

Citation: Cheung v. Canada (Minister of Employment and Immigration) (C.A.),

[1993] 2 F.C. 314

Date: April 1, 1993

Docket: A-785-91

cheung v. canada

A-785-91

Ting Ting Cheung and Karen Lee by her Litigation Guardian, Ting Ting Cheung (Appellants)

v.

The Minister of Employment and Immigration (Respondent)

Indexed as: Cheung v. Canada (**Minister of Employment and Immigration**) (C.A.)

Court of Appeal, Mahoney, Stone and Linden JJ.A."Toronto, March 26; Ottawa, April 1, 1993.

Citizenship and Immigration " Status in Canada " Convention refugees " Appeal from Board's decision woman and second child not Convention refugees " Appellant facing forced sterilization under China's one-child policy after birth of second child " Second child already deprived of medical care, facing deprivation of education, employment opportunities and food if returned to China " Appeal allowed " Women in China with one child and faced with forced sterilization constitute particular social group " Forced sterilization of women such extreme violation of basic human rights as to constitute persecution " Second child Convention refugee in own right " Second children constitute particular social group facing deprivations amounting to persecution.

These were appeals from the Immigration and Refugee Board's finding that the appellants did not have a well-founded fear of persecution and could not claim Convention refugee status. The alleged persecution was forced sterilization under China's one-child policy. The appellant Ting Ting Cheung had a son in 1984. Over the next two years she underwent three abortions. In 1986, she moved to another province so that the local authorities would not learn that she was again pregnant. She gave birth to a daughter, who has already been denied the normal medical attention given to young children, and will be deprived of food subsidies, education and employment opportunities if returned to China. Upon her return, the local authorities took the appellant away to be sterilized, but the procedure had to be postponed for medical reasons. The appellant left the province before the procedure was again attempted and eventually came to Canada. It was accepted that the appellant would be sterilized if returned to China. The Board's decision focused on the general aim of the one-child policy, i.e. the modernization of China. It held that there was no persecutory intent and that the policy was a law of general application. The first issue was whether a well-founded fear of forced sterilization under China's one-child policy constituted a well-founded fear of persecution for reasons of membership in a particular social group. Deciding that question necessitated a determination as to whether women in China who have more than one child and are faced with forced sterilization constitute a social group within the definition of Convention refugee, and whether forced sterilization constitutes persecution. The second issue was whether a second child, born in contravention of the one-child policy, qualifies for refugee status.

Held, the appeals should be allowed.

The Board misconstrued the law by focusing on the general aim of the one-child policy, rather than examining the methods used to enforce it. The Board decision ignored the severity of the

intrusiveness of sterilization to a person's mental and physical integrity, and wrongly required that a "persecutory intent" be present, whereas a persecutory effect will suffice.

Women in China who have one child and are faced with forced sterilization satisfy enough of the criteria set out in *Canada (Minister of Employment and Immigration) v. Mayers* to constitute a particular social group. They share similar social status and hold a similar interest which is not held by their government. They are identified by a purpose which is so fundamental to their human dignity that they should not be required to alter it on the basis that interference with a woman's reproductive liberty is a basic right "rank[ing] high in our scale of values".

Forced sterilization in the context of China's one-child policy constitutes persecution. Forced sterilization of Chinese women who have had a child is not a law of general application. It is a practice that affects a limited and well-defined group of people and does not have general application. It is not universally applied throughout China. It is mainly conducted by local authorities, not the central government, but even where the state does not directly participate in the persecution of an individual, the victim of such persecutory treatment may still fall within the definition of Convention refugee. Even if accepted as a law of general application, that would not prevent a claim to Convention refugee status where the law is applied in such a way as to constitute persecution. The appellant's fear extended beyond the consequences of the law of general application (i.e. economic penalties) to include extraordinary treatment in her case (forced sterilization). Furthermore, if the punishment is so Draconian as to be completely disproportionate to the objective of the law, it may be viewed as persecutory, regardless of whether the intent of the punishment is persecution. The forced sterilization of women is a fundamental violation of basic human rights. It is an unacceptable violation of security of the person, and is cruel, inhuman and degrading treatment. The practice of forced sterilization of women is such an extreme violation of basic human rights as to be persecutory, even though thought to advance the modernization of China. The appellant had a well-founded fear of persecution.

