



RESEARCH NOTE

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China's 'One Child Policy' and Refugee Law: Recent trends in Canada and the United States

Introduction

The use of China's 'One Child Policy' as a basis for refugee status has been the subject of some debate following a decision in the Federal Court in December 1994.

According to the *1951 Convention relating to the Status of Refugees*, as amended by the *1967 Protocol*, a refugee is a person who has:

a 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.

Justice Sackville of the Federal Court upheld a decision of the Refugee Review Tribunal (RRT) granting refugee status to a married couple, nationals of the People's Republic of China (PRC). The RRT found that the couple was at 'risk of forcible sterilisation by reason of population control policies and practices followed in some parts of China.' The couple was granted refugee status because:

- they feared persecution (eg, risk of forced sterilisation); **and**
- they were members of a 'particular social group'.

Justice Sackville said:

parents with one child wishing to have more children are unlikely ... to constitute a particular social group. But if government policies and practices identify such people as having special characteristics and impose a system of rewards and sanctions by refer-

ence to those characteristics, the people concerned are likely to constitute a particular social group.

This Research Note considers how this issue is treated in the United States and Canada.

The United States

The use of China's 'One Child Policy' as a basis for refugee status was considered in the US in *Re Chang* in 1989. In *Re Chang*, the Board of Immigration Appeals (BIA) dismissed a claim for asylum by Mr Chang, a 33 year old citizen of the PRC. Mr Chang had argued that he would be forcibly sterilised on return to China as he already had two children and he refused to limit the size of his family.

The BIA considered Mr Chang could not establish a 'well-founded fear of persecution' on any of the five stated grounds (that is race, religion, national origin, political opinion, or membership of a particular social group). The BIA:

accepted the Chinese government's assertions that it uses economic incentives and birth control education, but forbids coercive techniques. The Board also noted that because rights guaranteed to United States citizens are not guaranteed to citizens of other countries, denial of those rights does not establish 'persecution' under the Act. Based on those reasons, the Board stated that the Chinese policy was non discriminatory and, therefore, did not constitute the type of persecution needed to qualify for asylum.

On 11 April 1990, President Bush issued Executive Order 12711 - Policy Implementation with respect to Nationals of the PRC. The Executive Order states:

The Secretary of State and the Attorney General are directed to provide for enhanced consideration under the immigration laws for individuals from any country who express a fear of persecution upon return to their country related to that country's policy of forced abortion or coerced sterilisation, as implemented by the Attorney General's regulation effective January 29, 1990.

On 13 June 1993, the *South China Morning Post* reported that the foundering in New York harbour of the Golden Venture, a ship carrying Chinese citizens, 'has intensified a fiery debate within government about the abuse of US asylum laws.' At issue was whether persecution under China's One Child Policy is a legitimate basis for political asylum.

In *Guo v Carroll*, decided in the US District Court in January 1994, Judge Ellis said that the 'right to bear children is one of the basic civil rights of man.' *Guo* involved an application for asylum by a male citizen of the PRC who feared forced sterilisation. The issue in the case was whether opposition to forced sterilisation could constitute 'political opinion'. Judge Ellis said it could:

The expressions of one's view regarding issues related to the right to procreate is 'political'. The alien's opposition to the PRC's

population control policies constitutes a 'political opinion'.

The applicant, therefore, satisfied the test for asylum.

In *Gao v Waters*, decided by another District Court in November 1994, Judge Lynch considered a claim for asylum from a PRC national who claimed to have fled China to escape persecution for his opposition to the One Child Policy. The applicant argued that legislative and executive developments had overruled *Re Chang*.

Judge Lynch, however, disagreed. He said that few courts had considered the issue and those that have are not in accord. *Re Chang*, although shaken, had not been brought down. Judge Lynch, therefore, refused the application:

This alien has made no showing that the policy was applied to him for reasons other than population control.

Decisions at the District Court level, therefore, have gone both ways. It is interesting to note that, in *Guo*, the Court reached its decision on the basis of persecution for a 'political opinion', rather than 'persecution for membership of a particular social group.'

The most recent case, *Zhang v Slattery*, a decision of the US Court of Appeals, was handed down on 19 May 1995. (The Court of Appeals hears appeals from the District Courts. Cases may then go to the US Supreme Court but in the majority of cases, the Court of Appeals finally decides federal cases.)

In *Zhang*, the Court said *Re Chang* had not been overruled and held:

We cannot find that the implementation of the 'one couple, one child' policy in and of itself, even to the extent that involuntary

sterilisations occur, is persecution or creates a well-founded fear of persecution 'on account of race, religion, nationality, membership in a particular social group, or political opinion'.

Canada

In *Zhou v Canada*, decided by the Immigration and Refugee Board in 1989, refugee status was granted. The claimant had suffered persecution in China for various reasons including, his family background (he came from a family of 'landowners'), and his wife's violation of the family planning policy.

In its conclusions, the Board stated in relation to the One Child Policy that it was a law or policy of 'general application and it is not within the jurisdiction of this tribunal to evaluate the merits of the policy.' The Board continued:

Mr Zhou violated the family planning policies, and resulting economic incentives and disincentives would normally not constitute persecution. However, Mr Zhou was detained without warrant for half a month and tortured. He was demoted and then fired. He was effectively barred from employment of any kind. Finally he was evicted from his apartment. In other words, he was unable to work, feed his family or provide shelter for his family.

The Board also noted that Mr Zhou claims that the family planning policy was carried out in an arbitrary and extreme manner due to his family background. He, therefore, claims persecution as a consequence of membership of a social group - which the Board accepted.

In *Re Cheung*, decided in April 1993, the Canadian Federal Court of Appeal held that 'women in China who have more than one child and are faced with forced sterilisation constitute a social

group within the meaning of the definition of Convention refugee.' Further the Court said:

The forced sterilisation of women is a fundamental violation of their basic human rights and there is no doubt that the threat of forced sterilisation can ground a fear of persecution within the definition of Convention refugee.

In the course of the judgement it was pointed out that not all women in China who have one child automatically qualify for refugee status under the Convention:

It is only those women who also have a well-founded fear of persecution as a result of that (of having more than one child) who can claim such status.

In *Chan*, decided in July 1993, another panel of the Canadian Federal Court of Appeal decided that parents in China with more than one child do not constitute a particular social group. *Chan* is currently before the Canadian Supreme Court, which has reserved judgement.

Until the outcome in *Chan* is known, then, the situation in Canada remains inconclusive.

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