

## CASE COMMENTS

**Immigration Law**—Withholding Automatic Asylum for Spouses or Partners of Victims of China’s Coercive Family-Planning Policies—*Shi Liang Lin v. U.S. Dep’t of Justice*, 494 F.3d 296 (2d Cir. 2007)

Section 601(a) of the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA) amended the Immigration and Nationality Act (INA) definition of “refugee” to include victims of coercive family-planning policies.<sup>1</sup> In the 1997 decision *In re C-Y-Z*,<sup>2</sup> the Board of Immigration Appeals (BIA) interpreted section 601(a) to extend protection to the victim’s spouse, offering automatic refugee status to both individuals.<sup>3</sup> Since then, circuit courts have disagreed over whether *C-Y-Z*’s holding also extends automatic asylum to the victim’s common-law spouse, unmarried partner, or fiancé.<sup>4</sup> In *Shi Liang Lin v. U.S. Dep’t of Justice*,<sup>5</sup> the Second Circuit Court of Appeals considered whether section 601(a) confers automatic refugee status on a victim’s unmarried partner.<sup>6</sup> The Second Circuit not only declined to impute automatic refugee status to a victim’s *unmarried* partner, but

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1. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 601(a)(1), 8 U.S.C. § 1101(a)(42)(B)(2006) (amending INA § 101(a)(42) definition of refugee). Section 601(a) defines refugee as follows:

[A] person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for the 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, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

*Id.*

2. 21 I. & N. Dec. 915 (B.I.A. 1997) (en banc).

3. See *In re C-Y-Z*, 21 I. & N. Dec. 915, 917-18 (B.I.A. 1997) (en banc) (holding applicant may establish asylum eligibility by virtue of spouse’s forced abortion or sterilization).

4. See *Yuan Rong Chen v. Gonzales*, 457 F.3d 670, 674 (7th Cir. 2006) (holding no categorical protection to victim’s boyfriend); *Ru-Jian Zhang v. Ashcroft*, 395 F.3d 531, 532 (5th Cir. 2004) (holding *C-Y-Z* inapplicable where marriage neither traditional nor legal). Compare *Hao Zhu v. Gonzales*, 465 F.3d 316, 321 (7th Cir. 2006) (extending *C-Y-Z* to traditional marriage not legally recognized under China’s marriage-age restrictions), and *Kui Rong Ma v. Ashcroft*, 361 F.3d 553, 559-61 (9th Cir. 2004) (extending *C-Y-Z* protection to unofficial/traditional spouse where marriage legal but for China’s age restrictions), with *Cai Luan Chen v. Ashcroft*, 381 F.3d 221, 227-29 (3d Cir. 2004) (refusing to extend *C-Y-Z* to traditional marriage invalid under China’s marriage-age restrictions).

5. 494 F.3d 296 (2d Cir. 2007).

6. *Id.* at 299 (outlining issues determined during rehearing en banc).

also abrogated *C-Y-Z-* as applied to a victim's *legal spouse*.<sup>7</sup> The court held that neither the victim's spouse nor unmarried partner are per se refugees, and that to obtain asylum, such applicants must demonstrate *their own* persecution under China's coercive policies.<sup>8</sup>

Three Chinese citizens, Shi Liang Lin, Zhen Hua Dong, and Xian Zou, sought asylum under section 601(a) by virtue of their unmarried partners' forced abortions.<sup>9</sup> In each case, the immigration judge denied the application and held that the *C-Y-Z-* holding does not apply to a victim's boyfriend or fiancé.<sup>10</sup> After the BIA summarily affirmed each decision, petitioners appealed to the Second Circuit, which consolidated the petitions, reviewed them, and remanded them to the BIA.<sup>11</sup> The Second Circuit noted that because, in deciding *C-Y-Z-*, the BIA failed to provide reasoning for extending section 601(a) to a victim's *spouse*, the court could not logically determine whether a victim's *unmarried* partner should enjoy such protection.<sup>12</sup> The court therefore remanded the petitions and ordered the BIA to explain its reasoning in *C-Y-Z-*

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7. *Id.* at 300 (holding BIA misinterpreted IIRIRA § 601(a) in extending automatic refugee status to victim's spouse); see also Deborah Anker, *Grounds for Asylum, Withholding and CAT Protection: Current Issues and Recent Developments*, 1625 PLI/CORP. 339, 343 (2007) (noting Second Circuit decision created circuit split).

