Immigration Law Advisor

July 2007 A Monthly Legal Publication of the Executive Office for Immigration Review Vol 1. No.7

The Immigration Law Advisor is a professional monthly newsletter produced by the Executive Office for Immigration Review. The purpose of the publication is to disseminate judicial, administrative, regulatory, and legislative developments in immigration law pertinent to the mission of the Immigration Courts and Board of Immigration Appeals.

In this issue...

"Attention Must Be Paid:" Circuits Issue Significant Decisions in Chinese Coercive Population Control Cases

by Edward R. Grant

Few would confuse the rarefied pronouncements of the Federal Courts of Appeals with the humble strivings of Willy Loman. While the major circuit news of the past month may be the Second Circuit's en banc rejection of *Matter of C-Y-Z-*, 21 I&N Dec. 915 (BIA 1997), attention must be paid as well to several other decisions that could affect outcomes in a significant number of cases before Immigration Courts and the Board. These include: a Third Circuit panel decision endorsing *Matter of C-Y-Z-*, a Fifth Circuit decision endorsing an expansive view of when an abortion or sterilization has been "forced;" the Eleventh Circuit's further elucidation of "persecution" in Colombia; the Ninth Circuit's validation of *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005); and the Second Circuit's limitation on its practice of remanding cases to the Board for consideration of extra-record evidence. This article will address the cases relating to Chinese Coercive Population Control Policies (CPC). My monthly article in the circuit court activity section of this publication will discuss the other cases.

Shi Liang Lin v. U.S. Dep't of Justice, _ F.3d _, 2007 WL 2032066 (2d Cir. 2007), is the clear highlight of the month, both for its rejection of a decade-old Board precedent, and for its potential impact on hundreds (if not more) of cases currently in the decision pipeline, or which will be filed in the future.

The case arose from the Court's earlier remand,[1] which required the Board to re-visit two holdings: whether *Matter of C-Y-Z-* was correct in holding that the spouse of a person who has been forced to undergo an abortion or sterilization procedure can claim asylum based on the 1996-amended definition of "refugee" covering coercive population

control claims; and whether such spousal-derivative claims could be limited to those in lawfully-recognized marriages. The en banc Board in *Matter of S-L-L-*, 24 I&N Dec. 1 (BIA 2006), answered both questions in the affirmative, and returned the case to the Second Circuit, which had retained jurisdiction.

Given the complexity of issues and multiple opinions in this case it is helpful to note the following: none of the applicants in the three cases consolidated for review under Lin were legally married to the women whose forced abortions served as the basis for their claims; furthermore, no judge on the 12-member panel would have extended *Matter of C-Y-Z-* to these or other unmarried applicants based on harm to their girlfriend, fiancee, or "ceremonial" spouse.

We begin with the majority: to its seven members, the issue was straightforward: The Board's interpretation of section 101(a)(42) of the Immigration and Nationality Act,[2] as amended by section 601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),[3] warranted *Chevron*[4] deference as a "permissible" statutory construction only if (under the "first step" of *Chevron* analysis) those provisions, particularly the IIRIRA amendment,[5] were silent or ambiguous on the question.

The majority found neither silence nor ambiguity, noting that Congress, by limiting the coverage of section 601(a) of IIRIRA to "a person" who has been subject to a forced abortion, sterilization, or other CPC-based persecution, evinced a clear intent only to include those directly suffering such acts. The provision, according to the Court, "unambiguously refers to a woman who has been physically subjected to a forced abortion . . . [or] an individual who has physically undergone an involuntary medical procedure intended to result in infertility."

The majority's "plain language" construction of section 601(a) concluded that Congress had a narrow intent in overturning pre-1996 Board precedent that had restricted CPC-based claims:[6]

> Congress's specific designation of some persons (i.e., those who fear, resist, or undergo particular medical procedures) is incompatible with the view that others (e.g. their spouses) should also be granted asylum *per se* because of birth control policies. The inclusion of some obviously results in the exclusion of others . . . The language of section 601(a) does nothing to alter the pre-IIRIRA definition of "political opinion" . . . and this further demonstrates the exclusivity of the group of persons entitled to asylum *per se* under section 601(a). . . . [That section] makes clear that those who benefit from the amendment would not be entitled to *per se* political opinion asylum relief absent the amendment. In other words, their political opinion rests de jure rather than as a matter of fact on which the applicant bears the burden of proof.... This is consistent with what we know: While it is plain that suffering a forced medical procedure can be a persecution if it is on account of a protected ground, the conception of a child is no more an expression of political opinion than birth, death, sleep, or the taking of nourishment. If the language of § 601(a) indicates that the woman who is subjugated to the outrage of a forced abortion has not herself been persecuted for the "political opinion" of conceiving a child under [the pre-IIRIRA definition of "refugee"], then so much less the man who has impregnated her . . . he must *prove* the existence of a political opinion or other protected ground [in order to obtain asylum.][7]

