

## **9th Circuit Has Stern Words for L.A. Immigration Judge Who Denied Relief**

**By Don J. DeBenedictis, Daily Journal Staff Writer**

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**SANTA ANA - For the second time in less than a year, the 9th U.S. Circuit Court of Appeals has rebuked a prominent Los Angeles immigration judge, this time for abusing his discretion in denying relief to a Chinese immigrant who asserted she had a forced abortion in her homeland.**

**In Tuesday's ruling, 9th Circuit Judge Harry Pregerson held for a unanimous panel that Immigration Judge Thomas Y.K. Fong was "arbitrary and unreasonable" when he unfairly cut short the woman's hearing without listening to any testimony or considering any evidence. Cui v. Mukasey, 05-72185 (9th Cir., Aug. 19, 2008).**

**Fong, a former immigration attorney for the Department of Justice, has been on the bench since 1984. In 2006, he was named the assistant chief immigration judge for the Central District of California.**

**He has also been criticized by the 9th Circuit before. In 2001, the circuit held Fong had "evidenced a bias toward single mothers" and become a "partisan adjudicator" by upbraiding a young Mexican woman for having children out of wedlock and accepting public assistance from this country.**

**In December 2007, in another opinion by Pregerson, the circuit criticized Fong for having "berated" a man and having "already decided not to give him a continuance" even though the man's attorney had not appeared for the hearing.**

**In the latest case, Fong also denied a continuance to the immigrant. The woman, Qi Cui, had come to this country from China legally in 1996 for a job and later obtained legal status as a student to study nursing. Her permission to remain in the country expired in 1998, allegedly because her school missed some paperwork.**

**In October 2000, Cui applied for asylum, claiming she had undergone a forced abortion in China because of the nation's one-child policy. As required, she submitted her fingerprints with her application.**

**Cui and her attorney appeared for their first hearing in January 2001, but it and later hearings were continued repeatedly, first at the federal government's immigration attorney's request and later for the judge's**

calendar. At one hearing along the way, Fong reminded Cui's attorney that his client would need to resubmit her fingerprints for the mandatory security check, to show that she had not committed any crimes in this country.

At that same hearing, Cui also dropped her asylum request but substituted a claim to stay in this country under the Convention Against Torture.

Finally, on June 20, 2003, Fong began a hearing on the merits of Cui's claim. Her attorney asked for a continuance, explaining that he had failed to have his client re-fingerprinted. "We forgot about it. I'm sorry," he said.

Fong said no. "I don't see good cause again for ... proceeding when the record is quite clear that I gave you and your client opportunity to present the claim," the judge said.

Because the new set of fingerprints were required for an updated security check, his decision on the continuance meant Cui could not be allowed to remain in the United States.

"Her case was over," Pregerson wrote in his opinion.

Fong "cut short ... [her] applications for relief without hearing any testimony or considering any evidence," Pregerson said. "The evidence included a medical record that corroborated Cui's claim that she suffered a forced abortion while in China."

Appeals of immigration judges' continuance decisions must be decided case by case by weighing several factors, Pregerson explained. In this case, the continuance was vital and the applicant's conduct was "not unreasonable," he said.

Further, the law and regulations about fingerprints were "unclear and uncertain," the judge added. Under newer, clarifying regulations, Fong's reminder to Cui's counsel to get new fingerprints would not have been enough notice to Cui, who did not speak English.

Pregerson also criticized the Board of Immigration Appeals, which upheld Fong's decision. "The BIA's finding that 'the respondent indicated that she understood these instructions' has no support in the record at all," he wrote. "In fact, the record demonstrates that Cui did not speak during the exchange."

Some statements by Fong also were wrong, Pregerson said. Fong "mischaracterized the record" and "inaccurately faulted Cui for the

previous delays in her case," most of which were sought by the government and Fong himself.

"It would be unfair to punish Cui for the government's lack of preparation and the crowded docket of the immigration courts. ... [A]n immigrant's right to have her case heard should not be sacrificed because of the [immigration judge's] heavy caseload."

In conclusion, Pregerson wrote that Cui lost the right to present her case because of Fong's "arbitrary invocation of an ambiguous rule as to which Cui had no notice."

Therefore, he held for the circuit, Fong abused his discretion and must be reversed.

Charles Miller, a spokesman for the U.S. Department of Justice, said the department had not reviewed Pregerson's decision and could not express an opinion on it.

Cui's attorney at the 9th Circuit, William Kiang of Kiang & Kiang in San Gabriel, did not return a call Tuesday afternoon.

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