8. See 494 F.3d at 313 (noting victim's partner must show own basis for asylum).

9. *Shi Liang Lin v. U.S. Dep't of Justice*, 416 F.3d 184, 188-89 (2d Cir. 2005) (outlining petitioners' asylum claims), *reh'g after remand*, 494 F.3d 296 (2d Cir. 2007). Dong claimed that, after his fiancée's forced abortion, China's family-planning officials threatened to fine or sterilize him if his fiancée became pregnant again. *Id.* When his fiancée became pregnant one year later, Dong fled, but the government forced his fiancée to terminate her pregnancy. *Id.* at 188-89. Zou sought asylum by virtue of his girlfriend's forced abortion. *Id.* at 188. Lin claimed that he and his girlfriend, who was subject to a forced abortion, would have married but for China's marriage-age requirements, under which men must be age twenty-two and women must be age twenty to marry. *Id.*; see also Megan C. Dempsey, Note, *A Misplaced Bright-Line Rule: Coercive Population Control in China and Asylum for Unmarried Partners*, 92 IOWA L. REV. 213, 216-17 (2006) (stating China's marriage-age restrictions).

10. See *Shi Liang Lin v. U.S. Dep't of Justice*, 416 F.3d 184, 188-89 (2d Cir. 2005) (summarizing immigration judge's decision restricting *C-Y-Z-* holding to legal spouse), *reh'g after remand*, 494 F.3d 296 (2d Cir. 2007).

11. See *Shi Liang Lin v. U.S. Dep't of Justice*, 416 F.3d 184, 187, 189 (2d Cir. 2005) (listing reasons for remand and explaining BIA streamlining regulation), *reh'g after remand*, 494 F.3d 296 (2d Cir. 2007). Pursuant to BIA streamlining regulations, a single BIA member may affirm the results of an immigration judge's decision without providing reasoning. *Id.* at 189 (citing 8 C.F.R. § 1003.1(e)(4) (2006)). As a result, a court may have difficulty determining whether the BIA's rationale was reasonable. See *id.*

12. See *Shi Liang Lin v. U.S. Dep't of Justice*, 416 F.3d 184, 192 (2d Cir. 2005) (remanding to BIA to clarify *C-Y-Z-* and retaining jurisdiction to rehear petitions), *reh'g after remand*, 494 F.3d 296 (2d Cir. 2007); see also Raina Nortick, Note, *Singled Out: A Proposal to Extend Asylum to the Unmarried Partners of Chinese Nationals Fleeing the One-Child Policy*, 75 FORDHAM L. REV. 2153, 2180 (2007) (stating *C-Y-Z-* lacked rationale regarding legal spouses' status because parties agreed on issue). In *C-Y-Z-*, the government conceded that the provision applied to the victim's spouse; in fact, in 1996, Immigration and Naturalization Services issued a memorandum stating that a victim's spouse may "stand in [the victim's] shoes" and make a bona fide claim for asylum based on problems that impact the victim "more intimately" than the applicant. *In re C-Y-Z-*, 21 I. & N. Dec. 915, 917-18 (B.I.A. 1997) (en banc) (quoting Memorandum from the Office of the General Counsel of the INS 4 (Oct. 21, 1996)); *supra* note 11 (explaining streamlining regulations foster limited rationales). In *Shi Liang Lin*, the Second Circuit initially declined to review the petitioners' claims given the BIA's lack of rationale. See Nortick, *supra*, at 1279-80.

and to clarify whether section 601(a) extends to a victim's unmarried partner as well as her spouse.<sup>13</sup>

On remand, the BIA reaffirmed *C-Y-Z-*, as applied to legal spouses, but declined to extend per se eligibility to a victim's unmarried partner.<sup>14</sup> The BIA reasoned that the underlying purpose of section 601(a) is to protect the victim *and* the spouse as a marital unit.<sup>15</sup> It held, however, that this protection only extends to a victim's legal spouse and that unmarried partners, such as the petitioners, must claim asylum under section 601(a)'s "other resistance" clause.<sup>16</sup>

After the BIA's decision on remand, the Second Circuit ordered sua sponte an en banc rehearing to consider whether section 601(a) is ambiguous such that courts must defer to the BIA's ruling under the *Chevron* doctrine and whether the BIA reasonably construed section 601(a) to offer automatic asylum to a victim's spouse but not to an unmarried partner.<sup>17</sup> The court held that section 601(a) is not ambiguous, and therefore, the BIA impermissibly construed the statute.<sup>18</sup> Not only did the Second Circuit hold that section 601(a) does not apply to a victim's unmarried partner, but it also abrogated *C-Y-Z-*, holding that even a victim's *legal spouse* lacks automatic protection under the provision.<sup>19</sup> As a result, in the Second Circuit, only direct victims of coercive family-planning policies are per se refugees under section 601(a).<sup>20</sup> To attain asylum under the provision, victims' spouses and partners must demonstrate other resistance to a coercive family-planning policy or a well-founded fear of persecution based on such resistance.<sup>21</sup>

Prior section 601(a)'s enactment, INA § 101(a)(42) limited refugee status to aliens who had suffered persecution by their national government or had a well-

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13. See *Shi Liang Lin v. U.S. Dep't of Justice*, 416 F.3d 184, 187 (2d Cir. 2005) (setting forth issues for clarification), *reh'g after remand*, 494 F.3d 296 (2d Cir. 2007); see also *Dempsey*, *supra* note 9 at 234-35 (noting court could not evaluate *C-Y-Z-*'s reasonableness because BIA did not articulate rationale).

