UNITED STATES DEPARTMENT OF JUSTICE
BEFORE THE ATTORNEY GENERAL

In the Matter of: **SHI, Jianzhong** In removal proceedings	File No.: A 95 476 611

BRIEF OF JIANZHONG SHI
ON REFERRAL FROM THE BOARD OF IMMIGRATION APPEALS

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I. PRELIMINARY STATEMENT

The Immigration and Naturalization Act ("INA") authorizes the Attorney General to grant asylum to an alien who establishes that he has a well-founded fear he will be persecuted "on account of political opinion" if he returns to his home country. INA § 101(a)(42). The Department of Justice has long maintained that an applicant presumptively meets this definition if he establishes that he was targeted by the People's Republic of China's "one couple, one child" policy, and that the Chinese government forced his partner to submit to an abortion or involuntary sterilization. Amendments to the INA in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") and in the REAL ID Act of 2005 demonstrate that the policy is a sound interpretation of the INA.

The contrary position advanced here by the Department of Homeland Security ("DHS"), building on an unprecedented, deeply divided opinion of the U.S. Court of Appeals for the Second Circuit, makes a basic analytical mistake. It reads the law on asylum as if the only relevant legal materials are the words used in the 1996 amendment—to be parsed without regard to the absence of any evidence of Congressional intention to narrow the scope of asylum, and without regard to the longstanding Justice Department interpretation of the INA dating back at least to the Tiananmen Square events of spring 1989. The DHS interpretation misconstrues Congress's intent in passing the 1996 amendment and fails to give full effect to the principal statutory provision governing asylum eligibility—INA § 101(a)(42).

A change in Justice Department policy is entirely unwarranted. The Attorney General should reaffirm the Department's policy of presumptive spousal eligibility or, in the alternative, release this case for the U.S. Court of Appeals for the Third Circuit to restart its review of the Board of Immigration Appeals ("BIA") decision challenged by petitioner. In any event,

applying longstanding Justice Department policy to the facts of this proceeding, petitioner Jianzhong Shi should be granted asylum.

II. STATEMENT OF THE CASE

Jianzhong Shi is a citizen of the People's Republic of China ("PRC" or "China"). Joint Appendix ("J.A.") 24, 182.[1] On January 1, 1992, Mr. Shi and his wife, Xiu Yun Chen, married in a traditional ceremony. J.A. 65, 97-98. The local government family planning officials fined the couple one thousand renminbi ("RMB") because Ms. Chen was under the legal age of marriage. J.A. 97-98. Mr. Shi legally registered the marriage in 1999. J.A. 65.

The couple had a son, Shi Fong, on November 28, 1993. J.A. 68. A month after their son was born, the family planning officials took Mrs. Shi from the couple's home and forcibly implanted in her an intrauterine contraceptive device ("IUD"), effectively preventing another pregnancy. J.A. 28, 69, 93-94, 223. Mrs. Shi subsequently had to report four times a year for over eight years to medical units working together with local family planning officials, so that they could make sure the IUD had not been removed. J.A. 76, 167-74, 223.

Mr. Shi and his wife applied three times to the government for permission to have additional children. J.A. 77. Refusing the couple's applications, the village officials warned Mr. Shi to not make the same mistakes as his mother and older sister, both of whom were forcibly sterilized due to their violations of China's "one couple, one child" policy.[2] J.A. 69-71, 231,

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[1] The Immigration Judge concluded that Mr. Shi "testified in a straightforward and consistent fashion" and found that his "testimony [had] been credible." J.A. 31. Courts of appeals should accept asylum applicants' testimony as true in the absence of an explicit adverse credibility finding. *Kataria v. INS*, 232 F.3d 1107, 1114 (9th Cir. 2000); *see also Zhang v. Gonzales*, 408 F.3d 1239, 1242 (9th Cir. 2006) ("Because neither the IJ nor the BIA made a negative credibility finding, we accept Ms. Zhang's testimony before the IJ as true"); *see also* 8 U.S.C. § 1252(b)(4)(B) ("the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary").

[2] *See Matter of S-L-L-*, 24 I. & N. Dec. 1, 4 (BIA 2006) (discussing "the PRC's use of forced abortions and sterilizations to implement its 'one couple, one child' policy.").

238. Mr. Shi believes that if his wife becomes pregnant again, she will be forced to have an abortion, one of them will be forcibly sterilized, and the couple will face additional fines. J.A. 187, 223.

Mr. Shi and his wife decided that he would leave for the United States, planning to have Mrs. Shi follow him in order to have the IUD removed and thus enable the couple to have additional children. J.A. 68, 70, 79. Mr. Shi arrived in the United States on June 25, 2001. J.A. 63, 66. Mrs. Shi remains in the PRC. J.A. 70.

On August 2, 2002, the Immigration and Nationalization Service ("INS" or "Service") commenced removal proceedings by filing a Notice to Appear charging Mr. Shi with removability pursuant to INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i). J.A. 291. On June 25, 2002, Mr. Shi filed an application for asylum, withholding of removal, and relief under the Convention Against Torture. J.A. 182-90.

Mr. Shi's removal hearing before an Immigration Judge ("IJ") commenced on June 16, 2004, and concluded on November 8, 2004. J.A. 55-117. The IJ denied the asylum petition, reasoning that the Chinese government's forced insertion of an IUD into Mr. Chi's wife was not sufficient to establish a claim for asylum based on past persecution.[3] J.A. 33-34, 116. The BIA summarily affirmed the IJ's decision. *In re Jianzhong Shi*, No. A95 476 611 (BIA Feb. 24, 2006), *aff'g* No. A95 476 611 (Immig. Ct. Newark, N.J., Nov. 8, 2004); J.A. 2, 24-34.

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[3] DHS suggests that the presence of an economic motive along with a fear of a persecution motive in escaping the PRC for the United States signifies the absence of persecution. *See* DHS Br. at 24. The agency's premise is mistaken. Courts have held that "an economic motive for persecution does not rule out eligibility for asylum, as other motives may exist." 3 Charles Gordon et al., Immigration Law and Procedure § 33.04(2)(e)(iii) (1998 & Supp. 2007). *See, e.g., Osorio v. INS*, 18 F.3d 1017, 1028 (2d Cir. 1994) (finding eligibility for asylum "where an applicant fears persecution for both his political and economic beliefs"); *Borja v. INS,* 175 F.3d 732, 736 (9th Cir. 1999) (en banc) ("[p]ersecutory conduct may have more than one motive, and so long as one motive is one of the statutorily enumerated grounds, the requirements have been satisfied") (internal citations omitted); *Jahed v. INS*, 356 F.3d 991, 998 (9th Cir. 2004) (same).

