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CHEN ZHOU CHAI v. CARROLL
48 F.3d 1331 (4th Cir. 1995)
United States Court of Appeals for the Fourth Circuit

I. FACTS

Chen Zhou Chai ("Chen"), a citizen of the People's Republic of China (PRC) is one of three hundred illegal Chinese immigrants who jumped off the Golden Venture when it ran aground on a sand bar in New York Harbor on June 6, 1993.[1] Chen was fleeing the PRC's population control policy. The policy limits each family to one child; noncompliance with which is met with punishment and fines. The PRC had arrested Chen's wife in 1992 when she was five months pregnant with their third child. Chen and his wife had violated the country's policy by already having a second child, although the government had not taken any action based upon this birth. The PRC forced Chen's wife to abort her third pregnancy and imposed a 20,000 yuan fine (twelve times the amount of Chen's annual salary) for the second child. In July 1992, the PRC forced Chen to submit to surgical sterilization and threatened to sterilize his wife unless he paid the fine within five years. Furthermore, the government removed Chen from his position clerking at a government owned food cooperative on a commune for his failure to attend commune meetings and his refusal to cooperate with the commune.[2] Thus, Chen was forced to choose between paying 20,000 yuan when he had no income, or seeing his wife sterilized by government order. Feeling that he had no other recourse, Chen sailed to the United States on the Golden Venture, jumped into the water when it ran aground, and was picked up by a rescue boat before he reached the shore. Upon his arrival in the United States, the Immigration and Naturalization Service (INS) placed him in detention and initiated exclusion proceedings.

THE PRC POLICY

China holds one-fifth of the world's population yet has only seven percent of the world's arable land.[3] The government has an interest in assuring that its citizens have adequate housing, education, medical services, and other benefits. Faced with limited resources, China's leaders have made family planning a national priority. They believe that land scarcity and economic modernization are unresolvable without a decline in population growth. Hence, the government aims for the maximum population to be 1.2 billion by the year 2000.[4] To achieve this goal, the government discourages early marriages and enforces a "one couple-one child" policy. This limits urban residents to one child per couple unless special permission is granted. In no case is a third birth permissible. The mechanics of implementation—economic sanctions, peer pressure, and propaganda—are determined locally. The only limitation on local enforcement is that local officials may not use physical force to obtain compliance with birth quotas. Any other mechanism is acceptable to achieve the state imposed birthrates.[5] Couples who follow through with forbidden pregnancies may suffer the suspension of wages, fines, forced abortions,[6] sterilization, and other sanctions.

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[1] *Chen Zhou Chai v. Carroll*, 48 F.3d 1331 (4th Cir. 1995).

[2] Chen refused to attend the commune meetings because he did not want to associate with the Communist party. He was fired shortly after he declined an offer to join the Communist party by the head of the commune.

[3] *Matter of Chang*, 1989 WL 24751, *23 (BIA 1989) (citing 1985 *Country Reports on Human Rights Practices, Joint Committee of the Senate and the House of Representatives*, 99th Cong., 2nd Sess. (1986), and 1987 *Country Reports on Human Rights Practices, Joint Committee of the Senate and the House of Representatives*, 100th Cong., 2d Sess. (1988).

[4] *Matter of Chang*, 1989 WL 24751, *29 (BIA 1989).

[5] *Id.*

[6] Some of the more gruesome forced abortion practices documented by researchers on China's policy include the inducement of labor by drugs during late term pregnancies and the subsequent injection of formaldehyde into the baby's brain as it crowns in the birth canal. Nancy L. Katz, *Caught Between Cultures, Mothers Fight for Rights*, Atlanta J. & Constit., May 21, 1995 at D1. Other practices include inserting a rubber "bulb" into a woman's uterus during late term pregnancy and filling it with water until the pressure induces contractions and premature stillbirth and injecting "poison shots" into the amniotic fluid, which poisons the baby and also causes premature stillbirth. April Adell, *Fear of Persecution for Opposition to Violations of the International Human Right to Found a Family as a Legal Entitlement to Asylum for Chinese Refugees*, 24 Hofstra L. Rev. 789, n.21 (citing Jeff Jacoby, *Clinton's China Policy: Raw Naked Cruelty*, Boston Globe, May 9, 1995, at 19).

