

NOTE

A CIRCUIT SPLIT ON JUDICIAL DEFERENCE: INTERPRETING ASYLUM CLAIMS BY FIANCÉS AND BOYFRIENDS OF VICTIMS OF CHINA'S COERCIVE FAMILY PLANNING POLICIES

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INTRODUCTION

Determining who qualifies for asylum under United States law is a complex task based in large part on prevailing international norms about fundamental rights.¹ The grant of asylum to an individual serves as recognition of profound harm—that it would be unreasonable and cruel to return a refugee facing persecution to his or her home country.² Under U.S. law, however, asylum eligibility requires not a violation of international norms, but that an applicant qualifies as a “refugee.”³ This “refugee” definition, as much as our consciences may demand otherwise, cannot incorporate each and every victim of maltreatment or persecution. Rather, it demonstrates that our national immigration policy has limits, and is constrained by finite governmental resources, issues of proof, and differences

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¹ See Robert D. Sloane, *An Offer of Firm Resettlement*, 36 GEO. WASH. INT'L L. REV. 47, 68–69 (2004) (depicting asylum as a “profound moral judgment” made by the international community designed to protect “certain shared values”).

² See Frederick B. Baer, Recent Development, *International Refugees as Political Weapons*, 37 HARV. INT'L L.J. 243, 247 (1996) (defining the principle of non-refoulement, which “prohibits states from expelling refugees, if the refugees would be forced to return to a country where their life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion” (quoting Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 137)).

³ See *infra* notes 39–40 and accompanying text.

over what practices actually constitute persecution.⁴ Drawing the line between applicants who do and do not qualify under U.S. law is a difficult, case-by-case task.⁵

One example illustrating the complexity of this task relates to the practice of forced abortion and sterilization. With direct victims, the decision may seem easy. Most agree that forcible abortion and sterilization comprise egregious human rights violations.⁶ In fact, in 1996 Congress codified this prevailing norm by enacting legislation aimed at providing specific relief for such victims, particularly for those who suffered under the coercive family planning policies of the People's Republic of China ("PRC").⁷ This legislation—the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA")—provides per se asylum eligibility for direct victims of forced abortions or sterilizations.⁸

A more complicated question is whether per se eligibility should be extended to husbands or boyfriends seeking asylum based *solely* on their wives' or girlfriends' forced abortion or sterilization. This Note discusses the split among the Second,⁹ Third,¹⁰ and Ninth¹¹ Circuit Courts of Appeals, and addresses questions that stem from this judicial disagreement. The first substantive issue is whether the derivative harm caused by a forcible abortion or sterilization meets the "persecution" requirement as set forth by the IIRIRA.¹² Unquestionably—from a moral perspective—abortion or sterilization harms a husband's

⁴ See *Iao v. Gonzales*, 400 F.3d 530, 535 (7th Cir. 2005) (noting "caseload pressures" and "resource constraints" in asylum petitions); see also Heather A. Leary, *The Nature of Global Commitments and Obligations: Limits on State Sovereignty in the Area of Asylum*, 5 IND. J. GLOBAL LEGAL STUD. 297, 298 (1997) (stating that "it is important to analyze the way in which we *should* limit the number of persons who can claim refugee or asylum status.").

⁵ See H.R. REP. NO. 104-469, pt. 1, at 174 (1996) ("Determining the credibility of the applicant and whether the actual or threatened harm rises to the level of persecution is a difficult and complex task . . .").

⁶ See Stanford M. Lin, Recent Development, *China's One-Couple, One-Child Family Planning Policy as Grounds for Granting Asylum—Xin-Chang Zhang v. Slattery*, No. 94 Civ. 2119 (S.D.N.Y. Aug. 5, 1994), 36 HARV. INT'L L. J. 231, 242 (1995) ("Forced sterilization and abortion no doubt contravene universally recognized fundamental rights . . .").

⁷ See *infra* Part I.

⁸ See *infra* notes 43–45 and accompanying text.

⁹ See *Lin v. U.S. Dep't of Justice*, 416 F.3d 184 (2d Cir. 2005).

¹⁰ See *Chen v. Ashcroft*, 381 F.3d 221 (3d Cir. 2004).

¹¹ See *Ma v. Ashcroft*, 361 F.3d 553 (9th Cir. 2004).

¹² See *infra* notes 43–46 and accompanying text.

or boyfriend's fundamental right to procreate;¹³ in the case of forcible sterilization, he loses his ability to have children with his partner, and in the case of forcible abortion, he loses his own child. Yet courts disagree over the Board of Immigration Appeals' ("BIA") determination that legally married husbands of forcibly sterilized spouses are deemed to be persecuted, but husbands married in traditional ceremonies not recognized by the state, as well as boyfriends and fiancés, are not also eligible for such imputed persecution. The second, and perhaps more important, question concerns the level of deference a court must show to decisions of the BIA. Is the issue of asylum eligibility within the exclusive purview of the BIA—which has primary authority to determine asylum eligibility—or can a federal court that hears an appeal overrule a BIA interpretation?

This Note addresses these two questions—(1) whether the forcible sterilization of a wife or girlfriend is an act of persecution against a husband, fiancé, or boyfriend, and (2) what level of deference must a federal appeals court show to a determination by the BIA—and argues that the Third and Ninth Circuits, while coming to contrary determinations in the cases at issue, misapplied the required principle of judicial deference to administrative agencies, and consequently intruded upon the BIA's authority. The Third Circuit deferred to the BIA, implicitly ratifying a BIA interpretation that the court should have instead recognized as unsound.¹⁴ In contrast, the Ninth Circuit identified the BIA's weak reasoning, but inappropriately set forth its own interpretation and construction of the statute.¹⁵ This Note endorses the approach applied by the Second Circuit, namely, its recognition that the BIA's statutory construction was unsound but that remand, rather than adjudication or analysis of the issue, was appropriate.¹⁶ This Note concludes by briefly

¹³ See *Yuan v. U.S. Dep't of Justice*, 416 F.3d 192, 197 (2d Cir. 2005) (noting that the right to have offspring is shared by a married couple, and if denied to one, it is denied to both).

¹⁴ *Chen*, 381 F.3d at 224 (writing that "[h]ere, there is no dispute that the BIA should be accorded Chevron deference" (internal quotation marks omitted)).

¹⁵ *Ma*, 361 F.3d at 558–59 ("The BIA's refusal to grant asylum . . . leads to absurd and wholly unacceptable results.").

¹⁶ In the subsequent case, *Ci Pan v. United States Attorney General*, 449 F.3d 408 (2d Cir. 2006) (per curiam), the court again remanded to the BIA to allow the agency to answer the same question posed by its reasoning in *In re C-Y-Z*, 21 I. & N. Dec. 915 (BIA 1997). See *Ci Pan*, 449 F.3d at 409.

discussing similar unresolved issues that have arisen under the language of the IIRIRA, suggesting that the Second Circuit's approach is a useful means of encouraging the BIA to promulgate meaningful interpretations of the statute without intruding upon its authority to decide such questions in the first instance.

Part I provides a brief overview of China's coercive family planning policies and sets out the legislative response authorizing asylum eligibility for qualified victims of those policies. Part II summarizes the principles of administrative deference in connection with immigration and asylum law. Part III begins by explaining the facts and holding of *In re C-Y-Z*,¹⁷ the precedent BIA case interpreting the language of the IIRIRA as granting per se asylum eligibility to legally married husbands of victims of forced abortion or sterilization. Part III discusses the facts and holdings of the three circuit court cases examining the BIA's subsequent determinations that the grant of per se eligibility does not extend to unrecognized husbands, fiancés, or boyfriends. Part IV examines why both the Third and Ninth Circuits—while coming to opposite conclusions on the substantive issue—failed to accord the BIA's determination proper deference, and thus encroached on the BIA's authority to provide a reasoned analysis for its statutory construction. This Note then advocates the approach and analysis employed by the Second Circuit. Finally, Part V highlights the importance of these decisions in the larger context of adjudicating issues of statutory construction under the IIRIRA.

I. CHINA'S COERCIVE FAMILY PLANNING POLICIES, AND THE U.S. RESPONSE

In 1979, responding to a population boom during the previous two decades, the People's Republic of China initiated a family planning program aimed at limiting its population growth.¹⁸ The core component of this policy—still in effect today—forbids couples from having more than one child under threat of various sanctions,¹⁹ including fines, the withholding of

¹⁷ 21 I. & N. Dec. 915 (BIA 1997).

¹⁸ 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, 623 (1996).