14. See *In re S-L-L-*, 24 I. & N. Dec. 1, 4 (B.I.A. 2006) (en banc) (reaffirming *C-Y-Z-* but limiting scope).

15. *In re S-L-L-*, 24 I. & N. Dec. 1, 6 (B.I.A. 2006) (en banc) (noting congressional intent to rectify China's intrusion on married couples' privacy).

16. *In re S-L-L-*, 24 I. & N. Dec. 1, 10, 11-12 (B.I.A. 2006) (en banc) (explaining other resistance clause and denying Lin's petition because no such claim existed); see 494 F.3d at 299 (stating BIA dismissed Dong's appeal for failure to assert other resistance); 494 F.3d at 299 (stating BIA remanded Zou's case to determine whether vocally protesting girlfriend's abortion constitutes other resistance).

17. 494 F.3d at 299-300 (setting forth procedural history and issues for review); see Mark Hamblett, *En Banc Panel: No Per Se Asylum for Spouses of Persecuted Chinese*, 238 N.Y. L.J. 1, col. 3 (2007) (noting sua sponte ordering of en banc rehearing unusual); see also *infra* note 28 and accompanying text (discussing *Chevron* doctrine).

18. 494 F.3d at 300 (nullifying *C-Y-Z-*).

19. See *id.* at 311-12 (stating *C-Y-Z-*'s long-standing precedent does not make doctrine incontestable); see also Hamblett, *supra* note 17 (noting case unravels ten years of precedent).

20. See 494 F.3d at 308 (declining to impute per se refugee status to spouses and partners unless direct persecution).

21. See *id.* (requiring spouses show own persecution or resistance); *supra* note 1 (quoting IIRIRA § 601(a)); *supra* note 16 and accompanying text (explaining other resistance claims).

founded fear of such persecution on the basis of race, religion, nationality, membership in a particular social group, or political opinion.<sup>22</sup> Prior to section 601(a), coerced abortions and sterilization did not constitute persecution because such procedures were part of China's uniform family-planning policy designed to rectify its overpopulation problem.<sup>23</sup> In 1996, concerned by what it considered a serious human rights abuse, Congress passed section 601(a), which specifically classified forced abortions or sterilization as political persecution.<sup>24</sup> The following year, the BIA issued *C-Y-Z-*, applying automatic refugee status to a victim's spouse.<sup>25</sup> Under *C-Y-Z-*, a physically unharmed applicant could establish *his own* persecution by virtue of his spouse's direct victimization, such that a wife's forced abortion is an act of persecution against her husband as if he was a direct victim.<sup>26</sup>

Prior to *Shi Liang Lin*, courts that considered whether section 601(a) extends to a victim's spouse invoked the *Chevron* doctrine and deferred to the BIA's interpretation in *C-Y-Z-*.<sup>27</sup> *Chevron*'s two-step test directs courts to defer to an

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22. See Immigration and Nationality Act § 101(a)(42), 8 U.S.C. § 1101(a)(42)(2006) (defining refugee).

23. See *Matter of Chang*, 20 I. & N. Dec. 38, 48 n.2 (B.I.A. 1989) (concluding China's one-child policy not persecution); see also Meredith M. Snyder, Note, *For Better or Worse: A Discussion of the BIA's Ambiguous C-Y-Z- Decision and its Legacy for Refugees of China's One Child Policy*, 84 WASH. L. REV. 1541, 1543-44 (2006) (discussing reasons for China's one-child policy).

24. See Nortick, *supra* note 12, at 2162-65 (discussing policy reasons behind IIRIRA); *supra* note 1 (quoting IIRIRA § 601(a)); see also *Sun Wen Chen v. U.S. Att'y Gen.*, 491 F.3d 100, 104-05 (3d Cir. 2007) (stating applicant may still demonstrate persecution on qualifying ground); Dempsey, *supra* note 9, at 226 (stating IIRIRA overruled *Chang*).

