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Protection for Chinese Nationals Who Have Provided Humanitarian Assistance to North Korean Escapees: Recent Developments in U.S. Immigration Law

Andrew Wolman

Abstract

For many years, Chinese nationals threatened with torture or persecution for their role in helping North Korean escapees had little success gaining protection from removal in U.S. courts. In 2009 and 2010, however, some courts bucked this trend, showing a greater acceptance of both the dangers faced by Chinese nationals suspected of assisting North Koreans, and the political nature of their actions. However, inconsistency remains on the fundamental question of whether Chinese authorities have engaged in the persecution of individuals who have assisted North Koreans, or whether they instead have legitimately prosecuted them pursuant to Chinese law.

Keywords: asylum, torture, refugee, North Korea, China

Introduction

Since 1995, hundreds of thousands of North Koreans have fled to China, where they are considered illegal immigrants and are reliant on the goodwill of Chinese

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nationals—often affiliated with humanitarian organizations or churches—who assist them with food, lodging, and other support. While the perilous existence of these North Korean escapees has been widely reported, there has been less study of the acute dangers faced by the Chinese who help them. These individuals are under the constant threat of persecution or torture by Chinese authorities for their role in providing such aid, and in recent years an increasing number of them have made their way to the United States, where they have claimed asylum or protection under the Convention Against Torture (CAT).

Prior to March 2009, very few of these asylum or CAT appeals worked their way up to the federal courts, and those that did were firmly rejected, largely because the courts did not recognize Chinese actions as persecution.¹ Between March 2009 and September 2010, however, a spike in asylum and torture cases involving Chinese nationals who assisted North Korean escapees resulted in a notable jurisprudential shift. In short, three primary observations can be drawn from the recent decisions. First, judges seem more willing to accept that a real danger of persecution and torture exists for those who assist North Korean escapees. Second, judges are showing an increased openness to ascribing political motivations to individuals assisting North Korean refugees. And third, there is now a split in the circuits on the fundamental question of whether Chinese nationals who assist North Korean escapees are actually violating Chinese law, and if so, whether the appropriate conclusion to be drawn is that they are being “prosecuted” instead of “persecuted” and should therefore be denied asylum.

Factual Background

Between 1995 and 1998, North Korea suffered one of the worst famines of the twentieth century. Scholars have attributed the famine to different causes: Some stress the decline in food supplies due the collapse of the Soviet Union and a series of damaging droughts and floods, while others primarily blame breakdowns in North Korea’s distribution system.² The famine’s effects were extraordinarily grim, and estimates of the number of dead vary widely, from between 220,000 (according to North Korean officials) to 3.5 million.³ Survivors suffered lasting ill effects as well, with malnutrition leading to an entire generation of North Koreans of short stature.⁴ These effects were not spread uniformly throughout the country, however. While shortages existed in Pyongyang, the level of food deprivation in the capital was far less than existed in the northeastern provinces of North and South Hamgyong.⁵ One immediate result of the famine was a wave of migration across the 1,300-kilometer border with China, largely from the hardest-hit northeastern regions, in search of food.

The North Korean economy has improved somewhat over the past decade.⁶ However, the country still experiences dire poverty and food shortages.⁷ This ongoing economic hardship, along with harsh political repression at the hands of Kim Jong Il’s dictatorial regime, continues to prompt thousands of North Korean nationals to flee across the Chinese border in search of a better life.⁸ Once in China, some settle in

the adjacent province of Jilin, mixing in with the local population, which is largely of Korean ethnicity. Others attempt to continue their voyage through China to Thailand, Mongolia, or other countries, from where they can safely transit to their destination country, normally the Republic of Korea (South Korea).⁹ While in China, however, North Korean escapees face a life that is fraught with dangers, both from human traffickers and others exploiting their desperate circumstances, as well as at the hands of the Chinese authorities, who consider North Korean escapees to be illegal border crossers who must be repatriated.¹⁰

