

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-40290

AN MA CAI,

Petitioner,

VERSUS

IMMIGRATION & NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the Immigration
and Naturalization Service

(A72 756 786)

(June 21, 1995)

Before WISDOM, DUHÉ, and BENAVIDES, Circuit Judges.

PER CURIAM:*

This case calls upon the Court to consider an application for asylum based on the "one couple, one child" population control policy of the People's Republic of China ("PRC"). The plaintiff/appellant, An Ma Cai ("Cai"), appeals from the decision

* Local Rule 47.5.1 provides:
"The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession."
Pursuant to that Rule, the Court has determined that this opinion should not be published.

of the Board of Immigration Appeals (the "Board") ordering his deportation. We affirm.

I

Cai is a 53 year-old male citizen of the PRC. One night in June 1992, PRC officials came to Cai's house looking for Cai's son, whose wife was pregnant with their third child. The officials had orders to arrest Cai's daughter-in-law, sterilize her, and abort her pregnancy. Cai refused to tell the officials where his son and daughter-in-law were hiding, and the officials destroyed Cai's house. Cai denounced the officials and hit one of them with a hammer. Cai fled from his village, hid from authorities for about a month, then boarded a ship for America in the summer of 1992.

Cai testified that he fled the PRC to escape from the unfairness of the government and the coercive population control policies. Cai testified that he refused to disclose the whereabouts of his son and daughter-in-law because he opposes the PRC's population control policies. He also testified that the PRC government considers opposition to the population control policies as opposition to the government itself.

Cai entered the United States without inspection. In June 1993, the INS charged him with deportability. At the November 1993 hearing before an immigration judge, Cai conceded deportability and applied for relief from deportability through asylum and withholding of deportation in accordance with 8 U.S.C. §§ 1158 and 1253(h). The immigration judge concluded that Cai's

opposition to the PRC's population control policies did not constitute a ground for asylum and denied his applications for asylum and withholding of deportation. On appeal, the Board affirmed the decision of the immigration judge and entered a final order of deportation. From that decision, Cai appeals.

II

The Immigration and Nationality Act (the "Act") provides that an alien "may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title".¹ "Refugee" is defined as:

any person who is outside any country of such person's nationality . . . who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.²

The standard for obtaining a withholding of deportation is more stringent. To obtain a withholding of deportation, the alien must show that there is a clear probability that his or her life or liberty would be threatened in the alien's country on account of the alien's race, religion, nationality, membership in a particular social group, or political opinion.³

The Board denied Cai's application for asylum and

¹ 8 U.S.C. § 1158(a) (1995).

² 8 U.S.C. § 1101(a)(42)(A) (1995).

³ 8 U.S.C. § 1253(h)(1) (1995), Castillo-Rodriguez v. I.N.S., 929 F.2d 181, 185 (5th Cir. 1991).

withholding of deportation, concluding that Cai failed to demonstrate that he was persecuted or had a well-founded fear of persecution on one of the five grounds enumerated in the Act. The Board's factual finding that an alien is not eligible for asylum must be upheld if it is supported by substantial evidence.⁴ To obtain a reversal of the Board's decision under the substantial evidence standard, an alien must show that the evidence he or she presented was so compelling that no reasonable factfinder could fail to arrive at the alien's conclusion.⁵

Cai raises three arguments on appeal: first, that the Board erred in concluding that he was not entitled to asylum; second, that the Board erred in concluding that he was not entitled to asylum based on severe past persecution; and third, that the Board erred in relying on Matter of Chang. We address the plaintiff's arguments in turn.

A

Cai's first argument contends that the Board erred in concluding that under Matter of Chang, Cai was not entitled to asylum. In Matter of Chang, the Board held that implementation of the PRC's population control policy, even to the extent that involuntary sterilizations may occur, does not in itself constitute persecution or create a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social

⁴ Zheng v. I.N.S., 44 F.3d 379, 380 (5th Cir. 1995); Castillo-Rodriguez, 929 F.2d at 183.

⁵ Rojas v. I.N.S., 937 F.2d 186, 189 (5th Cir. 1991).

group, or political opinion. Thus, under Chang, if the PRC took action against an alien merely to implement its population control policy, the alien's application for asylum will be denied. In order to establish asylum eligibility, the applicant must demonstrate that the PRC selectively enforced its population control policy against the applicant because of his or her race, religion, nationality, membership in a particular social group, or political opinion. Cai contends that the PRC selectively enforced the population control policy against him based on his political opinion and his membership in a particular social group.

The Board rejected Cai's argument that the PRC selectively enforced the policy against him because of his political beliefs, and we conclude that substantial evidence supports the Board's findings. There is no indication that Cai ever voiced his opposition to the population control policies prior to the night the officials came to Cai's house, and the Board found that Cai's resistance to the PRC officers was not a political act. Substantial evidence supports the conclusion that Cai acted to protect his son and property rather than to voice opposition to the government.

The Board also rejected Cai's argument that the PRC selectively enforced the population control policy against him because of his membership in a social group. The social group in which Cai alleges membership includes people who have "violated or resisted the coercive family planning policy in China". The Board concluded that Cai failed to demonstrate membership in a group that

shares common or immutable characteristics that are "fundamental to their individual identities or consciences",⁶ and we agree. Substantial evidence supports the Board's conclusion that the PRC did not selectively enforce the population control policy against Cai. We affirm the Board's conclusion that under Matter of Chang, Cai is not a refugee and is not entitled to asylum.

B

Cai's second argument on appeal contends that under Matter of Chen,⁷ the Board should have granted him asylum based on severe past persecution on account of either his political beliefs or his membership in a social group.

In Matter of Chen, the Board held that an asylum applicant who demonstrates past persecution establishes a rebuttable presumption that he or she has reason to fear similar persecution in the future, entitling the applicant to a discretionary grant of asylum.⁸ The Board further held that in some cases, an applicant has suffered persecution so severe that he or she should be treated as a refugee even if the likelihood of future persecution is not great.⁹

Because we conclude that substantial evidence supports the Board's conclusion that Cai failed to demonstrate that he was

⁶ Matter of Acosta, 19 I. & N. Dec. 211, 233 (BIA 1985).

⁷ Int. Dec. 3104 (BIA 1989).

⁸ Id. at 4.

⁹ Id. at 5.

persecuted on the basis of either his political opinion or membership in a particular social group, Matter of Chen is inapplicable to this case and cannot provide Cai with a basis for relief.

C

Cai's final argument on appeal contends that the Board erred in following the Board's decision in Matter of Chang on the ground that Matter of Chang has been effectively overruled by subsequent legislative and administrative action. Cai did not raise this argument before the Board. Under 8 U.S.C. § 1105a(c), failure to raise a contention before the Board of Immigration Appeals constitutes a failure to exhaust administrative remedies and precludes review of the contention in this Court.¹⁰

III

Substantial evidence supports the Board's conclusion that Cai failed to demonstrate that the PRC persecuted him or that he has a well-founded fear of persecution on account of his political beliefs or membership in a social group. Accordingly, we cannot grant Cai asylum nor withhold his deportation. We affirm the decision of the Board of Immigration Appeals.

¹⁰ Ka Fung Chan v. I.N.S., 634 F.2d 248, 258 (5th Cir. 1981).