RECENT DEVELOPMENTS

GUO CHUN DI V. CAROLL: A GREAT LEAP FORWARD?

In June 1993, the *Golden Venture*, a cargo ship smuggling hundreds of Chinese nationals into the United States, ran aground near New York City.[1] Guo Chun Di, a citizen of the People's Republic of China, was aboard the *Golden Venture*, and was detained by the Immigration and Naturalization Service (INS).[2] Mr. Guo was charged with attempting to enter the United States without valid documents, a violation of federal law.[3] While deportation proceedings were pending, Mr. Guo made a claim for political asylum, based on the coercive population control policies of the Chinese government.[4] In a hearing before an immigration judge, Mr. Guo averred that the Chinese government had threatened him with involuntary sterilization and his wife with a forced abortion if they chose to have another child.[5] Mr. Guo further testified he had fled China because he indeed wanted to have more children but feared retaliation from the Chinese government.[6] The immigration judge ruled that Mr. Guo was not a refugee according to the standards established by the INS, and thus he could be deported.[7] This ruling was affirmed by the Board of Immigration Appeals (BIA or Board).[8] Mr. Guo then filed a writ of habeas corpus with the U.S. District Court for the Eastern District of Virginia.[9] At the hearing, the court acknowledged discord within the executive branch over the granting of asylum status to similarly situated refugees. In dicta, the court noted that judicial deference to an agency's interpretation of a statute need only

1. Robert D. McFadden, *Smuggled to New York: The Overview—Seven Die as Crowded Immigrant Ship Grounds Off Queens; Chinese Aboard are Seized for Illegal Entry*, N.Y. TIMES, June 7, 1993, at A1.
2. Guo Chun Di v. Carroll, 842 F. Supp. 858, 861 (E.D. Va. 1994).
3. *Id.*; *see* Immigration and Nationality Act, 8 U.S.C. §§ 1181-1183 (1994).
4. *Guo*, 842 F. Supp. at 861-62.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Guo*, 842 F. Supp. at 861-62.

occur when those interpretations have been consistent.[10] The court, *holding* that an individual's expression of opposition to his country's population control policies constituted political opinion within the meaning of the Immigration and Nationality Act (INA),[11] as amended by the Refugee Act of 1980 (Refugee Act),[12] granted him refugee status. *Guo Chun Di v. Carroll*, 842 F. Supp. 858 (E.D. Va. 1994).

Matters concerning immigration and asylum in the United States are governed by two statutes, the INA and the Refugee Act. Congress enacted the Refugee Act in order to bring the INA into line with the UN Protocol Relating to the Status of Refugees,[13] and to streamline the procedure through which refugees apply for political asylum in the United States.[14]

The Refugee Act defines a refugee as one who is outside his or her country of nationality or habitual residence, and who is unable to or unwilling to return because of "persecution, or a well-founded fear of persecution on the basis of race, religion, nationality, membership in a particular social group, or political opinion."[15] The Refugee Act also permits the President to admit certain refugees not covered by the above definition.[16] Moreover, the Refugee Act provides that once designated a refugee, an alien is eligible for asylum at the discretion of the Attorney General.[17] Finally, pursuant to section 203(e) of the Refugee Act, the Attorney General is prohibited from deporting an alien who can show that his life or freedom is threatened.[18]

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10. *Id.* at 867.

11. 8 U.S.C. § 1101 *et seq.* (1994).

12. Refugee Act of 1980, Pub. L. No. 96-212, §§ 201 *et seq.*, 1980 U.S.C.C.A.N. (94 Stat.) 102 (amending 8 U.S.C. § 1101 *et seq.*(1980)).

13. United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6228.

14. S. REP. NO. 96-256, 96th Cong., 2d Sess. (1980), *reprinted in* 1980 U.S.C.C.A.N. 141, 144. "Asylum will . . . be granted only to those who qualify under the terms of the United Nations Protocol Relating to the Status of Refugees." *Id.* at 149. The United States acceded to the Protocol in 1969. *Id.*

15. Pub. L. No. 96-212, § 201, 1980 U.S.C.C.A.N. (94 Stat.) at 102.

16. *Id.* "The term 'refugee' means . . . in such special circumstances as the President after appropriate consultation . . . may specify." *Id.*

17. Immigration and Nationality Act, 8 U.S.C. § 1158(a).

18. *Id.* § 1253(h)(1). *See also* Stevic v. INS, 467 U.S. 407, 430 (1984) (holding that an alien must establish a "clear probability of persecution" to avoid deportation).

