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Guo Chun Di v. Carroll: The Refugee Status of Chinese Nationals Fleeing Persecution Resulting from China's Coercive Population Control Measures

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Measures

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International Law; Commercial Law; Law

NOTES

Guo Chun Di v. Carroll: The Refugee Status of Chinese Nationals Fleeing Persecution Resulting from China's Coercive Population Control Measures

I. Introduction

In the late 1970's, during a meeting with Chinese leaders, President Carter pressed his counterparts to lift China's restrictions on emigration. Without blinking an eye, the Chinese officials asked Carter how many million immigrants the United States might like. Carter diplomatically steered the discussion in less volatile directions.¹

The history of the U.S. immigration policy toward Chinese nationals is replete with inconsistencies that reveal the conflicting tensions inherent in U.S. immigration policy in general. In refugee law, these tensions arise when the humanitarian impulse confronts the realities of domestic and foreign policy agendas.

The first Chinese to immigrate to the United States were welcomed with curiosity and respect.² Immigration had been almost unrestricted in America as the new nation quickly expanded westward.³ However, by the 1860s America's attitude toward Chinese immigrants had soured.⁴ Unlike the European immigrants that flooded into the United States from the East, the Chinese were thought to be inassimilable.⁵ In 1882 Congress enacted the first Chinese Exclusion Act (Exclusion Act), which suspended immigration of Chinese, with minor

¹ Bruce Stokes, *Millions On The Move*, 23 NAT'L J. 2850, 2850 (1991).

² "In 1852 the governor of California claimed he wanted 'further immigration and settlement of the Chinese - one of the worthy classes of our newly adopted citizens.'" Harold Hongju Koh, *Bitter Fruit of the Asian Immigration Cases*, reprinted in 141 CONG. REC. S569, S569 (daily ed. Jan. 6, 1995).

³ See JOHN HIGHAM, *STRANGERS IN THE STRANGE LAND: PATTERNS OF AMERICAN NATIVISM* 8 (1988).

⁴ *Id.* "White workers assailed the Chinese for working too hard for too little, while the popular press vilified them as lairs [sic], criminals, prostitutes and opium addicts." *Id.*

⁵ *Id.* Justice Stephen Field wrote:

[T]hey remained strangers in the land, residing apart from themselves, and adhering to the customs and usages of their own country As they grew in numbers each year the people of the [West] Coast saw, or believed they saw . . . great danger that at no distant day that portion of our country would be overrun by them unless prompt action was taken to restrict their immigration.

Ping v. United States, 130 U.S. 581, 595 (1889).

exceptions, for the next sixty years.⁶

The political backlash toward free flowing immigration evidenced by enactment of the Exclusion Act was typical of the "inherent tension that runs through all political and legal decision making on refugee and asylum questions in the United States. The notion of refugee invokes sympathy. The possibility of resulting privileges, especially a potential right to resettle indefinitely, evokes suspicion that the unworthy are trying to claim that status."⁷ As one commentator noted: "Historically, the United States has led the world in willingness to admit immigrants. Yet for at least one hundred years that willingness has competed with widespread public sentiment in favor of limiting immigration flow."⁸ Immigration law has thus had to contend with these conflicting domestic attitudes toward the influx of immigrants to this country.

Refugee law in particular has had the additional handicap of developing against the backdrop of cold war politics.⁹ The adoption of the Refugee Act of 1980¹⁰ (Act) first introduced to American law a prospective, nonideological framework for refugee admissions.¹¹

⁶ 22 Stat. 58-60, 214 (1882). This statute and its progeny set the stage for *Ping v. United States*, the landmark Chinese Exclusion Case that established the plenary power of Congress and of the federal government over immigration. *Ping*, 130 U.S. at 609. Justice Field for the first time found the unrestricted power to control the nation's borders to be inherent in national sovereignty, both because the sovereignty would be diminished to the extent the government lacked exclusive jurisdiction over its own territory, and because such a power is necessary to guarantee the nation's security. *Id.* at 603-04.

⁷ THOMAS ALEINKOFF & DAVID MARTIN, IMMIGRATION: PROCESS AND POLICY 616 (1985); see also GERASSIMOS FOURLANOS, SOVEREIGNTY AND THE INGRESS OF ALIENS 120 (1986) (characterizing such tension as a "competition of principles; on the one hand sovereignty and its related concepts (territorial supremacy, self-defense, self-preservation) and, on the other hand, humanitarian principles deriving from both general international law and from treaties").

⁸ John Scanlan, *Regulating Refugee Flow: Legal Alternatives and Obligations Under The Refugee Act of 1980*, 56 NOTRE DAME L. REV. 618, 619 (1981). This tension is illustrated in the debates culminating in the passage of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified in scattered sections of 8 U.S.C.). For example, Senator Alan Simpson stated that the United States should accept "the hideous reality that there are many more people who want to come here than there is room or intent to accommodate them." 1989 CONG. Q. WEEKLY REP. 1785, 1786. Conversely, Senator Edward Kennedy stated that "[w]e can't afford to put a sign on the Statue of Liberty that says, 'No Vacancy.'" *Id.* at 1785.

⁹ Since World War II, the United States has admitted hundreds of thousands of refugees. DAVID CARLINER ET AL., THE RIGHTS OF ALIENS AND REFUGEES 46 (1990). As early as 1969, Senator Kennedy complained that the definition of a refugee remained rooted in a "cold war framework." 115 CONG. REC. 36,966 (1969). Refugees from countries hostile to the United States have invariably been accorded asylum while equally worthy persons fleeing friendly countries have met with far less success. Ira Kurzban, *A Critical Analysis of Refugee Law*, 36 U. MIAMI L. REV. 865 (1982).

¹⁰ Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.). See generally Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1981).

¹¹ "Refugee" is defined under the Act as:

any person who is outside any country of such person's nationality . . . who is unable to or unwilling to return to, and is unwilling or unable to avail himself or herself of the protection of, that country because of persecution or a well-

Nonetheless, the Act's implementation by the Executive Branch has allowed the intrusion of party politics and foreign relations objectives into asylum law to continue.¹²

In *Guo Chun Di v. Carroll*,¹³ the United States District Court for the Eastern District of Virginia granted a petition for a writ of habeas corpus to a Chinese national who had been denied asylum based on his claim that he feared persecution because of his opposition to the People's Republic of China's (PRC) coercive population control practices.¹⁴ In arriving at its decision, the court was forced to grapple with the "cacophony of administrative voices" reflecting the political "flip-flopping" that has characterized this area of refugee law.¹⁵ The court in *Guo Chun Di* abandoned this deluge of conflicting agendas in favor of what it determined to be the result warranted by the plain meaning of the Act.¹⁶

Part II of this note presents the facts, procedural history and holding of *Guo Chun Di v. Carroll*.¹⁷ In Part III, the note relates the applicable background law, including the Refugee Act of 1980 and its application to the issue of Chinese nationals fleeing that country's coercive family planning measures.¹⁸ Then, in Part IV, the note analyzes the holding in *Guo Chun Di* in light of decisions by the Board of Immigration Appeals (BIA or Board) and the decisions of Article III courts. The note explains that the court's decision in *Guo Chun Di*, while contrary to contemporaneous decisions by other courts, is consistent with controlling precedent, as well as a faithful interpretation of the Act.¹⁹ Finally, in Part V, this note concludes that the court's ruling in *Guo Chun Di* is significant both for its contribution to legal jurisprudence

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) (1988). See S. REP. NO. 590, 96th Cong., 2d Sess. 20 (1980) (stating that the refugee definition is based on an ideological and geographically neutral definition); H.R. REP. NO. 608, 96th Cong., 2d Sess., at 9 (1980) (stating that the definition of refugee "eliminates the geographical and ideological restrictions now applicable to conditional entrant refugees"); 126 CONG. REC. 4499 (1980) (remarks of Rep. Holtzman) (definition of refugee "finally eliminates the geographic and ideological restrictions"); 126 CONG. REC. 4507 (1980) (statement of Rep. Chisholm) (expressing hope that refugee admissions would not become tainted "with ideological, geographical or racial or ethnic biases" and criticizing exclusive admission of persons from communist or Middle Eastern countries).

¹² For critical discussions of the political nature of refugee law, see J. Michael Cavosie, *Defending the Golden Door: The Persistence of Ad Hoc and Ideological Decision Making in U.S. Refugee Law*, 67 IND. L.J. 411 (1992); Joan Fitzpatrick & Robert Pauw, *Foreign Policy, Asylum and Discretion*, 28 WILLAMETTE L. REV. 751 (1992); Kevin R. Johnson, A "Hard Look" at the Executive Branch's Asylum Decisions, 1991 UTAH L. REV. 279 (1991); and Note, *Prisoners of Foreign Policy: An Argument For Ideological Neutrality in Asylum*, 104 HARV. L. REV. 1878 (1991).

¹³ 842 F. Supp. 858 (E.D. Va. 1994).

¹⁴ *Id.* at 874. See *infra* notes 95-103 and accompanying text (describing China's population control policy).

¹⁵ See *infra* notes 51-74 and accompanying text.

¹⁶ See *infra* notes 75-92 and accompanying text.

¹⁷ See *infra* notes 21-92 and accompanying text.

¹⁸ See *infra* notes 93-205 and accompanying text.

¹⁹ See *infra* notes 206-53 and accompanying text.

on the issue of refugee status for Chinese nationals and for its illumination of the intrusion of politics into the arena of asylum law.²⁰

II. Statement of the Case

Guo Chun Di²¹ was a twenty-eight year old citizen of the PRC.²² Mr. Guo, along with approximately three hundred other Chinese nationals, fled his homeland aboard the vessel *Golden Venture*, which ran aground in New York Harbor on June 6, 1993.²³ Mr. Guo was rescued while attempting to swim ashore and was taken into custody by the Immigration and Naturalization Service (INS).²⁴ He was charged by INS with attempting to enter the United States without valid documents.²⁵ Mr. Guo asserted a claim for political asylum and was transferred to a state detention center in Winchester, Virginia, pending exclusion and deportation proceedings.²⁶

At a hearing before an immigration judge in Arlington, Virginia, Mr. Guo testified through an interpreter and explained the circumstances that led to his decision to flee the PRC.²⁷ He testified that after the birth of his first child, government planning officials ordered Mr. Guo's wife to report to a local hospital for a sterilization operation.²⁸ Because of her opposition to involuntary sterilization, Mr. Guo's wife fled from her home village to a distant city where relatives lived.²⁹ Government family planning officials then sent Mr. Guo a similar notice to report to a local hospital for sterilization.³⁰ Also opposed to this procedure, Mr. Guo fled his village and joined his wife in the city.³¹ While there, Mr. Guo received word that government officials had vis-

²⁰ See *infra* notes 254-70 and accompanying text.

²¹ Guo Chun Di's name is given in the Chinese fashion, that is, surname first.

²² *Guo Chun Di v. Carroll*, 842 F. Supp. 858, 861 (E.D. Va. 1994).

²³ *Id.* The *Golden Venture* was a cargo freighter piloted during its three month voyage by a crew of thirteen Indonesian nationals. See *Matter of G*, Int. Dec. 3215 (BIA 1993) (describing the *Golden Venture* incident). The vessel ran aground approximately 100 to 200 yards offshore of the Fort Tilden military reservation located on the Rockaway Peninsula in the Gateway National Recreation Area of Queens, New York. *Id.* According to newspaper accounts of several passengers interviewed, pandemonium erupted on board when the ship grounded. *Id.* Passengers spewed out of the cargo bay in which they had been cooped during the voyage and into the fifty-three degree waters. *Id.* Many of the ship's passengers who attempted to swim ashore suffered from hypothermia and collapsed upon reaching the beach. *Id.* At least seven of the passengers of the *Golden Venture* are reported to have died. Jane Fritsch, *Smuggled To New York: The Immigrants — Seven Die as Crowded Immigrant Ship Grounds Off Queens*, N.Y. TIMES, June 7, 1993, at A1. The pilots were later arrested and charged with smuggling. *Id.*

²⁴ *Guo Chun Di*, 842 F. Supp. at 861.

²⁵ *Id.*

²⁶ *Id.* See 8 U.S.C. § 1226 (1988 & Supp. V 1993) (setting forth exclusion and deportation procedure).

²⁷ *Guo Chun Di*, 842 F. Supp. at 861.

²⁸ *Id.* at 861-62. See *infra* notes 93-108 and accompanying text (discussing the PRC's population control policy).

²⁹ *Guo Chun Di*, 842 F. Supp. at 862.

³⁰ *Id.*

³¹ *Id.*

ited his home, confiscated his and his wife's personal property, and destroyed their home.³² Mr. Guo testified that upon receiving this information he decided to leave the PRC and come to the United States.³³

Mr. Guo testified that in addition to his one child, he wished to have two more children.³⁴ He feared that family planning officials in the PRC would not allow this to happen.³⁵ Mr. Guo further testified that he feared that if returned to the PRC he would be imprisoned for his prior noncompliance and forced to undergo the government-ordered sterilization.³⁶

The immigration judge found Mr. Guo to be truthful and accepted his account of the circumstances that led to his decision to flee the PRC.³⁷ Nonetheless, the immigration judge ruled that Mr. Guo was "not a 'refugee' as that term is defined by the law."³⁸ Therefore, the immigration judge ruled that Mr. Guo was not eligible for asylum in the United States; rather he was subject to exclusion and deportation.³⁹

The immigration judge relied on *Matter of Chang*,⁴⁰ a decision by the BIA⁴¹ holding that a coercive population control policy that includes sterilization does not constitute "persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."⁴² Mr. Guo appealed the decision of the immigration judge to the BIA on the ground that *Matter of Chang* had been

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* An excerpt from Mr. Guo's testimony before the immigration judge follows:

Q: And can you say exactly why you wanted to leave China?

A: Because I feared that China has no freedom. Because I only have one child, I want to have two more child, but they don't let me have. If . . . I afraid that if they find me, they will took me to get sterilize operation.

Q: Why did you want to come to the United States instead of some other country?

A: Because I heard about the U.S.A. is a freedom country.

