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U.S. Department of Justice  
Office of Legal Counsel

Reading file  
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Office of the  
Assistant Attorney General

Washington, D.C. 20530

August 20, 1993

Janet --

At your request, I have personally reviewed a series of four recent OLC memoranda concerning applications for political asylum by refugees who allege persecution under China's harsh and coercive family planning regime. This letter sets forth my views on the legal issues generally, and particularly as applied to two Board of Immigration Appeals (BIA) cases, Matter of Chu, Exclusion Proceedings No. A 71 824 281 (June 10, 1993), and Matter of Tsun, Exclusion Proceedings No. A 71 824 320 (June 10, 1993), which the BIA has certified to you for your decision.

The central question presented in these cases is whether the BIA's decision in Matter of Chang, Int. Dec. # 3107 (BIA, May 12, 1989) -- which the BIA followed in Chu and Tsun -- was correct and whether it remains good law notwithstanding Executive Order 12711, 55 Fed. Reg. 13897 (1990). Chang held that China's coercive population control policy does not per se constitute "persecution on account of . . . membership in a particular social group, or political opinion" within the meaning of section 101(a)(42) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(42) (1988). The Applicants and the Immigration and Naturalization Service (INS) urge you to overrule Chang on the ground that Chang is incompatible with Executive Order 12711, under which, Applicants argue, "the Attorney General is directed to achieve one objective - to recognize persecution based on coercive family planning policies as providing presumptive eligibility for asylum." Applicants Brief in Support of Overruling Matter of Chang at 7.

I have reviewed the relevant materials in this matter, including the briefs filed by the Applicants and the INS and four memoranda prepared by OLC. After careful consideration, I have concluded that the BIA correctly interpreted the INA in Chang. Executive Order 12711, although somewhat unclear and the source of considerable confusion, appears to be inconsistent with Chang and with the Immigration and Nationality Act, because the Order improperly creates a new protected class of aliens eligible for refugee status that is not authorized by the statute.

I substantially agree with the extensive analysis supporting these conclusions as set forth in the OLC memoranda of July 1, 1993

and July 23, 1993. To summarize briefly, there is no doubt that Chinese officials are widely reported to engage in coercive population control measures that are oppressive, repugnant and violative of basic human rights. Not all persons who suffer such harms, however, are eligible for asylum; the INA expressly limits that protection to victims of "persecution on account of" one of five enumerated reasons: "race, religion, nationality, membership in a particular social group, or political opinion."

Of course, as Chang notes, an applicant fleeing a threatened forced abortion or sterilization may be eligible for asylum if he or she demonstrates that the threatened action is "on account of" one of the enumerated reasons -- upon a showing, for example, of disparate, more severe treatment as punishment for political opponents of the population control policy. The INS argues that an individualized showing is unnecessary and that China's coercive population control policies per se constitute persecution on account of political opinion, because Chinese officials impute political opposition to any person who violates the policy. The coercive measures, under this theory, are generally imposed as punishment for (real or imagined) political disloyalty.

I find this argument unpersuasive. The evidence instead supports the BIA's conclusion in Chang that China is enforcing, often harshly and in violation of human rights, a generally applicable population control policy without regard to the political opinions (whether actual or imputed) of those subject to it. I believe that Chang was correct in its basic holding that it is not sufficient to establish grounds for asylum under the INA for an applicant to allege that her country has a harsh, oppressive law. If Chang were overruled, it could vastly increase the numbers of peoples who would qualify for asylum. Women from Ireland seeking abortions might qualify as well as couples from China wishing to have additional children. As I read the statute, Congress intended to provide eligibility for asylum to those who are being persecuted for their political opinions, not for all those subject to laws we believe violate human rights. Correctly read, for example, the statute allows asylum for those persecuted for their political opposition to the regime of coercive family planning, but not for all those who wish not to comply with that regime.

The Chu and Tsun cases are complicated by Executive Order 12711, which appears to be inconsistent with the statute as interpreted in Chang. The 1990 Executive Order directs the Attorney General "to provide enhanced consideration under the immigration laws for individuals from any country who express a fear of persecution upon return to their country related to that country's policy of forced abortion or coerced sterilization, as implemented by the Attorney General's regulation effective January 29, 1990." The regulation referred to is the Interim Final Rule, "Refugee Status, Withholding of Deportation, and Asylum; Burden of

Proof," 55 Fed. Reg. 2803 (1990), which provides that an alien "may be granted asylum on the ground of persecution on account of political opinion" if the applicant shows that he or she (a) has a well-founded fear of forced abortion or sterilization under his or her country's coercive population control policies, or (b) has (or has a spouse who has) refused abortion or sterilization under such policies and has a well-founded fear of persecution if returned.

