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NOTE

ASYLUM FOR A MINOR CHILD OF PERSECUTED PARENTS IN *ZHANG v. GONZALES*

INTRODUCTION

Over the past twenty-five years, the government of China has adopted coercive family-planning policies to combat overpopulation.¹ Family-planning officials dictate when or if couples may marry and regulate a couple's decision to bear children.² Among the family-planning policies is "one couple, one child."³ If a couple violates this policy by having two or more children, the government requires one parent to undergo sterilization, and the family is often fined.⁴ Refusal to comply with these coercive measures can be disastrous for all family members.

These are the circumstances underlying the Ninth Circuit's asylum case of *Zhang v. Gonzales*.⁵ One morning, government officials entered the Zhang household in rural China.⁶ The officials removed Ms. Xue Yun Zhang's father and forced him to undergo sterilization that caused permanent harm to his health.⁷ The government also penalized the Zhang family with a substantial fine for violating the family-planning

¹ Susan Greenhalgh & Edwin A. Winckler, Immigration and Naturalization Service, *Perspective Series: Chinese State Birth Planning in the 1990s and Beyond*, at xix (2001), available at uscis.gov/graphics/services/asylum/ric/documentation/pschn01001.pdf.

² Michael Weisskopf, *One Couple, One Child: Abortion Policy Tears at China's Society*, Wash. Post, Jan. 7, 1985, at A1.

³ *Id.*

⁴ Greenhalgh & Winckler, *supra* note 1, at 6-7.

⁵ *Zhang v. Gonzales*, 408 F.3d 1239 (9th Cir. 2005).

⁶ *Id.* at 1243.

⁷ *Id.*

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policy.⁸ Due to his weakened condition Ms. Zhang's father was unable to support his family or pay the government fine.⁹ As a result, the government barred the Zhang children from attending school.¹⁰ The Zhang family was devastated by their father's sterilization.¹¹ The trauma left the family destitute and the children without access to education.¹² Shortly thereafter, the Zhang family's oldest child, Ms. Xue Yun Zhang, left for the United States, hoping to receive an education and gain employment in this country.¹³ However, instead of being able to pursue her dreams, she was detained upon entry and has been fighting to stay ever since.¹⁴

In *Zhang v. Gonzales*, the Ninth Circuit considered for the first time whether an unaccompanied minor child of a parent who was forcibly sterilized should be automatically eligible to apply for asylum. Deferring to the statutory interpretation adopted by the Board of Immigration Appeals ("BIA"), the court found against the child.¹⁵ The court's opinion retreated from earlier dictum suggesting that the refugee statute could reasonably be extended to grant automatic eligibility to a child.¹⁶ However, the court went on to hold that the parents' political opinion – in the form of resistance to coercive population controls – could still be imputed to the child for purposes of establishing asylum eligibility based on persecution suffered by the child.¹⁷ Because the BIA's decision on this issue – that Ms. Zhang had not suffered persecution – was not supported by sufficient evidence, the Ninth Circuit remanded the case for further proceedings.¹⁸

Part I of this Note provides a background of Chinese population-control policies, a discussion of the applicable fundamental rights recognized in domestic and international law, and United States asylum law.¹⁹ Part II provides the factual and procedural history of the *Zhang* case and outlines the Ninth Circuit's decision.²⁰

Part III analyzes the Ninth Circuit's approach to the *Zhang* case and

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 1242; see 8 U.S.C. § 1101(a)(42)(B) (Westlaw through 2006).

¹⁶ *Zhang*, 408 F.3d at 1245; see *Jie Lin v. Ashcroft*, 377 F.3d 1014, 1031 (9th Cir. 2004).

¹⁷ *Zhang*, 408 F.3d at 1246-47.

¹⁸ *Id.* at 1247-50.

¹⁹ See *infra* notes 23-95 and accompanying text.

²⁰ See *infra* notes 96-131 and accompanying text.

agrees that the court correctly deferred to the BIA's statutory construction in holding that Ms. Zhang was outside the scope of the automatic-eligibility provision.²¹ Part III further contends that the court also correctly held that Ms. Zhang would be eligible for asylum if she had herself been persecuted on the basis of her parents' resistance to coercive population-control measures. Appropriately, therefore, the primary issue in the case on remand will be the evaluation of whether the hardships suffered by Ms. Zhang rose to the level of "persecution."²²

Part IV concludes that when a minor child of a parent who suffered persecution by the Chinese government for a violation of their population-control policies claims asylum, the child's claims should be judged on their own merits. The *Zhang* court should have taken the opportunity to provide guidance on which particular hardships cumulatively rise to persecution, keeping in mind that a child's harm may be relatively less than an adult's and still qualify as persecution.

I. BACKGROUND

Opposition to Chinese birth-control policies is one of many grounds currently recognized for asylum protection under United States and international law.

A. CHINA'S POPULATION-CONTROL POLICY

Chairman Mao Zedong declared the formation of the People's Republic of China on October 1, 1949.²³ In the 1950's Mao wished to produce a more prosperous nation by increasing the population.²⁴ He reasoned that more people would provide more "productive hands waiting to work."²⁵ However, after about twenty years, the population boom in China threatened to outgrow its agricultural capacity.²⁶ The government realized that to become economically modern, reduce poverty, and ensure national survival, China had to control its population

²¹ See 8 U.S.C. § 1101(a)(42)(B) (Westlaw through 2006).

²² See *infra* notes 132-178 and accompanying text.

²³ Greenhalgh & Winckler, *supra* note 1, at 168.

²⁴ Stephen Mufson, *Population Curbs Slip in China, 1.2 Billion Reached Five Years Early*, Wash. Post, Feb. 14, 1995, at A17.

²⁵ *Id.*

²⁶ See Mufson, *supra* note 24, at A17 ("Lester Brown of Worldwatch Institute has written that China's population growth, the disappearance of Chinese farmland and continued industrial expansion would make China a big food importer, disrupting world food markets, in about 20 to 30 years."); Weisskopf, *supra* note 2, at A1 ("The one-child policy was launched in 1979.").