Q: What do you think will happen to you if you are sent back to China?

A: They . . . first they will sent me to the jail and then they will force me to do the sterilize operation.

Id.

³⁷ *Id.*

³⁸ *Id.* (quoting the opinion of the immigration judge); see *infra* notes 109-17 and accompanying text (discussing the definition of "refugee" under the law).

³⁹ *Guo Chun Di*, 842 F. Supp. at 862.

⁴⁰ Int. Dec. 3107 (BIA 1989).

⁴¹ Unless modified by the BIA or the Attorney General of the United States, decisions of the BIA are binding upon immigration judges. See 8 C.F.R. § 3.1(g) (1994).

⁴² *Guo Chun Di*, 842 F. Supp. at 862 (quoting *Matter of Chang*, Int. Dec. 3107 (BIA)). See also 8 U.S.C. § 1101(a)(42)(A) (1988) (defining "refugee" to mean "any person who is outside any country of such person's nationality . . . who 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 . . .").

invalidated by certain federal regulations.⁴³

The Board of Immigration Appeals rejected Mr. Guo's appeal, noting that *Chang* was still valid controlling administrative precedent.⁴⁴ The Board ruled that the federal regulations cited by Mr. Guo "were not codified and [had] no force or effect."⁴⁵ Mr. Guo then petitioned the District Court for the Eastern District of Virginia for a writ of habeas corpus.⁴⁶

The District Court, with Judge Ellis presiding, granted Mr. Guo's petition for writ of habeas corpus.⁴⁷ In so doing, the court held that none of the several inconsistent administrative pronouncements regarding the ability of aliens to seek asylum based on opposition to coercive population control policies were entitled to judicial deference.⁴⁸ The court further found that Mr. Guo had met the statutory criteria for political asylum by proving that he had fled his country to avoid arrest, imprisonment, and involuntary sterilization because he and his wife opposed and would not obey their country's policy of coercive population control.⁴⁹ The court found that Mr. Guo had made an overt manifestation of his opposition to the population control policy and that he had been persecuted for expressing this opposition.⁵⁰

The District Court reviewed the "regulatory saga"⁵¹ of the executive branch's position on the refugee status of Chinese nationals fleeing the PRC's coercive population control measures.⁵² The court ruled that these pronouncements amounted to "an administrative

⁴³ *Guo Chun Di*, 842 F. Supp. at 862; see *infra* notes 118-53 (discussing federal regulations Mr. Guo asserted had invalidated *Chang*).

⁴⁴ *Guo Chun Di*, 842 F. Supp. at 862. The BIA has consistently applied *Chang* in considering applications for asylum filed by aliens who claim they fear persecution on the basis of their opposition to the PRC's population control policies. See, e.g., *Matter of G*, Int. Dec. 3215 (BIA 1993) (reaffirming reliance upon *Chang*).

⁴⁵ *Guo Chun Di*, 842 F. Supp. at 862.

⁴⁶ *Id.* "While the Courts of Appeal have 'sole and exclusive' jurisdiction over all final orders of deportation, 8 U.S.C. § 1105a(a) (1988), district courts have jurisdiction over habeas corpus petitions filed by aliens in custody who, after exhausting their administrative remedies, seek review of an exclusion order." *Guo Chun Di*, 842 F. Supp. at 864 n.7 (citing *Castillo-Magallon v. INS*, 729 F.2d 1227, 1229 (9th Cir. 1984)).

The filing of the petition, by itself, did not halt INS deportation and exclusion proceedings against Mr. Guo. *Id.* at 864. In addition to filing the petition, Mr. Guo filed a request for immediate and preliminary injunctive relief in the Eastern District Court of Virginia. *Id.* at 864-65. Prior to oral argument, the parties stipulated that the execution of the INS order of exclusion and deportation would be stayed. *Id.* at 865. The court endorsed the stipulation and postponed resolution of Mr. Guo's request for injunctive relief. *Id.* At a later date, the court, pursuant to FED. R. CIV. P. 65(a)(2), ordered that the merits of the case should be accelerated and consolidated with the consideration of the preliminary injunction. *Id.*

⁴⁷ *Guo Chun Di*, 842 F. Supp. at 874.

⁴⁸ *Id.* at 867.

⁴⁹ *Id.* at 873.

⁵⁰ *Id.*

⁵¹ *Id.* at 863.

⁵² *Id.* at 862-70.

cacophony undeserving of judicial deference.”⁵³ The court noted that while the BIA had consistently applied the principle elucidated in *Matter of Chang* to all asylum claims based on opposition to a country’s coercive family planning policies,⁵⁴ this was “only one of many Department of Justice (DOJ) pronouncements” on the issue.⁵⁵ The court pointed out that the most recent pronouncement was a final rule signed in the waning days of the Bush Administration by then Attorney General William Barr (January 1993 Rule),⁵⁶ the preamble of which specifically stated that “one effect of this rule is to supersede the decision of *Matter of Chang* . . . to the extent that it held that the threat of forced sterilization pursuant to a government family planning policy does not give rise to a well-founded fear of persecution on account of political opinion”⁵⁷ The court noted that it was “especially significant” that this was a pronouncement by the Attorney General who has the authority to overrule BIA decisions.⁵⁸

The court addressed, yet failed to satisfactorily resolve, the question of whether the January 1993 Rule, which was withdrawn from the *Federal Register* three days prior to its publication,⁵⁹ ever became effective.⁶⁰ The court considered the factors that govern whether a unpub-

⁵³ *Id.* at 867 (“To hold otherwise would be judicial abdication, not principled judicial deference.”).

⁵⁴ *Id.* at 867 & n.11 (citing 8 C.F.R. § 3.1(g) (1993) (“decisions designated by the Board shall serve as precedents in all proceedings involving the same issue or issues”)); *Matter of G*, Int. Dec. 3215 (BIA) (applying *Chang* in denying PRC residents asylum based on opposition to coercive family planning practices); accord *Matter of Tsun*, A 71 824 320 (BIA June 17, 1993); *Matter of Chu*, A 71 824 281 (BIA June 7, 1993).

⁵⁵ *Guo Chun Di*, 842 F. Supp. at 867; see *infra* part III.B. (discussing regulatory history of refugee status of Chinese nationals fleeing that country’s population control measures).

⁵⁶ See *infra* notes 146-51 and accompanying text.

⁵⁷ *Guo Chun Di*, 842 F. Supp. at 867 (alteration in original).

⁵⁸ *Id.* (citing 8 C.F.R. § 3.1(g) (1993) (stating that decisions of the Board shall be binding in the administration of the Act “[e]xcept as they may be modified or overruled by . . . the Attorney General”)); see also *Matter of Anselmo*, Int. Dec. 3105 (BIA 1989) (“[T]he Board and immigration judges . . . only have such authority as is created and delegated by the Attorney General”).

⁵⁹ See *infra* notes 148-51 and accompanying text.

⁶⁰ *Guo Chun Di*, 842 F. Supp. at 867-68. Both Mr. Guo and INS classified the January 1993 Rule as a substantive, as opposed to interpretive, rule. *Id.* But see *id.* at 868 n.12 (noting that the rule “could arguably be classified as an interpretive rule setting forth a general statement of policy”).

“Federal Register publication is required for substantive rules of general applicability, as well as for statements of general policy or interpretations of general applicability formulated and adopted by an agency.” *Id.* at 868 (citing 5 U.S.C. § 552(a)(1)(D) (1988) (Supp. 1992) and *Knutzen v. Eben Ezer Lutheran Hous. Ctr.*, 815 F.2d 1343, 1351 (10th Cir. 1987) (noting that the APA requires publication of rules and public statements if such rules or public statements constitute change from existing law, policy or practice)). However, the court noted that “failure to publish a rule is not necessarily fatal.” *Id.* (citing *Caribbean Produce Exch. v. Secretary of Health and Human Serv.*, 893 F.2d 3, 7 (1st Cir. 1989); and *Welch v. United States*, 750 F.2d 1101, 1111 (1st Cir. 1985) (“[F]ailure to publish in the Federal Register does not automatically invalidate an administrative regulation or guideline.”)). *But cf. Jerri’s Ceramic Arts v. Consumer Prods. Safety Comm’n.*, 874 F.2d 205, 208 (4th Cir. 1989) (indicating that a substantive rule not published, as required under the Federal Hazardous Substances Act, must be set aside).

lished agency interpretation should nonetheless be given effect⁶¹ and concluded that under these factors "the unpublished [January] 1993 Rule is arguably entitled to legal effect."⁶²

Regardless, the court pointed out that "there [was] no doubt" that an interim rule issued in 1990 (January 1990 Interim Rule),⁶³ which also contradicted *Chang*, was validly published and in effect from January through June 1990.⁶⁴ The court recognized that "this validly published and promulgated rule reflect[ed] the considered opinion of the Attorney General to construe Section 1101(a)(42)(A) to permit granting asylum" in cases of applicants fleeing persecution under the coercive population control measures of the PRC.⁶⁵ However, the court conceded that "there is significant doubt whether the [January] 1990 Interim Rule [was] either binding on BIA judges or affected the legal force of *Chang*."⁶⁶

The court also characterized an Executive Order issued by President Bush in 1990 (1990 Executive Order)⁶⁷ as having "underscor[ed] the correctness of the Attorney General's construction of the Act" by directing the Attorney General and Secretary of State to give "en-

⁶¹ *Guo Chun Di*, 842 F. Supp. at 868. The court cites *Nguyen v. United States*, 824 F.2d 697 (9th Cir. 1987) for the proposition that

courts should consider a variety of factors in determining whether a non-published agency interpretation should nonetheless be given legal effect, including (i) whether the unpublished interpretation affects individuals' substantive rights, (ii) whether the interpretation deviates from the plain meaning of the statute or regulation at issue, and (iii) whether the interpretation limits administrative discretion.

Guo Chun Di, 842 F. Supp. at 868 (citing *Nguyen*, 824 F.2d at 701).

⁶² *Guo Chun Di*, 842 F. Supp. at 868. The court pointed out that the January 1993 Rule: (i) impacts Mr. Guo's substantive rights, *id.* at 868 n.15 (citing *Nguyen*, 824 F.2d at 701 (stating that an unpublished rule affects substantive rights when it changes existing rules, policy, or practice)); (ii) deviates from other agency interpretations of 8 U.S.C. § 1101(a)(42)(A), *id.*; and (iii) restricts the discretion of immigration officers in classifying an individual as a refugee, *id.* (citing *Nguyen*, 824 F.2d at 701).

On the other hand, the court conceded that "the status and legal effect of the [January] 1993 Rule remain unclear." *See id.* at 868 & n.16. The court determined that it need not resolve this issue in order to reach a decision in the case at bar. *Id.* at 868 n.16. *Cf. Xin-Chang v. Slattery*, 859 F. Supp. 708 (S.D.N.Y. 1994) (holding that the unpublished January 1993 Rule had binding legal effect upon the BIA).

⁶³ *See infra* note 137 and accompanying text.

⁶⁴ *Guo Chun Di*, 842 F. Supp. at 869. *See* 55 Fed. Reg. 2803 (1990). *See also infra* notes 137-42 and accompanying text.

⁶⁵ *Guo Chun Di*, 842 F. Supp. at 869.

⁶⁶ The court acknowledged that "[t]hough it contradicted *Chang*, the January 1990 Interim Rule likely did not erase or overrule *Chang*, for it was apparently an interpretive rule of limited legal force." *Id.* *See* 55 Fed. Reg. 2803, 2804 (1990) ("These amendments are interpretive rules and general statements of policy for establishing statutory eligibility for asylum . . .").

To have the force of law, a regulation "must be a substantive or legislative-type rule . . . which has been issued by the agency pursuant to statutory authority and promulgated in accordance with the procedural requirements of the Administrative Procedure Act." *Morton v. Ruiz*, 415 U.S. 199, 232 (1974). *See also Chrysler Corp. v. Brown*, 441 U.S. 281, 301 (1979); *Jerri's Ceramic Arts v. Consumer Prods. Safety Comm'n.*, 874 F.2d 205 (4th Cir. 1989).

⁶⁷ *See infra* note 138 and accompanying text.

hanced consideration" to asylum claims related to an applicant's opposition to the PRC's policy of forced abortion or coercive sterilization.⁶⁸

Finally, the court stated that "it is worth noting that four Attorneys General in three administrations have made pronouncements" regarding the refugee status of immigrants fleeing the PRC population control policy.⁶⁹

The court in *Guo Chun Di v. Carroll* recognized the "well established principle" dictated by the Supreme Court in *Chevron v. Natural Resources Defense Council*⁷⁰ that an agency's interpretation of its statute or regulation is entitled to considerable judicial deference.⁷¹ Nonetheless, the court held that judicial deference was not warranted for the agency construction of Section 1101(a)(42)(A) expressed in *Matter of Chang*.⁷² In reaching this conclusion, the court relied upon a line of decisions limiting the appropriateness of judicial deference to those instances in which an agency's interpretation of its own statutes and regulations has been consistent.⁷³ The court concluded that on the question of statutory interpretation of Section 1101(a)(42)(A), "there [was] a cacophony of administrative voices, each singing a different tune in a different key" and that therefore "[d]eference to one voice or one tune in these circumstances [was] unwarranted."⁷⁴

The court then considered, independently of past administrative interpretations of Section 1101(a)(42)(A), whether Mr. Guo met the definition of "refugee" so as to qualify for asylum under the Act.⁷⁵ The

⁶⁸ *Guo Chun Di*, 842 F. Supp. at 869. *But see* Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1498, 1510-11, (11th Cir.) (holding that an Executive Order that set forth procedures for the interdiction of Haitian migrants on the high seas did not give rise to a private cause of action), *cert. denied*, 112 S. Ct. 1245 (1992).