Thus, in order to survive in a country where they face a constant danger of capture and repatriation, North Korean escapees must rely on the goodwill and humanitarian assistance of quietly operating NGOs and concerned individuals, both foreign and Chinese (oftentimes Chinese nationals of Korean ethnicity). These individuals and NGOs assist the escapees with shelter, food, work, and transportation to third countries. However, the decision to help North Korean escapees comes at considerable personal risk, and there are many documented cases of Chinese nationals being fined, prosecuted, or tortured for providing humanitarian aid or assistance to North Koreans present on Chinese territory.¹¹ The Chinese government also offers rewards to Chinese nationals who turn in North Korean escapees to the authorities.¹²

Legal Background

There are three principal forms of relief under U.S. law for individuals fleeing persecution or other serious harm in their home country: asylum, withholding of removal, and protection under the CAT. Chinese nationals who have been persecuted for assisting North Korean escapees generally file claims under all three mechanisms.

Asylum is available under the Immigration and Naturalization Act, which mirrors the language of the 1951 Convention Relating to the Status of Refugees by providing that in order to be eligible for asylum, an applicant must show that he or she has a well-founded fear of persecution on account of a protected ground — race, religion, nationality, membership in a particular social group, or political opinion — if returned to his or her country of origin.¹³ A showing of past persecution can give rise to a rebuttable presumption that the petitioner has a well-founded fear of future persecution.¹⁴ A withholding of removal claim is substantively similar to an asylum application: The applicant must demonstrate that his or her life or freedom would be threatened on account of the same five statutory grounds as an asylum seeker.¹⁵

The United States also offers individuals protection pursuant to its domestic implementation of the CAT, under which it has agreed not to expel, return, or extradite a person to another country where he or she would be more likely than not to face torture.¹⁶ The differences between CAT protection and asylum include that CAT protection does not require that torture be threatened on any particular grounds (i.e., race, religion, nationality, membership in a particular social group, or political opinion); that not all forms of harm that qualify as persecution would be considered

torture; and that CAT protection is mandatory for individuals who meet the statutory standards.¹⁷

Asylum Applications

Until recently, courts rejected asylum applications from Chinese nationals who had assisted North Korean escapees because of the lack of a nexus to one of the five grounds for asylum eligibility,¹⁸ and because China's policy to repress such humanitarian behavior was considered to be prosecution, not persecution.¹⁹ The distinction between persecution and legitimate prosecution is one of the trickier issues in asylum law, but the basic parameters of the jurisprudence are clear. On the one hand, "as a rule, the enforcement of generally applicable law cannot be said to be on account of the offender's political opinion, even if the offender objects to the law."²⁰ On the other hand, "someone who has been singled out for enforcement or harsh punishment because of his political opinion can show eligibility."²¹

The first reason for denial — lack of nexus to a protected ground — has now been rejected in some cases by the Ninth and Second Circuits. The second reason for denial — that Chinese actions should necessarily be considered prosecution rather than persecution — has been rejected by the Ninth Circuit, questioned by the Second Circuit, and reaffirmed by the Fourth Circuit. Thus, of the twelve asylum appeals heard by federal courts from March 2009 to September 2010, all of which were appeals of negative determinations by the Board of Immigration Appeals (BIA), four claims were remanded to the BIA for further consideration in light of new instructions,²² and eight denials were upheld, four of which were due to adverse credibility determinations.²³ The following sections briefly summarize the leading cases.

*Li v. Holder*²⁴

At the suggestion of his pastor, Li provided shelter to North Korean escapees, leading to his arrest, interrogation, and brutal beating by Chinese authorities prior to his being sent to a labor camp.²⁵ Li later made his way to California, where he applied for asylum.²⁶

The immigration judge (IJ) denied Li's petition, stating inter alia that he had not been persecuted on account of his political opinion and that his labor camp detention had been a legitimate sanction for violating Chinese law.²⁷ The decision was upheld by the BIA, but was overturned by the Ninth Circuit in March 2009.²⁸ The court examined the political motivation issue from two separate perspectives. First, it stated that the persecutors' motivation should not be questioned when the persecutors specifically articulate their reason for attacking a victim, as was the case here.²⁹ Second, it concluded that even though Li had not stated his political disagreement with Chinese authorities prior to being detained, his political opposition was clearly indicated by his humanitarian actions.³⁰