The appellant's second child may claim Convention refugee status in her own right. She is a member of a particular social group, second children, and as such would suffer such severe and concerted discrimination as to amount to persecution.

statutes and regulations judicially considered

Federal Court Act, R.S.C., 1985, c. F-7, s. 52(c)(i) (as am. by S.C. 1990, c. 8, s. 17).

Immigration Act, R.S.C., 1985, c. I-2, s. 2(1) (as am. by R.S.C., 1985 (4th) Supp.), c. 28, s. 1).

Universal Declaration of Human Rights, U.N. Gen. Ass. Res. 217 A (III), Dec. 10, 1948, Arts. 3, 5.

cases judicially considered

applied:

Canada (Minister of Employment and Immigration) v. Mayers, [1993] 1 F.C. 154 (C.A.); *Padilla v. Canada (Minister of Employment and Immigration)* (1991), 13 Imm. L.R. (2d) 1 (F.C.A.); *E. (Mrs.) v. Eve*, [1986] 2 S.C.R. 388; (1986), 31 D.L.R. (4th) 1; 185 A.P.R. 273; 61 Nfld. & P.E.I.R. 273; 8 C.H.R.R. D/3773; 13 C.P.C. (2d) 6; 71 N.R. 1.

distinguished:

Canada (Attorney General) v. Ward, [1990] 2 F.C. 667; (1990), 67 D.L.R. (4th) 1; 10 Imm. L.R. (2d) 189; 108 N.R. 60 (C.A.).

referred to:

I. (R.R.) (Re), [1992] C.R.D.D. No. 87 (Q.L.); *H. (W.I.) (Re)*, [1989] C.R.D.D. No. 15 (Q.L.); *Surujpal v. Minister of Employment and Immigration* (1985), 60 N.R. 73 (F.C.A.); *Zalzali v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 605 (C.A.); *T. (S.N.) (Re)*, [1989] C.R.D.D. No. 30 (Q.L.); *A. (W.R.) (Re)*, [1989] C.R.D.D. No. 98 (Q.L.).

authors cited

Hathaway, James C. *The Law of Refugee Status*, Butterworths: Toronto, 1991.

APPEALS from The Immigration and Refugee Board's finding appellants did not have a well-founded fear of persecution therefore, were not Convention refugees. Appeals allowed.

counsel:

M. Pia Zambelli for appellants.

John Vaissi-Nagy for respondent.

solicitors:

Hoppe, Jackman, Zambelli & Associés, Mont- réal, for appellants.

Deputy Attorney General of Canada for respondent.

The following are the reasons for judgment rendered in English by

Linden J.A.: The main issue in this appeal is whether a well-founded fear of forced sterilization under China's one-child policy may constitute a well-founded fear of persecution for reasons of membership in a particular social group. Also at issue is whether a second child, born in contravention of the one-child policy, may qualify for refugee status.

FACTS

The appellants, Ting Ting Cheung and her young daughter, Karen Lee, came to Canada and had a refugee hearing on August 10, 1990. In 1984, Ms. Cheung had given birth to a baby boy. Following the birth of her son, she relied on an intra-uterine device as a method of birth control in compliance with China's one-child policy. As a result of complications leading to extreme bleeding during her menstrual cycle, Ms. Cheung was forced to abandon use of the I.U.D. Over the course of the next two years, the appellant became pregnant and had abortions three times. Although sterilization was urged upon her by her doctor, the appellant did not undergo that procedure. It appears that her husband, who lived and worked in Hong Kong, was opposed to her sterilization.

In 1986, Ms. Cheung became pregnant again. This time, she decided against having another abortion. Instead, she moved to her in-laws' residence in Pun Yu so that the authorities where she lived in Guangzhou would not learn about her pregnancy. If it had been discovered that she was pregnant she would have been forced to again have another abortion.

