

06-2959-ag
Xia v. Mukasey

1
2 **UNITED STATES COURT OF APPEALS**

3
4 **FOR THE SECOND CIRCUIT**

5
6 August Term, 2006

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8
9 (Argued: April 24, 2007 Decided: December 7, 2007)

10
11 Docket No. 06-2959-ag

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15 XIU FEN XIA,

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17 Petitioner,

18
19 -v.-

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21 MICHAEL MUKASEY, Attorney General,*

22
23 Respondent.

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25 - - - - -x

26
27 Before: JACOBS, Chief Judge, KEARSE and POOLER,
28 Circuit Judges.

29
30 Petition for review of a final decision and order of
31 removal of the Board of Immigration Appeals affirming in
32 part an immigration judge's denial of an application for
33 asylum, withholding of removal, and relief under the

* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Michael Mukasey is automatically substituted for former Attorney General Alberto Gonzales as a respondent in this case.

1 Convention Against Torture.

2 Petition denied.

3 JOSHUA BARDAVID, Law Office of
4 Joshua Bardavid, New York, New
5 York (Peter D. Lobel, New York,
6 New York, on the brief), for
7 Petitioner.

8
9 NICOLE N. MURLEY, United States
10 Department of Justice, Office of
11 Immigration Litigation,
12 Washington, D.C. (Judy K. Hunt
13 and David P. Rhodes, Assistant
14 United States Attorneys, for
15 Paul I. Perez, United States
16 Attorney for the Middle District
17 of Florida, Tampa, Florida, on
18 the brief), for Respondent.

19
20 DENNIS JACOBS, Chief Judge:

21
22 Petitioner Xiu Fen Xia, a native and citizen of China,
23 seeks review of a May 25, 2006 order of the Board of
24 Immigration Appeals ("BIA") affirming in part the December
25 7, 2004 decision of the Immigration Judge denying Xia's
26 applications for asylum, withholding of removal pursuant to
27 8 U.S.C. § 1231(b)(3), and withholding of removal pursuant
28 to the Convention Against Torture ("CAT"). In re Xia, No.
29 A98 228 356 (B.I.A. May 25, 2006), aff'g No. A98 228 356
30 (Immig. Ct. N.Y. City Dec. 7, 2004). Xia claims that she
31 arranged to have an abortion in order to avoid adverse
32 consequences, possibly including the harsh treatment and

1 substandard medical conditions attributed to an abortion or
2 sterilization at the hands of Chinese government cadres;
3 that she was thus subjected to a forced abortion under
4 China's family-planning policy; and that she is therefore a
5 "refugee" as that term is defined in 8 U.S.C. § 1101(a)(42).

6 The BIA concluded that her abortion was not "forced"
7 within the meaning of § 1101(a)(42) because "the Chinese
8 government was completely unaware of her pregnancy and did
9 not know that she had an abortion." In re Xia, No. A98 228
10 356, at 2 (B.I.A. May 25, 2006). We agree; and therefore we
11 deny the petition. "An abortion is not 'forced' within the
12 meaning of the refugee definition . . . unless the
13 threatened harm for refusal would, if carried out, be
14 sufficiently severe that it amounts to persecution." In re
15 T-Z-, 24 I. & N. Dec. 163, 169 (B.I.A. 2007). Because no
16 government official was aware of Xia's pregnancy, she has
17 not sufficiently established a threatened harm, let alone a
18 threatened harm so severe as to rise to the level of
19 persecution.

20
21 **I**

22 Xia is a 32-year-old woman from Wenzhou City, Zhejiang

1 Province, China. In 2003 Xia arrived in the United States;
2 and in 2004 she applied for asylum, withholding of removal,
3 and relief under the CAT. One month later the government
4 instituted removal proceedings against her.

5 At a hearing on December 7, 2004, Xia testified as
6 follows: she and her husband were married in 1995; she gave
7 birth to a child in 1997 and was fined 5,000 RMB because the
8 marriage had not been registered at the time she gave birth;
9 the Chinese government forced her to use an IUD in 1998; she
10 was required to receive "checkups" three times a year to
11 ensure that the IUD was in place and that she was not
12 pregnant; she became pregnant before her October 2000
13 checkup; her resulting dilemma was that if she skipped the
14 October checkup, she would have been arrested, but if she
15 attended the checkup, officials would have discovered the
16 pregnancy.