To the majority, therefore, no "nexus" to a protected ground could be established under pre-IIRIRA refugee and asylum law, and section 601(a) created a *de jure* category of "refugees" that Congress expressly intended to limit by statute. The result is that, for others, including spouses, the "nexus" rule set forth in *Matter of Chang* still applies: they must establish a motivation on the part of the alleged persecutor, outside the act of coercive abortion or sterilization of their spouse itself, to establish that this act amounted to persecution (or would amount to persecution) on account of a ground stated in the Act. In the alternative, applicants may establish that they have suffered (or may suffer) persecution for "other resistance" to a policy of CPC, but the abortion or sterilization of the spouse does not, itself, constitute such resistance.

Having so ruled, the majority easily disposed of the three cases before it, none of which, as noted, involved men who were legally married. (Remarkably, the petition for review of the lead petitioner, Mr. Lin, was dismissed as moot because he had failed to stay in touch with his attorney, and may actually have taken ill, returned to China, and died.)

The separate opinions, no less than the majority, merit careful study, for they highlight what appear to have been the two issues dividing the Court: whether the Court should even have addressed the issue of "spousal" persecution in the context of cases that did not involve legal spouses; and whether § 601(a) should be construed as having established a narrow exception to the ordinary burdens of proof in asylum cases, or as having legitimated CPC-based claims more broadly as cases of imputed political opinion that should be fully integrated into the mainstream of refugee and asylum law. Not surprisingly, this last issue has bedeviled the legacy INS, DHS, the Board, the courts, and Congress for nearly twenty years. *Lin* suggests it is far from settled.

Judge Katzmann, in concurrence, began with the first question, criticizing the majority for reaching an issue not present before it. He then questioned the majority's "plain language" analysis, noting that it is equally true that § 601(a) of IIRIRA did not exclude spouses from its coverage. He relied heavily on the lengthy administrative and judicial history that led up to the enactment of § 601(a), describing concerted efforts by officials in the first Bush administration to limit the impact of *Matter of Chang* by giving "enhanced consideration" to CPC-based claims, and drafting regulations (never fully adopted) that would have overturned that Board decision. Section 601(a) followed, and both the Board and the courts which have specifically addressed the issue have heretofore held that applicants are entitled to rely on section 601(a) if their spouse has been forcibly aborted or sterilized.[8] Judge Katzmann noted: "Just as nothing in the language or history of the amendment indicates a congressional intent to foreclose the extension of relief to spouses, Congress has done nothing to indicate such an intent in the years since the amendment's enactment, notwithstanding that the Board interpreted [the definition of "refugee"] to cover spouses *a decade ago* and numerous courts of appeals have upheld this interpretation as reasonable."[9]

Turning to the second question, Judge Katzmann stated that "Congress enacted [§ 601(a)] not primarily to define the term 'persecution,' but to clarify what it means to be persecuted 'on account of political opinion.'"[10] Congress sought to make clear, contrary to *Chang*, that even though China's CPC policies are of general applicability, and the violation thereof may not have been motivated by political opinion, the "on account of" prong of the refugee definition encompasses those whose violation of the law "is regarded by the state as political disloyalty." This legitimate interpretation, according to Judge Katzmann, means that § 601(a) is not unambiguous, and that it is therefore up to the Board to interpret when an individual can be said to have been "persecuted" on the basis of a CPC violation.

Judge Sotomayor's concurrence, while also criticizing the majority for addressing an issue not directly before it, focused on another aspect of the "second" question: whether CPC-based claims should be considered as fully integrated into the generally-applicable norms of asylum jurisprudence. Concluding that Congress intended this result, she criticized the majority for establishing a rule that would violate some of those norms, chiefly the rule that family members may be able to show eligibility for asylum based on harm inflicted upon or threatened to a member of their family or other closely-associated person. "Requiring an applicant's eligibility for asylum to rest only on instances where he or she suffers persecution 'personally' merely begs the question of what personal harm is and how to define it. As with any ambiguous statutory term, it is for the Board to determine within its expertise what exactly constitutes 'persecution' so long as its interpretation is reasonable."[11]

Finally, Judge Calabresi, concurring and dissenting, criticized the majority for unduly restricting the Board's ability to interpret the definition of refugee as amended by § 601(a), and criticized the other concurrences for concluding that the Board, in *Matter of C-Y-Z-* and *Matter of S-L-L-*, had fully resolved the question of "nexus" in a reasoned fashion that warranted *Chevron* deference. Judge Calabresi's analysis highlights one of the anomalies of post-IIRIRA law in this area: *Matter of C-Y-Z-* did not so much analyze the question of whether spouses should be encompassed by § 601(a) of IIRIRA as simply accede to the then-INS position that they should. (Notably, the Department of Homeland Security, Immigration and Customs Enforcement, has now argued against that position.)

