

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO. 71553/99

AT AUCKLAND

Before: C M Treadwell (Chairperson)
R Donald (Member)

Counsel for Appellant: Mr Sullivan

Date of Hearing: 8 November 1999

Date of Decision: 28 January 2000

DECISION

This is an appeal against a decision of the Refugee Status Branch of the New Zealand Immigration Service, declining the grant of refugee status to the appellant, a national of the People's Republic of China.

INTRODUCTION

The appellant arrived in New Zealand on 12 May 1999, having been refused entry to Australia. He was returned to Hong Kong through New Zealand but his connecting airline refused to uplift him in Hong Kong and he was repatriated back to his last port of call, New Zealand. On his arrival here he sought refugee status. He was detained in Mt. Eden Prison and a formal refugee application was completed by him on 1 June 1999. He was interviewed by the Immigration Service on 4 June 1999. His application was declined by letter dated 11 June 1999.

The appellant now appeals to this Authority. By the time of his appeal hearing on 8 November 1999 the appellant had been released from custody.

BACKGROUND

According to the appellant, he is one of seven children of a poor peasant family from rural Fujian province in China. He is 46 years old.

In 1979 the appellant married a young woman from Sechuan province. They had a small plot of land on which they grew crops and the appellant supplemented his income by working as an occasional construction worker.

The appellant's first child, a daughter, was born in about 1980. Their second child, also a daughter, was born in about 1982. At that time, according to the appellant, China's 'one child family' policy was not enforced in rural areas and the appellant and his wife experienced no difficulty in having a second child. As time passed, however, the attitude of the authorities became more strict and the appellant and his wife were twice detained by the local village officials and required to account for the fact that they had two children. On both these occasions the appellant escaped from custody and for some time thereafter kept out of the way of the village officials.

In 1983 the appellant's third child, also a daughter, was born. On seeing her pregnant for the third time, local village officials had attempted to persuade the appellant's wife to have an abortion but she had refused. The appellant was again arrested and was detained for several days.

When the appellant's third daughter was born his wife arranged to have her nominally adopted by other people. In this way she was able to avoid the criticism of the local authorities.

In 1986 the couple's fourth child, a son, was born and the appellant went to live in Guangzhou, where he found casual work. He remained there for two years before being joined there by his wife and children.

The appellant worked for a total of three years in Guangzhou, undertaking casual work in a brick factory. His wife also worked for the same employer.

In 1990 the appellant and his wife returned to live in their village in Fujian province. Prior to this time, the appellant had not attempted to register the births of his second, third and fourth children but he decided that this was now necessary, in

order that the couple's second child could go to school.

A further motivating factor was the fact that the appellant had voluntarily undergone a vasectomy since the birth of their fourth child and this, he hoped, would help to appease the local authorities. Accordingly, in 1995, with their second child already 13 years old, the appellant and his wife registered the children with the local authority.

Shortly thereafter, the appellant was detained by the local authorities for questioning. He was charged with breaches of the 'one child family policy' and was fined RMB30,000.

After two days in custody the appellant forced the window of the room in which he was being held and made his escape. Thereafter, he stayed away from his home and eventually made his way back to Guangzhou, where he remained until he left China.

The appellant kept in touch with his wife by telephone and learned from her that the authorities had visited their home and confiscated all of their possessions, including the front door. She herself was not arrested at any time until 1998. In that year, she was given a warrant for the appellant's arrest and was herself detained for several days in the hope that this would cause her husband to come out of hiding. Instead, the appellant's children went to see the head of the village, who spoke up on their behalf and secured the release of the appellant's wife.

Late in the appeal hearing, the appellant told the Authority that he considered that his own difficulties with the local authorities had been exacerbated by the fact that he was disliked by the head of the village. The appellant told the Authority that he (the appellant) had been a petty junior official during the Cultural Revolution and had persecuted the man who later became head of the village. Specifically, the appellant had been part of a group which had vilified the man, forcing him to walk through the streets with a placard hung around his neck. According to the appellant, the head of the village had always disliked him and had gone out of his way to make things difficult for him. The appellant could not however point to anything specific which the man had done to him subsequently in revenge or retribution, nor could he explain why the man had given such assistance to the appellant's children in 1998.

The appellant says that he cannot pay the RMB30,000 fine and he fears that if he is returned to China he will be jailed for this and also for having escaped from custody. The seizure of his property will not have been in reduction of his fine but, he says, was simply further (and arbitrary) punishment for his failure to pay the fine.

THE ISSUES

The Inclusion Clause in Article 1A(2) of the Refugee Convention relevantly provides that a refugee is a person who:-

"... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it."

In terms of Refugee Appeal No. 70074/96 (17 September 1996), the principal issues are:

1. Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?
2. If the answer is yes, is there a Convention reason for that persecution?

