U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: (b) (6) Date: SEP 25 2007

In re (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Yee Ling Poon, Esquire

ON BEHALF OF DHS: Leslie Smith Turner
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal

ORDER:

PER CURIAM. In a decision dated (b) (6) the United States Court of Appeals for the (b) (6) remanded this case to the Board with instructions to further remand it to the Immigration Judge. Pursuant to the court's decision, we are obliged to remand this case to the Immigration Judge. Accordingly, the decision of the Board in this case dated May 24, 2005, is vacated and the record is remanded to the Immigration Judge for further proceedings consistent with the court's decision.

FOR THE BOARD

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
(b) (6)

IN THE MATTER OF:	)	**IN REMOVAL PROCEEDINGS**
(b) (6)	)	**File #:** (b) (6)
RESPONDENT	)	

CHARGES: **Immigration and Nationality Act ("INA") § 212(a)(6)(A)(i)**, as amended, in that the Respondent is an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General

APPLICATIONS: Asylum pursuant to **INA § 208**; Withholding of Removal pursuant to **INA § 241(b)(3)**; Withholding of Removal pursuant to **Article 3 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment ("CAT")**

APPEARANCES

ON BEHALF OF RESPONDENT:
William O. Low, Esq.
Law Offices of Yee Ling Poon
(b) (6)

ON BEHALF OF THE DHS:
Christopher Coxe, Esq.
Senior Attorney
(b) (6)

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MEMORANDUM OF DECISION AND ORDER

I. Procedural History

The Respondent is a male native and citizen of the People's Republic of China. He was served with a Notice to Appear ("NTA") on December 30, 2002. The NTA alleges that (1) the Respondent is not a native or citizen of the United States; (2) the Respondent is a native and citizen of the People's Republic of China; (3) the Respondent entered the United States at or near Calexico, California on or about December 27, 2002; and (4) the Respondent was not then admitted or paroled after inspection by an Immigration Officer. As such, the Respondent was charged with removability pursuant to **INA § 212(a)(6)(A)(i)**, as amended.

At a Master Calendar Hearing and also through pleadings contained in a motion to change venue, the Respondent admitted the factual allegations in the NTA and conceded removability as charged. He declined to designate a country of removal and the Court designated the People's Republic of China at the request of the Government.

On or about March 5, 2003, the Respondent filed a Form I-589, Application for Asylum, with this Court.

This Court issued an oral decision and order in this case on March 4, 2004, denying the Respondent's claims for Asylum, pursuant to **INA § 208**, Withholding of Removal pursuant to **INA § 241(b)(3)**, and Withholding of Removal pursuant to **Article 3** of the **United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment ("CAT")**.

The Respondent filed a timely appeal with the Board of Immigration Appeals ("BIA" or "the Board") who affirmed this Court's decision without opinion. The Respondent petitioned the (b) (6) (b) (6) for a review of the BIA's decision.

The (b) (6) in its decision of (b) (6), denied the Respondent's petition for review of the BIA's denial of relief under CAT. Additionally, the Court denied 'the [Respondent's] petition with respect to [his] claim that he established a well-founded fear of persecution.' (b) (6) (b) (6) The Court however, went on to conclude that substantial evidence to deny the Respondent's claim of past persecution was lacking. The Court

remanded the case for the sole purpose of considering "whether the testimony and other evidence establishes that [the Respondent] suffered past persecution." (b) (6) In its decision the Court relied on In re C-Y-Z, 21 I&N Dec. 915, 918 (BIA 1997)(overruled by Matter of J-S-, 24 I&N Dec. 520 (A.G. 2008))[1]. The Court found that the Immigration Judge was silent on the issue of past persecution and therefore presumed that the Respondent was credible in this regard. Accordingly, the parties agree that this Court's determination is limited to whether the Respondent suffered past persecution. As the (b) (6) presumed that the Respondent's testimony was credible regarding past persecution, this Court will find that his testimony was credible in this regard. Id. at 191.