continued on page 8

FEDERAL COURT ACTIVITY

CIRCUIT COURT DECISIONS FOR JUNE 2007

by John Guendelsberger

The overall reversal rate by the United States Courts of Appeal of petitions for review of Board decisions for June 2007 was 18.9%. This is a drop from last month's unusually high 25%. The following chart provides the results from each circuit for June 2007 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	%
1st	7	7	0	0.0
2nd	95	81	14	14.7
3rd	33	26	7	21.2
4th	7	7	0	0.0
5th	29	28	1	3.4
6th	15	11	4	26.7
7th	5	3	2	40.0
8th	5	5	0	0.0
9th	245	188	57	23.3
10th	6	6	0	0.0
11th	34	28	6	17.6
All:	**481**	**390**	**91**	**18.9**

The Ninth Circuit accounted for over half of the total decisions and over 60% of all reversals. The Ninth Circuit reversal rate, however, dropped to 23% compared to last month's 36%. The panel composed of Judges Pregerson, Reinhardt and Tashima reversed in 33 of its 48 decisions this month (69%). Last month the same panel reversed in 36 of 48 decisions (75%). The other Ninth Circuit panels reversed at a 12 % rate in their June decisions.

The reversals in the Ninth Circuit covered a wide range of issues including credibility in asylum cases(13); past persecution; nexus (2); well-founded fear determination (4); changed country conditions (2); failure to separately address the CAT claim (1), and failure to apply the willful blindness test for CAT. Approximately twenty of the reversals came in appeals from denials of motions to reopen in absentia orders or Board final orders. Many of these involved claims of ineffective assistance of counsel and equitable tolling. Several other remands involved cases in which the Court found that the Board or the Immigration Judge had failed to address issues or had overlooked significant evidence in the record.

The Second Circuit reversed in 14 of 95 cases (14.7%), about the same as last month. Five of these reversals involved flaws in the adverse credibility determination in asylum claims, including one in which the Immigration Judge failed to make a clear ruling on credibility. Other asylum-related reversals were for deficient analysis of nexus, a flawed corroboration requirement, administrative notice of changed country conditions without affording the parties an opportunity to respond, and a frivolousness determination that did not meet required standards. The Court also rejected the Board's approach to determining comparable grounds in section 212(c) cases on equal protection grounds. The remaining cases involved ineffective assistance of counsel and motions to reopen in cases presenting new evidence in regard to fear of sterilization in China based on birth of children in the United States.

The Eleventh Circuit reversed in six cases. In four of these cases the Court found a failure to address whether the cumulative harm amounted to past persecution so that it remained unclear who had the burden as to changed county conditions. Among the seven reversals in the Third Circuit, four involved flaws in the adverse credibility determination.

The chart below shows numbers of decisions for the first half of calendar year 2007 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	%
7th	49	32	17	34.1
8th	47	35	12	25.5
2nd	586	478	108	18.4
9th	1335	1128	207	15.5
6th	69	59	10	14.5
3rd	174	153	21	12.1
10th	41	37	4	9.9
4th	93	86	7	7.5
5th	113	105	8	7.1
11st	173	161	12	6.9
1st	28	27	1	3.6
All:	**2708**	**2301**	**407**	**15.0**

Last year at this point we had a total of 2819 decisions from January through June 2006 with 517 reversals for an 18.3% overall reversal rate.

John Guendelsberger is Senior Counsel to the Board Chairman, and is serving as a Temporary Board Member.

Circuits Issue Significant Decisions in High Impact Cases

by Edward R. Grant

Colombian asylum cases are as common in the Eleventh Circuit as Chinese cases are in the Second; hence, the Atlanta-based court's decisions in *Sanchez-Jimenez v. Gonzales*, _ F3d _ , 2007 WL 2034955 (11th Cir. July 12, 2007) and *Lopez v. U.S. Att'y Gen.*, _ F.3d _, 2007 WL 1953603 (11th Cir. July 6, 2007), could be as significant in their own right as the cases discussed in the feature article. In *Sanchez-Jimenez*, the Circuit reversed an Immigration Judge's ruling, summarily affirmed by the Board, that the petitioner, who had been shot at after receiving threats from FARC guerillas based on his political activity, did not suffer past persecution, and was targeted for reasons other than his political activity. In *Lopez*, the Court ruled that a physical attack on the petitioner after she had been warned and threatened regarding her community activity could not be treated as a random criminal act, but rather, was politically-motivated.

The petitioner in *Sanchez-Jimenez* received death threats beginning in 1999, which he reported to police, resulting in the arrest of three FARC members. The threats soon resumed, indicating that the petitioner was a "military objective." FARC attempted to kidnap his daughter from college, and the threats became more frequent. Finally, guerrillas on motorcycles fired several shots at the car he was riding in, later calling him to claim responsibility. He was not injured.

