

Third Circuit Court

Case: *Fei Yan Zhu v. A.G.*, 744 F.3d 268 (3d Cir. 2014)

Date: March 4, 2014

Panel: Smith, Shwartz, Scirica

Opinion: Shwartz

Tags: Immigration, Motion to Reopen, asylum, China, forced sterilization, authentication of gov't documents

Question(s) Presented: Did the BIA meaningfully consider respondent's petition for motion to reopen due to changed country conditions?

Holdings: No, the "BIA's opinion did not reflect meaningful consideration of much of the evidence that Zhu submitted in support of her motion." Grants petition for review, vacates denial of MTR, remands to BIA.

Rationale: BIA didn't say anything about gov't documents that would be probative if authentic, so they should give those another look. BIA's rejection of documents from outside home province is inconsistent with past decisions (and anyway it was cool with U.S. country reports about areas outside respondent's region), so they should give those another review, too. Additionally, BIA ignored references in U.S. reports to forced abortions and sterilization.

Facts: Citizen of China entered U.S. in 1999 EWI. Claimed fear of returning, met credible fear standard, was paroled into U.S. Claim based on population control measures because she refused to wear an IUD while living with her boyfriend.

Procedural History:

- **2000: IJ** – conceded removability, filed application for asylum & whr & CAT.
- **2002: Timely MTR:** new conditions—married, 1 son, now would be forcibly sterilized if she returned to China.
- **200?: BIA**—denied MTR because she had not shown that punitive birth control measures were inevitable if she returned with her child born overseas.
- **2008: Second MTR:** new conditions—gave birth to two more children; evidence that China counted children born overseas when considering violations of its population control policies. Notice from Chinese officials saying that she would have to submit to sterilization measures.
- **200?: BIA**—denied MTR because it wasn't a change, exactly, it just reflected "incremental increases in the enforcement of family planning policies in China that have been in existence for approximately 30 years." 271
- **2013: Third MTR:** new conditions: voluminous documentation updating current conditions in China.
- **2013: BIA**—denied MTR because there was no material change in country conditions and no prima facie case for CAT relief.

Appeals to Statute & Precedent:

- **8 C.F.R. § 1003.2(c)(2):** time and number limit on MTR = 1X and within 90 days of entry of final administrative order.

- **8 C.F.R. § 1003.2(c)(3)(ii):** waiver of ^^ must be based on material evidence of country conditions that could not have been obtained previously.
- ***Zheng v. A.G.*, 549 F.3d 260 (3d Cir. 2008):** Whether BIA meaningfully considered the evidence and arguments presented.
- ***Huang v. A.G.*, F.3d 372 (3d Cir. 2010):** BIA may not ignore evidence favorable to the noncitizen, and must provide explanation for its decisions about the evidence.
- ***Liu v. Ashcroft*, 372 F.3d 529 (3d Cir. 2004):** failure to authenticate government documents does not automatically result in exclusion. Proponent must try to support the evidence in another way.
- ***Lin v. A.G.*, 700 F.3d 683 (3d Cir. 2012):** asylum seeker whose government won't authenticate gov't documents can attempt to prove the authenticity of these documents through other means.
- ***INS v. Lopez-Mendoza*, 463 U.S. 1032 (1984):** exclusion of evidence is exceptional.
- ***Chen v. Holder*, 715 F.3d 207, 212 (7th Cir. 2013):** Using FRE to presumptively authenticate documents purportedly from gov't websites "if government sponsorship can be verified by visiting the website itself."

Discussion:

- **Re. unauthenticated government documents:**
 - "The BIA is not required to conduct an independent examination of a document where the proponent has provided no basis from which it could find the document is authentic or decipher its relevance. Thus, if a proponent fails to make such a showing, then it is within the BIA's discretion to decline to rely on such evidence. If such a showing is made, then the BIA must consider the evidence." 274

Commentary:

- **Authentication of gov't documents:** certification by an officer in the U.S. Foreign Service stationed in that country
- "Although the FRE do not apply to immigration proceedings, . . . evidence is admissible if it is probative and its use is fundamentally fair so as not to deprive the alien of due process." 273
 - "Exclusion of evidence is exceptional." 273
 - "Nonetheless, the BIA can reject evidence that it finds to be untrustworthy or irrelevant and can accept evidence that has significant indicia of reliability." 273
- **Alternate Indicia of Reliability: Burden rests with proponent**
 - Could come through FRE (though not binding)
 - Could visit gov't websites that the documents purportedly came from
 - "the proponent could provide information concerning how the document was obtained, identify the source of the information contained in the document, or show that there are consistencies between the information contained in the otherwise unauthenticated document and authenticated documents." 274
 - Expert testimony about government seals, signatures
 - Forensic testing results or evidence from DOS re. foreign documents