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COMMENT

***SHU-HAO ZHAO V. SCHILTGEN:* PERSECUTION ON ACCOUNT OF POLITICAL OPINION—INCONSISTENCIES AND AMBIGUITIES**

I. INTRODUCTION

In response to the rapid growth in population in the People's Republic of China (PRC or China), the Chinese government introduced the "one couple, one child" policy in 1979. It is this policy upon which petitioner Shu-Hao Zhao (Zhao or petitioner), and many other Chinese immigrants base their asylum claims.¹ In the hopes of quelling an increasing population control problem, Chinese authorities introduced a family planning policy that consists mainly of education, propaganda, and economic incentives.² In addition, the PRC's policy mandates that couples limit their families to one child, or face sanctions such as fines, forced abortions, compulsory sterilizations, implantation of intrauterine devices, and inevitably, ridicule, ostracism, and stigmatization.³ Since China imple-

* No. C 93-3660 CW, 1995 WL 165562 (N.D. Cal. Mar. 31, 1995).

1. See Stanford M. Lin, Recent Development, *China's One-Couple, One-Child Family Planning Policy as Grounds for Granting Asylum—Xin-Chang Zhang v. Slattery*, No. 94 Civ. 2119 (S.D.N.Y. Aug. 5, 1994), 36 HARV. INT'L L.J. 231, 234 (1995); see also *Zhao*, 1995 WL 165562, at *1.

2. See U.S. DEPT OF FOREIGN AFFAIRS AND TRADE, REFUGEE DETERMINATION: CHINA 35-36 (Country Profile Series Nov. 1993); U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1993: REPORT SUBMITTED TO THE COMM. ON FOREIGN RELATIONS OF THE U.S. SENATE AND THE COMM. ON FOREIGN AFFAIRS OF THE HOUSE OF REPRESENTATIVES, CHINA SECTION 609 (Feb. 1993).

3. See Lin, *supra* note 1, at 235; Tara A. Moriarty, Comment, *Guo v. Carroll*:

mented this policy, it has taken subsequent steps to insure its compliance, and its birth and fertility rates have dropped dramatically.⁴ Consequently, the number of China's fleeing citizens seeking asylum in the United States has increased steadily.

In June 1993, Mr. Zhao, a citizen of the PRC, became one of many people who sought asylum in the United States because of his or her country's family planning policy.⁵ In 1995, the United States District Court for the Northern District of California decided *Shu-Hao Zhao v. Schiltgen*, holding that Mr. Zhao was not eligible for either political asylum⁶ or withholding of deportation⁷ under the Immigration and Nationality Act (INA).⁸

This Comment will discuss the history of *Shu-Hao Zhao v. Schiltgen* and the decision of the *Zhao* court. It addresses the

Political Opinion, Persecution, and Coercive Population Control in the People's Republic of China, 8 GEO. IMMIGR. L.J. 469, 482 (1994).

4. See Lin, *supra* note 1, at 235 (citing Lena H. Sun, *China's Crackdown on Births: A Stunning, and Harsh, Success*, N.Y. TIMES, Apr. 25, 1993, at 1).

5. See *Zhao*, 1995 WL 165562, at *1-2.

6. See Immigration and Nationality Act [INA] § 208(a), 8 U.S.C. § 1158(a) (1994).

7. See *id.* § 243(h), 8 U.S.C. § 1253(h).

8. See *Zhao*, 1995 WL 165562 at *1. There are two methods by which a deportable alien present in the United States may seek relief: asylum and withholding of deportation. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987). Although the granting of asylum and the withholding of deportation are closely related, see *Osorio v. INS*, 18 F.3d 1017, 1021 (2d Cir. 1994), there are two important distinctions. "First, [t]he burden of proof that an alien must meet to be eligible for asylum is lower than that required of an alien who seeks withholding of deportation." *Id.* (quoting *Carranza-Hernandez v. INS*, 12 F.3d 4, 7 (2d Cir. 1993)) (alteration in original). "Second, once eligibility for asylum has been established, a grant of asylum remains within the Attorney General's discretion. In contrast, 'withholding of deportation for those who qualify [is] mandatory rather than discretionary.'" *Id.* (quoting *Aliens and Nationality; Asylum and Withholding of Deportation Procedures*, 55 Fed. Reg. 30,674, 30,675 (1990)) (alteration in original). Since *Osorio*, this language regarding the mandatory nature of withholding of deportation has been codified in the *Code of Federal Regulations*. 8 C.F.R. § 208.16(c)(1) (1996). "Thus, although the Attorney General has the discretion to deny asylum to an alien eligible under section 208(a), she may not deny withholding of deportation to the same alien if the alien satisfies the stricter standards of section 243(h)." *Osorio*, 18 F.3d at 1021 (citing *Cardoza-Fonseca*, 480 U.S. at 443 & n.28). Section 243(h) states in pertinent part: "The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such an alien's life or freedom would be threatened in such a country on account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 243(h)(1), 8 U.S.C. § 1253(h)(1).

current state of China's population control policy, and its policy of sterilizing men and women who act contrary to its "one couple, one child" law. This Comment argues that *Zhao* was incorrectly decided by the district court, and that past judicial interpretations of the asylum laws have been erroneous and inconsistent. This Comment further asserts that petitioner's claim for asylum should have been granted despite the district court's interpretation of current asylum laws; and that petitioner should have been granted asylum based on United States jurisprudential notions of persecution and basic human rights.

Finally, this Comment concludes that even if the United States chooses not to define its current asylum laws as to include fear of compulsory sterilization and abortion (as well as other coercive procedures) as legitimate means for granting asylum, the U.S. Congress should broaden the Refugee Act of 1980 (Refugee Act)⁹ to make such fears a sixth ground of persecution.¹⁰

II. REGULATORY AND JUDICIAL HISTORY OF U.S. ASYLUM LAW

A. *Statutory Guidelines—The Immigration and Nationality Act and the Refugee Act*

Applications for asylum in the United States are governed by the INA,¹¹ as amended by the Refugee Act.¹² In 1980,

9. Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 & 22 U.S.C.).

10. The Refugee Act, in defining "refugee," sets forth five grounds for persecution:

The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and 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

8 U.S.C. §1101(a)(42)(A). Similarly, federal regulations set forth these five grounds for persecution in establishing eligibility for withholding of deportation:

The applicant's life or freedom shall be found to be threatened if it is more likely than not that he would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 C.F.R. § 208.16(b)(1) (1996).

11. Ch. 477, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-

Congress passed the Refugee Act to establish "formal statutory procedures concerning asylum applications for the first time in U.S. immigration law. . . ."13 Its purpose was to enable refugees to seek a safe haven on American soil. The Refugee Act was to serve as an "instrument that would allow this country to carry out the humanitarian ideal to which our nation has been historically committed. That ideal is the offer of liberty and safety to persons from other lands who are persecuted."¹⁴

Although the United States seeks to provide individuals fleeing oppression with a safe haven by "welcoming homeless refugees to [its] shores,"¹⁵ according to the guidelines established pursuant to the INA, the definition of "refugee" lies at the focal point of U.S. asylum law. Under section 208 of the INA, an individual may qualify for asylum in the United States if he or she meets the definition of "refugee."¹⁶ In order to qualify for asylum as a refugee, an alien must meet the burden of proving an objective "well-founded" basis for his or her subjective fear of persecution on account of either race, religion, nationality, membership in a particular social group, or political opinion.¹⁷ In other words, an applicant's burden of proving "well-founded fear" necessitates a showing of objective elements, such as conditions in the alien's home country, as well as subjective elements, such as the alien's mental state.¹⁸

1524).