17 Xia testified that if officials discovered her
18 pregnancy she could be subject to the following punishments:
19 "I would get sterilized right away"; "I would pay a really
20 heavy fine"; "they will take me forcibly for an abortion";
21 "they are going to arrest my famil[y] members"; and the
22 "Government will come to arrest me." Therefore (she says)

1 she decided to obtain an abortion, even though she "really
2 [didn't] want to have [it]." Xia also testified, however,
3 that she obtained the abortion because: "If we have this
4 child[,] when it grows up where is the baby going to
5 stay[?]"

6 Before the scheduled October checkup, Xia went to a
7 private hospital and aborted her pregnancy; the government
8 did not know of her pregnancy or the abortion.

9

10 II

11 The IJ denied Xia's applications on the alternate
12 grounds that Xia was not credible and that (even if she were
13 credible) her testimony established that the termination of
14 her pregnancy was voluntary rather than forced. In re Xia,
15 No. A98 228 356, at 12-13 (Immig. Ct. N.Y. City Dec. 7,
16 2004). The BIA did not affirm the IJ's adverse credibility
17 finding, In re Xia, No. A98 228 356, at 1 (B.I.A. May 25,
18 2006), but agreed with the IJ that Xia "did not establish
19 her eligibility for asylum, withholding of removal and
20 protection under the [CAT] . . . [because] she chose to
21 undergo an abortion by a private doctor . . . [and] the
22 Chinese government was completely unaware of her pregnancy

1 and did not know that she had an abortion," id. at 1-2.
2 Xia's petition for review argues that she is eligible for
3 asylum because the circumstances of her abortion "meet the
4 definition of 'forced' within the meaning of 8 U.S.C. §
5 1101(a)(42)(B) . . . [and] fit[] perfectly within the
6 ordinary meaning of the word 'force.'"¹ She does not
7 meaningfully challenge the BIA's decision with respect to
8 her applications for withholding of removal or relief under
9 the CAT.

10 We review the BIA's factual findings under the
11 substantial evidence standard and treat them as "conclusive
12 unless any reasonable adjudicator would be compelled to
13 conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B). The
14 BIA's application of law to fact is reviewed de novo. See
15 Yi Long Yang v. Gonzales, 478 F.3d 133, 141 (2d Cir. 2007);
16 see also Jin Shui Qiu v. Ashcroft, 329 F.3d 140, 149 (2d
17 Cir. 2003).

18

¹ Xia also argues that she "suffered past persecution and has a well founded fear of future persecution when she had an IUD forcibly inserted." But this point was not raised before the BIA, so we do not address it here. See Lin Zhong v. U.S. Dep't of Justice, 480 F.3d 104 (2d Cir. 2007).

1 "derive the meaning of a 'forced' abortion." 24 I. & N.
2 Dec. at 167. Both parties contend that In re T-Z- supports
3 their positions; neither argues that In re T-Z- is
4 unreasonable and therefore undeserving of Chevron deference.
5 Accordingly, we have no occasion to decide whether such
6 deference is due.

7 In re T-Z- concluded that:

8 the question whether an abortion is "forced"
9 within the meaning of [§ 1101(a)(42)] should be
10 evaluated in terms of whether the applicant would
11 have otherwise been subjected to harm of
12 sufficient severity that it amounts to
13 persecution. Therefore, an abortion is "forced" .
14 . . . when a reasonable person would objectively
15 view the threats for refusing the abortion to be
16 genuine, and the threatened harm, if carried out,
17 would rise to the level of persecution.

18

19 Persecutory force . . . is force which,
20 if carried out, would meet or exceed the level of
21 harm require to demonstrate persecution. The term
22 "persecution" is not limited to physical harm or
23 threats of physical harm and may include threats
24 of economic harm, so long as the threats, if
25 carried out, would be of sufficient severity that
26 they amount to past persecution. Not all threats
27 of fines, wage reduction, or loss of employment,
28 however, will suffice to indicate that submission
29 to an abortion was "forced"

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31 . . . The statute requires that the abortion
32 be "forced," not merely that a person choose an
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1 unpreferred course of action as the result of some
2 pressure that sways the choice. The mere fact of
3 submission to pressure only tells us that the
4 particular person's preference was altered. It is
5 insufficient, by itself, to tell us the level of
6 that pressure or whether it reasonably can be
7 equated to "force."
8

9 24 I. & N. Dec. at 168-70.