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growth.²⁷ This became a national priority and culminated in the “one couple, one child” regulation promulgated in 1979.²⁸ The government’s subsequent policy changes contained extensive regulations restricting the right to marry and the right to have children, which are only nominally protected by China’s law and constitution.²⁹

Beyond the implementation of many economic and social reforms, governance and social control in the People’s Republic of China are largely based on collective action, group decisions, and social pressure.³⁰ These social attitudes significantly influence and control individuals’ personal and professional lives.³¹

All Chinese citizens belong to a workplace or rural governing unit³² headed by government officials who enforce the government’s policies and regulations.³³ These officials control salaries, housing allocation, land-ownership rights, crop-growing rights, educational opportunities, and the ability to marry and to have children.³⁴

Each unit contains a birth-control committee responsible for the enforcement of birth-control policies.³⁵ Government officials must ensure that their unit stays within its birth quota, but there are no formal policies dictating how unit officials are to enforce and control the quotas.³⁶ Some officials track menstruation dates and birth-control methods of all women of child-bearing age.³⁷ Adherence to the “one couple, one child” policy requires a couple with one child to use long-term birth control.³⁸ After the birth of the first child, the government often orders IUDs to be inserted without the woman’s consent.³⁹ If a

²⁷ Mufson, *supra* note 24, at A17.

²⁸ *Id.*

²⁹ *Id.*; see U.S. Department of State, *Country Reports on Human Rights Practices - 2000 (China)* (2001), available at <http://www.state.gov/g/drl/rls/hrrpt/2000/eap/684.htm> (“The Constitution and laws provide for fundamental human rights; however, these protections often are ignored in practice.”).

³⁰ Ben-Fu Li, *Informed Consent in Research Involving Human Subjects*, 15 J. CLINICAL ETHICS, 35, 36 (2004).

³¹ *Id.*

³² Weisskopf, *supra* note 2, at A1.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ U.S. Department of State, *Country Reports on Human Rights Practices - 2000 (China)*, *supra* note 29, at “f. Arbitrary Interference With Privacy, Family, Home, Correspondence.”

³⁷ Weisskopf, *supra* note 2, at A1.

³⁸ U.S. Department of State, *Country Reports on Human Rights Practices - 2000 (China)*, *supra* note 29, at “f. Arbitrary Interference With Privacy, Family, Home, Correspondence.”

³⁹ Greenhalgh & Winckler, *supra* note 1, at 5. An IUD is an intrauterine device that is used as one of several forms of birth-control methods.

couple has two children, one parent is strongly encouraged to be sterilized.⁴⁰ Doctors are to abort unplanned pregnancies immediately,⁴¹ but to follow the birth-control policy doctors may perform late-term abortions up to the time of birth.⁴² Observance of the “one couple, one child” policy in urban areas is strong, due to strict enforcement and the increasing costs of education and child-rearing.⁴³ Because the demands of farm labor require more workers, units in rural areas generally allow a couple to have two children if the first child is a girl or is handicapped.⁴⁴

Officials often take coercive measures to prevent violation of the unit’s birth quota.⁴⁵ Although the practice has been on the decline since the late 1980’s, unit officials may use physical force against offending couples to comply with the birth quota.⁴⁶ Neighbors and colleagues are encouraged to publicly criticize offending couples.⁴⁷ In some cases, unit officials may financially penalize even compliant co-workers of a unit if the unit exceeds its birth quota.⁴⁸ China characterizes any resistance to the “one couple, one child” policy as political dissent,⁴⁹ and higher-ups may reprimand unit officials for violations within their unit and may withhold their salary bonuses.⁵⁰

China’s implementation and coercive enforcement of the current population-control policies often involve persecution and violation of basic human rights recognized under both international and United States

⁴⁰ *Id.* at 7.

⁴¹ U.S. Department of State, *Country Reports on Human Rights Practices - 2000* (China), *supra* note 29, at “f. Arbitrary Interference With Privacy, Family, Home, Correspondence.”

⁴² Greenhalgh & Winckler, *supra* note 1, at 33.

⁴³ U.S. Department of State, *Country Reports on Human Rights Practices - 2000* (China), *supra* note 29, at “f. Arbitrary Interference With Privacy, Family, Home, Correspondence.”

⁴⁴ *Id.*

⁴⁵ *Id.* (“Rewards for couples who adhere to family planning policies include monthly stipends and preferential medical and educational benefits. Disciplinary measures against those who violate policies can include fines (sometimes called a ‘fee for unplanned birth’ or a ‘social compensation fee’), withholding of social services, higher tuition costs when the child goes to school, demotion, and other administrative punishments that sometimes result in loss of employment.”).

⁴⁶ Greenhalgh & Winckler, *supra* note 1, at 17.

⁴⁷ U.S. Department of State, *Country Reports on Human Rights Practices - 2000* (China), *supra* note 29, at “f. Arbitrary Interference With Privacy, Family, Home, Correspondence.”

⁴⁸ *Id.*

⁴⁹ 145 Cong. Rec. E1159-01 (extension of remarks. June 8, 1999). In the United States this political dissent is considered a political opinion for purposes of asylum eligibility. *In re C-Y-Z*, 21 I. & N. Dec. 915, 922 (BIA 1997) (“one who opposes or resists a coercive population control program involving forced abortion and sterilization because he or she believes that it is wrong or improper on personal, ethical, religious or philosophical grounds, holds a political opinion.”).

⁵⁰ Greenhalgh & Winckler, *supra* note 1, at 18.

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law.⁵¹ Such persecution may become the basis of an asylum claim of a person who subsequently enters the United States seeking protection.⁵²

B. FUNDAMENTAL RIGHTS

Fundamental rights, as recognized by international law, include the right to privacy, marital sanctity, and bodily integrity. These rights are enumerated in international human rights law under the United Nations' 1948 Universal Declaration of Human Rights.⁵³ The Declaration specifically protects the rights to marry, form a family, and obtain an education.⁵⁴ It protects the right to be free from arbitrary interference in "privacy, family, home or correspondence."⁵⁵ Congress and the courts have recognized similar fundamental rights in the United States.⁵⁶

Although many fundamental privacy rights are not articulated in the United States Constitution, courts have found them to exist by implication.⁵⁷ In 1972 the United States Supreme Court held in *Eisenstadt v. Baird* that "[i]f the right of privacy means anything, it is the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."⁵⁸ Government-imposed birth-control policies reject fundamental privacy rights; Congress has thus made opposition to these policies an express basis for asylum.⁵⁹ Enforcement by Chinese officials in *Zhang* of their coercive population-control policies resulted in the violation of the fundamental rights of Ms. Zhang and her parents.