¹⁹ For a detailed discussion of the implementation and consequences of the PRC

social services, demotion, and loss of employment.²⁰ Violators also risk physical harassment by local authorities,²¹ to whom the PRC delegates the responsibility of enforcing its family-planning policies. While the central government “officially” condemns the use of coercive methods, the decentralized structure of enforcement has resulted in the widely publicized punishment of forcible abortion and sterilization.²² The frequency of these procedures has waned since the 1980s and varies by province, but generally entails women being forcibly removed from their homes into hospitals in order to undergo abortions.²³ Alternatively, a woman may be allowed to carry the baby to term, after which either she or her husband/boyfriend is sterilized without consent.²⁴ While a more in-depth examination of the PRC’s policies is beyond the scope of this Note, debate remains as to whether its efforts toward reform have actually reduced the coercion, forced abortions, and infanticide long associated with such policies.²⁵

policies, see Gerrie Zhang, *U.S. Asylum Policy and Population Control in the People’s Republic of China*, 18 HOUS. J. INT’L L. 557, 560–74 (1996) (discussing Chinese history, demographics, and government practices); see also Gomez, *supra* note 18, at 623–24 (addressing enforcement of the one-couple, one-child policy).

²⁰ See Gomez, *supra* note 18, at 623. Local officials are primarily responsible for implementing the PRC’s family planning program, and the methods of ensuring compliance vary by province. See Zhang, *supra* note 19, at 569.

²¹ See Gomez, *supra* note 18, at 624 (“[M]any local officials engage in physical coercion, such as forcing women to have abortions, and forcing men and women to be sterilized. Some of these abortions and sterilizations begin with the subjects being dragged from their homes in the middle of the night.”) (internal citations omitted).

²² See Zhang, *supra* note 19, at 569–70 (noting reports of forced procedures occurring in “remote, rural areas”); see also Leary, *supra* note 4, at 304 (providing a cursory description of China’s policies).

²³ See, e.g., *Lin v. Ashcroft*, 385 F.3d 748, 749 (7th Cir. 2004). *But cf.* Cleo J. Kung, *Supporting the Snakeheads: Human Smuggling from China and the 1996 Amendment to the U.S. Statutory Definition of “Refugee,”* 90 J. CRIM. L. & CRIMINOLOGY 1271, 1297–98 (2000) (arguing that forced abortions and sterilizations are the exception rather than the norm, and that such procedures are perpetrated by corrupt local officials rather than attributable to the PRC’s national policy).

²⁴ See *China: Human Rights Violations and Coercion in One-Child Policy Enforcement: Hearing Before the House Comm. on Int’l Relations*, 108th Cong. (2004) (statement of Arthur E. Dewey, Assistant Sec’y, Bureau of Population, Refugees & Migration, U.S. Dep’t of State), available at http://wwwc.house.gov/international_relations/108/dew121404.htm.

²⁵ See Jim Abrams, *Abuse of One-Child Program Decried*, TORONTO STAR, Dec. 19, 2004 (referring to State Department officials’ testimony in concluding that “coercion, forced abortions, infanticide and perilously imbalanced boy-girl ratios” remain).

The PRC's "coercive family planning policy"²⁶ has stirred a significant amount of outrage in the United States,²⁷ giving rise to a strong political will toward providing asylum eligibility for its victims.²⁸ A principal catalyst for this effort was the 1989 BIA decision in *Matter of Chang*.²⁹ *Chang* held that a coercive family planning policy that includes forced sterilization does not constitute "persecution on account of race, religion, nationality, membership in a particular social group, or political opinion,"³⁰ and consequently, that a victim of such a procedure does not meet the "refugee" definition. Later that year, Congress—unhappy with the result in *Chang*—proposed unsuccessful legislation seeking to overturn that decision.³¹ The push continued in 1990, when President Bush issued an Executive Order directing the Secretary of State and Attorney General to provide "enhanced consideration" under the immigration laws for those individuals expressing fear of persecution related to their home country's policy of forced abortion or sterilization.³² Nevertheless, the BIA continued to adhere to the precedent set by *Chang*.

In 1996, Congress passed section 101(a)(42)(B) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("1996 Amendment"),³³ finally giving legislative bite to practices it deemed among the most extreme and egregious human rights abuses in the world.³⁴ The IIRIRA amended the Immigration and Nationality Act ("INA") of 1980 ("1980 Act"), the core legislation governing asylum eligibility.³⁵ The particular

²⁶ U.S. courts generally refer to the PRC's population program as a "coercive family planning" policy. *See, e.g.*, *Ma v. Ashcroft*, 361 F.3d 553, 555 (9th Cir. 2004).

²⁷ *See Zhang, supra* note 19, at 572 (describing U.S. reaction).

²⁸ *See id.* at 578 (quoting the Attorney General's announcement in 1988 directing those adjudicating asylum claims to give "careful consideration" to applicants fearing persecution as a result of the PRC's population control policies); *see also* Emergency Chinese Immigration Relief Act of 1989, H.R. 2712, 101st Cong. § 3(a) (1989) (implementing the Attorney General's policy).

²⁹ 20 I. & N. Dec. 38 (BIA 1989).

³⁰ *See id.* at 47 (quoting the Immigration and Nationality Act § 101(a)(42)(B), 8 U.S.C. § 1101(a)(42)(B) (2000) (internal quotation marks omitted)).

³¹ President Bush supported this legislation but vetoed it because of concerns with other portions of the bill. *See Lin, supra* note 6, at 237.

³² *See* Exec. Order No. 12,711, 55 Fed. Reg. 13,897 (Apr. 13, 1990).

³³ 8 U.S.C. § 1101(a)(42)(B).

³⁴ *See* H.R. REP. NO. 104-469, pt. 1, at 174 (1996) (depicting abuses as "undeniable and grotesque").

³⁵ 8 U.S.C. §§ 1101–1537; *see, e.g.*, *Gonzales v. Thomas*, 126 S.Ct. 1613, 1613

provision of the 1996 Amendment covering victims of forced abortion and sterilization provides:

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.³⁶

The 1996 Amendment expressly overruled the BIA's decision in *Matter of Chang*,³⁷ and clarified the requirements faced by a victim of a forced abortion or sterilization when applying for asylum.³⁸ Generally, all aliens seeking asylum must prove that they qualify as a "refugee" under codified sections 1101(a)(42)(A) and (B) of the 1980 Act.³⁹ An applicant meets the refugee standard by proving that: (1) he or she has a fear of persecution; (2) the fear is well-founded; (3) he or she suffered persecution on

(2006) (discussing the circumstances under which the INA permits the Attorney General to grant asylum).

³⁶ 8 U.S.C. § 1101(a)(42)(B).

³⁷ Paula Abrams, *Population Politics: Reproductive Rights and U.S. Asylum Policy*, 14 GEO. IMMIGR. L.J. 881, 885 (2000).

³⁸ The final grant of asylum is at the discretion of the Attorney General. See James M. Wines, Note, *Guo Chun Di v. Carroll: The Refugee Status of Chinese Nationals Fleeing Persecution Resulting from China's Coercive Population Control Measures*, 20 N.C. J. INT'L L. & COM. REG. 685, 699 (1995) (quoting statutory text).

³⁹ 8 U.S.C. § 1101(a)(42)(A)–(B). In relevant part, the term refugee is defined as follows:

The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation . . . may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Id.

account of race, religion, nationality, membership in a particular social group, or political opinion; and (4) he or she is unwilling to return to the country of nationality because of this well-founded fear of persecution.⁴⁰ The 1996 Amendment relieved forced abortion or sterilization victims of the burden of proving element (3)—namely, persecution on account of one of the established statutory grounds. Forced abortion or sterilization is now classified as persecution based on political opinion.⁴¹

The 1996 Amendment is separable into four discrete conditions under which asylum applicants may allege past persecution: “(a) the applicant has been forced to abort a pregnancy, (b) the applicant has undergone involuntary sterilization, (c) the applicant has been persecuted for failing or refusing to undergo such a procedure, or (d) the applicant has been persecuted for other resistance to a coercive population control program.”⁴²

Before examining the circuit court asylum claims made by unrecognized husbands, boyfriends, and fiancés, it is first useful to distinguish among the four conditions under which an applicant may allege past persecution. The first two conditions of the 1996 Amendment grant automatic persecution status to individuals without assessing the severity of the harm suffered.⁴³ In the hearings and reports leading up to the Amendment’s passage, it is clear that Congress recognized the extreme and gruesome nature of a forced abortion or sterilization⁴⁴ and thus eliminated the necessary showing of persecution for these victims. Yet the remaining two conditions—relating to refusals to undergo procedures or resistance to coercive family planning

⁴⁰ Wines, *supra* note 38, at 699.

⁴¹ See 8 U.S.C. § 1101(a)(42)(B).