I agree with the Applicants, the INS and the OLC memoranda that the interpretation of Executive Order 12711 best fitting the Order's language and intent is that it establishes a per se rule that an applicant who shows he or she is fleeing a coercive population control policy is eligible for asylum without providing evidence of persecution on account of one of the reasons specified in the INA. Under this interpretation, however, the Executive Order creates a wholly new protected class not provided for by the statute enacted by Congress and therefore is invalid.<sup>1</sup>

Assuming that you concur with my legal conclusions, I would recommend that you consider one or more of the following actions:

1. Before issuing an opinion in this matter, consider notifying the President of the following:

-- you have been advised by the Office of Legal Counsel of its determination that Executive Order

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<sup>1</sup> A narrower interpretation of the Executive Order, though arguably defensible, would be inconsistent with the actual and perceived intention of the Order, as demonstrated by a review of the events surrounding the Order's promulgation. In 1989, both Houses of Congress passed by wide margins legislation that provided that where an applicant who expresses fear of persecution related to China's population control policy "establishes that such applicant has refused to abort or be sterilized, such applicant shall be considered to have established a well-founded fear of persecution, if returned to China, on the basis of political opinion consistent with paragraph 42 (A) of section 101 (a) of the Immigration and Nationality Act (8 U.S.C. 1101(a))." Emergency Chinese Immigration Relief Act, H.R. 2712. President Bush pocket-vetoed the bill, but at the same time ordered measures that he stated would "provide the same protections as H.R. 2712" to applicants, not only from China, but from any country. 25 Weekly Comp. Pres. Doc. 1853 (Nov. 30, 1989). The House voted to override the veto, 390-25, but the Senate fell three votes short. Soon after, Attorney General Thornburgh published the Interim Final Rule, followed by President Bush's issuance of Executive Order 12711.

12711 is invalid and that Chang correctly interpreted the Immigration and Nationality Act.

- unless the President directs you otherwise, you will assume that he does not want you to enforce an order that the Office of Legal Counsel has determined to be invalid.
- you are preparing an opinion finding Executive Order 12711 invalid which you intend to release after a specified date, unless the President directs you to enforce the Order notwithstanding OLC's determination of its invalidity.
- the President should consider rescinding or revising the Executive Order.

2. The prompt issuance of an opinion in this matter seems advisable, given the current confusion and disagreement over the applicable standard for granting or denying asylum to applicants fleeing coercive population control policies. I recommend that OLC begin drafting an opinion, to be issued by you after the date specified to the President, that would:

- affirm the denial of Chu's application for asylum because the evidence he offered to establish eligibility for asylum under the standards set forth in the Executive Order was not credible; affirm the denial of Tsun's application for asylum because the evidence he offered to establish eligibility for asylum under the INA was not credible, and because he offered no evidence of (and appears not to have asserted) eligibility under the standards set forth in the Executive Order.

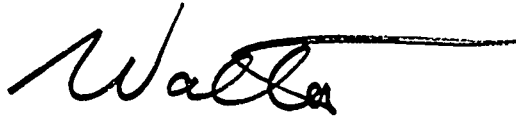
These credibility determinations could be based either on de novo findings or on deferential review of the findings below. Affirming the denial of asylum on this basis would insulate your determination from judicial review.

- state that Chang represents a correct interpretation of the INA, that Chang is consistent with granting asylum to applicants who show persecution on account of political opinion imputed to them by their persecutors, and that Executive Order 12711 is invalid because it purports to create a new basis for eligibility for asylum that is not compatible with the INA.

This section of the opinion would be dictum, but

should provide clear guidance to the BIA and the INS concerning your interpretation of the INA, Chang and the Executive Order.

3. If the Administration determines that its policy is to recognize persecution based on coercive population control policies as providing presumptive eligibility for asylum, the proper vehicle is legislation that would add to the categories now contained in section 101(a)(42) of the INA. Although the votes on the 1989 legislation to accomplish this suggest overwhelming congressional support, the votes followed the "Tiananmen Square massacre." Prospects for legislation in the current political climate are therefore uncertain. Some level of support is evidenced by a June 23, 1993 letter signed by eighteen members of the House of Representatives urging you to "instruct immigration officials to treat forced abortion or coerced sterilization as a form of persecution which may give rise to eligibility for asylum and/or refugee status."<sup>2</sup>



Walter Dellinger

cc: Webb Hubbell  
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<sup>2</sup> There is an argument against deporting persons if Congress is actively considering legislation that would make them eligible for asylum. If the President proposes new legislation to permit those suffering under coercive family planning policies to be eligible for asylum, you may wish to consider issuing a moratorium on the enforcement of the INA's exclusion and deportation provisions with respect to victims of coercive population control policies. Precedent exists for a temporary moratorium on enforcement of the immigration laws.