II. Evidence Presented

A. Documentary Evidence

The Court received and accepted the following documents into evidence:

Respondent's Exhibit 1:

- (b) (6)

Respondent's Exhibit 2:

A. Motion to Supplement the Record
B. Respondent's Authenticated Notarial Birth Certificate, with translation
C. Respondent's Wife's Authenticated Notarial Birth Certificate, with translation
D. Respondent's Daughter's Authenticated Notarial Birth Certificate, with translation
E. Respondent's Son's Authenticated Notarial Birth Certificate, with translation
F. Respondent's Authenticated Notarial Marriage Certificate, with Translation
G. Respondent's Authenticated Notarial Household Register Book, with Translation
H. DHL Express Mail Envelope Contains Items B - G sent by the Respondent's wife from China
I. Witness List
J. Affidavit of (b) (6) Respondent's Maternal Aunt, dated April 7, 2008; and copy of I-551
K. Affidavit of (b) (6) Respondent's Maternal Uncle , dated April 7, 2008; and copy of N-550
L. Affidavit of (b) (6) Respondent's Maternal Cousin, dated April 7, 2008; and

[1]The (b) (6) decision in (b) (6) predated the Matter of J-S- decision.

copy of I-551

M. Affidavit of (b) (6) Respondent's Maternal Cousin, dated May 5, 2008; and copy of N-550.

N. Proposed Order

O. Certificate of Service

III. Statement of Law and Findings of Court

A. Asylum pursuant to INA § 208

1. Applicable standards

The Attorney General has overruled C-Y-Z-, I&N Dec. 915, "to the extent that [C-Y-Z-] hold[s] that the spouse of a person who has been physically subjected to forced abortion or sterilization procedure is per se entitled to refugee status." Matter of J-S-, 24 I&N Dec. 520, 521 (A.G. 2008). The spouse of the person who was subjected to forced abortion or sterilization must qualify for asylum under IIRIRA § 601(a). Id. at 523-24. The categories established by Section 601(a) are people who 1) have suffered forced abortions; 2) have suffered forced sterilization; 3) have failed, refused, or resisted an abortion or sterilization and have been persecuted because of this; or 4) "have a well founded fear that they will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance." Id. at 527. Categories one and two only apply to the individual who was physically forced to undergo an abortion or sterilization and does not apply to the spouse of such person. Id. at 528-29. The spouse of an asylum applicant who falls within category one or two is only "eligible for derivative asylum . . . if they accompany or follow to join" the applicant. Id. at 530. Respondents who have not physically undergone a forced abortion or sterilization must be assessed on a case-by-case basis. Id. at 538. The Respondent must establish that he "i) 'resisted' China's coercive population control program, ii) suffered or has a well-founded fear that he will suffer 'persecution' by the Chinese Government, and iii) can show that such persecution was inflicted, or that he has a well-founded fear that it would be inflicted, 'on account of' his resistance to the coercive population control program." Id. at 542.

2. **Resistance to Coercive Population Control Program**

The term "resistance" is not defined in the Act. **In re S-L-L, 241 I&N Dec. 1, 10 (BIA 2006).** However, it has been broadly construed and includes "expressions of general opposition, attempts to interfere with enforcement of government policy in particular cases, and other overt forms of resistance to the requirements of family planning law'." **Lin v. Mukasey, 517 F.3d 685, 694 (4th Cir. 2008)(citing In re S-L-L-, 24 I. & N. Dec. 1, 10 (BIA 2006)(en banc)).** The court in **In re S-L-L, 241 I&N Dec. at 10,** adopted the dictionary definition of resistance, and held "[i]n the context of coercive family planning, the term 'resistance' covers a wide range of circumstances, including expressions of general opposition, attempts to interfere with enforcement of government policy in particular cases, and other overt forms of resistance to the requirements of the family planning law." **In re S-L-L, 241 I&N Dec. at 10 (citing Merriam Webster's Collegiate Dictionary 994 (10th ed. 2002)).** While physically struggling against a forced procedure has been held to constitute resistance, **Lin v. Mukasey, 517 F.3d at 694 (citing Yang v. Att'y Gen., 418 F.3d 1198, 1203 (11th Cir. 2005)),** impregnating someone in violation of the one-child policies has not constituted resistance. **In re S-L-L, 241 I&N Dec. at 11-12.** Seeking an exception to the one-child policy has been held to constitute compliance with the policy and where a respondent failed to take steps to avoid a forced abortion when an exception was denied, the court held that the respondent did not 'resist.' **Id.**