12. 94 Stat. 102; see Daniel Compton, Comment, *Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar*—Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986), 62 WASH. L. REV. 913, 914 (1987).

13. James M. Moschella, Comment, *Osorio v. Immigration and Naturalization Service: The Second Circuit and "Well-Founded Fear of Persecution on Account of Political Opinion,"* 21 BROOK. J. INT'L L. 471, 475 (1995). The Refugee Act states:

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the 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.

8 U.S.C. § 1158(a) (emphasis added).

14. Doris Meissner, *Reflections on the Refugee Act of 1980*, in *THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980S* 57, 58-59 (David A. Martin ed., 1988).

15. S. REP. NO. 96-256, at 1 (1980), reprinted in 1980 U.S.C.C.A.N. 141.

16. See 8 U.S.C. § 1158(a).

17. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430 (1987).

18. See Moschella, *supra* note 13, at 480; Arthur C. Helton, *The Criteria For Refugee Protection and Asylum in the United States*, in *BASIC IMMIGRATION LAW* 1992, at 205, 211-12 (PLI Litig. & Admin. Practice Course Handbook Series No.

Specifically, section 101(a)(42)(A) of the Refugee Act¹⁹ mandates that “[a]n alien may be classified as a refugee within the meaning of the INA if he or she is unable or unwilling to return to the country of origin because of persecution or a well-founded fear of persecution on account of race, nationality, membership in a particular social group, or political opinion.”²⁰ Therefore, an individual physically present in the United States may seek asylum in this country if he or she proves to be a victim of persecution or has a well-founded fear of being persecuted upon return to his or her country.²¹

Although the United States has been committed to granting asylum to those who meet its definition of “refugee,” it has not granted asylum to “people who are not [individual] targets of persecution but suffer instead from general conditions in their own countries.”²² This distinction has inspired much debate over the ability of aliens to seek political asylum based on opposition to their country’s population control policies. Denying an individual asylum who has been persecuted similarly to others in his or her country has been met with both ardent support and unyielding opposition. These divergent views are illustrated by the inconsistent interpretations handed down by numerous administrative and judicial bodies regarding immigrants seeking asylum as refugees in the United States on account of their opposition to such policies.²³

B. *International Standards*

Because Congress passed the Refugee Act in order to conform to international refugee standards,²⁴ any analysis of U.S. asylum law must include a discussion of the 1967 United Nations Protocol Relating to the Status of Refugees (U.N. Protocol),²⁵ which the United States has ratified,²⁶ and is the foun-

433, 1992).

19. 8 U.S.C. § 1101(a)(42)(A).

20. *Shu-Hao Zhao v. Schiltgen*, No. C 93-3660 CW, 1995 WL 165562 at *4 (N.D. Cal. Mar. 31, 1995) (citing 8 U.S.C. § 1101(a)(42)(A)).

21. See Laura J. Dietrich, *United States Asylum Policy*, in *THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980S*, *supra* note 14, at 67-68.

22. *Id.* at 67.

23. See *infra* notes 42-62 and accompanying text.

24. See *Compton*, *supra* note 12, at 914.

25. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter U.N. Protocol].

26. Congress ratified the U.N. Protocol in 1968. See 114 CONG. REC. 29,607

dation for the Refugee Act. The Protocol revised the United Nations Convention Relating to the Status of Refugees of 1951 (U.N. Convention),²⁷ and helped to clarify the meaning of "refugee" and explain the principle of *nonrefoulement*.

At the heart of international refugee law is the universal definition of "refugee" and the core principle of *nonrefoulement*.²⁸ The U.N. Convention defines "refugee" as any person who,

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.²⁹

The Refugee Act of 1980 adopts this amended definition of refugee.³⁰

In addition, the Office of the United Nations High Commissioner for Refugees drafted a handbook for determining refugee status (U.N. Handbook),³¹ which serves as the principle guide to interpreting the term "refugee," and specifies how to apply the U.N. Protocol's definition.³² For example, the U.N. Handbook acknowledges that where an asylum applicant must demonstrate that he or she qualifies as a refugee, the applicant is not required to illustrate the precise motives of his or her persecutors.³³ Furthermore, the U.N. Handbook recog-

(1968). By virtue of ratification, the provisions of the U.N. Protocol have become a part of U.S. law under the Supremacy Clause. See U.S. CONST. art. VI, cl. 2; Moschella, *supra* note 13, at 474.

27. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter U.N. Convention].

28. See Compton, *supra* note 12, at 915-16 (discussing the principle of *nonrefoulement*). See generally GUNNEL STENBERG, NON-EXPULSION AND NON-REFOULEMENT 171 (1989).

29. U.N. Convention, *supra* note 27, art. 1.

30. INA § 201(a), 8 U.S.C. § 1101(a)(42).

31. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS (1979) [hereinafter U.N. HANDBOOK].

32. See UNITED NATIONS HUMAN RIGHTS COMMISSION, PROTECTION DIVISION, Preface to U.N. HANDBOOK, *supra* note 31, at 1.

33. See U.N. HANDBOOK, *supra* note 31, at 17.

nizes an applicant's political opinion may be exhibited through actions alone, even if that opinion is not overtly expressed.³⁴ Lastly, if any evidentiary ambiguities remain regarding whether an applicant has been persecuted, they are to be interpreted in a light most favorable to the asylum-seeker.³⁵

A second important component of the U.N. Convention and the U.N. Protocol is the concept of *nonrefoulement*.³⁶ "This principle prohibits a government from returning individuals to a country where their lives or freedom would be in danger"³⁷ on account of one or more of the five enumerated characteristics.³⁸ If an individual shows a "clear probability of persecution," the withholding of deportation becomes mandatory.³⁹ A "clear probability of persecution"⁴⁰ is such that it is more likely than not that the alien will be persecuted upon return to his or her country.⁴¹ Although these definitions and interpretations are instructive as to how U.S. asylum policy should operate, applying them often leads to ambiguities and inconsistencies.

C. Administrative and Judicial Interpretations

Notwithstanding the United States' adherence to the international definition of "refugee," the historical, administrative, and judicial treatment of granting of asylum to aliens on account of their opposition to their countries' population control policies is replete with inconsistencies. In 1988, then-Attorney General Edwin Meese set forth policy guidelines⁴² "designed

34. *Id.* at 20.

35. *See id.* at 47-49.

36. *See* Compton, *supra* note 12, at 916.

37. *Id.*

38. *See id.*

39. *Id.* (citing *INS v. Stevic*, 467 U.S. 407, 407 (1984)).

40. *Stevic*, 467 U.S. at 407.

41. *See* Compton, *supra* note 12, at 916 (citing *Stevic*, 467 U.S. at 429).

42. Section 1158(a) of the Refugee Act provides:

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the 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.