Mr. Shi sought review of the BIA decision in the U.S. Court of Appeals for the Third Circuit. On July 27, 2007, the court decided, *sua sponte*, to hear the petition en banc. *Shi v. U.S. Att'y Gen.*, No. 06-1952 (3d Cir. July 27, 2007). The Third Circuit directed the parties, including the DHS, to submit briefs addressing "whether spouses of those victimized by China's coercive population control policy are entitled to automatic asylum under the Immigration and Nationality Act." *Shi v. U.S. Att'y Gen.*, No. 06-1952 (3d Cir. July 27, 2007). The Third Circuit also instructed the parties (and the DHS) to address whether it should "adopt any or all of the reasoning announced in the Second Circuit's decision" in *Lin v. U.S. Dept. of Justice*, 494 F.3d 296 (2d Cir. 2007). Alone among the courts of appeals, the Second Circuit held in *Lin* that § 601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, Div. C, 110 Stat. 3009-546 (1996) ("IIRIRA"), precludes the presumptive eligibility of spouses.[4]

On September 1, 2007, the Attorney General certified this case for review under 8 C.F.R. § 1003.1(h)(1)(i) and directed the parties to submit briefs "address[ing] all relevant statutory questions," including whether IIRIRA § 601(a) authorizes refugee status for "partners of individuals who have been subjected to forced abortion or sterilization, and whether the BIA interpretation of Section 601(a) set forth in [*Matter of C-Y-Z-* , 21 I. & N. Dec. 915 (BIA 1997) and *Matter of S-L-L-*, 24 I. & N. Dec. 1 (BIA 2006)] is correct." *Matter of Jianzhong Shi*, Order No. 2905-2007 (A.G. Sept. 4, 2007). On September 4, 2007, the Department of Justice filed a

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[4] The court of appeals did recognize a seemingly narrow exception to its no-spouse coverage rule—where the spouse could prove resistance to the PRC's coercive family control policies independent of the physically coercive practices, fines, and psychological abuse to which they and their partners were subjected for seeking to have children in violation of those polices. See *Lin*, 494 F.3d at 313.

Motion to Dismiss for lack of jurisdiction with the Third Circuit. Mr. Shi opposed the Motion to Dismiss. On October 24, 2007, the court of appeals granted the Government's motion.[5]

III. SUMMARY OF ARGUMENT

The question here is whether the Justice Department should depart from its longstanding position that a person who introduces credible evidence that he and his marital partner were targeted by their country's coercive population control program and whose spouse was forced to undergo an abortion, involuntary sterilization, or other coercive population control practice has established "past persecution," and therefore is presumptively eligible for asylum under INA § 101(a)(42).

The Department has long found the presumption of spousal eligibility to be consistent with the Act. Presumptive eligibility reflects Congress's extensive findings, expressed in IIRIRA and in several committee reports leading to its enactment, that families are the predominant targets of China's oppressive "one couple, one child" policy. Presumptive eligibility further reflects the real sense in which the persecution of one family member is in practice and effect the persecution of the immediate family as a unit. Executive branch policy has accordingly supported presumptive eligibility since at least 1989, when the events of Tiananmen Square brought the PRC's repressive social policies to the attention of Congress and the wider public.

The 1996 IIRIRA amendment of the INA's asylum provision, which was intended to *broaden* the availability of asylum, provides no basis for rejecting the presumption. The

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[5] Petitioner does not waive and fully preserves his basic objection to the Attorney General's attempt to remove this case from the Third Circuit. Title 8 of the C.F.R. § 1003.1(h)(1)(i) states that "[t]he *Board* shall refer to the Attorney General [if] [t]he Attorney General directs the *Board* to refer [the case] to him." (emphasis added). The BIA had not referred this case to the Attorney General, as it was already pending before the Third Circuit when the Attorney General certified the case for review.

language of the amendment and its unequivocal legislative history demonstrate that the sole purpose of IIRIRA § 601(a) was to correct *Matter of Chang*, 20 I. & N. Dec. 38 (BIA 1989) and *Matter of G-*, 20 I. & N. Dec. 764 (BIA 1993). Congress rejected these BIA decisions, which adopted a restrictive (and factually ungrounded) understanding of "persecution" that failed to reflect the real-world persecution couples experienced under China's coercive "one couple, one child" policy. In the REAL ID Act 2005, Pub. L. 109-13, 119 Stat. 231 (2005) (codified in various titles of the U.S. Code), Congress effectively ratified the Justice Department's interpretation of its asylum authority in coercive population control cases by removing the pre-existing statutory limitation on the number of such applications that could be granted each year.

The Second Circuit's unprecedented view to the contrary in *Lin v. U.S. Department of Justice*, reiterated by the DHS in this proceeding, is not persuasive. The product of a deeply divided court reaching out to decide an issue not squarely before it, *Lin* reads the text of the IIRIRA amendment in isolation. The court of appeals treats the spousal eligibility rule as if the world began in 1996, as if it only legal material to consider are the words of IIRIRA § 601(a)—without regard for the overarching INA § 101(a)(42) asylum authority of which § 601(a) is a part, the longstanding position of the Justice Department, and the history of coercive population control practices in the PRC which prompted both legislative and executive concern.

To the extent *Lin* is based on perceived abuses of the asylum system, the concern is misplaced. Immigration Judges and the BIA have substantial authority to deal with fraudulent claims in asylum proceedings, most prominently through the power to make adverse credibility findings. It should not be assumed that certain asylum applications are problematic because one spouse remains in China. For all its progress, China remains a closed society; presumptive

spousal eligibility provides an important escape valve when one member of a couple targeted by the PRC's coercive population policies can escape the country but the other cannot.

IV. ARGUMENT

A. The Presumptive Eligibility of Spouses in INA § 101(a)(42) Reflects the Longstanding Pre-1996 Position of the Justice Department on Asylum for Persons Facing Official Coercive Population Control Programs

1. *Matter of C-Y-Z-* Follows the INS's Express Recognition in 1996 of the Presumptive Eligibility of Spouses under INA §101(a)(42)

Section 101(a)(42) of the INA establishes the general rule for eligibility for asylum: a "refugee" is a person outside of his own country who is unable to return to that country or avail himself of its protections "because of persecution or a well-founded fear of persecution on account of . . . political opinion . . . ." 8 U.S.C. § 1101(a)(42).

In *Matter of C-Y-Z-*, 21 I. & N. Dec. 915 (BIA 1997), the BIA ruled that an applicant whose spouse was forced by China's coercive population control program to undergo an abortion or forced sterilization had suffered past persecution on account of political opinion and could thereby be eligible for asylum under INA § 101(a)(42), as amended by IIRIRA § 601(a). *See id.* at 917-18. The Board explained that an applicant whose wife had been forcibly sterilized "established eligibility for asylum by virtue of his wife's forced sterilization." *Id.* at 918. By such a showing, "the applicant has adequately established that he suffered past persecution," giving rise to the "regulatory presumption" that he has a well-founded fear of future persecution under 8 C.F.R. § 208.13(b)(1) (1997). 21 I. & N. Dec. at 919. The burden of proof then shifts to the Government to show "a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality." 8 C.F.R. § 208.13(b)(1)(i)(A).

C-Y-Z-'s reasoning rests on a memorandum by the INS General Counsel examining INA § 101(a)(42) and IIRIRA § 601(a) that the Service issued soon after the 1996 amendment was enacted. *See* Memorandum from the Office of the General Counsel of the Immigration and Nationalization Service 4 (Oct. 21, 1996) (hereinafter the "G.C. Memorandum"). The G.C. Memorandum states that the 1996 amendment rejects the interpretation of INA § 101(a)(42) in *Matter of Chang*, 20 I. & N. Dec. 38 (BIA 1989), and *Matter of G-*, 20 I. & N. Dec. 764 (BIA 1993), which held that coercive application of population control policies does not, standing alone, constitute persecution on account of "political opinion," in favor of an interpretation of INA § 101(a)(42) that coercive application of such policies does constitute "political opinion" persecution. G.C. Memorandum at 2, 4.

