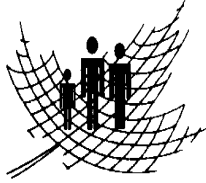


**IMMIGRATION AND REFUGEE BOARD
(REFUGEE DIVISION)**



**LA COMMISSION DE L'IMMIGRATION
ET DU STATUT DE RÉFUGIÉ
(SECTION DU STATUT DE RÉFUGIÉ)**

VA0-02635

IN CAMERA
HUIS CLOS

CLAIMANT(S)

DEMANDEUR(S)

XXXXXX

DATE(S) OF HEARING

DATE(S) DE L'AUDITION

March 12, 2001

DATE OF DECISION

DATE DE LA DÉCISION

March 22, 2001

CORAM

CORAM

S.M. Beckow
Heather Gibbs

FOR THE CLAIMANT(S)

POUR LE(S) DEMANDEUR(S)

Robert Kincaid
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REFUGEE CLAIM OFFICER

AGENT CHARGÉ DE LA REVENDICATION

Nil

DESIGNATED REPRESENTATIVE

REPRÉSENTANT DÉSIGNÉ

Nil

MINISTER'S COUNSEL

CONSEIL DE LA MINISTRE

Nil

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These are the reasons for the decision of the Convention Refugee Determination Division (CRDD) in the refugee claim of XXXXXX ("the claimant"). The claimant is a 19-year-old citizen of China. He arrived in Vancouver on XX August 2000 as an unaccompanied minor, and made his refugee claim¹ on 28 August 2000. The hearing into his claim was held pursuant to section 69.1 of the *Immigration Act*,² at Vancouver, B.C. on 12 March 2001.

In determining whether the claimant is a Convention refugee, the panel considered the evidence adduced, all representations, country documents, statutory provisions, and case law. The claimant had recently become an adult; however, for the sake of caution and in view of his fragile psychological condition, the panel followed the IRB's Guidelines on *Child Refugee Claimants*³ in procedural and evidentiary matters. At the time of the hearing, the claimant remained a ward of the Ministry for Children and Families. His social worker, XXXXXXXX, attended the hearing and testified on the claimant's behalf.

ALLEGATIONS

In his CIC Notes, the claimant said that he had come to Canada to work, that he had no fears of returning to China, but that he did not want to. In his original Personal Information Form (PIF),⁴ the claimant said that his parents sent him from China

¹ A Convention refugee is defined, in part, in section 2(1) of the *Immigration Act* as follows:

A Convention refugee means any person who

- a) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,
 - (i) is outside the country of the person's nationality and is unable or, by reason of that fear, is unwilling to avail himself of the protection of that country, or
 - (ii) not having a country of nationality, is outside the country of his former habitual residence and is unable or, by reason of that fear, is unwilling to return to that country.

² As enacted by R.S.C. 1985 (4th Supp.), c.28, s.18.

³ Chairperson's Guidelines on *Child Refugee Claimants: Procedural and Evidentiary Issues*, September 1996.

⁴ Exhibit 1A.

and he feared being jailed on return. In his amended PIF,⁵ he revealed that he was under considerable pressure from his parents to reconnect with the snakeheads and continue his journey to the United States. His mother repeatedly yells at him on the phone and asserted recently that her whole life depends on him. His father threatened to disown the claimant if he did not rejoin the snakeheads. The claimant contends that "they were trying to make me feel guilty and persuade me to run to the United States. I was not willing to do this."⁶ He stated that:

I am afraid that if I comply with my parents' demands I will be placed again into the hands of the snakeheads. I am afraid they will beat me. Once I am in their hands I will not have choice. If they demand I perform illegal activities to pay off this debt quickly, I will be forced to comply.⁷

The claimant alleged that his aunt entered into the conflict, warning him that his cousin was being mistreated by the snakeheads because of his refusal to cooperate, a story, which the claimant believes is concocted.

In the end, and with the support of his social worker, Ms. XXXX, he refused to reconnect with the snakeheads and pursued his refugee claim in Canada.