25. See *supra* note 3 and accompanying text (explaining *C-Y-Z-* held spouse may stand in victim's shoes and make bona fide asylum claim); see also Erin Bergeson Hull, Note, *When is the Unmarried Partner of an Alien Who Has Been Forcibly Subjected to Abortion or Sterilization a "Spouse" for the Purpose of Asylum Eligibility? The Diverging Opinions of Ma v. Ashcroft and Chen v. Ashcroft*, 2005 UTAH L. REV. 1021, 1029 (2005) (highlighting BIA's broad interpretation in *C-Y-Z-*). But see David A. Martin, *Major Developments in Asylum Law Over the Past Year: A Year of Dialogue Between Courts and Agencies*, 84 No. 35 INTERPRETER RELEASES 2069, 2074 (2007) (relaying concern broad interpretation allows applicants to misuse doctrine).

26. See *In re C-Y-Z-*, 21 I. & N. Dec. 915, 917 (B.I.A. 1997) (en banc) (providing protection for spouse and stating Congress enacted section 601(a) while *C-Y-Z-* appeal pending); R. Rhett Owens, *In re C-Y-Z-: Determining the Limits of the Expanded Definition of a Refugee Entitled to Asylum in the United States*, 30 AM. J. TRIAL ADVOC. 687, 687-89 (2007) (noting *C-Y-Z-* immigration judge's findings issued before IIRIRA enacted); see also Immigration and Nationality Act § 208(b)(3), 8 U.S.C. § 1158(b)(3)(2006) (describing derivative asylum provision). When any alien obtains asylum, her spouse and children may obtain derivative asylum status and "follow to join." See § 208(b)(3). Unlike the refugee, however, the refugee's family does not actually attain refugee status and does not stand in the victim's shoes. See *id.* The family attains derivative status only if the refugee *in fact* obtains asylum. See *Sun Wen Chen v. U.S. Att'y Gen.*, 491 F.3d 100, 105 (3d Cir. 2007) (contrasting statutory derivative asylum and jurisprudential imputed asylum); *In re S-L-L-*, 24 I. & N. Dec. 1, 17-18 (B.I.A. 2006) (en banc) (Filppu, Board Member, concurring in result and dissenting in part) (explaining derivative status less beneficial and unavailable to physically unharmed spouse who leaves victim behind).

27. See, e.g., *Qin Liu v. U.S. Att'y Gen.*, No. 07-11386, slip op. at 4-5 (11th Cir. Nov. 1, 2007) (deferring to BIA interpretation); *Yi Qiang Yang v. U.S. Att'y Gen.*, 494 F.3d 1311, 1317-18 (11th Cir. 2007) (holding *Chevron* deference permissible); *Sun Wen Chen v. U.S. Att'y Gen.*, 491 F.3d 100, 107 (3d Cir. 2007) (concluding *C-Y-Z-* decision entitled to *Chevron* deference because IIRIRA § 601(a) silent with respect to spouses).

agency's statutory construction if the statute is silent or ambiguous with respect to the issue and if the agency's construction is reasonable.<sup>28</sup> Prior to *Shi Liang Lin*, circuit courts applied this test and agreed that section 601(a) is ambiguous with respect to spouses; they also agreed that in *C-Y-Z-*, the BIA reasonably construed the provision to protect spouses because a victim's forced abortion or sterilization may impact the spouse's child-rearing opportunities and may cause the spouse to suffer emotional and psychological trauma.<sup>29</sup> As they consider the scope of *C-Y-Z-*'s application, however, circuit courts disagree over whether the holding extends beyond legal marriages to protect a victim's common-law spouse, unmarried partner, or fiancé.<sup>30</sup> The Ninth and Seventh Circuits apply *C-Y-Z-* to a victim's common-law spouse where the couple participates in a traditional marriage ceremony, but the marriage is void under China's restrictive marriage-age laws.<sup>31</sup> In contrast, the Third Circuit distinguishes between legal and common-law spouses and limits *C-Y-Z-* to marriages that are legal under Chinese law.<sup>32</sup>

In *In re S-L-L-*,<sup>33</sup> the BIA sought to resolve the division among circuits, to clarify its reasoning in *C-Y-Z-*, and to explain its basis for extending section

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28. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984) (stating courts must defer to agencies' reasonable construction of statutes they administer). Under *Chevron*'s first step, an agency may not construe a statute if Congress directly addressed the issue. See *id.* at 842-43. If, however, the statute is silent or ambiguous with respect to the issue and it is unclear whether Congress considered the issue, the agency may construe the statute, and the court must then apply the second step and determine whether the agency's construction is reasonable. *Id.* at 843, 845; cf. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (stating judicial deference heightened in foreign policy matters); *Gonzales v. Reno*, 212 F.3d 1338, 1349 n.12 (11th Cir. 2000) (suggesting particular deference in immigration and international relations).