On the very issue that is the subject of the instant referral proceeding, the G.C. Memorandum expressly recognizes the presumptive eligibility for asylum of spouses whose partners have been subjected to coercive population control practices, such as a forced abortion or sterilization:

> Cases where the applicant demonstrates that *his or her spouse* has been forced to undergo an abortion or involuntary sterilization raise the issue of what constitutes past persecution. In general, we believe that *an applicant whose spouse has been forced to undergo an abortion or involuntary sterilization has suffered past persecution*, and may thereby be eligible for asylum under the terms of the new refugee definition. In such a case, the applicant may or may not have a well-founded fear of future persecution.

Id. at 4 (emphasis added). In *Matter of C-Y-Z-*, the BIA quoted both the foregoing discussion in the G.C. Memorandum and the INS's own brief in its decision: "The Service is aware that its legal perspective as directed by the General Counsel is that the husband of a sterilized wife can essentially stand in her shoes and make a bona fide and non-frivolous application for asylum based on problems impacting more intimately on her than on him." *Matter of C-Y-Z-*, 21 I. & N. Dec. at 918.

2. *Matter of C-Y-Z-* and the INS General Counsel's 1996 Memorandum Were the Culmination of a Justice Department Interpretation of Asylum Eligibility in Coercive Population Control Cases

a. The Emergency Chinese Immigration Relief Act of 1989

In reaction to China's coercive population control policies, the BIA's *Matter of Chang* decision and, more broadly, the events in Beijing's Tiananmen Square in the spring of 1989, Congress passed the Emergency Chinese Immigration Relief Act of 1989. H.R. 2712, 101st Cong. (1989). Section 3(a) of the bill stated in pertinent part:

> (a) With respect to the adjudication of all applications for asylum, withholding of deportation, or refugee status from nationals of China filed before, on, or after the date of the enactment of this Act, *careful consideration shall be given to such an applicant who expresses a fear of persecution upon return to China related to China's "one couple, one child" family planning policy.* If the applicant establishes that such applicant has refused to abort or be sterilized, such applicant shall be considered to have established a well-founded fear of persecution, if returned to China, on the basis of political opinion consistent with paragraph (42)(A) of section 101(a) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)).

H.R. 2712, 101st Cong. § 3(a) (1989) (emphasis added); *see also* 66 INTERPRETER RELEASES 1290, 1290 (1989) (describing the amendment as granting "presumptive eligibility for asylum to PRC nationals refusing to comply with that government's 'one couple, one child' policy").

The Act passed in both houses, but it was vetoed by President George H.W. Bush on November 30, 1989. President's Memorandum of Disapproval for the Emergency Chinese Immigration Relief Act of 1989, 25 WKLY. COMP. PRES. DOC. 1853, 1853-54 (Jan. 23, 1990). In part fearing the diplomatic fallout the legislation might have precipitated, President Bush explained that executive action could accomplish the same objectives, and he directed the Attorney General to give "enhanced consideration [to] . . . 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." *Id.* While Congress was unable to override the veto,

several Senators who declined to join the override effort cited the President's promised administrative action as a preferable method of overturning *Matter of Chang*.[6]

b. The January 1990 Thornburgh Interim Rule

On January 29, 1990, in response to the President's stated preference for an administrative response to *Matter of Chang*, Attorney General Richard L. Thornburgh issued an interim rule with a request for comments. It contained "interpretive rules and general statements of policy" modifying 8 C.F.R. §§ 205(b)(1) and 205(b)(2) to establish "statutory eligibility for asylum or withholding of deportation on the basis of political opinion for aliens who express *a fear of coercive population control policies* in their homeland." 55 Fed. Reg. 2803, 2804 (1990) (emphasis added). The Interim Rule expressly recognized the presumptive eligibility of applicants whose spouses were forces to undergo coercive population control procedures under the pre-1996 INA §101(a)(42):

> 1. Aliens who have a well-founded fear that they will be required to abort a pregnancy or 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.
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> 2. An applicant who establishes that the applicant *(or the applicant's spouse)* has refused to abort a pregnancy or 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 abort a pregnancy or to be sterilized or otherwise persecuted if *the applicant* were returned to such country may be granted asylum.

Id. at 2805 (emphasis added).

The Interim Rule both implemented the preference for an administrative solution expressed in President Bush's veto statement and started a process intended to overturn *Matter of*

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[6] For example, Senator Specter stated: "…I am voting to oppose overriding President Bush's veto because I believe the President's executive action, rather than the proposed legislation, will better promote human rights in China and also the international interests of the United States." 136 Cong. Rec. S376 (Jan. 25, 1990).

Chang. *See* New Rules on Aliens Fleeing Forced Abortions or Sterilization, 67 INTERPRETER RELEASES 117, 117 (Jan. 29, 1990). The rule also confirmed that forced abortion or sterilization, or threats of abortion or sterilization, were sufficient bases for asylum relief based on political opinion. *Id.*[7]

c. Executive Order 12,711

On April 11 1990, President Bush issued Executive Order 12,711, further affirming his commitment to protect asylum applicants subjected to government coercive population control policies. *See* Exec. Order No. 12,711, 55 Fed. Reg. 13,897, 13,897 (Apr. 11, 1990). The President directed the Attorney General and the Secretary of State

> 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.

Id. (emphasis added). The Executive Order, by express reference to Attorney General Thornburgh's Interim Rule of January 29, 1990, endorses the Justice Department's interpretation of INA § 101(a)(42) embodied in that rule.

d. The July 1990 Rule, November Memorandum, and January 1993 Rule

The policy of providing asylum to persons subjected to coercive population control policies was unaccountably omitted[8] in the final rules issued by the Attorney General in July 1990. *See* 55 Fed. Reg. 30,674, 30,676 (July 27, 1990). On November 7, 1991, however, the

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[7] As some observers have noted, the Interim Rule was "clearly binding on the Executive Office for Immigration Review (which includes the BIA and [immigration judges]) as well as the INS." 67 INTERPRETER RELEASES at 117.

[8] One court observed that the omission of the January interim rule from the July 1990 final rule was "mere inadvertence." *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1337 n.4 (4th Cir. 1995) (citation omitted). *See also INS Asylum Regulations Mistakenly Supersede Regulations on PRC "One Couple, One Child" Policy*, 67 INTERPRETER RELEASES 1222, 1222 (Oct. 29, 1990) ("Unfortunately, the July regulations inadvertently supersede and negate the January regulations, because they completely replace the Justice Department's asylum regulations, make no mention of the January regulations, and make no mention of the Chinese population control measures.").