These "undisputed" facts, the Court held, "fairly compel[led]" a finding that past persecution had occurred. "We have no difficulty concluding that being intentionally shot at in a moving car multiple times by two armed men on motorcycles qualifies as 'extreme' under any definition. Put simply, attempted murder is persecution."[1] The Court rejected the Immigration Judge's conclusion that FARC's motivation in intending to harm the petitioner was its need to raise money, noting that while monetary demands were made, evidence established that he was also targeted because of his political activities. The Court also found that the Immigration Judge had not adequately addressed the issue of internal relocation in light of its holding in *Arboleda v. U.S. Att'y Gen.*, 434 F.3d 1220 (11th Cir. 2006).

From a doctrinal standpoint, there is nothing particularly remarkable about the Court's ruling; the holding that specific threats of death backed up by apparent means and intention to carry them out can constitute persecution is not novel. However, practically speaking, the decision could influence the presentation and adjudication of claims from countries such as Colombia, where political violence such as kidnaping, bombing, and shooting are commonplace, and the motivation for such attacks may be less than entirely clear. While traditionally deferential to EOIR adjudicators on issues of credibility and fact-finding, the Eleventh Circuit has also signaled that it will scrutinize determinations regarding what constitutes persecution, whether "nexus" is present, and what conditions allow for internal relocation from the source of harm.

The Court's ruling in *Lopez* underscores these points. There, the petitioner worked in providing humanitarian assistance, training, and education in her role as a community coordinator for the Liberal Party. She was threatened both in person and by telephone. On one occasion she was physically attacked and suffered lacerations and bruises that required medical attention. *Lopez* did not file a police report regarding any of these incidents, and left for the United States after an escalated threat in 2002 that blamed her for supporting "SOB politicians."

The Court rejected the Immigration Judge's finding that the petitioner's activities were community-

based, not political in nature. The Court found that the record compelled a finding that the physical attack was politically-motivated, as the attackers mentioned prior threats that had referred to the petitioner's membership in the Liberal Party. The Court found a remand necessary because the Immigration Judge did not assess whether this attack, coupled with the threats preceding and following it, constituted persecution.

Lopez is significant because many Colombian claims arise from similar circumstances: persons threatened or attacked by FARC because they are engaged in humanitarian activities allegedly perceived by FARC as undermining its own standing in rural communities. Since the Court made no ultimate findings regarding eligibility, the case is more important on the question of "nexus" than it is on the question of persecution. But taken together with *Sanchez-Jimenez*, the ruling in *Lopez* demarcates a new standard for addressing the type of "mixed motive" cases that often arise from that troubled country. Since neither case was resolved under the provisions of the REAL ID Act, their impact on cases subject to REAL ID's standard for determining nexus remains to be seen.

The Second Circuit continues to stand alone in its rejection of the Board's decision in *Matter of Blake,* 23 I&N Dec. 722 (BIA 2005), that an aggravated felony offense of sexual abuse of a minor finds no comparable charge of inadmissibility under section 212(a) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a), and thus cannot be waived under former section 212(c). See *Blake v. Carbone*, 489 F.3d 88, (2d Cir. 2007). Joining the First, Third, Fifth, and Seventh Circuits in upholding the Board's approach, the Ninth Circuit declined to follow the June 2007 decision of the Second Circuit reversing *Blake* in *Abede v. Gonzalez*, _ F.3d _, 2007 WL 1965165 (9th Cir. July 9, 2007).[2] The Court found the Board's ruling consistent with the statute (which has consistently been interpreted to waive only grounds of excludability or inadmissibility under section 212, not grounds of deportation under section 237 or former section 241), consistent with the regulation, and, contrary to the Second Circuit, not violative of the Equal Protection Clause.

In conclusion, the Second Circuit's decision in *Xiao Xing Ni v. Gonzales*, ___ F.3d ___, 2007 WL 2012395 (2d Cir. July 12, 2007) merits attention. There, in the wake of *Tian Ming Lin v. U.S. Dep't of Justice*, 473 F.3d 48 (2d Cir. 2007), the Court recognized strict curbs on its ability to use inherent equitable powers to remand cases to the Board for consideration of evidence that was not before the Board when it decided the case. The Immigration Judge found the petitioner, in *Ni*, not credible and therefore denied asylum, which the Court found was supported by substantial evidence. That would have ended the case, the Court noted, but for its statement in a prior decision, *Lin*, *supra*, taking judicial notice of documents in the record of another case that might have relevance, and remanding to the Board for consideration of that extra-record evidence.