⁴² Lin v. Ashcroft, 385 F.3d 748, 752 (7th Cir. 2004).

⁴³ See 8 U.S.C. § 1101(a)(42)(B).

⁴⁴ See H.R. REP. NO. 104-469, pt. 1, at 174 (1996) (describing coercive abortion or sterilization as “undeniable and grotesque violations of fundamental human rights”); Zhao v. U.S. Dep’t of Justice, 265 F.3d 83, 92 (2d Cir. 2001) (citing *Coercive Population Control in China: Hearings Before the Subcomm. on Int’l Operations & Human Rights of the Comm. on Int’l Relations*, 104th Cong. 30 (1995) (statement of Rep. Smith, Chair, House Subcomm. on Int’l Operations & Human Rights)) (stating that “forced abortion and forced sterilization [are] particularly gruesome violations of fundamental human rights”) (internal quotation marks omitted); see also *In re Y-T-L-*, 23 I. & N. Dec. 601, 607 (BIA 2003) (pointing out that “[i]n the long course of administrative rulings, Presidential directives, proposed regulations, and congressional action . . . , the profound and permanent nature of [coerced sterilization] has rarely, if ever, been called into question”).

programs—require a showing of persecution independent of the act of resistance.⁴⁵ This means that an applicant must show that such refusal or resistance rises to the level of persecution.⁴⁶ The distinction is important, signifying that per se persecution status exists only for *direct* victims of forced abortion or sterilizations. While it is clear that Congress intended the statute to cover victims other than those directly experiencing forced abortion or sterilization, a grant to indirect victims—such as boyfriends or fiancés—must be justified under some other form of analysis.

II. ADMINISTRATIVE DEFERENCE AND THE BIA REGULATIONS

A. *Chevron Deference and its Progeny*

In order to properly understand the split among the Second, Third, and Ninth Circuits as to whether a boyfriend or fiancé qualifies for asylum, it is necessary to examine the appropriate level of deference owed by courts to administrative agency decisions. In general, as set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,⁴⁷ when reviewing an administrative agency's construction of a particular statute, a court must apply the principle of deference.⁴⁸ *Chevron* deference involves a two-part determination.⁴⁹ First, a court asks whether the language of the statute addresses the specific issue in question.⁵⁰ If so, the particular language of the statute controls the determination of that issue.⁵¹ If the statutory language does not speak to the issue in question, then the second part of the standard requires that a court limit its examination only to the reasonableness of the administrative agency's statutory interpretation.⁵² Key to this analysis is the precept that a court may

⁴⁵ See 8 U.S.C. § 1101(a)(42)(B).

⁴⁶ *Id.*

⁴⁷ 467 U.S. 837 (1984).

⁴⁸ See *id.* at 844 (describing the high level of deference afforded administrative decisions).

⁴⁹ See *id.* at 842; John W. Guendelsberger, *Judicial Deference to Agency Decisions in Removal Proceedings in Light of INS v. Ventura*, 18 GEO. IMMIGR. L.J. 605, 618 (2004) (noting the two-step process).

⁵⁰ See *Chevron*, 467 U.S. at 842–43.

⁵¹ *Id.*

⁵² See *id.* at 843 (“[T]he question for the court is whether the agency’s answer is based on a permissible construction of the statute.”); Guendelsberger, *supra* note 49, at 618 (“[T]he court is limited to assessing whether the agency’s interpretation of the statute is reasonable.”); see also *Chen v. Ashcroft*, 381 F.3d 221, 223–24 (3d Cir.

not impose its own construction of the statute in place of that of an administrative agency.⁵³

The principle of *Chevron* deference has been repeatedly affirmed and refined since its declaration in 1984, especially as it relates to immigration law.⁵⁴ In *Immigration and Naturalization Service v. Abudu*,⁵⁵ the Supreme Court noted that judicial deference to a decision by the Executive Branch is particularly appropriate in the immigration context, where officials “exercise especially sensitive political functions that implicate questions of foreign relations.”⁵⁶ In *Immigration and Naturalization Service v. Aguirre-Aguirre*,⁵⁷ the Court affirmed *Chevron*’s two-step process, stating that the Attorney General has “vested the BIA with power to exercise the ‘discretion and authority conferred upon the Attorney General by law’ in the course of ‘considering and determining cases before it.’”⁵⁸ Consequently, BIA decisions should be accorded significant deference under *Chevron*, as that agency “gives ambiguous statutory terms ‘concrete meaning through a process of case-by-case adjudication.’”⁵⁹ In *United States v. Mead*,⁶⁰ the Court narrowed *Chevron*’s applicability by creating two additional requirements. First, Congress must have delegated general authority to the administrative agency to formulate rules that carry “the force of law.”⁶¹ Second, the agency interpretation requiring deference “was promulgated in the exercise of that authority.”⁶² So long as the *Mead* requirements are met, however, the Court has continued to stress the importance of according significant deference to

2004) (illustrating the applicability of *Chevron* deference to the question of whether fiancés or boyfriends are eligible under the language of the 1996 Amendment).

⁵³ See *Chevron*, 467 U.S. at 843; *INS v. Wang*, 450 U.S. 139, 144 (1981) (stating, in the context of immigration law, that the INA “commits” the definition of its language “in the first instance to the Attorney General and his delegates, and their construction and application of this standard should not be overturned by a reviewing court simply because it may prefer another interpretation of the statute”).

⁵⁴ See Guendelsberger, *supra* note 49, at 618–19 (noting the Supreme Court’s treatment of federal court deference to BIA decisions in two other cases).

⁵⁵ 485 U.S. 94 (1988).

⁵⁶ *Id.* at 110.

⁵⁷ 526 U.S. 415 (1999).

⁵⁸ *Id.* at 425 (quoting 8 C.F.R. § 3.1(d)(1) (1998)).

⁵⁹ *Id.* (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448–49 (1987)).

⁶⁰ 533 U.S. 218 (2001).

⁶¹ *Id.* at 226–27.

⁶² *Id.*

administrative decisions.⁶³ Especially where the agency has not yet ruled on the issue in question, a court of appeals should remand cases to the agency for decisions on matters “that statutes place primarily in agency hands.”⁶⁴ Remand is appropriate because an administrative agency brings its specialized expertise to bear upon the particular subject matter at issue, thus providing an “informed discussion and analysis” for a later court to review when determining the existence of an error.⁶⁵

B. *The Streamlining Regulations of the Board of Immigration Appeals*

In examining the reasoning behind the circuit courts’ inconsistent holdings, it is also helpful to understand both the BIA’s recently streamlined regulations and the stricter standards imposed by the IIRIRA as a whole. Between 1984 and 2000, the caseload of the BIA grew from 3,000 to nearly 30,000 appeals.⁶⁶ Additional board members were added, and streamlining regulations were adopted to cope with the BIA’s exploding caseload.⁶⁷ These provisions, promulgated in 1999 and 2002, authorize the BIA to issue single member decisions in place of panel decisions, and to affirm a significant number of additional cases without opinion.⁶⁸ Furthermore, the IIRIRA stripped the federal courts of jurisdiction over various types of proceedings,⁶⁹

⁶³ See Guendelsberger, *supra* note 49, at 608 (describing how the Court in *Immigration and Naturalization Service v. Ventura*, 537 U.S. 12 (2002) (per curiam), relied on broad principles of administrative law to emphasize the importance of judicial deference).

⁶⁴ *Ventura*, 537 U.S. at 16; accord Guendelsberger, *supra* note 49, at 644 (“When the issue involves statutory interpretation within the domain of agency authority delegated by Congress, and the Board’s reasoning is insufficient for meaningful review, the court should remand for a reasoned agency decision on the legal point in question.”).

⁶⁵ *Ventura*, 537 U.S. at 17.

⁶⁶ Guendelsberger, *supra* note 49, at 612.

⁶⁷ *Id.* at 612–13.

⁶⁸ *Id.* at 607. Summary affirmances are authorized if: (1) the result below was correct, (2) any errors were harmless or immaterial, and (3) either the issue on appeal was clearly controlled by existing BIA or federal court precedent and did not implicate a novel factual situation, or the factual and legal questions raised on appeal were not substantial enough for issuance of a written opinion. See 8 C.F.R. § 1003.1(e)(4) (2006); see also Guendelsberger, *supra* note 49, at 613 (discussing the reforms introduced by the 2002 regulations).

