

## ASSESSING ASYLUM CLAIMS FROM CHILDREN BORN IN VIOLATION OF CHINA'S ONE-CHILD POLICY: WHAT THE UNITED STATES CAN LEARN FROM AUSTRALIA

BRIAN EDSTROM

### INTRODUCTION

Although Xiu Fei Wang and Chen Shi Hai were born several years apart to different families, they were both conceived in violation of China's one-child policy. Xiu Fei and Chen Shi were also born into dire circumstances due to their parents' incompliance with China's policy of limiting most couples to birthing only one child. Xiu Fei's mother had been forcibly sterilized while six months pregnant with Xiu Fei.<sup>1</sup> Chen Shi was born in an immigration detention facility in Australia, from which his parents were later deported after their asylum claims were denied.<sup>2</sup> Xiu Fei sought asylum in the United States (U.S.) independently from her parents at age fourteen.<sup>3</sup> A guardian residing in Australia brought a claim on behalf of the infant Chen Shi.<sup>4</sup> Both of the children's claims alleged that they would be discriminated against and persecuted if returned to China.<sup>5</sup> The children alleged that in China they would be subjected to discriminatory treatment, denied access to healthcare, education, employment opportunities, and face harsh consequences because of their parents' failure to comply with the one-child policy.<sup>6</sup> Despite the similarities in the claims of both children, Chen Shi was deemed eligible for asylum in Australia,<sup>7</sup> while Xiu Fei was denied asylum in the United States.<sup>8</sup>

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<sup>1</sup> Xiu Fei Wang v. U.S. Attorney Gen., 222 F. App'x 176, 178 (3d Cir. 2007).

<sup>2</sup> Chen Shi Hai v. Min. for Immigration & Multicultural Affairs (2000) 201 C.L.R. 293, 294.

<sup>3</sup> Xiu Fei Wang, 222 F. App'x at 177.

<sup>4</sup> Chen Shi Hai, 201 C.L.R. at 308.

<sup>5</sup> *Id.* at 293; Xiu Fei Wang, 222 F. App'x at 180-81.

<sup>6</sup> Chen Shi Hai, 201 C.L.R. at 294; Xiu Fei Wang, 222 F. App'x at 180-81.

<sup>7</sup> Chen Shi Hai, 201 C.L.R. 293 (holding that "black children" born outside of China's family planning policy belong to a persecuted social group, entitling Chen Shi Hai to refugee status).

<sup>8</sup> Xiu Fei Wang, 222 F. App'x at 180-81 ("Wang has made no showing that she was physically or emotionally affected by her mother's forcible sterilization while she was in utero. Therefore,

In the United States and Australia, a growing number of asylum applications from unaccompanied children claiming persecution under China's one-child policy have created new questions and problems in refugee and asylum law.<sup>9</sup> It is likely that a child will be automatically eligible for asylum if he or she accompanies a parent who is granted asylum.<sup>10</sup> To be granted asylum abroad, however, an *unaccompanied* child claiming asylum independently from his parents must demonstrate that he has been persecuted in his home country.<sup>11</sup> Because it is not common for children to travel outside of China independently from their parents, asylum applications coming from unaccompanied children are rare. In recent years, however, a number of asylum applications have been brought by older children, such as Xiu Fei Wang, who have managed to travel independently from their parents. Many of these unaccompanied children have left China at the urging of their parents, who hope they may have more opportunities elsewhere. Others, such as Chen Shi Hai, have traveled with their parents, but have brought separate asylum applications.<sup>12</sup>

The United States and Australia are two countries that have developed case law surrounding applications from unaccompanied children.<sup>13</sup> The standard for assessing these claims differs between both countries. Pursuant to domestic law introduced to comply with the United Nations Convention on the Status of Refugees, U.S. immigration authorities have assessed the claims of unaccompanied children, largely on the issue of whether the children are persecuted on account of their political

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Wang cannot prove persecution on account of political opinion, nor can she prove persecution on any of the other statutorily enumerated bases. The economic persecution suffered by her family, while deplorable, did not rise to the level [necessary to grant asylum.] Accordingly, we will deny the petition for review.”)

<sup>9</sup> See generally JACQUELINE BHABHA & MARY CROCK, *SEEKING ASYLUM ALONE* (2007) (providing a detailed overview of unaccompanied children seeking asylum under a number of circumstances, including due to the one-child policy, in Australia, the United States and the United Kingdom).

<sup>10</sup> See *Ma v. Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004).

<sup>11</sup> See, e.g., *Xiu Fei Wang*, 222 F. App'x at 180-81; *Chen Shi Hai*, 201 C.L.R. 293.

<sup>12</sup> *Chen Shi Hai*, 201 C.L.R. 293. See also *Cheung v. Canada* [1993] 2 F.C. 314 (The Federal Court of Appeals in Canada granted asylum to a mother forced to undergo a sterilization procedure. In holding that the applicants minor child was also eligible for asylum in the interest of preserving family unity, the court went on to say: “Moreover, if Karen Lee [the child] were sent back to China, she would, in her own right, experience such concerted and severe discrimination, including deprivation of medical care, education and employment opportunities and even food, so as to amount to persecution . . . As such, she is a member of a particular social group, that is, second children.” *Id.* at 325.)

<sup>13</sup> Canada also dealt with this issue in *Cheung*, [1993] 2 F.C. 314.

opinion.<sup>14</sup> Australian courts, however, have placed more emphasis on determining whether children born in violation of the one-child policy are persecuted due to membership in a particular social group.<sup>15</sup> This article argues that U.S. immigration authorities have been incomplete in their evaluation of asylum claims brought by unaccompanied children claiming persecution under China's one-child policy. The U.S. should follow Australia's lead in determining whether unaccompanied children seeking asylum are persecuted due to membership in a social group of children born outside of the one-child policy. Within that evaluation, however, U.S. immigration authorities should determine on a case-by-case basis whether the treatment of a child belonging to a group of "out-of-plan"<sup>16</sup> children truly rises to the level of persecution warranting asylum.

Part I of this article describes the history of China's population control policies and discusses the international law applicable to those victimized by China's one-child policy. Specifically, Part I contends that unaccompanied children seeking asylum under these circumstances should receive enhanced consideration by both the U.S. and Australia pursuant to the UN Convention Relating to the Status of Refugees and the Convention on the Rights of the Child. Part II compares U.S. and Australian case law pertaining to unaccompanied children seeking asylum under China's one-child policy. Part II contends that the Australian High Court's decision in *Chen Shi Hai v. The Minister for Immigration and Multicultural Affairs*<sup>17</sup> provides a useful analysis in determining the asylum eligibility of unaccompanied children affected by the one-child policy. Part II also argues that the Australian approach to assessing asylum claims under these circumstances correctly gives the most consideration to the asylum eligibility of unaccompanied children. Part III concludes that the United States should follow Australia's lead in analyzing asylum claims from unaccompanied children based on their membership in a particular social group. Such an analysis allows for more careful and more appropriate consideration for the protection of those children who are persecuted under the one-child policy and deserve international protection.

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<sup>14</sup> See *Wang v. Gonzales*, 405 F.3d 134, 142 (3d Cir. 2005). See also *Xiu Fei Wang*, 222 F. App'x at 180-81.

<sup>15</sup> *Chen Shi Hai*, 201 C.L.R. 293.

<sup>16</sup> For the purposes of this article, the term "out-of-plan" children refers to children born to parents who somehow violated China's one-child policy.

<sup>17</sup> *Chen Shi Hai*, 201 C.L.R. 293.

## I. ANALYZING CHINA'S ONE-CHILD POLICY UNDER INTERNATIONAL LAW

China's family planning policies raise complicated questions in international law. The one-child policy inherently limits the rights and personal freedoms of parents who hope to have multiple children. However, the policy was created out of necessity to protect Chinese citizens from the very real problems associated with overpopulation. This section summarizes the history of China's one-child policy and analyzes whether the policy complies with international law.

### A. THE HISTORY OF CHINA'S ONE-CHILD POLICY

Despite a vast surface area, China struggles to support a population exceeding 1.3 billion people—20 percent of the world's population—on just seven percent of the world's arable land.<sup>18</sup> China's population has grown enormously over the past several decades, and the Chinese government has been forced to take drastic steps to keep further population growth in check. The most significant step has been the enforcement of the one-child policy, introduced in 1979.<sup>19</sup> The one-child policy limits most women in urban areas to birthing only one child, while allowing women in rural areas to have a second child if the first child is a daughter.<sup>20</sup>

To facilitate and enforce the one-child policy, the Chinese government delegates power to locally based family planning officials throughout the country.<sup>21</sup> The local officials are expected to closely monitor child-bearing couples in their communities and enforce quotas limiting the number of births per region.<sup>22</sup> To meet those demands, some

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<sup>18</sup> Simon Montlake, *China Sounds Retreat Against Encroaching Deserts*, CHRISTIAN SCI. MONITOR, Aug. 16, 2007, at 1 (explaining additional problem of encroaching deserts and infertility of land in China due to climate change, inefficient agricultural techniques and pollution); *Family Planning Policy*, CHINA DAILY, Nov. 24, 2007, at 4.

<sup>19</sup> Kimberly Sicard, *Section 601 of IIRIRA: A Long Road to a Resolution of United States Asylum Policy Regarding Coercive Methods of Population Control*, 14 GEO. IMMIGR. L.J. 927, 927-28 (2000).