CREDIBILITY

Before turning to address the issues raised by the Convention it is necessary to first consider the question of the appellant's credibility. The Authority has some reservations over aspects of the appellant's account. He has, for example, been inconsistent as to the dates and sequences of events. Mr Sullivan urges the Authority to accept that the appellant is a confused and uneducated man and the Authority is prepared to accept that this is so.

One aspect over which the Authority has some reservation is the last-minute claim that the head of the village has a personal grudge against the appellant. This aspect of the appellant's claim never emerged at any time prior to the appeal hearing itself, a discrepancy which the appellant himself attempted to explain away by stating that he had deliberately withheld this information from his statement and

at the Refugee Status Branch interview because he had not known that he could trust the New Zealand authorities and did not wish to reveal this information.

We are sceptical. There does not appear to be any good reason why the appellant should have elected to withhold this particular piece of information. Further, the appellant's own account suggests that the head of the village was instrumental in having the appellant's wife released from custody, at the request of his children. That action seems inconsistent with the claimed antipathy with which the appellant says the head of the village regards him.

Ultimately, the Authority cannot entirely dismiss the appellant's evidence in this regard and it is appropriate to give him the benefit of the doubt.

The appellant's claim being accepted as credible, it is necessary now to address the issues raised by the Convention.

Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to China?

There is no real chance of the appellant being persecuted if he returns to China.

As the Authority has previously held, the implementation of China's family planning regulations is not inherently persecutory. See Refugee Appeal No. 3/91 Re ZWD (20 October 1992) at pp. 22 to 50 with regard to the 'one child family' policy.

The right to make laws governing a field of human activity necessarily carries with it the right to impose appropriate sanctions for breaches of those laws. Potentially, of course, sanctions may nevertheless be persecutory if they are disproportionate to the offence committed. Whether a particular punishment is so disproportionate will depend on the particular facts of each case. In Refugee Appeal No. 3/91 Re ZWD (20 October 1992), for example, the Authority held, at p. 62, that forced or involuntary sterilisation and abortion constitute human rights abuses and may amount to persecution.

Here, the imposition of a global fine of RMB30,000 for breaches of the 'one child family' policy is not so disproportionate to the offences that the Authority considers it to be persecutory. Neither is the imposition of a term of imprisonment for failure to pay a fine. Both penalties fall well within the nature and severity of punishments

which a state might reasonably be expected to impose on offenders.

The Authority notes the appellant's evidence that the local authorities confiscated possessions from his house, including the front door. Regrettable though such acts are, there is no suggestion from the appellant that they are ongoing, or that there is a risk of repetition.

The appellant asserted, late in the day, that the enforcement of the family planning regulations against him was, at least in part, the result of ancient antipathy towards him by the head of the village. Even if the head of the village did bear some resentment towards the appellant for acts carried out during the Cultural Revolution thirty years ago, there is simply no evidence that it had any bearing on the imposition of a fine for breaches of the family planning regulations and the subsequent attempts at enforcement of that penalty. The appellant admits that he is in breach of the regulations and the only evidence from which the attitude of the head of the village can be discerned is the acknowledgement by the appellant that he was in fact instrumental in having the appellant's wife released from custody at the request of their children. That evidence is not consistent with the appellant's claim that the head of the village bears him ill will.

If the answer is yes, is there a Convention reason for that persecution?

Because the claimed harm which the appellant fears is not persecutory, it follows that it is not strictly necessary to address this issue. Nevertheless, counsel made a specific submission that the appellant is a member of "the poor" as the Convention ground of 'particular social group' and it is appropriate to consider whether such a group exists in this case.

In Refugee Appeal No. 3/91 Re ZWD (20 October 1992) at p.88 the Authority framed the issues central to the existence of a particular social group thus:

1. What is the particular social group in question?
2. Does that group have a distinct identity in the eyes of:
 - a) The community at large; and/or
 - b) The agents of persecution.

3. Do members of the group in question share a common immutable characteristic, i.e. a characteristic that is either beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed. Expressed in a shorthand way, is the group definable by reference to a shared characteristic of its members which is fundamental to their identity?
4. Is there a link or causal connection between the fear of persecution and the civil or political status of the members of the group?

We address each issue in turn.

What is the particular social group in question?

In considering any claim to the existence of a particular social group, the initial enquiry must be to identify the group because unless the group is capable of reasonably precise definition it becomes difficult, if not impossible, to address the balance of the issues .

Here, Mr Sullivan submits that “the poor” comprise a particular social group, of which the appellant is a member. We disagree. “The poor” is simply not a group capable of definition in this manner because poverty is a relative concept. To a wealthy person, a labourer may well be considered poor, but the same labourer would seem wealthy to a beggar. The ‘poverty line’ in New Zealand, for example, would far exceed the income levels of the middle classes in many third world countries.