Chen applied for political asylum under The Immigration and Nationality Act,[7] based on his opposition to China's population control policy. The Board of Immigration Appeals ("Immigration Board") denied his application for asylum because he failed to prove persecution "on account of . . . political opinion."[8] Chen brought a writ of habeas corpus in which he sought review of the Board's decision, and the United States District Court for the Eastern District of Virginia denied his petition.[9] Chen appealed the Immigration Board's decision to the Fourth Circuit.

II. HOLDING

The Fourth Circuit Court of Appeals for the Fourth Circuit affirmed the Immigration Board's decision and held that severe sanctions for Chen's violation of China's population control policy did not constitute persecution resulting from a political opinion.[10] The court found that the Immigration Board had no authority to confer asylum when the PRC took action or threatened to take action against the asylum applicant merely to enforce its population control policy. Such an applicant was not a "refugee" as defined in the Immigration and Nationality Act.[11]

III. ANALYSIS/APPLICATION

A. *MATTER OF CHANG*

The Fourth Circuit based its decision largely on a 1989 Immigration Board decision, *Matter of Chang*.[12] Under the Immigration and Nationality Act, ("Refugee Act") an applicant for asylum must establish persecution, or that a reasonable person in like circumstances would fear persecution, as a result of race, religion, nationality, membership in a particular social group, or political opinion.[13] In *Chang*, the Immigration Board ruled that government action in furtherance of a coercive population control policy that includes involuntary sterilization did not constitute persecution within the meaning of the Refugee Act.[14] It further found that an individual claiming asylum based on the one couple-one child policy must establish a well-founded fear that the policy would be enforced selectively. The Immigration Board found "no evidence that the goal of China's policy was other than . . . [to control population]," and that it was not a subterfuge for persecuting any portion of the Chinese citizenry, on account of one of the reasons enumerated in the statute."[15] The Immigration Board stated that "implementation of the 'one couple-one child' policy in and of itself, even to the extent that involuntary sterilizations may occur, [was] . . . not persecution within the meaning of the Refugee Act, as long as it was implemented for a general population control reasons."[16] Thus, an asylum claim based solely on the fact that the applicant was subjected to this policy must fail under *Chang*. The Immigration Board noted that "whether immigration laws should be amended to provide temporary relief from deportation to all individuals who face the possibility of forced sterilization as part of a country's population control program is a matter for Congress to resolve legislatively."[17]

B. EFFORTS TO OVERTURN *CHANG*

Immediately after the ruling in *Chang*, Congress passed the DeConcini Amendment to the Emergency Chinese Immigration Relief Act of 1989.[18] The

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[7] 8 U.S.C. §1158. This section of the Immigration and Nationality Act provides that an alien "may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a 'refugee' within the meaning of section 1101(a)(42)(A) of this title." Chen also applied for withholding of deportation under 8 U.S.C. 1253(h).

[8] *Id.*

[9] *Chen Zhou Chai v. Carroll*, 858 F. Supp. 569 (E.D. Va. 1993).

[10] *Chen Zhou Chai*, 48 F.3d at 1331.

[11] 8 U.S.C. 1101(a)(42)(A). The Immigration and Nationality Act defines "refugee" 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 avail himself or herself of the protection or that country because of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."

[12] *Matter of Chang*, 1989 WL 24751, *23 (BIA 1989).

[13] *See Matter of Chang*, 1989 WL 24751, *23 (BIA 1989). *See also INS v. Cardoza- Fonseca*, 480 U.S. 421 (1987).

[14] *Matter of Chang*, 1989 WL 24751, *25 (BIA 1989).

[15] *Id.* at *25.

[16] *Id.*

[17] *Id.* at *28.