8 U.S.C. § 1158(a) (1994). Section 1158(b) provides:

Asylum granted under subsection (a) of this section may be terminated if the Attorney General, pursuant to such regulations as the Attorney Gen-

to ensure that asylum could be granted to persons who demonstrated a well-founded fear of persecution stemming from the PRC's family planning policy.⁴³ The Department of Justice (DOJ) issued policy guidelines to the Immigration and Naturalization Service (INS) noting that because the PRC's government views opposition to its forced sterilization policies as a form of "political dissent," a finding of the required "well-founded fear of persecution under these circumstances is reasonable."⁴⁴ The DOJ further concluded that this constituted persecution on account of "political opinion" under the INA and would therefore be grounds for granting asylum.⁴⁵ Despite Attorney General Meese's promulgation, the Board of Immigration Appeals (BIA) disregarded it in its 1989 decision, *In re Chang*,⁴⁶ by finding that these guidelines were directed to the INS, not to immigration judges or to the BIA.⁴⁷

After the *Chang* decision, many voiced their opposition to the PRC's policies, as well as their disagreement with the *Chang* ruling. For example, Congress, in its Armstrong-DeConcini Amendment (Amendment) to the Emergency Chi-

eral may prescribe, determines that the alien is no longer a refugee within the meaning of section 1101(a)(42)(A) of this title owing to a change in circumstances in the alien's country of nationality or, in the case of an alien having no nationality, in the country in which the alien last habitually resided.

Id. § 1158(b).

43. *Shu-Hao Zhao v. Schiltgen*, No. C 93-3660 CW, 1995 WL 165562 at *1 (N.D. Cal. Mar. 31, 1995) (citing *In re Chang*, 20 I. & N. Dec. 38, 43 (BIA 1989)).

44. *Guo Chun Di v. Carroll*, 842 F. Supp. 858, 862 (E.D. Va. 1994) (citing 135 CONG. REC. S8244 (daily ed. July 19, 1989)).

45. *Id.* at 862 n.3.

46. *In re Chang* signifies the beginning of the judicial controversy over granting asylum based on opposition to a country's family planning policies. In *In re Chang*, the BIA found that where the PRC's policies could, in certain circumstances, be grounds for granting asylum, implementation of the "one couple, one child" policy "in and of itself, even to the extent that involuntary sterilizations may occur," is not persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, within the meaning of INA § 101(a)(42)(A)." *Zhao*, 1995 WL 165562, at *1, (quoting *In re Chang*, 20 I. & N. Dec. at 44).

47. *See id.* at *1 (citing *In re Chang*, 20 I. & N. Dec., at 43). Asylum cases in the United States are first heard by an immigration judge, who makes the initial determination regarding an alien's application for withholding of deportation and asylum. *See* 8 C.F.R. § 208.2(b) (1996). The immigration judge's decision is then appealable to the Board of Immigration Appeals (BIA). *See id.* § 3.38(a). If a petitioner disagrees with the finding of the BIA, he or she may seek review of the BIA determination in the federal courts of appeals. *See* 8 U.S.C. § 1105a(a) (1994).

nese Immigration Relief Act of 1989 (Relief Act),⁴⁸ took strides to overrule *Chang*.⁴⁹ Although the Act was passed by both the House and the Senate, it was pocket-vetoed by President Bush, despite his general agreement with it.⁵⁰ In conformity with the Amendment, President Bush gave direction to the Attorney General to give "enhanced consideration" to aliens who fear persecution in the form of forced abortion or sterilization upon return to their country.⁵¹

In January 1990, in response to the President's instructions, the Attorney General announced an interim rule, amending the existing rules regarding asylum and withholding of deportation in relation to forced sterilization policies.⁵² The 1990 interim rule⁵³ provided that:

1. Aliens who have a well-founded fear that they will be required . . . to be sterilized because of their country's family planning policies may be granted asylum on the ground of persecution on account of political opinion.
2. An applicant who establishes that the applicant (or the applicant's spouse) has refused . . . to be sterilized in violation of a country's family planning policy, and who has a well-founded fear that he or she will be required . . . to be

48. The Emergency Chinese Immigration Relief Act of 1989 provides in pertinent part:

With respect to the adjudication of all applications for asylum, withholding of deportation, or refugee status from nationals of China filed before, on, or after the date of the enactment of this Act, careful consideration shall be given to such an applicant who expresses a fear of persecution upon return to China related to China's "one couple, one child" family planning policy. If the applicant 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 of 1989, H.R. 2712, 101st Cong. § 3(a) (1989).

49. See *Zhao*, 1995 WL 165562, at *1.

50. See *id.* President Bush withheld approval of the Bill, citing foreign relations concerns and a desire to maintain executive control over the situation. See Memorandum of Disapproval for the Emergency Chinese Immigration Relief Act of 1989, 25 WEEKLY COMP. PRES. DOC. 1853 (Nov. 30, 1989) [hereinafter Memorandum of Disapproval].

51. Memorandum of Disapproval, *supra* note 50, at 1853-54.

52. See *Zhao*, 1995 WL 165562, at *1-2.

53. Refugee Status, Withholding of Deportation, and Asylum; Burden of Proof, 55 Fed. Reg. 2803 (1990). This interim rule took effect on January 29, 1990. See *Zhao*, 1995 WL 165562, at *2.

sterilized or otherwise persecuted if the applicant were returned to such country may be granted asylum.⁵⁴

On April 11, 1990, President Bush issued Executive Order 12,711, which again required the Attorney General to "provide for 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."⁵⁵

In July 1990, the Attorney General promulgated the final rule making considerable changes in the regulations pertaining to asylum and withholding of deportation.⁵⁶ This rule omitted both the 1990 interim rule and "inexplicably removed any reference to the issue of asylum for persecution on the basis of opposition to family planning practices."⁵⁷ Much confusion regarding the status of asylum law in the United States ensued, and in January 1993, then-Attorney General William Barr signed a final rule (1993 Rule), reiterating the 1990 interim rule and overruling *Chang*.⁵⁸ The 1993 Rule authorized asylum on the basis of opposition to the PRC's family planning policies.⁵⁹ Three days before the anticipated publication of the

54. 55 Fed. Reg. 2803; see *Guo Chun Di v. Carroll*, 842 F. Supp. 858, 863 (E.D. Va. 1994) (discussing this rule).

55. Exec. Order No. 12,711, 55 Fed. Reg. 13,897 (1990).

56. See 55 Fed. Reg. at 30,674-88 (codified in scattered sections of 8 C.F.R.).

57. *Zhao*, 1995 WL 165562, at *2.

58. See *id.*

59. See *id.* The 1993 Rule provides as follows:

An applicant (and the applicant's spouse, if also an applicant) shall be found to be a refugee on the basis of past persecution on account of political opinion if the applicant establishes that, pursuant to the implementation by the country of the applicant's nationality or last habitual residence of a family planning policy that involves or results in forced abortion or coerced sterilization, the applicant has been forced to abort a pregnancy or to undergo sterilization or has been persecuted for failure or refusal to do so, and that the applicant is unable or unwilling to return to, or to avail himself or herself of the protection of, that country because of such persecution

An applicant (and the applicant's spouse, if also an applicant) shall be found to be a refugee on the basis of a well-founded fear of persecution on account of political opinion if the applicant establishes a well-founded fear that, pursuant to the implementation by the country of the applicant's nationality or last habitual residence of a family planning policy that involves or results in forced abortion or coerced sterilization, the applicant will be forced to abort a pregnancy or to undergo sterilization or will be persecuted for failure or refusal to do so, and that the

1993 Rule, President Clinton was inaugurated and, immediately thereafter, a directive was issued "prohibiting the publication of any new regulations not approved by an agency head appointed by President Clinton."⁶⁰ The 1993 Rule was one of the regulations that was withdrawn, and has not been resubmitted or published.⁶¹

Finally, in December 1993, Attorney General Janet Reno, after examining two asylum cases from the BIA, declined to resolve any conflict between the 1989 *Chang* decision and Executive Order 12,711.⁶² The Clinton Administration has not taken any further action on this issue.⁶³ Therefore, the July 1990 omission of any reference to asylum based on family planning practices remains as the current state of the regulations. The various regulations promulgated by the Attorney General pursuant to the Refugee Act have further contributed to the ambiguities inherent in the definition of "refugee."