⁶⁹ *Guo Chun Di*, 842 F. Supp. at 870. Attorney General Edwin Meese in August 1988 "promulgated a series of policy guidelines classifying opposition to coercive population control measures as 'political opinion' sufficient" for refugee status. *Id.*; *see infra* note 119 and accompanying text. Attorney General Richard Thornburgh then issued the January 1990 Interim Rule "which implicitly overruled *Chang*." *Guo Chun Di*, 842 F. Supp. at 870; *see infra* note 137 and accompanying text. Attorney General William Barr signed the January 1993 Rule "that was explicitly intended to overrule *Chang*." *Guo Chun Di*, 842 F. Supp. at 870; *see infra* note 147 and accompanying text. Finally, in December 1993 current Attorney General Janet Reno declined an opportunity to resolve the conflict between *Chang* and the other conflicting DOJ interpretations of Section 1101(a)(42)(A). *Guo Chun Di*, 842 F. Supp. at 870; *see infra* notes 152-53 and accompanying text.

⁷⁰ 467 U.S. 837 (1984); *see infra* notes 157-61 and accompanying text.

⁷¹ *Guo Chun Di*, 842 F. Supp. at 865-66.

⁷² *Id.* at 870.

⁷³ *Id.* at 866 (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987); *General Elec. Co. v. Gilbert*, 429 U.S. 125, 143 (1976); *Ehlert v. United States*, 402 U.S. 99, 105 (1971); *Wilcox v. Ives*, 864 F.2d 915, 924-25 (1st Cir. 1988); *United Transp. Union v. Dole*, 797 F.2d 823, 829 (10th Cir. 1986); and *Allen v. Bergland*, 661 F.2d 1001, 1004 (4th Cir. 1981)).

⁷⁴ *Guo Chun Di*, 842 F. Supp. at 870. The Court also noted that, "in any event, 'the agency's preferred interpretation is only one input in the interpretational equation.'" *Id.* at 870 n.25 (citing *United Transp. Union v. Dole*, 797 F.2d 823, 829 (10th Cir. 1986) and *Zuber v. Allen* 396 U.S. 168, 192 (1969)).

⁷⁵ *Id.* at 870-71.

court separated its inquiry into two stages: (1) "whether [Mr. Guo's] opposition to coercive population control practices in the PRC constitut[ed] a 'political opinion' within the meaning of 8 U.S.C. § 1101(a)(43)(A);" and (2) "whether [Mr. Guo had] a particularized, well-founded fear of persecution based on this purported political opinion."⁷⁶

The court concluded that "there can be little doubt that the phrase 'political opinion' encompasses an individual's view regarding procreation."⁷⁷ The court began by noting that the term "political" is commonly understood to mean "of or pertaining to the exercise of rights or privileges"⁷⁸ The court cited the Supreme Court's decision in *Skinner v. Oklahoma*⁷⁹ for the proposition that "the right to bear children is 'one of the basic civil rights of man.'"⁸⁰ Particularly, the court emphasized that *Skinner* viewed involuntary sterilization as an egregious infringement of this fundamental right:⁸¹

The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands, it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.⁸²

The court analogized the right to procreate, which is protected under the Bill of Rights,⁸³ to other fundamental rights that are well recognized as legitimate grounds for asylum.⁸⁴ In addition, the court ruled that "it [was] beyond dispute that the expression of one's views regarding issues related to the right to procreate is 'political'.⁸⁵

⁷⁶ *Id.* at 871-72.

⁷⁷ *Id.* at 872.

⁷⁸ *Id.* (quoting BLACK'S LAW DICTIONARY 1158 (6th ed. 1991)).

⁷⁹ 316 U.S. 535 (1942) (invalidating state statute allowing for involuntary sterilization of habitual offenders).

⁸⁰ *Guo Chun Di*, 842 F. Supp. at 872 (quoting *Skinner*, 316 U.S. at 541); accord *Carey v. Population Serv. Int'l*, 431 U.S. 678, 685 (1977); *Roe v. Wade*, 410 U.S. 113, 154-56 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965). "While the right to procreate is not absolute, intrusions upon this fundamental right are looked upon with disfavor." *Guo Chun Di*, 842 F.Supp. at 872 (citing *Carey*, 431 U.S. at 687 ("[T]he teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.")).

⁸¹ *Guo Chun Di*, 842 F. Supp. at 872 (citing *Skinner*, 316 U.S. at 541).

⁸² *Skinner*, 316 U.S. at 541.

⁸³ See *Carey*, 431 U.S. at 684-85 ("The decision whether or not to beget or bear a child is at the very heart of [a] cluster of constitutionally protected choices."); *Griswold*, 381 U.S. at 484-86.

⁸⁴ *Guo Chun Di*, 842 F. Supp. at 872 (discussing asylum based upon freedom of religion and freedom of speech).

⁸⁵ *Id.* (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791, 2815 (1992) (expressing hesitation to overrule *Roe v. Wade*: "[W]hatever the premises of opposition may be, only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure . . ."). "In addition, opposition to certain aspects of procreative rights and privileges may involve the exercise of protected political rights and privileges."

The court held that the right to procreate and the expression of that right are analogous to other fundamental rights that may support an asylum claim based upon "persecution on the basis of political opinion."⁸⁶ Therefore, Mr. Guo's opposition to the PRC's family planning policies constituted a "political opinion" within the meaning of Section 1101(a)(42)(A).⁸⁷

Finally, the court in *Guo Chun Di* considered whether Mr. Guo had a "well-founded fear of persecution" because of his "overt manifestation of a political opinion."⁸⁸ The court found that "[t]here can be no question that [Mr. Guo] made an 'overt manifestation' of his opposition to the PRC's 'one couple one child' policy, and that [he] has been persecuted for expressing this opposition."⁸⁹ Thus, the court ruled that Mr. Guo had established prima facie eligibility for asylum.⁹⁰ The court therefore stated that Mr. Guo was, in essence, "one of the 'huddled masses . . . yearning to be free' who [had] established statutory eligibility for asylum,"⁹¹ and that it was now within the discretion of the Attorney General to grant or deny his asylum request.⁹²

III. Background Law

A. China's Population Control Policy

For Communist China, population has always played an important role in the Communist Party's ideology. In the 1950s Communist Party Chairman Mao Zedong officially encouraged people to have children as part of their civic duty because, as one analyst wrote, Mao "regarded each newborn Chinese as a set of productive hands waiting to work"⁹³ Under this policy, the population growth rate in the PRC increased from 1.6 percent in 1949 to 2.8 percent in 1965.⁹⁴ In 1979

Id. (citing *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993) (discussing balancing of rights of abortion protesters and women seeking abortions)).

⁸⁶ *Id.* at 873.

⁸⁷ *Id.*

⁸⁸ *Id.* (citing *De Valle v. INS*, 901 F.2d 787, 797 (9th Cir. 1990) and *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1287 (9th Cir. 1984)).

⁸⁹ *Id.* The court found that Mr. Guo and his wife's opposition to the PRC's family planning policies had been openly expressed by their refusal to comply with sterilization orders and by fleeing their village in response to those orders. *Id.* The government's response to these actions was to confiscate the couple's personal property and to destroy their home. *Id.* The court held that "it simply defies logic to contend that these governmental actions do not amount to persecution." *Id.*

⁹⁰ *Id.* at 874.

⁹¹ *Id.* (citing *E. LAZARUS, NEW COLOSSUS* (alteration in original)).

⁹² *Id.* (citing 8 U.S.C. § 1158(a) (1988) and *M.A. v. INS*, 899 F.2d 304, 307 (4th Cir. 1990) (en banc)); see *infra* notes 112-13 and accompanying text (discussing the discretionary aspect of a grant of asylum).

⁹³ Steven Mufson, *Population Curbs Slip in China, 1.2 Billion Reached Five Years Early*, WASH. POST, Feb. 14, 1995, at A17. Chairman Mao was the leader of the Communist Party of China in 1949 when the post-revolution People's Republic of China was founded. See P.R.C. CONST. pmb1.

⁹⁴ Mufson, *supra* note 93, at A17.

Mao revised his strategy and launched the PRC's "one couple, one child" policy as the centerpiece of an ambitious plan to contain China's population at 1.2 billion by the year 2000.⁹⁵

Population control is considered one of the most important objectives on China's Communist Party agenda. Article Twenty-Five of the Constitution of the PRC, which was adopted on December 4, 1982, provides: "The state promotes family planning so that population growth may fit the plans for economic and social development."⁹⁶ Chinese leaders consider their policy of "one couple, one child" a fight for national, as well as party, survival. The PRC's Minister of Family Planning explained:

The size of a family is too important to be left to the personal decision of a couple. Births are a matter of state planning, just like other economic and social activities, because they are a matter of strategic concern. A couple cannot have a baby just because it wants to. That cannot be allowed if China is to stabilize its population and keep it from doubling and redoubling as it might.⁹⁷

As one observer noted:

Faced with strong popular resistance, Peking resorts to even stronger measures. To this struggle, it brings the full powers of a totalitarian state, operating without fear of political opposition. There is no check on official abuse, no outlet for human rights complaints and no forum for public debate of this policy.

What emerges from more than 200 interviews spaced over three years with officials, doctors, peasants and workers in almost two-thirds of China's 29 main subdivisions is the story of an all-out government siege against ancient family traditions and the reproductive habits of a billion people.⁹⁸

China's family planning policy is backed by the full organizational might of the Communist Party.⁹⁹ In the PRC, every citizen belongs to

⁹⁵ *Id.* The population control program in China is guided by a joint directive of the Chinese Communist Party and the State entitled "On the Further Implementation of Family Planning Work" issued in 1982. Matter of Chang, Int. Dec. 3107 (BIA 1989) (citing Letter from Library of Congress to Immigration and Naturalization Service (Nov. 23, 1987) [hereinafter Library of Congress Letter]). The policy provides that citizens are allowed only one child per couple, with limited exceptions when permission is obtained. *Id.* For a comprehensive history of the establishment and implementation of the "one couple, one child" policy, see JUDITH BANISTER, CHINA'S CHANGING POPULATION 185-226 (1987).

The technical policy of birth control is formulated by the State Family Planning Commission with the approval of the leadership of the Party Central. Its principal content is: "Those women who have already given birth to one child must be fitted with IUD's, and couples who already have two children must undergo sterilization by either the husband or the wife. Women with unplanned pregnancies must adopt remedial measures as soon as possible."

Id. at 212. "Remedial measures" is a euphemism used by the Chinese government officials for abortion. *Id.* at 208. China's population reached 1.2 billion in 1995, five years ahead of the government's goal. Mufson, *supra* note 93, at A17.

⁹⁶ P.R.C. CONST. art. XXV.

⁹⁷ Michael Weisskopf, *One Couple, One Child: Abortion Policy Tears at China's Society*, WASH. POST, Jan. 7, 1985, at A1.

⁹⁸ *Id.*

⁹⁹ *Id.*

a unit, which is a workplace or rural governing body.¹⁰⁰ Every unit has a birth control committee headed by Party officials.¹⁰¹ These officials control citizens' salaries; their eligibility to occupy housing space and to grow crops; their educational opportunities; as well as their ability to marry and have children.¹⁰² Peking, in order to insure compliance with the policy, distributes cash bonuses to local officials only if their units observe birth control limits.¹⁰³

Opposition to the "one couple, one child" policy is considered political dissent in the PRC and is dealt with severely.¹⁰⁴ This reality is evident in a series of letters by the Population Control Office of a bearing factory in Dalian, China. The letters were sent to a Chinese woman studying in the United States who had learned she was pregnant with her second child:

Birth control is one of our nation's basic policies.

Second children are absolutely banned. If a woman insists on having a second child, all the staff and line workers of her factory will be punished. No salary increases will be allowed, and the factory will be disqualified from production contests. She herself will be placed on probation, and receive only minimum living expenses. You absolutely cannot afford these political and financial losses Do not lose anymore time. Fix this problem as soon as possible.

If you come back at the end of this year pregnant, even if you are eight or nine months along, you will absolutely not be allowed to have

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*; 1985 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, 99th Cong., 2d Sess. 740 (1986) [hereinafter 1985 COUNTRY REPORTS]

Extensive regulation of individual and family life is one of the distinctive features of the Chinese sociopolitical system. For most Chinese (particularly urban residents), life revolves around the work unit, which provides not only employment, but housing, ration coupons, permission to marry and have a child, and other aspects of ordinary life

Id.

¹⁰³ Weisskopf, *supra* note 97, at A1; Matter of Chang, Int. Dec. 3107 (BIA 1989) (citing Library of Congress Letter, *supra* note 95) ("Economic sanctions, peer pressure and propaganda are used to insure compliance.").

When the local cadres report failure, they are publicly criticized and admonished to stop waivering in their determination to succeed. Always speaking in euphemisms, the media urge the local cadres to achieve the ends no matter what the means required. Indeed, when it comes to family planning program abuses . . . the roots of coercion originate from the top.

BANISTER, *supra* note 95, at 205.

¹⁰⁴ See BANISTER, *supra* note 95, at 200.

To refuse to control fertility or to encourage others to refuse is sometimes treated as a crime against the state. . . . Most married people of reproductive age in China must control their fertility to avoid being guilty of an ideological offense in the eyes of the government. Those who would rather not practice birth control find that they must do so, or at least pretend to, in order to avoid political reprisals.

Id. "[F]amily planning must be understood as the implementation of party discipline and state law." Director of State Family Planning Commission quoted in Jiankang Bao [Health Gazette, Beijing], Feb. 27, 1983, at 1.

your baby.¹⁰⁵

The Chinese government has consistently denied supporting the use of force to obtain compliance with birth quotas.¹⁰⁶ However, Provinces are allowed to make their own regulations regarding enforcement of the population control laws so long as overall birthrates match the state imposed goals.¹⁰⁷ Overwhelming evidence indicates that the "one couple, one child" policy is enforced by local officials through violent methods that include mandatory sterilization, forced abortions and infanticide.¹⁰⁸

B. *The Refugee Act of 1980*

Congress added the definition of refugee to U.S. law by means of the Refugee Act of 1980.¹⁰⁹ In so doing, Congress intended to conform the Immigration and Nationality Act (INA) to the United Nations Protocol Relating to the Status of Refugees¹¹⁰ to which the United States acceded in 1968.¹¹¹

¹⁰⁵ Stephen Mosher, *The Long Arm of 'One-Child' China*, WASH. POST, April 10, 1988, at B1. Stephen Mosher, the journalist who published this and numerous other articles about the policy after an extended visit to China in the early 1980s, was branded by Chinese authorities as an "international spy." See Stephen Mosher, *'One Family, One Child': China's Brutal Birth Ban; For Chinese Women, It's Abortion or Sterilization*, WASH. POST, Oct. 18, 1987, at D1.