He testified that he asked to have himself transferred out of XXXXX, the Ministry's residence for minors, when a young boy with the same snakehead was suspected of leaking information on him. He is now in hiding.

ANALYSIS

Credibility

The claimant's CIC Notes, original PIF, and amended PIF were not consistent. His testimony added new and important details that did not appear in any of

⁵ Exhibit 1B.

⁶ Exhibit 1B.

⁷ *Ibid.*

the three documents. At the same time, these new details were difficult for him to share and brought tears to his eyes. When the claimant communicated details of his history, the inconsistency became explicable.

In our view, the claimant has the history and demeanour of a severely-abused child, abuse much beyond the range of the typical claimant's experience. He testified that his father subjected him to physical, emotional, and psychological degradation over a long period of time when he was young. The father's actions appear to have been designed to create an unquestioning, obedient son. But the claimant has emerged from the experience having only the weakest conception of his own individuality and interests. Only under the protection of Ministry caregivers has he attained the strength of will to resist his parents' ongoing wish that he reconnect with the snakeheads and continue on to America, as they originally planned.

Ms. XXXX said that the claimant was easily persuaded to do even what he did not want to do and had only recently begun to be able to think of himself as a factor in any decision he made. To the panel he appeared not simply to have low self-esteem; he appeared to have little or no self-estimation. Ms. XXXX described the difficulties this presents. She has expended much effort on a daily basis to get him to open up to the limited extent that he has.

The *Gender Guidelines* state that:

... in cases involving sexual violence, the claimant may be very traumatized. Victims of sexual violence are often reluctant to disclose what has happened to them, and in such cases the Refugee Division must proceed with extreme caution.⁸

In our view, much the same could be said of children who are victims of serious psychological and physical abuse such as the present claimant

⁸ *Guideline 4. Women Refugee Claimants Fearing Gender-Related Persecution: Update*. Ottawa: Immigration and Refugee Board, November 25, 1996, at p. 38.

Notwithstanding his inwardness, the claimant delivered his testimony in a credible manner. The presiding member had to caution him on occasion against having his claim fail for lack of information. When he spoke, he spoke frankly and sincerely. We heard no exaggeration or deviousness. At the same time, his head was bowed and he did not look at the panel except when he thought he was unobserved. His demeanour was despondent and his voice barely audible. Ms. XXXX testified that she has not seen him smile; she states that he is always sad-looking. She said that he had to put away his knives so he would not be tempted into suicide.

Having observed his behaviour, the panel is convinced that he is not a devious individual who is manipulating the Board according to a pre-arranged smuggling plan. In all matters relating to his claim, we find him to be a trustworthy and reliable witness.

Personal Identity

The claimant produced only a photocopy of selected pages from his hukou. He explained that his parents are refusing to support his Canadian refugee claim. They would send a photocopy and nothing else.

We find that the claimant cannot produce more satisfactory documents for the Board because his parents are withholding them. We are satisfied that he has operated with due diligence and have no issue with personal identity.

Past Persecution

When asked what would happen to him if he returned to China, the claimant initially stated that he feared his father would beat him. The panel used this opportunity to ask him about the circumstances of his family life. This line of questioning brought an emotional response from him. He testified to a childhood of

beatings, before he ended in tears. The claimant alleges that his father beat him almost every day when he was young and consequently he is very much afraid of him.

One particularly-distressing example of the treatment he received from his father the presiding member considers a "ritual" in that it had a fixed form, occurred at regular intervals, and seemed triggered by factors independent of a fair and just assessment of the claimant's behaviour.

In this ritual, after he served his father dinner, he was obliged to kneel until his father finished. The father then made his son remove his pants and beat him with a thick stick. The claimant said that this ritual happened often; perhaps twice a week when he was younger. Although, in our view, designed to instil obedience, the claimant says that he had no idea why it occurred. Finally the neighbours intervened to have the father stop. The violence he experienced from his father tapered off as he grew older. The panel however perceives that it has left him a seriously-damaged youth.