10
11 **IV**

12 We agree with the BIA's conclusion that Xia's abortion
13 was not forced. Xia concedes that the Chinese government
14 was unaware of her pregnancy. Therefore, Xia's list of
15 potential punishments (sterilization, fine, arrest, forced
16 abortion, or arrest of family members) is not a list of
17 harms that were threatened; rather, it is a list of worries
18 about what punishment Xia might have faced had government
19 officials eventually learned of her pregnancy. But based on
20 Xia's decision to terminate her pregnancy, these
21 contingencies never developed in fact or as threat.²

22 The distinction drawn by In re T-Z- between "submission
23 to pressure" and "force," 24 I. & N. Dec. at 169-70,

² Nor has Xia established the existence of a universal law or custom or practice having the force of law ensuring that she would have suffered a forced abortion or sterilization.

1 requires evidence as to the pressure actually exerted on a
2 particular petitioner. Xia cannot establish that she faced
3 a threat that amounted to persecution without the threshold
4 showing that a palpable threat existed. For example, Xia
5 claims that she or members of her family might have been
6 arrested had she not undergone the abortion; but because
7 this risk of arrest was hypothetical, Xia cannot establish
8 that the circumstances surrounding the arrest would have
9 risen to the level of persecution. See, e.g., Beskovic v.
10 Gonzales, 467 F.3d 223, 226 & n.3 (2d Cir. 2006) (stating
11 that detention without physical abuse does not always
12 constitute persecution and requiring a "case-by-case"
13 inquiry). Similarly, she cannot establish that she risked
14 "anything more than modest fees or fines," which also would
15 not rise to the level of persecution. Jian Xing Huang v.
16 INS, 421 F.3d 125, 127, 129 (2d Cir. 2005) (per curiam).

17 Xia contends that the threatened harms are not
18 speculative, because government officials would have
19 certainly discovered her pregnancy at the October checkup.
20 This argument fails. However, even if it were certain that
21 Xia would face some punishment following the October
22 checkup, speculation as to what that punishment might have

1 been cannot establish that the threatened harm would have
2 risen to the level of persecution. Not all punishment is
3 persecution. See, e.g., Beskovic, 467 F.3d at 226. Because
4 Xia provided no evidence regarding the risks associated with
5 an arrest of uncertain duration, let alone the risk of
6 sterilization or forced abortion, she did not establish a
7 threat of persecution. See id.

8 We recognized before In re T-Z- that an “essential”
9 element of force is “that the agents of coercion were
10 government birth control officials.” Jin Shui Qiu, 329 F.3d
11 at 151; see also id. (“A forced sterilization . . . can be
12 effected by one arresting official or ten; with an arrest in
13 the morning or the evening, in the rain or in the sunshine;
14 with a detention for no longer than the time it takes to
15 perform the surgery, or a detention for a term of years . .
16 . .”); cf. Lau May Sui v. Ashcroft, 395 F.3d 863, 871 (8th
17 Cir. 2005) (reading “force” to require “that Chinese
18 officials used some sort of physical force or undue pressure
19 with the intent to cause, and which did cause, the
20 particular abortion in question,” and concluding that the
21 petitioner did not establish force where “it is undisputed
22 that no Chinese official knew at the time that [the

1 petitioner] was pregnant"). Here, the record is clear that
2 no government official was aware of Xia's pregnancy or her
3 abortion; therefore no government official forced Xia to
4 terminate her pregnancy.

5 Xia relies on two Ninth Circuit cases: Ding v.
6 Ashcroft, 387 F.3d 1131 (9th Cir. 2004), and Wang v.
7 Ashcroft, 341 F.3d 1015, 1020 (9th Cir. 2003). However, the
8 BIA has expressly "disagree[d] with . . . the decisions in
9 Ding and Wang to the extent that they suggest that threats
10 of economic harm that do not rise to the level of
11 persecution, if carried out, would suffice to demonstrate
12 that an abortion was 'forced' within the meaning of the
13 statute." In re T-Z-, 24 I. & N. Dec. at 169. And even in
14 Ding and Wang, government officials were actually aware of
15 the petitioner's pregnancy and took direct measures targeted
16 against the petitioner to compel her to undergo an abortion.
17 See Ding, 387 F.3d at 1139 (holding that abortion was forced
18 when government officials forced the petitioner "into a van,
19 to a hospital, into a room, and onto a surgical table for
20 the abortion" before the petitioner submitted); Wang, 341
21 F.3d at 1020 (9th Cir. 2003) (holding that abortion was
22 forced when government officials "harassed [the petitioner]

1 by either deducting her wages, threatening her job
2 stability, or threatening to impose unreasonably high fines”
3 until the petitioner “submitted to the pressure”).
4

5 **V**

6 Xia’s supplemental brief concedes that [i] the record
7 “is . . . largely deficient” as to Xia’s financial situation
8 and her ability to pay a fine, and [ii] the record “is
9 significantly devoid of any discussion regarding what, if
10 any, economic deprivation Ms. Xia feared.” Accordingly, Xia
11 requests a “remand for further fact-finding” so that she can
12 adduce additional evidence of her fear.