C. UNITED STATES ASYLUM LAW

United States asylum law⁶⁰ is governed by domestic law but is also

⁵¹ U.S. Department of State, *Country Reports on Human Rights Practices - 2000* (China), *supra* note 29, at "f. Arbitrary Interference With Privacy, Family, Home, Correspondence"; *see, e.g.*, *Cardoza-Fonseca v. INS*, 480 U.S. 421, 436-37 (1987).

⁵² *Cardoza-Fonseca*, 480 U.S. at 437-39.

⁵³ Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/180 (1948).

⁵⁴ *Id.* arts. 16(1), 26(1).

⁵⁵ *Id.* art. 12.

⁵⁶ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade* 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁵⁷ *See, e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade* 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁵⁸ *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

⁵⁹ Illegal Immigration Reform and Immigrant Responsibility Act, of 1996, 110 Stat. 3009-546 (codified as amended at 8 U.S.C. § 1101(a)(42)(B) (1996) (Westlaw through 2006)).

⁶⁰ This Note focuses on the law in force at the time of Ms. Zhang's asylum application.

guided by international agreements such as the 1967 United Nations Protocol Relating to the Status of Refugees (“UN Protocol”).⁶¹ The relevant federal statutes governing asylum include the Immigration and Nationality Act (“INA”),⁶² the Refugee Act of 1980 (“Refugee Act”),⁶³ the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”),⁶⁴ and the REAL ID Act of 2005.⁶⁵

The objective of the Refugee Act was to establish permanent procedures for the admission of refugees into the United States.⁶⁶ The Refugee Act amended the INA to conform to the UN Protocol.⁶⁷ The definition of the term “refugee” from the UN Protocol was adopted nearly verbatim in the Refugee Act as:

any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country *because of persecution or a*

However, the primary contention of this Note—that the circumstances of a parent’s persecution, including the parent’s involuntary sterilization, are relevant in determining whether the child has been persecuted—remains applicable under current law.

⁶¹ *Cardoza-Fonseca v. INS*, 480 U.S. 421, 437-39 (1987).

⁶² 8 U.S.C. § 1101 *et seq.* (Westlaw through 2006).

⁶³ Pub. L. No. 96-212, 94 Stat. 102 (1980).

⁶⁴ Pub. L. No. 104-208, div. C, 110 Stat. 3009–546 (1996).

⁶⁵ REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 302 (May 11, 2005) (Westlaw through 2006). The REAL ID Act of 2005 applies to new applications for asylum filed on or after May 11, 2005, and does not apply to Ms. Zhang’s case. Going forward, asylum applicants have a higher burden of proof and must establish a clear nexus between persecution and at least one of the five protected grounds as the central reason for the persecution. *See also* US REAL ID Act Changes Asylum Law (2005), <http://www.asylumlaw.org/index.cfm?fuseaction=showNewsItem&siteNewsID=157>. The new standard for sufficiency of evidence is that the IJ may grant asylum on testimony alone as long as it is credible, persuasive and points to sufficiently specific facts to demonstrate the applicant is a refugee. *Id.* Attorneys should try to gather corroborating evidence as well. *Id.* The new standard for credibility is that the trier of fact can base the determination on demeanor, candor or responsiveness when considering the totality of the circumstances and all relevant factors, including inherent plausibility of the applicant’s story, consistency between written and oral statements, internal consistency of each statement, consistency of statements with evidence of record and State Department Reports, and any falsehoods or inaccuracies contained in the statements. *Id.*

⁶⁶ Refugee Act of 1980, 94 Stat. 102 (codified at 8 U.S.C. § 1521 (Westlaw through 2006)). Any refugee who is physically present in the United States may apply for asylum within one year after the date of the alien’s arrival in the United States. *Id.* If the Attorney General determines the alien is a refugee under an applicable statute, the Attorney General may grant asylum to the applicant. *Id.* Asylum may be granted for an indefinite period, but asylum status does not automatically give the asylum grantee the right to remain in the United States permanently. *Id.* Asylum grantees may be returned to their country by the United States during the asylum grant. *Id.*

⁶⁷ *Cardoza-Fonseca v. INS*, 480 U.S. 421, 436 (1987) (the United States acceded to the protocol in 1968).

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*well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.*⁶⁸

An applicant may be classified a refugee by the United States government based on any one of these five protected grounds.⁶⁹

To qualify for protection⁷⁰ as a refugee or asylee under the Refugee Act, (1) the applicant must have suffered past persecution or have a fear of future persecution; (2) the fear must be well-founded; (3) the persecution must be on account of race, religion, nationality, membership in a social group, or political opinion; and (4) the applicant must be unable or unwilling to return to his or her country of nationality or to the country in which he or she last habitually resided because of the persecution or well-founded fear of persecution.⁷¹

“Persecution” has been defined as “the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive.”⁷² Substantial economic deprivation, although not required to be the total deprivation of all means of earning a livelihood, is sufficient to constitute persecution.⁷³

Persecution claims generally arise in two forms.⁷⁴ First, if past persecution is established there is a presumption that the applicant has a well-founded fear of persecution in the future that can be overcome only if the INS⁷⁵ can establish by a preponderance of the evidence that conditions in the applicant’s country have changed.⁷⁶ Second, past persecution may be established without a well-founded fear of future persecution if the past persecution was so severe that there are

⁶⁸ 8 U.S.C. § 1101(a)(42)(A) (Westlaw through 2006) (emphasis added).

⁶⁹ Baballah v. Ashcroft, 367 F.3d 1067, 1073-74 (9th Cir. 2004).

⁷⁰ The applicant bears the initial burden of proving these requirements. 8 U.S.C. § 1158(b)(1)(B)(i) (Westlaw through 2006). The applicant’s testimony alone may be sufficient to sustain the burden of proof without corroboration, if the trier of fact finds that the applicant is credible and persuasive and has referred to specific facts to demonstrate that he or she is a refugee. 8 U.S.C. § 1158(b)(1)(B)(ii) (Westlaw through 2006).

⁷¹ Cardoza-Fonseca v. INS, 480 U.S. 421, 428 (1987).

