SHAKING THE PILLARS: AN ASYLUM APPLICANT SHAKES LOOSE SOME UNUSUAL RELIEF by Jonathan Robert Nelson*

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The name of Xiaodong Li, a Chinese refugee, may not sound like Samson, but his struggle for asylum shook the American religious establishment in late 2005. In the process, Li's case exposed fault lines in the administration's immigration policies and littered the legal ground with broken precedents and vacated decisions. Whether Li will be able to move the Board of Immigration Appeals to grant him asylum remains to be seen.

LI'S ASYLUM CLAIM

Xiaodong Li grew up in a Christian family in Ningbo, China, but his parents refused to allow him to participate in the church because the Communist Party suppressed religion. In 1989, Li briefly joined the government-approved version of the Protestant church. He stopped going after the administrators of his school threatened to discharge him from school and inform the police if he continued to participate. So, against his parents' wishes, Li organized an underground "house church" in his home with six or seven other Christian believers.[1] From December 1989 through April 1995, Li's group studied the Bible and exchanged religious materials at their meetings. In December 1994, the police raided the meeting and warned Li not to distribute religious or reactionary materials, but made no arrests.

The police came again in April 1995 and found religious materials in Li's home. When they warned him that his meeting was illegal, Li told the police that his right to practice religion was protected by the Chinese Constitution. He was arrested as a reactionary, handcuffed, and taken to the police station. After Li refused to kneel, he was beaten and kicked into kneeling, and then "interrogated" with the aid of shocks from an electric baton for two hours. Finally he signed a confession that he had conducted an illegal gathering against the government and organized an underground church. Li was detained for another five days, and upon his release he lost his job and was required to clean public toilets without pay, for 40 hours a week, instead.

Upon his release, Li was told that he would be brought to trial in six months, on charges that would probably bring a prison sentence of up to two years. In November 1995, having obtained a passport and visa, Li left China, and two months later he entered the United States as a crewman. When his I-94 expired, he remained as a visa overstay, and in 1999 Li applied for asylum. His application was referred to an Immigration Judge (IJ), who found that his asylum claim was barred for failure to apply within one year, but granted Li withholding of removal to China in 2000. The IJ found that Li had been threatened with prosecution under a law that prohibited unregistered religious activities, and that enforcement of the law constituted a form of institutional persecution of people taking part in unregistered churches. The Immigration and Naturalization Service (INS) appealed the IJ decision.

On July 17, 2003, in a 2-to-1 decision, a panel of the Board of Immigration Appeals (BIA, or Board) sustained the INS appeal, and ordered Li removed from the United States. The key paragraph of the BIA majority decision read as follows:

> We too find the respondent's testimony credible. We nevertheless find that he has failed to meet his burden of establishing that it is more likely than not that he will be persecuted if he is returned to China. The evidence of record provides that the Government of China attempts to control all non-government sanctioned religious activity by forcing churches to register and submit to regulations imposed by the government. In this case, the respondent was arrested for violation of a law regarding an unregistered church, and he left prior to his court date. We do not find that he was punished on account of his religion. Rather, he was arrested for a crime in China. We find the Government

[1] This discussion is taken from the Fifth Circuit's decision in *Li v. Gonzales*, 420 F.3d 500 (2005), *vacated* 429 F.3d 1153 (2005), from the Board of Immigration Appeals decision dated July 17, 2003 and from Li's brief in support of his judicial petition for review.

> of China has a legitimate right to enforce the laws which it creates. We also find that the respondent's fears are of prosecution for his violation of Chinese law prohibiting unregistered religions and underground churches. China does not prohibit registered religions and its law is a legitimate sovereign right not "institutional persecution."[2]

Board Member Osuna dissented from the panel's decision, expressing his opinion that the IJ had decided the matter correctly.