<sup>20</sup> See CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA, 2007 ANNUAL REPORT 108 (2007) [hereinafter COMMISSION ON CHINA, 2007 REPORT].

<sup>21</sup> See U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2002), <http://www.state.gov/g/drl/rls/hrrpt/2001/eap/8289.htm>.

<sup>22</sup> *Id.*

officials have used aggressive propaganda and coercive techniques to force couples to comply with the one-child policy.<sup>23</sup> Examples of those coercive techniques include, imposing highly-unreasonable fines on couples who have violated the policy, destroying or confiscating property or homes of those unable to pay the fees, and forcing violators of the policy to undergo late-term abortions or sterilization procedures.<sup>24</sup>

Despite China's efforts in recent years to crack down on the use of coercive birth control techniques, human rights violations still persist. China's central government has developed programs to reward and support those who have fewer children, rather than punish those who have multiple children. Additionally, China has continually pledged to reprimand government agents who use illegal coercive techniques to enforce the policy.<sup>25</sup> However, international institutions and human rights organizations continue to criticize China for its use of coercive population control measures.<sup>26</sup> In May 2007, the continued use of coercive techniques made international headlines when farmers living in rural Guanxi Province rioted against family planning officials. The officials had been going from home to home, demanding the payment of fines from families who had more than one child.<sup>27</sup> Also in 2007, a Chinese court affirmed a four year, three-month prison sentence that had been imposed upon Chen Guangcheng, a man who exposed human rights abuses under the one-child policy.<sup>28</sup>

Coercive measures used to enforce China's one-child policy have the most direct impact on parents who conceive a child outside of the policy's limitations. However, punishments dealt to men and women who violate the policy also have significant impact on the children born outside of the policy. These out-of-plan children are often punished, in-

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<sup>23</sup> *Id.* See also COMMISSION ON CHINA, 2007 REPORT, *supra* note 20, at 108; *China Bans Stiff Family Planning Slogans*, CHINA DAILY, Aug. 5, 2007.

<sup>24</sup> See Sicard, *supra* note 19, at 930. See also COMMISSION ON CHINA, 2007 REPORT, *supra* note 20, at 108.

<sup>25</sup> See COMMISSION ON CHINA, 2007 REPORT, *supra* note 20, at 109; *Family Planning Policy*, CHINA DAILY, Nov. 24, 2007, at 4 (explaining social security policy that provides financial award to elderly rural farmers who only have one child or two female children); *More Benefits for One-Child Families*, CHINA DAILY, Nov. 20, 2007.

<sup>26</sup> See U.N. Econ. & Soc. Council [ECOSOC], Comm. On Econ., Soc. & Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant*, para. 36, U.N. Doc. E/C.12/1/Add.107 (May 13, 2005).

<sup>27</sup> See Joseph Kahn, *Chinese Police Arrest 28 in Riots Against Family Planning Laws*, N.Y. TIMES, May 24, 2007, at A12.

<sup>28</sup> See COMMISSION ON CHINA, 2007 REPORT, *supra* note 20, at 110.

directly or indirectly, for their parents' failure to abide by the one-child policy.

Parents who violate the policy may be required to pay an expensive fee to register their out-of-plan child.<sup>29</sup> Furthermore, unauthorized children may be prevented from registering as legal residents.<sup>30</sup> In either case, out-of-plan children have difficulties obtaining official documentation, such as birth certificates and passports.<sup>31</sup> Moreover, out-of-plan children are deprived of social benefits, such as government subsidies meant to help provide education, health care, pensions, and employment benefits to Chinese citizens.<sup>32</sup> In some instances, parents are denied grain rations for failing to abide by the one-child policy, meaning out-of-plan children may not have the same access to food as children born within the one-child policy's regulations.<sup>33</sup>

## **B. COMPLICATED ISSUES OF STATE SOVEREIGNTY AND COMMUNITY RIGHTS**

The one-child policy raises a number of complicated questions under international law. The policy exemplifies a marked difference between how the concept of human rights is viewed by China as opposed to many Western countries. Whereas many Western countries place an unyielding emphasis on preserving an individual's rights, regardless of the circumstances, in China, the collective rights of a society often supersede the rights of the individual.<sup>34</sup> This means, from a Chinese human rights standpoint, that the ends justify the means in limiting individual rights if doing so benefits society at large. Chinese legal scholars have spoken out against Western critics of the one-child policy, claiming that foreign

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<sup>29</sup> Nicole M. Skalla, Note, *China's One-Child Policy: Illegal Children and the Family Planning Law*, 30 *BROOK. J. INT'L L.* 329, 355 (2004).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> See COMMISSION ON CHINA, 2007 REPORT, *supra* note 20, at 109. See also U.N. Comm. on the Rights of the Child, 40th Sess., 1062d mtg. at 8, U.N. Doc. CRC/C/SR.1062 (Sept. 27, 2005) [hereinafter U.N. Comm. on the Rights of the Child, 1062d mtg.].

<sup>33</sup> Skalla, *supra* note 29, at 356 ("[I]n Fujian province, women who refuse to use IUDs lose grain rations and medical benefits for their first child, regardless of whether the child's birth was authorized.").

<sup>34</sup> Arjan Hamburger, Dutch Ambassador for Human Rights, Address at the University of Groningen, (Dec. 5, 2007). See also *Are Human Rights Higher than Sovereignty?* PEOPLE'S DAILY ONLINE, Mar. 17, 2006 (commenting on the Chinese perspective of ongoing allegations from the United States of human rights abuses in China).

interference under the guise of protecting human rights amounts to a violation of China's sovereignty.<sup>35</sup>

The negative effects that the one-child policy has on out-of-plan children raise complex issues of international law, specifically economic and social rights. On the one hand, out-of-plan children are being punished for the actions of their parents. As a result of their parent's actions, an out-of-plan-child is often the victim of discrimination, denied access to healthcare, education, employment benefits, and food. On the other hand, China's enormous population places a heavy burden on Chinese society. The one-child policy was conceived to ensure that Chinese citizens *do* receive the support, treatment, and sustenance they need to survive in a world of limited resources. Had population growth gone unchecked, surely an even greater number of children would have similarly received unequal access to education, healthcare, food, etc., despite also being entirely innocent of any wrongdoing.

Whether or not out-of-plan children are subjected to persecution is a legal question that must be approached carefully and with an eye to the greater circumstances surrounding the realities of overpopulation affecting China. Beyond the general legal questions surrounding state sovereignty and the mere existence of the one-child policy, international criticism surrounds China's coercive means used to enforce the policy. Discriminatory treatment that limits a child's access to education, healthcare, and food arguably violates the UN Convention Relating to the Status of Refugees and the Convention on the Rights of the Child, which influence asylum law in the United States and Australia.

### **C. THE UNITED NATIONS CONVENTION RELATING TO THE STATUS OF REFUGEES**

The United Nations Convention Relating to the Status of Refugees of 1951, as amended by the Protocol Relating to the Status of Refugees of 1967,<sup>36</sup> provides an international definition of "refugee." The Convention defines a refugee as a person who has a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail

<sup>35</sup> PEOPLE'S DAILY ONLINE, *supra* note 34.

<sup>36</sup> See United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150, art. 1(A)(2) [hereinafter Refugee Convention].

himself of the protection of that country.”<sup>37</sup> Most asylum seekers claiming persecution under the one-child policy claim either that they are persecuted due to their political opinion or due to membership in a particular social group.

#### 1. PERSECUTION DUE TO POLITICAL OPINION

In the United States, the interpretation of “persecution due to political opinion” is interpreted broadly, and decisions regarding its application have been “convoluted and inconsistent.”<sup>38</sup> An asylum applicant seeking refugee status in the United States must “satisfy two requirements in order to show that he or she was persecuted ‘on account of’ a political opinion.”<sup>39</sup> The applicant must show that (1) he held an opinion, and (2) that his persecutors persecuted him due to that opinion.<sup>40</sup> In other words, persecution due to political opinion usually arises when a persecutor “desires to punish” a person because that person possesses “a political opinion that the persecutor finds objectionable.”<sup>41</sup> Further, those who have been forced to undergo an abortion or sterilization procedure due to their incompliance with a government policy are, by statute, automatically eligible for asylum in the United States.<sup>42</sup> Under U.S. law, such procedures are considered severe enough, in-and-of-themselves, to amount to persecution due to political opinion (opposing the government policy).<sup>43</sup>

However, for those who *indirectly* suffer from the forced abortion or sterilization of a family member, alleging persecution due to political opinion raises complicated questions of both law and fact. For example, should the husband of a woman forcibly sterilized be automatically eligible for asylum if he, too, is deprived of a right to have children with his wife? What if that husband cannot prove that he was married to the woman, or that she was forced to undergo such a procedure? Should a boyfriend or fiancé of a woman forcibly sterilized be extended automatic asylum? Finally, should children of parents punished

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<sup>37</sup> *Id.*

<sup>38</sup> Donald W. Yoo, *Exploring the Doctrine of Imputed Political Opinion and its Application in the Ninth Circuit*, 19 GEO. IMMIGR. L.J. 391, 395 (2005).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 396.

<sup>42</sup> 8 U.S.C. § 1101(a)(42)(B) (2006). *See also infra* Part II.A.

<sup>43</sup> § 1101(a)(42)(B).



for violating family planning policies be eligible for asylum if those children also suffer negative consequences?