13 Xia’s request must be denied. We cannot order the BIA
14 to reopen the record for the taking of additional evidence
15 where, as here, “the agency regulations set forth procedures
16 to reopen.” Xiao Xing Ni v. Gonzales, 494 F.3d 260, 269 (2d
17 Cir. 2007). The appropriate avenue for such relief would be
18 to file a motion to reopen in the agency. See 8 C.F.R. §
19 1003.2(c). In any event, Xia already has had a reasonable
20 opportunity to present the evidence she now seeks to add to
21 the record. Even before In re T-Z-, the seriousness of a
22 potential fine and the effect of such a fine were held to

1 have bearing on the question of persecution. See
2 Ivanishvili v. U.S. Dep't of Justice, 433 F.3d 332, 341 (2d
3 Cir. 2006). She therefore had an incentive to present
4 evidence of the economic hardship she would face; and she
5 offers no explanation for why she did not, or why she should
6 be allowed to do so now when she did not do so then.

7 Xia's request for a remand to supplement the record
8 raises a collateral issue that should be (briefly)
9 addressed. The BIA did not apply In re T-Z- in Xia's case
10 because the decision had not yet issued. The Supreme Court
11 has instructed that "a court reviewing an agency decision
12 following an intervening change of policy by the agency
13 should remand to permit the agency to decide in the first
14 instance whether giving the change retrospective effect will
15 best effectuate the policies underlying the agency's
16 governing act." NLRB v. Food Store Employees Union, 417
17 U.S. 1, 10 n.10 (1974). But the Court's instruction does
18 not compel a remand here.

19 First, neither party has requested a remand for the
20 purpose of determining whether In re T-Z- should be applied
21 to Xia retrospectively. Both Xia and the government agree
22 that In re T-Z- governs Xia's petition; and even Xia's

1 request for the taking of additional evidence presupposes
2 that the evidence would be relevant to meet the standard set
3 out in In re T-Z-. She does not argue that it would be
4 unfair to apply In re T-Z- or that In re T-Z- would result
5 in a different or unfavorable outcome.

6 Second, and more fundamentally, neither party contends
7 that In re T-Z- represents a "change of policy" by the BIA.
8 Rather, In re T-Z- amounts to a formal articulation of the
9 standard that was actually applied in the BIA's resolution
10 of Xia's case. If, as here, the BIA's initial unpublished
11 decision was proper and supported by substantial evidence,
12 then a subsequent precedential BIA decision that validates
13 the agency's initial reasoning does not constitute a "change
14 of policy"--and Food Store Employees therefore does not
15 justify a remand.

16 Our refusal to remand in this case does not leave
17 future petitioners defenseless against the application of
18 strict new standards set forth in intervening decisions, or
19 deprive them of the benefit of new more favorable decisions.
20 If such decisions are truly new, then petitioners can seek
21 remand under Food Store Employees so that the BIA can
22 determine in the first instance if the new rule should be

1 applied to the petitioner's case. Or, if the rule
2 represents an irrational departure from prior decisions, it
3 is possible that the rule itself would be "overturned as
4 arbitrary, capricious, or an abuse of discretion." INS v.
5 Yueh-Shaio Yang, 519 U.S. 26, 32 (1996) (internal quotation
6 marks and emendations omitted). But there is no need to
7 remand where, as here: [i] the BIA's decision is supported
8 by substantial evidence; [ii] no valid challenge is raised
9 against Chevron deference; [iii] the intervening decision
10 supports and validates the reasoning of the decision under
11 review; and [iv] the intervening decision does not amount to
12 a pivot in agency policy.

13
14 * * *

15 For the reasons set forth above, the petition is hereby
16 denied. Having completed our review, this Court's previous
17 order granting a motion for stay of removal is vacated, and
18 the motion for a stay of removal is dismissed as moot.