The decision in *Ni* signals a clear departure from that practice. Finding that IIRIRA had specifically revoked the statutory authority of circuit courts to remand to the Board for the taking of additional evidence, the Court concluded that exercise of its inherent equitable authority to order such a remand is not warranted if (1) the basis for the remand is to consider evidence that was not previously in the record before the Board and (2) the Board's regulations set forth procedures to reopen a case for the taking of additional evidence.

Perhaps not quite Loman-esque, but a humbler approach nonetheless. Let attention be paid.

Edward R. Grant is a Board Member with the Board of Immigration Appeals.

1. *Sanchez-Jimenez* at *7.

2. *Dalombo Fontes v. Gonzales,* 483 F.3d 115 (1st Cir.2007); *SarethKim v. Gonzales*, 468 F.3d 58(1st Cir.2006); *Caroleo v. Gonzales*, 476 F.3d 158 (3d Cir.2007); *Brieva-Perez v. Gonzales*, 482 F.3d 356 (5th Cir.2007); *Avilez-Granados v. Gonzales*, 481 F.3d 869 (5th Cir.2007); *Dung Tri Vo v. Gonzales*, 482 F.3d 363 (5th Cir.2007); *Valere v. Gonzales*, 473 F.3d 757 (7th Cir.2007); see also *Rubio v. U.S. Atty. Gen.*, 182 Fed Appx. 925 (11th Cir.2006) (unpublished).

RECENT COURT DECISIONS

Second Circuit

Khan v. DOJ, _ F.3d _, 2007 WL 1976151 (2d Cir. July 10, 2007): In a case involving applications for cancellation of removal and adjustment of status, the petitioner submitted a motion to reconsider to the Board one day late, allegedly due to a Federal Express error. The Board denied the motion as untimely, based in part on a finding that Federal Express properly delivered the motion. The Second Circuit remanded, ruling that the Board erred by failing to analyze the motion's timeliness under *Zhong Guang Sun v. DOJ*, 421 F.3d 105 (2d Cir. 2005), which permits the Board to consider untimely submissions if extraordinary or unique circumstances are present. The Court further ruled that, under *Zhong Guang Sun*, errors by overnight couriers are not the sole grounds for establishing extraordinary or unique circumstances. In addition, the Court held that *Zhong Guan Sun* remained valid despite *Bowles v. Russell*, 127 S.Ct. 2360 (2007),

which held that statutory time limits for civil appeals to the circuit courts do not allow for equitable exceptions. The Court left open the possibility that, under *Bowles*, equitable exceptions would no longer be allowed for deadlines in asylum cases that are set by statute, as opposed to regulation.

Fifth Circuit

Garcia-Maldonado v. Gonzales, _ F.3d _, 2007 WL 1865562 (5th Cir. June 29, 2007): In a case involving Texas law, the Fifth Circuit held that failure to stop and render aid following an automobile accident is a crime involving moral turpitude. The Court further held that a conviction is effective for immigration purposes even if on appeal at the time of the decision. For this holding, the Court cited *Renteria-Gonzalez v. INS*, 322 F.3d 804 (5th Cir. 2002), in which it ruled that a conviction vacated for any reason remains effective for immigration purposes. The Court acknowledged that *Renteria-Gonzalez* conflicts with other circuits, as well as *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).

Eleventh Circuit

Yang v. Attorney General, _ F.3d_ , 2007 WL 2000044 (11th Cir. July 12, 2007): The petitioner, a native and citizen of China, applied for asylum and withholding of removal. The petitioner, who was married in a traditional ceremony that was not legally binding in China, alleged that his wife was forced to have an abortion. The Immigration Judge denied the applications and the Board affirmed. The Eleventh Circuit affirmed. The Court first found that the Board's decision in *Matter of S-L-L-*, 24 I&N Dec. 1 (BIA 2006), that, for a male to qualify as a refugee under section § 101(a)(42) of the Act based on a forcible abortion or sterilization, the couple must be legally married is entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), and was a reasonable construction. The Court dismissed the contrary precedent from the Ninth and Seventh Circuits in *Ma v. Ashcroft*, 361 F.3d 553, 558-61 (9th Cir.2004) and *Zhang v. Gonzales*, 434 F.3d 993, 999 (7th Cir.2006), as they were rendered before *Matter of S-L-L-* and are therefore of little precedential value. Finally, the Court ruled that there was insufficient evidence to establish past persecution based on "other resistance" to the coercive population control program, as the petitioner did not suffer prolonged detention or physical violence, and was at little risk of future physical violence in China.