⁷² Kovac v. Immigration and Naturalization Service, 407 F.2d 102, 107 (9th Cir. 1969).

⁷³ *Id.*

⁷⁴ Matter of Chen, 20 I. & N. Dec 16, 18 (BIA 1989).

⁷⁵ The Homeland Security Act of 2002 consolidated the Immigration and Naturalization Service into the Department of Homeland Security. Most of the functions were transferred to the Bureau of Border Security and the Bureau of Citizenship and Immigration Services. Pub. L. No. 107-296, 116 Stat. 2135 (2002). This Note refers to the INS since it was the relevant agency at the time of Ms. Zhang’s application.

⁷⁶ 8 C.F.R. § 208.13(b)(1)(ii) (Westlaw through 2006), 8 U.S.C. § 1158(c)(2)(A) (Westlaw through 2006).

compelling reasons for being unwilling to return.⁷⁷ Because of the severity of past persecution needed for the second method, most applicants establish their claim using the first.

The presumption that the applicant has a well-founded fear of future persecution arises when the applicant shows subjective fear, objective fear, and persecution on account of a protected ground.⁷⁸ A subjective fear of harm can be established if the applicant's testimony regarding his or her fear is credible.⁷⁹ The objective component of a reasonable possibility (not requiring probability) of persecution requires a showing of "some direct, credible evidence supporting the claim,"⁸⁰ under a reasonable-person standard.⁸¹ The third element is an explanation of the mistreatment or the reason for the persecution, which requires a nexus between the infliction of harm and one of the five enumerated grounds.⁸² At the time *Zhang* was decided, the nexus requirement was simply a connection between persecution that was "at least in part" on account of one of the five enumerated grounds.⁸³

As late as 1989, the United States did not view punishment suffered under a government's coercive population-control policies as sufficient to qualify individuals for asylum eligibility, because these laws were considered to apply to the population in general "as a set of incentives for limiting the size of families," instead of persecuting individuals.⁸⁴ In 1996 Congress reversed its position on coercive population-control through the IIRIRA, which amended the INA.⁸⁵ The amendment, codified at 8 U.S.C. § 1101(a)(42)(B), provides that "*a person [1] who has been forced to abort a pregnancy or to undergo involuntary sterilization, or [2] who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion.*"⁸⁶ The two parts of the amendment will

⁷⁷ *Matter of Chen*, 20 I. & N. Dec 16 (BIA 1989), 8 C.F.R. § 208.13(b)(1)(iii) (Westlaw through 2006). Past persecution can be established through credible testimony without the need for corroborative evidence. *Garrovillas v. INS*, 156 F.3d 1010, 1016 (9th Cir. 1998).

⁷⁸ *Baballah v. Ashcroft*, 367 F.3d 1067, 1074 (9th Cir. 2004).

⁷⁹ *Id.*

⁸⁰ *Id.* (quoting *Sarvia-Quintanilla v. INS*, 767 F.2d 1387, 1394 (9th Cir.1985)).

⁸¹ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987).

⁸² *In re Fauziya Kasinga*, 21 I. & N. Dec. 357, 374 (B.I.A. 1996).

⁸³ *Borja v. INS*, 175 F.3d 732, 735 (9th Cir.1999).

⁸⁴ *In re C-Y-Z-*, 21 I & N. Dec. 915, 925 (BIA 1997); *see In re Chang*, 20 I. & N. Dec. 38 (B.I.A. 1989).

⁸⁵ Illegal Immigration Reform and Immigrant Responsibility Act, of 1996, 110 Stat. 3009-546 (codified as amended at 8 U.S.C. § 1101(a)(42)(B) (Westlaw through 2006)).

⁸⁶ *Id.* (enumeration and emphasis added).

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hereinafter be referred to as “clause [1]” and “clause [2].” The condition specified in clause [1] is sometimes referred to as “automatic eligibility for asylum,” because the simple fact of involuntary abortion or sterilization results in eligibility for asylum, without any further showing of persecution.⁸⁷

This new change incorporated an additional definition of “refugee” specifically to aid Chinese nationals fleeing China in fear of harm for violating population-control policies.⁸⁸ Clause [1] of the amendment mentions only the asylee’s persecution and does not specifically allow a grant of asylum to the applicant’s spouse for that persecution.⁸⁹ However, in considering *In re C-Y-Z-*, the BIA held that clause [1] also applies to the spouse of an individual who has been forced to have an involuntary abortion or sterilization.⁹⁰ In *Jie Lin v. Ashcroft*, the Ninth Circuit stated, in dictum, that the reasoning of *C-Y-Z-* might plausibly be extended to make clause [1] applicable also to the child of an individual who has been forced to have an involuntary abortion or sterilization.⁹¹ Then, in *Zhang*, the Ninth Circuit retreated from its *Jie Lin* dictum, deferring to the BIA’s interpretation of clause [1] of 8 U.S.C. § 1101(a)(42)(B).⁹² The BIA construed clause [1] as not applicable to the child of an individual who has been forced to have an involuntary abortion or sterilization.⁹³

The *Zhang* court, however, went on to hold that such a child may nevertheless be eligible for asylum under clause [2], based on the imputation to the child of the parent’s “resistance to a coercive population control program.”⁹⁴ Because clause [2] (unlike clause [1]) does not provide for automatic eligibility for asylum, though, the child in such a case must prove that he or she suffered persecution because of the parent’s resistance.

⁸⁷ See *Zhang v. Gonzales*, 408 F.3d 1239, 1244 (9th Cir. 2005).

⁸⁸ 8 U.S.C. § 1101(a)(42)(B) (Westlaw through 2006).

⁸⁹ *Id.*

⁹⁰ *In re C-Y-Z-*, 21 I & N. Dec. 915, 919 (BIA 1997).

⁹¹ *Jie Lin v. Ashcroft*, 377 F.3d 1014, 1031 (9th Cir. 2004). In addition, if a child of persecuted parents is ineligible for asylum by not meeting the requirements for refugee status on his or her own, he or she may be granted the same status as a parent who is found eligible for asylum if the child is accompanying the parent or joining the parent at a later date in the United States. 8 U.S.C. § 1158(b)(3)(A) (Westlaw through 2006); *Devi v. Aguirre*, No. C 05-01179 JSW, 2005 WL 2656590, at *2 (N.D.Cal. Oct. 18, 2005).