After giving birth to her second child, Karen Lee, Ms. Cheung returned to Guangzhou. She was unable to bring her new daughter with her. Ms. Cheung's second child was not born in a hospital and was denied the normal medical attention given to young children. The appellant indicated that, as a second child, Karen Lee would not be given food subsidies, would receive low-grade education, and might not even be able to register for school. This evidence was confirmed in the documentary material.

Shortly after returning to Guangzhou, the Family Planning Bureau came to Ms. Cheung's home and took her away to be sterilized. However, because she was suffering from an infection, the doctor determined that he would be unable to proceed with the operation for six months. Before the six months was up, the appellant fled Guangzhou in order to avoid being sterilized. She again moved in with her in-laws in Pun Yu. She became pregnant once again, but had yet another abortion in Pun Yu.

Over the next three years, Ms. Cheung returned periodically to Guangzhou to visit her son who remained there with his grandparents. In 1989, while visiting Guangzhou, the appellant participated in three demonstrations supporting the pro-democracy movement. Shortly afterwards, following the crackdown in China, the Public Security Bureau visited her parents' home on a number of occasions. It is unclear, however, whether these visits were in connection to Ms. Cheung or to her brother who participated in demonstrations in Beijing. In any event, it was shortly thereafter that the appellant came to Canada.

It was accepted by the Board that the appellant would be sterilized if she were forced to return to China. Additional penalties faced by Ms. Cheung if she were returned to China, may include imprisonment, perhaps at a camp for ideological re-education.

THE REASONS OF THE BOARD

Based on these facts, the Board determined that Ting Ting Cheung did not have a well-founded fear of persecution and therefore could not claim Convention refugee status. The core of the Board's reasons were as follows:

I do not read in the evidence a persecutory intent on the part of the Chinese government, simply a desperate desire to come to terms with the situation that poses a major threat to its modernization plans. It is not a policy born out of caprice, but out of economic logic.

While the central government's stated approach is that of persuasion, the evidence indicates that the coercion has been used by local authorities, who have been charged with implementing this policy. Such coercion has taken the form of steep fines, career setbacks, loss of certain privileges and involuntary abortion and sterilization. These dis-incentives, which have varied from province to province, have been accomplished by incentives to those couples adhering to government guidelines. The possibility of coercion in the implementation of this policy is not sufficient, in my view, to make it one of persecution.

It is a policy that amounts to a law of general application whose clear objective is not persecution, but general population control

I do not perceive the Chinese one-child policy to be subterfuge for some persecutive purpose and while I sympathise with those who must bow to it, I do not feel it is my purpose to tell the Chinese government how to run its economic affairs. Even though the claimant faces the possibility of being sterilized if she is returned to China, since this violation of her personal integrity is simply the implementation of a law of general application and cannot be related to one of the five Convention grounds, I do not see it falling within the gambit (*sic*) of the Convention refugee division.

In my view, the Board's ruling misconstrued the law by focusing on the general aim of the one-child policy of the government, which may well make sense for China, rather than examining the methods used to enforce that policy. In so doing, the Board ignored the severity of the intrusiveness of sterilization to a person's mental and physical integrity. It also wrongly required that a "persecutory intent" be present, whereas a persecutory effect suffices. (See Hathaway, *The Law of Refugee Status*, at page 125).

DECISION

The *Immigration Act* [R.S.C., 1985, c. I-2] defines "Convention refugee" in subsection 2(1) [as am. by R.S.C., 1985 (4th Supp.), c. 28, s. 1] as follows:

2. (1) In this Act,

...

"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 the person's former habitual residence and is unable or, by reason of that fear, is unwilling to return to that country

The main issue before this Court is whether a well-founded fear of forced sterilization under China's one-child policy constitutes a well-founded fear of persecution for reasons of membership in a particular social group. This issue can be broken into two sub-issues, the first being whether women in China who have more than one child and are faced with forced sterilization constitute a social group within the meaning of the definition of a Convention refugee. The second sub-issue addresses the question of whether forced or coerced sterilization constitutes persecution.