BIA PRECEDENT DECISIONS

In *Matter of R-D-*, 24 I&N Dec. 221 (BIA 2007), the Board considered the status of an alien who leaves the United States for Canada to apply for refugee status there, and then returns to the United States after the application is denied in Canada. The respondent is a native and citizen of Guinea who traveled to Canada from the United States to apply for asylum. She was returned to the United States after her application was denied. The Immigration Judge found, and the Board agreed, that the respondent departed the United States when she left, and was an arriving alien upon her return. The Board concluded that neither the Reciprocal Agreement nor the Agreement Between the Government of the United States and the Government of Canada for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries (Safe Third Country Agreement) identify or mandate the status of an alien deported from one country to the other. While the Supplementary Information accompanying the DHS's regulations implementing the Safe Third Country Agreement indicated that returnees from Canada would be in the same position they would be in had they not left the United States, the Board declined to follow those comments. The Board found that the case cited by DHS, *Matter of T-*, 6 I&N Dec. 638 (BIA 1955)(finding that a lawful permanent resident aboard a ship who was refused entry in any other country and was returned to the United States was not seeking entry to the United States) was clearly distinguishable, and because neither agreement nor a memorandum cited by DHS are controlling, the respondent was subject to the statutes and regulations regarding aliens seeking admission to the United States. The respondent should have been charged as an arriving alien under section 235(a)(1) of the Act, and the regulations make clear that an alien in either removal proceedings or expedited removal proceedings is subject to the Safe Third Country Agreement.

In *Matter of Escobar*, 24 I&N Dec. 231 (BIA 2007), the Board found that a parent's lawful permanent resident status cannot be imputed to a child for purposes of calculating the 5 years of lawful permanent residence required to establish eligibility for cancellation of removal under section 240A(a)(1) of the Act. The respondent came to the United States as a minor around the age of 4 or 5. Her mother became a lawful permanent resident when respondent was 14 or 15. The Ninth Circuit Court of Appeals held in *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (9th Cir. 2005), that the first of two requirements

for cancellation eligibility, the requirement for 7 years' continuous residence after admission in any status, can be imputed to an unemancipated minor. The Board first stated it disagreed with the reasoning in *Cuevas* and declined to apply the holding outside of the Ninth Circuit. The Ninth Circuit relied on precedent which found that the parent's intent in establishing domicile for former section 212(c) could be imputed to an unemancipated minor. The Board disagreed that domicile could be equated to residence for this purpose because residence does not contain an element of subjective intent. The Board then declined to extend the *Cuevas* holding to the lawful permanent residence requirement, reasoning that obtaining lawful permanent residence status requires compliance with substantive and procedural requirements. To ignore those requirements and allow the status of a parent to attach to a child would run contrary to the clear intent of Congress which required "lawful" admission. Further, the two requirements set forth by Congress in section 240A would essentially be merged, the Board reasoned.

In *Matter of Sejas*, 24 I&N Dec. 236 (BIA 2007), the Board addressed whether a conviction for assault and battery against a family or household member in violation of section 18.2-57.2 of the Virginia Code is categorically a crime involving moral turpitude (CIMT). The Board found that it is not because a conviction for assault and battery in Virginia does not require the actual infliction of physical injury. While a conviction requires intent to cause injury, that injury may be to the feelings or mind, as well as to the body. In *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006), the Board indicated that to find moral turpitude in a general assault and battery statute, the offense must necessarily involve the intentional infliction of serious bodily injury. This statute does not so require. As the conviction documents provided no specific facts regarding the conviction, the Board did not need to consider whether to use a modified categorical approach. The Board terminated proceedings.

In *Matter of Solon*, 24 I&N Dec. 239 (BIA 2007), the Board considered whether the offense of assault in the third degree in violation of section 120.00(1) of the New York Penal Law is a CIMT. The Board held that a finding of moral turpitude in assault statutes involves an assessment of both the state of mind and the level of harm required to complete the offense. Intentional conduct resulting in a meaningful level of harm may be morally turpitudinous, but as the level of conscious behavior decreases, more serious resulting harm is required. The New York statute at issue here requires both specific intent and physical injury. The specific intent element distinguishes this New York statute from general-intent simple assaults, as does the requirement of evidence of physical impairment or "substantial pain." The Board concluded that the offense is a CIMT.

continued from page 3

"Attention Must Be Paid:"...

In Judge Calabresi's view, the Board also failed to deal with the "text" of § 601(a) in *Matter of S-L-L-*. The point is open to debate. Briefly, *S-L-L-* noted (in agreement with the concurrences in Lin) that § 601(a) did not specifically include or exclude spouses, and that the then-prevailing view in administrative and judicial cases was that it could. The Board also noted the long-standing nature of the precedent and, significantly, the fact that enforcement of CPC policies in China are directed at the couple and the family at large, not merely on the pregnant woman. The Board's dissenters in *S-L-L-* criticized the majority for not returning to re-visit *Matter of C-Y-Z-* on a more purely textual basis, so on that point at least, the dissenters may concur with Judge Calabresi's description of what the Board did and did not do in that case. In the end, Judge Calabresi would have ruled more narrowly on the cases before the Court, and left for another day (and another Board decision more focused on the text of § 601(a)) whether an applicant can establish eligibility for a forced abortion or sterilization of his or her spouse.