General Counsel of the INS, Grover J. Rees, issued a memorandum that reiterated Department of Justice and INS policy—specifically noting that the policy was "embodied" in (1) prior Attorney General directives of August 5, 1988, and December 1, 1989; (2) President Bush's Emergency Chinese Immigration Relief Act veto message and Executive Order 12,711; and (3) the interim final regulation published on January 29, 1990. Memorandum from the Office of General Counsel of the Immigration and Nationalization Service 1 (Nov. 7, 1991), *reprinted in* 69 INTERPRETER RELEASES app. I 311, 311 (1991) (hereinafter "Rees Memorandum"). Reiterating this pre-existing policy, the Rees Memorandum stated:

> [T]he INS will regard an applicant for asylum (*and the applicant's spouse*, if also an applicant) to have established presumptive eligibility for asylum on the basis of past persecution on account of political opinion if the applicant establishes that, pursuant to the implementation by the country of the applicant's nationality of a family planning policy that includes forced abortion or coerced sterilization, the applicant has been forced to abort a pregnancy or to undergo involuntary sterilization or has been persecuted for failure or refusal to do so.

Id. (emphasis added).

Furthermore, the omission from the July 1990 final rules was thereafter corrected in Attorney General William P. Barr's January 1993 final rule, which denoted both conjugal partners who had been forced to undergo an involuntary abortion or sterilization and their spouses as eligible for asylum on grounds of past persecution because of political opinion under INA § 101(a)(42). *See* January 1993 Rule, § 208.13(2)(ii), Att'y Gen. Order No. 1659-93, *cited in Guo Chun Di v. Carroll*, 842 F. Supp. 858, 864 (E.D.Va. 1994).[9] Reflecting the

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[9] The applicant in *Guo Chun Di*, one of many aliens aboard the *Golden Venture* ship that ran aground in New York harbor on June 6, 1993, asserted a claim for political asylum. *Guo Chun Di v. Carroll*, 842 F. Supp. 858, 861 (E.D. Va. 1994). After the birth of his first child, his wife was ordered by the PRC's government family planning officials to report for a forced sterilization, but fled instead; the applicant was similarly notified to report for sterilization and also fled. *Id.* at 861-62. The PRC also imposed economic sanctions on the couple. *Id.* at 862. His testimony was found truthful and credible by the Immigration Judge, and the District Court found that he had met the statutory criteria for political asylum. *Id.* at 874. This decision was subsequently overturned by *Guo Chun Di v. Moscato*, 66 F.3d 315 (4th Cir. 1995), which followed *Matter of Chang*.

Administration's position on asylum and coercive family planning policies, Attorney General Barr's 1993 final rule "took explicit account of the comments previously received concerning the January 1990 Interim Rule and then amended the regulations in essentially the same way as they had been amended by the January 1990 Interim Rule." *Id.* In pertinent part, the rule provided:

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

January 1993 Barr Rule, § 208.13(2)(ii) (emphasis added), Att'y Gen. Order No. 1659-93, *cited in Guo Chun Di*, 842 F. Supp. at 864. This rule both countered *Chang* by predicating eligibility for asylum upon a showing that the applicant was subjected to a coercive family planning regime, and made clear the Department's view that spousal eligibility was authorized under INA § 101(a)(42).

Slated to take effect upon publication in the *Federal Register* on January 25, 1993, Attorney General Barr's belated implementation of the Department's consistent position was halted by the inauguration of President William Clinton. On January 22, 1993, the new administration prohibited the publication of any new regulations until the new heads of agencies approved them. *Guo Chun Di*, 842 F. Supp. at 864. As a result, the new Acting Assistant Attorney General withdrew the January 1993 Barr Rule. *Id.* Asylum regulations were published in February 1993, but these did not include anything from the January 1993 rule.

B. Presumptive Spousal Eligibility Is a Reasonable Interpretation of the INA

Because the 1996 amendment to the INA was specifically intended to overrule the BIA's restricted understanding of "persecution on account of political opinion," it cannot be understood

as *narrowing* the scope of asylum eligibility of spouses of partners subjected to coercive population control programs. The Department's longstanding position that INA § 101(a)(42) authorizes the Attorney General to grant asylum to spouses is therefore in harmony with the 1996 amendment: That provision establishes that being subjected to a coercive population control program constitutes persecution on account of political opinion. And a person whose family unit has been targeted by PRC family control officials (hereinafter a "targeted partner") establishes presumptive eligibility under INA § 101(a)(42) by showing that (1) his spouse was subjected to a coerced abortion or sterilization, and (2) in addition to the harm suffered from having one's spouse subjected to such coercion, the government also targeted him as part of its "one couple, one child" persecutive policy.[10] Indeed, the REAL ID Act of 2005 effectively ratified the Department's position, making a change in administrative policy particularly inappropriate at this juncture.

1. The 1996 Amendment Did Not Restrict Asylum Eligibility

As a majority of the courts of appeals recognize, "Congress amended the definition of refugee [in the 1996 amendment] in order to overrule *Chang* . . . ." *Qu v. Gonzalez*, 399 F.3d 1195, 1203 (9th Cir. 2005). "[T]he impact of that amendment was to . . . allow for the granting of asylum applications in cases in which the claim of persecution stemmed from the enforcement of China's coercive population control policies." *Zhang v. Gonzales*, 434 F.3d 993 (7th Cir.

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[10] Petitioner agrees that "applicants can become candidates for asylum relief only based on persecution that they themselves have suffered or must suffer," *Lin*, 494 F.3d at 308, but takes issue with the *Lin* majority's assertion that the harm visited on the spouse subjected to a coerced abortion or sterilization has no bearing on the merits of the targeted partner's asylum application. This ignores the fact that a forced abortion or sterilization of one spouse by the PRC is targeted at and necessarily affects both members of the couple whose reproductive capacity is thus curtailed. We further discuss this point in Part IV.C.3. Moreover, there may be circumstances where at the time of the persecution the applicant was not in an active relationship with his or her spouse. That is not this case.

2006). *Accord Huang v. Ashcroft*, 113 F. App'x. 695, 700 (6th Cir.2004); *Li v. Ashcroft*, 82 F.App'x. 357, 358 (5th Cir. 2003).

The amendment should thus be understood as correcting the restrictive definition of political opinion insisted on in *Chang*, but not otherwise altering the standard governing asylum eligibility under INA § 101(a)(42). Beyond the substantial federal appellate court authority to this effect, three features of the amendment independently confirm the accuracy of this interpretation.

First, the amendment's language is inconsistent with a change in the substantive standard governing asylum eligibility for spouses of partners subjected to coercive population control practices. The 1996 amendment did not alter the definition of "refugee," which has remained unchanged since the Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (1980). Instead, the amendment directed Executive Branch officials charged with administering the asylum laws that persecution pursuant to a coercive population control program should be considered persecution on account of political opinion:

> For *purposes of determinations under this chapter*, a person [victimized by a coercive family planning program through a forced abortion or sterilization] *shall be deemed* to have been persecuted on account of political opinion . . . ."

8 U.S.C. § 1101(a)(42)(B). Had Congress intended to change the substantive standard governing asylum eligibility, it could have done so directly and explicitly. *Compare* 8 U.S.C. 1158(b)(2)(A) (directly excluding certain classes of aliens from asylum eligibility).