In later years, when he disagreed with his parents, the claimant says his father beat him and told him that, if he would not cooperate, he should leave home. Later in Canada, when he separated from the snakeheads, under the protection of the Ministry, he said his father threatened to disown him if he did not continue on. It is against this background of violence and threats that his agreement to emigrate should be weighed. The claimant testified that the choice was not his own. We find that the claimant is not accountable for the decision to emigrate.

The IRB Guidelines on *Child Refugee Claimants* state:

In determining the child's fear of persecution, the international human rights instruments, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child, should be considered in determining whether the harm which the child fears amounts to persecution.⁹

⁹ *Child Refugee Claimants, supra.*

What do these instruments say? The UN *Universal Declaration of Human Rights* declares that:

Article 3. Everyone has the right to life, liberty and security of person.

Article 5. No one shall be subjected to torture or to cruel, inhumane, or degrading treatment or punishment.

Article 9 of the UN *Declaration of the Rights of the Child* lays out the child's right to state protection:

The child shall be protected against all forms of neglect, cruelty and exploitation.

Article 37 of the U.N. *Convention on the Rights of the Child* enjoins signatories to provide that protection. The People's Republic of China signed the Convention on 29 Aug. 1990 and ratified it on 2 March 1992.

States Parties shall ensure that (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

We find the father's actions to be the source of the damage the claimant has suffered. We find the treatment meted out to him to be a violation of Article 3 of the *Universal Declaration of Human Rights*, as a threat to his life, liberty, and security of person. We also find the father's actions to be cruel, inhumane, and degrading and, as such, violations of Article 5 of the *Universal Declaration of Human Rights*, Article 37 of the U.N. *Convention on the Rights of the Child*, and Article 9 of the UN *Declaration of the Rights of the Child*.

We would like to turn our attention to several points of view which hold that what happened to the claimant does not amount to persecution. One is that child-beating is common in China. The authors of the Human Rights in China report, *Caught Between Tradition and the State* (hereafter the HRIC report) believe that "the problem of

violence by parents and parents-in-law against minor and adult children may be ... serious and widespread" in China.¹⁰ They continue:

Domestic violence is certainly not new to Chinese society, where a male-centered cultural system in which women were required to be subservient to men has been in place for thousands of years.¹¹

Virtually unnoticed, except in the occasional instance where beatings result in the death of the child, child abuse has not, to our knowledge, been the subject of serious studies and there are no specific legal provisions outlawing it.¹²

Even if child abuse is common in China, is the practice to be accepted by the international community? The *Gender Guidelines* offer assistance: "A gender-related claim cannot be rejected simply because many women in the country of origin suffer generalized oppression or violence."¹³ In the same way, a child-abuse claim cannot be rejected simply because many children in the country of origin suffer generalized oppression or violence.

Another point of view holds that the international community should accept and respect a country's values like filial piety and patrilineal authority. Dr. Graham XXXX describes these two values in the Chinese context:

The relationship between parents and children in a Chinese family is most importantly regulated by the concept of "filial piety" (xiao). ... Filial piety ... implies respect [and] obedience....¹⁴

The links that a Chinese individual has to the family are intense. ... The system of kinship in traditional China was based on male predominance and was strictly patrilineal.¹⁵

¹⁰ Exhibit 4, Human Rights In China, "Caught Between Tradition and the State: Violations of the Human Rights of Chinese Women," at p. 24. (Hereafter HRIC Report.)

¹¹ *Ibid.* at p. 23.

¹² *Ibid.*, at p. 24.

¹³ *Gender Guidelines, supra*, at p. 38.

¹⁴ Exhibit 4, Dr. Graham Johnson, *The Chinese State, Families and Filial Piety. An Opinion.* At p. 3.

¹⁵ *Ibid.*, at p. 4.

However, in the panel's view, the cruel and degrading punishment which the claimant received cannot be justified under rubrics like "filial piety" and "patrilineal authority." The States parties to the UN *Convention on the Rights of the Child* took a stand against violence towards children, and by doing so clearly held that the international community should not tolerate certain patterns of behaviour, whether or not they are culturally-specific. Using children as soldiers, selling them into prostitution, and beating them into submission are all acts enjoined by the *Convention*, wrong wherever they are practiced, in China or in Canada. Thus, when "filial piety" and "patrilineal authority" result in the psychological disabling of a child's normal functioning, "cultural" values must take a back seat to the child's best interests. It is persecution to be beaten in this cruel and systematic way, whatever arguments we advance to justify it.