As will be discussed in more detail in subsequent sections of this article, U.S. courts have dealt with several of these questions. For example, U.S. courts have held in the past that a husband can claim past prosecution by effectively “stand[ing] in [the] shoes” of a wife forced to undergo sterilization or abortion procedures.<sup>44</sup> Applying a slightly different standard, U.S. courts have also found that the political opinion of parents can be *imputed* onto children.<sup>45</sup> Persecution due to imputed political opinion occurs when a persecutor believes that a person holds an objectionable opinion and punishes him accordingly, despite the fact that the victim of persecution “holds no opinion, or holds an opinion different than that attributed to him.”<sup>46</sup> However, contention exists surrounding the scope and application of the imputed political opinion doctrine<sup>47</sup> and whether it may be applied specifically to children born to parents who have violated China’s one-child policy.<sup>48</sup>

Children claiming persecution under the one-child policy are not automatically eligible for asylum in the United States because they have not, themselves, been forced to undergo an abortion or sterilization.<sup>49</sup> Nor can they claim to “stand in the shoes” of a parent who has been persecuted, as a child’s relationship to a parent differs from that of a spouse whose partner has been prevented from having a child.<sup>50</sup> Rather, children must show that the circumstances affecting them directly amount to per-

<sup>44</sup> *In re C-Y-Z-*, 21 I. & N. Dec. 915, 918 (B.I.A. 1997).

<sup>45</sup> *See, e.g. Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987). *See also Zhang v. Gonzales*, 408 F.3d 1239, 1246 (9th Cir. 2005) (In assessing a child’s claim that she had experienced persecution in China as the child of parents who had violated China’s family planning policies, the Ninth Circuit determined that the child’s parent’s resistance to the policies “is imputed to [the child] for the purposes of determining whether she has been persecuted on account of a protected ground”). *See also Gao v. Gonzales*, 424 F.3d 122, 130 (2d Cir. 2005) (In remanding the case to the BIA for further proceedings, the Second Circuit accepted that the concept of imputed political opinion can constitute a ground of political persecution within the meaning of the Immigration and Nationality Act). *See also Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001) (“a petitioner may establish a well-founded fear of persecution on account of a political opinion imputed to him by his persecutors, whether or not he actually holds that opinion”). *See also Amanfi v. Ashcroft*, 328 F.3d 719, 729 (3d Cir. 2003) (“there is wide endorsement of the concept of persecution on account of imputed political opinion”).

<sup>46</sup> Yoo, *supra* note 38, at 396.

<sup>47</sup> *Id.* at 406-07.

<sup>48</sup> *See infra* Part II.A.2.

<sup>49</sup> *See, e.g., Wang v. Gonzales*, 405 F.3d 134, 143 (3d Cir. 2005). *See also infra* Part III.

<sup>50</sup> *Wang*, 405 F.3d at 142-43 (explaining that where a husband loses his interest in a child when his wife is sterilized, a child only loses interest in a potential sibling).

secution.<sup>51</sup> To do so, the children must show that they are treated differently from other children because their parents' political opinion has been imputed upon them.<sup>52</sup>

For example, when the Chinese government denies out-of-plan children subsidies for education and healthcare, the children can argue that such denial amounts to discrimination and that the discrimination is due to their parents' incompliance with the one-child policy.<sup>53</sup> U.S. courts have agreed that children born in violation of the one-child policy may be treated differently than those born in compliance with the policy.<sup>54</sup> However, as will be discussed later in this article, U.S. courts have been reluctant to conclude that that difference in treatment is severe enough to amount to persecution.<sup>55</sup>

## 2. PERSECUTION DUE TO MEMBERSHIP IN A PARTICULAR SOCIAL GROUP

Another one of the most ambiguous, problematic, and discussed portions of the definition of the term "refugee" is the phrase "membership in a particular social group." For example, women from African countries where female genital mutilation (FGM) rituals take place have sought asylum in a number of countries worldwide. The women claim they belong to a persecuted social group: young women who have not yet participated in such a ritual, but fear being forced to undergo FGM upon return to Africa.<sup>56</sup> Additionally, in the United Kingdom, Pakistani women have sought asylum claiming they do not receive adequate state protection from domestic abuse in their home country.<sup>57</sup> Applicants have

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<sup>51</sup> *Id.* at 141.

<sup>52</sup> *Id.* at 142.

<sup>53</sup> *See, e.g.,* Jie Lin v. Ashcroft, 377 F.3d 1014, 1031 (9th Cir. 2004); Zhang v. Gonzales, 408 F.3d 1239, 1249 (9th Cir. 2005).

<sup>54</sup> *See Zhang*, 408 F.3d at 1245.

<sup>55</sup> *See infra* Part II.

<sup>56</sup> *See In re Fauziya Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996) ("Young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice, are recognized as members of a 'particular social group' within the definition of the term 'refugee' under section 101(a)(42)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (1994)" [which was enacted in compliance with the Refugee Convention].).

<sup>57</sup> *R. v. Immigration Appeal Tribunal, ex parte Shah* (1999) 2 A.C. 629 (UKHL).

claimed they belong to a social group of women who are not protected from domestic abuse.<sup>58</sup>

In both of these instances, the courts faced the challenge of drawing a clear line around a group of people that make up a persecuted “social group.” Can *all* girls who have not been subjected to genital mutilation, but who live in countries where such rituals frequently occur, claim they belong to a persecuted social group? Can *all* Pakistani women claim they belong to a social group having a substantial fear of domestic abuse due to a failure of the Pakistani state to protect them? The same question can be applied to Chinese applicants claiming persecution under the one-child policy. Some applicants may not have directly suffered from forced abortions or sterilizations, but they still claim that they face a reasonable fear of persecution if returned to China.<sup>59</sup> Can *all* Chinese children born to parents who have violated the one-child policy claim they are persecuted for belonging to a social group?

“Social group” questions have come up in a number of U.S. asylum cases dealing with victims of China’s one-child policy. Three main arguments have been made against allowing those affected by the one-child policy to claim persecution due to membership in a particular social group. First, China’s population control policies are meant to be enforced throughout the entire country via Chinese domestic law, without discriminating against a specific group or sub-population.<sup>60</sup> Because the law affects everyone in China, it is impossible to argue that the one-child policy discriminates against one particular social group that can be separated from the population at large.<sup>61</sup> Second, a social group cannot be defined based *only* on the common trait of being persecuted.<sup>62</sup> In other words, a group of people cannot be defined as belonging to a social group if no common characteristic, belief, or practice—other than the fact that they are persecuted—binds them together.<sup>63</sup>

Finally, the practical consequences of defining a social group as “those who are persecuted for opposing China’s population control poli-

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<sup>58</sup> *Id.* at 635.

<sup>59</sup> *See, e.g.,* *Chen Shi Hai v. Min. for Immigration & Multicultural Affairs* (2000) 201 C.L.R. 293 (applicants parents, who had three children but had not been forced to undergo an abortion or sterilization, claimed that they would be forced to undergo such procedures if returned to China, or that they would be otherwise punished for failure to undergo such procedures).

<sup>60</sup> *See Applicant A v. Min. for Immigration & Ethnic Affairs* (1997) 190 C.L.R. 225, 243 (Austl.).

<sup>61</sup> *Id.* at 259.

<sup>62</sup> *Id.* at 263.

<sup>63</sup> *Id.*

cies” are potentially enormous.<sup>64</sup> If every Chinese parent that has one child and plans to have another in violation of the one-child policy is deemed to belong to a persecuted social group, the number of legally valid asylum claims could reach enormous proportions.<sup>65</sup> The same could be true if every child who receives limited access to healthcare and educational opportunities is deemed to belong to a persecuted social group. Given China’s population, now in excess of 1.3 billion people, many governments are wary of “opening the floodgates” to Chinese asylum seekers claiming persecution under the one-child policy.<sup>66</sup> As will be discussed in Part II of this article, the United States and Australia have approached the “social group” question differently—especially when it comes to unaccompanied children seeking asylum due to persecution under the one-child policy.

#### D. THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

Upon ratifying the UN Convention on the Rights of the Child<sup>67</sup> (CRC) on April 1, 1992, China was bound by international law to uphold the CRC. Although China entered a reservation<sup>68</sup> to the CRC, alluding to the necessity of enforcing the one-child policy, a number of articles within the Convention are directly applicable to the treatment of children under China’s population control system. Under the CRC, State Parties are to ensure that all children are entitled to equal access to health care, edu-

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<sup>64</sup> See Anne M. Gomez, *The New INS Guidelines on Gender Persecution: Their Effect on Asylum in the United States for Women Fleeing the Forced Sterilization and Abortion Policies of the People’s Republic of China*, 21 N.C.J. INT’L L. & COM. REG. 621, 645 (1996). See also *Chen v. Ashcroft*, 381 F.3d 221, 228 (3d Cir. 2004) (in referring to the “crushing caseload” of men claiming asylum due to persecution of their wives and girlfriends under the one child policy, Judge Alito argues that, partly in the interest of judicial efficiency, unmarried partners of those persecuted under the one-child policy must not also be extended automatic asylum eligibility).

<sup>65</sup> See Gomez, *supra* note 64, at 645.

<sup>66</sup> *Id.* at 645-46.