Second, the amendment's language tracks that of *Chang*. In *Chang*, the Board concluded that "the respondent's claims are insufficient to establish that he has a well-founded fear of persecution on account of one of the five grounds enumerated in section 101(a)(42) of the Act." The response of the 1996 amendment was simple and unequivocal: "a person who has been

forced to abort a pregnancy or to undergo involuntary sterilization . . . shall be deemed to have been persecuted on account of political opinion." IIRIRA §601(a), 8 U.S.C. § 1101(a)(42).

In addition, the legislative history of the 1996 amendment reveals that Congress's specific intent in amending the INA was to reverse *Chang*'s reasoning and repudiate its incorrect factual assumptions. The House Judiciary Committee, where the language of IIRIRA § 601(a) first originated, stated in its report:

> The primary intent of section 522 is to overturn several decisions of the Board of Immigration Appeals, principally *Matter of Chang* and *Matter of G-* . . . . The Committee believes that the BIA's rationale for these opinions—that policies of coercive family planning are "laws of general application" motivated by concerns over population growth, and thus are not "persecutory"—is unduly restrictive.

H.R. Rep. 104-469, Part I, 104th Cong., 2d Sess., 173-74 (1996) (considering H.R. 2202).[11] As reflected in this highly visible report, joined by members of both parties, Congress's "primary intent" was to reverse the "unduly restrictive" reasoning of *Chang*. *Id.* at 173-74. It was not Congress's intent to narrow in any way the pre-1996 INA § 101(a)(42) standard governing asylum eligibility.

2. The Department's Spousal Eligibility Rule is Plainly Authorized by INA § 101(a)(42)

INA § 101(a)(42) continues to govern whether the spouse of a partner to a forced abortion or sterilization is eligible for asylum. The 1996 amendment merely confirms that persecution pursuant to a coercive population control program is persecution "on account of political opinion." Under INA § 101(a)(42), a spouse of a partner forced to undergo such a coercive procedure may establish that he was subjected to a level of persecution sufficient to

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[11] Section 601(a) was in the House version but not the Senate version of H.R. 2202. The Senate adopted the House's version of the amendment in conference, without referring the matter to committee. H.R. Rep. No. 104-828, 104th Cong., 2d Sess. 245 (1996) (Conf. Rep.).

establish asylum eligibility based on (1) the harm thereby visited on his partner, (2) country conditions, and (3) the harm visited on him and other members of his immediate family on account of political opinion.

A spouse may establish persecution on account of political opinion by showing that the government targeted him as well as his partner. In general, "persecution" refers to "punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate." *Mitev v. INS*, 67 F.3d 1325, 1330 (7th Cir. 1995); *accord Zhang v. Gonzalez*, 408 F.3d 1239 (9th Cir. 2006); *Chaib v. Ashcroft*, 397 F.3d 1273, 1277 (10th Cir. 2005). "[P]ersecution includes more than threats to life and freedom, and therefore encompasses a variety of forms of adverse treatment, including non-life[-]threatening violence and physical abuse, or non-physical forms of harm such as the deliberate imposition of a substantial economic disadvantage." *Ivanishvili v. U.S. Dept. of Justice*, 433 F.3d 332, 341 (2d Cir. 2006) (quotations and citations omitted). "Serious violations of basic human rights can constitute acts of persecution." Immigration and Naturalization Service, *The Basic Law Manual: U.S. Law and INS Refugee/Asylum Adjudications* (1995) ("Basic Law Manual").

In the PRC, the spouse of a person forced to undergo an abortion, involuntary sterilization, or other coercive population control practice is subject to persecution because the government's target is the marital couple. As the House report on the bill that ultimately became IIRIRA §601(a) recognized:

> Both men and women who have met their "quota" for children may be forcibly sterilized. *Couples* with unauthorized children are subjected to excessive fines, and sometimes their homes and possessions are destroyed.

H.R. Rep. 104-469, Part I, 104th Cong., 2d Sess. 174 (1996) (considering H.R. 2202) (emphasis added).[12] "China's population control policies are *targeted at both partners* in a couple; both members of a couple who defy population control policies may be subjected to forced sterilization or birth control." *Zhang v. Gonzales*, 408 F.3d 1239, 1245 (9th Cir. 2006) (emphasis added).

The express text of Chinese law reinforces that conclusion. The national family planning law provides that "husbands and wives shall bear *joint responsibility* in the implementation of family planning." Law of the People's Republic of China on Population and Family Planning ch. 3, art. 17 (promulgated date: Dec. 29, 2001; effective date Sept. 1, 2002) (emphasis added), *available at* http://www.lawinfochina.com. "For those in violation of this Law, failing to perform the obligation of assisting the family planning management, the relevant local people's government shall order *them* to make corrections and circulate a notice of criticism . . . ." *Id.*, ch. 6, art. 40 (emphasis added).[13]

This is not, as the DHS suggests, a matter of persecution by "proxy." *See* DHS Br. at 2. Rather, it is that the coercive procedure imposed on one partner does—and is intended to—directly and adversely affect both marital partners. As then-Judge Alito recognized, a coercive

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[12] Congress's judgment that the PRC's "one couple, one child" policy targets both spouses was supported by extensive evidence gathered at hearings held over many years. *See, e.g.*, Coercive Population Control in China: New Evidence of Forced Abortion and Forced Sterilization: Hearing Before the H. Comm. on International Relations, 107th Cong., 1st Sess. (Oct. 17, 2001); Hearings on Country Reports on Human Rights Practices During 1995 before the International Operations and Human Rights Subcomm. of the H. International Relations Comm., 104th Cong. 2d Sess. (Mar. 26, 1996); Forced Abortion and Sterilization in China: The View From the Inside: Hearings Before the Subcomm. on Int'l Operations and Human Rights of the House Comm. on Int'l Relations, 105th Cong., 2d Sess. (June 10, 1998).

[13] *See also* Law of the People's Republic of China on Population and Family Planning, ch. 3, art. 20 ("The *spouses* at childbearing age shall deliberately take the contraception measures of family planning, and accept the preferred techniques of family planning.") (emphasis added); ch. 4, art. 27 ("The *spouses* who have obtained the Honor Certificate for the Parents of a Single Child shall, according to the relevant provisions of the State, the provinces, autonomous regions and municipalities directly under the Central Government, enjoy the awards for the parents of only child.") (emphasis added).

population control procedure performed on one partner also constitutes persecution of the other marital partner "because of the impact on the latter's ability to reproduce and raise children." *Chen v. Ashcroft*, 381 F.3d 221, 226 (3d. Cir. 2004) (Alito, J.). Indeed, the procedure may "cause[] the other spouse to experience intense sympathetic suffering that rises to the level of persecution." *Id.* at 225. Moreover, it cannot be forgotten that a substantial portion of the world's population considers abortion—elective abortion, even—as the unjustified taking of a human life. *See, e.g.*, Y.T. Lee et al., *Cross-cultural Research on Euthanasia and Abortion*, 52 J. Soc. Issues. 131, 144-45 (1996) (describing Chinese attitudes toward abortion). For couples holding these beliefs, a forced abortion is tantamount to the murder of their child.

An applicant must of course show that the state targeted both partners in a couple. Such a showing would be made where, as here, the applicant establishes both that a coercive procedure was performed on his spouse *and* that he was targeted because of the PRC's coercive policies—whether by physical harm, threats of violence, or economic sanctions.