29. See *Sun Wen Chen v. U.S. Att'y Gen.*, 491 F.3d 100, 107-08 (3d Cir. 2007) (reasoning victim's forced abortion directly impacts spouse's child-rearing opportunities and causes "emotional and sympathetic harm"). The Third Circuit also upheld *C-Y-Z-* as reasonable because China's family-planning policies explicitly target the couple, such that one spouse's victimization constitutes persecution of both parties to the marriage. See *id.*; *Junshao Zhang v. Gonzales*, 434 F.3d 993, 1001 (7th Cir. 2006) (upholding *C-Y-Z-* and suggesting Congressional intent to provide *families* asylum); *Cai Luan Chen v. Ashcroft*, 381 F.3d 221, 225-26 (3d Cir. 2004) (upholding *C-Y-Z-* as reasonable and supplanting possible rationale for decision). The Third Circuit identified two possible rationales supporting the BIA's construction: 1) the victim's spouse's "intense sympathetic suffering" may amount to persecution; and 2) the victim's forced abortion or sterilization may impact the spouse's reproductive opportunities. *Cai Luan Chen v. Ashcroft*, 381 F.3d 221, 225-26 (3d Cir. 2004); *Lin v. Ashcroft*, 356 F.3d 1027, 1041 (9th Cir. 2004) (reasoning legal spouse's reproductive opportunities legally "bound up" with victim's); see also *Corado v. Ashcroft*, 384 F.3d 945, 947 (8th Cir. 2004) (holding term "persecution" ambiguous); *Singh v. INS*, 134 F.3d 962, 967 (9th Cir. 1998) (stating no definition or criteria for "persecution" in INA).

30. See *supra* note 4 and accompanying text (discussing varying interpretations of *C-Y-Z-*). But see *Nortick*, *supra* note 12, at 2169-70 (stating all circuits agree *C-Y-Z-* does not apply to victim's boyfriend or fiancée).

31. See *supra* note 4 and accompanying text (noting circuit split concerning common-law marriages); see also *Kui Rong Ma v. Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004) (stating marriage-age laws integral part of coercive family-planning policy).

32. See *Cai Luan Chen v. Ashcroft*, 381 F.3d 221, 222 (3d Cir. 2004) (limiting *C-Y-Z-* to legal marriages to ensure close relationship between applicant and victim).

33. 24 I. & N. Dec. 1 (B.I.A. 2006) (en banc).

601(a) protection to a victim's spouse.<sup>34</sup> The BIA reaffirmed *C-Y-Z-*, holding that the nature of the married relationship imputes the victim's persecution to her spouse.<sup>35</sup> However, it limited *C-Y-Z-* to couples who are legally married under Chinese law.<sup>36</sup> Refusing to extend *C-Y-Z-* to common-law spouses, fiancés, and partners, the BIA reasoned that these relationships lack the sanctity, validity, and long-term commitment inherent in legal marriages.<sup>37</sup>

In *Shi Liang Ling v. U.S. Dep't of Justice*, the Second Circuit agreed with the BIA that section 601(a) does not protect a victim's unmarried partner.<sup>38</sup> The court went further, however, and abrogated *C-Y-Z-*, holding that section 601(a) only protects the actual victim of a forced abortion or sterilization; the victim's legal spouse, common-law spouse, or unmarried partner cannot obtain automatic asylum by virtue of the victim's persecution.<sup>39</sup> The court first determined that section 601(a)'s language concerning individuals subjected to China's coercive policies or persecuted for resistance is unambiguous, and that therefore, *Chevron* prohibits the BIA from construing the provision.<sup>40</sup> According to the court, by choosing the words, "person," "undergo," "he," and "she" to describe the class that section 601(a) protects, Congress clearly intended to limit protection to *persons*, not couples.<sup>41</sup> The court further

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34. See *In re S-L-L-*, 24 I. & N. Dec. 1, 4 (B.I.A. 2006) (en banc) (reaffirming, clarifying, and limiting *C-Y-Z-*).

35. *In re S-L-L-*, 24 I. & N. Dec. 1, 7-8 (B.I.A. 2006) (en banc) (discussing impact on marital unit). The BIA reaffirmed that a victim's forced abortion or sterilization amounts to persecution of the victim and her legal spouse as an entity. *Id.* at 6-8; see *supra* note 29 and accompanying text (stating rationales for imputing victim's persecution to spouse).

36. See *In re S-L-L-*, 24 I. & N. Dec. 1, 8 (B.I.A. 2006) (en banc) (suggesting unmarried partners may lack close bond).