The Ninth Circuit also squarely addressed the question of whether there was a law prohibiting the provision of humanitarian assistance to North Korean escapees

that would force the issue of whether its enforcement would constitute prosecution or persecution. With the help of two expert opinions on Chinese law, the court concluded that in fact no such law exists.³¹ Therefore, according to the Ninth Circuit, “because no law prohibits Li’s conduct, when the Chinese officials abruptly arrested Li in his home and took him to a police station where he endured physical abuse as part of a coercive interrogation aimed at locating North Korean refugees and discouraging the provision of humanitarian aid to them, the record *compels* the conclusion that the officials were not engaged in legitimate criminal prosecution.”³²

Interestingly, the Ninth Circuit stressed that its decision was informed by the official U.S. policy interest in protecting North Korean escapees, as set forth in the North Korean Human Rights Act.³³ According to the court, “It would be an odd form of justice, and one to which we do not subscribe, that would beseech people of good conscience to provide aid, officially designate recipients of the aid as refugees, and then determine that those who provided that aid are categorically ineligible to enter the United States when other governments persecute them for providing the aid.”³⁴

*Jingzhe Cui v. Holder*³⁵

Cui asserted that he had been arrested, detained, and beaten for sheltering North Korean escapees. His asylum application was denied by the IJ, and the IJ’s decision was upheld by the BIA.³⁶ In February 2010, his appeal then went to the Fourth Circuit Court of Appeals, which is widely regarded as the most conservative judicial circuit in the United States.³⁷ The court chose not to hear oral arguments, and issued a one-page opinion upholding the asylum denial. According to the court, “Cui did not show that his detention and beating or the issuance of a summons for his arrest were due to anything more than the charge that he violated a legitimate Chinese law prohibiting persons from harboring persons who crossed the border to enter the country. There was no evidence he was chosen for detention or prosecution because of a protected ground.”³⁸ The court also agreed with the BIA’s conclusion that the Ninth Circuit’s decision in *Li v. Holder* was distinguishable,³⁹ although the decision seems to facially contradict *Li*, which concluded that in fact there was no legitimate Chinese law prohibiting individuals from harboring North Korean escapees.

*Jin Jin Long v. Holder*⁴⁰

In September 2010, the Second Circuit entered the fray with its opinion in *Jin Jin Long v. Holder*. This opinion jointly ruled on consolidated petitions from Song Ri Quan and Jin Jin Long, two individuals alleging persecution for assisting North Korean escapees.

Song had helped arrange for his uncle’s family (who were North Korean escapees) to travel from China to South Korea.⁴¹ He later fled to the United States upon being informed that the police were asking about him.⁴² Song’s application for withholding of removal was rejected by the BIA, which found that he had failed to establish that his actions constituted the expression of a political opinion, and that there was

insufficient nexus between a protected ground and his alleged persecution.⁴³ The BIA's decision was upheld by the Second Circuit, which stated that Song's petition failed "on the essential ground that there is little (if any) evidence that he acted from a political motive. [...] He evidently acted on the independently sufficient motive of family loyalty and concern for his uncle, aunt, and cousins."⁴⁴ Song had not argued that the Chinese government had "imputed" political opinion to him, so the Second Circuit did not consider the issue.⁴⁵

Like Song, Jin stated that he had provided aid and transportation assistance to a family of North Korean escapees.⁴⁶ He was later arrested and interrogated about the incident, during which time he was beaten with electric batons.⁴⁷ He was never charged with a crime, and was released upon payment of a fine, after which he departed for the United States.⁴⁸ Jin's application for asylum and withholding of removal was denied by the BIA because of his failure to establish a nexus between his political opinion and the alleged persecution.⁴⁹