(a) Membership in a Social Group

I will begin with the question of whether women in China who have more than one child and are faced with forced sterilization constitute a social group within the meaning of the definition of a Convention refugee. There is very little jurisprudence directly addressing the meaning of the phrase "membership in a particular social group". The only two cases by the Federal Court of Appeal on this issue are *Canada (Attorney General) v. Ward*, [1990] 2 F.C. 667 (leave to appeal to the Supreme Court granted) and *Canada (Minister of Employment and Immigration) v. Mayers*, [1993] 1 F.C. 154. The facts of our case correspond more directly with those in *Mayers, supra*. Indeed, as was determined in *Mayers, supra*, at page 162, the facts on which the decision in *Ward* was based "are so different from the present as to render particular conclusions and *dicta* entirely inapposite." Accordingly, the *Ward* decision is of little help in deciding Ms. Cheung's appeal.

The *Mayers* case does give us some assistance. In *Mayers*, Mahoney J.A. (Heald J.A. concurring) stated [at page 169]:

In conclusion, in my opinion, the adjudicator cannot be said to have erred in law by implicitly concluding that the Refugee Division might find "Trinidadian women subject to wife abuse" to

be a particular social group and fear of that abuse, given the indifference of the authorities, to be persecution.

Mahoney J.A. did not go so far as to conclude that Trinidadian women subject to wife abuse are a particular social group with a well-founded fear of persecution, as he was not called upon to make such a determination. In concurring reasons, Chief Justice Isaac agreed with the majority on the issue of whether Trinidadian women in the circumstances described may constitute a social group with a well-founded fear of persecution within the definition of Convention refugee. The Chief Justice stated [at page 157]:

I agree with my colleague that the adjudicator cannot be said to have erred in law by concluding that the Refugee Division might find "Trinidadian women subject to wife abuse" to be a particular social group, and fear of that abuse, given the indifference of the authorities, to be persecution.

In *Mayers, supra*, Mahoney J.A. indicated [at page 165] that the following criteria may be a useful basis for consideration in constructing a test for being a particular social group:

(1) a natural or non-natural group of persons with (2) similar shared background, habits, social status, political outlook, education, values, aspirations, history, economic activity or interests, often interests contrary to those of the prevailing government, and (3) sharing basic, innate, unalterable characteristics, consciousness, and solidarity or (4) sharing a temporary but voluntary status, with the purpose of their association being so fundamental to their human dignity that they should not be required to alter it.

It is clear that women in China who have one child and are faced with forced sterilization satisfy enough of the above criteria to be considered a particular social group. These people comprise a group sharing similar social status and hold a similar interest which is not held by their government. They have certain basic characteristics in common. All of the people coming within this group are united or identified by a purpose which is so fundamental to their human dignity that they should not be required to alter it on the basis that interference with a woman's reproductive liberty is a basic right "rank[ing] high in our scale of values" (*E. (Mrs.) v. Eve*, [1986] 2 S.C.R. 388 [at page 434]).

I find, therefore, that women in China who have more than one child, and are faced with forced sterilization because of this, form a particular social group so as to come within the meaning of the definition of a Convention refugee (*I. (R.R.) (Re)*, [1992] C.R.D.D. No. 87 (Q.L.)). This does not mean, of course, that all women in China who have more than one child may automatically claim Convention refugee status. It is only those women who also have a well-founded fear of persecution as a result of that who can claim such status.

(b) Persecution

Having concluded that the claimant comes within a category enumerated in the definition of a Convention refugee, namely membership in a particular social group, it remains to be determined whether Ms. Cheung has a well-founded fear of persecution based on that. The question here is whether forced or strongly coerced sterilization in the context of China's one-child policy constitutes persecution. The Board concluded that forced sterilization in that context was not persecution. I disagree for several reasons.

While the one-child policy is generally applicable in China, the forced sterilization of Chinese women who have had a child is not a law of general application (*H. (W.I.) (Re)*, [1989] C.R.D.D. No. 15 (Q.L.)). This is a practice that affects a limited and well-defined group of people and does not have general application. What is more, the documentary evidence indicates that forced sterilization is not universally applied throughout China. There are many exceptions. Forced sterilization and forced abortions are mainly conducted by local authorities

rather than by the central government. In fact, these practices may even come into conflict with official policies of the Chinese government. In any event, where the state does not directly participate in the persecution of an individual, the persecutory treatment of that person may still fall within the definition of Convention refugee (*Surujpal v. Minister of Employment and Immigration* (1985), 60 N.R. 73 (F.C.A.); *Zalzali v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 605 (C.A.)).