⁶⁹ See Guendelsberger, *supra* note 49, at 616 (“[The limitation] prohibits court review of discretionary determinations in removal proceedings except for the

principally as to “discretionary decisions”.⁷⁰ With these restrictions in mind, however, a court can still review a case in which the BIA’s denial of asylum turns on its construction of provisions of the governing statute.⁷¹

Here, the BIA’s interpretation of the 1996 Amendment is at issue, and the courts agree that Congress did not speak precisely to the issue of whether husbands, boyfriends, or fiancés are eligible for asylum based on the direct victimization of their wives, girlfriends, or fiancées.⁷² Thus, the second step of *Chevron*—whether the BIA’s interpretation is reasonable—must be assessed. At the same time, in light of the subsequent Supreme Court rulings on deference toward administrative decisions, and given the above noted congressional limits on federal court jurisdiction, courts must proceed lightly, so as not to encroach on the BIA’s primary jurisdiction in this area of the law. Viewed in this context, it is clear that the Second Circuit adopted the most cautious and reasoned approach toward reviewing the BIA’s interpretation that only spouses in legally recognized marriages qualify for per se persecution status.⁷³

III. THE PRECEDENT *C-Y-Z*- DECISION, AND THE EMERGING CIRCUIT SPLIT

Before addressing the current circuit split as to a fiancé’s or boyfriend’s derivative asylum status, one must understand the BIA’s decision in *C-Y-Z*. *C-Y-Z* served as the basis for all three of the BIA decisions reviewed by the circuit courts.⁷⁴ After examining *C-Y-Z*, this Note presents the facts and holding of each of the circuit court decisions forming the split, and undertakes an analysis of each decision’s reasoning.

exercise of discretion in granting asylum.”).

⁷⁰ See *Kalaw v. INS*, 133 F.3d 1147, 1150 (9th Cir. 1997) (noting a court’s limited ability to review discretionary decisions while still allowing review of non-discretionary statutory interpretations).

⁷¹ See *Ma v. Ashcroft*, 361 F.3d 553, 558 (9th Cir. 2004). The courts in *Chen* and *Lin* failed to even raise the issue, suggesting that they were not concerned about their jurisdiction to review the BIA’s interpretation of the 1996 Amendment.

⁷² See *Chen v. Ashcroft*, 381 F.3d 221, 223–24 (3d Cir. 2004) (finding that *Chevron* deference applies in light of the court’s implicit observation that Congress never spoke directly to the issue).

⁷³ See *infra* text accompanying notes 129–167.

⁷⁴ See *Lin v. U.S. Dep’t of Justice*, 416 F.3d 184, 187 (2d Cir. 2005); *Chen*, 381 F.3d at 227–29; *Ma*, 361 F.3d at 558–59.

A. *In re C-Y-Z-*

In re C-Y-Z- concerned an asylum applicant who was a citizen of China and who alleged persecution on account of his opposition to China's family planning policies.⁷⁵ After giving birth to the couple's first child, the applicant's wife underwent forced insertion of an intrauterine device ("IUD").⁷⁶ The applicant protested, and was arrested and detained for one day.⁷⁷ The IUD was removed, and a short time later the applicant's wife again became pregnant.⁷⁸ Local officials ordered her to undergo a forced abortion, but the woman went into hiding and eventually gave birth to her second child.⁷⁹ As punishment, the government threatened to destroy the applicant's home; he managed, however, to pay a fine instead.⁸⁰ The applicant's wife became pregnant yet a third time, and she again succeeded in avoiding detection until birth, at which time the authorities discovered the baby.⁸¹ In response, the woman was forcibly sterilized.⁸²

The BIA held that the applicant was eligible "for asylum by virtue of his wife's forced sterilization."⁸³ Its reasoning was very brief and seemed based solely on "the agreement of the parties that forced sterilization of one spouse on account of a ground protected under the Act is an act of persecution against the other spouse."⁸⁴ The BIA neither referenced the statutory language of the 1996 Amendment upon which its decision was based, nor provided an explicit rationale for adopting this view.⁸⁵

Board Member Rosenberg—one of the BIA's appellate panel members—filed a comparatively lengthy concurrence to the brief *C-Y-Z-* opinion.⁸⁶ Rosenberg agreed with the grant of asylum to

⁷⁵ *In re C-Y-Z-*, 21 I. & N. Dec. 915, 915–16 (BIA 1997).

⁷⁶ *Id.* at 916.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 918.

⁸⁴ *Id.* at 919.

⁸⁵ *See id.* at 919–20; *see also* *Lin v. U.S. Dep't of Justice*, 416 F.3d 184, 187 (2d Cir. 2005) (observing that the BIA did not "identify the specific statutory language pursuant to which it deemed spouses eligible for asylum under IIRIRA § 601(a)").

⁸⁶ *See C-Y-Z-*, 21 I. & N. Dec. at 920–27 (Board Member Rosenberg, concurring). An additional concurrence and two dissenting opinions were also filed; however, for brevity's sake, each separate analysis will not be reviewed.

the applicant, but provided a more reasoned explanation,⁸⁷ arguing that eligibility for asylum should be granted by imputing the wife's political opinion to her husband.⁸⁸ Notably, however, like the majority opinion, Rosenberg did not identify which statutory language of the 1996 Amendment supported such a conclusion.⁸⁹

B. Ma v. Ashcroft

The central issue in *Ma* was the applicant's marital status, and the case demonstrates how the BIA subsequently used *C-Y-Z-* to deny, rather than to grant, asylum to unmarried partners or to husbands married in traditional—but not state-recognized—marriages. In *Ma*, the Ninth Circuit reviewed the BIA's denial of an asylum claim by Ma, a husband alleging persecution based on his wife's forced abortion.⁹⁰ Ma's wife underwent the procedure upon coming out of hiding; she revealed herself only after the government took Ma's father into custody and threatened his life.⁹¹

Ma's marital status was at issue because his age prevented him from entering into a legally recognized marriage;⁹² instead, he had married his wife in a so-called "traditional" ceremony.⁹³ The BIA, however, refused to extend the *C-Y-Z-* spousal eligibility rule to a husband whose marriage was not officially recognized by the state.⁹⁴ The BIA stated that proof of a legal marriage was required for an applicant to qualify as "the spouse of the person who was allegedly forced to have an abortion."⁹⁵

⁸⁷ See *id.* at 920 ("My agreement is based not only on the specific language of the statute as amended and the positions of the parties. It is also based on the relevant precedent decisions of this Board, the Federal courts, and the Supreme Court, which have construed the elements contained in the refugee definition and interpreted the proper exercise of discretion in asylum cases.").

⁸⁸ See *id.* at 926–27. Rosenberg argued that the statute was intended to operate within the normal realm of asylum law, and she proceeded with her assessment in accordance with these principles. See *id.*

⁸⁹ See *id.*

⁹⁰ See *Ma v. Ashcroft*, 361 F.3d 553, 554–56 (9th Cir. 2004).

⁹¹ *Id.* at 555–56.

⁹² *Id.* at 555.

⁹³ *Id.*

⁹⁴ See *id.* at 554, 558.

⁹⁵ *Id.* at 557 (internal quotation marks omitted).

Moreover, the BIA found no link between Ma's inability to legally marry and China's coercive family planning policy.⁹⁶

While the BIA viewed Ma's marital status as dispositive, the Ninth Circuit disagreed.⁹⁷ The court reversed the BIA's decision and remanded on the grounds that the agency's distinction between legally and traditionally married couples contravened Congress' intent for enacting the 1996 Amendment, and led to "absurd and wholly unacceptable results."⁹⁸ The court thus declined to afford *Chevron* deference to such an interpretation.⁹⁹ In noting that prior courts consistently applied the Amendment's protection to husbands, it held that the legislative intent of the 1996 Amendment was to provide relief to couples—without reference to marital status—who have been persecuted on account of an "unauthorized" pregnancy.¹⁰⁰ With such a purpose—and because China's ban on "underage" marriage formed an integral part of its coercive family planning policy¹⁰¹—the court found that husbands married in traditional ceremonies deserve as much protection as those officially married in the eyes of the law.¹⁰² It reasoned that the BIA's relief-restricting rule would encourage the breakup of the family, a result at odds with immigration policy as a whole.¹⁰³ Thus, because the Ninth Circuit determined that the BIA's analysis was premised upon groundless distinctions, it did not find *Chevron* deference applicable.¹⁰⁴

C. *Chen v. Ashcroft*

C-Y-Z- also supplied the basis for the BIA's denial of asylum to an applicant as reviewed by the Third Circuit in *Chen v. Ashcroft*.¹⁰⁵ In *Chen*, the applicant alleged that he was eligible

⁹⁶ *Id.*

⁹⁷ *See id.* at 558–59.

⁹⁸ *Id.* at 559.

⁹⁹ *See id.* at 558–59 (explaining the usual level of deference afforded BIA decisions by the courts, and why this decision did not warrant such deference).