III. ZHAO V. SCHILTGEN

A. Factual Background of Zhao

Petitioner Shu-Hao Zhao was a thirty-six year old citizen of the People's Republic of China.⁶⁴ On April 16, 1993, petitioner fled China and headed for the United States, where he was arrested by the INS for failing to possess a valid immigrant visa.⁶⁵ Mr. Zhao was placed in exclusion proceedings pursuant to section 235 of the INA.⁶⁶ Petitioner applied for asylum and withholding of deportation⁶⁷ pursuant to the INA, arguing that based upon his well-founded fear of being persecuted on account of his political opinion, he should not be de-

applicant is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear.

Id. at *8 n.3 (citing Attorney Gen. Order No. 1659-93, § 208.13(2)(ii), JA 1652, 1664-65 (Jan. 15, 1993)); see also *Xin-Chang Zhang v. Slattery*, 55 F.3d 732, 740 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1271 (1996).

60. *Zhao*, 1995 WL 165562, at *2.

61. *See id.*

62. *See id.* at *3.

63. *See id.*

64. *See id.*

65. *See id.*

66. *See id.*; 8 U.S.C. § 1225 (1994).

67. For an explication of the difference between asylum and withholding of deportation, see *supra* note 8 and accompanying text.

ported.⁶⁸ At a hearing before an immigration judge,⁶⁹ petitioner provided information about his history and the details of what prompted his flight to the United States.

Petitioner was married and had two daughters, in violation of the PRC's "one couple, one child" policy.⁷⁰ His youngest child was born physically disabled, and resided with relatives in a city where the birth control policies were not strictly enforced.⁷¹ Petitioner resided in the Chungwang Township, Linjuan County, of the Fujian Province of China.⁷² In 1992, petitioner's wife became pregnant with their third child, and shortly thereafter, received notice from the family planning committee that she was to report to the hospital for an abortion and a tubal ligation.⁷³ In addition, they were notified that they would be fined 5,000 yuan for excessive birth.⁷⁴

Unwilling to undergo a forced abortion and sterilization, petitioner and his wife fled from their residence to the Fuzhou province where they stayed with friends.⁷⁵ While away from his home and village, petitioner learned that the authorities had confiscated his television and refrigerator, that his eldest daughter had been expelled from school, and that his employment had been suspended.⁷⁶

After learning that their youngest daughter would be returning home for a visit, petitioner and his wife, who was then seven months pregnant, secretly returned home to their village.⁷⁷ Shortly after their arrival home, family planning officials were notified of their return, and arrested petitioner's wife.⁷⁸ The next day, February 21, 1993, petitioner's wife was forced to have an abortion in her seventh month of pregnancy.⁷⁹

When petitioner arrived at the hospital to visit his wife

68. *See* Shu-Hao Zhao v. Schiltgen, No. C 93-3660 CW, 1995 WL 165562, at *3-7 (N.D. Cal. Mar. 31, 1995).

69. *In re* Zhao, No. A 72 969 069 (July 15, 1993).

70. *Id.*

71. *Zhao*, 1995 WL 165562, at *3.

72. *See id.*

73. *See id.*

74. *See id.*

75. *See id.*

76. *See id.*

77. *See id.*

78. *See id.*

79. *See id.*

after her abortion, angry words ensued between him and a government official.⁸⁰ Petitioner pushed the official, who reportedly suffered a broken arm.⁸¹ Petitioner managed to escape the hospital and once again fled to the Fuzhou province.⁸² After learning that he was wanted for arrest for violating the family planning law and for assaulting a government official, petitioner fled to the United States.⁸³

B. Procedural History of Zhao

On July 15, 1993, the immigration judge, relying on the BIA's decision in *In re Chang*,⁸⁴ denied petitioner's application for asylum.⁸⁵ The immigration judge stated that although she found petitioner's testimony believable, she also recognized that "[t]here is no evidence in this record that [petitioner] has any reason to fear punishment different than all of the rest of the individuals in China if he is in fact forced to return there."⁸⁶

Petitioner appealed the immigration judge's decision to the BIA, and on September 22, 1993, the BIA dismissed his appeal.⁸⁷ The BIA disagreed with petitioner's contention that President Bush's Executive Order 12,711 overruled *Chang*, and concluded that the case was governed by regulations issued by the Attorney General.⁸⁸ The BIA held that it would not overrule *Chang* by upholding petitioner's claim because the Attorney General never gave it directions to apply different standards from those applied in *Chang*.⁸⁹ Petitioner then appealed the BIA's decision to the United States District Court for the Northern District of California.

80. *See id.*

81. *See id.*

82. *See id.*

83. *See id.*

84. *In re Chang*, 20 I. & N. Dec. 38, 43 (BIA 1989); *see supra* note 47.

85. *See Shu-Hao Zhao v. Schiltgen*, No. C 93-3660 CW, 1995 WL 165562, at *4 (N.D. Cal. Mar. 31, 1995).

86. *Id.* (quoting *In re Zhao*, A 72 969 069 (July 15, 1993), at 10) (alteration in original).

87. *See id.*

88. *See id.*; *see also supra* notes 54-62 and accompanying text.

89. *See Zhao*, 1995 WL 165562, at *4.

C. The District Court's Decision

The district court affirmed the BIA's decision denying asylum to petitioner, and held that although Executive Order 12,711 criticizes *Chang*, it did not overrule it.⁹⁰ In addition, the district court found that until further legislative or executive action is taken, *Chang* would control.⁹¹

Mr. Zhao asserted that a person's views regarding his or her country's population control policies are "political" within the meaning of section 1101 of the INA.⁹² Petitioner argued that by choosing to have another child, he became a "political enemy of the government, and thus must be granted asylum in accordance with [the 1992 U.S. Supreme Court's decision in] *Elias-Zacarias*."⁹³ Although petitioner argued that by seeking to have another child he and his wife were acting contrary to the PRC's policy, and thus expressing their political opinion, the district court found that *Chang* made clear that the "eligibility for asylum cannot be established absent some evidence that the government's motivation for applying its policy was specifically because Petitioner has a political opinion the PRC sought to influence."⁹⁴ The district court further concluded

90. *See id.* at *5.

91. *See id.* at *6.

92. *See id.* Section 1101(a)(42)(A) specifies that an alien may be classified as a refugee within the meaning of the INA if he or she is unable or unwilling to return to the country of origin because of persecution or well-founded fear of persecution on account of race, nationality, membership in a particular social group, or political opinion. *See id.*; *see also supra* notes 8-10 and accompanying text.

93. *Zhao*, 1995 WL 165562 at *6. In *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992), the U.S. Supreme Court put forth principles applicable to aliens seeking asylum based on their political opinion. As the *Zhao* court noted:

First, the Court [in *Elias-Zacarias*] held in order to reverse a BIA finding that an alien failed to establish a well-founded fear of persecution, the record must compel the conclusion that the alien expressed a political opinion, and it must compel the additional conclusion that the "persecutor" would persecute the alien because of that political opinion. Further, the Court held that the mere existence of a general political motive underlying the persecutor's actions was insufficient to establish asylum *since the focus of the statute is the victim's political opinion, not the persecutor's*. Since motive is a critical factor in determining eligibility, a petitioner must then provide evidence that the persecutor's motive was to harm him specifically because of his political opinion. Thus, punishment under a law of general applicability will not ordinarily constitute persecution on account of political opinion unless the punishment provided is far in excess of that which is applied to the population as a whole.