Thus, taken together, the well-established country conditions in the PRC, the effect of a forced abortion or sterilization or other coercive population control practice on both the applicant and the other partner in a relationship, and the circumstances of an applicant's individual case may credibly establish persecution of a spouse on account of political opinion within the meaning of the INA. The Department's longstanding policy reflects these social realities.

3. The REAL ID Act of 2005 Effectively Ratified the Department's Interpretation

Congress's further amendment of the precise statutory provision at issue in this proceeding, 8 U.S.C. § 1101(a)(42), in § 101(g)(2) of the REAL ID Act of 2005, Pub.L. 109-13, Div. B, Title III, § 301, 119 Stat. 231 (2005), confirms that the Department's spousal eligibility rule is authorized by INA § 101(a)(42). As originally enacted, the 1996 amendment permitted

the Attorney General to grant asylum to "not more than a total of 1,000 refugees." 8 U.S.C. § 1157(a)(5) (1994 & Supp. 1998). In the REAL ID Act of 2005, Congress *removed* this cap, allowing the Attorney General to grant asylum to an unlimited number of aliens persecuted under a coercive family control program.

Congress's action must be understood as ratifying the Department's spousal eligibility rule and the BIA's recognition of that rule in *Matter of C-Y-Z-*, 21 I. & N. Dec. 915 (1997). By 2000, "the number of individuals receiving asylum based on their fear of coercive population control exceeded 1,000 per year." Letter from Lavinia Limon, Director, Office of Refugee Resettlement, to all interested parties, File No. SL00-22, Conditional Grants of Asylum (Nov. 8, 2000), *available at* http://www.acf.dhhs.gov/programs/orr/policy/sl00-22.htm. In the Second Circuit, "70-80 percent of the appellants are Chinese seeking asylum to escape their homeland's family planning policies." BIA Appeals Remain High in 2nd and 9th Circuits, The Third Branch: Newsletter of the Fed. Cts. (Admin. Office of the U.S. Cts. Office of Pub. Affairs, D.C.), Feb. 2005, *available at* http://www.uscourts.gov/ttb/feb05ttb/bia/index.html.
The necessity of removing the 1,000 person cap on asylum applicants persecuted by China's population control policy is directly related to *Matter of C- Y- Z-* and subsequent BIA decisions. As such, the REAL ID Act's removal of that cap must be understood as implying Congressional approval of those rulings.[14]

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[14] To be sure, as a general matter "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *United States v. Wells*, 519 U.S. 482, 496 (1997) (citations omitted). Here, however, Congress's action makes sense only if Congress knew about, and approved of, the BIA decisions applying the 1996 amendment. As Judge Katzmann cogently reasoned (while questioning the adequacy of the BIA's reasoning in *C-Y-Z-* and its progeny):

> While the fact that Congress, in the course of its active attention to immigration issues and legislation, has not amended 8 U.S.C. § 1101(a)(42) in light of the interpretation it has been given by the BIA and the courts does not definitively mean that Congress intended to protect spouses, it does suggest, at the very least, that it was not Congress's intent to foreclose that relief.

Against this background, it is plain that the Department's spousal eligibility rule is authorized by INA § 101(a)(42). Not only does the policy faithfully apply the basic standard governing asylum eligibility, it has also been implicitly ratified by subsequent Congressional action.

C. The Second Circuit's Ruling Should Not Be Followed

The Second Circuit's ruling in *Lin v. U.S. Dept. of Justice*, 494 F.3d 296 (2d Cir. 2007), clashes with all court of appeals decisions since *Matter of C-Y-Z-* was decided in 1997. Until *Lin*, each of the courts of appeals (including the Second Circuit) facing the issue agreed with the Justice Department that spouses of partners forced to undergo abortions or sterilizations were eligible for asylum. *Lin v. Ashcroft*, 371 F.3d 18, 21 (1st Cir. 2004) (dictum); *Zhao v. U.S. Dep't of Justice*, 265 F.3d 83, 94-95 (2d Cir. 2001); *Chen v. Attorney Gen.*, 491 F.3d 100 (3d Cir. 2007);[15] *Lin-Jian v. Gonzales*, 489 F.3d 182, 188 (4th Cir. 2007) (dictum); *Li v. Ashcroft*, 82 F. App'x 357, 358 (5th Cir. 2003); *Huang v. Ashcroft*, 113 F. App'x 695, 698-99 (6th Cir. 2004); *Zhang v. Gonzales*, 434 F.3d 993, 1001 (7th Cir. 2006); *Cao v. Gonzales*, 442 F.3d 657, 660 (8th Cir. 2006) (dictum); *Hi v. Ashcroft*, 328 F.3d 593, 604 (9th Cir. 2003); *Wang v. U.S. Att'y Gen.*, 152 F. App'x 761, 767 (11th Cir. 2005) (dictum).[16] The Second Circuit's decision to overturn *C-Y-Z-* and *S-L-L-* was, moreover, highly contested; only seven judges on the twelve judge panel voted to limit eligibility. *Lin*, 494 F.3d at 296.

Lin v. U.S. Dept. of Justice, 494 F.3d 296, 323 (2007) (Katzmann, J., concurring in the judgment en banc).

[15] The Third Circuit has since granted *sua sponte* en banc review in light of *Lin*. That proceeding was halted in view of the instant referral proceeding.

[16] We acknowledge that some of these decisions were based on deference to the Department of Justice's interpretation of the INA. However, under *Chevron, U.S.A., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), deference would not have been appropriate if the government's interpretation of the INA were legally unsupportable under the INA.

In the ten years that have passed since the BIA decided *C-Y-Z-*, Congress has not once disapproved of or commented on spousal eligibility under INA § 101(a)(42). The scope of asylum relief is a particularly appropriate area to "ascribe meaning to the absence of congressional response to administrative and judicial interpretations of a statute" because the issue—and indeed the very provision in question—has "been on Congress's radar." *Lin* (Katzman, J., concurring in the judgment en banc), 494 F.3d at 323.

Furthermore, the court's reasoning in *Lin* is flawed. Although the *Lin* majority purports to examine "§ 601(a), viewed in the context of the statutory scheme governing entitlement to asylum," 494 F.3d at 300, its analysis focuses on the text of IIRIRA § 601(a) as if that provision stood alone. However, as discussed above, IIRIRA § 601(a) must be assessed in light of the statute which it amended. *See id*. at 307. Much of the majority opinion dwells on the definition of "person," *Lin*, 494 F.3d at 307, offering the refrain that § 601(a) "could not be more clear in its reference to 'a person' rather than 'a couple.'" *Id.* at 305. The point is not whether "person" is correctly read to include couples. Even if "persons" are individuals, the question under INA § 101(a)(42) is whether the PRC's "one couple, one child" policy targets couples, entailing the persecution of both members of the family unit on account of political opinion.

The *Lin* majority observes it is "inconceivable" that Congress intended to extend asylum eligibility to spouses because of "the perverse effect of creating incentives for husbands to leave their wives." *Lin*, 494 F.3d at 312. No evidence, however, was offered in support of the court's policy-laden assertion. Not a single case was offered of a husband leaving behind his wife in order to, as crassly put by the majority, "capitalize" on her persecution. *Id*. at 223. Indeed, the rule of extending asylum eligibility to spouses allows the spouse most capable of escaping China to seek asylum, later bringing in his or her conjugal partner as a matter of derivative asylum.