⁹² *Zhang v. Gonzales*, 408 F.3d 1239, 1245 (9th Cir. 2005).

⁹³ *Id.*

⁹⁴ *Id.* at 1247; see also *Jie Lin*, 377 F.3d at 1031.

II. ZHANG CASE

Ms. Zhang emigrated from China to the United States in April 2000 at the age of fourteen, due to the government persecution resulting from her parents' choice to have three children in violation of China's population-control policies.⁹⁵

A. FACTS AND PROCEDURAL HISTORY

An Immigration Judge in Arizona initially heard Ms. Zhang's case.⁹⁶ She then appealed to the BIA and later to the Ninth Circuit.⁹⁷

1. Basis of Zhang's Claim

Ms. Zhang was born in Changla City, China, in 1985, followed two years later by her sister and over six years later by her brother.⁹⁸ Families living in Ms. Zhang's rural village were permitted only two children per family in accordance with village governmental regulations.⁹⁹ The family successfully concealed Ms. Zhang's younger brother from the authorities for six years, but they eventually had to record their son in the family register for him to attend school.¹⁰⁰ Upon learning of the Zhangs' third child, the government ordered Ms. Zhang's father to be sterilized.¹⁰¹ In 2000, officials forcibly removed Ms. Zhang's father from his home to undergo the procedure.¹⁰² Ms. Zhang later testified about the terrifying experience: "My mother was crying, and our sisters [sic] and brothers [sic] were crying, and we did not want my father to be taken away to be forced to terminate his reproductive ability."¹⁰³ The operation left Ms. Zhang's father so physically weakened that he was unable to return to his job and unable to support the family.¹⁰⁴

In addition to sterilizing Ms. Zhang's father, officials fined the

⁹⁵ *Zhang*, 408 F.3d at 1242-43.

⁹⁶ *In re Xue Yun Zhang*, BIA, A77 297 144 (Phoenix 2001).

⁹⁷ *Id.*

⁹⁸ *Zhang*, 408 F.3d at 1243.

⁹⁹ *Id.*

¹⁰⁰ *Id.* In addition, the Zhangs reported the boy's birth to local officials. *Id.*

¹⁰¹ *Zhang*, 408 F.3d at 1243.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* The U.S. also recognized that "sterilization operations are often debilitating in ways unrelated to reproductive functions." INS General Counsel Opinion Letter, Genco Op. No. 93-1, 1993 WL 1503948 (Jan. 19 1993).

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Zhang family 23,000 renminbi (about \$2,800) – an amount impossible for the family to pay.¹⁰⁵ Because the Zhang family could not pay the fine, the government confiscated the family's belongings, threatened eviction from their home, and prohibited the children from attending school.¹⁰⁶ With no educational prospects at home, the Zhangs arranged to smuggle Ms. Zhang into the United States with financial help from a relative.¹⁰⁷ Ms. Zhang's goal in emigrating was to escape persecution, obtain an education, and find employment in the United States.¹⁰⁸ However, upon her arrival at Los Angeles International Airport, the INS apprehended Ms. Zhang and detained her for removal proceedings.¹⁰⁹

2. *Immigration Judge Decision*

At Ms. Zhang's removal hearing, the Immigration Judge ("IJ") held that despite her testimony being credible, she was not eligible for asylum.¹¹⁰ The IJ held that the IIRIRA confers automatic eligibility for asylum on involuntarily sterilized persons and their spouses under clause [1] of 8 U.S.C. § 1101(a)(42)(B), but not on their unaccompanied children such as Ms. Zhang.¹¹¹ The IJ also ruled that Ms. Zhang did not suffer individualized past persecution based on the specific facts and circumstances of her case.¹¹² The IJ therefore found that Ms. Zhang did not have a well-founded fear of future persecution on account of one of the five protected grounds.¹¹³ The IJ then denied Ms. Zhang's request for asylum, based on insufficient evidence.¹¹⁴

3. *Board of Immigration Appeals Decision*

In a timely appeal, the Board of Immigration Appeals ("BIA") affirmed the IJ's decision and dismissed Ms. Zhang's appeal.¹¹⁵ The

¹⁰⁵ *Zhang*, 408 F.3d at 1243. Fines for violating birth quotas are typically assessed at two to three times a family's annual income. U.S. Department of State, *Country Reports on Human Rights Practices - 2000* (China), *supra* note 29, at "f. Arbitrary Interference With Privacy, Family, Home, Correspondence."

¹⁰⁶ *Zhang*, 408 F.3d at 1243.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1243-44. Ms. Zhang was held in detention in Arizona for several years, but the Ninth Circuit noted that she was not being detained by the time the case was heard in 2005. *Id.* at 1244.

¹¹⁰ *Id.* at 1243.

¹¹¹ *Id.* at 1243; *see supra* note 86 for statute.

¹¹² *Zhang*, 408 F.3d at 1244.

¹¹³ *Id.*

¹¹⁴ *Id.* at 1243.

¹¹⁵ *Id.* at 1243. The BIA and its opinions are binding across the U.S. as the appellate body

BIA held that Ms. Zhang had failed to meet her burden of establishing past persecution or a well-founded fear of future persecution¹¹⁶ on account of any of the statutorily protected grounds.¹¹⁷ The BIA stated that Ms. Zhang had not met her burden by adducing evidence “that her parents suffered harm, *i.e.*, a fine, damaged furniture, and the forced sterilization of her father.”¹¹⁸ Although the BIA addressed the expanded “refugee” definition that confers automatic eligibility for asylum on persons who have been forced to abort a pregnancy or undergo involuntary sterilization and their spouses {clause [1] of 8 U.S.C. § 1101(a)(42)(B)},¹¹⁹ the BIA refused to extend that provision to children of a forcibly sterilized parent.¹²⁰ Having exhausted her administrative remedies, Ms. Zhang then petitioned for judicial review by the Court of Appeals for the Ninth Circuit.¹²¹

B. NINTH CIRCUIT DECISION

A Ninth Circuit panel¹²² reviewed the BIA’s legal conclusions *de novo*, “granting deference to its reasonable interpretation of ambiguous statutory provisions,”¹²³ and reviewed the BIA’s findings of fact – particularly the finding that Ms. Zhang had not suffered persecution¹²⁴ – for substantial evidence.¹²⁵ The Ninth Circuit deferred to the BIA by agreeing that Ms. Zhang was not automatically eligible for asylum under the IIRIRA provision regarding refugee status for victims of forced abortions or sterilizations {clause [1] of 8 U.S.C. § 1101(a)(42)(B)}, even though both of her parents would be eligible for asylum under the

designated to review decisions from the immigration court. 8 C.F.R. § 3.1(b) (Westlaw through 2006).