Id. (citations omitted) (emphasis added).

94. *Id.* at *7 (citing *In re Chang*, 20 I. & N. Dec. 38, 44 (BIA 1989)).

that petitioner failed to provide it with any evidence indicating that the PRC wished to enforce its family planning policy against him for any reason other than maintaining population control.⁹⁵ Furthermore, the district court pointed out that punishment based on general applicability of a law does not establish that an individual is persecuted on account of his or her political opinion, absent other evidence of persecution, since under *Elias-Zacarias*, it is the victim's political opinion which is determinative.⁹⁶ In other words, the district court asserted that if petitioner had contended that the PRC specifically sought out his family due to contrary political beliefs or religious opinions, granting of asylum would have been warranted.⁹⁷ Because the one-couple, one-child policy by its nature involves "general applicability," the district court found that petitioner neither had been persecuted nor had a well-founded fear of being persecuted on account of his political opinion.⁹⁸ In conclusion, the district court found that the BIA's decision in *In re Chang* was controlling, and that Mr. Zhao did not present evidence that he had a well-founded fear of persecution based on his specific political beliefs.⁹⁹ Therefore, the district court denied petitioner's writ of habeas corpus.¹⁰⁰

IV. ANALYSIS

A. *Petitioner's Claim Encompassed a Well-Recognized U.S. Right that Was "Political"*

According to the district court's reading of *Elias-Zacarias*, in order to gain asylum an alien must prove that he or she expressed a political opinion and that he or she would be persecuted on account of that opinion.¹⁰¹ Furthermore, an individual has the burden of proving that the persecutor's motive was to harm him or her specifically because of that political opinion,¹⁰² and not simply because of general political mo-

95. *See id.*

96. *See id.* at *7.

97. *See id.*

98. *Id.*

99. *See id.* at *8.

100. *See id.*

101. *See id.* at *6.

102. *See id.*

tives.¹⁰³ By refusing to find that petitioner's opposition to the PRC's population control policy constituted his political opinion, the district court possessed an overly narrow view of what is "political" for asylum purposes. Based on U.S. jurisprudential notions of what constitutes "political," and on international refugee standards which are the basis of U.S. asylum law, petitioner's actions should have been deemed "political," and asylum should have been granted accordingly.

1. United States' Notions of "Political Opinion"

Mr. Zhao violated the PRC's family planning policies not once, but twice.¹⁰⁴ The law mandates that couples are legally permitted to have only one child in order to maintain population control. When petitioner's wife became pregnant with their third child, in clear violation of the PRC's policy, they fled their village and went into hiding, only to return to their home upon the arrival of their youngest daughter.¹⁰⁵ After being apprehended by authorities for violating its family planning policy, Mr. Zhao's wife was forced to abort her seven month fetus.¹⁰⁶ After having an altercation with a government official in the hospital,¹⁰⁷ and after violating the PRC's population control policy for the second time, Mr. Zhao fled to the United States in anticipation of gaining political asylum.¹⁰⁸

Despite the great lengths Mr. Zhao and his wife went through to defy the PRC's population control policy, the district court found that petitioner's actions did not demonstrate his "political opinion." Absent other evidence of persecution, punishment based on a law that applies to the population at large does not constitute persecution on account of a political opinion.¹⁰⁹

This premise instructs us to look at China's definition of "political opinion" when determining whether or not to grant

103. See Moschella, *supra* note 13, at 481.

104. See Shu-Hao Zhao v. Schiltgen, No. C 93-3660 CW, 1995 WL 165562, at *3 (N.D. Cal. Mar. 31, 1995).

105. See *id.*

106. See *id.*

107. See *supra* text accompanying notes 80-81.

108. See Zhao, 1995 WL 165562, at *3-4.

109. *Id.* at *7 (citing INS v. Elias-Zacarias, 502 U.S. 478, 482 (1992)); see *supra* Part III.C.

asylum to an alien in the United States. When a U.S. court decides whether or not an individual should be granted political asylum, it is only logical to apply U.S. notions of what is considered persecution on account of political opinion. Merely analyzing how the PRC defines political opinion, when ultimately deciding whether or not an individual should be permitted to remain in the United States, is contrary to the ideals of U.S. asylum laws.

Based on China's actions since the implementation of its policy in 1979, it is obvious that the PRC does not consider an individual's active opposition to its population control policies a form of political expression. If the PRC viewed active opposition to its policies as a demonstration of one's political opinion, then surely forcing women to have abortions and mandating compulsory sterilization of both men and women would be deemed a form of political oppression. It is not considered a form of political oppression in China, however, because intentionally becoming pregnant in violation of the one-couple, one-child policy, is not deemed an expression of an individual's political opinion. Therefore, it defies logic to preclude an individual, like Mr. Zhao, from gaining asylum in the United States strictly because his country does not consider his actions to be a form of political expression. After all, it is only reasonable to assume that a petitioner, such as Mr. Zhao, would not have fled his country to begin with, if China recognized its actions to be a form of political oppression that was reprehensible.

Mr. Zhao's actions, which clearly were in opposition to his country's population control policy, were "political"¹¹⁰ based on current U.S. notions of individual liberty and freedom. The United States Supreme Court has found that the Due Process Clause of the Fourteenth Amendment contains a liberty interest that extends to individual decision-making regarding choices that involve the most intimate and personal matters.¹¹¹ The Supreme Court has consistently recognized the right of individuals to make procreative decisions.¹¹² The

110. "Political" is defined as "of or pertaining to exercise of rights and privileges or the influence by which individuals of a state seek to determine or control its public policy; having to do with organization or action of individuals" BLACK'S LAW DICTIONARY 1158 (6th ed. 1990).

111. *See, e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

112. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that mar-

right to procreate, the right to be free from unwarranted governmental intrusion, and more generally, the right to privacy, are liberties that U.S. citizens now enjoy. Through a series of Supreme Court cases and numerous political protests, U.S. citizens have been arguing over such complex issues for decades. Thus, it seems unreasonable not to deem opposition to a country's coercive population control policy encompassing, among other things, compulsory sterilization and forced abortion, as a form of political opinion or expression.

Although aliens generally are not protected by provisions of the U.S. Constitution, such as the Due Process Clause of the Fourteenth Amendment, U.S. courts should use domestic notions of political expression by analogy. By not extending our domestic definition of "political opinion" to individuals seeking asylum, such as petitioner, the United States is being inconsistent and disingenuous. Through its inconsistencies, the United States has not been true to the ideals of its asylum laws.