¹⁰⁶ *Chang*, Int. Dec. 3107 (citing Library of Congress Letter, *supra* note 95).

¹⁰⁷ *Id.*

¹⁰⁸ "Although coercive family planning is contrary to official Chinese policy, there have been numerous reports of coercive birth control practices, including forced abortions and sterilization . . ." 1985 COUNTRY REPORTS, *supra* note 102. See, e.g., STEVEN MOSHER, A MOTHER'S ORDEAL: ONE WOMAN'S FIGHT AGAINST CHINA'S ONE-CHILD POLICY (1993); JOHN AIRD, SLAUGHTER OF THE INNOCENTS: COERCIVE BIRTH CONTROL (1990); BANISTER, *supra* note 95; Nicholas Kristof, *China's Crackdown on Births: A Stunning, and Harsh, Success*, N.Y. TIMES, April 25, 1993, at A1; Steven Mosher, *'One Couple, One Child': China's Brutal Birth Ban; For Chinese Women, Its Abortion or Sterilization*, WASH. POST, Oct. 18, 1987, at D1; Weisskopf, *supra* note 97; Michael Weisskopf, *China Orders Sterilization for Parents*, WASH. POST, May 28, 1983, at A1. These methods are referred to in official jargon as "technical measures." BANISTER, *supra* note 95, at 201 ("The phrase 'technical measures' is a euphemism for required sterilization, abortion and IUD insertion."). Implementation of "technical measures," rather than education or voluntary compliance, is the main criterion for judging the achievements of local family planning officials. *Id.* at 202.

¹⁰⁹ Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

¹¹⁰ United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268 [hereinafter U.N. Protocol]. Article 1.2 of the Protocol defines a refugee as one who, "owing to 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 . . ." U.N. Protocol, *supra*, at art. 1.2.

Article 1.2 of the Protocol largely incorporated the definition of refugee contained in Article 1A(a) of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6261, 189 U.N.T.S. 137, to which the United States was not a party.

¹¹¹ H.R. REP. NO. 781, 96th Cong., 1st Sess. 4, 14-15 (1979), *reprinted* in 1980 U.S.C.C.A.N. 141, 144, 154-55; H.R. REP. NO. 608, 96th Cong., 1st Sess. 9-10 (1979); Matter of Acosta, 19 I. & N. Dec. 211 (BIA 1985).

Because Congress intended for the definition of refugee under the Refugee Act of 1980 to conform to the U.N. Protocol, the BIA has recognized the appropriateness of considering international interpretations of the agreement when determining the meaning of "refugee"

A grant of asylum under the Act is a matter of discretion.¹¹² Aliens seeking asylum are eligible for the favorable exercise of that discretion only after a determination that they qualify as a "refugee" under Section 1101(a)(42)(A) of the Act.¹¹³ This section creates four separate elements that must be satisfied before an alien qualifies as a refugee: (1) the alien must have a "fear of persecution";¹¹⁴ (2) the fear must be "well-founded";¹¹⁵ (3) the persecution must be "on account of race, religion, nationality, membership in a particular social group, or political opinion";¹¹⁶ and (4) the alien must be "unwilling to return" to his country of nationality because of his well-founded fear of persecution.¹¹⁷

C. Regulatory History

The history of the position of the United States government and its various agencies toward the refugee status of Chinese nationals fleeing persecution as a result of that country's coercive population control measures is a bizarre and convoluted story of bureaucratic inconsistency.

In August 1988, the DOJ issued policy guidelines to the INS designed to insure that asylum would be granted to persons showing a well-founded fear of government persecution stemming from the PRC's involuntary sterilization and abortion programs.¹¹⁸

under the Act. *Acosta*, 19 I. & N. Dec. 211. However, the Board held that these interpretations were not binding upon them, "for the determination of who should be a refugee is ultimately left by the Protocol to each State in whose territory a refugee finds himself." *Id.* (citing Young, *Between Sovereigns: A Reexamination of the Refugee's Status*, *The Transnational Legal Problems of Refugees*, 1982 MICH. Y.B. INT'L LEGAL STUD. 339, 344-45 (1982); OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEE, *THE HANDBOOK ON THE PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES* 1, 3-4 (Geneva, 1979)[hereinafter U.N. HANDBOOK]; and *INS v. Stevic*, 467 U.S. 407, 428 n.22 (1984)).

¹¹² See 8 U.S.C. § 1158(a) (1988).

The Attorney General shall establish a procedure for an alien physically present in the United States . . . 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.

Id.

¹¹³ 8 U.S.C. § 1158(a) (1988); see also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 427-28 (1987) ("Under [Section 1158(a)], eligibility for asylum depends entirely on the Attorney General's determination that an alien is a 'refugee,' as that term is defined in [Section 1101(a)(42)(A)] . . ."). For the Act's definition of "refugee," see *supra* note 11. 8 U.S.C. § 1101(a)(42)(A) (1988).

¹¹⁴ 8 U.S.C. § 1101(a)(42)(A) (1988).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Guo Chun Di v. Carroll*, 842 F. Supp. 858, 862 (E.D. Va. 1994). These guidelines were described in the Congressional Record as follows:

The Attorney General [Meese] issued guidelines instructing asylum adjudicators to give "careful consideration" to applications from PRC nationals who

In May 1989 the BIA issued its decision in *Matter of Chang*.¹¹⁹ In that decision the Board held that the implementation of the "one couple, one child" policy by the government of the PRC, "in and of itself, even to the extent that involuntary sterilization may occur," is not persecution, nor does it create "a well-founded fear of persecution 'on account of race, religion, nationality, membership in a particular social group, or political opinion.'"¹²⁰ The Board expressly stated that it was not bound by the policy guidelines announced a year earlier by the DOJ because those guidelines were directed toward the INS and not toward immigration judges and the Board.¹²¹

The petitioner in *Chang* in his application for asylum indicated that neither he nor his family had been mistreated, and that the family had not suffered from the government's policy any more than the rest of the citizens of the PRC.¹²² The petitioner's testimony regarding his alleged persecution under the "one couple, one child" policy was found by the Board to be "simply not sufficiently detailed to provide a plausible and coherent account of the basis of his asylum claim" ¹²³ The Board also found the testimony to have been contradicted by other information on the record.¹²⁴ It was based on this account that the BIA found that the mere implementation of the PRC's population control policy was not "on its face persecutive."¹²⁵

The Board did not foreclose the possibility that the policy could be enforced in such a manner so as to be persecution on account of a ground protected by the Act.¹²⁶ However, according to the Board's

seek asylum because they have defied their government's population control policies.

. . . DOJ guidelines, noting that the PRC government views such defiance as an act of 'political dissent', state that "a finding of the requisite 'well-founded fear of persecution' under these circumstances is reasonable." This constitutes persecution for 'political opinion' under the Immigration Act and would result in a grant of asylum.

Id. (citing 135 CONG. REC. S8244 (daily ed. July 19, 1989)).

¹¹⁹ *Id.* Int. Dec. 3107 (BIA 1989).

¹²⁰ *Id.*

¹²¹ *Id.* (citing 8 C.F.R. §§ 2.1, 3.1, 236.1, 236.3, 242.2(d), 242.8(a) (1988) (delegating and defining the authority of the INS commissioner, BIA and immigration judges)); *see also* United States *ex rel.* Accardi v. Shaughnessey, 347 U.S. 260, 266-67 (1954) ("The Board must exercise its own judgement when considering appeals . . .").

¹²² *Chang*. Int. Dec. 3107. In fact, the petitioner in *Chang* made no reference to the PRC's population control measures in his asylum application. *Id.* Instead, he indicated that he was an anti-communist who fled his homeland "because of Communist domination of China." *Id.* It was not until his deportation hearing that the petitioner in *Chang* testified that he feared persecution because, among other things, "he and his wife were forced to flee from their commune because they had two children and did not agree to stop having more children; and, that they disagreed with China's family planning policies . . ." *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* "Because the alien in *Chang* failed to establish the factual predicate of a well-founded fear of persecution, the holding [in *Chang*] with respect to involuntary sterilization is arguably dictum." Guo Chun Di v. Carroll, 842 F. Supp. 858, 862 n.2 (E.D. Va. 1994).

¹²⁶ *Matter of Chang*, Int. Dec. 3107. According to the Board, an applicant for asylum

holding, "a policy [that is] tied solely to controlling population, rather than as a guise for acting against people for reasons protected by the Act," can never be the basis for a well-founded fear of persecution.¹²⁷

The Board addressed the applicant's assertion that the right to procreate is a fundamental right under the United States Constitution, and that any country abridging that right must be engaging in persecution.¹²⁸ The Board stated that "the fact that a citizen of another country may not enjoy the same constitutional protections as a citizen of the United States does not mean that he is therefor persecuted on account of one of the five grounds enumerated in . . . the Act."¹²⁹

Shortly after the decision in *Chang*, efforts were made in Congress to overturn it. These efforts culminated in the Armstrong-DeConcini Amendment to the Emergency Chinese Immigration Relief Act of 1989,¹³⁰ an amendment offered expressly for that purpose.¹³¹ By November 1989, the Senate had unanimously passed the Amendment and the House, by a substantial margin, had voted to concur in the amendment.¹³² President Bush, while voicing approval for the amendment, vetoed the Emergency Chinese Immigration Relief Act of 1989 because of concerns about other portions of the bill.¹³³ While the House of Representatives voted to override the veto, the Senate failed to do so by a margin of five votes.¹³⁴ Several of the Senators who voted to uphold the veto stated that they did so relying upon assurances made by the President that administrative action would be taken to reverse *Chang*.¹³⁵

would need to provide additional facts proving that the population policy was in fact persecutive or that he had a well-founded fear that it would be persecutive "on account of one of the five reasons enumerated in section 1101(a)(42)(A)." *Id.* Examples the Board gives of how the population policy could be enforced so as to amount to persecution under the Act include: selective application against members of particular religious groups; use to punish persons for their political opinions; or more severe treatment of those who publicly oppose the policy. *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* Similarly, the court argued that even if the population control policy of the PRC were found to be a violation of internationally recognized human rights, "that fact in itself would not establish that an individual subjected to such [a policy] was a victim of persecution 'on account of race, religion, nationality, membership in a particular social group, or political opinion.'" *Id.*

¹³⁰ H.R. 2712, 101st Cong., 1st Sess. (1989)

¹³¹ The amendment is reprinted at 135 CONG. REC. S8244 (daily ed. July 19, 1989):

The Armstrong amendment would by statute apply the DOJ policy to all relevant agencies, including the INS and the Board of Immigration Appeals. It would thereby assure that applications for asylum by Chinese nationals who fear persecution because they have defied the party's population control policies would be given the fullest possible consideration.

Id.

¹³² *Guo Chun Di v. Carroll*, 842 F. Supp. 858, 863 (E.D. Va. 1994).

¹³³ See Memorandum of Disapproval for the Emergency Chinese Relief Act of 1989, reprinted in 25 WEEKLY COMP. PRES. DOC. 1853-54 (Nov. 30, 1989) [hereinafter Memorandum of Disapproval].

¹³⁴ *Guo Chun Di*, 842 F. Supp. at 863.

¹³⁵ *Id.* (citing 135 CONG. REC. S376 (daily ed. Jan 25, 1990)).

Faithful to his assurances, President Bush issued instructions to then Attorney General Thornburgh to take appropriate steps to overturn *Chang*.¹³⁶ In January 1990, the Attorney General issued the January 1990 Interim Rule amending the regulations governing asylum and withholding of deportation to allow asylum for those applicants showing a well-founded fear of sterilization or persecution as a result of the PRC's coercive population control measures.¹³⁷ Three months later, the 1990 Executive Order was issued underscoring the substance of the January 1990 Interim Rule.¹³⁸

In July 1990, Attorney General Thornburgh published a final rule which implemented extensive changes in the regulations pertaining to asylum and withholding of deportation (July 1990 Rule).¹³⁹ Inexplicably, the July 1990 Rule made no mention of the January 1990 Interim Rule and did not refer to the issue of asylum for persecution resulting from coercive family planning practices in the PRC.¹⁴⁰ Nonetheless, the July 1990 Rule rewrote the sections of the *Code of Federal Regulations* that ostensibly had been amended by the January 1990 Interim Rule.¹⁴¹ Consequently, when the *Code of Federal Regulations* was published in January 1991, the January 1990 Interim Rule, quite simply, vanished.

This regulatory hocus-pocus caused understandable confusion among immigration administrators. In April 1991 the Chief Attorney Examiner of the BIA made a written inquiry to the Appellate Counsel of the INS requesting the position of the INS on the status of the January 1990 Interim Rule in light of the July 1990 Rule.¹⁴² The Appellate

¹³⁶ *Id.* See also Memorandum of Disapproval, *supra* note 133, at 1853-54 ("I [, President Bush,] have directed that enhanced consideration be provided 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.").

¹³⁷ Specifically, the January 1990 Interim Rule amended then existing 8 C.F.R. § 208.5 to provide:

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

55 Fed. Reg. 2803-05 (1990).

¹³⁸ The executive order stated:

The Secretary of State and the Attorney General are directed 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, as implemented by the Attorney General's regulation effective January 29, 1990.

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

¹³⁹ See 55 Fed. Reg. 30,674 (1990).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² See *Wang v. Reno*, 862 F. Supp. 801, 805 (E.D.N.Y. 1994).