¹¹⁶ *Zhang*, 408 F.3d at 1243-44.

¹¹⁷ The five protected grounds are race, religion, nationality, membership in a particular social group, or political opinion. U.S.C § 1101(a)(42)(A) (Westlaw through 2006).

¹¹⁸ *In re Xue Yun Zhang*, BIA, A77 297 144 (Phoenix 2001).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Zhang*, 408 F.3d at 1244.

¹²² The panel consisted of Circuit Judges Robert E. Cowen (Senior United States Circuit Judge for the Third Circuit, sitting by designation), Michael Daly Hawkins and William A. Fletcher, who wrote the unanimous opinion.

¹²³ *Zhang*, 408 F.3d at 1244; *see INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999). Agency decisions and interpretations based on legal error fall under plenary review of the courts. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 445-47 (1987).

¹²⁴ *See Zhang*, 408 F.3d at 1247-49.

¹²⁵ *See INS v. Elias-Zacarias*, 502 U.S. 478, 481 n. 1 (1992); *Guo v. Ashcroft*, 361 F.3d 1194, 1203 (9th Cir. 2004).

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statute.¹²⁶ However, the court also found that the IJ's discretionary denial of Ms. Zhang's asylum application based on her individual persecution for her parents' resistance to population controls was not supported by substantial evidence.¹²⁷

Therefore, the court remanded the case and instructed the IJ to reconsider the cumulative effect of the trauma Ms. Zhang suffered as a result of her father's forcible removal and sterilization, the economic deprivation she experienced, and her inability to pursue an education due to her family's choices, constituted persecution.¹²⁸ The Ninth Circuit also instructed the IJ to re-evaluate whether Ms. Zhang had a well-established fear of persecution should she return to China.¹²⁹

III. ANALYSIS OF THE NINTH CIRCUIT'S OPINION

A. DEFERENCE TO BIA'S CONSTRUCTION OF AUTOMATIC ELIGIBILITY

First, the Ninth Circuit in *Zhang* was correct to retreat from its *Jie Lin* dictum and defer to the BIA's construction of 8 U.S.C. § 1101(a)(42)(B), clause [1].¹³⁰ The BIA's interpretation is not only reasonable;¹³¹ it is the only reading that is supportable by a textual analysis of the plain language of the statute.¹³² The statute describes "a person who has been forced to abort a pregnancy or to undergo involuntary sterilization" as suffering persecution on account of political opinion. The statute does not expressly require that a child or a spouse of such a person be deemed to have been persecuted.

However, subsequent interpretation of this statutory amendment has applied clause [1] to the spouse of a person who has been forced to undergo involuntary sterilization, so that the spouse is deemed automatically eligible for asylum.¹³³ This is largely because the forced sterilization of one spouse persecutes the other spouse by limiting the

¹²⁶ *Zhang*, 408 F.3d at 1242.

¹²⁷ *Id.* at 1250.

¹²⁸ *Id.* at 1249.

¹²⁹ *Id.*; see also *Guo v. Ashcroft*, 361 F.3d 1194, 1203 (9th Cir. 2004). A court may decide that an applicant has been persecuted based on totality of circumstances and cumulative effect of incidents. *Id.*

¹³⁰ *Zhang*, 408 F.3d at 1245; see 8 U.S.C. § 1101(a)(42)(B) (Westlaw through 2006); see also *supra* note 86.

¹³¹ *Zhang*, 408 F.3d at 1245.

¹³² 8 U.S.C. § 1101(a)(42)(B) (Westlaw through 2006); see *supra* note 86.

¹³³ *Zhang*, 408 F.3d at 1244; see also *Ma v. Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004); *Li v. Ashcroft*, 356 F.3d 1153, 1157 (9th Cir. 2004) (en banc); *In re C-Y-Z*, 21 I. & N. Dec. 915, 918 (BIA 1997).

latter's ability to have children with the sterilized spouse.¹³⁴ "The evident purpose of these decisions is to fulfill Congress's goal in passing the amendments – to provide relief for 'couples' persecuted on account of an 'unauthorized' pregnancy and to keep families together."¹³⁵ In deferring to the BIA's refusal to extend clause [1] to the child of an involuntarily sterilized parent, the *Zhang* court stated that "sterilization of a parent does not necessarily persecute a child, though of course in particular circumstances, it might."¹³⁶ The court also pointed out that the legislative history of the amendment did not discuss the possibility of granting the automatic eligibility of clause [1] to children of forcibly sterilized parents.¹³⁷

The issue for the BIA in *In Re C-Y-Z-* was whether the asylum applicant could establish statutory eligibility for asylum based on his wife's sterilization.¹³⁸ C-Y-Z-'s claim was based on the forced sterilization of his wife after they had a third child in violation of the population-control policies.¹³⁹ The IJ had found that nothing significant had happened to C-Y-Z- other than a threat of arrest and a one-day detention, but that he was trying to ride the coattails of his wife's persecution to claim persecution for himself.¹⁴⁰ However, the IJ's opinion was issued before the statutory amendment adding clause [1] of 8 U.S.C. § 1101(a)(42)(B) was enacted.¹⁴¹

The BIA in *C-Y-Z-* described an INS memorandum stating the Service's position that the amendment applied to an applicant spouse of the person forced to undergo involuntary abortion or sterilization.¹⁴² The legal perspective 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," basically grants the spouse clause [1] "automatic eligibility for asylum."¹⁴³ Thus, the BIA found that C-Y-Z- had established persecution based on his wife's sterilization.

A concurring opinion in *C-Y-Z-* went a step further, stating that an individual's close familial association with a person who resists or

¹³⁴ *Zhang*, 408 F.3d at 1245.

¹³⁵ *Ma*, 361 F.3d at 559; see H.R. Rep. No. 104-469(I), at 174 (1996).