¹⁰⁰ *Id.* at 559 (citing H.R. REP. NO. 104-469, pt. 1, at 174 (1996)) (internal quotation marks omitted).

¹⁰¹ *Id.* at 559–60 (citing various sources for the notion that the policy against early marriages is predicated upon preventing and terminating young pregnancies and births).

¹⁰² *See id.* at 561.

¹⁰³ *Id.* (noting the separation of husband and wife that would result).

¹⁰⁴ *Id.* at 558–59.

¹⁰⁵ 381 F.3d 221, 235 (3d Cir. 2004). Notably, the decision was authored by

for asylum based on his fiancée's forced abortion by Chinese officials.¹⁰⁶ The issue of marital status was again central. Chen reasoned that the *C-Y-Z* spousal eligibility rule should extend to him because—although he and his fiancée never married—they *would* have married had Chinese law allowed marriages by citizens his age.¹⁰⁷ Specifically, Chen argued that the BIA's interpretation of the 1996 Amendment—that a husband but not a fiancé of a victim is per se eligible for asylum—is “arbitrary, capricious, and irrational.”¹⁰⁸

The immigration judge (“IJ”) held that Chen qualified for asylum because the facts of his case fell “by analogy” within the *C-Y-Z* principle of extending eligibility to a spouse.¹⁰⁹ The BIA reversed, however, on the grounds that the agency did not extend *C-Y-Z* in prior decisions to the unmarried partners of forced abortion victims.¹¹⁰ The Third Circuit upheld this decision, thus adopting a view contrary to that of the Ninth Circuit in *Ma*.¹¹¹

In *Chen*, however, the Third Circuit, in applying step two of *Chevron* deference—whether the agency's construction of the statute was reasonable—limited its review to the distinction drawn by the BIA between married and unmarried couples.¹¹² The court declined to assess whether the underlying *C-Y-Z* interpretation of the 1996 Amendment was, in fact, permissible.¹¹³ Specifically, the court held that the BIA's decision not to extend *C-Y-Z* was reasonable in light of the agency's “crushing caseload[s],”¹¹⁴ its need to avoid problems of proof,¹¹⁵

recently appointed Supreme Court Justice (then Judge) Samuel Alito.

¹⁰⁶ *Id.* at 222.

¹⁰⁷ *Id.* At the time in question, Chen was nineteen, and his fiancée was eighteen. *Id.* at 223.

¹⁰⁸ *Id.* at 224.

¹⁰⁹ *Id.* at 223.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 222 (“[T]he BIA's interpretation, which contributes to efficient administration and avoids difficult and problematic factual inquiries, is reasonable.”). The Fifth Circuit similarly upheld the BIA's determination that the spousal rule did not extend to fiancés, adopting, in its entirety, the reasoning of the Third Circuit in *Chen*. See *Zhang v. Ashcroft*, 395 F.3d 531, 532 (5th Cir. 2004).

¹¹² *Chen*, 381 F.3d at 227.

¹¹³ *Id.* (“[I]f *C-Y-Z*'s interpretation is permissible (and we assume for the sake of argument that it is), the distinction that the BIA has drawn between married and unmarried couples satisfies step two of *Chevron*.”).

¹¹⁴ *Id.* at 228 (quoting *Dia v. Ashcroft*, 353 F.3d 228, 235 (3d Cir. 2003)).

¹¹⁵ *Id.* (noting the difficulty implicit in proving paternity when a male applicant claims to have fathered an illegitimate child who was forcibly aborted).

and the 1,000-person-per-year cap imposed on asylum grants under the language of the 1996 Amendment.¹¹⁶ The court ultimately determined that *Chevron* deference was appropriate because a bright-line marriage rule—used by courts in other areas of the law—could not possibly be considered arbitrary, capricious, and irrational.¹¹⁷ The Third Circuit further held that the rule was reasonable despite excluding those who tried to procure a legal marriage yet who were prevented from doing so because of China's age requirements.¹¹⁸

D. *Lin v. United States Department of Justice*

The Second Circuit in *Lin* split the difference between the contrary approaches of *Ma* and *Chen* in assessing fiancé/boyfriend eligibility for asylum. The court reviewed the denials of asylum of three applicants: two boyfriends of direct victims of coercive family planning policies, and one fiancé.¹¹⁹ The immigration judges in all three cases denied asylum on the grounds that the BIA did not extend its *C-Y-Z* interpretation to fiancés or boyfriends of direct victims.¹²⁰ The BIA affirmed without opinion in each of the three cases.¹²¹

The Second Circuit first held that an immigration judge's statutory construction—like that affirmed here by the BIA—was not entitled to deference under the *Chevron* principle.¹²² As a

¹¹⁶ *Cf. id.* at 229 (emphasizing the limited number of spots permitted by Congress for asylum claims).

¹¹⁷ *Id.* at 227 n.6.

¹¹⁸ *Id.* at 229–31. The court found that every country has the right to regulate the age at which couples can legally marry, and that China's age limit could not be deemed to be unduly burdensome. *Id.* at 230.

¹¹⁹ *Lin v. U.S. Dep't of Justice*, 416 F.3d 184, 188 (2d Cir. 2005).

¹²⁰ *Id.* at 188–89. In the first case, petitioner Lin claimed asylum eligibility based on his girlfriend's forced abortion. *Id.* at 188. The IJ denied Lin's application on the ground that, based on the 1,000-person-per-year cap on asylum grants under the language of the 1996 Amendment, a grant to an unmarried partner may “open[] the immigration floodgates to non-spouses . . . [and] jeopardize the ability of those individuals more directly harmed . . . to secure immigration relief.” *Id.* In the second case, petitioner Zou also claimed eligibility based on his girlfriend's forced abortion. *Id.* The judge's analysis was merely that there was “absolutely no way” that the language of the 1996 Amendment or existing case law applied to Zou's claim. *Id.* (internal quotation marks omitted). In the third case, petitioner Dong sought asylum in connection with his fiancée's two forced abortions, and a threat toward him of forcible sterilization. *Id.* at 188–89. The IJ denied eligibility based on the BIA's refusal to extend such status to unmarried partners or fiancés. *Id.*

¹²¹ *Id.* at 189.

¹²² *Id.* at 187.

result, it was unable to review such decisions, remanding the case back to the BIA for a more reasoned explanation of why spouses, but not fiancés and boyfriends, are per se eligible for asylum status.¹²³ Returning to the issue of review, the court found *Chevron* deference inapplicable in situations where opinions of immigration judges were summarily affirmed, often without opinion, by the BIA.¹²⁴ Immigration judges, the court reasoned, lack the “juridical power” to issue binding decisions.¹²⁵

As to the substantive rationale for the bright-line marriage rule, the Second Circuit found it impossible to conduct a meaningful analysis of the BIA’s interpretation of the language of the 1996 Amendment.¹²⁶ Unlike the Third Circuit in *Chen*, the court was unable to separate the reasoning of *C-Y-Z-*, that spouses are per se eligible, from that of the BIA’s subsequent determination that fiancés and boyfriends must be denied eligibility. The Second Circuit held that, because the BIA never explained its rationale for spousal eligibility under the 1996 Amendment,¹²⁷ and because the *C-Y-Z-* decision provides at least a partial basis for denying eligibility to fiancés and boyfriends, remand to the BIA for additional explanation was required.¹²⁸

IV. WHY *CHEN* AND *MA* ERRED, BUT *LIN* DREW A PERFECT BALANCE

A. *Chen’s Error*

At first glance, the Third Circuit’s approval in *Chen* of the BIA’s bright-line marriage rule appeals to one’s notion of common sense. After all, as the court pointed out, there are many other areas of the law which use marital status as a proxy for dealing

¹²³ *Id.*

¹²⁴ *Id.* at 189–90.

¹²⁵ *Id.* at 190. The court also held that “a summarily affirmed IJ decision . . . cannot be construed as a ‘rule’ promulgated by the BIA on behalf of the Attorney General,” due to the fact that when the BIA summarily affirms, it approves only “the result reached . . . [and] it does not necessarily imply approval of all of the [decision’s] reasoning.” *Id.*

¹²⁶ *Id.* at 191 (“[B]ecause the BIA failed, in *C-Y-Z-*, to articulate a reasoned basis for making spouses eligible for asylum . . . IJs cannot possibly advance principled—let alone persuasive—reasons to distinguish between, on the one hand, the BIA’s decision to create spousal eligibility . . . and, on the other hand, the eligibility of boyfriends and fiancés under that same statutory provision.”).

¹²⁷ *Id.* at 192.

¹²⁸ *Id.* at 187.

with problems of proof and for adjudicating claims.¹²⁹ A closer look, however, reveals both substantive difficulties with the rule itself, as well as problems with the Third Circuit's method of review.