Under the rule established by *Chevron U.S.A. v. Natural Resources Defence Council*,[19] courts must defer to the decisions of administrative agencies unless the agencies have issued decisions or interpretations that are contradictory to the relevant statute or enabling act.[20] Traditionally, the courts have interpreted this rule as encompassing the INS.[21] This deference extends to INS determinations of who may qualify for refugee status, and also to BIA decisions.[22]

In *Fatin v. INS*,[23] for example, the Third Circuit ruled that the protections of the Refugee Act could not be triggered by a finding that the persecution was "unfair, unjust . . . or even unconstitutional."[24] Rather, the court announced that where a statute does not speak directly to the issue at hand, courts should not impose their own construction.[25] Courts should defer to the BIA's interpretation of the Refugee Act, providing the interpretation is consistent with the Refugee Act.[26] The Fourth Circuit has also followed this rule of deference.[27]

Deference to the INS also extends to agency adjudication of refugee claims based on noncompliance with governmental policies or laws. In *M.A. A26851062 v. U.S. Immigration and Naturalization Service*,[28] an El Salvadoran national made a claim for political asylum based on a fear of complying with El Salvador conscription laws, was rejected by the Fourth Circuit Court of Appeals.[29] Here, the petitioner claimed that he wanted to avoid military service for political reasons, and that in so doing, he would be tortured or possibly killed.[30] Nonetheless, the court noted that both international law and BIA precedent recognized a nation's right to enforce conscription laws.[31] Moreover, the court

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19. 467 U.S. 837 (1984).
20. *Id.* at 843-44.
21. *See, e.g.*, Immigration and Naturalization Service v. Elias-Zacarias, 112 S. Ct. 812, 815 (1992); Nwolise v. U.S. Immigration and Nationalization Service, 4 F.3d 306, 309 (4th Cir. 1993); Chiravacharadhikul v. Immigration and Nationalization Service, 645 F.2d 248, 251 (4th Cir.), *cert. denied*, 454 U.S. 893 (1981).
22. *Id.*
23. 12 F.3d 1233 (3d Cir. 1993).
24. *Id.* at 1240.
25. *Id.* at 1239.
26. *Id.*
27. *See, e.g.*, *Nwolise*, 4 F.3d at 309.
28. 899 F.2d 304 (4th Cir. 1990).
29. *Id.* at 305
30. *Id.* at 306.
31. *Id.* at 312.

refused to consider the evidence supplied by private organizations concerning the activities of the El Salvadoran military, noting that to do so would be to place courts in the position of "examining the validity of public acts of a sovereign government executed within its territory"[32]—something that the courts were restrained from doing by the Act of State doctrine.[33] The court believes that review of such acts is left to other political branches because "unless the government's non-action has been condemned by a recognized public governmental body, the inquiry into the government's 'control' over forces within its borders would place us in precisely the political posture that we have attempted to avoid."[34]

Similarly, in *Janusiak v. U.S. Immigration and Naturalization Service*,[35] the Third Circuit ruled that the threat of prosecution for criminal violations of a fairly administered law could not be considered a proper ground for asylum application.[36] According to the court, fear of persecution must be grounded in one of the five bases enumerated by the Refugee Act:[37] (1) race, (2) political beliefs, (3) religion, (4) nationality, or (5) membership in a particular social group.[38] The court ruled that the petitioner would have had to show that he was treated differently from other violators based on one of the five factors.[39]

Finally, the Supreme Court ruled in *Immigration and Naturalization Service v. Elias-Zacarias*[40] that mere noncompliance does not constitute political opinion.[41] Here, a Guatemalan national requested political asylum on the grounds that he had refused to join a guerrilla force in Guatemala. The INS refused the request, stating that the applicant had not shown a "well-founded fear on account of race, religion, nationality, membership in a particular social group, or political

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32. *Id.* at 314.

33. *M.A. A26851962*, 899 F.2d at 314. The Act of State doctrine is usually invoked in cases involving the expropriation of property by foreign governments. It derives from a formulation in Underhill v. Hernandez 168 U.S. 250 (1897), which stated that "courts will not sit in judgement on the acts of another done within its territory." *See* J.P. Fonteyne, *Acts of State*, *in* 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 17 (Rudolf Bernhardt ed., 1992).

34. *Id.*

35. 947 F.2d 46 (3d Cir. 1991).

36. *Id.* at 48.

37. Pub. L. No. 96-212, § 201, 94 Stat. at 102.

38. *Janusiak*, 947 F.2d at 48.

39. *Id.*

40. 112 S. Ct. 812 (1992).