<sup>67</sup> United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

<sup>68</sup> See Declarations and Reservations to the Convention on the Rights of the Child, Office of the High Commissioner for Human Rights, <http://www2.ohchr.org/english/law/crc-reserve.htm> (“[T]he People’s Republic of China shall fulfill its obligations provided by article 6 of the Convention under the prerequisite that the Convention accords with the provisions of article 25 concerning family planning of the Constitution of the People’s Republic of China and in conformity with the provisions of article 2 of the Law of Minor Children of the People’s Republic of China.”); P.R.C. Const. art. 25 (1982) (“The state promotes family planning so that population growth may fit the plans for economic and social development.”).

cation, and social security.<sup>69</sup> The Convention also states that, “no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home, or correspondence, nor to unlawful attacks on his or her honor and reputation.”<sup>70</sup> Furthermore, State Parties are expected to ensure the rights of each child within their jurisdiction “without discrimination of any kind, irrespective of the child’s *or his or her parent’s or legal guardian’s*” political opinion, or other status.<sup>71</sup> Finally, State Parties are bound to ensure that children are protected against all forms of discrimination or punishment “on the basis of the status, activities, expressed opinions, or beliefs of the child’s *parents, legal guardians, or family members.*”<sup>72</sup>

The Chinese government has been criticized by a number of other CRC State Parties and international institutions for its failure to comply with several of these articles.<sup>73</sup> First, children who have been born in violation of China’s policies are arguably discriminated against due to their parents’ opposition to the one-child policy. Second, limiting access to healthcare and state subsidies for education goes against the objectives set out in the CRC.<sup>74</sup> Furthermore, the indirect results of the one-child policy have had broad reaching, devastating effects on children and infants throughout China. For example, discrimination against disabled children and girls is perpetuated by the policy.<sup>75</sup> An increasingly imbalanced sex ratio shows that sex-selective abortions of female fetuses, although illegal under Chinese law, are still pervasive in some parts of the country.<sup>76</sup> Girls and disabled children are often abandoned, or their births are not reported, by parents who feel compelled to wait for a healthy ba-

<sup>69</sup> CRC, *supra* note 67, arts. 24, 26, 28.

<sup>70</sup> *Id.* art. 16.

<sup>71</sup> *Id.* art. 2(1) (emphasis added).

<sup>72</sup> *Id.* art. 2(2) (emphasis added).

<sup>73</sup> See COMMISSION ON CHINA, 2007 REPORT, *supra* note 20, at 108. See also U.N. Comm. on the Rights of the Child, 1062d mtg., *supra* note 32.

<sup>74</sup> See COMMISSION ON CHINA, 2007 REPORT, *supra* note 20, at 109. See also U.N. Comm. on the Rights of the Child, 1062d mtg., *supra* note 32.

<sup>75</sup> UN Convention on the Rights of the Child, Consideration of Reports Submitted by State Parties Under Article 44 of the Convention, CRC/C/CHN/CO/2 [Hereafter UN Committee on the Rights of the Child, Article 44] at ¶¶ 28-32; 60(d) (November 24, 2005).

<sup>76</sup> See *China Warned of Risks of Imbalanced Sex Ratio, Aging Society*, PEOPLE’S DAILY ONLINE, Aug. 24, 2007 (explaining that the sex ratio in parts of China had reached as high as 163.5 boys to 100 girls by the end of 2005). See also Jo L. Kent, *Chinese Miss World Sparks Debate*, ABC NEWS, Dec. 4, 2007 (explaining that even the recent crowning of a Chinese woman as Miss World in an international beauty pageant has been linked to the plight of girls in a society in which many parents still prefer male children).

by boy.<sup>77</sup> Finally, many of these children suffer, together with the rest of their family, the enormous burden of paying heavy fines imposed upon their parent's for violating the one-child policy.<sup>78</sup>

Acts that violate the CRC, however, do not necessarily rise to the level of persecution. In a somewhat analogous situation, a Roma couple sought asylum in the United Kingdom (UK) for themselves and their two children, stating as part of their claim that their children would be denied equal access to education in the Czech Republic on account of their race.<sup>79</sup> The children had been put into a "special school" for lower-level students.<sup>80</sup> The family claimed that they were discriminated against due to their race and that they were denied equal access to education.<sup>81</sup> The UK court, pointing to European legislation complying with the CRC, held that, although it was reasonably likely that the family had suffered racial discrimination, such discrimination did not amount to persecution.<sup>82</sup>

Even though discriminatory treatment based on race is deplorable, it is a reality that exists throughout the world. Similarly, unequal access to food and healthcare is a form of discriminatory treatment that can be attributed to the reality of overpopulation. In that sense, the standard for defining persecution must be higher than that which defines discriminatory treatment. Applying a high standard for persecution ensures that those in most dire need of asylum protection are the first to receive it. The CRC outlines a number of principles and policies that should be considered by State Parties that assess asylum claims brought by Chinese children born outside of the one-child policy.

Although the United States is one of few countries that has signed but not ratified the CRC, U.S. immigration officials should still consider the policies outlined by the Convention. The United States' Immigration and Naturalization Service published a memo titled Guide-

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<sup>77</sup> See U.N. Comm. on the Rights of the Child, *Article 44*, *supra* note 75, para. 28.

<sup>78</sup> See COMMISSION ON CHINA, 2007 REPORT, *supra* note 20, at 109.

<sup>79</sup> R v. Sec'y of State for the Home Dep't, [2002] EWHC 1199 (Admin.), para. 1.

<sup>80</sup> *Id.* para. 25.

<sup>81</sup> *Id.* para. 2.

<sup>82</sup> *Id.* para. 26 ("In light of the copious background information, I accept that there is a reasonable degree of likelihood that the appellant and his family have suffered racial discrimination in the Czech Republic. However, I am not satisfied that such discrimination amounted to persecution in this case.").

lines for Children's Asylum Claims,<sup>83</sup> which suggests that the CRC can provide useful guidance to U.S. asylum and immigration officers.<sup>84</sup> The Guidelines also noted that U.S. asylum officers "should not assume that a child cannot have an asylum claim independent of the [child's] parents."<sup>85</sup> As will be discussed in Part II of this paper, U.S. immigration officials should more carefully consider the specific circumstances of individual, unaccompanied children seeking asylum due to alleged persecution under China's one-child policy.

## II. DIVERGING RESPONSES TO UNACCOMPANIED CHILDREN SEEKING ASYLUM

Unique questions of both law and fact arise when unaccompanied children seek asylum due to alleged persecution under the one-child policy. The United States and Australia have addressed those questions somewhat differently. This section examines the approach of both the United States and Australia in determining whether or not an unaccompanied child may be eligible for refugee status due to alleged persecution under China's one-child policy.

### A. THE RESPONSE OF THE UNITED STATES

For years, the United States has voiced strong criticism against the one-child policy, creating tension in the sometimes fragile relationship between China and the United States.<sup>86</sup> Women's rights and human rights organizations, as well as conservative pro-life groups have expressed unified outrage over China's coercive birth control practices.<sup>87</sup> During George W. Bush's presidency, the United States repeatedly de-

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<sup>83</sup> Memorandum from Jeff Weiss, Acting Dir., Office of Int'l Affairs, U.S. Dep't of Justice, to Asylum Officers, Immigration Officers & Headquarters Coordinators (Dec. 10, 1998), available at <http://www.uscis.gov/files/pressrelease/ChildrensGuidelines121098.pdf>.

<sup>84</sup> *Id.* at 2 nn.1-2.

<sup>85</sup> *Id.* at 15.

<sup>86</sup> See, e.g., *Are Human Rights Higher than Sovereignty?* PEOPLE'S DAILY ONLINE, Mar. 17, 2006.

<sup>87</sup> See, e.g. Population Research Institute, *Major Coalition Urges President Bush to Zero-Fund UNFPA* (June 20, 2002), available at <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/06-20-2002/0001750820&EDATE> ("Population Research Institute, along with a coalition of over 140 groups, representing millions of Americans and many worldwide, urge President Bush in the following letter not to fund the UNFPA because of its continuing support of China's coercive abortion policy.").

nied funding to the United Nations Population Fund (UNFPA), due to UNFPA's support of the development of China's family planning policies.<sup>88</sup> This policy has changed only recently with the inauguration of U.S. President Barack Obama. Soon after taking office in January of 2009, President Obama showed a clear intent to restore U.S. funding to the UNFPA.<sup>89</sup>

Despite years of U.S. opposition to the one-child policy, before 1989 the U.S. did not extend asylum eligibility to those claiming persecution under the one-child policy.<sup>90</sup> However, the controversial 1989 decision of *Matter of Chang*<sup>91</sup> prompted the United States to reconsider that position. In *Matter of Chang*, the Board of Immigration Appeals refused to extend refugee status to a father of two who had fled China to escape a sterilization procedure.<sup>92</sup> The decision contributed to growing alarm over human rights abuses occurring in China following the massacre of hundreds of pro-democracy protestors in Tiananmen Square that occurred in June of the same year.<sup>93</sup> To protect Chinese nationals who entered the United States and who faced potential persecution if deported to China, Congress quickly attempted to pass the Emergency Chinese Immigration Relief Act of 1989.<sup>94</sup> Despite strong support from the United States House and Senate, the Act was vetoed by President George H.W. Bush to maintain U.S.-China foreign relations.<sup>95</sup> Soon after vetoing the Act, however, President Bush introduced an Executive Order requiring the Secretary of State and the Attorney General to provide "enhanced consideration" for individuals who feared persecution due to forced abortion or sterilization.<sup>96</sup>

In 1993, popular support for extending asylum rights to victims of coercive birth control practices enflamed when a ship called "The

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<sup>88</sup> See Melanie Hunter, *Bush Denies Funding for UNFPA for Sixth Time*, CNSNEWS.COM, Sep. 14, 2007, <http://www.crosswalk.com/news/11554199/>.