In the case *sub judice*, the Respondent testified that he went into hiding to avoid the repercussions of trying to violate the one-child policy. He argues that hiding is a form of "failure, refusal, or resistance." **Matter of J-S-, 24 I&N Dec. at 521.** This Court has found the Respondent's testimony regarding being in hiding incredible (b) (6) In this regard, the (b) (6) (b) (6) stated that "we conclude that substantial evidence supports at least two of the IJ's reasons for rejecting [the Respondent's] testimony that he has a well-founded fear of sterilization, and consequently, we are not 'compelled to conclude' that [the Respondent's] testimony was reliable."[2] **Id. at 191.** The Respondent's claim to resist through hiding is incredible and the Respondent failed

[2]The Court was addressing, *inter alia*, the Respondent's testimony that he had gone into hiding.

to provide any additional persuasive evidence or testimony regarding other forms of resistance.

3. Persecution

The BIA has interpreted "persecution" to include serious threats to an individual's life or freedom, or the infliction of significant harm on the applicant, as a means of punishing that person for holding a characteristic that the persecutor seeks to overcome. **Matter of Acosta, 19 I&N at 233.** **Cf. Klawitter v. INS, 970 F.2d 149, 152 (6th Cir. 1992)** (distinguishing between mere harassment and persecution); **Fatin v. INS, 12 F.3d 1233, 1240 (3d Cir. 1993)** (finding that persecution within the INA does not encompass all treatment that society regards as unfair, unjust, or even unlawful or unconstitutional); **Matter of Kasinga, 21 I&N Dec. 357, 365 (BIA 1996)** (discussing the level of harm necessary to constitute persecution). Persecution must also be more than mere harassment. Based on the record before it, and more specifically, pursuant to **In re S-L-L-, 24 I. & N. Dec. 1,** this Court is unable to find that the Respondent has suffered past persecution.[3]

B. Withholding of Removal under INA § 241(b)(3)

Withholding of removal, in contrast to asylum, confers only the right not to be deported to a particular country rather than the right to remain in the United States. **See INS v. Aguirre-Aguirre, 526 U.S. 415 (1999).** To establish eligibility for withholding of removal, a respondent must show that there is a clear probability of persecution in the country designated for removal on account of race, religion, nationality, membership in a particular social group, or political opinion. **See INS v. Stevic, 467 U.S. 407 (1984).** Such a showing requires that the respondent establish that it is more likely than not that he would be subject to persecution if returned to the country from which he seeks withholding of removal. **See Cardoza-Fonseca, 480 U.S. at 423.** Thus, the

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[3]The Respondent did not argue on remand that the 10,000 RMB fine that he paid was persecution, but the Court will address the issue nonetheless. While severe economic sanctions may amount to persecution, the sanction would need to be so severe as to threaten life or liberty. **See In re T-Z, 24 I&N Dec. 163, 172-73 (BIA 2007).** There is no evidence in the record to suggest that the 10,000 RMB fine (equivalent to $1,000) was so severe as to threaten the life or liberty of the Respondent and thus does not rise to the level of persecution.

standard for withholding of removal is more stringent than the standard for asylum. Stevic at 429-30. There is no discretionary element. Therefore, if the applicant establishes eligibility, withholding of removal must be granted. INA § 241(b)(3); see also INS v. Ventura, 537 U.S. 12, 13 (2002). Additionally, there is no statutory time limit for bringing a withholding of removal claim.