37. *In re S-L-L-*, 24 I. & N. Dec. 1, 9 (B.I.A. 2006) (en banc) (concluding legal spouse more involved than unmarried partner in determining whether wife should bear child).

38. See 494 F.3d at 300, 314 (upholding denial of IIRIRA § 601(a) protection to victim's unmarried partner).

39. See *id.* at 304 (rejecting BIA's construction in *S-L-L-* regarding legal spouse). The court held that the BIA incorrectly construed section 601(a) of IIRIRA's unambiguous language, which plainly limits protection to the actual victim. *Id.* at 307-08. Although the petitioners in *Shi Liang Lin* were not legally married to the victims, the court reviewed and rejected the BIA's construction with respect to legal spouses. *Id.* at 314. The court noted that a spouse's emotional suffering and loss of reproductive opportunities provide no basis for disregarding the statute's plain meaning. *Id.* at 309. The court provided, however, that an applicant may introduce evidence of his spouse's victimization to establish the requisite nexus for attaining his *own* political asylum. See *id.* at 313.

40. See *id.* at 304 (holding language unambiguous). The court found the following clauses unambiguous: (1) "a person who has been forced to abort a pregnancy or to undergo involuntary sterilization"; (2) a person who "has been persecuted for failure or refusal to undergo" such a procedure; (3) "a person who has a well-founded fear that he or she will be forced to undergo" such a procedure; and (4) "a person who has a well-founded fear that he or she will be . . . subject to persecution for such failure," refusal, or resistance. *Id.* at 305-06.

41. *Id.* at 306 (reasoning clauses contemplate procedures performed on victim's own body). Although *Chevron*'s first step prohibited the BIA's construction and rendered step-two analysis unnecessary, the Second Circuit applied the second prong and determined that the construction was unreasonable. *Id.* at 309, 312 (noting because derivative status provision already provides spouse immigration mechanism, intent for additional means unlikely). But see *Mirzoyan v. Gonzales*, 457 F.3d 217, 220 (2d Cir. 2006) (holding no clear

reasoned that section 601(a) is merely an exception to the general rule that to obtain asylum applicants must describe a personal ordeal amounting to impermissible persecution.<sup>42</sup> According to the Second Circuit, this exception applies only to the actual victim and does not extend to the victim's spouse or partner.<sup>43</sup>

The Second Circuit then addressed the provision's other resistance clauses and held that a victim's spouse or partner *may* obtain asylum under section 601(a) by showing other resistance to China's coercive policies.<sup>44</sup> Unlike the clauses addressing *direct* victimization or resistance, the court found section 601(a)'s other resistance clause ambiguous and therefore subject to the BIA's reasonable interpretation.<sup>45</sup> While permitting the BIA to construe the phrase, "other resistance," the Second Circuit stipulated that an applicant may not establish other resistance merely by asserting that his spouse or partner suffered a forced abortion or sterilization.<sup>46</sup> The court further specified that under the other resistance clause, applicants who have not directly resisted China's policies must establish that the government has or will impute the spouse or partner's resistance to the applicant.<sup>47</sup> The Second Circuit acknowledged that its decision created a circuit split, but it refused to misinterpret the unambiguous statute solely for the sake of stare decisis.<sup>48</sup>

In *Shi Liang Lin*, the Second Circuit failed to recognize that section 601(a) is ambiguous and that it must therefore defer to the BIA's reasonable interpretation.<sup>49</sup> First, the BIA decided *C-Y-Z-* just one year after section

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definition of "persecution" in INA).

42. 494 F.3d at 306-07 (stating section 601(a) does not change refugee definition requiring personally-experienced persecution). Explaining this exception, the Second Circuit reasoned that while asylum applicants must ordinarily prove persecution, under section 601(a), persecution exists de jure. *Id.* at 307 n.8.

43. *Id.* (reasoning section 601(a) applies to specific class deemed de jure refugees). Because Black's Law Dictionary defines "deemed" as "to treat something as if it were really something else," the court interpreted the phrase "shall be deemed persecuted" to benefit persons not otherwise entitled to political asylum. *Id.* at 308 n.9 (quoting BLACK'S LAW DICTIONARY 446 (8th ed. 2004)). Without the amendment, victimization under China's coercive policies would not qualify an applicant for political asylum because conception and reproduction are not expressions of political opinion. *Id.* at 307-08 (holding section 601(a) exception applies only to victim, not spouse). *But see id.* at 324 (Katzmann, J., concurring) (arguing effect on victim's spouse may amount to personal persecution).