Counsel responded that the January 1990 Interim Rule had not been amended or repealed and that the Interim regulation remained the policy of the INS.¹⁴³ In a memorandum to Regional Counsel and District Counsel dated November 1991, the Office of the General Counsel of the INS stated that the DOJ and INS's "policy with respect to aliens claiming asylum or withholding for deportation based upon coercive family planning policies is that the application of such coercive policies does constitute persecution on account of political opinion" and directed that INS trial attorneys act accordingly.¹⁴⁴ According to this view, an applicant whose claim was based on family planning measures involving forced abortions or sterilization was not required to demonstrate that the coercive measures were tied to a governmental purpose other than to control the population.¹⁴⁵

There is some indication that the failure of the July 1990 Rule to include the January 1990 Interim Rule was mere inadvertence.¹⁴⁶ Regardless, in the waning days of the Bush administration, then Attorney General William Barr signed the January 1993 Rule, a final rule that essentially reiterated the January 1990 Interim Rule.¹⁴⁷ The January 1993 Rule was sent to the *Federal Register* where it was made available for public inspection and scheduled for publication on January 25, 1993.¹⁴⁸ Immediately after President Clinton was inaugurated on January 22, 1993, the proposed Director of the Office of Management and Budget, Leon Panetta, issued a directive prohibiting the publication of any new regulations not approved by a new agency head appointed by President Clinton.¹⁴⁹ Acting on this directive, the Acting Assistant Attorney General sent a memorandum to the Office of the Federal Register requesting the return of, among other things, the January 1993 Rule.¹⁵⁰ The January 1993 Rule has not been resubmitted or published.¹⁵¹

In June 1993, Attorney General Reno granted a request by the BIA

¹⁴³ *Id.*

¹⁴⁴ *Id.*; *Guo Chun Di v. Carroll*, 842 F. Supp. 858, 866-67 (E.D. Va. 1994); *Matter of G*, Int. Dec. 3215 (BIA 1993).

¹⁴⁵ *Matter of G*, Int. Dec. 3215; *cf. Matter of Chang*, Int. Dec. 3107 (BIA 1989) (holding that in order to make a showing of persecution, the applicant must present evidence that "the governmental action [arises] for a reason other than general population control . . .").

¹⁴⁶ An October 1990 article entitled "INS Asylum Regulations Mistakenly Supersede Regulations on PRC 'One Couple, One Child Policy'" characterizes the July 1990 rule as "an example of the bureaucratic left hand not noticing what the bureaucratic right hand is doing." 67 *Interpreter Releases* 1222 (Oct. 29, 1990). The article further quotes an INS spokesperson as indicating that new regulations would be issued to correct the oversight. *Id.*

However, at least one court has pointed out that "the fact that the omission was not subsequently reversed suggests that it was not inadvertent." *Si v. Slattery*, 864 F. Supp. 397, 401 n.2 (S.D.N.Y. 1994).

¹⁴⁷ *Guo Chun Di*, 842 F. Supp. at 864.

¹⁴⁸ *Id.*

¹⁴⁹ 58 Fed. Reg. 6074 (1993).

¹⁵⁰ *Guo Chun Di*, 842 F. Supp. at 864.

¹⁵¹ *Id.*

to review two cases of individuals seeking asylum based on the PRC's population control measures in order to resolve the conflict between the 1990 Executive Order and *Chang*.¹⁵² After several months, the Attorney General concluded, without explanation, that no determination was required concerning the conflict between the 1990 Executive Order and *Matter of Chang* and rescinded her grant of review.¹⁵³

D. Judicial Deference

In an appeal from a decision of the BIA, the Board's conclusions of law are reviewable *de novo*.¹⁵⁴ The Board's factual findings, however, are given considerable deference.¹⁵⁵ A finding of fact will not be disturbed simply because the reviewing court differs with the Board's evaluation of the facts; the court will uphold the Attorney General's determination whether to grant asylum unless the petitioner shows that the action was arbitrary, capricious, or an abuse of discretion.¹⁵⁶

Additionally, in *Chevron v. Natural Resources Defense Council, Inc.*,¹⁵⁷ the Supreme Court held that an agency's interpretation of its statute

¹⁵² See Att'y Gen. Order No. 1756-93 (June 29, 1993). The Attorney General has the authority to perform such a review pursuant to 8 C.F.R. § 3.1(h)(1)(ii) (1993).

¹⁵³ The Attorney General's statement follows:

IN EXCLUSION PROCEEDINGS Pursuant to 8 C.F.R. § 3.1(h)(1)(ii), the Board of Immigration Appeals ("BIA") referred, for my review, its decisions in these two cases in which nationals of the People's Republic of China claimed eligibility for asylum and withholding of deportation under the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101(a)(42)(A), 1253(h). In both cases, the BIA found that the applicant's evidence was not credible, and that the applicants' accounts, if true, were inadequate to establish eligibility for asylum and withholding of deportation under the interpretation of the INA that the BIA adopted in *Matter of Chang*, Int. Dec. 3107, 1989 WL 247513 (B.I.A. May 12, 1989). The BIA also noted that Executive Order No. 12,711, 55 Fed. Reg. 13,897 (1990), which sets forth standards for eligibility for asylum and withholding of deportation of aliens fleeing coercive abortion and sterilization policies, is in conflict with *Chang*. *Matter of Chu*, A 71 824 281 (B.I.A. June 7, 1993) at 6-14; *Matter of Tsun*, A 71 824 320 (B.I.A. June 7, 1993) at 7-11. In referring these cases for my review, the BIA requested that I resolve the conflict. I granted the BIA's request for review. Attorney General Order No. 1756-93 (June 29, 1993). After review, it is apparent that the BIA's determination in these cases do [sic] not require a determination that one or the other of these standards is lawful and binding. Because such a determination is not required, the Order granting review is rescinded.

Att'y Gen. Order No. 1756-93 (June 29, 1993).

¹⁵⁴ Under the Administrative Procedure Act, courts reviewing agency decisions must consider questions of law *de novo*. 5 U.S.C. § 706 (1988). See also *Sotelo-Aquije v. Slattery*, 17 F.3d 33, 35 (2d Cir. 1994); *Abdenini v. INS*, 971 F.2d 188, 190-91 (9th Cir. 1992); *Si v. Slattery*, 864 F. Supp. 397, 400 (S.D.N.Y. 1994); *Doherty v. Thornburgh*, 750 F. Supp. 131, 135 (S.D.N.Y. 1990), *aff'd* 943 F.2d 204 (2d Cir. 1991), *cert. dismissed* 1123 S. Ct. 1254 (1992).

¹⁵⁵ See 8 U.S.C. § 1105a(a)(4) (1988) (stating that findings of fact are conclusive "if supported by reasonable, substantial, and probative evidence on the record considered as a whole"). The Supreme Court, in *INS v. Elias-Zacarias*, 112 S. Ct. 812 (1992), stated that a petitioner seeking reversal of a BIA factual determination must show "that the evidence he presented was so compelling that no reasonable fact finder could fail to find the requisite fear of persecution." *Id.* at 815.

¹⁵⁶ *Castillo-Rodriguez v. INS*, 992 F.2d 181, 184 (5th Cir. 1991).

¹⁵⁷ 467 U.S. 837 (1984).

or regulation is entitled to considerable judicial deference.¹⁵⁸ The Court established a two-part analysis for reviewing an agency's construction of the statute it administers:

First . . . is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute Rather, . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute.¹⁵⁹

The Court explained that "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."¹⁶⁰ Thus the Court held that an agency's construction is to be given controlling weight if it is reasonable and not "arbitrary, capricious, or manifestly contrary to the statute."¹⁶¹

Since the Supreme Court's decision in *Chevron*, courts have recognized certain limits to the notion of judicial deference to agency interpretations.¹⁶² One such exception states that deference is less appropriate where an agency's interpretation of its own statutes and regulations has been inconsistent.¹⁶³ In *INS v. Cardoza-Fonseca*,¹⁶⁴ the

¹⁵⁸ *Id.* at 842-43.

¹⁵⁹ *Id.* (emphasis added). "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 843 n.11.

¹⁶⁰ *Id.* at 843 (alteration in original) (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

¹⁶¹ *Id.* at 844 ("A court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

¹⁶² A comprehensive review of the treatment that the *Chevron* principle has received by subsequent courts is beyond the scope of this note. For such analysis see Peter Schuck & E. Donald Elliot, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L. J. 984 (1990); Thomas Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992); Cass Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071 (1990).

The court in *Chevron* explicitly noted two situations in which judicial deference to an agency's construction would be inappropriate. First, deference is not required in the absence of administrative interpretation. *Chevron*, 467 U.S. at 843 & n.9; see *Guo Chun Di*, 842 F. Supp. at 866 (Only when an agency has endeavored to interpret its rules or regulations "is there any validity to the assumption that underlies judicial deference, namely a congressional intent to delegate certain policy choices to expert independent agencies or to the Executive Branch." (citing *Chevron*, 467 U.S. at 844)). The second instance in which *Chevron* indicated deference was inappropriate is where an administrative construction is contrary to clear congressional intent. *Chevron*, 467 U.S. at 843 & n.9; accord *Bureau of Alcohol, Tobacco, and Firearms v. Federal Labor Relations Auth.*, 464 U.S. 89, 98 n.8 (1983); *International Bd. of Teamsters v. Daniels*, 439 U.S. 551, 566 n.29 (1979) ("Deference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose and history."). The Court in *Chevron* did not indicate that these were the only situations in which deference was not warranted.

¹⁶³ *Guo Chun Di*, 842 F. Supp. at 866 (citing *Ehlert v. United States*, 402 U.S. 99, 105

Supreme Court overruled the BIA's interpretation of the burden of proof required by the Refugee Act of 1980 in order for aliens seeking asylum to show that they have a "well-founded fear of persecution."¹⁶⁵ Although the holding in *Cardoza-Fonseca* was based on the Court's determination that the agency's interpretation conflicted with the plain language in the statute,¹⁶⁶ the decision also contained dicta regarding the application of judicial deference in light of inconsistent agency interpretation.¹⁶⁷ The Court stated that "[a]n additional reason for rejecting INS's request for heightened deference" to the agency's interpretation of the statute was the "inconsistency of the positions the BIA has taken through the years."¹⁶⁸ The Court noted that "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view."¹⁶⁹

(1971) (stating that courts are obligated to regard as controlling a reasonable, consistently applied agency interpretation of its own regulations), and *Allen v. Bergland*, 661 F.2d 1001, 1004 (4th Cir. 1981)); see also *General Elec. Co. v. Gilbert*, 429 U.S. 125, 143 (1976) ("[W]e have declined to follow administrative guidelines in the past where they conflicted with earlier pronouncements of the agency."); *United Transp. Union v. Dole*, 797 F.2d 823, 829 (10th Cir. 1986) (stating that when faced with conflicting agency constructions, courts will not engage in "blind adherence" to agency position.)

¹⁶⁴ 480 U.S. 421 (1987). The issue presented in *Cardoza-Fonseca* was whether the "well-founded fear of persecution" standard that must be met by an alien seeking asylum, 8 U.S.C. § 1101(a)(42)(A) (1988), and the "clear probability of persecution" standard required to be met by an applicant for withholding of deportation, 8 U.S.C. § 1253(h) (1988) (standard of eligibility for withholding of deportation), were functional equivalents. *Cardoza-Fonseca* 480 U.S. at 430.

Asylum and withholding of deportation are two distinct remedies under the INA. See *Cardoza-Fonseca*, 480 U.S. at 429 n.6. (describing the differences between asylum and withholding of deportation).

¹⁶⁵ *Id.* at 448-49 (holding that the Immigration Judge and the BIA were incorrect in holding that the two standards — "well-founded fear" and "clear probability" — are identical). *Id.* at 448.

¹⁶⁶ *Id.* at 449 ("Our analysis of the plain language of the Act . . . lead[s] to the inexorable conclusion that to show a 'well-founded fear of persecution,' an alien need not prove that it is more likely than not that he or she will be persecuted in his or her home country.")

¹⁶⁷ *Id.* at 446 n.30.

¹⁶⁸ *Id.* at 447 n.30 (noting that the BIA and the INS had answered the question as to the relationship between the two standards in at least three different ways between 1965 and 1985).

¹⁶⁹ *Id.* at 446 n.30 (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981); and citing *General Elec. Co. v. Gilbert*, 429 U.S. 125, 143 (1976) ("We have declined to follow administrative guidelines in the past where they conflicted with earlier pronouncements of the agency."); *accord* *NLRB v. United Food and Commercial Workers*, 484 U.S. 112, 124 n.20 (1987) ("We consider the consistency with which an agency interpretation has been applied . . ."); *South-eastern Community College v. Davis*, 442 U.S. 397, 411-12 n.11 (1979) ("[T]he assertion by HEW of the authority to promulgate any regulations . . . has been neither consistent nor longstanding . . . [T]his fact substantially diminishes the deference to be given to HEW's present interpretation of the statute."); *Skidmore v. Swift and Co.*, 323 U.S. 134, 140 (1944) ("The weight of such [an administrative] judgement in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."); *Wilcox v. Ives* 864 F.2d 915, 924-25 (1st Cir. 1988); *United Transp. Union v. Dole*, 797 F.2d 823, 829 (10th Cir. 1986).

In *Wilcox v. Ives*¹⁷⁰ the Secretary of Health and Human Services (HHS) published an initial regulation regarding monthly child support payments to AFDC families.¹⁷¹ Nine days later the Secretary proposed a second, incongruous version of the same rule.¹⁷² In a *Federal Register* statement a year later, the Secretary reiterated the position outlined in the second rule but ultimately withdrew the proposed amendment in response to perceived difficulties that would result from implementation.¹⁷³ The Secretary then “flip flop[ped]” and revised the rule two more times.¹⁷⁴ The First Circuit observed that “[w]hat is revealed by the history of the Secretary’s regulations . . . since the amended statute was passed in 1984 is a series of self-contradictory rules.”¹⁷⁵ The court then held that deference was not appropriate when the agency’s interpretation had “radically and repeatedly alternated between polar extremes”¹⁷⁶

However, the inconsistency exception to judicial deference has not been universally applied. The district court in *Chen v. Slattery*¹⁷⁷ held that “an inconsistency of policy is not, by itself, sufficient to require less deference to an agency’s determination.”¹⁷⁸ Rather, according to the court, “[a]n interpretation will be rejected only where it is unreasonable and at odds with the plain meaning of the statute.”¹⁷⁹ The court relied upon the Second Circuit’s decision in *Himes v. Shalala*,¹⁸⁰ which in turn relied upon the Supreme Court’s decision in *Rust v. Sullivan*,¹⁸¹ for the proposition that an agency’s interpretation is entitled to deference despite representing “a sharp break with prior

¹⁷⁰ 864 F.2d 915 (1st Cir. 1988). The issue addressed by the court in *Wilcox* was whether to defer to the Department of Health and Human Services’ (HHS) interpretation of 42 U.S.C. § 657(b)(1), the federal statute regarding the distribution of “pass-throughs” of portions of child support payments received by a state to families receiving Aid To Families With Dependent Children (AFDC). *Id.* at 916. The dispute between the AFDC recipients and HHS arose from situations in which no child support payments were received one month and a multiple payment was received in another month. *Id.* The Secretary of HHS had promulgated a regulation that provided that the AFDC family should receive only a single pass-through in such situations. 45 C.F.R. § 302.51 (1988).