The Second Circuit's closely divided opinion came on the heels of a similarly-divided panel decision of the Third Circuit, *Sun Wen Chen v. U.S. Att'y Gen.,* ___ F.3d ___, 2007 WL 1760658 (3d Cir. June 20, 2007). The petitioner in Chen married his wife in the United States and they had one child; his claim for asylum (hers being foreclosed by the 1-year application deadline) was based on fear that she would be sterilized or subject to a forced abortion if they returned to China and attempted to have more children. The Board had reversed an Immigration Judge's grant of asylum to the petitioner.

In more succinct fashion than their colleagues in *Lin*, the Third Circuit panel divided on the question of the "clarity" of § 601(a). The majority, under "step one" of *Chevron* analysis, found that § 601(a) is "silent" on the issue of spouses, "suggest[ing] a gap of the sort that the administering agency may fill." Nothing in the statute established a particular policy regarding spouses,

and the availability of derivative eligibility under the general provisions of § 208 of the Act did not "foreclose additional pathways to asylum specific to spouses."

Turning to *Chevron* "step two," the panel found that the Board's construction of § 601(a) – based on deprivation of spousal interests in having children, the "emotional and sympathetic harm" felt by a spouse, and the targeting of both husband and wife under China CPC policies – was a reasonable exercise of "gap-filling." Although the legislative history to § 601(a) cautioned against credulous acceptance of CPC-based claims, this did not impose, in the majority's view, any impediment to the Board's construction of the rules of eligibility. The majority remanded the case for further consideration of the Board, finding that the Board had incorrectly imposed a burden on the petitioner to show that his wife would face forced abortion or sterilization if pregnant again in China.

Judge McKee, in dissent, presaged the majority view in *Lin*, focusing on § 601(a)'s determination that "a person" is persecuted for purposes of that section only if that person has been subject (or proves a well-founded fear of being so subject) to a forced abortion, sterilization, or punishment for "other resistance" to a CPC policy. A key point of his analysis was whether Congress intended to protect the "marital entity" – which is the central focus of the Board's reasoning in *Matter of S-L-L-*, as well as the Board's analysis of the issue of "continuing persecution" in *Matter of Y-T-L-*, 23 I&N Dec. 601 (BIA 2003). He criticized the Board for concluding, without adequate analysis, that the forced abortion of a wife is equally directed against the husband, finding that such a conclusion is beyond the range of the Board's expertise to which a reviewing court must defer under *Chevron*. "[T]he Board has no more expertise in marital relationships than it does in parenting, matters of religion, or the proper temperature for cooking a leg of lamb. I see no reason to defer to the Board's views of marriage and procreation. There is more ethnocentrism than statutory interpretation in its discussion of the marital relationship."[11] While expressing regret that he could not join in the result reached by the majority, Judge McKee concluded that he could not "reconcile that result with the language of the statute we must construe."

In another significant decision regarding the construction of § 601(a), the Fifth Circuit held that an unmarried Chinese woman who procured an abortion in 1994 without the government even knowing that she was pregnant could nevertheless claim that the abortion was "forced" because her motivation was to avoid the possibility of a physically-forced abortion later in pregnancy, a possible sterilization, fines, and social and economic detriment to her child (if born). *Yuqing Zhu v. Gonzalez*, ___ F.3d ___, 2007 WL 2083712 (5th Cir., July 23, 2007). The Immigration Judge had found that under conditions existing in 1994, continuation of the pregnancy would have subjected her to a later-term abortion, and that her child, if born, would be denied citizenship, medical treatment, and admission to school. Nevertheless, he concluded as a matter of law that Zhu had not been forced to have an abortion because she voluntarily submitted to the procedure in the belief that it was what the law required her to do. After an earlier remand from the Circuit with instructions to address the issue of "force," the Board re-affirmed the Immigration Judge; this second Board decision was criticized by the Circuit as being unduly "terse."

While the result in *Zhu* suggests a significant expansion of eligibility under § 601(a), the decision claims support in Board case law, particularly *Matter of T-Z-,* 24 I&N Dec. 163 (BIA 2007), holding that compulsion short of physical force (but still rising to the level of persecution) could result in a finding of "forced" abortion or sterilization. Based on the Immigration Judge's uncontested findings regarding the consequences to *Zhu* if she continued with her pregnancy, State Department country reports from the period, and "the mass of federal cases depicting abuses of China's family planning laws," the Court had "no trouble" in concluding that the 1994 abortion fell within the definition of "forced" as set forth in *Matter of T-Z-*. The Court rejected the government arguments that the abortion was not "forced" within the meaning of § 601(a) because the petitioner's boyfriend had urged her to have the abortion, and because the government was not even aware that she was pregnant. The Court found that given *Zhu's* "perception" that a government-compelled abortion was "inevitable," neither the influence of her boyfriend nor government ignorance of her pregnancy made her decision "voluntary" rather than forced.