44. 494 F.3d at 313 (holding applicant may qualify as refugee if persecuted for resistance "directly related" to own opposition).

45. *Id.* (noting limited case law and legislative history clarifying "other resistance").

46. *Id.* (conditioning deference to BIA and stating other resistance not based purely on another's direct victimization); *see also supra* note 1 (quoting provision's other resistance language).

47. 494 F.3d at 313 (qualifying *Chevron* deference and suggesting more difficult for spouse or partner to prove persecution). While insufficient, by itself, to establish other resistance, the fact that an applicant's partner or spouse suffered a forced abortion or sterilization is relevant in determining whether the applicant actually resisted. *Id.*

48. *Id.* at 310 (refusing to follow *C-Y-Z-* because stare decisis not inexorable command but policy principle). *But cf.* *Jian Hui Shao v. B.I.A.*, 465 F.3d 497, 502 (2d Cir. 2006) (stating uniformity and adherence to BIA decisions crucial in immigration cases).

49. *See supra* notes 4, 29 and accompanying text (discussing provision's ambiguity).

601(a)'s enactment, which indicates the immediate confusion courts faced in applying the provision and their need for clarification.<sup>50</sup> Moreover, other circuits' consistent deference to the BIA's construction of section 601(a) suggests an inter-circuit consensus that the provision is ambiguous under the *Chevron* doctrine.<sup>51</sup> Similarly, the circuit split over whether section 601(a) applies to a victim's legal spouse, common-law spouse, unmarried partner, or merely the victim suggests that the provision may not be entirely clear.<sup>52</sup> If, as the Second Circuit concludes, section 601(a) is sufficiently clear, the decade-long circuit split over the provision's scope would be unfounded and courts would have easily agreed on the provision's meaning.<sup>53</sup> Interestingly, the Second Circuit deviated from every other circuit that previously considered the issue yet failed to identify other courts' logical flaws in finding section 601(a) ambiguous.<sup>54</sup>

By failing to defer to the BIA's construction, the Second Circuit also created an unnecessary circuit split concerning section 601(a)'s scope.<sup>55</sup> Because the petitioners in *Shi Liang Lin* sought asylum by virtue of their *unmarried* partners' victimization, it was unnecessary for the Second Circuit to resolve the question of whether section 601(a) extends to a victim's *legal spouse*.<sup>56</sup> Rather than intensify the discord concerning section 601(a)'s scope, the Second Circuit should have followed the Eleventh Circuit's approach in *Yi Qiang Yang v. U.S. Att'y Gen.* and simply considered the issue before it: whether section 601(a)

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50. See *supra* notes 4, 29 and accompanying text (discussing term, "persecution" ambiguous and various C-Y-Z- interpretations). Since the enactment of section 601(a), courts have debated whether the emotional and psychological suffering an applicant experiences resulting from a spouse or partner's direct victimization constitutes persecution. See Snyder, *supra* note 23, at 1548 n.66 (noting courts also disagree over "other resistance" and "well-founded fear" meaning); see also 494 F.3d at 329 n.4 (Sotomayor, J., concurring) (noting other circuits find term "persecution" ambiguous).

51. See *supra* notes 27, 29 and accompanying text (discussing circuit courts recognizing *Chevron* deference to C-Y-Z- decision); see also *Yi Qiang Yang v. U.S. Att'y Gen.*, 494 F.3d 1311, 1317 (11th Cir. 2007) (reviewing unmarried partner's claim, but assuming S-L-L- correct regarding legal spouse). Since S-L-L-, only the Third Circuit has reviewed an applicant's claim for asylum based on his *legal* spouse's forced abortion; it deferred to the BIA's reasonable interpretation in S-L-L-. *Sun Wen Chen v. U.S. Att'y Gen.*, 491 F.3d 100, 108 (3d Cir. 2007). Other courts, such as the Eleventh Circuit, however, have reviewed applicants' claims for asylum based on their *unmarried* partners' direct victimization; those courts presumed that S-L-L- is correct with respect to legal spouses and simply evaluated the decision's reasonableness with respect to unmarried partners. See *Yi Qiang Yang v. U.S. Att'y Gen.*, 494 F.3d 1311, 1317 (11th Cir. 2007).

52. Compare 494 F.3d at 306 (holding provision unambiguously refers to "person" not "couple"), with *Qin Liu v. U.S. Att'y Gen.*, No. 07-11386, slip op. at 4 (11th Cir. Nov. 1, 2007) (stating statute silent on spouse's status), and *Sun Wen Chen v. U.S. Att'y Gen.*, 491 F.3d 100, 107 (3d Cir. 2007) (noting silence on matter germane to provision).