Li filed a petition for review with the U. S. Court of Appeals for the Fifth Circuit. On August 9, 2005, a panel of that court upheld the BIA's decision and dismissed Li's petition.[3] The Court noted that under the rule of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[4] courts are required to defer to administrative interpretations of statutory language within their areas of specialized expertise when the text is silent or ambiguous, unless the agency's interpretation is arbitrary, capricious or manifestly contrary to the statute. The court reasoned that because the term "persecution" is nowhere defined in the immigration statute, "the court must accept any interpretation by the BIA that is not arbitrary, capricious, or manifestly contrary to the statute."[5] Applying the *Matter of Acosta*[6] definition of persecution as "harm or suffering that is inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome," the court accepted the BIA's analysis that Li was accused of violating a law of "general applicability" and the Government of China was more concerned about the political ramifications of independent activity than about religion *per se*. The Court cited to *INS v. Elias-Zacarias*[7] for its holding that persecution "on account of" a protected ground requires that "the persecutor's motivation to harm the victim is on account of the victim's possession of the characteristic at issue."[8] Noting that the Chinese Government permits Protestant Christian worship in a state-approved Protestant church, the Court found that "[t]he evidence suggests that the Chinese government condones, or rather tolerates, the Christian faith and seeks to punish only the unregistered aspect of Li's activities. There is therefore reasonable, substantial, and probative evidence to support the BIA's decision that Li's punishment was for his activities and not for his religion, and there is nothing in the record that mandates us to find otherwise."[9]

THE REACTION TO *LI V. GONZALES*

Unlike many asylum denials, the Fifth Circuit's decision in *Li v. Gonzales* caused an uproar that extended beyond the insular community of professional human rights defenders. *Christianity Today* published an article that suggested that the *Li* decision may have essentially "removed religion as a basis of gaining asylum."[10] Church groups and advocates of religious freedom made calls and wrote to their Congressional representatives; a religious freedom law firm volunteered to join Li's appellate team and filed a motion for rehearing *en banc*; religious organizations of all stripes teamed up with human rights groups to draft amicus briefs in support of the motion; and influential political players went behind the scenes in Washington to question how the government could have advocated for a position that seemed so hostile to religious freedom.[11]

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2 *Matter of Li*, unpublished decision at 2 (BIA July 17, 2003).

3 *Li v. Gonzales*, 420 F.3d 500 (5th Cir. 2005).

4 *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

5 *Li v. Gonzales*, 420 F.3d at 508.

6 *Matter of Acosta*, 19 I. & N. Dec. 211, 212 (BIA 1985).

7 *INS v. Elias-Zacarias*, 502 U.S. 478, 481-482, 112 S.Ct. 812, 117 L.Ed.2d 38 (1992).

8 *Li v. Gonzales*, 420 F. 3d at 508.

9 *Id.*, 420 F.3d at 510-511. The Court went on to speculate that Li should perhaps have claimed to have been persecuted on the basis of political opinion, 420 F.3d at 511, n. 3.

10 Boaz Herzog, "U.S. Denies Asylum for Persecuted Chinese Christian: Court believes Christian's story, says China has the right to maintain social order," Christianity Today (Sept. 6, 2005) (quoting Ann Buwalda of Jubilee Campaign USA). A retitled version of the article may be viewed on the web at: http://www.christianitytoday.com/ct/2005/136/22.0.html.

11 A letter from Congressman Frank R. Wolf to Attorney General Alberto R. Gonzales and its accompanying memorandum provide one of the few public examples of this activity (copy in author's archives). Other private groups known to have expressed concern about the case included the Christian Legal Society; the National Association of Evangelicals, the Ethics and Religious Liberty Commission of the Southern Baptist Convention;

The *coup de grace* in the campaign to overturn the decision in *Li v. Gonzales* came in the form of an unprecedented letter to the Attorney General from the United States Commission on International Religious Freedom ("USCIRF").[12] In the letter, the Chair of the USCIRF stated some of the concerns which members of the USCIRF had developed during their visit to China the previous month, including "specifically, efforts by the Chinese government to control and criminalize religious activities in violation of China's commitments under international law." Noting that "we have never before taken a position on a case involving an individual asylum claimant," the USCIRF informed Assistant Attorney General Keisler that "[g]iven the potential adverse impact which the decision in *Li*, as well as the arguments advanced by the Department of Justice, may have on both asylum adjudications and on U.S. efforts to promote international religious freedom, we now feel compelled to voice our concern."[13]