The substantive problem with the bright-line marriage rule—while admittedly more ambiguous than the problems posed by the Third Circuit's review of that rule—comes in two forms. First, a grant of per se eligibility to a legally married husband, but not to a fiancé or boyfriend, is incompatible with the concept of equal treatment of asylum applicants.¹³⁰ The resistance and trauma suffered by a fiancée or girlfriend could conceivably rise to a significantly higher level of persecution than that experienced by a legally married wife. Take a hypothetical situation, for example, where a husband receives imputed persecution based on his wife's single forced abortion, yet a fiancé remains ineligible despite his five-year relationship with a woman having suffered several forced abortions, who was ultimately abducted and forcibly sterilized. Similarly, a husband loyal to the PRC and supportive of its policies may nonetheless be imputed the persecution of his forcibly sterilized wife, while a boyfriend who vehemently opposes such practices will not.¹³¹ Both of these hypothetical situations, while extreme, demonstrate that the marital status rule can result in finding an applicant who has arguably suffered greater persecution—by way of imputed political opinion—ineligible for asylum, while finding an applicant who has suffered less, or no, persecution as per se eligible. This strays from the established process of adjudicating asylum claims, which, as stated above, inquires into the applicant's status as a refugee by examining whether the applicant was in fact persecuted.¹³² Moreover, there is a strong human rights argument for adjudicating claims by looking to the

¹²⁹ See *Chen v. Ashcroft*, 381 F.3d 221, 227 n.6 (3d Cir. 2004) (mentioning income tax, welfare benefits, property, inheritance, and testimonial privilege).

¹³⁰ See *In re Y-T-L-*, 23 I. & N. Dec. 601, 619 (BIA 2003) (Board Member, Pauley, dissenting) (positing that the BIA's holding in *C-Y-Z-* is "(at least arguably) at odds with . . . notions of equivalent treatment and analysis"); see also *Barroso v. Gonzales*, 429 F.3d 1195, 1207 (9th Cir. 2005) (affirming the approach taken in *Ma* and rejecting statutory constructions that lead to absurd results).

¹³¹ See *Y-T-L-*, 23 I. & N. Dec. at 619 (Board Member, Pauley, dissenting) (providing a similar example).

¹³² See *Wines*, *supra* note 38, at 699 (laying out the four-part test used to determine whether an alien may properly be classified as a "refugee").

severity of the harm, eschewing formalistic rules such as marital status.¹³³ Focusing on the severity of the harm, in addition, comports with the idea that Congress intended the 1996 Amendment to operate within the established context of asylum law, not to exist as a separate definitional provision.¹³⁴

A second substantive argument in opposition to the bright-line rule is that it conflicts with the congressional intent for enacting the 1996 Amendment. As the Ninth Circuit in *Ma* pointed out, Congress sought relief for “couples;” the legislative history makes no mention of marriage itself.¹³⁵ If one accepts that persecution as a result of forced abortion can be imputed to a legally married husband, why cannot the same level of persecution be imputed to a husband whose only distinction is that he has been married in a traditional ceremony which, on account of China’s family planning policies, is not legally recognized? Such a result is tantamount to a judgment that the family bond created by a traditional marriage does not rise to the level of that borne by a legally recognized marriage.¹³⁶ Moreover, this result could readily lead to the breakup of family units by allowing only one spouse asylum, forcing the other to remain in his home country.¹³⁷ Congress sought to protect “anyone whose ‘human rights’ are threatened by a coercive family planning policy,”¹³⁸ and intended claims to be adjudicated on a case-by-case basis, rather than by use of bright-line rules.¹³⁹ To be fair-minded, it must be noted that the Third Circuit’s analysis

¹³³ See Daniel J. Steinbock, *Interpreting the Refugee Definition*, 45 UCLA L. REV. 733, 779 (1998) (stating that a focus on human rights would “ensure that morally equivalent threats are treated alike”).

¹³⁴ See H.R. REP. NO. 104-469, pt. 1, at 174 (1996) (“[T]he burden of proof remains on the applicant . . . to establish . . . that he or she has been subject to persecution . . . or has a well-founded fear of such treatment.”).

¹³⁵ See *Ma v. Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004) (citing H.R. REP. NO. 104-469, pt. 1, at 174).

¹³⁶ Admittedly, this argument is stronger for a husband married in a traditional ceremony than for a boyfriend or fiancé who has not participated in a consummation ceremony.

¹³⁷ See *Ma*, 361 F.3d at 561.

¹³⁸ *Yuan v. U.S. Dep’t of Justice*, 416 F.3d 192, 197 (2d Cir. 2005) (citing *Zhao v. U.S. Dep’t of Justice*, 265 F.3d 83, 92 (2d Cir. 2001)).

¹³⁹ See H.R. REP. NO. 104-469, pt. 1, at 174 (“Determining . . . whether the actual or threatened harm rises to the level of persecution is a difficult and complex task, but no more so in the case of claims based on coercive family planning than in cases based on other factual situations. Asylum officers and immigration judges are capable of making such judgments.”).

included the 1,000-person-per-year cap on the number of applicants granted asylum under the language of the 1996 Amendment.¹⁴⁰ Yet while such a cap partially justifies using the bright-line marriage rule, the cap, as the Second Circuit pointed out,¹⁴¹ was lifted in 2005;¹⁴² as such, it cannot currently serve as a basis for upholding the marital distinction adopted by the BIA.¹⁴³

On balance, one must appreciate that the Third Circuit was restrained by its determination that *Chevron* deference applied. That is, its task was to gauge whether the bright-line marriage rule was arbitrary, capricious, and irrational.¹⁴⁴ Yet the court's exercise of review is itself seriously flawed. First, *Chen* granted *Chevron* deference to a BIA interpretation with no grounding in actual statutory language. *Chevron* deference is proper when an administrative agency promulgates a "permissible construction of the statute."¹⁴⁵ Here, however, no statutory language appears in the discussion of the rule's validity.¹⁴⁶ One must therefore

¹⁴⁰ See *Chen v. Ashcroft*, 381 F.3d 221, 225, 229, 232 (3d Cir. 2004).

¹⁴¹ *Lin v. U.S. Dep't of Justice*, 416 F.3d 184, 188 n.1 (2d Cir. 2005).

¹⁴² See REAL ID Act of 2005, Pub. L. No. 109-13, § 101(g), 119 Stat. 231, 305.

¹⁴³ See *Leary*, *supra* note 22, at 312–13 (arguing that the U.S. should stop adopting numerical limitations on specific groups of asylum seekers, positing that such caps violate our "affirmative commitment[s] to asylum seekers in pursuance of [our] treaty obligation[s]").

¹⁴⁴ See *Chen*, 381 F.3d at 227 n.6 (explaining that the court would not find the bright-line test here to be unreasonable, as "the marriage relation is used in so many areas of the law (income tax, welfare benefits, property, inheritance, testimonial privilege, etc.) that it would seem absurd to characterize reliance on marital status in *C-Y-Z* as arbitrary and capricious.").

¹⁴⁵ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

¹⁴⁶ See *Chen*, 381 F.3d at 227–31. The court states that the BIA separately determined that *Chen's* own experiences—that he suffered beatings and denial of a marriage license—did not rise to the level of persecution. *Id.* at 234–35. This is a much more appropriate basis for rejection of his claim, because it fits with the established process of adjudicating claims on a case-by-case basis, and specifically addresses the level of harm suffered by the applicant, evaluating whether that harm rises to the level of persecution. Moreover, reference to whether the applicant was persecuted is rooted in the statutory language of the 1996 Amendment, namely, that an applicant resisting coercive family planning policies has not automatically demonstrated persecution, but rather must show that he "has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program." Illegal Immigration Reform and Immigration Responsibility Act of 1996 § 601, 8 U.S.C. § 1101(a)(42)(B) (2000). The problem with the Third Circuit's reasoning remains, however, because a large portion of the opinion is devoted to upholding the marital-status rule. Despite this concern, the decision now stands as precedent for future courts.

question whether the statute itself, rather than some other principle, was actually “constructed.”¹⁴⁷ In general, a court must bear in mind that when evaluating an asylum claim, it should usually rely on the statutory definition set forth by the relevant statutory language.¹⁴⁸

The second flaw in the Third Circuit’s reasoning flows inescapably from the first. Rather than identifying the specific reasoning upon which the BIA interpretation was based, the court engaged in an undue amount of speculation and inference. For example, when discussing potential rationales for the bright-line marriage rule, the court used language such as “the BIA *might* reasonably have chosen to avoid,”¹⁴⁹ or “*we may say* that the BIA ‘logically could have concluded,’”¹⁵⁰ or “[*a/s we understand it, C-Y-Z- uses marital status as a rough way . . .*”¹⁵¹ Such wording suggests that the *Chen* court was unable to pinpoint the specific basis upon which the BIA distinguished between legally married and traditionally married husbands, boyfriends, and fiancés. This is problematic, because a court is “not at liberty to search the law and the record for reasoning to support the BIA’s decision.”¹⁵² The concept of judicial deference entails recognition that the BIA has primary authority to interpret immigration laws.¹⁵³ Thus, the court should have

¹⁴⁷ See *Yuan v. U.S. Dep’t of Justice*, 416 F.3d 192, 196–97 (2d Cir. 2005) (stating that although the court had “afford[ed] . . . deference” to the BIA’s rule in a prior decision, the BIA had merely relied on an INS concession, which itself never explained why it took that position). I submit that it is inappropriate to uphold a subsequent interpretation—that fiancés and boyfriends do not qualify—if that subsequent interpretation is based on an unreasoned prior interpretation that married spouses do qualify. Cf. *Jiang v. Gonzales*, No. 03-40661-AG, 2005 WL 2660391, at *1 (2d Cir. 2005) (upholding an adverse credibility determination but again calling for clarification of the *C-Y-Z-* bright-line test).