¹⁷¹ *Wilcox*, 864 F.2d at 922 (citing 45 C.F.R. § 302.51 (1984)).

¹⁷² *Id.* (citing 49 Fed. Reg. 36,797 (1984)).

¹⁷³ *Id.* (citing 50 Fed. Reg. 19,634 (1985)).

¹⁷⁴ *Id.* at 922-23 (citing 50 Fed. Reg. 19,648 (1985) and 53 Fed. Reg. 21,642 (1988)).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 925.

¹⁷⁷ 862 F. Supp. 814 (E.D.N.Y. 1994).

¹⁷⁸ *Id.* at 821 (citing *Himes v. Shalala*, 999 F.2d 684, 690 (2d Cir. 1993)); *accord* *Si v. Slattery*, 864 F. Supp. 397, 405 (S.D.N.Y. 1994).

¹⁷⁹ *Chen*, 862 F. Supp. 814.; *accord* *Si*, 864 F. Supp. at 405.

¹⁸⁰ 999 F.2d 684 (2d Cir. 1993). The issue presented in *Himes* was whether an interpretation by the Secretary of HHS setting eligibility standards for Medicaid recipients deserved less deference because it represented a shift in position. *Id.* at 690. The circuit court held that the Secretary’s shift of position in that case was “not enough to cause this court to ignore the deference normally due the Secretary . . . because it [was] a reasonable attempt to interpret and apply all sections of the statute, including [a section] added in 1988” *Id.*

¹⁸¹ 500 U.S. 173 (1991)

interpretations."¹⁸²

Rust v. Sullivan concerned a facial challenge to HHS regulations that limited the ability of Title X fund recipients to engage in abortion related activities.¹⁸³ The petitioners in *Rust* argued, inter alia, that the regulations were entitled to little or no deference because they "reverse[d] a longstanding agency policy that permitted nondirective counseling and referral for abortion,"¹⁸⁴ and thus represented a "sharp break" from the Secretary's prior construction of the statute.¹⁸⁵

The Court stated that it had previously rejected the argument that "an agency's interpretation 'is not entitled to deference because it represents a sharp break with prior interpretations' of the statute in question."¹⁸⁶ The Court found that "the Secretary amply justified his change of interpretation with a 'reasoned analysis.'¹⁸⁷ The Court found that the Secretary had explained that the regulations were in response to reports that the prior policy had failed to properly implement the statute and that it was necessary to provide " 'clear and operational guidance to grantees about how to preserve the distinction between Title X programs and abortion as a method of family planning.' "¹⁸⁸ The Court also found that the Secretary made the determination "that the new regulations [were] more in keeping with the original intent of the statute, [were] justified by client experience under the prior policy, and . . . [were] supported by a shift in attitude against the 'elimination of unborn children by abortion.' "¹⁸⁹ The Court held that "these justifications [were] sufficient to support the Secretary's revised approach."¹⁹⁰

E. *INS v. Elias-Zacarias*

Since *Chang*, federal courts, with the exception of *Guo Chun Di*, have considered the propriety of the Board's decision in light of traditional judicial deference to an agency's interpretation of its own stat-

¹⁸² *Id.* at 186 (quoting *Chevron v. National Resources Defense Council, Inc.*, 467 U.S. 837, 862 (1984)).

¹⁸³ *Id.* at 177-78.

¹⁸⁴ *Id.* at 186 (citing Brief for Petitioners at 20, *id.* (No. 89-1392)).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* (citing *Chevron*, 467 U.S. at 862-64 (holding that a revised agency interpretation deserves deference because "[a]n initial agency interpretation is not instantly carved in stone" and "the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis")); see also *Motor Vehicle Mfrs. Ass'n of United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (stating that an agency is not required to "establish rules of conduct to last forever," (quoting *American Trucking Assn's, Inc. v. Atchinson, T. & S.F.R. Co.*, 387 U.S. 397, 416 (1967))), but rather "must be given ample latitude to 'adapt [its] rules and policies to the demands of changing circumstances.'" (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968))).

¹⁸⁷ *Rust*, 500 U.S. at 187 (quoting *Motor Vehicle Mfrs.*, 463 U.S. at 42.)

¹⁸⁸ *Id.* (citing 53 Fed.Reg. 2923-2924 (1988)).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

ute.¹⁹¹ Thus, these courts have upheld the Board's policy absent a showing that it is an unreasonable interpretation.¹⁹² All of the courts, again, with the exception of the court in *Guo Chun Di*, have determined that the Board's decision in *Chang* was not unreasonable.¹⁹³ The Supreme Court's decision in *INS v. Elias-Zacarias*¹⁹⁴ is often cited as support for this determination.¹⁹⁵

In *Elias-Zacarias*, the Supreme Court denied asylum eligibility for a Guatemalan native who had fled his country because of a guerrilla organization's attempt to conscript him into military service.¹⁹⁶ The Court understood the ordinary meaning of the phrase "persecution on account of . . . political opinion" in Section 1101(a)(42)(A) to be limited to "persecution on account of the victim's political opinion, not the persecutor's."¹⁹⁷ "Thus," the Court reasoned, "the mere existence of a generalized 'political' motive underlying the guerrillas' forced recruitment [was] inadequate to establish . . . the proposition that Elias-Zacarias fear[ed] persecution on account of political opinion," as Section 1101(a)(42)(A) required.¹⁹⁸ Rather, the Court required that "since the statute makes motive critical,"¹⁹⁹ aliens seeking asylum must prove that they were persecuted for their political opinion, rather than for some other reason not enumerated by the Act.²⁰⁰

The principle of *Elias-Zacarias* is that when determining whether an alien fears persecution on account of his or her political opinion, the Act requires courts to focus on the motive of the persecutor and

¹⁹¹ *Wang v. Slattery*, No. 94 CIV 3489 (CSH) 1995 WL 46332, at *10 n.8 (S.D.N.Y. 1995) (stating that because the court had concluded that the Board's decision in *Chang* was entitled to deference, "it [was] not for [the court] to determine de novo whether the desire to have more children manifested by the act of procreation constitutes a political opinion"); *See supra* notes 154-90 and accompanying text.

¹⁹² *See, e.g., Wang*, 1995 WL 46332, at *8; *Dong v. Slattery*, 870 F. Supp. 53, 56 (S.D.N.Y. 1994); *Gao v. Waters*, 869 F. Supp. 1474, 1481 (N.D. Cal. 1994); *Si v. Slattery*, 864 F. Supp. 397, 405 (S.D.N.Y. 1994).

¹⁹³ *See, e.g., Wang*, 1995 WL 46332, at *8; *Dong*, 870 F. Supp. at 57-58; *Gao*, 869 F. Supp. at 1481; *Si*, 864 F. Supp. at 405; *Chen v. Slattery*, 862 F. Supp. 814, 820-21 (E.D.N.Y. 1994).

¹⁹⁴ 502 U.S. 478 (1992).

¹⁹⁵ *See, e.g., Wang*, 1995 WL 46332, at *8; *Dong*, 870 F. Supp. at 57-58; *Gao*, 869 F. Supp. at 1481; *Si*, 864 F. Supp. at 405; *Chen*, 862 F. Supp. at 820-21.

¹⁹⁶ *Elias-Zacarias*, 502 U.S. at 480.

¹⁹⁷ *Id.* at 482. By analogy the court notes that "[i]f a Nazi regime persecutes Jews, it is not, within the ordinary meaning of language, engaging in persecution on account of political opinion . . ." *Id.*

¹⁹⁸ *Id.* *See Osorio v. INS*, 18 F.3d 1017, 1029 (2d Cir. 1994) (interpreting *Elias-Zacarias*). The court in *Osorio* interpreted this requirement to mean that "the persecutor's political motive is insufficient to infer the relevant causal connection, persecution on account of the victim's political opinion." *Id.*

¹⁹⁹ *Elias-Zacarias*, 502 U.S. at 480. The Court noted that applicants need not necessarily provide direct proof of their persecutors' motives, but that they must provide some evidence of it, either direct or circumstantial. *Id.*

²⁰⁰ *Id.* at 483 & n.2.; *Osorio*, 18 F.3d at 102. The Court in *Elias-Zacarias* determined that *Elias-Zacarias* would be persecuted for his refusal to fight and not for his political opinion. *Elias-Zacarias*, 502 U.S. at 483.

the belief of the victim.²⁰¹ Courts evaluating *Chang* in light of *Elias-Zacarias* have found the Board's decision consistent with this principle.²⁰² The Board in *Chang* asserted that the PRC's population policy had an objectively legitimate and nonpolitical goal of controlling population growth.²⁰³ The Board also implicitly held that opposition to the PRC's policy manifested by a desire to have more children was not a political opinion.²⁰⁴ Courts have thus concluded that the Board's interpretation is consistent with the statute because it focuses upon the political belief of the victim and the motivation of the alleged persecutor.²⁰⁵

IV. Analysis

The court's conclusion in *Guo Chun Di* that judicial deference to the Board's decision in *Chang* was inappropriate conforms with the law on judicial deference in response to administrative inconsistency. Language in the Supreme Court's decision in *INS v. Cardoza-Fonseca* supports the determination that judicial deference to a decision by the BIA is unwarranted where the decision represents one of many conflicting agency pronouncements on the issue.²⁰⁶ However, the inconsistencies in agency interpretation relied upon by the court in *Guo Chun Di v. Carroll* are distinguishable in one important respect from those present in *Cardoza-Fonseca*. In *Guo Chun Di*, the government correctly pointed out that the BIA, "which is the highest administrative tribunal empowered to conduct deportation proceedings, has acted consistently and designated *Chang* as the precedent applicable to all cases involving asylum claims on opposition to a country's coercive family planning policies."²⁰⁷ The court in *Guo Chun Di* relied upon the contradictory pronouncements of the several Attorneys General, the President and INS in order to show agency inconsistency on the is-

²⁰¹ See *Elias-Zacarias*, 502 U.S. at 482-83. *Elias-Zacarias* does not require that a victim necessarily hold the belief for which he faces persecution if he can adequately prove that his persecutors have imputed to him such political opinion. *Id.* at 482. See also, *Canas-Segovia v. INS*, 970 F.2d 599, 601-02 (9th Cir. 1992) ("Imputed political opinion is still a valid basis for relief after *Elias-Zacarias*."); *Desir v. Ilchert*, 840 F.2d 723, 729 (9th Cir. 1988) ("[W]hether the political opinion is actually held or implied makes little difference where the alien's life is equally at risk."); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 517 (9th Cir. 1985) ("[I]t is irrelevant whether a victim actually possesses any of these opinions as long as the government believes that he does."); *Dong v. Slattery*, 870 F. Supp. 53, 58 (S.D.N.Y. 1994).

²⁰² See, e.g., *Wang v. Slattery*, 1995 WL 46332, at *8 (S.D.N.Y. 1995); *Dong*, 870 F. Supp. at 57-58; *Gao v. Waters*, 869 F. Supp. 1474, 1481 (N.D. Cal. 1994); *Si v. Slattery*, 864 F. Supp. 397, 405 (S.D.N.Y. 1994); *Chen v. Slattery*, 862 F. Supp. 814, 820-21 (E.D.N.Y. 1994); *Matter of G*, Int. Dec. 3215 (BIA 1993).

²⁰³ *Matter of Chang*, Int. Dec. 3107 (BIA 1989).

²⁰⁴ *Wang*, 1995 WL 46332, at *4-5.

²⁰⁵ See, e.g., *Wang*, 1995 WL 46332, *8; *Dong*, 870 F. Supp. at 57-58; *Gao*, 869 F. Supp. at 1481; *Si*, 864 F. Supp. at 405; *Chen*, 862 F. Supp. at 820-21; *Matter of G*, Int. Dec. 3215.

²⁰⁶ See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987); *supra* notes 164-69 and accompanying text.

²⁰⁷ *Guo Chun Di v. Carroll*, 842 F. Supp. 858, 867 (E.D. Va. 1994).

sue.²⁰⁸ In *Cardoza-Fonseca*, however, the BIA itself had issued contradictory rulings on the question of the relationship between the standards of proof necessary for refugee status and for withholding of deportation.²⁰⁹

The court in *Guo Chun Di v. Carroll* finds more direct support for its action by analogizing the administrative inconsistency in the case to the inconsistency in *Wilcox v. Ives*.²¹⁰ Similar to the situation presented in *Guo Chun Di*, the administrative inconsistencies at issue in *Wilcox* were the conflicting pronouncements of the executive officers directly responsible for promulgating regulations to enforce the statute whose interpretation was in question.²¹¹ In addition, the court in *Wilcox* did not consider it relevant that one of those conflicting pronouncements was contained in a proposed amendment to the regulation that was subsequently withdrawn prior to publication.²¹²

Of the numerous federal district court decisions contemporaneous with *Guo Chun Di v. Carroll* that address the issue of whether *Chang* is entitled to judicial deference, the court in *Guo Chun Di* is the only one that has ruled that it is not.²¹³ For the most part, however, these courts have concentrated solely on the question of whether any of the administrative pronouncements that are contrary to *Chang* ever had legal effect.²¹⁴ As such, these decisions are inapposite to *Guo Chun Di*'s

²⁰⁸ *Id.* at 866-67 (listing the various pronouncements). See also *supra* notes 119-53 and accompanying text.