On appeal, the Second Circuit found that there was a nexus between Jin's political opinion and his persecution, because even though he did not testify that he acted out of political motives, he still could be imputed a political opinion, as "a humanitarian or charitable act may signify a humanitarian or charitable conviction; and a government might construe violation of a law as opposition or resistance to the law's underlying policy, and punish it."⁵⁰

The next issue for the court to address was whether Jin had been prosecuted according to a law of general applicability. Unlike the Ninth and Fourth Circuits, the Second Circuit was not capable of making that determination on the evidence presented, and remanded to the BIA with instructions to "determine whether there is a law barring assistance to North Koreans, and (whether there is or is not) in what circumstances persecution of those who assist North Korean refugees would constitute persecution on account of a protected ground."⁵¹

Convention Against Torture

Chinese nationals alleging persecution by Chinese authorities for assisting North Korean escapees have often also claimed that they would more likely than not be tortured upon repatriation, and that they therefore merit protection under the CAT. These claims have been dismissed for various reasons, such as lack of credibility,⁵² or a conclusion that torture would not be "more likely than not" to occur.⁵³ The Third Circuit's decision in *Kang v. Attorney General*,⁵⁴ however, is notable as a particularly strong statement in favor of CAT protection for an individual who had provided aid to North Korean escapees.

Jinyu Kang fled China for the United States in January 2004 after being named with two other people in an arrest warrant as being involved in an organization that provided food and shelter to North Korean escapees.⁵⁵ She was later arrested in Philadelphia for solicitation (charges that were later withdrawn) and the U.S. commenced removal proceedings.⁵⁶ In response, Kang filed a CAT claim, supported by

affidavits from the two other people named in her Chinese arrest warrant that described the torture that they experienced upon their arrest.⁵⁷ One stated that police had beaten him with clubs, covered his face with a bag to obstruct his breathing, poured cold water over him, pulled his hair, forced him to kneel for hours, whipped the soles of his feet, and slapped his face until it was swollen and bloody.⁵⁸ The other had been administered electric shocks, caused to faint by putting bags over her head, and had strong light beams shot into her eyes, among other abuses.⁵⁹

Although the IJ approved Kang's CAT claim, the BIA then reversed, claiming that the IJ had "failed to establish that the severe instances of mistreatment found in the record are so pervasive as to establish that a person detained in a Chinese prison will be more likely than not be subjected to torture, as opposed to other acts of punishment or treatment, which do not amount to torture."⁶⁰ On appeal, the Third Circuit overturned the BIA's judgment, and granted Kang's CAT application. The court found that the descriptions in the affidavits from Kang's associates compelled the conclusion that "the authorities acted with the purpose of inflicting serious pain and suffering" and that Kang would be more likely than not to suffer the same fate upon removal, because "individuals accused of precisely the same crime as Kang were subjected to this treatment."⁶¹ The court also found support in independent contextual evidence, specifically the 2007 U.S. State Department Country Report, which reported "widespread" torture in China, involving many of the methods described in the affidavits supplied by Kang.⁶²

The Third Circuit's opinion was also notable for its indignant tone. The court upbraided the government lawyers for opposing Kang's petition, stating that "it is disappointing, even shocking, that the government fails to acknowledge that the evidence is not only strongly in Kang's favor, but, indeed, compels the conclusion that she will likely be tortured."⁶³ The court concluded that the case was one of those "rare circumstances" where remand was not necessary because the "evidence overwhelmingly supports—and indeed, compels—the conclusion that Kang's petition for withholding of removal under CAT should be granted, and no amount of reconsideration by the BIA would change that."⁶⁴

While CAT cases are inherently fact-specific, *Kang* shows that it is not necessary to actually suffer torture (or even persecution) oneself in order to file a successful CAT petition. Evidence of torture occurring to similarly placed individuals can be enough to prove a claim, and U.S. government reports can also be effectively used to support a claim.