To qualify for withholding of removal, a respondent must show that there is a clear probability of persecution in the country designated for removal on account of race, religion, nationality, membership in a particular social group, or political opinion. The BIA has interpreted "persecution" to include serious threats to an individual's life or freedom, or the infliction of significant harm on the applicant, as a means of punishing that person for holding a characteristic that the persecutor seeks to overcome. Matter of Acosta, 19 I&N at 233. Cf. Klawitter, 970 F.2d at 152 (distinguishing between mere harassment and persecution); Fatin, 12 F.3d at 1240 (finding that persecution within the INA does not encompass all treatment that society regards as unfair, unjust, or even unlawful or unconstitutional); Matter of Kasinga, 21 I&N Dec. at 365 (discussing the level of harm necessary to constitute persecution). In mixed motive cases, any asylum applicant is not obliged to show conclusively why persecution has occurred or may occur; however, in proving past persecution, the applicant must produce evidence, either direct or circumstantial, from which it is reasonable to believe that the harm was motivated in part by an actual or imputed political ground. See In re S-P-, 21 I&N Dec. 486; see also Elias-Zacarias, 112 S.Ct. 812 (finding that persecution *on account of* political opinion is not established by the fact that the coercing guerrillas had "political" motives; in order to satisfy § 101(a)(42), the persecution must be on account of the *victim's* political opinion, not the persecutor's).

The Respondent has failed to demonstrate eligibility for asylum. It necessarily follows that he has failed to meet the higher legal burden to establish eligibility for withholding of removal under the Act.

IV: Conclusion

Having reviewed all of the available evidence, this Court finds that the Respondent has not established that he suffered past persecution as that term is used at **INA § 101(a)(42)(A)**. Because the Respondent has not suffered past persecution, the Respondents' applications for Asylum pursuant to **INA § 208** and Withholding of Removal pursuant to **INA § 241(b)(3)** are **DENIED.** An appropriate order is attached.

7/8/08
Date

Jill H. Dufresne
United States Immigration Judge
Baltimore, Maryland

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File: (b) (6)

Date: JAN 08 2010

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Yee Ling Poon, Esquire

ON BEHALF OF DHS: Billy J. Sapp
Senior Attorney

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent has appealed from an Immigration Judge's July 8, 2008, written decision which denied his applications for asylum and withholding of removal.[1] The Department of Homeland Security ("DHS") has filed a response in opposition. The appeal will be dismissed.

We review an Immigration Judge's findings of fact, including the credibility determination, under the "clearly erroneous" standard. We review all other issues, including whether the parties have met the relevant burden of proof, and issues involving questions of law, judgment and discretion, under a *de novo* standard. *Matter of V-K-*, 24 I&N Dec. 500 (BIA 2008); *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008); 8 C.F.R. § 1003.1(d)(3) (2009). The respondent's asylum application is not governed by the REAL ID Act (Exh. 3). *Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

The respondent is a married male native and citizen of China who testified that his wife underwent a forced abortion in August 2002 because the couple already had two children. On May 24, 2005, the Board summarily affirmed an Immigration Judge's March 4, 2004, oral decision which had denied his asylum and withholding of removal applications because she found that he was not credible.

On (b) (6) the United States Court of Appeals for the (b) (6) remanded the respondent's case for further proceedings. (b) (6)
The Court determined that substantial evidence supported two of the Immigration Judge's reasons for finding the respondent not credible and therefore upheld her determination that he did not have a well-founded fear of sterilization. *Id.* The Court also affirmed her finding that the respondent had testified inconsistently by maintaining that he was in hiding while still reporting to his construction job, and her rejection of his explanation that he was required to continue to work to support his family (rather than borrow money for living expenses while in hiding) when he was able to secure a $10,000 loan from relatives to pay a snakehead to travel to the United States. *Id.* Finally, the

[1] On November 6, 2008, we granted the motion to accept an untimely brief filed by the respondent's counsel.

Court affirmed the Immigration Judge's denial of the respondent's application for protection under the Convention Against Torture.