THE *LI* DECISIONS ARE VACATED

On October 4, 2005, the Department of Justice reversed its position on Li's case. In reaction to USCIRF's unprecedented intervention, the government filed a motion to reopen with the BIA seeking leave to withdraw its appeal from the Immigration Judge's order. The government informed the Board that "new evidence has now come to the Department's attention bearing on this particular case," citing the USCIRF letter and the State Department's 2004 Country Report on Human Rights Practices.[14] Since the appeal in question had been sustained by the BIA two years before, and upheld in court, the government's request was highly unusual. The BIA reacted with uncharacteristic speed. On October 6, 2005, Board Member Osuna signed a three-judge panel decision vacating the BIA's prior decision in the case, and reinstating the IJ's order granting Li withholding of removal as if no appeal had been taken from it.[15]

The vacatur of the BIA's decision left the Fifth Circuit decision in the case in the anomalous position of affirming an order that now officially had never existed. Li's attorneys amended their motion for rehearing before the court to add an alternative request that the decision be vacated for mootness,[16] which was granted on November 1, 2005.[17]

LI V. GONZALES IN CONTEXT

Although asylum applications are down from their historic highs in the early 1990's,[18] the asylum caseload

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the Hebrew Immigrant Aid Society; the Presbyterian Church (U.S.A.); the U.S. Conference of Catholic Bishops; Jubilee Campaign USA; Episcopal Migration Ministries; China Aid Association; Saddleback Church; Church World Service; Lutheran Immigration & Refugee Service; Refugio del Rio Grande; Amnesty International USA; American Immigration Lawyers Association; Minnesota Advocates for Human Rights; Human Rights First; Asian American Justice Center; the Capital Area Immigrants' Rights Coalition; the Center for Gender and Refugee Studies; World Organization for Human Rights USA; and an informal coalition of immigration law professors and clinicians. *See, e.g.*, letter dated Oct. 28, 2005 from Carlina Tapia-Ruano, *et al*., to Hon. Michael Chertoff and Hon. Alberto R. Gonzales (copy in author's file).

[12] Letter dated September 13, 2005 from Michael Cromartie, Chair of USCIRF, to Assistant Attorney General Peter D. Keisler ("USCIRF Letter") (copy attached to undated Response to Petition for Rehearing and Rehearing *En Banc*, served Oct. 24, 2005 in *Xiaodong Li v. Alberto Gonzales*, No. 03-60670, 5th Cir. Ct. App.). *See* Press Release, "China/Asylum Issues: USCIRF deeply troubled by 5th Circuit decision in Li v. Gonzales," available online at http://www.uscirf.gov/mediaroom/press/2005/October/10032005_china.html (setting forth text of subsequent letter to Attorney General Alberto R. Gonzales).

[13] USCIRF Letter at 1.

[14] Government's Motion to Reopen and Withdrawal of Appeal served October 4, 2005, filed with BIA in *Matter of Xiaodong Li* ("Government Motion").

[15] *Matter of Xiaodong Li*, slip op. (BIA Oct. 6, 2005).

[16] Supplement to the Petition for Rehearing *En Banc* and Motion to Vacate the Panel Opinion, dated October 19, 2005, filed in *Li v. Gonzales*, no. 03-60670 (5th Cir.), at 2-3. The government ultimately consented to vacating the Fifth Circuit opinion for mootness. Response to Petition for Rehearing and Rehearing *En Banc* dated October 24, 2005, filed in *Li v. Gonzales*, no. 03-60670 (5th Cir.), at 1.

[17] *Li v. Gonzales*, 429 F.3d 1153 (5th Cir. 2005).

[18] U. S. Citizenship & Immigration Services, Table 19: Asylum cases filed with USCIS Asylum Officers by asylum office and state of residence: fiscal year 2003, downloaded from web address: http://uscis.gov/graphics/shared/aboutus/statistics/RA2003yrbk/RAExcel/Table16.xls .

in the federal courts of appeal is at an all-time high.[19] The Department of Justice has responded by increasing the number of its attorneys who are tasked with writing briefs in appellate cases, and has seemingly given its attorneys wide latitude to craft legal arguments to limit the application of asylum law by the BIA and the courts.[20]

Some courts have rejected government arguments, and BIA decisions, that attempt to confine asylum protections within narrow limits.[21] In *Li*, however, the Fifth Circuit found itself constrained by the *Chevron* rule of deference to accept the BIA's distinction between persecution on the ground of religion and prosecution for a "legitimate" law that prohibits, and criminalizes, unregistered religious practices.[22] Similarly, in *Gu v. Gonzales* a panel of the Ninth Circuit Court of Appeals recently upheld a BIA finding that the police arrest, beating, forced confession, jailing, threatening and monitoring of another Christian house church member did not rise to the level of persecution because the individual did not risk a repetition, or worsening, of the treatment by returning to church.[23]