<sup>89</sup> Press Release, United Nations Population Fund, UNFPA Welcomes Restoration of U.S. Funding (Jan. 23, 2009), available at <http://www.unfpa.org/public/News/pid/1562>.

<sup>90</sup> Roxana M. Smith, Note, *Asylum for a Minor Child of Persecuted Parents in Zhang v. Gonzales*, 36 GOLDEN GATE U.L. REV. 69, 77 (2006).

<sup>91</sup> *Matter of Chang*, 20 I. & N. Dec. 38 (B.I.A. 1989).

<sup>92</sup> *Id.* at 47.

<sup>93</sup> See *June 4, 1989: Massacre in Tiananmen Square*, BBC NEWS, [http://news.bbc.co.uk/onthisday/hi/dates/stories/june/4/newsid\\_2496000/2496277.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/june/4/newsid_2496000/2496277.stm).

<sup>94</sup> Emergency Chinese Immigration Relief Act, H.R. 2712, 101st Cong. (1989).

<sup>95</sup> See Memorandum of Disapproval for the Bill Providing Emergency Chinese Immigration Relief, 25 WEEKLY COMP. PRES. DOC. 1853 (Nov. 30, 1989).

<sup>96</sup> *Id.*



Golden Venture” ran aground in New York while carrying almost 300 Chinese nationals trying to enter the United States illegally.<sup>97</sup> Several of the Chinese passengers detained by immigration authorities sought asylum in the U.S., claiming a fear of persecution for violating the one-child policy if returned to China.<sup>98</sup> Although some were granted asylum, others were deported to China or jailed in the United States.<sup>99</sup> Following this incident, human rights and anti-abortion groups pushed Congress to extend American asylum protection to include those victimized under the one-child policy.<sup>100</sup>

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which amended the Immigration and Nationality Act (INA) in order to specifically address the persecution of Chinese nationals under the one-child policy.<sup>101</sup> Section 101(a)(42) of the INA defined “refugee” as “any person who is outside any country of such person’s nationality . . . and is unable or unwilling to avail himself or herself of the protections of that country because of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>102</sup> Section 601(a) of the IIRIRA amended section 101(a)(42) of the INA to clarify that:

A person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, 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.<sup>103</sup>

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<sup>97</sup> Editorial, *The Golden Venture, Plus 100,000*, N.Y. TIMES, June 9, 1993, at A20.

<sup>98</sup> See e.g., *Dai Xiu Ying v. Caplinger*, 1995 U.S. Dist. LEXIS 4079 (D. La. Mar. 30, 1995).

<sup>99</sup> See Kenneth B. Noble, *Golden Venture Refugees on Hunger Strike in California to Protest Detention*, N.Y. TIMES, Dec. 2, 1995. See also David Johnston, *Bush May Name Former Federal Judge to Succeed Gonzales*, N.Y. TIMES, Sept. 16, 2007, § 1, at 23 (Michael Mukasey’s decision to deny asylum to a Chinese man whose wife had been sterilized led to criticism of his nomination for attorney general in 2007).

<sup>100</sup> Sicard, *supra* note 19, at 929-31.

<sup>101</sup> Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

<sup>102</sup> 8 U.S.C. § 1101(a)(42)(A) (2000).

<sup>103</sup> Illegal Immigration Reform and Immigrant Responsibility Act § 601(a)(1).

Under this expanded definition, those who can prove that they have *directly* suffered from an act, attempt, or have a fear of forced abortions or sterilizations can claim persecution *per se* on account of political opinion. However, the statute is less clear on the treatment of those *indirectly* affected by such acts, such as the spouses or children of those directly affected. In recent years, a number of cases have challenged U.S. courts to address the question of whether a spouse or child of a person persecuted *per se* under section 1101(a)(42) of the INA is also persecuted on account of political opinion.

#### 1. EXTENDING ASYLUM TO SPOUSES OF THOSE VICTIMIZED UNDER THE ONE-CHILD POLICY

In 1997, the Board of Immigration Appeals (BIA) awarded asylum protection to the spouse of a woman persecuted under the one-child policy. In *In re C-Y-Z-* the BIA held that the automatic asylum granted under section 1101(a)(42) of the INA should also be extended to spouses of those victimized under the one-child policy.<sup>104</sup> The BIA held that the “treatment of the applicant’s wife supports the conclusion that the applicant, by virtue of the events culminating in his wife’s forced sterilization, has suffered past persecution and that his fear [of future persecution] is well founded.”<sup>105</sup> In that sense, the *In re C-Y-Z-* decision forwarded a standard by which “the husband of a sterilized wife can essentially stand in her shoes and make a bona fide and non-frivolous application for asylum based on problems impacting more intimately on her than on him.”<sup>106</sup>

Following the *In re C-Y-Z-* decision, a circuit split developed on whether automatic asylum eligibility under section 1101(a)(42) of the INA should be extended further to include *non*-married partners of those victimized under the one-child policy.<sup>107</sup> The Seventh Circuit and Ninth Circuit have, to a certain degree, extended asylum eligibility to non-married partners.<sup>108</sup> Both circuits have held that the common law husband of a woman forced to have an abortion is also eligible for asylum

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<sup>104</sup> *In re C-Y-Z-*, 21 I. & N. Dec. 915, 918 (B.I.A. 1997).

<sup>105</sup> *Id.* at 927.

<sup>106</sup> *Id.* at 918.

<sup>107</sup> See, e.g. *Zi Zhi Tang v. Gonzales*, 489 F.3d 987 (9th Cir. 2007); *Ma v. Ashcroft*, 361 F.3d 553 (9th Cir. 2004); *Zhu v. Gonzales*, 465 F.3d 316 (7th Cir. 2006).

<sup>108</sup> See *Zi Zhi Tang*, 489 F.3d at 992. See also *Ma*, 361 F.3d at 553; *Zhu*, 465 F.3d at 321.

under section 1101(a)(42) of the INA.<sup>109</sup> Other circuits, however, have taken a different approach.<sup>110</sup> In the Third Circuit case, *Chen v. Ashcroft*,<sup>111</sup> Judge Samuel Alito disagreed with the assertion that automatic asylum should be extended to those partners that *would* be married, but were not allowed to obtain a legal marriage certificate due to China's high age requirements for marriage.<sup>112</sup> In *Chen v. Ashcroft*, for the Third Circuit, Judge Alito noted his concern for efficiency in his argument, referencing the "crushing caseload" of asylum claims already pouring in from Chinese men claiming asylum due to the victimization of their wives or girlfriends.<sup>113</sup>

In 2008, the Board of Immigration Appeals revisited its approach to extending *per se* asylum to spouses of those persecuted under the one-child policy. In *Matter of J-S*<sup>114</sup> the BIA adopted a strict statutory interpretation of section 601(a) of IIRIRA. The BIA found that the IIRIRA created four specific classes of refugees (1) "person[s] who ha[ve] been forced to abort a pregnancy"; (2) "person[s] who ha[ve] been forced . . . to undergo involuntary sterilization"; (3) "person[s] . . . who ha[ve] been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program"; and (4) "person[s] who ha[ve] . . . a well founded fear that [they] will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance."<sup>115</sup> Applying that strict interpretation, the BIA held that "section 601(a) does not support the per se rule of spousal eligibility [that] the Board adopted in [*In re*] *C-Y-Z*."<sup>116</sup> However, in reaching that conclusion, the Board also recognized "that section 601(a) does not explicitly *exclude* spouses from its purview."<sup>117</sup> In that sense, the Board left open the possibility that spouses of those forced to undergo forced abor-

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<sup>109</sup> See *Zi Zhi Tang*, 489 F.3d at 992. See also *Ma*, 361 F.3d at 556; *Zhu*, 465 F.3d at 321.

<sup>110</sup> See e.g. *Chen v. Ashcroft*, 381 F.3d 221 (3d Cir. 2004); *Zhang v. Ashcroft*, 395 F.3d 531 (5th Cir. 2004); *Jiu Shu Wang v. U.S. Attorney Gen.*, 152 Fed. App'x 761 (11th Cir. 2005).

<sup>111</sup> *Chen*, 381 F.3d at 221.

<sup>112</sup> *Id.* at 228-31. The Embassy of the United States in Beijing states that the minimum age to marry in China is "generally 22 for men and 20 for women, although a higher minimum may be established by the local civil affairs office." Basic Information about Getting Married in China, [http://beijing.usembassy-china.org.cn/acs\\_married.html](http://beijing.usembassy-china.org.cn/acs_married.html) (last visited Feb. 10, 2009).

<sup>113</sup> *Chen*, 381 F.3d at 228 (referring to *Dia v. Ashcroft*, 353 F.3d 228, 235 (3d Cir. 2003)).

<sup>114</sup> *Matter of J-S*-, 24 I. & N. Dec. 520, 530 (A.G. 2008).

<sup>115</sup> *Id.* at 527.

<sup>116</sup> *Id.* at 530.

<sup>117</sup> *Id.* (emphasis added).

tions or sterilizations procedures could be deemed eligible for asylum in the U.S. under some circumstances.