[18] H.R. 2712 101st Cong., 1st Sess. (1989). Section 3 of the Act provided, in pertinent part, as follows:

STANDARDS TO BE APPLIED IN ADJUDICATING APPLICATIONS FOR ASYLUM, WITHHOLDING OF DEPORTATION, AND REFUGEE STATUS FROM CHINESE FLEE-

Amendment provided that opposition to a government's family planning policy was a political opinion and, thus, should be grounds for asylum in the United States. By November 1989, the Senate had passed the Amendment unanimously,[19] and the House of Representatives had concurred.[20] Although President Bush approved the Amendment, he had misgivings about other portions of the bill. Viewing the portions of the bill that related to the PRC's policy as intrusive of his constitutional and statutory authority, he vetoed the legislation.[21] Subsequent congressional vote failed to override the veto.[22]

President Bush then instructed the Attorney General to promulgate an interim rule with similar language and having the same effect as the failed DeConcini Amendment.[23] He ensured the enforcement of the rule through an executive order[24] which provided as follows:

> The Secretary of State and the Attorney General are directed to provide for enhanced consideration under the immigration laws for individuals from any country who express a fear of persecution upon return to their country related to that country's policy of forced abortion or coerced sterilization, as implemented by the Attorney General's regulation effective January 29, 1990.[25]

When the interim rule was published in the Federal Register, this language regarding family planning policies was omitted without explanation.[26]

In 1993, on the last day of the Bush Administration, the Attorney General signed a final rule that provided for asylum based on an applicant's opposition to his or her country's family planning policy. The final rule parroted the language of 1990 interim rule and was to take effect upon publication in the Federal Register.[27] Following the 1993 inauguration, President Clinton ordered the withdrawal of any unpublished regulations so that his own appointees could approve them. Why the Clinton administration did not publish the rule later is unclear. Nonetheless, the rule was never published and it never became binding law on the courts. This omission gave rise to a conflict between *Chang* and the Bush Executive Order. Unsure as to how to resolve this conflict, the Immigration Board referred two of its decisions to Attorney General Reno, who granted review. Reno later rescinded her grant of review without explanation and left the conflict unresolved.

C. THE *CHANG* DECISION DID NOT BIND THE *CHEN* COURT

A court may substitute its own judgment for an agency's ruling if it finds that the agency's interpre-

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

[19] 135 Cong. Rec. S8241-55 (daily ed. July 19-20, 1989).

[20] 135 Cong. Rec. H7945-54 (daily ed. Nov. 2, 1989).

[21] Memorandum of Disapproval for the Emergency Chinese Immigration Relief Act of 1989, reprinted in Public Papers of the Presidents of the United States 1611-12 (Nov. 30 1989).

[22] Although the House voted to override the veto (136 Cong. Rec. H66-67 (daily ed. Jan. 24, 1990)), the Senate failed by falling five votes short of the two thirds majority (136 Cong. Rec. S382 (Daily Ed. Jan. 25, 1990)).

[23] The rule included the following:

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

55 Fed. Reg. 2803, 2805 (Jan. 29, 1990).

[24] Exec. Order No. 12,711, § 4, 55 Fed. Reg. 13,897 (1990).

[25] Exec. Order No. 12,711, § 4, 55 Fed. Reg. 13,897.

[26] The court in *Chen* characterized this omission as mere "inadvertence." *Chen*, 48 F.3d at 1337, n. 4. *See also Gou v. Carroll*, 842 F.Supp. 858, 869 n. 20 (E.D. Va. 1994) (citing an article describing the omission of the January 29, 1990 interim rule as "an example of the bureaucratic left hand not noticing what the bureaucratic right hand is doing.")

[27] 8 C.F.R. § 208.13 (1994). The January 22, 1993 rule would have provided, in pertinent part, as follows:

tation of its regulations is unreasonable.[28] Although a court must give the agency's decision deference, it also conducts a plenary review of the decision.[29] Despite the litany of cases that blindly follow *Chang,*[30] the *Chen* court should have ignored the Immigration Board's ruling. First, the legislative history of the Refugee Act indicates that Congress and the executive branch intended for opposition to a country's family planning policy to be construed as political opinion. Opposition to a country's family planning policy is unquestionably "political opinion" within the intended meaning of the Refugee Act, and the *Chang* interpretation of the Refugee Act violates the spirit of United Nations human rights policies upon which the Act is based. Second, the notion that Chang's requirement of particularized persecution is unreasonable in light of the United States executive's traditional treatment of asylum.