The Supreme Court has emphasized its rule requiring the giving of *Chevron*-style deference to administrative immigration decisions, noting the foreign policy implications that are inherent in immigration policy.[24] American foreign policy is not determined exclusively by the executive branch of government, however.[25] Immigration policy is assigned by the Constitution to Congress, which has been declared to have "plenary authority" over the subject.[26] Thus, under *Chevron*, the courts must defer to administrative interpretations of law only when Congress's statutes are ambiguous or silent on a subject that is delegated by Congress to an agency for further development.[27]

The Fifth Circuit panel in *Li* found that it had to defer to the BIA's interpretation of "persecution" because Congress had not defined the term in the Immigration and Nationality Act, leaving an ambiguity or silence to be interpreted by the administrative agency.[28] Yet Congress has not been silent on the subject of *religious* persecution. Congress legislated extensively on the subject in the International Religious Freedom Act of 1998 ("IRFA").[29]

One of IRFA's key provisions was the creation of the U.S. Commission on International Religious

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[19] Adam Liptak, "Courts Criticize Judges' Handling of Asylum Cases," The New York Times Electronic Edition (Dec. 26, 2005). The surge in the courts' immigration docket seems to have been caused by the "streamlining" reforms of the BIA undertaken by Attorney General Ashcroft. *Id*.

[20] *See* The Center For Gender and Refugee Studies, "Current Issues in Refugee Protection: Troubling Resistance to Cases Based on Religion, Trafficking, Family and the Sanctity of Life" (Nov. 29, 2005) (copy available by e mail from Center at: http://cgrs.uchastings.edu/) (attributing responsibility for anti-asylum trends in appellate arguments to the Office of Immigration Litigation in the Department of Justice).

[21] *See, e.g., Iao v. Gonzales*, 400 F.3d 530, 533-534 (7th Cir. 2005); *Guo v. Ashcroft*, 361 F.3d 1194 (9th Cir. 2004); *Bandari v. INS*, 227 F. 3d 1160 (9th Cir. 2000); *Chang v. INS*, 119 F.3d 1055 (3d Cir. 1997).

[22] *Li v. Gonzales*, 420 F.3d at 508-511.

[23] *Gu v. Gonzales*, 429 F.3d 1209 (9th Cir. 2005).

[24] *See, e.g., INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999). Such considerations would, however, be particularly *in*appropriate in the making of asylum decisions. By treaty, the States Party to the Refugee Convention of 1951 agreed that they would apply the provisions of the treaty to all refugees "without discrimination as to race, religion or country of origin." 1951 Convention Relating to the Status of Refugees, 189 U.N.T.S. 137, art. 3.

[25] The Constitution grants Congress power, *inter alia*, to regulate commerce with foreign nations, U.S. Const. Art. I, Sec. 8, cl. 3; to define and punish offenses against the law of nations, *id*., cl. 10; and to declare war, *id*., cl. 11; and requires treaties to be ratified by the Senate, *id*., Art. II, Sec. 2, cl. 2.

[26] *Id*., Art. I, Sec. 9, cl. 1; *see INS v. Chadha*, 462 U.S. 919, 940-941 (1983); *Fong Yue Ting v. U.S.*, 149 U.S. 698, 707 (1893) ("The right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country.").

[27] *Chevron, supra*, 467 U.S. at 842-843 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. ... [But] if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

[28] *Li v. Gonzales*, 420 F.3d at 508.