## 2. EXTENDING ASYLUM ELIGIBILITY TO CHILDREN OF THOSE VICTIMIZED UNDER THE ONE-CHILD POLICY

Despite some willingness to extend asylum rights automatically to spouses and partners of those victimized under the one-child policy, U.S. courts have given little leeway to unaccompanied children seeking asylum under these circumstances. Compared to the “crushing caseload” of claims coming from spouses of those victimized by the one-child policy, U.S. courts have seen relatively few cases involving unaccompanied children. Three principle cases have been decided involving unaccompanied children seeking asylum due persecution under the one-child policy: *Jie Lin v Ashcroft*,<sup>118</sup> *Wang v. Gonzales*,<sup>119</sup> and *Zhang v. Gonzales*.<sup>120</sup> These cases held that the treatment of children born in violation of the one-child policy, although at times deplorable, does not rise to the level of persecution that is required to warrant asylum under section 1101(a)(42) of the INA.<sup>121</sup>

In the 2004 case, *Jie Lin v Ashcroft*, a fourteen-year-old boy unsuccessfully sought asylum, claiming he was persecuted after his parents violated the one-child policy.<sup>122</sup> Following the birth of Jie Lin’s sibling—his mother’s second child—a heavy fine was imposed upon the family.<sup>123</sup> The fine made it impossible for Lin’s family to pay for his school tuition.<sup>124</sup> Lin later fled to the United States seeking asylum.<sup>125</sup> The Ninth Circuit analyzed Lin’s claim for asylum on two grounds (1) whether Lin was persecuted for membership in a particular social group and (2) whether he was persecuted on account of his political opinion.<sup>126</sup> Regarding the first question, the court held that Lin had a plausible claim for refugee status due to membership in a particular social group, his

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<sup>118</sup> *Jie Lin v. Ashcroft*, 377 F.3d 1014 (9th Cir. 2004).

<sup>119</sup> *Wang v. Gonzales*, 405 F.3d 134 (3d Cir. 2005).

<sup>120</sup> *Zhang v. Gonzales*, 408 F.3d 1239 (9th Cir. 2005).

<sup>121</sup> See *Jie Lin*, 377 F.3d at 1031; *Wang*, 405 F.3d at 134; *Zhang*, 408 F.3d at 1250.

<sup>122</sup> *Jie Lin*, 377 F.3d at 1019.

<sup>123</sup> *Id.* at 1021.

<sup>124</sup> *Id.* at 1022.

<sup>125</sup> *Id.* at 1019.

<sup>126</sup> *Id.* at 1028, 1031.

immediate family.<sup>127</sup> Lin, however, would have to demonstrate a well-founded fear of persecution on account of being part of that group to qualify for asylum.<sup>128</sup> The court found that Lin did not provide enough factual evidence to support his assertion that he was persecuted due to his membership in the social group of his family.<sup>129</sup>

Regarding the second question, the Ninth Circuit, referring to *In re C-Y-Z*,<sup>130</sup> determined that the political opinion of a parent could be imputed on an unaccompanied child.<sup>131</sup> By finding no reason to distinguish the spouse and the child of a person forcibly sterilized, the court found that the forced sterilization of a Lin's mother could be imputed to Lin.<sup>132</sup> Although the Ninth Circuit was close to granting Lin asylum on account of persecution due to his political opinion, the case was remanded to the BIA due to ineffective assistance of council.<sup>133</sup>

In *Wang v. Gonzales*, the Third Circuit refused to extend the *In re C-Y-Z*-imputed opinion criteria to an unaccompanied child.<sup>134</sup> Neng Long Wang, a fourteen-year-old boy, sought asylum in the United States after his family was punished by family planning officials for failure to adhere to the one-child policy.<sup>135</sup> Wang's mother was forcibly sterilized, and his parents were told to pay an enormous fine that amounted to one hundred times their monthly income.<sup>136</sup> After Wang's parents agreed to pay the fine in installments, family planning authorities continued to harass them, demanding payment.<sup>137</sup> While the debt remained unpaid, officials destroyed the family's home and furniture, as well as the business equipment used in a snack bar opened by Wang's parents.<sup>138</sup> The contin-

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<sup>127</sup> *Id.* at 1029.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *In re C-Y-Z*, 21 I. & N. Dec. 915, 922 (B.I.A. 1997) ("An individual's own refusal or failure to comply with a compulsory population control program, or his or her association with one who expressly resists or opposes such a program, may cause such a political opinion to be imputed to that individual.").

<sup>131</sup> *Lin*, 377 F.3d at 1031. *See also* n. 45.

<sup>132</sup> *Lin*, 377 F.3d at 1031. *See also* *Zhang*, 408 F.3d at 1245-46.

<sup>133</sup> *Lin*, 377 F.3d at 1031.

<sup>134</sup> *Wang v. Gonzales*, 405 F.3d 134, 142 (3d Cir. 2005).

<sup>135</sup> *Id.* at 136-37.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 137.

ued abuse at the hands of family planning officials led Wang's parents to smuggle their son into the United States.<sup>139</sup>

Wang, like Lin, brought an asylum claim on the two grounds of persecution due to membership in a particular social group and persecution due to political opinion.<sup>140</sup> The Immigration Judge who initially denied Wang's asylum claim dismissed Wang's claim that he was persecuted due to membership of a social group of "poor and uneducated Chinese who are forced to pay a heavy fine for larger than they can afford for violating the family planning policies."<sup>141</sup> The judge also held that persecution could not be attributed to Wang's political opinion, or to the forcible sterilization of his mother.<sup>142</sup> The judge reasoned that, despite the punishments imposed on Wang's family, Wang himself was not fleeing direct physical persecution, and he did not leave China to escape future persecution.<sup>143</sup> In upholding that decision, the Court of Appeals for the Third Circuit, like the Ninth Circuit in *Lin*, compared Wang's association with his mother to that of a spouse seeking automatic asylum due to the sterilization of his wife.<sup>144</sup> The Third Circuit reasoned, however, that the child of a parent who has been forcibly sterilized is not affected in the same way as the spouse of a person forcibly sterilized.<sup>145</sup> A husband is intimately affected by the sterilization of his spouse due to the implications the procedure has on his ability to have a child. The child of a sterilized parent, on the other hand, has only lost an interest in a "potential sibling."<sup>146</sup>

The court's assessment of Wang's claim is consistent with other case law outlining standards for determining whether spouses and partners of persecuted victims are also automatically persecuted. The court, however, stopped short of fully examining the difference between an asylum claim coming from the spouse of a persecuted victim versus a claim coming from the unaccompanied child of that victim.

The court should have more carefully considered the implications of the punishment of Wang's parents, and how that punishment was

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 139-40.

<sup>141</sup> *Id.* at 140.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 143.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

unfairly extended to him. It may be true, as the court asserts, that a father's interest in a child is more significant than a child's interest in a sibling.<sup>147</sup> Such comparisons are incomplete, however, when assessing asylum claims coming from unaccompanied children of persecuted parents. The court should have more carefully considered the implications of the punishment of Wang's parents, and how that punishment was unfairly extended to him. Rather than qualify Wang's suffering by comparison to the suffering experienced by either Wang's father or mother, the court should have examined the extent to which Wang suffered and was persecuted for being born to parents who had violated the one-child policy.

Soon after the Third Circuit decided the *Wang* case, in *Zhang v. Gonzales*, the Ninth Circuit again had a chance to rule on the case of an unaccompanied child claiming persecution under the one-child policy.<sup>148</sup> Xue Yun Zhang was born in 1985 to parents living in a rural part of China, where parents were allowed to have no more than two children.<sup>149</sup> Following Zhang's birth, however, her parents had two other children, thus violating the government's family planning regulations.<sup>150</sup> When local family planning officials learned that the family had three children, Zhang's father was forced to undergo a sterilization procedure.<sup>151</sup> The Chinese government also penalized the Zhang family with a substantial fine.<sup>152</sup> When the family was unable to pay the fine, government officials prohibited Zhang and her two siblings from attending school.<sup>153</sup> In April 2000, Zhang left China for the United States to pursue the education and work opportunities she was denied in China.<sup>154</sup> After being detained at the U.S. border, Zhang brought an asylum claim alleging persecution under China's one-child policy.<sup>155</sup>

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<sup>147</sup> *Id.* ("It should be obvious to anyone that whereas a husband has a direct interest in whether his wife can have additional children, a child is in a very different position as the family planning policies as applied to his parents can affect him only as a potential sibling and not as a parent").

<sup>148</sup> *Zhang v. Gonzales*, 408 F.3d 1239, 1242 (9th Cir. 2005).

<sup>149</sup> *Id.* at 1243.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

Zhang's asylum claim was first denied by an Immigration Judge.<sup>156</sup> The judge found that the automatic asylum that extended to spouses under section 1101(a)(42) of the INA could not also be extended to unaccompanied children.<sup>157</sup> The Immigration Judge also ruled that the hardships suffered by Zhang's father and family, as a whole, did not amount to individualized persecution directed toward Zhang herself.<sup>158</sup> Therefore, the Immigration Judge found that Zhang did not have a well-founded fear of future persecution on account of one of the five protected grounds outlined in section 1101(a)(42) of the INA.<sup>159</sup> After the Board of Immigration Appeals found against Zhang,<sup>160</sup> her case came before the Ninth Circuit. The Ninth Circuit held that Zhang's parents' political opinion (opposition to the one-child policy) could be imputed to Zhang for purposes of establishing the child's asylum eligibility.<sup>161</sup> However, despite the reasoning forwarded in its *Lin v. Ashcroft* opinion, the Ninth Circuit agreed with the Third Circuit's precedent, holding that Zhang was not statutorily eligible for asylum, as the sterilization of a mother does not affect a child to the same degree that the sterilization of a wife affects her husband.<sup>162</sup>

As the decisions in *Wang* and *Zhang* are extended further in subsequent cases, such as that of Xiu Fei Wang,<sup>163</sup> there is a risk that U.S. courts and immigration authorities will develop a pattern of incompletely assessing asylum claims brought by unaccompanied children claiming persecution under the one-child policy. It is important to evaluate whether a child is persecuted due to the political opinion of his parents, which are imputed onto him. However, the heavy caseload involving spouses and partners of persecuted individuals threatens to complicate decisions surrounding children claiming asylum under these circumstances. In cases involving unaccompanied children, U.S. courts and immigration authorities have focused too much on comparing a child's

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<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 1243-44.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 1244.