The claimant testified that the idea of coming to Canada was not his own, but his parents' solution to his having reached employable age and their desire to augment their income. He stated that he was in Canada for economic reasons -- to find a good job. However, when the panel probed that statement, the reason he wanted a good job was so that he could remit money to his parents.

Involuntary trafficking is also a violation of the security of the person. It is specifically banned by Article 9 of the UN *Declaration of the Rights of the Child*, which says: "[The child] shall not be the subject of traffic, in any form." Most claimants are not trafficked in the sense that they are chronologically and emotionally of an age to have participated in the choice to come to Canada and have in point of fact chosen to come here. But this claimant was an involuntary and passive figure in events, a consequence of his father's brutal treatment.

Now, far from his parents, and with the social worker's daily assistance, he has arrived at a point where he has distinguished a very few of his own interests. With the social worker's assistance, he does not want to rejoin with the snakeheads, possibly to

be drawn into dangerous and illegal activities, should his parents decide not to pay for his passage.

The claimant's social worker has corroborated the snakeheads' attempts to reconnect with him. She says that she also resisted their efforts to move him back into their smuggling operation.

The panel finds that both the child abuse and involuntary human smuggling constitute persecution.

Future Persecution

The claimant believes that, if he is returned to China, he will be re-trafficked. He credibly argued that he does not believe he can hold out against his parents' combined efforts to send him to the U.S.A. again. His mother told him by phone that her whole life depended on him. Our interpretation of that statement is that his mother regards him as the source of the family's future income. Given that the snakeheads have tried to reach him at his Ministry house and that the parents wish him to rejoin the snakeheads, we believe that Canada's protection is all that stands between him and falling into the hands of the traffickers, on return to China.

The U.N.H.C.R. *Handbook on Procedures and Criteria for Determining Refugee* states that:

If the will of the parents cannot be ascertained or if such will is in doubt or in conflict with the will of the child, then the examiner, in cooperation with the experts assisting him, will have to come to a decision as to the well-foundedness of the minor's fear on the basis of all the known circumstances, which may call for a liberal application of the benefit of the doubt.¹⁶ [Emphasis added.]

¹⁶ *Handbook, supra*, at. p. 51.

The claimant has testified that the parents' will is in conflict with his own. His testimony on this question was delivered with more conviction than on any other statement he made.

We find that the claimant faces a serious risk of persecution for a Convention reason were he to be returned to the care of his parents in China at the present time.

Agents of Persecution

The agents of persecution in this claim are the boy's parents, who have subjected him to child abuse and trafficking.

Nexus

Justice Gibson ruled in *Li*:

Against the guidance provided by the Supreme Court of Canada in *Canada (Attorney General) v. Ward*, I am satisfied that counsel's urging that the applicants were members of a "particular social group" warranted more serious consideration and analysis than was provided by the CRDD on the ground that the applicants could be considered to be members of a group defined by an innate or unchangeable characteristic, that is to say, their ages at the time they left China, under eighteen, thus making them "children" within the meaning of Article 1 of the Convention on the Rights of the Child.¹⁷ [Emphasis added.]

The nexus of this claim, after Justice Gibson, is "children." One may say that this nexus would only ground a claim of a person below the age of eighteen, according to the UN *Convention on the Rights of the Child*. The claimant has now passed the age of eighteen. We would argue, generously interpreting the international instruments,¹⁸ that the same nexus nevertheless applies.

¹⁷ *Li, Shu Ping et al v. M.C.I.* (F.C.T.D., no. IMM-932-00), Gibson J, December 11, 2000, at p. 6..

¹⁸ *Ibid*, at p. 6.