In any event, the majority's baldly stated policy concern cannot be squared with the Congressional judgment in the REAL ID Act of 2005, to remove the cap altogether from asylum applications seeking relief from the coercive family control programs of the PRC and other countries. *See* Part I.A.3, *supra*.

D. DHS Offers No Justification for Overturning the Board's Interpretation in *C-Y-Z-* and its Progeny

After a decade of virtually universal support for the holding in *C-Y-Z-*, courts, refugees and immigration attorneys alike have all come to treat protection of the spousal unit as settled law. Individuals seeking asylum under INA § 101(a)(42) as amended by IIRIRA § 601(a) have a reliance interest in prior precedent. Immigration cases can take years to work through the justice system, and many individuals have come to this country in the hope of securing asylum available under existing law and have based their arguments before the IJ, the BIA, or the court of appeals on the assumption that *C-Y-Z-* is good law. Until the Second Circuit's ruling in *Lin,* applicants could have presumed and relied on the future viability of *C-Y-Z-* given its solid foundation in Congressional intent, executive action, longstanding Justice Department policy, and multi-circuit approval of the BIA ruling.

Any reversal of Justice Department policy would require a reasoned explanation not furnished here by DHS. "An agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). An agency has a "duty to give a reasoned justification for any departure from its prior policies or practices." *Pittsburgh Press Co. v. NLRB*, 977 F.2d 652, 655 (D.C. Cir. 1992). The Supreme Court has also noted that the expertise of agencies cautions against overturning long-standing agency policy. "A settled course of behavior embodies the agency's

informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 41-42 (citation omitted).

E. Claimed Abuses Reflect a Misunderstanding of the Rebuttable Presumption Involved in this Case

DHS's argument that "some husbands" intend to exploit and abandon their wives, DHS Br. 21 n.12, rests on a misunderstanding of the spousal eligibility rule.

1. Immigration Judges Have Ample Authority to Identify and Reject Groundless Asylum Applications

First, it is a mistake to think of the spousal eligibility rule as a *per se* grant of asylum. Bare assertions, without more, do not survive the asylum process. The IJ must make credibility findings in favor of the asylum applicant for the matter to proceed. *See* 8 C.F.R. § 208.13(a). The House Judiciary Committee report addressed this concern after adding the language that became INA § 101(a)(42):

> Determining the credibility of the applicant and whether the actual or threatened harm rises to the level of persecution is a difficult and complex task, but no more so in the case of claims based on coercive family planning than in cases based on other factual situations. Asylum officers and immigration judges are capable of making such judgments.

H.R. Rep. 104-469, Part I, 104th Cong., 2d Sess., 174 (1996) (considering H.R. 2202).[17]

Moreover, as developed above, *C-Y-Z-* establishes only a rebuttable presumption of eligibility. Thus, an individual who has abandoned his or her spouse will lack convincing evidence to justify a well-founded fear of persecution upon return to the PRC. While an asylum applicant seeking eligibility under the "past persecution" prong of INA § 101(a)(42)—which

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[17] Of course, there exists the possibility that a skilled charlatan could lie convincingly enough to evade the credibility determinations of the IJ. Nonetheless, U.S. Rep. Chris Smith, a principal sponsor of § 601(a), correctly points out that "[p]eople who are willing to lie in order to get asylum will simply switch to some other story. The only people who will be forced to return to China will be those who are telling the truth." 142 Cong. Rec. H11067 (Sept. 25, 1996) (statement of Rep. Smith of New Jersey).

includes those seeking asylum based on their own or their spouse's forced abortion or sterilization or other coercive population control practices—is generally presumed to have a well-founded fear of future persecution, the applicant may still be denied asylum if the agency proves that there has been a change of circumstances in the country of origin such that a fear of future persecution is no longer "well-founded." *See Matter of C-Y-Z-* at 7-8, 9; 8 C.F.R. § 1204.13(b)(1).

2. The Presumptive Eligibility of Spouses Provides an Important Escape Valve for Members of Spousal Units Targeted for Coercive Population Policies

The spousal eligibility rule of *C-Y-Z-* serves to protect many persecuted spousal units who would otherwise be in the hands of their persecutors with no means to escape persecution under coercive population control programs.

The crucial point in a practical analysis of the *C-Y-Z-* rule is that the scheme for granting derivative asylum to spouses does not suffice to protect the victims of coercive population control. Under *C-Y-Z-,* a couple has two chances to escape persecution and become refugees in the United States. The DHS's narrow interpretation of IIRIRA § 601(a) allows only one member of the spousal unit—in many cases, the person *least* able to leave the country—to seek asylum in the United States and bring the spouse. *See* 8 C.F.R. § 208.21. By contrast, *C-Y-Z-* allows either spouse to seek asylum in the United States and seek derivative status for the other. For many couples, this two-level opportunity is outcome-determinative. As the many cases in the *C-Y-Z-* line illustrate, the spouse of a partner forced to undergo an abortion or sterilization may be the member of the family unit most able to reach the United States first to seek asylum.

Despite China's progress as an economic power, it is important to remember the challenges that couples still face in a relatively closed society that actively punishes dissidents. *See* Bureau of Democracy, Human Rights, and Labor, U.S. Dept. of State, China Country Report

on Human Rights Practices for 2006 (Mar. 6, 2007), *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78771.htm (observing that "[t]he country's birth planning policies retained harshly coercive elements in law and practice" where laws requiring officials "to obtain court approval before taking 'forcible' action, such as detaining family members or confiscating and destroying property of families" are "not always followed"). One should not assume, contrary to the premise of the Justice Department's position since at least 1989, that individuals already targeted by PRC officials for violations of state family planning practices will be able to flee their country without great difficulty.

V. RESPONDENT SHI IS ELIGIBLE FOR ASYLUM

The forced implantation and required maintenance of an IUD pursuant to a coercive population control program constitute persecution on account of political opinion under INA § 101(a)(42). Forced abortions and involuntary sterilizations are important examples of the practices PRC and other states use in coercive population control programs, but Congress did not purport to limit the range of such practices cognizable under IIIRIRA § 601(a) to involuntary abortions and sterilizations. Moreover, forced IUD insertion coupled with periodic monitoring by the state is a form of "sterilization" under § 601(a). Because Mr. Shi faced fines, threats, and the denial of requests to have additional children—in addition to the suffering caused to his family by the forced insertion of an IUD into his wife and the accompanying state monitoring—he is eligible for asylum.