41. *Id.* at 815-16.

opinion."[42] This decision was affirmed by the Supreme Court, which noted that noncompliance might be motivated by a number of factors, including political or purely economic motives.[43]

In the 1989 BIA decision *Matter of Chang*,[44] the Board reviewed whether China's population policy, including forced sterilization, constituted persecution within the meaning of the Refugee Act.[45] The BIA ruled that the "one couple, one child" policy of the Chinese government was not on its face coercive.[46] In order for an alien to succeed in his claim for asylum, a claim had to be directly grounded on one of the five bases for asylum listed in the Refugee Act.[47] In this case, the petitioner needed to show that the Chinese government's enforcement of the population policy against him was driven by one of these proscribed factors, and not by the stated desire to control population growth.[48]

A number of efforts were made to overturn *Chang* after it was decided. For example, Congress engaged in several unsuccessful attempts to enact legislation that would have created an additional ground for refugee status, thus allowing persons fleeing China's population control programs to be granted asylum within the United States.[49] Moreover, the executive branch had encouraged the amending of immigration regulations in order to reverse the *Chang* decision.[50]

Prior to *Chang*, the Department of Justice issued guidelines to INS officers recommending that they exercise greater flexibility with respect to refugees from China making asylum claims based on the forcible population control policies of the Chinese government.[51] Yet in *Chang*, the BIA explained that it was not bound by these guidelines.[52]

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42. *Id.* at 815.
43. *Id.* at 816.
44. Matter of Chang, No. A-27202715, 1989 BIA LEXIS 13, Immig. Library, BIA File (Bd. of Immigration App. May 12, 1989).
45. *Id.* at *3-4.
46. *Id.* at *12.
47. *Id.* at *14.
48. *Id.* at *15-16.
49. *See, e.g.*, ARMSTRONG-DECONCINI AMENDMENT ON ASYLUM FOR PRC NATIONALS, 135 CONG. REC. S8244 (daily ed. July 19, 1989) [hereinafter ARMSTRONG-DECONCINI AMENDMENT].
50. 136 CONG. REC. S375-376 (daily ed. Jan. 25, 1990).
51. 135 CONG. REC. S8243 (daily ed. Jan. 25, 1990) (statement of Sen. DeConcini and Sen. Armstrong).
52. *Chang*, 1989 BIA LEXIS 13 at *12.

The BIA held that the guidelines were directed towards the INS rather than the immigration judges and the BIA.[53]

After the BIA issued its decision in *Chang*, Congress attempted to pass legislation which would have directly overruled *Chang*.[54] Although Congress failed to overcome a presidential veto, the legislative branch did extract promises of direct executive branch action to overrule the holding of the BIA.[55] Accordingly, President Bush ordered the Attorney General to take appropriate action, which came in the form of an Interim Rule amending C.F.R. 208.5,[56] effectively overruling *Chang*.[57]

A curious set of developments soon followed. In April of 1990, the Interim Rule was buttressed by an additional executive order reaffirming the grant of special status to persons fleeing China's population control policies,[58] and was superseded soon thereafter by a new rule, that of July 27, 1990. The new rule made no reference to sterilization or forced abortion and considerably revised several rules dealing with Refugee Act procedures, including C.F.R. 208.5, but completely omitted any special considerations for those fleeing China's population control programs, thus apparently restoring *Chang* as valid precedent.[59]

In January of 1993, a subsequent rule, reestablishing special considerations for persons fleeing forced sterilization and abortion which had been eliminated by the Rule of July 27, 1990, was put through the promulgation process by the exiting Bush administration. Although this new rule was ready for publication in the Federal Register, the incoming Clinton administration, as part of an effort to review all new regulation, withdrew the rule.[60] To date, the Clinton Administration has not issued any new rules or policy guidelines that would overrule *Chang*.[61]

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53. *Id.*

54. *See, e.g.,* ARMSTRONG-DECONCINI AMENDMENT, 135 CONG. REC. S8244 (daily ed. July 19, 1989).

55. 136 CONG. REC. S375-376 (daily ed. June 25, 1990).

56. 8 C.F.R. 208.5. This rule establishes the burden of proof requirements for asylum applicants. The January 1990 Interim Rule specifically included abortion and forced sterilization and provided for such applicants to be eligible for asylum if they could show a "well founded fear" of forced sterilization or abortion. *See* 55 Fed. Reg. 2803, 2804-05, Jan. 29, 1990.

57. *Guo*, 842 F. Supp. at 863.

58. Executive Order No. 12711 of April 11, 1990, 55 Fed. Reg. 13897-13898.

59. 55 Fed. Reg. 30674 (July 27, 1990).