Conclusion

The issue of protection for Chinese nationals threatened with persecution or torture for providing humanitarian aid to North Korean escapees has arisen rather suddenly, and has not been well studied in the United States or elsewhere. Yet the issue is unlikely to disappear soon—the number of North Korean escapees has reportedly been increasing with the recent worsening of economic conditions in North Korea,⁶⁵

and recent reports indicate that Chinese authorities are continuing to carry out periodic crackdowns against Chinese citizens who harbor North Koreans.⁶⁶

As the cases described in this essay show, there now appears to be a willingness by at least some courts in the United States to provide asylum and CAT protection for Chinese nationals persecuted for providing aid to North Korean escapees, but significant barriers still remain. Credibility will in many cases be an issue, and IJs should be cautious not to grant asylum to human traffickers who may falsely claim persecution when in fact they were merely subjected to legitimate prosecution. For asylum cases, an important question that has repeatedly arisen is whether the persecution committed by Chinese authorities is on political grounds. While the facts may provide different ways for an applicant to get around this barrier, the doctrine of “imputed political opinion” provides one proven method in the Second Circuit, and has been successful many times in other contexts in the Ninth Circuit.⁶⁷

Another important issue is whether there is a Chinese law that prohibits the provision of humanitarian assistance to North Korean refugees, as claimed by the Fourth Circuit, denied by the Ninth Circuit, and questioned by the Second Circuit. In fact, there is no credible evidence that such a law exists, although it is quite a burdensome task for applicants to prove this non-existence,⁶⁸ especially given U.S. attorneys’ lack of familiarity with Chinese criminal law and the sometimes secretive nature of escapee issues.⁶⁹ The Ninth Circuit has been the only circuit to examine the issue in depth, enlisting the assistance of two independent experts: Professor Robert Berring, an expert in Chinese law from the University of California–Berkeley School of Law, and Professor Cheng Gan-Yuan, formerly of Nanjing Normal University School of Law.⁷⁰ Professor Berring stated that to his knowledge, “There is no published law forbidding Chinese citizens from providing food and comfort to illegal aliens,” while Professor Cheng swore unequivocally that there “is no criminal law of any kind (written or verbal, formal or informal) in China prohibiting citizens from providing food, water, shelter, social assistance, or other assistance to individuals who entered China illegally from another country.”⁷¹

The U.S. Supreme Court would be very unlikely to resolve this Circuit split, given the essentially factual nature of the debate and its reluctance to address questions of fact.⁷² It is more likely that further BIA and court decisions will help clarify the issue over time, perhaps with the contribution of additional expert opinions. For now, however, prospective asylum seekers and their counselors should be aware of this emerging jurisprudence, and to the extent that forum selection is possible (i.e., by choosing which U.S. port of entry to arrive at), asylum seekers would be well advised to file their claims in the Ninth Circuit, while the Third Circuit appears to be the most receptive to CAT claims.

Notes

1. Alison Carrinski, “The Other North Korean Dilemma: Evaluating U.S. Law Towards North Korean Refugees,” *Suffolk Transnational Law Review* Vol. 31 (2008), p. 659 (“The United States, despite political rhetoric pressuring China to amend its repatriation policy towards North Koreans residing within China, has not recognized the policy as persecution within its own courts.”).

See *Mei Shu Li v. Board of Immigration Appeals*, 229 Fed. Appx. 20 (2d. Cir. 2007); *Yu Quan v. Keisler*, 249 Fed. Appx. 682 (9th Cir. 2007); *Guang Jin v. Mukasey*, 293 Fed. Appx. 74 (2d Cir. 2008).

2. William Moon, “The Origins of the Great North Korean Famine,” *North Korean Review* Vol. 5, No. 1 (2009), p. 107 (citing Suk Lee, *The DPRK Famine of 1994–2000: Existence and Impact* [Seoul: Korean Institute for National Unification, 2005] and Stephan Haggard and Marcus Noland, *Famine in North Korea: Markets, Aid, and Reform* [New York: Columbia University Press, 2007]).

3. *Ibid.*, p. 106.