¹³⁶ *Zhang*, 408 F.3d at 1245 (emphasis added).

¹³⁷ *Id.*

¹³⁸ *In re C-Y-Z-*, 21 I & N. Dec. 915, 917 (BIA 1997).

¹³⁹ *Id.* at 916.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 917.

¹⁴² *Id.* at 917.

¹⁴³ *Id.* at 918. See *supra* note 86.

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opposes a compulsory population-control program may cause the political opinion of that person to be imputed to such individual.¹⁴⁴ This led the Ninth Circuit in *Jie Lin* to state in dictum that the reasoning applied to give a spouse automatic eligibility might also be extended to give a child automatic eligibility.¹⁴⁵ However, the “association with one who expressly resists” should be properly categorized under clause [2] of the statutory amendment to the refugee definition¹⁴⁶ and, therefore, would not grant automatic eligibility to the applicant in association as the *Jie Lin* court seemed to think. The applicant could still rightly claim an imputed political opinion to establish persecution under clause [2] but would not be able to claim an automatic grant of eligibility under clause [1].

Lin, like Ms. Zhang, was fourteen when he arrived at the Los Angeles airport from China.¹⁴⁷ His mother had given birth to a second child in violation of the mandatory limits on procreation and had gone into hiding, leaving Lin with his grandparents.¹⁴⁸ As with Ms. Zhang’s parents, the government imposed a heavy fine against Lin’s parents.¹⁴⁹ The *Jie Lin* court’s central holding was that Lin’s counsel had denied him effective assistance by failing to collect available material testimony and documentary evidence to present his asylum claims, but the court couldn’t resist opining on an asylum theory for Lin.¹⁵⁰

The court described 8 U.S.C. §1101(a)(42)(B), clause [2], as the operative language of the amended statute to find persecution on account of political opinion to be imputed to children.¹⁵¹ But then the *Jie Lin* court blurred the distinction between clause [1] (which grants automatic eligibility) and clause [2] (which allows eligibility for a child based on the imputation of the parent’s resistance to a coercive population controls) when it used *C-Y-Z*’s concurrence that would extend clause [1] based on an “association with one who expressly resists or opposes” the

¹⁴⁴ *Id.* at 922.

¹⁴⁵ *Jie Lin v. Ashcroft*, 377 F.3d 1014, 1031 (9th Cir. 2004).

¹⁴⁶ Illegal Immigration Reform and Immigrant Responsibility Act, of 1996, 110 Stat. 3009-546 (codified as amended at 8 U.S.C. § 1101(a)(42)(B) (1996)) (Westlaw through 2006). *See supra* note 86.

¹⁴⁷ *Jie Lin*, 377 F.3d at 1019.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1021.

¹⁵⁰ *Id.* at 1033-34.

¹⁵¹ *Id.* at 1031 (“The operative language in § 1101(a)(42) deems a person persecuted on account of political opinion if he is ‘persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program’; it does not say that that ‘failure’ or ‘refusal’ or ‘resistance’ must have been his own. The discrimination or abusive treatment of children in families with more than one child may qualify them for refugee status.”); *see supra* note 86.

coercive program.¹⁵² The Ninth Circuit concluded that Lin had a “plausible claim for relief” and that his attorney should have argued that the government officials attributed his parents’ political opinion to him under clause [1].¹⁵³ However, the language of clause [1] in the statute cannot support this extension, and the Ninth Circuit in *Zhang* was correct to return to the BIA’s majority interpretation in *C-Y-Z-* that clause [1] simply grants automatic eligibility to the sterilized person and his or her spouse.

B. IMPUTATION OF PARENTS’ “RESISTANCE” TO THEIR CHILD

Second, the *Zhang* court also reasonably and correctly construed clause [2] of 8 U.S.C. § 1101(a)(42)(B) as being applicable to the child of a parent who resists coercive population-control measures.¹⁵⁴ The text of the statute does not require the person who is persecuted and seeking asylum to be the same person whose resistance is the motivation for the persecution.¹⁵⁵ Thus, a child who is persecuted because of the parent’s resistance to population controls will be eligible for asylum.

The *Zhang* court stated as follows:

In this case, it was Ms. Zhang’s parents who resisted China’s coercive population control program. Their resistance, however, is imputed to Ms. Zhang for the purposes of determining whether she has been persecuted on account of a protected ground. . . . Here there is no doubt that the hardships Ms. Zhang suffered were on account of her parents’ resistance to China’s population control measures.¹⁵⁶

The court cited to the *C-Y-Z-* concurrence, finding that association may cause a political opinion to be imputed. But the *Zhang* court considered this imputation by association properly under clause [2] of the statutory amendment instead of clause [1] as *Jie Lin* did. The *Jie Lin* court had stated that “the doctrine of imputed political opinion may offer no crisp method for distinguishing [a spouse and a child “in association” with a forcibly sterilized person].”¹⁵⁷ Correctly analyzing spouses under clause [1] and children under clause [2] does provide such a “crisp” method of

¹⁵² *Jie Lin*, 377 F.3d at 1031.

¹⁵³ *Id.*

¹⁵⁴ *Zhang*, 408 F.3d at 1247.

¹⁵⁵ In re *C-Y-Z-*, 21 I & N. Dec. 915, 923 (BIA 1997) (it would be “antithetical to the doctrine [of imputed political opinion] to suggest that it is only available when the persecuted victim whose views are imputed to the applicant also is applying for asylum.”).

¹⁵⁶ *Zhang*, 408 F.3d at 1246.

¹⁵⁷ *Id.*

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distinction.