The Eastern District of Virginia, in its decision in *Guo Chun Di v. Carroll*,¹¹³ has been true to U.S. asylum laws and the domestic definition of "political opinion." In *Guo Chun Di* the district court articulated that "there can be little doubt that the phrase 'political opinion' encompasses an individual's views regarding procreation."¹¹⁴ The *Guo Chun Di* court described the legal precedents defining the right of individuals to make procreative decisions, and further stated that "[i]nvoluntary sterilization, in particular, has been viewed as an egregious infringement on the fundamental right to procreate."¹¹⁵ The court emphasized that "[b]ecause the right to make procreational decisions is a basic liberty right protected under the Bill of Rights, it is, in that respect, analogous to other fundamental rights that are well-recognized as legitimate grounds for asylum, such as the freedom of religion and free-

ried couples have the right to use contraception); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding that non-married individuals have a right to contraception); *Roe v. Wade*, 410 U.S. 113 (1973) (holding that women have the right to obtain an abortion free from governmental intrusion in the first trimester); *Carey v. Population Services Int'l*, 431 U.S. 678 (1977) (finding that the right to bear a child is at the heart of a cluster of constitutionally protected rights).

113. 842 F. Supp. 858 (E.D. Va. 1994).

114. *Id.* at 872.

115. *Id.* (citing *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)); see Moriarty, *supra* note 3, at 479.

dom of speech."¹¹⁶ In conclusion, the court stressed that "it is beyond dispute that the expression of one's views regarding issues related to the right to procreate is 'political.'"¹¹⁷ Thus, the *Guo Chun Di* court held that petitioner Guo was eligible for a discretionary grant of asylum on account of his opposition to the PRC's population control policy.¹¹⁸

Similarly, Mr. Zhao's blatant opposition to the PRC's family planning policy was plainly an expression of his political opinion. The *Zhao* court should have followed the sensible precedent set by the Eastern District of Virginia in *Guo Chun Di*, and found Mr. Zhao eligible for a discretionary grant of asylum.

2. International Standards

In addition to seeking guidance from U.S. notions of political expression, the *Zhao* court should have relied on international refugee standards to adequately support a finding that Mr. Zhao was eligible for a discretionary grant of asylum. For example, the U.N. Handbook¹¹⁹ provides guidance for resolving the issue of what is considered political opinion under the internationally accepted definition of "refugee". The Supreme Court recognized this in *INS v. Cardoza-Fonseca*,¹²⁰ indicating that because the Refugee Act was founded on international refugee standards, the U.N. Handbook was persuasive in interpreting the Refugee Act.¹²¹ The U.N. Handbook indicates that the *actions* of a petitioner alone can constitute political opinion, even if that opinion is not clearly expressed.¹²² In other words, a petitioner should not be required to express his or her political opinion like a politician does before he or she is able to qualify for asylum. This view is further supported by the U.N. Handbook, as it demonstrates that if any ambiguities remain with regard to proving persecution, they should be interpreted in the light most favorable to the individual seek-

116. *Guo Chun Di*, 842 F. Supp. at 872 (footnotes omitted).

117. *Id.*

118. *Id.* at 874.

119. *See supra* note 31.

120. 480 U.S. 421 (1987).

121. *Id.* at 438-39 & n.22; *see Moschella, supra* note 13, at 479.

122. *See Moschella, supra* note 13, at 474.

ing asylum.¹²³ Therefore, interpretation of the U.N. Handbook provides further evidence and support for the conclusion that Mr. Zhao's actions should have been deemed political opinion, even though his request for asylum might not have been eloquently stated.

Further examination of international standards reveals that Mr. Zhao should have been granted asylum. For example, the Universal Declaration of Human Rights, article 16(1), states that persons "have the right to marry and to found a family."¹²⁴ Article 23(2) of the International Covenant on Civil and Political Rights has a parallel provision.¹²⁵ The United Nations Human Rights Committee has interpreted these provisions as follows: "[T]he right to found a family implies, in principle, the possibility to procreate and live together. When State parties adopt family planning policies, they should be compatible with the provisions of the Covenant and should, in particular, not be discriminatory or compulsory."¹²⁶

Undoubtedly, the PRC's one-couple, one-child policy is contrary to this provision.¹²⁷ There is ample evidence indicating that the PRC's family planning policy is implemented by forcing individuals to undergo compulsory sterilizations and forced abortions.¹²⁸ Additionally, the PRC's policy is both arbitrary and discriminatory, in that it is administered inconsistently.¹²⁹

Therefore, taking into consideration U.S. notions of politi-

123. *See id.*

124. Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., pt. 1, at 74, U.N. Doc A/810 (1948); *see also* Moriarty, *supra* note 3, at 482-83.

125. International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, art. 23, para. 2, S. EXEC. DOC. E, 95-2 at 30 (1978), 999 U.N.T.S. 171, 179.

126. *International Covenant on Civil and Political Rights: General Comments*, U.N. GAOR, Hum. Rts. Comm., general cmt. No. 19(39), para. 5, U.N. Doc CCPR/C/21/Rev.1/Add.2 (1990).

127. *See* Moriarty, *supra* note 3, at 483.

128. *See, e.g.*, *Shu-Hao Zhao v. Schiltgen*, No. C 93-3660 CW, 1995 WL 165562, at *3 (N.D. Cal. Mar. 31, 1995); *Yang You Yi v. Maugans*, 24 F.3d 500, 502 (3d Cir. 1994) (where petitioner's wife was forced to undergo sterilization after she gave birth to a second child); *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1334 (4th Cir. 1995) (petitioner's wife, who was five months pregnant with their third child, was forced to have an abortion); *Li Zhi Guan v. Carroll*, No. 94-1759, 1995 WL 396914, at *1 (4th Cir. Jul. 7, 1995) (PRC officials, after realizing that petitioner's wife could not withstand the sterilization procedure, sought to sterilize petitioner).

129. *See* Moriarty, *supra* note 3, at 483.

cal opinion and international human rights and refugee law, the *Zhao* court should have granted Mr. Zhao asylum. By not recognizing petitioner's eligibility for asylum based on international human rights law and U.S. notions of political opinion, the *Zhao* court placed an unreasonable burden on Mr. Zhao, and ultimately forced him to return to a country where he would be sure to face persecution.

B. Petitioner Had a Well-Founded Fear of Being Persecuted

Although attempting to gain refugee status in the United States first requires an individual to prove that he or she actually expressed a political opinion, this alone is not sufficient. As the district court expressed in its reading of *Elias-Zacarias*,¹³⁰ a petitioner must also prove that the state would persecute him or her because of that political opinion.¹³¹ The district court found that Mr. Zhao did not adequately prove that he would be persecuted based on his political opinion upon his return to the PRC.¹³² More specifically, the district court found that "Petitioner faced punishment after the forced abortion, not because Petitioner's wife did not submit voluntarily to the procedure, but because of Petitioner's struggle with family planning officials in the hospital."¹³³

Despite the fact that petitioner might have indeed faced penalties for his struggle with an official upon his return to the PRC, it cannot be disputed that he also had a well-founded fear of being persecuted based upon his flagrant violation of the PRC's population control policy. Any analysis by the court that insinuates that Mr. Zhao was only in fear of being persecuted for arguing with a governmental official, ignores the fundamental truth and runs counter to the ideals of the Refugee Act.

Furthermore, according to the U.N. Handbook, asylum-seekers need not "identify the reasons" for the persecution they fear "in detail."¹³⁴ Because an asylum applicant does not have

130. *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992).

131. *See Shu-Hao Zhao v. Schiltgen*, No. C 93-3660 CW, 1995 WL 165562, at *6 (N.D. Cal. Mar. 31, 1995).

132. *See id.* at *7.