1. POLITICAL OPINION

The heart of the issue is whether opposition to the PRC's family planning policy constitutes a "political opinion." When interpreting a statute, a court ordinarily "must . . . start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used."[31] Political opinion is defined as:

> "The exercise of the functions vested in those charged with the conduct of government; relating to the management of affairs of state . . . of or pertaining to exercise of rights and privileges or the influence by which individuals of a state seek to determine or control its public policy . . . ."[32]

It can hardly be doubted that one's views regarding abortion, whether "pro-life" or "pro-choice" is a "political opinion" within this definition. The ordinary meaning of "political opinion" encompasses an individual's views regarding procreation. In fact, the Court has stated that the expression of one's views on abortion, however expressed, is "political."[33]

Additionally, the legislative history of the Refugee Act indicates that Congress intended for views regarding procreation and forced sterilization in the form of opposition to a government's family planning policy to constitution "political opinion." The executive and legislative branches have made innumerable attempts to include opposition to a country's population control policy as political opinion. They have failed only for logistical reasons. The proposed January 1993 Rule specifically stated that "one effect of this rule is to supersede the decision *Matter of Chang* . . . ."[34]

In *INS v. Elias-Zacharias,*[35] the United States Supreme Court specifically stated that it was appropriate to interpret the Refugee Act using an "analysis of the plain language of the [Refugee] Act, its symmetry with the United Nations Protocol, and its legislative history."[36] The Court found these "ordinary canons of statutory construction compelling."[37] The Court also noted that "[i]n enacting the [Refugee Act] . . . Congress sought to 'give the United States sufficient flexibility to respond to situations involving political or religious dissidents and detainees throughout the world.'"[38] The preamble to the United Nations Protocol, to which the United States is a party, states that the purpose for the Refugee Act's enactment was "that new refugee situations have arisen since the [Refugee] Convention

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

Chen, 48 F.3d at 1337.

[28] *See Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566-67(1980).

[29] *Chen*, 48 F.3d at 1342.

[30] *See Wang v. Slattery*, 877 F. Supp. 133 (S.D.N.Y 1995); *Si v. Slattery*, 864 F. Supp. 397 (S.D.N.Y. 1994); *Lan v. Waters*, 869 F. Supp. 1483 (N.D. Ca. 1994); *Gao v. Waters*, 869 F. Supp. 1474 (N.D. Ca. 1994); *Chen Zhou Chai*, 866 F. Supp. at 283.

[31] *Richards v. United* States, 369 U.S. 1, 9 (1962); *See also INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987).

[32] Websters II, New Riverside Dictionary 910 (1984).

[33] *Planned Parenthood v. Casey,*112 S. Ct. 2791, 2815 (1992).

[34] *Gou Chun Di v. Carroll*, 842 F. Supp. 858, 864 (1994) (quoting the 1993 Proposed Rule, *supra* note 27).

[35] *INS v. Elias-Zacharias*, 502 U.S. 478 (1992).

[36] *Elias-Zacharias*, 502 U.S. at 487.

[37] *Id.* at 487.

[38] *Id.* at 488. (citing H.R. Rep. No. 96-608, at 9 (1979)).

was adopted and that the refugees concerned, therefore, may not fall within the scope of the Convention."[39] Hence, construing the Act to be in symmetry with United States protocol requires it to be interpreted as protecting the fundamental human right of procreation.

Humans rights law has been consistent with this notion; the right was formally recognized by the international community in 1948 with the promulgation of the Universal Declaration of Human Rights.[40] Article 16 of the Declaration states that "[m]en and women of full age . . . have the right to . . . found a family."[41] The right to found a family has been codified subsequently in other human rights treaties.[42]

Opposition to governmental regulation of reproduction, a fundamental human right, constitutes "political opinion" within the plain meaning of the words. The ruling in *Chang* conflicts with these principles. Thus, it is wholly within the judiciary's authority to interpret the Refugee Act broadly to "respond to situations"[43] in which human rights are being violated. The *Chang* interpretation is not reasonable in light of the legislative and administrative history of the Refugee Act. Faced with conflicting administrative interpretations and legislative history, courts should not engage in "blind adherence"[44] to a single agency ruling.