60. *Guo*, 842 F. Supp at 864.

61. *Id.*

In the noted case, the court began by reviewing the confusing administrative events which had followed in the wake of *Chang*. While admitting that the judiciary is usually required to defer to agency decisions, the *Guo* court determined that the *Chang* decision was not an authoritative interpretation of a statute, but simply one of a number of contradictory statements on the law.[62] Thus, the court concluded that traditional judicial deference was unnecessary, since there was really very little to which to defer.[63]

The court then analyzed the criteria required by the INA to grant asylum. First, the court stated that in order to be classified as a refugee, an alien must show that a reasonable person in the same circumstances would fear persecution if he or she returned to their native country, and that the fear is based on real circumstances.[64] Moreover, that persecution must be based on one of the previously enumerated categories, namely, race, religion, membership in a particular social group, or political opinion.[65] The court decided that Mr. Guo satisfied the tests necessary to comply with the INA because Mr. Guo's opposition to the population control policies of China constituted political opinion within the meaning of the INA.[66] The court based its conclusion on two rationales. First, "political" was deemed to be related to "the exercise of rights or privileges."[67] Second, the right to procreate was held to be protected in the "penumbras" of the Bill of Rights,[68] as established by Supreme Court decisions providing for both the rights to procreate, and the right to express hostility to sterilization.[69] Further, the court established that Mr. Guo had sufficiently expressed his opinion by refusing to comply with the policies and by receiving sterilization notices from the Chinese government as a consequence of those refusals.[70] Taken together, the

62. *Id.* at 866.
63. *Id.* (citing I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987)).
64. *Id.* at 871 (citing Huaman-Cornelia v. Board of Immigration Appeals, 979 F.2d 995, 999 (4th Cir. 1992)).
65. *Guo*, 842 F. Supp. at 871.
66. *Id.* at 872.
67. *Id.*
68. *Id.*
69. *Id.* at 872 (citing Carey. v. Population Services Int'l, 431 U.S. 678 (1977); Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma, 316 U.S. 541 (1940)).
70. *Guo*, 842 F. Supp. at 873.

actions of Mr. Guo constituted an expression of political opinion deserving of protection under the Act.[71]

The decision in *Guo*, though on its face attractive, presents several problems. First, the court in *Guo* misunderstood the level of judicial scrutiny appropriate for review of administrative action. Secondly, the court's decision directly contradicts an earlier Supreme Court ruling which defined political opinion.[72] Finally, the court also encroaches on the traditional territory of the executive branch. In effect, the ruling of the court overstepped the limits of judicial authority, both in the realm of administrative law, and in the interpretation of the Refugee Act.[73]

Furthermore, the *Guo* decision is problematic because Mr. Guo never actually lobbied or protested against the population control policies of the Chinese government, except in so far as he refused to comply. The *Guo* court read this noncompliance as an expression of political opinion.[74] Yet, as discussed above, the Supreme Court has ruled that mere noncompliance does not constitute political opinion.[75]

Initially, it should be recalled that in the year between the removal of the Interim Rule overruling *Chang* and the issuance of the decision in the instant case, the Clinton administration never acted to alter or overrule the policy behind the *Chang* decision. Hence, while the *Guo* court was correct in describing the series of inconsistent pronouncements that flowed from the executive branch as "cacophonous," that cacophony ceased after January 25, 1993. Moreover, the Clinton administration had indicated its support for the *Chang* policy in its briefs to the court in the *Guo* decision.[76]

Moreover, at no point did the INS itself issue contradictory statements. The cacophony that the court referred to existed between the agency, the President, and the Attorney General, all of whom attempted to develop new policy. Within the INS, there was never any discord over the *Chang* ruling. Indeed, the *Guo* court recognized that in the year prior to its ruling, immigration courts handed down several rulings which

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71. *Id.*
72. *Elias-Zacarias*, 112 S. Ct. at 812.
73. Pub. L. No. 96-212, § 201, 94 Stat. 102.
74. *Guo*, 842 F. Supp. at 872-73.
75. *Elias-Zacarias*, 112 S. Ct. at 815-16.
76. Robert Pear, *Victims of China's Birth-Control Policy are Entitled to Asylum, a U.S. Judge Says*, N.Y. TIMES, Jan. 21, 1994, at A14.

followed *Chang*.[77] The doctrine of judicial restraint, as formulated in *Nwolise* and *Chiravacharadhikul* remained controlling. Thus, the decision of *Chang* had been consistent with the Refugee Act and the INS had consistently adhered to the *Chang* decision.