¹⁴⁸ See Wes Henricksen, Abay v. Ashcroft: *The Sixth Circuit’s Baseless Expansion of INA § 101(a)(42)(A) Revealed a Gap in Asylum Law*, 80 WASH. L. REV. 477, 494 (2005) (arguing that, rather than pointing to a “governing principle,” the court should have applied the statutory definition of “refugee” when evaluating the claim (internal quotation marks omitted)).

¹⁴⁹ *Chen*, 381 F.3d at 228 (emphasis added).

¹⁵⁰ *Id.* (emphasis added).

¹⁵¹ *Id.* at 227 (emphasis added).

¹⁵² *Mickeviute v. INS*, 327 F.3d 1159, 1162–63 (10th Cir. 2003). *But cf.* *Mariuta v. Gonzales*, 411 F.3d 361, 367 (2d Cir. 2005) (holding that the court lacked jurisdiction over the case because the BIA’s reasons for denying to reconsider the petitioner’s motion were undeniably clear).

¹⁵³ See *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (“[T]he BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms ‘concrete

recognized the BIA's "construction" as unreasoned, and ordered the case remanded, rather than inserting its own reasoning.¹⁵⁴ Such an approach—which allows the BIA to elucidate a rationale stemming directly from its experience and expertise in the area of asylum law—permits appellate courts to conduct a cogent review of sound statutory construction.¹⁵⁵

The court's third and perhaps most fundamental error is that it inappropriately divorced the *C-Y-Z*- holding from the BIA's subsequent marital status rule, when in fact the two interpretations cannot actually be separated.¹⁵⁶ The Third Circuit reasoned that, in applying *Chevron* deference, it is required to analyze not whether the *C-Y-Z*- interpretation is permissible, but only whether the marital status rule alone is arbitrary, capricious, and irrational.¹⁵⁷ Yet, as the Third Circuit itself noted, the BIA denied relief, at least in part, because "*C-Y-Z*- had not been extended to include unmarried partners."¹⁵⁸ The interesting aspect of the court's refusal to assess the validity of the interpretation in *C-Y-Z*- is that it still seemed implicitly to recognize *C-Y-Z*'s importance. The Third Circuit undertook a lengthy discussion of *C-Y-Z*'s holding, even analyzing potential rationales that could have served as the basis for extending eligibility to unmarried spouses.¹⁵⁹ It is submitted, therefore,

meaning.'").

¹⁵⁴ See Guendelsberger, *supra* note 49, at 644. Alternatively, the court could have pointed out the problems with the bright-line marriage rule, but still upheld denial of asylum based on the applicant's failure to demonstrate persecution; this assumes, of course, that the BIA first presented a reasoned analysis of this issue.

¹⁵⁵ See *INS v. Ventura*, 537 U.S. 12, 17 (2002) (per curiam) (explaining how the agency can gather evidence, apply its "expertise," and make initial conclusions that can then help the court).

¹⁵⁶ See *Lin v. U.S. Dep't of Justice*, 416 F.3d 184, 188 (2d Cir. 2005) (stating that the *C-Y-Z*- decision forms at least part of the basis for denying eligibility to boyfriends or fiancés); see also *In re Y-T-L*, 23 I. & N. Dec. 601, 619 (BIA 2003) (Board Member, Pauley, dissenting) (arguing that an assessment of whether a spouse, who was married only by traditional ceremony, can assert past persecution requires that the underlying reasoning of *C-Y-Z*- first be resolved).

¹⁵⁷ See *Chen v. Ashcroft*, 381 F.3d 221, 227 (3d Cir. 2004). The court in *Chen* assumed that if the *C-Y-Z*- rule is not permissible, then the statute applies only to persons upon whom a forced abortion or sterilization procedure has actually been performed. See *id.* This may be true, but it is within the authority of the BIA, not the circuit court, to make such a determination.

¹⁵⁸ *Id.* at 223 (internal quotation marks omitted).

¹⁵⁹ *Id.* at 225–27 ("Two rationales seem possible. . . . The first would proceed on the assumption that the persecution of one spouse by means of a forced abortion or sterilization causes the other spouse to experience intense sympathetic suffering

that it is not the bright-line marital status rule itself that is clearly arbitrary and capricious, but rather the use of that rule as drawn from the *C-Y-Z* holding, which provides no explicit explanation for extending per se persecution eligibility to husbands. A poorly reasoned affirmative grant of asylum as the source for an unreasoned denial of asylum strays too far from the explicit language of the statute, and should not stand.¹⁶⁰

B. *Ma's Error*

The Ninth Circuit in *Ma* committed a different error, though its analysis also intruded upon the BIA's authority in this context. Unlike in *Chen*, the *Ma* court held that *Chevron* deference was inappropriate based on its determination that the BIA's chosen construction of the 1996 Amendment would lead to absurd results.¹⁶¹ In particular, it reasoned that such a rule would result in unequal treatment, and may potentially lead to the breakup of families.¹⁶² The court recognized, however, that the BIA's marital status rule, to an extent, "adopted the underlying reasoning and holding"¹⁶³ of *C-Y-Z*. Moreover, the court clearly approved of the result in *C-Y-Z*, both explicitly¹⁶⁴ and implicitly, by extending asylum eligibility to *Ma*.¹⁶⁵

The court erred in that, having recognized *C-Y-Z* as intertwined with the BIA's interpretation, it never addressed the inadequate reasoning in that case. Rather, it provided an alternative construction of the statute—namely, that husbands whose marriages would be legally recognized but for China's coercive family planning policies are also eligible for asylum based on the imputed persecution of their forcibly sterilized spouse. If *Chevron* deference does not apply—that is, if the

that rises to the level of persecution. . . . The second possible rationale . . . [is] the impact on the latter's ability to reproduce and raise children.").

¹⁶⁰ See *Zheng v. Gonzales*, 409 F.3d 804, 812 (7th Cir. 2005) (holding that the court is "not authorized to affirm unreasoned decisions" (quoting *Lao v. Gonzales*, 400 F.3d 530, 535 (7th Cir. 2005) (internal quotation marks omitted))).

¹⁶¹ See *Ma v. Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004).

¹⁶² *Id.* at 561.

¹⁶³ See *id.* at 557.

¹⁶⁴ See *id.* at 559 (citing legislative history); see also *He v. Ashcroft*, 328 F.3d 593, 604 (9th Cir. 2003) (recognizing the BIA rule that the forcible sterilization of one spouse is an act of persecution against the other).

¹⁶⁵ By having extended eligibility to *Ma*, an unrecognized husband, the court must have logically approved of the extension of eligibility to a legally married spouse as in *In re C-Y-Z*, 21 I. & N. Dec. 915, 919 (BIA 1997).

chosen construction is arbitrary and produces an absurd result—then a court has the legal duty only to remand, and not to put forth its own reasoning.¹⁶⁶ The *Ma* court thus intruded upon the BIA's authority as the primary interpreter of asylum legislation.