The *Zhang* court then discussed the level of Ms. Zhang's persecution, quoting the INS Guidelines for Children's Asylum Claims to the effect that "[t]he harm a child fears or has suffered . . . may be relatively less than that of an adult and still qualify as persecution."¹⁵⁸ The court rejected the IJ's conclusion that Ms. Zhang had not suffered persecution, because the IJ had relied on two factual findings not supported by the evidence: (1) that the actions of the Chinese did not deny Ms. Zhang access to an education, and (2) that the Zhang family could have paid the fine. Accordingly, the court granted Ms. Zhang's petition for review and remanded the case for the IJ to make a new determination of whether Ms. Zhang suffered persecution. To guide the IJ's determination on remand, the court stated that the IJ should consider the loss of property and income the family suffered, as well as the barrier the fine posed to Ms. Zhang's ability to pursue and education. The court also pointed out that the violence against Ms. Zhang's father is relevant to whether she had a well-founded fear of persecution. Finally, the court stated that the IJ should consider the cumulative impact of all the hardships imposed on Ms. Zhang as a result of her father's forcible removal and sterilization.¹⁵⁹

C. CUMULATIVE HARDSHIPS SUFFERED UNDER PARENTS' PERSECUTION

Third, *Zhang's* retreat from the *Jie Lin* dictum may have little practical effect on a child's ability to gain asylum based on involuntary abortion or sterilization forced on the child's parent. Even though a child in such a case will not be automatically eligible for asylum under clause [1] of 8 U.S.C. § 1101(a)(42)(B), typically a parent's forced sterilization will give rise to a multitude of hardships that may cumulatively rise to the level of "persecution" necessary to make the child eligible for asylum under clause [2] of the statute.¹⁶⁰ This is illustrated by the circumstances of the *Zhang* case, in which the court instructed the IJ on remand to consider the cumulative impact of *all* of the hardships imposed on the child in connection with the parent's forced sterilization.¹⁶¹

¹⁵⁸ Memorandum from the U.S. D.O.J. I.N.S. on Guidelines for Children's Asylum Claims to Asylum Officers, Immigration Officers and Headquarters Coordinators (Asylum and Refugees) File: 120/11.26 (Dec. 10, 1998) p. 19, available at http://uscis.gov/graphics/lawsregs/handbook/10a_ChldrGdlns.pdf.

¹⁵⁹ *Zhang*, 408 F.3d at 1249.

¹⁶⁰ *Id.*; see *Baballah v. Ashcroft*, 367 F.3d 1067, 1076 (9th Cir. 2004).

¹⁶¹ *Zhang*, 408 F.3d at 1249.

Additionally, when the court was describing the reasons for its deference to the BIA holding, which would not extend clause [1] to grant automatic eligibility to children, the court stated that “in particular circumstances” sterilization of a parent might or would be considered persecution of a child.¹⁶² The court could have clarified that in discussing the “particular circumstances”¹⁶³ the court was in fact referring to elements that would fall under clause [2]. While the court stated that it could not conclude that the BIA’s interpretation of the statute is unreasonable or absurd, the court failed to pursue the inquiry as to the circumstances under which a child would be entitled to statutory eligibility for asylum based on the parent’s persecution by sterilization.¹⁶⁴ Since the court felt constrained by “deference to [the BIA’s] reasonable interpretation of ambiguous statutory provisions.” the court could have included, in its guidance for the IJ on remand, a suggestion that the IJ consider the circumstances under which a child would be entitled to asylum based on a parent’s forcible sterilization.¹⁶⁵ Evaluation of such circumstances might include the following:

- (1) Age, sex and marital status of the child.¹⁶⁶
- (2) Mental and physical development of the child.¹⁶⁷
- (3) Physical presence and custody of the child at the time of sterilization of the parent.¹⁶⁸
- (4) The actual effect on the child of the sterilization and persecution of the parent.¹⁶⁹
- (5) Harmful treatment of the child by the officials conducting the sterilization and persecution of the parents.¹⁷⁰
- (6) Economic deprivation.¹⁷¹
- (7) Denial of access to education.¹⁷²
- (8) Adverse consequences to the child.¹⁷³

¹⁶² *Id.* at 1245; *see supra* note 138 and accompanying text.

¹⁶³ *Zhang*, 408 F.3d at 1245.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 1244.

¹⁶⁶ *Li v Ashcroft*, 356 F. 3d 1153, 1164 (9th Cir 2004).

¹⁶⁷ Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees 1979, at ¶ 214, p. 35, HCR/IP/eng/Rev.1 Reedited 1992. Available at <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=PUBL&id=3d58e13b4>.

¹⁶⁸ *Jie Lin v. Ashcroft*, 377 F.3d 1014, 1029 (9th Cir 2004).

¹⁶⁹ *Zhang*, 408 F.3d at 1243.

¹⁷⁰ *In re C-Y-Z-*, 21 I & N. Dec. 915, 923 (BIA 1997).

¹⁷¹ *Baballah v. Ashcroft*, 367 F.3d 1067, 1075 (9th Cir. 2004).

¹⁷² *Bucur v. INS*, 109 F.3d 399, 403 (7th Cir. 1997).

¹⁷³ *Zhang*, 408 F.3d at 1247.

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This Note contends that the IJ and the BIA on remand, and the Ninth Circuit in any subsequent appeal in this case or in other cases, should pursue consideration of the “particular circumstances” under which sterilization of a parent might or would be considered an element or contributing factor in the persecution of a child.

The trauma suffered by Ms. Zhang included the shock and distress at seeing the violent and forcible removal of her father and then knowing that he was being sterilized against his will.¹⁷⁴ The hardships also included the fine and the economic deprivation she experienced when personal belongings were taken and the family was threatened eviction from their home, and the denial to her of the ability to pursue an education.¹⁷⁵ The court considered that these taken cumulatively could constitute persecution, but the court remanded to the IJ to make its finding based on the all of these hardships.¹⁷⁶

This Note also contends that, in addition to imputing Ms. Zhang’s parents’ resistance for the purpose of determining whether she has been persecuted on account of a protected ground, the circumstances, actual harm, and persecution of Ms. Zhang’s parents should also be considered in evaluating the level of Ms. Zhang’s persecution. The court did direct the IJ to consider the trauma suffered by Ms. Zhang as a result of her father’s forcible sterilization; the court should also have instructed the IJ to consider the full circumstances of her parents’ persecution on remand of the case.

IV. CONCLUSION

The court should have described the “particular circumstances” under which sterilization of a parent might or would be considered as persecution of a child. The court, in addition, should have included the circumstances, actual harm, and persecution of Ms. Zhang’s parents as an additional factor to be considered in evaluating the level of Ms. Zhang’s persecution. Also helpful in the court’s instructions on remand would have been a specific reminder that the harm a child fears or has suffered may be relatively less than that of an adult and still qualify as persecution.

¹⁷⁴ *Id.* at 1243.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 1248-49.

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ASYLUM FOR A MINOR CHILD

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