4. Barbara Demick, “Effects of Famine: Short Stature Evident in North Korean Generation,” *Seattle Times*, February 14, 2004, online at <http://community.seattletimes.nwsources.com/archive/?date=20040214&slug=korea14>.

5. Marcus Noland and Stephen Haggard, *Hunger and Human Rights: The Politics of Famine in North Korea* (Washington, DC: U.S. Committee for Human Rights in North Korea, 2005), pp. 18, 30.

6. Un-Chul Yang, “Reform without Transition: The Economic Situation in North Korea since the July 1, 2002, Measures,” *North Korean Review* Vol. 6, No. 1 (2010), p. 72 (attributing positive economic growth in the early 2000s to the effect of foreign subsidies).

7. Tania Branigan, “UN Fears Tragedy over North Korean Food Shortage,” *The Guardian*, April 17, 2008, online at <http://www.guardian.co.uk/world/2008/apr/17/korea.food>.

8. Estimates of the number of North Koreans currently in China vary widely, from 10,000 (the official Chinese estimate) to 300,000 or more. Rhoda Margesson et al., *North Korean Refugees in China and Human Rights Issues: International Response and U.S. Policy Options*, CRS Report for Congress (September 26, 2007), p. 4.

9. Mikiyoung Kim, “Human Rights Policies of China and Japan towards North Korea: Domestic Agendas and International Norms,” *North Korean Review* Vol. 6, No. 1 (2010), pp. 8–9 (noting that South Korea is seen as an attractive final destination because of family ties, the lack of a language barrier, and South Korea’s settlement policy and cultural similarity). doi:10.3172/NKR.6.1.6

10. Many scholars and human rights advocates argue that China’s repatriation policy violates its obligations under the 1951 United Nations Convention Relating to the Status of Refugees. See, for instance, Russell Aldrich, “An Examination of China’s Treatment of North Korean Asylum Seekers,” forthcoming in *North Korean Review* Vol. 7, No. 1 (2011); Human Rights Watch, “China: Protect North Korean Refugees” (March 19, 2004), online at <http://www.hrw.org/en/news/2004/03/08/china-protect-north-korean-refugees>.

11. See, for instance, U.S. Department of State, “Country Reports on Human Rights Practices: China” (March 2010) (“The government also arrested and detained individuals who provided food, shelter, transportation, and other assistance to North Koreans”); Congressional-Executive Commission on China, “2009 Annual Report” (2009), p. 177 (reporting the sentencing of Zhang Yonghu and Li Mingshun to 7 and 10 years’ imprisonment, respectively, for providing food, shelter, and transportation to North Korean refugees); Abraham Lee, Director of Public Affairs, Crossing Borders, Statement at “Combating Human Trafficking in China: International and Domestic Efforts,” Hearing Before the Congressional-Executive Commission on China (March 6, 2006), online at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_house_hearings&docid=f:26671.pdf (“Beginning in 2003, it appears that the Chinese government increased its efforts to hunt down and repatriate North Korean refugees as well as persecute and arrest those who attempted to provide assistance to refugees”). <http://www.cecc.gov/pages/annualRpt/annualRpt09/CECCannRpt2009.pdf>

12. Mikiyoung Kim, *supra* n. 9, p. 9.

13. 8 U.S.C. § 1158(b)(1)(B)(i) (2006).

14. *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004).

15. 8 U.S.C. § 1231(b)(3)(A) (2006). This essay will not detail withholding of removal claims, as the relevant issues are the same as those in asylum claims.

16. 8 C.F.R. § 208.16(c)(2) (2009).

17. U.S. Department of Justice, Executive Office of Immigration Review, “Asylum Protection in the United States” (April 28, 2005), online at <http://www.justice.gov/eoir/press/05/AsylumProtectionFactsheetQAApr05.htm>.

18. *Guang Jin v. Mukasey*, 293 Fed. Appx. 74 (2d Cir. 2008) at 75.