<sup>160</sup> *Id.* at 1242.

<sup>161</sup> *Id.* at 1246-47.

<sup>162</sup> *Id.* at 1245-46.

<sup>163</sup> *Xiu Fei Wang v. U.S. Attorney Gen.*, 222 Fed. App'x 176, 180 (3d Cir. 2007) ("The fact that Wang was in utero at the time of her mother's forcible sterilization, standing alone, is not enough for Wang to surmount this court's holding in *Wang* that children are not entitled to relief merely on the basis of persecution to their parents for the latter's violation of the one-child policy.").



connection to a persecuted parent to a spouse's connection to a persecuted partner. Although an individual parent may be greatly affected by the persecution of his or her spouse or partner, parents are usually equally complicit in conceiving a child in violation of China's family planning policies. Children of parents who violate the one-child policy, on the other hand, have done nothing wrong. A different legal standard for assessing their asylum claims should therefore apply.

U.S. Courts and immigration authorities should focus more carefully on the treatment of the child as he exists independently from his family and his parents. They should focus on how the ill treatment and fines imposed upon the family affect the child as an individual. They should also focus more carefully on the extent to which the child is barred from benefits otherwise granted to Chinese children. Asylum claims brought by children born in violation of the one-child policy should be addressed according to their membership in a group of such children that suffers from undeserved discrimination. The courts and immigration authorities should then determine when, and to what degree, such discrimination rises to the level of persecution. Such a consideration awards more careful consideration of the true needs of the child while avoiding the tendency to get distracted by contentious case law surrounding spouses and partners of persecuted victims.

The *full* definition of refugee contained in the INA should be applied in determining whether or not an unaccompanied child qualifies as a refugee who is persecuted under the one-child policy. Although the Ninth and Third Circuits have explored in depth the concept of political opinion being imputed onto children of those persecuted under the one-child policy, they have not fully explored whether out-of-plan children may be persecuted due to membership in a particular social group. Where persecution due to membership in a particular social group has been discussed, the social group to which the child applicant potentially belongs has been defined incorrectly.<sup>164</sup> In *Wang*, the court assessed whether the applicant was persecuted for belonging to a group of "poor and uneducated Chinese who are forced to pay a heavy fine far larger

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<sup>164</sup> See *Wang v. Gonzales*, 405 F.3d 134, 140 (3d Cir. 2005) (discussing whether Wang was persecuted due to membership in a "particular social group consisting of poor and uneducated Chinese who are forced to pay a heavy fine far larger than they can afford for violating the family planning policies"). See also *Jie Lin v. Ashcroft*, 377 F.3d 1014, 1029 (9th Cir. 2004) (discussing briefly whether Lin could claim persecution due to membership in the particular social group of Lin's immediate family).

than they can afford for violating the family planning policies.”<sup>165</sup> The definition of that social group is overbroad and without clear boundaries. Wang was not being persecuted for being poor and uneducated, nor was he persecuted for his own inability to pay a heavy fine, nor was he persecuted for his individual violation of the family planning policies. Defining a social group in such a way is merely another, more roundabout way of determining whether he was persecuted due to his parents’ political opinion.

A similar argument can also be made regarding persecution due to membership in the social group of one’s “immediate family,” as was the case in *Lin*. Although this is a clearer, more easily definable definition of a social group than that addressed in *Wang*, an immediate family remains too narrow of a definition in this context. The claim of the child remains too closely connected with the alleged mistreatment of his parents. Because his parents will almost always suffer more severe personal hardship and potential persecution than will their child, the circumstances affecting a child are overshadowed by those affecting his parents.

## B. THE AUSTRALIAN REACTION

As in the United States, Australian courts have processed a number of asylum claims from Chinese nationals who claim to be persecuted under China’s one-child policy.<sup>166</sup> Pursuant to section 36(2) of the Australian Migration Act of 1958 (the Act), a person may be eligible for a “protection visa” in Australia if he can demonstrate that he is a refugee as defined in the UN Convention relating to the Status of Refugees 1951 and its amending protocol.<sup>167</sup> As described earlier in this article, the Convention defines a refugee as a person who has a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.”<sup>168</sup> The Australian application

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<sup>165</sup> *Wang*, 405 F.3d at 140.

<sup>166</sup> See, e.g., *Chen Shi Hai v. Min. for Immigration & Multicultural Affairs* (2000) 201 C.L.R. 293; *Applicant A v. Min. for Immigration & Ethnic Affairs* (1997) 190 C.L.R. 225; *VTAO v. Min. for Immigration & Multicultural & Indigenous Affairs* (2004) 81 A.L.J. 332; *Min. for Immigration & Ethnic Affairs v. Guo* (1997) 191 C.L.R. 559.

<sup>167</sup> See *Chen Shi Hai*, 201 C.L.R. at 296. See also Migration Act, 1958, § 36(2) (Austl.).

<sup>168</sup> Refugee Convention, *supra* note 36, art. 1(A)(2).

of the Convention's definition of a refugee differs from that of the United States in that the "political opinion" element, discussed at length in the U.S. cases, is discussed very little in Australian cases. Australia focuses almost exclusively on whether or not those bringing the claims are persecuted for their membership in a particular social group.<sup>169</sup> A prominent case discussing the "social group" element of determining asylum eligibility is the Australian High Court's decision in *Chen Shi Hai v. Minister for Immigration and Multicultural Affairs*.<sup>170</sup>

Chen Shi Hai was born in an immigration detention facility in Australia.<sup>171</sup> His parents had fled China after giving birth to two children before being legally allowed to marry in China due to their young age.<sup>172</sup> An application for a protection visa was brought on Chen's behalf after his parents were denied asylum and were awaiting deportation to China.<sup>173</sup> Making an initial determination on Chen's claim, the Australian Refugee Review Tribunal found that because Chen was born outside of the parameters of China's one-child policy, and because he was born of an unauthorized marriage, he was what is known in China as a "black child."<sup>174</sup> The Tribunal further noted that, as a "black child" in China, Chen would be "denied access to food, education, and to health care beyond a very basic level [and would] probably face social discrimination and some prejudice and ostracism."<sup>175</sup> Although the tribunal also equated this unequal treatment with a likelihood that Chen faced a real chance of persecution in China, the Tribunal found against Chen.<sup>176</sup> The Tribunal made a distinction between persecution *because of* membership in a social group and persecution *for reasons of* membership in that group.<sup>177</sup> The Tribunal found that Chen did not face persecution *for reasons of* his membership in the social group of "black children."<sup>178</sup> The Tribunal reached this conclusion by determining that any mistreatment of

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<sup>169</sup> See *Chen Shi Hai*, 201 C.L.R. at 299-302.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 294.

<sup>172</sup> *Id.* at 297.

<sup>173</sup> *Id.* at 294, 297.

<sup>174</sup> *Id.* at 297.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 294, 297.

<sup>177</sup> *Id.* at 297. See also *Applicant A v. Min. for Immigration & Ethnic Affairs* (1997) 190 C.L.R. 225 (holding that the "common thread" which links "persecuted," "for reasons of" and "membership of a particular social group" in the Convention definition of "refugee" dictates that "a shared fear of persecution [is not] sufficient to constitute a particular social group").

<sup>178</sup> *Chen Shi Hai*, 201 C.L.R. at 297.

a “black child” was not born out of “malignity, enmity, or other adverse intention towards him on the part of the Chinese authorities,” but instead as means of penalizing those that had violated the one-child policy.<sup>179</sup> Chen, therefore, did not meet the standard for proving a reasonable fear of persecution for reasons of membership in a particular social group, outlined in the UN Convention.<sup>180</sup>

The decision of the Tribunal was subsequently reviewed by the Federal Court of Australia, which clarified two points put forth by the Tribunal.<sup>181</sup> The Federal Court found that “there was no need for persecution to be motivated by ‘enmity’ or ‘malignity.’”<sup>182</sup> Rather, the court said that any persecution related to the five grounds outlined in the UN Convention qualified as persecution, regardless of the motivation behind it.<sup>183</sup> Therefore, the court found that the Tribunal erred in determining that the right connection did not exist, linking “persecution” to “membership in a social group.”<sup>184</sup> According to the Federal Court, Chen likely faced persecution, and that persecution surrounded his membership in a social group of “black children.”<sup>185</sup> The court said he should therefore be entitled to refugee status, thus warranting asylum.<sup>186</sup>

On appeal from the Federal Court’s decision, the Full Court of the Federal Court added another element to the discussion.<sup>187</sup> Similar to the U.S. cases described earlier, the Full Court held that the adverse treatment likely to befall Chen was not due to his membership in a social group of “black children,” but rather because of his parents’ conduct in violating the obligations set forth in the one-child policy.<sup>188</sup> Although the Full Court did not introduce a discussion on whether Chen’s parents’ political opinion could be imputed onto him, it did conclude that “black children” did not constitute a social group for the purposes of the Convention.<sup>189</sup> The Full Court turned to the previous decision of *Applicant A*

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<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 294.