[29] Pub. L. No. 105-292, 112 Stat. 27871 (Oct. 27, 1998), *codified in part at* 22 U.S.C. § 6401 *et seq.*

Freedom.[30] USCIRF's studies of international religious freedom inform the State Department's annual international religious freedom country reports, which are also mandated by IRFA.[31] In IRFA Congress also incorporated international law standards into domestic United States law in defining specific foreign government acts as "violations of religious freedom,"[32] which can serve as the basis for a finding of foreign government persecution on the basis of religion if sufficient harm may result therefrom.[33] The USCIRF Letter noted that the statute condemns "violations such as...arbitrary prohibitions on, restrictions of, or punishment for: assembling for peaceful religious activities such as worship, preaching and prayer, including arbitrary registration requirements;...possession and distribution of religious literature, including bibles...[and] any of the following acts...if committed on account of an individual's religious belief or practice: detention; interrogation; forced labor...".[34]

Congress enacted IRFA in order, among other purposes, "to express United States foreign policy with respect to, and to strengthen United States advocacy on behalf of, individuals persecuted in foreign countries on account of religion."[35] IRFA was enacted in part in order to remedy deficiencies which Congress perceived in the adjudication of religious persecution claims by immigration judges and others.[36] As an aid to "advocacy" on behalf of the religiously persecuted, IRFA sets forth guidelines that are to be followed not only by American diplomats, but also by asylum adjudicators, in the identification and condemnation of international religious persecution.[37]

The application of IRFA's findings, definitions and guidelines to the adjudication of asylum cases would seem to compel the BIA and courts to arrive at determinations different than the one reached in *Matter of Li*. State Department country reports contained in Li's administrative record noted that thousands of individuals, including the national leaders of the house church movement, were detained in China "in violation of international human rights instruments."[38] Under IRFA, a foreign law or police action that violates an individual's religious freedom in violation of international law cannot also be "a legitimate sovereign right."[39] In cases like *Gu v. Gonzales*, similarly, an IRFA analysis would be constrained to recognize Congress's finding that "detention" and "beatings" may qualify as "severe and violent forms of religious persecution" when they are inflicted upon individuals "merely for the peaceful belief in, change of or practice of their faith."[40]

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30 *Id*. at Sec. 201 *et seq.*

31 *Id*., Secs. 102, 202, 203.

32 IRFA, *supra*, Sec. 3(13), codified at 22 U.S.C. §6402(13), cited in USCIRF Letter, *supra*, at 1,2, 7.

33 USCIRF Letter, *supra*, at 7, citing also to Asylum Officer Basic Training Course: International Religious Freedom Act (Dep't of Homeland Security Immigration Officer Academy, Mar. 3, 2005).

34 USCIRF Letter, *supra*, at 7 (quoting IRFA, Sec. 3(13), codified at 22 U.S.C. §6402(13).

35 IRFA, *supra*, Sec. 2, codified at 22 U.S.C. §6401, Preamble. In enacting IRFA, Congress was particularly concerned about the persecution of unregistered Christians by the Chinese Government. *See* Steven Wales, "Remembering the Persecuted: An Analysis of the International Religious Freedom Act," 24 Hous. J. Int'l L. 579, 586, 587 (2002). The IRFA analysis of this article relies upon arguments made in Brief of Amici Curiae Christian Legal Society, National Association of Evangelicals, the Ethics & Religious Liberty Commission, and American Immigration Lawyers Association in Support of Petitioner and Supporting Rehearing En Banc and Reversal of Prior Decisions dated Oct. 6, 2005, and filed in *Li v. Gonzales*, no. 03-60670 (5th Cir.).

36 Craig B. Mousin, "Standing With The Persecuted: Adjudicating Religious Asylum Claims After the Enactment of the International Religious Freedom Act of 1998," 2003 BYU L. Rev. 541, 544.

37 To ensure that they would be aware of international religious freedom issues, Congress mandated that immigration judges and other asylum adjudicators refer to the State Department's annual religious freedom reports, IRFA § 601, *codified at* 22 U.S.C. § 6471, and receive training "on the nature of religious persecution abroad, including country-specific conditions, instruction on the internationally recognized right to freedom of religion, instruction on methods of religious persecution practiced in foreign countries, and applicable distinctions within a country in the treatment of various religious practices and believers." IRFA §603 (b), *codified at* 22 U.S.C. § 6473(b); *id*. §602(a), *codified at* 8 U.S.C. § 1157(f).

38 U.S. Department of State, Country Reports on Human Rights Practices for 1998, Vol. I, China (1999), contained in the Certified Administrative Record submitted in *Li v. Gonzales*, no. 03-60670 (5th Cir.) at 291(A).

39 *Matter of Li*, unpublished decision at 2 (BIA July 17, 2003).