19. *Yu Quan v. Keisler*, 249 Fed. Appx. at 682; *Jing Zhe Qiu v. Holder*, 366 Fed. Appx. 280, 281 (2d Cir. 2010).
20. *Jin Jin Long v. Holder*, 620 F.3d 162, 166 (2d Cir. 2010) (citing *Yueqing Zhang v. Gonzales*, 426 F.3d 540, 544 [2d Cir. 2005]).
21. *Ibid.* (citing *Vumi v. Gonzales*, 502 F.3d 150, 157–59 [2d Cir. 2007]).
22. *Li v. Holder*, 559 F.3d 1096 (9th Cir. 2009); *Shengzhe Dong v. Holder*, 362 Fed. Appx. 770 (9th Cir. 2010); *Jin Jin Long v. Holder*, 620 F.3d 162 (regarding Jin); *Fang Hua v. Holder*, Slip Copy, 2010 WL 3735822 (9th Cir. 2010).
23. *He Yun Fang v. Holder*, 320 Fed. Appx. 714 (9th Cir. 2009) (denied due to adverse credibility determination); *Xiangzhe Cui v. Holder*, 320 Fed. Appx. 712 (9th Cir. 2009) (denied because treatment by authorities did not rise to the level of persecution); *Long Quan Piao v. Attorney General*, 358 Fed. Appx. 361 (3d Cir. 2009) (denied due to failure to comply with procedural requirements); *Jing Zhe Qiu v. Holder*, 366 Fed. Appx. 280 (2d Cir. 2010) (no nexus to a protected ground); *Jingzhe Cui v. Holder*, 363 Fed. Appx. 992 (4th Cir. 2010) (see below); *Hua Lan An v. Attorney General*, 369 Fed. Appx. 374 (3d Cir. 2010) (denied due to adverse credibility determination); *Mei Hua Cui v. Attorney General*, Slip Copy, 2010 WL 3398928 (3d Cir. 2010) (denied due to adverse credibility determination); *Jin Jin Long v. Holder*, 620 F.3d at 162 (regarding Song; see below).
24. 559 F.3d 1096 (9th Cir. 2009).
25. *Ibid.*, p. 1100–01.
26. *Ibid.*, p. 1101.
27. *Ibid.*
28. *Ibid.*, p. 1113. The Ninth Circuit remanded to the BIA to allow the government the opportunity to prove that Li did not have a well-founded fear of future persecution due to a fundamental change in circumstances in China. *Ibid.*
29. *Ibid.*, p. 1111–12.
30. *Ibid.*, p. 1112.
31. *Ibid.*, p. 1110. In a footnote, the court rejects the applicability of Article 318 of China’s Criminal Law, which prohibits trans-border human trafficking but not the provision of humanitarian aid. (“Whoever makes arrangements for another person to illegally cross the national border [frontier] shall be sentenced to fixed-term imprisonment of not less than two years but not more than seven years and shall also be fined.”) Criminal Law of the People’s Republic of China, pt. 2, Ch. 6, § 3, Art. 318 (1997). There are, however, anecdotal reports that Chinese authorities do use (or misuse) Article 318 to prosecute individuals who have been involved only in providing humanitarian assistance, and not in trans-border smuggling. See, for example, Kato Hiroshi, Executive Director of Life Funds for North Korean Refugees, speech entitled “Japanese Policies on North Korean Refugees and Problems They Encounter When Settling in Japan” (April 2, 2008), online at <http://www.northkoreanrefugees.com/2008-06-speech.htm> (“Anyone who attempts to help or protect North Korean refugees in China is punished under the Chinese criminal code Article 318 related to illegal immigrants”); Kim Sang Hun, activist on behalf of North Korean refugees, statement at “The Plight of North Korean Migrants in China: A Current Assessment,” Round Table of the Congressional-Executive Commission on China (April 19, 2004), online at <http://www.cecc.gov/pages/roundtables/041904/kim.php> (claiming that Kim Hee-tae was charged with “organizing an illegal border crossing” under Article 318, even though he merely assisted North Korean escapees once they were inside China).
32. *Ibid.*, p. 1111 (emphasis by court).
33. *Ibid.*, p. 1112–13 (citing North Korean Human Rights Act of 2004, 22 U.S.C. §§ 7801–7845 [2004]).
34. *Ibid.*, p. 1113.
35. 363 Fed. Appx. 992 (3d Cir. 2010).
36. *Ibid.*, p. 993.
37. See Ann C. Hodges, “Lessons from the Laboratory: The Polar Opposites on the Public Sector Labor Law Spectrum,” 18 *Cornell Journal of Law & Public Policy* Vol. 18 (2009), p. 759 (“The United States Court of Appeals for the Fourth Circuit ... has a reputation as the most conservative appeals court in the country.”) The other three courts discussed in this essay have more liberal reputations. See John Schwartz, “‘Liberal’ Reputation Precedes Ninth Circuit Court,” *New York Times*, April 24, 2010, online at <http://www.nytimes.com/2010/04/25/us/25sf ninth.html> (citing