53. See *supra* notes 4, 32, 52 and accompanying text (discussing varying opinions regarding provision's clarity and scope).

54. See 494 F.3d at 300 n.4 (discussing other circuits' application of and deference to C-Y-Z- decision).

55. See *id.* (recognizing new split and noting existing split regarding unmarried partners).

56. See *id.* at 314 (admitting petitioners not legally married); *id.* at 327 (Sotomayor, J., concurring) (noting issue of legal spouse's status "unbriefed, unargued, and unnecessary to resolve").

confers automatic refugee status upon a victim's unmarried partner.<sup>57</sup> Instead, by considering *sua sponte* whether it was permissible for the BIA to construe section 601(a) to protect a victim's legal spouse, the Second Circuit not only misapplied the *Chevron* doctrine but also created yet another circuit split in immigration law jurisprudence.<sup>58</sup> Consequently, as courts continue to disagree over the status of unmarried partners', *Shi Liang Ling* may generate further discord over legal spouses' status.<sup>59</sup>

While all circuit splits inevitably create jurisprudential confusion, they are particularly problematic in the immigration context, where uniformity is essential.<sup>60</sup> Rather than creating yet another circuit split, which further complicates section 601(a) jurisprudence and frustrates the implementation of a uniform national immigration system, the Second Circuit should have adhered to the well-established principle that deference to an agency's reasonable interpretation is particularly important in immigration and foreign policy matters.<sup>61</sup> As a result of the *Shi Liang Lin* decision, circuit courts may inconsistently apply asylum laws and the protection section 601(a) affords an applicant may vary by jurisdiction.<sup>62</sup>

Since section 601(a)'s enactment, courts' disagreement over what constitutes persecution and whether a victim's persecution may be imputed to her spouse or partner has created inconsistent application of an important asylum law. In *Shi Liang Lin*, by failing to defer to the BIA and creating yet another circuit split, the Second Circuit frustrated the important goal of implementing a

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57. See *Yi Qiang Yang v. U.S. Att'y Gen.*, 494 F.3d 1311, 1317 (11th Cir. 2007) (declining to address legal spouse's status because petitioners unmarried). The Eleventh Circuit simply considered the issue before it and upheld the BIA's construction that section 601(a) does not protect a victim's unmarried partner. *Id.*; cf. *Cai Luan Chen v. Ashcroft*, 381 F.3d 221, 227 (3d Cir. 2004) (holding unnecessary to consider legal spouses' status under section 601(a) because petitioner not legally married). Compare 494 F.3d at 315 (Katzmann, J., concurring) (stating majority considered legal spouse's status although petitioners not legally married), with *Yi Qiang Yang v. U.S. Att'y Gen.*, 494 F.3d 1311, 1317 (11th Cir. 2007) (abstaining from addressing legal spouse issue because petitioner not married to victim).

58. See 494 F.3d at 316 (Katzmann, J., concurring) (arguing broad majority opinion muddles Second Circuit case law). The Second Circuit should have limited its analysis to consider *S-L-L*'s holding that section 601(a) does not apply to a victim's boyfriend or fiancée. *Id.* at 328 (Sotomayor, J., concurring).

59. See *id.* at 316 (Katzmann, J., concurring) (arguing majority went "out of its way" to create unnecessary circuit split).

60. See *Snyder*, *supra* note 23, at 1542 (arguing inconsistent application renders legislation ineffective); *infra* notes 61-62 and accompanying text (discussing uniformity important in immigration). But cf. *Snyder*, *supra* note 23, at 1558 (suggesting circuit splits reflect policy differences among regions).

61. See 494 F.3d at 300 n.4 (noting new circuit split); see also *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (stating special importance of deference to agencies in foreign policy matters); 494 F.3d at 334 (Sotomayor, J., concurring) (reiterating deference important where agency exercises political function impacting foreign relations); *Jian Hui Shao v. B.I.A.*, 465 F.3d 497, 502 (2d Cir. 2006) (suggesting "unsound" for circuit courts to create conflicting precedent and "nonuniform body of [asylum] law."); cf. *Snyder*, *supra* note 23, at 1542 (recommending unified standards for asylum eligibility).

62. See *Snyder*, *supra* note 23, at 1542 (warning courts' conflicting statutory interpretations foster inconsistent asylum law); see also *Anker*, *supra* note 7, at 344 (noting some immigration judge's now applying *Shi Liang Lin* rather than BIA's decisions).

uniform national immigration policy. Although the decision creates further inconsistency in the jurisprudence surrounding section 601(a), it is possible that the decision will prompt constructive dialogue among the circuits and Congress, leading to a comprehensive effort to clarify the statute and to achieve greater uniformity in asylum law.

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