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BAR BULLETIN FOCUS: IMMIGRATION LAW

Till Asylum Do We Part

~ Establishing 'persecution' no longer a given for spouses of victims of forced sterilization ~

By Eric Singer

The days when a *spouse* of a woman who is forced to undergo an abortion or sterilization procedure can establish "persecution" on that basis alone in order to receive asylum in the United States are apparently over, according to the Fourth Circuit's very recent decision in *Yi Ni v. Holder.*

Twenty-one years ago, the Board of Immigration Appeals (BIA) – our nation's highest administrative body for interpreting U.S. immigration law, including the asylum provisions of the Immigration and Nationality Act (INA) – ruled that involuntary sterilization under China's "one-couple, one-child policy," however offensive, would not *per se* constitute persecution "on account of race, religion, membership in a particular social group, or political opinion," the bases for a valid asylum claim. Miffed, in 1996 Congress amended the INA's definition of "refugee" so that a person who had been forced to abort or had been involuntarily sterilized *would* be deemed to have been persecuted on account of political opinion.

The BIA then interpreted the amended text to mean not only what it plainly said – that the person directly subjected to the coerced medical procedure could thereby establish persecution – but that her spouse could do so as well. Notably, in *Matter of S-L-L*, 24 I. & N. Dec. 1, 6-8 (BIA 2006), the BIA reasoned that "Congress was concerned not only with the offensive assault upon the woman, but also with the obtrusive government interference into a married couple's decisions regarding children and family. When the government intervenes in the private affairs of a married couple to force an abortion or sterilization, it persecutes the married couple as an entity." The BIA also stressed that the husband (presuming him to be opposed to the coerced abortion or sterilization undergone by his wife) may suffer such intense emotional harm arising from his spouse's mistreatment and the infringement on their shared reproductive rights that the forced sterilization could be imputed to him.

And in a 2007 case that reached the Fourth Circuit, *Lin-Jian v. Gonzalez*, 489 F. 3d 182 (4th Cir. 2007), the government never challenged this view; the interpretation was taken as a "given."

The case of Mr. Yi Ni, a citizen of the People's Republic of China, would have stood a fair chance back then. Ni fathered a son with his wife in 1993; two months later, the local government forcibly inserted an IUD into her. During an "IUD check" in 2000, his wife was discovered to be pregnant; she was forced to have an abortion. Depressed, wanting more children but afraid to do so, and hating the family planning policy, Ni left the country and arrived in the U.S.

In May 2008, however, the Attorney General – the BIA's "supervisor", so to speak – overruled the BIA's standing interpretation, arguing that the unambiguous language of the 1996 amendment did not automatically extend refugee status to the spouse of a person who has been physically subjected to a forced abortion or sterilization procedure.

Enter the unfortunate Mr. Ni. The central question before the Fourth Circuit was whether it could adopt the AG's supervening interpretation or was bound by its precedent in *Lin-Jian v. Gonzalez*, which applied the earlier BIA interpretation that would be favorable to Ni. In a pattern shaking much of immigration litigation arising from the Supreme Court's 2005 *Brand X* decision, the Fourth Circuit held that its prior decision in *Lin-Jian* did not necessarily trump the new AG opinion, because, in *Lin-Jian*, it did not actually decide that the interpretation in favor of *per se* protection of spouses flowed from the unambiguous terms of the amendment. Rather, it just assumed the interpretation was correct because neither party challenged it.

Unconstrained, therefore, the panel in *Yi Ni* took a fresh look at the 1996 amendment and concluded, joining four other federal circuits, that the unambiguous language of the statute gave protection to one

person and one person only – the person forced to undergo the forced procedure – and not a couple. Thus, Ni was out of luck with his argument that he suffered persecution because his wife had been forced to have an IUD inserted or coerced to have an abortion.

Ni's other arguments fared no better with the Court. He asserted that he planned to have more children, if deported, and would face persecution in China if he succeeded. The Court ruled, however, that his plan to have more children was speculative and that the evidence did not support the view that he had or that he would affirmatively violate or resist the family planning policies and be subject to persecution on account of his resistance.

The Court also rejected his claim that he established persecution because he had suffered depression resulting from his wife's abortion and suffered from fear of conceiving out of plan. This psychological harm alone, the Court ruled, was not a sufficient injury to his person or his freedom to constitute persecution under the law.

How far the pendulum has swung from the BIA's 2006 decision in *Matter of S-L-L* noted above!

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