Federal Court of Appeal in *Cheung v. Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 314, 102

¹ The Board's stipulation is found in the following exchange at page 923 of the Tribunal Record: "A. On the night of 19th of April, 2005, I started bleeding. Q. No, I accept that the alleged abortion took place. But, what happened after the abortion?"

D.L.R. (4th) 214 where Justice Linden made the following observation with respect to the Chinese practise of sterilization:

Even if forced sterilization were accepted as a law of general application, that fact would not necessarily prevent a claim to Convention refugee status. Under certain circumstances, the operation of a law of general application [sic] can constitute persecution. In *Padilla v. M.E.I.*, [1991] 13 Imm. L.R. (2d) 1 (F.C.A.), the Court held that even where there is a law of general application, that law may be applied in such a way as to be persecutory. In *Padilla*, the Court ruled that a Board must consider extra-judicial penalties which might be imposed. Similarly, in our case, the appellant's fear is not simply that she may be exposed to the economic penalties authorized by China's one child policy. That may well be acceptable. Rather, the appellant, in this case, genuinely fears forced sterilization; her fear extends beyond the consequences of the law of general application to include extraordinary treatment in her case that does not normally flow from that law (*Re I. (R.R.)*, [1992] C.R.D.D. No. 87). Furthermore, if the punishment or treatment under a law of general application is so Draconian as to be completely disproportionate to the objective of the law, it may be viewed as persecutory. This is so regardless of whether the intent of the punishment or treatment is persecution. Cloaking persecution with a veneer of legality does not render it less persecutory. Brutality in furtherance of a legitimate end is still brutality.

[14] I do not agree with the Board that the forcible insertion of an IUD is not a form of state persecution. In *E. (Mrs.) v. Eve*, [1986] 2 S.C.R. 388 at para. 92 the Court held that interference with a woman's reproductive liberty is a basic right ranking high on our scale of values. A similar observation was made by Justice Dolores Hansen in *Chi v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 126, [2002] F.C.J. No. 186, where she examined the Chinese practice of sterilization and the forced use of IUD's. My own views conform with her concluding comments at paragraph 48:

The punishment that the applicant fears is the state-enforced suppression of her reproductive capacity. The CRDD's suggestion that the applicant can return to China and live as a single woman without being targeted for sterilization or forced insertion of an IUD is an imposition of a significant personal choice the applicant does not want to make and fails to take into account the cultural context.

[15] What is left unresolved by the Board decision is whether there were alternative administrative options available to Ms. Zheng short of a direct physical assault on her reproductive integrity. There is country condition evidence in the record dealing with that issue but the Board apparently declined to consider it after finding that Ms. Zheng's evidence that she would be forced to submit to sterilization was not credible.

[16] Because the Board decision contains an error of law and must be set aside on that basis, it is unnecessary to resolve the issue of the reasonableness of the Board's credibility analysis. Unfortunately this case must be remitted to the Board for a third time.

[17] I will allow the Respondent 7 days to consider the issue of a certified question. If the Respondent proposes a certified question, the Applicant will have 7 days to respond.

JUDGMENT

THIS COURT ADJUDGES that this application is allowed with the matter to be remitted to a differently constituted panel for reconsideration on the merits and in accordance with these reasons.

“ R. L. Barnes ”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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**REASONS FOR JUDGMENT
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