The claimant's past persecution has prevented him from developing the normal defenses that he would as a child. In particular, it has left him without the adequate defence of a strong, functioning, independent will. While he is a chronological adult, he remains, as his demeanour in the courtroom indicates and his social worker argues, a psychological child. Therefore we find that he remains today a member of the particular social group "children" for the purposes of his claim. We therefore find him entitled to the surrogate protection that the *Convention on the Rights of the Child* enjoins on Canada as a signatory.

State Protection

The objective evidence supports the strong presumption that the Public Security Bureau would in all likelihood have done nothing to prosecute a charge of child abuse against the father. That evidence suggests that the husband/father is regarded as the supreme head of the family and that the police regard child abuse as a family matter.¹⁹

According to the 1992 Chinese *Law on the Protection of Juveniles*, physical abuse of children can be grounds for criminal prosecution.²⁰ However, the law is seldom invoked and little protection from abusive family members is available. Again, the 1991 *Protection of Minors Act* states that, even when "the circumstances are serious," only administrative punishments are available against those who violate its provisions.²¹ Says the HRIC report:

The act ... did not increase protection for children against abuse by relatives, a problem which, to HRIC's knowledge, has not been the subject of systematic research. In the case of such abuse, the Act refers to Article 182 of the Criminal Code which provides for lesser penalties for assaults against relatives as compared to those against strangers and states that prosecutions will only be initiated when someone has filed a complaint with the authorities. Furthermore, the Article states that there will be prosecutions only

¹⁹ Exhibit 4, HRIC Report, at p. 22.

²⁰ Exhibit 3, Department of State *Country Reports on Human Rights Practices for 1998* - Volume 1, at p. 863.

²¹ Exhibit 7, HRIC, "Protections' Fail to Protect," *China Rights Forum*, Spring 1996, at p. 2.

when an assault is "odious," which law enforcement and judicial bodies have generally interpreted as meaning that it results in permanent physical injury.²²[Emphasis added]

Dr. XXXX corroborates the lack of state protection:

Families [have always been] responsible for the behaviour of their members. ... In general, ... the state would not intervene in family matters. ... What may be a matter of public concern in a Canadian context -- wife beating, child abuse -- may well remain in the private realm with no official intervention. ... Child protection as it might be understood in a Canadian context is but poorly developed.²³ [Emphasis added.]

Even though the neighbours eventually stopped the obedience ritual, the HRIC report suggests that the claimant could not have voluntarily called for their help without incurring shame. It states that Chinese families hold the "common belief that 'family shame [in this case, the subject of child abuse] should not be aired in public.'"²⁴ The intervention of the neighbours is thus uncommon and remarkable. The claimant's refraining from complaining is common and unremarkable. Thus, cultural custom as well as his age and prevailing police practice combine to deprive him of protection.

We therefore find that state protection is not available to the claimant.

Finally a note is added on the nature of this claim. The presiding member has only seen one other case of severe psychological trauma stemming from longstanding child abuse. These reasons should not be seen as applying to every case of a family imposing reasonable standards of discipline or imparting justifiable values where their behaviour does not exceed the standards imposed by international convention. It should also not be seen as covering those claims where the claimant has voluntarily participated in being trafficked to Canada. These reasons are meant to cover only extreme cases

²² *Ibid*, at p. 2.

²³ Exhibit 4, XXXX, *supra*, footnote 3, at pp. 2-3.

²⁴ Exhibit 4, HRIC Report, at p. 23.

where it is apparent that the claimant has been severely psychologically damaged and left unable to function as a normal person by cruel, inhumane, and degrading treatment.

DETERMINATION

In light of these reasons, we determine that XXXXXX is a Convention refugee, as defined in section 2(1) of the *Immigration Act*.

“S.M. Beckow”

S.M. Beckow

Concurred in by: “Heather Gibbs”

Heather Gibbs

DATED at Vancouver, BC, this 22nd day of March 2001.

KEYWORDS - REFUGEE DIVISION - MINORS - UNACCOMPANIED MINORS - PARTICULAR SOCIAL GROUP - CHILDREN - DOMESTIC VIOLENCE - INTERNATIONAL INSTRUMENTS - GUIDELINES - MALE - POSITIVE - CHINA