<sup>181</sup> *Id.* at 298.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

v. *Minister for Immigration and Ethnic Affairs* in making its determination.<sup>190</sup>

In *Applicant A*, the Australian High Court discussed two common problems surrounding the definition of social group.<sup>191</sup> First, in *Applicant A*, the High Court found that a particular social group cannot be distinguished as being persecuted under a law of general application—a law that is enforced upon all Chinese citizens.<sup>192</sup> In *Applicant A*, the High Court held that the one-child policy, because it is a law of general application, cannot persecute one particular “social group” any more than any other group or individual that must abide by the policy.<sup>193</sup> Second, the Court held that a group cannot be defined as a “social group” for purposes of the UN Convention when the sole trait linking members to that group is the fact that they are persecuted.<sup>194</sup> Applying the reasoning of *Applicant A* to the *Chen Shi Hai* case, the Full Court thereby set aside the Federal Court’s decision, restoring the original decision of the Tribunal.<sup>195</sup> Although the Full Court did not dispute that Chen belonged to a social group of “black children,” the Full Court agreed with the Tribunal that persecution could not be linked to that “social group” to the extent required by the UN Convention Relating to the Status of Refugees.<sup>196</sup>

When the case finally reached the Australian High Court, two points of law had been established (1) that Chen Shi Hai belonged to a social group of “black children,” and (2) that he faced the likelihood of persecution in China in the form of discrimination and ostracism, as well as unequal access to education, healthcare, and food.<sup>197</sup> However, the link between persecution and membership in a particular social group remained undefined.<sup>198</sup> Regarding the Full Court’s conclusion that the one-child policy amounted to a law of general application, the High Court noted that it was dangerous to conclude that, “because a law is one

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<sup>190</sup> *Id.* at 298-99.

<sup>191</sup> See *Applicant A v Min. for Immigration and Ethnic Affairs* (1997) 190 C.L.R. 225, 243, 263.

<sup>192</sup> *Id.* at 243.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 263 (“Allowing persecutory conduct of itself to define a particular social group would, in substance, permit the ‘particular social group’ ground to take on the character of a safety net. It would impermissibly weaken . . . the definition of ‘refugee.’ It would also effectively make the other four grounds of persecution superfluous.”).

<sup>195</sup> *Chen Shi Hai v. Min. for Immigration & Multicultural Affairs* (2000) 201 C.L.R. 293, 299.

<sup>196</sup> *Id.* at 298.

<sup>197</sup> *Id.* at 297, 310-11.

<sup>198</sup> *Id.* at 311.

of general application it can play no part in identifying, consolidating and motivating a particular social group as one falling within the protection of the Convention.<sup>199</sup> Laws of general application, the court went on to say, “can sometimes be the instruments which reinforce and give effect to the antecedent persecution and help to define the persecuted and to occasion their urgent search for foreign refuge.”<sup>200</sup> The court also noted that the social group of “black children” pre-existed the one-child policy.<sup>201</sup> Children born out of wedlock were subjected to discriminatory practices prior to the existence of the one-child policy.<sup>202</sup> Although the implementation of the policy acted to aggravate and expand that discrimination, the policy did not form the basis for defining that social group.<sup>203</sup> Therefore, the High Court concluded that “once discrimination and persecution against the appellant, a child, were found (as the evidence accepted by the Tribunal amply justified) the classification of the persecution in this case as being ‘for reasons of’ membership of a ‘particular social group’ followed quite readily.”<sup>204</sup> Chen was thereby granted a protection visa and allowed to remain in Australia.

The Australian High Court’s assessment of Chen Shi Hai’s asylum application is both simpler and more exhaustive than the assessments put forward by U.S. courts in the cases described above. The assessment is simpler because the Australian High Court is able to disconnect Chen Shi Hai’s claim from that of his parents. This avoids the complications that have emerged in U.S. law surrounding the flexibility of the law, and how far it will stretch to accommodate family members of persecuted victims. Rather than focusing on whether the law permits the persecution of the parents to be imputed onto their child, the court focuses on the factual realities of Chen Shi’s existence as a “black child” in China. Based on the facts surrounding the treatment of “black children” the court then determines whether the legal standard for persecution applies to Chen Shi as an individual, rather than as a son. At the same time, the High Court’s assessment is more exhaustive because it looks more carefully at the unique hardships that Chen Shi is likely to

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<sup>199</sup> *Id.* at 316.

<sup>200</sup> *Id.* at 317 (the High Court brings up the fact that the Nazi State in Germany was generally a Rechtsstaat, yet it is well established that persecuted resulted from the general laws imposed via the Nazi Regime).

<sup>201</sup> *Id.* at 316.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

face, not as an individual within his family, but as an individual within society at large, who shares common characteristics with other individual children born in violation of the one-child policy. By connecting Chen Shi to other children, rather than his parents, the High Court is able to more fully assess whether the discrimination of such children truly amounts to persecution, or if it is merely an unfortunate reality of over-population.

Despite the precedent set in *Chen*, Australian courts have not often extended asylum to children who claim persecution due to their status as “black children.” In other cases, children facing similar circumstances to that of Chen have been denied protective visas despite belonging to a social group of “black children” born in violation of the one-child policy.<sup>205</sup> For example, in the unreported decision of *SZLAW v. Minister for Immigration & Citizenship*,<sup>206</sup> a child was denied a protective visa, despite the Federal Court of Australia finding that he could belong to the social group of “black children” defined in *Chen*. The Federal Court found that, although the child applicant could face some discriminatory treatment in the form of teasing and bullying, so long as an “appropriate ‘social compensation fee’ [was] paid, neither the appellant nor his parents would be deprived of any social services or other benefit generally available from the State to citizens of [China].”<sup>207</sup> Because the factual circumstances surrounding the case made it clear that the family could afford such a fee, the applicant was unable to prove a reasonable fear of persecution and was thus denied a protective visa.<sup>208</sup>

### C. FINDING COMMON GROUND

Given the complexities surrounding the existence, as well as the enforcement, of the one-child policy, it is important for U.S. courts and immigration authorities to decide, on a case-by-case basis, whether persecution has truly occurred. As espoused in the 2008 BIA decision, *Matter of J- S-*, U.S. immigration authorities should not extend refugee status *per se* to an individual, including a child, unless that child can prove that

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<sup>205</sup> See, e.g., *SZLAW v. Min. for Immigration & Citizenship* (2008) F.C.A. 647; *SZHXB v. Min. for Immigration & Multicultural & Indigenous Affairs* (2006) F.M.C.A. 1118; *SZBXV v. Min. for Immigration & Citizenship* (2007) F.C.A. 1286.

<sup>206</sup> *SZLAW*, (2008) F.C.A. 647, paras. 4, 25.

<sup>207</sup> *Id.* para. 24.

<sup>208</sup> *Id.* paras. 5, 6, 25.

he or she expressly falls with section 101(a)(42) in the INA's definition of refugee.<sup>209</sup> However, immigration authorities should not limit the application of section 101(a)(42) by only analyzing whether such a child has been persecuted on account of the child's political opinion or the political opinion of the child's parents. Rather, the individual treatment of the child, as an out-of-plan child, should be the foremost issue to be addressed.

The Australian High Court offers the United States useful guidance in outlining a procedure for assessing asylum claims brought by unaccompanied children claiming persecution under China's one-child policy. In assessing such claims, U.S. courts should determine whether an unaccompanied child is persecuted for belonging to a particular social group of "black children" or out-of-plan children. Such analysis allows for the most careful consideration to be given to an individual child's claim. Considering an application based on persecution for reason of membership in a social group of out-of-plan children also allows a court to consider the claim within the greater context of the one-child policy.

Australia's *Chen Shi Hai* decision, however, has potentially opened a new door, at least in Australian courts, for a "crushing caseload" of cases brought by Chinese children who claim to belong to a social group of "black children" without truly suffering a reasonable fear of prosecution due to that status. For U.S. immigration authorities to open a new door to Chinese asylum applicants claiming persecution due to membership in a social group of "black children" invariably invites additional applications from those who may not be the most deserving of U.S. protection. Therefore, in assessing claims from out-of-plan children, U.S. immigration authorities should be very careful to define the context and situations in which discriminatory treatment of out-of-plan children truly amounts to persecution.

## CONCLUSION

The United States should reconsider its approach to determining the asylum eligibility of unaccompanied children claiming persecution under China's one-child policy. Although the 2008 BIA decision, *Matter of J- S-* outlines a clearer standard for determining asylum eligibility of

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<sup>209</sup> See *Matter of J-S-*, 24 I. & N. Dec. 520 (A.G. 2008).



spouses of those persecuted under China's one-child policy, it does not adequately address asylum claims brought by unaccompanied children of those persecuted under the policy. The Australian High Court has offered useful guidance in assessing such claims, and U.S. immigration authorities should take note of the *Chen Shi Hai* decision in future asylum cases. Although it is important to assess whether children are persecuted due to the imputed political opinion of their parents, it is also necessary to assess whether such children are persecuted due to their membership in a social group of children born in violation of the one-child policy. Assessing asylum claims in this way gives the most careful consideration to the protection of a child who may be in need of international protection. Within that assessment, however, U.S. courts and immigration authorities should be careful to define the parameters of a social group of children persecuted under the one-child policy.