C. *Lin's Insightful and Cautious Approach*

In *Lin*, the Second Circuit adopted the most measured and appropriate approach to the BIA's interpretation. The court recognized that the *C-Y-Z-* holding provides a significant basis for the BIA's bright-line marriage rule, but that in *C-Y-Z-*, the BIA provided no reasoned analysis for its holding. Based on this insight, the Second Circuit also understood that any analysis of the bright-line marriage rule would be similarly unreasoned. By remanding, the Second Circuit avoided insertion of its own statutory construction, and appropriately exercised *Chevron* deference—by determining that, in this case, such deference did not apply under *Mead*. While considerable deference should generally be afforded the BIA, the Second Circuit correctly recognized that the decisions of numerous immigration judges, summarily affirmed, cannot possibly stand as binding precedent. Moreover, remand is consistent not only with *Mead*, but with the general principle of preserving the BIA's primary authority to interpret immigration laws. Remand is especially prudent in light of the BIA's recent failure to recognize even its own cursory reasoning in *C-Y-Z-*, practically denying the existence of a circuit split as to its marital status rule.¹⁶⁷

CONCLUSION

In evaluating the BIA marital status rule, the logical starting point is to ask why a legally married husband can essentially stand in the shoes of his persecuted wife. There may indeed be some legitimate and well-reasoned grounds for extending asylum status to legally married spouses, despite the

¹⁶⁶ See *Mickeviciute v. INS*, 327 F.3d 1159, 1164–65 (10th Cir. 2003) (holding that the BIA has the duty to explain its reasoning and that “supporting a result reached by the agency with reasoning not explicitly relied on by the agency” represents an intrusion on the agency's authority). The court in *Ma* did, in fact, remand; however, it set forth an analysis upon which the BIA's decision was to conform. See *Ma*, 361 F.3d at 561.

¹⁶⁷ Cf. *In re E-L-H-*, 23 I. & N. Dec. 814, 824–25 (BIA 2005) (implying that precedent has been uniformly applied in various cases).

fact that such applicants do not fall within the explicit language of the 1996 Amendment. Several commentators, for example, have posited a human rights basis for rules developed by the BIA in this area.¹⁶⁸ At the same time, the BIA has reason to adopt a bright-line marriage rule based on its need to distinguish between applicants, to deal with problems of proof, and to remain faithfully within the boundaries of the statutory language.

The evolution of *Chevron* deference and the streamlining procedures are also very significant. Clearly, Congress—by recently stripping the federal courts of partial jurisdiction over BIA decisions—and the Supreme Court—in *Chevron* and its progeny—have firmly limited an appellate court's power to review administrative judgments. An important question is whether either Congress or the Court envisioned the development of rules promulgated upon virtually no explanatory rationale whatsoever. The emerging tension manifests itself in the fact that the streamlining procedures, at times, allow unreasoned interpretations to stand in the name of efficiency.¹⁶⁹

In this context, the Second Circuit's measured view of judicial deference may be an especially useful approach for ensuring reasoned analyses. Additional cases on the same issue

¹⁶⁸ See Abrams, *supra* note 37, at 905 (“The analysis of what constitutes a coercive population program should incorporate current international consensus on the definition and scope of reproductive rights.”); Steinbock, *supra* note 133, at 803–04 (arguing that although a focus on human rights may stray from the statutory refugee definition, such a focus is consistent with the purposes of providing asylum); Inna Nazarova, Comment, *Alienating “Human” from “Right”: U.S. and UK Non-Compliance with Asylum Obligations Under International Human Rights Law*, 25 *FORDHAM INT'L L.J.* 1335, 1417 (2002) (“International guarantees to asylum seekers must remain binding rules of law, which civilized nations respect.”); see also *C-Y-Z-*, 21 I. & N. Dec. at 925 (Board Member Rosenberg, concurring) (referencing United Nations materials in determining refugee status).

¹⁶⁹ See *Guchshenkov v. Ashcroft*, 366 F.3d 554, 560–61 (7th Cir. 2004) (remanding cases for clarification of reasons for denying asylum, stating that this instance “is one more indication of systemic failure by the judicial officers of the immigration service to provide reasoned analysis for the denial of applications for asylum”); see also Scott D. Pollock, *Survey of Illinois Law: 2004–2005 Developments in Seventh Circuit Jurisprudence: Protecting Foreign Nationals Against Return to Countries Where They Fear Persecution or Torture*, 29 *S. ILL. U. L.J.* 723, 723 (2005) (describing the view of the Seventh Circuit, and particularly Judge Posner, that the BIA and immigration judges engage in substantial misapplication of “elementary principles of adjudication”) (internal quotation marks omitted); cf. *Krastev v. INS*, 292 F.3d 1268, 1279 (10th Cir. 2002) (cautioning the BIA that its practice of assuming factual credibility, without actually deciding, is “not favored” by the court).

continue to reach the courts.¹⁷⁰ Moreover, spousal eligibility is not the only issue under the 1996 Amendment which has been recently litigated.¹⁷¹ Another central question as to the Amendment's language—and which has been largely unanswered by the BIA—asks which applicants qualify as having been “persecuted . . . for other resistance to a coercive population control program.”¹⁷² The Ninth Circuit was the first to address this issue in depth,¹⁷³ however, subsequent cases have been remanded to the BIA for clarification.¹⁷⁴ By remanding these issues, it is clear that the courts are calling for the BIA to provide reasoned interpretations of the 1996 Amendment.

¹⁷⁰ See, e.g., *Bin v. Gonzales*, 154 Fed. Appx. 273, 275 (2d Cir. 2005) (remanding to BIA based on the same reasoning given in *Lin v. United States Department of Justice*, 416 F.3d 184, 187 (2d Cir. 2005)); see also *Mirzoyan v. Gonzales*, 457 F.3d 217, 218–19 (2d Cir. 2006) (per curiam) (remanding for the BIA to construe the word “persecution”); *Ci Pan v. U.S. Att’y Gen.*, 449 F.3d 408, 409 (2d Cir. 2006) (per curiam) (remanding to the BIA to determine whether a boyfriend could qualify as a refugee); *Long v. Gonzales*, 130 Fed. Appx. 85, 87 (9th Cir. 2005) (mem.) (remanding to the BIA to decide if a husband was eligible for imputed persecution despite being divorced at the time of his asylum appeal).

¹⁷¹ See *Yuan v. U.S. Dep’t of Justice*, 416 F.3d 192, 194 (2d Cir. 2005) (holding that parents are not per se eligible for political asylum).

¹⁷² Illegal Immigration Reform and Immigration Responsibility Act of 1996 § 601, 8 U.S.C. § 1101(a)(42)(B) (2000); see *Abrams*, *supra* note 37, at 905 (stating that the 1996 Amendment “clearly leaves open the possibility that coercive population policies encompass methods other than involuntary abortion or sterilization.”).

¹⁷³ See *Li v. Ashcroft*, 356 F.3d 1153, 1156 (9th Cir. 2004) (asking whether those persecuted for “other resistance” include a woman “subjected to a forced gynecological exam and threatened with future abortion, sterilization of her boyfriend, and arrest,” and answering affirmatively); see also *Zhang v. Ashcroft*, 395 F.3d 531, 532 (5th Cir. 2004) (noting in dicta that merely impregnating a girlfriend does not constitute “[other] resistance” for that man within the meaning of the statute).

¹⁷⁴ See *Chen v. Gonzales*, 152 Fed. Appx. 92, 92–93 (2d Cir. 2005) (remanding to the BIA for its failure to adequately address all of petitioner’s evidence in relation to her claim that she resisted China’s coercive population control program); *Yang v. U.S. Att’y Gen.*, 418 F.3d 1198, 1205 (11th Cir. 2005) (remanding to the BIA to determine whether privately removing an IUD could be considered “other resistance”); *Zheng v. Gonzales*, 409 F.3d 804, 811–12 (7th Cir. 2005) (remanding to the BIA for failure to properly explain why the plaintiff did not meet her burden of proof given that she was repeatedly subjected to involuntary insertion of IUDs); *Lin v. Ashcroft*, 385 F.3d 748, 757 (7th Cir. 2004) (remanding to the BIA to determine, in part, whether petitioner’s efforts to remove IUDs inserted involuntarily are the type of “[other] resistance” that Congress sought to protect); see also *Yuan*, 416 F.3d at 197–98 (noting that the BIA has not yet definitively interpreted the “other resistance” statutory language).

It may be entirely appropriate for the BIA to adopt a relatively restrained interpretation about who qualifies under the 1996 Amendment. The BIA may even determine that asylum law is not the most appropriate vehicle for providing relief to a potentially unlimited number of family members.¹⁷⁵ Whatever the outcome, courts operating within the context of current asylum law must keep two principles in mind: first, the BIA holds primary responsibility for issuing reasoned interpretations of immigration laws, and second, if unreasoned interpretations do in fact surface, remand is the best vehicle for avoiding intrusion upon that agency's authority.

¹⁷⁵ See *Wang v. Gonzales*, 405 F.3d 134, 143–44 (3d Cir. 2005) (upholding the BIA's determination that the child of a direct victim of a forced abortion is not eligible for asylum merely by virtue of his mother's experience).