2. PARTICULARIZED PERSECUTION

The *Chang* court's view of "persecution" as requiring "selective enforcement" and excluding any generally enforced governmental policy is also unreasonable.[45] The PRC's family planning policy, because it applies equally to all citizens, is a generally-applied policy. In *Chen*, the Fourth Circuit followed *Chang's* interpretation of the Refugee Act. The Fourth Circuit found that even if Chen had successfully characterized his failure to comply with the population control policy as a "political opinion," he also would have had to demonstrate that the PRC's actions or threats against him—even to the extent that those actions involved forced abortions or sterilizations—were taken for a reason other than to enforce the general population control policy.[46] The Fourth Circuit stated that the *Chang* interpretation was consistent with the United States Supreme Court's decision in *Elias-Zacharias*[47]; however, the *Elias-Zacharias* Court did not mention any "particularization" requirement.

Such an interpretation is at odds with the United States' traditional treatment of asylum laws. The United States has, in other circumstances, afforded asylum to individuals who were persecuted by a government that enforced a generally-applied government policy. For instance, most totalitarian governments such as North Korea, Argentina, Cuba, and the former Soviet Union, uniformly apply government policies against all who challenge the the government's legitimacy, or who aspire to replace the government by democratic means. The Refugee Act contains no requirement of particularized application for a policy to meet the definition of "political opinion." The *Chang* interpretation of the Refugee Act to require selective application of the policy in this case constitutes an unreasonable addition to the showing required under the Refugee Act as traditionally understood and applied by the executive and legislative branches.

Even if a court determines that it is obligated to follow *Chang*, it has another option which would afford a person such as Chen refugee status. By interpreting the 1993 Rule[48] as an interpretive rule, setting forth a general statement of policy rather than a substantive rule, the requirement of publication can be avoided.[49] Although a regulation must be substantive or legislative to have the force and effect of law, the Administrative Procedure Act does

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[39] Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, pmbl. (enforced with respect to the United States Nov. 1, 1968).

[40] G.A. Res. 217(A), U.N. GAOR, 3d Sess., 183d plen.mtg., U.N. Doc. A/810(1948).

[41] Universal Declaration of Human Rights, art 16, G.A. Res. 217(A), U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc. A/810 (1948).

[42] *See* International Covenant on Civil Political Rights, Dec. 19, 1966, art. 23, 999 U.N.T.S. 171, 179 6 I.L.M. 368 (1967); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 10, G.A. Res. 2200, U.N. GAOR 21st Sess., 1496th plen. mtg., U.N. Doc A/6316 (1966); and Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, art. 16, G.A. Res. 180, U.N. GAOR, 3d Comm., 34th Sess., Annex, Agenda Item 75, at 41, U.N. Doc. A/830 (1979).

[43] *INS v. Elias-Zacharias*, 502 U.S. 478, 488 (1992).

[44] *United States Trans. Union v. Dole*, 797 F.2d 823, 829 (10th Cir. 1986).

[45] *Matter of Chang* 1989 WL 24751, *25 (BIA 1989).

[46] *Chen*, 48 F.3d at 1343.

[47] *Elias-Zacharias*, 48 F.3d at 1342.

[48] 8 C.F.R. § 208.13. For text, see *supra* note 27.

[49] *See United States v. Harvey*, 659 F.2d 62,64 (5th Cir. 1981). *See also American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987) (citing *Pacific Gas & Elec. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974)).

not require the publication of interpretive rules.[50] In making a distinction between substantive rules and interpretive rules, the central question is essentially "whether an agency is exercising its rulemaking power to clarify an existing statute or regulation, or to create new law, rights, or duties."[51] Because the 1993 Rule could be construed as a legislative attempt at interpreting "political opinion," the courts could legitimately follow its guidance.