The appellant and his family had a dwelling in China, together with a plot of agricultural land as well as the ability to earn income from other ‘unofficial’ activities in Guangzhou. While he might have lacked material wealth, there is no suggestion that the appellant or his family were malnourished or in poor health. The only bar to the schooling of the appellant’s children was the need to register them in accordance with the family planning regulations.

Viewed against this background, it can be seen that there are insoluble difficulties in attempting to either define “the poor” as a social group, or even to say with any certainty that the appellant fell within it.

Does the group have a distinct identity?

The relevant enquiry is to ascertain the view of the Chinese state. In other words, did the state itself view the appellant as a member of “the poor” as a particular social group? Mr Sullivan points to the commentary of Professor J C Hathaway in *The law of refugee status* at pp.166-167 that:

“... the poor as a class ... may constitute a persecuted ‘social group’ when the economic conditions underlying their poverty are attributable to the exercise or maintenance of political power. If in a given country the poor are kept poor by those in power in order to maintain the current political structure - if all or substantially all economic opportunity is foreclosed - a victim of such poverty suffers ‘substantial economic disadvantage’ on account of his membership in the lower class.”

We do not disagree that the general view expressed by Professor Hathaway may be relevant to some factual circumstances, but here the appellant is not at risk of being persecuted because the Chinese state regards him as a member of “the poor”, but because he breached the family planning regulations. The fact that he may also be poor, and therefore unable to pay the fine, is unfortunate but there is no suggestion that he would not have been fined had he not been poor. Further, there is no evidence that the appellant has been persecuted by the Chinese state in any other way, other than the imposition of a fine for breaches of the family planning regulations. If his poverty were the reason for the appellant being persecuted by the state, then one would not expect his persecution to be restricted to so limited a form of harm.

Mr Sullivan also submits that corrupt local government officials are a prime cause of the inconsistency with which the regulations are enforced. He asks the Authority to accept that such officials appear to be motivated to enforce the family planning regulations by their ability to obtain money by way of fines, which are then applied to the local government coffers. This, it is submitted, results in abuses of local government power against the most disenfranchised - the poor. Even putting aside the speculative nature of that submission, logic dictates that in fact the poor ought to face a lower risk of having the family planning regulations enforced, for the simple reason that they must be a less attractive source of revenue. The very ‘social group’ propounded by counsel would operate to reduce the degree of risk.

A shared characteristic

It will be recalled that a particular social group must share a common characteristic which is either immutable or which is so fundamental to the identity of the members that they ought not to be required to change it. Neither alternative is met here by “the poor”. Poverty *per se* is not immutable, nor is it so fundamental to the identity of the members that they ought not to be required to change it. Indeed, it is surely a characteristic which the impecunious would be happy to change.

The Authority does not overlook that there may be other circumstances where poverty might in fact be immutable because a state deliberately operates to prevent the poor from rising above their poverty. Such circumstances would be consistent with the situation envisaged by Professor Hathaway, where “the poor are kept poor by those in power in order to maintain the current political structure”. That is not the present case, however. Here, there is no suggestion that the appellant’s financial circumstances are anything more than the lot of a rural Chinese farmer. Nor is there any suggestion that the state would obstruct any effort by the appellant to improve his lot. Indeed, the economic liberalisation of China over the past decade would suggest, if anything, the opposite.

Is there a link or causal connection between the fear of persecution and the civil or political status of the members of the group?

There is not. The appellant is at risk of having the fine against him enforced (whether by way of payment or imprisonment or both) because it is the legitimate application of the ordinary laws of China. Rejecting as we do the speculative submission that the appellant was fined because he is poor, the only relevance of his poverty is that it may exacerbate the effect of the punishment on him. We are satisfied that, even if it were to do so, there is no particular intent on the part of the Chinese state to enforce the family planning regulations against him *for that reason*.

Conclusions on ‘particular social group’

From the foregoing analysis, we conclude that, on the facts of this claim, “the poor”:

- is not capable of definition;
- does not have a distinct identity, either among its own members or in the

eyes of the state;

- does not have a shared characteristic which is either immutable or which its members ought not to be required to change;
- lacks any causal link between the feared persecution and the civil or political status of the members.

For these reasons, we are satisfied that “the poor” does not comprise a particular social group for the purposes of this appeal.

Conclusion

For the foregoing reasons we conclude that the appellant does not have a well founded fear of persecution for a Convention reason. He is not a refugee within the meaning of Article 1A(2) of the Convention. Refugee status is declined. The appeal is dismissed.

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C M Treadwell
Member
Refugee Status Appeals Authority