research showing that the Ninth Circuit is the country's most liberal circuit, followed closely by the Second and Third Circuits).

38. *Jingzhe Cui v. Holder*, 363 Fed. Appx. at 994.
39. *Ibid.*
40. 620 F.3d 162 (2d Cir. 2010).
41. *Ibid.*, p. 165.
42. *Ibid.*
43. *Ibid.*
44. *Ibid.*, p. 168.
45. *Ibid.*
46. *Ibid.*, p. 164.
47. *Ibid.*, p. 164–65.
48. *Ibid.*
49. *Ibid.*
50. *Ibid.*, p. 167.
51. *Ibid.*
52. See *He Yun Fang v. Holder*, 320 Fed. Appx. at 715; *Mei Shu Li v. B.I.A.*, 229 Fed. Appx. at 22.
53. See *Guang Jin v. Mukasey*, 293 Fed. Appx. at 76; *Jingzhe Cui v. Holder*, 363 Fed. Appx. at 994; *Hua Lan An v. Attorney General*, 369 Fed. Appx. at 376.
54. 611 F.3d 157 (3d. Cir. 2010).
55. *Ibid.*, p. 160.
56. *Ibid.*
57. *Ibid.*, p. 161.
58. *Ibid.*
59. *Ibid.*
60. *Ibid.*, p. 163.
61. *Ibid.*, p. 167.
62. *Ibid.*, p. 166.
63. *Ibid.*, p. 167.
64. *Ibid.*, p. 168.
65. Hyung-Jin Kim, “Number of N. Korean Defectors to S. Korea Tops 20,000,” Associated Press, November 15, 2010, online at http://hosted.ap.org/dynamic/stories/A/AS_KOREAS_DEFECTORS.
66. Congressional-Executive Commission on China, *2009 Annual Report*, No. 11, p. 177.
67. See, generally, Donald Yoo, “Exploring the Doctrine of Imputed Political Opinion and Its Application in the Ninth Circuit,” *Georgetown Immigration Law Journal* Vol. 19 (2005), p. 391.
68. Precedent from the Tenth Circuit puts the burden on the asylum applicant to disprove the existence of a law that was purportedly the basis of a prosecution. *Sadeghi v. INS*, 40 F.3d 1139, 1143 (10th Cir. 1994) (ruling that the BIA was entitled to draw a reasonable inference that Iran had laws prohibiting interference with the conscription of 14-year-old boys, despite the fact that the government had not put forth any evidence that this was actually the case).
69. There are, for example, widespread reports of a secret treaty between North Korea and China requiring repatriation of North Korean escapees. Elim Chan and Andreas Schloenhardt, “North Korean Refugees and International Refugee Law,” *International Journal of Refugee Law* Vol. 19 (2007), p. 224. doi:10.1093/ijrl/eem014
70. *Li v. Holder*, 559 F.3d at 1110.
71. *Ibid.*
72. See Sup Ct. R. 10 (“A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.”)

Biographical Statement

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