²⁰⁹ *Cardoza-Fonseca*, 480 U.S. at 447 n.30. However, in the course of discussing the agency's inconsistency, the Court noted that at one time the INS was instructing its officials to apply a standard that was at odds with BIA precedent. *Id.* (citing *Matter of Dunar*, 14 I. & N. Dec. 310 (BIA 1973) and DEPT. OF JUSTICE, INS OPERATING INSTRUCTIONS REGULATIONS TM 100, § 208.4, at 766.9) (Nov. 11, 1981)); cf. *supra* notes 142-45 (discussing INS's position that refugee status was appropriate for aliens fleeing PRC's coercive population control practices despite decision in *Chang*).

²¹⁰ *Guo Chun Di*, 842 F. Supp. at 870 n.24 (citing *Wilcox v. Ives*, 864 F.2d 915 (1st Cir. 1988)).

²¹¹ *Supra* notes 170-76 and accompanying text.

²¹² See *Wilcox*, 864 F.2d at 922-23 (discussing the conflicting regulations but making no differentiation between proposed and actual regulations).

²¹³ See, e.g., *Wang v. Slattery*, 1995 WL 46332, at *3 (S.D.N.Y. 1995) (holding that *Chang* was still in force and entitled to considerable deference); accord *Dong v. Slattery*, 870 F. Supp. 53, 56-57 (S.D.N.Y. 1994); *Gao v. Waters*, 869 F. Supp. 1474, 1481 (N.D. Cal. 1994); *Si v. Slattery*, 864 F. Supp. 397, 405 (S.D.N.Y. 1994); *Chen v. Slattery*, 862 F. Supp. 814, 820-21 (E.D.N.Y. 1994).

Indeed, two of Judge Ellis' fellow Eastern District of Virginia Judges have ruled the other way since *Guo Chun Di v. Carroll* was handed down. See *Li Zhi Guan v. Carroll*, Civ. A No. 94-410-A, 13 (E.D. Va. May 13, 1994) ("I reach the same issue [as in *Guo Chun Di*] and, with respect, I come to a different conclusion.") (bench decision); *Chen v. Carroll*, 866 F. Supp. 283, 285 (E.D. Va. 1994) (Brinkema, J.).

But see *Xin-Chang v. Slattery*, 859 F. Supp. 708, 712-13 (S.D.N.Y. 1994) (holding that January 1993 Rule became effective despite being unpublished and that BIA was required to apply the standard mandated thereby).

²¹⁴ See, e.g., *Wang*, 1995 WL 46332, at *3-7 (holding that the January 1990 Interim Rule, 1990 Executive Order and the January 1993 Rule did not invalidate *Chang*); *Gao*, 869 F. Supp. at 1480 ("While legislative and executive events subsequent to *Chang* have shaken its foundation they have not brought the decision down."); *Si*, 864 F. Supp. at 401-04 (holding that the

ruling that the culmination of these inconsistent pronouncements, rather than the actual legal effect of any particular one,²¹⁵ creates the "cacophony of administrative voices" that makes judicial deference inappropriate.²¹⁶

Where the specific issue of diminished judicial deference due to administrative inconsistency has been addressed by these courts, it has generally been dismissed with little analysis.²¹⁷ The district court in *Wang v. Slattery* noted that "[w]hile it is readily apparent that various arms from time to time made inconsistent pronouncements concerning the policy to be followed, the only consistent policy which has in fact been applied is the *Chang* decision . . ."²¹⁸ This statement by the court cannot be reconciled with the history of administrative policy regarding the refugee status of PRC nationals seeking asylum due to coercive family planning practices. First, three Attorneys General have issued regulations that were directly contrary to the Board's decision in *Chang*.²¹⁹ Second, the Board's refusal in *Chang* to follow the guidelines issued by Attorney General Meese, because "the[] guidelines . . . were directed to the Immigration and Naturalization Service, rather than the immigration judges and this Board,"²²⁰ indicates that the BIA and INS, though both departments within the DOJ, applied different standards.²²¹ Third, the decision in *Chang* was apparently not the policy of the agency during the seven months that the January 1990 Interim Rule was in effect.²²² Finally, while the BIA may have consistently applied the standard in *Chang*, immigration judges have routinely applied the policy announced in the 1990 Executive Order to grant asylum to refugees fleeing coercive population control practices

1990 Executive Order and January 1993 Rule did not invalidate *Chang*); *Chen v. Carroll*, 866 F. Supp. at 286-288 ("Even without giving the appropriate deference to the Board's determination, this Court would find that *Chang* is valid legal authority."); *Chen v. Slattery*, 862 F. Supp. at 821-23 (holding that neither the January 1990 Interim Rule, the 1990 Executive Order, nor January 1993 Rule overruled *Chang*).

²¹⁵ *Guo Chun Di v. Carroll*, 842 F. Supp. 858, 866-70 (E.D. Va. 1994); see also *Wilcox*, 864 F.2d at 922-23. The court in *Guo Chun Di* conceded that "the status and legal effect of the [January] 1993 Rule remains unclear." *Guo Chun Di*, 842 F. Supp. at 868. However, the court did not rely upon the validity of the January 1993 Rule in reaching its conclusion regarding deference. *Id.* at 868 n.16 ("In the final analysis, . . . [the] continuing validity of the [January] 1993 Rule need not be resolved in order to decide the case at bar."). Likewise, the court conceded that the January Interim Rule "likely did not erase or overrule *Chang* . . ." *Id.* at 869.

²¹⁶ See *Guo Chun Di*, 842 F. Supp. at 870.

²¹⁷ See *Wang*, 1995 WL 46332, at *9 (concluding BIA's decision in *Chang* is reasonable); *Dong*, 870 F. Supp. at 58 (brief discussion downplaying inconsistencies); *Si*, 869 F. Supp. at 405 (*Si* has not shown *Chang* to be overruled); *Chen v. Carroll*, 866 F. Supp. at 286 n.3 (discussing inconsistencies in a footnote).

²¹⁸ *Wang*, 1995 WL 46332, at *9; accord *Chen v. Carroll*, 866 F. Supp. at 286 n.3.

²¹⁹ See *supra* notes 119-53 and accompanying text.

²²⁰ *Matter of Chang*, Int. Dec. 3107 (BIA 1989).

²²¹ *Guo Chun Di*, 842 F. Supp. at 870 n.21; see also *supra* notes 142-45 (discussing the position of INS regarding validity of January 1990 Interim Rule).

²²² See *supra* notes 137-41.

in the PRC.²²³

The court in *Dong v. Slattery* asserted that "all that the various pronouncements cited in *Guo Chun Di* suggest is that the legislative and executive branches studiously abstained from overruling *Chang*."²²⁴ This argument ignores the period between January 1990 and July 1990 when the BIA's decision in *Chang* was presumably overturned by then Attorney General Thornburgh's January 1990 Interim Rule.²²⁵ Furthermore, the 1990 Executive Order, despite the fact that it did not give rise to a private right of action, nonetheless explicitly evinced the executive branch's determination to overrule *Chang*.²²⁶

The district court in *Chen v. Slattery* incorrectly interpreted the holdings in *Himes v. Shalala* and *Rust v. Sullivan* to require deference to the BIA's decision in *Chang*.²²⁷ The facts of *Himes*²²⁸ and *Rust*²²⁹ are distinguishable from those presented in *Chen v. Slattery*, and the similar refugee cases. In *Himes*, the court found that "because [of] the circumstances surrounding" the Secretary of HHS's change of position, namely, the issuance of a policy ruling by the Federal Health Care Financing Administration and New York State's subsequent amendment to its eligibility rules, the Secretary had provided "sufficient justification" for the current policy.²³⁰ Similarly, in *Rust* the Court found that the Secretary's change in position was occasioned by a determination that the previous policy had failed to enforce the statute.²³¹ The Court in *Rust* found it determinative that the Secretary had "amply justified his change of interpretation with a 'reasoned analysis.'" ²³²

Himes and *Rust* characterize the challenged inconsistencies as shifts that were justified responses in light of well-reasoned analyses of changed circumstances.²³³ This characterization does not describe the inconsistencies in administrative policy regarding aliens seeking asy-

²²³ See, e.g., Letter from Grover Rees, Former General Counsel of the Immigration and Nationalization Service, to the Hon. Jesse Helms, U.S. Senator (R-N.C.) (Jan. 27, 1994) [hereinafter Rees Letter] reprinted in 140 CONG. REC. S492-01, 518 (daily ed. Feb. 1, 1994) (noting a total of 654 grants of asylum in 1992 to PRC nationals asserting claims of persecution based upon resistance to the population control program).

²²⁴ *Dong v. Slattery*, 870 F. Supp. 53, 59 (S.D.N.Y. 1994). The court in *Dong* stated that this conclusion was "all the more compelling when one considers that the Attorney General has the express authority to formally review any BIA decision . . ." *Id.* (citing 8 C.F.R. § 3.1(h)(1)(i) (1994)).

²²⁵ See *supra* notes 137-41 and accompanying text (discussing the January 1990 Interim Rule).

²²⁶ See *supra* note 138 and accompanying text.

²²⁷ *Chen v. Slattery*, 862 F. Supp. 814, 821 (E.D.N.Y. 1994); accord *Wang v. Slattery*, 1995 WL 46332, at *8-9 (S.D.N.Y. 1995); *Dong*, 870 F. Supp. at 57-58; *Gao v. Waters*, 869 F. Supp. 1474, 1481 (N.D. Ca. 1994); *Si v. Slattery*, 864 F. Supp. 397, 405 (S.D.N.Y. 1994).

²²⁸ See *supra* note 180.

²²⁹ See *supra* notes 181-90 and accompanying text.

²³⁰ *Himes v. Shalala*, 999 F.2d 684, 690 (2d Cir. 1993).

²³¹ *Rust v. Sullivan*, 500 U.S. 173, 187 (1991).

²³² *Id.* (citing *Motor Vehicle Mfrs. Assoc. of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983)).

²³³ *Rust*, 500 U.S. at 186-87; *Himes*, 999 F.2d at 690.

lum in response to the PRC's coercive family planning practices. To the contrary, there is a conspicuous lack of justification for the inconsistencies. The Board in *Chang* did not justify its disregard of Attorney General Meese's policy guidelines except to say that it was not bound to adhere to them.²³⁴ The January 1990 Interim Rule was superseded and ostensibly repealed by the July 1990 Rule without so much as a reference.²³⁵ The January 1993 Rule was removed from the office of the Federal Register three days prior to publication, again without any stated policy justification.²³⁶ And finally, Attorney General Reno expressly declined to either resolve or justify the continuing inconsistency that exists between the 1990 Executive Order and the Board's decision in *Chang*.²³⁷ Therefore, contrary to the court's decision in *Chen v. Slattery*, the holdings in *Himes* and *Rust* compel the conclusion that judicial deference to the BIA's decision in *Chang* is not merited in the absence of a well-reasoned justification for the administrative inconsistency presented by the regulatory history.

The BIA's ruling in *Matter of Chang*, deprived of the trappings of judicial deference, is revealed by the court in *Guo Chun Di* to be disingenuous to the plain meaning of the Refugee Act.²³⁸ The Board's reasoning in *Matter of Chang* was incomplete. It concluded that the abrogation of an alien's fundamental right was not persecution because disregard of human rights, per se, was not one of the enumerated reasons under the Act.²³⁹ What the Board failed to adequately address was whether opposition to a country's policy of infringing the fundamental right to procreate was a form of political opinion. If such opposition constituted political opinion, then an alien's persecution for manifesting that opinion should have qualified him for refugee status.²⁴⁰

The Board did off-handedly remark that aliens who show that "they are opposed to the policy [of coercive population control], but were subjected to it anyway, have [not] demonstrated that they are being 'punished' for their opinions."²⁴¹ Rather, according to the Board, the alien would have to show "evidence of disparate, more severe treatment for those who publicly oppose the policy."²⁴²

This spurious requirement, however, was not supported by any

²³⁴ See *Matter of Chang*, Int. Dec. 3107 (BIA 1989).

²³⁵ See 55 Fed. Reg. 30,674 (1990).

²³⁶ See *Guo Chun Di v. Carroll*, 842 F. Supp. 858, 864 (E.D. Va. 1994).

²³⁷ See Att'y Gen. Order No. 1756-93 (June 29, 1993).

²³⁸ *Guo Chun Di*, 842 F. Supp. at 871-73.

²³⁹ See *Matter of Chang*, Int. Dec. 3107 (BIA 1989).

²⁴⁰ See *Guo Chun Di*, 842 F. Supp. at 871-73.

²⁴¹ *Chang*, Int. Dec. 3107.

²⁴² *Id.*; accord *Matter of G*, Int. Dec. 3215 (BIA 1993) (denying asylum eligibility because applicant failed to show how he had been treated any more severely than others who had violated the population policy).

language in the Act.²⁴³ Nothing in the Act precludes asylum to an alien persecuted because of his political opposition to a governmental policy that was uniformly applied.²⁴⁴ In fact, this requirement was disingenuous to the purpose of the Act. As the court in *Guo Chun Di* pointed out,

the uniformly applied policy of most totalitarian governments (e.g. Cuba and the former Soviet Union and its satellites) is to persecute all who disagree with the government's legitimacy, or who seek to replace the government by democratic means. Yet citizens in this category have always been beneficiaries of asylum under Section 1101(a)(42)(A).²⁴⁵

Thus the Board's decision in *Chang* failed to provide a reasonable justification for why an alien who has been persecuted for his opposition to his country's policy of forced sterilization does not qualify as a refugee eligible for asylum under the Act.