However, the Court held that none of the reasons for the Immigration Judge's adverse credibility determination pertained to his testimony about his wife's forced abortion, and therefore he should be presumed credible on this issue. (b) (6) *supra*, at (b) (6) The case was remanded for the Immigration Judge to consider whether the respondent had established past persecution.

On May 15, 2008, subsequent to the (b) (6) decision in this matter, the Attorney General decided *Matter of J-S-*, 24 I&N Dec. 520 (A.G. 2008), holding that a spouse of a person who has been physically subjected to a forced abortion or sterilization is not *per se* entitled to refugee status, and overruling our prior holdings to the contrary in *Matter of S-L-L-*, 24 I&N Dec. 1 (BIA 2006) and *Matter of C-Y-Z-*, 21 I&N Dec. 915 (BIA 1997). The decision also held that persons who have not physically undergone a forced abortion or sterilization procedure nevertheless may still qualify as a refugee on account of a well-founded fear of persecution of being forced to undergo such a procedure, or on account of a well-founded fear of persecution for failure or refusal to undergo such a procedure, or for other resistance to a coercive population control program. Furthermore, even if an alien demonstrates other resistance, "it is still necessary to establish that any resulting punishment constitutes persecution, as opposed to less serious sanctions meant to pressure the alien into submission." *Matter of M-F-W- & L-G-*, 24 I&N Dec. 633, 639 (BIA 2008).

We will affirm the Immigration Judge's written decision dated July 8, 2008. Because the Court of Appeals affirmed her finding that the respondent's testimony about being in hiding was incredible, the Immigration Judge properly determined that the respondent was unable to qualify for asylum based on any claim related to his having been in hiding, and that he had not established past persecution (I.J. at 5-6).[2] Because the respondent had failed to qualify for asylum, the Immigration Judge found that he was unable to meet the higher burden of proof to establish eligibility for withholding of removal (I.J. at 7).[3]

After careful consideration of the respondent's contentions on appeal, we conclude that he has failed to establish his eligibility for asylum and withholding of removal under applicable Fourth Circuit law and Board precedent. *Lin v. Mukasey*, *supra*; *Matter of J-S-*, *supra*; *Matter of M-F-W- & L-G-*, *supra*. To the extent that the respondent argues that he will be subject to forced sterilization

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[2] The Immigration Judge observed that in *Lin v. Mukasey*, 517 F.3d 685 (4th Cir. 2008), the Court had relied on the Board's definition of "resistance" enunciated in *Matter of S-L-L-*, *supra*, at 10, as covering "a wide range of circumstances, including expressions of general opposition, attempts to interfere with enforcement of government policy in particular cases, and other overt forms of resistance to the requirements of the family planning law."

[3] Although the respondent did not argue on remand that the 10,000 RMB fine (equivalent to $1,000) that he had been required to pay in 1996 because he and his wife had their second child within 1 year of their first child constituted a form of persecution, the Immigration Judge nonetheless held that the fine did not amount to persecution because it did not threaten the life or liberty of the respondent under *Matter of T-Z-*, 24 I&N Dec. 163 (BIA 2007) (I.J. at 6).

and relies upon certain documentation in support of this claim, we observe that none of the documents specifically pertain to him. In light of the valid adverse credibility determination, he is unable to meet his burden of proof to establish a well-founded fear of persecution based solely on this documentation. Although he relies upon the 1999 Q&A for Changle City Family-Planning Information Handbook discussed in *Guo v. Gonzales,* 463 F.3d 109 (2d Cir. 2006), we previously held that this document does not support a well-founded fear of persecution in *Matter of S-Y-G-,* 24 I&N Dec. 247 (BIA 2007), a decision we rendered after the Second Circuit Court of Appeals remanded the case in *Guo v. Gonzales, supra.* Finally, regarding the respondent's allegation that the Immigration Judge failed to consider the evidence he submitted on remand, the Immigration Judge specifically enumerated all of the documents submitted by the respondent on remand in Exhibit 2 at the beginning of her written decision (I.J. at 3).

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

FOR THE BOARD