A. Forced Implantation of an IUD and Periodic Monitoring by the State Constitute Persecution on Account of Political Opinion

The PRC's forced implantation in Mrs. Shi of an IUD pursuant to its "one couple, one child" policy is an invasive and potentially dangerous medical procedure that rises to the level of

persecution on account of political opinion under INA § 101(a)(42).[18] In a recent opinion addressing forced IUD insertion, the Fourth Circuit noted that "the harms and injuries associated with compelled IUD usage—such as the continuing invasion of [one's] most intimate bodily privacy and the potentially indefinite disabling of her reproductive capability—when taken together with the flagrant violation of personal privacy involved in the actual insertion of the IUD, might collectively rise to the level of 'persecution.'"[19] *Li v. Gonzales*, 405 F.3d 171, 179 (4th Cir. 2005).[20] *See also Zheng v. Gonzales*, 409 F.3d 804, 810 (7th Cir. 2005) (noting the BIA "assumed that the involuntary insertion of IUDs constitutes 'a cognizable claim' of persecution on account of political opinion" under INA § 101(a)(42)); *Li v. Ashcroft*, 356 F.3d 1153, 1158 (9th Cir. 2004) (holding that a forced "crude and aggressive" gynecological procedure to detect pregnancy, coupled with the threat of a forced abortion if the applicant were found to be pregnant, constituted persecution).

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[18] The insertion of an IUD is by definition an invasive medical procedure and an absolute invasion of privacy. Inserting an IUD involves exposing "the cervix…with a speculum", the potential use of a "paracervical block" to reduce pain, and grasping the cervix "with a tenaculum" (a hook) and "pulling downwards to straighten the angle between the cervical canal and the uterine cavity" in order to insert the IUD. Jonathan S. Berek, *Novak's Gynecology* 246 (13th ed. 2002). The invasion of a woman's body and privacy is exacerbated when the act of insertion is viewed in conjunction with frequent, mandatory check-ups to ensure that the IUD has not been removed. Complications can also arise. The most serious is pelvic inflammatory disease; other complications include perforation of the uterus, ectopic pregnancy, cervicitis, abortion, embedding of the device in the wall of the uterus, endometritis, bleeding, pain, and cramping. *Mosby's Dictionary of Medicine, Nursing & Health Professions* 1007 (7th ed. 2006).

[19] Several courts of appeals have remanded cases to the BIA in order for the BIA to articulate, "in a published, precedential decision, its position concerning whether and under what conditions the forced insertion of an IUD constitutes persecution." *Zheng v. Gonzales*, 497 F.3d 201, 202 (2d Cir. 2007); *see also Lin v. Ashcroft*, 385 F.3d 748, 757 (7th Cir. 2004).

[20] While in *Li* the petitioner only argued that the singular act of insertion constituted persecution, the court stated that "if Li's argument on appeal were not so narrowly limited to the single act of insertion, we might well be prepared to hold that the compulsory insertion and required usage of an IUD constitutes 'persecution' within the meaning of 8 U.S.C. § 1101(a)(42)." 405 F.3d at 179. Such "compulsory insertion and required usage of an IUD" is precisely what happened to Mrs. Shi. *Id.*

The statutory phrases "abort a pregnancy" and "undergo involuntary sterilization" are merely examples of "coercive population control program[s]" under which individuals may establish persecution. The statute refers to persons who have undergone a forced abortion or sterilization, "*or* who [have] been persecuted for failure or refusal to undergo *such a procedure or* for other resistance to a *coercive population control program*." 8 U.S.C. § 1101(a)(42), as amended by IIRIRA § 601(a) (emphasis added). By ending the provision with the broadening phrase "coercive population control program," Congress intended the earlier phrases to be viewed as non-exhaustive examples of "procedures" and "coercive population control program[s]." *See, e.g.*, *Jones v. United States*, 527 U.S. 373, 389 (1999) ("Statutory language must be read in context and a phrase gathers meaning from the words around it.") (citation omitted).

The above reading comports with the 1996 amendments broader purpose of expanding eligibility for asylum, and its expansive phrase "coercive population control program." As there is no way to accurately predict what particular coercive methods PRC family planning officials will use to enforce compliance with the "one couple, one child" policy, or any way to predict future medical advances, this expansive view is the one intended by Congress.

Moreover, the "involuntary sterilization" language of § IIRIRA § 601(a) encompasses an involuntary IUD insertion, especially when coupled with mandatory quarterly monitoring visits with family planning officials to ensure that the IUD was still in place. "Sterilization" is a fairly broad, inclusive term defined as a "process or act that renders a person unable to have children." *Mosby's Dictionary of Medicine, Nursing & Health Professions* 1178 (7th ed. 2006). IUDs, vasectomies, and tubal litigations are medical procedures which prevent reproduction, or conception. Jonathan S. Berek, *Novak's Gynecology* 242, 270, 276 (13th ed. 2002). As Mrs. Shi

was forced to report to quarterly examinations by local officials to guarantee that the IUD was still in place, the family planning officials refused three separate applications by Mr. Shi to remove the IUD and have additional children, and the couple was threatened with sterilization if they chose to remove the IUD without permission, Mr. and Mrs. Shi were, in effect, barred from reproducing for the remainder of their fertile lives.

Additionally, IUD insertions, vasectomies, and tubal litigations are all serious procedures necessarily performed by a doctor or other qualified medical clinician, in contrast to temporary forms of birth control such as birth control pills, diaphragms, or condoms which are controlled by the individual. *See Stedman's Medical Dictionary* 1563 (28th ed. 2006) (defining "procedure" as an "[a]ct or conduct of diagnosis, treatment, or *operation*") (emphasis added).

B. Mr. Shi Suffered Persecution as a Target of China's "Coercive Population Control Program"

Mr. and Mrs. Shi suffered persecution as a result of the forced implantation of an IUD in Mrs. Shi and quarterly visits to local government officials to ensure that the IUD had not been removed. Mrs. Shi not only had to undergo the invasive procedure described above, she had to do so against her will. J.A. 28, 69, 93-94, 223. This invasive procedure took place only one month after Mrs. Shi had given birth and entirely *without warning*; the family planning officials simply showed up at her door and took her away. J.A. 223. She then was required to submit to invasive gynecological exams *four times a year* in order to ensure that the IUD had not been removed—putting the couple under close and constant supervision. J.A. 76, 223. Finally, Mrs. Shi had to live on a daily basis with an IUD, precluding the child-bearing capacity she and Mr. Shi desire.

In addition to the forced insertion and maintenance of the IUD, Mr. and Mrs. Shi both faced fines, threats, and an inability to have another child. The couple as a unit was fined 1,000

RMB because they were married earlier than the age of marriage as prescribed under the population control program. J.A. 97-98. Although they together applied three separate times for permission to remove the IUD and have additional children, each request was denied by the village family planning officials—thus barring Mr. and Mrs. Shi from having another child. J.A. 77. Finally, the village officials threatened Mr. Shi, telling him that if the couple were to become pregnant they would force Mrs. Shi to have an abortion, sterilize either Mr. or Mrs. Shi, and further fine the couple. J.A. 69-71, 231, 238. Mr. Shi was specifically threatened that if his wife became pregnant, he would be sterilized as had happened to his mother and sister. J.A. 69-71, 231, 238. Viewed cumulatively, these events establish persecution. *See Ying v. Gonzales*, 2007 WL 2398802, *1 (2d Cir. 2007) ("the 'cumulative effect of the applicant's experience must be taken into account'") (summary order).

CONCLUSION

For the foregoing reasons, the Department's policy of presumptive spousal eligibility should be reaffirmed, and petitioner Jianzhong Shi should be granted asylum.

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By: ___________/s/___________

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