40 IRFA, Sec. 2(a)(5), codified at 22 U.S.C. § 6401(a)(5).

LEGAL ARGUMENTS RAISED IN *LI V. GONZALES*

Although Xiadong Li should take some personal comfort from the outcome of his case, the government's procedural legerdemain, by mooting the Fifth Circuit's decision, minimized the precedential effect of that outcome. Aside from the USCIRF Letter, which should have continued usefulness in Chinese religious persecution cases, Li's case leaves only a host of unresolved arguments which may be expected to echo through asylum cases for the foreseeable future.

The government's argument in *Li*, that religious persecution does not include punishment for religious practice, and that foreign states may criminally punish peaceful religious practices that violate registration laws, continues to be relevant in cases that span the globe. Registration requirements have become a favored means to continue government control over religious practices, particularly (but not exclusively) in Communist and formerly Communist countries.[41] The weird procedural maneuver that mooted the Fifth Circuit's decision may perhaps have been intended to enable the government to raise the argument again in a more favorable factual context. Yet Congress' clear reference, in IRFA, to "religious persecution...merely for the peaceful belief in, change of or practice of [a] faith"[42] should provide an effective defense against this argument.

Government litigators rely heavily upon *Chevron*'s rule of judicial deference to persuade courts to accept BIA interpretations of immigration statutes. Yet deference is only due to administrative decisions in which an agency has interpreted ambiguous statutory language, or has used its rulemaking powers to fill gaps within the scope of Congress's delegation of power to the agency. Recent electronic searches of a database of publicly-available BIA decisions produced none in which IRFA has ever been mentioned. In IRFA, Congress enacted findings and definitions relating to religious persecution and international religious freedom that the BIA is required to apply. Arguably, no judicial deference is due to any BIA decision concerning religious persecution in which the agency has failed even to acknowledge the existence of this important statute.

Asylum arguments based on international human rights instruments usually seem to fall upon deaf ears. However, in IRFA, Congress specifically incorporated into United States law standards of international religious freedom that are set forth in such instruments as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Helsinki Accords, the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, the United Nations Charter, and the European Convention for the Protection of Human Rights and Fundamental Freedoms.[43] Thus, in the context of religious persecution claims such arguments would seem to be expressly authorized by Congress.[44] In Li's case, for example, several *amici curiae* relied on these instruments to argue that prosecution for religious practices amounts to persecution where the law violates accepted human rights standards, is applied in a discriminatory manner, and inflicts a disproportionate punishment.[45]

The Fifth Circuit panel that decided *Li* fell into confusion in attempting to apply *Elias-Zacarias* to the facts of Li's case. Time will tell whether the seeming bright-line rule that asylum adjudicators must look to the

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41 *See generally* "Helsinki Commission briefing explores religious registration," available on web at: http://www.hrwf.net/html/osce2001.html

42 *Id.*

43 IRFA, Sec. 2(a)(2), codified at 22 U.S.C. § 6401(a)(2); IRFA, Sec. 3(13), codified at 22 U.S.C. § 6402(13). The international law analysis of this article follows generally the argument set forth in Brief of Amici Curiae Amnesty International USA, Minnesota Advocates for Human Rights, Human Rights First, Asian American Justice Center and Episcopal Migration Ministries in Support of the Petitioner's Motion for Rehearing En Banc, dated Oct.11, 2005, filed in *Li v. Gonzales*, no. 03-60670 (5th Cir.) (hereafter, "International Law Brief").

44 The issue of whether a treaty obligation of the United States has been incorporated into domestic law has proven to be an obstacle to treaty-based legal claims in other contexts. *See, e.g.*, *Haitian Refugee Center, Inc. v. Baker*, 949 F.2d 1109 (11th Cir. 1991)(holding that Article 33 of Refugee Convention of 1951 is not self-executing); *but see* cases cited in Kurzban, Immigration Law Sourcebook 930 (9th ed. 2004).

45 International Law Brief, *supra*, *passim*. The *amici* in question also relied upon the Handbook on Procedures and Criteria for Determining Refugee Status of the Office of the United Nations High Commissioner for Refugees as an authoritative international legal source that has found approval in United States asylum adjudications. International Law Brief, *supra* at 3, citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987).

victim's characteristics, rather than to those of the persecutor, to determine whether persecution is "on account of" a characteristic,[46] truly serves the purposes of the Refugee Act generally. However, in providing definitions and findings about religious persecution in IRFA, Congress seems to have provided adjudicators with a supplemental source of guidance for determining whether particular conduct constitutes persecution "on account of" religion.