133. *Id.*

134. U.N. HANDBOOK, *supra* note 31, at 17.

to assert in detail his or her persecutor's motives,¹³⁵ petitioner had less of a burden to prove than the district court indicated in its decision. Moreover, simply because there exists one form of persecution that is not recognized by the statute should not preclude a finding that petitioner was also persecuted on account of his political opinion. In other words, believing that petitioner would be persecuted because of his scuffle with the Chinese authorities does not mean that he would not also be persecuted on account of his political opinion.¹³⁶ It should be sufficient for an asylum-seeker to prove that he or she would be persecuted upon his or her return to the PRC, by showing how and when other similarly situated individuals are persecuted in China. The *Zhao* court simply closed its eyes to the truth by inferring that there was not ample evidence that petitioner was sure to be persecuted upon his return to the PRC based on both his political actions and opinions. Extensive case law and statistics exist that indicate how individuals, like petitioner, are treated when they violate the PRC's population control policies.¹³⁷

For example, although the PRC's policies include such measures as education, propaganda and economic incentives, there is also evidence that its policies include "officially sanctioned forced abortions, mandatory sterilizations, implantation of IUDs, and 'coercive community pressures' to persuade pregnant women to terminate pregnancies."¹³⁸ In addition, cases such as *Shan Ming Wang v. Slattery*,¹³⁹ and *Li Zhi Guan v. Carroll*,¹⁴⁰ provide specific evidence that individuals are forced to have abortions in late months of pregnancy, that both men and women are forced to undergo sterilization procedures, are excessively fined for violation of the policy, and are assigned to dangerous and undesirable work in government-owned factories.¹⁴¹ These two cases do not stand alone. They are among many cases that demonstrate how men and women

135. See *Elias-Zacarias*, 502 U.S. at 483.

136. See *infra* text accompanying notes 142-45.

137. See *infra* notes 138-41.

138. Sharon K. Hom, *Female Infanticide in China: The Human Rights Specter and Thoughts Toward Another Vision*, 23 COLUM. HUM. RTS. L. REV. 249, 266 (1992).

139. 877 F. Supp. 133 (S.D.N.Y. 1995).

140. No. 94-1759, 1995 WL 396914, at *1 (4th Cir. Jul. 7, 1995).

141. See *Wang*, 877 F. Supp. at 135; *Guan*, 1995 WL 396914, at *1.

are forced and manipulated to undergo procedures to limit their ability to procreate. Cases and reports provide further validation that Mr. Zhao had great reason to fear persecution upon return to the PRC.

Furthermore, the facts of *Zhao* indicate that this well-founded fear of persecution was based on his and his wife's opposition to the PRC's population control policies. The district court erred in finding that petitioner did not adequately establish this requirement. First, petitioner and his wife were specifically pursued by officials prior to the forced abortion and sterilization procedures.¹⁴² Second, petitioner was fired from his place of employment, his eldest daughter was expelled from school, their home was raided and their personal belongings were confiscated.¹⁴³ Clearly, these facts indicate that the PRC intended to harm him and his wife specifically because of their opposition to its population control policy. In addition, it is clear that the PRC began persecuting petitioner well before he had the incident with the government official. Even if a court were to find that the PRC was partially motivated by Mr. Zhao's confrontation with a government official, this should not preclude a finding that he had a well-founded fear of being persecuted upon return to the PRC due to his ardent opposition to the one-couple, one-child policy.¹⁴⁴ As the Second Circuit in *Osorio v. INS* made clear, "the phrase 'persecution on account of the victim's political opinion,' does not mean persecution *solely* on account of the victim's political opinion."¹⁴⁵

The district court in *Zhao* also found that petitioner did not meet the specificity requirement to establish a well-founded fear of persecution because he did not provide any evidence that others who violate the PRC's family planning policy are not pursued and persecuted similarly.¹⁴⁶ Although the district

142. See *Shu-Hao Zhao v. Schiltgen*, No. C 93-3660 CW, 1995 WL 165562, at *3 (N.D. Cal. Mar. 31, 1995).

143. See *id.*

144. See *Osorio v. INS*, 18 F.3d 1017, 1028 (2d Cir. 1994).

145. See *id.* The *Osorio* court explained:

Nothing in *Elias-Zacarias* suggests . . . that where an applicant fears persecution for both political and religious beliefs, that refugee should be denied eligibility for political asylum. Similarly, where an applicant fears persecution for both his political and economic beliefs, nothing in *Elias-Zacarias* precludes a finding that the applicant is eligible for political asylum.

Id.

146. See *Zhao*, 1995 WL 165562, at *7. In its decision, the *Zhao* court conclud-

court was not original in its interpretation of this requirement, it is unreasonable to find that an individual does not have a well-founded fear of being physically harmed and persecuted because others are similarly punished. As one author observed:

[F]orced sterilization and [abortion are] invasive procedures that would constitute human rights abuses when performed without a woman's [or man's] consent; and a general policy of imposing such measures ought to be deemed persecution *Deprivations of fundamental human rights are not to be excused, simply because the government oppresses all equally.*¹⁴⁷

Moreover, the U.N. Handbook recognizes that an alien's fear may reasonably be inspired by the persecution of similarly situated persons and that persecution of members of an alien's social group can indicate that the alien himself or herself will suffer in the future.¹⁴⁸

The district court erroneously heightened the evidentiary threshold an asylum applicant must meet by finding that Mr. Zhao did not establish a well-founded fear of persecution based on his political opinion. Petitioner had a "well-founded" fear that he would be specifically persecuted based upon the voicing of his political opinion. Mr. Zhao's deliberate circumvention of the PRC's policy represented a political threat to the government's authority. It was this political threat, along with petitioner's defiance, that drove the PRC to persecute Mr. Zhao. Any analysis which reaches a contrary conclusion is intellectually dishonest. Even if the district court believed that petitioner did not have a "well-founded" fear of persecution

ed that "Petitioner [did] not assert, nor [did] he provide any evidence, that others who fled from family planning officials are not pursued and face no consequences." *Id.* Therefore, the court ultimately inferred that because others are persecuted similarly, Mr. Zhao did not have a well-founded fear of being persecuted. *See id.* at *8. This argument is also advanced by the *Zhao* court to demonstrate that persecution of an individual, based on general application of a law, does not indicate that he or she is persecuted on account of his or her political opinion. *See supra* notes 94-99 and accompanying text.

147. Rebecca O. Bresnick, *Reproductive Ability as a Sixth Ground of Persecution Under the Domestic and International Definitions of Refugee*, 21 SYRACUSE J. INT'L L. & COM. 121, 136 (1995) (quoting T. Alexander Aleinikoff, *The Meaning of "Persecution" in United States Asylum Law*, 3 INT'L J. REFUGEE L. 5, 23 (1991) (emphasis added)).

148. U.N. HANDBOOK, *supra* note 31, at 19.

essentially unique or proportionally different than others in his situation, this standard employed by the district court and other courts alike, is both illogical and inconsistent with the U.S. ideal of granting resettlement opportunities to those individuals fleeing persecution in other parts of the world.¹⁴⁹ Furthermore, this decision forced Mr. Zhao, and will ultimately, force other men and women who seek refugee status in the United States based on their opposition to population control policies, to return to an oppressive country that is protected by the fact that it persecutes all its citizens equally.

V. THE POSSIBILITY OF A SIXTH PRONG TO U.S. ASYLUM LAWS

United States asylum laws, and more specifically, the standard that defines persecution based upon political opinion, is replete with inconsistencies.¹⁵⁰ One solution to ridding ourselves of such disparities, is establishing a sixth category of persecution under the statutory definition of "refugee". This category would require the United States to grant refugee status to an individual seeking asylum based upon a well-founded fear of compulsory sterilization, as well as fear of other forms of punishment based on reproductive ability.