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 can constitute persecution. In *Padilla v. Canada (Minister of Employment and Immigration)* (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 (*I. (R.R.) (Re)*, [1992] C.R.D.D. No. 87 (Q.L.)). 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.

The forced sterilization of women is a fundamental violation of basic human rights. It violates Articles 3 and 5 of the United Nations *Universal Declaration of Human Rights*. This declaration was adopted and proclaimed by the General Assembly resolution 217 A (III), December 10, 1948. Articles 3 and 5 read as follows:

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, inhuman or degrading treatment or punishment.

The forced sterilization of a woman is a serious and totally unacceptable violation of her security of the person. Forced sterilization subjects a woman to cruel, inhuman and degrading treatment. In a strongly worded judgment, in the context of a mentally disabled person, the Supreme Court of Canada has recently forbidden non-therapeutic sterilization as a "serious intrusion on the basic rights of the individual" [at page 432]; as "in every case a grave intrusion on the physical and mental integrity of the person" [at page 434]; and, as a "grave intrusion on a person's rights [leading to] certain physical damage" [at page 431] (*E. (Mrs.) v. Eve*, [1986] 2 S.C.R. 388). There are few practices that could be more intrusive and more brutal than forced sterilization. I have no doubt, then, that the threat of forced sterilization can ground a fear of persecution within the meaning of Convention refugee under the *Immigration Act* (*T. (S.N.) (Re)*, [1989] C.R.D.D. No. 30 (Q.L.); *H. (W.I.) (Re)*, [1989] C.R.D.D. No. 15 (Q.L.); *I. (R.R.) (Re)*, [1992] C.R.D.D. No. 87 (Q.L.); *A. (W.R.) (Re)*, [1989] C.R.D.D. No. 98 (Q.L.)). If, for example, rather than forced sterilization, the policy was to put to death every child subsequently born to a one-child family, no one could possibly deny that the law was persecutory. There is a point at which cruel treatment becomes persecution regardless of whether it is sanctioned by law; the forced sterilization of women is so intrusive as to be beyond that point. This is not merely an "economic affair" as the Board suggested in

its reasons, nor is it "purely regulatory," as counsel for the Minister argued. The practice of forcing women to undergo sterilization is such an extreme violation of their basic human rights as to be persecutory, even though this was thought to advance the modernization of China.

KAREN LEE CHEUNG

The Board also erred in its treatment of the minor appellant. As a minor child dependent on Ms. Cheung, Karen Lee may also claim the benefit of such status on the principle of family unity. Moreover, if Karen Lee were sent back to China, she would, in her own right, experience such concerted and severe discrimination, including deprivation of medical care, education and employment opportunities and even food, so as to amount to persecution. She was poignantly described as a "black-market person," denied the ordinary rights of Chinese children. As such, she is a member of a particular social group, that is, second children. Karen Lee has already experienced certain deprivations and may be subject to further persecution should she be returned to China.

CONCLUSION

Based on these findings, the appeal of Ting Ting Cheung and her minor daughter Karen Lee should be allowed. The Board erred in deciding that Ms. Cheung did not have a well-founded fear of persecution on the basis of membership in a particular social group. In my view, it should have decided that she was a refugee. I also conclude that, like her mother, Karen Lee has a well-founded fear of persecution and should have been permitted to remain in Canada as a Convention refugee in her own right.

Accordingly, this appeal will be allowed. There being no problems as to the credibility of the adult claimant, nor any factual questions that need to be resolved by the Board, this Court will exercise its discretion under subparagraph 52(c)(i) of the *Federal Court Act* [R.S.C., 1985, c. F-7 (as am. by S.C. 1990, c. 8, s. 17)] and declare both appellants to be Convention refugees.

Mahoney J.A.: I agree.

Stone J.A.: I agree.