Even the failure to publish a substantive rule is not necessarily fatal.[52] Although the Freedom of Information Act ("FOIA") mandates that publication of agency rules,[53] the Second Circuit has stated that the FOIA requirment "attaches only to matters which if not published would adversely affect a member of the public."[54] Furthermore, the Second Circuit has noted, albeit in dicta, that "[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures . . . even though the procedural requirement has not yet been published in the federal register."[55] Under *Nguyen v. United States*[56] the Ninth Circuit held that an unpublished rule is effective unless it adversely affects a person's substantive rights.[57] The Ninth Circuit stated that courts should consider a variety of factors in determining whether a non-published agency rule should be given legal effect, including: whether or not the unpublished interpretation affects individuals' substantive rights; (ii) whether the interpretation deviates from the plain meaning of the statute or regulation at issue; and (iii) whether the interpretation limits administrative discretion.[58] Under these factors, the unpublished 1993 Rule could be entitled to legal effect.[59]

IV. CONCLUSION

The right to procreate is a fundamental human right and should be the basis for asylum in the United States. The Immigration Board and the United States courts should interpret asylum standards consistently with the current global trend reflected in international human rights law. Such a widely recognized international human right to procreate must at least imply the right of parents to decide the size of their family. "The humanitarian spirit of the Refugee Act requires that as new violations of human rights emerge, the definition of refugees who qualify for asylum should expand to include them."[60] Involuntary sterilization is both a violation of fundamental human rights and a denial of the right to life, liberty, and security. As Justice Douglas noted in *Skinner v. Oklahoma*, "The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands, it can cause races or types which are inimical to the dominant group to wither and disappear."[61]

In *Chang* and *Chen*, the Immigration Board and the Fourth Circuit failed to apply these principles and ruled in direct contravention of the spirit of the Refugee Act and the regulatory history underlying these principles in the United States. It also ruled in direct contravention of International Protocol.

As long as China's coercive enforcement policy is in place, its subjects should have refugee status in the United States. Decisions like *Chang* are erroneous and should not be followed by other courts. At a minimum, counsel should note that the *Chen* decision and others like it may not present a barrier to success in arguing that the United States should grant asylum to victims of China's one couple-one child policy.

Summary and Analysis Prepared by:

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[50] 5 U.S.C. § 553(d)(2); *see also Allen v. Bergland*, 661 F.2d 1001, 1006 (4th Cir. 1981).

[51] *Mejia-Ruiz v. INS*, 51 F.3d 358, 363 (2d Cir. 1995).

[52] *Welch v. United States*, 750 F.2d 1101, 1111 (1st Cir. 1985).

[53] 5 U.S.C. § 552(a)(1).

[54] *New York v. Lyng*, 829 F.2d 346, 354 (2d Cir. 1987).

[55] *Zhang v. Slattery*, 55 F.3d 732, 749 (2nd Cir. 1995) (quoting *Montilla v. Ruiz*, 415 U.S. 199, 235 (1974)).

[56] *Nguyen v. United States*, 824 F.2d at 697 (9th Cir. 1987).

[57] *Nguyen*, 824 F.2d at 700.

[58] *Id.* at 701.

[59] These arguments were discussed by the Second circuit in *Zhang v. Slattery*, 55 F.3d 732, 749 (2d Cir. 1995); the court nonetheless found that the rule never became binding on anyone because the nonpublication was "a deliberate step by the oncoming Administration to terminate all open initiatives of the outgoing administration . . . [and therefore] [b]y its own terms, the Rule never became effective." *Id.* One court contemplated whether or not the 1993 Rule could be construed to have legal effect despite its non-publication but never ruled on the issue. *See Gou Chun Di v. Carroll*, 842 F. Supp. 858 (E.D. Va. 1994), *overruling Di v. Moscato*, 66 F.3d 315 (4th Cir. 1993).

[60] April Adell, *Fear of Persecution for Opposition to Violations of the International Human Right to Found a Family as a Legal Entitlement to Asylum for Chinese Refugees*, 24 Hofstra L. Rev 789, 803 (Spring 1996) (citing Kristine M. Fox, Note, *Gender Persecution: Canadian Guidelines Offer a model for Refugee Determination in the United States*, 11 Ariz. J. Int'l 7 Comp. L. 117, 121 (1994)).

[61] *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).