Because the Refugee Act of 1980 enacted into domestic law a body of law that has a "special transnational character," a consortium of law school scholars and clinicians argued in support of Li that the court should consider foreign asylum decisions in deciding whether persecution on the ground of religion must be interpreted to exclude punishment for religious "practice."[47] Citing decisions from Australia, Canada, Germany and the United Kingdom, these *amici* demonstrated strong support in the asylum adjudications of the four countries that the term "religion" as a ground of persecution *must* be interpreted to include persecution on the ground of religious practice, not just belief. Foreign decisions of this kind may provide a rich source of interpretive guidance in arguments made to the BIA or the courts with respect to the interpretation of central asylum terms.

Religious registration laws implicitly or explicitly create two classes of religious organizations: approved and disapproved. This situation finds a parallel in early American history, in the experience of the Pilgrims and Quakers who fled England to escape the criminal penalties imposed by a one-church state for dissenting religious behavior.[48] Thus, the argument that punishment for violation of a law of "general application" cannot be persecution falls apart when the law in question compels an individual to conform to state-sanctioned religious beliefs and practices or suffer criminal penalties.[49] In the particular case of China, such an argument derives additional force from the government's official policy to promote atheism.[50]

The USCIRF Letter describes the Government as being "on the forefront of the battle to defend the internationally recognized right to freedom of religion or belief."[51] No such principle or policy coheres, however, in the Government's litigation papers in religious asylum cases. Until the Government imposes clear litigating guidelines or instructions on its litigators, America's national policy of international religious freedom will continue to be undermined by its own civil servants. The policy's last line of defense consists of lawyers and jurists who will stand firm in support of religious refugees—and in the Samsons among those refugees who will continue to push against pillars in defense of their religious liberty.[52] ■

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46 *See INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992).

47 Brief of Amici Curiae Immigration and Asylum Law Scholars and Clinicians in Support of the Petitioner's Petition for Rehearing en Banc, filed Oct. 13, 2005 in *Li v. Gonzales*, no. 03-60670 (5th Cir.) at 1 (citing Deborah E. Anker, "Refugee Law, Gender and the Human Rights Paradigm," 15 Harv. Hum. Rts. J. 133 (2002)).

48 *See* Brief of *Amici Curiae* Hebrew Immigrant Aid Society in Support of the Petitioner's Motion for Rehearing en Banc, dated Oct. 7, 2005, and filed in *Li v. Gonzales*, no. 03-60670 (5th Cir.) at 2 (quoting David A. Cline, The Pilgrims and Plymouth Colony: 1620 (2003).

49 The Fifth Circuit's treatment of the "law of general application" argument in *Li*, *see id.* at 420 F.3d 500, 508, left out crucial elements of that formulation: neutrality toward religion and validity. *See Lin v. INS*, 238 F.3d 239, 245 (3d Cir. 2001); *Bandari v. INS*, 227 F.3d 1160, 1168 (9th Cir. 2000). These requirements derive from Supreme Court precedents involving religion under the U.S. Constitution, especially *Employment Division v. Smith*, 494 U.S. 872, 110 S. Ct. 1595 (1990) and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 113 S.Ct. 2217 (1993).

50 *See* Brief of *Amici Curiae*, Jubilee Campaign USA and China Aid Association, in Support of Petitioner and Supporting Rehearing *en Banc* and Reversal of BIA and Panel Decisions, dated Oct. 10, 2005 and filed in *Li v. Gonzales*, no. 03-60670 (5th Cir.) at 5-6.

51 USCIRF Letter, *supra* at 2.

52 Mr. Li's case is still "shaking." His attorneys have filed their own motion to reopen before the BIA to request asylum for their client. The BIA's grant of the Government's motion to reopen would seem to establish an administrative finding that changed circumstances exist and justify a grant of withholding of removal to Li pursuant to 8 U.S.C. §1231(b)(3). *A fortiori*, then, one might expect the changed circumstances to make Li newly eligible for asylum despite the passage of time since his entry, pursuant to 8 U.S.C. §1158(a)((2)(D).