The third major problem with the *Guo* decision is that the court applies U.S. constitutional norms to the domestic policies of foreign countries. The court in *Guo* acknowledges that asylum eligibility is not established merely by referring to a right guaranteed under U.S. law. As noted earlier, the third circuit in *Fatin* had in fact discouraged such action by U.S. courts.[78] However, the *Guo* court circumvents this problem by characterizing Mr. Guo's refusal to comply with the Chinese population control policy as a political opinion because procreation is a fundamental right.[79]

The court's reasoning is perplexing. The court ignores prior federal decisions which consistently have given the Refugee Act a narrow and strict interpretation.[80] The drafters of the Refugee Act had specifically stated that matters of interpretation should be guided by UN protocols, and omitted references to domestic judicial norms.[81] The reasons for this are clear; as discussed earlier, the Refugee Act was enacted to bring U.S. law into line with the provisions of the United Nations Protocol Relating to the Status of Refugees.[82] The federal courts have recognized that in order for the Refugee Act to function properly, interpretations should be in accord with international norms, rather than purely domestic considerations.[83]

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77. *Guo*, 848 F. Supp. at 867. *See also* Matter of G---, No. A-72761974, 1993 BIA LEXIS 14, Immig. Library, BIA File (Bd. of Immigration App. Dec. 8, 1993).

78. *See Fatin*, 12 F.3d at 1240.

79. *Guo*, 848 F. Supp. at 872-73.

80. *See, e.g.*, Fatin v. INS, 12 F.3d 1233 (3d Cir. 1993); Nwolise v. U.S. Immigration and Naturalization Service, 4 F.3d 306 (4th Cir. 1993); M.A. A26851962 v. U.S. Immigration and Naturalization Service, 899 F.2d 304 (4th Cir. 1990); Immigration and Naturalization Service v. Elias-Zacarias, 112 S. Ct. 812 (1992).

81. Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421, 440 n.22 (1987).

82. Pub. L. No. 96-212, § 201, 94 Stat. at 102. *See also* United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6228.

83. *See, e.g., Cardoza-Fonseca*, 480 U.S. at 439 n.22, M.A. A26851062 at 312 n.5, Canas-Segovia v. I.N.S., 902 F.2d 717, 724 n.13 (1990) (noting that courts may rely on the U.N. High Commissioner for Refugees' *Handbook on Procedures and Criteria for Determining Refugee Status*(Geneva 1979)).

It is easy to see why determining refugee status solely on the basis of domestic notions of "rights" is problematic. Under the *Guo* ruling, foreigners who choose to violate their own country's law would have grounds to make a claim for refugee status in the United States. If the policies in question touch on fundamental rights as understood by the U.S. Constitution and the courts which interpret it, foreign nationals would have a reasonable claim that their noncompliance was an expression of political opinion.[84]

A final problem is that the *Guo* decision impinges on the conduct of foreign policy—the traditional domain of the executive branch.[85] Courts have always deferred to executive conduct in this area, and have also declined from exercising jurisdiction where it might infringe on the President's authority.[86] The noted case involves making judgments about the propriety of China's birth control programs. Since this is inherently the preserve of the political branches, the court should have deferred to the administration's judgments. Otherwise, there is a great likelihood of conflict between the branches over the conduct of U.S. foreign policy.[87]

Of course, given the nature of the asylum process and the requirements of the Refugee Act, it will always be necessary for courts to delve into such matters. However, as noted above, such inquiries are typically carried out in a narrow fashion. The instant case should not be an exception.[88]

This is not to say that the petitioner does not have a valid claim or that human rights abuses do not occur in China. Abuses of this sort would give rise to a valid claim for political asylum under the Refugee Act.[89] The essential flaw in the decision is that it does not ground Mr. Guo's claim directly on one of the factors listed in the Refugee Act. By not doing so, the *Guo* court tramples on the key purpose of the Refugee Act which is to streamline the asylum claim process. It also impairs U.S.

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84. *See, e.g.,* U.S. CONST. amend. II.; Pennsylvania Planned Parenthood v. Casey, 112 S. Ct. 2791, 2804 (1992).

85. *See, e.g.,* Dames and Moore v. Regan, 453 U.S. 654 (1981); United States v. Curtis-Wright Corp., 299 U.S. 304 (1936).

86. *Cf.* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

87. *Id.* at 433.

88. *See supra* note 82.

89. For a governmental overview of the problem, see China Human Rights Practices, Jan. 31, 1994, *in* DEP'T ST. DISPATCH, Feb. 1994.

relations with China. As such, the *Guo* ruling represents an aberration, rather than a true advance, in the law.

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