Furthermore, courts' subsequent reliance on the principle of *Elias-Zacarias* to validate *Chang* has been misguided. This conclusion arises from a misconception of the PRC's population control policy.²⁴⁶ These courts have ignored the persecutor's view of birth activity that not only gives the background necessary to understand the dispute leading to the persecution, but also provides evidence of the victim's political beliefs.²⁴⁷

In light of the political nature of the PRC's attitude toward population control,²⁴⁸ those who manifest their opposition to coercive family planning measures face persecution on account of their political beliefs. In the PRC, a couple's decision to have more than one child is viewed as a direct affront to the legitimacy of the power of that government over its citizenry.²⁴⁹ Not only does the government view such opposition as politically subversive, but efforts to enforce the policy in the face of opposition are considered necessary to the maintenance of totalitarian rule.²⁵⁰ The expression of the desire to have more than one child despite the potential repercussions is an act of defiance that strikes at the heart of a fundamental party policy and is thus necessarily an expression of political opinion.²⁵¹ Refugee law does not require

²⁴³ *Guo Chun Di*, 842 F. Supp. at 871 n.29.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ See *supra* notes 93-108 and accompanying text.

²⁴⁷ See *Osorio v. INS*, 18 F.3d 1017, 1030 (2nd Cir. 1994) (criticizing the BIA for "ignoring the underlying political context of the dispute" in the Board's misapplication of the *Elias-Zacarias* motive principle).

²⁴⁸ See *supra* notes 93-108 and accompanying text.

²⁴⁹ See *supra* note 104.

²⁵⁰ "We must expose and deal resolute blows at class enemies who sabotage planned parenthood." Foreign Broadcast Information Serv. Daily Rep. - P.R.C., Vol I, 152, Aug. 7, 1978, at G4.

²⁵¹ See *supra* notes 97-98 and accompanying text; see also 140 CONG. REC. S517-02 (daily ed. Feb. 1, 1994) (statement of Sen. Helms) ("There is an extremely strong case that people facing persecution for resistance to the coercive population control programs are refugees

that victims of persecution be politicians, only that they have been persecuted for their political beliefs.²⁵² It seems clear that persons fleeing persecution resulting from their opposition to the PRC's coercive family planning measures have met the *Elias-Zacarias* motive requirement for asylum on "political opinion" grounds.

Unlike the applicant seeking asylum in *Chang*, Mr. Guo was not challenging the mere implementation of the PRC's 'one couple, one child' policy. Rather, "he [was] contending that his opposition to the policy . . . led to a situation where the government directly persecuted him and his family as a result of his opposition to the policy."²⁵³ The court's decision in *Guo Chun Di* convincingly demonstrates that a faithful interpretation of the Act leads to the conclusion that an alien fleeing such persecution qualifies for refugee status.

V. Conclusion

The District Court's decision in *Guo Chun Di v. Carroll* is not binding precedent for future decisions by the BIA. To this day, the BIA continues to adhere to its decision in *Matter of Chang*.²⁵⁴ Since *Guo Chun Di* was decided in January 1994, numerous other challenges to the Board's reliance upon *Chang* have been brought in both Federal District Court and the United States Court of Appeals in various circuits.²⁵⁵ Almost without exception, these challenges have failed.²⁵⁶

Nonetheless, the decision in *Guo Chun Di* has far-reaching implications. The decision provides a sensible alternative analysis of the definition of "refugee," enabling the Board to overturn its decision in *Chang*.²⁵⁷ The court's decision in *Guo Chun Di* exposes the Board's imprudent determination that a Chinese national's choice to have more than one child is not political. The court correctly characterizes the fundamental right to procreate and the expression of one's opinions regarding that right as inherently political. This conclusion seems

within the definition of the act. The PRC regime treats these people not as ordinary law-breakers but as its political and ideological enemies.")

²⁵² *Osorio*, 18 F.3d at 1030.

²⁵³ *Id.* See *supra* notes 27-36 and accompanying text.

²⁵⁴ See, e.g., *Matter of G*, Int. Dec. 3215 (BIA 1993) (applying *Chang* in denying PRC residents asylum based on opposition to coercive family planning practices). Accord *Matter of Tsun*, A 71 824 320 (BIA June 17, 1993); *Matter of Chu*, A 71 824 281 (BIA June 7, 1993).

²⁵⁵ See *supra* note 202 and the cases cited therein.

²⁵⁶ See *supra* note 202 and the cases cited therein. *But cf.* *Xin-Chang v. Slattery*, 859 F. Supp. 708 (S.D.N.Y. 1994) (granting habeas relief and holding that the Board should have applied the unpublished January 1993 Rule interpreting "refugee").

²⁵⁷ There is some indication that immigration judges have already taken the lead in this respect. According to a report in the *New York Times* in May of 1994, Immigration Judge Alan Vomacka granted three Chinese men, each the father of two children in China, relief from deportation due to their fear of persecution resulting from the PRC's population control policy. Robert McFadden, *Three Smuggled Refugees Are Granted Asylum*, N.Y. TIMES, May 29, 1994, at A27. The three men were believed to be the first from the *Golden Venture* to win asylum from an immigration judge on the grounds of China's family planning measures. *Id.* See *supra* note 23 and accompanying text.

obvious considering the political polarization that has occurred over abortion in American society. When considered in light of the PRC's coercive population control measures, however, the conclusion seems inescapable. The BIA and immigration judges should recognize this reality when evaluating asylum claims by Chinese nationals and acknowledge that persons are persecuted under the PRC's policy because of their political opinion and thus are eligible for consideration as refugees under the Act.

Failure by the BIA to follow the lead of the court in *Guo Chun Di* may convince Congress to act legislatively to correct Board policy that is contrary to the intent of the Refugee Act.²⁵⁸ Adoption of this position would not equate to wholesale asylum for all Chinese nationals claiming persecution resulting from the PRC's coercive population control program. Aliens seeking asylum on this basis would still be required to prove that: (1) they in fact had been persecuted or possessed a well-founded fear of persecution; (2) they made an overt manifestation of their opposition to coercive family planning; and (3) the persecution was because of this opposition and not some other reason not protected by the Act.²⁵⁹ Furthermore, after a determination that an applicant has made the requisite showing in order to qualify as a refugee under the Act, the Attorney General still must decide as a matter of discretion whether or not to grant asylum.²⁶⁰ The adoption of the definition of refugee expressed in *Guo Chun Di* would not open the proverbial floodgates to Chinese applicants who claim a fear of persecution as a result of the PRC's coercive population control practices.²⁶¹ Rather, recognition that these are legitimate political refugees would simply allow them to be considered for asylum on terms equal to those imposed upon other refugees that arrive on our nation's shores.

In addition, *Guo Chun Di* is an example of a well-reasoned decision that calls into question the assumptions and conclusions in the multi-

²⁵⁸ An attempt was made to do just that during the 1994 session of Congress. Senator Jesse Helms (R-NC) introduced an amendment to the Foreign Relations Authorization Act For The Fiscal Years 1994 and 1995, S. 1281, 103d Cong., 2d Sess. (1994), the purpose of which was to "provide relief from exclusion and/or deportation . . . to persons who can show that they have a well founded fear of persecution for refusal to submit to forced abortion or sterilization under the coercive population control program" of the PRC. 140 CONG. REC. S517 (daily ed. Feb. 1, 1994). The bill along with the amendment passed the Senate; however the corresponding House bill contained no corollary amendment and the Conference Committee adopted the House perspective. H.R. CONF. REP. NO. 482, 103d Cong., 2d Sess. 559 (1994).

²⁵⁹ 8 U.S.C. § 1101(a)(42)(A) (1988); *INS v. Elias-Zacarias*, 502 U.S. 478, 481-83 (1992).

²⁶⁰ 8 U.S.C. § 1158(a) (1988). As former INS General Counsel Joseph Rees points out "[i]t is also important to remember that several thousand applications during a year typically result in only a few hundred actual grants of asylum during the year." Rees Letter, *supra* note 223.

²⁶¹ The reported 6,500 Chinese nationals who sought asylum on this basis in 1993 was "hardly the 'floodgate' that opponents of refugee status were predicting earlier in the year. It is a tiny fraction of the many thousands of asylum applications received during the year . . ." Rees Letter, *supra* note 223.

tude of contrary contemporary decisions. The court's analysis withstands scrutiny and provides a legitimate means for reviewing courts to set aside traditional judicial deference to the Board's interpretation of the Refugee Act and to examine the continued legitimacy of *Chang*. The legislative history related in *Guo Chun Di* reveals the politicization that can occur when Congress vests authority in an agency to interpret and enforce a statute. Judicial deference to inconsistent agency interpretation risks "a scheme of statutory construction based not on a government of laws, but rather on a government of 'who was most recently elected.'" ²⁶²

In particular, the executive branch has faced repeated criticism for its use of immigration policy to clandestinely further foreign and domestic policy, as well as ideological objectives.²⁶³ The adoption of the Refugee Act of 1980 was a recognition of this country's moral responsibility to admit, as refugees, persons fleeing specified types of persecution without discrimination as to their country of origin or personal beliefs. Nonetheless, grants of asylum have flowed almost exclusively to persons fleeing countries with which the United States has hostile relations.²⁶⁴ Likewise, the exclusion policy regarding homosexuals seeking asylum that was in effect until the passage of the Immigration Act of 1990 further exemplifies how political and moral judgments can corrupt what is meant to be an ideologically neutral determination as to refugee status.²⁶⁵

It is unlikely that mere coincidence adequately explains why the Bush administration sought to facilitate the immigration of Chinese nationals fleeing persecution at a time when television viewers were

²⁶² *Guo Chun Di v. Carroll*, 842 F. Supp. 858, 866 (E.D. Va. 1994).

²⁶³ Norman and Naomi Zucker observe:

The major provisions of the Refugee Act — ideologically neutral admissions and a fair asylum policy — were never implemented. The admission of refugees and the granting of asylum have been bent to the exigencies of foreign policy, public pressure and budget restraints. . . . Thus, the Congress, despite its intentions, created a monster when it provided for the granting of asylum: the asylum apparatus has the body of a border patrol officer and the mind of a foreign policy bureaucrat.

Norman Zucker & Naomi Zucker, *The 1980 Refugee Act: A 1990 Perspective*, in *REFUGEE POLICY: CANADA AND THE UNITED STATES* 240-41 (Howard Adelman ed., 1991). See also AMNESTY INTERNATIONAL, U.S.A., *REASONABLE FEAR: HUMAN RIGHTS AND UNITED STATES REFUGEE POLICY 2* (1990) (criticizing the U.S. Government for having "broken the promise of the 1980 Refugee Act" by discriminating on the basis of nationality).

²⁶⁴ "From the 1950's until 1989, United States asylum policy could be reduced to a simple maxim: Cuba, yes, Haiti, no. People fleeing Communist dictatorships had an open door; people fleeing right-wing regimes did not." Tim Weiner, *Smuggled To New York; Fixing Immigration*, N.Y. TIMES, June 8, 1993, at B2. See Zucker & Zucker, *supra* note 263, at 240-41 (listing statistics for asylum approvals by district directors from 1983 to 1989, ranging from a high of 72.6% for persons from the U.S.S.R. to a low of 2.0% for Guatemalans).

²⁶⁵ See Robert J. Foss, *The Demise of the Homosexual Exclusion: New Possibilities For Gay and Lesbian Immigration*, 29 HARV. C.R.-C.L. L. REV. 439 (1994), for a postmodernist discussion of the various socio-political factors that conspired in the enactment and enforcement of the language that excluded homosexuals.

horrified by scenes of the Tiananmen Square massacre.²⁶⁶ Similarly, in light of the progress that President Clinton has made toward reestablishing friendly diplomatic and trade relations with China, it is not surprising that the administration does not wish to address the potentially embarrassing issue of China's coercive population control practices.²⁶⁷ Domestic policy considerations have probably also played a part in both administrations' choices of action. President Bush's political alliance with the anti-abortion movement necessitated a strong reaction towards any population control program that included government sponsored abortion, whether coerced or not.²⁶⁸ President Clinton had to be concerned with appearing to "open the flood gates" of potential Chinese refugees in light of American voters' growing resentment toward immigrants.²⁶⁹

Ironically, the adoption of the Chinese Exclusion Act marked the beginning of political intrusion into immigration policy.²⁷⁰ It is clear that the practice continues to thrive at the expense of Chinese persons seeking to relocate to the United States. The story beneath the surface of the court's decision in *Guo Chun Di* is that under the current implementation of the Refugee Act, through capricious agency interpretation glossed with judicial deference, people who legitimately deserve the protection afforded by our laws are routinely sacrificed as pawns in a political game.

JAMES M. WINES

²⁶⁶ The Armstrong-DeConcini Amendment was introduced as an amendment to the Emergency Chinese Immigration Relief Act of 1989, a bill designed to offer various safeguards to Chinese students residing in the United States in light of the Tiananmen Square Massacre. See *supra* notes 130-32 and accompanying text. President Bush also announced his intention to implement the policy of the Amendment despite vetoing the bill in a release that denounced the Chinese government for its actions during the June 1989 student uprising. See Memorandum of Disapproval, *supra* note 133.

²⁶⁷ Despite the PRC's failure to satisfy certain human rights conditions, President Clinton renewed most-favored-trade status for China in May 1994. 59 Fed. Reg. 31,103 (1994). See *Clinton Reverses China MFN Policy: Mitchell To Introduce China Measure*, 11 Int'l Trade Rep. (BNA) No. 22, at 844 (June 1, 1994); *China Says U.S. Move On MFN Creates 'Historic Opportunity' For Better Ties*, 11 Int'l Trade Rep. (BNA) No. 22, at 844 (June 1, 1994).

²⁶⁸ "What you have is an ideological decision made by the Bush and Reagan Administrations based on their attitudes toward population control and politics." Weiner, *supra* note 264 (quoting George High, Executive Director of the Center for Immigration Studies).

²⁶⁹ In response to this political pressure, both the House of Representatives and the Senate introduced restrictive immigration reform legislation in the early days of the 104th Congress. 141 CONG. REC. E1 (daily ed. Jan. 4, 1995) (statement of Rep. Stump); 141 CONG. REC. S1453 (daily ed. Jan. 24, 1995) (statement of Sen. Simpson).

²⁷⁰ See *supra* notes 2-6 and accompanying text.