While claiming support in *Matter of T-Z-*, the Fifth Circuit's opinion does represent some extension

of that ruling. Government officials (a work unit) were aware of both pregnancies at issue in *T-Z-*, and threatened loss of the wife's job and fines if she did not submit to an abortion. The Board's holding – that nonphysical forms of harm such as deliberate imposition of severe economic disadvantage, loss of liberty, food, housing, employment, and other essentials of life may amount to "persecution" – was premised on the existence of a specific threat of such harm as punishment for refusing to abort a pregnancy. "[A]n abortion is `forced' within the meaning of the Act when a reasonable person would objectively view the threats for refusing the abortion to be genuine, and the threatened harm, if carried out, would rise to the level of persecution." The Board noted that the alien and his wife were not subject to "idle threats" by the work unit, and the only issue (which was to be addressed on remand by the Immigration Judge) was whether the harm threatened would rise to the level of persecution.[12] Other circuit decisions which have found that physical compulsion was not necessary to establish a "forced" abortion likewise have involved specific threats of economic or other harm for continuing a pregnancy. *Lidan Ding v. Ashcroft*, 387 F.3d 1131 (9th Cir. 2004); *Xuan Wang v. Ashcroft*, 341 F.3d 1015 (9th Cir. 2003); *Zhen Hua Li v. U.S. Attorney General of U.S.*, 400 F.3d 157 (3d Cir. 2005).

The Fifth Circuit's decision potentially creates new issues in assessing an applicant's burden of proof. Absent evidence of government compulsion in response to an "unlawful" pregnancy, or even government awareness of the pregnancy, an applicant may still be eligible for asylum or withholding of removal premised on a good-faith belief that government sanctions were inevitable. While relying on the Immigration Judge's specific findings of fact in this regard – findings not present in *Matter of T-Z-*, the Circuit's reliance on country reports and the general body of Federal case law appears to diminish the applicant's burden to demonstrate that she would have faced persecution as a result of her decision to not abort her pregnancy. The Circuit hinted that it was aware of its direction, noting that "we would interpret 'forced abortion' *at least as broadly as* the Board."[13] It also noted that both the Board's and its own application of the term "forced" in this context may differ from the interpretation of "force" in other contexts.[14] Anyone who has wrestled with the concept of "force" in the definition of "crime of violence" would nod in agreement. Whether other circuits follow the Fifth Circuit's lead in delineating the concept of "force" is definitely a question to which attention must be paid.

Edward R. Grant has been since 1998 a Member of the Board of Immigration Appeals.

---

1. *Shi Liang Lin v. U.S. Dep't of Justice*, 416 F.3d 184, 187 (2nd Cir. 2005).

2. 8 U.S.C. §1101(a)(42)

3. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, § 601(a), 110 Stat. 3009-546, 3009-689 (codified at section 101(a)(42)(2000)).

4. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

5. Section 601(a) of IIRIRA amended the definition of "refugee" at section 101(a)(42) of the Act to state that "a person" who has been subject to forced abortion or sterilization under a policy of coercive population control, or has been persecuted for refusal to undergo such a procedure, "shall be deemed to have been persecuted on account of political opinion." The same rule would apply to a person with a well-founded fear of such treatment.

6. *Matter of Chang*, 20 I&N Dec. 38 (BIA 1989); *Matter of G-,* 20 I&N Dec. 761 (BIA 1993).

7. *Shi Liang Lin*, _ F.3d _, 2007 WL 2032066, *8(2d Cir. 2007).

8. *Sun Wen Chen v. U.S. Att'y Gen.*, _ F.3d _ , 2007 WL 1760658 (3d Cir. 2007); Junshao Zhang v. Gonzalez, 434 F.3d 993 (7th Cir. 2006); Kui Rong Ma v. Ashcroft, 361 F.3d 553 (9th Cir. 2004).

9. *Shi Liang Lin,* at *21.

10. *Shi Liang Lin*, at *26.

11. *Sun Wen Chen*, at *13.

12. *Matter of T-J-*, at 167

13. *Matter of T-J-*, at 167

14. *Id.*

EOIR Immigration Law Advisor

Juan P. Osuna, Acting Chairman
Board of Immigration Appeals

David L. Neal, Chief Immigration Judge
Office of the Chief Immigration Judge

Karen L. Drumond, Editor
(703) 605-1102
EOIR Law Library

Jean King, Senior Legal Advisor
(703)605-1744
Board of Immigration Appeals

Anne Greer, Assistant Chief Immigration Judge
(703) 305-1247
Office of the Chief Immigration Judge

Layout by Hasina Rahman, Kimberly Camp & Kathy Edwards