For example, in *Guo Chun Di v. Carroll*,¹⁵¹ the District

149. This analysis is cognizant of the fact that our limited national resources and current political trends preclude the United States from admitting an unlimited number of aliens. As Doris Meissner points out:

[R]efugee resettlement tends to stimulate increases in a refugee flow. While it meets the needs of particular refugees, [U.S.] experience has been that the humanitarian response of resettlement, an attempt at solutions, also creates the problem of generating more people in need. Over time a refugee flow loses much of its refugee character and becomes a migration stream. By this point, many of those on the move are seeking admission to the United States to join family members and find opportunity—the classic profile of an immigration rather than a refugee group. To continue to admit such persons and call them refugees is improper. . . . This brings into play a degree of public cynicism and hostility that makes it difficult to draw from our national reservoir of humanitarianism and good will.

Meissner, *supra* note 14, at 59.

Confronting and dealing with this anti-immigration sentiment, however, must be done in accordance with the statutory guidelines and the humanitarian ideals it sought to address. Furthermore, due to inconsistent and arbitrary judicial decisions, if immigration laws are to be further restricted, these restrictions should come from Congress and not from the courts.

150. See *supra* text accompanying notes 42-63.

151. 842 F. Supp. 858 (E.D. Va. 1994).

Court of Virginia, on appeal from a BIA decision denying petitioner Guo Chun Di asylum, found that people "who have a well-founded fear that they will be arrested and involuntarily sterilized because they oppose and refuse to obey their country's coercive population control policies may be granted asylum on the ground of 'persecution . . . on account of . . . political opinion.'"¹⁵² Petitioner Guo, in his deportation hearing, testified that he and his wife were forced to flee the PRC because they refused to stop having children, in clear opposition to China's policies, and consequently, they feared that they would be forcibly sterilized.¹⁵³ The district court found that Guo's refusal to comply with the PRC's policies and his subsequent flight to the United States, constituted political opinion.¹⁵⁴

Although the district court of Virginia was correct in finding that Guo's actions constituted an expression of his political opinion as statutorily defined, it could have also concluded that Guo, and others similarly situated, were persecuted on account of their reproductive ability.¹⁵⁵ The district court reasoned that the right to procreate was a basic liberty right constitutionally protected.¹⁵⁶ In comparing the right to procreate with other fundamental constitutional rights such as freedom of speech and freedom of religion, the district court "support[ed] the recognition of persecution on account of reproductive ability as a new ground for refugee status."¹⁵⁷

Although asylum claims, such as those of petitioners Zhao and Guo, may justly be categorized as persecution on account of political opinion,¹⁵⁸ judicial bodies and executive agencies have been inconsistent in such a finding.¹⁵⁹ Perhaps this is an indication that a new category of persecution should be added to the definition of "refugee".

The right to procreate, and more generally, reproductive freedom, deserves as much protection from the United States as that given to the five categories of persecution already rec-

152. *Id.* at 861.

153. *See id.* at 861-62.

154. *See id.* at 874.

155. *See* Bresnick, *supra* note 147, at 142.

156. *See id.*

157. *Id.*

158. *See supra* text accompanying notes 101-48.

159. *See supra* text accompanying notes 42-63.

ognized under the INA: race, religion, nationality, membership in a particular social group and political opinion. The United States zealously protects these five categories because it deems them fundamental rights which are entitled to the highest degree of protection. Because the United States regards such liberties as fundamental, it has been willing to extend such rights abroad. In other words, although aliens are not privileged with the rights afforded U.S. citizens, the United States, through its current asylum laws, extends aliens such liberties because it finds them to be so important that they are worthy of the highest protection. Race, religion, nationality, membership in a particular social group, and political opinion are so worthy of protection in the United States that the United States is willing to grant aliens asylum if they fear persecution in their home country on account of any of these characteristics. Likewise, reproductive freedom, and decisions relating to procreation, have long been recognized as deserving constitutional protection in the United States.¹⁶⁰ They are afforded constitutional protection because they involve "the most intimate and personal choices a person may make in a lifetime . . ."¹⁶¹ Reproductive freedom, like the five statutorily enumerated characteristics, "is fundamental to one's identity and is similarly a basis upon which a person may not be singled out for differential treatment, at least in the United States."¹⁶²

Therefore, because the right to procreate is vigorously protected in this country, as are race and political and religious freedom, a sixth category should be added to the definition of "refugee" under U.S. asylum laws. This category would grant asylum to those who fear that their country will either force them to reproduce or deprive them of such an opportunity. Such an amendment to U.S. law is a logical and just step, "consistent with both the evolution of the definition and the United States' historic concern for refugees."¹⁶³

160. See *supra* notes 110-12 and accompanying text.

161. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

162. Bresnick, *supra* note 147, at 143-44.

163. Mattie L. Stevens, Note, *Recognizing Gender-Specific Persecution: A Proposal to Add Gender as a Sixth Refugee Category*, 3 CORNELL J.L. & PUB. POL'Y 179, 179 (1993).

VI. CONCLUSION

In *Zhao v. Schiltgen*, the United States District Court for the Northern District of California erred in finding that Mr. Zhao did not meet his burden for seeking asylum as a refugee in the United States.¹⁶⁴ In using the BIA's decision in *In re Chang*¹⁶⁵ as binding precedent, the *Zhao* court found that Mr. Zhao's actions did not constitute "political opinion," and that petitioner did not establish a "well-founded" fear that he would be persecuted on account of political beliefs that were dissimilar to other individuals in his position.¹⁶⁶ The district court, however, erroneously applied inconsistent and unreasonable judicial interpretations of United States asylum law to the facts of Zhao's case. In addition, the *Zhao* court wrongly adopted an overly narrow definition of persecution and political opinion. By adopting such a strict standard, the court abandoned the humanitarian ideals behind U.S. asylum law and international refugee standards. The district court should have found that acting in direct opposition to the PRC's one-couple, one-child policy constituted political opinion as a matter of law. Furthermore, the district court should have realized that Mr. Zhao's fear of persecution based upon these beliefs was substantial, real, well-founded, and on account of his political opinion, despite the fact that other individual men and women in petitioner's situation are treated similarly. In essence, the district court neglected to embrace the real purpose behind U.S. asylum laws, which is

not to exclude people, but to make it possible for the United States to protect those people who need protection the most: individuals who have a well-founded fear that they will suffer persecution.¹⁶⁷

Shu-Hau Zhao was one of these people who needed protection. The *Zhao* court should have had the courage to grant Mr. Zhao asylum, and to add to the meaning of life, rather than cheapen it.

Finally, the difficulties inherent in applying our current

164. See *Shu-Hau Zhao v. Schiltgen*, No. C 93-3660 CW, 1995 WL 165562, at *8 (N.D. Cal. Mar. 31, 1995).

165. *In re Chang*, 20 I. & N. Dec. 38 (BIA 1989).

166. *Zhao*, 1995 WL 165562, at *4, *8.

167. Dietrich, *supra* note 21, at 71.

definition of "refugee" to those fleeing persecution on account of their opposition to their country's population control policies, is a strong indication that Congress should explicitly recognize such persecution as a sixth category under the Refugee Act. United States jurisprudential notions of liberty and the ideals behind our asylum laws demand nothing less.

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